

2009

# Merrick Young Incorporated v. Wal-mart Real Estate Resources Trusts, Engineered Structures Inc., and the American Insurance Company : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MERRICK YOUNG INCORPORATED, :

Plaintiff/Appellant, :

v. :

WAL-MART REAL ESTATE RESOURCES :  
TRUSTS, ENGINEERED STRUCTURES, :  
INC., AND THE AMERICAN INSURANCE :  
COMPANY, :

Appellate Case No. 20090227-CA

Defendants/Appellees.

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BRIEF OF APPELLANT

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APPEAL FROM ORDER OF DISMISSAL OF CLAIMS FOR RELIEF OF AMENDED  
COMPLAINT AND RELATED RULINGS FROM THE FIFTH DISTRICT COURT,  
WASHINGTON COUNTY, THE HONORABLE G. RAND BEACHAM PRESIDING

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**DEC 07 2009**

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## **APPELLATE JURISDICTION**

Appellant Merrick Young Incorporated, plaintiff/counter-defendant below (“MYI”), appeals the dismissal with prejudice of its claims for relief asserted in the Amended Complaint below. The final order of dismissal, which was entitled “Amended Order of Dismissal with Prejudice” and certified by the trial court as a final order for appeal pursuant to Utah R. Civ. P. 54(b) (“Order of Dismissal”), was entered below on April 20, 2009 and MYI filed its Notice of Appeal on April 21, 2009. (R. 4198-200 (Tab D), 4204-05.)<sup>1</sup> The Utah Supreme Court transferred the appeal to this Court pursuant to Utah R. App. P. 42(a) by order dated March 20, 2009. (R. 4194.) This Court has jurisdiction over this appeal pursuant to Utah R. Civ. P. 54(b), Utah R. App. P. 3 and 4, and Utah Code Ann. § 78A-3-102(3)(j), (4), § 78A-4-103(2)(j).<sup>2</sup>

## **ISSUE ON APPEAL**

The issue on appeal concerns who owns the claims for relief asserted in the Amended Complaint that were dismissed with prejudice by the subject Order of Dismissal, as between

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<sup>1</sup> Record items cited as “Tab” are included in the Addendum at the referenced Tab.

<sup>2</sup> This appeal is a consolidated matter, by Orders of this Court dated May 29, 2009 and October 26, 2009, involving Case No. 20090227-CA, Case No. 20090351-CA and Case No. 20090297-CA. Case No. 20090227-CA was initiated by MYI’s February 23, 2009 Notice of Appeal from the original January 21, 2009 Order of Dismissal. (R. 4174-76.) MYI filed a notice of appeal as to the original Order of Dismissal prior to its certification as a final order pursuant to Utah R. Civ. P. 54(b) out of an abundance of caution so as to avoid losing its right to appeal the dismissal of the subject claims for relief. Case No. 20090351-CA was initiated by MYI’s April 21, 2009 Notice of Appeal from the final April 20, 2009 Order of Dismissal. (R. 4204-06.) Case No. 20090297 involves defendant’s appeal of the trial court’s denial of defendant’s motion for sanctions under Utah R. Civ. P. 11, which concerns the same issue as to who owns the subject claims for relief as is presented by MYI’s appeal.

MYI and Clyde G. Seely, involuntary plaintiff/counter-defendant below, both of whom claim MYI owns the subject claims for relief. This issue turns on interpretation of a March 2004 settlement agreement between MYI, Mr. Seely and MYI's bonding company, which had resolved a separate action against MYI by that bonding company. Engineered Structures, Inc. ("ESI"), defendant/counterclaimaint below and a stranger to the settlement agreement, claimed below that MYI had transferred the subject claims for relief to Mr. Seely *pendente lite* under that settlement agreement. Mr. Seely and MYI disputed that claim. After having obtained Mr. Seely's joinder below as an involuntary plaintiff based upon that claim, ESI eventually got Mr. Seely to stipulate to the dismissal of the subject claims for relief with prejudice in exchange for dismissal of ESI's claims for relief against Mr. Seely for somehow wrongfully allowing MYI to continue as the plaintiff below. ESI then obtained the subject Order of Dismissal based upon that stipulation. The trial court entered the Order of Dismissal upon ESI's motion for dismissal, over MYI's objection, ruling that Mr. Seely owned the claims under the settlement agreement and thus could stipulate to their dismissal, without considering Mr. Seely's and MYI's evidence that there had been no intent to transfer the subject claims for relief. This appeal raises the following issue:

Did the trial court err in interpreting the March 2004 settlement agreement as, on its face, unambiguously providing for the transfer of the subject claims for relief, without considering the extrinsic evidence presented and offered by the parties to that agreement regarding their intent as to the contested contract term, when (1) the agreement's contested definition of the assets that had been transferred to Mr. Seely is reasonably susceptible to the

interpretation that the subject claims for relief were not included in the transferred assets, if not reasonably susceptible only to this interpretation, and (2) the extrinsic evidence showed there had been no intent to include those claims in the transferred assets and there was no contrary evidence? (R. 4122-31 (Tab H).)

The trial court's interpretation of the March 2004 settlement agreement is given no deference on appeal and is reviewed for correctness. WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 15, 54 P.3d 1139.

## STATEMENT OF THE CASE

### **I. Nature Of The Case, Course Of Proceedings, And Disposition In The Court Below**

This case is for recovery of amounts due under a construction subcontract between MYI, the subcontractor, and ESI, the general contractor, regarding a project owned by Wal-Mart Real Estate Business Trust, also a defendant below ("Wal-Mart"). (R. 13-26.) The project was a Wal-Mart super store development in Washington County, Utah. (R. 15) MYI asserted claims for relief for breach of contract, lien foreclosure and recovery of a payment bond against ESI, Wal-Mart and The American Insurance Company, ESI's payment bond surety ("American Insurance"), alleging MYI had not been paid approximately \$1.3 million for materials and work performed in connection with the construction of retaining walls as part of the project.<sup>3</sup> (R. 13-26.) MYI filed the original Complaint on May 4, 2001, and an Amended Complaint on June 7, 2001. (R. 1, 13.)

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<sup>3</sup> The case also originally included claims by and against one of MYI's sub-subcontractors, Western Rocks Products, Inc. (R. 13-26.) All claims against and by Western Rocks Products, Inc. were dismissed from the case in July 2006. (R 1073-75.)

Because this appeal concerns the ownership and dismissal of the claims for relief asserted in MYI's Amended Complaint, those claims are referred to here as the "Subject Claims."

On August 1, 2001, ESI and American Insurance answered the Amended Complaint and ESI counterclaimed against MYI with claims for breach of the their construction subcontract.<sup>4</sup> (R. 37-57.) On June 27, 2005, ESI filed an Amended Counterclaim against MYI, which carried forward the breach of contract claim and added a claim for specific performance as to MYI's alleged indemnification duties under the subject subcontract (relating to MYI's subcontractor's claim against ESI). (R. 465-71.)

In January 2007, ESI started focusing its defense of the Subject Claims on a March 2004 "Settlement Agreement, Mutual Release, and Assignment" (the "March 2004 Settlement Agreement"). The March 2004 Settlement Agreement was between MYI, Merrick and Stephanie Young (husband and wife and MYI's principals/owners), Developers Surety and Indemnity Company ("Developers") and Mr. Seely, and had resolved a separate action against MYI by Developers, which was MYI's bonding company. (R. 1672-1680 (Tab A), 1636-64.) As discussed more fully in the Statement of Facts section below, the March 2004 Settlement Agreement provided that eight categories of specifically listed assets of MYI and the Youngs were transferred to Mr. Seely, who paid \$150,000 to Developers. (R. 1672-80 (Tab A).) ESI, a stranger to the March 2004 Settlement Agreement, claimed

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<sup>4</sup> ESI also originally asserted claims for relief by way of cross-claim and third-party complaint against Wal-Mart and Wal-Mart Stores, Inc. (R. 48-56.) Those claims were resolved and dismissed on September 23, 2002, and Wal-Mart joined with ESI, retaining ESI's counsel, to defend against MYI's claims for relief. (R. 246-48, 242-44.)

below that the Subject Claims were included in the assets that were transferred to Mr. Seely under that agreement. (R. 1259-71, 1469-71, 1472-83, 3025-27.) MYI, the alleged transferor, and Mr. Seely, the alleged transferee, disputed that claim below. (R. 1310-17, 3186, 3192, 3195-98, 3203-17h, 3286-98 (Tab F), 4122-31 (Tab H).)

ESI first used the March 2004 Settlement Agreement to have Mr. Seely involuntarily joined as a plaintiff in the action below, based upon the claim that Mr. Seely was the owner of the Subject Claims under that agreement.

On January 22, 2007, ESI filed a Rule 17(a) Objection, claiming Mr. Seely was the real plaintiff-in-interest as to the Subject Claims, and on February 20, 2007, ESI moved under Utah R. Civ. P. 25(c) to have Mr. Seely joined or substituted as plaintiff, based upon ESI's claim that Mr. Seely was the owner of the Subject Claims under the March 2004 Settlement Agreement. (R. 1256-58, 1259-71, 1469-71, 1472-83.) MYI opposed ESI's Rule 17(a) Objection on the grounds, *inter alia*, that MYI continued to own the Subject Claims and opposed ESI's Rule 25(c) motion on the grounds, *inter alia*, it was not necessary under Utah R. Civ. P. 25(c) to join Mr. Seely even if he were the owner of the Subject Claims. (R. 1310-17, 1517-27.) On May 21, 2007, without interpretation of the March 2004 Settlement Agreement, the trial court ordered Mr. Seely's joinder as an involuntary plaintiff, in addition to MYI, upon ESI's February 20, 2007 motion. (R. 2903, 2905-07.)

After using the March 2004 Settlement Agreement to have Mr. Seely joined as an involuntary plaintiff, ESI next used that agreement to assert claims for relief against Mr. Seely, based upon the allegation that he owned the Subject Claims under that agreement.

On August 16, 2007, ESI filed a Second Amended Counterclaim. (R. 3014-179.) The Second Amended Counterclaim carried forward the claims for relief against only MYI for breach of contract and specific performance, based upon the same subcontract that was the subject of the Amended Complaint, and asserted new claims for declaratory judgment regarding ownership of the Subject Claims and new claims against Mr. Seely alone for abuse of process and recovery of attorneys' fees. (R. 3020-30.) The new claims for relief were based upon ESI's allegation that Mr. Seely had become the owner of the Subject Claims under the March 2004 Settlement Agreement. (R. 3022-30.) ESI alleged that Mr. Seely had acted wrongfully by allegedly allowing MYI to continue to prosecute the Subject Claims after March 2004. (R. 3027-30.) MYI replied to the Second Amended Counterclaim, denying ESI's allegations that MYI had transferred the Subject Claims to Mr. Seely. (R. 3186, 3192, 3195-98.)

On September 28, 2007, Mr. Seely, an Idaho resident, moved to dismiss the claims of the Second Amended Counterclaim against him on the grounds, *inter alia*, of lack of personal jurisdiction. (R. 3217-18, 3203-17bbb.) As discussed in the Statement of Facts section below, **Mr. Seely supported his motion to dismiss with his declaration stating he did not own the Subject Claims.** (R. 3217-17b (Tab E).)<sup>5</sup>

On April 10, 2008, the trial court entered a Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim (the "April 10, 2008 Ruling on Seely's Motion to

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<sup>5</sup> MYI includes in its Addendum items from the record on appeal that were incorrectly numbered by the clerk's office, including Mr. Seely's declaration and its attachment. MYI includes these items in their original form from the record on appeal.



Dismiss”), denying Mr. Seely’s September 28, 2007 motion to dismiss the Second Amended Counterclaim. (R. 3280-84 (Tab B).) As discussed in the Statement of Facts section below, in the April 10, 2008 Ruling on Seely’s Motion to Dismiss, the trial court ruled that it had personal jurisdiction over Mr. Seely on the basis that Mr. Seely had the right to control the Subject Claims under the March 2004 Settlement Agreement. (R. 3282-83 (Tab B).)

On April 28, 2008, Mr. Seely replied to the Second Amended Counterclaim. (R. 3286-99 (Tab F).) In his reply, which is discussed more fully in the Statement of Facts section below, Mr. Seely continued to deny that he was the owner of the Subject Claims. (R. 3292-93, 3297 (Tab F).)

After having used the March 2004 Settlement Agreement to successfully assert claims for relief against Mr. Seely, ESI finally used those claims for relief as leverage to obtain Mr. Seely’s stipulation to the dismissal of the Subject Claims and, based upon that stipulation, obtained the Order of Dismissal as if Mr. Seely owned the Subject Claims.

In October 2008, defendants ESI, American Insurance and Wal-Mart, and involuntary plaintiff Mr. Seely entered into a settlement agreement in which Mr. Seely stipulated to the dismissal of the Subject Claims. (R. 4111-14 (Tab G).) As discussed in the Statement of Facts section below, in the October 2008 settlement agreement, **Mr. Seely expressly reserved his position that he was not the owner of the Subject Claims.** (R. 4111-12 (Tab G).)

Mr. Seely’s only consideration for his stipulation to the dismissal of the Subject Claims was a release from and dismissal of ESI’s claims for relief of the Second Amended

Counterclaim against Mr. Seely (which were based upon ESI's contention that Mr. Seely, rather than MYI, owned the Subject Claims). (R. 4111-14 (Tab G).) MYI was not a party to the October 2008 settlement agreement or its negotiation, was not aware of that agreement before it was presented to the trial court in November 2008, and received no consideration under that agreement or otherwise for the dismissal of the Subject Claims that it alone had carried the burden of prosecuting since the inception of the case. (R. 4111-14 (Tab G).)

On November 24, 2008, ESI, along with American Insurance and Wal-Mart, moved for entry of the original Order of Dismissal based upon Mr. Seely's stipulation to that order, which provided for dismissal with prejudice of the Subject Claims, as well as ESI's claims for relief on the Second Amended Counterclaim against Mr. Seely. (R. 4107-16 (Tab G), 4117-21, 4157-59.) As discussed more fully in the Statement of Facts section below, MYI opposed defendants' November 24, 2008 Motion to Dismiss with Prejudice as to the Subject Claims on the grounds, *inter alia*, that Mr. Seely lacked standing to stipulate to the dismissal of the Subject Claims. (R. 4122-31 (Tab H).)

On January 21, 2009, without a hearing, the trial court entered a Ruling on Motion for Dismissal granting defendants' Motion to Dismiss with Prejudice (the "January 21, 2009 Ruling of Dismissal"), and entered the requested original Order of Dismissal. (R. 4152-56 (Tab C), 4157-59.) In the January 21, 2009 Ruling of Dismissal, the trial court ruled that it already had decided that Mr. Seely was the owner of the Subject Claims in its April 10, 2008 Ruling on Seely's Motion to Dismiss. (R. 4152 (Tab C).) As discussed in the Statement of Facts section below, in the January 21, 2009 Ruling of Dismissal, the trial court reiterated

and expanded upon its interpretation of the March 2004 Settlement Agreement as unambiguously providing for the transfer from MYI to Developers and then to Mr. Seely of the Subject Claims. (R. 4152-54 (Tab C).) As such, the trial court ruled, “Mr. Seely now has the right to pursue the claims filed by MYI in this case or to settle them.” (R. 4154 (Tab C at p. 3).)

On April 20, 2009, the trial court entered the final Order of Dismissal from which MYI appeals, upon MYI’s February 6, 2009 Rule 54(b) Motion to Amend Order of Dismissal with Prejudice as a Final Order for Appeal. (R. 4162-69, 4170-73, 4198-200 (Tab D).) The final Order of Dismissal dismissed with prejudice the Subject Claims and was certified by the trial court as a final judgment for appeal. (R. 4200 (Tab D).)

## **II. Statement Of Facts Relevant To The Appeal**

### **A. Defendants Below Were Not Parties to the March 2004 Settlement Agreement or to the Separate Action Resolved by that Agreement**

The parties to the March 2004 Settlement Agreement were MYI, Merrick and Stephanie Young, Developers and Mr. Seely. (R. 1672-80 (Tab A).) MYI and the Youngs were referred to as the “Indemnitors” in the agreement. (R. 1672 (Tab A at Recital D).) Mr. Seely is Stephanie Young’s father, and was identified in the March 2004 Settlement Agreement as “an individual interested in purchasing **certain** assets of MYI. . . . Seely’s interest is in purchasing assets of Indemnitors owned by Developers or which are subject to the judgment, injunction, and garnishment.” (R. 1676 (Tab A at Recital H (emphasis added)).) Mr. Seely later declared that he had entered into the March 2004 Settlement Agreement in order to pay off certain of his daughter’s and son-in-law’s debts so as to help

them avoid bankruptcy. (R. 3217a (Tab E at ¶ 4).)

The March 2004 Settlement Agreement resolved an action, separate from the action below, against MYI by Developers, Case No. 02-0502319 in the Fifth Judicial District Court (“Developers’ Separate Action”). (R. 1672-80 (Tab A), 1636-64.) Developers had issued performance bonds in favor of MYI in connection with two construction projects unrelated to the Wal-Mart project that was the subject of the underlying action, the “Black Ridge Project” and the “River Road Project.” (R. 1672 (Tab A at Recitals A-C), 1636-70.) In connection with the bonds, MYI and the Youngs had agreed to indemnify Developers if Developers had to pay on the bonds and had pledged certain assets to Developers in order to secure their indemnity obligation. (R. 1672-73 (Tab A at Recital D), 1637-38.) Developers had paid on the two bonds and, as a result, sued MYI and the Youngs in Developer’s Separate Action to enforce their indemnity obligation and pledge. (R. 1673-76 (Tab A at Recitals E, F, I), 1637-38.) In Developers’ Separate Action, Developers obtained an order allowing it to execute upon MYI’s and the Youngs’ assets, including eight categories of specifically listed assets. (R. 1673-74 (Tab A at Recital F), 1626-34 (Tab I at pp. 7-8).) Prior to executing on MYI’s or the Youngs’ assets, Developers, MYI, the Youngs and Mr. Seely entered into the March 2004 Settlement Agreement, which resolved Developers’ Separate Action. (R. 1672-80 (Tab A).) As discussed below, the March 2004 Settlement Agreement provided for the transfer of certain of MYI’s and the Youngs’ assets to Developers and Mr. Seely.

None of the defendants below, ESI, Wal-Mart, or American Insurance, were parties

to Developers' Separate Action or to the March 2004 Settlement Agreement. (R. 1672-80 (Tab A), 1636-64.)

**B. The March 2004 Settlement Agreement Did Not Provide that All of MYI's Assets Were Transferred to Developers and Mr. Seely**

The March 2004 Settlement Agreement used the defined term "Indemnitors' Assets" to identify the assets that were transferred from MYI (and the Youngs) to Mr. Seely under that agreement. Paragraph 2 of the March 2004 Settlement Agreement provided in relevant part that:

(1) MYI and the Youngs confirmed that they had transferred to Developers any and all of their interests in the "**Indemnitors' Assets**":

Indemnitors confirm and aver that Indemnitors have assigned, transferred, and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to **Indemnitors' Assets**.

(R. 1676 (Tab A at ¶ 2(b) (emphasis added)).)

(2) Mr. Seely paid to Developers \$150,000:

Concurrently with Developers' execution of this Agreement, Seely shall pay Developers a lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds.

(R. 1676 (Tab A at ¶ 2(c)).)

(3) In consideration of Mr. Seely's payment of \$150,000, Developers transferred to Mr. Seely the "**Indemnitors' Assets**," with the exception of the Black Ridge Project and its related claims:

In consideration of Seely's payment to Developers of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds, Developers (I) hereby assigns, transfers, and sets over to Seely any and all interests rights, and title

that Developers possesses or may possess to the payment of any money regarding the UDOT Project, including any and all interests, rights and title to the UDOT Litigation; and (ii) hereby assigns, transfers, and sets over to Seely **all Indemnitors' Assets** with the exception of the Black Ridge Drive Project, the MYI Black Ridge Drive Project Litigation, and Developers Black Ridge Drive Project Litigation.

(R. 1676-77 (Tab A at ¶ 2(d) (emphasis added))).) Under these provisions of paragraph 2 of the March 2004 Settlement Agreement, the assets of MYI and the Youngs that were transferred to Mr. Seely were **only the “Indemnitors’ Assets”** (with the exception of the Black Ridge Project and its related claims, which were left with Developers).

The term “Indemnitors’ Assets” was defined in Recital F of the March 2004 Settlement Agreement, by reference to the execution order that Developers had obtained in Developers’ Separate Action (which execution order was referred to in the March 2004 Settlement Agreement as the “Court’s Order”). (R. 1673-74 (Tab A at Recital F).) However, the term “Indemnitors’ Assets” in the March 2008 Settlement Agreement was defined to be only some of the assets covered by Developers’ execution order. (R. 1673-74 (Tab A at Recital F, pp. 2-3), 1626, 1632-33 (Tab I at pp. 7-8).)

As set forth in Recital F of the March 2004 Settlement Agreement, the execution order that Developers had obtained in Developers’ Separate Action had authorized it to execute on **all of the assets** of MYI and the Youngs in the amount of \$540,668.61, **including but not limited to** eight categories of specifically listed assets and asset types. (R. 1673-74 (Tab A at Recital F, pp. 2-3); 1626, 1632-33 (Tab I).) The relevant part of the execution order was quoted in Recital F of the March 2004 Settlement Agreement as follows:

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND

DECREED that pursuant to URCP 64C and URCP 64D, Developers may execute, attach and garnish, in the amount of \$540,668.61, the **accounts receivable, assets, interest, money, stocks, memberships, bonds, real property, and personal property in which the Indemnitors [MYI and the Youngs] have an interest, including but not limited to the following:**

1. Merrick Young  
Stephanie Young  
3511 Paiute Road  
St. George or Bloomington, Utah 84790-7741  
The above real property known as 3511 Paiute Road and any funds obtained from its sale, including all other assets of the Indemnitors.
2. Funds due and owing to Indemnitors, either individually or collectively, for the project known as Black Ridge Drive, 250 West Improvement, Project SID 99-4, Inquiry No. 00-1260
3. Funds due and owing to Indemnitors, either individually or collectively, for the project known as River Road, Project No. STP-3196(1)0.
4. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, La Farge, N.A., for the project known as I-15 Sevier River Northward Project, Project No.: \*IM-NH-15-5(31)200.
5. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, Meadow Valley Contractors, Inc., for the project known as UDOT I-15 North Interchange, Project No.: IM-15-2-3861.
6. Any equity in any other real property, business or asset in which any Indemnitor has any interest.
7. Any money, stocks, bonds, or other assets of any Indemnitor.
8. Any interest in Black Ridge Commercial Center,

LLC; Black Ridge, LLC, or any other partnership, limited partnership, limited liability company, sole proprietorship, corporation, or other business entity in which any Indemnitor has an interest, and any real property in which these entities have an interest.

(R. 1673-74 (Tab A at Recital F, pp. 2-3); 1632-33 (Tab I at pp. 7-8) (emphasis added).)

