FILED
SID J. WHITE
APR 23 1998
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT IN AND FOR
THE STATE OF FLORIDA

CASE NO. 92,697

ROGER V. BARTH,

Petitioner/Appellant

vs.

VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC.
AND AZAD INTERNATIONAL, INC.,

Respondents/Appellees

On Review from the Third District Court of Appeals
Decision Case No. 97-681

RESPONDENTS' BRIEF ON JURISDICTION

Herbert Stettin, Esquire
HERBERT STETTIN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 374-3353
Telecopier: (305) 374-6366
Florida Bar No. 078021

Susan E. Trench, Esquire
GOLDSTEIN & TANEN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 374-3250
Telecopier: (305) 374-7632
Fla. Bar No. 253804

Attorneys for
Respondents/Appellees

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

TABLE OF CITATIONS 1

STATEMENT OF THE CASE AND FACTS 3

SUMMARY OF ARGUMENT 3

LEGAL ARGUMENT 4

I. CASES HAVE CONSISTENTLY APPLIED THE "TWO ISSUE RULE" TO INDEPENDENT AFFIRMATIVE DEFENSES WHICH, EACH ALONE, WOULD SUPPORT THE JURY VERDICT. 7

II. CASES CITED BY PETITIONER DO NOT EXAMINE THE "TWO ISSUE RULE" IN THE CONTEXT OF INDEPENDENT AFFIRMATIVE DEFENSES. 10

CONCLUSION 11

CERTIFICATE OF SERVICE 11

TABLE OF CITATIONS

Page

A.G. Edwards & Sons, Inc. v. Weinreich,
572 So. 2d 993 (Fla. 2d DCA 1990) 8

Barhoush v. Louis,
452 So. 2d 1075 (Fla. 4th DCA 1984),
rev. denied, 458 So. 2d 271 (Fla. 1984) 6, 7, 9

Barth v. Khubani,
705 So. 2d 72 (Fla. 3d DCA 1997) 3

Charlemagne v. Francis,
700 So. 2d 157 (Fla. 4th DCA 1997),
rev. denied, 703 So. 2d 476 (Fla. 1997) 7

Colonial Stores, Inc. v. Scarbrough,
355 So. 2d 1181 (Fla. 1978) 4

Comreal v. Hatari Imports, Inc.,
559 So. 2d 1175 (Fla. 3d DCA 1990) 3, 4, 6

Davidson v. Gaillard,
584 So. 2d 71 (Fla. 1st DCA 1991),
rev. denied, 591 So. 2d 181 (Fla. 1991). 9

Emerson Electric Company v. Garcia,
623 So. 2d 523 (Fla. 3d DCA 1993) 9

First Interstate Development Corp. v. Ablanedo,
511 So. 2d 536 (Fla. 1987) 4

Gonzalez v. Leon,
511 So. 2d 606 (Fla. 3d DCA 1987),
rev. denied, 523 So. 2d 577 (Fla. 1988) 9

LoBue v. Travelers Insurance Company,
388 So. 2d 1349 (Fla. 4th DCA 1980),
rev. denied, 397 So. 2d 777 (Fla. 1981) 9

Odom v. Carney,
625 So. 2d 850 (Fla. 4th DCA 1993) 5, 7

Rosenfelt v. Hall,
387 So. 2d 544 (Fla. 5th DCA 1980) 3, 4, 6

Treal Group, Inc. v. Custom Video Services, Inc.,
682 So. 2d 1230 (Fla. 4th DCA 1996) 3-5, 7

TABLE OF CITATIONS

Page

Whitman v. Castlewood International Corp., 383 So. 2d 618 (Fla. 1980) 4

OTHER AUTHORITIES

Chapter 517, Fla. Stat. 8

Fla.R.App.P. 9.030(2)(A)(iv) 10

§ 83.51(4), Fla. Stat. 7

STATEMENT OF THE CASE AND FACTS

Respondents, VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC., and AZAD INTERNATIONAL, INC., make the following additions and corrections to the Statement of the Case and Facts provided by Petitioner, ROGER V. BARTH.

The claim that went to the jury in this matter was Count I of Petitioner's Amended Complaint, alleging breach of contract by failure to pay Petitioner's $300,000 fee. (App. 1). This claim was premised upon Petitioner's contention that a written, unsigned "Agreement" constituted the agreement between the parties and required Respondents to pay this fee. (App. 1).

Respondents denied that this was the operative agreement, and instead took the position that a different oral agreement had been reached which required the happening of certain conditions precedent before the Petitioner's fee was earned. (App. 2). In their Answer, therefore, Respondents raised as an affirmative defense that, "Plaintiff has failed to comply with conditions precedent required under the terms of the 'agreement' between the parties." (App. 2).

Respondents also raised as an independent affirmative defense that Petitioner's cause of action was barred by the Statute of Frauds in that the agreement was, in actuality, one to pay the debt of another. (App. 2).

The bulk of the testimony and evidence presented during the five day trial was directed toward the first issue -- that is, whether the "Agreement" was truly the operative agreement which set

forth the terms under which Petitioner was entitled to the $300,000.00 fee.

The agreed upon verdict form asked the jury the following questions:

> QUESTION 1:
>
> Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth and Khubani Enterprises, Inc.?
>
> QUESTION 2:
>
> Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth, and Victor Khubani?

(App. 3). The jury answered "NO" to both Questions 1 and 2, and judgment was entered for Respondents accordingly.

On appeal, Petitioner did not raise any issues as to trial proceedings involving the central theory of defense — that the "Agreement" sued upon was not the actual agreement between the parties. Petitioner's appellate argument related only to the second affirmative defense, alleging it was error to give the statute of frauds jury instruction.[1]

On appeal, the Third District held:

> [W]e find that the plaintiff did not properly preserve the statute of frauds issue for review on appeal. Because a general verdict form was submitted to the jury, it is unclear

---

1/

Contrary to Petitioner's representation, the statute of frauds jury instruction was not erroneous as a matter of law. The Third District did not address this issue only because it found Petitioner had not properly preserved the issue on appeal.

> whether the jury found the underlying contract to be unenforceable because it was barred by the statute of frauds, because the plaintiff had failed to perform the conditions precedent, or because no valid contract existed. Therefore, in the absence of an objection to the use of the general verdict form, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to demonstrate prejudice.

Barth v. Khubani, 705 So. 2d 72, 73 (Fla. 3d DCA 1997). Petitioner now argues this holding conflicts with decisions of the First, Second and Fourth District Courts of Appeal.

SUMMARY OF ARGUMENT

The District Courts of Appeal which have examined this issue have consistently ruled in accord with the concept that a party must provide special verdict interrogatories as to separate and independent affirmative defenses in order to subsequently allege that error affecting only one of those defenses was prejudicial. **Treal Group, Inc. v. Custom Video Services, Inc.**, 682 So. 2d 1230 (Fla. 4th DCA 1996); **Comreal v. Hatari Imports, Inc.**, 559 So. 2d 1175 (Fla. 3d DCA 1990); **Rosenfelt v. Hall**, 387 So. 2d 544 (Fla. 5th DCA 1980). This was the ruling made below, and there is no conflict between the District Courts of Appeal on this issue.

LEGAL ARGUMENT

I. CASES HAVE CONSISTENTLY APPLIED THE "TWO ISSUE RULE" TO INDEPENDENT AFFIRMATIVE DEFENSES WHICH, EACH ALONE, WOULD SUPPORT THE JURY VERDICT.

All Florida cases, in all of the District Courts of Appeal, have ruled on the "two issue rule" in accord with this Court's

pronouncement in **Colonial Stores, Inc. v. Scarbrough**, 355 So. 2d 1181, 1186 (Fla. 1978):

> [W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found **as to one of two issues** submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced.

