

1993

# Healey v. Prince : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930759-CA

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IN THE UTAH COURT OF APPEALS

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FRED HEALEY,	)	
	)	
Plaintiff and Appellant,	)	
	)	CASE NO. 930759-CA
v.	)	
	)	
JOHN PRINCE,	)	
	)	ARGUMENT PRIORITY NO. 15
Defendant and Appellee.	)	

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BRIEF OF APPELLEE

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ON APPEAL FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT FOR  
SALT LAKE COUNTY, STATE OF UTAH

HONORABLE J. DENNIS FREDERICK

---

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**FILED**

DEC 14 1993

**COURT OF APPEALS**

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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to § 78-2a-3(2)(k) Utah Code Annotated, 1953, as amended.

## ISSUES PRESENTED FOR REVIEW

The issues presented for review consist of the following:

1. Whether substantial evidence exists in the record in support of the trial court's finding of fact that Healey was in material breach of the terms of the Memorandum Agreement by refusing to convey his interests in an entity known as Income Fund, by his breach of fiduciary duties owed to Prince and by his conditional delivery of certain real property interests.

Standard of Review: Substantial evidence standard; *Warner v. Sirstins*, 838 P.2d 666 (Utah App. 1992).

2. Whether the trial court's refusal to grant Healey's request for specific performance of the Memorandum Agreement following Healey's breach of the Memorandum Agreement and breach of his fiduciary duties to Prince was incorrect.

Standard of Review: Correctness standard: *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

3. Whether substantial evidence exists in the record in support of the trial court's findings of fact that Healey



converted and otherwise misappropriated property of the partnership.

Standard of Review: Substantial evidence standard:  
*Warner v. Sirstins*, 838 P.2d 666 (Utah App. 1992).

#### STATEMENT OF THE CASE

Appellee objects to the form and content of Appellant's Statement of the case.

This case involves a claim by appellant (Healey) for specific performance of a contractual agreement entitled Memorandum Agreement against appellee (Prince). By means of a Counterclaim Prince sought recovery of damages based on conversion and breach of contract from Healey and an accounting of partnership business.

The case was tried before the Honorable J. Dennis Frederick on March 23, 24 and 25, 1993. The trial court entered findings of fact and conclusions of law in which it denied Healey's claim for specific performance and granted Prince judgment against Healey for conversion of partnership assets and breach of contract.

Following denial of Healey's motion for a new trial, Healey brought the present appeal from the decision of the Third District Court.

Because Healey's appeal questions the sufficiency of the evidence before the trial court, a recitation of the facts relevant to the issues presented on appeal would entail marshalling the entire evidentiary basis for the trial court's findings of fact. Healey has failed to set out any statement of facts in Appellant's Brief and has failed to marshal the evidence in support of the trial court's findings.

Because of the nature of the appeal, Prince has incorporated the determinative facts with citation to the record directly into his arguments.

## SUMMARY OF ARGUMENTS

FIRST ARGUMENT: Healey has failed to marshal the evidence before the trial court on the question of Healey's tender of his interests in an entity known as Income Fund. The evidence before the trial court supports the finding that Healey did not tender said interests. Based on that evidence and Healey's failure to marshal, the trial court's finding of fact should be upheld by this Court.

SECOND ARGUMENT: Based on the trial court's findings of fact that Healey was in material breach of the Memorandum Agreement and in breach of fiduciary duties owed to Prince, the trial court's conclusion of law denying Healey's request for specific performance and dismissing that claim was not incorrect.

THIRD ARGUMENT: Substantial evidence presented at trial supports the trial court's finding that Healey's failure to transfer the Income Fund interests constituted a material breach of the Memorandum Agreement and his intentional concealment of his intent to withhold those interests were done in bad faith.

FOURTH ARGUMENT: Delivery of quit-claim deeds to Prince upon the condition he execute a promissory note not required by the terms of the Memorandum Agreement was not an absolute tender of those deeds. Substantial evidence exists in

the record to support the trial court's finding of a conditional delivery.

FIFTH ARGUMENT: Substantial evidence which was not marshalled by Healey exists in the record in support of the trial court's findings of fact that Healey converted partnership property relative to his receipt of distributions from Income Fund and the partnership ventures and receipt of investor monies belonging to the partnership.

SIXTH ARGUMENT: Under the facts of the present case and Healey's material breach of the Memorandum Agreement the trial court's decision to deny Healey specific performance of that agreement was not in error. Healey's failure to establish the value of the partnership assets transferred by him foreclosed the trial court and this Court from granting Healey any recovery under his Amended Complaint.

#### FIRST ARGUMENT

THE TRIAL COURT'S FINDING OF FACT THAT HEALEY MADE NO TENDER OF THE INCOME FUND INTERESTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

To successfully attack a trial court's findings of fact, a party must first marshal all the evidence in support of the trial court's findings and then demonstrate that, even when viewed in the light most favorable to the findings, the evidence is insufficient to support the findings. *See Warner v. Sirstins,*

838 P.2d 666, 669 (Utah App. 1992). *See also Crouse v. Crouse*, 817 P.2d 836, 838 (Utah App. 1991).

The rule in Utah is well established that if the appellant fails to marshal the evidence, the appellate court assumes that the evidence supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case. *See Allred v. Allred*, 835 P.2d 974, 979 (Utah App. 1992) (quoting from *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)).

In the present case, appellant has made no effort to marshal the evidence that supports the trial court's findings of fact. Instead, appellant refers this Court to those portions of the record which he alleges support his factual assertions and claims that the evidence is simply nonexistent to support the trial court's findings (Brief of Appellant, pp. 17, 22, 25).

There is simply no basis for appellant's claim that no evidence exists to support the various findings of fact contested by appellant and his failure to marshal the evidence represents sufficient basis for this Court's summary denial of this appeal.

At findings of fact no. 12, the trial court found that Healey did not make a tender of any interests or assets involving an entity known as Income Fund, Ltd. (Income Fund) or make an

unconditional tender of certain quit-claim deeds to property owned by the partnership. (R. 428 ¶ 12).

The evidence in the record that supports that finding consists in part of the following:

(1) Healey's direct testimony that Income Fund was not transferred to Prince (R. 660 L. 16-17);

(2) The fact that Healey instructed his attorney, Brent Armstrong, to send a demand letter to Prince in the name of Income Fund demanding payment of \$696,500 (R. 692 L. 9-21; 834 L. 2-9);

(3) The fact that Healey claimed that a fictitious family partnership owns the 71 limited partnership units that Prince claims should have been transferred (R. 710 L. 6-9; R. 733 L. 22-25; R. 734 L. 18-25);

(4) The fact that Healey claimed that Income Fund did not fall within the terms of the Memorandum Agreement (R. 789 L. 2; 815 L. 1-7; 842 L. 22-24);

(5) Healey's actions as general partner of Income Fund in filing a lawsuit against Prince to collect the \$696,500 (R. 835 L. 7-9);

(6) Prince's testimony that the Income Fund interests were not tendered to him (R. 876 L. 20-23; R. 902 L. 4-7);

(7) Prince's testimony that he stopped making payments because Income Fund and the quit-claim deeds were not delivered to him (R. 877 L. 4-5; 882 L. 24-25; 883 L. 22-25; 885 L. 3-7);

(8) Prince's testimony that he did not receive notification from Healey's attorney, Brent Armstrong, after he stopped making payment that Healey was willing to transfer Income Fund (R. 901 L. 18-25);

(9) Prince's testimony that prior to trial he would have resumed payments if he got what he bargained for (R. 902 L. 1-3).

Instead of marshalling this or any other evidence, Healey argues that, through counsel, he told Prince that Income Fund would be included in the transfer (Appellant's Brief, p. 9). In support of this argument, Healey refers the Court to the testimony of Healey's attorney, Gary Henrie.

Mr. Henrie did testify that he spoke with Healey about the issue of the transfer of Income Fund. (R. 843 L. 22-25; 844 L. 1-4). And, Mr. Henrie testified that he told Prince's counsel that Income Fund would be included in the deal if Prince performed his end of the deal (R. 847 L. 22-25).

However, by not marshalling all the evidence, Healey has failed to disclose to this Court that these statements were made by Mr. Henrie sometime around September 30, 1991. (R. 847

L. 6-12). Following those statements, Prince made the installment payments called for in November and December 1991. (R. 884 L. 21-24). Nor does Healey point out that Prince stopped making those payments because he had not received the Income Fund interests. (R. 385 L. 3-7). Finally, Healey fails to direct the court's attention to other portions of Mr. Henrie's testimony that directly contradict his claim that the Income Fund interests were tendered. For example, Mr. Henrie testified that discussions were held wherein Healey was willing to make Income Fund part of the transaction based on concessions by Prince. (R. 842-843 L. 25, 1-3).

And, Healey fails to inform this Court that Mr. Henrie testified that Healey withdrew his prior offer to make Income Fund part of the transaction. (R. 848 L. 9-13).

Healey's claim that the Income Fund interests were tendered to Prince after the monthly installments were discontinued is simply not supported by the record. In fact, the overwhelming evidence contradicts that position and supports the trial court's findings of fact that no tender was made. Healey's failure to marshal that evidence is not based on the lack of substantial supporting evidence as he claims, but rather is simply a ploy used by Healey to try and obfuscate the true facts.



Prince believes that Healey's argument of tender has not been presented in good faith. At the inception of this lawsuit, Prince made his claim to the Income Fund interests crystal clear. In response to the filing of the initial complaint and its subsequent amendment, Prince brought a motion to dismiss based on Healey's refusal to convey the Income Fund interests and make an unconditional tender of the quit-claim deeds (R. 32-65). In support of that motion, Prince submitted his sworn affidavit wherein he stated that Healey had failed and refused to convey the Income Fund interests. (R. 35).

