

2008

McNeil Engineering, Inc., McNeil Engineering and Land Surveying, LLC, Engcad LLC, Scott McNeil v. Benchmark Engineering and Land Surveying, LLC, Benchmark Cad Services, LLC, Land Development Cadd, Inc., Dale K. Bennett, and Florence Alahambra, individually : Brief of Appellee

Utah Court of Appeals

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Reed L. Martineau; Keith A. Call; Derek J. Williams; Snow Christensen and Martineau; Attorneys for Defendant/Appellee.

Matthew C. Barneck; Paul P. Burghardt; Richards, Brandt, Miller and Nelson; Attorneys for Plaintiff/Appellant.

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IN THE UTAH COURT OF APPEALS

McNEIL ENGINEERING, INC.,
McNEIL ENGINEERING AND LAND
SURVEYING, L.L.C., ENGCAD,
L.L.C., and SCOTT McNEIL,

Plaintiff/Appellant,

vs.

BENCHMARK ENGINEERING AND
LAND SURVEYING, L.L.C.,
BENCHMARK CAD SERVICES,
L.L.C., LAND DEVELOPMENT
CADD, INC., DALE K. BENNETT,
AND FLORENCE ALHAMBRA,
individually,

Defendant/Appellee.

Appeal No. 20080319

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEE

APPEAL FROM ORDER AND JUDGMENT DATED APRIL 3, 2008 OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH THE HONORABLE PAT B. BRIAN
TRIAL COURT CASE NO. 050917315

MATTHEW C. BARNECK (5249)
PAUL B. BURGHARDT (10795)
RICHARDS BRANDT MILLER & NELSON
299 South Main Street
P.O. Box 2465
Salt Lake City, UT 84110-2465
Tel: (801) 531-2000
Attorneys for Plaintiff/
Appellant

REED L. MARTINEAU (2106)
KEITH A. CALL (6708)
DEREK J. WILLIAMS (9864)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Tel: (801) 521-9000
Attorneys for Defendant/
Appellee

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Salt Lake City, UT 84110-2465
Tel: (801) 531-2000
Attorneys for Plaintiff/
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DEREK J. WILLIAMS (9864)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Tel: (801) 521-9000
Attorneys for Defendant/
Appellee

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) pursuant to an Order of the Utah Supreme Court entered April 16, 2008.

STATEMENT OF THE ISSUES

POINT I. Appeal of the Judgment and Underlying Orders is Properly Before This Court.

POINT II. Under the Clear and Unambiguous Terms of the ME&LS Operating Agreement, Dale Bennett Did Not Terminate His Employment with the Company (ME&LS) So Is Still a Member of ME&LS.

POINT III. The Relevant Language of the Operating Agreement Is Not Ambiguous and the Intentions of the Parties Are Clear from a Plain Reading of the Operating Agreement.

POINT IV. Plaintiffs' Position Ignores the Clear Language of the Operating Agreement and Unnecessarily Relies on Irrelevant Facts Outside the Operating Agreement.

POINT V. Proper Construction of the Clear Language of the Operating Agreement Does Not Lead to Absurd Results or to Nullification of its Terms.

POINT VI. Plaintiffs' Attempt to Restructure the
Operating Agreement, Without Notice to Bennett,
Is Invalid and a Violation of Judge Boyden's
Previously Announced Order.

STATEMENT OF THE CASE

The plaintiffs filed this suit, claiming, among other things, that the resignation of Dale K. Bennett ("Bennett") as an "employee" of McNeil Engineering, Inc. ("MEI") automatically constituted a "withdrawal" by him as a "member" of McNeil Engineering & Land Surveying, LLC ("ME&LS"). Following briefing and argument on the parties' Cross-Motions for Partial Summary Judgment, Judge Ann Boyden ruled that Bennett remains a member of ME&LS and is entitled to all of the benefits of a member. Plaintiffs' Motion to Reconsider was denied by Judge Pat Brian.