(emphasis added); **Whitman v. Castlewood International Corp.**, 383 So. 2d 618 (Fla. 1980).

In **First Interstate Development Corp. v. Ablanedo**, 511 So. 2d 536, 538 (Fla. 1987), this Court further stated that the rule applies where there are "two theories of liability, but where a single basis for damages applies."

By the same token, the rule has been consistently applied where, as here, there are "two theories of nonliability" — that is, affirmative defenses — each of which, independently, would sustain the jury verdict. **Treal Group, Inc. v. Custom Video Services, Inc.**, 682 So. 2d 1230 (Fla. 4th DCA 1996); **Comreal v. Hatari Imports, Inc.**, 559 So. 2d 1175 (Fla. 3d DCA 1990); **Rosenfelt v. Hall**, 387 So. 2d 544 (Fla. 5th DCA 1980). That is precisely the rule applied by the Third District in this matter -- it held that the "two-issue rule" precluded review where Petitioner's argument went only to one of two very distinct affirmative defenses, since the Petitioner had not requested a verdict form from which it could be determined which of these two defense theories formed the basis for the jury's verdict.

This holding is not in conflict with existing case law. The Third, Fourth, and Fifth District Courts of Appeal have ruled

consistently, finding that the failure to break out separate theories of affirmative defense on the verdict form calls the "two-issue rule" into play and precludes considerations of alleged error as to one of the two affirmative defenses supporting the verdict. *Id.* (The First and Second District Courts of Appeal have not examined this issue).

Thus, in **Treal Group, Inc. v. Custom Video Services, Inc.**, 682 So. 2d 1230 (Fla. 4th DCA 1996), the lessor sued for breach of a commercial lease. The tenant defended, alleging: (1) that the lease was invalid; and (2) that there had been nonperformance by the lessor of a lease condition. After a jury verdict for the tenant, the lessor opposed the grant of attorney's fees to the tenant (based on the lease's "prevailing party" provision), arguing that the verdict must have been based on the defense that the lease was invalid. The lower court agreed and denied the tenant's fee recovery. The Fourth District reversed, holding:

> Because both issues were presented to the jury by [the tenant], and the jury could have found for [the tenant] on either ground, but entered a general verdict, the two-issue rule of *Odom* applies here.

682 So. 2d at 1231.[2]

2/

Odom v. Carney, 625 So. 2d 850 (Fla. 4th DCA 1993), also involved only one claim, but the Fourth District nonetheless found the "two-issue rule" applicable. In that case, the jury returned a verdict for the plaintiff in a personal injury matter, awarding $20,000.00. Since the verdict form did not distinguish as to what damages were awarded for medicals as opposed to lost earnings, the "two-issue rule" barred the defendant's subsequent motion for set-off of PIP benefits.

Of equal interest is the Fourth District decision in **Barhoush**

Similarly, in **Rosenfelt v. Hall**, 387 So. 2d 544 (Fla. 5th DCA 1980), the plaintiff had brought a statutory claim of injury by a dog (§767.01, Fla. Stat.). Defendants raised an affirmative defense of provocation and an instruction was given on this defense. After verdict was returned for the defense, the trial judge granted a new trial based on his belief that the provocation defense did not apply. In quashing and remanding, the Fifth District noted that, even if the provocation instruction had been erroneous, the motion for new trial still should have been denied since a general verdict form had been used so that there was no way of knowing whether this defense was the basis of the jury's verdict.

And, in **Comreal v. Hatari Imports, Inc.**, 559 So. 2d 1175 (Fla. 3d DCA 1990), a brokerage commission suit, two independent issues were raised by Comreal by way of defense -- that the brokerage contract was not an exclusive right to sell agreement and that, in any event, the contract had been terminated. After a general verdict was returned for Hatari, the Third District

---

v. Louis, 452 So. 2d 1075 (Fla. 4th DCA 1984), *rev. denied*, 458 So. 2d 271 (Fla. 1984), a medical malpractice action in which the jury had returned a $1.8 million plaintiff's verdict. The jury had been instructed on various aspects of potential damages, both tangible and intangible. The defendant's appellate arguments related solely to an expert witness who had testified as to the economic, but not the intangible, damages. The Fourth District held that, while this did not present a "classic application of the two issue rule," the principal had analogous application and precluded the defendant from obtaining a reversal. "Had defendant requested the itemized verdict to which he was entitled, the problems relating to the effect of Dr. Goffman's testimony would have been clarified." 452 So. 2d at 1077.

rejected Comreal's appeal, holding that Comreal's failure to object to the use of the general verdict form required affirmance under the "two issue rule."

These cases are all in accord with the need to include special interrogatories relating to independent affirmative defenses to preserve those issues on appeal.

II. CASES CITED BY PETITIONER DO NOT EXAMINE THE "TWO ISSUE RULE" IN THE CONTEXT OF INDEPENDENT AFFIRMATIVE DEFENSES.

While at first glance, the Fourth District's recent decision in **Charlemagne v. Francis**, 700 So. 2d 157 (Fla. 4th DCA 1997), *rev. den.,* 703 So. 2d 476 (Fla. 1997) may appear at odds with its decisions in **Treal**, **Odom** and **Barhoush,** and with the Third and Fifth District cases cited above, it is actually fully consistent, and stands for the proposition that the "two issue rule" does not apply to a fundamental error which affects the entirety of a plaintiff's legal claim. In **Charlemagne**, suit was brought for common law negligence and resulted in a jury verdict in favor of the defendant property owner. The Fourth District reversed, finding error in the trial court's giving of a jury instruction on § 83.51(4), Fla. Stat., which statutorily exculpates a landlord under certain conditions. The Court noted that (unlike the cases cited above and unlike the present case), the defendant **had not** raised the statutory defense as an affirmative defense, nor could it, since it was not a defense to a common law negligence action.[3] As opposed

3/ The statute applied only to exclude liability of the landlord if suit was brought for breach of statutory warranties. 700 So. 2d at 160.

to the affirmative defenses that were available to the defendant -- comparative negligence and negligence of others -- the statute had the effect of absolutely exonerating a landlord as opposed to allowing for allocation of fault. The Court held that it was error to instruct the jury on this inapplicable, nonpleaded statutory defense, and that this error affected the jury's consideration of **all** aspects of the tenant's negligence claim, so that the "two-issue rule" did not preclude reversal.

This ruling did not involve the issue of separate, independent theories of affirmative defense — rather, it involved a judge's error in instructing on a non-pleaded issue having a potentially huge impact on the jury's consideration of **all** aspects of the plaintiff's legal theory of liability.

Of like import is **A.G. Edwards & Sons, Inc. v. Weinreich**, 572 So. 2d 993 (Fla. 2d DCA 1990). An erroneous jury instruction had been given to the effect that violation of Chapter 517, Fla. Stat., constituted negligence *per se* under the facts of that case. Chapter 517 was, in actuality, not applicable to the facts (and had not been raised as a separate theory of liability or a legal defense), and clearly tainted the jury's consideration of the necessary proofs for **all** aspects of the negligence claim. The court found, "The manner in which the instruction was given so heavily emphasized a violation of chapter 517 as negligence per se that it could not fail to prejudice appellants to the extent that a new trial should be ordered." 572 So. 2d at 996. Again, the

Court found that this erroneous instruction affected all aspects of the plaintiff's claim, so that reversal was mandated.

