

2000

Water and Energy Systems Technology, Inc. v.
Steven L. Keil, Brody Chemical Company, Inc. :
Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WATER & ENERGY SYSTEMS
TECHNOLOGY, INC., a Utah corporation,

Plaintiff and Appellee,

v.

STEVEN L. KEIL; and BRODY CHEMICAL
COMPANY, INC., a Utah corporation

Defendants and Appellants.

**APPELLEE/
CROSS-APPELLANT BRIEF**

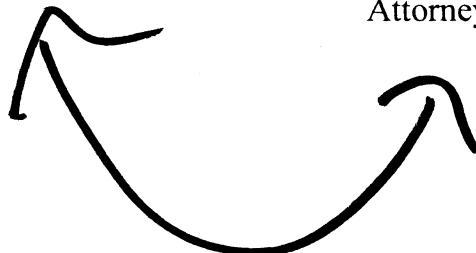
Supreme Court No. *20000468-SC*
Argument Priority No. *15*

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR DAVIS COUNTY,
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WATER & ENERGY SYSTEMS
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Defendants and Appellants.

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

The jury verdict and award in this case were based in part on provisions of the Utah Trade Secrets Act, Utah Code Ann. §§ 13-24-1 et seq.

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1. Did the trial court err in denying WEST's request for attorneys fees under the pertinent provision of the Utah Trade Secrets Act (Utah Code Ann. § 13-24-5), despite the jury's express finding that Defendant Keil, acting as an agent of Defendant Brody, misappropriated WEST's confidential pricing information?

Standard of review: Correctness. Whether attorneys fees are recoverable in a given action is a question of law, which a reviewing court reviews for correctness. Also, whether the trial court's findings of fact in support [or denial] of an award of attorneys fees are sufficient is a question of law, reviewed for correctness. Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

2. Did the trial court err in denying WEST's request for double damages under the pertinent provision of the Utah Trade Secrets Act (Utah Code Ann. § 13-24-4(2)), despite the jury's express finding that Defendant Keil, acting as an agent of Defendant Brody, misappropriated WEST's confidential pricing information?

Standard of review: Intermediate standard between “correctness” and “abuse of discretion.” A finding of damages liability (or lack thereof) is a mixed question of law and fact requiring an application of law to findings of fact. “[A] trial court’s or agency’s application of the law to the facts may, depending on the issue, be reviewed by an appellate court with varying degrees of strictness, falling anywhere between a review for ‘correctness’ and a broad ‘abuse of discretion’ standard.” Drake v. Industrial Comm’n of Utah, 939 P.2d 177, 181 (Utah 1997). In the context of reviewing the propriety of an award of damages, a “rational basis” intermediate standard of review may be appropriate. See Sampson v. Richins, 770 P.2d 998, 1007 (Utah Ct. App. 1989) (in the context of a damage award, a lower court’s findings of fact must provide a sufficient basis for the reviewing court to determine whether there is a rational legal basis as well as a sufficient factual basis for the award of damages).

3. Did the lower court err in denying WEST’s request for damages, or the jury’s consideration of the same, stemming from interference with WEST’s contractual relationship with Utah State University?

Standard of review: Intermediate standard between “correctness” and “abuse of discretion.” A finding of damages liability (or lack thereof) is a mixed question of law and fact requiring an application of law to findings of fact. “[A] trial court’s or agency’s application of the law to the facts may, depending on the issue, be reviewed by an appellate court with varying degrees of strictness, falling anywhere between a review for ‘correctness’

and a broad abuse of discretion standard.” Drake v. Industrial Comm’n of Utah, 939 P.2d 177, 181 (Utah 1997). In the context of reviewing the propriety of an award of damages, a “rational basis” intermediate standard of review may be appropriate. See Sampson v. Richins, 770 P.2d 998, 1007 (Utah App. 1989) (in the context of a damage award, a lower court’s findings of fact must provide a sufficient basis for the reviewing court to determine whether there is a rational legal basis as well as a sufficient factual basis for the award of damages).

STATEMENT OF THE CASE

WEST takes no exception to Brody’s and Keil’s “Statement of the Case,” other than to note that this Court’s written opinion in Water & Energy Systems Technology, Inc. v. Keil, 1999 UT 16, 974 P.2d 821, speaks for itself, and adequately sets forth the scope of and rationale behind this Court’s ruling in the interlocutory appeal of the trial court’s preliminary injunction.

STATEMENT OF FACTS

Appellants Brody and Keil have apparently either misunderstood or ignored their duty as a matter of law and as appellants to marshal the evidence. “[T]he appealing party has the burden of marshaling the evidence in support of the verdict and then showing that it is insufficient.” Fitz v. Synthes (USA), 1999 UT 103, ¶ 8, 990 P.2d 391. In their Brief, rather than meet their burden of marshaling the evidence, Brody and Keil instead have selectively presented as “facts” those portions of testimony that are most favorable to their argument on

appeal while at the same time omitting critical evidence supporting the jury's verdict. Thus, they have failed in their duty to marshal (as is discussed further below). As a consequence, WEST has identified below certain critical facts (with citations to the Record) which support the jury's verdict. While not exhaustive as to Brody's and Keil's appeal (since WEST does not have the marshaling burden in that respect), the facts presented below were adduced at trial and lend support to the jury's verdict, but were otherwise ignored by Brody and Keil in their recitation of selective material facts.

As to the cross-appeal, the marshaling requirement is a little different. In that respect the trial court ruled as a matter of law that there was insufficient testimony to support WEST's claim for double damages and attorneys fees. Therefore, also listed below are facts that support WEST's claims on its cross appeal.

1. Although Brody had some limited water treatment chemicals available prior to January of 1998, as of the end of 1997 it did not have any significant presence in the Utah water treatment market and was not a competitor of WEST. (R. at 2365, pp. 124, 138.)

2. Beginning sometime in late September or early October of 1997 and continuing until he voluntarily left his full time employment with WEST on March 2, 1998, Keil worked at least weekly at Brody's offices to develop and price new Brody water treatment products to compete with corresponding WEST products. (R. at 2365, pp. 140-42.)

3. The water treatment products which Brody did have prior to January of 1998 were inferior to WEST's corresponding products and were unacceptable to Keil as the kind of products which could compete against WEST. (R. at 2365, pp. 139-40.)

4. In October of 1997, Keil was introduced by Brody to one of Brody's chemical suppliers, Buckman Laboratories, as an employee of Brody. (R. at 2366, p. 257; Plaintiff's Exhibit Nos. 31, 32 and 33.)

5. When Keil was developing his products on behalf of Brody, and to ensure that such products were essentially the same as corresponding WEST products, Keil provided Brody with a list of suppliers WEST used so that Brody could acquire its ingredients from those same suppliers. (R. at 2365, pp. 143-44.)

6. While still a full-time employee with WEST, Keil visited a company called Gardenburger on behalf of Brody, whose contact person, Jan Smith, he had called on a year earlier at the same place on behalf of WEST. He made at least two service visits to Gardenburger to check on and gather information concerning its water treatment system, all on behalf of Brody but while still a full-time employee of WEST. (R. at 2365, pp. 57-59; Plaintiff's Exhibit No. 57.)

7. WEST's pricing rates to individual customers were kept closely guarded and protected within WEST. (R. at 2365, pp. 6-8; Plaintiff's Exhibit No. 10.)

8. Prior to leaving WEST's employ, Keil had access to all of WEST's product pricing for customers he was servicing as a representative of WEST, including specifically

Alliant TechSystems ("Alliant"), Utah State University ("USU"), MagCorp and Cargill Flour ("Cargill"). (R. at 2365, pp. 32-33; Plaintiff's Exhibit No. 9.)