However, “Indemnitors’ Assets” was defined in Recital F of the March 2004 Settlement Agreement to mean **only** the assets specifically listed in paragraphs 1-8 of the execution order quoted in that recital. (R. 1674 (Tab A at Recital F, p. 3).) Recital F of the March 2004 Settlement Agreement added the following language at the end of its quotation from the execution order (which language was not present in the execution order itself): “**All assets referenced in paragraphs 1 through 8 of the Court’s Order [Developers’ execution order] are referred to in this Agreement as ‘Indemnitors’ Assets.’**” (R. 1674 (Tab A at Recital F, p. 3 (emphasis added)); 1632-33 (Tab I at pp. 7-8).)

As such, although the execution order, as set forth in Recital F of the March 2004 Settlement Agreement, had provided that Developers could execute on all of MYI’s and the Youngs’ assets, **including but not limited to** the eight categories of assets, the March 2004 Settlement Agreement provided that **only** the eight categories of assets were the “Indemnitors’ Assets” that were transferred to Mr. Seely. (R. 1674, 1676-77 (Tab A at Recital F, p. 3 and ¶ 2).) The “Indemnitors’ Assets” were defined in the March 2004 Settlement Agreement to be limited only the eight categories of assets lists in Recital F, rather than all of MYI’s and the Youngs’ assets. (R. 1674 (Tab A at Recital F, p. 3).)

As discussed below, the trial court interpreted categories 6 and 7 of the “Indemnitors’



Assets” to unambiguously mean, on their face, all of MYI’s and the Youngs’ assets. (R. 3280, 3282-83 (Tab B at pp. 3-4), 4152-53 (Tab C at p. 2).) However, category 6 on its face referred only to assets in which MYI and/or the Youngs had an equity interest, such as real property. Category 6 stated: “Any equity in any other real property, business or assets in which any Indemnitor has an interest.” (R. 1674 (Tab A at Recital F, p. 3).). Category 7 on its face referred only to liquid assets such as stocks, bonds and other similar assets. Category 7 stated: “Any money, stocks, bonds or other assets of any Indemnitor.” (R. 1674 (Tab A at Recital F, p. 3).)

As discussed below, the trial court interpreted the term “Indemnitors’ Assets” by referring to MYI’s and the Youngs’ pledge of assets to Developers in connection with the issuance of Developers’ performance bonds in MYI’s favor, which pledge had included “all sums due or to become due on all other contracts . . . in which [MYI or the Youngs] has any interest, together with any notes, accounts receivable or chose in action related thereto.” (R. 1673 (Tab A at Recital D, p. 2).) However, the term “Indemnitors’ Assets” was not defined in the March 2004 Settlement Agreement by reference to that pledge and the eight categories of assets that defined the “Indemnitors’ Assets” did not include “all sums due or to become due on all other contracts . . . in which [MYI] has any interest, together with any . . . chose in action related thereto.” (R. 1673-74 (Tab A at Recital F, pp. 2-3).)

The Subject Claims constituted a significant asset of MYI at the time the March 2004 Settlement Agreement was executed, as they were pending at that time and sought recovery of approximately \$1.3 million. (R. 13-26.) The term “Indemnitors’ Assets” was defined to

include specifically referenced construction projects on which MYI had worked and as to which MYI had then-pending claims for payment of money. (R. 1673-74 (Tab A at Recital F, pp. 2-3).) However, that definition did **not** refer to the Wal-Mart project that was the subject of the Amended Complaint or to the Subject Claims for payment of money. (R. 13, 1673-74 (Tab A at Recital F, pp. 2-3).) The listing of the “Indemnitors’ Assets” only referred to the Black Ridge Project, the River Road Project, the “Sevier River Northward Project” and the “UDOT I-15 Project,” and related claims, none of which were the Wal-Mart project or the Subject Claims. (R. 1674 (Tab A at Recital F, p. 3).)

The Subject Claims were accompanied by potential counterclaim liability at the time the March 2004 Settlement Agreement was executed. (R. 37-57.) However, the March 2004 Settlement Agreement did not address assignment of this potential liability (either by a carve-out or an indemnity provision). (R. 1672-80 (Tab A).)

**C. Mr. Seely and MYI Never Intended, Under the March 2004 Settlement Agreement, that the “Indemnitors’ Assets” Included the Subject Claims, and Offered Extrinsic Evidence that there Was No Such Intent**

Mr. Seely stated in declaration testimony that he did not understand the March 2004 Settlement Agreement to have transferred to him the Subject Claims and **disclaimed ownership of the Subject Claims**. (R. 3217-17b (Tab E).) Mr. Seely attached a copy of the March 2004 Settlement Agreement to his September 26, 2007 declaration and stated in that declaration under oath as follows:

At the time I signed the [March 2004 Settlement Agreement], I was generally aware of a dispute between MYI, Wal-Mart and others. **I did not understand that the [March 2004 Settlement Agreement] gave me any right or interest with respect to the above-captioned litigation [the instant action] nor did**

**I expect to receive any such right or interest.** The first time I learned that anyone was asserting that I had any right or interest with respect to the litigation was when the defendants sought to join me as a party in this litigation. **I have not at any time, nor do I now, claim any right or interest in or with respect to the above-captioned litigation.**

(R. 3217a (Tab E at ¶ 5) (emphasis added).)

In his reply to the Second Amended Counterclaim, Mr. Seely denied that: (1) he owned the Subject Claims, under the March 2004 Settlement Agreement or otherwise, and (2) he was the proper plaintiff on the Subject Claims. (R. 3286, 3292-93 (Tab F at pp. 6-9, ¶¶ 49-72).) Mr. Seely affirmatively alleged “he does not claim any right or interest in or with respect to the above-captioned litigation” and that the claims against him were barred “because Seely does not claim any right or interest in or with respect to the above-captioned litigation.” (R. 3292, 3297 (Tab F at p. 7, ¶ 61, p. 12).)

Even in the October 2008 settlement agreement between ESI, Wal-Mart, American Insurance and Mr. Seely, by which Mr. Seely stipulated to the dismissal with prejudice of the Subject Claims, Mr. Seely still did **not** take the position that he had any interest, much less exclusive interest, in the Subject Claims. (R. 4111-14 (Tab G).) Mr. Seely purported to stipulate to the dismissal of the Subject Claims without ever acknowledging that he has any interest in the claims. (R. 4111-14 (Tab G).) The October 2008 settlement agreement stated in relevant part:

SEELY makes no representations or warranties of any kind that the Court’s [April 10, 2008 Ruling on Seely’s Motion to Dismiss] is correct or that **he in fact acquired, has ever held or now holds any claims (including [the Subject Claims])** against any of ESI, WAL-MART, or AIC.

...

SEELY . . . hereby releases, discharges and acquits ESI, WAL-MART, and

AIC . . . of and from any and all claims (including [the Subject Claims]) . . .  
SEELY makes no representations or warranties of any kind with respect to whether he acquired, has ever held or now holds any such claims (including [the Subject Claims]).

(R. 4111-12 (Tab G at Recital E and ¶ 1) (emphasis added).)

MYI made an offer of proof that its principal at the time of the March 2004 Settlement Agreement, Merrick Young, would testify that there was no intent to transfer the Subject Claims under that agreement. (R. 4122, 4127 (Tab H at p. 6).) Other assets of MYI and the Youngs not specified in the March 2004 Settlement Agreement, in addition to the Subject Claims, were left with MYI or the Youngs. (R. 4126 (Tab H at p. 5).)

The alleged interim owner of the Subject Claims, Developers, did not take the position that it owned the Subject Claims, and never exercised control over those claims. (R. 1431-32.)

MYI continued to prosecute the Subject Claims after March 2004 without interruption. Mr. Seely never exercised any control over the Subject Claims after March 2004. (R. 3217a (Tab E at ¶ 5).) MYI denied ESI's allegations that MYI had transferred to Mr. Seely the Subject Claims. (R. 3186, 3192, 3195-98.)

**D. The Trial Court Dismissed the Subject Claims Upon Its Interpretation of the March 2004 Settlement Agreement as Unambiguously Providing for the Transfer of the Subject Claims to Mr. Seely, and Did Not Consider Either the Reasonableness of Mr. Seely's and MYI's Claimed Interpretation or Their Extrinsic Evidence**

The trial court interpreted the March 2004 Settlement Agreement in two decisions in which the trial court decided Mr. Seely was the owner of the Subject Claims, first to the effect that the trial court had personal jurisdiction over Mr. Seely and second to the effect

that Mr. Seely could stipulate to the dismissal with prejudice of the Subject Claims.

In the April 10, 2008 Ruling on Seely's Motion to Dismiss, the trial court decided it had jurisdiction over Mr. Seely on the basis that Mr. Seely had the right to control the Subject Claims under the March 2004 Settlement Agreement. (R. 3280, 3282 (Tab B at p. 3).) The trial court recited facts regarding the March 2004 Settlement Agreement and events leading to that agreement, including MYI's and the Youngs' pledge of assets to Developers and Developers obtaining the execution order. (R. 3280-82 (Tab B at pp. 1-3).) The trial court asserted that the execution order had referred to the assets on which Developers could execute as the "Indemnitors' Assets," even though that term existed only in the March 2004 Settlement Agreement, and not the execution order. (R. 3281 (Tab B at p. 2), 1632-33 (Tab I at pp. 7-8).) The trial court interpreted categories 6 and 7 of the "Indemnitors' Assets" to cover all of MYI's assets so as to include the Subject Claims. (R. 3282-83 (Tab B at pp. 3-4).) The trial court ruled that, because Mr. Seely had acquired "all of the assets of MYI and its principals during the pendency of this action by MYI," Mr. Seely could and should have anticipated that he would be subject to the trial court's jurisdiction. (R. 3283 (Tab B at p. 4).) Nonetheless, the trial court stated that MYI remained a valid plaintiff in the case. (R. 3283 (Tab B at p. 4).)

The trial court's analysis in the April 10, 2008 Ruling on Seely's Motion to Dismiss, in relevant part, was as follows:

Regardless of whether Mr. Seely covertly controlled the prosecution of this action after 2004 or he deliberately or negligently allowed MYI to continue to control it, Mr. Seely had the right to control MYI's claims in this case. **The specification of certain lawsuits transferred to Mr. Seely in the [March**

**2004 Settlement Agreement]** does not obviate the general language therein which also gave Mr. Seely “[a]ny equity in any other . . . asset in which any Indemnitor has an interest” and “[a]ny . . . other assets of any Indemnitor.” **The chose in action upon which MYI sued defendants in this case is one such asset , and Mr. Seely owns it.** For these reasons, this Court has previously ruled that Mr. Seely as the assignee and real party in interest, should be joined as a plaintiff.

This does not mean that Mr. Seely steps into MYI’s shoes for all purposes. ESI does not seek to subject Mr. Seely to its original counterclaims against MYI, but ESI does assert that it has claims against Mr. Seely which accrued after he acquired his rights to MYI’s claims in 2004. **Having acquired all of the assets of MYI and its principals during the pendency of this action by MYI,** Mr. Seely could and should have anticipated that this would subject him to the jurisdiction of this Court for his acts and omissions as to the ownership of the chose of action in this case. Consequently, there is nothing wrong or unreasonable or unfair in requiring Mr. Seely to respond to ESI’s claims, and this Court has jurisdiction sufficient to do so.

(R. 3282-83 (Tab B at pp. 3-4 (emphasis added)).)

The trial court did not address Mr. Seely’s declaration testimony that he did not understand the March 2004 Settlement Agreement to have transferred to him the Subject Claims and that he disclaimed ownership of the claims. (R. 3280-83 (Tab B at pp. 1-4).)

Subsequently, in the January 21, 2009 Ruling of Dismissal, the trial court decided that Mr. Seely could stipulate to the dismissal of the Subject Claims on the basis that Mr. Seely owned those claims under the March 2004 Settlement Agreement. (R. 4152-54 (Tab C).)

MYI argued in opposition to defendants’ November 24, 2008 Motion to Dismiss with Prejudice that Mr. Seely lacked standing to stipulate to the dismissal of the Subject Claims because: (1) ESI’s claims for relief that Mr. Seely owned the Subject Claims still needed to be adjudicated, and (2) the Subject Claims had not been transferred to Mr. Seely under the March 2004 Settlement Agreement. (R. 4122-27 (Tab H).) MYI argued the “Indemnitors’

Assets” did not include the Subject Claims because: (1) the “Indemnitors’ Assets” were limited to only eight categories of specifically listed assets, rather than all of the MYI’s and the Youngs’ assets, (2) the Subject Claims were not included in categories 6 or 7 because MYI did not have an equity interest in the claims and the claims were not a liquid asset akin to money, stocks or bonds, (3) there was no specific reference to the Subject Claims, which were a significant asset of MYI, even though the definition of “Indemnitors’ Assets” included references to specific claims. (R. 4126-27 (Tab H at pp. 5-6).) MYI argued that extrinsic evidence demonstrated there had been no intent to include the Subject Claims in the “Indemnitors’ Assets, including Mr. Seely’s statement of non-ownership of the Subject Claims in his declaration filed in support of his motion to dismiss, Mr. Seely’s assertions of non-ownership of the Subject Claims in his reply to the Second Amended Counterclaim, and Mr. Seely’s reservation of his position that he did not own the Subject Claims in the October 2008 settlement agreement. (R. 4124-25 (Tab H at pp. 3-4).) MYI offered testimony of MYI’s principal that there had been no such intent. (R. 4127 (Tab H at p. 6).) MYI also pointed out that other assets, besides the Subject Claims, had been left with MYI and the Youngs, over which Mr. Seely never exercised control. (R. 4126 (Tab H at p. 5).)

In response, in the January 21, 2009 Ruling of Dismissal, the trial court stated it already had decided in its April 10, 2008 Ruling on Seely’s Motion to Dismiss that Mr. Seely owned the Subject Claims, and reiterated and expanded upon its decision that Mr. Seely owned the Subject Claims. (R. 4152-54 (Tab C at pp. 1–3).) The trial court made clear that it interpreted the term “Indemnitors’ Assets” to unambiguously mean all of MYI’s and the

Youngs' assets existing at the time that agreement was executed, by reference to MYI's pledge to Developers and by interpreting categories 6 and 7 of the "Indemnitors" Assets" to unambiguously mean, on their face, all of MYI's and the Youngs' assets. (R. 4152-54 (Tab C at pp. 1-3.) As such, the trial court interpreted the March 2004 Settlement Agreement on its face as unambiguously providing for the transfer of the Subject Claims to Mr. Seely. (R. 4152-54 (Tab C at pp. 1-3.)

In the January 21, 2009 Ruling of Dismissal, the trial court stated in relevant part as follows (all of the bracketed and parenthetical language, definitions and citations were by the trial court):

In a Ruling entered April 10, 2008, the Court concluded that Mr. Seely is the owner of the claims made by MYI in this case, so that it is proper for the Court to exercise personal jurisdiction over him. Since MYI does not appear to understand that Ruling completely, the Court will restate in greater detail its analysis of the "Settlement Agreement, Mutual Release, and Assignment" (the "Agreement") executed by Mr. Seely, MYI and its two principals, the Developers Surety and Indemnity Company ("Developers") in March and April 2004. The critical elements of that Agreement are as follows:

- a. Developers, MYI and its two principals had previously entered into an Indemnity Agreement in which MYI and its two principals assigned to Developers, for security purposes, several property rights, including "all sums due or to become due on all . . . contracts, covenants and agreements . . . in which [MYI] and its two principals] has [sic] any interest, together with any . . . chose in action related thereto" (Agreement, p. 2, reciting ¶ 7 of the Indemnity Agreement.)
- b. In another action filed in this court, Developers obtained a judgment against MYI and its two principals which ordered that Developers could execute against "Any equity in any other . . . asset in which [MYI or its two principals] has any interest" as well as "Any . . . other assets of [MYI or its two principals]." (Agreement, p. 3.)



- c. The Agreement provided that “MYI and its two principals] confirm and aver that [they] have assigned, transferred, and set over to Developers any and all interest, rights, and title that [MYI and its two principals] possess or may possess to [their] assets.” (Agreement, p. 5, ¶ 2.b.)
- d. The Agreement further provided that Mr. Seely would pay Developers \$150,000, for which Developers “hereby assigns, transfers, and sets over to Seely all [MYI’s and its two principals’] Assets,” with exceptions which are not relevant to the instant case. (Agreement, pp. 5-6, ¶ 2.d.)
- e. This case was commenced by the Complaint filed by MYI on May 4, 2001, nearly three years before the Agreement was executed by MYI, so the claims made by MYI in this case constituted a chose of action – a right to make a claim in a lawsuit – which, regardless of its value or the likelihood of its success, constituted an asset of MYI which MYI transferred to Developers, and Developers transferred to Mr. Seely, in 2004.
- f. Accordingly, Mr. Seely now has the right to pursue the claims filed by MYI in this case or to settle them.

(R. 4153-54 (Tab C at pp. 2-3).)

In paragraph (a) of this ruling, the trial court relied upon MYI’s pledge of assets to Developers in connection with Developers’ issuance of performance bonds in favor of MYI in order to interpret the term “Indemnitors’ Assets,” even though that term was not defined by reference to that pledge. (R. 4153 (Tab C at p. 2), 1673-74 (Tab A at Recital F, pp. 2-3).) In paragraph (b) of this ruling, the trial court made clear it interpreted categories 6 and 7 of the “Indemnitors” Assets” to each mean all of the assets of MYI and the Youngs. (R. 4153 (Tab C at p. 2).) In paragraphs (c) and (d) of this ruling, the trial court made clear it interpreted the term “Indemnitors’ Assets” to mean all of MYI’s and the Youngs’ assets. (R. 4153 (Tab C at p. 2).)

The trial court decided it would not consider the extrinsic evidence of Mr. Seely's statements and assertions that he did not own the Subject Claims and MYI's offer of proof that MYI's principal did not intend the March 2004 Settlement Agreement to effectuate a transfer of the Subject Claims. (R. 4154 (Tab C at p. 3).) On this point, the trial court stated as follows in the January 21, 2009 Ruling of Dismissal:

MYI identifies no ambiguity in the [March 2004 Settlement] Agreement . . . and the Court finds none. The intent of the parties to the Agreement is clearly expressed in the written terms of the Agreement and an objective reading of the Agreement leads to the Court's conclusions. Consideration of extrinsic evidence to prove a different intent would not be consistent with the rules of construction or rules of evidence.

(R. 4154 (Tab C at p. 3).)

The trial court entered the Order of Dismissal based upon its interpretation of the March 2004 Settlement Agreement as providing for the transfer of the Subject Claims to Mr. Seely. According to the trial court, because the Subject Claims had been transferred to Mr. Seely, Mr. Seely could stipulate to the Order of Dismissal as he purported to do in the October 2008 settlement agreement. (R. 4154 (Tab C at p. 3).) The trial court stated: "Accordingly, Mr. Seely now has the right to pursue the claims filed by MYI in this case or to settle them." (R. 4154 (Tab C at p. 3).)

### **SUMMARY OF ARGUMENT**

The trial court's interpretation of the March 2004 Settlement Agreement as unambiguously, on its face, providing for the transfer of the Subject Claims to Mr. Seely, which was the basis of the Order of Dismissal, was error under Utah law regarding interpretation of contracts. Under settled Utah law, if contested contract language is

reasonably susceptible to being interpreted as claimed by a party offering relevant and credible extrinsic evidence regarding the intention of the parties to the contract as to that language, a trial court errs by interpreting the contract as being unambiguous and having a contrary plain meaning based upon the contract language alone, without considering the extrinsic evidence. Ward v. Intermountain Farmers Ass'n., 907 P.2d 264, 268 (Utah 1995); Daines v. Vincent, 2008 UT 51, ¶ 26-31, 190 P.3d 1269.

The language defining the term “Indemnitors’ Assets” is reasonably susceptible to being interpreted, as claimed by Mr. Seely and MYI, as not including the Subject Claims, if not reasonably susceptible to only that interpretation:

(1) “Indemnitors’ Assets” was defined in that agreement to be limited to only some of the assets covered by the execution order that Developers had obtained in Developers’ Separate Action. Although, as set forth in the March 2004 Settlement Agreement, the execution order had provided Developers could execute on all of MYI’s and the Youngs’ assets, including but not limited to eight categories of specifically listed assets, the assets that were transferred under the March 2004 Settlement Agreement, the “Indemnitors’ Assets,” were limited to only the eight categories that had served to identify particular assets on which Developers could have executed out of all of MYI’s and the Youngs’ assets.

(2) Categories 6 and 7 of the “Indemnitors’ Assets” (which the trial court had interpreted as argued by ESI to cover all of MYI’s assets) were limited to, respectively, assets in which MYI and the Youngs had an equity interest and liquid assets, none of which covered the Subject Claims.

(3) Even though the definition of the term “Indemnitors’ Assets” included references to specific projects on which MYI had worked and had claims for money, that definition did not refer to the Wal-Mart project that is the subject of the Amended Complaint or to the Subject Claims, which were significant assets of MYI at the time the March 2004 Settlement Agreement was executed.

(4) The trial court’s interpretation improperly rendered the listing of the eight categories of the “Indemnitors’ Assets” redundant and meaningless.

Because the language defining the term “Indemnitors’ Assets” is reasonably susceptible to being interpreted as not including the Subject Claims, if not reasonably susceptible only to that interpretation, the trial court erred in not considering the extrinsic evidence offered by Mr. Seely and MYI either to properly interpret that definition by its plain terms or to resolve any facial ambiguity as to the meaning of that term.

Mr. Seely’s and MYI’s extrinsic evidence conclusively showed that the “Indemnitors’ Assets” were not intended to include the Subject Claims. There was no relevant and credible evidence showing a contrary intent.

MYI was prejudiced by the trial court’s failure to properly interpret the term “Indemnitors’ Assets” according to the intent of the parties to the March 2004 Settlement Agreement, as expressed in that agreement and as shown by Mr. Seely’s and MYI’s extrinsic evidence as to those parties’ intent. The trial court’s erroneous interpretation of the term “Indemnitors’ Assets” was the basis of its ruling that Mr. Seely owned the Subject Claims. This ownership ruling was the basis of the Order of Dismissal, which required Mr. Seely’s

stipulation to the dismissal of the Subject Claims as if he owned them. As a result, MYI had its claims for relief dismissed based upon a ruling on a Utah R. Civ. P. 12(b) motion to which it was not a party, and without an adjudication, in which MYI could be heard, of ESI's claims for relief that Mr. Seely owned the claims. MYI had its claims for relief against ESI voluntarily dismissed based upon the stipulation of a party who was an involuntary plaintiff upon ESI's motion, and who disclaimed ownership of those claims for relief. MYI had its claims for relief dismissed without an adjudication of those claims on their merits, after having alone carried the burden and cost of prosecuting those claims since 2001, and without receiving any consideration.