Healey filed a memorandum in response to Prince's motion to dismiss and a personal affidavit in response to that motion. In neither of those pleadings did Healey mention any tender of the Income Fund interests. (R. 66-87). Instead, Healey argued that Prince's assertion that Healey was required to transfer limited partnership shares purchased in the name of the Healey family partnership was ludicrous. (R. 71-72).

In his affidavit, Healey represented that he was willing and able to tender the quit-claim deeds in question to the court for disposition as the court deems fit and proper, but made no similar tender of the Income Fund interests. (R. 74-78). Instead, Healey presents four paragraphs in his affidavit detailing the history of Income Fund and arguing that it was not

a jointly-held asset subject to transfer under the Memorandum Agreement. (R. 76-78). At no point in his argument or affidavit does he claim a tender was made of the Income Fund interests.

The fact of the matter is that Healey did not tender his limited and general partnership interests in Income Fund to Prince. Prior to the court's entry of its decision, Healey claimed that the 70 Income Fund limited partnership units in question were owned by a family partnership in which he held no interest. (Healey's Affidavit, R. 76-78; R. 662 L. 1-3; R. 662 L. 10-12; R. 67 L. 18-19).

Healey made his wife testify that she was the general partner of the alleged family partnership even though she had no documents that supported the alleged fact of its existence, had never filed a tax return for the partnership, had never received any distributions in the name of the partnership, and had no partnership bank account. (R. 922 L. 17-20; 925 L. 18; 926 L. 1-13).

The court rejected this family partnership claim and found that Healey was the true owner of the limited partnership units in question (R. 430 ¶ 13) and that all of the Income Fund interests in question should have been conveyed to Prince under the terms of the Memorandum Agreement. (R. 431 ¶ 21).

The final evidence of Healey's bad faith in presenting this tender argument is presented by a letter sent to Prince's counsel by Gary Henrie. As explained above, during his trial testimony, Mr. Henrie states that Healey was willing to make Income Fund part of the transaction based on concessions being given by Prince. (R. 843 L. 1-3). At trial, Prince offered into evidence a letter dated November 9, 1991, from Mr. Henrie to Daniel W. Jackson. (Exhibit No. 23). The court refused to admit the letter on the grounds that the paperwork going back and forth between the lawyers was not relevant to the issue in dispute. (R. 635 L. 20-25; 630 L. 1-13).

Prince made that letter a part of the record when he attached a true and correct copy of it to his memorandum filed in opposition to Healey's motion for new trial. (R. 491-496). At the second full paragraph of the second page of that letter (R. 492), Mr. Henrie advised counsel for Prince that the Memorandum Agreement did not include any Income Fund interests and that Healey needed to be compensated by Prince if those interests were going to be transferred. Obviously, these are the concessions that Mr. Henrie testified about.

On the next page of that letter, Mr. Henrie informed counsel that the prior offer to transfer the Income Fund interests for additional consideration was retraced (R. 493).

Again, on the next page of that letter, Mr. Henrie reiterated that Healey would retain the Income Fund interests. (R. 494).

The record in this case clearly evidences that Healey did not tender the general and limited partnership interests which he owned in Income Fund to Prince. At all times leading up to trial, Healey held fast to the position that Income Fund was not covered by the Memorandum Agreement and that he did not own the limited partnership interests in question. Both Healey and his counsel are aware of the content of Mr. Henrie's November 9th letter which withdrew Healey's prior offer to transfer the Income Fund interests upon the payment of additional consideration by Prince.<sup>1/</sup>

The trial court's findings that Healey did not tender the Income Fund interests and therefore, was in breach of the Memorandum Agreement, is supported by substantial evidence in the record and should be affirmed on appeal.

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<sup>1/</sup> The Utah Code of Judicial Administration requires at Chapter 13 Rule 3.3 that a lawyer has a professional responsibility of candor to the tribunal that continues to the conclusion of the proceedings. Healey's argument that he made an ongoing, unconditional tender to Prince of the general and limited partnership interest which he held in Income Fund is so totally contrary to the undisputed facts as to constitute a violation of that professional duty of candor and good faith.

## SECOND ARGUMENT

BASED ON HEALEY'S MATERIAL BREACH OF THE MEMORANDUM AGREEMENT AND OTHER EQUITABLE REASONS THE TRIAL COURT CORRECTLY DISMISSED HIS CLAIM FOR SPECIFIC PERFORMANCE

Throughout the trial, the trial court and counsel stated and restated that Healey was seeking specific performance of the Memorandum Agreement. (R. 301 L. 19-25; R. 802 L. 8-14). Specific performance is an equitable remedy, and the trial court is granted wide discretion in applying and formulating it. See *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988). In *LHIW*, the Utah Supreme Court recognized that a party seeking equity must do so with clean hands and that specific performance will not be granted to a plaintiff who is unwilling to perform. *Id.* at 963.

In *Bradford v. Alvey & Sons*, 621 P.2d 1240, 1242 (Utah 1980), the Utah Supreme Court explained that as a predicate to the equitable relief of specific performance, a party must exercise reasonable efforts to discharge his own obligations and the party seeking specific performance has the burden of convincing the trial court that he has discharged those obligations. See also *Nielsen v. Chin-Hsien Wang*, 613 P.2d 512, 514 (Utah 1980).

Under this standard, specific performance was not available to Healey if the court determined that Income Fund fell

within the terms of the Memorandum Agreement. Based on the clear and unambiguous language of that agreement and the evidence before it, the trial court made a specific finding of fact that all of Healey's limited partnership interests, general partnership interests and associated interests and assets were governed by that Memorandum Agreement. (R. 431 ¶ 21). The trial court found further that Healey was required as part of the parties' agreement to convey those interests and assets to Prince. (R. 43 ¶ 21).

Finally, at paragraph 10 of its findings of fact, the trial court found that Healey refused to convey those interests and assets and refused to disassociate himself from the operations of Income Fund. (R. 427-28 ¶ 10).

Healey has not challenged any of these findings on appeal. Based on these specific findings and Healey's failure to discharge his obligations under the Memorandum Agreement, the trial court correctly concluded that Healey was not entitled to specific performance of that contract.

At trial, Healey's counsel appeared to be confused about the legal standard applicable to a claim for specific performance. Specifically, he attempted to present testimony on the value of Income Fund to support his argument that its value

could be offset against the monies to be paid by Prince. For example, during his examination of Healey, Mr. England stated:

Obviously they're making an issue out of whether Income Fund was included or not. I need to ask you now. Assuming that Judge Frederick determines that Income Fund was to be included and that you've breached the agreement by not including it, do you have a way or a method of placing a value on Income Fund?

(R. 823 L. 8-13).

Similarly, when examining Prince, Mr. England stated:

I'm going to ask you the same question I asked Mr. Healey. Let's assume that Judge Frederick determines that you're entitled to Income Fund and that since Mr. Healey's didn't transfer it that you're entitled to an offset. What do you think the value is of Income Fund.

(R. 877 L. 19-24).

In response to this approach, the trial court informed Mr. England that it was not going to reform the parties' agreement but rather was going to determine whether or not and to what extent one or the other of them committed a breach. (R. 879 L. 20-23).

Having found that Healey was in breach of the Memorandum Agreement and had breached the fiduciary duty he owed to Prince, the trial court correctly refused to grant Healey's

request for specific performance and dismissed that cause of action.<sup>2/</sup> (R. 440 ¶ 20).

### THIRD ARGUMENT

#### HEALEY'S FAILURE TO TRANSFER HIS INCOME FUND INTERESTS WAS A MATERIAL BREACH OF THE MEMORANDUM AGREEMENT

At Point II and Point VI of Appellant's Brief, Healey argues that his failure to transfer the Income Fund interests to Prince did not constitute a material breach of the Memorandum Agreement.

In part, the argument presented in Point II repeats Healey's prior tender argument. Once again, instead of marshalling the evidence that supports the trial court's finding that Healey did not make an ongoing tender of those interests, Healey again refers the court to that portion of the record which he believes supports his position. As Prince detailed above, Healey's tender argument is meritless and brought in bad faith.

The rest of Point II is concerned with the trial court's finding that Healey's intentional nondisclosure of his desire to retain the Income Fund interests was done in bad faith (R. 434 ¶ 31). Healey confuses that finding with the trial

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<sup>2/</sup> The trial court concluded that Healey's breach of the fiduciary duty owed to Prince constituted another basis for the dismissal of that cause of action. (R. 439 ¶ 16).

Therefore, the court relied on two separate basis for its denial of Healey's request for specific performance and the dismissal of that claim.



court's conclusion of law No. 13(c) which states that Healey breached the fiduciary duty he owed to Prince in part by withholding his intention to retain the Income Fund interests. (R. 438).

Conclusion of law no. 13(c) is based upon the trial court's finding of fact no. 30. (R. 433-434 ¶ 30). That finding states:

Healey had an affirmative duty to disclose his intention to retain the various interests in Income Fund and Income Leasing and related assets to Prince prior to the execution of the Memorandum Agreement. Healey failed to fulfill that duty and thereby breached the fiduciary duty he owed to Prince.

Healey has failed to question that finding which is fully supported by substantial evidence. For example, Healey testified that he knew that the Income Fund interests would not be included in the interests that he was going to convey prior to the execution of the Memorandum Agreement (R. 790 L. 9-14). And, although he expressly disclosed to Prince that certain other assets in which they held ownership interests would not be conveyed, he never told Prince that Income Fund would not be included. (R. 791 L. 24-25; 792 L. 1-2).

This evidence establishes that Healey was aware of his intent not to transfer Income Fund prior to the execution of the Memorandum Agreement. In Utah, partners occupy a fiduciary

relationship and must deal with each other in the utmost good faith. *See Burke v. Farrell*, 656 P.2d 1015, 1017 (Utah 1982).

In *Burke*, the Utah Supreme Court held that a breach of fiduciary duty occurs if one partner falsely represents or conceals matters from the other partner in relation to his acquisition of that partner's interests. *Id.* at 1017. Thus, the law imposes an affirmative duty upon a partner to make full disclosure of relevant information to the other partner when the partners are dissolving their partnership.

