

1998

W. David Weston, Darko Segota, Bergaz, LC
Branimir Globevnik, and Okrad International, LC,
BA/LF Holdings LC, Ba/LF Technologies, LC v.
Stephen H. Smoot, Utah International, LC, Park
Smoot, H.J. Russel Mcnitt Trust : Reply Brief

Utah Court of Appeals

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Recommended Citation

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

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COURT OF APPEALS

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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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	i
Preliminary Statement	1
Argument	3
A. Appellant’s Motion to Intervene was Timely.	3
B. Appellant Held a Legally Protectable Interest in the Subject Matter of the Litigation. . .	4
(1) True Subject Matter of The Underlying Litigation.	4
(2) The Application of the Interest Test	5
C. Appellant’s Interest Were Not Adequately Protected.	6
CONCLUSION	7

Table of Authorities

<i>Alameda Water & Sanitation District</i> 9 F.3d 88, 90 (10 th Cir. 1993)	7, 8
<i>Ceres Gulf v. Cooper</i> , 957 F.2d 1199, 1203 n. 10 (5 th Cir. 1992)	8
<i>National Farm Lines v. Interstate Commerce Comm’n</i> , 564 F.2d 381, 384 (10 th Cir. 1977)	8, 9
<i>Nuesse v. Camp</i> , 385 F.2d 694, 700 (D.C. Cir. 1967)	8
<i>Regents of the University</i> , 516 F.2d 350 (10 th Cir.)	8
<i>Sanquine, Ltd. V. Department of Interior</i> , 736 F.2d 1416, 1420 (10 th Cir. 1984)	8
<i>Security Ins. Co., v. Schipporeit, Inc.</i> , 69 F.3d 1377, 1381 (7 th Cir. 1995).	7
<i>Sierra Club v. Espy</i> , 18 F.3d 1202, 1207 (5 th Cir. 1994)	8
<i>Trbovich v. United Mine Workers</i> , 404 U.S. 528, 538 n. 10 (1972)	9

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 (7th 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.3d 88, 90 (10th 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 (10th 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 (5th Cir. 1994); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n. 10 (5th Cir. 1992); *Sanquine, Ltd. V. Department of Interior*, 736 F.2d 1416, 1420 (10th 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 (10th 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 (10th 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.

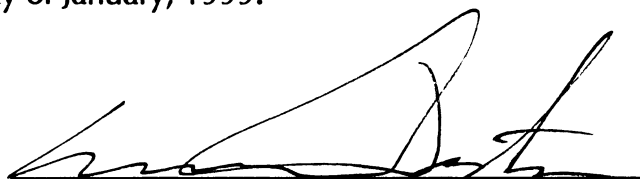
CONCLUSION

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 21st day of January, 1999.

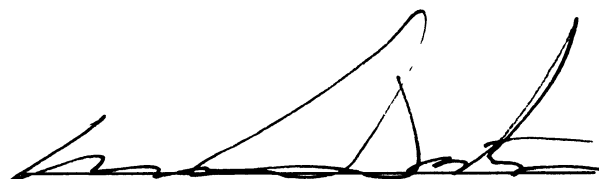
A handwritten signature in black ink, appearing to read 'W. David Weston', written over a horizontal line.

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 21st 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 'W. David Weston', written over a horizontal line.

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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)	Case No. 960902318CV
)	
Plaintiffs,)	AFFIDAVIT OF W. DAVID
vs.)	WESTON IN SUPPORT OF
)	MOTION TO INTERVENE AS
STEPHEN SMOOT, individually and as)	PARTY PLAINTIFF
Manager of Utah International, L.C. and UTAH)	
INTERNATIONAL, L.C., a Utah Limited Liability)	
Company)	
)	
Defendants.)	Judge: Homer F. Wilkinson
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)	

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

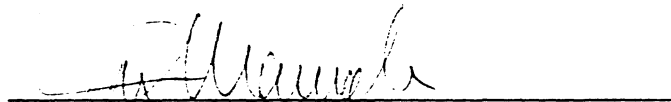
W. David Weston, being first duly sworn deposes and says that the attached agreements and contracts are true and correct copies of the originals and that the attached pleadings are true and correct copies of the pleading filed in the therein designated court.

DATED: November 12, 1997.



W. David Weston

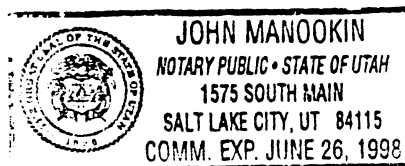
Subscribed to and sworn before me, a notary public for Utah on this ~~22th~~ day of ~~November~~ 1997.



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 14th day of November, 1997, to the following:

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