

1996

Lawrence C. Kay, Joy Kay, Robert L. Kay and
Teresa Kay v. Summit Systems, Inc., a corporation;
Val E. Southwick : Brief of Appellant

Utah Court of Appeals

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Marlon L. Bates; Scalley and Reading; Attorneys for Appellant.

Unknown.

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IN THE UTAH COURT OF APPEALS

LAWRENCE C. KAY, JOY KAY,
ROBERT L. KAY and TERESA KAY,

Plaintiffs/Appellees,

vs.

SUMMIT SYSTEMS, INC., a corporation;
VAL E. SOUTHWICK
(Defendant/Appellant); et al,

Defendants.

Appeal No. 960027-CA

Priority No. 15

BRIEF OF APPELLANT

**APPEAL FROM THE THIRD DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH**

HONORABLE J. DENNIS FREDERICK

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FILED

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COURT OF APPEALS

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JURISDICTIONAL STATEMENT

The Third Judicial District Court for Salt Lake County, with the Honorable J. Dennis Frederick presiding, entered an order denying defendant's/appellant's Motion to Enforce Settlement Agreement on October 16, 1995. The order was timely appealed by the filing of a Notice of Appeal on November 15, 1995. The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3(2)(k).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Trial Court properly denied defendant's/appellant's motion to enforce a settlement agreement where two of the four plaintiffs/appellees accepted the settlement offer unconditionally and where the other two plaintiffs/appellees (the wives of the other two plaintiffs/appellees) first claimed that they had not consented to the settlement four months after the settlement offer was unconditionally accepted in writing by their attorney and after defendant had performed his duties in reliance upon the unconditional acceptance.

Because the facts relating to this issue are not in material dispute, the issue arises from the Trial Court's application of the law to the undisputed facts. Issues of law have a "correction of error" standard where no particular deference is accorded to the Trial Court's conclusion. Diversified Equities, Inc. v. American Savings and Loan Association, 739 P.2d 1133, 1136 (Utah App. 1987); Schroder v. Horack, 592 S.W.2d 742, 744 (MO. 1979); Cooper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah App. 1987).

DETERMINATIVE STATUTORY PROVISIONS

None. The only determinative law is case law.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a dispute regarding the enforceability of a settlement agreement between a defendant/appellant Val E. Southwick ("Southwick") and the plaintiffs/appellees Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay (the "Kays"). On October 16, 1995, Judge J. Dennis Frederick of the Third Judicial District Court of Salt Lake County entered an Order Denying Val E. Southwick's Motion to Enforce Settlement Agreement. On November 15, 1995, Southwick filed this appeal.

B. Statement of Facts.

1. In December of 1993, judgment was entered against Southwick and others in favor of the Kays. (R. at 1980-1983)

2. On March 16, 1995, Southwick, through his attorney, transmitted a written settlement offer by facsimile to the Kays' attorney. (R. at 2655 and 2670) (Addendum B, Exhibit A) (Addendum C, p. 2)

3. Within 30 minutes after the written offer was transmitted, Southwick informed his attorney that he could increase the amount of the offer to \$10,200.00. A new written settlement offer was transmitted via facsimile by Southwick's attorney to the Kays' attorney on March 16, 1995. (R. at 2656 and 2670) (Addendum B, Exhibit B) (Addendum C, p. 2)

4. On April 7, 1995, the Kays' attorney mailed a written, unconditional acceptance of the offer to settle for \$10,200.00. (R. at 2658 and 2670) (Addendum B, Exhibit C) (Addendum C, p.2)

5. In reliance upon the settlement agreement created by the acceptance of the Southwick's offer, Southwick transferred the full settlement funds into his attorney's trust account and directed his attorney to prepare a written Settlement and Release Agreement (the "Agreement"). (R. at 2651, 2670-2671) (Addendum B, p. 2) (Addendum C, pp. 2-3)

6. On April 18, 1995, the Agreement was mailed to the Kays' attorney (R. at 2658-2662) (Addendum B, Exhibit D)

7. On May 9, 1995, Southwick's attorney spoke to the Kays' attorney by telephone to inquire as to the status of the Agreement. The Kays' attorney told Southwick's attorney that he was satisfied with the language contained therein and sent it to his clients for their signatures. (R. at 2671) (Addendum C, p. 3)

8. On May 23, 1995, Southwick's attorney left a telephone message with the Kays' attorney inquiring as to whether the Agreement was fully executed. (R. at 2671) (Addendum C, p. 3)

9. On June 20, 1995, Southwick's attorney spoke with the Kays' attorney regarding the status of the Agreement. The Kays' attorney stated that his clients may have changed their minds with respect to settlement. Southwick's attorney told the Kays' attorney that he should tell the Kays that Southwick's attorney did not believe the Kays could change their mind at this point and Southwick's attorney would file a motion to enforce the agreement if they did not sign and return the Agreement. (R. at 2671) (Addendum C, p. 3)

10. On July 11, 1995, Southwick's attorney mailed written notice to the Kays' attorney informing him that if the Agreement was not signed and returned by July 21,

1995, a motion would be filed to enforce the Agreement. (R. at 2671-2672) (Addendum B, Exhibit E) (Addendum C, pp. 3-4)

11. On August 2, 1995, Southwick's attorney filed a Motion to Enforce Settlement Agreement, a memorandum in support thereof and an attorney's affidavit (R. at 2648-2682) (Addenda A, B and C)

12. On August 15, 1995, the Kays' attorney filed a memorandum in opposition to the motion and two affidavits in support thereof. (R. at 2685-2691 and 2697-2698) (Addenda D, E and F)

13. On August 21, 1995, Southwick's attorney filed a reply to the Kays' opposition to the motion. (R. at 2692-2696) (Addendum G)

14. On August 28, 1995, the Kays' attorney filed a supplemental memorandum to the opposition to the motion. (R. at 2704-2706) (Addendum H)

15. On August 30, 1995, Southwick's attorney filed a response to the supplemental memorandum. (R. at 2701-2703) (Addendum I)

16. On September 12, 1995, the Trial Court entered a Minute Entry which denied the motion "FOR REASONS SPECIFIED IN OPPOSING MEMORANDA." (R. at 2707-2708) (Addendum J)

17. On October 16, 1995, the Trial Court entered the Order denying the motion. (R. at 2709-2710) (Addendum K)

18. On November 15, 1995, Southwick's attorney filed the Notice of Appeal. (R. at 2711-2712) (Addendum L)

SUMMARY OF THE ARGUMENT

The Trial Court erred in denying Southwick's Motion to Enforce Settlement Agreement. The Kays, through their attorney, unconditionally accepted Southwick's written settlement offer. In reliance upon this acceptance, Southwick performed his duties by transferring settlement funds to his attorney's trust account and by directing his attorney to prepare and deliver the Agreement to the Kays. Approximately 20 days thereafter, the Kays' attorney told Southwick's attorney that the Agreement looked fine and he expected to receive the signed original from his clients shortly. Approximately 40 days later, the Kays' attorney told Southwick's attorney that he thought his clients were changing their minds about settling with Southwick. Approximately two months thereafter, Southwick first learned that instead of changing their minds, two of the four Kays (the two wives of the other two Kays) claimed to have never consented to settling with Southwick. (R. at 2685) (Addendum D, p. 1)

Because two of the Kays undoubtedly accepted the offer to settle; because the other two Kays permitted Southwick to rely upon their attorney's unconditional acceptance of the offer for over four months without lifting a finger to communicate their nonacceptance until being forced to do so by Southwick's motion to enforce the Agreement; and because Southwick did, indeed, reasonably rely upon the unconditional acceptance in performing his duties under the Agreement, a valid and binding settlement agreement was formed. Furthermore, specific performance is the only equitable remedy which applies to the Kays' breach of contract, the Trial Court erred in refusing to enforce the Agreement through specific performance.

ARGUMENT

A. A Valid and Binding Settlement Agreement Was Entered Into Between Southwick and the Kays.

An agreement to settle is a contract between the parties to the agreement. 15A Am.Jur.2d Compromise and Settlement, § 7 (1976); Zions First National Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah Ct. App. 1989); Butcher v. Gilroy, 744 P.2d 311, 312 (Utah Ct. App. 1987). Like other contracts, it requires offer, acceptance and consideration to formulate. Once formed, it is fully enforceable. Id.

In the present case, the undisputed facts demonstrate that a specific, written settlement offer was transmitted from Southwick to the Kays through their respective attorneys. (R. at 2656, 2670, 2675) (Addendum B, Exhibit B) (Addendum C, p. 2 and Exhibit B). The Kays' attorney spoke with Lawrence C. Kay and Robert L. Kay (the husbands of Joy Kay and Teresa Kay) regarding the settlement offer. Lawrence and Robert Kay told their attorney that they could accept the settlement offer for the Kays. (R. at 2685, 2689-2691) (Addendum D, p. 1) (Addendum E). Accordingly, the Kays' attorney unconditionally accepted the settlement offer in writing on behalf of the Kays. (R. at 2658) (Addendum B).

In reliance upon the unconditional acceptance of the settlement offer, Southwick transferred the settlement funds to his attorney's trust account and directed his attorney to prepare the Agreement. (R. at 2651, 2670-2671) (Addendum B, p. 2) (Addendum C, pp. 2-3). Shortly thereafter, Southwick's attorney transmitted the Agreement to the Kays' attorney. (R. at 2651, 2670) (Addendum B, p. 2) (Addendum C, pp. 2-3). The

Kays' attorney reviewed the Agreement, approved its terms, and forwarded the Agreement to the Kays for their signatures (R. at 2651, 2670-2671) (Addendum B, p. 2) (Addendum C, pp. 2-3).