Thereafter the District Court, Judge Brian, entered a Judgment in favor of Bennett for Bennett's unpaid percentage share of ME&LS distributions for 2005 and 2006.

STATEMENT OF FACTS

1. Scott F. McNeil ("McNeil") formed McNeil Engineering, Inc. ("MEI") in 1983, and since has been the sole owner of MEI. (R.1168)

2. Upon its formation, Bennett became an employee of MEI and remained an employee of MEI from 1983 until he resigned as an employee of that company on August 17, 2005. (R.1187; R.6630)

3. In 1996, McNeil formed three limited liability companies associated with MEI to perform the services to clients theretofore carried on by MEI itself. ME&LS was one of the three LLCs created. (R.1169-1170, 1173; R.6627)

4. MEI remained the employer of all personnel and leased them to ME&LS and to the other two companies. (R.1178) MEI also provided administrative services through its staff employees for all of the companies. (R.1175-1177; R.6628) MEI has provided no engineering services since 1996. (R.1174)

5. Bennett became a 25% member owner of ME&LS at its inception in 1996 and thereafter rendered services on ME&LS projects as a leased "employee" of and for MEI. (R.6628) In 2005 Bennett owned 252 shares for a total of 26.53% of the membership interest in ME&LS. (R.6618)

6. Both McNeil and Bennett were managers, but never employees, of ME&LS. (R.6601) In fact, ME&LS has never had any employees. All services on ME&LS projects were

provided to ME&LS by leased employees working for MEI, not for ME&LS. (R.1178; R.6628, emphasis added.)

7. Both McNeil and Bennett understood from the beginning that Bennett was an employee of MEI. (R.1175; R.5445)

8. MEI provided all of the services required of an employer to all of its employees, including Bennett. (R.5444-5445)

9. An Amendment No. 2, dated November 1, 2001, to the Operating Agreement ("Operating Agreement") of ME&LS provided in Sec 12.1 that a member

"shall cease to be a member . . . upon the withdrawal of a member,"

and in Section 12.3 that

"a member shall be deemed to withdraw when the member voluntarily resigns or terminates the member's employment with the Company for reasons other than bankruptcy, death, disability or incompetence." (R.6618-21, emphasis added.)

10. Under definitions of the ME&LS Operating Agreement, in Section 1.10, the "Company" is defined as

"McNeil Engineering and Land Surveying, L.C., a liability company formed under the laws of Utah, and any successor company." Id.

11. MEI is not referred to in either the Operating Agreement or in Amendment No. 1 or Amendment No. 2, nor is

there any definition of "employment," "employee" or "withdrawal." There is also no reference to the term "leased employee."

12. On August 17, 2005, Bennett submitted a letter to McNeil stating that he was resigning his employment with MEI. (R.2600-2601) Bennett did nothing to waive, sell or otherwise give up his valuable ownership interest in ME&LS.

13. In August, 2006, the parties filed cross motions for summary judgment on Bennett's status as a member of ME&LS and his rights, if any, as a member. (R.2510-2581; R.2585-2644)

14. On November 17, 2006, Judge Boyden ruled that Bennett is still a member of ME&LS and is entitled to:

"All of the rights of a member, including, for example, the same right to current information, accounting, disbursements, and other benefits that any other member of ME&LS is entitled to receive."

(R.3119-22) That ruling was confirmed by Judge Boyden's Order dated December 21, 2006. (R.3119-3123)

15. None of the documents related to ME&LS had ever referred to MEI until an Amendment No. 4 was purportedly adopted on November 29, 2006, without notice to Bennett, just twelve days after Judge Boyden's ruling on November 17, 2006. (R.5772-75)

16. Amendment No. 4 is a clear attempt to overrule and void Judge Boyden's Order. See Attachment 1. Amendment No. 4 omitted Bennett as a member and his membership interest was transferred to McNeil and the other members of ME&LS. Id.

