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Jack J. Grynberg; Celeste C. Grynberg and L & R  
Exploration Venture v. Questar Pipeline Company,  
a Utah corporation, Questar Gas Management  
Company, a Utah corporation, and Questar Energy  
Trading Company, a Utah corporation : Brief of  
Appellant

Utah Supreme Court

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JACK J. GRYNBERG; CELESTE C.  
GRYNBERG and L & R EXPLORATION  
VENTURE,

V.

**Defendants/Appellees.**

Case No. 20010731-SC  
Third District No. 990909729

On appeal from the final judgment of the Third Judicial District Court  
for Salt Lake County, Honorable Timothy R. Hanson, District Judge

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**CLERK SUPREME COURT  
UTAH**

JACK J. GRYNBERG; CELESTE C.  
GRYNBERG and L & R EXPLORATION  
VENTURE,  
  
Plaintiffs/Appellants,  
  
v.  
  
QUESTAR PIPELINE COMPANY,  
a Utah Corporation, QUESTAR GAS  
MANAGEMENT COMPANY, a Utah  
corporation and QUESTAR ENERGY  
TRADING COMPANY, a Utah  
corporation,  
  
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51 Am. Jur. 2d Limitations of Actions § 362 (1970)	89
6A Charles A. Wright, Arthur R. Miller & Mary K. Kane Federal Practice and Procedure § 1497 at 85 (1990)	54,55
E. Kuntz, <u>A Treatise on the Law of Oil and Gas</u> , § 59.1 at 105-06 (1991)	78,79

P. Martin & B. Kramer, <u>Williams &amp; Meyers Oil &amp; Gas Law</u> , § 861.1 at 425 (2000)	78,79
Restatement (Second) Contracts § 302 (1981)	43
Restatement (Second) Contracts § 302(1)(a)	47
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Restatement (Second) Contracts § 302(1)(b)	49
S. Tourate, T. Boyd & C. Schoenwatter, <u>Bucking The "Trend:" The Uniform Commercial Code, The Economic Loss Doctrine, And Common Law Causes of Action for Fraud And Misrepresentation</u> , 84 Iowa L. Rev. 875, 884 (Aug. 1999)	30,31,68

## **JURISDICTIONAL STATEMENT**

Jurisdiction of the Court is conferred by Utah Code Ann. § 78-2-2(3)(j) (2001).

## **ISSUES FOR REVIEW**

I. Did the trial court err in granting summary judgment dismissing the Grynberg Parties' tort and contract claims for periods after July 1994, including the following rulings:

A. A non-final interlocutory order in another case as to when the contracts terminated is a proper basis for a dismissal with prejudice of contract claims in this case (preserved at R 2290, 2346, 2353-54, 2702, 2747, 2758-60);

B. The economic loss doctrine precludes tort claims even after the parties no longer had a contractual relationship (preserved at R2317-25, 2346, 2352-53, 2701, 2747, 2803);

C. An absence of intent to grant third party beneficiary status can be found without requiring Questar to produce the involved contracts for review and even though Questar offered no evidence to support summary judgment but instead attacked only the legal sufficiency of the pleading by seeking a more definite statement (preserved at 2269, 2276, 2346-49, 2700-01, 2745).

D. The Grynberg Parties failed to adequately plead the torts of conversion and breach of fiduciary duty (preserved at R 2269, 2349-50, 2701-02, 2328-31).

II. Did the trial court err in ruling that the one year savings clause in Utah Code Ann. § 78-12-40 does not apply to this "case," including the Grynberg Parties' six non-contract claims asserted with respect to periods both before and after the alleged July 1, 1994 termination of the Contracts (preserved at R 2268-74, 2307-13, 2325-28, 2331, 2336-43, 2703, 2748-49, 2760-61, 2803).

III. Did the trial court err in ruling that the "economic loss" doctrine bars the Grynberg Parties' six non-contract claims, including claims for conversion, fraud, negligent misrepresentation and breach of fiduciary duty asserted with respect to periods both before and after the alleged July 1, 1994 termination of the contracts (preserved at R 2274, 2317-25, 2803).

IV. Did the trial court err in ruling that all the Grynberg Parties' contract claims were untimely, including the following rulings:

A. The six month savings statute in Utah Code Ann. § 70A-2-725(3) applies to a partial dismissal of claims rather than dismissal of the "action" (§ 70A-2-725(3) and the relevant date is October 1, 1998 when the BTU "claims" were dismissed without prejudice rather than March 20, 2000 when the court in *Questar II* dismissed the action by entry of a final judgment (preserved at R 2268-74, 2307-13, 2325-28, 2331, 2336-43, 2703, 2748-49, 2760-61, 2803);

B. Pursuant to Wyo. Stat. Ann. § 1-3-119 a payment does not accrue the statute of limitations anew because a written "acknowledgment" is also required

despite the statute's disjunctive language ("[w]hen payment has been made . . . **or** a written acknowledgment . . . **or** promise to pay . . . the time for commencing an action runs from the date of such payment, acknowledgement **or** promise") (preserved at 2270, 2305-07, 2331-35, 2344, 2617, 2631-32, 2803); and

C. The statute of limitation accrued at the time of production of the gas, including for contract payments made by Questar in 2000 and 2001 of \$7.1 million using incorrect BTU measurements (preserved at R 2270-73, 2305-07, 2331-35, 2344, 2354-56, 2617, 2631-32, 2803).

V. Did the trial court correctly refuse to apply the equitable tolling doctrine (preserved at R 2313-17).

VI. Did the trial court correctly rule that under Contract 219 the Grynberg Parties have not raised genuine issues of material fact (preserved at R 2269, 2345-46, 2702-03, 2745-46, 2758-59)?

The trial court's grant of summary judgment on each of the above issues is reviewed for correctness. *See Price Development Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237 (Utah 2000).

#### **DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

A. Utah Code Ann. § 78-12-40:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall

have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

B. Wyo. Stat. Ann. § 1-3-119:

When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged, the time for commencing an action runs from the date of such payment, acknowledgment or promise.

**STATEMENT OF THE CASE**

**I. Nature of the Case and Course of the Proceedings**

Jack J. Grynberg, Celeste C. Grynberg and L&R Exploration ("Plaintiffs" or the "Grynberg Parties") own working interests in gas wells located in the Nitchie Gulch Fields of Wyoming. They have sold their gas to Questar Pipeline Company ("QPC") and its affiliates (collectively "Defendants" or "Questar") for many years. Questar is charged with measuring the volume and analyzing the heating content of the gas expressed in BTUs, so that the Grynberg Parties and others can be fairly paid for the value of gas they produced. Unknown until 1993 to the Grynberg Parties, Questar engaged in a scheme to systematically shortchange the owners of gas production by designing its pipeline, equipment, sampling devices and procedures in a way that would underreport the true heating content of the gas Questar bought. Questar uses a different, more reliable analysis when it sells the gas. The Grynberg Parties raised issues concerning the BTU analysis in 1993 in a then pending lawsuit referred to as *Questar II*. Among other things

the Grynberg Parties' Amended Counterclaim in *Questar II* alleged that Questar "paid for gas purchased from the Defendants using incorrect BTU adjustments." The parties engaged in discovery and designated exhibits and witnesses on this and on other issues surrounding the price and quantity of gas sold.

Although the BTU claims were directly related to the other claims in *Questar II*, the BTU claims were not tried because Questar asked Judge Johnson, the Wyoming federal district judge presiding over *Questar II*, to prevent it. Questar filed a motion in limine in which it sought to exclude evidence concerning the BTU claims and it also sought an order precluding the Grynberg Parties from ever bringing the BTU claims. Judge Johnson denied Questar's requests and announced that he would dismiss these claims without prejudice so that they could be separately litigated.

Thereafter, on March 22, 1994, the jury awarded a multi-million dollar verdict against Questar. Four and one-half years later, Judge Johnson entered a Partial Judgment Notwithstanding the Verdict. The Grynberg Parties successfully appealed the JNOV to the Tenth Circuit and Questar paid the Grynberg Parties more than \$5.1 million in March 2000 without reservation of any rights while acknowledging that Mr. Grynberg claimed that more money was owed. Thereafter, Questar paid additional amounts to bring the total payments in 2000 and 2001 to over \$7.1 million related to purchases from the Nitchie Gulch wells. The payments for gas included in this \$7.1 million were based on a formula: price, multiplied by volume, multiplied by a BTU adjustment. In making these

payments, Questar used the same incorrect BTU adjustments of which the Grynberg Parties complained in *Questar II*.

On October 1, 1998, Judge Johnson finally entered a written order on the BTU claims dismissing them "without prejudice." Within one year thereafter, on September 29, 1999, the Grynberg Parties filed this action to resolve the dismissed BTU claims. On March 20, 2000 the district court entered a final judgment in *Questar II*.

On July 6, 2000 Questar filed a motion to dismiss the Grynberg Parties' Amended Complaint. In support of its motion, Questar attacked claims based upon alleged insufficiency of certain pleadings but with respect to other claims Questar relied upon exhibits. On March 8, 2001 the trial court issued a Memorandum Decision (R 2674-84) (Addendum Ex. A) granting Questar's motion, treating Questar's motion as one for summary judgment. The trial court denied the Grynberg Parties' request for any discovery, finding that "additional discovery would [not] be of assistance, particularly where the core issues are centered around the statute of limitations and legal principles of the economic loss doctrine." Although the trial court refused "additional" discovery, in actuality the trial court allowed **no** discovery since Questar filed objections and refused to respond to any of the discovery previously served. Thereafter, on August 6, 2001 the trial court entered its Order Granting Summary Judgment for Defendants ("S.J. Order") (R 2784-91) (Addendum Ex. B). The Order was prepared by Questar and contained significant rulings not contained in the Memorandum Decision.

## **II. Statement of Facts**

1. The Grynberg Parties and QPC and/or its predecessors are and have been at all relevant times, parties to four (4) contracts for the purchase and sale of natural gas, identified as Gas Purchase Agreements 245, 246 and 249 from lands and leases located within the state of Wyoming (the "Contracts") and Gas Purchase Agreement 219 located in the state of Colorado (the "219 Contract"). *See* (R 1496-15; 1518-67) Addendum Exs. C-F. The Grynberg Parties have also been selling gas to Defendants, their predecessors or affiliates and Defendants have been measuring the volume, analyzing the heating content, gathering the gas, separating gas liquids and transporting gas production owned by the Grynberg Parties under Defendants' direct contracts with the Grynberg Parties and under contracts with Hunt Oil Company (the "Hunt Contracts"). Hunt Oil Company ("Hunt") is the operator of the wells that produce gas sold pursuant to the Contracts and is authorized by virtue of the operating agreement to sell the Grynberg Parties' gas production for the Grynberg Parties' benefit. Affidavit of Jack J. Grynberg ("Grynberg Aff.") (R 2358-59); Amended Complaint ¶ 9 (R 771-853) (Addendum Ex. G).

2. Defendants' gathering system is the exclusive method by which the Grynberg Parties' gas production economically can be gathered and transported to an interstate pipeline. The gas gathering from the Nitchie Gulch Gas Field is exclusively tied into Questar Pipeline's transportation system. As part of the gathering process QPC and Questar Gas Management Company ("QGMC") measure the volume and analyze the

heating content of the gas entering Defendants' gathering lines. Payment from Defendants, or from any other purchaser, is based on the measured volume of gas, expressed in MCFs multiplied by the heating content, expressed in BTUs of the gas and multiplied by the price per MMBTU. Errors, whether innocent or deliberate, in the volumetric measurement and in the BTU value analysis of the gas can and do significantly effect the ultimate price paid to the owner of the gas. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 11 (R 773-74).

3. Questar Energy Trading Company ("QETC") is an affiliate of QPC and QGMC. At some time after QPC purported to unilaterally terminate the Contracts, QETC purchased the gas produced from the Grynberg Parties' wells. QETC contracted with Hunt, the Nitchie Gulch Gas Field operator, to purchase the same knowing of the Grynberg Parties' interest in the gas and proceeds of the gas. QETC knew or should have known of the mismeasurement and wrongful analysis of the heating content of the gas in which its affiliates were engaged. During the period of time QETC bought the Grynberg Parties' gas production it was the beneficiary of the mismeasurement and wrongful heating content analysis schemes in which it and its affiliates engaged and has been unjustly enriched as a result of those schemes. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 13 (R 774).

4. QPC sued the Grynberg Parties for declaratory judgment in the United States District Court for the District of Wyoming in an action titled *Questar Pipeline*

*Company v. Grynberg, et al.*, Civil No. 92-CV-265J (herein "*Questar II*"). The Grynberg Parties, counterclaimed, alleging among other things that QPC had breached the Contracts because it under reported the volume of gas, paid the wrong price and in an Amended Counterclaim based on recent discoveries alleged that Questar "paid for gas purchased from the [Grynberg Parties] using incorrect BTU adjustments." See Defendants' Addendum of Exhibits in Support of Motion to Dismiss (hereafter "Q. Ex."), Ex. 13 (R 1603-12) (included in Addendum Ex. H), *Questar II* Amended Counterclaim, ¶14 (R 1605); Grynberg Aff. (R 2353-54); Amended Complaint ¶ 14 (R 775).

5. The Grynberg Parties sought damages from Questar "in an amount equal to the difference between the price provided by the agreements and the price actually paid by the Defendants." *Questar II* Amended Counterclaim, Prayer ¶1 (Q. Ex. 13) (R 1609). Under the Contracts Questar is required to send "a statement showing the amount of gas received by Buyer during the preceding calendar month, and payment shall be made therefor by Buyer within ten (10) days after the rendering of any such statement; . . . Any errors in such statement or payment shall be promptly reported to [Questar], and [Questar] shall make proper adjustment thereof within thirty (30) days after **final determination** of the correct volume or values involved." (emphasis added). Q. Exs. 4, 5 and 6 (R 1518-67) (Addendum Exs. D, E and F).

6. At least since the filing of the amended complaint in *Questar II* the parties have had a dispute as to whether Questar used the correct BTU adjustment. The correct

BTU adjustment is both necessary and mandatory to determine the correct price paid under the Contracts during all periods of time for gas produced from all wells. A correct payment, including the over \$7.1 million paid by Defendants in 2000 and 2001 for gas cannot be made until there has been a final determination of the correct BTU adjustment. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 20 (R 776-77); Supplementation of the Record (R 2616-23); *see also infra* ¶ 16.

7. Although the full extent of Questar's failure to correctly analyze and determine the BTU adjustment was not known at the time the Amended Counterclaim in *Questar II* was filed, the Grynberg Parties' understanding of Questar's action grew as the case progressed and Mr. Grynberg and representatives of Questar had substantial exchanges of information and meetings concerning the correct BTU adjustment before trial. *See* Q. Ex. 23 (R 1677-98); Grynberg Aff. (R 2353-54).

8. Questar complained that the BTU claim it previously had understood to be a \$6,000 claim had become a multi-million dollar claim because, as Questar understood, the determination of the correct BTU adjustment "rippled through" all of the Grynberg Parties' damage calculations because all amounts paid under these Contracts are based upon a determination of a correct BTU adjustment for all of the gas produced. All the discussions and meetings between Grynberg and Questar dealt at all times with all gas wells under the Contracts and all gas produced from them. *Id.*

9. The morning before the trial started the court announced that it would bifurcate the BTU claims. The court's oral announcement made clear that it was denying Questar's Motion in Limine in which Questar had sought to preclude the Grynberg Parties from introducing evidence concerning the BTU adjustment and was denying Questar's request for an order precluding the Grynberg Parties from ever again bringing a claim concerning the BTU adjustment. Instead the court granted the Grynberg Parties' request that they be allowed to bring their claims concerning the determination of the correct BTU adjustment in a separate proceeding. *See* Transcript of Trial Proceedings, p. 14 (Q. Ex. 8) (R 1575-78) (Addendum Ex. I).

10. Although the court orally announced that it would dismiss the BTU claims without prejudice on February 28, 1994, the court did not enter a written order to that effect until October 1, 1998. Although Questar represented to the trial court in this case that Judge Johnson had granted its motion in limine, that assertion is incorrect. Shortly after trial Questar and Grynberg submitted proposed forms of judgment both of which indicated that the BTU claims had been **dismissed without prejudice**.

Specifically, Questar's own proposed form of judgment stated:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants' claim against the Plaintiff for paying for gas using incorrect btu adjustments is dismissed without prejudice.

*See* Ex. 2 to Grynberg Parties' Memorandum in Opposition to Defendants' Motion to Dismiss (hereinafter "Grynberg Ex.") at ¶ 9 (R 2360-65) (Addendum Ex. J).

11. The jury returned a verdict in *Questar II* in favor of the Grynberg Parties on March 22, 1994. The court did not enter judgment on the jury verdict until June 1998. After the court substantially reduced the jury award, the Grynberg Parties filed a Motion for Direction of Entry of Final Judgment Under Rule 54(b) so that they could finally pursue an appeal of the issues tried in *Questar II* and obtain the written order of dismissal without prejudice of the BTU claims. *See* Grynberg Ex. 2 (R 2360-65) (Addendum Ex. J).

12. Questar's response to Defendants' motion under Rule 54(b) recited that Questar "generally concurs in defendants' motion requesting the Court to direct the entry of final judgment as to all claims resolved by the 1993 Judgment, the 1994 Order and the 1998 Judgment." *See* Grynberg Ex. 3 (R 2366-69) (Addendum Ex. K). Questar took issue with the proposed treatment of the claims under Contract No. 219 and 563 and claimed that they should be dismissed for failure to prosecute, however, Questar concurred in the dismissal without prejudice of the BTU claims. *Id.*

13. On October 1, 1998 the court in *Questar II* finally issued an order regarding the BTU issue, dismissing the BTU claims without prejudice.

Additionally, to the extent it is required, in accordance with prior rulings of this Court relative to defendants' claim against plaintiff for paying for gas using incorrect BTU adjustments (the BTU claims), the BTU claims have been **DISMISSED WITHOUT PREJUDICE**. (emphasis in original)

Q. Ex. 24 at p. 2 (R 1699-1706) (Addendum Ex. L).

14. Although Questar had argued that the BTU claims the court dismissed were not included in the pleadings and sought a preclusive order, that motion was denied and as of October 1998 those claims were dismissed "**without prejudice.**" *Id.* This case was filed within one year thereafter on September 29, 1999 (R 1-23).

