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MARC SMITH Plaintiff and Appellant, GRAND
CANYON EXPEDITIONSCO., MARTIN
MATHIS, MICHAEL DENOYER, RONALD R.
SMITH, DONALD SAUNDERS, JOHN DOES I
through 5 and JANE DOES I through 5,
Defendants and Appellees.: Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARC SMITH

Plaintiff/
Appellant,

v.

GRAND CANYON
EXPEDITIONSCO., MARTIN
MATHIS, MICHAEL DENOYER,
RONALD R. SMITH, DONALD
SAUNDERS, JOHN DOES 1
through 5 and JANE DOES 1
through 5,

Defendants/
Appellees.

APPELLANT'S SECOND BRIEF

(Subject to Assignment to the Court of
Appeals)

Case No. 20010667-SC

APPELLANT'S SECOND BRIEF
(Filed Under Seal)

Appeal from Judgment of the Sixth Judicial District Court
Kane County, State of Utah

The Honorable K.L. McIff, Presiding

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②

FILED
UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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MARC SMITH

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ARGUMENT ON CROSS APPEAL

I. THE TRIAL COURT PROPERLY DENIED APPELLEES' MOTION FOR SUMMARY JUDGMENT ON SMITH'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARISING OUT OF THE ARIZONA TAX REFUND.

A. The Law of Good Faith and Fair Dealing in Utah.

Appellees misinterpret the covenant of good faith and fair dealing under Utah law. They would like the Court to believe that the covenant of good faith and fair dealing may only be breached by showing evidence that Appellees acted “unreasonably or in “bad faith.” However, to prevail on a claim of breach of the implied covenant of good faith and fair dealing, Smith is not required to show that the breaching party acted unreasonably or in bad faith. Rather, the Utah Supreme Court has determined that the covenant of good faith and fair dealing requires the parties, particularly those vested with discretion over the other under terms of a contract, to exercise that discretion **reasonably** and in **good faith**. *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah 1996). The Appellees flip this rule to mean that Smith must show that the Appellees acted unreasonably or in bad faith. This logic does not follow the rule. It is not a sufficient defense that Appellees did not intentionally or purposely engage in unreasonable or bad acts. In other words, because a person does not act reasonably or in good faith does not mean that they acted “unreasonably” or in “bad faith.” Again, this distinction is subtle,

but significant.¹ Instead, the covenant of good faith and fair dealing requires that the party exercising discretion under a contract do so “for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties.” *Olympus Hills Shopping Center v. Smiths Food and Drug Centers*, 889 P.2d 445, 450 (Utah Ct. App. 1994). The *Olympus Hills* court continues, “[a] contract thus would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range-a reason beyond the risks assumed by the party claiming a breach.” *Id.* citing *RESTATEMENT [2D] OF CONTRACTS*, § 205 cmt.a (1979). (“[g]ood faith performance of enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with justified expectations of the other party”). In his decision on this motion, Judge McIff rejected Appellees’ interpretation of the law, and instead relied on the law stated above. (Rec. at 1719-1720).

Furthermore, Utah courts have embraced §205 of the *Restatement*. See, e.g., *St. Benedicts Development Co. v. St. Benedict’s Hosp.*, 811 P.2d 1994, 2000 (Utah 1991). The covenant requires honesty in fact. §205 *Comment a* (1981). In some instances, it may require more than honesty. *Id.*, *Comment d*. Appellees did not act honestly, and breached the covenant of good faith and fair dealing, when they pocketed the tax refund without even disclosing it to Smith.

¹Throughout their brief, Appellees argue that there is no evidence that they purposely acted “unreasonably” or in “bad faith.” Therefore, it is important for the Court to recognize Appellees’ flaw in the interpretation of the law of good faith and fair dealing.