### **ARGUMENT**

The trial court entered the Order of Dismissal based upon its rulings that Mr. Seely owned the Subject Claims under the March 2004 Settlement Agreement and, thus, could stipulate to the Order of Dismissal. The trial court ruled Mr. Seely owned the Subject Claims under the March 2004 Settlement Agreement by interpreting the term "Indemnitors' Assets" in that agreement to mean all of the assets of MYI (and the Youngs) existing at the time that agreement was executed. The trial court interpreted the term "Indemnitors' Assets" based solely on the language of the March 2004 Settlement Agreement by interpreting categories 6 and 7 of the "Indemnitors' Assets" on their face to have covered all of MYI's (and the Youngs') assets. Without any analysis of whether the definition of the term "Indemnitors' Assets" was reasonably susceptible to Mr. Seely's and MYI's claimed interpretation, the trial court ruled that there was no ambiguity such that it would not consider Mr. Seely's and

MYI's extrinsic evidence regarding their intent in entering into the March 2004 Settlement Agreement, which, the trial court ruled, was a "different intent" than that plainly expressed by the language of the March 2004 Settlement Agreement.

**I. Under A Settled Utah Rule Of Contract Interpretation, The Trial Court Erred In Interpreting The Term "Indemnitors' Assets" As Unambiguously Providing For The Transfer Of The Subject Claims Without Considering Mr. Seely's And MYI's Extrinsic Evidence As To A Contrary Intent, Because The Language Defining That Term Was Reasonably Susceptible To Being Interpreted To Not Include The Subject Claims**

Under Utah law, interpretation of contracts is a matter of determining the intentions of the parties to the contract, which are controlling. WebBank, 2002 UT 88 at ¶ 17. The parties' intentions may be determined from the plain meaning of the contract language, but only if the contract language is without facial ambiguity. Ward, 907 P.2d at 268. "An ambiguity exists in a contract term or provision 'if it is capable of more than one reasonable interpretation because of "uncertain meanings of terms, missing terms, or other facial deficiencies."'" WebBank, 2002 UT 88 at ¶ 20.

A trial court is required to consider relevant and credible extrinsic evidence as to the intentions of the parties to the contract at the time of contracting in order to determine whether there is a facial ambiguity. Ward, 907 P.2d at 268 ("When determining whether a contract is ambiguous, any relevant evidence **must** be considered." (Emphasis added)); Daines, 2008 UT 51 at ¶ 26. However, a facial ambiguity can exist only if the two competing interpretations are both reasonable, tenable or plausible when considering the contract language that was used. Daines, 2008 UT 51 at ¶¶ 26-31.

Thus, where interpretation of a contract term is at issue, the trial court must first

consider a party's relevant and credible extrinsic evidence regarding the intentions of the parties to the contract as to the meaning of the contested contract language and then decide whether that language is reasonably susceptible to that party's claimed interpretation. Ward, 907 P.2d at 268; Daines, 2008 UT 51 at ¶¶ 26-31. If the contract language is reasonably susceptible to the party's claimed interpretation, the trial court must interpret the contested contract language based upon the extrinsic evidence (that is, the trial court must decide the intentions of the parties to the contract based upon the extrinsic evidence) and cannot interpret the contract as being unambiguous under the contract's plain terms (that is, the trial court cannot decide the intentions of the parties to the contract from the contract language alone). Ward, 907 P.2d at 268; Daines, 2008 UT 51 at ¶¶ 26-31. Conversely, if the extrinsic evidence is offered to support a claimed interpretation that is implausible or unreasonable under the language used in the contract, there is no facial ambiguity and the intent of the parties (the interpretation of the contested contract language) can be decided from the contract language alone. Ward, 907 P.2d at 268; Daines, 2008 UT 51 at ¶¶ 26-31.

The Utah Supreme Court has referred to this as the “*Ward* rule,” which is set forth as follows in the *Ward* decision.

When determining whether a contract is ambiguous, any relevant evidence **must be** considered. . . . A judge then should therefore consider any credible evidence offered to show the parties' intention.

. . .

If after considering such evidence, the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms. Conversely, if after considering such evidence, the court determines that the language of

the contract is not ambiguous, then the parties intentions must be determined solely from the language of the contract.

Ward, 907 P.2d at 268 (emphasis added, citations omitted). The “*Ward* rule” was further explained by the Utah Supreme Court in *Daines* as follows:

In *Ward* we set forth a two-part standard for determining facial ambiguity. First, we indicated that “[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise the determination of ambiguity is inherently one-sided, namely, it is based solely on the ‘extrinsic evidence of the judge’s own linguistic education and experience.’” Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that “the interpretation contended for are reasonably supported by the language of the contract.”

...

As illustrated by our line of facial ambiguity cases, the two-part *Ward* rule requires that a judge first review relevant and credible extrinsic evidence offered to demonstrate that there is in fact an ambiguity. After reviewing the evidence offered, the *Ward* rule justifies a finding of ambiguity only if the competing interpretations are “reasonably supported by the language of the contract. “Conversely, there can be no ambiguity where evidence is offered in an attempt to obscure otherwise plain contractual terms. Thus, even though we permit admission of extrinsic evidence to support a claim of ambiguity in contractual language, the claim “must be plausible and reasonable in light of the language used.”

2008 UT 51 at ¶¶ 26, 31 (citations omitted).

Under the “*Ward* rule,” whether a trial court errs in refusing to consider relevant and credible extrinsic evidence regarding the intentions of the parties to a contract in order to interpret a contract depends upon whether that evidence was offered to support an interpretation that is plausible and reasonable under the contested language. Ward, 907 P.2d at 268-69; Daines, 2008 UT 51 at ¶¶ 26-31. If contested contract language is reasonably susceptible to being interpreted as claimed by the party offering the extrinsic evidence, a trial



court errs by interpreting the contract as being unambiguous and having a contrary plain meaning based upon the contract language alone, without considering the extrinsic evidence.

See Ward, 907 P.2d at 268-69; Daines, 2008 UT 51 at ¶¶ 26-31. In *Ward*, the Utah Supreme Court held as follows:

Because the language of the agreement is reasonably susceptible to Ward’s contended interpretation, we conclude that it is ambiguous, and any evidence relevant to prove its meaning is admissible. Indeed, exclusion of such evidence would deny the relevance of the parties’ intentions and defeat the principle of contract interpretation that “the intentions of the parties are controlling.” Furthermore, excluding such evidence would by no means gut the purpose of the parol evidence rule, which is “to limit the ability of the finder of fact (the jury) to believe testimony contradicting integrated writings. This is not a case where the extrinsic evidence, if believed by the fact finder, would contradict the parties’ written agreement.

907 P.2d at 269 (citations omitted).

Under the “*Ward* rule,” the trial court below erred in interpreting the term “Indemnitors’ Assets” without considering the extrinsic evidence offered by Mr. Seely and MYI regarding their intent as to that term. The trial court got it backwards by first interpreting the term “Indemnitors’ Assets” as claimed by ESI to unambiguously mean all of MYI’s and the Youngs’ assets based upon the contract language alone and without consideration of the reasonableness of Mr. Seely’s and MYI’s claimed interpretation, and then refusing to consider Mr. Seely’s and MYI’s extrinsic evidence on the basis there allegedly was no ambiguity and their evidence showed an intent that allegedly was different than the intent expressed by the contract’s plain language.

The issue of the meaning of the term “Indemnitors’ Assets” was raised below by ESI and pitted ESI, a stranger to the March 2004 Settlement Agreement, against Mr. Seely and

MYI, who were parties to the that agreement. ESI claimed that term meant all of MYI's and the Youngs' assets existing at the time the March 2004 Settlement Agreement was executed so as to include the Subject Claims. In response, Mr. Seely and MYI claimed that term did not include the Subject Claims.

The following demonstrates that the language of the March 2004 Settlement Agreement defining the term "Indemnitors' Assets" is reasonably susceptible to being interpreted as claimed by Mr. Seely and MYI to not include the Subject Claims, if not reasonably susceptible to only being interpreted as such:

(1) The difference between the assets that Developers could have executed on under its execution order and the assets that comprised the "Indemnitors' Assets" under the March 2004 Settlement Agreement, which difference was set forth in Recital F of that agreement, shows that the "Indemnitors' Assets" were not intended to include all of MYI's and the Youngs' assets. The term "Indemnitors' Assets" was defined by reference to the execution order that Developers had obtained in Developers' Separate Action. (R. 1673-74 (Tab A at Recital F, pp. 2-3).) As set forth in Recital F, that execution order plainly had provided that Developers could have executed on all of MYI's and the Youngs' assets, **including but not limited to** the eight categories of assets that were specifically listed in that order. (R. 1673-74 (Tab A at Recital F, pp. 2-3).) As such, as set forth in Recital F, the eight categories of assets listed in that execution order were not all of MYI's and the Youngs' assets, but served to identify particular assets that Developers could have executed on out of all of MYI's and the Youngs' assets. This follows from the rule that "including but not

limited to” clauses, by definition, are not exhaustive listings of all items included in the general category referred to by the clause, but merely serve to illustrate particular items that are included in the general category. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206-07 (5th Cir. 1996). The term “Indemnitors’ Assets” was defined in Recital F to be limited to **only** the eight categories of assets. (R. 1673-74 (Tab A at Recital F, pp. 2-3).) Given that use of the phrase “including but not limited to” in the execution order expressly meant MYI had assets that were not listed in the eight categories, the fact that the “Indemnitors’ Assets” was limited to only the eight categories meant there was no intent that this term included all of MYI’s assets. If there had been such intent, the “Indemnitors’ Assets” would have been defined to mean all of the assets covered by the execution order, rather than only the eight categories of assets that identified particular assets that Developers could have executed on out of all of MYI’s assets.<sup>6</sup>

(2) Categories 6 and 7 of the “Indemnitors’ Assets,” on their face, respectively covered only MYI’s and the Youngs’ assets in which they had an equity interest or all of MYI’s and the Young’s liquid assets such as money, stocks and bonds, rather than all of MYI’s and the Youngs’ assets. *See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶¶ 25, 34, 207 P.3d 1235 (“‘[U]nder the well-established rule of construction *ejusdem generis*,’ we determine the meaning of a general contractual term based on the specific

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<sup>6</sup> Or, if there had been an intent to transfer all of MYI’s and the Youngs’ assets, the March 2004 Settlement Agreement could have avoided using the execution order language altogether to define the “Indemnitors’ Assets” and simply defined that term to mean all of MYI’s and the Young’s assets.

enumerations that surround that term.”).<sup>7</sup> The crux of the trial court’s interpretation of the term “Indemnitors’ Assets” to mean all of MYI’s and the Youngs’ assets was its interpretation of categories 6 and 7 to mean all of MYI’s and the Youngs’ assets. (R. 3281-83 (Tab B at pp. 2-4), 4153 (Tab C at p. 2).) However, category 6 did not state “all of Indemnitors’ assets” or “all of Indemnitors’ other assets.” Instead, category 6 stated “Any equity in any other real property, business or asset in which any Indemnitor has an interest.” (R. 1674 (Tab A at Recital F, p. 3).) This did not include the Subject Claims because MYI did not have an equity interest in those choses of actions; plaintiffs do not have an equity interest in their claims for relief. Category 6 on its face was a catch-all category of assets in which MYI and the Youngs had an equity interest (other than the specifically listed real property in category 1), rather than a reference to all of MYI’s and the Youngs’ assets, much less any claims for relief. Likewise, category 7 did not state “All of Indemnitors’ assets” or “All of Indemnitors’ other assets.” Instead, category 7 stated “Any money, stocks, bonds, or other assets of any Indemnitor,” which covered only liquid assets such as money, stocks and bonds. (R. 1674 (Tab A at Recital F, p. 3).) The Subject Claims were not an asset akin to “money, stocks, [or] bonds.” See Café Rio, 2009 UT 27 at ¶ 34.

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<sup>7</sup> In *Café Rio*, the Utah Supreme Court interpreted the term “obstruction” under the principle *ejusdem generis* to be limited to barriers of similar type to those listed along with that term in the subject contract: “[U]nder the principle *ejusdem generis*, the general term ‘obstruction’ . . . should be construed according to the specific enumerations of ‘fence, wall, [and] barricade,’ that precede it. Under this interpretive framework, the term obstruction refers to those barriers that are similar to fences, walls, and barricades. A building is not similar in character or purpose to those barriers.” 2009 UT 27 at ¶ 34. Here, under the principle *ejusdem generis*, the general term “asset” as used in categories 6 and 7 should be construed according to the specific enumerations of specific types of assets set forth in those categories.

(3) The difference between MYI's pledge of assets to Developers in connection with Developers' issuance of the performance bonds in favor of MYI (which had precipitated Developers' Separate Action) and the definition of the term "Indemnitors' Assets" in the March 2004 Settlement Agreement demonstrates that not all of MYI's choses in action, including the Subject Claims, were included in the "Indemnitors' Assets." MYI's pledge had specifically included all choses in action relating to any contracts of MYI. (R. 1673 (Tab A at Recital D, p. 2).) However, none of the eight categories comprising the "Indemnitors' Assets" referred to "choses in action," much less to all of MYI's choses in action relating to any of MYI's contracts. (R. 1673-74 (Tab A at Recital F, pp. 2-3).) To the contrary, the Recital F definition of the term "Indemnitors' Assets" included references to several specific projects and related claims for money owed to MYI, but did not refer to the specific Wal-Mart project or its related Subject Claims for approximately \$1.3 million owed to MYI, which was a significant asset of MYI at the time of the March 2004 Settlement Agreement. (R. 13-26, 1674 (Tab A at Recital F, p. 3).) This meant it was intended that the Wal-Mart project and its related Subject Claims were excluded from the "Indemnitors' Assets." *See Mifflin v. Shiki*, 293 P. 1, 3 (Utah 1930) ("The reference to one class of details, without inclusion of more, implies the exclusion of all not expressed, under the rule of *Expressio unius, exclusio alterius*.").

(4) The March 2004 Settlement Agreement did not address the potential counterclaim liability that accompanied the Subject Claims. (R. 1672-80) (Tab A).) If there had been an intent to include the Subject Claims in the "Indemnitors' Assets," then the

March 2004 Settlement Agreement would have addressed this potential counterclaim liability. The fact that it did not meant it was not intended that those claims for relief were included in “Indemnitors’ Assets.”

In contrast, the language defining the term “Indemnitors’ Assets” is not reasonably susceptible to ESI’s claimed interpretation adopted by the trial court as including the Subject Claims, or is at least less reasonably susceptible to that interpretation than to Mr. Seely’s and MYI’s claimed interpretation:

(1) ESI’s and the trial court’s interpretation of the term “Indemnitors’ Assets” to mean all of MYI’s and the Youngs’ assets hinged on their interpretation of categories 6 and 7 of the “Indemnitors’ Assets” to mean all of MYI’s and the Youngs’ assets. (R. 3281-83 (Tab B at pp. 2-4), 4153 (Tab C at p. 2).) However, as discussed above, categories 6 and 7, on their face, were limited to, respectively, all property in which MYI and the Youngs had an equity interest and all liquid assets of MYI and the Youngs, such as money, stocks and bonds. Moreover, interpreting categories 6 and 7 as covering all of MYI’s and the Youngs’ assets would incorrectly render those categories redundant and meaningless as to each other, and render the remaining categories of the “Indemnitors’ Assets” redundant and meaningless. *See Encon Utah, LLC v. Flour Ames Kraemer, LLC*, 2009 UT 7, ¶ 28, 210 P.3d 263. One or the other of categories 6 and 7 would have no purpose if the other meant all of MYI’s and the Youngs’ assets; the remaining categories 1-5 and 8 also would have served no purpose if both categories 6 and 7 meant all of MYI’s and the Youngs’ assets.

(2) The trial court also relied upon the fact that MYI and the Youngs had pledged

to Developers all of their assets, including all of their choses in action, in the indemnity agreement between those parties. (R. 3280-81 (Tab B at pp. 1-2), 4153 (Tab C at p. 2).) However, the term “Indemnitors’ Assets” was not defined in the March 2004 Settlement Agreement to cover the assets that MYI and the Youngs had pledged to Developers. Instead, the term “Indemnitors’ Assets” was defined by reference to Developers’ execution order, and was defined to mean only the eight categories of assets that had been set forth in that execution order to identify particular assets that Developers could have executed on out of all of MYI’s and the Youngs’ assets. (R. 1673-74 (Tab A at Recital F, pp. 2-3).)

(3) The trial court also relied upon paragraphs 2(b) and 2(d) of the March 2004 Settlement Agreement to rule that all of MYI’s assets existing at the time of that agreement had been transferred to Mr. Seely. (R. 4153 (Tab C at pp. 2).) However, paragraph 2(b) served to confirm that MYI and the Youngs had transferred to Developers **only** the “Indemnitors’ Assets,” rather than all of their assets, and paragraph 2(d) provided for the transfer from Developers to Mr. Seely of **only** the “Indemnitors’ Assets” (excluding the Black Ridge Project and its related claims), rather than all of MYI’s and the Youngs’ assets. (R. 1676-77 (Tab A at pp. 5-6).) There was no basis in the language of paragraphs 2(b) and 2(d) alone or together to interpret the term “Indemnitors’ Assets” as meaning all of MYI’s and the Youngs’ assets, especially when the term “Indemnitors’ Assets” was separately defined in Recital F of the March 2004 Settlement Agreement.

This all demonstrates that the language of the March 2004 Settlement Agreement defining the term “Indemnitors’ Assets” is reasonably susceptible to Mr. Seely’s and MYI’s

claimed interpretation, if not reasonably susceptible to only Mr. Seely's and MYI's interpretation. Thus, under the "*Ward* rule," the trial court erred in interpreting the definition of the term "Indemnitors' Assets" as it did and not considering the extrinsic evidence presented and offered by Mr. Seely and MYI regarding their intent as to the meaning of that term. See Ward, 907 P.2d at 269; Daines, 2008 UT 51 at ¶¶ 25-31. The trial court erroneously determined that the language of the March 2004 Settlement Agreement was unambiguous on its face in favor of ESI in a manner that was contrary to a reasonable interpretation of that language, without consideration or analysis of whether Mr. Seely's and MYI's claimed interpretation was reasonable under that language, without considering Mr. Seely's and MYI's extrinsic evidence, and without considering that there was no extrinsic evidence supporting ESI's claimed interpretation.

Mr. Seely's and MYI's extrinsic evidence showed that the term "Indemnitors' Assets" was not intended to include the Subject Claims, and served, under the "*Ward* rule," either to support the only reasonable interpretation of the definition of that term under the plain contract language or to properly resolve any facial ambiguity. That extrinsic evidence made clear the parties to the March 2004 Settlement Agreement, whose intent is controlling, did not intend that the "Indemnitors' Assets" included the Subject Claims. Mr. Seely provided declaration testimony that he did not understand that he had received the Subject Claims under that agreement. (R. 3217a (Tab E at ¶ 5).) Mr. Seely affirmatively alleged he had no interest in the Subject Claims. (R. 3292, 3297 (Tab F at pp. 7, 12).) MYI offered the testimony of its principal that there had been no intent to include the Subject Claims in the



“Indemnitors’ Assets,” and also evidence that MYI had continued to exercise control over assets after March 2004 other than the claims for relief that MYI, which showed that the intended meaning of the “Indemnitors’ Assets” was not to include the Subject Claims. (R. 4126-27 (Tab H at pp. 5-6).) MYI continued to prosecute the Subject Claims, and Mr. Seely never exercised control over the claims, consistent with their intent that the claims had not been transferred to Mr. Seely. (R. 3217a (Tab E at ¶ 5).) Developers never exercised control over the Subject Claims, also consistent with the intent that the claims were not included in the “Indemnitors’ Assets.” (R. 1431-32.)

This extrinsic evidence showed an intent that supported and was entirely consistent with a reasonable interpretation of the term “Indemnitors’ Assets,” if not the only reasonable interpretation (which is demonstrated above), rather than, as ruled by the trial court, an intent that was “different” than the intent expressed by the plain language of the March 2004 Settlement Agreement. Mr. Seely and MYI did not offer their extrinsic evidence “in an attempt to obscure otherwise plain contractual terms,” which, if they had, would have justified the trial court’s refusal to consider the evidence. *See Daines, 2008 UT 51* at ¶ 31. Indeed, this case illustrates the reason for the “*Ward* rule,” which is to acknowledge “the relevance of the parties’ intentions” and adhere to “the principle of contract interpretation that ‘the intentions of the parties are controlling.’” *Ward, 907 P.2d at 269*. The trial court interpreted the term “Indemnitors’ Assets” as claimed by ESI without considering the reasonableness of Mr. Seely’s or MYI’s claimed interpretation of that term or their extrinsic evidence regarding their intent, even though ESI was a stranger to that contract and Mr. Seely

and MYI were parties to it.

Even assuming the subject language was also reasonably susceptible to ESI's claimed interpretation such that there was a facial ambiguity, the extrinsic evidence that the trial court refused to consider was uncontested and controlling as to whether "Indemnitors' Assets" was intended to include the Subject Claims. Mr. Seely's extrinsic evidence alone is conclusive to show there was no such intent because, as the transferee and intended beneficiary of the transfer, it was in Mr. Seely's interest to have the term "Indemnitors' Assets" defined as expansively as possible. There was no relevant and credible extrinsic evidence that conflicted with Mr. Seely's and MYI's evidence and showed an intent that the "Indemnitors' Assets" meant all of MYI's and the Youngs' assets and included the Subject Claims. How could there be any conflicting evidence when MYI and Mr. Seely were the parties to the March 2004 Settlement Agreement? ESI, being a stranger to the March 2004 Settlement Agreement, could not offer any such evidence from its principals, employees or agents.<sup>8</sup>

In sum, the trial court erred in interpreting the term "Indemnitors' Assets" as including the Subject Claims and ruling those claims had been transferred to Mr. Seely. The trial court's interpretation was contrary to the intent of the parties to the March 2004 Settlement Agreement, as expressed in that agreement and as demonstrated by the offered extrinsic

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<sup>8</sup> Moreover, even if the extrinsic evidence had not been conclusive, the trial court's interpretation still would have been error. Even if there had been conflicting extrinsic evidence, the term "Indemnitors' Assets" still would have had to be interpreted based upon the extrinsic evidence, once any conflict was resolved; the question of the intent of the parties to the March 2004 Settlement as to the meaning of that term simply would have become a question of fact to be decided based upon the conflicting extrinsic evidence. See *Daines*, 2008 UT 51 at ¶ 24.

evidence regarding those parties' intent.

**II. MYI Was Prejudiced By The Trial Court's Error In Interpreting The Term "Indemnitors' Assets" Without Considering Mr. Seely's And MYI's Extrinsic Evidence Regarding Their Intent As To The Meaning Of That Term**

Absent the trial court's interpretation error, there would have been no basis for the Order of Dismissal. The trial court was able to enter the Order of Dismissal only if Mr. Seely was the owner of the Subject Claims. *See* Utah R. Civ. P. 41(a)(2). As such, only by having erroneously interpreted the March 2004 Settlement Agreement to have transferred the Subject Claims to Mr. Seely, based upon its erroneous interpretation of the term "Indemnitors' Assets" to mean all of MYI's and the Youngs' assets, was the trial court able to enter the Order of Dismissal. (R. 4152-54 (Tab C at pp. 1-3).)

The trial court's interpretation of the March 2004 Settlement Agreement that was the basis of the Order of Dismissal originally was made in a ruling upon a Utah R. Civ. P. 12(b) motion to dismiss as to which MYI was not a party. (R. 3280-84 (Tab B).) MYI had its claims for relief dismissed without an adjudication in which MYI was heard of ESI's declaratory judgment claims by which the ownership issue had been interjected in the case.

