

1992

Walter P. Larson, Sybil Larson and John Larson v. James Hogle, Jr. and Owen C. Hogle : Brief of Appellee

Utah Court of Appeals

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FILED

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COURT OF APPEALS

FEB 10 1993

IN THE UTAH COURT OF APPEALS

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

WALTER P. LARSON,	:	
SYBIL LARSON and	:	APPELLEES' SUMMARY
JOHN LARSON,	:	OF ARGUMENT
	:	
Plaintiffs and	:	
Appellants,	:	
	:	Case No. 920364
v.	:	
	:	
JAMES HOGLE, JR. and	:	Priority 15
OWEN C. HOGLE,	:	
	:	
Defendants and	:	
Appellees.	:	

**APPEAL FROM THE ORDER OF THE THIRD DISTRICT COURT
JUDGE RICHARD H. MOFFAT PRESIDING**

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SUMMARY OF ARGUMENT

POINT I: The first point of the Appellees' brief is that "There Are No Genuine Issues As to Appellants' Cause of Action for Breach of Contract." Within Point I are three subpoints. The first subpoint is that it is undisputed that the Appellees did not enter into a contract with the Appellants. The basis for this argument is the simple, undisputed fact that the contract ("Agreement and Escrow") that the Appellants claim the Appellees breached, and the documents incorporated with the "Agreement and Escrow", were not signed by or for the Appellees. It is also an undisputed fact that the parties who did sign these documents were careful to state in what capacity they were signing. The Appellants' attempt to create a factual dispute by presenting the Affidavit of Walter Park Larson, which states that Bruno and Gay (the parties who did sign the written documents) did so as agents of the Appellees. The parol evidence rule prevents the Appellants from introducing evidence that would vary or contradict the terms of the written documents. As the Affidavit of Walter Park Larson contradicts and varies the terms of the written documents by claiming that the Appellees, and not the others, are bound and obligated by the terms of the contract, by operation of the parol evidence rule, the Affidavit does not create a factual issue that the Appellees were parties to the written agreements.

The second subpoint is that it is undisputed that the Appellees' contractual obligations, if any, are subject to an unfulfilled condition precedent. The purchasers under the contract were purchasing an automobile dealership known as "Larson Ford." Prior to the signing of the "Agreement and Escrow", Larson Ford had filed for relief under Chapter 11 of the United States Bankruptcy Code, and had a 120-day exclusive right to file a Plan of Reorganization. According to the written documents in this case, (a) the closing date of the "Agreement and Escrow" was to be within ten (10) days from the date the bankruptcy court confirmed Larson Ford's plan of reorganization; and (b) if the bankruptcy court did not approve Larson's Ford's plan, the purchasers had the right to rescind the "Agreement and Escrow". As it is undisputed that the bankruptcy court did not approve Larson Ford's plan of reorganization, it is equally undisputed that the purchasers' obligations under the "Agreement and Escrow" and incorporated documents never arose as they were subject to an unfulfilled condition precedent.

The third subsection is that pursuant to the Amendment to the "Agreement and Escrow" it is undisputed that the purchasers had the right to cease active pursuit of Larson Ford's plan of reorganization. The Amendment to the "Agreement and Escrow" provides that the purchasers had the absolute right to cease active

pursuit of the plan of reorganization of Larson Ford. Even if there is a factual dispute as to whether the Appellees were parties to the contract, summary judgment is still proper as the written documents allowed the purchasers the right to cease their efforts to purchase Larson Ford.

POINT II: The second point of the Appellees' Brief is that "There Is No Genuine Dispute That the Appellees Did Not Make Careless and/or Negligent Misrepresentations." This point contains four subsections.

The first subsection is that the Appellants' claim of negligent and/or careless misrepresentations is barred by the parol evidence rule. The misrepresentations claimed by the Appellants are actually the contractual terms of the Addendum to the "Agreement and Escrow". As it is undisputed that the Appellees are not parties to those documents, it is undisputed that the Appellees could not have made misrepresentations.

The second subsection is that it is undisputed that negligent misrepresentations cannot apply in the instant case. For negligent misrepresentations to apply, there must be a special confidential relationship. Based upon the Appellants' own discovery answers, it is undisputed that the transaction in question was an arms-length transaction.

The third subsection of Point II is that it is undisputed that the Appellees did not misrepresent facts to the Appellants. As Appellant Walter P. Larson testified in deposition and in his answers to interrogatories that the alleged misrepresentations were made by an individual who did not have the authority to bind the Appellees, it is undisputed that the Appellees did not misrepresent facts to the Appellants.

The fourth subsection of Point II is that it is undisputed that the Appellants did not rely on representations of the Appellees in entering into the "Agreement and Escrow". Reliance is an element of negligence and/or careless misrepresentation. As it is undisputed that the Appellees made no misrepresentations to the Appellants, it is undisputed that the Appellants did not rely on the statements of the Appellees.

POINT III: The third point of the Appellees' Brief is that "On the Basis of the Appellants' Own Deposition Testimony and Answers to Interrogatories, It Is Undisputed That the Appellees Were Not Part of a Scheme to Defraud the Appellants". The third cause of action of the Appellants' Amended Complaint (which should have properly been denominated Second Amended Complaint) was that the Appellees had conspired with a third party. The conspiracy was that the Appellees would pretend to be interested in purchasing Larson Ford. The Appellees would deplete the resources of Larson

Ford, then would fail to proceed with the purchase of Larson Ford, which would then allow their co-conspirator to purchase the assets of Larson Ford at a reduced price. Appellant Walter P. Larson was asked in deposition what evidence he had to support this plan of collusion with the alleged co-conspirator, Stephen Wade. The Appellants were also asked by way of interrogatories what evidence they had to support these allegations. In Walter P. Larson's deposition testimony, as well as in the answers to interrogatories, the Appellants failed to set forth any admissible evidence that would support the allegation that the Appellees had conspired to deplete the assets of Larson Ford.

POINT IV: The fourth point of the Appellees' Brief is that "The Appellants Incorrectly Assert That the Lower Court Was Unable to Rule Decisively". In their brief, the Appellants claim that the trial court was unable to rule decisively. The Appellees first brought a Motion for Summary Judgment requesting the dismissal of the cause of action for carelessly and/or negligently made misrepresentations. That motion was granted. The Appellees then brought another Motion for Summary Judgment requesting the dismissal of the remaining cause of action, breach of contract. That motion was also granted. The Appellants then approached the court and requested permission to amend their Complaint so as to allow them to bring forth the cause of action that the Appellees

had conspired with a third party to drive down the price of Larson Ford. The court allowed the requested amendment. The complaint the Appellants filed contained not only the new cause of action, but also the two old causes of action, breach of contract and carelessly and/or negligently made misrepresentations. The Appellees then brought a Motion for Summary Judgment. That motion was denied. In the court's Findings of Fact and Conclusions of Law dated July 7, 1992, the court indicated that the reason for the denial of the Motion for Summary Judgment was that the court was of the opinion that the Appellants had not had sufficient time in which to develop their theory that the Appellees were trying to deplete the assets of Larson Ford. As the court allowed the Appellants to amend their complaint after having granted the Appellees two motions for summary judgment, and then allowed the Appellants sufficient time in which to develop their theory of conspiracy, it is correct to say that the trial court not only ruled decisively, but also gave every opportunity to the Appellants to present a factual dispute.

POINT V: The final point of the Appellees' Brief is that "The Appellees Have Not Made the Admissions Attributed To Them By the Appellants". In their brief, the Appellants claim that the Appellees have made certain admissions. By virtue of the Appellees' Answers to Request for Admissions and their Amended

Answers to Request for Admissions, it is undisputed that the Appellees did not make the admissions attributed to them by the Appellants.

DATED this 10th day of February, 1993.

McKAY, BURTON & THURMAN

By: 

Harry Caston
Attorneys for Appellees

MAILING CERTIFICATE

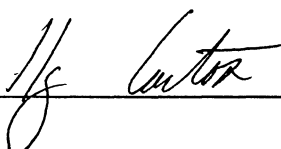
I hereby certify that on the 10th day of February, 1993, a true and correct copy of the foregoing Summary of the Argument was mailed, postage prepaid, to the following:

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IN THE UTAH COURT OF APPEALS

WALTER P. LARSON,	:	
SYBIL LARSON and	:	BRIEF OF APPELLEES
JOHN LARSON,	:	
	:	
Plaintiffs and	:	
Appellants,	:	
	:	Case No. 920364
v.	:	
	:	
JAMES HOGLE, JR. and	:	Priority 15
OWEN C. HOGLE,	:	
	:	
	:	
Defendants and	:	
Appellees.	:	

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TABLE OF CONTENTS

DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE	2
A. NATURE OF THE CASE	2
B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.	2
STATEMENT OF RELEVANT FACTS TO THE ISSUES PRESENTED BEFORE REVIEW	6
A. UNDISPUTED FACTS RELATED TO BREACH OF CONTRACT. . .	6
B. FACTS RELATED TO NEGLIGENT MISREPRESENTATIONS. . .	10
C. FACTS RELATED TO FRAUD.	12
ARGUMENT	14
POINT I: THERE ARE NO GENUINE ISSUES AS TO APPELLANTS' CAUSE OF ACTION FOR BREACH OF CONTRACT	14
A. <u>It Is Undisputed That the Appellees Did Not Enter Into A Contract With The Appellants</u>	14
B. <u>It Is Undisputed That The Appellees' Contractual Obligations, If Any, Are Subject To An Unfulfilled Condition Precedent</u>	16
C. <u>Pursuant to the "Amendment" to the "Agreement and Escrow", It Is Undisputed That the Purchasers Had the Right to Cease Active Pursuit of Larson Ford's Plan of Reorganization</u>	19
POINT II: THERE IS NO GENUINE DISPUTE THAT THE APPELLEES DID NOT MAKE CARELESS AND/OR NEGLIGENT MISREPRESENTATIONS	20
A. <u>The Appellant's Claim of Negligent and/or Careless Misrepresentation Is Barred by The Parol Evidence Rule.</u>	20
B. <u>It Is Undisputed That Negligent Misrepresentation Cannot Apply In The Instant Case</u>	21

C.	<u>It Is Undisputed That The Appellees Did Not Misrepresent Facts to the Appellants</u>	23
D.	<u>It Is Undisputed That Appellants Did Not Rely on Representations of the Appellees in Entering Into the "Agreement and Escrow"</u>	25
POINT III:	ON THE BASIS OF THE APPELLANT'S OWN DEPOSITION TESTIMONY AND ANSWERS TO INTERROGATORIES, IT IS UNDISPUTED THAT APPELLEES WERE NOT PART OF THE SCHEME TO DEFRAUD THE APPELLANTS	26
POINT IV:	THE APPELLANTS INCORRECTLY ASSERT THAT THE LOWER COURT WAS UNABLE TO RULE DECISIVELY	28
POINT V:	THE APPELLEES HAVE NOT MADE THE ADMISSIONS ATTRIBUTED TO THEM BY THE APPELLANTS	30
CONCLUSION		31

TABLE OF AUTHORITES

Cases

<u>Blodgett v. Martsch</u> , 590 P.2d 298 (Utah 1979)	21, 22
<u>Christensen v. Commonwealth Land Title Insurance</u> , 666 P.2d 302 (Utah 1983)	22
<u>Creer v. Thurman</u> , 581 P.2d 149 (Utah 1979)	17
<u>Dupler v. Yates</u> , 351 P.2d 624 (Utah 1960)	25, 26
<u>Ellis v. Hale</u> , 373 P.2d 382 (Utah 1962)	21, 22
<u>FMA Financial Corporation v. Hansen Dairy, Inc.</u> , 617 P.2d 327 (Utah 1980)	15
<u>Webster v. Sill</u> , 675 P.2d 1170 (Utah 1983)	24

Statutes

Rule 56(a) Utah Rules of Civil Procedure	1
Rule 56(c) Utah Rules of Civil Procedure	1

Miscellaneous

1 F. Harper and F. James, <u>The Law of Torts</u> , § 7.6 at 546 . .	22
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DETERMINATIVE STATUTES

1. Rule 56(a) Utah Rules of Civil Procedure:

"A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

2. Rule 56(c) Utah Rules of Civil Procedure:

"If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

STATEMENT OF THE CASE

A. **NATURE OF THE CASE.**

The Appellants claim the lower court erred in granting the Appellees' Motion for Summary Judgment date May 26, 1992.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

1. On or about July 1, 1983, Appellants filed their Complaint. (Index pp. 2-9).

2. The Complaint contained two causes of action. The first cause of action alleged breach of contract. The second cause of action sought relief based on "carelessly and/or negligently made false representations made by the defendants".

3. The Appellees moved the lower court for a dismissal of the second cause of action or, in the alternative, for a more definite statement as the Appellants had failed to properly plead the elements of fraud as required by Rule 9B of the Utah Rules of Civil Procedure. (Index pp. 77-80).

4. On May 29, 1984, the lower court granted Appellees' motion for a more definite statement and allowed the Appellants 10 days to amend their complaint.

5. Appellants filed their amended complaint within the time provided by the court.

6. As did the original complaint, the Amended Complaint contained causes of action for breach of the contract known as the "Agreement and Escrow" and for "carelessly and/or negligently made false representations". (Index pp. 111-118).

7. In August of 1988 the Appellees moved the Court for partial summary judgment on the cause of action for carelessly and/or negligently made false misrepresentations. The points presented in the supporting memorandum were that:

- (a) the Appellees did not misrepresent facts to the Appellants;
- (b) the Appellants did not rely on representations of the Appellees in entering into the agreement and escrow;
- (c) the Appellees did not act knowingly and recklessly; and
- (d) the Appellants had not pled fraud with specificity. (Index pp. 283-292).

8. On August 26, 1988 the lower court granted the Appellees' Motion for Partial Summary Judgment.

9. The Appellants then moved the Court for Summary Judgment on the remaining cause of action, breach of contract. The Points and Authorities in Support of that motion (Index pp. 339-359) contended, based on the Appellants' own deposition testimony and the relevant documents, that it was undisputed that:

- (a) the Appellees never entered into a contract with the Appellants;

- (b) even if the Appellees had contracted with the Appellants, the Appellees' obligations were subject to an unfulfilled condition precedent in that the "Amendment" to the contract provided that the purchasers could "...cease active pursuit of the plan of reorganization of Larson Ford, Inc."; and
- (c) in fact the contract had not been breached.

10. On October 7, 1988, the lower court, ruling from the bench, granted the Second Motion for Summary Judgment. (Index pp. 436, 437).

11. The Appellants then claimed that there was a new theory that their previous counsel had failed to advance. The new theory was that the Appellees were part of a scheme to defraud the Appellants. (Index 446-456).

12. The Court granted the Appellants' Motion to File an Amended Complaint to allow the Appellants to pursue this new theory.

13. The Appellants' Amended Complaint (which should have properly been denominated Second Amended Complaint) contains three causes of action. The first two causes of action are the same as were contained in the original Complaint and the (first) Amended Complaint. These causes of action are breach of the contract dated March 5, 1983, and negligent misrepresentation. The third cause of

action alleges fraud. The third cause of action is where the Appellants allege that the Appellees acted in collusion with Stephen Wade to deplete Larson Ford's assets which would then allow Wade to purchase the entity at a reduced price. (Index pp. 487-573).

14. Following the Appellants filing the Amended Complaint, the Appellees again moved the lower court for Summary Judgment. (Index pp. 593-593H). The court did not grant the Appellees' motion as the court was of the opinion that at the time the Appellees had brought the motion, the Appellants had not had sufficient time in which to pursue the matters set forth in the Amended Complaint. (Findings of Fact, paragraph 7).

15. On the 27th day of May, 1992 the Appellees filed their final Motion for Summary Judgment. On June 12, 1992 the court heard oral argument on the Appellees' Motion for Summary Judgment. Ruling from the bench, the court granted the Motion for Summary Judgment. The Findings of Fact and Conclusion of Law, and Order Granting Motion for Summary Judgment were signed and entered on July 7, 1992, and are attached hereto as Addendum A and B.

STATEMENT OF RELEVANT FACTS TO THE ISSUES
PRESENTED BEFORE REVIEW

The Appellants claim that the lower court erred in granting Appellees' Motion for Summary Judgment filed May 27, 1992. As the Amended Complaint contained the same two causes of action (breach

of contract and carelessly and/or negligently made false misrepresentations) that had been dismissed by the court, the Appellees incorporated the memoranda they had previously submitted. These memoranda are found as Addendum C, D and E. The memoranda that was filed on May 27, 1992 (which is included as Addendum F) presented the undisputed facts that warranted dismissal of the new cause of action - fraud. In the three subsections below, the Appellees set forth the undisputed facts that were presented to the lower court for each of the Appellants' three causes of action; breach of contract, carelessly and/or negligently made false misrepresentations, and the alleged scheme to defraud the Appellants.

A. UNDISPUTED FACTS RELATED TO BREACH OF CONTRACT.

1. Appellants in their Amended Complaint allege that the Appellees breached the contract known as the "Agreement and Escrow".

2. The "Agreement and Escrow" (which is Exhibit A to Addendum C) was entered into on March 5, 1983, between Appellant Walter P. Larson as Seller, Larson Ford Sales, Inc., and HBGH, an intended corporation, as Seller.

3. Stephen P. Bruno and Dennis W. Gay signed the "Agreement and Escrow" on behalf of HBGH, an intended corporation (Exhibit A of Addendum C).

4. Prior to entering into the "Agreement and Escrow", Larson Ford Sales had filed for relief pursuant to Chapter 11 of the United State Bankruptcy Code.

5. Pursuant to paragraphs E and F of the "Agreement and Escrow":

"...the time for closing of this Agreement shall be ten days from the date of confirmation of the Larson Ford Sales plan of reorganization by the Bankruptcy Court...Purchasers shall have the right to rescind the purchase agreement and escrow in the event that the Larson Ford Sales plan of reorganization is not approved by the Bankruptcy Court. Upon occurrence of this event, the Purchasers have the right to rescind this Agreement." (Exhibit A of Addendum C).

6. The "Agreement and Escrow" incorporated an Earnest Money Receipt and Offer to Purchase and Addendum of February 4, 1983. The Earnest Money Receipt and Offer to Purchase and Addendum were agreements between Bruno, Gay and/or their assigns, and Appellant Walter P. Larson (Exhibits B & C of Addendum C).

7. Pursuant to the Addendum the offer was subject to the "...approval of the Federal Bankruptcy Court" (Exhibit C of Addendum C).

8. Concurrently with the execution of the "Agreement and Escrow", Bruno and Gay entered into an Amendment with Appellant Walter P. Larson and Larson Ford Sales, Inc. (Exhibit D of Addendum C). Paragraph 1 of the Amendment states that:

"It is agreed that the stock voting rights will be reconveyed to Walter P. Larson in the event the purchasers cause active pursuit of the Plan of Reorganization of Larson Ford Sales, Inc. (emphasis added).

9. Pursuant to Section 1121 of the United States Bankruptcy Code, Larson Ford Sales had a 120-day exclusive period in which to file a plan of reorganization.

10. Pursuant to Section 1121 of the United States Bankruptcy Code, after the expiration of the 120-day period in which Larson Ford Sales had an exclusive right to file a plan of reorganization, any interested party could file a plan of reorganization.

11. The Purchasers' obligation under the "Agreement and Escrow" were "contingent on the Bankruptcy Court's approval of a plan of reorganization submitted by Larson Ford Sales, Inc."

12. The Bankruptcy Court did not approve the plan of reorganization submitted by Larson Ford Sales, Inc.

13. The Bankruptcy Court did approve the second plan of reorganization submitted by Stephen Wade.

14. From March 21, 1983, HBGH supplied in excess of \$150,000 to Larson Ford Sales.¹ (Affidavit of Owen Hogle, Index 360 and Addendum G).

¹ Oddly, on page 8 of their Brief, Appellants state, "In fact, it must be noted that Appellees never filed any affidavit in support of their Motion for Summary Judgment.

