

1983

D. Scott McGregor And Eldon L. Richardson, II v. Peter A. Benz And David Cowan : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

D. SCOTT MCGREGOR and ELDON)
L. RICHARDSON, II,)

Plaintiffs and
Respondents,)

vs.)

Case No. 19173

PETER A. BENZ and)
DAVID COWAN,)

Defendants and
Appellants.)

RESPONDENTS' BRIEF

Appeal from an Order of the Third Judicial
District Court for Salt Lake County
Honorable Timothy R. Hanson, Judge

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Clark, Supreme Court, Utah

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STATEMENT OF THE CASE

Respondents D. Scott McGregor and Eldon L. Richardson, II, brought the instant action seeking a declaratory judgment that a certain "Compensation Agreement" dated December 3, 1981, was null and void and of no force and effect against the respondents. Respondents also sought damages based on certain alleged fraudulent misrepresentations of the appellants and for breach by defendant-appellant Benz of his fiduciary duty of loyalty owed to the respondents.

DISPOSITION IN LOWER COURT

On January 12, 1983, appellants Peter A. Benz and David Cowan filed a certain Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties. On March 7, 1983, the Honorable Timothy R. Hanson, District Judge, issued an Order Denying Motion of Defendants Peter A. Benz and David Cowan for Leave to File Amended Answer and Counterclaim and to Join Additional Parties and a certain Memorandum Decision setting forth his reasons for the Order. Respondents and appellants subsequently stipulated to the entry of judgment in favor of respondents on one of respondents' claims and the dismissal of respondents'

remaining claims. Appellants have appealed from Judge Hanson's Order and Memorandum Decision.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmance by the Utah Supreme Court of the Order and Memorandum Decision issued by the Honorable Timothy R. Hanson of the Third Judicial District Court of Salt Lake County, State of Utah, denying defendants'-appellants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties.

STATEMENT OF FACTS

Respondents generally agree with the Statement of Facts set forth in Appellants' Brief at pages 2 through 4. However, in order to fully understand Judge Hanson's Order and Memorandum Decision of March 7, 1983, a review of the history of this action up to and including March 7, 1983, is necessary. The following is a history of this action:

1. On January 28, 1982, respondents D. Scott McGregor and Eldon L. Richardson, II, filed a certain Complaint in the Third Judicial District Court of Salt Lake County, State of Utah. Respondents' Complaint sought a Declaratory Judgment that a certain "Compensation Agreement"

was void and unenforceable as against McGregor and Richardson. (Transcript, pp. 2-11).

2. Appellant David Cowan is a citizen and resident of the State of Utah. Appellant Peter A. Benz is a resident, citizen and a member of the Bar of the State of New Jersey. Jurisdiction over the person of appellant Benz was asserted pursuant to the provisions of the Utah Long Arm Statute, Utah Code Ann. §§ 78-27-24(1) and (3) (Repl. Vol. 9A 1977).

3. On March 3, 1982, appellant Benz filed a certain Motion to Quash Service or, in the Alternative, Motion to Dismiss. (Transcript, pp. 29-30).

4. The Motion of Defendant Peter A. Benz to Quash Service or, in the Alternative, to Dismiss, was heard before the Law and Motion Judge of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable David B. Dee presiding, on March 11, 1982, at the hour of 2:00 p.m.

5. Based upon the pleadings on file, including the affidavits of Peter A. Benz, David Cowan, D. Scott McGregor and Eldon L. Richardson, II, and having heard the arguments of counsel and being fully advised in the premises, on March 19, 1982, the Honorable David B. Dee, District Judge, entered certain Findings of Fact and Conclusions of Law and issued an Order Denying Motion of Defendant

Peter A. Benz to Quash Service or, in the Alternative, to Dismiss. (Transcript, pp. 94-96). Pursuant to that Order, Benz was granted ten (10) days, until March 29, 1982, to file an Answer to the Complaint. (Transcript, p. 95).

6. On March 18, 1982, respondents gave notice of the taking of the deposition of Peter A. Benz on Tuesday, April 20, 1982. (Transcript, pg. 75). Also on March 18, 1982, respondents served notice of the taking of the deposition of David Cowan on Wednesday, April 21, 1982. (Transcript, p. 73).

7. On March 18, 1982, respondents served upon counsel for Benz Plaintiffs' First Request for Production of Documents Directed to Defendant Peter A. Benz. (Transcript, pp. 81-84). Said documents were to be produced by Benz at 9:00 a.m. on Monday, April 19, 1982. (Transcript, pp. 77-84).

8. On March 29, 1982, appellant David Cowan filed his Answer to respondents' Complaint. Cowan's Answer asserted none of the counterclaims which he and appellant Peter A. Benz now contend are compulsory counterclaims. (Transcript, pp. 95-100).

9. Also on March 29, 1982, appellant Peter A. Benz, rather than filing an Answer to respondents' Complaint as ordered by the Third Judicial District Court on March 19,

1982, filed a Petition for Intermediate Appeal with this Court contesting Judge David B. Dee's Order of March 19, 1982, on the ground that the Third Judicial District Court of Salt Lake County, State of Utah, could not assert in personam jurisdiction over him.

10. On April 14, 1982, this Court denied the Petition for Intermediate Appeal filed by appellant Peter A. Benz.

11. On April 15, 1982, seventeen (17) days after he was required to file an Answer to respondents' Complaint, four (4) days prior to the date that documents were to be produced pursuant to Plaintiffs' First Request for Production of Documents and six (6) days prior to the date set for the taking of his deposition, appellant Benz filed a certain Motion for Extension of Time in Which to File Responsive Pleading, in Which to Respond to Discovery Request, and for Protective Order. (Transcript, pp. 105-108). On April 19, 1982, Benz' Motion was heard before the Third Judicial District Court, the Honorable Kenneth Rigtrup presiding. At the conclusion of the Hearing, Judge Rigtrup ordered:

(a) That Peter A. Benz be granted an additional ten (10) days to file an Answer to plaintiffs' Complaint;

(b) That Peter A. Benz be granted an additional ten (10) days to respond to Plaintiffs' First Request for Production of Documents;

(c) That the deposition of Benz be taken within twenty (20) days of the Court's Order; and

(d) That plaintiffs advance the air fare necessary to enable Benz to travel to Salt Lake City for the taking of his deposition and, if necessary, the cost of one night's hotel accommodations.

(Transcript, pg. 116-117).

12. On April 19, 1982, counsel for respondents was contacted by counsel for appellant Cowan and informed that the documents requested pursuant to Plaintiffs' First Request for Production of Documents Directed to Defendant David Cowan would not be produced on April 19, 1982, as required therein. In addition, counsel for Cowan informed plaintiffs' counsel that a family emergency had arisen necessitating Mr. Cowan's absence from the State of Utah. Counsel for Cowan requested that Cowan's deposition be continued until Mr. Cowan could return to the State of Utah. Accordingly, it was agreed that Mr. Cowan's deposition would be continued until 10:00 a.m. on Tuesday, April 27, 1982. (Transcript, pp. 110-111). It was also agreed that the documents requested pursuant to Plaintiffs' First Request for Production of Documents would be produced no later than

Friday, April 23, 1982. On April 20, 1982, a letter confirming the telephone conference of April 19, 1982 was hand-delivered to counsel for David Cowan. (See letter dated April 20, 1982, attached hereto as Exhibit "A").

13. On April 23, 1982, counsel for respondents met with counsel for appellant Cowan for the purpose of procuring the documents requested pursuant to Plaintiffs' First Request for Production of Documents Directed to Defendant David Cowan. At that time, respondents' counsel received some of the requested documents but was informed that Mr. Cowan had been unable to find all of the documents requested. The remaining documents requested pursuant to Plaintiffs' First Request for Production of Documents were not produced by Cowan until Friday, April 30, 1982. In addition, counsel for Cowan indicated that Mr. Cowan had important business matters in Idaho during the week of April 26, 1982, and requested that the deposition of Mr. Cowan be continued to the following week. As an accommodation to counsel, respondents' counsel agreed to such an extension of time. Accordingly, the deposition of David Cowan was again continued, this time until 10:00 a.m. on Tuesday, May 4, 1982. (Transcript, pp. 114-115).

14. During a telephone conference on April 26, 1982, between counsel for respondents and counsel for

appellant Benz, it was agreed that the deposition of Peter Benz would be taken on May 13, 1982, at the hour of 10:00 a.m. Accordingly, a Notice of Deposition for the taking of the Benz deposition was hand-delivered to counsel for Benz on April 27, 1982. (Transcript, pp. 112-113).

15. On April 27, 1982, counsel for respondents received a certain Notice of Deposition, scheduling the depositions of respondents D. Scott McGregor and Eldon L. Richardson, II, for the afternoon of May 13, 1982. (Transcript, pg. 118).