Neither of these cases deal with the application of the "two-issue rule" to separate and independent affirmative defenses, consideration of each of which does not affect the other. Nor do the other cases cited by Petitioner which, instead, deal with the different question of whether a plaintiff is required to break out **every element** of his claim into a separate interrogatory on the verdict form. *See e.g.*, **Davidson v. Gaillard**, 584 So. 2d 71 (Fla. 1st DCA 1991), *rev. den.* 591 So. 2d 181 (Fla. 1991);[4] and **LoBue v. Travelers Insurance Company**, 388 So. 2d 1349 (Fla. 4th DCA 1980), *rev. den.* 397 So. 2d 777 (Fla. 1981).[5] The Third District also has confirmed its belief, in accord with these cases, that the "two issue rule" should not be extended "to require a jury finding on every factual basis alleged in support of a theory of liability." **Emerson Electric Company v. Garcia**, 623 So. 2d 523, 524 (Fla. 3d DCA 1993).

That, however, is quite different from saying that separate and independent affirmative defenses, like separate claims, do have to be broken out on the verdict form to preserve the argument on

---

4/ It is correct that a prior Third District case, **Gonzalez v. Leon**, 511 So. 2d 606 (Fla. 3d DCA 1987), *rev. denied*, 523 So. 2d 577 (Fla. 1988), is in conflict with **Davidson**. That conflict, however, does not relate to our facts, since it involves the issue of separating elements of one claim, not separating independent affirmative defenses.

5/ At least one court has questioned the continued viability of the **LoBue** decision after the Fourth District's subsequent holding in **Barhoush v. Louis**, *supra*. **Gonzalez v. Leon**, *supra*.

appeal that error relating to only one of those defenses was prejudicial. The Third, Fourth and Fifth Districts have so held. There are no decisions of the First or Second District in conflict with this rule.[6] There is, therefore, no "express and direct conflict" between the district courts of appeal on this issue and, therefore, no basis for this Court to exercise its discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(2)(A)(iv).

CONCLUSION

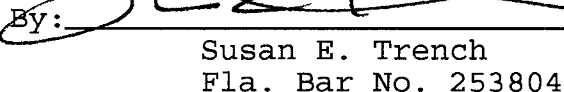
The facts and law set forth above confirm that there is no express and direct conflict between the Third District's holding in this matter and any of the other District Courts of Appeal. This Court, therefore, should not exercise its discretionary jurisdiction for review of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of April, 1998 to BERNARDO BURSTEIN, ESQ., Akerman, Senterfitt & Eidson, P.A., Sun Trust International Center, One Southeast Third Avenue, 28th Floor, Miami, FL 33131 and PAUL S. RICHTER, ESQ., Richter, Miller & Finn, 1019 Nineteenth Street, N.W., Suite 650, Washington, D.C. 20036.

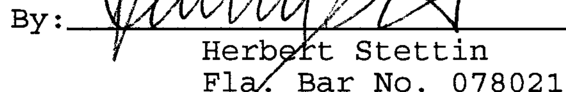
Respectfully submitted,

Susan E. Trench, Esq.
GOLDSTEIN & TANEN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131



By: ____________________
Susan E. Trench
Fla. Bar No. 253804

Herbert Stettin, Esquire
HERBERT STETTIN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131



By: ____________________
Herbert Stettin
Fla. Bar No. 078021

6/ Without improperly arguing the merits in this jurisdictional brief, Respondents would note that the reasoning behind the "two issue rule" would apply as equally to two independent theories of defense as it would to two independent theories of liability.

Appendix

IN THE SUPREME COURT IN AND FOR
THE STATE OF FLORIDA

CASE NO. 92,697

ROGER V. BARTH,

Petitioner/Appellant

vs.

VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC.
AND AZAD INTERNATIONAL, INC.,

Respondents/Appellees

On Review from the Third District Court of Appeals
Decision Case No. 97-681

APPENDIX TO RESPONDENTS' BRIEF ON JURISDICTION

Herbert Stettin, Esquire
HERBERT STETTIN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 374-3353
Telecopier: (305) 374-6366
Florida Bar No. 078021

Susan E. Trench, Esquire
GOLDSTEIN & TANEN, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 374-3250
Telecopier: (305) 374-7632
Fla. Bar No. 253804

Attorneys for
Respondents/Appellees

INDEX

Amended Complaint for Damages and Jury Trial
dated July 30, 1993 1

Answer of Victor M. Khubani, Khubani Enterprises, Inc.
and Azad International, Inc. to Plaintiff's Amended
Complaint dated January 5, 1995 2

Jury Verdict Form dated October 14, 1996 3

Appendix Part 1

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 93-7185 CA (08)

ROGER V. BARTH, Plaintiff, v. VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC., AZAD INTERNATIONAL, INC., and ETHAN P. MINSKY, Defendants.	**AMENDED COMPLAINT FOR DAMAGES AND JURY TRIAL DEMANDS** Florida Bar No. 972207

Plaintiff, Roger V. Barth ("Barth"), by his undersigned counsel, hereby commences this action against each of the above named Defendants and alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred upon this Court under Fla. Stat. § 26.012, in that this is an action that exceeds $15,000.00, exclusive of interest and costs. Defendants Victor M. Khubani ("Khubani"), Khubani Enterprises, Inc., ("Enterprises"), and Azad International ("Azad"), have consented to jurisdiction in this Court. Defendant Ethan P. Minsky ("Minsky") is sui juris and at all times relevant hereto has been a resident and domiciliary of Miami, Florida.

2. Venue is proper in this Court under Fla. Stat. § 47.001 and has been consented to by Defendants Khubani, Enterprises, and Azad.

THE PARTIES AND PROCEDURAL HISTORY

3. Plaintiff, Roger V. Barth ("Barth"), is an individual whose address is 1801 K. Street, N.W., Suite 1205L, Washington, D.C., and who for many years has been a citizen of New York.

4. Defendant, Victor M. Khubani ("Khubani"), is an officer, director and controlling stockholder of defendants Khubani Enterprises, Inc., and Azad International, Inc., and maintains his principal place of business and business office at 37 West 26th Street, New York, New York.

5. Defendant, Khubani Enterprises, Inc. ("Enterprises"), is a New Jersey corporation which maintains its principal place of business and business office at 37 west 26th Street, New York, New York.

6. Defendant, Azad International, Inc. ("Azad"), is a New York corporation which maintains its principal place of business and business office at 37 West 26th Street, New York, New York.

7. Defendant, Ethan P. Minsky ("Minsky"), is an attorney at law licensed in Florida and Washington, D.C., and whose

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI .FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

principal place of business and business office is at 1428 Brickell Avenue, Miami, Florida.

8. Plaintiff previously commenced this action against these defendants in the Superior Court of the District of Columbia, Civil Division, Civ. Action No. 90-CA07625, and the defendants moved to dismiss based upon forum non conveniens. The first motion to dismiss for forum non conveniens was denied. Subsequently, defendant Minsky moved to be dismiss from that action based upon a lack of personal jurisdiction. The Superior Court of the District of Columbia granted Minsky's motion and Barth appealed. While Barth's appeal of Minsky's dismissal was pending, the other defendants renewed their motion to dismiss on the grounds of forum non conveniens. The Superior Court then granted that motion provided that the remaining defendants enter an agreement not to contest personal jurisdiction of any court in Florida and not to interpose any statute of limitation defenses.

BACKGROUND FACTS

9. On May 28, 1986, Khubani met with Barth in Barth's office in the District of Columbia for the purpose of considering whether Khubani should engage Barth's services in connection with Khubani's possible acquisition of certain real property located in Seminole County, Florida, and in connection with Khubani's possible acquisition of a certain judgment encumbering that same certain real property in Florida. The matters of potential interest to

Khubani at that time related to certain real property in Florida owned by certain individuals named Turner who were being represented by Barth (and others assisting Barth), and Barth met with Khubani with the knowledge and consent of the Turners. The real property in question was at that time subject to numerous competing liens of record in the land records in Seminole County, Florida, and had been tied up in litigation in the U.S. District Court for the Middle District of Florida, Orlando Division, in Civil Action No. 79-425-ORL-CIV-Y for more than six years.

