

1998

W. David Weston, Darko Segota, Bergaz, L.C.  
Branimir Globevnik, and Okrad International, L.C.,  
BA LF Holdings L.C., BA LF Technologies, L.C. v.  
Stephan H. Smoot, individually and as Manager of  
Utah International, and Utah International, L.C. a  
Utah Limited Liability Company, and Stephen H.  
Smoot and Park Smoot as Co-Trustees of the H.J.  
Russel McNitt Trust : Reply Brief

Utah Court of Appeals

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Theodore E. Kanell; Hanson, Epperson and Smith; Attorney for Appellees.

W. David Weston; In Proper Person.

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### Recommended Citation

Reply Brief, *Weston v. Smoot*, No. 980254 (Utah Court of Appeals, 1998).

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980254-CA

*Court of Appeals*  
**IN THE UTAH SUPREME COURT**

W. DAVID WESTON,

Appellant/Petitioner

DARKO SEGOTA, BERGAZ, L.C.

BRANIMIR GLOBEVNIK, and OKRAD

INTERNATIONAL, L.C., BA/LF HOLDINGS )

L.C., BA/LF TECHNOLOGIES, L.C. )

Plaintiffs,

vs.

STEPHEN H. SMOOT, individually and  
as Manager of UTAH INTERNATIONAL,

and UTAH INTERNATIONAL, L.C. a )

Utah limited Liability Company, and )

STEPHEN H. SMOOT and PARK )

SMOOT as Co-Trustees of the H.J. )

RUSSEL MCNITT TRUST, )

Appellee/Defendants. )

No. 980254

Case No. 960902318PR

**REPLY BRIEF OF APPELLANT**

Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
Honorable Homer Wilkinson, District Judge, Presiding

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JAN 22 1999

COURT OF APPEALS

**FILED**  
UTAH SUPREME COURT  
JAN 22 1999  
PAT BARTHOLOMEW

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**IN THE UTAH SUPREME COURT**

---

W. DAVID WESTON,	)	
	)	
Appellant/Petitioner	)	
	)	
DARKO SEGOTA, BERGAZ, L.C.	)	
BRANIMIR GLOBEVNIK, and OKRAD	)	No. 980254
INTERNATIONAL, L.C., BA/LF HOLDINGS	)	
L.C., BA/LF TECHNOLOGIES, L.C.	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
STEPHEN H. SMOOT, individually and	)	
as Manager of UTAH INTERNATIONAL,	)	Case No. 960902318PR
and UTAH INTERNATIONAL, L.C. a	)	
Utah limited Liability Company, and	)	
STEPHEN H. SMOOT and PARK	)	
SMOOT as Co-Trustees of the H.J.	)	
RUSSEL MCNITT TRUST,	)	
	)	
Appellee/Defendants.	)	

---

**REPLY BRIEF OF APPELLANT**

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Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
Honorable Homer Wilkinson, District Judge, Presiding

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The Appellant respectfully submits this brief in reply to the response of the Appellees.

#### PRELIMINARY STATEMENT

Appellees misrepresent cases referenced by them as 2034 and 2018 claiming the cases “involved the same parties and the same facts” (Appellee Brf., pg 2, 11) and somehow “were treated as if they were consolidated.” Neither statement is true nor do the Appellees supply any evidence to support either claim. Case 2034, was principally a replevin action to recover equipment and pled causes of action unrelated to case 2018. By their own admission case 2018 involved additional parties. There is no evidence to support any claim that Judge Wilkinson treated the cases as consolidated. No party made any motion to have the cases consolidated and any such motion would have been resisted during the pendency of Mr. George’s representation (April 1966 - January 1997). Appellees would mislead the Court into believing that Appellant filed but one motion to intervene involving both cases. This also is not true. The Motions respecting Intervention in the underlying case (2318) were individually filed and not combined with any other Motion.

The Appellees misrepresent the subject nature of the underlying action by claiming “the lawsuit dealt primarily with the ownership of certain patents”. (Appellee Brf pg. 9) The underlying actions (Add “E”) subject matter was whether Mr. Smoot had any claim to ownership in BA/LF Holdings, L.C., and with Mr. Smoot’s breach of fiduciary duty and confidential relationships, fraud and to find that he was not the manager of BA/LF Holdings. Each of these issues affected the contract rights of the Appellant both as to a continuing right

to sell product and receive commission income and his rights to an ownership interest in the company. Appellees mischaracterize the Appellant as a creditor only disregarding the affect of the settlement in extinguishing Appellant's contract rights. Appellant needed to be involved to prevent a settlement of the case which would in effect have dissolved BA/LF Holdings, L.C. leaving him without any remedy to protect his contract rights. As previously noted case 2034 was dissimilar in that it dealt with the recovery of equipment which Mr. Smoot had misappropriated which belonged to BA/LF Holdings L.C.

Finally, Appellees reference in Exhibit "C" Findings of Fact and Conclusions of Law arising out of an involuntary petition filed with the Bankruptcy Court respecting BA/LF Holdings. This matter is not final, is the subject of a motion for rehearing because the Findings are in error as a result of false, perjured and misleading testimony. (See attached copy of Memorandum in Support of Motion for Rehearing.) Appellant was denied significant due process where the Bankruptcy Court held a so-called evidentiary hearing without any notice and without any opportunity for preparation.

Appellees only purpose in including this prejudicial and defamatory material, where it was not before the lower court and has nor can have any affect on the issues on appeal, was to prejudice the Appellant before the Court. The Appellant respectfully requests that this material (Appellees' Exhibit "C") not be considered on appeal.

Appellees call the Court's attention to the inadvertence of the Appellant to include a copy of his affidavit which was filed with the lower court attesting to the items contained in

Appellants Addendum. Appellant believed that the record below would be transmitted to the Court of Appeals (Rule 11(d)(3) which would have included the Appellant's affidavit.

Appellant concurrently herewith has filed a motion requesting that the record be augmented with a copy of his Affidavit as filed below which is attached to this Reply Brief.

### **ARGUMENT**

The Appellant filed his petition in a timely fashion; has a direct, substantial and legally protected interest in the subject of the underlying action; his interests would absolutely be impaired absent his intervention; and none of the parties before the court could or could adequately represent his interest where the attorney for BA/LF Holdings was withdrawing and the parties were conspiring to defeat the Appellants interests and strip BA/LF holdings in a proposed settlement.

#### **A. Appellant's Motion to Intervene was Timely.**

Contrary to Appellees assertions the Appellant amply set out the tolling facts on pages 4 and 5 of his Main Brief on appeal which demonstrate that his Motion for Intervention was timely when filed as soon as practicable. First, Mr. George did not withdraw until January 1997 and thereafter there was no reason to believe that Mr. Anderson, who subsequently entered an appearance would not continue with the litigation to trial. Appellant only learned of the intended withdrawal of Mr. Anderson for non payment and the conspiracy between Mr. Segota and Mr. Smoot to settle and leave BA/LF Holdings L.C. and the Appellant high and dry, approximately two weeks before the trial date scheduled for July 14, 1997. It was the notice



of withdrawal and a proposed fraudulent settlement leaving BA/LF Holdings a shell and Appellant without any remedy to protect his contract rights that produced the need to intervene. Given the inability of BA/LF Holdings to meet its obligations, the lack of counsel, the best course of action was to litigate the state court claims in an adversary proceeding in bankruptcy. This would have the same affect as intervention in bringing all the parties before the Court. The subsequent involuntary bankruptcy petition tolled any timely requirement to intervene. When the bankruptcy petition was dismissed the Appellant was left with no alternative but to intervene as necessary to judicially and fairly resolve the underlying litigation. Accordingly, the Appellant did not wait “six months” to bring his motion to intervene, but acted timely upon dismissal of the bankruptcy petition.

**B. Appellant Held a Legally Protectable Interest in the Subject Matter of the Litigation.**

**(1) True Subject Matter of The Underlying Litigation.**

The Appellees would mislead the Court into believing the underlying litigation only involved a dispute as to who owned certain patent rights not involving the Appellant. To the contrary as clearly set out in the complaint (ADD “E” 2318) the litigation was filed to determine that Segota and Globevnik were the majority owners of BA/LF Holdings who had replaced Mr. Smoot as manager and who, on behalf of BA/LF Holdings, had entered into valid and binding contracts with the Appellant. The litigation asked the Court to determine that Mr. Smoot, had no ownership interest in BA/LF Holdings, had breached his fiduciary duty and confidential relationship with the majority owners and the company in attempting to defraud

the company by removing to himself its principal assets. This subject matter affected the substantial contract rights of the Appellant with the majority owners and the company.

