

2008

Kenneth L. Failor; Premium Plastics, Inc., Mary Gilmer v. Megadyne Medical Products, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**KENNETH L. FAILOR; PREMIUM
PLASTICS, INC., a California
corporation and MARY GILMER,**

Appellants/Plaintiffs,

vs.

**MEGADYNE MEDICAL PRODUCTS,
INC., a Utah corporation, f.k.a. American
Medical Products, Inc.**

Appellees/Defendants/Counterclaimants.

Appeal No: 20080459

REPLY BRIEF OF APPELLANTS

Appeal From An Interlocutory Order of the Third Judicial District Court,
Salt Lake County
Case No. 980907641 CN, Honorable L.A. Dever, Order dated May 6, 2008

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ORAL ARGUMENT REQUESTED

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Kenneth L. Failor (“Mr. Failor”), Premium Plastics, Inc. (“PPI”) and Mary Gilmer, (“Mrs. Gilmer”) respectfully submit this Brief of the Appellants. Collectively, Appellants are sometimes referred to herein as “Premium Plaintiffs”. The Appellee/Defendant is often referred to as “MegaDyne”.

INTRODUCTION

Justice Oliver Wendell Holmes Jr. is reputed to have said. “Lawyer’s spend a great deal of their time shoveling smoke.” In an attempt to clear the air in the case at bar, the Plaintiffs Reply Brief focuses on undisputed dispositive facts gleaned from the parties briefs and the basic codified rules of law. The undisputed facts and basic rules of law, clearly demonstrate: (1) the Premium Plaintiffs are entitled to a jury trial; (2) the master’s report is facially erroneous, and should not be used by the Court for any purpose; (3) no “accounting” ever occurred; (4) because the master violated every Order of Reference direction and procedural safeguard, his flawed report should not be used by the trial court; and (5) it was abuse of discretion to deny the Mrs. Gilmer’s and other Premium Plaintiffs’ motion to amend their complaint. For these compelling reasons, the Interlocutory Order on the foregoing issues should be reversed.

RESPONSE TO STATEMENT OF FACTS

The background of the parties’ relationship, the agreements entered into between the parties and the appointment of the special master in this case are generally not in dispute. In its statement of facts, however, Megadyne glosses over the fact that this case is not simply and only an accounting case. Rather, this is a breach of contract case involving various

written agreements entered into between the parties. The Premium Plaintiffs respond to the Appellee's Statement of Facts as follows:

1. Paragraphs 1 through 4 are undisputed. This case stems from a series of contracts between the parties. More importantly, it is undisputed that the Premium Plaintiffs' complaint alleges the legal claims of breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, and negligent misrepresentation. The equitable claims of unjust enrichment and accounting are also in the complaint. (R. 1-43)

2. Paragraph 5. MegaDyne acknowledges that the Premium Plaintiffs' claims are all based on amounts not paid under the various agreements. But the Premium Plaintiffs two misrepresentation claims are actually centered on MegaDyne's partial and incomplete documentation, (R. 42, para 41) something that MegaDyne continued to do during this entire litigation. See paragraph 41 of the statement of facts in Appellant's Opening Brief

3. Paragraph 6. The fact that the Premium Plaintiffs' alternative accounting claim was necessary to determine what amounts were owed under the various agreements does not mean that the Premium Plaintiffs are not entitled to pursue their primary legal claims through a jury trial as requested. Also, the complaint asked for the legal remedies of compensatory damages and punitive damages, as well as the equitable remedy of an accounting. (R. 42-43)

4. Paragraph 7. The order of the Premium Plaintiffs' request for relief in the complaint has no bearing on any issue raised in this appeal.

5. Paragraphs 8-11. It is correct that 5 months into the litigation the Premium Plaintiffs moved for and the MegaDyne consented to, the appointment of a Special Master to deal with the issue of products coated and sold. MegaDyne omits the portions of that motion addressing the substantive basis for the Premium Plaintiffs' request. The Premium Plaintiffs told the court, "Supporting documentation will need to be reviewed from . . . suppliers and customers." (R. 73: 7-9) Something that was not done. (R. 1242 and para 29 of the Appellee's Statement of Facts identifying 22 categories of documents not used by the master.) MegaDyne also omits the substance of the Order of Reference (R. 84-88) which is summarized in paragraph 20 of the Appellants Opening Brief.