B. There is No Accord and Satisfaction.

Appellees argue that the refund claim was not an asset at the time, and therefore any “discussion” would have been meaningless. To prevail on the claim of the existence of an accord, the moving party must show “(1) an unliquidated claim or bona fide dispute over the amount . . .” *ProMax Dev. Corp. v. Raile*, 998 P.2d 254, 259 (Utah 2000) *citing Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985). There could not have been an accord and satisfaction on the Arizona Tax Refund because the issue was simply not discussed nor contemplated when the settlement documents were prepared and executed. Appellees point to no evidence in the record to the contrary. The trial court relied on this fact in finding no accord. (Rec. at 2015). When the Arizona Tax Refund was finally discovered and the refund materialized, Appellees’ only response was to pocket the money. Regardless, the accord and satisfaction defense are objectionable on other grounds discussed below. *See* II.A. *Infra*. There being no accord, the issue is ripe for consideration at trial.

C. The Implied Covenant of Good Faith and Fair Dealing Was Never Terminated.

Appellees argue that the implied covenant does not survive the termination of the contract. They cite the case *Republic Group* as legal authority. However, Appellees misinterpret the court in *Republic Group*, which simply said that in order for there to be a breach of the implied covenant of good faith, there must be a some type of **preexisting**

contractual relationship. *See Republic Group, Inc. v. Won-Door, Corp.*, 883 P.2d 285, 289-90 (Utah Ct. App. 1994) citing *Andreini v. Hultgren*, 860 P.2d 916, 921 (Utah 1993) (where the actual existence of a contract was in dispute). Obviously, in the present case, Smith and Appellees had a preexisting contractual relationship as evidenced by the Buy-Sell Agreement and the termination papers. Therefore, Appellees are incorrect in assuming that the covenant cannot survive the contract. Regardless, the contract was never terminated as Appellees argue.

The tax refund was paid while Smith was still receiving payments under the note and buyout agreement. Furthermore, the Appellees argue that because the tax refund was “beyond the fixing of values” in 1992 there is no sound basis to distinguish this particular accounting matter from the other accounting entries at issue. Appellees are incorrect to assume the refund is “beyond the fixing of values.” In his affidavit, Smith’s accounting expert states that the generally accepted accounting principles require the accountant to record the tax refund directly to equity as a “prior period adjustment.” (Rec. at 1000). As such, generally accepted accounting principles require the consideration of the portion of the tax refund that would have been in existence in June of 1992 as part of the equity as of June 1992. (Rec. at 1000). Appellees cannot escape their duty under the covenant of good faith and fair dealing and pocket the admitted windfall they received. Therefore, because the covenant of good faith existed just the same in 1995 when Appellees pocketed the tax refund, as it did in 1992 when Smith executed the buyout documents, the trial court’s judgment should be upheld.

D. The Trial Court's Reasoning for Imputing the Tax Attorney's Knowledge on the Corporation is Sound.

Appellees then play possum in attempt to keep their admitted windfall by claiming that if the tax attorney's knowledge is imputed to the corporation, then it is imputed to Smith. As the trial court suggested, their argument is flawed. (Rec. at 2019, fn. 2). It is undisputed that at the time Smith signed the termination papers in July 1992, neither Smith, nor the corporate officers, were aware of the tax refund claim was being purposely kept alive by the corporation's counsel. It is further undisputed that at a subsequent point the corporate officials became aware of and cooperated with the effort to obtain and retain the refund. At that time, Smith was no longer working for GCE, but instead, was in an adversarial setting. Therefore, as the trial court suggested, "to suggest that he should be treated as a corporate official in this context flies in the face of reason." *Id.* ("the corporation stood to gain everything and [Smith] nothing by keeping the refund effort alive and by secreting it from [Smith]. This is exactly what happened.").

II. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF SMITH'S EXPERT DERK RASMUSSEN.

Appellees argue that Rasmussen's testimony should be excluded because it is "unreliable" and "irrelevant." However, Appellees stretch the standard for admitting expert testimony in Utah beyond its legal limits in an attempt to fit it around their arguments. The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard. Under

this standard, the appellate cannot reverse a decision to exclude expert testimony unless the decision exceeds the limits of **reasonability**. *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted).

