

2001

Joseph Mecham v. Consolidated Oil &  
Transportation, INC., A Colorado Corporation,  
Chase Manhattan Bank, a New York Corporation :  
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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**JOSEPH MECHAM**

**Plaintiff/Appellant,**

**vs.**

**CONSOLIDATED OIL &  
TRANSPORTATION, INC., A Colorado  
Corporation, CHASE MANHATTEN  
BANK, a New York Corporation,**

**Defendant/Appellee.**

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**Priority No.: 15**

**Case Number: 20010041-CA**

**Dist. Ct. No: 960800543**

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ADDENDUM TO BRIEF OF APPELLANT

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**APPEAL FROM ORDER ENTERED IN THE EIGHTH DISTRICT COURT  
UINTAH COUNTY, STATE OF UTAH  
THE HONORABLE A. LYNN PAYNE**

---

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Utah Court of Appeals

MAY 21 2001



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**AMENDED AND RESTATED CREDIT AGREEMENT**

**Dated as of June 24, 1992**

**Between**

**LANDMARK PETROLEUM INC.**

**and**

**THE CHASE MANHATTAN BANK, N.A.**

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## AMENDED AND RESTATED CREDIT AGREEMENT

THIS AMENDED AND RESTATED CREDIT AGREEMENT dated as of June 24, 1992, is by and between LANDMARK PETROLEUM INC., a Delaware corporation (the "Company"), and THE CHASE MANHATTAN BANK, N.A., a national banking association (together with its successors and assigns, the "Bank").

### RECITALS

WHEREAS, pursuant to that certain Credit Agreement dated as of November 5, 1990 (such agreement, as amended by that certain First Amendment and Supplement dated as of February 20, 1991, the "Original Credit Agreement"), by and among the Company, The Chase Manhattan Bank, N.A., as agent (in such capacity, the "Agent"), and the banks that are a signatory thereto, the Company received certain loans;

WHEREAS, The Chase Manhattan Bank, N.A. is the only bank that is a signatory to the Original Credit Agreement (in such capacity, the "Original Bank");

WHEREAS, such loans received by the Company are evidenced by that certain promissory note dated November 5, 1990, issued by the Company in the original principal amount of \$10,000,000.00, and made payable to the order of the Original Bank (the "Original Term Note"), and that certain promissory note dated November 5, 1990, issued by the Company in the original principal amount of \$25,000,000.00, and made payable to the order of the Original Bank (the "Original Revolving Credit Note"; the Original Term Note and the Original Revolving Credit Note shall hereinafter be collectively referred to as the "Original Notes");

WHEREAS, the Original Notes are secured by the Security Instruments (as defined in the Original Credit Agreement and hereinafter defined as the "Original Security Instruments");

WHEREAS, upon the terms and conditions herein stated, the Company has requested and the Bank has agreed, inter alia, to renew, rearrange, modify and extend the indebtedness evidenced by the Original Notes and to provide a new revolving credit/letter of credit facility;

WHEREAS, pursuant to the Option Agreement (CPI) (as hereinafter defined), the Company is granting to Colorado Processing, Inc. ("CPI"), a Utah corporation and wholly-owned subsidiary of Flying J Inc., an option to acquire substantially all of the assets and business of the Company, subject to CPI's assumption of all indebtedness and liabilities of the Company;

WHEREAS, pursuant to that certain Option Agreement (Chase) (as hereinafter defined), Flying J Inc. is granting to the Bank an option to acquire a 25% equity interest in CPI; and

WHEREAS, the Bank is accepting such option from Flying J Inc. as interest on the loans herein provided.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, the aforesaid option to be granted to the Bank, and of the loans and commitments hereinafter referred to, the parties hereto agree as follows:

Section 1. Definitions and Accounting Matters.

1.01 Terms Defined Above. As used in this Agreement, the terms "Agent", "Bank", "Company", "CPI", "Original Bank", "Original Credit Agreement", "Original Notes", "Original Revolving Credit Note", "Original Term Note" and "Original Security Instruments" shall have the meanings indicated above.

1.02 Certain Defined Terms. As used herein, the following terms shall have the following meanings (all terms defined in this Section 1 or in other provisions of this Agreement in the singular to have the same meanings when used in the plural and vice versa):

"Affiliate" of any Person shall mean (i) any Person directly or indirectly controlled by, controlling or under common control with such first Person and (ii) any director, officer, partner or stockholder of such first Person or of any Person referred to in clause (i) above.

"Agreement" shall mean this Amended and Restated Credit Agreement, as the same may be further amended, supplemented or modified from time to time.

"Borrowing Request" shall mean a request for a Loan or a Letter of Credit pursuant to Section 2.01 to be substantially in the form attached as Exhibit G.

"Business Day" shall mean any day on which commercial banks are not authorized or required to close in New York, New York.

"Calciner" shall mean the calciner referred to in the Calciner Operating Agreement.

"Calciner Operating Agreement" shall mean that certain Operating Agreement dated as of November 5, 1990, between the Company and Western Slope, as assigned to the Calciner Operating Subsidiary by the Company pursuant to



that certain General Assignment and Assumption Agreement dated as of November 5, 1990, and as amended by that certain First Amendment to Operating Agreement dated as of June 3, 1992, by and between the Calciner Operating Subsidiary and Western Slope, and as the same may be further amended, supplemented or modified from time to time.

"Calciner Operating Subsidiary" shall mean Landmark Carbon Inc., a Subsidiary formed by the Company to operate the Calciner pursuant to the Calciner Operating Agreement.

"Cash Flow" shall mean for each calendar month an amount equal to the sum of (a) net income for such period determined in accordance with generally accepted accounting principles, (b) all deferred taxes deducted in determining such net income, (c) Interest Expense for such period, and (d) depreciation, depletion, amortization and other non-cash charges deducted in determining such net income less capital expenditures not in excess of \$125,000 per month and the Unused Cap Ex Amount.

"Code" shall mean the Internal Revenue Code of 1986, as amended.

"Commitment" shall mean the Revolving Credit/Letter of Credit Commitment, the Term Loan Commitment and the Special Purpose Credit Commitment.

"Consultation and Service Agreement" shall mean that certain Consultation and Service Agreement dated as of June 19, 1992, by and between the Company, Flying J Inc., a Utah corporation and Big West Oil Company, a wholly owned subsidiary of Flying J Inc.

"Debt" shall mean, for any Person the sum of the following (without duplication): (a) all obligations of such Person for borrowed money or evidenced by bonds, debentures, notes or other similar instruments; (b) all obligations of such Person (whether contingent or otherwise) in respect of letters of credit, bankers' acceptances, surety or other bonds and similar instruments; (c) all obligations of such Person to pay the deferred purchase price of Property or services, except trade accounts payable (other than for borrowed money) arising in the ordinary course of business of such Person; (d) all obligations under leases which shall have been, or should have been, in accordance with generally accepted accounting principles in effect on the date of this Agreement, recorded as capital leases in respect of

which such Person is liable, contingently or otherwise, as obligor, guarantor or otherwise, or in respect of which obligations such Person otherwise assures a creditor against loss; (e) all Debt and other obligations secured by a Lien (other than Excepted Liens provided that the portion of such Debt which has not been paid when due does not exceed \$100,000 in the aggregate at any one time) on any asset of such Person, whether or not such Debt or other obligations are assumed by such Person; (f) all Debt and other obligations of others guaranteed by such Person; and (g) all obligations or undertakings of such Person to maintain or cause to be maintained the financial position or covenants of other Persons.

"Default" shall mean an Event of Default or an event which with notice or lapse of time or both would become an Event of Default.

"Deferred Accrued Interest" shall mean all interest accrued on the Notes for the period commencing on the date of this Agreement to and including August 31, 1992 and any other interest accrued and unpaid on the Notes.

"Dollars" and "\$" shall mean lawful money of the United States of America.

"Drawdown Termination Date" shall mean the earlier to occur of (a) June 15, 2002 or (b) the date on which the Commitments are terminated or cancelled pursuant to Section 2.03(a) or Section 10.

"Environmental Laws" shall mean any and all applicable laws, statutes, ordinances, rules, regulations, orders, or determinations of any Governmental Authority pertaining to health or the environment applicable to the Company and/or its Subsidiaries or any of its Property in effect in any and all jurisdictions in which the Company and/or its Subsidiaries is conducting or at any time has conducted business, or where the Mortgaged Properties are located, or where any hazardous substances generated by or disposed of by the Company and/or its Subsidiaries are located, including but not limited to the Clean Air Act, as amended, the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), as amended, the Federal Water Pollution Control Act, as amended, the Occupational Safety and Health Act of 1970, as amended, the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid

Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), as amended, the Safe Drinking Water Act, as amended, the Toxic Substances Control Act, as amended, the Hazardous Materials Transportation Act, as amended and other environmental conservation or protection laws. The terms "hazardous substance," "release," and "contaminants" shall have the meanings specified in CERCLA, and the terms "solid waste", "hazardous waste" and "disposal" (or "disposed") shall have the meanings specified in RCRA; provided, however, that (i) in the event either CERCLA or RCRA is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment, and (ii) to the extent the laws of the state in which the Mortgaged Properties are located establish a meaning for "hazardous substance," "release," "hazardous waste," "solid waste" or "disposal" which is broader than that specified in either CERCLA or RCRA, such broader meaning shall apply to the extent relevant to those state laws.

"ERISA" shall mean the Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Affiliate" shall mean any corporation or trade or business which is a member of the same controlled group of corporations (within the meaning of Section 414(b) of the Code) as the Company or a Subsidiary or is under common control (within the meaning of Section 414(c) of the Code) with the Company or a Subsidiary.

"Event of Default" shall have the meaning assigned to that term in Section 10.

"Excepted Liens" shall mean:

(a) Liens for taxes, assessments or other governmental charges or levies not yet due or which are being contested in good faith by appropriate action by the Company or any Subsidiary;

(b) Liens in connection with workmen's compensation, unemployment insurance or other social security, old age pension or public liability obligations not yet due or which are being contested in good faith by appropriate action by the Company or any Subsidiary;

(c) vendors', carriers', warehousemen's, repairmen's, mechanics', workmen's, materialmen's,

construction or other like Liens arising by operation of law in the ordinary course of business in respect of obligations which shall have been outstanding not more than 90 days or which are being contested in good faith by appropriate action by the Company or any Subsidiary;

(d) inchoate Liens and charges imposed by law and incidental to construction, maintenance, development or operation of Properties in the ordinary course of business if payment of the obligation secured thereby is not yet due or if the validity or amount of which is being contested in good faith by appropriate action by the Company or any Subsidiary;

(e) Liens reserved in any oil, gas or other mineral lease for rent, royalty or delay rental under such lease and for compliance with the terms of such lease;

(f) Liens for any judgments or attachments if, and only if, such judgments do not constitute an Event of Default under Section 10(j) and such attachments do not exceed (individually or in the aggregate) \$25,000 outstanding at any time;

(g) Liens arising under joint operating agreements for obligations (other than Debt) that are not delinquent and that will be paid or discharged in the ordinary course of the Company's or any Subsidiary's business, or if delinquent, that are being contested in good faith by appropriate action in the ordinary course of the Company's or any Subsidiary's business;

(h) easements, servitudes, rights-of-way and other rights, exceptions, reservations, conditions, limitations, covenants and other restrictions which do not materially interfere with the operation, value or use of the Properties affected thereby;

(i) conventional provisions contained in any contracts or agreements affecting Properties under which the Company or any Subsidiary is required immediately before the expiration, termination or abandonment of a particular Property to reassign to the Company's or such Subsidiary's predecessor in title all or a portion of the Company's or such Subsidiary's rights, titles and interests in and to all or a portion of such Property;

(j) any Lien upon any Property of a Subsidiary in favor of the Company or another Subsidiary as security for Debt or other obligation permitted under this Agreement owing to the Company or such other Subsidiary;

(k) any Lien consisting of (i) statutory and contractual landlord's liens under leases to which the Company or any Subsidiary is a party for rent or for compliance with the terms of such leases, (ii) rights reserved to or vested in any municipality or governmental, statutory or public authority to control or regulate any Property of the Company or any Subsidiary or to use such Property in any manner which does not materially impair the use of such Property for the purposes for which it is held by the Company or any such Subsidiary, and (iii) zoning laws and ordinances and municipal regulations;

(l) Liens described in the Mortgagee Title Policy delivered to the Agent pursuant to the terms of the Original Credit Agreement;

(m) all other Liens (other than Liens securing any Debt), encumbrances, defects and irregularities that are customary in the industry and not, in the aggregate, material in amount as compared to the value of the Mortgaged Property; and

(n) Liens, if any, created by that certain Mutual Access Easement and Use Agreement dated November 5, 1990, by and between the Company and Western Slope (including the non-exclusive easement with respect to water rights to be granted to Western Slope by the Company upon the satisfaction of the conditions set forth in that certain Purchase Agreement (WS) dated June 3, 1992, between the Company, Western Slope and the Bank), and that certain Services Agreement dated as of November 5, 1990, by and between the Company and Western Slope, as amended by that certain First Amendment to Services Agreement dated June 3, 1992, by and between the Company and Western Slope, as such agreements may be further modified from time to time in the ordinary course of business and in good faith to reflect bona fide operation requirements.

"Excess Cash Flow" shall have the meaning assigned to that term in Section 2.05.

"Financial Statements" shall mean the consolidated financial statement or statements of the Company and its Subsidiaries described or referred to in Section 7.02.

"Gary-Williams Subordinated Note" shall mean that certain promissory note dated June 14, 1991, executed by the Company and payable to the order of Gary-Williams Energy Corporation, which promissory note has been assigned by Gary-Williams Energy Corporation to the Bank pursuant to that certain Assignment of Note and Liens (GWEC) dated June 3, 1992.

"Governmental Authority" shall include the United States, the state, county, city and political subdivisions in which any Property of the Company and/or its Subsidiaries is located or which exercises jurisdiction over any such Property, and any agency, department, commission, board, bureau or instrumentality of any of them which exercises jurisdiction over any such Property.

"Governmental Requirement" shall mean any applicable law, statute, code, ordinance, order, rule, regulation, judgment, decree, injunction, franchise, permit, certificate, license, authorization or other lawful direction or requirement (including, without limitation, Environmental Laws, energy regulations and occupational, safety and health standards or controls) of any (domestic or foreign) federal, state, county, municipal or other government, department, commission, board, court, agency or any other instrumentality of any of them.

"Highest Lawful Rate" shall mean the maximum nonusurious interest rate, if any, that at any time or from time to time may be contracted for, taken, reserved, charged or received on the Notes or on other Indebtedness under laws applicable to the Bank which are presently in effect or, to the extent allowed by law, under such applicable laws which may hereafter be in effect and which allow a higher maximum nonusurious interest rate than applicable laws now allow.

"Indebtedness" shall mean any and all amounts owing or to be owing by the Company to the Bank in connection with the Notes or any Security Instrument, including this Agreement and the Letter of Credit Agreements, and all renewals, extensions and/or rearrangements thereof.

"Indemnity Matters" shall have the meaning assigned to that term in Section 11.03.

"Interest Expense" shall mean, for any period, the gross interest expense of the Company for such period.

"Letters of Credit" shall mean the standby letters of credit, commercial letters of credit and direct pay letters of credit hereafter issued by the Bank pursuant to Section 2.01(c), and all reimbursement obligations pertaining to any such letters of credit, and "Letter of Credit" shall mean any one of the Letters of Credit and the reimbursement obligation pertaining thereto.

"Letter of Credit Agreements" shall mean the written agreements with the Bank executed or hereafter executed in connection with the issuance by the Bank of the Letters of Credit, such agreements to be on the Bank's customary form for such letters of credit of comparable amount and purpose, as from time to time in effect.

"Liens" shall mean, with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset. For the purposes of this Agreement, the Company and its Subsidiaries shall be deemed to own subject to a Lien any asset which any of them has acquired or holds subject to the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement relating to such asset.

"Loan" shall mean a Revolving Credit Loan, the Term Loan or a Special Purpose Credit Loan and "Loans" shall mean the Revolving Credit Loans, the Term Loan and the Special Purpose Credit Loans.

"Material Adverse Effect" shall mean any material and adverse effect on (i) the assets, liabilities, financial condition, business or operations of the Company and its Subsidiaries taken as a whole from those reflected in the Financial Statements or from the facts represented or warranted in this Agreement or any other Security Instrument, or (ii) the ability of the Company and its Subsidiaries taken as a whole to carry out in all material respects its business as at the date of this Agreement or as proposed at the date of this Agreement to be conducted or meet its obligations under the Notes, this Agreement or the other Security Instruments on a timely basis.

"Mortgaged Property" shall mean the Property owned by the Company or in which the Company owns an undivided interest and which is subject to the Liens, privileges,

priorities and security interests existing and to exist under the terms of the Security Instruments.

"Multiemployer Plan" shall mean a Plan defined as such in Section 3(37) of ERISA to which contributions have been made by the Company or any ERISA Affiliate and which is covered by Title IV of ERISA.

"Notes" shall mean the Term Note, the Revolving Credit Note and the Special Purpose Credit Note.

"Option Agreement (Chase)" shall mean that certain Option Agreement (Chase) dated as of June 24, 1992, by and between the Flying J Inc., CPI and the Bank.

"Option Agreement (CPI)" shall mean that certain Option Agreement (CPI) dated as of June 24, 1992, by and between the Company and CPI.

"PBGC" shall mean the Pension Benefit Guaranty Corporation or any entity succeeding to any or all of its functions under ERISA.

"Person" shall mean any individual, corporation, company, voluntary association, partnership, joint venture, trust, unincorporated organization or government or any agency, instrumentality or political subdivision thereof, or any other form of entity.

"Plan" shall mean an employee pension benefit or other plan established or maintained by the Company or any Subsidiary or any ERISA Affiliate and which is covered by Title IV of ERISA, other than a Multiemployer Plan.

"Post-Default Rate" shall mean, in respect of any principal of any Loan or any other amount payable by the Company under this Agreement or any Note which is not paid when due (whether at stated maturity, by acceleration or otherwise), a rate per annum during the period commencing on the due date until such amount is paid in full or the default is cured or waived equal to 2% per annum above the Prime Rate as in effect from time to time, but in no event to exceed the Highest Lawful Rate.

"Prime Rate" shall mean the rate of interest from time to time announced by the Bank at the Principal Office as its prime commercial lending rate. Such rate is set by the Bank as a general reference rate of interest, taking into account such factors as the Bank may deem appropriate, it being understood that many of the Bank's



commercial or other loans are priced in relation to such rate, that it is not necessarily the lowest or best rate actually charged to any customer and that the Bank may make various commercial or other loans at rates of interest having no relationship to such rate. Changes in the rate of interest on Loans will take effect simultaneously with each change in the Prime Rate.

"Principal Office" shall mean the principal office of the Bank, presently located at 1 Chase Manhattan Plaza, New York, New York 10081.

"Property" shall mean any interest in any kind of property or asset, whether real, personal or mixed, or tangible or intangible.

"Refinery" shall mean the real property, fixtures and equipment purchased by the Company pursuant to the WS Purchase Agreement.

"Revolving Credit/Letter of Credit Commitment" shall mean the obligation of the Bank to make Revolving Credit Loans or to issue, reissue, renew or extend Letters of Credit for the account of the Company, in an aggregate amount at any one time outstanding equal to \$3,500,000.00 (as the same may be reduced pursuant to Section 2.03 hereof).

"Revolving Credit Loans" shall mean the revolving credit loans as provided for by Section 2.01(b).

"Revolving Credit Note" shall mean the promissory note of the Company provided for in Section 2.04 and being in the form of Exhibit B-1 hereto, together with any and all renewals, extensions for any period, increases or rearrangements thereof.

"Security Instruments" shall mean this Agreement, the Letter of Credit Agreements, the agreements or instruments described or referred to in Exhibit F, and any and all other agreements or instruments now or hereafter executed and delivered by the Company, the Calciner Operating Subsidiary, or any other Person (other than participation or similar agreements between the Bank and any other bank or creditor with respect to any Indebtedness pursuant to this Agreement) in connection with, or as security for the payment or performance of, the Notes, the Letter of Credit Agreements or this Agreement, as such agreements may be amended or supplemented from time to time.

"Subordinated Debt" shall mean the Western Slope Subordinated Note and the Gary-Williams Subordinated Note.

"Subsidiary" shall mean any corporation of which at least a majority of the outstanding shares of stock having by the terms thereof ordinary voting power to elect a majority of the board of directors of such corporation (irrespective of whether or not at the time stock of any other class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is at the time directly or indirectly owned by the Company.

"Special Purpose Credit Commitment" shall mean the obligation of the Bank to make an initial Special Purpose Credit Loan equal to the maximum amount of \$3,000,000.00 and certain subsequent Special Purpose Credit Loans.

"Special Purpose Credit Loans" shall mean the special purpose credit loans as provided for by Section 2.01(d).

"Special Purpose Credit Maximum Availability" shall mean an amount equal to the aggregate of all prepayments on the Special Purpose Credit Note with Unused Cap Ex Amounts, as required by Section 2.05(d).

"Special Purpose Credit Note" shall mean the promissory note of the Company provided for in Section 2.01(d) and being in the form of Exhibit B-2 hereto, together with any and all renewals, extensions for any period, increases or rearrangements thereof.

"Term Loan Commitment" shall mean the obligation of the Bank to rearrange \$25,500,000 of the principal balance outstanding on the Original Notes into a Term Loan in an amount equal to \$25,500,000.00.

"Term Loan" shall mean the term loan provided for by Section 2.01(a).

"Term Note" shall mean the promissory note of the Company provided for in Section 2.04 and being in the form of Exhibit A hereto, together with any and all renewals, extensions for any period, increases or rearrangements thereof.

"Trigger Date" shall mean the date on which \$12,500,000 of principal of the Term Note has been paid.

"Unused Cap Ex Amount" shall mean for each month an amount (if a positive number) equal to \$125,000 less the Capital Expenditure made by the Company in such month.

"Western Slope" shall mean Western Slope Refining Company, a Colorado corporation.

"Western Slope Properties" shall mean all of the assets of Western Slope and Gary-Williams Energy Corporation acquired by the Company pursuant to the WS Purchase Agreement and the Purchase Agreement (WS) dated June 3, 1992, between the Company, Western Slope and the Bank.

"Western Slope Subordinated Note" shall mean that certain promissory note dated November 5, 1990, executed by the Company and payable to the order of Western Slope, which promissory note has been assigned by Western Slope to the Bank pursuant to that certain Assignment of Note and Liens (WS) dated June 3, 1992.

"WS Purchase Agreement" shall mean that certain Asset Purchase Agreement made and entered into as of August 17, 1990, between Western Slope and the Company, as amended by First Amendment to Asset Purchase Agreement dated September 20, 1990 and by Second Amendment to Asset Purchase Agreement dated November 1, 1990, together with the Agreement made and entered into by and between Gary-Williams Energy Corporation and the Company dated August 17, 1990.

1.03 Accounting Terms and Determinations. Unless otherwise specified herein, all accounting terms used herein shall be interpreted, all determinations with respect to accounting matters hereunder shall be made, and all financial statements and certificates and reports as to financial matters required to be furnished to the Bank hereunder shall be prepared, in accordance with generally accepted accounting principles as in effect, applied on a basis consistent with the Financial Statements (except for changes concurred with by the Company's independent public accountants).

## Section 2. Commitments.

2.01 Loans and Letters of Credit. The Bank agrees, on the terms of this Agreement, to make the following loans to the Company, and agrees to issue, reissue, renew or extend Letters of Credit for the account of the Company in accordance with the following:

(a) **Term Loan** - Upon the request of the Company as hereinafter provided, \$25,500,000 of the principal balance outstanding on the Original Notes shall be rearranged into a Term Loan.

(b) **Revolving Credit Loans** - During the period from the date of this Agreement to and including the Drawdown Termination Date, Revolving Credit Loans in an aggregate principal amount at any one time outstanding up to, but not exceeding, the amount of the Revolving Credit/Letter of Credit Commitment as then in effect; provided, however, that the aggregate principal amount of all such Revolving Credit Loans made by the Bank hereunder at any one time outstanding shall not exceed (A) the Revolving Credit/Letter of Credit Commitment minus (B) the outstanding Letters of Credit (together with all amounts previously drawn on Letters of Credit but not yet funded as a Revolving Credit Loan pursuant to Section 4.05(b) or reimbursed). Subject to the terms of this Agreement, during the period from the date of this Agreement to and including the Drawdown Termination Date, the Company may borrow, repay and reborrow the amount of the Revolving Credit/Letter of Credit Commitment.

(c) **Letters of Credit** - (i) During the period from the date of this Agreement to and including the Drawdown Termination Date, the Bank agrees to extend credit to the Company at any time and from time to time by issuing, renewing, extending or reissuing Letters of Credit; provided, however, the aggregate amount of all Letters of Credit at any one time outstanding shall not exceed (A) the Revolving Credit/Letter of Credit Commitment minus (B) the sum of all outstanding Revolving Credit Loans, plus all amounts previously drawn on Letters of Credit but not yet funded as a Revolving Credit Loan pursuant to Section 4.05(b) or reimbursed.

(ii) Each of the Letters of Credit shall (A) be issued by the Bank, (B) contain such terms and provisions as are reasonably required by the Bank, (C) be for the account of the Company, and (D) with respect to standby Letters of Credit, expire not later than 390 days from the date of issuance and with respect to non-standby Letters of Credit, expire not later than 180 days from the date of issuance, unless prior approval of the Bank is obtained for a longer period, but in no event shall any Letter of Credit have an expiration date beyond the Drawdown Termination Date.

(iii) In conjunction with the issuance of a Letter of Credit, the Company shall execute a Letter of Credit Agreement. In the event of any conflict between any provision of a Letter of Credit Agreement and this Agreement, the Company and the Bank hereby agree that the provisions of this Agreement shall govern.

(d) **Special Purpose Credit Loans** - Upon the request of the Company as hereinafter provided, \$3,000,000 of the principal balance outstanding on the Original Notes shall be rearranged into an initial Special Purpose Credit Loan. On and after the date of the initial Special Purpose Credit Loan through the earlier of the date the Term Note is paid in full or the maturity of the Special Purpose Credit Note, the Company may reborrow principal amounts repaid from time to time on the Special Purpose Credit Note to the extent of the Special Purpose Credit Maximum Availability provided the proceeds of such reborrowing are used for Capital Expenditures.

## **2.02 Borrowings and Issuances.**

(a) The Company shall give the Bank advance notice as hereinafter provided of each borrowing and each request for issuance of a Letter of Credit hereunder, which shall specify the aggregate amount of such Loan or such Letter of Credit and the date (which shall be a Business Day) of the Loans to be borrowed or the Letters of Credit to be issued and the beneficiary and other terms of such Letter of Credit, all of which (other than the beneficiary) must be reasonably acceptable to the Bank.

(b) All Loans (as part of the same borrowing) shall be in amounts of at least \$100,000 or any whole multiple of \$50,000 in excess thereof or the remaining unused portion of the applicable Commitment, as the case may be.

(c) All borrowings or requests for issuance of Letters of Credit shall require advance written notice to the Bank in the form of a Borrowing Request, which in each case shall be irrevocable, from the Company to be received by the Bank not later than 11:00 a.m. New York time on the date such Loan is to be obtained and one (1) Business Day prior to the date such Letter of Credit is to be issued.

(d) Not later than 2:00 p.m. New York time on the date specified for each borrowing hereunder, the Bank shall make available the amount of the Loan to be made

by it on such date to the Company by depositing the same, in immediately available funds, in an account of the Company, designated by the Company and maintained with the Bank at the Principal Office.

(e) Not later than 10:00 a.m. New York time on the date specified for the issuance of a Letter of Credit, the Bank shall make available to the Company at the Bank's Principal Office such Letter of Credit.

#### 2.03 Changes of Commitments.

(a) The Company shall have the right to terminate or to reduce the amount of the Revolving Credit/Letter of Credit Commitment at any time or from time to time upon not less than two (2) Business Days prior notice to the Bank of such termination or each such reduction, which notice shall specify the effective date thereof and the amount of any such reduction (which shall be in amounts of at least \$100,000 or any whole multiple of \$50,000 in excess thereof) and shall be irrevocable and effective only upon receipt by the Bank.

(b) The Revolving Credit/Letter of Credit Commitment once terminated or reduced may not be reinstated.

#### 2.04 Notes.

(a) The Term Loan made by the Bank shall be evidenced by a single promissory note of the Company in substantially the form of Exhibit A hereto, dated on or before the date such Term Loan is made, payable to the order of the Bank in a principal amount equal to the Term Loan Commitment and otherwise duly completed.

(b) The Revolving Credit Loans made by the Bank shall be evidenced by a single promissory note of the Company in substantially the form of Exhibit B hereto, dated on or before the date of the initial borrowing under this Agreement, payable to the order of the Bank in a principal amount equal to the Revolving Credit/Letter of Credit Commitment as originally in effect and otherwise duly completed.

(c) The Special Purpose Credit Loans made by the Bank shall be evidenced by a single promissory note of the Company in substantially the form of Exhibit B-2 hereto, dated on or before the date of the initial Special Purpose Credit Loan under this Agreement, payable to the order of the Bank in a principal amount equal to

the Special Purpose Credit Commitment and otherwise duly completed.

(d) The date and amount of each Loan made by the Bank, and all payments made on account of the principal thereof, shall be recorded by the Bank on its books for the applicable Note, and prior to any transfer of any Note held by it, endorsed by the Bank on the schedule attached to such Note or any continuation thereof.

#### 2.05 Prepayments.

(a) The Company may prepay Loans at any time, provided such prepayment is made on or before 11:00 a.m. New York time and such prepayment is in an amount of at least \$100,000 or any whole multiple of \$50,000 in excess thereof or the remaining aggregate principal balance outstanding on the Notes and provided that interest on the principal prepaid, accrued to the prepayment date, shall be paid on the prepayment date.

(b) If, after giving effect to any termination or reduction of the Revolving Credit/Letter of Credit Commitment, pursuant to Section 2.03, the sum of (i) outstanding aggregate principal amount of the Revolving Credit Loans, (ii) the face amount of all outstanding Letters of Credit and (iii) all amounts previously drawn on Letters of Credit, but not yet funded as a Revolving Credit Loan pursuant to Section 4.05(b) or reimbursed, exceeds the amount of the Revolving Credit/Letter of Credit Commitment, then the Company shall on the date of such termination or reduction pay or prepay the amount of such excess for application first towards reduction of all amounts previously drawn, but not yet funded as a Revolving Credit Loan pursuant to Section 4.05(b) or reimbursed, and second, if necessary, towards reduction of the outstanding principal balance of the Revolving Credit Note and, third, if necessary, towards prepaying the amount of the Letters of Credit, which amount shall be held by the Bank as cash collateral to secure the Company's obligation to reimburse the Bank for drawings under the Letters of Credit, together with interest on such excess accrued to the date of such payment or prepayment.

#### (c) Mandatory Prepayments of Notes.

(i) Prior to the occurrence of the Trigger Date, the Company will apply on or before 30 days after the end of each month any Cash Flow remaining after the interest payments

required by Section 3.02 as a prepayment on the Term Note.

(ii) On and after the occurrence of the Trigger Date, the Company will apply on or before 30 days after the end of each month any Cash Flow remaining after the interest payments required by Section 3.02 as a prepayment on the Term Note until the principal of the Term Note is paid in full. After the principal of the Term Note is paid in full, the Company will then apply the aforesaid prepayment from Cash Flow on the Special Purpose Credit Note until the principal of the Special Purpose Credit Note is paid in full. After the principal of the Special Purpose Credit Note is paid in full, the Company will then apply the aforesaid prepayment from Cash Flow on the Revolving Credit Note until the principal of the Revolving Credit Note is paid in full. The amount of principal prepayments required by this Section 2.05(c)(ii) shall not exceed \$450,000 per calendar quarter.

(iii) On and after the occurrence of the Trigger Date, the Company will also apply on or before 30 days after the end of each month fifty percent (50%) of any Cash Flow remaining after the interest payments required by Section 3.02 and the prepayments required by Section 2.05 (c)(ii) (the "Excess Cash Flow"), as a prepayment on the Term Note until the principal of the Term Note is paid in full. After the principal of the Term Note is paid in full, the Company will then apply the aforesaid prepayment from Excess Cash Flow on the Special Purpose Credit Note until the principal of the Special Purpose Credit Note is paid in full. After the principal of the Special Purpose Credit Note is paid in full, the Company will then apply the aforesaid prepayment from Excess Cash Flow on the Revolving Credit Note until the principal of the Revolving Credit Note is paid in full. The remaining fifty percent (50%) of Excess Cash Flow shall be paid by the Company to Flying J Inc., as a consulting fee pursuant to the Consultation and Service Agreement.

(d) The Company will apply on or before 30 days after the end of each month the Unused Cap Ex Amount for



such month as a prepayment on the Special Purpose Credit Note.

(e) Prepayments permitted under this Section 2.05 shall be without premium or penalty, and shall be applied in inverse order of maturity.

### Section 3. Payments of Principal and Interest.

3.01 Principal. The Company will pay to the Bank the principal of each Note when due. The principal amount of each Note outstanding on June 15, 2002 shall be due and payable on that date.

#### 3.02 Interest.

(a) The Company will pay to the Bank interest on the unpaid principal amount outstanding from time to time of each Loan made by the Bank for the period commencing on the date of such Loan to, but excluding, the date such Loan shall be paid in full, at a varying rate per annum equal to the Prime Rate (as in effect from time to time), but in no event to exceed the lesser of nine percent (9%) per annum or the Highest Lawful Rate. Notwithstanding the foregoing, the Company will pay to the Bank interest at the applicable Post-Default Rate on any principal of any Loan made by the Bank, and (to the fullest extent permitted by law) on any other amount (including interest) payable by the Company hereunder or under any Note held by the Bank, which shall not be paid in full when due (whether at stated maturity, by acceleration or otherwise), for the period commencing on the due date thereof until the same is paid in full.

(b) Accrued interest on each Note (other than the Deferred Accrued Interest) shall be payable monthly on or before 30 days after the end of each month, commencing on September 30, 1992. The Deferred Accrued Interest shall be payable on the same date(s) the accrued interest described in the preceding sentence is paid until the Deferred Accrued Interest is paid in full. All accrued interest on the Notes (including the Deferred Accrued Interest) shall be payable by the Company from the Cash Flow. The Company shall apply the Cash Flow to the payment of interest as follows:

(i) first to the payment of all interest accrued on the Term Note during the month;

(ii) second to the payment of all interest accrued on the Special Purpose Credit Note during the month;

(iii) third to the payment of all interest accrued on the Revolving Credit Note during the month; and

(iv) fourth to the payment of any Deferred Accrued Interest.

(c) Promptly after the determination of any interest rate provided for herein or any change therein, the Bank shall notify the Company thereof.

#### Section 4. Payments; Computations; Etc.

4.01 Payments. Except to the extent otherwise provided herein, all payments of principal, interest and other amounts to be made by the Company under this Agreement, the Notes and the Letter of Credit Agreements shall be made in Dollars, in immediately available funds, to the Bank at such account as the Bank shall specify by notice to the Company from time to time, not later than 11:00 a.m. New York time on the date on which such payments shall become due (each such payment made after such time on such due date to be deemed to have been made on the next succeeding Business Day). The Company shall, at the time of making each payment under this Agreement or any Note or any Letter of Credit Agreement, specify to the Bank the Loans, Letters of Credit or other amounts payable by the Company hereunder to which such payment is to be applied (and in the event that it fails to so specify, or if an Event of Default has occurred and is continuing, the Bank may distribute such payment in such manner as it may determine to be appropriate). If the due date of any payment under this Agreement or any Note or any Letter of Credit Agreement would otherwise fall on a day which is not a Business Day such date shall be extended to the next succeeding Business Day and interest shall be payable for any principal so extended for the period of such extension.

4.02 Computations. Interest and fees shall be computed on the basis of a year of 365 or 366 days, as the case may be, and actual days elapsed (including the first day but excluding the last day) occurring in the period for which payable.

4.03 Set-off The Company agrees that, in addition to (and without limitation of) any right of set-off, bankers' lien or counterclaim the Bank may otherwise have, the Bank shall be entitled, at its option, to offset balances held by it for the account of the Company at any of its offices, in Dollars or in any other currency, against any principal of or interest on any of the Bank's Loans, or any other amount payable to the Bank hereunder or under any Letter of Credit Agreement, which is not paid when due (regardless of whether such balances are then due to the Company),

in which case the Bank shall promptly notify the Company thereof, provided that the Bank's failure to give such notice shall not affect the validity thereof. Nothing contained herein shall require the Bank to exercise any such right or shall affect the right of the Bank to exercise, and retain the benefits of exercising, any such right with respect to any other indebtedness or obligation of the Company.

4.04 Assumption of Risks. The Company assumes all risks of the acts or omissions of beneficiaries of any of the Letters of Credit with respect to its use of the Letters of Credit. Except in the case of gross negligence or willful misconduct on the part of the Bank or any of its employees, neither the Bank nor the Bank's correspondents shall be responsible for the validity or genuineness of certificates or other documents, even if such certificates or other documents should in fact prove to be invalid, fraudulent or forged; for errors, omissions, interruptions or delays in transmissions or delivery of any messages by mail, telex, or otherwise, whether or not they be in code; for errors in translation or for errors in interpretation of technical terms; or for any other consequences arising from causes beyond the Bank's control; nor shall the Bank be responsible for any error, neglect, or default of any of the Bank's correspondents; and none of the above shall affect, impair or prevent the vesting of any of the Bank's rights or powers hereunder or under the Letter of Credit Agreements, all of which rights shall be cumulative. The Bank and the Bank's correspondents may accept certificates or other documents that appear on their face to be in order, without responsibility for further investigation. In furtherance and not in limitation of the foregoing provisions, the Company agrees that any action, inaction or omission taken or not taken by the Bank or by any correspondent for the Bank in absence of gross negligence or willful misconduct by the Bank in connection with any Letter of Credit, or any related drafts, certificates, documents or instruments, shall be binding on the Company and shall not put the Bank or the Bank's correspondents under any resulting liability to the Company.

4.05 Obligation to Reimburse and to Prepay.

(a) If any draft or claim shall be presented for payment under a Letter of Credit, after confirming that such draft or claim complies with all requirements of the relevant Letter of Credit, the Bank shall promptly notify the Company verbally (confirming such notice promptly in writing) of the date and the amount of the draft or claim presented for payment.

(b) If a disbursement by the Bank is made under any Letter of Credit and no Default under this Agreement shall have occurred and be continuing, the Company may

elect to have the amount of such disbursement up to the amount of the Revolving Credit/Letter of Credit Commitment then available treated as a Revolving Credit Loan to the Company as provided in Subsection 2.01(b) hereof, subject to the terms and conditions set forth in this Agreement. With respect to any disbursement under a Letter of Credit for which no such election is made or after and during the continuance of a Default, the Company shall pay to the Bank immediately after notice of any such disbursement is received by the Company in federal or other immediately available funds, the amount of each such disbursement made by the Bank under the Letter of Credit (if such payment is not sooner effected as may be required hereunder or under other provisions of the Letter of Credit Agreement), together with interest on the amount disbursed from and including the date of disbursement until payment in full of such disbursed amount at a varying rate per annum equal to the Prime Rate (as in effect from time to time) plus two percent (2%) (but in no event to exceed the Highest Lawful Rate).

(c) The Company's obligation to make each such payment shall be absolute and unconditional and shall not be subject to any defense or be affected by any right of setoff, counterclaim or recoupment which the Company may now or hereafter have against any beneficiary of any Letter of Credit, the Bank, or any other Person for any reason whatsoever (but, without prejudice to any other provisions hereof, any such payment shall not waive, impair or otherwise adversely affect any claim, if any, that the Company may have against any beneficiary of a Letter of Credit, the Bank or any other Person).

(d) In the event of the occurrence of any Event of Default, upon request of the Bank, an amount equal to the entire remaining obligation of the Bank under each outstanding Letter of Credit shall be deemed to be forthwith due and owing by the Company to the Bank as of the date of any such occurrence; and the Company's obligation to pay such amount shall be absolute and unconditional, and without regard to whether any beneficiary of any such Letter of Credit has attempted to draw down all or a portion of such amount under the terms of a Letter of Credit, and shall not be subject to any defense or be affected by a right of setoff, counterclaim or recoupment which the Company may now or hereafter have against any such beneficiary, the Bank, or any other Person for any reason whatsoever (but, without prejudice to any other provisions hereof, any such payment shall not waive, impair or otherwise

adversely affect any claim, if any, that the Company may have against any beneficiary of a Letter of Credit, the Bank or any other Person). The Company hereby grants a security interest in any such amounts to the Bank as security for all Indebtedness now or hereafter owing hereunder. In the event of any such prepayment (or prepayment of Letters of Credit pursuant to Section 2.05) by the Company of amounts contingently owing under outstanding Letters of Credit and in the event that thereafter drafts or other demands for payment complying with the terms of such Letters of Credit are not made prior to the respective expiration dates thereof, the Bank agrees, if no Event of Default has occurred and is continuing or if no other amounts are outstanding under this Agreement, the Notes or the Security Instruments, to remit to the Company amounts for which the contingent obligations evidenced by such Letters of Credit have ceased.

#### Section 5. Increased Costs.

(a) If, due to either (i) the introduction of or any change in or in the interpretation of any law or regulation or (ii) the compliance with any guideline or request from any central bank or other governmental authority (whether or not having the force of law), there shall be any increase in the cost to the Bank (other than an increase relating to taxes) specifically relating to the Bank's agreeing to make or making, funding or maintaining Loans hereunder, then the Company shall from time to time, upon demand by the Bank, pay to the Bank additional amounts sufficient to compensate the Bank for such increased or imposed cost. A certificate as to the amount of such increased cost, submitted to the Company by the Bank, shall be conclusive and binding for all purposes, absent manifest error.

(b) If compliance with any law or regulation or any guideline or request from any central bank or other governmental authority (whether or not having force of law) affects or would affect the amount of capital required or expected to be maintained by the Bank or any corporation controlling the Bank and the Bank determines that the amount of such capital is increased by or based upon the existence of (i) the Bank's commitment to lend or extend other credit by letter of credit or otherwise hereunder or (ii) the Bank's obligation on one or more letters of credit or other similar credit enhancements issued pursuant hereto, then the Company shall from time to time, upon demand by the Bank, pay to the Bank, additional amounts sufficient to compensate the Bank in

the light of such circumstances, to the extent that the Bank reasonably determines such increase in capital to be allocable to the existence of the Bank's commitment or obligation. A certificate in reasonable detail as to the basis for and the amount of such compensation submitted to the Company by the Bank, shall be conclusive and binding for all purposes, absent manifest error.

Section 6. Conditions Precedent.

6.01 Initial Loan or Letter of Credit.

The obligation of the Bank to renew, rearrange, modify and extend the Original Notes and to make the initial Loans hereunder is subject to the receipt by the Bank of the following documents and satisfaction of the other conditions provided in this Section 6.01 and as called for, Sections 6.02 and 6.03, each of which shall be satisfactory to the Bank in form and substance:

(a) Certificates of the Secretary or Assistant Secretary of the Company and of the Calciner Operating Subsidiary setting forth (i) resolutions of its board of directors in form and substance satisfactory to the Bank with respect to the authorization of the Notes, this Agreement and the other Security Instruments provided herein, (ii) the officers of the Company and of the Calciner Operating Subsidiary (y) who are authorized to sign this Agreement, the Notes, and the other Security Instruments and (z) who will, until replaced by another officer or officers duly authorized for that purpose, act as its representative for the purposes of signing documents and giving notices and other communications in connection with this Agreement and the transactions contemplated hereby, (iii) specimen signatures of the officers so authorized, and (iv) that the articles or certificates of incorporation and the bylaws of the Company and the Calciner Operating Subsidiary have not been amended since June 3, 1992. The Bank may conclusively rely on such certificates until the Bank receives notice in writing from the Company or the Calciner Operating Subsidiary, as the case may be, to the contrary.

(b) Certificates of the appropriate state agencies with respect to the valid existence and good standing of the Company and of the Calciner Operating Subsidiary.

(c) A compliance certificate which shall be true and correct in all material respects and in the form of Exhibit C, duly and properly executed by an executive

officer of the Company, and dated as of the date of the initial borrowing.

(d) The Notes, duly completed and executed.

(e) The Security Instruments listed on Exhibit F hereto, duly completed and executed in sufficient number of counterparts for recording.

(f) An opinion of Messrs. Bracewell & Patterson, counsel to the Company and the Calciner Operating Subsidiary, substantially in the form of Exhibit E hereto.

(g) An original Consultation and Service Agreement executed by the parties thereto.

(h) An original of the Option Agreement (CPI) executed by the parties thereto.

(i) An original of the Option Agreement (Chase) executed by the parties thereto.

(j) Such other documents as the Bank or special counsel to the Bank may reasonably request.

6.02 Conditions Relating to Letters of Credit. In addition to the satisfaction of all other conditions precedent set forth in this Section 6, the issuance, renewal, extension or reissuance of the Letters of Credit referred to in Section 2.02(c) is subject to the following conditions precedent:

(a) At least one (1) Business Days prior to the date of the issuance, renewal, extension or reissuance of each Letter of Credit, the Bank shall have received a Borrowing Request for a Letter of Credit.

(b) The Company shall have duly and validly executed and delivered to the Bank a Letter of Credit Agreement pertaining to the Letter of Credit.

6.03 Initial and Subsequent Loans. The obligation of the Bank to make Loans to the Company upon the occasion of each borrowing hereunder, or of the Bank to issue Letters of Credit (including the initial borrowing) is subject to the further conditions precedent that, as of the date of such Loans or issuance of Letters of Credit and after giving effect thereto: (i) no Default shall have occurred and be continuing; (ii) no condition causing a Material Adverse Effect shall have occurred and be continuing; and (iii) the representations and warranties made by the Company in Section 7 shall be true in all material respects on

and as of the date of the making of such Loans or the issuance of such Letter of Credit with the same force and effect as if made on and as of such date and following such new borrowing, except as such representations and warranties are modified to give effect to transactions expressly permitted hereby. Each request for a borrowing or request for the issuance, renewal, extension or reissuance of a Letter of Credit by the Company hereunder shall constitute a certification by the Company to the effect set forth in the preceding sentence (both as of the date of such notice and, unless the Company otherwise notifies the Bank prior to the date of and immediately following such borrowing, as of the date thereof).

Section 7. Representations and Warranties. The Company represents and warrants to the Bank that (each representation and warranty herein is given as of the date of this Agreement and shall be deemed repeated and reaffirmed on the dates provided in Section 6.03):

7.01 Corporate Existence. The Company and each Subsidiary: (a) is a corporation duly organized, legally existing, and in good standing under the laws of the jurisdiction of its incorporation; (b) has all requisite corporate power, and has all material governmental licenses, authorizations, consents and approvals necessary to own its assets and carry on its business as now being or as proposed to be conducted; and (c) is qualified to do business in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary and where failure so to qualify would have a Material Adverse Effect.

7.02 Financial Condition.

(a) The audited consolidated and consolidating statements of income, stockholders' equity and cash flows of the Company and its Subsidiaries for the Company's fiscal year ended September 30, 1991, and the related consolidated and consolidating balance sheet of the Company and its Subsidiaries as at the end of such fiscal year, and the unaudited consolidated and consolidating statements of income, stockholders' equity and cash flows of the Company and its Subsidiaries for the period ending April 30, 1992, and the related consolidated and consolidating balance sheet as at the end of such period heretofore furnished to the Bank, are complete and correct and fairly present the financial condition of the Company and its Subsidiaries and the results of operations of the Company and its Subsidiaries as at said date or dates and for the period or periods stated (subject only to normal year-end audit adjustments with respect to such unaudited interim statements), all in



accordance with generally accepted accounting principles and practices applied on a consistent basis.

(b) Neither the Company nor any Subsidiary had, on the date set forth above, any material contingent liabilities, liabilities for taxes, unusual forward or long-term commitments or unrealized or anticipated losses from any unfavorable commitments, except as referred to or reflected or provided for in such financial statements as at said respective dates or in Schedule 7.02(b) hereto. Since April 30, 1992, there has been no change or event having a Material Adverse Effect.

7.03 Liabilities; Litigation. Except for liabilities incurred in the normal course of business and those permitted hereby, neither the Company nor any Subsidiaries has any material (individually or in the aggregate) liabilities, direct or contingent, except as disclosed or referred to in the Financial Statements or as disclosed to the Bank in Schedule 7.03 or Schedule 7.16 hereto. At the date of this Agreement, there is no litigation, legal, administrative or arbitral proceeding, investigation or other action of any nature pending or, to the knowledge of the Company threatened against or affecting the Company or any Subsidiary which could reasonably be expected to result in a judgment or liability not fully covered by insurance, and which would have a Material Adverse Effect. No unusual and unduly burdensome restriction, restraint, or hazard exists by contract, law or governmental regulation or otherwise relative to the business or Properties of the Company or any Subsidiary, except as disclosed to the Bank in Schedule 7.03 or Schedule 7.16 hereto.

7.04 No Breach. Neither the execution and delivery by the Company or any Subsidiary of this Agreement, the Notes, or the other Security Instruments to which it is a party, nor compliance with the terms and provisions hereof by the Company or any Subsidiary will conflict with or result in a breach of, or require any consent under, the respective charter or by-laws of the Company or any Subsidiary, or (other than actions required to maintain compliance with Section 8.03(a)) any law or regulation applicable to the Company or any Subsidiary, or any order, writ, injunction or decree applicable to the Company or any Subsidiary of any court or governmental authority or agency, or any agreement or instrument to which the Company or any Subsidiary is a party or by which it is bound or to which it is subject, or constitute a default under any such agreement or instrument, or result in the creation or imposition of any Lien upon any of the revenues or assets of the Company or any Subsidiary pursuant to the terms of any such agreement or instrument.

7.05 Corporate Action. Each of the Company and the Subsidiaries has all necessary corporate power and authority to

execute, deliver and perform its obligations under this Agreement, the Notes, or the other Security Instruments to which it is a party; and the execution, delivery and performance by each of the Company and the Subsidiaries of this Agreement, the Notes, or the other Security Instruments to which it is a party have been duly authorized by all necessary corporate action on its part; and this Agreement, the Notes and the Security Instruments constitute the legal, valid and binding obligations of each of the Company and the Subsidiaries to the extent they are respectively parties thereto, enforceable in accordance with their terms, subject to bankruptcy, insolvency, moratorium and other similar laws affecting generally the rights of creditors and to principles of equity.

7.06 Approvals. No authorizations, approvals or consents of, and no filings or registrations with, any governmental or regulatory authority or agency are necessary for the execution, delivery or performance by the Company or any Subsidiary of this Agreement, the Notes, or the Security Instruments to which it is a party or for the validity or enforceability thereof against the Company or such Subsidiary other than such actions required to maintain compliance with Section 8.03(a) and such filings as are, required to properly perfect and record the Liens created by the Security Instruments.

7.07 Use of Loans. The proceeds of the Term Loan and the initial Special Purpose Credit Loan shall be used to renew, rearrange, modify and extend the indebtedness evidenced by the Original Notes, and the proceeds of the Revolving Credit Loans shall be used for working capital or other general corporate purposes of the Company. The proceeds of all Special Purpose Credit Loans other than the initial Special Purpose Credit Loan shall be used for Capital Expenditures. Neither the Company nor any Subsidiary is engaged principally, or as one of its important activities, in the business of extending credit for the purpose, whether immediate, incidental or ultimate, of buying or carrying margin stock (within the meaning of Regulation U or X of the Board of Governors of the Federal Reserve System) and no part of the proceeds of any Loan hereunder will be used to buy or carry any margin stock.

7.08 ERISA. Each of the Company, the Subsidiaries and the ERISA Affiliates have fulfilled its obligations under the minimum funding standards of ERISA and the Code with respect to each Plan and are in compliance in all material respects with the presently applicable provisions of ERISA and the Code, and do not have any liability (other than current required payments to the Plan) to the PBGC or any Plan or Multiemployer Plan.

7.09 Taxes. The Company and its Subsidiaries have at the date of this Agreement filed all United States Federal income tax returns and all other material tax returns which are required

to be filed and have paid all taxes due pursuant to such returns or pursuant to any assessment received by the Company or any Subsidiary. The charges, accruals and reserves on the books of the Company and its Subsidiaries in respect of taxes and other governmental charges are, in the opinion of the Company, adequate.

7.10 Titles, etc. The Company and its Subsidiaries have good and defensible title to their respective material (individually or in the aggregate) Properties, free and clear of all Liens except Excepted Liens, Liens permitted by Section 9.02, and Liens disclosed to the Bank in Schedule 7.10.

7.11 No Material Misstatements. No information, statement, exhibit, certificate, document or report furnished to the Bank by the Company or any Subsidiary in connection with the negotiation of this Agreement contained any material misstatement of fact or omitted to state a material fact or any fact necessary to make the statement contained therein not materially misleading which fact or statement could reasonably be expected to have a material effect on the Bank's decision to enter into this Agreement.

7.12 Investment Company Act. Neither the Company nor any Subsidiary is an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

7.13 Public Utility Holding Company Act. The Company is not a "holding company," or a "subsidiary company" of a "registered holding company," or an "affiliate" of a "registered holding company" or of a "subsidiary company" of a "registered holding company," or a "public utility" within the meaning of the Public Utility Holding Company Act of 1935, as amended.

7.14 Subsidiaries and Partnerships. As of the date of this Agreement, the Company has no Subsidiaries (except those identified in Section 9.03 hereof) and no interest in any partnerships.

7.15 Location of Business and Offices. As of the date of this Agreement, the Company's principal place of business and chief executive office are located at the addresses stated on the signature page of this Agreement.

7.16 Environmental Matters. Except as provided in Schedule 7.16 and except as would not have a Material Adverse Effect (or with respect to (c), (d), and (e) below, where the failure to take such actions would not have such a Material Adverse Effect):

(a) Neither any Mortgaged Properties nor any other Properties owned by the Company or any Subsidiary nor the

operations conducted thereon violate any Environmental Laws or the order of any court or Governmental Authority with respect to Environmental Laws;

(b) Without limitation of clause (a) above, neither the Mortgaged Properties nor any other Properties owned by the Company or any Subsidiary nor the operations currently conducted thereon or by any prior owner or operator of such Property or operation, are subject to any existing, pending or (to the knowledge of the Company) threatened action, suit, investigation, inquiry or proceeding by or before any court or Governmental Authority with respect to Environmental Laws or to any remedial obligations under Environmental Laws;

(c) All notices, permits, licenses or similar authorizations, if any, required to be obtained or filed by the Company or any Subsidiary in connection with the operation or use of any and all Mortgaged Properties and other Property of the Company or any Subsidiary, including without limitation, the treatment, storage, disposal or release of a hazardous substance or solid waste into the environment, have been duly obtained or filed;

(d) Since the inception of the applicable requirements of RCRA, all hazardous wastes generated at any and all Mortgaged Property and other Property of the Company or any Subsidiary and requiring disposal have been transported only by carriers then maintaining valid authorizations under RCRA and any other Environmental Law and treated and disposed of only at treatment, storage and disposal facilities then maintaining valid authorizations under RCRA and any other Environmental Law, which carriers and facilities to the knowledge of the Company have been and are operating in compliance with such authorizations;

(e) The Company has taken the steps outlined in Schedule 7.16 to make a reasonable determination that no hazardous substances or solid waste have been disposed of or otherwise released and that there has been no threatened release of any hazardous substances on or to any Mortgaged Property or other Property of the Company or any Subsidiary except in compliance with Environmental Laws; and

(f) Neither the Company nor any Subsidiary has any material contingent liability in connection with any release or threatened release of any hazardous substance,

solid waste or oil and gas exploration and production waste into the environment.

7.17 Mortgaged Property. The Security Instruments delivered cover substantially all material Property of the Company and of the Calciner Operating Subsidiary.

7.18 Defaults.

(a) After giving effect to the transactions called for in Section 6.01, neither the Company nor any Subsidiary is in default nor has any event or circumstance occurred which, but for the passage of time or the giving of notice, or both, would constitute a default (in any respect which would have a Material Adverse Effect) under any material agreement or other instrument to which the Company or any Subsidiary is a party or by which the Company or any Subsidiary is bound. No Default hereunder has occurred and is continuing.

(b) The Bank hereby waives all defaults and events of default under the Subordinated Debt existing on the date of this Agreement. Nothing in this Section 7.18(b) shall be construed to be a waiver by the Bank of any default or event of default which may occur after the date of this Agreement.

7.19 Compliance with the Law. Except for environmental matters covered by Section 7.16, neither the Company nor any Subsidiary has violated any Governmental Requirement nor failed to obtain any license, permit, franchise or other governmental authorization necessary for the ownership of any of their respective Properties or the conduct of their respective businesses, which violation or failure would have (in the event such violation or failure were asserted by any Person through appropriate action) a Material Adverse Effect.

Section 8. Affirmative Covenants. The Company agrees that, so long as any of the Commitments are in effect and until payment in full of all Indebtedness, all interest thereon and all other amounts payable by the Company hereunder:

8.01 Financial Statements. The Company shall deliver, or shall cause to be delivered, to the Bank:

(a) As soon as available and in any event within 90 days after the end of each fiscal year of the Company, the audited consolidated and consolidating statements of income, stockholders' equity and cash flows of the Company and its Subsidiaries for such fiscal year, and the related consolidated and consolidating balance sheet

of the Company and its Subsidiaries as at the end of such fiscal year, and commencing on September 30, 1992, setting forth in each case in comparative form the corresponding figures for the preceding fiscal year, and accompanied by the related opinion of KPMG Peat Marwick or other independent public accountants of recognized national standing reasonably acceptable to the Bank which opinion shall state that said consolidated financial statements fairly present the financial condition and results of operations of the Company and its Subsidiaries as at the end of, and for, such fiscal year.

(b) As soon as available and in any event within 30 days after the end of each of the first three (3) fiscal quarterly periods of each fiscal year of the Company, consolidated and consolidating statements of income, stockholders' equity and cash flows of the Company and its Subsidiaries for such period and for the period from the beginning of the respective fiscal year to the end of such period, and the related consolidated and consolidating balance sheet as at the end of such period, and commencing December 31, 1992, setting forth in each case in comparative form the corresponding figures for the corresponding period in the preceding fiscal year, accompanied by the certificate of the senior financial officer of the Company, which certificate shall state that said financial statements fairly present the financial condition and results of operations of the Company and its Subsidiaries in accordance with generally accepted accounting principles, consistently applied, as at the end of, and for, such period (subject to normal year-end audit adjustments).

(c) As soon as possible, and in any event within 30 days of the end of each calendar month, consolidated and consolidating financial statements of the Company and its Subsidiaries for each such month in form and substance reasonably acceptable to the Bank.

(d) As soon as available and in any event within 30 days after the end of each fiscal quarterly period of each fiscal year of the Company, the Environmental Compliance Certificate of a responsible officer of the Company in the form of Exhibit D, certifying for such quarterly period either that (i) the Properties and operations of the Company and its Subsidiaries are in compliance with the provisions of Section 9.13, or, (ii) if the Company or any Subsidiary is not in compliance with Section 9.13, providing detail in form and substance satisfactory to the Bank as to the nature

of such non-compliance and what action the Company or such Subsidiary has taken or proposes to take with respect thereto.

(e) As soon as possible, and in any event within ten days after the Company knows that any of the events or conditions specified below with respect to any Plan or Multiemployer Plan have occurred or exist, a statement signed by a senior financial officer of the Company setting forth details respecting such event or condition and the action, if any, which the Company, its Subsidiaries or its ERISA Affiliate proposes to take with respect thereto (and a copy of any report or notice required to be filed with or given to PBGC by the Company, its Subsidiaries or an ERISA Affiliate with respect to such event or condition):

(i) any reportable event, as defined in Section 4043(b) of ERISA and the regulations issued thereunder, with respect to a Plan, as to which PBGC has not by regulation waived the requirement of Section 4043(a) of ERISA that it be notified within 30 days of the occurrence of such event (provided that a failure to meet the minimum funding standard of Section 412 of the Code or Section 302 of ERISA shall be a reportable event regardless of the issuance of any waivers in accordance with Section 412(d) of the Code);

(ii) the filing under Section 4041 of ERISA of a notice of intent to terminate any Plan or the termination of any Plan;

(iii) the institution by PBGC of proceedings under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Plan, or the receipt by the Company or any Subsidiary or any ERISA Affiliate of a notice from a Multiemployer Plan that such action has been taken by PBGC with respect to such Multiemployer Plan;

(iv) the complete or partial withdrawal by the Company or any Subsidiary or any ERISA Affiliate under Section 4201 or 4204 of ERISA from a Multiemployer Plan, or the receipt by the Company or any Subsidiary or any ERISA Affiliate of notice from a Multiemployer Plan that is in reorganization or insolvency pursuant to Section 4241 or 4245 of ERISA or that it intends to terminate or has terminated under Section 4041A of ERISA; and

(v) the institution of a proceeding by a fiduciary of any Multiemployer Plan against the Company or any Subsidiary or any ERISA Affiliate to enforce Section 515 of ERISA, which proceeding is not dismissed within 30 days.

(f) Promptly after the Company knows of the occurrence of any Event of Default, a notice of such Event of Default, describing the same in reasonable detail.

(g) From time to time such other information regarding the business, affairs or financial condition of the Company and its Subsidiaries (including, without limitation, any Plan or Multiemployer Plan and any reports or other information required to be filed under ERISA) as the Bank may reasonably request.

The Company will furnish to the Bank, at the time it furnishes each set of financial statements pursuant to paragraph (a) or (b) above, a certificate of a senior financial officer of the Company (i) to the effect that no Default has occurred and is continuing (or, if any Default has occurred and is continuing, describing the same in reasonable detail) and (ii) setting forth in reasonable detail the computations necessary to determine whether the Company and its Subsidiaries are in compliance with Section 9.12 as of the end of the respective fiscal quarter or calendar year.

8.02 Litigation. The Company, once it has notice, shall promptly give to the Bank notice of all legal or arbitral proceedings, and of all proceedings before any Governmental Authority, affecting the Company or any Subsidiary, except proceedings which, if adversely determined, would not reasonably be expected to have a Material Adverse Effect.

#### 8.03 Corporate Existence, Etc.

(a) The Company shall and shall cause each Subsidiary to: preserve and maintain its corporate existence and all of its material rights, privileges and franchises except as provided by Section 9.08; keep books of record and account in which full, true and correct entries will be made of all dealings or transactions in relation to its business and activities; comply with the requirements of all applicable laws, rules, regulations and orders of governmental or regulatory authorities if failure to comply with such requirements would have a Material Adverse Effect; pay and discharge all material taxes, assessments and governmental charges or levies imposed on it or on its income or profits or on any of its Property prior to the date on which penalties attach



thereto, except for any such tax, assessment, charge or levy the payment of which is being contested in good faith and by proper proceedings and against which adequate reserves are being maintained; and permit representatives of the Bank, during normal business hours, to examine, copy and make extracts from its books and records, to inspect its Properties, and to discuss its business and affairs with its officers, all to the extent reasonably requested by the Bank.

(b) The Company shall and shall cause each Subsidiary to keep insured by financially sound and reputable insurers all Property of a character usually insured by corporations engaged in the same or similar business similarly situated against loss or damage of the kinds and in the amounts customarily insured against by such corporations and carry such other insurance as is usually carried by such corporations. Upon request of the Bank, the Company will furnish or cause to be furnished to the Bank from time to time a summary of the insurance coverage of the Company and its Subsidiaries in form and substance reasonably satisfactory to the Bank and if requested will furnish the Bank copies of the applicable policies. In the case of any fire, accident or other casualty causing loss or damage to any material Properties of the Company, the proceeds of such policies shall be used, if such loss or damage is material (i) to repair or replace the damaged Property, or (ii) to prepay the Indebtedness. The Company will obtain endorsements to the policies pertaining to all physical Properties in which the Bank shall have a Lien under the Security Instruments, naming the Bank as a loss payee and containing provisions that such policies will not be cancelled without 30 days' prior written notice having been given by the insurance company to the Bank.

(c) The Company will and will cause each Subsidiary to, at its own expense, do or cause to be done all things reasonably necessary to preserve and keep in good repair, working order and efficiency all of the material Properties owned by the Company and its Subsidiaries including, without limitation, all material equipment, machinery and facilities, and from time to time will make all the reasonably necessary repairs, renewals and replacements so that at all times the state and condition of the material Properties owned by the Company and its Subsidiaries will be fully preserved and maintained. The Company will operate its material Properties or cause or use its best efforts to cause such Properties to be operated in a careful and efficient manner in accordance with the practices of the industry and in compliance in

all material respects with all applicable contracts and agreements and in compliance in all material respects with all Governmental Requirements. Nothing herein shall prevent the Company from discontinuing the operation, maintenance or repair or from failing to renew or replace any of its Properties, if such Property is not of material value and is otherwise not material in the operation of the Company.

8.04 Further Assurances. The Company will and will cause each Subsidiary to cure promptly any defects in the creation and issuance of the Notes and the execution and delivery of the Security Instruments, including this Agreement. The Company at its expense will and will cause each Subsidiary to promptly execute and deliver to the Bank upon request all such other and further documents, agreements and instruments in compliance with or accomplishment of the covenants and agreements of the Company or any Subsidiary in the Security Instruments, including this Agreement, or to further evidence and more fully describe the collateral intended as security for the Notes, or to correct any omissions in the Security Instruments, or more fully state the security obligations set out herein or in any of the Security Instruments, or to perfect, protect or preserve any Liens created pursuant to any of the Security Instruments, or to make any recordings, to file any notices, or to use its best efforts to obtain any consents, all as may be necessary or appropriate in connection therewith.

8.05 Performance of Obligations. The Company will pay the Notes according to the reading, tenor and effect thereof; and the Company will and will cause each Subsidiary to do and perform every act and discharge all of the obligations provided to be performed and discharged by the Company or any Subsidiary under the Security Instruments, including this Agreement, at the time or times and in the manner specified.

8.06 Calciner Agreement. The Company will and will cause the Calciner Operating Subsidiary to perform in all material respects all obligations to be performed by it under the Calciner Operating Agreement and maintain said agreement in full force and effect and will take such action as is necessary to keep the prior Liens of the U.S. Small Business Administration encumbering the Calciner current. The Company will and will cause the Calciner Operating Subsidiary to promptly notify the Bank of any default known to the Company or the Calciner Operating Subsidiary, as the case may be, in the prior Liens on the Calciner.

8.07 Consultation and Service Agreement. The Company will perform in all material respects all obligations to be performed by the Company under the Consultation and Service Agreement pursuant to the terms thereof.

8.08 Option Agreement (CPI). The Company will perform in all material respects all obligations to be performed by the Company under the Option Agreement (CPI) pursuant to the terms thereof. The Company shall not enter into any amendment or supplement to the Option Agreement (CPI) without the prior written consent of the Bank.

Section 9. Negative Covenants. The Company agrees that, so long as any of the Commitments are in effect and until payment in full of the Indebtedness, all interest thereon and all other amounts payable by the Company hereunder:

9.01 Debt. Neither the Company nor any Subsidiary will incur, create, assume or suffer to exist any Debt, including, without limitation, the guarantee of the Debt of any other Person, except:

(a) the Notes or other Indebtedness;

(b) Debt of the Company and its Subsidiaries existing on the date of this Agreement which is reflected in the Financial Statements or is disclosed in Schedule 9.01, and any renewals and extensions (but not increases) thereof;

(c) accounts payable (for the deferred purchase price of Property or services) from time to time incurred in the ordinary course of business and which, if greater than 90 days past the invoice or billing date, are being contested in good faith by the Company or its Subsidiary, as the case may be;

(d) the Subordinated Debt;

(e) obligations incurred in connection with surety and performance bonds purchased in the ordinary course of business; and

(f) intercompany Debt permitted by Section 9.03(b).

9.02 Liens. Neither the Company nor any Subsidiary will create, incur, assume or permit to exist any Lien on any of its Properties (now owned or hereafter acquired), except:

(a) Liens securing the payment of any Indebtedness;

(b) Excepted Liens;

(c) Liens existing on Property owned by the Company or any Subsidiary on the date of this Agreement which have been disclosed to the Bank in Schedule 7.10, and any renewals and extensions thereof; and

(d) Liens securing the Subordinated Debt.

9.03 Investments, Loans and Advances. Neither the Company nor any Subsidiary will make or permit to remain outstanding any loans or advances to or investments in any Person, except that the foregoing restriction shall not apply to:

(a) investments, loans or advances reflected in the Financial Statements or which are disclosed to the Bank in Schedule 9.03; and

(b) the investments in the Calciner Operating Subsidiary and in Landmark Resources Inc. on the date hereof as reflected in the Financial Statements.

9.04 Dividends, Distributions and Redemptions. The Company will not declare or pay any dividend, purchase, redeem or otherwise acquire for value any of its stock now or hereafter outstanding, return any capital to its stockholders, or make any distribution of its assets to its stockholders; provided, however, so long as no Default exists, the Company may redeem its stock so long as the total cost to the Company of such redemptions does not exceed \$1,000.00 in the aggregate.

9.05 Sales and Leasebacks. Neither the Company nor any Subsidiary will enter into any arrangement, directly or indirectly, with any Person whereby the Company or any Subsidiary shall sell or transfer any Property whether now owned or hereafter acquired, and whereby the Company or any Subsidiary shall then or thereafter rent or lease as lessee such Property or any part thereof or other Property which the Company or any Subsidiary intends to use for substantially the same purpose or purposes as the Property sold or transferred.

9.06 Nature of Business. The Company will not allow any material change to be made in the character of its principal business of owning and operating the Western Slope Properties.

9.07 Limitation on Leases. Neither the Company nor any Subsidiary will create, incur, assume or suffer to exist any obligation for the payment of rent or hire of Property of any kind whatsoever (real or personal), under leases or lease agreements which would cause the aggregate amount of all payments made by the Company and its Subsidiaries (determined on a consolidated basis) pursuant to such leases or lease agreements to exceed \$750,000 in any period of twelve consecutive calendar months.

9.08 Mergers, Etc. The Company will not merge into or with or consolidate with any other Person, or sell, lease or otherwise dispose of (whether in one transaction or in a series of transactions) all or any substantial part of its Property or assets to any other Person, or permit any Subsidiary to do so; provided, however, any Subsidiary may be merged into the Company with the Company being the surviving corporation, provided such merger will not create a Default hereunder.

9.09 Proceeds of Notes. The Company will not permit the proceeds of the Notes to be used for any purpose other than those permitted by Section 7.07.

9.10 ERISA Compliance. The Company and the Subsidiaries will not at any time permit any Plan maintained by it to:

(a) engage in any "prohibited transaction" as such term is defined in Section 4975 of the Code;

(b) Except as provided in Schedule 9.10, incur any "accumulated funding deficiency" in excess of \$100,000 as such term is defined in Section 302 of ERISA; or

(c) terminate any such Plan in a manner which could result in the imposition of a Lien on the Property of the Company or any Subsidiary pursuant to Section 4068 of ERISA.

9.11 Sale or Discount of Receivables. Neither the Company nor any Subsidiary will discount (except pursuant to standard industry terms in the ordinary course of business) or sell (with or without recourse) any of its notes receivable or accounts receivable.

9.12 Current Ratio. The Company will not permit its ratio of (i) current assets to (ii) current liabilities to be less than 1.0 to 1.0 at the end of any fiscal quarter. As used in this Section, current assets shall include unused credit availability under the Revolving Credit/Letter of Credit Commitment and the Special Purpose Credit Commitment and current liabilities will not include current maturities of Debt permitted under Section 9.01 other than Section 9.01(c).

9.13 Environmental Matters. Except for those pre-existing matters disclosed on Schedule 7.16, neither the Company nor any Subsidiary will cause or permit any of its Property to be in violation of, or do anything or permit anything to be done which will subject any such Property to any remedial obligations (other than customary closure obligations) under any Environmental Laws, assuming disclosure to the applicable Governmental Authority

of all relevant facts, conditions and circumstances, if any, pertaining to such Property, except for any such violations or remedial obligations (individually or in the aggregate) which would not have a Material Adverse Effect. The Company will establish and implement such procedures as may be necessary to determine and provide reasonable assurance, consistent with generally accepted industry standards and practices and any applicable Environmental Laws, that (i) except for integral Refinery operations where adequate reserves or other financial assurances have been established to cover all such closure or cleanup obligations, no solid wastes are disposed of on any Property owned by the Company or any Subsidiary in quantities or locations that would require remedial action under any Environmental Laws, (ii) no hazardous substance will be released on or to any such Property except in compliance with Environmental Laws, (iii) no hazardous substance is released on or to any such Property so as to pose an imminent and substantial endangerment to public health or welfare or the environment; (iv) all hazardous wastes generated by the Company or any Subsidiary or on any Property of the Company or any Subsidiary and requiring disposal will be transported only by carriers maintaining valid RCRA authorizations and treated, stored, and disposed of only by facilities operating in compliance with RCRA, and (v) the Company and the Subsidiaries and their respective Property and operations will maintain and operate in compliance with all permits, licenses, and similar authorizations required pursuant to any Environmental Laws. The Company covenants and agrees to, and will cause its Subsidiaries to, take any remedial action required on its Property under any Environmental Laws promptly upon discovery of such remedial obligations.

9.14 Transactions with Affiliates. Neither the Company nor any Subsidiary shall enter into any transaction, including, without limitation, any purchase, sale, lease or exchange of property or the rendering of any service, with any Affiliate unless such transactions are in the ordinary course of the Company's or Subsidiary's business, are upon fair and reasonable terms no less favorable to the Company or Subsidiary than it would obtain in a comparable arm's length transaction with a Person not an Affiliate and are not prohibited by this Agreement.

9.15 Subordinated Debt. The Company will neither prepay nor amend the Subordinated Debt.

Section 10. Events of Default. If one or more of the following events (herein called "Events of Default") shall occur and be continuing:

(a) The Company shall default in the payment when due of any principal of any Loan or of any reimbursement obligations for disbursements made under any Letter of Credit; or

(b) The Company shall default in the payment when due of (i) interest for any three calendar months in any twelve (12) month period or (ii) any fees or other amount payable by it hereunder and not described in (a) above and such default shall continue unremedied for 3 Business Days; or

(c) The Company shall default in the payment when due of any principal of or interest on any of its other Debt incurred after the date hereof in an amount in excess of \$100,000; or any event specified in any note, agreement, indenture or other document evidencing or relating to any such Debt shall occur if the effect of such event is to cause, or (with the giving of any notice or the lapse of time or both) to permit the holder or holders of such Debt (or a trustee or agent on behalf of such holder or holders) to cause, such Debt to become due prior to its stated maturity; or

(d) Any representation, warranty or certification made or deemed made herein or in any other Security Instrument by the Company or any Subsidiary, or any certificate furnished to the Bank pursuant to the provisions hereof or any other Security Instrument, shall prove to have been false or misleading as of the time made or furnished in any material respect; or

(e) The Company shall default in the performance of any of its obligations under Section 9 (except Section 9.13); or

(f) The Company shall default in the performance of any of its other obligations in this Agreement, other than its obligations under Section 9 (with the exception of Section 9.13), and such default shall continue unremedied for a period of 30 days after notice thereof to the Company by the Bank; or

(g) The Company shall admit in writing its inability to, or be generally unable to, pay its debts as such debts become due; or

(h) The Company shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its Property, (ii) make a general assignment for the benefit of its creditors, (iii) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (iv) file a petition seeking to take advantage of any other law

relating to its bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of its debts, (v) fail to controvert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the Federal Bankruptcy Code, or (vi) take any corporate action for the purpose of effecting any of the foregoing; or

(i) A proceeding or case shall be commenced, without the application or consent of the Company, in any court of competent jurisdiction, seeking (i) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts, (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of the Company or of all or any substantial part of its assets, or (iii) similar relief in respect of the Company under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of 60 days; or an order for relief against the Company shall be entered in an involuntary case under the Federal Bankruptcy Code; or

(j) A final judgment or judgments for the payment of money in excess of \$100,000 in the aggregate shall be rendered by a court or courts against the Company and the same shall not be discharged (or provision shall not be made for such discharge), or a stay of execution thereof shall not be procured, within 30 days from the date of entry thereof and the Company shall not, within said period of 30 days, or such longer period during which execution of the same shall have been stayed, appeal therefrom and cause the execution thereof to be stayed during such appeal; or

(k) An event or condition specified in Section 9.10 shall occur or exist with respect to any Plan or Multiemployer Plan and, as a result of such event or condition, together with all other such events or conditions, the Company or any Subsidiary or any ERISA Affiliate shall incur or in the opinion of the Bank shall be reasonably likely to incur a liability to a Plan, a Multiemployer Plan or PBGC (or any combination of the foregoing) which is, in the determination of the Bank, material in relation to the financial position of the Company; or



(l) The Company or any Subsidiary shall default in the due observance or performance of any of the covenants or agreements contained in any Security Instrument other than this Agreement, and such default shall continue unremedied for a period of 30 days after notice thereof to the Company or such Subsidiary by the Bank; or

(m) Except as otherwise permitted in Section 9.04, any stockholder of the Company shall transfer stock in the Company to any Person other than a Person who is a stockholder in the Company on the date hereof other than transfers to heirs by reason of death; or

(n) Any Subsidiary takes, suffers or permits to exist as to such Subsidiary any of the events or conditions referred to in clause (g), (h), (i) or (j) of this Section 10; or

(o) The Company shall default in the due observance or performance of any of the Company's agreements or obligations contained in the Consultation and Service Agreement and such default shall continue unremedied beyond the expiration of any applicable grace period therein provided, or the Consultation and Service Agreement shall have terminated; or

(p) The Option Agreement (CPI) after delivery thereof shall for any reason, except to the extent permitted by the terms thereof, cease to be in full force and effect and valid, binding and enforceable in accordance with its terms;

THEREUPON: (i) in the case of an Event of Default other than one referred to in clause (g), (h) or (i) of this Section 10, or in clause (n) of this Section 10 to the extent that such clause refers to such clauses (g), (h) or (i), the Bank shall, by notice to the Company, cancel the Commitments and/or declare the principal amount then outstanding of and the accrued interest on the Loans and all other amounts payable by the Company hereunder and under the Notes to be forthwith due and payable, whereupon such amounts shall be immediately due and payable without presentment, demand, protest, notice of intent to accelerate, notice of acceleration or other formalities of any kind, all of which are hereby expressly waived by the Company; and (ii) in the case of the occurrence of an Event of Default referred to in clause (g), (h) or (i) of this Section 10, or in clause (n) of this Section 10 to the extent that such clause refers to such clauses (g), (h) or (i), the Commitments shall be automatically cancelled and the principal amount then outstanding of, and the accrued interest on, the Loans and all other amounts payable by the Company hereunder and under the Notes

shall become automatically immediately due and payable without presentment, demand, protest, notice of intent to accelerate, notice of acceleration or other formalities of any kind, all of which are hereby expressly waived by the Company.

Section 11. Miscellaneous.

11.01 Waiver. No failure on the part of the Bank to exercise and no delay in exercising, and no course of dealing with respect to, any right, power or privilege under this Agreement or any Note shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege under this Agreement or any Note preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The remedies provided herein are cumulative and not exclusive of any remedies provided by law.

11.02 Notices. All notices and other communications provided for herein and in the other Security Instruments (including, without limitation, any modifications of, or waivers or consents under, this Agreement or the other Security Instruments) shall be given or made by telex, telecopy, telegraph, cable or in writing and telexed, telecopied, telegraphed, cabled, mailed or delivered to the intended recipient at the "Address for Notices" specified below its name on the signature pages hereof or in the other Security Instruments; or, as to any party, at such other address as shall be designated by such party in a notice to each other party. Except as otherwise provided in this Agreement or in the other Security Instruments, all such communications shall be deemed to have been duly given when transmitted by telex or telecopier, delivered to the telegraph or cable office or personally delivered or, in the case of a mailed notice, upon receipt, in each case given or addressed as aforesaid.

11.03 Payment of Expenses, Indemnities, etc. The Company agrees to:

(a) whether or not the transactions hereby contemplated are consummated, pay all reasonable expenses of the Bank in the administration (both before and after the execution hereof and including advice of counsel as to the rights and duties of the Bank with respect thereto) of, and in connection with the negotiation, investigation, preparation, execution and delivery of, recording or filing of, preservation of rights under, enforcement of, and refinancing, renegotiation or restructuring of, this Agreement, the Notes, the Letters of Credit, the Letter of Credit Agreements and the other Security Instruments and any amendment, waiver or consent relating thereto (including, without limitation, the reasonable fees and disbursements of counsel for the

Bank); and promptly reimburse the Bank for all amounts expended, advanced or incurred by the Bank to satisfy any obligation of the Company under this Agreement, the Letters of Credit, the Letter of Credit Agreements or any Security Instrument;

(b) pay and hold the Bank harmless from and against any and all present and future stamp and other similar taxes with respect to the foregoing matters and save the Bank harmless from and against any and all liabilities with respect to or resulting from any delay or omission to pay such taxes; and

(c) indemnify the Bank, its officers, directors, employees, representatives, agents and affiliates from, hold each of them harmless against, promptly upon demand pay or reimburse each of them for, and refrain from creating or asserting against any of them, any and all actions, suits, proceedings (including any investigations, litigation or inquiries), claims, demands, causes of action, costs, losses, liabilities, damages or expenses of any kind or nature whatsoever regardless of whether foreseeably caused by the ordinary negligence of the Bank (collectively the "Indemnity Matters") which may be incurred by or asserted against or involve any of them (whether or not any of them is designated a party thereto) as a result of, arising out of or in any way related to (i) any actual or proposed use by the Company of the proceeds of any of the Loans or Letters of Credit or (ii) any other aspect of this Agreement, the Notes, the Letters of Credit, the Letter of Credit Agreements and the other Security Instruments, including, without limitation, the reasonable fees and disbursements of counsel and all other expenses incurred in connection with investigating, defending or preparing to defend any such action, suit, proceeding (including any investigations, litigation or inquiries) or claim, but excluding from this clause (ii) all Indemnity Matters to the extent resulting from claims between the Bank and a Bank shareholder or from the gross negligence or willful misconduct on the part of the Bank; and

(d) indemnify and hold the Bank, its officers, directors, employees, representatives, agents and affiliates harmless against, promptly to pay on demand or reimburse each of them with respect to, any and all claims, demands, causes of action, loss, damage, liabilities, costs and expenses regardless of whether foreseeably caused by the ordinary negligence of the Bank of any and every kind or nature whatsoever asserted against or incurred by any of them by reason of or

arising out of or in any way related to (i) the breach of any representation or warranty as set forth herein regarding Environmental Laws, or (ii) the failure of the Company to perform any obligation required to be performed pursuant to Environmental Laws. The foregoing indemnity shall not apply with respect to matters caused by or arising out of the sole negligence, sole gross negligence or sole willful misconduct of the Bank. The Bank shall give notice to the Company of any such claim or demand being made against the Bank and the Company shall have the non-exclusive right to join in the defense against any such claim or demand.

11.04 Amendments, Etc. Any provision of this Agreement or any other Security Instrument may be amended, modified or waived if, but only if, such amendment, modification or waiver is in writing and is signed by the Company (and/or any other Person which is a party to any Security Instrument being amended or with respect to which a waiver is being obtained) and the Bank.

11.05 Successors and Assigns. All covenants and agreements contained by or on behalf of the Company or any Subsidiary in the Notes, this Agreement and any other Security Instrument shall bind its successors and assigns and shall inure to the benefit of the Bank and its successors and assigns. The Company shall not, however, have the right to assign its rights under this Agreement, any Letter of Credit Agreement, or any interest herein or therein, without the prior written consent of the Bank. In the event that the Bank sells participations in the Notes or other Indebtedness of the Company incurred or to be incurred pursuant to the Agreement or any Letter of Credit Agreement, to other lenders, each of such other lenders shall have the rights of set off against such Indebtedness and similar rights or Liens to the same extent as may be available to the Bank.

11.06 Invalidity. In the event that any one or more of the provisions contained in the Notes, this Agreement or in any other Security Instrument shall, for any reason, be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of the Notes, this Agreement or any other Security Instrument.

11.07 Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument and any of the parties hereto may execute this Agreement by signing any such counterpart.

11.08 References. The words "herein," "hereof," "hereunder" and other words of similar import when used in this Agreement refer to this Agreement as a whole, and not to any particular article, section or subsection. Any reference herein

to a Section or Subsection shall be deemed to refer to the applicable Section or Subsection of this Agreement unless otherwise stated herein. Any reference herein to an exhibit or schedule shall be deemed to refer to the applicable exhibit or schedule attached hereto unless otherwise stated herein.

11.09 Survival. The obligations of the Company under Sections 5 and 11.03 shall survive the repayment of the Indebtedness, the expiration of the Letters of Credit and the termination of the Commitments.

11.10 Captions. Captions and section headings appearing herein are included solely for convenience of reference and are not intended to affect the interpretation of any provision of this Agreement.

11.11 GOVERNING LAW; SUBMISSION TO JURISDICTION.

(a) THIS AGREEMENT AND THE NOTES SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.

(b) ANY LEGAL ACTION OR PROCEEDING WITH RESPECT TO THIS AGREEMENT, THE NOTES OR THE OTHER SECURITY INSTRUMENTS MAY BE BROUGHT IN THE COURTS OF THE STATE OF NEW YORK OR OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF NEW YORK, AND, BY EXECUTION AND DELIVERY OF THIS AGREEMENT, THE COMPANY HEREBY ACCEPTS FOR ITSELF AND (TO THE EXTENT PERMITTED BY LAW) IN RESPECT OF ITS PROPERTY, GENERALLY AND UNCONDITIONALLY, THE JURISDICTION OF THE AFORESAID COURTS. THE COMPANY HEREBY IRREVOCABLY WAIVES (TO THE EXTENT PERMITTED BY LAW) ANY OBJECTION, INCLUDING, WITHOUT LIMITATION, ANY OBJECTION TO THE LAYING OF VENUE OR BASED ON THE GROUNDS OF FORUM NON CONVENIENS, WHICH IT MAY NOW OR HEREAFTER HAVE TO THE BRINGING OF ANY SUCH ACTION OR PROCEEDING IN SUCH RESPECTIVE JURISDICTIONS. THIS SUBMISSION TO JURISDICTION IS NONEXCLUSIVE AND DOES NOT PRECLUDE THE BANK FROM OBTAINING JURISDICTION OVER THE COMPANY IN ANY COURT OTHERWISE HAVING JURISDICTION.

(c) The Company hereby irrevocably designates CT Corporation System located at 277 Park Avenue, New York, New York 10017, as the designee, appointee and agent of the Company to receive, for and on behalf of the Company, service of process in such respective jurisdictions in any legal action or proceeding with respect to this Agreement, the Notes or the other Security Instruments. It is understood that a copy of such process served on such agent will be promptly forwarded by overnight courier to the Company at its

address for notices pursuant to Section 11.02 set forth opposite its signature below, but the failure of the Company to receive such copy shall not affect in any way the service of such process. The Company further irrevocably consents to the service of process of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the Company at its said address, such service to become effective 30 days after such mailing.

(d) Nothing herein shall affect the right of the Bank or any holder of a Note to serve process in any other manner permitted by law or to commence legal proceedings or otherwise proceed against the Company in any other jurisdiction.

11.12 Interest. It is the intention of the parties hereto that the Bank shall conform strictly to usury laws applicable to it. Accordingly, if the transactions contemplated hereby would be usurious as to the Bank under laws applicable to it (including the laws of the United States of America and the State of New York or any other jurisdiction whose laws may be mandatorily applicable to the Bank notwithstanding the other provisions of this Agreement), then, in that event, notwithstanding anything to the contrary in the Notes, this Agreement or in any other Security Instrument or agreement entered into in connection with or as security for the Notes, it is agreed as follows: (i) the aggregate of all consideration which constitutes interest under law applicable to the Bank that is contracted for, taken, reserved, charged or received by the Bank under the Notes, this Agreement or under any of the other aforesaid Security Instruments or agreements or otherwise in connection with the Notes shall under no circumstances exceed the maximum amount allowed by such applicable law, and any excess shall be cancelled automatically and if theretofore paid shall be credited by the Bank on the principal amount of the Indebtedness (or, to the extent that the principal amount of the Indebtedness shall have been or would thereby be paid in full, refunded by the Bank to the Company); and (ii) in the event that the maturity of the Notes is accelerated by reason of an election of the holder thereof resulting from any Event of Default under this Agreement or otherwise, or in the event of any required or permitted prepayment, then such consideration that constitutes interest under law applicable to the Bank may never include more than the maximum amount allowed by such applicable law, and excess interest, if any, provided for in this Agreement or otherwise shall be cancelled automatically by the Bank as of the date of such acceleration or prepayment and, if theretofore paid, shall be credited by the Bank on the principal amount of the Indebtedness (or, to the extent that the principal amount of the Indebtedness shall have been or would thereby be paid in full,

refunded by the Bank to the Company). All sums paid or agreed to be paid to the Bank for the use, forbearance or detention of sums due hereunder shall, to the extent permitted by law applicable to the Bank, be amortized, prorated, allocated and spread in equal parts throughout the full term of the Loans evidenced by the Notes until payment in full so that the rate or amount of interest on account of any Loans hereunder does not exceed the maximum amount allowed by such applicable law. If at any time and from time to time (i) the amount of interest payable to the Bank on any date shall be computed at the Highest Lawful Rate applicable to the Bank pursuant to this Section and (ii) in respect of any subsequent interest computation period the amount of interest otherwise payable to the Bank would be less than the amount of interest payable to the Bank computed at the Highest Lawful Rate applicable to the Bank, then the amount of interest payable to the Bank in respect of such subsequent interest computation period shall continue to be computed at the Highest Lawful Rate applicable to the Bank until the total amount of interest payable to the Bank shall equal the total amount of interest which would have been payable to the Bank if the total amount of interest had been computed without giving effect to this Section.


Without limiting the intent of the parties expressed under Sections 11.11 and 11.12, to the extent, if any, that Article 5069-1.04 of the Texas Revised Civil Statutes is relevant to the Bank for the purpose of determining the Highest Lawful Rate, the Bank hereby elects to determine the applicable rate ceiling under such Article by the indicated (weekly) rate ceiling from time to time in effect and, in no event, shall Tex. Rev. Civ. Stat. Ann. Art. 5069, ch. 15 (which regulates certain revolving credit loan accounts and revolving tri-party accounts) apply to this Agreement or the Notes.

11.13 Senior Debt. The Indebtedness incurred and to be incurred hereunder is and shall be Senior Debt, as defined in the Subordinated Debt and is and shall be entitled to all of the rights and benefits afforded to such Senior Debt.

11.14 Effectiveness. This Agreement shall not be effective until the date that it is delivered to the Bank in the State of New York, accepted by the Bank in such State, and executed by the Bank in such State.

The parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

**LANDMARK PETROLEUM INC.**

By:   
H. R. Bowers  
President

Address for Notices and Chief  
Executive Office:


50 West 990 South  
Brigham City, Utah 84302

Telecopier No.: (801) 734-6400  
Telephone No.: (801) 734-6556  
Attention: Robert W. Anderson

Address for principal place of  
business:

1193 Highway 6 & 50  
Fruita, Colorado 81521

**THE CHASE MANHATTAN BANK, N.A.**

By:   
Name: BETTYLOU J. ROBERT  
Title: VICE PRESIDENT

Address for Notices:

The Chase Manhattan Bank, N.A.  
1 Chase Manhattan Plaza  
New York, New York 10005

Telecopier No.: (212) 552-1687  
Telephone No.: (212) 552-6362  
Attention: Vito Cipriano



with a copy to:

Chase National Corporate Services, Inc.  
1100 Milam, Suite 2345  
Houston, Texas 77002

Telecopier No.: (713) 751-9122  
Telephone No.: (713) 751-5661  
Attention: Peter Licalzi

c:\wp50\lpi\arca-5.lpi  
0732:4024 June 23, 1992

EXHIBIT A

[Form of Term Note]

\$ \_\_\_\_\_ New York, New York \_\_\_\_\_, 1992

FOR VALUE RECEIVED, LANDMARK PETROLEUM INC., a Delaware corporation (the "Company"), hereby promises to pay to the order of THE CHASE MANHATTAN BANK, N.A. (the "Bank"), at the Principal Office of the Bank located at 1 Chase Manhattan Plaza, New York, New York 10005, the principal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), in lawful money of the United States of America and in immediately available funds, on the dates and in the principal amounts provided in the Credit Agreement referred to below with respect to the Term Loan, and to pay, to the extent permitted by law, interest on the unpaid principal amount of, and any overdue interest on, the Term Loan, at such office, in like money and funds, for the period commencing on the date of the Term Loan until the Term Loan shall be paid in full, at the rates per annum and on the dates provided in the Credit Agreement.

This Note is one of the Notes referred to in the Amended and Restated Credit Agreement (together with all amendments or supplements thereto, the "Credit Agreement") dated as of \_\_\_\_\_, 1992, between the Company and the Bank, and evidences the Term Loan made by the Bank thereunder. Capitalized terms used in this Note have the respective meanings assigned to them in the Credit Agreement.

The Credit Agreement provides for the acceleration of the maturity of this Note upon the occurrence of certain events and for prepayments upon the terms and conditions specified therein.

THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

LANDMARK PETROLEUM INC.

By: \_\_\_\_\_  
Name:  
Title:

EXHIBIT B-1

[Form of Revolving Credit Note]

\$ \_\_\_\_\_ New York, New York \_\_\_\_\_, 1992

FOR VALUE RECEIVED, LANDMARK PETROLEUM INC., a Delaware corporation (the "Company"), hereby promises to pay to the order of THE CHASE MANHATTAN BANK, N.A. (the "Bank"), at the Principal Office of the Bank located at 1 Chase Manhattan Plaza, New York, New York 10005, the principal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (or such lesser amount as shall equal the aggregate unpaid principal amount of the Revolving Credit Loans made by the Bank to the Company under the Credit Agreement referred to below), in lawful money of the United States of America and in immediately available funds, on the dates and in the principal amounts provided in the Credit Agreement referred to below with respect to Revolving Credit Loans, and to pay, to the extent permitted by law, interest on the unpaid principal amount of, and, any overdue interest on, each such Revolving Credit Loan, at such office, in like money and funds, for the period commencing on the date of such Revolving Credit Loan until such Revolving Credit Loan shall be paid in full, at the rates per annum and on the dates provided in the Credit Agreement.

The date and amount of each Revolving Credit Loan made by the Bank to the Company, and each payment made on account of the principal thereof, shall be recorded by the Bank on its books and, prior to any transfer of this Note, endorsed by the Bank on the schedule attached hereto or any continuation thereof.

This Note is one of the Notes referred to in the Amended and Restated Credit Agreement (together with all amendments or supplements thereto, the "Credit Agreement") dated as of \_\_\_\_\_, 1992, between the Company and the Bank, and evidences Revolving Credit Loans made by the Bank thereunder. Capitalized terms used in this Note have the respective meanings assigned to them in the Credit Agreement.

The Credit Agreement provides for the acceleration of the maturity of this Note upon the occurrence of certain events and for prepayments of Revolving Credit Loans upon the terms and conditions specified therein.

THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED IN  
ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

LANDMARK PETROLEUM INC.

By: \_\_\_\_\_  
Name:  
Title:

## LOANS

<u>Date of Loan</u>	<u>Principal Amount of Loan</u>	<u>Amount Paid or Prepaid</u>	<u>Amount of Interest Paid</u>	<u>Unpaid Principal Amount</u>	<u>Notation Made By</u>
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EXHIBIT B-2

[Form of Special Purpose Credit Note]

\$ \_\_\_\_\_ New York, New York \_\_\_\_\_, 1992

FOR VALUE RECEIVED, LANDMARK PETROLEUM INC., a Delaware corporation (the "Company"), hereby promises to pay to the order of THE CHASE MANHATTAN BANK, N.A. (the "Bank"), at the Principal Office of the Bank located at 1 Chase Manhattan Plaza, New York, New York 10005, the principal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (or such lesser amount as shall equal the aggregate unpaid principal amount of the Special Purpose Credit Loans made by the Bank to the Company under the Credit Agreement referred to below), in lawful money of the United States of America and in immediately available funds, on the dates and in the principal amounts provided in the Credit Agreement referred to below with respect to Special Purpose Credit Loans, and to pay, to the extent permitted by law, interest on the unpaid principal amount of, and any overdue interest on, each such Special Purpose Credit Loan, at such office, in like money and funds, for the period commencing on the date of such Special Purpose Credit Loan until such Special Purpose Credit Loan shall be paid in full, at the rates per annum and on the dates provided in the Credit Agreement.

The date and amount of each Special Purpose Credit Loan made by the Bank to the Company, and each payment made on account of the principal thereof, shall be recorded by the Bank on its books and, prior to any transfer of this Note, endorsed by the Bank on the schedule attached hereto or any continuation thereof.

This Note is one of the Notes referred to in the Amended and Restated Credit Agreement (together with all amendments or supplements thereto, the "Credit Agreement") dated as of \_\_\_\_\_, 1992, between the Company and the Bank, and evidences Special Purpose Credit Loans made by the Bank thereunder. Capitalized terms used in this Note have the respective meanings assigned to them in the Credit Agreement.

The Credit Agreement provides for the acceleration of the maturity of this Note upon the occurrence of certain events and for prepayments of Special Purpose Credit Loans upon the terms and conditions specified therein.

THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED IN  
ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

LANDMARK PETROLEUM INC.

By: \_\_\_\_\_  
Name:  
Title:

LOANS

Date of <u>Loan</u>	Principal Amount <u>of Loan</u>	Amount Paid or <u>Prepaid</u>	Amount of Interest <u>Paid</u>	Unpaid Principal <u>Amount</u>	Notation <u>Made By</u>
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EXHIBIT C

FORM OF  
COMPLIANCE CERTIFICATE

The undersigned hereby certifies that he is the \_\_\_\_\_ of Landmark Petroleum Inc., a Delaware corporation (the "Company"), and that as such he is authorized to execute this certificate on behalf of the Company. With reference to the Amended and Restated Credit Agreement dated as of \_\_\_\_\_, 1992 (together with all amendments or supplements thereto being the "Agreement") between the Company and The Chase Manhattan Bank, N.A., the undersigned further certifies, represents and warrants as follows (each capitalized term used herein having the same meaning given to it in the Agreement unless otherwise specified):

(a) The representations and warranties of the Company contained in Section 7 of the Agreement and otherwise made in writing by or on behalf of the Company pursuant to the Agreement were true and correct in all material respects when made, and are repeated at and as of the time of delivery hereof and are true and correct in all material respects at and as of the time of delivery hereof.

(b) The Company has performed and complied with all conditions contained in the Agreement required to be performed or complied with by it prior to or at the time of delivery hereof.

(c) Since the date of the Financial Statements, no change has occurred and is continuing in the condition, financial or otherwise, of the Company or any Subsidiary which would have a Material Adverse Effect.

(d) There exists, and, after giving effect to the Loans or Letters of Credit with respect to which this certificate is being delivered, will exist, no Default under the Agreement.

EXECUTED AND DELIVERED this \_\_\_\_ day of \_\_\_\_\_,  
199\_.

LANDMARK PETROLEUM INC.

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

EXHIBIT D

FORM OF

ENVIRONMENTAL COMPLIANCE CERTIFICATE

The undersigned hereby certifies that he is the \_\_\_\_\_ of Landmark Petroleum Inc., a Delaware corporation (the "Company"), and that as such he is authorized to execute this certificate on behalf of the Company. With reference to the Amended and Restated Credit Agreement dated as of \_\_\_\_\_, 1992 (together with all amendments or supplements thereto being the "Agreement") between the Company and The Chase Manhattan Bank, N.A., the undersigned further certifies, represents and warrants, as follows (each capitalized term used herein having the same meaning given to it in the Agreement unless otherwise specified):

Except as specified on Schedule 7.16 attached to the Agreement and Schedule D-1 attached hereto, the Company and all Subsidiaries are in full compliance with the requirements of Section 9.13 of the Agreement.

With respect to those matters disclosed on Schedule 7.16 to the Agreement and Schedule D-1 attached hereto, the Company and its Subsidiaries are taking the actions described on Schedule D-1 in order to establish and maintain compliance with the requirements of Section 9.13 of the Agreement.

EXECUTED AND DELIVERED this \_\_\_\_ day of \_\_\_\_\_,  
19\_\_.

LANDMARK PETROLEUM INC.

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

EXHIBIT E

[FORM OF OPINION OF COMPANY'S COUNSEL]

[Date of loan closing]

The Chase Manhattan Bank, N.A.  
1 Chase Manhattan Plaza  
New York, New York 10005

Gentlemen:

We have acted as counsel for Landmark Petroleum Inc., a Delaware corporation (the "Company"), and Landmark Carbon Inc., a Delaware corporation ("Carbon"), in connection with the Amended and Restated Credit Agreement dated as of June 24, 1992 (the "Credit Agreement"), between the Company and The Chase Manhattan Bank, N.A. (the "Bank"). This opinion is delivered to you pursuant to Section 6.01 of the Credit Agreement. Capitalized terms not otherwise defined herein are defined as set forth in the Credit Agreement.

In connection with the opinions hereinafter expressed, we have (i) investigated such questions of law, (ii) examined such corporate documents and records of the Company and Carbon and certificates of public officials, and (iii) received such information and certificates from officers and representatives of the Company and Carbon, as we have deemed necessary or appropriate for the purposes of this opinion. We have examined the following documents (those identified in items (a) through (i) below being referred to collectively as the "Identified Documents"):

- (a) A copy of the Credit Agreement executed by the Company;
- (b) The executed Notes;
- (c) A copy of the Second Amendment and Supplement to Deed of Trust and Security Agreement of even date with the Credit Agreement executed by the Company;
- (d) A copy of the Second Amendment and Supplement to Security Agreement (Equipment and Other Property) of even date with the Credit Agreement executed by the Company;

- (e) A copy of the Second Amendment and Supplement to Security Agreement (Accounts, Inventory and Other Property) of even date with the Credit Agreement executed by the Company;
- (f) A copy of the Second Amendment and Supplement to Security Agreement (Stock, Bonds and Other Securities) of even date with the Credit Agreement executed by the Company;
- (g) A copy of the Third Amendment and Supplement to Security Agreement (Accounts and Other Property) of even date with the Credit Agreement executed by Carbon;
- (h) A copy of the Consultation and Service Agreement dated as of June 19, 1992, executed by the Company; and
- (i) A copy of the Option Agreement (CPI) of even date with the Credit Agreement executed by the Company (the "Option Agreement (CPI)").

We have assumed the following: the genuineness of all signatures on all documents and instruments (other than the signatures of the officers of the Company and Carbon); the authenticity of all documents submitted to us as originals; the conformity to originals of all documents submitted to us as copies; the correctness and accuracy of all facts set forth in all certificates referred to in this opinion; each instrument and agreement reviewed by us is a legal, valid and binding obligation of and is enforceable in accordance with its terms against the parties thereto (other than the Company and Carbon); each individual executing or otherwise taking any action with respect to any of the Identified Documents or any related document or other certificate, instrument or agreement (other than officers of the Company or Carbon to the extent representing or acting on behalf of the Company or Carbon) has the legal capacity to effect such execution or action.

On the basis of, and in reliance upon, all of the foregoing and subject to the qualifications set forth herein, we are of the opinion that:

1. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, with all requisite corporate power and authority to own, operate and lease its Properties and to carry on in all material respects its business as is now being conducted and as currently proposed to be conducted. Carbon is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, with all requisite corporate power

and authority to own, operate and lease its Properties and to carry on in all material respects its business as is now being conducted and as currently proposed to be conducted.

2. The Company is duly qualified or licensed as a foreign corporation authorized to do business in the States of Colorado and Texas. Carbon is duly qualified or licensed as a foreign corporation authorized to do business in the State of Colorado.

3. The Company has the requisite corporate power and authority to execute, deliver and perform the Identified Documents to which it is a party and to consummate the transactions contemplated thereby. The execution delivery and performance by the Company of the Identified Documents to which it is a party and the consummation of the transactions contemplated thereby by the Company have been duly authorized by all necessary corporate action on the part of the Company. The Identified Documents to which the Company is shown as a party have been duly and validly executed and delivered by the Company.

4. Carbon has the requisite corporate power and authority to execute, deliver and perform the Identified Documents to which it is a party and to consummate the transactions contemplated thereby to be consummated by it. The execution, delivery and performance by Carbon of the Identified Documents to which it is a party and the consummation of the transactions contemplated thereby by Carbon have been duly authorized by all necessary corporate action on the part of Carbon. The Identified Document to which Carbon is shown as a party has been duly and validly executed and delivered by Carbon.

5. At the date of the Credit Agreement, except for the litigation described on-Schedule 7.03 to the Credit Agreement, no litigation, investigation, legal or administrative proceeding or arbitration known to us after due inquiry, of or before any court, arbitrator or governmental authority is pending or threatened against the Company or Carbon which could reasonably be expected to result in a judgment or liability not fully covered by insurance and which would have a Material Adverse Effect.

6. The execution and delivery of the Identified Documents by the Company and Carbon and the performance by the Company and Carbon of their respective obligations thereunder do not violate, conflict with or result in a default under any provision of (i) any existing law, rule or regulation applicable to the Company or Carbon, or

(ii) to the best of our knowledge after due inquiry, any order, injunction or decree of any court or governmental agency having jurisdiction over the Company or Carbon.

7. The Option Agreement (CPI) constitutes a legal, valid and binding obligation of the Company enforceable against the Company in accordance with its terms.

8. In connection with the choice of law provisions of the Identified Documents, we bring to your attention the recent Supreme Court of Texas case styled *Edward DeSantis, et al. v. Wackenhut Corporation*, 793 S.W. 2d 670 (Tex. 1990) which generally provides that contractual choice of law provisions may not be valid if application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. However, based on the factual assumptions set forth below, if the issue is properly presented to a court of competent jurisdiction, the choice of New York law to govern the Credit Agreement and the Notes, and the choice of Colorado law to govern the other Identified Documents, should be found by a court sitting in the State of Texas to be a valid choice of law under the laws of the State of Texas.

The opinions above are subject in all respects to the following:

1. We are licensed to practice law in the State of Texas and do not purport to be experts on, generally familiar with, or expressing legal conclusions based on, laws other than the law of the State of Texas, the federal laws of the United States of America and the General Corporation Law of the State of Delaware.

2. Our opinion is ~~is~~ subject to applicable bankruptcy, insolvency, moratorium and other similar laws affecting generally creditors' rights, including without limitation, laws pertaining to fraudulent conveyances and preferences.

3. Whenever our opinion is based on circumstances "known to us after due inquiry" or is stated to be "to the best of our knowledge after due inquiry," we have relied exclusively on certificates of officers (after the discussion of the contents thereof with such officers) of the Company and Carbon or certificates of others as to the existence or nonexistence of the circumstances upon which such opinion is predicated. We have no reason to believe, however, that any such certificate is untrue or incorrect in any material respect.

4. In rendering the opinions herein relating to the absences of any litigation, investigation, proceeding or arbitration, we express no opinion with respect to the possible effect of litigation, arbitration, proceedings and investigations as to which the Company or Carbon is not a named party.

5. With respect to the choice of law provisions in the Option Agreement (CPI), we assume the enforceability of such provision but express no opinion with respect thereto.

6. With respect to the enforceability of the Option Agreement (CPI), we express no opinion as to the availability of specific performance or any other equitable remedy (regardless of whether such question is considered in a proceeding in equity or at law).

7. With respect to the enforceability of the option granted in the Option Agreement (CPI), we have assumed that all documents necessary to exercise the option will be properly authorized, executed and delivered and that all consents needed from third parties (other than the directors and stockholders of the Company) in connection with the exercise of the option and the transfer of assets pursuant thereto will be obtained.

8. We have assumed that (i) the Bank is a national banking association domiciled in New York and is the only lender party to the Credit Agreement, (ii) the Credit Agreement was executed by the Bank in New York, (iii) advances and payments under the Credit Agreement and the Notes will be made in New York, and (iv) substantially all the property covered by the Identified Documents is located in Colorado.

9. We express no opinion as to the creation, existence, perfection or priority of any Lien.

This opinion is to be delivered only to the Bank and its counsel and only in connection with the transactions contemplated by the Identified Documents and may not be quoted, circulated or published in whole or in part or furnished to any other Person without our prior written consent.

Very truly yours,

Bracewell & Patterson

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## EXHIBIT F

### Security Instruments

1. Amended and Restated Credit Agreement
2. Deed of Trust and Security Agreement by the Company, dated as of November 5, 1990, as amended by First Amendment and Supplement to Deed of Trust and Security Agreement dated as of June 3, 1992 and Second Amendment and Supplement to Deed of Trust and Security Agreement
3. Security Agreement (Equipment and Other Property) by the Company, dated as of November 5, 1990, as amended by First Amendment and Supplement to Security Agreement (Equipment and Other Property) dated as of June 3, 1992 and Second Amendment and Supplement to Security Agreement (Equipment and Other Property)
4. Security Agreement (Accounts, Inventory and Other Property), by the Company, dated as of November 5, 1990, as amended by First Amendment and Supplement to Security Agreement (Accounts, Inventory and Other Property) dated as of June 3, 1992 and Second Amendment and Supplement to Security Agreement (Accounts, Inventory and Other Property)
5. Security Agreement (Accounts and Other Property) by the Calciner Operating Subsidiary, dated as of November 5, 1990, as amended by First Amendment and Supplement to Security Agreement (Accounts and Other Property) dated as of June 14, 1991, Second Amendment and Supplement to Security Agreement (Accounts and Other Property) dated as of June 3, 1992, and Third Amendment and Supplement to Security Agreement (Accounts and Other Property)
6. Security Agreement (Stock, Bonds and Other Securities) by the Company dated as of November 5, 1990, as amended by First Amendment and Supplement to Security Agreement (Stock, Bonds and Other Securities) dated as of June 3, 1992 and Second Amendment and Supplement to Security Agreement (Stock, Bonds and Other Securities)
  - a. Certificate(s) representing 100% of the issued and outstanding shares of Calciner Operating Subsidiary stock
  - b. Certificate(s) representing 100% of the issued and outstanding shares of Landmark Resources Inc. stock
  - c. Stock Powers related to 6a and 6b

EXHIBIT G

FORM OF  
BORROWING REQUEST

\_\_\_\_\_, 199\_

LANDMARK PETROLEUM INC., a Delaware corporation (the "Company"), pursuant to the Amended and Restated Credit Agreement dated as of \_\_\_\_\_, 1992, between the Company and THE CHASE MANHATTAN BANK, N.A. (together with all amendments or supplements thereto, the "Credit Agreement") hereby makes the requests indicated below (unless otherwise defined herein capitalized terms are defined in the Credit Agreement):

- ☐ 1. Revolving Credit Loans:
- (a) Aggregate amount of new Revolving Credit Loans to be made is \$\_\_\_\_\_;
- (b) Requested funding date is \_\_\_\_\_, 199\_\_.
- ☐ 2. Letter(s) of Credit:
- (a) Amount of Letter of Credit to be issued, reissued, renewed or extended is \$\_\_\_\_\_;
- (b) Requested date of issuance is \_\_\_\_\_, 199\_\_;
- (c) Beneficiary: \_\_\_\_\_;  
and
- (d) Terms of Letter of Credit: \_\_\_\_\_.
- ☐ 3. Term Loan:
- Requested funding date is \_\_\_\_\_.
- ☐ 4. Special Purpose Credit Loans:
- (a) Aggregate amount of new Special Purpose Credit Loans to be made is \$\_\_\_\_\_;
- (b) Requested funding date is \_\_\_\_\_.

The undersigned certifies that he is the \_\_\_\_\_ of the Company, and that as such he is authorized to execute this certificate on behalf of the Company. The undersigned further certifies, represents and warrants on behalf of the Company that

the Company is entitled to receive the requested Loan or Letter of Credit under the terms and conditions of the Credit Agreement (including, but not limited to, the conditions set forth in Sections 2.02, 6.02 and 6.03 of the Credit Agreement).

If delivered as a request for Revolving Credit Loans or Letter(s) of Credit, Schedule G-1 is attached to this Borrowing Request for the purpose of showing the availability of credit under the Credit Agreement. Each amount thereon is correctly stated.

If delivered as a request for Special Purpose Credit Loans, Schedule G-2 is attached to this Borrowing Request for the purpose of showing the availability of credit under the Credit Agreement. Each amount thereon is correctly stated.

LANDMARK PETROLEUM INC.

By: \_\_\_\_\_  
Name:  
Title:

SCHEDULE G-1  
to  
Borrowing Request

Date \_\_\_\_\_, 199\_\_

- |    |   |          |
|----|---|----------|
| 1. | Revolving Credit/Letter of Credit Commitment  | \$ _____ |
| 2. | Less outstanding Revolving Credit Loans   | \$ _____ |
| 3. | Less outstanding Letters of Credit issued under the Revolving Credit/Letter of Credit Commitment                              | \$ _____ |
| 4. | Less all amounts drawn on Letters of Credit, but not yet reimbursed   | \$ _____ |
| 5. | Excess (deficit) of remaining Revolving Credit/Letter of Credit Commitment over amounts outstanding (#1 - #2 - #3 - #4 above) | \$ _____ |
| 6. | Request for new Revolving Credit Loan(s)  | \$ _____ |
| 7. | Request for new Letter(s) of Credit under Revolving Credit/Letter of Credit Commitment  | \$ _____ |
| 8. | Remaining excess (deficit) of Revolving Credit/Letter of Credit Commitment over amounts outstanding (#5 - #6 - #7 above)      | \$ _____ |

SCHEDULE G-2  
to  
Borrowing Request

Date \_\_\_\_\_, 199\_\_

- |    |   |          |
|----|---|----------|
| 1. | Special Purpose Credit Maximum Availability   | \$ _____ |
| 2. | Less aggregate amount of all outstanding Special Purpose Credit Loans   | \$ _____ |
| 3. | Excess (deficit) of remaining Special Purpose Credit Maximum Availability over all outstanding Special Purpose Credit Loans (#1 - #2) | \$ _____ |
| 4. | Request for new Special Purpose Credit Loans  | \$ _____ |

#### SCHEDULE 7.02(b)

Under a Feedstock Agreement with Petrosource, Petrosource has possession of \$300,000 delivered to it by the Company. The Company has been advised from time to time that Petrosource believes that additional sums are owed to it by the Company. The parties are no longer operating under the Feedstock Agreement. Petrosource has not made any claim as to any specific amount alleged to be owed it by the Company.

The Company has a contract with the United States government for the sale of jet fuel. The contract requires a price adjustment based on factors set forth therein. This price adjustment process may result in a refund owing to the United States government.

The Company is in default under all of its equipment leases.

SCHEDULE 7.03

(LITIGATION AND LIABILITIES)

VENDOR	LIEN	SUIT	AMOUNT		RESPONSE TO SETTLEMENT LETTER		
					YES	NO	NO REPLY
A & B Asbestos	x		61,741.27		x		
All Waste (Western Ind. Cleaning Service Inc. and Vac-N-Jet Environmental)		x	40,134.25	Plus attorney's fees, court costs and interest not less than \$10,000.00			x
Basic Industries	x		156,686.49	Plus interest, attorney's fees and other costs.		x	
Falcon Pump & Supply Co. <sup>1</sup>		x	20,098.55		x		
J. & J. Protective Coating <sup>2</sup>	x	x	18,000.00	Plus court costs. Offered to settle for \$15,000.00			x
Roe Fire & Safety		x	2,637.42	Plus 8% interest/yr. plus court costs.			x
Webb Crane			30,427.44	Rec'd intent to file lien.			

<sup>1</sup> Plaintiff agreed to terms of settlement and has filed Motion to Set Aside Judgment and Dismiss with Prejudice. Presently awaiting court order.

<sup>2</sup> (a) Action No. 1: Satisfaction of judgment filed with the court. Filed for certificate of satisfaction necessary to release judgment lien.

(b) Action No. 2: Filed Stipulation for Dismissal. Presently awaiting court order. Possess a signed release of mechanics lien to be filed.

[illegible]

[27W] SDSW\0001.CHT



SHCEDULE 7.10

(Disclosure of Liens other than Excepted Liens)

1. See Schedule 7.03.

Schedule 7.16  
Disclosures as to Section 7.16

Environmental matters disclosed to the Bank, including:

1. The matters described in the report entitled "Western Slope Refining Company: Confidential Memorandum," prepared by Turner, Mason & Company, dated January 1990.
2. CDH Notice of Violation issued January 30, 1990 for failure to have continuous emission monitoring for SO<sub>2</sub> and H<sub>2</sub>S. See item 3 below.
3. CDH Compliance Order issued April 5, 1990 requiring implementation of a continuous emission monitoring program for H<sub>2</sub>S. In addition, the U.S. Environmental Protection Agency Notice of Violation issued April 18, 1990 for failure to continuously monitor H<sub>2</sub>S and SO<sub>2</sub> emissions under the PSD permit. H<sub>2</sub>S and SO<sub>2</sub> monitors have been installed but are undergoing certification testing.
4. CDH Final Order for Compliance issued July 27, 1990 concerning exceedance of SO<sub>2</sub> per bbl. oil processed emission standard for SO<sub>2</sub> sources. The Company is now operating in compliance with the Order.
5. CDH Compliance Order on Consent No. 88-09-29-01 dated September 29, 1988 and closure plans submitted and approved pursuant to that Order. The Company understands that Gary-William has received an approved closure plan and is implementing such plan.
6. The matters described in the letter pursuant to Section 6.01(o) of the Original Credit Agreement or in the letter from Purvin & Gertz, Inc. to the Bank dated August 21, 1990.
7. In addition as to Section 7.16(e) of the Original Credit Agreement, Pilko & Associates, Inc. conducted a limited environmental assessment of the Mortgaged Property on behalf of the Company. Pilko's assessment process included a visit to and review of the Mortgaged Property and the operations therein, discussions with environmental staff, and review of a variety of environmental information sources such as facility records, reports, regulations and industry standards. See also the letters referenced above.

8. The NPDES permit has expired, and the Company is now operating on an interim basis as instructed by the appropriate regulatory agency and is negotiating a new permit.
9. The Company is currently operating under a Colorado Department of Health compliance order dated December 3, 1991 dealing with visible emissions (fugitive dust) emanating from calcined coke handling facilities.
10. Completion of the enclosure of the Refinery's process sewer system and subsequent closure of the present open hydrocracker ditch may be necessary upon restarting facility operations. While the Refinery is not operating and is not in closure, these do not constitute violations. Should the Refinery be returned to operation as a fuel products refinery, these closures would have to be completed.
11. The lab underground storage tank closure must be completed. This could result in the discovery of, and remediation and clean-up of, contamination.

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Schedule 9.01  
(Debt not reflected in Financial Statements)

[None]

Schedule 9.03  
(Investments, loans or advances  
not reflected in Financial Statements)

[None]

Schedule 9.10  
(Accumulated Funding Deficiencies)

[None]

Tab B

LIENS

1. Tax Lien

[Wescourt shall set forth here a description of any liens (including appropriate recording information) securing the Tax Obligations.]

Wescourt and Landmark agree that Wescourt may remove this reference in the Bill of Sale with respect to the Sale of any Asset upon the agreement of the County of Mesa to release such Asset from the such liens in connection with such Sale.

2. Chase Liens

[Wescourt shall set forth here a description of the Chase Liens (including appropriate recording information).]

This description of liens may include an express reference to the release provisions set forth in Section 5.1 of this Marketing Agreement. Alternatively, Wescourt and Landmark agree that Wescourt may remove this reference to the extent Wescourt obtains from Chase proper releases of the Chase Liens and records such releases in the proper filing location on or prior to the delivery of the Bill of Sale.

3. Additional Liens

[Wescourt shall set forth here any liens, claims or encumbrances affecting the Assets being conveyed which liens, claims or encumbrances are set forth in the Owners' Policy of Title Insurance delivered pursuant to the terms of the Asset Purchase Agreement.]

Wescourt and Landmark agree that Wescourt may remove the reference to any lien, claim or encumbrance that is properly satisfied and released of record on or prior to the date of the execution of the Bill of Sale.



ASSET PURCHASE AGREEMENT

BETWEEN

WESCOURT GROUP, INC.  
a Delaware corporation

and

LANDMARK PETROLEUM, INC.  
a Delaware corporation

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Assets to third parties, in one or more sales, pursuant to a marketing agreement in the form of attached Exhibit A (the "Marketing Agreement").

2.3 Nonassumption of Liabilities. Buyer shall not assume, and shall not be liable to pay, perform or discharge when due, any Obligation of Seller known or unknown, anticipated or unanticipated, contingent or matured, with respect to the Transferred Assets arising on or prior to Closing or with respect to the Retained Assets at any time, including, without limitation, Obligations with respect to (i) Seller's employees (under any employment agreement, under any benefit plan, under any Legal Requirement applicable to employee benefits, health, or safety, or otherwise), (ii) the existence or disposal of Hazardous Materials on, in, or under the Assets, or (iii) any violation of Environmental Law with respect to the Assets (or the operation or decommission thereof). Notwithstanding the foregoing, from and after the Closing, Buyer shall be responsible for all real estate taxes and assessments and personal property taxes relating to the Transferred Assets and accruing on or after the date of Closing. Further, from and after Closing, Buyer shall be responsible for all utility charges relating to the Transferred Assets and Buyer shall notify all appropriate utilities as to the transfer of the Transferred Assets and instruct all such utilities to change their billing records accordingly.

### 3. CLOSING

3.1 Time and Place. The consummation ("Closing") of the transactions contemplated by this Agreement shall take place by facsimile exchange of all documents required to be delivered hereunder, with originals to follow immediately by overnight courier, on February 28, 1994, or as otherwise agreed by the parties in writing (the actual date of Closing, the "Closing Date"). Except as otherwise indicated, all such transactions will be deemed effective as of the close of business on the Closing Date.

3.2 Consideration. At Closing, in consideration of the sale, transfer, assignment, conveyance and delivery by Seller to Buyer of the Transferred Assets, Buyer will pay Fifty Thousand Dollars (\$50,000) (the "Purchase Price") to Seller. The sale, transfer, assignment, conveyance and delivery by Seller to Buyer of the Transferred Assets shall be subject to the Chase Liens on the terms set forth in the Chase Consent and subject to the Tax Lien on such terms as may be agreed upon by Buyer and the Treasurer of Mesa County, Colorado.

3.3 Allocation. The Purchase Price will be allocated among the Transferred Assets as determined by Buyer, in its reasonable discretion, after the Closing and notified to Seller within ninety (90) days after the Closing. Neither Seller nor Buyer will take a position in its tax returns which is inconsistent with such allocation. Seller and Buyer will comply with and furnish any information required by Section 1060 of the Code and the Treasury Regulations thereunder.

#### 4. REPRESENTATIONS AND WARRANTIES OF SELLER

Seller hereby represents and warrants to Buyer that each of the following statements are true and correct:

4.1 Organization. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller is qualified to do business and is in good standing as a foreign corporation in the State of Colorado.

4.2 Power and Authority. Seller has full corporate power and authority to enter into this Agreement and to perform its obligations hereunder.

4.3 Execution, Delivery and Performance. The execution, delivery and performance by Seller of this Agreement have been duly authorized by all necessary corporate action. The execution, delivery and performance by Seller of this Agreement do not violate, breach or cause a default under (a) its certificate of incorporation or bylaws, (b) any Legal Requirement, or (c) to the Knowledge of Seller, except with respect to any consents provided for in Section 4.5 (including, without limitation, the Chase Consent) and the terminations provided for in Section 7.5, any agreement, contract or instrument to which it is a party or by which it, or any of the Assets, is bound.

4.4 Binding Effect. Upon execution and delivery to Buyer, this Agreement and the other agreements to be executed and delivered by Seller at the Closing will each constitute a valid and binding Obligation of Seller, enforceable against Seller in accordance with its terms except as enforceability may be limited by bankruptcy, insolvency and other similar laws affecting creditors' rights generally or by general equitable principles.

4.5 Consents and Approvals. To the Knowledge of the Seller, other than the consents described in Schedule 4.5, no consent, approval, authorization, registration or qualification of or by any Person is

required in connection with the execution, delivery and performance by Seller of this Agreement and the consummation by Seller of the transactions contemplated hereby.

4.6 Compliance with Legal Requirements. To the Knowledge of Seller, except as disclosed in the records of the Seller maintained at the Refinery (the "Refinery Records") (a) the ownership, operation and decommission by Seller of the Assets does not violate or infringe, and has not in the past during Seller's ownership of the Assets violated or infringed, any Legal Requirement, (b) there are no outstanding Orders against Seller, any Affiliate of Seller or any other Person relating to the ownership, operation, or decommission of the Assets, (c) none of the Assets is in violation of any Legal Requirement and (d) there are no special assessment, condemnation, zoning or other land-use regulation proceedings either instituted or planned to be instituted with respect to the Assets.

4.7 Litigation. To the Knowledge of Seller, except as disclosed in the Refinery Records, there is no Action pending or threatened with respect to the ownership, operation, or decommission of the Assets. Without limiting the foregoing, to the Knowledge of Seller, except as disclosed in the Refinery Records, there is no Action pending or threatened with respect to the ownership, operation, or decommission of the Assets (a) under any Environmental Law, or (b) directly or indirectly arising out of an Environmental Occurrence or the presence of Hazardous Materials or a condition of nuisance on, in, or under the Assets (including the Real Property).

4.8 Title to Transferred Assets. Seller has good and marketable title to the Transferred Assets other than the Real Property (as to which Buyer shall rely solely on the title policy to be obtained pursuant to Section 7.4), free and clear of Encumbrances except for (a) the Tax Lien, (b) the Chase Liens, (c) the Encumbrances listed on the Title Policy and reflected as encumbering Assets other than the Real Property, (d) the Encumbrances listed on searches of the Uniform Commercial Code Records obtained by Buyer, and (e) Encumbrances for current Taxes not yet due and payable. Other than this Agreement, the Chase Documents, and the agreements to be terminated pursuant to the Termination Agreements as a condition to the Closing, there are no contracts, commitments, understandings, or arrangements relating to the sale or other disposition of any Transferred Asset. To the Knowledge of Seller, Schedule 4.8 and the Refinery Records collectively contain a complete description of all Assets leased by Seller from or to any Person.

4.9 Permits. To the Knowledge of Seller, Schedule 4.9 and the Refinery Records contain a complete and accurate description of all Permits. To the Knowledge of Seller, except as disclosed in Schedule 4.9 or the Refinery Records, each Permit is in full force and effect, there has been no default or breach thereunder, and there is no pending or threatened proceeding under which any Permit may be revoked, terminated or suspended. To the Knowledge of Seller, other than the Permits described in Schedule 4.9 and the Refinery Records, Seller is not required to hold or maintain any license, permit, authorization, certification, or approval with respect to the ownership or sale of the Assets.

4.10 Insurance. To the Knowledge of Seller, Schedule 4.10 sets forth a complete and accurate list of all Insurance Policies, including, with respect to each Insurance Policy, carrier, type and amount of coverage, deductible (if any) and all claims thereunder (or under its predecessor policy, if any) in the 36-month period ending on the date of this Agreement.

4.11 Environmental Matters. To the Knowledge of Seller, the Refinery Records contain a complete description of each instance in which, during Seller's ownership of the Refinery, there has occurred in, on, from, or under any Asset (including the Real Property) a release, threatened release, disposal, discharge, spillage, loss, seepage, transport or migration of Hazardous Materials, other than releases incidental to the ordinary operation of the Assets that could not, either individually or in the aggregate, be reasonably expected to have a material adverse effect on the ownership, value or operation of the Assets, or upon Seller's operating results (each such event, an "Environmental Occurrence") and a description of the current status of any investigation thereof by any Governmental Body. Buyer has been provided with full access to originals or copies of all of Seller's documents concerning, and correspondence to or from any Governmental Body concerning, any Environmental Occurrence (the foregoing, "Environmental Records") including any investigation thereof.

4.12 Financial Records. Buyer has been provided with full access to originals or copies of all of Seller's books of account, documents, correspondence and other books and records with respect to the Assets (collectively, "Financial Records").

4.13 Taxes. All Returns required to be filed by Seller with respect to the ownership or operation of the Assets have been duly filed on a timely basis and such



Returns are true, complete and correct. Except for the Tax Obligations, all Taxes shown to be payable on the Returns or on subsequent assessments with respect thereto have been paid in full on a timely basis, and no other Taxes are payable by Seller or by any other Person with respect to the ownership or operation of the Assets for the periods covered by such Returns (whether or not shown on or reportable on such Returns) or with respect to any other period prior to the date of this Agreement. Seller has withheld and paid over all Taxes required to have been withheld and paid over, and complied with all information reporting and backup withholding requirements, including maintenance of required records with respect thereto, in connection with amounts paid or owing to any employee, creditor, independent contractor, or other Person. Except for the Tax Obligations, there are no pending questions relating to, nor claims asserted for, Taxes on the ownership or operation of the Assets. There are no outstanding agreements or waivers executed by or on behalf of Seller extending the statutory period of limitation applicable to any Return for any period.

4.14 Disclosure. Seller has provided Buyer with access to each of the documents described in this Article 4 (including the Refinery Records, the Environmental Records, and the Financial Records). No representations or warranties made by Seller in this Agreement and, to the Knowledge of Seller, no statement made by Seller in any document or other writing furnished by Seller to Buyer pursuant to this Agreement contain any untrue statement of material fact or omit to state any material fact necessary in order to make such statements not misleading.

5. REPRESENTATIONS AND WARRANTIES BY BUYER

Buyer hereby represents and warrants to Seller that the following statements are true and correct:

5.1 Organization. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Buyer is qualified to do business and is in good standing as a foreign corporation in the State of Colorado.

5.2 Power and Authority. Buyer has full corporate power and corporate authority to enter into this Agreement and to perform its obligations hereunder.

5.3 Execution, Delivery and Performance. The execution, delivery and performance by Buyer of this Agreement have been duly authorized by all necessary

corporate action. The execution, delivery and performance by Buyer of this Agreement do not violate, breach or cause a default under (a) its certificate of incorporation or bylaws, (b) any Legal Requirement, or (c) any agreement, contract or instrument to which it is a party or by which it, or any of its assets, is subject or bound.

5.4 Binding Effect. Upon execution and delivery to Seller, this Agreement will constitute a valid and binding Obligation of Buyer, enforceable against Buyer in accordance with its terms except as enforceability may be limited by bankruptcy, insolvency and other similar laws affecting creditors' rights generally or by general equitable principles.

5.5 Consents and Approvals. No consent, approval, authorization, registration or qualification of or by any Person is required in connection with the execution, delivery and performance by Buyer of this Agreement and the consummation by Buyer of the transactions contemplated hereby.

## 6. OBLIGATIONS PRIOR TO CLOSING

6.1 Negative Covenants. From the date of this Agreement until the Closing Date, Seller shall not take any action which, if taken immediately prior to the date hereof, would render any of Seller's representations and warranties inaccurate or incomplete in any respect. Without limiting the foregoing, from the date of this Agreement until the Closing Date Seller shall not, directly or indirectly, (a) make, create, incur, assume or suffer to exist any Encumbrance on or with respect to any Asset (other than those existing on the date hereof), or (b) sell, assign, lease, convey, transfer or otherwise dispose of any Asset.

6.2 Notice of Default. From the date of this Agreement until the Closing Date, Seller shall give written notice to Buyer of Seller's receipt of notice of any (a) default under, or dispute with respect to, any Permit, agreement, contract or instrument to which it is a party, including, without limitation, the Chase Documents, and (b) the commencement of, or any material development in, any Action involving Seller or any Asset, such notice to be given to Buyer prior to Closing or within five (5) Business Days after Seller learns of such event, whichever is sooner.

6.3 Employee Matters. Seller agrees that it shall make any terminations of its employees in full compliance with all applicable Legal Requirements, including, without limitation, to the extent applicable, the Worker Adjustment and Retraining Notification Act.

6.4 Maintenance of Permits/Insurance Policies.

Notwithstanding the decommissioning of the Assets, from the date of this Agreement until the Closing Date, Seller shall maintain each Permit and Insurance Policy in full force and effect.

6.5 Partition of Assets. Promptly after the execution of this Agreement, Buyer and Seller shall commence such steps as are necessary or appropriate to accomplish the partition of the Retained Assets from the Transferred Assets, including the steps described below. Buyer and Seller shall diligently pursue such steps with the goal of completing such partition prior to Closing or, if not, as soon thereafter as is reasonably practicable.

(a) Real Property Survey. Buyer shall arrange for the preparation, by a surveyor or civil engineer licensed in the State of Colorado, of an "as-built" survey ("Survey") of the Real Property and the improvements located thereon, including, without limitation, lines for water, sewer, electricity, steam, gas, fuel oil, telephone and other utilities and the easements relating thereto. The Survey shall be reasonably acceptable to, and certified to, Buyer, Seller and Title Company, signed by the surveyor or civil engineer, and in sufficient detail to provide the basis for the title policy referred to in Section 7.4 without boundary, encroachment or survey exceptions.

(b) Partition of Real Property. Buyer and Seller shall take such steps as are necessary to effect the subdivision of the Real Property into the Retained Real Property and the Transferred Real Property in compliance with all Legal Requirements. Such steps shall include, to the extent applicable, (i) preparation by Buyer of a subdivision map, reasonably acceptable to Seller and Buyer, based on the Survey and (ii) the filing by Buyer of such map with all appropriate Governmental Bodies.

(c) Partition of Other Assets. Seller and Buyer shall cooperate in identifying the other steps that may be reasonably required to separate the Retained Assets and the Transferred Assets, including, without limitation, the segmentation and re-routing of piping, utilities, and other operational links between the Retained Assets and the Transferred Assets.

6.6 Cooperation in Due Diligence. From the date of this Agreement until the Closing Date, Seller shall reasonably cooperate with Buyer in connection with Buyer's due diligence review of the Assets. Without limiting the foregoing:

(a) Access to Records. Seller shall afford to Buyer and its employees, agents and authorized representatives full and free access to all Environmental Records, Records and Returns and to such other materials as Buyer may reasonably request (whether in the possession of Seller or its professional advisors). Seller shall ensure that its advisors fully cooperate with Buyer in connection with its review of the foregoing.

(b) Access to Assets. Seller shall permit Buyer and its employees, agents and authorized representatives, upon reasonable notice and during regular business hours, to enter the Refinery at their own risk for such purposes as Buyer may reasonably deem appropriate in connection with the transactions contemplated hereby. Seller agrees that, as part of such access, Buyer shall have the right to have a representative present at the Refinery during Seller's normal business hours to observe the decommissioning and partition of the Assets as contemplated hereby. Seller further agrees that Buyer and its representatives shall have the right to enter the Refinery at their own risk in connection with its environmental assessment of the Assets, including, without limitation, to make tests and take samples (including, in the case of the Real Property, soil borings and groundwater samples) in order to determine (i) if any Hazardous Materials exist therein or thereon (including on, in, or under the Real Property), and (ii) if any condition exists (including on, in, or under the Real Property) as to which a Governmental Body could require investigation or corrective action under any Environmental Law. Buyer shall indemnify and hold Seller and each Seller Indemnitee harmless from and against any and all Losses of Seller or any Seller Indemnitee arising out of the negligence or intentional misconduct of Buyer, its employees, agents or authorized representatives in conducting due diligence pursuant to this Section 6.6(b). Buyer shall provide to Seller, at Seller's request, copies of any environmental reports with respect to the Assets produced for Buyer by third party consultants (to the extent not subject, in Buyer's view, to the attorney-client privilege).

6.7 No Solicitation or Negotiation. From the date of this Agreement until the Closing Date, Seller will not directly or indirectly solicit, initiate or continue any discussions or negotiations with, or encourage or respond to any inquiries or proposals by, any Person (other than Buyer and its employees, representatives, and agents) concerning the sale or other disposition of all or any part of the Assets.

7. CONDITIONS PRECEDENT TO OBLIGATIONS OF BUYER

The obligation of Buyer to consummate the transactions contemplated by this Agreement is subject to the satisfaction of each of the following conditions. Buyer may waive any or all of these conditions by giving written notice of such waiver to Seller on or before the Closing Date.

7.1 Representations; Compliance with Covenants.

All representations and warranties of Seller shall be true and correct in all material respects on the Closing Date as though restated on and as of that date. Seller shall have performed all covenants required by this Agreement to have been performed by Seller on or before the Closing Date.

7.2 Litigation Affecting Closing. No Action shall be threatened or pending by any Person other than Buyer which seeks to restrain or prohibit the consummation of the transactions contemplated by this Agreement.

7.3 Chase Consent. Seller shall have obtained a consent of Chase with respect to the transactions contemplated hereby in the form of attached Exhibit B (the "Chase Consent").

7.4 Title Policy. Buyer shall have received an irrevocable commitment for ALTA Owner's Policies of Title Insurance (Form B, rev. 10/17/70) in the aggregate amount of the Purchase Price, at no more than Title Company's standard rates, insuring fee simple title to the Transferred Real Property, all appurtenances related thereto and all improvements located thereon, subject only to the Chase Liens, the Tax Lien and such other exceptions as Buyer shall have approved in writing, and providing such special endorsements as Buyer may reasonably require, including, without limitation, a Subdivision Map Act endorsement.

7.5 Seller's Deliveries at Closing. On or before Closing, Seller shall have delivered to Buyer the following documents:

(a) An original grant deed for each parcel of the Transferred Real Property in substantially the form of attached Exhibit C, duly executed by Seller and acknowledged;

(b) An original Assignment of Rights in substantially the form of attached Exhibit D assigning from Seller to Buyer all rights of Seller under the contracts and leases described in Schedule 5 with respect to the Transferred Assets, duly executed by Seller;

(c) A counterpart original of the Marketing Agreement, duly executed by Seller;

(d) A counterpart original of the Management Agreement, duly executed by Seller;

(e) An original Termination Agreement in substantially the form of attached Exhibit E, with respect to each of the agreements described in Schedule 6, duly executed by the parties thereto;

(f) An original Bill of Sale in substantially the form of attached Exhibit F; and

(g) Such other documents and instruments as may be reasonably necessary to effectuate the transactions contemplated hereby.

7.6 Chase's Deliveries at Closing. On or before Closing, Chase shall have delivered to Buyer (a) a counterpart original of the Marketing Agreement, duly executed by Chase and (b) an original Chase Consent, duly executed by Chase.

#### 8. CONDITIONS PRECEDENT TO OBLIGATIONS OF SELLER

The obligation of Seller to consummate the transactions contemplated by this Agreement is subject to the satisfaction of each of the following conditions. Seller may waive any or all of these conditions by giving written notice of such waiver to Buyer on or before the Closing Date.

8.1 Representations; Compliance with Covenants. All representations and warranties of Buyer shall be true and correct in all material respects on the Closing Date as though restated on and as of that date. Buyer shall have performed all covenants required by this Agreement to have been performed by Buyer on or before the Closing Date.

8.2 Litigation Affecting Closing. No Action shall be threatened or pending by any Person other than Seller which seeks to restrain or prohibit the consummation of the transactions contemplated by this Agreement.

8.3 Buyer's Deliveries at Closing. At Closing, Buyer shall pay to Seller the Purchase Price by certified check or bank cashier's check. In addition, on or before Closing, Buyer shall have delivered to Seller (a) a counterpart original of the Marketing Agreement, duly executed by Buyer, (b) a counterpart original of the

Management Agreement, duly executed by Buyer, and (c) such other documents and instruments as may be reasonably necessary to effectuate the transactions contemplated hereby.

8.4 Partition of Assets. Seller shall be satisfied with the progress of, and prospects for completion of, the partition of the Assets (including the Retained Real Property and the Transferred Real Property) pursuant to Section 6.5.

## 9. COVENANTS AFTER CLOSING

9.1 Indemnification by Seller. From and after Closing, Seller shall indemnify and hold Buyer and each Buyer Indemnitee harmless from and against any and all Losses that Buyer or any Buyer Indemnitee may incur or suffer which arise out of or result from:

(a) any breach of any representation, warranty or covenant of Seller in this Agreement or in any agreement, document or other writing furnished by Seller to Buyer pursuant to this Agreement;

(b) the ownership, use, possession, operation, or decommissioning of the Transferred Assets prior to Closing;

(c) except for the Tax Obligations, any failure by Seller to pay Taxes with respect to the Transferred Assets that are allocable to any period prior to and including the Closing Date;

(d) any failure by Seller to comply with any applicable bulk transfer statute in connection with the transactions contemplated by this Agreement; or

(e) the existence, release, threatened release, or disposal of Hazardous Materials on, in, or under the Transferred Assets on or prior to Closing, or any violation of Environmental Law with respect to the Transferred Assets (or the operation or decommission thereof) on or prior to Closing. For purposes of the foregoing, any release or disposal of Hazardous Materials on, in, or under the Transferred Assets as to which timing cannot be established shall be deemed to have occurred prior to Closing.

9.2 Indemnification by Buyer. From and after Closing, Buyer shall indemnify and hold Seller and each

Seller Indemnitee harmless from and against any and all Losses that Seller or any Seller Indemnitee may incur or suffer which arise out of or result from:

(a) any breach of any representation, warranty or covenant of Buyer in this Agreement or in any document or other writing furnished by Buyer to Seller pursuant to this Agreement;

(b) the ownership, use, possession or operation of the Transferred Assets from and after Closing; or

(c) any failure by Buyer to pay Taxes with respect to the Transferred Assets that are allocable to any period after the Closing Date.

9.3 Indemnification Claims. If any liability is asserted or Action is commenced by a third Person against a party indemnified pursuant to this Article 9 ("Indemnitee") which might give rise to an obligation, on the part of the other party ("Indemnitor") to indemnify hereunder:

(a) Notice. The Indemnitee shall give prompt written notice to the Indemnitor of the asserted liability or Action, stating the nature, basis and (to the extent known) amount thereof; provided, however, that the failure of an Indemnitee to provide such notice to the Indemnitor shall not limit the right to indemnification of the Indemnitee unless such failure prejudices the Indemnitor's ability to contest such asserted liability or Action.

(b) Defense of Claim. Upon the written agreement of the Indemnitor that it is obligated to indemnify hereunder, the Indemnitee shall afford the Indemnitor the right to assume responsibility for the defense (including all proceedings on appeal or review which counsel for the defendant shall deem appropriate) of any such asserted liability or Action ("Indemnified Proceeding") involving a claim by a Person other than the Indemnitor or any of its respective Affiliates. The Indemnitee shall have the right to employ its own counsel in any such case, but the fees and expenses of such counsel shall be at the expense of the Indemnitee unless Indemnitee shall have reasonably concluded that such matter involves to a significant extent matters beyond the scope of the indemnity agreements contained herein or the Indemnitor shall not have agreed promptly, and in any event within thirty (30) days, after receipt of the notice described above that it is obligated to indemnify hereunder and it is ultimately determined that Indemnitor was required to provide



indemnification for the matters raised in such Indemnified Proceeding. The Indemnatee shall be kept fully informed of such matter at all stages thereof whether or not it is so represented. The parties hereto shall render to each other such assistance as may be reasonably required in order to ensure the proper and adequate defense of any such asserted liability or Action. The Indemnitor shall not make any settlement of any Action without the written consent of the Indemnatee, which consent shall not be withheld unless the Indemnatee shall have reasonably concluded that the claim or settlement thereof involves to a significant extent matters beyond the scope of the indemnity agreements contained herein.

(c) Buyer's Knowledge. Notwithstanding anything in this Agreement to the contrary, Seller shall not be liable to Buyer for any claim for indemnification for a breach of representation or warranty set forth in this Agreement of which breach Buyer had knowledge, as defined below, at the time of the Closing. For purposes of this section, Buyer shall be deemed to have "knowledge" if Buyer knew of the untruth of such representation or warranty. In the determining whether Buyer had such knowledge, Keith Holder shall be deemed to have read this Agreement and the attached schedules and exhibits and the knowledge of Keith Holder shall be imputed to Buyer.

#### 9.4 Further Assurances.

(a) Generally. From and after Closing, Seller and Buyer shall, at their own expense, prepare, execute and deliver such further instruments of conveyance, sale, assignment or transfer, and shall take or cause to be taken such other or further action, as Seller or Buyer shall reasonably request at any time or from time to time in order to perfect, confirm or evidence the transactions contemplated hereby or to give effect to the provisions of this Agreement. If requested by Buyer, Seller agrees at Buyer's expense to prosecute or otherwise enforce in its own name for the sole benefit of Buyer any claims, rights, or benefits that are transferred to Buyer by this Agreement and that require prosecution or enforcement in Seller's name, including, without limitation, any warranty or indemnity rights with respect to any of the Assets. Any prosecution or enforcement of any claims, rights, or benefits under the preceding sentence shall be solely at Buyer's expense, unless the prosecution or enforcement is in connection with an indemnification obligation of Seller pursuant to Section 9.1.

(b) Additional Instruments; Consents. The parties recognize that a separate instrument or instruments of assignment (in addition to the Assignment) and/or termination (in addition to the Termination Agreements) may be necessary or appropriate with respect to certain of the contracts, leases, agreements, undertakings and commitments that are part of or applicable to the Transferred Assets, or that the signatures of all parties to the Assignment and the Termination Agreements may not be obtained on or prior to Closing. If any such instruments or additional signatures are required after the Closing in connection with the Assignment of Rights, the parties agree to use their best efforts to obtain all such instruments and/or additional signatures promptly after the Closing. If additional signatures are required to be obtained after Closing with respect to any instrument of consent or assignment, the lack of such signatures shall not affect the validity of such instrument to effectuate the consent or assignment described therein at Closing as with respect to each of the parties that has then executed such instrument, and such instrument shall thereafter become effective as to each additional signatory as and when signed by such additional signatory.

(c) Partition of Assets. The parties recognize that certain of the steps under Section 6.5 that are necessary or appropriate to partition the Retained Assets from the Transferred Assets may not be completed on or prior to the Closing. In such event, the parties agree to diligently pursue all such outstanding steps with the goal of completing such partition as soon after the Closing as is reasonably practicable.

(d) Certain Easements.

(i) Seller acknowledges that it may be necessary for Buyer to acquire certain easements after Closing in connection with the operation of the Transferred Assets, including easements to assure the continued supply of utilities to the Transferred Assets and/or to expand such supply in connection with the operation of such Assets after the Closing. If so requested during the six month period following the Closing, Seller agrees to grant to Buyer such easements and rights of way with respect to the Retained Real Property as Buyer may deem reasonably necessary from time to time.

(ii) Buyer acknowledges that it may be necessary for Seller to acquire certain easements after Closing in connection with the effective use (in a decommissioned state) or disposition of the Retained Assets, including easements to assure the continued supply of

utilities to the Retained Assets and/or to expand such supply in connection with the maintenance of such Assets in a decommissioned state, and/or to insure the access of the Retained Real Property to a public highway. If so requested during the six month period following the Closing, Buyer agrees to grant to Seller such easements and rights of way with respect to the Transferred Real Property as Seller may deem reasonably necessary from time to time. In connection with the foregoing, Buyer agrees to permit Seller to utilize after the Closing the utility systems included within the Transferred Personal Property to the extent that use thereof is required in connection with the maintenance of the Retained Assets in a decommissioned state. The use described in the preceding sentence will be without charge, but any resulting utility payments will be the sole responsibility of Seller.

(e) Permits. Seller acknowledges that it may be necessary for Buyer to acquire certain permits after Closing in connection with the operation of the Transferred Assets. If so requested after the Closing, Seller shall assign to Buyer such Permits as (a) are assignable, (b) relate to the Transferred Assets, and (c) are not required for maintenance of the Retained Assets in a decommissioned state. Seller shall also cooperate with Buyer to the extent the Buyer reasonably requests in connection with divisions of existing Permits or Buyer's applications for additional permits that are required as a result of the transactions contemplated hereby for the post-Closing operation of the Transferred Assets.

(f) Marketing Agreement. From and after Closing, Buyer and Seller shall cooperate to effect the sale of the Retained Assets under and as provided in the Marketing Agreement.

9.5 Access. After Closing, for so long as the Management Agreement remains in effect, Seller will upon reasonable notice and during business hours afford Buyer such access to the Records and Returns as Buyer may reasonably require in connection with the resolution of tax questions, the conduct of tax audits, and any related matters. Seller will not, during such period, dispose of or destroy any material Records or Returns without providing thirty (30) days' prior written notice to Buyer so that Buyer may at its expense examine, copy, or repossess the Records and Returns to be disposed of or destroyed.

10. GENERAL PROVISIONS

10.1 Termination.

(a) Cause for Termination. This Agreement and the transactions contemplated hereby may be terminated prior to Closing:

(i) By mutual written agreement of Buyer and Seller at any time;

(ii) By either Buyer or Seller if Closing has not occurred on or before March 15, 1994 and the party electing to terminate is not in breach of its obligations hereunder;

(iii) By Buyer if there has been a casualty to or condemnation of any of the Assets prior to Closing entitling Buyer to terminate this Agreement pursuant to Section 10.16;

(iv) By Buyer if there has been a material breach on the part of Seller of the representations, warranties, or covenants of Seller in this Agreement; or

(v) By Seller if there has been a material breach on the part of Buyer of the representations, warranties, or covenants of Buyer in this Agreement.

(b) Effect of Termination. Upon any termination of this Agreement pursuant to Section 10.1(a), this Agreement shall be void and neither Buyer nor Seller, nor any other Buyer Indemnitee or Seller Indemnitee, shall have any liability hereunder except that Section 6.6(b) and Section 10.2 shall survive such termination. A breaching party shall be liable for such damages, costs and expenses as are the direct and proximate result of its breach but shall not be liable for or on account of any consequential damages of any kind suffered as a result thereof.

10.2 Costs and Expenses. Except as otherwise provided herein or in the Marketing Agreement, the parties shall each bear their own costs and expenses (including attorneys' fees) incurred in connection with the negotiation and preparation of this Agreement and consummation of the transactions contemplated hereby. Seller shall pay the cost of all title insurance premiums and endorsements and all surveys associated therewith. All sales, use and documentary taxes payable in connection with the

transactions contemplated hereby and any escrow fees associated herewith shall be shared equally by Buyer and Seller.

10.3 Communications. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been given (a) when delivered personally, or (b) 48 hours after being sent by facsimile with duplicate sent by courier service. Such communications shall be directed as follows:

To Seller at:

Landmark Petroleum, Inc.  
1493 Highway 6 & 50  
Fruita, Colorado 81521  
Att'n: Mr. Richard Means  
Fax: (303) 858-9194

with a copy to:

Bracewell & Patterson  
711 Louisiana, Suite 2900  
Houston, TX 77002-2781  
Att'n: Richard Rice  
Fax: (713) 221-1212

To Buyer at:

Wescourt Group, Inc.  
2401 River Road  
Grand Junction, Colorado 81505  
Att'n: Keith Holder  
Fax: (303) 329-2902

with a copy to:

Morrison & Foerster  
345 California Street  
San Francisco, CA 94104  
Att'n: Ken Siegel, Esq.  
Fax: (415) 677-7522

Any party may change its address for purposes of this Section 10.3 by giving the other party notice of the new address in the manner set forth above.

10.4 Schedules and Exhibits. The schedules and exhibits attached hereto are made a part hereof. References herein to this Agreement include such schedules and exhibits.

10.5 Captions and Headings. The captions contained herein are for convenience and reference only and shall not affect the meaning, scope, intent, or interpretation of this Agreement or its provisions.

10.6 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings, written and oral with respect thereto. No prior draft of this Agreement nor any parole evidence shall be admissible to prove the meaning or intent of any provision of this Agreement.

10.7 Amendment or Modification. This Agreement may only be amended, modified or supplemented by a written instrument specifically referring to this Agreement and signed by Seller and Buyer.

10.8 Waiver. The failure of either party to enforce at any time any provision of this Agreement will not be construed to be a waiver of any such provision and will not affect the validity of this Agreement or any part hereof or the right of either party to enforce such provision. No waiver of any breach hereof will be construed to be a waiver of any other breach.

10.9 Assignment. Neither party may assign its rights and obligations under this Agreement either prior to or after the Closing except that Buyer may assign all or a portion of its rights hereunder to one or more Affiliate of Buyer; provided, that, as between Buyer and Seller, no such assignment by Buyer shall relieve Buyer of any of its obligations under this Agreement. Without limitation of the foregoing, Buyer may elect, by written notice to Seller on or prior to Closing, to have the Transferred Real Property transferred to one Affiliate of Buyer and the other Transferred Assets transferred to another Affiliate of Buyer.

10.10 Parties in Interest. Subject to Section 10.9, this Agreement will inure to the benefit of and be binding upon Seller and Buyer and their respective successors, assigns and legal representatives. Nothing in this Agreement express or implied is intended to confer upon any Person other than Buyer, Seller and, to the limited extent expressly provided herein, the Buyer Indemnitees and the Seller Indemnitees, any right or remedy by reason of this Agreement.

10.11 Survival. The representations and warranties of Buyer and Seller in this Agreement shall survive only until the second (2nd) anniversary of the Closing Date and any claim for breach of any of such representations and warranties made after that date shall be barred; provided, however, that the representations, warranties, covenants and indemnities of Seller with respect to the environmental matters (including, without limitation, pursuant to Section 4.11) and with respect to Taxes (including, without limitation, pursuant to Section 4.13) shall continue in full force and effect until the fourth (4th) anniversary of the Closing Date and any claim for breach of any of such representations and warranties made after that date shall be barred.

10.12 Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York.

10.13 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of any such provision in any other jurisdiction, unless such prohibition or unenforceability frustrates the overall objective of this Agreement.

10.14 Time of the Essence. Time shall be of the essence of this Agreement and of every part hereof.

10.15 Finder's or Broker's Fees. Each of the parties represents and warrants that it has not dealt with any broker or finder in connection with any of the transactions contemplated by this Agreement and that, insofar as it knows, no broker or other Person is entitled to any commission or finder's fee in connection with any of these transactions. Each of the parties shall be responsible for, and shall indemnify and hold the other party harmless against, the fees of its finder's or broker's, if any.

10.16 Risk of Loss. Seller shall promptly notify Buyer if, prior to Closing, any of the Transferred Assets (a) are damaged or destroyed by casualty, or (b) taken pursuant to the power of eminent domain (or any proceeding with respect to such a taking is instituted or threatened). Buyer shall have the right, at its option, to terminate this Agreement by delivering notice of such termination to Seller not later than ten (10) Business Days after the date Buyer

receives any such notice from Seller. In the event Buyer does not elect to terminate this Agreement by reason hereof, then Closing shall occur and the Purchase Price shall not be reduced by any costs associated with such casualty or taking.

10.17 Bulk Sales. The parties hereby waive compliance with the provisions of any bulk transfer or bulk sales law of any jurisdiction.

10.18 Counterparts. This Agreement will be executed in counterparts, and the several counterparts shall constitute one executed Agreement.

10.19 DISCLAIMER. EXCEPT AS IS EXPRESSLY STATED IN THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED IN CONNECTION HERewith TO THE CONTRARY, SELLER HEREBY DISCLAIMS TO THE FULLEST EXTENT ALLOWED BY LAW ANY AGREEMENT, WARRANTY, GUARANTY, OR REPRESENTATION, ORAL OR WRITTEN, EXPRESSED, IMPLIED, OR ARISING BY LAW, PAST, PRESENT OR FUTURE, OF, AS, TO OR CONCERNING (I) THE NATURE AND CONDITION OF THE ASSETS AND THE SUITABILITY THEREOF FOR ANY AND ALL USES WHICH BUYER MAY ELECT TO CONDUCT THEREON OR ANY IMPROVEMENTS CONSTRUCTED THEREON, INCOME TO BE DERIVED THEREFROM OR COSTS TO BE INCURRED WITH RESPECT THERETO, MERCHANTABILITY, HABITABILITY OR ANY OTHER MATTER RELATING THERETO OR AFFECTING SAME; (II) THE QUALITY AND TYPE OF CONSTRUCTION AND THE CURRENT CONDITION OF ANY IMPROVEMENTS LOCATED THEREON; AND (III) THE COMPLIANCE OF THE ASSETS WITH THE OPERATION AND USE OF THE ASSETS WITH ANY LAWS, ORDINANCES, RULES OR REGULATIONS OF ANY GOVERNMENTAL BODY. BUYER ACKNOWLEDGES ITS INSPECTION AND SATISFACTION WITH THE ASSETS AND EXCEPT AS EXPRESSLY PROVIDED HEREIN OR IN ANY OTHER AGREEMENT EXECUTED IN CONNECTION HERewith TO THE CONTRARY WAIVES ALL CLAIMS, IF ANY NOW OR HEREAFTER ARISING. BUYER ACKNOWLEDGES THAT IT IS AWARE IN GENERAL TERMS OF SELLER'S FINANCIAL CONDITION INCLUDING THE FACT THAT CURRENTLY ITS LIABILITIES MAY EXCEED ITS ASSETS. AS BETWEEN BUYER AND SELLER, BUYER AGREES TO LOOK SOLELY TO THE OBLIGATIONS, REPRESENTATIONS AND WARRANTIES OF SELLER IN THIS AGREEMENT AND THE OTHER AGREEMENTS AND DOCUMENTS CONTEMPLATED HEREBY AND RELEASES SELLER FROM ANY CLAIM THAT BUYER MAY HAVE EXCEPT TO THE EXTENT THAT SUCH CLAIM ARISES OUT OF A BREACH OF ANY SUCH OBLIGATION, REPRESENTATION, OR WARRANTY BY SELLER.



IN WITNESS WHEREOF the parties hereto have executed  
this Agreement on the date first written above.

WESCOURT GROUP, INC.

By   
Keith R. Holder, President

LANDMARK PETROLEUM, INC.

By \_\_\_\_\_  
Richard Means, Vice President

WESCOURT GROUP, INC.

LANDMARK PETROLEUM, INC.

W77191 [KAS1]

### Schedules and Exhibits

Schedule 1	- Definitions
Schedule 2	- Transferred Personal Property
Schedule 3	Transferred Real Property
Schedule 4.5	- Consents
Schedule 4.8	- Leased Assets
Schedule 4.9	- Permits
Schedule 4.10	- Insurance
Schedule 5	- Assigned Agreements
Schedule 6	- Terminated Agreements
Exhibit A	- Marketing Agreement
Exhibit B	- Chase Consent
Exhibit C	- Grant Deed
Exhibit D	- Assignment of Rights
Exhibit E	- Termination Agreement
Exhibit F	- Bill of Sale

Schedule 1  
to Asset Purchase Agreement

DEFINITIONS

"Action" means any action, suit, claim, arbitration, judgment, or legal, administrative, or other proceeding, or governmental investigation.

"Affiliate" means, as to any Person, any Person which, directly or indirectly, controls or is controlled by or is under common control with such Person. For the purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with") means, as to any Person, the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

"Agreement" means this Asset Purchase Agreement (including all exhibits and schedules hereto), as the same may hereafter be amended from time to time.

"Apportionment Statement" has the meaning specified in Section 3.3(b).

"Assets" means all of Seller's right, title and interest in and to all property and assets of every description and wherever situated connected with the Refinery on the date hereof or purchased by Seller on or prior to Closing for use in connection with the Refinery (whether or not delivered), including, without limitation, the following:

(a) Real Property. The real property located at 1493 Highway 6 & 50, Fruita, Colorado 81521 consisting of the Retained Real Property and the Transferred Real Property (collectively, the "Real Property");

(b) Personal Property. All personal property located on the Real Property or used or usable by Seller in connection with the operation of the Refinery, including, without limitation, (i) all refinery and office equipment, machinery, spare-parts, tools, manuals, testing and maintenance devices and supplies, (ii) all computer hardware and software and (iii) all automobiles and vehicles, together with all warranties and guaranties pertaining thereto and all maintenance records, plans and specifications therefore (collectively, the "Personal Property");

(c) Contracts. All of Seller's contracts, agreements, contract rights, warranty rights, license agreements, and other rights with respect to the ownership and operation of the Refinery, including, all of Seller's rights with respect to utilities provided to the Refinery (collectively, the "Contracts");

(d) Permits. All federal, state, local and foreign governmental licenses, permits, authorizations and approvals held by Seller with respect to the ownership or operation of the Refinery, including, without limitation, all such licenses, permits, authorizations and approvals relating to (i) utilities, (ii) the ownership, construction, operation, use and occupancy of any of the Assets, including, without limitation, building, zoning, subdivision, sewer, environmental matters, wetlands and drainage, (iii) the manufacture, processing, distribution, use, treatment, storage, recycling, disposal, release, transport or handling of Hazardous Materials and (iv) transportation of goods to and from the Refinery (intrastate or interstate) (collectively, the "Permits"); and

(e) Insurance. All of Seller's rights under insurance policies or other arrangements relating to the Refinery (collectively, the "Insurance Policies").

"Business Day" means a date that is not a Saturday, Sunday or bank holiday in the State of Colorado.

"Buyer" means Wescourt Group, Inc., a Delaware corporation.

"Buyer Indemnitee" means, collectively, (a) Buyer, (b) each Affiliate of Buyer, and (c) each officer, director, employee and agent of any Person described in clauses (a) or (b).

"Chase" means The Chase Manhattan Bank, N.A., a national banking association.

"Chase Consent" has the meaning specified in Section 7.3.

"Chase Documents" means the Amended and Restated Credit Agreement, dated as of June 24, 1992, between Chase and Seller and all agreements and other instruments executed by Chase and/or Seller as security for or in connection therewith or pursuant thereto, in each case as amended prior to the date hereof including, without limitation, the

Security Instruments and the Option Agreement (Chase) (as such terms are defined in such Amended and Restated Credit Agreement).

"Chase Liens" means the liens and security interests with respect to the Assets granted by Seller to Chase pursuant to the Chase Documents.

"Closing" has the meaning specified in Section 3.1.

"Closing Date" has the meaning specified in Section 3.1.

"Code" means the Internal Revenue Code of 1986, as amended.

"Encumbrance" means, with respect to any tangible or intangible asset, any encumbrance, security interest, mortgage, lien, pledge, charge, equity, claim, easement, right-of-way, covenant, or restriction.

"Environmental Occurrence" has the meaning specified in Section 4.11.

"Environmental Laws" means any and all federal, state, local and foreign laws (statutory or common), rules, regulations, ordinances, codes, Orders, permits, or licenses relating to human health or the environment or to emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes into the environment, including, without limitation, ambient air, surface water, groundwater or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, recycling, disposal, transport or handling of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 et seq.) ("CERCLA"), as amended, the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), and the Federal Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.).

"Environmental Records" has the meaning specified in Section 4.11.

"GAAP" means United States generally accepted accounting principles, as in effect on the date hereof.

"Governmental Body" means any federal, state, local entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any department, commission, board, bureau, agency, court or other instrumentality.

"Hazardous Material" means any material, substance, chemical or waste which is (a) listed, defined or otherwise identified as hazardous, toxic or dangerous or regulated under any Environmental Law, including, without limitation, crude oil, petroleum (and any petroleum product or by-product), asbestos, and polychlorinated biphenyls, (b) a basis for liability under any common law theory or (c) potentially injurious to human health or the environment.

"Indemnified Proceeding" has the meaning specified in Section 9.3.

"Indemnitee" has the meaning specified in Section 9.3.

"Indemnitor" has the meaning specified in Section 9.3.

"Insurance Policies" has the meaning specified in the definition of Assets.

"Knowledge of Seller" means the actual knowledge (after reasonable inquiry) of each of the officers and individuals with executive responsibility for any aspect of the Assets or the business of Seller.

"Legal Requirement" means, as to any Person, any law (statutory or common), rule, regulation, ordinance, Order, permit, or license, including, without limitation, any Environmental Law, in each case applicable to or binding upon the Person or any of its property or to which the Person or any of its property is subject, including, without limitation, in the case of Seller, to which the ownership, operation, or decommission of Assets are subject.

"Losses" means demands, claims, losses, damages, injuries, costs, liabilities, obligations, fines, penalties, and legal and administrative investigations and proceedings and any associated costs and expenses (including, without limitation, court costs, reasonable attorneys', experts' and consultants' fees). Without limiting the foregoing, "Losses" includes all necessary costs of investigation and response incurred with respect to any violation of Environmental Law, the condition of the Assets, or the

existence, release, or disposal of Hazardous Materials on, in, or under the Assets, or any release or threatened release resulting therefrom.

"Management Agreement" means the Management Agreement, dated the date hereof, between Seller and an affiliate of Buyer with respect to the management of the Retained Assets after the Closing.

"Marketing Agreement" has the meaning specified Section 2.2.

"Obligation" means, as to any Person, any liability or obligation of such Person of any type whatsoever, known or unknown, anticipated or unanticipated, contingent or matured.

"Order" means any judgment, decree, writ, stipulation, injunction, determination, award, or other order or ruling of any Governmental Body.

"Permits" has the meaning specified in the definition of Assets.

"Person" means any individual, corporation, partnership, firm, Governmental Body or other entity, whether acting in an individual, fiduciary or any other capacity.

"Personal Property" has the meaning specified in the definition of Assets.

"Purchase Price" has the meaning specified in Section 3.1.

"Real Property" has the meaning specified in the definition of Assets.

"Records" has the meaning specified Section 4.12.

"Refinery" has the meaning specified in Recital A.

"Retained Assets" has the meaning specified in Recital B.

"Retained Real Property" means the Real Property described in the attached Schedule 3 (and related map) as Parcel 2 of Tract A, including, without limitation, all of Seller's right, title and interest in and to (a) all rights, privileges and easements appurtenant thereto, including (i) all minerals, oil, gas and other hydrocarbon substances



thereon and thereunder, (ii) all development rights, air rights, water, water rights and water stock relating thereto and (iii) all easements, rights-of-way or other appurtenances used in connection with the beneficial use and enjoyment thereof and (b) all improvements and fixtures, owned or leased, that are located thereon.

"Returns" means all reports, estimates, declarations of estimated tax, information statements and returns relating to, or required to be filed in connection with, any Taxes, including information returns or reports with respect to backup withholding and other payments to third parties.

"Seller" means Landmark Petroleum, Inc., a Delaware corporation.

"Seller Indemnitee" means, collectively, (a) Seller, (b) each Affiliate of Seller, and (c) each officer, director, employee and agent of any Person described in clauses (a) or (b).

"Survey" has the meaning specified in Section 6.5(a).

"Tax Lien" means the Lien in favor of the tax authorities of the County of Mesa, Colorado securing the obligation of Seller to pay the Tax Obligations.

"Tax Obligations" means the obligations of the Seller with respect to certain past due property Taxes payable to the County of Mesa, Colorado in an aggregate amount not exceeding \$1,024,000.

"Taxes" means all taxes, however denominated, including any interest, penalties or other additions to tax that may become payable in respect thereof, imposed by any federal, territorial, state, local or foreign government or any agency or political subdivision of any such government, which taxes shall include, without limitation, all income or profits taxes (including, without limitation, federal income taxes and state income taxes), payroll and employee withholding taxes, unemployment insurance, social security taxes, sales and use taxes, ad valorem taxes, excise taxes, franchise taxes, gross receipts taxes, business license taxes, stamp taxes, environmental taxes or fees, transfer taxes, workers' compensation, Pension Benefit Guaranty Corporation premiums and other governmental charges, and other obligations of the same or of a similar nature to any of the foregoing, which Seller or any person with respect to the Business and the Assets is required to pay, withhold or collect.

"Title Company" means First American Title Insurance Co., Ltd.

"Transferred Assets" means the Transferred Real Property and the Transferred Personal Property.

"Transferred Personal Property" means the Personal Property described in Schedule 2. To the extent that any such Personal Property is being leased by Seller, Seller shall be deemed to have conveyed all of its interest in and under each applicable lease.

"Transferred Real Property" means the Real Property described in the attached Schedule 3 (and related map) as Parcel 1 of Tract A, including, without limitation, all of Seller's right, title and interest in and to (a) all rights, privileges and easements appurtenant thereto, including (i) all minerals, oil, gas and other hydrocarbon substances thereon and thereunder, (ii) all development rights, air rights, water, water rights and water stock relating thereto and (iii) all easements, rights-of-way or other appurtenances used in connection with the beneficial use and enjoyment thereof and (b) all improvements and fixtures, owned or leased, that are located thereon.

Schedule 2  
to Asset Purchase Agreement

TRANSFERRED PERSONAL PROPERTY

PERSONAL PROPERTY LOCATED ON TRANSFERRED REAL PROPERTY

The following Personal Property to the extent, but only to the extent, such property is located on the Transferred Real Property:

Administration Building: All office furniture and equipment

Laboratory: All laboratory equipment

Shop/Maintenance/Warehouse Areas: All equipment, tools & parts in any of these areas

Tracks 1, 2, 3 & 6 (to the extent such tracks are located on the Transferred Real Property)

Track 4 (to the extent such tracks are located on the Transferred Real Property), including unloading/loading equipment

Track 5 (to the extent such tracks are located on the Transferred Real Property), including unloading/loading equipment

Water Rights: Shares From Headgate 540

5.1 CFS Absolute Water Right And 4.9 CFS Conditional Water Right Decreed By The District Court Of Colorado For Water Division No. 5 In Case No. 88CW086, As Awarded On April 13, 1972, In Civil Action No. 13368 By Mesa County District Court.

All necessary parts and components located on the Transferred Real Property for all utility systems applicable to the Transferred Assets, including the following systems:

Electricity  
Natural Gas  
River Water Intake System & Clarification Equipment  
Fire Water

Gasoline Blending Facility and all associated pumps, piping and equipment

LPG & Butane Truck Unloading/Loading Sites & Equipment:

<u>Tank #</u>	<u>Service</u>	<u>Vol - bbls</u>	<u>Comments</u>
4402	Sweet LPG	1,000	Located By Track 6
4403	Sweet LPG	1,000	Located By Track 6
4431	Butane	1,371	Located By Track 6
4432	Butane	1,371	Located By Track 6

Truck Terminal, Loading Rack, Tanks & Equipment:

<u>Tank #</u>	<u>Service</u>	<u>Vol - bbls</u>	<u>Comments</u>
2001	Premium Unleaded	1769	
2002	Jet A Fuel	1989	
1003	Super Diesel	1066	
1012	Super Diesel	1065	

PERSONAL PROPERTY LOCATED ON RETAINED REAL PROPERTY

The following Personal Property to the extent, whether or not such Personal Property is located on the Retained Real Property or the Transferred Real Property"

Track 2: Unloading/Loading Equipment

Track 3: Unloading/Loading Equipment

Natural Gasoline Unloading/Loading Equipment

All Tanks in Area 44 less than 11,000 bbl, and the following Tanks in Area 44 exceeding 11,000 bbl:

<u>Tank #</u>	<u>Service</u>	<u>Vol - bbls</u>
313	Alcohol Additive	
520	Fuel Oil	499
521	Fuel Oil	499
538	Acid Sludge Oil	524
652	Flush Oil	477
1030	API Oil	993
1031	Acid Sludge Oil	993
2032	Acid Sludge Oil	1,989
2033	Naphtha	1,992
2034	Reclaim Oil	2,012
2035	Reclaim Oil	2,012
2036	Reclaim Oil	2,006
2039	Acid Sludge Oil	2,011
2042	Coker Kerosene	2,391
2072	#2 Diesel	2,297
4051	Premium Unleaded	3,886

5041	Coker Kerosene	4,845
10053	Syncrude	9,773
10054	Vacuum Gas Oil	9,773
10055	Vacuum Gas Oil	9,724
10064	Syncrude	9,467
10070	Coker Naphtha	9,623
10071	Syncrude	9,623
10073	Syncrude	9,623

The following Butane/LPG Tanks In Area 44:

<u>Tank #</u>	<u>Service</u>	<u>Vol - bbls</u>	<u>Comments</u>
4401	Sweet LPG	416	Pressure Bottle
4408	C4 - C6	1,066	Pressure Bottle
4409	C4 - C6	956	Pressure Bottle
4420	Sour LPG	1,360	Pressure Bottle
4421	Sour LPG	1,360	Pressure Bottle
4422	Sour LPG	1,360	Pressure Bottle
4423	Sour LPG	1,360	Pressure Bottle

The following tanks In Area 60:

<u>Tank #</u>	<u>Service</u>	<u>Vol - bbls</u>
1010	Air Stripper	956
1011	Air Stripper	962

All pumps & piping associated with any of the foregoing Tanks

Schedule 3  
to Asset Purchase Agreement

TRANSFERRED REAL PROPERTY

PARCEL 2 OF TRACT A (REVISED 1/27/94)

A parcel of land located in the SE1/4 of Section 2, the NE1/4 of Section 10, and Section 11 Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows;

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00" E a distance of 2629.24 feet for a basis of bearings, with all bearings contained herein relative thereto; thence S 00°07'00" E a distance of 872.57 feet along the East line of the Northeast quarter (NE1/4) of Section 11 to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence North 56 degrees 41 minutes 00 seconds West (N 56°41'00" W), a distance of 1473.79 feet along said railroad right-of-way; to the TRUE POINT OF BEGINNING; thence South 33 degrees 53 minutes 32 seconds West (S 33°53'32" W), a distance of 384.57 feet; thence South 56 degrees 34 minutes 02 seconds East (S 56°34'02" E), a distance of 665.06 feet; thence South 33 degrees 49 minutes 38 seconds West (S 33°49'38" W), a distance of 472.87 feet; thence North 56 degrees 35 minutes 40 seconds West (N 56°35'40" W), a distance of 258.17 feet; thence South 33 degrees 24 minutes 17 seconds West (S 33°24'17" W), a distance of 115.46 feet; thence South 57 degrees 40 minutes 48 seconds East (S 57°40'48" E), a distance of 52.07 feet; thence North 33 degrees 24 minutes 17 seconds East (N 33°24'17" E), a distance of 90.58 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 414.12 feet; thence North 52 degrees 42 minutes 15 seconds East (N 52°42'15" E), a distance of 81.06 feet; thence South 58 degrees 04 minutes 10 seconds East (S 58°04'10" E), a distance of 261.08 feet; thence South 07 degrees 30 minutes 19 seconds West (S 07°30'19" W), a distance of 94.49 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 418.13 feet; thence South 31 degrees 19 minutes 33 seconds West (S 31°19'33" W), a distance of 240.00 feet; thence South 58 degrees 50 minutes 11 seconds East (S 58°50'11" E), a distance of 115.86 feet; thence North 33 degrees 42 minutes 50 seconds East (N 33°42'50" E), a distance of 234.64 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 289.73 feet; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 842.93 feet; thence South 70 degrees 59 minutes 23 seconds West (S 70°59'23" W), a distance of 383.97 feet; thence South 00 degrees 06 minutes 58 seconds East (S 00°06'58" E), a distance of 374.74 feet; thence North 89 degrees 53 minutes 00 seconds East (N 89°53'00" E), a distance of 363.28 feet; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 611.55 feet; thence South 44 degrees 02 minutes 01 seconds West (S 44°02'01" W), a distance of 564.53 feet to a point on the North bank of the Colorado River; thence the following 4 courses along the North bank of the Colorado River; (1) North 61 degrees 31 minutes 53 seconds West (N 61°31'53" W), a distance of 541.72 feet; (2) North 85 degrees 19 minutes 06 seconds West (N 85°19'06" W), a distance of 615.61 feet; (3) South 69 degrees 33 minutes 17 seconds West (S 69°33'17" W), a distance of 1015.56 feet; (4) South 45 degrees 30 minutes 57 seconds West (S 45°30'57" W), a distance of 384.19 feet to a point on the Northerly right-of-way of Interstate 70, thence the following 4 courses along the Northerly right-of-way of Interstate 70; (1) along a curve to the right having a radius of 11359.20 feet, arc length of 4261.46 feet, delta angle of 21 degrees 29 minutes 41 seconds (21°29'41"), a chord bearing of North 51 degrees 44 minutes 01 seconds West (N 51°44'01" W), and a chord length of 4236.51 feet; (2) North 40 degrees 59 minutes 10 seconds West (N

40°59'10" W), a distance of 400.50 feet; (3) North 32 degrees 26 minutes 20 seconds West (N 32°26'20" W), a distance of 309.30 feet; (4) along a curve to the left having a radius of 3969.70 feet, arc length of 130.31 feet, delta angle of 1 degree 52 minutes 51 seconds (1°52'51"), a chord bearing of North 44 degrees 10 minutes 50 seconds West (N 44°10'50" W), and a chord length of 130.30 feet; thence leaving said right-of-way North 00 degrees 50 minutes 33 seconds West (N 00°50'33" W), a distance of 644.86 feet; thence North 89 degrees 09 minutes 42 seconds East (N 89°09'42" E), a distance of 22.71 feet; thence South 32 degrees 55 minutes 25 seconds East (S 32°55'25" E), a distance of 264.97 feet; thence South 11 degrees 48 minutes 58 seconds West (S 11°48'58" W), a distance of 270.91 feet; thence South 48 degrees 11 minutes 15 seconds East (S 48°11'15" E), a distance of 859.15 feet; thence South 41 degrees 40 minutes 17 seconds East (S 41°40'17" E), a distance of 148.14 feet; thence South 20 degrees 12 minutes 02 seconds East (S 20°12'02" E), a distance of 434.73 feet; thence South 31 degrees 42 minutes 25 seconds East (S 31°42'25" E), a distance of 203.83 feet; thence South 63 degrees 51 minutes 48 seconds East (S 63°51'48" E), a distance of 484.33 feet; thence South 86 degrees 31 minutes 14 seconds East (S 86°31'14" E), a distance of 158.42 feet; thence North 41 degrees 43 minutes 28 seconds East (N 41°43'28" E), a distance of 62.52 feet; thence South 89 degrees 56 minutes 00 seconds East (S 89°56'00" E), a distance of 767.57 feet; thence South 01 degrees 13 minutes 31 seconds East (S 01°13'31" E), a distance of 58.91 feet; thence South 89 degrees 34 minutes 20 seconds East (S 89°34'20" E), a distance of 1003.06 feet; thence North 09 degrees 38 minutes 43 seconds West (N 09°38'43" W), a distance of 249.49 feet; thence North 39 degrees 13 minutes 56 seconds West (N 39°13'56" W), a distance of 131.38 feet; thence North 59 degrees 12 minutes 29 seconds West (N 59°12'29" W), a distance of 125.97 feet; thence North 00 degrees 34 minutes 39 seconds East (N 00°34'39" E), a distance of 318.00 feet; thence North 09 degrees 38 minutes 07 seconds East (N 09°38'07" E), a distance of 551.22 feet; thence North 69 degrees 50 minutes 17 seconds East (N 69°50'17" E), a distance of 307.09 feet; thence South 56 degrees 47 minutes 45 seconds East (S 56°47'45" E), a distance of 612.77 feet; thence South 32 degrees 13 minutes 29 seconds West (S 32°13'29" W), a distance of 178.70 feet; thence South 56 degrees 44 minutes 51 seconds East (S 56°44'51" E), a distance of 66.38 feet; thence South 28 degrees 52 minutes 33 seconds West (S 28°52'33" W), a distance of 433.57 feet; thence South 68 degrees 32 minutes 14 seconds East (S 68°32'14" E), a distance of 737.09 feet; thence South 61 degrees 16 minutes 50 seconds East (S 61°16'50" E), a distance of 299.30 feet; thence North 31 degrees 46 minutes 50 seconds East (N 31°46'50" E), a distance of 101.53 feet; thence North 58 degrees 27 minutes 39 seconds West (N 58°27'39" W), a distance of 298.31 feet; thence North 01 degrees 32 minutes 36 seconds West (N 01°32'36" W), a distance of 218.60 feet; thence North 32 degrees 56 minutes 45 seconds East (N 32°56'45" E), a distance of 345.01 feet; thence North 56 degrees 22 minutes 59 seconds West (N 56°22'59" W), a distance of 698.15 feet; thence North 22 degrees 46 minutes 44 seconds West (N 22°46'44" W), a distance of 312.10 feet; thence North 33 degrees 18 minutes 45 seconds East (N 33°18'45" E), a distance of 296.66 feet; thence North 56 degrees 35 minutes 17 seconds West (N 56°35'17" W), a distance of 214.74 feet; thence South 32 degrees 28 minutes 42 seconds West (S 32°28'42" W), a distance of 631.90 feet; thence North 47 degrees 11 minutes 13 seconds West (N 47°11'13" W), a distance of 209.61 feet; thence North 42 degrees 34 minutes 43 seconds East (N 42°34'43" E), a distance of 544.55 feet; thence North 29 degrees 35 minutes 16 seconds West (N 29°35'16" W), a distance of 298.77 feet; thence North 34 degrees 27 minutes 49 seconds East (N 34°27'49" E), a distance of 271.33 feet; thence South 59 degrees 05 minutes 40 seconds East (S 59°05'40" E), a distance of 298.49 feet; thence North 32 degrees 06 minutes 52 seconds East



(N 32°06'52" E), a distance of 166.80 feet; thence South 44 degrees 31 minutes 02 seconds East (S 44°31'02" E), a distance of 218.40 feet; thence North 33 degrees 33 minutes 41 seconds East (N 33°33'41" E), a distance of 45.53 feet; thence North 57 degrees 02 minutes 42 seconds West (N 57°02'42" W), a distance of 131.96 feet; thence North 33 degrees 33 minutes 52 seconds East (N 33°33'52" E), a distance of 68.49 feet; thence South 60 degrees 44 minutes 32 seconds East (S 60°44'32" E), a distance of 33.52 feet; thence North 33 degrees 29 minutes 45 seconds East (N 33°29'45" E), a distance of 86.70 feet; thence South 56 degrees 35 minutes 23 seconds East (S 56°35'23" E), a distance of 131.91 feet; thence North 33 degrees 04 minutes 32 seconds East (N 33°04'32" E), a distance of 21.50 feet; thence North 56 degrees 55 minutes 28 seconds West (N 56°55'28" W), a distance of 31.33 feet; thence North 33 degrees 43 minutes 06 seconds East (N 33°43'06" E), a distance of 36.91 feet; thence South 56 degrees 25 minutes 59 seconds East (S 56°25'59" E), a distance of 101.55 feet; thence South 33 degrees 01 minutes 00 seconds West (S 33°01'00" W), a distance of 13.57 feet; thence South 57 degrees 02 minutes 09 seconds East (S 57°02'09" E), a distance of 34.90 feet; thence South 32 degrees 57 minutes 51 seconds West (S 32°57'51" W), a distance of 4.35 feet; thence South 56 degrees 29 minutes 07 seconds East (S 56°29'07" E), a distance of 111.95 feet; thence North 33 degrees 22 minutes 49 seconds East (N 33°22'49" E), a distance of 41.69 feet; thence North 56 degrees 58 minutes 03 seconds West (N 56°58'03" W), a distance of 65.92 feet; thence North 32 degrees 32 minutes 02 seconds East (N 32°32'02" E), a distance of 65.75 feet; thence North 56 degrees 58 minutes 09 seconds West (N 56°58'09" W), a distance of 89.51 feet; thence North 32 degrees 22 minutes 45 seconds East (N 32°22'45" E), a distance of 35.88 feet; thence South 57 degrees 07 minutes 02 seconds East (S 57°07'02" E), a distance of 76.98 feet; thence North 43 degrees 10 minutes 35 seconds East (N 43°10'35" E), a distance of 142.24 feet; thence North 55 degrees 25 minutes 58 seconds East (N 55°25'58" E), a distance of 33.39 feet; thence North 33 degrees 18 minutes 50 seconds East (N 33°18'50" E), a distance of 106.81 feet; thence North 56 degrees 36 minutes 08 seconds West (N 56°36'08" W), a distance of 88.73 feet; thence North 32 degrees 34 minutes 45 seconds East (N 32°34'45" E), a distance of 152.28 feet to the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence South 56 degrees 41 minutes 00 seconds East (S 56°41'00" E), a distance of 348.21 feet to the TRUE POINT OF BEGINNING. Said parcel containing 280.186 acres as described.

Said parcel being subject to easements and right-of-ways of record as recorded in the Mesa County Clerk and Recorder's Office.

Prepared by: **Dennis W. Johnson, PLS**  
**Professional Surveying Services**  
**PO Box 4506**  
**Grand Junction, CO 81502**  
**303-241-3841**  
**Jan. 27, 1994**

**BOUNDARY ADJUSTMENT**  
OF PARCELS LOCATED IN  
SECTIONS 2, 10, & 11  
T1N, R3W, UTE MERIDIAN  
MESA COUNTY, COLORADO

**Parcel 2  
(Retained Real  
Property)**

5-15

[illegible]

1944



SCALE 1"=200'

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

Prepared for: **MISSISSAUGA / THORNHILL**  
**24th Street Road**  
**Grand Junction, ON**

Professional Surveying Service  
P.O. Box 6888 Grand Ave., CO 801  
303.341.3944

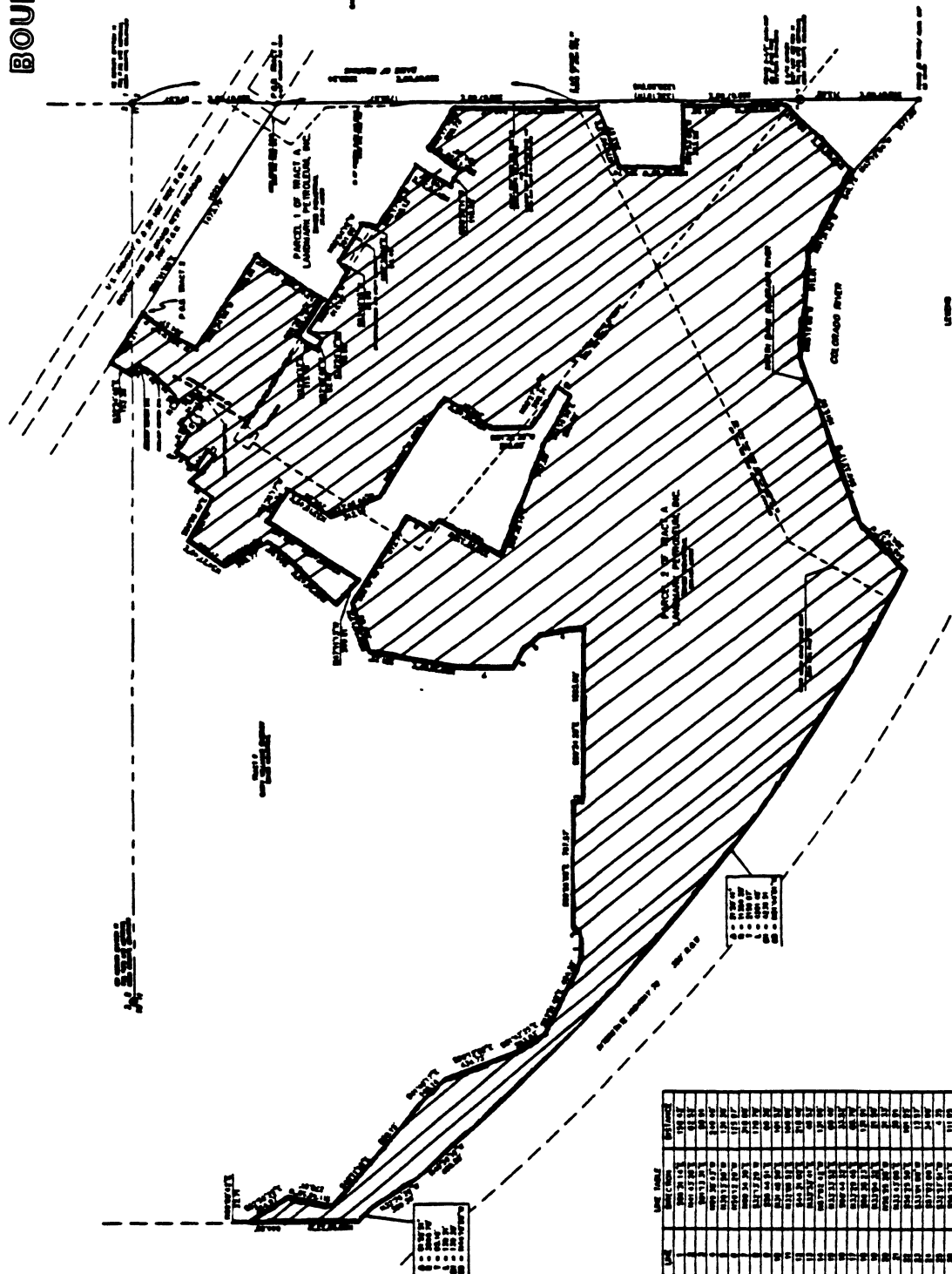
SECTION 2, 10 & 11  
T1N 33S R1E W6E 1/4M  
WELLS COUNTY COLORADO

DATE OF SURVY	SECTION OR PART
10/11/01	SECTION 2, 10 & 11

**PRELIMINARY**  
**FOR REVIEW ONLY**

[illegible]

**2010**



**WISCONSIN ADOPTED**

1. US COUNTY OR SURVEY AGENCY  
 2. CALCULATED POSITION (LAT)  
 3. UT 1 1/2' ALTIMETER CAP ON NO. 5 NEEDLE, PLS INCLUDE  
 4. RECORD OF SURVEY?  
 5. FOUND IMMEDIATELY ADJACENT

1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved. It is important to gather all relevant information and to define the scope of the problem.

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	2398	2399	2400	2401	2402	2403	2404	2405	2406	2407	2408	2409	2410	2411	2412	2413	2414	2415	2416	2417	2418	2419	2420	2421	2422	2423	2424	2425	2426	2427	2428	2429	2430	2431	2432	2433	2434	2435	2436	2437	2438	2439	2440	2441	2442	2443	2444	2445	2446	2447	2448	2449	2450	2451	2452	2453	2454	2455	2456	2457	2458	2459	2460	2461	2462	2463	2464	2465	2466	2467	2468	2469	2470	2471	2472	2473	2474	2475	2476	2477	2478	2479	2480	2481	2482	2483	2484	2485	2486	2487	2488	2489	2490	2491	2492	2493	2494	2495	2496	2497	2498	2499	2500	2501	2502	2503	2504	2505	2506	2507	2508	2509	2510	2511	2512	2513	2514	2515	2516	2517	2518	2519	2520	2521	2522	2523	2524	2525	2526	2527	2528	2529	2530	2531	2532	2533	2534	2535	2536	2537	2538	2539	2540	2541	2542	2543	2544	2545	2546	2547	2548	2549	2550	2551	2552	2553	2554	2555	2556	2557	2558	2559	2560	2561	2562	2563	2564	2565	2566	2567	2568	2569	2570	2571	2572	2573	2574	2575	2576	2577	2578	2579	2580	2581	2582	2583	2584	2585	2586	2587	2588	2589	2590	2591	2592	2593	2594	2595	2596	2597	2598	2599	2600	2601	2602	2603	2604	2605	2606	2607	2608	2609	2610	2611	2612	2613	2614	2615	2616	2617	2618	2619	2620	2621	2622	2623	2624	2625	2626	2627	2628	2629	2630	2631	2632	2633	2634	2635	2636	2637	2638	2639	2640	2641	2642	2643	2644	2645	2646	2647	2648	2649	2650	2651	2652	2653	2654	2655	2656	2657	2658	2659	2660	2661	2662	2663	2664	2665	2666	2667	2668	2669	2670	2671	2672	2673	2674	2675	2676	2677	2678	2679	2680	2681	2682	2683	2684	2685	2686	2687	2688	2689	2690	2691	2692	2693	2694	2695	2696	2697	2698	2699	2700	2701	2702	2703	2704	2705	2706	2707	2708	2709	2710	2711	2712	2713	2714	2715	2716	2717	2718	2719	2720	2721	2722	2723	2724	2725	2726	2727	2728	2729	2730	2731	2732	2733	2734	2735	2736	2737	2738	2739	2740	2741	2742	2743	2744	2745	2746	2747	2748	2749	2750	2751	2752	2753	2754	2755	2756	2757	2758	2759	2760	2761	2762	2763	2764	2765	2766	2767	2768	2769	2770	2771	2772	2773	2774	2775	2776	2777	2778	2779	2780	2781	2782	2783	2784	2785	2786	2787	2788	2789	2790	2791	2792	2793	2794	2795	2796	2797	2798	2799	2800	2801	2802	2803	2804	2805	2806	2807	2808	2809	2810	2811	2812	2813	2814	2815	2816	2817	2818	2819	2820	2821	2822	2823	2824	2825	2826	2827	2828	2829	2830	2831	2832	2833	2834	2835	2836	2837	2838	2839	2840	2841	2842	2843	2844	2845	2846	2847	2848	2849	2850	2851	2852	2853	2854	2855	2856	2857	2858	2859	2860	2861	2862	2863	2864	2865	2866	2867	2868	2869	2870	2871	2872	2873	2874	2875	2876	2877	2878	2879	2880	2881	2882	2883	2884	2885	2886	2887	2888	2889	2890	2891	2892	2893	2894	2895	2896	2897	2898	2899	2900	2901	2902	2903	2904	2905	2906	2907	2908	2909	2910	2911	2912	2913	2914	2915	2916	2917	2918	2919	2920	2921	2922	2923	2924	2925	2926	2927	2928	2929	2930	2931	2932	2933	2934	2935	2936	2937	2938	2939	2940	2941	2942	2943	2944	2945	2946	2947	2948	2949	2950	2951	2952	2953	2954	2955	2956	2957	2958	2959	2960	2961	2962	2963	2964	2965	2966	2967	2968	2969	2970	2971	2972	2973	2974	2975	2976	2977	2978	2979	2980	2981	2982	2983	2984	2985	2986	2987	2988	2989	2990	2991	2992	2993	2994	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PARCEL 1 OF TRACT A (REVISED 1/27/94)

A parcel of land located in the SE1/4 of Section 2, and East 1/2 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows;

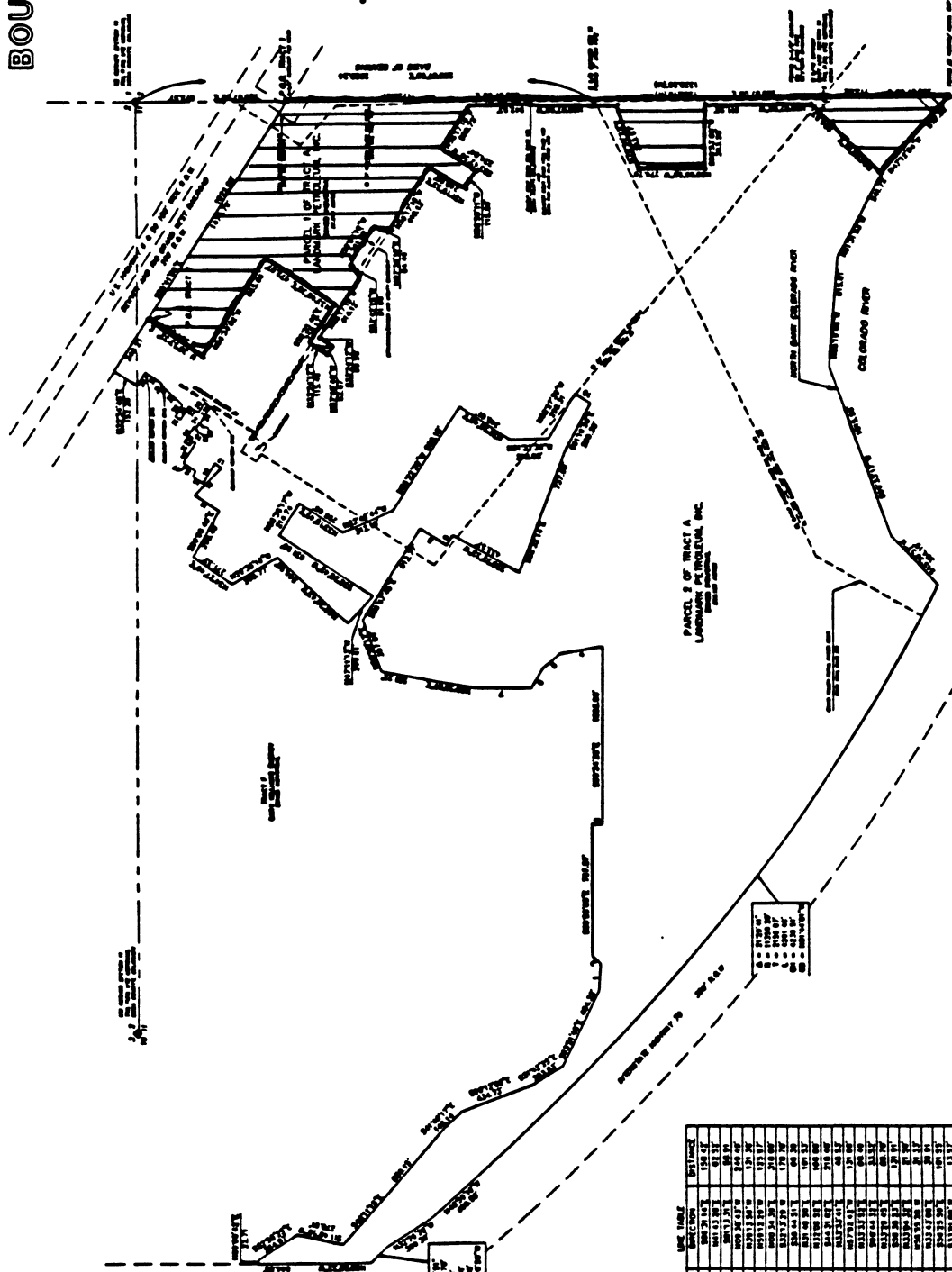
Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00" E a distance of 2629.24 feet for a basis of bearings, with all bearings contained herein relative thereto; thence S 00°07'00" E a distance of 872.57 feet along the East line of the Northeast quarter (NE1/4) of Section 11 to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad, and the TRUE POINT OF BEGINNING, thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 1756.67 feet to the Northeast corner of the SE1/4 of Section 11 (E 1/4 corner); thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 1332.18 feet to the Northeast corner of the SE1/4 SE1/4 of Section 11; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 713.82 feet to a point on the North bank of the Colorado River; thence along said North bank North 47 degrees 12 minutes 04 seconds West (N 47°12'04" W), a distance of 577.89 feet; thence leaving said North bank North 44 degrees 02 minutes 01 seconds East (N 44°02'01" E), a distance of 564.53 feet; thence North 00 degrees 07 minutes 00 seconds West (N 00°07'00" W), a distance of 611.55 feet; thence South 89 degrees 53 minutes 00 seconds West (S 89°53'00" W), a distance of 363.28 feet; thence North 00 degrees 06 minutes 58 seconds West (N 00°06'58" W), a distance of 374.74 feet; thence North 70 degrees 59 minutes 23 seconds East (N 70°59'23" E), a distance of 383.96 feet; thence North 00 degrees 07 minutes 00 seconds West (N 00°07'00" W), a distance of 842.93 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 289.73 feet; thence South 33 degrees 42 minutes 50 seconds West (S 33°42'50" W), a distance of 234.64 feet; thence North 58 degrees 50 minutes 11 seconds West (N 58°50'11" W), a distance of 115.86 feet; thence North 31 degrees 19 minutes 33 seconds East (N 31°19'33" E), a distance of 240.00 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 418.13 feet; thence North 07 degrees 30 minutes 19 seconds East (N 07°30'19" E), a distance of 94.49 feet; thence North 58 degrees 04 minutes 10 seconds West (N 58°04'10" W), a distance of 261.08 feet; thence South 52 degrees 42 minutes 15 seconds West (S 52°42'15" W), a distance of 81.06 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 414.12 feet; thence South 33 degrees 24 minutes 17 seconds West (S 33°24'17" W), a distance of 90.58 feet; thence North 57 degrees 40 minutes 48 seconds West (N 57°40'48" W), a distance of 52.07 feet; thence North 33 degrees 24 minutes 17 seconds East (N 33°24'17" E), a distance of 115.46 feet; thence South 56 degrees 35 minutes 40 seconds East (S 56°35'40" E), a distance of 258.17 feet; thence North 33 degrees 49 minutes 38 seconds East (N 33°49'38" E), a distance of 472.87 feet; thence North 56 degrees 34 minutes 02 seconds West (N 56°34'02" W), a distance of 665.06 feet; thence North 33 degrees 53 minutes 32 seconds East (N 33°53'32" E), a distance of 384.57 feet to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence along said right-of-way South 56 degrees 41 minutes 00 seconds East (S 56°41'00" E), a distance of 1473.79 feet to the TRUE POINT OF BEGINNING. Said Parcel containing 37.816 acres as described.

Said parcel being subject to easements and right-of-ways of record as recorded in the Me  
County Clerk and Recorder's Office.

Prepared by: Dennis W. Johnson, PLS  
Professional Surveying Services  
PO Box 4506  
Grand Junction, CO 81502  
303-241-3841  
Jan. 27, 1994  
9391A6.LGL

**BOUNDARY ADJUSTMENT  
OF PARCELS LOCATED IN  
SECTIONS 2, 10, & 11  
T1N, R3W, UTE MERIDIAN  
MESA COUNTY, COLORADO**

**Parcel 1  
(Transferred Real  
Property)**



Parcel 1 of Tract A  
Landscape Architecture, Inc.  
Survey No. 10000  
Surveyed May 1993

LINE	SECTION	DISTANCE
1	10	125.57
2	10	125.57
3	10	125.57
4	10	125.57
5	10	125.57
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99	10	125.57
100	10	125.57

**PRELIMINARY  
FOR REVIEW ONLY**

MEASUREMENTS ON THIS SURVEY ADJUSTMENT  
WAS MADE BY THE SURVEYOR  
ON THE 10TH DAY OF MAY 1993  
AT THE OFFICE OF THE SURVEYOR  
IN THE CITY OF DENVER, COLORADO

DATE OF SURVEY  
10 MAY 1993  
BY  
JAMES H. HARRIS  
SURVEYOR  
No. 10000

Professional Surveying Service  
P.O. Box 4000, Grand Ave., CO 80501-4000  
303-241-2411  
Professional Surveying Service  
P.O. Box 4000, Grand Ave., CO 80501-4000  
303-241-2411  
Professional Surveying Service  
P.O. Box 4000, Grand Ave., CO 80501-4000  
303-241-2411

MEASUREMENTS ON THIS SURVEY ADJUSTMENT  
WAS MADE BY THE SURVEYOR  
ON THE 10TH DAY OF MAY 1993  
AT THE OFFICE OF THE SURVEYOR  
IN THE CITY OF DENVER, COLORADO

Schedule 4.5  
to Asset Purchase Agreement

CONSENTS

1. Buyer will need to obtain any consents required from parties other than Chase and Landmark ("Third Parties") required for the assignment of the agreements described in Schedule 5 to be effective as to the Third Parties.
2. Buyer will need to obtain any consents required for the transfer to Buyer of any of the Permits.
3. In connection with any sale after Closing of any contract rights constituting Retained Assets, Buyer will need to comply with any consent requirements for the transfer of such contracts under their respective terms.

LEASED ASSETS

To the knowledge of Seller, the following constitutes all of the Leases with respect to Assets leased by Seller and the Assets subject thereto (but only to the extent that the same are still in effect):

1. Equipment Lease Agreement between Western Slope Refining Company ("Western") and First Interstate Leasing Company (formerly UCB Leasing Corp.) dated November 9, 1981, as amended, and assigned to Seller on November 6, 1990.

Leased Equipment

80,000 bbl. pitch tank  
Computer monitored loading system  
Boiler feedwater pumps  
Emergency generator  
Lisbon charge pump  
Lab bottle washer  
Diesel powered fire water pump  
HP gas chromatograph

2. Equipment Lease Agreement between Western and Banc One Equipment Finance Inc. (formerly American Fletcher Leasing Corporation) dated June 22, 1983, as amended, and as assigned to Seller by letter agreement dated November 12, 1990, covering hydrocracker charge tank, vacuum charge tank, diesel tank and other tanks and associated facilities.

Leased Equipment

Diesel tank #20074  
Shale Oil tank #55092  
Reduced crude tank #40075  
JP-4 tank #55088  
JP-4 tank #55089  
MTBE/Toluene tank #2050

3. GATX Leasing Corporation Equipment Lease with Western dated as of April 29, 1983, as assigned to Seller by letter agreement dated October 18, 1990, covering railcars.

### Leased Equipment

Sour water stripper  
Gas oil tank  
Decant oil tank  
Vacume Feed Slurry Tank #5086

4. Equipment Lease Agreements with Browning-Ferris Industries, Inc. and its affiliates covering cleaning equipment.
5. Railroad Equipment Lease with ITEL Rail Corporation.
6. