

1992

LeAnna Robbins v. Old Republic Surety, North  
Western National Insurance Comapny of  
Milwaukee, Wisconsin, Atlas Stock Transfer, Check  
Rite International Inc., Cardinal Energy  
Corporation : Brief of Appellant

Utah Supreme Court

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BRIEF

920300

IN THE SUPREME COURT

OF THE STATE OF UTAH

LeANNA (BROADWATER) ROBBINS,

Cross-Appellant/  
Appellee/Plaintiff

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Appellants/  
Cross-Appellees/  
Defendants.

CROSS-APPELLANT'S BRIEF

Case No. ~~900508~~

920300

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Rule 56(f) Affidavit in Opposition to the  
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#### STATEMENT OF JURISDICTION

Jurisdiction over this appeal is based on Utah Code Ann. §78-2-2(3)(j), as amended, 1989.

#### STATEMENT OF ISSUES

Whether a person who has sustained undisputed damages under an open penalty indemnity bond issued to protect her and who receives no cooperation of any kind from either the issuer of the stock, the issuer's transfer agent, or the insurance company which issued the bond (Cross-Appellees herein), during which time such person's stock -- which she is prevented from obtaining possession of -- increases substantially in value, has a cause of action against any or all such entities for breach of an implied covenant of good faith and fair dealing (i.e., Count III of Cross-Appellant's amended complaint). [Emphasis added.]

Whether a person who has sustained undisputed damages under an open penalty indemnity bond issued to protect her and who is instructed by the obligee to deal directly with the obligor on the bond to resolve her claim, and, who does in fact deal directly with the bonding companies for several months to no avail (while the stock such person/owner has been deprived of increases substantially in value in the interim), and who is further informed directly by the bonding companies that they will resolve the claim with her directly but never do, has a cause of action against the bonding companies for either breach of an implied third-party beneficiary contract or bad faith refusal

(i.e., Counts IV and V of Cross-Appellant's amended complaint).  
[Emphasis added.]

(a) Standard of Review.

Because this appeal involves summary dismissal of Cross-Appellant Robbins' claims, this Court is free to reappraise the trial court's legal conclusions. Berube v. Fashion Centre, Ltd., 104 Utah Adv. Rep. 4, 771 P.2d 1033, 1039 (Utah Sup. Ct. 1989); Commerce Financial v. Markwest Corp., 142 Ut. Adv. Rep. 20, 22, 806 P.2d 200 (Ut. Ct. of App. 1990). Accordingly, this Court reviews the trial court's conclusions of law for correctness and accords them no particular deference. Bountiful v. Riley, 124 Utah Adv. Rep. 15, 784 P.2d 1174, 1175 (Ut. Sup. Ct. 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

The lower court's cursory dismissal of Counts III, IV, and V of Mrs. Robbins' amended complaint violates the open court provisions of the Utah Constitution. Art. 1, §11, Title 1A, Utah Code Ann., p. 83. It may also violate the Seventh Amendment of the U.S. Constitution. Title 1A, Utah Code Ann., p. 20.

STATEMENT OF THE CASE

(a) Nature of the proceedings. This appeal involves summary dismissal of Counts III, IV, and V of Cross-Appellant/Plaintiff's Amended Complaint, Exhibit "A" hereto; R. 69-114. Count III alleges a tort claim against all Cross-Appellees for breach of an implied covenant of good faith

and fair dealing; Count IV alleges breach of an implied third-party beneficiary contract as against the Insurance Company Appellees ("ICAs"); Count V alleges the tort of bad faith refusal on the part of the ICAs.

(b) Course of proceedings and disposition below. The lower court granted Cross-Appellant Robbins' motion for summary judgment on Counts I and II of her amended complaint. The Cross-Appellees' then obtained Rule 54(b) certification to appeal such ruling. Mrs. Robbins thus filed this cross-appeal relative to Counts III, IV, and V. Mrs. Robbins' negligence claim remains intact below and a trial, for obvious economic reasons, cannot proceed until this appeal is resolved.

#### RELEVANT FACTS

1. Several years ago, Cross-Appellant/Plaintiff LeAnna (Broadwater) Robbins<sup>1</sup> ("Cross-Appellant" or "Mrs. Robbins") purchased 8,000 shares of stock of Cross-Appellee Check Rite International, Inc. ("Check Rite") from Potter Investment Company, a local securities broker-dealer. (¶13, Amended Complaint, Exhibit "A" hereto; R. 69-114.)

2. Pursuant to her purchase, Mrs. Robbins received Check Rite Certificate No. 258, registered in the name of Defendant Scott J. Fletcher ("Fletcher"), a certificate which was

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<sup>1</sup> Since this case was filed in 1989, Cross-Appellant/Plaintiff has remarried and now goes by the name of Robbins as opposed to Broadwater.

endorsed-over by Fletcher and properly signature guaranteed.  
(¶13, Amended Complaint.)

3. Mrs. Robbins held the certificate in "street name" and in May, 1988, presented such certificate to Check Rite's transfer agent for registration into her name. The price of Check Rite stock was trading at about 25¢-30¢ per share. (¶36, Amended Complaint.)

4. On May 4, 1988, after Mrs. Robbins had presented Certificate No. 258 to Check Rite's stock transfer agent, Cross-Appellee Atlas Stock Transfer ("Atlas"), for transfer and registration into her name, Atlas refused transfer, kept Mrs. Robbins' certificate, and canceled it, further refusing to issue her a new certificate. (See Exhibit "J" to Plaintiff's Amended Complaint, Exhibit "A" hereto.) Atlas' justification for refusal was that Certificate No. 258 had been reported lost or stolen by Defendant Scott J. Fletcher. In reality, however, Fletcher had previously sold such certificate through Potter Investment, who had in turn sold the same to Mrs. Robbins. In other words, because Fletcher had posted a lost instrument bond relative to Certificate No. 258 and, as a result, obtained 8,000 additional replacement shares for himself, Atlas was required to place a "stop transfer" on Certificate No. 258. (¶37, Amended Complaint.)

5. Atlas informed Mrs. Robbins that Fletcher had posted the open penalty indemnity bond with Cross-Appellee Northwestern

National (hereinafter "Insurance Company Appellee" or "ICA")<sup>2</sup>. Atlas further instructed Mrs. Robbins to deal directly with Northwestern to resolve her claim. Atlas said that it did not know how to contact Northwestern about this problem inasmuch as it was "Northwestern's problem." Atlas specifically advised Mrs. Robbins to contact Northwestern directly and resolve the matter with it on her own. (¶s 37 and 38, Amended Complaint; ¶3, Exhibit "B" hereto.)

6. While Mrs. Robbins was instructed to deal directly with the ICAs, it is undisputed that the ICAs first received formal notice of her claim by at least May 20, 1988. (¶2, Exhibit "D" hereto, R. 390; Answers to Plaintiff's First Set of Interrogatories.)

7. Mrs. Robbins, with due diligence, sought to and did contact the ICAs' local Salt Lake branch office(s) as per Atlas' instructions. When she reached someone there in May 1988, she gave an employee the entire factual situation and background. Such employee informed Mrs. Robbins that he or she would "look into the situation" and immediately get back to her. Mrs. Robbins heard nothing. Having heard nothing for some time, Mrs. Robbins again phoned and reiterated the facts of her problem and informed the ICAs that Atlas had told her that they would

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<sup>2</sup> Insurance Company Appellee Northwestern, the obligor on the open penalty indemnity bond subject of this suit, was absorbed by Insurance Company Appellee Old Republic Surety. Thus, both were named as defendants in Mrs. Robbins' Amended Complaint.

remedy the problem, specifically, that they would buy her 8,000 replacement shares of Check Rite. The local ICA employee Mrs. Robbins again talked to on this second occasion said he or she would look into the matter and again get back to Mrs. Robbins. Mrs. Robbins again heard nothing for some time. Becoming frustrated that no one would help her, Mrs. Robbins phoned the Salt Lake ICA office a third time and demanded to know who she had to speak to directly to resolve her problem. At such point, Mrs. Robbins was directed to the ICAs' home office in Milwaukee, Wisconsin. Mrs. Robbins telephoned the home office of the ICAs and eventually, after much time, effort, conversation, and inquiry, was able, in late June 1988, to talk to Mr. Paul S. Guardalabene ("Guardalabene"), Assistant Claims Attorney for the ICAs. (¶2, Exhibit "D" hereto, R. 389-392; ¶'s 39 and 40, Amended Complaint.)

8. Guardalabene, the ICAs' agent and employee, informed Mrs. Robbins that he would resolve the matter with her directly. (¶'s 40 and 41 and Exhibits "K" and "L", Amended Complaint; ¶4, Exhibit "B" hereto, R. 186-190.)

9. During this time, namely, June end/early July 1988, Guardalabene contacted George "John" Potter of Potter Investment Company, the local stock brokerage firm who had sold Certificate No. 258 to Mrs. Robbins. Mr. Potter informed Guardalabene that penny stocks such as Check Rite were "highly volatile" and that, not knowing whether it could skyrocket in price, Guardalabene

ought to hurry and buy Mrs. Robbins 8,000 shares of replacement stock. (Affidavit of George "John" Potter, R. 381-383; ¶42, Amended Complaint.)

10. Guardalabene and Mrs. Robbins, during the ensuing period, continued to converse and Guardalabene led Mrs. Robbins to reasonably believe that the ICAs had a direct legal obligation of some kind to her, particularly in that there was no other reason why Guardalabene took it upon himself to resolve the matter with her directly. (¶41, Amended Complaint; ¶'s 4 and 5, Exhibit "B" hereto.)

11. Based on her direct and continued dealings with the Guardalabene, Mrs. Robbins came to believe that she had a "contract" of some kind with the ICAs or that they otherwise had a legal duty or other obligation to resolve the problem directly with her. (¶4, Exhibit "B" hereto.)

12. It is undisputed that between May 1988 and early August 1988 -- the time period during which Guardalabene was negotiating directly with Mrs. Robbins and allegedly investigating the matter -- the price of Check Rite stock increased from approximately 25¢ per share to \$1-5/16ths per share.<sup>3</sup> It is further undisputed that Guardalabene knew the price of Check Rite was on the rise and continuing to rise during this time. (¶'s 47 and 49 and Exhibit "L", Amended Complaint.)

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<sup>3</sup> This was due to the fact that Check Rite announced some kind of merger transaction -- a transaction which, after several months, eventually fell through.



13. As time went on, Guardalabene neglected to investigate the matter and, after stalling Mrs. Robbins for several months, continued to inform Mrs. Robbins that he was still "working on it." Eventually, to further stall Mrs. Robbins' claim, Guardalabene even went so far as to instruct Mrs. Robbins to deal directly with Defendant Fletcher. (¶15, Exhibit "E" hereto, R. 415.) Eventually, after several months and while the price of Check Rite stock had risen dramatically in price and reached its peak, Guardalabene finally informed Mrs. Robbins that there was a question as to whether Fletcher's signature on Certificate No. 258 was a forgery. (¶17, Exhibit "B" hereto, R. 188.) This latest excuse on the part of Guardalabene was put forth even though Fletcher himself sold the stock and had received a check from his stockbroker, Potter Investment, for its sale. (¶143, Amended Complaint; ¶17, Exhibit "B" hereto; ¶15, Exhibit "E" hereto.)

14. After the market price of Check Rite plummeted, Guardalabene informed Mrs. Robbins that she never should have been dealing with him all along -- as if it had been her fault for taking his representations at face value for several months -- and he informed her that she then had to deal, and should have dealt all along with Cross-Appellees Atlas, Check Rite, or even Defendant Fletcher. (¶146, Amended Complaint; ¶'s 8 and 9, Exhibit "B" hereto; ¶15, Exhibit "E.")

15. Because Mrs. Robbins was unable to possess and sell her 8,000 shares of Check Rite, Mrs. Robbins believes she has been directly damaged by the ICAs' continuous "lulling activity", regardless of how such is characterized in her Amended Complaint. (¶9, Exhibit "B" hereto; ¶7, Exhibit "D" hereto.)

16. Mrs. Robbins never received any replacement stock or any other compensation as a result of the conduct of Cross-Appellees. Mrs. Robbins also does not recall the ICAs ever having informed her that she was not an "obligee" on the bond until after the price of Check Rite stock had plummeted. [Emphasis added.] The ICAs further never informed Mrs. Robbins that she was not an "intended beneficiary" on the bond. Thus, there can be no dispute that Mrs. Robbins was led to believe by the ICAs that it was appropriate for her to have been dealing with them directly to resolve her claim. (¶'s 41, 43, 44, 45, and 46 of Amended Complaint; ¶2 and 6, Exhibit "D" hereto; ¶3, Exhibit "E" hereto.)

17. After the price of Check Rite dropped and because Mrs. Robbins did not believe that the matter would ever be resolved, Mrs. Robbins hired counsel who exchanged settlement correspondence with Guardalabene commencing as late as September 21, 1988. Since no settlement could be reached by the parties as to Mrs. Robbins' damages, and in the interim, because the stock had fallen well below \$1.25 and  $\$1\text{-}5/16\text{ths}$  per share to virtual worthlessness, this suit was filed by Mrs. Robbins in April 1989.

As a direct result of being forced by the Cross-Appellees to hire legal counsel to resolve the problem -- a problem that should have been resolved without litigation -- Mrs. Robbins has also incurred substantial unwarranted attorney's fees and costs as additional damages. (¶'s 8 and 9, Exhibit "B" hereto; ¶5, Exhibit "E" hereto.)

18. On June 26, 1989, after Mrs. Robbins filed her Amended Complaint in the lower court, the ICAs made a motion to dismiss. The trial court ordered such motion held in abeyance until discovery was completed. (R. 259-260.) Mrs. Robbins resisted such motion with two affidavits, copies of which are attached hereto as Exhibits "B" and "C".<sup>4</sup> (R. 186-195) While discovery in the lower court proceedings has never been completed, the ICAs, on February 27, 1990, renewed, re-entitled and re-filed their previous motion to dismiss as one for partial summary judgment dismissing Counts III, IV, and V of the Amended Complaint. (R. 307-309) At the same time, no new arguments or facts were presented to the lower court by the ICAs. Mrs. Robbins resisted such renewed motion with her affidavit filed in support of her own motion for summary judgment on Counts I and II, a copy of which is attached hereto as Exhibit "D." (R. 389-392) Mrs. Robbins further resisted the "renewed" motion

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<sup>4</sup> Mrs. Robbins also made a request to treat the ICAs' motion to dismiss as one for summary judgment (R. 183-185), a request ignored by the lower court. See last sentence of Rule 12(b)(6), Utah Rules of Civil Procedure.

with her own opposing affidavit and a Rule 56(f) affidavit attesting how and why discovery was not complete as to Counts III, IV, and V, the latter of which was consistent with the lower court's previous ruling in that regard. The latter two opposing affidavits are attached hereto as Exhibits "E" and "F."

(R. 413-416 and 542-547, respectively). Nonetheless, on May 24, 1990, the lower court dismissed Counts III, IV, and V without cause and as an obvious trade-off for granting Mrs. Robbins a summary judgment on Counts I and II of her Amended Complaint, a judgment which Cross-Appellees have also appealed to this Court. (R. 710-712; see also Exhibit "B" to Mrs. Robbins' Docketing Statement.) This cross-appeal has ensued.

#### SUMMARY OF ARGUMENT

The crux of Mrs. Robbins' cross-appeal is Rule 12(b)(6), Utah Rules of Civil Procedure. There can be little dispute that Mrs. Robbins has been damaged by the Cross-Appellees.

Mrs. Robbins merely lent titles to Counts III, IV, and V in an effort to give Cross-Appellees some notice as to that with which they are charged. The titles of such causes of action are not on trial -- only the potential liability of Cross-Appellees. Yet, such liability should be within the province of a jury. The lower court simply ignored U.S. and Utah Supreme Court standards

in dismissing counts III-V of Mrs. Robbins' amended complaint as a matter of law.<sup>5</sup>

Mrs. Robbins' fourth claim for relief, a claim against the ICAs grounded in contract, is valid because Mrs. Robbins is a creditor beneficiary and/or an intended beneficiary on the bond. Further, the bond by its own terms, provides for "absolute liability." (See Exhibit "E" to the amended complaint, Ex. "A" hereto.)

