

1992

GRO Enterprises, Inc., dba Chicago Barter Corp. v. National Insurance Marketing Services, Inc., a Utah corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

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

Leslie van Frank; Cohne, Rappaport & Segal; Attorneys for Plaintiff and Appellee.

Lynn P. Heward; Delwin T. Pond; Attorneys for Defendant and Appellant.

Recommended Citation

Brief of Appellant, *GRO v. National Insurance Marketing Services*, No. 920114 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4029

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

BRIEF

FU

10

DOCKET NO.

92-0114-CA

IN THE UTAH COURT OF APPEALS

GRO ENTERPRISES, INC., dba CHICAGO
BARTER CORP.,

Plaintiff and Appellee,

vs.

NATIONAL INSURANCE MARKETING SERVICES,
INC., a Utah corporation,

Defendant and Appellant.

Case Nos. 920114-CA
and 920227-CA

BRIEF OF APPELLANT

APPEAL

FROM THE THIRD DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE

HONORABLE J. DENNIS FREDERICK, JUDGE

ARGUMENT PRIORITY CLASSIFICATION 16

LESLIE VAN FRANK #4913
COHNE, RAPPAPORT & SEGAL, P.C.
Attorneys for Plaintiff
and Appellee
P.O. Box 11008
Salt Lake City, Utah 84147
Telephone: 532-2666

LYNN P. HEWARD #1479
DELWIN T. POND #2623
Attorneys for Defendant
and Appellant
923 East 5350 South #E
Salt Lake City, Utah 84117
Telephone: 264-8040

MAY 12 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
JURISDICTION	4
STATEMENT OF ISSUES AND STANDARD OF REVIEW	4
RULE TO BE INTERPRETED	5
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENTS	9
ARGUMENT	10
1. There was no willfulness in the failure to respond to discovery which would justify the harsh sanction of a default judgment.	10
2. The harsh sanction of a default judgment should have been set aside in the interest of justice.	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES

<u>Amica Mut. Ins. Co. v. Schettler</u> , 768 P.2d 950	
(Utah App. 1989)	11, 13
<u>Darrington v. Wade</u> , 812 P.2d 452 (Utah App. 1991) .	4, 13-15
<u>First Fed. Sav. & Loan Ass'n v. Schamanek</u> , 684 P.2d 1257,	
1266 (Utah 1984)	10-11
<u>Katz v. Pierce</u> , 732 P.2d 92 (Utah 1986)	14-16
<u>Nephi City v. Hansen</u> , 779 P.2d 673, 675 (Utah 1989) . .	14
<u>Schoney v. Memorial Estates, Inc.</u> , 790 P.2d 584	
(Utah App. 1990)	12-13

STATUTES

Subsection 78-2-2(3)(j) of the Utah Code	4
Subsection 78-2a-3(2)(j) of the Utah Code	4
Rule 60(b) of the Utah Rules of Civil Procedure . .	5, 15

JURISDICTION

The Supreme Court had jurisdiction in this matter pursuant to Section 78-2-2(3)(j) of the Utah Code, since it is a consolidated appeal from the district court of a matter over which the Court of Appeals did not have original jurisdiction. The Court of Appeals now has jurisdiction in this matter pursuant to Section 78-2a-3(2)(j) as a case transferred to the Court of Appeals from the Supreme Court.

Appellate jurisdiction was originally invoked by reason of Notices of Appeal filed in compliance with Rule 3.(a) of the Rules of Appellate Procedure, namely, the Notice of Appeal dated September 16, 1991, which was deemed to have given notice of an appeal of the Default Judgment entered nunc pro tunc as of August 22, 1991, and by reason of the Notice of Appeal dated Monday February 24, 1992, which gave notice of an appeal of the Order dated January 23, 1992 denying defendant's Motion to Set Aside Default Judgment, which Motion was filed on November 18, 1991 and was likewise deemed to have referred to the same Default Judgment.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The appellant asserts that the standard of review under Darrington v. Wade, 812 P.2d 452 (Utah App. 1991) is whether the trial court abused its discretion, and the pertinent issues are as follows:

1. Did the trial court err by sanctioning the failure to respond to discovery with a Default Judgment entered in the principal sum of \$12,559.70 (giving no allowance for the \$11,050

plus interest claimed as a credit) on the basis of an order entered when defendant was unrepresented by counsel, where after the appearance of new counsel and the breakdown of settlement negotiations, appropriate response was made to the discovery within a month despite defendant's principal officer being in Chile?

2. Did the trial court err by refusing to set aside in the interest of justice a Default Judgment which resulted from a sanction for the failure to respond to discovery and which Default Judgment was entered in the principal sum of \$12,559.70 (giving no allowance for the \$11,050 plus interest claimed as a credit) on the basis of an order entered when defendant was unrepresented by counsel, where after the appearance of new counsel and the breakdown of settlement negotiations, appropriate response was made to the discovery within a month despite defendant's principal officer being in Chile?

