1972

American Gypsum Trust, A Common Law Trust, And John Paul Jones, S. Lewis Crandall, John Russell Ritter, Donald W. Mcewen And Barry Phillips v. Georgia-Pacific Corporation : Reply Brief of Appellant Georgia Pacific Corporation

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN GYPSUM TRUST, a common law trust, and JOHN PAUL JONES, S. LEWIS CRANDALL, JOHN RUSSELL RITTER, et al,
Plaintiffs-Respondents,

-vs-

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellant.

Case No. 12887

REPLY BRIEF OF APPELLANT GEORGIA-PACIFIC CORPORATION

PRELIMINARY STATEMENT

An analysis of the facts stated and arguments made in Respondents' brief convinces us that, faced with an adverse record in the Court below and the rationale of the overwhelming array of legal authorities cited by Appellant, Georgia-Pacific Corporation, (hereinafter referred to as G-P), Respondents have adopted the diversionary principle of skipping around the real issues. Rather than follow their lead we will merely point out to this Court the errors in the facts stated or not mentioned by them. In that connection,

we rest assured that the Court will examine the pertinent portions of the record itself in areas where the parties are in dispute.

The position of G-P throughout this entire lawsuit and in this reply brief has been and is as follows:

1. The requirements provision of the lease agreement does not impose upon G-P an obligation to supply the requirements of any given fixed market area or produce gypsum products at the Sigurd plant at any set production level. G-P acted in a prudent and businesslike manner for all interests concerned in light of the existing economic conditions by acquiring the Lovell, Wyoming plant, increasing capacity at the Acme, Texas plant, and concentrating the Sigurd market area.

2. Since becoming the assignee of the lease, G-P has strictly complied with generally accepted accounting principles in calculating the profit royalty by transferring gypsum products from the Sigurd plant to the distribution center at the wholesale fair market value.

3. The record does not contain any evidence which supports the trial court's finding that there was a fixed historical Sigurd market area.

4. As a matter of law, the testimony of the witness for Respondents, Grant Caldwell, was inadmissible for the reasons that:

(a) He made economic assumptions to support his contentions which he was not qualified to make as an expert in the fields in which he expressed his opinion, and

(b) His assumptions and conclusions were not supported by facts of record. On the contrary they were based on his imagination and desires.

In the portion of Respondents' brief entitled Introduction to Argument the Respondents make certain specious statements. Firstly, they assert that there is not a single argument on any principle of law involved in any of Georgia-Pacific's claims of error. Secondly, they contend that G-P had failed to cite the overwhelming evidence that supports the trial court's findings, and thirdly, that G-P is seeking a retrial of isolated parts of this action.

To aid the Court in following our contentions, and rejecting those of Respondents, we file under separate cover Appendix "A" to this brief. It contains the evidence which will show to the Court that the Respondents have either misstated the facts, overlooked those essential to properly resolve the issue, unfairly characterized their effect, or imagined their presence in the record.

POINT I

THE TRIAL COURT ERRED BOTH LEGALLY AND FACTUALLY IN ENTERING ITS FINDING OF FACT NO. 27 WHICH DEALS WITH THE REQUIREMENTS PROVISION OF THE LEASE AND SADDLES GEORGIA-PACIFIC WITH AN OBLIGATION TO PRODUCE AT A GIVEN LEVEL.

Point I of Respondents' brief indicates that the arguments are directed to answering G-P's contention that the lease does not obligate it to supply gypsum products from the Sigurd plant to a fixed market area or that it must produce at any given level. However, most of the argument directs itself to Point III of G-P's brief which deals with the erroneous economic assumptions upon which the trial court based its findings and conclusions as to damages. That issue will be developed in a subsequent portion of this brief.

Preliminary to our principal development we mention that Respondents assert that G-P's position here and below is that the requirements language of the lease agreement means nothing — that it is not even a part of the lease. Nothing could be further from the truth. An examination of the argument under this point in G-P's opening brief will demonstrate beyond cavil that our position on the issue was that the requirements language of the lease agreement was indeed a vital part of the bargain negotiated by the parties and that the requirements language pen-

ned by Judge Ritter when he wrote the lease is clear and unambiguous and binds both parties.

A cursory reading of the document establishes that Judge Ritter selected the following words to evidence the understanding of the parties as to requirements:

> " . . . all gypsum requirements of the lessee or his assigns shall be supplied from the demised premises hereinabove described, providing rock of the kind and quality needed can be supplied therefrom . . ."

