

2008

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

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

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

COURTS

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PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the caption.

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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, they are sometimes hereinafter referred to as “Premium Plaintiffs”.

I.

JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-4-103.

ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW

Issue 1: Whether the district court erred in granting Defendant’s Motion to Strike Jury Demand, effectively dismissing all of the Premium Plaintiffs legal claims and denying the Premium Plaintiffs’ right to a jury trial, all of which is contrary to Rule 53 (e) of the Utah Rules of Civil Procedure and Art. 1 Section 10 of the Utah Constitution.

Standard of Review: The district court’s denial of the Premium Plaintiffs’ right to a jury trial on the basis that this is only an equitable accounting case is a legal conclusion which is reviewed for correctness. *See OLP, LLC v. Burningham*, 2008 UT App 173 ¶ 11.

Preservation of Issue in District Court: The Premium Plaintiffs preserved this issue below in:

Their Memorandum in Opposition to Defendant’s Motion to Strike Jury Demand and for Judgment on the Special Master’s Final Report (R. 2374-76);

Their Supplemental Memorandum in Opposition to Defendant’s Motion to Strike the Jury Demand and for Judgment on the Master’s Report (R. 6324-26; 6330-37); and

Oral argument at hearing on March 6, 2008 (R. 6716).

Issue 2: Whether the district court erred in denying the Premium Plaintiffs’

Objections to the Master’s Ex Parte Process and Final Report?

Standard of Review: The district court’s rejection of the Premium Plaintiffs objections to the report of the Special Master under Rule 53 is the interpretation of a rule of civil procedure which is a question of law reviewed for correctness. *See Plumb v. State*, 809 P.2d 734, 741 (Utah 1990), *Pete v. Youngblood*, 2006 UT App 303, ¶ 9, 141 P.3d 629.

Preservation of Issue in District Court: the Premium Plaintiffs preserved this issue below in:

Their Objections to the Final Report of the Special Master (R. 840-1109);

Their Supplemental Memorandum Re: Objections to the Master’s Report (R. 6330-37); and

Oral argument at hearing on March 6, 2008 (R. 6716).

Issue 3: Whether the district court erred in denying the Premium Plaintiffs’ Motion to File an Amended Complaint?

Standard of Review: The district court’s denial of the Premium Plaintiffs request to file an amended complaint is subject to an abuse of discretion standard. *See Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998) (citing *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 92 (Utah 1992)).

Preservation of Issue in District Court: The Premium Plaintiffs preserved this issue below in:

Their Motion for Leave to File an Amended Consolidated Complaint (R.6527-6585);

Their Reply Memorandum in Support of Motion for Leave to File an Amended Consolidated Complaint (R 6678-87), and

Oral argument at hearing on March 6, 2008 (R 6716)

II.

DETERMINATIVE PROVISIONS

The determinative Constitutional provisions, rules and statutes are as follows

United States Constitution, 7th Amend.

In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ”

Utah Constitution, Art. I Sec. 10.

In capital cases the right of trial by jury shall remain inviolate In court so general jurisdiction, except in capital cases, a jury shall consist of eight jurors In courts of inferior jurisdiction a jury shall consist of four jurors In criminal cases the verdict shall be unanimous In civil cases three-fourths of the jurors may find a verdict A jury in a civil case shall be waived unless demanded

Utah Code Ann. § 78-21-1. Right to jury trial.

In actions for the recovery of specific real or personal property, with or without money damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury is waived or a reference is ordered

Utah Rule of Civil Procedure 15. Amended and Supplemental Pleadings

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action not been placed upon the trial calendar, he may so amend it any time within 20 days after it is served Otherwise a party may his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given where justice so requires

Utah Rule of Civil Procedure 38. Jury trial of right.

- (a) *Right preserved.* The right of trial by jury as declared by The constitution or as given by statute shall be preserved to the parties.
- (b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Utah Rule of Civil Procedure 53(c):

The order of reference to the may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

Utah Rule of Civil Procedure 53 (c)(3):

In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His finding 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.

III

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is a breach of royalty contract dispute.¹ Under the contracts at issue, MegaDyne is required to pay plaintiffs Mr. Failor, Mr. Harvey Van Epps Gilmer² and Premium Plastics,

¹ This is a consolidated case. The first case asked for damages and royalties earned up until July 31, 1998. The second case was for damages and royalties earned after July 31, 1998. The two cases were consolidated on August 19, 2003. (R. 3363-3365, 3367-3371, and 3480-3482). Only in the first case was a Master appointed and only the first case is the subject of the Interlocutory Order, appealed by the Premium Plaintiffs.

Inc. and its owner Harvey Van Epps Gilmer (collectively referred to herein as “the Premium Plaintiffs”) \$0.05 and \$0.06 as royalties for surgical tips and balls coated by MegaDyne with a Teflon-like substance. In its Complaint and Jury Demand, the Premium Plaintiffs asserted five claims: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unjust enrichment; (4) accounting; and (5) intentional and negligent misrepresentation and non-disclosure. (R. 1-43).

After the Premium Plaintiffs filed the Complaint, the parties moved and obtained the appointment of a Special Master. (R. 72-83). The Order of Reference required the Master to prepare a report of his findings regarding the amount of MegaDyne’s product coated and the amount of MegaDyne’s product sold under the agreements between the parties. (R. 86 ¶ 4) Ex parte communications were strictly forbidden (R. 86-87, ¶ 5).

Nevertheless, the Master used an ex parte process to gather and analyze MegaDyne’s documents. Also, the Master’s report exceeded the Order of Reference by calculating what the Master believed to be an overpayment of royalties. Objections to the Master ex parte process, his failure to abide by the Order of Reference and his internally inconsistent report were filed the Premium Plaintiffs. (R. 6330-6337, 2143-2185, and 846-1109)

Meanwhile, the Premium Plaintiffs successfully subpoenaed documents from third party suppliers which showed that the Premium Plaintiffs were underpaid and that MegaDyne had been successful in obtaining a patent infringement judgment based on a per unit coated basis.

² Mr. Gilmer, the owner of Premium Plastics, Inc., died during the proceedings below. Consequently, his wife and trustee of Mr. Gilmer’s Trust was substituted as a party plaintiff.

Thereafter MegaDyne moved to strike the Premium Plaintiffs' jury demand and the Premium Plaintiffs moved to amend the Complaint. (R. 4635-4637, 6527-6585). The trial court denied the Premium Plaintiffs' objections to the Master's report, and their motion to amend the complaint. The Court granted MegaDyne's motion to strike the jury demand. (R. 6702-6705)

The Premium Plaintiffs subsequently petitioned for permission to appeal the interlocutory order of the trial court. Permission was granted on June 27, 2008. (R. 6712).

B. Statement of Facts Relevant to the Issues Presented for Review

Background of Parties' Relationship Giving Rise to Litigation

1. MegaDyne was initially incorporated April 17, 1985 as American Medical Products, Inc.³

2. In 1987, Dr. Marsden Blanch, a founder of MegaDyne, filed his first application with the United States Patent and Trademark Office ("USPTO") as the purported inventor of an electrosurgical knife utilizing a two-step PTFE coating process. Dr. Blanch's first application, filed on February 24, 1987, was issued as Patent No. 4,785,807 (the "'807" patent) in 1988. On March 19, 1987, Dr. Blanch assigned his rights in the technology and products to MegaDyne. On November 2, 1987, the USPTO recorded the transfer of Mr. Blanch's interests in the '807 patent to MegaDyne. (R. 6531).

3. In February 1986, Mr. Failor began discussions with Harvey Van Epps Gilmer ("Mr. Gilmer"), a California chemical engineer and expert in plastic coatings. In June 1986, Mr. Gilmer and his company Premium Plastics Inc. ("PPI") began to work on developing,

³ American Medical Products, Inc.'s name was changed to MegaDyne Medical Products, Inc. on February 22, 1989. The company is hereinafter referred to as "MegaDyne."

perfecting and applying the nonstick coating on electrosurgical blades for MegaDyne. (R. 6531-32).

4. Subsequently, Mr. Failor developed the prototype two-step coating process for applying the PTFE to medical instruments. In 1986, Mr. Failor engaged Mr. Gilmer to begin large-scale production of the medical instruments. By January 1987, Mr. Failor had developed a protocol for processing MegaDyne's coated units for mass market production. (R. 6531-32).

5. Mr. Gilmer and PPI developed trade secrets consisting of a manufacturing process for coating medical instruments with PTFE, including the detailed, sequential steps involved, selecting products in connection with the process and improving on the coating technology described in and covered by MegaDyne's '807 patent. (R. 6532).

6. On August 10, 1987, Dr. Blanch filed a division of the original '807 patent. That application issued as Patent No. 4,876,110 on October 24, 1989. (R. 6532).

7. In April of 1988, after Dr. Blanch's second patent filing, Mr. Failor entered into a compensation agreement in which Mr. Failor was responsible for providing certain services to MegaDyne in exchange for compensation. (R. 6532). The compensation agreement provided that Mr. Failor would be paid based upon number of units of specified products that were actually sold to and paid for by customers based on the following schedule:

<u>Agreement Year</u>	<u>Time Period</u>	<u>Compensation Per Unit</u>
Year 1-3	April 20, 1988- April 19, 191	\$.08
Year 4	April 20, 1991 – April 19, 1992	\$.07

Year 5	April 20, 1992 – April 19, 1993	\$.06
Year 6	April 20, 1993 – April 19, 1997	\$.05

(R. 6444). A copy of the Agreement is attached in the addendum.

8. Under a June 1, 1988 Exclusive Product Coating Agreement, PPI and Mr. Gilmer agreed to and did provide MegaDyne with trade secrets developed in connection with the coating process and cooperated with MegaDyne in perfecting the application for MegaDyne’s products. A copy of the Agreement is attached in the addendum. PPI and Mr. Gilmer retained as their own proprietary trade secrets, certain refinements and technologies developed on MegaDyne’s behalf. (R. 6532).

9. On or about March 26, 1991, PPI and Mr. Gilmer entered into an “Agreement” (the “1991 Contract”) with MegaDyne whereby PPI agreed to continue to provide coating services to MegaDyne upon the terms and conditions of the 1988 Contract. (R. 6533). A copy of the 1991 Contract is attached in the addendum.

10. The parties further agreed under the 1991 Contract that MegaDyne would pay Mr. Gilmer six cents (\$.06) per product coated by MegaDyne or its designee, that Mr. Gilmer would provide to MegaDyne the trade secret knowledge, expertise, formula and methods of application and processing “learned by Mr. Gilmer and PPI”, to enable MegaDyne to coat certain of MegaDyne’s medical products. (R. 6533).

11. Also under the 1991 Contract, MegaDyne agreed to provide to PPI and Mr. Gilmer any and all records necessary to perform an audit to ensure MegaDyne’s payment compliance. The 1991 Contract further provides that, in the event an audit discloses a

variance of greater than five percent (5%) between what was paid and what was due to Mr. Mr. Gilmer, the cost of the audit would be borne by MegaDyne. (R. 6533).

12. The 1991 Contract was modified by a “Contract Modification” (the “1991 Modification”), which was signed shortly after execution of the 1991 Contract. Pursuant to the 1991 Modification, MegaDyne agreed to require present and future suppliers of metal cautery tips and laparoscopic devices to provide copies of all invoices to Mr. Gilmer. (R. 6533). A copy of the 1991 Modification is attached in the addendum

13. The 1991 Contract was further modified by a “Contract Modification” dated September 15, 1997 (the “1997 Modification”) whereby MegaDyne agreed to pay PPI six cents (\$.06) for each product coated by MegaDyne through September 30, 1997. (R. 6534).

14. MegaDyne also agreed that beginning October 1, 1997, and continuing until December 1, 2005, MegaDyne would pay to PPI six cents (\$.06) for each coated Product invoiced or shipped to a third party for use or resale, including samples and consignments, and agreed that returns and bad debts would not be debited against payments due to PPI. MegaDyne further agreed that it would make payments due to PPI on a monthly basis, with payments to be made within a month and ten days after the end of each month and that it would accompany each monthly payment with a computer printout reporting all coated Electrodes invoiced and/or shipped during the month with consecutive invoice numbers, date, total Electrodes on each invoice and applicable lot numbers. (R. 6534).

15. The cooperative relationship between the parties began to crumble after MegaDyne took the coating process in-house and began paying royalties to the Premium Plaintiffs. After receiving an average monthly payment of \$22,642 in royalties in 1996, PPI’s

royalties reached a high point of \$43,490 in March 1997, followed by an unexplained steep decline, as follows.

Feb-97	\$28,687
Mar-97	\$43,490
Apr-97	\$27,820
May-97	\$2,144
Jun-97	\$4,194
Jul-97	\$7,758
Aug-97	\$8,334
Sep-97	\$11,375
Oct-97	0
Nov-97	\$851

(R 481, ex. 3 to the Special Master's Report)

16. The Premium Plaintiffs' efforts to resolve the disparities amicably were unsuccessful. The reports that MegaDyne provided with the royalty payments failed to support the payment amount made to Premium Plastics, Inc and Mr. Failor. MegaDyne's royalty reports did not include certain safeguards the contracts required to make the accounting more transparent, such as lot numbers and consecutive invoices. Also, as the years passed, the apparent growth of the company, evident in MegaDyne's expansion of facilities and personnel, was not reflected in the royalties that the Premium Plaintiffs received, which remained essentially flat over time. (R. 6535).

17. This case was initiated by the Premium Plaintiffs on or about July 31, 1998, after MegaDyne's federal lawsuit was dismissed pursuant to a Stipulation without Prejudice. The Premium Plaintiffs' Complaint and Jury Demand asserted legal claims for breach of contract, breach of the covenant of good faith and fair dealing and misrepresentation/non-disclosure. The Complaint included alternative equitable claims for unjust enrichment and for an accounting. (R. 1-43).

Appointment of Special Master and Adoption of Order of Reference

18. The parties agreed in January 1999 to the appointment of a Special Master under Utah Rule of Civil Procedure 53 to prepare a report on the amount of products coated and sold. (R. 72-79).

19. The Order of Reference, which specifically sets forth and limits the duties of the Special Master, provided that the Special Master act pursuant to the Order of Reference in determining the amount of products coated and sold. Specifically, the Order of Reference provides:

The issues relating to the amount of the Defendant's products coated and the Defendant's coated products sold under the Agreements are hereby referred to the Master.

(R. 84-90). Order of Reference ("Order") ¶3, a copy is attached hereto in the addendum.

20. The Order of Reference also provided:

- That the Master meet with parties to establish a work plan for the preparation of the Special Master's report and comply with certain deadlines in preparing and submitting his report to the trial court (Order at ¶ 6(a);
- That the Special Master not engage in any improper ex parte communications with the parties to the litigation (Order at ¶ 5);
- That the Special Master may conduct discovery and require the production of books, papers, documents, vouchers, etc. (Order at ¶ 5);
- That the Special Master submit his report to the trial court and to the parties along with copies of all evidence relied upon by the Master to support the findings in the report (Order at ¶ 6(d)).

Work Plan/ Deadlines

21. The Premium Plaintiffs submitted a proposed work plan to the Special Master but he neither accepted nor rejected the Premium Plaintiffs' proposed work plan. In fact, the Master refused to establish a work place of the preparation of his report. When the Premium Plaintiffs inquired about creating a work plan, the Master said that he would do those tasks as he "deemed necessary." (R. 1235).