15. In paragraph 36 of the Amended Complaint the Appellants allege that the Appellees had the obligation to "support plaintiff's plan to the Bankruptcy Court on the terms agreed to with the plaintiffs...and not vote for a competing plan."

16. The "Agreement and Escrow" and documents incorporated into the "Agreement and Escrow":

(a) do not set forth the terms of the bankruptcy plan that the Appellants and Appellees allegedly had agreed upon; and

(b) do not state that the Appellees were prevented from voting for a competing plan of reorganization if the Bankruptcy Court rejected Larson Ford's plan of reorganization.

17. The Appellees were not obligated by or parties to any of the aforementioned agreements. (Exhibits A, B and C of Addendum C).

18. The Appellees were never the assigns of Bruno and Gay. (Affidavit of Owen Hogle, Index 360-361 and Addendum G).

19. The Appellees were not and have never been officers, directors or shareholders of HBGH. (Affidavit of Owen Hogle, Index 360-361 and Addendum G).

20. The Appellants were aware that HBGH was to become a corporation and dealt with HBGH as a corporation. (Deposition of Sybil Larson, page 11, line 8; Addendum H).

21. HBGH became a corporation on March 22, 1983.
(Exhibit E of Addendum C)

B. FACTS RELATED TO NEGLIGENT MISREPRESENTATIONS.

22. In paragraphs 41 through 43 of the Amended Complaint, Appellants allege that Bruno and Gay, while acting as agents of the Appellees, made negligent or careless misrepresentations to the Appellants.

23. In paragraphs 45(a) through (e) of the Amended Complaint, Appellants set forth six misrepresentations that the Appellees through "action, conduct, and words" made to the Appellants. At least four of those alleged misrepresentations refer to promises to perform certain acts in the future. The alleged misrepresentations do not refer to then existing facts. Further Appellants do not specify which misrepresentations were made by actions and conduct and which were made by "words."

24. On May 21, 1987, the Appellees took the deposition of Appellant Walter P. Larson. Appellant Larson was asked numerous questions concerning the Appellees' alleged false misrepresentations. Appellant Larson testified that (a) the alleged misrepresentations were the Appellees' "failure to perform

on the basis of the agreement we'd drawn up..." (page 51, lines 17, 24; page 52, lines 4-7; page 53, lines 15-24; page 57, line 25; page 58, lines 3-5); (b) misrepresentations were made by an individual who had no authority to bind the Appellees (page 53, lines 24, 15; page 54, lines 1-7); (c) the basis for its claim that the Appellees knew their alleged misrepresentations were false when they were made was that Appellee Owen Hogle was not present during the "final negotiating..." (page 58, lines 18-22) and that "they didn't follow through with it" (page 58, lines 8 and 9). (Pages 51, 52, 53, 57 and 58 are attached as Addendum I).

25. Appellant Larson did not have with him at the time of the deposition any documentary evidence which would support his claim that the Appellees knew the alleged misrepresentations were false when made, but he would supply such evidence to Appellees' counsel (page 61, lines 8, 25; page 62, lines 1-3; Addendum J).

26. The Appellees never received any documentary evidence from the Appellants regarding Appellants' claims that the defendants knew the alleged misrepresentations were false when made.

27. On February 16, 1988, the Appellees served upon the Appellants Interrogatories and Request for Production of Documents.

28. Interrogatory No. 6 of Appellees' Interrogatories asked the Appellants to state each and every fact which supports

Appellants' claim that the Appellees made fraudulent misrepresentations and to identify and produce each and every document which supported its claim that the defendants made fraudulent misrepresentations.

29. In response to Interrogatory No. 6, Appellants stated that an individual had made "claims and assurances that the Appellees had "wealth" and that other "contacts" had stated that the Appellees' name was "reliable and respected." Appellant Walter P. Larson had testified at his deposition that the individual did not have the authority to bind the Appellees.

C. FACTS RELATED TO FRAUD.

31. The Appellants' third cause of action alleges that the Appellees:

(a) Fraudulently represented that "they are presently capable and interested in purchasing Larson Ford" in order to induce the Appellants to sell Larson Ford;

(b) Were involved in a scheme in which the defendants planned to deplete Appellants' resources, after which another individual in collusion with the Appellees would purchase Appellants' assets at a greatly reduced price.

32. At the deposition of Appellant Walter P. Larson on May 21, 1987, Appellant Larson was asked if he had any "evidence whatsoever that there was any collusion with Stephen Wade and the defendants" After a conference with his attorney, the Appellant stated, on page 13, lines 8 through 17 (Addendum K), that his evidence of collusion consisted of Appellant being told at a date he could not remember and from a person whom he could not recall that:

"Wades and the Hogles had been in contact with each other with the idea that was discussed being the fact that Wade had an inside track of some kind with Ford that they would be approved as the dealer that if the Hogle group wanted to protect the investment that they had made the dealership to that point and time in order to have the cooperation of the Wades were they successful in getting a creditor's plan accepted, the whole group wanted to get their money out, that they would withdraw."

33. On January 28, 1992 the Appellees served the Appellants with a set of Interrogatories and Request for Production of Documents. Interrogatory No. 4 asked the Appellants to set forth the factual basis upon which they claimed that the Appellees had participated in a plan to deplete the resources of Larson Ford so as to allow a co-conspirator to purchase the assets of Larson Ford at a greatly reduced price. In Appellants' answer to Interrogatory No. 4 (Addendum L), the Appellants set forth absolutely no admissible evidence that there was any collusion

whatsoever between the Appellees and any other party to deplete the assets of Larson Ford.

34. On June 11, 1992, one day prior to the hearing on the Motion for Summary Judgment, the Appellants filed their responsive memorandum and the Affidavit of Walter Park Larson (Addendum M). The Affidavit does not indicate that the statements are made upon personal knowledge.

ARGUMENT

POINT I: THERE ARE NO GENUINE ISSUES AS TO APPELLANTS' CAUSE OF ACTION FOR BREACH OF CONTRACT.

A. It Is Undisputed That the Appellees Did Not Enter Into A Contract With The Appellants.

The first cause of action of the Appellants' Amended Complaint alleges a breach of the "Agreement and Escrow" dated March 5, 1983. For the Appellees to have breached this contract, they must have been parties to that contract. It is undisputed that Appellees James and Owen Hogle are not parties to the "Agreement and Escrow". The "Agreement and Escrow" is between HBGH, Inc. as purchaser and Walter Park Larson as seller. Stephen Bruno and Dennis Gay signed the agreement on behalf of HBGH, an "intended corporation". At the time the agreement was signed, HBGH was not a corporation. HBGH was incorporated on March 22, 1983. Appellant Sybil Larson stated in her deposition that the appellants were aware HBGH was to become a corporation, and treated it as such.

The "Agreement and Escrow" incorporated an Earnest Money Receipt and Offer to Purchase and Addendum dated February 4, 1983. The Appellees are not parties to either of those documents. The parties to the Earnest Money Receipt and Offer to Purchase were Stephen P. Bruno and Dennis W. Gay and/or assigns, and Appellant Walter P. Larson. The parties to the Addendum are Walter P. Larson for Larson Ford Sales and Stephen B. Bruno. As was stated in Appellee Owen Hogle's Affidavit, the Appellees were never the assigns of Bruno, Gay or HBGH.

There is an Amendment to the "Agreement and Escrow" of March 5, 1983. That Amendment is between Stephen B. Bruno and Dennis Gay as buyers and Appellants Walter P. Larson and Walter P. Larson, president of Larson Ford Sales, Inc.

The parol evidence rule as set forth in FMA Financial Corporation v. Hansen Dairy, Inc., 617 P.2d 327 (Utah 1980), prevents the Appellants from introducing any evidence that would contradict or vary the terms of the written agreements. There is one caveat to the parol evidence rule. A party may introduce evidence that is collateral to the written agreement. The collateral evidence may not be inconsistent with or repudiate the terms of the written agreement.

Appellants claim that the Appellees were parties to the March 5, 1983 Agreement by virtue of representations made to the

Appellants by agents of the Appellees. This assertion contradicts and varies the terms of the written agreements. The Appellants may not make use of the caveat to the parol evidence rule. The Agreement of March 5, 1983 (and other documentation in this case) is void of even the slightest indication that the Appellees were parties to the contract. To claim otherwise is inconsistent and varies an essential term of the March 5, 1983 Agreement.

It is significant to note that the parties who signed the "Agreement and Escrow" and other documents did specify the capacity in which they were signing each document. On numerous documents, Appellant Walter P. Larson signed for himself and for Larson Ford Sales, Inc. Gay and Bruno signed on their behalf and on behalf of HBGH. No document was signed on behalf of the Appellees.

B. It Is Undisputed That The Appellees' Contractual Obligations, If Any, Are Subject To An Unfulfilled Condition Precedent.

If the Court finds that there is a factual dispute as to whether the Appellees are parties to the "Agreement and Escrow", summary judgment on the cause of action for breach of contract is still proper. Pursuant to the contractual documents, the purchasers obligations were subject to an unfulfilled condition precedent. The case of Creer v. Thurman, 581 P.2d 149 (Utah 1979) is an example of where an individual's obligations to a contract do

not arise due to an unfulfilled condition precedent. In Creer the plaintiff entered into an agreement with the defendant to purchase a parcel of real estate. The court found that the plaintiff knew that there was a possibility that the defendant's ability to convey title was based on a contingency. The contingency did not occur and the defendant was unable to convey title. The court, in holding that the defendant's contractual obligation had not arisen, stated:

"Whether a provision in a contract is a condition, the non-fulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the circumstances when they executed the contract." Id. at 51.

Should this court find that there is a factual dispute as to whether the Appellees are parties to the contract, summary judgment is still proper as the Appellees cannot be liable for a breach of contract as it is undisputed that the purchasers' contractual obligations are subject to a condition precedent that was never satisfied. Prior to the Agreement of March 5, 1983, Larson Ford Sales had filed for relief under Chapter 11 of the United States Bankruptcy Code. The Appellants had, in accordance with Section 1121 of the United States Bankruptcy Code, 120 days from the date they filed for relief in which to file their own bankruptcy plan.

Pursuant to paragraphs E and F of the March 5, 1983 "Agreement and Escrow", the closing date was to be within ten (10) days from the date the Bankruptcy Court confirmed the Plan of Reorganization submitted by Larson Ford Sales. Pursuant to the "Agreement and Escrow", if the Bankruptcy Court did not approve the plan of Larson Ford Sales, the purchasers had the right to "rescind the purchase "Agreement and Escrow". It is undisputed that the Bankruptcy Court did not approve the plan submitted by Larson Ford.

Once the 120-day period in which the debtor has an exclusive right to file a bankruptcy plan has expired, any other party in interest may file a bankruptcy plan. Once the bankruptcy court approves a plan of an interested party, a debtor can no longer file his own plan. In the instant case, it is undisputed that Stephen Wade, as a party in interest, submitted a bankruptcy plan. Wade's first plan was rejected. Wade submitted a second plan which was then approved by the Bankruptcy Court. As it is undisputed that the obligation to purchase Larson Ford was contingent upon the Bankruptcy Court's approval of a plan submitted by Larson Ford, and as it is undisputed that the Bankruptcy Court did not approve Larson Ford's plan, it is also undisputed that the purchasers' obligation to purchase Larson Ford was subject to an unfulfilled condition precedent.

C. Pursuant to the "Amendment" to the "Agreement and Escrow", It Is Undisputed That the Purchasers Had the Right to Cease Active Pursuit of Larson Ford's Plan of Reorganization.

Should the Court find that there are factual disputes as to whether (a) Bruno and Gay signed the "Agreement and Escrow" on behalf of the Appellees; and (b) the purchasers' obligation under the "Agreement and Escrow" is subject to an unfulfilled condition precedent, summary judgment is still proper as there can be no dispute that the Amendment to the "Agreement and Escrow" allowed the purchasers to cease the pursuit of Larson Ford's plan of reorganization. The first paragraph of the Amendment states:

"It is agreed that the stock and voting rights will be reconveyed to Walter P. Larson in the event the purchasers cease active pursuit of the plan of reorganization of Larson Ford, Inc. (emphasis added)".

As it is undisputed that the Addendum to the "Agreement and Escrow" gave the purchasers the absolute right to no longer pursue the purchase of Larson Ford, the Appellants cannot create a factual dispute by claiming that by way of affidavit the Appellees breached the contract by failing to comply with the terms of the "Agreement and Escrow".

POINT II: THERE IS NO GENUINE DISPUTE THAT THE APPELLEES DID NOT MAKE CARELESS AND/OR NEGLIGENT MISREPRESENTATIONS.

The Appellants' Second Cause of Action alleged that the Appellees, acting through their agent Bruno and Gay, falsely represented:

(a) that the Appellees would get releases from Citizen's Bank and CSB Bank;

(b) that the Appellees would substitute collateral with the Small Business Administration;

(c) that the Appellees would pay the outstanding sales tax;

(d) that the Appellees would personally commit funds; and

(e) that the Appellees would cooperate in the committing of ...financial resources.

A. The Appellant's Claim of Negligent and/or Careless Misrepresentation Is Barred by The Parol Evidence Rule.

In the immediately preceding section, the Appellees have set forth the negligent and/or careless misrepresentations claimed by the Appellants. These "misrepresentations" are actually contractual obligations set forth in the "Addendum". Considering that Bruno and Gay signed the "Agreement and Escrow", Addendum and Amendment as purchasers and in their own capacity without any indication that they were signing the documents on behalf of anyone else, it is undisputed that Bruno and Gay obligated themselves

(and/or HBGH) and no one else. As was stated above, the parole evidence rule prevents the Appellants from introducing evidence that would vary or contradict the explicit terms of the written agreements, unless the evidence is consistent with or does not repudiate the terms of the written agreement. To claim that the Appellees were to perform certain acts when the written documents state that it was Bruno and Gay (and/or HBGH) who were to perform these acts is inconsistent with and repudiates an essential term of the contract.

B. It Is Undisputed That Negligent Misrepresentation Cannot Apply In The Instant Case.

In Ellis v. Hale, 373 P.2d 382 (Utah 1962) this Court held that:

"Negligent misrepresentation differs from intentional representation in that in the former the representor makes an affirmative assertion which is false without having used reasonable diligence or competence in ascertaining the verity of the assertion. Moreover, liability will only lie for negligent misrepresentation when there is a special duty of care running from the representor to the representee." Id. at 385.

In Blodgett v. Martsch, 590 P.2d 298 (Utah 1979), the court set forth the limited circumstances in which the representor is held to a special duty of care:

"If the circumstances are such that the defendant could exercise extraordinary influence over the plaintiff and the defendant was or should have been aware the plaintiff reposed trust and confidence in the defendant and reasonable relief on defendant's guidance, then the

parties are said to be 'in confidential relationship'....There are few relationships (such as parent-child, attorney-client, trustee-cestui) which the law presumes to be confidential." Id. at 302.

The Appellants cite the case of Christensen v. Commonwealth Land Title Insurance, 666 P.2d 302 (Utah 1983) to set forth the elements of negligent misrepresentation. The Appellants fail to mention that in Christensen, just as in Ellis and Blodgett, the court held that unless there is a special duty of care, there cannot be negligent misrepresentation. The court quoted 1 F. Harper and F. James, The Law of Torts, § 7.6 at 546, for the proposition that such a special relationship and duty of care exists where the speaker is in the business of providing such information:

"If, however, the information is given in the capacity of one in the business of supplying such information, that care and diligence should be exercised which is compatible with the particular business or profession involved. Those who deal with such persons do so because of the advantages which they expect to derive from this special competence. The law, therefore, may well predicate on such a relationship, the duty of care to insure the accuracy and validity of the information." 1 F. Harper & F. James, *supra*, § 7.6 at 546.

It is undisputed that in the instant case there was no such special duty of care or confidential relationship. The Appellants do not argue in their brief that negotiations between Bruno and Gay and the plaintiffs were anything but arms-length negotiations. The Affidavit of Walter Park Larson is devoid of any assertion that

there was a special duty of care or a confidential relationship. Even should this Court find that Bruno and Gay were the agents of the Appellees, the lower court properly dismissed the cause of action for negligent misrepresentation as negligent misrepresentation does not apply to facts of the instant case.

C. It Is Undisputed That The Appellees Did Not Misrepresent Facts to the Appellants.

As was set forth above, the Appellants second cause of action claims that the Appellees made careless and/or negligent misrepresentations. On May 21, 1987 Appellant Walter P. Larson was deposed by the Appellees. Appellant Larson was asked numerous questions concerning the alleged false misrepresentations. Appellant Larson testified that (a) the alleged misrepresentations were the Appellees' "failure to perform on the basis of the agreement we'd drawn up..." (page 51, lines 17, 24; page 52, line 4-7; page 53, lines 15-24; page 57, line 25; page 58, lines 3-5); (b) that misrepresentations were made by an individual who had no authority to bind the Appellees (page 53, lines 24, 15; page 54, lines 1-7); and (c) that the basis for the claim that the defendants knew their alleged misrepresentations were false when they were made was that Appellee Owen Hogle was not present during the "final negotiating..." (page 58, lines 18-22) and that "they didn't follow through with it" (page 58, lines 8, 9).

On February 16, 1988 Appellees served Appellants with Interrogatories and Request for Production of Documents. Interrogatory No. 6 asked the Appellants to state each and every fact that supported the Appellants' claim that the Appellees had made false misrepresentations. In response, the Appellants stated that an individual had made "claims and assurances that the defendants had wealth" and that other "contacts had stated that the defendants' name was "reliable and respected." On May 21, 1988 Appellant Walter P. Larson was deposed. Consistent with the above-mentioned answer to Interrogatories, the Appellant had testified that the misrepresentations were made by an individual named Steven Brown, and that Mr. Brown did not have the authority to bind the Appellees. Despite his answers to Interrogatories and his deposition testimony, the Appellants sought to forestall summary judgment by filing an affidavit in which they claimed that the Appellees, both personally and through their agents, made careless and/or negligent misrepresentations.

In Webster v. Sill, 675 P.2d 1170 (Utah 1983), the Court stated:

"...when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." Id. at 1173.

As the Affidavit of Walter P. Larson contradicts his deposition testimony as well as his signed and sworn Answers to Interrogatories, and as the Affidavit does not attempt to explain the discrepancies between his Affidavit and his previous testimony, it remains undisputed that the Appellees did not make careless and/or negligent misrepresentations to the Appellants.

D. It Is Undisputed That Appellants Did Not Rely on Representations of the Appellees in Entering Into the "Agreement and Escrow".

As was set forth in the preceding subsection, it is undisputed that the Appellees did not make any careless and/or negligent misrepresentations. It follows that if the Appellees did not make any representations, it is also undisputed that the Appellants could not have relied on any false misrepresentations made by the Appellees. Support for this position is found in Dupler v. Yates, 351 P.2d 624 (Utah 1960). In Dupler, the plaintiff had purchased the defendant's interest in oil wells. The plaintiff claimed that he had been induced to purchase these oil wells by the defendant's false representations. The Supreme Court of Utah affirmed the trial court's granting of defendant's motion for summary judgment. The court based its decision on the fact that the plaintiff, in agreeing to buy the defendant's oil

interests, had relied on representations made by individuals other than the defendants:

"As a matter of law it is conceivable that a person might simultaneously rely on misrepresentations of divergent defendants. However, standing alone admissions by plaintiffs that they relied on others is sufficient proof to negative reliance on the present defendant." Id. at page 636.

In the instant case, as in Dupler, as the Appellants' sworn testimony is that they relied on representations of others in entering into the agreement, it is undisputed that the Appellants did not rely on representations of the Appellees.

POINT III: ON THE BASIS OF THE APPELLANT'S OWN DEPOSITION TESTIMONY AND ANSWERS TO INTERROGATORIES, IT IS UNDISPUTED THAT APPELLEES WERE NOT PART OF THE SCHEME TO DEFRAUD THE APPELLANTS.

