

2009

Jack W. Peterson v. D. Scott Jackson, Alan D. Allred, and Peterson Allred Jackson, P.C. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JACK W. PETERSON,

Plaintiff, Counterclaim Defendant,
and Appellee/Cross-Appellant,

vs.

D. SCOTT JACKSON; ALAN D.
ALLRED; and PETERSON ALLRED
JACKSON, P.C.

Defendants, Counterclaim Plaintiffs,
and Appellants/Cross-Appellees.

Case No. 20090710-CA

Trial Court No. 06-0102504
Judge Kevin K. Allen

BRIEF OF APPELLANTS

Appeal from a Judgment and Order of the
First Judicial District Court
Cache County, Utah
The Honorable Kevin K. Allen Presiding

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(ORAL ARGUMENT REQUEST)

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vs.)	Case No. 20090710-CA
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(ORAL ARGUMENT REQUESTED)

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the trial court:

1. JACK W. PETERSON, Plaintiff, Counterclaim Defendant, Appellee/Cross-Appellant, was represented by James C. Jenkins of Olson & Hoggan, P.C.
2. D. SCOTT JACKSON, ALLAN D. ALLRED, and PETERSON ALLRED JACKSON, P.C. (collectively “PAJ”), Defendants, Counterclaim Plaintiffs, and Appellants/Cross-Appellees, were represented by Mark Hancey of Hancey Law Offices.

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IN THE UTAH COURT OF APPEALS

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Plaintiff, Counterclaim Defendant, and Appellee/Cross-Appellant,)	BRIEF OF APPELLANTS/ CROSS-APPELLEES
vs.)	
D. SCOTT JACKSON; ALAN D. ALLRED; and PETERSON ALLRED JACKSON, P.C.,	)	Case No. 20090710-CA
Defendants, Counterclaim Plaintiffs, and Appellants/Cross-Appellees.	)	Trial Court No. 06-0102504 Judge Kevin K. Allen

STATEMENT OF JURISDICTION

This is an appeal from a final Judgment entered by the Honorable Kevin K. Allen of the First Judicial District Court on August 6, 2009, pursuant to the Memorandum Decision issued on July 20, 2009, which modifies the trial court's original Judgment dated May 6, 2009 and Memorandum Decision issued April 17, 2009. The respective Judgment and Memorandum Decision documents are attached hereto as Addenda A through D. The Utah Supreme Court has original jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j) and Rules 3 and 4 of the Utah Rules of Appellate Procedure. This matter was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Issue No. 1: Did the trial court commit error by failing to make sufficient findings justifying the applicability of Townsend’s market approach, including sufficient findings to demonstrate that companies used in Townsend’s market approach are comparable to PAJ given the vast discrepancy between Townsend’s market and income approaches?

Standard of Review: “It is the duty of the trial court to make findings on all material issues raised by the pleadings, and the failure to do so is regarded as reversible error.” *See Piper v. Hatch*, 86 Utah 292, 43 P.2d 700, 701 (Utah 1935). In order for findings to be sufficient they “...must show that the court’s judgment or decree follows logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *See Rasband v Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v Deliran*, 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted).

The Utah Supreme Court held in *Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 86 (Utah 2002) that “... choice of valuation methods is a question of law.” The Court further indicated that: “We note that the selection of guideline companies was part of the determination of market value, which is one of the three primary valuation models.” *Id.* at 87. “[W]hile the ultimate determination of fair value is a question of fact, the determination of whether a given fact or circumstance is relevant to fair value under [state law] is a question of law we review *de novo*.” *Id.* at 84 (internal citations omitted).

Issue No. 2: Did the trial court commit error by including each of the shareholders' personal goodwill in reaching its conclusion as to the fair value of PAJ shares and by failing to make sufficient findings?

Standard of Review: The question of personal goodwill in determining fair value in either a dissenting shareholder action or an election to purchase case is a matter of first impression in Utah. However, in *Stonehocker v. Stonehocker*, 176 P.3d 476 (Utah 2008), the Utah Court of Appeals did find that valuing a business in a divorce case "...should be determined independent of any goodwill component. There can be no good will in a business that is dependent for its existence upon the individual who conducts the enterprise and would vanish were the individual to die, retire or quit work." *Id.* at 490.

Issue No. 3: Did the trial court commit error by relying on an incorrect calculation of Jackson's 2001 buy-in purchase price and the buy-in multiple in reaching its conclusion as to the fair value of the PAJ shares?

Standard of Review: A mathematical error constitutes an error correctible under Rule 60(a) URCP. *See Stanger v. Sentinel Security Life Insurance*, 669 P.2d 1201 (Utah 1983); *See also as cited above...Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 86 (Utah 2002).

Preservation of Issues on Appeal: The foregoing issues were preserved in the trial court by PAJ's filing of its Motion to Amend and as set forth in its pleadings. *See Addendum F; TR at 688 and 875.*

APPLICABLE STATUTE

The following statutory provisions are of central importance to this appeal and are attached hereto as Addendum G: Utah Code Ann. § 16-10a-1430; Utah Code Ann. § 16-10a-1434.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition. Peterson held a 36.37% interest in PAJ, a Certified Public Accounting firm. On November 2, 2006 Peterson filed his Verified Complaint seeking judicial dissolution of PAJ under Utah Code Ann. § 16-10a-1430. *See Verified Complaint, TR at 001.* Four days later, PAJ made an election to purchase Peterson's shares at fair value in lieu of Dissolution as authorized by Utah Code Ann. § 16-10a-1434. *See Counterclaim, TR at 085.* Thereafter PAJ filed its Answer and a Counterclaim. *See Counterclaim, TR at 085.* This case was originally assigned to Judge Gordon Low. Peterson brought two separate Motions for Temporary Restraining Order on November 2, 2006 and January 19, 2007, which were each denied. *See Motion for TROs, TR at 022 and 098.* Judge Low retired from the bench during September 2007. Ultimately, Governor Huntsman appointed the Honorable Kevin K. Allen as the new First District Court Judge to replace Judge Low and this case was assigned to Judge Allen.

A bench trial was held on February 18, 19, and 20, 2009 to determine, inter alia, the fair value of PAJ shares. *See Trial Transcript, TR at 1045.* The trial court issued its original Memorandum Decision on April 17, 2009 and entered its original Judgment on May 6, 2009. *See Addendum C and D; TR at 613 and 675.*

Thereafter, PAJ filed a Motion to Amend the Findings or Make Additional Findings under Rule 52(b), Motion for Amendment of Judgment under Rule 59(a), Motion for Relief from Judgment under Rule 60(a), (b)(1) and b(6), and a Motion for Stay under Rule 62(b) dated May 15, 2009. *See Addendum F; TR at 688; See infra.*

As a result of PAJ's Motion, the trial court issued a second Memorandum Decision dated July 20, 2009 and amended Judgment dated August 6, 2009. *See Addendum A and B; TR at 910 and 977.* The trial court ultimately dismissed Peterson's petition to dissolve PAJ and awarded PAJ the right to purchase Peterson's shares effective December 31, 2006 and valued Peterson's shares at \$459,000. *See Addendum A; TR at 977.*

PAJ contends that as a matter of law, the trial court committed several errors in reaching its conclusion as to the "fair value" of Peterson's shares and further failed to make sufficient findings.

B. Statement of Facts.

1. On September 11, 2007, under stipulation and Order of the trial court, the parties established the effective date of the purchase of Peterson's shares to be December 31, 2006, rather than the Verified Complaint date of November 4, 2006. The stipulation tied the date for establishing "fair value" of Peterson's shares to a date consistent with the end of Peterson's employment and with PAJ's year-end accounting. *See Order, TR at 421.*

2. As part of a case management plan, the parties stipulated to a simultaneous exchange of expert reports regarding the fair value of PAJ, which reports were exchanged

by September 8, 2008. *See Scheduling and Discovery Order, TR at 436; See Simultaneous Filing of Expert Valuation Reports, TR at 445.* Peterson retained Brad Townsend (“Townsend”) as his expert and PAJ retained Tyler Bowles (“Bowles”) as expert witness.

3. The calculations of the value of Peterson’s Shares in PAJ were calculated as of December 31, 2006.

4. Townsend opined as to PAJ’s fair value as follows:

	<u>Valuation Method</u>	<u>Value</u>
i.	Income Approach ¹	\$724,366 to \$744,409
ii.	Market Approach ²	\$1,098,094 to \$1,963,581
iii.	Asset Approach ³	\$375,019

See Townsend Report, Schedule A, Trial Exhibit 90.

5. Townsend then calculated PAJ’s value by weighing the values of each method as follows; 40% income approach; 60% Market approach, 0% asset approach.

See Id.

6. Townsend concluded that the Fair Value of PAJ as an entity was \$1,263.086, which equated to a value of \$459,000 for Peterson’s 36.37% interest. *See Id.*

7. Bowles opined as to PAJ’s fair value of PAJ after adjusting for personal goodwill as follows:

1 Capitalization of Earning

2 Historical Transaction

3 Excess Earnings

<u>Valuation method</u>	<u>Value</u>
Income Approach	\$581,084
Market Approach	\$712,556
Asset Approach	\$617,649

See Bowles Report, Exhibit 8, pg. 21, Trial Exhibit 90.

8. Bowles then reasoned that “the excess earnings method with the adjustment made for personal goodwill is the most applicable method” and then concluded that the fair value of PAJ as an entity was \$617,649, which equated to a value of \$224,639 for Peterson’s 36.37% interest. *See Id.*

9. As a result of the disparity in valuation, the parties were unable to reach a resolution of the case, resulting in the matter being scheduled for a three-day bench trial, which ultimately occurred February 18-20, 2009. The trial court issued its initial Memorandum Decision on April 17, 2009 and adopted Townsend’s calculation of “fair value,” and held Peterson was not entitled to any additional distributions, held there was no oppressive conduct by PAJ, and denied costs and attorney fees to both parties. *See Addendum C and D; TR at 613 and 675.*

10. Thereafter, PAJ filed a Motion for Amendment of Judgment under Rule 59(a) URCP, Motion for Relief from Judgment under Rules 60(a), 60(b)(1), and 60(b)(6) URCP, Motion to Amend Findings or make Additional Findings under Rule 52(b) URCP, and a Motion to Stay under Rule 62(b) URCP, with supporting memoranda,

giving the trial court an opportunity to correct the errors and insufficient findings asserted below. *See Addendum F; TR at 688 and 875; See supra.*

11. Peterson then filed his Motion to Partially Amend or Alter Judgment under Rules 59(e) and 60 URCP. *See Addendum G; TR at 708.*

12. The trial court issued an amended Memorandum Decision dated July 20, 2009 and a subsequent amended Judgment dated August 6, 2009. *See Addendum A and B; TR at 910 and 977.* The Judgment incorporated the Court's Memorandum Decision as its findings of fact and conclusions of law. It is from this final Judgment, that PAJ appeals. *Id.*

SUMMARY OF ARGUMENTS

The trial court erred in failing to make sufficient findings of fact that would allow the parties and the Court of Appeals to follow the conclusions it made in its Memorandum Decisions. PAJ preserved these issues by filing its Rule 52 Motion to Amend Findings. Without the additional findings, PAJ cannot determine how the trial court came to its conclusions regarding the value of PAJ shares.

The trial court further erred in failing to appropriately consider the issue of personal goodwill, which is a matter of first impression in Utah regarding dissenting shareholder actions and the election to purchase in lieu of dissolution. The trial court erred in concluding that the undisputed Non-Solicitation Agreement converted all of the shareholders' goodwill to personal enterprise goodwill.

The trial court likewise erred when it failed to correct a mathematical error regarding the Jackson 2001 buy-in, and by so doing, relied on a value of PAJ shares well in excess of the appropriate value had the error been corrected.

ARGUMENT

I

THE TRIAL COURT FAILED TO MAKE SUFFICIENT FINDINGS JUSTIFYING THE APPLICABILITY OF TOWNSEND'S MARKET APPROACH, INCLUDING SUFFICIENT FINDINGS TO DEMONSTRATE THAT COMPANIES USED IN TOWNSEND'S MARKET APPROACH ARE COMPARABLE TO PAJ.

Standard of Review

"It is the duty of the trial court to make findings on all material issues raised by the pleadings, and the failure to do so is regarded as reversible error." *See Piper v. Hatch*, 86 Utah 292, 43 P.2d 700, 701 (Utah 1935). In order for findings to be sufficient they "...must show that the court's judgment or decree follows logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *See Rasband v Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v Deliran*, 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted).

Necessity of sufficient findings

"It is the duty of the trial court to make findings on all material issues raised by the pleadings, and the failure to do so is regarded as reversible error."⁴

In order for findings to be sufficient they "...must show that the court's judgment or decree follows logically from, and is supported by, the evidence. The findings should

4 *Piper v. Hatch*, 86 Utah 292, 43 P.2d 700, 701 (Utah 1935) (citing *Piper v. Eakle*, 78 Utah, 342, 2 P.(2d) 909; *Dillon Implement Co. v. Cleaveland*, 32 Utah, 1, 88 P. 670; *Thomas v. Clayton Piano Co.*, 47 Utah, 91, 151 P. 543; *Mitchell v. Jensen*, 29 Utah, 346, 81 P. 165; *Thomas v. Farrell*, 82 Utah, 535, 26 P.(2d) 328.)

be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.”⁵

To state it another way, the trial court’s findings “should ... include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *Rehn v Rehn*, 974 P.2d 306, 310 (Utah Ct. App. 1999) (omission in original) (quoting *Stevens v Stevens*, 754 P.2d 952, 958).

This Court held in *Bell v Bell*, 810 P.2d 489, 492 (Utah Ct. App. 1991), “the trial court must make sufficiently detailed findings of fact on each factor to enable a reviewing court to ensure that the trial court’s discretionary determination was rationally based...”.

This Court further pointed out that “[t]he absence of findings of fact ‘is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court’s fact-finding domain.’” *Bakanowski v. Bankanowski*, 80 P.3d 153, 156 (Utah Ct. App. 2003) (quoting *Acton v Deliaran*, 737 P.2d 996, 999 (Utah 1987)).

Thus, “[A] trial court’s failure to provide adequate findings is reversible error when the facts are not clear from the record.”⁶

PAJ preserved its right to appeal question of insufficient findings

5 *Rasband v Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v Deliran*, 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted).

6 *Andrus v. Andrus*, 169 P.3d 754, 759 (Utah Ct. App. 2007). *See Rasband v Rasband*, 752 P.2d 1331, 1334-35 (Utah Ct. App. 1988)).

The trial court's May 6, 2009 Judgment did not include "Findings of Fact" or "Conclusions of Law." Rather it incorporated the trial court's April 17, 2009 Decision pursuant to Rule 52(a) URCP. *See TR at 67.5.*

PAJ then timely filed its Motion to Amend Findings or Make Additional Findings under Rule 52(b) URCP. *See Addendum F; TR at 688 and 875.*

In response, the trial court issued its second Memorandum Decision on July 20, 2009. In the subsequent August 6, 2009 Judgment, the trial court again simply incorporated its prior Decisions rather than providing separate "Findings of Fact" or "Conclusions of Law". PAJ submits that the trial court has yet to make sufficient findings.

Insufficient findings regarding comparability of Townsend's market sample

Before the trial court can begin the weighting of any market approach, it must first determine if the proposed market approaches are comparable.⁷ The *Hogle* Court determined that the experts' values should be "substantially disregarded as unreliable" precisely because the comparables offered were not comparable. *Id.* at 88.

The trial court's initial Decision did not contain a single finding to support comparability of PAJ to the companies Townsend used in his market analysis. Even after the trial court was given the opportunity to make additional findings, the court supplemented its findings with only the following statement:

⁷ *See Hogle v Zinetics Med., Inc.*, 63 P.3d 80, 87 (Utah 2002).

“Townsend’s market analysis data was comparable to and appropriately considered in the valuation of PAJ, as shown by a high correlation of PAJ of 0.92. Townsend testified that such a high correlation was rare and therefore determined the market approach to be very appealing in determining value for this particular company.” (Citing Trial Testimony, February 18, 2009.) *See Addendum B; TR at 910, pg. 6, ¶ 3.*

This single finding poses two problems: First, it demonstrates a misunderstanding of the statistical term R-squared and the application of .92. Second, the trial court failed to make the subsequent findings that would make the number relevant to the valuation of PAJ. Absent these accurate and detailed findings, a reviewing court cannot ensure that the trial court applied correct law or that its discretionary determination was rationally based.

Incorrect application of .92⁸

The trial court’s finding that relies on “a high correlation to PAJ of 0.92” leads one to conclude that the trial court does not understand the statistical term R-squared—.92 is the calculated R-squared value.

The trial court may have even mistakenly thought the .92 was equivalent to the “.9 times earnings” the trial court references elsewhere in its opinion. See Issue III *infra*. Unfortunately, one cannot tell given the limited findings.

In statistics, R-squared is a defined term. It is the coefficient of determination and is used in models whose main purpose is to predict future outcomes based on related data.

⁸ “You keep using that word. I do not think it means what you think it means.” Reiner, Rob, *The Princess Bride*, Act III Communications, 1987

“But there are problems with R-squared. First, it measures *in-sample* goodness of fit in the sense of how close an estimated Y value is to its actual value in the given sample. There is no guarantee that it will forecast well *out of sample* observations.”⁹

R-squared, by definition, only measures how well a particular sample is clustered around a given point. R-squared is a mechanical calculation that summarizes a characteristic of a sample.

Simply put, one cannot gather a sample of one-year old pigs, take an average of their weight, and use it to estimate the average weight of a pen of one-year old cows. The fact that the R-squared for the sample of pigs (e.g., the weights of the one-year old pigs were all close to the same), does not make the average weight of pigs at one year of age a good basis for estimating the average weight of a one-year old cow.

Statistics may at times be difficult to grasp, but the trial court owes it to the parties to understand the statistical concepts cited in its decision. It appears the trial court did not.

Townsend ran a statistical regression model with his chosen market samples comparing their selling price to one or more variables. Townsend testified that at least one of the regression models he ran produced an R-squared of .92.¹⁰

Since the court did not understand R-squared, it did not identify the variable “Y” on which the court believed Townsend ran his statistical regression to obtain an R-squared of .92.

⁹ *Basic Econometrics*, 5th ed. 2009, p. 493, Damodar N. Gujarati and Dawn C. Porter.

¹⁰ See Trial Transcript, pg. 85, lines 18-21, TR at 1045.

Townsend could have run several different statistical regression models on these same companies comparing their sale price to any number of variables: number of employees; number of partners; geographical location, or number of bald employees. Presumably the R-squared in each analysis would have been different. To understand Townsend's reference to .92 one must understand it relates to a particular variable among Townsend's sample companies. It does not relate to the comparability of PAJ to the sample companies. It also does not predict the value of PAJ absent a finding that PAJ is comparable to the companies used in the sample.

It was error for the trial court to find that Townsend's R-squared value, in and of itself, establishes comparability between PAJ and Townsend's market samples.

Insufficient findings

Even after Townsend's variable "Y" used to derive his R-squared of .92 is identified, the only way Townsend's R-squared of .92 would be relevant in determining the value of PAJ is if Townsend's sampling of subject companies are comparable to PAJ.

For findings to be sufficient they must contain enough detail to ensure the trial court correctly applied the law and that the trial court's discretionary determination was rationally based.

The trial court did not make sufficient findings on the issue of "if" and "how" PAJ is comparable to Townsend's market samples to allow for an appropriate appellate review of the decision. Simply stated, the trial court did not say why he thought the "cow" was similar to the "pigs."

PAJ illustrates the insufficiency of the trial courts findings as follows:

First, the trial court does not tie its finding to specific underlying evidence; it only references an entire day of trial rather than any particular testimony. Leaving one to guess at the specific evidence on which the trial court relied.

Second, the finding fails to demonstrate why the trial court considered Townsend's market samples relevant in valuing PAJ in spite of the following:

1. PAJ had annual sales of \$1,583,495¹¹. Of the 53 transactions that Townsend used spanning over ten years, 51 had annual sales under \$650,000 and 30 had annual sales under \$300,000. None had annual sales over \$1,250,000.^{12 13 14 15}

¹¹ See Townsend's Report, Schedule B.

¹² See Bowles Report, Appendix F, and Townsend Report, pg. 21, Schedules O & P.

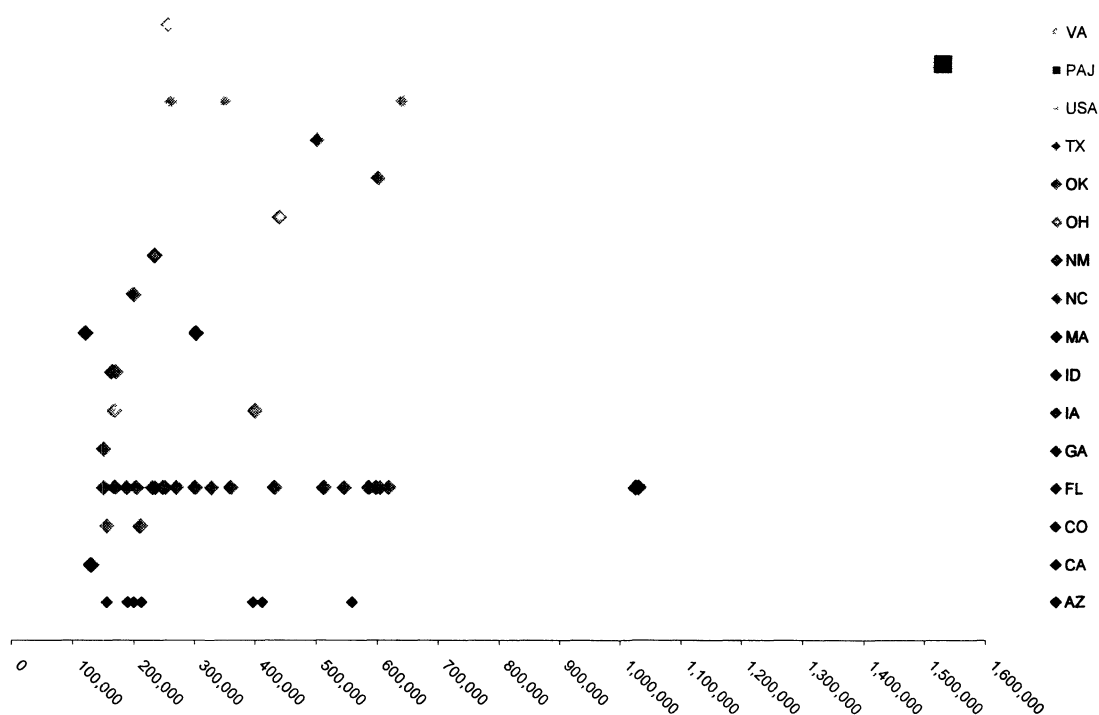
¹³ The Utah Supreme Court engaged in a detailed analysis of market comparables in *Hogle v Zinetics Med., Inc.*, 63 P.3d 80 (Utah 2002). The *Hogle* Court rejected the market approach proposed by Zinetics precisely because comparable companies could not be found. *Id.* at 86-88. The *Hogle* Court concluded by stating that because the comparables were not comparable, the expert's values should be "substantially disregarded as unreliable." *Id.* at 88.