Approximately 40 days after the Kays received the Agreement, Southwick's attorney telephoned the Kays' attorney to find out why the Agreement had not been signed and returned. The Kays' attorney told Southwick's attorney that his clients may be changing their minds about settling with Southwick. (R. at 2651-2652, 2671) (Addendum B, pp. 2-3) (Addendum C, p. 3).

Approximately 3 months after the Kays received the Agreement, Southwick learned for the very first time that instead of changing their minds, Joy Kay and Teresa Kay were now claiming that they had never agreed to accept the settlement offer. (R. at 2685) (Addendum D, p. 1). Southwick learned of this surprising claim only after the Kays were forced to respond to Southwick's motion to enforce the Agreement. (R. at 2685) (Addendum D, p. 1).

In the Kays' opposition to the motion, they asserted that because their attorney could not bind them to the Agreement, and because two of the four had never accepted the offer, Southwick could not enforce the Agreement because there was no agreement. (R. at 2685-2688) (Addendum D).

The Kays were absolutely correct in asserting that their attorney's unconditional acceptance of the settlement offer does not unilaterally bind the Kays unless the Kays authorized the acceptance. Utah Code Ann. § 78-51-32 (1992). In 1909, the Utah Supreme Court held that a settlement agreement cannot be enforced against parties against

their will or without the consent of the parties. McWhirler v. Donaldson, 36 Utah 293, 104 P. 731, 734 (1909) (quoting Borkheim v. N.B. & M. Insurance Co., 38 Cal. 623).

But while the Kays' attorney cannot unilaterally bind them to the Agreement, the Kays' own action can bind them to the Agreement. First, with respect to Lawrence and Robert Kay, the undisputed facts are that they not only completely and unconditionally accepted the settlement offer, they communicated that acceptance to their attorney in such a way that he believed they were speaking with authority to bind not only themselves, but their wives as well. There is no dispute that Lawrence and Robert Kay are bound by the Agreement. Absolutely no defense was offered on their behalf.

Second, with respect to Joy and Teresa Kay, they are bound to the Agreement because of their actions. A contract can be formed without the express manifestation of the parties: "under some circumstances, silence and inaction operate as an acceptance, as where, under the circumstances, an inference of assent is warranted. . . . Under certain circumstances, the offeree may authorize or cause the offeror to regard silence as an acceptance. . . . " 17A Am. Jur.2d Contracts § 103 (1991). "Consent may be implied from acts or may be indicated by silence or inaction. Conduct may be as effective as words in manifesting mutual assent to a contract." 17A Am.Jur.2d Contracts § 29 (1991). "The meeting of the minds, which is essential in the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions, which may be wholly at variance with the former." 17A Am.Jur.2d Contracts § 28 (1991).

For over three months after Joy and Teresa Kay were sent the original Agreement by their attorney to sign, they did absolutely nothing to inform their attorney or

Southwick that they did not accept his settlement offer, even though their own attorney had unconditionally accepted the offer for all of them, and their husbands had accepted the offer. Assuming, arguendo, that Joy and Teresa Kay did not see a copy of their attorney's letter accepting the offer even though it was sent to both Lawrence and Robert Kay (see the "cc" at the bottom of the letter found at R. 2657 and Addendum B, Exhibit C); and assuming the wives never discussed the settlement offer with their husbands, Joy and Teresa Kay received the original Agreement by May 9, 1995. (R. at 2671) (Addendum C, p. 3). If a reasonably prudent person who does not want to settle a judgment receives a settlement agreement from his or her attorney requesting that person's signature, the reasonably prudent person would communicate his or her intentions to the attorney. One might expect to hear the reasonably prudent say, "Why on earth are you asking me to sign this Agreement when I do not wish to settle with Southwick!"

Furthermore, if one reasonably assumes that Joy and Teresa Kay do read the letters coming from their attorney or if one reasonably assumes that Joy and Teresa Kay and their husbands discuss major events occurring in the Southwick matter, then the complete silence and inaction of Joy and Teresa Kay makes no sense whatsoever. In addition, a reasonable person would understand that their silence and inaction in the face of the unconditional acceptance of the settlement offer by their attorney would cause Southwick to believe he had an agreement and he would begin performing thereunder.

Because Lawrence and Robert Kay expressly accepted the offer, because Joy and Teresa Kay demonstrated a lack of good faith and diligence in the way they did nothing when it would have been so easy to communicate with their attorney, and because Southwick

did, indeed, perform his duties under the Agreement in reasonable reliance upon the acceptance, the Court should rule that the Kays have bound themselves to the Agreement by silently (in the case of Joy and Teresa Kay) or actively (in the case of Lawrence and Robert Kay) manifesting their intent to be bound thereby.

B. The Court Should Enforce the Settlement Agreement By Ordering Specific Performance.

Utah Courts have uniformly held that "Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the Court. . . ." Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). Se also Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980); Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979); and LHIW, Inc. v. DeLorean, 753 P.2d 961, 963 (Utah 1988). Utah courts have also held that "Before specific performance will be employed by the courts to enforce a contract the terms of the agreement must be reasonably certain so the parties know what is required of them, and definite enough that the courts can delineate the intent of the contracting parties." Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980). See also Eliason v. Watts, 615 P.2d 427, 429 (Utah 1980).

In the present case, the elements necessary for specific performance are clearly present. First, with respect to justice and fairness, only Southwick has clean hands. Lawrence and Robert Kay unconditionally accepted the settlement offer. Is specific performance unfair as to them? Absolutely not! Lawrence and Robert Kay should be held to the agreement they accepted.

The Kays' attorney could possibly have been careless in assuming that Lawrence and Robert Kay spoke for their wives. If this is true, who should bear the burden

of this carelessness? Is it fair for Southwick to be denied the benefit of his settlement agreement because the Kays' attorney may have been careless in confirming the authority of his clients before he sent out the unconditional acceptance upon which Southwick relied? Absolutely not! If anyone should have to bear the burden of anything an attorney does in an inappropriate way, the clients who selected the attorney should bear the burden. They are the only ones who would then have recourse against their attorney to recoup their loss. Furthermore, only they and their attorney know whose fault it was that their attorney was positive that all his clients were accepting the offer. Southwick has no way of knowing whether Joy and Teresa Kay ever accepted the offer or whether they just changed their minds, as the Kays' attorney represented to Southwick's counsel on June 20, 1995. (R. at 2652) (Addendum B, p. 3).

Is it fair to allocate the fault upon Joy and Teresa Kay when they may be telling the truth that they never accepted the settlement offer? Absolutely! Even if they did not verbally accept the settlement offer, their silence and inaction under these unique circumstances manifests an acceptance of the settlement offer irrespective of what their intent truly was. 17A Am.Jur.2d Contracts at §§ 28, 29 and 103. Only Southwick is an innocent victim in the Kays' attempt to renege on their acceptance of the settlement offer. Fairness dictates, therefore, that Southwick should be protected from the damage caused by not finding the formation of and enforcing the Agreement.

From a public policy standpoint, enforcing the Agreement is the only remedy that preserves the fairness of the legal system. If the Agreement is not enforced, a message will be sent to clever clients and attorneys who may use the Kays' method of accepting and

then rejecting settlement offers in order to find out whether and to what extent the opposing party can assemble financial resources. In very few settlements are the acceptances of settlement offers made by all accepting parties directly to the offering parties. Typically, offers and acceptances are transmitted through attorneys. Consequently, a majority of settlement offers could be rejected after being unconditionally accepted by the attorney and all but one of his clients and after the offering party has performed in reliance upon the acceptance.

From a public policy standpoint, it would be much fairer to hold the party responsible whose attorney incorrectly assumed there was authority to settle. If the clients led their attorney astray, the clients deserve to be held responsible. If the attorney was careless in confirming authority, the clients have recourse against their attorney. When you add to this the fact that Joy and Teresa Kay failed to respond in good faith if they did not want to accept the settlement offer and the fact that Southwick reasonably relied upon an unconditional acceptance in performing his duties under the Agreement, then it is easy to see that equity and fairness mandate the enforcement of the Agreement through specific performance.

The second element necessary for specific performance is reasonable certainty as to the terms of the Contract being enforced. Once again, the present case is well suited for this remedy. The written offer and its acceptance without conditions or modifications is an excellent indication of what the parties agreed to do. Southwick would pay \$10,200.00 and the Kays would release Southwick of any further liability and would file a Satisfaction of Judgment as to Southwick. (R. at 2657) (Addendum B, Exhibit B).

In addition to the written offer and acceptance, Southwick's attorney prepared the Agreement which incorporated the settlement offer and other typical language contained in a settlement agreement. The Agreement was fully acceptable to the Kays' attorney, who sent it to his clients for signing. (R. at 2671) (Addendum C. p. 3). For this reason, it would also be appropriate for the Court to adopt the Agreement as the full terms to be enforced. Because the terms of the Agreement are specific and easy to identify, specific performance can appropriately be applied in this case.

CONCLUSION

In conclusion, a valid and binding contract was formed between Southwick and the Kays. The terms of the contract are simple and easy to identify. Fairness dictates that the contract be enforced through the application of specific performance. In fairness to Southwick and the judicial system as a whole, the Kays should not be allowed to slip out of their acceptance of the contract by claiming their attorney had no authority to act on behalf of Joy and Teresa Kay.

Because the Court is reviewing the legal conclusions of the Trial Court, no particular deference should be given to the Trial Court's conclusions; and for the reasons stated herein, the Trial Court's ruling should be overturned, Southwick's motion to enforce the Agreement should be granted, and the Agreement should be enforced through specific performance.

