

2006

# Mark Hopkins and Kathy Hopkins dba Eldridge Financial v. Bill Hales : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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MARK HOPKINS and KATHY HOPKINS  
d.b.a. ELKRIDGE FINANCIAL

Plaintiffs and Appellants,

vs.

BILL HALES,

Defendant and Appellee.

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**BRIEF OF APPELLANTS**

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Appeal from the Final Order and Judgment of the  
Sixth Judicial District Court, Sanpete County  
State of Utah, by the Honorable David L. Mower

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### **PRELIMINARY STATEMENT.**

This is an appeal of a civil matter, brought by the Plaintiffs – Appellants, Mark Hopkins and Kathy Hopkins d.b.a. Elk Ridge Financial. This is an appeal of the award of attorney’s fees pursuant to Utah Code section 78-27-56. The underlying claims of the Hopkins are waived having failed to obtain judicial enforcement of their contracted Agreements with Bill Hales, the Defendant – Appellee.

### **STATEMENT RELATED TO OTHER APPEALS.**

There are no prior or related appeals concerning this matter.

### **STATEMENT OF JURISDICTION.**

Jurisdiction is conferred on this Court by Utah Code Ann. § 78-2a-3 (2) (j) (1953, as amended) ((j) cases transferred to the Court of Appeals from the Supreme Court).

### **STATEMENT OF ISSUES.**

1) Whether the trial court concluded erroneously awarding attorney’s fees pursuant to Utah Code Section 78-27-56, where there was no evidence of bad faith litigation, and the court’s findings of bad faith go to the original formation of the contract alone?

Issue preserved: 100, 157, 162, 281, 289, 326, 358, 380, 417.

2) Whether the trial court misapplied Utah Code Section 78-27-56, where there existed a contract and so Section 78-27-56.5 should have applied?

Issue preserved: 100, 157, 162, 281, 289, 326, 358, 380, 417.

### **STANDARDS OF REVIEW.**

We review a trial court's findings of fact under a clearly erroneous standard. *Taylor v. Hansen*, 958 P.2d 923, 929 (Utah Ct. App. 1998); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *Id.* at 935-36. Statutory interpretation presents a question of law which we review for correctness." *Taylor (citing Gull Labs., Inc. v. Utah State Tax Comm'n*, 936 P.2d 1082, 1084 (Utah Ct. App. 1997)).

The standard of review regarding questions of law, this Court accords no deference to the trial court and reviews the trial court's decisions for correctness. *J.H. v. West Valley City*, 840 P.2d 115 (Utah 1992).

## **STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.\***

Utah Code Ann. § 78-27-56 (2005)

Utah Code Ann. § 78-27-56.5 (2005)

(\* This provision is reproduced in the attached Addendum G).

## **STATEMENTS OF THE CASE.**

### **I. Nature of the Case:**

This is an appeal of a civil matter from Sixth District Court in Sanpete County, Manti Division. The matter was brought by the Plaintiffs – Appellants, Kathy Hopkins and Mark Hopkins (together, the “Hopkins”) seeking the enforcement of a binding Non-Competition Agreement (hereinafter, the “Agreement”). They entered into the Agreement with Mr. Hales, the Defendant – Appellee.

After Mr. Hales employment terminated, the Hopkins sought enforcement of their agreements. In district court, the court dissolved the agreements concluding “bad faith” on the part of the Hopkins because of errors found against the Hopkins during Hales’ employment. Afterwards, Hales sought attorney fees by filing a motion some ten months later. Only on appeal, is the question of that award of attorneys fees issued by the Court. However, it should be noted there is no evidence of bad faith litigation, and the Hopkins deny any “bad faith” intentions – the errors found by the trial court speak for themselves

and are only evidence of mistakes by Elkridge; not bad faith.

## **II. Course of the Proceedings:**

The Hopkins commenced their injunction on December 28, 1999. R. 1, 358. Mr. Hales counsel, Mr. Graham, entered an appearance on January 7, 2000 and filed an answer on February 17, 2000. R. 19, 29, 358. A scheduling conference was conducted on April 12, 2000. R. 65, 67, 358. Mr. Graham appeared by telephone. R. 67, 358. At that hearing, the court scheduled the Hopkins' temporary restraining order hearing for May 3, 2000. R. 68, 359.

At the May 3, 2000 hearing, the hearing lasted the duration of the one day and then the court recessed scheduling a second day for hearing on May 17, 2000. R. 86, 359. During the hearing, Plaintiff's exhibits 1 and 2, the non-competition agreement and the non-disclosure agreements were received. (See Addenda B and C). The parties then stipulated to reconvene till May 24, 2000 at 10:00 a.m. R. 93.

On May 24, 2000, Mr. Graham appeared by telephone again. R. 93, 359. The Court scheduled oral arguments for June 21, 2000 at 2:00 p.m. R. 95, 359. On June 21, 2000, the court heard oral arguments. R. 98, 359. The hearing commenced at 2:06 p.m. and the matter was taken under advisement at 5:07 p.m. R. 98, 359. At the closing of the hearing, the court ordered each party to prepare and submit proposed findings. R. 99, 359. The proposed findings were submitted on July 3, 2000. R. 100, 106, 359. Relying

on the proposed findings, on July 27, 2000, the court entered its order. R. 132, 134, 359. (See findings and order, Addenda D and E).

Since defeating the temporary restraining order and preliminary injunction, the Hopkins contended that Hales failed to prevail on any following issues. R. 359. After considerable debating over the July 2000 order, findings and decree, a new order was entered on December 19, 2002. R. 256, 359. (See Addendum F). Then finally, Hales moved for attorney's fees 10 months after the order was entered. R. 270, 359.

### **III. Disposition in Trial Court:**

On December 19, 2002, the Court entered Findings of Fact and Conclusions of Law. R. 256. Ten months later, Mr. Hales motioned for attorneys fees on October 1, 2003. R. 270. The Hopkins opposed the motion, raising issues including timeliness arguments. R. 281, 289, 358. On March 15, 2004, the court ruled on the motion ruling that "The Findings of Fact and Conclusion of Law in this case provide a sufficient basis for an award of attorney fees pursuant to section 78-24-56, Utah Code."<sup>1</sup> But the court required a new motion to be filed because of deficiencies. R. 326. Ultimately, on July 26, 2006, the Honorable David L. Mower entered judgment for attorney's awarding the Defendant Hales the amount of \$6,085.00 erroneously. R. 462. See Order, (Addendum A).

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<sup>1</sup> The Hopkins assume "78-24-56" is merely a clerical error. The Hopkins believe the trial court meant to cite "78-27-56" as the true section to the Utah Code,

## **STATEMENT OF FACTS.**

The Hopkins are individuals residing in Gunnison City, Sanpete County, Utah. R. 256. The Hopkins were the sole proprietors of Elkridge Financial. R. 257. They maintained their principal place of business in Gunnison. R. 257. Hopkins began doing business as Elkridge on or about February, 1997. R. 257. Bill Hales became acquainted on or about March, 199, when Hales sought to obtain a loan through the services of Eldridge. R. 257.

Shortly after, on or about March, 1999, Hales and Hopkins entered into a business relationship whereby Hales was employed by Elkridge as an independent contractor and consultant. R. 257. Prior to this employment relationship, Hales had no experience in the loan or mortgage broker industry. The Hopkins offered Hales wages of \$2,000.00 per month. R. 257. On May 13, 1999, after training, the Hopkins and Hales, executed two agreements, a Non-Compete Agreement, Exhibit 1, and a Non-Disclosure Agreement, Exhibit 2. See R. 469. The agreements restrained the defendant for five years and 100 miles. R. 258. Hales received training, which included filling out loan applications and learning the documents of the mortgage trade. R. 257-58.

Mr. Hales was set-up in a new office located in Richfield. R. 259. But because of financial troubles in September 1999, Hales was asked to look for other employment. Prior to lending, Mr. Hales acted a police officer. R. 258. He commenced looking for employment in law enforcement without success. R. 259-60. Therefore, he started

looking for employment with other mortgage brokers. R. 260. Meanwhile, Hales continued his work for Hopkins and Elkridge, soliciting loans and acquiring information and applications for potential loan applicants. R. 260. In November 1999, Mr. Hales was asked to relinquish his keys to the Richfield office and the files which he was working for Elkridge. R. 260. Hales promptly did so. R. 260. Pursuant to his earlier employment search efforts, Hales immediately contacted another mortgage broker to pursue employment. Such pursuit was finally fruitful and Hales begun to solicit loans for the new mortgage broker company towards the end of December, 1999, about three weeks after his termination. R. 260. Having learned of Hales activities in December, 1999, thus this action was commenced by the Hopkins. R. 1. Hopkins' filing of an action was reasonable under the law, in light of Exhibits 1 and 2, the non-disclosure and non-compete agreements. R. 12, 469-a and 469-b.