22. The Master never did establish a plan with counsel for both parties before March 2, 1999 as required by the Order of Reference. Instead, as stated by the Master before Judge Thorne, "we did not want to disclose [a] work plan to the parties because that would be basically tipping our hand as to what areas we were going to examine." (R. 1235-36).

23. The Master failed to provide the court with a status report by the deadline in the Order of Reference and instead filed it 400 days later. (R. 1239).

24. The Master failed to complete his work by April 23, 2000, as ordered by the trial court, or submit a letter to the court indicating anything additional that needed to be done. Rather the Special Master never submitted a letter to the court, did not request an extension and did not file his draft report until June 16, 2000. (R. 430-645). His final report was later filed on August 2, 2000 (R. 803-833).

Improper Ex Parte Process

25. From the beginning of his work until the Master submitted his final report, the Master used an unfair ex parte process. MegaDyne's former accountant testified:

A: They came out early May, two people, I believe

* * *

A: They were there for weeks.

Q: Did you give them a room to work out of?

A: The conference room.
Q: Out at MegaDyne?
A: Yes

* * *

Q: About how often would you meet with the folks from Ernst and Young?

A: Well, I would only come to the office on Monday, Wednesday, and Friday.

* * *

Q: So you would go out there three times a week?

A: Most of the time, they would be there, there may be a day or two when they were not.

Q: Is that it?

A: Right

* * *

Q: Who else from MegaDyne, if you know, met with the folks at Ernst and Young besides you?

A: I know Brian did.

Q: Anybody else?

A: They asked Jeff Roberts to give them electronic information from time to time . . . I know that he had conversations with them about exactly what they needed and he gave them disks.

(R. 1237-38).

26. The Master admitted that he conducted his document investigation at MegaDyne, with MegaDyne, and on an ex parte basis:

Upon our arrival at MegaDyne, we were introduced to key accounting and manufacturing personnel, given a tour of the facilities, and shown to the conference room. The conference room contained approximately 10 to 15 boxes of sales invoices, general ledger detail for the period under inspection, receipts and invoices and other financial records. . . . We reviewed, inspected, analyzed and obtained support for and brief explanations of electronic and paper forms of documents that we deemed necessary to determine the number of products coated and sold under the invoices.

(R. 1238).

27. The Master also engaged in improper ex parte communications by asking that “MegaDyne prepare[] a schedule . . . that indicated the quantity received and the quantity coated” to determine the amount of products coated. The Master then spot checked with copies of invoices. (R. 1239).

Failure to Conduct Discovery

28. Throughout the proceedings, the Master never issued one subpoena and never served any Rule 34 Request for Production of Documents. Consequently, it was impossible for the parties to know what documents had been made available to the Master or the documents on which the Master relied in reaching his decision. (R. 1236).

29. MegaDyne has in its possession the following documents that would have enabled the Master to determine the amount of products coated and products sold: purchase orders to suppliers, receiving logs, shipping receipts, production schedules, inspection documents, coating reports, coating process traveler reports, manufacturing department inspection reports, quality control inspection reports, packaging documents, sterilization certificates, balance sheets, income statements, cash flow documents, sales journals, sales reports, unit activity reports, unit inventory reports, and packaging lists. The Master, however, never obtained or relied upon those documents in preparing his report. (R. 1242).

30. MegaDyne’s former accountant testified that the Master was only given “a small portion” of the financial statements, that no sales reports were provided for the time prior to October 1, 1997, and that the unit activity reports and inventory reports, as well as

the sales orders and packaging lists, were not asked for by or were not provided to the Master. (R. 1243).

31. The Master did state that he had access to original invoices. But he only tested 61 out of 28,000 transactions. (R. 2129)

Unreliability of Final Report

37. The Master failed to include with his report any documents, evidence or testimony relied upon in preparing the report. Instead of attaching relevant documents and evidence to his final report as required by the Order of Reference, the Master attached to his preliminary report schedules of payments, purchase, and units coated, all created by the Master. The evidence and underlying and supporting documents used by the Master to create his schedules to create his final report were not provided. (R. 1240-1241, 2125-2133).

36. The basic documents relied upon by the Master do not support his findings in the report. The following errors/inconsistencies reviewed by the Master were found by the Premium Plaintiffs' expert:

- Documents produced by the Master show that the amount of products coated, at a minimum, is 397,306 pieces more than the number determined by the Master; (R. 852).
- The schedule of invoices provided by the Master show that a minimum of \$62,227.14 is due to Mr. Gilmer; (R.852)
- The Master failed to explain why Mr. Failor purchases declines from an average of at least 375,000 per month to 18,000 in November 1996; (R. 856)
- The Master failed to explain why there are wide variations in the products coated between the Mr. Failor and the Mr. Gilmer/Premium Plastics' schedules; (R. 857)

- The Master does not explain why the Mr. Failor and Mr. Gilmer schedules were constructed differently, i.e. why they are not in the same format so that numbers could be easily compared to check for accuracy; (R. 856-57)
- The Master failed to explained how units coated could decline from 511,550 in April 1997 to 50,613 in May of 1997 and 44,505 in August 1997; (R. 857)
- The Master failed to address, for example, inconsistencies in the report that show that more products was coated than was sold (it is impossible to sell units that don't exists). (R.857)

37. On or about August 18, 2000, the Premium Plaintiffs filed its Objection to the Final Report of the Special Master based on the master's failure to abide by the procedures in the Order of Reference and the errors and inconsistencies in the Master's report as set forth above. (R. 840-1109).

38. On or about October 31, 2007, based on the report of the Premium Plaintiffs' forensic accountant, the Premium Plaintiffs filed Plaintiffs' Supplemental Memorandum Re: Plaintiffs' Objections to the Master's Report setting forth the following additional objections to the Master's Report:

- The Master did not compute the number of coated units by extrapolating information from MegaDyne's coating reports. Rather, he relied upon a schedule prepared for him by MegaDyne; (R. 6332) (*see* Affidavit and Report of Derk Rasmussen, R. 2102)
- The MegaDyne schedule relied upon by the Master was incomplete in that it omitted 25 products; (R. 6332, 2102, 2114, 2115)
- The Master only tested five lot numbers with records of coating processing condition reports, all within the months of May and June 1996; (R. 6332, 2103)
- The schedules relied upon by the Master did not include all the batches coated; (R. 6332, 2103)

- No all lots were included during the months of March through June of 1997 and there were at least three lots totaling over 800,000 unaccounted for by the Master; (R. 6332, 2103)
- Since not all of the coated products were included in MegaDyne's schedule, none of the ROCPC reports were reviewed and not all lot numbers were accounting meaning that Special Master could not have calculated all of the products coated; (R. 6332-6333, 2103)
- For the period of January 1997 through September 1997, the Master did not independently calculate the number of units coated, but simply deferred to the quantities provided on the schedule prepared by MegaDyne for the Master; (R. 6333, 2104)
- For the coated products sold, the Master tested only 61 transactions out of 28,000 invoices; (R. 6333, 2105)
- The Master did not perform any tests verifying that the information contained in the invoices was complete; (R. 6333, 2105)
- The Master failed to sufficiently document how he reached his conclusions; (R. 6333, 2105)
- The Master calculated a beginning inventory of 1,219,167 units as of March 1, 1996 without any documented evidence supporting that figure. Rather the Master simply backed into the number by starting with the September 30, 1997 inventory, added his calculation of sold units and subtracted his calculations of units purchased. For the Master to be correct, MegaDyne would have had to sell 1,072,782 units during January to February 1996, something MegaDyne had never done; (R. 6333, 2106)
- The Master did not reconcile the beginning inventory with the closest known physical inventory of December 31, 1995; (R. 6333, 2106)
- The Master did not have all of the production reports and sales sub ledgers did not match the production totals; (R. 6333, 2107)
- In calculating the beginning inventory of 1,219,167, the Master overlooked MegaDyne's documents showing a beginning inventory of only 60,000 units; (R. 6333)

- The errors in the Master's calculations results in underpayments to PPI and Mr Gilmer of at least \$69,550 00 and underpayment to Mr Failor of \$57,958 00, (R 6334)
- Invoices from MegaDyne's tips and balls supplier, National Wire Services show that PPI and Mr Gilmer were underpaid royalties of at least \$132,384 00, (R 6334)
- Royalties calculated from the purchase of coating material demonstrate that PPI and Mr Gilmer were underpaid by at least 1,400,797 00, (R 6334)
- By analyzing business trends created by third party documents, PPI's expert calculated that PPI and Mr Gilmer were underpaid at least \$877,067 00, (R 6334)
- PPI's expert accountant examined documents from third parties and from MegaDyne and concluded that based on vendor unit purchases only, PPI and Mr Gilmer were underpaid at least \$2,831,075 and by applying the royalty trend analysis to the documents reviewed, PPI/Mr Gilmer were underpaid royalties by \$2,411,284, (R 6334)
- Royalties calculated from vendor invoices show that Mr Failor was underpaid at least \$7,255 in 1997, (R 6335)
- The Master did not examine the documents from coating material suppliers. If he had, he would have learned that from March 1996 through April 1997, Mr Failor was underpaid by at least \$440,000 00, (R 6335)
- For the period from March 1996 through April 1997, the checks, coating reports and material certifications show that the Master reached erroneous conclusions regarding the number of units coated, i.e., the Master found that 4,747,425 units were coated when the documents show that between 4,854,984 and 4,912,864 were coated, (R 6335)
- The Master incorrectly determined that Mr Failor earned royalties from March 1996 through April 1997 of \$237,371 25 when the documents show that Mr Failor actually earned royalties during that period from between \$262,422 25 to 264,432 35, (R 6336)
- The Master never reconciled the difference between the electronic download provided by MegaDyne reflecting spatula coating with

MegaDyne's spatula coating reports which resulted in an additional \$8,323.44 owed to PPI and Mr. Gilmer. (R. 6336)

Denial of Jury Trial

39. On or about August 30, 2000, Defendants filed a Motion to Strike Jury Demand and for Judgment on the Special Master's Final Report asserting that the Premium Plaintiffs were not entitled to a jury trial on the equitable accounting claim, that the case was too complicated to be submitted to a jury, and requesting that the Court enter judgment based solely on the Special Master's Report under Utah Rule of Civil Procedure 53. (R. 1135-37).

40. In the Premium Plaintiffs' Memorandum in Opposition to Defendant's Motion to Strike Jury Demand and for Judgment on the Special Master's Report, the Premium Plaintiffs asserted that they have never received an accurate accounting from defendants or the Special Master in more than nine (9) years of litigation and that they did not waive and are not precluded from having a jury trial on their legal claims. They also asserted that under Rule 53, the Special Master's report may, at most, be submitted as evidence by a jury. (R. 2374-76).

41. Throughout the proceeding, MegaDyne persistently refused to produce relevant documents as shown by the following:

- October 1999: Order to Compel Production of Discovery; (R. 163-34)
- August 2000: MegaDyne's Motion for Protective Order; (R. 1148-52)
- December 2000: PPI's Motions for Sanctions for Noncompliance with Discovery; (R. 1364-98)

- December 2000: MegaDyne's Motion to Quash PPI's Subpoenas Duces Tecum; (R. 1440-42)
- June 2001: Order Requiring MegaDyne's to Allow PPI to Review all Documentation Made Available to Special Master and Other Discovery Requests; (R. 1949)
- July 2001- Protective Order issued; (R. 1973-78)
- August 2001: Stipulation and Order re: PPI's Access to Master's Documents; (R. 1979-81)
- October 2001: PPI's Motion to Compel Document Production and Third Document Production Request; (R. 1996-98)
- November 2001: MegaDyne's Motion for Protective Order; (R. 2266-71).
- February 2002: Order Granting PPI's Access to Some Requested Documents and Granting MegaDyne's Motion for Protective Order on Others. Deferred evidentiary hearing on whether special master exceeded the order of reference; (R. 2410-11)
- August 2002: PPI's Motion for Sanctions for Discovery Noncompliance; (R. 2606-2959)
- September 2002: Order Deferring Sanctions and Granting PPI's Discovery; (R. 3001-05)
- April 2003: PPI's Motion to Compel Discovery or Rule 37 sanctions; (R. 3110-3188)
- July 2003: Order Compelling Discovery; (R. 3466-68)
- May 2004: MegaDyne's Motion for Protective Order Denying Discovery; (R. 4400-07)
- September 2004: Bench Ruling ordering MegaDyne's to produce 400 sample invoices; (R. 4656)
- September 2005: Order compelling production of 400 sample

invoices; (R. 4724-27)

- August 2007: Parties reached stipulation to access certain sealed documents from MegaDyne's *Aspen Labs* litigation in federal court. (R. 6304)

42. After MegaDyne repeatedly stonewalled discovery, as set forth above, the Premium Plaintiffs succeeded in subpoenaing documents from out-of-state third party suppliers and sources.⁴ The Premium Plaintiffs also obtained patent litigation information in a hearing in federal court on August 10, 2007, after MegaDyne refused to supply the information. (R. 6535).

Denial of Motion to Amend

43. In the documents obtained by the Premium Plaintiffs in the federal court, the Premium Plaintiffs discovered that MegaDyne licensed the coating of medical products and provided PPI's trade secrets to third parties. (R. 6534).

44. 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*"). (R. 6534-35).

⁴ The Premium Plaintiffs requested this information from defendants on several occasions during the litigation, including in Plaintiff's Second Request for Production of Documents filed on June 28, 2000, and in a Motion to Compel filed October 17, 2001. (R. 2217-2256).

45. Mr. Failor and Mr. Gilmer provided supporting testimony and disclosed their trade secrets in the *Aspen Labs litigation* to enable MegaDyne to prevail. The documents obtained from third parties and the information provided by Mr. Gilmer and Mr. Failor in the *Aspen Labs litigation* was subsequently used by MegaDyne to prevail in the other cases specified above. (R. 6535).

46. 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. (R. 6535).

47. Throughout the parties' relationship, the Premium Plaintiffs and MegaDyne were bound by confidentiality agreements and duties of good faith and fair dealing. However, as a result of the *Aspen Labs* litigation, PPI, Mr. Gilmer and Mr. Failor was induced to disclose trade secrets that were not obligated under contract, but which were used to the monetary benefit of MegaDyne's and for which the Premium Plaintiffs received no compensation. (R. 6535).

48. MegaDyne did not pay any of the proceeds received from the patent litigation to the Premium Plaintiffs or compensate the Premium Plaintiffs for units unlawfully coated by the third party defendants or for units designated by MegaDyne with the foregoing defendants. (R. 6535).

49. On or about December 5, 2007, the Premium Plaintiffs filed a Motion for Leave to File an Amended Consolidated Complaint requesting that it be permitted to file an amended complaint to assure that all issues were fully and properly litigated in one forum

and to include claims based on the information and documents that had been received by the Premium Plaintiffs regarding the patent litigation in which defendants were involved. (R.6586-89).

50. The Premium Plaintiffs' Motion for Leave to File an Amended Complaint was filed *prior* to the deadline for the amendment of pleadings. (R. 6318-23; 6586-89).