RULE TO BE INTERPRETED

Rule 60(b) provides:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;
....

STATEMENT OF THE CASE

This action was brought by plaintiff to collect a debt on an account. The action was defended on the basis of payments, that credits omitted in the accounting offset at least the amount plaintiff claimed. Following the filing of a motion to compel a

response to discovery, the trial court ordered interrogatories answered within 10 days at a time when defendant was without counsel. New counsel entered into settlement negotiation before answering the interrogatories. Once the settlement negotiations failed, the interrogatories were answered within 30 days despite the absence of a key principal of defendant. Nevertheless, the sanction of a Default Judgment was entered and the trial court refused to set that Judgment aside.

The facts in more detail are as follows, with citations to the record on appeal (ROA):

1. This was a collection action based on defendant's alleged failure to timely pay an account with plaintiff. ROA at 2.

2. Summons in this action was served on defendant on December 6, 1990, along with a copy of the Complaint dated November 2, 1990. ROA at 7.

3. Following receipt of defendants' Answer, and on January 3, 1991, plaintiff served defendant with Plaintiff's First Set of Interrogatories and Request for Production of Documents, bearing that same date of January 3, 1991. ROA at 10, 12.

4. On April 3, 1991, plaintiff filed a Motion to Compel defendant to respond to that discovery, which Motion was followed by a Request to Submit for Decision dated April 19, 1991. ROA at 13, 21.

5. A couple of days later, on April 22, 1991, defendant's attorney, Terry C. Turner, mailed his Withdrawal of Counsel, which was followed by the plaintiff's Notice to Appear or Appoint New

Counsel dated May 1, 1991. ROA at 28, 30.

6. While defendant was without counsel, a Minute Entry was made dated April 23, 1991 granting "defendant's" Motion to Compel, including reasonable attorney's fees of \$127.50, noting the lack of opposition. The Minute Entry also required a response within ten days to avoid "dismissal." ROA at 23.

7. Plaintiff's counsel then wrote the trial court to explain that there had been a mix-up in the designations, and that it was plaintiff's Motion, warranting the striking of defendant's Answer, and submitted a corresponding Order. ROA at 26.

8. The Order thus submitted, which required a response to discovery within ten days, was executed on May 1, 1991, and followed up with a corresponding Amended Minute Entry dated May 9, 1991, all while defendant was without counsel. ROA at 24, 32.

9. On or about May 10, 1991, Delwin T. Pond was retained to represent the defendant, and the defendant's principal advised its new attorney of the need to answer some interrogatories and gave no indication of a desire postpone or avoid that task. A copy of his affidavits attesting to these facts and others referred to hereinbelow is attached hereto. ROA at 40, 81.

10. However, Mr. Pond felt there was a good possibility to settle the entire matter and on that date he spoke with plaintiff's counsel concerning the possibility of settlement, which conversation was followed by an exchange of documentation, including a document dated May 26, 1987 showing the items returned by defendant to plaintiff for a total credit of \$11,050. ROA at 82, 84.

11. Defendant halted these negotiations by means of a letter to Mr. Pond dated June 3, 1991, a copy of which is attached hereto, indicating that no credit would be given for those items and setting a deadline of June 14, 1991 for the response to discovery. ROA at 38.

12. Mr. Pond immediately forwarded a copy of this letter to defendant and followed that up with a telephone call on June 10, 1991. However, the officer with the information needed to respond to discovery had gone to Chile for a month. ROA at 41.

13. After contacting other principals of the defendant and trying on numerous occasions to contact defendant's former attorney, Mr. Pond was finally able to get through to the officer in Chile so he could draft an accurate response, which response was signed by an officer of defendant's available locally, and served July 3, 1991. ROA at 41, 82-83, 43. A copy of these Answers to Interrogatories is attached hereto. ROA at 75.

14. Meanwhile, plaintiff filed a Motion for Entry of Default dated June 27, 1991. On July 3, 1991 defendant responded by serving an Affidavit in Opposition to Plaintiff's Motion for Entry of Judgment setting forth the pertinent foregoing facts. Plaintiff then filed a Supplemental Affidavit of Leslie Van Frank dated July 10, 1991 and a Request to Submit for Decision dated July 16, 1991. ROA at 33, 40, 44, 47.

15. By means of a Minute Entry dated July 31, 1991, the trial court granted plaintiff's said Motion for Entry of Default. It then executed the Order and Default Judgment, the latter granting

judgment for the \$12,559.70 principal sought (giving no allowance for the \$11,050 plus interest in credit), which together with interest, costs, and attorneys' fees brought the total judgment to \$18,103.95. On March 16, 1992, this Order and Default Judgment were entered nunc pro tunc as of August 22, 1991. ROA at 49, 50, 135, 139(?).