6. Subheading's C and E are Argument and should be ignored.

7. Paragraph 12. It is undisputed that 277 days after the Master accepted his appointment and 155 days after the Master was supposed to have completed his work, the Premium Plaintiffs filed a motion to vacate the Order of Reference (*See* R. 84-90 and 193-195). Not only is it undisputed that the Master did not comply with the Order of Reference deadlines, it is also undisputed that he refused to provide a work plan or a status report indicating when he would file his report which was due more than 6 months earlier. (*See* Order of Reference and R: 171 para's 13-15 and R. 1235-1236). Those facts, the base of the motion, were not disputed in the Appellee's opposing memorandum. (*See* R. 206-210). Lastly, it is misleading to simply say "The District Court rejected the Respondent's Objections." Instead, the Court imposed a new set of deadlines and reserved on the issue of the ex parte contacts. (*See* Vol 2 of District Court Order, unnumbered May 23, 2000, p. 2).

8. Paragraph 13. It is undisputed that the Premium Plaintiffs filed a Renewed Motion to Vacate the Order of Reference, after more than a year lapsed beyond the Order of Reference's deadline to file the Master's Report. Again, the factual grounds for the motion were undisputed. The Master had not complied with the deadlines ordered by the Court. (R. 343-345). Instead the Appellee mistakenly said that the May 23, 2000 order extended discovery to May 23, 2000. (R. 355).¹ It did not. It set the deadline of April 23, 2000. (see Vol. 2 of the District Court Record, Order of May 23, 2000 unnumbered). MegaDyne then submitted to the Court a document entitled Stipulation, Motion and Order, to which the Premium Plaintiffs did not sign or agree, extending the deadlines. (R. 328-331). It is correct that the Renewed Motion to Vacate was denied 14 months later on July 17, 2001.

9. Paragraphs 14 and 15 are disputed. Almost all of the Master's process was ex parte with "key" MegaDyne personnel. (*See* paras 25-27 and 38 of the Premium Plaintiffs' Opening Brief). Moreover, the MegaDyne's citation of a letter (R. 6508) for the notion that the Master would conduct its examination on May 3, 1999, where no request to attend was made, is misleading. In the unsworn letter, the Master says, the Ernst & Young notes and collective recollections did not indicate a request to be in attendance. (R. 6508). However, the record lacks any invitation to be there and the sworn affidavit of Ken Failor states:

“[A]t the April 21st meeting, no specific work plan was agreed to. The Plaintiffs work plan was presented to the Master. The Master did not indicate that he rejected it, but neither did he comment to us whether he would follow it. What was important, however, is that no one agreed that the Master

¹ Megadyne's Memorandum opposing the Premium Plaintiffs Renewed Motion to Vacate was mistakenly captioned "Response to Plaintiffs' Objection to Defendant's Stipulation, Motion and Order. (R. 420, 355).

should go on his own to view MegaDyne's documents without the presence of the Plaintiffs. In other words, no one agreed that he could conduct discovery different than that allowed for in the order of reference. Instead, Mr. Curran explained that he wanted to go out to MegaDyne to get the lay of the land before doing any significant work."

(R. 263 paras 9-10).

10. Paragraphs 16 through 17 are disputed. The undisputed sworn testimony of Plaintiffs' expert, Derk Rasmussen, is that the documents examined by the Master do not support the Master's report. (R. 4546-4547). And that it was impossible to determine the number of products coated and sold from the partial documents supplied by MegaDyne and reviewed by the Master. (*Id*) there were 32 categories of documents the Master should have used, but did not. (R. 4558-4565). Lastly, as set forth in detail in the Premium Plaintiffs' opening brief, the special master's report was clearly erroneous. He failed, among other things, to obtain and consider key documents, failed to consider all products and lots, failed to perform adequate sampling and testing, improperly relied on product schedules or lists provided to him by MegaDyne, and failed to explain the process by which he arrived at his conclusions. (R. 4546, 4570-4588). Lastly, he failed to reconcile his inventory hypothesis with an impossible amount of sales.

11. Paragraphs 18 through 28. MegaDyne's implication that the Premium Plaintiffs' objections to the special master's work were an improper "attack" is again a mischaracterization of the proceedings. The Premium Plaintiffs objected to the special master's work because the special master failed to comply with the Order of Reference and his work and conclusions were facially incomplete, inaccurate, and internally inconsistent. (*See* R. 2044-2062 and 4546-4634).