In the court below, the Appellees filed a total of four (4) Motions for Summary Judgment. The first Motion for Partial Summary Judgment addressed the Appellants' claim of carelessly made and/or false misrepresentations. The lower court granted that motion and dismissed the cause of action for false misrepresentations. The Appellees then moved the lower court for summary judgment on the cause of action for breach of contract. The lower court granted that motion as well. After granting the Appellees' second motion, the Appellants pled with the Court to allow the Appellants to pursue a cause of action that Appellants' previous counsel had failed to pursue. The new theory was that the Appellees had

conspired with Stephen Wade to drive down the value of Larson Ford. The lower court allowed the Appellants to file an Amended Complaint to pursue this new theory. The new theory was presented in paragraph 56 of the Amended Complaint. The paragraph alleges that Appellants were involved in a scheme:

"where a buyer would approach a seller and offer favorable terms which would be accepted by the seller. After depleting the seller's resources and limiting his ability to find other buyers, the original buyer would step back and allow for the distressed sale to another seconde [sic] buyer. The original buyer would profit through moneys paid by a second buyer or through the improper conversion of the seller's assets."

Appellant Walter P. Larson's sworn deposition testimony shows that there is no genuine factual dispute that no such scheme existed. On page 10 of the deposition, Walter P. Larson was asked if he "had any evidence whatsoever that there was any collusion between Stephen Wade and the defendants..." After attempting to dodge the question and although Appellant Walter P. Larson did not recall when or by whom he was so informed, he did recall that he was told that:

"Wades and the Hogles had been in contact with each other with the idea that was discussed being the fact that Wade had an inside track of some kind with Ford that they would be approved as the dealer, that if the Hogle group wanted to protect the investment that they'd made in the dealership to that point in time, in order to have the cooperation of the Wades, were - were they successful in getting a creditors' plan accepted, if the Hogle group wanted to get their money out that they would withdraw."

In short, the Appellants' entire evidence for the alleged scheme is a hearsay conversation in which the Appellees discussed with Stephen Wade the possibility of HBGH recovering through the bankruptcy court the money it had supplied to Larson Ford Sales.

On January 28, 1992 the Appellees served the Appellants with a second set of Interrogatories. Interrogatory No. 4 stated:

"Regarding your belief that the defendants were involved in a scheme in which the defendants planned to deplete plaintiff's resources after which another individual in collusion with the defendants would purchase plaintiff's assets at a greatly reduced price, please state (a) each and every fact upon which you base your belief; (b) the title, location and individual in possession of each document which supports your belief."

The Appellants' lengthy answer to this Interrogatory is devoid of any admissible evidence that the Appellees were part of a scheme to defraud the Appellants.

POINT IV: THE APPELLANTS INCORRECTLY ASSERT THAT THE LOWER COURT WAS UNABLE TO RULE DECISIVELY.

On page 7 of their brief, the Appellants state that "The trial court in this case was unable to clearly resolve the issues presented to it and decisively rule." It is imagined that the Appellants make this statement in that it is easier to convince this Court that the lower court erred if the lower court was not certain as to whether there were genuine disputes. In making this assertion, the Appellants have completely mischaracterized the proceedings in the court below. On the 26th day of August, 1988,

ruling from the bench, the lower court granted the Appellees' first Motion for Summary Judgment and thereby dismissed the cause of action for carelessly and/or negligently made misrepresentations. On October 7, 1988 the lower court, ruling from the bench, granted the Appellees' second Motion for Summary Judgment and thereby dismissed the remaining cause of action, breach of contract. As is set forth in paragraphs 4, 5, 6 and 7 of the court's Findings of Fact and Conclusions of Law dated July 7, 1992 (Addendum A), following the court's granting of the second Motion for Summary Judgment, the Appellants pled with the court to allow the Appellants to pursue a theory that the Appellants' previous counsel had failed to advance. That cause of action was that the Appellees had been part of a scheme to deplete Larson Ford's assets after which the co-conspirator would purchase Larson Ford at a greatly reduced price. The court did allow the Appellants to file an amended complaint to explore this new cause of action. The complaint filed by the Appellants contained the new cause of action as well as the two old causes of action which had been previously dismissed. On July 6, 1989 the Appellees filed a Motion for Summary Judgment. On November 20, 1989, after having taken the matter under advisement, the court denied the Motion for Summary Judgment. As is set forth in paragraph 7 of the Findings of Fact, the reason the court denied the Motion for Summary Judgment was

none other than "the Court was of the opinion that at the time the defendant had brought the motion, the plaintiff had not had sufficient time to pursue the matters set forth in the Amended Complaint." On May 5, 1992, after having received the Appellants' answers to Appellees' Interrogatories dated January 28, 1992, the Appellees filed the Motion for Summary Judgment that is the subject of this Court's review. The procedural history demonstrates that not only did the lower court rule decisively, but in allowing the Appellants to amend their complaint to pursue the new theory after the court had granted summary judgment, and in denying the Appellees' Motion for Summary Judgment filed July 17, 1989 so as to allow the Appellants sufficient time to develop the allegations of fraud, it is undisputed that the lower court allowed the Appellants every opportunity to present a factual dispute, something the Appellants have been unable to do.

POINT V: THE APPELLEES HAVE NOT MADE THE ADMISSIONS
ATTRIBUTED TO THEM BY THE APPELLANTS.

On page 13 of their brief, the Appellants claim that:

"Appellees have admitted that they met with Appellants for the purpose of extending the time within which conditions contained in the Earnest Money Agreement had to be satisfied"

and that

"Appellees further admitted that Owen Hogle filed personal financial statements with the United States Bankruptcy Court indicating that he intended to purchase Larson Ford."

Attached hereto as Addendum N are the Appellees' Answers to Plaintiff's First Set of Request for Admissions to Defendants James Hogle, Jr. and Owen Hogle, and the Amended Answer to Plaintiff's First Set of Request for Admissions to Defendants James Hogle, Jr. and Owen Hogle. In answering Admission No. 7, the Appellees denied that they met with the Appellants to extend the time in which conditions contained in the Earnest Money Agreement had to be satisfied. In answering Admission No. 12, the Appellees denied that Owen Hogle had filed personal financial statements with the United States Bankruptcy Court indicating that he intended to purchase Larson Ford.

CONCLUSION

The Appellees respectfully request that this Court affirm the lower court's granting of the Appellees' Motion for Summary Judgment as based on the written documents, the Appellants' deposition testimony, Answers to Interrogatories and the Affidavit of Appellee Owen C. Hogle, there are no genuine factual issues disputing that:

(a) Appellees James and Owen C. Hogle were not parties to the written documents;

(b) The contractual obligations of the purchasers (whomever they are) are subject to an unfulfilled condition precedent;

(c) The purchasers (whomever they are) had the absolute right to no longer pursue the purchase of Larson Ford;

(d) The cause of action for carelessly and/or negligently made false representations is barred by the parol evidence rule;

(e) There is no confidential relationship between the Appellants and the Appellees;

(f) The Appellants did not rely on any statements of the Appellees; and

(g) At time was there any collusion between the Appellees and any other individual to deplete the assets of Larson Ford.

DATED this 31st day of February, 1993.

McKAY, BURTON & THURMAN

By: Harry Caston
Harry Caston
Attorneys for Appellees

MAILING CERTIFICATE

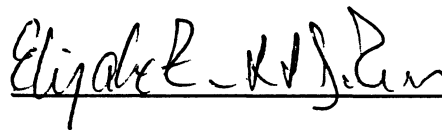
I hereby certify that on the 3rd day of February, 1993, a true and correct copy of the foregoing Brief of Appellee was mailed, postage prepaid, to the following:

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Attorneys for Appellants



ADDENDUM A

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FILED DISTRICT CLERK
Third Judicial District

JUL - 7 1992

SALT LAKE COUNTY

By _____
Deputy Clerk

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

WALTER P. LARSON,	:	FINDINGS OF FACT AND
SYBIL LARSON and	:	CONCLUSIONS OF LAW
JOHN LARSON,	:	
Plaintiffs and	:	
Counter-Defendants,	:	
	:	Civil No. C83-5542
v.	:	
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	
OWEN C. HOGLE, et al.,	:	Judge Richard H. Moffat
Defendants and	:	
Counter-Claimants.	:	

On the 12th day of June, 1992 at the hour of 9:00 a.m. came on to be heard defendant James and Owen Hogle's Motion for Summary Judgment, the Honorable Richard H. Moffat presiding. The plaintiffs were represented by their counsel of record, John J. Borsos and Hans M. Scheffler. Defendants, James and Owen Hogle, were represented by their counsel of record, Harry Caston. The Court having read the pleadings submitted by the parties, having reviewed the file and having heard oral argument, now makes the following

FINDINGS OF FACT

1. The plaintiff's Amended Complaint filed in June of 1984 contained two causes of action, a cause of action for breach of the contract known as the Agreement and Escrow, and a cause of action for "carelessly and/or negligently made false misrepresentations".

2. Defendants James and Owen Hogle moved the Court for partial summary judgment on the cause of action for carelessly and/or negligently made false misrepresentations. The Court granted the defendants' Motion for Partial Summary Judgment as there were no genuine issues as to any of the material facts:

(a) that Defendants James and Owen Hogle made any representations to the plaintiffs;

(b) there were any representations made to the plaintiff of a then presently existing material fact;

(c) the plaintiffs did not rely on representations of the Hogles;

(d) that if anything, the plaintiffs relied on representations made by others who were not agents or authorized to speak on behalf of the Hogles;

(e) that the Hogles did not act knowingly or recklessly.

3. The Hogles then moved the Court for summary judgment on the remaining cause of action, breach of contract. The Court granted the defendants' Motion for Summary Judgment as the Court found that there were no genuine issues as to the following material facts:

(a) the Hogles were not parties to any of the agreements with the plaintiff and/or Larson Ford;

(b) the Agreement and Escrow and Addendum allowed the purchasers to cease efforts to purchase Larson Ford;

(c) the purchasers' obligation under the Agreement and Escrow was contingent upon a condition precedent which was unfulfilled.

4. The plaintiff then claimed that there was a new theory that plaintiffs' previous counsel had failed to advance. This new theory was that the Hogles were part of a scheme to defraud the plaintiff. This theory held that the Hogles conspired with Stephen Wade. The plan was that the Hogles would deplete the plaintiffs' business assets which would then allow Stephen Wade to purchase the assets of Larson Ford at a greatly reduced price.

5. The Court granted the plaintiffs' Motion to File an Amended Complaint to allow the plaintiffs to pursue this new theory.

6. The plaintiffs' Amended Complaint (which should properly be denominated Second Amended Complaint) contains three causes of action. The first two causes of action are the same as were contained in the original Complaint and the plaintiffs' First Amended Complaint. These causes of action are breach of the contract dated March 5, 1983, and negligent misrepresentation. The third cause of action alleges fraud. This new cause of action is where the plaintiff alleges that the Hogles acted in collusion with

Stephen Wade to deplete Larson Ford's assets which would then allow Wade to purchase the entity at a reduced price.

7. That following the plaintiff's filing the Amended Complaint, the defendant again moved the Court for summary judgment. The Court did not grant the defendant's motion as the Court was of the opinion that at the time the defendant had brought the motion, the plaintiff had not had sufficient time in which to pursue the matters set forth in the Amended Complaint. The defendants subsequently filed the Motion for Summary Judgment that is now before the Court.

8. That the plaintiffs have failed to present any new evidence by way of affidavit or documentation which would raise a genuine issue to any of the material facts raised in Defendant Hogles' Motion for Summary Judgment regarding the causes of action for breach of contract and negligently and/or carelessly made false misrepresentations.

9. The plaintiff's new cause of action alleges that Defendants James and Owen Hogle acted fraudulently and that they joined forces with Stephen Wade to deplete the assets of Larson Ford. Particularly, the plaintiffs claim that the Hogles never intended to purchase the assets of Larson Ford, that the Hogles undertook to manage Larson Ford in a slipshod manner and then withdraw which would allow Stephen Wade to purchase the assets of Larson Ford at a reduced price.

10. That the defendants took the deposition of plaintiff Park Larson. The plaintiff was asked to explain the factual basis of

his claim of fraud against the Hogles. The plaintiff's answer to the deposition question does not in any way raise a factual dispute that the Hogles fraudulently schemed to deplete the assets of Larson Ford so as to allow Stephen Wade to purchase the dealership.

11. The plaintiff was asked by the defendant through interrogatories to identify the factual basis of his claim that the Hogles had acted fraudulently. The plaintiff's answer to this interrogatory as well as to the deposition question does not in any way raise the factual dispute that the Hogles fraudulently schemed to deplete the assets of Larson Ford to allow Stephen Wade to purchase the dealership.

12. The Court also finds that there is no genuine factual dispute that the Hogles fraudulently entered into a contract with the plaintiffs in that:

(a) that the Hogles did not enter into any agreement with the plaintiff; and

(b) that the parties to the Agreement and Escrow had a right to cease pursuit of the purchase of Larson Ford.

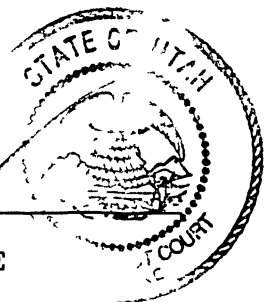
CONCLUSIONS OF LAW

As there are no genuine issues as to any of the material facts raised in the plaintiff's Complaint, it is just and proper that the Court grant Defendant James and Owen Hogle's Motion for Summary Judgment.

DATED this 27th day of July, 1992.

BY THE COURT:

Richard H. Moffat
RICHARD H. MOFFAT
DISTRICT COURT JUDGE



Approved as to form:

John J. Borsos, Esq.
Attorney for Plaintiff

Hans M. Scheffler, Esq.
Attorney for Plaintiff

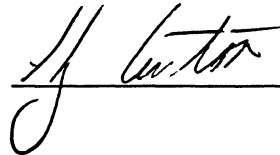
eliz\harry\hogle6.fof

MAILING CERTIFICATE

I hereby certify that on the 24 day of June, 1992, true and correct copies of the foregoing Findings of Fact and Conclusions of Law were mailed, postage prepaid, to the following:

John J. Borsos
370 East South Temple
Salt Lake City, Utah 84111

Hans M. Scheffler
311 South State, #380
Salt Lake City, Utah 84111



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ADDENDUM B

JUL - 7 1992

SALT LAKE COUNTY

By _____ Deputy Clerk

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

WALTER P. LARSON,	:	ORDER ON MOTION FOR
SYBIL LARSON and	:	SUMMARY JUDGMENT
JOHN LARSON,	:	
Plaintiffs and	:	
Counter-Defendants,	:	
	:	Civil No. C83-5542
v.	:	
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	
OWEN C. HOGLE, et al.,	:	Judge Richard H. Moffat
Defendants and	:	
Counter-Claimants.	:	

On the 12th day of June, 1992 at the hour of 9:00 a.m. came on to be heard Defendants James and Owen C. Hogle's Motion for Summary Judgment. The plaintiffs were represented by their counsel of record, John J. Borsos and Hans M. Scheffler. Defendants James and Owen C. Hogle were represented by their counsel of record, Harry Caston. The Court having heard the arguments of the parties, having reviewed the pleadings on file herein, having made its Findings of Fact and Conclusions of Law, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED

1. That Defendants James and Owen C. Hogle's Motion for Summary Judgment be granted.

DATED this 7 day of July, 1992.

BY THE COURT:

RS
RICHARD H. MOFFAT
DISTRICT COURT JUDGE

Approved as to form:

John J. Borsos, Esq.
Attorney for Plaintiff

Hans M. Scheffler, Esq.
Attorney for Plaintiff

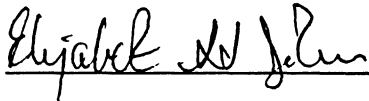
eliz\harry\hogle6.ord

MAILING CERTIFICATE

I hereby certify that on the 21 day of June, 1992, true and correct copies of the foregoing Order on Motion for Summary Judgment were mailed, postage prepaid, to the following:

John J. Borsos
370 East South Temple
Salt Lake City, Utah 84111

Hans M. Scheffler
311 South State, #380
Salt Lake City, Utah 84111



eliz\harry\hogle6.ord

ADDENDUM C

WILLIAM THOMAS THURMAN (3267)
 HARRY CASTON (4009)
 McKAY, BURTON & THURMAN
 Attorneys for Defendants James Hogle, Jr.
 and Owen C. Hogle
 1200 Kennecott Building
 10 East South Temple Street
 Salt Lake City, Utah 84133
 Telephone: (801) 521-4135

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

WALTER P. LARSON, SYBIL LARSON	:	
and JOHN LARSON,	:	
Plaintiffs and Counter-	:	DEFENDANTS' OWEN AND JAMES
Defendants.	:	HOGLE'S MEMORANDUM OF POINTS
	:	AND AUTHORITIES IN SUPPORT
	:	OF MOTION FOR SUMMARY
vs.	:	JUDGMENT
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	Civil No. C83-5542
OWEN C. HOGLE, et al.,	:	
Defendants and Counter-	:	Judge Richard H. Moffat
Claimants.	:	
	:	

FACTS

1. Plaintiffs allege in their Amended Complaint that the defendants have breached the contract known as the "Agreement and Escrow," a copy of which is attached hereto and hereby made Exhibit "A".

2. The Agreement and Escrow was entered into on March 5, 1983, between plaintiff, Walter P. Larson, Larson Ford Sales, Inc. and HBGH, an intended corporation.

3. Defendants Stephen Bruno and Dennis W. Gay signed the Agreement and Escrow for HBGH, an intended corporation.

4. The Agreement and Escrow incorporated an Earnest Money Receipt and Offer to Purchase and Addendum of February 4, 1983, all of which are attached hereto and are hereby made Exhibits "B" and "C". The Earnest Money Receipt and Offer to Purchase and Addendum were agreements between defendants Bruno, Gay and/or their assigns and Walter P. Larson.

5. That concurrently with the execution of the Agreement and Escrow, defendants Bruno and Gay entered into an Amendment (a copy of which is attached hereto and hereby made Exhibit "D") with Walter P. Larson and Larson Ford Sales, Inc. Paragraph 1 of the Amendment states that: "It is agreed that the stock voting rights will be reconveyed to Walter P. Larson in the event the purchasers cease active pursuit of the Plan of Reorganization of Larson Ford Sales, Inc. (emphasis added)

6. That prior to entering into the Agreement and Escrow, Larson Ford Sales had filed for relief pursuant to Chapter 11 of the United States Bankruptcy Code.

7. Pursuant to Section 1121 of the United States Bankruptcy Code, Larson Ford Sales had a 120-day exclusive period in which to file a Plan of Reorganization.

8. That pursuant to Section 1123 of the United States Bankruptcy Code, after the expiration of the 120-day period in which Larson Ford Sales had an exclusive right to file a Plan of Reorganization, any interested party could file a Plan of Reorganization.

9. That the defendants' obligation under the Agreement and Escrow was "contingent on the Bankruptcy Court's approval of a Plan of Reorganization submitted by Larson Ford Sales, Inc."

10. The Bankruptcy Court did not approve the Plan of Reorganization submitted by Larson Ford Sales, Inc.

11. The Bankruptcy Court did approve the second Plan of Reorganization submitted by Stephen Wade.

12. That from March 21, 1983, HBGH supplied in excess of \$150,000.00 to Larson Ford Sales.

13. Plaintiffs' claim in paragraph 3 of the Amended Complaint that the defendants had the obligation to "take such steps as to submit a satisfactory plan to the Bankruptcy Court as required in the contract."

14. The Agreement and Escrow does not obligate the defendants to take such steps as to submit a satisfactory plan to the Bankruptcy Court.

15. Plaintiff Sybil Larson was never a party to any of the aforementioned agreements.

16. Defendants James and Owen Hogle were not obligated by or parties to any of the aforementioned documents.

17. That defendants James and Owen Hogle were not and have never been officers, directors or shareholders of HBGH.

18. Plaintiffs were aware that HBGH was to become a corporation and dealt with HBGH as a corporation (deposition of Sybil Larson, page 11, line 8).

