

1993

Klein and Stein v. Peter J. Arnold : Reply Brief

Utah Court of Appeals

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James W. Kennicott; Attorneys for Plaintiffs/Appellees.

Vincent C. Rampton; Jones, Waldo, Holbrook & McDonough; Attorneys for Defendant/Appellant.

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DOCKET NO. 930337

KLEIN & STEIN, Attorneys at Law,

Plaintiffs/Appellees,

VS.

PETER J. ARNOLD,

Defendant/Appellant.

93-0337-CA

Case No. [REDACTED]

92-11615

Priority No. **14**

REPLY BRIEF OF APPELLANT

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Attorneys for Plaintiffs/Appellees

FILED

JUN 08 1993

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KLEIN & STEIN, Attorneys at Law,

Plaintiffs/Appellees,

vs.

PETER J. ARNOLD,

Defendant/Appellant.

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Case No. ~~93-0022~~ 930337
~~92-11615~~

CERTIFICATION OF CONSTITUTIONAL ISSUES

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FILED
Utah Court of Appeals

JUN 08 1993


Mary T. Noonan
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KLEIN & STEIN, Attorneys at Law,

Plaintiffs/Appellees,

vs.

PETER J. ARNOLD,

Defendant/Appellant.

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Case No. ~~93-0022~~ 930337
~~92-11615~~

CERTIFICATION OF CONSTITUTIONAL ISSUES

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Utah Co--

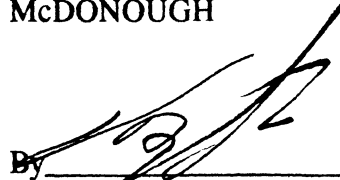
JUN 08 1993


Mary T. Noonan
Clerk of the Court

Defendant/appellant Peter J. Arnold, by counsel and pursuant to Rule 24, Utah Rules of Appellate Procedure, certifies that no determinative constitutional provisions are involved in this appeal; all governing statutes, ordinances and rules are set out in defendant/appellant's opening brief, filed before the Supreme Court of the State of Utah.

DATED this 7th day of June, 1993.

JONES, WALDO, HOLBROOK &
McDONOUGH

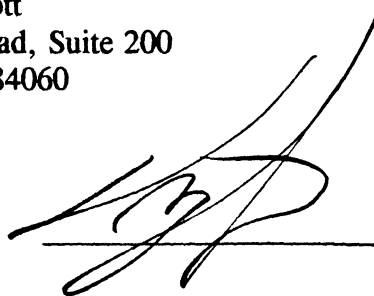
By 

Vincent C. Rampton
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 1993, 1993, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing CERTIFICATION OF CONSTITUTIONAL ISSUES, to the following:

James W. Kennicott
1647 Shortline Road, Suite 200
Park City, Utah 84060



IN THE COURT OF APPEALS OF THE STATE OF UTAH

| | | |
|----------------------------------|---|------------------|
| KLEIN & STEIN, Attorneys at Law, | : | |
| | : | |
| Plaintiffs/Appellees, | : | |
| | : | |
| vs. | : | Case No. 93-0022 |
| | : | 92-11615 |
| PETER J. ARNOLD, | : | |
| | : | |
| Defendant/Appellant. | : | |

REPLY BRIEF OF APPELLANT

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JONES, WALDO, HOLBROOK &
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

| | | |
|----------------------------------|---|------------------|
| KLEIN & STEIN, Attorneys at Law, | : | |
| | : | |
| Plaintiffs/Appellees, | : | |
| | : | |
| vs. | : | Case No. 93-0022 |
| | : | 92-11615 |
| PETER J. ARNOLD, | : | |
| | : | |
| Defendant/Appellant. | : | |

REPLY BRIEF OF APPELLANT

Defendant/Appellant Peter J. Arnold, by counsel and pursuant to Rule 24, Utah Rules of Appellate Procedure, submits the following Reply Brief in support of the instant appeal.

RESPONSE TO STATEMENT OF FACTS

Plaintiff/appellee's brief offers its own statement of facts in opposition to defendant/appellant's appeal (see opposing brief at pp. 4-9). As set out below, many of these factual claims were directly contested by counter affidavits before the lower Court; accordingly, the entry of an order denying defendant/appellant's motion for relief from judgment without an evidentiary proceeding was manifest error.