12. Paragraphs 29 through 35. The Premium Plaintiffs' allegation that MegaDyne misappropriated trade secrets for use in litigation leading to a recovery for MegaDyne is sufficient for the Premium Plaintiffs to assert a claim under the Utah Uniform Trade Secrets Act ("Act"). Misappropriation under the Act requires only that a party acquire a trade secret knowing it was acquired by improper means or disclose a trade secret under circumstances giving rise to a duty to maintain its secrecy. In the Amended Complaint, the Premium Plaintiffs allege that MegaDyne improperly obtain the Premium Plaintiffs' trade secrets without the consent of the Premium Plaintiffs, knowing that MegaDyne was not entitled to obtain the trade secrets. It is further alleged that MegaDyne improperly utilized those trade secrets to its benefit in the *Aspen Labs* litigation. The Premium Plaintiffs do not, as asserted by MegaDyne, contend that they are entitled to share in MegaDyne's recovery in the *Aspen Labs* litigation. Rather, the Premium Plaintiffs properly request an award of damages under the Act based on MegaDyne's misappropriation of their trade secrets. (*See* Introduction of this Brief)

Plaintiffs removed their equitable claims for accounting and unjust enrichment when they determined that the accounting claim was futile in light of MegaDyne's continued refusal to provide comprehensive information to Plaintiffs. (*See* R. 4546-4549). Plaintiffs could not have foreseen MegaDyne's obstructionist tactics before initiating this suit. (*See* paragraph 4 of the Premium Plaintiffs' statement of Facts in their Opening Brief).

MegaDyne's repeated assertion that the evidentiary hearing ordered by the district court judge never occurred is irrelevant. The district court granted MegaDyne's motion to strike the jury demand, depriving the Premium Plaintiffs of their constitutional right to a jury

trial on their legal claims. The denial of that right is the crux of this appeal. The court also repeatedly denied the Appellants' objections that the Master did not abide by the procedural requirements and deadlines of the Order of Reference.

ARGUMENT

I. THE PREMIUM PLAINTIFFS ARE ENTITLED TO A JURY TRIAL ON THEIR LEGAL CLAIMS AND MEGADYNE CITES NO CONTRARY AUTHORITY.

No Utah appellate court has ever denied a jury trial on legal claims when a master was appointed and a jury trial demanded. That is not surprising. Article I, Section 10 of the Utah Constitution and Rules 39 and 53(e)(3) explicitly guarantee that right. In contrast, MegaDyne begins with a citation to Corpus Juris Secundum ("CJS"), a treatise of last resort that is no longer widely used by legal practitioners and cannot be obtained from online research sources such as LEXIS NEXIS or WESTLAW. CJS does not set forth the applicable rules with respect to an accounting performed by a special master; the Utah Rules of Civil Procedure and the Order of Reference do. As demonstrated below, MegaDyne's citation to CJS relies on an incorrect special master procedure.

MegaDyne mistakenly says that an accounting conducted by a special master will stand "if no exception" is taken to the master's report. (Emphasis added) P. 16. First, as set forth in detail by the Premium Plaintiffs in their opening brief, and in the fact section of this brief, the Premium Plaintiffs raised several procedural and substantive objections to the special master's report precluding the Court from simply adopting the master's report as a matter of course. More importantly, however, the procedure referred to by MegaDyne is a procedure applicable only to *non-jury* actions under Rule 53(e)(2). It is not the procedure

followed in actions where, as here, a jury trial was demanded.² Under Rule 53(e)(2), i.e. non jury trials, a court may accept the master's findings and adopt his report unless clearly erroneous. That standard and procedure, does not apply in a jury action where a special master's "findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury." Utah R. Civ. P. 53(e)(2). In a jury action, the Court does not have the authority to simply adopt the master's findings and report. Rather, the special master's findings are submitted to the jury like any other evidence. The Premium Plaintiffs are not attempting to "wish away the Special Master's report and start from scratch." Rather, the Premium Plaintiffs simply want any unobjectionable portions of the report to be presented to the jury as evidence as provided by Rule 53(e)(3).

