

1966

# Hoggan & Hall & Higgins, Inc., A Corporation v. Nelson W. Hall and Raymond C. Higgins : Brief of Appellants

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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HOGGAN & HALL & HIGGINS,  
INC., a corporation,  
*Plaintiff and Respondent,*

v.

NELSON W. HALL and RAY-  
MOND C. HIGGINS,  
*Defendants and Appellants.*

No.  
10453

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## BRIEF OF APPELLANTS

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Appeal from the Judgment of the Third District Court  
for Salt Lake County  
Honorable Parley E. Norseth, Judge

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DRAPER, SANDACK & SAPERSTEIN  
606 El Paso Natural Gas Building  
Salt Lake City, Utah  
Attorneys for Defendants-Appellants

HANSON & GARRETT  
520 Continental Bank Building  
Salt Lake City, Utah  
Attorneys for Plaintiff-Respondent

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INC., a corporation,

*Plaintiff and Respondent,*

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No.  
10453

NELSON W. HALL and RAY-  
MOND C. HIGGINS,

*Defendants and Appellants.*

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## BRIEF OF APPELLANTS

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### STATEMENT OF THE KIND OF CASE

This is an action by a corporation engaged in business as an advertising agency to permanently enjoin the defendants, former officers and employees thereof, from rendering advertising services to five advertising accounts, former customers of the corporation, allegedly solicited by defendants while in the employ of plaintiff corporation, and for damages resulting therefrom.

## DISPOSITION IN LOWER COURT

The trial court, sitting without a jury, entered judgments in favor of the plaintiff corporation and against defendants for damages in the amount of \$25,000.00. The court, at the conclusion of the case, announced to counsel, dehors the record, that he would not grant the injunction sought; and that aspect of plaintiff's case was accordingly abandoned. After entry of the court's memorandum decision, which merely assessed damages without discussion, findings, conclusions and a form of judgment were prepared and signed on only the damage aspect of plaintiff's claim. Defendants filed and argued their Objections to Findings, Motion for New Trial, and Motion to Amend the Findings, all of which were denied.

## RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment in their favor, no cause of action, as a matter of law; or that failing, reversal of the judgment and judgment in favor of the plaintiff but for nominal damages only; or that failing, a new trial.

## STATEMENT OF FACTS

The plaintiff corporation was the outgrowth of a prior partnership between Edward Hoggan and the defendant, Nelson W. Hall. The partnership was formed on August 1, 1953, among Hoggan, the defen-

dant Hall and a Robert L. Parkin (R. 229). Parkin had since left the organization and is not involved in this action (R. 107). The partnership business was incorporated on March 1, 1960 (R. 229, 107). In September of 1963, defendant Higgins acquired stock in the corporation and became a principal thereof, at which time the name of the corporation was changed to Hoggan & Hall & Higgins, Inc. (R. 230, 108, 209). Prior to his association with the plaintiff corporation, the defendant Higgins had been engaged in business for himself as "Ray Higgins Advertising Agency" a sole proprietorship; and he brought into the business of the plaintiff corporation the following advertising accounts: Safeway Stores, Redwood Nurseries, Grant Auto Parks, Foulger Equipment Company, Hammond Wholesale Toys, Mountain State Fence Company, and Pride Oil Company (R. 225, Exhibit 9 P). On December 31, 1963, the plaintiff corporation lost its largest single advertising account, the Boise Cascade Corporation (R. 233). Mr. Hoggan serviced this advertising account prior to its leaving the plaintiff corporation, and according to his testimony, this task occupied approximately 75 percent of his time (R. 233).

On or about the 13th or 14th day of February, 1964, the defendant Higgins requested a meeting with Hoggan and Hall at the close of the business that day (R. 234, 209, 211, 212, 109, 110, 112). Hoggan and both defendants were officers and directors of the plaintiff corporation at that time (R. 108). This meeting was prompted by financial reports that had been made avail-



able which indicated a substantial loss to the corporation for the month of January, 1964 (R. 113, 212), and the prospect of another heavy loss in February of that year (R. 234). Profit and loss statements of the corporation were introduced in evidence and reflected a net loss for the month of January, 1964, in the amount of \$1,399.32, and a net loss for the month of February, 1964, in the amount of \$4,212.11, or a total net loss of \$5,611.43 (Exhibits 16d, 17d). See the Appendix to this brief. At this meeting, Higgins expressed to Hoggan his alarm at the situation and requested that Hoggan take a cut in salary to which Hoggan replied, in effect, that he would accept a cut in salary if Higgins and Hall would likewise reduce their salary equally. A reduction in personnel was also discussed including the dismissal of Mrs. Fran Hoopes, one of the account executives, with the suggestion that Hoggan could service her accounts. Hoggan refused. Hoggan stated that he was not overly concerned and could see no great cause for alarm; and he further indicated that he should not be penalized by a cut in salary by reason of the loss of the Boise Cascade Corporation account. When asked by defendant Hall how long he, Hoggan, proposed to continue to draw on his present salary, Hoggan replied: "Well, theoretically, Nels, I could draw it until the corporation's reserves are entirely exhausted and we go down the drain." Hoggan, however, indicated that, "in practicality," he had no intentions to do so. After Hoggan's refusal to take a reduction in salary unless both defendants took an equal reduction, defendant

Higgins, according to Hoggan's testimony, indicated he felt Hoggan was entitled to no salary at all because he was not producing any income. Higgins thereupon announced that he did not propose to remain and watch the company lose money and go bankrupt and that he was, therefore, leaving the company (R. 233-236, 212, 213, 113, 114).

On the following Monday, Feb. 17, Hall contacted several of the advertising accounts which he had been servicing, namely, Freed Motor Company, Wilson Transport Supply, and Club Manhattan-Hofbrau, for the stated purpose of (1) making his routine service call in connection with their advertising business and (2) to advise them that he had decided to leave the plaintiff (R. 125, 124). He also contacted Salt Lake Mattress Company on that day. However, Salt Lake Mattress Company retained the plaintiff corporation as its advertising agent and insofar as the record shows, was still a client and customer of the plaintiff corporation as of the date of trial (R. 286). With the exception of Wilson Transport Supply, the sum and substance of Hall's conversation with the representative of each customer, namely, Charles Freed of Freed Motor Company, Alan E. Brockbank of Continental Real Estate, and Tony Hatsis of Club Manhattan-Hofbrau, was that they were having difficulty at the agency and that he had decided to leave the company. No solicitation was made by Hall for the business of any of these last-mentioned three accounts (R. 120, 122, 123, 124, 125, 280, 281, 270, 274, 313). Mr. Freed, Mr. Brock-

bank and Mr. Hatsis each, in effect, volunteered the advice, without solicitation, that they would continue doing business with Mr. Hall regardless of his leaving the employ of the plaintiff (R. 281, 270, 271, 313).

The other advertising account which plaintiff claims was wrongfully solicited was that of Country Mutual Life Insurance Company. On March 2, 1964, Hall contacted Frank Shelley, the insurance company's representative, and advised him that he had left the plaintiff after it was an accomplished fact (R. 308, 310). Hall's resignation as an officer and director of the plaintiff corporation was effective as of February 26, 1964, and as an employee thereof became effective as of February 29, 1964 (Exhibit 2P).

As of the date of trial, Freed Motor Company, Continental Real Estate, Club Manhattan-Hofbrau, Country Mutual Life Insurance Company and Wilson Transport Supply were being serviced by the defendant Hall (R. 308, 311, 312, 271, 280, 289).

On Tuesday, February 18, 1964, Higgins requested a meeting with Hoggan, at which time Higgins announced that Hall had decided to leave the corporation. Hoggan was further advised at that time that the defendants had the business (R. 242, 132, 264).

Hall testified that he did not advise Higgins of his, Hall's, intention to leave the corporation prior to his contact with the customers on February 17. He also testified that the decision to contact the accounts was

his own decision. (R. 117, 118). No prior conversations were held by defendants relative to Higgins' leaving the corporation; and Hall first became aware of Higgins' desire to leave the company when the latter announced this fact in the presence of Hall and Hoggan at the meeting on February 13, 1964 (R. 118, 172).

On the 29th day of February, 1964, the defendants organized a corporation known as Higgins & Hall (R. 108, 208), and have been employed continuously by that corporation since that date. There was no contract with the plaintiff corporation whereunder defendants bound themselves not to compete therewith after termination; nor did any of the advertising customers have a contract which gave to the plaintiff corporation an exclusive right to handle their business (R. 167, 168, 225, 226, 248, 249, 250).