RESPECTFULLY SUBMITTED this 2 day of July, 1996.

SCALLEY & READING

By: Marlon L. Bates
Marlon L. Bates
Attorney for Val E. Southwick

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 2 day of July, 1996, I caused to be hand-delivered a true and correct copy of the foregoing Brief of Appellant to the following:

Reed L. Martineau, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff/Appellee
10 Exchange Place, Suite 1100
PO Box 45000
Salt Lake City, Utah 84145

Marlon L. Bates

ADDENDA

- A. Defendant Val E. Southwick's Motion to Enforce Settlement Agreement
- B. Memorandum of Points and Authorities in Support of Defendant Val E. Southwick's Motion to Enforce Settlement Agreement
- C. Affidavit of Marlon L. Bates
- D. Memorandum in Opposition to Val E. Southwick's Motion to Enforce Settlement Agreement
- E. Affidavit of Leslie W. Slauch
- F. Affidavit of Joy Kay
- G. Reply to Memorandum in Opposition to Val E. Southwick's Motion to Enforce Settlement Agreement
- H. Supplemental Memorandum in Opposition to Motion to Enforce Settlement Agreement
- I. Response to Supplemental Memorandum in Opposition to Motion to Enforce Settlement Agreement
- J. Minute Entry
- K. Order Denying Val E. Southwick's Motion to Enforce Settlement Agreement
- L. Notice of Appeal

ADDENDUM A

Defendant Val E. Southwick's Motion to Enforce Settlement Agreement

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IN THE THIRD JUDICIAL DISTRICT COURT


SALT LAKE COUNTY, STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT	:	DEFENDANT VAL E. SOUTHWICK'S
L. KAY and TERESA KAY,	:	MOTION TO ENFORCE
	:	SETTLEMENT AGREEMENT
Plaintiffs,	:	
	:	
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 9209061060 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

Defendant, Val E. Southwick, hereby moves the Court for an Order to enforce the settlement agreement entered into between Val E. Southwick and the plaintiffs on April 7, 1995. This Motion is supported by a Memorandum of Points and Authorities and the Affidavit of Marlon L. Bates, which are filed concurrently herewith.

DATED this 2 day of August, 1995.

SCALLEY & READING



Marlon L. Bates
Attorney for Val E. Southwick

MAILING CERTIFICATE

I hereby certify that on the 2nd day of August, 1995, I caused to be mailed a true and correct copy of the foregoing Defendant Val E. Southwick's Motion to Enforce Settlement Agreement by United States mail, postage prepaid, addressed to the following:

Jackson Howard, Esq.
Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

William B. Gaudin

ADDENDUM B

**Memorandum of Points and Authorities in Support of Defendant
Val E. Southwick's Motion to Enforce Settlement Agreement**

MARLON L. BATES, #4794
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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT	:	MEMORANDUM OF POINTS AND
L. KAY and TERESA KAY,	:	AUTHORITIES IN SUPPORT OF
	:	DEFENDANT VAL E. SOUTHWICK'S
Plaintiffs,	:	MOTION TO ENFORCE SETTLEMENT
	:	AGREEMENT
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 9209061060 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

CHRONOLOGY OF EVENTS

On September 3, 1993, a judgment was entered against Val E. Southwick ("Southwick") and others in the above referenced matter. On March 16, 1995, Southwick, through his attorney, Marlon L. Bates, transmitted by facsimile to the plaintiffs' counsel of record a written offer to pay the plaintiffs the sum of \$9,180.00 to satisfy their judgment against Southwick. A copy of said offer is attached hereto as "Exhibit A" and incorporated herein by this reference.

Within 30 minutes after the written offer was transmitted to the plaintiffs' counsel, Southwick informed his attorney that he

could offer \$10,200.00 in exchange for a satisfaction of the judgment against him. Southwick's attorney immediately prepared a new written offer to pay \$10,200.00 in exchange for a satisfaction of judgment and transmitted the written offer by facsimile to the plaintiffs' attorney. A copy of the offer is attached hereto as "Exhibit B" and incorporated herein by this reference.

On April 7, 1995, plaintiffs' attorney mailed a written acceptance of the offer to settle for \$10,200.00. The written acceptance was received by Southwick's attorney on April 10, 1995. A copy of the written acceptance is attached hereto as "Exhibit C" and incorporated herein by this reference.

In reliance upon the settlement agreement created by the plaintiffs' acceptance of Southwick's offer, Southwick transferred settlement funds into his attorney's trust account and Southwick's attorney prepared a written Settlement and Release Agreement. On April 18, 1995, the agreement was mailed to the plaintiffs' attorney for review with a cover letter explaining that the settlement payment could be made when the language of the written agreement was finalized. A copy of the agreement and cover letter are attached hereto as "Exhibit D" and incorporated herein by this reference.

On May 9, 1995, Southwick's attorney spoke to the plaintiffs' attorney by telephone regarding the Settlement and Release Agreement. The plaintiffs' attorney told Southwick's

attorney that he was satisfied with the language in the Settlement and Release Agreement and had sent it on to his clients for their signatures.

On May 23, 1995, Southwick's attorney left a telephone message for the plaintiffs' attorney to call him regarding whether the plaintiffs had signed the Settlement and Release Agreement.

On June 20, 1995, Southwick's attorney spoke to the plaintiffs' attorney regarding the status of the Settlement and Release Agreement. The plaintiffs' attorney informed Southwick's attorney that his clients may have changed their minds with respect to the settlement agreement. Southwick's attorney asked the plaintiffs' attorney to inform his clients that he believed they could not lawfully rescind their settlement agreement and that a motion would be brought to enforce the settlement agreement if they did not sign and return the Settlement and Release Agreement. The plaintiffs' attorney said he would convey this message to his clients.

On July 11, 1995, Southwick's attorney mailed a written notice to the plaintiffs' counsel informing him that if the Settlement and Release Agreement was not signed and returned by July 21, 1995, a motion would be filed to enforce the agreement between the parties. A copy of said notice is attached hereto as "Exhibit E" and incorporated herein by this reference. No response

to this notice was ever received and the plaintiffs have not signed or returned the Settlement and Release Agreement.

APPLICATION OF LEGAL PRINCIPLES

An agreement to settle is a contract between the parties to the agreement. 15A Am.Jur.2d Compromise and Settlement, §7 (1976). Like other contracts, it requires offer, acceptance and consideration to formulate and once formed, it is fully enforceable. Id. In the present case, a written offer to pay \$10,200.00 in consideration of the receipt of a satisfaction of judgment was transmitted to the plaintiffs' attorney. The offer was unconditionally accepted in writing on April 7, 1995, which created a fully enforceable settlement agreement. After Southwick transferred funds and Southwick's attorney prepared and delivered the Settlement and Release Agreement for execution in reliance upon the agreement, the plaintiffs simply changed their minds and decided not to go through with what they agreed to do. In doing so, the plaintiffs materially breached the agreement.


There are typically three remedies available when a settlement agreement has been breached: (1) enforcement of the agreement; (2) treating the agreement as rescinded; and (3) damages. Id. at §35. In the present case, it would be fair for the Court to enforce the agreement by ordering the plaintiffs to deliver to Southwick a Satisfaction of Judgment upon the receipt of the \$10,200.00 agreed upon. It would also be fair to award damages

by requiring the plaintiffs to pay Southwick's attorney's fees and costs incurred in enforcing the settlement agreement.

For the reasons stated above, Southwick requests an Order directing the plaintiffs to deliver to Southwick a proper Satisfaction of Judgment upon the receipt of the sum of \$10,200.00 and requiring plaintiffs to pay Southwick's attorney's fees and costs incurred in enforcing the settlement agreement.

DATED this 2 day of August, 1995.

SCALLEY & READING


Marlon L. Bates
Attorneys for Val E. Southwick

MAILING CERTIFICATE

I hereby certify that on the 2nd day of August, 1995, I caused to be mailed a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Defendant Val E. Southwick's Motion to Enforce Settlement Agreement by United States mail, postage prepaid, addressed to the following:

Jackson Howard, Esq.
Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603



EXHIBIT A

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE

AREA CODE 801

531-7870

FACSIMILE

AREA CODE 801

531-7968

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MICHAEL W. SPENCE
MARLON L. BATES
JOHN EDWARD HANSEN*
SCOTT N. RASMUSSEN
JOHN E. SWALLOW**
STEVEN B. SMITH
WESLEY D. HUTCHINS
JAMES W. CLAFLIN JR.***

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

March 16, 1995

VIA FACSIMILE

Jackson Howard, Esq.
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Mr. Howard:

As you are well aware, Mr. Southwick's financial situation is ideal for a "no asset" chapter 7 bankruptcy. In fact, I have been urging him to file bankruptcy for quite some time now. In addition to the substantial judgment now on appeal, there are many other judgment creditors who are making his life miserable with collection efforts.

Rather than discharging the Kay's judgment in bankruptcy, Val has authorized me to offer the sum of \$9,180.00 in full satisfaction of the judgment against Val Southwick. This offer is contingent on Val's ability to borrow this amount from his friends or family. While the prospects of this appear good, it has not been finalized yet and I do not want to mislead you into believing that it can be positively accomplished.