16. On April 28, 1982, counsel for respondents received a Motion of Defendant Peter A. Benz for Protective Order and Order Compelling Discovery. Said Motion requested:

(a) That the deposition of Cowan be continued to May 13, 1982, or at such time as was convenient to all parties;

(b) That the respondents be ordered to appear at their depositions scheduled for May 13, 1982; and

(c) Alternatively, should respondents not be available for their depositions on May 13, 1982, that they pay the costs and expenses for Benz to come to Salt Lake City, Utah, for the taking of their depositions.

(Transcript, pp. 119-120).

17. Defendant Benz' Motion for Protective Order and Order Compelling Discovery was argued on May 3, 1982, before the Honorable David B. Dee, District Judge. After having considered the pleadings on file, the arguments and representations of counsel, and being fully advised in the premises, Judge Dee denied Benz' Motion and ordered that all prior Orders of the Court be complied with by appellants. (Transcript, pp. 155-156).

18. As of April 29, 1982, appellant Benz had neither filed an Answer to respondents' Complaint nor produced the documents requested pursuant to Plaintiffs' First Request for Production of Documents as required by Judge Rigtrup's Order of April 19, 1982.

19. On May 3, 1982, Peter A. Benz filed his Answer to respondents' Complaint. (Transcript, pp. 152-154). Benz did not file the counterclaims which both he and David Cowan now contend are compulsory. The Answer of Peter A. Benz was filed more than three (3) months after the filing of the Complaint and after two orders of the Third Judicial District Court, neither of which were complied with by appellant Benz.

20. Also on May 3, 1982, appellants Peter A. Benz and David Cowan filed a certain Complaint against respondents and others in the Superior Court of New Jersey,

Chancery Division: Morris County Docket No. C 3221 81.
(Attached hereto as Exhibit "B").

21. On or about May 4, 1982, counsel for respondents received a certain Notice of Continuance of Taking of Depositions from counsel for Benz, continuing the depositions of D. Scott McGregor and Eldon L. Richardson, II, from May 13, 1982, to May 17, 1982. (Transcript, pg. 159). These were the very depositions for which Benz had sought an Order of the Third Judicial District Court on May 3, 1982, compelling the attendance of McGregor and Richardson.

22. The deposition of Peter A. Benz was taken on May 17, 1982. At the conclusion of the deposition, Benz and his counsel of record advised that they were continuing without date the depositions of respondents on the specific representation that an offer of settlement would be made by Benz "within a reasonable time." (See Affidavit of LeRoy S. Axland, Transcript, pg. 182). No offer of settlement was subsequently received by respondents' counsel from either of the appellants.

23. On or about Monday, June 21, 1982, counsel for respondents contacted, by telephone, counsel for appellant Peter A. Benz. At that time, counsel for Benz advised respondents' counsel that Benz was seeking to change counsel in this proceeding. (See Affidavit of LeRoy S. Axland, Transcript, p. 183).

24. On June 21, 1982, respondents filed a Motion for Expedited Trial Setting. (Transcript, pp. 163-165). As set forth therein, the Motion for Expedited Trial Setting was made on the following grounds and for the following reasons:

(a) The appellants had sought to hinder and delay respondents' discovery;

(b) The filing of the New Jersey action was an attempt by appellants to harass and annoy respondents and to obtain a favorable ruling in a forum in which one of the appellants, Peter A. Benz, is a member of the Bar;

(c) That appellant Benz had made no offer of settlement as he had represented would be done during the taking of his deposition on May 17, 1982; and

(d) The substitution of counsel by appellant Benz was an attempt to further delay the adjudication of respondents' claims.

25. On or about June 23, 1982, counsel for respondents received formal notice from the firm of McKay, Burton, Thurman & Condie of their withdrawal as counsel for Peter A. Benz. (Transcript, pg. 160).

26. On or about July 1, 1982, counsel for respondents received a Notice of Entry of Appearance filed by Merlin O. Baker, Esq., giving notice of the appearance of

the law firm of Ray, Quinney & Nebeker as attorneys for appellant Peter A. Benz. (Transcript, p. 180).

27. On July 7, 1982, respondents' Motion for Expedited Trial Setting came on for hearing before the Honorable Bryant H. Croft of the Third Judicial District Court of Salt Lake County, State of Utah. After having reviewed the pleadings on file and having heard the representations and arguments of counsel, respondents' Motion was denied. However, Judge Croft set this matter for trial, on a firm first place setting, in April of 1983. (Transcript, p. 187).

28. Subsequent to July 7, 1982, the appellants engaged in the following discovery:

(a) On or about August 18, 1982, counsel for respondents received Defendant Peter A. Benz' First Request for Production of Documents Directed to Plaintiffs. (Transcript, pp. 189-191). The Response to Defendant Peter A. Benz' First Request for Production of Documents Directed to Plaintiffs was filed on September 23, 1982. (Transcript, pp. 192-197); and

(b) On January 4, 1983, counsel for respondents received a certain Notice of Taking Depositions scheduling the depositions of respondents for January 18 and 19, 1983. (Transcript, pp. 198-199).

29. On November 4, 1982, Judge Arnold M. Stein of the Superior Court of New Jersey entered a certain "Order Staying Action on Condition" in the action filed by Benz and Cowan in the New Jersey courts. (Attached hereto as Exhibit "C").

30. On January 12, 1983, appellants Benz and Cowan filed a certain Motion for Leave to File Amended Answer and Counterclaim and to Join Additional Parties (hereinafter "Motion to Amend"). (Transcript, pp. 200-237). Appellants' Motion sought to assert, for the first time, four counterclaims against respondents McGregor and Richardson and seven "counterclaims" against parties not heretofore parties to this action. Appellants' Motion was made less than three months prior to the date set for trial and more than two months after Judge Stein's Order staying the New Jersey action.

31. Appellants' Motion to Amend came on regularly for hearing before the Law and Motion Judge of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Timothy R. Hanson presiding, on Thursday, January 20, 1983. (Transcript, pp. 363-364). At the conclusion of said hearing, Judge Hanson took appellants' Motion under advisement.

32. On or about March 2, 1983 counsel for respondents and appellants were informed by a telephone call that

appellants' Motion to Amend had been denied. Respondents' counsel was asked to prepare an appropriate Order.

33. On March 3, 1983, appellants Benz and Cowan filed yet another action naming as defendants D. Scott McGregor, Eldon L. Richardson, II, the McNeil/Mehew Group, Inc., Buttonwood Management Associates, Donald Remlinger, Peter Caruso, Guy J. Cutuli, Gus DiBiasi, Robert A. DiMizio, and Anthony Zero in the Third Judicial District Court of Salt Lake County, State of Utah, Civil No. C-83-1605. The Benz and Cowan Complaint of March 3, 1983 (Attached hereto as Exhibit "D"), sets forth those causes of action which appellants Benz and Cowan sought to join in this action pursuant to their Motion to Amend dated January 12, 1983, and which are asserted in the New Jersey action.

34. On March 7, 1983, the Honorable Timothy R. Hanson of the Third Judicial District Court of Salt Lake County, State of Utah, issued the Order Denying Motion of Defendants Peter A. Benz and David Cowan for Leave to File Amended Answer and Counterclaim and to Join Additional Parties. (Transcript, pp. 363-364). In addition, Judge Hanson entered a certain Memorandum Decision setting forth his reasons for the denial of appellants' Motion.

ARGUMENT

POINT I

JUDGE TIMOTHY R. HANSON DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANTS' MOTION FOR LEAVE TO FILE AMENDED AN- SWER AND COUNTERCLAIM AND TO JOIN ADDITIONAL PARTIES

Judge Timothy R. Hanson's Memorandum Decision of March 7, 1983, denying appellants' Motion to Amend, sets forth the grounds of the Court's decision as follows:

An examination of the nature of the controversy in this matter and the activities of the parties up to this point in time, together with the fact that on July 7, 1982 Judge Bryant H. Croft, of this Court, following a special hearing, set this matter as a number one setting in April of 1983, together with the observations of the Court that defendants' Motion to Amend and to Join Additional Parties would raise new issues, delay the long-standing trial date, and would seriously prejudice the plaintiffs in having the matter heard as scheduled all lead the Court to the conclusion that the defendants' Motion must be denied, even in the face of the long-standing rule that amendments are to be liberally allowed where justice so requires. An overall view of the file and activities, together with this specially set trial date as above-noted do not lead this Court to believe that the amendment should be allowed in that justice does not so require in this circumstance. A weighing of the "interests of justice" as required by the Rules of Procedure and taking into account and weighing the respective hardships of the particular parties all lead this Court to the

conclusion that defendants' Motion should be denied, and it is so ordered.

(Transcript, pp. 365-366) (emphasis added).

A review of the facts of this case, together with the applicable case law, can only lead to the conclusion that Judge Hanson's Memorandum Decision and Order were fully justified and proper and did not constitute an abuse of judicial discretion.