19. HBGH became a corporation on March 22, 1983.

20. The Hogles were never the assigns of Bruno and Gay.

POINT I

THE HOGLES DID NOT ENTER INTO A CONTRACT WITH THE PLAINTIFFS

The First Cause of Action of Plaintiffs' Amended Complaint alleges that the defendants breached a contract of March 5, 1983. There can be no argument that it is impossible for a person to breach a contract to which he is not a party. James and Owen Hogle were not parties to the contract of March 5, 1983. The contract (otherwise referred to as the "Agreement and Escrow") is between HBGH, Inc. as purchaser and Walter Park Larson as seller. Defendants Stephen Bruno and Dennis Gay signed the agreement on behalf of HBGH. At the time the agreement was signed, HBGH was not a corporation. However, HBGH was incorporated on March 22, 1988. As Sybil Larson stated in her

deposition, the plaintiffs were aware HBGH was to become a corporation.

The Agreement of March 5, 1983, incorporated an Earnest Money Receipt and Offer to Purchase and Addendum dated February 4, 1983. The Hogles are not parties to either of those documents. The parties to the Earnest Money Receipt and Offer to Purchase were Stephen P. Bruno and Dennis W. Gay and/or assigns and Walter P. Larson. The parties to the Addendum are Walter P. Larson for Larson Ford Sales and defendant Stephen P. Bruno. The Hogles were never the assigns of Bruno, Gay or HBGH.

There was an amendment to the Agreement of March 5, 1983. That amendment was between Stephen P. Bruno and Dennis Gay as buyers and Walter P. Larson and Walter P. Larson, president of Larson Ford Sales, Inc.

Plaintiffs suggest that even though the Hogles did not sign any agreements with the plaintiffs, the Hogles are liable for the alleged breach of contract for two reasons. The first reason is that agents of the Hogles represented to the plaintiffs that the Hogles were in fact parties to the contract. The second argument is that because HBGH was never a corporation, the Hogles were partners in HBGH. Neither of these theories are valid.

The parol evidence rule as set forth in FMA Financial Corporation v. Hansen Dairy, Inc., 617 P.2d 327 (Utah 1980),

prevents the plaintiffs in this case from introducing any evidence which would contradict or vary the terms of the parties written agreements. There is one caveat to the parol evidence rule. A party may introduce evidence that is collateral to the written agreement. The collateral evidence may not be inconsistent with the written agreement. The collateral evidence may not repudiate the terms of the written agreement.

To reiterate, plaintiffs claim that the Hogles are actually parties to the March 5, 1983 Agreement by virtue of representations made to the plaintiffs by agents of the Hogles. This assertion certainly contradicts and varies the terms of the written agreement. The plaintiffs may not make use of the caveat to the parol evidence rule. The Agreement of March 5, 1983 (or any other documentation for that matter) is void of even the slightest indication that the Hogles were parties to the contract. To claim otherwise is inconsistent and varies an essential term of the March 5, 1983 Agreement.

It is significant that the parties who signed the Agreement and Escrow and other documents did specify the capacity in which they were signing each document. On numerous documents, plaintiff Walter P. Larson signed for himself and for Larson Ford Sales, Inc. Defendants Gay and Bruno signed on their behalf and on behalf of HBGH. No one ever signed any agreement on behalf of the Hogles.

Plaintiffs' second claim, that the Hogles are liable by virtue of the fact that the Hogles were partners in HBGH as HBGH never incorporated is absurd. HBGH was a corporation. The Certificate of Incorporation attached hereto and hereby made Exhibit "E" proves that fact. HBGH was a corporation during the time it paid \$150,000.00 to cover the operating expenses of Larson Ford, Inc.

POINT II

THE OBLIGATIONS OF THE DEFENDANTS WERE SUBJECT TO AN
UNFULFILLED CONDITION PRECEDENT

There are instances when an individual's contractual obligations do not arise until a condition precedent has been satisfied. An example is the case of Creer v. Thurman, 581 P.2d 149 (Utah 1978). In Creer the plaintiff entered into an agreement with the defendant to purchase a parcel of real estate. The court found that the plaintiff knew that there was a possibility that the defendant's ability to convey title was based on a contingency. The contingency did not occur and the defendant was unable to convey title. The court, in holding that the defendant's contractual obligation had not arisen, stated:

"Whether a provision in a contract is a condition, the non-fulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the circumstances when they executed the contract." Id. at 51.

Defendants James and Owen Hogle vigorously cling to the argument stated above, that the Hogles were not parties to the contract that is the subject of this action. Assuming for the sake of argument, the court finds that the Hogles were parties to the contract; the Hogles and the other defendants cannot be liable for a breach of contract as the defendant's contractual obligations were subject to a condition precedent. That condition precedent was never satisfied. Prior to the Agreement of March 5, 1983, Larson Ford Sales had filed for relief under Chapter 11 of the United States Bankruptcy Code. The plaintiffs had, in accordance with Section 1121 of the United States Bankruptcy Code, 120 days from the date they filed for relief in which to file their own bankruptcy plan.

Pursuant to paragraphs E and F of the March 5, 1983 Agreement and Escrow, the closing date of the agreement was to be within ten days from the date the Bankruptcy Court confirmed the Plan of Reorganization submitted by Larson Ford Sales. If the Bankruptcy Court did not approve the plan of Larson Ford Sales, the defendants had the right to "rescind the purchase Agreement and Escrow." The Bankruptcy Court did not approve the plan submitted by Larson Ford.

Once the 120-day period in which the debtor has an exclusive right to file a bankruptcy plan has expired, any other party in interest may file a bankruptcy plan. Once the

bankruptcy court approves a plan of an interested party, the debtor can no longer file his own plan. In the instant case, Stephen Wade, as a party in interest, submitted a bankruptcy plan. Wade's first plan was rejected. Wade submitted a second plan which was then approved by the Bankruptcy Court.

POINT III

THE DEFENDANTS DID NOT BREACH THE AGREEMENT OF MARCH 5, 1983

In paragraph 3 of the Amended Complaint, plaintiffs claim that the defendants breached the contract by failing to deliver any consideration that was called for in the agreement and failing to submit a satisfactory plan to the Bankruptcy Court as required in the contract. The first problem with this allegation is that a review of the contract reveals that the defendants did not have an obligation to submit a satisfactory plan to the Bankruptcy Court. In fact, the Amendment to the Agreement and Escrow gave the defendants the right to cease active pursuit of the Plan of Reorganization. The second problem with this allegation is that HBGH supplied over \$150,000.00 from March 21, 1983, through June, 1983 to Larson Ford Sales.

POINT IV

DEFENDANTS OWEN AND JAMES HOGLE ARE ENTITLED TO A REASONABLE ATTORNEY'S FEE INCURRED IN THE DEFENSE OF THIS ACTION

Pursuant to Rule 11 of the Utah Rules of Civil Procedure, 1953 as amended, the court may impose a sanction including

reasonable expenses and a reasonable attorney's fee incurred in the defense of a pleading that is not well grounded in fact, warranted by existing law or a good-faith argument. There can be no question that plaintiffs' Amended Complaint offends the standard of Rule 11. Plaintiffs' link to defendants Owen and James Hogle is the assertion that HBGH was never a corporation. A ninety-second telephone call to the Department of Business Regulations would have informed plaintiffs that HBGH was in fact a corporation. In paragraph 2 of the Amended Complaint, plaintiffs assert that the defendants entered into the contract individually and as partners of HBGH. As has been discussed above, this assertion is false. Defendants Gay and Bruno entered into contracts with the plaintiff Walter Larson. As if these falsehoods were not sufficient, in paragraph 3 of the Amended Complaint the plaintiffs assert that the defendants failed to deliver consideration and to take the necessary steps to submit a satisfactory bankruptcy plan. As was stated above, these allegations have no correlation to the truth. HBGH supplied \$150,000.00 to Larson Ford Sales. It is odd that plaintiffs contend that the defendants had an obligation to submit a bankruptcy plan when in fact the amendment to the Agreement and Escrow allows the defendants to unequivocally cease active pursuit of such a plan.

POINT V

PLAINTIFF SYBIL LARSON WAS NOT A PARTY TO THE CONTRACT
OF MARCH 5, 1983

Should the court not grant defendants' Motion for Summary Judgment dismissing plaintiffs' First Cause of Action, plaintiff Sybil Larson should be removed as a plaintiff as Sybil Larson was not a party to the Agreement of March 5, 1983.

CONCLUSION

Defendants James and Owen Hogle are entitled to summary judgment on plaintiffs' First Cause of Action as there are no genuine disputes as to any of the material facts. The undisputed fact is that Owen and James Hogle were not parties to the contract that is the subject matter of this lawsuit. Similarly, Sybil Larson was not a party to the contract that is the subject matter of this lawsuit. The Hogles were not hidden principals. They were not the assigns of defendants Bruno and Gay. The plaintiffs entered into a contract with certain individuals. The Hogles are not these individuals. Any evidence to the contract is prohibited by the parol evidence rule.

There is no genuine dispute that the plaintiffs were negotiating with defendants Bruno and Gay individually and with Bruno and Gay as representatives of HBGH. The plaintiffs knew all along that HBGH was to become a corporation. HBGH did in fact incorporate on March 22, 1983.

There can be no factual dispute that the obligation of the parties to the March 5, 1983 contract could not arise until the Bankruptcy Court had approved the Larson Ford Sales Plan of Reorganization. The Bankruptcy Court did not approve Larson's plan. Thus, assuming for the sake of argument, that the Hogles were parties to the contract, the fact that Larson's plan was never approved by the Bankruptcy Court prevents any obligation the Hogles may have had from arising.

Assuming once again for the sake of argument, that not only were the Hogles parties to the March 5, 1983, contract, but also that the Hogles obligation to perform under the contract had arisen, the Hogles would still be entitled to summary judgment. That is because there is no genuine debate that the Hogles did not breach the contract. The alleged breaches in the contract are a failure to deliver consideration and failure of the defendants to take the necessary steps to submit a satisfactory plan to the Bankruptcy Court. The undisputed evidence is that HBGH did supply \$150,000.00 to Larson Ford Sales. Further the defendants could not have breached the contract by failing to take such steps as necessary to submit a satisfactory plan to the Bankruptcy Court as the defendants were not required to do so.

Defendants James and Owen Hogle are entitled to sanctions against the plaintiffs as the allegations in their Amended Complaint are completely at odds with the undisputed evidence.

Dated this _____ day of September, 1988.

McKAY, BURTON & THURMAN

By _____
William Thomas Thurman
Harry Caston
Attorneys for Defendants
Owen and James Hogle

MAILING CERTIFICATE

I, the undersigned, hereby certify that on the _____ day of September, 1988, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

JOHN J. BORSOS, ESQ.
Attorney for Plaintiffs
807 East South Temple, Suite 101
Salt Lake City, Utah 84102

Mr. Dennis W. Gay
780 West 889 South
Payson, Utah 84651

Stanley Adams, Esq.
Attorney for Stephen P. Bruno
521 Sixth Avenue
Salt Lake City, Utah 84103

Dated this _____ day of September, 1988.

3-6-83

EXHIBIT A

Weld EXHIBIT 3
FOR I.D. 5-21-87 (1-4)
PAULETTE FOTHERINGHAM, NP, CSR, RPR
WITNESS W. Larson

AGREEMENT AND ESCROW

AN AGREEMENT dated this 5th day of March, 1983, by and between HBGH, INC. (an intended corporation) hereinafter referred to as "Purchasers" and WALTER PARK LARSON, hereinafter referred to as "Seller".

RECITALS

1. Seller is the owner of all of the issued and outstanding common shares of Larson Ford Sales, a Delaware corporation, and further represents that he is authorized to represent any parties claiming an interest in said stock for the purpose of carrying out the objectives of this Agreement.

2. Larson Ford Sales has filed a petition for relief under Chapter 11 of the Bankruptcy Act which is presently pending before the United States Bankruptcy Court for the District of Utah.

Seller is an officer and director of Larson Ford Sales and is authorized to execute this Agreement on behalf of Larson Ford Sales insofar as this Agreement affects the implementation of the debtor's plan of reorganization and the day-to-day operation of the business of Larson Ford Sales.

4. Purchasers desire to purchase all of the issued and outstanding shares of Larson Ford Sales and desire further to manage the daily operations of Larson Ford Sales, including directing the formulation of the plan of reorganization for Larson Ford Sales.

IN CONSIDERATION OF the mutual promises contained herein,
the parties agree as follows:

~~B. Purchasers agree to pay Seller the sum of \$100,000.00 for said shares. Said payment shall be in the form of cash, which shall be due and payable upon acceptance and confirmation of Larson Ford Sales plan of reorganization. Delivery of said cash to the escrow agent shall be concurrent with the delivery of the subject shares.~~

D. The parties agree that the terms and conditions set forth in the Earnest Money Receipt and Offer to Purchase and Addendum dated February 4, 1983, by and between the parties, except as inconsistent with this Agreement, be incorporated into this Agreement.

5. The parties agree that the time for closing of this Agreement shall be within ten days from the date of confirmation of the Larson Ford Sales plan of reorganization by the Bankruptcy Court.

7. Purchasers shall have the right to rescind the purchase Agreement and escrow in the event that the Larson Ford Sales plan of reorganization is not approved by the Bankruptcy Court. Upon the occurrence of this event, the Purchasers have the right to rescind this Agreement. In that event the escrow agent is directed to return the subject cash to the Purchasers and the subject shares of stock to the Seller.

8. Purchasers agree to infuse the necessary capital to implement this agreement, excluding any further funds from Walter P. Larson.

9. Walter P. Larson and Larson Ford Sales, Inc. represent and agree to do all things necessary to maintain the Ford Motor Company franchise in continual force and effect until such time as it may be transferred.

10. The parties acknowledge that this Agreement is meant to be fully binding upon the parties and that subsequent to the execution of other agreements, the parties agree to cooperate fully in executing whatever other agreements and documents are necessary to fully carry out the terms and conditions of this agreement.

IN WITNESS WHEREOF, the parties have set their hands the day and year first above written.

Escrow Agent, Harold R. Stephens

LARSON FORD SALES, INC.

BY: Walter Larson

ITS: Pres.

Walter Larson
Walter Park Larson, Seller

HBGH, INC., an intended corporation

BY: [Signature]

BY: [Signature]

"Purchasers"

[Signature]
[Signature]
3-4

REALTOR

WAINWRIGHT CORPORATION

Salt Lake City

February 4

1983

CONSIDERATION OF your agreement to use your efforts to present this offer to the seller, Stephen P. Brown and Dennis W. Gay and to execute and apply on the purchase of the property covered by 3500 South State Street, known as Larson Ford

Murray City Salt Lake County, State of Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoves and oil tanks, water heaters, and burners, electric and gas fixtures including built-in, bathroom fixtures, shower, curtain rods and fixtures, window blinds, window and door screens, floor mats, and any other fixtures.

The foregoing personal property shall also be included as part of the property purchased: See Addendum

The purchase price of the property is 175,000.00 One Hundred Seventy Five Thousand and No/100

which shall be payable as follows: 5,000.00 which represents the aforesaid deposit, receipt of which is hereby acknowledged by you:

on or before March 15, 1983 and See Addendum on delivery of deed or final contract or

each month commencing See Addendum

and the balance of See Addendum together with interest is paid; provided, however, that if you are paying at any time, may pay amounts in excess of the monthly

payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the payer herein assumed, interest at See Addendum per annum on the unpaid portions of the

purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before See Addendum All risk of loss and destruction

of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be

borne by the buyer as of date of possession, all other taxes and all assessments, mortgages, charges and other liens, encumbrances or charges against the property of any nature shall be paid by

the buyer unless:

The following special improvements are included in this sale: Sewer ☐ Connected ☐ Septic Tank and/or Compost ☐ Sidewalk ☐ Curb and Gutter ☐ Special Street Paving ☐

Special Street Lighting ☐ Curb and Gutter (City) ☐ Other Community System ☐ Connected ☐ Private ☐ (Legend: Yes (X) No (O)).

Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of To be determined prior to closing

This agreement is intended and shall be made subject to the written acceptance of the seller endorsed herein within upon presentation days from date hereof, and unless so

accepted the return of the money herein received shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid herein shall, at the option of the seller

be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by

anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing and signed by the undersigned agent.

WAINWRIGHT CORPORATION Agent See Addendum

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's

expense a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or

in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails to do so, he agrees to pay all expenses of enforcing this agree-

ment, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of See Addendum

in the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

Date 2/4/83 Seller Walter P. Brown Buyer See Addendum

3. To be furnished to the buyer in the form of a contract, bearing signatures to buyer and seller. Consistent with the method used, one of the following forms must be completed:

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ATTACHMENT A

THIS IS ADDENDUM to that certain Earnest Money Receipt and Offer to Purchase dated February 1, 1983 wherein Stephen P. Bruno, Dennis J. Gay and/or assigns appear as Purchasers of the business at 5500 South State Street, Murray, Utah, known as Larson Ford Sales:

The total purchase price to be \$175,000.00 to be paid in the form of cash notes or real estate deemed acceptable to the Seller.

Purchaser agrees to purchase all assets of Larson Ford, including property lease, stock in the corporation, all parts, furniture, fixtures, signs, accessories, equipment and all other items used in the operation of Larson Ford, together with all liabilities of the business.

Seller agrees to furnish the Purchaser with a list of all Larson Ford Assets. Seller agrees to furnish the Purchaser with a list of all Larson Ford's personal property. The assets and personal property should include but not be limited to: signs, furniture, fixtures, apparatus, equipment, machinery, tools, leasehold improvements, cars, accessories, parts and appliances and replacements thereto, if any, owned by Larson Ford and located on or attached to the premises or used in connection with the operation of the premises.

Seller agrees to make available to Purchaser's agent, at Larson Ford's place of business, all books, records and other personal documents.

Purchaser agrees to sign over to Seller all right, title, liability and all interest in the fire insurance claim currently in dispute.

Purchaser agrees to negotiate substitute collateral to accomplish release of Larson's personal liability to Citizens Bank, Zions First National Bank, Commercial Security Bank, Small Business Administration, and State Tax Commission.

Purchaser understands that there is an immediate cash flow problem at the business, and upon removal of all other contingencies, will be willing to influx needed capital into the business to keep it functioning during the escrow period.

Seller represents that the total monies due to all creditors exclusive of any interest or sales tax or SEA, is no more than \$2,100,000.00. In the event that the total monies due to all creditors is more than \$2,100,000.00, the amount over \$2,100,000.00 shall be deducted from the purchase price and downpayment respectively.

Seller agrees to execute a "Non-Competition Agreement" agreeing not to have an ownership interest in a Ford dealership within a radius of five (5) miles from Larson Ford for a period of five years, carrying with it a penalty of \$500,000.00 if Seller is found in violation of the Agreement.

Purchaser agrees to honor an agreement with Salt Lake School District for "loaner" cars.

Purchaser agrees to furnish the Sellers with two (2) demos through August, 1983, at no cost.

This offer subject to approval of Purchaser's and Seller's attorneys of final Buy-Sell Agreement, and approval of the Federal Bankruptcy Court.

Purchaser agrees to allow the Seller to purchase cars or trucks for Seller's personal use at invoice price.

This offer subject to and contingent upon the following:

1. Approval of Ford Motor Corporation of franchise transfer or acceptable solution to the franchise
2. Purchaser's inspection and approval of property lease, such approval to be in writing
3. Purchaser's inspection and approval of the list of the assets and the list of personal property, such approval and acceptance to be in writing
4. Purchaser accepting and approving the findings of his agent after the inspection of the books, records and other personal documents. Such approval and acceptance shall be in writing.

All contingencies shall be removed in writing by noon, Tuesday, February 22, 1983.

Buyer agrees to pay to Wardley Corporation a finder's fee of \$75,000.00 to be paid at closing. Closing shall be on or before March 15, 1983.