Mrs. Robbins' third and fifth claims for relief are grounded in tort. These claims are valid based on Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Ut. Sup. Ct. 1985) and Culp Construction Co. v. Buildmart Mall, 137 Utah Adv. Rep. 4, 6 and notes 9 and 12, 795 P.2d 650 (Ut. Sup. Ct. 1990) (" . . . our holding in Beck does not preclude the bringing of a tort claim independently of a contract claim . . . . Furthermore, 'privity of contract is not a necessary prerequisite to liability.'").

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<sup>5</sup> Conely v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)(a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)(a trial court, in ruling on a motion to dismiss, is required to view the complaint in a light most favorable to plaintiff); Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984)(it is only proper to dismiss a complaint for failure to state a claim when plaintiff can prove no set of facts which would entitle plaintiff to relief); Burnett v. Utah Power & Light Co., 142 Utah Adv. Rep. 3, 797 P.2d 1096 (Ut. Sup. Ct. September 4, 1990)(involuntary dismissal is a severe measure and is only appropriate where it appears to a "certainty" that plaintiff cannot recover); Avila v. Winn, 136 Utah Adv. Rep. 3, 794 P.2d 20, 22 (Ut. Sup. Ct. 1990)(involuntary dismissal only allowed if plaintiff fails to show that upon the facts and the law, he or she has no right to recover).

DETAIL OF ARGUMENT

POINT I

AS A MATTER OF LAW, MRS. ROBBINS IS A THIRD-PARTY CREDITOR BENEFICIARY ON THE OPEN PENALTY INDEMNITY BOND AND THEREFORE COUNT IV OF HER AMENDED COMPLAINT STATES A VALID CAUSE OF ACTION IN CONTRACT AGAINST THE INSURANCE COMPANY CROSS-APPELLEES ("ICA"s).

The ICAs admit in the lower court proceedings that the open penalty indemnity bond upon which Mrs. Robbins is suing is a third-party beneficiary contract. They contend, however, that Mrs. Robbins is not an "intended beneficiary" thereunder. This contention is made even though the bond reads as follows:

The Surety agrees that its liability herein under shall be absolute, regardless of any liability of the Principal hereunder, whether by reason of any irregular or unauthorized execution of, or failure to execute this bond, or any absence or interest of the Principal in the subject matter hereof, or otherwise.  
[Emphasis added.]

See Exhibit "E" to Mrs. Robbins' Amended Complaint, a copy of the bond in issue.

Relative to Mrs. Robbins' contract claim, the threshold issue is whether Mrs. Robbins is either a donee beneficiary or creditor beneficiary under the bond. Schwinghammer v. Alexander, 21 Utah 2d 418, 446 P.2d 1254, 415 (Sup. Ct. of Ut. 1968) (holding that one must be either a donee or creditor beneficiary to have an enforceable contract right).<sup>6</sup> In Fleck v. National Property

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<sup>6</sup> See also Ringwood v. Foreign Auto Works, Inc., 125 Utah Adv. Rep. 45, 47, 795 P.2d 1138 (Ut. Ct. App. 1990); Palmer v. Davis, 155 Utah Adv. Rep. 34, 36, \_\_ P.2d \_\_ (Ut. Ct. App. March 7, 1991).

Management, Inc., 590 P.2d 1254, 1256 (Sup. Ct. of Ut. 1979), this Court held that a creditor beneficiary is one in whom the promisee's expressed intent is that some third-party shall receive performance and satisfaction in discharge of some actual supposed duty or liability of the promisee, in this case, Cross-Appellees Atlas and Check Rite. In this case, the purpose of the bond was to insure that Mrs. Robbins would be issued or delivered replacement stock in satisfaction and discharge of the duty or liability created by such bond.

In the trial court below, the ICAs cited Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Ut. 1982), for the proposition that nothing in the bond agreement evidences that the ICAs intended to benefit Mrs. Robbins. On the contrary, the bond instrument, by its own terms, states that the liability of the obligor, namely, the ICAs, is "absolute." Further, the bond was put up or posted for Mrs. Robbins' exclusive benefit though no one knew who she was or would be, unlike the facts in Tracy Collins.

In this case, there is no question that the bond was put up explicitly for Mrs. Robbins' benefit or someone like her, otherwise there would have been no reason for Defendant Fletcher to have obtained it. Tracy Collins involved a secured creditor who never enforced its right as such. There is no question that the Cross-Appellees in this case obtained the bond to protect a person like Mrs. Robbins at the time the bond was posted.

[Emphasis Ours.] In Tracy Collins, the contracting parties knew nothing of the secured creditor plaintiff at the time the contract was entered into. The Tracy Collins Court further said that if benefits are "incidental" then the person suing cannot recover.<sup>7</sup>

Mrs. Robbins is not a "stranger" to the promise (bond) because the purpose of the bond is to safeguard against her appearance at some future date. Cross-Appellee Atlas, as Atkinson in Tracy Collins, surely cannot testify that it knew a person like Mrs. Robbins would never ultimately make a request for transfer as Atkinson knew absolutely nothing of Tracy Collins in Tracy Collins. Tracy Collins involved disbursements out of an escrow to a secured creditor that Atkinson knew nothing about. Tracy Collins' remedy was to enforce its rights only as a secured creditor: a remedy Mrs. Robbins is not so fortunate to have at her disposal.<sup>8</sup>

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<sup>7</sup> The Tracy Collins Court further stated that whether the benefit to be conferred upon the plaintiff was "incidental" to performance is a question of fact determined by the intentions of the parties. Tracy Collins supra at p. 1315. Here, there is nothing remotely "incidental" about Mrs. Robbins' relationship to the Cross-Appellees simply because the ICAs' performance would be triggered when a person like Mrs. Robbins appeared on the scene to make a claim on the bond. Clearly, the exclusive intent of the bond was to protect a prospective third-party, otherwise there would be no bond.

<sup>8</sup> It is also readily arguable that because Atlas instructed Mrs. Robbins to deal directly with the ICAs, that such effected either a waiver or an express assignment of its contractual rights to Mrs. Robbins. As a result, she thus stands in Atlas' shoes as an obligee on the bond.



In Tremble v. Fitzgerald, 626 P.2d 453, 454 (Utah 1981), this Court held that a third-party beneficiary must essentially prove that the contract was intended to benefit him directly. In this case, there is no one else who could or would conceivably benefit directly from the bond other than Mrs. Robbins.<sup>9</sup> The Tremble Court, as the Court in Tracy Collins, further stated that it is an issue of fact as to what the parties intended. Id. Based on these authorities, the lower court manifestly erred in dismissing Count IV without a trial.

Tremble involved an earnest money agreement providing: "Buyer to be responsible for real-estate commissions." The earnest money agreement contained no language that, in and of itself, it would benefit the third-party broker. This is because he was to get paid separately by the buyer, his client. In this case Mrs. Robbins was not Atlas' client and the bond only contemplates restitution to Mrs. Robbins if and when Certificate No. 258 resurfaced, which it did. Clearly, there is no other purpose for the bond. In Tremble, the purpose of the earnest money agreement was not to pay the broker real estate commissions but merely to sell the property. In this case, there is no reason for Mrs. Robbins to prove that the bond was "intended" to benefit her directly: the sole purpose of the bond was to protect her. To be sure, without a possible and foreseeable

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<sup>9</sup> Other than Defendant Fletcher, of course, who had already been able to obtain another 8,000 shares -- 8,000 more shares than he was entitled to.

Mrs. Robbins -- one which all the parties foresaw -- no bond would have been necessary. In Tremble, the realtor could have been paid or not been paid regardless of an earnest money agreement and its purpose.

In Fleck v. National Property Management, Inc., supra, the defendants argued that damages were not caused by the failure to do that for which the bond was designed to accomplish, namely, the construction of improvements on certain property. In this case, Mrs. Robbins' damages have been caused by that very failure for which the bond was put up, namely, to cover all damages caused by a lost instrument that resurfaces. The Fleck plaintiffs lost property through a foreclosure sale under trust deeds. Such plaintiffs didn't redeem, but claimed their damages were the result of defendants' failure to improve the property -- property they had already lost. The Fleck court held that plaintiffs' damages had nothing whatsoever to do with the bond. This is because the damages caused the Fleck plaintiffs (i.e., loss of title to the property) were not reasonably foreseeable from a breach of the bond contract. Failure to make improvements did not cause foreclosure of the trust deeds and plaintiffs' consequent loss of title. On the contrary, in this case, the failure of the ICAs to do anything, let alone honor their bond (which is apparently not worth the paper it's written on), has indeed been the proximate cause of Mrs. Robbins'

damages.<sup>10</sup> The issue is thus simply whether the parties to the bond contract had a purpose or object to benefit a third person. Kelly v. Richard, 95 Utah 560, 83 P.2d 731 (1938). In this case, the Cross-Appellees did, not merely by virtue of the bond itself, but by their own undisputed conduct once Mrs. Robbins lodged her claim.

In Rio Algom Corporation v. Jimco Ltd., 618 P.2d 497 (Utah Sup. Ct. 1980), this Court held that third-party beneficiaries are persons recognized as having an enforceable right created on a contract to which they give no consideration. Again, had it not been for the possibility of Certificate No. 258 resurfacing, the bond wouldn't have been necessary. Thus, how can the Cross-Appellees argue that the actual parties to the bond did not in fact contemplate her? In none of the cases cited by the ICAs before the lower court were the third-parties directly damaged by the parties against whom they sought to recover as their third-party beneficiaries. As a matter of fact, contrary to what the Cross-Appellees have asserted below, the issue in Rio Algom was merely whether there was a fiduciary relationship between co-tenants. Stoltz v. Maloney, 630 P.2d 560, 563 (Ariz. App. 1981). Such is irrelevant here. In this case, there is absolutely no question that the Cross-Appellees' failure to

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<sup>10</sup> In fact, the Cross-Appellees' entire defense below has been railroaded by the ICAs, thereby preventing Atlas and Check Rite, the obligees on the bond, from settling, even if they had wanted to. See Atlas' crossclaim below, R. 140-166.

deliver Mrs. Robbins replacement stock on a rising market price for such stock directly caused her damage.

POINT II

MRS. ROBBINS IS IN PRIVACY OF CONTRACT WITH THE INSURANCE COMPANY CROSS-APPELLEES ("ICA"s) BY VIRTUE OF THEIR CONDUCT, REPRESENTATIONS, AND DIRECT DEALINGS WITH HER OR OTHERWISE, UNDER PRINCIPLES OF PROMISSORY ESTOPPEL. FOR THIS REASON, MRS. ROBBINS' CLAIMS ARE NOT BARRED.

The elements of estoppel are: "Conduct by one party which leads another party in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate its conduct." Clarke v. American Concept Insurance Co., 87 Ut. Adv. Rep. 29, 31, 758 P.2d 470 (Ut. Ct. of App. 1988); Scheller v. Dixie Six Corp., 81 Ut. Adv. Rep. 27, 28, 753 P. 2d 971 (Ut. Ct. of App. 1988); Blackhurst v. TransAmerica Ins. Co., 699 P.2d 688, 691 (Ut. Sup. Ct. 1985). More recently, in Eldredge v. Utah State Retirement Board, 137 Utah Adv. Rep. 25, 27, 795 P.2d 671 (Ut. Ct. of App. 1990), the Utah Court of Appeals articulated the elements essential to invoke equitable estoppel, all of which are present here. There is no question that ICAs' continuous misleading conduct and lulling activity led Mrs. Robbins, in direct reliance thereon, to adopt a course of action resulting in her detriment or damage,<sup>11</sup> particularly if

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<sup>11</sup> For instance, had Mrs. Robbins known what she knows today, she would have immediately filed suit in May, June or July 1988 and obtained some kind of order enjoining the ICAs from not honoring the bond or otherwise compelling them to immediately furnish her replacement stock.

the ICAs are now permitted to repudiate such conduct. Accordingly, if the lower court dismissed Counts III, IV, and V of Mrs. Robbins' Amended Complaint, Exhibit "A" hereto, on the basis of an alleged "lack of privity," it erred.<sup>12</sup>

In order to determine the nature of a contract or if there is one between Mrs. Robbins and the Cross-Appellees, the Court must consider the intent of the parties and the totality of circumstances. Rhodes v. Allied Development Company, 719 P.2d 83, 85 (Ut. Sup. Ct. 1986). Based on Guardalabene's conduct and Atlas' oral assignment of its rights to Mrs. Robbins, the issue of whether Mrs. Robbins and any Cross-Appellee had any "contract," or were otherwise in privity, is a question of fact precluding the lower court's summary dismissal without a trial.

### POINT III

MRS. ROBBINS' AMENDED COMPLAINT STATES A CAUSE OF ACTION AGAINST CROSS-APPELLEES IN TORT BECAUSE CROSS-APPELLEES OWED, HAD, OR ASSUMED A DUTY TO HER AND OTHERWISE, THEIR CONDUCT WAS UNREASONABLE AND IT DIRECTLY AND PROXIMATELY CAUSED HER DAMAGE.

The ICAs have cited Amica Mutual Insurance Company v. Schettler, 100 Ut. Adv. Rep. 17, 768 P.2d 950 (Ut. Ct. of App.

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<sup>12</sup> Mrs. Robbins may also have a contract with the ICAs implied-in-fact. See Scheller, *supra* at 30. There is no question that Guardalabene represented to Mrs. Robbins that if she furnished him all of the documentation he requested that the matter would not only be settled, but it would be settled quickly. There is thus detrimental reliance, a substitute for consideration. Guardalabene knew or should have known that Mrs. Robbins expected him to fulfill his promises. In this regard, the existence of an implied-in-fact contract is also a question of fact. Gilmore v. Salt Lake Area Community Action Program, 110 Ut. Adv. Rep. 51, \_\_ P.2d \_\_, (Ut. Ct. of App. 1989)(writ of cert. filed).

1989) and Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Ut. 1985) for the proposition that Mrs. Robbins' tort claims (i.e., Counts III and V) are barred. On the contrary, all Beck did was hold that a tort cause of action in a third-party context is not present in a first-party situation. Saying it another way, Beck only holds that in a first-party relationship, the duties and obligations of the parties are contractual rather than fiduciary. This is consistent with this Court's previous recognition of a tort cause of action for breach of an insurer's obligation to bargain in a third-party context. Ammerman v. Farmers Insurance Exchange, 19 Utah 2d 261, 430 P.2d 576 (1967). In this case, the ICAs created a fiduciary relationship with Mrs. Robbins by virtue of the conduct of Guardalabene, their exclusive agent. In Timmons v. Royal Globe Insurance Company, 653 P.2d 907 (Okla. 1982), the Supreme Court of Oklahoma held:

There is but one duty to deal fairly and in good faith, which is owed by the insurer to both the insured and third-parties. [Emphasis added.]

Timmons at p. 911.

Recently, this Court clarified Beck in Culp Construction Co. v. Buildmart Mall, 137 Utah Adv. Rep. 4, 6 and notes 9 and 12, 795 P.2d 650 (Ut. Sup. Ct. 1990). Culp is thus dispositive of this entire cross-appeal.

Based on the foregoing, Mrs. Robbins is entitled to maintain her tort action for the ICAs' bad faith refusal or bad

faith bargaining with her and Cross-Appellees Atlas and Check Rite. Mrs. Robbins is further entitled to maintain her tort claim against all Cross-Appellees for breach of an implied covenant of good faith and fair dealing, Count III of her Amended Complaint.<sup>13</sup>

The ICAs have argued that they had no duty to Mrs. Robbins and caused her no damage. This is completely belied by the facts of this case. No reasonable person, let alone a reasonable attorney employed by any reputable insurance company, would have led a person down the primrose path for several months thinking it was proper for her to be dealing directly with him (whether she was or not), only to turn around after the price of the stock had dropped and inform her that she had been wasting her time. If this is not bad faith or at least breach of any covenant of good faith and fair dealing, or, something exceedingly more pernicious, then such concepts simply have no meaning. The ICAs have cited the case of Beach v. The University of Utah, 726 P.2d 413 (Utah 1986) for the proposition that they

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<sup>13</sup> Recently, the Court of Appeals issued Pixton v. State Farm Mutual, 158 Utah Adv. Rep. 31, \_\_\_ P.2d \_\_\_ (Ut. Ct. of App. April 8, 1991). Therein, the court misread Beck and held that a contractual duty is a necessary prerequisite to tort liability (i.e., a fiduciary duty). Id. at p. 34, top. This is neither the law of this Court nor what Beck holds. Regardless, there became a contractual relationship in this case and if not, the reality is that the ICAs did cause Mrs. Robbins damage. As a result, it shouldn't matter how the relationship between the parties to this appeal is characterized. See e.g., Culp Const. Co. v. Buildmart Mall, 137 Utah Adv. Rep. 4, 6, and notes 9 and 12, 795 P.2d 650 (Ut. Sup. Ct. June 20, 1990) ("... our holding in Beck does not preclude the bringing of a tort claim independently of a contract claim.") In short, the Court of Appeals' Pixton decision cannot be squared with this Court's decisions in Beck and Culp Construction.

did not commit a tort on Mrs. Robbins. That case merely involved a student who was injured when a University-sponsored field trip resulted in an injury. The Court held that "the law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties." Id. at 415.