In the present case, Healey performed all of the accounting for the parties' various businesses and had control over the actual books and records of those ventures. (R. 766 L. 8-25; 720 L. 9-21). Additionally, Healey testifies that he dedicated 70-75% of his time to running the restaurants while Prince spent probably 20-25% of his time involved in the business of the partnership. (R. 622 L. 2-4).

At trial, it was obvious to everyone, including the court, that Healey had a much greater understanding of the intricacies of the parties' business than Prince. As Prince explained in relation to his request for all-inclusive language in the Memorandum Agreement:

I was keenly aware of my inability to know all the business. Those were lots of entities and they were almost only known to Fred. I mean, not that I

just didn't know them. I know I couldn't remember all of them, think of them all. . . .

(R. 881 L. 5-9).

Based on the role of the two parties in the partnership business and the superior knowledge of partnership affairs held by Healey, the trial court was justified in imposing an affirmative duty of disclosure upon him. Healey's failure to disclose his personal decision to retain the Income Fund interests certainly constituted a breach of that duty. Once the duty to disclose and the concealment of a fact is established the next question before the trial court was whether that concealment was done innocently or in bad faith.

In the present case, the court found that Healey's concealment of his intent to withhold the Income Fund interests was done in bad faith. That determination is a question of fact. In Utah, the standard for overturning factual findings is a rigorous one and the appellate courts may not set aside a finding of fact unless it is clearly erroneous. *See Saunders v. Sharp*, 793 P.2d 927, 931 (Utah App. 1992).

As stated previously, to establish clear error an appellant must marshal the evidence in support of the finding and then demonstrate that despite that evidence, the trial court's finding is so lacking in support as to be against the clear

weight of the evidence. *Id.* at 931. As the Utah Court of Appeals explained in *Saunders*:

This burden "is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts."

*Id.* at 931 (quoting from *In re Bartell*, 776 P.2d 885, 886 (Utah 1989)).

In relation to the trial court's finding of bad faith, Healey has failed to marshal any evidence and that finding must be assumed to be supported by substantial evidence.<sup>3/</sup>

Supporting evidence exists throughout the record. A review of the evidence that supports the trial court's finding of bad faith could go on ad nauseam. One example is the fact that Healey's original written offer of July 8 included those entities in which the parties were co-guarantors such as Income Fund. (R. 652 L. 21-25, 653 L. 1-2). Healey testified that his later oral

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<sup>3/</sup> Substantial evidence does exist in support of the trial court's finding on that issue. For example, at trial Healey took the position that his interpretation of the language found in the Memorandum Agreement excluded entities that the parties owned an interest in but in which Prince did not exercise control over. (R. 788 L. 16-24). This alleged interpretation was parroted by Healey's attorney, Brent Armstrong. (R. 688 L. 23-24).

In direct contradiction of this interpretation, Healey transferred to Prince all of his interests in an entity named Duff's West although Prince was not an officer or director and had no control over that entity. (R. 658 L. 22-24). If Healey's alleged interpretation of the clear and unambiguous language of the Memorandum Agreement made "joint control" the determining factor, then why did he convey Duff's West (an entity in which Prince had no control) to Prince. Obviously, the trial court found Healey's testimony regarding this and numerous other issues lacking in credibility.

offer of August 14, which was accepted by Prince was not intended to include the co-guaranteed entities. (R. 653 L. 6-15). The only entity that was excluded by that alleged change was Income Fund.

Healey's failure to marshal the evidence requires this Court to conclude that the trial court's finding of bad faith is supported by substantial evidence and not clearly erroneous.

In the last paragraph of Point Six Healey argues that his failure to convey the Income Fund interests was not a material breach of the Memorandum Agreement. In support of that argument, he states that the only evidence before the court as to the value of Income Fund was his testimony that he would purchase or sell that entity for \$50,000. The argument continues that since it was only worth \$50,000 his failure to convey it was not a material breach.

In its findings of fact, the Trial Court found that Healey received annual distributions of \$15,600 from Income Fund. (R. 430-431 ¶ 20). Those distributions included annual accounting fees of \$300 per month (R. 429 ¶ 16), annual distributions for his limited partnership units of \$7,000 (R. 429 ¶ 17; R. 430 ¶ 18) and general partnership distributions of \$5,000 annually. (R. 430 ¶ 18). These findings (which have not been appealed from) were based on Prince's introduction of copies

of the actual distribution checks Healey received by Healey and deposited into his personal account. (R. 729-752).

The trial court found that Healey's retention of the interests and assets involving Income Fund would deprive Prince of a significant portion of what he bargained for and agreed to purchase and would unjustly enrich Healey. (R. 434 ¶ 32). This finding is supported by substantive evidence. That evidence includes the testimony of Healey and his attorney concerning Healey's demand that Prince pay Income Fund \$696,500. (R. 692 L. 13-21, Exhibit 54).

This demand for payment was based on the existence of a lease agreement between Income Fund and one of the Ponderosa Restaurants (the Roy Ponderosa) under which that restaurant was obligated to pay Income Fund an annual lease payment of \$42,000 for the use of its equipment. (R. 762 L. 3-20). Healey testified that he and Prince personally guaranteed the lease payments from the Ponderosa Restaurant to Income Fund. (R. 782 L. 1-84; 831 L. 22-24).

Healey testified further that the Roy Ponderosa entered into three leases with Income Fund for a total of 20 years at an annual lease rate of \$42,000. (R. 832 L. 9-13). Fifteen years are remaining under the terms of those leases. (R. 832 L. 19). Healey testified that Prince guaranteed those lease payments and

under the terms of the Memorandum Agreement indemnified Healey against paying anything on their joint guarantees. (R. 832 L. 16-25; 833 L. 4-11).

The total of the remaining lease payments equaled the \$696,500 contained in the demand letter. (R. 833 L. 21-24; 834 L. 2-4).

Under these facts, as testified to by Healey, Healey would have the personal right to receive annual distribution payments totalling \$234,000 for a 15 year period or a lump sum payment of \$201,985.00 (\$696,500 multiplied by 29% which is the percentage of Healey's limited and general partnership units relative to all Income Fund units).

As Prince testified, he had no idea that Income Fund was such an income source for Healey. (R. 896 L. 19-16). When asked about the significance of Income Fund, Prince testified that the income stream derived by Healey was fifty percent or more of the amount that Prince had agreed to pay Healey in monthly installments under the Memorandum Agreement. (R. 877 L. 9-17).

In addition to this significant cash flow which would have come directly from Prince or one of his restaurants, the intangible factor of Healey remaining involved with Prince in the role of lessor was important in Prince's mind. (R. 896 L. 7-16).

It appears obvious that the court took this evidence as substantial, credible evidence of the value of Income Fund. Clearly, the court did not rely on Healey's self-serving testimony that the value of those interests were merely \$50,000.

A breach of contract is material if it goes to the very substance of the contract and defeats the object of the parties in entering into the contract. See *McKeon v. Williams*, 799 P.2d 198, 200 (Or. App. 1990). In *McKeon* the Oregon Court of Appeals set forth three factors to be considered in determining if a breach is material. They are (1) the extent to which the injured party will obtain the substantial benefit which he reasonably could have anticipated; (2) the extent to which the injured party may be adequately compensated in damages for lack of performance; and (3) the wilful, negligent or innocent behavior of the party failing to perform. *Id.* at 200.

Application of each of these factors in the present case leads to the inescapable conclusion that Healey's intentional withholding of the Income Fund interests constituted a material breach of the parties' agreement. However, in the present case, Healey's withholding of the Income Fund interests does not stand alone as the basis for the court's conclusion that Healey materially breached the parties' agreement. The trial court's conclusion of law in question was based upon Healey's



refusal to convey those interests and Healey's failure to disclose his prior financial self-dealings. When those elements are combined there is no question that a material breach occurred.

#### FOURTH ARGUMENT

HEALEY'S DELIVERY OF THE QUIT-CLAIM DEEDS CONDITIONED ON PRINCE'S EXECUTION OF A PROMISSORY NOTE WAS NOT A VALID, ABSOLUTE TENDER OF THOSE DEEDS

Healey's argument at Point Five of Appellant's Brief is not determinative of the present appeal, but is another example of Healey's misapplication of the actual facts to relevant legal principles. In his Fifth Argument, Healey contests the trial court's finding and conclusion concerning three quit claim deeds that Healey was required to deliver to Prince.

The disputed question of fact before the trial court was whether or not the delivery of the deeds Healey was conditional or absolute. Healey argues again that there was no testimony upon which the trial judge could base his finding that the original delivery was conditional. Once again, Healey fails to marshal the evidence that supports the trial court's findings.

Instead, Healey relies on limited portions of Gary Henrie's testimony to support the claim that the delivery of the deeds in question was absolute. Mr. Henrie testified that he delivered the deeds in conjunction with a letter dated September

30, 1991. (Exhibit 17). (R. 844 L. 19-23; 845 L. 1-14). In relation to those specific deeds, Mr. Henrie stated in his letter:

The delivery of these deeds to Mr. Prince is conditioned upon the performance by Mr. Prince of all obligations and duties he has under the Memorandum Agreement. These duties include the execution and return of the documents described in the numbered paragraphs above . . .

(R. 845 L. 21-25; 846 L. 1) (emphasis added).

The first numbered paragraph, referenced in the above-quoted passage, calls for the execution of a secured promissory note in the original face amount of \$425,000. (Exhibit 17). Under questioning by Healey's counsel, Mr. Henrie testified that it was his understanding that the September 30 letter was not altering or amending the original Memorandum Agreement. (R. 849 L. 24-25; 850 L. 1-2).

Healey relies on that testimony to the exclusion of all other evidence to support his claim that the deeds were absolutely as opposed to conditionally delivered. Healey relies on this evidence notwithstanding the trial court's statement that the letter speaks for itself and limiting Mr. Henrie's answer to whether in his mind the letter included any additional terms. (R. 849 L. 18-23).

