

2001

Marc Smith v. Grand Canyon Expeditions Co.,
Martin Mathis, Michael Denoyer, Ronald R. Smith,
Donald Saunders, John Does 1 through 5 : Errata
Addendum and Supplemental Addendum

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARC SMITH,

:

Appellant,

:

v.

:

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

:

Subject to Assignment to the Court of
Appeals

:

Case No. 20010667-SC

:

Appellees.

:

ERRATA ADDENDUM AND SUPPLEMENTAL ADDENDUM

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

The Honorable K. L. McKiff, Presiding

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FILED
UTAH SUPREME COURT

MAY - 1 2002

IN THE UTAH SUPREME COURT

MARC SMITH,	:	
Appellant,	:	
v.	:	
GRAND CANYON EXPEDITIONS	:	Subject to Assignment to the Court of
CO., MARTIN MATHIS, MICHAEL	:	Appeals
DENOYER, RONALD R. SMITH,	:	
DONALD SAUNDERS, JOHN DOES	:	Case No. 20010667-SC
1 through 5 and JANE DOES 1	:	
through 5,	:	
Appellees.	:	

ERRATA ADDENDUM AND SUPPLEMENTAL ADDENDUM

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The Honorable K. L. McKiff, Presiding

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Pleadings and Documents of Record from the Sixth District Court's file cited in Appellant's Brief are included in this Addendum. The Supplemental Addendum included in this bound set duplicates that attached to Appellant's Brief, and is included for the Court's convenience. The numbering of the documents within the Addendum and Supplemental Addendum are done in accordance with the numbering provided by the Clerk of the Sixth District Court. As such, the documents are numbered in reverse numerical order.

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SUPPLEMENTAL ADDENDUM

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF KANE, STATE OF UTAH

MARC SMITH,)	
)	
Plaintiff,)	
)	
vs.	)	Civil No. 940600003
)	
GRAND CANYON EXPEDITIONS CO.;)	
MARTIN MATHIS; MICHAEL DENOYER;)	
RONALD R. SMITH; DONALD)	
SAUNDERS, JOHN DOES 1 through)	
5 and JANE DOES 1 through 5,)	
)	
<u>Defendants.</u>)	

(Condensed Transcript)

* * *

DEPOSITION OF: LINDA RAE KOLLANDER

TAKEN ON: May 21, 1997

PAUL G. McMULLIN
CERTIFIED SHORTHAND REPORTER

PO BOX 1534
ST GEORGE, UTAH 84771

(801) 674-1283

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- 1 A. Yes.
- 2 Q. Did that also decrease over time? That is, her
- 3 visits to the office?
- 4 A. Yes.
- 5 Q. Did the tension between Marc and Ron continue
- 6 after the sale?
- 7 A. Yes.
- 8 Q. Would you characterize it as getting worse,
- 9 better or about the same?
- 10 A. I would say probably a little worse.
- 11 Q. Okay. And how was it that this worsening of the
- 12 tension manifested itself to you? What things did you
- 13 notice --
- 14 A. Ron started coming into the office less. When
- 15 he did come in, Ron -- Marc would either -- he would get up
- 16 and leave.
- 17 Q. Did it manifest itself in any other ways to you?
- 18 A. Not that I'm aware of.
- 19 Q. Okay. Did you attribute Ron coming into the
- 20 office less to this poor relationship he had with his
- 21 brother?
- 22 A. Yes.
- 23 Q. Between 1986 and 1992, when Marc left the employ
- 24 of Grand Canyon, did you ever discuss with Marc his
- 25 relationship with Ron?

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- 1 A. Pardon?
- 2 Q. Between 1986 and mid 1992 -- July, 1992, when
- 3 Marc was separated from the company, did you ever discuss
- 4 with Marc the -- this tension between himself and Ron?
- 5 A. I don't recall discussing it with Marc. I may
- 6 have. I don't recall it right -- I may have. I don't
- 7 really recall it.
- 8 Q. Do you recall discussing it with Ron during that
- 9 same time frame?
- 10 A. Very -- yes.
- 11 Q. Okay. And what do you recall discussing with
- 12 Ron in that connection?
- 13 A. He still really didn't know why Marc was so
- 14 upset with him. I think he felt like he had tried to talk
- 15 to -- to Marc and was unable to talk with him.
- 16 Q. Was this something that Ron communicated to you
- 17 in a personal conversation face-to-face?
- 18 A. Yes.
- 19 Q. Do you recall having more than one conversation
- 20 with Mr. Smith about that?
- 21 A. I think so.
- 22 Q. Could you, as you sit here today, assign any
- 23 time period to one or more of those conversations? In
- 24 other words, it occurred in this year or that year?
- 25 A. I can't say specifically what year. It was

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- 1 after the sale of the company, probably in -- in probably
- 2 the first or second year.
- 3 Q. Do you remember anything else about the
- 4 substance of those conversations with Mr. Smith about the
- 5 poor relationship he had with Marc Smith?
- 6 A. It also caused a very poor relationship with the
- 7 other -- with his family, of course -- with his brothers
- 8 and sisters. It -- it destroyed his family relationship
- 9 with the rest of his family.
- 10 Q. And why do you feel that way?
- 11 A. It was because they felt that Ron had not
- 12 treated Marc fairly, I guess, in the sale of the company.
- 13 Q. Did you feel that Ron had not treated Marc
- 14 fairly in -- in terms of the sale of the company?
- 15 A. I -- he let everyone know he was selling the
- 16 company. I can't say that -- and I don't -- and as far as
- 17 I knew, there was no agreement between the two brothers
- 18 as -- that he would have part -- you know, other than that
- 19 he tried to make a place for him in the company when the
- 20 company sold.
- 21 Q. Okay. Was it your understanding that Ron Smith
- 22 had tried to make a place for Marc in the new company?
- 23 A. Yes.
- 24 Q. On what basis did you understand that?
- 25 A. That he was going to be one of the partners in

29

- 1 the company.
- 2 Q. All right. What understanding did you have as
- 3 to Ron Smith's role in -- in securing a place in the new
- 4 company for Marc Smith?
- 5 A. If it hadn't have been for Ron Smith doing it,
- 6 it wouldn't have happened.
- 7 Q. How do you know that?
- 8 A. Because the other two members of it didn't
- 9 really -- really want a third member or a third partner.
- 10 Q. And the other two members you're referring to
- 11 would be Mr. DeNoyer and Mr. Mathis?
- 12 A. That's correct.
- 13 Q. And you said that the other two did not want a
- 14 third partner, is that right?
- 15 A. That's right.
- 16 Q. Did you have any conversation with Mr. DeNoyer
- 17 or Mr. Mathis when they indicated as much to you?
- 18 A. I was sitting in the room when they discussed it
- 19 right after the sale of the business. Marty was very
- 20 disappointed. He did not want to have a third partner.
- 21 And Michael just said, "We'll deal with it."
- 22 Q. And this was in -- at the end of 1986, after the
- 23 business sold?
- 24 A. Yes. Shortly thereafter. Just when the papers
- 25 were being finalized.

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

MARC SMITH,

PLAINTIFF,

VS.

GRAND CANYON EXPEDITIONS CO.,
MARTIN MATHIS, MICHAEL DENOYER,
RONALD R. SMITH, DONALD SAUNDERS,
JOHN DOES 1 THROUGH 5 AND JANE
DOES 1 THROUGH 5.

DEFENDANTS.

CASE NO. 940600003

DEPOSITION OF DON SAUNDERS

TAKEN: APRIL 18, 1997

CONDENSED TRANSCRIPT/INDEX

INTERMOUNTAIN COURT REPORTERS
5980 South Fashion Blvd.
Murray, Utah 84107
263-1396

File No. 41897

Reported By:
KELLY SOMMERVILLE, CSR, RPR

COPY

Page 2

1 Deposition of DONALD A. SAUNDERS, taken on behalf of
2 Plaintiff, at 920 Hildebrand Ln. N.E., Bainbridge
3 Island, Washington, on April 18, 1997, commencing at
4 8:00 a.m., before KELLY SOMMERVILLE, Registered
5 Professional Reporter and Notary Public in and for the
6 State of Utah, pursuant to Notice.
7
8
9
10 APPEARANCES:
11
12 FOR THE PLAINTIFF: STIRBA & HATHAWAY
13 BY: BENSON L. HATHAWAY, JR.
14 215 So. State St., Suite 1150
15 Salt Lake City, Utah 84111
16
17 FOR THE DEFENDANT: VAN COTT, BAGLEY,
18 CORNWALL & MCCARTHY
19 BY: JOHN ANDERSON
20 50 So. Main St., Suite 1600
21 Salt Lake City, Utah 84144
22
23 ALSO PRESENT: MARC SMITH
24
25

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2
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4 I N D E X
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6 WITNESS EXAMINATION BY PAGE
7 Don Saunders Mr. Hathaway 4
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11 EXHIBITS: REFERRED TO:
12 No. 14 - Letter Page 79
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Page 4

1 Salt Lake City, Utah, April 18, 1997, 8:00 a.m.
2 DONALD A. SAUNDERS,
3 was duly sworn, was examined and
4 testified as follows:
5 BY MR. HATHAWAY:
6 Q. Don, would you state and spell your full name
7 for the record for us?
8 A. Donald, D-o-n-a-l-d, Arthur, A-r-t-h-u-r
9 Saunders, S-a-u-n-d-e-r-s.
10 Q. What's your address?
11 A. 5261 Battle Point Drive NE, Bainbridge Island,
12 Washington 98110.
13 Q. How long now have you lived on Bainbridge
14 Island?
15 A. Year and-a-half.
16 Q. Do you still have a residence in Arlington,
17 Washington?
18 A. No.
19 Q. Sold that place?
20 A. Yes.
21 Q. What is your birth date?
22 A. 7/25/34.
23 Q. Give me an idea if you would, Don, as to your
24 educational background.
25 A. I graduated from Lake Washington High School

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1 and then I did about 200 credit hours at University of
2 Washington but I didn't technically graduate in
3 accounting. I took a lot of accounting courses and
4 various other courses that I felt would further my
5 accounting background. I was in public accounting
6 business at the time, but I didn't need a certificate
7 because I was in business with my father.
8 Q. What did your father do?
9 A. He was a public accountant.
10 Q. So you were working with him doing those types
11 of things?
12 A. Yes.
13 Q. When was it that you finished any formal
14 education at University of Washington?
15 A. Probably the last regular course, see, I've
16 taken courses there. I guess I don't know what you mean
17 by formal. I kept taking courses off and on for, you
18 know, where they had seminars and different things like
19 that for years.
20 Q. Did you?
21 A. 20 years, yeah.
22 Q. Yeah.
23 A. And other places, you know, that I did some.
24 Q. Have you ever received any certificates?
25 A. No.

<p style="text-align: right;">Page 6</p> <p>1 Q. No graduation diploma?</p> <p>2 A. From the university?</p> <p>3 Q. Right.</p> <p>4 A. No.</p> <p>5 Q. And you're not a C.P.A.?</p> <p>6 A. No.</p> <p>7 Q. Were you born in Washington?</p> <p>8 A. Yes.</p> <p>9 Q. Whereabouts?</p> <p>10 A. Seattle.</p> <p>11 Q. Lived here all your life?</p> <p>12 A. Yes, uh-huh, lived in the state of Washington</p> <p>13 all my life.</p> <p>14 Q. Tell me if you would, Don, briefly about your</p> <p>15 employment background starting from this point in time</p> <p>16 when you were employed with your father.</p> <p>17 A. I worked for my father for a few years, then as</p> <p>18 a partner with my father for a few years, and then my</p> <p>19 father retired and I ran the practice for a couple</p> <p>20 years, and then I sold the practice and became the</p> <p>21 financial officer for a boat building company.</p> <p>22 Q. That was Bayliner Boats as I understand it?</p> <p>23 A. Yes, uh-huh.</p> <p>24 Q. When did you sell the practice?</p> <p>25 A. In about September of '72.</p>	<p style="text-align: right;">Page 7</p> <p>1 Q. How many employees were there at Saunders</p> <p>2 Accounting and Bookkeeping at the time you sold it?</p> <p>3 A. Five.</p> <p>4 Q. Why don't you describe for us what you did</p> <p>5 after going to work for Bayliner as the chief financial</p> <p>6 officer.</p> <p>7 A. When I went to work for Bayliner, I handled all</p> <p>8 of the financial matters, the trucking department, the</p> <p>9 -- all the computer operations, the health, accident,</p> <p>10 all those types of things, all the employee benefit</p> <p>11 programs. All of the hiring policies and hiring of all</p> <p>12 the people were in my departments. I used to say it was</p> <p>13 everything the other guys didn't want to do actually</p> <p>14 there, but anyway, those types of things. I got</p> <p>15 involved in manufacturing from time to time and in</p> <p>16 the -- somewhat in the design of the boats, pretty much</p> <p>17 the whole thing.</p> <p>18 Eventually, by 1976 there was the five people who</p> <p>19 eventually were the owners of the company, myself and</p> <p>20 three other guys. We had lunch together every day and</p> <p>21 we, between the four of us, we pretty much basically ran</p> <p>22 the company under us because we were -- if everybody was</p> <p>23 in town eating lunch together every day, we got involved</p> <p>24 in each other's parts of the business. So I was</p> <p>25 involved in everything, but primarily the parts I named.</p>
<p style="text-align: right;">Page 7</p> <p>1 Q. What was the practice known as at the time you</p> <p>2 sold it?</p> <p>3 A. Saunders Accounting and Bookkeeping.</p> <p>4 Q. During your work with Saunders Accounting and</p> <p>5 Bookkeeping, was Bayliner one of your customers,</p> <p>6 clients?</p> <p>7 A. Well, maybe we better distinguish on Bayliner.</p> <p>8 It started out as Puget Advanced Outboard Marine,</p> <p>9 Advanced Outboard went to Advanced Outboard Marine, went</p> <p>10 to Puget Plastics, went to some different names but</p> <p>11 for -- we could just for simplicity purposes say</p> <p>12 Bayliner. Bayliner was the name of the boats the</p> <p>13 company built.</p> <p>14 Q. I understand.</p> <p>15 A. And so it's commonly known as that. The</p> <p>16 corporate names were different things as well through</p> <p>17 the years.</p> <p>18 Q. What was the corporate name at the time you</p> <p>19 became involved as the chief financial officer?</p> <p>20 A. By then it was Bayliner Marine.</p> <p>21 Q. And that was about in 1972?</p> <p>22 A. '72, yes. I had for a number of years before</p> <p>23 that done all our accounting and our office had done all</p> <p>24 the payrolls and payables and everything for what was to</p> <p>25 become eventually Bayliner Marine.</p>	<p style="text-align: right;">Page 1</p> <p>1 Q. When did you become an owner in this entity</p> <p>2 that became Bayliner Boats?</p> <p>3 A. When I sold my accounting practice. The owner,</p> <p>4 the person at that time that basically owned the whole</p> <p>5 thing, Orin Edson, said he was going to have to get a</p> <p>6 financial officer to come in and work in the company if</p> <p>7 I wouldn't sell my accounting practice and go to work</p> <p>8 for him. And so I made him a deal where he'd sell me</p> <p>9 part of the company if I sold the accounting practice</p> <p>10 and go to work for him simply because I was a little</p> <p>11 bored with the accounting. It's the same old thing</p> <p>12 every day. Bayliner was exciting and it was growing. I</p> <p>13 knew I was taking a pretty good risk, but I just was</p> <p>14 really impressed with it because my accounting practice,</p> <p>15 the year I sold it, which brought it to a head was I had</p> <p>16 taken two months off my practice. I had about a hundred</p> <p>17 clients and it ran so smooth and was so good I'd just</p> <p>18 take the summer off and tour around the country with my</p> <p>19 kids. And while I was gone the two months they'd got in</p> <p>20 some problems with personnel and everything at Bayliner,</p> <p>21 so when I got back Orin says, Don, God, I've got to have</p> <p>22 you do that. That was one of my very wise decisions and</p> <p>23 I got rid of it.</p> <p>24 Q. What percentage did you buy?</p> <p>25 A. It varied and I bought more later. You know, I</p>

1 can't remember what percentage that was. Eventually I
2 owned about four percent of Bayliner.
3 Q. Was Bayliner a publicly traded corporation?
4 A. No. When we sold the company in 1986, there
5 were four stockholders, two other people with the same
6 stock as me and then a majority. Orin owned the
7 majority.
8 Q. Who were the four shareholders with you?
9 A. Vinton Sommerville, David Livingston, and J.
10 Orin Edson.
11 Q. J. Orin Edson, and I take it from your prior
12 statements that he was the primary --
13 A. Yes.
14 Q. -- shareholder?
15 A. Yes. He'd started the original company which
16 sold used outboards in Seattle.
17 Q. And he sold to the Brunswick Corporation,
18 correct?
19 A. We sold to the Brunswick.
20 Q. I'm sorry, you sold.
21 A. Uh-huh.
22 Q. Brunswick, they still own Bayliner, don't they?
23 A. Yes. And there was a number of names. It
24 wasn't just Bayliner. Bayliner was the biggest
25 product. We had other companies within it. We had

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1 bought Chrysler Marine Corporation. You know, we had
2 other boat companies that were -- Blue Fin Aluminum
3 Boats, things like that, but Bayliner basically, yes,
4 that's what we sold.
5 Q. Can you tell me what the other entities were
6 that was part of that deal?
7 A. I can't remember. There's lots of them. I'd
8 have to go through the records and look.
9 Q. But they were all included in your four percent
10 ownership of the stock in this entity?
11 A. Yes. They were all part of it. Originally
12 there was, you know, back in the early '70s, the common
13 thing was you keep a bunch of different corporations and
14 eventually we'd put them all together because you didn't
15 have any tax advantage and it got messy and everything
16 was one corporation. So finally as we bought any other
17 boat company we just took the assets and we didn't do
18 the corporations and stuff.
19 Q. Of the four shareholders of the company, who
20 was most involved in these acquisitions and handling --
21 at least the way these other business entities or
22 enterprises you described were handled and incorporated
23 into the business?
24 A. Orin Edson and I. If it was a large one, we'd
25 generally negotiate it together because we'd play ping

1 pong with the purchasers, you know. And then if it was,
2 you know, not a major deal, you know, we're buying a
3 200,000 square foot plant or something in Mississippi, I
4 might go negotiate it myself or whatever.
5 Q. Once you made the determination in this prior
6 entity to acquire an asset or to acquire an enterprise,
7 who was it that set up the actual structure, by the
8 Bayliner group or Bayliner company for lack of a better
9 name, to handle that new enterprise?
10 A. I don't understand your question.
11 Q. Well, you testified that in the '70s
12 everybody -- you used to set up the subsidiaries --
13 A. Uh-huh, right.
14 Q. -- for other corporations that were involved
15 and ultimately there was no tax advantage to doing that
16 so you brought all the businesses in?
17 A. Sure, yep.
18 Q. As these acquisitions were subsequently made,
19 were they just purchased in the name of this Bayliner
20 company?
21 A. Yep, uh-huh.
22 Q. Were any of the four or the three remaining
23 shareholders involved at all with you directly in the
24 aspects of the business you described, you were involved
25 in primarily the accounting business?

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1 A. To some extent. Again, we ate lunch together
2 every day.
3 Q. It was an oversight kind of function?
4 A. Yeah. We'd talk about that and then we --
5 every Monday night we had a meeting for three or four
6 hours and that also included -- and the lunch included
7 maybe three other key personalities. It would vary from
8 one to four as time went on, but it involved other
9 people. We were just together. I mean, we -- and our
10 offices were all in a row in the offices, you know, so
11 we saw each other lots.
12 Q. You talked on a regular basis?
13 A. Yeah.
14 Q. When you sold Baylienr in 1986, how many
15 employees did Bayliner have?
16 A. About 7,000.
17 Q. How many employees would you consider at least
18 as of 1986 when you sold the business to have been in a
19 management sort of a position?
20 A. In some type of management, do you consider a
21 leadman, is he a management person?
22 Q. That's a broad question.
23 A. Yeah.
24 Q. Were there other employees of the entity
25 besides the four of you which you considered to be key

<p style="text-align: right;">Page 14</p> <p>1 personnel involved in the operation of the business?</p> <p>2 A. Many.</p> <p>3 Q. Many?</p> <p>4 A. We had 7,000 employees. There was many, many,</p> <p>5 many.</p> <p>6 Q. Was there a core group of decision makers for</p> <p>7 the company besides the four of you?</p> <p>8 A. Yes. The other people that went to like lunch</p> <p>9 with us and met in our Monday night meeting were part of</p> <p>10 that core group. The guy that ran our marketing or I</p> <p>11 mean, actually our advertising department,</p> <p>12 communications we called it, the guy that was the</p> <p>13 bruntman as far as all the manufacturing operations.</p> <p>14 Oh, various other people. There was probably 30 key</p> <p>15 people. There was probably 30 people say in 1986 that</p> <p>16 earned more than 100,000 a year and those are fairly --</p> <p>17 at that time that would be like a quarter of a million</p> <p>18 today. Those were fairly key management people who</p> <p>19 worked with us.</p> <p>20 Q. Was there ever a point in time that the four of</p> <p>21 you that owned and ultimately controlled the company had</p> <p>22 disagreements about how to handle certain aspects of the</p> <p>23 business?</p> <p>24 A. Yeah, occasionally, uh-huh.</p> <p>25 Q. Is it fair to say that that wasn't something</p>	<p style="text-align: right;">Page 16</p> <p>1 two times that we had over 18 years we really had any,</p> <p>2 you know, really dispute that I had to kind of mediate</p> <p>3 in the middle of you might say over that many years. So</p> <p>4 there wasn't a lot. We were -- our business was making</p> <p>5 money and we concentrated on that. We didn't have a lot</p> <p>6 of infighting in the company. We didn't have -- we were</p> <p>7 very untypical of a very large company, you know, or</p> <p>8 large company because we didn't have a bunch of</p> <p>9 politicking going on, and that's where you get all of</p> <p>10 this infighting, you know. We didn't have it. I mean,</p> <p>11 we paid our people well and we kept them real busy and</p> <p>12 it's like I always said, just run the office short of</p> <p>13 people so they don't have time to get their little</p> <p>14 political groups together. So we didn't have it. It</p> <p>15 was a really rare incidence.</p> <p>16 Q. What have you done professionally since 1986</p> <p>17 when you sold the business?</p> <p>18 A. Professionally, nothing.</p> <p>19 Q. Nothing.</p> <p>20 A. I have businesses that other people -- I mean,</p> <p>21 it's like this, I don't get involved in them. I'm very</p> <p>22 careful to stay kind of distanced from anything because</p> <p>23 I don't want any involvement in my company.</p> <p>24 Q. Tell me if you would, Don, what businesses</p> <p>25 you've got going besides the Grand Canyon Expeditions?</p>
<p style="text-align: right;">Page 15</p> <p>1 that necessarily was uncommon?</p> <p>2 MR. ANDERSON: I'll object to the question. That's</p> <p>3 overbroad.</p> <p>4 THE WITNESS: Well, actually it was -- it was very</p> <p>5 uncommon in our company.</p> <p>6 BY MR. HATHAWAY:</p> <p>7 Q. How about within this group of 30 core people,</p> <p>8 was it -- I take it that some of those may have been</p> <p>9 involved in generally the same aspect of the business?</p> <p>10 A. Yes, uh-huh.</p> <p>11 Q. In your experience with Bayliner Corporation,</p> <p>12 isn't it true that on occasion disputes arise as to how</p> <p>13 to handle the operation of the business?</p> <p>14 A. Not that I can really call disputes. We paid</p> <p>15 our help extremely well. Probably our key people were</p> <p>16 getting twice as much as anybody else in the industry.</p> <p>17 We never had anybody stolen from us because everybody</p> <p>18 would think I can't pay this guy that kind of money, so</p> <p>19 we didn't have that kind of problem, so we had the very</p> <p>20 best. So we, I mean, it was rare that I can ever</p> <p>21 remember any disputes among the people. I mean, we had</p> <p>22 the best and they worked it out and they were</p> <p>23 reasonable. We didn't have that kind of problem.</p> <p>24 It's like you ask the question about Orin, Slim, and</p> <p>25 Dave and I getting at each other. I don't remember but</p>	<p style="text-align: right;">Page 17</p> <p>1 A. Let's see, right now, I believe I don't have</p> <p>2 any except a land development company and GCE. I have</p> <p>3 another corporation I guess it's got some land in it but</p> <p>4 it's not very active. My land development company has</p> <p>5 quite a bit. I have a son-in-law that runs that.</p> <p>6 Q. What's the name of that company?</p> <p>7 A. It's SK Enterprises Company or it's Donald --</p> <p>8 Don Saunders DBA. It's not a corporation.</p> <p>9 Q. And I take it you're not in any way involved in</p> <p>10 the management or operation of the business of the</p> <p>11 entity?</p> <p>12 A. I've been one time in the last few years just</p> <p>13 on one piece of property where they were having some</p> <p>14 problems selling it, and I got in with the guys that</p> <p>15 were buying it and negotiated the sale price.</p> <p>16 Q. What sort of development do they do?</p> <p>17 A. Vacant lands, 300 acre lots, 1000 acre lots,</p> <p>18 5000 acre lots, that kind of property.</p> <p>19 Q. Is this recreational property?</p> <p>20 A. Residential.</p> <p>21 Q. Residential, so estate-type lots?</p> <p>22 A. Yeah, uh-huh.</p> <p>23 Q. Whereabouts are they operating?</p> <p>24 A. Snohomish County in the state of Washington.</p> <p>25 Q. Maybe you better spell Snohomish.</p>

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IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,)	
)	
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
v.	)	MOTION FOR SUMMARY
	)	JUDGMENT
GRAND CANYON EXPEDITIONS)	
CO.; MARTIN MATHIS; MICHAEL	)	(HEARING REQUESTED)
DENOYER; DONALD SAUNDERS;	)	(FILED UNDER SEAL)
JOHN DOES 1 through 5; and JANE)	
DOES 1 through 5,	)	Civil No. 940600003
)	
Defendants.	)	Hon. K. L. McIff
)	
)	

Defendants Grand Canyon Expeditions Co. ("Grand Canyon" or the "Company"), Donald Saunders ("Saunders"), Michael Denoyer ("Denoyer"), and Martin Mathis ("Mathis") (collectively referred to as "Defendants") submit the following points and authorities in support of their motion for summary judgment.