I realize that the offer is only a fraction of the amount owed on the judgment, but it is two or three times the amount necessary to complete a chapter 7 bankruptcy and it may help defray the cost the Kays are currently incurring on the appeal. Thank you for your consideration of this offer and I look forward to hearing from you.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada

EXHIBIT B

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE

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JAMES W. CLAFLIN JR.***

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

March 16, 1995

VIA FACSIMILE

Jackson Howard, Esq.
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Mr. Howard:

Val just received the copy of the letter I faxed to you 20 minutes ago and he tells me that he believes that he can borrow \$10,200.00 instead of \$9,180.00. Consequently, I am now authorized to offer \$10,200.00 in full satisfaction of the judgment against Val Southwick, subject to Mr. Southwick's ability to borrow this amount.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada

EXHIBIT C

HOWARD, LEWIS & PETERSEN

ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street

Post Office Box 778

Provo, Utah 84603

Telephone: (801) 373-6345

Facsimile: (801) 377-4991

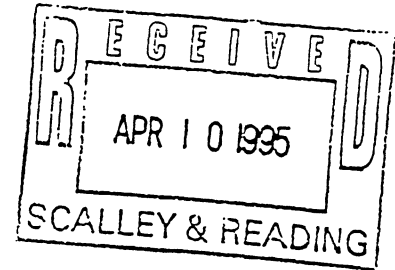
File No. 18,080

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Fred D. Howard
Leslie W. Slaugh

Richard W. Daynes
Phillip E. Lowry
Kenneth Parkinson

OF COUNSEL
S. Rex Lewis

April 7, 1995



Marlon L. Bates, Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111

Re: Kay v. Val Southwick

Dear Marlon:

Kays have authorized us to accept Val Southwick's offer of \$10,200.00 in full satisfaction of the judgment against him.

Sincerely,

HOWARD, LEWIS & PETERSEN

Leslie W. Slaugh

LWS/lo

cc: Lawrence Kay
Robert Kay

J:\LWS\BATES.LO

002657

EXHIBIT D

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE

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FORD G. SCALLEY
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JOHN EDWARD HANSEN
SCOTT N. RASMUSSEN
JOHN E. SWALLOW
STEVEN B. SMITH
WESLEY D. HUTCHINS
JAMES W. CLAFLIN JR.

• ALSO ADMITTED IN WYOMING
• ALSO ADMITTED IN COLORADO
• ALSO ADMITTED IN ARIZONA

April 18, 1995

Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Leslie:

I am enclosing a proposed Settlement and Release Agreement for your review. The duty of confidentiality is very important to Mr. Southwick because he has several creditors who are seeking payments. Please let me know if any changes need to be made. The payment can be arranged as soon as the agreement is finalized.

Sincerely,

SCALLEY & READING



Marlon L. Bates

ada
Enclosure

SETTLEMENT AND RELEASE AGREEMENT

THIS AGREEMENT is made this ____ day of April, 1995 by and among Lawrence C. Kay, Joy Kay, Robert L. Kay and Teresa Kay (hereinafter collectively "the Kays") and Val E. Southwick ("Southwick").

Recitals

A. WHEREAS, on or about September 3, 1993, the Kays received a judgment in the amount of \$652,347.00 against Southwick ("the Judgment") and others in that certain lawsuit in the Third Judicial District Court of Salt Lake County, Utah which is identified as Civil No. 920906160 ("the Lawsuit"); and

B. WHEREAS, the Kays and Southwick have determined that it is in their best interest to resolve the Judgment in the manner described herein rather than by continuing costly and time consuming litigation or debt collection procedures.

Agreement

NOW THEREFORE, in consideration of the foregoing, and the mutual covenants and duties contained herein, the Kays and Southwick agree as follows:

1. Southwick shall cause the sum of \$10,200.00 to be paid jointly to the Kays and their attorneys, HOWARD, LEWIS & PETERSON, upon the execution of this Agreement.

2. The Kays shall accept the sum of \$10,200.00 as payment in full of the Judgment against Southwick. It is the intention of the Kays and Southwick that once the amount of \$10,200.00 has been received by the Kays through their attorneys, then no further amounts will be owed by Southwick to the Kays and the Kays shall promptly file a Satisfaction of Judgment which releases and discharges the Judgment as to Southwick. Upon receipt of the payment described herein, the Kays shall further file any documents necessary to release and discharge any abstracts of the Judgment as it relates to Southwick which may have been docketed in any other court.

3. The Kays agree to preserve the confidentiality of the terms of this Agreement and the amount which Southwick has caused to be paid hereunder. Accordingly, the Kays agree that they will not disclose the terms of this Agreement or the amount received hereunder to any third party (except the Kays' attorneys, accountants, the Internal Revenue Service and any other governmental agency to which disclosure is required by law) unless required to do so by court order. The Kays understand that if this duty of confidentiality is breached, it could cause substantial damage to Southwick and Southwick would have the right to recover such damage from whomever breaches the duty of confidentiality.

4. This Agreement does not affect any judgment or ongoing litigation between the Kays and Summit Systems, Inc. or the other defendants in the Lawsuit and these parties are explicitly excluded from this Agreement; the Kays shall have all of the rights and remedies against these parties which the Kays had before this Agreement was entered into, including but not limited to those which the Kays are pursuing before the Utah Supreme Court in Case No. 930626.

5. Once the Kays, through their attorneys, have received the sum of \$10,200.00, the Kays hereby fully, completely and forever discharge and release Southwick and his agents and attorneys from all claims, demands, obligations, liabilities, indebtedness, breaches of duty, acts, omission, misfeasance, malfeasance, nonfeasance, causes of action, sums of money, accounts, compensation, contracts, controversies, promises, damages, costs, losses, and expenses of every type, kind, nature, description or character which relate in any manner whatsoever to the Judgment, and irrespective of how, why or by reason of what facts, whether heretofore existing or which could be claimed to exist, of whatever kind, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length arising out of any event occurring or matter existing at or prior to the time of this Agreement which relate in any manner whatsoever to the Judgment, save and except the duties required by this Agreement.

6. Once the release described in paragraph 5 above becomes effective, Southwick hereby fully, completely and forever discharges and releases the Kays and their respective agents and attorneys from all claims, demands, obligations, liabilities, indebtedness, breaches of duty, acts, omission, misfeasance, malfeasance, nonfeasance, causes of action, sums of money, accounts, compensation, contracts, controversies, promises,

damages, costs, losses, and expenses of every type, kind, nature, description or character which relate in any manner whatsoever to the Judgment, and irrespective of how, why or by reason of what facts, whether heretofore existing or which could be claimed to exist, of whatever kind, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length arising out of any event occurring or matter existing at or prior to the time of this Agreement which relate in any manner whatsoever to the Judgment, save and except the duties required by this Agreement.

7. The parties hereto acknowledge and agree that good and valuable consideration has been given for the covenants and agreements set forth herein and that each party has been fully advised (to the extent they have deemed necessary) by competent legal counsel.

8. The parties agree that nothing herein contained shall be construed to be a waiver of claims, rights, interest, remedies, or causes of action which arise as of a result of acts, inaction, representations, warranties, agreements or covenants which have their origin on a date subsequent to this Agreement.

9. Should any party hereto default in any of the promises or agreements contained herein or seek to enforce any claim released by this Agreement, the non-defaulting or released party, as applicable, shall have the right to enforce the terms hereof and the cost of such enforcement, including but not limited to reasonable attorney's fees and costs, shall be borne by the defaulting or releasing party, as applicable, and shall be payable upon demand.

10. The terms of this Agreement and all rights and obligations of the parties hereto shall be governed by the laws of the state of Utah.

11. This Agreement may be executed in any number of counterparts by the parties hereto and all counterparts together shall constitute a single agreement. This Agreement may be executed on facsimile copies of the original and each party so executing agrees to provide an original executed counterpart as soon thereafter as is reasonable.

IN WITNESS WHEREOF, the parties have set their hand below
on the day and year indicated above.

Lawrence C. Kay

Joy Kay

Robert L. Kay

Teresa Kay

Val E. Southwick

EXHIBIT E

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE

AREA CODE 801

531-7870

FACSIMILE

AREA CODE 801

531-7968

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MICHAEL W. SPENCE
MARLON L. BATES
JOHN EDWARD HANSEN*
SCOTT N. RASMUSSEN
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STEVEN B. SMITH
WESLEY D. HUTCHINS
JAMES W. CLAFLIN JR.***

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

July 11, 1995

Leslie W. Slauch, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

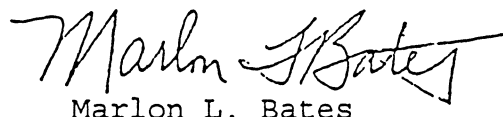
Re: Kay v. Val Southwick

Dear Leslie:

This letter will notify you that if your clients have not signed and returned the Settlement and Release Agreement on or before July 21, 1995, I will bring a motion to enforce the agreement. I appreciate any assistance you can give in completing this settlement without litigation.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada
cc: Val Southwick

ADDENDUM C

Affidavit of Marlon L. Bates

MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Defendant Val E. Southwick
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

LAWRENCE C. KAY, JOY KAY, ROBERT	:	AFFIDAVIT OF
L. KAY and TERESA KAY,	:	MARLON L. BATES
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 9209061060 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

I, Marlon L. Bates, having been duly sworn, depose and state as follows:

1. I am over eighteen years of age, am a resident of Davis County, Utah, and have personal knowledge of the facts asserted herein.

2. I am a member of the Utah State Bar and have been retained to represent the defendant, Val E. Southwick ("Southwick"), with respect to the judgment entered against him on September 3, 1993.

3. On March 16, 1995, I transmitted by facsimile to the plaintiffs' attorney of record a written offer to pay the sum of \$9,180.00 in exchange for a Satisfaction of Judgment. A copy of said offer is attached hereto as "Exhibit A" and incorporated herein by this reference.