Appellees' arguments claiming Rasmussen's various statements and opinions are unreliable and irrelevant do not "exceed the limits of reasonability." Therefore, they are best suited for trial and have no place in the realm of admissibility. Besides, their alleged discrepancies and claims that Rasmussen's opinions are "irrelevant and unreliable," are substantially based on Appellees' deposition in a cross-examination setting. They do not go to the admissibility of evidence, but instead the weight to be given by the trier of fact.

The cross-examination tactics Appellees attempt to use to show that Rasmussen's opinions are "irrelevant" and "unreasonable" are material issues of fact to be determined by a jury. A review of the evidence clearly shows Rasmussen's opinions are founded on undisputed accounting expertise and grounded in applicable industry standards and customary practice. Therefore, the trial court properly denied Appellees' motion to strike the testimony of Rasmussen on summary judgment.

III. THE TRIAL COURT PROPERLY DENIED APPELLEES' MOTION FOR SUMMARY JUDGMENT IN HOLDING THE INDIVIDUAL APPELLEES LIABLE.

In their brief, Appellees first argue that the issue of whether the trial court failed to dismiss the individual Appellees is a "ruling of law," which should be "reviewed for correctness," without an deference to the trial court. (p.3). They then argue "the court

found that since [GCE] was a privately held, Subchapter S corporation, it would not dismiss the individual Appellees.” (p.65). Finally, the Appellees argue that under Utah law, an individual cannot be held liable for a breach of a corporation’s contracts, absent exigent circumstances that do not exist in this case. However, it appears all three of these assertions are incorrect.

While normally corporate shareholders are insulated from a corporation’s liabilities, Utah courts have developed a two part test for determining when disregarding the corporate form is justified:

“[I]n order to disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such *unity of interest and ownership* that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one of a few individuals; and (2) the observance of the corporate form would sanction a fraud, *promote injustice, or an inequitable result would follow.*”

Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979) (emphasis added). Courts have held that the alter ego theory is a discretionary remedy that will only be reversed on appeal if there is an abuse of discretion. *See Envirotech Corp. v. Callahan*, 872 P.2d 487, 501 (Utah App. 1994). The abuse of discretion standard of review requires appellate to “presume that the discretion of the trial court was

properly exercised unless the record clearly shows the contrary.” *Goddard v. Hickman*, 685 P.2d 530, 534-35 (Utah 1984).

Therefore, the only way the appellate court can overturn this ruling is if the record “clearly shows” the trial court’s discretion was improper. As long as there is sufficient evidence upon which the trial court made its finding, its decision should be upheld. Here, the trial court judge apparently invoked the equitable alter-ego doctrine in his decision not to dismiss the individual Appellees. However, the trial court judge also stated that “it was established at oral argument that GCE is a subchapter S, closely held corporation *and that virtually all of the refund monies have been distributed to the small group of shareholders who are remaining Appellees.*” (Rec. at 714). In other words, the court did not rely solely on the corporation’s form in maintaining the claims against the individuals, but also on the manner in which the corporate funds were handled by the individual Appellees. Therefore, using its discretion, the court decided it was equitable to hold the individual Appellees liable.

REPLY ARGUMENT

I. THE TRIAL IMPROPERLY GRANTED SUMMARY JUDGMENT OF SMITH’S EMPLOYMENT-RELATED CLAIMS ON THE THEORY OF ACCORD AND SATISFACTION.

Smith claims his termination from Grand Canyon Expedition’s employ was both wrongful and constituted a breach of the implied covenant of good faith and fair dealing. The court below dispensed with these employment-related claims by concluding that an

accord was reached. (Rec. at 807-815). Therefore, the summary judgment order relating to this claim is only sustainable if this Court affirms there is (1) a valid accord and satisfaction; and, (2) that there are no issues of fact as to whether an accord exists.

A. Appellees Failed to Plead Accord and Satisfaction as an Affirmative Defense.

Accord and satisfaction is an affirmative defense under the Utah Rules of Civil Procedure 8(c), which Appellees failed to plead as such. The court therefore erred by relying on the defense of accord and satisfaction in dismissing Appellant's employment-related claims. Appellees' excuses for failing to affirmatively pleading accord and satisfaction are based on incorrect assumptions and procedurally invalid.