9. Prior to leaving WEST's employ, Keil prepared letters to his WEST customers announcing his departure from WEST and stating on behalf of Brody that he could supply those customers with Brody products which were "essentially the same" as corresponding WEST products but at roughly ten percent below WEST's pricing. These letters were printed on Brody stationery and delivered to WEST customers on or about March 3, 1998, the day after Keil's departure from WEST. The letters provided side-by-side pricing comparisons between WEST products that such customers had been purchasing up to that point and allegedly corresponding Brody water treatment products. (R. at 2366, pp. 330-31, 368-69; Plaintiff's Exhibit Nos. 12, 13, 14, 15, 16, 17, and 18.)

10. At the time of his departure from WEST, Keil had WEST pricing sheets in his possession, many of which he did not return until at least a month later, and others, including pricing sheets for Alliant, Cargill, and MagCorp that he never returned. (R. at 2365, p. 33; Plaintiff's Exhibit No. 9.)

11. To the right of WEST's prices on a WEST pricing sheet for Alliant which Keil had, Keil wrote in figures that were the same as those later quoted to Alliant as being Brody's prices for "essentially the same" products. This written information was a source for the pricing information found in Keil's letter to Alliant and hand delivered to Kathy Vigil of

Alliant on or about March 4, 1998. (R. at 2366, pp. 249-50; compare Plaintiff's Exhibit No. 21 with Plaintiff's Exhibit No. 15.)¹

12. At the time of the trial, Keil could not identify WEST's pricing for one of its most important products without looking at a WEST pricing sheet. (R. at 2366, p. 388.)

13. Immediately upon receiving the March 3, 1998 Keil solicitation letter on behalf of Brody, at least three WEST customers who had a long-term relationship with WEST terminated that relationship, and two, Alliant and Cargill, commenced immediately thereafter to purchase water treatment products from Brody. (R. at 2366, pp. 179, 198-99.)

14. One WEST customer, MagCorp, announced to WEST in a letter dated March 16, 1998 that because of Keil's actions, including the Keil solicitation letter, it would cease doing business with WEST. (R. at 2365, pp. 156-57; Plaintiff's Exhibit No. 20.)

15. Kathy Vigil, on behalf of Alliant, said that if she could get a comparable water treatment product from another supplier at a cheaper price, she would purchase the competing cheaper product. (R. at 2366, pp. 197-98, 215.)

16. As a consequence of receiving Keil's solicitation letter, and earlier discussions with Keil before he left WEST, on or about March 3, 1998 (the day she received the Keil letter), Kathy Vigil took steps to cancel a newly signed two-year purchase order with WEST

¹ The Court will need to view the original of Exhibit 21 to ascertain and read the light handwriting to the right of WEST's prices. Some of the writing appears to have been erased.

and to immediately buy product from Brody. (R. at 2366, pp. 198-99, 214, 218-20; Plaintiff's Exhibits Nos. 1 and 37.)

17. Kathy Vigil had not even met Frank Leaver or Curtis Beck prior to informing Alliant's purchasing department to switch purchasing water treatment products from WEST to Brody. The personal visit from Leaver and Beck occurred approximately one week after that decision had been made and carried out. (R. at 2366, pp. 217-18.)

18. Bruce Henderson, on behalf of Cargill, said that pricing is always a factor in deciding whom to use among competing water treatment suppliers, but that the water treatment product would need to be the same in any event. (R. at 2366, pp. 179-81.)

19. It is not normal business practice for a water treatment customer to release one supplier's pricing to that supplier's competitors. (R. at 2365, pp. 129-30; R. at 2366, pp. 183, 268-69.)

20. For a water treatment business to know the pricing of its competitor would be a real and material competitive advantage. As a result of Keil knowing WEST's customer-specific pricing, Keil could make Brody's products immediately competitive. (R. at 2365, p. 131; R. at 2366, pp. 268-69, 369.)

21. Cargill, Alliant, and MagCorp had been faithful customers of WEST for more than two years prior to Keil's March 3, 1998 solicitation letter to them. (R. at 2365, pp. 42, 44-45, 49; Plaintiff's Exhibit Nos. 22, 23 and 24.)

22. The loss in profits to WEST for the two-year period following Keil's departure was provided to the jury in Plaintiff's Exhibit No. 29².

23. Even though Keil was supposed to monitor WEST's customers' product supply and ensure a constant, uninterrupted supply of the same, and even though he was given a commission by WEST for products that were sold, for some unexplained reason, Alliant ran out of certain of its water treatment product just at the moment Keil was leaving WEST. (R. at 2366, p. 199.)

24. Alliant (f.k.a. Hercules, Inc.) required that any party supplying water treatment products to Alliant demonstrate, by means of six current references in Northern Utah, that that party had been in the water treatment business and engaged in water treatment services similar to those required by Alliant for the previous three years. (See Plaintiff's Exhibit No. 7.)

25. Kathy Vigil of Alliant did not require Brody to go through the same pre-qualification requirements that had been required of WEST. Furthermore, she did not know anything about Brody's qualifications other than what Keil had said to her. (R. at 2366, pp. 220-21.)

26. By at least February 9, 1998, if not sooner, and while still employed with WEST on a full-time basis, Keil prepared a form virtually identical to WEST's customer

²This Exhibit was later redacted by the Court to remove some of WEST's claimed damages. R. at 1981.

report form for the benefit of Brody, which was then used by Keil on behalf of Brody. (R. at 2365, p. 58: compare Plaintiff's Exhibit No. 6 with Plaintiff's Exhibit No. 57.)

27. Keil mailed a letter dated March 3, 1998 to Clint Hovey at USU in which Keil said he would provide the same water treatment products at a lower rate than WEST and in addition would double the frequency of service visits. (R. at 2365, pp. 51-52; Plaintiff's Exhibit No. 18.)

28. As a direct result of Keil's letter to USU, and in order to maintain USU as an ongoing customer--which it had been for approximately ten years--WEST was required to double the amount of its service visits. (R. at 2365, pp. 52-53.)

29. The loss to WEST as a direct result of its increased service visits was the sum of \$500.00 a week for twenty-four months or in other words, \$52,000.00. (R. at 2365, pp. 53, 61.)³

SUMMARY OF THE ARGUMENT

Brody and Keil have failed to marshal all the evidence supporting the jury's verdict and then demonstrate that, despite such marshaled evidence, the verdict is against the clear weight of the evidence. Instead, they have selectively presented and skewed evidence to support their argument on appeal, in effect rearguing the merits of their case before this Court. The trial court properly denied summary judgment on the issue of pricing

³ Any reference to USU including the associated damages claimed and outlined in Plaintiff's Exhibit No. 29, were stricken by the trial court prior to the submission of the case to the jury. R. at 1981, 2366, pp. 293-294.

information, since the evidentiary standards and burdens applicable to a Rule 65A extraordinary relief hearing (involving limited evidence) do not obtain to a jury trial setting (involving a broader hearing of the evidence). Brody's and Keil's arguments about the lack of a written non-compete clause are misplaced and irrelevant, since: (1) Utah law imposes a duty on an employee not to disclose or misappropriate the confidential information of his employer in order to compete with that employer; and (2) the relief requested in this case was based on a theory of misappropriation of trade secrets and not upon a duty not to compete. By basing damages on WEST's losses rather than on Brody's and Keil's benefits, the jury utilized the proper measure of damages since Utah law expressly uses such a measure of damages. The trial court erred in refusing: (1) admission of evidence in relation to Brody's and Keil's diversion of the USU account from WEST; (2) consideration of statutory double damages due to willful and malicious misappropriation; and (3) an award of statutory attorneys fees.