Mr. Seely was able to stipulate to the Order of Dismissal, while continuing to disclaim ownership of the Subject Claims, only because ESI had maneuvered to have him joined as an involuntary plaintiff based upon ESI's meritless interpretation of the March 2004 Settlement Agreement. Mr. Seely entered into that stipulation only because ESI had obtained leverage against him by asserting claims for relief against him, which were based ESI's meritless interpretation. This was all while the parties to the March 2004 Settlement

Agreement, who were the only parties able to weigh in on the intent of that agreement, agreed that ESI's interpretation was meritless. MYI had its claims for relief dismissed after alone having carried the burden of prosecuting those claims since their inception in 2001 and without either obtaining an adjudication of the claims on their merits or receiving any consideration for the dismissal.

### CONCLUSION

For the foregoing reasons, MYI respectfully submits that the trial court erred as a matter of law in interpreting the term "Indemnitors' Assets" as used in the March 2004 Settlement Agreement and entering the Order of Dismissal based upon that erroneous interpretation. MYI respectfully requests that the Order of Dismissal be reversed and the matter remanded with instructions that the Subject Claims are re-instated and that the term "Indemnitors' Assets" in the March 2004 Settlement Agreement does not include the Subject Claims.

DATED: December 4, 2009

SAVAGE, YEATES & WALDRON, P.C.

A handwritten signature in black ink, appearing to read "E. Scott Savage", written over a horizontal line.

E. Scott Savage  
Stephen R. Waldron  
Kyle C. Thompson

Attorneys for Appellant Merrick Young  
Incorporated

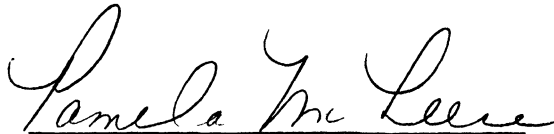
**CERTIFICATE OF MAILING**

Pursuant to Utah Rule of Appellate Procedure 26(b), I hereby certify that on this 4<sup>th</sup> day of December, 2009, I caused two true and correct copies of the within and foregoing to be mailed, postage prepaid, to the following:

Clark B. Fetzer  
Rinehart Fetzer Simonsen & Booth, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101

Kim Trout  
Trout Jones Gledhill Fuhrman, P.A.  
P.O. Box 1097  
Boise, Idaho 83701

Greggory J. Savage  
Ray Quinney & Nebeker, P.C.  
36 South State Street, Suite 1400  
Salt Lake City, UT 84111

  
Pamela M. Reese

# **ADDENDUM**

Tab A

SETTLEMENT AGREEMENT, MUTUAL RELEASE, AND ASSIGNMENT

This Settlement Agreement, Mutual Release and Assignment (hereinafter "Agreement") is made on this \_\_\_\_ day of \_\_\_\_\_, 2004, by and between Developers Surety and Indemnity Company (hereinafter "Developers"); and Merrick Young Incorporated (hereinafter "MYI"), a Utah corporation; Merrick Young, an individual (hereinafter "Mr. Young"); Stephanie Young, an individual (hereinafter "Ms. Young"); and Clyde G. Seely, an individual (hereinafter "Seely"). All entities referenced above are collectively referred to as the "Parties".

RECITALS

WHEREAS:

A. Developers issued Labor and Material Payment Bond and Performance Bond No. 870694P (hereinafter referred to as the "Black Ridge Bond"), with City of St. George, as obligee, and MYI, as principal, for the project known as Black Ridge Drive, 250 West Improvement, Project SID 99-4, Inquiry No. 00-1260 (hereinafter the "Black Ridge Project"). The amount, or penal sum, of the bond was \$1,543,000.00.

B. Developers issued Payment Bond and Performance Bond No. 870960P (hereinafter referred to as the "River Road Bond"), with the State of Utah by and through the Utah Department of Transportation, as obligee, and MYI, as principal, for the project known as River Road, Project No. STP-3196(1)0 (hereinafter the "River Road Project"). The penal sum of the bond was \$1,229,229.00.

C. Developers Insurance Company merged into Developers, and Developers assumed all assets, rights, liabilities and obligations of Developers Insurance Company.

D. MYI, Mr. Young, and Ms. Young (collectively referred to as "Indemnitors") entered into an Indemnity Agreement, GIA No. 75605-01, (hereinafter "GIA") with Developers wherein Indemnitors agreed, among other things, to fully defend and indemnify Developers from and against any and all loss incurred as a consequence of issuing any bonds in favor of MYI and to assign to Developers accounts receivable and contracts. The pertinent portions of these promises are set forth in paragraphs 1 and 7 of the GIA, as follows:

1. **INDEMNIFICATION.** In consideration of the execution and delivery by Surety of a Bond or any Bonds on behalf of Principal, Principal and Indemnitor shall pay all premiums charged by Surety in connection with any Bond (including extensions, renewals or modifications) issued by Surety on behalf of Principal and shall indemnify and hold Surety harmless from and against any and all liability, loss, claims, demands, costs, damages, attorneys' fees and expenses of whatever kind or nature, together with interest thereon at the maximum rate allowed by law, which Surety may sustain or incur by reason of or in consequence of the execution and delivery by Surety of any Bond on behalf of Principal, whether or not Surety shall have paid any amount on account thereof, ...



\* \* \*

7. **Assignment.** To secure the obligations of Principal [MYI] and Indemnitor hereunder and any other indebtedness and liabilities of Principal or Indemnitor to Surety [Developers], Principal and Indemnitor hereby assign, transfer, pledge and convey to Surety, effective immediately upon and only in the event that there shall be an event of default hereunder, all rights in and to . . . :

7.1 Any and all contracts to subcontracts let in connection therewith . . . ,

7.2 Any and all machinery, plant, equipment tools and materials which shall be upon the site or sites of the work or project . . . or elsewhere . . .

7.3 Any and all sums due or which may become due upon partial or full performance of the Obligation and all sums due or to become due on all other contracts, covenants and agreements whether bonded or unbonded, in which the Principal or Indemnitor has any interest, together with any notes, accounts receivable or chose in action related thereto.

\* \* \*

7.5 Any an all undisbursed loan funds, deposits or interest reserve accounts to which the Principal or Indemnitor may be entitled, and any and all collateral for any undertakings given by Principal, Indemnitor or any Guarantor in connection with any Obligation.  
(Emphasis in original).

E. Claims were made against the Black Ridge Bond and the River Road Bond by MYI's unpaid subcontractors or suppliers. As a result, Developers was compelled to pay bond claimants a principal sum approximating \$456,812.48 in satisfaction of said claims, and also incurred legal and other expenses.

F. Developers sought recovery of these losses by commencing three lawsuits:

1) Developers vs. Indemnitors. This suit, being case number 02-0502319 (hereinafter "Indemnity Litigation"), was brought in the Fifth Judicial District Court, Washington County, State of Utah against the Indemnitors seeking enforcement of the GIA. Developers obtained judgment against the Indemnitors, an injunction against the Indemnitors from disbursing funds or conveying any assets, and garnishments. The Order and Judgment specifically provides in the pertinent part as follows:

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to URCP 64C and URCP 64D, Developers may execute, attach and garnish, in the amount of \$540,668.61, the accounts receivable, assets, interests, money, stocks, memberships, bonds, real property, and personal property in which the Indemnitors have an interest, including but not limited to, the following:

1. Merrick Young  
Stephanie Young  
3511 Paiute Road  
St. George or Bloomington, Utah 84790-7741  
The above real property known as 3511 Paiute Road and  
any funds obtained from its sale, including all other assets  
of the Indemnitors.
2. Funds due and owing to Indemnitors, either individually or  
collectively, for the project known as Black Ridge Drive,  
250 West Improvement, Project SID 99-4, Inquiry No. 00-  
1260.
3. Funds due and owing to Indemnitors, either individually or  
collectively, for the project known as River Road, Project  
No. STP-3196(1)0.
4. Funds due and owing to Indemnitors, either individually or  
collectively, from General Contractor, La Farge, N.A., for  
the project known as I-15 Sevier River Northward Project,  
Project No.: \*IM-NH-15-5(31)200.
5. Funds due and owing to Indemnitors, either individually or  
collectively, from General Contractor, Meadow Valley  
Contractors, Inc., for the project known as UDOT I-15  
North Interchange,  
Project No.: IM-15-2-3861.
6. Any equity in any other real property, business or asset in  
which any Indemnitor has an interest.
7. Any money, stocks, bonds, or other assets of any  
Indemnitor.
8. Any interest in Black Ridge Commercial Center, LLC; Black  
Ridge, LLC, or any other partnership, limited partnership, limited  
liability company, sole proprietorship, corporation, or other  
business entity in which any Indemnitor has an interest, and any  
real property in which these entities have an interest. [All assets  
referenced in paragraphs 1 through 8 of the Court's Order are  
referred to in this Agreement as "Indemnitors' Assets"].

IT IS FURTHER HEREBY ORDERED,

ADJUDGED AND DECREED that the Indemnitors Merrick Young, individually; Stephanie Young, individually; and Merrick Young Inc. (collectively referred to as "Indemnitors") are preliminarily enjoined as follows:

1. Indemnitors are enjoined, restrained and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any corporate assets, limited liability company assets, partnership assets, real property, personal property or assets of any business entity in which Indemnitors possess an interest until further order of this Court except as described in paragraph 3 below.
2. All corporations, limited liability companies, partnerships and/or any business entities in which Indemnitors possess any interest are hereby restrained, enjoined and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any asset or real or personal property until further order of this Court.
3. Merrick Young, individually; and Stephanie Young, individually; shall be allotted reasonable funds for reasonable daily living expenses, such as food, housing, gasoline for necessary travel, clothing, and utilities for the household, but are enjoined, absent approval of this Court, from the purchase or expenditure of funds to acquire any motorized vehicle, jewelry, stocks, bonds, vacations or other consumer items not necessary to sustain life and health.
4. This Order is binding upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of this Order.

2) Developers v. Utah Department of Transportation. This suit, being Civil Case No. 030500102, was instituted in the Fifth Judicial District Court, Washington County, State of Utah against UDOT for additional sums owed MYI based on UDOT's alleged breach of contract, breach of express and implied warranties, unjust enrichment, subrogation, and negligence with respect to the River Road project (hereinafter "UDOT Litigation").

3) Developers v. City of St. George. Developers instituted Civil Case No. 030500096 in the Fifth Judicial District Court, Washington County, State of Utah against the City of St.

George for additional sums owed MYI based on the City of St. George's alleged breach of contract, breach of express and implied warranties, unjust enrichment, and subrogation with respect to the Black Ridge Drive Project (hereinafter "Developers Black Ridge Drive Project Litigation").

G. MYI v. the City of St. George. MYI instituted Civil Case No. 030500101 in the Fifth Judicial District Court, Washington County, State of Utah against the City of St. George for additional amounts allegedly due and owing to MYI from the City of St. George pertaining to the Black Ridge Drive Project. (hereinafter "MYI Black Ridge Drive Project Litigation").

H. Seely is an individual interested in purchasing certain assets of MYI. Seely is not an indemnitor to Developers nor does Seely have any relationship to Developers. Seely's interest is in purchasing assets of Indemnitors owned by Developers or which are subject to the judgment, injunction, and garnishment.

I. Developers has paid out, for and on behalf of MYI, a principal amount of approximately \$456,812.48, which amount has accrued interest at the rate of ten percent (10%), and has also expended attorneys' fees and costs. Developers asserts that Indemnitors are liable for all these expenses. Indemnitors assert that they are currently incapable of satisfying Developers in full.

**NOW, THEREFORE, IT IS EXPRESSLY UNDERSTOOD AND AGREED**, for valuable consideration, as follows:

1. **Recitals.** The foregoing recitals are true and correct and are incorporated herein.

2. **Payment of Settlement Funds and Consideration.** Developers, and Indemnitors mutually wish to resolve the disputes and litigation between them and assign certain interests. In consideration of such resolution and assignments, Developers, Indemnitors, and Seely agree as follows:

a) Indemnitors do hereby assign, transfer, and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to the payment of any money regarding the Black Ridge Drive Project, including any and all interests, rights and title to the MYI Black Ridge Drive Project Litigation. Developers is specifically authorized by Indemnitors to prosecute, compromise, dismiss or otherwise dispose of the MYI Black Ridge Drive Project Litigation. Indemnitors have no further claim against the City regarding the MYI Black Ridge Drive Project Litigation as all those rights are assigned to Developers.

b) Indemnitors confirm and aver that Indemnitors have assigned, transferred, and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to Indemnitors' Assets.

c) Concurrent with Developers' execution of this Agreement, Seely shall pay Developers a lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds.

d) In consideration of Seely's payment to Developers of One Hundred Fifty Thousand Dollars

Settlement Agreement, Mutual Release, and Assignment

Page 5 of 9

Developers: \_\_\_\_\_

MYI: [Signature]; Mr. Young: [Signature]  
Ms. Young: [Signature]; Mr. Seely: [Signature]

11-7-16

(\$150,000.00) in certified funds, Developers (I) hereby assigns, transfers, and sets over to Seely any and all interests, rights, and title that Developers possesses or may possess to the payment of any money regarding the UDOT Project, including any and all interests, rights and title to the UDOT Litigation ; and (ii) hereby assigns, transfers, and sets over to Seely all Indemnitors' Assets with the exception of the Black Ridge Drive Project, the MYI Black Ridge Drive Project Litigation, and Developers Black Ridge Drive Project Litigation.

e) In consideration of MYI's assignment set forth in paragraph 2a, and in consideration of Seely's lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds to Developers, Developers shall assign the Indemnity Litigation to Seely, and Seely shall upon execution of this Agreement immediately notify the court in the Indemnity Litigation of the assignment, substitute in as Plaintiff in the stead of Developers, and retain Seely's own counsel. If Seely fails to so notify the court in the Indemnity Litigation within 10 business days of the execution of this Agreement, then Developers is authorized to notify the court as appropriate that the Indemnity Litigation is resolved and should be dismissed.

f) In consideration of Developers' promises herein, the Indemnitors promise to provide full and complete cooperation to Developers to assist Developers in the Developers Black Ridge Drive Project Litigation. Such full and complete cooperation requires Indemnitors to produce requested documents, provide complete information, promptly respond to telephone calls and correspondence, and thoroughly prepare for and attend any substantive settlement meetings, depositions or trial. Developers and Indemnitors stipulate and agree that the failure of the Indemnitors to reasonably cooperate will damage Developers in the amount of \$100,000, for which Developers may sue Indemnitors under this Agreement. The liquidated damage of \$100,000 bears a reasonable relationship to Developers' anticipated loss and is agreed upon due to the difficulty in calculating an actual damage

g) As stated in paragraphs 2(b) and 2(d), and as of the date of this Agreement, all of Indemnitors' assets and all interests therein (except those reserved to Developers), which have been or could be attached by Developers via the GIA or otherwise, are hereby conveyed to Developers and then to Seely. Developers retains no interest in any such assets. Further, Developers hereby releases Indemnitors from all obligations associated with the Black Ridge Drive Project and River Road Project except as stated herein. However, this Agreement shall in no way impair or affect the indemnity obligations which Indemnitors may have, if any, under the GIA as to any other bonded projects, if any. Developers may enforce the GIA as against any such other bonded projects, and attach any of Indemnitors' assets, as provided by the GIA, after the date of this Agreement. The parties hereby represent that they are not aware of any such bonded projects, for which Indemnitors might have any obligations.

h) Regarding the MYI Black Ridge Drive Project Litigation assigned by MYI to Developers and the Indemnity Litigation and the UDOT Litigation assigned by Developers to Seely, Developers and Seely mutually agree to notify the defendant(s) of the applicable assignment and to substitute the name of the assignee for the assignor within 30 days of this Agreement being executed by all parties. All parties to this Agreement agree to execute any document necessary to accomplish the assignments and substitutions so that this 30 day deadline is met.

### 3. Mutual Releases, Consideration and Assignments. In exchange for the Payment of

Settlement Agreement, Mutual Release, and Assignment

Page 6 of 9

Developers: \_\_\_\_\_  
MYI: MYI; Mr. Young: MYI  
Ms. Young: MYI, Mr. Seely: MYI

1677  
Plaintiff MYI

Settlement Funds and Consideration described herein, Developers and Indemnitors agree to the following mutual releases:

**a. Developers.** Developers and its parent(s), assignees, heirs, successors in interest, predecessors in interest, principals, and other related entities, hereby unconditionally waive, release, relinquish, acquit, and forever discharge (with the exception of warranty work) the Indemnitors, their respective heirs, assignees, successors in interest, parents, subsidiaries, and other related entities, of and from any and all rights, claims, demands, damages, debts, liens, claims for relief, actions, suits, causes of action, interest, damages, fees, costs, and the like, of every kind and nature whatsoever, known and unknown, suspected and unsuspected, anticipated and unanticipated, past, present and future, whether arising at law, under a contract, in tort, in equity, or otherwise, for all damages, losses, injuries, economic loss, attorneys' fees, costs, expenses, or otherwise, including without limitation all consequential, general, special, and/or punitive damages, resulting from, or to result from, or in any way arising out of or related to MYT's default or failure to pay KV Electric; Triple "B" Concrete; Western Rock Products; Environmental Abatement, Inc.; Koch Performance Asphalt; KV Electric; Progressive Contracting; Progressive Contracting & AT Asphalt Paving; Contech Construction; Hikiau, Inc.; and K&J Traffic Control, and any and all other obligations under the GIA, except as reserved herein. Developers specifically reserves all rights and remedies against MYI and the Indemnitors regarding any performance, warranty, defect, personal injury, third party injury, real property, personal property or asbestos claim that may be asserted by the City, UDOT or any other entity against Developers regarding the Black Ridge Drive Project or the UDOT Project, and Developers is entitled to recovery attorneys' fees, costs and other expenses as set forth in the GIA in defending or resolving such claims.

**b. MYI and Indemnitors.** In consideration of Developers' foregoing release and Developers' agreement to assign to Seely the Indemnity Litigation, Indemnitors, for themselves, and their heirs, assignees, and successors in interest, hereby unconditionally waive, release, relinquish, acquit, and forever discharge Developers and its heirs, assignees, parents, subsidiaries, successors in interest, and other related entities, of and from any and all rights, claims, demands, damages, debts, liens, claims for relief, actions, suits, causes of action, interest, damages, fees, costs, and the like, of every kind and nature whatsoever, known and unknown, suspected and unsuspected, anticipated and unanticipated, past, present and future, whether arising at law, under a contract, in tort, in equity, or otherwise, for all damages, losses, injuries, economic loss, attorneys' fees, costs, expenses, or otherwise, including without limitation all consequential, general, special, and/or punitive damages, resulting from, or to result from, or in any way connected to the Indemnity Agreement, or any bond.

### III. General Terms.

1. **Assignment of this Agreement.** Developers may freely assign and/or delegate, in whole or in part, its rights, interest, and remedies to this Agreement. Indemnitors shall not assign, however, any of MYI's accounts receivables, the proceeds therefrom, or any interest therein existing prior to the date of this Agreement.

2. **Headings.** The headings in this Agreement are for ready reference only and shall not be used to limit or expand the terms of this Agreement.

3. **Verification of Authority.** Each of the individuals signing this Agreement hereby confirms, individually and/or on behalf of the entity whom they represent, that they have full legal power and authority to execute this Agreement on the entity's behalf and that the entity has full legal power and authority to perform this Agreement. The consummation of all transactions contemplated herein have been duly authorized by all necessary entities, including the appropriate passing of resolutions and directions, and this Agreement constitutes legal, valid, and binding obligations of such Party, enforceable in accordance with its terms.

4. **Default and Attorneys Fees.** The laws of the State of Utah govern this AGREEMENT and any party to this AGREEMENT who retains counsel to enforce the terms hereof shall be entitled to attorneys' fees incurred in said enforcement. Any action to enforce the terms of this Agreement shall be brought in the Fifth Judicial District Court in and for Washington County, Utah.

5. **Severability.** If any provision of this AGREEMENT is determined to be invalid, said determination shall not affect the validity of the remainder of the AGREEMENT.

6. **Counterparts and copies.** This AGREEMENT may be signed in counterpart, and copies or facsimile copies of signatures shall be considered to be originals.

7. **Withdrawal of Counsel and Waiver of Potential Conflict.** In anticipation of this Agreement, Parties agree that Robert M. Jensen will be completely withdrawing as Counsel for Developers. Developers recognizes that from this point forward, Robert M. Jensen is not representing the interests of the Developers with respect to any lawsuit or in respect to the drafting of this Agreement. Further, Developers agrees and understands that Robert M. Jensen is directly opposed to Developers for purposes of negotiating this Agreement and for all business dealings and associations hereafter. Developers knowingly and voluntarily waives any and all conflicts of interest.

8. **Attorney Fees and Costs.** If suit is commenced by any Party to enforce the terms of this Agreement, then the prevailing Party shall recover all attorneys' fees and costs incurred in such suit.

DATED this \_\_\_\_ day of January, 2004.

Developers Surety and Indemnity Company

Approved as to form and content:

DATED this \_\_\_\_ day of January, 2004.

FAUX & ASSOCIATES, P.C.

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

its authorized representative

\_\_\_\_\_  
Kurt C. Faux, Esq.

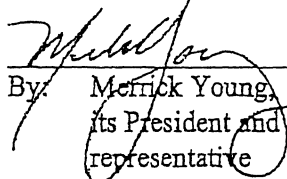
2785 E. Desert Inn Road, Suite 270

Las Vegas, NV 89121

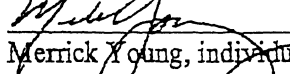
Attorney for Developers Surety and Indemnity  
Company

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

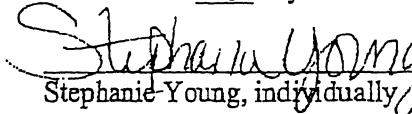
Merrick Young, Incorporated

  
By: Merrick Young,  
its President and authorized  
representative

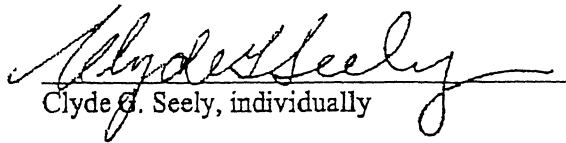
DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

  
Merrick Young, individually

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

  
Stephanie Young, individually

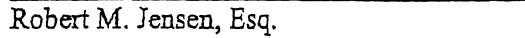
DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

  
Clyde G. Seely, individually

Approved as to form and content:

DATED this \_\_\_ day of January, 2004.

JENKINS JENSEN & BAYLES, LLP

  
Robert M. Jensen, Esq.  
1240 East 100 South, Suite 9  
St. George, UT 84790  
*Attorney for Merrick Young, Incorporated; and  
Merrick Young, individually*



Tab B

2008 APR 10 PM 4:29

WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT FOR  
WASHINGTON COUNTY, STATE OF UTAH

MERRICK YOUNG INCORPORATED, a  
Utah corporation, and CLYDE G. SEELY,  
assignee and real party in interest,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, et al.,

Defendant.

