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McNeil Engineering, Inc; McNeil Engineering and Land Surveying, LLC; and Scott McNeil, and individual v. Benchmark Engineering and Land Surveying, LLC; Benchmark Cad Services, LLC; Land Development Cadd, Inc.; Dale K. Bennett, and individual; and Florence B. Alhambra, an individual : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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McNEIL ENGINEERING, INC; McNEIL  
ENGINEERING AND LAND  
SURVEYING, LLC; and SCOTT  
McNEIL, an individual,

Plaintiffs, Counterclaim  
Defendants, and Appellant,

vs.

BENCHMARK ENGINEERING AND  
LAND SURVEYING, LLC;  
BENCHMARK CAD SERVICES, LLC;  
LAND DEVELOPMENT CADD, INC;  
DALE K. BENNETT, an individual; and  
FLORENCE B. ALHAMBRA, an  
individual,

Defendants, Counter Claimants,  
and Appellee.

**REPLY BRIEF OF APPELLANT**

Case No. 20080319-CA

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**APPEAL FROM AN ORDER AND JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT, SALT LAKE COUNTY, HONORABLE PAT B. BRIAN**

---

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**IN THE UTAH COURT OF APPEALS**

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**McNEIL ENGINEERING, INC; McNEIL ENGINEERING AND LAND SURVEYING, LLC; and SCOTT McNEIL, an individual,**

Plaintiffs, Counterclaim  
Defendants, and Appellant,

**vs.**

**BENCHMARK ENGINEERING AND LAND SURVEYING, LLC;  
BENCHMARK CAD SERVICES, LLC;  
LAND DEVELOPMENT CADD, INC;  
DALE K. BENNETT, an individual; and  
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## **ARGUMENT**

### **POINT I**

#### **BENNETT WORKED EXCLUSIVELY FOR ME&LS, AND HIS VOLUNTARY RESIGNATION TERMINATED THAT EMPLOYMENT.**

Appellee Dale K. Bennett (“**Bennett**”) does not contest the record facts or the authorities cited in the Brief of Appellant. Those facts and law support a ruling that the word “employment” in the Second Amendment to the Operating Agreement (the “**Second Amendment**”)<sup>1</sup> includes Bennett’s leased employment at McNeil Engineering and Land Surveying (“**ME&LS**”).

Bennett does not and cannot challenge the undisputed facts concerning his relationship with ME&LS. For example, he agrees he “was one of many employees leased by MEI to ME&LS . . .” (Brief of Appellee at 15.)<sup>2</sup> Bennett also concedes he had a “close day-to-day association with ME&LS . . .” (*Id.*) He simply contends those facts are irrelevant to the issues before the Court. (*Id.*) Bennett thus maintains the untenable position that he is entitled to keep one foot on each side of the fence – to set up his own engineering firm in competition with ME&LS, and but still retain his membership interest and demand a share of profits from ME&LS. Not only is this a manifestly unjust result, it is flatly contrary to Bennett’s intent and that of the other Members who signed the Second Amendment. (Addendum 2 at 3.)

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<sup>1</sup>The Second Amendment is attached as Addendum 2 to the Brief of Appellant dated October 7, 2008. Addenda 1-6 are each attached to the Brief of Appellant.

<sup>2</sup> McNeil Engineering, Inc. is referred to as “**MEI**.”

The following uncontested facts establish the intent of the Second Amendment. ME&LS and the other limited liability companies were formed in 1996. (R. 1174.)<sup>3</sup> Bennett testified that after its formation his work was for ME&LS. (R. 6585.) He further testified: “I believe everything after they started was supposed to have gone through the LCs, as far as the jobs, and that [MEI] was more of an administration . . .” (*Id.*) Since that time MEI has only leased employees and performed other administrative functions. MEI does not provide engineering services. (R. 1174-1175.) Bennett was an MEI employee who was leased to ME&LS. (R. 1175.) He worked for ME&LS as a civil engineer and surveyor. (*See* R. 6588.) Bennett has not worked for ME&LS since he left in August 2005. (R. 6588.) By contrast, some employees of MEI were “administrative staff” who were not leased to the limited liability companies. (R. 1177.) Bennett was not part of the administrative staff. (*Id.*)<sup>4</sup>

Bennett also does not contest the legal and definitional authorities cited in the Brief of Appellant. In Point II of the Brief, ME&LS cites Utah case law, Utah statutes, and a dictionary source for the definition of the word “employment” as used in Section 12.3(a) of the Second Amendment. (Brief of Appellant at 18-21.) Bennett does

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<sup>3</sup>Certain pages from the record are collected at Addendum 7, attached to this Reply Brief, including R. 1167-1180, 6582-6588, and 6624-6628, which consist of deposition testimony by Bennett and by Scott F. McNeil (“**McNeil**”).

<sup>4</sup>With no supporting facts Bennett also contends ME&LS was a “client” of MEI, and that he worked for MEI and not ME&LS. (Brief of Appellee, p. 18.) That argument is directly contrary to Bennett’s own testimony that all of his work was for ME&LS after the limited liability companies were formed. (R. 6585.) It is also contrary to the testimony of both Bennett and McNeil that after the limited liability companies were formed MEI had only an administrative role and performed no engineering services. (R. 1174-1175, 6585.)

not challenge these sources nor does he cite any legal authority or dictionary source to define “employment.” The only legal authorities he cites are general rules of contract interpretation. (Brief of Appellee, pp. 10-20.)<sup>5</sup>

The word “employment” means the “activity in which one engages or is employed.” *Merriam-Webster OnLine*, <<http://www.Merriam-Webster.com/dictionary>>. In *Mesa Development Co., Inc. v. Sandy City Corp.*, 948 P.2d 366 (Utah Ct. App. 1997), this Court held that words “which are used in common, daily, non-technical speech should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage.” *Id.* at 369. The word “‘employment’ is broadly defined and liberally construed” in Utah law. *Pro-Benefit Staffing, Inc. v. Board of Review of the Industrial Commission of Utah, et al.*, 771 P.2d 1110, 1113 (Utah Ct. App. 1989).