Upon redirect examination by counsel for Prince, Mr. Henrie testified that he had not reviewed the Memorandum

Agreement for some time and did not know if the agreement required Prince to execute a promissory note. (R. 850 L. 14-19). However, on further questioning Mr. Henrie admitted that execution of a promissory note was different than the exact language of the Memorandum Agreement. (R. 850 L. 22-25; 851 L. 1-2).

In addition to Mr. Henrie's testimony, Mr. Brent Armstrong who acted as an attorney for Healey in the negotiation of the Memorandum Agreement testified that the Memorandum Agreement did not contain language requiring the execution of a promissory note. (R. 676 L. 21-25).

Taken together, the evidence before the Court provides absolute evidence that the deeds in question were delivered conditionally.

#### FIFTH ARGUMENT

#### SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD IN SUPPORT OF THE TRIAL COURT'S FINDINGS THAT HEALEY CONVERTED PARTNERSHIP PROPERTY

The issue of marshalling evidence is raised again in Points Four and Five of Appellant's Brief. A great deal of time at trial was spent introducing documentary evidence on the issue of monies received by Healey from the partnership ventures.

Prince introduced into evidence each check received by Healey from Income Fund. Those checks included distributions for

the limited partnership units which the trial court ultimately determined were owned by Healey, and distributions for the 50 general partnership units that Healey held in Income Fund. (Exhibits 36-49).

Regarding Exhibit 39, Healey testified that the copies of checks contained therein represented checks received by him from Income Fund. (R 751 L. 17-25). In relation to Exhibit 41, Healey testified that the distribution check in the amount of \$125.00 was made out to the corporate general partner and deposited into Healey's personal account. (R. 756 L. 9-21). He testified further that he received another check at the same time in the amount of \$1,125 representing the distribution from Income Fund for the general partnership units which Healey held personally. (R. 756, L. 19-25; 757 L. 1-20).

Each exhibit from 39 through 49 contained two identical checks which represented the distributions received by Healey as a result of his claimed ownership of the Income Fund general partnership units. (R. 774 L. 5-25). This documentary evidence established conclusively that Healey received quarterly distributions of \$1,250 from Income Fund for the general partnership units for a total of 11 quarters. This represented a total of \$13,750 received by Healey based on the Income Fund general partnership units.

The record reflects that Income Fund was created by Prince and Healey as a means of raising capital to pay off a joint debt that the parties had incurred as a result of the closure of one of their restaurants. (R. 663 L. 3-25; 664-666).

One of the issues before the court in this case was how Healey obtained those general partnership units and what was the basis for his entitlement to the general partnership distributions totalling over \$13,000. When questioned on this issue, Healey testified that he did not pay cash for those units. (R. 705 L. 7-14). Upon further examination, Healey explained that he and Prince owned certain restaurant equipment equally as partners and sold that equipment to Income Fund. (R. 706 L. 18-25; 707 L. 1-6).

In exchange for his one-half interest in that equipment, Prince received one-half of the cash paid by Income Fund for the purchase of the equipment. (R. 707, L. 7-10). However, for his identical one-half interest in the equipment, Healey received one-half of the cash paid by Income Fund and all the general partnership units. (R. 709 L. 3-16).

Based on the testimony of Healey, the trial court made its finding of fact no. 19 which states that the general partnership units were issued in consideration for the transfer

of an unspecific, undesignated portion of restaurant equipment owned equally by Prince and Healey. (R. 430 ¶ 19).

Because the general partnership units were obtained in exchange for property of the partnership they became partnership property and any distributions traceable to those units should have been split equally between Prince and Healey. The evidence showed that Healey received all the general partnership distributions and deposited them in his personal checking account.

At paragraph 20 of the trial court's findings of fact, the court found specifically that Healey received those checks and deposited them in his personal bank account. (R. 430 ¶ 20). That finding was supported by the evidence set forth above.

Following these findings, at ¶ 24, the trial court entered its finding that Healey or his designated entities received distribution checks from Income Fund and other entities involved in the ventures and failed and refused to pay Prince's share. (R. 432 ¶ 24). The court continued by finding that Healey exercised exclusive dominion and control over said funds which he deposited in his personal checking account. (R. 432 ¶ 24).

The distribution checks received by Healey for the Income Fund general partnership units fall squarely within that

finding of fact. Prince's rightful share of those distributions equalled \$6,875.

In addition, Healey received additional distributions from partnership businesses which he deposited into his personal banking account. Those distributions are dealt with also by the trial court in finding of fact no. 24. (R. 432 ¶ 24). Again, reference to the record reveals an evidentiary basis for the court's finding.

On the afternoon of the second day of trial, Prince called Healey to the stand and began introducing a series of exhibits. Those exhibits contained copies of checks received from one or another of the parties' various joint businesses and deposited by Healey in his personal bank account at First Interstate Bank. Each exhibit corresponded to one month in 1989, 1990 and 1991. (R. 947 L. 4-10).

Initially, Healey's counsel objected when Prince asked to have the first of these exhibits admitted into evidence. (R. 947 L. 13-14). Following that objection, the trial court reserved ruling on the admissibility of the exhibits to allow Healey and his counsel an opportunity to examine them over the evening. (R. 948 L. 19-24; 955 L. 20-25; 956 L. 1-5). The court explained that Healey and his counsel would be given an opportunity to review the various exhibits and make a

determination as to whether or not Healey had signed the checks, etc., and if their authenticity was established then exhibit summaries rather than the exhibits themselves would be admitted into evidence. (R. 957 L. 11-25).

The next morning at trial, Healey's counsel explained that they had reviewed the exhibits and did not dispute that they represented accurate copies of checks received and deposited by Healey. (R. 978 L. 20-24). As Mr. England explained:

But in specific response to the court's inquiry, those are in fact, or at least appear to be the actual records of that particular account, and whatever weight the court wants to give them, we don't have any objections.

(R. 979 L. 9-13).

Following additional comments by counsel, the court received into evidence Exhibits 69 and 70 through 82 which included the actual checks and bank statements as well as the three summaries. (R. 980 L. 9-13). Those summaries (Exhibits 69, 81 and 82) set forth Healey's receipt and deposit of checks totalling \$222,097.93 from the various partnership businesses from 1989 through the first eight months of 1991.<sup>4/</sup>

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<sup>4/</sup> At page 19 of Appellant's Brief, Healey argues that the record does not indicate the exhibit which sets out the eight month totals for 1991 and states that there was no evidence before the trial court on that issue. Exhibit 82 which was received into evidence by the trial court is the summary for 1991. (R. 980 L. 9-13). That summary totals \$50,474.52.



Healey's counsel did lodge an objection to this evidence, which he now argues to this Court, that the checks actually received and deposited into Healey's account were not the best evidence of what monies Healey received from the partnership's businesses.

That objection has no merit. In the first place the "best evidence" rule denotes only the requirement that the contents of an available written document be proven by introduction of the document itself. *Roods v. Roods*, 645 P.2d 640, 642 (Utah 1982). In the present case, Prince introduced copies of the actual checks that were deposited into Healey's account and copies of the account statements and deposit slips which evidenced conclusively Healey's receipt of those checks.

In reviewing questions of admissibility of evidence at trial, deference is given to the trial court's advantageous position. A trial court's ruling regarding admissibility will not be overturned unless it clearly appears that the lower court was in error. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 923 (Utah 1990).

In the present case, Healey and his counsel were provided the opportunity of reviewing the exhibits before the trial court admitted them into evidence. Healey, through his counsel and through direct testimony, admitted that the checks

represented monies received by Healey from the various partnership businesses.

Now Healey argues that it is the obligation of the moving party to present to the trier of fact the best evidence available. This statement does not accurately state the moving party's evidentiary burden. In every case there is a burden of production and a burden of persuasion. The burden of production is met if there is evidence from which a rational trier of fact could find that each element of the cause of action has been proven by a preponderance of the evidence. *Whitchurch v. McBride*, 818 P.2d 622, 624 (Wash. App. 1991).

This burden of production is simply a corollary of the substantial evidence test. Substantial evidence is said to be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Johnson-Bowles v. Division of Securities*, 829 P.2d 101, 107 (Utah App. 1992).

Thus, to question the sufficiency of the evidence is to question whether the burden of production has been met. That burden is met when the moving party produces evidence on each element of his cause of action. *Carle v. McChord Credit Union*, 827 P.2d 1070, 1075 (Wash. App. 1992). By reviewing the sufficiency of the evidence, the appellate court considers whether or not the moving party sustained its burden of

production. Once substantial evidence is found in the record, the job of the reviewing court is over. *Silvis Through Silvis v. Hobbs*, 824 P.2d 1013, 1015 (Mont. 1990).

There is no legal requirement that a moving party must meet its burden of production with anything other than relevant, admissible evidence. In the present case, Healey has repeatedly confused the burden of production with the burden of persuasion and asked this Court to substitute its judgment for that of the trier of fact.

Prince claimed in his Counterclaim that Healey had converted partnership property for his personal benefit. (R. 138-139). Said allegations of conversion must necessarily include the direct misappropriation of partnership monies.

At the beginning of the case, Healey testified that he and Prince were fifty-fifty partners. (R. 617 L. 17-18). Repeatedly, Healey testified that whenever he received a distribution from the operation of the partnership, an equal and common amount was paid to Prince. (R. 1004 L. 18-23). At trial, Prince showed that Healey, in fact, paid himself almost twice as much in partnership distributions than were received by Prince.

In support of that claim, Prince introduced copies of the checks received and deposited by Healey from the various partnership businesses which totalled \$222,097.93 for the period

of time from 1989 through the first eight months of 1991. As further evidence in support of his conversion claim, Prince introduced into evidence his receipts from partnership entities for that same period of time. Proper foundation was presented for the introduction of that evidence and it was received by the court. (R. 1051-1054). Those distributions totalled \$105,106.21.