While the Premium Plaintiffs set forth exhaustive, applicable authority supporting their position that they cannot be denied a jury trial simply because they requested an accounting, MegaDyne responds by stating, without explanation or support, that the cases cited by the Premium Plaintiffs are distinguishable from this case. MegaDyne says, again without support, that the case law relied upon by the Premium Plaintiffs is inapplicable because those cases did not involve a stipulation to an accounting that occurred before the plaintiff pursued its legal claims in the case. This is simply incorrect. None of the cases cited by the Premium Plaintiffs stand for the proposition, as MegaDyne would have it, that if a party stipulates early in a case to an accounting conducted by a special master, before pursuing its legal claims, that the party waives its right to later pursue its legal claims or waives its right to a jury trial. Whether the parties have stipulated to an accounting or an

² From the beginning the Premium Plaintiffs demanded a jury trial. (See R. 8)

accounting is ordered by the court, the timing of the accounting has no bearing on plaintiff's right to assert both legal and equitable claims and to a jury trial where one was demanded.³

MegaDyne also twists and misreads the Premium Plaintiffs' statements made in their motion requesting the appointment of a special master. There, the Premium Plaintiffs did not stipulate, as MegaDyne implies, that they would accept without exception the special master's report or that the Court could simply enter judgment based upon the master's findings. Rather, the Premium Plaintiffs were simply explaining at the outset of the case that the appointment of a special master, in many cases, simplifies the issues in complex cases which may make the determination of final verdict easier. Asking for a special master early in the case certainly is not a clear waiver of a right to proceed with the Rule 53(e)(3) process for use of a special master's findings and report in a jury case.

MegaDyne cites to one and only one case in arguing that the district court properly struck the Premium Plaintiffs request for a jury demand. That case, *Haynes Trane Service Agency, Inc. v. American Standard, Inc.*, 51 Fed. Appx. 786 (10th Cir. 2002), plainly supports the Premium Plaintiffs' position. There, the plaintiff asserted legal claims, including breach of contract, as well as equitable claims for accounting and unjust enrichment. *See id.* at 799-800. The court stated that the plaintiff was entitled to proceed to trial on both its equitable and legal claims and held that "the district court erred in finding that [plaintiff] waived its counterclaims for unjust enrichment and an accounting" on the basis that the plaintiff had also proceeded with its legal claims. *See id.* at 800. While the court did state that **some** cases are so complex that an accounting may be warranted, the court *did not*, as suggested by

³ Moreover, as shown in part III of this Argument, the Premium Plaintiffs never have and never will receive an accounting.

MegaDyne, state that pursuing an accounting claim waives the right to pursue legal remedies or the right to a jury trial.

There is no dispute that an accounting in this case by a special master would have been appropriate. That, however, has no bearing on the Premium Plaintiffs' right to pursue their legal claims or their right to a jury trial.

II. ALL ISSUES RAISED BY THE PREMIUM PLAINTIFFS ARE RIPE FOR REVIEW.

MegaDyne again relies on the inapplicable rule relating to *non-jury* actions in asserting that the issue of the Premium Plaintiff's objections to the special master's report is not ripe for review. Rule 53(e)(2) provides that a court must accept the findings of the special master unless clearly erroneous "*in an action to be tried **without a jury.***" *Id.* (emphasis added). Under the applicable Rule 53(e)(3), the district court does not accept or reject the special master's findings. Rather, the special master's findings are submitted to the jury as evidence. Rule 53(e)(3) provides that:

In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

Id. Because the objections to the master's report will ultimately be raised and decided at trial, by a jury, the fact that the district court agreed to hold a hearing on the Premium Plaintiff's objections to the master's report is of no moment. Furthermore, the district court repeatedly ruled on most, if not all, of the objections made to the master's report by the Premium Plaintiffs. As set forth in MegaDyne's statement of facts, the district court denied the Premium Plaintiff's various procedural and substantive objections to the master's report

and their request to vacate the master's report in orders dated May 23, 2000, (*See* Vol 2 of the District Court record, unnumbered May 23, 2000 Order), July 19, 2001 (R. 1971), and April 18, 2002. (R. 2433). In its order of May 6, 2008, the Court denied the Premium Plaintiffs' procedural objections and expressed concern about the scope of any hearing on the substantive objections. (R. 6703-6704, paras 2 and 4). Consequently the time is ripe for instructing the lower court on how objections to the report are to be made in a jury trial and to reverse the orders denying the procedural objections.

MegaDyne incorrectly relies on *State v. Herrera*, 895 P.2d 359 (Utah 1995). That case has no application here. In *Herrera*, the court, refused to consider the application of legislation to an insanity defense where the defendants had not been convicted of any crime. *See id.* at 371. In contrast, the district court's ruling in this case extinguished the Premium Plaintiff's right to object to the master's findings at trial by striking their request for a jury demand. The district court's denial of the Premium Plaintiffs' objections to the master's report and its denial of their right to a jury trial are inextricably intertwined. Whether couched in terms of the district court's denial of the objections to the master's report or the denial of the right to a jury trial, the district court's decision poses a controversy that is properly before this Court and ripe for decision.