I. INTRODUCTION

Defendants previously moved for summary judgment on all claims for relief set forth in Plaintiff's Second Amended Complaint. The court granted partial summary judgment to Defendants, dismissing the first claim for relief in its entirety and the second claim for relief in

attorney, Mr. Skeen, that Plaintiff's stock was being purchased and he would need to prepare a buy-out amount consistent with the Buy/Sell Agreement. Id.

Denoyer and Mathis were completely unsophisticated in financial and accounting matters. They relied upon the accounting expertise of the Company's accountant Mr. Willis. Mr. Willis has attested that there was no manipulation of the books and records of Grand Canyon to create an artificially low buy-out amount for Plaintiff. Id. ¶ 22. Moreover, this theory is seriously undermined by the fact that Plaintiff, in essence, dictated the timing of his departure.⁴

Plaintiff's counsel also appears to be under the mistaken impression that Grand Canyon's investment in White Water mysteriously disappeared in the consolidated financial statement prepared by Mr. Willis. In fact, the investment appears in the asset column of White Water that is added to Grand Canyon's assets. See Exs. "F", "G", and "H". Counsel's libelous suggestion that Grand Canyon engaged in income tax fraud through erasure is unsupported by any factual evidence and simply indicates the depths to which counsel will sink to manufacture an illusory issue of fact. See Plaintiff's counsel's letter to Court dated January 18, 1999 (attached hereto as Exhibit "R").

Plaintiff's counsel has also misrepresented to the Court previously that Grand Canyon's financial condition was worse in July 1992 than at any point in the history of the Company. As noted at the last hearing, and confirmed through Mr. Willis' Affidavit and the data available to Plaintiff's counsel, Grand Canyon's position was significantly better in July 1992

⁴ The undisputed facts demonstrate that Plaintiff demanded that his employment difficulties with Grand Canyon be resolved during the 1992 rafting season, rather than thereafter as Denoyer and Grand Canyon would have preferred. See Memorandum in Support of Motion for Summary Judgment, filed October 30, 1998 (citing deposition testimony).

DATED this 22^d day of March, 1999.

STOEL RIVES LLP

A handwritten signature in dark ink, appearing to read "Matthew M. Durham", written over a horizontal line.

John A. Anderson
Matthew M. Durham
Attorney for Defendants

*726259 2001 UT App 209

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Court of Appeals of Utah.

James DISHINGER and Nancy Dishinger dba TCBY Yogurt,
Plaintiffs, Appellants, and Cross-appellees,
 v.
Jana POTTER dba Silver Queen Hotel, Defendant,
Appellee, and
Cross-appellant.
 No. 20000081-CA.
 June 28, 2001.

Commercial tenants filed declaratory judgment action asking court to interpret lease provision regarding monthly rental rate. Landlord counterclaimed for breach of lease and unlawful detainer. After jury trial, the Third District Court, Coalville Department, Robert K. Hilder and Pat B. Brian, JJ., entered judgment for landlord in amount of \$8,730. Tenants appealed, and landlord cross-appealed. The Court of Appeals, Billings, J., held that: (1) jury's special verdict was not advisory, and thus trial court was bound by jury's findings; (2) accord and satisfaction precluded finding of unlawful detainer; (3) waiver provision in lease did not preclude finding of accord and satisfaction; (4) landlord was entitled to administrative fees; (5) landlord was not entitled to late fees; and (6) remand was necessary to determine prevailing party for purposes of attorney fees.

Reversed and remanded.

Orme, J., dissented and filed opinion.

[1] Appeal and Error ⚡ 1078(1)

30 ----

30XVI Review

30XVI(K) Error Waived in Appellate Court

30k1078 Failure to Urge Objections

30k1078(1) In General.

Tenants could raise issue of accord and satisfaction on appeal, even though issue was not raised in pleadings, as record showed that evidence regarding existence of accord and satisfaction was presented at

trial, jury was instructed on and made findings of fact that supported accord and satisfaction, and landlord had opportunity to prepare and meet issue. Rules Civ.Proc., Rule 15(b).

[2] Pleading ⚡ 427

302 ----

302XVIII Waiver or Cure of Defects and Objections

302k427 Objections to Evidence as Not Within Issues.

If an issue is fully tried, a court may decide the issue and deem the pleadings amended even if the issue was not originally pleaded, and whether the pleadings may be deemed amended depends on whether the opposing party had a fair opportunity to prepare and meet the issue.

[3] Appeal and Error ⚡ 498.1

30 ----

30X Record

30X(A) Matters to Be Shown

30k498 Presentation and Reservation of Grounds of Review

30k498.1 In General.

Commercial tenants who appealed from jury's special verdict were not required to provide transcript of proceedings below or marshal evidence, as tenants were not challenging findings of fact but trial court's application of law to jury's special verdict findings.

[4] Declaratory Judgment ⚡ 369

118A ----

118AIII Proceedings

118AIII(F) Hearing and Determination

118Ak369 Verdict and Findings.

Jury's special verdict in declaratory judgment action brought by tenants against landlord was not advisory, and thus trial court was bound by jury's findings, as both parties pursued legal, not equitable claims, tenants demanded jury trial on claims, and trial court did not inform parties or jury that jury was merely advisory. Rules Civ.Proc., Rule 49(a).

[5] Trial ⚡ 347

388 ----

388IX Verdict

388IX(B) Special Interrogatories and Findings

388k346 Power of Jury to Find Specially

388k347 Special Verdict.

In the case of a special verdict, the jury only finds the facts, and the court applies the law thereto and renders the verdict.

[6] Accord and Satisfaction ⚡ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

[See headnote text below]

[6] Accord and Satisfaction ⚡ 11(2)

8 ----

8k6 Part Payment

8k11 Conditioned on Acceptance as Payment in Full

8k11(2) Remittances on Condition.

Accord and satisfaction was established in dispute between commercial tenant and landlord as to rental rate, and thus tenants were not in unlawful detainer, where jury found a good faith agreement over amount due under lease, payments tendered were made in full satisfaction of disputed rent, and landlord negotiated check, which contained notation that amount was for new base rent.

[7] Accord and Satisfaction ⚡ 1

8 ----

8k1 Nature and Requisites in General.

To establish an accord and satisfaction, three elements must be present: (1) an unliquidated claim or a bona fide dispute over the amount due, (2) a payment offered as full settlement of the entire dispute, and (3) an acceptance of the payment as full settlement of the dispute.

[8] Accord and Satisfaction ⚡ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

To satisfy the requirement that there be a good-faith disagreement over the amount due under the contract, as required to establish an accord and satisfaction, the disagreement need not be well-founded, so long as it is in good faith.

[9] Contracts ⚡ 15

95 ----

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k15 Necessity of Assent.

A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced.

[10] Trial ⚡ 358

388 ----

388IX Verdict

388IX(B) Special Interrogatories and Findings

388k358 Inconsistent Findings.

Where a jury's special verdict findings support inconsistent legal claims, a court is not precluded from applying the law to those findings and entering judgment for a party on one theory, as a matter of law, which precludes judgment on another inconsistent legal theory. Rules Civ.Proc., Rule 49(a).

[11] Accord and Satisfaction ⚡ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

[See headnote text below]

[11] Accord and Satisfaction ⚡ 11(2)

8 ----

8k6 Part Payment

8k11 Conditioned on Acceptance as Payment in Full

8k11(2) Remittances on Condition.

Waiver provision in commercial lease providing that acceptance of rent did not constitute waiver did not preclude finding of accord and satisfaction based on tenants' tender of check for disputed rent amount, as lease provision did not provide that acceptance of partial rent did not constitute accord and satisfaction, and landlord could not claim that check tendered by tenants was partial rent, as there was no agreement as to amount of rent upon expiration of lease.

[12] Landlord and Tenant ⚡ 238

233 ----

233VIII Rent and Advances

233VIII(B) Actions

233k238 Costs.

Landlord was entitled to administrative fees ***726259** in dispute with commercial tenant, despite jury's finding of accord and satisfaction with respect to rent due, where lease unambiguously provided that tenants would pay for all costs and fees association with supervising and administering common areas.


[13] Landlord and Tenant ⚡ 216

233 ----

233VIII Rent and Advances

233VIII(A) Rights and Liabilities
233k216 Penalties or Double Rent.

Landlord was not entitled to late fees under lease provision based on tenant's alleged failure to pay rent, as there was accord and satisfaction as to rent due, and thus tenants were current on rent payments.

[14] Appeal and Error  1177(5)

30 ----

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(5) Errors in Rulings and
Instructions at Trial.

Remand was necessary in dispute between landlord and commercial tenants to determine which party was entitled to attorney fees as prevailing party, where trial court's finding of unlawful detainer was reversed on appeal.

Third District, Coalville Department.

The Honorable Robert K. Hilder.

The Honorable Pat B. Brian.

Dwayne A. Vance and David B. Thompson, Park City, for Appellants.

Robert M. Felton, Salt Lake City, for Appellee.

Before Judges BILLINGS, ORME, and THORNE.

OPINION

BILLINGS, Judge:

****1** ¶ 1 Plaintiffs James and Nancy Dishinger dba TCBY Yogurt (the Dishingers) appeal the trial court's judgment finding them in unlawful detainer. Defendant Jana Potter dba Silver Queen Hotel (Potter) cross-appeals the trial court's refusal to instruct the jury on the meaning of "prevailing rate" and its failure to award her administrative, late, and attorney fees. We reverse and remand.

BACKGROUND

¶ 2 In May of 1990, Erik Ziskend entered into a commercial lease with Potter for premises located on Main Street in Park City, Utah. On May 31, 1994, Ziskend assigned the lease to the Dishingers. Potter consented to the assignment. The Dishingers operated

a frozen yogurt shop on the premises.

¶ 3 The lease provided for continuous three year options after expiration of the initial three year lease term. Under the terms of the lease, the Dishingers, as tenants, were required to notify Potter in writing of their desire to exercise the option 120 days prior to the expiration of the current lease term. The lease specified that the rental rate for an option period would be "adjusted upward, but not less than the current Minimum Monthly Rent being paid, to the then prevailing rental rate of similar buildings in the Main Street area of Park City, Utah." (FN1)

¶ 4 On February 1, 1996, the Dishingers notified Potter in writing of their desire to exercise the lease renewal option. Thereafter, the following correspondence took place. On April 4, 1996, Potter advised the Dishingers that the prevailing rental rate of similar buildings on Main Street in Park City was \$30 per square foot and thus, pursuant to the lease, \$30 per square foot (\$2,425.00/month) would constitute the new base monthly rent. The Dishingers responded that, based on the appraisal they had performed, the prevailing rental rate of similar buildings was \$19 per square foot (\$1,535.83/month).

¶ 5 At the commencement of the July 1, 1996 renewal period, without an agreement as to what would constitute the base monthly rent, the Dishingers began paying rent in an amount reflecting their appraisal of \$19 per square foot. They sent Potter a check for \$1,976.92, clearly noting it was for "New Base Rent." On July 8, 1996, Potter sent the Dishingers a notice of default on the grounds that the Dishingers were \$889.17 delinquent in their July rental payment. On July 13, 1996, Potter served the Dishingers with a notice to pay the remaining rent or quit. On July 15, 1996, Potter negotiated the Dishinger's July 1 rent check. On the first of every month, from July 1996 through June 1997, the Dishingers sent Potter a check for \$2,137.11 (FN2) reflecting \$19 per square foot in base monthly rent. Potter negotiated each of those checks.

¶ 6 On August 8, 1996, the Dishingers filed a declaratory judgment action asking the trial court to interpret the lease provision regarding the monthly rental rate. Potter counter-claimed for breach of lease and unlawful detainer.

****2** ¶ 7 After a jury trial, the jury returned a special verdict answering a number of factual

questions. In the special verdict the jury found there was a legitimate dispute as to the "then prevailing rental rate," that the Dishingers tendered payment to Potter in full satisfaction of the disputed amount based on their appraisal of \$19, and that Potter accepted the rent payments after the July 13 notice to quit. The jury also found the "then prevailing rental rate" to be \$25 per square foot, and as such, Potter was entitled to recover the balance of base rent, totaling \$8,730.

¶ 8 The Dishingers filed a motion for entry of judgment based on the special verdict, arguing that the jury's special verdict established an accord and satisfaction, which fixed the base rental rate at \$19 per square foot, and thus, they were current in monthly payments and Potter's unlawful detainer claim should be dismissed. The Dishingers also argued that a determination that they were in unlawful detainer of the premises was precluded because Potter accepted rental payments after serving the notice to quit, thus waiving forfeiture of the lease.

¶ 9 The trial court, first Judge Brian, then Judge Hilder in an amended judgment, entered judgment for Potter. The trial court concluded that, based on the findings of the jury in its special verdict, it was "clear" that while Potter accepted payments after the notice to quit, the amount received "did not represent a full payment of base rent," and thus did not constitute an accord and satisfaction. Thus, the trial court concluded the Dishingers were in unlawful detainer and entered judgment in favor of Potter for \$8,730, which was trebled to \$26,190 pursuant to Utah Code §11n. 78-36-10 (1996). This appeal followed.

¶ 10 On appeal, the Dishingers argue the trial court was precluded from determining they were in unlawful detainer because the jury's special verdict established an accord and satisfaction as a matter of law. Alternatively, the Dishingers argue that Potter affirmed the lease by accepting rent payments, thereby waiving forfeiture of the lease, and thus precluding a finding of unlawful detainer.

¶ 11 Potter cross-appeals, arguing the trial court should have instructed the jury that the "then prevailing rental rate" meant market rate. Potter also argues the trial court erred by failing to award her administrative fees, late fees, and attorney fees as required by the lease.

ANALYSIS

I. Preliminary Issues

¶ 12 In addition to the claims raised in her cross-appeal, Potter asserts that the Dishingers failed to preserve their claims below, failed to provide a transcript of the proceedings and marshal the evidence, and cannot rely on the jury's special verdict because it was merely advisory. Before addressing the main substantive issues on appeal, we first address these threshold arguments.

A. Preservation of Claims

[1][2] ¶ 13 Potter first argues the Dishingers failed to preserve their claim of accord and satisfaction in accordance with Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure. Rule 24(a)(5)(A) provides that "[t]he brief of the appellant shall contain ... citation to the record showing that the issue was preserved in the trial court." Utah R.App. P. 24(a)(5)(A). The Dishingers reference several places in the record to show that the issue of accord and satisfaction was preserved in the trial court. (FN3) Thus, Potter's argument that the Dishingers did not preserve the issue of accord and satisfaction is without merit. (FN4)

B. Marshaling the Evidence

**3 [3] ¶ 14 Potter next argues the Dishingers needed to provide a transcript of the proceedings to allow meaningful review of the evidence, and have also failed to marshal the evidence. A transcript of the proceedings is not required because the Dishingers are relying on the jury's special verdict on appeal, not the evidence presented at trial. See, e.g. *Pugh v. North Am. Warranty Servs., Inc.* 2000 UT App 121¶ 11, 1 P.3d 570. Moreover, the marshaling requirement applies only when challenging findings of fact. See *Moon v. Moon*, 1999 UT App 12¶ 24, 973 P.2d 431. Clearly, the Dishingers are not challenging findings of fact. Rather, they are challenging the trial court's application of the law to the jury's special verdict findings and thus the Dishingers do not have the burden of marshaling the evidence.

C. Advisory Jury Verdict

[4] ¶ 15 Relying on *Peirce v. Peirce* 2000 UT 7, 994 P.2d 193, Potter next argues that the jury's special verdict was merely advisory, and therefore the trial court was not bound by the jury's findings in the special verdict. Potter's reliance on *Peirce* is misplaced. In

Peirce, the issue before the court was "whether the jury served in an advisory capacity or whether [the] case was tried by a jury as a matter of right." *Id.* at ¶ 12. However, the plaintiff *Peirce* was seeking an equitable remedy. *See id.* "When a jury is used in an equity case, it acts in an advisory capacity," (quoting *Romrell v Zions First Nat'l Ban* 611 P 2d 392, 394 (Utah 1980) (quotation and citation omitted)), "unless both parties have clearly consented to accept a jury verdict." *Id.* at ¶ 13 (quoting *Romrell*, 611 P 2d at 394 *see also* Utah R. Civ. P. 39(c)). Because the parties did not clearly consent to accept a jury verdict, and the record indicated that the trial court treated the jury as advisory, the court held that the jury served only in an advisory capacity and thus afforded no deference to its findings. *See id.* at ¶ 15.

¶ 16 In the instant case, we are not dealing with an action in equity. Both the Dishingers and Potter pursued legal claims, the Dishingers specifically demanded a jury trial on those claims, and at no time did the trial court inform the parties or the jury that the jury was merely advisory. (*Goldberg v Jay Timmons & Assoc.* 896 P 2d 1241, 1244 (Utah Ct App 1995) (stating, "if the trial court had intended to use an advisory jury, it should have notified the parties before the trial began"). Where, as here, the case is tried to a jury as a matter of right, Rule 49(a) of the Utah Rules of Civil Procedure permits the trial court to "require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Utah R. Civ. P. 49(a). "The [trial] court then applies the law to the facts as found and renders a verdict." *Brigham v Moon Lake Elec. Ass'n* 24 Utah 2d 292, 298, 470 P 2d 393, 397 (1970) (Ellett, J., further opinion) (commenting on Rule 49(a)).

****4** ¶ 17 As Justice Ellett explained in *Brigham*.

The special verdict was devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict. Instructions to the jury are thus simplified, and the jurors may, therefore, concentrate upon the functions which belong to them, viz., to find the facts in the case.

Id. Thus, "[i]n [the] case of a special verdict, the jury only finds the facts, and the court applies the law thereto and renders the verdict. This is what occurred in the instant case. The trial court instructed the jury "[i]t is not exclusive duty to determine the

facts in this case, and to consider and weigh the evidence for that purpose", "You are *exclusive judges of the facts and the evidence*" (Emphasis added). The trial court then entered judgment, *Based upon the evidence and the special verdict*" (Emphasis added). Thus, the jury was not merely advisory. Rather, the jury found the facts as set forth in its special verdict and the trial court entered judgment applying the law to those facts.

II Accord and Satisfaction

[6] ¶ 18 The Dishingers argue that an accord and satisfaction occurred prior to trial which set the rental rate at \$19 per square foot thus precluding a finding of unlawful detainer. They claim the jury's special verdict answers require a legal determination of accord and satisfaction. Whether the special verdict established an accord and satisfaction is a question of law which we review for correctness without any deference to the trial court. *See ProMax Dev. Corp. v Raile* 2000 UT 4 ¶ 17, 998 P 2d 254.

A Elements of Accord and Satisfaction

[7] ¶ 19 To establish an accord and satisfaction, three elements must be present: "(1) an unliquidated claim or a bona fide dispute over the amount due, (2) a payment offered as full settlement of the entire dispute, and (3) an acceptance of the payment as full settlement of the dispute." *Id.* at ¶ 20 (citing *Marton Remodeling v Jensen*, 706 P 2d 607, 609-10 (Utah 1985)).

1 Bona Fide Dispute Over Amount Due

[8][9] ¶ 20 To satisfy the first element, "There must be a good-faith disagreement over the amount due under the contract. The disagreement need not be well-founded, so long as it is in good faith." *Estate Landscape & Snow Removal Specialists, Inc. v Mountain States Tel. & Tel. Co.* 844 P 2d 322, 326 (Utah 1992) (citing *Golden Key Realty, Inc. v Mantas*, 699 P 2d 730, 733 (Utah 1985) *Ashton v Skeen*, 85 Utah 489, 496, 39 P 2d 1073, 1076 (1935)). The jury clearly found that there was a good faith disagreement over the amount due under the lease. (FN5) The jury was asked:

Considering all of the evidence in this case, do you find by a preponderance of the evidence that a legitimate dispute existed as to the "then prevailing rental rate of similar buildings in the Main Street

area of Park City" at the time the [Dishingers] made monthly rental payments based on \$19 per square foot as satisfaction in full?

****5** To this question the jury answered, "Yes." Thus, the first element of accord and satisfaction was established by the jury's special verdict.

2. Payment Tendered in Full Satisfaction of Dispute

¶ 21 The jury found that the payments tendered by the Dishingers were made in full satisfaction of the disputed rent. The jury was asked: "Considering all the evidence in this case, do you find by a preponderance of the evidence that the [Dishingers] notified [Potter] that these payments were made in full satisfaction of the disputed rent amount?" The jury answered, "Yes." Thus, the second element of accord and satisfaction was established by the jury's special verdict.

3. Acceptance of Payment as Full Settlement of Dispute

¶ 22 In *Estate Landscape*, the Utah Supreme Court reasoned that the third element of accord and satisfaction may be satisfied by the creditor's subjective intent to discharge an obligation by assenting to the accord, or conduct which gives rise to a reasonable inference that acceptance of payment discharged the obligation. See *Estate Landscape*, 844 P.2d at 330.

¶ 23 In the instant case, the jury found that Potter accepted the monthly payments made by the Dishingers. The jury was asked: "Considering all of the evidence in this case, do you find by a preponderance of the evidence that [Potter] accepted the monthly rent payments made by the [Dishingers] which are calculated at a rate of \$19 per square foot?" The jury answered, "Yes." However, the jury did not make a finding that Potter subjectively intended to assent to the accord. The fact that Potter counter-claimed for breach of the lease and unlawful detainer shows she did not subjectively intend to assent to the accord. Thus, to find an accord and satisfaction, we must determine whether Potter's conduct established the accord and satisfaction as a matter of law.

¶ 24 In *Estate Landscape* the defendant sent the plaintiff a check for \$8,613, and followed it with a letter stating that the check was "payment in full for satisfaction of contracted services. If you are not willing to accept that sum, ... in full satisfaction of the

sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid." *Id.* at 324-25 (emphasis omitted). The plaintiff filed suit to recover the \$30,162.50 it thought it was owed by the defendant, then negotiated the \$8,613 check, and amended its complaint to recover the difference. See *id.* at 325.

¶ 25 The trial court ruled that negotiation of the check did not constitute an accord and satisfaction. See *id.* This court affirmed, over Judge Jackson's dissent, reasoning that the defendant's letter was "entirely unilateral," and that the plaintiff's

signature on the check is not an assent to an accord not found on the face of the check as a restrictive endorsement, where the party to whom the accord is offered has expressly rejected the proposed accord, continued the dispute, and filed litigation to resolve it adversarially in court.

****6** *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 793 P.2d 415, 419-20 (Utah Ct.App.1990) (footnote omitted), *rev'd*, 844 P.2d 322 (Utah 1992).

¶ 26 The Utah Supreme Court disagreed and reversed, holding, "Where, as here, the check is tendered under the condition that negotiation will constitute full settlement, mere negotiation of the check constitutes the accord, regardless of the payee's efforts or intent to negate the condition *Estate Landscape*, 844 P.2d at 330. Thus, "[w]hat is said is overridden by what is done, and assent is imputed as an inference of law." *Id.* (quoting *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373, 374 (1932; see also *Marton Remodeling v. Jense* 706 P.2d 607, 609 (Utah 1985) (holding negotiation of check with restrictive condition is an accord and satisfaction even though creditor wrote "not full payment" beneath condition prior to negotiation) *Cove View Excavating & Constr. Co. v. Fly*, 758 P.2d 474, 478 (Utah Ct.App.1988) (finding an accord and satisfaction even though creditor crossed out restrictive condition on check before negotiation)).

¶ 27 In the instant case, the Dishinger's first check noted the amount thereof was for "New Base Rent." Therefore, because Potter negotiated the check, which was tendered by the Dishingers in full satisfaction of the disputed amount of the base monthly rent, the fact that Potter at the same time brought an action for

breach of lease and unlawful detainer is of no legal consequence. (FN6) The third and final element of accord and satisfaction was established by Potter's conduct.

B. Special Verdict

¶ 28 In its special verdict, the jury found: (1) "that a legitimate dispute existed as to the 'then prevailing rental rate of similar buildings in the Main Street area of Park City' at the time the [Dishingers] made monthly rental payments based on \$19 per square foot as satisfaction in full;" (2) the Dishingers "notified [Potter] that [the] payments were made in full satisfaction of the disputed amount;" and (3) Potter "accepted the monthly rent payments made by the [Dishingers] ... at a rate of \$19 per square foot."

¶ 29 However, the jury also found that the prevailing rental rate was \$25 per square foot, and that Potter was entitled to recover the "balance of base rent" from the Dishingers, totaling \$8,730. Based on these findings, the trial court entered judgment for Potter, concluding that no accord and satisfaction existed and that the Dishingers were in unlawful detainer because the amount Potter received and accepted each month was less than what the jury subsequently determined to be the rental rate.