**(2) The Application of the Interest Test:**

Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination. *Security Ins. Co., v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7<sup>th</sup> Cir. 1995).

The controlling facts are that Appellant, who also acted as the manager of BA/LF Holdings, (1) held a contract right to make continuing sales of the companies products and to receive a continuing commission, (2) held rights to ownership interests in BA/LF Holdings directly attributable to contracts involving majority owners of BA/LF Holdings, (3) such rights were related to Appellants having contracted to be the manager of BA/LF Holdings with the majority owners and (3) all such rights were contested by Smoot who claimed to be the manager. In fact it was the Appellant acting as the manager of BA/LF Holdings that initiated the initial action. All of these interests were directly related to the property and transactions which were the subject of the action because all of these rights would be determined in that action.

The Appellees cite *Alameda Water & Sanitation District* 9 F.3rd 88, 90 (10<sup>th</sup> Cir. 1993). This case is clearly not on point. In the Alameda case the Court addressed the interest requirement in the context of an administrative action holding that a public interest group lacked sufficient interest in the litigation because the interest group wanted to “offer

extraneous evidence beyond the administrative record, and thus beyond the scope of the narrow issue before the district court.” 9 F.3d at 91. Here the Appellant does not propose to go outside the record, but desires to advocate the protection of BA/LF Holdings, L.C., and to litigate the present suits claims. Thus the holding in *Alameda* is not directly applicable to this case. Nonetheless, *Alameda* lends support to Appellants arguments. In a footnote in *Alameda*, the Court distinguished *Regents of the University*, 516 F.2d 350 (10<sup>th</sup> Cir.), from the facts in *Alameda*. The facts in *Regents* are more nearly analogous to the facts here before the Court. In *Regents* the Court held that certain pharmacists had a right to intervene in the litigation because their economic interests were affected as well as their interests in maintaining their profession and in supporting independent drug stores from unfair competition.

In *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) the Court held that “the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process”; accord *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5<sup>th</sup> Cir. 1994); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n. 10 (5<sup>th</sup> Cir. 1992); *Sanquine, Ltd. V. Department of Interior*, 736 F.2d 1416, 1420 (10<sup>th</sup> Cir. 1984) wherein the Court stated “We determine whether an applicant’s interest is sufficient by applying the policies underlying the “interest” requirement to the particular facts of the case;” see also *National Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10<sup>th</sup> Cir. 1977) wherein the court stated “Our Court has tended to follow a somewhat liberal line in

allowing intervention.

**C. Appellant's Interest Were Not Adequately Protected.**

While the burden is on the applicant in intervention to show that the representation by the existing parties may be inadequate this burden is generally considered minimal. *National Farm Lines*, 564 F.2d at 383 (10<sup>th</sup> Cir.) citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). The Trbovich Court stated:

An applicant may fulfill this burden by showing collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest.

In the proceeding below the attorney for BA/LH Holdings was withdrawing, Jr. Darko Segota had entered into a conspiracy with Mr. Smoot to attempt to defeat the claims and interests of the Appellant and to strip BA/LF Holdings of its assets. Thus, all the then supposed representatives of BA/LF Holdings held interests adverse to the Appellant and to BA/LF Holdings, L.C. The Appellees have made no showing that the proposed settlement was either fair or in the best interests of BA/LF Holdings, L.C.

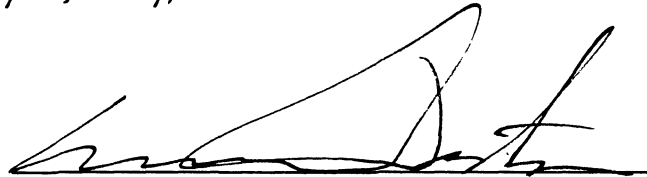
**CONCLUSION**

The Appellant has a direct, substantial and legally Protectable interest in the subject of the action between BA/LF Holdings, L.C., BA/LF Technologies, L.C. and Stephen H. Smoot, et al., ; this interest may be impaired by the determination of the action and is impaired by the presently proposed settlement; and where no party presently represents BA/LF Holdings or Technologies and Darko Segota holds adverse interests no one is available to adequately

represent either the Appellants interests or those of BA/LF Holdings and Technologies.

Accordingly the Court should reverse the District Court's order and grant the Appellant intervention.

Respectfully submitted this 21<sup>st</sup> day of January, 1999.

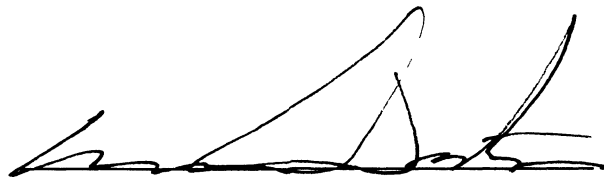
A handwritten signature in black ink, appearing to read 'W. David Weston', with a large, stylized 'W' and 'D'.

W. David Weston

#### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Appellant's Reply Brief on Appeal was mailed on the 21<sup>st</sup> day of January 1999 to the following by first class mail postage prepaid.

Theodore E. Kanell  
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A handwritten signature in black ink, appearing to read 'Theodore E. Kanell', with a large, stylized 'T' and 'K'.

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**IN AND FOR THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

---

BA/LF HOLDINGS, BA/LF TECHNOLOGIES,  
L.C. AND OKRAD INTERNATIONAL, L.C.,  
Utah Limited Liability Companies

Plaintiffs,

vs.

STEPHEN SMOOT, individually and as  
Manager of Utah International, L.C. and UTAH  
INTERNATIONAL, L.C., a Utah Limited Liability  
Company

Defendants.

vs.

DARKO SEGOTA, individually and as manager  
of Okrad International, L.C., And BERGAZ, L.C.,  
a Utah Limited Liability Company, OKRAD  
INTERNATIONAL, L.C. a Utah Limited  
Liability Company, BRANIMIR GLOBEVNIK  
and GAIL STOTT, dba, Plant Properties,

Third Party Defendants

---

Case No. 960902318CV

AFFIDAVIT OF W. DAVID  
WESTON IN SUPPORT OF  
MOTION TO INTERVENE AS  
PARTY PLAINTIFF

Judge: Homer F. Wilkinson

STATE OF UTAH     )  
                              ) ss.  
County of Salt Lake )

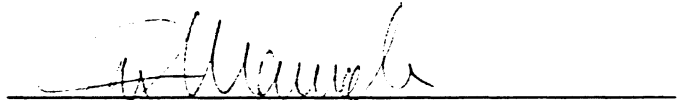
W. David Weston, being first duly sworn deposes and says that the attached agreements and contracts are true and correct copies of the originals and that the attached pleadings are true and correct copies of the pleading filed in the therein designated court.

DATED: November 12, 1997.



W. David Weston

Subscribed to and sworn before me, a notary public for Utah on this 12<sup>th</sup> day of ~~November~~ November 1997.



Notary Public for Utah


Residing:

Commission expires:



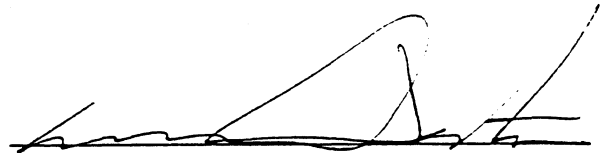
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Affidavit in Support of Motion for Intervention was mailed by first class mail postage prepaid this 14<sup>th</sup> day of November, 1997, to the following:

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Phone: (801) 272-5545

**UNITED STATES BANKRUPTCY COURT  
FOR THE CENTRAL DISTRICT OF UTAH**

---

IN THE MATTER OF:

BA/LF HOLDINGS, L.C.

Putative Debtor,

)  
)  
)  
)  
)  
)

Case No. 97B-25450  
(Involuntary Chapter 7)

---

**REPLY TO PUTATIVE DEBTOR'S OBJECTION TO MOTION FOR REHEARING**

---

Comes now W. David Weston, by and through his attorney of record, Ronald S. George, and submits the following Reply to the Putative Debtor's Objection to the Motion for Rehearing. This Reply Memorandum is supported by the Affidavit of W. David Weston submitted concurrently herewith.

The Objection Memorandum of the Putative Debtor cites to no evidence or finding which would support the award of punitive damage in light of the factors which must be expressly considered as set out in *White v. General Motors Corp., Inc.* 908 F.2d 675, 684 (10<sup>th</sup> Cir. 1990) as adopted by the Federal Court of this district of which this Bankruptcy Court is an appendage.