Unfortunately for the Cross-Appellees, the case at bar clearly involves a "special relationship" existing between Mrs. Robbins and the ICAs by virtue of not only the bond, but Guardalabene's undisputed conduct and continuous false representations.

Further, the case at bar involves an "affirmative duty" existing by virtue of an open penalty indemnity bond providing for "absolute liability." Beach supra has been quoted in University of Denver v. Whitlock, 744 P. 2d 54, 58 (Colo. Sup. Ct. 1987), in which the Colorado Supreme Court stated that

the law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or mutual dependence. (Citing Beach at 415-16.)

The ICAs contend that the circumstances of this case do not create any duty or any special relationship. Such argument is simply antithetical to the facts of this case: the ICAs in fact treated Mrs. Robbins as an obligee on the bond and as though they had a fiduciary relationship or other obligation to her.

#### CONCLUSION

The lower court's summary dismissal of Counts III, IV, and V of Mrs. Robbins' Amended Complaint without a trial is

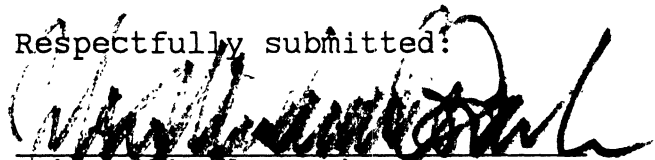


manifest error. Certainly there is an issue of fact as to whether the ICAs' conduct resulted in either detrimental reliance or the creation of a privity situation. If there is no privity as a matter of law, such may only mean that Count IV was properly dismissed below. Counts III and V are grounded in tort and, under Beck and Culp Construction, Mrs. Robbins has valid tort claims against Cross-Appellees. This is evidenced by Mrs. Robbins' several lower court affidavits, each of which are attached in the addendum hereto and their contents incorporated by reference.

There are innumerable justiciable issues of fact remaining to be resolved in this case. Based on the foregoing, the lower court should be reversed so Mrs. Robbins may present her just claims to a jury.

DATED this 27th day of August, 1991.

Respectfully submitted:



John Michael Coombs  
Attorney for Cross-Appellant  
(Broadwater) Robbins

PROOF OF SERVICE

The undersigned hereby certifies that on the 27th day of August, 1991, (s)he mailed sufficient true and correct copies of the foregoing CROSS-APPELLANT'S BRIEF by regular mail, postage prepaid to:

Robert A. Burton, Esq.  
Stephen J. Trayner, Esq.  
H. Burt Ringwood, Esq.  
Attorneys for Defendants Old Republic  
Surety and Northwestern National  
Insurance Company of Milwaukee,  
Wisconsin  
STRONG & HANNI  
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Larry G. Reed, Esq.  
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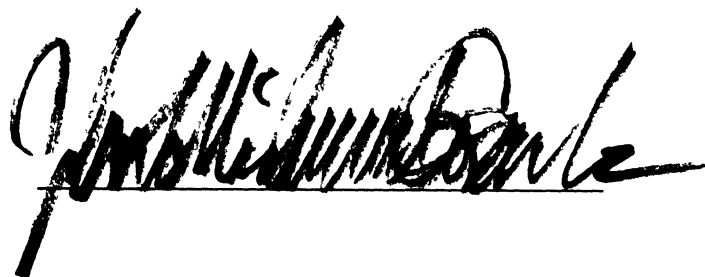
A handwritten signature in black ink, appearing to read "Phillip R. Hughes", written over a horizontal line.

EXHIBIT "A"

JOHN MICHAEL COOMBS, No. 3639  
ATTORNEY for Plaintiff 72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

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

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LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a CARDINAL  
ENERGY CORPORATION, a Utah  
corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AMENDED COMPLAINT AND  
JURY DEMAND

Civil No. 89-0902684-CV

Judge Raymond S. Uno

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Plaintiff LeAnna Broadwater hereby alleges and complains that Defendants jointly and  
severally or individually where otherwise indicated as follows:

PARTIES

1. Plaintiff LeAnna Broadwater is a Salt Lake County resident. She is the lawful and undisputed assignee or successor-in-interest of KASU Securities, Inc., the purchaser of certain shares of Cardinal Energy Corporation subject to this dispute.

2. Defendant Atlas Stock Transfer Corporation, ("Atlas") is a Utah corporation doing business in Salt Lake County. It is an obligee on the open penalty indemnity bond subject hereto.

3. Defendant Cardinal Energy Corporation ("Cardinal") n/k/a Check-Rite International, Inc., ("Check-Rite") is a publicly held Utah corporation and the issuer of the securities subject to this dispute. Its transfer agent is Atlas and it is an obligee on the open penalty indemnity bond subject hereto.

4. Defendant Northwestern National Insurance Company of Milwaukee, Wisconsin ("Northwestern") is a Wisconsin corporation licensed as a foreign corporation to do business in Utah and further licensed with the Utah Insurance Department to do business in this state. It is the obligor on the open penalty indemnity bond subject hereto.

5. Defendant Old Republic Surety ("Old Republic") is a Wisconsin corporation licensed as a foreign corporation to do business in the state of Utah and further licensed with the Utah Insurance Department to do business in this state. It is believed to have acquired Defendant Northwestern and therefore it is the assignee or successor-in-interest of all claims as against Defendant Northwestern.

6. Defendant Scott J. Fletcher is a Utah resident. He is the purchaser of and principal on the open penalty indemnity bond at issue in this case which he obtained through fraud as set forth below.

#### JURISDICTION

7. Jurisdiction over the parties is based on the fact that state courts are of general jurisdiction and Defendants Northwestern and Old Republic have consented to jurisdiction by being licensed in this state to do business. Jurisdiction is further based on 18 U.S.C. §1964(c) of the Racketeer Influenced and Corrupt Organizations Act.

#### FACTUAL ALLEGATIONS

8. On August 17, 1981, Defendant Fletcher placed an order to sell six thousand (6,000) shares of Cardinal Energy Corporation ("Cardinal") with Potter Investment Company ("Potter"), a local securities broker-dealer as evidenced by Exhibit "A" hereto, a true and correct copy of Fletcher's stock sale confirmation. On the same date, Fletcher placed a similar order with Potter to sell 2,000 Cardinal shares represented by Certificate 568 for the account of Jeanne Winder, Fletcher's neighbor, as further set forth below.

9. On August 27, 1981, Defendant Fletcher placed a another order with Potter to sell two thousand (2,000) additional shares of Cardinal as evidenced by Exhibit "B" hereto, a true and correct copy of Fletcher's stock sale confirmation.

10. To honor Fletcher's 8,000 share sale orders, Fletcher delivered Cardinal certificate No. 258, representing eight thousand (8,000) shares, and issued in his name to Potter on 7/27/81.

11. On 7/27/81, Potter issued a check to Fletcher in the amount of \$1,699.80 as payment for his sale of six thousand (6,000) Cardinal shares. It is undisputed that such check was received by Fletcher and deposited in his bank account as evidenced by Exhibit "C" hereto, a true and correct copy of such Potter check, front and reverse sides thereof.

12. On 8/4/81, Potter issued a check to Fletcher in the amount of five hundred sixty dollars (\$560.00) as payment for his 4/27/81 sale of two thousand (2,000) Cardinal shares. It is undisputed that such check was received by Fletcher and deposited in his bank account as evidenced by Exhibit "D", a true and correct copy of such Potter check, front and reverse sides thereof.

13. On or about September 21, 1981, Plaintiff Broadwater, acting on behalf of KASU Securities, purchased eight thousand (8,000) shares of Cardinal stock from Potter. Potter delivered certificate No. 258 to Plaintiff which had been signed over by Fletcher and properly signed and guaranteed. Such is known in the securities industry as "street stock" and certificates representing such are negotiable instruments.

14. Approximately one (1) year later, on or about August 23, 1982, Fletcher falsely claimed that certificate No. 258 had been lost or stolen. Thereupon Fletcher posted a bond through Defendant Northwestern (now Old Republic) and paid the premium thereon. Fletcher was issued a new Cardinal certificate in the amount of eight thousand (8,000) shares. A true and correct copy on such bond which is the subject of this dispute, the premium of which was accepted by Defendant Northwestern, is attached hereto and incorporated by reference as Exhibit "E", denominated by bond No. UMI871385.

15. Such open penalty indemnity bond, Exhibit "E" hereto, sets forth Defendant Northwestern as the obligor thereon and Defendants Atlas and Cardinal (now Check-Rite) as obligees.

16. On or about August 9, 1982, Defendant Fletcher also sold, through Potter, Cardinal certificate No. 676, also representing eight thousand (8,000) shares and also registered in his name. A true and correct copy of Fletcher's stock sale confirmation is attached hereto and incorporated by reference as Plaintiff's Exhibit "F".

17. Defendant Fletcher received \$1,374.20 from Potter on 8/25/82 for his sale of certificate 676 as evidenced by Exhibit "G" hereto, a true and correct copy of Potter's returned check, front and reverse sides thereof, further evidencing deposit of such in Fletcher's bank account.

18. It is undisputed that after selling certificate No. 676 and receiving valuable consideration therefor, Fletcher on or about November 23, 1983, claimed and alleged that Cardinal certificate No. 676 had been lost or stolen.

19. On November 23, 1983, Fletcher, after having previously sold certificate No. 676, and having declared it lost or stolen, caused Defendant Northwestern to issue an additional open penalty indemnity bond to cancel certificate 676. A true and correct copy of this additional bond, obtained from Defendant Northwestern for Fletcher's benefit, is attached hereto and incorporated by reference as Exhibit "H" and denominated by Bond No. UMI902168.

20. A new replacement certificate was then issued to Fletcher on said date by Atlas in reliance on such bond.



21. Subsequently, certificate 676 surfaced and when it was submitted for transfer, Defendant Northwestern, after demand by Defendant Atlas, paid sufficient funds to replace that certificate in the amount of eight thousand (8,000) shares for its bona fide purchaser.

22. It is thus undisputed that Fletcher was issued an additional eight thousand (8,000) shares on at least two occasions or at total of 16,000 shares as a result of his posting two open penalty indemnity bonds through Defendant Northwestern.

23. Based on the foregoing, Fletcher was able to unlawfully obtain an additional sixteen thousand (16,000) shares to which he was not entitled and which he is also believed to have subsequently sold, as with the first sixteen thousand shares (16,000), in interstate commerce.

24. The foregoing actions of Fletcher were a fraud in that Fletcher had not lost or had stolen either certificate 258 or 676 inasmuch as he had sold such certificates and knew or had to have known he had done such.

25. The two frauds of Fletcher each constitute a "predicate act" of racketeering as contemplated in 18 U.S.C. §1961(1) of the Racketeer Influenced and Corrupt Organizations Act and a "pattern" in that regard as contemplated thereunder.

26. Plaintiff further asserts and believes that Fletcher was and has been under criminal investigation by the Utah Attorney General's office for such frauds, an investigation at one time spear-headed by David Baskam, a former Assistant Attorney General. Plaintiff further believes that Fletcher has been brought before an LDS Bishop's Court for his history and pattern of fraudulent activity. In this regard, Plaintiff asserts and believes that Fletcher, relative to a "project" in Green River, Utah, Fletcher was promoting, also

defrauded Jeanne C. Winder and her family out of approximately \$14,000. This conduct may constitute but another "predicate act(s) of racketeering" on the part of Fletcher as contemplated in RICO.

27. Plaintiff further asserts and believes that Defendant Fletcher is a sophisticated businessman who is knowledgeable about securities and brokerage affairs and who maintains numerous brokerage accounts. For this reason his actions are nothing less than intentional, let alone reckless, as contemplated in Section 61-1-22(1)(b) of the Utah Uniform Securities Act and otherwise under federal securities and other laws.

28. Plaintiff believes and asserts that Fletcher has engaged in similar if not identical "predicate acts of racketeering", namely by fraudulently obtaining lost instrument bonds on securities already sold or which he intends to sell and does sell in interstate commerce or through the mails.

29. Plaintiff further asserts that Fletcher was acting or has acted as an investment or business advisor for others, including one Jeanne C. Winder, believed to be an unsophisticated woman. Fletcher also has never registered under the Investment Advisor's Act or Utah's statutory counterpart thereto.

30. On the same day as Fletcher sold 6,000 Cardinal shares, namely 7/17/81, Fletcher also sold two thousand (2,000) shares of Cardinal through Potter for Winder's account and he, not Winder, received \$560 from Potter on 7/27/81. Fletcher delivered certificate No. 568 to Potter. On or about December 14, 1982, Fletcher, for Ms. Winder, posted an identical Northwestern open penalty indemnity bond on certificate No. 568, based on the belief that the certificate Fletcher sold, for Winder on 7/17/81, had been (like Fletcher's

two other certs) lost or stolen. A true and correct copy of a third bond Fletcher posted through Northwestern for Winder on alleged lost or stolen certificate 568 is attached hereto as Exhibit "I" and denominated by Bond No. UMI880735.

31. Ms. Winder was a neighbor of Fletcher and Plaintiff asserts that at all times Winder was acting at Fletcher's exclusive direction. Further, Fletcher was a "control person" of Winder as contemplated in Section 15 of the Securities Act of 1933 and Section 20(a) of the Securities Act of 1934 and therefore her acts are ascribable or attributable to Fletcher and he is thereby liable therefor.

32. Based on Fletcher's control of Winder, Plaintiff asserts and believes that the activity of Winder through Fletcher is but a third "predicate act of racketeering" ascribable and attributable to Fletcher. Plaintiff asserts that Winder would not have sold her two thousand shares (2,000) and then posted an identical lost instrument bond with the very same bonding company used twice by Fletcher unless she was acting under his exclusive control, direction, and advice.

33. On or during February, 1985, based on Winder's alleged lost certificate, Potter, who had purchased certificate 568 from Fletcher for Winder's account put a demand on Defendants Check-Rite, Atlas, and Northwestern to replace certificate No. 568 allegedly lost by Winder.

34. Potter obtained a quote on two thousand (2,000) shares of Check-Rite during February, 1985, and Defendant Northwestern honored its obligation on the Winder bond, purchasing such two thousand (2,000) shares in the open market to cover its liability.

Thereby, Potter received two thousand (2,000) replacement shares of Check-Rite which it delivered to the bona fide purchaser of certificate 568.

35. Based on the foregoing, Defendant Northwestern honored the Winder bond and the second bond posted by Fletcher on certificate 676 but, under absolutely identical circumstances, has refused to honor bond No. UMI871385 in bad faith and to the detriment of Plaintiff as set forth more fully hereinbelow. (See ¶21 hereinabove.)

36. In May, 1988, Plaintiff submitted Cardinal certificate 258 to Atlas Stock Transfer to be registered in her name. Until that time Plaintiff had held such certificate in her safe deposit box for purposes of investment until such time as she sought to have such shares transferred.

37. Atlas responded with a letter attached hereto and incorporated by reference as Exhibit "J" in which it refused to act on Plaintiff's lawful request.

38. Thereafter, Atlas directed Plaintiff to resolve the dispute directly with Defendant Northwestern and/or Potter.

39. Plaintiff telephoned Northwestern's local office in May 1988 and lodged her complaint which was ignored.

40. Based on the non-responsiveness of Northwestern and/or Old Republic's local office, Plaintiff, in May 1988, subsequently telephoned such Insurance Company Defendant's main offices in Milwaukee, and, over the ensuing months had numerous telephone conversations with one Paul S. Guardalabene ("Guardalabene"), Assistant Claims Attorney for Defendants Northwestern and Old Republic.

41. Guardalabene proceeded to delay the matter by requesting voluminous and totally unnecessary and irrelevant documentation as to how, why, and when Plaintiff obtained the eight thousand (8,000) shares from KASU Securities, Inc., etc. During such telephone conversations of which there were several, Plaintiff continually put demand on Guardalabene to replace her 8,000 shares consistent with the Insurance Company Defendants' obligations under the open penalty bond. During this time, Guardalabene treated Plaintiff and gave Plaintiff the reasonable impression that she was the obligee on the open penalty indemnity bond and that it was appropriate for her, as opposed to Atlas and Check-Rite, to deal directly with the Insurance Company Defendants.