51. On March 6, 2008, the district court held a hearing on each of the above-referenced motions. The Order from the hearing provides:

1. This case involves an accounting issue. The parties previously agreed that a special master was to be appointed and present his report to the Court. Accounting is an equitable remedy and the Plaintiffs are not entitled to a jury on the issue. Defendant's motion to strike the jury demand is granted.
2. Plaintiff's [sic] objections to the method of assembling the report of the Special Master are noted. The Court has previously rejected the Plaintiff's [sic] objections as they relate to the Special Master's exceeding the scope of the Order of Reference, contact with the parties, the filing of a work plan and the method of obtaining documents from the Defendants. The Court, once again, denies these objections.
3. Plaintiff's [sic] request to depose the Special Master has previously been denied. The Plaintiff has presented no new grounds for the Court to revisit this denial. Plaintiff's Motion to Depose the Special Master is denied.
4. Plaintiff's [sic] Motion for a Hearing on the Report of the Special Master. The Utah R. Civ. P. 53 provides that the Court is to accept the Report of the Special Master's finding of fact unless clearly erroneous. An objection to the report has been made accompanied by a request for a hearing. Based upon the allegations of error coupled with a report from the Plaintiff's [sic] expert, the Court determines that it is proper to grant the Plaintiff's [sic] request for a hearing on the Report of the Special Master. The Court has some concerns about the scope of such a hearing. Therefore, it directs that the parties

meet, agree to a proposed format and consult with the Court to finalize the procedures to be followed.

5. Plaintiff's [sic] Motion to file an Amended Complaint is denied. This case is ten years old. The new issues raised by the Amended Complaint cannot be addressed in an accounting issue case. If the Plaintiff's [sic] desire to raise these new issues, they will have to do it in a separate action.

(R. 6703-04).

IV

SUMMARY OF ARGUMENTS

Unquestionably, the lower court committed reversible error in striking the Premium Plaintiffs demand for a jury trial. Their right to a jury trial is protected by Article I, Section 10 of the Utah Constitution, Utah Code Ann. § 78-21-1 and Rules 38 and 53 of the Utah Rules of Civil Procedure. Moreover, simply because a party pleads both legal and equitable claims, is no justification for denying a jury trial. Instead, the jury decides the facts on the legal claims first.

Finally the appointment of a Special Master, does not deprive a litigant of a jury trial. The Master's report is simply given to the jury as evidence. Rule 53 of the Utah Rules of Civil Procedure.

The lower court also clearly erred in not rejecting the Master's report. There is no question the Master repeatedly violated the Order of Reference, engaged in unfair ex parte process, and came up with an internally, inconsistent and impossible report. Both the process used by the Master and the substance of the report itself dictates a rejection of the Master's report.

Lastly, the Premium Plaintiffs should be allowed to amend their Complaint. The Complaint is based on facts recently discovered after MegaDyne stonewalled discovery. Also, judicial economy and the lack of procedure to MegaDyne suggests a reversal of the lower court on this issue.

V.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE PREMIUM PLAINTIFFS' DEMAND FOR A JURY TRIAL AND REJECTING THE PREMIUM PLAINTIFFS' OBJECTIONS TO THE MASTER'S REPORT

The district court erred in granting MegaDyne's request to strike the Premium Plaintiffs' jury demand and in rejecting their objections to the report of the special master. The court should have allowed the Premium Plaintiffs to proceed to trial to present all evidence regarding their objections to the special master's report and allowing the jury to be the final arbiter of the case. The trial court's ruling should accordingly be reversed and the case remanded with an instruction that the Premium Plaintiffs are entitled to proceed to trial.

Along with their equitable claim for an accounting, the Premium Plaintiffs initiated this action by asserting contract and tort claims in the Complaint and properly demanded a jury trial. Constitutional, statutory and common law entitles the Premium Plaintiffs to a jury trial of its contract and tort claims in this case.

The United States Constitution guarantees that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." United States Constitution, 7th Amend. The Utah Constitution similarly guarantees the right to a jury trial in civil cases. Utah Const. Art. I Sec. 10. So do Utah Statutes and Rule.

Utah Code Ann. § 78-21-1 provides:

Right to jury trial.

In actions for the recovery of specific real or personal property, with or without money damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury is waived or a reference is ordered.

Id.

Utah Rule of Civil Procedure 38 provides:

Rule 38. Jury trial of right.

- (c) *Right preserved.* The right of trial by jury as declared by The constitution or as given by statute shall be preserved to the parties.
- (d) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Id.

A. The Premium Plaintiffs Assertion in the Complaint of Both Legal and Equitable Claims Does Not Deprive Them of a Jury Trial

Historically, a distinction was made between cases involving equitable claims in which a party is not entitled to a jury trial and cases involving legal claims where a party is entitled to a jury trial:

In an action where a single claim is presented and a single remedy demanded, the action can rationally be classified as one which historically would have been either legal or equitable. In such a case, the proper approach to deciding whether a claiming has a right to a

jury trial is whether the action is ‘legal’ or ‘equitable’. Similarly, where the case presents several claims or demands more than one remedy . . . the matter is not more difficult than simply suit if the claims, or the remedies, are either all legal or all equitable. Thus, where the case presents several claims or demands more than one remedy, the most direct test is whether the action now pending before the District Court contains legal issues.

Swofford v. B&W, Inc., 336 F.2d 406, 409 (5th Cir. 1964) (plaintiff entitled to jury trial where equitable claim for accounting and legal claim for damages asserted). However,

in a series of cases starting about 40 years ago, the Supreme Court changed the focus to some extent. When a proceeding involves a mixture of legal and equitable claims, the question is not the character of the entire proceeding as legal or equitable, but the character of particular issues as legal or equitable.

Bandy v. Bandy, 237 B.R. 661, 664 (U.S. Bk. E.D. Tenn. 1999). As stated by the Utah Supreme Court:

It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages . . . is as clearly a legal remedy as any that could be named, and it is an action in which a party cannot be deprived of a jury trial.

Valley Mortuary v. Fairbanks, 225 P.2d 739, 744 (Utah 1950); *see also Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970) (“where equitable and legal claims are joined in the same action, there is a right to a jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims Jurisdictions throughout the United States agree.”). Jurisdictions throughout the United States have followed this doctrine. *See Walker v. Jones*, 693 F. Supp. 1202, 1203 (Dist. D.C. (1988); *University of the Virgin Islands v. Springer*, 232 F.Supp.2d 462, 471

(D. Virgin Islands 2002); *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1224 (3rd Cir. 1983) (“It is well established that joint of legal and equitable claims does not result in the waiver of a right to a jury trial on the legal claims.”); *Bandy*, 237 B.R. 661 at 664 (“court cannot deny a jury trial of the legal issues on the ground that they are incidental to the equitable issues”).

Utah courts have also long adhered to the well-established rule that a party does not waive its right to a jury trial by asserting both legal and equitable claims. “Where the issues are legal issues, the fact that equitable relief may be prayed for, to carry into effect the judgments based upon the legal issues, is not sufficient to deprive either party of his rights to have the legal issues submitted to a jury.” *Petty v. Clark*, 129 P.2d 568, 590 (Utah 1942). As stated by the Utah Supreme Court:

The right of trial by jury is a constitutional right, and every litigant, in an action of legal cognizance, has an absolute right to that method of trial, a right which the court may not disregard. . . . The question therefore is: Are legal or equitable principles to be applied? If the principles to which appeal must be had are principles of law in the main or primary action, either party thereto upon demand is entitled to a trial by jury. This is true, although in the action application is made to the court to exercise its equity powers in granting injunctive relief. Where the issues are legal issues, the fact that equitable relief may be prayed for, to carry into effect the judgments based upon the legal issues, is not sufficient to deprive either party of his rights to have the legal issues submitted to a jury.

Norback v. Bd. of Directors, 37 P.2d 339, 341-43 (Utah 1934) (internal citations and quotations omitted) (emphasis added).

According to the allegations of his complaint, plaintiff had two rights of action and was entitled to two remedies, of which he might pursue either or both at his election, the legal remedy of damages . . . and [an] equitable remedy. . . . Under those circumstances it will be conceded that the plaintiff would have been entitled as of right to a trial by jury of the legal issues as to

damages. Instead of doing this, he accepted the invitation held out to him by our laws and joined his two actions in one. He should not be held to have thereby forfeited his right to a jury trial of the legal issues

Valley Mortuary, 225 P.2d at 744; *Zions First Nat'l Bank v. Rocky Mtn. Irrigation*, 795 P.2d 658, 662 (Utah 1990) (“when legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the jury’s factual determination binds the trial court in its determination of the parallel equitable issue”).

The fact that the Premium Plaintiffs asserted both legal and equitable claims in this case does not preclude a jury trial. Utah law is clear that a party may plead alternative claims in a complaint without waiving their right to a jury trial.

Where a party seeks an accounting, “[t]he fact that . . . equitable relief in the form of an accounting is [also] sought does not in and of itself preclude a right to a jury trial, as it has been declared that the right to a trial by jury does not depend upon the choice of words used in pleadings.” *Bruce v. Bohanon*, 436 F.2d 733, 736 (10th Cir. 1970); *see also, Koch v. Koch*, 203 F.3d 1202 (10th Cir. 2002) (trial on accounting claim); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (where both legal and equitable claims exist, a jury may, with proper legal instructions, “readily determine the recovery, if any, to be had . . . whether the theory finally settled upon is that of breach of contract,” an equitable claim or any combination thereof.).

The trial court’s denial of the Premium Plaintiffs’ demand for a jury trial on the basis that this case involves an accounting was clearly erroneous and should be reversed.

B. The Appointment of a Special Master Cannot Deprive the Premium Plaintiffs of their Right to a Jury Trial

Utah Rule of Civil Procedure 53 (e)(3), which governs the appointment of a special master in jury trials provides:

In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His finding 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.

The purpose of the appointment of a special master:

primarily ought to include findings of fact going to the ultimate issues of the case rather than analysis of the evidence yielding the special master's conclusions. Legal analysis in a case where there is a jury demand is appropriate only to the extent that they provide a proper context for the special master's findings of fact.

Miller v. Bank South Corp., 173 F.R.D. 543, 545 (N.D. Ga. 1997). In complicated cases involving an accounting, a special master's report "can help jurors organize and assess complicated issues [and a] master's findings [may] reduce the complexity of [an] accounting to a manageable level" but cannot remove the case from the jury. *Music Suppliers, Inc. v. London Records, Inc.*, 1988 U.S. Dist. Lexis 3475, 6-7 (D. Mass 1988). "In a jury action, a master's finding is not a final determination." *Id.* at 9. Issues presented to a special master are:

referred merely for purposes of clarification before presentation to the jury which remains the ultimate arbiter of the facts. The admission of the master's report does not prevent the parties from introducing evidence that conflicts with the master's findings, or calling witnesses who have testified before the master; the report of the master is merely *prima facie* evidence which the parties may attack at the trial with any competent evidence and which the jury is free to disregard.

Id. at 9-10. *see also Jackson v. Local Union 542*, 155 F. Supp. 2d 332, 338 (E.D. Penn. 2001); *Eastern Fireproofing Co., Inc. v. United States Gypsum Co.*, 50 F.R.D. 140, 142 (D. Mass 1970).

Although the appointment of a special master is meant to simplify complex issues, the parties and the court are not bound by a special master's conclusions. Once a special master has prepared a report under Rule 53, any "party who so desires is doubtless free to put before the jury any competent evidence are variance with the Master's conclusions." *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 227 (D. Conn. 1940); *L.K. Comstock & Co., Inc. v. Becon Const. Co., Inc.* 932 F. Supp. 906, 909-10 (either party may present evidence contradicting special master's report and jury need not accept special master's findings). Even where parties have agreed to and tried an entire case before a special master, the right to a jury trial is nonetheless preserved. *Music Suppliers, Inc.*, 1988 U.S. Dist. LEXIS 3475 at 3-7. As explained by one court:

The reference to a special master in no way infringes [a party's] constitutional rights to a trial by jury. This reference is preliminarily to a jury trial and is designed and calculated to simplify, shorten and facilitate that trial. . . . [A] report by a special master, distilling the mass of facts involved, will certainly aid a correct disposition of the case. It is not necessary that the order of reference reserve the parties' right to a jury trial because rule 53 (e)(3) itself makes that reservation. . . . Instead of denying or impinging upon a trial by jury this reference to a master should provide a more scientific and better jury trial.

Wirtz v. Bunch, 1841 U.S. Dist. LEXIS 7210, 4 (M.D. Ga.,1963).

A party that voluntarily agrees to the appointment of a special master and participates in the special master proceedings does not waive a jury demand. *Evans v. Boyd Restaurant Group*, 240 Fed. Appx. 393, 398 (11th Cir. 2007). A court commits reversible error by adopting a recommendation and report of a special master and denying a jury trial where one

has been properly requested by the plaintiff. *Id.* at 397. As explained by the Tenth Circuit Court of Appeals:

Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown. That the case involves complex issues of fact and law is no justification for reference to a Master, but rather is an impelling reason for a trial before an experienced judge. . . . [T]he Master's report in a jury case is merely evidence which a jury may disregard.

Polin v. Dun & Bradstreet, Inc., 634 F.2d 1319 (10th Cir. 1980)(emphasis added). In *Henry A. Knott Co. v. Chesapeake and Potomac Telephone Co. of West Va.*, 772 F.2d 78, (4th Cir. 1985), the court noted:

The use of a master does not *per se* violate the Seventh Amendment right to a jury trial; but, if the master makes no factual findings or his findings are unclear, the parties must be able to present their case to the jury.

Id. at n.5; *see also DeBry v. Cascade Enters.*, 879 P.2d 1353, 1364 (Utah 1994) (emphasis added) (jury trial held where parties stipulated to appointment of special master); *Sutton v. Johnson Cotton Co.*, 114 F.2d 302 (4th Cir. 1940) (master's report may be submitted to jury, but jury makes final determinations on issues of fact); *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 227 (D. Conn. 1940) ("Any party who so desires is doubtless free to put before the jury any competent evidence at variance with the Master's conclusions and to submit any resulting conflict to the jury.").

In this case, the Premium Plaintiffs properly requested and is entitled to a jury trial on the legal claims for breach of contract, breach of the covenant of good faith and fair dealing and misrepresentation/non-disclosure. In addition, the Premium Plaintiffs are entitled to a jury trial on the unjust enrichment claim. *See e.g., Kurth v. Wiarda*, 1999 UT 335 ¶ 4, 991 P.2d

1113; *Pacific Chromalox Division v. Irey*, 787 P.2d 1319, 1320 (Utah App. 1990). Only the claim for an accounting is not subject to the right of a trial by jury.

The district court failed to even acknowledge the Premium Plaintiffs' legal and equitable claims and appears to have simply ignored all claims except the accounting claim in ruling that they had no right to a jury trial. Moreover, although the court granted the Premium Plaintiffs' request for a hearing on the report of the Special Master, the court erroneously applied the standard in Rule 53 applicable to *non-jury* actions which provides that a court may adopt, modify or reject the report of a special master after receiving objections to the report from the parties. *See* Utah R. Civ. P. 53 (e)(2).

II. THE TRIAL COURT ERRED IN REJECTING THE PREMIUM PLAINTIFFS' OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

Utah Rules of Civil Procedure 53 (c) provides:

The order of reference to the may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

Plumb v. State, 809 P.2d 734, 742 (Utah 1990); *Ferguson Contracting Co. v. Manhattan Trust Co.*, 118 F. 791, 794 (6th Cir 1902) (order of reference is both "the chart and limitation of the Master's authority"); *U.S. v. IBM Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974) ([T]he power of a special master is completely dependent upon the Order of Reference").