Counsel for the putative debtor suggests the court should rely on alleged statements of Mr. Segota at trial that Mr. Weston "has no assets." If this is the only evidence upon which the Court relied, to accord with White, any punitive damage award would clearly be

excessive given Mr. Weston's age (62) and the number of his dependants (4).

Counsel's argument that Weston allegedly made statements that he is "judgment proof" are simply hearsay.

### **SEGOTA PERJURY CLAIM**

The Motion for rehearing raised the issue that the testimony of Darko Segota upon which this Court apparently relied to support its Findings No. 43, 51 and 69, was perjured.

In Findings 43 this Court found the Patent UCC-1 filed December 5, 1995, in favor of the McNitt Trust, did not create a new lien on the patent assets of BA/LF Holdings. This Court held that the reason the Patent UCC-1 did not create a new lien is because somehow the same patents were the subject of a previous security agreement held by Ivan Radman which made all the patents a part of the "Radman security interests." In Finding 51 and 69 this Court found, based on Segota's testimony, that sometime prior to July 1997 Segota somehow learned that he had formerly pledged his patent rights to Radman and the Patent UCC-1 which now perfected a security interest in his former patent rights to the McNitt trust was only a reaffirmation of a previous security interest he had given to Radman. It is this recognition which the Court found caused Segota to become reconciled with Smoot. Apparently, here also is found the support to finding No. 69 that Weston filed the involuntary bankruptcy because he believed the state court litigation claims involving Smoot and the December 5, 1995 Patent UCC-1 could no longer be sustained. These Findings by the Court are in error.

The obligation in question is the security interest in the BA/LF patents in favor of the Mc Nitt Trust and whether at the time of filing, (December 5, 1995), Smoot who was the operating manager of BA/LF Holdings and a trustee of the McNitt Trust acted properly.

Attached hereto as Exhibit "A" is the Patent UCC-1 giving notice of a secured interest in BA/LF's patents in favor of the McNitt Trust. This UCC-1 was filed with the State of Utah on December 5, 1995 and received in evidence at trial as Exhibit No. 75. (Herein "Patents" UCC-1).

#### **RADMAN UCC-1 AND PMJ OPTION (Exhibit 39)**

Attached hereto as Exhibit "B" are true and correct copies of the UCC-1 filed with the State of Utah on March 2, 1995 giving notice that Okrad International, L.C., and Segota had secured W. F. Engineering (Radman) with the specific property described on three attached pages. The ratification for W. F. Engineering, Inc., the secured party, is signed by Ivan Radman. This UCC-1 evidences the so called "Radman security interests." (Hereinafter "Radman" UCC-1). No patents or patent applications are listed.

The Radman UCC-1 in favor of W.F. Engineering, was part of the PMJ, L.C., Option (See Exhibit 39). The Radman UCC-1 was provided by Okrad and Segota to secure the amounts of money Mr. Radman would advance prior to any exercise of the option. Okrad never owned the Segota patent or patent application. Segota's new pump technology did not become the subject of any patent application until November 8, 1995 nine months after the Radman UCC-1 was filed. On information and belief the older pump technology

was owned by Bergaz whereas the new pump technology was owned by Segota. No evidence exists that any pending patent rights were ever the subject of a security agreement provided to W.F. Engineering (Radman) by Okrad or Segota and therefore no pending patent rights are part of any "Radman Security Interests." The Radman UCC-1 was later purchased by BA\LF Holdings as part of the PMJ Option as set out below. (See attached Exhibit "E"). The Radman UCC-1 was assigned on October 3, 1995, by Smoot as manager of BA\LF Holdings, to the McNitt Trust. (See attached Exhibit "F") This assignment occurred before the Patent UCC-1 was filed (December 5, 1995).

The Radman UCC-1 Financing Statement was created by Stephen Smoot a non-lawyer. There is no evidence that the Radman UCC-1 was ever supported by a security agreement, which would be necessary to create a valid security interest. In the absence of an underlying security agreement it is questionable whether any "Radman Security Interests" in fact exist.

#### **PATENT UCC-1 IS UNRELATED TO ANY "RADMAN SECURITY INTERESTS."**

The Putative Debtor's argument that the Patent UCC-1 (filed in December 1985) in favor of the McNitt Trust is merely an extension of the Radman UCC-1 (executed on March 2, 1995 in favor of W. F. Engineering), as part of the PMJ, L.C. option, (Exhibit 39) is nonsensical and unsupported by any evidence. The Putative Debtor's contention that Mr. Segota did not commit perjury in so testifying is contradicted by:

- (1) The new pump technology invented by Segota did not become the subject of a

patent application until November 8, 1995 (See "Assignment" a part of Exhibit "D")

whereas the Radman UCC-1 was dated March 2, 1995, **eight months earlier**;

(2) No patents or patent applications are mentioned in the three page attachment to the Radman UCC-1 (Exhibit "B");

(3) There is no evidence of any security agreement to support the Radman UCC-1;

(4) A previous assignment of **all** the "Radman Security Interests" to the McNitt Trust was made **2 months in advance** of the Patent UCC-1 filing. Consequently, the McNitt trust already had all of the "Radman Security" by the time the Patent UCC-1 was filed.

What should now be clear to the Court is that the assignment of the Radman UCC-1 as owned by BA/LF Holdings on October 3, 1995 by Smoot to the McNitt trust two months prior to the December 5, 1995 creation of the Patent UCC-1 and the patent filing on November 8, 1995, fully eight months after the Radman Interests were created destroys any claim that somehow Segota recognized that the Patent UCC-1 were part of a previous assignment as a "Radman Security Interest." Thus the Patent UCC-1 would be superfluous where the McNitt trust already had an assignment of the Radman Security Interests. Clearly Mr. Smoot filed the Patent UCC-1 because he recognized the "Radman Security Interests" did not include the patents. See trial Exhibit 35 ¶¶ 48-67, 70 -71; Exhibits 75 and 22; Exhibit 34, page 2-3), the Patent UCC-1 language (Exhibit "A").

#### **BA/LF HOLDINGS CREATION**

BA/LF Holdings was created as a result of the Consolidation Agreement of August 29, 1995 (attached Exhibit "C"; trial Exhibit 76) and the Memorandum of Agreement dated

September 18, 1995 (Exhibit "D"). The memorandum of Agreement evidences that Segota owned the **new pump invention** for which an additional patent was filed on November 8, 1995 (See "Assignment" a part of Exhibit "D"). In the Memorandum of Agreement Segota agreed to transfer his patent applications respecting all the pump technology to BA/LF Holdings. The Memorandum of Agreement, among other items, identifies Segota "as the inventor." Paragraph 5 thereof states: "Segota will execute assignments on the existing patent application and the **new application** to BA/LF Holdings..."

Paragraph 7 of the Memorandum of Agreement provided that BA/LF Holdings would purchase the PMJ Option. Upon purchase of the PMJ Option BA/LF Holdings acquired all rights and interest in the Radman UCC-1. This fact is evidenced by the Assignment of the Radman UCC-1 to BA/LF Holdings, L.C., on September 22, 1995. (See Exhibit "E" and trial Exhibit 35 ¶ 62 also Exhibit 34 page 2 item 8). As further evidence of Segota's perjured testimony he makes the following statement in Paragraph 62 of his verified complaint. (Exhibit 35):

Smoot then prepared a Option Purchase Agreement, dated September 18, 1995 between PMJ, L.C. and BA/LF Holdings, whereby BA/LF Holdings would purchase the PMJ Option Agreement for \$100,000, and would also obtain certain UCC-1 instruments secured by Okrad's equipment as held by PMJ. L.C. (Exhibit "C"). (emphasis added).

Clearly, Segota's new pump patent could not have been a part of any "Radman Security Interests" because this pumps patent was filed on November 5, 1995.

What is missing from these organizational documents, i.e. Consolidation Agreement

and Memorandum of Agreement (Exhibits C and D) is how the PMJ option and Radman UCC-1 purchase was to be accomplished. Also missing is any reference or agreement among the organizers permitting BA/LF Holdings to borrow the money to complete the Option purchase or any disclosure of an intent to pledge the assets of BA/LF Holdings to accomplish the purchase. These assets included (1) the patents and (2) the Radman UCC-1 obtained by BA/LF Holdings. (See Exhibit "B" and "F" attached).