16. A Motion to Set Aside Default Judgment was the only post judgment motion, and was filed on November 18, 1991. It was supported by a Memorandum and an Affidavit of Delwin T. Pond and copies of the responses to discovery. ROA at 62, 64, 81, 75.

17. A Request for Hearing on the matter was denied in a Minute Entry dated December 19, 1991, and the Motion to Set Aside Default Judgment was denied in an Order dated and entered January 23, 1992. ROA at 100, 105.

SUMMARY OF ARGUMENTS

1. There was no willfulness in the failure to respond to discovery which would justify the harsh sanction of a default judgment.

The cases require a showing of willfulness, bad faith, or fault to justify sanctioning a failure to respond in a timely manner to discovery, and especially to justify the harsh sanction of the entry of a default judgment. In the instant matter, there was no need to "deter misconduct." There was no "aggravated misconduct." There was no "willful and deliberate disobedience of discovery orders." There was no "bad faith conduct." There was nothing that would rise to the level of "intentional failure," or

anything close to demonstrating willfulness.

2. The harsh sanction of a default judgment should have been set aside in the interest of justice.

Once the default judgment in the sum of \$18,103.95 plus interest and costs had been entered, it should have been set aside in the interest of justice in view of the neglect being excusable and since the defendant's credits may well have completely offset the principal amounts claimed by the plaintiff.

ARGUMENT

1. THERE WAS NO WILLFULNESS IN THE FAILURE TO RESPOND TO DISCOVERY WHICH WOULD JUSTIFY THE HARSH SANCTION OF A DEFAULT JUDGMENT.

In 1984, the Utah Supreme Court addressed the issue of the imposition of sanctions when a party fails to respond to an order compelling discovery in a case quoted several times since by the Utah Court of Appeals, namely, First Fed. Sav. & Loan Ass'n v. Schamanek, 684 P.2d 1257, 1266 (Utah 1984).

In that case, the Supreme Court emphasized that for such sanctions to be imposed, there needed to be an element of willfulness in the failure to respond to the order compelling discovery:

The general rule is that a party in a civil case who refuses to respond to an order compelling discovery is subject to sanctions pursuant to Utah R. Civ. P. 37(b)(2)(C). [Citation.] The sanctions are intended to deter misconduct in connection with discovery, [citation], and require a showing of "willfulness, bad faith, or fault" on the part of the non-complying party. Id. [Emphasis added.]

Obviously, more than the mere failure to respond is required for the sanctions to be imposed. Whereas a simple failure

to respond to summons justifies entry of a default and default judgment, a simple failure to respond to discovery does not. The party seeking a sanction for the failure to respond bears the burden of demonstrating not only a failure to respond to discovery, but that the failure was willful, or there was bad faith, or some other additional fault.

In First Federal, a civil case, the issue was whether the defendant wrongfully retrieved a check after being paid for it. When she was asked to admit taking the check, she affirmatively refused to answer, and maintained this refusal despite an order compelling a response. Thus willfulness was clearly present.

The opinion in Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989) included a quotation of some of the same language of the Supreme Court quoted above. That language was used by the Court of Appeals to show that it is harsh to sanction a party for failure to comply with discovery:

Imposing sanctions for a party's refusal to respond to a court order compelling discovery is a harsh sanction and therefore, requires "a showing of 'willfulness, bad faith, or fault' on the part of the non-complying party." Id. at 961. [Emphasis added.]

This Amica court went on to say that although wrongful intent need not be shown, willfulness does involve at least an intentional failure:

"Willful failure" has been defined as "'any intentional failure as distinguished from involuntary noncompliance. ...'" Id.

The sanction in the Amica case was upheld. The non-complying party failed to demonstrate that there was any inability to comply.

Although no findings were made of "willfulness, bad faith, or fault," the record clearly showed the existence thereof, allowing the the imposition of sanctions to be upheld.

The record in this case clearly demonstrates a pattern of aggravated misconduct in the form of willful and deliberate disobedience of discovery orders, fabricated testimony, and attempted witness tampering. In light of this overwhelming evidence of willful and bad faith conduct, the trial court's failure to make a specific finding of willfulness was not reversible error. Id. at 962.

In the case of Schoney v. Memorial Estates, Inc., 790 P.2d 584 (Utah App. 1990), other factors seemed to have reduced the burden of showing "willfulness, bad faith, or fault." Although answers to the interrogatories were tendered at the hearing on the motion for sanctions, default judgment was entered against the plaintiff based on the failure to respond in a timely manner.