[10] ¶ 30 Although it could be argued that the special verdict supports inconsistent legal theories (accord and satisfaction and unlawful detainer), the inconsistency is not fatal. The jury was instructed to answer all factual questions on all legal theories presented in the special verdict. While the jury's findings support inconsistent legal claims, a court is not precluded, under Rule 49(a), from applying the law to those findings and entering judgment for a party on one theory, as a matter of law, which precludes judgment on another inconsistent legal theory. *See Milligan v. Capitol Furniture Co.* 8 Utah 2d 383, 387, 335 P.2d 619, 622 (1959) (holding inconsistent special verdict answers immaterial under Utah R. Civ. P. 49(a) *see also Tsudek v. Target Stores, Inc.* 414 N.W.2d 466, 469-70 (Minn.Ct.App.1987) (finding inconsistent special verdict answers reconcilable where jury was simply answering all questions submitted based on the evidence). Thus, as was the case here, if the special verdict findings support, as a matter of law, an accord and satisfaction then there cannot be an unlawful detainer.

C. Effect of Lease Provision

**7 [11] ¶ 31 Potter responds that even if the jury's special verdict findings support an accord and satisfaction, the lease itself precludes an accord and satisfaction. Potter relies on the "Waiver" provision of the lease which states:

The waiver by Landlord of any term, covenant or condition herein contained shall not be deemed to be a waiver of such terms, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. *The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay particular rent also accepted,* regardless of Landlord's knowledge of such preceding default at the time of the acceptance of such rent.

(Emphasis added.) Potter asserts that under this lease provision, "acceptance of partial rent could not constitute an accord and satisfaction."

¶ 32 Though not perfectly drafted, the boilerplate language of this "Waiver" provision is not ambiguous. The relevant portion, emphasized above, provides that if the Dishingers default on any term, covenant, or condition of the lease, and thereafter tender a rental payment to Potter, and Potter accepts, by accepting, Potter has not waived the prior defaults. For example, if the Dishingers install exterior lighting as prohibited by the lease, the installation, if not cured within thirty days of notice, is a default. If, thereafter, the Dishingers send Potter a rent check which Potter accepts, Potter has not waived the Dishinger's default for the installation. However, if the Dishinger's default for failure to pay rent, and thereafter tender a rental payment to Potter, which Potter accepts, Potter thereby waives the Dishinger's default for failure to pay rent.

¶ 33 What the lease provision does not provide, is that acceptance of partial rent does not constitute an accord and satisfaction. In fact, the term "accord and satisfaction" is conspicuously absent from the face of the lease, and beyond the "Waiver" provision, Potter fails to point to any language in the lease that would support her strained construction. Additionally, and perhaps more importantly, Potter cannot claim that the initial check tendered by the Dishingers was "partial

rent," when there was never an agreement as to what would actually be the rental rate. While hindsight suggests that Potter should have provided for such a situation in the lease, we cannot write such a provision into the lease for h *Se Jones v. ERA Brokers Consol.*, 2000 UT 61 ¶ 18, 6 P.3d 1129 *see also* *Rio Algom Corp. v. Jimco Ltd* 618 P.2d 497, 505 (Utah 1980); *Provo City Corp. v. Nielsen Scott Co.*, 603 P.2d 803, 806 (Utah 1979). Thus, Potter's argument that the lease prohibits an accord and satisfaction is not supported by the lease itself.

¶ 34 In sum, the jury's special verdict established as a matter of law an accord and satisfaction. The trial court erred in not entering a judgment on the rental rate for the option period in favor of the Dishingers. We therefore reverse the trial court's judgment of unlawful detainer and remand for the entry of a judgment for the Dishingers based on the legal theory of accord and satisfaction setting the rental rate at \$19 per square foot. (FN7)

III. Administrative, Late, and Attorney Fees

****8** [12] ¶ 35 Potter argues that the lease provides that the Dishingers shall pay administrative, late, and attorney fees. Potter submitted her claims for administrative and late fees to the jury. In its special verdict, the jury found that, in addition to what the Dishingers had already paid to Potter, Potter was only entitled to the "Balance of base rent." Based on this finding, the trial court determined that Potter was not entitled to administrative and late fees. However, this was properly a legal not a factual determination. The lease is clear and unambiguous that Potter was entitled to administrative fees. The lease states in no uncertain terms that the tenant shall pay for all costs and fees associated with supervising and administering to the common areas. (FN8)

¶ 36 The Dishingers respond that Potter's argument for administrative fees was not presented below. However, the trial court clearly ruled on the issue based on the jury's special verdict findings. Thus, Potter's claim for administrative fees was presented below. Therefore, we reverse and remand to the trial court for an award of Potter's administrative fees.

[13] ¶ 37 The lease further provides:

Tenant shall pay to Landlord *late charge* of ten (\$10.00) dollars per day until the amount due is

paid in full. Tenant **further agrees** to pay any attorney's fees [sic] **incurred by Landlord** by reason of Tenant's failure to pay rent and/or other charges when due hereunder.

(Emphasis added.) Thus, Potter was only entitled to late fees and attorney fees under this provision if the Dishingers failed to pay rent. Because we conclude there was an accord and satisfaction, the Dishingers were current on their rent payments and therefore Potter was not entitled to late fees. (FN9)

[14] ¶ 38 The trial court determined that Potter was not entitled to attorney fees because the lease provided that the "prevailing party shall be entitled to recover" its attorney fees, and while Potter prevailed on her counter-claim, the Dishingers prevailed on their claims for an accounting and credit for overcharges of common area expenses. Thus, the trial court determined neither party should be awarded attorney fees because both prevailed.

¶ 39 Because we conclude that there was an accord and satisfaction and thus no unlawful detainer, the "prevailing party" issue as to attorney fees should be reconsidered by the trial court on remand. Therefore, pursuant to the terms of the lease, Potter is entitled to her administrative fees, and we remand to have the trial court determine if either party should be awarded attorney fees as the "prevailing party" under the lease.

CONCLUSION

¶ 40 We conclude, based on the jury's special verdict, an accord and satisfaction occurred as a matter of law fixing the "then prevailing rental rate" for the option period of the lease at \$19 per square foot in base monthly rent. Therefore, because the Dishingers were in lawful possession of the premises, we reverse the trial court's legal determination of unlawful detainer and its award of treble damages. We further conclude that under the terms of the lease, Potter was entitled to her administrative fees and remand for the trial court to determine if either party is entitled to attorney fees as the "prevailing party" under the lease.

¶ 41 I CONCUR: WILLIAM A. THORNE, Jr., Judge.

ORME, Judge (dissenting):

****9** ¶ 42 I cannot agree there **was an** accord and satisfaction in this case. While **there was** a bona fide

dispute over the new rental rate and the Dishingers may well have tendered their payments with the thought it was in full satisfaction of what was due, there is no finding that Potter accepted the payments in full satisfaction nor any basis in the evidence to conclude that she did so. On the contrary, the Dishingers and Potter had exchanged letters indicating very different views of what constituted the "then prevailing rental rate." Nothing suggests either side thereafter acceded to the view of the other or that they reached a compromise. On the contrary, within days of accepting the Dishingers' check, Potter sent the Dishingers a default notice stating what she believed the shortfall to be. A couple of weeks later, the Dishingers filed their declaratory judgment action acknowledging there was a dispute between the parties and asking the court to resolve it-not claiming there had been a dispute between the parties that had been resolved by accord and satisfaction and asking the court to enforce the accord.

¶ 43 Applicable law does not require anything inconsistent with the expectations of the parties, as shown by their conduct. The "New Base Rent" notation, apparently made in the "For _____" space on the front of the check, clearly does not satisfy the UCC's requirement that "the instrument or an accompanying written communication contain[] a conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim." Utah Code Ann. § 70A-3-311(2) (1997) (emphasis added). In addition, cases relied on by the majority are inapposite. In both *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985), an *Cove View Excavating & Construction Co. v. Fly*, 758 P.2d 474 (Utah Ct.App.1988), unlike in this case, the checks evidencing the accord and satisfaction contained actual restrictive endorsement provisions. *Marton Remodeling*, 706 P.2d at 608 ("Endorsement hereof constitutes full and final satisfaction of any and all claims...."); *Cove View*, 758 P.2d at 476 (check contained "pmt. in full" language on front of check and this restrictive endorsement language on back of check: "payment in full for all labor and materials to 6/26/84"). In *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co.*, 844 P.2d 322 (Utah 1992), a detailed letter made it clear that the check could be accepted only as full payment. See *id.* at 324-25.

¶ 44 As a matter of law, the facts in this case do not establish an accord and satisfaction. The jury

recognized this and went on to find that the prevailing rental rate was \$25 per square foot and that the Dishingers owed this to Potter under their contract. Does this mean the Dishingers unlawfully detained the premises, subjecting them to treble damages? It does not. Potter, in her "notice to pay rent or quit," demanded payment of a sum well in excess of what she was entitled to contractually. The jury found the prevailing rate was \$25, but she had demanded payment of \$30. The invalid demand renders the notice completely ineffective to place the Dishingers in a state of unlawful detainer.

**10. ¶ 45 When the dust settles in this case, the proper result emerges with reasonable clarity. The Dishingers did not owe as much as Potter thought they did, but they owed more than they thought they did. There was no accord and satisfaction, so they are liable for the shortage. On the other hand, Potter had no right to demand payment of an amount to which she was not entitled, so she may not have the lesser amount to which she was actually entitled trebled, nor is she entitled to any other relief specially available under the unlawful detainer statute. Clearly, then, there is no prevailing party here-each side won a little and lost a little-so neither side is entitled to an award of attorney fees.

¶ 46 On remand, I would simply have the trial court amend its judgment to reflect the foregoing.

(FN1.) From a review of the record it appears that the Dishingers were paying \$18.48 per square foot in minimum monthly rent at the time they notified Potter of their desire to exercise the option.

(FN2.) The Dishingers subtracted \$160.19 from the July 1, 1996 rental payment for remaining credits and premature Consumer Price Index increases occurring in 1994 and 1995.

(FN3.) The Dishinger's citations to the record reference the jury's special verdict; the Dishinger's motion for entry of judgment based on special verdict; the Dishinger's memorandum in support of motion for relief from judgment; and the Dishinger's supplemental memorandum in support of motion for relief from judgment. In all these instances the issue of accord and satisfaction was raised in the trial court.

(FN4.) We note the issue of accord and satisfaction was not raised in the pleadings. However, Rule 15(b) of the Utah Rules of Civil Procedure provides

that issues not raised in the pleadings may be tried by express or implied consent. *See* Utah R. Civ. P. 15(b). "If an issue is fully tried, a court may decide the issue and deem the pleadings amended even if the issue was not originally pleaded." *Shinkoskey v. Shinkoskey*, 2001 UT App 4¶ 6 n. 2, 19 P.3d 1005 (citing *Fisher v. Fisher*, 907 P.2d 1172, 1176 (Utah Ct.App.1995) (citation omitted)). "Whether the pleadings may be deemed amended depends on whether the opposing party had a fair opportunity to [prepare and meet the issue]. *Id.* (citing *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct.App.1987)). It must be evident from the record that the issue has been tried. *See id.* (citing *Fisher*, 907 P.2d at 1176).

A review of the record reveals that evidence regarding the existence of an accord and satisfaction was presented at trial, and the jury was instructed on and made findings of fact that would support an accord and satisfaction. Additionally, the Dishingers argued accord and satisfaction in their motion for entry of judgment based on special verdict, which Potter had the opportunity to rebut, and the trial court entered judgment finding there was no accord and satisfaction. Thus, because Potter had the opportunity to prepare and meet the issue, we conclude that the issue of an accord and satisfaction was tried by implication.

(FN5.) Although neither party has addressed this issue in their briefs, we note at the outset that the option provision in the lease is most likely unenforceable in Utah. It is a well-recognized principle that, "A condition precedent to the enforcement of any contract is that there be *meeting of the mind* of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced." *Pingree v. Continental Group of Utah, Inc.* 558 P.2d 1317, 1321 (Utah 1976) (emphasis added) (citation omitted). *Pingree*, the Utah Supreme Court stated,

"a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable."

Id. at 1321 (quoting *Slayter v. Pasley*, 199 Or. 616, 264 P.2d 444, 446 (Or.1953)).

In the instant case, the lease provided that the rental rate for the renewal period would be "the then prevailing rental rate of similar buildings in the Main Street area of Park City." On July 1, 1996, the commencement of the renewal period, the parties had yet to agree on what constituted "the then prevailing rental rate of similar buildings in the Main Street area of Park City." Both parties had communicated to the other a vastly different rate and interpretation, and the Dishingers filed a declaratory judgment action asking the trial court to interpret the provision. Thus, it cannot be said that the rate provided for in the option provision of the lease possesses the certainty and definiteness required to be enforced. In sum, there was no meeting of the minds, and as a result, no agreement. Therefore, the lease terminated by its own terms as of July 1, 1996. However, because we conclude that an accord and satisfaction occurred, the unenforceability of the option provision does not affect our analysis.

****10** (FN6.) In response, Potter attempts to rely on language from *Tates, Inc. v. Little America Refining Co.*, 535 P.2d 1228 (Utah 1975), wherein our supreme court stated, "Ordinarily, the payment of part of a debt does not discharge it.... The reason for this is that in making the part payment, the debtor is doing nothing more than he is legally obligated to do" at 1229. This general statement is true, to the extent that there is no "dispute or uncertainty as to the amount due." *Id.* at 1229-30. In the instant case it is well established that there is a dispute as to the amount due.

(FN7.) Because we conclude there was an accord and satisfaction and thereby reverse the trial court's legal conclusion that the Dishingers were in unlawful detainer, we do not address the Dishinger's alternative argument of waiver and Potter's cross-appeal regarding the definition of the term "prevailing rate."

(FN8.) Specifically, the lease states that the tenant shall pay

All costs to supervise and administer said common areas, used in common by the tenants or occupants of the building. [S]aid costs shall include such fees as may be paid to a third party in connection with same and shall in any event include a fee to

Landlord to supervise and administer same in an amount equal to ten (10%) of the total costs of (i) above.

(FN9.) Potter does not argue she was entitled to attorney fees under this provision.

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FILED
UTAH SUPREME COURT

SEP 2 6 2001

STIRBA & HATHAWAY
IN THE SUPREME COURT OF THE STATE OF UTAH

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PAT BARTHOLOMEW
CLERK OF THE COURT

Marc Smith,
Plaintiff and Petitioner,
v.
Grand Canyon Expeditions Co.,
Martin Mathis; Michael Denoyer;
Donald Saunders; John Does 1
through 5; and Jane Does 1
through 5,
Defendants and Petitioners.

Case No. 20010667-SC

ORDER

This matter is before the Court upon a Petition for Permission to Appeal an Interlocutory Order, filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Permission to Appeal an Interlocutory Order filed on August 17, 2001 is granted.

For The Court:

Sept. 26, 2001

Date

Richard C. Howe

Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on September 27, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below:

BENSON L. HATHAWAY
STIRBA & HATHAWAY
215 S STATE ST STE 1150
PO BOX 810
SALT LAKE CITY UT 84111

JOHN A. ANDERSON
MATTHEW M. DURHAM
STOEL RIVES LLP
201 S MAIN ST STE 1100
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

SIXTH DISTRICT, RICHFIELD DEPT
ATTN: MARILYN
895 E 300 N
RICHFIELD UT 84701

By 
Deputy Clerk

Case No. 20010667-SC
SIXTH DISTRICT, RICHFIELD DEPT , 940600003

ADDENDUM

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STIRBA & HATHAWAY

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab, Utah 84741

Telephone: (435) 644-2458 Fax: (435) 644-2052

MARC SMITH,

Plaintiff,

vs.

GRAND CANYON EXPEDITIONS CO.,
MARTIN MATHIS; MICHAEL DENOYER;
DONALD SAUNDERS,;

Defendant.

RULE 54(b) CERTIFICATION AND
ENTRY OF JUDGMENT

Case No. 940600003

Assigned Judge: K. L. McIFF

Thrice this matter has been before the court on summary judgment proceedings and thrice the court has made legal rulings which have narrowed the issues remaining for trial.

The parties have now jointly petitioned the court to enter a final judgment as to the claims which have been addressed in the court's rulings. Counsel represent that this will be the most economical means of resolving a dispute that cannot be settled. They reason that this will ensure only one trial, whereas the possibility now exists for a trial, an appeal and a retrial.

After thoughtful consideration, and pursuant to authority of Rule 54(b) URCivP, the court expressly determines that there is no just reason for delay, and the court's Order of July 30, 2001, incorporating its Memorandum Decisions of January 15, 1999, March 20, 2000 and January 26, 2001, is certified as final and JUDGMENT ENTERED accordingly.

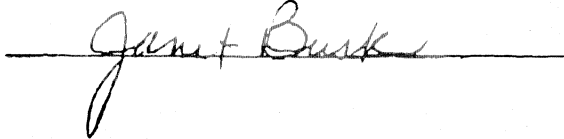
Dated this 23 day of August, 2001.


K. L. McEliff
District Court Judge

CERTIFICATE OF SERVICE

On August 24, 2001 a copy of the above was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method (M=mail, P=in person, F=Fax)</u>	<u>Addressee</u>	<u>Method (M=mail, P=in person, F=Fax)</u>
Benson L. Hathaway, Jr. STIRBA & HATHAWAY 215 South State Street Suite 1150 PO Box 810 Salt Lake City, UT 84110-0810	[m]	John A. Anderson STOEL RIVES One Utah Center 201 Main Street, Suite 1100 Salt Lake City, UT 84111	[m]



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201 Main Street, Suite 1100
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Telephone: (801) 328-3131

Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,

Plaintiff,

vs.

GRAND CANYON EXPEDITIONS CO.;
MARTIN MATHIS; MICHAEL
DENOYER; DONALD SAUNDERS;
JOHN DOES 1 through 5; and JANE
DOES 1 through 5,

Defendants.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
JOINT MOTION FOR
RULE 54(b) CERTIFICATION

Civil No. 940600003

Hon. K. L. McIff

Plaintiff and defendants submit the following points and authorities in support of their
joint motion for Rule 54(b) certification.

INTRODUCTION

This court already is aware of the procedural history of this case, including its present procedural posture. The court's prior memorandum decisions have granted summary judgment in favor of defendants on plaintiff's wrongful termination claim, on his breach of implied covenant of good faith and fair dealing claim as it relates to his employment contract with Grand Canyon and on plaintiff's breach of implied covenant of good faith and fair dealing claim based on the Buy-Sell Agreement except to the extent it involves the Arizona Amusement Tax refund issue. The court has also granted summary judgment on plaintiff's prayer for punitive damages and for attorneys' fees as consequential damages. The court denied summary judgment to the individual defendants on the Arizona Amusement Tax question. Finally, the court has denied plaintiff leave to amend to assert a claim for unjust enrichment arising out of the Arizona Amusement Tax refund.

Plaintiff and defendants stipulated to continue the trial date based upon their agreement that they would seek Rule 54(b) certification of all issues appropriate for such certification and file a joint petition for interlocutory appeal on all remaining issues that were not appropriate for Rule 54(b) certification. The parties have prepared a petition for interlocutory appeal (the "Petition") which they have filed contemporaneously with this motion. The Petition may be conditioned upon this court certifying the issues described below pursuant to Rule 54(b). In the event the court grants 54(b) certification but the court of appeals denies the petition for interlocutory appeal, the parties will seek to stay the 54(b) appeal pending trial of all remaining issues.

ARGUMENT

1. The Claims for Which Plaintiff and Defendants Seek Rule 54(b) Certification Are Appropriate for Such Certification to the Utah Supreme Court.

Rule 54(b) provides that the court's prior memorandum decisions are not final orders as they do not dispose of all claims for relief against all parties. See, e.g., Bradbury v. Valencia, 2000 UT 50, 5 P.3d 649, 651 (Utah 2000). Rule 54(b) also provides, however, that where more than one claim for relief is present in an action and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims of the parties upon certain conditions. Rule 54(b), Utah R. Civ. P. (2000). Those conditions are that the court make an express determination that there is no just reason for delay and expressly direct the entry of judgment. Id.

The court was fully advised of the grounds upon which plaintiff and defendants jointly sought continuance of the trial date. The parties then agreed, and still agree, that the most economical means of resolving a dispute that obviously will not be settled is to have all issues heard by the appropriate appellate court as soon as reasonably practicable. This will result in no trial at all, if the appellate court agrees with defendants, or a single trial, in the event the court agrees with the plaintiff. A failure to certify the case for immediate appeal will result in a trial of a single issue, an appeal of multiple issues beyond those tried, and possibly another trial of different issues. This result would plainly be inefficient for the reasons earlier discussed with the

court. Accordingly, this court may find that there is no just reason for delay, and certify as final its July 30, 2001 Order incorporating its Memorandum Decisions dated January 15, 1999, March 20, 2000, and January 26, 2001.

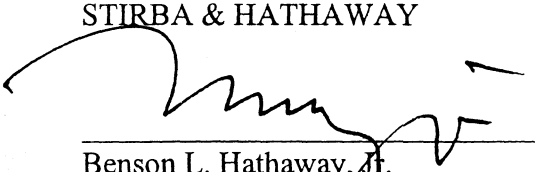
DATED this _____ day of August, 2001.

STOEL RIVES, LLP

John A. Anderson
Attorneys for Defendants

DATED this 15 day of August, 2001.

STIRBA & HATHAWAY



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Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,)

Plaintiff,)

vs.)

GRAND CANYON EXPEDITIONS CO.;)

MARTIN MATHIS; MICHAEL)

DENOYER; DONALD SAUNDERS;)

JOHN DOES 1 through 5; and JANE)

DOES 1 through 5,)

Defendants.)

JOINT MOTION FOR
RULE 54(b) CERTIFICATION

Civil No. 940600003

Hon. K. L. McLiff

Plaintiff and defendants hereby jointly move pursuant to Rule 54(b), Utah Rules of Civil Procedure, for certification of the court's order dated July 30, 2001, incorporating its memorandum decisions dated January 15, 1999, March 20, 2000, and January 26, 2001, as follows:

1. For a certification of finality of summary judgment dismissing plaintiff's wrongful termination claim;

2. For a certification of finality of summary judgment dismissing plaintiff's claim for breach of the implied covenant of good faith and fair dealing arising out of his employment relationship with defendant Grand Canyon Expeditions Company.

The grounds for this motion are set forth in the accompanying joint memorandum of points and authorities. Plaintiff and defendants further represent to the court that they have prepared a petition for interlocutory appeal of all issues on which the court has either granted or denied summary judgment but for which Rule 54(b) certification is unavailable. Those issues include those portions of the prior memorandum decisions granting summary judgment on the breach of implied covenant of good faith and fair dealing claim arising out of the Buy-Sell Agreement, together with plaintiff's prayer for punitive damages and attorneys' fees as consequential damages, as well as the court's denial of defendants' motions for summary judgment on all grounds asserted in support of that claim, denial of defendants' motion to dismiss the individual defendants, and denial of plaintiff's motion for leave to amend.

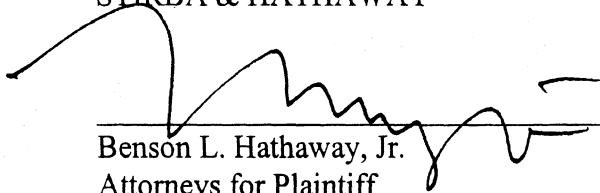
DATED this _____ day of August, 2001.

STOEL RIVES, LLP

John A. Anderson
Attorneys for Defendants

DATED this 14 day of August, 2001.

STIRBA & HATHAWAY



Benson L. Hathaway, Jr.
Attorneys for Plaintiff

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STIRBA & HATHAWAY

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Telephone: (801) 364-8300

Attorneys for Plaintiff

FILED

KANE COUNTY

JUL 31 2001

SIXTH DISTRICT COURT Clerk

IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR

KANE COUNTY, STATE OF UTAH

MARC SMITH,

Plaintiff,

v.

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

Defendants.

:

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:

:

:

:

:

**ORDER ON DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

Civil No. 940600003

Judge Kay McKiff

Defendants' Third Motion for Summary Judgment came before the Court for hearing on November 20, 2000. Defendants filed two previous motions for summary judgment, and Plaintiff filed a previous Motion to Amend, which were fully briefed, argued and addressed in memorandum decisions on January 15, 1999 and March 20, 2000. No prior memorandum decision of the Court has been reduced to an order. After hearing the arguments of counsel and having reviewed the pleadings and documents of record supporting and opposing Defendants' Third Motion for Summary Judgment, the Court ruled from the bench granting the Defendants' Third Motion in part

and denying it in part. Subsequently, upon the request of both parties, the Court took the matter under advisement and issued a Memorandum Decision on January 26, 2001, incorporating its January 15, 1999 and March 20, 2000 memorandum decisions.

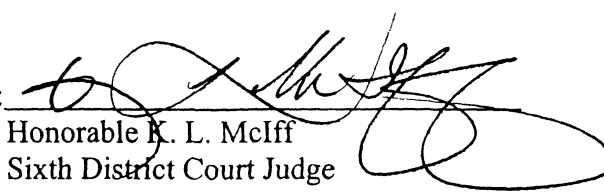
For the reasons set forth in this Court's January 15, 1999, March 20, 2000, and January 26, 2001 Memorandum Decisions, which three Memorandum Decisions are fully incorporated in this Order, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

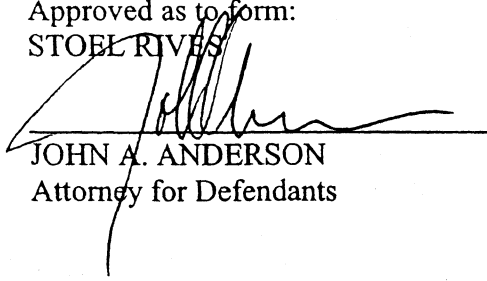
1. Plaintiff's Motion for Leave to Amend its Complaint is denied.
2. Defendants' Motions for Summary Judgment are granted as to all of Plaintiff's claims, with the exception of Plaintiff's claim for breach of implied covenant of good faith and fair dealing to the extent it pertains to Defendants' treatment of the Arizona amusement tax refund.