First, Appellees allude to an agreement with Smith's prior counsel as a reason for not affirmatively pleading the defense of accord and satisfaction. Smith's prior counsel did not consent to the defense of accord and satisfaction. Therefore, Appellees should have first raised this defense in an answer and not before. Second, Appellees contend that they may proceed because Appellant consented to the defense in connection with their motion for summary judgment. As a preliminary matter, the Rules require the defense to be raised in the answer, not in connection with a motion for summary judgement. Utah R. Civ. P. 8(c). Further, Smith never consented to allow Appellees to use the defense without first raising it affirmatively in their opposition to the motion for summary judgement. Again, Appellees point to no evidence in the record to the contrary because none exist. In addition, the Appellees argued "waiver" not accord and

satisfaction in their motion for summary judgment. How could Smith's counsel have ever responded to an issue that was not even clearly raised? Instead, the trial court raises the defense of accord sua sponte in its decision on Appellees' first motion for summary judgment. (Rec. at 810). Finally, the case law relied on by Appellees is simply not applicable because it involves amendments to conform to evidence **at trial**. *See Poulsen v. Poulsen*, 672 P.2d 97, 98 (Utah 1983) (the Court's analysis relates to Utah R.Civ. P. 15(b) involving amendments to conform to evidence in trial); *See also, Jones v. Dutra Const. Co.*, 67 Cal. Rptr. 2d. 411, 414 (Cal. Ct. App. 1997); *Lancaster v. C.F. & I Steel Corp.*, 548 P.2d 914, 916 (Colo. 1976). For these reasons, Appellees should not be allowed to hold onto this defense, and the trial court erred in allowing it as the basis for his decision.

B. Material Issues of Fact Exist as to Whether an Accord and Satisfaction Exist And/Or Waiver Are Present.

The trial court erred in granting summary judgment of the employment-related claims because whether the parties reached accord and satisfaction is a question of **fact**. *See R.A. Reither Const., Inc. v. Wheatland Rural Elec. Ass'n*, 680 P.2d 1342 (Col.App. 1984); *Employers Workers' Compensation Ass'n v. W.P. Industries*, 925 P.2d 1225 (Okl.App. 1996). In addition, Appellees' argument that Appellant waived any claims he had when he signed the "termination documents" is a highly **fact-dependent** question and should not be disposed on a summary judgment order. *See Olympus Hills Shopping*

Center, Ltd. v. Smiths Food King and Drug Centers, Inc., 889 P.2d 445, 461 (Utah App. 1994); citing *Barnes v. Wood*, 750 P.2d 1226, 1230 (Utah App. 1988).

There are not sufficient facts that an accord was reached between the parties, or that Smith waived or released any of his claims. Therefore, the order of the court below, dismissing Smith's claims under his employment-related claims should be reversed and the case remanded for trial. To prevail on the claim of the existence of an accord, the moving party must show " . . . (2) payment offered as full settlement of the entire dispute . . ." *ProMax Dev. Corp. v. Raile*, 998 P.2d 254, 259 (Utah 2000) citing *Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985). The payments made to Smith were not final or offered, accepted, and agreed upon by parties as a full resolution and satisfaction of the disputed claim. Appellee argues that no written agreement or specific language is required to show an accord and satisfaction. Nevertheless, the evidence does not support the conclusion that Smith accepted payments as a discharge of his original agreement with Appellees. There is no language in the Separation Agreements indicating that it was made in full satisfaction of all claims.

Waiver is the intentional relinquishment of a known right. *Soters, Inc. v. Deseret Federal Savings & Loan Assn.*, 857 P.2d 935, 939-940 (Utah 1993); citing *Reese v. Intermountain Healthcare, Inc.*, 808 P.2d 1069, 1073 (Utah 1991). Any waiver "must be distinctly made, although it may be express or implied." *Id.* citing *Phoenix, Inc. v. Heath*, 61 P.2d 308, 311 (Utah 1936). This reiteration of the *Phoenix* statement was to insure "that waiver would not be found from any particular set of facts unless it was clearly

intended.” *Soters, Inc.*, at 940. There is not language in the July 25, 1992 Agreement and Resignation adequate to provide as a matter of law a waiver or release of any claims that Smith may have had at the time.