In applying this language to the parties at the time of the execution of the lease, the following facts adduced at trial are vital and with them the picture painted by the words become clear:

1. The execution of the lease agreement in 1946 was preceded by long and hard negotiations in which the lessor was represented by Judge Ritter, and the lease itself was written by Judge Ritter. (Ab 178, 179, 191, 194)[1]

2. The assets of the lessor at the time and the

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1 Reference numbers designated herein refer to the following parts of the record:

(Ab.....) designated references to the abstract of the Transcript of the trial court proceedings.

(C. .....) designates the Record on Appeal as submitted by the district court.

(Ex.....) designates the exhibits admitted as evidence at trial.

subject of the lease were a group of gypsum claims situated among numerous other similar claims in the same general area. (Ab. 179, 214-215, 238)

3. To encourage mining of the claims by lessee and to prevent lessee from using better quality ore in place of that of lessors, the parties specifically agreed that lessee would construct a plant and that the gypsum requirements of that plant would be taken from lessor's claims, not from other sources. Significantly, it is pertinent to note that both United States Gypsum Company, with a plant next door, and G-P itself, have extensive ore bodies contiguous to those embraced by this lease agreement. (Ab. 179, 794, 805, 214-215, 238)

4. Intent is often shown by silence and the lease language selected by Judge Ritter referred neither to any required level of production of the plant to be constructed or to any exclusive market area to be served by the plant.

5. In more than twenty (20) years of lease operation, no claim was ever made by lessor that the requirements language imposed either production level requirements or market area requirements. (Ab. 524-526)

6. Lessor did not assert such claim in the negotiations that led to the filing of this litigation or even in its complaint when originally filed. (Ab. 199, 202-203, Ex. 163)

7. Over many years of performance pursuant to the lease agreement, G-P and its predecessors in interest have scrupulously adhered to the requirements language of the lease by providing all of the requirements of this plant from lessor's ore body, despite the fact that, over the years, the quality of the ore has presented serious problems. Moreover, richer ore deposits contiguous to the claims in the lease were available and owned by G-P and its predecessors. (Ab. 817-821, 832-833, 214) Had G-P not been obligated under the requirements provision of the lease to obtain gypsum ore only from Respondents' premises, G-P would have utilized the higher quality ore contiguous thereto to its economic advantage.

With support from these uncontroverted facts, the position of G-P is that the trial court erred as a matter of law in its findings of fact and conclusions of law by:

1. Writing burdensome obligations into the contract of the parties not placed there by Judge Ritter when he wrote the lease in 1946.

2. Writing implied contract obligations not within a reasonable construction of the agreement favoring the scrivener of the lease.

3. Writing new obligations in the lease at a time some twenty (20) years subsequent to the date of the lease. These obligations consist of creating a production level requirement and geographic market area requirement based upon varying circumstances which developed over the intervening years.

4. Adding obligations to an assignee of the lessee not saddled on the original lessee.

5. In failing to bar Respondents from belatedly asserting their unnegotiated requirements theory after G-P, relying upon the agreement itself and prior interpretive actions of Respondents, acquired the Sigurd operations.

The argument made by Respondents as to the actions by G-P and the market and competitive conditions which arose twenty (20) years after the lease agreement was negotiated is totally irrelevant to proper interpretation of the requirements provision of the lease. The issue here being discussed is the intention of the parties at the time the lease was negoitated and their construction of its terms over many years. At the time of execution there was a single lessee, a single lessor, a single ore deposit owned by lessors and an obligation to construct a single plant. The ore body was adjacent to numerous other ore bodies. The parties, in language enunciated by Judge Ritter, the lessor's attorney, stated clearly and simply that lessee will supply the single plant to be constructed from Respondents' ore body, not from contiguous ore boddies. That is the only requirement provision contained in the agreement. It has been performed by G-P and Respondents should not be permitted to alter its terms by arguments relating to changed conditions and competitive factors arising during the twenty (20) years G-P and its predecessors have mined the property. Such argument is clearly deceptive. Further-

more, as is demonstrated by Appendix "A", at pages 19-41, the characterization of the evidence of record in this section of Respondents' brief is not accurate.