DATED this 30 day of ^{July}~~June~~, 2001.

BY THE COURT

By: 
Honorable K. L. McIff
Sixth District Court Judge

Approved as to form:
STOEL RIVES

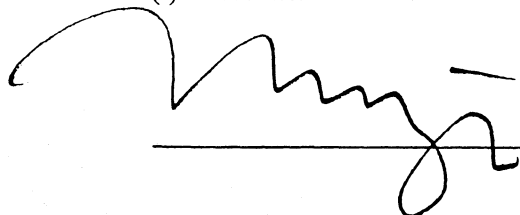

JOHN A. ANDERSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of June, 2001, I caused to be served a true copy of the foregoing **ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**, by the method indicated below, to the following:

John A. Anderson
STOEL RIVES
Attorney for Defendants
201 South Main Street Suite 1100
Salt Lake City, UT 84111-4904

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile



CERTIFICATE OF SERVICE

On 7/31, 2000, a copy of the above ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT was sent to each of the following by the method indicated:

Addressee

Method (Mail, Person, Fax) Addressee

Method (Mail, Person, Fax)

Benson Hathaway
215 South State Street Suite 1150
P O Box 810
Salt Lake City Ut 84110 0810



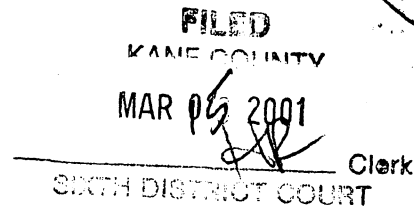
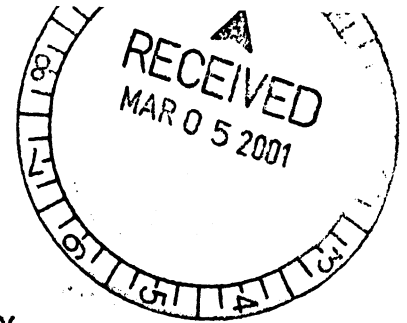
John A Anderson
210 South Main Street Suite 1100
Salt Lake City Ut 84111 4904



Holly Ramsey

BENSON L. HATHAWAY, JR. (Bar No. 4138)
STIRBA & HATHAWAY
215 South State Street, Suite 1150
P.O. Box 810
Salt Lake City, UT 84110-0810
Telephone: (801) 364-8300

Attorneys for Plaintiff



**IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR
KANE COUNTY, STATE OF UTAH**

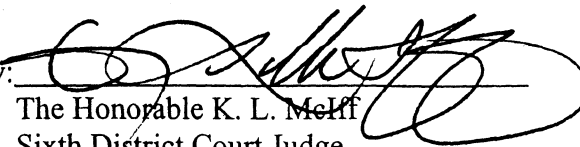
MARC SMITH,	:	
Plaintiff,	:	
v.	:	ORDER GRANTING PLAINTIFF'S MOTION TO SUBSTITUTE PARTIES
GRAND CANYON EXPEDITIONS CO., MARTIN MATHIS, MICHAEL DENOYER, RONALD R. SMITH, DONALD SAUNDERS, JOHN DOES 1 through 5 and JANE DOES 1 through 5,	:	Civil No. 940600003
Defendants.	:	Judge Kay McKiff

Based on the Motion of Plaintiff pursuant to Utah R.Civ. P. 25(a), the death of Defendant Donald A. Saunders, and for other good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that Glen Perez, the personal representative of the Estate of Donald A. Saunders, and the estate of Donald A. Saunders are hereby substituted as a Defendants, in the stead of Defendant Donald Saunders

DATED this 13 ^{March} day of ~~February~~, 2001.

BY THE COURT

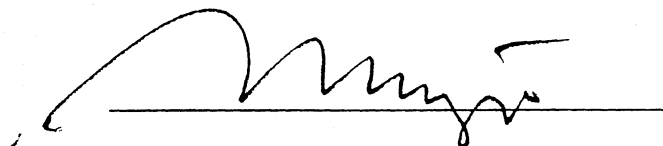
By: 
The Honorable K. L. Melff
Sixth District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of February, 2001, I caused to be served a true copy of the foregoing **ORDER GRANTING PLAINTIFF'S MOTION TO SUBSTITUTE PARTIES**, by the method indicated below, to the following:

John A. Anderson
STOEL RIVES
Attorney for Defendants
201 South Main Street Suite 1100
Salt Lake City, UT 84111-4904

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile



RECEIVED

JAN 29 2001 ✓

STIRBA & HATHAWAY

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab,, Utah 84741

Telephone: (435) 644-2458 Fax: (435) 644-2052

MARC SMITH,

Plaintiff,

vs.

GRAND CANYON EXPEDITIONS CO.,
MARTIN MATHIS, MICHAEL DENOYER,
DONALD SAUNDERS,

Defendants.

MEMORANDUM DECISION
(Defendants' Third Summary
Judgment Motion)

Case No. 940600003

Assigned Judge: K. L. McIFF

INTRODUCTION

The Court has now heard three summary judgment motions filed by defendants. The first resulted in a Memorandum Decision dated January 15, 1999. The second resulted in a Memorandum Decision dated March 20, 2000. The Court incorporates both of those decisions herein including the recitation of facts. As a result of these prior rulings, plaintiff's remaining cause of action is limited to a claimed breach of the duty of good faith and fair dealing. Moreover, the Court has heretofore narrowed this claim so there are only two areas of potential recovery. One relates to a large tax refund received from the State of Arizona after plaintiff's forced departure, and the second relates to the manner in which the corporate defendant accounted for and valued certain assets included in the involuntary buyout.

DEFENDANT'S THIRD SUMMARY JUDGMENT MOTION

In their third summary judgment motion, defendants argue that the same reasoning heretofore employed by the Court warrants summary judgement with respect to the remaining claims.

In the event the Court does not grant complete summary judgment, defendants seek to further narrow the litigation. Specifically they seek dismissal of plaintiff's claim for punitive damages and also the claim for attorneys' fees as an element of consequential damages.

LEGAL ANALYSIS

A. Sobek/Whitewater Accounting

In August of 1990, defendant Grand Canyon Expeditions, Co. (hereafter Grand Canyon) reached an agreement for purchase of Sobek/Whitewater assets which included personal property and a concession contract authorizing a "whitewater" operation in the Grand Canyon. This acquisition was not finalized until some 13 months later in September of 1991.

Because of the close temporal proximity to plaintiff's forced departure in July of 1992, and because the facts were not previously fully developed, the Court concluded that there were issues of fact as to whether accounting decisions were influenced by plaintiff's impending departure. Specifically, the Court was concerned that depreciation schedules and the allocation of values to various components of the Sobek/Whitewater purchase could have been manipulated to result in lesser compensation to the plaintiff.

It now appears clear that these accounting decisions were made prior to and completely uninfluenced by plaintiff's departure. The rupture and forced buyout of the stock all occurred during the month of July 1992, whereas the accounting decisions were made during the late fall of 1991 and early spring of 1992. Moreover, they were essentially consistent with and in no event less advantageous to plaintiff than accounting practices and decisions made during the entire history of the corporation dating to its inception in 1986.

Plaintiff has failed to allege any facts that would support a finding by the trier of fact that the accounting methodology employed with respect to the Sobek/Whitewater acquisition was influenced in any manner by plaintiff's forced exit.

The Court must therefore conclude that the accord reached between the parties during July 1992, as reflected in plaintiff's resignation and a settlement agreement, bar any claim arising from the Sobek/Whitewater transaction. There is simply no basis to give the latter separate treatment.

B. The Arizona Tax Refund

The sole area left open for trial relates to a large tax refund received from the State of Arizona. The relevant facts are really quite simple and have been discussed in both of the Court's prior memorandum decisions. At the time of the settlement by these parties in July of 1992, there was outstanding a million dollar tax refund claim lodged with the State of Arizona. The president of defendant Grand Canyon had told counsel to abandon the claim. Counsel disregarded this

directive and purposely left the claim open under the express belief that it might ultimately be successful.¹ Three years later it was successful and the corporation received a refund which was greater than the entire value of the corporation on which plaintiff's buy-out was premised.

At the time plaintiff met with the corporate president in July of 1992 and reached a settlement, apparently neither was aware that the tax refund claim was being purposely kept alive by the corporation's counsel.² It may be safely assumed that at some subsequent point the corporate president and other officials became aware of and cooperated with the effort to obtain and retain the refund. It did not just show up one day in the mail.

¹ The affidavit of corporate attorney Ann M. Dumenil unequivocally acknowledges purposely keeping the refund claim alive both before and after plaintiff's forced departure:

Before Departure

13- . . . I did not formally withdraw Grand Canyon's request, however, because I thought another rafting company might someday successfully challenge the transaction privilege tax; consequently, I believed that leaving Grand Canyon's request pending would be beneficial to Grand Canyon because they might be able to argue that they were entitled to a refund.

. . . .

After Departure

17- I again made the determination that it was in Grand Canyon's best interest not to formally withdraw the request, but rather merely to cancel its hearing and wait to see if another company successfully challenged the tax. . . .

18- the transaction privilege tax was subsequently challenged successfully by a another river rafting company in an appeal before the Arizona Supreme Court reported as Wilderness World, Inc. v. Department of Revenue, 895 P.2d 108 (Ariz. 1995).

² In its second memorandum decision, the Court discussed possible imputation of knowledge to the president. Defendants insist that if the corporation or its president is charged with the knowledge of its attorney, it must also be imputed to the plaintiff who was a corporate official. The argument is flawed. Plaintiff was being forced out. It was an adversarial setting. To suggest that he should be treated as a corporate official in this context flies in the face of reason. The corporation stood to gain everything and plaintiff nothing by keeping the refund effort alive and by secreting it from the plaintiff. That is exactly what happened.

The simplicity of the facts belies the difficulty of the legal inquiry. The peculiar facts lend support to the Restatement's observation that "A complete catalogue of types of bad faith is impossible." §205, *Restatement (Second) of Contracts, Comment d (1981)*. As the process unfolded, the corporate officials moved from a status of misinformation to awareness and on to active pursuit and recovery. In such circumstances, were they justified in stone cold silence toward plaintiff? Is there a legitimate legal basis for arguing that the duty of good faith and fair dealing reached far enough to require that plaintiff be advised that the facts were different than the parties supposed and that recovery was being pursued? When the million dollars came, were defendants entitled to pocket the same without any disclosure or obligation to plaintiff? These questions probe the outer limits of the doctrine in question.

Utah courts have embraced § 205 of the *Restatement* which provides "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." See, e.g., *St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 1994, 200 (Utah 1991). The covenant of good faith and fair dealing may be summarized as follows: The covenant requires honesty in fact. § 205, *Comment a (1981)*. In some instances, it may require more than honesty. *Id.*, *Comment d*. It can relate to acts or omissions. *Id.* Under the covenant parties impliedly promise that they will not intentionally or purposely do anything or fail to do anything which will injury the other party's right to receive the fruits of the contract. *St. Benedicts*, at 199. To comply with the covenant, the parties' actions must be consistent with the

agreed common purpose of the contract and the reasonable expectations of the other party to the contract. *Id.* Moreover, it has been held that breach of the covenant of good faith and fair dealing is a fact issue usually left for determination by the jury. *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). The jury is obliged to consider the language of the contract documents and the course of dealing and conduct of the parties, but, as stated in *St. Benedict's*, “an examination of express contract terms alone is insufficient to determine whether there has been a breach of the implied covenant of good faith and fair dealing.” At 200.

Defendants freely acknowledge that they have received an enormous windfall but deny any responsibility to plaintiff. They suggest that the governing principles are strictly legal and that fairness and equity have no place. They urge that the tax refund claim was contingent - not a “bookable asset” - and therefore irrelevant in the forced buyout.

While it is true that contractual rights are generally legal rather than equitable, that does not mean that equity and fairness are completely foreign to the field. See 27A Am Jur 2d, Equity § 164, page 561 (1996). As the words employed to describe the doctrine suggest, the “duty of good faith and fair dealing” is firmly rooted in notions of equity and fairness. The obligation arises by implication rather than by contractual expression. As previously noted, it is sometimes necessary to look beyond the express contract terms. *St. Benedict's*, at 200. The mere fact that

the tax refund claim was not labeled a “bookable asset” is not solely determinative of relevancy, nor of whether the duty of good faith and fair dealing has been breeched.

As this litigation now stands, plaintiff thinks this Court has gone too far in limiting his potential remedy and defendants think the court has not gone far enough. Defendants argue that the resignation and settlement documents constitute complete waivers and give rise to complete defenses irrespective of the equities and the fact that the negotiating parties were unaware that the claim for refund was being kept alive and that it ultimately produced an enormous windfall.

Plaintiff’s counsel, on the other hand, claims that his client should now be able to go behind the settlement documents, not just as it relates to the Arizona tax refund which was not treated in any manner, but to upset the determination of “book value” on which the buy-out of plaintiff’s stock was based. He claims that it was the common purpose and the reasonable expectation of the parties that plaintiff receive the “real value” rather than the “book value” of his stock and that the latter has been unduly and inappropriately impacted by accounting procedures over the years that have been designed for “tax purposes.” His expert witness acknowledged that the approach of the corporate accountant in dealing with expenses, depreciation, purchase price allocations, etc., though “aggressive,” was nonetheless within the range of generally accepted accounting principles. This does not satisfy plaintiff. Even though he benefitted from this accounting approach for a number of years and even though he agreed upon and executed a settlement document relying upon the values fixed by the corporate accountant, he now claims

that the duty of good faith and fair dealing requires that the corporate accountant start anew from the inception of the corporation, re-evaluate all transactions, reallocate the purchase price, recalculate depreciation schedules and revisit treatment of expenses to see if they were appropriate. He opines that only in this way can the “real value” of the corporation be determined resulting in fair treatment to him in the buy-out.

Plaintiff not only disregards the history of the corporation but what happened in the buyout. When the rupture occurred, plaintiff met with the corporate president. They talked. They negotiated. Concessions were made. They agreed upon additional consideration for plaintiff. Documents were prepared. Plaintiff had them for several days before signing. Both parties signed. The agreed-upon payments were made for a year and a half before plaintiff filed suit. Moreover, the payments were not at “book value” but at 140% of book value as required by the buy/sell and settlement agreements. This waters down plaintiff’s claim that “real value” has been completely ignored. There is too much meaning in this history and the settlement documents to allow them to be disregarded.

After thoughtful consideration and reconsideration, this Court has concluded and now reconcludes that the basic value matters were resolved and merged into the settlement documents. This has been extensively discussed in the Court’s two prior memorandum decisions. The sole exception to all of this relates to the Arizona tax refund which simply was not discussed nor contemplated when the settlement documents were prepared and executed and is entirely beyond

the fixing of values by the accountant. When this oversight was discovered and the refund materialized, defendants' only response was to pocket the money. It was not until late in the litigation that the disclosures regarding the Arizona tax refund were forthcoming.

A jury could reasonably conclude that defendants' acts and /or omissions were inconsistent with common purposes and reasonable expectations. As such they may fail to comply with the duty of good faith and fair dealing. Plaintiff ought to have the opportunity to make that case to the jury whose right it is to resolve the issue of breach.

C. Punitive Damages

Plaintiff's sole remaining claim is for breach of the duty of good faith and fair dealing. This claim sounds in contract rather than in tort. *St. Benedict's*, at 199. It is well established that punitive damages are not recoverable for breach of contract. *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161, 1167 (Utah 1983). Moreover, there is an absence of alleged facts which come close to the egregious facts required to support a punitive damage claim. If the trial in this matter produces an appropriate foundation, the Court could always revisit this ruling.

D. Attorney Fees as Consequential Damages

In *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989), the Utah Supreme Court allowed recovery of attorney fees as consequential damages in an action for breach of an insurance contract. The contract did not provide for attorney fees and they were incurred in the context of first-party rather than third-party litigation. The court acknowledged departure from

the well-established rule that attorney fees generally can not be recovered unless provided for by statute or by contract.

The result in *Bracey* was analyzed by the Court of Appeals in *Collier v. Heinz*, 827 P.2d 982 (Utah App. 1992). The *Heinz* court noted that *Bracey* went beyond the previously recognized exception that allowed attorneys fees as foreseeable consequential damages only where the injured party incurred attorney fees through litigation with a third party.

The *Heinz* court resolved what it termed “a problematic conflict” by concluding that “the award of attorney fees as consequential damages, outside the context of statutory and contractual authorization, should be limited to . . . two situations . . . : insurance contracts and the third-party exception.” At 984. The opinion seems to have been an effort to “tidy-up” and leave the precedential footprint clean. It was not to be.

The ink was barely dry on the *Heinz* decision when the Supreme Court handed down its decision in *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992). The *Heslop* court added another exception, i.e., employment termination cases.³ A former bank employee was able to recover attorney fees as consequential damages for wrongful termination by the bank.

³ It may not be conceptually accurate to think only in terms of “exception” categories. It may be more appropriate to examine the relative strength of the claims and defenses and the disparity of strength in the relationship. A clear disparity of strength exists between an insurer and its insured, and between an employer and an employee. Depending upon the circumstances, it could also exist in cases such as this where a minority owner lacks any bargaining strength in a forced buyout.

It is by no means certain that development of the law in this area is at an end. However, it is worth noting that *Heinz* and *Heslop* were decided in 1992 and there does not appear to be any subsequent cases that have treated the subject or identified any new areas of exception to the general rule. Plaintiff argues that this Court should venture into the unknown and defendant argues that should only be done by the Supreme Court.

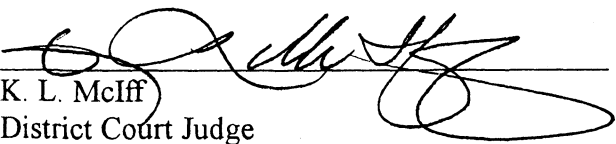
Given the prior rulings herein and the nature of the limited claim which remains, it is this Court's view that the facts are not of sufficient strength to warrant departure from the general rule. If the evidence at trial dictates otherwise, the matter can be revisited.

CONCLUSION

Having declined to grant summary judgment as to all claims, trial herein shall go forward.

GOVERN YOURSELVES ACCORDINGLY.

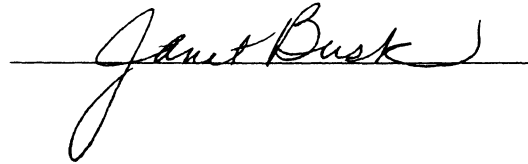
Dated this 26th day of January, 2001.


K. L. McIff
District Court Judge

CERTIFICATE OF SERVICE

On January 26, 2001 a copy of the above ORDER was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Mr. John A. Anderson STOEL RIVES 201 South Main Street, Suite 1100 Salt Lake City, UT 84111	[m]	Mr. Benson Hathaway STIRBA & HATHAWAY 215 South State Street, Suite 1150 Salt Lake City, UT 8111	[m]



STOEL RIVES LLP
John A. Anderson (4464)
Matthew M. Durham (6214)
201 Main Street, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 328-3131

Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,)

Plaintiff,)

v.)

GRAND CANYON EXPEDITIONS)

CO., MARTIN MATHIS; MICHAEL)

DENOYER; DONALD SAUNDERS;)

JOHN DOES 1 through 5; and JANE)

DOES 1 through 5,)

Defendants.)

AFFIDAVIT OF
ANN M. DUMENIL

Civil No. 940600003

Hon. K. L. McIff

STATE OF ARIZONA)

:ss.

COUNTY OF MARICOPA)

Ann M. Dumenil, having been first sworn, deposes and states:

1. I am a resident of Maricopa County, Arizona, over the age of majority, and otherwise competent to make this affidavit.

2. I am an attorney duly licensed to practice law in the State of Arizona; I am associated with the law firm of Jennings, Strouss & Salmon, P.L.C., in Phoenix, Arizona.

3. In 1990, Jennings, Strouss & Salmon was retained by Grand Canyon Expeditions Co. ("Grand Canyon") to represent it in connection with a dispute with the Arizona Department of Revenue ("ADOR") over Grand Canyon's payment of certain use taxes to the state of Arizona.

4. The ADOR was attempting to collect from Grand Canyon taxes for food purchased outside Arizona, but brought into that state during river trips.

5. In December 1990, I sent Michael R. Denoyer, President of Grand Canyon, a draft Notice of Protest and Request for Refund (the "Notice of Protest") for filing with the ADOR. (A copy of the draft Notice of Protest, along with my letter to Mr. Denoyer is attached to Grand Canyon's Supporting Memorandum as Exhibit "I.")

6. The draft Notice of Protest was intended to challenge the assessment of the use tax mentioned above; it also, however, requested a refund of a transaction privilege (sales) tax in the amusement classification under Arizona state tax laws. See Supp. Mem. Ex. "I."

7. Although Grand Canyon had not requested that I include the request for a refund of the transaction privilege tax, I had prepared such a request for Grand Canyon's predecessor and included it in Grand Canyon's request. I believed the request was advisable because other taxpayers in Arizona, including the owner of Grand Canyon's predecessor, were challenging the tax or defending other audits by the ADOR. Id.

8. I explained in my letter that, although I did not believe Grand Canyon would actually prevail on the transaction privilege tax refund, the request was strategically advisable because it could serve as a bargaining offset of approximately \$21,000 on Grand Canyon's protest of the use tax. Id.

9. On July 15, 1991, I wrote to advise Grand Canyon of the status of the Notice of Protest. See Letter of Ann M. Dumenil to Michael R. Denoyer, July 15, 1991 (attached to Grand Canyon's Supporting Memorandum as Exhibit "J. ").

10. In my July 15 letter, I told Grand Canyon that although it was possible that some river rafting company might successfully challenge the transaction privilege tax in Arizona, such a challenge would take years to resolve. Moreover, I explained that ADOR was taking the position that since the costs of the tax were passed on to Grand Canyon's customers, the refund would not be made to Grand Canyon, even if Grand Canyon were technically entitled to such a refund. Id.

11. I asked if Grand Canyon desired to continue litigating the question of the transaction privilege tax as it would involve significant time, expense and risk. Id.

12. On August 21, 1991, Mr. Denoyer called me to say that Grand Canyon did not want to continue litigating the transaction privilege issue.

13. Pursuant to Grand Canyon's instruction, I allowed their request to lapse; I did not formally withdraw Grand Canyon's request, however, because I thought another rafting company might someday successfully challenge the transaction privilege tax; consequently, I believed that leaving Grand Canyon's request pending would be beneficial to Grand Canyon because they might be able to argue that they were entitled to a refund.

14. I did not specifically advise Grand Canyon that I had not formally withdrawn its refund request until August 20, 1992, when I sent a letter to Mr. Denoyer explaining my decision and its rationale. I also advised Mr. Denoyer that a hearing had been scheduled on the request for refund of the transaction privilege tax. Letter of Ann M. Dumenil to Michael

R. Denoyer, August 20, 1992 (attached to Grand Canyon's Supporting Memorandum as Exhibit "K.")

15. In my August 20, 1992 letter I explained to Grand Canyon that I did not believe it was likely to prevail on this issue, and asked again whether Grand Canyon wanted to pursue the matter. Id.

16. Shortly thereafter, Mr. Denoyer told me that Grand Canyon did not wish to pursue the request for a refund of transaction privilege taxes and asked me to withdraw Grand Canyon's request.

17. I again made the determination that it was in Grand Canyon's best interest not to formally withdraw the request, but rather merely to cancel its hearing and wait to see if another company successfully challenged the tax. Accordingly, I canceled the hearing on Grand Canyon's request for refund, although I did not specifically explain this to Grand Canyon at the time. See Handwritten Notes on Memorandum of August 25, 1992 (attached to Grand Canyon's Supporting Memorandum as Exhibit "L.").

18. The transaction privilege tax was subsequently challenged successfully by a another river rafting company in an appeal before the Arizona Supreme Court reported as Wilderness World, Inc. v. Department of Revenue, 895 P.2d 108 (Ariz. 1995).

19. On September 13, 1995, I sent Grand Canyon a copy of my 1992 memo (Exhibit "O") to file memorializing a call from Mike Denoyer in which he said he did not want to pursue any refund claim.

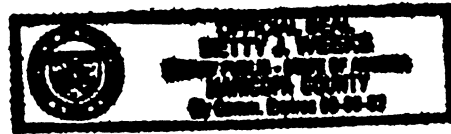
20. I wrote on this memo a note indicating that it was fortuitous that I did not withdraw the refund claim, but had only canceled Grand Canyon's hearing on the matter, since that left Grand Canyon eligible for a refund. See Supp. Mem. Ex. "L."

DATED this 26th day of March, 1999.

Ann M. Dumenil
Ann M. Dumenil

SUBSCRIBED AND SWORN to before me this 26th day of March, 1999.

Betty J. Weeks
Notary Public
Residing at: 302 E Montelista #C-6
Phoenix AZ 85004



RECEIVED

APR 15 2000

STIRBA & HATHAWAY

FILED
KANE COUNTY
MAR 21 2000
SIXTH DISTRICT COURT
Clerk

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab

Telephone: (435) 644-2458 Fax: (435) 644-2052

MARC SMITH,

Plaintiff,

vs.

GRAND CANYON EXPEDITIONS CO.;
MARTIN MATHIS; MICHAEL DENOYER;
DONALD SAUNDERS; ,

Defendant.

MEMORANDUM DECISION

Case No. 940600003

Assigned Judge: K. L. McIFF

This matter is before the Court on the following motions.

- 1- Defendants' motion for summary judgment;
- 2- Defendants' motion to exclude testimony of plaintiff's expert;
- 3- Plaintiff's motion for leave to amend.