Date: _____

[Signature] Purchaser
[Signature] Purchaser
Walter P. Larson Sellers

Date: 2/4/83

AMENDMENT

LARSON FORD AGREEMENT

IT IS AGREED THAT THE STOCK AND VOTING RIGHTS WILL BE RECONVEYED TO WALTER P. LARSON IN THE EVENT THE PURCHASERS CEASE ACTIVE PURSUIT OF THE PLAN OF REORGANIZATION OF LARSON FORD INC.

THE PURPOSE OF THE VOTING RIGHTS IS TO PROVIDE THE BUYER WITH THE AUTHORITY TO HIRE MANAGEMENT.

IN THE EVENT THE STOCK AND VOTING RIGHTS ARE RECONVEYED, THEN FROM THAT DATE THE TERM FOR REPAYMENT OF MONIES LOANED TO LARSON FORD SHALL BE 120 DAYS

~~REMOVED THE STOCK PURCHASERS AGREEMENT~~

WHEN THE STOCK IS RETURNED FROM AND REVERTS TO WALTER P. LARSON, HE WILL HAVE ALL MANAGEMENT RESPONSIBILITY.

LARSON FORD SALES, INC.

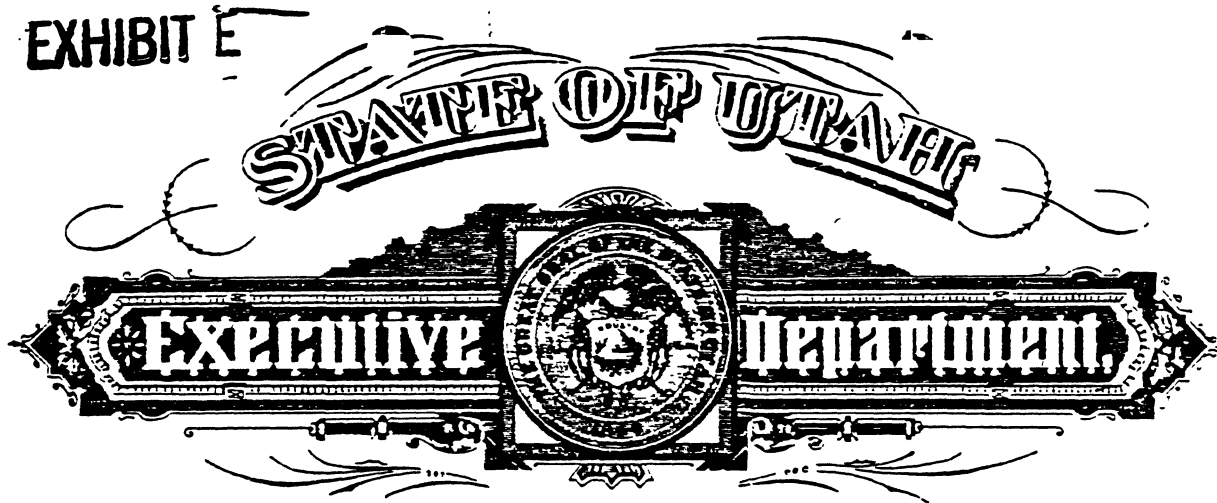
Walter P. Larson, Pres.

Walter P. Larson

Walter P. Larson

353

EXHIBIT E



Office of the Lieutenant Governor

CERTIFICATE OF INCORPORATION

OF

HBGH, INC.

I, DAVID S. MONSON, LIEUTENANT GOVERNOR OF THE STATE OF UTAH, HEREBY CERTIFY THAT DUPLICATE ORIGINALS OF ARTICLES OF INCORPORATION FOR THE INCORPORATION OF

HBGH, INC.

DULY SIGNED AND VERIFIED PURSUANT TO THE PROVISION OF THE UTAH BUSINESS CORPORATION ACT, HAVE BEEN RECEIVED IN MY OFFICE AND ARE FOUND TO CONFORM TO LAW.

ACCORDINGLY, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY LAW, I HEREBY ISSUE THIS CERTIFICATE OF INCORPORATION OF

HBGH, INC.

AND ATTACH HERETO A DUPLICATE ORIGINAL OF THE ARTICLES OF INCORPORATION. 102879.



IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Great Seal of the
State of Utah, at Salt Lake City, this 22 day
of MARCH, 19 83

David S. Monson

LIEUTENANT GOVERNOR

ADDENDUM D

WILLIAM THOMAS THURMAN (3267)
HARRY CASTON (4009)
McKAY, BURTON & THURMAN
Attorneys for Defendants James Hogle, Jr.
and Owen C. Hogle
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

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

WALTER P. LARSON, SYBIL LARSON and JOHN LARSON,	:	
Plaintiffs and Counter-	:	POINTS AND AUTHORITIES IN
Defendants.	:	SUPPORT OF DEFENDANTS HOGLES'
	:	MOTION FOR PARTIAL SUMMARY
vs.	:	JUDGMENT AND MOTION TO
	:	DISMISS
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	Civil No. C83-5542
OWEN C. HOGLE, et al.,	:	
Defendants and Counter-	:	Judge Richard H. Moffat
Claimants.	:	
	:	

FACTS

1. On or about July 1, 1983, plaintiffs filed their complaint.
2. The complaint contained two causes of action. The second cause of action sought relief based on "carelessly and/or negligently made false representations made by the defendants."

3. Defendants brought a motion to dismiss the second cause of action or in the alternative, a motion for a more definite statement as the plaintiffs had failed to properly plead the elements of fraud as is required by Rule 9B of the Utah Rules of Civil Procedure.

4. On May 29, 1984, this Court granted defendants' motion for a more definite statement and allowed the plaintiffs 10 days to amend their complaint.

5. Plaintiffs filed their Amended Complaint within the time provided by the Court.

6. That paragraph 9 of the plaintiffs' amended complaint alleges that "defendants carelessly and/or negligently made false representations that they could and would perform the conditions described in the agreements between the parties."

7. On May 21, 1987, defendant Hogle took the deposition of plaintiff Walter P. Larson. Plaintiff was asked numerous questions concerning the defendants' alleged false misrepresentations. The plaintiff testified that (a) the alleged misrepresentations were the defendants' "failure to perform on the basis of the agreement we'd drawn up . . . " (Page 51, line 17, 24; Page 52, lines 4-7; Page 53, lines 15-24; Page 57, line 25; Page 58, lines 3-5); (b) that misrepresentations were made by an individual who had no authority to bind the Hogles. (Page 53, line 24, 25; Page 54, lines 1-7); (c) that the basis for its

claim that the defendants knew their alleged misrepresentations were false when they were made was that defendant Owen Hogle was not present during the "final negotiating. . . ." (Page 58, lines 18-22) and that "they didn't follow through with it" (Page 58, lines 8 and 9).

8. Plaintiff did not have with him at the time of the deposition any documentary evidence which would support his claim that the defendants knew the alleged misrepresentations were false when made, but he would supply such evidence to defendants' counsel (Page 61, lines 8 and 25; Page 62, lines 1-3).

9. Defendants have never received any documentary evidence from plaintiffs regarding plaintiffs' claims that the defendants knew the alleged misrepresentations were false when made.

10. On February 16, 1988 defendants served upon plaintiffs Interrogatories and Requests for Production of Documents, a copy of which is attached hereto and made Exhibit "A".

11. Interrogatory No. 6 of defendants' Interrogatories asks the plaintiffs to state each and every fact which supports plaintiffs' claim that defendants made fraudulent misrepresentations and to identify and produce each and every document which supported its claim that the defendants made fraudulent misrepresentations.

12. In response to Interrogatory No. 6, a copy of which is attached hereto and made Exhibit "B", plaintiffs stated that an individual had made "claims and assurances that the defendants had wealth" and that other "contacts" had stated that the defendants' name was "reliable and respected." Plaintiff had testified at deposition that the individual did not have the authority to bind the Hogles.

13. Plaintiff did not, in his answers to defendants' Interrogatories, identify or supply any documents which in any way relate to plaintiffs' claim that the defendants had made fraudulent misrepresentations.

ARGUMENT

I. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR FRAUDULENT MISREPRESENTATION AGAINST DEFENDANTS JAMES AND OWEN HOGLE.

Plaintiffs' second cause of action alleges that as a result of defendants' "careless and/ or negligent" false misrepresentations the parties entered into an agreement. In order to prevail plaintiff must prove all of the elements of fraud.

Taylor v. Gasor, Inc., 607 P.2d 293 (Utah, 1980). These essential elements of fraud were set forth by the court in Conder v. A. L. Williams & Assoc., 739 P.2d 634 (Utah App. 1987):

"(1) that a representation was made (2) concerning a presently existing material fact (3) which was false (4) which the representor either (a) knew to be false, or (b) made

recklessly knowing that he had insufficient knowledge upon which to base such representation (5) for the purpose of inducing the other party to act upon it (6) that the other party, acting reasonably and in ignorance of its falsity (7) did in fact rely upon it (8) and was thereby induced to act (9) to his injury and damage." Id at page 637.

Defendants Jones and Owen Hogle are entitled to summary judgment on plaintiffs' Second Cause of Action. Plaintiffs' own testimony demonstrate there are no genuine dispute as to three of the above stated essential elements.

A. The Hogles Did Not Misrepresent Facts to the Plaintiffs.

The plaintiffs must first prove that the defendants caused false representations to be made to the plaintiffs. According to plaintiff's deposition testimony and answers to Interrogatories, neither of the Hogles made representations which induced the plaintiffs to enter into the agreement. Representations were made by an individual named Steven Brown and other "contacts". The plaintiffs do not identify these other "contacts". Plaintiff's testimony at deposition was that Steven Brown did not have the authority to bind the Hogles.

B. The Plaintiffs Did Not Rely On Representations Of The Hogles In Entering Into The Agreement.

To prevail at trial the plaintiffs must prove reliance upon the defendants' representations in entering the agreement.

In subsection A above, defendants have shown that the Hogles did not misrepresent facts to the plaintiffs. It is not possible to rely on statements that were never made. The plaintiffs cannot claim reliance on statements of the Hogles which the plaintiffs have admitted do not exist. Similar to the case at hand is Dupler v. Yates, 351 P.2d 624 (Utah, 1960). In Dupler, the plaintiff had purchased the defendant's interest in oil wells. The plaintiff claimed that he had been induced to purchase these oil wells by the defendant's false representations. The Supreme Court of Utah affirmed the trial court's granting of defendant's motion for summary judgment. The court based its decision on the fact that the plaintiff, in agreeing to buy the defendant's oil interests, had relied on representations made by individuals other than the defendant:

"As a matter of law it is conceivable that a person might simultaneously rely on misrepresentations of divergent defendants. However, standing alone admissions by plaintiffs that they relied on others is sufficient proof to negative reliance on the present defendant." Id at page 636.

In the instant case, as in Dupler, the plaintiffs have indicated that they relied on representations of others in entering into the agreement. Reliance on others negates reliance on the Hogles.

C. There Is No Genuine Issue That The Hogles Acted Knowingly Or Recklessly.

The plaintiffs must prove that the false representations made by the Hogles were made knowingly and recklessly. In the subsections above, the Hogles argue that the evidence clearly shows that the Hogles did not make any representations to the plaintiffs which the plaintiffs then relied on in reaching an agreement with the defendants. Assuming arguendo that the Court finds that the Hogles did make misrepresentations to the plaintiffs, summary judgment is still proper as there is no genuine issue that the Hogles acted knowingly and/or recklessly in making representations. As was stated by the court in Blodgett v. Martsch, 590 P.2d 298 (Utah 1978)

"If the circumstances are such that the defendant could exercise extraordinary influence over the plaintiff and the defendant was or should have been aware the plaintiff reposed trust and confidence in the defendant and reasonably relied on defendant's guidance, then the parties are said to be "in confidential relationship" . . . There are few relationships (such as parent-child, attorney-client, trustee-cestui) which the law presumes to be confidential. Id at 302.

As is set forth in the plaintiff's deposition, there is no question that the relationship between the plaintiffs and the Hogles did not rise to the level of a confidential relationship. There is no evidence which would suggest anything other than an arm's length transaction between the parties. The evidence indicates that the Hogles did not act knowingly or recklessly. In his deposition the plaintiff was asked a number of times what

evidence he had to support a claim that the Hogles had knowingly made false statements. Repeatedly the plaintiffs were unable to present any evidence or testimony that by any stretch of the imagination would tend to demonstrate that the Hogles had knowingly and/or recklessly made false statements. Similarly, in their answer to Interrogatory No. 6 in which plaintiffs were asked to state each and every fact which supports their claim of fraudulent misrepresentation, the plaintiffs did not even attempt to set forth facts which would indicate that the Hogles knowingly or recklessly made false statements. The plaintiffs in their Amended Complaint allege that the defendants acted "carelessly and/or negligently." Not only have the plaintiffs failed to produce a shred of evidence that the defendants acted knowingly or recklessly, but the plaintiffs do not even allege this essential element.

II. PLAINTIFF'S SECOND CAUSE OF ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Rule 9B of the Utah Rules of Civil Procedure declares that ". . . fraud or mistake shall be stated with particularity" Plaintiffs' second cause of action does not approach the standard contemplated by Rule 9B. There are over five defendants in this action. It is not possible to tell from the complaint which misrepresentations are attributed to which defendant. Plaintiffs have also failed to plead two of the

essential elements of fraud; that the plaintiffs were induced by false representations made by the Hogles and that the Hogles knowingly or recklessly made false statements. Further, the alleged misrepresentations in the complaint did not satisfy the requirement that the misrepresentations be of a presently existing material fact.

CONCLUSION

Plaintiffs' Second Cause of Action in the Amended Complaint alleges fraudulent misrepresentations. In an action for fraudulent misrepresentation, the plaintiffs must prove nine essential elements. Plaintiff is entitled to Summary Judgment as there are no factual disputes on three essential elements. First, there is no question, based on the evidence presented by the plaintiff, Walter Larson, that the Hogles did not misrepresent facts to the plaintiff. Secondly, as the Hogles did not misrepresent facts to the plaintiffs, there can be no question that the plaintiffs did not rely on representations of the Hogles in entering into agreements with the Hogles. Finally, at the deposition and in plaintiffs' Answers to Defendants' Interrogatories, plaintiffs fail to present a shred of evidence that the Hogles knowingly and/or recklessly made false representations to the plaintiffs.

In the motion before the court, the Hogles seek the alternative relief of a dismissal of plaintiffs' Second Cause of

Action. The procedural rules require that fraud be pleaded with particularity. At the very least, this requirement demands that all of the elements of fraud be set forth in the Complaint. The Second Cause of Action of plaintiffs' Amended Complaint is deficient. The plaintiffs fail to plead two essential elements. Plaintiffs fail to allege that the plaintiffs were induced by false representations made by the Hogles and that the Hogles knowingly or recklessly made false statements.

Another essential element of fraud is that the misrepresentation must be of a fact that existed at the time the representation was made. The plaintiff's Amended Complaint also fails in this respect. The representations set forth by the plaintiffs in their Second Cause of Action refer to promises to perform in the future. These allegations seem to be more suited to a claim for breach of contract. These allegations do not make for a proper claim of fraud.

Dated this _____ day of August, 1988.

McKAY, BURTON & THURMAN

By _____
Harry Caston
Attorneys for Defendants
James Hogle, Jr. and Owen C.
Hogle

ADDENDUM E

WILLIAM THOMAS THURMAN (3267)
HARRY CASTON (4009)
McKAY, BURTON & THURMAN
Attorneys for Defendants James Hogle, Jr.
and Owen C. Hogle
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

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

WALTER P. LARSON, SYBIL LARSON	:	
and JOHN LARSON,	:	REPLY POINTS AND AUTHORITIES
	:	IN SUPPORT OF DEFENDANTS
Plaintiffs and Counter-	:	JAMES AND OWEN HOGLE'S MOTION
Defendants.	:	FOR SUMMARY JUDGMENT
vs.	:	
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	Civil No. C83-5542
OWEN C. HOGLE, et al.,	:	
Defendants and Counter-	:	Judge Richard H. Moffat
Claimants.	:	

FACTS

1. The Affidavit tendered by plaintiff Walter Park Larson in opposition to defendant's Motion for Summary Judgment disputes that defendants Gay and Bruno were the agents of defendants James and Owen Hogle.

2. The Affidavit tendered by plaintiff Walter Park Larson does not dispute the facts that:

(a) The obligation of the parties did not arise until Larson Ford Sales had obtained Bankruptcy Court approval of its Plan of Reorganization.

(b) That there was no breach of contract.

(c) That the defendants are entitled to sanctions under Rule 11 as the allegations of the defendants' Amended Complaint are utterly false.

ARGUMENT

POINT I

THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THE
INAPPLICABILITY OF THE PAROL EVIDENCE RULE

The quote set forth in plaintiff's Memorandum from State v. Bonnett, 201 P.2d 939, fits squarely with the cases cited by the defendants in their Points and Authorities. As the contract in the instant case clearly indicates that the plaintiffs intended to deal only with defendants Bruno and Gay, the plaintiffs cannot subsequently claim that defendants James and Owen Hogle were parties to the contract. It is clear from the form of the contract that the plaintiffs were dealing with defendants Bruno and Gay in their individual capacity and on behalf of HBGH, a Utah corporation.

POINT II

SHOULD THE COURT DETERMINE THAT DEFENDANTS OWEN AND JAMES
HOGLE WERE PARTIES TO THE CONTRACT OF MARCH 5, 1983,
DEFENDANTS ARE STILL ENTITLED TO SUMMARY JUDGMENT

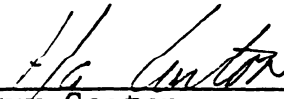
Defendants Owen and James Hogle's Motion for Summary Judgment does not rest upon whether or not the Hogles were parties to the contract of March 5, 1983. In support of their Motion for Summary Judgment, the Hogles have set forth evidence which shows that the obligation of the defendants was subject to an unfulfilled condition, and further that there was no breach of contract. The plaintiffs have produced no evidence to dispute these allegations. As there are no disputes as to the material facts, defendants James and Owen Hogle are entitled to a Motion for Summary Judgment.

CONCLUSION

The plaintiffs may not escape the application of the parol evidence rule. It is clear that the plaintiffs were dealing only with defendants Gay and Bruno individually and as agents of HBGH. However, should the court determine that the Hogles were parties to the contract, the Hogles are still entitled to their Motion for Summary Judgment as there is no dispute as to any of the remaining material facts.

Dated this 2nd day of October, 1988.

McKAY, BURTON & THURMAN

By 
Harry Caston
Attorneys for Defendants
James and Owen Hogle

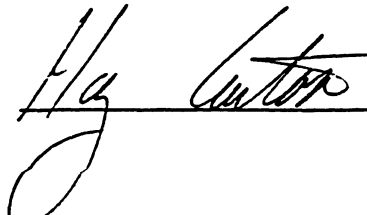
MAILING CERTIFICATE

I, the undersigned, hereby certify that on the 2nd day of October, 1988, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

JOHN J. BORSOS, ESQ.
Attorney for Plaintiffs
807 East South Temple, Suite 101
Salt Lake City, Utah 84102

Mr. Dennis W. Gay
780 West 889 South
Payson, Utah 84651

Stanley Adams, Esq.
Attorney for Stephen P. Bruno
521 Sixth Avenue
Salt Lake City, Utah 84103



HC06/18

ADDENDUM F

HARRY CASTON (4009)
McKAY, BURTON & THURMAN
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10 East South Temple Street
Salt Lake City, Utah 84133
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WALTER P. LARSON,	:	MEMORANDUM IN SUPPORT OF
SYBIL LARSON and	:	MOTION FOR SUMMARY JUDGMENT
JOHN LARSON,	:	
Plaintiffs and	:	
Counter-Defendants,	:	
	:	Civil No. C83-5542
v.	:	
STEPHEN P. BRUNO, DENNIS W.	:	
GAY, JAMES HOGLE, JR., and	:	
OWEN C. HOGLE, et al.,	:	Judge Richard H. Moffat
Defendants and	:	
Counter-Claimants.	:	

PROCEDURAL HISTORY

1. On or about July 1, 1983, plaintiffs filed their Complaint.

2. The Complaint contained two causes of action. The first cause of action alleged breach of contract. The second cause of action sought relief based on "carelessly and/or negligently made false representations made by the defendants".