#### **MCNITT TRUST AND THE PATENT UCC-1**

Mr. Segota testified that at the time the PMJ Option was purchased, the Option was to expire by its terms within a few months and Mr. Radman had informed Mr. Segota that he did not intend to exercise the option. Accordingly, the only reason for BA/LF's purchase of the PMJ Option was the commitment of Smoot to Segota that he would personally provide the purchase amount as part of the consideration for his acquiring a 45% interest in Segota's new pump technology through BA/LF Holdings. As additional consideration he was to step into the shoes of Radman to meet Radman's previous financial commitment to provide the money to develop the new technology. Otherwise Smoot would have obtained the 45% interest in the new technology and patent applications without having paid any consideration for such interest.

Mr. Segota also testified that prior to the discovery of the Patent UCC-1 in March of 1996 by Mr. Weston, Smoot, never disclosed to either Bergaz or Segota that as manager of BA/LF Holdings he either intended to or had pledged the patents and the Radman UCC-1 to

himself as the trustee of the McNitt trust. Simply stated the McNitt \$100,000 was part of the purchase price Smoot had promised Segota he would pay for his interest in BA/LF Holdings.

**LITIGATION TO REQUIRE SMOOT TO ACCOUNT AND PAY FOR HIS NEWLY ACQUIRED INTERESTS:**

The evidence at trial supports the conclusion that all litigation by Segota against Smoot was predicated on the fact that Smoot owed something to Segota for the interest he obtained in Segota's new technology (See Exhibit 37 ¶¶ 3-10). There is no evidence before the Court to refute the testimony that Smoot's purchase of his 45% interest in Segota's technology was conditioned upon his assuming the obligations of Radman as set out in the PMJ option (Exhibit 5 ¶ 3) leaving Segota and Globevnik with a carried 55% interest. This Smoot did not do. Instead of putting up his own money to pay for his interest in the technology, he had BA/LF borrow the money which he secured with Segota's patents, without his knowledge or consent, (See Exhibit 22) to a trust over which he had the power of foreclosure to divest Segota and Globevnik of all their interests.

Given the evidence as set forth above, Finding No. 69 is also in error. Clearly Weston believed in July of 1997 that the claims set out in the Verified Complaint challenging the December 5, 1995 UCC- 1 and against Smoot for breach of fiduciary duty and overreaching would be successful. He did not file the involuntary petition to prevent the state court trial because somehow he had come to believe the Patent UCC-1



represented patent interests Segota had previously conveyed to Radman for no such patent interests were conveyed and the new pump patent did not exist at that time.

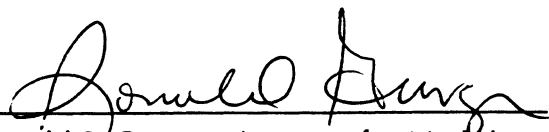
#### **THE RECONCILIATION:**

Finally, the Putative Debtor does not refute Weston's claim that the point of reconciliation between Smoot and Segota only occurred upon Smoot returning to Segota his patents and Smoot and Segota conspiring to defeat the obligations owing to Weston. Notwithstanding Segota at trial stated that he no longer owned anything with respect to the technology. That Segota would regain rights to his patents is a conclusion sought by the litigation filed on Segota's behalf by George (Exhibit 35).

#### **CONCLUSION**

Based on the arguments and evidence set out above Mr. Weston respectfully requests that his motion for rehearing, amendment of judgment and leave to obtain Mr. Segota's testimony and file a supplemental memorandum be granted.

Respectfully submitted this 17<sup>th</sup> day of September, 1998.

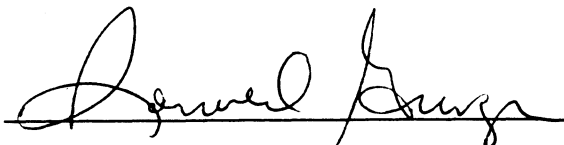
  
Ronald S. George, Attorney for Mr. Weston

# CERTIFICATE OF MAILING

I hereby certify that on this 1~~5~~<sup>th</sup> day of September, 1998, a true and correct copy of the foregoing **Reply Memorandum** was filed with the Court and mailed postage prepaid, to the following:

Theodore E. Kanell  
HANSON, EPPERSON & WALLACE  
4 Triad Center, Suite 500  
P.O. Box 2970  
Salt Lake City, Ut 84110-2970

John B. Anderson  
623 East First South  
P.O. Box 11643  
Salt Lake City, Utah 84147-0643

A handwritten signature in cursive script, appearing to read "Daniel Hays", written over a horizontal line.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

State of Utah  
Department of Commerce  
Division of Corporations & Commercial Code

UCC File #  
95-500181

Recorded on 12/05/1995 at 01:28pm.  
(Page #1)

1. Debtor(s) (Last Name First) and address(es)

/LF HOLDINGS L.C. and  
/LF TECHNOLOGIES L.C.  
00 Pine Valley Road  
Salt Lake City, Utah 84036

2. Secured Party(ies) and address(es)

THE H.J. RUSSELL MCNITT TRUST  
765 East 3 Fountains Circle #33  
Murray, Utah 84107  
A. Park Smoot, Trustee

Emp. Fed. I.D. No. \_\_\_\_\_

4. This financing statement covers the following types (or items) of property:

5. Patent Application Serial No. 08/446,054  
and any continuation-in-part

6. Gross sales price  
of collateral

\$ \_\_\_\_\_

\$ \_\_\_\_\_ Sales

or use tax paid to  
State of \_\_\_\_\_

For Filing Officer (Date, Time, Number,  
and Filing Office)

5. Assignee(s) of Secured Party and  
Address(es)

The Secured party is \_\_\_\_\_ is not \_\_\_\_\_ a seller or  
purchase money lender of the collateral.

This statement is filed without the debtor's signature to perfect a security interest in collateral. (Check ☒ if so)

☐ already subject to a security interest in another jurisdiction when it was brought into this state.

☐ which is proceeds of the original collateral described above in which a security interest was perfected:

Check ☒ if covered: ☐ Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented: 11

3. Maturity date (if any):

Approved by the Division of Corporations  
and Commercial Code Department of Business Regulation.

/LF HOLDINGS L.C. and BA/LF TECHNOLOGIES L.C.

By: \_\_\_\_\_

Signature(s) of Debtor(s)

By: \_\_\_\_\_

Signature(s) of Secured Party(ies)

Filing Officer Copy - Alphabetical

STANDARD FORM - FORM UCC-1.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

1. Debtor(s) (Last Name First) and address(es)

OKRAD INTERNATIONAL, L.C.  
and Darko, Segota  
3500 Pine Valley Road  
Woodland, Utah 84036 U.S.A.

2. Secured Party(ies) and address(es)

W.F. ENGINEERING DBA W.F. TECHNOLOGY  
879 South 4400 West  
Salt Lake City, Utah 84121  
U.S.A.

Emp. Fed. I.D. No. \_\_\_\_\_

4. This Financing Statement covers the following types (or items) of property:

See Attached three (3) pages.

6. Gross sales price  
of collateral

\$ \_\_\_\_\_

\$ \_\_\_\_\_ Sales

or use tax paid to  
State of \_\_\_\_\_

UCC DEPT  
STATE OF UTAH  
Filing Officer Date, Time, Number,  
and Filing Office

The Secured party is \_\_\_\_\_ is not ☒ a seller or  
Purchase money lender of the collateral.

5. Assignee(s) of Secured Party and  
Address(es)

This statement is filed without the debtor's signature to perfect a security interest in collateral (Check ☒ if so)

Microfilm No. \_\_\_\_\_

☐ already subject to a security interest in another jurisdiction when it was brought into this state.

☐ which is proceeds of the original collateral described above in which a security interest was perfected.

Check ☒ if covered: ☐ Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented: \_\_\_\_\_

3. Maturity date (if any): \_\_\_\_\_

Approved by Division of Corporations and Commercial  
Code, Department of Business Regulations.

OKRAD INTERNATIONAL, L.C. & Darko Segota

W.F. Engineering, Inc.

By: \_\_\_\_\_

Signature(s) of Debtor(s)

By: \_\_\_\_\_

Signature(s) of Secured Party(ies)

STANDARD FORM - FORM UCC-1.

(1) FILING OFFICER COPY - ALPHABETICAL

428822

4.

All of Debtor's accounts, contract rights, Contracts of Bailment, instruments, documents, drawings, technology, chattel paper, general intangibles and any other obligations or indebtedness owed to Debtor from whatever source arising; all rights of the Debtor to receive any payments of any kind; all of the right, title and interest of Debtor in and with respect to goods, services, or other property that gives rise to or that secure any of the foregoing and insurance policies and proceeds relating thereto, whether now owned or hereafter acquired by the Debtor, wherever located. All items listed on the following two (2) pages, although not limited to such.