Appellees admit as much, and focus on the point that waiver can be implied from the conduct of the parties. They argue that intent to relinquish a right can be implied if the parties conduct ““unequivocally evinces[s] an intent to waive or [is] at least ... inconsistent with any other intent.”” *Beckstead v. Deseret Roofing Co.*, 831 P.2d 130, 133 (Utah Ct. App. 1992). However, Appellees point to no evidence, other than the **express** Agreements Smith signed at his forced departure where the Court could “unequivocally” imply that Smith relinquished his rights.

In fact, the express language in the “Agreement” Appellees prepared is hard evidence that the a waiver of any claims arising from Smith’s employment was never implied. Appellees apparently knew what was required to articulate a waiver because paragraph 9 on page 3 of the “Agreement” Appellees state “[t]he corporation hereby waives any right to enforce the provisions of the covenant not to compete set out in paragraph II.2 ‘Non-Competition of the Employment Agreement executed by Smith on November 29, 1986 in favor of the corporation’” However, no such language exists in either agreement distinctly manifesting Smith’s waiver of any claims arising from his employment by GCE, or of any other nature.

In granting summary judgment, the trial court judge based his decision on the fact that the claim had been subject to an accord and satisfaction. However, as discussed

above, the trial court erred for a number of reasons in this conclusion. First, as a matter of procedure, the Appellees should not have been allowed to use the defense because they failed to raise it affirmatively as the rules require. Second, accord and satisfaction is a question of fact. From a reading of both parties' briefs it is obvious that there is a factual dispute as to whether an accord and satisfaction exist. Third, neither an accord and satisfaction, or any other relinquishment of rights, is present.

Finally, the trial court acknowledged that issues of material fact existed regarding the remainder of the employment issues. First, the trial court correctly admits that the trier of fact may conclude from the evidence and permissible inferences that the terms of the written contract were perpetuated with the consent of both parties. (Rec. at 812). Second, the trial court admits that the determination of whether sufficient indicia of an implied in-fact promise exists is a question of fact for the jury. (Rec. at 811). Finally, the trial court concludes that issues of material fact exist regarding whether or not the Appellees had cause to terminate Smith. (Rec. at 28). Therefore, the order of the trial court dismissing Smith's claims under his employment agreement should be reversed and the case remanded for trial.

II THE TRIAL COURT IMPROPERLY GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN CONNECTION WITH THE CALCULATION OF GCE'S NET BOOK VALUE.

A. Appellees Breached Covenant When They Calculated the Net Book Value at the Time of Smith's Forced Buyout.

Appellees argue that they could not breach the covenant of good faith and fair dealing when calculating the net book value at the time of Smith's departure because there is no evidence of intent or bad faith by Appellees. As mentioned at the outset of this brief, Appellees misinterpret the law of good faith and fair dealing. *See I.A.I. Supra*. As previously mentioned, the covenant of good faith and fair dealing requires adherence to an agreed common purpose consistent with justified expectations of the parties. *RESTATEMENT [2D] OF CONTRACTS*, § 205 cmt.a (1979). The parties' reasonable expectations of the net book value in the event of a forced buyout is the correct issue of fact in dispute.