With the exception of Wilson Transport Supply, no person other than defendant Hall had rendered advertising services to the five accounts involved in this case during the period that each had done business with either the prior partnership or the corporation (R. 164, 165). During the life of each account with the plaintiff corporation and its predecessor partnership to Dec. 31, 1963, these accounts produced the following average gross receipts per year: Country Mutual Life Insurance Company, \$1,455.36; Freed Motor Company, \$5,134.32; Club Manhattan-Hofbrau, \$1,489.18 (this figure is a projection inasmuch as this account had been with the plaintiff corporation only a period of four

months); Continental Real Estate, \$5,110.20; Wilson Transport Supply, \$1,197.24 (Exhibit 14p). See the Appendix to this brief. These accounts produced during the year 1964 the following gross receipts, to-wit: Country Mutual Life Insurance Company, \$125.99; Freed Motor Company, \$10,149.23; Club Manhattan-Hofbrau, \$625.17; Wilson Transport Supply, \$1,374.96; and Continental Real Estate (Brockbank), \$3,434.39; or total gross receipts of \$15,709.74 during 1964 (R. 130, 267). During the year 1963, these accounts produced their greatest total gross revenue to the plaintiff corporation: \$17,272.35 (Exhibit 14p). Nevertheless, plaintiff corporation failed to show a profit for the year 1963, and in fact sustained a net loss of \$428.56 (Exhibit 18d). Although plaintiff in its Complaint alleged wrongful solicitation of additional accounts not heretofore mentioned, namely, Utah Automobile Dealers Association and Culligan Soft Water Service (R. 2), the record is barren of any evidence with respect either to the solicitation of or the revenue produced by these accounts. At the time of the termination of the defendants' employment with the plaintiff corporation, the defendant Hall was being paid a salary for servicing the accounts in dispute in the amount of \$1,100.00 per month (Exhibit 16d, 17d; R. 137).

For the convenience of the Court, Exhibit 14p which reflects the income from each account in dispute during its life with the plaintiff corporation and its predecessor partnership through 1963, together with a yearly average thereof, has been extracted and repro-

duced in the Appendix of this Brief, together with Exhibits 16d, 17d and 18d.

The principal officers of each of the accounts allegedly solicited and lost to the plaintiff corporation, with the exception of Wilson Transport Supply and Country Mutual Life Insurance Company, testified unequivocally that their respective decisions to continue with defendant Hall after he left plaintiff's employ were not influenced by the contact made by the defendant Hall; and that it would have made no difference in their respective decisions to remain with Hall had he contacted them prior to his termination with the plaintiff corporation, subsequent to his termination, or not at all! (R. 272, 280, 313) As indicated above, Frank Shelley, representing Country Mutual Life Insurance Company, testified that he was not contacted until after Hall had terminated his employment with plaintiff. Peter Wilson, doing business as Wilson Transport Supply, a sole proprietorship, testified that it would have made no difference in his decision had he been contacted while Hall was in the employ of the plaintiff corporation or thereafter. Wilson indicated that he was unable to state whether it would have made any difference had he not held any discussion with Hall whatsoever (R. 289).

Plaintiff called as an expert witness, Alfred H. Garrigues, a principal in the advertising firm of Ross Journey & Associates of Salt Lake City, who was allowed, over defendants' objection, to present to the Court a formula for evaluating advertising accounts. He had

used this formula for internal capitalization purposes at the time his business that had theretofore operated as a partnership was incorporated (R. 184, 185). In applying this formula, two percentage factors are applied to the gross annual billing of an account. One factor is so-called acquisition cost which is arbitrarily fixed at 5 per cent of the annual billing. The other is the revenue factor which is 15 per cent of the annual billing (R. 183, 191). An additional factor also to be considered was what Garrigues referred to as indoctrination costs — that amount which an agency expends in time to get the account “off the ground” prior to the agency deriving any benefit therefrom (R. 190, 191). However, in expressing, over defendant’s objections, a market value as to a hypothetical account having a gross annual billing of \$100,000.00, Garrigues took into consideration only the acquisition and the revenue factors (R. 192, 193). That hypothetical account in his opinion had a market value of a minimum of \$12,500.00 and a maximum of \$20,000.00 (R. 193).

Another approach suggested by Garrigues is to determine the average of one month’s gross billing and one year’s gross revenue utilizing the 15 per cent factor to determine the revenue figure. Hence, on a hypothetical account having a gross annual billing of \$100,000.00, the evaluator will take one-twelfth of that figure thereby arriving at one month’s gross billing and add to it 15 per cent of that figure representing the annual gross revenue therefrom and average the same to arrive at the value of the account (R. 191, 192).

The record is completely devoid of any evidence with respect to (1) the gross annual billing of each of the accounts which plaintiff complains were wrongfully solicited by defendants and (2) the acquisition and/or indoctrination costs of these accounts.

Garrigues read of these formulae in a work known as "Rubel's Account and Agency Management Practice" (R. 185); admitted that his source material provided at least ten different formulas; that Rubel and his associates "can't make up their minds which one to use themselves"; and that his formulae fail to consider an agency's ability to hold an account cancellable at will as a factor (R. 197, 198). He admitted that his so-called acquisition and indoctrination cost factors vary not only from agency to agency but from account to account within a single agency (R. 201-203).

## ARGUMENT

### POINT I.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE LOWER COURT'S FINDINGS THAT DEFENDANTS SOLICITED ANY ADVERTISING ACCOUNT, EXCEPT THAT OF WILSON TRANSPORT SUPPLY.

Defendants do not quarrel with the general principle of law that one standing in a fiduciary relation to



a corporation may not, while acting in such capacity, solicit customers from that corporation for his own or a competing business. *Nichols-Morris v. Morris*, 174 F. Supp. 691 (S.D.N.Y. 1959). However, the uncontroverted evidence of record shows no solicitation of Country Mutual Life Insurance Company, Club Manhattan-Hofbrau, Continental Real Estate or Freed Motor Company by defendants prior to their termination as officers, directors and employees of the plaintiff corporation. It was stipulated at the Pre-Trial conference that Wilson Transport Supply was solicited by the defendant Hall; and that he likewise solicited Salt Lake Mattress Company. However, the court is reminded that the Salt Lake Mattress Company remained with the plaintiff corporation and accordingly no claim is made for any loss by reason thereof (R. 286).

Defendant Hall was interrogated at length as part of plaintiff's case in chief with respect to his conversations with Freed, Brockbank, and Hatsis on Monday, February 17, 1964, the date solicitations allegedly occurred. Hall repeatedly stated that he advised these customers that he was leaving the plaintiff and indicated that the agency was having internal difficulties, but at no time did he request the client's business (R. 119, 120, 122, 123, 124, 125, 126). While the trial court was free to disbelieve Hall's uncontroverted testimony to this effect by reason of his evident self-interest, Hall's testimony was corroborated by the representatives of these advertising clients who were called in behalf of the defendant.

Charles Freed, chairman of the board of Freed Motor Company, testified as follows:

“Q. Mr. Freed, inviting your attention to the middle or latter part of February of last year, 1964, do you recall a conversation with Mr. Hall relative to his leaving the agency then known as Hoggan & Hall & Higgins, Inc.?”

A. Yes. I am not certain that it was February but I know it was in early Spring about a year ago.

Q. Do you recall where that conversation took place?

A. In my office.

Q. And who was present at the time?

A. Just Nelson Hall and myself.

Q. Would you relate the conversation to the Court?

A. Well, he informed me that he and Ned Hoggan were splitting up. They would no longer be together.

Q. And in substance what did you say in reply?

A. Well, I said: ‘I’m always sorry to hear about people splitting up.’ But we had always done business with Nels Hall and it was satisfactory and I saw no reason why we should not continue.” (R. 279, 280)

On cross-examination, Mr. Freed testified as follows:

“Q. Did he imply to you that they were dividing and dissolving the corporation?”

A. I wouldn't say he implied to me that they were dividing the corporation, but stated that they were splitting up. They were leaving one another.

Q. I see. And he did ask you for your business, didn't he, at that time?

A. No.

Q. He did not?

A. No. I had volunteered it." (R. 281)

Alan E. Brockbank, President of Continental Real Estate, testified as follows:

“Q. Inviting your attention to the middle or latter part of February, 1964, did you have a conversation with Mr. Hall relative to his leaving the agency known as Hoggan & Hall & Higgins, Inc.?

A. Yes.

Q. Do you recall where that conversation took place?

A. Yes. At my desk in my office.

Q. Who else was present other than you and Mr. Hall?

A. No one.

Q. Could you relate to the Court what was said at that time?

A. Mr. Hall came to my office and told me that the organization was going to be divided and that he and Mr. Higgins were going to form a new organization.

Q. What did you say to him at that time?

A. Well, I pretty much took it under advisement. I wanted to find out all I could about it. But I had made up my mind — I don't know as to whether or not I told him — I had made up my mind that, oh, just on the basis that he was servicing my account and had been the only one servicing my account that I would naturally have to stay with him if he had a sound organization.” (R. 270, 271)

On cross-examination, Mr. Brockbank testified as follows:

“Q. All right. Now as a matter of fact you knew in your own mind as a result of this conversation, that Hall was there to get your business for his new organization, didn't you?