15. After Judge Johnson granted a Partial Judgment Notwithstanding the Verdict and an appeal to the Tenth Circuit, the jury verdict was substantially reinstated. *See QPC Co. v. Grynberg*, 201 F.3d 1277 (10th Cir. 2000) (Addendum Ex. M). On March 20, 2000, the trial court entered Judgment Following Remand to District Court After Appeal ("*Questar II* Final Judgment"). *See* Grynberg Ex. 4 (R 2370-73) (Addendum Ex. N). The *Questar II* Final Judgment determined the price to be paid per MMBTU (which is volume multiplied by BTU value) under the Contracts and determined the amount owing for gas QPC was obligated to take but for which it had not either taken or paid under the Contracts. The court also dismissed some of the Grynberg Parties' claims against QPC including the claim that it had stolen volumes of gas through bypassing gas meters. *Id.*

16. On March 16, 2000, QPC delivered to the Grynberg Parties' counsel its check in the amount of \$5,146,071.56. The delivery of the check on the account was "without any restrictions, limitations or reservation of rights" and Questar acknowledged that the Grynberg Parties claimed they were owed additional amounts but nonetheless requested that "Mr. Grynberg accept the enclosed check for the amounts everyone agrees

upon while we continue to try to resolve differences on other amounts." *See* Grynberg Ex. 5 (R 2374-79) (Addendum Ex. O); Amended Complaint ¶ 17 (R 776). Questar paid additional amounts in 2000 and 2001 for gas produced from the wells, including \$106,441 on August 1, 2000 (for compression reimbursement), \$524,400.51 on October 2, 2000 and \$128,677.42 on January 5, 2001 (for tax reimbursements) for a total of \$5,905,590.49. *See* Amended Complaint ¶ 17 (R 776); Grynberg Aff. (R 2353-54); Grynberg Ex. 6 (R 2380-82) (Addendum Ex. P); Exhibit A to Supplementation of The Record (R 2620-23) (Addendum Ex. Q). Subsequent to the court's Memorandum Decision in this lawsuit, Questar Gas Company made four additional payments totaling \$1,260,795.53. *See* Addendum Ex. R. In total Questar has made payments in 2000 and 2001 of over \$7.1 million for gas produced from the wells using an incorrect BTU adjustment. *Id.*

17. The March 16, 2000 and later payments were based upon volumes of gas and price as determined by the court. There has been no court or other final determination of the BTU adjustment factor to be applied to the delivered gas volumes. The parties have not agreed on the BTU adjustment factor to be used in the \$7.1 million payments or in any earlier payments. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 18 (R 776).

18. During the four and one-half years between the time the jury returned its verdict in favor of the Grynberg Parties and Judge Johnson's ruling on Questar's Motion

for Judgment Notwithstanding the Verdict, the parties continued discussions and meetings on the determination of the correct BTU adjustment. *See, e.g.*, the March 31, 1995 letter from Questar to the Grynberg Parties' Wyoming attorney, Mr. Toner. Grynberg Ex. 7 (R 2383) (Addendum Ex. S). This letter provides:

**Al Walker and Jack Grynberg have had several conversations concerning Mr. Grynberg's views about the testing and measuring of the BTU content of gas that is brought into QPC Company's system.** Mr. Grynberg has indicated that he believes he has a basis for filing an action on behalf of the United States based on the provisions of the federal False Claims Act. Before doing so, he has offered to resolve the matter through a settlement that he has outlined to Mr. Walker.

\* \* \*

At the present time, we do not have a basis for making a definitive response to Mr. Grynberg's settlement proposal. Before making a final response, it would be helpful if we could obtain a more complete description and explanation of the scientific basis for Mr. Grynberg's claims. (emphasis added)

*Id.*

19. Under the Contracts, QPC is to pay the Grynberg Parties based on three factors: First, for the volume of gas delivered. Second, a determinable price per cubic foot of gas, and third, the price is adjusted by the heating content expressed in BTU of the delivered gas. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 19 (R 776).

20. As reflected in the *Questar II* Final Judgment, the correct volumes, at least with regard to the take or pay issue and the stolen gas claims, and price have now been determined by the Tenth Circuit Court of Appeals. However, the correct and necessary

BTU adjustment has not been determined. In addition, the date the Contracts terminated, if at all, which determines the price and Questar's "take obligation" is presently the subject of litigation between the parties in the United States District Court for the District of Wyoming ("*Questar III*"). That question will be finally determined in *Questar III* or in an appeal of *Questar III*. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 21 (R 777).

21. After QPC purported to terminate the Contracts the Grynberg Parties contracted with Hunt, and Hunt contracted with QPC and/or its affiliates to gather, measure, analyze, purchase and transport the gas produced from the lands covered by the Contracts. Upon information and belief these purchase Contracts extended at least through November 1997, but gas gathering and transportation arrangements remain in effect because there is no alternative. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 22 (R 777).

22. Either by the Contracts, the Hunt Contracts or otherwise, Questar undertook to gather, measure, analyze the heating content and transport the gas owned by the Grynberg Parties or for which the Grynberg Parties would be paid based upon volume measurements and analysis of the heating content expressed in BTUs performed by Questar. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 23 (R 778).

23. Questar's standard Gas Gathering Agreements obligate the operator to warrant that it "owns or otherwise controls supplies of gas that it wishes to have

gathered." The operator also promises "to make settlement for all royalties due and payments owed to Shipper's mineral and royalty owners" based on the measurements determined as specified in the Gas Gathering Agreement. Based upon information and belief, the Hunt Contracts contain provisions of similar effect. *See* Grynberg Ex. 8 at p. 9, ¶ 9 (R 2384-93) (Addendum Ex. T); Grynberg Aff. (R 2353-54); Amended Complaint ¶¶ 24-25 (R 778).

24. The Grynberg Parties as mineral and royalty owners are intended beneficiaries of the Hunt Contracts including any gas gathering or transportation agreements between Hunt and Defendants. *Id.*

25. Defendants at all times knew or should have known that Hunt would pay the Grynberg Parties based upon the volume in MMCF measurements together with the heating content expressed in BTUs they supplied to Hunt. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 26 (R 778).

26. QPC and/or Questar Gathering at all relevant times have been purchasing, gathering, measuring, analyzing the heating content or transporting natural gas from the lands and wells that are subject to the Contracts and the Hunt Contracts. In connection with their pipeline or gathering systems Defendants measured the volume and analyzed the heating content of the natural gas production from all the wells delivering gas under the Contracts and the Hunt Contracts. During such time Defendants have been improperly and incorrectly determining the heating content, expressed in BTUs, of the

natural gas production from all such wells. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 30 (R 779).

27. A spot check analysis of the filings with the Federal Energy Regulatory Commission ("FERC") indicates that at various times since 1989 Defendant QPC has reported that it sold more gas than it purchased. QPC reported that it actually **gained** gas on the way from the well to the final destination, a physical impossibility since gas is inevitably lost between the well and the destination by leakage, use by the pipeline company to power the pipeline compressors and from shrinkage. These reports are false, and illustrate that natural gas is consistently and knowingly undermeasured and undervalued at the wellhead. Amended Complaint ¶ 34 (R 780-81).

28. The process of analyzing the heating content of natural gas is highly technical. It requires special equipment, trained personnel to operate it without manipulation, and proper laboratory conditions to obtain accurate results. Without knowledge, and in reasonable reliance on the Defendants, the Grynberg Parties were defrauded by Defendants who unjustly enriched themselves or their affiliates by knowingly under reporting, at the point of purchase or input into a gathering line and/or pipeline, the heating content of natural gas produced. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 35 (R 781).

29. Defendants periodically submitted statements to the Grynberg Parties reporting the volume in MMCF and the heating content expressed in BTUs of the gas the

Grynberg Parties produced and for which they were entitled to be paid the correct amount. Defendants reported heating content in BTUs of gas produced from wells in the Nitchie Gulch Gas Field that varied from 1,034 to 1,248 BTUs per MCF. This constitutes an approximate 20% difference in heating content value which would result in an approximate 20% difference in payments. Grynberg Ex. 9 (R 2394-2429) (included in Addendum Ex. G--Amended Complaint) are graphs of the heating content of the gas produced from the Grynberg Parties' wells as reported by QPC. The unexplained differences in heating content expressed in BTUs were presented as normal variations in the field that did not provide any basis for further inquiry or alarm. In fact, Defendants knew or should have known that the heating content of the gas in the field should have been roughly consistent within the field and over time. For the Dakota formation gas production, the heating content should have been approximately 1,248 BTUs. For the Frontier formation gas production the heating content should have been 1,273 BTUs. These variations should have alerted Defendants, who were in a superior position to know the significance of these variations, that there were problems with Defendants' measurement and analysis of the heating content expressed in BTUs. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 63 (R 795-96).

30. In 1993 Plaintiff Jack Grynberg discovered pipe bypasses that he believed enabled Questar to receive gas that did not pass through its respective gas meters and for which Questar did not pay. Upon discovering that Questar unilaterally and without

anyone's knowledge had installed ten (10) meter bypass devices Grynberg conducted his own independent investigation and requested information from Questar about its measurements. In *Questar II*, the Grynberg Parties requested that Questar produce monthly information from its gas Master meter, which is the meter that measures all of the gas gathered from the field. Except for line loss, the reading at the gas Master meter should equal the sum of the individual and separate gas meter readings from each of the particular wells in which the Grynberg Parties had an interest. The gas Master meter reading cannot properly record a greater quantity of gas than the sum of the individual wells delivering gas into the line and through the gas Master meter. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 65 (R 796).

31. QPC resisted producing information from the Master meter for eight (8) months. Finally, after a court order, Questar produced volume reports from its Master meter showing that the volume at the Master meter was as much as 12% per month greater than the sum of the volumes reported by individual meters from all of the feeder lines. This physical impossibility further demonstrated that Defendants' measurements were wrong and that they were underreporting and underpaying the Grynberg Parties for their gas production and that Questar knew about it. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 66 (R 796-97).

32. QPC at all times has had sole control of the placement of measuring devices, extraction of gas samples, positioning of the extraction points, custody of gas

samples and analysis of gas samples. It maintains records of such information. QPC produces only information on the results of its analyses and has vigorously resisted attempts to obtain more specific information about its mismeasurements and analysis. Without the whole scheme the individual techniques could not be effectively evaluated and challenged by the Grynberg Parties. Grynberg Aff. (R 2353-54); Amended Complaint ¶ 69 (R 797-98).

33. In the period beginning sometime in 1996 and thereafter, QPC became a transportation company only. QPC operates the pipeline connected to the gathering lines into which the Nitchie Gulch gas production is delivered. QPC previously operated the gathering system as well as the pipeline and wrongly analyzed the heating content of the gas that the Grynberg Parties delivered into the pipeline. QGMC continued and continues QPC's wrongful practices in its operation of the gathering system and in its wrongful analysis of the heating content of the gas the Grynberg Parties delivered into the pipeline system. Grynberg Aff. (R 2353-54); Amended Complaint ¶¶ 10-11 (R 773-74).

34. In 1996, QPC turned over the gathering system to its affiliate, QGMC, but QPC continued to measure gas and analyze it for heating content at the exit point of its pipeline. Rather than use the inaccurate and unrepresentative techniques described in paragraphs 36-62 of the Grynberg Parties' First Amended Complaint, at the exit point of the pipeline, QPC analyzes the heating content of the gas using a calorimeter--a process

in which the gas is actually burned and the total heating content is accurately determined for its own benefit and for the benefit of its affiliates. Grynberg Aff. (R 2353-54); Amended Complaint ¶¶ 32-62 (R 781-95).

35. Notwithstanding that QPC at all times has had the capability of determining the correct heating content and knows the correct heating content of the gas it transports, QPC does not disclose the accurately determined heating content to sellers, such as the Grynberg Parties, and assists its affiliates in carrying out the scheme to wrongly analyze and keep from sellers the actual heating content of the gas delivered to QPC. *Id.*

### **SUMMARY OF ARGUMENT**

On March 8, 2001 the trial court issued its Memorandum Decision in which the court made two sweeping legal conclusions that supposedly justify summary judgment and a dismissal with prejudice of all the Grynberg Parties' claims over the entire time frame embraced by this lawsuit. These legal conclusions are that the "contractual claims are time-barred as a matter of law" and that the "economic loss doctrine bars the plaintiffs' tort claims." Memorandum Decision at 8-9.

This decision to grant summary judgment and dismiss the Grynberg Parties' entire lawsuit with prejudice had to surprise even Questar since its motion attacked only the legal sufficiency of the pleading as to many claims (including a request for a more definite statement); Questar acknowledged that the Grynberg Parties' tort claims are timely at least as to production after September 29, 1995 and September 29, 1996

(depending upon the claim); and Questar argued certain claims must be brought in a different forum. *See* Defendants' Brief in Support of Motion to Dismiss First Amended Complaint ("Defendants' Opening Memo") at 53-71 (arguing the legal sufficiency of certain claims and advocating resolution before FERC), and 87 (acknowledging timeliness); Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss First Amended Complaint ("Defendants' Reply") at 48 ("claims arising after the termination of the contract in July 1994 should be dismissed for failure to state a claim . . . or on the ground of preemption").

Upon receiving the trial court's erroneous summary judgment, Questar attempted to "fill the holes" in the trial court's logic by preparing an order that goes far beyond the Memorandum Decision and contains unquestionable legal errors. The trial court's errors, however, do not end with the holes Questar tried to plug by drafting an overly broad order. The trial court committed error as follows:

**I. THE TRIAL COURT IMPROPERLY DISMISSED ALL OF THE GRYNBERG PARTIES' POST-JULY 1, 1994 CLAIMS WITH PREJUDICE.**

The only basis for the trial court's dismissal of contract claims related to the time period four years prior to the filing of this Complaint is the conclusion that the Contracts terminated on July 1, 1994, as found by Judge Johnson in a related case (*Questar III*). By giving Judge Johnson's interlocutory order preclusive effect, the trial court committed clear error. In addition, to the extent Judge Johnson's date of termination turns out to be

correct, the economic loss doctrine relied upon by the trial court to dismiss the Grynberg Parties' tort claims, by definition, does not apply after July 1, 1994. The trial court erred in applying that doctrine to all tort claims for all periods.

The trial court also erred in issuing alternative rulings that the Grynberg Parties failed to plead claims for conversion, breach of fiduciary duty and third party beneficiary. With respect to conversion, the Grynberg Parties had title to the gas sold as verified in the Amended Complaint and by affidavit. Questar's contrary factual claim is absolutely false. The Grynberg Parties also adequately pled breach of fiduciary duty and third party beneficiary status.

## **II. THE TRIAL COURT IMPROPERLY FAILED TO APPLY THE ONE YEAR SAVINGS STATUTE IN UTAH CODE ANN. § 78-12-40 TO THE GRYNBERG PARTIES' TORT CLAIMS.**

The trial court committed error in failing to give the one year savings statute contained in Utah Code Ann. § 78-12-40 any application to "this case." Instead, the trial Court held that the UCC savings provision contained in Utah Code Ann. § 70A-2-725 applies to "this case." In reality, the UCC savings statute unquestionably has no application to the Grynberg Parties' tort claims. The UCC provision also cannot apply to periods after the parties no longer had a contractual relationship, alleged by Questar to have occurred on July 1, 1994.

Further, under Utah R. Civ. P. 15(c) analysis that is applied for purposes of the savings statute, the Grynberg Parties alleged the same conduct, transaction or occurrence

in *Questar II* that serves as the basis for its claims here. The Grynberg Parties expressly amended their counterclaim in *Questar II* to allege that Questar "paid for gas purchased from [the Grynberg Parties] using incorrect BTU adjustments." The Grynberg Parties were not required to plead the same legal theories in *Questar II*, nor are they precluded from asserting additional and more specific allegations here. Lastly, Judge Johnson never found that the BTU claims had not been pled in *Questar II* and all arguments to the contrary conflict with the Amended Counterclaim, Judge Johnson's express written orders in *Questar II* and admissions by Questar.

### **III. THE GRYNBERG PARTIES' TORT CLAIMS ARE NOT BARRED BY THE ECONOMIC LOSS RULE DURING THE PERIOD OF THE CONTRACTS.**

The district court gave the economic loss doctrine an expansive and unwarranted interpretation. Under Wyoming and Colorado law, the economic loss rule does not bar intentional claims. Second, the negligent misrepresentation claim is not based upon contractual duty, but upon the independent common law duty requiring a party to exercise reasonable care or confidence in obtaining or communicating information on which others rely. Finally, the negligent claim arises from Questar's enhanced duties as a common carrier and as the party in control of measurement operations. Accordingly all of the tort claims are independent of the contract claims and not barred by the economic loss rule.

#### **IV. THE GRYNBERG PARTIES' CONTRACT CLAIMS ARE TIMELY.**

The Grynberg Parties' contract claims are unquestionably timely for all periods four years prior to commencement of this lawsuit. The contract claims for all periods are also timely for three additional reasons. First, the six month savings statute in Utah Code Ann. § 70A-2-725(3) does not "trump" Utah Code Ann. § 78-12-40 and in all events the six month period began on March 20, 2000, the date of the final judgment in *Questar II*. Second, Wyo. Stat. Ann. § 1-3-119 accrues the statute of limitations anew based upon Questar's recent payments. Third, the statute of limitations did not accrue for contract payments of \$7.1 million made in 2000 and 2001 using incorrect BTU analyses until those payments were made.

#### **V. THE TRIAL COURT ERRED IN FAILING TO ADDRESS EQUITABLE TOLLING.**

The trial court erred by failing to address equitable tolling. All factors necessary for application of that doctrine are present.

#### **VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE CONTRACT 219.**

The trial court also erred in granting summary judgment on the Contract 219 claim. Questar presented no evidence on the allegations of fraudulent inducement and consequently the court had no basis to grant summary judgment. Further, the trial court erred in failing to allow the Grynberg Parties to conduct discovery before granting summary judgment.