Bennett’s “employment” was with ME&LS because the activity in which he was engaged or employed was civil engineering and surveying work for ME&LS. It is clear Bennett was not part of MEI’s administrative staff (R. 1177) and that he was leased to and worked only for ME&LS. (R. 6584-6585.) Bennett agrees his resignation was voluntary. He also testified that he has not worked for ME&LS since his resignation in August 2005. (R. 6588.) Because his resignation terminated that employment, it triggered his withdrawal as a Member of ME&LS.

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<sup>5</sup>In fact, of his five argument points addressing the merits of this appeal, only two contain citations to legal authorities. (Brief of Appellee at 10-20.)



## POINT II

### **THE DISTRICT COURT'S ORDERS LEAD TO AN ABSURD RESULT AND RENDER THE WITHDRAWAL PROVISIONS MEANINGLESS.**

Bennett does not contest ME&LS' position that the intent of Sections 12.1 and 12.3 was to create a mechanism for ME&LS to break ties with a Member who resigns and to provide for repurchase of the Member's interest. (Brief of Appellee at 16-18.) The language of the Second Amendment plainly shows the Members intended withdrawal to occur upon resignation, and that resignation was the primary event which would trigger withdrawal. (Addendum 2 at 3.)

Nor does Bennett challenge the Utah case law ME&LS cites for the proposition that a contract should be interpreted "in an attempt to harmonize and give effect to all of the contract provisions." *Nielsen v. O'Reilly, et al.*, 848 P.2d 664, 665 (Utah 1992). "Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none." *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990); (see other cases cited in Brief of Appellant at 23-24). Bennett does not cite a single authority in response to ME&LS' arguments on this point. (See Brief of Appellee at 16-18.)

Very recently the Utah Supreme Court reaffirmed the importance of this principle. In *Café Rio, Inc., et al. v. Larkin-Gifford-Overton, LLC*, 2009 UT 6. – P.3d –, decided last week, the Utah Supreme Court applied this rule of construction to interpret a cross-easement agreement. The circumstances of that case illustrate how Utah courts apply the rule to resolve competing interpretations of contract language. Larkin-Gifford-

Overton (“**LGO**”) owns a parcel of commercial property in St. George, Utah. The Vera R. Hughes Grandchildren’s Trust (the “**Trust**”) owns an adjacent parcel, of which Café Rio is a tenant. LGO, the Trust, and four other adjacent property owners signed a cross-easement agreement establishing common areas of open space in the center of the six parcels and governing the use of those common areas. *Café Rio*, 2009 UT 6, ¶¶8-10. Later, LGO began constructing a new building on its parcel. Café Rio and the Trust filed suit to enjoin the construction claiming it was an “obstruction” prohibited by the cross-easement agreement. (*Id.* ¶14.) The district court granted summary judgment for the Trust and Café Rio, interpreting the cross-easement agreement to prohibit LGO’s building construction. (*Id.* ¶17.)

On appeal, the Utah Supreme Court reversed that ruling. Construing multiple provisions of the cross-easement agreement, the Court ruled that it must “‘consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.’” *Café Rio*, 2009 UT 6, ¶25 (*quoting Green River Canal Co. v. Thayn*, 2003 UT 50, ¶17, 84 P.3d 1134). The Court held that interpreting the word “‘obstruction’ to include buildings would eviscerate LGO’s ability to construct a building on Parcel 5 – a right explicitly bargained and provided for. *We will not interpret a general contractual term such that it renders an explicit right meaningless.*” *Café Rio*, 2009 UT 6, ¶33 (emphasis added). Accordingly, the District Court’s grant of summary judgment was reversed and remanded for entry of summary judgment in favor of LGO. (*Id.* ¶38.)

In the present case, the ruling in *Café Rio* applies with equal force. To accept the narrow interpretation of “employment” advanced by Bennett and accepted by the District Court would eliminate the possibility of withdrawal upon a Member’s resignation and would do away with ME&LS’ right to repurchase that Member’s interest. These are explicit rights provided for in the Operating Agreement and the Second Amendment. Following the Supreme Court’s guidance, this Court should not “interpret a general contractual term [employment] such that it renders an explicit right meaningless.” *Café Rio*, 2009 UT 6, ¶33.

Bennett does not respond to or challenge ME&LS’ position that the District Court’s Orders render meaningless the withdrawal and repurchase provisions of the Second Amendment. His only response is to argue that ME&LS could have hired employees of its own, but did not do so. (Brief of Appellee at 16.) This argument ignores the undisputed fact that all of ME&LS’ employees were leased employees. (R. 1174-1175.) More specifically, each of the six Members who signed the Second Amendment, including Bennett himself, was a leased employee of ME&LS and had been for some five years. (See Addendum 2; R. 1174-1175.) It is also undisputed that ME&LS continued to lease all of its employees through the time of Bennett’s resignation in August 2005. (R. 1174, 6584.)