### **SUMMARY OF THE ARGUMENT.**

Because this matter was a contract case, the application of Utah Code section 78-27-56.5 was controlling. Since the contract did not have liquidated damages clause, no attorney's fees could be awarded to Hales. The trial court committed plain error awarding attorney's fees to Hales pursuant to Utah Code section 78-27-56. Moreover the trial court's belief that finding "bad faith" formation of the contract rather than finding "bad faith" litigation in order to award attorney's fees pursuant to Utah Code section 78-27-

56.5, was also clearly erroneous.

## **ARGUMENTS.**

### **POINT ONE.**

#### **THE PARTIES' WRITTEN AGREEMENTS, TO WIT, THE NON-COMPETE AGREEMENT AND NON-DISCLOSURE AGREEMENT, NEITHER PROVIDED FOR AN AWARD OF ATTORNEY'S FEES.**

As a preliminary matter, we note that had the trial court reached a final judgment granting or denying a permanent injunction, we would dismiss that portion of the appeal challenging the temporary restraining order under the doctrine of merger. *Sterling v. Constantin*, 287 U.S. 378, 386, 77 L. Ed. 375, 53 S. Ct. 190 (1932); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 224, 76 L. Ed. 1062, 52 S. Ct. 559 (1932); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 588-89, 70 L. Ed. 747, 46 S. Ct. 408 (1925); *Shaffer v. Carter*, 252 U.S. 37, 44, 64 L. Ed. 445, 40 S. Ct. 221 (1920); *Atomic Oil*, 419 F.2d at 1102 n.9.

Utah Code section 78-27-56.5 provides for attorney's fees and states reciprocal rights to recover attorney's fees:

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Utah Code Ann. § 78-27-56.5 (Supp. 2003).

Utah Code section 78-27-56 otherwise provides for attorney's fees in litigation,



awarding where an action or defense was brought or asserted in bad faith.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Utah Code Ann. § 78-27-56 (Supp. 2003). Here in this matter, the Hopkins did not file a frivolous action, nor were their claims raised in bad faith. In good faith, they filed their action relying on what they determined were enforceable agreements. Having no experience in the mortgage business Bill Hayes himself, Elkridge had a right to protect itself from having its trade secrets or copyrighted materials being used against it following Mr. Hales' termination, as the Hopkins apparently believed. By Hales' own signatures on the agreements, Exhibits 1 and 2, the Hopkins had every right to expect their agreements were enforceable, in good faith. In neither agreement was attorney's fees included as a provision. Regardless, the trial court in this matter did not award attorney's fees pursuant to either agreement or pursuant to Section 78-27-56.5. Instead, the awarded attorney's fees was provided citing to Section 78-27-56.<sup>2</sup>

The history of Section 78-27-56, insofar as it can be reconstructed, suggests that it

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<sup>2</sup> Even though, the trial court erroneously awarded they citing to the wrong provision, 78-24-56, in reality.

was designed as a cost statute. Utah, like most jurisdictions, adheres to the American Rule for awarding attorneys fees, viz., in the absence of a contractual or statutory provision which dictates otherwise, each party to litigation pays his own attorneys fees. This rule was derived, in part, from the belief that fees were costs, and that costs were a creature of statutes which could not be enlarged by judicial fiat. *See, e.g., Western Casualty and Surety Company v. Marchant*, 615 P.2d 423, 426-427 (Utah 1980); *Ranch Homes, Inc. v. Greater Park City Corporation*, 592 P.2d 620, 625-626 (Utah 1979); *Nelson v. Newman*, 583 P.2d 601, 603-605 (Utah 1978); *Leger Construction, Inc. v. Roberts, Inc.*, 550 P.2d 212, 215-216 (Utah 1976); *American States Ins. Co. v. Walker*, 486 P.2d 1042, 1044 (Utah 1971). *Cf. Frampton v. Wilson*, 605 P.2d 771, 773-774 (Utah 1980). In Utah, the rule has exceptions, for example, where “litigation . . . was not resorted to in good faith, but was merely spiteful, contentious or obstructive.” *Western Casualty and Surety Company v. Marchant*, *supra* at 427. *See also, Ranch Homes, Inc. v. Greater Park City Corporation*, *supra* at 625-626; *American States Ins. Co. v. Walker*, *supra* at 1044. Critics, however, view the rule as obsolete, and the exception for bad faith litigation as overstrict. They have argued for reform, either through abolition of the rule, or enlarging the exception for vexatious lawsuits. *See, e.g., Birnbaum*, *supra* at 1082-1088; Ehrenzweig, “*Reimbursement of Counsel Fees and the Great Society*,” 54 Calif. L. Rev. 792 (1966); Kuenzel, “*The Attorney’s Fee: Why Not a Cost of Litigation?*” 49 Iowa L. Rev. 75 (1963); Mayer and Stix, “*The Prevailing Party Should Recover*

*Counsel Fees*,” 8 Akron L. Rev. 426 (1975); McLaughlin, “*The Recovery of Attorneys’ Fees: A New Method of Financing Legal Services*,” 40 Fordham L. Rev. 761 (1972); Stoebuck, “*Counsel Fees Included in Costs: A Logical Development*,” 38 U. Colo. L. Rev. 202 (1966); Note, “*Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*,” 44 U. Chi. L. Rev. 619 (1977); Note, “*Court Awarded Attorney’s Fees and Equal Access to the Courts*,” 122 U. Pa. L. Rev. 636 (1974); Note, “*Use of Taxable Costs to Regulate the Conduct of Litigants*,” 53 Colum. L. Rev. 78 (1953); Note, “*Detering Unjustifiable Litigation by Imposing Substantial Costs*,” 44 Ill. L. Rev. 507 (1949).

Section 78-27-56 was introduced as H.B. 100 in the 1981 General Session of the Utah legislature. As proposed, H.B. 100 abolished the American Rule and permitted courts to award fees to prevailing parties in civil suits. It was amended, however, by the House Judiciary Committee to allow fees only “if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith,” and was enacted in this form. Given these circumstances, Section 78-27-56 may have been intended to broaden slightly or merely to codify the exception for bad faith litigation as it had existed in Utah. The paucity of procedural guidance under Section 78-27-56 is probably due to an assumption by the legislature that the rules for taxing costs, post-judgment, would be used in enforcing the statute.

Despite the plain language of Section 78-27-56 and the intentions of the statute,

the trial court awarded attorney fees to Mr. Hales. The award is contrary to the statute and its intended purpose. Here, there is no evidence of bad faith litigation. Here, the court merely, and incorrectly so, made a finding that the agreements were entered into in bad faith. However, a review of the trial court's own findings reveals a different conclusion. The reasonable conclusion is that Elkridge had made mistakes, those mistakes are not evidence of bad faith. Broken promises are distinguishable from misrepresentations. And Mr. Hales, despite it all was an "at will employee." He had no experience in the mortgage business prior to meeting the Hopkins. He was hired in March and eight month later, in November, terminated. After termination, Hales sought other employment with a competitor mortgage broker, and Elkridge sought enforcement of what they believed were binding non-compete and non-disclosure agreements. Not a big deal. No fees or costs should have been awarded. In Utah, the American Rule of each side being reasonable for its own attorneys should have been followed and this is a classic example where fees should not have been awarded to the defendant. Quite simply, Section 78-27-56 is not helpful and cannot be used as an excuse to award Hales any fees either, there is just no evidence of bad faith. Once, the Hopkins lost the first round of litigation, the TRO hearing, the Hopkins have no longer sought enforcement of their agreements. As for Hales, he filed counterclaimed issues, they two were abandoned by Hales as well. So, Hales cannot even assert that the Hopkins' defenses to Hales's counterclaims were asserted in bad faith either.

**POINT TWO.**  
**DEFENDANT’S MOTION WAS NOT TIMELY, AND THEREFORE *WAIVED*.**

Rule 54, *Utah Rules of Civil Procedure* provides, inter alia:

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

Utah R. Civ. P. 54(d)(2). The language in this rule is mandatory where in it states “must within 5 days.” The judgment, along with the findings and conclusion were signed by this Court almost one year ago. Far in excess of the mandatory five day period. Clearly the request violates Rule 54 and therefore, Defendant’s motion is not timely made and should therefore be denied. Being interlocutory in nature, that decision is a final appealable order and any request for fees must follow within 5 days or must be

considered waived.

**POINT THREE.  
DEFENDANT’S REQUEST WAS NOT REASONABLY GROUNDED.**

This case was an action which dealt with signed agreements, contracts in another word. While the judgment was final and resolved all issues in the case, the hearing in this matter was actually a hearing on a temporary restraining order which took place in 2000. To spend anywhere between an alleged 114 to 150 hours in this type of action is clearly not reasonable. This is the type of case and action that generally would not have taken more than 5 to 10 hours, tops, to prepare and to prosecute or defend—for either side. The Hopkins recognize that the length of the trial was about one-and-a-half days – however the salient issues presented by Hales was rudimentary two-fold. *First*, accepting the Court’s ruling, the Covenant Not To Compete was overbroad; and *second*, there was a lack of consideration at the time the covenant was entered. In a case of this nature the evidence could have been presented much more streamlined and direct and saved the time of the court along with the party litigants. Because one party or the other takes a long time to present their case does not mean that it is reasonable. In this case, including in court time, 5 to 10 hours is the only time-frame that could be considered “reasonable” preparation. The prep-time cannot reasonably exceed the length of the trial time. Therefore, a reasonable request could not arguably exceed 10 to 20 hours, or in other

words \$3,000.00 total. Two of the hearings, Mr. Graham appeared telephonically for scheduling purposes requiring hardly any prep-time. The Court awarded Mr. Hales in excess of \$6,000.00 though.