Each motion has been extensively briefed and argued. After careful consideration, the Court has determined to deny each of the motions; however, in so doing the Court has narrowed the areas which remain viable and concerning which proof will be permitted. The reasoning behind the Court's decision is briefly summarized hereafter, though no effort has been made to cite legal authority for well-established principles. The exhaustive briefing has supplied more than ample authority for the Court's conclusions of law. Rather the Court has focused on sharing with the parties its view of the issues with which the jury will be obliged to grapple.

I begin by noting that plaintiff was forced out of a closely held corporation. There were five shareholders. Plaintiff owned 17.66% of the outstanding stock. Under the buy/sell agreement entered into at inception, three of the shareholders, including plaintiff, were obliged to sell their stock upon termination of employment, whether voluntary or involuntary. At the time of his involuntary termination, a buyout agreement was reduced to writing and signed by plaintiff and the corporate president. In reliance on this agreement the Court previously granted partial summary judgment, dismissing the plaintiff's claim of an entitlement to continued employment. This ruling left only plaintiff's claimed breach of the duty of good faith and fair dealing. With respect to this claim, the Court stated:

The duty of good faith and fair dealing applies not only to the original agreements between these parties, but would have extended to the termination proceedings and the manner of accounting and fixing values. And this is so even though the buy-sell agreement accorded 'conclusive status' to the value determined by the accountant. The conclusive status of these values necessarily presumes the absence of a breach of the duty of good faith and fair dealing.

After revisiting all the pleadings, including the extensive briefing and massive amount of supporting material filed of late, the Court remains convinced that the statement above quoted essentially outlines the proper areas for trial. An effort has been made hereafter to add sufficient substance and detail so that the parties may know how to proceed.

It is the Court's considered view that the duty of good faith and fair dealing has both negative and affirmative components. The former prevents the doing of anything in bad faith or with intent to injure. The latter, in the right circumstances, may require affirmative acts which are

reasonable and faithful to an agreed common purpose and consistent with justified expectations. I consider this view to be supported by the RESTATEMENT (SECOND) OF CONTRACTS which has been adopted by Utah Courts. It is not a sufficient defense that defendant's did not intentionally injure plaintiff or intentionally engage in acts of bad faith.

With the foregoing in mind, I will proceed to examine the potential application of the doctrine requiring good faith and fair dealing. Plaintiff asserts that in the beginning the corporate accountant used inappropriate accounting procedures which at the time of the buyout unfairly compromised the value of his stock. A major difficulty with this position is that the accounting method in question was developed when no dispute existed between the parties. It was employed for some six years before a dispute arose. The benefits and burdens of the approach have been enjoyed by all participants and there has been no evidence proffered to the effect that it was inconsistent with their contemporaneous common purposes or reasonable expectations. Moreover, the evidence before the Court supports the conclusion that in the absence of competing positions the accounting procedures were within the broad range of what might be considered "generally accepted accounting procedures". This early part of the business relationship between the parties is a closed chapter.

The foregoing reasoning does not apply with equal force to the accounting procedures employed at or around the time of the buyout when the relationship had ruptured. Plaintiff has challenged the handling of some matters at this time, including the corporation's accounting

methodology in acquisition of another business. Some of the potential disputes in this area may evaporate in the light of further examination of relevant information by the parties and their accountants, but to the extent that a dispute remains, it is the proper subject of inquiry at trial. Once the rupture occurred and the buyout triggered, the natural loyalty of the corporate accountant (as opposed to the broader duty owed all shareholders) would have run to defendants. Plaintiff would have been viewed as an outsider. The relationship was adversarial. This is not analogous to the situation six years earlier when all parties were essentially in the same boat. I conclude, therefore, that plaintiff's expert is entitled to address the appropriateness of accounting procedures employed at or near the time of the buyout when the parties were at odds. At that time it may not be a complete defense that the methodology employed comports with "generally accepted accounting principles". In briefing and at oral argument, both sides agreed that the inherent flexibility in accounting principles make them analogous to a line rather than a dot on a line. 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.

I turn now to the matter of the Arizona tax refund. The salient facts are these. The tax was collected from third persons. It was collected in its entirety and paid to the State of Arizona while plaintiff was a shareholder. It came back to the corporation in 1995 and 1996 some three plus years after plaintiff's departure. Plaintiff did not become aware of the refund until 1998 and the extent of the refund was not disclosed to him until some time in 1999. The dollar figures are

revealing. Plaintiff was forced to sell his stock based upon a net book value for the entire corporation of some \$730,000. The tax refund relating entirely to the time covered by plaintiff's ownership was approximately \$1,000,000. Of the one million dollars received, defendants were theoretically required to return \$280,000 to the original payers, but apparently this has proved at least somewhat impossible. The bottom line is that the corporate defendant received and distributed to its then existing shareholders an amount which exceeds the total value of the corporation which was employed to compute the value of the plaintiff's stock in the forced buyout.¹

It is my considered view that a jury could reasonably conclude that there is a lack of equity and fairness in the scenario outlined and that it violates what the parties could have reasonably expected from each other. The two suggested remedies are unjust enrichment and breach of the duty of good faith and fair dealing. Defendants claim plaintiff cannot prove the essential elements of a claim of unjust enrichment. Specifically, they argue that plaintiff has not conferred any benefit on defendant; rather the benefit was conferred by third parties to whom a refund is either not required or impractical. Defendants freely acknowledge the windfall, but claim plaintiff is not entitled to any credit. Rather than get in that quagmire, the Court has determined that the better remedy is to allow the jury to consider whether plaintiff has a reasonable expectation of participation based on the duty of good faith and fair dealing. Equity and justice are as central to

¹ Some monies may still be held in a retained earnings account, but this will likely not change the ultimate economics or equities.

this claim as they are to a claim of unjust enrichment. The defense claims that the duty of good faith and fair dealing is unavailable because there is no evidence of an intent to injure and no evidence of bad faith conduct. The Court views this as an excessively narrow construction of the duty; and of equal importance, the Court believes defendants have disregarded important facts surrounding the preservation of and ultimate recovery under the claim against the State of Arizona.

More specifically, defendants' claim that when the corporate president signed the buyout agreement with plaintiff, he was unaware that the tax refund claim was still viable. The president had directed counsel to dismiss the claim, but this direction was disobeyed. The corporation seeks to insulate itself against a claimed breach of good faith by drawing a line between corporate officials and the attorney whom the corporation had retained to represent its interest in the State of Arizona. The line is too fine for this Court. Based upon the affidavit of the Arizona attorney, it appears clear that the potential of obtaining a tax refund was deliberately kept open from August 1991 through the buyout of plaintiff's stock in July of 1992, and on through 1995 and 1996 when the tax refund ultimately came. The attorney's affidavit indicates that she declined to follow the directive of the corporate president to withdraw the request, opting instead to simply cancel hearings, thereby leaving the request intact. She states unequivocally that she deliberately made these decisions believing that it was in the best interest of the corporation and that it might ultimately be able to obtain a refund. The Court is unwilling to allow the defendant to draw a line

between corporate officials and the corporate attorney when answering plaintiff's claim, while at the same time holding on to the benefits derived from the course deliberately pursued by the attorney.

At oral argument defendants suggested that they may have been entitled to receive the refund even if the attorney would not have disobeyed directions and kept the claim alive. The Court does not consider that controlling.² The fact remains that the corporate attorney, by conscious design, kept alive a claim which ultimately resulted in recovery of an amount exceeding the entire remaining value of the corporation. This overlapped the period of the buyout and was not disclosed to the plaintiff in any manner. Moreover, if the facts are as the defendants allege, to wit, the corporate officials were also in the dark, then all of the parties (save only the attorney) were negotiating without full knowledge of the facts at the time of the buyout. This posture continued until near the time the refund was received. After that, it was only the plaintiff that remained in the dark, a posture which continued until the latter stages of this litigation. If the knowledge of the attorney is imputable to the corporate president, then there was a unilateral mistake of fact on plaintiff's part coupled with "sharp practices" by the other negotiating party. If the knowledge is not imputable, then there was a mutual mistake by the negotiating parties.

² Apparently the Arizona legislature granted relief to the "river running" companies, including the defendant Grand Canyon Expeditions (GCE). Presumably there were enough companies similarly situated to urge successful passages of favorable legislation. GCE may not have been active and it may not have tipped the scales, but it would be indefensibly speculative to assume that it or any other similarly situated player was irrelevant to the outcome. The old saying applies: "There is strength in numbers."

Either way, a jury could well conclude that there has been a breach of the duty of good faith and fair dealing. This, it has been held, is a factual inquiry generally inappropriate for decisions as a matter of law.

I address one other matter relating to expert testimony. The parties argued at length as to how the corporate accountant should have treated the tax refund; whether it should be labeled a “prior period adjustment” or simply considered income for the period in which it was received.³ I do not consider this to be the controlling issue. The duty of good faith and fair dealing has more to do with the reasonable expectations of the parties than it does with accounting procedures. Defendants ask the rhetorical question, “What if there would have been a tax liability, would there have been an expectation of liability on plaintiff’s part?” Defendants will have to pitch that question to the jury. It is more in the nature of argument. It has to do with reasonable expectations which are the focal point of the duty of good faith and fair dealing.

Finally, the individual defendants ask for dismissal of the claims as against them. It was established at oral argument that the corporate defendant 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 the remaining defendants. Given these facts, the Court declines to dismiss the claim against the individual defendants.

Govern yourselves accordingly.

³ The accountant apparently treated it as “retained earnings”. What can be made of that, if anything, remains to be seen.

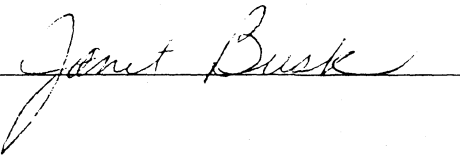
Dated this 20th day of March, 2000.


K. L. McInff
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

On March 20, 2000 a copy of the above MEMORANDUM DECISION was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Mr. John A. Anderson STOEL RIVES 201 South Main Street, Suite 1100 Salt Lake City, UT 84111	[m]	Mr. Benson Hathaway STIRBA & HATHAWAY 215 South State Street, Suite 1150 Salt Lake City, UT 84111	[m]



STOEL RIVES LLP
John A. Anderson (4464)
Matthew M. Durham (6214)
201 Main Street, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 328-3131

Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,)	
)	
Plaintiff,	)	AFFIDAVIT OF
	)	NYLE W. WILLIS
vs.)	
)	
GRAND CANYON EXPEDITIONS	)	Civil No. 940600003
CO., MARTIN MATHIS; MICHAEL)	
DENOYER; DONALD SAUNDERS;	)	Hon. K. L. McLiff
JOHN DOES 1 through 5; and JANE)	
DOES 1 through 5,)	
)	
Defendants.)	
)	
)	

STATE OF UTAH)
	) ss.
COUNTY OF KANE)

Nyle W. Willis, having been first sworn, deposes and states:

1. I am a resident of Kane County, Utah, over the age of majority, and otherwise competent to make this affidavit.
2. I am a certified public accountant duly licensed to practice in the State

under the heading "Grand Canyon" set forth the balance sheet as it appeared on the Concession Report for Grand Canyon Expeditions Co. for 1991. The next two columns under the heading "White Water" set forth the balance sheet as it appeared on the Concession Report for White Water for the period of October 1, 1991 to December 31, 1991. The third two columns under the heading "Combined Balance Sheet" set forth the totals of each of the line items as they would have appeared had the financial reports been presented for the combined companies. It was necessary to eliminate the \$1,200,000 representing "Investment in White Water" (Exhibit "F" at line 17) from the asset side of Grand Canyon Expeditions Co.'s balance sheet and the \$1,200,000 representing "Partner's or Proprietor's Capital" (Exhibit "G" at line 33) from the *equity in the White Water balance sheet because the assets, liabilities and earnings are already included when the two balance sheets are combined.* Including the \$1,200,000 overstates the equity by that amount. The correct equity for Grand Canyon Expeditions Co. combined with White Water as of December 31, 1991 is the total of capital stock of \$74,720, additional paid-in capital of \$299,382 and retained earnings of \$399,342 for a total of \$773,444, which represents the net book value of Grand Canyon Expeditions Co. as of December 31, 1991. This net book value is reflected in both Exhibit "H" (titled "TOTAL CAPITAL") and Exhibit "I" (lines 22-24).

16. Attached as Exhibit "J" is a photocopy of the balance sheet portion of the corporate income tax return filed for Grand Canyon Expeditions Co. for the year ended 1991. The total net book value is consistent with the above, that is \$773,445 (see lines 22-24).

17. At no time has any officer, director, or shareholder of Grand Canyon engaged in acts or omissions to manipulate the financial status of Grand Canyon, nor have they

made any attempt to reduce Marc Smith's proportionate share of the company or reduce the purchase price of his stock at the time Grand Canyon Expedition Co. purchased it.

18. Grand Canyon Expedition Co.'s 1991 year-end financial statements and accounting records were prepared several months before Marc Smith's separation from employment.

19. At the time I prepared the 1991 year-end financial statements and accounting records for Grand Canyon Expedition Co., I was unaware of any possibility that Marc Smith would leave the company's employ, or that Grand Canyon Expeditions Co. would purchase Marc Smith's stock in Grand Canyon Expeditions Co.

20. I was not contacted by anyone concerning Marc Smith's separation from employment at Grand Canyon until July 1992, shortly before the separation occurred; at that time, I was contacted by Dick Skeen, Grand Canyon Expeditions Co.'s attorney who requested that I calculate the net book value as described in the Buy-Sell Agreement.

21. Prior to that time, I never discussed Marc Smith's separation from employment at Grand Canyon Expedition Co. with anyone.

DATED this ____ day of March, 1999.

Nyle W. Willis

SUBSCRIBED AND SWORN to before me this ____ day of March,
1999.

Notary Public

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

* * * * *

MARC SMITH,) DEPOSITION OF
Plaintiff,) NYLE WILLIAM WILLIS
vs.)
GRAND CANYON EXPEDITIONS CO.,)
MARTIN MATHIS; MICHAEL)
DENOYER, RONALD R. SMITH;)
DONALD SAUNDERS, JOHN DOES 1)
through 5 and JANE DOES 1)
through 5,)
Defendants.) Civil No. 940600003

*

BE IT REMEMBERED, that on Tuesday, the 10th day of
October, 1995, the deposition of NYLE WILLIAM WILLIS,
produced as a witness at the instance of the plaintiff
pursuant to written notice and subpoena in the above-
captioned matter now pending in the above-entitled Court,
was taken before me, Byron Ray Christiansen, a Notary Public
and Certified Shorthand Reporter in and for the State of
Utah, commencing at the hour of 9:00 a.m. of said day, at
the Kane County Courthouse, 76 South Main, Kanab, Utah
84741.

1 we'll go from there.

2 Did you know, Mr. Willis, at the time the Sobek company
3 was acquired, that there was just one year left before the
4 contract -- the Sobek contract expired?

5 A. No.

6 Q. Okay. And you testified earlier that your
7 understanding was usually those contracts -- concession
8 contract rights and the right of preference with them that
9 made them valuable were amortized over their life -- over
10 the remaining life of the contract before it was to expire
11 and had to be renewed, is that correct?

12 A. That they were amortized over that length of time?

13 Q. Usually they were amortized that way?

14 A. Like I say, this is a unique company with a unique
15 situation. I don't know if they -- what they are normally
16 done; this is the only client I have that has one of these
17 things.

18 Q. All right. Well, I guess what I'm coming back to,
19 then, is -- you say -- you know, I got completely lost when
20 I forgot your answer to "I assume so," and I lost my train
21 of thought.

22 But I was asking you, was I not, how it was determined
23 to amortize the Sobek \$500,000 Contract Right of Preference
24 over -- you know, what the amortization period would be.
25 And you said you assumed it was five years, is that correct?

1 A. Yes.

2 Q. Maybe that's what I was asking you. What did you
3 base that assumption on?

4 A. Tax law.

5 Q. Okay. And it was -- was it you that set that up
6 that way or was it pursuant to instructions from Mr.
7 Saunders or his accountants in Washington?

8 A. No, we didn't have any contact with the
9 accountants in Washington.

10 Q. Okay.

11 A. So I set it up that way, I assume.

12 Q. Hypothetically, if the million dollars, that
13 represented the covenant not to compete when Saunders bought
14 the company from Ron Smith, was set up as a Contract Right
15 of Preference or a concession contract, in your mind, it
16 would have been amortized off over the remaining life of the
17 contract until it expired with the National Park Service?

18 MR. ANDERSON: Objection. Incomplete
19 hypothetical, calls for speculation.

20 Q. (By Mr. Paxton) Would that have been -- but for
21 the covenant not to compete, had the million dollars, that
22 was assigned to the covenant not to compete in the Ron Smith
23 and Don Saunders deal, been allocated to the contract right,
24 the concession contract and its right of preference, over
25 what period of time would you have amortized that on the

1 ballpark it, or what?

2 A. No. I think it had to do with the fair market
3 value that we had established on some of those assets in the
4 dissolution of Ronald R. Smith Company.

5 Q. Okay. Any other ways?

6 A. I don't remember.

7 Q. Okay. Is it fair to say, then, Mr. Willis, that
8 Exhibit No. 35, the Financial Statements you've prepared for
9 the company throughout these years -- these year-end
10 statements were kept for tax purposes rather than according
11 to GAP as such?

12 A. Yes.

13 Q. Are the assets being depreciated according to GAP
14 in all cases, as reflected in 35, the method of
15 depreciation?

16 A. GAP will accept IRS depreciation in most cases,
17 but the decisions on how to depreciate the assets was made
18 with the tax law in mind, not with GAP in mind.

19 Q. And would that be the same answer for the way the
20 amortization -- the intangibles has been handled?

21 A. Yes.

22 Q. Let me show you what we've marked as Deposition
23 Exhibit No. 36, which is comprised of six pages, and ask you
24 if you ever recall seeing that document before. Let me just
25 represent -- state on the record, that these were documents

AGREEMENT

THIS AGREEMENT by and between MARC SMITH ("Smith" hereafter) and GRAND CANYON EXPEDITIONS CO., a Utah corporation ("Corporation" hereafter), is made in consideration of the mutual promises and covenants of the parties as follows:

1. Smith is a shareholder of the Corporation, owning Certificate No. 4 representing 4,250 shares and Certificate No. 9 representing 2,348 shares, a total of 6,598 shares ("Shares" hereafter).

2. The ownership and disposition of the Shares are subject to the terms and conditions of a Buy-Sell Agreement dated November 29, 1986 by and among all of the shareholders of the Corporation ("Buy-Sell Agreement" hereafter, a copy of which is attached as Exhibit "A").

3. Smith is an employee of the Corporation, having executed an Employment Agreement dated November 29th, 1986; is Vice President of the Corporation and is a member of the Board of Directors.

4. Pursuant to the provisions of the Buy-Sell Agreement Smith hereby sells, assigns and transfers all of his right, title and interest in and to the Shares owned by him for a total purchase price of One Hundred Eighty Thousand Six Hundred Thirty-Nine Dollars and Thirty-Seven Cents (\$180,639.37). The purchase price has been determined in accordance with the terms of the Buy-Sell Agreement based upon One Hundred Forty percent (140%) of the Corporation's net book value as of June 30, 1992.

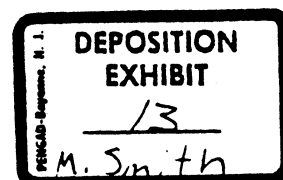
5. The purchase price shall be paid as follows:

a. \$69,690.00 shall be paid by the Corporation at Closing by check payable to Donald A. Saunders and Marc Smith representing the amounts due from Marc Smith to Donald A. Saunders as provided in the following-described Notes:

i. Note dated November 19, 1986 in the amount of \$42,500.00.

ii. Note dated September 30, 1991 in the amount of \$23,484.00.

iii. Interest on the above-described notes from January 1, 1991 to July 25, 1992 in the amount of \$3,710.00.



Upon receipt of the above check, Smith shall endorse it to Donald A. Saunders which shall constitute payment in full of all amounts owed by Smith to Donald A. Saunders in connection with the above notes, and said notes shall be canceled.

b. The balance of the purchase price in the amount of \$110,949.37 shall be evidenced by a Promissory Note in the form attached to this Agreement as Exhibit "A" which shall be executed by the Corporation. The promissory note shall provide for payment in equal monthly installments payable over a period of six years at ten percent (10%) interest per annum. The first monthly installment shall be due on August 25th, 1992 and such monthly installments shall be payable on the 25th day of each month thereafter until principal and interest has been paid in full. All payments shall first be credited to interest and the balance to principal. Any time after the first monthly installment, the holder of the note may demand payment in full. Corporation shall make payment of the then unpaid balance within 15 days after receipt of a written demand for payment in full. Corporation shall not have the right to prepay any monthly payment.

6. In addition to the payments provided above, and in lieu of any other amounts or benefits which may be due from the Corporation as provided in the Employment Agreement or otherwise, including but not limited to bonus, additional salary, commissions and health benefits, the Corporation shall pay Smith the sum of Thirty-Seven Thousand Nine Hundred Forty Dollars and Eighty-Eight Cents (\$37,940.88) which represents severance pay. The severance pay is subject to withholding taxes.

7. Smith shall resign as an officer and employee of the Corporation effective July 15, 1992 and shall execute a resignation letter in the form attached as Exhibit "C".

8. The closing for the transaction described in this Agreement shall be July 25, 1992 at the offices of the Corporation in Kanab, Utah. At the Closing the parties shall deliver and perform the following:

a. Corporation.

i. Deliver a check payable to Marc Smith and Donald A. Saunders in the amount of \$69,690.00.

ii. Deliver a check to Marc Smith for severance pay less taxes required to be withheld as described in paragraph 6. The amount of the check

shall be determined by deducting the applicable tax withholdings from the gross severance pay of \$37,940.88.

iii. Deliver a Promissory Note in the form of Exhibit "B" in the face amount of \$110,949.37 in favor of Marc Smith and executed by the Corporation.

b. Smith.

i. Smith shall endorse the check payable to Marc Smith and Donald A. Saunders in the amount of \$69,690.00 to Donald A. Saunders and deliver it to the Corporation at Closing.

ii. Deliver Certificate No. 4 for 4,250 shares of Corporation stock and Certificate No. 9 for 2,348 shares of Corporation stock to the Corporation. The certificates shall be endorsed on the back by Marc Smith.

c. The Corporation shall deliver the check in the amount of \$69,690.00 to Donald A. Saunders in exchange for the Promissory Notes executed by Marc Smith, on November 29, 1986 in the amount of \$42,500.00, and on September 30, 1991 in the amount of \$23,484.00. Said Notes shall be marked "paid in full" by Donald A. Saunders and returned to Marc Smith.

9. The 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; provided, however, that Marc Smith shall not disclose confidential information regarding the business of the Corporation acquired during his employment including but not limited to trade secrets belonging to Corporation or solicit customers of the Corporation or use or in any way disclose to others mailing lists or lists of past or present customers of the Corporation.

10. Smith represents and warrants that there are no liens or other encumbrance against any of the Corporation stock certificates owned by him except for the lien in favor of Donald A. Saunders and that no other person or entity can claim or has any interest in and to those certificates and that Smith has the right to transfer the Shares as contemplated by this Agreement.

11. This Agreement embodies the entire agreement between the parties hereto with respect to the subject matter hereof and there are no agreements, warranties or representations between the parties other than those set forth and as provided herein.

12. This Agreement and each provision thereof shall be binding upon and inure to the benefit of the Corporation and Smith and their respective successors, heirs, personal representatives or assigns.

13. This agreement shall be construed in accordance with the laws of the State of Utah.

DATED this 25th day of July, 1992.

CORPORATION:

GRAND CANYON EXPEDITIONS COMPANY

By Michael Denoyer
Michael Denoyer, President

SMITH:

By Marc Smith
Marc Smith

BENSON L. HATHAWAY, JR. (Bar No. 4138)
RICHARD J. ARMSTRONG (Bar No. 7461)
STIRBA & HATHAWAY
215 South State Street, Suite 1150
Salt Lake City, UT 84111
Telephone: (801) 364-8300

Attorneys for Plaintiff

**IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR
KANE COUNTY, STATE OF UTAH**

MARC SMITH,	:	
Plaintiff,	:	AFFIDAVIT OF
	:	DERK G. RASMUSSEN
v.	:	
GRAND CANYON EXPEDITIONS	:	
CO., MARTIN MATHIS, MICHAEL	:	
DENOYER, RONALD R. SMITH,	:	Civil No. 940600003
DONALD SAUNDERS, JOHN DOES	:	
1 through 5 and JANE DOES 1	:	Judge Kay McKiff
through 5,	:	
Defendants.	:	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Derk G. Rasmussen, being first duly sworn, hereby deposes and states as follows:

1. I am a resident of Davis County, Utah, over the age of majority, and am otherwise competent to make this affidavit.

2. I am a Certified Public Accountant by the American Institute of Certified Public Accountants; a Certified Fraud Examiner by the Association of Certified Fraud Examiners; and I am Accredited in Business Valuations by the American Institute of Certified Public Accountants. I have been practicing in the profession of accounting for the past 16 years.

3. I have received several financial records of Grand Canyon produced by it pursuant to Plaintiff's discovery requests in preparation of this Affidavit. I note that the financial statement for October 1991 a month critical to the analysis of the Whitewater/Sobek transaction was not produced.