The Schoney case had been pending for five years at the trial court level. There had been five amended complaints. The plaintiff had narrowly escaped summary judgment. The trial court obviously was growing impatient and wanted to move the case along. The court had imposed a discovery cut-off date, and the trial date was set for only a few weeks thereafter. The failure to respond hurt the defendant's position, not only with respect to the discovery propounded, but also with respect to any follow-up discovery that might be deemed appropriate in light of the responses.

Thus in the Schoney case, the failure to respond in a timely manner became much more analogous to a failure to respond in a timely manner to a summons. Therefore, the appellate court

concluded there had not been an abuse of discretion "given the posture of this case." Id. at 586.

In the case of Darrington v. Wade, 812 P.2d 452 (Utah App. 1991), the issue was whether the trial court abused its discretion when it set aside the default judgment it previously entered as a discovery sanction. An order requiring the payment of additional costs and attorney fees had been substituted as the discovery sanction.

The Court of Appeals first found that the conduct of the sanctioned party, including obnoxious litigation strategies, did indeed rise to the level which would justify discovery sanctions. Therefore, the appellate court probably would not have reversed the trial court had it left the default judgment in place, and would have reversed had there been no sanction imposed.

Specifically, the defendants had avoided service of process and had to be served by publication. They then refused to cooperate with discovery over a period of two years. Default judgment had been entered once for this failure to respond to discovery and was then set aside.

Even after this, defendants continued to be elusive and uncooperative, resulting in a motion to compel, which was granted. One appearance at a deposition resulted, but when no documents were produced, and other depositions scheduled, the defendants did not appear. Hence the second default judgment was entered.

In upholding the trial court's decision to substitute another sanction for that this second default judgment, the Darrington

opinion stated that "default judgment is an unusually harsh sanction that should be meted out with caution," citing Amica. Id. at 546. [Emphasis added.]

The Darrington court then cited Katz v. Pierce, 732 P.2d 92 (Utah 1986) for the proposition that the trial court was within its discretion in setting aside the default judgment.

In the instant matter, there was no "willfulness, bad faith, or fault" of the type necessary to impose discovery sanctions. The only fault that might exist would be negligence, that is, excusable neglect. And that would not be the kind of fault meant. Under the principles of ejusdem generis, the fault needs to be of a type analogous to willfulness or bad faith. Nephi City v. Hansen, 779 P.2d 673, 675 (Utah 1989).

In the instant matter, there was no need to "deter misconduct." There was no "aggravated misconduct." There was no "willful and deliberate disobedience of discovery orders." There was no "bad faith conduct." There was nothing that would rise to the level of "intentional failure," or anything close to demonstrating willfulness.

Rather, as indicated in the affidavits of Delwin T. Pond attached hereto, the defendant's principal advised its new attorney of the need to answer some interrogatories and gave no indication of a desire postpone or avoid that task. ROA at 81. After a period of negotiation, there were the strenuous efforts described in the affidavits of Delwin T. Pond to comply with the discovery requests despite that principal being in Chile at the time. ROA 41, 82-83.

It is true that these efforts did not reach fruition until 19 days after the 11-day deadline set by opposing counsel. But there was certainly no willfulness nor bad faith in this simple failure to comply in a timely manner.

Likewise there were no factors which would justify a lower standard of willfulness. This matter had not been pending two to five years. There had been no discovery cut-off date or trial date set.

Even had there been such willfulness as to justify imposing sanctions for failure to comply with discovery, it would certainly not rise to the level of justifying the entry of a default judgment, "an unusually harsh sanction that should be meted out with caution." Darrington, supra, at 546.

2. THE HARSH SANCTION OF A DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE IN THE INTEREST OF JUSTICE.

Rule 60(b) provides:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... [Emphasis added.]

In the first part of the opinion found in Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986), the Utah Supreme Court recited some basic principles to be applied in ruling on a motion under Rule 60(b):

The court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse for the defendant's failure to answer and when timely application is made. Where there is doubt about whether a default should be set aside, that doubt should

be resolved in favor of doing so.

That case also suggested the trial court consider the preference to allow the presentation of all claims and defenses, the unfairness of a party's conduct, the resulting hardships, as well as the fact that the trial court should liberally grant relief from a default.

In the instant matter, the hardship to the defendant of leaving the judgment in place was extreme, and it was in the interest of justice to allow the presentation of all defenses.

In response to the plaintiff's Request for Production of Documents, defendant produced a copy of the letter to plaintiff dated May 26, 1987 itemizing the returns resulting in a credit of \$11,050 on that date, a copy of which letter is attached to the Affidavit of Delwin T. Pond dated November 15, 1991 attached hereto. ROA at 84. This credit was wrongfully refused by defendant. Thus although the plaintiff sued for the principal amount of \$12,559.70, that amount was only \$1,509.70 more than the omitted credit.