¹⁴ There had to be hundreds (perhaps thousands) of transactions involving ownership interests in accounting firms in the few years before 2006. Two take a handful of transactions from small firms in Florida and make any inferences about a much larger firm in Logan, may be less reasonable than guessing cow weights based on pig data, regardless of an R-squared value relating to the sample of small Florida firms.

¹⁵ Mr. Shannon Pratt (a recognized and well published expert in the field of business valuation) noted this problem with *incomparable* companies when he stated "probably the most common shortcoming implementation to the market approach is the one that takes place near the beginning of the exercise, poor selection of guideline companies." See Pratt, Shannon P. *The Market Approach to Valuing Business*, (John Wiley & Sons: New York), 2001, 253; *Trial Exhibit 94.6* (hereinafter "*Pratt Approach to Valuing Business*").

The following graph illustrates this point. This was admitted as Trial Exhibit 94.1.

Gross Sales Summary Of Townsend Market Comparables



2. Townsend did not disclose in his report, and initially denied during cross examination¹⁶ (but ultimately acknowledged¹⁷), he had excluded from his sampling, companies with gross revenue under \$100,000.

¹⁶ See Trial Transcript, pg. 122, line 25, TR at 1045.

¹⁷ See Trial Transcript, pg. 123, line 25, TR at 1045.

3. Townsend's methodologies varied by over 271% among themselves ranging from \$724,336 to \$1,963,581.^{18 19 20}

4. Townsend acknowledged in Cross Examination that he had no information regarding: the mix of revenue; number of partners; revenue per partner; number of employees; revenue per employee; firm specialty practice; niche practice; or, demographics of population where the firm is located about any of the companies he included in his market analysis.²¹ Townsend acknowledged in Cross Examination there is so much more we do not know about his "*comparables*" than what we do know.²²

5. The trial court failed to reconcile its determination of the fair value of PAJ (\$1,263,086) with the required rate of return to owners of the corporation given its finding on the amount of reasonable compensation in the amount of \$273,844²³ (i.e., the

18 Townsend's Report, Schedule A, Trial Exhibit 90.

19 This Court has noted that the market price is reliable only when "the evidence reveals the existence of a free and open market, characterized by a substantial volume of transactions that makes the market a fair reflection of the judgment of the investing public." See *Bingham Consolidation Company v. Groesbeck*, 105 P.3d 365 (Utah Ct. App. 2005).

20 Other jurisdictions have held that "The utility of the comparable company approach depends upon the similarity between the company the court is valuing and the companies used for comparison. At some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes." See *In re Radiology Associates, Inc.*, 611 A.2d 485, 490 (Del.Ch.1991); See also *Steiner v Benninghoff*, 5 F.Supp.2d 1117, 1127 (D. Nevada 1998).

21 See Trial Transcript, vol. 1; pg. 15, TR at 1045.

22 See Trial Transcript, vol. 1; pg. 130, lines 13-22, TR at 1045.

23 Townsend Report, Schedule B, Trial Exhibit 90.

trial court's fair value of \$1,263,086²⁴, and reasonable compensation of \$273,844 does not provide a reasonable rate of return to the owners).

Specific findings on each of these issues are necessary for the parties and the appellate court to review the trial court's choice of valuation methods. Even if some of these issues are ultimately questions of fact, they must be specifically addressed by the trial court. "The absence of findings of fact 'is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain.'" *Bakanowski* at 156 (citing *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)).

PAJ respectfully requests this Court remand the case, advising the trial court on the definition of R-squared, and further instructing the trial court to articulate additional findings addressing all relevant issues that would allow an Appellate Court to logically evaluate whether the trial court properly concluded whether or not Townsend's market data is comparable to PAJ and therefore whether Townsend's market data is a properly chosen valuation method. Only then can the Appeal Court review as a matter of law the trial court's choice of valuation methods.

The Utah Supreme Court held in *Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 86 (Utah 2002) (citing *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, at 491) that "... choice of valuation methods is a question of law." The Court further indicated that: "We note that the selection of guideline companies was part of the determination of market value,

24 Townsend Report, Schedule A, Trial Exhibit 90.

which is one of the three primary valuation models.” *Id.* at 87. While the ultimate determination of fair value of a corporation’s stock is a question of fact, the determination of whether a given fact or circumstance is relevant to fair value under state law is a question of law reviewed *de novo*. *Id.* at 80.

II

THE TRIAL COURT COMMITTED ERROR BY INCLUDING EACH OF THE SHAREHOLDER’S PERSONAL GOODWILL IN REACHING ITS CONCLUSION AS TO THE FAIR VALUE OF PAJ SHARES AND BY FAILING TO MAKE SUFFICIENT FINDINGS

Allocation of personal goodwill when determining fair value in either a dissenting shareholder action or an election to purchase is a case of first impression in Utah.

Case law on personal goodwill

In *Stonehocker v. Stonehocker*, 176 P.3d 476 (Utah 2008), the Utah Supreme Court held that the value of a business in a divorce case “...should be determined independent of any goodwill component. There can be no goodwill in a business that is dependent for its existence upon the individual who conducts the enterprise and would vanish were the individual to die, retire or quit work.” *Id.* at 490.

Other jurisdictions have distinguished between enterprise and personal goodwill in valuing businesses. The US Supreme Court in *Prince v Unsecured Creditors Committee*, 117 S.Ct. 608 (1996), cited both *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E. 2d 946 (1991) and *In re Marriage of Talty*, 166 Ill.2d 232, 209 Ill.Dec. 790, 652 N.E.2d 330 (1995), “citing *Zells* as holding ‘goodwill represents merely the ability to acquire future income’, and that that case involved a professional practice wherein goodwill is generally

personal to the professional, and the case went on to make the following distinction: *to the extent goodwill inheres in the business, existing independently of the individual's personal efforts, and will outlast his involvement with the enterprise, it should be considered as an asset of the business, and, in contrast, to the extent that goodwill of the business is personal to the individual, depends on his efforts and will cease when his involvement ends, it should not be considered property (it is income generating ability that goes with the person).*” See *Prince v Unsecured Creditors Committee*, 117 S.Ct. 608 (1996), (emphasis added).

The US Supreme Court further noted that “Forcing a professional to purchase his own personal goodwill as being part of a corporation’s stock value *was taking away what the professional personally owned and charging the professional for his own income generating ability as being a corporate asset* contrary to the holdings of the Illinois Supreme Court as well as the future earnings exemption of 11 U.S.C. §541(6).” *Id.* (emphasis added).

PAJ’s Employment Agreement

It is undisputed that all three shareholders in PAJ had signed employment agreements which included the following clause:

2.0 I will not --

1. For a period of two years after the termination of this agreement:

a. Directly or indirectly solicit to provide or provide any professional services such as those provided by the Employer for anyone who was a client of the Employer anytime during the twelve months prior to the termination of my employment

with the Employer. This provision does not apply to clients who are my immediate family members.

See Employment Agreements, Trial Exhibit 46, 53 and 54, pg. 1; Peterson Employment Agreement, Addendum H.

The Employment Agreement does not prevent any shareholder from opening up a competing business next door. They simply cannot solicit certain customers for a two year period from termination of employment.

The trial court's error

The trial court determined that “Townsend’s exclusion of any personal goodwill deduction was appropriate where that expert gave considerable weight to Plaintiff’s employment contract, and opined that such constructively affixed any of Plaintiff’s personal goodwill with PAJ as an enterprise. As Townsend testified, where personal goodwill has become transferable, it is no longer personal. Further, how Bowles extrapolated personal goodwill in his calculations was in error and excluded the benefit of the bargain.” *See Memorandum Decision, Addendum B at pg. 6; TR at 910.*

However, as indicated above, the *Stonehocker* Court determined that there “can be no goodwill in a business that is dependent for its existence upon the individual who conducts the enterprise and would vanish were the individual to die, retire or quit work.” *See Stonehocker v. Stonehocker*, 176 P.3d 476, 490 (Utah 2008). Clearly one who dies or retires will not be soliciting clients (at least not for two years). And if something as serious as death cannot convert personal goodwill to enterprise goodwill, then certainly a two year non-solicitation agreement cannot do so as a matter of law. In short, PAJ

contends that under the standard articulated in *Stonehocker*, the two year non-solicitation clause cannot as a matter of law convert all personal goodwill to enterprise goodwill. The trial court's failure to account for personal goodwill was in error.

The trial court's other findings are also inconsistent with its position that the non-solicitation agreement converted all personal goodwill. On Page 8 of the trial court's April 17 2009 Memorandum Decision, the court stated: "the Court views the securities license much like a college degree or certification from the state as a CPA. It runs with the person, not the entity." *See Memorandum Decision, Addendum D at pg. 8; TR at 613.*

The trial court cannot have it both ways. If a college degree and certification runs with the person, then the personal goodwill related thereto runs with the person. Each shareholder in this case holds *inter alia* a college degree or certification from the state as a CPA. If they run with the person then the value associated therewith must also run with the person.

Bowles was the only expert to assign a value to personal goodwill in his Expert Report. *See Bowles Report, Exhibit 8, pg. 17-20, Trial Exhibit 90.* The trial court committed error by failing to adjust the value of the PAJ shares by offsetting the personal goodwill attributed to each shareholder as provided in Bowles' Expert Report and consistent with his testimony. *See TR at 1045, pg. 36, lines 14 through pg. 37.*

The insufficiency of the findings regarding goodwill

The trial court's finding regarding goodwill is insufficient. As asserted previously, in order for a finding to be sufficient it must "show that the court's judgment or decree follows logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."²⁵

The trial court's finding has no reference to the language relied upon in the Employment Agreement, no reference to the testimony of Townsend it relied upon, no analysis as to whether the shareholders' goodwill has in fact become institutionalized and how that occurred, no reference to the evidence or a statement of law determining "how Bowles extrapolated personal goodwill in his calculations was in error and excluded the benefit of the bargain," etc. The trial court's finding simply has no direct tie back to the trial record and fails to include the "subsidiary facts to disclose the steps by which it reached its ultimate conclusion."²⁶

For these reasons, the issue of goodwill should be remanded to the trial court to determine the value of personal goodwill of its shareholders with instructions to exclude such from the fair value of PAJ and make sufficient findings related thereto.

III

THE TRIAL COURT COMMITTED ERROR BY RELYING ON AN INCORRECT CALCULATION OF JACKSON'S 2001 BUY-IN PURCHASE PRICE AND THE BUY-IN MULTIPLE IN REACHING ITS

²⁵ See *Rasband v Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v Deliran*, 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted).

²⁶ See *Memorandum Decision, Addendum B* at pg. 6; *TR* at 910.

CONCLUSION AS TO THE FAIR VALUE OF THE PAJ SHARES

A mathematical error constitutes an error correctible under Rule 60(a) URCP.²⁷

The trial court stated in its April 17, 2009 Memorandum Decision that “Scott Jackson bought his shares using a value calculation of the gross sales times 0.9, times the percentage of stock (i.e., $\$750,000 * .9 * 15.83\% = 106,852.50$). See Ex. 83. Applying this formula to the Plaintiff’s shares would result in his shares being worth $\$517,763.17$.”²⁸ The trial court also stated that while “...the Court will not apply this value calculation as the sole means of determining the value of the Plaintiff’s shares; however, the Court does view this transaction between Mr. Jackson and then Peterson, Allred as a guidepost in its decision.” *Id. at pg. 7*(emphasis added). The trial court went on to note, two paragraphs later, that: “The Court points out that this determined value [Townsend’s value] is less than what the value of PAJ would have been had the Court used the same formula that Mr. Jackson used to purchase his shares in PAJ. The Court was heavily influenced by this transaction...” *Id. (emphasis added)*.

As part of PAJ’s Motion to Amend Findings, Defendants directed the trial court to undisputed evidence introduced at trial establishing that Jackson’s 2001 buy-in was not a cash sale but rather financed by non-interest bearing Promissory Notes. *See Motion to Amend Findings, Addendum F, pg. 5-7; TR at 688 and 875.*

²⁷ See *Stanger v. Sentinel Security Life Insurance*, 669 P.2d 1201 (Utah 1983); *See also as cited above...Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 86 (Utah 2002).

²⁸ See *Memorandum Decision, Addendum D, pg. 6 ; TR at 613.*

PAJ further pointed out that the only testimony the trial court heard regarding present value of the notes was contained on Page 4 of Bowles' Expert Report which reads:

On September 21, 2001, D. Scott Jackson purchased a one-third interest in PAJ[PC] to be effective January 1, 2002 by executing three promissory notes to the following individuals: Mr. Peterson, Mr. Allred, and to his parents.⁸ Based on the principal payments specified in these notes, a present value date of January 1, 2002, and a discount (interest) rate of 8.0 percent, the present values of these three notes were \$41,743, \$41,743, and \$43,026, respectively, for a total purchase price of \$126,512. Per PAJ[PC]'s 2001 corporate tax return, gross receipts for 2001 were \$752,562, which includes \$31,942 from investment advisory services included on schedule K. Therefore, Mr. Jackson paid approximately 17.0 percent of revenue for his one-third interest. (emphasis added)

See Bowles Report, pg. 4, Trial Exhibit 91.

PAJ's motion also reminded the trial court that making a present value adjustment for these payment terms is an essential component in properly calculating Jackson's buy-in value and purchase price for his percentage in PAJ. PAJ's Motion then illustrated three significant consequences stemming from this corrected formula:

1. Once the present value of the non-interest bearing notes is calculated using the only evidence admitted at trial, the combined total of the three notes executed by Jackson is reduced from \$206,850 to \$126,063.
2. The correct formula of Jackson's 2001 buy-in was not .90 times earning, but rather .50.

3. The Correct value of Peterson's shares based upon the Jackson buy-in is not \$517,763, as the Court suggests, but rather \$287,646.21.

See Motion to Amend Findings, Addendum F, pg. 8; TR at 688 and 875.

In the trial court's subsequent Memorandum Decision dated July 20, 2009, the trial court acknowledged "Mr. Jackson stated that an important component of this buy-in transaction [2001] was the no interest notes that he was allowed to enter into." *See Memorandum Decision, pg. 2, Addendum B, pg. 2; TR at 910.* The trial court, however, refused to correct its previous finding that the formula to value Jackson's 2001 buy-in in its subsequent decision.

Rather than correcting the formula on which the court admittedly relied and acknowledging the consequences that flow therefrom, the trial court sought to skirt the issue by reasoning the 2001 buy-in formula did "not provide definitive valuation guidance" nor was it the "sole means of determining value of Plaintiff's shares." *Id. at 4 (emphasis added).* The trial court reasoned "the Court does not feel it necessary to amend any findings with regard to the 2001 buy-in formula, especially since the Court ultimately did not rely on it when determining fair value of Plaintiffs." *Id. at 5.* The trial court also asserted that "it was relying on a formula not the value derived from the formula" and that the "0.9 formula" was "a simple" formula. *Id.*

The question is not whether the 2001 formula was the "definitive" or "sole" means of valuation—rather whether the trial court considered it relevant in making its decision.

Since the trial court considered the 2001 formula relevant, PAJ maintains it was error for the court not to correct the formula to show the present value of the 2001 transaction.

As to the first claim, PAJ submits the trial court cannot separate the formula from the value of that formula. As to the second, the trial court cannot exchange simplicity for accuracy. If the trial court is going to rely on a simple formula, the simple formula must be accurate.

This Utah Supreme Court stated in *Hogle* that the determination of whether a given fact or circumstance is relevant to fair value under state law is a question of law reviewed de novo. “whether a given fact or circumstance is relevant of fair value is a question of law” tried de novo. *See Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 84 (Utah 2002).

The trial court acknowledged that the 2001 buy-in was something that heavily influenced and was a guidepost to its decision. As such the trial court considered it to be relevant regardless of whether it used it as its sole method of determining value. Thus, the trial Court erred when it failed to correct a formula on which it expressly considered relevant in valuing PAJ.

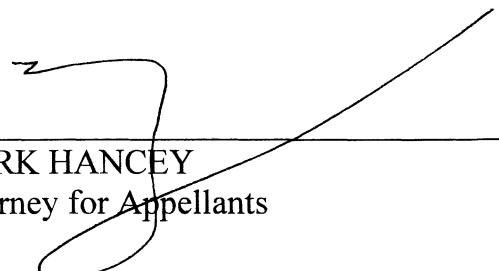
PAJ respectfully requests that this Court remand this case to the trial court to make additional sufficient findings as to its valuation of PAJ as requested above and to correct its mathematical error related to the Jackson 2001 buy-in as outlined herein.

CONCLUSION

For the forgoing reasons, PAJ respectfully requests that this Court remand this case to the trial court with instructions to make sufficient findings regarding the trial court's calculation of the fair value of PAJ shares specifically addressing the comparability, to PAJ, of the sample companies used in Townsend's market approach. With further instructions: that fair value does not include personal goodwill of the shareholders; that as a matter of law the undisputed non-solicitation clause does not convert all shareholder personal goodwill to enterprise goodwill; to determine the fair value of PAJ exclusive of shareholders personal goodwill; to correct the trial court's mathematical error regarding the Jackson 2001 buy-in; and to conduct an evidentiary hearing as may be necessary to enable the trial court to make such additional findings and determinations.


DATED this 25 day of January, 2010.

HANCEY LAW OFFICES

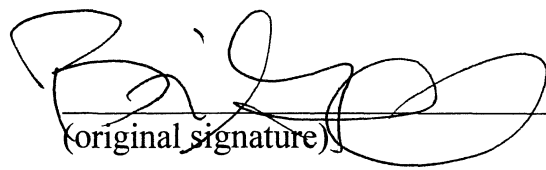


MARK HANCEY
Attorney for Appellants

HILLYARD, ANDERSON & OLSEN, P.C.



GARY N. ANDERSON
BRIAN G. CANNELL
Attorneys for Appellants



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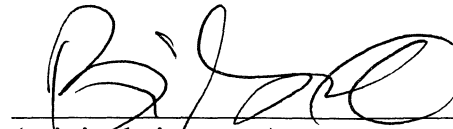
CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANTS were mailed, postpaid, to the following this 25 day of January, 2010:

James C. Jenkins (USB 01658)
OLSON & HOGGAN, P.C.
Attorney for Appellee
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84323-0525

A handwritten signature in black ink, appearing to read "B. Cannell", written over a horizontal line.

BRIAN G. CANNELL
Attorney at Law

A handwritten signature in black ink, appearing to read "B. Cannell", written over a horizontal line.

(original signature)

ADDENDUM

- A. Judgment dated August 6, 2009;
- B. Memorandum Decision dated July 20, 2009;
- C. Judgment dated May 6, 2009;
- D. Memorandum Decision dated April 17, 2009;
- E. Notice of Appeal dated July 21, 2009;
- F. PAJ's Motion to Amend the Findings or Make Additional Findings under Rule 52(b), Motion for Amendment of Judgment under Rule 59(a), Motion for Relief from Judgment under Rule 60(a), (b)(1) and b(6), and a Motion for Stay under Rule 62(b) dated May 15, 2009 and supporting memoranda;
- G. Utah Code Ann. § 16-10a-1430; Utah Code Ann. § 16-10a-1434;
- H. Peterson Employment Agreement;
- I. Gujarati, Damodar N. *Basic Econometrics*, (McGraw-Hill: Boston), 2009, 493.

Tab A

James C. Jenkins (#1658)
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120 South Main, Suite 200
P.O. Box 525
Logan, Utah 84323-0525
Telephone (435) 752-1551
Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

JACK W. PETERSON,

Plaintiff and Counterclaim
Defendant,

v.

D. SCOTT JACKSON, individually; and
ALAN D. ALLRED, individually; and on
behalf of PETERSON ALLRED
JACKSON, P.C., a Utah Professional
Corporation

Defendants and
Counterclaim Plaintiffs.

JUDGMENT

Civil No. 060102504

Judge: Kevin Allen

This matter having come for trial, without jury, on February 18, 19, and 20, 2009, before Judge Kevin K. Allen, and the court thereafter having issued and entered its Decision in writing on April 17, 2009; which Decision includes specific Findings of Fact and Conclusions of Law as particularly stated therein, and which pursuant to Rule 52 (a) of the Utah Rules of Civil Procedure constitute the court's findings of fact and conclusions of law in support of the judgment herein; and,

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation
CIVIL NO. 06012504
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The court having entered Judgment herein on May 6, 2009; and,

The court having entered its Memorandum Decision in writing dated July 20, 2009, after having considered Defendants' postjudgment *Motion to Amend Findings or Make Additional Findings, Motion for Amendment of Judgment, Motion for Relief from Judgment, and Motion to Stay*, and also after having considered Plaintiff's postjudgment *Motion to Partially Amend or Alter Judgment*, which Memorandum Decision includes specific Findings of Fact and Conclusions of Law as particularly stated therein, and which pursuant to Rule 52 (a) of the Utah Rules of Civil Procedure also constitute the court's additional findings of fact and conclusions of law in support of the judgment herein; and the court having granted in part Defendants' postjudgment motions as to ~~making the additional and clarifying findings contained in said~~ ^{THE MOTION TO STAY AND AS TO} Memorandum Decision of July 20, 2009, and otherwise having denied the aforesaid postjudgment motions of the Defendants, and having granted in part and denied in part the aforesaid postjudgment motion of Plaintiff as specifically stated in said Memorandum Decision of July 20, 2009; and,

Following an oral arguments hearing on July 2, 2009, and cause having been determined by the court, and the court specifically having directed that a new judgment be prepared in conformance with the Memorandum Decision of July 20, 2009; it is now therefore adjudged and decreed as follows:

1. By way of declaratory judgment, Plaintiff's petition to dissolve Peterson Allred Jackson, P.C. (hereinafter the "Corporation") is hereby dismissed;
2. Defendant Peterson Allred Jackson, P.C., is awarded the right to purchase Plaintiff Jack W. Peterson's 36.37% interest in the Corporation, which purchase shall be deemed effective December 31, 2006;

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation
CIVIL NO. 06012504

3. The Court has determined the fair value for the purchase of said shares of the Corporation to be \$454,170.06, representing the determined "fair value" of Plaintiff's shares as of December 31, 2006 of \$459,000.00, less the stipulated offset for Plaintiff's USU earnings of \$4,829.94 (hereinafter "Purchase Price");

4. The Purchase Price is subject to interest as determined by the Court from December 31, 2006 until paid in full as more particularly described as follows:

- a. \$31,746.48 for the calendar year 2007 at 6.99% per annum;
- b. \$24,616.02 for the calendar year of 2008 at 5.42% per annum; and
- c. \$3,284.96 for the period of January 1, 2009 until April 20, 2009 at 2.40% per annum; and,
- d. \$29.86 per day thereafter until paid in full;

5. By way of declaratory judgment, Plaintiff is not entitled to any distribution of cash reserves held by the Corporation;

6. By way of declaratory judgment, Plaintiff's investment practice belongs with Plaintiff. As such, Plaintiff may retain the sum of \$24,522.25 representing the passive investment income from his investment practice received and held by Plaintiff since his termination by Defendants;

7. By way of declaratory judgment, the Defendants did not engage in oppressive conduct or misapplication or wasting of assets. Therefore, attorney's fees and costs will not be awarded;

8. By way of declaratory judgment, Defendants are not entitled to damages under their Counterclaim and it is dismissed; and

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation
CIVIL NO. 06012504

9. By way of declaratory judgment, the Purchase Price together with the accrued interest shall be payable to the Plaintiff within ten days following the entry of Judgment.