Rule 15(a), Utah Rules of Civil Procedure, generally governs the amendment of pleadings. Insofar as Rule 15(a) is pertinent, it provides:

[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The granting or denying of a motion to amend pleadings under the provisions of Rule 15(a) lies within the sound discretion of the trial court. Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983); Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960). This Court has recently stated that "[a] trial court's refusal to grant leave to amend is not reversible error unless the denial constitutes an abuse of discretion." Staker v. Huntington Cleveland Irrigation, Co., No. 18203, slip op. at 2 (Utah filed May 17, 1983) (citations omitted).

In construing Rule 15(a) of the Federal Rules of Civil Procedure, which is identical to Utah Rule 15(a), the United States Supreme Court in Foman v. Davis, 371 U.S. 178 (1962), enumerated the following general standard to be employed by courts in determining whether a motion to amend should be granted:

If the underlying facts or circumstances relied on by a [party] may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or undeclared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

Id. at 182 (emphasis added).

A court considering a motion to amend must inquire into whether there has been undue delay, bad faith or dilatory motive on the part of the movant, whether the party opposing the amendment will be prejudiced if the amendment is allowed, the reasons for the movant's failing to include in his original pleading the material sought to be added, and the hardship to the moving party if leave to amend is denied. See, e.g., 6 C. Wright & A. Miller, Federal Practice and Procedure § 1487 (1971). Respondents respectfully submit that Judge Hanson's Order and Memorandum Decision

denying appellants' Motion to Amend constituted a proper exercise of his discretion and was correct as a matter of law for the following reasons:

1. A review of the history of this lawsuit reveals what could only be considered a concerted attempt by appellants to delay adjudication of the case;

2. The granting of appellants' Motion to Amend would have raised new issues and resulted in a delay of the long-established trial date, thereby prejudicing respondents;

3. Appellants have failed to give sufficient reasons justifying their failure to include in their original Answers those counterclaims proposed to be asserted by amendment; and

4. Any hardship to appellants was caused by their own acts.

A. APPELLANTS ENGAGED IN A CONCERTED EFFORT
TO DELAY ADJUDICATION OF OF THIS ACTION

A review of the history of this action as set forth in the Statement of Facts reveals what can only be considered a concerted attempt by appellants to delay the adjudication of this matter. While not wishing to belabor the point, respondents strongly believe that the following

analysis demonstrates appellants' bad faith and dilatory motives throughout the history of this action.

Respondents' Complaint was filed on January 28, 1982. Appellant David Cowan was served with the Complaint on January 29, 1982 at the hour of 4:35 p.m. (Transcript, pg. 15). Under the provisions of Rule 12(a), Utah Rules of Civil Procedure, Cowan should have filed his Answer to the Complaint on or before February 18, 1982. Appellant Cowan did not file his Answer to respondents' Complaint until March 29, 1982. (Transcript, pp. 95-100).

Appellant Peter Benz was served with the Summons and Complaint in this action on February 1, 1982. (Transcript, pp. 39-41). On March 3, 1982, appellant Benz filed his Motion to Quash Service or, in the Alternative, Motion to Dismiss. (Transcript, pp. 29-30). By Order of the Third Judicial District Court dated March 19, 1982, appellant Benz' Motion was denied. (Transcript, pp. 94-95). Pursuant to that Order of March 19, 1982, defendant Benz was given ten (10) days, until March 29, 1982, to file his Answer to the Complaint. Appellant Benz did not file his Answer on or before March 29, 1982. On April 19, 1982, the Third Judicial District Court ordered Benz to file his Answer to plaintiffs' Complaint on or before April 29, 1982. (Transcript, pg. 117). Appellant Benz did not do so. Appellant Benz did not file his Answer to the Complaint until May 3,

1982, five weeks after the date set by the Court's first order. (Transcript, pp. 152-154).

On March 18, 1982, respondents gave notice of the taking of the deposition of Peter A. Benz scheduled for Tuesday, April 20, 1982. (Transcript, pp. 75-76). Also on March 18, 1982, respondents served upon counsel for appellant Benz Plaintiffs' First Request for Production of Documents. The documents were to be produced by Benz at 9:00 a.m. on Monday, April 19, 1982. Rather than appearing for his deposition and producing the documents requested, Benz, on April 15, 1982, four days prior to the date his documents were to be produced and six days prior to the date set for the taking of his deposition, filed a Motion for Extension of Time in Which to File Responsive Pleading, in Which to Respond to Discovery Requests, and for Protective Order. On April 19, 1982, the Third Judicial District Court ordered that Benz be granted an additional ten (10) days to respond to Plaintiffs' First Request for Production of Documents and that the deposition of appellant Benz be taken within twenty days of the Court's Order. (Transcript, pg. 117). Benz did not produce the documents on April 29, 1982, as required by the Court.

On March 18, 1982, respondents served notice of the taking of the deposition of appellant David Cowan on

Wednesday, April 21, 1982. Cowan's deposition was twice continued at the request of Cowan's counsel.

On April 27, 1982, counsel for respondents received a Notice of Deposition, scheduling the depositions of D. Scott McGregor and Eldon L. Richardson, II, for the afternoon of May 13, 1982. (Transcript, p. 118). On April 28, 1982, counsel for respondents received a Motion of Defendant Peter A. Benz for Protective Order and Order Compelling Discovery. (Transcript, pp. 119-120). That Motion requested, inter alia, that respondents McGregor and Richardson be ordered to appear at the depositions scheduled for May 13, 1982 and that should they not be available for their depositions on May 13, 1982, that they pay the costs and expenses for Benz to come to Salt Lake City, Utah, for the taking of their depositions. At the time Benz' Motion was made, there was no indication that respondents would not appear for the taking of their depositions on May 13, 1982. Benz' Motion was apparently made for the sole purpose of harassing and annoying respondents. Accordingly, on May 3, 1982, Judge David B. Dee of the Third Judicial District Court denied Benz' Motion for Protective Order and Order Compelling Discovery.

On May 4, 1982, notwithstanding the filing of the meritless Motion to Compel Discovery, counsel for respondents received a certain Notice of Continuance of Taking of

Depositions from counsel for Benz, continuing the depositions of D. Scott McGregor and Eldon L. Richardson, II, from May 13, 1982, to May 17, 1982. On May 17, 1982, Benz and his counsel of record advised that they were continuing without date respondents' depositions. The depositions of respondents were not taken by counsel for Benz until January of 1983, more than seven months after the date on which Benz sought to compel respondents' attendance by Court order.

On May 3, 1982, defendant Peter A. Benz finally filed his Answer to respondents' Complaint. On May 3, 1982, appellants Benz and Cowan also filed their Complaint in the New Jersey action. Appellants admit that the complaint filed in the state courts of New Jersey is virtually identical to the counterclaims which appellants sought leave of the Third Judicial District Court to add to their Answers in their Motion to Amend dated January 12, 1983. (See Appellant's Brief, pp. 7-8). The only apparent purpose for the filing of the New Jersey action was to harass and annoy respondents and to force them to simultaneously litigate their claims in two separate forums.

On May 17, 1982, Benz and his counsel of record made the representation to respondents' counsel that an offer of settlement would be made by Benz "within a reasonable period of time." (Affidavit of LeRoy S. Axland, dated July 6, 1982, Transcript, p. 182). No offer of settlement

was subsequently made. On June 21, 1982, counsel for respondents contacted then-counsel for Benz by telephone to inquire as to the offer of settlement. At that time, counsel for Benz advised respondents' counsel that Benz was seeking to change Utah counsel in this proceeding. (See Affidavit of LeRoy S. Axland, dated July 6, 1982, Transcript, p. 183).

For these reasons, respondents filed a Motion for Expedited Trial Setting on June 21, 1982. Although the motion was subsequently denied, Judge Bryant H. Croft of the Third Judicial District Court of Salt Lake County, State of Utah, set this matter for trial on a firm first place setting in April of 1983. (Transcript, p. 187).

Subsequent to July 7, 1982, appellants can hardly be said to have vigorously pursued discovery in this action. On the contrary, the sole discovery undertaken by appellants was the service of Defendant Peter A. Benz's First Request for Production of Documents Directed to Plaintiffs on August 18, 1982, (Transcript, pp. 188-191), and the taking of respondents' depositions during January, 1983.

On November 4, 1982, Judge Arnold M. Stein of the Superior Court of New Jersey entered his Order Staying Action on Condition in the action filed by Benz and Cowan in the New Jersey courts. Appellants then delayed for over two months, until January 12, 1983, before filing their Motion

to Amend. Appellants do not dispute that the granting of their Motion by Judge Hanson would have raised new issues and delayed the trial date. Indeed, appellants state: "Appellants concede that the granting of the Motion for Leave to File an Amended Answer both would have raised new issues and delayed the trial date." (Appellants' Brief, pp. 21-22).