UCC DEPT  
STATE OF UTAH

MAR 2 12 06 PM '95

*Stephen Paul*

5061010021

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STATE OF UTAH  
MAR 2 12 06 PM '95

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## Okrad Financial Analysis

UCC DEPT  
STATE OF UTAH

Mar 2 12 06 PM '95

Assets	
Current Assets	
Cash	
Equipment	
	Computer
	Office Equipment
	Trailer
Inventory	
	300 ft pipe
	Air Hose Canada
	Air Hose SLC
	Quicklock
	Bag House
	Classification Chamber
	Fan
	350 HP Soft Start
	Motors (15)
	Spare Flightings - Shafts - stock
	Electrical (power boxs/wiring/connectors/switchs)
	Compressor
	Conveyor/ Frame Hopper
	Fan
	Hopper (8)
Pumps Complete	
	3- 1" Linear/blass (each 10,200)

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UCC DEPT  
STATE OF UTAH  
Mar 2 12 06 PM '95

HJ

4 2 8 8 2 2

	4- 4" Linear/blass (90%)	\$
	1- 4" Dredge Pump <sup>S/N 94045-5578-06</sup> <del>S/N 9489027-06</del> <sup>94B5514-02</sup>	\$
	3- 10" pump frames	\$
	2- Blowers (2800 CFM Roots)(3000 MD 100HP)	\$
	3- 3" Pump/Coke <sup>S/N I 94B5511-03-02</sup>	\$
	1- 4: Dredge/w blwr - Canada	\$
	1- 10" pump/w blwr - Canada <sup>S/N 94B3875B-05</sup> <sup>S/N 94H10-11/12-05</sup>	\$
	1- S Curve 3" Nozzles - Canada	\$
	1- S Curve 1" Nozzles - Canada	\$
	Spare Bearings - Canada	\$
Leased Units		\$
	1- 1" Linear - Canada/Test	\$
	1- 3" Garnet Linear - Canada	\$
	1- 3" Coke Linear - Canada	\$

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STATE OF UTAH  
Mar 2 12 07 PM '95

IR J

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STATE OF UTAH  
Mar 2 12 07 PM '95

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## CONSOLIDATION AGREEMENT

THIS AGREEMENT is made and entered into this 29th day of August, 1995, by and between Darko Segota and Angela Segota (hereinafter collectively called the "Segota's"), and Bergaz, L.C., a Utah Limited Liability Company (hereinafter called "Bergaz"), located at 4961 So. Murray Blvd. Apt. 31P, Salt Lake City, Utah 84123, and Stephen Smoot of 3500 Pine Valley Road, Woodland, Utah 84036, (hereinafter called "Smoot").

Whereas, Bergaz, Segota's and Smoot have entered into past agreements involving the development, patenting, manufacturing, use and profit sharing of Boundary Air/Laminar Flow material handling and processing technology, including future improvements thereof (hereinafter referred to as "the BA/LF technology"), and;

Whereas, Bergaz, Segota's and Smoot wish to simplify, consolidate and enhance the relationship between each other.

Therefore, for Ten Dollars, and other good and valuable consideration, Bergaz, Segota's and Smoot agree as follows:

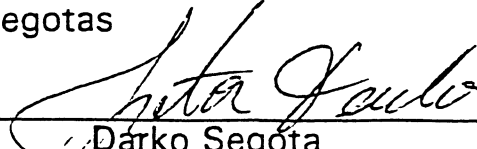
- 1) All past agreements between Bergaz, Segota's and Smoot are hereby replaced by this Consolidation Agreement.
- 2) Bergaz, Segota's and Smoot hereby convey whatsoever right, title, and interest they may have in the BA/LF technology BA/LF technology and any receivables (notes, etc.) to BA/LF Holdings, L.C., a Utah Limited Liability Company (hereinafter referred to as "BA/LF Holdings").
- 3) Bergaz, Segota's and Smoot acknowledge that Bergaz is controlled and owned by Segota's and Utah International L.C., a Utah Limited Liability Company (hereinafter referred to as "Utah") is controlled and owned by Smoot. Bergaz and Utah shall together own all shares of BA/LF Holdings equally. Utah shall be the managing partner in BA/LF Holdings.
- 4) Bergaz, Segota's and Smoot hereby agree that some ownership interest in BA/LF Holdings will be held in trust for third parties and that Bergaz and Utah hereby agree that a total of ten percent

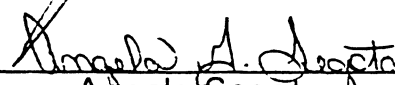


(10%) interest of BA/LF Holdings shall be held in trust for Branimir Globevnik, or his assigns. In the event it is necessary for BA/LF Holdings to hold any additional interest for third parties, there must be mutual consent between Bergaz and Utah.

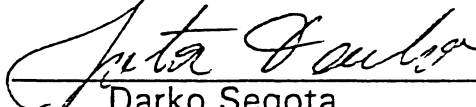
Witness the hand and seal of the parties to this agreement as of the day first above written.

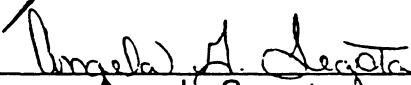
The Segotas

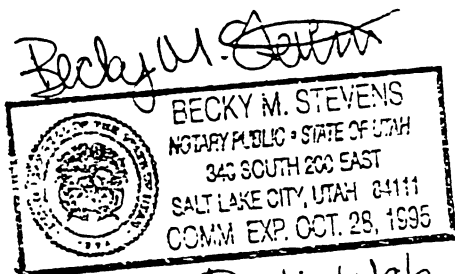
  
Darko Segota

  
Angela Segota

Bergaz, L.C., a Utah Limited Liability Company

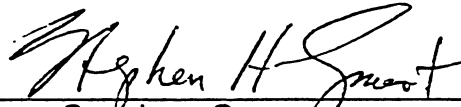
  
Darko Segota

  
Angela Segota



West one Bank, Utah  
08-29-95

Stephen Smoot

  
Stephen Smoot

## MEMORANDUM OF AGREEMENT

This agreement is made and entered into this 18 day of September, 1995 by and between Darko Segota located at 4961 So. Murray Blvd. Apt. 31P, Salt Lake City, Utah 84123 (hereinafter called "Segota"), and Stephen H. Smoot of 3500 Pine Valley Road, Woodland, Utah 84036, (hereinafter called "Smoot").

Whereas, Segota controls Bergaz, L.C., a Utah Limited Liability Company located at 4961 So. Murray Blvd. Apt. 31P, Salt Lake City, Utah 84123 (hereinafter called "Bergaz"), and;

Whereas, Smoot controls Utah International L.C., a Utah Limited Liability Company located at 3500 Pine Valley Road, Woodland, Utah 84036, (hereinafter called "Utah"), and;

Whereas, pursuant to a Consolidation Agreement executed August 29, 1995, Bergaz and Utah joined as members of BA/LF Holdings L.C., a Utah Limited Liability Company filed with the office of the Utah Secretary of State with Utah being named as the Managing Member of BA/LF Holdings L.C., and;

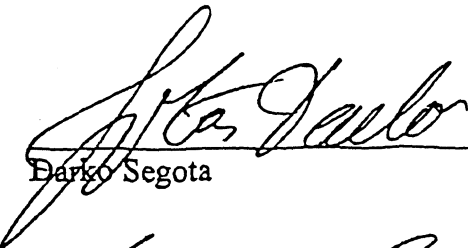
Whereas, the Managing Member of a Limited Liability Company controls and directs the affairs of the company and Segota desires to receive a more definitive understanding about certain aspects of BA/LF Holdings L.C. in order to confirm that both his (as the inventor) and Bergaz's interests are protected.

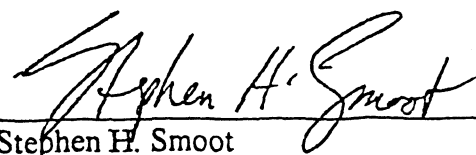
For Ten Dollars, and other good and valuable consideration, Segota and Smoot agree as follows:

- 1) Bergaz shall execute the Equipment Testing Agreement with PMJ L.C. (see exhibit "A").
- 2) Bergaz shall execute the Equipment Testing Agreement with Western Fiberglass, Inc. (see exhibit "B").
- 3) Segota will sign and deliver the attached letter (see exhibit "C") to Thorpe, North & Western, hereinafter called the "patent attorney".
- 4) Segota and Smoot will sign and deliver the attached letter (see exhibit "D") to the patent attorney.
- 5) Segota will execute assignments on the existing patent application and the new application to BA/LF Holdings L.C., in the form stipulated by the patent attorney.
- 6) BA/LF Holdings L.C. shall pay the patent attorney Five Thousand Dollars (\$5,000) for the past application and to start the new application.
- 7) BA/LF Holdings L.C. shall purchase the attached option (see exhibit "E") from PMJ L.C.