**POINT FOUR.  
HALES'S AMENDED AFFIDAVIT OF COSTS AND  
ATTORNEY'S FEES WAS INADEQUATE TO CORRECT EARLIER  
MISTAKES.**

Hales asked for the outrageous amount of \$22,550.81 as attorney's fees in this matter, that request was wholly unreasonable. Hales claims 150.34 hours at \$150.00 per hour. On its face this would require very detailed time keeping, the type most attorneys never see, and in which this counsel the undersigned, has not seen in 19 years of practicing law. Hales's counsel would have to keep time records to the level of  $\frac{1}{2}$  of a minute. This is apparent because his time computation goes to the 1/100th of an hour (0.34) which equates to 6/10th of a minute or about 36 second per 1/100th of an hour. Counsel then did not provide any support for his position except a very general statement. A statement which makes it impossible to respond to except in very general terms. Counsel's affidavit was very general and woefully lacking hampering Elkridge's ability to respond with specifics, and therefore it begged to be denied. HERE, it begs to be reversed.

**POINT FIVE.**  
**COUNSEL'S OWN AFFIDAVIT WAS CONTRADICTORY LEADING TO**  
**CONFUSION AND LACK OF NOTICE TO PROPERLY DEFEND.**

In paragraph 2 of the affidavit, Hales's counsel claimed that 150.34 hours as being reasonable. In paragraph 4, counsel alleges that 114.57 hours is reasonable. A difference of 35.77 hours. This on its face creates questions of veracity with regards to what is reasonable or to be relied upon. Elkridge does not believe that either figure is reasonable but on its face Hales contradicts himself and both cannot be reasonable. This does not suggest that the less figure is acceptable, because of the arguments made therein are contrary to the law and lack sensibility. E.g., Hales's counsel contacted the FBI and sought to tax Elkridge for that cost. That's ridiculous. At any rate, Defendant's request should be denied for lack of reliability.

**POINT SIX. ELKRIDGE HAS NOT ASSERTED ANY FRIVOLOUS**  
**ISSUES OR ISSUES WITHOUT MERITORIOUS BELIEF.**

The Hopkins's case was based upon the parties' agreements between the party, which Hales signed of his own free will in May. In December, a month after termination, the Hopkins sought enforcement of these agreements. Hales resisted the enforcement of the agreements. Going to court as the parties did is the American way. The trial court found that the agreements to be unenforceable. That outcome was not foreseeable for the Hopkins – once the court made its judgment, the Plaintiffs accepted the court's ruling and



discontinued litigation. The Supreme Court in *Cady v. Johnson*, 671 P.2d 149 (Utah 1983), has laid out the criteria for the award of attorney fees. The Court indicated that attorney fees are not to be awarded to all prevailing parties but rather to only those who bring cases without merit and without good faith. In *Cady, supra*. there was a contract (a real estate purchase agreement) which was not contested. The issue in *Cady* was that there was some internal quotation marks (“ ”) which were missing—a very trivial issue. The Court found this issue to be frivolous or without merit. This is not at all similar to this case where the Hopkins were, in good faith, seeking the enforcement of the parties agreements and the court happened to rule that the agreements were unenforceable. Though the Hopkins did not prevail in the action they presented their claim based in law or fact *in good faith*. For this reason, Hales’s motion for attorney’s fees should have been denied. The second prong in *Cady* dealt with the question of good faith. “Good faith” is defined generally as “honesty of intention and the absence of malice.” *Flynn v. United States*, 902 F.2d 1524 (10th Cir. 1990) (*quoting Black’s Law Dictionary* 623 (5th ed. 1979)). This court reverse the judgment of the district court finding there was nothing in the record to support a defendant’s claim that the Hopkins litigated maliciously or in absence of good faith. And since the district court’s ruling, the Hopkins have discontinued attempts to enforce the voided agreements.

In the case at bar Hopkins in good faith brought their action to enforce the agreements, Exhibits 1 and 2, which was freely and voluntarily entered into between the

two parties. The three elements enumerated in *Cady* are lacking concerning attorneys fees. First and foremost, the issue was not asserted at the time of trial and was not proved. These are only assertions made by the defendant in this second request for attorneys fees. Defendant's second request does not provide even a sworn affidavit and no proof of this point was alleged at trial. This suit was a legitimate controversy between Plaintiffs and the defendant about the validity of signed agreements. The fact that one party over the other party prevails does not create a belief of bad faith in litigation. All the issues argued were substantial legal arguments for both side. Absent Mr. Graham's inability to keep addresses straight and his failure to date a certificate of mailing, this case has been very similar to any other controversy between any plaintiff and defendant. Judgment of the district court should be vacated.

### **CONCLUSION.**

In this matter, it is clear and convincing in light of the plain language of both Utah Code section 78-27-56 and 78-27-56.5, that the trial court abused its discretion in awarding Hales attorney's fees. It is the American Rule for each side to bear their own fees and costs. In this matter, as in any matter, the only time a party can be awarded fees under Utah Code section 78-27-56, is when the court finds that a party has acted in bad faith in the litigation. The trial court made no such findings. Besides, the application of Utah Code section 78-27-56 was also incorrect. Utah Code section 78-27-56 is not

available where there is a contract dispute. When there is a disputed contract, as there was in this matter, Utah Code section 78-27-56.5 applies in stead. Because no attorney fees provision was included in either of the parties' agreements disputed, no attorney's fees could be awarded pursuant to section 78-27-56.5.

RESPECTFULLY SUBMITTED this 22<sup>ND</sup> day of

June, 2007.



D. BRUCE OLIVER

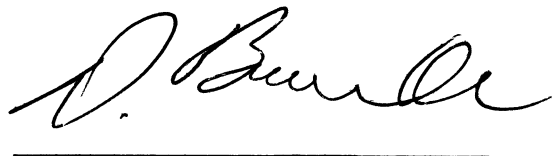
Attorney for Plaintiffs – Appellants

#### CERTIFICATE OF SERVICE.

I, D. Bruce Oliver, hereby certify that on this 22<sup>ND</sup> day of June, 2007, I mailed two true and correct copies of the foregoing **BRIEF OF APPELLANTS**, postage prepaid, to:

Stanford A. Graham #6392  
STANFORD A. GRAHAM, P.C.  
4548 South Atherton Drive  
Salt Lake City, Utah 84123

Attorney for Bill Hales



## ADDENDUM A

Stanford A. Graham (6392)  
STANFORD A. GRAHAM, P.C.  
2120 North Valley View Drive  
Layton, Utah 84040  
Telephone: (801) 497-0094  
Facsimile: (801) 497-0982

Attorney for Defendant

JUL 4 2006  
CLERK OF COURT  
SANPETE  
BY *R. Brown*

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IN THE SIXTH JUDICIAL DISTRICT – MANTI COURT  
SANPETE COUNTY, STATE OF UTAH

---

MARK HOPKINS and KATHY HOPKINS  
dba ELK RIDGE FINANCIAL

Plaintiffs,

vs.

BILL HALES,

Defendant.

**ORDER FOR JUDGEMENT**

Civil No. 990600458  
Judge Mower

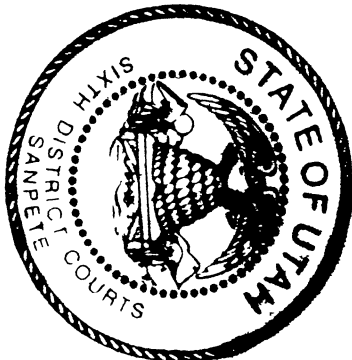
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Based on the Court's Notice filed on June 1, 2006, the Court orders the following:

An Order for Judgement for attorney's fees in the amount of \$6,085.00 shall be awarded  
to Defendant.

DATED this 26 day of July, 2006.

BY THE COURT:



*David L. Mower*  
\_\_\_\_\_  
JUDGE DAVID L. MOWER  
Sixth Judicial District Court Judge

## ADDENDUM B

NON-COMPETE AGREEMENT

PLAINTIFF'S EXHIBIT	
EXHIBIT NO	# 1
CASE NO	990600458
DATE REC'D IN EVIDENCE	5-3-00
CLERK	SU

FOR GOOD CONSIDERATION, the undersigned jointly and severally covenant and agree not to compete with the business of Elkridge Financial (Company) and its lawful successors and assigns.

The term "non-compete" as used herein shall mean that the Undersigned shall not directly or indirectly engage in a business or other activity described as. Loan Brokerage Service notwithstanding whether said participation be as an owner, officer, director, employee, agent, consultant, partner or stockholder (excepting as a passive investment in a publicly owned company).