In this case, the Order of Reference included specific procedural requirements, including the establishment and compliance with a work plan, the compliance with certain deadlines, a prohibition against improper ex parte communications and the submission of a

report with all evidence supporting the master's findings in the report. The Master failed to comply with any of these mandates in the Order of Reference. The master instead refused to establish a work plan and in essence, determined that he had the discretion to carry out certain tasks or not at he saw fit. The Master failed to comply with deadlines in the Order of Reference, failed to conduct discovery, including serving requests for production of documents to the parties or issuing any document subpoenas and failed to submit any documents, evidence or testimony supporting his report as required by the Order of Reference. The master also engaged in improper ex parte communications with MegaDyne in reviewing and discussing MegaDyne's documents at MegaDyne's facility and requesting that MegaDyne prepare a schedule regarding the products coated and sold. Rather than conducting a thorough examination of the voluminous documents relevant to the issue of the amount of products coated and sold, the master instead simply asked MegaDyne for its calculations and then simply minimally sampled those figures against invoices provided by MegaDyne. The Master also failed to comply with the Order of Reference by failing to submit with his report any evidence, testimony of documents relied upon in reaching the findings in his report.

The substantive purpose of the order of Reference was limited to the determination of the amount of product coated and sold. The order did not authorize the master to conduct an accounting or to calculate any damages or amounts owed to either party. The master nonetheless exceeded his authority in the Order of Reference by calculating amounts owed to the parties and conducting his version of an inaccurate and incomplete accounting of amounts owed based on products sold and coated. The conclusions reached by the

Master, in any event, were inaccurate and inconsistent as the Master failed to consider all relevant documentation and failed to properly calculate products coated, products sold and amounts owed based on those figures.

Despite the master's utter failure to comply with any of the procedural requirements of the Order of Reference and his failure to accomplish the only objective of his appointment—calculating the number of products coated and sold—the trial court nonetheless rejected the Premium Plaintiffs' objections to the Master's report.

In the Order denying the Premium Plaintiffs' objections to the report of the special master, the trial court improperly references the clearly erroneous standard found in Rule 53 (e) (2) which is applicable only to special master's findings in non-jury actions. In jury, actions, a court is not bound to accept the report of the special master unless clearly erroneous. Rather, as explained above, the special master's findings are merely evidence to be submitted to the jury at trial. Thus, instead of rejecting the Premium Plaintiffs' objections to the special master's report, the court should have ordered the special master to comply with the requirements of the Order of Reference and should have allowed the Premium Plaintiffs to proceed to trial to challenge the findings of the special master as it would any other evidence presented at trial. The trial court's rejection of the Premium Plaintiffs' objections to the Master's report was accordingly erroneous and should be reversed by the this and remanded to the trial court for a trial on all issues, including the findings in the Master's report.

III. THE TRIAL COURT ERRED IN DENYING THE PREMIUM PLAINTIFFS' MOTION TO FILE AN AMENDED COMPLAINT

Utah Rule of Civil Procedure 15 (a) provides that a party may amend a pleading after a responsive pleading has been filed only upon leave of the court and “leave shall be freely given when justice so requires.” Utah R. Civ. P. 15(a). “[I]t is well established that rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated.” *Jones v. Salt Lake City Corp.*, 2003 UT App 355 ¶ 16, 78 P.3d 988 (internal quotations omitted). “[T]he Court’s ultimate goal in deciding a motion to amend is to have the real controversy between the parties presented, their rights determined, and the cause decided” *Savage v. Utah Youth Vill.*, 2004 UT 102 ¶9, 104 P.3d 1242 (internal quotations and citations omitted).

In Utah courts, “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 in each particular case.” *Kelly v. Hard Money Funding, Inc.*, 2004 UT App. 44, ¶ 41, 87 P.3d 734. However, there are three factors that courts generally consider when determining whether to grant a motion for leave to amend: “the timeliness of the motion; the justification given by the movant for the delay; and the resulting prejudice to the responding party.” *Id.* ¶ 26. Here, each of these three factors weighs decisively in favor of granting the Premium Plaintiffs leave to amend, and the trial court erred when it denied the Premium Plaintiffs leave to amend its Complaint on the grounds that “[t]his case is ten years old” and that “[t]he new issues raised by the Amended Complaint cannot be addressed in an accounting issue case.” (R. 6704-05).

A. The Premium Plaintiffs’ Motion to Amend Was Timely Filed

First, the Premium Plaintiffs' Motion to Amend was timely. Explaining this factor, Utah courts have noted that “motions to amend are typically untimely when they are filed in the advanced procedural stages of the litigation process.” *Swan Creek Vill. Homeowners Ass’n v. Warne*, 2006 UT 22, ¶20, 134 P.3d 1122.

Although the initial complaint in this case was filed ten years ago, discovery was not completed, no summary judgment has been issued, and no trial date has been set. Even more importantly, the Premium Plaintiffs sought leave to amend its Complaint prior to the deadline for the amendment of pleadings. Thus, the Premium Plaintiffs' Motion to Amend was not untimely.

The Premium Plaintiffs recognizes that this Court has stated: “[R]egardless of the procedural posture of the case, motions to amend have typically been deemed untimely when they were filed several years into the litigation.” *Kelly*, 2004 UT App. at ¶30. The Court’s rationale for this secondary part of the analysis was explained as follows:

In such cases, the ongoing passage of time makes it increasingly difficult for the nonmoving party to effectively respond to the new allegations or claims. Parties in such circumstances are often hindered by witnesses who have since moved or died, by their shaky memories and recollections, or by documents which have since been lost or destroyed.

Id. at ¶31. The Premium Plaintiffs submits that this case is not typical in this regard, and justifies an exception from this general consideration for several reasons.

First, the Premium Plaintiffs' Amended Consolidated Complaint arises from the same set of facts and under the same contracts that are central to the pending litigation. Indeed, the additional claims under the Amended Consolidated Complaint relate back to the

contractual relationships between the parties that are already at issue. As such, issues related to the passage of time should not bar the Premium Plaintiffs' new claims.

Second, the new related claims should have been admitted into this case in the interests of judicial efficiency and economy. The number of contracts at issue, the understanding of the patent and technology issues, the conduct between the parties, and the voluminous number of records applicable to the claims should only be dealt with by one court and one jury. If the Premium Plaintiffs are forced to bring a new suit, then another court will have to revisit these same issues that have taken so long to determine in this proceeding, which would squander valuable judicial resources.

Third, justice requires the amendment of the Premium Plaintiffs' Complaint. Due to the physical limitations of the parties involved, the Court's decision denying the Premium Plaintiffs leave to amend its Complaint virtually assures that the new claims will never be brought. The primary Plaintiff, Mr. Mr. Gilmer, died in 2006 at the age of 87, and his widow is in no position to bring the newly discovered related claims in new litigation. In a very real sense, the trial court's denial of the right to amend the consolidated complaint amounts to summary judgment against the Premium Plaintiffs on its related claims.

Finally, the trial court erred when it characterized this action as one for an equitable accounting in denying the Premium Plaintiffs leave to amend. As previously set forth, a number of claims are at issue in this proceeding in addition to the Premium Plaintiffs' request for an accounting. Consequently, the Premium Plaintiffs' new claims should not be barred because they exceed the request for an accounting.

**B. The Premium Plaintiffs Did Not Delay in Requesting
Leave to File an Amended Complaint**

In considering whether to grant a motion to amend, the court must also look to the reason offered for the delay in seeking to amend the pleading. This factor focuses on

“whether the moving party had knowledge of the events that are sought to be added.” Utah courts have generally adopted the United States Supreme Court’s narrow rule focusing on whether the motion to amend was filed as the result of a dilatory motive, bad faith, or unreasonable neglect on the part of the movant. While the requirements for finding a dilatory motive, bad faith, or unreasonable neglect have not been expressly defined, the Utah Court of Appeals has correctly noted that “where the party’s prior knowledge was minimal, or where it was instead based on suspicious or inconclusive evidence, the party’s decision to hold off on pleading those allegations until reliable confirmation could be obtained should not serve as grounds for procedural default.”

Swan Creek Vill. Homeowners Ass’n, 2006 UT 22, ¶22.

For the past eight years, MegaDyne has persistently avoided the production of relevant documents. The following establish the Premium Plaintiffs’ diligent efforts from 1999 through 2007 to obtain the document relevant to its claims.

- October 1999: Order to Compel Production of Discovery; (R. 163-34)
- August 2000: MegaDyne’s Motion for Protective Order; (R. 1148-52)
- December 2000: the Premium Plaintiffs’ Motions for Sanctions for Noncompliance with Discovery; (R. 1364-98)
- December 2000: MegaDyne’s Motion to Quash the Premium Plaintiffs’ Subpoenas Duces Tecum; (R. 1440-42)
- June 2001: Order Requiring MegaDyne’s to Allow the Premium Plaintiffs to Review all Documentation Made Available to Special Master and Other Discovery Requests; (R. 1949)
- July 2001- Protective Order issued; (R. 1973-78)

- August 2001: Stipulation and Order re: the Premium Plaintiffs' Access to Master's Documents; (R. 1979-81)
- October 2001: the Premium Plaintiffs' Motion to Compel Document Production and Third Document Production Request; (R. 1996-98)
- November 2001: MegaDyne's Motion for Protective Order; (R. 2266-71).
- February 2002: Order Granting the Premium Plaintiffs' Access to Some Requested Documents and Granting MegaDyne's Motion for Protective Order on Others. Deferred evidentiary hearing on whether special master exceeded the order of reference; (R. 2410-11)
- August 2002: the Premium Plaintiffs' Motion for Sanctions for Discovery Noncompliance; (R. 2606-2959)
- September 2002: Order Deferring Sanctions and Granting the Premium Plaintiffs' Discovery; (R. 3001-05)
- April 2003: the Premium Plaintiffs' Motion to Compel Discovery or Rule 37 sanctions; (R. 3110-3188)
- July 2003: Order Compelling Discovery; (R. 3466-68)
- May 2004: MegaDyne's Motion for Protective Order Denying Discovery; (R. 4400-07)
- September 2004: Bench Ruling ordering MegaDyne's to produce 400 sample invoices; (R. 4656)
- September 2005: Order compelling production of 400 sample invoices; (R. 4724-27)
- August 2007: Parties reached stipulation to access certain sealed documents from MegaDyne's *Aspen Labs* litigation in federal court. (R. 6304)

The Premium Plaintiffs were unaware of its new claims until it received the documents that it had been seeking for eight years. The above-listed events clearly demonstrate that any delay in this case was due to MegaDyne's refusal to cooperate in discovery. Had MegaDyne produced the records initially sought by the Premium Plaintiffs, they would have become aware of its additional claims and been able to assert its new claims much earlier.

Secondly, progress was hindered by the sheer complexity of evaluating the documents that the Premium Plaintiffs eventually obtained. No single source of documents was complete enough to establish the royalties due for the contract years. Determining the scope of damages required assembling and coordinating data from literally thousands of individual records produced from various sources and having accountants generate calculations from the data thus collated. The quantity of royalty units ultimately compiled from discovered sets of documents of individual sales and shipments of coated units numbered over 50,000,000. Not until these tasks were completed did the full extent of the Premium Plaintiffs' underpaid royalties become apparent.

C. MegaDyne Will Not Be Unduly Prejudiced If the Premium Plaintiffs Are Permitted To Amend Their Complaint

The question of prejudice arising from failure to provide timely notice is generally a question of fact, as the Utah Supreme Court has explained:

In deciding on a motion to amend, the trial court should primarily consider whether granting the motion would subject the opposing party to unavoidable prejudice "by having an issue adjudicated for which he had not had time to prepare." . . . Where the amendment would advance a new theory of recovery based almost entirely on facts already in evidence, the court should liberally allow amendment because the opposing party is then generally prepared to address such a

claim. *Aurora Credit Svcs. Inc. v. Liberty West Devel.* 970 P.2d 1273, 1282 (Utah 1998).

This Court has expounded the prejudice rule more fully, as follows.

[A] showing of simple prejudice is not enough to support a denial of a motion to amend. . . . [I]n order to justify the denial of a motion to amend on prejudice grounds, the prejudice "must be undue or substantial prejudice, since almost every amendment of a pleading will result in some 'practical prejudice' to the opposing party."

Kelly 2004 UT App. at ¶31 (internal citations and quotations omitted).

The trial court denied the Premium Plaintiffs' motion to file an amended complaint that it filed *prior* to the deadline for the amendment of pleadings, based on the court's conclusion that this case is ten (10) years old and presently solely an accounting case. As explained above, this case, while including a claim for accounting, also involves claims for breach of contract, unjust enrichment, and misrepresentation. The trial court failed to consider the Premium Plaintiffs' existing legal claims in this action, the deadline for amendment of pleadings or any of the factors relevant to a determination as to the requested amendment. For example, the trial did not consider the fact that the new claim for violation of the Utah Uniform Trade Secrets Act in the Amended Complaint are based on information recently obtained by the Premium Plaintiffs from a third party subpoena after Defendants refused to produce the information to the Premium Plaintiffs.

Under Rule 15, a party should be permitted to amend a complaint based on newly discovered evidence and under the multi-factored test set forth above. Accordingly, the trial court erred when it denied the Premium Plaintiffs leave to amend its Complaint to allow for full and fair litigation of the entire controversy between the parties.


CONCLUSION

The Lower Court misapplied Rule 53 when it struck the Premium Plaintiffs jury demand. Pleading legal and alternatively legal claims in the same Complaint does not justify eliminating the right to a jury trial. The inherent impossibility of the Master's report coupled with the Master's repeated failure to abide by the Order of Reference requires the rejection of his report. Lastly, the lower court did not apply the correct criteria in declining the Motion to Amend the Complaint.

For these compelling reasons, the Master's report should be rejected, the demand for jury trial reinstated, and the Order denying the Motion to Amend reversed.

DATED this 1ST day of December, 2008.

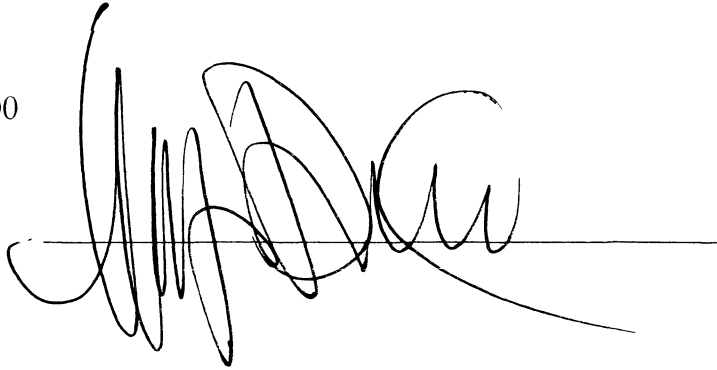
VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: 
Dale F. Gardiner
Scott M. Lilja
Cassie J. Medura
Lisa B. Bohman
Attorneys for Appellants

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 1st day of December, 2008, to the following:

George M. Haley
David R. Parkinson
J. Andrew Sjoblom
HOLME ROBERTS & OWEN
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "J. Andrew Sjoblom", is written over a horizontal line. The signature is stylized with large, sweeping loops and a long, trailing flourish extending to the right.

