

1991

# Western Heritage Thrift and Loan v. Donald G. Anderson dba Don Anderson Construction, and Hogue Equipment Co., Inc. a California Corporation : Brief of Appellant

Utah Supreme Court

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E. Craig Smay; Thomas Taylor; Snow, Christensen & Martineau; Attorneys for Appellants.

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DOCKET NO. 910491

IN THE UTAH SUPREME COURT

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=====
WESTERN HERITAGE THRIFT AND )
LOAN, )
    Plaintiff/Appellee, )
vs. )
DONALD G. ANDERSON dba )
DON ANDERSON CONSTRUCTION, )
    Defendant/Appellant, )
    )
and HOGUE EQUIPMENT CO., INC. )
a California Corporation, )
    Defendant. )
=====
    
```

No. 910491  
890904268 CV

APPELLANT'S BRIEF OF  
DONALD G. ANDERSON, DBA DON ANDERSON CONSTRUCTION

On Appeal from the Third Judicial District Court of Utah,  
Honorable Pat B. Brian, Trial Judge

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IN THE UTAH SUPREME COURT

WESTERN HERITAGE THRIFT AND  
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Plaintiff/Appellee,

vs.

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# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
STATEMENT SHOWING JURISDICTION . . . . .	1
STATEMENT OF ISSUES PRESENTED ON APPEAL . . . . .	1
STANDARD OF REVIEW . . . . .	2
STATEMENT OF THE CASE . . . . .	2
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT . . . . .	6
Mandatory Arbitration Clauses Must be Enforced . . . . .	6
That Plaintiff is a Thrift and Loan in Receivership is Irrelevant . . . . .	6
Exhibit "A," "Commercial Lease Agreement, June 5, 1986 . . . . .	6
Exhibit "B," Order, November 27, 1992 . . . . .	7
Sections 78-31a-3, 78-31a-4, 78-31a-12, 78-31a-19, Utah Code An. (1953) . . . . .	1, 4, 5, 7, 8
The Lease in Issue Creates No Separate Right to Litigate . . . . .	9
CONCLUSIONS . . . . .	11
ADDENDUM . . . . .	14

# TABLE OF AUTHORITIES

## Page

### CASES

<u>Allegaert v. Perot</u> , 548 F.2d 432 (2 Cir. 1977) . . . . .	5, 7
<u>Coar v. Brown</u> , 29 B.R. 806 (N.D. Ill. 1983) . . . . .	6, 7
<u>Docutel Olivetti Corp. v. Dick Brady Systems, Inc.</u> , 731 P.2d 475 (Utah, 1986) . . . . .	1, 6
<u>50 West Broadway Assoc. v. Redevelopment Agency</u> , 784 P.2d 1162 (Utah, 1989) . . . . .	2
<u>Imperial Savings Assoc. v. Lewis</u> , 730 F. Supp. 1068 (D. Utah, 1990) . . . . .	8
<u>Mountain Fuel Supply Co. v. Salt Lake City</u> , 752 P.2d 884 (Utah, 1988) . . . . .	2
<u>Quinn v. CGR</u> , 48 B.R. 367 (D. Colo., 1985) . . . . .	6, 7
<u>Robinson and Wells, P.C. v. Warren</u> , 669 P.2d 144 (Utah, 1983) . . . . .	5, 8

### STATUTES

9 U.S.C. §3 . . . . .	3
§78-31a-3, Utah Code Ann. (1953) . . . . .	1, 4, 7, 8
§78-31a-4, Utah Code Ann. (1953) . . . . .	1, 4, 5
§78-31a-12 et seq., U.C.A. (1953) . . . . .	11
§78-31a-19, Utah Code Ann. (1953) . . . . .	1

### Statement Showing Jurisdiction

The Supreme Court has jurisdiction to review the refusal of a district court, under §78-31a-4, Utah Code Ann. (1953), to comply with a mandatory arbitration clause. Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475 (Utah, 1986); §78-31a-19, Utah Code Ann. (1953).

### Statement of Issues Presented on Appeal

1. Whether, under Section 78-31a-4, Utah Code Ann. (1953), a lease provision that

Any controversy or claim arising out of our (sic.) relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgement upon the award rendered by the arbitration(s) may be entered in any court having jurisdiction thereof.

requires the District Court in which a complaint for breach of the lease has been filed to grant a request to remand the proceeding to arbitration.

2. Whether the fact that plaintiff is a thrift and loan association in receivership cancels the effect of Sections 78-31a-3 and 78-31a-4, Utah Code Ann. (1953).

3. Whether a provision of the lease that if lessee in default fails to make payments properly accelerated by lessor, "Lessor shall be entitled to institute appropriate legal proceedings against Lessee," means that lessor may directly institute a litigation rather than an arbitration.

### Standard of Review

All issues presented are questions of statutory and contract interpretation. Review is de novo with respect to all issues. The views of the District Court are not entitled to deference. E.g., Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884 (Utah, 1988); 50 West Broadway Assoc. v. Redevelopment Agency, 784 P.2d 1162 (Utah, 1989).

### Statement of the Case

In 1987, plaintiff/appellee instituted an arbitration against defendant/appellant, under a sale-lease agreement (appended hereto as Exhibit "A") for heavy equipment containing the following provision:

3. ANY CONTROVERSY OR CLAIM ARISING OUT OF OUR (sic.) RELATING TO THIS CONTRACT OR THE BREACH THEREOF SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATION(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. ARBITRATION SHALL BE HELD IN THE CITY OF SALT LAKE, COUNTY OF SALT LAKE, STATE OF UTAH. ANY QUESTION OF LAW SHALL BE DECIDED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH.

The complaint in arbitration alleged that defendant had not completed payments under the contract.