Respondents' only challenge to the *five* separately stated legal arguments set forth in G-P's opening brief, dealing with the interpretation of requirements contracts, is to its argument on estoppel. And, even in that attack, the primary thrust of their argument is procedural in nature rather than substantive. Respondents maintain that the estoppel argument was never raised below and, therefore, as a matter of law, cannot be raised on this appeal. This assertion is plainly false. Attached hereto as Appendix "B" is an excerpt from memorandum filed with the trial court in support of G-P's Motion for Summary Judgment. (C. 382-385) It is proper to raise estoppel by motion for summary judgment. (See Moore's Federal Practice, 2d Ed. Vol. 2A § §8.28, 12.09, construing Rule 12(b) (6) of the Federal Rules of Civil Procedure which is identical to the Utah Rule as here pertinent.) The matter was again presented to the court below in G-P's post trial brief. (C. 657)

As to the issue of estoppel, Respondents further contend at page 15 of their brief that estoppel cannot be found because of the lease provision relating to non-waiver of prior breaches. This position likewise is without merit.

As stated by Professor Corbin:

> "Parties to a contract cannot, even by an express provision in that contract, deprive

themselves of the power to alter or vary or discharge it by subsequent agreement. * * * In like manner, a provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promissor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the same extent that he would have had this power if there had been no such provision." Corbin on Contracts, 1951 Ed. §763, Vol. 3A p. 351.

In summary, the contract language is clear. Even if we go so far as to assume ambiguity the language must be construed against the scrivener. G-P conformed with the requirements language of the agreement. Respondents are estopped from asserting their requirements theory, after permitting G-P to acquire the lease without first advising of such unstated claim which was impossible of determination either by examination of the lease itself or of the conduct of the parties in their performance over those many years.

POINT II

RESPONDENTS PREMISE ARGUMENTS ALLEGING A DEFINED HISTORIC SIGURD MARKET AREA UPON "FACTS" WHICH ARE NOT TO BE FOUND IN THIS RECORD.

Respondents, in support of the Court's ruling on market area and to uphold the argument in their brief, make two basic and erroneous assertions. They are:

1. That from the date of the execution of the lease agreement to the date of trial, a fixed and historic market area had been served exclusively by the Sigurd plant.

2. That G-P creamed the market to its own advantage and acted in a manner adverse to the interest of the parties to the lease.

As to the first assertion, the uncontroverted evidence which is set forth in Appendix "A" (pages 2-12) is to the contrary. In summary, there never was and never has been any fixed or certain market area served by the Sigurd plant. Any market area mentioned has fluctuated depending upon existing market conditions and competitive forces. No part of the critical Southern California market was served by Sigurd from 1952 through 1958. That market was served by the lessee from the Union Gypsum plant in Phoenix, Arizona. (Ab. 103, 119, 121-123, 569-570, Ex. 110)

The second assertion is as vulnerable as the first for it too lacks evidentiary support and in fact, is contrary to the facts. Respondents offered no evidence on this subject at all, except the erroneous assumptions or conclusions of its unqualified expert. Respondents' accounting witness admittedly had no knowledge or background of any kind with respect to the subject being considered. (Ab. 364-365) The only admissible and trustworthy evidence offered by any party at the trial came through the knowledgeable administrative and executive employees of G-P (Mc-

Caskill, Burch and Wilson) and through independent economic and marketing experts (Grether and Rosse). Their testimony demonstrates that the very acts[2] of G-P which are complained of by Respondents were beneficial, not detrimental to the Sigurd operation and to Respondents' interests. (Ab. 437-438, 468-470, 541-542, 595, 628-631, 643-644, 688). (See Appendix "A", pages 32-41) But for these acts, this plant would have suffered the same fate as its more favorably situated competitors—it would have been forced to close down. (Ab. 464, 594) This evidence is uncontroverted. Respondents' bold declaration to the contrary cannot change the record.

Respondents do not here point to any language in the lease agreement or to any evidence in a "1946" time frame which would indicate an intention to bind the lessee to serve exclusively any particular market area. The entire market area argument, therefore, is wholly irrelevant. In addition, as is noted above, the basic factual premises utilized as a base is false.

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2. The acquisition of the Lovell, Wyoming plant to prohibit a competitor from acquiring it and competing with Sigurd in the intermountain area (Ab. 466); the addition of production capacity at the Acme, Texas plant to relieve the burden on Sigurd of shipping to Southern California at a loss. (Ab. 526-527) The concentration of the Sigurd market area to reduce costs (Ab. 594); and the use of G-P's existing distribution centers to take advantage of truck delivery and multi-product sales. (Ab. 364)

POINT III

THE "ASSUMPTIONS" OR "CONCLUSIONS" TESTIFIED TO BY RESPONDENTS' ACCOUNTING WITNESS, CALDWELL, ARE INADMISSIBLE IN EVIDENCE AND ARE NOT SUPPORTED BY EVIDENCE IN THE RECORD.