Addenda

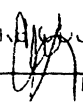
Tab 1

Dale F. Gardiner, #1147
Mark C. Quinn, #6782
O'RORKE & GARDINER, LLC
6965 Union Park Center, Suite 450
Midvale, Utah 84047-6045

Telephone: (801) 569-3131
Facsimile: (801) 569-3434

FILED DISTRICT COURT
Third Judicial District

FEB 12 1999

SALT LAKE COUNTY
By  Deputy Clerk

Attorneys for Plaintiffs

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

KENNETH L. FAILOR; and PREMIUM
PLASTICS, INC., a California Corporation;
HARVEY VAN EPPS GILMER, JR.,

Plaintiffs,

v.

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

Defendant.

ORDER OF REFERENCE

Civil No.: 980907641
Judge: William A. Thorne

Pursuant to Rule 53, Utah R. Civ. P., Plaintiffs' motion to appoint a national accounting firm to serve as a special master in this action, the Consent of Defendant, and good cause appearing therefor, accordingly,

IT IS HEREBY ORDERED:

- Appointment.** John W. Curran, of Ernst & Young, LLP, 60 East South Temple, Salt Lake City, Utah 84111, shall serve as special master in this action until further

order of the Court. The special master will submit an Affidavit of Impartiality certifying that he has not previously worked for, and has no reason to be partial towards, any party or attorney in this action.



2. **Compensation.** The compensation to be paid to the special master shall be approved by the Court based upon a rate of \$300.00 per hour for Mr. Curran and other partners of Ernst & Young, \$200.00 per hour for mid-level assistants and \$125.00 per hour for other assistants, plus reasonable expenses incurred in performing the master's duties. Because Mr. Curran is located primarily in the Seattle office of Ernst & Young, it is anticipated that he will be required to travel to Salt Lake City on occasion. The expenses of such travel will be absorbed by Ernst & Young for six to eight trips during the course of Mr. Curran's duties as special master. The expense of any further trips to Salt Lake City over and above the anticipated six to eight trips will be subject to further negotiation if and when they become necessary. All other travel expenses of the special master beyond travel from Seattle to Salt Lake City will be part of the special master's reasonable expenses to be paid by the parties. Until further order of the Court, each party shall timely pay one-half of the compensation to the master as it becomes due and each party shall also pay one-half of the special master's reasonable expenses. The master shall submit to the Court and counsel for both parties monthly statements itemizing the time and expenses incurred in this proceeding and the work performed. Each party shall have five (5) business days following receipt of the

master's monthly statement to file an objection with the Court concerning any amount included in the statement and, if either party objects, the objection shall be determined before the disputed amount is paid. The master shall not retain his report as security for payments.

3. **Referred Issues.** The issues relating to the amount of the Defendant's products coated and the Defendant's coated products sold under the Agreements (attached as Exhibit A through Exhibit E to Plaintiffs' Complaint) are hereby referred to the master.
4. **Duties.** The special master shall take evidence on, identify, and prepare a report to the Court of his findings as to, the amount of Defendant's products coated and the amount of Defendant's coated products sold under the Agreements. Attached to his report, the special master shall include transcripts of any evidentiary proceedings conducted by the master and copies of any exhibits submitted to the master.
5. **Powers.** The master has and shall exercise the power to do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order. Without limiting the broad scope of the master's powers, such powers shall include the following: He may require the production before him of evidence upon all matters embraced in this reference, including the production of all books, papers, vouchers, documents, and writing applicable thereto, he may put witnesses under oath, and himself examine witnesses and call the parties to the action and examine them under oath provided that he shall not engage in *ex parte* communications with

either party, the parties' counsel or with any owners, employees, agents or representatives of any of the parties except as provided herein. The parties may participate in all discovery proceedings conducted by the master and shall be given adequate notice to sufficiently participate in any discovery proceedings. If either party fails to appear at the time and place established by the master, the master may proceed *ex parte* or, in his discretion, may adjourn the proceedings to a future date giving notice to the absent party of the adjournment. Either party may procure the attendance of witnesses before the master through the issuance and service of subpoenas as provided in Rule 45, Utah Rules of Civil Procedure. If without adequate excuse a witness fails to appear or give evidence, that witness will be subject to punishment as for contempt and subject to the consequences, penalties, and remedies provided in Rules 37 and 45, Utah Rules of Civil Procedure, as determined by the Court. The parties may submit evidence to the master for his consideration in connection with the performance of his duties hereunder.

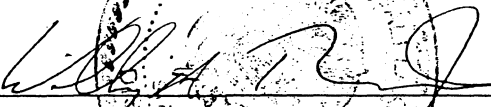
6. **Procedure.**

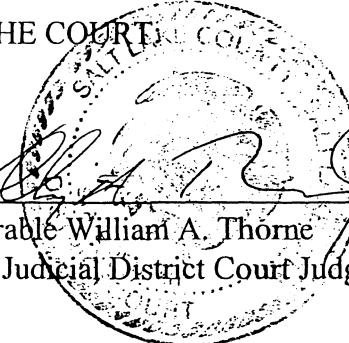
- Twenty (20)*  
- (a) Within ~~ten (10)~~ *Twenty (20)* days after the date of entry of this Order, the master shall meet with counsel for both parties to establish a plan for the preparation of the master's report;
- (b) Within sixty (60) days after the date of entry of this Order, the master shall report to the Court as to the status of his findings and the date on which his report will be completed;

- (c) The master shall submit his report to the Court and counsel for the parties and each party shall have ten (10) days after receipt of the report to submit objections and recommendations to the master concerning its contents;
- (d) After consideration of any such objections and recommendations, the master shall within twenty (20) days submit his final report by filing it with the Clerk of the Court together with the relevant documents, testimony, and other evidence on which it is based, and providing a copy to counsel for each party;
- (e) Each party shall have ten (10) days after receipt of the master's final report to file with the Court any objections to any part of the report. Application to the Court for action upon the report and upon objections to the report shall be by motion and upon notice as described in Rule 6(d), Utah Rules of Civil Procedure. The Court, after hearing upon any objections, may adopt the report or may modify or reject the report in whole or in part or may receive further evidence through hearings or trial or may recommit the report to the master with instructions.

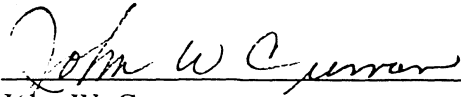
DATED this 11 day of ²⁶~~December~~, 1998.

BY THE COURT


Honorable William A. Thorne
Third Judicial District Court Judge



Approved and Accepted:

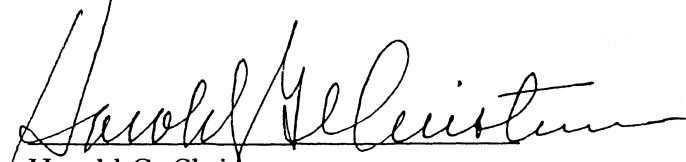


John W. Curran
Special Master


The parties to this action hereby stipulate and consent to the appointment of John W. Curran of Ernst & Young, LLP, as Special Master in this proceeding and also stipulate to and approve the entry of this Order of Reference:

SNOW, CHRISTENSEN & MARTINEAU

O'RORKE & GARDINER, LLC



Harold G. Christensen
Attorneys for Defendant

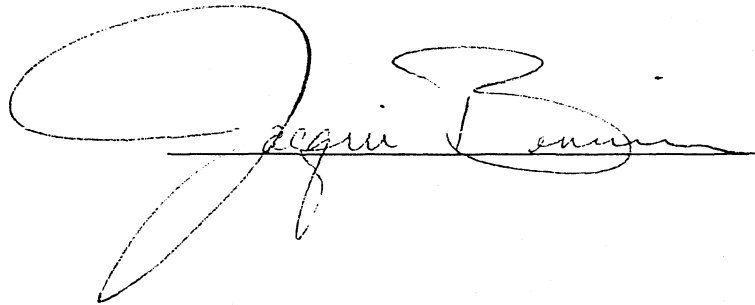


Dale F. Gardiner
Mark C. Quinn
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document **ORDER**
OF REFERENCE was hand-delivered on the 29th day of January, 1999 to the
following:

Harold G. Christensen
Rodney R. Parker
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P. O. Box 45000
Salt Lake City, UT 84145

A handwritten signature in black ink, appearing to read "Rodney R. Parker", written over a horizontal line.

Tab 2

MAY - 6 2008

By CLERK
SALT LAKE COUNTY
Deputy Clerk

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

KENNETH L. FAILOR, et.al., Plaintiffs, vs. MEGADYNE MEDICAL PRODUCTS, INC., a Utah Corporation, Defendant.	ORDER CIVIL NO. 98 090 7641 CN JUDGE L.A. DEVER
---	---

This matter came on for hearing for arguments on pending motions. The motions are noted as:

1. Defendant's motion to strike jury demand of the Plaintiffs.
2. Plaintiff's objection to the final report of the Special Master.
3. Plaintiff's renewed motion to depose the Special Master.
4. Plaintiff's motion for an evidentiary hearing on report of Special Master.
5. Plaintiff's motion to file an amended complaint.

The Plaintiff's were present and represented by Dale F. Gardiner. The Defendant was represented by George Haley. The Court having considered the

arguments and memoranda of the parties, rules as follows:

1. This case involves an accounting issue. The parties previously agreed that a special master was to be appointed and present his report to the Court. Accounting is an equitable remedy and the Plaintiffs are not entitled to a jury on the issue. Defendant's motion to strike the jury demand is granted.

2. Plaintiff's objections to the method of assembling the report of the Special Master are noted. The Court has previously rejected the Plaintiff's objections as they relate to the Special Master's exceeding the scope of the Order of Reference, contacts with the parties, the filing of a work plan and the method of obtaining documents from the Defendant. The Court, once again; denies these objections.

3. Plaintiff's request to depose the Special Master has previously been denied. The Plaintiff has presented no new grounds for the Court to revisit this denial. Plaintiff's Motion to Depose the Special Master is denied.

4. Plaintiff's Motion for a Hearing on the Report of the Special Master. The Utah R. Civ. P. 53 provides that the Court is to accept the Report of the Special Master's findings of fact unless they are clearly erroneous. An objection to the report has been made accompanied by a request for a hearing. Based upon the allegations of error coupled with a report from the Plaintiff's expert, the Court determines that it is proper to grant the Plaintiff's request for a hearing on the Report of the Special Master.

The Court has some concerns about the scope of such a hearing. Therefore, it directs that the parties meet, agree to a proposed format and consult with the Court to finalize the procedures to be followed.

5 Plaintiff's Motion to file an Amended Complaint is denied. This case is ten years old. The new issues raised by the Amended Complaint cannot be addressed in an accounting issue case. If the Plaintiff's desire to raise these new issues, they will have to do it in a separate action.

THIS IS THE ORDER OF THE COURT.

Dated this 6th day of May, 2008.

BY THE COURT

A handwritten signature in black ink, appearing to read "L. A. Dever", written over the printed name.

L. A. DEVER
Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed,
postage prepaid, on the 6th day May, 2008, to the following:

George M. Haley
J. Andrew Sjoblom
HOLME ROBERTS & OWEN, LLP
299 South Main Street, Ste 1800
Salt Lake City, UT 84111-5800

Dale F. Gardiner
VANCOTT BAGLEY CORNWALL & McCARTHY
36 South State Street Ste 1900
Salt Lake City, UT 84111

John W. Curran, Special Master
ERNST & YOUNG, LLP
999 Third Avenue, Suite 3500
Seattle, WA 98104

Debbie Peterson
Deputy Court Clerk

Tab 3

FILED
JUN 2 - 2008
U.S. DISTRICT COURT

Kenneth L. Failor;
Premium Plastics, Inc.;
and Mary Gilmer,

v.

Respondents.

Case No. 20080459-CA

JUN 27 2038,

By SALT LAKE COUNTY
Deputy Clerk

This matter is before the court on a petition for permission to appeal from an interlocutory order filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the petition for permission to appeal is GRANTED. This court will notify the parties upon setting a briefing schedule.

DATED this 26th day of June, 2008.

FOR THE COURT:

Carolyn B. McHugh
Carolyn B. McHugh, Judge

Tab 4

American Medical Products, Incorporated

6203 Smelter Street • Murray, Utah 84107 • (801) 958-6574

April 20, 1988

Mr. Kenneth L. Failor
3434 West 12600 South
Riverton, Utah 84065

Re: Compensation Agreement

Dear Ken:

The purpose of this letter is to memorialize our mutual agreement regarding the payment of compensation to you by American Medical Products, Inc. ("AMP") and certain other matters. The agreement we have reached is as follows:

1. Term and Scope. This Agreement shall commence upon the execution hereof by you, and shall continue for a term of nine (9) years thereafter, unless earlier terminated as set forth in Paragraph 7 hereof. The parties hereto acknowledge and agree that this Agreement and the compensation to be paid to you shall apply only to those products of AMP commonly known as the "E/Z Clean Cautery Tip", the "E/Z Clean Needle Tip", the "E/Z Clean Extended Blade Tip" and the "E/Z" Clean Ball Electrode" (collectively, the "AMP Products"). The parties hereto specifically agree that this Agreement shall supersede, cancel and terminate that certain Agreement, dated as of May 12, 1987, by and between AMP, you and KF Manufacturing; provided, however, that you agree to continue to assist AMP in facilitating the manufacture of the AMP Products until the definitive exclusive manufacturing agreement referred to in Paragraph 4 hereof has been executed.

2. Compensation. AMP shall pay you compensation according to the following schedule for each unit of AMP Products actually sold to customers of AMP during the term hereof:

Mr. Kenneth L. Failor
April 20, 1988
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Years 1-3	\$0.08/unit
Year 4	0.07/unit
Year 5	0.06/unit
Years 6-9	0.05/unit

Such compensation shall be payable in arrears, and will be paid on a monthly basis as, if and when AMP receives payment for the AMP Products from its customers.

3. Inspection of Books and Records. Upon reasonable notice, during normal business hours, and in the offices and presence of an officer or representative of AMP, you shall be entitled to inspect those books and records of AMP pertaining to actual sales of the AMP Products to customers of AMP to ensure compliance herewith.

4. Release of PPI. In consideration of the compensation to be paid hereunder, you hereby agree to unconditionally release and discharge in writing PPI from all of its obligations under that certain Manufactures License Agreement dated as of _____, 1987 by and between PPI and KF Manufacturing, the parties hereto intending that such Agreement be superseded, cancelled and terminated hereby. Contemporaneously with the execution hereof, you shall execute and deliver to the attorney of AMP the form of Release attached hereto as Exhibit A, which shall be held by such attorney pending the negotiation of a definitive exclusive manufacturing agreement by and between AMP and PPI.

5. Reaffirmation. You hereby specifically reaffirm to AMP that you have assigned to AMP all of your right, title and interest in and to the AMP Products, the process whereby the non-stick surface coating is applied to the AMP Products (the "Process") and all patent and trademark applications made regarding the AMP Products and the Process, and any and all derivatives, improvements and modifications to the AMP Products and the Process. Henceforth, your only interest with respect to such matters and AMP shall be the receipt of the compensation set forth in Paragraph 2 hereof.

6. Confidentiality. You hereby specifically reaffirm your obligations of confidentiality to AMP as set forth in that certain Agreement of Confidentiality dated as of March 20, 1987, by and between AMP and you.