17. Appellants filed a motion to reconsider Judge Boyden's Order which was denied by Judge Pat Brian on April 2, 2008. (R.6791-6793)

18. During the year 2005, ME&LS made distributions to members totaling \$320,136.10. These distributions were paid out quarterly. In January 2005, a distribution of \$100,000 was paid, and Bennett was paid \$26,526.32, or 26.53%. In April 2005, a distribution of \$90,000 was paid and Bennett was paid \$23,873.68, or 26.53%. In September 2005, a distribution of \$30,136.10 was paid. In November 2005, a distribution of \$100,000 was paid. Bennett was not paid his share of either the September or November distributions. (See Yearly General Ledger Detail Report. Bates numbered ME 0009934, attached as Exhibit 2.) (R.6432-6433)

19. During the year 2006, ME&LS made distributions to members totaling \$405,740.40. In February 2006, a

distribution of \$105,740.40 was paid. In April 2006, a distribution of \$90,000 was paid. In July 2005, a distribution of \$100,000 was paid. In October 2005, a distribution of \$100,000 was paid. Bennett was not paid his share of any of the distributions paid to all the other members during 2006. Id.

20. In January, 2007, Bennett filed a Motion for Order of Judgment seeking an order requiring payment to him of his unpaid share of ME&LS distributions for 2005 and 2006 in the amount of \$142,974.42. (R.6432-6435) Id.

21. On December 21, 2006, Judge Boyden granted that motion subject only to an accounting as to what funds Bennett had received and what he had not received. (R.6421-6427)

22. On April 3, 2008, following briefing and oral argument, Judge Brian entered an Order and Judgment in favor of Bennett in the amount of \$142,174.93, representing Bennett's share of unpaid distributions in 2005 and 2006. The Court also found that there was no just reason for delaying entry of the judgment and certified the judgment as final. (R.6791-6793)

SUMMARY OF ARGUMENT

During the time Bennett was an employee of MEI from 1996 until he resigned as an employee on August 17, 2005, MEI provided to him all of the services and support usually provided by an employer to its employees.

Bennett has never been an employee of ME&LS. ME&LS has provided no employer support or services to Bennett. In fact, ME&LS, as structured by McNeil, has never had any employees.

McNeil's contention that Bennett's status and termination of employment as an "employee of MEI" somehow automatically constitutes his "withdrawal as a member of ME&LS" is a forced and strained construction beyond any reasonable interpretation of the terms of the ME&LS Operating Agreement or of Amendments 1 or 2. Bennett's work was performed for, and as an employee of MEI, on tasks MEI undertook for ME&LS.

The District Court properly ruled that the ME&LS Operating Agreement is unambiguous and that Bennett remains a member of ME&LS.

The District Court properly entered the Order and Judgment in the amount of unpaid member distributions for

2005 and 2006 because McNeil did not have a right to offset uncertain, unproven, disputed and unliquidated claims against the distributions Bennett should have received. The District Court's determination that there was no just reason for delay was proper under the facts of this case.

ARGUMENT

POINT I. APPEAL OF THE JUDGMENT AND UNDERLYING ORDERS IS PROPERLY BEFORE THIS COURT.

This appeal is taken by ME&LS from both the Judgment and the underlying Orders of December 21, 2006 and April 2, 2008. The Judgment was certified as final under Rule 56(b) of the Utah Rules of Civil Procedure by the District Court, and it was determined that "there is no just reason for delay."

This appeal meets the three requirements set out by the Utah Supreme Court in Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1101 (Utah 1991). First, there are "multiple claims for relief" by "multiple parties" to this action. Second, "the Judgment and certification entered would otherwise have been appealable absent the other claims," and the District Court made a determination "that there is no just reason for delay" of the appeal.

POINT II. UNDER THE CLEAR AND UNAMBIGUOUS TERMS OF THE
ME&LS OPERATING AGREEMENT, DALE BENNETT DID NOT
TERMINATE HIS EMPLOYMENT WITH THE COMPANY
(ME&LS) SO IS STILL A MEMBER OF ME&LS.