4. Within 30 minutes after transmitting the written offer to the plaintiffs' attorney, I was informed by Southwick that I could offer the sum of \$10,200.00 in exchange for a Satisfaction of Judgment.

5. After being notified of the increase in the settlement offer, I immediately prepared a new settlement offer which set forth the increased settlement amount of \$10,200.00 and transmitted it by facsimile to the plaintiffs' attorney. A copy of the revised offer of settlement is attached hereto as "Exhibit B" and incorporated herein by this reference.

6. On April 7, 1995, the plaintiffs' attorney mailed a written acceptance of the offer to exchange the sum of \$10,200.00 for a Satisfaction of Judgment. The written acceptance was received by me on April 10, 1995. A copy of the written acceptance is attached hereto as "Exhibit C" and incorporated herein by this reference.

7. In reliance upon the settlement agreement, I arranged to have the settlement funds transferred to my law firm's trust account and I prepared a written Settlement and Release

Agreement and mailed it to the plaintiffs' attorney on April 18, 1995, with a letter explaining that the settlement payment would be made once the exact form of the agreement was finalized. A copy of the Settlement and Release Agreement and the cover letter is attached hereto as "Exhibit D" and incorporated herein by this reference.

8. On May 9, 1995, I spoke by telephone with the plaintiffs' attorney regarding the Settlement and Release Agreement. The plaintiffs' attorney told me that he was satisfied with the language in the Settlement and Release Agreement and had sent it to his clients for their signatures.

9. On May 23, 1995, I left a telephone message with the plaintiffs' attorney to call me regarding the status of the Settlement and Release Agreement.

10. On June 20, 1995, I spoke by telephone to the plaintiffs' attorney, who told me that his client may have change their minds with respect to the settlement agreement. I asked the plaintiffs' attorney to tell his clients that I did not think they could legally rescind the settlement agreement and I would file a motion to enforce the settlement agreement if they did not sign and return the Settlement and Release Agreement. The plaintiffs' attorney said he would convey my message to his clients.

11. On July 11, 1995, I mailed a written notice to the plaintiffs' attorney informing him that if the Settlement and

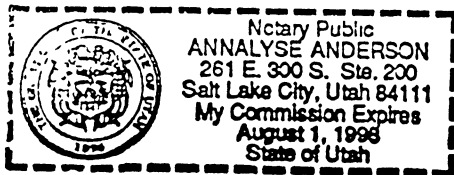
Release Agreement was not signed and returned by July 21, 1995, a motion would be filed to enforce the settlement agreement. A copy of said notice is attached hereto as "Exhibit E" and incorporated herein by this reference. I have received no response to this notice and the plaintiffs have not signed and returned the Settlement and Release Agreement.

DATED this 2 day of August, 1995.

Marlon L. Bates
Marlon L. Bates

SUBSCRIBED AND SWORN to before me this 2nd day of August, 1995.

Annalyse Anderson
Notary Public



MAILING CERTIFICATE

I hereby certify that on the 2nd day of August, 1995, I caused to be mailed a true and correct copy of the foregoing Affidavit of Marlon L. Bates by United States mail, postage prepaid, addressed to the following:

Jackson Howard, Esq.
Leslie W. Slauch, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

Annaliese Anderson

EXHIBIT A

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE
AREA CODE 801
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FACSIMILE
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JOHN EDWARD HANSEN*
SCOTT N. RASMUSSEN
JOHN E. SWALLOW**
STEVEN B. SMITH
WESLEY D. HUTCHINS
JAMES W. CLAFLIN JR.***

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

March 16, 1995

VIA FACSIMILE

Jackson Howard, Esq.
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Mr. Howard:

As you are well aware, Mr. Southwick's financial situation is ideal for a "no asset" chapter 7 bankruptcy. In fact, I have been urging him to file bankruptcy for quite some time now. In addition to the substantial judgment now on appeal, there are many other judgment creditors who are making his life miserable with collection efforts.

Rather than discharging the Kay's judgment in bankruptcy, Val has authorized me to offer the sum of \$9,180.00 in full satisfaction of the judgment against Val Southwick. This offer is contingent on Val's ability to borrow this amount from his friends or family. While the prospects of this appear good, it has not been finalized yet and I do not want to mislead you into believing that it can be positively accomplished.

I realize that the offer is only a fraction of the amount owed on the judgment, but it is two or three times the amount necessary to complete a chapter 7 bankruptcy and it may help defray the cost the Kays are currently incurring on the appeal. Thank you for your consideration of this offer and I look forward to hearing from you.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada

EXHIBIT B

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE

AREA CODE 801

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JAMES W. CLAFLIN JR.***

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

March 16, 1995

VIA FACSIMILE

Jackson Howard, Esq.
120 East 300 North
PO Box 778
Provo, Utah 84603


Re: Kay v. Val Southwick

Dear Mr. Howard:

Val just received the copy of the letter I faxed to you 20 minutes ago and he tells me that he believes that he can borrow \$10,200.00 instead of \$9,180.00. Consequently, I am now authorized to offer \$10,200.00 in full satisfaction of the judgment against Val Southwick, subject to Mr. Southwick's ability to borrow this amount.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada

EXHIBIT C

HOWARD, LEWIS & PETERSEN

ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street

Post Office Box 778

Provo, Utah 84603

Telephone: (801) 373-6345

Facsimile: (801) 377-4991

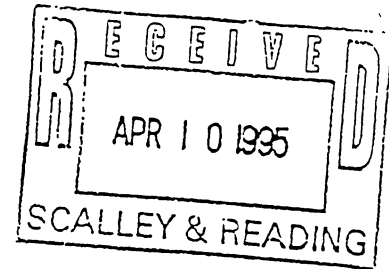
File No. 18,080

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Fred D. Howard
Leslie W. Slaugh

Richard W. Daynes
Phillip E. Lowry
Kenneth Parkinson

OF COUNSEL
S. Rex Lewis

April 7, 1995



Marlon L. Bates, Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111


Re: Kay v. Val Southwick

Dear Marlon:

Kays have authorized us to accept Val Southwick's offer of \$10,200.00 in full satisfaction of the judgment against him.

Sincerely,

HOWARD, LEWIS & PETERSEN



Leslie W. Slaugh

LWS/lo

cc: Lawrence Kay
Robert Kay

J:\LWS\BATES.LO

002676

EXHIBIT D

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
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SCOTT N. RASMUSSEN
JOHN E. SWALLOW**
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*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

April 18, 1995

Leslie W. Slauch, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Leslie:

I am enclosing a proposed Settlement and Release Agreement for your review. The duty of confidentiality is very important to Mr. Southwick because he has several creditors who are seeking payments. Please let me know if any changes need to be made. The payment can be arranged as soon as the agreement is finalized.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada
Enclosure

SETTLEMENT AND RELEASE AGREEMENT

THIS AGREEMENT is made this ____ day of April, 1995 by and among Lawrence C. Kay, Joy Kay, Robert L. Kay and Teresa Kay (hereinafter collectively "the Kays") and Val E. Southwick ("Southwick").

Recitals

A. WHEREAS, on or about September 3, 1993, the Kays received a judgment in the amount of \$652,347.00 against Southwick ("the Judgment") and others in that certain lawsuit in the Third Judicial District Court of Salt Lake County, Utah which is identified as Civil No. 920906160 ("the Lawsuit"); and

B. WHEREAS, the Kays and Southwick have determined that it is in their best interest to resolve the Judgment in the manner described herein rather than by continuing costly and time consuming litigation or debt collection procedures.

Agreement

NOW THEREFORE, in consideration of the foregoing, and the mutual covenants and duties contained herein, the Kays and Southwick agree as follows:

1. Southwick shall cause the sum of \$10,200.00 to be paid jointly to the Kays and their attorneys, HOWARD, LEWIS & PETERSON, upon the execution of this Agreement.

2. The Kays shall accept the sum of \$10,200.00 as payment in full of the Judgment against Southwick. It is the intention of the Kays and Southwick that once the amount of \$10,200.00 has been received by the Kays through their attorneys, then no further amounts will be owed by Southwick to the Kays and the Kays shall promptly file a Satisfaction of Judgment which releases and discharges the Judgment as to Southwick. Upon receipt of the payment described herein, the Kays shall further file any documents necessary to release and discharge any abstracts of the Judgment as it relates to Southwick which may have been docketed in any other court.

3. The Kays agree to preserve the confidentiality of the terms of this Agreement and the amount which Southwick has caused to be paid hereunder. Accordingly, the Kays agree that they will not disclose the terms of this Agreement or the amount received hereunder to any third party (except the Kays' attorneys, accountants, the Internal Revenue Service and any other governmental agency to which disclosure is required by law) unless required to do so by court order. The Kays understand that if this duty of confidentiality is breached, it could cause substantial damage to Southwick and Southwick would have the right to recover such damage from whomever breaches the duty of confidentiality.

4. This Agreement does not affect any judgment or ongoing litigation between the Kays and Summit Systems, Inc. or the other defendants in the Lawsuit and these parties are explicitly excluded from this Agreement; the Kays shall have all of the rights and remedies against these parties which the Kays had before this Agreement was entered into, including but not limited to those which the Kays are pursuing before the Utah Supreme Court in Case No. 930626.