Given the history of this litigation, it was not unreasonable for Judge Hanson to conclude that appellants' Motion to Amend was made in bad faith and with a dilatory motive. Indeed, Judge Hanson so found when he stated:

An overall view of the file and activities, together with the specially set trial date as above-noted do not lead this Court to believe that the amendment should be allowed in that justice does not so require in this circumstance.

(Memorandum Decision, p. 2, Transcript, p. 366).

The record in this case amply supports a determination by Judge Hanson that appellants' Motion to Amend was made in bad faith and with a dilatory motive. Accordingly, Judge Hanson's denial of appellants' Motion to Amend was not an abuse of discretion and must be affirmed.

B. THE GRANTING OF APPELLANTS' MOTION TO
AMEND WOULD HAVE RAISED NEW ISSUES
AND RESULTED IN A DELAY OF THE TRIAL
DATE THEREBY PREJUDICING RESPONDENTS

Appellants have conceded that the granting of their Motion to Amend would have raised new issues and delayed the trial date. (Appellants' Brief, pp. 21-22). Appellants further state that "[s]ome inconvenience may have been imposed upon plaintiffs if the time for adjudicating their claims had been delayed." (Appellants' Brief, p. 7). Appellants argue, however, that that inconvenience is "minimal" when compared to the prejudice that appellants would suffer if their compulsory counterclaims were not allowed to be tried in this case. (Appellants' Brief, p. 7).

While such an argument may have some surface appeal, it ignores a long line of cases holding that it is the denial of a speedy and inexpensive adjudication of the non-movant's claims to which the courts look in determining whether the party opposing the motion to amend is prejudiced. The "prejudice" of a party opposing a Motion to Amend "is not that occasioned by defeat on the merits, but rather the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation." Romo v. Reyes, 26 Ariz. App. 374, 548 P.2d 1186, 1188 (1976). See also Williams v. United States, 405

F.2d 234 (5th Cir. 1968); Kuris v. Pepper Poultry Company, Inc., 2 F.R.D. 361, 362 (S.D.N.Y. 1941).

A review of appellants' proposed counterclaim shows that the issues raised therein go far beyond the enforceability of the Compensation Agreement of December 3, 1981. If Judge Hanson had granted appellants' Motion, it would have been necessary to redepose the appellants, particularly with respect to the issues set forth in the Fourth through Seventh Counts of the proposed counterclaim. Additional discovery, unnecessary for the matter to have gone to trial as scheduled on the issues as framed by respondents' Complaint, would need to have been taken. Specifically, the depositions of Donald Remlinger and all persons associated with BMC Acquisition Corporation would have needed to have been taken. Under such circumstances, the courts have not hesitated to deny eleventh-hour motions to amend.

In Idaho First National Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979), the Idaho Supreme Court upheld the decision of a trial court in denying defendants' motion to amend their answer to join a third-party defendant. The amendment was proposed approximately two years after the filing of the complaint and five months prior to the date set for trial. In so holding, the Idaho Supreme Court stated:

The trial court stated that "the granting of defendants' motion at this late stage of the proceedings would complicate and delay the principal action and impose an unwarranted hardship on plaintiff . . ." We agree with the trial court's analysis of the consequences of allowing the amendment and therefore hold that the trial court did not abuse its discretion in denying appellants' motion to amend their complaint [sic] to add a third party defendant.

596 P.2d at 434 (emphasis added).

In Morgan Brothers, Inc. v. Haskell Corporation, Inc., 24 Wash. App. 773, 604 P.2d 1294 (1979), the Washington Court of Appeals held that the trial court did not abuse its discretion in denying a motion to amend five weeks before trial absent a showing of why a third-party defendant was not brought in prior to such time and where the amendment would have delayed the trial of the case. See also Cherokee National Life Insurance Company v. Coastal Bank of Georgia, 238 S.E.2d 866 (Ga. 1977) (the trial court did not abuse its discretion in denying leave to file third-party complaint where such leave was sought more than nine months after suit was commenced); Cowman v. Lavine, 234 N.W.2d 114 (Iowa 1975) (the denial by the trial court of defendants' motion to amend was not an abuse of discretion where the motion was not filed until nine months after suit was commenced and was made subsequent to the taking of depositions, the filing of an answer, and a pre-trial conference

at which a specific trial date was set); Hogue v. Superior Utilities, 53 N.M. 452, 210 P.2d 938 (1949) (where plaintiffs' motion to join additional party as a defendant was not made until late in the case, there was not an abuse of discretion on the part of the trial court in denying the motion).

In DeBry v. Transamerica Corporation, 601 F.2d 480 (10th Cir. 1979), plaintiffs sought damages from defendant Transamerica Corporation for alleged fraud in a transaction involving an exchange of stock. After the filing of two amended Complaints, plaintiffs moved again, eighteen months after the filing of their original Complaint and three months prior to trial, to again amend their Complaint. The proposed Third Amended Complaint alleged new theories of recovery and, if granted, would possibly have resulted in a postponement of the trial. The United States District Court for the District of Utah, Central Division, the Honorable Aldon J. Anderson presiding, denied Plaintiffs' Motion to File Third Amended Complaint. The case thereafter proceeded to trial and a jury verdict was returned in favor of defendant Transamerica. Thereafter, plaintiffs appealed, alleging, inter alia, error by the trial court in denying plaintiffs' Motion to Amend. In upholding the decision of the trial court, the Tenth Circuit Court of Appeals held that the trial court did not abuse its discretion in denying

plaintiffs' Motion and that good reason existed for the denial. In so holding, the Court stated:

First, the case had been on file for eighteen months. The trial setting was three months off. The tendered complaint brought in new concepts and theories which created a hazard that postponement of trial would be necessary. The court reasoned that:

The interest of fairness and justice to both parties are best served at this stage of the case by avoiding the additional discovery and trial preparation which the different causes of action would require. The additional causes of action which the plaintiffs seek to include by this amendment do not represent new areas of the law that could not have been developed further and incorporated in this cause of action at an earlier date.

It would thus appear that the trial court was of the opinion that there had been ample time for the plaintiffs to develop the concepts and theories embodied in the amended complaint since they did not represent new areas of the law. It cannot be said, therefore, that the trial court acted in an unreasonable or arbitrary manner.

601 F.2d at 492.

In the case at bar, granting appellants' Motion to Amend would have required additional extensive discovery and preparation and greatly added to the trial time involved to the detriment of a speedy resolution of the case, thereby

unduly prejudicing respondents. Thus, Judge Hanson's Order and Memorandum Decision of March 7, 1983, were proper, did not constitute an abuse of judicial discretion and must be affirmed.

C. APPELLANTS HAVE FAILED TO JUSTIFY THEIR
FAILURE TO ASSERT THEIR COUNTERCLAIMS
UPON THE FILING OF THEIR ANSWERS

Appellants argue that the prejudice to respondents because of a postponement of the trial date "is minimal compared to the permanent prejudice sustained by the defendants if their compulsory counterclaims are not allowed to be tried in this action." (Appellants' Brief, p. 7). The fact that the amendments that appellants sought were for the purpose of asserting compulsory counterclaims does not, however, ipso facto justify allowing the amendment, particularly when it would result in a delay of the long-established trial date.

Rule 13(a), Utah Rules of Civil Procedure, provides in pertinent part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . .

(Emphasis added).

On March 29, 1982, the date upon which appellant Cowan filed his Answer, and on May 3, 1982, the date upon which appellant Benz filed his Answer, the appellants knew of, and could have asserted, the claims which formed the basis of their Motion to Amend dated January 12, 1983. This is conclusively shown by reason of the fact that on May 3, 1982, more than eight months prior to their Motion to Amend, appellants filed their New Jersey action asserting essentially the very claims which they sought to add to this action by amendment. Having failed to properly assert their compulsory counterclaims when they filed their Answers, appellants could seek to assert their counterclaims only under the provisions of Rule 13(e), Utah Rules of Civil Procedure. Rule 13(e) provides:

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

Respondents respectfully submit that appellants failed before the District Court, and have failed before this Court, to justify their failure to assert the counterclaims and to join the additional parties upon the filing of their original Answers. A review of the history of this litigation to date, as extensively set forth above, can only lead to the conclusion that appellants sought to gain a

strategic advantage in this litigation by filing the parallel action in the state courts of New Jersey rather than asserting their counterclaims in the instant case. Having been ordered by the New Jersey court to attempt to seek relief in this action, appellants waited more than two months before belatedly petitioning the Third Judicial District Court to allow their proposed counterclaims and other amendments. Such action on the part of the appellants does not constitute oversight, inadvertence or excusable neglect.