As we read Respondents' arguments under Point III, they do not quarrel with the legal propositions stated in G-P's opening brief that Mr. Caldwell was not competent to state the assumptions and conclusions[3] relied upon by him at the trial. Rather, they seek to escape those propositions by suggesting that the trial judge's findings are supported by other evidence. In this regard, we invite the attention of the Court to the argument contained under Point III in G-P's opening brief which demonstrated the total inadmis-

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3 These assumptions are:

1. The price decline in the Western market was caused solely by G-P in its operation of the Lovell and Acme plants. (Ab. 309-314)
2. The Sigurd plant should have experienced profit levels in 1965-1970 equal to the profit levels of 1962-1964. (Ex. 139-141)
3. The production of G-P's Acme and Lovell plants supplied to the West Coast could have been supplied, to the extent of Sigurd's capacity, at a profit level as in the years 1962, 1963 and 1964. (Exs. 139-141)
4. During the years 1967-1968 the Sigurd plant could have produced at 97% of the capacity which was the capacity achieved by that plant in 1967 and at the same profit level as was reached in the years 1962, 1963 and 1964. (Ex. 139-141)

sibility and incompetence of the testimony of Grant Caldwell.

The Respondents chide G-P for asserting that Caldwell made economic "assumptions", but they then go on to admit that he testified as follows:

> ". . . additional capacity from Lovell, Acme, and the other Georgia-Pacific sources so *affected* the price of gypsum products in the Sigurd market *that the price experienced in that market* in the period 1968-70 *was an unreliable index* for measuring plaintiff's damages." (see page 21)

Respondents further proceed to make this admission:

> "Mr. Caldwell and the trial court logically *concluded* that the profits at the Sigurd plant would not have changed *absent Georgia-Pacific violations* of the lease, except as the price of gypsum products declined in areas *untainted by Georgia-Pacific's misconduct*." (see p. 21-22)

Mr. Caldwell's assumptions or conclusions are without foundation and should not have been received in evidence. Over objections of G-P they were improperly admitted, relied upon, and used as a basis for the findings of the Court below as to damages and future accounting procedures. Mr. Caldwell admitted that he had not made any study to support his conclusions as a market analyst or economist; that he is neither a market analyst nor a professional economist; that he had made no studies as to what competitors were doing in the market place; and, that he did not know

what customers were doing or demanding in the market place. (Ab. 364-365)

Furthermore, the only competent evidence in the record on this subject did not support Caldwell's conclusions. This uncontroverted evidence is summarized in Appendix "A" (pp. 19-41) submitted herewith and was furnished by the witnesses Wilson, McCaskill, Burch, Grether and Rosse. In substance, the evidence is that G-P acted in good faith and exercised prudent business judgment and its acts inured to the benefit and not detriment, of the Sigurd plant and of Respondents' interests. Accordingly, Respondents' conclusions as to tainted acts and misconduct on the part of G-P and alleged adverse effects thereof upon Respondents reflect only visionary hopes and aspirations of counsel.

Respondents attempt to rehabilitate themselves in their brief by boldly asserting:

> "* * * the Trial Court did not rely solely upon Mr. Caldwell's testimony, but relied heavily upon the testimony of Georgia-Pacific's own witnesses." (pp. 20-21)

As noted previously and verified by the evidence listed in Appendix "A", this proposition is not true. The testimony of G-P's executive employees, and of the independent qualified experts is to the contrary. The thrust of Respondents' argument here is simply to escape the effects of the wholly uncontroverted evidence.[4]

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4. In G-P's opening brief, attention is invited to Mr. Caldwell's admitted lack of knowledge of basic economic prin-

The cases cited on page 23 of Respondents' brief to the effect that a wrongdoer must bear the risk of uncertainty in measuring the harm he causes are not here pertinent.