10. At the conclusion of that meeting on May 28, 1986, Khubani stated to Barth that Khubani would discuss the matters involved further with his own attorneys in Florida and that those attorneys would probably be contacting Barth. Khubani also invited Barth to contact Khubani's Florida attorneys directly for further discussions if Barth wished to do so. Barth advised Khubani that Khubani would be required to pay Barth a $300,000.00 fee for all services and expenses if Khubani chose to engage Barth and if Barth performed the services in question.

11. On May 30, 1986, Barth wrote to one of Khubani's attorneys in Florida, advising that Barth represented certain individuals named Turner who were connected with the matters for which Khubani had expressed interest in engaging Barth during the May 28, 1986, meeting, and providing certain other written information relating to those matters so that Khubani's Florida

attorneys could do their own evaluation and advise Khubani appropriately whether Khubani should engage Barth and proceed with the proposed acquisitions.

12. Thereafter and at an exact time not now known to Barth, but prior to August, 1986, Khubani determined after private consultations with his own Florida attorneys (including defendant Minsky, who was located in Dade County, Florida) and against the advice of those Florida attorneys, but for Khubani's own reasons, that Khubani wished to proceed forward with the matters described in § 9 supra herein using various corporations owned or controlled by him and to engage Barth's services to assist in and facilitate such matters. The advice of Khubani's own Florida attorneys referred to above was based upon independent, extensive investigation of the matters described in § 9 supra herein by those attorneys. As a result of that decision, Khubani authorized and instructed his Florida attorneys, including specifically Minsky, who was one of Khubani's Florida attorneys, to undertake negotiations with Barth and to enter into a definitive agreement with Barth for the services to be performed by Barth for Khubani and for the fees to be paid by Khubani to Barth in connection with those matters, and to then take other appropriate steps to secure and utilize the services of Barth (and others assisting Barth) to accomplish the acquisition of the real property and the judgment for Khubani or another entity to be designated by Khubani.

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

13. Thereafter, Minsky had repeated contact with Barth (and others assisting Barth) in the District of Columbia concerning these matters. At all relevant times referred to herein, Khubani and the other defendants herein owned or controlled by Khubani were represented by Khubani's own Florida attorneys (in Dade County, Florida) with whom Khubani had had a long standing relationship. Khubani, by his acts and manifestations, including but not limited to his request that Barth communicate with Minsky directly concerning the details of the proposed Agreement, represented that Minsky had authority to act on his behalf, or in the alternative, knowingly allowed Minsky to assume such authority in interactions with Barth so as to induce Barth to consider undertaking the rendering of services for the benefit of Khubani. Barth, in good faith, reasonably relied upon such representations made to him by Khubani regarding Minsky being his Florida lawyer who would be acting on his behalf relative to the proposed Agreement contemplated between Barth and Khubani, and Barth accepted Minsky's representations and actions as being conduct on behalf and in furtherance of the business relation with Khubani and for which Minsky was authorized to act as an agent of Khubani.

14. On or about August 18, 1986, Minsky, specifically acting on behalf of Khubani and Enterprises, wrote to Glenn W. Turner, one of the Turners referred to in § 9 supra, and specifically requested that certain documents prepared by Minsky

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

and relating to Khubani's proposed acquisition of the land be executed and returned by the Turners. The documents requested by Minsky, however, were not returned to Minsky by the Turners on Barth's advice to the Turners, in part, because the documents in question were not suitable for the intended purposes given all of the circumstances of the matter, and because Khubani (or Minsky on behalf of Khubani and Enterprises) had not yet made or entered into a definitive agreement with Barth for the services to be performed by Barth for Khubani and the fees to be paid by Khubani to Barth in connection with these matters.

15. Thereafter, Minsky entered into extended negotiations with Barth in the District of Columbia for a detailed and definitive agreement under which Barth would provide Khubani and Enterprises certain services in connection with these matters, and under which, upon the occurrence of certain specific events, Khubani and Enterprises would become obligated to pay a $300,000.00 fee to Barth.

16. On or about September 15, 1986, Minsky sent by Federal Express to Barth in the District of Columbia a proposed form of agreement for these purposes. Because Minsky, in fact, had full authority to bind Khubani and Enterprises, Minsky expressly reserved in his September 15, 1986, transmittal letter to Barth the right to make further changes to the form of agreement based upon any further instructions which Minsky might receive from Khubani

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

who Minsky was copying with the proposed form of agreement. Following receipt of that proposed form of agreement (which was not acceptable to Barth), Barth initiated further negotiations directly with Minsky.

17. On or about September 25, 1986, Minsky sent to Barth in the District of Columbia by facsimile transmission a further draft of the proposed form of agreement. This further draft was still not acceptable to Barth, and Barth initiated further negotiations directly with Minsky.

18. On or about October 1, 1986, Minsky sent to Barth in the District of Columbia by facsimile transmission what Minsky then stated in his transmittal letter he hoped would be the final draft of the proposed agreement between Khubani and Enterprises on the one hand and Barth on the other hand. This further draft, however, still contained minor matters not acceptable to Barth, and Barth had further discussions directly with Minsky.

19. On or about October 2, 1986, Minsky then sent by Federal Express to Barth in the District of Columbia a letter transmitting what Minsky characterized as the "execution" copies of the agreement which had been prepared by Minsky on behalf of Khubani and Enterprises. Because the duplicate execution copies had already been fully authorized and approved by Khubani and Enterprises, Minsky did not reserve the right to make any further changes to them, but instead, requested Barth to sign and return

them directly to Minsky to evidence Barth's acceptance of the terms thereof.

20. Following receipt of the execution copies on October 3, 1986, Barth spoke by telephone with Minsky, and orally confirmed to Minsky that the agreement was now acceptable to Barth in all of its particulars and that Barth would sign, date and return it to Minsky as soon as Barth received from the Turners a written consent for Barth to enter into the specific form of agreement with Khubani and Enterprises, which written consent Barth had already been promised by the Turners. In response, Minsky stated that such a procedure was acceptable for Barth's acceptance of the agreement with Khubani and Enterprises.

21. Thereafter, Barth sent to the Turners written forms of consent for the Turners to sign and return to Barth, together with an exact duplicate of one of the execution copies of the agreement which Barth had received from Minsky on or about October 3, 1986. On October 15, 1986, Barth received the requested written consents from the Turners which included promises by the Turners to execute all necessary further documents and to cooperate fully with Barth as would be necessary for Barth to perform all of the contemplated services for Khubani and Enterprises.

22. Immediately thereafter on October 15, 1986, and as had been agreed with Minsky, Barth sent to Minsky by Federal Express the three duplicate originals of the agreement fully

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

signed and dated as of October 15, 1986 (hereinafter, the "Agreement"), to manifest Barth's acceptance thereof. (A true and correct copy of the Agreement is annexed hereto as Exhibit "A".) In his transmittal letter, Barth requested Minsky to return one of the duplicate originals of the Agreement fully signed by Khubani and Enterprises for Barth's files.

23. Upon receipt back of the accepted (signed) Agreement from Barth, Minsky telephoned Barth at his office in the District of Columbia and requested Barth to proceed forthwith to provide the services contemplated by the Agreement, which services Barth (and others assisting Barth) then began to perform diligently and fully for Khubani and Enterprises in full cooperation at all times with Minsky and Khubani's other Florida attorneys. During that same telephone conversation Minsky reiterated to Barth that Khubani had approved, accepted, and signed the Agreement as signed by Barth, and Minsky asked Barth whether Minsky could hold for Barth Barth's original of the Agreement fully signed by Khubani in order to minimize possible discovery questions relating to the Agreement. Barth orally agreed that Minsky could hold the fully signed original of the Agreement for Barth, and Minsky said he would do so. Relying upon such representations by Minsky, Barth changed his position to his detriment by undertaking to render the services contemplated in the Agreement. In furtherance of his obligations under the Agreement, Barth started incurring expenses,

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

exerted great personal efforts, and utilized resources which could have been used in furtherance of other agreements. Said efforts above noted where undertaken by Barth in reliance upon representations, information and instructions given to him by Minsky acting on behalf of Khubani. Absent such representations by Minsky purportedly acting on behalf of Khubani, Barth would not have undertaken to perform under the Agreement and therefore such reliance was to Barth's detriment. Barth reasonable relied upon the representations and manifestations made by Minsky as being authority by Khubani. If no representations and manifestations had been made as to Minsky's authority to act on behalf of Khubani, which were made by Khubani to Barth, Barth would not have undertaken to render services under the Agreement which Minsky negotiated on behalf of Khubani.