10. Judgment is hereby awarded to Plaintiff against Defendants, jointly and severally, for all amounts as due hereunder.

11. The Defendants' *Motion to Amend Findings or Make Additional Findings* is granted in part with respect to making the additional findings stated in the court's Memorandum Decision of July 20, 2009; said motion and Defendants' *Motion for Amendment of Judgment*, ^{AND} *Motion for Relief from Judgment*, ~~and Motion to Stay~~ are each and all hereby otherwise denied.

12. The Plaintiff's *Motion to Partially Amend or Alter Judgment* is granted with regard to amendment of paragraphs 2 so as to correct Plaintiff's ownership interest to be 36.37%, and with regard to amendment of paragraph 8 regarding the judgment that Defendants' Counterclaim is dismissed. Said motion is otherwise denied.

13. The stay of judgment entered by the court on June 1, 2009 is no longer in effect.

DATED THIS 6 day of ^{Aug.}~~July~~, 2009.

BY THE COURT:


Kevin K. Allen, District Court Judge

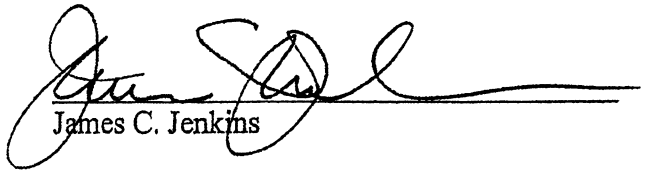


JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation
CIVIL NO. 06012504

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Judgment was hand delivered and also mailed postage prepaid by US Mail to counsel for Defendants, Mark Hancey, Suite 200, 121 N. Springcreek Pkwy., Providence, Utah 84332, and to Gary N. Anderson and Brian G. Cannell, 595 South Riverwoods Pkwy, Suite 100, Logan, Utah, on the 29th day of July, 2009.



James C. Jenkins

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation

CIVIL NO. 06012504

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Tab B

FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

Jack W. Peterson, Plaintiff, vs. D. Scott Jackson, individually; Alan D. Allred, individually and on behalf of Peterson Allred Jackson, P.C., a Utah Professional Corporation, Defendant and Counterclaim Plaintiffs.	MEMORANDUM DECISION Civil No. 06012504 Judge: Kevin K. Allen
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THE ABOVE MATTER is before the Court pursuant to Defendants' *Motion to Amend the Findings or Make Additional Findings* under Utah R. Civ. P. 52(b), *Motion for Amendment of Judgment* under Utah R. Civ. P. 59(a), *Motion for Relief from Judgment* under Utah R. Civ. P. 60(a), (b)(1) and (b)(6), *Motion to Stay* under Utah R. Civ. P. 62(b), and Plaintiff's *Motion to Partially Amend or Alter Judgment* under Utah R. Civ. P. 59(e) and 60. In preparation for its decision, the Court has reviewed the parties' respective Motions and Memoranda, the respective Opposition Memoranda, the respective Replies, each document submitted before the Court, and the applicable case law and statutory provisions. Further, oral arguments were held on July 2, 2009. Having considered the forgoing, the Court issues this Memorandum Decision.

SUMMARY

A three-day trial was held to determine the "fair value" of Plaintiff's shares in Peterson, Allred, Jackson, P.C. ("PAJ") as well as five other stipulated issues in dispute. During trial, both parties submitted expert testimony as to the fair value of Mr. Peterson's shares. Plaintiff's expert (hereinafter "Townsend") concluded that the fair value of Mr. Peterson's 36.37% interest in the corporation entitled him to \$459,000.00. Additionally, Townsend concluded Mr. Peterson was entitled to \$46,625.00 of undistributed cash, bringing the total to \$505,625.00. In contrast,

Defendant's expert (hereinafter "Bowles") concluded that the fair value of Mr. Peterson's 36.37% interest in the corporation entitled him to \$224,639.00. Both experts analyzed different accounting methods to determine what the fair value of PAJ was. Townsend concluded that the income approach, market approach, and general rule of thumb approach provided reasonable indications of fair value and gave weights to each in coming to his final value. In contrast, Bowles relied only on an asset approach, the excess earnings method, in deciding his final value.

Furthermore, the Court also heard testimony of historical transactions of PAJ's stock namely: (1) Scott Jackson's 2001¹ buy-in and (2) the 2005 buy-sell agreement. Specifically, the Court heard testimony from Mr. Peterson as to how the value of the shares was determined in 2001 when Mr. Jackson bought into the firm. Mr. Peterson testified that the formula used to value the shares was 90 percent of the total revenue of the company. Exhibit 83 contains handwritten notes showing such formula, as well as showing that Mr. Jackson had already obtained a 17.50 percent interest in the company. Exhibit 83 shows that the 90-percent-of-total-revenue formula was only being applied to the remaining 15.83 percent of stocks that Mr. Jackson needed to acquire to become a one-third owner. In regards to this buy-in formula, Mr. Jackson testified in rebuttal by stating that he did not believe that any of them had any experience in what they were doing at that time. Mr. Jackson testified that the most equitable thing to do was to see what each firm's revenue was and merge them together. Further, Mr. Jackson stated that an important component of this buy-in transaction was the no interest notes he was allowed to enter into. Also, the Court received into evidence the 2005 buy-sell agreement (Ex. 70) and Townsend's computation of PAJ's value as of December 31, 2006, using this buy-sell agreement as a basis. (*See* Ex. 90 Sch. R.)

Townsend did not use either historical transaction in his final determination of the fair value of PAJ. Townsend concluded that Mr. Jackson's 2001 buy-in did not provide "definitive valuation guidance" because of the factors and terms of the agreement and, therefore, he did not address how this transaction might affect fair value. (Ex. 90 p. 19.) Townsend examined the 2005

¹ The Court will note that Mr. Jackson bought into the firm on January 1, 2002, however the parties have consistently referred to this transaction as the 2001 buy-in, so the Court will do the same.

buy-sell agreement and determined that while it was “a good reasonableness check of value and supports the values derived using the market approaches” no weight was placed on this approach in the final value weightings. (*Id.* at p. 28.)

Bowles also did not use either the 2001 buy-in or the 2005 buy-sell agreement in determining the fair value of PAJ. Defendants’ expert summarily came up with a 2006 value of PAJ based on Mr. Jackson’s 2001 buy-in. (Ex. 91 p. 16.) However, Bowles dismissed the 2001 buy-in because it was five years old and because PAJ was a smaller company at the time. In regards to the 2005 buy-sell agreement, Bowles stated that it “probably provides some indication as to the value of PAJ.” However, Bowles asserted that authors of the industry’s standard guide on business valuation methods have stated that a buy-sell agreement “should not necessarily be used as a sole basis for determining value.” (Ex. 90 p. 17.) Bowles dismissed using the buy-sell agreement altogether.

After receiving the above testimony and evidence, the Court determined the fair value of Mr. Peterson’s 36.37% interest in the corporation entitled him to \$459,000.00. (Decision p.7.) The Court relied upon the Townsend’s calculations in determining this value. The Court stated in the Decision that it used Townsend’s figure because “Plaintiff’s expert’s valuation used widely accepted principles of financial analysis and valuation.” (*Id.*) Further, the Court disregarded Bowles’s figure since it was based solely on an asset-based approach, which is the least reliable method in valuing an ongoing, non asset driven company. (*Id.*) While the Court relied solely on Townsend’s valuation in coming to its final determination of fair value, the Court noted that it viewed the 2001 buy-in transaction “as a guidepost in its decision.” (*Id.*) The Court pointed out that the value given by Townsend was “less than what the value of PAJ would have been had the Court used the same formula that Mr. Jackson used to purchase his shares in PAJ.” (*Id.*) Further, the Court stated that it “was influenced heavily by [the 2001 buy-in transaction]; yet in the end did not use it as the sole means to determine value” (*Id.*)

The Court also noted that “[t]here is no definitive procedure for [valuing a business] and highly qualified experts offer vastly different opinions regarding determined value.” (*Id.* at p. 4.) The Court further noted that it refused to take a “Solomon approach” since doing so would “require the Court to pick a number out of thin air.” (*Id.*)

ANALYSIS

I. Defendant's *Motion to Amend the Findings or Make Additional Findings*

Under Rule 52(b) of the Utah Rules of Civil Procedure, the Court may amend its findings or make additional findings upon motion by a party. Utah R. Civ. P. 52(b). Questions of sufficiency of evidence to support the findings may be raised regardless of whether such was raised during trial. *Id.* However, a post judgment motion for reconsideration of a decision, once rendered, is never appropriate under the Utah Rules of Civil Procedure. *See Gillett v. Price*, 2006 UT 26, ¶ 6 (Utah 2006).

Defendants seek to amend the findings by correcting alleged mathematical errors in the 2001 buy-in, and also seek to have the Court reconsider its analysis by giving greater weight to the 2001 buy-in. Defendants argue that because the computations were flawed in regards to this buy-in, the Court's reliance on this transaction in valuing Plaintiff's shares was misplaced. Therefore, Defendants argue, the Court should correct the computations, and select the valuation method that most closely approximates Plaintiff's shares under such.

However, regardless of any alleged flaws, the Court never attributed such weight to the 2001 buy-in "number" as Defendants try to argue. In its Decision, the Court stated "Scott Jacksons' buying into the firm did not provide definitive valuation guidance and therefore, the Court will not apply this value calculation as the sole means of determining the value of Plaintiff's shares." (Decision, p.7.) The Court specifically stated that it was not willing to take a Solomon approach, as Defendants now seem to suggest the Court do. The Court pointed out that the simple formula used for the 2001 buy-in lead to a higher amount than what Plaintiff was asking for because it wanted to demonstrate to the Defendants how unfair their proposed value was. The Court did not use it to choose the value in the middle or to justify Plaintiff's "number."

When the parties were dealing cordially with one another they came up with simple and easy valuation formulas which all seemed to be based on approximately 90 percent of their revenues. (*See* Ex. 70, Ex. 83, Ex. 90 Sch. R., and Trial Testimony, Feb. 19-20, 2009.) While the Court used the simple 2001 buy-in formula for ease in the Decision, the buy-sell agreements also used an approximate 0.90 multiplier. (Ex. 90 Sch. R.) The Court was "influenced heavily" by this

since the parties were deciding for themselves what the fair value of their company was. However, the Court does not have the expertise in valuing companies as do the parties' experts. Because both experts rejected using these historical transactions, the Court did not feel comfortable in using them either, although in theory it seemed to be fair. Therefore, the Court chose not to use this method in deciding the fair value of PAJ and instead weighed the expert's opinions.

Defendants are merely attempting to persuade this Court to reconsider the weight it attributed to the 2001 buy-in. Regardless of how Defendants couch their argument, this the Court cannot and will not do. *See Gillett*, 135 P.3d at ¶ 6. Defendants, at trial, argued that Townsend's calculations needed to be adjusted for present value, Plaintiff argued they did not. The Court found Plaintiff and Plaintiff's expert more credible. Further, it was not the "number" reached by the 2001 buy-in formula that influenced the Court as Defendant tries to argue. It was the simple formula itself and the parties' seeming reliance on the 90 percent of revenue in the buy-sell agreements. (*See* Ex. 70, Ex. 83, and Trial Testimony, Feb. 19-20, 2009.) Therefore, the Court does not feel it necessary to amend any "findings" with regard to the 2001 buy-in formula, especially since the Court ultimately did not rely upon it when determining the fair value of Plaintiff's shares.

Defendants also argue additional findings were not made that are necessary to support the Court's ultimate Decision. The Court was asked to determine the fair value of Plaintiff's shares in PAJ. The Court found the fair value to be \$459,000.00. Ultimately the Court found Plaintiff's expert more convincing because he used "widely accepted principles of financial analysis . . . [and] addressed the three most recognized valuation methods that the Supreme Court of Utah has relied on . . . [rather than] only the asset based approach." (Decision, p. 7.)

The Court is only required to make findings on the material issues; it is not necessary to resolve all conflicting evidentiary issues. *In Re Estate of Grimm*, 784 P.2d 1238, 1248 (Utah Ct. App. 1989). However, the Court will make the following additional findings to ensure its Decision is sufficiently detailed to disclose the steps on which this ultimate conclusion was reached. *See Breinholt v. Breinholt*, 905 P.2d 877 (Utah App. 1995).

- 1) Townsend's exclusion of any personal goodwill deduction was appropriate where that expert gave considerable weight to Plaintiff's employment contract, and opined that such constructively affixed any of Plaintiff's personal goodwill with PAJ as an enterprise. (*See* Trial Testimony, Feb. 18, 2009). As Townsend testified, where personal goodwill has become transferrable, it is no longer personal. (*See* Trial Testimony, Feb. 18, 2009.) Further, how Bowles extrapolated personal goodwill in his calculations was in error and excluded the benefit of the bargain. (*Id.*)
- 2) Townsend's determination of "reasonable compensation to the shareholders" was appropriate insofar as it was based on a comprehensive, independent, third-party study. (*See* Ex. 90. Sch. E, Robert Half International 2007 Salary Guide; *see also* Trial Testimony, Feb. 18, 2009.) Such cannot be said of Defendants' expert's analysis. (*See* Ex. 90, p. 8) (Bowles interviewed four Utah CPAs in medium-sized firms to determine what they paid senior managers.). Further, contrary to Defendants' assertion, Townsend only provided one value for "reasonable compensation to the shareholders," where any additional values were mere extrapolations by Defendants. (*See* Trial Testimony, Feb. 18, 2009.)
- 3) Townsend's market analysis data was comparable to and appropriately considered in the valuation of PAJ, as shown by a high correlation to PAJ of 0.92. (*See id.*) Townsend testified that such a high correlation was rare and therefore determined the market approach to be very appealing in determining value for this particular company. (*See id.*)
- 4) Townsend's analysis of Seller's Discretionary Earnings, even with any deviation from the general definition, was appropriate given the task was to value the entire PAJ enterprise. (*See id.*)
- 5) As to the exclusion of Plaintiff's investment practice income, the Court finds such has no material effect on the fair value of PAJ. The investment income included by Townsend was appropriate where Plaintiff's investment income prior to being terminated was paid to PAJ pursuant to the rental agreement and therefore, had

value to the company as such.

Therefore, the *Motion to Amend Findings or Make Additional Findings* is granted with respect to making additional findings by incorporating the above findings into the Court's Decision. However, the Motion is denied with respect to amending any findings with respect to the 2001 buy-in formula.

II. Defendants' *Motion for Amendment of Judgment*

Under Rule 59(a) of the Utah Rules of Civil Procedure, there are seven grounds on which Defendants could amend the Judgment. These include: irregularity in the proceedings, misconduct of the jury, accident or surprise, newly discovered evidence, influence of passion or prejudice, insufficiency of evidence to justify the verdict, and error in the law. *Id.* While Defendants' original Memorandum made a blanket argument under Rule 59(a), in their Reply Memorandum they argued the relief sought is only under Rule 59(a)(6) and (7). Therefore, the Court will address only these two grounds.

A party slanting already available evidence in its favor will not meet the party's burden of showing an insufficiency of the evidence. *See Child v. Gonda*, 972 P.2d 425 (Utah 1998). The Court's judgment was that the fair value of Plaintiff's shares was \$459,000.00. This was supported by Townsend's Expert Report as well as Townsend's testimony at trial. Defendants' attack on the alleged mathematical errors in the 2001 buy-in formula is inconsequential when the Court did not make its judgment based on that formula. Townsend analyzed all three methods of valuation in his report. (*See* Ex. 90.) Townsend testified that he felt that he needed to use more methods because of the nuances of a professional business. (Trial Testimony, February 18, 2009.) Townsend testified that what really drove value in this company was income, however, the market approach method was very appealing because of the very high correlations. (*Id.*) Townsend therefore assigned weights to the income approach, market approach, and general rule-of-thumb approaches to determine a fair value. (Ex. 90.) Defendant's expert, on the other hand, chose only to use the excess earnings approach, which is an asset method. (Ex. 91.) The Utah Court of Appeals has found that the asset-based methods are the least reliable when looking at a company that is not being liquidated. *Bingham Consolidation Co. v. Groesbeck*, 2004 UT

App. 434, ¶ 19 (Utah Ct. App. 2004). Therefore, the Court finds that there was sufficient evidence to base to follow Plaintiff's expert in deciding what fair value was.

Further, there was no error in the law when the Court chose to follow Plaintiff's expert. There is no fixed method for valuation. *See Bingham Consolidation*, 2004 UT App. 434, ¶ 18 (holding all generally accepted techniques of valuation used in the financial community may be considered). However, "the three most recognized and relevant elements of fair value for stock valuation purposes are asset value, market value, and investment value. *Hogle v. Zinetics Med. Inc.*, 2002 UT 121 ¶ 18 (Utah 2002). The *Hogle* court held that all three values should be considered even though they may not influence the result in every valuation. *Id.* It was Defendants' expert who testified that only the asset method should be used, the very method that is least reliable where PAJ is not being liquidated. *See Bingham Consolidation*, 2004 UT App. 434, ¶ 19. In contrast, it was Plaintiff's expert who analyzed all three methods of valuation, and determined that the asset value was inapplicable, while the market and investment/income values were highly relevant. Therefore, the Court did not commit an error in the law by following Plaintiff's expert. *See Jensen v. Logan City*, 88 P.2d 459 (Utah 1939) (holding it is the court's duty to weigh the credibility of witnesses, and accept or reject such evidence).

III. Defendants' Motion for Relief from Judgment

Under Rule 60 of the Utah Rules of Civil Procedure, a motion for relief from judgment is only granted where there is a clerical mistake, mistake, inadvertence, excusable neglect, newly discovered evidence or any other reason justifying relief. Utah R. Civ. P. 60. Again, Defendants make blanket arguments under this rule based on the alleged mathematical errors of the 2001 buy-in. However, in the Reply Memorandum Defendants argue specifically that the Court committed a clerical mistake in calculating Scott Jackson's buy-in, and that the Court was thus mistakenly induced to follow Plaintiff's expert witness.

Townsend's expert report as well as his testimony as to the 2005 buy-sell agreement set forth the same general 90 percent multiplier. However, accepting *arguendo* that the 2001 buy-in computations must be corrected for present value, the Court still made clear that the 2001 buy-in was not dispositive, and that Defendants' expert was unconvincing for wholly separate reasons.

(*See Decision.*) Therefore, to repair the alleged clerical mistake for the reasons posited by Defendants would place more emphasis on the 2001 buy-in than was ever intended by the Court. *See Stranger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983) (clerical mistakes are corrected in the interest of having the judgment reflect what was intended). As noted, the Court never intended for the “number” arrived at by using the 2001 buy-in formula to be a factor in determining the fair value of Plaintiff’s shares. The Court will not now change those intentions. *See Gillett*, 135 P.3d at ¶ 6.

Further, the Court does not find that there was any other mistake, inadvertence, excusable neglect, newly discovered evidence or any other reason that would justify relieving Defendants from this judgment. As noted, the Court’s judgment was that the fair value of Plaintiff’s shares is \$459,000.00. This was based on the testimony and evidence presented by Plaintiff’s expert. The Court was aware of all the factors that Defendants argue must be viewed in regards to the 2001 buy-in. Defendants have not presented any new evidence. The Court specifically held that it would not apply the 2001 buy-in because both experts dismissed using it. Therefore, there has been no mistake, inadvertence, or excusable neglect when the Court’s judgment was based on the Plaintiff’s expert and not the 2001 buy-in.

Further, Defendants have not set forth any other reason that would justify relieving them from this judgment. Defendants are merely trying to persuade the Court to reconsider the judgment by disregarding Plaintiff’s expert and to rely solely on a method that their own expert dismissed. Defendants’ expert rejected the value he arrived at by using the 2001 buy-in, even when adjusting it for present value and adjusting for personal goodwill. The Court is not going to change the judgment to choose a value based on a method that both experts dismissed for being inappropriate. The Court found that the parties had continuously used an approximate 90 percent of revenue multiplier when valuing their company, however, both experts stated that these transactions were unfitting for use in determining a fair value of PAJ. Therefore, the Court relied on the expert opinions and rejected using the 2001 buy-in formula altogether. Consequently, Defendants have not set forth any reason for why the Court’s reliance on Plaintiff’s expert was in error.

IV. Defendants' Motion to Stay

The Court previously granted this Motion since under *Valley Bank & Trust Co. v. Gerber*, when a motion for amendment of the findings has been timely made and served upon all parties, such invokes a continuation of jurisdiction and *suspends* the finality of the judgment until the motion is ruled upon. 526 P.2d 1121, 1124, n.3 (Utah 1974). However, the Court has now ruled on Defendants' *Motion to Amend the Findings or Make Additional Findings* and, therefore, the stay is no longer in effect.

V. Plaintiff's Motion to Partially Amend or Alter Judgment

Plaintiff moves the Court to amend four separate paragraphs of the Judgment. The Court will address each paragraph separately.

Paragraph 1:

New language emphasizing Defendants' obligation to pay the final purchase price is unnecessary, as such is already made clear by paragraph nine of the Judgment. (*See* Judgment, ¶ 9). Additionally, all that Utah Code § 16-10a-1434(6) requires of the Court is to order a dismissal, and any additional quotation of the statute is superfluous. The statute controls and as such, there is no need to add the statutory language to the Judgment. Finally, even accepting Defendants' argument that Plaintiff's new language eliminates the requirement for Jackson's and Allred's joint and several liability, such is not what the Court or parties have intended. Paragraph ten of the Judgment makes clear that liability is to be had jointly and severally. (*See* Judgment, ¶ 10.) Additionally, the parties stipulated to joint and several liability during the May 5, 2009 Objection Hearing. Therefore, as to amending paragraph one of the Judgment, Plaintiff's motion is denied.

Paragraph 2:

The misstated interest of 36.67% is a clerical error, mechanical in nature where correction requires no legal analysis. *See Stranger*, 669 P.2d at 1206. Therefore, Plaintiff's motion is granted so the Judgment reflects Jack Peterson has a 36.37% interest in PAJ.

The omission of the purchase being "deemed effective December 31, 2006" is denied. Plaintiff's argument that only the *right* to purchase was had on December 31, 2006, is contrary to

the language of Utah Code § 16-10(a)-1434. The Court was to determine the fair value of Jack Peterson's interest in PAJ from either the day before the petition was filed, or the date the Court determined appropriate. *See* Utah Code § 16-10(a)-1434(4). The Court determined the appropriate date of valuation was December 31, 2006. (*See* Court Order, September 11, 2007.) However, because the valuation date and the fair value are rarely determined simultaneously, interest may be allowed "from the date determined by the court to be equitable." Utah Code § 16-10(a)-1434(5)(c). Thus by allowing interest, the statute makes clear that the valuation date not only signifies a right to purchase, but also signifies the effective purchase date. The Court properly interpreted it as such, and allotted interest from December 31, 2006. (*See* Judgment, ¶ 4.)

Lastly, the additional language directing Defendants to pay the Plaintiff is denied. The same is already had through paragraph nine of the Judgment. (*See* Judgment, May 6, 2009.)

Paragraph 3:

There is no mistake, clerical or otherwise, contained in this paragraph. The words of the Judgment make clear what constitutes the final Purchase Price. (*See* Judgment, ¶ 3.) Mere semantics are an inappropriate basis for amending the Judgment, at least insofar as such were already agreed to during the May 5, 2009, Objection Hearing.