3. The defendants' first motion sought a dismissal of the second cause of action or, in the alternative, for a more definite statement as the plaintiffs had failed to properly plead the

elements of fraud as required by Rule 9B of the Utah Rules of Civil Procedure.

4. On May 29, 1984, this Court granted defendants' motion for a more definite statement and allowed the plaintiffs 10 days to amend their complaint.

5. Plaintiffs filed their amended complaint within the time provided by the court.

6. As did the original complaint, the amended complaint contained causes of action for breach of the contract known as the "Agreement and Escrow" and for "carelessly and/or negligently made false representations".

7. The Hogles moved the Court for partial summary judgment on the cause of action for carelessly and/or negligently made false misrepresentations. The points presented in the supporting memorandum were that:

- (a) the Hogles did not misrepresent facts to the plaintiffs;
- (b) the plaintiffs did not rely on representations of the Hogles in entering into the agreement and escrow;
- (c) the Hogles did not act knowingly and recklessly; and
- (d) the plaintiffs had not pled fraud with specificity.

8. On August 26, 1988 the Court granted the Hogles' Motion for Partial Summary Judgment.

9. The Hogles then moved the Court for summary judgment on the remaining cause of action, breach of contract. The Points and

Authorities in Support of that motion proved to the Court that, based on the plaintiffs' own testimony and documents:

- (a) the Hogles never entered into a contract with the plaintiffs;
- (b) even if the Hogles had contracted with the plaintiffs, the defendants' obligations were subject to an unfulfilled condition precedent and that the amendment to the contract provided that the purchasers could "cease active pursuit of the plan of reorganization of Larson Ford, Inc."; and
- (c) in fact the contract had not been breached.

10. On October 7, 1988, ruling from the bench, the Court granted the Second Motion for Summary Judgment.

11. The plaintiff then claimed that there was a new theory that plaintiffs' previous counsel had failed to advance. This new theory was that the Hogles were part of a scheme to defraud the plaintiff. This theory held that the Hogles conspired with Stephen Wade. The plan was that the Hogles would deplete the plaintiffs' business assets which would then allow Stephen Wade to purchase the assets of Larson Ford at a greatly reduced price.

12. The Court granted the plaintiffs' Motion to File an Amended Complaint to allow the plaintiffs to pursue this new theory.

13. The plaintiffs' Amended Complaint (which should properly be denominated Second Amended Complaint) contains three causes of action. The first two causes of action are the same as were

contained in the original Complaint and the plaintiffs' First Amended Complaint. These causes of action are breach of the contract dated March 5, 1983, and negligent misrepresentation. The third cause of action alleges fraud. This new cause of action is where the plaintiff alleges that the Hogles acted in collusion with Stephen Wade to deplete Larson Ford's assets which would then allow Wade to purchase the entity at a reduced price.

ARGUMENT

POINT ONE: THE CAUSES OF ACTION FOR BREACH OF CONTRACT AND CARELESSLY AND/OR NEGLIGENTLY MADE FALSE MISREPRESENTATIONS HAVE BEEN LITIGATED AND DISMISSED BY THE COURT.

The defendant previously filed two Motions for Summary Judgment. The first Motion for Partial Summary Judgment addressed the plaintiffs' claim of carelessly made and/or false misrepresentations. The Court granted this motion and dismissed that cause of action. The defendants then moved the Court for summary judgment on the cause of action for breach of contract. The Court granted this motion as well. After granting the defendants' second motion, the plaintiff pled with the Court to allow the plaintiff to pursue a cause of action that had not been presented to the Court due to the fumbling of the plaintiffs' previous counsel. This new theory was that the Hogles had colluded with Stephen Wade to drive down the value of Larson Ford. The Court allowed the defendant to file an Amended Complaint to pursue this new theory. The plaintiffs' new complaint included this new cause of action. The new complaint also included causes of action

for breach of contract and negligent misrepresentation - the same exact causes of action that were previously dismissed by the Court.

The defendant contends that the Court's dismissal of the causes of action for breach of contract and negligent and/or careless misrepresentation became the law of this case. These issues have been litigated by the parties. These matters were fully briefed and argued. In presenting these issues to the Court, the plaintiff had the extremely competent assistance of his present attorney. Based on the undisputed facts, the Court determined that the applicable case law required dismissal of the causes of action of breach of contract and negligent and/or careless misrepresentations. These issues are now res judicata. If the plaintiff disagrees with the Court's dismissal, the plaintiff has the right to appeal. The plaintiff does not have the right to include issues that have been litigated and dismissed. Should the Court disagree with the defendant on the issue of res judicata, the defendant incorporates the defendant's previous Motions for Summary Judgment within this memorandum. The defendant will be prepared to discuss these issues with the Court at the hearing which is scheduled for June 12, 1992.

POINT TWO: THE PLAINTIFFS' CAUSE OF ACTION FOR FRAUD SHOULD BE DISMISSED.

A. The Plaintiffs' Own Deposition Testimony Proves There Was No Collusion Between Stephen Wade and the Hogles.

The Court granted the plaintiffs' Motion to File an Amended Complaint to allow the plaintiff to pursue the theory that the Hogles acted in collusion with Stephen Wade to defraud the

plaintiff. The plaintiffs' theory is that the Hogles and other defendants would deplete the plaintiff's business assets. Stephen Wade would then purchase the assets of Larson Ford at a greatly reduced price. On page 23 of the Defendants' Points and Authorities in Support of Defendant Hogle's Motion for Summary Judgment, a copy of which is attached hereto as Exhibit A, the defendants set forth the deposition testimony of plaintiff Park Larson. As the defendant asks that the Court review that memorandum, the defendant will not burden the Court by repeating in full the arguments contained therein or the excerpt of the plaintiff's deposition testimony. The defendant will repeat the crucial observation that at the deposition the plaintiff was given an opportunity to set forth any evidence he had that there was collusion between Stephen Wade and any of the defendants. The plaintiff's own sworn testimony demonstrates that there was no fraud and/or collusion.

B. The Plaintiff's Answers to Interrogatories Fail to Demonstrate Any Collusion Between the Hogles and Stephen Wade.

In Interrogatory Number 4 of the defendant's Interrogatories and Request for Production of Documents dated January 28, 1992, the defendant sought to discover the factual basis upon which the plaintiff based his claim that the defendants and Stephen Wade had a plan to deplete the plaintiff's resources so as to allow Stephen Wade to purchase the assets of Larson Ford at a greatly reduced price. A copy of plaintiff's answers signed on May 19, 1992 are attached hereto as Exhibit B. As did the plaintiff's deposition

testimony, the answer to Interrogatory Number 4 demonstrates that there was no collusion between the Hogles and Stephen Wade. The foundation upon which the plaintiff's claim rests is that the Hogles had approached the plaintiff to purchase Larson Ford. The plaintiff's own previous testimony was that he was not approached by the Hogles but by a third party who the plaintiff admitted had no authority to speak for or to bind the Hogles. The contention that the Hogles had made statements to the plaintiff also must fail. This Court has previously ruled that the parole evidence rule prevents the plaintiff from claiming that there were statements and representations outside of the contract as the contract and its amendments completely set forth the agreement between the parties. The Court has also previously ruled that the Hogles were not parties to any of the contracts. As was stated in the Affidavit of Owen Hogle, the Hogles' relationship to the sale of Larson Ford was that they were funding the corporation that was purchasing Larson Ford.

C. The Plaintiff's Complaint Should Be Dismissed For Failure to Include an Indispensable Party.

Rule 19 of the Utah Rules of Civil Procedure holds that

"a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties..."

In the instant case the plaintiff claims that Stephen Wade acted in collusion with the defendants in order to defraud the plaintiff. If what the plaintiff says is true, Stephen Wade would then be

responsible for a portion of the plaintiff's damages, if any. If Stephen Wade were not made a party, the Hogles would then be responsible for Stephen Wade's share of these alleged damages. It is for this reason that Stephen Wade is an indispensable party. Section 78:12-26(3) of the Utah Code sets forth a three year statute of limitations on fraud. As Stephen Wade, an indispensable party, cannot be made a defendant the complaint should be dismissed.

CONCLUSION

The defendants previously sought and obtained summary judgment on the causes of action for breach of contract and negligent and/or carelessly made misrepresentations. Following the Court's granting of the defendants' Motions for Summary Judgment, the plaintiff requested that he be allowed to file an amended complaint to state a new cause of action. This cause of action was based upon the theory that the Hogles had conspired with Stephen Wade. The theory held that the Hogles really never intended to purchase the assets of Larson Ford; all along, the Hogles intended to run Larson Ford into the ground. Their co-conspirator, Stephen Wade, would then purchase the assets of Larson Ford at a greatly reduced price.

The Court allowed the plaintiff to amend its complaint to include this new cause of action. The problem is that the plaintiff's new complaint included the causes of action that had previously been dismissed. There are procedural remedies that could have been sought to obtain relief from the Court's ruling on the defendants' Motions for Summary Judgment. These remedies

include those provided by Rule 60 of the Utah Rules of Civil Procedure. The plaintiff did not seek such relief. The plaintiff did not at any time ask the Court to set aside the ruling on the defendants' Motion for Summary Judgment.

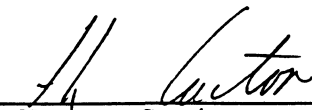
The Court dismissed the causes of action for breach of contract and negligent and/or carelessly made misrepresentations based upon the plaintiff's own testimony. During the deposition and during the briefing period as well as at oral argument, the plaintiff was represented by his present counsel. As these actions were dismissed, there is no reason why they should be included in the plaintiff's present complaint.

The new cause of action should also be dismissed. This cause of action alleges that the Hogles depleted the assets of Larson Ford so that Stephen Wade could buy the remainder at a reduced price. The plaintiff has been asked on two occasions to produce whatever evidence he has to prove fraud and/or collusion between the Hogles and Stephen Wade. In his own deposition, the plaintiff offered a hearsay statement which does not include any evidence of fraud or collusion. In responding to Interrogatory Number 4, the plaintiff commenced by stating that the Hogles had approached him with an offer to buy the business, and how the Hogles had made statements and promises. The plaintiff had previously testified that the Hogles did not approach him to purchase Larson Ford. The Court previously noted that the Hogles were not parties to any of the contracts, and further, that the purchasers had the right to no longer pursue the purchase of Larson Ford. There is another reason

why the plaintiff's action for fraud should be dismissed. The plaintiff alleges that Stephen Wade was a co-conspirator. In this regard, he would also be responsible for the plaintiff's damages. As the three year statute of limitations for fraud has expired, this indispensable party cannot be brought into this lawsuit.

DATED this 26th day of May, 1992.

McKAY, BURTON & THURMAN

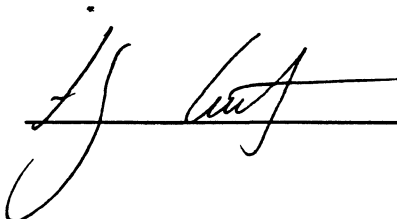
By: 
Harry Caston
Attorneys for Defendants

MAILING CERTIFICATE

I hereby certify that on the 26th day of May, 1992, true and correct copies of the foregoing Memorandum in Support of Motion for Summary Judgment were mailed, postage prepaid, to the following:

John J. Borsos
370 East South Temple
Salt Lake City, Utah 84111

Hans M. Scheffler
311 South State, #380
Salt Lake City, Utah 84111



ADDENDUM G

FILED

FILED IN CLERKS OFFICE
SALT LAKE COUNTY UTAH

SEP 21 2 10 PM '88

H. DICKINSON, CLERK

BY [Signature]
DEPUTY CLERK

WILLIAM THOMAS THURMAN (3267)
HARRY CASTON (4009)
McKAY, BURTON & THURMAN
Attorneys for Defendants James Hogle, Jr.
and Owen C. Hogle
1200 Kennecott Building
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Telephone: (801) 521-4135

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

WALTER P. LARSON, SYBIL LARSON :
and JOHN LARSON, :
 :
Plaintiffs and Counter- : AFFIDAVIT OF OWEN HOGLE
Defendants. :
 :
vs. :
 :
STEPHEN P. BRUNO, DENNIS W. :
GAY, JAMES HOGLE, JR., and : Civil No. C83-5542
OWEN C. HOGLE, et al., :
 :
Defendants and Counter- : Judge Richard H. Moffat
Claimants. :
 :

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Affiant being first duly sworn deposes and states:

1. That from March 21, 1983, HBGH supplied in excess of \$150,000.00 to Larson Ford Sales.
2. The Hogles were never the assigns of Bruno and Gay.
3. That defendants James and Owen Hogle were not and have never been officers, directors or shareholders or HBGH.

000380

4. HBGH became a corporation on March 22, 1983.

Dated this 14th day of September, 1988.

Owen C. Hogle
Owen C. Hogle

Subscribed and sworn to before me this 19th day of
September, 1988.

Shirley J. Lloyd
Notary Public

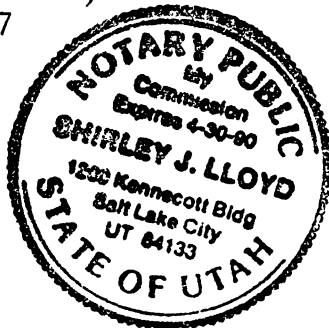
My commission expires:

4/30/90

HC06/17

Residing at:

Salt Lake County, Utah



000301

ADDENDUM H

1 A Mr. Stephen Brown told us that, Mr. Gary Routh
2 told us that, Mr. Bruno told us that, and Mr. Gay told us
3 that.

4 Q That it was to be a corporation?

5 A Right.

6 Q And you were dealing with H.B.G.H. as an intended
7 corporation; is that right?

8 A Uh-huh (affirmative).

9 Q I think you have to speak audibly.

10 A Yes.

11 Q Can you show me anywhere in there where the
12 Hogles signed--and there are some other documents,
13 Mrs. Larson, that you didn't look at-- I will contend
14 that these documents are fairly the same, but I would ask
15 you to go through them. These are the ones that were
16 supplied to me by yourself as being the plaintiff in this
17 matter.

18 A On page 5 of 45, it says "H.G.B.H."

19 Q Incorporated?

20 A Yes.

21 MR. BORSOS: Let the record show that she is pointing
22 to Exhibit 4 of the deposition of Park Larson on the last
23 page, page 5, and that she is referring to the letters
24 "H.B.G.H.," without any words "intended corporation."

25 THE WITNESS: This agreement says "H.G.B.H." Not

ADDENDUM I

1 backer or --

2 Q Could you have devised a plan that, perhaps, the
3 parties could agree upon?

4 A No. I had -- We'd already agreed on what the plan
5 was going to be under our agreement. Anything less than that
6 was unacceptable.

7 At that point in time, the Hogles couldn't perform,
8 or wouldn't, and didn't.

9 Q You claim, do you not, that the defendants made
10 fraudulent misrepresentations; isn't that correct?

11 A Yes.

12 Q What were those fraudulent misrepresentations?

13 A Well, very clearly the fact that they were going to
14 be able to perform and meet the requirements of the agreement
15 that we'd -- that we'd agreed upon for a plan.

16 Q Is that all of the fraudulent misrepresentations?

17 A I think that it's -- All the fraudulent
18 misrepresentations at this point as I think about it would be
19 involved with their failure to perform on the basis of the
20 agreement that we'd drawn up, which was the requirements that
21 I had set for me to relinquish my position and ownership of
22 the business, giving up my stock to the Hogles so that they
23 could become my successor as debtor-in-possession.

24 Q Please correct me if I'm mischaracterizing what
25 you're telling me, but, basically, the fraudulent

1 misrepresentations which they made to you were what they were
2 going to do to fund your plan; is that correct? Is that your
3 claim?

4 A I think that -- that plus their -- their failure to
5 be able to inject funds into the business on the schedule
6 which they had told me they would. That would be a part of it
7 though not directly associated with the plan itself.

8 Q When they made you these, what you claim to be,
9 false representations, you claim the defendants knew they were
10 false when they were made?

11 A I can't second-guess what they thought.

12 Q Do you have any evidence upon which to base a
13 belief that the defendants when they made these statements
14 which you believe are false misstatements knew they were false
15 when they made them?

16 MR. PACE: Excuse me a minute, Counsel. Just give me a
17 minute.

18 MR. CASTON: Let the record reflect that he's consulting
19 with the witness.

20 MR. PACE: You may show that I'm consulting him.

21 (Discussion held off the record between the
22 witness and his counsel.)

23 THE WITNESS: Would you repeat that question again.

24 Q (By Mr. Caston) Certainly.

25 You've told me there were certain things which the

1 defendants told you which, more or less, were not true. And
2 these are --

3 A Well, they never materialized, they didn't ever
4 come to pass.

5 Q You claim --

6 And you can go through your amended complaint, if
7 you like, so you don't have to take my word for it.

8 -- and please correct me if I'm wrong -- that the
9 defendant made fraudulent misrepresentations to you.

10 MR. PACE: You want him to confirm what's in the
11 complaint? Is that your question?

12 MR. CASTON: Yes. Not only the complaint, but I also
13 want to know if he feels that they made fraudulent
14 misrepresentations.

15 THE WITNESS: Well, the representations that were made to
16 me were that the Hogle group, as Steve Brown said, had the
17 bucks, had the intense desire to own, operate and manage
18 Larson Ford Sales, Inc., that they had extensive collateral
19 that would be used to substitute for S.B.A. collateral that I
20 had provided personally, that they were fully capable and able
21 to financially follow through with the plan that we agreed
22 upon. Those representations was made to me by -- not only by
23 Mr. Brown initially but later on by Mr. Bruno.

24 Q (By Mr. Caston) But Mr. Brown didn't have the
25 authority to bind the Hogles; isn't that correct?

1 document here.

2 Q (By Mr. Caston) Before we proceed in another
3 direction, let me bring back to your attention that before we
4 went on the break I told you that I was going to ask questions
5 regarding what you believe to be specific misrepresentations
6 that the defendants made to you. Is that pretty much what
7 happened?

8 A Yes.

9 Q And I gave you a copy of the amended complaint, and
10 I told you that those were what you allege to be the specific
11 misrepresentations which you claim the defendants made to you.

12 A Uh-huh (affirmative).

13 Q And they are, in fact, contained in there, are they
14 not? When I say "in there," I'm referring to the paragraph of
15 the amended complaint --

16 A Shall we be specific as to some of these items,
17 such as paragraph 9 under the Second Cause Of Action --

18 Q Sure.

19 A -- which you've underlined, I believe; maybe those
20 are your marks, they are not mine:

21 "Defendants carelessly and/or negligently
22 made false representations that they could and
23 would perform the conditions described in the
24 agreements between the parties."

25 They have definitely made some assurance to me and

1 to my wife.

2 Q What was that that they told you?

3 A That they could and would perform the conditions
4 described in the agreements between the parties, that they
5 would assume the debt, that they would get --

6 Q Do you have any information on which to base a
7 belief that that statement was false when it was made?

8 A I'm -- I have to assume that it was. Because they
9 didn't follow through with it, it had to be.

10 Q Do you have any evidence on which to base that
11 belief?

12 A I was very suspicious that Mr. Hogle was not
13 present during the negotiations.

14 Q That's the only evidence you have to base the
15 belief that that statement was false?

16 A Not necessarily.

17 Q What evidence do you have?

18 A The fact that when we got down to the final
19 negotiating stage necessary in meeting, that I would have
20 liked, as I said, to have had Mr. Hogle there.

21 I was concerned that Owen C. Hogle's brother, James
22 Junior, who I had been assured all along was a party to the
23 agreement --

24 Q Who assured you?

25 A Mr. Bruno on a number of occasions, Dennis Gay, the

ADDENDUM J

1 demonstrations to Plaintiffs through August
2 of 1983 at no cost, to allow Plaintiffs to
3 purchase trucks or cars at invoice price, to
4 to take on up to \$2,100,000.00 liabilities of
5 the dealership."