This covenant shall extend only for a radius of 100 miles from the present location of the Company at 97South Main, Gunnison, Utah, 84634 and shall remain in full force and effect for 5 years from date hereof.

In the event of any breach, the Company shall be entitled to full injunctive relief without need to post bond, which rights shall be cumulative with and not necessarily successive or exclusive of any other legal rights.

This agreement shall be binding upon and inure to the benefit of the parties, their successors, assigns and personal representatives.

Signed this                      day of

Witnessed:

Witness

Witness

 5-13-99

## ADDENDUM C



PLAINTIFF'S EXHIBIT	
EXHIBIT NO.	# 2
CASE NO.	990600458
DATE REC'D IN EVIDENCE	5-3-00
CLERK	SU

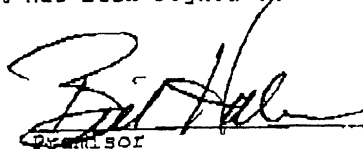
# NON-DISCLOSURE AGREEMENT

To induce Elkridge Financial (Client) to retain Bill Halos (Promisor) as an outside consultant and to furnish Promisor with certain information that is proprietary and confidential, Promisor hereby warrants, represents, covenants, and agrees as follows:

1. Engagement. Promisor, in the course of engagement by Client, may or will have access to or learn certain information belonging to Client that is proprietary and confidential (Confidential Information).
2. Definition of Confidential Information. Confidential Information as used throughout this Agreement means any secret or proprietary information relating directly to Client's business and that of Client's affiliated companies and subsidiaries, including, but not limited to, products, customer lists, pricing policies, employment records and policies, operational methods, marketing plans and strategies, product development techniques or plans, business acquisition plans, new personnel acquisition plans, methods of manufacture, technical processes, designs and design projects, inventions and research programs, trade "know-how," trade secrets, specific software, algorithms, computer processing systems, object and source codes, user manuals, systems documentation, and other business affairs of Client and Client's affiliated companies and subsidiaries.
3. Nondisclosure. Promisor agrees to keep strictly confidential all Confidential Information and will not, without Client's express written authorization, signed by one of Client's authorized officers, use, sell, market, or disclose any Confidential Information to any third person, firm, corporation, or association for any purpose. Promisor further agrees to not make any copies of the Confidential Information except upon Client's written authorization, signed by one of Client's authorized officers, and will not remove any copy or sample of Confidential Information from the premises of Client without such authorization.
4. Return of Material. Upon receipt of written request from Client, Promisor will return to Client all copies or samples of Confidential Information that, at the time of the receipt of the notice, are in Promisor's possession.
5. Obligations Continue Past Term. The obligations imposed on Promisor shall continue with respect to each unit of the Confidential Information following the termination of the business relationship between Promisor and Client, and such obligations shall not terminate until such unit shall cease to be secret and confidential and shall be in the public domain, unless such event shall have occurred as a result of wrongful conduct by Promisor or Promisor's agents, servants, officers, or employees or a breach of the covenants set forth in this Agreement.
6. Equitable Relief. Promisor acknowledges and agrees that a breach of the provisions of Paragraph 3 or 4 of this Agreement would cause Client to suffer irreparable damage that could not be adequately remedied by an action at law. Accordingly, Promisor agrees that Client shall have the right to seek specific performance of the provisions of Paragraph 3 to enjoin a breach or attempted breach of the provisions thereof, such right being in addition to all other rights and remedies that are available to Client at law, in equity, or otherwise.

IN WITNESS WHEREOF, this Agreement has been signed this \_\_\_\_\_ day of \_\_\_\_\_

Witness \_\_\_\_\_

 5-13-99  
Promisor

## ADDENDUM D

Stanford A. Graham (6392)  
STANFORD A. GRAHAM, P.C.  
2120 North Valley View Drive  
Layton, Utah 84040  
Telephone: (801) 497-0094  
Facsimile: (801) 497-0982

Attorney for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY

CITY OF EPHRAIM, STATE OF UTAH

MARK HOPKINS and KATHY HOPKINS  
dba ELK RIDGE FINANCIAL

Plaintiff,

vs.

BILL HALES

Defendant.

**FINDING OF FACTS  
AND  
CONCLUSIONS OF LAW**

Civil No. 990600458  
Judge: David L. Mower

An evidentiary hearing on Plaintiff's Motion for Temporary Restraining Order having been heard before the honorable David L. Mower on June 21, 2000, with Plaintiffs represented by their counsel, Douglas L. Neeley, and Defendant represented by his counsel, Stanford A. Graham, and based upon the pleadings herein and oral argument heard, the Court enters the following Findings of Fact and Conclusions of Law.

**FINDING OF FACTS**

1. Mark Hopkins and Kathy Hopkins (hereinafter "Hopkins") are individuals residing in Gunnison City, Sanpete County, Utah.

2. Hopkins are sole proprietors, of Elkridge Financial (hereinafter "Elkridge").  
Elkridge is a registered d/b/a to Mark Hopkins and Kathy Hopkins. Elkridge and Hopkins provide mortgage broker services.
3. The principal place of business of Elkridge is in Gunnison City, Sanpete County, Utah.
4. Mark Hopkins is an equal partner with Kathy Hopkins in Elkridge, he has been employed full-time with Elkridge since January 1, 1998.
5. Hopkins began doing business as Elkridge on or about February, 1997.
6. Bill Hales (hereinafter "Hales") is a resident of Severe County, State of Utah.
7. Hopkins and Hales became acquainted on or about March, 1999, when Hales sought to obtain a loan through the services of Elkridge.
8. Shortly thereafter, on or about March, 1999, Hales and Hopkins entered into a business relationship whereby Hales was employed by Elkridge as an independent contractor and consultant. Prior to this employment relationship, Hales had no experience in the loan or mortgage broker industry, other than his experience in obtaining his own personal loans. At the initial employment of Hales, Hopkins agreed to pay Hales \$2,000.00 per month. Hales was to be a traveling loan originator, soliciting loans for Elkridge.
9. Elkridge did not provide a written employment agreement to Hales at the time of his initial employment.
10. The training which Hales received from Elkridge included; learning how to fill out a loan application and learning the documents that loan applicants would need to provide to support their loan applications. All other information which Hales learned concerning the mortgage lending

business he learned on his own and through his own efforts. Elkridge provided no other instruction to Hales either directly through its own efforts or indirectly through instruction such as, seminars, professional training or otherwise. Hales received extensive sales training and experience prior to his employment with Elkridge through his involvement with Amway International. Such sales training and experience included; attendance at professional sales seminars, the purchase and study of volumes of sales and professional materials on how to start and progress a personal business and Internet businesses. Hales brought this education, training and experience with him to Elkridge.

11. Prior to his business relationship with Hopkins, Hales had worked as a police officer and received compensation which included benefits such as health insurance, retirement and others.

12. On or about May 13, 1999, nearly seven weeks after Hales' initial employment, Hopkins presented a non-competition agreement and non-disclosure agreement to Hales. The limitations contained in the non-competition agreement consisted of a time restraint of five (5) years and a geographical restriction of a 100 miles radius from Elkridge's principal place of business in Gunnison, Utah, to Hales, an area of 31,400 square miles. The terms of the non-disclosure agreement are so broadly drafted that many do not apply to Elkridge's business. In addition, the Hopkins was not familiar with and did not understand many of the terms of the non-disclosure agreement. During closing arguments, the Hopkins offered to amend the non-compete agreement by reducing the geographical restrictions and time limitations contained therein.

13. As an inducement to persuade Hales to sign the agreements, the Hopkins represented that they would promote Hales in the business, increase his compensation, and provide benefits to him, including health insurance. Moreover, Hopkins represented to Hales that he would

become an equity owner in the near future incorporation of Elkridge. The Hopkins did not intend to fulfill these promises.

14. In reliance on these representations, Hales signed the non-compete and non-disclosure agreements.

15. During this same time in May, Mrs. Hopkins contacted Hales' sister, Tami Baugh. The two had recently become reacquainted through Hales recent association with Hopkins. During these communications, Mrs. Hopkins represented to Mrs. Baugh that Hopkins and Elkridge would obtain health insurance for Hales, that Hales future was bright with Elkridge, that soon Hales would be making commissions in addition to his base compensation of \$2,000.00 a month and that Hales would have nothing to worry about financially.

16. At the beginning of his employment, Hales performed routine office work including data entry, loan applications and answering phone calls.

17. Earlier in the year, the Hopkins determined to open an office in Richfield, Utah.

18. The Richfield office was opened on approximately April, 1999. At this time, Elkridge had been in business for over two (2) years and had established good business relations and good will with lenders, investors, appraisers, banks and other business entities in their area. Mark Hopkins initially manned the Richfield office until August, 1999. At this time Mr. Hopkins personally visited real estate agents and real estate brokers in the area, lenders, local banks, builders and title companies all in an effort to build and further strengthen existing business relations and good will between Elkridge and these entities.