ARGUMENT

I. BRODY AND KEIL HAVE FAILED TO MEET THEIR BURDEN OF MARSHALING THE EVIDENCE.

In challenging a jury verdict and that verdict's associated factual findings, Brody and Keil must proceed in two steps. First, they must marshal all the evidence that supports the jury verdict. Second, they must then demonstrate that, despite the marshaled evidence, the verdict and associated findings are so lacking in support as to be "against the clear weight

of the evidence” and, thus, clearly erroneous. See Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); see also Grayson Roper Ltd. Partnership v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

Furthermore, Brody and Keil have a high standard to meet in marshaling the evidence. “In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings [or verdict] the appellant resists.” Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs., 881 P.2d 929, 933 (Utah Ct. App. 1994) (emphasis in original, quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah Ct. App. 1991)). “Once appellants have established every pillar supporting their adversary’s position, they then ‘must ferret out a fatal flaw in the evidence’ and show why those pillars fail to support the trial court’s [or jury’s] findings.” Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994), quoting West Valley, 818 P.2d at 1314. An appellant fails to meet his burden of marshaling where he ignores evidence supportive of a jury’s verdict and associated findings and instead selectively marshals only evidence supportive of his position, since to do so is tantamount to improperly rearguing the merits of his case before the appellate court. Interiors Contracting, 881 P.2d at 933; Oneida, 872 P.2d at 1053. Therefore, when an appellant fails to adequately marshal the evidence for a reviewing appellate court, that court should “refuse to consider the merits of challenges to the findings [or verdict] and accept the findings [or

verdict] as valid.” Mountain States Broadcasting v. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989).

As is apparent from a comparison between WEST’s “Statement of Facts” section above and the selective “facts” adduced by Brody and Keil in their Appellants’ Brief, a number of important pieces of evidence presented to the jury and supportive of the jury verdict were not even cited by Brody and Keil in their Appellants’ Brief. Instead of presenting such supportive evidence and attempting to demonstrate its insufficiency, Brody and Keil instead presented this Court with the selective version of the facts that Brody and Keil think the jury should have accepted at the trial below.⁴ In other words, Brody and Keil selected facts favorable to their theory of the case, while wholly ignoring those facts supportive of the findings of the jury and trial court below. Rather than properly marshaling the evidence as required, Brody and Keil selectively presented facts favorable to their argument on appeal in a misplaced and inappropriate effort to reargue the merits of their case before this Court. Because Brody and Keil have failed in their basic threshold duty on appeal to properly marshal the evidence, the jury’s verdict must stand.

However, Brody and Keil not only fail to cite certain material facts supportive of the jury’s verdict, they go a step further to actually misrepresent or skew the nature of certain facts adduced in their Brief. In analyzing Brody’s and Keil’s arguments as contained in their

⁴ Brody’s and Keil’s implication of jury ineptitude is of a piece with their inappropriate and continued disparagement throughout their Brief of the abilities, competencies and judgment of both the jury and the trial court. (See Appellants’ Brief at 20, 24, 25, 28, 39, 40 and 41.)

Brief, it should be noted that a number of their arguments are built on assumptions that they reached in their arguments before the trial court, but which the jury did not reach and which in fact are contradicted by testimony presented to the jury and supportive of the jury verdict.

For example, Brody and Keil in their Fact No. 17 claimed that Keil took no documents with him that set forth pricing. That is specifically contradicted by the testimony of Mr. Keil himself admitting that a pricing document, specifically Exhibit No. 21, he returned after he terminated his employment with WEST, had his writing on it. (R. at 2366, pp. 249-50.) Not only does that admission prove he had WEST's pricing documents after he left WEST but also the handwriting on Exhibit No. 21 reflects the pricing which Brody proposed to Alliant in Keil's solicitation letter of March 3, 1998. (Compare with Plaintiff's Exhibit No. 15.) In addition, the testimony is quite clear that Keil had other pricing documentation which he took when he left WEST, much of which he did not return. Thus, much of the claims of Brody and Keil contained in their Fact No. 17 with regard to how that pricing came to be put in the solicitation letters is not only strongly countered by testimony presented to the jury, but is completely contradicted by Mr. Keil's own admissions at trial, including Keil's statement that based solely on memory he had no idea what a particular price was for a particular WEST product.

The claim is made in Brody's and Keil's Fact No. 21 that Keil did not disclose WEST's customer pricing to other WEST customers. Since Cargill, MagCorp and Alliant are in totally different lines of business (Cargill is in the flour business, MagCorp extracts

minerals, and Alliant makes rocket propellants and other similar products). they were not competitors with each other. The competitors in this case were WEST and Brody, not WEST's various and disparate customers. There was a specific disclosure of WEST confidential and customer-specific pricing to WEST's competitor, namely Brody. Therefore Brody's and Keil's factual claim is off-point and irrelevant to the real issue in this case: whether Keil misappropriated and improperly disclosed WEST's proprietary and confidential information to WEST's competitor, Brody. Any inference that no actionable disclosure took place by virtue of the fact that no disclosure was made among WEST's non-competing customers is totally and completely incorrect.

It is represented in Brody's and Keil's Fact No. 23 that neither Cargill nor Alliant stopped utilizing WEST or started utilizing Brody on the basis of price. Although there was some claim that price was not the determinative factor in those companies' respective purchasing decisions, nevertheless it was a significant factor for both Cargill and Alliant, and they admitted as much, particularly on the basis that everything else they were promised to receive from Brody--in terms of product formulation and support service--would be essentially the same as they had been receiving from WEST.

In Brody's and Keil's Fact No. 25, the claim is made that the rudeness and inappropriate behavior of Frank Leaver and Curtis Beck toward Cathy Vigil caused Ms. Vigil to switch Alliant's water treatment business away from WEST to Brody. The true testimony is that she had already made the decision to switch water treatment suppliers a full week or

more before she even saw or otherwise came into contact with Mr. Leaver and Mr. Beck. She testified that when Keil came to see her the day after he formally left WEST was the very day she went to her company management to cancel Alliant's newly-placed two-year order with WEST and to immediately place an order with Brody. Whatever the circumstances of her meeting with Mr. Leaver and Mr. Beck a week or so later, such contact was not the factor which occasioned Alliant's switch from WEST to Brody.

One other area where Keil and Brody misstate the evidence is in the text of their argument at page 36 of their Brief. They point out certain information as "set forth in Plaintiff's Exhibit F and G appended to Defendants' Memorandums supporting Motion for a New Trial." Those documents are not part of the trial transcript. They were never introduced at trial as exhibits. No attempt was ever made to introduce them at trial. They are not facts before this Court. This inappropriate citation is an attempt to indirectly introduce evidence for this Court's consideration which was not submitted at trial below. To do so by the bootstrap means of identifying unadmitted attachments to a post-judgment memorandum is disingenuous at best. This Court should completely ignore the calculations and figures contained in such unadmitted documents, and should likewise disregard Brody's and Keil's argument on that point. The only evidence which was presented to the jury with regard to damages was that which came from Plaintiff (except for Keil's claim of damages on his counterclaim).

One last instance of misleading marshaling is Brody's and Keil's selective out-of-context quotation of Brent Chettle's trial testimony in order to make it appear that WEST acknowledged that pricing was not a significant factor in the water treatment industry. (Appellants' Brief at 30.) Mr. Chettle's testimony was that, all other factors being equal, pricing can be the determinative factor in closing a sale of water treatment products. (R. at 2366; pp.267-69.)