G-P maintained financial records in accordance with established business practices in the industry as required by the lease agreement. Furthermore, Respondents, not G-P, have the burden to eliminate whatever uncertainty there may be as to what causes the alleged damages. This is Horn Book law:

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ciples affecting the gypsum industry. G-P then argued that the assumption of Mr. Caldwell that Georgia-Pacific was entirely to blame for the precipitous price decline of gypsum products in the Western Market area beginning in 1968 was unsupported by any foundation whatsoever. Respondents have dedicated a major portion of their brief, pp. 7, 10, 12, 13, 20, 21, 23, to discredit this argument. They have attempted to do so by pointing to a lag between the time at which increased supply and decreased housing starts commenced (1966-1967) and the time at which the price decline occurred. (1968) Their argument simply is not supported by evidence of record. The uncontroverted evidence of record and case law demonstrate the cause of this time lag. In 1966 to 1967, the price was not determined by the law of supply and demand. It was artificially supported by actions of Georgia-Pacific's leading competitors in the West, namely U. S. Gypsum, National Gypsum and Kaiser Gypsum. Dr. Rosse so testified. The Federal Court so found in *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Calif. 1971) which is a part of the record in this case. (see especially C. 724-725). The testimony of Dr. Rosse on this subject and the excerpt from Wall Products are set out for the convenience of the Court on pages 24-27 of Appendix "A" accompanying this brief.

> " . . . *no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause*, or where it is impossible to say what, if any, portion of the damages resulted from the fault of the defendant and what portion from the fault of the plaintiff himself." (Emphasis is the Court's) *Allen v. McCormick* 238 P.2d 220 at 224 citing 15 Am Jur Damages, 413 §22.

This Court has accepted this principle of law, see *Gould v. Mountain States Telephone & Telegraph Co.*, 6 U.2d 187 at 193, 309 P.2d 802 (1957).

Mr. Caldwell's assumptions, the only testimony proffered by Respondents as to the cause of damages, and which were accepted by trial court, are mere speculations and conjectures which have been completely refuted by all admissible evidence of record. The record demonstrates that by a single unfounded Caldwell assumption accepted at the trial level, the Judge found that G-P was the *sole cause* of the 1968 product price decline in the Western Market area. Based on that erroneous assumption, he increased the damages assessed against G-P by $233,416. (See Appendix "B" to G-P's opening brief) We repeat that all admissible evidence as to this issue was contrary to this assumption. Even as to the *measure* of damages this court has consistently held that although they need not be measured with exactness, such measure must have a reasonable basis. (See *Robinson v. Hreinson*, 17 U.2d 261, 267, 408 P.2d 121 (1965). *Monter v. Kratzers Specialty Bread Company*, ...

U.2d ....., Docket No. 12810 (December 5, 1972). Only when plaintiffs show such basis by admissible evidence must G-P bear a burden for any alleged risk of uncertainty. Respondents have not met this burden.

POINT IV

THE ASSERTIONS MADE BY RESPONDENTS IN THEIR POINT IV THAT THE SOLE ACTIVITY IN G-P'S DISTRIBUTION SYSTEM IS A SELLING FUNCTION AND SHOULD NOT BE USED AS AN EXPENSE IN DETERMINING THE PROFIT ROYALTY IS CONTRARY TO THE UNCONTROVERTED TESTIMONY OF ALL EXPERT WITNESSES.

Respondents attack G-P's method of accounting by asserting the letter agreement between Bestwall Gypsum and Respondents containing the 10% formula (Ex. 113) applies to costs other than those attributable to the expenses of general administration, selling and advertising. This Respondents do by including in the formula costs of warehousing functions in the distribution centers which prior to the G-P - Bestwall merger, lessees did not perform, but were borne by independent dealers. Respondents are ignoring that the letter agreement specifically limits the formula to selling, advertising and general administrative expenses.

G-P's integration of the gypsum division into its distribution system and elimination of the independent dealer allowed G-P to substitute warehousing and related services for the Sigurd plant at a lesser cost and improved benefits to the customer than was possible prior thereto. This evidenced by the following:

1. Competitive factors and marketing patterns in the California market, which commenced to materialize immediately after G-P acquired the Sigurd plant, caused numerous competitors of G-P many hundreds of miles nearer the principle market to close plants and required G-P to adopt an innovative distribution system to avoid closure of Sigurd. (Ab. 440-441, 464, 594).