Appellants Benz and Cowan agree that the counterclaims which they sought to assert in their Motion to Amend are the same that they asserted in their New Jersey action. (Appellants' Brief, pp. 7-8). The courts have consistently denied leave to amend when the moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleading. See Larson v. Arnold E. Verdi Trucking, Inc., 28 F.R.D. 377 (E.D. Pa. 1961); Singer Manufacturing Company v. Shepard, 13 F.R.D. 509 (S.D.N.Y. 1952); Kuris v. Pepper Poultry Company, Inc., 2 F.R.D. 361 (S.D.N.Y. 1941) Cf. Dow Corning Corporation v. General Electric Company, 461 F. Supp. 519 (N.D.N.Y. 1978).

In Ralston-Purina Company v. Bertie, 541 F.2d 1363 (9th Cir. 1976), the United States Court of Appeals for the

Ninth Circuit upheld an order of the trial court denying defendants' motion for leave to assert an omitted compulsory counterclaim. The Court found no abuse of discretion on the part of the trial court where defendants' motion contained no allegations of newly discovered evidence establishing, for the first time, that they had a compulsory counterclaim, and where the motion was made six months after the filing of the answer and two months after a pre-trial conference.

Indeed, this Court, in Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983), held that the trial court did not abuse its discretion in denying a plaintiff's motion to amend his complaint where the amendment would have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier. In Westley, plaintiff, on April 23, 1980, filed a two count complaint. In the first count, plaintiff alleged that Farmer's had breached its contract with him. In the second count, plaintiff alleged that Farmer's had defamed him. Depositions were taken and in November, 1981, Farmer's moved for summary judgment on both counts. Shortly thereafter, plaintiff retained new counsel who immediately moved for a continuance of the trial scheduled for January 13, 1982. Plaintiff also moved to amend his complaint to include an allegation that Farmer's had maliciously removed his name from the list of Farmer's Insurance agents in the telephone

directory. The trial court denied plaintiff's Motion to Amend.

On appeal, plaintiff Westley contended that the trial court erred in not allowing him to amend his complaint. In upholding the decision of the lower court, this Court stated:

On the facts presented, we are not convinced that the trial court abused its discretion in refusing to grant the requested leave to amend. An amendment would certainly have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier when plaintiff discussed it in his deposition.

Id. at 94 (emphasis added).

In the case at bar, as in Westley, there is no dispute that had the Third Judicial District Court granted appellants' Motion to Amend it would "certainly have delayed the trial." Moreover, the factual basis of appellants' proposed counterclaims against McGregor and Richardson were known to appellants at least as of May 3, 1982, more than eight months earlier, when appellants filed their New Jersey action. As in Westley, the present case does not involve an abuse of discretion in Judge Timothy R. Hanson's denial of appellants' Motion to Amend.

While it is not altogether clear, appellants apparently argue that the reason they did not attempt to assert their compulsory counterclaims prior to January of

1983 is that by so doing appellant Benz would have waived his objection to the Third Judicial District Court's assertion of in personam jurisdiction over him. This argument is without merit for two reasons. First, it ignores the fact that there is no question that the Third Judicial District Court had in personam jurisdiction over the person of appellant Cowan. Cowan's failure to assert the compulsory counterclaims at an earlier date is entirely unjustified. Second, with respect to appellant Benz, the assertion of a compulsory counterclaim does not waive an objection to the jurisdiction of a court. Professors Wright and Miller in their treatise on Federal Practice and Procedure state:

The general rule is that the assertion of a compulsory counterclaim by defendant does not constitute a waiver of any objections he might have to the court's personal jurisdiction over him or its venue . . .

6 C. Wright & A. Miller, Federal Practice and Procedure § 1409 (1971). See also Dragor Shipping Corporation v. Union Tank Car Company, 378 F.2d 241, 244 (9th Cir. 1967) ("[S]ince . . . a party has no alternative but to submit his compulsory counterclaim against an opposing party, or lose it, his act in asserting it does not constitute a waiver of any jurisdictional defense he previously or concurrently asserts."); Hasse v. American Photograph Corporation, 299

F.2d 666, 669 (10th Cir. 1962); Hunt v. BP Exploration Company (Libya) Ltd., 492 F. Supp. 885, 895-896 (N.D. Texas 1980); Baltimore & Ohio Railroad Company v. Thompson, 80 F. Supp. 570, 574 (E.D. Mo. 1948).

Because appellants did not and could not show oversight, inadvertence or excusable neglect in failing to file their proposed counterclaims prior to January, 1983, as required by Rule 13(e) of the Utah Rules of Civil Procedure, coupled with the fact that appellants knew about the "facts" on which their proposed counterclaims were based no later than May 3, 1982, Judge Timothy R. Hanson correctly denied appellants' Motion to Amend. This Honorable Court must therefore find, as a matter of law, that Judge Hanson did not abuse his discretion in denying appellants' Motion to Amend.

D. ANY PREJUDICE TO APPELLANTS HAS BEEN
CAUSED BY THEIR OWN ACTS

Appellants argue that because the counterclaims they sought to assert against respondents were compulsory counterclaims, Judge Hanson abused his discretion in denying their Motion to Amend. What appellants fail to candidly acknowledge, however, is that their proposed counterclaims were compulsory on March 29, 1982, the date appellant Cowan filed his Answer in the instant action, and were

likewise compulsory on May 3, 1982, the date appellant Benz filed his Answer to respondents' Complaint. Rather than filing their compulsory counterclaims, appellants sought to gain a strategic advantage by bringing a separate action in the state courts of New Jersey in which appellant Benz is a member of the Bar.

The New Jersey action was subsequently stayed on November 4, 1982. The stay of the New Jersey action did not, however, miraculously transform the claims asserted by the appellants in the New Jersey action into compulsory counterclaims which had to be asserted in the Utah action. The counterclaims were compulsory counterclaims on March 29, 1982, May 3, 1982 and in January, 1983.

Moreover, notwithstanding the stay of the New Jersey proceedings on November 4, 1982, appellants did not seek to amend their Answers in the instant case until January 12, 1983, over two months after the stay of the New Jersey proceedings, thus necessitating a delay of the trial of this action if their Motion had been granted. The problems which appellants face in the instant action are problems solely of their own making. They have repeatedly and consistently attempted to delay discovery in this action, as well as to delay the trial date. Judge Hanson correctly held, based on the record in this case, that

appellants' Motion to Amend should be denied. This Court should likewise deny appellants' Appeal and affirm the Order and Memorandum Decision dated March 7, 1983.

POINT II

RESPONDENTS' ARGUMENTS IN THE NEW JERSEY
ACTION SHOULD NOT ESTOP THEM FROM
OPPOSING APPELLANTS' MOTION FOR LEAVE TO
FILE AN AMENDED ANSWER AND COUNTERCLAIM
AND TO JOIN ADDITIONAL PARTIES

Appellants argue that by reason of the representations made by respondents to the New Jersey court regarding the staying of the New Jersey action, respondents should have been estopped to argue that the Third Judicial District Court of Salt Lake County, State of Utah, should not allow appellants' Motion to Amend. (Appellants' Brief, pp. 7-10). This argument is made without the citation of any authority and is based solely upon the arguments made by respondents in the New Jersey action.

The Brief in Support of Motion to Stay on Behalf of Eldon L. Richardson, II, D. Scott McGregor, Donald Remlinger and McNeil/Mehew Group, Inc. was filed in the New Jersey action on July 16, 1982. At the time the arguments set forth therein were made, respondents in good faith believed that the New Jersey action should have been stayed and that parallel litigation in two disparate forms was

unwise, constituted a waste of judicial resources and was inconvenient to the parties. Respondents further believed that for the New Jersey action to go forward would cause unnecessary duplication of discovery, litigation, and constitute annoyance and harassment of the respondents. If appellants had done as they should have done - filed their compulsory counterclaims when they filed their Answers in the instant case - the New Jersey action would not have been brought in the first instance. Respondents were fully justified in opposing appellants' Motion to Amend.

Appellants Cowan and Benz consciously chose a litigation strategy of vexation and harassment in bringing their New Jersey action. When the New Jersey action was stayed, appellants belatedly petitioned the Third Judicial District Court of Salt Lake County, State of Utah, to allow them to assert claims which should have been asserted in March and May of 1982. When the lower court refused to allow appellants' Motion to Amend, appellants claim that decision to be an abuse of discretion and appeal to this Court to rescue them from a situation of their own making. Neither the law nor any known concept of "justice" requires this Court to untie appellants' Gordian knot.

The Order and Memorandum Decision of March 7, 1983, entered by the Honorable Timothy R. Hanson of the


Third Judicial District Court of Salt Lake County, State of Utah, must be affirmed.

CONCLUSION

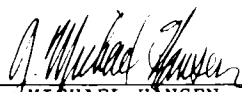
For the reasons set forth above, this Court must affirm the Order and Memorandum Decision of the Honorable Timothy R. Hanson of the Third Judicial District Court of Salt Lake County, State of Utah, denying appellants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties.