1. Defendant/appellant vigorously disputes Paragraph 3 (and Paragraphs 8-9 of Mr. Klein's affidavit, cited in support thereof). Defendant/appellant retained plaintiff/appellee to prepare documents in connection with a real estate acquisition which, in defendant/appellant's experience as real estate developer, should not have taken more than a fraction of the time which Mr. Klein claims to have spent on the project. Plaintiff/appellee's billing statement (Exhibit 1 hereto, R.0159) offers no detail as to why preparation of the documents required forty-two hours of a name partners time, billed at \$185.00 per hour. In repeated telephone conversations with Michael Klein, defendant made clear that the bill was excessive in his opinion, and challenged the amount of time actually spent on the project. Affidavit of Peter J. Arnold, Exhibit 2 hereto (R. 0161), at ¶¶ 2-6.

2. At paragraph 2, (based on Paragraphs 11-13 of Mr. Klein's affidavit), plaintiff/appellee makes reference to defendant/appellant's promises to pay its bill. Any such promises were occasioned by the fact that, at the time, defendant/appellant was completely insolvent, dealing with a number of creditors, and in no position to mount a legal challenge to the amount of plaintiff's bill. This is evidenced by the fact that, being unable to satisfy all or any portion of the bill, defendant was forced to submit to the entry of default judgment against him. Arnold Affidavit (Exhibit 2, R. 0161) at ¶¶ 6-7.

3. In response to Paragraphs 5 and 6, defendant/appellant refers the court to its opening brief. No representations contrary to those set out in the correspondence attached to the opening memorandum were ever made to Mr. Klein.

4. Responding to paragraph 7, defendant/appellant encourages the court to review the totality of the circumstances surrounding the May 18, 1992 letter--rather than Mr. Klein's self-serving, after-the-fact declarations concerning his unexpressed intentions in writing it--in determining whether or not it constituted a valid offer of settlement. It should be borne in mind that (as plaintiff/appellee implicitly admits) the settlement figure of \$7,500.00 had already been raised by plaintiff/appellee during the telephone conversation between Mr. Klein and Mr. Rampton.

5. In response to paragraph 8, the Court is again urged to review the correspondence submitted in connection with the affidavit of Vincent C. Rampton (Exhibit 3 to defendant/appellant's opening brief, R. 0032). No representations inconsistent therewith were made to any person.

6. Mr. Klein apparently attempts to characterize his on-going contact with Arthur Greenburg, also defendant's counsel, as being merely an attempt to locate defendant or discover his whereabouts (Klein Affidavit at Paragraphs 14, 22-23). This is plainly intended to portray defendant/appellant as attempting to hide from plaintiff. In fact, from the first contact from the law office of Jones, Waldo, Holbrook & McDonough, plaintiff was well aware that defendant was residing in the State of Utah, and working through counsel in Salt Lake County in an attempt to resolve this matter.

7. Contrary to the representations at ¶¶ 23-24 of Mr. Klein's affidavit, Arthur Greenburg never offered to "assist plaintiff and Mr. Klein in the collection of fees" from

defendant; neither did Mr. Greenburg request any letter from plaintiff concerning any aspect of this matter. See Letter of Arthur Greenburg to Vincent C. Rampton, Exhibit 3 hereto (R. 0165).

8. Plaintiff claims never to have received defendants letter of August 5, 1992, making the first of two tenders of \$7,500.00 in full settlement of this matter (Klein Affidavit at Paragraph 30). Yet, plaintiff attempts to rely on the self-same letter for the proposition that defendant/appellant's counsel "retracted" the "damaging statements" made to Arthur Greenburg concerning Mr. Klein.

9. Plaintiff/appellant admits, at ¶ 13, that at least by August 26, 1992, he had received formal tender of settlement in the amount of \$7,500.00; plaintiff/appellee further implicitly admits that no objection thereto was ever communicated prior to the docketing of the California judgment in Summit County.