Like the *Herrera* Court, the Utah Supreme Court, in *Pett v. Autoliv ASP, Inc.*, 2005 UT 5, 106 P.3d 705, declined to decide an issue because there was no "imminent clash of legal rights," only a mere "difference of opinion regarding the hypothetical application" of law to a particular situation. *Id.* ¶ 4. Here, however, the controversy is not hypothetical. Instead, the district court's ruling has, with certainty, denied the Premium Plaintiffs of their right to a

jury trial on their legal claims and, whether an additional hearing is held on the objections to the master's report or not, has prohibited the Premium Plaintiffs from submitting their objections to the master's findings under Rule 53(e)(3). Thus, an immediate question of whether the Premium Plaintiffs are entitled to a jury trial exists, making all issues raised by the Premium Plaintiffs ripe for review.

III THE DISTRICT COURT ERRED IN REJECTING THE PREMIUM PLAINTIFFS' OBJECTIONS TO THE MASTER'S REPORT, NO ACCOUNTING OCCURRED, AND THE MASTER'S REPORT WAS CLEARLY ERRONEOUS.

A. The District court Erred in Denying the Objections to the Master's Report.

MegaDyne cites to *Plumb v. State*, 809 P.2d 734, 744 (Utah 1990), in support of its argument that the district court properly rejected the Premium Plaintiff's procedural objections to the Special Master's report. *Plumb*, however, demonstrates that the lower court, in the case at bar, erred in refusing to require the special master to comply with the specific procedural requirements and safeguards in the Order of Reference. In *Plumb*, the appellants asserted that the special master exceeded the Order of Reference. *Id.* at 741. The Utah Supreme Court stated:

The scope of the master's authority may be specific or limited by the order of reference. If so, *the order of reference is at once the chart and limitation of the master's authority. And the master should not exceed it even with the consent of the parties*

Id. at 742 (emphasis added). The special master in *Plumb* investigated and reported on attorneys' fees, an issue not included in the order of reference. The *Plumb* Court concluded the trial court erred in adopting the special master's findings because they exceeded the master's authority under the order or reference. *See id.*

As explained in *King v. Spain*, 2007 Tenn. App. LEXIS 667 No. M2006-02178-COA-R3-CV (October 31, 2007):

A [special master's] report is ordinarily either a formal statement by the Master which finds certain facts, or a formal statement of how he has discharged some duty imposed upon him by the Court. It is, therefore, essential to a complete report that the Master shall fully and definitely respond to every matter referred, to the end that the report may supply the Court with all the facts called for or inquired about. *In all respects it should show that the Master has fully and properly discharged every duty imposed on him by the order of reference.*

An ideal report should not only contain everything called for, and how every duty imposed has been performed, but *it should contain no recital of facts not called for, and no statement of acts not required to be done.* In making his report the Master must confine himself to the matter referred to him. Those matters circumscribe his authority and limit his jurisdiction. All other matters contained in his report are mere surplusage and impertinence.

The report must not only respond to all the requirements of the order of reference, but it must be positive, definite, and correct; not inferential, hypothetical, or in the alternative as to any matter

Id. at *16 (emphasis added).

MegaDyne's assertion that the special master did not exceed his authority under the Order of Reference is similarly without merit. MegaDyne cites no authority for the proposition that a special master may include in his report information beyond that set forth in the Order of Reference. To the contrary, the case law cited and relied by the Premium Plaintiffs in their opening brief and above clearly establishes that a special master is strictly limited by the Order of Reference. As such the Special Master had no right whatsoever to determine an amount owed between the parties.

The special master also did not abide the Order of Reference procedures, i.e. the "chart." He did not obtain and review critical documents. He did not conduct a complete investigation. He did not take advantage of discovery procedures available to him. The

foregoing resulted in a report that did not accomplish the Order of Reference directive, the preparation of a complete and accurate report on the number of products coated and number sold (*See* R 4546-4634)

Next, MegaDyne's reliance on *Normandeau v Hanson Equip, Inc*, 2007 UT App 382, in asserting that an abuse of discretion standard applies to compliance with scheduling orders, is misplaced. This case does not involve an attorney's planning report and concomitant scheduling order as did *Normandeau*. Rather, discovery in this case was governed by the Order of Reference which is the chart and limit of the Master's authority. It is undisputed that the special master discarded the discovery process and ignored the deadlines in the Order of Reference.