- 8) BA/LF Holdings L.C. shall execute agreements with Okrad International L.C., a Utah Limited Liability Company to form a Utah Limited Liability Company to be called BA/LF Technologies L.C. (see exhibit "F").
- 9) BA/LF Technologies L.C. shall enter into an employment agreement with Segota stipulating that a minimum monthly salary of Five Thousand Dollars (\$5,000) shall be paid to him for his machining, engineering, research and development services. The employment agreement shall stipulate that as long as Segota is performing under normal and customary policies and regulations of companies in standard industry, the minimum monthly salary shall be continually paid.
- 10) Okrad International L.C. shall show BA/LF Holdings L.C. and Plant Properties L.C., as holders of seventy percent (70%) and thirty percent (30%) respectively, of the outstanding units of beneficial interest in Okrad International L.C.
- 11) Okrad International L.C. shall acknowledge BA/LF Holdings L.C. as the holder of the existing Four Hundred Thousand Dollar (\$400,000) note.
- 12) Okrad International L.C. shall cancel the existing note and issue a new note to Plant Properties L.C. so that the total amount outstanding from Okrad International L.C. to Plant Properties L.C. shall be One Hundred Seventy Four Thousand Dollars (\$174,000).
- 13) BA/LF Technologies L.C. shall enter into serious negotiations with third parties with the intent of proposing to its shareholders the exchange of all shares of BA/LF Technologies L.C. with those of a public company under the auspices of reasonable and prudent business standards.
- 14) Smoot shall make all decisions on behalf of BA/LF Holdings L.C. under reasonable and prudent business standards.
- 15) In the event Smoot fails to manage the business under reasonable and prudent business standards, it is hereby agreed that  is designated to name a third party as Manager of BA/LF Holdings L.C. *Bryan Clarke* *GF*.

Signed,

  
Darko Segota

  
Stephen H. Smoot

A S S I G N M E N T

Whereas, I, DARKO SEGOTA, a resident of Utah, have invented a certain new and useful improvement in a BOUNDARY AIR/LAMINAR FLOW CONVEYING SYSTEM WITH AIR REDUCTION CONE for which an application for United States Letters Patent was executed on November 8, 1995; and

Whereas, BA/LF HOLDINGS, L.C., a Limited Liability Company, having an address of 3500 Pine Valley Road, Woodland, Utah, is desirous of acquiring the entire right, title and interest in the same;

NOW, THEREFORE, in consideration of one dollar (\$1.00), the receipt and sufficiency whereof is hereby acknowledged, and other good and valuable consideration, I, the said inventor, by these presents do sell, assign and transfer unto said BA/LF HOLDINGS, L.C. the full and exclusive right to the said invention and in and to said application and any and all divisions and continuations, substitutes and reissues of said application and the entire right, title and interest in, to and under any and all Letters Patent of the United States and foreign countries that may issue or be granted on said invention.

The Commissioner of Patents is hereby authorized and requested to issue said Letters Patent to said BA/LF HOLDINGS, L.C. as the assignee of the entire right, title, and interest in and to the same, for its sole use and behoof; and for the use and behoof of

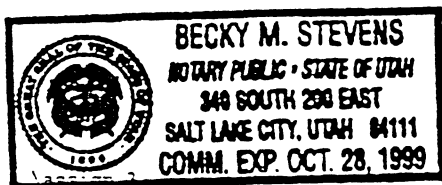
its legal representatives, to the full end of the term for which said Letters Patent may be granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed this 8 day of Nov., 1995, at  
Salt Lake City.

Darko Segota  
DARKO SEGOTA

STATE OF Utah )  
COUNTY OF Salt Lake ) : SS

Before me personally appeared said Darko Segota and acknowledged the foregoing instrument to be his free act and deed this 8<sup>th</sup> day of November, 1995.



Becky M. Stevens  
Notary Public

This STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code:

1. Debtor(s) (Last Name First) and address(es)

2. Secured Party(ies) and address(es)

OKRAD INTERNATIONAL, L.C.  
and Darko Segota

3500 Pine Valley Road  
Woodland, Utah 84036 USA  
Social Security No.  
Emp. Fed. I.D. No.

W.F. ENGINEERING DBA  
W.F. TECHNOLOGY  
879 South 4400 West  
Salt Lake City, Utah 84121

4. This statement refers to original Financing Statement bearing File No.

428822 70

Date Filed

March 2

19 95

Maturity Date

19

For Filing Officer (Date, Time and Filing Office)

5. ☐ Continuation. The original financing statement between the foregoing Debtor and Secured Party, bearing file number shown above, is still effective.
6. ☐ Termination. Secured party no longer claims a security interest under the financing statement bearing file number shown above.
7. ☒ Assignment. The secured party's right under the financing statement bearing file number shown above to the property described in Item 10 have been assigned to the assignee whose name and address appears in Item 10.
8. ☐ Amendment. Financing Statement bearing file number shown above is amended as set forth in Item 10.
9. ☐ Partial Release. Secured Party releases the collateral described in Item 10 from the financing statement bearing file number shown above.

10.

BA/LF HOLDINGS L.C.  
3500 Pine Valley Road  
Woodland, Utah 84036 USA

## ASSIGNMENT

No. of additional Sheets presented:

52650  
0033

By: \_\_\_\_\_  
Signature(s) of Debtor(s) (necessary only if Item 8 is applicable).

By: \_\_\_\_\_  
Signature(s) of Secured Party(ies)

W.F. Engineering, Inc. DBA  
WF TECHNOLOGY

(1) Filing Officer Copy - Alphabetical

STANDARD FORM - FORM UCC-3

This STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code:

1. Debtor(s) (Last Name First) and address(es)

OKRAD INTERNATIONAL, L.C.  
and Darko Segota  
3500 Pine Valley Road  
Woodland, Utah 84036 USA  
Social Security No. \_\_\_\_\_  
Emp. Fed. I.D. No. \_\_\_\_\_

2. Secured Party(ies) and address(es)

BA/LF HOLDINGS L.C.  
3500 Pine Valley Road  
Woodland, Utah 84036 USA

UCC DEPT  
STATE OF UTAH

OCT 3 12 39 PM '95

4. This statement refers to original Financing Statement bearing File No. \_\_\_\_\_

428822 67e

Date Filed March 2, 19 95 Maturity Date \_\_\_\_\_ 19 \_\_\_\_\_

For Filing Officer (Date, Time and Filing Office)

5. ☐ Continuation. The original financing statement between the foregoing Debtor and Secured Party, bearing file number shown above, is still effective.  
6. ☐ Termination. Secured party no longer claims a security interest under the financing statement bearing file number shown above.  
☒ Assignment. The secured party's right under the financing statement bearing file number shown above to the property described in Item 10 have been assigned to the assignee whose name and address appears in Item 10.  
8. ☐ Amendment. Financing Statement bearing file number shown above is amended as set forth in Item 10.  
9. ☐ Partial Release. Secured Party releases the collateral described in Item 10 from the financing statement bearing file number shown above.

10.

THE H.J. RUSSELL MCNITT TRUST  
765 East 3 Fountains Circle #33  
Murray, Utah 84107  
A. Park Smoot, Trustee

ASSIGNMENT

No. of additional Sheets presented: \_\_\_\_\_

BA/LF HOLDINGS L.C.

5276010014

By: \_\_\_\_\_

Signature(s) of Debtor(s) (necessary only if Item 8 is applicable).

By: \_\_\_\_\_

*Stephen H. Smoot*

Signature(s) of Secured Party(ies)

(1) Filing Officer Copy - Alphabetical

STANDARD FORM - FORM UCC-3

Ronald S. George  
3804 Highland Drive #5  
Salt Lake City, Utah 84106  
Phone: (801) 272-5545

**UNITED STATES BANKRUPTCY COURT  
FOR THE CENTRAL DISTRICT OF UTAH**

---

IN THE MATTER OF:

BA/LF HOLDINGS, L.C.