4. In his March ____, 1999 affidavit, Nyle Willis states in paragraph 5, what the records of Grand Canyon Expedition Company, "Grand Canyon", reflect the net book value to be for the years of 1986 through 1992. Based on my review of the financial statements, tax returns and Annual Concessioners Reports prepared by Mr. Willis on behalf of Grand Canyon, and as set forth more precisely herein below, the net book value entered for Grand Canyon for the years of 1986 through 1992 is substantially less than the net book value should have been according to generally accepted accounting principles and their reasonable application, especially in light of the provision in the subject Buy-Sell Agreement fixing outgoing shareholders' stock forced sales price to Grand Canyon's "net book value".

5. In paragraphs 6 through 15 of his affidavit, Mr. Willis explains how he eliminated \$1,200,000 representing "partners or proprietors capital" from the combined financial statements of Whitewater/Sobek and Grand Canyon. While I do not have any dispute in theory with Mr. Willis' elimination of the \$1,200,000 "partners or proprietors capital" from the combined financial statement, as set forth more fully in paragraph 6~~7~~.b. below, Mr. Willis, Grand Canyon, and its officers and

directors, recorded a value of the assets acquired through the Whitewater/Sobek acquisition \$229,304 less than the \$1,200,000 purchase price. This was accomplished by Grand Canyon and Mr. Willis adjusting the \$1.2 million dollar purchase price by deducting a negative retained earnings in the amount of \$229,304. This accounting treatment of Whitewater and Grand Canyon's books upon the consolidation of the financial statements is best reflected in Mr. Willis' reconciliation prepared and attached as Exhibit "D" to Grand Canyon's Memorandum in Support of its Supplemental Motion for Summary Judgment, and effectively decreases the net book value of Grand Canyon as of January 1, 1992 by \$229,304.

6. In Mr. Willis' paragraph 16, he states that the net book value of the combined Grand Canyon/Whitewater/Sobek enterprise as of December 31, 1991 was \$773,445. It appears to me that the net book value for the end of that year should at least be adjusted by \$229,304 as set forth in paragraph 5 above, and in addition, bears a substantial adjustment in accordance with the other accounting applications set forth below in paragraph 7.

7. In his affidavit paragraph 17, Mr. Willis states that "No officer, director, or shareholder of Grand Canyon engaged in acts or omissions to manipulate the financial status of Grand Canyon, nor have they made any attempt to reduce Marc Smith's proportioned share of the company or reduced the purchase price of the stock at the time Grand Canyon Expedition Company purchased it." See Willis Affidavit, ¶ 17. Upon review of Grand Canyon's financial records, in my opinion, Mr. Willis' statement is false in the following particulars:

a. When Grand Canyon acquired the river running business assets from Ron Smith in 1986, Mr. Willis, ostensibly under the direction of the officers and directors of Grand

Canyon, accounted for the assets acquired and included them on the books of Grand Canyon. In my opinion, Mr. Willis and the officers and directors of Grand Canyon did not comply with generally accepted accounting principles and unreasonably accounted for the purchased assets on the financial statements of Grand Canyon.

Grand Canyon paid Ron Smith \$2,147,000 for the assets. Approximately \$1,047,000 of the purchase price was allocated to physical assets such as equipment, land and buildings. \$100,000 of the purchase price was allocated to good will and \$1,000,000 of the purchase price was allocated to a covenant not to compete granted to Grand Canyon by Ron Smith. A copy of the Grand Canyon/Ron Smith purchase agreement is attached to Plaintiff's Memorandum in Opposition as Exhibit "D" and made a part hereof. Generally accepted accounting principles require that when a company acquires a business by purchasing assets, the assets should be placed on the balance sheet of the acquiring company at fair value. In other words, the purchase price of the business assets is included on the balance sheet of the acquiring company by allocating the purchase price to identifiable acquired assets based on each asset's fair value. Generally accepted accounting principles also require a prioritization of how the assets are to be allocated. The purchase price is first allocated to all physical assets acquired such as land, buildings, and equipment. If the purchase price exceeds the fair value of the physical assets, the remaining amount is required by generally accepted accounting principles to be allocated to intangible assets such as good will, permits and covenants not to compete. The process of allocating purchase price to intangible assets is the same as the allocation process for physical or tangible assets, that is, their fair value. To

comply with generally acceptable accounting principles, each identifiable, intangible asset needs to have its fair value determined so that an appropriate amount of the purchase price can be allocated to that asset. In this case, Mr. Willis and the officers and directors of Grand Canyon erred when they simply recorded \$1,000,000 on the books of Grand Canyon attributable to Ron Smith's covenant not to compete, without first making a determination of the covenant's fair value. Generally accepted accounting principles require that a transaction be recorded based on its substance, rather than its form. In my opinion, Ron Smith's covenant not to compete was virtually worthless and therefore little, if any, of the purchase price should have been allocated to it. My reasons follow:

- (1) Ron Smith sold all of his permits to operate river trips on the Colorado River through the Grand Canyon to Grand Canyon as part of the 1986 transaction. It was illegal to run commercial river trips through the Grand Canyon without a permit. In 1986, new permits were not being issued by the federal government;
- (2) Ron Smith was about 45 years old at the time of the sale when he signed the covenant not to compete and expressed his intentions to all concerned that it was his purpose to get out of the business and "go fishing" *see* Ron Smith's Deposition, 216:15-216:2, attached to Plaintiff's Memorandum as Exhibit "K" and made a part hereof.;
- (3) Marc Smith, not Ron, had been running the business for several years before Ron sold his assets to Grand Canyon. *See* Don Saunders Deposition 33:14 to 34:12, attached to Plaintiff's Memorandum as Exhibit "I" and made a part hereof, and,

(4) Ron Smith remained a 10 percent shareholder of Grand Canyon and agreed to consult with Grand Canyon as necessary and was paid a salary for that purpose. See November 29, 1986 Purchase Agreement ¶¶ 2, 3 and 24, Exhibit D.

I found no analysis of the fair value of Ron Smith's covenant not to compete performed by Mr. Willis or any officer or director of Grand Canyon. It is my opinion, therefore, that neither Mr. Willis nor any officer or director of Grand Canyon followed generally accepted accounting principles when they booked Ron Smith's covenant not to compete at \$1,000,000.

I recognize in 1986 Grand Canyon had a tax incentive to record as much of the purchase price as possible to the covenant not to compete. At that time, the tax laws allowed a company to write off a covenant not to compete over the life of the covenant. Indeed, Grand Canyon wrote off Ron Smith's covenant not to compete within four years of its acquisition, reflecting an annual write-off of \$250,000, which came directly off the net book value. While this might have been good tax planning, it was not in compliance with generally accepted accounting principles.

At the same time Mr. Willis recorded a \$1,000,000 value for Ron Smith's covenant not to compete on the books of Grand Canyon, he completely ignores the most valuable asset acquired by Grand Canyon in the Ron Smith asset acquisition. The U.S. Forest Service permits to operate river trips through the Grand Canyon are the most valuable assets acquired by Grand Canyon. Without those, Grand Canyon cannot operate in the Grand Canyon. In Mr. Willis' 1986 accounting, no mention is made of the permits or their value on the books and records of Grand Canyon. (In 1993 the tax laws were changed to require the

amortization of all intangible assets, including covenants not to compete, over 15 years. This tax law change virtually eliminated the tax planning employed by Mr. Willis and the officers and directors of Grand Canyon in 1986.) It is worth noting that when Grand Canyon acquired the Whitewater/Sobek assets in 1991, most of the intangible value was recorded by Mr. Willis and the officers and directors of Grand Canyon, as it should have been in 1986, to the U.S. Forest Service permits. Indeed the permits are the only asset of Whitewater/Sobek that had any value to Grand Canyon. A copy of a letter from Mike Denoyer to Don Saunders discussing the Whitewater deal, which was produced by Defendants in discovery, is attached to Plaintiff's Memorandum as Exhibit "F" and made a part hereof. In my opinion, in order for its financial statements to comply with generally accepted accounting principles, Mr. Willis and the officers and directors of Grand Canyon should have allocated the \$1,000,000 attributed to Ron Smith's covenant not to compete, to the U.S. Forest Service permits, and perhaps some small amount to the covenant not to compete and good will. Had Mr. Willis and the officers and directors of Grand Canyon recorded the value of the permits at their fair value, the net book of Grand Canyon would have been significantly different on July 31, 1992 when Marc Smith's stock was redeemed.

As generally accepted accounting principles require the amortization of intangible assets over their useful lives, the life of the permits and good will is certainly greater than four years (the amortization period used to write off Ron Smith's covenant not to compete.) By way of comparison, Grand Canyon amortized the \$100,000 allocated to good will recorded at its acquisition of Ron Smith's assets to the limited extent that as of July 31, 1992, none of the \$100,000 allocated toward good will had been amortized at all.

It is my opinion that the amortization of Ron Smith's permits acquired by Grand Canyon should have been the maximum allowable period under the generally accepted accounting principles, or 40 years. The permits Grand Canyon acquired from Ron Smith are now approximately 35 years old and still have a far-reaching useful life. For all intents and purposes, it seems the permits will continue in perpetuity.

If Mr. Willis and the officers and directors of Grand Canyon had properly booked \$1,000,000 of the purchase price toward the forest service permits, and amortized that over 40 years instead of four years, the net book value of Grand Canyon would have been approximately \$862,500 higher in July of 1992 when Marc Smith's stock was redeemed.

b. As set forth above in paragraph 4, Grand Canyon recorded a value of the Whitewater/Sobek assets acquired in the 1991 sale on Grand Canyon's books in an amount which is \$229,321 less than the \$1.2 million purchase price. A copy of Grand Canyon's November 30 and December 31, 1991 financial statements are attached to Plaintiff's Memorandum as Exhibit "G" and made a part hereof. As part of his consolidation of the Whitewater/Sobek financial statement with that of Grand Canyon, Mr. Willis did not enter onto the books of Grand Canyon the full purchase price value of \$1,200,000. Mr. Willis reduced the equity value of the Whitewater/Sobek investment by creating a negative balance in the retained earnings of Whitewater/Sobek Investment in the amount of \$229,304. This negative balance is comprised of four components: (1) Mr. Willis booked the assets at \$1,170,000 instead of \$1,200,000 purchase price creating a difference of \$30,000; (2) Mr. Willis entered a figure of depreciation in the amount of \$59,304 for assets that had been acquired approximately one month earlier; (3) a negative cash balance of \$26,382 was

recorded; and, (4) Mr. Willis recorded prepaid, 1992 trip deposits in the amount of \$113,618 without reflecting a corresponding increase in the cash account.

I find it remarkable that assets acquired one month prior to consolidation would generate a cash loss of \$140,450, non-cash depreciation of \$59,304 and a reduction in asset value for the purchase price of \$30,000. Certainly, generally accepted accounting principles would allow for the recording of some depreciation for the month of December 1991, but not in the substantial amount of \$59,304. This aggressive depreciation represents 12.6 percent of the entire recorded value of the Whitewater/Sobek physical assets. This level of depreciation is inconsistent with generally accepted accounting principles, or may be at best on the very high end of what is allowable by generally accepted accounting principles. Similarly, Mr. Willis and the officers and directors of Grand Canyon booked a cash loss of \$140,450 for approximately one month generated by the assets of a non-operating entity, when in comparison, Grand Canyon's year to date operating expenses for the month of December 1991 increased by only \$87,804 as compared with year to date operating expenses through November 30, 1991. *See Exhibit G.* Finally, Mr. Willis provides no explanation for recording Whitewater/Sobek's assets on the books of Grand Canyon at \$30,000 less than the purchase price of \$1,200,000.

c. When Whitewater/Sobek assets were acquired by Grand Canyon in 1991, Mr. Willis recorded intangible value of the U.S. Forest Service permits at \$500,000, the customer mailing list at \$100,000 and the good will at \$100,000. *See Exhibit G.* While this method employed by Mr. Willis of accounting for the intangible assets is closer to being in compliance with generally accepted accounting principles from that previously employed by Grand

Canyon upon the acquisition of Ron Smith's assets, it still is not without its problems. First, Mr. Willis makes no assessment for the fair value of the forest service permits. It appears that the permits are the only reason Grand Canyon acquired Whitewater/Sobek's assets. *See* Exhibit F. Second, Mr. Willis' allocation of \$100,000 toward a mailing list and \$100,000 toward good will appears to be entirely arbitrary. The allocations do not of themselves affect the net book value of Grand Canyon as of July of 1992, but the amortization of these intangible assets does. In the seven months from June 30, 1992 back to November of 1991 when Whitewater/Sobek's assets were acquired, Grand Canyon wrote off \$90,000 of the intangible value. A copy of Grand Canyon's June 30, 1992 balance sheet and financial statement is attached to Plaintiff's Complaint as Exhibit "H" and made a part hereof.

In my opinion, \$90,000 is far in excess of economic reality and is an unreasonable application of generally accepted accounting principles. The assets acquired from Whitewater/Sobek in November of 1991 would not have reduced their economic value by \$90,000 in seven months. If anything, they would have increased in value. As a result, in my opinion, to conform to generally accepted accounting principles, any amortization of the intangibles from the Whitewater/Sobek asset acquisition should be over 40 years. Had Mr. Willis amortized the intangible assets over 40 years in accordance with generally accepted accounting principles, the appropriate amortization for the seven months from November of 1991 to June of 1992 would have been \$11,250 instead of \$90,000.

d. Based on the financial documents I have reviewed, it appears to have been Mr. Willis' and/or Grand Canyon's officers' and directors' policy to expense items that could properly have been capitalized under generally accepted accounting principles. For example,

legal fees paid by Grand Canyon to defend and renew the forest service permits could have been capitalized according to generally accepted accounting principles, which capitalization would have increased the net book value dollar for dollar for all such fees incurred.

e. In my opinion, Grand Canyon adopted an unreasonably conservative accounting policy in recognizing pre-paid trip revenue. As of June 30, 1992, there was \$1,107,059.45 of prepaid trip fees for 1992 trips sitting in a current liability account on the books of Grand Canyon. A copy of Grand Canyon's June 30, 1992 financial statement is attached to Plaintiff's Memorandum as Exhibit "H" and made a part hereof. In my opinion, at a minimum, the prepaid trip revenue should have been recognized to the extent of fixed costs already incurred (taking into account historical cancellation rates) plus revenue equal to the potential cancellation fees on the prepaid revenue. The reasonable recognition of these substantial receipts as income would have substantially increased the net book value as of June 30, 1992.

f. According to generally accepted accounting principles, depreciation expense should be recorded according to the matching principle. The cost of acquiring an asset should be spread over the time period that the asset participates in the generation of revenue. Typically this is done by estimating an asset's useful life and depreciating the asset over its useful life. The depreciation taken by Grand Canyon through Mr. Willis and/or its officers and directors appears to be unreasonably aggressive given the nature and longevity of the assets owned by Grand Canyon, particularly in light of the company's obligations under its buy-sell agreement with its shareholders to buy back its shareholders' stock at the net book value. The aggressive manipulation of generally accepted accounting principles as applied by

Mr. Willis in this case results in an unreasonably reduced net book value available to Marc Smith in July of 1992.

8. Upon review of the Grand Canyon April 1992 pre bookings as reflected on its financial statements, as compared to its April 1991 pre bookings, it appears that Grand Canyon's bookings in 1992 were almost double those of 1991. A copy of Grand Canyon's April 30, 1991 and April 30, 1992 financial statements is attached hereto as Exhibit "L" and made a part hereof. Further, those bookings were substantially higher than any preceding year. Apparently, Grand Canyon was sensitive to this potential increase in revenue since it paid off in full its \$542,000 long-term note payable to Shareholder Don Saunders in June of 1992. A copy of the May 31, 1992 Grand Canyon financial statement is attached to Plaintiff's Memorandum as Exhibit "M" and made a part of hereof. *See also* Exhibit H. According to Grand Canyon's financial records, it was on the cusp of a wave of substantial increase in its income at the time it terminated Marc Smith in July of 1992. A copy of Grand Canyon's July 31, 1992 financial statements attached to Plaintiff's Memorandum as Exhibit "N" and made a part hereof. I note that even though Grand Canyon paid Saunders in excess of \$500,000 cash from its 1992-1993 trip deposits, essentially none of that income had been recognized as income by Mr. Willis or the other officers and directors of Grand Canyon by July 1992.

9. The proper method for accounting for a refund, such as that received by Grand Canyon from the state of Arizona related to the entertainment tax, would be to record the receipt of the refund as a "prior period adjustment". According to generally accepted accounting principles, a "prior period adjustment" is an accounting treatment used when a transaction occurs or an error is discovered which does not relate to the period in which it is determined or realized. Generally accepted accounting principles require the accountant, in this case Mr. Willis, to record the amount

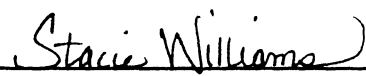
in question directly to equity *via* a "prior period adjustment". The "prior period adjustment" is shown in the equity section of the balance sheet and places the reader of the financial statement on notice that the affect relates to prior periods. It is my opinion that generally accepted accounting principles require the consideration of the portion of the Arizona entertainment tax refund that would have been in existence in June of 1992 as part of the equity as of June 1992.

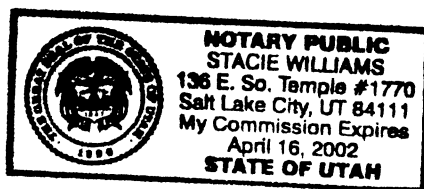
10. Based on my review of the financial records of Grand Canyon, produced to date by Defendants including those related to the 1996 Arizona entertainment tax refund, and according to a reasonable application of generally accepted accounting principles, the net book value of Grand Canyon in June of 1992 should increase by at least \$1,750,554.

DATED this 31st day of March, 1999.


DERK G. RASMUSSEN

Subscribed and sworn to before me this 31 day of March, 1999.


Notary Public



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STIRBA & HATHAWAY

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Attorneys for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MARC SMITH,	)	DEFENDANTS' ANSWERS TO
	)	PLAINTIFF'S SECOND SET OF
Plaintiff,	)	INTERROGATORIES
)	
vs.)	
)	
GRAND CANYON EXPEDITIONS CO.,	)	Civil No. 940600003
MARTIN MATHIS; MICHAEL)	
DENOYER; DONALD SAUNDERS;	)	The Honorable K.L. McIff
JOHN DOES 1 through 5; and JANE)	
DOES 1 through 5,)	
)	
Defendants.)	
_____)	

Defendants Grand Canyon Expeditions Co., ("Grand Canyon") Martin Mathis, Michael Denoyer, Donald Saunders (sometimes collectively referred to as "Defendants"), hereby respond to Plaintiff's Second Set of Interrogatories pursuant to Rule 33 of the Utah Rules of Civil Procedure.

INTERROGATORY NO. 4: Identify the person who informed you Grand Canyon Expeditions Co. might be entitled to a refund of the Amusement Tax pursuant to the Arizona Supreme Court's ruling in *Wilderness World Inc. v. Department of Revenue*, 895 P.2d 108 (Ariz. 1995).

ANSWER: Defendants object to this interrogatory to the extent that it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Defendants further object to this interrogatory on the grounds that it is overly broad in that the *Wilderness World* case was decided years after the separation of Plaintiff from employment at Grand Canyon. Subject to and without waiving these objections, Defendants state that Grand Canyon and Michael Denoyer were informed by counsel in Arizona of the *Wilderness World* litigation.

INTERROGATORY NO. 5: Identify the individual at Grand Canyon Expeditions Co. who first received the information referred to in Interrogatory No. 4.

ANSWER: Michael Denoyer.

INTERROGATORY NO. 6: State the date(s) Grand Canyon Expeditions Co. received a refund of the Amusement Tax pursuant to the Arizona Supreme Court's ruling in *Wilderness World Inc. v. Department of Revenue*, 895 P.2d 108 (Ariz. 1995).

ANSWER: Defendants object to this interrogatory on the grounds that it is overly broad and not reasonably calculated to the discovery of admissible evidence because Grand Canyon was unaware of any refund from the State of Arizona until more than three years after Plaintiff's separation from employment at Grand Canyon. Subject to and without waiving this

objection, Grand Canyon received a refund of \$907,916.94 in three payments in late 1995 or early 1996.

INTERROGATORY NO. 7: Identify to whom the refund of the Amusement Tax was made payable.

ANSWER: Defendants object to this interrogatory on the same grounds discussed in their answer to Interrogatory No. 6. Subject to and without waiving this objection, Defendants state that all refund payments were made to Grand Canyon.

INTERROGATORY NO. 8: State the period of time during which the Amusement Tax was assessed Grand Canyon Expeditions Co. by the state of Arizona.

ANSWER: Defendants object to this interrogatory on the same grounds discussed in their answer to Interrogatory No. 6. Subject to and without waiving this objection, Defendants state that the state of Arizona assessed the Amusement Tax against Grand Canyon from the time the company was formed until April 1995.

INTERROGATORY NO. 9: State how the Amusement Tax refunded Grand Canyon Expeditions Co., Mike Denoyer, Martin Mathes, Don Saunders, Ron Smith or any other individual affiliated with Grand Canyon Expeditions Co. was applied and distributed from the date of receipt through the present, and identify where the refund was accounted for on Grand Canyon Expeditions Co.'s financial statements and tax returns.

ANSWER: Defendants object to this interrogatory on the same grounds as discussed in their answer to Interrogatory No. 6. Subject to and without waiving this objection, Defendants state that Grand Canyon received a total \$907,916.94 in three payments from the state of Arizona. Of that amount, \$280,600.18 was paid to Grand Canyon with the intention

that Grand Canyon refund that amount to certain of its former customers. All but approximately \$44,000 of that amount has been refunded to former Grand Canyon customers. The remaining amount refunded to Grand Canyon was treated as corporate income during the quarter it was received.

INTERROGATORY NO. 10: Identify all persons who received distribution of any portion of the refunded Amusement Tax and the amount received by each such person.

ANSWER: Defendants object to this interrogatory on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Many of the individuals who received refunds were former clients or customers of Grand Canyon whose specific identity is not relevant to Plaintiff's claims in this actions. Subject to and without waiving these objections, Defendants state that \$699,316.76 of the amount refunded was received by Grand Canyon.

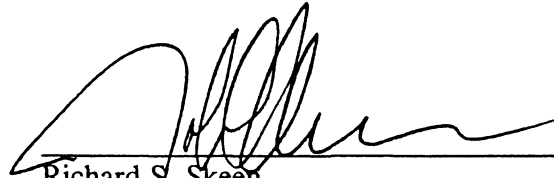
INTERROGATORY NO. 11: State the date(s) Grand Canyon Expeditions Co. distributed all or a portion of the refunded Amusement Tax to Mike Denoyer, Martin Mathis, Don Saunders, Ron Smith, customers of Grand Canyon Expedition Co., and all other affiliates of Grand Canyon Expeditions Co.

ANSWER: Defendants object to this interrogatory on the same grounds discussed in their answer to Interrogatory No. 6. Subject to and without waiving this objection, Defendants state that certain refund payments were made to former customers of Grand Canyon as described in answer to Interrogatory No. 9. Other than those payments, refunds of the Amusement Tax were not made, as such, to any individual or entity. Rather, those remaining amounts were treated as corporate income for the period in which they were received.

Decisions regarding corporate distributions were made based upon a number of factors, only one of which was the Amusement Tax refund payment.

DATED this 14th day of March, 1999.

STOEL RIVES LLP

A handwritten signature in black ink, appearing to be 'Richard S. Skeen', written over a horizontal line.

Richard S. Skeen

John A. Anderson

Matthew M. Durham

Attorneys for Defendants

VERIFICATION

Michael R. Denoyer, as President of Grand Canyon Expeditions Co., states he has read the foregoing Defendants' Answers to Plaintiff's Second Set of Interrogatories to Defendants; that the facts contained in the answers were compiled by various employees and agents of Grand Canyon Expeditions Co., and no single employee or agent of Grand Canyon Expeditions Co. has personal knowledge as to all the facts contained in the answers; that the answers are true and correct to the best of his knowledge, information and belief, and that he signs the Defendants' Answers to Plaintiff's Second Set of Interrogatories for and on behalf of Grand Canyon Expeditions Co.

Michael R. Denoyer

President

Grand Canyon Expeditions Co.

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JAN 21 1999 ✓

Stirba and Hathaway

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab, UT 84741

Telephone: 435-644-2458 Fax: 435-644-2052

MARC SMITH,

Plaintiff,

vs.

GRAND CANYON EXPEDITIONS CO.,
MARTIN MATHIS, MICHAEL DENOYER,
DONALD SAUNDERS, JOHN DOES 1
through 5 and JANE DOES 1 through 5,

Defendants,

MEMORANDUM DECISION

Case No. 940600003

Assigned Judge: K. L. McIff

Undisputed Facts

The defendant, Grand Canyon Expeditions Co., (hereafter the "Company") is a Utah corporation organized in November 1986. Its initial assets were acquired from a similarly named entity, Grand Canyon Expeditions Inc. The owners of the new Company were five in number: The plaintiff Marc Smith, his brother Ronald Smith, founder and owner of the selling company, and the three who are now named as individual defendants, Martin Mathis, Michael Denoyer, and Donald Saunders.

Defendant Saunders provided the funds to purchase the assets and form the new Company, but retained only 28% of the stock. Ten percent was issued to Ron Smith as part of the consideration in the buy-out of the former company. Twenty-eight percent went to Denoyer

and 17% each to Mathis and plaintiff. The latter three were required to sign non-recourse notes in favor of Saunders for the stock issued to each of them.

While Denoyer, Mathis and plaintiff did not contribute cash, they apparently brought experience and expertise and became the principal operators of the Company. Each was required to sign an employment contract. The defendant Denoyer became president, responsible for daily operations; the defendant Mathis became vice-president of marketing, and the plaintiff became vice-president of operations. The employment agreement of each covered the year 1987 but carried the following proviso: "At the request of Expeditions [the Company], this Agreement and the Employment Period may be extended by the mutual consent of Employee and Expeditions." The employment agreements went on to provide: "Either Employee or Expeditions may terminate Employee's employment at any time, with or without cause."