MegaDyne curiously asserts that the Premium Plaintiffs have not meaningfully challenged the Special Master's work or conclusions. Appellee's Brief at 24. While MegaDyne characterizes the work of the Premium Plaintiffs' experts as "pot shots," the reality is that the Premium Plaintiffs' expert, a national forensic accounting firm, carefully reviewed **all** of the relevant documents and information and prepared 2 affidavits and a comprehensive and detailed report with supporting schedules showing the deficiencies in the master's report (R 2186-2216 and 4546-4634). The trial court agreed that the Premium Plaintiffs had raised serious issues with respect to the master's report in granting the Premium Plaintiffs an evidentiary hearing on their objections to the master's report (R 6963, para 4).

With no substantive basis to challenge the Premium Plaintiffs' objections to the master's report, MegaDyne asserts that the Premium Plaintiffs' expert report, which can be

based on inadmissible documents under the rules of evidence, is not reliable because the underlying documents are not authenticated and contain hearsay. Any evidentiary objections, however, can be easily dealt with at trial where the Premium Plaintiffs can present all evidence refuting the special master's report and MegaDyne can cross-examine that evidence. MegaDyne's evidentiary objections to the documentation and testimony submitted by the Premium Plaintiffs in objecting to the special master's report only underscores the need for a trial where all evidence can be presented to and considered by a jury.

B. No Accounting Has Occurred And Can Never Occur If The Process Is Limited To Only The Documents Supplied By Megadyne.

Typically, in royalty cases where the defendant has control over the records that can establish a plaintiff's damages, the risk of any incompleteness in the records is shifted to the defendant by requiring him to prove that royalties are not owed, and/or a Court resolves all inconsistencies in the records in favor of the plaintiff. *See Wolf v. Superior Court of Los Angeles County*, 130 Cal Rptr.2d 860 (Cal. App. 2003); *Palma v. Fox*, 93 F.Supp. 134, 135 (S.D.N.Y. 1947); *See generally, Cheves v. Williams*, 1999 UT 86, ¶ 13, 993 P.2d 191 (burden of proof regarding whether partnership funds were used to acquire assets . . . shifts to the defendants). The assumption is that the defendant has or should have all the documents necessary to make the calculation. But in this case, an accounting is impossible, because it is undisputed that MegaDyne's documents are hopelessly incomplete. Consequently, relying on documents "voluntarily supplied" by MegaDyne (*See Appellee's brief*, p. 22) does not and cannot do the job.

When the Premium Plaintiffs' forensic accountant examined the documents made available to the Master, he testified by affidavit, "it is impossible to determine the number of products coated and the number sold from the foregoing documents" [made available to the Master]. (R. 4559, para 6). He determined that there were 32 categories of documents that had not been produced by MegaDyne that were necessary to determine the number of products coated and the number sold. (R. 4548, para 2).

More importantly, MegaDyne manufactures medical products. Consequently it must compile FDA packets of documents so that its products can be traced and the quantity of units processed can be known. But MegaDyne's FDA packets are incomplete and deficient. Consequently, the amount of products coated and sold cannot be determined. (R. 4548-4549 and 4594). Coming to a damage figure is not simple arithmetic, as MegaDyne naively asserts. It is impossible based only on the documents MegaDyne made available to the Master.

When third party documents are used, however, a Plaintiff award of over \$2 million is supportable. (R. 5347-5351).

C. The Master's Report is Facially Erroneous.

Even if the "clearly erroneous standard" in Rule 53(d)(2) applied to the case at bar, and it does not because this is a jury case under Rule 53(d)(3), the Master's report is facially and clearly erroneous. To know the amount of products coated and sold during a particular period of time, the fixing of the beginning inventory amount must be reliable. In this case it is undisputed that the Master simply backed into the beginning inventory number by calculating the ending inventory of September 30, 1997, adding his calculation of sold

products, and subtracting his calculation of units purchased. By doing that he assumed a beginning inventory of 1,219,167 units in March, 1996. But for his calculations to be correct, MegaDyne would have had to have sold 4,118,912 pieces during March to December, 1996. The Special Master, however, reported sales of only 3,225,147. (R. 4575).