Discovery on the part of the defendant had not been pursued. It might well have shown that the principal amount owing was not \$12,559.70 before allowing any credit for the returns, but \$10,873.37, as indicated in the letter to defendant from plaintiff's attorney dated November 28, 1989, a copy of which is attached hereto. ROA at 80. In the latter case, the credit due defendant in 1987 would exceed the amount due the plaintiff in 1989.

The furtherance of justice required that the defendant be

allowed to present its defenses rather than being subjected to a default judgment in the sum of \$18,103.95 plus interest and costs.

CONCLUSION

There was not the requisite showing of willfulness, bad faith, or fault to justify the harsh sanction of the entry of a default judgment for the failure to respond in a timely manner to discovery requests. Once the default judgment in the sum of \$18,103.95 plus interest and costs had been entered, it should have been set aside in the interest of justice in view of the neglect being excusable and since a trial on the merits may well have shown that the defendant's credits had completely offset the principal amounts claimed by the plaintiff, and that the plaintiff's Complaint should have been dismissed, no cause of action.

Therefore, this Court should vacate the Order and Default Judgment entered below and remand for a continuation of the litigation.

DATED this 11th day of May, 1992.

LYNN P. HEWARD & DELWIN T. POND
Attorneys for Defendant and Appellant

By Lynn Heward
LYNN P. HEWARD

MAILING CERTIFICATE

I hereby certify that four copies of this Brief were mailed to Leslie Van Frank, P.O. Box 11008, Salt Lake City, UT 84147 on this 11th day of May, 1992, with postage attached thereon.

Lynn Heward

JOHNE, RAPPAPORT & SEGAL

A Professional Corporation
ATTORNEYS AT LAW
525 EAST FIRST SOUTH
FIFTH FLOOR
SALT LAKE CITY, UTAH 84102

Mailing Address
POST OFFICE BOX 11008
84147-0008

Telephone (801) 532-2666
Telecopier (801) 355-1813

OF COUNSEL
JOHN MASON

BRUCE G. COHNE
RICHARD A. RAPPAPORT
ROGER G. SEGAL
JEFFREY L. SILVESTRINI
WILLIAM B. WRAY, JR.
DAVID S. DOLOWITZ
VERNON L. HOPKINSON
JOHN T. MORGAN
KEITH W. MEADE
RAY M. BECK
PAUL J. TOSCANO
JULIE A. BRYAN
ERIK STRINDBERG
MARTHA S. STONEBROOK
CLAIRE G. ZANOLLI
LESLIE VAN FRANK
MARCO B. KUNZ
M. JOY DOUGLAS

June 3, 1991

Delwin T. Pond, Esq.
923 East 5375 South
Suite E
Salt Lake City, Utah 84117

Re: GRO Enterprises dba Chicago Barter vs National Insurance
Marketing Services, Inc.

Dear Mr. Pond:

I am in receipt of your note of May 29, 1991 with respect to National Insurance Marketing Services, Inc.'s alleged credit for defective or outdated merchandise in the amount of \$11,050.00. After review of my file, this is the same claim that your client has been making throughout the pendency of this lawsuit. My client has no record of ever receiving any return items, and cannot credit your client for the claimed returns. The first my client had ever heard of any claimed credit was in late November, 1989 in response to a demand letter that this office had sent. My client is unwilling at this time to allow your client any credit for the claimed returns, and has instructed us to proceed with the lawsuit.

Accordingly, and as you know, the court recently ordered that your client respond to the outstanding discovery by May 11, 1991, or its answer would be stricken and default entered. Because Mr. Turner withdrew as counsel, I sent notice to your client of an additional 20 days within which to appear or appoint new counsel. That time expired on May 21, 1991. Your client has had more than ample opportunity to answer the discovery, and on June 14, 1991, I will approach the court for an order entering their default if answers to the discovery are not delivered to this office before then.

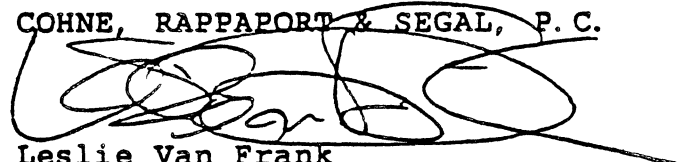
T. A. V.

Delwin T. Pond, Esq.
June 4, 1991
Page 2

If you have any questions or wish to discuss this matter further, please do not hesitate to call.

Very truly yours,

COHNE, RAPPAPORT & SEGAL, P.C.