Paragraph 8:

Defendants' argument that Utah Code Section 16-10a-1434 makes no requirement to dismiss a claim for damages is irrelevant. The Counterclaim was not based on that statute, but rather on a covenant not to compete. Any legal analysis required, namely that Defendants are not entitled to damages, has already taken place. (*See* Judgment, ¶ 8.) Dismissal follows as an automatic operation of law. Therefore, Plaintiff's amendment is merely mechanical in nature, and failure to dismiss the Counterclaim was a clerical error under Rule 60(a) of the Utah Rules of Civil Procedure. *See Stranger*, 669 P.2d at 1206. Therefore, as to amending paragraph eight of the Judgment, Plaintiff's motion is granted

CONCLUSION

Based on the foregoing, Defendants' *Motion to Amend the Findings or Make Additional*

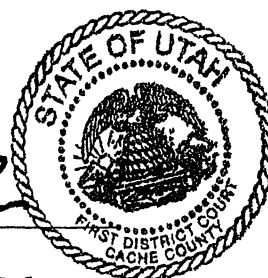
Findings is granted in part as to the additional findings and denied as consistent herewith. Defendants' *Motion for Amendment of Judgment* and *Motion for Relief from Judgment* are denied. Plaintiff's *Motion to Partially Amend or Alter Judgment* is denied, except as to the clerical errors in paragraphs two and eight of the Judgment

The stay of judgment is no longer in effect. Counsel for Plaintiff is directed to prepare a new Judgment in conformance herewith.

Dated this 20 day of July, 2009.

BY THE COURT:


Kevin K. Allen
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060102504 by the method and on the date specified.

BY HAND: MARK B HANCEY

BY HAND: JAMES C JENKINS

Date: 7-20-09


Deputy Court Clerk

Tab C

James C. Jenkins (#1658)
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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

JACK W. PETERSON,

Plaintiff and Counterclaim
Defendant,

v.

D. SCOTT JACKSON, individually; and
ALAN D. ALLRED, individually; and on
behalf of PETERSON ALLRED
JACKSON, P.C., a Utah Professional
Corporation

Defendants and
Counterclaim Plaintiffs.

JUDGMENT

Civil No. 06012504

Judge: Kevin Allen

This matter having come for trial, without jury, on February 18, 19, and 20, 2009, before Judge Kevin K. Allen, and the court thereafter having issued and entered its Decision in writing on April 17, 2009; which Decision includes specific Findings of Fact and Conclusions of Law as particularly stated therein, and which pursuant to Rule 52 (a) of the Utah Rules of Civil Procedure constitute the court's findings of fact and conclusions of law in support of the judgment herein; and

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation

CIVIL NO. 06012504

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Following hearing on May 5, 2009 and good cause having been determined by the court, it is now therefore adjudged and decreed as follows:

1. By way of declaratory judgment, Plaintiff's petition to dissolve Peterson Allred Jackson, P.C. (hereinafter the "Corporation") is hereby dismissed;
2. Defendant Peterson Allred Jackson, P.C., is awarded the right to purchase Plaintiff Jack W. Peterson's 36.67% interest in the Corporation, which purchase shall be deemed effective December 31, 2006;
3. The Court has determined the fair value for the purchase of said shares of the Corporation to be \$454,170.06, representing the determined "fair value" of Plaintiff's shares as of December 31, 2006 of \$459,000.00, less the stipulated offset for Plaintiff's USU earnings of \$4,829.94 (hereinafter "Purchase Price");
4. The Purchase Price is subject to interest as determined by the Court from December 31, 2006 until paid in full as more particularly described as follows:
 - a. \$31,746.48 for the calendar year 2007 at 6.99% per annum;
 - b. \$24,616.02 for the calendar year of 2008 at 5.42% per annum; and
 - c. \$3,284.96 for the period of January 1, 2009 until April 20, 2009 at 2.40% per annum; and,
 - d. \$29.86 per day thereafter until paid in full;
5. By way of declaratory judgment, Plaintiff is not entitled to any distribution of cash reserves up to December 31, 2006 held by the Corporation;
6. By way of declaratory judgment, Plaintiff's investment practice belongs with Plaintiff. As such, Plaintiff may retain the sum of \$24,522.25 representing the passive

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation
CIVIL NO. 06012504

investment income from his investment practice received and held by Plaintiff since his termination by Defendants;

7. By way of declaratory judgment, the Defendants did not engage in oppressive conduct or misapplication or wasting of assets. Therefore, attorney's fees and costs will not be awarded;

8. By way of declaratory judgment, Defendants are not entitled to damages under their Counterclaim; and

9. By way of declaratory judgment, the Purchase Price together with the accrued interest shall be payable to the Plaintiff within ten days following the entry of Judgment.

10. Judgment is hereby awarded to Plaintiff against Defendants, jointly and severally, for all amounts as due hereunder.

DATED THIS 6 day of May, 2009.

BY THE COURT:

/s/ Kevin K. Allen

Kevin K. Allen, District Court Judge

JUDGMENT

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CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 6 day of May, 2009, I caused to be hand-delivered a true and correct copy of the foregoing **JUDGMENT**, to the following:

Mark Hancey
121 Springcreek Pkwy
Providence, Utah 84332
mark@hancey.com

A handwritten signature in black ink, appearing to read "Mark Hancey", is written over a horizontal line.

JUDGMENT

JACK W. PETERSON, v. D. SCOTT JACKSON, individually; and ALAN D. ALLRED, individually; and on behalf of PETERSON ALLRED JACKSON, P.C., a Utah Professional Corporation

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Tab D

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

JACK W. PETERSON,

Plaintiff and Counterclaim
Defendant,

v.

D. SCOTT JACKSON, individually; and ALAN
D. ALLRED, individually; and on behalf of
PETERSON ALLRED JACKSON, P.C., a Utah
Professional Corporation

Defendants and Counterclaim
Plaintiffs.

DECISION

Civil No. 06012504

Judge: Kevin K. Allen

THE ABOVE MATTER is before the Court pursuant to the trial held on this matter on February 18, 19, and 20, 2009. Additionally, the Court and the Parties met April 16, 2009 to consider and review final arguments. A Stipulated Pretrial Order was entered into by the parties. The parties stipulated that the Defendants would pay the amount, which the court after trial adjudicates to be owing to the Plaintiff, within ten (10) business days following the entry of judgment. The parties stipulated to a Statement of Undisputed Facts, listed below. Further, the parties stipulated to the six issues of dispute that needed resolution by the Court. Finally, the parties stipulated to bifurcate the issue of costs and fees, if any, should the Court determine that they are warranted in this case. Having considered the foregoing, the Court issues this Memorandum Decision.

STATEMENT OF UNDISPUTED FACTS

1. Plaintiff filed a Verified Complaint on November 2, 2006 seeking, among other claims, dissolution of the corporation.
2. Plaintiff also sought a Temporary Restraining Order preventing a Special Shareholders' Meeting which was scheduled by Defendants to discuss and approve changes to PAJ Bylaws.

3. The Court denied Plaintiff's motion after a hearing on November 4, 2006.
4. Plaintiff filed a second motion for injunctive relief herein on January 19, 2007.
5. After hearing the court issued a memorandum decision dated January 26, 2007 denying such motion.
6. Defendants acknowledged that the Corporation must be dissolved and elected under Utah Code Ann. § 16-10a-1434 to purchase Plaintiff's shares in lieu of dissolution for their "fair value". See Election dated November 6, 2006.
7. Plaintiff owns 36.37% of the Corporation. Defendants Allred and Jackson collectively own the remaining 63.63%.
8. The parties were unable to reach an agreement as to the fair value of Plaintiff's shares under the procedures of Utah Code Ann. § 16-10a-1434(3).
9. Pursuant to order of this court, the parties have caused to be prepared and simultaneously filed expert valuation reports asserting the fair value of Plaintiff's shares to be paid to Plaintiff under Defendant's election. This court has set the valuation date of the shares as of December 31, 2006.
10. Plaintiff's expert witness, R. Brad Townsend, in his valuation report asserted that the fair value of Plaintiff's 36.37% in Peterson Allred Jackson, PC, as of December 31, 2006, equals \$459,000.00. Townsend further concluded Plaintiff was entitled to 36.37% of the \$128,196.00 undistributed cash as of December 31, 2006, equaling \$46,625.00.
11. In total, Townsend asserts Plaintiff is entitled to \$505,625.00.
12. Defendant's expert witness, Tyler J. Bowles, in his valuation report asserted that the fair value of Plaintiff's 36.37% in Peterson Allred Jackson, PC, as of December 31, 2006, equals \$224,639.00.
13. Defendants have continued to operate the corporation under the name of "Peterson Allred Jackson".
14. Defendants have continued to operate at the same location in North Logan, as a tenant under the terms of a 10 year lease executed in 2004.

15. Plaintiff's counsel holds in trust the sum of \$6,692.49 representing deposits of payments to Plaintiff from American Underwriters Life Insurance Company and Western United Life Assurance Co. Inc. from 12/14/06 until 1/12/09.

16. Plaintiff has received direct deposits from Cambridge Investment Research Inc. as residual commissions of \$17,829.96 from 11/30/06 until 3/14/08. Those funds are held in a dedicated account with Zions First National Bank.

17. For approximately 20 years prior to this lawsuit, Plaintiff has been an adjunct instructor of accounting at Utah State University (USU). Plaintiff's gross monthly salary from USU was \$1,523.83 (1,092.78 after tax) in December 2006. For the times relevant to this action Plaintiff's salary at PAJ has been reduced by the gross compensation he has earned at USU. In January 2007, Plaintiff received an additional payment of \$6,000.00 (\$4,829.94 after tax) from USU for services rendered during the fall semester of 2006.

18. For times relevant to this action, Plaintiff and Dennis Jackson each held securities licenses. Dennis Jackson and Jack Peterson have for several years provided financial investment services as licensed registered securities representatives for various clients.

19. Securities regulations require all commissions be paid directly to the registered representative of the investment client. Dennis Jackson and Jack Peterson received such commissions as 1099 income from the registered broker. After receiving commissions each paid to PAJ and amount equal to such commissions as rent.

20. The files for investment clients were maintained at the offices of PAJ and authorized staff assisted in servicing the clients under the direction of the registered representative.

21. Cambridge Investment Research, Inc. was Jack Peterson's broker. Beacon Financial Planning, LLC was Dennis Jackson's broker.

22. After Peterson's termination of employment, Peterson spoke on occasion with agents of Cambridge.

23. Cambridge sent two separate letters dated November 1, 2007 and November 12,

2007.

24. On June 4, 2007, PAJ gave Peterson notice of intent to sell shares of PAJ to Dianna Cannell and Kelly Wilson. Peterson objected to such sale.

STIPULATED ISSUES OF DISPUTE

1. What is the “fair value” of Plaintiff’s shares in Peterson Allred Jackson, P.C. to be paid by Defendants to Plaintiff because of their election to purchase his shares in lieu of dissolution?
2. Was the investment practice of Plaintiff his property or an asset of the corporation?
3. Whether Plaintiff is entitled to prejudgment interest relating back to December 31, 2006, the judicially determined effective date for fair value; and if so, what is the amount of interest?
4. Whether Defendants engaged in oppressive conduct or misapplication or wasting of assets as specified under Utah Code 16-10a-1430 (2), and if so, should the court under 16-10a-1434(5)(d) in its discretion award Plaintiff reasonable attorney fees and costs?
5. What, if any, are Defendants’ credits and off-sets against Plaintiff’s claims?
6. Are Defendants’ entitled to any damages under their counterclaim?

DISCUSSION and FINDINGS

1. *What is the “fair value” of Plaintiff’s shares in Peterson Allred Jackson, P.C. to be paid by Defendants to Plaintiff because of their election to purchase his shares in lieu of dissolution?*

Valuing a business is always a difficult undertaking for the Court. There is no definitive procedure for so doing and highly qualified experts offer vastly different opinions regarding determined value. A perfect example is this case. The Court heard two different opinions regarding the value of Peterson Allred Jackson, P.C. (hereinafter PAJ) from two very qualified individuals. Yet, in the end there was over a 50% difference in value between the two. The natural inclination is to take a Solomon approach and split the difference. However, the Court has not done this. To do so would negate both expert opinions and require the Court to pick a

number out of thin air. The Court has weighed carefully Utah law and the different experts' approaches to determining value, along with the testimony and evidence presented at trial, and finds the following:

Utah Code Annotated Section 16-10a-1434(1) provides that in a dissolution proceeding, the corporation or its shareholders may elect to purchase all shares of the corporation owned by the petitioning shareholder, at the "fair value" of the shares. If the parties cannot come to an agreement as to the fair value of the shares, the court shall "determine the fair value of the petitioning shareholder's shares as of the . . . date the court determines to be appropriate under the circumstances and based on the factors the court determines to be appropriate." Utah Code Ann. § 16-10A-1434(4). The Court has established the valuation date to be December 31, 2006.

Section 1434 does not define fair value and there are no fixed methods for valuating shares. However, "[m]ost courts permit 'all generally accepted techniques of valuation used in the financial community.'" *Bingham Consolidation Co. v. Groesbeck*, 2004 UT App 434, ¶18 (Utah Ct. App. 2004) citing *Paskill Corp. v. Alcoma Corp.*, 747 A.2d 549, 556 (Del. 2000). The fair value of shares under this statute has not been interpreted in a reported decision in the State of Utah. However, the Supreme Court of Utah addressed the determination of the fair value of a dissenting minority shareholder's stock in *Oakridge Energy, Inc. v. Clifton*, 937 P.2d 130 (Utah 1997) and *Hogle v. Zinetics Med., Inc.*, 2002 UT 121 (Utah 2002). The Utah Supreme Court noted in *Oakridge* and reiterated in *Hogle*, that "the three most recognized and relevant elements of fair value for stock valuation purposes are asset value, market value, and investment value." *Hogle*, 2002 UT 121 ¶18.

Unless a corporation is being liquidated, "the value of a corporation's assets "is the least reliable of the three factors in value determination" because it provides "little indication of what people will pay for the shares.'" *Bingham Consolidation*, 2004 UT App 434, ¶19 citing *Oakridge*, 937 P.2d at 133. Additionally, the investment value approach has been traditionally favored by courts. *Oakridge*, 937 P.2d at 133.

In the present case, the Defendant's expert has made his recommendation as to the fair value of Plaintiff's shares based on an asset based approach of valuation, specifically the excess

earnings method. Defendant's expert asserts the fair value of Plaintiff's 36.37% in PAJ, as of December 31, 2006, equals \$224,639.00. However, PAJ is not being liquidated, therefore, according to *Bingham*, the asset based approach is the least reliable of the valuation methods. Further, in Defendant's valuation report, the expert states that "[i]t is my understanding that Utah case law supports a fair value concept in which the ownership interest is valued in the hands of a specific owner or buyer." Ex. 91 p. 2. The expert then cites the *Hogle* case for this proposition. However, the Court in *Hogle* held, "'fair value' is not measured by any unique benefits that will accrue to the acquiring corporation, any more than the compensable value of property taken by eminent domain is measured by its special value to the condemnor." *Hogle*, 2002 UT 121 ¶ 17 quoting *Oakridge*, 937 P.2d at 134.

On the other hand, the Plaintiff's expert considered all three valuation techniques mentioned in *Hogle* and subsequently applied a percentage weight to each of the elements of value. Although there was never an established method in determining the percentage weight of each value, Plaintiff's expert did offer a reasonable and educated explanation for making the assumptions he did. Plaintiff's expert witness asserts that the fair value of Plaintiff's 36.37% in PAJ, as of December 31, 2006, equals \$459,000.00. Further, Plaintiff's expert also states that Plaintiff was entitled to 36.37% of the \$128,196.00 undistributed cash as of December 31, 2006, equaling \$46,625.00. Therefore, in total, Plaintiff's expert asserts Plaintiff is owed \$505,625.00.

The court also heard evidence that Scott Jackson bought into the firm on or about January 1, 2002. Scott Jackson bought his shares using a value calculation of the gross sales times 0.9, times the percentage of stock (i.e., $\$750,000 * .9 * 15.83\% = \$106,852.50$). See Ex. 83. Applying this formula to the Plaintiff's shares would result in his shares being worth \$517,763.17.¹ Defendants argued that this was an inaccurate measure for two reasons. First, PAJ is not the same firm it was in 2002. There had been substantial growth since that time; and it was argued that the growth was primarily attributable to Mr. Jackson's efforts to expand the firm. It was argued that given the gross sales of the firm at the applicable time, Mr. Jackson would have

¹ This figure resulted from using Defendant's expert's total revenue of Peterson Allred Jackson from 2006 of \$1,581,77.33. See Ex. 91 p. 3. It will be noted that Plaintiff's expert has a total revenue figure of approximately \$1,720,563. See Ex. 90 Schedule A.

never used that formula to determine value because it would have resulted in a value that did not coincide with a reasonable return on such an investment. Second, it was argued that the Parties did not know what they were doing, having had little experience in these matters and that the method used in 2002 resulted in an overvaluation of the firm.

The first argument has merit; the second argument is silly. That Mr. Jackson bought into a firm that has since grown and expanded is already an established fact. There was little testimony to contradict that much of the growth in the firm since Mr. Jackson joined the firm could be attributed to him. However, it could also be argued that without the opportunity to grow such an established firm as Peterson, Allred, Mr. Jackson's shares would not have much value.

To say that Certified Public Accountants with the experience and education of the parties in this case did not know what they were doing when evaluating the firm's worth contradicts their very purpose as CPA's. Of course these parties knew what they were doing. The fact that one or both or all later regretted the valuation method or terms of Mr. Jackson's purchase of shares in the firm does not mean that this valuation method does not have merit. The Court recognizes that Plaintiff's expert stated that Scott Jackson's buying into the firm did not provide *definitive* valuation guidance and therefore, the Court will not apply this value calculation as the sole means of determining the value of the Plaintiff's shares; however, the Court does view this transaction between Mr. Jackson and then Peterson, Allred as a guidepost in its decision.

Based on the foregoing, the Court finds that the fair value of Plaintiff's shares in PAJ is \$459,000.00. Plaintiff's expert's valuation used widely accepted principles of financial analysis and valuation. Further, the Plaintiff's expert's valuation has addressed the three most recognized valuation methods that the Supreme Court of Utah have relied on in dissenter shares valuation cases whereas Defendant's expert used only the asset based approach which has been determined as the least reliable in a non-asset driven company.

The Court points out that this determined value is less than what the value of PAJ would have been had the Court used the same formula that Mr. Jackson used to purchase his shares in PAJ. The Court was influenced heavily by this transaction; yet, in the end did not use it as the sole means to determine value because 1) Plaintiff's expert's opinion was that it did not provide

definitive valuation guidance and 2) Defendant's arguments that the firm is a different firm than it was in 2002 has merit. The Court did not have enough evidence to separate the increased value that Mr. Jackson brought to the firm and the Parties did not agree as to how that increased value would be treated, leaving the Court to only view PAJ's value in its entirety.

The Court heard evidence that at the end of every year most of the excess cash was distributed to the partners which would leave very little cash reserves in the following months. Plaintiff was fired in the fall and subsequently no cash was distributed. The Court finds for reasons stated hereinafter that the controlling partners in PAJ had the prerogative to manage the firm as they saw fit, to include increasing cash reserves. Plaintiff's expert reduced cash in the adjusted balance sheet approach so as to avoid double counting excess cash in its valuation report. See Ex. 90, p. 27. Unfortunately, the Court could not find nor determine what the Plaintiff's expert's subsequent value would be had the excess cash been included and the Court was not willing to speculate. Therefore, the court finds that the Defendants had the right to change business practices by keeping excess cash as reserves instead of distributing it and that Plaintiff was not entitled to any distribution thereof. Additionally, Defendants have maintained this cash reserve practice since Plaintiff was fired.

2. *Was the investment practice of Plaintiff his property or an asset of the corporation?*

Plaintiff operated an investment practice while employed by PAJ. The broker association, contracts and licensing were held by the Plaintiff personally. PAJ was not licensed to practice or advise or sell securities. Plaintiff received all income and reported such on a form 1099. Plaintiff paid PAJ rent in an amount equal to Plaintiff's commissions and receipts from this investment practice. This arrangement was done as consideration for the time and expenses incurred by Plaintiff in the operation of this investment practice.

When Plaintiff was fired, he no longer had an obligation to pay rent equal to his commission and receipts, primarily because PAJ was no longer providing any support for Plaintiff's investment practice. It is clear that the securities license belonged to the Plaintiff. This begs the question of which comes first, the investment practice or the licenses and which has the value? The Court views the securities license much like a college degree or certification from the state as a CPA. It runs with the person, not the entity. While the court would agree that the

investment practice was a part of PAJ, it was only under the conditions that all commissions and rent be passed through to the corporation in exchange for the support of the corporation. When Plaintiff was terminated, neither side had any obligation to the other regarding income, or support. Certainly, the Parties did not contemplate that Plaintiff would surrender his securities license and all that comes with it by being terminated against his will. As such, Plaintiff's investment practice belonged to him.

3. *Whether Plaintiff is entitled to prejudgment interest relating back to December 31, 2006, the judicially determined effective date for fair value; and if so, what is the amount of interest?*

Utah Code Annotated Section 16-10a-1434(5)(c) provides, “[i]nterest may be allowed at the rate and from the date determined by the court to be equitable.” Utah Code Ann. §16-10a-1434(5)(c). Plaintiff argues that the Utah legislature has given direction as to the rate of prejudgment interest in dissolving shareholder disputes under the Utah Business Code. Section 16-10a-1301(5) defines “interest” as “interest from the effective date of the corporate action until the date of payment, at the statutory rate set forth in Section 15-1-1, compounded annually.” Utah Code Ann. § 16-10a-1301(5).

Utah Code 15-1-1 states in pertinent part that “[u]nless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.” Utah Code Ann. § 15-1-1(2). Defendants on or about November 6, 2006 elected to purchase Plaintiff's shares of the corporation pursuant to Utah Code Section 16-10a-1434. The Defendants obligated themselves to pay the fair share of Plaintiff's shares at that time. Therefore, Plaintiff argues that the Court should order interest at the rate of 10% per annum.

Defendants argue that no or very little interest should be owing to Plaintiff because keeping his money in PAJ “is about the best place Peterson could have his money.” See Post Trial Mem., p. 7. This argument ignores the time honored principle that one should be able to chose what to do with their money. There are many things Plaintiff could have been doing with the value of his shares, all of which are his right as the owner of such assets. The Court also notes that Plaintiff was fired and thus during this time had to support himself through means

other than operating an accounting firm he started in 1984. In addition, Defendants have had use of said funds for over two years.

The Defendants have failed to make any payments to the Plaintiff for his value of the shares they elected to purchase on November 6, 2006.

Where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damages must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.

Canyon Country Store v. Bracey, 781 P.2d 414, 422 (Utah 1989).

Damages in this matter have previously been determined to be from December 31, 2006. Also, the valuation of Plaintiff's shares can be measured by facts and figures to a mathematical certainty. Therefore, it is equitable to award the Plaintiff prejudgment interest. The Court finds guidance in the Post Judgment Interest Rates set by the State of Utah. These rates are based on a variety of economic indicators and generally reflect a fair interest rate, absent an agreement otherwise. The Post Judgment Interest Rates for the years in which this amount is due are as follows: 2007 – 6.99%; 2008 – 5.42%; 2009 – 2.40%. The Court orders that these rates will apply for the applicable time period in which Plaintiff was entitled to judgment.