At the same time the employment agreements were executed, the Company entered into a buy-sell agreement with each of its five shareholders. Under its terms, the Company was obliged to buy and each respective shareholder was obliged to sell his stock "Upon . . . death, disability or termination of employment with the corporation, (either voluntarily or involuntarily)"

The one-year employment agreements were not formally renewed, but Denoyer as president and Mathis and plaintiff as vice-presidents continued as the principal operating officers of the company until July 15, 1982. On that date, and for reasons that are in dispute, Denoyer advised plaintiff that he was being terminated and that the necessary documentation was being

prepared to carry out the terms of the buy-sell agreement. Plaintiff immediately tried to reach Saunders, who had funded the creation of The Company and to whom plaintiff still owed money for issuance of stock to him. When plaintiff reached Saunders two or three days later, Saunders stood behind the termination decision and discussed with plaintiff the buy-out provisions. Thereafter, plaintiff obtained the termination documents which he had in his possession for a matter of days before executing them on July 25, 1992. There were two documents, one a single page entitled “Resignation” and a second one labeled “Agreement”. The latter made reference to the former and then went on to provide in some detail the terms of the buy-out of plaintiff’s stock as well as other provisions concerning his relationship with the Company.

Upon execution of the documents, The Company made payment to plaintiff according to the terms thereof and continued to do so during the months and years that followed until full satisfaction.

On January 10, 1994, some one and one-half years after termination, plaintiff brought the within action. It initially named the current defendants along with plaintiff’s brother, Ron Smith, and his brother’s children. It alleged breach of contract, tortious interference with contract and economic relations, wrongful termination, libel and slander, estoppel and claims for punitive as well as other damages. In July 1998, plaintiff filed a second amended complaint narrowing the relief sought and limiting the defendants to four: The Company, the original financier and major owner, Saunders, and the two remaining officers, Denoyer and Mathis.

Plaintiff's claims are now limited to two: Breach of an implied in-fact employment agreement and breach of the duty of good faith and fair dealing.

Legal Discussion

In their motion for summary judgment, defendant's raise four arguments. Each will be discussed in turn.

I.

Defendants initially claim that plaintiff is an "at will" employee by virtue of the express language of the employment agreement which covered the year 1987, but which defendants' claim was extended by implication as evidenced by the fact that the employment has continued uninterrupted. They point to the language that provided for extension at the request of the company and the consent of both. Plaintiff counters with the argument that the one-year contract has expired by its own terms and therefore has no bearing on the issues. The Court cannot embrace either position as a matter of law. 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. If such be the case, the employment would be an "at will" arrangement. On the other hand, a full airing of the evidence may establish that the relationship evolved into something which contemplated greater job security and permanency.

II.

Defendants next argue that even if the written employment agreement was not extended and accordingly no longer governs, Utah law raises a presumption of an “at will” employment arrangement. Defendants are correct, but this presumption has been softened considerably during recent years. The presumption can be overcome by an affirmative showing by the plaintiff that the parties expressly or impliedly intended a longer term or that the relationship could be terminated only for cause. *Berube v. Fashions Center, Ltd.*, 771 P.2d 1033 (Utah 1989). Moreover, as stated in *Berube*, “[T]he determination of whether sufficient indicia of an implied in-fact promise exists is a question of fact for the jury, with the burden of proof resting upon the plaintiff-employee.” *Id.* at 1044. The facts in this case have not been developed sufficiently for the Court to conclude as a matter of law that plaintiff could not meet this burden.

III.

Defendants next argue that even if the relationship had evolved into something other than “at will” employment, the Company had just reason to terminate plaintiff for cause. On this point, the evidence is clearly in dispute. Defendants point to numerous confrontations and incidents in which plaintiff’s behavior or practices were considered contrary to the interests of the Company. Plaintiff counters with denials and affidavits of other Company employees that paint a complimentary portrait of plaintiff. The Court is unable to conclude as a matter of law that reasonable minds would arrive at the same conclusion with respect to this issue.

IV.

Finally, defendants advance the position that the parties reached an accord between July 15 and July 25, 1992 as reflected in the termination documents. With this the Court is essentially in agreement. Plaintiff's resignation is short and simple and is signed and notarized. The accompanying agreement provides for the purchase of plaintiff's stock at 140% of value, consistent with the buy-sell agreement, and affords him two other forms of relief to which he does not appear to have been previously entitled. These two benefits are respectively a severance payment equivalent to one year's salary and the second, a relaxation of a non-competition covenant.

Under paragraph 6 of the termination agreement, the severance pay was "In addition to the payments provided above [for stock purchase], and in lieu of any other amounts or benefits which may be due from the corporation as provided in the employment agreement or otherwise" This is strong language. Plaintiff's deposition testimony indicates that it was he who raised the possibility of a severance payment with Mr. Saunders. According to plaintiff's testimony, Saunders replied, "We could think about it. Give you a year. I'm sure the guys would go with that." Plaintiff's deposition volume II at 297. That, of course, is what happened.

Plaintiff alleges by deposition or affidavit testimony that he was in "shock", that he was "coerced" and that he "did not know what he was doing", but he stops short of claiming fraud in the inducement or some other legal theory warranting avoidance of the terms agreed upon in

writing. By affidavit, he claims that he “did not negotiate,” but such seems at least partially compromised in light of his testimony regarding the matter of severance pay.

Plaintiff’s deposition testimony also establishes his awareness of the existence of a non-compete obligation binding upon him at the time of termination. *Id.* at 125. Under paragraph 9 of the termination agreement, the Company agreed to waive any right to enforce this provision. This is further consideration for plaintiff’s compromise of a continued right of employment if such existed at that time.

By way of affidavit, plaintiff seeks to water-down his deposition testimony regarding his role in arriving at the termination agreement, but he fails to supply a sufficient explanation for the discrepancies and further fails to supply sufficient facts to support a claim for relief from the documents signed by him and which governed the termination and buy-out. To the contrary, the undisputed evidence is that Plaintiff accepted the agreed-upon payments contemporaneously made as well as the payments that were made during the months and years that followed.

Ruling

For the reasons set forth, the Court is persuaded that plaintiff’s claim of an entitlement to continued employment fails as a matter of law. This is true whether premised on a claimed breach of an implied in-fact employment agreement or a claimed breach of the duty of good faith and fair dealing. There is, however, one other issue which has been raised in a somewhat oblique fashion, but has not been resolved to the Court’s satisfaction. Plaintiff has alleged that at the

time he was obliged to sell his stock, the value thereof was “aberrationally lower” than it had been in the two preceding years and only half of what it was reported to be in the following year. He further points to a subsequent recovery by the company of a very substantial improperly paid tax to the State of Arizona. Defendants’ counsel undertook at oral argument to make explanation for the variations in stock values as well as the subsequently recovered tax payment. Perhaps there are adequate explanations, but at this point it appears that the buy-out of plaintiff’s ownership interest occurred at the worst possible time for him. Moreover, it appears from the deposition testimony to which the Court has had exposure, that plaintiff was not versed in the Company’s accounting matters and would not have been in a position to evaluate the numbers unilaterally supplied. Further, all parties would have been laboring under the erroneous assumption that the tax payments were gone forever.

The duty of good faith and fair dealing applies not only to the original agreements between these parties, but would have extended to the termination proceedings and the manner of accounting and fixing values. And this is so even though the buy-sell agreement accorded “conclusive status” to the values determined by the accountant. The conclusive status of these values necessarily presumes the absence of a breach of the duty of good faith and fair dealing.

Conclusion

Defendants’ counsel is directed to prepare a partial summary judgment in conformity with this memorandum decision and the rules of the Court. Counsel for both parties are invited to

examine the issues remaining with an eye toward resolution or refinement for purposes of further proceedings or trial.

Dated this 15th day of January, 1999.

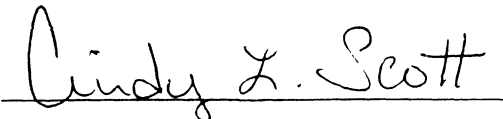

K.L. MCIFF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

On January 15, 1999 a copy of the above Memorandum Decision was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Benson L. Hathaway, Jr.	[m]
Linette B. Hutton	
STIRBA & HATHAWAY	
215 South State Street, Suite 1150	
Salt Lake City, UT 84111	

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
John A. Anderson	[m]
Matthew M. Durham	
STOEL RIVES	
201 South Main Street, Suite 1100	
Salt Lake City, UT 84111	



EMPLOYMENT AGREEMENT

THIS AGREEMENT dated the 29th day of November, 1986, is entered into by and between Marc Smith, (hereinafter referred to as "Employee") and Grand Canyon Expeditions Co., (hereinafter referred to as "Expeditions").

I. RECITALS

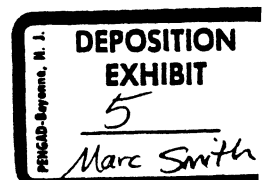
A. Expeditions is engaged in the business of promoting and running raft trips in the Grand Canyon, Arizona.

B. It is essential for the full protection of the business of Expeditions (hereinafter referred to as the "Employer"), and its employees engaged in such businesses, that the employees should not disclose confidential or other vital information regarding such business with which they have or may become acquainted during the period of their employment. Without such protection, it would not be practical to expose Employee to work being done by Employer and its employees, nor to bring Employee into free and open relationships with other employees of Employer who are possessed of such proprietary information.

II. AGREEMENT

Therefore, it is agreed as follows:

1. Terms of Employment. Terms of Employment of



Employee by Expeditions, including Employment Period, are as follows:

A. Employment Period. Expeditions agrees to employ Employee, and Employee agrees to remain in the employ of Expeditions during the period (the "Employment Period") beginning on the 1st day of January, 1987, and ending on the 31st day of December, 1987. During the Employment Period, the Employee shall perform such duties for Expeditions as he may be reasonably requested to do, relating to its business. At the request of Expeditions this Agreement and the Employment Period may be extended by the mutual consent of Employee and Expeditions.

B. Performance of Duties. Expeditions and Employee agree that during the Employment Period, Employee shall devote his business time to the business affairs of Expeditions and its affiliated companies. Employee's responsibilities to Expeditions and its affiliated companies shall be substantially comparable to the duties he performed for other companies immediately prior to the date hereof or as mutually agreed.

C. Compensation. Subject to the terms and conditions of this Employment Agreement, Employee shall be compensated as follows:

1. For the 12 consecutive-month period commencing on the first day January 1987, Employee shall receive, in substantially equal monthly or more frequent installments, a basic annual salary of \$ 32,000⁰⁰. The basic salary payable during any extension of the Employment Period shall be by mutual agreement of the parties.

2. Employee shall be entitled to participate in a bonus plan to be established and to be known as The Grand Canyon Expeditions Co. Key Personnel Bonus Plan. Said Plan will be based on a percentage of pre federal income tax net profit and substantially in the form attached hereto as Attachment A.

3. Either Employee or Expeditions may terminate Employee's employment at any time, with or without cause. Expedition's obligation to pay Employee in accordance with the provisions of subparagraph 1 next above shall cease as of the date of Employee's termination of employment with Expeditions, if such termination is on account of Employee's death, disability, voluntary resignation or on account

of his dismissal for cause. If Employee's employment with Expeditions terminates for any other reason, Expedition's obligation to pay Employee in accordance with subparagraph 1 next above shall continue for the remainder of the Employment Period, or, if earlier, until the date of his death, as though he were employed during that period.

4. If Employee's employment is terminated on account of Employee's death, disability, or dismissal by Expeditions without cause, then Employee shall be entitled to receive, prorated for the applicable one year period based upon the period of employment preceding such termination, benefits under Attachment A.

5. Employee shall be entitled to the same pension, retirement, medical, insurance, customary holidays, and other fringe benefits as shall be made available to management employees of Expeditions.

2. Non-Competition. During the Employment Period and during the two years after the end of the Employment Period, or any extensions thereof, Employee shall not:

a. Own (directly or indirectly), work for or act as a consultant for, or serve as a director, officer or principal of, any business (except for the Employer or an affiliated company) which engages (as a major line of business) in, or

b. Intentionally assist any business (except for the Employer or an affiliated company) in the establishment or operation of, the business of promoting and running rafting trips in the Grand Canyon, Arizona.

3. Successors. In the event that Expeditions shall at any time be merged or consolidated with or into any other corporation or corporations or shall sell or otherwise transfer substantially all of its assets to another corporation, the provisions of this Agreement shall be binding upon and inure to the benefit of the consolidated Corporation or to the Corporation which such assets shall be sold or transferred.

4. Assigns. Except as provided in the preceding paragraph, this Agreement may not be assigned by either Expeditions or Employee.

5. Notices. Any notice or communication required by or permitted to be given in connection with this Agreement shall be in writing and shall be delivered in person, sent by prepaid telegram and followed with a confirming letter, or mailed by

certified or registered mail, return receipt requested, and addressed to Employee at such address as he may from time to time select and to Expeditions at:

Grand Canyon Expeditions Co.
P. O. Box 0
Kanab, Utah 84741

6. General Provisions. The following general terms and provisions shall apply:

A. No amendment or modification of this Agreement shall be deemed effective unless executed in writing by both parties hereto.

B. No term or condition of this Agreement shall be deemed to have been waived, nor shall there be any estoppel to enforce any provision of this Agreement, except by written instrument executed by the party charged with such waiver or estoppel. Any written waiver shall not be deemed a continuing waiver unless specifically stated, shall operate only as to the specific term or condition waived and shall not constitute a waiver of such term or condition for the future or as to any act other than that specifically waived.

C. If any part, term or provision of this Agreement is held by the courts to be unenforceable, illegal or in conflict with any federal, state or local laws, such part, term or provision shall be considered severable from the rest of the Agree-

ment. The remaining portions of the Agreement shall not be affected, and the rights and obligations of the parties shall be construed and inferred as if the Agreement did not contain the particular term, part or provision held to be invalid, unless the invalid provisions, when considered in the aggregate, render the administration and intent of this Agreement unreasonably burdensome or destroy the intent of the parties hereto, in which case this Agreement shall be terminated.

D. The provision against assignment of this Agreement shall not preclude the legal representatives of the estate of the Employee from assigning any rights hereunder to the person or persons entitled thereto under his will or, in the case of intestacy, to the person or persons entitled thereto under the laws of intestacy applicable to his estate.

E. This Agreement constitutes the sole understanding of the parties with respect to the subject matter hereof.

F. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of Kanab in accordance with the provisions of the American Arbitration Association.

9. Governing Law. This Agreement shall be governed by and construed according to the laws of the State of Utah.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement as of the date and year first above written.

GRAND CANYON EXPEDITIONS CO.

By Michael P. Duroy
Its PRESIDENT

Marc Smith
MARC SMITH
EMPLOYEE

18.7

EXHIBIT "A"

BUY SELL AGREEMENT

GRAND CANYON EXPEDITIONS CO.

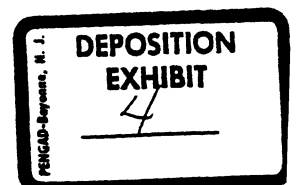
THIS AGREEMENT made this 29th day of November, 1986, by and between DONALD A. SAUNDERS, RONALD R. SMITH, MICHAEL R. DENOYER, MARTIN M. MATHIS and MARC SMITH, (hereinafter collectively referred to as "Shareholders") and GRAND CANYON EXPEDITIONS CO., a Utah corporation (hereinafter referred to as the "Corporation").

WHEREAS, the Shareholders will, upon issue, own all of the issued and outstanding shares of the Corporation, and

WHEREAS, the Shareholders desire to promote their mutual interest and the interest of the Corporation by imposing certain restrictions and obligations upon themselves, the Corporation and on the shares of stock of the Corporation.

IT IS THEREFORE AGREED:

1. Purchase of Stock. Upon the death, disability, or termination of employment with the Corporation, (either voluntarily or involuntarily), of any Shareholder, the Corporation shall purchase and the individual Shareholder, or his estate, shall sell, all of that individual's interest in the Corporation now owned or hereinafter acquired. The purchase price of the stock shall be as set forth in paragraph 2 of this Agreement.



2. Purchase Price. The purchase price of each share of stock will be determined as follows:

1. The first year, net book value.
2. The second year, net book value times one hundred ten percent (110%).
3. The third year, net book value times one hundred twenty percent (120%).
4. The fourth year, net book value times one hundred thirty percent (130%).
5. The fifth year and beyond, net book value times one hundred forty percent (140%).

The determination of net book value shall be made by the accountant servicing the Corporation and shall be made according to generally accepted accounting principles. Any such determination shall be conclusive on all parties.

3. Payment Date. The purchase price shall be paid in cash within sixty (60) days after any of the events set forth in paragraph 1 and shall be paid as follows:

- A. A down payment equal to thirty percent (30%) of the purchase price or the total amount of the remaining obligation owed by the individual Shareholder to Donald A. Saunders for the purchase of the stock, whichever is greater;
- B. The balance over six (6) years at ten percent (10%) interest.

4. Delivery of Stock. Upon the happening of any of the events set forth in paragraph 1, the individual, or his estate, shall immediately assign and deliver the shares of that Shareholder to the Corporation. Such shares shall immediately be designated as treasury stock on the books and records of the Corporation; thereafter, Shareholder, or his estate, shall have no further right or interest in the management or operation of the Corporation and his sole claim against the Corporation shall be for the payment of the said shares pursuant to the terms of this Agreement.

5. Restrictions on Stock. No Shareholder shall dispose of or encumber any part of his stock in the Corporation unless all other Shareholders of the Corporation previously agree in writing. Any such attempted sale or encumbrance shall be void and shall not be recognized by the Corporation for any purpose.

6. Sale of Stock. Anytime the Shareholders of SIXTY FOUR PERCENT (64%) or more of the outstanding shares of stock in the Corporation desire to sell their shares, they shall so notify all of the remaining Shareholders in writing. Such writing shall set forth the sales price for the shares, any terms of sale, the name and address of the proposed purchaser and shall contain a representation that the offer to sell is bona fide and has tentatively been accepted by the proposed purchaser. The writing shall also contain an offer to the remaining Shareholders to

RESIGNATION

I, MARC SMITH, hereby resign as Vice President/Director of Grand Canyon Expeditions Co., effective the 15th day of July, 1992.

DATED this 25th day of July, 1992.

Marc Smith
MARC SMITH
Vice President/Director

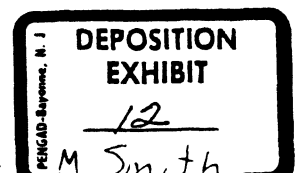
STATE OF ~~UTAH~~ Arizona)
COUNTY OF Coconino) ss.

this 25th day of July, 1992, by MARC SMITH. The foregoing instrument was acknowledged before me

Gloria J. Lee
NOTARY PUBLIC
Residing at: Flagstaff, Arizona

My Commission Expires:

June 29, 1996



PETER STIRBA (Bar No. 3118)
BENSON L. HATHAWAY, JR. (Bar No. 4138)
STIRBA & HATHAWAY
Attorneys for Plaintiff
215 South State Street, Suite 1150
Salt Lake City, UT 84111
Telephone: (801) 364-8300

**IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR
KANE COUNTY, STATE OF UTAH**

MARC SMITH,	:	
Plaintiff,	:	
v.	:	SECOND AMENDED COMPLAINT
GRAND CANYON EXPEDITIONS CO., DONALD SAUNDERS, MICHAEL DENOYER MARTIN MATHIS,	:	
Defendants.	:	Civil No. 940600003
	:	Judge Kay McKiff

Plaintiff, by and through counsel of record, hereby complains against the above-named Defendants and alleges for cause of action as follows:

PARTIES AND JURISDICTION

1. Plaintiff Marc Smith is an individual residing in Salt Lake County, Utah.
2. Defendant Grand Canyon Expedition Company, "Grand Canyon", is a Utah corporation in good standing with its principal place of business in the city of Kanab, Kane County, Utah.
3. Defendant Donald Saunders, "Saunders", is an individual residing in King County, Washington.
4. Defendant Michael Denoyer, "Denoyer", is an individual residing in Kanab, Kane County, Utah.
5. Defendant Martin Mathis, "Mathis", is an individual residing in Kanab, Kane County, Utah.
6. All of the acts complained of occurred in Salt Lake County and Kane County, Utah.
7. Defendants Saunders, Denoyer and Mathis are shareholders and directors of Defendant Grand Canyon.
8. Defendant Grand Canyon was incorporated on about November 24, 1986 and is in the business of guiding river trips through the Grand Canyon. Defendant Grand Canyon is a corporate successor to two corporations known as Ronald R. Smith Co., a Utah corporation, and Grand Canyon Expeditions, Inc., a Utah corporation.
9. Witnesses and documentary evidence related to this case are more accessible and available within the jurisdiction of this Court than they would be elsewhere. This is the most convenient forum for trial of this action.

10. Defendant Saunders is subject to the jurisdiction of this Court pursuant to Utah Code Ann. § 78-27-22 *et seq.* inasmuch as he has transacted business in Kane County, Utah, has caused injury in Kane County, Utah, and directly owns property located in Kane County, Utah.

11. Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-3-4 (1997 as amended).

12. Venue is appropriate in this forum pursuant to Utah Code Ann. § 78-13-4 and 7 (1953 as amended).

BACKGROUND FACTS

13. Plaintiff incorporates herein paragraphs 1 through 12 above.

14. Grand Canyon Expeditions, Inc., predecessor to Defendant Grand Canyon, was incorporated in or about 1964 and commenced doing business conducting guided river trips on the Colorado River that same year.

15. Plaintiff began working for Grand Canyon Expeditions, Inc. in or about 1966 and became a full-time employee as a river guide and manager in 1973.

16. Grand Canyon Expeditions, Inc. was owned solely by an individual named Ron Smith, the Plaintiff's older brother.

17. Plaintiff remained employed by Grand Canyon Expeditions, Inc. until it sold its assets and business to Defendant Grand Canyon in November of 1986.

18. During the 13 years of Plaintiff's full-time employment at Grand Canyon Expeditions, Inc., he had gone from a guide running the river trips to managing all of the operations of Grand

Canyon Expeditions, Inc.'s business. Plaintiff never received any stock or participated in the equity in any way of Grand Canyon Expeditions, Inc. prior to November of 1986.

19. Some time prior to November of 1986, Plaintiff's older brother Ron Smith entered into negotiations for the sale of Grand Canyon Expeditions, Inc.'s assets to an entity controlled by Defendant Saunders.

20. In the course of the sale of the assets of Grand Canyon Expeditions, Inc. to the Saunders-controlled entity, Defendant Grand Canyon was formed and incorporated, which entity acquired all of the assets of the pre-existing business known as Grand Canyon Expeditions, Inc. including all park service river permits held by Grand Canyon Expeditions, Inc. and other entities.

21. While conducting his due diligence prior to acquiring the assets of Grand Canyon Expeditions, Inc., Defendant Saunders observed, among other things, Plaintiff's role in the operation of Grand Canyon Expeditions, Inc.'s business.

22. Based on these observations, Defendant Saunders offered Plaintiff employment with Defendant Grand Canyon and offered Plaintiff the opportunity to purchase a 17 percent interest in the equity of Defendant Grand Canyon for the sum of \$42,500.00.

23. Plaintiff was also advised by Saunders that Defendants Denoyer and Mathis would assume management positions in Defendant Grand Canyon.

24. Upon receiving this offer, Plaintiff discussed with Defendants Saunders, Denoyer and Mathis the fact that with Denoyer, Mathis and Plaintiff involved in management responsibilities at the company, such a management team would make the company top heavy.

25. Defendant Saunders assured Plaintiff that Defendant Grand Canyon would soon make further acquisitions of other river running operations which would make necessary the management team proposed by Defendant Saunders.

26. Defendant Saunders also proposed to loan Plaintiff \$42,500.00 to purchase the stock offered Plaintiff by Defendant Grand Canyon.

27. Defendants Saunders, Denoyer and Mathis also represented to Plaintiff that the employment commitment and the Plaintiff's equity participation in Defendant Grand Canyon would be long term.

28. Based upon these and other representations, Plaintiff agreed to be employed by Defendant Grand Canyon in essentially the same position he had maintained prior to Defendant Grand Canyon's acquisition of the business, and accepted the offer to purchase 17 percent of the equity of Grand Canyon for \$42,500.00. To facilitate this purchase, Plaintiff signed a promissory note to Defendant Saunders in that amount.

29. On November 29, 1986, Plaintiff executed a document styled "Employment Agreement". A copy of the Agreement is attached hereto as Exhibit "A" and made a part hereof.

30. The November 29, 1986 Employment Agreement was for a specific term of 1 year commencing January 1, 1987 and ending December 31, 1987. *See* Exhibit "A", ¶ II.1.A.

31. While the employment period set forth in the November 29, 1986 Agreement was never extended, renewed or amended in writing, Plaintiff's employment continued after December 31, 1987 without break until about July 15, 1992.

32. On about November 29, 1986, Plaintiff also executed a document styled "Buy-Sell Agreement - Grand Canyon Expeditions Co.", referred to hereinafter as "Buy-Sell Agreement", between he and Defendants Saunders, Denoyer, Mathis and Plaintiff's older brother Ronald R. Smith. A copy of the Buy-Sell Agreement is attached hereto as Exhibit "B" and made a part hereof.

33. Among other things, the Buy-Sell Agreement provided a mechanism whereby the purchase price of the stock of the participating shareholders would be acquired by either the corporation or other shareholders, and provided that upon the "termination of employment with the corporation, (either voluntarily or involuntarily), of any shareholder, the corporation shall purchase the individual shareholder['s]" stock. *See* Exhibit "B", ¶ 1 and 2.