5. Once the Kays, through their attorneys, have received the sum of \$10,200.00, the Kays hereby fully, completely and forever discharge and release Southwick and his agents and attorneys from all claims, demands, obligations, liabilities, indebtedness, breaches of duty, acts, omission, misfeasance, malfeasance, nonfeasance, causes of action, sums of money, accounts, compensation, contracts, controversies, promises, damages, costs, losses, and expenses of every type, kind, nature, description or character which relate in any manner whatsoever to the Judgment, and irrespective of how, why or by reason of what facts, whether heretofore existing or which could be claimed to exist, of whatever kind, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length arising out of any event occurring or matter existing at or prior to the time of this Agreement which relate in any manner whatsoever to the Judgment, save and except the duties required by this Agreement.

6. Once the release described in paragraph 5 above becomes effective, Southwick hereby fully, completely and forever discharges and releases the Kays and their respective agents and attorneys from all claims, demands, obligations, liabilities, indebtedness, breaches of duty, acts, omission, misfeasance, malfeasance, nonfeasance, causes of action, sums of money, accounts, compensation, contracts, controversies, promises,

damages, costs, losses, and expenses of every type, kind, nature, description or character which relate in any manner whatsoever to the Judgment, and irrespective of how, why or by reason of what facts, whether heretofore existing or which could be claimed to exist, of whatever kind, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length arising out of any event occurring or matter existing at or prior to the time of this Agreement which relate in any manner whatsoever to the Judgment, save and except the duties required by this Agreement.

7. The parties hereto acknowledge and agree that good and valuable consideration has been given for the covenants and agreements set forth herein and that each party has been fully advised (to the extent they have deemed necessary) by competent legal counsel.

8. The parties agree that nothing herein contained shall be construed to be a waiver of claims, rights, interest, remedies, or causes of action which arise as of a result of acts, inaction, representations, warranties, agreements or covenants which have their origin on a date subsequent to this Agreement.

9. Should any party hereto default in any of the promises or agreements contained herein or seek to enforce any claim released by this Agreement, the non-defaulting or released party, as applicable, shall have the right to enforce the terms hereof and the cost of such enforcement, including but not limited to reasonable attorney's fees and costs, shall be borne by the defaulting or releasing party, as applicable, and shall be payable upon demand.

10. The terms of this Agreement and all rights and obligations of the parties hereto shall be governed by the laws of the state of Utah.

11. This Agreement may be executed in any number of counterparts by the parties hereto and all counterparts together shall constitute a single agreement. This Agreement may be executed on facsimile copies of the original and each party so executing agrees to provide an original executed counterpart as soon thereafter as is reasonable.

IN WITNESS WHEREOF, the parties have set their hand below
on the day and year indicated above.

Lawrence C. Kay

Joy Kay

Robert L. Kay

Teresa Kay

Val E. Southwick

EXHIBIT E

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MICHAEL W. SPENCE
MARLON L. BATES
JOHN EDWARD HANSEN*
SCOTT N. RASMUSSEN
JOHN E. SWALLOW**
STEVEN B. SMITH
WESLEY D. HUTCHINS
JAMES W. CLAFLIN JR.***

TELEPHONE
AREA CODE 801
531-7870

FACSIMILE
AREA CODE 801
531-7968

*ALSO ADMITTED IN WYOMING
**ALSO ADMITTED IN COLORADO
***ALSO ADMITTED IN ARIZONA

July 11, 1995

Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

Re: Kay v. Val Southwick

Dear Leslie:

This letter will notify you that if your clients have not signed and returned the Settlement and Release Agreement on or before July 21, 1995, I will bring a motion to enforce the agreement. I appreciate any assistance you can give in completing this settlement without litigation.

Sincerely,

SCALLEY & READING


Marlon L. Bates

ada
cc: Val Southwick

ADDENDUM D

**Memorandum in Opposition to Val E. Southwick's Motion to
Enforce Settlement Agreement**

LESLIE W. SLAUGH (3752), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 18,080

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>LAWRENCE C. KAY, JOY KAY, ROBERT L. KAY and TERESA KAY,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SUMMIT SYSTEMS, INC., a corporation, et al.,</p> <p>Defendants.</p>	<p>MEMORANDUM IN OPPOSITION TO VAL E. SOUTHWICK'S MOTION TO ENFORCE SETTLEMENT AGREEMENT</p> <p>Case No. 9209061060CV Judge J. Dennis Frederick</p>
---	--

Plaintiffs submit this memorandum in opposition to Val E. Southwick's Motion to Enforce Settlement Agreement dated August 2, 1995.

STATEMENT OF FACTS

1. Lawrence C. Kay and Joy Kay are husband and wife, and Robert L. Kay and Teresa Kay are husband and wife.
2. Leslie W. Slauch is attorney for all of the plaintiffs but discussed the proposed settlement agreement only with Lawrence Kay and Robert Kay.
3. Neither Joy Kay nor Teresa Kay ever agreed to the proposed settlement.

002685

ARGUMENT

THE SETTLEMENT WAS NOT APPROVED BY ALL PLAINTIFFS AND IS THEREFORE NOT ENFORCEABLE.

The authority of an attorney to bind his clients is limited. While the attorney has control over procedural aspects of the litigation, only the client may consent to a settlement. The agency of the attorney is therefore limited. Utah Code Ann. § 78-51-32 (1992) expresses this limitation:

An attorney and counselor has authority:

. . . .

(2) To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.

The effect of this statute is to void the purported settlement. In McWhirter v. Donaldson, 36 Utah 293, 104 P. 731 (1909), the court stated:

Of such agreement, therefore, there can be no specific performance. To allow the court to enforce them, as was done in this case, against the will or without the consent of the parties, is to allow the court to work the precise mischief which the statute was designed to prevent. Instead of being nullified in that way, the statute ought to be strictly adhered to, for it is the dictation of wisdom.

104 P. at 734 (quoting Borkheim v. N.B.&M. Ins. Co., 38 Cal. 623).

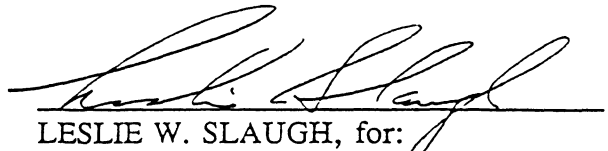
Based upon this authority, there is no settlement agreement for the Court to enforce. This is not a case where all of the plaintiffs reviewed the proposed settlement and agreed to it, and where their agreement was communicated by their attorney. In this case, two of the

plaintiffs never agreed to the proposed settlement. The statute clearly states that they are not bound by the actions of their attorney in inadvertently agreeing to the settlement.

The motion to enforce the settlement should be denied.

Val Southwick also seeks an award of attorney fees for bringing his motion. He cites no authority for his request, and the undersigned counsel is aware of none. The request should be summarily denied. See Utah R. Civ. P. 7(a)(1) (motions "shall state with particularity the grounds therefor"); Utah Code Jud. Admin. 4-501(1)(a) (motions to be "accompanied by a memorandum of points and authorities"); First Security Bank of Utah, N.A. v. Creech, 858 P.2d 958, 962 (Utah 1993) (court will not consider issues for which the party "presents no analysis or reasoning and cites no authority").

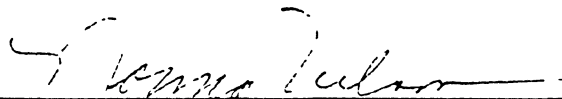
DATED this 15th day of August, 1995.


LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 15th day of August, 1995.

Marlon L. Bates, Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111



SECRETARY

J \LWSKAY.MEM

002688

ADDENDUM E

Affidavit of Leslie W. Slaugh

LESLIE W. SLAUGH (3752), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 18,080

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT L. KAY and TERESA KAY, Plaintiffs, vs. SUMMIT SYSTEMS, INC., a corporation, et al., Defendants.	AFFIDAVIT OF LESLIE W. SLAUGH Case No. 9209061060CV Judge J. Dennis Frederick
--	--

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

LESLIE W. SLAUGH, being duly sworn, states:

1. I am one of the attorneys for plaintiffs in this matter.
2. On or prior to April 6, 1995, I faxed to Robert Kay and Lawrence Kay, at their business office, a copy of Val Southwick's offer to pay \$10,200.00 in full satisfaction of the judgment against him.

002689

3. On April 6, 1995, I had a telephone conversation with Lawrence Kay and Robert Kay during which we discussed the proposed settlement.

4. During the April 6, 1995, telephone conversation, Lawrence Kay and Robert Kay told me that they would agree to the proposal.


5. We did not discuss whether Joy Kay or Teresa Kay had agreed or would agree to the proposal, but I assumed that Joy Kay and Teresa Kay had agreed or would agree to the proposal.

6. I had not spoken with either Joy Kay or Teresa Kay concerning the proposed settlement prior to mailing my letter to Marlon L. Bates dated April 7, 1995, and did not have actual authority from Joy Kay or Teresa Kay to accept the proposal to settle for \$10,200.00.

7. My present understanding is that Joy Kay and Teresa Kay are each unwilling to settle their judgment of over \$652,347.00 for only \$10,200.00.

8. I have personal knowledge of the facts stated herein.

DATED this 15th day of August, 1995.


LESLIE W. SLAUGH

SUBSCRIBED and sworn to before me this _____ day of August, 1995.

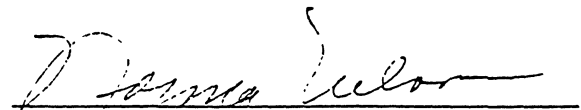
NOTARY PUBLIC

002690

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 15th day of August, 1995.