2. The technique utilized by G-P, which resulted in continued operations at Sigurd, was the integration of gypsum products into the existing warehouse distribution system of G-P. (Ab. 463-464)

3. Prior to G-P's integration of the gypsum division into the distribution system, all handling, sales, warehousing, transportation and servicing functions beyond the rail head were provided by independent dealers. (Ab. 537, 436, 600, 447) To cover costs and provide a profit to the dealers, a fee was charged which was represented by the difference between the *wholesale price* paid Sigurd and retail price charged the customers. (Ab. 447) Had G-P allowed Sigurd to continue to sell to the dealers at a price which would have allowed the dealers to realize a return

on their investment, it would have been forced to close the Sigurd plant. (Ab. 464, 594)

4. The distribution system was adopted by G-P in good faith and considered necessary to save the operation. (Ab. 536-539, 463-64, 594). The economic marketing experts, Rosse and Grether, testified the change was commendable and represented the exercise of sound business judgment. (Ab. 643-44, 678) The net effect of this distribution system was to have G-P provide the wholesaling function theretofore supplied by independent dealers at a substantially lower cost to the Sigurd plant than would have been the case had independent dealers continued to perform that function. (Ab. 608-09)

5. The warehouse function at the G-P distribution centers includes unloading of rail cars, inventorying, placing in storage, extracting from storage, delivery to the end user and accessorial services at the job site such as breaking packages, segregating, and delivering sheet by sheet to a designated floor of a building under construction. (Ab. 835-38) Prior to the integration of gypsum into the G-P distribution centers, all of these warehousing functions were supplied by independent dealers. The total cost thereof consequently was borne by Sigurd in the form of a reduction in sale price. (Ab. 558-59, 456-57, 541, 167, Ex. 152)

Respondents' arguments characterizing all warehousing functions as selling expenses are untenable. The only evidence offered on this subject by Respond-

ents was furnished by Caldwell. Although he indulged in an assumption, without foundation, that all of these warehouse related functions were "selling" costs, an admission was wrested from him on cross-examination that there are significant "costs of handling materials" in the warehouses that are not "selling" functions. (Ab. 368-69, 937-38) He further admitted he had given no consideration to these warehousing costs under his method of accounting. Caldwell simply had *assumed* that these warehousing costs were selling costs.

G-P's expert accounting witness, Duncan, testified that it is:

> "Improper to include the profits earned by Pryor on the sale of paper to Sigurd and improper to include the sales by the distribution centers relating the to Sigurd product." (Ab. 715)

Duncan further testified under sound accounting principles and principles accepted by the Internal Revenue Service, as specifically required by the lease agreement, G-P warehousing costs must be handled in one of two ways:

1. By treating the warehousing or wholesaling function as it had been treated historically as an independent function. Hence, the sale price to Sigurd would be the wholesale market price and none of the expenses of the warehousing and wholesale function would be charged against the Sigurd plant. This was the method adopted by G-P, and, of the two permis-

sible methods, was to the benefit of Respondents. (Ab. 716-23, see Ex. 152)[5]

2. If the price of the product to the end customer (retail price) is utilized in Sigurd accounting, then the necessary costs of the performance of the warehousing and wholesaling function must be deducted therefrom. (Ab. 723-24) Since G-P warehouses are operated at a loss as to gypsum products (Ab. 744-45) and since these warehousing and wholesaling functions are supplied by G-P much more cheaply than the same could be obtained through third party contracts (Ab. 608-09), the accepting of this accounting method would be less advantageous to Respondents than is the system utilized by G-P.

Respondents here assert and the court below erroneously found that the Sigurd plant should be credited with the retail price to the end user, but that none of the wholesaling, warehousing, transportation or accessorial product and customer service functions were to be charged against the retail price. By accepting this view, the court below: (a) departed from sound accounting principles, (b) departed from general accounting principles as applied by the Internal Revenue Service, (c) ignored the historic treatment of this subject by the parties through their perform-

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5 Significantly, the trial court accepted this testimony as it related to the *paper purchases* from the Pryor plant but rejected it as applied to the distribution center concept. (Findings of Fact 21, 28, C. 485-86, 491, Conclusion of Law 4, C. 494, 493) We respectfully submit that such rejection was erroneous.

ance under the lease, and (d) materially altered the lease provisions to the very significant advantage of the lessor and disadvantage of the lessee. In so doing, the court below erred and the findings should be set aside, the judgment reversed and one entered in favor G-P on its counterclaim against Respondents in the sum of $41,879.00.

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD PLAINTIFFS THEIR COSTS AND ATTORNEYS' FEES IN THIS ACTION.