The above examples of failed, incomplete, skewed, or misleading marshaling are by no means exhaustive. But the number and magnitude of such examples demonstrate that such instances of failure on the part of Brody and Keil are neither incidental, inadvertent nor harmless. Rather, they are legion, they are material, and they are systemic. In short, they call into serious question all of Brody's and Keil's factual representations, both what has been included (including whether any given factual representation is accurate or placed in proper context) and what has not been included.

II. THE TRIAL COURT PROPERLY DENIED BRODY'S AND KEIL'S SUMMARY JUDGMENT MOTION ON THE ISSUE OF PRICING INFORMATION.

Brody and Keil assail both the trial court's denial of summary judgment on pricing issues and the jury's verdict of misappropriation of confidential pricing information by arguing that such outcomes do not accord with this Court's prior ruling in Water & Energy Systems Technology, Inc. v. Keil, 1999 UT 16, 974 P.2d 821. This Court will recall that that opinion held that the trial court's preliminary injunction should be reversed since WEST did

not satisfy Rule 65A evidentiary standards. namely, WEST had failed to adequately show copying of confidential chemical formulations of products where such formulations were claimed to be misappropriated.

In relation to the issue of confidential product pricing, Brody and Keil try to equate pre-trial preliminary injunctive relief with the jury trial verdict at issue in this appeal, arguing that somehow the same evidentiary standards and burden for one should apply equally to the other. They argue that the same standards and presumptions that apply to immediate injunctive relief somehow obtain at a jury trial seeking damages.

Extraordinary relief--such as a preliminary injunction as was earlier requested in this case--has a different standard by which they are tested. Preliminary injunctions necessarily involve presenting limited amounts of testimony at the outset of a case. By no means is that testimony determinative of the case's ultimate outcome, particularly considering the abbreviated and extraordinary hearing and the fact that discovery has not even begun in most cases. Simply because this Court did not find evidence sufficiently persuasive to convince it that there had been copying of WEST's proprietary and confidential information given the limited evidence presented at the injunctive relief hearing does not mean that the Plaintiff is restricted to the same evidence without more in order to convince a trier of fact in a trial setting. Thus, this Court's previous interlocutory ruling goes to issues involving standards for preliminary injunctions, and not to those determining the propriety of facts as found by

a jury. Indeed a preliminary injunction operates on many of the same principles as a motion for summary judgment but usually without the benefit of any discovery.

In this specific instance, discovery yet commenced as of the time of the issuance of the preliminary injunction and many of the facts which the jury had before it had not been adduced as of the time the trial court granted the preliminary injunction. Possibly among the most important pieces of evidence were the various solicitation letters which Keil hand-delivered on or about March 3, 1998 to certain WEST customers he was servicing while employed at WEST. The letters were composed at least several weeks before Keil's departure from WEST, and made the claim that Keil could supply those customers with Brody products "essentially the same" as corresponding WEST products but at a ten percent reduction in price from what WEST had been charging. Those letters on their face tell the customer that the Brody products which Keil is going to be selling will duplicate what the client most likely considered was a confidential and exclusive WEST product, and more importantly, that the pricing from WEST (which was known only to WEST and the specific customer) is now known to Brody as a basis for competition. That Brody had access to or possession of WEST's confidential pricing and was using it to solicit WEST customers was not known to the trial court nor to this Court on interlocutory appeal at the time of that preliminary injunction action. Those letters and accompanying testimony supply some of the critical missing elements that this Court said were necessary to uphold the preliminary injunction, namely, proof that Keil was copying or utilizing WEST's confidential pricing.

In short, the presentation of evidence in an injunctive relief proceeding is governed by those standards and criteria laid out in Utah R. Civ. P. 65A. In a civil trial setting, particular causes of action are governed by the standards and burdens of proof as may be outlined in applicable statutory or case law. In this case, jury instructions stating applicable standards of proof were given and were based on the State's Model Jury Instructions, as well as on relevant Utah case law and the Utah Trade Secrets Act. It is of note that Brody and Keil failed at trial to complain of any particular jury instruction in this regard (or at least have failed to show that any such objections were preserved for the record), and would be unable to at this point, given that the jury instructions finally submitted by the trial court to the jury were reviewed and approved by Brody and Keil, who therefore did not preserve any such conceivable objection they may now make to the same. See Utah R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto.") Instead, Brody and Keil ignore and try to circumvent this deficiency by arguing, without any cited or persuasive authority, that somehow the standards of a Rule 65A injunctive proceeding should continue to obtain for a civil jury trial. The argument speaks for itself, and any contentions by Brody and Keil that the presentation of evidence presented at the jury trial somehow fell short of the requirements of the injunctive relief hearing should be ignored and discarded as irrelevant and pointless.

III. THIS IS NOT A CASE ABOUT NON-COMPETITION AGREEMENTS.

Throughout the trial and throughout the entirety of their Brief, Brody and Keil continually raise the contention that WEST is trying to prevent Keil from competing in his chosen field. Reference is made time and again to the fact that Keil did not sign a non-competition agreement.⁵ However, this is not a case about Mr. Keil competing against WEST, which Mr. Keil was free to do⁶. It is at its heart a case about Mr. Keil taking confidential information from WEST in order to compete unfairly and improperly with WEST.

While it is true that there is no written agreement between the parties, the lack of such a written document does not nullify the effects of controlling Utah case law, which imposes an equitable, implied contractual duty on the part of an employee to refrain from misappropriation and unfair competition. In Envirotech Corp. v. Callahan, 872 P.2d 487, 496-97 (Utah Ct. App. 1994), cert. denied, 883 P.2d 1359, the Court of Appeals stated:

A former employee may not use confidential information obtained during the course of his or her employment to compete after termination with his or her

⁵ Interestingly enough, Brody sought and obtained an injunction against its former employee Jim Wilson enjoining him from using or disclosing Brody's formulae, pricing, and customer lists, even though Mr. Wilson never signed a non-competition agreement with Brody. (Plaintiff's Exhibit No. 47; R. at 2365, pp. 144-46.)

⁶ For example, Keil testified under cross-examination that he had prepared quotes and bids for Weber State University and Salt Lake City Corporation while employed with Brody, a direct competitor with his former employer WEST. WEST made no claim in regard to those accounts, because Keil had no access to WEST confidential information in relation to those accounts, and therefore did not interfere with WEST's economic relations nor cause WEST any damage. (R. at 2366, pp. 380-81.)

former employer. *A written contract or formal employment contract is not required in order to create this duty.* “It is settled . . . that the duty of an employee not to disclose confidential information is grounded on ‘basic principles of equity’ . . . and upon an implied contract, growing out of the nature of the employer-employee relation.”

(Citations omitted; emphasis added).

Therefore, Brody’s and Keil’s several references to the fact that the parties did not have a written non-competition agreement is irrelevant and pointless for two basic reasons. First, the cause of action was based on misappropriation of trade secrets, and not on a violation of a duty not to compete. And second, for purposes of well-established Utah law, a written agreement is not necessary for such a duty to arise in the first place. Such a duty is implied in law from an employment relationship and the associated presence of confidential proprietary information by virtue of and in the course of such a relationship.

IV. THE ELEMENTS OF INTERFERENCE WITH ECONOMIC RELATIONS AND MISAPPROPRIATION OF TRADE SECRETS WERE SATISFIED.

The standard for establishing interference with economic relations was set out in Jury Instruction No. 22. This instruction required a finding of misappropriation of WEST’s price quotes. (See Jury Instruction No. 13.) Although two separate causes of action are alleged and the jury verdict found for WEST on both, they are interrelated by reason of the misappropriation element common to both.

Brody and Keil claim that no actionable disclosures took place because Keil disclosed WEST’s confidential pricing information to no one other than WEST customers who were

already in possession of such information. Specifically, Brody and Keil deny that Keil disclosed any such confidential information to Brody. Brody's and Keil's definition of disclosure of confidential information is interesting. They want to classify a disclosure as requiring the identification to one customer of the pricing provided to another customer. That is not the type of disclosure at issue, and certainly is not the type of disclosure which gave rise to the actionable behavior in this case.

The disclosure in this case was made by Keil to Brody, while Keil was in his capacity as a holder of WEST's confidential and proprietary information, in order for Brody and Keil (as an employee of Brody) to use such information to their own advantage and benefit in competing against WEST. Brody and Keil ignore the fact that without Keil's disclosure of confidential information to Brody, there could not have been any communication, whether oral or in writing, to any of WEST's customers by which those customers would be informed that Brody was able to directly compete with WEST as to both similarity of product and pricing. Without such disclosures, Brody and Keil would be limited to communicating to WEST customers Brody's own pricing only, which admittedly was not competitive with WEST's pricing (prior to Keil's disclosure of WEST's product pricing to Brody). Without the ability to tell WEST customers, by means of a side-by-side comparison of Brody and WEST prices, that Brody could not only meet but could also beat WEST's prices, there would have been no basis for these customers to consider switching from WEST to Brody.

The only thing WEST's three customers at issue had in common was that they all had boilers and cooling towers requiring water treatment service and products. They had no concern whatsoever with regard to pricing for such services and products relative to other customers of WEST because they did not compete against each other in their primary lines of business. What is of primary concern to such disparate companies is that they obtain the best price possible for water treatment services and products from either WEST or WEST's competitors.

It was clear from the letters which Keil, on behalf of Brody, distributed to certain WEST customers that he intended those customers to believe the price they were getting from WEST was ten percent too high. This is because Brody as a competitor to WEST claimed it could provide the same products at cheaper prices. Such a representation was important to such companies if they were to switch to Brody because they needed a product that worked, and needed to know that Brody would supply essentially the same products with the same properties as the WEST products they had utilized in the past and that had a proven track record. Keil, in each case, supplied such necessary assurances using confidential and proprietary information he had obtained from WEST during the course of his employment with WEST. Keil was wearing two contradictory hats while making such representations, and is entirely too quick to either ignore or forget the fact that he was wearing those hats simultaneously by claiming that he merely utilized information committed to memory while he was working at WEST. What he omits or ignores is that he communicated WEST's

confidential and proprietary information to Brody prior to, simultaneous with, and subsequent to his departure from WEST. That information would not have been available to any other competitor of WEST since, as was established by testimony produced at trial, such information was confidential. The information was created specifically for a given customer taking into account that customer's needs, quantities of product utilized and other facts and usage patterns unique to that customer. Testimony further established that such confidential customer-specific information is not generally known in the industry. (See, e.g., testimony of Mike Kimball, a competitor of WEST and a former employee of Brody. R. at 2365; pp.125, 129-30.) Moreover, the information that Keil disclosed to the WEST customers at issue was provided to them the very day of Keil's departure from WEST. If Keil had simply left WEST and had gone to those customers to ask if he could obtain and utilized their pricing information for WEST products in order to compete, it is doubtful he would have been able to get that release of information. (Note that MagCorp personnel thought Keil's conduct in this regard was highly unprofessional.)

It is also important to note the deceptive change in the Brody's products at issue. Prior to Keil's arrival, Brody's products had actual product names. (See Plaintiff's Exhibit No. 34.) After Keil's arrival and reformulation of such products, those products' names were changed to mimic the WEST numbering system for product names (using a "B" or a "C" followed by a three digit number). Only someone intimately familiar with the WEST product line would know, for example, that WEST's B-206 corresponds to Brody's B107.

As a final touch, Brody's inspection report, which was always left with the customer, immediately upon Keil's departure from WEST was made to look exactly like the WEST form. (See Plaintiff's Exhibit No. 4 and compare with Plaintiff's Exhibit No. 57.) Obviously, such mimicry was designed to make WEST customers believe that competing WEST and Brody products were fairly generic in and of themselves, and that any purchase decision was only an issue of pricing. The testimony was clear that if the Brody product in question had been a different product than the previously-used WEST product, such disparity in quality or nature of product would have been a significant factor in any purchasing decision. However if, as Keil represented to WEST customers, the products were essentially the same, then pricing became the significant factor.

Brody and Keil repeatedly claim throughout their Brief that pricing was not the determinate factor in a given customer's purchasing decision and/or decision to enter into a long-term supply relationship with a particular supplier. What Brody and Keil fail to note, however, is that pricing was in fact a significant factor and, moreover, all other factors being equal, could be the only factor that would compel a customer to sever a long-term relationship with its current supplier and procure its supply from a new source. In other words, Keil's representation to WEST customers was that everything about Brody's water treatment products would be the same as the corresponding WEST products, except the price, which would be ten percent lower. Those customers had Keil's assurance that heretofore unknown Brody products would be essentially the same as known WEST products, which

they could assume would be the case because Keil had worked with and sold WEST products and now was doing the same with Brody products (having even created them himself).⁷

One of the jury instructions in this case to which neither Keil nor Brody made any objection relates to agency. (See Jury Instruction Nos. 27 and 28.) The jury found that in his activities on behalf of Brody, Keil was acting as an agent for Brody. (See Special Verdict Answer No. 5.) As such, Keil, as a holder of WEST's confidential information, disclosed WEST's confidential and proprietary information to Brody as an agent of Brody. Furthermore, this was not in the form of simply retaining the confidential information and not actively using it. Rather, such confidential information was openly and actively used to WEST's economic disadvantage. The testimony is--as even discussed by Brody and Keil in their Brief--that Keil had to provide product pricing which was ten percent below WEST's pricing in order to entice any given customer away from WEST. For Keil to tell Brody that its pricing had to be ten percent below WEST's pricing, and then for Brody to approve pricing which clearly was uniformly ten percent below WEST's pricing (and as in fact approved by John Liddiard, the president of Brody), is to effectively admit that not only was

⁷ At this point, it is important to address one of the strictures on this case imposed by the trial court, namely that having ruled in Brody's and Keil's favor in regard to the misappropriation of chemical formulations, the court required WEST to put on its case without any reference to the knowledge and access that Keil had to WEST's proprietary product formulations as well as his specific role in creating new products for Brody based on his access to and knowledge of WEST's proprietary and confidential chemical formulations. Therefore, for example, when a WEST customer, who was successfully diverted to Brody by Keil, was asked about product formulations upon examination at trial, the trial court immediately struck any reference to product formulations, and would not allow the witness to proceed any further along such lines. (R. at 2366; pp.187-88.)

Keil using WEST's confidential customer-specific pricing actively on behalf of Brody but also that he had specifically disclosed that information to others at Brody, including John Liddiard. All Liddiard had to know was what Brody's proposed pricing was going to be to any given WEST customer, and then he would know WEST's confidential customer-specific pricing if by no other reason than working backwards.⁸ Also, the testimony of Greg Offerman stated that the product pricing issue was openly discussed amongst Wilson, Liddiard, Keil, and himself, and that Keil was handed old pricing for Brody products which he rejected because it was not low enough to be competitive with WEST's product pricing, thus requiring Brody to lower its pricing even further in order to get to the requisite ten percent discount from WEST's pricing. (R. at 2366, pp. 226-28.) To say that such activity does not constitute disclosure is to deny the plain meaning of disclosure.

To accept Brody's and Keil's argument would be to suggest that any employee who took trade secrets to a new company which was a direct competitor of the employee's former company would not be misappropriating such secrets as long as he, himself, used those trade secrets in competing with his former employer without telling anyone at his new company about those trade secrets. That does not comport with the letter or the spirit of the Utah Trade Secrets Act or other controlling Utah law.

⁸ Thus, for example, if Liddiard approved the price of \$0.90 a pound for a particular product to a particular customer (and the testimony is unequivocal that Liddiard agreed to work with Keil in getting the prices to such a point. R. at 2365, pp. 139-141), then Liddiard, along with Keil, would know that WEST's pricing for that same customer was \$1.00 a pound.

The various elements of interference with a business expectancy and the elements of the Utah Trade Secrets Act were thus satisfied by the evidence presented at trial. The jury evaluated and weighed the evidence presented to it, and decided the issues accordingly. There is no identifiable basis of reversible error.

V. THE JURY AWARD UTILIZED THE PROPER MEASURE OF DAMAGES.

In this case, it was alleged by WEST and established by the jury verdict that both Brody and Keil violated the Trade Secrets Act and interfered with WEST's business expectancies. The measure of damages under either theory is based on amounts lost to WEST, not on amounts that may have been gained by Brody and/or Keil. It is immaterial to WEST's damages (lost profits) what is the exact amount of product that Alliant or Cargill may or may not have bought from Brody. Indeed, Brody put on no testimony as to exactly how much product Alliant and Cargill purchased from Brody. However, there was specific testimony as to what these customers bought from WEST in the two years prior to Keil's departure and misappropriation of trade secrets. For purposes of projecting future profits and making damages calculations, a two-year earnings period is reasonable under the circumstances.

More importantly, controlling legal authority in this jurisdiction expressly identifies a complainant's *losses* as the measure of damages in both trade secret misappropriation and economic interference causes of action. Utah Code Ann. § 13-24-4(1) states in pertinent part: "Damages can include both the *actual loss* caused by misappropriation and the unjust

enrichment caused by misappropriation that is not taken into account in computing actual loss” (emphasis added). Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982)--on which Utah Model Jury Instruction No. 19.1 and the derivative jury instruction in this case are based--identified as an element of a case for intentional interference with economic relations the requirement that a plaintiff prove defendant’s intentional interference “caus[ed] *injury to the plaintiff*” (emphasis added), not that the defendant benefitted in any manner.

Thus, it is plain that in Utah a complainant’s *loss* is the primary criterion for determining misappropriation or interference damages, and a tortfeasor’s unjust enrichment or gain is only a supplementary--not exclusive or primary--measure. This is because the complainant’s loss does not always directly translate into the tortfeasor’s gain. A party can interfere with and destroy another party’s economic relationship, yet still fail to benefit from or appropriate that destroyed relationship to itself. For instance, in this case Brody and Keil dissuaded particular WEST customers from continuing to buy WEST products (therefore incurring significant loss to WEST), but ultimately failed to secure or retain those customers on Brody’s account (thereby realizing little or no financial gain from such diversion).

Yet Brody and Keil ignore the clear language and intent of governing Utah law, and argue that damages are measured solely by a defendant’s gain. As authority for their misplaced argument, Brody and Keil cite to decades-old case law from federal circuits outside Utah which are obviously not dealing with the subsequently-issued Utah case and

statutory law governing this case.⁹ It is clear that in Utah, damages from trade-secret misappropriation and intentional interference with economic relations are determined first and foremost on the basis of a complainant's loss. Brody's and Keil's contention that "[t]he focus, therefore, should be on the benefit to the Defendants not what WEST purportedly lost" is a complete misstatement of law at total variance with the appropriate measure of loss specified by controlling Utah legal authority.

Similarly, Brody's and Keil's conclusory statement that there is no evidence tying Keil's misappropriation of confidential pricing information to WEST's damages in the form of lost sales is wrong. The jury in this case, after consideration of the evidence presented and after due deliberation, found that the elements of "misappropriation" had been met in this case, and that Keil's and Brody's improper actions caused WEST's loss. Indeed, Mr. Rydalch of MagCorp. in characterizing the letter from Keil unprofessional and in citing to Keil in his cancellation of business letter (Plaintiff's Exhibit No. 20) as part of the cause of

⁹ This exact same issue was briefed by the parties in Appellants' post-trial motions below, and the exact same Utah authority was adduced by WEST as has been adduced above. As such, Brody and Keil were apprised of relevant Utah authority on the issue of measure of damages in trade secrets and economic interference cases, and consequently had a duty to recite the same to this Court. See Utah Rules of Professional Conduct, Rule 3.3(a)(3) ("[a] lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"). Therefore, for Brody and Keil to affirmatively represent to this Court that "there is not a specific reference to the measure of damages in a Trade Secrets case in this jurisdiction," while ignoring the specific language of the Utah Trade Secrets Act itself, and of which they are fully aware, all in furtherance of an argument that decades-old case law from far-flung jurisdictions should control this issue rather than on-point Utah statutory law, borders on misrepresentation, and is just the type of misrepresentation that Rule 3.3(a)(3) above proscribes.

cancellation, made it clear that Keil's letter was the triggering factor causing MagCorp to cease dealing with WEST as well as with Keil. In short, it was the loss or injury to WEST which is to be measured for purposes of determining compensable damages, not any gain to Brody or Keil.

VI. KEIL'S AND BRODY'S MISUSE OF WEST'S TRADE SECRETS WAS MALICIOUS AND WILLFUL, AND ENTITLES WEST TO DOUBLE DAMAGES AND ATTORNEYS FEES AS A MATTER OF LAW.

At the conclusion of Plaintiff's case in chief, the trial court rejected any claim based on a suggestion of willful and malicious conduct by Keil and/or Brody. (R. at 2366, p. 293.) At the conclusion of the entire case the trial court refused to grant Plaintiff's requested Jury Instruction No. 30.¹⁰ R. at 1957, 1971. As result, neither double damages nor attorneys fees were awarded. However, it is WEST's position that the same should have been granted.

It is clear from trial court testimony that for approximately six months prior to leaving WEST's employ, Keil actively worked to establish Brody as a feasible competitor to WEST where it had not been one before. He completely revamped and reformulated Brody's previously uncompetitive water treatment products. He changed Brody's product names to a numbering system deceptively similar to that of WEST's corresponding products. He created a customer form identical to WEST's. He actively worked at Brody's offices at least weekly to create new products that would have essentially the same chemical formulations

¹⁰ The transcript of this ruling and related colloquy is the subject of and is attached to a pending motion. (See Motion for Admission of Additional Transcript and accompanying Memorandum, filed January 22, 2001.)

as corresponding WEST products. He knew that regardless of whether WEST customers knew the formulations as to the essential similarity between Brody and WEST products due to his long-time representation of and employment by WEST. That was an important assurance that WEST customers had to have before they would change long-term suppliers. Contrary to normal industry practice, Keil used WEST's exact customer-specific pricing to tell the customer that Brody could beat WEST's pricing by ten percent. Thus, for at least six months while drawing a salary in addition to commissions from WEST, Keil was actively working to undermine WEST in the marketplace, not in the normal competitive spirit of competitive business enterprises providing competitive goods and services, but in a flagrant breach of his fiduciary duty to his current employer, and in full and complete violation of the confidentiality of proprietary information with which he had been entrusted by WEST. This conduct is egregious at best, and is fraudulent and corrupt at worst. This is not a case of an employee unwittingly using confidential information, or rightfully using general information committed to memory over the course of time. Instead, this is a case of an employee carefully and intentionally plotting for nearly six months to misappropriate and misuse his then-current employer's confidential and proprietary information to that employer's immediate and long-term detriment. In short, this is the very type of malicious and willful misuse of trade secrets that the double damages provision of the Utah Trade Secrets Act was enacted to address. As a consequence the trial court incorrectly refused WEST's claim for double damages and attorney's fees. This Court should correct that error.

VII. WEST IS ENTITLED TO ADDITIONAL DAMAGES FOR BRODY'S AND KEIL'S INTERFERENCE WITH WEST'S USU ACCOUNT.

The testimony is unequivocal that Clint Hovey of USU received one of the standard Keil solicitation letters sent out to WEST customers (Plaintiff's Exhibit No. 18) in which Keil not only made his side-by-side comparison of product pricing, but also represented that he would now provide twice-weekly support service. In this instance, Keil was using the same confidential information that was the basis for the trade secret violation and interference with business relations found by the jury in the instances of Cargill, Alliant and MagCorp. Except for the trial court's removal from the jury's consideration of any claims with regard to USU (R. at 1980), it is certain that the jury would have awarded an additional \$52,000 to WEST for interference with WEST's economic relations with USU.¹¹ The interference tactics in this instance were the same as those in the instances the jury was allowed to consider. The misappropriation and misuse of trade secrets was the same. The different element in the case of USU was the added financial burden to WEST of having to double its visits to USU at no extra compensation. It was improper of the trial court to have taken away that claim. The testimony was sufficiently clear and the special verdict of the jury is sufficiently clear that despite whatever rebuttal testimony Brody and Keil would have proposed, the jury undoubtedly would have and should have made that extra award. This Court should therefore add \$52,000.00 to the judgment.

¹¹ The Court modified Exhibit 29 to strike any reference to Utah State University. R. at 1981.

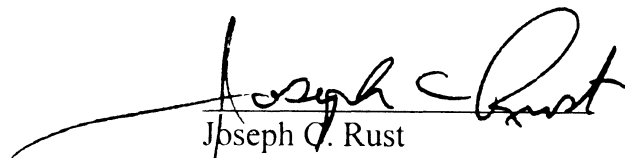
CONCLUSION

Brody and Keil fail in their burden of marshaling the evidence. Rather than gather all evidence supportive of the jury verdict, and then demonstrating how such evidence fails to reasonably uphold such a verdict and its associated findings, Brody and Keil selectively recite or skew facts in support of their arguments, all in an improper effort to reargue the merits of their case before this Court. The facts and evidence adduced in this Appellee Brief, and at the trial below, adequately support the jury's verdict, findings, and award below. For this reason, Brody's and Keil's appeal should be denied. Furthermore, the evidence adduced in this case is sufficient to support an award of double damages and attorneys fees under the Utah Trade Secrets Act, and the trial court erred in refusing to allow appropriate jury instructions to that effect go to the jury. Also, the evidence adduced in this case is sufficient to show damages accruing to WEST from Brody's and Keil's attempted diversion of the USU account from WEST, and the trial court likewise erred in refusing to allow the jury to consider this issue. The case should therefore be remanded to add these amounts to the jury award. In all other respects, the jury award should be affirmed.

Respectfully submitted,

DATED this 22nd day of January, 2001.

KESLER & RUST


Joseph Q. Rust
Attorneys for Plaintiff/Appellee

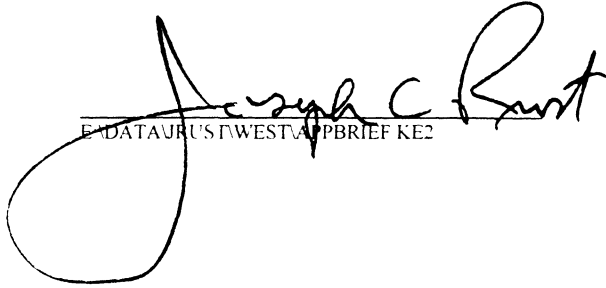
CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **APPELLEE/ CROSS-APPELLANT BRIEF**, this 22nd day of January, 2001, to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION

Thomas R. Blonquist
40 South Sixth East
Salt Lake City, Utah 84102

John T. Caine
2568 Washington Boulevard
Ogden, UT 84401


ENDATAURUS WEST VALLEY BRIEF KE2

ADDENDUM “A”

(b) Each health spa registering in this state shall designate a registered agent for receiving service of process. The registered agent shall be reasonably available from 8 a.m. until 5 p.m. during normal working days.

(c) The division shall charge and collect a fee for registration under guidelines provided in Section 63-38-3.2.

(2) (a) Each health spa shall obtain and maintain:

(i) a performance bond issued by a surety authorized to transact surety business in this state;

(ii) an irrevocable letter of credit issued by a financial institution authorized to do business in this state; or

(iii) a certificate of deposit.

(b) The bond, letter of credit, or certificate of deposit shall be payable to the division for the benefit of any consumer who incurs damages as the result of:

(i) the health spa's violation of this chapter; or

(ii) as the result of the health spa's going out of business or relocating and failing to offer an alternate location within ten miles.

(c) The division may recover from the bond, letter of credit, or certificate of deposit the costs of collecting and distributing funds under this section, up to 10% of the face value of the bond, letter of credit, or certificate of deposit but only if the consumers have fully recovered their damages first. The total liability of the issuer of the bond, letter of credit, or certificate of deposit may not exceed the amount of the bond, letter of credit, or certificate of deposit. The health spa shall maintain a bond, letter of credit, or certificate of deposit in force for one year after it notifies the division in writing that it has ceased all activities regulated by this chapter.

(d) A health spa providing services at more than one location shall comply with the requirements of Subsection (2)(a) for each separate location.

(e) The division may impose a fine against a health spa that fails to comply with the requirements of Subsection (2)(a) of up to \$100 per day that the health spa remains out of compliance. All penalties received shall be deposited into the Consumer Protection Education and Training Fund created in Section 13-2-8.

(3) The minimum principal amount of the bond, letter of credit, or certificate of credit required under Subsection (2) shall be based on the number of unexpired contracts for health spa services to which the health spa is a party, in accordance with the following schedule.

Principal Amount of Bond, Letter of Credit, or Certificate of Deposit	Number of Contracts with an Unexpired Term Exceeding 90 Days
\$15,000	500 or fewer
35,000	501 to 1,500
50,000	1,501 to 3,000
75,000	3,001 or more

(4) Each health spa shall obtain the bond, letter of credit, or certificate of deposit and furnish a certified copy of the bond, letter of credit, or certificate of deposit to the division prior to selling, offering or attempting to sell, soliciting the sale of, or becoming a party to any contract to provide health spa services. A health spa is considered to be in compliance with this section only if the proof provided to the division shows that the bond, letter of credit, or certificate of credit is current.

(5) Each health spa shall maintain accurate records of the bond, letter of credit, or certificate of credit and of any payments made, due, or to become due to the issuer and shall open the records to inspection by the division at any time during normal business hours.

(6) If a health spa changes ownership, ceases operation, discontinues facilities, or relocates and fails to offer an alternate location within ten miles within 30 days after its closing, the health spa is subject to the requirements of this section as if it were a new health spa coming into being at the time the health spa changed ownership. The former owner may not release, cancel, or terminate the owner's liability under any bond, letter of credit, or certificate of deposit previously filed with the division, unless:

(a) the new owner has filed a new bond, letter of credit, or certificate of deposit for the benefit of consumers covered under the previous owner's bond, letter of credit, or certificate of deposit; or

(b) the former owner has refunded all unearned payments to consumers.

(7) If a health spa ceases operation or relocates and fails to offer an alternative location within ten miles, the health spa shall provide the division with 45 days prior notice. 1995

13-23-6. Exemptions from bond, letter of credit, or certificate of deposit requirement.

A health spa which offers no paid-in-full membership, but only memberships paid for by installment contracts is exempt from the application of Section 13-23-5 if:

(1) each contract contains the following clause: "If this health spa ceases operation and fails to offer an alternate location within ten miles, no further payments under this contract shall be due to anyone, including any purchaser of any note associated with or contained in this contract.";

(2) all payments due under each contract, including down payments, enrollment fees, membership fees, or any other payments to the health spa, are in equal monthly installments spread over the entire term of the contract; and

(3) the term of each contract is clearly stated and is not capable of being extended. 1995

13-23-7. Enforcement — Costs and attorney's fees — Penalties.

(1) The division may, on behalf of any consumer or on its own behalf, file an action for injunctive relief, damages, or both to enforce this chapter. In addition to any relief granted, the division is entitled to an award for reasonable attorney's fees, court costs, and reasonable investigative expenses.

(2) (a) A person who willfully violates any provision of this chapter, either by failing to comply with any requirement or by doing any act prohibited in this chapter, is guilty of a class B misdemeanor. Each day the violation is committed or permitted to continue constitutes a separate punishable offense.

(b) In the case of a second offense, the person is guilty of a class A misdemeanor.

(c) In the case of three or more offenses, the person is guilty of a third degree felony. 1995

CHAPTER 24

UNIFORM TRADE SECRETS ACT

Section	
13-24-1.	Short title.
13-24-2.	Definitions.
13-24-3.	Injunctive relief.
13-24-4.	Damages.
13-24-5.	Attorneys' fees.
13-24-6.	Preservation of secrecy.
13-24-7.	Statute of limitations.
13-24-8.	Effect on other law.
13-24-9.	Uniformity of application and construction.

13-24-1. Short title.

This chapter is known as the "Uniform Trade Secrets Act "

1989

13-24-2. Definitions.

As used in this chapter, unless the context requires otherwise

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means

(2) "Misappropriation" means

(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means, or

(b) disclosure or use of a trade secret of another without express or implied consent by a person who

(i) used improper means to acquire knowledge of the trade secret, or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(A) derived from or through a person who had utilized improper means to acquire it,

(B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use, or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

1989

13-24-3. Injunctive relief.

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation

(2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable

(3) In appropriate circumstances affirmative acts to protect trade secret may be compelled by court order

1989

13-24-4. Damages.

(1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to

know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret

(2) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under Subsection (1)

1989

13-24-5. Attorneys' fees.

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party

1989

13-24-6. Preservation of secrecy.

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval

1989

13-24-7. Statute of limitations.

An action for misappropriation shall be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered. For the purposes of this section a continuing misappropriation constitutes a single claim

1989

13-24-8. Effect on other law.

(1) Except as provided in Subsection (2), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret

(2) This chapter does not affect

(a) contractual remedies, whether or not based upon misappropriation of a trade secret,

(b) other civil remedies that are not based upon misappropriation of a trade secret, or

(c) criminal remedies, whether or not based upon misappropriation of a trade secret

1989

13-24-9. Uniformity of application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the chapter among states enacting it

1989

CHAPTER 25**AUTOMATED DIALING TELEPHONE SOLICITATION
[REPEALED]****13-25-1 to 13-25-5. Repealed.**

1996

CHAPTER 25a**TELEPHONE AND FACSIMILE SOLICITATION ACT****Section**

13-25a-101

Title

13-25a-102

Definitions

13-25a-103

Prohibited conduct for telephone solicitations
— Exceptions

13-25a-104

Prohibited conduct for facsimiles — Exceptions

ADDENDUM “B”

Instruction No. 30

WEST claims that Keil and Brody maliciously and wilfully misappropriated WEST's trade secrets. If you find that the evidence in this case proves that Keil and Brody did maliciously and wilfully misappropriate WEST's trade secrets, you may award exemplary damages against Keil and Brody and in favor of WEST in an amount not exceeding twice the amount the actual damages you find WEST has incurred by the misappropriation.

An injury may be "malicious" injury if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word "willful" means "deliberate or intentional," and an injury is "wilfull" if it involves a deliberate and intentional act which necessarily leads to injury, or which the actor knew or should have know would result in injury. Therefore, "willful and malicious" injury is a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse.

Utah Code Ann. § 13-24-4(2); State v. Staver, 706 P.2d 611, 613 (Utah 1985); Madsen v. State, 583 P.2d 92, 95 (Utah 1978); Black' Law Dictionary, p. 1434 "Willful and malicious injury" (5th ed. 1979)

ADDENDUM “C”

BRODY **CHEMICAL**

4825 South 6200 West
Salt Lake City, Utah 84118-0747
PHONE: (801) 963-2436 FAX: (801) 963-2437

March 3, 1998

Mr. Clint Hovey
Utah State University
UMC 6600
Logan, Utah 84322

Dear Clint,

I have enjoyed our relationship during the time I served Utah State as a representative of W.E.S.T., Inc. I have made a change, and I now represent Brody Chemical. I have made this change for many reasons. A number of these are beneficial to you. I can now provide you greater support resources and a substantially lower cost for the technical service and the water treatment products. The additional latitude and support I now enjoy will enhance the level of service I can provide you.

This level will be particularly enhanced in the turnkey service on the cooling towers and the closed systems. Because, under Brody Chemical's TKP (TurnKey Protection) Program, I will be performing all the work, you will have a chemical engineer regularly on site, rather than a technician with superficially imposed task and time constraints. This will also prevent the communication problems we have occasionally experienced.

The cooling towers require a greater frequency of service than the current program allows. I will double the current frequency of service on the thirty seasonal systems. I believe this will eliminate the problems we have seen in a few of these systems. Also, I will be able to improve the system service coverage during system startup and shutdown.

The water treatment products that I will supply are essentially the same as those I have supplied in the past, and that have provided you with remarkable results. However, these products will now come with two significant advantages: first, logistics will be improved because the manufacturing and warehousing facilities are in Salt Lake City, and, second, the cost will be substantially reduced because there will be lower product cost, and lower freight cost.

**PLAINTIFF'S
EXHIBIT**

18

The following is a list of the W.E.S.T. products I have utilized in treating your systems and the pricing, and the corresponding Brody Chemical products and pricing. The effectiveness and use rates will remain essentially the same, so you can see that the savings will be substantial. The freight savings will provide an additional cost reduction of \$0.08 to \$0.16 per pound. The turnkey service for the cooling towers and the closed systems will cost 16% less, even though the service will be greatly expanded. In total, the cost reduction will be more than \$12,000.00 per year.

WEST PRODUCT	WEST PRICING	BRODY PRODUCT	BRODY PRICING	ANNUAL SAVINGS
B-206	\$1.15	B107	\$1.05	\$400
B-404	\$2.07	B557	\$1.80	\$3,800
B-501	\$0.90	B600	\$0.80	\$100
B-240	\$1.25	B152	\$1.10	\$300
Freight	\$2,600	Freight	\$400	\$2,200
Total service	\$33,800	TKP	\$28,500	\$5,300

Please keep this information confidential.

I have worked hard to optimize the water treatment program results and to improve process efficiencies. The resulting increases in process efficiencies and equipment life I have helped bring about have been quantified and documented. I am pleased that the results have paid for my technical service and the treatment chemicals many times over.

Over the twelve years I have served you, I have developed an extensive knowledge of your systems and operations. I have also developed a good working relationship with your personnel. As in the past, my objective will be to provide you superior protection for your systems by applying optimal treatment products, state of the art control and application methods, and competent and dedicated technical service. Clint, I value your business highly, and I look forward to serving you in the future.

Sincerely,

Steve Keil