34. By the time the acquisition by Defendant Grand Canyon of the predecessor corporate entities' assets had closed, Defendant Saunders owned 28 percent of the stock of Defendant Grand Canyon, Defendant Denoyer owned 28 percent, Defendant Mathis owned 17 percent, Plaintiff owned 17 percent, and Plaintiff's older brother Ron Smith owned 10 percent.

35. Defendant Denoyer was made the president of Defendant Grand Canyon, Defendant Mathis was made a vice president and Plaintiff was made a vice president for purposes of the operation of the business of Defendant Grand Canyon.

36. From virtually the outset of their management of the operations of Defendant Grand Canyon in late November, early December of 1986, it was the Defendants Saunders, Denoyer and Mathis' intention to learn all they could from the work performed by Plaintiff in the management of the operations of the business, and once Defendants were comfortable with managing the operations

of the business, they designed to terminate Plaintiff's involvement as an employee and shareholder in the enterprise.

37. This intention was never explained or in any way made known to Plaintiff prior to, during, or at anytime after the execution of his Employment Agreement and the Buy-Sell Agreement in November of 1986.

38. Commencing in December of 1986 and continuing thereafter, Defendant Grand Canyon operated in much the same manner its corporate predecessors had been operated and generated a profit in every succeeding year.

39. In or about September of 1991, Defendant Grand Canyon acquired the assets of one of its competitors operating on the Colorado River and in the Grand Canyon, Sobek/White Water, Inc.

40. It was anticipated that the Sobek/White Water, Inc. acquisition would increase Defendant Grand Canyon's earning potential by approximately 50 percent, and substantially enhance the Plaintiff and Defendants' equity holdings, which anticipation was figured by Defendant Don Saunders and represented to Plaintiff.

41. In connection with this acquisition, Plaintiff, together with Defendants Saunders, Denoyer and Mathis were allowed to purchase additional shares of Defendant Grand Canyon. Plaintiff agreed to purchase an additional seven-tenths of one percent (.7%) of the common shares of Defendant Grand Canyon for \$23,000.00, increasing its equity participation to 17.7 percent.

42. Defendant Saunders loaned Plaintiff \$23,000.00 to pay Defendant Grand Canyon the purchase price of this stock. Defendants Saunders, Denoyer and Mathis also acquired additional shares of Defendant Grand Canyon at or about the same time.

43. On about July 15, 1992, without any prior notice, warning, or intimation, Defendant Denoyer as president of Defendant Grand Canyon discharged Plaintiff as an employee of the corporation.

44. Upon his termination, Plaintiff resigned as vice president/director of Defendant Grand Canyon as of July 15, 1992.

45. Defendants provided Plaintiff severance pay totaling one year's salary, and, citing Plaintiff's termination of employment as its sole cause and basis for doing so, Defendant Grand Canyon exercised the option to purchase Plaintiff's 17.7 percent equity interest in common shares of Defendant Grand Canyon according to the terms of the Buy-Sell Agreement, for the gross amount of \$180,000.00.

46. The decision to terminate Plaintiff's employment was made by Defendants Saunders, Denoyer and Mathis, individually and as officers and directors of Defendant Grand Canyon without prior consultation with or prior notice or warning to Plaintiff.

47. In determining the purchase price to be paid for Plaintiff's stock, according to the terms of the Buy-Sell Agreement, Defendant Grand Canyon relied on the "net book value" which, as a consequence of the Sobek/White Water, Inc. acquisition, on July 15, 1992, was substantially lower and subject to liabilities unique and non-existent at any other point in time on the books and records of Defendant Grand Canyon.

48. The fact that Defendant Grand Canyon had recently acquired Sobek/White Water, Inc.'s assets and had incurred substantial liabilities for purposes of that acquisition severely diminished the "net book value" of Defendant Grand Canyon in July of 1992.

49. In about October of 1992, less than three months after Plaintiff had been terminated and Defendant Grand Canyon had acquired his stock, Defendant Grand Canyon, by and through its directors, Defendants Saunders, Denoyer and Mathis declared a dividend of approximately \$300,000.00.

50. Based on Plaintiff's equity interest in Defendant Grand Canyon prior to his termination and the acquisition of his stock, his proportional share of the dividend declared in October of 1992, would have been approximately \$52,500.00.

FIRST CAUSE OF ACTION

(Breach of Contract Against Defendants Saunders, Denoyer, Mathis and Grand Canyon)

51. Plaintiff incorporates herein paragraphs 1 through 50 above.

52. The representations of Defendant Saunders, the person who was ultimately in control of Defendant Grand Canyon, made in or about November of 1986 and continuing thereafter that Plaintiff would be a valued, permanent employee of Defendant Grand Canyon, coupled with his offer to Plaintiff of approximately 17.7 percent equity interest in that corporation and his agreement to fund Plaintiff's purchase of that interest, and his continued assurances of the long-term viability of the business, created his and Defendant Grand Canyon's continuing agreement, supported by adequate consideration, to provide employment and equity participation to Plaintiff in perpetuity, barring good cause to the contrary.

53. The participation of Defendants Denoyer and Mathis in the representations of Defendant Saunders, and their individual supportive representations and actions as officers and directors of Defendant Grand Canyon created their individual agreements, and created an agreement on behalf of Defendant Grand Canyon, supported by adequate consideration, for the continued employment of Plaintiff by Defendant Grand Canyon and the continuation of Plaintiff's 17.7 percent equity interest in the corporation, as Plaintiff's individual property in perpetuity, barring good cause to the contrary.

54. These representations and actions of Defendants Saunders, Denoyer and Mathis, coupled with the course of dealing commencing in November of 1986 and continuing through July of 1992, as the controlling shareholders and directors of Defendant Grand Canyon, created a binding and on-going contract between Grand Canyon and Plaintiff pursuant to which Grand Canyon was obligated to maintain its employment of Plaintiff, and allow him to persist in his ownership of 17.7 percent equity in that corporation in perpetuity, barring good cause to the contrary.

55. Defendants Grand Canyon, Saunders, Denoyer and Mathis have breached their continuing contracts with Plaintiff by, among other things, using their positions of control to force the corporation to wrongfully terminate Plaintiff's employment without cause, prior notice or warning, and, consequently, forcing the acquisition by Defendant Grand Canyon of Plaintiff's stock pursuant to the Buy-Sell Agreement, at a time when the "net book value" was aberrationally low, depriving Plaintiff of the economic benefit and potential for growth thereof.

56. As a direct consequence of the breaches referenced herein, and others, Plaintiff has been damaged in an amount to be shown at trial including, but not limited to, the loss and potential

for growth in participation in the business of Defendant Grand Canyon, the difference in value paid for Plaintiff's stock in light of the aberrationally low "net book value", together with the value of Plaintiff's employment and benefits with Grand Canyon until a reasonable age of retirement.

WHEREFORE, Plaintiff prays for judgment below.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing)

57. Plaintiff incorporates herein paragraphs 1 through 56 above.

58. At all times material hereto, Plaintiff was a dutiful employee of Defendant Grand Canyon who more than fully and completely satisfied all of his employment obligations to the Defendant Grand Canyon and who contributed to the smooth operation, success and profitability of the Defendant Grand Canyon.

59. Neither Grand Canyon nor any of the Defendants ever complained to Plaintiff in writing, orally or otherwise that he was derelict in the performance of his responsibilities, that he was not contributing to the operations, success and profitability of the Defendant Grand Canyon's business or in any way was not satisfying his employment obligations to the Defendant Grand Canyon.

60. Plaintiff's Employment Agreement with Grand Canyon imposed on Grand Canyon and its agents a covenant or duty of good faith and fair dealing in its relationship and in the performance of its contractual obligations to Plaintiff.

61. Similarly, the Buy-Sell Agreement by and between Plaintiff and Defendants imposes on all the Defendants a covenant or duty of good faith and fair dealing in making provision for the

acquisition by the Company or other shareholders of Plaintiff's stock triggered by the termination of Plaintiff's employment.

62. Defendants breached their covenant of good faith and fair dealing inherent in Plaintiff's employment agreement by terminating him without cause and without prior notice or warning in accordance with their designs on July 15, 1992.

63. Defendants breached their covenant of good faith and fair dealing inherent in Plaintiff's Employment Agreement by not disclosing to him in November of 1986 that it was their intention to learn all they could from the operation of the business of Defendant Grand Canyon, and at such time as Defendants felt comfortable operating the business on their own, to terminate Plaintiff.

64. Defendants further breached their covenant of good faith and fair dealing inherent in the Buy-Sell Agreement by effectuating their design terminating the Plaintiff on July 15, 1992 at a point in time when the "net book value" of Grand Canyon was aberrationally low as a consequence of the Sobek/White Water. Defendants acted by effectively depriving Plaintiff of participating in the anticipated annual 1992 and the consequential dividend of \$300,000.00.

65. As a direct, foreseeable and contemplated consequence of the Defendants' breach of their covenant of good faith and fair dealing to Plaintiff, Plaintiff has sustained general and consequential damages in an amount to be shown at trial.

WHEREFORE, Plaintiff prays for judgment below.

JURY DEMAND

Plaintiff hereby respectfully requests this matter be tried to a jury.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. Against the Defendants Grand Canyon, Saunders, Denoyer and Mathis and each of them, jointly and severally, shown at trial; in an amount to compensate Plaintiff for the difference in value of his stock in July, 1992 and its value had it been sold calculating "net book value" not including the Sobek/White Water, Inc. Acquisition debt, plus the value of Plaintiff's continued employment at Grand Canyon until retirement plus benefits, together with the Plaintiff's portion of the 1992 annual dividend; and,
2. Against Defendants Grand Canyon, Saunders, Denoyer, Mathis, and each of them jointly and severally to compensate Plaintiff for sustaining general and consequential damages on Plaintiff's Second Cause of Action for breach of the covenant of good faith and fair dealing; and,
3. Punitive damages shown at trial against all the Defendants for their breaches of the implied covenant of good faith and fair dealing in the wrongful termination of Plaintiff and forced the sale of his stock in July of 1992; and,
4. Costs and attorney's fees incurred herein; and,
5. Any other relief the Court deems just.

DATED this 29 day of June, 1998.

STIRBA & HATHAWAY

By: 

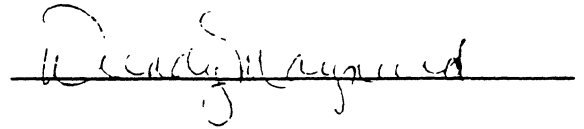
PETER STIRBA
BENSON L. HATHAWAY, JR.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 1998, I caused to be served a true copy of the foregoing SECOND AMENDED COMPLAINT, by the method indicated below, to the following:

John A. Anderson
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
Attorneys for Defendants
50 South Main, Suite 1600
P.O. Box 45340
Salt Lake City, Ut 84145

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



BUY SELL AGREEMENT
GRAND CANYON EXPEDITIONS CO.

THIS AGREEMENT made this 29th day of November, 1986, by and between DONALD A. SAUNDERS, RONALD R. SMITH, MICHAEL R. DENOYER, MARTIN M. MATHIS and MARC SMITH, (hereinafter collectively referred to as "Shareholders") and GRAND CANYON EXPEDITIONS CO., a Utah corporation (hereinafter referred to as the "Corporation").

WHEREAS, the Shareholders will, upon issue, own all of the issued and outstanding shares of the Corporation, and

WHEREAS, the Shareholders desire to promote their mutual interest and the interest of the Corporation by imposing certain restrictions and obligations upon themselves, the Corporation and on the shares of stock of the Corporation.

IT IS THEREFORE AGREED:

1. Purchase of Stock. Upon the death, disability, or termination of employment with the Corporation, (either voluntarily or involuntarily), of any Shareholder, the Corporation shall purchase and the individual Shareholder, or his estate, shall sell, all of that individual's interest in the Corporation now owned or hereinafter acquired. The purchase price of the stock shall be as set forth in paragraph 2 of this Agreement.

2. Purchase Price. The purchase price of each share of stock will be determined as follows:

1. The first year, net book value.
2. The second year, net book value times one hundred ten percent (110%).
3. The third year, net book value times one hundred twenty percent (120%).
4. The fourth year, net book value times one hundred thirty percent (130%).
5. The fifth year and beyond, net book value times one hundred forty percent (140%).

The determination of net book value shall be made by the accountant servicing the Corporation and shall be made according to generally accepted accounting principles. Any such determination shall be conclusive on all parties.

3. Payment Date. The purchase price shall be paid in cash within sixty (60) days after any of the events set forth in paragraph 1 and shall be paid as follows:

- A. A down payment equal to thirty percent (30%) of the purchase price or the total amount of the remaining obligation owed by the individual Shareholder to Donald A. Saunders for the purchase of the stock, whichever is greater;
- B. The balance over six (6) years at ten percent (10%) interest.

4. Delivery of Stock. Upon the happening of any of the events set forth in paragraph 1, the individual, or his estate, shall immediately assign and deliver the shares of that Shareholder to the Corporation. Such shares shall immediately be designated as treasury stock on the books and records of the Corporation; thereafter, Shareholder, or his estate, shall have no further right or interest in the management or operation of the Corporation and his sole claim against the Corporation shall be for the payment of the said shares pursuant to the terms of this Agreement.

5. Restrictions on Stock. No Shareholder shall dispose of or encumber any part of his stock in the Corporation unless all other Shareholders of the Corporation previously agree in writing. Any such attempted sale or encumbrance shall be void and shall not be recognized by the Corporation for any purpose.

6. Sale of Stock. Anytime the Shareholders of SIXTY FOUR PERCENT (64%) or more of the outstanding shares of stock in the Corporation desire to sell their shares, they shall so notify all of the remaining Shareholders in writing. Such writing shall set forth the sales price for the shares, any terms of sale, the name and address of the proposed purchaser and shall contain a representation that the offer to sell is bona fide and has tentatively been accepted by the proposed purchaser. The writing shall also contain an offer to the remaining Shareholders to

8. Term. This Agreement shall terminate upon the occurrence of any of the following events:

A. Cessation of the Corporation's business;

B. Bankruptcy, receivership or dissolution of the Corporation;

C. Whenever there is only one (1) surviving Shareholder bound by the terms hereof;

D. The voluntary agreement of all parties who are bound by the terms of this Agreement.

E. The sale of ONE HUNDRED PERCENT (100%) of the shares of the Corporation.

Upon the termination of this Agreement, each Shareholder shall surrender to the Corporation, certificates for his stock, the Corporation shall issue to him in lieu thereof new certificates for an equal number of shares without the endorsement set forth in paragraph 6.

9. Exclusions. Donald A. Saunders and Ronald R. Smith shall be exempt from the requirement of employment set forth in paragraph 1 and the failure of either or both, to be employed by the Corporation shall not require them to sell, nor the Corporation to purchase, their shares of stock.

10. Benefit. This Agreement shall be binding upon the Shareholders, their heirs, legal representatives, successors or assigns and upon the Corporation, its successors or assigns. The

sell, for a period of not less than SIX (6) months, the subject shares upon the same terms and conditions offered to the prospective purchase. If the remaining Shareholders do not accept the offer to sell within the SIX (6) month period, all of the Shareholders shall immediately thereafter sell all of their shares in the corporation to the proposed purchasers upon the terms and conditions at the price set forth in the notice. If the sale to the proposed purchaser has not closed within NINE (9) months from the date of the notice of intent to sell, such offer to sell shall lapse and any sale thereafter must comply anew with the provisions of this paragraph.

7. Endorsement on Stock Certificates. Upon the execution of this Agreement the Certificates of Stock subject hereto shall be endorsed as follows:

"This certificate is transferable only upon compliance with the provisions of an Agreement dated the 29th day of November, 1986, among DONALD A. SAUNDERS, RONALD R. SMITH, MICHAEL R. DENOYER, MARTIN M. MATHIS, MARC SMITH and GRAND CANYON EXPEDITIONS CO., a copy of which is on file in the office of the Secretary of the Corporation."

After endorsement the certificate shall be issued to the Shareholder, who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership in such stock. All stock hereinafter issued by the Company shall bear a similar endorsement.

executor, administrator or personal representative of a deceased Shareholder shall execute and deliver any and all documents or legal instruments necessary to carry out the provisions of this Agreement.

11. Miscellaneous. This Agreement shall be governed by the laws of the State of Utah.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

GRAND CANYON EXPEDITIONS CO.

By Michael R. Denoyer **PRESIDENT**
MICHAEL R. DENOYER, President

ATTEST:

J. Thomas Leven

Michael R. Denoyer
MICHAEL R. DENOYER

Marc Smith
MARC SMITH

Donald A. Saunders
DONALD A. SAUNDERS

Martin M. Mathis
MARTIN M. MATHIS

Ronald R. Smith
RONALD R. SMITH

18.11

EMPLOYMENT AGREEMENT

THIS AGREEMENT dated the 29th day of November, 1986, is entered into by and between Marc Smith, (hereinafter referred to as "Employee") and Grand Canyon Expeditions Co., (hereinafter referred to as "Expeditions").

I. RECITALS

A. Expeditions is engaged in the business of promoting and running raft trips in the Grand Canyon, Arizona.

B. It is essential for the full protection of the business of Expeditions (hereinafter referred to as the "Employer"), and its employees engaged in such businesses, that the employees should not disclose confidential or other vital information regarding such business with which they have or may become acquainted during the period of their employment. Without such protection, it would not be practical to expose Employee to work being done by Employer and its employees, nor to bring Employee into free and open relationships with other employees of Employer who are possessed of such proprietary information.

II. AGREEMENT

Therefore, it is agreed as follows:

1. Terms of Employment. Terms of Employment of

Employee by Expeditions, including Employment Period, are as follows:

A. Employment Period. Expeditions agrees to employ Employee, and Employee agrees to remain in the employ of Expeditions during the period (the "Employment Period") beginning on the 1st day of January, 1987, and ending on the 31st day of December, 1987. During the Employment Period, the Employee shall perform such duties for Expeditions as he may be reasonably requested to do, relating to its business. At the request of Expeditions this Agreement and the Employment Period may be extended by the mutual consent of Employee and Expeditions.

B. Performance of Duties. Expeditions and Employee agree that during the Employment Period, Employee shall devote his business time to the business affairs of Expeditions and its affiliated companies. Employee's responsibilities to Expeditions and its affiliated companies shall be substantially comparable to the duties he performed for other companies immediately prior to the date hereof or as mutually agreed.

C. Compensation. Subject to the terms and conditions of this Employment Agreement, Employee shall be compensated as follows:

1. For the 12 consecutive-month period commencing on the first day January 1987, Employee shall receive, in substantially equal monthly or more frequent installments, a basic annual salary of \$ 32,000 ⁰⁰. The basic salary payable during any extension of the Employment Period shall be by mutual agreement of the parties.

2. Employee shall be entitled to participate in a bonus plan to be established and to be known as The Grand Canyon Expeditions Co. Key Personnel Bonus Plan. Said Plan will be based on a percentage of pre federal income tax net profit and substantially in the form attached hereto as Attachment A.

3. Either Employee or Expeditions may terminate Employee's employment at any time, with or without cause. Expedition's obligation to pay Employee in accordance with the provisions of subparagraph 1 next above shall cease as of the date of Employee's termination of employment with Expeditions, if such termination is on account of Employee's death, disability, voluntary resignation or on account

of his dismissal for cause. If Employee's employment with Expeditions terminates for any other reason, Expedition's obligation to pay Employee in accordance with subparagraph 1 next above shall continue for the remainder of the Employment Period, or, if earlier, until the date of his death, as though he were employed during that period.

4. If Employee's employment is terminated on account of Employee's death, disability, or dismissal by Expeditions without cause, then Employee shall be entitled to receive, prorated for the applicable one year period based upon the period of employment preceding such termination, benefits under Attachment A.

5. Employee shall be entitled to the same pension, retirement, medical, insurance, customary holidays, and other fringe benefits as shall be made available to management employees of Expeditions.

2. Non-Competition. During the Employment Period and during the two years after the end of the Employment Period, or any extensions thereof, Employee shall not:

a. Own (directly or indirectly), work for or act as a consultant for, or serve as a director, officer or principal of, any business (except for the Employer or an affiliated company) which engages (as a major line of business) in, or

b. Intentionally assist any business (except for the Employer or an affiliated company) in the establishment or operation of, the business of promoting and running rafting trips in the Grand Canyon, Arizona.

3. Successors. In the event that Expeditions shall at any time be merged or consolidated with or into any other corporation or corporations or shall sell or otherwise transfer substantially all of its assets to another corporation, the provisions of this Agreement shall be binding upon and inure to the benefit of the consolidated Corporation or to the Corporation which such assets shall be sold or transferred.

4. Assigns. Except as provided in the preceding paragraph, this Agreement may not be assigned by either Expeditions or Employee.

5. Notices. Any notice or communication required by or permitted to be given in connection with this Agreement shall be in writing and shall be delivered in person, sent by prepaid telegram and followed with a confirming letter, or mailed by

certified or registered mail, return receipt requested, and addressed to Employee at such address as he may from time to time select and to Expeditions at:

Grand Canyon Expeditions Co.
P. O. Box 0
Kanab, Utah 84741

6. General Provisions. The following general terms and provisions shall apply:

A. No amendment or modification of this Agreement shall be deemed effective unless executed in writing by both parties hereto.

B. No term or condition of this Agreement shall be deemed to have been waived, nor shall there be any estoppel to enforce any provision of this Agreement, except by written instrument executed by the party charged with such waiver or estoppel. Any written waiver shall not be deemed a continuing waiver unless specifically stated, shall operate only as to the specific term or condition waived and shall not constitute a waiver of such term or condition for the future or as to any act other than that specifically waived.

C. If any part, term or provision of this Agreement is held by the courts to be unenforceable, illegal or in conflict with any federal, state or local laws, such part, term or provision shall be considered severable from the rest of the Agree-

ment. The remaining portions of the Agreement shall not be affected, and the rights and obligations of the parties shall be construed and inferred as if the Agreement did not contain the particular term, part or provision held to be invalid, unless the invalid provisions, when considered in the aggregate, render the administration and intent of this Agreement unreasonably burdensome or destroy the intent of the parties hereto, in which case this Agreement shall be terminated.

D. The provision against assignment of this Agreement shall not preclude the legal representatives of the estate of the Employee from assigning any rights hereunder to the person or persons entitled thereto under his will or, in the case of intestacy, to the person or persons entitled thereto under the laws of intestacy applicable to his estate.

E. This Agreement constitutes the sole understanding of the parties with respect to the subject matter hereof.

F. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of Kanab in accordance with the provisions of the American Arbitration Association.

9. Governing Law. This Agreement shall be governed by and construed according to the laws of the State of Utah.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement as of the date and year first above written.

GRAND CANYON EXPEDITIONS CO.

By Michael P. Duroy
Its PRESIDENT

Marc Smith
MARC SMITH
EMPLOYEE

18.7

GRAND CANYON EXPEDITIONS CO.

KEY PERSONNEL BONUS PLAN

1. Purpose. Grand Canyon Expeditions Co. (hereinafter referred to as the "Company") has established The Grand Canyon Expeditions Co., Key Personnel Bonus Plan as set forth herein (hereinafter referred to as the "Plan") to aid the Company in attracting, rewarding and retaining well-qualified key personnel and to further the identity of interests of such personnel with the interests of the Company's shareholder.

2. Administration. The authority to manage and control the operation and administration of the Plan, the power to grant Annual Incentive Awards (as described in paragraph 4), the authority to establish terms, conditions and limitations on Annual Incentive Awards and the authority to determine whether Performance Targets (as described in paragraph 4) have been met shall be vested in the Company's Board of Directors (hereinafter referred to as the "Board"). The Board shall act by a majority of its then members by meeting or by a writing filed without meeting. Any interpretation of the Plan and any decision on any other matter within the discretion of the Board made by the Board in good faith is final and binding on all persons. No member of the Board shall be liable for any action or determination made in good faith with respect to the Plan.

3. Participation. The Board shall designate the key employees of the Company who shall be eligible to receive Annual Incentive Awards for any calendar year (hereinafter referred to as the "Participants").

4. Annual Incentive Awards. Commencing with the year ending the 31st day of December, 1987, and ending in the year that the debt of Grand Canyon Expeditions Co., to Ronald Smith and Donald A. Saunders is paid in full, a bonus pool of twenty-two percent (22%) of the pre federal tax income of the Company will be divided between key personnel as directed by the Board. After the payment of the debt to Ronald Smith and Donald A. Saunders the percent shall be increased to thirty-five percent (35%).

5. Termination of Employment. If a Participant's employment is terminated by the Company without cause or is terminated by reason of death or disability, the Participant or, in the event of death, his estate, shall be entitled to a portion of the bonus which he would otherwise have received for the year in which such termination occurs, pro rated according to the portion of the calendar year which elapsed prior to the termination of employment. The Board shall make such equitable adjustments as it deems appropriate with respect to individual Performance Targets for a Participant whose employment is so terminated. Such portion shall be paid at the time that the

Participant would have received the bonus, if his employment had not terminated. Except as provided above in this paragraph 5, or as otherwise provided by the Board, no bonus shall be payable for any year to a Participant whose employment terminates prior to the end of that year.

6. Withholding of Taxes. Payment of any Incentive Award in accordance with the terms of the award shall be subject to the withholding of all applicable federal and states taxes.

7. Interests Not Transferable. Except for amounts, if any, owing to Expeitions, the interest of Participants under the Plan are not subject to the claims of their respective creditors, if any, and may not be voluntarily or involuntarily assigned, alienated or encumbered.

8. Amendment and Termination. The Company reserves the right to amend or terminate the Plan at any time by resolution of the Board.

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