## ARGUMENT

### **I. THE TRIAL COURT IMPROPERLY DISMISSED ALL OF THE GRYNBERG PARTIES' POST-JULY 1, 1994 CLAIMS WITH PREJUDICE.**

#### **A. The Grynberg Parties Either Have a Contract Claim After July 1, 1994 or the Economic Loss Doctrine Does Not Apply to the Post-July 1, 1994 Tort Claims.**

The trial court's ruling is internally inconsistent. The court erroneously dismissed the Grynberg Parties' post-1994 contract claims on the basis that the Contracts terminated on July 1, 1994 and were otherwise time barred. The court, however, then turned around and dismissed the Grynberg Parties' post-July 1, 1994 tort claims on the basis that the parties had a contract and therefore the economic loss doctrine bars those claims. This internal inconsistency cannot stand.

##### **1. The Post July 1, 1994 Contract Claims Cannot be Dismissed With Prejudice.**

Questar asserts that the Contracts were terminated effective July 1, 1994. The Grynberg Parties contend that these Contracts have not been terminated and this issue is currently being litigated in *Questar III*. The trial court recognized that the grant of partial summary judgment in *Questar III* is an "interlocutory order [that] is non-final and not yet appealable." See S.J. Order ¶ 5 at 3. Despite this recognition, the trial court charged ahead and found that "all" of the Grynberg Parties' contract claims are barred by the four year UCC statute of limitations (*id.*) and the court dismissed the Grynberg Parties'

contract claims "with prejudice" for all periods. *Id.* at 8 ("this action is dismissed in its entirety with prejudice."). The trial court committed clear error.

If the Tenth Circuit (or Judge Johnson upon reconsideration) were to find in *Questar III* that the Contracts were **not** terminated effective July 1, 1994, then Questar's "take or pay" objections continue after July 1, 1994 and its wrongful analysis of BTU relating to such gas production cannot fall prey to a statute of limitations defense--the only legal basis the court used to dismiss these contract claims. There is no justification for dismissing claims for breaches of contract within the four year period prior to the filing of this lawsuit (September 29, 1995 to present). While the Grynberg Parties believe September 25, 1995 is not the cutoff date for contract claims based upon the savings statute, in all events a trial must take place for periods after at least September 25, 1995.

Questar implicitly recognizes as much, having agreed that tort claims related to periods after September 29, 1995 are not barred by a similar four year statute of limitations. *See* Defendants' Opening Memo at 87. By dismissing all contract claims, even those related to periods after September 25, 1995, the trial court gave prejudicial effect to the non-final appealable order of Judge Johnson in *Questar III*, which the trial court clearly could not do. *In Re Pintlar Corp.*, 124 F.3d 1310, 1312 (9th Cir. 1997) (an interlocutory order does not have a preclusive effect in an unrelated action); *see e.g.*

*Searle Brothers v. Searle*, 588 P.2d 689, 690 (Utah 1978) (collateral estoppel requires a final judgment on the merits).

2. *If the Contracts Were Terminated on July 1, 1994 The Economic Loss Doctrine Does Not Apply to the Grynberg Parties' Tort Claims for Negligent or Intentional Misrepresentation, Fraud, Res Ipsa Loquitur and Negligence, and Equity (Injunction, Accounting, Quantum Meruit and Unjust Enrichment).*

Even if the interlocutory order in *Questar III* is upheld, a trial must take place on tort claims for, at a minimum, all periods after September 25, 1995. As noted above, Questar admits that the tort claims are timely at least for periods three or four years prior to the filing of this Complaint. *See* Defendants' Opening Brief at 87. While the Grynberg Parties believe their claims are timely for all periods based upon assertion of BTU claims in *Questar II* (as discussed below), the statute of limitations cannot serve as a basis to deny the Grynberg Parties their day in court.

After acknowledging timeliness, Questar convinced the trial court to enter a ruling that all tort "claims that relate to time periods after July 1994 . . . are barred . . . in their entirety by the economic loss doctrine." S.J. Order, ¶ 15 at 6. This ruling is a misapplication of the economic loss doctrine. The doctrine applies, if at all, only when a contract remedy is available to the party seeking to bring a tort claim. "The economic loss doctrine was developed and designed to protect contract law from being engulfed by the law of products liability." *Northwestern Public Service v. Union Carbide Corp.*, 115 F. Supp. 2d 1164, 1167 (D. S.D. 2000) (citing *East River Steamship Corp. v.*

*Transamerica Delaval, Inc.*, 476 U.S. 858, 866-75, 106 S.Ct. 2295, 2298 (1986)); *see also American Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1190 (Utah 1996) ("When a product does not perform or last as long as the consumer thinks it should, the claim pertains to the quality of the product as measured by the buyer's and user's expectations--expectations which emanate solely from the purchase [contract]. Thus, contract principles resolve issues when the product does not meet the user's expectations").<sup>1</sup> Where no contract exists, the doctrine has no application.

While the Grynberg Parties and Questar have very different views on the scope of the economic loss doctrine as applied to periods when a contract was in place (as discussed below), the doctrine simply cannot apply after the time when Questar asserts all contracts ended (July 1, 1994). Even the highly criticized economic loss case that Questar primarily relies upon, *Huron Tool and Eng'g Co. v. Precision Consulting Serv., Inc.*, 532 N.W.2d 541, 545 (Mich. Ct. App. 1995), does not apply that doctrine to time frames when the parties' relationship is not governed by a contract. *Id.* ("[T]he economic loss doctrine does not apply where there is no contractual relationship between the parties--that is, where the parties have never been in a position to negotiate the economic

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<sup>1</sup>*See generally* S. Tourate, T. Boyd & C. Schoenwatter, Bucking The "Trend:" The Uniform Commercial Code, The Economic Loss Doctrine, And Common Law Causes of Action For Fraud And Misrepresentation, 84 Iowa L. Rev. 875, 884 (Aug. 1999) ("the Economic Loss Doctrine, a judicially created doctrine, emerged as a method used to protect the U.C.C. from circumvention by the emerging area of products liability litigation") [hereinafter "The Economic Loss Doctrine And Common Law Fraud"].

risks themselves.");<sup>2</sup> *see also* *McLeod v. Barker*, 764 So.2d 790, 792 (Fla. Ct. App. 2000) ("the law is clear that the economic loss doctrine does not apply to tort claims where there is no contractual relationship between the parties").

Consequently, this Court must order a trial on the Grynberg Parties' tort claims for negligent or intentional misrepresentation, fraud, *res ipsa loquitur* and negligence and equity (injunction, accounting, quantum meruit and unjust enrichment) for the period after the contracts were terminated and for which Questar admits the claims are timely without regard to the savings statute.<sup>3</sup>

**B. Questar's Alternative Arguments That The Grynberg Parties Failed to Plead Claims for Conversion, Breach of Fiduciary Duty and Third Party Beneficiary Also Fail.**

*1. The Grynberg Parties' Tort Claim For Breach of Fiduciary Duty and Conversion Must Also be Tried.*

The above analysis applies equally to the Grynberg Parties' tort claims for breach of fiduciary duty and conversion. Contrary to the trial court's ruling, the economic loss

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<sup>2</sup>*See generally* The Economic Loss Doctrine and Common Law Fraud, 84 Iowa L. Rev. 875 (Aug. 1999) (discussing *Huron* in detail).

<sup>3</sup>While Questar also challenged the negligent or intentional misrepresentation and fraud claims under Rule 9(b), the trial court rejected Questar's arguments. *See* June 13, 2001 Minute Entry at 1-2 ("The defendants are to omit paragraph 21 of the Revised Proposed Order. The Court did not rely on Rules 8, 12 or 9(b) in its Memorandum Decision.") (R 2754-56) (Addendum Ex. U). Paragraph 21 of Questar's proposed Order, which the trial court rejected, included a statement that "Plaintiffs failed to plead . . . claims [for periods after July 1994] with particularity, as required by Rule 9(b), Utah R. Civ. P., and also failed to meet minimal pleading requirements of Rules 8 and 12 by failing to provide fair notice to each Defendant of the conduct alleged against each of them." *See* R (2801L-T) (Addendum Ex. V).

doctrine cannot preclude such claims for periods after the parties' contractual relationship ended and those claims are admittedly timely after September 29, 1995 and September 25, 1996. *See* Defendants' Opening Brief at 87. Unlike the other tort claims where the court rejected all Questar's alternative arguments for dismissal, the trial court made additional rulings concerning these two claims which are also in error. *See* S.J. Order, ¶¶ 17-18 at 7.

*i. The Grynberg Parties adequately plead conversion.*

In its initial brief Questar did not make its "alternative" argument that the conversion claim fails because the Grynberg Parties supposedly did not plead title to the gas when Questar gathered and transported the gas after July 1994. The Memorandum Decision likewise contains no separate analysis of the conversion claim beyond the improper application of the economic loss doctrine. In Defendants' Reply, however, Questar argued for the first time that "Grynberg **failed to allege** a key element of . . . conversion . . . namely, **that he had title to the gas when it was gathered by QGMC or transported by QPC.**" *See* Defendants' Reply at 56 (emphasis added). Questar's reply argument is unquestionably erroneous because the Grynberg Parties did allege that they were the mineral owners of the gas at all relevant times and that Hunt merely sold their production for their benefit. *See* Amended Complaint at ¶¶ 9, 13 and 23-26. These undisputed facts were verified by affidavit and the Grynberg Parties have never given up

their ownership interest in the minerals. *See* Statement of Facts at ¶¶ 1, 3 and 21-24.<sup>4</sup>

Despite this undisputed evidence of ownership, the trial court signed an order prepared by Questar which states: "Plaintiff's conversion claim should be dismissed on the additional ground that after 1994 Defendants only transported gas owned by parties other than Plaintiffs." *See* S.J. Order, ¶ 18 at 7.

There is absolutely no factual basis for this ruling which was designed to "plug a hole" in the trial court's decision without giving the Grynberg Parties a chance to reply. The only "factual" argument Questar offered to claim that the Grynberg Parties had no "title" to the gas when it was "gathered by QGMC or transported by QPC" was a reference to FERC's alleged "shipper must-have-title" policy for **transportation by QPC**. *See* Defendants' Reply at 56. The first obvious problem with this argument is that once gas gathering operations were transferred to QGMC on May 1, 1996, Questar admits "QGMC measured the quantities of gas" (*id.* at 53) and the FERC policy does not apply to QGMC or prove anything with respect to "title" as of the time of the incorrect BTU analysis by QGMC. More importantly, the standard form "gas gathering agreement" used by QGMC does not require that Hunt have "title," only that Hunt "owns

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<sup>4</sup>As stated in the Amended Complaint, the operating agreement authorized Hunt to sell the Grynberg Parties' gas for the benefit of the Grynberg Parties. In addition, after the Contracts with Questar were allegedly terminated, Hunt and the Grynberg Parties entered into a series of "Marketing Letter Agreements" whereby Hunt was appointed as an agent to sell gas on behalf of the Grynberg Parties but the Grynberg Parties **never** sold their gas to Hunt.

**or otherwise controls** supplies of gas" and the warranty is for "title to **or the right to** deliver and use the gas shipped." *See* Grynberg Ex. 8 at Recital B and ¶ 9 (R 2392) (Addendum Ex. T); *see also* Amended Complaint ¶ 24. In actuality, the gas gathering agreement expressly contemplates that ownership may reside with others because Hunt is required to pay all amounts owed to the "mineral and royalty owners." *Id.* Questar's "title" argument also ignores its admission that an affiliate purchased gas at the wellhead in 1997 before it was ever transported by QPC (*see* Answer to First Amended Complaint and Jury Trial Demand at ¶ 13 (R 862) and Questar concedes this gas "may have been sold for Grynberg's benefit." Defendants' Reply at 48, n.15. In reality, as stated by the Grynberg Parties' affidavit, gas was in fact sold to QETC for the Grynberg's benefit. *See* Statement of Facts ¶ 22.

In addition to the above problems with Questar's factual claim, Questar's "title" argument completely misapplies Wyoming law. In *Ferguson v. Coronado Oil Co.*, 884 P.2d 971 (Wyo. 1994) the defendant argued, similar to Questar, that a right to receive proceeds from an oil field (i.e. a "net profits interest") "is not a property interest but contractual in nature" and therefore that interest cannot be converted. *Id.* at 975. The Wyoming Court first noted that under existing Wyoming law, oil and gas brought to the surface is a property right in "the severed oil and gas and [in the] royalties, arising out of the proceeds from their sale, paid as a money equivalent of the property interest." *Id.* at 975-76 (quoting *Young v. Young*, 709 P.2d 1254, 1257 (Wyo. 1985)). The Court further

held that the net profit interests which entitled the owner to "a share of the proceeds from production in the oil and gas field" is "similar to a non-participatory royalty interest" and as such could be the subject of a conversion claim. *Id.* at 976. The Court further recognized that it is "an old and well established legal principle" that "money may be the subject of a conversion action." *Id.* at 978.

In short, Questar's "shipper must-have-title" argument proves nothing factually with respect to title and, more fundamentally, the Grynberg Parties, as the undisputed owners of the mineral interests, have continuing property interests in the gas and in its proceeds which QGMC fraudulently and intentionally converted. Consequently, the Grynberg Parties have unquestionably stated a claim for conversion under Wyoming law.

ii. *The Grynberg Parties adequately plead breach of fiduciary duty.*

Questar's alternative attack upon the breach of fiduciary duty claim concerned whether the Grynberg Parties **adequately pled** the existence of a fiduciary duty. *See* Defendants' Opening Memo at 79-82 ("Grynberg Fails to Plead Facts Sufficient for Recognition of a Fiduciary Duty"). Questar offered no specific facts to support its legal arguments and, as described in more detail below, the trial court cut off the Grynberg Parties from doing **any** discovery. Consequently, the trial court could not properly cross the line from Utah R. Civ. P. 12(b)(6) to Rule 56, without first informing the Grynberg Parties that it was going to go beyond the legal arguments made by Questar and without giving the Grynberg Parties an opportunity to conduct discovery. *See* Utah R. Civ. P.

12(b)(6) ("all parties **shall** be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56) (emphasis added). Moreover, the existence of a fiduciary duty is a question of fact for the jury.<sup>5</sup>

Further, because Questar attacked only the adequacy of the pleading, the trial court was required to assume as true all facts in the Grynberg Parties' Amended Complaint and view them in the light most favorable to the Grynberg Parties. *See Munteer v. Utah Power & Light*, 823 P.2d 1055, 1058 (Utah 1991). The trial court was also required to make all reasonable inferences in favor of the Grynberg Parties and the Amended Complaint had to be construed liberally. *Id.* In light of these standards, the Grynberg Parties clearly plead a claim for breach of fiduciary duty.

The trial court's finding of no fiduciary duty appears to be premised entirely on the claim that Jack Grynberg, who is only one of three Plaintiffs in this case, is knowledgeable about gas production. That conclusion fails for three reasons. First, Questar is a common carrier with heightened duties and responsibilities. *See Tennessee Gas Pipeline Co. v. Urbach*, 750 N.E.2d 52, 54 (N.Y. App. Div. 2001) (after FERC's

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<sup>5</sup>*See Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993) (cert. denied 511 U.S. 1137, 114 S.Ct. 2153 (1994)) ("The existence of the fiduciary relationship is a question of fact for the jury"); *Long v. Greatwest Life & Annuity Ins. Co.*, 957 P.2d 823, 828 (Wyo. 1998) (reversing grant of summary judgment on the basis that there had been no factual development as to fiduciary duty and there existed genuine questions of material fact); *General Bus. Machines v. National Semiconductor Datachecker*, 664 F. Supp. 1422, 1424 (D. Utah 1987) ("whether within these facts a fiduciary relationship was created involves questions of fact which must await further development of the record").

1992 Order 636 "pipelines became common carriers of natural gas"). Courts consistently hold that the common carrier relationship creates a fiduciary duty to the passenger or customer. *Stafford v. Intrav, Inc.*, 841 F. Supp. 284, 286 (E.D. Mo. 1993), *aff'd* 16 F.3d 1228 (8th Cir. 1994); *O'Keefe v. Inca Floats, Inc.*, 1997 WL 703784 at \*4 (N.D. Cal. October 31, 1997); *McDonald v. Railway Exp. Agency, Inc.*, 81 S.E.2d 525, 526 (Ga. Ct. App. 1954). The obligation to transport partakes of "a fiduciary character as to require the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him . . ." *Chicago & E.I.R. Co. v. Collins Produce Co.*, 249 U.S. 186, 193, 39 S.Ct. 189, 190 (1919). Questar served as a common carrier and undertook the task of measuring and analyzing the gas it gathered and transported. As a common carrier, Questar has fiduciary duties which give rise to an independent cause of action.

Second, Questar's fiduciary relationship to the Grynberg Parties is also implied in law because Questar undertook a duty to act for their benefit determining the heating content of the natural gas that is the subject of their relationship. A "fiduciary relationship" exists when one person is under a duty to act for the benefit of another upon matters within the scope of their relationship. *Martinez v. Associates Fin. Serv. Co. of Colo., Inc.*, 891 P.2d 785, 788 (Wyo. 1995); *Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152, 157 (Colo. Ct. App. 1996), *cert denied*, 519 U.S. 1093, 117 S.Ct. 771 (1997); *First Sec. Bank of Utah N.A. v. Banberry Dev.*

*Corp.*, 786 P.2d 1326, 1333 (Utah 1990).<sup>6</sup> A fiduciary duty may arise when one party occupies a superior position relative to another and it may also be based upon professional, business, or personal relationships. *Johnston v. CIGNA Corp.*, 916 P.2d 643, 646 (Colo. Ct. App. 1996). Quite simply, a fiduciary relationship may exist under a variety of circumstances, and "does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Denison State Bank v. Madeira*, 640 P.2d 1235, 1237 (Kan. 1982). The Grynberg Parties have alleged that they placed such trust in Questar pursuant to Questar's commitment to accurately measure the Grynberg Parties' gas.

Lastly, Questar's argument that because one of the parties, Jack Grynberg, "is a sophisticated participant in the field of gas production" Questar was not in a position of superiority over all of the Grynberg Parties is not an issue that can be resolved without a trial. The issue of whether a fiduciary duty exists is a question of fact for the jury. *See supra* note 6.