Leslie Van Frank

LVF: cp

cc: Chicago Barter Corporation
Dunn and Bradstreet

Delwin T. Pond #2623
Attorney for Defendant
923 East 5375 South
Executive Park Drive
Suite E
Salt Lake City, Utah 84117
Tel.d (801) 264-8040

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

GRO ENTERPRISES, INC., dba)	
CHICAGO BARTER CORP.,)	AFFIDAVIT IN OPPOSITION TO
)	PLAINTIFF'S MOTION FOR ENTRY
Plaintiff,)	OF JUDGMENT
)	Civil No. 90-0906404-CN
vs.)	
)	Judge J. Dennis Frederick
)	
NATIONAL INSURANCE MARKETING)	
SERVICES, INC., a Utah)	
Corporation,)	
)	
Defendant.)	

COMES NOW, the defendant, by and through his attorney,
Delwin T. Pond, and hereby submits the following Affidavit in
Opposition to Plaintiff's Motion for Entry of Judgment.

STATE OF UTAH)
) ss.
County of Salt Lake)

Delwin T. Pond, first being duly sworn on oath deposes
and says as follows:

1. I have been retained by the defendant, National
Insurance Marketing Services, Inc., a Utah Corporation, to represent
them in the above-entitled matter. That I was retained by said
defendant on or about the 10th day of May, 1991.

2. That on or about the 10th day of May, 1991, I spoke
to Leslie Van Frank, counsel for the plaintiff, to inquire about
the possibility of settling the action in total, which my client

indicated a willingness to do, provided they were given credit for goods that they claim were returned to the plaintiff.

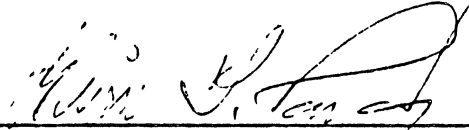
3. On May 29, 1991, I sent to plaintiff's counsel a copy of the Memorandum generated by the plaintiff relating to defendant's claim that goods for credit were returned to the plaintiff.

4. On June 3, 1991, I received a reply from plaintiff's counsel in writing, a copy of which is attached hereto marked "Exhibit A". On or about June 5, 1991, I forwarded a copy of plaintiff's counsel's letter to the defendant for his information and response. I received no response from my client, and so on or about June 10, 1991, I called my client, inasmuch as I had not heard from him relative to plaintiff's letter that was forwarded to him from the plaintiff, as well as to inform him that he would need to assist in the preparation of responses to the plaintiff's interrogatories. At the time of this call, I was advised and informed that Mr. Bob Weeks, defendant's chief executive officer, had left the U. S. A. for the country of Chili on or about June 9, 1991, and was not expected to return for a month.

5. I was finally able to contact Mr. Weeks in Chili to obtain information from him with regard to the answers to the Interrogatories, which have now been answered and submitted to the plaintiff's counsel.

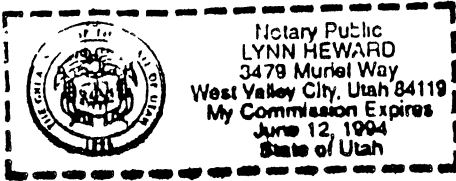
FURTHER, AFFIANT SAYETH NOT.

DATED, this the 2nd day of July, 1991.



DELWIN T. POND, Attorney for Defendant

Subscribed and sworn to before me, a Notary Public in and for Salt Lake County, State of Utah, on this the 2nd day of July, 1991.



Lynn Heward
NOTARY PUBLIC

MAILING CERTIFICATE

I hereby certify that I mailed a correct copy of the within and foregoing Affidavit in Opposition to Plaintiff's Motion for Entry of Judgment to plaintiff's counsel Leslie Van Frank at 525 East First South, Fifth Floor Salt Lake City, Utah 84147-0008 on this the 3rd day of July, 1991.

William J. Taylor

Delwin J. Pond #2623
Attorney for Defendant
923 East 5375 South
Suite E
Salt Lake City, Utah 84117
Tel (801) 264-8040

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

GRO ENTERPRISES, INC., dba)	
CHICAGO BARTER CORP.,)	
)	ANSWERS TO INTERROGATORIES
Plaintiff,)	
)	Civil No. 90-0906404-CN
vs.)	
)	Judge J. Dennis Frederick
)	
NATIONAL INSURANCE MARKETING)	
SERVICES, INC., a Utah)	
Corporation,)	
)	
Defendant.)	

Defendant, National Insurances Services, Inc., pursuant to Utah Rules of Civil Proceedure hereby answers the Interrogatories under oath, as propounded by the plaintiff to the defendant, under date of January 3, 1991.

INTERROGATORY NO. 1: Identify each paragraph of plaintiff's complaint which you specifically deny.

ANSWER: Defendant specifically denies paragraphs 6 and 7.

INTERROGATORY NO. 2: Identify each paragraph of plaintiff's complaint which you deny because you allegedly lack knowledge thereof.

ANSWER: Defendant alleges that he is without knowledge or information sufficient to form a belief as to the complete truth or falsity of the averments contained in paragraph 3, 4, 5 and 8.