6 I want to know every fact upon which you base that
7 those statements were false when they were made.

8 A My hesitancy in answering the question is -- is
9 merely to try and recall items that I don't have in my
10 possession right now, Counsel. I don't have any of -- I don't
11 have any notes, I don't have any documents of any kind in
12 front of me.

13 Q So at this time you have no evidence on which to
14 base a belief that --

15 A Not with me. I don't have anything here which I
16 would proffer to you or show to you or refer to to be
17 specific.

18 Q What kind of things would you refer to to show that
19 what the defendants said was false? What type of documents?

20 A I can't be specific on that, either.

21 Q Would you take it upon yourself to review those
22 documents and present them to me as the documents which you
23 believe support your claim as to what the defendants did, that
24 the defendants lied to you?

25 MR. PACE: Sure.

1 THE WITNESS: Yes, I would. Anything that I have, I'll --
2 I'll locate.

3 MR. PACE: Yes.

4 Q (By Mr. Caston) Did you rely on these statements?

5 A I relied on the statements made by the defendants,
6 very definitely.

7 Q How is it you relied on them?

8 A They were given to me as an absolute assurance, the
9 final discussion at 2 o'clock that Saturday morning -- that --
10 that Sunday morning.

11 In fact, I recall specifically my wife telling
12 Mr. Bruno that we were under a certain degree of duress here
13 timewise, "Hammered out this agreement with you, there are
14 other people that we've been working with, we are turning this
15 matter now over to you to meet the requirements which have
16 been agreed upon and what are we going to do and what happens
17 to us if you don't perform?"

18 Mr. Bruno specifically stated -- Well, he said,
19 "We're going to perform."

20 And when my wife expressed her concern again, he
21 said, "And if we don't, you can sue us."

22 We were told at that time that unless we eliminated
23 all uncertainties in the agreement before that meeting was
24 concluded, if we did not iron out all the details, that
25 Mr. Hogle and, I assume, Bruno and Gay or whoever among their

ADDENDUM K

1 A Correct.

2 Q Do you have any recollection of whom was present
3 when you were told that the Hogles were colluding with Stephen
4 Wade?

5 A No.

6 Q Do you recall what exactly it was that they told
7 you?

8 A As I recall, the essence of the information that I
9 got was that Wades and the Hogles had been in contact with
10 each other with the idea that was discussed being the fact
11 that Wade had an inside track of some kind with Ford that they
12 would be approved as the dealer, that if the Hogle group
13 wanted to protect the investment that they'd made in the
14 dealership to that point in time, in order to have the
15 cooperation of the Wades, were -- were they successful in
16 getting a creditors' plan accepted, if the Hogle group wanted
17 to get their money out that they would withdraw.

18 Q Do you have any knowledge as to when you were told
19 this?

20 A No, I don't.

21 Q Do you have any document which would reference when
22 you were told this?

23 A That I don't -- I don't know. I do have a lot of
24 notes left from meetings and -- and memos that I made that
25 were --

ADDENDUM L

INTERROGATORY 4: Regarding your belief that the defendants were involved in a scheme in which the defendants planned to deplete plaintiffs' resources after which another individual in collusion with the defendants would purchase plaintiff's assets at a greatly reduced price, please state:

(a) each and every fact upon which you base your belief;

(b) the title, location and individual in possession of each document which supports your belief.

ANSWER TO INTERROGATORY 4: In January, 1983, the hogles approached plaintiff to buy his business. Plaintiff had had several offers from various prospective purchasers, including his neighbor, Stephen Wade. The Hogles made many promises and statements (upon which plaintiffs' relied) to plaintiff which are the subject of this lawsuit. One particular crucial element in all negotiations was the deadline in Bankruptcy Court for plaintiff to submit a plan to creditors--March 21, 1983. This date was known to all defendants and it was this date by which plaintiff had to submit a plan in Bankruptcy for approval of the creditors. The Hogles, despite the recommendations of an auditor, said they would purchase the dealership and agreed to various provisions that would have to satisfy the creditors of the dealership. The Hogles agreed to substitute collateral, to get approval of Ford Motor Credit, and to pledge their personal wealth, reputation and effort to meeting

the deadline so they could purchase the business. The Hogles took over the dealership and began several questionable business practices of hiring and firing employees, having an apparent "Going out of Business Sale", and not paying the heat bill so that utilities were turned off for several days. These business practices caused the business to lose approximately \$150,000.00.

Prior to the bankruptcy deadline, Stephen Wade and other potential buyers, continued to request that the plaintiffs sell the dealership to them. Plaintiffs refused these reports because of their March 5th, 1983 Agreement with the defendants. Plaintiffs had taken Owen Hogle around to the various creditors to fulfill the March 5, 1983 agreement and had urged Owen Hogle to contact the other creditors of the dealership. Plaintiffs became worried as the deadline approached and the defendants had not attempted to fulfill their promises or their obligations under the Agreements signed by them. After meetings with plaintiff's bankruptcy attorney, defendants refused to abide by the terms of their agreements and decided not to purchase the dealership. On March 22, defendants finally incorporated HBGH. Then HBGH entered into an agreement to reimburse Owen Hogle for the money he had invested into the dealership. On or about March 22, 1983, the defendants made plaintiffs a --take it or leave it--offer to rescind the March 5th Agreement. The defendants did submit an inadequate plan to the

Bankruptcy Court. Stephen Wade again made an offer the plaintiffs to buy the dealership but he too would not satisfy creditors of the dealership.

Plaintiffs having surrendered the operation of the dealership to the Hogles and having relied upon the Hogles to comply with the March 5th agreement, were under severe duress to continue working with the defendants. Plaintiffs submitted the defendant's terms for payment as their plan. Stephen Wade submitted a plan because he was a \$130.00 creditor owed by plaintiff's bankrupt corporation. Wade's plan made better provision for payment of the major creditors than did defendant's inspired plan. Walter P. Larson told defendants that they would not succeed in this bankruptcy proceeding unless the defendants satisfied the creditors and those voting for the plans. Defendants amended their plan once and then withdrew their support entirely leaving only the Wade plan. After their withdrawal and support of the Wade plan, the defendants -- unlike other creditors-- received back from Wade and the Bankruptcy court all of monies they had invested in the dealership and defendant's attorneys received back the fees charged defendants, even though their interest was not stated in either of the competing Bankruptcy plans.

Plaintiffs have learned that the scenario of the their case patterns the scenario of several other ventures entered into by the defendants. Plaintiffs believe that the Hogles have a history of real estate dealings with Bruno. Bruno, who has been involved with several real estate ventures with defendants Hogle, was charged and convicted of felony HUD violations using a "strawman scheme" (Utah Federal District Court # CR85-00135S). In November, 1984 Gay and James Hogle (a purported silent investor) petitioned the court in DSR Southern Development Inc v Stephen Bruno, Utah State Third Distract Court Number C87-6053, to stop Bruno's interference with properties that all of them had owned together and to protect James Hogle Jr's unrecorded interest based on his personal guarantees. A default judgment for \$1,125,000 was entered against Bruno, who was represented by William Thurman, a partner of the firm now representing the hogles in this case.

(b) Attorney, John J. Borsos, 370 East South Temple, Suite #500, Salt Lake City, Utah 84111.

INTERROGATORY 5: Please state with specificity the damages you claim you suffered as a result of the defendant's actions together with the dollar amount which you are claiming for each element of damage.

ANSWER TO INTERROGATORY 5: Defendants agreed to pay plaintiffs \$175,000.00 of the purchase of the dealership. In

ADDENDUM M

JOHN J. BORSOS 384
Attorney for Plaintiffs
807 East South Temple, #101
Salt Lake City, Utah 84102
(801) 533-8883

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

WALTER P. LARSON and SYBIL LARSON,

Plaintiffs,

vs.

STEPHEN P. BRUNO, DENNIS W. GAY,
JAMES HOGLE, JR., and OWEN C. HOGLE,
as individuals; HBGH INC. PARTNERSHIP;
and, as partners,

Defendants.

AFFIDAVIT OF
WALTER P. LARSON

Civil No. C-83-5542

JUDGE RICHARD H. MOFFAT

State of California)
County of San Diego) ss

COMES NOW Walter P. Larson, Plaintiff in the above-entitled action, and
having been duly sworn and deposed, states as follows:

1. That he is the Plaintiff in the above-entitled action.
2. That he has read the Motion and Memorandum for Summary Judgment
filed by Defendants James and Owen Hogle.
3. That he was approached in early January of 1983 by Stephen P. Bruno
and Dennis Gay, who were later identified as agents for Owen C. Hogle and
James Hogle, Jr., concerning the sale of Larson Ford Sales which was then in
a bankruptcy.
4. That at all times during the negotiations for the sale of Larson
Ford Sales, Bruno and Gay represented that they were acting for and on behalf
of James Hogle, Jr., and Owen Hogle.

5. That on January 15, 1983, he had a meeting with Defendants Bruno, Gay and James Hogle. During that meeting, he was told by the Defendants that the individual defendants were all the principals of the earnest money offer for the purchase of Larson Ford Sales.

6. That in February, 1983, he personally led Defendants James and Owen Hogle on a tour of the business premises of Larson Ford Sales. He took Owen Hogle and James Hogle, along with Steven Brown and Gary Routh, on a tour of the entire dealership, including the show-room floor, customer lounge, offices and meeting rooms upstairs, parts department, service department, body shop, and other parts storage areas, as well as a walk through the outside ground and property fence lines.

7. That he found both James Hogle, Jr., and Owen C. Hogle to be very impressed. He answered all questions they had concerning the dealership and was told by them that Mr. Bruno and Mr. Gay would be working with him on details of the takeover of Larson Ford by the Hogles.

8. That on February 17, 1983, he met with Defendants James Hogle, Bruno and Gay for the purpose of extending the deadline set forth in the February 4, 1983, agreement.

9. That on February 18, 1983, the parties all agreed that the contingencies contained in the February 4, 1983, agreement were to be removed by February 25, 1983.

10. That later in February, 1983, a meeting was held at Larson Ford Sales with the Plaintiff and Defendants Bruno and Owen Hogle. During this meeting, said Defendants informed Plaintiff that their attorneys were communicating with the Bankruptcy Court judge concerning a possible loan.

11. That the Hogles visited the dealership a number of other times, and it was common knowledge that they were buying Larson Ford. This awareness reached the point that, on one occasion, an employee reported to him that

James Hogle, Jr., had just been seen in a parked car across the street from the dealership observing the dealership and watching customers come and go.

12. That at every meeting with Bruno and Steve Brown or Dennis Gay, Mr. Bruno, who was the negotiator for the Hogles, always referred to the fact that he was acting upon instruction of James Hogle and Owen Hogle and that he was reporting progress directly to them.

13. That on March 2, 1983, a Finder's Fee Agreement was made and entered into by Wardley Corporation and the individual Defendants. Pursuant to this agreement, the individual Defendants agreed to pay a finder's fee of \$75,000 for the purchase of Larson Ford Sales.

14. That in March, 1983, Jerry Christensen met with him and Defendants Bruno, Gay and Owen Hogle at Larson Ford Sales. At this meeting, Larson was informed that Mr. Christensen was to be the general manager and that he would receive a salary from the individual Defendants in the sum of \$3,000.00 per month plus a percentage of the profits.

15. That on March 5, 1983, an Agreement in Escrow was signed by HBGH, Inc., an intended corporation, and Walter Larson. The parties to that agreement agreed to incorporate the terms and conditions of the February 4, 1983, Earnest Money Receipt and Offer to Purchase and the addendum thereto.

16. That an amendment to the March 5, 1983, agreement modified the terms of payment and the purchasers; i.e., the individual Defendants, agreed to file a bankruptcy plan by March 20, 1983.

17. That on March 10, 1983, Randy Call, the bankruptcy attorney for Larson Ford Sales, met with Bill Thurman, Defendant Bruno and Walter Larson to discuss a lease with option to purchase the assets of Larson Ford Sales and to discuss the plan for reorganization.

18. That on March 11, 1983, following the instructions of Defendant Owen Hogle, Plaintiff Walter Larson deposited all outstanding shares of Larson Ford Sales into an escrow with Harold Stephens.

19. That on March 14, 1983, after Plaintiff Walter Larson had to inform the employees of Larson Ford Sales that he had to terminate their employment, Defendant Owen Hogle announced to all such employees that they were rehired. From that day on, Defendant Owen Hogle took up residence in the offices of Larson Ford Sales and assumed the responsibility for operating the dealership.

20. That on March 18, 1983, Defendant Owen Hogle promised to obtain operating funds for the business.

21. That on March 21, 1983, after the individual Defendants had threatened not to submit a plan in the Bankruptcy Court, an agreement was signed by Plaintiff Walter Larson, HBGH, Inc., and Defendant Bruno. That agreement provided that certain financing needed to be obtained.

22. That on March 22, 1983, a Disclosure Statement and Plan of Reorganization was filed in the Bankruptcy Court. On that date, Defendants Bruno, Gay and Owen Hogle also agreed that all the money which Defendant Owen Hogle would invest in Larson Ford Sales would be repaid at the interest rate of 12 percent prior to any withdrawals. Furthermore, Defendant Owen Hogle was to have access to all books and records of HBGH, Inc., and Larson Ford Sales. Furthermore, Defendant Owen Hogle was entitled to participate in all management decisions and was to be consulted prior to any alteration or action which materially affected either entity.

23. That on March 24, 1983, a First Amended Disclosure Statement was filed in the Bankruptcy Court. In that disclosure statement, HBGH, Inc., was represented as having been formed for the specific purpose of purchasing the assets of Larson Ford Sales.

24. That Defendants Owen Hogle and Gay had agreed to specific funding and financial backing of HBGH, Inc., in order to facilitate and properly fund the purchase of Larson Ford Sales. Defendants Owen Hogle and Gay had also arranged for \$300,000 cash, which was generated through assets other than those of the debtor, Larson Ford Sales, to be used in funding the purchase.

25. That the disclosure statement was modified on April 21, 1983, wherein investors were not limited to Defendants Owen Hogle and Gay, but would include anonymous investors who had alleged cash reserves available of one-half million dollars.

26. That Defendants Owen Hogle and Gay filed personal financial statements with the Bankruptcy Court and resumes to accompany the disclosure statements filed in the Bankruptcy Court.

27. That Defendants James and Owen Hogle made no effort to substitute collateral to satisfy the debts of Larson Ford Sales.

28. That Defendants James and Owen Hogle did not vote for the Larson Ford Sales Plan of Reorganization in the Bankruptcy Court.

29. That Defendant Owen Hogle operated and managed the business. In fact, he held a "Going Out for Business Sale."

30. That Defendants failed to pay the utilities of the dealership in March 1983.

31. That the Hogles themselves, through their actions, conduct, and words, indicated the following facts to him:

a. That they were intending to purchase Larson Ford Sales through the Bankruptcy Court by supporting the Debtors Plan of Reorganization, which they would co-draft with Larson Ford Sales law firm.

b. That Owen Hogle would continue operating the dealership until the Plan of Reorganization was approved and then he would operate all of his business from Larson Ford Sales. He personally signed checks and handed

these to the employees. He performed all the functions of an owner so that Walter Larson left the premises and let Owen Hogle operate as owner.

c. That when organizing the business, Owen C. Hogle told Walter Larson at the dealership with regard to Owen Hogle's responsibility of running the dealership and providing the necessary funds, "It is my responsibility, and I'll get the job done."

32. That at all times during the course of negotiations and after the contracts were entered into, his accountant was given instructions to fully cooperate with Stephen Bruno, Dennis Gay, Owen C. Hogle and James Hogle. All information available to Walter Larson was given to them regarding the financial condition of the business and the activities of the business.

33. That in a meeting with the Hogle representatives on February 9, 1983, he was asked to make available to Hogles' CPA or auditor any and all financial records held by Larson Ford at the dealership located at 5500 South State Street that they asked to inspect.

34. That he agreed and complied with this request, with the understanding that the Hogles needed hands-on verification of financial information which he had been given by Mr. Paul Jones, Larson Ford's treasurer and comptroller, and had supplied to them.

35. That he informed Defendants Stephen P. Bruno, Dennis W. Gay and Owen C. Hogle that he could not convey to them the franchise for Larson Ford without the approval of the Ford Motor Company. However, he explained such approval would have to be given if reasonable assurances could be given to Ford Motor of the ability of the Hogles to operate the Ford dealership and if the Hogles had proceeded, as they agreed, with Ford Motor Credit Company.

35. That the individual defendants breached their agreements to purchase Larson Ford Sales by failing to negotiate substitute collateral agreements with the various banks to which liability was owed, failing to

negotiate substitute guarantees with Ford Motor Credit Company, failing to supply the needed capital to keep the utilities and other operations of the business in working order, failing to purchase all of the assets of the business, and failing to subsequently execute other agreements and fully cooperate in executing those agreements to the degree necessary to fully carry out the terms of the March 5, 1983, agreement.

37. That just before the expiration of the exclusive period for him to file his amended plan as a debtor in possession before the Bankruptcy Court, the defendants failed to honor their obligations agreed to in the March 1983 agreement in order to submit a plan that would comply with acceptance of the major creditors (to wit, the banks, the Small Business Administration and the State Tax Commission).

38. That the plan submitted on March 25, 1983, was objected to on April 11 by Citizens Bank and Commercial Security Bank and Ford Motor Company. Both of the banks were to have been contacted by the individual defendants, and according to the February 4, 1983, agreement, the defendants were to negotiate substitute collateral to accomplish the release of Walter Larson's personal liability from these banks. Ford Motor Company, in its April 11 objection to approval of disclosure, stated that documentation by HBGH had not been submitted; in particular, the names of the officers, directors, and shareholders, experience of these people, financial information of the corporation, the source and amount of available funds, pro forma financial information, and the steps that the corporation would use to get the necessary flooring and secure the new and used car inventory. The failure to provide this information caused Ford Motor Company to object to the March plan.


39. That the defendants left the business and canceled the escrow and the contract prior to June 10, 1983, the date confirmation of the Stephen Wade plan occurred.

DATED this 10 day of ^{June} ~~July~~, 1983.

Walter P. Larson
WALTER P. LARSON

SUBSCRIBED AND SWORN to before me this 10th day of June, 1992.

Bradley P. Simonar
Notary Public



OFFICIAL SEAL
BRADLEY P. SIMONAR
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires December 8, 1995

ADDENDUM N

HARRY CASTON (4009)
 McKAY, BURTON & THURMAN
 Attorneys for Defendants James Hogle, Jr.
 and Owen C. Hogle
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 10 East South Temple Street
 Salt Lake City, Utah 84133
 Telephone: (801) 521-4135

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

WALTER P. LARSON and SYBIL LARSON,	:	ANSWERS TO PLAINTIFFS' FIRST
Plaintiffs and Counter-Defendants,	:	SET OF REQUESTS FOR ADMISSIONS
	:	TO DEFENDANTS JAMES HOGLE, JR.
	:	AND OWEN C. HOGLE
vs.	:	
STEPHEN P. BRUNO, DENNIS W. GAY, JAMES HOGLE, JR., and OWEN C. HOGLE, et al.	:	Civil No. C83-5542
Defendants and Counter-Claimants.	:	Judge Richard H. Moffat
	:	

Defendants, James Hogle, Jr. and Owen C. Hogle, respond to Plaintiffs' First Set of Requests for Admissions to Defendants James Hogle, Jr. and Owen C. Hogle as follows:

1. Admit that on January 15, 1983, James Hogle attended a meeting with Dennis Gay, Steve Bruno, and Walter P. Larson.

ANSWER: Admitted.

2. Admit that during the January 15, 1983, meeting James Hogle indicated that he was one of the wealthy individuals on whose

behalf was signed the January 13, 1990, Earnest Money Agreement to purchase the assets and liabilities of Larson Ford Sales, Inc.

ANSWER: Denied.

3. Admit that in January or February, 1983 Walter P. Larson gave a tour of the premises of Larson Ford Sales, Inc. to James Hogle, Jr., Steven Brown, Owen C. Hogle and the Realtor from Wardley Real Estate.