Both the underlining court and the Appellees mis-characterize the issue; therefore, it is helpful to provide the Court with some clarity. Judge McIff was initially correct when he recognized that the flexible accounting principles make the calculation of net book value analogous to a line rather than a dot on a line. (Rec. at 1718). Therefore, the calculation of net book value for tax purposes is one possible point on the line. However, the calculation of net book value for purposes of a forced buyout is another point. Both may comport with "generally accepted accounting principles" (GAAP). However, Smith argues that the later, rather than the former, more accurately reflects the reasonable expectations of the parties in the event of a forced buyout. Therefore, Appellees' argument that the accounting comports with "generally accepted accounting principles" is not a defense. Judge McIff agreed that "the duty of good faith and fair dealing may well

influence the acceptable position on the line consistent with the reasonable expectations of the parties.” *Id.* However, he later loses the issue when he dismisses the claim because he finds no evidence that the accounting decisions were influenced by Smith’s forced exit. This is the point of departure from the issue by the trial court and the Appellees. The issue is not so much whether the accounting methodology was influenced by Smith’s forced departure, but whether the accounting methodology used reflected the reasonable expectations of the parties in the event of a forced buyout. After all, the covenant of good faith and fair dealing requires the parties’ actions to be consistent with the **agreed common purpose** of the contract and the **reasonable expectations** of the other parties to the contract. §205, *RESTATEMENT [2D] OF CONTRACTS*, *Comment d* (1981). Therefore, the correct **factual issue** is, given the reasonable expectations of the parties, where should the net book value position have been on the accounting line in the event of a forced buyout?

As mentioned in the opening brief, “[g]ood faith and fair dealing are fact sensitive concepts, and whether there has been a breach of good faith and fair dealing is a **factual issue**, generally inappropriate for decision as a matter of law.” *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 883 P.2d 285, 291 (Utah Ct. App. 1994); *Cook v. Zions First Nat’l Bank*, 919 P.2d 56, 60 (Utah Ct. App. 1996); *Republic Group Inc. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah App. 1994); *Western Farm Credit Bank v. Pratt*, 860 P.2d 376, 380 (Utah App. 1993). Judge McIff agreed and Appellees do not dispute this rule. (Rec. at 2017). The evidence is clear, from the affidavit of Smith’s accounting expert, that a

dispute as to how the value should have been calculated exists. Again, the dispute is not just whether there is evidence that Appellees' accounting methodology was influenced by Smith's forced exit, but also, and more pertinent in this appeal, whether Appellees' accounting methodology reflected the reasonable expectations of the parties in the event of a forced buyout of one of the shareholders. Such is the case in the present determination, and because such a determination involves a dispute as to how the accounting should have been done at the time of Smith's departure, it is a question of fact that should be left to a jury.

Therefore, Appellees argument that Smith should be "estopped" from arguing was done incorrectly because he benefitted from it when he was an employee misinterprets the issue. Once again, the implied covenant of good faith requires the parties' actions to be consistent with the **agreed common purpose** and the **reasonable expectations** of the parties to the contract. *RESTATEMENT [2D] OF CONTRACTS, Comment d* (1981). It is undisputed that the the Buy-Sell Agreement does not expressly address the computation or accounting in the event of a shareholder buyout situation. In such case, the covenant requires that this decision be made based on the reasonable expectations of the parties. Smith argues that it was not within the reasonable expectations of the parties that a shareholder would receive a low net book value calculated for the purposes of tax liability, instead of in the interest of shareholder value, in the event the shareholder was forced to sell his or her ownership. Therefore, Appellees cannot avoid their implied duties by claiming estoppel.

B. Whether Parties Reached an Accord and Satisfaction and/or Whether Smith Waived Any Claims Are Factual Disputes.

After considering Appellee's Brief, there is still no evidence that at the time Appellant negotiated the "termination documents" he had any knowledge sufficient to evaluate GCE's unilateral determination of the net book value. The defense of accord and satisfaction requires the Appellee to show, among others, an unliquidated claim or a bona fide dispute over the amount due. *ProMax Dev. Corp. v. Raile* 998 P.2d 254, 259 (Utah 2000) citing *Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985). Without a dispute as to amount, there is no accord and satisfaction defense. Judge McIff acknowledges that the deposition testimony of Appellant shows that Appellant was "not versed in the Company's accounting matters and would not have been in a position to evaluate the numbers unilaterally supplied." (Rec. at 808). Further, and more importantly, there is still no evidence, nor does any exist, that a dispute as to the buyout amount existed at this point. Appellees hide this argument with their employment termination argument and offer no evidence of any bona fide dispute in regards to the calculation of net book value.