INTERROGATORY NO. 3: State the factual basis for your specific denial of the paragraphs identified in Interrogatory No. 1 herein.

ANSWER: The factual basis for defendant's denial of paragraph 6 is that defendant returned, for credit, to the plaintiff goods and merchandise equal in value to \$11,050.00, which amount plaintiff has not, but should have credited to the account of the defendant. Paragraph 7, defendant admits that he has failed and refused and does continue to fail and refuse to pay the amount plaintiff claims to be due in the sum of \$12,559.70, but denies that such amount is due or owing, because appropriate credits in the sum of \$11,050.00 has not been made to defendant's account.

INTRERROGATORY NO. 4: State the factual basis for your affirmative defense of accord and satisfaction.

ANSWER: The factual basis of affirmative defense of accord and satisfaction is that the defendant returned goods and merchandise to the plaintiff equal in the amount of \$11,050.00, which should have been credited to the account of the defendant, wherefore, there should have been an accord and satisfaction entered into in the amount of \$11,050.00.

INTERROGATORY NO. 5: State the factual basis for your affirmative defense of estoppel.

ANSWER: Due to the return of defective or outdated merchandise to the plaintiff, the plaintiff should be estopped from pursuing this action against the defendant.

INTERROGATORY NO. 6: State the factual basis for your

affirmative defense of failure of consideration.

ANSWER: The factual basis for the affirmative defense of failure consideration is that goods and services that were to be exchanged have been returned to the defendant in the sum of \$11,050.00.

INTERROGATORY NO. 7: State the factual basis for your affirmative defense of statute of limitations.

ANSWER: Defendant believes that the account was opened more than four years prior to the date that the plaintiff commenced action against the defendant, and if so, to the extent that such agreements were verbal, and not in writing, the statute of limitations would have expired, thus barring the plaintiff's claim against the defendant to the extent of liability created by oral agreements.

INTERROGATORY NO. 8: State the factual basis for your affirmative defense of statute of frauds.

ANSWER: The factual basis for defendant's affirmative defense of the statute of frauds is that defendant believes that part of the agreement entered into between the plaintiff and the defendant was oral and not in writing, and to the extent that it was an oral agreement and not in writing, the statute of frauds will have barred defendant from action against the defendant on such oral agreements.

INTERROGATORY NO. 9: State the factual basis for your affirmative defense of laches.

ANSWER: The case is old, much time has expired, records have been lost or destroyed before the action was brought. For

this reason, it is inequitable to bring the action at this late and deferred date.

INTERROGATORY NO. 10: State the factual basis to your claim that you are entitled to attorney's fees.

ANSWER: The return of the goods by the defendant to the plaintiff, constitutes a substantial satisfaction of the debt and obligation that the defendant owed to the plaintiff, and that for plaintiff to now bring the action demanding more than the plaintiff is in fact entitled to, constitutes good cause for the defendant to assert a claim for attorney's fees.

INTERROGATORY NO. 11: Identify all defective materials you claim you returned to plaintiff for which you claim you are entitled to a credit.

ANSWER: One hundred twenty five telephones, regular, valued at \$35.00 each, total value \$4,375.00. Twenty five telephones, cordless, \$199.00 each, total value \$4,975.00. Two Olivetti typewriters, \$500.00 each, total value \$1,000.00. Twenty cameras, \$35.00 each, \$700.00. Total goods and merchandise returned for credit, \$11,050.00.

125 telephones, regular @	35.00 ea.	\$4,375.00 total value
25 telephones, cordless @	199.00 ea.	4,975.00 total value
2 Olivetti typewriters @	500.00 ea.	1,000.00 total value
20 cameras,	35.00 ea.	700.00 total value

total goods and merchandise returned \$11,050.00

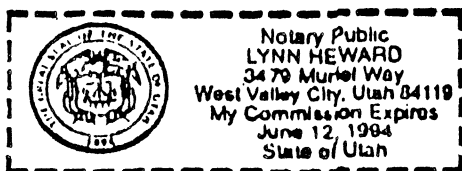
DATED, this the 3rd day of July, 1991.

NATIONAL INSURANCE MARKETING SERVICES, INC.

by 
W. BILL BOSGRAAF, Vice President

STATE OF UTAH)
) ss.
 County of Salt Lake)

Subscribed and sworn to before me, a Notary Public, in
 and for Salt Lake County, State of Utah on this the 3rd day of
 July, 1991.



Lynn Heward
 NOTARY PUBLIC

MAILING CERTIFICATE

I hereby certify that I mailed a correct copy of the
 within and foregoing Answers to Interrogatories to plaintiff's
 counsel Leslie Van Frank at 525 East First South, Fifth Floor
 Salt Lake City, Utah 84147-0008 on this the 31st day of July, 1991.