The District Court interpreted “employment” to exclude leased employment, and it is undisputed that ME&LS had nothing but leased employees. (R. 1174-1180.) Under this theory no Member would ever withdraw from ME&LS by resignation. Since bankruptcy, expulsion, death, or disability of a Member are less likely

events, withdrawal by resignation is the primary basis intended for those provisions. (*See* Addendum 2 at §§ 12.1 and 12.3.) It is absurd to contend, as Bennett does, that the Members who adopted the Second Amendment meant it to apply only to employment circumstances that never existed at ME&LS, and that it would never apply to themselves. Bennett cannot explain how the withdrawal and repurchase provisions would still have any application under his interpretation of the word “employment” on the facts of this case.

To give meaning to Sections 12.1 and 12.3 of the Second Amendment, this Court should construe the general term “employment” in Section 12.3(a) to include leased employment, which was the only kind of employment ME&LS ever had. To do so gives effect to all provisions of the Operating Agreement and the Second Amendment, and ignores none. Under this interpretation, withdrawal will occur as the Members contemplated when a voluntary resignation terminates the Member’s leased employment. The repurchase of the Member’s interest will then happen as provided in Section 12.3. Under this interpretation no provision of the Operating Agreement or the Second Amendment is rendered meaningless, and there is no absurd result. No “explicit right” of any party is “eviscerate[d].” *Café Rio*, 2009 UT 6, ¶33. Under governing Utah law, therefore, this Court should adopt ME&LS’ interpretation and rule that the word “employment” includes Bennett’s leased employment, and that his resignation triggered withdrawal as a Member of ME&LS.

### POINT III

#### **EXTRINSIC EVIDENCE SUPPORTS ME&LS' INTERPRETATION OF THE WORD "EMPLOYMENT."**

ME&LS believes the rules of law set forth above support its interpretation of the word "employment" in Section 12.3(a) of the Second Amendment, and resolve Bennett's conflicting interpretation. However, if the Court concludes the issue is not resolved by those rules of interpretation, the Court must consider "any relevant evidence" to determine whether "employment" is facially ambiguous. *Daines v. Vincent, et al.*, 2008 UT 51, ¶ 26, 190 P.3d 1269. Otherwise, the determination of ambiguity is inherently one-sided because it is based solely upon the "extrinsic evidence of the judge's own linguistic education and experience." *Id.* (quoting *Ward v. Intermountain Farmer's Assoc.*, 907 P.2d 264, 268 (Utah 1995)).

In that event, ME&LS has already identified several items of relevant, extrinsic evidence this Court should consider. (Brief of Appellant at 28-29.) Bennett makes the conclusory argument that Section 12.3(a) is not ambiguous, but does not address any item of extrinsic evidence or its bearing on the meaning of "employment." (Brief of Appellee at 12-14.) Bennett concedes he was "one of many employees leased by MEI to ME&LS" and that he had a "close day-to-day association with ME&LS . . . ." (Brief of Appellee at 15.) He makes no attempt to explain how the word "employment" in the Second Amendment can be narrowly construed to exclude leased employment when every member who signed it was a leased employee of ME&LS and had been for five years.

Moreover, Bennett wholly ignores the principle that an interpretation given to a contract provision “by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the Court.” *Okelberry v. West Daniels Land Assoc.*, 2005 UT App 327, ¶ 16, 120 P.3d 34. Bennett makes no attempt to explain the inconsistency between his current position and his Resignation Letter, which sought the repurchase of his membership interest. The Resignation Letter states Bennett expected to “receive at least current book value for my 252 interests . . . in a timely manner.” (Addendum 3 at 2; R. 6631.) By that statement Bennett tacitly admits that his resignation ended his “employment” with ME&LS and triggered the repurchase of his membership interest under § 12.3 of the Second Amendment.

Accordingly, this Court should consider the relevant, extrinsic evidence ME&LS has identified, and should rule that the interpretation ME&LS contends for is reasonably supported by the language of the Operating Agreement and the Second Amendment. *Daines*, 2008 UT 51, ¶ 26.

#### **POINT IV**

#### **ALTERNATIVELY, GENUINE ISSUES OF FACT PRECLUDED ENTRY OF THE JUDGMENT.**

Bennett entirely fails to respond to Point V of the Brief of Appellant concerning genuine issues of fact which precluded entry of the judgment. There ME&LS argued that if the Court rejects its interpretation of the word “employment” as set forth above, the District Court’s Judgment nevertheless was improperly entered because of

genuine issues of fact in the record. Bennett's non-response concedes this argument. If the Court should reach this Point, therefore, it should conclude that the Judgment was improperly entered because of genuine issues of material fact.

#### **POINT V**

#### **AMENDMENT NO. 4 HAS NO BEARING ON THE MEANING OF "EMPLOYMENT."**

Bennett's final point focuses on Amendment No. 4 to the ME&LS Operating Agreement and contends it was a violation of Judge Boyden's ruling. It is unclear what remedy Bennett seeks, but it is clear this argument was rejected below and Bennett has not appealed it.

In the District Court, Bennett filed a Motion for Order to Show Cause asking for a declaration that Amendment Nos. 3 and 4 to the ME&LS Operating Agreement are "null and void." (R. 3158-3160.) By a Minute Entry dated September 14, 2007, the District Court denied that Motion. (R. 6225-6226.) Bennett has not challenged that ruling on appeal. Moreover, Amendment No. 4 has no bearing on the meaning of "employment." Accordingly, any argument about Amendment No. 4 in the Brief of Appellee is irrelevant to the issues raised in this appeal.