Marion L. Baies, Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111



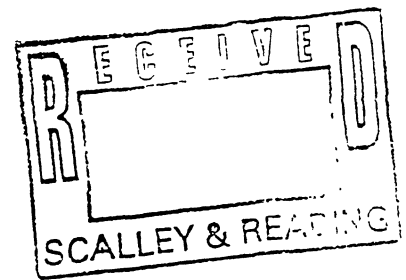
SECRETARY

J:\LWS\LWS.AFF

002691

ADDENDUM F

Affidavit of Joy Kay



LESLIE W. SLAUGH (3752), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 18,080

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LAWRENCE C. KAY, JOY KAY,
ROBERT L. KAY and TERESA KAY,

Plaintiffs,

vs.

SUMMIT SYSTEMS, INC., a
corporation, et al.,

Defendants.

AFFIDAVIT OF JOY KAY

Case No. 9209061060CV
Judge J. Dennis Frederick

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

JOY KAY, being duly sworn, states:

1. I am one of the plaintiffs in this matter.
2. I recall seeing a copy of a letter regarding a proposal that Val Southwick would pay \$10,200.00 in full satisfaction of our judgment against him.
3. I did not agree to the proposal and informed my husband, Lawrence Kay, that I did not want to agree to the proposal.

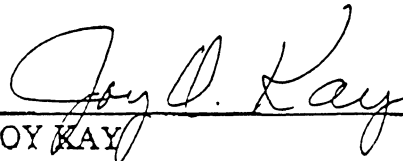
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4. I refused to sign the proposed settlement documents because I had not previously agreed to the settlement and did not want to agree to the settlement.

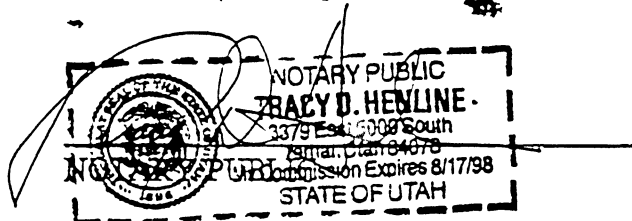
5. I did not authorize my attorney, Leslie W. Slaugh, to state that I had agreed to the settlement.

6. I have personal knowledge of the facts stated herein.

DATED this 16th day of August, 1995.


JOY KAY

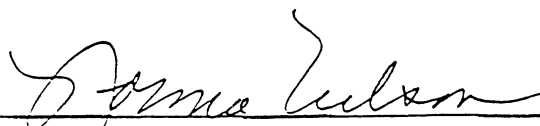
SUBSCRIBED and sworn to before me this 16th day of August, 1995.



MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 17th day of August, 1995.

Marlon L. Bates. Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111


SECRETARY

JLWSKAY AFF

002698

ADDENDUM G

**Reply to Memorandum in Opposition to Val E. Southwick's Motion to
Enforce Settlement Agreement**

MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Defendant Val E. Southwick
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT	:	REPLY TO MEMORANDUM IN
L. KAY and TERESA KAY,	:	OPPOSITION TO VAL E.
	:	SOUTHWICK'S MOTION TO ENFORCE
Plaintiffs,	:	SETTLEMENT AGREEMENT
	:	
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 9209061060 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

Plaintiffs oppose Val E. Southwick's ("Southwick") Motion to Enforce the Settlement Agreement on the basis that only two of the four plaintiffs accepted the settlement offer and the plaintiffs' counsel does not have authority to bind the two plaintiffs who did not accept the settlement offer. (See Memorandum In Opposition, pp. 1-3.) While it is true that the plaintiffs' counsel cannot unilaterally bind unwilling clients, this principle alone does not prevent the Court from granting Southwick's motion to enforce the settlement agreement.

Southwick's motion to enforce the settlement agreement is a request for specific performance. Utah courts have uniformly

held that "Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the Court, and accordingly, considerable latitude of discretion is allowed in his determination as to whether it shall be granted and what judgment should be entered in respect thereto;" Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). See also Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980); Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979); and LHIW, Inc. v. De Lorean, 753 P.2d 961, 963 (Utah 1988).

With respect to specific performance of a contract, Utah courts have held that "Before specific performance will be employed by the courts to enforce a contract the terms of the agreement must be reasonably certain so the parties know what is required of them, and definite enough that the courts can delineate the intent of the contracting parties." Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980). See also Eliason v. Watts, 615 P.2d 427, 429 (Utah 1980).

The circumstances of the present case strongly support the application of the Court's equitable powers. It is undisputed that a written settlement agreement was entered into between Southwick and Lawrence C. Kay and Robert L. Kay. Paragraph 4 of the Affidavit of Leslie W. Slaugh clearly sets forth the acceptance of the written settlement offer by Lawrence C. Kay and Robert L. Kay. Mr. Slaugh, who is a very competent and careful attorney, had no doubt in his mind after conversing with representatives of both couples who comprise the plaintiffs, that all plaintiffs had

accepted the settlement offer. Mr. Slauch would not have sent an unequivocal written acceptance of the offer unless he believed that all four plaintiffs had accepted the offer.

It is also undisputed that in reliance upon the written acceptance of the offer, Southwick moved forward to transfer settlement funds and to have his attorney prepare a written settlement agreement to describe the settlement in complete detail. It is further undisputed that while Southwick was proceeding in good faith to comply with the terms of the agreement, the plaintiffs did nothing for two and one-half months to advise Southwick or his counsel that the unequivocal acceptance of the offer was only binding as to Lawrence C. Kay and Robert L. Kay because Joy and Teresa Kay did not accept the offer. Although the plaintiffs' attorney mailed the acceptance of the offer on April 7, 1995, it was not until June 20, 1995 that Southwick's attorney first received word that the plaintiffs had "changed their minds" about the settlement. The plaintiffs allowed two and one-half months to pass after their counsel accepted the offer before providing Southwick with any notice that there was a problem. And this delay occurred even though the plaintiffs knew Southwick was diligently performing his duties under the agreement. It was not until Southwick's counsel received plaintiffs' Memorandum in Opposition over four months after the unequivocal acceptance of the

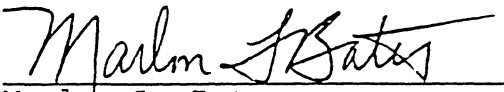
offer that Southwick first learned that Joy and Teresa Kay had not been consulted when the settlement offer was originally accepted.

Because the plaintiffs demonstrated a lack of good faith and diligence in the way they proceeded to accept and then belatedly reject the settlement offer, because two of the plaintiffs undisputedly accepted the offer, and because Southwick relied upon the plaintiffs' acceptance of the offer in carrying out his duties under the agreement, the Court should exercise its broad equitable powers to enforce the settlement agreement. If litigants are permitted to wait two and one-half months after their lawyer has unequivocally accepted a settlement agreement before providing the opposing party with any notice of a problem, and then to slip out of the agreement by alleging that not all of them accepted the offer, then a tremendous injustice will be condoned and settlement agreements will become a tool for the crafty litigant to use to find out what his opponent is willing to do or what financial resources his opponent can assemble. One side to the litigation can always allege after the fact that one of their group did not accept the settlement agreement. But when the accepting parties are the spouses of the nonaccepting parties and when the plaintiffs allow the defendant to continue with his duties under the agreement for two and one-half months without ever notifying the defendant that there is a problem, then equity requires the plaintiffs to be bound to the settlement agreement.

For the reasons explained above, the Court should grant the motion to enforce the settlement agreement as to all four plaintiffs.

DATED this 21st day of August, 1995.

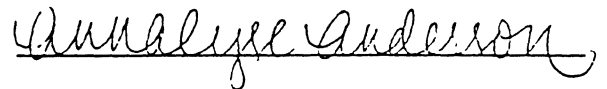
SCALLEY & READING


Marlon L. Bates
Attorneys for Val E. Southwick

MAILING CERTIFICATE

I hereby certify that on the 21st day of August, 1995, I caused to be mailed a true and correct copy of the foregoing Reply to Memorandum in Opposition to Val E. Southwick's Motion to Enforce Settlement Agreement by United States mail, postage prepaid, addressed to the following:

Jackson Howard, Esq.
Leslie W. Slauch, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603



ADDENDUM H

Supplemental Memorandum in Opposition to Motion to Enforce Settlement Agreement

LESLIE W. SLAUGH (3752), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 18,080

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT L. KAY and TERESA KAY, Plaintiffs, vs. SUMMIT SYSTEMS, INC., a corporation, et al., Defendants.	SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT Case No. 9209061060 CV Judge J. Dennis Frederick
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Plaintiff submits this memorandum to respond to arguments raised for the first time in Val Southwick's Reply to Memorandum in Opposition to Val E. Southwick's Motion to Enforce Settlement Agreement dated August 21, 1995.

Val Southwick argues that his motion seeks specific performance, which is addressed to the equitable powers of the Court. Southwick then attempts to extrapolate a rule that the Court can do whatever it deems equitable regardless of whether a contract exists. The law does not support this extrapolation.

002704

The law relating to settlement agreements was recently summarized by the Utah Supreme Court as follows:

Settlement agreements are favored by law and may be summarily enforced if there is a binding settlement agreement and the excuse for nonperformance is comparatively insubstantial. Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah Ct. App. 1989). Settlement agreements are governed by the rules applied to general contract actions. Butcher v. Gilroy, 744 P.2d 311, 312 (Utah Ct. App. 1987). Under the principles of basic contract law, a contract is not formed unless there is a meeting of the minds. Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317, 1321 (Utah 1976).