42. Prior to July 1988, Guardalabene also had telephone discussions with Potter and was informed by and otherwise put on notice directly by John Potter that penny stocks such as Check-Rite were volatile and that therefore he (Guardalabene) ought to hurry and replace Plaintiff's eight thousand (8,000) share certificate.

43. Regardless of such demands and warnings, Guardalabene continued to stall and delay Plaintiff and based on Guardalabene's dishonor of the bond posted by Fletcher, Plaintiff sent a letter to Guardalabene dated July 11, 1988, a true and correct copy of which is attached hereto as Plaintiff's Exhibit "K". Such letter evidences but further uninterrupted demand made by Plaintiff on the Insurance Company/Obligor Defendants to replace Plaintiff's eight thousand (8,000) shares.

44. Plaintiff's continued demands were refused by Defendants Atlas, Check-Rite, and more particularly, the Insurance Company/Obligor Defendants.

45. On July 27, 1988, after continued irrational stalling and delay tactics on the part of Guardalabene, acting on behalf of the Insurance Company/Obligor Defendants, Plaintiff wrote another letter to Guardalabene, a true and correct copy of which is attached hereto as Exhibit "L", and which put Guardalabene on further unequivocal notice that Plaintiff not only demanded a replacement certificate but that Check-Rite stock had reached a price of one dollar per share and could continue to rise in price.

46. After receipt of Exhibits "K" and Exhibit "L" above, the Insurance Company/Obligor Defendants proceeded to do nothing and otherwise redress the damages caused Plaintiff.

47. Plaintiff asserts that on or about July 28, 1988, the price of Check-Rite Stock traded at \$1.25 per share in Salt Lake City. This is evidenced by a letter from Bagley Securities, Inc., a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "M".

48. At this time Plaintiff was also in contact with one Chuck Burton, an account executive with Kober Financial in Denver, Colorado, a market maker in Check-Rite stock.

49. Kober Financial informed and has informed Plaintiff that the price of Check-Rite stock traded as high as a \$1.50 in Denver, Colorado on or after July 28, 1988. Chuck Burton has also telephoned Guardalabene and informed him personally of this fact.

50. The Defendants, knew or should have known that the price of Check-Rite stock would trade or could have traded as high as a \$1.50 per share after May 1988, which it did.

51. Had the Insurance Company/Obligor Defendants and issuer/transfer agent/obligee Defendants replaced Plaintiff's eight thousand (8,000) shares when request for transfer and registration was made, she could have and would have sold them at a \$1.50 per share in Denver or at least \$1.25 in Salt Lake City, Utah, in July, 1988, and/or at the beginning of August, 1988.

52. Plaintiff believes and asserts that Defendant Northwestern has a history and pattern of refusing to honor its open penalty indemnity bonds, particularly if they are in excess of a small amount of money, as further evidenced by a lawsuit involving Defendant Old Republic and filed in the Third Judicial District Court of Utah denominated by Civil No. C88-3713, assigned to the Honorable Raymond Uno. At such time that Plaintiff discovers additional "predicate acts" of racketeering on the part of the Insurance Company/Obligor Defendants, she shall seek to amend this complaint and state a cause of action against them under 18 U.S.C. §1962(a),(b),(c), and/or (d).

53. Defendants Atlas and Check-Rite have put substantial and repeated demands on Northwestern and Old Republic to honor its bond, the principal of which is Scott Fletcher. Such demands on the part of Atlas have been refused and ignored since May, 1988.

54. Plaintiff's counsel has further put continued and repeated demands on the Insurance Company/Obligor Defendants and on the issuer/transfer agent/obligee

Defendants to issue Plaintiff a replacement certificate or otherwise pay her damages of the highest price of the stock since the time Plaintiff could have sold her replacement shares but for Defendants' wrongful conduct. Evidence of such written formal demands include three (3) letters from Plaintiff's counsel directed to such Defendants dated September 21, 1988, September 30, 1988, and November 25, 1988.

55. Such Defendants with the exception of Defendant Fletcher have refused to make proper restitution to Plaintiff.

56. Plaintiff's counsel has spent at least 25 hours negotiating in good faith with Defendants to make restitution to Plaintiff, such negotiations being undertaken by Defendants in bad faith and therefore Plaintiff is entitled to attorney's fees of at least \$2,500.00, exclusive of attorney's fees paid her counsel to initiate this action.

57. The Defendants' refusals, with the exception of the Fletcher, have further been asserted in bad faith for which Plaintiff is entitled to an award of attorney's fees pursuant to Section 78-27-56, Utah Code Ann.

58. None of the Defendants have defended the demands of Plaintiff by asserting that the lost instrument bond in issue was not valid or binding or that the Defendants Northwestern and Old Republic did not receive or accept the premium in consideration for its issuance.

#### CAUSES OF ACTION

#### COUNT I

#### WRONGFUL REFUSAL TO TRANSFER



59. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

60. Plaintiff was a bona fide purchaser of eight thousand (8,000) shares of Cardinal (Check-Rite) as fully contemplated in §70A-8-401 and 405(3) Utah Uniform Commercial Code, Investment Securities.

61. Plaintiff had no knowledge of Defendant Fletcher's fraud nor did she know or had she ever heard of Fletcher at the time of her acquisition of such shares or otherwise until May, 1988.

62. Plaintiff, as a purchaser, had no notice of any adverse claims as contemplated in §70A-8-304, Utah Uniform Commercial Code ("U.U.C.C.").

63. In May, 1988, Plaintiff presented certificate 258 to Defendant Atlas Stock Transfer and lawfully requested transfer in accordance with §70A-8-306, U.U.C.C.

64. Certificate 258 was properly endorsed as fully contemplated in Article 8, U.U.C.C.

65. Plaintiff had no duty of inquiry into the problems posed by Defendant Fletcher's wrongful and fraudulent conduct.

66. Plaintiff had no obligation to register her transfer until such time until she sought to do so.

67. Plaintiff's right to registration was not affected by Fletcher's indorsement as such did not give notice of any adverse claims. (See Section 70A-8-310, U.U.C.C.)

68. Assuming Fletcher's indorsement on certificate 258 was unauthorized, which it was not, such was ratified by Fletcher's sale of certificate 258 through Potter in July 1981 and his receipt of valuable consideration for such sale. (See Section 70A-8-311, U.U.C.C.)

69. Plaintiff was a purchaser of certificate 258 for value and without notice of any adverse claims.

70. At the time of Plaintiff's purchase or assignment, she could not have known of any adverse claims as Fletcher waited one (1) year after he sold it before fraudulently claiming certificate 258 was lost or stolen.

71. A bona fide purchaser is entitled to transfer and registration without unreasonable delay as provided in §70A-8-401 and 405(3) U.U.C.C.

72. Defendant Atlas and Check-Rite should have transferred and registered Plaintiff's eight thousand (8,000) shares in May, 1988 when so presented.

73. Such Defendants' abject failure to do so has damaged Plaintiff in that she was unable to sell such eight thousand (8,000) shares in July or August, 1988, when Check-Rite stock reached a price of a \$1.50 per share.

74. Had Plaintiff obtained replacement shares in May 1988, she would have subsequently sold such shares and obtained approximately \$12,000.

75. Plaintiff prays for damages against Defendants Atlas and Check-Rite as set forth below.

**COUNT II**

**CONVERSION**

76. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

77. Defendants Atlas and Check-Rite received delivery and possession of certificate 258, Plaintiff's certificate representing the eight thousand (8,000) shares, in May, 1988.

78. Such Defendants have interfered with Plaintiff's right to control and possess eight thousand (8,000) shares of Check-Rite since May, 1988.

79. Such wrongful interference has been intentional and has caused Plaintiff great expense, inconvenience, and damage.

80. Such Defendants have effectively converted eight thousand (8,000) shares of Check-Rite belonging to Plaintiff to their own use.

81. Such possession of certificate 258 by such Defendants since May, 1988 is inconsistent with Plaintiff's right of control and ownership thereof.

82. Such Defendants have virtually done nothing to remedy the dispute which, prior to filing this complaint, has caused Plaintiff to incur attorney's fees of approximately \$2,500.

83. A mistake of law or fact is not a defense to such Defendants' conversion.

84. Plaintiff prays for damages against Defendants Atlas and Check-Rite as set forth below.

**COUNT III**

**BREACH OF AN IMPLIED COVENANT  
OF GOOD FAITH AND FAIR DEALING**

85. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

86. The relationship between Plaintiff and the Defendants, with the exception of Defendant Fletcher (with whom Plaintiff was not privy), required such Defendants to deal fairly with Plaintiff and otherwise act in good faith.

87. Such an obligation was a covenant that such Defendants each and all have breached.

88. Utah law recognizes such a cause of action and further that punitive damages are available hereunder.

89. Defendants, with the exception of Defendant Fletcher, are liable to Plaintiff for their breach of an implied covenant of good faith and fair dealing which has <sup>caused</sup> ~~damaged~~ Plaintiff damage as set forth below.

*Jme*

#### COUNT IV

#### BREACH OF AN IMPLIED THIRD PARTY BENEFICIARY CONTRACT ON THE PART OF THE INSURANCE COMPANY DEFENDANTS

90. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

91. Defendant Insurance Companies entered into an agreement whereby they agreed to indemnify Defendants Atlas and Check-Rite from any loss caused by the resurfacing of Check-Rite certificate 258.

92. The Insurance Company Defendants have breached such agreement by failing to honor the bond issued by them.

93. Such breach of contract on the part of the Insurance Company Defendants has caused Plaintiff, a bona fide purchaser of certificate 258, substantial damage and injury in that Plaintiff has not been able to seek restitution from Atlas and Check-Rite until such bond was honored by the Insurance Company Defendants.

94. The Insurance Company Defendants have no excuse or defense for their failure to honor the bond issued by them and they have maliciously lulled Plaintiff into the belief that she was an obligee on the bond.

95. Based on the Insurance Company Defendants' breach of contract which they knew and had reason to know would damage Plaintiff or a person similarly situated, such Defendants are liable to Plaintiff for all damages as a result of such breach as set forth below.

#### COUNT V

#### BAD FAITH REFUSAL ON THE PART OF THE INSURANCE COMPANY DEFENDANTS

96. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

97. The Insurance Company Defendants have no excuse for their failure to honor bond No. UMI871385.

98. Such Defendants have had since early May, 1988, to honor the bond issued by them.

99. Such Defendants acted negligently or otherwise intentionally in refusing to honor their bond obligation and otherwise remedy Plaintiff's damages immediately and reasonably.

100. Such Defendants have not acted reasonably and have acted in bad faith by innundating Plaintiff with false excuses for their failure to honor such bond and their legal commitment with respect thereto. Such excuses include but are not limited to (1) unreasonably demanding numerous documentation from Plaintiff that she was the lawful successor-in-interest of KASU Securities, Inc., (when Atlas had no dispute with such), (2) informing Plaintiff that they were in fact investigating the matter when they were not, (3) stalling several months and thereafter contending that the indorsement on certificate 258 was a forgery, and (4) ultimately informing Plaintiff that she had to deal with Atlas while all along leading her to believe that she should deal directly with the Insurance Company Defendants.

101. Plaintiff believes and asserts that the Insurance Company Defendants have refused to honor other bonds of a similar nature over the last ten (10) years, bonds in particular in which such Defendants' liability exceeds at least five hundred dollars (\$500.00).

102. On the other hand, the Insurance Company Defendants have singled Plaintiff out and not honored the bond covering her certificate while honoring the two other Fletcher bonds detailed hereinabove.

103. Such bad faith refusal on the part of the Insurance Company Defendants is so outrageous under the circumstances that Plaintiff is entitled to substantial punitive and exemplary damages to deter such wrongful and malicious conduct in the future as set forth below.

#### COUNT VI

AIDING AND ABETTING

104. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

105. The Insurance Company Defendants knew or should have known that they were putting Defendant Fletcher in a position where he could take advantage of and defraud others as further set forth elsewhere herein.

106. The Insurance Company Defendants did not investigate Defendant Fletcher reasonably, if at all. Had they done so, they would have either have not issued any bonds or, they would have immediately paid for a replacement certificate in May, 1988.

107. The Insurance Company Defendants should have known better than to rely on the false and fraudulent affidavits of Fletcher in issuing open penalty indemnity bonds for his benefit.

108. The Insurance Company Defendants have issued at least three (3) bonds which have benefited Fletcher, solely with regard to Check-Rite stock alone and may have issued other bonds in his favor with regard to the securities of other issuers.

109. But for the substantial assistance and aiding and abetting on the part of the Insurance Company Defendants, Fletcher would not have been able to fraudulently obtain an additional sixteen thousand (16,000) shares of Check-Rite which he did in fact obtain fraudulently and is believed to have thereafter sold in interstate commerce. But for the

Insurance Company Defendants' aiding and abetting and their subsequent bad faith refusals which have further aided and abetted Fletcher, Plaintiff would not have been damaged.

110. But for the substantial assistance of the Insurance Company Defendants, Fletcher would not of have been able to commit his frauds and racketeering as set forth below.

111. The Insurance Company Defendants' aiding and abetting of Fletcher has proximately caused Plaintiff damages as set forth below.

#### COUNT VII

#### NEGLIGENCE

112. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

113. Each and all of the Defendants owed Plaintiff the duty to prevent those damages of which she has been caused.

114. Each Defendant breached that duty under their respective circumstances which has been the proximate cause of Plaintiff's damages.

115. Reasonable persons in the same position of each of the Defendants would not have acted in the manner that each Defendant has in fact acted.

116. Plaintiff is entitled to punitive and exemplary damages against each of the Defendants for their individual and joint and several negligence which, under the circumstances, has exceeded all bounds of reasonableness and for which such additional damages are justified as set forth below.



COUNT VIII  
VIOLATION OF §12(2) OF THE SECURITIES ACT  
OF 1933 BY DEFENDANT FLETCHER

117. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

118. Defendant Fletcher sold a security by the use or the means of an instrument of interstate commerce or of the mails, by means of an oral communication, which included an untrue statement of a material fact or which omitted to state a material fact necessary in order to make his statements, in light of the circumstances under which they were made, not misleading.

119. Defendant Fletcher, when he sold certificate 258 representing eight thousand (8,000) shares, omitted to state that he would subsequently declare such certificate lost or stolen, that he would execute a false affidavit under oath to that effect, obtain a bond, receive an additional eight thousand (8,000) shares to which he was not entitled and otherwise put Plaintiff or someone like her in her present position.

120. Plaintiff did not know and there is no way or means by which she could have known of Fletcher's untruths or omissions when she obtained delivery of certificate 258 from Potter.

121. Defendant Fletcher cannot sustain the burden that he did not know and in the exercise of reasonable care could not have known of his untruths or omissions.

122. Defendant Fletcher is the proximate cause, culpable participant, significant factor, or proximate cause of the damages inflicted on Plaintiff and under §12(2) case law Plaintiff need not be in direct privity with him to recover damages hereunder. Plaintiff thus prays for damages against Fletcher as set forth below.

COUNT IX

VIOLATION OF SECTION 61-1-22(1)(b) OF  
THE UTAH UNIFORM SECURITIES ACT ON THE PART OF  
DEFENDANT FLETCHER

123. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

124. This count is the Utah statutory counterpart to Section 12(2) of the Securities Act of 1933, Plaintiff's preceding cause of action.

125. Plaintiff is entitled to an award of costs and attorney's fees hereunder.

126. Plaintiff is entitled to 12% interest from the date of payment for the stock subject to this dispute.

127. Plaintiff did not discover Defendant Fletcher's violation hereunder until May, 1988.

128. Defendant Fletcher's violation of this statute is reckless or intentional for which Plaintiff is entitled to damages of three times the consideration paid for the security with interest thereon at the rate of 12% as set forth below.

COUNT X

COMMON LAW FRAUD ON THE PART OF DEFENDANT FLETCHER

129. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

130. Defendant Fletcher engaged in a plan or scheme to defraud and injure Plaintiff or someone like her which has caused her and those similarly situated substantial injury and damage.

131. Defendant Fletcher, by selling certificate 258 through Potter Investment Company, impliedly represented that he would not subsequently encumber such certificate, knowing his representations as set forth hereinabove were false and that Plaintiff's problem which has been created by him would eventually occur.

132. The representations made by Fletcher as per certificate No. 258 itself through Potter and in turn to Plaintiff were false.