In 1988, plaintiff dismissed the arbitration, allegedly to save a \$700.00 arbitration fee.

In August, 1989, plaintiff re-filed the claim asserted in the arbitration by complaint in the Third District Court, Salt Lake County.

The Complaint was removed to the United States District Court in September, 1989, upon grounds of diversity of citizenship.

Beginning in December, 1989, plaintiff brought two motions for summary judgment, which were found to be without merit. In response to appellant's opposition to the first of these motions, the federal court, without formal ruling, declined to stay the proceeding to permit arbitration under the federal arbitration statute, 9 U.S.C. §3. In response to the ruling on the second motion, plaintiff joined a third party defendant, Hogue Equipment Company. Ultimately, the federal court determined that it had lacked jurisdiction, and returned the matter to the State court.

Upon return to the State court, Honorable Pat B. Brian, in January, 1991, plaintiff re-asserted a motion for summary judgment. In responding to the motion, defendant/appellant called to the Court's attention the arbitration agreement contained in the subject contract. The Court denied plaintiff's motion on the merits, but made no order respecting the arbitration clause.

At a subsequent hearing regarding settlement issues, when appellant renewed his objection that the dispute was the subject of a binding arbitration agreement which should be enforced, the District Court orally ordered appellant not to raise the matter of arbitration again. The District Court, however, declined to enter a written order. Ultimately, following filing of a Petition for Mandamus to compel issuance of an order, the District Court, on November 27, 1991, ordered that:

the issue of the prior submission of this matter to arbitration and the subsequent withdrawal from arbitration, and whether that action has prejudiced the Defendant, has been previously ruled on and dismissed by this Court and shall not be raised or argued any further in this matter.



Trial was set for the first available trial date. See Exhibit "B" hereto.

Defendant timely filed his Notice of Appeal from the decision refusing to enforce the arbitration agreement.

#### Summary of Argument

The Utah law regarding arbitration clauses is mandatory: they are enforceable, and, when called to the attention of the District Court, must be enforced. §§78-31a-3, 78-31a-4, Utah Code Ann. (1953). The ruling in this case declining to enforce the arbitration clause contained in the subject lease specifies no ground therefore, and is reversible on its face.

The grounds asserted by plaintiff for resisting a remand to arbitration, supposing them to have been adopted by the District Court, are erroneous.

Plaintiff, a thrift and loan in receivership, is not benefitted by cases creating a narrow exception from arbitration for federal bankruptcy trustees. A federal trustee in bankruptcy, where he asserts claims of creditors of the bankrupt which arise only by virtue of the bankruptcy law (such as claims to avoid preferences, or against transfers fraudulent as to creditors), is not bound by an arbitration agreement signed by the bankrupt, unless it was also signed by the creditors. In the enforcement of claims of the bankrupt, arising only by virtue of a contract containing an arbitration clause, however, a bankruptcy trustee is subject to mandatory arbitration just as anyone else. The plaintiff here is Western Heritage Thrift and Loan, not its

receiver under state law, and the claim asserted belongs only to Western Heritage and arises only as a result of the contract.

A remedies section (Section 12) in the subject lease provides that in the event of default:

Lessor shall have the right to (1) retake immediate possession of its equipment . . . [and] . . . at its option sell the equipment at public or private sale . . . and/or (2) accelerate the balance of rentals and other sums payable hereunder . . . . The dual rights granted the Lessor herein, shall be cumulative, and action upon one shall not be deemed to constitute an election or waiver of the other right of action, or any other right to which lessor may be entitled.

The same section provides, with respect to accelerated payments:

Should Lessee fail to make such payment after this notice and demand Lessor shall be entitled to institute appropriate legal proceedings against Lessee . . .

Plaintiff claims that the "dual rights" in reference are not (1) repossession and sale, and (2) acceleration of payments, but (1) arbitration, as required by Section 3, and (2) litigation, as permitted by Section 12. Plaintiff reads this language incorrectly. Moreover, if Section 12 were regarded as creating a separate right to "initiate legal proceedings," in Utah the appropriate initiation of legal proceedings would be the filing of an arbitration.

The ruling below violates Section 78-31a-4, Utah Code Ann. (1953). No authoritative rationale for it is offered by the District Court or plaintiff. The ruling should be reversed, the present proceeding should be stayed, and plaintiff should be required to re-file an arbitration if it wishes to pursue its complaint.

## Argument

### Mandatory Arbitration Clauses Must be Enforced

Utah law favors arbitration as a speedy and inexpensive means of dispute resolution. Robinson and Wells, P.C. v. Warren, 669 P.2d 844 (Utah, 1983). Enforcement of mandatory arbitration clauses is statutorily required (§78-51-4, U.C.A. (1953)), and failure of a district court to comply with the statutory requirement is immediately appealable (§78-51a-19, U.C.A. (1953)). Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 721 P.2d 475 (Utah, 1986). Where a mandatory arbitration clause is shown, the burden rests upon any party resisting arbitration to show some compelling ground why the statutes may not be enforced. Id.

### That Plaintiff is a Thrift and Loan in Receivership is Irrelevant

Some cases respecting whether a federal bankruptcy trustee is bound by an arbitration agreement made by the bankrupt point out that the trustee is a new legal entity, different from the bankrupt. Allegaert v. Perot, 548 F.2d 432 at 436 (2 Cir. 1977); Coar v. Brown, 29 B.R. 806 at 808 (N.D. Ill. 1983).