Respondents' argument under their *Point V* directs itself to the refusal of the trial court to award to them attorneys' fees and costs. The controlling lease provision states:

> "Fourteenth: It is mutually covenanted and agreed that *costs and reasonable attorneys' fees incurred in enforcing the terms and provisions of this lease* shall be borne by the party who breaches the covenants, agreements, terms and provisions thereof." (Emphasis added)

As noted above, there were only two pre-litigation disputes between the parties. Both involved proper accounting procedures to be used in computing lease royalty. The first involved the purchase of paper from G-P's plant at Pryor, Oklahoma. On that issue, the trial court found that G-P's accounting procedures were proper, that Respondents' claims were

contrary to the lease provisions. (C. 491, 495) Respondents' judgment was offset accordingly in the judgment below pursuant to G-P's counterclaim. Hence, as to this issue, attorney's fees and costs were expended by G-P to enforce the "terms and provisions" of the lease against erroneous claims by Respondents. Since no appeal was perfected by Respondents as to this issue, the matter is final. The second pre-litigation issue involved distribution center accounting. On that issue, the trial court found that G-P's accounting procedures were inconsistent with the lease provisions and entered judgment for Respondents. Assuming, arguendo, the validity of the finding and judgment on the second pre-litigation issue, here on appeal, then both parties expended sums for attorney's fees and costs to enforce the "terms and provisions" of the lease.

Hence, the court below ruled that the claims and actions of both parties violated "covenants, agreements, terms and provisions" of the lease agreement. Instead of awarding attorney's fees and costs to both, the trial court disallowed them to each. In so acting, it certainly did not abuse its discretion.

The picture is similar as to the two new issues generated by the complaint and refined in the course of litigation which were never the subject of pre-litigation claims. One of these issues involved claims of violation of the requirements provision. The other claimed conduct in lease performance by G-P violative of both lease provisions and of state anti-trust

laws. Again, the court below split its holding on the issues, siding with G-P on one and for Respondents on the other. Again, Respondents have not appealed from the ruling adverse as to them and that matter is final.

The cases cited by Respondents are inapposite. The rationale of these cases is that where only one of the parties breaches an agreement which provides for attorney's fees for the victor, the winning party may recover the same. Such is not the case here because the lease language is different and neither party was the victor.

From the foregoing it is apparent that the Trial Judge ruled correctly on this issue.

CONCLUSION

In conclusion, Georgia-Pacific asserts that it has demonstrated as a matter of law and fact that it has complied in all respects with the requirements and all other provisions of the lease; that it has acted in accordance with the generally accepted accounting principles in calculating royalties as required by the agreement; that the record proves positively that there was not a fixed historical Sigurd market area; that the testimony of Caldwell was inadmissible as the economic assumptions he made to determine both the cause and measure of damages were false; that there are no facts furnished by other witnesses which would support such assumptions and, therefore, the

findings of fact, conclusions of law and the judgment by the trial judge must fail.

For all of the foregoing reasons, Georgia-Pacific requests that this Court reverse the Judgment in favor of Respondent granted by the trial judge and enter judgment favorable to Georgia-Pacific as prayed for in its counterclaim, together with costs, expenses and attorneys' fees.

Respectfully submitted,

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APPENDIX "A"

This Appendix set forth under separate cover for convenience of the Court.

APPENDIX "B"

EXCERPT FROM DEFENDANTS' MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT DISCUSSING ITS ARGUMENT OF ESTOPPEL.
(C 382-385)

POINT IV

THE PLAINTIFFS ARE ESTOPPED FROM ASSERTING THAT THE DEFENDANTS MUST SUPPLY ALL OF THEIR REQUIREMENTS OF GYPSUM ORE FROM THE LEASED PREMISES.

Prior to the assignment of the Lease Agreement to Defendant, Georgia-Pacific, there has been an assignment from Western Gypsum Company to the Bestwall Gypsum Company. At the time of the Western-Bestwall assignment the Plaintiffs gave their express written consent. At that time Bestwall had several gypsum plants and ore bodies throughout the country. (Affidavit of Glenn E. Wilson, Paragraph 6). From the date that the assignment from Western to Bestwall was made until the Complaint was filed no demands were made by the Plaintiffs upon Bestwall or Defendants to fulfill all of their requirements of gypsum ore for their various plants throughout the United States from the leased premises at Sigurd, Utah. (Affidavit of Glenn E. Wilson, Paragraph 10).

In addition, at the time the merger between Bestwall and Georgia-Pacific took place an assignment was effectuated, (C 382) which made the lease agreement binding upon Georgia-Pacific. Thereafter, the

same silent condition existed and no demands were made by the Plaintiffs to the Defendants that they were legally bound to take their gypsum requirements for other plants from the leased premises at Sigurd, Utah. (Affidavit of Glenn E. Wilson, Paragraph 10). With full knowledge that Georgia-Pacific and its predecessors had extensive operations in far-away places, not the slightest intimation was offered that it was breaching the provisions now seized upon as the basis for Plaintiffs' present cause of action. If they ever had any such an idea, they certainly slept on their rights and successfully lulled each assignee into believing that the terms of the contract were being fully performed.