At that point in the proceeding Prince had introduced admissible, credible evidence in support of the elements of his claim of conversion or misappropriation. He had established that Healey was in charge of the day-to-day operations and all accounting functions of the partnership businesses. (R. 103 L. 13-16; 766 L. 18-24; 945 L. 18-20). He had established that Healey received distributions from the various partnership ventures which were deposited into his personal banking account at First Interstate Bank. (R. 757 L. 21-25; 758 L. 18; 946 L. 17-19).

Prince fulfilled his duty of production and introduced sufficient evidence from which a rational trier of fact could find that Healey had paid himself more than his partner, and therefore converted partnership property. At the same time, Prince had fulfilled his burden of presenting substantial

evidence. As this Court explained in *Johnson-Bowles, supra*, 829 P.2d at 107:

Substantial evidence is something less than the weight of the evidence, but more than a mere scintilla of evidence.

Upon the introduction of that evidence, the burden of persuasion or the burden of going forward shifted to Healey to prove his claim that the significant difference between what he received and what Prince received did not represent conversion of partnership property.

The general law of evidence provides that a party who asserts a fact has the burden of establishing that fact. See *Troutman v. Valley Nat. Bank of Arizona*, 826 P.2d 810, 814 (Ariz. App. 1992). Therefore, while the burden of proof never shifts, the burden of going forward with evidence may shift. *Id.* at 814.

In the present case, Healey attempted to persuade the trial court that he had not misappropriated partnership monies through his own testimony. Following the introduction of that evidence it was left to the trier of fact, which in this case was the trial court, to weigh the evidence presented by both parties and determine who had carried the burden of persuasion.

It is obvious from the trial court's decision that it did not find Healey's testimony to be credible and therefore granted judgment in favor of Prince on this and almost every

other issue. The fact of the matter is that Healey's testimony was not believable. A good example of that fact is his testimony regarding the 1991 distributions. In defense of the wide discrepancy between what Healey received and what Prince received, Healey testified that the difference was a result of reimbursement of expenses, reimbursement of lease payments, some small accounting fees and an intermittent salary. (R. 1005, L. 1-3; 1010 L. 10-13; 1011 L. 9-17).

However, Healey testified that in 1991 the various lease payments had dropped off and further testified that he took no salary for the eight month period in question. (R. 1013 L. 2-12). In the absence of what he previously claimed were additional distributions, Healey received \$50,474.52 from the partnership business in 1991. (R. 1013 L. 13-17). Prince received less than half that amount or \$20,680.55 in the same period of time. (R. 1054 L. 14-20).

When that evidence and all other reasonable inferences to be drawn therefrom are viewed in the light most favorable to the present judgment, clear support exists for the trial court's findings of fact.

Healey failed to carry the burden of persuading the trial court that he had not converted partnership monies for his own personal use and benefit. He now asks this Court to retry

that issue and substitute its judgment for that of the trier of fact. That is not the role of the appellate court. Healey's failure to marshal the evidence in support of the trial court's findings or persuade the trier of fact of the merit of his position must result in the affirmation of that portion of the judgment.<sup>5/</sup>

Healey's argument in Point Three is based on the same misunderstanding as found in his Fourth Argument. Once again, Prince presented evidence, both documentary and through the testimony of Healey, that Healey received \$362,302.44 of partnership monies and assumed control over those funds by depositing those monies into his personal bank account.

At page 961 of the record, counsel for Prince begins introducing the various checks that the partnership received from an investor group designated as the Bagleys. As to each check, Healey testified that he endorsed the instrument and deposited it

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<sup>5/</sup> Healey repeatedly states that no evidence exists that can be marshalled in support of the trial court's findings. His confusion appears to be based on the idea that said evidence must come from the testimony of witnesses called by Prince. For example, at the end of Point Four, Healey states: "Even, after an attempt to marshal the testimony of those witnesses called by Prince, no misappropriation of funds was ever inferred let alone testified to by those witnesses." Marshalling requires an appellant to present all evidence in favor of the facts as found by the trial court. See *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991) (emphasis added). Similarly, when determining if a party has met its burden of production which as explained above is analogous to the sufficiency of the evidence, all evidence is to be considered, regardless of the party who introduced it. See *Whitchurch v. McBride*, 818 P.2d 622, 624 (Wash. App. 1991).

into his personal checking account at First Interstate Bank. (R. 961-963).

However, at the time Healey was deposed in this case, he testified that he deposited the Bagley monies into a business account that he maintained for the joint venture. (R. 969 L. 11-13; R. 1308).<sup>6/</sup>

At the last day of the trial, Healey's testimony concerning the Bagley monies continued. During that testimony, Healey acknowledged that Exhibits 84, 85, 86 and 87 represented monies that he received in relation to the Bagley transaction which was partnership property. (R. 981 L. 24-25; 982 L. 1-5). Additionally, Healey admitted depositing this partnership property into his personal account rather than one of the numerous partnership accounts maintained by the parties. (R. 972 L. 17-25; 973 L. 1-10). That testimony and the exhibits introduced by Prince established Prince's prima facie case of conversion of this partnership property.

In *Allred v. Hinkley*, 328 P.2d 726, 728 (Utah 1958) the Utah Supreme Court set forth the standards for a conversion of personal property claim. This Court referred to those standards

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<sup>6/</sup> When questioned about this discrepancy, Healey testified that at the deposition he did not understand the full content of the question or what the check referred to. (R. 969 L. 14-20). Further review of the deposition testimony contradicted Healey's claim of a prior misunderstanding. (R. 969 L. 21-25; 970 L. 1-11).



in *State v. Twitchell* 832 P.2d 866, 870 (Utah App. 1992) and recognized that money may be the subject of conversion. *Id.* at 870.

The *Allred v. Hinkley* standard for the tort of conversion is:

A conversion is an act of wilful interference with a chattel, done without lawful justification by which a person entitled thereto is denied of its use and possession: the measure of damages of conversion is the full value of the property converted. . . Although conversion results only from intentional conduct, it does not, however, require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's rights.

(Quoted from *State v. Twitchell*, *supra*, 932 P.2d at 870).

In *Twitchell*, this Court held that the defendant committed conversion when he retained his victim's premium payments, presumably in a personal or corporate account under his direct control, rather than the trust account required by statute. *Id.* at 870.

Similarly in *Phillips v. Utah State Credit Union*, 811 P.2d 174, 179 (Utah 1991), the Utah Supreme Court held that plaintiff's conduct in holding checks issued to himself and defendant constituted conversion of the checks which entitled the defendant in that case to recover the amount of the property converted. *Id.* at 179.

In the present case, the testimony of Healey established sufficient evidence of conversion of the Bagley monies to support the trial court's finding on that issue. The measure of damages for conversion of personal property is the full value of the property converted. By Healey's own testimony, Prince had a right to one-half of the money received from the Bagleys. One-half of that amount is \$181,191.22 which is the amount awarded to Prince under the trial court's conclusion of law no. 11. (R. 438 ¶ 11).

Substantial evidence exists in the record that supports the trial court's determination that Healey converted Prince's interest in monies received by the partnership or distributed from the partnership ventures and those findings and the conclusions of law related thereto should be upheld on appeal.

#### SIXTH ARGUMENT

HEALEY'S FAILURE TO PRESENT ANY CREDIBLE EVIDENCE ON THE VALUE OF THE PARTNERSHIP AND HIS MATERIAL BREACH OF THE MEMORANDUM AGREEMENT FORECLOSES ANY RECOVERY BY HEALEY IN THE PRESENT CASE

In his final argument, Healey asks this Court to reinstate the indemnification provisions of the Memorandum Agreement. As set out in detail above, the trial court's decision to deny Healey's request for specific performance of the Memorandum Agreement and the dismissal of that Cause of Action

was supported by substantial evidence and correctly followed the applicable legal standard.

At the trial of this matter, Healey relied exclusively upon his right to specifically enforce the Memorandum Agreement. Healey presented no credible evidence on the value of the partnership at the time of the dissolution. Based on this lack of credible evidence, the trial court entered finding of fact no. 36 and conclusion of law no. 18. (R. 435 ¶ 36, 439 ¶ 18). Healey has not challenged that finding or the corresponding conclusion of law.

Therefore, there exists no basis in the record to support Healey's claim that the trial court's decision denied Healey his portion of the fair distribution of the partnership assets.

The evidence presented at trial established that Prince had made payments, releases and conveyances to Healey exceeding \$450,000 in value. (R. 701, L. 7-10; 884 L. 5-8, 17-20; 885 L. 8-16). And, there was testimony by Karen English who took over the accounting function for the partnership businesses that she had personally reviewed the historic accounting records created by Healey and based on that record there was no way to determine the actual financial condition of the various partnership entities. (R. 1077 L. 9-14).

One thing that could be ascertained from those records was the enormous amount of debt that those entities had accrued. Karen English testified that the total debt was more than two million dollars. (R. 1077 L. 4-5).

In the summer of 1991, Healey approached Prince with a demand that they disassociate and dissolve their partnership. At that time Healey had been in charge of the day-to-day operations of 17 or 18 restaurants and was in charge of all accounting for those restaurants. As Healey testified, he spent more than seventy-five percent of his time on partnership business.

Obviously, Healey had far superior knowledge of the true condition of the partnership business when he asked for dissolution of the partnership. Following a three-day trial, the court found that Healey withheld partnership property from Prince when he did not convey the Income Fund interest. The trial court found further that Healey breached fiduciary duties he owed to Prince by not making a full and honest disclosure of his receipt of partnership property. Finally, the trial court found that the financial information provided to Prince by Healey prior to the time of the parties' negotiations was incomplete, inaccurate and misleading and gave a misleading impression of the true financial condition of the parties' businesses. (R. 435 ¶ 35).

This later finding is supported by the very credible testimony of Karen English and has not been challenged by Healey on appeal.

At the time the parties negotiated the Memorandum Agreement, Healey had far more knowledge than Prince concerning the parties' business. Rather than fulfill his fiduciary duties to his partner, Healey failed to share this knowledge with Prince, failed to inform Prince of the true condition of the businesses, failed to inform Prince that he intended to keep the very valuable Income Fund interests and failed to inform Prince that he had been taking twice as much money out of their businesses than he had been distributing to Prince.

Taking into consideration the relative negotiating positions of the parties, the uncertainty concerning the true value of the partnership business and Healey's clear breach of both the Memorandum Agreement and his fiduciary duties to Prince, the trial court entered its findings of fact and conclusions of law.

The Utah Supreme Court has recognized that specific performance is a remedy of equity which is addressed to the sense of justice and good conscious of the court, and accordingly, considerable latitude of discretion is allowed in the trial court's determination as to whether it should be entered and what

judgment should be entered in respect thereto. *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981).

In the present case, the equities and law clearly preponderate on Prince's side and provide a more than adequate basis for the trial court's decision. Once again, in his last argument Healey resurrects his claim that the Memorandum Agreement should be specifically enforced with adjustments made to offset his violations of legal and equitable duties owed to Prince. Before a party can obtain equitable relief in the form of specific performance, he must have performed his side of the bargain both in terms of the express covenants of the agreement and the implied covenants of good faith and fair dealing. In this case, Healey did neither and therefore lost any and all right to the specific performance of the Memorandum Agreement.

When that Cause of Action was dismissed by the court, Healey's right to any recovery against Prince had to be based on the other Causes of Action presented in his Complaint. One such cause was unjust enrichment or quantum meruit. Specifically, in his Second Claim for Relief, Healey stated that he expected to be fully compensated for the reasonable value of his share of the partnership ventures and claimed that Prince would be unjustly enriched if he retained the benefit of the property conveyed to him without compensating Healey. (R. 24).

Yet at trial, Healey presented no credible evidence in support of that claim which was dismissed ultimately by the court. That portion of the court's judgment has not been challenged on appeal and is not subject to reversal or modification.

It was Healey's absolute lack of proof rather than an abuse of discretion or mistake of law that eliminated Healey's alleged claim to additional payment from Prince for the value of the partnership assets in question. That defect in Healey's case should not be overlooked by this Court.

Healey had every opportunity to present credible evidence as to the value of the parties' assets to support his unjust enrichment claim. That claim was plead by Healey in the alternative to cover the exact situation in which he now finds himself, to wit, unable to prevail on his specific performance claim. The failure to present credible evidence in support of that alternative basis for relief precludes Healey from recovering anything and precludes any modification of the trial court's findings and conclusions and the judgment below.

#### CONCLUSION


When the record is viewed as a whole and the evidence in support of the trial court's findings of fact marshalled and viewed in the light most favorable to the trial court's findings,

substantial evidence exists in support of each and every finding of the trial court. Healey has failed to marshal that evidence and has failed to establish that the court applied an incorrect legal standard to those facts.

Rather, Healey asks this Court to retry the case and substitute its judgment for that of the trial court. That is not the appropriate function for this Court on appeal.

The trial court's findings of fact are supported by substantial evidence and that court correctly applied those factual findings in determining the legal and equitable issues. This Court should not disturb those findings or conclusions, but should affirm the trial court's judgment in its entirety.

DATED this 14th day of December, 1993.



---

Daniel W. Jackson  
Attorney for Defendant Appellee John  
Prince



CERTIFICATE OF SERVICE

I hereby certify that on this ~~14th~~ day of December, 1993, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing Appellee's Brief, to:

Les F. England  
Sutherland & England  
3706 South Highland Drive, #200  
Salt Lake City, Utah 84106

A handwritten signature in dark ink, appearing to read "Les F. England", is written over a horizontal line.

## ADDENDUM

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### INDEX TO ADDENDUM

ADDENDUM 1: FINDINGS OF FACT AND CONCLUSIONS OF LAW

ADDENDUM 2: MEMORANDUM AGREEMENT

Tab 1

MAY 7 1993

By C. B. Bailey SALT LAKE COUNTY  
Clerk, Court

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

FRED HEALEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN B. PRINCE,	)	No. 920902344CN
	)	
Defendant.	)	
	)	
<hr/>		
JOHN B. PRINCE,	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
Counterclaimant,	)	OF LAW
	)	
vs.	)	Judge Dennis Frederick
	)	
FRED HEALEY,	)	
	)	
Counterdefendant.	)	
	)	
<hr/>		

This matter came on for trial before the above-entitled Court on March 22, 23 and 24. Plaintiff, Fred Healey ("Healey") was represented by Les England and defendant and counterclaimant, John B. Prince ("Prince"), was represented by Daniel W. Jackson. After hearing the presentation of evidence in open court, reviewing the exhibits received, reviewing the file in this matter, and after due deliberation, and good cause appearing therefor, the Court enters the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. On or about October 1979, Prince and Healey formed a partnership for the purpose of owning and operating restaurants and associated entities. The parties referred to their partnership as Prince/Healey Ventures (hereinafter "Ventures").

2. The parties' oral partnership agreement provided that Healey would supervise the day-to-day operations of the Ventures and provide management and accounting services to the various enterprises on a cost-only or non-profit basis. The agreement further provided that profits from the operations of the Ventures were to be distributed equally between Prince and Healey.

3. The Healey Company, a company owned solely by Healey, began performing bookkeeping and accounting services for the Ventures shortly after the creation of the partnership. Healey and Prince agreed that The Healey Company would perform said services without either partner deriving a profit from its operations. The name of The Healey Company was changed in 1990 to Food Management Systems, Inc. and the company was incorporated. It continued to perform accounting services for the Ventures until August, 1991.

4. By letter dated July 8, 1991, Healey gave notice to Prince that he wished to terminate their partnership

relationship. At a meeting on July 14, 1991, Healey offered to sell to Prince his interests in all entities and assets associated with and related to the Ventures. By letter dated August 15, 1991, Prince accepted Healey's offer.

5. The purchase and sale of Healey's interests and assets was memorialized in a Memorandum Agreement, Exhibit 3, dated as of August 15, 1991 (the "Memorandum Agreement"). It provided in pertinent part, as follows:

R. Fred Healey ("Healey") and John B. Prince ("Prince") hereby agree to separate all of their joint business interests, by Prince buying out Healey's total interest (except as noted below) in the assets, properties and interests which evidence or otherwise relate in any way to their joint business activities.

6. Under the terms of the Memorandum Agreement, Healey was obligated to:

(a) Assign or otherwise convey to Prince any and all interests owned or held by Healey (either individually or through Healey-owned entities) in all enterprises in which Healey and Prince held joint or common interests or which related in any way to their common business activities. . . .

(b) Deliver the accounting records and accounting contracts for all Ventures to Prince;

(c) Convey to Prince all real property associated with or related to the Ventures, including quit claim deeds for the properties located in St. George, West Valley City, and Ogden;

(d) Convey to Prince all personal property associated with or related to the Ventures; and

(e) Disassociate himself from all business activities related in any way to the Ventures, except as Healey was separately retained as a consultant under the Memorandum Agreement.

7. In consideration of his purchase of all of Healey's interests and assets and pursuant to the Memorandum Agreement, Prince made payments, releases or conveyances exceeding \$450,000. In addition, Prince paid common debts listed on Exhibit "A" to the Memorandum Agreement of more than \$225,000.

8. The Memorandum Agreement was a purchase agreement and did not contain any waiver of claims. It did not provide for the issuance of a promissory note by Prince or contain any provision for acceleration of Prince's installment payments to Healey. It did not include an attorneys fees provision.

9. On September 30, 1991 Healey made a conditional delivery to Prince of quit claim deeds for the three real properties he was required to convey under the Memorandum Agreement. Healey did not tender an unconditional delivery of those deeds until December, 1992.

10. Notwithstanding Prince's demands, in December 1991, Healey informed Prince that he would not transfer any limited or general partnership interests or assets involving or relating to Income Fund, Ltd. ("Income Fund" ), an entity which

was part of the Ventures, to Prince. Healey further refused to deliver the accounting records and accounting contract relating to Income Fund or the control of Income Fund to Prince. Further, Healey refused to disassociate himself from the operations of Income Fund.

11. Because of Healey's refusal to convey the various interests in Income Fund and unconditionally deliver the quit claim deeds as required by the Memorandum Agreement, Healey was in breach of the Memorandum Agreement. Prince gave notice to Healey of his intention to stop performance thereunder, and ceased making payments to Healey after payment of the November and December, 1991 installments.

12. On April 22, 1991, Healey filed his complaint in the present action wherein he sought specific performance of the Memorandum Agreement. Neither at the time of nor prior to filing his complaint, did Healey make any tender of any interests or assets involving Income Fund or make an unconditional tender of the quit claim deeds. Healey has continued to refuse tender of the Income Fund interests since filing this litigation.

13. Over one and one-half (1½) years after filing his complaint (on or about December 22, 1992), Healey delivered the quit claim deeds in question to Prince.



14. Income Fund was organized by Prince and Healey for the purpose of buying certain restaurant equipment from The Roy Ponderosa (Steak V) and leasing the equipment back to that restaurant. Both Prince and Healey acted as joint guarantors of the lease obligation between Income Fund and Steak V. Each of Prince and Healey received the benefit of one-half of the proceeds of the sale of the equipment to the limited partnership through the payment of debts of the Ventures.

15. The only business of Income Fund was the leasing of said equipment to Steak V. Its only asset was the equipment located at the restaurant. All monies obtained by Income Fund were derived directly from the operation of Steak V.

16. The Healey Company entered into an agreement with Income Fund to provide accounting services to the limited partnership for a monthly fee of \$300. The Healey Company aka Food Management Services, Inc. had similar contracts or agreements with the other Ventures.

17. The owners of partnership units in Income Fund received quarterly distributions from the partnership equalling an annual return of ten percent (10%) on their capital investment. Said distributions were paid each quarter from December, 1988 through September, 1991.

18. At the time the Memorandum Agreement was executed, Healey and Prince each owned 71 limited partnership units in Income Fund. In addition, 50 general partnership units were held in the names of Healey and Income Leasing, Inc., a Utah corporation wholly owned by Healey ("Income Leasing"). The sole business of Income Leasing was to act as general partner of Income Fund.

19. The general partnership units held in the name of Healey and Income Leasing were issued in consideration for the transfer of an unspecific, undesignated portion of restaurant equipment owned equally by Prince and Healey as part of the Ventures.

20. Healey received quarterly distribution checks from Income Fund for the 71 limited partnership units he held individually. Those distribution checks were endorsed by Healey and deposited into an account he held jointly with his wife at First Interstate Bank. This account was separate and distinct from the Healey's household account maintained at First Security Bank. In addition, Healey received quarterly distributions in his name and the name of Income Leasing for the general partnership units in Income Fund. He also received quarterly payments of the accounting fee through checks made out to the order of The Healey Company. The checks for the general

partnership distributions and the accounting contract were also deposited in Healey's First Interstate Bank account. In total, Healey received annual distributions of \$15,600.00 from Income Fund. Under the terms of the Memorandum Agreement Healey was to receive monthly installment payments from Prince in the principal amount of \$21,249.96 per annum.

21. All of Healey's limited partnership's interest in Income Fund, the general partnership interest in Income Fund held in the names of Healey and Income Leasing, and Income Fund's interest in the accounting contract constitute interests and assets governed by the Memorandum Agreement. Healey was required to convey those interests and assets to Prince pursuant to the clear and unambiguous language of the Memorandum Agreement.

22. In January, 1989, Healey received One Hundred and Seventy-Five Thousand Dollars (\$175,000) which funds were property of the partnership, and deposited those funds into Healey's First Interstate Bank account. Thereafter, Healey deposited an additional One Hundred and Eighty-Seven Thousand Three Hundred and Two Dollars and Forty-Four Cents (\$187,302.44) of partnership funds into that checking account. The funds were used by Healey for his own personal purposes. Prince did not receive his one-half share of said funds.

23. During the term of the Prince Healey partnership, Healey issued and signed checks written on partnership accounts to himself and Prince. Throughout their association, Healey represented to Prince that all such distributions to the partners were made equally and uniformly as their agreement required.

24. Healey or his designated entities received distribution checks from Income Fund and other entities involved in the Ventures and failed and refused to pay Prince's share. From January, 1989 through August, 1991, Healey received \$117,073.50 more funds from the Ventures than were paid to Prince. Healey exercised exclusive dominion and control over said funds which he deposited and held in his personal checking account at First Interstate Bank.

25. For a brief period in 1990, Prince and Healey agreed that Healey would take a salary from the partnership. Healey rescinded that agreement and returned one-half of the salary for a three-month period to Prince. No other agreement was ever reached by the partners that entitled Healey to receive a salary.

26. Healey agreed with Prince that he would not profit from the operations of The Healey Company. Contrary to that agreement, Healey diverted funds belonging to The Healey Company

to his personal use and benefit and thereby derived a profit from the operation of The Healey Company.

27. While in control over and supervision of the accounting and financial affairs of the Ventures, Healey caused funds of the associated entities to be commingled in an account entitled Ponderosa Combined Account. Additionally, Healey caused intracompany loans to be made between the associated entities.

28. As a result of the commingling of funds and the intracompany loans, Prince has been unable to reconcile the books and records of the associated entities.

29. Prior to the execution of the Memorandum Agreement, Healey determined that he would withhold all the various Income Fund interests and assets from Prince. At no time prior to the execution of the Memorandum Agreement did Healey inform Prince of his intention to withhold said interests and assets nor prior to the execution of the Memorandum Agreement did Healey inform Prince that those interests and assets would not be conveyed to Prince.

30. Healey had an affirmative duty to disclose his intention to retain the various interests in Income Fund and Income Leasing and related assets to Prince prior to the execution of the Memorandum Agreement. Healey failed to fulfill

that duty and thereby breached the fiduciary duty he owed to Prince.

31. Healey's intentional non-disclosure of his desire to retain the interests and assets relating to Income Fund was done in bad faith for the purpose of depriving Prince of a valuable portion of the parties' joint business activities.

32. Healey's retention of the interests and assets held by him in Income Fund would deprive Prince of a significant portion of what he bargained for and agreed to purchase from Healey pursuant to the terms of the Memorandum Agreement and would result in Healey being unjustly enriched.

33. At all times, Healey represented to Prince that the partners had received equal distributions from the operations of the Ventures. Healey failed to disclose to Prince, at the time of his offer to sell or prior to the execution of the Memorandum Agreement, that Healey had deposited into his personal account large sums of money in excess of the distributions received by Prince. Said omissions when viewed in light of the circumstances and prior statements made by Healey were misleading.

34. At the time the parties were negotiating the terms of the Memorandum Agreement, Healey, as managing partner, had control over and possession of all the books and records of the

partnership and related entities and possessed far greater knowledge than Prince concerning the financial affairs of the Ventures.

35. The financial information provided to Prince by Healey prior to the time the parties negotiated the terms of the Memorandum Agreement was incomplete, inaccurate and misstated or gave a misleading impression of the true financial condition of the partnership and related entities.

36. Healey failed to present any credible evidence at trial in support of his claims for quantum meruit, estoppel, appointment of a receiver, breach of fiduciary duty, fraud, conversion or partition of assets.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes as follows:

1. The Memorandum Agreement is clear and unambiguous and can be interpreted and enforced by the court without resort to extrinsic, parol evidence.

2. Pursuant to the terms of the Memorandum Agreement, the parties intended to completely disassociate themselves and terminate their partnership relationship.

3. Pursuant to the Memorandum Agreement, the parties intended for Prince to purchase and Healey to convey and assign

any and all interests, assets or property owned or held by Healey (either individually or through Healey-owned entities) in all enterprises in which the parties held joint or common interests.

4. Through the Memorandum Agreement, the parties intended for Prince to purchase and Healey to convey and assign any and all interests, assets or property owned or held by Healey (either individually or through Healey-owned entities) which related in any way to their joint business activities.

5. Prince and Healey owned and held joint interests in Income Fund. Income Fund's business relates exclusively to the parties' joint business activities. Income Leasing's sole business was to act as a general partner of Income Fund, which business was exclusively related to the parties' joint business activities.

6. Income Fund was governed by and fell within the broad language of the Memorandum Agreement. Healey's interest in Income Fund, the general partnership interests therein and the accounting contract between Income Fund and The Healey Company were purchased by Prince under the Memorandum Agreement.

7. Under the terms of the Memorandum Agreement, Healey was required to convey his 71 limited partnership units and all the general partnership units in Income Fund held in the names of Healey and Income Leasing to Prince. In addition, Healey was



required to transfer the accounting contract, accounting records and control over Income Fund to Prince and otherwise disassociate himself from all businesses related in any way to the operation of the parties' restaurants, except as separately retained as a consultant under the terms of the Memorandum Agreement.

8. Notwithstanding Prince's request for the conveyance of said interests, assets and control regarding Income Fund, Healey refused to convey, transfer or deliver said property to Prince. At no time has Healey tendered the conveyance or transfer of those interests, assets and control to Prince.

9. Through the present action, Healey seeks specific performance of the Memorandum Agreement. A party who desires to use legal process to enforce a contract by specific performance must perform his obligations under the contract or make a complete and unconditional tender of performance in order to put the other party in default.

10. The general partnership interests in Income Fund constitute property belonging to the Ventures. Prince is entitled to receive one-half of any and all distributions received by Healey which were in excess of distributions received by Prince. From January, 1989 through August, 1991, those excess distributions total \$117,073.50. Prince is awarded judgment

against Healey for one-half of said funds in the amount of \$58,536.75.

11. In January, 1989, Healey received \$175,000 and thereafter \$187,302.44 which were partnership funds and deposited said funds into his personal account at First Interstate Bank. Prince is awarded judgment against Healey for \$181,151.22 which is his one-half share of said funds.

12. As partners, Prince and Healey occupied a fiduciary relationship toward each other which required that they deal with each other in the utmost good faith. As the partner who maintained the books and records of the partnership and supervised its daily operations, Healey's duty to act in good faith and as a fiduciary toward Prince was heightened.

13. Healey breached the fiduciary duty he owed to Prince in at least the following ways:

- (a) Healey provided Prince with incomplete and inaccurate information concerning the financial condition of the parties' businesses,
- (b) Healey received distributions from the Ventures of cash and other partnership property in excess of the distributions received by Prince, and
- (c) Healey willfully and consciously withheld from Prince his intention to retain the various interest in Income Fund and not convey those interests to Prince as part of the Memorandum Agreement.

14. Healey's intentional non-disclosure of his decision to retain the interests and assets relating to Income

Fund evidenced his bad faith and his intent to deprive Prince of a valuable portion of the parties' joint business activities.

15. Healey's retention of the interests and assets held by him in Income Fund would deprive Prince of a significant portion of what he bargained for and agreed to purchase from Healey pursuant to the terms of the Memorandum Agreement and would result in Healey being unjustly enriched.

16. Healey's actions in failing to disclose his intent to retain the interests and assets associated with Income Fund and his other omissions and misstatements and his several breaches of the fiduciary duty owed to Prince constitute bad faith and unclean hands and provide another basis for this court's denial of Healey's request for specific performance and the dismissal of that claim.

17. This Court is persuaded as of the date of the trial that the accounting records have been conveyed and provided to Prince and Prince's request for a further accounting is denied.

18. At the trial in this matter, Healey failed to present any credible evidence in support of his claims for quantum meruit, estoppel, appointment of a receiver, breach of fiduciary duty, fraud, conversion or partition of assets and those causes are dismissed.

19. Healey's refusal to convey the interests, assets and control of Income Fund and failure to fully disclose Healey's financial self-dealing constitutes a material breach of the Memorandum Agreement.

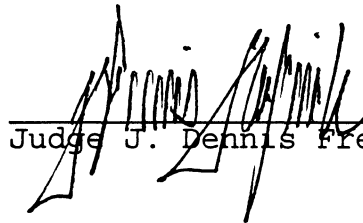
20. As a result of his breach of the Memorandum Agreement and failure to tender the agreed upon performance prior to the initiation of this action, Healey is not entitled to specific performance of the Memorandum Agreement and his claim or cause of action for specific performance is dismissed.

21. Healey is ordered to convey to Prince forthwith any and all interest he or his related entities have in Income Fund.

22. In light of Healey's substantial and material breach of the Memorandum Agreement, as well as his commingling and diverting of partnership assets, Prince is relieved from any further obligations for payment pursuant to the terms thereof.

DATED this 4th day of May, 1993.

BY THE COURT:



Judge J. Dennis Frederick

Tab 2

## **MEMORANDUM AGREEMENT**

This Memorandum Agreement memorializes the agreement reached between the parties on 15 August, 1991.

R. FRED HEALEY ("Healey") and JOHN B. PRINCE ("Prince") hereby agree to separate all of their joint business interests, by Prince buying out Healey's total interest (except as noted below) in the assets, properties and interests which evidence or otherwise relate in any way to their joint business activities. Said purchase to be made according to the following terms and conditions:

1. Prince shall pay Healey Seven Hundred Thousand Dollars (\$700,000.00) for the purchase by Prince of Healey's interests in all the businesses in which Healey and Prince have any joint interests (other than the Alamo Storage property and Swiss Colony) and all assets and properties, real and personal, used in the operation of those businesses.

2. The \$700,000.00 purchase price shall be paid as follows:

(a) \$150,000.00 cash down payment (of which \$100,000.00 has already been paid).

(b) Prince shall convey to Healey all of Prince's right, title and interest in the Alamo Storage property, and Prince shall receive a \$125,000.00 credit against the \$700,000.00 purchase price for such conveyance. Healey shall assume and agree to pay the mortgages on the Alamo Storage property and indemnify Prince from all liabilities associated with that property.

(c) The balance of the purchase price (\$425,000.00) shall be payable in 240 equal monthly payments (including principal and interest at the annual rate of 9.5% per annum), commencing November 1, 1991.

(1) As security for the deferred payments Prince shall:

-- pledge all of the shares in Square Meal, Inc., BB Barbecue, Inc. and the Broiler, Inc.;

-- grant a security interest to Healey (by a security agreement and financing statement) in all of the furniture, fixtures and equipment in the Ponderosa restaurants known as Steak V, VI, VII, VIII and IX if such grant does not result in a breach or default of any loan agreements with any financial institutions which holds a security interest in such property or if the applicable financial institution(s) consents to such grant or waives such breach; and

-- grant a lien to Healey (by trust deeds) on the real property utilized by Steak VII, Steak VIII and Steak IX if such grant does not result in a breach or default of any loan agreements with any financial institutions which holds a lien or other similar security interest in such property or if the applicable financial institution(s) consents to such grant or waives such breach.

(d) In addition to the payment of \$700,000.00, Prince shall release Healey from his obligation to pay Prince \$125,000 as part of the \$250,000.00 prior loan for Diego's.

(e) In addition to the payment of the \$700,000 as set forth above, Prince shall fully and totally indemnify Healey against all debts and obligations for which Prince and Healey are jointly liable (other than those associated with or resulting from the operations of the Alamo Storage property and Swiss Colony) and which are set forth on the schedule attached hereto as Exhibit "A" and by this reference made a part hereof. Additionally, Prince shall fully and totally indemnify Healey for those debts and obligations which are set forth on the schedule attached hereto as Exhibit "B" and by this reference made a part hereof.

(f) Prince shall use his reasonable efforts to cause Diego's to make payments on an obligation of Diego's to the financial institution that financed the satellite system in the approximate amount of \$2,200. The parties hereby agree that this paragraph 2(f) is not

a personal obligation of Prince to Healey. Healey waives any and all claims against Prince for the payment by Prince of all or any portion of this obligation or for contribution. If Diego's fails to pay such amount and Healey pays the obligation pursuant to his personal guarantee, Prince shall use his reasonable efforts to cause Diego's to deliver possession of the satellite system to Healey.

(g) The parties hereto acknowledge and agree that Diego's currently owes Sysco Food Service ("Sysco") approximately \$34,000 and that such amount is secured by certain assets of Diego's and the personal guarantee of Healey. If Diego's is unable to pay this amount to Sysco, and the value of the collateral does not satisfy the obligation in full, then Prince agrees to pay to Healey one half of any amounts which Healey pays to Sysco in satisfaction of his personal guaranty of such obligation. Prince agrees that the collateral or conforming equivalent collateral will remain on the premises at Diego's.

3. Swiss Colony shall continue under the present 50/50 ownership.

4. Healey agrees to not compete with Prince in the restaurant/catering business for a period of five (5) years within a 3-mile radius around any existing restaurants/catering business owned or controlled by Prince and Healey immediately prior to August 15, 1991. Prince agrees to pay Healey an additional \$50,000.00 no later than October 1, 1991 as consideration for Healey's agreement not to compete. As part of the non-competition agreement, Healey also agrees to not hire away any employees from any of the operations previously owned or controlled by Prince and Healey, and to not induce any employees to leave such employment. In this regard, Healey shall be free to hire such employees after a period of

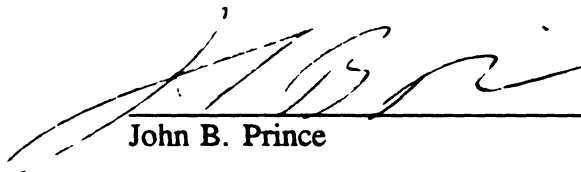


at least six months has passed after they have terminated their employment with Prince or his businesses.


5. Healey agrees to consult with Prince and/or the entities controlled by Prince for up to 5 years for payment of \$50.00 per hour. Prince has tendered \$1000.00 as a deposit toward the consulting service.

The parties intend that this shall be a binding agreement between the two of them, but also agree that more definitive, detailed documents consistent with this Memorandum Agreement, shall be prepared and reviewed by their respective legal counsel to replace and supersede this agreement, which will more fully evidence the agreement between the parties and which the parties agree to use best efforts to prepare and execute on or before October 15, 1991.

The agreement is binding upon and inures to the benefit of the parties and their respective heirs, successors and assigns. The parties agree that these rights and duties under this agreement cannot be assigned without the express written consent of the other which consent shall not be unreasonably withheld.



John B. Prince



R. Fred Healey

## LIABILITIES

### Steak One

Lease: Oakwood Village; Year 2000 \$5,534.92/Month plus CAM.

Zions: Cash Register Lease Less than \$400 per month

Limited Partners: Preferential 10% Return before a return to John or Me

### Steak Two

Lease: Hermes; Year 2001 with renewal options, \$5,150 plus CAM.

Limited Partners: Preferential 15% Return before a return to John or Me

Zions: Cash Register Lease less than \$400 per month

### Steak Three

Lease: 2100 Associates; Year 1992 with renewal options, \$4,500/month.

Gerry Nibley: \$150 per quarter

Ann Almond: \$675 per quarter

Limited Partners: 15% Preferential

### Steak Four

Lease: University Mall; Year 2003 with options, \$4,465.82/Month

Zions: Cash Register Lease \$307.50/Monthly

Limited Partners: Preferential return of 10% on \$95,000

### Steak Five

Lease: Roy Marketplace Plaza; Year 2005 with options, \$6772.67 Monthly

Income Fund Limited: Monthly Equipment Lease \$3,500

Zions: Cash Register Lease less than \$400 per month *(we pay \$1,150 per mo.)*

### Steak Six

Lease: Equity Properites; Year 2026; \$7,425 monthly plus CAM

Lease: Tricon Leasing; Equipment Lease \$5,550 approx, June 1992

### Steak Seven

Lease: Healey Prince; Year 2007; \$13,033.33 per month

Note: Trimble Healey; Interest only 1992; then Amort. \$200K

*SAVING & INVESTMENT CO.; 750,000 TOTAL*

### Steak Eight

Loan: SRA \$3,705.34 per month automatic withdrawal/20 years

Loan: Zions \$4,900 per month 15 year Amort.

Loan: FSB Equipment approximately \$8,500 per month 60 Mos.

### Steak Nine

Loan: First Security Bank; \$6,100 per month Equipment 3 years  
Loan: Far West Bank; Two payments \$5,788.59 per month  
Equipment: Steve Lowe Equipment \$511.62 for 60 Months

Duffs

Rig V Associates \$3,046 per month thru December 1995  
Hermes \$550 per month thru July 1992  
Bagley \$35,000 per year thru 1996

1/1/97

Diego's

Lease: Hermes 10,000 per month plus CAM, increases in 1994  
Loan: FSB \$250,000 over five years  
Wright Brothers: 65,000 approx  
Broiler

*[Handwritten initials]*

Lease: Crossroads Plaza Assoc.; Year 2009; \$2,319 per month  
Loan: Zions Securities Corp \$2,376.29, pay off July 1992

Watney Broiler

Loan: Zions Bank \$1,150 approx.

California Hot Dog

Lease: Crossroads Plaza; Lease \$1,545  
Loan: Bank of Utah Loan \$1,600 per month approx, July 1992

~~Diego's Liens of immediate needs;~~

Knight Brothers 65,000 approx  
Richard Refrigeration 7,000 approx  
Sysco 35,000 approx  
Nicholas 46,000 approx

**EXHIBIT "B"**

1. Young Electric Sign Company in the amount of approximately \$2000.
2. NCR in the approximate amount of \$1<sup>5</sup>,000 for the cash registers located at Diego's.

A handwritten signature in black ink, appearing to be "DJ", is written over the text of item 2.