III. THE DISTRICT COURT ERRED IN DENYING THE PREMIUM PLAINTIFFS MOTION TO AMEND THE COMPLAINT.

A. The Premium Plaintiffs Properly Pleaded a Claim for Violation of the Utah Uniform Trade Secrets Act.

MegaDyne says the Premium Plaintiffs did not properly plead a claim for violation of the Utah Uniform Trade Secrets Act in their proposed amended complaint. MegaDyne argues that the claim is deficient because the amended complaint does not use the words “misappropriated” or “improper means.” It is axiomatic, however, that under Utah’s liberal pleading standards, the use of specific words is not required in order to plead a claim for relief. Rather, all that is required is a “short and plain statement . . . showing that the pleader is entitled to relief and a demand for judgment for the relief. The plaintiff must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *Canfield v. Layton City*, 2005 UT 60 ¶ 13 (citing Utah R. Civ. P. 8(a)).

In the proposed amended complaint (R. 6530-6545), the Premium Plaintiffs allege the following:

27. On information and belief, MegaDyne has successfully prosecuted patent litigation, including but not limited to the following: *MegaDyne v. Aaron Med. Industries*, case no: 2:96CV0233 UC (1998); *MegaDyne v. American Catheter*, case no: 2:97XC0166 DAK (1998); *MegaDyne v. DeRoyal Industries et al*, case no: 2:00CV00267 TC (1999); *MegaDyne v. Olsen Electrical Medical*, case no:

2:91CV00019 BST (1993); *MegaDyne v. Saron*, case no: 2:97CV00228 TC (1997); *MegaDyne v. Triad Medical Tech et al*, case no: 2:00CV00548-18 (2003); *MegaDyne v. UniMed Medical Products*, case no: 2:01CV0021 DAK (2001); and *MegaDyne Medical Products Inc. v. Aspen Labs Inc.*, case no: 2:91CV00852 VSJ (1991)(“*Aspen Labs litigation*”).

28. Mr. Failor and Mr. Gilmer provided supporting testimony and disclosed their trade secrets in the *Aspen Labs litigation* to enable MegaDyne to prevail. On information and belief, recently discovered by the Premium Plaintiffs, the information provided by Mr. Gilmer and Mr. Failor in the *Aspen Labs litigation*, was used by MegaDyne to prevail in the other cases specific above.
29. As a result, MegaDyne received compensation from some or all the defendants named above based on a formula of a fixed amount per coated unit manufactured or sold by the foregoing defendants and/or gross sales, or other as yet undisclosed formulas.
30. Throughout the course of their dealing with MegaDyne, the Plaintiffs and MegaDyne have been bound by confidentiality agreements and duties of good faith and fair dealing. However, as a result of the *Aspen Labs* litigation, the Premium Plaintiffs were induced to disclose trade secrets that were not obligated under contract, but were used to the monetary benefit of MegaDyne’s and for which the Premium Plaintiffs received no compensation.

EIGHTH CLAIM FOR RELIEF

(Violation of the Uniform Trade Secret Act, Utah Code Ann. § 13-24-5 et seq)

93. Premium Plaintiffs incorporate by reference and reallege all other allegations of the Complaint as set forth in the preceding paragraphs.
94. In the course of Premium Plaintiffs dealing with MegaDyne, the Premium Plaintiffs developed and maintained trade secrets on behalf of MegaDyne. Those trade secrets included improvements on the processes described in the Blanch patents, resulting in significantly more effective and safe products as well as increased efficiencies in production.
95. Although the contracts between MegaDyne and the Premium Plaintiffs contemplated the possibility of Mr. Gilmer’s eventually conveying trade secrets he developed to MegaDyne. The contracts precedent that would have required Mr. Gilmer to convey his trade secrets never materialized. This interpretation of the Contract obligations was made by the Executive VP of MegaDyne, Matthias Sansom, during the *Aspen Labs* litigation in June of 1993, and the conditions precedent terms were not, in fact met during the three year

term specified by the Contract. Thus the Premium Plaintiffs were never obligated to purvey their trade secrets to MegaDyne.

96 Nevertheless, MegaDyne obtained the trade secrets from the Premium Plaintiffs and on information and belief used them in the *Aspen Labs* litigation and other subsequent patent infringement cases relying on *Aspen Labs* for precedent. The value of those trade secrets was acknowledged by the Premium Plaintiffs and MegaDyne in the course of the *Aspen Labs* litigation and subsequent proceedings.