RULING ON CLYDE G. SEELY'S  
MOTION TO DISMISS SECOND  
AMENDED COUNTERCLAIM

Civil No. 010500909  
Judge G. Rand Beacham

This matter came before the Court on counterclaim defendant Clyde G. Seely's "Motion to Dismiss Second Amended Counterclaim." The pleading that Mr. Seely seeks to have dismissed was filed by defendant Engineered Structures, Inc. ("ESI") on August 16, 2007. Having fully considered the parties' memoranda and arguments, the documents provided for purposes of this Motion, and the record shown in the Court's eleven-volume file for this action, the Court rules that Mr. Seely's Motion to Dismiss should be denied.

FACTS

This action began with the filing of the original Complaint of plaintiff Merrick Young Incorporated ("MYI") on May 4, 2001. After filing an Amended Complaint, MYI actively pursued its claims against several defendants.

In connection with other business matters not related to the subject of this action, MYI and its two principals, as "Indemnitors," entered into an Indemnity Agreement with Developers Surety and Indemnity Company ("Developers"). The Indemnity Agreement included the Indemnitors'

assignment to Developers, for security purposes, of all of their rights related to the other business matters, as well as “all sums due or to become due on all other contracts, covenants and agreements . . . in which the Principal or Indemnitor has any interest, together with any notes, accounts receivable or chose in action related thereto.”

When Developers was required to pay certain claims for which it was surety in those other business matters, Developers filed claims in this Court against MYI and its principals for indemnification. Developers obtained an Order and Judgment in that case allowing it to attach the assets of the Indemnitors (MYI and its principals), which included specific funds and claims as well as “[a]ny equity in any other ... asset in which any Indemnitor has an interest” and “[a]ny ... other assets of any Indemnitor.” The Court’s Order referred collectively to the several assets to be attached as “Indemnitors’ Assets.” Developers also filed actions in this Court against the Utah Department of Transportation and the City of St. George for sums it claimed were owed to MYI.

On March 25, 2004, MYI, its two principals, and Mr. Seely signed a “Settlement Agreement, Mutual Release, and Assignment” which was then signed by Developers on April 5, 2004. That Agreement recited that “Seely is an individual interested in purchasing certain assets of MYI.” By that Agreement, (a) MYI and its principals transferred all of the “Indemnitors’ Assets” to Developers, (b) Mr. Seely paid Developers \$150,000.00, and (c) Developers transferred to Mr. Seely all of the “Indemnitors’ Assets” as well as the rights to Developers’ lawsuit against MYI and its two principals and its lawsuit against the Utah Department of Transportation. Mr. Seely was required to substitute for Developers as plaintiff in those lawsuits, in this Court, so that they would be prosecuted in his own name. The Agreement further provided that its interpretation would be

governed by Utah law and that venue of any action to enforce the Agreement would be in this Court.

At the time of the “Settlement Agreement, Mutual Release, and Assignment,” this action by MYI was in active litigation in this Court. According to the evidence currently available to this Court, the facts appear to be as follows: The claims made in this case by MYI constituted a chose in action which was an asset of MYI. That chose in action was attached by Developers in its lawsuit against MYI and its principals, and it was transferred to Mr. Seely in accordance with the “Settlement Agreement, Mutual Release, and Assignment” signed by Mr. Seely in 2004. This litigation continued thereafter, with MYI continuing to prosecute the case in its own name, in spite of the transfer of its assets to Developers and then to Mr. Seely.

#### ANALYSIS

Mr. Seely argues that this history is insufficient to give this Court jurisdiction over him. He describes the “Settlement Agreement, Mutual Release, and Assignment” in 2004 as a transaction in which he only paid the debts of MYI and its principals, one of which is his daughter. He asserts that he “could not have anticipated that this act of charity to his daughter would subject him to the jurisdiction of this Court.”

This argument does not correctly describe Mr. Seely’s position and rights, however, under the “Settlement Agreement, Mutual Release, and Assignment.” Regardless of whether Mr. Seely covertly controlled the prosecution of this action after 2004 or he deliberately or negligently allowed MYI to continue to control it, Mr. Seely had the right to control MYI’s claims in this case. The specification of certain lawsuits transferred to Mr. Seely in the “Settlement Agreement, Mutual Release, and Assignment” does not obviate the general language therein which also gave Mr. Seely

“[a]ny equity in any other ... asset in which any Indemnitor has an interest” and “[a]ny ... other assets of any Indemnitor.” The chose in action upon which MYI sued the defendants in this case is one such asset, and Mr. Seely owns it. For these reasons, this Court has previously ruled that Mr. Seely, as the assignee and real party in interest, should be joined as a plaintiff.

This does not mean that Mr. Seely steps into MYI’s shoes for all purposes. ESI does not seek to subject Mr. Seely to its original counterclaims against MYI, but ESI does assert that it has claims against Mr. Seely which accrued after he acquired his rights to MYI’s claims in 2004. Having acquired all of the assets of MYI and its principals during the pendency of this action by MYI, Mr. Seely could and should have anticipated that this would subject him to the jurisdiction of this Court for his acts and omissions as to his ownership of the chose in action in this case. Consequently, there is nothing unreasonable or unfair in requiring Mr. Seely to respond to ESI’s claims, and this Court has jurisdiction sufficient to do so.

Mr. Seely also argues that ESI’s counterclaims against him have no merit, but that argument is adequately refuted by ESI’s memorandum. Considering the ESI counterclaims against Mr. Seely in the light most favorable to ESI, it appears that ESI has stated claims upon which relief may be granted.

Accordingly, Mr. Seely’s Motion to Dismiss Second Amended Counterclaim is denied.

Dated this 8 day of April, 2008.

  
G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 10 day of Apr, 2008, I provided true and correct copies of the foregoing RULING to each of the attorneys/parties named below by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Dennis C. Farley  
Attorney for Plaintiff MYI  
299 South Main, Suite 2200  
Salt Lake City, Utah 84111

E. Scott Savage  
Attorney for Plaintiff MYI  
170 South Main, Suite 500  
Salt Lake City, Utah 84101

Clark B. Fetzer  
Attorney for Defendants  
3 Triad Center, Suite 175  
Salt Lake City, Utah 84180

Kim J. Trout  
Attorney for Defendants  
P.O. Box 9695  
Boise, Idaho 83707

Greggory J. Savage  
Attorney for Clyde G. Seely  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

  
DEPUTY CLERK OF COURT

Tab C

FILED  
Date 1/21/09  
FIFTH DISTRICT COURT  
WASHINGTON COUNTY  
By \_\_\_\_\_

IN THE FIFTH DISTRICT COURT FOR  
WASHINGTON COUNTY, STATE OF UTAH

MERRICK YOUNG INCORPORATED, a  
Utah corporation, and CLYDE G. SEELY,  
assignee and real party in interest,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, et al.,

Defendant.

RULING ON MOTION FOR  
DISMISSAL WITH PREJUDICE

Civil No. 010500909  
Judge G. Rand Beacham

This matter came again before the Court on the “Motion for Dismissal With Prejudice” which was filed, with supporting memorandum and attachments, on November 24, 2008 by defendants Engineered Structures, Inc. (“ESI”), Wal-Mart Real Estate Business Trust (“Wal-Mart”), and American Insurance Company (“AIC”). Plaintiff Clyde G. Seely joined in the Motion, which was signed by his counsel of record. Plaintiff Merrick Young Incorporated (“MYI”) filed an opposing memorandum, and the moving defendants filed a reply memorandum and a Request to Submit for Decision. Although a hearing was requested, the Court finds that, so far as this Court is concerned, the issue has been authoritatively decided and denies the request for hearing. Having fully reviewed the matter, the Court grants the Motion.

In a Ruling entered April 10, 2008, the Court concluded that Mr. Seely is the owner of the claims made by MYI in this case, so that it is proper for the Court to exercise personal jurisdiction over him. Since MYI does not appear to understand that Ruling completely, the Court will restate in greater detail its analysis of the “Settlement Agreement, Mutual Release, and Assignment” (the



“Agreement”) executed by Mr. Seeley, MYI and its two principals, and Developers Surety and Indemnity Company (“Developers”) in March and April 2004. The critical elements of that Agreement are as follows:

- a. Developers, MYI and its two principals had previously entered into an Indemnity Agreement in which MYI and its two principals assigned to Developers, for security purposes, several property rights, including “all sums due or to become due on all . . . contracts, covenants and agreements . . . in which [MYI and its two principals] has [sic] any interest, together with any . . . chose in action related thereto.” (Agreement, p. 2, reciting ¶ 7 of the Indemnity Agreement.)
- b. In another action filed in this court, Developers obtained a judgment against MYI and its two principals which ordered that Developers could execute against “Any equity in any other . . . asset in which [MYI or its two principals] has any interest” as well as “Any . . . other assets of [MYI or its two principals].” (Agreement, p. 3.)
- c. The Agreement provided that “[MYI and its two principals] confirm and aver that [they] have assigned, transferred, and set over to Developers any and all interest, rights, and title that [MYI and its two principals] possess or may possess to [their] assets.” (Agreement, p. 5, ¶ 2.b.)
- d. The Agreement further provided that Mr. Seely would pay Developers \$150,000, for which Developers “hereby assigns, transfers, and sets over to Seely all [MYI’s and its two principals’] Assets,” with exceptions which are not relevant to the instant case. (Agreement, pp. 5-6, ¶ 2.d.)

- e. This case was commenced by the Complaint filed by MYI on May 4, 2001, nearly three years before the Agreement was executed by MYI, so the claims made by MYI in this case constituted a chose in action—a right to make a claim in a lawsuit—which, regardless of its value or the likelihood of its success, constituted an asset of MYI which MYI transferred to Developers, and Developers transferred to Mr. Seely, in 2004.
- f. Accordingly, Mr. Seely now has the right to pursue the claims filed by MYI in this case or to settle them.

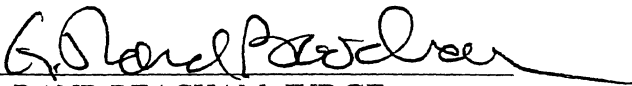
MYI suggests that the Court reconsider its Ruling regarding Mr. Seely's rights to the claims filed by MYI, and proposes to give evidence that MYI and Mr. Seely did not intend a transfer of MYI's claims from MYI to Developers to Mr. Seely. MYI identifies no ambiguity in the Agreement, however, and the Court finds none. The intent of the parties to the Agreement is clearly expressed in the written terms of the Agreement and an objective reading of the Agreement leads to the Court's conclusions. Consideration of extrinsic evidence to prove a different intent would not be consistent with rules of construction or rules of evidence.

MYI's other arguments are equally unavailing. Vague concepts of equity are not sufficient to rob the parties to a contract of the benefits of their bargain, and the Court is not free to give MYI a better contract than the Agreement it made for itself. Mr. Seely's interest or lack of interest in the MYI claims has nothing to do with his ownership of those claims. Finally, MYI's misfortune—in pursuing claims it did not own—is not a basis for ignoring clear legal principles.

Consequently, the Motion for Dismissal With Prejudice is granted, and the claims made in

the First, Second, Third and Fourth Causes of Action as set forth in the Amended Complaint will be dismissed with prejudice. The Order proposed by the moving parties, which includes additional terms consistent with the October 2008 "Settlement Agreement" among Mr. Seely and the moving defendants, will be executed and entered with this Ruling.

Dated this 9 day of January, 2009.

  
G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of Jan, 2009, I provided true and correct copies of the foregoing ORDER to each of the attorneys/parties named below by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Jon M. Lear  
Dennis C. Farley  
Attorneys for Plaintiff MYI  
808 E. South Temple  
Salt Lake City, Utah 84102

E. Scott Savage  
Attorney for Plaintiff MYI  
170 South Main Street, Suite 500  
Salt Lake City, Utah 84101

Clark B. Fetzer  
Attorney for Defendants  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101


Kim J. Trout  
Attorney for Defendants  
P.O. Box 1097  
Boise, Idaho 83701

Greggory J. Savage  
Attorney for Plaintiff Seely  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

  
\_\_\_\_\_  
DEPUTY CLERK OF COURT

Tab D

SAVAGE, YEATES & WALDRON, P.C.  
E. Scott Savage (2865)  
Stephen R. Waldron (6810)  
170 S. Main Street, Suite 500  
Salt Lake City, Utah 84101  
Telephone: (801) 328-2200  
Fax: (801) 531-9926

FILED  
FIFTH JUDICIAL DISTRICT COURT  
2009 APR 20 AM 11:37  
WASHINGTON COUNTY  
BY 

LEAR & LEAR  
Jon Lear (1913)  
The Downey Mansion  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: (801) 538-5000  
Fax: (801) 538-5001

Attorneys for Merrick Young Incorporated

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MERRICK YOUNG INCORPORATED, )  
)  
Plaintiff, )  
)  
vs. )  
)  
WAL-MART REAL ESTATE BUSINESS )  
TRUST, a Delaware business trust; )  
ENGINEERED STRUCTURES, INC., an )  
Idaho corporation; THE AMERICAN )  
INSURANCE COMPANY, a Nebraska )  
corporation; WESTERN ROCK )  
PRODUCTS CORPORATION, a Utah )  
corporation, and DOES 1-100, )  
)  
Defendants. )  
)

**AMENDED  
ORDER OF DISMISSAL  
WITH PREJUDICE**

Civil No. 010500909

Honorable G. Rand Beacham

BASED UPON THE MOTION SUBMITTED BY DEFENDANTS ENGINEERED

STRUCTURES, INC., THE WAL-MART REAL ESTATE BUSINESS TRUST AND THE AMERICAN INSURANCE COMPANY AND THE NOTICE OF NON-OPPOSITION BY PLAINTIFF CLYDE G. SEELY, AND GOOD CAUSE APPEARING, IT IS HEREBY ORDERED AS FOLLOWS:

1. The **First Cause of Action as set forth in the Amended Complaint** (Breach of Contract: Defendant ESI), is hereby **DISMISSED**, with prejudice;
2. The **Second Cause of Action as set forth in the Amended Complaint** (Mechanic's Lien/Foreclosure: Wal-Mart), is hereby **DISMISSED**, with prejudice;
3. The **Third Cause of Action as set forth in the Amended Complaint** (Bond Claim: Defendant ESI), is hereby **DISMISSED**, with prejudice;
4. The **Fourth Cause of Action as set forth in the Amended Complaint** (Unjust Enrichment), is hereby **DISMISSED**, with prejudice;
5. ESI's and AIC's **Sixth Claim for Relief as set forth in the Second Amended Counterclaim**, Abuse of Process against Clyde G. Seeley, is hereby **DISMISSED**, with prejudice;
6. ESI's **Seventh Claim for Relief as set forth in its Second Amended Counterclaim**, Attorney Fees/Breach of Contract against Clyde G. Seely, is hereby **DISMISSED**, with prejudice;
7. ESI's **Eighth Claim for Relief as set forth in its Second Amended Counterclaim**, Attorney Fees/Lien Foreclosure against Clyde G. Seely, is hereby **DISMISSED**, with prejudice;

8. ESI's and AIC's **Ninth Claim for Relief as set forth in the Second Amended Counterclaim**, Attorney Fees/Private Payment Bond against Clyde G. Seely, is hereby **DISMISSED**, with prejudice;

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay of an appeal of this Order, and expressly directs entry of a final judgment in favor of defendants as to plaintiff Merrick Young Incorporated's claims for relief in the Amended Complaint against defendants that are dismissed hereunder.

DATED this 17 day of April, 2009.

  
HONORABLE G. RAND BEACHAM  
Fifth Judicial District Court Judge



**CERTIFICATE OF MAILING**

I hereby certify that I caused a true and correct copy of the within and foregoing proposed  
**AMENDED ORDER OF DISMISSAL WITH PREJUDICE** to be mailed, postage prepaid,  
this \_\_\_\_\_ day of April, 2009, to the following:

Clark B. Fetzer  
Rinehart Fetzer Simonsen & Booth, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101

Kim Trout  
Trout Jones Gledhill Fuhrman, P.A.  
P.O. Box 1097  
Boise, Idaho 83701

Greggory J. Savage  
Ray Quinney & Nebeker, P.C.  
36 South State Street, Suite 1400  
Salt Lake City, UT 84111

\_\_\_\_\_

Tab E

Michael W. Spence (4674)  
Greggory J. Savage (5988)  
Angelina Tsu (9958)  
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Telephone: (801) 532-1500  
Facsimile: (801) 532-7543

Attorneys for Clyde Seely

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IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---

MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

Case No. 010500909  
Judge: G. Rand Beacham

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**DECLARATION OF CLYDE G. SEELY**

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I, Clyde G. Seely, declare and state as follows:

1. I am over eighteen years of age and have personal knowledge of the contents of this Declaration. This Declaration is submitted in support of a motion to dismiss me as a party in the above-captioned litigation.

2. I am a life long resident of the state of Montana. For the past 42 years, my exclusive residence has been in West Yellowstone, Montana where I am involved in the lodging business.

3. I am the father-in-law of Merrick Young who I understand was or is a minority shareholder of Merrick Young Inc. ("MYI"), the plaintiff in the above-captioned action.

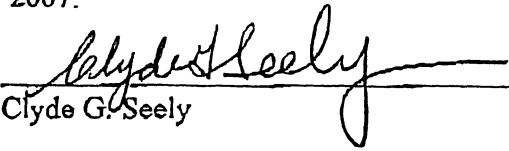
4. Starting in approximately 2003, Merrick Young experienced financial difficulties which created difficult circumstances for my daughter and him. In an effort to assist my daughter and her husband, I agreed to pay off certain of their personal obligations in order to allow them to avoid personal bankruptcy. In connection with paying some of these debts, Merrick Young had his counsel prepare the Settlement, Mutual Release, and Assignment ("Settlement Agreement") attached hereto as Exhibit 1. I was not represented by independent legal counsel with respect to the Settlement Agreement. Robert Jensen negotiated and drafted the Settlement Agreement on behalf Merrick Young. I assumed this Settlement Agreement would represent the best interest of both Merrick Young and me so I did not retain independent counsel. Robert Jensen answered all of my questions regarding the Settlement Agreement prior my executing it. I did not participate in preparing the Settlement Agreement. I am not sure where I signed the Settlement Agreement, but my best recollection at this time is that I signed the document in Montana.

5. At the time I signed the Settlement Agreement, I was generally aware of a dispute between MYI, Wal-Mart and others. I did not understand that the Settlement Agreement gave me any right or interest with respect to the above-captioned litigation nor did I expect to receive any such right or interest. The first time I learned that anyone was asserting that I had any right or interest with respect to the litigation was when the defendants sought to join me as a party in this litigation. I have not at any time, nor do I now, claim any right or interest in or with respect to the above-captioned litigation. I have not at any time directed, funded or otherwise pursued the litigation.

6. I do not regularly transact business in the State of Utah. My own regular business involvement with the State of Utah is that I annually have an exhibit at the Utah State Fair relating to the lodging businesses that I run in West Yellowstone, Montana. I do not maintain a bank account in the State of Utah.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on September 26, 2007.

  
Clyde G. Seely

# Exhibit 1

## SETTLEMENT AGREEMENT, MUTUAL RELEASE, AND ASSIGNMENT

This Settlement Agreement, Mutual Release and Assignment (hereinafter "Agreement") is made on this \_\_\_\_ day of \_\_\_\_\_, 2004, by and between Developers Surety and Indemnity Company (hereinafter "Developers"); and Merrick Young Incorporated (hereinafter "MYI"), a Utah corporation; Merrick Young, an individual (hereinafter "Mr. Young"); Stephanie Young, an individual (hereinafter "Ms. Young"); and Clyde G. Seely, an individual (hereinafter "Seely"). All entities referenced above are collectively referred to as the "Parties".

### RECITALS

#### WHEREAS:

A. Developers issued Labor and Material Payment Bond and Performance Bond No. 870694P (hereinafter referred to as the "Black Ridge Bond"), with City of St. George, as obligee, and MYI, as principal, for the project known as Black Ridge Drive, 250 West Improvement, Project SID 99-4, Inquiry No. 00-1260 (hereinafter the "Black Ridge Project"). The amount, or penal sum, of the bond was \$1,543,000.00.

Drive

B. Developers issued Payment Bond and Performance Bond No. 870960P (hereinafter referred to as the "River Road Bond"), with the State of Utah by and through the Utah Department of Transportation, as obligee, and MYI, as principal, for the project known as River Road, Project No. STP-3196(1)0 (hereinafter the "River Road Project"). The penal sum of the bond was \$1,229,229.00.

C. Developers Insurance Company merged into Developers, and Developers assumed all assets, rights, liabilities and obligations of Developers Insurance Company.

D. MYI, Mr. Young, and Ms. Young (collectively referred to as "Indemnitors") entered into an Indemnity Agreement, GIA No. 75605-01, (hereinafter "GIA") with Developers wherein Indemnitors agreed, among other things, to fully defend and indemnify Developers from and against any and all loss incurred as a consequence of issuing any bonds in favor of MYI and to assign to Developers accounts receivable and contracts. The pertinent portions of these promises are set forth in paragraphs 1 and 7 of the GIA, as follows:

1. **INDEMNIFICATION.** In consideration of the execution and delivery by Surety of a Bond or any Bonds on behalf of Principal, Principal and Indemnitor shall pay all premiums charged by Surety in connection with any Bond (including extensions, renewals or modifications) issued by Surety on behalf of Principal and shall indemnify and hold Surety harmless from and against any and all liability, loss, claims, demands, costs, damages, attorneys' fees and expenses of whatever kind or nature, together with interest thereon at the maximum rate allowed by law, which Surety may sustain or incur by reason of or in consequence of the execution and delivery by Surety of any Bond on behalf of Principal, whether or not Surety shall have paid any amount on account thereof, ...

\* \* \*

7. **Assignment.** To secure the obligations of Principal [MYI] and Indemnitor hereunder and any other indebtedness and liabilities of Principal or Indemnitor to Surety [Developers], Principal and Indemnitor hereby assign, transfer, pledge and convey to Surety, effective immediately upon and only in the event that there shall be an event of default hereunder, all rights in and to . . . :

7.1 Any and all contracts to subcontracts let in connection therewith . . . ,

7.2 Any and all machinery, plant, equipment tools and materials which shall be upon the site or sites of the work or project . . . or elsewhere . . . .

7.3 Any and all sums due or which may become due upon partial or full performance of the Obligation and all sums due or to become due on all other contracts, covenants and agreements whether bonded or unbonded, in which the Principal or Indemnitor has any interest, together with any notes, accounts receivable or chose in action related thereto.

\* \* \*

7.5 Any an all undisbursed loan funds, deposits or interest reserve accounts to which the Principal or Indemnitor may be entitled, and any and all collateral for any undertakings given by Principal, Indemnitor or any Guarantor in connection with any Obligation.  
(Emphasis in original).

E. Claims were made against the Black Ridge Bond and the River Road Bond by MYI's unpaid subcontractors or suppliers. As a result, Developers was compelled to pay bond claimants a principal sum approximating \$456,812.48 in satisfaction of said claims, and also incurred legal and other expenses.