DATED this 19th day of September, 1983.

SUITTER AXLAND ARMSTRONG & HANSON



LEROY S. AXLAND, Esq.



J. MICHAEL HANSEN, Esq.
Attorneys for Respondents
700 Clark Leaming Office Center
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Salt Lake City, Utah 84101
Telephone: (801) 532-7300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies
of the foregoing Respondents' Brief were hand-delivered this
19th day of September, 1983 to:

Merlin O. Baker, Esq.
John A. Adams, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, Utah 84111-1996



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PARK MEADOWS PLAZA

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April 20, 1982

HAND DELIVERED

Bruce Findlay, Esq.
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111

RE: D. Scott McGregor, et al. v. Peter A.
Benz, et al.

Dear Bruce:

The purpose of this letter is to confirm the substance of our telephone conference of Monday, April 19, 1982. At that time you informed me that the documents requested pursuant to Plaintiffs' First Request for Production of Documents Directed to Defendant David Cowan were not available for inspection and copying on April 19, 1982, as required by said Request. You also informed me that it was unlikely that Mr. Cowan would be available for the taking of his deposition on April 21, 1982, pursuant to the Notice of Deposition dated March 19, 1982.

Rather than go through the time and expense of filing a Motion to Compel Discovery, it was agreed that you would provide all documents requested pursuant to the Request for Production of Documents dated March 19, 1982, at 10:00 a.m. on Friday, April 23, 1982. You further agreed to make your client, Mr. Cowan, available for the taking of his deposition at 10:00 a.m. on Tuesday, April 27, 1982. Accordingly, you will find enclosed a copy of a Notice of Continuance of Deposition, continuing the deposition of David Cowan until 10:00 a.m. on April 27, 1982.


I trust that all documents will be produced on Friday, April 23, and that Mr. Cowan will present himself for the

Bruce Findlay, Esq.
April 20, 1982
Page two

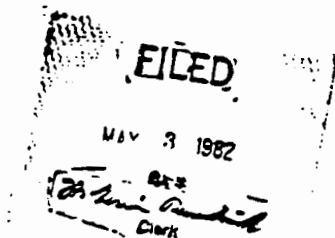
taking of his depositions on April 27. Should you have any questions or concerns, please feel free to contact me at any time.

Very truly yours,

SUITTER, AXLAND, ARMSTRONG & HANSON


J. Michael Hansen, Esq.

JMH:cc
Enclosure



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Attorneys for Plaintiff

C 3221 81

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MORRIS COUNTY
DOCKET NO.

PETER A. BENZ and
DAVID COWAN,

Plaintiffs,

Civil Action

-vs-

COMPLAINT

ELDON L. RICHARDSON, III;
D. SCOTT MCGREGOR;
DONALD REMLINGER;
MCNEIL/MEHEW GROUP, INC.,
a Utah corporation; and
BMC ACQUISITION CORPORATION,
a New York corporation, d/b/a
BUTTONWOOD MANAGEMENT CO.,

Defendants.

Plaintiffs, PETER A. BENZ, having his principal place of
business at 8 Court Street, Morristown, New Jersey, and DAVID COWAN,
having his principal place of business at 140 West 90th South, Sandy,
Utah, by way of complaint against defendants, say:

FIRST COUNT

1. Plaintiff Peter A. Benz, ("Benz") is a resident of the State of New Jersey in the business, among other things, of arranging sources of funding for various financial and business ventures.

2. Plaintiff David Cowan ("Cowan") is a resident of the State of Utah and is in business, among other things, as a financial broker and real estate developer.

3. Defendants Eldon L. Richardson, III, ("Richardson") and D. Scott McGregor, ("McGregor") are residents of the State of Utah.

4. Defendant Donald Remlinger, ("Remlinger") is a resident of the State of New Jersey, residing at Brigade Hill Road, Morris Township, New Jersey.

5. Defendant McNeil/Mehew Group, Inc. ("McNeil/Mehew") is, on information and belief, a Utah corporation with principal places of business in Utah and New York. Defendants Richardson, McGregor and Remlinger are, on information and belief, officers, principals and/or controlling shareholders of McNeil/Mehew.

6. Defendant BMC Acquisition Corporation, d/b/a Buttonwood Management Co., ("Buttonwood") is, on information and belief, a New York corporation of which defendant Remlinger is, also on information and belief, an officer, principal and/or controlling shareholder.

7. Sometime in October or November 1981, Richardson and McGregor approached Cowan concerning possible sources of funding for a proposed business venture.

8. In late November 1981 Cowan contacted Benz, a business acquaintance, concerning the plans of Richardson and McGregor. Benz indicated that he might be interested in investing himself and might also be able to obtain other investors.

9. Cowan relayed this information to Richardson and McGregor, who expressed their interest in meeting with, and doing business with, Benz in the State of New Jersey.

10. On November 24, 1981, Remlinger and other representatives of Buttonwood met with Benz and Cowan at Canoe Brook Country Club, Summit, New Jersey, to discuss all aspects of a proposal whereby Buttonwood would invest in the business venture in question.

11. On or about December 3, 1981, Richardson and McGregor met with Benz and Cowan at Benz's offices in Morristown, New Jersey. At that meeting Benz advised Richardson and McGregor that he had interested two potential investment groups in participating in the proposed business venture.

12. The first of these groups involved West Bridge Street Corporation, a New Jersey corporation of which Benz is president and principal shareholder. Under the terms of this arrangement West Bridge Street Corporation would enter into a joint venture with McNeil/Mehew, a corporation to be formed with Richardson and McGregor as the anticipated principals. The terms of this arrangement were embodied in the Letter of Intent duly executed that day, a true copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

13. The second group contacted by Benz principally involved Remlinger and/or Buttonwood. Benz and Cowan expressly conditioned the arranging of any meeting with Remlinger upon the agreement of Richardson and McGregor, in advance, that in the event Richardson and McGregor and/or McNeil/Mehew entered into an agreement with Remlinger and/or Buttonwood, Benz and Cowan would receive as compensation for their efforts \$250,000 in cash and a fifteen percent (15%) interest in any company formed. Richardson and McGregor expressly agreed to these conditions.

14. On that same day, while still in New Jersey, Benz, Cowan, Richardson and McGregor entered into a written agreement embodying the terms set forth above. A true copy of this agreement is attached hereto as Exhibit 2 and incorporated by reference herein.

15. On December 3, 1981, the meeting with Remlinger was held as scheduled. Remlinger at all relevant times had notice of the terms of the agreement attached hereto as Exhibit 2.

16. Immediately following the meeting Richardson and McGregor represented to Benz and Cowan that they were not interested in entering into an arrangement with Remlinger and would instead pursue the terms of the letter of intent attached hereto as Exhibit 1.

17. Notwithstanding such representation, Richardson and McGregor subsequently, without notice to plaintiffs, entered into an arrangement with Remlinger and/or Buttonwood Co. pursuant to which, on information and belief, all parties became principals in McNeil/Mehew.

18. Notwithstanding such arrangements defendants have failed and refused to comply with the agreement attached hereto as Exhibit 2. The monetary value of the 15 percent share in the venture is incapable of calculation.

19. Plaintiffs have no adequate remedy at law.

WHEREFORE plaintiffs demand judgment against all defendants:

1. For specific performance of the agreement attached hereto as Exhibit 2.
2. For compensatory and punitive damages.
3. For costs of suit.
4. For such other relief as the Court deems just and proper.

SECOND COUNT

1. The allegations of the First Count are repeated as if set forth at length herein.

2. As a result of the aforementioned conduct defendants have been, and will continue to be, unjustly enriched at the expense of plaintiffs.

3. Plaintiffs have no adequate remedy at law.

WHEREFORE plaintiffs demand judgment against all defendants:

1. For the imposition of a constructive trust on any and all profits earned by defendants pursuant to the arrangement among them.
2. For an accounting.
3. For costs of suit.
4. For such other relief as the Court deems just and proper.

THIRD COUNT

1. The allegations of the First and Second Counts are repeated as if set forth at length herein.

2. The actions of Remlinger and Buttonwood maliciously and without justification caused Richardson and McGregor to breach the agreement with plaintiffs attached hereto as Exhibit 2.

3. Plaintiffs would have earned substantial profits from the performance of the aforementioned agreement.

WHEREFORE plaintiffs demand judgment against defendants Remlinger and Buttonwood:

1. For compensatory and punitive damages.
2. For costs of suit.
3. For such other relief as the Court deems just and proper.

FOURTH COUNT

1. The allegations of the First, Second and Third Counts are repeated as if set forth at length herein.

2. Plaintiffs had a reasonable expectation of prospective economic advantage from their participation in either the arrangement attached hereto as Exhibit 1 or the arrangement attached hereto as Exhibit 2.