Mr. Kenneth L. Failor
April 20, 1988
Page 3

7. Termination and Buy-Out Provision. This Agreement may be terminated prior to the lapse of the term set forth in Paragraph 1 hereof in the event that all of the issued and outstanding common stock of AMP is bought by any other person or entity. In such an event, AMP shall exert best efforts to cause any such purchaser to assume all of the obligations of AMP hereunder. If such purchaser does not agree to assume such obligations, you shall receive the present value of the amount resulting from the operation of the following formula:

$$(AMV)(COMP)(y)$$

where

AMV = the aggregate average monthly volume of AMP Products sold during the twelve month period immediately preceding such sale of AMP;

COMP = the prevailing rate of compensation payable to you during the year in which any such sale of AMP occurs; and

y = the number of years remaining in the term hereof from the date of any such sale of AMP, as determined by the following schedule:

Years 1-4	y = 5
Year 5	y = 4
Year 6	y = 3
Year 7	y = 2
Year 8	y = 1

the parties hereto understanding that the provisions of this Section 7 shall be inapplicable to any sale of AMP occurring in the final twelve months hereof.

The amount payable pursuant to this Section 7, if any, shall be paid by AMP as, if and when AMP receives the proceeds of any such sale from its purchaser.

8. Assistance to AMP. You agree to assist AMP from time to time in facilitating and preserving the relationship between AMP and PPI, to ensure that the manufacturing process of the AMP Products is accomplished in an orderly, timely and workmanlike manner.

Mr. Kenneth L. Failor
April 20, 1988
Page 4

9. Entire Agreement. This Agreement and all exhibits hereto constitute the complete and entire agreement between the parties hereto with respect to the subject matter hereof. The execution and delivery hereof shall not constitute a waiver or relinquishment on the part of AMP of any of its rights relating to any matters giving rise to this Agreement. No statement or agreement, oral or written, made prior to or contemporaneously with the execution hereof and no course of dealing or practice by either party hereto prior to or after the execution hereof shall vary or modify the written terms of this Agreement.

10. Amendment. This Agreement may be amended only by a written document or instrument signed by the parties, stating that such document is intended to amend the provisions of this Agreement.

11. Notices. Any notices, requests, demands or other communications permitted or required to be made shall be delivered personally, by telegram, telex or by certified U.S. mail, postage prepaid, at the following addresses:

To AMP: American Medical Products, Inc.
6202 Stratler Street
Murray, Utah 84107

Attn: Matthias R. Sansom
Vice President

With copy to: Jeffrey D. Wilson, Esq.
Winstead, McGuire, Sechrest &
Minick, P.C.
5400 Renaissance Tower
Dallas, Texas 75270

To Failor: Kenneth L. Failor
3434 West 12600 South
Riverton, Utah 84107

With copy to: Thomas D. Neeleman, Esq.
1061 East 2100 South
Salt Lake City, Utah 84106

12. Assignment. You shall not assign this Agreement or any of your rights or obligations hereunder without the express prior written consent of AMP.

Mr. Kenneth L. Failor
April 20, 1988
Page 5

13. Transactional Expenses. Each party hereto shall bear its own costs and expenses incurred in connection with the preparation, negotiation, execution and delivery of this Agreement.


14. Binding Effect. This Agreement shall inure to the benefit of your heirs, successors and assigns.

15. Governing Law. This Agreement is executed in, performable at least in part in and shall be governed by and construed in accordance with the laws of the State of Utah.

Your execution, in the space provided below, shall evidence that you have read, understood and agreed to be bound by the provisions hereof. Please execute the three (3) copies of this Letter Agreement and the Release attached thereto as Exhibit A, and promptly return two (2) executed copies to the undersigned.

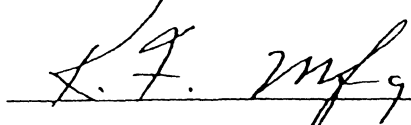
Sincerely,

AMERICAN MEDICAL PRODUCTS, INC.

By: 
Matthias R. Sansom,
Vice President

AGREED AND ACCEPTED: April 20, 1988.

KENNETH L. FAILOR, Individually

 4-22-88

KF MANUFACTURING


By:  4-22-88
Kenneth L. Failor,
President

Exhibit A

RELEASE

For value received, the undersigned hereby unconditionally releases and discharges Premium Plastics, Inc. ("PPI") and its officers, director and shareholders from all of its obligations to the undersigned pursuant to that certain Manufactures License Agreement by and between the undersigned and PPI, dated as of _____, 1987, relating to the manufacture of certain electro-surgical and medical instruments by PPI on behalf of American Medical Products, Inc. ("AMP"); shall permit and not object to or in any way interfere with the negotiation, preparation, execution and delivery of an exclusive manufacturing agreement between AMP and PPI; and acknowledges and affirms that PPI and its officers, directors and shareholders shall have no further obligation or liability of any nature whatsoever to the undersigned.

IN WITNESS WHEREOF, the undersigned has executed and delivered this Release as of April __, 1988.

KENNETH L. FAILOR,
Individually

Kenn. Failor 4-22-88

KF MANUFACTURING, INC.

By: Kenneth L. Failor 4-22-88
Kenneth L. Failor,
President

ADDENDUM TO COMPENSATION AGREEMENT

This addendum dated this 21st day of April, 1988, pertains to that certain Compensation Agreement ("The Agreement") dated April 20, 1988, by and between American Medical Products Inc. ("AMP") and Kenneth L. Failor and KF Manufacturing ("KFM").

NOTWITHSTANDING paragraph 9 of the agreement and pursuant to paragraph 10 of the agreement and in consideration of the mutual promises contained therein the parties additionally agree as follows:

1) Kenneth L. Failor or KFM shall at all times be considered independent contractors for the purpose of this agreement.

2) As a condition of the pending exclusive manufacturing agreement to be entered into between AMP and PPI referenced in paragraph 4 of the agreement, AMP shall require that PPI Provide Kenneth L. Failor with invoice copies detailing all purchases of AMP products by AMP.

3) For the purposes of clarification, the following shall be included in Paragraph 7.

a. the discount rate to be applied to the buy-out funds shall be 6.5% (six and one-half percent.)

b. for the purposes of calculating AMV, the monthly volume during the initial 12 months of the contract period shall be considered to be the greater of 125,000 units per month or the number of units actually sold.

4) The parties hereby relinquish, release, and agree to hold each the other harmless from any causes of action real or imagined which may have arisen as a result of or in connection with past dealings between the parties.

AGREED AND ACCEPTED: April 21, 1988.

KENNETH L. FAILOR, Individually

Kenneth Failor

KF MANUFACTURING

By: Kenneth Failor 4-21-88
Kenneth L. Failor
President

AMERICAN MEDICAL PRODUCTS, INC.

By: Matthias R. Sansom
Matthias R. Sansom
Vice President

ADDENDUM TO COMPENSATION AGREEMENT

This addendum dated this _____ day of April, 1988, pertains to that certain Compensation Agreement ("The Agreement") dated April 20, 1988, by and between American Medical Products Inc. ("AMP") and Kenneth L. Failor and KF Manufacturing ("KFM").

NOTWITHSTANDING paragraph 9 of the agreement and pursuant to paragraph 10 of the agreement and in consideration of the mutual promises contained therein the parties additionally agree as follows:

1) Kenneth L. Failor or KFM shall at all times be considered independent contractors for the purpose of this agreement.

2) As a condition of the pending exclusive manufacturing agreement to be entered into between AMP and PPI referenced in paragraph 4 of the agreement, AMP shall require that PPI provide Kenneth L. Failor with invoice copies detailing all purchases of AMP products by AMP.

3) For the purposes of clarification, the following shall be included in Paragraph 7.

a. the discount rate to be applied to the buy-out funds shall be 6.5% (six and one-half percent.)

b. for the purposes of calculating AMV, the monthly volume during the initial 12 months of the contract period shall be considered to be the greater of 125,000 units per month or the number of units actually sold.

4) The parties hereby relinquish, release, and agree to hold each the other harmless from any causes of action real or imagined which may have arisen as a result of or in connection with past dealings between the parties.

AGREED AND ACCEPTED: April _____, 1988.

KENNETH L. FAILOR, Individually

KF MANUFACTURING

By: _____
Kenneth L. Failor
President

AMERICAN MEDICAL PRODUCTS, INC.

By: _____
Matthias R. Sansom
Vice President

Tab 5

EXCLUSIVE PRODUCT COATING AGREEMENT

THIS EXCLUSIVE PRODUCT COATING AGREEMENT is entered into as of the 1st day of June, 1988, by and between American Medical Products, Inc., a Utah corporation ("AMP"), and Premium Plastics, Inc., a California corporation ("PPI").

W I T N E S S E T H:

WHEREAS, AMP has conceived and developed the concept of applying a non-stick surface (the "Coating") to certain electro-surgical instruments used in performing certain surgical procedures (the "Process Technology"), has developed such coated electro-surgical instruments (the "AMP Products") for marketing purposes and has applied for patents (the "Patents") with respect to both the Process Technology and the AMP Products;

WHEREAS, AMP has consulted with PPI with respect to the coating of the AMP Products in commercial quantities;

WHEREAS, PPI is capable of coating the AMP Products in commercial quantities for AMP;

WHEREAS, AMP desires to engage and employ PPI, and PPI desires to accept such engagement, as the exclusive product coater of the AMP Products for and on behalf of AMP, to apply the Coating to the AMP Products by means of the Process Technology; and

WHEREAS, AMP and PPI have determined that such engagement is in their respective and mutual best interests, and that this Agreement should supersede, cancel and terminate all previous understandings and arrangements with respect to the subject matter hereof.

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants and promises set forth herein, and for other good and valuable consideration, the delivery, receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Grant of Exclusive Product Coating Rights. Subject to the terms and conditions set forth herein, AMP hereby engages and employs PPI, and PPI hereby accepts such engagement and employment, as the only person authorized to apply the Coating to the AMP Products by means of the Process Technology during the term hereof. Upon receipt of an order or proposed order, AMP shall notify PPI of the tentative delivery date to PPI and the desired completion date for applying the Coating to the AMP

Products. PPI will acknowledge the best and fastest delivery date that it can meet. In consideration of such exclusive employment and engagement, PPI shall exert best efforts in good faith to satisfy on a timely basis the delivery dates requested by AMP and its customers. PPI shall not apply the Coating or use the Process Technology (or any subsequently-developed refinements of either of them) to electro-surgical cautery instruments for the benefit of any person or entity other than AMP without the express written consent of AMP, which consent may be withheld in the sole and absolute discretion of AMP. Nothing herein shall be construed to limit the ability of PPI to apply coating materials for other products that are not electro-surgical cautery instruments.

2. Term. Unless earlier terminated as provided herein, the initial term of this Agreement shall commence as of the date first written above, and shall continue in full force and effect for a period of ten (10) years therefrom. Thereafter, this Agreement shall be deemed to have been automatically renewed and extended under the same provisions hereof for an additional, successive period of ten (10) years unless notice is given in writing thirty (30) days prior to the lapse of such initial term by either party evidencing the intent of such party not to renew and extend the term hereof.

3. Compensation to PPI.

(a) The full and sole compensation to which PPI is entitled for coating the AMP Products under this Agreement shall, for all of the AMP Products identified below that are actually received by AMP pursuant hereto, be calculated as follows:

(i) For volume of less than 10,000 units per month:

E/Z Clean Cautery Tip	-	<u>40</u>	Cents/Tip
E/Z Clean Needle Tip	-	<u>40</u>	Cents/Tip
E/Z Clean Extended Blade Electrode	-	<u>70</u>	Cents/Electrode
E/Z Clean Ball Electrode	-	<u>45</u>	Cents/Electrode

(ii) For volume greater than 10,000 but less than 125,000 units per month:

E/Z Clean Cautery Tip	-	<u>33</u>	Cents/Tip
E/Z Clean Needle Tip	-	<u>37</u>	Cents/Tip
E/Z Clean Extended Blade Electrode	-	<u>66</u>	Cents/Electrode
E/Z Clean Ball Electrode	-	<u>43</u>	Cents/Electrode

Laprosopic Tip

**.75*

(iii) For volume greater than 125,000 units per month:

E/Z Clean Cautery Tip	-	<u>25</u>	Cents/Tip
E/Z Clean Needle Tip	-	<u>28</u>	Cents/Tip
E/Z Clean Extended Blade Electrode	-	<u>53</u>	Cents/Electrode
E/Z Clean Ball Electrode	-	<u>33</u>	Cents/Electrode

Laprosopic Tip

**.62*

provided, however, that the compensation applicable to the E/Z Clean Extended Blade Electrode and the E/Z Clean Ball Electrode set forth above shall be only for the first three (3) months after the commencement of production thereof, to enable the resolution of certain technical production difficulties, the parties hereto agreeing that the level of compensation established at the end of such three (3)-month period shall apply until the first annual review of such compensation referred to in Subsection (b) below, so that thereafter the compensation relating to all of the AMP Products will be reviewed at the same time. PPI agrees that it shall furnish duplicate copies of all such invoices to Kenneth L. Failor.

(b) The parties hereto agree that they shall in good faith review such compensation on the first annual anniversary hereof (and at each annual anniversary thereafter throughout the term hereof), and shall, at each such time, adjust such compensation as the parties hereto may mutually agree. If no agreement with respect to such compensation is reached after thirty (30) days after such anniversary, this Agreement may be terminated by either AMP or PPI. The parties hereto expressly understand and agree that nothing in this Agreement is intended or shall be construed as a grant of any right, title or interest to PPI in or to the Process Technology as it relates to the AMP Products, the AMP Products or the Patents, or of any equity interest in AMP.

(c) The AMP Products shall be shipped FOB Paramount, California or, in the event the production and coating facilities of PPI are relocated, FOB Plant. Shipping costs for the AMP Products to and from PPI shall be the sole responsibility of AMP. Payment of all invoices submitted by PPI to AMP shall be on the terms "Net Due End of Month Proximate." There shall be a minimum order charge of Forty Dollars (\$40.00) per invoice.

4. Relation of the Parties. PPI shall at all times during the term hereof have the status of an independent contractor. Nothing herein shall be construed to create a relationship of principal and agent or of master and servant between AMP and PPI, or create any liability in either party for the acts or omissions of the other, or grant any right to either party to commit the other to any obligation to anyone else.

5. Volume Requirements. PPI acknowledges and agrees that, as the exclusive product coater of the AMP Products, it shall timely and in a workmanlike manner coat that quantity of AMP Products as AMP and PPI shall specify from time to time, PPI understanding that the timetable for such product coating may change from time to time, and that time is of the essence in this Agreement. PPI shall exert best efforts in good faith and shall take all necessary and proper steps from time to time to ensure that any and all such timetables are satisfied. There shall be no minimum quantity requirements applicable to this Agreement; provided, however, that AMP shall pay the minimum order charge specified in Section 3(c) hereof per run of the AMP Products. In the event that PPI is unable to satisfy any such timetables, AMP shall be entitled, at its sole and exclusive option, to retain the services of other persons or entities to the extent necessary to timely satisfy the quantity requirements of AMP, and PPI shall cooperate with AMP and such other person or entity in any such event.