10. Paragraph 15 of plaintiff/appellee's statement of facts plainly implies that its willingness to negotiate a settlement in this matter was motivated by lies concerning defendant/appellant's financial posture. Neither before the lower Court nor before this Court, however, has plaintiff/appellee produced a single shred of competent evidence to suggest that any misrepresentation occurred. In making its accusations, plaintiff/appellee jumps to the conclusion that (1) defendant was current on legal fees to both Mr. Greenburg and Mr. Rampton, and (2) that this was "inconsistent" with statements previously made by Mr. Rampton concerning defendant/appellant's overall financial posture. The court is referred

to the correspondence attached to defendant's opening memorandum; nothing inconsistent therewith was ever represented to plaintiff or any of its representatives. Respecting communications between Mr. Klein and Mr. Greenburg concerning the status of defendants fees to Greenburg, Glusker, Fields, Clamen and Machinger, see Exhibit 3 (R. 0165).

11. The Court is referred to the text of Michael F. Klein's letter of June 22, 1992, concerning his claim that he had communicated a cessation of settlement negotiations thereby, and is invited to examine the letter in full--amid all the threats and representations contained therein, Mr. Klein nowhere expressly withdraws his \$7,500.00 settlement offer.

ARGUMENT

POINT I

PLAINTIFF/APPELLEE HAS FAILED TO JUSTIFY HIS FAILURE TO ACT ON DEFENDANT/APPELLANT'S TENDER OF \$7,500.00 IN SETTLEMENT OF THIS ACTION, AND IS BARRED BY LAW FROM ASSERTING ANY OBJECTION THERETO.

The lower Court's decision was based exclusively on its finding that, as a matter of law, defendant/appellant had failed to demonstrate the existence of a binding settlement agreement between the parties (this position is addressed at Points II and III, below). No attempt was made to address defendant/appellee's failure to particularize any objection to defendant/appellant's August, 1992 tender of \$7,500.00 in full settlement of plaintiff/appellee's claim, despite the fact that this issue was fully addressed in defendant/appellant's moving papers.

Likewise on appeal, plaintiff/appellee has offered no valid explanation why, having admittedly received a tender of \$7,500.00 in settlement of this matter, it failed in its obligation (imposed by statute in both Utah and California) to make a timely and particularize objection thereto. The law in this respect is clear, and must either be disregarded or enforced in this instance. As more fully discussed in defendant/appellant's opening brief, a valid tender was made and no response was forthcoming. Under these circumstances, without anything more, the lower Court's ruling must be reversed.

Plaintiff/appellee has attempted to characterize defendant/appellant's tender as "conditional", citing Seiverts v. White, 2 Utah 2d 351, 273 P.2d 974 (1954), and Kelly v. Leucadia Financial Corporation, 846 P.2d 1238 (Utah 1982). The Court is again referred to the operative documents in response to this argument. On August 5, 1992, and again on August 26, 1992 (the latter of which plaintiff/appellee acknowledges receiving), defendant/appellant made an unconditional offer of \$7,500.00 in satisfaction of plaintiff/appellee's claim. The only "condition" imposed was that the obligation be deemed satisfied thereby. If such a "condition" is regarded as defeating the validity of a tender, the statute is completely eviscerated--every tender of money carries with it the implied condition that its acceptance will satisfy the underlying obligation. Neither Seiverts nor Kelly suggests anything to the contrary.¹

¹ Neither the Seiverts nor the Kelly decision addresses directly the obligations imposed by the statutes here under consideration upon receipt of a tender. Instead, these cases concern themselves whether tenders of payment have been timely and properly made under real estate contracts, so as to give rise to an equitable interest in the property and entitle the offerors to

Plaintiff/appellee also argues that defendant/appellant's tender was "untimely," again relying on Seiverts and also on Zions Properties, Inc. v. Holt, 538 P.2d 1319 (1975). Again, the cited decisions do not interpret the propriety of a tender for purposes of 78-27-3, Utah Code Annotated (1953, as amended). The Zions Properties decision dealt with whether the assignee under a real estate contract had made a timely performance in order to avoid forfeiture of the property covered by the contract. Since two of the tenders in question had been made after the deadline imposed by the contract, the court concluded, forfeiture had already occurred, and the plaintiff had no further rights in the real property. As noted above, the Seiverts decision dealt

specific performance.