24. Notwithstanding Barth's having rendered the services contemplated by the Agreement or understanding of the parties, and otherwise having performed pursuant to the Agreement or understanding of the parties, the Khubani defendants have refused to pay the $300,000 fee called for under the Agreement or understanding.

25. Barth has demanded such payment.

26. All conditions precedent to bringing this action have been satisfied or waived.

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

COUNT I

(Breach of Contract)

27. The allegations in paragraphs 1 through 26 herein are hereby repeated as if fully set out herein.

28. Paragraph 7 of the Agreement obligated Khubani and Enterprises to pay Barth a $300,000.00 fee upon the occurrence of either one of the two following events:

> (a) If Khubani, Enterprises or an entity owned directly or indirectly by either or both Khubani or Enterprises, is the successful bidder at the Tax Sale [so described in Paragraph 6 of the Agreement] and takes title, pursuant thereto, to the Property (i.e., both Parcel A and Parcel B) free and clear of all encumbrances other than easements or similar matters not normally removed as a result of a tax sale; or
>
> (b) If Khubani, Enterprises or an entity owned, directly or indirectly by either or both Khubani or Enterprises purchases the Judgment (that judgment in favor of Genetics Laboratories, Inc. on May 14, 1977 in -the matter styled Genetic Laboratories Inc. v. Dividend Clubs Inc. et al., United States District Court for the District of Minnesota, Third Division, and recorded in the Public Records of Seminole County, Florida in Official Records Book 1148 at Page 1195 on December 12, 1977), but is not the successful bidder at the Tax Sale, it being understood and agreed that the occurrence of the Tax Sale is, in any event, a condition precedent to the creation of Enterprises' obligation to pay the Fee.

29. Barth has fully performed all of the services for Khubani and Enterprises required of him by the Agreement and has

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

30

fully complied with the Agreement in all respects, and all conditions precedent to Khubani's and Enterprises' obligation to pay the $300,000.00 fee to Barth have occurred.

30. As a result of services provided by Barth under the Agreement and of Khubani's own independent evaluation which was undertaken by Khubani's own Florida attorneys, Khubani caused Azad to acquire the certain Genetics Laboratories, Inc. judgment (and related judgment lien) described in Paragraph 7(b) of the Agreement for the cash sum of $100,000.00 on or about November 26, 1986. At that time, the amount of the unsatisfied Genetics Laboratories, Inc. judgment (including interest) was then in excess of $2,000,000, and the judgment lien encumbered (together with various potentially competing liens) the real property in Seminole County, Florida, which had a value in excess of $2,000,000 if the property were free of liens.

31. On April 29, 1987, the U.S. District Court for the Middle District of Florida, Orlando Division, entered an injunction in Civil Action No. 79-425-ORL-CIV-Y on a petition by the United States which enjoined the tax sale of the real property in Seminole County, Florida, encumbered by the Genetics Laboratories, Inc. judgment lien and the other competing liens and appointed a Receiver to conduct a judicially supervised sale of the subject real property in lieu of the tax sale.

32. On July 15, 1988, the U.S. District Court for the Middle District of Florida, Orlando Division, in Civil Action No. 79-425-ORL-CIV-Y approved a sale by the Receiver of the subject real property for the cash sum of $2,100,000.00. Although Enterprises and Azad submitted a series of bids to the Receiver for the subject real property, neither they nor Khubani was the successful bidder for the subject real property at the Receiver's Sale.

33. Following the U.S. District Court's approval on July 15, 1988, of the Receiver's Sale held in lieu of the tax sale in accordance with the Court order, a dispute arose between the United States and Azad concerning the priority of the Genetics Laboratories, Inc. judgment lien vis-a-vis certain liens held by the United States on the same property.

34. While litigation relating to that dispute was pending in the U.S. District Court on that issue, Khubani decided on the advice of his Florida attorneys (and without informing or consulting with Barth concerning such matters) to compromise that dispute with the United States in a settlement under which Azad received for the Genetics Laboratories, Inc. judgment lien the cash sum of $450,000.00 out of the sales proceeds from the Receiver's Sale of the subject real property. Such cash funds held by the Court were disbursed to Azad in accordance with an order of the Court entered January 11, 1989.

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI 'FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

35. Under Paragraph 9 of the Agreement, Khubani, Enterprises and Azad were obligated to begin making payments on the $300,000.00 fee to Barth within thirty days after receipt of those cash funds as follows: $50,000.00 thirty days after receipt of the funds, and additional sums of $50,000.00 at successive forty-five day intervals thereafter until the entire $300,000.00 amount had been paid. Despite repeated demands for payment and diligent efforts by Barth to obtain payment, Barth has not yet collected any portion of this $300,000.00 amount which Khubani, Enterprises and Azad have failed and refused to pay.

WHEREFORE, Plaintiff Barth demands judgment under this Count I in the amount of $300,000.00 against each of the Defendants Khubani, Enterprises and Azad, jointly and severally, for breach of the Agreement, plus interest as of February 15, 1989, the date payment was due, as allowed by law, and hereby makes demand for a jury trial on all issues so triable.

COUNT II

(Breach of Warranty of Authority of Agent)

36. The allegations in paragraphs 1 through 26 herein are hereby repeated as if fully set out herein.

37. At all material times hereto, Minsky stated or represented that he was, and otherwise conducted or held himself out as being, an agent for Khubani and Enterprises having the authority to bind Khubani and Enterprises. In the event that

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

Minsky was not or is claimed or alleged by any defendant in this action to not have been authorized to act as agent for and to bind Khubani and Enterprises to the Agreement as alleged herein, then Minsky has breached his warranty of his authority to bind his principals, Khubani and Enterprises, and is liable to Barth in the amount of $300,000.00 for breach of that warranty.

38. On or about August 18, 1986, Minsky stated in writing that he was representing Khubani and Enterprises.

39. Minsky's statements and representations that he represented Khubani and Enterprises in all matters in question, combined with Minsky's actions and representation of Khubani and Enterprises from May, 1986, through and after October, 1986, led Barth reasonably to believe and to rely upon that belief that Minsky had full authority to bind Khubani and Enterprises to the Agreement.

40. Barth reasonably relied upon Minsky's warranty of Minsky's authority to bind Khubani and Enterprises when Barth received the "execution" copies of the Agreement from Minsky on October 3, 1986, when Minsky stated to Barth that it was satisfactory for Barth to delay his acceptance of the offer from Khubani and Enterprises as represented by the "execution" copies of the Agreement provided by Minsky until after Barth obtained written consents from the Turners, when Barth accepted Minsky's statement that Khubani had approved and accepted the Agreement as signed and

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

returned by Barth on October 15, 1986, and that Minsky was holding for Barth one of the execution copies of the Agreement signed by Khubani, and when Barth fully performed all of the services for Khubani and Enterprises required of Barth by the Agreement and fully complied with the Agreement in all respects.