Under the unambiguous wording of the Operating Agreement, in order to withdraw as a member, Bennett had to resign his "employment" with ME&LS. The unwarranted interpretation plaintiffs attempt to apply to the ME&LS Operating Agreement contradicts the plain and simple meaning of its terms. The undisputed facts are that Bennett was never employed by ME&LS. He resigned his employment from a totally separate and independent company, MEI. Plaintiffs are asking the Court to ignore the plain language of the Operating Agreement and rule that upon his resignation from MEI he withdrew from ME&LS which is a wholly different entity. This transparent attempt to apply terms of the ME&LS Operating Agreement to MEI is without support in any documents related to either of these entities.

Because Dale Bennett was not employed by and did not resign his employment from ME&LS, his membership interests and ownership rights in ME&LS could not have been affected by his August 2005 resignation under the very clear and carefully crafted provisions of the ME&LS Operating

Agreement or under the provisions of any document related to MEI. Plaintiffs' argument would require the Court to ignore the plain language of the Operating Agreement.

ME&LS is a manager-managed limited liability company. The ME&LS Operating Agreement is the governing document for this company. Section 1.10 of the Operating Agreement defines "Company" as "McNeil Engineering and Land Surveying." This definition is determinative of the question of law before the Court. Plaintiffs want the Court to overlook this very clear definition and create, then import into the Operating Agreement, provisions that have no basis in fact, or in usual or customary use, or in any document related to either of these entities. Those documents say what they say and are not subject to manipulation by McNeil to suit his present interests.

The parties do not dispute that the provisions of Amendment No. 2 to the Operating Agreement pertaining to the dissociation of a member govern Bennett's membership status in ME&LS. It is also uncontested that under Section 12.1 of Amendment No. 2, a person ceases to be a member if that member withdraws as a member. Section 12.3(a) provides:

"For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with **the Company** for reasons other than bankruptcy, death, disability or incompetency."

(Emphasis added.) However, at no time has Bennett terminated or withdrawn as a member of ME&LS. His status and his role as a member and manager of ME&LS must not be confused with his role as an employee of MEI.

POINT III. THE RELEVANT LANGUAGE OF THE OPERATING AGREEMENT IS NOT AMBIGUOUS AND THE INTENTIONS OF THE PARTIES ARE CLEAR FROM A PLAIN READING OF THE OPERATING AGREEMENT.

The interpretation of a contract begins with the examination of the contract itself. See Utah Transit Authority v. Salt Lake City Southern R.R. Co., Inc., 2006 UT App 46, 131 P.3d 288 ("When interpreting a contract, a court first looks to the contract's four corners to determine the parties intentions, which are controlling.")(quotations and citations omitted); Trolley Square Associates v. Nielson, 886 P.2d 61, 63 (Utah Ct. App. 1994)(same). "If the contract is in writing and its language is not ambiguous, the parties' intentions should be determined from the words of the agreement." Turner v. Hi-Country Homeowners Association, 910 P.2d 1223, 1225-26 (Utah 1996); see also ELM, Inc. v. M.T. Enterprises, Inc.,

968 P.2d 861 (Utah Ct. App. 1998) (holding that if a contract's terms are clear and unambiguous, the court must construe the writing according to its plain and ordinary meaning). "When the contract is not ambiguous, the court may not look beyond the plain and ordinary meaning of the terms therein," Uintah Basin Medical Center v. Hardy, M.D., 2005 UT App 92, 110 P.3d 168.