4. *Whether Defendants engaged in oppressive conduct or misapplication or wasting of assets as specified under Utah Code 16-10a-1430 (2), and if so, should the court under 16-10a-1434(5)(d) in its discretion award Plaintiff reasonable attorney fees and costs?*

Utah Code Annotated Section 16-10a-1434(5)(d) provides that “[i]f the court finds that the petitioning shareholder had probable grounds for relief under Subsection 16-10a-1430(2)(b) or (d), it may award to the petitioning shareholder reasonable fees and expenses of counsel and experts employed by the petitioning shareholder.” Subsections 16-10a-1430(2) establishes grounds for judicial dissolution of a corporation. Subsection 16-10a-1430(2)(b) provides grounds for dissolution if “the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.” Subsection 16-10a-1430(2)(d)

provides grounds for dissolution if “the corporate assets are misapplied or wasted.”

Plaintiff argues that the Defendants colluded against the Plaintiff in a self-serving effort to force the Plaintiff out of the corporation to benefit themselves at the Plaintiff's and the corporation's detriment. The Court finds that Plaintiff was denied corporate records and information, computer passwords were changed to prevent his access to corporate information, employees and clients were solicited and instructed to side with Defendants and the Plaintiff was evicted from his office.

Plaintiff also alleges misapplication and waste of corporate assets. Specifically, Defendant Scott Jackson has for some time failed to follow the corporate policy requiring each employee to maintain daily records of their work time and that all work in progress and billable time be promptly and fully recorded.

The Court noted at the end of the trial that absent a marriage certificate, this case amounted to a nasty divorce in which previously loyal and trusted partners were turned against each other. Employees were forced to pick between their jobs and loyalty to the remaining partners. Plaintiff was removed both physically and emotionally from the accounting firm that he helped start over 22 years ago. It is disappointing to the Court that educated, intelligent and otherwise reasonable men cannot resolve their differences except through the measures taken in this case.

Nevertheless, this case is not about a marriage; it is about a business. Partners and shareholders have the right to make decisions that they deem in the best interest of the company; however unpleasant they may be. It is clear to the Court that Mr. Jackson's buying into the firm changed the environment of PAJ. More emphasis was placed on growth and profit. This change in direction created conflict and unfortunately, that conflict resulted in the case before the Court. The fact remains that a majority of the shareholders were convinced that the new business practices of PAJ were what was needed to keep PAJ a viable and profitable company, including firing the founding partner. There was not enough evidence nor is this Court going to speculate regarding the viability or wisdom of the new direction PAJ was taking. The Court does find that while the Defendants' actions may have been insensitive, disloyal, exclusionary, or overly

aggressive, they were not oppressive.

Further, while the Court notes that Scott Jackson's admitted billing practices could be described as contrary to his espoused philosophy of sound fiscal management of the company, they do not rise to the level of a misapplication or a waste of corporate assets. Therefore, attorney fees and costs will not be awarded.

5. *What, if any, are Defendants' credits and off-sets against Plaintiff's claims?*

Defendants claim offsets of income received by Plaintiff from Utah State University at the end of 2006 before they had formally terminated Plaintiff's employment. Defendants also claim an offset of the \$24,522.25 of passive investment income which Plaintiff received after his termination.

Because the income received by Plaintiff from Utah State University took away income that PAJ might have otherwise received from Plaintiff and because this income was earned before he was terminated, these payments should be offset against Plaintiff's value of his shares as of December 31, 2006. This amount is \$4,829.94.

The contractual arrangement between Plaintiff and PAJ for the investment income was for Plaintiff to pay rent in the amount equal to Plaintiff's commissions and receipts from the investment income. Once Plaintiff was terminated, he was entitled to all future income that flowed from his qualifications as a licensed investment advisor. No offset of \$24,522.25 is allowed.

6. *Are Defendants' entitled to any damages under their counterclaim?*

Defendants argue that Plaintiff violated his covenant not to compete under his Employment Agreement with PAJ. The Court finds that Plaintiff did not violate his Employment Agreement with PAJ and as such, Defendants are not entitled to any damages on their counterclaim.

CONCLUSION

(1) The Court determines the fair value of Plaintiff's shares in PAJ to be \$459,000.00. PAJ had the business prerogative to increase the cash reserves; therefore, Plaintiff is not entitled to any distribution thereof.

(2) The investment practice of Plaintiff belonged to Plaintiff.

(3) Plaintiff is entitled to prejudgment interest relating back to December 31, 2006. The equitable interest shall be 6.99% per annum for the year 2007, 5.42% per annum for the year 2008, and 2.40% for the year 2009.

(4) Defendants did not engage in oppressive conduct or misapplication or wasting of assets. Therefore, attorney fees and costs will not be awarded.

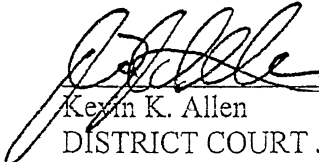
(5) Plaintiff's judgment will be offset by Plaintiff's Utah State University income of \$4,929.94. No offset is allowed for Plaintiff's passive investment income.

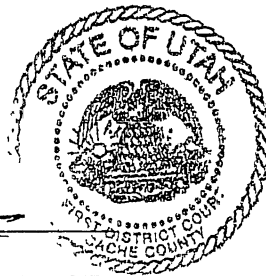
(6) Defendants are not entitled to any damages on their counterclaim.

Counsel for the Plaintiff is directed to prepare a judgment in conformance with this Decision.

Dated this 17 day April, 2008

BY THE COURT:


Kevin K. Allen
DISTRICT COURT JUDGE

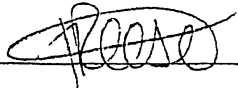


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060102504 by the method and on the date specified.

BY HAND: MARK B HANCEY
BY HAND: JAMES C JENKINS

Date: 4-17-09



Deputy Court Clerk

Tab E

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Attorneys for Defendants/Counterclaim Plaintiffs

**IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH**

JACK W. PETERSON,

Plaintiff and Counterclaim Defendant,

v.

**D. SCOTT JACKSON, individually; ALAN
D. ALLRED, individually; and on behalf of
PETERSON ALLRED JACKSON, P.C., a
Utah Professional Corporation,**

Defendants and Counterclaim Plaintiffs

NOTICE OF APPEAL

**Case No. 06-0102504
Judge: Kevin Allen**

Notice is hereby given that Defendants and Counterclaim Plaintiffs and Appellants, D. SCOTT JACKSON, ALLAN D. ALLRED, and PETERSON ALLRED JACKSON, P.C., through their counsel, Gary N. Anderson and Brian G. Cannell of Hillyard, Anderson & Olsen, P.C., appeal to the Utah Supreme Court the final Judgment of the Honorable Judge Kevin Allen entered into in this matter on May 6, 2009, as modified by his Memorandum Decision entered into on July 20, 2009. The appeal is taken from the entire judgment.

925 7/21/09

DATED this 21st day of July, 2009.

HILLYARD, ANDERSON & OLSEN, P.C.



GARY N. ANDERSON

BRIAN G. CANNELL

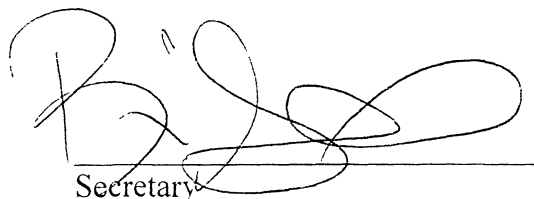
Attorneys for Defendants/Counterclaim Plaintiffs (Appellants)

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of Hillyard, Anderson & Olsen, P.C., 595 South Riverwoods Pkwy, Suite 100, Logan, Utah 84321, and that pursuant to Rule 5(b) of the Utah Rules of Civil Procedure, a true and correct copy of the foregoing **NOTICE OF APPEAL** was delivered to the following by HAND-DELIVERY, this 21st day of July, 2009:

James C. Jenkins
OLSON & HOGGAN, P.C.
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Tab F

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**IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH**

JACK W. PETERSON

**Plaintiff and
Counterclaim Defendant**

v.

**D. SCOTT JACKSON, individually; ALAN D.
ALLRED, individually; and on behalf of
PETERSON ALLRED JACKSON, P.C., a
Utah Professional Corporation,**

**Defendants and
Counterclaim Plaintiffs**

**REPLY MEMORANDUM IN
SUPPORT OF
MOTIONS FOR AMENDMENT OF
JUDGMENT, RELIEF FROM
JUDGMENT AND AMENDMENT OF
FINDINGS
and
MOTION TO STAY**

**Case No. 06-0102504
Judge: Kevin Allen**

COMES NOW, Defendants and Counterclaim Plaintiffs, D. Scott Jackson, Alan D. Allred, and Peterson Allred Jackson, P.C. (hereinafter collectively "PAJ"), by and through counsel, Mark Hancey, Hancey Law Offices, and hereby files this REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT AND AMENDMENT OF FINDINGS and MOTION TO STAY as follows.

I. INTRODUCTION

The Court's May 6, 2007 Judgment (hereinafter "Judgment") incorporated the Courts Findings as stated in its April 17, 2009 Decision (hereinafter "Decision") pursuant to Rule 52(a) URCP.

(a) Findings Pertaining to the Value of Scott Jackson's 2001 Buy-In and the Fair Value of Peterson's Shares

PAJ seeks first to amend the Court's findings pertaining to the Court's calculated value of D. Scott Jackson's (hereinafter "Jackson") 2001 buy-in and the subsequent findings that flow therefrom—most significantly the fair value of Jack W. Peterson's (hereinafter "Peterson") shares.

Justification for these amendments are founded on three independent grounds: Rule 60(a)(6) URCP, Rule 60(b) URCP and Rule 59(a)(6) URCP. Under these provisions, the Court's calculation is mathematically incorrect, thereby constituting a *clerical mistake* arising from oversight or omission, correctable under Rule 60(a) URCP; the miscalculation constitutes a *mistake, inadvertence or excusable neglect* under Rule 60(b)(1) URCP and Rule 60(b)(6) URCP; and/or there is *insufficient evidence* to justify the Court's calculated value of Jackson's 2001 buy-in under Rule 59(a)(6) URCP.

PAJ submits that once the 2001 Jackson buy-in is correctly calculated, the Court must, by necessity, amend its determination of the fair value of Jack W. Peterson's ("Peterson") shares, given the Court has acknowledged it was "influenced heavily" by Jackson's 2001 buy-in and considered it a "guidepost" in its Decision.

(b) Necessity of Additional Findings

PAJ further seeks 7 additional findings under Rule 52(b) URCP. Absent these findings, PAJ submits the Decision is not "sufficiently detailed [to] include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *See. Andrus v. Andrus*, 196 P.3d 754 (Ut. Ct. App. 2009) at 759.

(c) Motion to Stay

PAJ has also moved to stay the Judgment pending a resolution of these issues. The stay has already been addressed (at least in part) in the Order dated June 1, 2009. This Order was issued after Peterson's counsel

obtained ex parte Writs of Execution and Garnishment and served the Writs on Lewiston State Bank and Zion's Bank. In spite of the Court's ruling, Peterson's counsel continued to serve said Writs upon clients of Peterson Allred Jackson, P.C. (hereinafter "PAJPC"), namely Morrell & Associates, LLC, and Academy Mortgage Corporation.

PAJ contends that the payment of \$249,611.46 to Peterson together with the additional sureties as addressed by the Court are sufficient to entitle PAJ to a stay under Rule 52(b) URCP.

II. PETERSON'S PROCEDURAL ATTACKS

Before addressing the three issues, PAJ will respond to the procedural attacks raised by Peterson. It is interesting that Peterson has taken procedural attacks rather than confront the issues substantively.

(a) Not a Motion to Reconsider

Plaintiff has suggested that the Defendants' Motions are simply a Motion to Reconsider and should be rejected without addressing the substantive issues raised therein. In doing so, Plaintiff cites *Gillett v. Price*, 135 P.3d 861 (Utah 2006). However, the reliance upon *Gillett* is misguided. In *Gillett* the moving party had in fact filed a motion they titled a "motion to reconsider." Only thereafter did the moving party attempt to re-characterize its motion as a Rule 59 URCP motion. In *Gillett* the Court held that "the form of a motion does matter because it directs the court and litigants to the specific and available relief sought...Hereafter, when a party seeks relief from judgment, it must turn to the rules to determine whether relief exists, and if so, direct the court to the specific relief available." *Id.* at 863, emphasis added. This is exactly what PAJ has done by citing specifically Rules 59(a), 60(a), 60(b)(1), 60(b)(6) and 52(b) URCP.

PAJ has specifically phrased and presented their Motions as motions seeking amendment of judgment, relief from judgment and amendment of findings under Rules 59(a), 60(a), 60(b)(1), 60(b)(6) and 52(b) URCP and as such should be entitled to the relief as provided thereby.

With regards to Plaintiff's reliance on *L.A. Young Sons Construction Company v. County of Tooele*, 575 P.2d 1034 (Utah 1978), the case was decided in 1978, which predates the effective date of Rule 52. With the institution of Rule 52, there is clearly a procedural option for a party to obtain relief from a judgment.

This Court relied heavily upon Exhibit 83 in calculating the value of the Jackson buy-in. However, the Court was silent on Dr. Bowles' report on this very issue. Dr. Bowles' report contains the only testimony on the present value of the Notes, which properly calculated present value of Jackson's buy-in and the fair value of Peterson's shares based on this historical transaction. Dr. Bowles' report on these points was undisputed. For the Court to rule contrary to that sole testimony constitutes an error of calculation and a ruling not supported by sufficient evidence.

(b) Affidavits Are Unnecessary

Peterson has also contended that PAJ's Motions did not include an Affidavit or reference to the transcript. In regards to the claim of the necessity of an affidavit, it would appear that Peterson's counsel has incorrectly read Rule 59(c) URCP, which requires affidavits only when a party is seeking relief under 59(a)(1), (2), (3), and (4) URCP. The relief sought herein is under Rule 59(a)(6) and (7) URCP. Unlike an appellate ruling, the need to reference specific transcripts is not called-for in the motions, likely because of the unavailability of the transcripts within the short timeframe required to file. Nonetheless, contained within this Reply Memorandum, PAJ has cited both transcript and other admitted exhibits.

Peterson's counsel also stated that PAJ's Motions do not comply with Rule 61 URCP. However, PAJ has not sought relief under Rule 61 URCP, and therefore the contention is irrelevant.

III. AMENDMENT OF FINDINGS

(a) Jackson Buy-In Value and Its Effect on Fair Value of Peterson's Shares

PAJ has already set forth the substance of its argument in its May 15, 2009 Memorandum. PAJ has outlined the two miscalculations of the Jackson buy-in, namely: (1) the failure to account for the present value adjustment given the non-interest-bearing notes; and (2) the failure to value the entire transaction—namely Jackson's acquisition of a 1/3 interest in PAJPC, not the 17.5% interest the court used in its calculation.

1. Evidence of Present Value

In addition to the citations referenced in PAJ's May 15, 2009 Memorandum, PAJ refers the Court to page 4 of the Business Valuation of Tyler J. Bowles (hereinafter "Bowles Report"), wherein Dr. Bowles specifically calculated the present value of the notes. Dr. Bowles stated as follows:

On September 21, 2001, D. Scott Jackson purchased a one-third interest in PAJ[PC] to be effective January 1, 2002 by executing three promissory notes to the following individuals: Mr. Peterson, Mr. Allred, and to his parents.⁸ Based on the principal payments specified in these notes, a present value date of January 1, 2002, and a discount (interest) rate of 8.0 percent, the present values of these three notes were \$41,743, \$41,743, and \$43,026, respectively, for a total purchase price of \$126,512. Per PAJ[PC]'s 2001 corporate tax return, gross receipts for 2001 were \$752,562, which includes \$31,942 from investment advisory services included on schedule K. Therefore, Mr. Jackson paid approximately 17.0 percent of revenue for his one-third interest. (emphasis added)

⁸ The notes to Mr. Allred and Mr. Peterson were later modified as part of negotiations concerning the compensation of officers. Present value calculations are based on the original notes.

The Court correctly stated the principal amount of the notes executed by Jackson to Peterson and Alan D. Allred (hereinafter "Allred").¹ See. Decision, Page 6. However, the court did not make any present value

¹ Trial Exhibit 18 did not contain the original notes, but merely amended notes. The notation on Jackson's Note to Allred as part of Trial Exhibit 18 acknowledges these amendments. Bowles referenced these amendments in footnote 8 of page 4 of the Bowles Report when he stated, as above: "The notes to Mr. Allred and Mr. Peterson were later modified as part of negotiations concerning the compensation of officers. Present value calculations are based on the original notes." The
(continued)

adjustment for the fact that these notes were non-interest-bearing . The Court should rely on the only expert to value both the 2001 Jackson buy-in and the fair value of Peterson's shares based upon that historical transaction.

By correctly accounting for present value, the combined total of the three notes executed by Jackson is reduced from \$206,850 to \$126,063.

Furthermore, Scott Jackson discussed these notes during trial and their relation to cash flow and fair value as follows:

At that time, I don't think any one of us had any experience in what we were doing and certainly not me at that point in time. But, nevertheless, we were dealing with two small firms, we were bringing them together, we felt the most equitable way to bring them together was just to simply say okay let's look at what this revenue firm is what this revenue firm is. There were a few other adjustments and we brought them together. I still at that time looked and said okay, well let's look and see what I can cash flow and that'll make sense to me. So the notes and all of that, they bear no interest for seven years. The reason they bear no interest, or one of the reasons that they bear no interest is because again, you can only cash flow so much. You can't pay more for something than what it can cash flow you, after having a reasonable wage. So I signed a note with my parents. As Jack says it, he was protecting them—I appreciate that effort. I signed a note with Jack and Alan. All of those notes contained no interest for a long period of time, I think seven years, and then Jack and Alan's kicked in I think a nominal interest. And, I don't remember what my parents' note says to be honest with you. (*See*. Trial Transcript, February 20, 2009 at 10:24.31 AM)

Making a present value adjustment for these payment terms is an essential component in properly calculating Jackson's buy-in value and purchase price for his percentage in PAJPC. The Court need look no further than the award of interest to Peterson in the present case to see the value of interest in a purchase. The concepts of time value of money and present value calculations are such elementary and fundamental concepts of finance that one can only conclude that this oversight was an inadvertent error by the Court, as well as a Decision that is not supported by the evidence.

Second Affidavit of Alan D. Allred dated July 1, 2009 discusses in more detail the amendments to the initial promissory notes to Peterson and Allred. *See* Second Affidavit of Alan D. Allred filed contemporaneously herewith.

The Court has stated that the value of Jackson's 2001 buy-in was "... a guidepost in its decision." *See* Decision, Page 7. The Court further noted on page seven that it was "...*influenced heavily* by this transaction" (emphasis added). Given the reliance on this number, it is reasonable to expect that this number should be accurately calculated at its 2001 present value.

2. Evidence that transaction was for a 1/3 interest

The Court's Decision calculated Jackson's 2001 buy-in value as 15.83% of the company's gross sales of \$750,000 times 0.9 to arrive at Jackson's purchase price of \$106,852. The Court used this premise in calculating Peterson's current share value at \$517,763. *See* Decision, Page 6. However, both Exhibit 83 and the testimony of Jack Peterson confirm that the \$750,000 was used as the combined revenue of both Peterson Allred, P C., (hereinafter "PA") and Jackson, Downs, & Associates Financial Services, LLC (hereinafter "JDA"). Jackson purchased 33% of the two combined firms, not 15.83%.

The following Table compares the difference in the price per percentage of ownership in the company based on the Court's calculation of 15.83% interest and the actual calculation of 33.33% ownership interest in the combined companies. *See* Table 1 Below.

TABLE 1 – Value per 1% Membership Interest

	TOTAL GROSS SALES	BUY-IN PERCENT	NOTES USED IN CALCULATING \$	BUY-IN AMOUNT	\$ VALUE PER 1% INTEREST	RESULTING GROSS SALES MULTIPLE
COURT CALCULATION	\$750,000	15.83%	Peterson (\$53,425), Allred (\$53,425)	\$106,850.50	\$6,749.87	0.90
CORRECTED	\$750,000	33.33%	Peterson (\$53,425), Allred (\$53,425), D & K Jackson (\$100,00)	\$206,850.00	\$6,206.12	0.83

Mr. Peterson's own testimony confirms the \$750,000 was the combined revenues of both JDA and PA.

At Trial, Peterson stated as follows

Mr. Jenkins: Alright, so tell me what was the agreement that resulted in the January 1, 2002 coming-together.

Mr. Peterson: What we decided was that were going to combine the firms effective January 1, 2002....And so the value that we assigned was \$587,000 [for PA], and I'll just round those. The

value that came in from the Jackson Downs clients was \$123,000, making a total of \$711,000. This represented the twelve month period ending 10-31-00. Scott was going to come in on January 1, 2002. We agreed at that time that the sales at that point would approximate \$750,000. (See. Trial Transcript, February 20, 2009 at 9:10 AM)

3. Combined effect of correcting both calculations

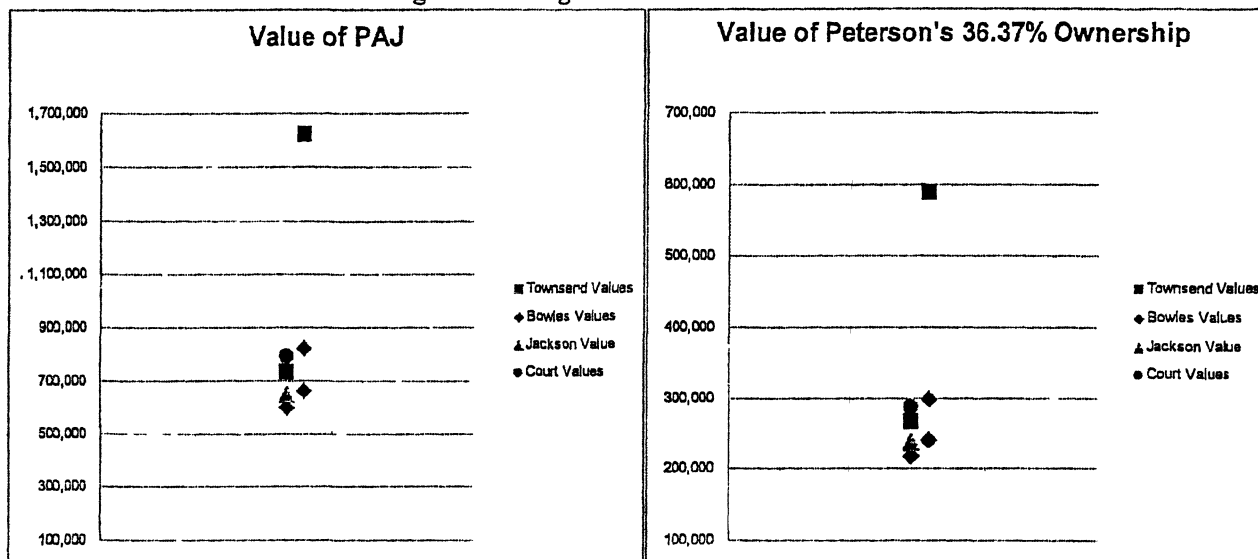
The Court has the opportunity to correct both of these errors: first by properly reviewing the purchase price of 1/3 interest through the sum of the three notes executed, and second, by using the proper present value adjustment to those notes. Once the Court has done so, the correct value of Peterson's shares based upon the Jackson buy-in is not \$517,763, as the Court suggests, but rather \$287,646.21. See. May 15, 2009 Memorandum, Page 5.