ANSWER: Admitted.

4. Admit that in January, 1983 you were interested in purchasing Larson Ford Sales, Inc.

ANSWER: Denied.

5. Admit that on January 13, 1983, an Earnest Money Offer was made to Wardley Real Estate Company from Western Slope Development which had been incorporated the day before to purchase Larson Ford Sales, Inc. for a total purchase price of \$150,000.00.

ANSWER: Defendants object to Request for Admission No. 5 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

6. Admit that the Earnest Money Offer, referred to in the preceding request, contained certain contingencies, to-wit: approval by Ford Motor Company of the franchise transfer, purchasers' inspection and approval of the property lease, assets of

the business, and inspection and approval of the findings of his agent after inspection of the books and records of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 6 as it calls for a legal conclusion and that the document referred to speaks for itself.

7. Admit that on February 17, 1983, Walter P. Larson met with James Hogle, and others, to extend time within which the conditions contained in said Earnest Money Agreement must be satisfied.

ANSWER: Defendants object to Request for Admission No. 7 as it is vague and ambiguous as to which conditions the plaintiffs are referring.

8. Admit that James Hogle, Jr. and Owen C. Hogle before March 11, 1983 interviewed and hired Jerry Christensen to be the manager of Larson Ford Sales, Inc.

ANSWER: Denied.

9. Admit that on August 31, 1982, Larson Ford Sales, Inc., Inc. filed a Chapter 11 Bankruptcy.

ANSWER: Admitted.

10. Admit that on March 23, 1983, HBGH, Inc. was identified in a first Amended Disclosure Statement, filed with the Bankruptcy Court, as having been formed for the specific purpose of purchasing the assets of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 10 in that the document referred to speaks for itself.

11. Admit that Owen C. Hogle and Dennis Gay agreed to specific funding and financial backing of HBGH to facilitate and properly fund the purchase of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 11 as it is vague and ambiguous as to the specific funding being referred to.

12. Admit that Owen C. Hogle filed his personal financial statement and resume along with the Disclosure Statement filed in the Bankruptcy Court in the Larson Ford Sales, Inc. Bankruptcy.

ANSWER: Defendants object to Request for Admission No. 12 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

13. Admit that on April 21, 1983, the Amended Disclosure Statement, filed in the Larson Ford Sales, Inc. Bankruptcy proceeding, was modified to disclose the investors and purchasers of Larson Ford Sales, Inc., as being Owen C. Hogle and Dennis Gay, among others.

ANSWER: Defendants object to Request for Admission No. 13 in that the document referred to speaks for itself.

14. Admit that the anonymous investors, not identified in the disclosure statement referred to in the preceding request, were alleged to have cash reserves available in an amount of \$500,000.00.

ANSWER: Defendants object to Request for Admission No. 14 as being vague and ambiguous.

15. Admit that on March 2, 1983, a finder's fee agreement to Wardley Corporation was signed by Dennis Gay, Stephen P. Bruno, James Hogle, Jr., and Owen C. Hogle.

ANSWER: Admitted.

16. Admit that on March 5, 1983, an escrow agreement was signed by HBGH, Inc. and Walter P. Larson.

ANSWER: Admitted.

17. Admit that the letters in HBGH, Inc. stand for Hogle, Bruno, Gay, and Hogle.

ANSWER: Denied.

18. Admit that on March 8, 1983, you paid the payroll of Larson Ford Sales, Inc.

ANSWER: Denied.

19. Admit that on or about March 11, 1983, Owen C. Hogle became an owner of Larson Ford Sales, Inc.

ANSWER: Denied.

20. Admit that on or about March 11, 1983, Owen C. Hogle, as an owner of Larson Ford Sales, Inc., re-hired all of Larson Ford Sales' employees.

ANSWER: Denied.

21. Admit that Owen C. Hogle established the office directly opposite the office of Walter P. Larson at the dealership, and that Owen C. Hogle directed the affairs of Larson Ford Sales from that office.

ANSWER: Denied.

22. Admit Owen C. Hogle maintained the above office so that he could monitor and protect his investment in Larson Ford Sales, Inc.

ANSWER: Denied.

23. Admit that Owen C. Hogle personally acknowledged to Walter P. Larson that the operation of Larson Ford Sales, Inc. was his [Owen C. Hogle's] responsibility.

ANSWER: Denied.

24. Admit that Owen C. Hogle directly represented to the Plaintiffs that he was personally and financially responsible for the purchase of Larson Ford Sales, Inc.

ANSWER: Denied.

25. Admit that you directly represented to the Plaintiffs that you would operate, fund, and manage Larson Ford Sales, Inc.

ANSWER: Denied.

26. Admit that you directly represented to Plaintiffs that you would resolve problems concerning certain loans made by Commercial Security Bank, Citizen's Bank, and the Small Business Administration made to Larson Ford Sales, Inc.

ANSWER: Denied.

27. Admit that you directly represented to plaintiffs that you would provide Ford Motor Credit Company with personal financial statements and assume the guarantee contract under Ford Motor Credit Company's ninety (90) day repurchase agreement with Walter P. Larson and Larson Ford.

ANSWER: Denied.

28. Admit that you directly represented to plaintiffs that you would cooperate and commit the financial resources as were necessary under the confirmed bankruptcy plan to operate Larson Ford Sales, Inc., Inc.

ANSWER: Denied.

29. Admit that pursuant to Utah State law, Owen C. Hogle, as an owner of Larson Ford, provided, through his own insurance company, an automobile dealer bond in order for Larson Ford to operate as a dealer with the Utah Department of Motor Vehicles.

ANSWER: Defendants object to Request for Admission No. 29 in that it calls for a legal conclusion.

30. Admit that Owen C. Hogle, in his own handwriting, caused memos to be written to Larson Ford employees defining procedures to be followed, as well as penalties to be inflicted on employees who failed to comply.

ANSWER: Defendants object to Request for Admission No. 30 as being vague and ambiguous.

31. Admit that Owen C. Hogle proceeded, as owner of Larson Ford, to cause certain advertising slogans to be painted on the showroom windows of Larson Ford Sales, Inc.

ANSWER: Denied.

32. Admit that Owen C. Hogle obtained his own funds to pay obligations of Larson Ford Sales as owner of Larson Ford Sales, Inc.

ANSWER: Denied.

33. Admit that Owen C. Hogle met in the Salt Lake office of the Ford Motor Credit Company with Park Larson and Denny Anderson, Ford Motor Credit Branch Manager, at which time Owen C. Hogle was introduced by Park Larson to Mr. Anderson as the new owner of Larson Ford Sales, Inc.

ANSWER: Denied.

34. Admit that Owen C. Hogle agreed to provide personal financial statements to Ford Motor Credit with the intent for Hogle

to assume the liability for new vehicle flooring for Larson Ford to be provided by Ford Motor Credit Company.

ANSWER: Denied.

35. Admit that Owen C. Hogle terminated all Larson Ford Sales employees as soon as he took ownership control of Larson Ford Sales, Inc. and that he then proceeded to interview and re-hire those employees he wanted to retain.

ANSWER: Denied.

36. Admit that Owen C. Hogle, as owner, and Jerry Christensen, as Manager, met often in the Hogle Larson Ford office at which time Hogle gave Christensen instructions and directions relating to the operation and management of Larson Ford Sales, Inc.

ANSWER: Denied.

37. Admit that Owen C. Hogle gave specific verbal instructions to Larson Ford Sales lot boy employees that the lot boys were to no longer run personal errands for Park Larson or his family and not to go to Park's home in connection with personal favors for Park Larson.

ANSWER: Admitted.

38. Admit you have personally advanced over \$150,000 in monies and nearly two months of time in the daily operations of Larson Ford Sales, Inc.

ANSWER: Denied.

39. Admit that since 1983 you were silent investors with Steven Bruno or various real estate investments.

ANSWER: Defendants object to Request for Admission No. 39 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

40. Admit that your attorney, Harold Stephens, in Compliant No. 87-6053, claimed that the ostensible ownership of a closely held corporation in the names of Dennis Gay, Kees Versteeg, Tony Versteeg and Steve Bruno did not represent you and their hidden equity interest in that closely held corporation.

ANSWER: Defendants object to Request for Admission No. 40 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

41. Admit HBGH incorporated on March 22, without mentioning you as participants.

ANSWER: Admitted.

42. Admit that you allowed Stephen Bruno and/or Dennis Gay to represent that they acted in your name in purchasing the assets and assuming the liabilities of Larson Ford Sales, Inc.

ANSWER: Denied.

43. Admit that during all or part of 1982 and 1983 Harold Stephens represented you as your attorney.

ANSWER: Defendants object to Request for Admission No. 43 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

44. Admit that in 1983 you hired and paid with your funds, a CPA, D. Clark Brown, to represent you with the investigating and purchasing of Larson Ford Sales.

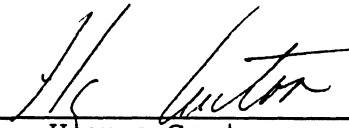
ANSWER: Defendants object to Request for Admission No. 44 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

45. Admit that you signed the March 2, 1983, Finder's Fee Agreement a copy of which is attached hereto.

ANSWER: Admitted.

DATED this 29th day of January, 1991.

MCKAY, BURTON & THURMAN

By 

Harry Caston
Attorneys for Defendants
James and Owen Hogle

HARRY CASTON (4009)
SHAWN D. TURNER (5813)
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WALTER P. LARSON, SYBIL LARSON	:	
and JOHN LARSON,	:	AMENDED ANSWERS TO
	:	PLAINTIFFS' FIRST SET OF
Plaintiffs and Counter-	:	REQUESTS FOR ADMISSIONS TO
Defendants,	:	DEFENDANTS JAMES HOGLE, JR.
	:	AND OWEN C. HOGLE
vs.	:	
STEPHEN P. BRUNO, DENNIS W.	:	Civil No. C83-5542
GAY, JAMES HOGLE, JR., and	:	
OWEN C. HOGLE, et al.	:	Judge Richard H. Moffat
Defendants and Counter-	:	
Claimants.	:	
	:	

Defendants, James Hogle Jr. and Owen C. Hogle, amend their
Answers to Plaintiffs' First Set of Requests for Admissions to
Defendants James Hogle, Jr. and Owen C. Hogle as follows:

1. Admit that on January 15, 1983, James Hogle attended a
meeting with Dennis Gay, Steve Bruno, and Walter P. Larson.

ANSWER: Admitted.

2. Admit that during the January 15, 1983, meeting James
Hogle indicated that he was one of the wealthy individuals on whose

behalf was signed the January 13, 1990 Earnest Money Agreement to purchase the assets and liabilities of Larson Ford Sales, Inc.

ANSWER: Denied.

3. Admit that in January or February, 1983 Walter P. Larson gave a tour of the premises of Larson Ford Sales, Inc. to James Hogle, Jr., Steven Brown, Owen C. Hogle and the Realtor from Wardley Real Estate.

ANSWER: Admitted.

4. Admit that in January 1983 you were interested in purchasing Larson Ford Sales, Inc.

ANSWER: Denied.

5. Admit that on January 13, 1983, an Earnest Money Offer was made to Wardley Real Estate Company from Western Slope Development which had been incorporated the day before to purchase Larson Ford Sales, Inc. for a total purchase price of \$150,000.00.

ANSWER: Denied. Defendants, James and Owen Hogle, have reviewed the Earnest Money Receipt and Offer to Purchase of January 13, 1983, but have no knowledge or information upon which to base a belief as to whether Western Slope Development was incorporated on January 12, 1983.

6. Admit that the Earnest Money Offer, referred to in the preceding request, contained certain contingencies, to-wit: approval by Ford Motor Company of the franchise transfer, pur-

chasers' inspection and approval of the property lease, assets of the business, and inspection and approval of the findings of his agent after inspection of the books and records of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 6 as it calls for a legal conclusion and that the document referred to speaks for itself.

7. Admit that on February 17, 1983, Walter P. Larson met with James Hogle, and others, to extend time within which the conditions contained in said Earnest Money Agreement must be satisfied.

ANSWER: Denied. James Hogle met with plaintiff, Walter P. Larson, on one occasion. That meeting took place at the dealership.

8. Admit that James Hogle, Jr. and Owen C. Hogle before March 11, 1983 interviewed and hired Jerry Christensen to be the manager of Larson Ford Sales, Inc.

ANSWER: Denied.

9. Admit that on August 31, 1982, Larson Ford Sales, Inc., Inc. filed a Chapter 11 Bankruptcy.

ANSWER: Admitted.

10. Admit that on March 23, 1983, HBGH, Inc. was identified in a first Amended Disclosure Statement, filed with the Bankruptcy

Court, as having been formed for the specific purpose of purchasing the assets of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 10 in that the document referred to speaks for itself.

11. Admit that Owen C. Hogle and Dennis Gay agreed to specific funding and financial backing of HBGH to facilitate and properly fund the purchase of Larson Ford Sales, Inc.

ANSWER: Defendants object to Request for Admission No. 11 as it is vague and ambiguous as to the specific funding being referred to.

12. Admit that Owen C. Hogle filed his personal financial statement and resume along with the Disclosure Statement filed in the Bankruptcy Court in the Larson Ford Sales, Inc. bankruptcy.

ANSWER: Denied. Owen C. Hogle's personal financial statement and resume were provided to Defendants Bruno and Gay and Ford Motor Company.

13. Admit that on April 21, 1983, the Amended Disclosure Statement, filed in the Larson Ford Sales, Inc. bankruptcy proceeding, was modified to disclose the investors and purchasers of Larson Ford Sales, Inc., as being Owen C. Hogle and Dennis Gay, among others.

ANSWER: Denied. Defendants, James and Owen C. Hogle, are not aware of any document which indicated that these defendants were

the purchasers of Larson Ford. These defendants had agreed to fund HBGH, which was contemplating the purchase of Larson Ford.

14. Admit that the anonymous investors, not identified in the disclosure statement referred to in the preceding request, were alleged to have cash reserves available in an amount of \$500,000.00.

ANSWER: Denied.

15. Admit that on March 2, 1983, a finder's fee agreement to Wardley Corporation was signed by Dennis Gay, Stephen P. Bruno, James Hogle, Jr., and Owen C. Hogle.

ANSWER: Admitted.

16. Admit that on March 5, 1983, an escrow agreement was signed by HBGH, Inc. and Walter P. Larson.

ANSWER: Admitted.

17. Admit that the letters in HBGH, Inc. stand for Hogle, Bruno, Gay, and Hogle.

ANSWER: Denied.

18. Admit that on March 8, 1983, you paid the payroll of Larson Ford Sales, Inc.

ANSWER: Denied.

19. Admit that on or about March 11, 1983, Owen C. Hogle became an owner of Larson Ford Sales, Inc.

ANSWER: Denied.

20. Admit that on or about March 11, 1983, Owen C. Hogle, as an owner of Larson Ford Sales, Inc., re-hired all of Larson Ford Sales' employees.

ANSWER: Denied.

21. Admit that Owen C. Hogle established the office directly opposite the office of Walter P. Larson at the dealership, and that Owen C. Hogle directed the affairs of Larson Ford Sales from that office.

ANSWER: Denied.

22. Admit Owen C. Hogle maintained the above office so that he could monitor and protect his investment in Larson Ford Sales, Inc.

ANSWER: Denied.

23. Admit that Owen C. Hogle personally acknowledged to Walter P. Larson that the operation of Larson Ford Sales, Inc. was his [Owen C. Hogle's] responsibility.

ANSWER: Denied.

24. Admit that Owen C. Hogle directly represented to the Plaintiffs that he was personally and financially responsible for the purchase of Larson Ford Sales, Inc.

ANSWER: Denied.

25. Admit that you directly represented to the Plaintiffs that you would operate, fund, and manage Larson Ford Sales, Inc.

ANSWER: Denied.

26. Admit that you directly represented to Plaintiffs that you would resolve problems concerning certain loans made by Commercial Security Bank, Citizen's Bank, and the Small Business Administration made to Larson Ford Sales, Inc.

ANSWER: Denied.

27. Admit that you directly represented to plaintiffs that you would provide Ford Motor Credit Company with personal financial statements and assume the guarantee contract under Ford Motor Credit Company's ninety (90) days repurchase agreement with Walter P. Larson and Larson Ford.

ANSWER: Denied.

28. Admit that you directly represented to plaintiffs that you would cooperate and commit the financial resources as were necessary under the confirmed bankruptcy plan to operate Larson Ford Sales, Inc.

ANSWER: Denied.

29. Admit that pursuant to Utah State law, Owen C. Hogle, as an owner of Larson Ford, provided, through his own insurance company, an automobile dealer bond in order for Larson Ford to operate as a dealer with the Utah Department of Motor Vehicles.

ANSWER: Denied. Defendant Owen C. Hogle is not aware of any documents in which he identified himself as owner of Larson Ford.

30. Admit that Owen C. Hogle, in his own handwriting, caused memos to be written to Larson Ford employees defining procedures to be followed, as well as penalties to be inflicted on employees who failed to comply.

ANSWER: Denied. Owen C. Hogle does recall writing a memorandum to employees; however, he never defined procedures or penalties.

31. Admit that Owen C. Hogle proceeded, as owner of Larson Ford, to cause certain advertising slogans to be painted on the showroom windows of Larson Ford Sales, Inc.

ANSWER: Denied.

32. Admit that Owen C. Hogle obtained his own funds to pay obligations of Larson Ford Sales as owner of Larson Ford Sales, Inc.

ANSWER: Denied.

33. Admit that Owen C. Hogle met in the Salt Lake office of the Ford Motor Credit Company with Park Larson and Denny Anderson, Ford Motor Credit Branch Manager, at which time Owen C. Hogle was introduced by Park Larson to Mr. Anderson as the new owner of Larson Ford Sales, Inc.

ANSWER: Denied.

34. Admit that Owen C. Hogle agreed to provide personal financial statements to Ford Motor Credit with the intent for Hogle

to assume the liability for new vehicle flooring for Larson Ford to be provided by Ford Motor Credit Company.

ANSWER: Denied.

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ANSWER: Denied.

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ANSWER: Denied.

37. Admit that Owen C. Hogle gave specific verbal instructions to Larson Ford Sales lot boy employees that the lot boys were to no longer run personal errands for Park Larson or his family and not to go to Park's home in connection with personal favors for Park Larson.

ANSWER: Admitted.

38. Admit you have personally advanced over \$150,000 in monies and nearly two months of time in the daily operations of Larson Ford Sales, Inc.

ANSWER: Denied.

39. Admit that since 1983 you were silent investors with Steven Bruno or various real estate investments.

ANSWER: Defendants object to Request for Admission No. 39 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

40. Admit that your attorney, Harold Stephens, in Complaint No. 87-6053, claimed that the ostensible ownership of a closely held corporation in the names of Dennis Gay, Kees Versteeg, Tony Versteeg and Steve Bruno did not represent you and their hidden equity interest in that closely held corporation.

ANSWER: Defendants object to Request for Admission No. 40 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

41. Admit HBGH incorporated on March 22, without mentioning you as participants.

ANSWER: Admitted.

42. Admit that you allowed Stephen Bruno and/or Dennis Gay to represent that they acted in your name in purchasing the assets and assuming the liabilities of Larson Ford Sales, Inc.

ANSWER: Denied.

43. Admit that during all or part of 1982 and 1983 Harold Stephens represented you as your attorney.

ANSWER: Defendants object to Request for Admission No. 43 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

44. Admit that in 1983 you hired and paid with your funds, a CPA, D. Clark Brown, to represent you with the investigating and purchasing of Larson Ford Sales.

ANSWER: Defendants object to Request for Admission No. 44 as it is not relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

45. Admit that you signed the March 2, 1983, Finder's Fee Agreement, a copy of which is attached hereto.

ANSWER: Admitted.

DATED this 15th day of November, 1991.

MCKAY, BURTON & THURMAN

By Shawn D. Turner
Shawn D. Turner
Attorneys for Defendants
James and Owen C. Hogle