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<sup>6</sup>Although Wyoming law applies to the Wyoming wells and Colorado law applies to the Colorado wells, no choice of law analysis is necessary because as the above cases recognize, Wyoming, Utah and Colorado recognize that a fiduciary relationship exists when one person has a duty to act primarily for the benefit of another and exercises influence over another.

2. *The Grynberg Parties' Third Party Beneficiary Claims Have Been Properly Plead.*

The trial court's decision to dismiss with prejudice the third party beneficiary claim presents perhaps the best example of the trial court's determination to rid itself of this lawsuit, followed by an attempt to create a rationale. The trial court committed both procedural and substantive errors.

i. *The Grynberg Parties' pleading was upheld and the Court could not properly go beyond the pleading without discovery concerning the involved contracts.*

At the outset, it must be kept in mind that Questar's **only** attack with respect to the third party beneficiary claims was whether the Grynberg Parties had pled the elements of a claim. *See* Defendants' Opening Memo at 54-57. Indeed, on reply, Questar proposed that "[i]n fairness to the Questar defendants and to save the court time and energy in sorting through these confusing claims, Grynberg should be required to re-plead." Questar Reply at 49. The trial court sided with the Grynberg Parties with respect to Questar's attack on the pleading and specifically instructed Questar to omit from its proposed order any "suggestion that the plaintiffs 'failed to purposely plead' [third party beneficiary status]." *See* June 13, 2001 Minute Entry, at ¶ 1 (R 2754-55) (Addendum Ex. U).<sup>7</sup>

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<sup>7</sup>Questar's proposed order, which was rejected, stated that "Plaintiffs failed to properly plead . . . third-party contractual beneficiary status." *See* Defendants' revised Proposed S.J. Order, ¶ 17 at 7 (R 2801G) (Addendum Ex. V).

Remarkably, the trial court nevertheless dismissed the third party beneficiary claim **with prejudice** even though Questar presented **no evidence** and its only challenge was to the sufficiency of the pleading. In fact, in arguing that no third party beneficiary status could exist under the Hunt Contracts, Questar refused to produce for the trial court's review those contracts which are exclusively in its control. Despite this void of evidence and the court's own conclusion that the pleading was sufficient, the trial court dismissed the claim with prejudice without ever reviewing or allowing the Grynberg Parties to review the Hunt Contracts. The trial court did so by entering a finding that the Grynberg Parties "failed to submit facts to support third-party contractual beneficiary status." S.J. Order, ¶ 15 at 6. This "finding" was made notwithstanding Questar's exclusive possession of the evidence--the Hunt Contracts--and the fact that Questar challenged the sufficiency of the pleadings, not the evidence. In *Richards Irrigation Co. v. Karren*, 880 P.2d 6 (Utah Ct. App. 1994), the trial court made this same error, dismissing a third party beneficiary claim at the motion to dismiss stage. The Court of Appeals reversed and held:

To determine whether a party is a third-party beneficiary, the trial court **must** examine the intent of the contracting parties **as evidenced by the contract and surrounding facts and circumstances**. Because the determination of intent is a factual determination, the trial court erred in dismissing this claim as a matter of law under Rule 12(b)(6).

*Id.* at 10 (citations omitted) (emphasis added).<sup>8</sup>

At a minimum, the Grynberg Parties were entitled to have Questar produce the Hunt contracts and to conduct discovery before the court could make factual findings. Utah R. Civ. P. 12(b)(6) mandates that before a motion to dismiss is converted into one under Rule 56 "all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." *Id.* The failure to allow any discovery and to rule on summary judgment when the only argument Questar presented concerned the pleadings is clear error. For example, in *Strand v. Associated Students of the Univ. of Utah*, 561 P.2d 191 (Utah 1977) the trial court granted a motion to dismiss after relying upon documents offered by the defendant outside the pleadings. This Court held that once the trial court decides to treat as a motion to dismiss as one for summary judgment:

the mandatory provision of Rule 12(b) controls, viz., all parties must be given adequate notice and opportunity to submit supporting materials, particularly the party against whom summary judgment is entered.

It is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material. The action of the trial court in denying plaintiff

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<sup>8</sup>See also *Clark v. American Standard, Inc.*, 583 P.2d 618, 620 (Utah 1978) (whether the contracting parties intended plaintiff to be a beneficiary is a question of fact); *Hanley v. Continental Airlines, Inc.*, 687 F. Supp. 533, 536 (D. Colo. 1988) ("the issue of whether a person is an intended third party beneficiary is, at least partially, a question of fact, and, . . . the facts alleged in the complaint must be taken as true for purposes of this motion to dismiss") (applying Colorado law); *Oost-Lievense v. North Am. Consortium*, 969 F. Supp. 874, 878 (S.D.N.Y. 1997) ("[t]he resolution of plaintiff's [third party beneficiary] status is, ultimately, a question of fact for the jury to decide").

the reasonable opportunity to present controverting material violated the mandate of the rule.

*Id.* at 193; *see also Bekins Bar V Ranch v. Utah Farm Prod. Credit Ass'n*, 587 P.2d 151, 152 (Utah 1978).

Not only were Questar's arguments directed only at the pleadings, the trial court refused all discovery. The Grynberg Parties provided the only evidence they need on this point, Questar's standard form agreement, but the actual Hunt Contracts are in Questar's possession, not Grynberg's. The trial court offered no rationale for precluding discovery but based its decision upon an overly broad assertion that the "core issues are centered around the statute of limitations and the legal principle of the economic loss doctrine." *See Memorandum Decision* at 2, n.1. That rationale in no way addresses the third party beneficiary claim and the court's granting of summary judgment must be overturned.

*ii. The Grynberg Parties are third party beneficiaries to the Contracts between Questar and Hunt.*

If this Court is inclined to deal with the substance of the third party beneficiary claim as plead, despite the absence of contracts in the record, it is clear the Grynberg Parties have properly plead that claim based upon the form contract attached to the Grynberg Parties' opposition. *See Grynberg Ex. 9 (Addendum Ex. T)*. In analyzing this form, Questar grossly misstated the law below.

In Colorado and Wyoming, there is a two part test based upon the Restatement (Second) Contracts § 302 (1981) for determining whether one is an intended beneficiary:

(1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must satisfy an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.<sup>9</sup> *Richardson Assoc. v. Lincoln-Devore, Inc.*, 806 P.2d 790, 808 (Wyo. 1991); *Smith v. TCI Communications, Inc.*, 981 P.2d 690, 693 (Colo. Ct. App. 1999). *Winters v. Schulman*, 977 P.2d 1218, 1224 (Utah Ct. App. 1999), *cert denied*, 994 P.2d 1271 (Utah 1999). Moreover, the third party beneficiary does not have to be specifically mentioned in the contract. *Wyoming Machinery Co. v. U.S. Fidelity & Guaranty Co.*, 614 P.2d 716, 720 (Wyo. 1980); *Smith*, 981 P.2d at 693.

The Grynberg Parties own working interests in producing gas wells operated by Hunt. Since the attempted unilateral termination of the Contracts, their gas has been sold to Questar and/or its affiliates pursuant to contracts between Hunt and Questar. The Grynberg Parties do not have copies of these Contracts and notwithstanding that Questar attached several inches of exhibits supporting its motion it completely failed to produce the Hunt Contracts. The Grynberg Parties have copies of the standard form contracts Questar uses. Questar and its affiliates are the only gatherer and the only common carrier pipeline serving the Nitchie Gulch Gas Field. By necessity they gather and transport all

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<sup>9</sup>The law and analysis is the same in Wyoming, Colorado and Utah since all three states have adopted the Restatement (Second) Contracts § 302 and, therefore, no choice of law analysis is necessary.

of the Grynberg Parties' production. In addition to transporting, Questar buys the gas from Hunt, and Questar has agreed to measure the gas volume and analyze the heating content as it enters the gas gathering and pipeline and to accurately report the results to the parties for purposes of payment.

Specifically, Questar promises in the standard form contract to accurately measure the volume and BTU of all gas gathered so that accurate billing and balancing can take place. *See* Grynberg Ex. 8 (Addendum Ex. T) at ¶ 5.1 ("Gas volumes [including BTU determined by QGMC] will be used for billing, balancing and calculation of fuel use"); ¶ 5.5 (BTU is measured under identified standards "with any subsequent amendments or revisions that QGM[C] may adopt.") and ¶¶ 5.11 and 5.12 ("The accuracy of all measuring equipment will be verified by QGM[C] at reasonable intervals. . . . If any measuring equipment is found to be inaccurate, the equipment will be adjusted immediately to measure accurately. . . . [A]ny payments based upon inaccurate measurement will be corrected"). The beneficiaries of Questar's express promises to measure accurately and to correct all payments based upon discovered inaccuracies are identified explicitly in the standard form to include all "mineral and royalty owners." The form **explicitly provides that Hunt will pay all such owners, such as the Grynberg Parties, for the gas purchased according to the measurements and BTU values Questar supplies.** *See id.* at ¶ 9 ("[Hunt] shall have the obligation to make

settlements for all royalties due and payments owed to [Hunt's] mineral and royalty owners.").

The Grynberg Parties thus are identified, by category, as beneficiaries of the Hunt Contracts which is all Wyoming law requires. As stated in *Peters Grazing Ass'n v. Legerski*, 544 P.2d 449 (Wyo. 1975):

Where a person makes a promise to another for the benefit of a third person, such third person may maintain an action thereon even though he is a stranger to the contract and the consideration therefor and had no knowledge of the contract when it was made and was not specifically named therein so long as he is otherwise sufficiently described or designated.

*Id.* at 457. Further, correct payment by Hunt to the Grynberg Parties clearly protects Questar from mineral owners' claims but such payment is entirely dependent upon Questar correctly analyzing BTU, as is recognized in the contract. In short, the Hunt Contracts expressly mandate payment to the Grynberg Parties based upon correct BTU determinations by Questar.

Questar tries to create confusion by arguing that in approximately March 1996 FERC imposed a requirement that gas gathered by QGMC and transferred by QPC be titled in the name of the shipper (Hunt) before being transported by QPC. Defendants' Opening Memo at 56. To the extent Questar's argument can be deciphered, Questar seems to be saying that because QPC did not take title to the gas during certain undefined periods, it could not intend to benefit mineral owners despite the express language in the standard gathering contract that mineral owners will be paid in accordance with the BTU

measurement made by Questar. It should first be noted that Questar's argument is factually inaccurate because Questar has admitted that for at least some period of 1997, QETC did take title to the Grynberg Parties' gas. *See* Answer, ¶ 13 at 4 (R 862); Questar's Reply at 48, n.15.<sup>10</sup> Under Wyoming law, the Grynberg Parties therefore held "an automatically perfected security interest" in the gas sold to QETC and they would thereby be "creditor" beneficiaries of the promise to pay royalty owners. *See* Wyo. Stat. Ann. § 34.1-9-319. The FERC regulation Questar relies upon also has no application to QGMC, the entity that actually gathers the gas and measures BTU under the standard form gathering contract. Lastly, Questar's contention that Hunt, not the Grynberg Parties, owns the gas is factually untrue and directly contrary to Questar's own contract language which notes that Hunt in some circumstances merely "controls" the gas and in such circumstances Hunt must pay all "mineral and royalty owners." *See* Grynberg Ex. 8 at Recital B and ¶ 9 (Addendum Ex. T); *see also* discussion *supra* in Section I.B.1.i.

Most importantly, Questar's argument boils down, in substance, to an assertion that the only type of intended beneficiary recognized in the law is one who would have a direct obligation to the beneficiary, i.e. a "creditor beneficiary." That legal assertion is plainly wrong. There is no legal requirement that QPC (or QGMC) take title to the gas

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<sup>10</sup>Questar feigns ignorance as to who the mineral owner is with respect to such gas but given the years of litigation between the parties and its knowledge of ownership of the involved wells, that claim is clearly without substance. Discovery--which the trial court denied--would easily disprove Questar's feigned ignorance.

or that it owe royalty payments to the Grynberg Parties in order to recognize third party beneficiary status. The Restatement (Second) Contracts § 302 expressly covers parties who owe money to the beneficiary (referred to under the First Restatement of Contracts as "creditor beneficiaries") (*id.* § 302(1)(a)) **and** any other party for whom "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.* § 302(1)(b). By agreeing to measure BTU so that mineral owners can be paid based upon such measurements, there is unquestionably a circumstance demonstrating intent to benefit regardless of whether the beneficiary is a creditor of the promisor.<sup>11</sup>

Questar clearly intended to obtain protection for itself and its affiliates and benefit the Grynberg Parties by insuring that interest owners were correctly paid based upon

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<sup>11</sup>Questar's argument that the promisor had to be a creditor of the beneficiary is refuted by overwhelming authority. For example, when a property owner (as promisee) obtains a promise from his builder (as promisor) to pay all laborers and materials suppliers on a house, intended beneficiary states exists for such laborers and suppliers "whether or not they have power to create liens on the house" and thereby are otherwise creditors of the owner. *See* Restatement (Second) § 302, Illustration 12. Another example (decided prior to adoption of the Restatement (Second) of Contracts) is found in *Peters Grazing Ass'n v. Legerski*, 544 P.2d 494 (Wyo. 1975). In that case, the promisee (an executor of an estate) denied any legal obligation to the plaintiff (a realtor). *Id.* at 453. The executor nevertheless obtained a promise from the buyer of real property (the promisor) to pay a commission to the realtor (the third party beneficiary). The Wyoming Supreme Court held that once the promise to pay is made "it is immaterial whether the promisee is actually indebted . . . at all." *Id.* at 457. The beneficiary (Grynberg) may "sue to enforce such performance even though not named in the contract and not privy to its consideration, and even though the contract works to the advantage of the contracting parties and the purpose in conferring a benefit on third party was a selfish one, benefitting or protecting themselves." *Id.* at 458.

Questar's measurements, which Questar concedes. *See* Defendants' Reply at 57 ("Hunt is . . . agreeing to protect the gatherer [Questar] from any claims by others"). The fact that due to regulatory issues QPC no longer took formal title once the gas entered the pipeline is irrelevant. Although the trial court refused all discovery and the facts and circumstances were never developed below, it is also possible that another Questar entity ended up with ultimate title to some of the Grynberg Parties' gas in addition to the gas purchased by QETC (creating creditor beneficiary status) since QPC transports gas to "the Wasatch front and communities in Wyoming and Idaho" where it is sold by a Questar affiliate. *See* Defendants' Reply at 61. By agreeing to correctly measure the gas and by insuring that the royalty owners were paid, QPC and/or QGMC could thereby protect themselves as well as an affiliated company that ends up as the final purchaser of gas.<sup>12</sup> In short, Questar's arguments with respect to QPC not taking title to the gas are

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<sup>12</sup>Promises that benefit affiliates are not uncommon in third party beneficiary law. *See Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1386 (Utah 1989) (upholding (under the Restatement (Second) Contracts § 302) a third party beneficiary's right to sue shareholders who promised to pay a debt, even though the debt was not an original obligation of those shareholders). The Restatement (Second) Contracts § 302 contains other examples of situations where a promise to pay will be upheld, even if the benefit of such promise runs to an affiliate. For example, illustration 6 reads:

A's son C is indebted to D. With the purpose of assisting C, A secures from B a promise to pay the debt to D. Both C and D are intended beneficiaries under Subsection (1)(b) [of the Restatement (Second) Contracts § 302].

irrelevant in light of the promises to measure and bill for gas correctly and express identification of the mineral owners as beneficiaries of those promises.

## **II. THE TRIAL COURT IMPROPERLY FAILED TO APPLY THE ONE YEAR SAVINGS STATUTE IN UTAH CODE ANN. § 78-12-40 TO THE GRYNBERG PARTIES' TORT CLAIMS.**

The Grynberg Parties' tort and contract claims are based upon Questar's incorrect BTU adjustments of natural gas Questar purchased from the Grynberg Parties. The Grynberg Parties asserted their BTU claims in *Questar II* in 1993. On October 1, 1998 Judge Johnson entered an order of dismissal **without prejudice** related to the Grynberg Parties' BTU claims. *Questar II*, however, was not finally resolved until March 20, 2000 when Judge Johnson entered the *Questar II* Final Judgment. The Grynberg Parties brought this suit on September 29, 1999 alleging BTU claims, under both contract and tort theories, which relate back to the BTU claims asserted in *Questar II*, within the applicable one-year savings statute.<sup>13</sup>

Despite these facts, the trial court determined that the six month savings statute in the Uniform Commercial Code "trumps" the savings statute contained in Utah Code Ann. § 78-12-40 and the former statute applies to this entire "case," including the six non-contract claims. *See* Memorandum Decision at 6; S.J. Order, ¶ 7 at 3. The trial court

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<sup>13</sup>Utah's one-year savings statute provides "[i]f any action is commenced within due time . . . the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the reversal or failure." Utah Code Ann. § 78-12-40.

committed error because even if this Court finds that the UCC savings statute applies to the contract claims, **that statute cannot apply to the Grynberg Parties' six non-contract claims.** In addition, the Grynberg Parties pled the same conduct, transaction or occurrence in *Questar II* that serves as the basis for its tort claims in this case.

**A. Utah Code Ann. § 70A-2-725 Does Not Apply to Grynberg's Non-Tort Claims.**

As argued below, the six month savings period provided in Utah Code Ann. § 70A-2-725(3) does not expire until six months after the entry of the *Questar II* Final Judgment on March 20, 2000 and therefore all contract claims governed by that statute are timely. The UCC savings statute, however, has very limited application. That savings provision is part of a Utah Uniform Commercial Code section which applies only to "[a]n action for breach of any contract for sale." *See* Utah Code Ann. § 70A-2-725(1). The savings provision itself (*id.* § 70A-2-725(3)) applies only to "the same breach" of contract identified in § 70A-2-725(1). This Court has recognized that the statute of limitations in UCC § 2-725 applies only to breach of warranty claims, not independent tort claims. *See Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 17 (Utah 1990). In *Davidson* this Court explained that "§ 2-725 was intended to apply only to cases of breach of contract [as] reflected in the Official Comments [which] define[] consequential damages to include 'injury to person or property proximately resulting from any breach of warranty.'" *Id.* at 17, n.6; *see also Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 340 (Wyo. 1986) (while § 2-725 applies to a claim for breach of warranty,

a separate tort statute of limitations applies to claims for negligence and strict liability); *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168, 176 (Colo. 1987) ("[t]he intended effect of section [UCC 2-725's statute of limitations] . . . is to provide sellers with a definite and uniform starting and termination date for possible warranty liability on a contract of sale"); *Wieser v. Firestone Tire and Rubber Co.*, 596 F. Supp. 1473, 1475 (D. Colo. 1984) (applying Colorado law and holding that UCC 2-725 supplies the statute of limitations for breach of warranty claims but does not apply to tort claims of misrepresentation).