133. The false representations made by Defendant Fletcher concerned past or present facts.

134. The past or present facts about which Defendant Fletcher made false misrepresentations were material.

135. The material, false representations made by Defendant Fletcher about past or present facts were susceptible of knowledge by him.

136. Defendant Fletcher who so represented, knew that that which is alleged herein was false or in the alternative, asserted such false representations as of his own knowledge without knowing or discerning if such was true or false.

137. Defendant Fletcher intended that a customer of Potter be induced to act, or in misleading a customer of Potter such as Plaintiff into thinking that she or someone like her

was justified in purchasing the subject security and thereby relying on Fletcher's misrepresentations and omissions.

138. A customer of Potter namely Plaintiff, was in fact induced to act or was justified or reasonable under the circumstances in acting on Defendant Fletcher's false and fraudulent representations and omissions either impliedly or directly as per certificate 258 on its face.

139. Plaintiff's purchase of the securities was in reliance on the representations of Fletcher as he had endorsed certificate 258 and such was properly signed and guaranteed, creating the undeniable impression that it was a negotiable instrument.

140. Plaintiff has suffered damages which are attributable to the misrepresentations of Defendant Fletcher, based on his false and fraudulent representations or statements, including his affidavit, which are the direct and proximate cause of Plaintiff's injury and damage.

141. Defendant Fletcher's scheme or artifice to defraud a customer of Potter, which has occurred on at least three occasions with the same security and with the same Insurance Company Defendants, is malicious and harmful to the free enterprise system, interstate commerce, and the securities industry as a whole, and entitles Plaintiff to substantial punitive and exemplary damages to deter fraudulent schemes of this nature in which is a sophisticated Defendant such as Fletcher takes advantage of and defrauds an individual such as Plaintiff out of substantial funds.

142. Defendant Fletcher has engaged in such a plan scheme or artifice to defraud other individuals such as Plaintiff for the same purposes and under the same pretenses with regard to the same security in issue and also with regard to the securities of other issuers. In this regard, as set forth above, he is believed to have been the subject of a criminal investigation.

143. Plaintiff had no avenue or reasonable means of knowing or discovering that Fletcher's express and implied representations were false and fraudulent as Plaintiff was not apprised of what Fletcher would subsequently do.

144. Fletcher's scheme or plan or artifice to defraud Plaintiff and someone like her was designed to harm and injure her and those similarly situated.

145. The representations and/or omissions of Fletcher were false or fraudulent and when made were then and there known by Fletcher to be false and fraudulent and his misrepresentations were matters of material fact inducing Plaintiff's purchase of the securities.

146. Said misrepresentations and omissions of Fletcher were made knowingly and intentionally or with the reckless or <sup>wholly</sup> ~~holding~~ negligent and wanton disregard for the truth for the express purpose of obtaining additional stock for which Fletcher was not entitled and thereby creating Plaintiff's present situation.

147. Defendant Fletcher had a duty not to make such representations to Plaintiff through Potter and had a duty to disclose facts and circumstances which he abjectly failed to disclose to Plaintiff through Potter.

148. As a direct and proximate result of Fletcher's breaches of duty owed Plaintiff and some one like her, Plaintiff has been substantially damaged and is entitled to have and recover against Fletcher, in addition to actual damages, punitive and exemplary damages in the amount of at least two hundred and fifty thousand dollars (\$250,000.00).

COUNT XI

VIOLATION OF THE RACKETEER INFLUENCED AND  
CORRUPT ORGANIZATIONS ACT ("RICO")  
ON THE PART OF DEFENDANT FLETCHER

149. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

150. This court has jurisdiction over violations of the Racketeer Influenced and Corrupt Organizations Act.

151. Defendant Fletcher is believed to have engaged in racketeering activity within the meaning of 18 U.S.C. §1961(1) including, but not limited to the following indictable offenses:

(a) the transmission by such Defendant, by means of wire communication in interstate commerce, of writings, signals or sounds for the purpose of executing his scheme or artifice to defraud Plaintiff and other investors similarly situated in violation of 18 U.S.C. §1343;

(b) the use of the mails in violation of 18 U.S.C. §1341 to consummate this and/or a similar scheme;

(c) fraud in the sale of securities; and/or

(d) any offense involving fraud connected with a case under Title 11 U.S.C., namely bankruptcy fraud.

152. The conduct of Defendant Fletcher as alleged herein constitutes a pattern of racketeering within the meaning of 18 U.S.C. §1961(5) insofar as Defendant Fletcher engaged in at least two acts of racketeering activity within the meaning of 18 U.S.C. §1961(1) within the last ten (10) years.

153. Defendant Fletcher has received income derived, directly or indirectly, from a pattern of racketeering activity and/or has used or invested, directly or indirectly, part of such income, or the proceeds of such income, in the acquisition of an interest in, and/or in the establishment or operation of, an enterprise or enterprises which is or are engaged in, or the activities of which affect interstate or foreign commerce, in violation of 18 U.S.C. §1962(a).

154. Defendant Fletcher has, through a pattern of racketeering activity, acquired and maintained, directly or indirectly, an interest in or control of an enterprise or enterprises which is or are engaged in, or the activities of which affect interstate or foreign commerce in violation of 18 U.S.C. §1962(b).

155. Defendant Fletcher has, while employed by or associated with an enterprise, engaged in, or the activities of which affect interstate commerce, conducted or participated, directly or indirectly in the conduct of such enterprise's(s') affairs through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c).

156. Defendant Fletcher has conspired with another (which may include the Insurance Company Defendants) to violate the provisions of 18 U.S.C. §§1962(a),(b), and (c) in violation of 18 U.S.C. §1962(d).

157. Plaintiff believes and asserts that Defendant Fletcher is a "person" and/or an "enterprise" as the case may be as necessary to satisfy the technical pleading requirement under the statute, particularly §1962(c), regarding such distinctions and Plaintiff asserts that she presently lacks sufficient information to presently make a more particularized distinction.

158. Defendant Fletcher aided, abetted, counseled, commanded, induced, procured, or willfully caused the commission of the racketeering activities, regardless of the capacities in which he acted, and therefore, is liable as a principal in and to said activity within the meaning of 18 U.S.C. §2.

159. Plaintiff has been injured in her business or property as a direct and proximate result of Defendant Fletcher's violations of 18 U.S.C. §1962 in an amount in excess of \$40,000.00, the precise amount of which damages is not yet ascertained, but which will be established at trial.

160. Pursuant to 18 U.S.C. §1964(c), Plaintiff is entitled to recover from and against Defendant Fletcher threefold the amount of the damages sustained by Plaintiff, in an amount believed to be in excess of \$40,000.00, to be proven on or before trial, plus the cost of this suit, interest, and reasonable attorney's fees.

WHEREFORE, on all of Plaintiff's causes of action, Plaintiff prays for trial by jury;



1. On Counts I and II of Plaintiff's complaint, Plaintiff prays for judgment against Defendants Atlas and Check-Rite in the amount of the highest price of the stock since May, 1988, an amount to be proven on or before trial and which Plaintiff calculates to be at least \$12,000.00, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any all further relief as the court deems fair and equitable;

2. On Count III of Plaintiff's complaint, Plaintiff prays for judgment against all Defendants with the exception of Defendant Fletcher in the amount of at least \$12,000 to be proven on or before trial, punitive damages of several thousand dollars, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

3. On Count IV of Plaintiff's complaint, Plaintiff prays for judgment against the Insurance Company Defendants in the amount of the highest price that Check-Rite stock has attained since May, 1988, which Plaintiff calculates to be at least \$12,000.00, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

4. On Count V of Plaintiff's complaint, Plaintiff prays for judgment against the Insurance Company Defendants in the amount of at least \$12,000 to be proven on or before trial, for punitive damages of at least \$200,000.00, for costs, pre and post-judgment

interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

5. On Count VI of Plaintiff's complaint, Plaintiff prays for judgment against the Insurance Company Defendants in amount to be determined on or before trial, for punitive damages of at least \$50,000.00, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

6. On Count VII of Plaintiff's complaint, Plaintiff prays for judgment against Defendants jointly and severally in an amount to be proven on or before trial, but which includes all of the attorney's fees that Plaintiff has incurred in attempting to settle the matter without litigation, for substantial punitive and exemplary damages as against all Defendants jointly and severally, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

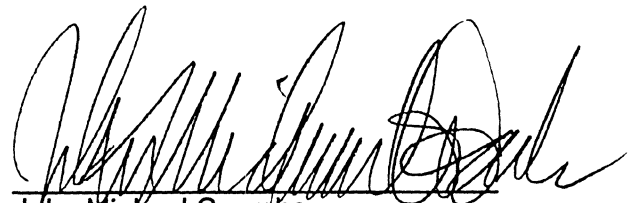
7. On Count VIII of Plaintiff's complaint, Plaintiff prays for judgment against Defendant Fletcher in an amount of her damages which Plaintiff believes to be at least \$12,000 and which further includes her needless incurring of substantial attorney's fees to date, costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

8. On Count IX of Plaintiff's complaint, Plaintiff prays for judgment against Defendant Fletcher in the amount of three times the consideration paid for the security, for costs, pre and post-judgment interest at 12% per annum since September 1981, attorney's fees in accordance with §78-27-56 and §61-1-22(1), Utah Code Ann., and for any and all further relief as the court deems fair and equitable;

9. On Count X of Plaintiff's complaint, Plaintiff prays for judgment against Defendant Fletcher in the amount of at least \$12,000.00, including all attorney's fees that Plaintiff has needlessly been required to incur, punitive damages of at least \$250,000.00, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with §78-27-56, Utah Code Ann., and otherwise, and for any and all further relief as the court deems fair and equitable;

10. On Count XI of Plaintiff's complaint, Plaintiff prays for judgment against Defendant Fletcher for violation of any one of 18 U.S.C. §§1962(a),(b),(c), and/or (d) of the Racketeer Influenced and Corrupt Organizations Act in an amount of at least \$40,000.00, for costs, reasonable attorney's fees as provided therein, pre and post-judgment interest at the highest legal rate, and any and all further relief as the court deems fair and equitable.

DATED this 18th day of May, 1989.



John Michael Coombs,  
Attorney for Plaintiff

Plaintiff's Address:  
3576 Oak Rim Way  
Salt Lake City, Utah 84109



**SIPC**

GEO. "JOHN" POTTER  
President

**ESTABLISHED - 1951**

335 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84111  
PHONE 801-364-3595  
WATTS 800-453-4267

WE	QUANTITY	CUSIP NUMBER	SECURITY DESCRIPTION	NET AMOUNT
DLI	2,000		CARDINAL ENERGY CORP	\$1,097,80

PRICE	EXTENSION	SER CHG OR COMM	TAXES & MISC
1.28350	1,699.80		

REC/DEL	ACCOUNT	TRANS NO	STOCK NUMBER	SHARES
RL	104338	10228	01265	6.000

SCOTT FLETCHER  
9916 PETUNIA WAY  
SANDY UT 84092

REC'D BY \_\_\_\_\_ DATE \_\_\_\_\_

EXHIBIT "A"

RECEIPT/DELIVERY



# Potter Investment Company

ESTABLISHED - 1951

GEO. "JOHN" POTTER  
President

335 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84111  
PHONE 801-364-3595  
WATTS 800-453-4267

GENERATOR NO	07/27/81	CODES				TRADE DATE	SETTLEMENT DATE	DELIVERY DATE
		TRANS NO	TR	CAP	SETT			
		10350		1		07-27-81	08-03-81	
IDENTIFICATION NO	CONTRA PARTY				CH NUMBER	SPECIAL DELIVERY INSTRUCTIONS		
104338	027-74-2146							
104338	SCOTT FLETCHER 9916 PETUNIA WAY SANDY UT 84092					UNSOLICITED ORDER		

WE	QUANTITY	CUSIP NUMBER	SECURITY DESCRIPTION	NET AMOUNT
RC	2,000		CARDINAL ENERGY CORP	\$260.00

NO SOLD

CONTRA: 401265

PRICE	EXTENSION	SER CHG OR COMM	TAXES & MISC
130.00	260.00		

QTS: CERTIFICATES RECEIVED/DELIVERED

REC/DEL	ACCOUNT	TRANS NO	STOCK NUMBER	SHARES
RC	104338	10350	01265	2,000

SCOTT FLETCHER  
9916 PETUNIA WAY  
SANDY UT 84092

REC'D BY \_\_\_\_\_ DATE \_\_\_\_\_

EXHIBIT "B"

00102

POTTER INVESTMENT CO.

MEMBER INTERMOUNTAIN STOCK EXCHANGE  
335 SOUTH MAIN  
SALT LAKE CITY, UTAH 84111

No 6385

ZIONS  
FIRST NATIONAL BANK  
BROADWAY OFFICE  
SALT LAKE CITY, UTAH  
31-5/1240

PAY

The sum of 1699.80

DATE

AMOUNT

SCOTT FLETCHER  
104338

7/27/81

\$ 1699.80

*Barbara L. Cram*

⑈0006385⑈ ⑆124000054⑆ 03 11482.4⑈

⑈0000169980⑈

Int. Mountain Bank Note

AT FIRST NATIONAL BANK  
OF UTAH N.A.  
SALT LAKE CITY, UTAH  
JUL 27 1981

*For deposit only*

111 25811

187 216

2162 31-62

2779

20000

EXHIBIT "C"

# POTTER INVESTMENT CO.

MEMBER INTERMOUNTAIN STOCK EXCHANGE  
335 SOUTH MAIN  
SALT LAKE CITY, UTAH 84111

Nº 6503

ZIONS  
FIRST NATIONAL BANK  
BROADWAY OFFICE  
SALT LAKE CITY, UTAH  
31-5/1240

PAY

The sum of 560.00

DATE  
8/4/81

AMOUNT  
\$ 560.00

TO  
IE  
PER  
F

SCOTT FLETCHER  
9916 PETUNIA WAY  
SANDY UTAH 84092

*Henry Potter*

⑈0006503⑈ ⑆124000054⑆ 03 1482 4⑈

⑈0000056000⑈

First National Bank Note

EXHIBIT

"D"

AG '81' 06

PAY ANY BANK P.O.  
FIRST SECURITY BANK  
OF UTAH N.A.  
SALT LAKE CITY, UTAH

31-1

31-62

31-62

31-62

6622

65409

*Scott Fletcher*



Bond for Lost Instrument -

# NORTHWESTERN NATIONAL INSURANCE COMPANY

## of Milwaukee, Wisconsin

Bond No. UMI 871385

Know all Men by these Presents, THAT Scott J. Fletcher

as Principal, and NORTHWESTERN NATIONAL INSURANCE COMPANY, a corporation organized and existing under the laws of the State of Wisconsin, duly authorized to transact the business of indemnity and suretyship in the State of Utah and having an office and principal place of business in said State

at 525 E 4500 S, Salt Lake City, Ut as Surety (hereinafter collectively called the "Obligors"), are held and firmly bound unto

Cardinal Energy Corporation  
and  
Atlas Stock Transfer

and unto all such individuals, firms and corporations, as may now and/or hereafter be acting as Transfer Agent(s) and/or Registrar(s) of the below-mentioned stock (hereinafter collectively called the "Obligees"), in an amount, payable in lawful money of the United States, sufficient to indemnify the Obligees under the condition of this bond as hereinafter set forth, not to exceed, however, the maximum amount of risk which may be legally assumed by the Surety under any law governing the validity or performance of this bond, to be paid to the Obligees, and each of them, and to their respective legal representatives, successors and assigns, as interest may appear; for which payment well and truly to be made, the Obligors do bind themselves, and their respective successors, assigns, heirs and legal representatives, jointly and severally, firmly by these presents.

SEALED with the seals of the Obligors and executed in ONE counterparts, this 23rd day of August, 1982

WHEREAS, the Principal represents that said Principal is the owner of Certificate(s) No.(s) 258 representing 8,000 shares of Cardinal Energy Corporation stock issued June 17, 1981.

registered in the name of \*676 Scott J. Fletcher 285970 (hereinafter called "old certificate(s)"); that the old certificate(s) has been lost, destroyed or stolen so that the same cannot be found or produced; and that said Principal has not sold, pledged, hypothecated or otherwise transferred the old certificate(s), or the shares represented thereby, or any interest therein or right thereto.