41. At no time did Minsky ever state, indicate, intimate or suggest to Barth in any manner that Minsky was uncertain of his authority or the extent of his authority to bind Khubani and Enterprises to the Agreement, that Khubani and Enterprises were not, in fact, bound by the Agreement, or that Khubani had not provided to Minsky an execution copy of the Agreement signed by Khubani which Minsky was holding for Barth.

42. Minsky did not, by act or implication, disclaim or suggest to disclaim his warranty of authority to act as agent for Khubani and in fact, Minsky at all times relevant to the acts giving rise to this suit, acted as if he had full capacity to bind Khubani and Enterprises and thus implied warranted his status as agent for Khubani. By not explicitly disclaiming the implied warranty of authority, Minsky implicitly assumed liability for any and all acts which might not have been authorized but which Minsky nonetheless undertook to convey or instruct Barth to perform and which acts Barth did perform.

43. Although Khubani has admitted under oath in a deposition given by him in the litigation in the Middle District of

Florida referred to in § 9 supra herein that Khubani had an agreement with Barth which contemplated that Khubani would pay Barth $300,000.00 upon the occurrence of certain events, Khubani denies ever executing the Agreement and now denies the existence of the actual Agreement as described herein and in Count I hereof, and has failed and refused to make the payment to Barth as required under the Agreement. If in fact there was no agreement and Minsky's representations and actions were not authorized, Minsky has breached the warranty of authority of agent and is liable to Barth for the entire amount due and paid under the aforementioned agreement based on breach of warranty just the same as if the agreement had been between Barth and Khubani.

44. Until 1990, Barth did not know or have reason to know that any representations made to him by Minsky were not authorized by Khubani, if in fact such acts were not authorized, or that the warranty of authority of agent may have been breached.

WHEREFORE, Plaintiff Barth demands judgment under this Count II in the amount of $300,000.00 against each of the Defendants Minsky, Khubani, Enterprises and Azad, jointly and severally, for breach of warranty of authority of agent, plus interest as of February 15, 1989, the date payment was due, as allowed by law, and hereby makes demand for a jury trial on all issues so triable.

COUNT III

(Fraud and Misrepresentation)

45. The allegations of paragraphs 1-26 herein are hereby repeated as if fully set out herein.

46. Although Khubani has admitted under oath in a deposition given by him in the litigation in the Middle District of Florida referred to in § 9 supra herein that Khubani had an agreement with Barth which contemplated that Khubani would pay Barth $300,000.00 upon the occurrence of certain events, Khubani denies ever executing the Agreement and now denies the existence of the actual Agreement as described herein and in Count I hereof, and has failed and refused to make the payment to Barth as required under the Agreement. If in fact there was no agreement or the Agreement is found to be not enforceable, because Khubani and/or Enterprises did not execute the Agreement (contrary to Minsky's affirmative representations and statements); or because no original or copy of the Agreement bearing the signature of Khubani and/or Enterprises is produced; or for any other reason, then Barth has been the victim of fraud perpetrated against him by Minsky and the Khubani defendants.

47. Unknown to Barth at the time he signed and returned the Agreement to Minsky on October 15, 1986, Khubani and Minsky had planned and schemed for improper and fraudulent purposes to induce Barth to accept the offer represented by the "execution" copies of

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

the Agreement as provided to Barth by Minsky on Khubani's and Enterprises' behalf on or about October 3, 1986, but then, for a purported reason which was only a pretext, never to return to Barth a copy of said Agreement bearing Khubani's signature, in order, among other things, to permit Khubani later to avoid liability to Barth by permitting Khubani later to contend that a binding agreement had never been entered into with Barth or that the Agreement is not enforceable. In addition and as part of said improper and fraudulent scheme, Khubani and Minsky planned to and did utilize Azad, a corporation owned and controlled by Khubani which was not a party to the Agreement to acquire the Genetics Laboratories, Inc. judgment and related judgment lien in lieu of Khubani or Enterprises in an attempt to posture later to avoid liability under Paragraph 7(b) of the Agreement. To this date Minsky has not provided Barth with the original of the Agreement bearing Khubani's signature which Minsky stated to Barth that Minsky was holding for Barth.

48. Minsky represented to Barth, in the expectation that Barth would rely and act to his detriment, that the "execution" copies of the Agreement which Minsky tendered to Barth for Barth's acceptance on or about October 3, 1986, had already been agreed to and accepted by Khubani and Enterprises, and that a valid contract would be formed upon Barth's acceptance by signing and return to Minsky of the offer represented by the "execution"

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI ·FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

copies of the Agreement. At that time, Minsky, at the instruction of Khubani, knew or had reason to know and believe that Khubani and Enterprises had no intention of performing their promise to pay Barth the $300,000.00 amount upon performance by Barth and upon the occurrence of the contingent events specified in the Agreement, all of which Minsky concealed from Barth.

49. Barth reasonably relied and acted in good faith upon the statements by Minsky that the Agreement would be and had been fully consummated by its acceptance by signing and return by Barth and that Minsky was holding for Barth an original of the Agreement bearing Khubani's signature, and as a result of that reliance, Barth was fraudulently induced to his detriment to perform fully the services required of Barth under the Agreement for Khubani and Enterprises without being paid for the value of those services.

50. As a result of Barth's performance of the Agreement and the occurrence of the events and conditions specified in the Agreement, great economic benefit was conferred upon Khubani, Enterprises and Azad, including their obtaining the cash sum of $450,000.00 out of the sales proceeds from the Receiver's Sale of the subject real property in Seminole County, Florida, in lieu of the tax sale as ordered by the U.S. District Court.

51. As a result of Minsky's and Khubani's fraudulent inducements, misrepresentations and continuing concealment and

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

Barth's reasonable reliance upon them, Barth was injured by expending his valuable time, effort and resources on behalf of Khubani, Enterprises and Azad without any reimbursement or payment.

52. Barth did not know or have and reason to know of the foregoing fraud until 1990.

WHEREFORE, Plaintiff Barth demands judgment under this Count III in the amount of $300,000.00 against each of the Defendants Khubani, Enterprises, Azad and Minsky, jointly and severally, for fraud and misrepresentation, plus interest as allowed by law beginning as of February 15, 1989, the date payment was due as allowed by law and judgment for an additional amount of up to $900,000.00 as punitive damages against each of said Defendants, and hereby makes demand for a jury trial on all issues so triable.

DATED this 30th day of July, 1993.

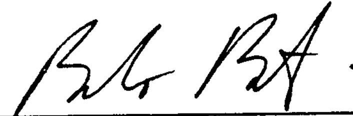
Respectfully submitted,

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
Attorneys for Plaintiff,
Roger V. Barth
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

By: ______________________
BERNARDO BURSTEIN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amended Complaint for Damages and Jury Trial Demands was served by hand-delivery upon: Jay D. Schwartz, Esquire, Shea & Gould, 1428 Brickell Avenue, Miami, Florida 33131, counsel for Defendant Ethan P. Minsky; and to Herbert Stettin, Esq., Herbert Stettin, P.A., 3270 - One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131, counsel for Victor M. Khubani, Khubani Enterprises, Inc., and Azad International, Inc., this 30th day of July, 1993.



BERNARDO BURSTEIN

GTH\BURSTEINB\141087.1\07/30/93

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE

AGREEMENT

THIS AGREEMENT is made this 15th day of October, 1986, by and between KHUBANI ENTERPRISES, INC. ("Enterprises"), a New York corporation having an office for the conduct of business located at 37 West 26th Street, New York, New York, 10010, VICTOR KHUBANI ("Khubani"), an individual having an office for the conduct of business located at 37 West 26th Street, New York, New York, 10010, and ROGER V. BARTH, ESQUIRE, ("Attorney") an attorney having an office for the conduct of business located at 1735 I Street, N.W., Suite 715, Washington, DC, 20006.