The business relationship between the Trustees of American Gypsum Trust and the various lessees gave the Trustees ample opportunity to bring to the attention of Bestwall and Georgia-Pacific the Plaintiffs' interpretation of the "requirements" clause in the lease. Had Plaintiffs prior to the last assignment advanced their present theory, Georgia-Pacific would not have merged with Bestwall and assumed the obligations of the lease agreement. (Affidavit of Glenn E. Wilson, Paragraph 13). This must necessarily follow, for if Georgia-Pacific were compelled under the agreement to supply from the leased premises at Sigurd, Utah, all of the gypsum ore required for all of the products it produces and sells throughout the United States, the shipping costs of ore to the various plants would be greater than the sale price of the finished product. (Affidavit of Glenn E.

Wilson, Paragraph 11). Under these circumstances the operational costs would be prohibitive and none of the plants could operate at a profit. (Affidavit of Glenn E. Wilson, Paragraph 12). Certainly the parties would not intend to execute a contract which would bar ipso facto any chances for profit and render the operation so expensive that any continuation of (C 383) the business would result in bankruptcy.

The facts stated above provide every element required by law to estop the Plaintiffs from asserting their claim that Georgia-Pacific must fulfill all of its gypsum requirements from the leased premises. It is well settled that one who is silent when good faith requires him to speak cannot afterwards be heard to say that it is not true which his conduct unmistakably declared was true, and on the faith of which others have acted. *Kirk v. Hamilton*, 102 U.S. 68, 26 L.Ed. 79 (1880).

The elements to be met in order to invoke the principle of estoppel caused by the inaction or silence of the estopped party are set forth in *Nelson v. Chicago Mill & Lumber Corp.*, 76 F.2d 17, (8th Cir., 1935), wherein the court stated:

> "The essential elements of estoppel, as applicable in this case, are: (1) ignorance of the party claiming estoppel of the matter asserted; (2) silence concerning [the] matter where there is a duty to speak amounting to misrepresentation or concealment of a material fact; (3) action by the party relying on the misrepresentation or concealment; and (4) damages resulting if the estoppel is denied."

The court in the *Nelson* case held that the Plaintiffs by their silence did not conceal any material fact and the Defendants were not damaged by the omission. Such is not the case under the circumstances of the present case. The difference between the amounts which could be claimed as profits and royalties by the Plaintiffs if the Lease Agreement were to be interpreted as they now contend and the sums paid to and accepted by them in full satisfaction of their royalties under the earlier construction, would be astronomical. Moreover, the costs of transportation would telescope to where the product could not be mined or sold at a profit.

In *Murray Hill Mining & Mill Co. v. Havenor*, 24 Utah 73, 66 P. 762 (1901), the Utah Supreme Court was confronted with the determination of title and possession of mining interests. The Defendants claimed they had never assigned such (C 384) rights to the Plaintiff corporation and the Defendants pled the Statute of Frauds in that the only document which indicated the holding of the mining claims by the corporation was the Articles of Incorporation. The court held that whether or not there was the necessary writing there was estoppel *in pais*, i.e., the Defendants were estopped by their prior conduct from asserting their claim. Explaining this concept, the court states:

> "The vital principle of estoppel *in pais* is that he who, in his dealings and contacts speaks falsely, or is silent when conscience makes it his duty to reveal the truth, shall

not be permitted to speak the truth when conscience requires him to be silent; that he who, *by his* language or *conduct, leads another to believe that certain facts exist, and the other is induced thereby to make expenditures, incur liabilities, or to do what he otherwise would not have done, shall not, to the injury of the other, be permitted to dispute those facts,* or by the enforcement of an adverse claim, based upon different facts, disappoint the expectations which his language or conducts inspired. No one is permitted by his language, silence, or conduct to mislead another to his injury." (Emphasis added)

The plaintiffs in the present case cannot expressly consent in writing to two assignments to assignees who have plants throughout the United States, and make no demands upon them to take the ore requirements of these plants from the leased premises at Sigurd, and later contend, after the last assignee has taken the assignment in reliance on past interpretation of the Lease Agreement, that it must now supply all of its requirements from the leased premises, thus eliminating all profit from the plants so supplied.

It follows from their conduct that the Plaintiffs are estopped from asserting their current interpretation of the "requirements" clause of the Lease Agreement. (C 385)