6. The Process Technology. Immediately upon the execution and delivery of this Agreement, PPI shall furnish to AMP a full, precise, complete and detailed written copy of the Process Technology (including, without limitation, the detailed sequential steps involved in successfully utilizing the Process Technology and the ingredients or materials used in connection therewith). PPI acknowledges that the concept of applying the Coating to the AMP Products by means of the Process Technology is a proprietary asset of AMP as it applies to the AMP Products, and that all information not in the public domain relating to such concept shall be surrendered to AMP upon the termination of this Agreement or upon the death or incapacity of Mr. Gilmer, whichever occurs earlier. PPI and Mr. Gilmer agree to cooperate with AMP to any extent that may be necessary to augment or perfect the applications for the Patents, and AMP agrees to

reimburse PPI for reasonable costs and expenses incurred in providing such assistance, if any.

7. Acquisition of PPI by AMP. PPI acknowledges that AMP has expressed an interest in acquiring PPI. The matter of any such acquisition shall be the subject of future negotiations and agreements by and between AMP and Harvey Van Epps Gilmer, Jr., his successors, heirs and assigns.

8. Events of Default. A material breach of any of the terms, conditions, obligations or performances of this Agreement, or a succession of such breaches which are not of themselves material but have a cumulative effect that constitutes a material breach hereof shall, unless cured within thirty (30) days of the receipt of written notice thereof, constitute an event of default hereunder, and shall entitle the non-defaulting party to (i) pursue any applicable legal and equitable remedies, including specific performance, incidental and consequential damages and the recovery of reasonable attorneys' fees; and (ii) in its sole and absolute discretion, terminate this Agreement. For purposes of this Section 8, a material breach of this Agreement shall be defined to include, but is not limited to, (x) the failure of PPI to satisfy the timeliness, quality or volume requirements of AMP, (y) the failure of the representation and warranty of PPI set forth in Section 14(f) hereof to be true and correct in all material respects at any time during the term hereof and (z) the bankruptcy or insolvency of PPI. All of the rights, remedies and powers of the parties hereunder shall be deemed cumulative and not exclusive of any other rights, remedies and powers available at law or in equity.

9. Confidentiality.

(a) PPI shall not disclose the terms and conditions of this Agreement, its relationship with or identity of AMP, or any information regarding the Coating or the Process Technology as they relate to AMP Products, the AMP Products, the Patents, other proprietary information of AMP, know-how, sketches, formulae, reports, processes, drawings, notes, technical expertise, technical or non-technical data, engineering or design, marketing or sale information, programs or any translations, copies or reproductions thereof to any person or entity under any circumstances whatsoever without the express prior written consent of AMP, which consent may be withheld in the sole and absolute discretion of AMP.

(b) All of the information described in Subsection (a) above that is in the possession of PPI during the term hereof shall be plainly and conspicuously marked as "CONFIDENTIAL" by PPI and shall be preserved and protected

by means of such reasonable and prudent precautions, safeguards and security measures as are necessary in the circumstances including, but not limited to, (i) restriction of public access to the premises of PPI where (A) such information is kept or stored, (B) the Coating and the Process Technology is used to coat the AMP Products; and (C) the AMP Products are stored prior to shipment to AMP; (ii) execution and delivery to PPI (with copies to AMP) of confidentiality agreements by each employee or agent of PPI; and (iii) reasonable and prudent steps to ensure the security of the premises of PPI both during and after business hours; and (iv) all other necessary and proper precautions and safeguards to avoid any possible deliberate or inadvertent disclosure of such information to any person or entity.

(c) The obligation of confidentiality set forth in this Section 9 shall survive the termination of this Agreement for a period of five (5) years.

10. Force Majeure. No failure or omission by either AMP or PPI in the performance of any obligation hereunder shall be deemed a breach of this Agreement or create any liability for damages if such failure or omission shall arise from any cause beyond the control or influence of either AMP or PPI, including the action of or compliance with any laws, rules, regulations, orders or decrees by any governmental authority prohibiting the use of the Process Technology or the Coating or its constituent chemical elements for the coating of electro-surgical instruments or otherwise or the revocation of any requisite approvals, licenses, permits or consents relating to the Coating, the Process Technology, the Patents or the AMP Products, or caused by any natural disaster, civil unrest, act of war or labor dispute.

11. Trademarks and Tradenames of AMP. Nothing herein shall be construed as the grant of any right, title, interest, license or permission in or for the use by PPI of any of the trademarks, tradenames, service marks or logos of AMP in connection with any aspect of the business of PPI without the express prior written consent of AMP, which consent may be withheld in the sole and absolute discretion of AMP.

12. The Patents. PPI understands and acknowledges that (i) AMP has applied for patents covering both the AMP Products and the Process Technology; (ii) such applications are presently pending; (iii) if granted, the Patents will be the sole and absolute property of AMP; and (iv) nothing herein shall be construed as the grant to PPI of any right, title or interest in or to the Patents. PPI hereby agrees to cooperate with and assist AMP as needed to more fully perfect such applications and shall comply with any request for information made by AMP in

connection therewith. AMP shall reimburse any reasonable expenses incurred by PPI in providing such assistance, if any.

13. Assignment. PPI shall not assign, in whole or in part, this Agreement or any monies or other rights, benefits or obligations hereunder without the prior written consent of AMP, which consent may be withheld in the sole and absolute discretion of AMP. Any assignment as to which such prior written consent has not been given by AMP shall be null and void. No assignment of this Agreement by reason of the acquisition of PPI by another person or entity shall be made unless such other person or entity provides satisfactory assurances to AMP of its ability to perform the provisions of this Agreement and executes and delivers a copy of this Agreement to AMP. The acceptance of any such assurances shall be at the sole and absolute discretion of AMP.

14. Representations and Warranties of PPI. In addition to those representations and warranties set forth in Section 7 hereof, PPI hereby represents, certifies and warrants to AMP that:

(a) PPI is a corporation duly organized, validly existing and in good standing under the laws of the State of California;

(b) The execution and delivery by PPI of this Agreement has been duly and validly authorized by all requisite corporate action, and PPI has all requisite power and authority to perform its obligations, duties and liabilities hereunder;

(c) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated herein, nor compliance with the terms hereof will conflict with, result in a breach of, constitute a default under or violate the terms of the Articles of Incorporation or Bylaws of PPI, or any law, rule, regulation, judgment, decree, contract, agreement or order to which PPI is a party or by which PPI or any of its assets are bound;

(d) None of the employees of PPI are represented by any union or subject to any collective bargaining agreement;

(e) PPI is in compliance with all applicable federal, state and local laws, ordinances, rules and regulations with respect to the business conducted by it and the ownership of its assets;

(f) The authority and right of PPI to use and apply the Coating and the constituent chemical elements thereof

remains in full force and effect, and has not been revoked by any person or entity having proprietary rights thereto through which PPI has received its right and authority, the parties hereto intending that the loss or revocation of any such authority and right from any such person or entity shall constitute an event of default hereunder; and

(g) This Agreement constitutes the valid and binding obligation of PPI, enforceable against PPI in accordance with the terms hereof, except as such enforcement may be limited by any applicable bankruptcy, reorganization, insolvency, moratorium or other laws affecting creditors' rights generally.

15. Representations and Warranties of AMP. AMP hereby represents, certifies and warrants that:

(a) AMP is a corporation duly organized, validly existing and in good standing under the laws of the State of Utah;

(b) The execution and delivery by AMP of this Agreement has been duly and validly authorized by all requisite corporate action, and AMP has all requisite power and authority to perform its obligations, duties and liabilities hereunder;

(c) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated herein, nor compliance with the terms hereof will conflict with, result in a breach of, constitute a default under or violate the terms of the Articles of Incorporation or Bylaws of AMP, or any law, rule, regulation, judgment, decree, contract, agreement or order to which AMP is a party or by which AMP or any of its assets are bound; and

(d) This Agreement constitutes the valid and binding obligation of AMP, enforceable against PPI in accordance with the terms hereof, except as such enforcement may be limited by any applicable bankruptcy, reorganization, insolvency, moratorium or other laws affecting creditors' rights generally.

16. Inspections by AMP. PPI shall permit the representatives of AMP to visit and tour the premises of PPI and inspect the AMP Products, during normal business hours, upon reasonable notice.

17. Quality Control. PPI shall establish, implement and enforce such standards, procedures and inspections of quality

control as are necessary to ensure that the AMP Products coated by PPI are of first quality and are being coated in a workmanlike manner. AMP shall have the right, exercisable in its sole and absolute discretion, to reject or revoke acceptance of any AMP Products not satisfying its specifications or quality control standards.

18. Integration. This Agreement constitutes the complete and entire agreement between the parties hereto and is intended to supersede any and all prior agreements with respect to the subject matter hereof. No other previous statement, agreement or understanding, oral or written, and no course of dealing or practice by either party hereto shall vary or modify the written terms hereof. The parties hereto agree and intend that this Agreement shall supersede, cancel and terminate that certain Exclusive Manufactures Agreement by and between PPI and KF Manufacturing, and PPI hereby acknowledges receipt of a written Release with respect thereto from Kenneth L. Failor and KF Manufacturing, attached hereto as Exhibit A.

19. Amendments. This Agreement may be amended only by a written document or instrument signed by the parties hereto, stating that such document or instrument is intended to amend the provisions hereof.

20. Notices. Any notices, requests, demands or other communications permitted or required to be made pursuant to this Agreement shall be delivered personally, by telegram, telex or by certified U.S. mail, return receipt requested, postage prepaid, at the following addresses:

To AMP: American Medical Products, Inc.
6202 Stratler Street
Murray, Utah 84107

Attention: Matthias R. Sansom,
Vice President

with a copy to: Jeffrey D. Wilson, Esq.
Winstead, McGuire, Sechrest
& Minick, P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

To PPI: Premium Plastics, Inc.
15542 Vermont Avenue
Paramount, California 90723

Attention: Harvey Van Epps Gilmer, Jr.

To Kenneth L. Failor:
(duplicate copies of
invoices only)

Mr. Kenneth L. Failor
3434 West 12600 South
Riverton, Utah 84065

21. Binding Effect. The provisions of this Agreement shall, whether or not so expressed, be binding upon and shall inure to the benefit of and be enforceable by and against the parties hereto and their respective successors, assigns and heirs.

22. No Implied Waiver. No action or inaction by the parties hereto with respect to any of the covenants, conditions or obligations hereof shall constitute a waiver or relinquishment for the future of any right, covenant, condition or option contained herein unless there exists a written waiver of rights duly executed by AMP and PPI. Any waiver of performance in one instance shall not constitute a waiver in any other instance whether before or after the execution of such waiver, and any such waived provisions shall remain in full force and effect in all other circumstances.

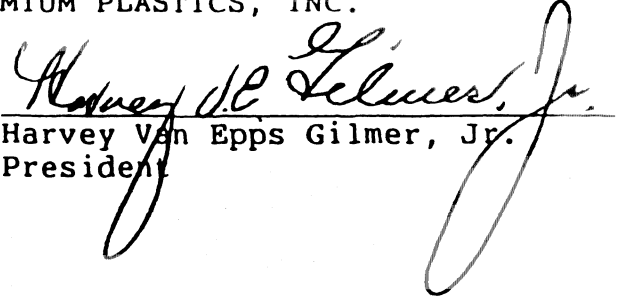
23. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date and year first written above.

AMERICAN MEDICAL PRODUCTS, INC.

By: 
Matthias R. Sansom
Vice President

PREMIUM PLASTICS, INC.

By: 
Harvey Van Epps Gilmer, Jr.
President

Tab 6

AGREEMENT

This Agreement is made and entered into this 26 day of March, 1991, by and between MegaDyne Medical Products, Inc., a Utah corporation and prior to a name change known as American Medical Products, Inc. (MegaDyne), and Premium Plastics, Inc., a California corporation (PPI) and Harvey Van Epps Gilmer Jr., an individual (Gilmer).

WHEREAS, MegaDyne has conceived and developed the concept of applying a Teflon non-stick surface (Coating) to certain electro-surgical instruments used in performing certain surgical procedures (the Process Technology), has developed such coated electro-surgical instruments (the MegaDyne Products) for marketing purposes and has received the patents (the Patents) for both the Process Technology and MegaDyne Products, and

WHEREAS, MegaDyne and PPI previously entered into an agreement as of the 1st day of June, 1988 (the 1988 Agreement), pursuant to which PPI was granted and accepted, under the terms and conditions of the 1988 Agreement, rights as the exclusive product coater of MegaDyne Products using the Process Technology, and

WHEREAS, Gilmer is president and sole or majority shareholder of PPI, and desires to sell his business, and

WHEREAS, MegaDyne desires to insure the availability of Gilmer to provide technical support and consultation services to MegaDyne after the sale of PPI or such earlier dates as hereinafter provided, and

WHEREAS, PPI and Gilmer, pursuant to the 1988 Agreement and performance thereunder, have been provided with and have obtained information, knowledge and experience in connection with MegaDyne Products, the Process Technology and the Patents, and

WHEREAS, MegaDyne desires to assemble a plant, equipment, knowledge and technology with which to itself apply the Coating to MegaDyne Products by means of the Process Technology and desires to engage Gilmer as a consultant, upon the terms and conditions contained herein, to provide MegaDyne with direction, knowledge, expertise and experience to apply the Coating with the same expertise and competence heretofore accomplished by PPI, and

WHEREAS, all parties desire and are in agreement that the 1988 Agreement be modified and continued as hereinafter provided,

NOW, THEREFORE, in consideration of the promises, the terms and conditions hereof and other good and valuable consideration, the delivery, receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. CONDITION PRECEDENT. The sale of PPI is the condition precedent ("Condition Precedent") to the modification of the 1988 contract and all new duties and obligations imposed by this contract on the parties. The sale of PPI is defined as the close of escrow between Gilmer and the new buyer(s) that transfers ownership and control of PPI or the majority of its assets to the new buyer(s) regardless of the structure of the sale between Gilmer and the new Buyer. In connection with this Condition Precedent PPI and Gilmer:

A. Represent, warrant and agree that PPI presently has and at all times prior to completion by Gilmer of the services to be performed by him in paragraphs 3, 4, and 5 hereof, PPI will have in its employment a person other than Gilmer who is and will be as thoroughly familiar with the Process Technology and all aspects of application of the Coating to MegaDyne surgical instruments as is Gilmer. Such other person shall be able to and will perform the services referred to in paragraphs 3, 4, and 5 hereof in the event Gilmer should die or become incapacitated prior to completion of such services himself;

B. Agree if Gilmer shall die or become permanently incapacitated prior to occurrence of the Condition Precedent and completion of the paragraphs 3, 4, and 5 services, then the Condition Precedent shall immediately terminate, if it has not already occurred, and PPI and/or Gilmer shall cause the paragraphs 3, 4, and 5 services to forthwith be performed by such other person. Gilmer shall be deemed permanently incapacitated if by reason of accident, illness or otherwise if, after a six month period from the date of the accident, illness or otherwise he is unable to reasonably and regularly perform those tasks and duties at PPI which he is and has been regularly performing prior to the accident, illness or otherwise happening.

C. Agree that if the Condition Precedent has not otherwise occurred or been terminated within 3 years from the date of execution hereof, then the Condition Precedent shall terminate at the end of such three year period.