Putative Debtor,

)  
)  
)  
)  
)  
)  
)

Case No. 97B-25450  
(Involuntary Chapter 7)

---

**AFFIDAVIT OF W. DAVID WESTON**

---

STATE OF UTAH )

) ss:

Salt Lake County )

W. David Weston, being first duly sworn deposes and says if called upon to testify in the above matter would so testify as follows:

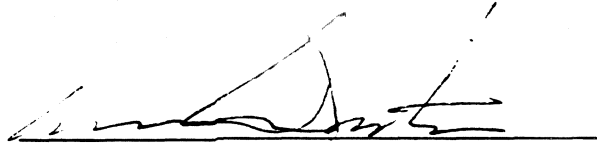
1. I have read the Reply to Putative Debtor's Objection to Motion for Rehearing, dated September 17, 1998, am familiar with its contents and based on information, my knowledge and belief attest to the accuracy thereof.
2. Exhibits A, C, and the documents comprising exhibit D, referenced in and attached to the Reply to Putative Debtor's Objection are true and correct copies of the original documents contained in the records of BA/LF Holdings, L.C. , which were obtained



by me from Mr. Darko Segota and maintained by me in the ordinary course of business while I was the manager of BA/LF Holdings, L.C.

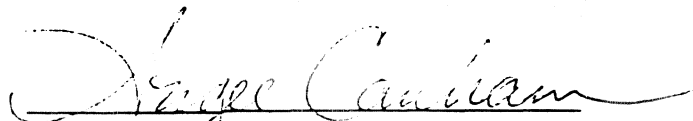
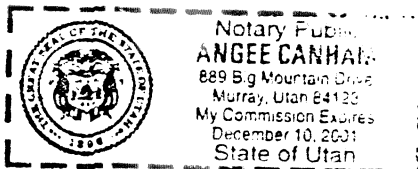
3. Exhibits B, E and F referenced in and attached to the Reply to Putative Debtor's Objection are true and correct copies of the originals which I obtained from the official records of the State of Utah as a result of a personally conducted computer search for any UCC-1 filings with the State of Utah involving Okrad International, L.C., Darko Segota, BA/LF Holdings, L.C., W. F. Engineering and PMJ, L.C.

Further this affiant saith nought.



W. David Weston

Subscribed to and sworn before me this 17<sup>th</sup> day of September, 1998.



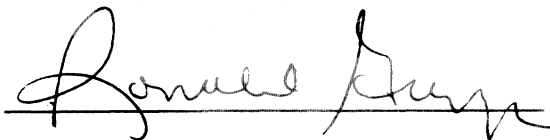
Notary Public, residing in Salt Lake County

CERTIFICATE OF MAILING

I hereby certify that on this 17<sup>th</sup> day of September, 1998, a true and correct copy of the foregoing Affidavit was mailed postage prepaid, to the following:

Theodore E. Kanell  
HANSON, EPPERSON & WALLACE  
4 Triad Center, Suite 500  
P.O. Box 2970  
Salt Lake City, Ut 84110-2970

John B. Anderson  
623 East First South  
P.O. Box 11643  
Salt Lake City, Utah 84147-0643

A handwritten signature in cursive script, appearing to read "Ronald B. [unclear]", written over a horizontal line.

Ronald S. George  
3804 Highland Drive #5  
Salt Lake City, Utah 84106  
Phone: (801) 272-5545

**UNITED STATES BANKRUPTCY COURT  
FOR THE CENTRAL DISTRICT OF UTAH**

---

IN THE MATTER OF:

BA/LF HOLDINGS, L.C.

Putative Debtor,

)  
)  
)  
)  
)  
)

Case No. 97B-25450  
(Involuntary Chapter 7)

---

**MOTION FOR REHEARING  
AMENDMENT OF JUDGMENT  
AND FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL MEMORANDUM**

---

Comes now W. David Weston, by and through his attorney, Ronald S. George and moves the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure made applicable by Rule 9023 of the Rules of Bankruptcy Procedure to amend its judgment and Findings of Fact and for an extension of time to obtain trial transcripts of the testimony of Darko Segota and file a supplemental memorandum in support of this motion for rehearing.

The Court is first asked to amend its judgment by striking and eliminating the punitive damage award of \$54,435 for failure of the putative debtor to present any evidence that would permit the Court to expressly comport with the standards required by *White v. General Motors Corp., Inc.* 908 F.2d 675, 684 (10<sup>th</sup> Cir. 1990).

A bankruptcy court exercises discretion in determining what sanction is appropriate under the circumstances of a particular case. See *Coter*, 496 U.S. at 399. But in this

Federal District both the Federal Court and the Tenth Circuit Court require that before an award of punitive damages can be made the court must “**expressly consider**” at least the following when determining a monetary sanction: 1) the reasonableness of the requested fees and expenses; 2) the sanctions amount reasonably necessary to deter the wrongdoer; 3) the offender’s ability to pay; 4) other factors deemed appropriate in the particular circumstances. See pertinent portions of the Memorandum Decision and Order in District Court Case No. 92C-1073J entered on March 9, 1994 attached hereto and the White factors referenced in this Court’s Finding No. 28 citing *In re Rex Montis Silver Company*, 87 F.3rd 435, 440 (10<sup>th</sup> Cir. 1996).

In this case the putative debtor has failed to present any evidence which would enable the Court to “**expressly consider**” all of the referenced White factors and in particular any evidence to permit this Court to “expressly consider” the judgment debtor’s ability to pay any sanction amount that might be awarded. There simply is no evidence in the record before the court as to what amount, if any, would be warranted or necessary to deter the alleged wrongdoer. Clearly \$54,000 would not deter Bill Gates, but no evidence has been established as to enable the court to “expressly consider” what, if any amount, is necessary to provide deterrence in this case.

In the absence of any evidence with which to “expressly consider” an amount for punitive damages the punitive damage award should be stricken. The burden to present all such evidence to meet the White standards rested with the putative debtor. It was the

putative debtor who requested sanctions and had the burden to be fully informed with respect to the White standards and to have submitted sufficient evidence during the hearing to meet their burden. The time for presenting all such evidence is past. In the absence of such evidence the Court is clearly unable to “expressly consider” these particular White factors and punitive damages are unwarranted. Accordingly, the judgment should be amended to eliminate the award for punitive damages.

The Court is further asked to Amend its Findings of Fact and to take additional testimony, as may be necessary, with respect to the Court’s finding that the judgment debtor acted in bad faith in filing the involuntary petition to stop the State Court action. The court found the filing in bad faith because 1) he (judgment debtor) believed that the challenges he had made to the UCC- 1 and against Smoot would not be successful and that 2) Segota, having learned that the UCC- 1 filing for the McNitt Trust was an assignment of the Radman security interest that represented an obligation that Segota recognized, had caused Segota to consequently reconcile with Smoot and 3) that the motive in filing the petition was to prevent Segota and Smoot from settling the litigation on behalf of their entities.

These findings are in error and are unsupported by the evidence. The evidence is that there are two UCC-1 or more in question. Those UCC-1 filings that pertain to the Ivan Radman option are wholly separate, distinct, apart and unrelated to later UCC-1 filed by Stephen Smoot on behalf of the McNitt trust. This later UCC-1 was created by Smoot

while manager of BA/LF Holdings, L.C. to secure a loan made by the McNitt trust, of which he was the trustee, the purpose of which was to acquire Mr. Radman's options rights in Mr. Segota's new pump technology which option terms were soon to expire and would not have been renewed. Without renewal all of the pump technology would have reverted to Segota free and clear of any and all encumbrances.

The evidence before the Court is that Mr. Segota had developed new technology in which Mr. Smoot held no pecuniary interest but which had been acquired by Mr. Radman by option. Mr. Smoot's intent was to obtain an interest in Mr. Segota's new technology through the acquisition of Mr. Radman's option rights at which time he would then be subject to Mr. Radman's obligations under the option.

In purchasing the Radman Option Mr. Smoot stepped into the shoes of Mr. Radman and assumed all of his obligation to fully fund the new technology to provide for manufacturing and marketing as set out in the Option at no cost to Segota. These obligations for funding were necessary compensation to earn and acquire an interest from Segota in his new technology. The cost of acquiring the option was solely that of Smoot to acquire the interest which also left Mr. Segota with a carried interest through BA/LF Holdings. The act of Mr. Smoot in pledging assets of BA/LF to secure his own purchase obligation and creating a UCC-1 encumbrance that upon Smoot's default could strip Mr. Segota of his carried interest in the new technology was simply wrong.