F. Developers sought recovery of these losses by commencing three lawsuits:

1) Developers vs. Indemnitors. This suit, being case number 02-0502319 (hereinafter "Indemnity Litigation"), was brought in the Fifth Judicial District Court, Washington County, State of Utah against the Indemnitors seeking enforcement of the GIA. Developers obtained judgment against the Indemnitors, an injunction against the Indemnitors from disbursing funds or conveying any assets, and garnishments. The Order and Judgment specifically provides in the pertinent part as follows:

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to URCP 64C and URCP 64D, Developers may execute, attach and garnish, in the amount of \$540,668.61, the accounts receivable, assets, interests, money, stocks, memberships, bonds, real property, and personal property in which the Indemnitors have an interest, including but not limited to, the following:



1. Merrick Young  
Stephanie Young  
3511 Paiute Road  
St. George or Bloomington, Utah 84790-7741  
The above real property known as 3511 Paiute Road and  
~~any funds obtained from its sale, including all other assets~~  
of the Indemnitors.
2. Funds due and owing to Indemnitors, either individually or collectively, for the project known as Black Ridge Drive, 250 West Improvement, Project SID 99-4, Inquiry No. 00-1260.
3. Funds due and owing to Indemnitors, either individually or collectively, for the project known as River Road, Project No. STP-3196(1)0.
4. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, La Farge, N.A., for the project known as I-15 Sevier River Northward Project, Project No.: \*IM-NH-15-5(31)200.
5. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, Meadow Valley Contractors, Inc., for the project known as UDOT I-15 North Interchange, Project No.: IM-15-2-3861.
6. Any equity in any other real property, business or asset in which any Indemnitor has an interest.
7. Any money, stocks, bonds, or other assets of any Indemnitor.
8. Any interest in Black Ridge Commercial Center, LLC; Black Ridge, LLC, or any other partnership, limited partnership, limited liability company, sole proprietorship, corporation, or other business entity in which any Indemnitor has an interest, and any real property in which these entities have an interest. [All assets referenced in paragraphs 1 through 8 of the Court's Order are referred to in this Agreement as "Indemnitors' Assets"].

IT IS FURTHER HEREBY ORDERED,

ADJUDGED AND DECREED that the Indemnitors  
Merrick Young, individually; Stephanie Young,  
individually; and Merrick Young Inc. (collectively referred  
to as "Indemnitors") are preliminarily enjoined as follows:

1. Indemnitors are enjoined, restrained and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any corporate assets, limited liability company assets, partnership assets, real property, personal property or assets of any business entity in which Indemnitors possess an interest until further order of this Court except as described in paragraph 3 below.
2. All corporations, limited liability companies, partnerships and/or any business entities in which Indemnitors possess any interest are hereby restrained, enjoined and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any asset or real or personal property until further order of this Court.
3. Merrick Young, individually; and Stephanie Young, individually; shall be allotted reasonable funds for reasonable daily living expenses, such as food, housing, gasoline for necessary travel, clothing, and utilities for the household, but are enjoined, absent approval of this Court, from the purchase or expenditure of funds to acquire any motorized vehicle, jewelry, stocks, bonds, vacations or other consumer items not necessary to sustain life and health.
4. This Order is binding upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of this Order.

2) Developers v. Utah Department of Transportation. This suit, being Civil Case No. 030500102, was instituted in the Fifth Judicial District Court, Washington County, State of Utah against UDOT for additional sums owed MYI based on UDOT's alleged breach of contract, breach of express and implied warranties, unjust enrichment, subrogation, and negligence with respect to the River Road project (hereinafter "UDOT Litigation").

3) Developers v. City of St. George. Developers instituted Civil Case No. 030500096 in the Fifth Judicial District Court, Washington County, State of Utah against the City of St.

George for additional sums owed MYI based on the City of St. George's alleged breach of contract, breach of express and implied warranties, unjust enrichment, and subrogation with respect to the Black Ridge Drive Project (hereinafter "Developers Black Ridge Drive Project Litigation").

~~G. MYI v. the City of St. George. MYI instituted Civil Case No. 030500101 in the Fifth~~  
Judicial District Court, Washington County, State of Utah against the City of St. George for additional amounts allegedly due and owing to MYI from the City of St. George pertaining to the Black Ridge Drive Project. (hereinafter "MYI Black Ridge Drive Project Litigation").

H. Seely is an individual interested in purchasing certain assets of MYI. Seely is not an indemnitor to Developers nor does Seely have any relationship to Developers. Seely's interest is in purchasing assets of Indemnitors owned by Developers or which are subject to the judgment, injunction, and garnishment.

I. Developers has paid out, for and on behalf of MYI, a principal amount of approximately \$456,812.48, which amount has accrued interest at the rate of ten percent (10%), and has also expended attorneys' fees and costs. Developers asserts that Indemnitors are liable for all these expenses. Indemnitors assert that they are currently incapable of satisfying Developers in full.

**NOW, THEREFORE, IT IS EXPRESSLY UNDERSTOOD AND AGREED**, for valuable consideration, as follows:

1. **Recitals.** The foregoing recitals are true and correct and are incorporated herein.

2. **Payment of Settlement Funds and Consideration.** Developers, and Indemnitors mutually wish to resolve the disputes and litigation between them and assign certain interests. In consideration of such resolution and assignments, Developers, Indemnitors, and Seely agree as follows:

a) Indemnitors do hereby assign, transfer, and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to the payment of any money regarding the Black Ridge Drive Project, including any and all interests, rights and title to the MYI Black Ridge Drive Project Litigation. Developers is specifically authorized by Indemnitors to prosecute, compromise, dismiss or otherwise dispose of the MYI Black Ridge Drive Project Litigation. Indemnitors have no further claim against the City regarding the MYI Black Ridge Drive Project Litigation as all those rights are assigned to Developers.

b) Indemnitors confirm and aver that Indemnitors have assigned, transferred, and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to Indemnitors' Assets.

c) Concurrent with Developers' execution of this Agreement, Seely shall pay Developers a lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds.

d) In consideration of Seely's payment to Developers of One Hundred Fifty Thousand Dollars

Settlement Agreement, Mutual Release, and Assignment

Page 5 of 9

Developers:

MYI: [Signature]; Mr. Young: [Signature]  
Ms. Young: [Signature]; Mr. Seely: [Signature]

(\$150,000.00) in certified funds, Developers (i) hereby assigns, transfers, and sets over to Seely any and all interests, rights, and title that Developers possesses or may possess to the payment of any money regarding the UDOT Project, including any and all interests, rights and title to the UDOT Litigation ; and (ii) hereby assigns, transfers, and sets over to Seely all Indemnitors' Assets with the exception of the Black Ridge Drive Project, the MYI Black Ridge Drive Project Litigation, and Developers Black Ridge Drive Project Litigation.

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e) In consideration of MYI's assignment set forth in paragraph 2a, and in consideration of Seely's lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000.00) in certified funds to Developers, Developers shall assign the Indemnity Litigation to Seely, and Seely shall upon execution of this Agreement immediately notify the court in the Indemnity Litigation of the assignment, substitute in as Plaintiff in the stead of Developers, and retain Seely's own counsel. If Seely fails to so notify the court in the Indemnity Litigation within 10 business days of the execution of this Agreement, then Developers is authorized to notify the court as appropriate that the Indemnity Litigation is resolved and should be dismissed.

f) In consideration of Developers' promises herein, the Indemnitors promise to provide full and complete cooperation to Developers to assist Developers in the Developers Black Ridge Drive Project Litigation. Such full and complete cooperation requires Indemnitors to produce requested documents, provide complete information, promptly respond to telephone calls and correspondence, and thoroughly prepare for and attend any substantive settlement meetings, depositions or trial. Developers and Indemnitors stipulate and agree that the failure of the Indemnitors to reasonably cooperate will damage Developers in the amount of \$100,000, for which Developers may sue Indemnitors under this Agreement. The liquidated damage of \$100,000 bears a reasonable relationship to Developers' anticipated loss and is agreed upon due to the difficulty in calculating an actual damage

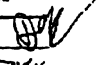




g) As stated in paragraphs 2(b) and 2(d), and as of the date of this Agreement, all of Indemnitors' assets and all interests therein (except those reserved to Developers), which have been or could be attached by Developers via the GIA or otherwise, are hereby conveyed to Developers and then to Seely. Developers retains no interest in any such assets. Further, Developers hereby releases Indemnitors from all obligations associated with the Black Ridge Drive Project and River Road Project except as stated herein. However, this Agreement shall in no way impair or affect the indemnity obligations which Indemnitors may have, if any, under the GIA as to any other bonded projects, if any. Developers may enforce the GIA as against any such other bonded projects, and attach any of Indemnitors' assets, as provided by the GIA, after the date of this Agreement. The parties hereby represent that they are not aware of any such bonded projects, for which Indemnitors might have any obligations.

h) Regarding the MYI Black Ridge Drive Project Litigation assigned by MYI to Developers and the Indemnity Litigation and the UDOT Litigation assigned by Developers to Seely, Developers and Seely mutually agree to notify the defendant(s) of the applicable assignment and to substitute the name of the assignee for the assignor within 30 days of this Agreement being executed by all parties. All parties to this Agreement agree to execute any document necessary to accomplish the assignments and substitutions so that this 30 day deadline is met.

### 3. Mutual Releases, Consideration and Assignments. In exchange for the Payment of

Settlement Agreement, Mutual Release, and Assignment

Page 6 of 9

Developers:   
MYI: , Mr. Young:   
Ms. Young: , Mr. Seely: 

Settlement Funds and Consideration described herein, Developers and Indemnitors agree to the following mutual releases:

**a. Developers.** Developers and its parent(s), assignees, heirs, successors in interest, predecessors in interest, principals, and other related entities, hereby unconditionally waive, release, ~~relinquish, acquit, and forever discharge~~ (with the exception of warranty work) the Indemnitors, their respective heirs, assignees, successors in interest, parents, subsidiaries, and other related entities, of and from any and all rights, claims, demands, damages, debts, liens, claims for relief, actions, suits, causes of action, interest, damages, fees, costs, and the like, of every kind and nature whatsoever, known and unknown, suspected and unsuspected, anticipated and unanticipated, past, present and future, whether arising at law, under a contract, in tort, in equity, or otherwise, for all damages, losses, injuries, economic loss, attorneys' fees, costs, expenses, or otherwise, including without limitation all consequential, general, special, and/or punitive damages, resulting from, or to result from, or in any way arising out of or related to MYI's default or failure to pay KV Electric; Triple "B" Concrete; Western Rock Products; Environmental Abatement, Inc.; Koch Performance Asphalt; KV Electric; Progressive Contracting; Progressive Contracting & AT Asphalt Paving; Contech Construction; Hikiau, Inc.; and K&J Traffic Control, and any and all other obligations under the GIA, except as reserved herein. Developers specifically reserves all rights and remedies against MYI and the Indemnitors regarding any performance, warranty, defect, personal injury, third party injury, real property, personal property or asbestos claim that may be asserted by the City, UDOT or any other entity against Developers regarding the Black Ridge Drive Project or the UDOT Project, and Developers is entitled to recovery attorneys' fees, costs and other expenses as set forth in the GIA in defending or resolving such claims.

**b. MYI and Indemnitors.** In consideration of Developers' foregoing release and Developers' agreement to assign to Seely the Indemnity Litigation, Indemnitors, for themselves, and their heirs, assignees, and successors in interest, hereby unconditionally waive, release, relinquish, acquit, and forever discharge Developers and its heirs, assignees, parents, subsidiaries, successors in interest, and other related entities, of and from any and all rights, claims, demands, damages, debts, liens, claims for relief, actions, suits, causes of action, interest, damages, fees, costs, and the like, of every kind and nature whatsoever, known and unknown, suspected and unsuspected, anticipated and unanticipated, past, present and future, whether arising at law, under a contract, in tort, in equity, or otherwise, for all damages, losses, injuries, economic loss, attorneys' fees, costs, expenses, or otherwise, including without limitation all consequential, general, special, and/or punitive damages, resulting from, or to result from, or in any way connected to the Indemnity Agreement, or any bond.

### III. General Terms.

1. **Assignment of this Agreement.** Developers may freely assign and/or delegate, in whole or in part, its rights, interest, and remedies to this Agreement. Indemnitors shall not assign, however, any of MYI's accounts receivables, the proceeds therefrom, or any interest therein existing prior to the date of this Agreement.

2. **Headings.** The headings in this Agreement are for ready reference only and shall not be used to limit or expand the terms of this Agreement.

3. **Verification of Authority.** Each of the individuals signing this Agreement hereby confirms, individually and/or on behalf of the entity whom they represent, that they have full legal power and authority to execute this Agreement on the entity's behalf and that the entity has full legal power and authority to perform this Agreement. The consummation of all transactions contemplated herein have been duly authorized by all necessary entities, including the appropriate passing of resolutions and directions, ~~and this Agreement constitutes legal, valid, and binding obligations of such Party, enforceable in accordance with its terms.~~

4. **Default and Attorneys Fees.** The laws of the State of Utah govern this AGREEMENT and any party to this AGREEMENT who retains counsel to enforce the terms hereof shall be entitled to attorneys' fees incurred in said enforcement. Any action to enforce the terms of this Agreement shall be brought in the Fifth Judicial District Court in and for Washington County, Utah.

5. **Severability.** If any provision of this AGREEMENT is determined to be invalid, said determination shall not affect the validity of the remainder of the AGREEMENT.

6. **Counterparts and copies.** This AGREEMENT may be signed in counterpart, and copies or facsimile copies of signatures shall be considered to be originals.

7. **Withdrawal of Counsel and Waiver of Potential Conflict.** In anticipation of this Agreement, Parties agree that Robert M. Jensen will be completely withdrawing as Counsel for Developers. Developers recognizes that from this point forward, Robert M. Jensen is not representing the interests of the Developers with respect to any lawsuit or in respect to the drafting of this Agreement. Further, Developers agrees and understands that Robert M. Jensen is directly opposed to Developers for purposes of negotiating this Agreement and for all business dealings and associations hereafter. Developers knowingly and voluntarily waives any and all conflicts of interest.

8. **Attorney Fees and Costs.** If suit is commenced by any Party to enforce the terms of this Agreement, then the prevailing Party shall recover all attorneys' fees and costs incurred in such suit.

DATED this 5<sup>TH</sup> APRIL day of ~~January~~, 2004.

Developers Surety and Indemnity Company

By: Daniel T. Keegan

its authorized representative

Approved as to form and content:

DATED this \_\_\_ day of January, 2004.

FAUX & ASSOCIATES, P.C.

Kurt C. Faux, Esq.  
2785 E. Desert Inn Road, Suite 270  
Las Vegas, NV 89121  
Attorney for Developers Surety and Indemnity Company

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

Merrick Young, Incorporated

[Signature]  
By: Merrick Young,  
its President and authorized  
representative

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

[Signature]  
Merrick Young, individually

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

[Signature]  
Stephanie Young, individually

DATED this 25<sup>th</sup> day of ~~January~~ <sup>March</sup>, 2004.

[Signature]  
Clyde G. Seely, individually

Approved as to form and content:

DATED this 31 day of ~~January~~ <sup>March</sup>, 2004.

JENKINS JENSEN & BAYLES, LLP

[Signature]  
Robert M. Jensen, Esq.  
1240 East 100 South, Suite 9  
St. George, UT 84790  
Attorney for Merrick Young, Incorporated; and  
Merrick Young, individually

Tab F



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WASHINGTON COUNTY

Michael W. Spence (4674)  
Greggory J. Savage (5988)  
Michael D. Mayfield (8237)  
RAY QUINNEY & NEBEKER P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

*Attorneys for Involuntary Plaintiff Clyde G. Seely*

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IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---

MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

ANSWER TO SECOND AMENDED  
COUNTERCLAIM

Case No. 010500909

Judge G. Rand Beacham

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Involuntary Plaintiff Clyde G. Seely ("Seely"), by and through his counsel, submits this answer to the Second Amended Counterclaim filed by defendants Engineered Structures, Inc. and The American Insurance Company (the "Counterclaim").

### **FIRST DEFENSE**

The Counterclaim and each and every claim for relief therein fails to state a claim upon which relief may be granted.

### **SECOND DEFENSE**

Answering the numbered paragraphs of the Counterclaim, Seely answers and alleges as follows:

1. Seely lacks knowledge regarding the allegations of paragraph 1 and therefore denies the same.

2. Seely lacks knowledge regarding the allegations of paragraph 2 and therefore denies the same.

3. Seely lacks knowledge regarding the allegations of paragraph 3 and therefore denies the same.

4. Seely lacks knowledge regarding the allegations of paragraph 4 and therefore denies the same.

5. Seely admits the allegations of paragraph 5.

6. Paragraph 6 states a legal conclusion to which no response is required. All factual allegations are denied. Seely specifically denies that the Court has personal jurisdiction over him.

7. Paragraph 7 states a legal conclusion to which no response is required. All factual allegations are denied.

8. Seely lacks knowledge regarding the allegations of paragraph 8 and therefore denies the same.

9. Seely lacks knowledge regarding the allegations of paragraph 9 and therefore denies the same.

10. Seely lacks knowledge regarding the allegations of paragraph 10 and therefore denies the same.

11. Seely lacks knowledge regarding the allegations of paragraph 11 and therefore denies the same.

12. Seely lacks knowledge regarding the allegations of paragraph 12 and therefore denies the same.

13. Seely lacks knowledge regarding the allegations of paragraph 13 and therefore denies the same.

14. Seely lacks knowledge regarding the allegations of paragraph 14 and therefore denies the same.

15. Seely lacks knowledge regarding the allegations of paragraph 15 and therefore denies the same.

16. Seely lacks knowledge regarding the allegations of paragraph 16 and therefore denies the same.

17. Seely lacks knowledge regarding the allegations of paragraph 17 and therefore denies the same.

18. Seely admits that the agreement referenced in paragraph 18 speaks for itself. Seely lacks knowledge regarding the remaining allegations of paragraph 18 and therefore denies the same.

19. Seely admits that the agreement referenced in paragraph 19 speaks for itself. Seely lacks knowledge regarding the remaining allegations of paragraph 19 and therefore denies the same.

20. Seely lacks knowledge regarding the allegations of paragraph 20 and therefore denies the same.

21. Seely admits that the documents referenced in paragraph 21 speaks for themselves. Seely lacks knowledge regarding the remaining allegations of paragraph 21 and therefore denies the same.

22. Seely lacks knowledge regarding the allegations of paragraph 22 and therefore denies the same.

23. Seely denies the allegations of paragraph 23.

24. Seely admits that the agreement referenced in paragraph 24 speaks for itself and otherwise denies the allegations of paragraph 24.

25. Seely admits that the agreement referenced in paragraph 25 speaks for itself and otherwise denies the allegations of paragraph 25.

26. Seely lacks knowledge regarding the allegations of paragraph 26 and therefore denies the same.

27. Seely lacks knowledge regarding the allegations of paragraph 27 and therefore denies the same.

28. Seely lacks knowledge regarding the allegations of paragraph 28 and therefore denies the same.

29. Seely lacks knowledge regarding the allegations of paragraph 29 and therefore denies the same.

30. Seely lacks knowledge regarding the allegations of paragraph 30 and therefore denies the same.

31. Seely lacks knowledge regarding the allegations of paragraph 31 and therefore denies the same.

32. Seely lacks knowledge regarding the allegations of paragraph 32 and therefore denies the same.

33. Seely lacks knowledge regarding the allegations of paragraph 33 and therefore denies the same.

34. Seely lacks knowledge regarding the allegations of paragraph 34 and therefore denies the same.

35. Seely denies the allegations of paragraph 35.

36. Seely denies the allegations of paragraph 36.

37. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

38. Seely lacks knowledge regarding the allegations of paragraph 38 and therefore denies the same.

39. Seely lacks knowledge regarding the allegations of paragraph 39 and therefore denies the same.

40. Seely lacks knowledge regarding the allegations of paragraph 40 and therefore denies the same.

41. Seely lacks knowledge regarding the allegations of paragraph 41 and therefore denies the same.

42. Seely lacks knowledge regarding the allegations of paragraph 42 and therefore denies the same.

43. Seely admits that the agreement referenced in paragraph 43 speaks for itself and otherwise denies the allegations of paragraph 43.

44. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

45. Seely admits that the agreement referenced in paragraph 45 speaks for itself and otherwise denies the allegations of paragraph 45.

46. Seely lacks knowledge regarding the allegations of paragraph 46 and therefore denies the same.

47. Seely lacks knowledge regarding the allegations of paragraph 47 and therefore denies the same.

48. Seely lacks knowledge regarding the allegations of paragraph 48 and therefore denies the same.

49. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

50. Seely admits that the document referenced in paragraph 50 speaks for itself and otherwise denies the allegations of paragraph 50.

51. Seely admits that the agreement referenced in paragraph 51 speaks for itself and otherwise denies the allegations of paragraph 51.

52. Seely admits that the agreement referenced in paragraph 52 speaks for itself and otherwise denies the allegations of paragraph 52.

53. Seely lacks knowledge regarding the allegations of paragraph 53 and therefore denies the same.

54. Seely denies the allegations of paragraph 54 and affirmatively states that he does not claim any right or interest in or with respect to the above-captioned litigation.

55. Seely denies the allegations of paragraph 55.

56. Seely denies the allegations of paragraph 56.

57. Seely admits that the Counterclaims seeks the stated relief but denies that it is appropriate and otherwise denies the allegations of paragraph 57.

58. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

59. Seely admits that the agreement referenced in paragraph 59 speaks for itself and otherwise denies the allegations of paragraph 59.

60. Seely lacks knowledge regarding the allegations of paragraph 60 and therefore denies the same.

61. Seely denies the allegations of paragraph 61 and affirmatively states that he does not claim any right or interest in or with respect to the above-captioned litigation.

62. Seely denies the allegations of paragraph 62 and affirmatively states that he does not claim any right or interest in or with respect to the above-captioned litigation.

63. Seely denies the allegations of paragraph 63.

64. Seely denies the allegations of paragraph 64.

65. Seely admits that the Counterclaims seeks the stated relief but denies that it is appropriate and otherwise denies the allegations of paragraph 65.

66. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

67. Seely admits that the agreement referenced in paragraph 67 speaks for itself and otherwise denies the allegations of paragraph 67.

68. Seely lacks knowledge regarding the allegations of paragraph 68 and therefore denies the same.

69. Seely denies the allegations of paragraph 62 and affirmatively states that he does not claim any right or interest in or with respect to the above-captioned litigation.

70. Seely denies the allegations of paragraph 70.

71. Seely denies the allegations of paragraph 71.

72. Seely admits that the Counterclaims seeks the stated relief but denies that it is appropriate and otherwise denies the allegations of paragraph 72.

73. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

74. Seely denies the allegations of paragraph 74.

75. Seely denies the allegations of paragraph 75.

76. Seely denies the allegations paragraph 76.



77. Seely lacks knowledge regarding the allegations of paragraph 77 and therefore denies the same.

78. Seely denies the allegations of paragraph 78.

79. Seely denies the allegations of paragraph 79.

80. Seely denies the allegations paragraph 80.

81. Seely denies the allegations of paragraph 81.

82. Seely denies the allegations paragraph 82.

83. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

84. Seely denies the allegations of paragraph 84.

85. Seely denies the allegations paragraph 85.

86. Seely admits that the agreement referenced in paragraph 86 speaks for itself and otherwise denies the allegations of paragraph 86.