Even the case Questar relies upon for application of the UCC savings provision, *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1106 (Ill. 1998), recognizes that the UCC savings provision applies to only "one subject," while other savings statutes apply "to cases generally." In *Portwood*, the Court held:

Section 13-217 of the Code of Civil Procedure explicitly governs a wide variety of actions, both real and personal. Conversely, UCC Section 2-725(3) governs only actions for breach of contracts for sale.

*Id.* Recognizing this limited scope, the Court in *Portwood* dismissed the action because the only claims asserted were for breach of warranty arising out of a sales contract. *Id.* at 1102; *see also Portwood v. Ford Motor Co.*, 685 N.E.2d 941, 943 (Ill. App. Ct. 1997) ("Plaintiff styled their complaint as a two count action for breach of warranty").

Judge Hanson erred in applying Utah Code Ann. § 70A-2-725(3) **to this entire "case,"** including the Grynberg Parties' six tort claims covering periods both before and

after the Contracts allegedly terminated. The trial court also erred in finding that the Grynberg Parties' tort claims never made the pleadings in *Questar II* as discussed below. See Memorandum at 8, n.4; S.J. Order, ¶¶ 9 and 4.

**B. The Grynberg Parties' BTU Claims in This Action Relate Back to the BTU Claims Asserted in *Questar II*.**

*1. Background Related to the Savings Statute.*

Savings statutes are designed to avoid the forfeiture of a plaintiff's legal rights and reflect an "intent to protect those who, although having filed in good faith and in a timely manner, would suffer a complete loss of relief on the merits because of a procedural defect." *LaBarge Inc. v. Universal Circuits Inc.*, 751 F. Supp. 807, 809 (W.D. Ark. 1990). As a remedial statute, savings provisions are construed liberally in favor of having cases decided on the merits. *Id.*; *Centerre Bank of Kansas City v. Angle*, 976 S.W.2d 608, 616 (Mo. Ct. App. 1998) ("being highly remedial, [the statute] should receive a liberal construction, and except in a case where the facts and circumstances plainly require, should not be interpreted . . . to defeat the beneficent purpose"); *Kinney v. Ohio Dept. of Admin. Serv.*, 507 N.E.2d 402, 405 (Ohio Ct. App. 1986) (savings statute is a remedial statute to be construed liberally and such statutes are "perfectly consistent with the goals statutes of limitations are designed to serve.").

This case presents a compelling case for liberal application of the statute. In *Questar II*, the Grynberg Parties sought to be fully paid for their gas based upon correct application of the three components of payment: price; volume; and BTU (heating

value). As a result of the Tenth Circuit's reinstatement of the jury verdict in *Questar II*, the Grynberg Parties have been compensated at the correct price and volume. With respect to the third fundamental component of payment, BTU, the Grynberg Parties have never received their day in court due to Questar's unwillingness to have that issue tried in *Questar II*. Questar's arguments that the Grynberg Parties did not fully plead BTU in *Questar II* must be viewed as inconsistent with the fundamental public policy of Utah reflected in the savings statute to have disputes decided on the merits.

2. *Application of the Utah Savings Statute to Questar II.*

Once applied, the savings statute ensures timeliness for all the Grynberg Parties' claims for all periods.<sup>14</sup> Where a new action is filed after the expiration of the limitations period, the new action will relate back to an earlier action, for purposes of the Utah savings statute, if the new action is substantially the same as the previous action.

*Hebertson v. Bank One, Utah, N.A.*, 995 P.2d 7, 12 (Utah Ct. App. 1999); *Wilcox v.*

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<sup>14</sup>Questar and the trial court failed to recognize the interplay between the savings statute and the Grynberg Parties' allegations of fraudulent concealment. The Order drafted by Questar concludes that the Grynberg Parties were on notice of incorrect BTU analysis "by no later than early 1995." See S.J. Order, ¶ 6 at 3. While knowledge of Questar's intentional activities has grown greatly, the Grynberg Parties have never argued that they did not discover incorrect BTU analysis during *Questar II*. Discovery of the incorrect BTU adjustment during the pendency of *Questar II* is irrelevant, however, because all the Grynberg Parties' claims relate back to the filing of BTU claims in *Questar II*. Fraudulent concealment is relevant only with respect to claims that would otherwise be untimely as of the date of first filing in *Questar II*. With respect to those early periods, the Grynberg Parties have adequately pled fraudulent concealment and the trial court made no adverse findings of notice during this early time frame. In fact, the trial court upheld the Grynberg Parties' allegations of fraud. See *supra* note 3.

*Geneva Rock Corp.*, 911 P.2d 367, 369 (Utah 1996); *Moffitt v. Barr*, 837 P.2d 572, 575 (Utah Ct. App. 1992) (applying event or transaction test to counterclaim filed in reliance on savings statute). The two actions are substantially the same if they arise out of the same conduct, transaction, or occurrence. *Id.* Utah R. Civ. P. 15(c).<sup>15</sup> Courts in Utah have emphasized that relation back is particularly appropriate where the real parties in interest have been sufficiently alerted to the proceedings. *Hebertson*, 995 P.2d at 12; *Wilcox*, 911 P.2d at 370; *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216-17 (Utah 1984); *Vina v. Jefferson Ins. Co.*, 761 P.2d 581, 586-87 (Utah Ct. App. 1988); *see also* 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane Federal Practice and Procedure § 1497 at 85 (1990) (rationale underlying Rule 15(c) is to allow relation back

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<sup>15</sup>Questar attempts to confuse this standard by suggesting the claims must be "identical," which is a much stricter standard of interpretation than "substantially the same." In doing so, Questar fails to cite a single Utah case holding that a stricter standard is required. More importantly, Questar completely ignores the clear directive of *Hebertson*, that a claim is substantially the same if it arises out of the same conduct, transaction, or occurrence as the issues raised in the original pleading. Utah Courts are not alone in applying Rule 15(c) analysis to savings statutes. *See Centerre Bank of Kansas City v. Angle*, 976 S.W.2d 608, 616 (Mo. Ct. App. 1998) (under the savings statute, as with amendments, the "relevant consideration is whether the pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading") (internal citations and quotations omitted); *Chandler v. Denton*, 741 P.2d 855, 862 (Okla. 1987) (for savings statute purposes the court uses a transactional approach); *Harnett v. Parris*, 1995 WL 550036 (D. Kan. Aug. 9, 1995) (for savings statute purposes the prior complaint "need only give the other side notice of the operative facts, transaction, event or occurrence for which relief is being sought"); *Koerpor & Co., Inc. v. United Int'l, Inc.*, 739 S.W.2d 705, 706 (Mo. 1987) (applying Rule 15(c) same conduct, transaction or occurrence analysis to compare two lawsuits).

where opposing party has been put on notice regarding claim or defense raised by amended pleading) (citations omitted).

Under the Rule 15(c) analysis, whether the two actions involve the same legal theories is irrelevant, as long as the new claims arise out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Utah R. Civ. P. 15(c); *Williams v. Nelson*, 145 P. 39, 40 (Utah 1914) (applying the Utah savings statute and noting that for purposes of evaluating what is pled in the first action the only duty is to plead "operative facts, as distinguished from the evidentiary facts and conclusions [] [and] [t]he pleader is not required to follow any particular form or special theory [] if the facts stated entitle the plaintiff to any relief under the substantive law"). Thus, even if the first action alleges only a breach of contract action, a second action alleging new tort theories will relate back to the original action so long as it satisfies Rule 15(c)'s same conduct, transaction or occurrence test. *See, e.g., C. Corkin & Sons, Inc. v. Tide Water Ass'd Oil Co.*, 20 F.R.D. 402, 404 (D. Mass 1957) (allowing plaintiff to allege common law deceit after originally seeking relief on an oral rental agreement); 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane Federal Practice and Procedure § 1497 at 98 (1990) ("an amendment may set forth a different statute as the basis of the claim, or change a common law claim to a statutory claim or vice-versa, or shift from a contract theory to a tort theory") (citations omitted)<sup>16</sup>.

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<sup>16</sup>*See also Johansen v. E.I. DuPont De Nemours & Co.*, 810 F.2d 1377, 1381 (5th  
(continued...)

The liberal nature of Rule 15(c) analysis is rooted in important public policy set forth in Rule 8. In *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367 (Utah 1996) this Court recognized the connection between Rule 8 and Rule 15(c):

This court has interpreted [Rule 15(c)] consistently with the liberal pleading practices mandated by Rule 8 of the Federal Rules of Civil Procedure. . . . "[T]he fundamental purpose of our liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.'" **"What [the parties] are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required."**

*Id.* at 369 (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) and *Chency v. Rucker*, 381 P.2d 86, 91 (Utah 1963)) (emphasis added).

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<sup>16</sup>(...continued)

Cir. 1987), *cert. denied*, 484 U.S. 849, 108 S. Ct. 148 (1987) (amendment asserting claims predicated on breach of implied and express warranty which arose out of same personal injury accident out of which strict products liability claim asserted in original complaint arose related back to original complaint); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 n.29 (9th Cir. 1982) (amended claim including new theory of fraud was proper because fraud claim and antitrust claim involved same transaction, occurrence, or core of operative facts); *Southern Colo. Prestress Co. v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1342, 1347 (10th Cir. 1978) (new theory related back to date of filing of original complaint where new theory based on same facts and circumstances complained of in original complaint); *Baruah v. Young*, 536 F. Supp. 356, 364 (D. Md. 1982) (additional theories of recovery in amended complaint are proper as long as new claims arise from same transaction, occurrence, or core of operative facts); *Mach v. Pennsylvania R.R. Co.*, 198 F. Supp. 471, 472 (W.D. Pa. 1960) (amended complaint seeking to recover under different legal theory not barred by statute of limitations because new theory arose out of same transaction, occurrence, or core of operative facts).

For purposes of amendments and/or savings statutes, the focus is on notice of a transaction, act or occurrence because under Rule 8(a) there is no need to even specify a legal theory. Rule 8(a) merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Utah R. Civ. P. 8(a). In *Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1992) the Court set out the guiding principles:

Although it is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule, nothing in the Rules of Civil Procedure requires this. To the contrary, the rules discourage it. Complaints should be short and simple, giving the adversary notice while leaving the rest to further documents.

...

[T]he complaint need not identify a legal theory, and specifying an incorrect theory is not fatal.

...

**Complaints in a system of notice pleading initiate the litigation but recede into the background as the case progresses. Later documents, such as the pretrial order under Rule 16(e), refine the claims; briefs and memoranda supply the legal arguments that bridge the gap between facts and judgments.**

*Id.* at 1078 (emphasis added); *Williams v. Nelson*, 145 P. at 40 (the complaint should plead "operative facts, as distinguished from the evidentiary facts and conclusions"); *see also Harmon v. Billings Bench Water Users Ass'n*, 765 F.2d 1464, 1467 (9th Cir. 1992) ("Under Rule 8(a) . . . [a] party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case.") (quoting *American Timber & Trading Co. v. First Nat'l Bank of Or.*, 690 F.2d 781, 786 (9th Cir. 1982)).

Consequently, not only can the pleadings assert different legal theories, additional or more specific allegations will relate back to the original cause of action as well. For example, in *Sherman v. Air Reduction Sales Co.*, 251 F.2d 543 (6th Cir. 1958) a plaintiff filed a complaint alleging negligence based upon a tank's allegedly defective valve and valve seal. After a dismissal of the first lawsuit, the plaintiff filed a new complaint that was "much longer and more elaborate" which specified six new ways that the defendant was allegedly negligent that "were without counterpart in the earlier petition." The court nevertheless found that the lawsuits were substantially the same and gave the savings statute a liberal construction "in order that controversies shall be decided upon important substantive questions rather than upon technicalities of procedure." *Id.* at 546 (internal citations omitted).<sup>17</sup> *Sherman* is similar to this case in that the Grynberg Parties now know and have alleged in detail the specific ways in which Questar incorrectly analyzed BTU. *See* Amended Complaint ¶¶ 36-62. Knowledge of how Questar achieved its wrongful analysis of BTU does not, however, change the essence of what was always

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<sup>17</sup>*See also Madarash v. Long Island Railroad Co.*, 654 F. Supp. 51, 54 (E.D.N.Y. 1987) (applying savings statute and noting that second complaint may contain more particularized facts); *Lind v. Vanguard Offset Printers, Inc.*, 857 F. Supp. 1060, 1068-69 (S.D.N.Y. 1994) (second amended complaint, which included allegations not included in first amended complaint, alleging omissions and misrepresentations, related back to first complaint); *Senger v. Soo Line R.R. Co.*, 493 F. Supp. 143, 145 (D. Minn. 1980) (doctrine of relation back for purposes of statute of limitations will apply when amendment adds more specific factual detail); *Kansas Milling Co. v. N.L.R.B.*, 185 F.2d 413, 416 (10th Cir. 1950) (relation back allowed where amended charge made general allegations more specific).

alleged--that Questar paid Grynberg based on incorrect BTU adjustments. Similarly, amendments increasing the amount claimed in damages or changing a demand for equitable relief to one for legal relief also relate back to the original pleading. *See Hartford Accident & Indem. Co. v. Clegg*, 135 P.2d 919, 922-23 (Utah 1943) (amended complaint which increased a damages claim did not state an entirely different legal obligation from that originally stated).

Taking into account the above law, the Grynberg Parties' claims, which are based upon Questar's incorrect BTU adjustments, are substantially the same as the BTU claims asserted in *Questar II* and arise out of the same conduct, transaction and occurrence as set forth in *Questar II*. During the litigation of *Questar II*, the Grynberg Parties discovered that Questar had been wrongfully determining the heating content of natural gas sold by the Grynberg Parties to Questar. Accordingly, on July 19, 1993, the Grynberg Parties amended their counterclaim, alleging that Questar "paid for gas purchased from [the Grynberg Parties] using incorrect BTU adjustments." Questar Ex. 13, ¶ 14 (R 1605) (Addendum Ex. F). The Grynberg Parties also alleged that "[a]s a result of [Questar's] actions and breaches, the [Grynberg Parties] have been and will be damaged in . . . an amount equal to the difference between the price provided by the agreements and the price actually paid by [Questar]." *Id.* ¶ 15. After incorporating the BTU adjustment claim, the Grynberg Parties alleged that "[Questar] intentionally, culpably and without justification caused injury to the [Grynberg Parties] and their

business and to the [Grynberg Parties'] legally protected property interests and engaged in a bad faith pattern of willful misconduct to injure the [Grynberg Parties]." *See* Questar Ex. 13, ¶ 28. The Grynberg Parties alleged that Questar's acts "were intentional, wilful and wanton, and [Questar] should be held liable for punitive damages to the [Grynberg Parties]." *Id.* ¶ 36. All of these allegations were made in the context of the long-term Contracts for which Questar had started litigation to have the court determine the parties' long-term rights.

Thus, the Grynberg Parties' counterclaim in *Questar II* included claims for breach of contract and tort based upon Questar's incorrect BTU adjustment of the Grynberg Parties' natural gas. The Grynberg Parties' claims in this case arise out of the same conduct, namely, Questar's incorrect BTU adjustments to the value of natural gas for which the Grynberg Parties are paid. Accordingly, the Grynberg Parties' claims in this case arise out of the same conduct, transaction and occurrence as alleged in *Questar II* and, for purposes of the savings statute, relate back to the claims asserted in *Questar II*.

Because the Grynberg Parties' claims in this case arise from the same facts as the claims alleged in *Questar II*, it is inconsequential that the Grynberg Parties have articulated more specific facts, asserted additional legal theories and sought more damages. Most importantly, Questar knew from the Grynberg Parties' original counterclaim, that the Grynberg Parties are seeking to enforce a claim for damages

sustained because of Questar's incorrect BTU adjustment.<sup>18</sup> See *Zagurski v. American Tobacco Co.*, 44 F.R.D. 440, 443-44 (D. Conn. 1967) (defendant had notice from beginning that plaintiff is trying to enforce a claim for damages sustained from smoking cigarettes it manufactured and marketed and therefore it is not unreasonable to require it to anticipate all theories of recovery and prepare its defense accordingly); see also *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 581-82, 65 S. Ct. 421, 424-25 (1945) (whether defendant had notice of issues raised in amended claim is often most important indicator of whether a dismissed action and refiled action are substantially the same).

Ironically, Questar has attempted to use its knowledge of what the Grynberg Parties alleged in *Questar II* to its advantage in this case. In resisting all discovery, Questar argued that discovery is unnecessary because fraudulent concealment is not a credible claim in light of all parties' understanding of the allegations of inaccurate BTU analysis in *Questar II*. Questar told the trial court at an early stage of this case the following:

First, there can be no genuine issue of concealment where the Plaintiffs already sued Questar for breach of contract due to alleged BTU mismeasurement (in their private 1993 lawsuit [*Questar II*]). . .

**It is beyond dispute that claims were not only discovered, but were actually filed, more than four years before the Complaint herein, so that there can be no issue of concealment and the only**

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<sup>18</sup>Questar was well aware of the Grynberg Parties' BTU claims in *Questar II*. In fact, in *Questar II*, Questar filed a motion in limine to exclude evidence on the Grynberg Parties' BTU claims because, according to Questar, the BTU claims were larger than it previously anticipated.

**question is whether the Plaintiffs re-filed within the savings period.**

See Questar's Opposition to Plaintiffs' Application for Default Judgment, Consent to Enlargement of Plaintiffs' Response Time, and Reply in Support of Motion for Protective Order (R 731-41) (emphasis added) (Addendum Ex. W). In light of this admission, it is remarkable that Questar even continues to argue that the BTU claims were not previously alleged in *Questar II*.