This was the position taken by Mr. Segota as set out in his verified complaint against


Mr. Smoot and has been the basis for the actions taken by the judgment debtor on behalf of Mr. Segota and Mr. Globevnik including the filing of the involuntary petition.

The judgment debtor has subsequently learned that in the settlement between Mr. Segota and Mr. Smoot that Mr. Segota has in fact reacquired his interests in the patent rights to the new technology outside of BA/LF Holdings, L.C.. This would be an end result fully contemplated by the litigation brought by the judgment debtor on behalf of Mr. Segota. This purported settlement would recognize that Mr. Smoot had not paid for such rights and that the UCC-1 filing in favor of the McNitt Trust was made in breach of Smoot's contract obligations and fiduciary duty. The transfer of the patents from BA/LF Holdings to Segota in cancellation of any security interests of Smoot as trustee of the McNitt Trust and release of Smoot to any rights in the patents to the new Technology other than by royalty or some other means would fully substantiate the position taken by the judgment debtor with respect to both the UCC-1 and Mr. Smoot's failure to pay adequate consideration for the rights and interests he subsequently claimed in this new technology.

To the extent that the Court's findings are the result of Mr. Segota's testimony, the judgment debtor has reason to believe that such testimony was perjured. Accordingly the judgment debtor has ordered that transcripts be made of Mr. Segota's testimony and respectfully requests that the Court grant sufficient time for these transcripts to be delivered and analyzed and based upon the transcripts that the judgment debtor be permitted to file a supplemental memorandum in support of this motion for Rehearing setting for the basis as

to why the above findings are not supported by any credible evidence and that any support to such findings as found by the court was based on perjured testimony.

Respectfully submitted this 20<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
Ronald S. George, Attorney for Mr. Weston

#### CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of August, 1998, a true and correct copy of the foregoing **MOTION FOR REHEARING AND AMENDMENT OF JUDGMENT** was filed with the Court and mailed postage prepaid, to the following:

Theodore E. Kanell  
HANSON, EPPERSON & WALLACE  
4 Triad Center, Suite 500  
P.O. Box 2970  
Salt Lake City, Ut 84110-2970

John B. Anderson  
623 East First South  
P.O. Box 11643  
Salt Lake City, Utah 84147-0643

  
\_\_\_\_\_



FILED IN UNITED STATES DISTRICT  
COURT DISTRICT OF UTAH

MAR 09 1994

MARKUS B. ZIMMER, Clerk

By                      DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

\* \* \* \* \*

In re  
REX MONTIS SILVER COMPANY,

Debtor.

                                      
RICHARD N. BIGELOW,

Appellant,

vs.

JEFFREY G. BANKS, et al.,

Appellees.

\*  
\* Bankruptcy No. 91A-27975  
\* Chapter 7  
\*

\* District Court Case  
\* No. 92C-1073J  
\*

\* MEMORANDUM DECISION  
\* AND ORDER  
\*

\* \* \* \* \*

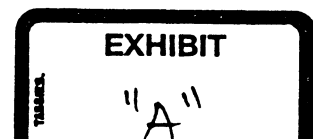
**I. Introduction**

This is an appeal from an order of the United States Bankruptcy Court for the District of Utah<sup>1</sup> entered on November 2, 1992, imposing Bankruptcy Rule 9011 ("Rule 9011") sanctions against appellant Richard N. Bigelow ("appellant") in the sum of \$10,000.00.

**Disposition Below**

On December 17, 1991, the Rex Montis Silver Company ("Rex Montis") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. (B. Dkt. 1, App. 331.) On February 28, 1992, Sam Harmatz, Bernard Hodowski, A.C. Nejedly, Rosalie Donahey, Chris Waugh, H.E. Moses, Estate of Joe Duncan, Elliot

<sup>1</sup> The Honorable John H. Allen, United States Bankruptcy Court for the District of Utah.



not well grounded in fact or law. Accordingly, a reasonable attorney would conclude that asserting and litigating such claims would delay proceedings, and needlessly increase costs.

The bankruptcy court was uniquely positioned to view this case as a whole and determine whether or not the pleadings at issue were interposed for improper purposes. It is evident from the record, that the bankruptcy court had a permissible basis to conclude that the pleadings were interposed for improper purposes such as recited within Rule 9011. Accordingly, this court finds that the bankruptcy court's finding that the pleadings at issue were interposed for improper purposes within Rule 9011 was not clearly erroneous and will not be disturbed.

#### **E. Sanctions.**

Based on its conclusions and findings as they pertained to the claims process and the trustee election process, the bankruptcy court determined that it was appropriate to impose sanctions against appellant for violating Rule 9011. Sept. 24, 1992 Tr. at 6. Attorneys who violate Rule 9011 "should" be sanctioned and the Rule specifically allows reasonable attorney's fees to be awarded in appropriate cases. Rule 9011. In this case, the record indicates that the bankruptcy court was appraising a situation where the lawyer failed to reasonably investigate his claims and apparently compounded the court's and appellee's problems by adopting a very aggressive litigation approach which caused unnecessary delay and increased litigation and administrative costs. Although the evidence before the court showed that appellees' incurred \$14,170.00 in attorney's fees and \$2,502.20 in costs the court, in its discretion, determined that \$10,000.00 was an appropriate sanction under the circumstances of the particular case. Sept. 24, 1992 Tr. at 6.

A bankruptcy court exercises discretion in determining what sanction is appropriate under the circumstances of a particular case. See Cooter, 496 U.S. at 399. The Tenth Circuit, however, requires that a court "expressly consider" at least the following when determining the appropriate monetary sanction in a particular case: 1) the reasonableness of the requested fees and expenses; 2) the sanctions amount reasonably necessary to deter the wrongdoer; 3) the offender's ability to pay; 4) and other factors as deemed appropriate in the particular circumstances. White v. General Motors Corp., Inc., 908 F.2d 675, 684 (10th Cir. 1990). In this instance, the bankruptcy court failed to "expressly consider" the White factors in making its findings concerning the appropriate sanctions amount. See Sept. 24, 1992 Tr. at 6. Implicit consideration appears to be insufficient.

This court finds that the bankruptcy court did not abuse its discretion in ordering that sanctions be imposed against appellant for violating Rule 9011. The problem is the need to "expressly consider" in determining what is appropriate. Because the bankruptcy court failed to "expressly consider" the factors listed above and note the same in its findings, this court must vacate the amount and remand for further express consideration of the factors set forth in White as to what is appropriate under the circumstances of this particular case. Cf. Dodd Ins. Servs., Ind. v. Royal Ins. Co. Of Am., 935 F.2d 1152, 1159 (10th Cir. 1991); see, e.g., East Plains Devlpt. Corp. v. King, (In re Faires), 123 B.R. 397 (D.Colo. 1991).

#### IV. Conclusion

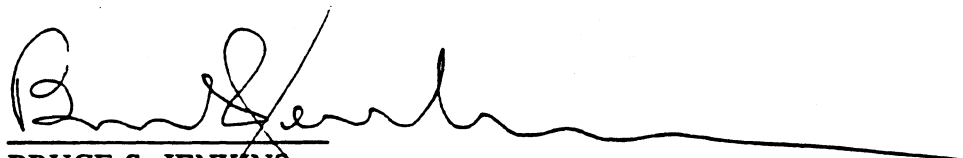
In this case, the bankruptcy court's findings indicate that it considered appellant's prefiling inquiry and the factual and legal basis for the pleadings filed by appellant before

concluding that appellant violated Rule 9011. After reviewing the entire record, as well as the relevant case law, this court cannot find that the bankruptcy court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell, 496 U.S. 384, 405 (1990). The record contains ample evidence which indicates that appellant failed to conduct a reasonable inquiry as required by the Rule. Simply put, a reasonable inquiry would have revealed that the "Surety Creditors" did not hold allowable, undisputed, fixed, liquidated, unsecured claims as required by Section 702(a)(1). Further, the record shows that the bankruptcy court's finding that the pleadings were filed for improper purposes such as recited in the Rule was "plausible in light of the record viewed in its entirety," Anderson, 470 U.S. 564, 573, and therefore not clearly erroneous. Although this court finds that the bankruptcy court had the authority to impose sanctions under Rule 9011, the matter must be remanded for express consideration of the appropriate amount in light of the factors delineated in White.

Accordingly, the bankruptcy court's order is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

DATED this <sup>th</sup>9 day of March, 1994.

BY THE COURT:

  
\_\_\_\_\_  
BRUCE S. JENKINS  
United States District Judge