87. Seely denies the allegations of paragraph 87.

88. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

89. Seely denies the allegations paragraph 89.

90. Seely lacks knowledge regarding the allegations of paragraph 90 and therefore denies the same.

91. Seely admits that the statute referenced in paragraph 91 speaks for itself and otherwise denies the allegations of paragraph 91.

92. Seely incorporates and re-asserts his responses to the foregoing paragraphs.

93. Seely denies the allegations paragraph 93.

94. Seely lacks knowledge regarding the allegations of paragraph 94 and therefore denies the same

95. Seely admits that the statute referenced in paragraph 95 speaks for itself and otherwise denies the allegations of paragraph 91.

96. To the extent any of the paragraphs of the Prayer for Relief seek relief against Seely, Seely denies such paragraphs.

97. Seely denies each and every other allegation of the Counterclaim which has not been expressly admitted herein.

### **THIRD DEFENSE**

The claims against Seely have been filed for an improper purpose, lack a reasonable and good faith basis in fact and have otherwise been asserted in bad faith contrary to the provisions of Rule 11 of the Utah Rules of Civil Procedure and Utah Code Ann. § 78B-5-825 (formerly Utah Code Ann. § 78-27-56), and Seely is entitled to recovery of his attorneys fees and costs.

### **FOURTH DEFENSE**

Seely adopts by reference any applicable defense, not otherwise expressly set forth herein, that is pleaded by any other party in this action.

### **FIFTH DEFENSE**

The claims against Seely are barred in whole or in part by applicable statutes of limitation.

#### **SIXTH DEFENSE**

The claims against Seely are barred in whole or in part by the doctrines of laches, waiver or laches.

#### **SEVENTH DEFENSE**

Defendants failed to mitigate their damages, if any, and are therefore barred, in whole or in part, from recovering damages from Seely.

#### **EIGHTH DEFENSE**

Defendants' injuries or damages, if any, were proximately caused by the acts or omission of third parties over whom Seely had no control and no right of control and for whom, Seely is not responsible.

#### **NINTH DEFENSE**

All actions of Seely were reasonable, proper, taken in good faith and in compliance with applicable law.

#### **TENTH DEFENSE**

The claims against Seely are barred in whole or in part by the lack and/or failure of consideration.

#### **ELEVENTH DEFENSE**

If defendants suffered damages as alleged in the Counterclaim, said damages were caused solely by the acts or omissions of defendants and/or their counsel.

#### **TWELFTH DEFENSE**

The claims against Seely are barred in whole or in part by the lack of privity between defendants and Seely.

#### **THIRTEENTH DEFENSE**

The claims against Seely are barred in whole or in part by defendants' lack of standing.

#### **FOURTEENTH DEFENSE**

Defendants' claims for damages, if any, are barred in whole or in part because they are too remote and speculative.

#### **FIFTEENTH DEFENSE**

The claims against Seely are barred in whole or in part because Seely does not claim any right or interest in or with respect to the above-captioned litigation.

#### **SIXTEENTH DEFENSE**

Seely is a resident of Montana who has not taken any action sufficient to subject himself to the jurisdiction of a Utah court.

#### **SEVENTEENTH DEFENSE**

The claims against Seely are barred because he has no personal liability for the obligations or liabilities of or actions taken by the plaintiff, a corporate entity.

#### **EIGHTEENTH DEFENSE**

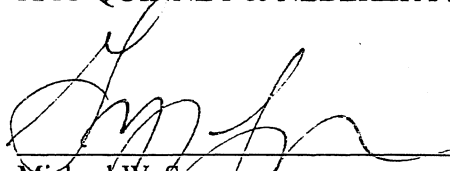
Seely reserves the right to assert additional affirmative defenses as discovery continues.

Wherefore, Seely prays that the Counterclaim and each of its claims against Seely be dismissed, that the Court award Seely his attorneys fees and costs incurred in connection with

this matter, and that the Court award such further and other relief as may be equitable or appropriate under the circumstances.

Dated this 25<sup>th</sup> day of April, 2008.

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in black ink, appearing to read "Michael W. Spence", is written over a horizontal line.

Michael W. Spence  
Greggory J. Savage  
Michael W. Mayfield

*Attorneys for Involuntary Plaintiff Clyde G. Seely*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 25 2008, a copy of the foregoing  
**ANSWER TO SECOND AMENDED COUNTERCLAIM** was served by first class U.S. Mail,  
postage prepaid, to the following:

Dennis C. Farley  
Lear & Lear  
299 South Main, Suite 2200  
Wells Fargo Center  
Salt Lake City, UT 84111

E. Scott Savage  
Berman & Savage, P.C.  
170 South Main, Suite 500  
Salt Lake City, UT 84101

Clark B. Fetzer  
Bryan H. Booth  
Rinehart Simonsen & Fetzer, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, UT 84101

Kim J. Trout  
Trout Jones Gledhill Fuhrman, P.A.  
225 N. 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701



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Tab G

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WASHINGTON COUNTY

CLARK B. FETZER (USB 1069)  
**RINEHART FETZER SIMONSEN & BOOTH, P.C.**  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, UT 84101  
Phone: (801) 328-0266 ext. 103  
Fax: (801) 328-0269

KIM J. TROUT (ISB 2468)  
VICKY J. ELKIN (ISB 5978)  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.**  
225 N. 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701  
Phone (208) 331-1170  
Facsimile (208) 331-1529

*Attorneys for Defendants*

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**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

---

MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

VS.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

**MOTION FOR DISMISSAL  
WITH PREJUDICE**

Civil No. 010500909

Judge G. Rand Beacham



**COMES NOW** Defendants Engineered Structures, Inc., Wal-Mart Real Estate Business Trust, and American Insurance Company (hereinafter individually identified as “ESI”, “Wal-Mart” and “AIC” and/or collectively identified as “Defendants”), by and through their attorneys of record **RINEHART FETZER SIMONSEN & BOOTH, P.C.** and **TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.**, and state as follows:

1. ESI, WAL-MART and AIC are parties to litigation in the Fifth Judicial District Court in and for Washington County in the State of Utah, Civil Case No. 010500909 brought by Merrick Young Incorporated (“MYI”) as plaintiff against Defendants (“the Litigation”). Upon the motion of Defendants SEELY was involuntarily joined as a plaintiff in the Litigation;

2. In the ruling on SEELY’S Motion to Dismiss Second Amended Counterclaim dated April 8, 2008 in the Litigation, the Court ruled in part:

The claims made in this case by MYI constitute a chose in action which was an asset of MYI. That chose in action was attached by Developers in its lawsuit against MYI and its principals, and it was transferred to Mr. Seely in accordance with the “Settlement Agreement, Mutual Release, and Assignment” signed by Mr. Seely in 2004.

3. The claims made in the Litigation by MYI include (4) causes of action against one or more of the Defendants titled: FIRST CAUSE OF ACTION, SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION, and FOURTH CAUSE OF ACTION. The claims described in Paragraphs B and C of these Recitals are collectively referred to as the “Claims.”

4. As of the date of signing this Agreement, SEELY has not transferred or assigned the Claims.

5. SEELY makes no representations or warranties of any kind that the Court's April 8, 2008 Ruling is correct or that he in fact acquired, has ever held or now holds any claims (including the Claims) against any of ESI, WAL-MART, or AIC.

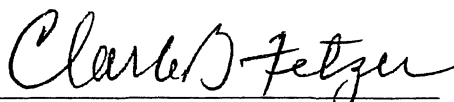
6. SEELY and the Defendants wish to settle their disputes and therefore entered into a Settlement Agreement attached hereto as **Exhibit "A"**.

Based upon these recitals and pursuant to Rule 41 of the Utah Rules of Civil Procedure, Defendants move for a dismissal of all claims which have been or may be asserted against them and SEELY on the merits, and to entry of an Order in the form attached hereto as **Exhibit "B"**.


SEELY does not oppose this Motion to Dismiss and does not oppose entry of an Order consistent with the Settlement Agreement.

DATED this 20th day of November, 2008.

**RINEHART FETZER SIMONSEN & BOOTH, P.C.**

  
Attorneys for Defendants

**RAY QUINNEY & NEBEKER P.C.**

  
Attorneys for Plaintiff Clyde G. Seely

# **EXHIBIT “A”**

## **SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered as of the \_\_\_\_ day of October, 2008, by and between Clyde G. Seely ("SEELY") and Defendants Engineered Structures, Inc., Wal-Mart Real Estate Business Trust, and The American Insurance Company (hereinafter individually identified as "ESI", "Wal-Mart" and "AIC" and/or collectively identified as Defendants"). SEELY, ESI, WAL-MART, and AIC are sometimes referred to herein individually as a "Party" and collectively as the "Parties".

### **RECITALS**

A. ESI, WAL-MART and AIC are parties to litigation in the Fifth Judicial District Court in and for Washington County in the State of Utah, Civil Case No. 010500909 brought by Merrick Young Incorporated ("MYI") as plaintiff against Defendants ("the Litigation"). Upon the motion of Defendants SEELY was involuntarily joined as a plaintiff in the Litigation;

B. In the ruling on SEELY'S Motion to Dismiss Second Amended Counterclaim dated April 8, 2008 in the Litigation, the Court ruled in part:

The claims made in this case by MYI constitute a chose in action which was an asset of MYI. That chose in action was attached by Developers in its lawsuit against MYI and its principals, and it was transferred to Mr. Seely in accordance with the "Settlement Agreement, Mutual Release, and Assignment" signed by Mr. Seely in 2004.

C. The claims made in the Litigation by MYI include (4) causes of action against one or more of the Defendants titled: FIRST CAUSE OF ACTION, SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION, and FOURTH CAUSE OF ACTION. The claims described in Paragraphs B and C of these Recitals are collectively referred to as the "Claims."

D. As of the date of signing this Agreement, SEELY has not transferred or assigned the Claims.

E. SEELY makes no representations or warranties of any kind that the Court's April 8, 2008 Ruling is correct or that he in fact acquired, has ever held or now holds any claims (including the Claims) against any of ESI, WAL-MART, or AIC.

F. The Parties wish to settle their disputes pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is unconditionally acknowledged, the parties hereto mutually agree as follows:

1. SEELY, for himself and his predecessors, successors, transferees, and assigns, hereby releases, discharges and acquits ESI, WAL-MART, and AIC, and each of them, and each of their predecessors, successors, transferees, assigns, parent, affiliates, shareholders, directors, officers, employees, agents, attorneys, accountants, and insurers, of and from any and all claims (including the Claims), causes of action, debts, liabilities, covenants, contracts, damages, demands or obligations of every kind or nature whatsoever, whether known or unknown, vested or contingent, suspected or unsuspected, which he has ever had, now has, or may have against any of ESI, WAL-MART or AIC, whether or not alleged in the Litigation, and which he acquired as described in Paragraph No. B. *supra*. SEELY makes no representations or warranties of any kind with respect to whether he acquired, has ever held or now holds any such claims (including the Claims).

2. Each of ESI, WAL-MART, and AIC, for itself and its predecessors, successors, transferees, assigns, and affiliates hereby releases, discharges and acquits SEELY and his predecessors, successors, transferees, employees, agents, attorneys, accountants, and insurers, of and from any and all claims, causes of action, debts, liabilities, covenants, contracts, damages, demands or obligations of every kind or nature whatsoever, whether known or unknown, vested or contingent, suspected or unsuspected, which each has ever had, now has, or may have against Seely, whether or not alleged in the Litigation.

3. Nothing in this Agreement (including reference in Paragraph Nos. 1 and 2 to SEELY's "predecessors") waives or releases or shall be construed to waive or release any claims of Defendants or any of them against MYI, whether or not alleged in the Litigation, which claims Defendants expressly reserve. It is the intent of each of the Defendants that SEELY be released from any and all claims as provided in Paragraph No. 2. Nothing herein shall be interpreted or deemed to create any personal liability on the part of SEELY for any actions or inactions of MYI or MYI's predecessors, successors, transferees, assigns, parent, affiliates, shareholders, directors, officers, employees, agents, attorneys, accountants, and insurers.

4. Upon execution of this Agreement, the Defendants may file in the Litigation the Motion for Dismissal with Prejudice and the related Order of Dismissal with Prejudice attached hereto as Exhibit A and Exhibit B, respectively. SEELY shall indicate his non-opposition to the Motion and shall not take any action before the Court to oppose entry of the Order proposed by Defendants or any other order consistent with the Settlement Agreement. Seely's conduct in this regard shall not be deemed to be inconsistent with any position previously asserted by Seely in the Litigation. It shall not affect the enforceability of this Agreement if the Court declines to sign the Order of Dismissal with Prejudice in the form attached hereto or alters said Order before signing it.

5. Each Party shall be responsible for his/its own attorney's fees and costs. No Party to this Agreement shall assert a claim for attorneys' fees and costs against the other as related to the released claims.

6. This Agreement contains the entire agreement and understanding concerning the subject matter hereof between the Parties and supersedes and replaces all prior negotiations, proposed agreements and agreements, written or oral.

7. This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of Utah without regard for its conflict of law provisions.

8. Each of the Parties agrees that this Agreement is the result of a compromise and shall never at any time nor for any purpose be considered as an admission of liability or responsibility on the part of a Party hereto.

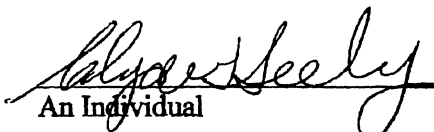
9. In the event of an action or proceeding regarding this Agreement, the prevailing party, in addition to all other legal or equitable remedies possessed, shall be entitled to be reimbursed for all expenses and costs, including attorney's fees.

**[Signatures on Following Page]**

IN WITNESS WHEREOF, the Parties have executed and entered into this Settlement Agreement effective as of the date first written above.


CLYDE G. SEELY

DATE: Oct 8, 2008

  
An Individual


ENGINEERED STRUCTURES, INC.

DATE: Oct 20, 2008

By:   
Its: THOMAS D. HILL  
President


WAL-MART REAL ESTATE BUSINESS TRUST

DATE: 11/14/08

By:   
Title: Bryan Novak  
Senior Director of Construction

THE AMERICAN INSURANCE COMPANY

DATE: October 30, 2008

By:   
Its: Sr. Director, Surety  
Richard A. Kowalczyk

## **EXHIBIT “B”**



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WASHINGTON COUNTY  
BY \_\_\_\_\_

E. Scott Savage (2865)  
Stephen R. Waldron (6810)  
BERMAN & SAVAGE, P.C.  
50 South Main Street, Suite 1250  
Salt Lake City, Utah 84144  
Telephone: (801) 328-2200  
Fax: (801) 531-9926

Attorneys for Merrick Young Incorporated

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MERRICK YOUNG INCORPORATED, a )  
Utah corporation; and CLYDE G. SEELY, )  
an individual, )

Plaintiffs, )

vs. )

WAL-MART REAL ESTATE BUSINESS )  
TRUST, a Delaware business trust; )  
ENGINEERED STRUCTURES, INC., an )  
Idaho corporation; THE AMERICAN )  
INSURANCE COMPANY, a Nebraska )  
corporation; WESTERN ROCK )  
PRODUCTS CORPORATION, a Utah )  
corporation, and DOES 1-100, )

Defendants. )

**MERRICK YOUNG  
INCORPORATED'S OBJECTION  
AND OPPOSITION TO MOTION  
FOR DISMISSAL WITH  
PREJUDICE**

REQUEST FOR ORAL ARGUMENT

Civil No. 010500909

Honorable G. Rand Beacham

Plaintiff Merrick Young, Inc. ("MYI") respectfully submits the following objection and opposition to defendants' and involuntary plaintiff Clyde G. Seely's ("Seely") Motion for Dismissal with Prejudice.

The Motion to Dismiss with Prejudice is objectionable and should be denied as to the subject claims for relief asserted against defendants by plaintiff MYI, because (1) the Motion for Dismissal with Prejudice depends upon Mr. Seely's settlement agreement with defendants and attendant stipulation to the dismissal as the purported real plaintiff-in-interest as to those subject claims for relief, and (2) Mr. Seely's stipulation to the dismissal is not effective, either because (a) Mr. Seely has no standing to stipulate to the dismissal of the subject claims and defendants may not rely upon the stipulation when Mr. Seely fails to acknowledge that he is the real plaintiff-in-interest, or (b) it does or should remain to be adjudicated whether Mr. Seely has such standing before any such motion can be granted.

Defendants move to dismiss with prejudice the four claims for relief that MYI asserts against defendants, which are the First, Second, Third and Fourth Causes of Action in the Amended Complaint (the "subject Claims for Relief"). Defendants do so (1) on the basis that Mr. Seely purportedly is the real plaintiff-in-interest as to the subject Claims for Relief, because those claims for relief allegedly were transferred by MYI to Mr. Seely pursuant to a March/April 2004 "Settlement Agreement, Mutual Release, And Assignment" between MYI, Merrick and Stephanie Young, Developers Surety and Indemnity Company ("Developers") and Mr. Seely (which resolved a separate action against MYI by Developers, who was MYI's bonding company), and (2) based upon Mr. Seely's consent, as the purported real plaintiff-in-interest, to the dismissal in an October 2008 "Settlement Agreement" between Mr. Seely and defendants.

Notably, Mr. Seely neither claims nor acknowledges that he is the real plaintiff-in-interest in the October 2008 "Settlement Agreement," or any other document. Further, defendants do not

pay any settlement amount to Mr. Seely, or to MYI, under this purported “settlement,” by which defendants contend that subject Claims for Relief should be dismissed with prejudice. MYI is not a party to the October 2008 “Settlement Agreement” and was not informed of this purported “settlement” prior to the filing of the Motion for Dismissal with Prejudice. MYI does not consent to the dismissal of the subject Claims for Relief. Instead, MYI seeks an adjudication of the subject Claims for Relief on their merits. Defendants have effected a purported “settlement” agreement that amounts to a contractual “quit claim deed” that in no manner is dispositive of whether Mr. Seely is the real plaintiff-in-interest. That “settlement” is not a proper basis for a dismissal of the subject Claims for Relief when MYI remains a proper plaintiff with a claim to sole ownership of the Claims for Relief and without a full adjudication of whether Mr. Seely has an interest in the subject Claims for Relief.

The Motion for Dismissal with Prejudice, as to the subject Claims for Relief, depends upon Mr. Seely’s stipulation to the requested dismissal, as the purported real plaintiff-in-interest as to those claims for relief. However, Mr. Seely is only a plaintiff in the action on an involuntary basis, upon the motion of defendants, and **Mr. Seely already is on record in this action as stating that he has no interest in the subject Claims for Relief.**

Mr. Seely was joined as an involuntary plaintiff in this action upon defendants’ February 16, 2007 Utah R. Civ. P. 25(c) motion to have Mr. Seely joined or substituted as a plaintiff in this action. In its May 21, 2007 “Corrected Rulings on Pending Motions; Associated Orders,” this Court ruled on defendants’ Rule 25(c) motion by joining, not substituting, Mr. Seely as an involuntary plaintiff. MYI was not dismissed and, thus, MYI manifestly remained and remains a

proper plaintiff. Plainly, Mr. Seely was involuntarily joined as a plaintiff, and MYI remains a plaintiff, for the very purpose of deciding in one action both the ownership, and the merits, of the subject Claims for Relief.

On September 28, 2007, Mr. Seely moved to dismiss the Second Amended Counterclaim under Utah R. Civ. P. 12(b) on the grounds of lack of jurisdiction and failure to state claims for relief against Mr. Seely. Attached to Mr. Seely's Motion to Dismiss was a declaration of Mr. Seely dated September 26, 2007, in which Mr. Seely **disclaimed ownership of the subject Claims for Relief**. In that declaration, Mr. Seely declared under oath as follows:

At the time I signed the [March/April 2004 "Settlement Agreement, Mutual Release, and Assignment"], I was generally aware of a dispute between MYI, Wal-Mart and others. I did not understand that the [March/April 2004 "Settlement Agreement, Mutual Release, and Assignment"] gave me any right or interest with respect to the above-captioned litigation [the instant action] nor did I expect to receive any such right or interest. The first time I learned that anyone was asserting that I had any right or interest with respect to the litigation was when the defendants sought to join me as a party in this litigation. **I have not at any time, nor do I now, claim any right or interest in or with respect to the above-captioned litigation.**

(9/26/07 Declaration of Clyde G. Seely at ¶ 5 (emphasis added).)

In his reply answer to the Second Amended Counterclaim, Mr. Seely maintained his position that he does not have any interest in subject Claims for Relief. On April 25, 2008, Mr. Seely filed an "Answer to Second Amended Counterclaim." In this reply to the Second Amended Counterclaim, Mr. Seely denied that: (1) he owns the claims of the Amended Complaint, under the March/April 2004 "Settlement Agreement, Mutual Release, and Assignment" or otherwise, and (2) he is the proper plaintiff on those claims. Mr. Seely affirmatively alleged that the claims against

him are barred “because Seely does not claim any right or interest in or with respect to the above-captioned litigation.” (4/24/08 Answer to Second Amended Counterclaim, at 7-9, 12.)

Although defendants would have the October 2008 “Settlement Agreement” effect the dismissal of the subject Claims for Relief as if Mr. Seely was the real plaintiff-in-interest, Mr. Seely still does **not** take the position that he has any interest, much less exclusive interest, in the subject Claims for Relief in that purported “settlement” agreement. Mr. Seely purports to stipulate to the dismissal of the subject Claims for Relief without ever acknowledging that he has any interest in the subject Claims for Relief.

It is MYI’s position that Mr. Seely has no interest in the subject Claims for Relief. The March/April 2004 “Settlement Agreement, Mutual Release, and Assignment” transferred to Mr. Seely only eight categories of specified assets belonging to MYI, and two individuals (Merrick and Stephanie Young), which were referred to as the “Indemnitors’ Assets.” If the intent had been to transfer all of MYI’s and Youngs’ assets, there would have been no need to list eight categories of assets. Other assets of MYI and the Youngs not specified in the March/April 2004 “Settlement Agreement, Mutual Release, and Assignment,” in addition to the subject Claims for Relief, were left with MYI or the Youngs over which Mr. Seely never exercised control. Included in the “Indemnitors’ Assets” were specifically listed claims to payment from various construction projects. The subject Claims for Relief had been asserted in this action and, thus, were known to the MYI, the Youngs, Developers and Mr. Seely in March/April 2004 and were a significant asset of MYI at that time. As such, the subject Claims for Relief would have been transferred only by specific reference, but they were not specifically listed. The subject Claims for Relief were

accompanied by counterclaim liability, which the March/April 2004 “Settlement Agreement, Mutual Release, and Assignment” did not address, but would have (either by a carve-out or an indemnity provision) if there had been an intent to transfer the subject Claims for Relief. Two of the categories of “Indemnitors’ Assets” were (1) “any equity in any other real property, business, or asset in which any Indemnitor has an interest,” and (2) “any money, stocks, bonds, or other assets of any Indemnitor.” On its face, the first of these referred to assets in which MYI and/or the two individuals considered they had an equity interest, such as real property. This is not how a chose of action is referred to. The second of these categories on its face referred only to liquid assets such as stocks, bonds and other similar assets, which would not include choses of action such as the subject Claims for Relief.