The court's main concern in Seiverts was the fact that at the time tender was made, the offeror had not sufficient funds in its checking account to back up the tender. The court properly observed that, under these circumstances, there had been no effective tender; that being the case, no specific performance would lie.

The Kelly decision also addressed the question of whether a tender had been timely and adequate to support a claim for specific performance. In its ruling, the court stated that

"the tender cannot impose on the other party a new condition or requirement not already impose by the contract. [citation omitted] If the law were otherwise, one could use a tender to compel the other party to comply with new contractual terms. Accordingly, a tender, as a general rule must be unconditional. A tender that contains an improper condition or requirements disqualifies a party from attaining a degree of specific performance." 846 P.2d at p. 1243 (emphasis added).

No question of specific performance is involved in this action; accordingly, the Seiverts and Kelly decisions are inapplicable.

with similar questions, concluding that since tender performance had been inadequate, the tenderer was not entitled to specific performance and conveyance of the real property. This case does not involve an advance of real property, nor defendant/appellant's entitlement to maintain an action for specific performance compelling the same. The question before this court arises strictly under the cited statutes: whether plaintiff/appellee was entitled to disregard a good-faith, unconditional tender of payment in satisfaction of an existing obligation.² If plaintiff/appellee has reasons why defendant/appellant's tender of the very sum which it had itself twice proposed was insufficient, it was statutorily obligated to furnish a particularization of the perceived insufficiency. Absent objection, the tender should be regarded as binding. To hold otherwise would be to read into the statute exceptions, conditions and qualifications which the legislature did not see fit to include.

POINT II

A GENUINE ISSUE OF MATERIAL FACT EXISTED WHETHER PLAINTIFF/APPELLEE MADE A VALID OFFER, WHICH DEFENDANT/APPELLANT TIMELY ACCEPTED.

At pages 12-13 of its brief, plaintiff/appellee argues that, as a matter of law, it did not make an offer to settle this matter for \$7,500.00. Yet, plaintiff/appellee has acknowledged that

² Plaintiff/appellee again suggests that, for some unspecified reason, defendant/appellant's tender "was made in good faith" (Opposing Brief at p. 18). As with its accusation of fraudulent misrepresentation, plaintiff/appellee offers no explanation why defendant/appellant's tender of \$7,500.00, based on funds then in counsel's trust account, was not "made in good faith." This court should not countenance such tactics.

it twice advanced that amount as an appropriate settlement figure in this matter. It now attempts to argue, though, that Michael Klein's May 18, 1992 letter was deliberately worded so as not to make an offer, but rather than to trick defendant into tendering the suggested amount, which it would then be at liberty to refuse.

Under the very authority relied in plaintiff/appellee's opposing brief, whether a proposal constitutes a binding offer is to be ascertained from a totality of the circumstances--not the technical use of magic words. See Restatement Second, Contracts (1980 Edition), at §§ 2, 4. Plaintiff/appellee acknowledges that a repeatedly suggested \$7,500.00 in settlement of this matter; plainly a fact question exists whether it made a settlement offer or not.

POINT III

PLAINTIFF/APPELLEE NEVER WITHDREW ITS SETTLEMENT PROPOSAL.

At pages 14-16 of its brief, plaintiff/appellee argues that, even if it did make a valid offer to settle its claim against defendant/appellant for \$7,500.00, that offer was withdrawn by Michael Klein's counsel.

The letter in question, attached as Exhibit 1 to plaintiff/appellee's brief, should be reviewed in full in this regard. Essentially, it is a tirade against defendant/appellant's counsel for having objected to Mr. Klein's contact with Arthur Greenburg in an attempt to enlist his insistence in forcing defendant/appellant to pay a disputed bill. Yet nowhere does the letter include any express language concerning any outstanding offer, of the withdrawal thereof. That

withdrawal of the outstanding offer to settle for \$7,500.00 was not clearly communicated is further established by the subsequent course of conduct by the parties. Defendant/appellant plainly did not understand that the offer to settle for \$7,500.00 was "off the table." Had such been the understanding, no subsequent acceptance thereof would have been communicated.

Plainly, whether plaintiff/appellee effectively withdrew its offer of settlement is a question of fact under the circumstances.

POINT IV

PLAINTIFF/APPELLEE'S FAILURE TO RESPOND TO DEFENDANT/APPELLANT'S SETTLEMENT TENDER SHOULD BE DEEMED AN ACCEPTANCE.

Plaintiff/appellee argues that, if defendant/appellant's August 5 and August 25, 1992 tenders of \$7,500.00 are treated as offers, rather than acceptances of plaintiff/appellee's offer, plaintiff/appellee's silence in the face thereof should not be deemed an acceptance. Only where negotiating parties have established a "business relationship," argues plaintiff, may silence be deemed an acceptance (opposing brief at pp. 16-18).

The correspondence history now urged by both parties to this matter clearly establish exactly such a relationship. In each instance where a proposal was tendered, a response was forthcoming thereto within one week. Yet, plaintiff/appellee now maintains that its lengthy silence in the face of repeated tenders of \$7,500.00 in full settlement--plaintiff/appellee's own figure, twice urged--communicated no assent thereto. The argument is completely contrary to common sense.

At the very least, the lower court erred in assuming that, based on the record before it, no fact question existed whether--in light of the parties' course of conduct--a fact question existed whether plaintiff/appellee's total silence in the face of an unconditional offer to tender its own suggested settlement amount constituted an acceptance thereof.

POINT V

PLAINTIFF/APPELLEE'S SHOULD BE ESTOPPED TO DENY THE EXISTENCE OF ITS SETTLEMENT AGREEMENT.

Relying on Triple I Supply, Inc. v. Sunset Rail, Inc., 652 P.2d 1298 (Utah 1982), plaintiff/appellee argues that it should not be estopped to deny the existence of its settlement agreement, since it made no effective communication upon which defendant/appellant could rely.

The court is invited to review the correspondence submitted both the lower court and incident to this appeal. Plaintiff/appellee most certainly did communicate--not once, but twice--its inclination to settle this matter for \$7,500.00. The June 22 letter upon which plaintiff/appellee relied so heavily is complete ambiguous concerning the status of its offer in this regard.

There is no ambiguity, however, in the fact that, at least by August 26, 1992, plaintiff/appellee was well aware that defendant/appellant understood the \$7,500.00 settlement figure to be still valid, and that defendant/appellant believed itself to have accepted that amount. Yet, plaintiff/appellee deliberately made no response whatever prior to retaining local counsel

and filing the instant lawsuit. Under these circumstances, a clear fact question is presented whether an estoppel should apply.

Plaintiff/appellee again relies upon its unsubstantiated and false claim that defendant/appellant somehow proceeded in bad faith by deliberately misrepresenting facts incident to the parties' settlement discussions. Continuing reliance upon this position without any evidence calls plaintiff/appellee's own good faith into question. If plaintiff/appellee maintains that it was lied to, it is incumbent upon it to come forward with some reliable evidence to establish that fact.

POINT VI

PLAINTIFF/APPELLEE IS NOT ENTITLED TO RECOVER COSTS AND FEES INCIDENT TO THIS APPEAL.

As the last point of its responsive brief, plaintiff/appellee has sought the recovery of damages, including costs and fees, under Rule 33, Utah Rules of Appellate Procedure.

Plaintiff/appellee has been told continually since the inception of this matter that it is not entitled to the recovery of attorneys' fees. The initial judgment entered by the Municipal Court of Los Angeles (Exhibit 1 to defendant/appellant's opening brief, R.0029) expressly excluded any award of attorneys' fees. Upon entry of the lower court's ruling denying defendant/appellant's motion to enforce the settlement agreement, plaintiff/appellees immediately submitted a proposed order including a full award of costs and attorneys' fees, which the court promptly rejected upon defendant/appellant's objection (R. 0274). Now, incident to this appeal,

plaintiff/appellee again attempts to impose upon defendant/appellant its own costs in avoiding the settlement agreement which it itself proposed in this matter. This it seeks to accomplish by labeling this appeal as "frivolous."

The argument is worthy of little response. The court is invited to review the totality of the circumstances in this matter, and determine for itself whether defendant/appellant's appeal is frivolous. Defendant/appellant, acting in good faith and under the belief that an agreement had been reached, both accepted and tendered plaintiff/appellee's own settlement figure. Under both statutory and common law, defendant/appellant has, at the very least, the right to a full evidentiary hearing concerning whether, under the facts of this case, it must be compelled to pay more than plaintiff/appellee requested. On their face, the facts are distinct by many orders of magnitude from the decision relied upon in plaintiff/appellee's brief.

CONCLUSION


Based on the foregoing, and upon defendant/appellant's opening brief, it is submitted that the lower court's decision denying defendant/appellant's motion for release from judgment,

and to enforce settlement agreement, must be reversed, and the agreement either enforced by order of this court or the matter remanded for further proceedings below.

DATED this 23rd day of June, 1993.

JONES, WALDO, HOLBROOK & McDONOUGH

By

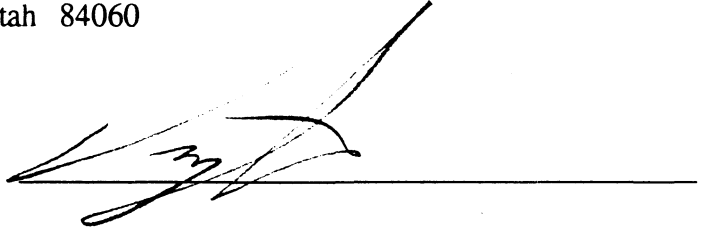


Vincent C. Rampton
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 1993, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, to the following:

James W. Kennicott
1647 Shortline Road, Suite 200
Post Office Box 2339
Park City, Utah 84060



Tab 1

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MICHAEL S. KLEIN
OF COUNSEL
RICHARD A. WEISS

KLEIN & STEIN
ATTORNEYS AT LAW
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ONE CENTURY PLAZA
2029 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067

TELEPHONE
(213) 556-8900

February 11, 1987

Mr. Peter Arnold
6321 Rocking Horse Way
Orange, California 92669

Re: Riverside Shopping Center

For legal services rendered in connection with the above captioned matter for the month of January, 1987 and through February 11, 1987, including telephone conferences with Carone, client, Reiss, opposing counsel, Bobker, Arthur Greenberg, accountant, Parasec; order UCC filings and LP-1; review documents and prepare memos and correspondence; review draft agreement; prepare draft agreement; review leases and prepare lease summary; research; review of files; conference at Bobker's office; conference at Klein & Stein; miscellaneous correspondence, all on a rush basis. Services rendered on January 21, 22, 23, 26, 27, February 2, 3, 4, 5, 6, 8, 9, 10, 11, 1987.

| | |
|---|------------|
| 42 hours at \$185 per hour | \$ 7,770 |
| Costs incurred, including copies, stamps, long distance postage, UCC search and Parasec fees, paralegal and overtime secretary | <u>450</u> |
| Total | \$ 8,220 |

Tab 2

Vincent C. Rampton (USB #2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

| | | |
|----------------------------------|---|------------------------------|
| KLEIN & STEIN, Attorneys at Law, | : | |
| | : | AFFIDAVIT OF PETER J. ARNOLD |
| Plaintiffs, | : | |
| | : | |
| vs. | : | Civil No. 92-11615 |
| | : | |
| PETER J. ARNOLD, | : | Judge Frank G. Noel |
| | : | |
| Defendant. | : | |
| | : | |

STATE OF UTAH)
 : ss.
COUNTY OF SUMMIT)

PETER J. ARNOLD, having been first duly sworn and upon oath,
deposes and states as follows:

1. I am currently a resident of Summit County, State of Utah, and am
the named defendant in the above-entitled action.

2. In January of 1987, I retained the law firm of Klein & Stein to assist in the purchase of a leasehold interest in a shopping center located in Riverside, California, my regular counsel (Arthur Greenberg) having a conflict of interest.

3. Mr. Michael S. Klein of Klein & Stein reviewed six existing documents relating to the property in question, wrote me on five-page memorandum analyzing his review, and drafted a purchase and sale agreement.

4. In my experience as a real estate developer, and in working with Arthur Greenberg, I was of the impression that the amount of work performed by Mr. Stein should amount to no more than ten hours' billable time.

5. On February 11, 1987, I received a bill from Klein & Stein in the amount of \$8,220.00, which included 42 hours of attorney time at \$185.00 per hour. I viewed this at the time, and continue to view it, as plainly excessive given the amount of work performed.

6. I have reviewed Michael S. Klein's Affidavit of October 5, 1992 in this matter. I have no recollection of any of the following matters claimed therein by Mr. Klein:

a. That I never complained about the size of Klein & Stein's bill—to the contrary, during personal meetings and telephone conversations, I repeatedly expressed to Mr. Klein that I was troubled by the size of the bill;

b. That I ever advised Mr. Klein that I had mailed a check in full payment to him;

c. That I committed at any time to visit Mr. Klein's office in person and pay the bill in full;

d. That I received Mr. Klein's letter of September 1, 1987, attached as Exhibit B to his Affidavit (I have no knowledge whether that letter was sent or not; however, I have no recollection of receiving or reading it).

7. When I was served with process by Klein and Stein in its attempt to collect its bill, I was in no position financially to make any payment thereon, or to challenge Klein & Stein in court. At that time, I had numerous creditors making demands on me, and could not afford the attorneys fees to resist the lawsuit. I therefore permitted default judgment to be entered against me.

8. Mr. Klein was well aware, at the time he obtained judgment against me, that I disputed the amount of his bill and considered it excessive.

DATED this _____ day of October, 1992.

PETER J. ARNOLD

SUBSCRIBED and sworn to before me this _____ day of October, 1992.

NOTARY PUBLIC

Residing at: _____

My Commission Expires:

0163

Tab 3

LAW OFFICES OF
GREENBERG, GLUSKER, FIELDS, CLAMAN & MACHTINGER

ARTHUR N. GREENBERG
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October 15, 1992

OUR FILE NUMBER:
99910-000.00

Vincent C. Rampton, Esq.
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

Re: Michael S. Klein

Dear Mr. Rampton:

The following are my comments to paragraphs 14 and 22-28 of Michael Klein's declaration.

Paragraph 14: I believe that I first became aware of the fact that Mr. Klein claimed that Mr. Arnold owed him money when I contacted Mr. Klein to obtain a declaration in connection with litigation between the owner of the ground of a Riverside shopping center and a former ground lessee. I never informed Mr. Klein that I "was representing parties against Mr. Arnold in an action arising from the sale of the shopping center". Mr. Arnold was never a party to that litigation. I did inform Mr. Klein that because Mr. Arnold was a former client of my firm, I would be unable to give Mr. Arnold's address to Mr. Klein.

Paragraph 22: No comment.

Paragraph 23: I did tell Mr. Klein that Mr. Arnold was again a client of my firm and that I would not be able to give Mr. Arnold's address to Mr. Klein. I told Mr. Klein that I would send to Mr. Arnold any correspondence which Mr. Klein wanted me to forward to Mr. Arnold. I did not offer "to attempt to assist in collection". I did not discuss with Mr. Klein the nature of our legal services for Mr. Arnold. I was not "well aware of the situation and the fact that Mr. Klein had not been paid by Mr. Arnold". Mr. Klein informed me that he had not been paid.

Paragraph 24: I did receive the Exhibit "I" letters. I believe I asked my partner, Bill Halama, to forward copies of those letters to Mr. Arnold.

Paragraph 25: I did receive a copy of Exhibit "K".

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Vincent C. Rampton, Esq.
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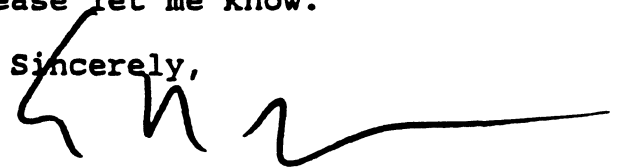
Paragraph 26: No comment.

Paragraph 27: No comment.

Paragraph 28: I never told Mr. Klein that Mr. Arnold was
paying our law firm.

If you have any questions, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to be 'A. N. Greenberg', with a long horizontal flourish extending to the right.

Arthur N. Greenberg

ANG:llw