Section 12.3(a) of the ME&LS Operating Agreement is not ambiguous. The plain and ordinary meaning of its terms are not contested here. To constitute a withdrawal as a member, paragraph 12.3(a) requires that the member voluntarily resign or terminate his employment with "the Company." This provision could arguably be ambiguous if the term "Company" was not a defined term in the Operating Agreement. "Company", however, is defined only as McNeil Engineering and Land Surveying. Therefore, the "plain and ordinary meaning" of the terms are that in order to be a withdrawing member, the member must voluntarily resign or terminate his employment with ME&LS. That simply has never happened in this case because Bennett has never been an employee of ME&LS. He has not resigned or terminated an employment he has never had.

Bennett stated in his August 17, 2005 letter of resignation, "I therefore resign as an employee of McNeil Engineering, Inc." Thus, Bennett was always employed by, and only resigned his employment from, MEI not from ME&LS. A plain and simple interpretation of the Operating Agreement is that Dale Bennett is still a member of ME&LS because he has not withdrawn as a member pursuant to the clearly defined terms of the Operating Agreement and his letter of resignation.

POINT IV. PLAINTIFFS' POSITION IGNORES THE CLEAR LANGUAGE OF THE OPERATING AGREEMENT AND UNNECESSARILY RELIES ON IRRELEVANT FACTS OUTSIDE THE OPERATING AGREEMENT.

Plaintiffs ask the Court to look beyond the plain meaning of the terms of the Operating Agreement and conclude that Bennett is no longer a member of ME&LS because his August 17, 2005 "resignation" from MEI was "in effect" also a "withdrawal" from ME&LS. This strained attempt to write new and wholly unsupported terms into the ME&LS Operating Agreement is patently wrong. See Utah Transit Authority, 2006 UT App 46 at ¶ 12 (stating that to merit consideration, an alternative interpretation must be based upon the usual and natural meaning of the language

used and may not be the result of a forced or strained construction).

Plaintiffs' argument cannot succeed because they attempt to interpret the Operating Agreement using terms that are nowhere found within it. MEI, Bennett's employer, is not mentioned anywhere in the ME&LS Operating Agreement. Bennett's resignation from MEI can have no impact on his ownership interests in ME&LS. Bennett's membership rights in ME&LS stand separate and apart from his status as an employee of MEI.

The fact that Bennett was one of many employees leased by MEI to ME&LS is immaterial to the question before the Court. Because Bennett was employed by MEI, he could have been leased to any of the three McNeil LLCs, or he could have remained as an employee of MEI itself, or ME&LS could have leased employees from another employee leasing company. To whom MEI chose to lease Bennett is not relevant to the interpretation of the ME&LS Operating Agreement. Plaintiffs' argument that Bennett's close day-to-day association with ME&LS somehow changed his actual employment status and therefore the meaning of the express terms of the Operating Agreement must be rejected.

Plaintiffs are distorting the undisputed facts about Bennett's employment in order to deprive him of his right as a member of ME&LS.

POINT V. PROPER CONSTRUCTION OF THE CLEAR LANGUAGE OF THE OPERATING AGREEMENT DOES NOT LEAD TO ABSURD RESULTS OR TO NULLIFICATION OF ITS TERMS.

Plaintiffs claim that any interpretation of Section 12.3 of the Operating Agreement, other than their own, would necessarily "nullify" its terms and lead to "absurd" results. A review of that section, however, demonstrates that such is not the case. Section 12.3 provides in material part that:

"A member shall be deemed to withdraw when the member voluntarily resigns or terminates the member's employment with the Company . . ."

To begin with, ME&LS had the ability, never invoked, to hire employees of its own to perform the same services as those that were being performed by leased employees from MEI. Thus the word employment clearly would have application had ME&LS decided, or should it at some point decide, to hire employees. The word termination cannot be applied to Bennett as a member or as a manager of ME&LS because he did not either voluntarily resign or terminate as to ME&LS. His only termination was as an employee from

a wholly different entity, MEI. Thus, plaintiffs' claim that his resignation as an employee of MEI triggered his withdrawal from ME&LS is nonsensical.