MYI’s principal at the time the March/April 2004 “Settlement Agreement, Mutual Release, and Assignment” was entered into will provide evidence that there was no intent on MYI’s or Mr. Seely’s part to transfer the subject Claims for Relief to Mr. Seely under that agreement. Both the alleged transferor, MYI, and the alleged transferee, Mr. Seely, say and intended that there was no transfer. MYI and Mr. Seely always acted consistent with the intent that the subject Claims for Relief were not transferred both in and out of this action; they never acted inconsistently with that intent and continue in their positions to this day. The only parties in this action claiming there was a transfer, defendants, were strangers to the April/March 2004 “Settlement Agreement, Mutual Release, and Assignment.”

MYI recognizes that this Court’s April 16, 2008 “Ruling on Clyde G. Seely’s Motion to Dismiss Second Amended Counterclaim” contained analysis, for purposes of determining whether

this Court had personal jurisdiction over Mr. Seely (an Idaho resident), that the subject Claims for Relief were choses in action that were assets of MYI which were transferred to Mr. Seely under either of the two categories of “Indemnitors’ Assets” in the March/April 2004 “Settlement Agreement, Mutual Release, and Assignment” referenced above. Defendants rely upon this analysis to pose Mr. Seely as the real plaintiff-in-interest as to the subject Claims for Relief, thereby purportedly validating Mr. Seely’s stipulation to the dismissal of the subject Claims for Relief.

However, MYI considers that this analysis was an effort by the Court to exercise judicial economy and insure that all parties who might have an interest in the litigation were before the Court or, in the alternative, requests the Court to reconsider the need for a full and final adjudication of the ownership issue. The Court’s analysis was on a motion to dismiss, which by its nature only addressed the matter of personal jurisdiction and Mr. Seely’s joinder, rather than the merits of any claim. Moreover, the Court’s denial of Mr. Seely’s motion to dismiss was not accompanied by a dismissal of MYI as the plaintiff. MYI remained a plaintiff, indicating that the ownership issue remains pending. MYI submits that it still remains to be adjudicated, upon a full record, whether the subject Claims for Relief were transferred to Mr. Seely. Indeed, defendant ESI’s pending Second Amended Counterclaim asserts claims for breach of contract and specific performance against only MYI, based upon the same subcontract that is the subject of the subject Claims for Relief, as well as three claims for declaratory relief that raised the issue of ownership of the subject Claims for Relief. Mr. Seely replied to this Second Amended Counterclaim denying ownership of the subject Claims for Relief. There has not been an adjudication of any of the claims asserted in the Second Amended Counterclaim.



Fundamentally, Mr. Seely has no standing to stipulate to the dismissal of claims for relief as to which he has no interest. Nor is Mr. Seely's stipulation effective when MYI remains a plaintiff in the action and, MYI submits, it remains to be adjudicated who is the real plaintiff-in-interest. MYI, a valid plaintiff, should not have its claims for relief against defendants dismissed with prejudice based upon the stipulation for dismissal by a person who disclaims any interest in those claims for relief, who is only a recent plaintiff strictly on an involuntary basis and who was joined as a plaintiff for the purpose of adjudicating who is the real plaintiff-in-interest.

Defendants' Motion to Dismiss with Prejudice is simply the latest tactical maneuver by defendants, this time with Mr. Seely's assistance, to prevent an adjudication on the merits of the subject Claims for Relief against them. Defendants, who were not parties to the March/April 2004 "Settlement Agreement, Mutual Release, and Assignment," use that agreement to claim the subject Claims for Relief were transferred, when the parties to that agreement firmly are of the position that there was no such transfer. Defendants effectively have introduced a "ringer" into this litigation who is prepared to dismiss the subject Claims for Relief simply because he does not have any interest in those claims and, thus, has no interest in having the claims adjudicated. Without any regard to the value of the subject Claims for Relief, Mr. Seely quite rationally is willing to stipulate to the dismissal because he stood to recover nothing on the claims, given his avowed and affirmed position that he has no interest in the claims. Mr. Seely did so to avoid the cost of having to defend defendants' claims against him (which were based upon the claim that he was the transferor of the subject Claims for Relief). Defendants have taken advantage of this situation created by them, without having to pay any amount to obtain a "settlement" of the claims against them, and thereby

avoid an adjudication of those claims. Defendants have done so by using Mr. Seely, a person who defendants fought to have joined as an involuntary plaintiff and who continues to disclaim an interest in the claims.

As a consequence, if the Motion for Dismissal with Prejudice were granted, MYI, the only plaintiff that has an established interest in the subject Claims for Relief and that has acted consistently upon that interest, would be left with nothing after pursuing seven years of litigation (several years of which has been consumed by defendants' pursuit of the ownership issue despite that both the purported transferor and transferee disclaimed any transfer took place). MYI would be denied its right to an adjudication of the subject Claims for Relief on their merits.

Based upon the foregoing, MYI objects to the Motion to Dismiss as to the subject Claims for Relief and respectfully submits that the Motion to Dismiss be denied as to the subject Claims for Relief. MYI does not object to or oppose the dismissal of defendants' claims against Mr. Seely.

DATED: December 5, 2008

BERMAN & SAVAGE, P.C.

A handwritten signature in dark ink, appearing to read "E. Scott Savage", is written over a horizontal line.

E. Scott Savage

Stephen R. Waldron

Attorneys for Merrick Young Incorporated

**CERTIFICATE OF MAILING**

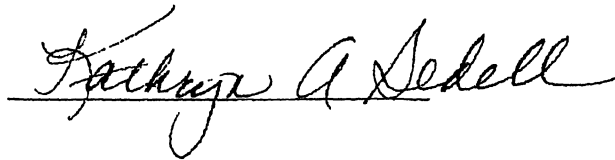
I hereby certify that I caused a true and correct copy of the within and foregoing **MERRICK YOUNG INCORPORATED'S OPPOSITION TO MOTION FOR DISMISSAL WITH PREJUDICE** to be mailed, postage prepaid, this 5<sup>th</sup> day of December, 2008, to the following:

Clark B. Fetzer  
Rinehart Fetzer Simonsen & Booth, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101

Kim Trout  
Trout Jones Gledhill Fuhrman, P.A.  
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Greggory J. Savage  
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Lear & Lear  
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Tab I

ORIGINAL

Kurt C. Faux, Esq.  
Utah Bar No. 4977  
FAUX & ASSOCIATES, P.C.  
2785 East Desert Inn Road, Suite 270  
Las Vegas, Nevada 89121  
(702) 458-5790  
Attorneys for Plaintiff

FILED  
FEB 13 AM 8:23  
WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT, WASHINGTON COUNTY

STATE OF UTAH

DEVELOPERS SURETY AND  
INDEMNITY COMPANY f/k/a  
DEVELOPERS INSURANCE  
COMPANY,

Plaintiff,

vs.

MERRICK YOUNG INC. also known as  
MERRICK YOUNG CONSTRUCTION;  
MERRICK YOUNG, individually;  
STEPHANIE YOUNG, individually;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

CIVIL NO. : 02-0502319

JUDGE : Beacham

**ORDER FOR PREJUDGMENT WRIT OF  
ATTACHMENT/GARNISHMENT;  
PRELIMINARY INJUNCTION FREEZING ASSETS; and  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff, Developers Surety and Indemnity Company f/k/a Developers Insurance  
Company's (post "Developers"), motion for prejudgement writ of attachment/garnishment,  
motion for ex parte temporary restraining and asset freeze order and preliminary injunction,  
having come on for a hearing on the 20<sup>th</sup> day of February, 2003; Kurt C. Faux, Esq., appearing on  
behalf of Plaintiff Developers Insurance Company; and no appearance on behalf of Defendants  
Merrick Young, individually; Stephanie Young, individually; and Merrick Young, Inc. a.k.a.  
Merrick Young Construction (Defendants are collectively referred to as "Indemnitors"); and the  
Court having reviewed the pleadings and papers on file herein and having entertained the  
argument of counsel makes the following Findings of Fact, Conclusions of Law, and Order as  
follows:

SUITE 270  
LAS VEGAS, NEVADA 89121  
TEL: (702) 458-5790  
FAX: (702) 458-5794

1 THE COURT FINDS THE FOLLOWING FACTS:

2 1. Developers issued Labor and Material Payment Bond and Performance Bond No.  
3 870694P (hereinafter referred to as the "Black Ridge Bond"), with City of St. George, as  
4 obligee, and Young, as principal, for the project known as Black Ridge Drive, 250 West  
5 Improvement, Project SID 99-4, Inquiry No. 00-1260. Exhibit A1<sup>1</sup>. The amount, or penal sum,  
6 of the bond is \$1,543,000.00. Id.

7 2. Developers also issued Payment Bond and Performance Bond No. 870960P  
8 (hereinafter referred to as the "River Road Bond"), with the County of Washington, as obligee,  
9 and Young, as principal, for the project known as River Road, Project No. STP-3196(1)0.  
10 Exhibit A2. The penal sum of the bond is \$1,229,229.00. Id.

11 3. As part of the consideration for issuing the Bonds<sup>2</sup>, the Indemnitors executed an  
12 Indemnity Agreement. Exhibit A3. The Indemnitors promised in the Indemnity Agreement to  
13 indemnify and hold harmless Developers from all losses arising out of the issuance of the Bonds:

14 1. INDEMNIFICATION. In consideration of the execution and  
15 delivery by Surety of a Bond or any Bonds on behalf of Principal,  
16 Principal and Indemnitor shall pay all premiums charged by Surety  
17 in connection with any Bond (including extensions, renewals or  
18 modifications) issued by Surety on behalf of Principal and **shall**  
19 **indemnify and hold harmless Surety from and against any and all**  
20 **liability, loss, claims, demand, costs, damages, attorney's fees and**  
21 **expenses of whatever kind or nature, together with interest thereon**  
22 **at the maximum rate allowed by law, which Surety may sustain or**  
23 **incur by reason of or in consequence of the execution and delivery**  
24 **by Surety of any Bond on behalf of Principal, whether or not Surety**  
25 **shall have paid any amount on account thereof, including, ... (Emphasis**  
26 **added). Id.**

27 4. The Indemnity Agreement also obligated the Indemnitors to post collateral with  
28 Developers in a sum equal to a reserve established by Developers to cover any claim, suit, or  
judgment against the Bonds. Specifically, the Indemnity Agreement provides as follows:

3. RESERVE ACCOUNT. If Surety shall establish a reserve  
account to cover any liability, claim asserted, suit or judgment

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<sup>1</sup> All exhibits refer to Developers' Motion for Prejudgment Writ of Attachment et al., file on  
December 6, 2002.

<sup>2</sup> The Black Ridge Bond and River Road Bond are referred to collectively as the "Bonds."

1 under any Bond, the Indemnitor shall, immediately upon demand  
2 and whether or not Surety shall have made any payment therefor,  
3 deposit with Surety a sum of money equal to such reserve account  
4 and any increase thereof as collateral security on such Bond, and  
5 such sum and other money and property which shall have been or  
6 shall thereafter be pledged as collateral security on any such Bond  
7 shall be available, in the discretion of Surety, as collateral security  
8 on all Bonds coming within the scope of this Agreement or for any  
9 other indebtedness of Indemnitor or Principal to Surety.... (Emphasis  
10 added). Id.

11 5. The Indemnitors promised to and granted Developers broad  
12 discretionary powers and authority to resolve claims, and promised that Developers' itemized  
13 statement of claims or losses constitutes prima facie evidence of the fact and extent of the  
14 Indemnitors' liability:

15 2. EXERCISE OF RIGHTS BY SURETY. In connection with the  
16 Exercise of any of Surety's rights under this Agreement:

17 2.1 Surety shall have the right in its sole and absolute discretion  
18 to determine whether any claims under a Bond shall be paid,  
19 Compromised, defended, prosecuted or appealed.

20 2.2 Surety shall have the right to incur such expenses in handling  
21 a claim as it shall deem necessary, including but not limited to,  
22 expenses for investigative, accounting, engineering and legal services.

23 \* \* \*

24 2.4 In any claim or suit hereunder, an itemized statement of claims or  
25 losses paid or liabilities incurred and expenses paid or incurred,  
26 declared under penalty of perjury to be true and correct by an officer  
27 of Surety, or the vouchers or other evidence of disbursement by  
28 Surety, shall be prima facie evidence of the fact and extent of liability  
hereunder of Principal and Indemnitor. (Emphasis added). Exhibit A3.

6. Indemnitors consented in the Indemnity Agreement to the assignment of  
Indemnitors' assets, appointment of a receiver without notice, waiver of the right to claim  
property, and the endowment to Developers of Indemnitors' power of attorney to enforce these  
rights. Exhibit A3, paragraphs 6, 7, 8, 9 and 10.

7. Developers received numerous claims against the Bonds from suppliers and  
subcontractors of Merrick Young, Inc. Exhibit A4. Developers made many attempts to  
convince the Indemnitors to directly satisfy any obligations to the bond claimants and to satisfy  
the Indemnitors' obligations to Developers under the Indemnity Agreement. These attempts  
included numerous telephone calls, letters, and personal meetings. Exhibit A, para. 8. The

Indemnitors have been materially unresponsive to Developers' requests and demands. Id.

8. Given the number of claims, Developers demanded, in accordance with the terms of the Indemnity Agreement, that the Indemnitors deposit collateral security with Developers in the sum of \$540,668.61, which was consistent with the reserves of Developers in response to the numerous claims. Exhibit A4 at 2. The demanded collateral has not been received. Exhibit A, paragraph 9.

9. The Indemnitors have been materially unresponsive to Developers and failed to resolve the claims against the Bonds despite having the opportunity to do so. Thus, Developers has resolved numerous claims against the Bonds - at considerable expense, as follows:

<u>CLAIMANTS PAID:</u> (Black Ridge Bond)	<u>AMT. PAID</u>
KV Electric	\$ 50,194.95
Triple "B" Concrete and Western Rock Products	\$101,741.40
Environmental Abatement, Inc.	<u>\$ 45,000.00</u>
TOTAL PAID TO DATE ON BLACK RIDGE BOND	<b>\$196,936.35</b>

<u>CLAIMANTS PAID:</u> (River Road Bond)	<u>AMT. PAID</u>
Koch Performance Asphalt	\$ 28,261.54
KV Electric	\$ 4,086.00
Progressive Contracting	\$127,433.18
Progressive Contracting & AT Asphalt Paving	\$ 75,663.50
Contech Construction	\$ 1,055.91
Hikiau, Inc.	<u>\$ 3,376.00</u>
TOTAL PAID TO DATE ON RIVER ROAD BOND	<b>\$239,876.13</b>

Exhibit A, para. 10.

\* \* \* \*

\* \* \* \*

\* \* \* \*



10. Outstanding claims not yet resolved are as follows:

CLAIMANTS: (Black Ridge Bond)

AMT. PENDING

Familian Northwest

\$45,793.00<sup>3</sup>

Bulloch Brothers

\$ 3,390.00<sup>4</sup>

CLAIMANT: (River Road Bond)

AMT. PENDING

K&J Traffic Control (Lawsuit pending)

\$27,000.00 (approx.)

Exhibit A, para. 11.

11. Developers has incurred a loss thus far of \$436,812.48 in satisfying the Indemnitors' obligations to the numerous claimants pursuant to the terms of the Bonds. Exhibit A, para. 12. The potential for further loss to Developers exists. Id.

12. Substantiated evidence has been presented that the individual Indemnitors either have moved or are moving from the State of Utah to the State of Montana and are terminating and winding-up Merrick Young, Inc., as a business entity. Exhibit A, para. 14; Exhibit B.

13. Indemnitors (either all or individually) have been sued in excess of 20 occasions for the alleged failure to pay their obligations. Exhibit C.

14. Developers is justified in its fear that Indemnitors may dissipate assets absent prejudgment relief and protection.

**THE COURT ENTERS THE FOLLOWING CONCLUSIONS OF LAW:**

1. There is a substantial likelihood that Developers will prevail on the merits of Developers' underlying claim that the Indemnity Agreement constitutes a valid and binding contract between Developers and Indemnitors.

2. Developers has presented a preponderance of material, substantive evidence to show entitlement to a preliminary injunction and that there is a substantial likelihood that Developers will prevail on the merits of Developers' underlying claims that:

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<sup>3</sup> Exhibit 5.

<sup>4</sup> Exhibit 6.

1 a. Indemnitors breached the Indemnity Agreement with Developers by failing to  
2 post collateral security in the amount of \$540,668.61 as required by paragraph 3 of the Indemnity  
3 Agreement;

4 b. Indemnitors breached the Indemnity Agreement with Developers by failing to  
5 hold harmless, defend and indemnify Developers from any cost, expense, or attorneys' fees as  
6 required by paragraph 1 of the Indemnification Agreement. Exhibit A3.

7 c. Developers has demonstrated equitable entitlement to payment  
8 of \$540,668.61.

9 d. Developers is entitled to specific performance to enforce the Indemnitors'  
10 obligation to post collateral security as set forth in the Indemnity Agreement.

11 e. Developers has satisfied the standards for the issuance of a preliminary injunction  
12 as set forth in URCP 65A(e) by showing that:

13 (1) Developers will suffer irreparable harm unless the order or  
14 injunction issues;

15 (2) The threatened injury to Developers outweighs whatever damage the  
16 proposed order or injunction may cause the Indemnitors;

17 (3) The order or injunction will not be adverse to the public  
18 interest; and

19 (4) There is a substantial likelihood that Developers will prevail on the  
20 merits of the underlying claims.

21 f. Developers has met the requirements for the issuance of a Pre-Judgment Writ of  
22 Attachment pursuant to URCP 64C and Pre-Judgment Writ of Garnishment pursuant to URCP  
23 64D by a preponderance of the evidence and by showing, pursuant to URCP 64C(a), that: (1)  
24 the Indemnitors are indebted to Developers in the amount of \$540,668.61 over and above any  
25 legal setoff; (2) the nature of the Indemnitors' indebtedness; (3) the attachment/garnishment is  
26 not sought to hinder, delay or defraud any creditor of the Indemnitors; (4) the payment of the debt  
27 was not secured by any mortgage or lien or that such security has become impaired without any  
28 act of Developers.

g. Developers has further met the requirements for the issuance of a Writ of  
Attachment and Garnishment based on URCP 64C(a) by showing by a preponderance of the

1 evidence that: (1) the Indemnitors have departed or are about to depart from the State of Utah to  
2 the injury of Developers; (2) the Indemnitors, Merrick and Stephanie Young, are no longer  
3 residents of the State of Utah and Indemnitor Merrick Young, Inc., is winding-up its affairs; and  
4 (3) the existence of additional facts as set forth above showing that Developers has probable  
5 cause for being justly apprehensive of losing its claims unless the writs of attachment and  
6 garnishment are issued.

7 3. Pursuant to URCP 65A(a)(1), proper notice of the proceedings was provided to  
8 the Indemnitors.

9 NOW THEREFORE, BASED ON THE FINDINGS OF FACT, CONCLUSIONS  
10 OF LAW AND GOOD CAUSE SHOWING, IT IS HEREBY ORDERED, ADJUDGED  
11 AND DECREED as follows:

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Developers be issued  
13 Pre-Judgment Writs of Execution, Attachment and Garnishment in the amount of \$540,668.61  
14 representing the reserves of Developers and/or payments made by Developers in response to  
15 claims against the Bonds.

16 IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to  
17 URCP 64C and URCP 64D, Developers may execute, attach and garnish, in the amount of  
18 \$540,668.61, the accounts receivable, assets, interests, money, stocks, memberships, bonds, real  
19 property, and personal property in which the Indemnitors have an interest, including but not  
20 limited to, the following:

- 21 1. Merrick Young  
22 Stephanie Young  
23 3511 Paiute Road  
24 St. George or Bloomington, Utah 84790-7741

25 The above real property known as 3511 Paiute Road and any funds obtained from  
26 its sale, including all other assets of the Indemnitors.

- 27 2. Funds due and owing to Indemnitors, either individually or collectively, for the  
28 project known as Black Ridge Drive, 250 West Improvement, Project SID 99-4,  
Inquiry No. 00-1260.
3. Funds due and owing to Indemnitors, either individually or collectively, for the  
project known as River Road, Project No. STP-3196(1)0.

4. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, La Farge, N.A., for the project known as I-15 Sevier River Northward Project, Project No.: \*IM-NH-15-5(31)200.
5. Funds due and owing to Indemnitors, either individually or collectively, from General Contractor, Meadow Valley Contractors, Inc, for the project known as UDOT I-15 North Interchange, Project No.: IM-15-2-3861.
6. Any equity in any other real property, business or asset in which any Indemnitor has an interest.
7. Any money, stocks, bonds, or other assets of any Indemnitor.
8. Any interest in Black Ridge Commercial Center, LLC; Black Ridge, LLC, or any other partnership, limited partnership, limited liability company, sole proprietorship, corporation, or other business entity in which any Indemnitor has an interest, and any real property in which these entities have an interest.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Indemnitors Merrick Young, individually; Stephanie Young, individually; and Merrick Young Inc. (collectively referred to as "Indemnitors") are preliminarily enjoined as follows:

1. Indemnitors are enjoined, restrained and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any corporate assets, limited liability company assets, partnership assets, real property, personal property or assets of any business entity in which Indemnitors possess an interest until further order of this Court except as described in paragraph 3 below.

2. All corporations, limited liability companies, partnerships and/or any business entities in which Indemnitors possess any interest are hereby restrained, enjoined and prevented from selling, transferring, disposing, distributing, pledging, or encumbering any asset or real or personal property until further order of this Court.

3. Merrick Young, individually; and Stephanie Young, individually; shall be allotted reasonable funds for reasonable daily living expenses, such as food, housing, gasoline for necessary travel, clothing, and utilities for the household, but are enjoined, absent approval of this Court, from the purchase or expenditure of funds to acquire any motorized vehicle, jewelry, stocks, bonds, vacations or other consumer items not necessary to sustain life and health.

1           4.       This Order is binding upon the parties to this action, their officers, agents,  
2 servants, employees, and attorneys, and upon those persons in active concert or participation with  
3 them who receive notice, in person or through counsel, or otherwise, of this Order.

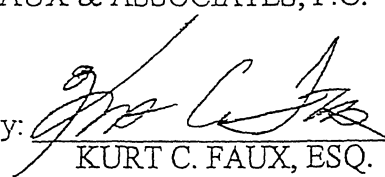
4           5.       Based on the above facts and law, and pursuant to URCP 64F and URCP  
5 65A(c)(1), no security, undertaking or bond is required of Developers.

6           DATED this 17 day of March, 2003.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 FAUX & ASSOCIATES, P.C.

12  
13 By:   
14 KURT C. FAUX, ESQ.  
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16 2785 E. Desert Inn Road, Suite 270  
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