WITNESSETH:

WHEREAS, Attorney is willing to provide services assistance to Khubani & to Enterprises on the terms and conditions hereinafter set forth; and

WHEREAS, Enterprises is willing, in consideration of Attorney's services and upon the occurrence of certain events as hereinafter set forth, to pay to Attorney an attorney's fee in the amount of Three Hundred Thousand and No/100 Dollars ($300,000.00) (the "Fee") on the terms and conditions and at the times hereinafter set forth; and

NOW THEREFORE, for and in consideration of the premises as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows:

1. The recitations hereinabove set forth are true and correct and are by this reference incorporated herein.

2. Enterprises shall attempt, with all due diligence, to purchase a Tax Sale Certificate ("Certificate") issued in any one of (at Enterprises' option) the year 1980, 1981, 1982, 1983 or 1984, by the Seminole County, Florida, Tax Assessors office (the "Tax Assessor") for unpaid and delinquent ad valorem real property taxes for the real property (described on Exhibit A, attached hereto and by this reference incorporated herein) owned by Glenn W. Turner ("Mr. Turner") and Alice A. Flynn, f/k/a/ Alice Turner ("Flynn"), as tenants-in-common, which real property is known to the Tax Assessor as "Parcel 14A" (hereinafter referred to as "Parcel 14A"). Enterprises shall attempt to purchase the Certificate from the holder thereof at a price which, in the sole discretion of Enterprises, shall be reasonable. Within fifteen (15) days after it has purchased the Certificate, Enterprises shall give written notice thereof to Attorney.

3. Upon the earlier of a) thirty (30) days after receipt by Attorney from Enterprises of written notice that Enterprises has purchased the Certificate or b) December 1, 1986, Attorney shall deliver the following to Enterprises:

(i) Evidence, in recordable form, duly signed by Flynn and her present spouse, if married, and notarized in accordance with Florida law expressly stating that Flynn and, if married, Flynn's spouse, has abandoned the property (the "Property") described on Exhibit B attached hereto and by this reference incorporated herein, that she no longer considers the Property, or any portion thereof, to be her residence or her homestead for purposes of Florida law, and, in addition, setting forth her new residence address, which new residence address shall not be located on the Property or any portion thereof. In addition, such evidence shall include the agreement, under oath, of Flynn

EXHIBIT "A"

that she shall not take up residence on the Property or any portion thereof for a period of at least one year from the date of this Agreement.

(ii) Evidence, in recordable form, duly signed by Mr. Turner and Sherrie Cooper Turner ("Mrs. Turner") and notarized in accordance with Florida law expressly stating that Mr. Turner and Mrs. Turner have abandoned the Property that they no longer consider the Property, or any portion thereof, to be their residence or homestead for purposes of Florida law, and, in addition, setting forth their new residence address, which new residence address shall not be located on the Property or any portion thereof. In addition, such evidence shall include the agreement, under oath, of Mr. Turner and Mrs. Turner that they shall not take up residence on the Property or any portion thereof for a period of at least one year from the date of this Agreement.

(iii) Lease (the "Lease"), in recordable form, from Mr. Turner, Mrs. Turner and Flynn collectively, as Lessors, to Khubani, as Lessee, for the Property on terms substantially as follows:

a) Term: one year

b) Rent: $50.00 a month

c) Termination clause providing that the Lease may be terminated without notice by Lessee upon the occurrence of a sale of the Property.

4. Upon receipt by Enterprises of the recordable documents described in Paragraph No. 3, above, Enterprises or its designee shall immediately commence negotiations with Genetic Laboratories, Inc. ("Genetic"), or its successor in interest, for the purchase of that certain judgement (the "Judgement") more particularly described in Paragraph 7 of this Agreement. The price and terms of that purchase from Genetic by Enterprises or its designee shall be at the sole discretion of Enterprises and, notwithstanding anything in this Agreement to the contrary, Enterprises shall be under no obligation to purchase the Judgement if Enterprises, in its sole opinion, believes that the price or terms of said purchase are not in the best interest of Enterprises.

5. Within forty-five (45) days from receipt by Enterprises, or its designated agent, of the recordable documents described in Paragraph 3 above, Enterprises shall file, simultaneously, two applications for Tax Deeds on each of Parcel 14A and Tax Parcel 14B ("Parcel 14B"), Parcel 14B being the balance of the Property not included in Parcel 14A; provided, however, that if Enterprises has been unsuccessful in obtaining the Certificate, Enterprises shall only file one application for a Tax Deed on Parcel 14B.

6. Upon the filing by Enterprises of the application(s) set forth in Paragraph 5, above, Enterprises shall use its best efforts to encourage the Seminole County Clerk's Office, or the appropriate subdivision thereof, to hold a Tax Deed Sale (the "Tax Sale") pursuant to its application(s), in accordance with Chapter 197, Florida Statutes, on either or both of Parcels 14A and 14B.

7. Enterprises shall become obligated to pay the Fee to Attorney upon the occurrence of either of the following:

a) If Khubani, Enterprises or an entity owned directly or indirectly by either or both Khubani or Enterprises, is the successful bidder at the Tax Sale and takes title, pursuant thereto, to the Property (i.e., both Parcel A and Parcel B) free and clear of all encumbrances other than easements or similar matters not normally removed as a result of a tax sale; or

b) If Khubani, Enterprises or an entity owned, directly or indirectly by either or both Khubani or Enterprises pur-

chases the Judgement (that judgment in favor of Genetics entered on May 14, 1977 in the matter styled Genetic Laboratories, Inc. v. Dividend Clubs, Inc., et al., United States District Court for the District of Minnesota, Third Division, and recorded in the Public Records of Seminole County, Florida in Official Records Book 1148 at Page 1195 on December 12, 1977), but is not the successful bidder at the Tax Sale, it being understood and agreed that the occurrence of the Tax Sale is, in any event, a condition precedent to the creation of Enterprises' obligation to pay the Fee.

8. If neither of the events set forth in subparagraphs 7(a) or (b) occurs, then neither Enterprises nor Khubani shall have any obligation to Attorney for all or any part of the Fee, nor for any other fees or costs.

9. In the event that Enterprises shall become liable to Attorney for the Fee as set forth in Paragraph 7(a) or (b), above, Enterprises shall pay the Fee to Attorney as follows:

a) Fifty Thousand and No/100 Dollars ($50,000.00) within thirty (30) days after the date of the Tax Sale (the "First Payment").

b) Fifty Thousand and No/100 Dollars ($50,000.00) within forty-five (45) days after the date of the First Payment, and Fifty Thousand and No/100 Dollars ($50,000.00) every forty-five (45) days thereafter until the entire Fee is paid in full.

10. This Agreement constitutes the entire agreement of the parties concerning the subject matter hereof, and supercedes any prior correspondence or agreements with reference to said subject matter. This Agreement may not be modified except by written instrument signed by all of the parties hereto.

11. This Agreement shall not be assigned by Attorney. Each of Khubani and Enterprises may freely assign its interest.

12. This Agreement shall be construed and governed in accordance with the laws of the State of Florida.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals as of the day and year first hereinabove written.

WITNESSES:

AS TO KHUBANI ENTERPRISES, INC.

____

____

KHUBANI ENTERPRISES, INC., a New York corporation

By: _______________________
Victor Khubani, President

(CORPORATE SEAL)

AS TO VICTOR KHUBANI:

____

____

____
VICTOR KHUBANI

AS TO ROGER V. BARTH:

[signature]

[signature] Catherine M. Long

[signature] Roger V. Barth
ROGER V. BARTH

KHUBANI-V1/Turner
agr EPM091286-1/10-01-86

Appendix Part 2

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 93-7185 (08)

FLA. BAR NO. 078021

ROGER V. BARTH

Plaintiff,

vs.

VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC. and AZAD INTERNATIONAL, INC., and ETHAN P. MINSKY,

Defendants.
_______________________________/

ANSWER OF VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC. and AZAD INTERNATIONAL, INC. TO PLAINTIFF'S AMENDED COMPLAINT

The Defendants Victor M. Khubani, Khubani Enterprises, Inc. and Azad International, Inc., through counsel, file their answer to the Plaintiff's amended complaint, as required by the Court's order of December 22, 1994, and say:

1. They deny the allegations contained in paragraphs 1 and 2 and demand proof.

2. They are without knowledge of the allegations contained in paragraph 3 and therefore deny the same.

3. They admit the allegations contained in paragraphs 4, 5, and 6 except that the business offices of Defendants, Khubani Enterprises, Inc. and Azad International, Inc., are maintained in Fairfield, New Jersey.

4. They are without knowledge of the allegations contained in paragraphs 7 and 8 and therefore deny same and demand proof.

6. They admit the allegations contained in the first sentence in paragraph 9. They are without knowledge of the

remaining allegations in paragraph 9 and therefore deny the same and demand proof.

7. They deny the allegations contained in paragraph 10 and demand proof.

8. They are without knowledge of the allegations contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 and therefore deny the same and demand proof.

9. They deny the allegations contained in paragraph 24 and demand proof.

10. They admit the allegations contained in paragraph 25.

11. They deny the allegations contained in paragraph 26.

ANSWER AS TO COUNT I

12. They admit and deny the allegations contained in paragraphs 24 and 27 as set forth above.

13. Paragraph 28, does not require an answer since it quotes a portion of an exhibit attached to the amended complaint and the legal conclusions drawn by the Plaintiff from that agreement. If an answer is required to this paragraph, it is denied.

14. They deny the allegations contained in paragraphs 29 and 30 and demand proof.

15. They admit the allegations in paragraph 31 except the claim that the receiver's sale was held in lieu of the tax sale.

16. They admit the allegations contained in paragraph 32.

17. They admit the allegations contained in paragraph 33 except the claim that the receiver's sale was held in lieu of the

HERBERT STETTIN, P. A.
ONE BISCAYNE TOWER • 2 SO. BISCAYNE BOULEVARD • SUITE 3270 • MIAMI, FLORIDA 33131 • TELEPHONE (305) 374-3353

tax sale.

18. They deny the allegations contained in paragraphs 34 and 35 and demand proof.

ANSWER AS TO COUNT II

19. They admit and deny the allegations contained in paragraph 36 as set forth above.

20. They are without knowledge of the allegations contained in paragraph 37, 38, 39, 40, 41, 42, 43, and 44 and demand proof.

ANSWER TO COUNT III

21. They admit and deny the allegations contained in paragraph 45 as set forth above.

22. They deny the allegations contained in paragraphs 46, 47, 48, 49, 50, 51 and 52 and demand proof.

23. For further answer to the Plaintiff's complaint, these Defendants allege:

a. Defendant Azad International, Inc., was not named in and did not sign the agreement attached to the amended complaint as Exhibit A. None of the Defendants agreed to or executed the agreement attached to Plaintiff's complaint as Exhibit A and they are not bound by its terms.

b. Plaintiff has failed to comply with all of the conditions precedent to the agreement attached to the amended complaint as exhibit A and therefore may not recover under the terms of said agreement.

c. Plaintiff has failed to comply with the agreement

HERBERT STETTIN, P. A.
ONE BISCAYNE TOWER • 2 SO. BISCAYNE BOULEVARD • SUITE 3270 • MIAMI, FLORIDA 33131 • TELEPHONE (305) 374-3353

attached to the amended complaint as exhibit A and therefore may not recover under the terms of said agreement.

d. Under the terms of the agreement attached to the amended complaint as exhibit A, the occurrence of the tax sale was a condition precedent to any obligation to pay a fee to the Plaintiff. The condition precedent did not occur.

e. There is no claim that Defendant Minsky represented Azad International, Inc., or could bind it in any respect.

f. These defendants deny making any fraudulent representations of any kind to the Plaintiff, or authorizing the making of any fraudulent representations to the Plaintiff.

AFFIRMATIVE DEFENSES

24. Plaintiff has failed to comply with conditions precedent required under the terms of the "agreement" between the parties and therefore may not maintain this action for breach of contract.

25. The conditions precedent to any liability under the terms of the "agreement" between the parties did not occur and these Defendants are not liable in breach of contract to the Plaintiff.

26. Plaintiff is barred from recovery in tort under Counts II and III of the amended complaint under the Economic Loss Rule.

27. Plaintiff may not maintain this action because he is guilty of inequitable conduct.

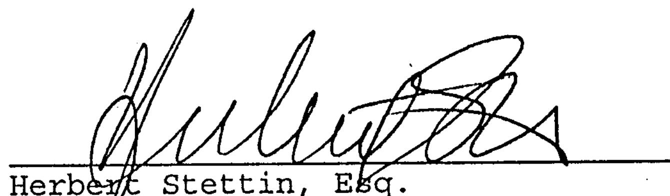
28. Plaintiff is estopped from maintaining this action because of his own affirmative misconduct.

HERBERT STETTIN, P. A.
ONE BISCAYNE TOWER • 2 SO. BISCAYNE BOULEVARD • SUITE 3270 • MIAMI, FLORIDA 33131 • TELEPHONE (305) 374-3353

137

29. Plaintiff has waived his right to maintain his action because of his own affirmative misconduct.

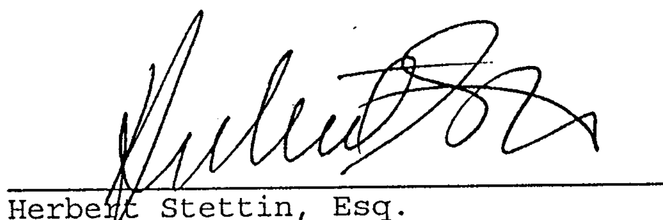
HERBERT STETTIN, P.A.
3270 - One Biscayne Tower
2 So. Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 374-3353



Herbert Stettin, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 4 day of January, 1995 to: Bernardo Burstein, Esq., GREENBERG, TRAURIG, et al., 1221 Brickell Avenue, Miami, Florida 33131; Paul S. Richter, Esq., P.O. Box 19190, Washington, D.C. 20036, and Jay Schwartz, Esq., CONRAD, SCHERER, JAMES & JENNE, 633 South Federal Highway, Ft. Lauderdale, FL 33302.



Herbert Stettin, Esq.

3420ANSWRAMD.COM

Appendix Part 3

IN CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 93-7185-CA-08

ROGER V. BARTH)
Plaintiff,)
v.)
VICTOR M. KHUBANI and)
KHUBANI ENTERPRISES, INC.)
Defendants.)

JURY VERDICT FORM

We, the jury, return the following verdict:

QUESTION 1:

Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth, and Khubani Enterprises, Inc.?

/___/ YES /✓/ NO

QUESTION 2:

Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth, and Victor Khubani?

/___/ YES /✓/ NO

You must answer this Question 3 if your answer to Question 1 is YES or if your answer to Question 2 is YES. If your answers to Question 1 and to Question 2 are both NO, you are to completely ignore this Question 3:

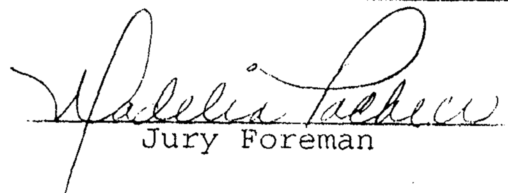
QUESTION 3:

What is the total amount of any damages sustained by Roger V. Barth and caused by the breach of the contract by either or both defendants.

$______________

SO SAY WE ALL.

DATED this 4th day of October, 1996



Jury Foreman

104