Plaintiffs refuse to acknowledge the simple fact that under usual, accepted and customary business practice, the role, rights and duties of an "employee" of a corporation differ markedly from the role, rights and duties of a "member" of an LLC. Plaintiffs do not want to recognize that under usual and customary practice, the resignation of an "employee" from a corporation has no effect on the employee's position as a "member" of a clearly distinct and different entity, an LLC. Plaintiffs also refuse to acknowledge that under the usual and customary business practices, employees of an employee leasing company do not become employees of the company that leases their services from their employer simply because services for the leasing company's client are provided by the leasing company's leased employees. This is so even though these services benefit their employee's client. Nor is there a limitation on the kinds, quality, or volume of work a leased employee can perform for his employer's clients.

It is a simple fact that employee leasing companies lease their employees to perform services for their employer on work undertaken for clients of their employer, often at the client's place of business. And leased employees of a leasing company often perform such services for multiple clients. That fact does not make them employees of each of the leasing company's clients.

As applied to this case, that relationship has existed where Bennett, as an employee of MEI, the employee leasing company, directed the work of MEI's other employees to perform the work for MEI on engineering and surveying projects of MEI's client, ME&LS. The work of both Bennett and the other employees was for their employer MEI who was by that means meeting its obligation to perform on projects of MEI's client, ME&LS. That didn't make them employees of ME&LS. Under plaintiffs' construction, where a leasing company's employees worked on different projects for multiple clients it would make them employees of each such client. That result would indeed be absurd. And if, as plaintiffs claim, Bennett became the employee of ME&LS, was he also at the same time still an employee of MEI? That result would also be absurd.

POINT VI. PLAINTIFFS' ATTEMPT TO RESTRUCTURE THE OPERATING AGREEMENT, WITHOUT NOTICE TO BENNETT, IS INVALID AND A VIOLATION OF JUDGE BOYDEN'S PREVIOUSLY ANNOUNCED ORDER.

It is significant that plaintiffs' statement of material facts does not include or even refer to ME&LS Amendment No. 4 that was adopted November 29, 2006, without notice to Bennett. That Amendment purports to eliminate Bennett's membership interest and apportion the same among McNeil and the other members of ME&LS. This attempt to write off and appropriate Bennett's membership came after, and was in direct violation of, Judge Boyden's ruling.

Within twelve (12) days following Judge Boyden's ruling, and in clear violation of the terms and effect of that ruling, McNeil deliberately proceeded, unilaterally, and without any notice to Bennett, to retroactively restructure the Operating Agreement to terminate and appropriate Bennett's valuable membership interest.

Without permission of the Court on the very matter that was pending before the Court for resolution, and without notice to Bennett, plaintiffs added new terms to the Operating Agreement to accomplish what the Court had denied and what they have claimed was already provided in the Agreement before that amendment was adopted. If plaintiffs

truly believed their interpretation of the Operating Agreement was valid, they would not have needed to provide in Amendment No. 4 what they claim was already provided under the existing terms of the Operating Agreement. These actions show contempt for Judge Boyden's ruling and also demonstrate the lengths to which McNeil will go to damage Bennett financially.

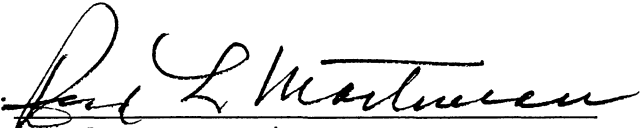
Rather than show respect for the Court's ruling and pursue a proper course to seek a reversal, the plaintiffs, unilaterally and without notice, took prompt action to overrule and void that ruling retroactively by self help. And despite that ruling the plaintiffs have still refused to accord any of those member's rights to Bennett. They still have refused to pay distributions or give Bennett any required notice of their attempted manipulation of ME&LS' core documents.

CONCLUSION

The Order of Judge Boyden confirmed by Judge Brian and the Order of Judgment of Judge Brian should be affirmed.

DATED this 8th day of December, 2008.