3. The actions of defendants herein jointly and severally interfered, maliciously and without justification, with plaintiffs' reasonable expectations of prospective economic advantage.

WHEREFORE plaintiffs demand judgment against all defendants:

1. For compensatory and punitive damages.

2. For costs of suit.
3. For such other relief as the Court deems just and proper.

LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
Attorneys for Plaintiffs

BY:



SHEPPARD A. GURYAN

DATED: April 30, 1982

P16EE

FILED

NOV 5 1982

ARNOLD M. STEIN, J.S.C.
ORIGINAL FILED WITH
CLERK OF THE SUPERIOR COURT

PITNEY, HARDIN, KIPP & SZUCH

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ATTORNEYS FOR Defendants

Eldon L. Richardson, II,
D. Scott McGregor, Donald
Remlinger and McNeil/Mehew Group, Inc.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MORRIS COUNTY
DOCKET NO. C-3221-81

PETER A. BENZ and
DAVID COWAN,

Plaintiffs,

-VS-

Civil Action

ELDON L. RICHARDSON, II;
D. SCOTT MCGREGOR; DONALD
REMLINGER; MCNEIL/MEHEW GROUP,
INC., a Utah corporation; and
BMC ACQUISITION CORPORATION, a
New York corporation, d/b/a
BUTTONWOOD MANAGEMENT CO.,

Defendants.

ORDER STAYING ACTION
ON CONDITION -

This matter having been opened to the Court by Pitney,
Hardin, Kipp & Szuch, attorneys for defendants Eldon L.
Richardson, II, D. Scott McGregor, Donald Remlinger and McNeil/
Mehew Group, Inc. (Frederick L. Whitmer, Esq. appearing), and on

the motion of Carl M. Kuntz, attorney for defendant BMC Acquisition Corporation (Michael E. Greene, Esq., of counsel, appearing) and in the present of Lasser, Hochman, Marcus, Guryan and Kuskin, attorneys for plaintiffs Peter A. Benz and David Cowan (Sheppard A. Guryan, Esq. appearing), and for the reasons set forth on the record October 22, 1982, and good cause otherwise appearing,

IT IS on this 4th day of November, 1982

ORDERED that this action be and the same hereby is stayed as to all proceedings pending the disposition of an action in the courts of the State of Utah entitled D. Scott McGregor and Eldon L. Richardson, II v. Peter A. Benz and David Cowan, Civil No. 382-727, on condition that Donald Remlinger not contest the exercise of jurisdiction over him by the courts of Utah in any claim asserted by the defendants here and arising out of the same transactions and occurrences in issue in this or that action and

IT IS FURTHER ORDERED that the motion of BMC Acquisition Corporation and Buttonwood Management Co. to dismiss this action for lack of in personam jurisdiction shall also be stayed; and

IT IS FURTHER ORDERED that in the event the defendants in the Utah action assert a claim naming as a defendant there any of the defendants named here over whom the Utah court determines it has no in personam jurisdiction, leave is given to any party on notice in accordance with the Rules Governing the Courts of

the State of New Jersey to move to dissolve the stay granted herein for good cause shown, provided, however, that nothing in this Order shall be deemed to permit any party automatically to dissolve this stay.

Arnold M. Stein

ARNOLD M. STEIN, J.S.C.

PAPERS CONSIDERED:

_____ Notice of Motion
_____ Movant's Affidavits
_____ Movant's Brief
_____ Answering Affidavits
_____ Answering Brief
_____ Cross-Motion
_____ Movant's Reply
_____ Other _____

MERLIN O. BAKER and
JOHN A. ADAMS of
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiffs, Peter A. Benz
and David Cowan
400 Deseret Building
Salt Lake City, Utah 84111-1996
Telephone: (801) 532-1500

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

PETER A. BENZ and DAVID COWAN, :
Plaintiffs, : COMPLAINT

v. :

D. SCOTT MCGREGOR, ELDON L. :
RICHARDSON, II, THE McNEIL/MEHEW :
GROUP, INC., a Utah corporation; : Civil No. C-83-1605
BUTTONWOOD MANAGEMENT ASSOCIATES, :
a New York general partnership; :
DONALD REMLINGER; PETER CARUSO; :
GUY J. CUTULI; GUS DI BIASI; :
ROBERT A. DI MIZIO; and ANTHONY :
ZERO; :

Defendants. :

-----oo0oo-----

Plaintiffs, Peter A. Benz and David Cowan, for their
Complaint against the defendants, allege as follows:

FIRST COUNT

1. Plaintiff Peter A. Benz ("Benz"), is a resident of the State of New Jersey who is in the business, among other things, of arranging sources of funding for various financial and business ventures.

2. Plaintiff David Cowan ("Cowan"), is a resident of the State of Utah and is in business, among other things, as a financial broker and real estate developer.

3. Defendants Eldon L. Richardson, II ("Richardson"), and D. Scott McGregor ("McGregor"), are residents of the State of Utah.

4. Defendant Donald Remlinger ("Remlinger"), is a resident of the State of New Jersey, residing at Brigade Hill Road, Morris Township, New Jersey.

5. Defendant The McNeil/Mehew Group, Inc. ("McNeil/Mehew") is a Utah corporation with principal places of business in Utah and New York. Defendants Richardson, McGregor, Peter Caruso ("Caruso") and Remlinger are officers, directors, principals and/or controlling shareholders of McNeil/Mehew.

6. Defendant Buttonwood Management Associates ("Buttonwood") is a New York general partnership, of which defendant Remlinger is also an agent, employee and/or officer.

7. Defendants Caruso, Guy J. Cutuli ("Cutuli"), Gus Di Biasi ("Di Biasi"), Robert A. Di Mizio ("Di Mizio"), and Anthony Zero ("Zero"), are not residents of the State of Utah but each is a

general partner of Buttonwood Management Associates, a New York general partnership.

8. This Court has jurisdiction over the non-resident defendants Buttonwood, Remlinger, Caruso, Cutuli, Di Biasi, Di Mizio and Zero, pursuant to the provisions of the Utah long-arm statute, UTAH CODE ANN. § 78-27-24.

9. Sometime in October or November 1981, Richardson and McGregor approached Cowan concerning possible sources of funding for a proposed business venture.

10. In late November, 1981 Cowan contacted Benz, a business acquaintance, concerning the plans of Richardson and McGregor. Benz indicated that he might be interested in investing himself and might also be able to obtain other investors.

11. Cowan relayed this information to Richardson and McGregor, who expressed their interest in meeting with Benz.

12. On or about November 24, 1981, Remlinger and other representatives of Buttonwood met with Benz and Cowan to discuss various aspects of a proposal whereby Buttonwood would invest in the business venture in question.

13. On or about December 3, 1981, Richardson and McGregor met with Benz and Cowan at Benz's offices in Morristown, New Jersey. At that meeting Benz advised Richardson and McGregor that he had interested two potential investment groups in participating in the proposed business venture.

14. The first of these groups involved West Bridge Street Corporation, of which Benz is president and principal shareholder. Under the terms of this arrangement West Bridge Street Corporation would enter into a joint venture with McNeil/Mehew, a corporation to be formed in which Richardson and McGregor would be the anticipated principals. The terms of this arrangement were embodied in the letter of intent ("Letter of Intent") duly executed that day, a true copy of which is attached hereto as Exhibit A and incorporated by reference herein.

15. The second group contacted by Benz principally involved Remlinger and/or Buttonwood. Benz and Cowan expressly conditioned the arranging of any meeting with Remlinger upon the agreement of Richardson and McGregor, in advance, that in the event Richardson and McGregor and/or McNeil/Mehew entered into an agreement with Remlinger and/or Buttonwood, Benz and Cowan would receive as compensation for their efforts the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) in cash and a fifteen percent (15%) interest in any company formed. Richardson and McGregor expressly agreed to pay this compensation.

16. On that same day Benz, Cowan, Richardson and McGregor entered into a written Compensation Agreement embodying the terms set forth above. A true copy of this agreement is attached hereto as Exhibit B and incorporated by reference herein.

17. On December 3, 1981, the meeting with Remlinger was held as scheduled. Remlinger, at all relevant times, had notice of the terms of the written Compensation Agreement attached hereto as Exhibit B.

18. Immediately following the meeting, Richardson and McGregor represented to Benz and Cowan that they were not interested in entering into an arrangement with Remlinger and would instead pursue the terms of the Letter of Intent attached hereto as Exhibit A.

19. Notwithstanding such representation, Richardson and McGregor subsequently, without notice to Benz and Cowan, entered into an arrangement with Remlinger and/or Buttonwood pursuant to which McNeil/Mehew was incorporated and capitalized. Richardson, McGregor, Remlinger and the partners of Buttonwood became officers and directors in McNeil/Mehew. Buttonwood, Caruso, Cutuli, Di Biasi and Di Mizio contributed \$300,000.00 to McNeil/Mehew to fund its operations in exchange for stock ownership in McNeil/Mehew. Subsequently, Cutuli invested or loaned McNeil/Mehew an additional \$65,000.00.