WHEREAS, the Obligees, in reliance upon said representations and at the request of the Obligors, are willing to issue and deliver a new certificate(s) in the place and stead of the old certificate(s), upon the execution and delivery of this bond;

NOW, THEREFORE, the condition of this obligation is such that, if the Principal shall at all times indemnify and keep indemnified and save harmless the Obligees, and each of them, and their respective legal representatives, successors and assigns, from and against any and all actions and suits, whether groundless or otherwise, and from and against any and all losses, damages, costs, charges, counsel fees, payments, expenses and liabilities whatsoever, which the Obligees, or any of them, or their respective legal representatives, successors or assigns, at any time shall or may sustain or incur (1) by reason of said issue and delivery of such new certificate(s), or (2) by reason of any claim which may be made in respect of the old certificate(s), or (3) by reason of any payment, transfer, exchange or other act which said Obligees, or any of them, or their respective legal representatives, successors or assigns, may make or do in respect of the old certificate(s), whether made or done through accident, oversight, or neglect, or whether made or done upon presentation thereof without contesting the propriety of such payment, transfer, exchange or other act, or (4) by reason of any other matter or thing arising out of the recognition of the aforesaid request of the Obligors, then this obligation shall be void; otherwise it shall remain in full force and effect.

The Surety agrees that its liability hereunder shall be absolute, regardless of any liability of the Principal hereunder, whether by reason of any irregular or unauthorized execution of, or failure to execute, this bond, or any absence of interest of the Principal in the subject matter hereof, or otherwise.

It is understood that the obligation hereby created in favor of any such Transfer Agent or Registrar shall not be affected by the termination of the agency of such Transfer Agent or Registrar.

(L. S.)  
Scott J. Fletcher  
NORTHWESTERN NATIONAL INSURANCE COMPANY,

By

Thomas J. Brough

Thomas J. Brough

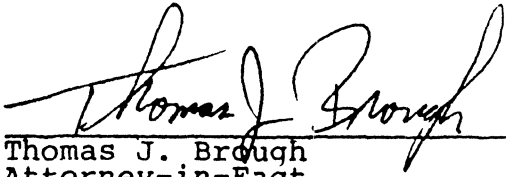
"E"  
EXHIBIT



AFFIDAVIT OF QUALIFICATION

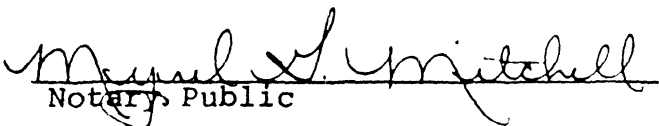
STATE OF UTAH                    )  
                                      ) SS  
COUNTY OF SALT LAKE )

Thomas J. Brough, being first duly sworn, on oath desposes and says that he is the ATTORNEY-IN-FACT of the NORTHWESTERN NATIONAL INSURANCE COMPANY, and that he is duly authorized to execute and deliver the foregoing obligations; that said company is authorized to execute the same and has complied in all respects with the laws of Utah in referenced to becoming sole Surety upon bond, undertakings and obligations.

  
\_\_\_\_\_  
Thomas J. Brough  
Attorney-in-Fact

Subscribed and sworn to before me this 23rd Day of August, 1982.

My Commission Expires: My Commission Expires April 15, 1984

  
\_\_\_\_\_  
Notary Public

RECEIPT/DELIVERY



# Potter Investment Company

GEO. "JOHN" POTTER  
President

ESTABLISHED - 1967

335 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84111  
PHONE 801-364-3595  
WATTS 800-453-4287

ORIGINATOR NO

CODES				TRADE DATE	SETTLEMENT DATE	DELIVERY DATE
TRANS. NO	TR	CAP	SETT			
4371		2		8-09-82	8-16-82	

IDENTIFICATION NO

CONTRA PARTY

CH NUMBER

SPECIAL DELIVERY INSTRUCTIONS

SCOTT FLETCHER  
9916 PETUNIA WAY  
SANDY, UT 84092

AUG 25 1982

WE	QUANTITY	CUSIP NUMBER	SECURITY DESCRIPTION	NET AMOUNT
BUY	8,000	141999 2011	CARDINAL ENERGY	1,374.10
YDN	OLD	CARD		

PRICE	EXTENSION	SER. CHG OR COMM	TAXES & MISC
171.75	1,350.00	125.90	0.00

REC/DEL	ACCOUNT	TRANS NO	STOCK NUMBER	SHARES

AGENTS CERTIFICATES RECEIVED/DELIVERED

8000 SL 0000676

Same

REC'D BY

NK

DATE

8/25/82

EXHIBIT

00104

"G"

EXHIBIT

POTTER INVESTMENT CO.

MEMBER INTERMOUNTAIN STOCK EXCHANGE  
335 SOUTH MAIN  
SALT LAKE CITY, UTAH 84111

No 2967

ZIONS  
FIRST NATIONAL BANK  
BROADWAY OFFICE  
SALT LAKE CITY, UTAH  
31-5/1240

PAY

The sum of 1374.80

TO  
THE  
ORDER  
OF

SCOTT FLETCHER  
9916 PETUNIA WAY  
SANDY, UT 84092

2322

1082

ZIONS FIRST NATIONAL BANK  
OPERATING CENTER

8/25/82

\$ 1,374.80

*George L. Potter*

⑈0002967⑈ ⑈124000054⑈ 03-11482 4⑈

⑈0000137410⑈

CI Rock Mountain Bank Note

00105





Bond for Lost in U.S. ( ) Yes ( ) No

20700

# NORTHWESTERN NATIONAL INSURANCE COMPANY

of Milwaukee, Wisconsin

Bond No. UMI 902168 ✓

Know all Men by these Presents, THAT Scott J. Fletcher

as Principal and NORTHWESTERN NATIONAL INSURANCE COMPANY a corporation organized and existing under the laws of the State of Wisconsin, duly authorized to transact the business of indemnity and surety ship in the State of Utah and having an office and principal place of business in said State

at 525 E 4500 S, Salt Lake City, Utah as Surety (hereinafter collectively called the Obligors ) are held and firmly bound unto

Cardinal Energy

and

Atlas Stock Transfer

and unto all such individuals, firms and corporations, as may now and/or hereafter be acting as Transfer Agent(s) and/or Registrar(s) of the below mentioned stock (hereinafter collectively called the "Obligees"), in an amount, payable in lawful money of the United States, sufficient to indemnify the Obligees under the condition of this bond as hereinafter set forth not to exceed however, the maximum amount of risk which may be legally assumed by the Surety under any law governing the validity or performance of this bond, to be paid to the Obligees, and each of them and to their respective legal representatives, successors and assigns, as interest may appear, for which payment well and truly to be made, the Obligors do bind themselves, and their respective successors, assigns, heirs and legal representatives, jointly and severally, firmly by these presents

SEALED with the seals of the Obligors and executed in TWO counterparts, this 23rd day of November, 1983 # 1228

WHEREAS, the Principal represents that said Principal is the owner of Certificate(s) No (s) 676 representing 8,000 shares of Cardinal Energy stock issued August 23, 1982

registered in the name of Scott J. Fletcher (hereinafter called "old certificate(s)"), that the old certificate(s) has been lost, destroyed or stolen so that the same cannot be found or produced, and that said Principal has not sold, pledged, hypothecated or otherwise transferred the old certificate(s), or the shares represented thereby, or any interest therein or right thereto

WHEREAS, the Obligees, in reliance upon said representations and at the request of the Obligors, are willing to issue and deliver a new certificate(s) in the place and stead of the old certificate(s), upon the execution and delivery of this bond,

NOW, THEREFORE, the condition of this obligation is such that, if the Principal shall at all times indemnify and keep indemnified and save harmless the Obligees, and each of them, and their respective legal representatives, successors and assigns, from and against any and all actions and suits, whether groundless or otherwise, and from and against any and all losses, damages, costs, charges, counsel fees, payments, expenses and liabilities whatsoever, which the Obligees, or any of them, or their respective legal representatives, successors or assigns, at any time shall or may sustain or incur (1) by reason of said issue and delivery of such new certificate(s) or (2) by reason of any claim which may be made in respect of the old certificate(s), or (3) by reason of any payment, transfer, exchange or other act which said Obligees, or any of them, or their respective legal representatives, successors or assigns, may make or do in respect of the old certificate(s), whether made or done through accident, oversight, or neglect, or whether made or done upon presentation thereof without contesting the propriety of such payment, transfer, exchange or other act or (4) by reason of any other matter or thing arising out of the execution of the aforesaid request of the Obligors, then this obligation shall be void otherwise it shall remain in full force and effect

The Surety agrees that its liability hereunder shall be absolute, regardless of any liability of the Principal hereunder, whether by reason of any irregular or unauthorized execution of, or failure to execute, this bond, or any absence of interest of the Principal in the subject matter hereof, or otherwise.

It is understood that the obligation hereby created in favor of any such Transfer Agent or Registrar shall not be affected by the termination of the agency of such Transfer Agent or Registrar

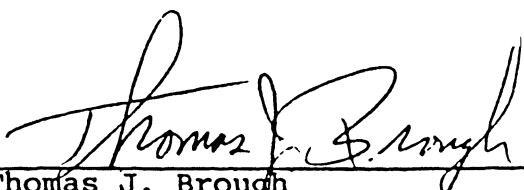
Scott J. Fletcher (L.S.)  
Scott J. Fletcher  
NORTHWESTERN NATIONAL INSURANCE COMPANY,  
By Thomas J. Brough  
ALL WIT IN TEST  
Thomas J. Brough

EXHIBIT "H"

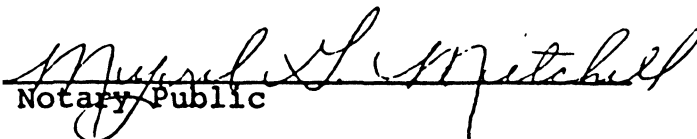
## AFFIDAVIT OF QUALIFICATION

STATE OF UTAH                    )  
                                      ) SS  
COUNTY OF SALT LAKE )

Thomas J. Brough, being first duly sworn, on oath desposes and says that he is the ATTORNEY-IN-FACT of the NORTHWESTERN NATIONAL INSURANCE COMPANY, and that he is duly authorized to execute and deliver the foregoing obligations; that said company is authorized to execute the same and has complied in all respects with the laws of Utah in referenced to becoming sole Surety upon bond, undertakings and obligations.

  
Thomas J. Brough  
Attorney-in-Fact

Subscribed and sworn to before me this 23rd Day of November, 1983.  
My Commission Expires: November 1, 1984

  
Notary Public



Bond for Last Instrument — Open Penalty

# NORTHWESTERN NATIONAL INSURANCE COMPANY

of Milwaukee, Wisconsin

Bond No. UMI 880735

Know all Men by these Presents, THAT Jeanne Winder

as Principal, and NORTHWESTERN NATIONAL INSURANCE COMPANY, a corporation organized and existing under the laws of the State of Wisconsin, duly authorized to transact the business of indemnity and suretyship in the State of Utah and having an office and principal place of business in said State at 525 E 4500 S, Salt Lake City, Ut, as Surety (hereinafter collectively called the "Obligors"), are held and firmly bound unto Cardinal Energy

and unto all such individuals, firms and corporations, as may now and/or hereafter be acting as Transfer Agent(s) and/or Registrar(s) of the below-mentioned stock (hereinafter collectively called the "Obligees"), in an amount, payable in lawful money of the United States, sufficient to indemnify the Obligees under the condition of this bond as hereinafter set forth, not to exceed, however, the maximum amount of risk which may be legally assumed by the Surety under any law governing the validity or performance of this bond, to be paid to the Obligees, and each of them, and to their respective legal representatives, successors and assigns, as interest may appear; for which payment well and truly to be made, the Obligors do bind themselves, and their respective successors, assigns, heirs and legal representatives, jointly and severally, firmly by these presents.

SEALED with the seals of the Obligors and executed in ONE counterparts, this 14th day of December, 1982

WHEREAS, the Principal represents that said Principal is the owner of Certificate(s) No.(s) 568 representing 2,000 shares of Cardinal Energy stock

\* 627

EXHIBIT "I"

01100

existing under the laws of the State of Wisconsin, duly authorized to transact the business of indemnity and surety  
ship in the State of Utah and having an office and principal place of business in said State  
at 525 E 4500 S, Salt Lake City, Ut, as Surety (hereinafter collectively called the "Obligors"),  
are held and firmly bound unto  
Cardinal Energy

and unto all such individuals, firms and corporations, as may now and/or hereafter be acting as Transfer Agent(s)  
and/or Registrar(s) of the below-mentioned stock (hereinafter collectively called the "Obligees"), in an amount, pay-  
able in lawful money of the United States, sufficient to indemnify the Obligees under the condition of this bond as  
hereinafter set forth, not to exceed, however, the maximum amount of risk which may be legally assumed by the Surety  
under any law governing the validity or performance of this bond, to be paid to the Obligees, and each of them, and  
to their respective legal representatives, successors and assigns, as interest may appear; for which payment well and  
truly to be made, the Obligors do bind themselves, and their respective successors, assigns, heirs and legal representa-  
tives, jointly and severally, firmly by these presents.

SEALED with the seals of the Obligors and executed in ONE .....counterparts, this 14th  
of December ..... 1982

WHEREAS, the Principal represents that said Principal is the owner of Certificate(s) No.(s) 568 ✓  
representing 2,000 shares of Cardinal Energy stock

registered in the name of Jeanne Winder 94655  
(hereinafter called "old certificate(s)"); that the old certificate(s) haS been lost, destroyed or stolen so that the  
same cannot be found or produced; and that said Principal has not sold, pledged, hypothecated or otherwise trans-  
ferred the old certificate(s), or the shares represented thereby, or any interest therein or right thereto.

WHEREAS, the Obligees, in reliance upon said representations and at the request of the Obligors, are willing to  
issue and deliver a new certificate(s) in the place and stead of the old certificate(s), upon the execution and delivery  
of this bond;

NOW, THEREFORE, the condition of this obligation is such that, if the Principal shall at all times indemnify  
and keep indemnified and save harmless the Obligees, and each of them, and their respective legal representatives,  
successors and assigns, from and against any and all actions and suits, whether groundless or otherwise, and from  
and against any and all losses, damages, costs, charges, counsel fees, payments, expenses and liabilities whatsoever,  
which the Obligees, or any of them, or their respective legal representatives, successors or assigns, at any time shall  
or may sustain or incur (1) by reason of said issue and delivery of such new certificate(s), or (2) by reason of any  
claim which may be made in respect of the old certificate(s), or (3) by reason of any payment, transfer, exchange or  
other act which said Obligees, or any of them, or their respective legal representatives, successors or assigns, may  
make or do in respect of the old certificate(s), whether made or done through accident, oversight, or neglect, or whether  
made or done upon presentation thereof without contesting the propriety of such payment, transfer, exchange or other  
act, or (4) by reason of any other matter or thing arising out of the recognition of the aforesaid request of the Obligors,  
then this obligation shall be void; otherwise it shall remain in full force and effect.

The Surety agrees that its liability hereunder shall be absolute, regardless of any liability of the Principal here-  
under, whether by reason of any irregular or unauthorized execution of, or failure to execute, this bond, or any absence  
of interest of the Principal in the subject matter hereof, or otherwise.

It is understood that the obligation hereby created in favor of any such Transfer Agent or Registrar shall not  
be affected by the termination of the agency of such Transfer Agent or Registrar.

CANCELLED 12-14-82

ISSUED # 697

Jeanne Winder (L.S.)  
Jeanne Winder  
NORTHWESTERN NATIONAL INSURANCE COMPANY,  
By Thomas J. Pugh



**ATLAS STOCK TRANSFER**  
C O R P O R A T I O N

May 4, 1988

LeAnna Broadwater  
3576 Oak Rim Way  
Salt Lake City, Utah 84109

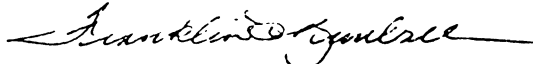
RE: Checkrite International

Dear Ms. Broadwater:

Enclosed please find a photocopy of Cardinal Energy Corporation certificate number SL-0000258 for 8,000 shares registered in the name of Scott J. Fletcher.

This certificate was reported lost and in lieu of which a new security was issued under a bond of indemnity dated Aug. 23, 1982. Therefore, we must refuse your request for registration, and propose to retain and cancel this certificate.