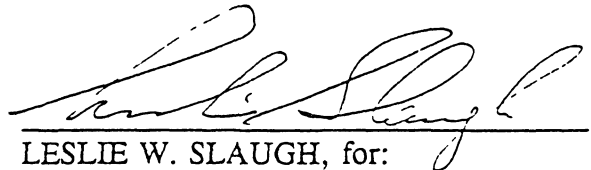
Sackler v. Savin, 267 Utah Adv. Rep. 22, 24 (June 16, 1995).

"[T]he existence of a valid contract is essential to the remedy of specific performance. In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the party against whom performance is sought, for specific performance is never applicable where there is no obligation to perform." 71 Am. Jur. 2d Specific Performance § 13 (1973). Accord, Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493 (1967).

It is, therefore, irrelevant whether the undersigned counsel thought there was a settlement. The fact is that two of the plaintiffs did not agree to the settlement, and counsel did not discover that until some weeks after mailing the proposed settlement documents to the defendants for signature. The equitable power of this Court to award specific performance cannot be invoked in this case. because there was never any contract.

Specific performance or other equitable relief is not appropriate in any event. While defendant may have arranged for a loan of money, there is no showing that he has been legally prejudiced. Nothing has occurred which cannot easily be undone. The loaned money can be returned. There has not been any reliance which would justify the Court in enforcing a contract which was never made, and binding Joy Kay and Teresa Kay to a settlement to which they did not agree.

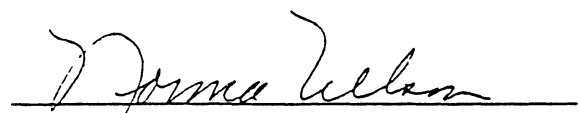
DATED this 28th day of August, 1995.


LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 28th day of August, 1995.

Marlon L. Bates, Esq.
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, UT 84111


SECRETARY

ADDENDUM I

**Response to Supplemental Memorandum in Opposition to Motion
to Enforce Settlement Agreement**

MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Defendant Val E. Southwick
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

LAWRENCE C. KAY, JOY KAY, ROBERT	:	RESPONSE TO SUPPLEMENTAL
L. KAY and TERESA KAY,	:	MEMORANDUM IN OPPOSITION TO
	:	MOTION TO ENFORCE
Plaintiffs,	:	SETTLEMENT AGREEMENT
	:	
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 9209061060 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

Plaintiffs' Supplemental Memorandum in Opposition to Motion to Enforce Settlement Agreement conveniently concludes that there is no contract and then recites cases which say that if there is no contract, there can be no specific performance to enforce the contract. The problem with this line of reasoning is that it assumes as fully resolved the very issue to be decided -- the existence of a contract. The Kays argue that because the two wives did nothing to manifest their consent to the settlement offer which their husbands accepted, no contract was formed. But a contract can be formed without the express manifestation of the parties: "under some circumstances, silence and inaction operate as an

acceptance, as where, under the circumstances, an inference of assent is warranted Under certain circumstances, the offeree may authorize or cause the offeror to regard silence as an acceptance" 17A Am. Jur.2d Contracts §103 (1991). "Consent may be implied from acts or may be indicated by silence or inaction. Conduct may be as effective as words in manifesting mutual assent to a contract." 17A Am. Jur.2d Contracts §29 (1991). "The meeting of the minds, which is essential in the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions, which may be wholly at variance with the former." 17A Am. Jur.2d Contracts §28 (1991).

In the present case, while the two husbands unconditionally accepted the settlement offer, the two wives did absolutely nothing for two and one-half months to advise Southwick or his counsel that the unequivocal acceptance of the offer was not effective as to the wives. The inaction of the wives during this extended period of time while Southwick was relying upon the acceptance in performing his duties thereunder is exactly the type of silence or inaction that manifests consent irrespective of whether there is actual consent. Consequently, a contract was formed and fairness dictates that it now be enforced.

DATED this 30 day of August, 1995.

SCALLEY & READING

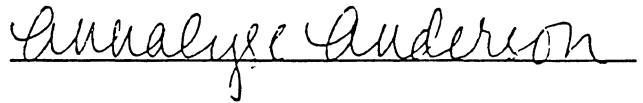


Marlon L. Bates
Attorney for Defendant Val E.
Southwick

MAILING CERTIFICATE

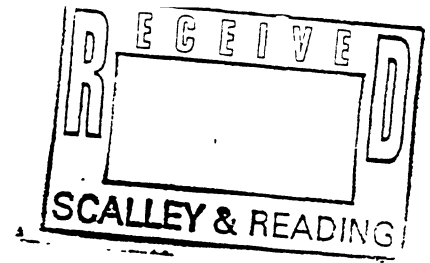
I hereby certify that on the 30th day of August, 1995, I caused to be mailed a true and correct copy of the foregoing Response to Supplemental Memorandum in Opposition to Motion to Enforce Settlement Agreement by United States mail, postage prepaid, to the following:

Jackson Howard, Esq.
Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603



ADDENDUM J

Minute Entry



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

KAY, LAWRENCE C	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 920906160 CV
	:	DATE 09/12/95
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
SUMMIT SYSTEMS, INC	:	COURT CLERK CLB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE
NOTICE TO SUBMIT FOR DECISION DATED AUGUST 16, 1995 AND
NOTICE TO SUBMIT FOR DECISION DATED AUGUST 30, 1995, THE
COURT RULES AS FOLLOWS:

1. DEFENDANT'S MOTION TO ENFORCE SETTLEMENT, ETC. IS DENIED
FOR THE REASONS SPECIFIED IN THE OPPOSING MEMORANDA.
2. COUNSEL FOR PLAINTIFFS TO PREPARE THE APPROPRIATE
ORDER.

002707

Case No: 920906160

Certificate of Mailing

I certify that on the 12th day of Sept., 1995,
I sent by first class mail a true and correct copy of the
attached document to the following:

JACKSON HOWARD
Atty for Plaintiff
120 EAST 300 NORTH
P O BOX 778
PROVO UT 84603

LESLIE W SLAUGH
Atty for Plaintiff
120 EAST 300 NORTH
P O BOX 778
PROVO UT 84603

MARLON L. BATES
Atty for Defendant
261 EAST 300 SOUTH
SUITE 200
SALT LAKE CITY UT 84111

District Court Clerk

By: C. Beverley

Deputy Clerk

002708

ADDENDUM K

Order Denying Val E. Southwick's Motion to Enforce Settlement Agreement

LESLIE W. SLAUGH (3752), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Attorneys for Plaintiffs

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

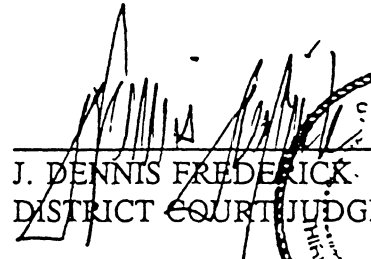
LAWRENCE C. KAY, JOY KAY, ROBERT L. KAY and TERESA KAY, Plaintiffs, vs. SUMMIT SYSTEMS, INC., a corporation, et al., Defendants.	ORDER DENYING VAL E. SOUTHWICK'S MOTION TO ENFORCE SETTLEMENT AGREEMENT Case No. 9209061 1 /60CV Judge J. Dennis Frederick
--	--

Val E. Southwick's Motion to Enforce Settlement Agreement dated August 2, 1995, came regularly before the Court for consideration without oral argument. The Court having considered the memoranda and affidavits supporting and opposing the motion, and having entered a Minute Entry on September 12, 1995, stating the reasons for the Court's ruling, now enters the following:

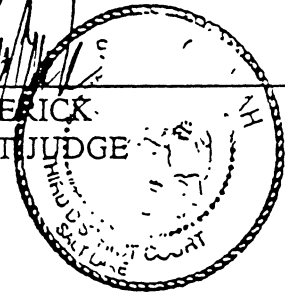
Val E. Southwick's Motion to Enforce Settlement Agreement is denied.

DATED this 16th ^{Oct} day of ~~September~~, 1995.


BY THE COURT



J. DENNIS FREDERICK
DISTRICT COURT JUDGE



APPROVED AS TO FORM:



MARLON L. BATES, ESQ.
ATTORNEY FOR DEFENDANT

J:\LWSKAY.ORD

002710
2

ADDENDUM L

Notice of Appeal

MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Defendant Val E. Southwick
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

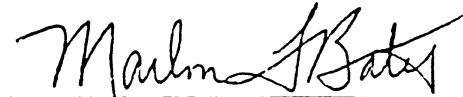
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LAWRENCE C. KAY, JOY KAY, ROBERT	:	NOTICE OF APPEAL
L. KAY and TERESA KAY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SUMMIT SYSTEMS, INC., a	:	Civil No. 920906160 CV
corporation, et al.,	:	
	:	Judge J. Dennis Frederick
Defendants.	:	

Notice is hereby given that Val E. Southwick, a defendant in the above-captioned matter, by and through his counsel of record, Marlon L. Bates, appeals to the Utah Supreme Court the entire Order Denying Val E. Southwick's Motion to Enforce Settlement Agreement, which was entered by the Honorable J. Dennis Frederick of the Third Judicial District Court of Salt Lake County, Utah on October 16, 1995.

DATED this 15th day of November, 1995.

SCALLEY & READING



Marlon L. Bates
Attorney for Val E. Southwick

MAILING CERTIFICATE

I hereby certify that on the 15th day of November, 1995,
I caused to be mailed a true and correct copy of the foregoing
Notice of Appeal by United States mail, postage prepaid, addressed
to the following:

Jackson Howard, Esq.
Leslie W. Slauch, Esq.
HOWARD, LEWIS & PETERSON
120 East 300 North
PO Box 778
Provo, Utah 84603

Annette Anderson