By necessity, this correction would result in the Court adjusting the fair value of Peterson's shares to coincide with this guidepost. Tables 2 and 3 below (originally included as Schedule 2 in the May 15, 2009 Memorandum) show that the correctly calculated 2001 buy-in correlates well with the income approaches of both experts and the 2001 historical transaction. As such, PAJ requests the Court make the proper adjustments to the 2001 buy-in and adjust the fair value of Peterson's shares accordingly and consistent with the values shown in Tables 2 and Table 3 below.

TABLE 2 – Income/Market Approach Comparisons Among Experts

Valuation Approach	Valuation Method	Expert	Derived Value of PAJPC before Personal Goodwill Allocation	Value of Peterson's 36.37% Ownership before Personal Goodwill Allocation	Reference
Income	Capitalization of Earnings	Bowles	\$600,000	\$218,220	Bowles Report, Exhibit 8 (p21)
Income	Average of Value Range	Jackson	\$650,000	\$236,405	Jackson's court testimony
Blend (Income/Asset)	Excess Earnings	Bowles	\$660,942	\$240,385	Bowles Report, Exhibit 8 (p21)
Income	Average of Income Methods	Townsend	\$734,388	\$267,097	Townsend Report, Schedule A
Market	Historical Transaction	Court	\$790,889	\$287,646	Court's Decision dated 4/17/2009
Market	Historical Transaction	Bowles	\$819,120	\$297,914	Bowles Report, Exhibit 8 (p2.)
Market	Average of Market Methods	Townsend	\$1,618,547	\$588,665	Townsend Report, Schedule A

TABLE 3 – Scatter Plot Showing Value Ranges²



(b) Mathematical Errors Constitute an Error Under Rule 60 URCP

The Supreme Court of Utah addressed specifically whether a mathematical error constitutes an error correctable under Rule 60(a) URCP in *Stanger v. Sentinel Security Life Insurance*, 669 P.2d 1201 (Utah 1983). *Stanger* is especially important because the mathematical error carried forward by the court was the result of an incorrect calculation within a particular exhibit (similar to the fact that Exhibit 83 did not address the non-interest-bearing notes). In its remand to seek the correction of the calculation, the Supreme Court noted the following (*See. Id.* at 1206):

Under Rule 60(a) of the Utah Rules of Civil Procedure, the trial court may correct clerical mistakes in judgments at any time... In explanation of the intent of the identical Federal Rule of Civil Procedure, the comment has been made that "in this broad approach to correctibility under Rule 60(a), it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended." Annot., 13 A.L.R. Fed. 794 (1972). The definition of "clerical mistake" thus extends to include the one here discovered. "It is a type of mistake or omission mechanical in

² The values shown in Table 3 are before personal goodwill allocation.

nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.” *In Re Merry Queen Transfer Corp.*, 266 F.Supp. 605, 607 (1967).

In *Nielsen v. Nielsen*, 2000 WL 33249399 (Ut. Ct. App. 2000), the Court of Appeals also remanded, not only because of mathematical errors, but because the methodology employed by the court was flawed, concluding “the methodology it [the trial court] employed in arriving at the \$76,137.99 total judgment was flawed...”

(c) Additional Case Law Regarding Correction of Mathematical Errors

Utah courts have also addressed the question of mathematical errors outside the Rule 60 URCP context. In *Andrus v. Andrus*, 196 P.3d 754 (Ut. Ct. App. 2009), a divorce matter, the husband appealed the lower court’s ruling based upon a miscalculation of alimony. The husband contended that the court based the calculation on his gross monthly income instead of his net monthly income. *See. Id.* at 759. The Court of Appeals remanded the case for additional findings to ensure that the court’s decision would be “sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *Id.* at 759. In the case, the Court of Appeals also found the following:

Here, the trial court arrived at its alimony award by awarding Wife half of Husband's monthly disposable income. The trial court determined Husband's disposable income by subtracting certain expenses, including housing, food, transportation, and child support, from Husband's stipulated gross monthly income. The findings of fact are silent on the issue of Husband's tax obligations and monthly net income. Even though there is some evidence in the record concerning the amount of taxes Husband pays, including testimony by Wife and documentary evidence provided by Husband, we cannot ascertain how or if the trial court contemplated Husband's duty to pay taxes in calculating his disposable income. The trial court's findings of fact are not sufficiently detailed to show the steps it took determining Husband's disposable income. We therefore reverse and remand for adequate findings that will show proper consideration of Husband's net income. (*Id.* at 759)

The present case is similar in that PAJ contends that the Court failed to calculate the present value of the note.

The Supreme Court of Wyoming also addressed this question in *Wallop v. Wallop*, 88 P.3d 1022 (Wyoming 2004). In *Wallop*, the husband appealed that the district court made a mathematical error when it awarded the wife with 29% of a lifetime annuity. *See. Id.* at 1034. The husband contended that the court incorrectly calculated the number of months in determining the percentage allocation. The Supreme Court agreed and ordered the award be modified to reflect the proper percentages and amounts. *See. Id.* at 1034-1035.

IV. ADDITIONAL FINDINGS REQUESTED

(a) Introduction

PAJ further requests the Court make seven additional findings of fact and law that were not addressed in the Court's Decision, but are necessary in calculating fair value of Peterson's shares.

The Utah Supreme Court in *438 Main Street v. Easy Heat, Inc.*, 99 P.3d 801 (Utah 2004), has stated that "[I]n order to preserve an issue for appeal [,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Id.* at 813 (Citing *Brookside Mobile Home Park, Ltd. v Peebles*, 48 P.3d 968). The seven additional requested findings of fact below are simply absent from the Court's Decision, but they have a significant impact upon determining fair value of the case. Because the findings are absent from the Court's Decision, any appellate court would not be able to determine the District Court's opinion on these issues. As such, through its Motions, PAJ has given the District Court "notice of the asserted error [to] allow for correction at that time in the course of the proceeding." *Id.* at 813. In doing so, PAJ has also reserved for appeal those issues.

(b) Case Law Regarding Rule 52 URCP and Incomplete Findings

The courts are replete and consistent in their findings that "It is the duty of the trial court to make findings on all material issues raised by the pleadings, and failure to do so is regarded as reversible error." *Piper v. Hatch*, 43 P.2d 700 (Utah 1935). (*See also. Cook v. Cook*, 174 P.2d 434 (Utah 1946)).

As far back as 1928, the Supreme Court of Utah held in *Prows v. Hawley*, 271 P. 31 (Utah 1928), that “it is the undoubted rule, that until the court has found on all the material issues raised by the pleadings, the findings are insufficient to support a judgment; and that findings should be sufficiently distinct and certain as not to require an investigation or review to determine what issues are decided.” *Id.* at 33.

Simply put, there are several issues the Court’s Decision failed to address. In its Motion, PAJ has presented the issues to the Court in such a way that the Court has an opportunity to rule on each issue and has put the Trial Judge on notice of the asserted error and allow for the correction of that error. This process is not only proper under Rule 52 URCP, it is required given the holding in *438 Main Street v. Easy Heat, Inc.*, 99 P.3d 801 (Utah 2004).

(c) **The 7 Additional Findings Requested by PAJ**

The 7 requested findings are as follows:

- 1. Additional Finding Requested #1 - The Court failed to address the issue of whether, as a matter of law, an adjustment to fair value should be made when taking into account enterprise versus personal goodwill. This issue was well briefed beginning on Page 17 of the Bowles Report, and the court heard significant testimony on this issue at trial.**

The Court’s Decision does not address in any respect the issue of enterprise versus professional goodwill. This is a question of law.

Utah courts have already held in divorce cases that professional goodwill must be excluded when determining fair value. Dr. Bowles’ report, beginning on page 18, discusses this issue. In citing *Sorensen v. Sorensen*, 839 P.2d 774 (Utah 1992) at 775, Dr. Bowles states, “‘It would not be equitable to require him [the dentist husband] to pay his wife part of the value ascribed to the goodwill [of the practice], because the goodwill of a sole practitioner is nothing more than his or her reputation for competency...’

In the present case, it is inequitable from an economic perspective and improper as a matter of law to require Alan Allred and Scott Jackson to purchase goodwill “that is due to their personal reputations, which they already own and are nontransferable.” *See*. Bowles Report; Page 19.

The Court of Appeals further addressed the issue of goodwill in *Stonehocker v. Stonehocker*, 176 P.3d 476 (Ut. Ct. App. 2008). *Stonehocker* was, again, a divorce case where the fair value of the husband’s business was to be determined. Therein, the Court of Appeals agreed with the trial court that the “value should be determined independent of any goodwill component. ‘There can be no good will in a business that is dependent for its existence upon the individual who conducts the enterprise and would vanish were the individual to die, retire or quit work.’” *Id.* at 490 (citing *Stevens v. Stevens*, 754 P.2d 95 (Ut. Ct. App. 1988) at 956).

Both *Stonehocker* and *Sorensen* cite several other cases that carve out a professional’s goodwill in a business valuation when determining fair value of that business. In *Stonehocker*, the court made a note in footnote 19 that excluding goodwill is even more important when evaluating a professional practice. *See. Stonehocker* at 490.

Dr. Bowles’ makes an adjustment of enterprise versus personal goodwill in each of his market, investment and income approaches. *See*. Bowles Report, Exhibit 8, Page 21. Dr. Bowles also testified extensively on this allocation of professional and personal goodwill.

Mr. Townsend acknowledges in his Rule 26 Report of R. Brad Townsend (hereinafter “Townsend Report”) that he has included goodwill in his company valuations. *See*. Townsend Report, Page 19. However, Mr. Townsend refused to adjust for any goodwill, which PAJ asserts is an error as a matter of law. The Court’s Decision fails to make any legal findings on this issue of law.

In short, PAJ contends that as a matter of law, professional goodwill must be excluded from the fair value calculation.

As a matter of law, professional goodwill must be stripped out of this valuation. The Court's ruling is silent on this issue.

2. Additional Finding Requested #2 - Once the legal conclusion regarding goodwill is resolved, the Court then must make a finding as to the proper adjustment to fair value.

Much of the analysis for this additional finding is discussed above. Simply put, PAJ contends that as a matter of law the Court's adjustment should be consistent with the only expert to testify on this matter, Dr. Bowles.³

3. Additional Finding Requested #3 - The Court failed to make a finding regarding reasonable compensation for the shareholders and how such compensation affects PAJPC's fair value.

The experts testified to three different reasonable compensation numbers. Mr. Bowles asserted that reasonable compensation for the shareholders is \$110,000.⁴ Mr. Townsend, on the other hand, provided two separate numbers, \$88,000 and \$124,000.⁵ Both experts acknowledged that reasonable compensation is a necessary element in determining valuation. Additionally, Dr. Bowles analyzed the value of reasonable compensation and its relation to cash flow as follows:

The cash paid to owners is the starting point for calculating the cash flow amount to be capitalized. But this amount does not represent the benefit of *ownership* as each owner worked full-time for PAJ[PC] during this period. A reasonable return to the labor of these owners must be deducted from the cash paid to the owners in order to arrive at a measure of the benefit of ownership...I want to emphasize that \$300,000 is a conservative estimate of the cost of retaining the services of the three owners. An estimate of \$350,000 is well within reason. This latter amount is higher than cash actually paid to the owners in every year of the past 10 with the exception of 2005. This is the same obvious point as made earlier: The owners of PAJ[PC] own a good job, but after accounting for that fact, there is little economic benefit associated with ownership of the stock of PAJ[PC]. (See. Bowles Report, Pages 7-8)

³ See. Bowles Report, Page 19-20.

⁴ See. Bowles Report, Page 8.

⁵ See. Townsend Report, Schedule E, Note A (2006 Adjusted Compensation to Officers of \$266,888 / 3), and Townsend Report, Schedule N (Officer's compensation equals 23.5% of sales—23.5%*1,583,495 respectively)

The consequences of determining reasonable compensation to shareholders are evident in Trial Exhibit 94.2. Officer compensation would be only \$64,084 (well below any of the experts' stated reasonable compensation numbers) at the Court's stated fair value of \$459,000.00 for Peterson's 36.67% interest, equating to \$1,262,029 for PAJPC.

4. Additional Finding Requested #4 - The Court failed to make any findings justifying the applicability of Townsend's market analysis, including a finding as to whether Townsend's market data is comparable to PAJPC given the vast discrepancy between Townsend's market and income approaches.

Before the Court can begin the weighting of any market approach, it must first determine if the proposed market approaches are comparable.⁶ The *Hogle* Court determined that the experts' values should be "substantially disregarded as unreliable" precisely because the comparables offered were not comparable. *Id.* at 88.

This Court noted "there was never an established method in determining the percentage weight of each value..." *See*. Decision, Page 6. However, PAJ submits that prior to even addressing the issue of weighting, the Court must make a finding as to whether or not the market analysis by Townsend is comparable and why. Absent such a finding, an appellate court could not determine the basis the trial court used in accepting Townsend's market approach as comparable.

5. Additional Finding Requested #5 - The Court failed to make a finding adjusting Townsend's admitted miscalculation of "Price/Sellers Discretionary Earnings." *See*. Townsend Report Schedule A. Townsend admitted to using EBIDA plus all owners compensation, rather than the accurate definition of Sellers discretionary earnings which is EBIDA plus one owners compensation. Townsend also acknowledged on the stand that the value should have been \$1,084,000 rather than \$1,522,469.

During Townsend's cross examination, beginning at 4:20 PM on February 18, 2009, Townsend read and acknowledged the correct definition of Seller's Discretionary Earnings, as stated in Trial Exhibit 94.7—namely,

⁶ *See. Hogle v Zinetics Med., Inc.*, 63 P.3d 80 (Utah 2002) at 88.

sellers discretionary earnings “is equal to earnings before interest, taxes, depreciation, and amortization (EBITDA) plus *all* compensation, benefits, and perks to one owner/operator.” (emphasis added) Townsend then acknowledged that when calculating discretionary earnings to establish the value of \$1,522,469 in Schedule A of his report, he used compensation for all owners. Townsend acknowledged at 4:21.31 PM that valuation of the company based upon sellers discretionary earnings given the acknowledged definition contained in Exhibit 94.7 is \$1,081,431 rather than \$1,522,469.

6. Additional Finding Requested #6 - The Court failed to make any findings as to how this adjustment would impact Townsend’s weighting of values.

The consequences of the correction to sellers discretionary earnings are two-fold: first, it adjusts Townsend’s market value; and second, it establishes the vast disparity between the various market approaches, which Townsend did not account for in his weighting (another reason for the Court to rely upon the experts’ income approaches and to ignore Townsend’s market approaches entirely.)

7. Additional Finding Requested #7 - The Court failed to make a finding as to how the exclusion of the investment practice affects PAJPC’s fair value since both experts included investment practice in their valuations of PAJPC.

Mr. Peterson and Mr. Jackson both testified that all income and expenses associated with the investment practice were contained within the company’s financials. Both experts used those company financials in their valuations, yet the Court made no adjustment in fair value of PAJPC exclusive of the investment practice after ruling to exclude the investment practice.

V. MOTION TO STAY

This issue has already been somewhat resolved by the Court during the May 29, 2009 Hearing, which resulted in the Order dated June 1, 2009. The issue was further briefed by PAJ in its Objection to Immediate

Request for Hearing and Reconsideration dated June 22, 2009. PAJ incorporates that language herein, and to summarize, point out the issue of payment within ten days as follows.

Plaintiff properly points out that Judgments are enforceable ten days after entry pursuant to Rule 62(a) URCP. Since this is so, the Court needs to look closer as to why the Parties referenced the ten days in the Pretrial Order. The January 12, 2009 Hearing answers this question. Prior to the January 12, 2009 Hearing, PAJ had sought the right to seek payment in installments as authorized under §16-10a-1434(5)(a) UCA. However, in an effort to avoid the need to disclose updated financials to Mr. Peterson and to his expert, and to avoid the necessity of bifurcating a trial, PAJ waived the right to seek payment in installments.⁷

PAJ respectfully requests the Court continue the stay in consideration of the payment of \$249,611.46, together with the line of credit PAJ maintains with Lewiston State Bank for \$250,000, to be sufficient sureties.

The disruption and complications evidenced by the Writs sought by the Plaintiff demonstrate the need for a stay pending the resolution of these issues. The payment of almost \$250,000 to Peterson in the interim, while not required under stay proceedings, is a significant relief to Peterson, relief that is not often called for to obtain a stay.

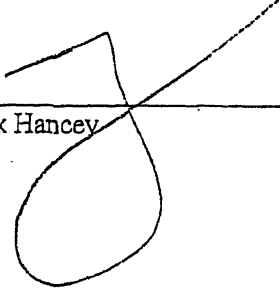
VI. CONCLUSION

Defendants respectfully submit their MOTIONS FOR AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT AND AMENDMENT OF FINDINGS and MOTION TO STAY and respectfully request the Court take this opportunity to correct the mathematical errors indicated herein and to make the suggested additional findings necessary to clarify the Court's Decision and provide a basis to ascertain the Court's methodology in reaching its conclusions on the value of the PAJPC shares. As the Court continues in this corrective process,

⁷ See. January 12, 2009 Hearing Transcript starting at 3:31.35 PM.

Defendants respectfully urge the Court to enter its stay of the judgment so that Defendants are not further penalized by Plaintiff's aggressive collection tactics.

DATED this 1 day of July, 2009.



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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

JACK W. PETERSON
Plaintiff and
Counterclaim Defendant

v.

D. SCOTT JACKSON, individually; ALAN D.
ALLRED, individually; and on behalf of
PETERSON ALLRED JACKSON, P.C., a
Utah Professional Corporation,

Defendants and
Counterclaim Plaintiffs

MOTIONS FOR
AMENDMENT OF JUDGMENT,
RELIEF FROM JUDGMENT AND
AMENDMENT OF FINDINGS
and
MOTION TO STAY

REQUEST FOR HEARING

Case No. 06-0102504
Judge: Kevin Allen

COMES NOW, Defendants and Counterclaim Plaintiffs, D. Scott Jackson, Alan D. Allred, and Peterson Allred Jackson, P.C. (hereinafter collectively "PAJ Defendants"), by and through counsel, Mark Hancey, Hancey Law Offices, and hereby files a MOTION FOR AMENDMENT OF JUDGMENT under Rule 59(a) URCP, MOTION FOR RELIEF FROM JUDGMENT under Rules 60(a), 60(b)(1), 60(b)(6) URCP, MOTION TO AMEND FINDINGS OR MAKE ADDITIONAL FINDINGS under Rule 52(b) URCP, and MOTION TO STAY pursuant to Rule 62(b) URCP. PAJ Defendants further file and REQUEST FOR HEARING on said Motions.

These Motions are supported by the attached Memorandum of Points and Authorities in Support thereof.

Dated this 15 day of May, 2009.



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Attorney for Defendants, Counterclaim Plaintiffs

**IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH**

JACK W. PETERSON	)	MEMORANDUM IN SUPPORT OF
	)	MOTIONS FOR AMENDMENT OF
Plaintiff and	)	JUDGMENT, RELIEF FROM
Counterclaim Defendant	)	JUDGMENT AND AMENDMENT OF
v.	)	FINDINGS
	)	and
D. SCOTT JACKSON, individually; ALAN D.	)	MOTION TO STAY
ALLRED, individually; and on behalf of)	
PETERSON ALLRED JACKSON, P.C., a	)	REQUEST FOR HEARING
Utah Professional Corporation,)	
Defendants and	)	Case No. 06-0102504
Counterclaim Plaintiffs	)	Judge: Kevin Allen

COMES NOW, Defendants and Counterclaim Plaintiffs, D. Scott Jackson, Alan D. Allred, and Peterson Allred Jackson, P.C. (hereinafter collectively "PAJ Defendants"), by and through counsel, Mark Hancey, Hancey Law Offices, and hereby files this MEMORANDUM IN SUPPORT OF MOTION FOR AMENDMENT OF JUDGMENT under Rule 59(a) URCP, MOTION FOR RELIEF FROM JUDGMENT under Rules 60(a), 60(b)(1), 60(b)(6) URCP, MOTION TO AMEND FINDINGS OR MAKE ADDITIONAL FINDINGS under Rule 52(b) URCP, and MOTION TO STAY pursuant to Rule 62(b) URCP. PAJ Defendants further file this Memorandum in support of their REQUEST FOR HEARING on said Motions.

Procedural History

The Court issued a Decision dated April 17, 2009 ("Decision") in the above-referenced matter. Subsequently, the Court entered a Judgment dated May 6, 2009 ("Judgment"), which Judgment, in part, included language incorporating the Court's Decision as the Court's findings of fact and conclusions of law in support of the Judgment. *See*. URCP 52(b).

PAJ Defendants have previously filed with this Court a Motion for Amendment of Decision or Relief From Decision and Request for Hearing dated April 22, 2009. However, with the Court entering the Judgment, PAJ Defendants file this Motion to replace and supersede the April 22, 2009 Motion.

This Motion further requests the Court stay the enforcement of the Judgment pursuant to Rule 62(b) URCP pending resolution of the Rule 52(b), Rule 59(a)(6)-(7) and Rule 60(a), 60(b)(1), 60(b)(6), URCP Motions.

PAJ Defendants seek amendment of Judgment, relief from Judgment, and amendment of findings as follows:

Incorrect Calculation of Jackson's Buy-In Value

The Court's Decision stated on page six, "Scott Jackson bought his shares using a value calculation of the gross sales times 0.9, times the percentage of stock (i.e., $\$750,000 * .9 * 15.83\% = \$106,852.50$)." This is not the correct calculation of the D. Scott Jackson's ("Jackson") buy-in purchase price.

In making this calculation the Court cited Exhibit 83. Exhibit 83 does not include the transaction documents. The Trial Exhibit List itself identifies Exhibit 83 as "Jack's Notes related to the creation of PAJ." The Exhibit is simply the personal notes of Jack W. Peterson ("Peterson") regarding the negotiations of the transaction. Further, a review of the Court's docket establishes that Exhibit 83 was not introduced or admitted during the trial, but was rather admitted at the end of trial along with the remaining exhibits in the Exhibit Binders. As such, there was no testimony establishing foundation of the document nor any allegation that Exhibit

83 constitutes the terms and conditions of Jackson's actual purchase. As such, there is insufficient evidence for the Court to reasonably rely upon Exhibit 83 to establish the terms of the agreement.

The Court's calculation contains two mathematical errors.

First, the Court did not calculate Jackson's buy-in multiple using the complete transaction. The complete transaction was the purchase by Jackson of a 33.33% (15.83% from Peterson and Alan D. Allred ("Allred") and 17.50% from Dennis and Karen Jackson) interest in the combined entities of Jackson, Downs & Associates ("JDA") and Peterson Allred ("PA"). The gross revenues of \$750,000, referenced by the Court, and Peterson's notes, were the sum of the gross revenues of both JDA and PA.¹

The terms of the transaction were memorialized by the parties in the execution of three promissory notes payable to Peterson, Allred, and Dennis and Karen Jackson from Jackson. A copy of the notes are attached hereto as Schedule 1. The multiple based on the complete transaction, without accounting for the present value of the payments, is .83 (i.e. $\$206,850^2 / \$250,000^3$), not .90.