97 Although MegaDyne relied heavily on the Premium Plaintiffs' trade secrets in its successful prosecution of its claims in *Aspen Labs* and in subsequent cases relying on *Aspen Labs* as a precedent, the Premium Plaintiffs received no consideration for that convenience.

Although the Premium Plaintiffs did not use the words "misappropriate" or "improper means" in the proposed amended complaint, the proposed amended complaint clearly sets forth the claim under the Utah Uniform Trade Secrets Act. It is alleged that MegaDyne was not entitled to obtain the trade secrets from the Premium Plaintiffs, but that the Premium Plaintiffs were induced to disclose those secrets which MegaDyne then used, without authorization, to its benefit in litigation resulting in monetary gain for MegaDyne. The allegations meet the notice pleading standard under Rule 8 and MegaDyne's assertion that the proposed amended complaint would be futile is without merit.

B. The Premium Plaintiffs' Proposed Amended Complaint Was Timely.

MegaDyne incorrectly asserts that the Premium Plaintiffs have provided no justification for moving to amend their complaint nine years after the litigation began. Leave to amend a complaint should be "freely given when justice so requires." *Mountain Am. Credit Union v. McClellan*, 854 P.2d 590, 592 (Utah Ct. App. 1993) (citing Utah R. Civ. P. 15). Three factors are relevant in considering a motion for leave to amend: (1) timeliness of the motion,

(2) reason for the delay; and (3) prejudice to the responding party. *Id.* In analyzing the timeliness prong, Utah courts typically will deny the amendment only when the delay results from “bad faith effort during the pleading process or unreasonable neglect in terms of pleading preparation.” *Kelly v. Hard Money Funding, Inc.*, 87 P.3d 734, 745 (Utah Ct. App. 2004). In addition to the factors set forth above, the motion to amend analysis is “a multi-factored, flexible inquiry that allows trial courts the leeway to evaluate the factual circumstances and legal developments involved in each particular case.” *Kelly*, 87 P.3d at 746. Discovery of new information or evidence justifies amendment of a complaint. *Kelly*, 87 P.3d at 743. (“In considering the justification prong of the analysis, Utah courts have typically focused on whether the moving party had knowledge of the events that are sought to be added in the amended complaint before the original complaint was filed”). “Motions to amend are typically deemed untimely when they are filed in the advanced procedural stages of the litigation process, such as after the completion of discovery, on the eve of a scheduled trial date, or after an order of dismissal has already been entered.” *Kelly v. Hard Money Funding, Inc.*, 87 P.3d at 742.

The Premium Plaintiffs moved to amend their complaint on December 5, 2007, the deadline for amendment of pleadings agreed to by the parties. (R.6680-6687). The request to amend was filed before fact discovery cut-off and before a trial date was set. Although the case had been pending for several years before the Premium Plaintiffs move to amend the complaint, the time the case has been pending, alone, does not justify the denial of the request to amend the complaint.


Furthermore, MegaDyne has consistently frustrated Plaintiffs' discovery efforts, as evidenced by the fact that the discovery is still ongoing. New allegations, such as those relating to the patent litigation, arise from information not known prior to the initiation of this suit. Specifically, the trade secrets claim is based in part upon other litigation involving MegaDyne (the "*Aspen Labs* Litigation") (R. 6680-6681) (See Plaintiffs' Motion to Supplement the Record and attached submissions). Plaintiffs learned of that litigation during the course of discovery in this case. MegaDyne, however, refused to produce relevant information regarding the *Aspen Labs* Litigation, forcing the Premium Plaintiffs to petition the *Aspen Labs* court to release documents filed under seal in that case. The *Aspen Labs* court granted the Premium Plaintiffs request for release of those documents on August 10, 2007. A four month delay from the date of that order to the date of the Motion to amend is more than reasonable given that, since the date of that order, Plaintiffs have had to actually obtain and review the documents to insure the viability of the trade secrets claim.

CONCLUSION

The Premium Plaintiffs are entitled to a jury trial on their legal claims. At most the Master's report is evidence to be submitted to the jury under Rule 53(d)(3). However, given the Master's wholesale violation of the Order of Reference, and the facial impossibility of correctness, the report should not be used for any purpose. To deny the Premium Plaintiffs' Motion to Amend rewards MegaDyne's stonewalling. For these important reasons, the Interlocutory Order on the foregoing issues should be reversed and the case remanded for a jury trial.

DATED this 8th day of April, 2009.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By. _____

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing document to be mailed, postage prepaid, this 8th day of April, 2009, to the following:

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