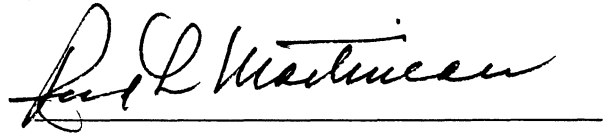
SNOW, CHRISTENSEN & MARTINEAU

By: 
Reed L. Martineau
Keith A. Call
Derek J. Williams
Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of December, 2008, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE** to be mailed to the following:

Matthew C. Barneck
Paul P. Burghardt
Richards, Brandt, Miller & Nelson
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Attorneys for Plaintiffs/Appellants

A handwritten signature in cursive script, appearing to read "Paul P. Burghardt", is written over a horizontal line.

22658-1 998065

ADDENDUM



RICHARDS
BRANDT
MILLER
NELSON

A PROFESSIONAL LAW CORPORATION

P. KEITH NELSON
ROBERT L. STEVENS
DAVID L. BARCLAY †
LYNN S. DAVIES
RUSSELL C. FERICKS
MICHAEL N. EMERY
MICHAEL P. ZACCHEO
GARY L. JOHNSON
GEORGE T. NAEGLER
CRAIG C. COBURN
S. BAIRD MORGAN

ROBERT G. WRIGHT *
CHRISTIAN W. NELSON ††
MATTHEW C. BARNECK ♦ *
MARK L. McCARTY
CARRIE T. TAYLOR
ELIZABETH A. HRUBY-MILLS
MELINDA A. MORGAN °
BRIAN C. WEBBER
MARK R. SUMSION
BRANDON B. HOBBS
MARTHA KNUDSON
WAYNE Z. BENNETT

ZACHARY E. PETERSON *
DAVID H. TOLK
RAMONA E. GARCIA
MICHAEL K. WOOLLEY
ANNE D. ARMSTRONG
NATHAN S. MORRIS
LINCOLN HARRIS □
RAFAEL A. SEMINARIO
JOEL J. KITTRELL
PAUL P. BURGHARDT
CORTNEY KOCHER
JENNIFER A. HEROLD

OF COUNSEL:
ROBERT W. BRANDT BRAD C. BETEBENNER
PETER K. ELLISON BRETT F. PAULSEN **

WILLIAM S. RICHARDS (1929-2002)
ROBERT W. MILLER (1940-1983)

ALSO ADMITTED IN:
** ARIZONA † CALIFORNIA
♦ COLORADO †† IDAHO
□ KENTUCKY * MONTANA
° WASHINGTON • WYOMING

KEY BANK TOWER
50 SOUTH MAIN 7th FLOOR
SALT LAKE CITY, UTAH 84144

PO BOX 2465
SALT LAKE CITY, UTAH 84110-2465
(801) 531-2000 FAX (801) 532-5506
E-MAIL ADDRESS: mail@rbmn.com

December 6, 2006

U.S. MAIL and VIA E-MAIL

Reed L. Martineau, Esq.
Keith A. Call, Esq.
Derek J. Williams, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145

RE: *McNeil Engineering v. Bennett*
Our File No. 16709-002

Gentlemen:

Enclosed for your records is a copy of Amendment No. 4 to the Operating Agreement of McNeil Engineering & Land Surveying, LC, which was signed by the managers and the majority of the members on November 29, 2006. Based on this Amendment, Dale K. Bennett is now deemed to have withdrawn as a member of ME&LS. Because he continues to engage in a business or enterprise that competes with ME&LS, the purchase price for his membership interest is an amount not exceeding what Mr. Bennett paid for the interest. If there is some discussion you would like to have about this Amendment, please contact me.

Sincerely,

RICHARDS, BRANDT, MILLER
& NELSON

Matthew C. Barneck

MCB:fc
Encl.

**AMENDMENT NO. 4
TO
OPERATING AGREEMENT
OF
McNEIL ENGINEERING AND LAND SURVEYING, LC**

THIS AMENDMENT NO. 4 TO OPERATING AGREEMENT is made and entered into as of November 21, 2006, by and between the parties who have signed this Amendment No. 4 (this "Amendment").