A. No, I didn't.

Q. I see. He told you that they were dividing up the old agency; is that right?

A. That's right.

Q. O.K. And didn't he also mention to you that they had suffered a financial loss in January?

A. Not that I recall.

Q. Don't you recall that?

A. No.

Q. Do you have information to that effect now?

A. I have been listening to it here in court, yes.

Q. Is this the first time?

A. This is the first time.”

Mr. Tony Hatsis, President of the Club Manhattan-Hofbrau, testified at the hearing on plaintiff's application for a preliminary injunction. A portion of this testimony read into the record of the trial below is as follows:

Q. When did Mr. Hall come to you and say he was forming a new agency?

A. Mr. Hall came to me I think it was the middle or early part of February and says that they were going to split, and he asked me what I wanted to do, and I says, 'Wherever you go, I want you to handle my advertising. You are the man that put yourself out for me. You are the man that has done all this work.' And I wanted him to continue my advertising.

Q. What did he say about Mr. Hoggan?

A. He didn't say anything except that it came to a point where they were going to separate.

Q. Did he tell you when?

A. No.

Q. And with whom?

A. No." (R. 313)

Frank Shelley, Manager of Country Mutual Life Insurance Company, testified that he was contacted by Hall and advised of his leaving the plaintiff corporation subsequent to his resignation as an officer and director of plaintiff and after his termination therewith as an employee. Shelley's testimony, like Hatsis', was read into the record from the transcript of the hearing

on plaintiff's application for preliminary injunction as follows:

"Q. I see. Now, did Mr. Hall contact you, Mr. Shelley, at any time and indicate to you that he was leaving the company of Hoggan & Hall & Higgins?

A. Yes, sir.

Q. Tell the court when that contact was made?

A. That contact was made on the 2nd of March, 1964.

Q. And do you know a man by the name of Ned Hoggan?

A. No I do not.

Q. You don't even know him, is that correct?

A. No." (R. 308)

On cross-examination, Shelley testified in pertinent part as follows:

"Q. When was the first time you learned, Mr. Shelley, that there had been, well, Mr. Hall had left the agency prior to that?

A. At this telephone call on the 2nd of March.

Q. 2nd day of March?

A. That was a very brief telephone conversation.

Q. I see, that's all."

From the foregoing testimony, it is clear that on no occasion did the defendant Hall ask for the business of these several advertising clients or solicit the same.

Upon being advised of the fact that Hall was leaving the plaintiff corporation, in each instance, the client advised him that they wished him to continue servicing their respective accounts. These were the unsolicited reactions to the information that Hall was leaving the agency. More importantly, this evidence is absolutely uncontradicted.

By reason of the professional relationship which Hall had enjoyed with these persons over a substantial period of time, it was only proper that they be advised of his termination with the agency. However, to simply advise a customer that one is leaving a company falls far short of solicitation of that customer's business. *Funk & Wagnall's New Standard Dictionary of the English Language*, 1927 ed., defines the word "solicit" as follows:

"To ask for with some degree of earnestness; seek to obtain by persuasion or entreaty; to seek to obtain something from, by persuasion or entreaty; beg of persistently."

The Supreme Court of the State of California in the case of *Aetna Building Maintenance Company v. West*, 246 P.2d 11 (Calif. 1952), had occasion to determine this precise point. That case involved an action for damages against West, a former employee of the plaintiff, for breach of a written contract which included an agreement by West not to solicit any of the customers of the company serviced by him as an employee for a period of two years after termination of his employ-

ment. In reversing the trial court, the California Supreme Court stated as follows:

“Considering the charge of solicitation, in the light most favorable to the findings, the most shown by the evidence is that West informed Aetna’s clients of the termination of his employment and his plans to go into business for himself. He also eagerly accepted business from Aetna’s customers when it was offered to him.”

\* \* \*

“West had the right to advise Aetna’s customers that he was severing his business relations with it and engaging in business for himself.”

\* \* \*

“‘Solicit’ is defined as ‘to ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite.’” Black’s Law Dictionary, 3rd Ed., p. 1639. ‘It implies personal petition and importunity addressed to a particular individual to do some particular thing \*\*\*’ *Golden & Co. v. Justices Court*, 23 Cal.App. 778, 798, 140 P.49, 58. It means: ‘To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore or importune; to make petition to; plead for; to try to obtain.’

“Merely informing customers of one’s former employer of a change of employment, without more, is not solicitation.”

It was stipulated at the Pre-Trial conference that Wilson Transport Supply was in fact solicited by the



defendant Hall. With respect to the other advertising accounts, however, it is respectfully submitted that the uncontroverted evidence of record affirmatively establishes that there was no solicitation. Although the trial court is the sole judge of the weight and credibility of the evidence, he may not arbitrarily disregard the uncontroverted testimony of credible witnesses. *Jones v. California Packing Corp.*, 121 Utah 612, 619, 244 P.2d 640. It is respectfully submitted that the action of the trial court in finding solicitation of Freed Motor Company, Continental Real Estate, Country Mutual Life Insurance Company, and Club Manhattan-Hofbrau, as reflected in Paragraph 9 of its Findings of Fact and Paragraph 2 of its Conclusions of Law (R. 23, 25), was in arbitrary disregard of the uncontroverted evidence on this issue.

## POINT II.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE LOWER COURT'S FINDINGS THAT THE DEFENDANT HIGGINS PARTICIPATED IN THE COMMISSION OF THE TORT AGAINST PLAINTIFF.

The Pre-Trial Order entered below (R. 18) framed plaintiff's contention and the issue for determination by the trial court in the following language:

“ . . . , it being the plaintiff's contention that while the defendants were in the employ of the

plaintiff, they conspired and agreed together to solicit the accounts of the plaintiff and to enter into a business by themselves separate and apart from the plaintiff."

\* \* \*

"The questions for the trial court to determine are:

1. Was there a conspiracy between Higgins and Hall while still in the employment of the plaintiff?

2. If there was a conspiracy, did the defendants solicit the plaintiff's accounts while still in the employ of the plaintiff?"

\* \* \*

The trial court made the following findings in its Findings of Fact and Conclusions of Law (R. 24):

"10. Defendant, Raymond Higgins, was aware of these solicitations by Mr. Hall and actually assisted Mr. Hall in his plan to take the accounts with him when he left the plaintiff and both he and Mr. Hall testified that an account belonged to the person who could control it."

The only evidence adduced by the plaintiff with respect to the defendant Higgins' participation in the alleged solicitation of the various advertising clients, which as the record clearly shows, occurred on Monday, the 17th day of February, 1964, was the testimony of the two defendants themselves. Those portions of defendant Higgins' testimony pertinent to this issue have been extracted from the record as follows:

“Q. Did you have a meeting with Mr. Hall before this meeting of the 18th which the three of you attended?

A. If you want to call a conversation a meeting, yes. I had a conversation with him.

Q. All right. O.K. Now, what I want to know is what was discussed between you concerning both of you leaving the agency.

A. By the 18th, that following Tuesday, I was aware that it was Nels' desire to leave the agency too.

Q. He expressed that to you before you had your meeting with Hoggan; is that right?

A. Yes.

Q. All right. Now did the subject matter of any of the agency accounts come up in your conversation with Mr. Hall before this meeting of the 18th?

A. Yes. We discussed some of the clients.

Q. All right, tell me what was said by Mr. Hall and by you during these informal conversations.

A. Well, he contacted some of the clients he had been servicing and told me that it looked like several of them would come along with him.

Q. I see. Before he made the statement to you that he had accounts that would go with him, had you discussed with him the idea of you and he forming a new agency?

A. No. At this point we had just talked about whether he was going to leave or not.

Q. Was it understood between you that you would go together and form an agency? Was that your understanding?

A. We didn't have a discussion of it, but I am sure we felt that if he decided to leave that we certainly had an area of understanding, and that we would discuss both of us leaving.

Q. All right. Now certainly you would not have been interested in having him go with you unless he brought business with him?

A. I would have welcomed the opportunity to have him as an associate whether he brought any business with him or not." (R. 213, 214)

\* \* \*

"Mr. Garrett:

"Q. Mr. Higgins, which of the accounts did you help Mr. Hall solicit before you left the agency?

A. Help him solicit?

Q. Yes.

A. I didn't help him solicit anything.

Q. You went with him to Wilson Transport did you not?

A. Yes, I beg your pardon. With one exception. I went to Pete Wilson with him.

Q. When was that?

A. The week following our February 13th meeting. I think it probably would be — I'm not sure whether it was before we had our meeting with Mr. Hoggan on the following Tuesday or not. It was that week.

Q. When you and Mr. Hall agreed to form a new agency, didn't you intend that that agency have as much business as possible?

A. Well, certainly.

Q. And you were perfectly willing and agreeable that Mr. Hall solicit such accounts of the old agency as he wished to do; is that correct?

A. Well, I was happy to see him contact them and inform them that he was leaving.

Q. And you also even encouraged them coming along, is that right?

A. I was happy that indications were that some of them would join the new agency." (R. 217)

Hall's testimony on this issue is as follows:

"Q. I see. Now had Mr. Higgins spoke to you, prior to this meeting (meeting of February 13 or 14, 1964) about you leaving the agency?