Instead, Appellees take the position that the negotiations surrounding the termination of Appellant, including severance pay and waiver of the non-competition provisions, indicate an accord. Again, this may be true if Smith realized the low-end net book value at the time. However, as mentioned above, Smith did not and could not then appreciate that the accounting of the net book value did not fully represent the net book

value of GCE in the context of his forced buyout. Therefore, Appellant can not be expected to have negotiated away his right to a higher net book value calculation, and the evidence supports this conclusion.

The Appellees then turn around and argue that accord and satisfaction can arise in connection with a claim the amount of which is unknown or uncertain. They cite two cases as support for this novel proposition. Regardless if these cases are accurately cited, the law goes against the grain of the well established law of accord and satisfaction espoused by the Court.

III. SMITH IS ENTITLED TO AN AWARD OF ANY DAMAGES PROVED AT TRIAL.

Appellees argue that in the event of a remand that Smith may not attempt to introduce facts allegedly supporting a claim for punitive damages. This is contrary to the trial court's decision and the law. The trial court admitted that "if the trial in this matter produces an appropriate foundation [for punitive damages], the Court could always revisit this ruling." (Rec. at 2014). Utah Supreme Court has stated that an award of punitive damages may be obtained even when not plead and without a formal amendment of pleadings. "If plaintiff were able to adduce the necessary foundational evidence at trial, she could claim punitive damages under Rule 45(c) . . ." *Behrens v. Raleigh Hills Hosp. Inc.*, 675 P.2d 1175, 1181-82 (Utah 1983) (quoting 6 J. Moore, W. Taggart and J. Wicker, *Moore's Federal Practice*, ¶ 54.60 at 1212-14 (2d Ed. 1983)). The trial court's statements above are consistent with the Court's ruling above, however, its decision to

grant Appellee's motion for summary judgment is contradictory. Smith should therefore not be precluded from presenting evidence, and if such evidence supports such an award, from recovering punitive damages at trial.

IV. UTAH CASE LAW JUSTIFIES RECOVERY OF ATTORNEYS' FEES FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN THIS CASE.

In Appellees' third motion for summary judgment, Judge McIff acknowledges that the Court in *Heslop* allowed the recovery of attorney fees as consequential damages in employment termination cases. *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992) (Rec. at 2013-2012). Appellees argue that *Heslop*'s considerations regarding the vulnerable position of discharged employees do not apply in this case. However, by the relationship's nature, a clear disparity of strength exists between an employer and an employee. This is especially true in regards to the termination of an employee. Therefore, Smith had no other option but to file suit to enforce his employment contract after his termination and forced buyout of his stock.

The trial court declined to recognize the controlling law of *Heslop* because of the contemporaneous case *Heinz*, which limited the recovery of attorney fees for consequential damages to third party litigation in an insured-insurer relationship. *Collier v. Heinz*, 827 P.2d 982 (Utah App. 1992) (Rec. at 2013). The *Heinz* ruled on a separate set of facts. The trial court appears to suggest that the *Heinz* decision reflects the Court's policy of limiting the exceptions allowing attorney fees as consequential damages, and

looks to this Court to determine whether or not *Heslop* should be given its full effect. (Rec. at 2012-2013). Further, the trial court refuses to recognize controlling case law because of the “nature of the limited claim which remains.” (Rec. at 2012). However, if this Court does not agree in its decision, either in whole or in part, in the limiting of the claims by the trial court, the trial court leaves open the possibility of allowing the recovery of attorney fees as consequential damages. (Rec. at 2012). Nevertheless, *Heslop* allows for the recovery for attorney’s fees in employment termination cases. Therefore, the case law and evidence submitted during the summary judgment proceedings in this case to the trial court justify allowing Smith’s claim for attorney fees as consequential damages.