19. In or about July, 1999, the Hopkins informed Hales that he, alone, would be manning the Richfield office. Hales manned the Richfield office beginning in August, 1999.

20. Hales' responsibilities in Richfield included continuing his work as a loan originator, soliciting loans for Elkridge, answering the office telephone and soliciting loans via the telephone, meeting people in the Richfield office and opening and closing the office during normal business hours from 9:00 a.m. to 5:00 p.m., five (5) days a week.

21. Elkridge designated Hales as the "manager" of the Richfield office. Hales was the only individual in the Richfield office. He was responsible for managing his own time and conduct and not that of any other individual or entity.

22. In September, 1999, approximately one (1) month after entering the Richfield office, Hales was informed by Mr. Hopkins that Hales would need to look for new work due to Elkridge's difficulty and inability to pay him and because of Mr. Hopkins' dissatisfaction with Hales' work.

23. Hales immediately began a diligent search for new employment. In October and November, 1999, Mr. Hopkins reiterated his position that Hales seek and obtain new employment due to Elkridge's difficulty and inability to pay him and due to his continuing dissatisfaction with Hales' work.

24. Hales' search for other employment included submission of applications to the local prison and local law enforcement agencies. Hales pursued these earnestly in an effort to obtain other employment. These searches, however, were fruitless. Hales also began searching for other employment with other mortgage brokers.

25. Meanwhile, Hales continued his work for Hopkins and Elkridge, soliciting loans and acquiring information and applications for potential loan applicants.

26. During September, October and November, Hales informed Mrs. Hopkins of the representations made by Mr. Hopkins that Hales would need to find new work. On each such occasion, Mrs. Hopkins assured Hales that his business relationship with Elkridge was secure, that he did not have to worry. Notwithstanding these representations from Mrs. Hopkins, Hales continued the search for other employment from September through November, 1999, that would allow him to adequately support his family.

27. In or about June, 1999, Hales asked the Hopkins about the benefits they promised to provide him at the time he signed the non-disclosure and non-competition agreements. Hales was very anxious about securing health insurance for his family. Hales spoke with Mrs. Hopkins about this on numerous occasions over a number of months. On each of those occasions, Mrs. Hopkins would represent that the matter would be worked out, that Elkridge was looking into obtaining the insurance for Hales and that Elkridge would acquire the health insurance for Hales very soon.

28. Although Mrs. Hopkins continually represented to Hales that she and Elkridge would obtain health insurance for Hales, the representations were never fulfilled. Neither health insurance nor any other benefits which the Hopkins promised Hales at the time of his signing the non-competition and non-disclosure agreements were provided.

29. Hales was not included as an equity owner in the incorporation of Elkridge, as promised. His compensation was not increased, as promised.

30. In November, 1999, Hales informed Mrs. Hopkins that he would be taking a day off in December to pick up his mother from the Salt Lake City Airport upon her return from visiting her ailing father. Thereafter, Hales learned from his mother that she had arrived a few days early and that he would not need to pick her up.



31. Hales did not advise Mrs. Hopkins of this communication, he felt that as an independent contractor, he had no duty to do so.

32. Hales took the requested day off to prepare for the Christmas season, purchasing gifts for his family, rather than retrieving his mother from the Salt Lake City Airport.

33. On this same day, December 6, 1999, Mrs. Hopkins, through various phone calls, learned that Hales' mother was not out of town as Hales had represented to her approximately one (1) week before.

34. Upon learning this information, Mrs. Hopkins contacted Hales to inquire about the seeming inconsistency of Hales' earlier statements.

35. Hales explained to Mrs. Hopkins what had happened concerning his representations to her, his mother's early arrival and his decision to take the day off to prepare for the Christmas holidays.

36. Mrs. Hopkins accused Hales of lying to her and terminated the business relationship on the spot.

37. Mrs. Hopkins expressed her unwillingness about having to pay Hales for the day that he had taken off from work at the rate of \$100.00 per day. Hales told Mrs. Hopkins that she was not obligated to pay him and instructed her not to pay him for the day that he took off.

38. During this same conversation, Mrs. Hopkins instructed Hales to relinquish his keys to the Richfield office and the files which he was working for Elkridge.

39. Hales promptly did so.

40. Pursuant to his earlier employment search efforts, Hales immediately contacted another mortgage broker to pursue employment opportunities. Such pursuit was fruitful and Hales began to solicit loans for the new mortgage brokerage company towards the end of December, 1999, about three (3) weeks after his termination.

41. Hopkins learned of Hales activities in December, 1999, and filed a complaint against him for breach of the non-competition and non-disclosure agreements. Hopkins also contemporaneously filed a motion for temporary restraining order and injunction, seeking an order to prevent Hales from continuing to solicit loans within the 31,400 square mile area identified in the non-competition agreement, for a period of five (5) years.

42. Hales ceased his business activity immediately until he recommenced on March 15, 2000.

43. From the time that Elkridge terminated its business relationship with Hales, to date, June 30, 2000, Hales has been involved in procuring five loans. None of the individuals for whom loans were acquired were customers of Elkridge. Nor were these loan applicants obtained by Hales through the use of the information he acquired from Elkridge.

44. In 1998 and 1999, Elkridge obtained loan approvals at the rate of 25 to 40 per month. That rate has been maintained or has increased since the time Hales was terminated. Elkridge failed to identify any of its customer that ceased doing business with Elkridge to do business with Hales. Hales has encouraged at least one (1) Elkridge customer, a personal friend, to continue to do business with Elkridge and not with Hales.

45. Elkridge has succeeded in its business as a mortgage broker in rural Utah because of the Hopkins' willingness to maintain close and consistent communications with their customers, working closely with local appraisers and packaging loan information acquired from its customers for lenders and investors. Elkridge and Hopkins work hard to obtain the necessary information from its customers and to gain approval of their loan applications by determining what information lenders and investors need and how that information needs to be packaged. These efforts made by the Hopkins have created good will between Elkridge and its customers.

46. Elkridge provides services as a mortgage broker in the areas of long term financing and debt consolidation.

47. Compensation for Elkridge's services are easily calculated based on precise, fixed and easily determined broker origination fees and interest on principal loan amounts.

48. Since it began business on approximately February, 1997, Elkridge has built its business through word of mouth, radio ads and other public promotions. Other mortgage companies in the area knew and were aware of these promotional efforts and methods. There are at least seven (7) other mortgage brokerage companies within a twenty (20) mile radius of Elkridge's principal place of business.

49. During Hales' business relation with Elkridge, Hales did not participate in same business promoting activities that Hopkins did. Rather, he simply solicited individuals to determine their needs for mortgage loan services.

50. Hales was specifically instructed by the Hopkins not to contact lenders, investors, appraisers or any other service provider unless they instructed him to do so. Hales activities were

limited to acquiring loan application information and supporting documentation from customers, unless he was instructed to do otherwise by Mrs. Hopkins.

51. Hopkins' and Elkridge's clientele is focused in Sanpete and Sevier County and lies within a twenty mile radius of Elkridge's principal place of business in Gunnison, Utah.

52. Hales did not develop any products for Elkridge. Hales' name, picture and position with Elkridge were not extensively promoted through advertising media.

53. Hales was featured in a small number of Elkridge radio advertisements, but no more than five (5).

### **CONCLUSIONS OF LAW**

1. To be enforceable, a non-compete agreement must be supported by consideration. The non-compete agreement was provided to Hales after the time of his initial employment. Although he was promised additional benefits and compensation to entice him to sign the non-compete and non-disclosure agreements, none of those benefits were increased compensation were ever provided. Therefore, the non-compete and non-disclosure agreements were not supported by consideration and are therefore unenforceable.

2. In addition, the non-compete agreement is enforceable if there is no bad faith involved in the contract negotiations. The non-compete and non-disclosure agreements were not negotiable but were provided to Hales in a take it or leave it fashion. Moreover, Hopkins engaged in bad faith negotiations by promising consideration in exchange for Hales' signature and thereafter failing to provide that consideration. Therefore, the non-compete and non-disclosure agreements are unenforceable.

3. In addition, the non-compete agreements are enforceable if they are necessary to protect the good will of the company. The non-compete agreement between Elkridge and Hales was not necessary to protect Elkridge's good will. Its good will was created by the Hopkins, not by Hales. Hales' brief work history with Elkridge, together with the lack of extensive advertising demonstrate that any good will enjoyed by Elkridge is a product of the Hopkins work over the last three (3) years and was not created in any significant way by Hales. Therefore, the non-compete agreement is unenforceable. Elkridge did not provide any substantial training to Hales during his employment, therefore, the non-competition agreement was not necessary to protect any substantial investment made by Elkridge into the training of Hales.