A. Absolutely not.

Q. It had not been discussed between you?

A. It had not.

Q. Is that correct?

A. That's correct.

Q. When was that first discussed between you, Mr. Hall?

A. My leaving the agency?

Q. Yes. By Higgins with you.

A. This would have been after the meeting of Thursday. Mr. Hoggan was the first man who

asked me if I was staying or leaving. He asked that night.

Q. I asked you when Mr. Higgins mentioned this subject to you?

A. This would have been on a Sunday or a Monday. I'm not certain.

Q. What did you tell him?

A. I told him the first time he asked that I still hadn't made up my mind.

Q. What did you tell him the second time?

A. The second time I told him that I was leaving the organization.

Q. At that time was the formation of the new agency, a new company, discussed between you.

A. I don't frankly recall any discussions where the formation of a new agency at that point was discussed, no. (R. 115, 116)

\* \* \*

A. Well, I'll attempt to. To the best of my knowledge, Mr. Higgins contacted me the day following Mr. Hoggan's conversation with me which would have been on a Saturday. The Hoggan conversation. At which time I told Mr. Hoggan I hadn't decided what I wanted to do. On Sunday, to the best of my knowledge, Mr. Higgins contacted me and asked if I had made up my mind and I told him I hadn't at that time. To the best of my knowledge, on Monday, when I contacted the accounts I serviced, I came back and told Ray I had been in touch with the accounts and that the accounts were coming with me when I left the organization. (R. 117)

\* \* \*

Q. All right. What date was that?

A. This would have been a Monday and I think that date would have been the 17th of February.

Q. All right. Now did I understand correctly that you told Mr. Higgins that you had contacted the accounts, and that they were going with you, so therefore you were leaving? Is that what you told him?

A. This in effect is what I told him. That I had contacted the accounts that were coming with me, yes.

Q. Now did you then arrange a meeting with Mr. Higgins to discuss you and he getting together and forming a company?

A. No.

Q. When did you next have a conversation with him concerning the formation of a new company?

A. To the best of my recollection, this would have been on the following Wednesday, and that would put us up to February 19th.

Q. Prior to this February 19th meeting, did you ever have any conversations with Mr. Higgins where he mentioned to you that you should obtain some business and leave —

A. No.

Q. — the agency?

A. No.

Q. He never mentioned that to you; is that correct?

A. No.

Q. Is it your testimony then that the decision to contact the accounts and to secure their business was your own?

A. Yes." (R. 117, 118)

It is respectfully submitted that there is no evidence of record to substantiate a finding that the defendant Higgins acted in concert with Hall with respect to contacting the several advertising clients involved in the instant case on the 17th day of February, 1964. Although Higgins admits having contacted Mr. Peter Wilson of Wilson Transport Supply, his testimony is to the effect that that occurred *during* the week of the 17th; and this is substantiated by Wilson's testimony to the effect that his initial contact was with the defendant Hall alone (R. 288).

The wrongful act constituting the tort which the court found and upon which it based its judgment is expressed in its Conclusion of Law No. 2 (R. 25):

"2. Defendants and each of them violated their fiduciary duty owing to the plaintiff corporation as officers and directors when they solicited and obtained the advertising accounts of plaintiff while still in plaintiff's employ."

While Higgins admittedly assisted Hall in connection with the solicitation of the Wilson Transport Supply account, this is the only tortious conduct on the part of the defendant Higgins revealed by the record. He was not present at the initial contact with Wilson Transport Supply Company on February 17, 1964.



He was not present during any discussions whatsoever with any of the other advertising accounts. He was not aware of the intention of the defendant Hall to contact these several accounts on February 17, 1964, until after the commission of that act. Nor does the fact that he accepted the business of these various clients thereafter as a principal in the corporation of Higgins & Hall constitute solicitation of them by him. *Aetna Building Maintenance Co. v. West, supra.*

At the initial meeting of the three principals of the plaintiff corporation on February 13 or 14, 1964, Higgins announced his intention to leave the plaintiff corporation. He admittedly discussed with the defendant Hall prior to February 17, 1964, the question of whether or not Hall desired to leave the employ of the plaintiff corporation. However, nowhere in the record is there any evidence to the effect that he *previously* discussed with Hall his contacting the several advertising clients. As a matter of fact, Hall stated under cross-examination that it was his idea alone. The applicable rule of law is laid down generally in 15 C.J.S., Conspiracy, Sec. 30, P. 1047, 1048 as follows:

“In order to establish a conspiracy, evidence must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise, otherwise it is insufficient to prove a conspiracy. Disconnected circumstances, any one of which or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking are insufficient to establish a conspiracy.”

The fact that the two defendants discussed prior to February 17, 1964, the determination as to whether or not Hall would go along with Higgins in leaving the agency does not establish a conspiracy between the two to commit a tort against the corporation. Both defendants were free to leave and engage in a competing business. Neither defendant had an employment agreement with the plaintiff corporation nor were under the disability of a covenant not to compete with the plaintiff corporation. This in itself, does not constitute an actionable conspiracy.

In the case of *Continental Car-Na-Var Corp. v. Moseley*, 148 P.2d 9 (Calif. 1944), the Supreme Court of California was faced with a problem somewhat analogous with that of the instant case. Plaintiff corporation sought damages against certain of its former employees for wrongful solicitation of plaintiff's customers. In reversing the trial court, the court there stated in language applicable to the instant case as follows:

"There is no evidence in the record which would uphold the finding of the trial court that the defendants wrongfully conspired to injure and destroy the business of plaintiff."

\* \* \*

"That the defendants were free to leave the employ of plaintiff and engage in a similar business there can be no doubt. For men to agree and plan to enter a business as associates, even though they have a design to draw other patronage from many rivals or all that a particular rival may have, does not constitute them conspirators.

Practically every co-partnership, corporation or private individual which enters into business does so with the intent of drawing all the business it possibility can from all competitors. If it were not so, there would be no such word as 'competition' in business."

Assuming therefore, for purposes of argument only, that the defendant Hall committed a tort by reason of his discussions with the advertising clients on the 17th day of February, 1964 (which defendants dispute) the court clearly erred in finding the defendant Higgins to have been a party to the commission thereof.

### POINT III.

**THE TRIAL COURT ERRED IN AWARDING PLAINTIFF DAMAGES BECAUSE THE LOSS SUSTAINED BY THE PLAINTIFF, IF ANY, WAS NOT CAUSED BY DEFENDANTS' ALLEGED WRONGFUL CONDUCT.**

The evidence is undisputed that the plaintiff corporation had no reasonable expectancy of retaining the advertising business of the accounts allegedly solicited and lost to it. The uncontroverted evidence shows that by reason of the relationship and professional confidence existing between the defendant Hall and the advertising accounts in question, the latter would have employed Hall upon immediately being apprised of his having left the plaintiff's employ. Therefore, the damages, if

any, resulting to the plaintiff resulted not from any alleged solicitation of these accounts but by reason of defendant Hall leaving the employ of the plaintiff corporation.

With the exception of Wilson Transport Supply Company, Hall had been the account executive servicing Freed Motor Company, Continental Real Estate, Club Manhattan-Hofbrau, and Country Mutual Life Insurance Company, since each had first employed plaintiff corporation or its predecessor partnership to handle its advertising business. Hall had serviced Wilson Transport Supply Company in 1954, and more recently from July of 1963. The function that an account executive performs for the advertising client being serviced is best expressed by Edward D. Hoggan on cross-examination as follows: (R. 260, 261)

“A. Well, he would be in constant contact with the client. He would arrange the overall program. Determine budget. Recheck with the client periodically. Show him development in the form of advertising that he was preparing or having prepared for the client.

Q. As a matter of fact, there is a very close professional relationship between the executive and the client he services. is there not?

A. There is an intimate relationship established between the account executive and the client.

Q. I believe, Mr. Hoggan, when you testified earlier in this hearing you intimated in substance

the account executive becomes almost a part of the organization which he services?

A. That is the intent.

Q. He becomes completely inculcated with the particular philosophy of the client he is attempting to serve?

A. Yes, sir."

Mr. Peter Wilson stated it in another way as follows: (R. 290)

"Q. Could you give the court some idea as to the training requirements for an advertising agent to handle your particular account?

A. Well, I think it probably takes an advertising man longer to become acquainted with the variety of products that we handle and the variety of markets we attempt to penetrate, than it would in a more, let's say, conventional or popular line of business and was in a single line of endeavor. We have varied products, appealing to varied markets, and in our own way — or the way we want to try to sell our merchandise, which has proved successful for us — at the time the agency man becomes familiar with those products, with those markets, and with the way we want to do our job, I think it takes longer than usual.\*\*\*"

During the course of the defendants' presentation of their case in chief, a representative of each advertising account allegedly solicited by defendants, testified with respect to this issue. Peter Wilson, owner of Wilson Transport Supply Company testified that if he had been contacted by the defendant Hall subsequent rather than prior to the 29th day of February, 1964, the date of

defendant's termination with plaintiff corporation, he would nevertheless have continued with the defendant Hall and severed the relationship with the plaintiff corporation (R. 289).

Both Mr. Charles Freed, chairman of the Board of Freed Motor Company, and Alan E. Brockbank, President of Continental Real Estate, likewise testified their respective decisions to continue with Mr. Hall were in no way related to any alleged solicitation prior to the 29th day of February, 1964. Both Mr. Freed and Mr. Brockbank testified unequivocally that it would have made no difference whatsoever in their decisions to remain with Mr. Hall had the contact been made prior to February 29, 1964, subsequent to February 29, 1964, or not at all! (R. 272, 280) Mr. Brockbank stated his reasons as follows:

"A. Well, I would say this. That everytime we have hired an advertising agency, it has taken us from months up to years to teach the advertising agency something about the building business, and how houses are sold and how they are built, and all about them. And especially the new things we put into ours, and the procedure we follow in selling them. Mr. Hall had serviced my account for three or four years and I didn't want to educate anybody else. I was too busy. It was at the beginning of a new season and I did not want to go through the process of teaching a new advertising agency how to operate in respect to handling our account." (R. 271)

Mr. Frank Shelley, manager of Country Mutual Life Insurance Company, of course was, in fact, con-

tacted and advised of Hall's termination with plaintiff corporation after it had become an accomplished fact on March 2, 1964. At least as to this account, there was no evidence to indicate that Country Mutual Life Insurance had even been contacted by Hall while he was still in the employ of the plaintiff corporation (R. 308, 310). His testimony is extracted earlier in this brief. His business contacts had been solely with the defendant Hall and he did not even know Edward D. Hoggan, the third principal involved in the plaintiff corporation.

Tony Hatsis, the President of Club Manhattan-Hofbrau, testified that the only person at the plaintiff corporation with whom he had had any contact was defendant Hall and he testified in effect that wherever Hall goes, he wanted him to handle his advertising. The extract of his precise testimony appears earlier in this brief (R. 312, 313).

The testimony of the several advertising clients themselves with respect to this issue is completely uncontroverted. Moreover, there is nothing in the record or otherwise that would indicate that any of these men, all of whom are respected members of the business community, would come into court and under oath perjure themselves with respect to this question. Indeed, the trial court refused even to make a finding on this issue, which failure will be explored in a separate point hereafter.

It is, therefore, abundantly clear that the causative factor in the loss of plaintiff of these accounts was not

any alleged solicitations made by Hall, but rather the close professional relationship that defendant Hall enjoyed with each account. It is apparent that wheresoever went the defendant Hall, so went these accounts. Like any capable businessman, each of these witnesses desired a competent skilled advertising executive available to perform such advertising services as they may require; and it was obviously immaterial whether such a person remained with the plaintiff corporation, associated with the defendant Higgins in a new company or established an independent agency by himself. The professional trust and confidence reposed in the defendant Hall by these various advertising clients is much the same as that confidence which exists between a lawyer-client or a doctor-patient. The entity or association with which the individual practitioner is associated is of little or no consequence to the client.

Therefore, the loss, if any, sustained by the plaintiff corporation, was not occasioned by an improper solicitation, the tort found, but rather by reason of defendant Hall's leaving the plaintiff corporation, which he was legally free to do. The evidence is clear and undisputed that neither Hall nor Higgins contractually bound themselves to remain with the plaintiff corporation nor had either defendant bound himself not to compete with the plaintiff corporation after leaving its employ. Had the plaintiff required of the defendants an employment contract with an enforceable covenant not to compete after termination, then the plaintiff would have



been in a different position to seek recourse from the courts for breach of such contract.

Neither were the advertising accounts in question, under an exclusive contract of any kind whatsoever with the plaintiff corporation. They were free to leave if and when they so desired without any restrictions whatsoever and for any reason whatsoever. Their reason in the instant case was because the defendant Hall left the employ of plaintiff corporation — not because they were solicited by the defendant Hall.

The case of *Nichols-Morris Corp. v. Morris, supra*, is of particular application to the facts and evidence of the case at bar. That case involved an action brought by a corporation against Morris, its former officer and director, for committing a breach of his fiduciary duty in allegedly inducing cancellation of a valuable distributorship with a company known as the Nichols Company. This distributorship, theretofore enjoyed by the plaintiff corporation was thereafter awarded to a corporation controlled by the defendant, Morris. The defendant Morris argued that regardless of any alleged or wrongful conduct on his part, the distributorship would have followed him in any event. The court agreed and stated as follows:

“The distributorship was not for a fixed term of years. It was cancellable by the Nichols Company upon notice. There was no assurance of its continuity. It is true that until the occurrence of the event already described, Nichols Company appeared likely to continue the plaintiff as its

national distributor of 'Nichols-Miller.' It is equally true that this prospect of continuance — the corporation opportunity — would remain only as long as the Nichols Company was of the view that the plaintiff had the capacity to perform as it had in the past. This was a matter which rested in the sole judgment of the Nichol Company. The record demonstrates that in the judgment of its officials, plaintiff's ability to perform to their satisfaction was conditioned upon the continued association with plaintiff of Morris and Block; that as between the two, Morris was regarded as the more effective and essential in the representation of the Nichols' interest.

Morris was under no contractual obligation to continue with the plaintiff. He was free to resign as its officer and director. Once he properly severed his relationship with the plaintiff, he was not restricted from entering into a competitive situation, so long as he did not breach his fiduciary obligation.

The Nichols Company was entirely free to make an independent decision in its own interests. When the break came between the two associates, it had the choice of continuing with the plaintiff, appointing the defendant in its place, or naming a new designee. But Morris, as we have seen, was barred from interfering with plaintiff's rights with respect to the distributorship, because he occupied a position of trust and confidence toward it which continued at least until May 11, 1956, the date of his resignation . . . while the law condemns him because his conduct fell below the standard imposed and inflexibly enforced by it, *the defendant may be held liable to the plaintiff only for the damages occasioned by his conduct.*

Plaintiff may not receive recompense on any unrealistic basis — certainly not upon that advanced by it. To accept plaintiff's claim, which finds no support in the facts, in effect would overcapitalize a cancellable distributorship, one that in the normal hazards of business, plaintiff would not have continued to enjoy once the defendant withdrew from it.

*The court is fully persuaded that even without the defendant's inducement, the Nichols Company, following his resignation, in its own interests and acting upon its own independent judgment, would have cancelled the distributorship and awarded it to the defendant.” (Emphasis supplied.)*

To the same effect, see the comment of the annotator at 9 A.L.R. 2d, 256, 257 and cases there cited, wherein it is stated as follows:

“Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that it must appear that such relationship or contract would otherwise have been entered into.”

Nowhere in the record is there any evidence that there existed a reasonable probability that the plaintiff corporation would have continued to do future business with the several advertising clients lost, once Hall had left the employ of plaintiff, which he was free to do. On the contrary, the uncontroverted evidence of record demands a directly contrary conclusion.

It is therefore respectfully submitted that based on the record before the court, it was error for the trial

court to have awarded damages to the plaintiff corporation. The damage, if any, sustained by the plaintiff corporation by reason of the loss of these advertising clients was not the proximate result of any alleged solicitations made thereto.

#### POINT IV.

THE TRIAL COURT ERRED IN AWARDING DAMAGES TO PLAINTIFF BECAUSE (1) ITS AWARD WAS BASED ON GROSS RECEIPTS AND HALL'S PRESENT SALARY; AND (2) THE UNCONTROVERTED EVIDENCE SHOWS THAT THERE WERE NO FUTURE PROFITS TO BE DERIVED BY PLAINTIFF FROM THE ADVERTISING CLIENTS ALLEGEDLY SOLICITED.

##### (1)

One of the trial court's glaring errors apparent on this Appeal has been the complete omission from its Findings of Fact as to the manner in which it concluded that the plaintiff corporation had been damaged in the amount of \$25,000.00 or as to the measure of damages applied by it.

Paragraph 13 of the trial court's Findings of Fact is the only finding made relative to the issue of damages (R. 24). That finding is as follows:

"13. The advertising accounts taken by defendants produce an annual *gross* billing of between

\$18,000.00 and \$22,000.00 per year. Mr. Hall services those accounts and draws a salary from the new corporation of \$1,250.00 per month. Each of said accounts is still being serviced by the new corporation of Higgins & Hall, Inc." (Emphasis supplied.)

There is no evidence of record whatsoever with respect to the gross *billing* of the advertising accounts allegedly solicited and taken. However, in fairness to the trial court and to counsel, it is recognized that the word "billing" in this finding was inserted by inadvertence and that what was intended to be inserted there was the word "revenue" or "receipts." However, neither is there any evidence of record to support the finding that these accounts produce an annual gross revenue of between \$18,000 and \$22,000.00 per year. The largest amount collectively produced by these respective accounts was during the year 1963, and that amount was \$17,272.35 (Exhibit 14p). The yearly revenue from the accounts in question averaged over the life of the account with the plaintiff corporation was \$14,386.30 (Exhibit 14p). The revenue produced by these five accounts during the year 1964 was \$15,709.74 (R. 130, 267). Admittedly, the defendant Hall testified that the approximate revenue derived from the accounts in the year 1963 was \$18,000.00 (R. 127). Yet, exhibit 14p, introduced by plaintiff, shows the more precise figure for 1963 to be \$17,272.35, as above stated. The \$18,000.00 to \$22,000.00 figure came from the mouth of plaintiff's counsel not the defendant Hall (R. 127). This approximation of plaintiff's counsel was apparently seized upon by the court

in its Findings of Fact and the court completely ignored the documentary evidence (Exhibit 14p) as well as the precise testimony of both Mr. Hall and Mr. Hoggan relating to the 1964 figures (R. 130, 267).

In any event, regardless of the figure taken relating to the gross revenue produced by the five accounts in question, the significant thing about the court's findings is that it is based on a *gross* revenue figure. There is no finding of fact relating to the net profits that the corporation derived or reasonably could expect to derive from the business of the five accounts allegedly solicited. This is where the court made its most egregious error. The cases and authorities abound with the proposition that damages in a case of this nature must relate to *net* not gross profits.

The general rule is well stated in 22 Am. Jur. 2d, Damages, Sec. 177, pp. 252, 253 as follows:

“\*\*\* Likewise, it is generally held that prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain that such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured from the evidence produced with reasonable certainty.\*\*\* *Proof of the gross receipts of the business, standing alone, is not sufficient.*” (Emphasis supplied.)

This rule is reiterated in 22 Am. Jur. 2d, Damages, Sec. 178, pp. 253, 254 as follows:

\*\*\* There are, however, certain principles applicable generally in the computation of lost profits. Thus, whether the action is in tort or contract, the expenses saved because of the wrongful act of the defendant must be subtracted from any recovery. Therefore, the plaintiff is entitled to his *net profits not his expected gross profits*. 'Net profit' is defined as the gross amount that would have been received pursuant to the business or investment that was interrupted by the defendants' wrongful act less the costs of running that business or attending that investment. The theory behind such a definition is that the plaintiff can minimize his damages by not making the expenditures which would have been required had the wrongful act of the defendant not intervened." (Emphasis supplied.)

In *American Fire Protection Service v. Williams*, 340 P.2d 644 (Calif. App., 1959) the plaintiff sought damages against defendants for violating a permanent injunction which restrained defendant from competing with plaintiff and from soliciting the business of persons who were customers of the plaintiff on and prior to January 2, 1953, the date that defendant left the employ of the plaintiff and engaged in a competing business. In discussing the plaintiff's claim for damages, the court stated as follows:

"The only evidence pertaining to actual damages suffered by the plaintiff in relation to the alleged violations by the defendants of the injunction, was that it lost \$440.00 per year *gross* in business diverted from it by defendants. For the breach of a duty in connection with the plaintiff's business, normally the measure of damages

is the loss of profits caused by the breach.\*\*\* Profits, of course, are the amount of gross income less the amount of costs. Plaintiff in this regard only proved the amount of gross profits it lost and not the net profits. Plainly, the plaintiff did not meet the burden of proving damages. The breach of a duty in a vacuum without damage does not normally give rise to a cause of action.” (Emphasis theirs.)

In the case of *Williams v. Bone*, 259 P.2d 810 (Idaho, 1953) the court there stated as follows:

“If there is any authority to the effect that the jury could fix compensatory damages from evidence showing only gross income without deduction of expenses and costs of operation, from which the net profits or decrease in net income could be determined, it has not been called to our attention.

“The compensatory damages suffered by plaintiff, if any, are limited to the pecuniary loss due to the wrongful act of the defendant.

“*Where a regular and established business is injured, interrupted, or destroyed by the wrongful acts of another, the measure of damages, when and if recoverable, is the net loss and not diminution in gross income. Hence in the case before us, if the loss of business was occasioned by the acts of defendant, the measure of damages would be the loss of profits, if any, resulting from such wrongful act .*”

\* \* \*

“In *Nelson v. Oversmith*, 69 Idaho 1, 201 P.2d 747, this court held that damages could not be predicated on proof of gross receipts of the busi-



ness, and that such evidence, standing alone, is insufficient proof of damages."

\* \* \*

"To permit the jury to fix the amount of damages from a showing only of gross receipts is so uncertain and speculative as to what the loss might be, if any, that it is not a proper criterion in fixing the loss.

"The jury and this Court cannot take judicial notice that a one-third, or any other part of gross income is profit.

"We therefore conclude that the testimony tending to show the claimed and supposed loss of profits is insufficient to sustain the verdict in this regard." (Emphasis supplied.)

To the same effect see *Rainbowe Island Productions Ltd. v. Leong*, 351 P.2d 1089, 1093 (Hawaii, 1960); *Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193, 199 (Colo., 1954); *St. Germain v. Bakery & Confectionery W. Union No. 9*, 166 Pac. 665, 668 (Wash., 1917); *McOmber v. Nuckols*, 353 P.2d, 398, 400 (Idaho, 1960); *Huggins v. Green Top Dairy Farms*, 273 P.2d 399, 407 (Idaho, 1954); and the numerous cases and authorities cited in *Williams v. Bone*, *supra*, at page 812.

The other finding made with respect to this issue of damages is that the defendant Hall services the five advertising accounts in question and presently draws a salary from the new corporation of \$1,250.00. No place in the record is it reflected how much of that salary is attributable to the five accounts allegedly solicited. However, assuming, *arguendo* only, that such evidence

did appear of record, this, in any event is not the proper measure of damages for the loss claimed by the plaintiff corporation in the instant case. The plaintiff has sought, in its pleadings, compensatory damages for the tort allegedly committed by defendants. The general rule is stated in 4 Restatement of Torts, Sec. 901, pp. 537, 538 as follows:

“\*\*\*\* In other situations, as where there has been harm to earning capacity, the law can indemnify the plaintiff for a pecuniary loss, such indemnity not being the exact equivalent but one which approximates the pecuniary harm which the injured person has suffered or is likely to suffer in the future. In determining the measure of compensation, indemnity or restitution, the law of torts ordinarily does not take into account, as do the rules based upon unjust enrichment, the benefit received by the defendant. This purpose leads to compensatory damages.”

It is apparent, therefore, that the court based its conclusion in fixing damages in the amount of \$25,000.00 in part upon the *gross* profits of the corporation and in part upon the salary that the defendant Hall is earning by reason of his services to his new employer. As demonstrated above, neither is a proper basis for determining damages in a case of this nature.

Plaintiff presented its claim for damages on the apparent theory that the plaintiff corporation had a proprietary interest in these accounts allegedly solicited. See Conclusion of Law No. 1 (R. 25). It accordingly approached the problem of damages from the viewpoint

of fixing a value on these accounts as if the same were chattels converted by the defendants. In order to assist the court in fixing such a value, it presented so-called expert testimony through Alfred Garrigues, an advertising executive of Salt Lake City. Mr. Garrigues presented to the court several formulae for determining such value. One approach was to take 15 per cent of the gross billing of the account sought to be evaluated plus 5 per cent thereof representing acquisition costs of such account as defined by Mr. Garrigues plus indoctrination costs based upon hours spent by the advertising agent "getting the account off the ground." Another approach was to take the average between one month's gross billing (as distinguished from actual receipts) and one year's gross revenue. Both approaches lose sight of the very obvious fact of life that the value of any customer to a business must be measured by the amount of net profit that can be produced for the business by the account or customer involved.

The authorities quoted above amply demonstrate that the measure of damages is the net profit reasonably to be expected from the accounts involved. These accounts represented various advertising customers utilizing the services of the plaintiff corporation from whom plaintiff derived revenue. Although none of these accounts were under contract with plaintiff corporation and could cancel at will, their value of plaintiff can be no greater for the purposes of this case than the value of their contractual relationship, such as it was, with plaintiff. The Restatement of Torts in its section on Dam-

ages. Volume 4, Sec. 911, p. 571, Comment "i," lays down the prevailing rule for determining the value of a contract as follows:

"The value of a contract is the present value of the *net expectable profit* to be derived from the contract plus the value of partial performance already given by the claimant and not paid for. This profit is the difference between the amount which probably would be received under the contract and the amount which probably would be expended in performance, both reduced to present worth. In some contracts, the contingencies on both sides are so uncertain that any fixed sum is a mere estimate based on guess. If so, the rule as to certainty may prevent recovery of anything more than nominal damages; if, however, it is *reasonably certain* that some profit would have been received, the trier of fact is justified in awarding an amount which roughly corresponds to the smallest sum which probably would have been gained." (Emphasis supplied.)

Additional objections to applying either of the formulae proposed by plaintiff's expert are (1) the record is completely devoid of any evidence reflecting the gross annual billing of each of the five accounts in question; (2) there is no evidence whatsoever with respect to the acquisition costs or indoctrination costs of each of the accounts in question; (3) its speculative because Garrigues admitted that his source from which he derived his formulae present at least 10 different formulae and this authority, (Rubel) itself, has difficulty in determining which one to apply; (4) Garrigues' only experience in determining value of accounts and for

which the formulae presented to the court was used was in connection with valuing accounts for purposes of incorporating a partnership; and (5) Garrigues himself admitted that accounts producing the gross annual revenue that the accounts here in question produce, with an overhead factor of 47% (plaintiff's 1963 overhead factor) plus a salary of \$13,200.00 annually to the account executive servicing those accounts (Hall's salary with plaintiff) would constitute "loss" accounts (R. 203-207).

## (2)

The court, despite the defendants' objections to its Findings of Fact refused to make a finding with respect to the net expectable profit to be derived from the accounts in question. The evidence before the court however demonstrates, without contradiction, that there were no net expectable profits to be derived from the five accounts in question.

From the testimony relative to the events surrounding the ultimate separation of the defendants from the plaintiff corporation, it is abundantly clear that the basis for the dispute between the principals was the serious financial condition of plaintiff. Plaintiff for the two months immediately preceding the resignation of defendants had suffered substantial financial losses. As reflected on Exhibit 17d, the profit and loss statement for the period from January 1, 1964, to February 29, 1964, the date of termination of defendants' employment, plaintiff sustained a net loss of \$5,611.43. This

exhibit further reflects that for the two months immediately preceding the termination of defendants' employment, gross profits to the plaintiff were in the amount of \$7,360.70 and expenses in the amount of \$5,786.39, exclusive of administrative salaries. In other words, the overhead for plaintiff's operations during the two months immediately preceding the termination of defendants' employment and the culmination of the events which led to this lawsuit was a staggering seventy-nine per cent of gross income. For the year 1963 (during which time plaintiff corporation was servicing its largest single account, Boise Cascade Corporation, which cancelled on December 31, 1963) as indicated on Exhibit 18d, the plaintiff sustained a net loss of \$428.56. Its overhead expenses, exclusive of administrative salaries, were \$31,053.67 as against a gross profit of \$66,362.62, or a ratio of overhead to revenue of forty-seven per cent. Even by utilizing the more favorable overhead ratio, i.e., forty-seven per cent, rather than the seventy-nine per cent incurred during the first two months of 1964, it is indisputable that there was no net expectable profit to be derived from the advertising accounts in question in this litigation by the plaintiff corporation, as will be shortly demonstrated. The chart which hereafter appears furnishes the court with the gross revenues produced by each of the accounts in question during (1) the year 1963, (2) the life of the account with the plaintiff corporation, and (3) during the year 1964. Exhibit 14p reflects the revenue produced yearly by each of the accounts. This exhibit also reflects the revenue per year

averaged over the entire life of each account with the plaintiff agency.

The Allen E. Brockbank Account was serviced by the plaintiff agency for a period of 33 months, Country Mutual Life Insurance Company for a period of 72 months, Freed Motor Company for a period of 126 months, Hofbrau-Manhattan for a period of 4 months, and Wilson Transport Supply for a period of 96 months. The revenue received by the plaintiff agency from each of these accounts averaged over their respective lives with plaintiff is the figure included and referred to in column (2) in the chart hereafter appearing.

There is no documentary exhibit before the court with respect to the revenue produced by each of the accounts for the year 1964. However, the defendant Hall testified from his records as to the revenue received by Higgins & Hall, Inc. from each account from the period March 1, 1964, through December 31, 1964 (R. 130), and Edward D. Hoggan testified from plaintiff's records as to the amount of revenue produced by each of these accounts for the months of January and February of 1964 (R. 267).

Kind of Account	(1) Revenue Produced during 1963 (Exh. 14p)	(2) Yearly Revenue Averaged over life of account with Plain- tiff (Exh. 14p)	(3) 1964 (R. 130, 267)
Continental Real Estate (Alan E. Brockbank)	4,512.60	\$5,110.20	\$3,434.39
Country Mutual Life Insurance	1,490.84	1,455.36	125.99
Freed Motor Co.	9,772.22	5,134.32	10,149.23
Hofbrau-Manhattan	496.38	1,489.18	625.17
Wilson Transport Supply	1,200.31	1,197.24	1,374.96
<b>TOTAL</b>	<b>\$17,272.35</b>	<b>\$14,386.30</b>	<b>\$15,709.74</b>

As shown and reflected on Exhibit 18d, the salary drawn by the defendant Hall as of the close of the year 1963 was \$2,100.00 per month. As reflected on Exhibit 17d, at the time of the termination of defendant's employment, the defendant Hall's salary was \$1,100 per month. Its rather basic that in order to determine whether or not a net profit was to be expected from the accounts in question, one must deduct from the gross revenues to be anticipated therefrom, the overhead attributable thereto, together with the salary that the corporation was paying the account executive servicing those accounts. Utilizing the lower overhead ratio of the two hereinabove referred to, that is forty-seven per cent, and the lower monthly salary for the defendant Hall, that is, \$1,100.00, its rather clear that there was *no net* expectable profit to be derived from the accounts in question.

Applying the overhead factor of forty-seven per



cent to the total income shown in column (1) above, which represents the gross revenue for the year 1963, i.e., \$17,272.35, we arrive at an overhead figure attributable to those accounts in the amount of \$8,118.00 for the year. Add to that the salary of Hall for the year (\$1,100.00 per month) of \$13,200.00, the cost to the corporation of those accounts for the year would be \$21,318.00. This represents a net *loss* to the corporation of \$4,045.65, the same representing the difference between the cost of the accounts and the revenue produced therefrom.

If we engage in the same calculations with respect to the yearly average, indicated above in column (2), of \$14,386.30, we arrive at an overhead figure of \$6,751.56. Adding to that the defendant Hall's yearly salary in the sum of \$13,200.00, we obtain a total cost for these accounts to the corporation of \$19,951.56. Inasmuch as the gross revenue produced was \$14,386.30, this approach results in a net *loss* to the corporation of \$5,565.26.

Following the same method with respect to the figures shown in column three above, we arrive at an overhead cost attributable to these accounts in the amount of \$7,383.58. Adding to that defendant Hall's yearly salary of \$13,200.00 we arrive at a total cost to the corporation for servicing these accounts of \$20,583.58. Since the accounts produced gross revenue of \$15,709.74 for the year 1964, the corporation suffers a net *loss* of \$4,873.84.

It is conceded that the salary of defendant Hall, were he to have remained with the corporation, at the rate of \$1,100 per month could in part be attributable to his servicing of the Salt Lake Mattress Company account in addition to those above indicated. The court will recall that the defendant Hall, in fact, was the account executive for Salt Lake Mattress as well as those above indicated, but that Salt Lake Mattress remained with the plaintiff corporation. However, Exhibit 14p shows quite clearly that the average revenue per year based on a servicing period of 85 months derived from this account was the sum of \$2,750.76. It should be noted that this figure is higher than actual revenue produced by this account in 1960, 1961, 1962, and 1963. Therefore, deducting the lower overhead factor of 47% to this account (but not Hall's salary because deducted at full amount above), the net loss to the plaintiff corporation would have been reduced by \$1,457.90 in each of the three illustrations above. The net loss to plaintiff in each approach would, therefore, have been reduced to \$2,587.75, \$4,107.36 and \$3,415.94 respectively. But, there would still remain a net loss —no profit — to the plaintiff corporation.

It is therefore respectfully submitted that not only did the trial court commit error in basing its award of damages to the plaintiff on gross, as distinguished from net, profits, but the trial court erred in awarding any damages whatsoever other than merely nominal. The record conclusively shows, without contradiction, from the best evidence available at the time of trial that the

plaintiff corporation had no reasonable expectancy of deriving net profits from the five accounts allegedly solicited. This demands a reversal with instructions to dismiss or at the least, to enter judgment in favor of the plaintiff for nominal damages only, because any award of loss for prospective profits is speculative and uncertain.

One of the leading cases in this jurisdiction dealing with the question of damages based upon prospective profits is that of *Gould v. Mountain States Telephone & Telegraph Co.*, 6 Utah 2d 187, 309 P.2d 802. Although the factual situation in that case differs from that of the case at bar, the language of the court lays down the test for determining when a claim for prospective profits is unwarranted and any loss resulting therefrom is deemed speculative and uncertain. The court there stated as follows:

“The rule of recovery against uncertain damages is generally directed against uncertainty with respect to cause rather than to measure or extent. . . .

The rule remains, however, proof of loss of profits must not be completely speculative or uncertain *as to fact*, although permissible as to measure or extent and on the present state of proof, it appears that the award for loss of prospective profits is only speculative and cannot be allowed. . . .” (Emphasis supplied.)

In the case of *Continental Car-Na-Var v. Moseley*, *supra*, the California Supreme Court in reversing the trial court’s award of damages there stated as follows:

“Evidence to establish profits must not be uncertain or speculative. This rule does not apply to uncertainty as to the amount of the profits which would have been derived, *but to uncertainty or speculation as to whether the loss of profits was the result of a wrong and whether any such profits would have been derived at all.*”

“There is no substantial evidence in the record to support the findings that the defendants conspired unlawfully, interfered with or deprived plaintiff of its trade in customers, that the customers list of plaintiff was confidential or a trade secret, that the defendants used the secret formulae of the plaintiff *or that plaintiff suffered damage by reason of the actions of the defendants.*” (Emphasis supplied.)

The general rule as stated in 22 Am.Jur. 2d, Damages, Sec. 177, p. 252, quoted above in the argument under subdivision (1) of this Point, to the effect that prospective profits from an established business prevented by the tortious conduct by the defendants are recoverable when it is proved that it is *reasonably certain* that such profits would have been realized *except* for the tort, together with the other cases and authorities therein cited are equally applicable to the argument raised herein.

During the year 1963, when the largest gross revenue from the five accounts in question was produced and while the corporation was still servicing the Boise Cascade account, the largest single account of the corporation, the corporation, nevertheless, failed to show a net profit. During the first two months of the year 1964,

the corporation sustained a net loss for that period in the staggering amount of \$5,611.43. Against the background of these uncontroverted figures, any finding of damages to the plaintiff corporation based upon prospective profits must be wholly speculative and uncertain because based upon the best available evidence at the time of trial, there was no reasonable expectancy that profits would have been realized; in fact, quite the contrary. It is respectfully submitted, therefore, that even if the trial court had applied the proper measure, that is, net profit rather than gross revenue, it could not have determined plaintiff's damage to have been anything other than nominal.

## POINT V.

### THE TRIAL COURT ERRED IN FAILING TO MAKE FINDINGS ON MATERIAL ISSUES OF FACT SUBMITTED FOR DECISION.

Appellants have heretofore explored at length questions relating to causation between the loss claimed by plaintiff corporation and the alleged tort of appellants. This was framed as a specific issue in the Pre-Trial Order (R.18). Although appellants respectfully submit that the uncontroverted evidence of record demands a finding as a matter of law that there was no causative relation between the tort allegedly committed by appellants and the loss sustained by plaintiff corporation because (1) the five accounts in question would

have cancelled with plaintiff by reason of Hall's terminating his employment therewith and not by reason of the alleged tort and (2) there were no net expectable profits to be derived by the plaintiff from said accounts, it should be noted by this court that the trial court nevertheless failed to make any finding whatsoever with respect to these facts.

The reason for necessity of findings on material issues for decision is well stated in the case of *Thomas v. Clayton Piano Co.*, 47 U. 91, 151 Pac. 543, as follows:

"... we must assume that the court passed upon the question of authority adversely to the defendants contention. That, however, ordinarily, at least, is not sufficient. The court should find the facts upon every issue either affirmatively and negatively, as the evidence may be, and thus give the defeated party an opportunity to assail the finding as not being supported by the evidence."

## CONCLUSION

IT IS THEREFORE RESPECTFULLY SUBMITTED that the judgment of the trial court be reversed and the cause dismissed because the uncontroverted evidence of record establishes that no solicitations were made to any of the five accounts involved with the exception of Wilson Transport Supply Company, while appellants were in the employ of plaintiff corporation; and that as to all accounts, including that of Wilson Transport Supply Company, there was no

causative relation between the acts and conduct of appellants and the loss sustained by plaintiff corporation, if any.

RESPECTFULLY SUBMITTED this 29th  
day of November, 1965.

DRAPER, SANDACK & SAPERSTEIN

By HERSCHEL J. SAPERSTEIN

606 El Paso Natural Gas Building  
Salt Lake City, Utah

*Attorneys for Defendants-Appellants*

## APPENDIX



**EXHIBIT 14p (Extract)**

[illegible]

**EXHIBIT 16d**

**HOGGAN & HALL & HIGGINS, INC.**  
**STATEMENT OF PROFIT AND LOSS**  
**For the Period Ending January 31, 1964**

Sales .....		\$20,222.35	
Less Discounts .....		6.75	
Net Sales .....		\$20,215.62	
Less Cost of Sales .....		15,351.36	
Gross Profit from Operations .....		\$ 4,864.26	
<b>Business Expenses</b>			
Rent .....	\$ 330.00		
Telephone .....	122.74		
Postage .....	20.00		
Office Supplies .....	47.02		
Wages — Employees .....	1,058.00		
Taxes .....	553.67		
Insurance .....	102.34		
Depreciation .....	192.87		
Automobile .....	56.44		
Dues and Public Relations .....	317.74		
Total Business Expenses .....		2,800.82	
Net Profit from Operations .....		2,063.44	
<b>Administrative Expenses</b>			
Officers Salaries			
E. D. Hoggan .....	\$1,100.00		
N. W. Hall .....	1,100.00		
R. C. Higgins .....	1,100.00	3,300.00	
Officers Insurance .....		162.76	
Total Administrative Expenses .....		3,462.76	
Net Loss .....		(\$1,399.32)	

**EXHIBIT 17d****HOGGAN & HALL & HIGGINS, INC.****STATEMENT OF PROFIT AND LOSS****For the Period Ending February 29, 1964**

	February 1964	Year to Date
33 Sales .....	\$22,700.71	\$42,923.06
79 Less Discounts .....	30.75	37.48
62		
36 Net Sales .....	\$22,669.96	\$42,885.58
26 Less Cost of Sales .....	20,173.52	35,524.88
Gross Profit from Sales .....	\$ 2,496.44	\$ 7,360.70
<b>Expenses</b>		
<b>Business Expenses</b>		
Rent .....	\$330.00	\$660.00
Accounting and Legal .....	235.00	235.00
Office .....	148.92	195.94
Telephone .....	115.58	238.32
Postage .....	30.00	50.00
Wages — Employees .....	1,058.00	2,116.00
Taxes .....	566.20	1,119.87
Insurance .....	36.46	138.80
2 Depreciation .....	109.53	302.40
Interest Expense .....	142.33	142.33
4 Automobile Expenses .....	32.19	88.63
Dues and Entertainment .....	31.13	348.87
Promotion MFS .....	150.23	150.23
Total Business Expenses .....	2,985.57	5,786.39
Net Profit from Operations .....	(\$489.13)	\$1,574.31
<b>Administrative Expenses</b>		
Officers Salaries .....	\$3,300.00	\$6,600.00
Officers Insurance .....	412.98	575.74
1963 Income Tax — State .....	10.00	10.00
Total Administrative Expenses .....	3,722.98	7,185.74
Net Loss .....	(\$4,212.11)	(\$5,611.43)

**EXHIBIT 18d**

**HOGGAN & HALL & HIGGINS, INC.**  
**STATEMENT OF PROFIT AND LOSS**  
**For the Period Ending December 31, 1963**

	December 1963	1963 to Date
<b>Sales</b>	\$30,842.52	\$268,562.44
Less Discounts .....	15.53	161.17
Net Sales .....	30,826.99	\$268,401.27
Less Cost of Sales .....	24,475.45	202,038.57
Gross Profit .....	\$ 6,351.54	\$ 66,362.70
<b>Expenses</b>		
Office Expenses		
Wages — Employees .....	\$1,198.18	\$16,342.68
Telephone .....	121.74	1,152.88
Rent .....	330.00	3,960.00
Accounting and legal .....	50.00	435.00
Postage .....	35.00	304.25
Office .....	45.69	1,417.38
Taxes .....	—	1,337.52
Insurance .....	56.15	1,088.03
Depreciation .....	162.68	1,655.42
Bad Debts .....	—	48.85
Interest Expense .....	—	212.33
Total Office Expenses ...	\$1,999.44	\$27,954.34
Selling Expenses		
Automobile .....	101.70	1,074.72
Travel .....	59.00	1,023.99
Dues and Public Relations..	456.74	1,000.62
Total Selling .....	\$617.44	3,099.33
Total Business Expenses.	2,616.88	31,053.67
	\$3,734.66	\$35,308.01
Administrative Expenses		
Officers Salaries		
E. D. Hoggan .....	\$2,250.00	\$16,000.00
N. W. Hall .....	2,100.00	14,200.00
R. C. Higgins .....	2,100.00	5,200.00
Total Officers Salaries	\$6,450.00	\$35,400.00
Other Income		
Dreyfus Fund .....	—	(228.72)
Total Admin. Expenses..	6,450.00	35,171.28
Net Profit from Operations .....	(2,715.34)	\$ 13,136.99
<b>Other Expenses</b>		
Officers Insurance .....	(78.13)	496.82
1962 Income Tax .....	—	69.41
Total Other Expenses .....	(78.13)	566.23
Net Loss .....	(\$2,637.21)	(\$428.56)