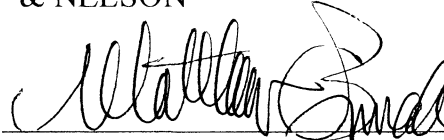
#### **CONCLUSION**

The Court should apply governing principles of Utah contract law by interpreting the common, ordinary meaning of "employment" broadly and liberally, and by giving effect to all provisions of the Operating Agreement and the Second

Amendment and ignoring none of them. If necessary, the Court should consider extrinsic evidence in its review. The Court should then conclude that Bennett's resignation terminated his leased employment with ME&LS and triggered his withdrawal as a Member. Based thereon, the Court should reverse the Judgment and the Orders of December 21, 2006 and April 2, 2008.

DATED this 6 day of February, 2009.

RICHARDS BRANDT MILLER  
& NELSON

A handwritten signature in black ink, appearing to read 'Matthew C. Barneck', is written over a horizontal line.

MATTHEW C. BARNECK

*Attorneys for Appellant*



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that two (2) copies of the foregoing REPLY BRIEF OF APPELLANT were sent by first-class mail, postage prepaid, on February 6, 2009, to the following:

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A handwritten signature in black ink, appearing to read "Matthew End", is written over a horizontal line.

## **ADDENDA**

### **ADDENDUM 7 – Record Excerpts Regarding Bennett’s Work for ME&LS**

## **ADDENDUM 7**

Scott McNeil \* April 27, 2006

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

McNEIL ENGINEERING, INC.,	)	
McNEIL ENGINEERING AND LAND	)	
SURVEYING, LLC, and SCOTT	)	
McNEIL,	)	Deposition of:
	)	
Plaintiffs,	)	SCOTT McNEIL
	)	
<b>vs.</b>	)	
	)	
BENCHMARK ENGINEERING AND	)	Case No. 050917315
LAND SURVEYING, LLC,	)	
BENCHMARK CAD SERVICES,	)	Judge Ann Boyden
LLC, ENGCAD, LLC, and DALE	)	
K. BENNETT, individually,	)	
	)	
Defendants.	)	

April 27, 2006 \* 8:30 a.m.

Location: Snow, Christensen & Martineau  
10 Exchange Place, #1100  
Salt Lake City, Utah 84111

Reporter: Diana Kent, CSR, RPR, CRR  
Notary Public in and for the State of Utah

CitiCourt, LLC  
801.532.3441

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1167

1 diminished, either way?

2 A. It's about the same.

3 Q. How many employees does ME&LS currently  
4 have?

5 A. Approximately twenty.

6 Q. Let's talk about McNeil Engineering, Inc.  
7 for just a minute. That's a corporation?

8 A. It is.

9 Q. Is it an S-corporation?

10 A. Yes.

11 Q. Who is the owner of McNeil Engineering,  
12 Inc.?

13 A. I am.

14 Q. Are you the sole owner?

15 A. I'm the sole owner, stockholder.

16 Q. When was it incorporated?

17 A. It was originally incorporated in either  
18 '83 or '84 as a C-corporation.

19 Q. So when you originally opened your  
20 business, or shortly thereafter, you performed  
21 engineering services through McNeil Engineering,  
22 Inc.; is that correct?

23 A. That's correct.

24 Q. Is it true that as of today, the  
25 engineering services are all performed through the

1 A. No.

2 Q. What is your position at McNeil  
3 Engineering, Inc.?

4 A. President.

5 Q. What are your current responsibilities?

6 A. Management.

7 Q. Do you do any hands-on engineering or  
8 surveying work at the present time?

9 A. Yes.

10 Q. So your responsibilities include more than  
11 just management, then? It does include some actual  
12 engineering work?

13 A. Yes.

14 Q. Can you give me a full description of what  
15 your current responsibilities are at McNeil?

16 A. In a broad overall --

17 Q. Yes.

18 A. I am responsible for basically reviewing  
19 everything that goes out, making sure that the  
20 quality of the work is professional. Complete. And  
21 when I managed the day-to-day operations of -- we are  
22 divided up into three departments or subcompanies,  
23 limited liability corporations under the McNeil, Inc.  
24 umbrella.

25 Q. What are the names of the three LLCs?

1 A. McNeil Engineering and Land Surveying,  
2 McNeil Engineering Structural and McNeil Consulting  
3 Engineering.

4 Q. McNeil Engineering and Land Surveying, LLC  
5 is a limited liability company?

6 A. Correct.

7 Q. When was that created?

8 A. '96.

9 Q. Who are the current owners of McNeil  
10 Engineering and Land Surveying?

11 A. It used to be Dale Bennett.

12 Q. I'm sorry?

13 A. It used to be Dale Bennett, Brad Peterson,  
14 Ken Petty, Greg Meyers, Mike Hoffman, and recently  
15 Ted Didas.

16 Q. Will you spell Didas, please?

17 A. D-I-D-A-S.

18 Q. When did Ted Didas become a part owner?

19 A. September, October, I'm not sure.

20 Q. Of 2005?

21 A. Uh-huh (affirmative).

22 Q. Is that a yes?

23 A. Yes.

24 Q. I have to ask you to answer audibly for  
25 the court reporter.

1 A. I understand that. It might have been  
2 November, I'm not exactly sure.

3 Q. What is Ted Didas's percentage ownership?

4 A. Ten percent.

5 Q. And from which of the other owners did Ted  
6 Didas's 10 percent ownership come from?

7 A. From all of us.

8 Q. When you say "all of us," would that  
9 include Dale Bennett?

10 A. Correct.

11 Q. Is Dale Bennett currently a member of  
12 McNeil Engineering and Land Surveying?

13 MS. KNUDSON: Objection. Calls for a  
14 legal conclusion.

15 Q. You can still answer to the best of your  
16 knowledge.

17 A. In my opinion, no.

18 Q. When did Mr. Bennett cease being a member  
19 of McNeil Engineering and Land Surveying?

20 A. Upon his resignation.

21 Q. In your view, does Mr. Bennett currently  
22 have any ownership interest of any kind in McNeil  
23 Engineering and Land Surveying?