4. In addition, non-compete agreements are enforceable if they are reasonable in their restrictions as to time and geographical area. The geographical area of 31,400 square miles is not reasonable. This area is calculated based on the non-compete agreement's radius measurement of 100 miles from Elkridge's principal place of business. Elkridge's business comes substantially from within a twenty (20) mile radius of its principal place of business because the geographical restriction is not reasonable, the non-compete agreement is unenforceable. The time restraint of five (5) years included in the non-compete agreement is not reasonable, particularly when considered together with the unreasonable geographical restriction. Therefore, the non-compete agreement is unenforceable.

5. In addition, non-compete agreements are enforceable if the services rendered by the employee were special, unique or extraordinary. Hales' duties as an independent contractor did not constitute special, unique or extraordinary services. Hales' services were comprised of rather routine

office work and sales. Although Hales' services may have been valued highly by Elkridge, they consisted of the exercise of a common calling -- that of a salesman. Therefore, the non-compete agreement is unenforceable.

6. Hales has a right to engage in the common calling of a salesman. The knowledge and training he acquired and which he used in selling mortgage loan services was knowledge and training he acquired prior to his employment with Elkridge. The skills which he obtained and developed through his work with Elkridge belong to him.

7. The broad and unrestrained language of the non-compete agreement is not limited by any restrictions related to the uniqueness of Hales' services or competitive unfairness. It does no more than restrain competition.

8. The non-compete and non-disclosure agreements were entered into after the initial employment of Hales and were not ancillary to any written employment contract.

9. To be enforceable, a non-compete agreement must be supported by consideration, cannot be the product of bad faith negotiations, must be necessary to protect the employer's good will, must be reasonable in its restrictions as to time and area, the employee's services must be special, unique or extraordinary, cannot restrain the right to engage in a common calling and cannot baldly restrain competition.

10. For a temporary restraining order to issue, Hopkins must prove irreparable harm. Hopkins have failed to do so. Any damages which Hopkins sustained, if any, are easily calculable and are not subject to conjecture or speculation. Damages, if any, are compensable in money.

11. Hales did not maintain a position with Elkridge for any significant duration of time that would allow him to become a competitive threat to Elkridge. In addition, the nature of his position did not allow him to acquire the relationships with business entities that would prove to be a threat to Elkridge. Hales' responsibilities did not put him in a position of familiarity with the public so as to be a threat to Elkridge. Hales' position did not allow him to obtain any technological or specialized expertise so as to be a threat to Elkridge.

12. The threatened injury to Elkridge does not outweigh the damage Hales will sustain if a temporary restraining order is issued. If an order is issued, Hales will be required to seek employment at least 100 miles from Gunnison, Utah. This may require him to relocate his entire family or to spend a total of four (4) hours commuting to and from work. Hales has sought alternate employment in the restricted area. However, such searches have proved fruitless. If the order does not issue, Elkridge will not sustain any significant damage. It has built a business reputation and clientele, good will and business contacts that cannot be endangered by Hales alone. Therefore, the injury to Hales, if the order issues, far outweighs any injury which Elkridge may suffer.

13. The order, if issued pursuant to Elkridge's requests, would be adverse to the public interest. It is bad public policy to issue orders based on unenforceable contracts. Additionally, it is bad public policy to issue orders based on contracts negotiated in bad faith. Because the non-compete agreement is not enforceable and because it is a product of bad faith representations, the order cannot be issued.

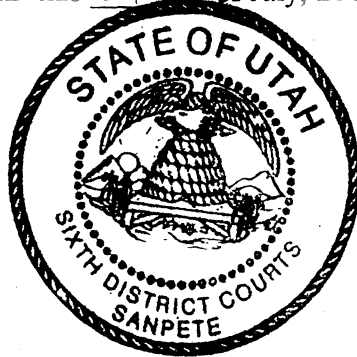
14. There is no substantial likelihood that Elkridge will prevail on the merits of its underlying claim. The non-compete agreement is not enforceable. In addition, its language is over broad. Moreover, the broad and over reaching language of the non-disclosure agreement is not

supported by the mutual intent of the parties. Elkridge is not aware of the meaning of its own contract. Therefore, a meeting of the minds is not possible. The contract is unenforceable.

15. For a temporary restraining order to issue, the four following elements must be satisfied:

- (a) Elkridge damages must be irreparable;
- (b) The damage to Elkridge if the order issues must outweigh the injury to Hales;
- (c) Issuing the order must not be adverse to public interest; and
- (d) Elkridge must demonstrate a substantial likelihood of prevailing at trial on the merits of its underlying claim.

DATED this 27 day of July, 2000.



BY THE COURT:

JUDGE DAVID L. MOWER  
Sixth Judicial District Court Judge

#### MAILING CERTIFICATE

I hereby certify that on the 19<sup>th</sup> day of July, 2000, I mailed, via first class mail, postage prepaid, a true and exact copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the following:

Douglas L. Neeley, Esq.  
96 South Main Street, Suite 5-15  
Ephraim, Utah 84627



## ADDENDUM E

Stanford A. Graham (6392)  
STANFORD A. GRAHAM, P.C.  
2120 North Valley View Drive  
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Telephone: (801) 497-0094  
Facsimile: (801) 497-0982

Attorney for Defendant

100 JUL 27 07 11 43

CRIST, J. L. JUDGE  
SALVENDY, J. L. JUDGE

BY Dheelson

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY

CITY OF EPHRAIM, STATE OF UTAH

MARK HOPKINS and KATHY HOPKINS  
dba ELK RIDGE FINANCIAL

Plaintiff,

vs.

BILL HALES

Defendant.

**ORDER DENYING PLAINTIFFS'  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Civil No. 990600458

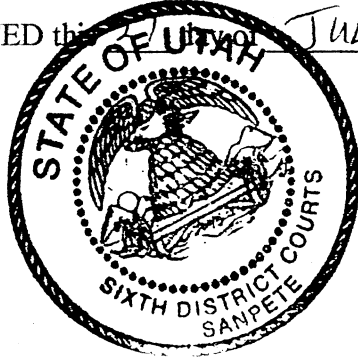
Judge: David L. Mower

Based on the Findings of Fact and Conclusions of Law, the Court orders the following:

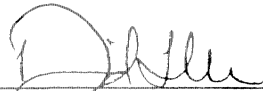
1. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is denied.
2. Plaintiff's non-disclosure agreement and non-compete agreement are not enforceable in law or equity.

3. Defendant may lawfully engage in business in competition with Plaintiffs.
4. Plaintiffs shall pay attorney's fees that Defendant has incurred.

DATED this 19<sup>th</sup> day of July, 2000.



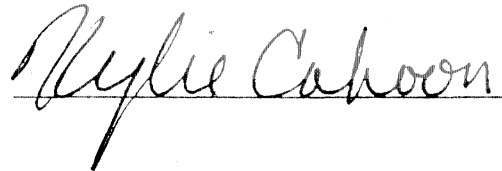
BY THE COURT:

  
JUDGE DAVID L. MOWER  
Sixth Judicial District Court Judge

**MAILING CERTIFICATE**

I hereby certify that on the 19<sup>th</sup> day of July, 2000, I mailed, first class, postage prepaid, a true and exact copy of the foregoing **ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**, to the following:

Douglas L. Neeley  
96 South Main Street, Suite 5-15  
Ephraim, Utah 84627



## ADDENDUM F

Stanford A. Graham (6392)  
STANFORD A. GRAHAM, P.C.  
2120 North Valley View Drive  
Layton, Utah 84040  
Telephone: (801) 497-0094  
Facsimile: (801) 497-0982

17  
BY RBennett

Attorney for Defendant

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IN THE SIXTH DISTRICT COURT OF SANPETE COUNTY  
CITY OF EPHRAIM, STATE OF UTAH

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MARK HOPKINS and KATHY HOPKINS	)	
dba ELK RIDGE FINANCIAL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BILL HALES,	)	
	)	
Defendant.	)	

---

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

Civil No. 990600458

An evidentiary hearing on Plaintiffs' Motion for Temporary Restraining Order having been heard before the honorable David L. Mower on June 21, 2000, with Plaintiffs represented by their counsel, Douglas L. Neeley, and Defendant represented by his counsel, Stanford A. Graham, and based upon the pleadings herein and oral argument heard, the Court enters the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Mark Hopkins and Kathy Hopkins (hereinafter "Hopkins") are individuals residing in Gunnison City, Sanpete County, Utah.

2. Hopkins are sole proprietors, of Elkridge Financial (hereinafter "Elkridge"). Elkridge is a registered d/b/a to Mark Hopkins and Kathy Hopkins. Elkridge and Hopkins provide mortgage broker services.

3. The principal place of business of Elkridge is in Gunnison City, Sanpete County, Utah

4. Mark Hopkins is an equal partner with Kathy Hopkins in Elkridge, he has been employed full-time with Elkridge since January 1, 1998.

5. Hopkins began doing business as Elkridge on or about February, 1997.

6. Bill Hales (hereinafter "Hales") is a resident of Severe County, State of Utah.

7. Hopkins and Hales became acquainted on or about March, 1999, when Hales sought to obtain a loan through the services of Elkridge.