3. *Judge Johnson Never Found That no BTU Claim was Alleged in Questar II.*

In the trial court's Memorandum Decision, Judge Hanson put in a footnote his conclusion that relation back did not apply to this case because "the plaintiffs' current BTU claims had never been pled [in *Questar II*]." Memorandum Decision at 8, n.4; see also S.J. Order, ¶¶ 9 and 13. Judge Hanson's observation relies upon Questar's interpretation of an oral comment by Judge Johnson on March 1, 1994 even though such interpretation is directly contrary to Judge Johnson's written orders, the Amended Counterclaim in *Questar II* (Addendum Ex. H) and Questar's own admissions. A review of the facts demonstrates that the Grynberg Parties did plead BTU claims in *Questar II* and Questar's reading of Judge Johnson's off-hand comment cannot change the essential facts.

Shortly before trial in *Questar II*, Questar filed a Motion in Limine seeking to prevent BTU adjustment evidence from being introduced at trial claiming the evidence

did not relate to a claim in the Grynberg pleading. In front of Judge Hanson, Questar argued that Judge Johnson "ruled from the bench that he would grant Questar's Motion in Limine." Judge Johnson, however, did **not** grant Questar's Motion. Instead, Judge Johnson orally announced "that I would construct a **dismissal in this case without prejudice** to allow that action to be separately pled and ruled upon by the Court." (emphasis added). *See* Q. Ex. 8 at 14-15 (Addendum Ex. G). Thereafter, on October 1, 1998, after a four and one-half year delay, Judge Johnson signed a written order **not** granting a Motion in Limine but dismissing the BTU claims **without** prejudice. *See* Q. Ex. 24 at 3 (Addendum Ex. J). This difference, as Questar recognizes, is material. A Motion in Limine excludes evidence. A "dismissal without prejudice" dismisses claims that were included in the pleading for the express purpose of allowing them to be separately litigated. Questar's Motion in Limine was **never** granted.

Questar compounded its error before Judge Hanson by repeatedly claiming that "the BTU claims" had "never made the pleadings." This is a mischaracterization of Judge Johnson's ambiguous oral statement that never made it into his order. Judge Johnson's oral comment follows:

THE COURT: Yes. The final matter that -- well, not final matter -- but another matter that we considered last night, and I indicated a preliminary ruling, and [Questar] had reserved the opportunity to speak to his client concerning that matter, is the assertion of a claim based upon the BTU content of the natural gas over a lengthy period of time. There is now a -- what appears to be a claim, although it is not one that has ever made the pleadings, but is represented in correspondence

at this point between Mr. Walker and Mr. Grynberg, as to what can be litigated in this case -- mainly letters to Mr. Walker from Mr. Grynberg, I think is primarily what I'm seeing -- but anyway, representing that it was agreed that there might be an issue concerning the BTU content. And then there was a motion filed seeking dismissal, I believe, with prejudice, of that claim on the part of the plaintiff.

Questar's attempt to construe Judge Johnson's comments into a **finding** "that the BTU claims had never made the pleadings" reads far more into the judge's cryptic comment than is justified and is inconsistent with his written order. Judge Johnson dismissed the BTU **claims without prejudice**. There is no basis to "dismiss" the BTU claims if they did not "make the pleadings" because there would be nothing to dismiss. Judge Johnson's oral comments are not a ruling or finding and are ambiguous. First, Judge Johnson describes the BTU claims as "the assertion of a claim based upon the BTU content of the natural gas over a lengthy period of time." He then mentions "a claim," without identifying it as a BTU claim, that did not make the pleadings. The reference to "the claim" that did not make the pleadings could just as easily be understood as a claim "as to what can be litigated in this case." *See* lines 8-12 of the transcript of Judge Johnson's oral ruling.

Questar's assertion that Judge Johnson found "the BTU claim" never made the pleadings is inconsistent with the Grynberg Parties' Amended Counterclaim which alleged as follows:

14. [Questar] paid for gas purchased from the [Grynberg Parties'] using incorrect btu adjustments.

And sought damages:

1. . . . in an amount equal to the difference between the price provided by the agreements and the price actually paid . . .

Q. Ex. 13, ¶ 14 and Prayer ¶ 1. It is inconsistent with Judge Johnson's contemporaneous oral statement that he "would construct a **dismissal** in this case without prejudice to allow that action to be separately **pled** and ruled upon by the Court." See Q. Ex. 8, p. 14, ln. 23 - p. 15, ln. 1, and is inconsistent with Judge Johnson's written order made over four years later in which he dismissed "the BTU claims" "**without prejudice**" (emphasis added).

At most, Judge Johnson's comment reflects that the full scope of this claim was not understood when the amended counterclaim was first filed. Through discovery, discussions and additional analysis the BTU adjustment claim was clarified. Before trial in *Questar II*, Questar moved in limine to have the BTU claims excluded and sought an unnamed order precluding them forever. Judge Johnson rejected Questar's demand and instead bifurcated the claim allowing for a new pleading and separate trial. The BTU claims that were included in the dismissed pleading was that Questar used "incorrect BTU adjustments," which are the same claims at issue in this case. The court eventually dismissed the Grynberg Parties' BTU claims without prejudice. The Grynberg Parties filed this action within the one year and therefore the Grynberg Parties' BTU tort claims are timely before this Court under Utah's savings statute.

### **III. THE GRYNBERG PARTIES' TORT CLAIMS ARE NOT BARRED BY THE ECONOMIC LOSS RULE DURING THE PERIOD OF THE CONTRACTS.**

In the First Amended Complaint, the Grynberg Parties have alleged facts arising from the same wrongful BTU adjustment scheme which give rise to seven independent tort claims. As argued above, the economic loss doctrine has no application to the tort claims asserted during periods when Questar argues the parties had no contractual relationship. Moreover, with respect to time frames when the parties did have a contractual relationship, these tort claims are not barred by the economic loss rule for several reasons. First, the economic loss rule does not bar intentional tort claims. Second, the negligent misrepresentation claim is based not upon contractual duty, but upon the independent common law duty requiring a party to exercise reasonable care or competence in obtaining or communicating information on which other parties rely. Finally, the negligence claim arises from Questar's enhanced duties as a common carrier and the operator of the gas gathering system in addition to its contractual duties. Accordingly, all of the tort claims are independent of the contract claims and therefore are not barred by the economic loss rule.

#### **A. The Grynberg Parties' Intentional Tort Claims are not Barred by the Economic Loss Rule.**

The intentional tort claims, conversion, fraud, fraudulent concealment, breach of fiduciary duty and intentional misrepresentation, are not barred by the economic loss rule. It is well settled that the economic loss rule applies only to tort claims based on

negligence, and then only to some negligence claims.<sup>19</sup> See *Town of Alma v. Azco Const. Inc.*, 10 P.3d 1256, 1263-64 (Colo. 2000) (the economic loss rule has no application to fraud, negligent misrepresentation or other claims where tort law imposes an independent duty of care); *Snyder v. Lovercheck*, 992 P.2d 1079, 1087 (Wyo. 1999) (recognizing that fraud is exception to economic loss rule); *American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1190 & n.11 (Utah 1996) (economic loss rule does not apply to intentional torts, e.g., fraud, business disparagement, intentional interference with contract, etc.). Judge Hanson acknowledged that "[f]raud, misrepresentation, and concealment are possible exceptions to the economic loss doctrine" (see S.J. Order at ¶ 6; and Memorandum Decision at 9) but he refused to give effect to these exceptions because he incorrectly found that the tort claims are untimely as a result of his refusal to apply the appropriate savings statute.<sup>20</sup> Consequently, the law of Wyoming, Utah and Colorado (as recognized by Judge Hanson) does not insulate Questar from its intentional

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<sup>19</sup>Although Wyoming law applies to the Contracts and Colorado law applies to the 219 Contract, no choice of law analysis is required because Wyoming, Colorado and Utah law all recognize that the economic loss rule does not apply to intentional torts, such as fraud and conversion.

<sup>20</sup>See *supra* Section II. In addition, to the extent Judge Hanson's rulings can be read to mean that notice of wrongful analysis in 1995 somehow insulated Questar from liability for future intentional torts thereafter committed, that ruling is manifestly wrong. Such a ruling is contrary to Questar's admission that tort claims three or four years prior to this Complaint are timely. See Defendants' Opening Memo at 87; see also *Simons v. Laramie County School Dist. No. One*, 741 P.2d 1116, 1119 (Wyo. 1987) ("[a] cause of action does not accrue until all of the elements . . . are present. If a party seeking relief has not yet been damaged, an action is premature.") (citations omitted).

torts simply because the parties had a contractual relationship. That ruling is consistent with the law in the majority of other jurisdictions. *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866-75, 106 S. Ct. 2295, 2299-2304 (1986) (economic loss rule is majority position that one may not recover economic losses under a theory of non-intentional tort).<sup>21</sup>

The right to pursue recovery for intentional torts committed by one party to a contract, after the contract has been entered into, is recognized in many contexts but the need for such a remedy is paramount when a pipeline company or operator abuses the rights of owners of natural resources. For example, *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023 (Okla. Ct. App. 1983) presents virtually identical facts to those alleged by the Grynberg Parties. In *Dehli Gas* the defendant pipeline company entered into a contract to purchase gas from mineral interest owners and pursuant to the contract agreed to operate the metering equipment that measured the volume of gas purchased. The evidence showed that the pipeline company installed a

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<sup>21</sup>While Questar agrees that the UCC gives special impact to its economic loss arguments, the UCC "does not, and was never intended to, eliminate and restrict common law fraud and misrepresentation claims." *The Economic Loss Doctrine And Common Law Fraud*, 84 Iowa L. Rev. 875, 876 (1999). The UCC expressly provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relevant to . . . fraud, misrepresentation . . . or other validating or invalidating cause shall supplement its provisions." Wyo. Stat. Ann. § 34.1-1-103. "Far from being displaced or limited by the U.C.C., there are several sections within the Code that affirmatively underscore the coexistence of common law fraud rights and remedies." *The Economic Loss Doctrine And Common Law Fraud*, 84 Iowa L. Rev. at 880.

larger orifice in the pipeline than was called for in the contract, resulting in a mismeasurement of the actual gas taken. The interest owners asserted claims for "negligence, res ipsa loquitur, conversion and breach of contract." *Id.* at 1025. The pipeline company argued, as Questar does here, that the interest owners' sole remedy was in contract and therefore punitive damages could not be awarded. The court rejected both arguments, finding that the evidence supported the claim that the pipeline company had "intentionally taken plaintiffs' gas" and therefore the plaintiff could pursue recovery in contract and tort. *Id.* at 1028.

Similarly, in *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308 (10th Cir. 1998) the Tenth Circuit upheld a jury verdict for fraud and deceit (including punitive damages) based upon Conoco's intentional misconduct in paying ten cents per MMBTU less than the contract price. Conoco achieved its fraud by offsetting, without a contract right, certain production-related costs as the purchaser and transporter of the gas. The Tenth Circuit upheld the entire verdict, including punitive damages, holding that although the "parties' relationship basically is contractual . . . the breaching party's acts constitute 'an independent, willful tort.'" *Id.* at 1314 (quoting *Zenith Drilling Corp. v. Internorth, Inc.*, 869 F.2d 560, 565 (10th Cir. 1989)); see also *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 501-02 (S.D. 1997) (upholding jury verdict including punitive damages based upon operator's intentional deceit in making misrepresentations to oil and gas

interest owners that resulted in the interest holders paying excessive nonconsent penalties).<sup>22</sup>

The Wyoming Supreme Court has likewise repeatedly recognized that an owner of oil and gas interests can simultaneously pursue tort recovery for conversion and breach of contract recovery in circumstances where the contracts comprehensively establish the parties' legal relationships. *See Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 542-43 (Wyo. 2000) (royalty owner could recover based upon conversion theory against

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<sup>22</sup>The Eleventh Circuit's decision in *Braswell v. Conagra, Inc.*, 936 F.2d 1169 (11th Cir. 1991) likewise presents analogous facts. In *Braswell*, the defendant contracted with plaintiff to buy broiler chickens and to pay the plaintiff according to the **weight** of the chickens. *Id.* at 1172-74. The defendant **misweighed** the chickens and represented that the false weights were accurate. *Id.* Plaintiff filed suit for breach of contract and fraud. The defendant asserted that it had merely breached the contract to pay the plaintiff based on the weight of the chickens and the facts did not give rise to an independent fraud claim. *Id.* The court rejected the defendant's assertion of the economic loss rule to bar the plaintiff's fraud claim, noting that because of defendant's fraud, the plaintiff accepted lower payments than called for under their contracts. *Id.* at 1173. Accordingly, the court concluded that the trial court properly presented both breach of contract and fraud to the jury. *Id.*; *see also Morrill v. Becton, Dickinson and Co.*, 747 F.2d 1217, 1225 (8th Cir. 1984) (manufacturer intentionally paid inventor less than inventor was entitled under contract and court held inventor's fraud claim not barred by economic loss rule); *Freedman v. Pearlman*, 706 N.Y.S.2d 407, 408 (N.Y.A.D. 2000) (finding plaintiff stated cause of action for fraud sufficiently independent of cause of action for breach of contract based on allegation that defendants deliberately concealed and undercounted share of income plaintiff was entitled to by contract); *Pershing Indus., Inc. v. Estate of Sanz*, 740 So.2d 1246, 1248 (Fla. Dist. Ct. App. 1999) (plaintiff's conversion claim is independent tort that falls outside scope of breach of contract claim and is not barred by economic loss rule); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1273-75 (M.D. Pa. 1990) (claim for intentional misrepresentation not barred by economic loss rule); *Douglas-Hanson Co. v. BF Goodrich Co.*, 598 N.W.2d 262, 265 (Wis. Ct. App. 1999), *aff'd* 607 N.W.2d 621 (Wis. 2000) (same); *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 452 (Ill. 1982) (same).

owner of leasehold with whom party had contract); *ANR Prod. Co. v. Kerr-McGee Corp.*, 893 P.2d 698, 701 and 704 (Wyo. 1995) (operator could sue nonoperating working interest owner for conversion based upon nonoperator's activities that drained area of hydrocarbons in breach of unit agreement); *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 977 (Wyo. 1994) (non-operator with net profits interest under a contract could sue operator for conversion); and *Young v. Young*, 709 P.2d 1254, 1257 (Wyo. 1985) (ex-wife who obtained royalty interest pursuant to divorce decree could sue ex-husband for conversion). The rationale for recognizing tort recovery is that while the contract places the parties into their relationship, the intentional tort is independent even if the acts occur after the contract is signed:

Where the transaction complained of has its origin in a contract which places the parties in such a relation that in attempting to perform the promised service the tort was committed, the breach of contract is not the gravamen of the action. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action *ex delicto*, and not an action *ex contractu*.

*Ferguson*, 884 P.2d at 978 (quoting 17A Am.Jur.2d Contract §732 (1991)).

The reason the economic loss rule does not apply to intentional torts is because the common law creates an obligation not to cheat people by fraudulent means, and this obligation exists independent of any contract. The duty not to lie, deceive or take another's property is outside the contract and is within "that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person,

and refrain from invading them by force or fraud." *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 501 (S.D. 1997) (citing *Smith v. Weber*, 16 N.W.2d 537, 538 (S.D. 1944)). The majority of courts recognize that a contrary rule would encourage and condone fraudulent behavior. *See Brody v. Bock*, 897 P.2d 769, 776 (Colo. 1995) (barring plaintiff's fraud claim because it is based on substance of contract claim would encourage and condone fraudulent behavior). If intentional torts were not carved out of the economic loss rule, a defrauding defendant would have everything to gain and nothing to lose. If the defendant is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest benefits. If he is caught, he has only to pay back that which he should have paid in the first place. As the North Carolina Supreme Court recognized, such a rule would give a party to a contract a license to steal and defraud with nothing to lose but to require the defendant to pay that which the contract required him to pay in the first place. *Oestreicher v. American Nat'l Stores, Inc.*, 225 S.E.2d 797, 809 (N.C. 1976).

Questar cites cases which are immediately distinguishable by the simple fact that they all deal solely with a claim for negligence arising out of the parties' contractual relationship. For example, Questar relies on *Schuler v. Community First Nat'l Bank*, 999 P.2d 1303, 1304-05 (Wyo. 2000) to support its argument that there is no independent basis for the Grynberg Parties' tort claims. However, *Schuler* deals only with a claim of negligence. Moreover, in *Schuler*, the plaintiff admits that the defendant's duty "arose in the contractual relationship." Questar's other primary cases are distinguishable on the

same ground. See *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd.*, 929 P.2d 1228, 1233 (Wyo. 1996) (only tort claims asserted were negligence and negligent misrepresentation); *Brubaker v. Glenrock Lodge Int'l Order of Odd Fellows*, 526 P.2d 52, 58 (Wyo. 1974) (only tort claim asserted was negligence).

Questar also cites *Waters v. Trenckmann*, 503 P.2d 1187 (Wyo. 1972) for the proposition that once the parties enter into a contract governed by Wyoming law the parties have no remedies outside of contract no matter how egregious an intentional fraud. Questar's "license to steal" argument is not supported by *Waters* or by any public policy of Wyoming. In *Waters* the Wyoming Supreme Court did **not** refer to or apply the economic loss doctrine. In *Waters* the Court simply reversed a jury verdict awarding punitive damages because the plaintiff failed to present anything "in the record to indicate the jury found Waters guilty of fraud." *Id.* at 1190. While the plaintiff claimed misrepresentations were made to induce the purchase of a ranch, the Court found that the record showed no fraud, only that the plaintiffs overextended themselves by making a down payment they couldn't afford. *Id.* The Court's holding is simply that absent "fraud," or evidence of "spite, ill will or willful or wanton misconduct," punitive damages are inappropriate. *Id.* 1190-91. The Court's dicta that "[t]he remedy for wrongful acts occurring afterwards would be compensatory damages for breach of contract" must be read in context. The **only** fraud alleged in *Waters* related to inducement to enter the contract and consequently all other complaints made by the

plaintiff in that case (i.e. alleged breaches of contract and warranty) were contractual in nature since the misrepresentations occurred previously.