2. MODIFICATION AND CONTINUANCE OF 1988 AGREEMENT. The designation and grant in the 1988 Agreement of and to PPI as the exclusive products coater and the only person or entity authorized to apply the Coating to MegaDyne Products is hereby modified on the happening of the Condition Precedent, and then PPI shall no longer the only person or entity authorized to apply the Coating to MegaDyne Products by means of the Process Technology. Thereafter, MegaDyne shall have first right to apply the Coating to MegaDyne Products by means of the Process Technology at and through use of its own facilities and employees or a Designee. PPI shall be relieved of all obligations imposed upon it under the 1988 Agreement for all MegaDyne Products for which PPI does not apply the Coating to and to which MegaDyne or a MegaDyne Designee applies the Coating as in this paragraph provided. All obligations imposed under the 1988 Agreement shall continue to be imposed upon and shall be performed by PPI for all MegaDyne Products for which PPI shall continue to or shall hereafter apply the Coating.

3. GILMER SERVICES. At the request and direction of MegaDyne, Gilmer shall consult with and furnish and provide to MegaDyne or its Designee all direction, knowledge, expertise, formulas, means and methods of application and procedures necessary, reasonable or desirable to enable MegaDyne to develop facilities and processes for and to apply the Coating by means of the Process Technology to MegaDyne Products with the same expertise, competence and results as heretofore accomplished by PPI and to facilitate and develop improvement to the Process Technology and Coating. Such duty of Gilmer shall include providing and disclosing knowledge, expertise and methods not provided by MegaDyne but learned, developed or enhanced by Gilmer and PPI through experience in use and application of the Process Technology in coating MegaDyne Products.

4. LOCATION OF SERVICES. Gilmer shall perform the duties required of him in the previous paragraph either in Los Angeles or at a MegaDyne or MegaDynes Designee's facility in a prompt and expeditious manner, and shall devote such time and attention to the performance of such duties as shall be requested by MegaDyne and as shall be necessary to the prompt and expeditious acquisition of the ability by MegaDyne or its Designee to apply and conduct the Process Technology and the coating of MegaDyne Products. However, Gilmer shall not be required to provide services at a MegaDyne or MegaDyne's Designee's facility if travel is inadvisable due to reasons of his health or the health of his wife. In this event, all such services shall be provided to MegaDyne or MegaDyne's Designee's employees in Los Angeles. Further, under no circumstances, shall Gilmer be required to spend more than two consecutive weeks away from Los Angeles.

5. STANDARD OF GILMER SERVICES. Gilmer shall provide technical consultations and services to the best of his abilities to insure MegaDyne or their Designee is successful in applying the coating with the same expertise, competence and results as heretofore accomplished by PPI when PPI was under his direction and control. However, MegaDyne acknowledges and agrees that since the actual operation of the MegaDyne's or MegaDyne's Designee's coating facility will not be under Gilmer's direction or control and that Gilmer does not warrant their success nor shall he be held responsible for the ultimate success of MegaDyne's or MegaDyne's Designees application of coating to the same level of expertise, competence and results as heretofore accomplished by PPI when PPI was under his ownership and control.

6. GILMER COMPENSATION. MegaDyne shall compensate and reimburse Gilmer as an individual for the duties described in paragraph 3, 4 and 5 above as follows:

A. \$75 per hour consulting fee for each hour spent by Gilmer in performing such duties and providing such services.

B. Gilmer's billable hours shall include time spent in Los Angeles, in travel and at MegaDyne or MegaDyne Designee's facilities providing or preparing to provide the services required.

C. When services are provided away from Los Angeles; the minimum daily charge shall be 8 hours per day. When the services require more than 5 consecutive working days Gilmer shall have the right to fly home on each Friday and fly back to the facility on the following Monday morning at MegaDyne expense.

D. Reasonable expenses for air travel, lodging, automobile rental, incidentals and meals when providing services away from Los Angeles and mileage and reimbursement for reasonable mileage and other expenses when providing services in Los Angeles.

E. Gilmer shall submit an invoice for all consulting hours and expenses to MegaDyne on a monthly basis and shall receive payment of each invoice within 30 days from submission of the invoice to MegaDyne.

F. In the event the consulting services are performed by a person other than Gilmer, as provided in paragraph 1, the above consulting fees and reimbursement for costs and expenses shall be paid to PPI. The below described "per unit coated fee" shall still be paid to Gilmer; his estate or his heirs as below provided.

G. As additional compensation for consulting Gilmer shall receive payment of a "per unit coated fee" of \$.06 per unit for all MegaDyne Products coated with Teflon by MegaDyne or its Designee(s) during the period set forth in subparagraph 6I below.

H. The above compensation shall apply to all MegaDyne Products coated by MegaDyne or its Designee including any coated by PPI. PPI shall reduce its charge for coating of any MegaDyne Products by an amount equal to the per unit coated fee as provided in subparagraph 6G above, that is paid to Gilmer, his estate or heirs on any MegaDyne products coated by PPI. Compensation under this section shall be payable 30 days from the end of each month in which MegaDyne Products are coated by MegaDyne or its Designees. MegaDyne agrees to provide any and all such records as may be necessary to perform any audit necessary to insure their compliance with this section. In the event that such an audit discloses a variance of greater than 5% between what was paid and what was due Gilmer then the cost of such audit shall be borne by MegaDyne.

I. The compensation discussed in Paragraph 6G above on all coated MegaDyne Products shall begin upon the happening of the Condition Precedent or its termination as provided in subparagraph 1B, or 1C above. Further, this compensation shall continue until the end of the 10 year period in the event Gilmer is unable to provide services due to reasons of health or if dies before the 10 year period is up in which case the compensation shall be paid to his estate or heirs.

7 SOLE COMPENSATION TO GILMER. The compensation provided in paragraph 6 above shall be the sole compensation to which Gilmer shall be entitled for his services to be provided pursuant to this Agreement, and he shall not acquire or be entitled to any ownership or other interest in the process Technology or Coating or in MegaDyne or MegaDyne Products.

8. TRANSFER OF EQUIPMENT. PPI agrees that it will cause to be duplicated and/or manufactured all jigs, tooling and other equipment specifically and exclusively designed for and used by PPI in coating MegaDyne Products and then shall transfer and deliver to MegaDyne the new jigs, tooling and other equipment it caused to be duplicated and/or manufacturer for the actual cost of such manufacturing and/or duplication. PPI will keep its original jigs, tooling and other equipment used in the coating of MegaDyne Products so it may continue to provide services to MegaDyne if MegaDyne so desires.

9. ACKNOWLEDGEMENTS, RELEASES AND COOPERATIONS. MegaDyne acknowledges that upon the happening of the Condition Precedent or its termination as specified above PPI shall not have and hereby releases PPI from obligations under the 1988 Agreement to coat, in the manner and under the time tables provided in the 1988 Agreement, those MegaDyne products that are hereafter coated by MegaDyne or its Designees. PPI acknowledges and agrees that it will no longer be the only person authorized to apply Coating to MegaDyne Products by means of the Process Technology and that release by MegaDyne of PPI from obligation to coat MegaDyne Products that will or in the future may be coated by MegaDyne or its Designees is adequate and sufficient consideration of PPI no longer being the exclusive coater of MegaDyne Products. PPI further acknowledges and agrees that if it desires or seeks additional consideration for termination of its status as exclusive coater of MegaDyne Products, MegaDyne is not obligated to provide such consideration and PPI will not seek such consideration from MegaDyne. To the extent reasonably necessary, PPI shall cooperate with and assist Gilmer in the performance of his duties under Paragraph 3 above.

10. RIGHT AND AUTHORIZATION TO PROVIDE SERVICES. Gilmer and PPI hereby acknowledge, represent and warrant that Gilmer, or such PPI employee as called for in paragraph 1, has the unrestricted right to perform and provide, and PPI and Gilmer authorize them to provide and perform, the duties and services to be provided by in paragraph 3, 4, and 5 above.

11. NON-CONFLICT WITH OTHER AGREEMENTS. The execution, delivery of and performance of this Agreement will not conflict with, result in a breach of or constitute a default under or violate any terms or conditions of any agreements, contracts, laws, rules, regulations, judgment or orders to which Gilmer, PPI and/or MegaDyne is subject and will not conflict with or violate any Articles of Incorporation, By-laws or other corporate documents of obligations of PPI or MegaDyne.

12. INVALIDITY. The invalidity or unenforceability of any provisions of this Agreement shall not effect any other provisions thereof, and this Agreement shall be construed in all respects as if any invalid or unenforceable provisions were omitted.

13. BINDING EFFECT AND AMENDMENT. The provisions of this Agreement shall be binding upon and inure to the benefit of each of the parties and their respective successors and assigns, and no amendment or modification of this Agreement shall be valid unless it is in writing and signed by the party or parties sought to be charged thereby.

14. EFFECT ON 1988 AGREEMENT. Except as modified herein, the 1988 Agreement and all terms and conditions thereof shall remain in full force and effect and shall be binding upon the parties as therein provided, and this Agreement and the 1988 Agreement represent all understandings and agreements between the parties on the subject matter thereof.

15. PARAGRAPH HEADINGS. Paragraph headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

16. GOVERNING LAW. This Agreement shall be construed under and shall be governed by and in accordance with the laws of the State of Utah.

17. ATTORNEY'S FEES. In the event of breach or default of any of the terms or conditions of this Agreement, the defaulting party shall pay all costs and expenses, including reasonable attorney's fees, arising out of breach or default thereof, whether incurred with or without suit and both before and after judgment.

IN WITNESS WHEREOF, this Agreement has been executed the date and year first above written.

MEGADYNE MEDICAL PRODUCTS, INC.

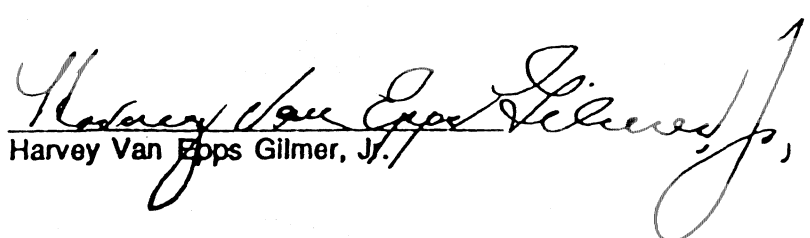
By 

its 

PREMIUM PLASTICS, INC.

By 

its 


Harvey Van Epps Gilmer, Jr.

Tab 7

PREMIUM PLASTICS, INC.

13342 VERMONT AVE.
Q131 634-3294



PARAMOUNT, CALIFORNIA 90723
Q131 774-0070

HARVEY V.E. GILMER, Jr.
President

CONTRACT MODIFICATION

This is a modification to the contract entered into between MegaDyne Medical Products, Inc. (MegaDyne), PREMIUM PLASTICS, INC. (PPI) and Harvey V.E. Gilmer, Jr. (Gilmer) dated March 26, 1991.

MegaDyne will have present & future suppliers of metal Cautery Tips & Laproscopic devices provide a copy of all invoices to: Harvey V.E. Gilmer, Jr.
30521 Miraleste Dr.
Rancho Palos Verdes, Ca., 90274

Gilmer will treat all invoices & information as confidential information.

MegaDyne Medical Products, Inc.

PREMIUM PLASTICS, INC.

A handwritten signature in dark ink, appearing to read "Harvey V.E. Gilmer, Jr.", written over a horizontal line.

Harvey V.E. Gilmer, Jr.

A large, stylized handwritten signature in dark ink, appearing to read "Harvey V.E. Gilmer, Jr.", written over a horizontal line.

A large, stylized handwritten signature in dark ink, appearing to read "Harvey V.E. Gilmer, Jr.", written over a horizontal line.

Tab 8

9/15/97

CONTRACT MODIFICATION

This Contract Modification made this ^{PA}15 day of September, 1997, between MegaDyne Medical Products(MegaDyne), Premium Plastics, Inc. (Premium) and Harvey Van Epps Gilmer, Jr., (Gilmer) WITNESSETH:

WHEREAS under that certain agreement between MegaDyne, formerly American Medical Products, Inc., and Premium Plastics, Inc. dated June 1, 1988, Premium Plastics, Inc was appointed the exclusive coater of electro-surgical electrodes marketed by MegaDyne, and

WHEREAS, ON March 26, 1991, said agreement was modified to allow for the possible sale of assets of PREMIUM PLASTICS, INC., of which Gilmer was President and sole or majority shareholder, and to insure the continued availability of Gilmer to provide technical support and consultation services to MegaDyne after the sale and to permit MegaDyne and others designated by MegaDyne to coat MegaDyne products at MegaDyne's facilities, or elsewhere, and

WHEREAS, In consideration of the surrender of such exclusive coating rights, MegaDyne agreed to pay Premium six cents (\$.06) for each electrode coated by MegaDyne, and

WHEREAS, the parties hereto desire to further modify said agreement of March 26, 1991, to provide that payment of said sum shall be based upon electrodes sold rather than upon electrodes coated,

NOW, THEREFORE, it is agreed:

1. MegaDyne shall continue to pay Premium six cents (\$.06) for each electrode coated by MegaDyne through September 30, 1997.
2. MegaDyne shall take a physical inventory to determine the actual number of electrodes coated as of September 30, 1997 to insure that Premium is paid for all electrodes coated as of said date and will record the date of all lot numbers of electrodes remaining unbilled as of that date, and all electrodes coated after said date.
3. Beginning October 1, 1997 and continuing until December 1, 2005 MegaDyne shall pay to Premium each month six cents (\$.06) for each coated electrode invoiced or shipped to a third party for use or resale, including samples and consignments with lot numbers dated on or after September 1, 1997. Returns and Bad Debts will not be debited against payments due Premium.
4. MegaDyne shall accompany said monthly payments with a computer printout reporting all electrodes invoiced and/or shipped during the month with consecutive invoice numbers, date, total electrodes on the invoice and applicable lot numbers. Payment for said month will be made within a month and ten days after end of said month.

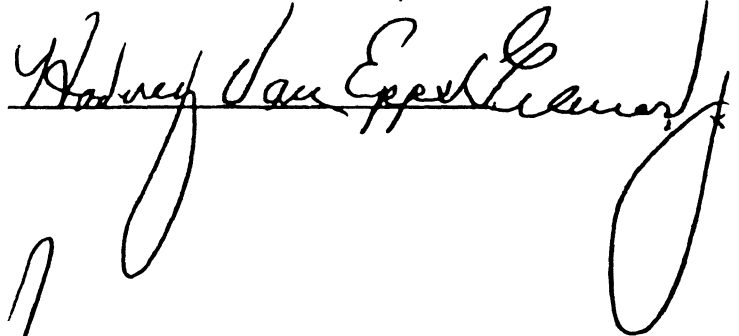
5. In October, 1997 MegaDyne will receive credit for the remaining September 30, 1997 inventory of coated electrodes not billed out in September. These are electrodes that MegaDyne previously paid Premium for under the old program. When calculating the payment for October, MegaDyne shall determine the total number of electrodes sold or transferred during October, 1997 and then subtract the remaining, unbilled September 30, 1997 inventory of coated electrodes and pay Premium on the difference if any monies are due.

6. Except as expressly modified by herein, all terms and conditions of the agreement of March 26, 1991, shall remain in full force and effect.

MEGADYNE MEDICAL PRODUCTS, INC.

By 
Matt R. Sansom
Its Executive Vice President & COO

HARVEY VAN EPPS GILMER, JR.



PREMIUM PLASTICS, INC.

By 
Harvey Van Epps Gilmer Jr.
Its President & CEO