William A. Smith

nimsans.d27

COHNE, RAPPAPORT & SEGAL

A Professional Corporation

ATTORNEYS AT LAW

525 EAST FIRST SOUTH

FIFTH FLOOR

SALT LAKE CITY, UTAH 84102

Mailing Address

POST OFFICE BOX 11008

84147-0008

Telephone (801) 532-2666

Telecopier (801) 355-1813

BRUCE G. COHNE
RICHARD A. RAPPAPORT
ROGER G. SEGAL
JEFFREY L. SILVESTRINI
WILLIAM B. WRAY, JR.
DAVID S. DOLOWITZ
JOHN T. MORGAN
KEITH W. MEADE
RAY M. BECK
MICHAEL S. EVANS
GALE K. FRANCIS
JULIE A. BRYAN
MARTHA S. STONEBROOK
CLAIRE G. ZANOLLI
LESLIE VAN FRANK
M. JOY DOUGLAS

November 28, 1989

**OF COUNSEL
JOHN B. MASON**

National Insurance Marketing
5505 South 900 East, Suite 220
Holliday, Utah 84117

RE: Your account with Chicago Barter Corp.

Gentlemen:

You have failed to respond to my previous letter dated November 17, 1989, concerning your obligation to the above captioned creditor. This letter will serve as a reminder of that prior letter, and also as a reminder of your unpaid obligation in the amount of \$10,873.37.

If I have not received your remittance in full nor heard from you within five (5) days of the date hereof, you will leave the creditor with no alternative but to commence suit for collection of this sum, in which case interest, costs of Court and any and all other applicable expenses, such as attorney's fees, will be included in the amount sued for, to your detriment.

The choice is yours.

Very truly yours,

Roger G. Segal
COHNE, RAPPAPORT & SEGAL

RGS: 1c

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

Judge J. Dennis Frederick

81

dated July 2, 1991 and filed herein, I spoke to Leslie Van Frank, the attorney for the defendant, relative to settling the case on the basis of the defendant paying all that would be left after the credit that had been omitted.

4. Ms. Van Frank indicated at that time that she did not know about any possible credit. She acceded to my request to check on that and get back to me.

5. It was my opinion, and I so informed Mr. Weeks, that based upon the defendant's willingness to pay anything owed after the appropriate credits were made, this case should be fairly simple and should settle.

6. There had been a Request for Production of Documents, and I sent Ms. Van Frank a copy of a letter dated May 26, 1987 showing the items returned by defendant to plaintiff for a total credit of \$11,050, a copy of which letter is attached hereto.

7. In view of this apparent likelihood of settlement, it appeared that the immediate response to the interrogatories would incur unnecessary costs.

8. Ms. Van Frank gave no indication she did not feel the same. That is, she did not mention the need for immediate an response except and until such was contained in her letter dated June 3, 1991.

9. In searching for information with which to draft the Answers to Interrogatories without the help of Mr. Weeks, who had left the country without my knowledge, I contacted Mr. Bosgraff and Mrs. Weeks and tried on numerous occasions to contact defendant's

former attorney, Mr. Turner. However no one I spoke with had the information I needed, and Mr. Turner never returned my calls.


10. So I could not draft meaningful answers until I was able to speak again with Mr. Weeks in Chile.

11. Thus once it became clear that the Interrogatories would need to be answered after all, I and the defendant did all we could to expeditiously submit the Answers.

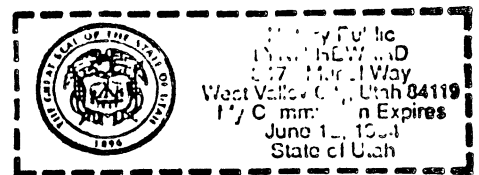
DATED this 15th day of November, 1991.


DELWIN T. POND

Subscribed and sworn to before me this 15th day of November, 1991.


NOTARY PUBLIC
Residing in Salt Lake County, Utah

My Commission Expires:



MAILING CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Affidavit was mailed to Leslie Van Frank, P.O. Box 11008, Salt Lake City, UT 84147 on this 15th day of November, 1991, with postage attached thereon.





National Insurance
Marketing Services,
Incorporated

May 26, 1987

Chicago Barter Corp
800 E. Roosevelt Road
Lombard, Illinois 60148

Subject: Defective items

Please credit our account for the following items that have
been returned to you, as they are either defective or outdated.

125	Telephones, regular	\$ 35.00 ea	\$ 4,375.00
25	Telephones, cordless	199.00 ea	4,975.00
2	Typewriters, Olivetti	500.00 ea	1,000.00
20	Cameras	35.00 ea	700.00
	Total Credit		<u>\$11,050.00</u>

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Weeks", is written over a horizontal line.

Robert Weeks