Moreover, according to Questar's reading of *Waters*, contract and tort claims can never co-exist in Wyoming, even if the separate elements of contract and tort law are found to exist. Case law subsequent to *Waters* and *Waters* itself demonstrates that such a reading is incorrect. For example, in *Arnold v. Mountain West Farm Bureau Mutual Ins. Co., Inc.*, 707 P.2d 161, 164 (Wyo. 1985) the Wyoming Supreme Court stated:

Punitive damages are generally not recoverable in an action upon a contract . . . [but] may be recoverable in an action in tort if the conduct constituting the breach rises to the level of an independent tort.

*Id.* at 164. In *Reynolds v. Tice*, 595 P.2d 1318 (Wyo. 1979) the Wyoming Supreme Court recognized that a fraud claim and a contract claim can co-exist even if based upon "the same alleged misrepresentations [because] [t]he elements of the two claims are different." *Id.* at 1322. As discussed above, the Wyoming Supreme Court has repeatedly held that an owner of natural resources can pursue recovery for conversion and breach of contract even though the parties' relationship springs from a contract. *See Amoco*, 2 P.3d at 542-43; *ANR*, 893 P.2d at 701 and 704; and *Ferguson*, 884 P.2d at 977. In *Waters* itself the Wyoming Supreme Court "call[ed] attention" to and relied upon *Continental Nat'l Bank v. Evans*, 489 P.2d 15, 19 (Ariz. 1971) wherein a conversion and breach of contract claim were both submitted to a jury. *See Waters*, 503 P.2d at 1191. The *Waters* Court acknowledged that while a plaintiff can pursue recovery for both conversion and

breach of contract, punitive damages can be awarded only if the evidence demonstrates "ill will or willful and wanton misconduct." *Id.*

In this case, the intentional tort claims are not barred by the economic loss rule as a matter of law. Questar had duties to the Grynberg Parties that arose outside the contractual obligation, namely, the legal duty not to misrepresent, defraud or convert other's property. Questar did not have free reign to defraud merely because Questar also had a contract. Thus, the Grynberg Parties have alleged facts demonstrating that Questar is liable for conversion, fraud, fraudulent concealment, breach of fiduciary duty and intentional misrepresentation and these claims are not barred by the economic loss rule.

**B. The Grynberg Parties' Negligent Misrepresentation Claim is not Barred by the Economic Loss Rule.**

The Grynberg Parties' negligent misrepresentation claim is also independent from their contract claims and is not barred by the economic loss rule. A negligent misrepresentation claim based on principles of tort law, independent of any principle of contract law, is available to a party to a contract. *Brubaker*, 526 P.2d at 58; *Town of Alma*, 10 P.2d at 1263; *see also PK Ventures, Inc. v. Raymond James & Assoc.*, 690 So.2d 1296 (Fla. 1997) (economic loss rule does not eliminate claims for negligent misrepresentation); *State by Bronster v. U.S. Steel Corp.*, 919 P.2d 294 (Haw. 1996) (same); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 714441 (E.D. La. Dec. 4, 1995) (same).

For example, in *Town of Alma*, the Colorado Supreme Court recognized that "negligent misrepresentation is a tort claim based 'not on principles of contractual obligation but on principles of duty and reasonable conduct.'" 10 P.3d at 1263 (quoting *Keller v. A.O. Smith Harrestone Prods., Inc.*, 819 P.2d 69, 73 (Colo. 1991)). Since this duty is "*independent* of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule." *Id.* (emphasis in original).

In this case, the Grynberg Parties have alleged that Questar negligently (or intentionally) "misrepresented the gas measurements and wrongful analysis to Plaintiffs in each payment and statement of heat content and, negligently or intentionally, concealed the mismeasurement from Plaintiffs." Thus undervaluing each monthly payment for each gas well. First Amended Complaint, ¶ 82. The Grynberg Parties' negligent misrepresentation claim is based upon the independent common law duty requiring Questar to exercise reasonable care and competence in measuring and providing accurate and truthful payments and statements of heating content to sellers and shippers upon which they rely. *See also Grynberg, et al. v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 501 (S.D. 1997) (duty not to lie and duty not to misrepresent facts with intent to deceive another person are duties imposed by the common law whether or not a contract exists).

**C. The Grynberg Parties' Negligence Claim is not Barred by the Economic Loss Rule.**

The Grynberg Parties' negligence claim is also independent of the parties' contractual relationship and arises from Questar's enhanced duties to the Grynberg Parties as a common carrier and based upon the special nature of Questar's responsibilities to the Grynberg Parties to faithfully measure their gas. It is well established in Wyoming that a contract may create a relationship from which arises the duty to exercise proper care and acts and omissions in performance may give rise to a tort liability. *Brubaker*, 526 P.2d at 58. In *Town of Alma* the Colorado Supreme Court likewise recognized "that some special relationships by their nature automatically trigger an independent duty of care that supports a tort action even when the parties have entered into a contractual relationship." 10 P.3d at 1263. Examples include relationships of a "quasi-fiduciary nature." *Id.*

In this case, Questar's duty arises out of an independent, non-contractual duty imposed upon Questar as a common carrier and as the party with the responsibility to gather, measure and transport gas from the Nitchie Gulch area. Questar's duties are fiduciary in nature given that it is in a superior position to assure the accuracy of its measurement technologies and equipment. *See supra* Section I.B.1.ii. As a common carrier, Questar also owes enhanced duties of care. *See New York Cent. R.R. Co. v.*

*Lockwood*, 84 U.S. 357, 377, 21 L.Ed. 627 (1873) (common carriers owe the utmost care and diligence in the performance of their duties).<sup>23</sup>

In addition, courts have long recognized the "special relationship" that exists between operators of oil and gas wells and the interest owners upon whose behalf the minerals are extracted, gathered and transported. See E. Kuntz, A Treatise on the Law of Oil and Gas, § 59.1 at 105-06 (1991) (an operator has a "duty of diligent and proper operation [that] is a broad duty to perform operations such as the testing . . . of wells" and this duty applies to "the manner in which all operations must be conducted.") (hereinafter "Kuntz"); P. Martin & B. Kramer, Williams & Meyers Oil & Gas Law, § 861.1 at 425 (2000) ("It is generally agreed that the lessee must conduct operations on the leasehold with due care") (hereinafter "Williams & Meyers"). The obligation exists because of the inherent conflict of interest that exists between mineral owners and the operators who extract, gather and transport the owners' gas. Kuntz § 59.1 at 105.

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<sup>23</sup>Without regard to FERC orders, Questar is a common carrier. A common carrier is one who, "by virtue of his business or calling or holding out, undertakes for compensating to transport persons or property, or both, from one place to another for all such as may choose to employ him." *State v. Nelson*, 238 P. 237, 239 (Utah 1925). During the period Questar transported the Grynberg Parties' gas both in its gathering system and in its pipeline, it was transporting a product owned by others. At all times it undertook the obligation to accurately measure volumes and determine heating content. Moreover, whether business conducted by a pipeline company is actually that of a common carrier is a question of fact and, therefore, not the appropriate subject of a motion to dismiss or motion for summary judgment. *China-Nome Gas Co., Inc. v. Riddle*, 541 S.W.2d 905, 908 (Tex. App. 1976).

While Questar did not extract the minerals in the Nitchie Gulch unit, it did act as the gathering and transporting operator at all relevant times. Consequently, when Questar measured the gas it purchased as the gathering systems operator, it had a clear conflict of interest giving rise to a "prudent operator standard." See Williams & Meyers, § 861.1 at 427 (citing *Woods Petroleum Corp. v. Delhi Pipeline Corp.*, 700 P.2d 1023 (Okla. App. 1983)).<sup>24</sup> Questar's product operator duty is separate from and in addition to the parties' contractual duties. See Kuntz, § 59.1 at 106; Williams & Meyers, § 861.1 at 425. This "special relationship" duty of care is precisely the type of independent duty that does not give way to the economic loss doctrine. See, e.g., *Town of Alma*, 10 P.3d at 1263 (listing examples).

In *Woods Petroleum* the Court applied these established principles to a pipeline company within indistinguishable facts. The Court found that when a pipeline company assumes responsibility to measure and transport the gas it purchases, this type of contract creates a special "common law duty" to "measure the gas . . . with care, skill, reasonable expediency and **faithfulness**." 700 P.2d at 1027. When failing to do so, the pipeline company "breach[es] the contract and also commit[s] a tort." *Id.* Accordingly, the Grynberg Parties have stated a negligence claim not barred by the economic loss rule.

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<sup>24</sup>The Grynberg Parties' acknowledge that Questar did not purchase gas for all periods. When it did not purchase, however, it unquestionably served as a common carrier. Moreover, even when Questar stopped purchasing, it had a large incentive to conceal its prior fraud by continuing its established techniques used to incorrectly analyze BTU.

#### IV. THE GRYNBERG PARTIES' CONTRACT CLAIMS ARE TIMELY.

As argued above, the Grynberg Parties' contract claims are unquestionably timely for all periods four years prior to the commencement of this lawsuit, assuming that the contracts continued in force after July 1, 1994. That issue will be resolved in *Questar III*. In addition, the Grynberg Parties' other contract claims are timely for the following reasons: (a) the six month savings statute in Utah Code Ann. § 70A-2-725(3) does not "trump" Utah Code Ann. § 78-12-40 and in all events the six month period began on March 20, 2000 when the *Questar II* Final Judgment was entered making all contract claims timely; (b) pursuant to Wyo. Stat. Ann. § 1-3-119 Questar's payments accrue the statute of limitations anew; and (c) the statute of limitations did not accrue for contract payments of \$7.1 million made in 2000 and 2001 using incorrect BTU adjustments until those payments were made.

##### A. UCC's Six Month Savings Statute Does not Bar the Grynberg Parties' Contract Claims.

Questar argues that instead of the one-year savings statute, Utah's six-month UCC savings clause should apply and bar all the Grynberg Parties' tort and contract claims. As argued above, the UCC savings provision does not apply to the Grynberg Parties' tort claims. Moreover, as demonstrated below, the UCC savings clause is not a bar for three reasons. First, Utah's UCC savings clause does not apply because it only revives an entire **action** that is dismissed. Instead, because the Grynberg Parties are reviving only an individual claim or specific cause of action instead of an entire lawsuit, the one-year

savings statute is applicable. Second, when two statutes of limitations potentially apply, courts should apply the longer statute of limitation. Third, even if applied, the six month period did not start until entry of the *Questar II* Final Judgment on March 20, 2000 and all claims were timely filed.

1. *The Utah UCC Savings Statute Does Not Apply to the Dismissed BTU Claim.*

The Utah UCC savings clause does not apply to the BTU claims, therefore, the one-year savings statute applies. In interpreting these two statutes, the court is guided by certain rules of statutory construction. First, the primary rule guiding statutory interpretations is that the court "give effect to the intent of the legislature." *Johnson v. Redevelopment Agency of Salt Lake County*, 913 P.2d 723, 727 (Utah 1996). To discover that intent, courts "first look to the plain language of the statute." *Id.* Finally, courts "presume that the Legislature used each word advisedly, and [courts] give effect to each term according to its ordinary and accepted meaning." *Utah State Bar v. Summerhayes & Hayden*, 905 P.2d 867, 871 (Utah 1995). Therefore, the plain language of both the UCC and the general one-year savings statutes are analyzed to show that only the one-year savings statute is applicable.

The UCC savings clause only applies to revive an action, or lawsuit that is dismissed, but by its terms does not apply to revive single dismissed claims, like the BTU claims. The Utah UCC savings statute provides, "Where **an action commenced . . . is so terminated** as to leave available a remedy by another action for the same breach such

other action may be commenced after the expiration of the time limited and within six months after the termination of the first action." Utah Code Ann. § 70A-2-725(3) (emphasis added). The use of the word "action" in the UCC statute means that the entire lawsuit would have to be dismissed before the statutory period would begin to run. *See* Utah Code Ann. § 70A-1-201(1) ("'action' in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are determined"); Black's Law Dictionary 28 (6th ed. 1990) ("term [action] in its usual sense means a lawsuit brought in a court"). In the instant case, however, only one claim was dismissed, and not an entire action.

In contrast, the Utah general one-year savings statute provides, "If any action is commenced within due time and . . . the plaintiff fails in **such action or upon a cause of action** otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the reversal or failure." Utah Code Ann. § 78-12-40 (emphasis added). Reading these clauses together, it is clear that the one-year savings statute is not limited to reviving only actions that are dismissed, but also to any individual claim that is dismissed. Because the UCC six-month savings clause does not apply to revive an individual claim that is dismissed, it does not apply and the one-year savings statute was properly applied to revive this individual claim.

2. *The Longer One-year Savings Statute Should be Applied, Over the Six-month Savings Clause, if the Court Finds That There is any Doubt as to the Application of Either Statute of Limitations.*

In any event, the wording of the one-year savings statute and the six-month savings clause creates confusion and doubt, and the longer one-year savings statute should therefore apply. When faced with two different statutes of limitation which can both be applied, any "doubt should be resolved in favor of the application of the statute containing the longest limitation." *Cathco v. Valentiner Crane Brunjies Onyon Architects*, 944 P.2d 365, 369 (Utah 1997); *Hardinge Co. v. Eimco Corp.*, 1 Utah 2d 320, 323, 266 P.2d 494, 496 (1954); *see also* 51 Am. Jur. 2d Limitations of Actions § 63 (1970). Therefore, the doubt as to which savings statute should apply should be resolved by applying the longer one-year savings statute.<sup>25</sup>

3. *The Six-Month Period Began on March 20, 2000.*

The UCC savings statute states that the period to refile a previously commenced action ends "six months after the **termination** of the first **action**." Utah Code Ann. § 70A-2-725(3). In this case, *Questar II* was not terminated until March 20, 2000 when

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<sup>25</sup>Questar argues that the UCC savings clause is a mandatory requirement that precludes the application of the one-year savings statute. Yet the savings clause only states that a party **may** refile its claim within six months after termination of its first action. *See* Utah Code Ann. § 70A-2-725(c) (1999). Within the UCC statute of limitations, the only mandatory portion is the requirement that breach of a sales contract actions must be filed within four (4) years. *See* Utah Code Ann. § 70A-2-725(a) (1999). Therefore, even if there is ambiguity between the applicability of both statutes of limitations, the non-mandatory, six-month savings clause should yield, and the one-year savings statute should be applied.

Judge Johnson entered the *Questar II* Final Judgment. Consequently, all contract claims asserted in *Questar II* could be refiled at any time prior to September 21, 2000. By refiling the contract claims on September 29, 1999--almost a year **earlier**--those claims were clearly asserted in time.

Despite these straightforward facts, Questar argued, and the trial court found, that the six month period referenced in Utah Code Ann. § 70A-2-725(3) began to run on October 1, 1998 when in *Questar II* "related **claims** terminated . . . with no appeal of relevant **claims**." See S.J. Order ¶ 8 (emphasis added). By selecting October 1, 1998, rather than March 20, 2000, as the date that the *Questar II* "action" was finally "terminated," the trial court committed error.

In *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988) this Court was called upon to determine whether the period provided in a savings statute runs from the date of the trial court's order or from the time that the first lawsuit is finally resolved by the appellate courts. This Court held that it would defeat a fundamental purpose of the savings statute to find that the time for recommencing an action runs from any date other than final resolution by a court of appeals. This Court stated:

One purpose of section 78-12-40 is to assure that claimants are not deprived of potentially valid suits by appeals that are not resolved until after the applicable periods of limitation run. In accordance with that purpose, we have held that if dismissal of the first action is appealed, section 78-12-40's extension of time for filing a second action runs from the date of the dismissal's affirmance.

*Id.* at 254 (citing *Guthiel v. Gilmer*, 27 Utah 496, 508, 76 P. 628, 632 (1904)). While *Madsen* dealt with the general savings statute rather than the UCC savings statute, the underlying rationale is the same. The UCC savings period begins when the "action" "terminates," (Utah Code Ann. § 70A-2-725(3)) and the period in the general savings statute begins when the "action" or "cause of action" "fails." Utah Code Ann. § 78-12-40.

In this case, Judge Johnson's interlocutory dismissal of the BTU claims on October 1, 1998 neither terminated *Questar II*, nor resulted in a failure of that action. While the Order of Dismissal did facilitate Rule 54(b) certification of issues that had been tried to the jury, it clearly did not result in a "termination" of any "action." Moreover, this Court in *Madsen* recognized the important policies behind interpreting the savings statute in a way where a party is not forced to choose between filing a second lawsuit or pursuing an appeal. This decision is in accord with the opinion of an overwhelming majority of courts interpreting savings statutes. *See Grider v. USX Corp.*, 847 P.2d 779, 784 (Okla. 1993) ("an overwhelming majority of jurisdictions agree with Kansas and the Tenth Circuit that the time of commencement of the savings provisions is the date the judgment is decided on appeal, not the date of determination in the trial court"); *Hollister v. Forsythe*, 889 P.2d 1205, 1208 (Mont. 1995) ("use of the word

'termination' refers to the ultimate termination which occurs after final appellate action").<sup>26</sup>

The Montana Supreme Court's analysis is particularly important because the Court recognized that "use of the word 'termination' [within a savings statute] refers to the ultimate termination which occurs after final appellate action." *Hollister*, 889 P.2d at 1207; *see also Buchholz v. United States Fire Ins. Co.*, 269 A.D. 49, 50 (N.Y. App. Div. 1945) ("termination [for savings statute purposes] was the decision of the court of appeals (or entry of judgment on remittitur) in the earlier action"); and *Glass v. Basin & Bay State Mining Co.*, 85 P. 746, 747 (Mont. 1906) ("termination" of a former action for savings statute purposes occurs upon affirmation on appeal).