20. Richardson, McGregor, McNeil/Mehew and the other defendants have failed and refused to comply with the written Compensation Agreement attached hereto as Exhibit B. The monetary

value of the fifteen percent (15%) share in the business venture is incapable of calculation.

21. Plaintiffs Benz and Cowan have no adequate remedy at law.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants:

1. For specific performance of the agreement attached hereto as Exhibit B, including payment of \$250,000.00, plus interest and fifteen percent (15%) of the common stock of McNeil/Mehew.

2. For compensatory damages of \$150,000.00 and punitive damages of \$250,000.00.

3. For costs of suit.

4. For such other relief as the Court deems just and proper.

SECOND COUNT

1. The allegations of the First Count of the Complaint are repeated as if set forth at length herein.

2. As a result of the aforementioned conduct, defendants have been, and will continue to be, unjustly enriched at the expense of the plaintiffs Benz and Cowan.

3. Plaintiffs Benz and Cowan have no adequate remedy at law.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants:

1. For compensatory damages of \$400,000.00.
2. For the imposition of a constructive trust on any and all profits earned by the defendants pursuant to the arrangement among them.
3. For an accounting.
4. For costs of suit.
5. For such other relief as the Court deems just and proper.

THIRD COUNT

1. The allegations of the First and Second Counts of the Complaint are repeated as if set forth at length herein.
2. As a result of plaintiffs' aforementioned efforts and expertise in bringing the defendants together, the financing was secured to enable the subsequent incorporation of McNeil/Mehew and its successful business operation.
3. Plaintiffs Benz and Cowan provided defendants valuable services for which they have received no compensation.
4. Plaintiffs are entitled to the value of the services they rendered to defendants.
5. Plaintiffs Benz and Cowan have no adequate remedy at law.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants:

1. For compensatory damages in the amount of \$400,000.00.
2. For costs of suit.
3. For such other relief as the Court deems just and proper.

FOURTH COUNT

1. The allegations of the First, Second and Third Counts of the Complaint are repeated as if set forth at length herein.

2. The actions of Remlinger, Buttonwood and the defendant partners of Buttonwood intentionally, maliciously and without justification induced or otherwise caused Richardson and McGregor not to enter into or continue the prospective joint venture relation with plaintiffs Benz and Cowan, as evidenced by the Letter of Intent, attached as Exhibit A.

3. Because of the unlawful actions of Remlinger, Buttonwood and the defendant partners as alleged above, plaintiffs Benz and Cowan have lost substantial profits and have been denied a substantial ownership interest in McNeil/Mehew which would have resulted from the final execution and performance of the terms set forth in the aforementioned Letter of Intent attached as Exhibit A.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants Remlinger, Buttonwood and the individual partners of Buttonwood:

1. For compensatory damages of \$400,000.00 and punitive damages of \$250,000.00.
2. For costs of suit.
3. For such other relief as the Court deems just and proper.

FIFTH COUNT

1. The allegations of the First, Second, Third and Fourth Counts of the Complaint are repeated as if set forth at length herein.

2. The actions of Remlinger, Buttonwood and the defendant partners of Buttonwood intentionally, maliciously and without justification induced or otherwise caused Richardson and McGregor to breach the written Compensation Agreement with plaintiffs Benz and Cowan attached hereto as Exhibit B.

3. Because of the unlawful actions of Remlinger, Buttonwood and the defendant partners alleged above, plaintiffs Benz and Cowan have lost substantial profits and have been denied a substantial ownership interest in McNeil/Mehew which would have resulted from the performance of the aforementioned Compensation Agreement.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants Remlinger, Buttonwood and the individual partners of Buttonwood:

1. For compensatory damages of \$400,000.00 and punitive damages of \$250,000.00.
2. For costs of suit.
3. For such other relief as the Court deems just and proper.

SIXTH COUNT

1. The allegations of the First, Second, Third, Fourth and Fifth Counts of the Complaint are repeated as if set forth at length herein.

2. The actions of Remlinger, Buttonwood and the defendant partners of Buttonwood intentionally, maliciously and without justification interfered with the business and contractual relations between plaintiffs Benz and Cowan and defendants Richardson and McGregor.

3. Because of the unlawful actions and tortious interference of Remlinger, Buttonwood and the individual partners of Buttonwood, plaintiffs Benz and Cowan have lost substantial profits and economic benefits from their business venture and contractual relations with defendants, McGregor and Richardson.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants Remlinger, Buttonwood and the individual partners of Buttonwood:

1. For compensatory damages of \$400,000.00 and punitive damages of \$250,000.00.

2. For costs of suit.

3. For such other relief as the Court deems just and proper.

SEVENTH COUNT

1. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Counts of the Complaint are repeated as if set forth at length herein.

2. Plaintiffs Benz and Cowan had a reasonable expectation of prospective economic advantage from their participation in either the arrangement attached hereto as Exhibit A or the arrangement attached hereto as Exhibit B.

3. The actions of the defendants herein jointly and severally, maliciously and without justification, interfered with plaintiffs' reasonable expectations of prospective economic advantage which has caused the plaintiffs the loss of substantial profits and economic benefits.

WHEREFORE, plaintiffs Benz and Cowan demand judgment against the defendants:

1. For compensatory damages of \$400,000.00 and punitive damages of \$250,000.00.

2. For costs of suit.

3. For such other relief as the Court deems just and proper.

DATED this 3rd day of March, 1983.

RAY, QUINNEY & NEBEKER

Merlin O. Baker
Merlin O. Baker

John A. Adams
John A. Adams

Attorneys for Plaintiffs
Peter A. Benz and David Cowan
400 Deseret Building
Salt Lake City, Utah 84111

LETTER OF INTENT

McNeill/Hebew Group, Inc.
and West Bridge Street Corporation

This is to confirm our agreement to form a "Financial Management Company", the purpose of which is to establish a mechanism for a series of public trust that will become another "secondary market".

Initially, the "Company" will be using an inflation adjusted mortgage instrument to accomplish this purpose.

The essential terms are as follows:

1. Initial capitalization - \$250,000.00.
2. In addition to the \$250,000.00, there shall be available \$600,000.00 as back-up funding.
3. West Bridge Street Corporation shall retain a 45% interest in the Company in consideration for said funding.
4. McNeill/Hebew Group shall retain a 45% interest.
5. Jerold Oldroyd, attorney, shall have 10% interest.
6. Unanimous consent of the Board of Directors is required for calling the back-up funding. Any negative vote must be based upon a sound fundamental business reason as to this Company and shall not be arbitrary.
7. The Board of Directors shall be appointed in accordance with the interest of the stockholders and shall consist initially of five Directors.

EXHIBIT "A"

The execution of this Agreement is not binding, but is only an expression of intent.

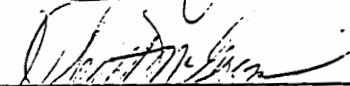
West Bridge Street Corporation

McBeil/Mehew Group, Inc.


By: Peter A. Benz


By: Eldon L. Richardson, II

DATED: December 3, 1981


By: D. Scott McGregor

COMPENSATION AGREEMENT

It is agreed between the parties hereto that should Donald Remlinger and/or Buttonwood Management Co. and its associates, affiliates, etc. enter into an agreement with the McNeil, Mehew Group, Inc. or Scott McGregor and Eldon L. Richardson, II either directly or indirectly that David Cowan and Peter Benz shall receive compensation as follows: (payee's also to include Bob Fugar, Doug Hume and Richard Anderson) as their interest may appear:

1. \$250,000 cash
2. A fifteen percent (15%) interest in any Company formed and arising from the aforementioned agreement.

This agreement entered into this 3rd day of December, 1981.

s/ David Cowan
s/ Peter A. Benz

s/ D. Scott McGregor
s/ Eldon L. Richardson, II

EXHIBIT 2

EXHIBIT "B"

Compensation Agreement

It is agreed between the parties hereto that
Donald Rumbin and/or Rumbin Management
Co and its associates, affiliates, etc. enter into an
agreement with the McNeil, Hyman & Co. Group, Inc.
or Subsidiary Group and Elder L. Richardson, II either
directly or indirectly that David Green and Peter Berg
shall receive compensation as follows: (payee is also to
include Ed Fugate, Doug Hume and Richard Anderson) first
of May 1977 ① \$250,000 cash

- ② A fifteen percent (15%) interest in any
company formed and arising from the
aforementioned agreement.

This agreement entered into this 3rd day of December 1977.

David Green

Peter A. Berg

Donald McNeil

Ed Fugate