V. SMITH IS ENTITLED TO AMEND HIS COMPLAINT TO INCLUDE AN ALTERNATIVE THEORY OF UNJUST ENRICHMENT.

Rule 15(a), Utah Rules of Civil Procedure, permits amendment with leave of court and states that “leave shall be freely given when justice requires.” In *Cheney*, the Court held that rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated. *Timm v. Dewsnup*, 851 P.2d 1178 (Utah 1993) quoting *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963) (“[the rules of civil procedure] must be looked at in light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.” See also *Johnson v. Brinkerhoff*, 89 Utah 530, 538-39, 57 P.2d 1132, 1136 (1936) (“[t]he policy of the law

is toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided.”); *Hancock v. Luke*, 46 Utah 26, 38, 148 P. 452, 457 (1915) (“Courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented on their merits.”). The trial court avoids what it believes is a “quagmire” on the necessary element on a claim for unjust enrichment, that there be a benefit conferred on one person, in denying Smith’s motion for leave to amend the complaint to include the claim. (Rec. at 1717). They also suggest the claim can equally be made under the covenant of good faith and fair dealing. (Rec. at 1717-18). Smith should not be precluded from arguing a viable remedy simply because the court below believes there is a **potentially** equal remedy. As such, justice requires that Smith be allowed to amend his complaint to plead the viable claim of unjust enrichment.

Appellees incorrectly argue that an unjust enrichment claim would be insufficient or futile. In fact, Judge McIff in his decision on Appellees’ second motion for summary judgment never says that an unjust enrichment claim would likely fail. Instead, he avoids what he believes is a “quagmire” on an element, mentioned below, of an unjust enrichment claim. *See American Towers Ass’n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1192 (Utah 1996) (Rec. 1717). The first element on an unjust enrichment cause of action is that a benefit must be conferred on one person to another. *Id.* Appellees reason that because the refund was not paid by Appellant to GCE, Smith cannot show any benefit conferred upon Appellees in connection with Arizona Tax Refund, and therefore,

the claim is “futile.” However, this element is not remotely “futile,” as Appellees suggest. It is undisputed that GCE treated the refund as corporate income. (Rec. at 917-916, Interrogatory No. 9). The refund constitutes an asset developed during Smith’s ownership of GCE. That value was not included in the determination of his net book value in July 1992. Therefore, the refund, as paid and realized, is now a benefit bestowed on Appellees at Smith’s expense. At the very least, there is factual evidence in dispute as to this element that should be determined by a jury in a trial. The court below erred in denying Smith’s motion for leave to amend.

CONCLUSION

The trial court properly denied Appellees’ summary judgment motion on the Arizona Tax Refund issue. Appellees breached the implied covenant of good faith and fair dealing when they received the admitted windfall and denied Smith of any share in the benefit.

The trial court properly admitted the testimony of Smith’s expert because his testimony does not exceed the limits of reasonability and Appellees’ contentions are better suited for trial.

The trial court properly denied Appellees’ summary judgment motion in holding the individual Appellees liable because of the nature of the corporation and the benefits they received make it both legal and equitable to prevent them from hiding behind the corporate veil.

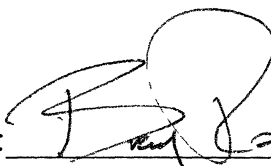
However, the trial court improperly granted summary judgement on Smith’s

employment-related claims because there are both procedural and factual disputes regarding accord and satisfaction and Appellees' breached the implied covenant of good faith and fair dealing.

For similar reasons, the trial court improperly granted summary judgment in connection with the calculation of net book value. In addition, the trial court and the Appellees misconstrue the issue associated with this defense.

The trial court improperly granted summary judgment by denying Smith the entitlement to damages proved at trial because Smith may show the necessary evidence at trial. Further, the trial court improperly denied Smith's claim for attorney fees because this Court's case precedent allows such a recovery. Finally, Smith is entitled to amend his complaint to include a claim for unjust enrichment because the Rules liberally permit amendments when justice requires.

DATED this 15 day of November, 2002.

By: 
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of November, 2002, I caused to be served a true copy of the foregoing APPELLANT'S SECOND BRIEF, by the method indicated below, to the following:

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