Very truly yours,



Franklin L. Kimball  
Transfer Agent

FLK:pg  
Enclosures

EXHIBIT "J"

July 11, 1988

Mr. Paul S. Guardatabene  
Old Republic Insurance Co.  
P. O. Box 1635  
Milwaukee, Wisconsin 53201

Dear Mr. Guardatabene:

Pursuant to our telephone conversation of last week, this letter will confirm my purchase of 8,000 shares of Check Rite International (formerly Cardinal Energy) from Potter Investment Company, Salt Lake City, Utah, on September 21, 1981. The certificate which was delivered to me by Potter Investment Company was #258, in the name of Scott J. Fletcher, 9916 Petunia Way, Sandy, Utah 84092. The amount I paid for the stock at that time was \$.31.

As I indicated to you on the phone, I purchased this stock in good faith from Potter Investment Company for investment purposes, and I will in no way accept what you proposed as far as settling with me for my original purchase price.

After further consideration, I feel that it would be in everyone's best interests to simply replace the stock so that I will be free to sell it whenever I choose. The market seems to be firming up on said stock, so ~~consequently~~, this matter should be resolved as quickly as possible.

I look forward to hearing from you in the very near future.

Sincerely,

LeAnna Broadwater  
3576 Oak Rim Way  
Salt Lake City, Utah  
Phone: (801) 277-3068

lb

EXHIBIT "K"

87700

July 27, 1988

Mr. Paul S. Guardalabene  
Old Republic Surety Company  
P. O. Box 1635  
Milwaukee, Wisconsin 53201

Dear Mr. Guardalabene:

Regarding our telephone conversation of today, enclosed please find documents which should clarify my position and status with KASU Securities, Inc. and the fact that I am the legal owner of the 8,000 shares of Check-Rite International (formerly Cardinal Energy).

I have high-lighted the pertinent information on enclosed documents for your convenience.

As I stated to you today, the subject stock is now trading at \$1.00 and could continue to go much higher.

I will be waiting to hear from you soon.

Sincerely,

LeAnna Broadwater  
3576 Oak Rim Way  
Salt Lake City, Utah  
Phone: (801) 277-3068

lb  
encl.

EXHIBIT

" L "

61100



Member NASD • SIPC

Mr. J. Michael Coombs  
72 East 400 South Suite 220  
Salt Lake City, UT 84111

November 25, 1988

Dear Mr. Coombs:

This letter is in response to your inquiring today regarding the market action of CHECK RITE INTERNATIONAL formerly Cardinal Energy.

Our firm is a primary market maker and has provided a continuous quotation for this stock to the investment community and the National Quotation Bureau. In researching our records, I find that CHECKRITE INTERNATIONAL had a high trade of \$1.25 per share on July 28, 1988.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ernest Muth', is written over a horizontal line. The signature is fluid and cursive.

Ernest Muth

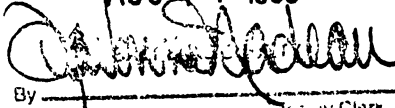
EM/ka

EXHIBIT "M"

EXHIBIT "B"

FILED 1989-08-11  
Third Judicial District

JOHN MICHAEL COOMBS, No. 3639  
ATTORNEY for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

AUG 11 1989  
  
By \_\_\_\_\_ Deputy Clerk

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

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a CARDINAL  
ENERGY CORPORATION, a Utah  
corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF PLAINTIFF IN  
OPPOSITION TO THE INSURANCE  
COMPANY DEFENDANTS' MOTION

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

LeAnna Broadwater, on her oath, deposes and says as follows:

1. That your affiant is the Plaintiff in the above-matter and she has personal  
knowledge as to that which is contained herein.

2. That in May, 1988, Defendant Atlas refused to transfer 8,000 shares of the stock of Check Rite International, Inc., owned and held by your affiant. (See Exhibit "J" to Plaintiff's Amended Complaint.)

3. Thereafter your affiant was informed by Defendant Atlas Stock Transfer that your affiant was to deal directly with the Insurance Company Defendants as it was "their problem."

4. Your affiant then located Mr. Paul Guardalabene, Assistant Claims Attorney for the Insurance Company Defendants who informed your affiant that she was to deal directly with him in resolving this problem. In fact, in so many words, your affiant was treated by Mr. Guardalabene as an "obligee" on the bond in issue and not being sophisticated in these matters, your affiant was led to believe and naturally assumed that Mr. Guardalabene would take care of and otherwise resolve the problem as he continually so indicated to her. Based on Mr. Guardalabene's conduct and direct and continued negotiations with your affiant, your affiant believes and asserts that a "contract" was created between herself and the Insurance Company Defendants acting by and through Guradalabene.

5. Thereafter, your affiant corresponded with Mr. Guardalabene at his exclusive insistence and furnished him documentation as requested by him as to when and how your affiant acquired the Check Rite stock in issue. This is evidenced by Exhibits "K" and "L" to Plaintiff' Amended Complaint. Your affiant also engaged in several telephone conversations with Mr. Guardalabene who even demanded documentation as to your

affiant's marital status. Clearly, your affiant was reasonably led to believe that the Insurance Company Defendants had a contractual obligation with respect to her claims.

6. As months went on, Mr. Guardalabene informed your affiant that he was investigating the matter diligently when your affiant believes he was not. At no time (until much later) did Mr. Guardalabene inform your affiant that she was not an "obligee" or beneficiary on the bond, assuming she knew what that meant, nor that she should have been dealing with Defendants Atlas or Check Rite and that her dealing directly with Mr. Guardalabene for several months would have been a complete waste of her time and energy.

7. Because Mr. Guardalabene continued to stall your affiant and kept informing her directly that he was "working" on the matter when he was not, your affiant had no choice but to retain legal counsel in August 1988 to assist her in this matter. Your affiant's counsel then corresponded with Mr. Guardalabene on at least three occasions and had additional telephone conversations with him. (See ¶54 of Plaintiff's Amended Complaint.) Your affiant is further informed that at this time Mr. Guardalabene, for the first time, brought up the excuse that the signature on your affiant's stock certificate was a forgery. Such additional stalling and meritless excuses on the part of the Insurance Company Defendants, by and through Guardalabene, directly caused Plaintiff substantial damages in the form of attorney's fees far in excess of \$2,500, excluding damages for loss of time, long distance telephone expenses, and general inconvenience.

8. That your affiant was eventually informed by her counsel that the Insurance Company Defendants would neither settle or resolve the matter, that she, according to



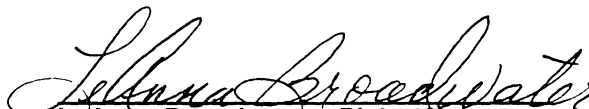
Guardalabene, should have dealt directly with Atlas all along after having dealt with Guardalabene for several months, and that it would be necessary for her to file suit.

9. That this lawsuit has followed in that none of the Defendants have been willing to remedy the situation and every one of them has pointed the finger at someone else, time and time again. That your affiant incurred attorney's fees of \$2,500 prior to filing suit, your affiant has further been damaged to the extent of at least \$10,000 and perhaps \$12,000 based on the price of Check Rite stock that your affiant could have obtained had Defendants pooled together to resolve this matter, and further, your affiant has incurred substantial additional damages and attorney's fees since filing this suit. In sum, your affiant has been damaged to date to the extent of at least \$18,000 and perhaps \$20,000. Lastly, your affiant believes that most of her damage has been directly caused by the misconduct of Mr. Guardalabene acting within the scope of his employment, particularly by virtue of his misrepresentations that he could and would resolve the matter and that he had a contractual obligation to do so, only, after several months, to turn around and inform your affiant and her counsel that all along your affiant should have dealt directly with Defendant Atlas Stock Transfer. The foregoing is also not to ignore that Atlas informed your affiant she should deal directly with the Insurance Company Defendants and that this was repeatedly confirmed by Guardalabene orally and otherwise through his continuous conduct and representations to your affiant.


FURTHER SAITH AFFIANT NAUGHT.

In re: Broadwater v. Old Republic Surety, et al.  
Civil No. 89-0902684-CV  
AFFIDAVIT OF PLAINTIFF IN OPPOSITION TO THE INSURANCE  
COMPANY DEFENDANTS' MOTION.

DATED this 13th day of July, 1989.

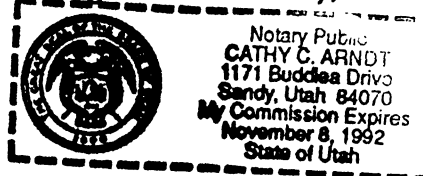
  
LeAnna Broadwater, Plaintiff

SUBSCRIBED and SWORN to before me this 13th day of July, 1989.

  
Notary Public  
Residing at Salt Lake City, UT

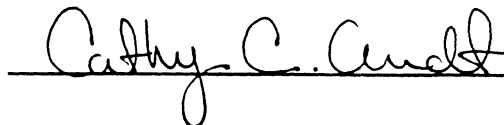
My Commission Expires:

November 8, 1992



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of July, 1989, (s)he mailed a true and correct copy of the foregoing RULE 56(f) AFFIDAVIT by regular mail, postage prepaid to Robert A. Burton, and Stephen J. Trayner, Attorneys for Defendants Old Republic Surety and Northwestern National Insurance Company of Milwaukee, Wisconsin, of STRONG & HANNI, located at Sixth Floor Boston Building, Salt Lake City, Utah 84111, Larry Reed, Attorney for Defendant Atlas, of PARSONS & CROWTHER, located at 445 South 300 East, Suite 300, Salt Lake City, Utah 84111, Blake T. Ostler, Attorney for Defendant Fletcher, of KIRTON, McCONKIE & POELMAN, located at 330 South, 300 East, Salt Lake City, Utah 84111, and William Hart, Attorney for Defendant Check Rite, located at 1624 Washington, Denver, Colorado 80203.



B:AFDVT.2

EXHIBIT "C"

FILED DISTRICT COURT  
Third Judicial District

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

AUG 11 1989  
*[Signature]*  
By \_\_\_\_\_ Deputy Clerk

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

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a CARDINAL  
ENERGY CORPORATION, a Utah  
corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

RULE 56(f) AFFIDAVIT

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

John Michael Coombs on his oath deposes and says as follows:

1. That your affiant is Plaintiff's legal counsel in the above-matter, licensed to practice law in the State of Utah, and he has personal knowledge of that which is contained herein.

2. That Plaintiff's Amended Complaint on file herein contains five (5) separate causes of action as against the Defendant Insurance Companies, namely (1) Breach of an Implied Covenant of Good Faith and Fair Dealing, (2) Breach of an Implied Third-Party Beneficiary Contract, (3) Bad Faith Refusal, (4) Aiding and Abetting (a violation of §12(2) of the Securities Act of 1933), and (5) Negligence.

3. That the bond subject to this dispute which was issued by Defendant Northwestern National, Exhibit "E" to Plaintiff's Amended Complaint, by its own terms states:

"The Surety agrees that its liability hereunder shall be absolute, . . . [Emphasis added.]

4. That your affiant is aware of a similar lawsuit involving Defendant Old Republic (Defendant Northwestern's successor-in-interest) presently before his Honor, Judge Uno, denominated by Civil No. C88-3713. (See ¶52 of Amended Complaint.) Your affiant is further aware of an identical bond issued by Defendant Northwestern denominated by Bond #UMI902229, the principal on which was one George E. Charlton. Your affiant has reason to believe that the Insurance Company Defendants similarly denied coverage on the Charlton bond as evidenced by a letter attached hereto and incorporated by reference as Exhibit "A". Your affiant brings these instances to the Court's attention in that such may be probative of continued and repeated wrongdoing on the part of the Insurance Company Defendants justifying not only Plaintiff's allegations in her Amended Complaint, but further justifying an award of substantial punitive damages against them as prayed for therein.

5. That by their very nature, the five (5) separate causes of action against the Insurance Company Defendants on their face involve innumerable issues of material fact

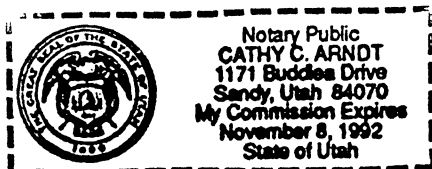
and because Plaintiff has had no opportunity whatsoever to date to conduct discovery, Plaintiff will be severely prejudiced if the Insurance Company Defendants' Motion to Dismiss or for Summary Judgment is granted in the absence of any opportunity for Plaintiff to conduct meaningful discovery or, in the absence of an opportunity for Plaintiff to amend her Amended Complaint and allege breach of a contract Implied in law, breach of a contract implied-in-fact, promissory estoppel, and/or allege a general claim for damages caused by the Insurance Company Defendants.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 25th day of July, 1989.

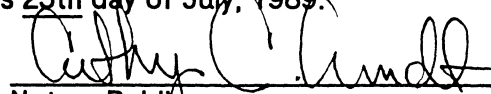
  
John Michael Coombs  
Attorney for Plaintiff

SUBSCRIBED and SWORN to before me this 25th day of July, 1989.



My Commission Expires:

November 8, 1992

  
Cathy C. Arndt  
Notary Public  
Residing at Salt Lake City, UT

In re: Broadwater v. Old Republic Surety, et al.  
Case No. 89-0902684-CV  
RULE 56(f) AFFIDAVIT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of July, 1989, (s)he mailed a true and correct copy of the foregoing RULE 56(f) AFFIDAVIT by regular mail, postage prepaid to Robert A. Burton, and Stephen J. Trayner, Attorneys for Defendants Old Republic Surety and Northwestern National Insurance Company of Milwaukee, Wisconsin, of STRONG & HANNI, located at Sixth Floor Boston Building, Salt Lake City, Utah 84111, Larry Reed, Attorney for Defendant Atlas, of PARSONS & CROWTHER, located at 445 South 300 East, Suite 300, Salt Lake City, Utah 84111, Blake T. Ostler, Attorney for Defendant Fletcher, of KIRTON, McCONKIE & POELMAN, located at 330 South, 300 East, Salt Lake City, Utah 84111, and William Hart, Attorney for Defendant Check-Rite, located at 1624 Washington, Denver, Colorado 80203.

B:AFDVT.1

Cathy C. Amel

LAW OFFICES  
**SNODGRASS & SNODGRASS**

2300 21ST AVENUE, SOUTH  
NASHVILLE, TENNESSEE  
37212

STANLY T. SNODGRASS  
T. TURNER SNODGRASS

(AREA CODE 615)  
TELEPHONE 385-2750

December 30, 1985

Northwestern National Ins. Co.  
525 E. 4500 S.  
Salt Lake City, Utah 84100

Gentlemen:

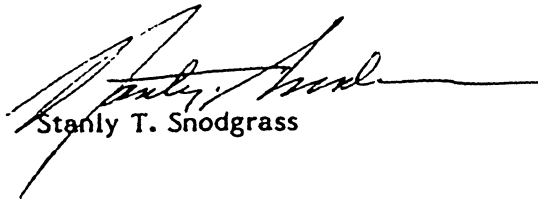
RE: Appalachian Oil & Gas Co., Inc.  
Indemnity Bond No. ~~911890229~~

On November 19, 1985 this office wrote to you on behalf of our client, Appalachian Oil & Gas Co., Inc. relative to the above indemnity bond. We have had no response to our letter.

We understand it is necessary for your Company to investigate the factual circumstances which we set out. We have, however, been asked by our client to seek a response from you as to the Company's intentions in the matter.

We will appreciate your response.

Very truly yours,

  
Stanly T. Snodgrass

TTS/jrm



EXHIBIT "D"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
COURT

FEB 10 1990

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

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF PLAINTIFF IN  
SUPPORT OF HER MOTION FOR  
SUMMARY JUDGMENT ON COUNTS  
I AND II OF HER AMENDED  
COMPLAINT

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH       )  
                          )ss.  
SALT LAKE COUNTY    )

LeAnna Broadwater, on her oath, deposes and says as follows in Support of  
her Motion for Summary Judgment on Counts I and II of her Amended Complaint:

1. That your affiant is the sole plaintiff in the above-matter and she has  
personal knowledge and experience as to that which is contained herein.

2. That your affiant has carefully read and helped prepare the Statement of Undisputed Facts in her Memorandum in Support of her Motion for Summary Judgment on counts I and II of her Amended Complaint and in fact, she personally participated in the drafting thereof. That in an effort not to duplicate each of such enumerated Facts as detailed therein in this affidavit, your affiant can attest that each and every such Statement of Undisputed Fact therein as it pertains to her and her knowledge and experience as to how she was mistreated, misled, and "lulled" by certain of the defendants and, as to what otherwise transpired in this case, is true and correct in all particulars.