Second, the Court failed to adjust its calculated buy-in value to its present value. The notes to Peterson and Allred bore 0% interest over the first five years. The note to Dennis and Karen Jackson bore 0% interest until June 1, 2016.

PAJ Defendants' counsel raised this issue of non-interest bearing notes at the April 16, 2009 hearing. However, the Court did not account for any present value calculations in its analysis.

¹ Page 4 of Trial Exhibit 83 included a Profit and Loss Statement of Peterson Allred showing revenues of \$558,516.50. Even when outside revenues from USU of \$12,918.00 and Logan City of \$16,277.00 are added to that number as described in Page 3 of Exhibit 83, the total revenue of Peterson Allred totals only \$587,711.00. The balance of \$750,000 is the gross revenue of JDA.

² The amount equals the sum of Peterson's note (\$53,425) Allred's note (\$53,425), and Dennis and Karen Jackson's note (\$100,000).

³ \$250,000 equals 1/3 of the gross revenues of the combined entities JDA and PA at the time of Jackson's original purchase. Jackson paid \$206,850, before discounting, for 1/3 of JDA and PA combined.

Making a present value adjustment for these payment terms is an essential component in properly calculating Jackson's buy-in value. The Court need look no further than the award of interest to Peterson in the present case.

The concepts of time value of money and present value calculations are such elementary and fundamental concepts of finance that one can only conclude that this oversight was an inadvertent error by the Court. Such an error justifies relief from judgment and/or amended judgment under URCP Rules 59 and 60(a).

The Court has stated that the value of Jackson's buy-in was "... a guidepost in its decision." *See*, Decision, page seven. The Court further noted, on page seven, that it was "...*influenced heavily* by this transaction" (emphasis added). Given the reliance on this number, it is reasonable to expect that this number should be accurately calculated at its present value. Or, in the alternative, the Court should allow Defendants to pay the judgment over the same terms as the prior transaction, namely: 51.66% of the judgment to be paid over 7.5 years with 5 years no interest and 48.34% of the judgment to be paid over 14.5 years with no interest and payments beginning at 7.5 years. In doing so, the Court would be consistent in its analysis.

The Correct Calculation of Jackson's Buy-in Value

Mr. Townsend did not calculate any value of Peterson Allred Jackson, P.C. ("PAJ") based upon Jackson's original purchase.

Mr. Bowles is the only expert that calculated the present value of this transaction. *See*, Bowles Report Page 16 and Exhibit 6. Mr. Bowles' market analysis was based upon the 2001 Jackson buy-in transaction. Mr. Bowles stated in his report on Page 16:

As the purchase of PAJ stock by Mr. Jackson is more recent, I have used the multiple from this purchase in my application of the market approach to value PAJ stock. Exhibit 6 represents the value of PAJ based on this historical transaction.

In Exhibit 6 of the Bowles Report, Bowles uses a present value multiple of .17 to derive the value of a 33.33% interest in PAJ. The present value multiple for PAJ as a whole would be .51⁴ (i.e. $.17 * 3$).

When the Court correctly applies the total amount Jackson paid for the combined interest in PAJ and JDA, and further makes the necessary present value adjustments, the correct present value of Jackson's buy-in to PAJ is not \$106,852.50 for a 15.83% interest but rather \$126,063 for a 33.33% interest. The details of this calculation are set forth in the attached Schedule 2. The correct values result in a present value multiple of .50⁵ (i.e. $\$126,063 / \$250,000$ ⁶) rather than .90.

Affect on Fair Value of Peterson's Shares

Applying the Court's rationale and analysis using the same equation that the Court used in its Decision, the Court's calculation of \$517,763.17⁷ adjusts to \$287,646.21 ($\$1,581,777.33 * .50 * 36.37\%$).

On page seven of its Decision, the Court took the time to actually calculate the spread between the Townsend value and the value based upon the Jackson buy-in. Therein the Court stated: "The Court points out that this determined value is less than what the value of PAJ would have been had the Court used the same formula that Mr. Jackson used to purchase his shares in PAJ" (i.e. the determined value of \$459,000 is less than the Court's calculation of \$517,763.17)."

When the Jackson buy-in is correctly calculated at its present value, the comparison the Court presented to support its decision is turned on its head. The Court's determined value of \$459,000 now exceeds the value derived using the Jackson buy-in formula by \$171,353.79 or 60% (i.e. $\$459,000 - \$287,646.21$).

⁴ The difference between the present value multiple derived in the attached Schedule 2 and Bowles' report is rounding.

⁵ See. Footnote 4 above.

⁶ The \$250,000 represents Jackson's original purchase of 33.33% of PAJ (i.e. $\$750,000 * 33.33\%$).

⁷ Referring to Peterson's shares as of 12/31/06.

Since the Court has acknowledged the heavy influence of this prior transaction, it seems that when the *guidepost* is correctly located, the Court must adjust the value of Peterson's shares to coincide with the correctly-placed guidepost.

The evidence before this Court justifies a valuation of Peterson's shares consistent with the values derived by each expert using their respective income/investment methods, as favored by Utah Courts. *See* Decision, Page 5. *See also*, *Oakridge Energy, Inc. v. Clifton*, 937 P.2d 130 (Utah 1997). These income methods compare with the properly calculated present value of the Jackson buy-in using the Court's formula, which values PAJ at \$790,889, resulting in Peterson's 36.37% totaling \$287,646.21.

The income values of each expert are as follows:

Townsend's opinion of the value of PAJ derived using his two income methods averages \$734,388. *See* Townsend Report Schedule A. Consequently, the value of Peterson's 36.37% based upon Townsend's income methods would average \$267,097.

Bowles' opinion of the value of PAJ derived using his income method is \$600,000. *See* Bowles Report Exhibit 7. Using Bowles' value of PAJ, Peterson's 36.37% would have a value of \$218,220⁸.

Based upon the value range Jackson presented at trial during his testimony, the Court heard from Jackson that in his opinion the value of PAJ averages \$650,000. Using Jackson's value of PAJ, the value of Peterson's 36.37% would average \$236,405.

Thus, when the guidepost is correctly placed by accounting for the present value of Jackson's purchase, these income method valuations converge around \$710,000 for PAJ, with a corresponding \$258,000 for Peterson's 36.37% interest therein.

⁸ It should be noted that during trial the Court heard testimony that the only significant difference between the two experts in deriving their respective values under the income approach is the issue of reasonable compensation which the Court did not address in its Decision.

To illustrate this convergence, PAJ Defendants have prepared a scatter plot showing these various valuations for both PAJ and for Peterson's interest therein. *See* Schedule 3 attached hereto. Each value is somewhat different because of issues like reasonable compensation, variations in adjusted gross revenue, etc—but they still converge. As illustrated by the scatter plot, the same cannot be said for the Townsend Market Approach. Thus, there is insufficient evidence to find that Townsend's market approach is comparable to PAJ's fair value.

PAJ is simply an income stream to its owners. The value of that income stream must be supported by the evidence this Court received regarding the income the asset produces. This concept was addressed in Jackson's buy-in when the parties used long-term (non-interest bearing) notes. These notes substantially reduced the present value of the purchase price. If the use of such notes is not available, then the Court must make appropriate present value adjustments to the historical transaction. Plaintiff's own expert acknowledged this concept when he acknowledged in cross-examination that the cash flows of PAJ would not support his own opinion of value.

The duty of the Court is to determine the fair value rather than to simply split the difference among all the different values it was given, or to allow an expert to do the same. The Court stated as much in its Decision when it chose not to "take a Solomon approach and split the difference." However, splitting the difference is exactly the approach that Townsend's valuation took between the market, income/investment and assets approaches. This Court does not have two valuations to pick from—it has the market, income/investment and asset approaches provided by each of the experts. If the Court sees the Jackson buy-in as a true guidepost, it should then determine which market, income and/or asset approach most approximates the guidepost. Perhaps not coincidentally, the income approaches established independently by each expert, while not identical, do approximate the mathematically correct calculation of Jackson's buy-in transaction. By drilling down to the individual income/investment valuations within each expert report, the Court avoids the very issue of "splitting the difference" that it has explicitly sought to avoid.

Insufficiently Detailed Findings of the Court

PAJ Defendants also argue that the Findings of Fact/Law incorporated into the Judgment were insufficiently detailed to address the issues pled at trial. The Decision of the Court further fails to make Findings and/or Conclusions on several key issues including the following:

1. The Court failed to address the issue of whether, as a matter of law, an adjustment to fair value should be made when taking into account enterprise versus personal goodwill. This issue was well briefed beginning on Page 17 of the Bowles Report, and the court heard significant testimony on this issue at trial.
2. Once the legal conclusion regarding goodwill is resolved, the Court then must make a finding as to the proper adjustment to fair value.
3. The Court failed to make a finding regarding reasonable compensation for the shareholders and how such compensation affects PAJ's fair value.
4. The Court failed to make any findings justifying the applicability of Townsend's market analysis, including a finding as to whether Townsend's market data is comparable to PAJ given the vast discrepancy between Townsend's market and income approaches.
5. The Court failed to make a finding adjusting Townsend's admitted miscalculation of "Price/Sellers Discretionary Earnings." *See*. Townsend Report Schedule A. Townsend admitted to using EBIDA plus all owners compensation, rather than the accurate definition of Sellers discretionary earnings which is EBIDA plus one owners compensation. Townsend also acknowledged on the stand that the value should have been \$1,084,000 rather than \$1,522,469.
6. The Court failed to make any findings as to how this adjustment would impact Townsend's weighting of values.

7. The Court failed to make a finding as to how the exclusion of the investment practice affects PAJ's fair value since both experts included investment practice in their valuations of PAJ.

Motion to Stay

PAJ Defendants further request the Court stay enforcement of the Judgment under Rule 62(b) URCP. PAJ Defendants assert that the Decision by the Court to make Allred and Jackson jointly and severally liable for the Judgment, together with the identified lines of credit and other assets identified by PAJ Defendants in their Statement of Sureties dated January 22, 2009 constitutes sufficient security under the limited timeframe of the stay contemplated under the Rule 62(b) Motion. This Motion to Stay is distinguished from a Rule 62(d) Motion to Stay pending appeal.

At hearing, the Court can take further evidence and arguments on determining the sufficiency of the security or any additions thereto as the Court deems necessary.

Conclusion

Because the Court acknowledged that it relied upon the calculation of the value of Jackson's purchase of shares in 2002, and the calculation used by the Court is incorrect, Defendants submit that they are entitled to amended findings of fact under Rule 52(b) URCP, together with an amendment of the Judgment under Rule 59(a)(6)-(7) URCP or in the alternative relief from the Judgment und Rule 60(b)(1) URCP. Simply put, the sufficiency of the evidence does not justify the mis-calculation of that value. Moreover, the incorrect calculation constitutes a clerical error under Rule 60(a) URCP, "a mistake" under Rule 60(b)(1) URCP, or "other reasons justifying relief" under Rule 60(b)(6) URCP.

Additionally, PAJ Defendants have filed a Rule 62(b) URCP Motion to Stay pursuant to these Motions.

Request for Hearing

PAJ Defendants further request a hearing on their Motions.

Dated this 15 day of May, 2009.



Mark Hancey

original - 2002

PROMISSORY NOTE

\$53,425.00

Logan, Utah

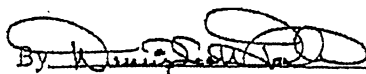
September 21, 2001

In installments as herein stated, for the purchase of ninety six (96) shares of Peterson Allred Jackson, P.C. common stock, the undersigned promises to pay **Jack W. Peterson**, an individual, the sum of \$ 53,425.00 to be paid as follows:

<u>Due Date</u>	<u>Payment</u>
January 1, 2002	\$ 2,500.00
June 1, 2002	3,500.00
January 1, 2003	3,500.00
June 1, 2003	3,500.00
January 1, 2004	3,500.00
June 1, 2004	3,500.00
January 1, 2005	3,500.00
June 1, 2005	3,500.00
January 1, 2006	3,500.00
June 1, 2006	3,500.00
January 1, 2007	3,500.00
June 1, 2007	3,500.00
January 1, 2008	3,500.00
June 1, 2008	3,500.00
January 1, 2009	3,500.00
June 1, 2009	<u>1,925.00</u>
Total	<u>\$53,425.00</u>

Privilege is reserved to pay the note in full at any time with no prepayment penalty. This note is non interest bearing until January 1, 2007. Thereafter, the remaining balance shall carry an interest rate of 8 percent per annum. Both principle and accrued interest shall be payable on the respective due date. Upon default of any payment, the prorated shares paid for will be issued and the balance of the note will be null and void with the prorated shares unpaid for being retained by Jack W. Peterson.

Executed this 21st day of September, 2001, at Logan, Utah.

By 
D. Scott Jackson - Maker

f:\wpdocs\jackypromis-1.wpd

SCHEDULE 1

Original - 2002

PROMISSORY NOTE

\$53,425.00

Logan, Utah
September 21, 2001

In installments as herein stated, for the purchase of ninety six (96) shares of Peterson Allred Jackson, P.C. common stock, the undersigned promises to pay Alan D. Allred, an individual, the sum of \$ 53,425.00 to be paid as follows:

<u>Due Date</u>	<u>Payment</u>
January 1, 2002	\$ 2,500.00
June 1, 2002	3,500.00
January 1, 2003	3,500.00
June 1, 2003	3,500.00
January 1, 2004	3,500.00
June 1, 2004	3,500.00
January 1, 2005	3,500.00
June 1, 2005	3,500.00
January 1, 2006	3,500.00
June 1, 2006	3,500.00
January 1, 2007	3,500.00
June 1, 2007	3,500.00
January 1, 2008	3,500.00
June 1, 2008	3,500.00
January 1, 2009	3,500.00
June 1, 2009	<u>1,925.00</u>
Total	<u>\$53,425.00</u>

Privilege is reserved to pay the note in full at any time with no prepayment penalty. This note is non interest bearing until January 1, 2007. Thereafter, the remaining balance shall carry an interest rate of 8 percent per annum. Both principle and accrued interest shall be payable on the respective due date. Upon default of any payment, the prorated shares paid for will be issued and the balance of the note will be null and void with the prorated shares unpaid for being retained by ~~Jack W. Peterson.~~
Alan D. Allred.

Executed this 21st day of September, 2001, at Logan, Utah.

By 
D. Scott Jackson - Maker

PROMISSORY NOTE

.\$100,000

Logan, Utah
September 21, 2001

In installments as herein stated, for the purchase of the assets of Jackson Downs & Associates Financial Services, LLC, the undersigned promises to pay Dennis and Karen Jackson, individuals, the sum of \$ 100,000.00 to be paid as follows:

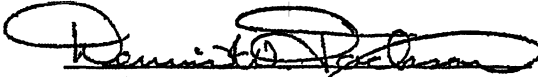
<u>Due Date</u>	<u>Payment</u>
June 1, 2009	\$ 3,150.00
January 1, 2010	7,000.00
June 1, 2010	7,000.00
January 1, 2011	7,000.00
June 1, 2011	7,000.00
January 1, 2012	7,000.00
June 1, 2012	7,000.00
January 1, 2013	7,000.00
June 1, 2013	7,000.00
January 1, 2014	7,000.00
June 1, 2014	7,000.00
January 1, 2015	7,000.00
June 1, 2015	7,000.00
January 1, 2016	7,000.00
June 1, 2016	<u>5,850.00</u>
 Total	 <u>\$100,000.00</u>

Privilege is reserved to pay the note in full at any time with no prepayment penalty. This note is non interest bearing until June 1, 2016. Thereafter, the remaining balance shall carry an interest rate of 8 percent per annum. Both principle and accrued interest shall be payable on the respective due date.

Executed this 21st day of September, 2001, at Logan, Utah.

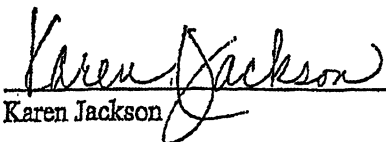
By 
D. Scott Jackson - Maker

I, Dennis W. Jackson, do hereby relinquish any claim against Peterson Allred Inc., Peterson Allred Jackson, Inc., Jack W. Peterson, and Alan D. Allred for transferring equity ownership in Peterson Allred Inc. resulting from the merger of Jackson Downs & Associates Financial Services LLC with Peterson Allred Inc., and the subsequent transfer of my ownership to D. Scott Jackson.


Dennis W. Jackson

October 26, 2001
Date

I, Karen Jackson, do hereby relinquish any claim against Peterson Allred Inc., Peterson Allred Jackson, Inc., Jack W. Peterson, and Alan D. Allred for transferring equity ownership in Peterson Allred Inc. resulting from the merger of Jackson Downs & Associates Financial Services LLC with Peterson Allred Inc., and the subsequent transfer of my ownership to D. Scott Jackson.


Karen Jackson

10-26-01
Date

SCHEDULE 2

Name	Payment Due Date	Payment Amount per Each Note	Discount Factor		Present Value of Each Payment
			8% Annual	Semi-annual	
Peterson Note	January 1, 2002	2,500	1.0000		2,500
	June 1, 2002	3,500	0.9678		3,387
	January 1, 2003	3,500	0.9246		3,236
	June 1, 2003	3,500	0.8948		3,132
	January 1, 2004	3,500	0.8548		2,992
	June 1, 2004	3,500	0.8273		2,896
	January 1, 2005	3,500	0.7903		2,766
	June 1, 2005	3,500	0.7649		2,677
	January 1, 2006	3,500	0.7307		2,557
	June 1, 2006	3,500	0.7072		2,475
	January 1, 2007	3,500	0.6756		2,365
	June 1, 2007	3,500	0.6756		2,365
	January 1, 2008	3,500	0.6756		2,365
	June 1, 2008	3,500	0.6756		2,365
	January 1, 2009	3,500	0.6756		2,365
	June 1, 2009	1,925	0.6756		1,301
Total Peterson Note		53,425 {a}			41,742 {a}
Allred Note	January 1, 2002	2,500	1.0000		2,500
	June 1, 2002	3,500	0.9678		3,387
	January 1, 2003	3,500	0.9246		3,236
	June 1, 2003	3,500	0.8948		3,132
	January 1, 2004	3,500	0.8548		2,992
	June 1, 2004	3,500	0.8273		2,896
	January 1, 2005	3,500	0.7903		2,766
	June 1, 2005	3,500	0.7649		2,677
	January 1, 2006	3,500	0.7307		2,557
	June 1, 2006	3,500	0.7072		2,475
	January 1, 2007	3,500	0.6756		2,365
	June 1, 2007	3,500	0.6756		2,365
	January 1, 2008	3,500	0.6756		2,365
	June 1, 2008	3,500	0.6756		2,365
	January 1, 2009	3,500	0.6756		2,365
	June 1, 2009	1,925	0.6756		1,301
Total Allred Note		53,425 {a}			41,742 {a}
Dennis & Karen Note	June 1, 2009	3,150	0.5589		1,761
	January 1, 2010	7,000	0.5339		3,737
	June 1, 2010	7,000	0.5167		3,617
	January 1, 2011	7,000	0.4936		3,455
	June 1, 2011	7,000	0.4778		3,345
	January 1, 2012	7,000	0.4564		3,195
	June 1, 2012	7,000	0.4417		3,092
	January 1, 2013	7,000	0.4220		2,954
	June 1, 2013	7,000	0.4084		2,859
	January 1, 2014	7,000	0.3901		2,731
	June 1, 2014	7,000	0.3776		2,643
	January 1, 2015	7,000	0.3607		2,525
	June 1, 2015	7,000	0.3491		2,444
	January 1, 2016	7,000	0.3335		2,335
	June 1, 2016	5,850	0.3228		1,888
Total Dennis & Karen Note		100,000 {a}			42,579 {a}
Multiple Data	Multiple Calculation				
	Total Payments - Sum {a}	206,850 {b}			126,063 {b}
	Gross Revenues at time of Jackson's Purchase	750,000 {c}			750,000 {c}
	Jackson's Original Purchase Percentage	33.33% {d}			33.33% {d}
	1/3 of Gross Revenues {c} x {d}	250,000 {e}			250,000 {e}
Jackson's Gross Revenue Purchase Multiple {b} / {e}		0.83 Nondiscounted			0.50 Discounted

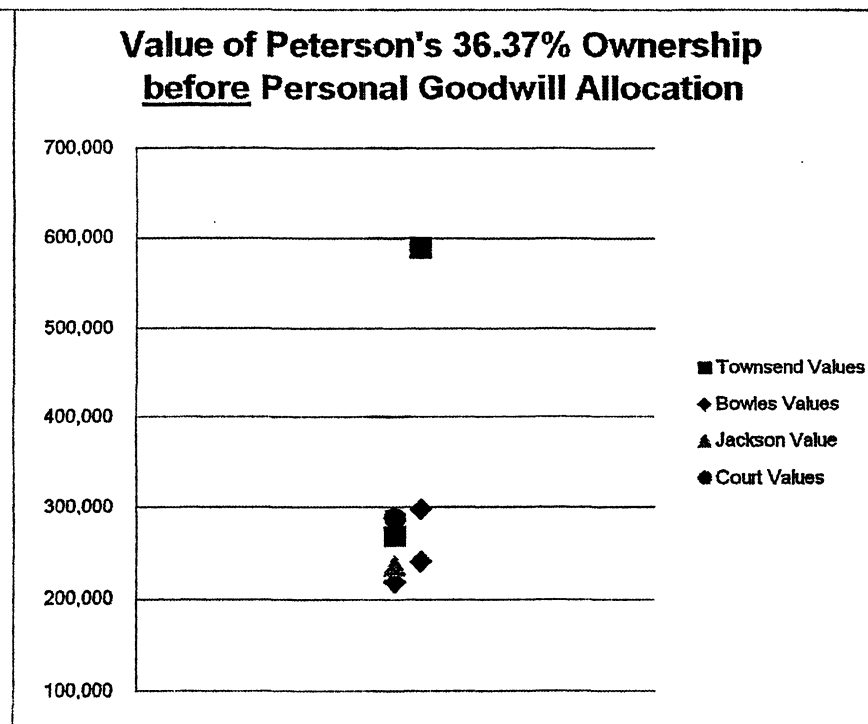
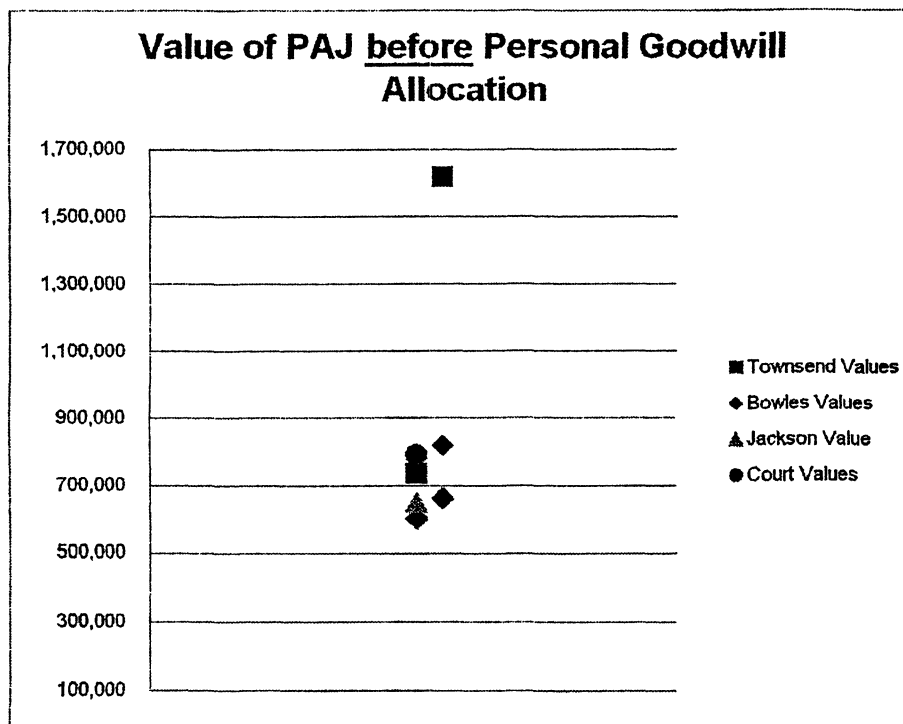
SCHEDULE 3