RECITALS

A. Scott F. McNeil, Dale K. Bennett, D. Bradford Petersen, Kenneth A. Petty, D. Gregg Meyers and Michael D. Hoffman entered into an Operating Agreement with an effective date of January 1, 1997, and amended August 1, 2000, by that certain Amendment No. 1 to Operating Agreement, and again on November 1, 2001, by that certain Amendment No. 2 to Operating Agreement, and again on May 2, 2006, by that certain Amendment No. 3 to Operating Agreement (the "Operating Agreement"), for McNEIL ENGINEERING AND LAND SURVEYING, LC (the "Company").

B. The parties hereto desire to amend the Operating Agreement to reflect various changes in the Operating Agreement.

NOW, THEREFORE, the parties hereto hereby amend the Operating Agreement as follows:

1. Section 1.26 is hereby amended to read in its entirety as follows:

***Managers** – Members selected to manage the affairs of the Company under Article VII hereof.*

2. Section 7.1 is hereby amended to read in its entirety as follows:

Managers. The ordinary and usual decisions concerning the business affairs of the Company shall be made by the Managers. The Managers must be Members of the Company. The Managers are Scott F. McNeil, Theodore J. Didas, D. Bradford Petersen, Michael D. Hoffman and Kenneth A. Petty.

3. The first paragraph of Section 11.3 is hereby amended by substituting 60% in place of 75%.
4. Section 11.3.2 is hereby amended to read in its entirety as follows:

No Member shall be expelled without at least 30 days prior written notice, which shall state reason for expulsion and shall be signed by Members holding a 60% majority interest in the Company.

5. Section 12.3(a) is hereby amended to read in its entirety as follows:

(a) *For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with the Company or any affiliated entity of the Company, including McNeil Engineering, Inc., for reasons other than bankruptcy, death, disability or incompetency.*

6. Section 12.3 is hereby amended by the addition of the following subparagraph:

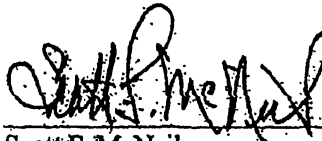
(e) *Notwithstanding any provision herein to the contrary, in the event a Member (i) voluntarily terminates the Member's employment with the Company or any affiliated entity of the Company, including McNeil Engineering, Inc., and (ii) continues to engage as an owner, manager, officer, employee, consultant, agent or otherwise for a business or enterprise that competes with the Company or McNeil Engineering, Inc. in any way, the purchase price for such Member's Membership Interest shall not exceed the amount paid by the withdrawing Member for said Membership Interest.*

The Operating Agreement shall remain in full force and effect and shall remain unaltered, except to the extent specifically amended herein.

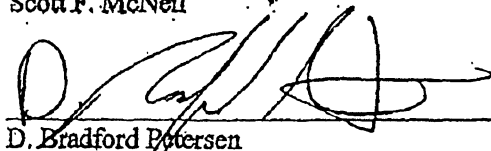
This Amendment may be signed in several counterparts, through the use of multiple signature pages appended to each original, and all such counterparts shall constitute one and the same instrument. Any counterpart to which is attached the signatures of all parties shall constitute an original of this Amendment.

IN WITNESS WHEREOF, the undersigned have executed this Amendment as of the date first above written.


MANAGERS:





Scott F. McNeil



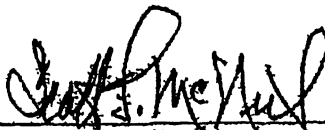
D. Bradford Petersen



Kenneth A. Petty



Theodore J. Didas



Michael D. Hoffman

MEMBERS:


Scott F. McNeil


D. Bradford Peterson


Kenneth A. Petty


Michael D. Hoffman


F. Clay Tolbert


Theodore J. Didas