3. That your affiant can attest that had she had a replacement certificate for Certificate 258 at July end/August beginning 1988 she would have sold it. She further believes that she would have received the highest price that such stock reached in 1988, namely, \$1-5/16ths per share, or, at a minimum, at least \$1.25 per share. This is because your affiant knew of a pending Check Rite merger and she also had a brokerage account with Ernest Muth and was daily, if not very closely, following the price of the stock at that time. For instance, your affiant would have had an open order placed in which to sell the stock at that time. On the other hand, your affiant believes that had she had a replacement certificate at such time, she may have well received \$1-5/16ths per share as set forth in the supporting affidavit of Penny Grace. Thus, your affiant believes that she is entitled to at least \$10,000 in damages (8,000 shares x \$1.25 per share) and perhaps \$10,500 in damages (8,000 shares x \$1-5/16ths per share). Your affiant further believes that she is entitled to pre-judgment interest at the highest legal rate or at a rate of no less than 12% and in her Amended Complaint she has indeed asked for pre-judgment interest. Lastly, your affiant has incurred attorney fees of at least \$10,000 just trying to protect and enforce her rights,

and she believes that such incurred fees have caused her additional damage which would not have occurred but for the wrongful conduct of the insurance company defendants and defendants Atlas and Check Rite.

4. That your affiant believes that the defendants (with the exception of defendant Fletcher) had a duty to make her whole, a duty which included immediately going out into the market in May 1988 and buying 8,000 shares of stock to replace Certificate 258 on which a lost instrument bond had been posted. That the misfortune of this entire case is that no responsible entity or person would help your affiant in any way and no one wanted to take responsibility for the problem until there was nothing left to do but file a lawsuit -- and even then, the defendants would rather spend more money litigating this case than giving your affiant what she truly deserves.

5. That your affiant believes that Guardalabene's investigation of the matter was exclusively for his own employer and Fletcher, the principal on the bond, and had nothing to do with her inasmuch as she is and was a totally innocent victim. That your affiant believes that Atlas, Check Rite, and the insurance company defendants have no excuse not to have immediately purchased 8,000 shares of replacement stock in May 1988 and thereafter and immediately delivered the same to her.


6. That your affiant does not believe that she had an obligation to go out and "cover", namely, to go out into the market herself and with her own money buy replacement stock for four reasons: (1) the problem was not her fault, (2) no one ever told her to "cover" or do anything else at any time, (3) she did not have the resources or cash on hand to have so bought replacement stock herself, and (4) she was not "short" the stock herself, namely, she had not sold it to or by or through anyone else and therefore she had no duty herself to

deliver 8,000 shares of replacement stock to any third party. That your affiant believes that had she been "short" 8,000 shares herself then she arguably would have had a duty to "cover", but under the circumstances of this case, she did not. That if anyone involved in the case had simply informed your affiant that your affiant should have "covered" -- just to avoid this lawsuit your affiant would have done so. Unfortunately, no one did and your affiant had no reason to think she was acting other than as reasonably as could be expected of anyone.

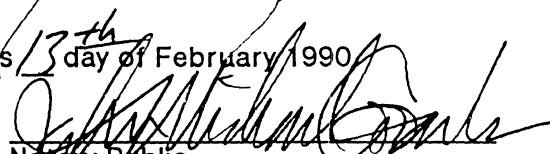
7. That your affiant has incurred additional damages of substantial unwarranted attorney fees, costs, including out-of-pocket expenses, and time expended and she believes that she is entitled to such additional damages on which there should be an evidentiary hearing.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 13 day of February, 1990.

  
LeAnna Broadwater Plaintiff

SUBSCRIBED and SWORN to before me this 13<sup>th</sup> day of February 1990

  
Notary Public  
Residing at Salt Lake City, UT

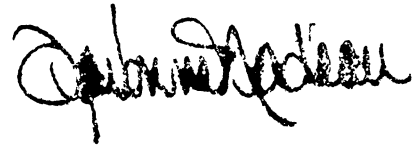
My Commission Expires:

1/6/91

B:AFDVT.8

EXHIBIT "E"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833



---

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

---

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF PLAINTIFF IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

Civil No. 89-0902684-CV

Judge Raymond S. Uno

---

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

LeAnna Broadwater, on her oath, deposes and says as follows in opposition to  
certain defendants' February 6, 1990, motion for partial summary judgment on Counts I and  
II of her amended complaint:

1. That your affiant is the sole plaintiff in the above-matter and she has personal knowledge and experience as to that which is contained herein. That your affiant incorporates by reference her affidavit filed in support of her cross-motion for summary judgment on Counts I and II of her Amended Complaint.

2. That your affiant disputes the defendants' calculation of a "reasonable time" as set forth in their memorandum in support of their motion for partial summary judgment. That your affiant believes that she could not have acted more reasonably under the facts and circumstances of this case and she believes that defendants Atlas, Check Rite, Northwestern National, and Old Republic did not. That in fact, none of the responsible parties would assist her or do anything to resolve the problem and in fact there was nothing she could do under the circumstances other than eventually file this lawsuit.

3. That your affiant believes that the conduct of the above-mentioned defendants "lulled" her into thinking that they would resolve the matter when they would not and did not, and if the Court invokes a "reasonable time" period after the conversion and notice of conversion, such a period should be tolled or extended by virtue of the misconduct of the above-named defendants -- certainly not by any conduct on your affiant's part. That less than 90 days after the alleged date of conversion is a "reasonable time" in this case because your affiant acted reasonably during all that period and she does not know how it is possible that she could have acted more reasonably or diligently. That your affiant believes that no reasonable person in her shoes would have acted any differently and certainly no one, under the same circumstances, would have thought that he or she had an independent duty to effect "cover" and buy replacement stock, especially when no defendant informed your affiant of such and such only became an issue after this



case was filed. That your affiant believes that no reasonable person would have spent several thousand dollars of his or her own money buying replacement stock when any such person, and your affiant in particular, is the sole victim of the gross negligence, malfeasance, misfeasance, and overall intentional conduct of the defendants.

4. Because your affiant acted reasonably and the culpable defendants did not, a "reasonable time" after the conversion and notice of conversion should include a time period up to and until July end/August beginning 1988 when the price of Check Rite stock admittedly attained its highest price of \$1-5/16th per share.

5. Lastly, your affiant should add that during one conversation with Guardalabene, Guardalabene tried to get your affiant to deal directly with Fletcher to resolve the problem. Your affiant responded that she did not think such was her responsibility. At that point, Guardalabene informed your affiant that because she was a "layman" and apparently didn't understand the situation, she should get a lawyer. Your affiant then understood Guardalabene to say that he would no longer deal with her directly until she consulted with legal counsel and had him talk directly to Guardalabene. Your affiant can attest that after she retained counsel, who in fact tried to negotiate unsuccessfully with Guardalabene, Guardalabene was still unwilling to resolve the problem and therefore, Guardalabene caused your affiant to incur unwarranted and unjustified attorney fees, not only prior to filing suit, but thereafter as well.

FURTHER SAITH AFFIANT NAUGHT.

DATED this <sup>14</sup>/<sub>3</sub> day of February, 1990.

  
LeAnna Broadwater, Plaintiff

SUBSCRIBED and SWORN to before me this <sup>13</sup>/<sub>3</sub> day of February 1990.

My Commission Expires:

1/6/91

B:AFDVT.9

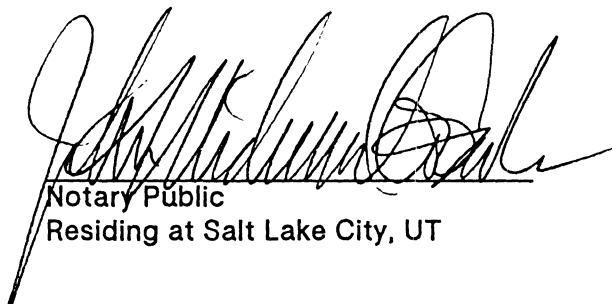
  
Notary Public  
Residing at Salt Lake City, UT

EXHIBIT "F"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
DISTRICT COURT

MAR 9 4 53 PM '90

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY

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

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

RULE 56(f) AFFIDAVIT IN  
OPPOSITION TO THE INSURANCE  
COMPANY DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT ON COUNTS III, IV,  
AND V OF PLAINTIFF'S  
AMENDED COMPLAINT

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH       )  
                          )ss.  
SALT LAKE COUNTY   )

JOHN MICHAEL COOMBS, having been sworn and on his oath, deposes and says  
as follows:

1. I am plaintiff's counsel in the above-matter and I have personal knowledge,  
experience, and competence as to that which is set forth herein. I am informed and believe

that the following matters need to be completed or explored before any decision can possibly be made on the Insurance Company Defendants' ("ICD"s') February 27, 1990, motion for partial summary judgment on plaintiff's third, fourth, and fifth causes of action in her amended complaint.

2. There is presently outstanding certain responses to discovery on the part of the ICDs' to plaintiff's first set of discovery requests that are objectionable, non-responsive, and thoroughly and inexcusably inadequate. In particular, these are responses to plaintiffs' interrogatories seeking to discover other bonds that the ICDs have reneged on, why, who was affected, the results, and whether such resulted in litigation. This clearly goes to the ICDs' bad faith and negligence which are issues in this case. Further, the ICDs have completely skirted the issue of their company policies with respect to issuing bonds of the nature involved in this case and why or how such an open penalty bond could ever have been issued to defendant Fletcher, who, in his deposition, has admitted that he did not have a \$500,000 net worth that was attributed to him as a condition to his obtaining bonds which he ultimately obtained. In other words, defendant Fletcher's own testimony is at odds with the ICDs' position in this case and their specific responses to date to plaintiff's discovery requests.

3. That the plaintiff has purposely and understandably not sought further discovery relative to Counts III, IV, and V of her amended complaint based on her having made a motion for summary judgment on Counts I and II of her amended complaint. As specifically set forth on the face of her motion, if plaintiff obtains that which she is seeking and believes she is entitled to in such motion, she has indicated that she will more than likely drop the remaining counts in her amended complaint. This is because if she so prevails, she

will have been made whole and there will be no reason to pursue the remaining counts therein unless she merely wanted to pursue punitive and exemplary damages -- something which would not be particularly reasonable or cost-effective.

4. That in my experience as a lawyer, it is more than reasonable for plaintiff to try to get what she believes she is entitled to the simplest and cheapest way, which is, to seek summary judgment on Counts I and II and not waste time, energy, and money conducting unnecessary and expensive discovery as to the remaining counts, especially when such is unnecessary. That I don't believe any court would find fault with plaintiff trying to be made whole by pursuing such a course of action. Further, I can't imagine that another defendant unrelated to Counts I and II, namely, the ICDs, would find fault with the same unless such a defendant's counsel wanted to bill his clients for unnecessary work and charge 4 or 5 times the amount of actual damages in a case.

5. That plaintiff has made a motion to amend her amended complaint under Rule 15 to include insurance agent Fred S. James of Utah on Counts III and VII of her amended complaint, namely, causes of action for Breach of an Implied Covenant of Good Faith and Fair Dealing and Negligence. Since the court has not ruled on such motion and such will have an effect on this action and the ICDs' motion for summary judgment on Counts III, IV, and V as against them, I believe that it would be highly improper and irregular for the Court to rule on such motion of the ICDs until it has ruled on such motion to amend and the other dispositive motions now pending before it.

6. That I believe, as plaintiff's counsel, that plaintiff will be irreparably harmed and injured if the Court rules on the ICDs' motion relative to Counts III, IV, and V, without, at a minimum, allowing her to conduct further discovery and otherwise take the corporate

depositions of the ICDs under Rule 30(b)(6), costs and expenditures that plaintiff should certainly not be forced to undertake until the Court rules on her motion for summary judgment on Counts I and II.

7. That in my professional opinion, it is of absolutely no benefit or value to anyone, including the Court, to rule on the ICDs' motion relative to Counts III, IV, and V of the amended complaint because such defendants are still parties to Counts VI and VII of the amended complaint and a favorable ruling on their motion will not be dispositive of their remaining exposure and liability under the amended complaint. In particular, I believe and have so informed the plaintiff that the ICDs are, at a minimum, liable for negligence in this case. In fact, it is clear from the ICDs' motion that they know there are genuine, justiciable issues of fact relative to Counts VI and VII or they naturally would have made the same motion for summary judgment relative to such counts at the same time. Thus, there is nothing to be accomplished by the ICDs' motion as to Counts III, IV, and V.

8. That plaintiff has not completed discovery in this action by any stretch of the imagination as set forth in this Court's Order of September 11, 1989, and therefore, the ICDs' motion cannot be granted unless this Court chooses to reverse itself and its own order of such date. That were the Court to in fact reverse its own order of September 11, 1989, I believe, as counsel to the plaintiff, that she would be severely prejudiced as she could not have afforded to conduct further discovery on incidental causes of action when she may indeed easily prevail, and get what she is fully entitled to on her own summary judgment motion relative to Counts I and II.

9. That I believe Mr. Trayner's supporting affidavit of February 27, 1990, is so false and misleading in its implications that I am shocked and I cannot in good conscience

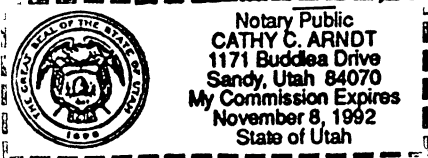
let it go unanswered. First, I never agreed on behalf of plaintiff to dismiss any counts with prejudice at any time. I only told Mr. Trayner that I thought the plaintiff may not be able to afford to prosecute other causes of action inasmuch as plaintiff's actual damages are only \$10,500 with interest thereon since July 31, 1988. If, on the other hand, I did say anything derogatory about any causes of action other than Counts I and II, I only meant that I thought Counts I and II were better because they could be resolved on the summary judgment level. I might add that there has never been any discussion with counsel at any time of "linking" a stipulation of facts relative to Counts I and II with a dismissal with prejudice of any other counts and Mr. Larry G. Reed, counsel to Atlas, can testify to the same. In fact, there would have been no reason to have dismissed any counts of the amended complaint with prejudice while the Cross-Motions on Counts I and II are under advisement. I might also say that I have practiced law twice as long as Mr. Trayner and I cannot even fathom, for the life of me, the legal significance of his affidavit other than it must somehow be an ignoble attempt to slander me personally and somehow have the Court think that I do not keep my word -- something to which I take personal affront and which is a complete falsehood. That I also consider Mr. Trayner's enclosures of my confidential correspondence to him, among other things, as a breach of trust. I would further like to say unequivocally that counts III, IV, V, VI, and VII to plaintiff's amended complaint are meritorious (whether discovery is complete or not) as this Court has already ruled that they state a claim. Further, neither I nor my client was ever under any obligation of any kind to dismiss any of counts against the ICDs with or without prejudice. I can only add that if my client does not receive the relief to which she believes she is entitled on her Counts I and II summary judgment motion, then she intends to go to jury trial on such other counts. This is because

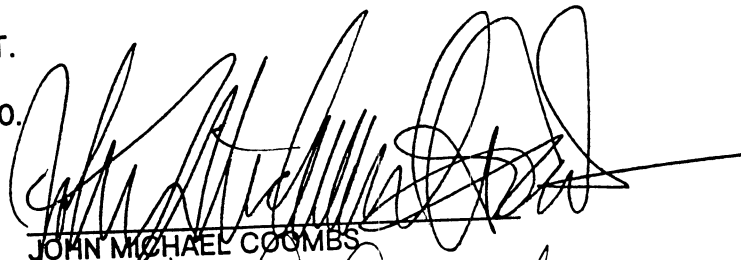


I have advised her that in my professional opinion, the ICDs are liable on some or all of such counts and it is simply a question of the economics and practicality of plaintiff's pursuing the same to trial. Certainly, she is entitled to her day in court and I can't imagine this Court begrudging her that.

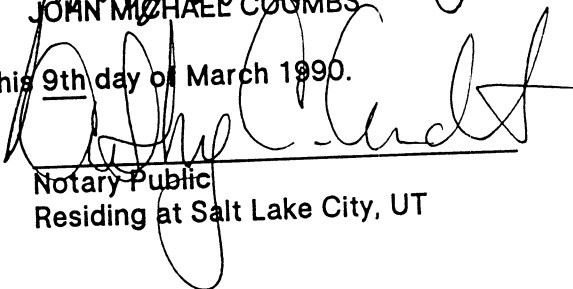
FURTHER SAITH AFFIANT NAUGHT.

DATED this 9th day of March, 1990.



  
JOHN MICHAEL COOMBS

SUBSCRIBED and SWORN to before me this 9th day of March 1990.

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

November 8, 1992

B:AFDVT.12-13