8. Shortly thereafter, on or about March, 1999, Hales and Hopkins entered into a business relationship whereby Hales was employed by Elkridge as an independent contractor and consultant. Prior to this employment relationship, Hales had no experience in the loan or mortgage broker industry, other than his experience in obtaining his own personal loans. At the initial employment of Hales, Hopkins agreed to pay Hales \$2,000.00 per month. Hales was to be a traveling loan originator, soliciting loans for Elkridge.

9. Elkridge did not provide a written employment agreement to Hales at the time of his initial employment.

10. The training which Hales received from Elkridge included; learning how to fill out a loan application and learning the documents that loan applicants would need

to provide to support their loan applications. All other information which Hales learned concerning the mortgage lending business he learned on his own and through his own efforts. Elkridge provided no other instruction to Hales either directly through its own efforts or indirectly through instruction such as, seminars, professional training or otherwise. Hales received extensive sales training and experience prior to his employment with Elkridge through his involvement with Amway International. Such sales training and experience included; attendance at professional sales seminars, the purchase and study of volumes of sales and professional materials on how to start and progress a personal business and Internet businesses. Hales brought this education, training and experience with him to Elkridge.

11. Prior to his business relationship with Hopkins, Hales had worked as a police officer and received compensation which included benefits such as health insurance, retirement and others.

12. On or about May 13, 1999, nearly seven weeks after Hales' initial employment, Hopkins presented a non-competition agreement and non-disclosure agreement to Hales. The limitations contained in the non-competition agreement consisted of a time restraint of five (5) years and a geographical restriction of a 100 miles radius from Elkridge's principal place of business in Gunnison, Utah, to Hales, and area of 31,400 square miles. The terms of the non-disclosure agreement are so broadly drafted that many do not apply to Elkridge's business. In addition, the Hopkins was not familiar with and did not understand many of the terms of the non-disclosure agreement. During closing arguments, the Hopkins offered to amend the non-compete agreement by reducing the geographical restrictions and time limitations contained therein.

13. As an inducement to persuade Hales to sign the agreements, the Hopkins represented that they would promote Hales in the business, increase his compensation, and provide benefits to him, including health insurance. Moreover, Hopkins represented to Hales that he would become an equity owner in the near future incorporation of Elkridge. The Hopkins did not intend to fulfill these promises.

14. In reliance on these representations, Hales signed the non-compete and non-disclosure agreements.

15. During this time in May, Mrs. Hopkins contacted Hales' sister, Tami Baugh. The two had recently become reacquainted through Hales recent association with Hopkins. During these communications, Mrs. Hopkins represented to Mrs. Baugh that Hopkins and Elkridge would obtain health insurance for Hales, that Hales future was bright with Elkridge, that soon Hales would be making commission in addition to his base compensation of \$2,000.00 a month and that Hales would have nothing to worry about financially.

16. At the beginning of his employment, Hales performed routine office work including data entry, loan applications and answering phone calls.

17. Earlier in the year, the Hopkins determined to open an office in Richfield, Utah.

18. The Richfield office was opened on approximately April, 1999. At this time, Elkridge had been in business for over two (2) years and had established good business relations and good will with lenders, investors, appraisers, banks and other business entities in their area. Mark Hopkins initially manned the Richfield office until August, 1999. At this time Mr. Hopkins personally visited real estate agents and real



estate brokers in the area, lenders, local banks, builders and title companies all in an effort to build and further strengthen existing business relations and good will between Elkridge and these entities.

19. In or about July, 1999, the Hopkins informed Hales that he, alone, would be manning the Richfield office. Hales manned the Richfield office beginning in August, 1999.

20. Hales' responsibilities in Richfield included continuing his work as a loan originator, soliciting loans for Elkridge, answering the office telephone and soliciting loans via the telephone, meeting people in the Richfield office and opening and closing the office during normal business hours from 9:00 a.m. to 5:00 p.m., five (5) days a week.

21. Elkridge designated Hales as the "manager" of the Richfield office. Hales was the only individual in the Richfield office. He was responsible for managing his own time and conduct and not that of any other individual or entity.

22. In September, 1999, approximately one (1) month after entering the Richfield office, Hales was informed by Mr. Hopkins that Hales would need to look for new work due to Elkridge's difficulty and inability to pay him and because of Mr. Hopkins' dissatisfaction with Hales' work.

23. Hales immediately began a diligent search for new employment. In October and November, 1999, Mr. Hopkins reiterated his position that Hales seek and obtain new employment due to Elkridge's difficulty and inability to pay him and due to his continuing dissatisfaction with Hales' work.

24. Hales' search for other employment included submission of applications to the local prison and local law enforcement agencies. Hales pursued these earnestly in

an effort to obtain other employment. These searches, however, were fruitless. Hales also began searching for other employment with other mortgage brokers.

25. Meanwhile, Hales continued his work for Hopkins and Elkridge, soliciting loans and acquiring information and applications for potential lion applicants.

26. During September, October and November, Hales informed Mrs. Hopkins of the representations made by Mr. Hopkins that Hales would need to find new work. On each such occasion, Mrs. Hopkins assured Hales that his business relationship with Elkridge was secure, that he did not have to worry. Notwithstanding these representations from Mrs. Hopkins, Hales continued the search for other employment from September through November, 1999, that would allow him to adequately support his family.

27. In or about June, 1999, Hales asked the Hopkins about the benefits they promised to provide him at the time he signed the non-disclosure and non-competition agreements. Hales was very anxious about securing health insurance for his family. Hales spoke with Mrs. Hopkins about this on numerous occasions over a number of months. On each of those occasions, Mrs. Hopkins would represent that the matter would be worked out, that Elkridge was looking into obtaining the insurance for Hales and that Elkridge would acquire the health insurance for Hales very soon.

28. Although Mrs. Hopkins continually represented to Hales that she and Elkridge would obtain health insurance for Hales, the representations were never fulfilled. Neither health insurance nor any other benefits which the Hopkins promised Hales at the time of his signing the non-competition and non-disclosure agreements were provided.

29. Hales was not included as an equity owner in the incorporation of Elkridge, as promised. His compensation was not increased, as promised.

30. In November, 1999, Hales informed Mrs. Hopkins that he would be taking a day off in December to pick up his mother from Salt Lake City Airport upon her return from visiting her ailing father. Thereafter, Hales learned from his mother that she had arrived a few days early and that he would need to pick her up.

31. Hales did not advise Mrs. Hopkins of this communication, he felt that as an independent contractor, he had no duty to do so.

32. Hales took the requested day off to prepare for the Christmas season, purchasing gifts for his family, rather than retrieving his mother from the Salt Lake City Airport.

33. On this same day, December 6, 1999, Mrs. Hopkins, through various phone calls, learned that Hales' mother was not out of town as Hales had represented to her approximately one (1) week before.

34. Upon learning this information, Mrs. Hopkins contacted Hales to inquire about the seeming inconsistency of Hales' earlier statements.

35. Hales explained to Mrs. Hopkins what had happened concerning his representations to her, his mother's early arrival and his decision to take the day off to prepare for the Christmas holidays.

36. Mrs. Hopkins accused Hales of lying to her and terminated the business relationship on the spot.

37. Mrs. Hopkins expressed her unwillingness about having to pay Hales for the day that he had taken off from work at the rate of \$100.00 per day. Hales told Mrs.

Hopkins that she was not obligated to pay him and instructed her not to pay him for the day that he took off.

38. During this same conversation, Mrs. Hopkins instructed Hales to relinquish his keys to the Richfield office and the files which he was working for Elkridge.

39. Hales promptly did so.

40. Pursuant to his earlier employment search efforts, Hales immediately contacted another mortgage broker to pursue employment opportunities. Such pursuit was fruitful and Hales began to solicit loans for the new mortgage brokerage company towards the end of December, 1999, about three (3) weeks after his termination.

41. Hopkins learned of Hales activated in December, 1999, and filed a complaint against him for breach of the non-competition and non-disclosure agreements. Hopkins also contemporaneously filed a motion for temporary restraining order and injunction, seeking an order to prevent Hales from continuing to solicit loans with the 31,400 square mile area identified in the non-competition agreement, for a period of five (5) years.

42. Hales ceased his business activity immediately until he recommenced on March 15, 2000.

43. From the time that Elkridge terminated its business relationship with Hales, to date, June 30, 2000, Hales has been involved in procuring five loans. None of the individuals from whom loans were acquired were customers of Elkridge. Nor were these loan applicants obtained by Hales through the use of the information he acquired from Elkridge.

44. In 1998 and 1999, Elkridge obtained loan approvals at the rate of 25 to 40 per month. That rate has been maintained or has increased since the time Hales was terminated. Elkridge failed to identify any of its customers that ceased doing business with Elkridge to do business with Hales. Hales has encouraged at least one (1) Elkridge customer, a personal friend, to continue to do business with Elkridge and not with Hales.

45. Elkridge has succeeded in its business as a mortgage broker in rural Utah because of the Hopkins' willingness to maintain close and consistent communications with their customers, working closely with local appraisers and packaging loan information acquired from its customers for lenders and investors. Elkridge and Hopkins work hard to obtain the necessary information from its customers and to gain approval of their loan applications by determining what information lenders and investors need and how that information needs to be packaged. These efforts made by the Hopkins have created good will between Elkridge and its customers.