The trial court apparently based its determination that October 1, 1998 was the relevant date upon the assertion that there was "no appeal of relevant **claims**." *See* S.J. Order, ¶ 8 at 4. The fact that Judge Johnson entered an order dismissing the BTU claims

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<sup>26</sup>*See also Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964) ("it has been held in an overwhelming majority of cases that the time limited for the recommencement of an action is to be measured from the date of the affirmance on appeal of a judgment or decision"); *Adams v. Sullivan*, 261 A.2d 273, 275 (N.H. 1970) (agreeing with "overwhelming majority of cases" that savings statute should begin to run from the date of affirmance on appeal); *Ockerman v. Wise*, 274 S.W.2d 385, 387 (Ky. Ct. App. 1955) (for savings statute purposes the relevant period runs from the appellate court's ruling if there is an appeal); *Seaboard Air Line Ry. v. Randolph*, 55 S.E. 47, 50 (Ga. 1906) (the ruling of the statute is suspended during the pendency of a valid writ of error); *Patridge v. Lott*, 15 Mich. 251 (Mich. 1867) (time for further suit ran from dismissal of appeal); *New v. Smith*, 119 P. 380, 382 (Kan. 1911) (plaintiff had one year from affirmation of dismissal on appeal to file a new action).

without prejudice at the same time he provisionally granted a new trial and certified for appeal certain claims, is irrelevant since the period in the savings statute runs from the date of "termination of the first **action**." See Utah Code Ann. § 70A-2-725(3). In *Grider* the Supreme Court of Oklahoma rejected the same argument Questar now makes. In *Grider*, the plaintiff filed a claim in federal court asserting a RICO claim and pendant state law claims. The federal court dismissed the RICO claim on substantive grounds and because the federal claim was dismissed, the pendant state law claims were also dismissed. The Tenth Circuit affirmed the trial court's dismissal and thereafter the U.S. Supreme Court denied *certiorari*. The defendants in *Grider* argued that because the plaintiff did not appeal the dismissal of the pendant state law claims, the savings statute began to run from the date of the trial court's dismissal of those "claims," rather than from the date that the U.S. Supreme Court denied *certiorari* and the "action" terminated.

The Oklahoma Supreme Court held that the state and federal claims would be treated the same and the operative date was when the U.S. Supreme Court denied *certiorari*, refusing to hear the merits related to dismissal of the RICO claim. *Grider*, 847 P.2d at 784-85. The Court stated that "[t]he key to understanding [the savings statute] is the word 'action.' We hold that an 'action' includes the initial judgment and any validly filed appeals that suspend the finality of the judgment." *Id.* at 784 (emphasis added). The Court further rejected all arguments that the state law claims had been abandoned noting that the plaintiff's "entire cause of action was based on the series

of transactions in which he was allegedly deprived of proceeds from oil operations." *Id.* at 785.

Grynberg's BTU claims likewise cannot be treated any differently from the remainder of their "action."<sup>27</sup> This is especially true since savings statutes are remedial and are to be construed liberally in favor of having claims decided on the merits. *See supra* Section III.B.1. The trial court's reading of "action" is contrary to the statutory language and it violates the remedial nature of savings provisions by placing the Grynberg Parties in the position of having to foresee that the trial court would read "action" to mean "claim" within the uniquely complex procedural facts of *Questar II*. Such a position is unfair and contrary to the policy of the statute, especially because the Grynberg Parties did not invite this procedural complexity. They were prepared to go to trial on the BTU claims in *Questar II*.

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<sup>27</sup>The Montana Supreme Court appears to have reached the same result in *Hollister v. Forsythe*, 889 P.2d 1205 (Mont. 1995). In *Hollister*, the plaintiff brought a lawsuit in federal court asserting federal and pendant state law claims. *Id.* at 1206. The trial court granted summary judgment on the federal claim and exercised its discretion not to entertain the pendant state law claims. *See Hollister v. Forsythe*, 22 F.3d 950, 954 (9th Cir. 1994). The Ninth Circuit affirmed the trial court's grant of summary judgment. *Id.* In evaluating these facts, the Supreme Court of Montana refused to treat the state and federal claims any differently despite the fact that the appeal before the Ninth Circuit addressed only the substance of the federal claims. *See Hollister*, 889 P.2d at 1207 (recognizing that the plaintiff could file a new lawsuit in connection with the state law claims under the savings statute); *Hollister*, 22 F.3d at 951-54 (substantively addressing only the plaintiff's federal claims but noting a dismissal of the state law claims).

**B. Under Wyoming Substantive Law the Date of Questar's Continuing Payments for Gas Sold Under the Contracts Determines the Accrual of a Cause of Action and the Statute of Limitations Has Not Run.**

In 2000 and 2001, Questar has paid the Grynberg Parties for gas, compression charges and other obligations owing under the contracts using an incorrect BTU adjustment. These payments total more than \$7.1 million. In Wyoming, "[w]hen payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged, **the time for commencing an action runs from the date of such payment, acknowledgment or promise.**" Wyo. Stat. Ann. § 1-3-119 (2001) (emphasis added.). This statute clearly determines "the time for commencing an action" and undisputed facts demonstrate that this action is timely. The accrual of a cause of action is a question of substantive law governed by the law of Wyoming (the jurisdiction both sides agree provides the substantive law to the Contracts). *See Federal Ins. Co. v. Fries*, 355 N.Y.S.2d 741, 745 (N.Y. Civ. Ct. 1974) ("accrual of the cause of action' is properly characterized as substantive" for choice of law analysis); *cf. Financial Bancorp, Inc. v. Pingree & Dahle, Inc.*, 880 P.2d 14, 17 (Utah Ct. App. 1994) ("a cause of action for a breach of contract generally arises where the contract is to be performed.").

The Grynberg Parties' contract claims continue to accrue with each partial payment or acknowledgment of a debt, even if an original statute of limitations lapsed. *See* 51 Am. Jur. 2d Limitations of Actions § 362 (1970) ("[i]t is the general rule that the

limitation period may be started anew by a part payment which is made either before or after the original obligation has become barred) (citations omitted).<sup>28</sup>

Years of unresolved negotiations and litigation between the Grynberg Parties and Questar regarding the amounts owed under the Contracts have also transformed the Contracts into an open account. This is particularly true given the absence of a "final determination" under the Contracts as discussed below. *See infra* Section IV.C. An "open account" is generally defined as "an unsettled claim or demand made by the creditor." *Smith v. Davis*, 323 U.S. 111, 114, 65 S. Ct. 157, 159 (1944); *see also* Black's Law Dictionary 1090 (6th ed. 1990) (stating an "open account" is "unpaid or unsettled account; an account with a balance which has not been ascertained, which is kept open in anticipation of future transactions.") On any open account, the statute of limitations does not begin to run until final payment is made. *See Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471, 1483 (10th Cir. 1985).

Questar's payments on obligations owing under the Contracts, after this case was filed were "without any restrictions, limitations or reservations of rights." Grynberg Ex. 5 at p. 1 (Addendum Ex. M). Questar asked that Mr. Grynberg accept the tendered

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<sup>28</sup>Utah has a similar partial payment statute as Wyoming (Utah Code Ann. § 78-12-44), however it has been construed as precluding revival of claims **previously expired**. *See State Bank of S. Utah v. Troy Hygro Sys. Inc.*, 894 P.2d 1270, 1276 (Utah Ct. App. 1995). In any event, such statutes define the accrual of the cause of action and are thus substantive. Accordingly, the Wyoming statute, rather than the Utah statute, applies.

check for "the amounts everyone agrees upon while we continue to try to resolve differences in other amounts." *Id.* Based on this communication alone, Questar has not only made a partial payment, but has also acknowledged the unsettled nature of Questar's remaining debt.

Although the Grynberg Parties argued for application of Wyo. Stat. Ann. § 1-3-119 (1999) (*see* Memorandum in Opposition to Defendants' Motion to Dismiss at 57-59), the trial court largely ignored this critical statute, making **no** reference to it in the Court's S.J. Order. The Court's Memorandum Decision at 7, n.3, does reference a March 8, 2001 Minute Entry (R 2690-94) (Addendum Ex. X) wherein the court supposedly addressed the "substance" of this statute. In that Minute Entry the trial court concluded that Questar's payments "cannot be construed as an acknowledgment of an obligation on the BTU claims." Minute Entry at 3 (R 2692). The court reasoned that § 1-3-119 is "simply inapplicable" because Questar's payments were made pursuant to court order and therefore cannot be "construed as an acknowledgment of the primary claims." *Id.*

The trial court's analysis ignores the plain language of § 1-3-119. The statute expressly restarts the limitation period from the date of any "payment, acknowledgment **or** promise." Wyo. Stat. Ann. § 1-3-119 (emphasis added). The trial court's conclusion that a payment can be disregarded if not accompanied by a written "acknowledgment" (i.e. is made pursuant to court order) ignores the plain language of the statute. The statute is written in the disjunctive. "Canons of construction ordinarily suggest that

terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotome Corp.*, 442 U.S. 330, 338, 99 S. Ct. 2326, 2330 (1975). In light of these rules the trial court clearly read § 1-3-119 incorrectly to require both a "payment" and a written "acknowledgment." All of the Grynberg Parties' contract claims therefore accrued on the date of Questar's last payment, including the \$7.1 million of gas paid for in 2000 and 2001 using incorrect BTU adjustment.

**C. Alternatively, the Statute of Limitations Has Not Started Running Because no Cause of Action Has Accrued.**<sup>29</sup>

The contract statute of limitations does not begin to run until a cause of action has accrued. In Wyoming, "[a] cause of action does not accrue until all the elements . . . are present. If a party seeking relief has not yet been damaged, an action is premature." *Simons v. Laramie County School District No. One*, 741 P.2d 1116, 1119 (Wyo. 1987) (internal citations omitted); Wyo. Stat. Ann. § 34.1-2-725(b) ("A cause of action accrues when the breach occurs"). In this case, the Grynberg Parties' contract claim for the incorrect BTU adjustment related to the \$7.1 million of gas paid for by Questar in 2000 and 2001 could not possibly accrue prior to Questar's payments. Prior to that time, no damage occurred.

In addition, under the unique provisions of the Contracts, there must be a "final determination of the correct [BTU]" before the contract can be considered to have been

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<sup>29</sup>If this Court finds that Questar's payments mark the beginning of the running of the statute of limitations, there is no need to consider this argument.

breached. *See* paragraph XV-1 of the Contracts, Q. Exs. 4, 5 and 6. Under the Contracts, a "final determination" does not occur upon tender of the gas, but only after the Grynberg Parties report errors and a "final determination" is thereafter made. *Id.* The Contracts do not identify the procedure for obtaining such "final determination" and given the lack of resolution, it is the Grynberg Parties' position that no "final determination" has ever taken place. For that reason the Grynberg Parties have requested that the trial court finally determine correct values to be used in the BTU adjustment measurements pursuant to the Grynberg Parties' declaratory judgment claim. *See* First Amended Complaint ¶¶ 79-81. Until that determination is made, the contract cause of action cannot accrue because Questar's obligations arise 30 days after the "final determination" and a cause of action does not accrue in Wyoming until the cause of action could have been filed and prosecuted to completion. *Gillis v. F&A Enterprises*, 934 P.2d 1253, 1255 (Wyo. 1997); *DeWitt v. Balben*, 718 P.2d 854, 858 (Wyo. 1986).

Even if a "final determination" is somehow made without court assistance, at a minimum, there is a question of fact as to when "final determinations" occurred under the Contracts for various gas payments including the \$7.1 million paid in 2000 and 2001. *See Schelske v. South Dakota Poultry Cooperative*, 465 N.W.2d 187, 189 (S.D. 1991) ("[t]he jury [must] determine if the contract was breached, and if so, when the breach occurred" under UCC 2-725). In *Schelske* the Court upheld a jury verdict that a breach

did not occur upon tender of the goods or at the time of a partial payment but instead much later based upon the terms of the involved contract. *Id.* at 190.

#### **V. THE TRIAL COURT ERRED IN FAILING TO ADDRESS EQUITABLE TOLLING.**

The assertion of the BTU claims in *Questar II* also tolled the applicable statute of limitations under the equitable tolling doctrine. The trial court erred in failing to address this doctrine in both its S.J. Order and in its Memorandum Decision. The statute of limitations is not a defense where equitable principles justify tolling of the statute. *Sevy v. Security Title Co.*, 902 P.2d 629, 636 (Utah 1995); *Shell Western E & P, Inc. v. Dolores County Bd. of Comm'rs*, 948 P.2d 1002, 1007-08 (Colo. 1997) (en banc); *Erickson v. Croft*, 760 P.2d 706, 708 (Mont. 1988); *Jones v. Tracy Sch. Dist.*, 611 P.2d 441, 445-46 (Cal. 1980); *Elkins v. Derby*, 525 P.2d 81 (Cal. 1974); *Gudenau & Co. v. Sweeney Ins. Inc.*, 736 P.2d 763, 769-70 (Alaska 1987). One such circumstance is when an injured person has several legal remedies and, reasonably and in good faith, pursues one. The doctrine has been summarized as follows:

[C]ourts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designated to lessen the extent of his injuries or damage.

*Erickson*, 760 P.2d at 708 (citing *Addison v. State*, 578 P.2d 941, 943 (Cal. 1978)).

Courts typically agree that there are three requirements to invoke equitable tolling: (1) timely notice to the defendant [within the applicable statute of limitations]; (2) lack of

prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim. *Id.* The Grynberg Parties satisfy all three.

The California Supreme Court applied the doctrine of equitable tolling to reverse dismissal of an action filed in state court because the plaintiff had timely pursued a concurrent federal remedy which had been dismissed for lack of jurisdiction after the applicable statute of limitations had run. *Addison*, 578 P.2d at 941. In *Addison*, the court reasoned that the equitable tolling doctrine fosters the policy of the law which favors avoiding forfeitures and allowing good faith litigants their day in court.

Importantly, the court noted that where the plaintiffs filed a claim within the statute of limitations period, the defendants were fully notified of plaintiff's intent to litigate and the nature of the claims. *Id.* In another case, the court unanimously held that the statute of limitations on a personal injury action is tolled while the plaintiff asserts a workers' compensation claim against defendant. *Elkins*, 525 P.2d at 82-83. In *Elkins*, the Court reasoned that the defendant can claim no substantial prejudice, having received timely notice of **possible tort liability** upon filing of the compensation claim, and having ample opportunity to gather defense evidence in the event a court action ultimately is filed. *Id.*; *see also New York Cent. & H.R.R. Co. v. Kinney*, 260 U.S. 340, 346; 43 S. Ct. 122, 123 (1922) (when defendant has had notice from beginning that plaintiff is trying to enforce a

claim against it, "the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied").

Similarly, in this case, the Grynberg Parties are entitled to an equitable tolling of the statute of limitations. In 1993, Mr. Grynberg discovered that Questar was fraudulently or negligently altering the gas stream and/or measurement devices and procedures in the measurement and analysis of natural gas while representing that its determinations were accurate. At that time, *Questar II* was pending before the U.S. District Court in Wyoming. The Grynberg Parties promptly amended their counterclaim to assert claims that Questar had paid them based on incorrect BTU adjustments. Discovery and further work revealed a much more extensive problem than was initially appreciated. The parties and the court had extensive discussions regarding the Grynberg Parties' BTU claims and the court, before further pleadings or amendments could be made, bifurcated the Grynberg Parties' BTU claims "for later determination." See Statement of Facts ¶¶ 7 to 9. More than four years later, on October 1, 1998, the court dismissed the BTU claims without prejudice, enabling them to be brought in this action. Since 1993, Questar was clearly on notice that the Grynberg Parties were asserting contract and tort claims for Questar's failure to properly determine heating content of the gas it bought and transported. Thus, as in *Elkins*, Questar received timely notice of possible liability for the BTU claim and can claim no prejudice. Also, Questar had ample notice because of numerous meetings and conversations between Grynberg and Questar

trying to resolve the wrongful BTU analysis of the gas Questar purchased and transported.

For these reasons, the Grynberg Parties have met the three elements required for equitable tolling. First, the BTU claims were timely asserted in July 1993 in *Questar II* shortly after they were discovered and within the statute of limitations. Second, in July 1993 and thereafter, Questar was on notice that Grynberg was pursuing claims for incorrect BTU adjustments and had ample opportunity to gather and preserve evidence and prepare a defense in the pending action. Through no fault of the Grynberg Parties the court delayed entering a written order on the dismissal for four and one-half years. During that time Questar cannot have changed its position. Therefore, Questar can claim no substantial prejudice. Third, the Grynberg Parties acted in good faith. Soon after asserting the BTU claims in *Questar II*, the court severed the claims. The court waited more than four years before finally dismissing the claims without prejudice. Thereafter, within the one-year's savings statute period, Grynberg filed this suit, alleging, once again, the BTU claims. Statute of limitations are not designed to be pitfalls and traps, but instead are supposed to do substantial justice. *See Shell Western E & P, Inc. v. Dolores County Bd. of Comm'rs*, 948 P.2d 1002, 1007 (Colo. 1997) ("equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice") (citations omitted). To apply the doctrine of equitable tolling in this case satisfies the policy underlying the statute of limitations without ignoring the competing policy of

avoiding technical and unjust forfeitures. Therefore, all causes of action based on improper BTU adjustments should be equitably tolled.

## **VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE CONTRACT 219.**

The trial court did not address the Contract 219 in its Memorandum Decision. In an effort to again "plug a hole" in the trial court's analysis, Questar added a finding in the Order that "Plaintiffs failed to raise a genuine issue of material fact regarding enforceability of that [Contract 219 settlement and release] or of concealment." Order Granting Defendants' Motion for Summary Judgment, ¶ 19b at 7. This ruling is one more example of the court improperly going beyond the pleadings and Questar's arguments.

In actuality, although Questar put before the court a new contract that the Grynberg Parties specifically allege was fraudulently induced (*see* Amended Complaint ¶¶ 73-77), Questar presented no evidence on the claim of fraudulent inducement. Instead, those allegations were ignored. The Grynberg Parties are clearly entitled to a trial on their allegations of fraudulent inducement and the trial court could not make factual findings without first allowing discovery on this issue. *See supra* Section I.B.2.i. discussing Rule 12(b)(6). Further, the trial court rejected Questar's arguments that the Grynberg Parties failed to adequately plead fraud and therefore those allegations stand. *See supra* note 3.

## CONCLUSION

Based upon the foregoing, this Court must reverse Judge Hanson and order a trial on all claims asserted by the Grynberg Parties.

DATED this 9th day of November, 2001.

MANNING CURTIS BRADSHAW &  
BEDNAR LLC

A handwritten signature in black ink, appearing to read "Brent V. Manning", is written over a horizontal line.

Brent V. Manning  
Alan C. Bradshaw  
Jack M. Morgan  
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copies of the foregoing Appellants' Brief to be served by placing the same in the U.S. Mail, postage prepaid, to the below named attorneys this 9th day of November, 2001:

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