The significance of this, however, is that a trustee may, in one part of his capacity, prosecute claims which are conferred by the bankruptcy law upon the bankrupts' creditors, such as claims to avoid preferences or distributions fraudulent as to creditors, while, in another part of his capacity, he prosecutes claims which belong to the bankrupt simply as a matter of contract. See Allegaert, supra, 548 F.2d at 436-437; Quinn v. CGR, 48 B.R. 367, 369 (D.Colo. 1985). In prosecuting claims conferred by the

bankruptcy law upon creditors, the trustee is not bound by an arbitration agreement unless the creditors have entered into it, and regardless of whether the bankrupt is subject to an arbitration agreement. Id., Coar, supra, 29 B.R. at 807. On the other hand, if a bankrupt's contract claim arises out of a contract containing an arbitration clause, it is subject to arbitration, regardless of whether there is a trustee in place. Allegaert, supra, 548. F.2d at 438; Quinn, supra, 48 B.R. at 369-370. (These cases also indicate that where a trustee presents claims imbued with important federal policy questions, such as antitrust claims, he may not be required to arbitrate. That part of the cases plainly has no bearing upon this case about a State law contract claim.)

It was asserted below that such cases have a bearing upon the present, because Western Heritage Thrift and Loan is in the hands of a receiver, which is liquidating its assets for the benefit of creditors. It was even asserted that, as litigation was expected to result in a larger return for creditors of Western Heritage than would arbitration, an equitable basis had been established for canceling the arbitration provision in this case under Section 78-31a-3, Utah Code Ann. (1953).

The obvious fact, however, is that no trustee or receiver is a party to this action. Western Heritage is pursuing in its own name a claim that does not belong to its creditors as a result of any bankruptcy or receivership law. The claim belongs to Western Heritage, and arises solely as a result of its contract. There is no separate legal status here which is not bound by Western

Heritage's contract, and there is no assertion that the claim prosecuted arises otherwise than under the contract. There is no reason cited by Western Heritage why a federal bankruptcy trustee would not be bound by the arbitration clause affecting this claim, and there is, correspondingly, no reason why a state receiver should not be.

Utah law has long favored arbitration as a cheap and speedy means of dispute resolution. Robinson and Wells, P.C. v. Warren, 669 P.2d 844 (Utah, 1983); Imperial Savings Assoc. v. Lewis, 730 F.Supp. 1068 (D.Utah 1990). Plaintiff, nevertheless, has argued that as litigation will be cheaper for it, it has an equitable right, on behalf of its creditors, to cancel the arbitration provisions in this case. There appears to be no law of any kind that supports such a claim.

No doubt an arbitration provision may be set aside if contrary to positive law, or obtained by fraud or in violation of some strong equity. Section 78-31a-3, Utah Code Ann. (1953). Nothing in the statute suggests, however, that the fact creditors of a party may perceive, after the fact, some financial benefit to noncompliance, is such an equity as would void an arbitration provision. However bankruptcy or receivership law may affect the enforcement of claims against a bankrupt, they do not expand the claims of bankrupts against those who contract with them. There is no legal basis for the claim that sympathy for creditors of Western Heritage should result in creation of a right to impose upon

appellant the costs of litigation in a foreign place, under a contract that expressly provides a right to avoid such litigation.

The Lease in Issue Creates No Separate Right to Litigate

Plaintiff also claimed below that Section 12 of the lease provided it the option of initiating litigation instead of arbitration. Section 12 is as follows:

12. In the event Lessee shall default in the payment of any rent or any other sums due hereunder or in the event of any default or breach of the terms and conditions of this lease or any other agreement between the parties hereto, or if any execution or other writ or process shall be issued in any action or proceeding against the Lessee whereby the said equipment may be taken or distrained, or if a proceeding, receivership or insolvency shall be instituted by or against the Lessee or its property, or if the Lessee shall enter into any agreement or composition with its creditors, breach any of the terms of any loan or credit agreement, or default thereunder, or if the condition of the Lessee's affairs shall so change as to, in the Lessor's opinion, impair the Lessor's security or increase the credit risk involved, or if the Lessee shall merge, consolidate or transfer all or substantially all of its assets, then and in the event the Lessor shall have the right to (1) retake immediate possession of its equipment without any Court Order or other process of law and for such purpose, the Lessor may enter upon any premises where said equipment may be and may remove the same therefrom with or without notice of its intention to do same, without being liable to any suit or action or other proceedings by the Lessee. Lessor may, at its option, sell the equipment at public or private sale for cash or on credit and may become the purchaser at such sale. The Lessee shall be liable for arrears of rent, if any, the expense of retaking possession and the removal of the equipment, court costs, the booked residual, the balance of the rentals provided for herein, or in any renewal hereof and a reasonable attorney's fee and/or (2) accelerate the balance of rentals and other sums payable hereunder, thereby requiring prepayment of this lease with such sums due and payable forthwith upon such notice of acceleration and demand for payment. Should Lessee fail to make such payment after this notice and demand Lessor shall be entitled to institute appropriate legal proceedings against Lessee with the Lessee being responsible for said sums, court costs, and a reasonable attorney's fee. The

dual rights granted the Lessor herein, shall be cumulative, and action upon one shall not be deemed to constitute an election or waiver of the other right of action, or any other right to which lessor may be entitled. All sums due under the calculations above shall become immediately due and payable and are to be construed as liquidated damage rather than a penalty provision. The Lessee shall remain and be liable for the return of the equipment and any loss or destruction of, or injury to the equipment in the same manner as herein provided. Lessee hereby waives trial by jury in any action or proceeding arising hereunder. Whenever any payment is not made when due hereunder, interest shall accrue and be payable on the amount due at the rate of 1 1/2% per month or any portion thereof until paid.

Plaintiff asserted that the sentence, "The dual rights granted the Lessor herein shall be cumulative, and action upon one shall not be deemed to constitute an election or waiver of the other right of action . . .," demonstrated that plaintiff has the "dual rights" of arbitration and/or litigation.

It is obvious that the "dual rights" in reference in this section are those numbered (1) and (2): repossession and sale, and acceleration. If arbitration and litigation were intended, it would be possible, under the sentence relied upon by plaintiff, to commence a litigation and, having obtained a bad result, to commence an arbitration in the hope of something better, or vice versa. Vice versa is, in fact, very close to what plaintiff has done in this case.

Further, it is plainly not necessary to read the provision that if lessee fails to make accelerated payments, "Lessor shall be entitled to institute appropriate legal proceedings," as authorizing immediate litigation. The lease is specifically subject to the laws of Utah. In Utah, the proper way to commence

legal proceedings on a contract with a mandatory arbitration clause, is to commence an arbitration. If the arbitration results in a judgment, the judgment may be enforced in court. §78-31a-12 et seq., U.C.A. (1953). Arbitration is unquestionably a form of legal dispute resolution in Utah. See Robinson and Wells, P.J. v. Warren, supra.

This lease simply does not say, as plaintiff asserts, on the one hand that "any controversy or claim arising out of our (sic) relating to this contract or the breach thereof shall be settled by arbitration," and, on the other, that any time lessor wants to go to court and avoid arbitration, it can. It says, at most, that lessor can institute certain self-help remedies, repossession and sale and acceleration, before going to arbitration.

#### Conclusions

In the end, it required a petition for mandamus to persuade the District Court to sign an order, from which an appeal would lie, specifically declining to enforce the arbitration clause in the subject lease. The ground of the District Court's aversion to arbitration in this case was never clearly expressed.

Whatever it may have been, it was inadequate. Disputes under the lease are clearly subject to arbitration. Plaintiff so conceded by first filing an arbitration. The lease does not provide, nonsensically, that litigation is always an alternative. There exists no ground for setting the arbitration clause aside.



In the circumstances, it was the duty of the District Court to stay its proceedings, and to remand the parties to arbitration. The Supreme Court should enter its order to that effect forthwith.

RESPECTFULLY SUBMITTED this 7 day of May, 1992.

---

E. Craig Smay, Esq.  
Attorney for Defendant/Appellant

Addendum

Exhibit "A"

Commercial Lease Agreement, Dated June 5, 1986

Exhibit "B"

Order, Dated November 27, 1991

§§78-31a-3, 78-31a-4, 78-31a-12, 78-31a-19, Utah Code Ann. (1953)

EXHIBIT A



## COMMERCIAL LEASE AGREEMENT

Lessor:

**WESTERN HERITAGE**

THRIFT &amp; LOAN

9383 South 700 East, Sandy, Utah 84070 (801) 562-0209

LEASE NO. ....

LESSEE		SUPPLIER OF EQUIPMENT	
Name	Don Anderson DEA	Name	Hogue Equipment
Address	Don Anderson Construction 1900 Held Road	Address	1300 Hastings St.
City	Redwood Valley, CA	City	Lkiah, State Ca
Zip	95470	Zip	95432
Person to Contact	Don Anderson	Salesman	Bob
Telephone No.	707-485-7569	Telephone No.	707-462-1941

Upon the terms and conditions set forth below, Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the personal property described herein.

The property leased hereunder is as follows:

QTY.	SERIAL NO.	EQUIPMENT DESCRIPTION
1	136033	1980 JCB 3L Backhoe Loader with Cat, henter, 12" & 24" bucket

☐ If this block is checked, see Exhibit A consisting of \_\_\_\_\_ pages attached hereto and a part hereof for quantity, Serial Numbers, Description, Supplier and other Equipment Information.  
Address of installation if different from the above address .....

TERMS AND CONDITIONS OF LEASE	
1. LEASE TERM AND PAYMENT. Lessee shall pay Lessor at its offices in Sandy, Utah or at such other place as Lessor may designate in writing the periodical rental payments for the term indicated:	Documentation Fee: \$ 330.00
Duration of Lease: <u>Forty-Eight</u> Months	Security Deposit Refundable at Maturity: \$
Due on: <u>5th</u> day of each <u>2</u> Month <u>Quarter</u> Other	Security Deposit Non-refundable: \$
Payments beginning <u>June 5, 1986</u>	Monthly Rental Payment: \$ 678.30
Skip Payments (if any):	Monthly Use Tax: \$ 40.70
	Other: \$
	Total Monthly Rental Payment: \$ 719.00
Advance payments equal to the first and last _____ months rental payments in the total amount of \$	\$ 1,438.00
is due and payable upon acceptance of this lease by Lessor.	Total front payment, including security deposit: \$ 1,468.00

**PERSONAL PROPERTY TAXES TO BE REPORTED AND PAID BY LESSEE. LESSOR ASSUMES NO RESPONSIBILITY FOR PERFORMANCE OR MAINTENANCE. THIS IS A NON-CANCELLABLE LEASE. EQUIPMENT TO BE INSURED BY LESSEE.**

This Lease Agreement, consisting of the foregoing AND THE REVERSE SIDE HEREOF, sets forth the entire Agreement between Lessor and Lessee. No agreement or understandings shall be binding on either of the parties hereto unless specifically set forth in this Agreement. The term "Lessee" as used herein shall mean and include any and all lessees who sign hereunder, each of whom shall be jointly and severally bound thereby.

Executed this 31 day of May, 1986

*Joanne L. Vite*  
Witness

LESSOR:

Accepted this 5th day of June, 1986

WESTERN HERITAGE THRIFT &amp; LOAN

By

*Jerry R. Hendricks*  
President

By execution hereof, the undersigned hereby certifies that he has read this Agreement, INCLUDING THE REVERSE SIDE HEREOF, and further represents and warrants that he is fully authorized to execute this lease for and in behalf of the Lessee.

LESSEE:

*Don Anderson*

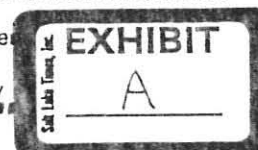
By

Authorized Signature and Title

THIS LEASE CANNOT BE CANCELLED (continued on reverse side)

WHITE - Lease Original  
GREEN - Lease Original  
CANARY - Lessee Copy - Destroy and Retain

PINK - Equipment acceptance notice - Lessor Copy  
GOLDEN ROD - Equipment Acceptance Notice - Lessee



1. [A] Lessor leases to Lessee and Lessee rents from Lessor the equipment listed above or, if separately scheduled, in the schedule hereto annexed, marked Schedule "A" and made a part hereof. Said equipment will be located at the above address and will not be moved to a new location without written permission first given by Lessor. Lessor acknowledges receipt of the Advance Payment referred to above from Lessee. Any amount received by the Lessor, at or prior to the date of this lease, shall be held in security for the performance of the terms of this lease. This lease shall commence on the date accepted by the authorized signature of Lessor as set forth below, and the retention or deposit of the Advance Payment by Lessor as above provided shall not be deemed to signify acceptance by Lessor.

2. If the Lessor is desirous of cancelling this lease prior to the rental period commencement date and the Lessor accepts said cancellation, the Lessor can retain the Advance Payment to offset the expenses incurred.

3. [A] Lessee has selected both (1) the equipment and (2) the supplier from whom Lessor is to purchase the equipment. LESSOR MAKES NO WARRANTY EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING THE CONDITION OF THE EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE, AND AS TO LESSOR, LESSEE LEASES THE EQUIPMENT "AS IS."

4. IF THE EQUIPMENT IS NOT PROPERLY INSTALLED, DOES NOT OPERATE AS REPRESENTED OR WARRANTED BY SUPPLIER OR IS UNSATISFACTORY FOR ANY REASON, LESSEE SHALL MAKE ANY CLAIM OR ACCOUNT THEREOF SOLELY AGAINST SUPPLIER AND SHALL, NEVERTHELESS, PAY LESSOR ALL RENT PAYABLE UNDER THE LEASE. LESSEE HEREBY WAIVING ANY SUCH CLAIMS AGAINST LESSOR. Lessor hereby agrees to assign to Lessee, solely for the purpose of making and prosecuting any said claim, all of the rights which Lessor has against supplier for breach of warranty or other representation respecting the equipment. Lessor shall have no responsibility for delay or failure to file the order.

5. Lessee hereby authorizes Lessor to insert in this lease the serial numbers and other identification data, of the equipment when determined by Lessor.

6. ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS CONTRACT OR THE BREACH THEREOF SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATION(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. ARBITRATION SHALL BE HELD IN THE CITY OF SALT LAKE, COUNTY OF SALT LAKE, STATE OF UTAH. ANY QUESTION OF LAW SHALL BE DECIDED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH.

7. Lessor may inspect the equipment at any time; and Lessee agrees to keep it in first class condition and repair at Lessee's expense and house the same in suitable shelter and not to sell or otherwise dispose of this interest therein or in any equipment or accessories attached thereto.

8. Payments shall be payable at the office of Lessor, or to such other person and/or at such other place as Lessor may from time to time designate in writing. Lessor may apply remittance received to unpaid rental installments and/or charges on a due date basis. Remittances received being applied to the oldest unpaid rental installment or charge.

9. No title in said equipment shall pass to Lessee herein expressly granted. Plates or other markings may be affixed to or placed on said equipment by Lessor or at Lessor's request, by Lessee at Lessee's expense indicating the Lessor is the owner thereof and Lessee will not remove the same. Upon the termination of the initial lease period Lessee will immediately crate, insure and ship the equipment and operating manuals to whatever destination Lessor shall direct, all at Lessee's expense, in as good condition as received less normal wear and tear. Lessee agrees to pay Lessor monthly rent at the rate specified for the initial term for any month or part thereof from the end of the initial term until the equipment is received by Lessor. Said equipment shall always remain and be deemed personal property of Lessor even though attached to realty. All replacements, accessories or capital improvements made to or placed in or upon said equipment shall become component parts thereof and title thereto shall be immediately vested in Lessor and shall be included under the terms hereof.

10. Lessor may assign this lease and its assignee may assign the same. All rights of Lessor hereunder shall be succeeded to by any assignee hereof and said assignee a title to this lease, to the rental herein provided for to be paid, and in and to said equipment shall be free from all defenses, claims or counterclaims of any kind which Lessee may be entitled to assert against Lessor. Lessee hereby waiving the same as against such assignee; it being understood and agreed that any assignee of Lessor does not assume any obligations of the Lessor herein named. It is further understood and agreed, however, that Lessee may separately claim against Lessor as to any matters which Lessee may be entitled to assert against Lessor. Lessee shall not assign, mortgage or hypothecate this lease or any interest herein or subject said equipment without the prior written consent of the Lessor. Any assignment, mortgage, hypothecation or sublease by Lessee without such consent shall be void.

11. Lessee assumes the entire risk of loss or damages to the equipment, whether or not covered by insurance, and no such loss shall relieve Lessee of its obligations hereunder. Lessee agrees to keep the equipment insured and provide proof of insurance to Lessor to protect its interests of Lessor, at Lessee's expense, against all risks of loss or damage from any cause whatsoever for not less than the unpaid balance of the lease rentals due hereunder or 80% of the then current value of said equipment, whichever is higher; and to purchase insurance in an amount reasonable under the circumstances to cover the liability of Lessor for public liability and property damage. Said insurance policies and the proceeds therefrom shall be the sole property of Lessor and Lessor shall be named as insured in all said policies and as loss payee in the policies insuring the equipment. Each policy shall expressly provide that said insurance as to Lessor and its assigns shall not be invalidated by any act, omission or neglect of Lessee and cannot be cancelled without ten (10) days' prior written notice to Lessor. As to each policy, Lessee shall furnish Lessor a Certificate of insurance and copy of policy from the insurer reflecting the coverage required by this paragraph on or before Commencement date of Lessee. The proceeds by such insurance whether resulting from loss or damage or return of premium or otherwise, shall be applied toward the replacement or repair of the said equipment or the payment of obligations of Lessee hereunder at the option of Lessor.

12. Lessee does hereby agree to indemnify and hold Lessor free and harmless against all claims, loss, liability and expense (including attorney's fees) resulting from any loss or damage to the equipment and for injuries to, or deaths of persons, and damage to property, howsoever arising, directly or indirectly from or incident to the use, operation or storage of the equipment and whether such injury or death to persons be to agents or employees of the Lessee or to third parties; it being specifically agreed to and acknowledged by the Lessee that the foregoing provision includes but is not limited to all claim, loss, liability and expense (including attorney's fees) occurring by reason of any negligence (active or passive), omission, or other act or conduct of the Lessor or any third party acting for or on behalf of the Lessor.

13. Lessee agrees to use, operate and maintain said equipment in accordance with all laws, to pay all licensing and registration fees for said equipment, to keep the same free of liens, claims and encumbrances, TO SHOW THE EQUIPMENT AS "LEASED EQUIPMENT" ON LESSEE'S PERSONAL PROPERTY TAX RETURNS; TO PAY LESSOR A SUM EQUAL TO ALL PERSONAL PROPERTY TAXES ASSESSED AGAINST THE EQUIPMENT, WHICH SUM LESSOR SHALL REMIT TO THE TAXING AUTHORITY; to pay, in respect to said equipment, all taxes and penalties which may be levied or assessed on or in respect to said equipment or its use or any interest therein, or rental payments thereon including but not limited to all federal, state and local taxes, however designated, levied or assessed upon the Lessee and Lessor or either of them or said equipment or upon the site ownership, use or operation thereof. Lessor may pay such taxes and other amounts and may, in such returns on behalf of Lessee if Lessee fails to do so as provided herein. Lessee agrees to reimburse Lessor for reasonable costs incurred in collecting any charges, taxes, assessments or fees for which Lessee is liable hereunder.

14. All advances made and costs incurred by Lessor to preserve said equipment or to discharge and pay any taxes, assessments, fees, penalties, liens, insurance premiums, or encumbrances thereon shall be added to the unpaid balance of rentals due hereunder; and shall be repayable by Lessee to Lessor immediately together with interest thereon at the rate of 1 1/4% per cent. per month until paid.

15. In the event Lessee shall default in the payment of any rent or any other sums due hereunder or in the event of any default or breach of the terms and conditions of this lease, or any other agreement between the parties hereto, or if any execution or other writ or process shall be issued in any action or proceeding, against the Lessee whereby the said equipment may be taken or distrained, or a proceeding, receivership or insolvency shall be instituted by or against the Lessee or its property, or if the Lessee shall enter into any agreement or composition with its creditors, breach any of the terms of any loan or credit agreement, or default thereunder, or if the condition of the Lessee's affairs shall so change as to in the Lessor's opinion, impair the Lessor's security or increase the credit risk involved, or if the Lessee shall merge, consolidate or transfer all or substantially all of its assets, then and in the event the Lessor shall have the right to: (1) take immediate possession of its equipment without any Court Order or other process of law and for such purpose, the Lessor may enter upon any premises where said equipment may be and may remove the same therefrom with or without notice of its intention to do same, without being liable to any suit or action or other proceedings by the Lessee. Lessor may, at its option, sell the equipment at public or private sale for cash or on credit and may become the purchaser at such sale. The Lessee shall be liable for arrears of rent, if any, the expense of relaying possession and the removal of the equipment, court costs, the booked residual, the balance of the rentals provided for herein, or in any renewal hereof and a reasonable attorney's fees; and/or (2) accelerate the balance of rentals and other sums payable hereunder, thereby requiring prepayment of this lease with such sums due and payable forthwith upon such notice of acceleration and demand for payment. Should Lessee fail to make such payment after this notice and demand, Lessor shall be entitled to institute appropriate legal proceedings against Lessee with the Lessee being responsible for said sums, court costs, and a reasonable attorney's fee. The double right granted the Lessor herein, shall be cumulative, and action upon one shall not be deemed to constitute an election or waiver of the other right of action, or any other right to which Lessor may be entitled. All sums due under the calculations above shall become immediately due and payable and are to be construed as liquidated damages rather than a penalty provision. The Lessee shall remain and be liable for the return of the equipment and any loss of destruction of, or injury to the equipment in the same manner as herein provided. Lessee hereby waives trial by jury in any action or proceeding arising hereunder. Whenever any payment is not made when due hereunder, interest shall accrue and be payable on the amount due at the rate of 1 1/4% per month or any portion thereof until paid.

16. Lessee agrees that the Lessor, as a part of its yield, has set a residual value that it would expect to receive for its equipment at the end of the lease, and upon default this amount may be a part of Lessee's damages.

17. In the event rent payment or personal property tax payment is not made when due hereunder the Lessee promises to pay (1) a late charge to the Lessor or its assigns not later than one month thereafter, in an amount calculated at the rate of 5% of each such delayed payment or fifteen dollars, whichever is greater; (2) interest to the Lessor upon each delayed payment calculated at the rate of one and three quarters (1 3/4%) per cent. per month, or any part thereof, commencing one month after the due date of the first delayed payment. The late charge and/or the interest payment set forth in this contract shall apply only when permitted by law and, if not permitted by law, the late charge and/or interest payments shall be calculated at the maximum rate permissible in the applicable jurisdiction. Lessee shall reimburse Lessor for time and expense incurred by Lessor in collecting any amounts due and owing and not timely paid under this Lease. Such reimbursement to be at Lessor's standard rate for collection procedures which are hereby agreed to be not less than \$15.00 for each telephone inquiry and \$50.00 for each personal contact made by any employee or agent of Lessor.

18. The omission by the Lessor at any time to enforce any default or right reserved for or to require performance of any of the terms, covenants or provisions hereof by the Lessee at any time designated, shall not be a waiver of any such default or right to which the Lessor is entitled, nor shall it in any way affect the right of the Lessor to enforce such provisions thereafter. The Lessor may exercise all remedies simultaneously, pursuant to the terms hereof, and any such action shall not operate to release the Lessee until the full amount of the rentals due and to become due and all other sums to be paid hereunder have been paid.

19. The provisions of this agreement apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

20. IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT ALL UNDERSTANDINGS AND AGREEMENTS HERETOFORE AND BETWEEN THE PARTIES HERETO RELATIVE TO THIS LEASE ARE MERGED IN THIS AGREEMENT, WHICH CONTAINS THE ENTIRE AGREEMENT AND UNDERSTANDING OF THE PARTIES HERETO, AND NEITHER PARTY RELIES UPON ANY OTHER STATEMENT OR REPRESENTATION. THIS AGREEMENT MAY NOT BE MODIFIED OR CANCELLED EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE LESSEE AND A CORPORATE OFFICER OF THE LESSOR.

21. Anything herein contained to the contrary notwithstanding, the title to the equipment subject to this Lease is retained by the Lessor and the Lessee covenants that it will not pledge or encumber the equipment in any manner whatsoever, nor permit any liens to attach thereto. The Lessee further agrees that it (a) will not permit its rights or interests hereunder to be subject to any lien, charge or encumbrance, and (b) will keep each unit of equipment free and clear of any and all liens, charges and encumbrances which may be levied against or imposed on such unit of equipment as a result of the failure of the Lessee for any reason to perform or observe any of the covenants and agreements required to be performed or observed by the Lessee hereunder.

EXHIBIT B

Mark S. Swan - 3873  
Mark E. Medcalf - 5404  
RICHER, SWAN & OVERHOLT, P.C.  
A Professional Corporation  
311 South State Street  
Suite 350  
Salt Lake City, Utah 84111  
Telephone: (801) 539-8632  
Attorneys for Plaintiff  
Western Heritage Thrift & Loan

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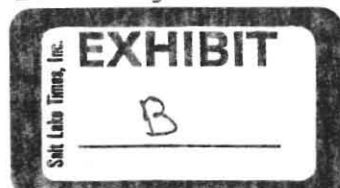
IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

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WESTERN HERITAGE THRIFT & LOAN	:	
Plaintiff,	:	ORDER
vs.	:	
DONALD G. ANDERSON dba DON	:	
ANDERSON CONSTRUCTION, and	:	
HOGUE EQUIPMENT CO., INC.,	:	
a California Corporation,	:	Civil No. 890904268 CV
Defendants.	:	Judge Brian

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On September 23, 1991, Defendant Donald G. Anderson dba Don Anderson Construction's Motion for Reconsideration and Motion to Set Aside the Order of the Court came for hearing before the above-entitled Court. Western Heritage Thrift & Loan was represented by its counsel of record, Mark S. Swan of the law firm Richer, Swan & Overholt, P.C., Defendant Donald G. Anderson dba Don Anderson Construction was represented by its counsel of record, E. Craig



Smay and Defendant Hogue Equipment Co., Inc. was represented by its counsel of record, Thomas Taylor of the law firm Snow, Christensen & Martineau.

The purpose of the hearing was for reconsideration of a ruling from the bench made by the Court on July 8, 1991 as the result of a pre-trial settlement conference which was not attended by Defendant Donald G. Anderson or his counsel.

At the September 23, 1991 hearing, the Court set a deadline for payment of fees and costs no later than noon, October 1, 1991. As a result of that deadline having expired without payment being made and upon request of E. Craig Smay, Attorney for Defendant Donald G. Anderson for an additional extension, and the Court once again granting further extension to Defendant to pay the fees and costs as hereinafter ordered, and after hearing argument concerning the factual background and the law concerning the appropriateness of sanctions under Rule 16 Utah Rules of Civil Procedure, the Court finds and Orders as follows:

1. That Defendant Donald G. Anderson dba Anderson Construction has violated the spirit of the Court's prior Orders requiring cooperation in disclosure of information to facilitate settlement.

2. Defendant Donald G. Anderson dba Don Anderson Construction has not made a cooperative good faith effort in



participating in meaningful settlement as ordered by the Court.

3. The Court finds that Defendant Donald G. Anderson dba Don Anderson Construction's failure to cooperate is a technical violation of the Court's previous Orders, however that violation is not sufficiently egregious to subject the Defendant to the harsh remedy of having its Answer stricken and Default Judgment entered against him.

4. Based upon this Court's commitment to allow a full hearing on the merits, the Court finds that it was inappropriate to strike the Defendant's Answer and enter Judgment against the Defendant at the July 8, 1991 hearing and therefore the Court shall not execute the Order and Judgment prepared by Plaintiff's counsel, subject to the conditions precedent as set forth below.

5. As conditions precedent to the Court's non-entry of the Order and Judgment against Defendant that has been submitted to this Court as the result of the July 8, 1991 hearing, the Defendant must do the following:

a. Pay the attorney's fees and out-of-pocket costs incurred by Plaintiff Western Heritage Thrift & Loan and Defendant Hogue Equipment Co, Inc. in the preparation for the July 8, 1991 hearing, the attendance at that hearing, and all expenses, attorney's fees and costs incurred by both of those parties since that date in connection with attempts to resolve

the disputes between the parties with regard to the issues raised by that hearing, including the cost of preparing for and attending the hearing on September 23, 1991 and the cost of preparing this Order.

b. Counsel for Plaintiff Western Heritage Thrift & Loan and Defendant Hogue Equipment Co., Inc. shall file Affidavits of Fees and Costs by September 27, 1991 at 12:00 noon with copies being delivered to counsel for Defendant Donald G. Anderson dba Don Anderson Construction by that date.

c. Payment of those attorney's fees and costs is to be made in certified funds by Defendant Donald G. Anderson dba Don Anderson Construction to the respective parties, delivered to the Honorable Pat B. Brian's courtroom, on or before October 7, 1991 by 5:00 p.m.

d. If Defendant Donald G. Anderson dba Don Anderson Construction fails to pay the attorney's fees and costs as ordered herein, then this Court will sign and enter the Order submitted to this Court in conjunction with the July 8, 1991 hearing to become a final Judgment against Defendant Donald G. Anderson dba Don Anderson Construction on the basis that the Court finds that Donald G. Anderson dba Don Anderson Construction has committed contumacious conduct and that there has been a clear record of delay and dilatory tactics in this

litigation on the part of Donald G. Anderson dba Don Anderson Construction.


e. If the attorney's fees and costs are paid by the date and time set forth herein, then this matter shall be scheduled for a one (1) day non-jury trial on December 11, 1991. All discovery shall be completed by the parties by November 15, 1991 which shall require that discovery be submitted sufficiently in advance that responses shall be due by that date. All pre-trial Motions and argument on those Motions shall be concluded by December 1, 1991.

6. The Motion of Defendant Hogue Equipment Co., Inc. for dismissal based upon lack of in personam jurisdiction, which has been continued by this Court to allow further discovery on that issue, shall be noticed and argued at the convenience of the respective counsel of the parties involved.

7. The issue of the prior submission of this matter to arbitration and the subsequent withdrawal from arbitration, and whether that action has prejudiced the Defendant, has been previously ruled on and dismissed by this Court and shall not be raised or argued any further in this matter.

DATED this 27 day of ~~October~~ <sup>November</sup>, 1991.

BY THE COURT:

  
HONORABLE PAT B. BRIAN  
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of September, 1991, I caused a true and correct unsigned copy of the foregoing to be served upon the following by placing the same in the United States mails, postage prepaid, and addressed as follows:

E. Craig Smay  
A Professional Corporation  
Attorney for the Defendant  
Donald G. Anderson dba Don Anderson Construction  
400 First Federal Plaza  
505 East 200 South  
Salt Lake City, Utah 84101

Thomas Taylor  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
Hogue Equipment Co., Inc.  
10 Exchange Place  
Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

Mark E. McLeod

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of September, 1991, I caused a true and correct signed copy of the foregoing to be served upon the following by placing the same in the United States mails, postage prepaid, and addressed as follows:

E. Craig Smay  
A Professional Corporation  
Attorney for the Defendant  
Donald G. Anderson dba Don Anderson Construction  
400 First Federal Plaza  
505 East 200 South  
Salt Lake City, Utah 84101

Thomas Taylor  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
Hogue Equipment Co., Inc.  
10 Exchange Place  
Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

Mark S. Swan, Esquire  
Richer, Swan & Overholt, P.C.  
Attorney for Plaintiff  
Western Heritage Thrift & Loan  
311 South State Street  
Suite 350  
Salt Lake City, Utah 84111

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## STATUTES

### **78-31a-3. Arbitration agreement.**

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement, or when fraud is alleged as provided in the Utah Rules of Civil Procedure.

### **78-31a-4. Court order to arbitrate.**

(1) The court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly.

(2) If an issue subject to arbitration under the alleged arbitration agreement is involved in an action or proceeding pending before a court having jurisdiction to hear motions to compel arbitration, the motion shall be made to that court. Otherwise, the motion shall be made to a court with proper venue.

(3) An order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement. However, if the issue is severable from the other issues in the action or proceeding, only the issue subject to arbitration is stayed. If a motion is made in an action or proceeding, the order for arbitration shall include a stay of the action or proceeding.

(4) Refusal to issue an order to arbitrate may not be grounded on a claim that an issue subject to arbitration lacks merit, or that fault or grounds for the claim have not been shown.

### **78-31a-12. Confirmation of award.**

Upon motion to the court by any party to the arbitration proceeding for the confirmation of the award, and 20 days notice to all parties, the court shall confirm the award unless a motion is timely filed to vacate or modify the award.

### **78-31a-19. Appeals.**

An appeal may be taken by any aggrieved party as provided by law for appeals in civil actions from any court order:

- (1) denying a motion to compel arbitration;
- (2) granting a motion to stay arbitration;
- (3) confirming or denying confirmation of an arbitration award;
- (4) modifying or correcting an award; or
- (5) vacating an award without directing rearbitration.



CERTIFICATE OF MAILING

I hereby certify that on the 14<sup>th</sup> day of May, 1992, I caused a true and correct copy of the foregoing instrument to be mailed, postage prepaid, to:

Mark S. Swan, Esq.  
Mark E. Medcalf, Esq.  
RICHER, SWAN AND OVERHOLT  
311 S. State Street, Suite 350  
Salt Lake City, UT 84111

Thomas Taylor, Esq.  
SNOW, CHRISTENSEN AND MARTINEAU  
10 Exchange Place, 11th Floor  
Salt Lake City, UT 84111

A handwritten signature in dark ink, appearing to read "Karen H. Taylor", is written over a faint, circular postmark. The signature is fluid and cursive, with a long horizontal stroke extending to the right.