46. Elkridge provides services as a mortgage broker in the areas of long term financing and debt consolidation.

47. Compensation for Elkridge's services are easily calculated based on precise, fixed and easily determined broker origination fees and interest on principal loan amounts.

48. Since it began business on approximately February, 1997, Elkridge has built its business through work of mouth, radio ads and other public promotions. Other mortgage companies in the area knew and were aware of these promotional efforts and methods. There are at least seven (7) other mortgage brokerage companies with a twenty (20) mile radius of Elkridge's principal place of business.

49. During Hales' business relation with Elkridge, Hales did not participate in same business promoting activities that Hopkins did. Rather, he simply solicited individuals to determine their needs for mortgage loan services.

50. Hales was specifically instructed by the Hopkins not to contact lenders, investors, appraisers or any other service provider unless they instructed him to do so. Hales activities were limited to acquiring loan application information and supporting documentation from customers, unless he was instructed to do otherwise by Mrs. Hopkins.

51. Hopkins' and Elkridge's clientele is focused in Sanpete and Sevier County and lies within a twenty (20) mile radius of Elkridge's principal place of business in Gunnison, Utah.

52. Hales did not develop any products for Elkridge. Hales' name, picture and position with Elkridge were not extensively promoted through advertising media.

53. Hales was featured in a small number of Elkridge radio advertisements, but no more than five (5).

### **CONCLUSIONS OF LAW**

1. To be enforceable, a non-compete agreement must be supported by consideration. The non-compete agreement was provided to Hales after the time of his initial employment. Although he was promised additional benefits and compensation to entice him to sign the non-compete and non-disclosure agreements, none of those benefits or increased compensation was ever provided. Therefore, the non-compete and non-disclosure agreements were not supported by consideration and are therefore unenforceable.

2. In addition, the non-compete agreement is enforceable if there is no bad faith involved in the contract negotiations. The non-compete and non-disclosure agreements were not negotiable but were provided to Hales in a take it or leave it fashion. Moreover, Hopkins engaged in bad faith negotiations by promising consideration in exchange for Hales' signature and thereafter failing to provide that consideration. Therefore, the non-compete and non-disclosure agreements are unenforceable.

3. In addition, the non-compete agreements are enforceable if they are necessary to protect the good will of the company. The non-compete agreement between Elkridge and Hales was not necessary to protect Elkridge's good will. Its good will was created by the Hopkins, not by Hales. Hales' brief work history with Elkridge, together with the lack of extensive advertising demonstrate that any good will enjoyed by Elkridge is a product of the Hopkins work over the last three (3) years and was not created in any significant way by Hales. Therefore, the non-compete agreement is unenforceable. Elkridge did not provide any substantial training to Hales during this employment; therefore, the non-competition agreement was not necessary to protect any substantial investment made by Elkridge into the training of Hales.

4. In addition, non-compete agreements are enforceable if they are reasonable in their restrictions as to time and geographical area. The geographical area of 31,400 square miles is not reasonable. This area is calculated based on the non-compete agreement's radius measurement of 100 miles from Elkridge's principal place of business. Elkridge's business comes substantially from within a twenty (20) mile radius of its principal place of business because the geographical restriction is not reasonable, the non-compete agreement is unenforceable. The time restraint of five (5) years

included in the non-compete agreement is not reasonable, particularly when considered together with the unreasonable geographical restriction. Therefore, the non-compete agreement is unenforceable.

5. In addition, non-compete agreements are enforceable if the services rendered by the employee were special, unique or extraordinary. Hales' duties as an independent contractor did not constitute special, unique or extraordinary services. Hales' services were comprised of rather routine office work and sales. Although Hales' services may have been valued highly by Elkridge, they consisted of the exercise of a common calling – that of a salesman. Therefore, the non-compete agreement is unenforceable.

6. Hales has a right to engage in the common calling of a salesman. The knowledge and training he acquired and which he used in selling mortgage loan service was knowledge and training he acquired prior to his employment with Elkridge. The skills which he obtained and developed through his work with Elkridge belong to him.

7. The broad and unrestrained language of the non-compete agreement is not limited by any restrictions related to the uniqueness of Hales' services or competitive unfairness. It does not more than restrain competition.

8. The non-compete and non-disclosure agreements were entered into after the initial employment of Hales and were not ancillary to any written employment contract.

9. To be enforceable, a non-compete agreement must be supported by consideration, cannot be the product of bad faith negotiations, must be necessary to protect the employer's good will, must be reasonable in its restrictions as to time and



area, the employee's services must be special, unique or extraordinary, cannot restrain the right to engage in a common calling and cannot baldly restrain competition.

10. For a temporary restraining order to issue, Hopkins must prove irreparable harm. Hopkins has failed to do so. Any damages which Hopkins sustained, if any, are easily calculable and are not subject to conjecture or speculation. Damages, if any, are compensable in money.

11. Hales did not maintain a position with Elkridge for any significant duration of time that would allow him to become a competitive threat to Elkridge. In addition, the nature of his position did not allow him to acquire the relationships with business entities that would prove to be a threat to Elkridge. Hales' responsibilities did not put him in a position of familiarity with the public so as to be a threat to Elkridge. Hales' position did not allow him to obtain any technological or specialized expertise so as to be a threat to Elkridge.

12. The threatened injury to Elkridge does not outweigh the damage Hales will sustain if a temporary restraining order is issued. If an order is issued, Hales will be required to seek employment at least 100 miles from Gunnison, Utah. This may require him to relocate his entire family or to spend a total of four (4) hours commuting to and from work. Hales has sought alternate employment in the restricted area. However, such searches have proved fruitless. If the order does not issue, Elkridge will not sustain any significant damage. It has built a business reputation and clientele, good will and business contacts that cannot be endangered by Hales alone. Therefore, the injury to Hales, if the order issues, far outweighs any injury which Elkridge may suffer.

13. The order, if issued pursuant to Elkridge's requests, would be adverse to the public interest. It is bad public policy to issue orders based on unenforceable contracts. Additionally, it is bad public policy to issue orders based on contracts negotiated in bad faith. Because the non-compete agreement is not enforceable and because it is a product of bad faith representations, the order cannot be issued.

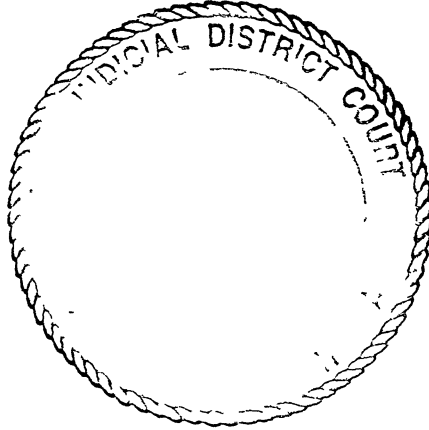
14. There is no substantial likelihood that Elkridge will prevail on the merits of its underlying claim. The non-compete agreement is not enforceable. In addition, its language is over broad. Moreover, the broad and over reaching language of the non-disclosure agreement is not supported by the mutual intent of the parties. Elkridge is not aware of the meaning of its own contract. Therefore, a meeting of the minds is not possible. The contract is unenforceable.

15. For a temporary restraining order to issue, the four following elements must be satisfied:

- (a) Elkridge damages must be irreparable;
- (b) The damage to Elkridge if the order issues must outweigh the injury to Hales;
- (c) Issuing the order must not be adverse to public interest; and
- (d) Elkridge must demonstrate a substantial likelihood of prevailing at trial on the merits of its underlying claim.

16. The Court finds that none of these elements has been met.

DATED this 18 day of December, 2002.



BY THE COURT:

JUDGE DAVID L. MOWER  
Sixth Judicial District Court Judge

**MAILING CERTIFICATE**

I hereby certify that on the \_\_\_\_ day of December, 2002, I mailed, via first class mail, postage prepaid, a true and exact copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the following:

David Bruce Oliver  
180 South 300 West #210  
Salt Lake City, Utah 84101

  
Paralegal

**MAILING CERTIFICATE**

I certify that on the 19 day of December, 2002, a copy of documents entitled **Order Denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Findings of Fact and Conclusions of Law** were mailed to:

Stanford A. Graham  
2120 North Valley View Drive  
Layton, Utah 84040

David Bruce Oliver  
180 South 300 West #210  
Salt Lake City, Utah 84101

  
Court Clerk, deputy

## ADDENDUM G

**78-27-56. Attorney's fees -- Award where action or defense in bad faith -- Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

- (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
- (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Amended by Chapter 92, 1988 General Session

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**78-27-56.5. Attorney's fees -- Reciprocal rights to recover attorney's fees.**

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Enacted by Chapter 79, 1986 General Session

Download Code Section [Zipped](#) WP 6/7/8 [78\\_23047.ZIP](#) 1,727 Bytes