Summary of Derived Values by Expert Illustrative of Value Central Tendency

Valuation Approach	Valuation Method	Expert	Derived Value of PAJ before Personal Goodwill Allocation		Value of Peterson's 36.37% Ownership before Personal Goodwill Allocation	Reference
Income	Capitalization of Earnings	Bowles	600,000		218,220	Bowles Report, Exhibit 8 (page 21)
Income	Average of Value Range	Jackson	650,000	{a}	236,405	Jackson's court testimony
Blend (Income/Asset)	Excess Earnings	Bowles	660,942		240,385	Bowles Report, Exhibit 8 (page 21)
Income	Average of Inome Methods	Townsend	734,388		267,097	Townsend Report, Schedule A
Market	Historical Transaction	Court	790,889	{b}	287,646	Court's Decision dated 4/17/2009
Market	Historical Transaction	Bowles	819,120		297,914	Bowles Report, Exhibit 8 (page 21)
Market	Average of Market Methods	Townsend	1,618,547		588,665	Townsend Report, Schedule A

{a} Jackson testified at court he believed the value to range from \$600,000 to \$700,000

{b} Derived using the correct present value multiple



Mark Hancey (USB 06884)
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Providence, Utah 84332
Telephone: (435) 787-1444
Facsimile: (435) 755-5152

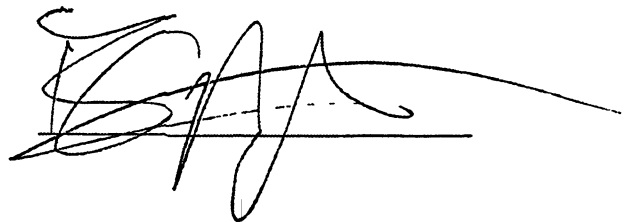
Attorney for Defendants, Counterclaim Plaintiffs

**IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH**

JACK W. PETERSON)	
Plaintiff and)	
Counterclaim Defendant	)	CERTIFICATE OF MAILING
v.)	
D. SCOTT JACKSON, individually; ALAN D.	)	Case No. 06-0102504
ALLRED, individually; and on behalf of	)	Judge: Kevin Allen
PETERSON ALLRED JACKSON, P.C., a)	
Utah Professional Corporation,)	
Defendants and)	
Counterclaim Plaintiffs)	

I hereby certify that on the 15th day of May, 2009, I mailed by first class postage pre-paid a true and correct copy of the MOTIONS FOR AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT AND AMENDMENT OF FINDINGS and MOTION TO STAY; REQUEST FOR HEARING and the MEMORANDUM IN SUPPORT OF MOTIONS FOR AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT AND AMENDMENT OF FINDINGS and MOTION TO STAY; REQUEST FOR HEARING to:

James Jenkins, attorney for Plaintiff
OLSON & HOGGAN, P.C.
Suite 200
130 South Main
Logan, Utah 84321



TAB **G**



CWest's Utah Code Annotated Currentness

Title 16. Corporations

[Ⓢ] Chapter 10A. Utah Revised Business Corporation Act [Ⓢ] Part 14. Dissolution

→ § 16-10a-1430. Grounds for judicial dissolution

(1) A corporation may be dissolved in a proceeding by the attorney general or the division director if it is established that:

- (a) the corporation obtained its articles of incorporation through fraud; or
- (b) the corporation has continued to exceed or abuse the authority conferred upon it by law.

(2) A corporation may be dissolved in a proceeding by a shareholder if it is established that:

- (a) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
- (b) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;
- (c) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or
- (d) the corporate assets are being misapplied or wasted.

(3) A corporation may be dissolved in a proceeding by a creditor if it is established that:

- (a) the creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the corporation is insolvent; or
- (b) the corporation is insolvent and the corporation has admitted in writing that the creditor's claim is due and owing.

(4) A corporation may be dissolved in a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

CREDIT(S)

LIBRARY REFERENCES

Corporations502.

Westlaw Key Number Search: 101k502.

C.J.S. Corporations § 716.

RESEARCH REFERENCES

Encyclopedias

92 Am. Jur. Proof of Facts 3d 163, Establishing Liability for Minority Shareholder Oppression.

Treatises and Practice Aids

Fletcher Cyclopedia of Private Corp. § 8025, Judicial Supervision of Voluntary Dissolution.

Fletcher Cyclopedia of Private Corp. § 8078, Creditors.

Fletcher Cyclopedia of Private Corp. § 5820.10, Oppressed Shareholders.

Fletcher Cyclopedia of Private Corp. § 8046.10, Illegal, Oppressive, or Fraudulent Conduct of Directors or Controlling Shareholders.

NOTES OF DECISIONS

In general 1

Causes and grounds, generally 2

Deficiency of members or officers 6

Invalid or fraudulent corporation 3

Loss or transfer of capital or property 7

Nonuser or surrender of franchise 4

Violation of charter or statute 5

1. In general

Within statute providing for suspension of powers, rights and privileges of corporation delinquent in payment of franchise taxes, term “suspended” imports temporary restriction of function of corporation, something less than termination of corporate life as brought about by dissolution. U.C.A.1953, 16-1-2, 16-10-1 et seq., 16-10-100, 16-10-101, 59-13-62, 59-13-63. Mackay & Knobel Enterprises, Inc. v. Teton Van Gas, Inc., 1969, 23 Utah 2d 200, 460 P.2d 828. Corporations 592.5

Legislature which provides for creation of corporations may provide that particular omissions or acts should operate to end their existence and permit forfeiture to be declared by administrative officers. Const. art. 5, § 1; art. 8, § 1. Citizens' Club v. Welling, 1933, 83 Utah 81, 27 P.2d 23. Corporations 592.5

2. Causes and grounds, generally

Liquidation of medical corporation was proper where stock in corporation was transferred to nonprofessional creditor of bankrupt shareholder, corporation did not provide in its articles, in its bylaws, or by private agreement for repurchase or redemption of shares upon disqualification of shareholder, and corporation failed to purchase shares of bankrupt shareholder at their “reasonable fair value” within 90 days after transfer. U.C.A.1953, 16-11-13. Riche v.

North Ogden Professional Corp., 1988, 763 P.2d 1210, certiorari granted 773 P.2d 45, affirmed 784 P.2d 1126. Corporations 592

3. Invalid or fraudulent corporation

While Rev. St. 1898, §§ 318, 319, requiring the filing of the original articles of incorporation with the secretary of state, are mandatory, and apply equally to any amendment thereof which is fundamental (section 339, Rev. St. 1898), a failure to file an amendment which is not fundamental, such as an increase of the number of its board of directors, is not vital, and would form no basis for a direct proceeding by the state to forfeit the charter of such corporation. Jackson v. Crown Point Min. Co., 1899, 21 Utah 1, 59 P. 238, 81 Am.St.Rep. 651, Unreported. Corporations 593

4. Nonuser or surrender of franchise

That a corporation was without directors and officers and had entirely ceased to do business did not deprive it from being a corporation and continuing to exist as such. Jones Mining Co. v. Cardiff Min. & Mill. Co., 1920, 56 Utah 449, 191 P. 426. Corporations 596

5. Violation of charter or statute

Nevada statutes requiring payment of fees for filing list of officers of corporation and imposing penalties for failure to comply with such statutes are construed as "revenue measures", and third parties may not make any issue of failure to comply with such requirements unless clearly injured by reason of such default. Comp.Laws Nev. §§ 1804-1808. Buhler v. Maddison, 1943, 105 Utah 39, 140 P.2d 933. Corporations 599

6. Deficiency of members or officers

In the absence of statute to the contrary want of the required officers does not dissolve a corporate entity. Buhler v. Maddison, 1943, 105 Utah 39, 140 P.2d 933. Corporations 600

7. Loss or transfer of capital or property

A corporation is not dissolved by the mere transfer of its property to a trustee for the purpose of paying its debts. Wyeth Hardware & Manufacturing Co v. James-Spencer-Bateman Co., 1897, 15 Utah 110, 47 P. 604. Corporations 603

U.C.A. 1953 § 16-10a-1430, UT ST § 16-10a-1430

Current through 2009 General Session and 2009 First Special Session

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END OF DOCUMENT

CWest's Utah Code Annotated Currentness

Title 16. Corporations

▣ Chapter 10A. Utah Revised Business Corporation Act

▣ Part 14. Dissolution

→ § 16-10a-1434. Election to purchase in lieu of dissolution

(1) In a proceeding under Subsection 16-10a-1430(2) to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the corporation may elect, or if it fails to elect, one or more shareholders may elect to purchase all shares of the corporation owned by the petitioning shareholder, at the fair value of the shares, determined as provided in this section. An election pursuant to this section is irrevocable unless the court determines that it is equitable to set aside or modify the election.

(2)(a) An election to purchase pursuant to this section may be filed with the court at any time within 90 days after the filing of the petition under Subsection 16-10a-1430(2) or at any later time as the court in its discretion may allow. If the corporation files an election with the court within the 90-day period, or at any later time allowed by the court, to purchase all shares of the corporation owned by the petitioning shareholder, the corporation shall purchase the shares in the manner provided in this section.

(b) If the corporation does not file an election with the court within the time period, but an election to purchase all shares of the corporation owned by the petitioning shareholder is filed by one or more shareholders within the time period, the corporation shall, within ten days after the later of:

(i) the end of the time period allowed for the filing of elections to purchase under this section; or

(ii) notification from the court of an election by shareholders to purchase all shares of the corporation owned by the petitioning shareholder as provided in this section, give written notice of the election to purchase to all shareholders of the corporation, other than the petitioning shareholder. The notice shall state the name and number of shares owned by the petitioning shareholder and the name and number of shares owned by each electing shareholder. The notice shall advise any recipients who have not participated in the election of their right to join in the election to purchase shares in accordance with this section, and of the date by which any notice of intent to participate must be filed with the court.

(c) Shareholders who wish to participate in the purchase of shares from the petitioning shareholder must file notice of their intention to join in the purchase by the electing shareholders, no later than 30 days after the effective date of the corporation's notice of their right to join in the election to purchase.

(d) All shareholders who have filed with the court an election or notice of their intention to participate in the election to purchase the shares of the corporation owned by the petitioning shareholder thereby become irrevocably obligated to participate in the purchase of shares from the petitioning shareholders upon the terms and conditions of this section, unless the court otherwise directs.

(e) After an election has been filed by the corporation or one or more shareholders, the proceedings under Subsection 16-10a-1430(2) may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dis-

pose of any shares of the corporation, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioning shareholders, to permit any discontinuance, settlement, sale, or other disposition.

(3) If, within 60 days after the earlier of:

(a) the corporation's filing of an election to purchase all shares of the corporation owned by the petitioning shareholder; or

(b) the corporation's mailing of a notice to its shareholders of the filing of an election by the shareholders to purchase all shares of the corporation owned by the petitioning shareholder, the petitioning shareholder and electing corporation or shareholders reach agreement as to the fair value and terms of purchase of the petitioning shareholder's shares, the court shall enter an order directing the purchase of petitioner's shares, upon the terms and conditions agreed to by the parties.

(4) If the parties are unable to reach an agreement as provided for in Subsection (3), upon application of any party the court shall stay the proceedings under Subsection 16-10a-1430(2) and determine the fair value of the petitioning shareholder's shares as of the day before the date on which the petition under Subsection 16-10a-1430(2) was filed or as of any other date the court determines to be appropriate under the circumstances and based on the factors the court determines to be appropriate.

(5)(a) Upon determining the fair value of the shares of the corporation owned by the petitioning shareholder, the court shall enter an order directing the purchase of the shares upon terms and conditions the court determines to be appropriate. The terms and conditions may include payment of the purchase price in installments, where necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional costs, fees, and expenses awarded by the court, and an allocation of shares among shareholders if the shares are to be purchased by shareholders.

(b) In allocating the petitioning shareholders' shares among holders of different classes of shares, the court shall attempt to preserve the existing distribution of voting rights among holders of different share classes to the extent practicable. The court may direct that holders of a specific class or classes shall not participate in the purchase. The court may not require any electing shareholder to purchase more of the shares of the corporation owned by the petitioning shareholder than the number of shares that the purchasing shareholder may have set forth in his election or notice of intent to participate filed with the court as the maximum number of shares he is willing to purchase.

(c) Interest may be allowed at the rate and from the date determined by the court to be equitable. However, if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, interest may not be allowed.

(d) If the court finds that the petitioning shareholder had probable grounds for relief under Subsection 16-10a-1430(2)(b) or (d), it may award to the petitioning shareholder reasonable fees and expenses of counsel and experts employed by the petitioning shareholder.

(6) Upon entry of an order under Subsection (3) or (5), the court shall dismiss the petition to dissolve the corporation under Section 16-10a-1430, and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded to him by the court. The award is enforceable in the same manner as any other judgment.

(7)(a) The purchase ordered pursuant to Subsection (5) shall be made within ten days after the date the order be-

comes final, unless before that time the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to Sections 16-10a-1402 and 16-10a-1403. The articles of dissolution must then be adopted and filed within 50 days after notice.

(b) Upon filing of the articles of dissolution, the corporation is dissolved in accordance with the provisions of Sections 16-10a-1405 through 16-10a-1408, and the order entered pursuant to Subsection (5) is no longer of any force or effect. However, the court may award the petitioning shareholder reasonable fees and expenses in accordance with the provisions of Subsection (5)(d). The petitioning shareholder may continue to pursue any claims previously asserted on behalf of the corporation.

(8) Any payment by the corporation pursuant to an order under Subsection (3) or (5), other than an award of fees and expenses pursuant to Subsection (5)(d), is subject to the provisions of Section 16-10a-640.

CREDIT(S)

LIBRARY REFERENCES

Corporations504.
Westlaw Key Number Search: 101k504.
C.J.S. Corporations § 713.

RESEARCH REFERENCES

Treatises and Practice Aids

Fletcher Encyclopedia of Private Corp. § 8043, Alternative Remedies.

U.C.A. 1953 § 16-10a-1434, UT ST § 16-10a-1434

Current through 2009 General Session and 2009 First Special Session

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END OF DOCUMENT

Tab H

EMPLOYMENT CONTRACT

1.1 In consideration of my employment with Peterson Allred Nelson, Inc., a Utah professional corporation(the Employer), I, Jack W. Peterson,(Employee) hereby agree to abide by the following terms and conditions relating to my employment with the Employer.

1.2 I understand my compensation will be as shown in the attached "Schedule of Compensation" plus benefits as outlined in the current Employer's written statements. The Employer and Employee may, from time to time, reflect changes in the Employee's compensation as may be mutually agreed upon by executing the changes as shown on the attached "Schedule of Compensation".

1.3 I will devote my best efforts and time in fulfilling my responsibilities in the performance of the Employer's business. My progress will be reviewed during each calendar year and any changes in my compensation or position will be stated in writing and considered amendments to this agreement.

1.4 I understand that my employment relationship is at will. I further agree that nothing contained in any policies or rules, or any representations to the contrary, will in any manner alter that relationship, other than a signed writing executed by the managing officer of the Employer.

1.5 I have read and understand Employer policies and rules as set forth in the Employer's written statements. I agree to abide by those policies and rules and any subsequent changes as set forth in writing from time to time by the Employer, and to abide by any confidentiality restrictions the Employer may require of me. I further agree not to obligate the Employer to any contractual agreement or undertaking without the express approval of the managing officer of the Employer.

1.6 The Employer may terminate this relationship without cause, upon giving a two week notice. I may terminate this relationship without cause, upon giving a two week notice. Furthermore, the Employer may terminate my employment for cause without notice. "Cause" will include: any acts of dishonesty; knowing violations of Employer's policy; violations of applicable laws, rules, or regulations regarding professional demeanor or ethics; breach of this agreement; or acts of insubordination. I understand that those notice provisions are in lieu of any severance arrangements.

2.0 I will not --

1. For a period of two years after the termination of this agreement:

- a. Directly or indirectly solicit to provide or provide any professional services such as those provided by the Employer for anyone who was a client of the Employer anytime during the twelve months prior to the termination of my employment with the Employer. This provision does not apply to clients who are my immediate family members.

- b. Directly or indirectly, without the prior written consent of the Employer, solicit for employment with myself or any firm or entity with which I am associated, any employee of the Employer or otherwise disrupt, impair, damage, or interfere with the Employer's relationship with its employees; and
- 2. Upon the termination of my employment, remove, retain, copy, or utilize any confidential, privileged or proprietary information, trade secrets, or other property of the Employer, including but not limited to manuals, software, data files, client lists or materials, other data publications or materials, or financial information about the Employer or any of its owners or employees.

2.1 The non-compete provisions contained within section 2.0 of this agreement will not apply to a client of the Employer for whom I performed services or with whom I had significant professional contact prior to joining the Employer as shown in the attached "Schedule of Non-Compete Exceptions".

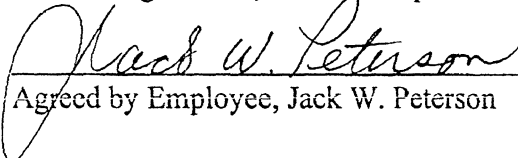
2.2 If this employment contract is terminated by either party, and any of the non-compete provisions of sections 2.0 and 2.1 of this agreement are violated, I agree to pay the Employer an amount equal to 100% of the prior twelve months billings plus the balance of unbilled work-in-progress on the date of termination of employment to such clients. This amount shall be payable over two years, with one-half of the amount payable by January 1 of each year.

3.0 Insofar as any terms or conditions set forth in this agreement are found by a court of law to be unenforceable, then the remaining terms and conditions shall remain in full force and effect and those terms or conditions, if any, found to be unenforceable shall be modified to conform to the most expansive permissible reading under the law.

3.1 Any and all prior or contemporaneous agreements, whether written or oral, concerning the terms and conditions of employment shall be superseded by this agreement. This agreement may not be amended other than in writing signed by the managing officer of the Employer.

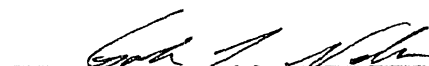
4.0 The defaulting party to any provisions of this agreement agrees to pay any expenses incurred by the nondefaulting party to protect its rights herein, including, but not limited to court costs and a reasonable attorney's fee.

5.0 This agreement, and its interpretation shall be governed by the laws of the State of Utah.


Agreed by Employee, Jack W. Peterson

8-28-96
Date

PETERSON ALLRED NELSON, INC.


Agreed by Managing Officer, Gordon L. Nelson

8/28/96
Date

SCHEDULE OF COMPENSATION

Employer hereby agrees to compensate Jack W. Peterson, Employee, as shown below. If the frequency shown below is "hourly", any hours worked over 40 in any calendar week shall be paid at 1.5 times the regular rate. All others shall be paid overtime once a year at their hourly rate multiplied by the hours worked exceeding the standard. For purposes of this contract, a standard work year will be 2080 hours.

[illegible]

SCHEDULE OF NON-COMPETE EXCEPTIONS

Client Name

Utah State University

Initials (Employee)

Paul

Initials (Employer)

Utah State University

Tab I

Basic Econometrics

Fifth Edition

Damodar N. Gujarati

*Professor Emeritus of Economics,
United States Military Academy, West Point*

Dawn C. Porter

University of Southern California



**McGraw-Hill
Irwin**

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Model Selection Criteria

In this section we discuss several criteria that have been used to choose among competing models and/or to compare models for forecasting purposes. Here we distinguish between **in-sample** forecasting and **out-of-sample** forecasting. In-sample forecasting essentially tells us how the chosen model fits the data in a given sample. Out-of-sample forecasting is concerned with determining how a fitted model forecasts future values of the regressand, given the values of the regressors.

Several criteria are used for this purpose. In particular, we discuss these criteria: (1) R^2 , (2) adjusted R^2 ($= \bar{R}^2$), (3) Akaike's information criterion (AIC), (4) Schwarz's information criterion (SIC), (5) Mallows's C_p criterion, and (6) forecast χ^2 (chi-square). All these criteria aim at minimizing the residual sum of squares (RSS) (or increasing the R^2 value). However, except for the first criterion, criteria (2), (3), (4), and (5) impose a penalty for including an increasingly large number of regressors. Thus there is a trade-off between goodness of fit of the model and its complexity (as judged by the number of regressors).

The R^2 Criterion

We know that one of the measures of goodness of fit of a regression model is R^2 , which, as we know, is defined as:

$$R^2 = \frac{\text{ESS}}{\text{TSS}} = 1 - \frac{\text{RSS}}{\text{TSS}} \quad (13.9.1)$$

R^2 , thus defined, of necessity lies between 0 and 1. The closer it is to 1, the better is the fit. But there are problems with R^2 . *First*, it measures *in-sample* goodness of fit in the sense of how close an estimated Y value is to its actual value in the given sample. There is no guarantee that it will forecast well *out-of-sample* observations. *Second*, in comparing two or more R^2 's, the dependent variable, or regressand, must be the same. *Third*, and more importantly, an R^2 cannot fall when more variables are added to the model. Therefore, there is every temptation to play the game of "maximizing the R^2 " by simply adding more variables to the model. Of course, adding more variables to the model may increase R^2 but it may also increase the variance of forecast error. *

Adjusted R^2

As a penalty for adding regressors to increase the R^2 value, Henry Theil developed the adjusted R^2 , denoted by \bar{R}^2 , which we studied in Chapter 7. Recall that

$$(13.9.2)$$

As you can see from this formula, $\bar{R}^2 \leq R^2$, showing how the adjusted R^2 penalizes for adding more regressors. As we noted in Chapter 8, unlike R^2 , the adjusted R^2 will increase only if the absolute t value of the added variable is greater than 1. For comparative purposes, therefore, \bar{R}^2 is a better measure than R^2 . But again keep in mind that the regressand must be the same for the comparison to be valid.

ADDENDUM

- A. Judgment dated August 6, 2009;
- B. Memorandum Decision dated July 20, 2009;
- C. Judgment dated May 6, 2009;
- D. Memorandum Decision dated April 17, 2009;
- E. Notice of Appeal dated July 21, 2009;
- F. PAJ's Motion to Amend the Findings or Make Additional Findings

Rule 52(b), Motion for Amendment of Judgment under Rule 59(a),

for Relief from Judgment under Rule 60(a), (b)(1) and b(6), and a Motion

for Stay under Rule 62(b) dated May 15, 2009;

- G. Peterson's Motion to Partially Amend or Alter Judgment under Rules 59(e) and 60 dated May 18, 2009.

*Presumably
in the
record!*

copies of code sections,

14. Enforce (H)