24 MS. KNUDSON: Objection. Calls for a  
25 legal conclusion.



1 Q. Your answer, please?

2 A. I don't know.

3 Q. Other than the owners that you have  
4 mentioned or identified, are there any other past  
5 owners of McNeil Engineering and Land Surveying?

6 A. Yes.

7 Q. Who are the other past owners?

8 A. Steve Fackrell.

9 Q. Can you spell his last name, please?

10 A. F-A-C-K-R-E-L-L.

11 Q. When did Steve Fackrell cease being a  
12 member? Or excuse me, when did Steve Fackrell cease  
13 being an owner?

14 A. I don't know the year.

15 Q. Can you give me an approximate time frame?

16 A. 2001.

17 Q. And I'm not going to hold you to that  
18 precisely, but it gives me some time frame to deal  
19 with. What is McNeil Engineering and Land  
20 Surveying's current scope of work? What does it do  
21 currently?

22 A. It provides engineering and land surveying  
23 to the general public.

24 Q. Can we call that Land Surveying for short?  
25 Is there a shorter way to refer to that company or do

1 diminished, either way?

2 A. It's about the same.

3 Q. How many employees does ME&LS currently  
4 have?

5 A. Approximately twenty.

6 Q. Let's talk about McNeil Engineering, Inc.  
7 for just a minute. That's a corporation?

8 A. It is.

9 Q. Is it an S-corporation?

10 A. Yes.

11 Q. Who is the owner of McNeil Engineering,  
12 Inc.?

13 A. I am.

14 Q. Are you the sole owner?

15 A. I'm the sole owner, stockholder.

16 Q. When was it incorporated?

17 A. It was originally incorporated in either  
18 '83 or '84 as a C-corporation.

19 Q. So when you originally opened your  
20 business, or shortly thereafter, you performed  
21 engineering services through McNeil Engineering,  
22 Inc.; is that correct?

23 A. That's correct.

24 Q. Is it true that as of today, the  
25 engineering services are all performed through the

1 three limited liability companies?

2 A. Yes.

3 Q. As of today, McNeil Engineering acts as an  
4 umbrella, sort of an umbrella company for the three  
5 limited liability companies?

6 A. Correct.

7 Q. And is that true since the limited  
8 liability companies were formed in 1996?

9 A. Correct.

10 Q. Were all three of the limited liability  
11 companies formed in 1969?

12 A. Yes.

13 Q. So as of today -- let me rephrase that.  
14 From 1996 until today, is it true that McNeil  
15 Engineering, Inc. does not actually perform any  
16 engineering services itself?

17 A. Correct.

18 Q. Is the function of McNeil Engineering,  
19 Inc. today to lease employees to the other McNeil  
20 limited liability companies?

21 A. Yes.

22 Q. And that's been true since 1996?

23 A. Yes.

24 Q. Does McNeil Engineering, Inc. currently  
25 have any other function?

1           A.     The administration of all the LLCs is  
2 through McNeil Engineering, Inc. So the employees,  
3 the secretaries, business manager, accountant are all  
4 members of or employees of McNeil Engineering, Inc.  
5 and work for all three LCs.

6           Q.     So there's some administrative staff that  
7 are employed by McNeil Engineering, Inc. that perform  
8 administrative functions for all three of the limited  
9 liability companies?

10          A.     Correct.

11          Q.     There are other employees of McNeil  
12 Engineering, Inc. that were leased to the various  
13 limited liability companies; is that correct?

14          A.     Correct.

15          Q.     And Dale Bennett would be an example of  
16 somebody who was an employee of McNeil Engineering,  
17 Inc. who was leased to ME&LS.

18          A.     Correct.

19          Q.     Other than leasing employees to the  
20 limited liability companies and performing  
21 administrative functions, does McNeil Engineering,  
22 Inc. have any other function or purpose today?

23          A.     No.

24          Q.     Has it had any other function or purpose  
25 since 1996?

1 A. Repeat the functions again.

2 Q. Okay. Other than leasing employees to the  
3 limited liability companies and performing  
4 administrative services, does McNeil Engineering,  
5 Inc. have any other or perform any other functions or  
6 services since 1996?

7 MS. KNUDSON: Object to the form.

8 MR. CALL: What's the problem with the  
9 form?

10 MS. KNUDSON: Vague and ambiguous as to  
11 functions.

12 MR. CALL: Go ahead and answer that.

13 MS. KNUDSON: You can answer it if you  
14 can.

15 A. I think it needs some clarification as far  
16 as the administration. The whole idea of having the  
17 McNeil Engineering, Inc. perform services for the  
18 other three was to limit costs. So like copying  
19 centers, we have a copying center that is managed by  
20 McNeil, Inc. So in essence, the answer to your  
21 question is yes.

22 Q. (By Mr. Call) The answer to my question  
23 is yes, but you're a little uncomfortable with the  
24 scope of what "administrative function" means? Is  
25 that where you are hesitating?

1 A. Yes.

2 Q. Okay. How many employees does McNeil  
3 Engineering, Inc. have, including its administrative  
4 staff and the employees that are leased to the  
5 limited liability companies?

6 A. Approximately 40.

7 Q. How many of those are full-time employees  
8 of McNeil Engineering, Inc. that are not leased to  
9 the limited liability companies? In other words, the  
10 administrative staff?

11 A. Approximately eight.

12 Q. Could you tell me who those are?

13 A. Full names?

14 Q. Full names, please.

15 A. Jessica Bennett. Virgil Hammon. Marilyn  
16 Young. Nikki Priestly. Don't ask me to spell it.  
17 Jared Madsen. I said Andrea, correct? Andrea Crane.  
18 We have a runner that we call Tevi. I couldn't tell  
19 you his real name.

20 Q. Okay. How many have I got?

21 MS. KNUDSON: You have seven.

22 A. I think that's it. I said Virgil. Did I  
23 say Virgil? Okay.

24 Q. So there are approximately 30 or 33  
25 employees that are leased to the limited liability

1 companies?

2 A. Correct.

3 Q. Do you know if Jessica Bennett is related  
4 to Dale Bennett?

5 A. No, she isn't.

6 Q. Now, these 30 or so, you don't know if  
7 it's 30 or 33, do you? You don't have an exact  
8 number?

9 A. I don't.

10 Q. I'll just refer to them as the 30 or so  
11 employees.

12 A. That works.

13 Q. The 30 or so employees that are leased,  
14 their employer, the employer for all of those  
15 individuals is McNeil Engineering, Inc.?

16 A. Correct.

17 Q. And they are leased by McNeil Engineering,  
18 Inc. to the three limited liability companies?

19 A. Correct.

20 Q. Are those 30 or so employees all leased  
21 only to those three limited liability companies or  
22 are there other companies that they are leased to?

23 A. For the most part, those 30 would be  
24 leased only to one of the LCs.

25 Q. Are there any exceptions to that?

1 A. I can't think of any exceptions. We do  
2 have some crossover in drafting. But what we try and  
3 do is bill the other company for the time, to keep it  
4 straight.

5 Q. Okay.

6 A. There's also -- we have an office in St.  
7 George and there's some crossover there.

8 Q. Okay. Does the St. George office have a  
9 separate limited liability company?

10 A. No.

11 Q. Which limited liability company operates  
12 the St. George office, or do they all three?

13 A. McNeil Engineering and Land Surveying is  
14 the main LC in St. George. But we have one  
15 structural engineer that is strictly leased to the  
16 McNeil Engineering Structural.

17 Q. So I think I understand this but I need to  
18 make this absolutely clear. Other than the three  
19 limited liability companies that we have discussed,  
20 McNeil Engineering, Inc. does not lease any employee  
21 to any other company other than the three LLCs; is  
22 that correct?

23 A. That's correct.

24 Q. Do the three limited liability companies  
25 lease employees from any other company other than



1 McNeil Engineering, Inc.?

2 MS. KNUDSON: Objection. Calls for legal  
3 conclusion.

4 Q. You can still answer.

5 A. I don't know. I guess I don't know.

6 Q. You don't know? You don't know if the  
7 three limited liability companies lease employees  
8 from some other company other than McNeil  
9 Engineering, Inc.?

10 A. Do the limited liability companies lease  
11 other employees?

12 Q. Right. You have three limited liability  
13 companies that we have discussed. We have discussed  
14 ME&LS and we have discussed Structural and we have  
15 discussed Consulting, right?

16 A. Correct.

17 Q. Do those three limited liability companies  
18 lease employees from anyone other than McNeil  
19 Engineering, Inc.?

20 A. No.

21 Q. What is Scott F. McNeil Company, LLC?

22 A. I don't know.

23 Q. You don't know? You have never heard of  
24 that company?

25 A. Scott F. McNeil, LLC?

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

-ooOoo-

McNEIL ENGINEERING, INC; : CIVIL NO. 050917315  
McNEIL ENGINEERING AND  
LAND SURVEYING, LLC; and : DEPOSITION OF:  
SCOTT McNEIL, an : DALE K. BENNETT  
individual, :  
Plaintiffs, : TAKEN: JUNE 23, 2006  
vs. : REPORTED BY:  
: CARILEE DUSTIN, CSR, RPR

BENCHMARK ENGINEERING : JUDGE ANN BOYDEN  
AND LAND SURVEYING, LLC;  
BENCHMARK CAD SERVICES,  
LLC; LAND DEVELOPMENT  
CADD, INC.; Engcad, LLC;  
and DALE K. BENNETT, an  
individual,

Defendants.

---

-ooOoo-

Deposition of DALE K. BENNETT, taken on  
behalf of the Plaintiffs, at 50 South Main Street,  
Seventh Floor, Salt Lake City, Utah, before CARILEE  
DUSTIN, Certified Shorthand Reporter and Notary  
Public in and for the State of Utah, pursuant to  
Notice.

1           A. I believe the role is defined in the operating  
2 agreement, and is that in here?

3           Q. Yes, it is. I'll take you to that in a  
4 minute.

5           The third page has some signatures. Would you  
6 look at that and tell me if the second one is yours.

7           A. Yes.

8           Q. Okay.

9           A. It's not the same as the way I do it now  
10 because I've signed about -- thousands of documents  
11 since then. I kind of shortcut it a little bit.

12          Q. Yeah. Mine evolves over time, too.

13          If I'm understanding this right, there were  
14 six members, each of these individuals mentioned on this  
15 third page, but only two managers; is that correct?

16          A. Yes.

17          Q. All right. So this -- describe for me your  
18 understanding of the working relationship between this  
19 new company and McNeil Engineering, Inc.

20          A. Can you give me more information?

21          Q. Yeah. That may be too vague.

22          Let me ask a more specific question. First,  
23 were you -- did you consider yourself or was it your  
24 understanding that you were an employee of ME&LS or an  
25 employee of McNeil Engineering, Inc.?

CARILEE B. DUSTIN \* CSR, RPR 28

REPORTERS, INC. (801) 746-5080

1           A. To answer the question honestly, the way I  
2 understand it, when this thing was first organized, I  
3 wasn't exactly sure. I thought it would transfer over.  
4 But after reading and understanding it better, I was --  
5 I kept -- continued to be an employee of McNeil  
6 Engineering, Incorporated.

7           So to answer the question, yes, McNeil  
8 Engineering, Incorporated.

9           Q. All right. And then were you loaned or leased  
10 to ME&LS, or do you have an understanding in that  
11 regard?

12          A. I didn't ever really consider it to be leased,  
13 but I believe that might be the correct term the way  
14 the -- the way it reads.

15          Q. Okay.

16          A. In reading the documents.

17          Q. After the formation of these three companies,  
18 did McNeil Engineering, Inc. continue to do engineering  
19 and surveying work, or was it an administrative entity,  
20 or do you know?

21          A. To this day, I still can't figure out why he  
22 continued to keep McNeil Engineering, Inc., only to try  
23 to keep one -- the two -- the three companies together,  
24 even though some of us had no interest in the other  
25 companies; and, two, to just continue to keep the

1 employees so that they had their same -- the number of  
2 years that they had worked for a company instead of  
3 having to start over with a new company and act like it  
4 was new employees.

5 So I don't know that -- I believe everything  
6 after they started was supposed to have gone through the  
7 LCs, as far as the jobs, and that McNeil Inc. was more  
8 of an administration, like you had mentioned.

9 Q. Okay. So for all practical purposes, your  
10 work was for ME&LS after this time; is that a fair  
11 statement?

12 A. Yes.

13 Q. Did -- well, let me ask it this way: My  
14 understanding is that McNeil Engineering, Inc. would --  
15 made arrangements for the office space where ME&LS and  
16 the other LLCs perform their work. Is that correct?

17 MR. MARTINEAU: If you know.

18 THE WITNESS: I had no say in what MEI ever  
19 did. And many times Mr. McNeil would say this is what  
20 he was going to do, and sometimes he would run it by me,  
21 but I had no say, so, you know, he -- he bought the  
22 building, leased the space in 1997 back to the LCs, and  
23 we had no say in how much it cost or anything. It was  
24 him, take it or leave it, type of thing.

25 Q. (BY MR. BARNECK) All right. And the question

CARILEE B. DUSTIN \* CSR, RPR

30

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1 A. Yes.

2 Q. Did the company pay for, for example, if you  
3 went to seminars or other continuing education, did the  
4 company pay for those?

5 A. It was -- you had to use your own time, but  
6 they would pay for the seminar.

7 Q. And did the company provide automobiles for  
8 you at some point in time?

9 A. Yes.

10 Q. And was that McNeil Engineering, Inc. or  
11 ME&LS? Do you know who?

12 A. I believe it was MEI originally and -- but I  
13 believe that the cars were owned by -- after the LC was  
14 created, the LCs, I think they were -- I think McNeil  
15 Engineering, Incorporated owned some of them and then  
16 they sold them to the LC.

17 Q. When did you first -- when did the company  
18 first provide you an automobile?

19 A. 1983, when I started.

20 Q. What were the terms of that deal? They just  
21 paid for it?

22 A. Yeah. It had to be used for surveying, the  
23 vehicle, the truck.

24 Q. So from then on out, did you always have a car  
25 that was provided by McNeil, one of the McNeil

CARILEE B. DUSTIN \* CSR, RPR

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REPORTERS, INC. (801) 746-5080

CARILEE DUSTIN, CSR, RPR

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

-ooOoo-

McNEIL ENGINEERING,	:	CIVIL NO. 050917315
INC.; McNEIL ENGINEERING	:	
AND LAND SURVEYING, LLC;	:	DEPOSITION OF:
ENGCAD, LLC; and SCOTT	:	DALE K. BENNETT, VOL. II
McNEIL, an individual,	:	
	:	TAKEN: January 18, 2007
Plaintiffs,	:	
	:	Judge Ann Boyden
v.	:	
BENCHMARK ENGINEERING	:	
AND LAND SURVEYING, LLC;	:	
BENCHMARK CAD SERVICES,	:	
LLC; LAND DEVELOPMENT	:	
CADD, INC; AND DALE K.	:	
BENNETT, an individual,	:	
FLORENCE B. ALHAMBRA, an	:	
individual,	:	
	:	
Defendants.	:	

---

Deposition of DALE K. BENNETT, taken  
on behalf of the Plaintiffs, at 50 South Main Street,  
Suite 700, Salt Lake City, Utah, before ROCKIE E.  
DUSTIN, Certified Shorthand Reporter and Notary  
Public in and for the State of Utah, pursuant to  
Notice.

658

1 yes.

2 Q. And are you the manager of that?

3 A. Yes.

4 Q. Does it still have its offices in Sandy?

5 A. Yes. 09:04

6 Q. And you're still performing civil  
7 engineering and land surveying work in Salt Lake County  
8 and other areas; is that correct?

9 A. Yes.

10 Q. And you haven't worked for any of the 09:04

11 McNeil companies since you left in August of '05?

12 A. No.

13 Q. All right.

14 When we finished off last time, we were  
15 looking at some exhibits in this binder. I'll give you 09:04  
16 that because we'll be working from that one. That's  
17 the second one. We had started to talk about Exhibit  
18 No. 71. If you could turn to that one for me.

19 A. (Witness reviews document.)

20 Q. This appears to be some kind of corporate 09:05  
21 document prepared by Carlos Ocampo in the Philippines.  
22 Below that -- I guess toward the top, below that box,  
23 there's a date that says, "Actual date of  
24 organizational meeting, November 25, 2005."

25 Do you see that? It's right there. 09:05

US88



Scott McNeil \* April 27, 2006

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

McNEIL ENGINEERING, INC.,	)	
McNEIL ENGINEERING AND LAND	)	
SURVEYING, LLC, and SCOTT	)	
McNEIL,	)	Deposition of:
	)	
Plaintiffs,	)	SCOTT McNEIL
	)	
vs.	)	
	)	
BENCHMARK ENGINEERING AND	)	Case No. 050917315
LAND SURVEYING, LLC,	)	
BENCHMARK CAD SERVICES,	)	Judge Ann Boyden
LLC, ENGCAD, LLC, and DALE	)	
K. BENNETT, individually,	)	
	)	
Defendants.	)	

April 27, 2006 \* 8:30 a.m.

Location: Snow, Christensen & Martineau  
10 Exchange Place, #1100  
Salt Lake City, Utah 84111

Reporter: Diana Kent, CSR, RPR, CRR  
Notary Public in and for the State of Utah

CitiCourt, LLC  
801.532.3441

0eea8f80-ab01-4f2b-a22b-f225725595c2

6624

1 A. No.

2 Q. What is your position at McNeil  
3 Engineering, Inc.?

4 A. President.

5 Q. What are your current responsibilities?

6 A. Management.

7 Q. Do you do any hands-on engineering or  
8 surveying work at the present time?

9 A. Yes.

10 Q. So your responsibilities include more than  
11 just management, then? It does include some actual  
12 engineering work?

13 A. Yes.

14 Q. Can you give me a full description of what  
15 your current responsibilities are at McNeil?

16 A. In a broad overall --

17 Q. Yes.

18 A. I am responsible for basically reviewing  
19 everything that goes out, making sure that the  
20 quality of the work is professional. Complete. And  
21 when I managed the day-to-day operations of -- we are  
22 divided up into three departments or subcompanies,  
23 limited liability corporations under the McNeil, Inc.  
24 umbrella.

25 Q. What are the names of the three LLCs?

CitiCourt, LLC  
801.532.3441

1 A. McNeil Engineering and Land Surveying,  
2 McNeil Engineering Structural and McNeil Consulting  
3 Engineering.

4 Q. McNeil Engineering and Land Surveying, LLC  
5 is a limited liability company?

6 A. Correct.

7 Q. When was that created?

8 A. '96.

9 Q. Who are the current owners of McNeil  
10 Engineering and Land Surveying?

11 A. It used to be Dale Bennett.

12 Q. I'm sorry?

13 A. It used to be Dale Bennett, Brad Peterson,  
14 Ken Petty, Greg Meyers, Mike Hoffman, and recently  
15 Ted Didas.

16 Q. Will you spell Didas, please?

17 A. D-I-D-A-S.

18 Q. When did Ted Didas become a part owner?

19 A. September, October, I'm not sure.

20 Q. Of 2005?

21 A. Uh-huh (affirmative).

22 Q. Is that a yes?

23 A. Yes.

24 Q. I have to ask you to answer audibly for  
25 the court reporter.

1 three limited liability companies?

2 A. Yes.

3 Q. As of today, McNeil Engineering acts as an  
4 umbrella, sort of an umbrella company for the three  
5 limited liability companies?

6 A. Correct.

7 Q. And is that true since the limited  
8 liability companies were formed in 1996?

9 A. Correct.

10 Q. Were all three of the limited liability  
11 companies formed in 1969?

12 A. Yes.

13 Q. So as of today -- let me rephrase that.  
14 From 1996 until today, is it true that McNeil  
15 Engineering, Inc. does not actually perform any  
16 engineering services itself?

17 A. Correct.

18 Q. Is the function of McNeil Engineering,  
19 Inc. today to lease employees to the other McNeil  
20 limited liability companies?

21 A. Yes.

22 Q. And that's been true since 1996?

23 A. Yes.

24 Q. Does McNeil Engineering, Inc. currently  
25 have any other function?

1 A. The administration of all the LLCs is  
2 through McNeil Engineering, Inc. So the employees,  
3 the secretaries, business manager, accountant are all  
4 members of or employees of McNeil Engineering, Inc.  
5 and work for all three LCs.

6 Q. So there's some administrative staff that  
7 are employed by McNeil Engineering, Inc. that perform  
8 administrative functions for all three of the limited  
9 liability companies?

10 A. Correct.

11 Q. There are other employees of McNeil  
12 Engineering, Inc. that were leased to the various  
13 limited liability companies; is that correct?

14 A. Correct.

15 Q. And Dale Bennett would be an example of  
16 somebody who was an employee of McNeil Engineering,  
17 Inc. who was leased to ME&LS.

18 A. Correct.

19 Q. Other than leasing employees to the  
20 limited liability companies and performing  
21 administrative functions, does McNeil Engineering,  
22 Inc. have any other function or purpose today?

23 A. No.

24 Q. Has it had any other function or purpose  
25 since 1996?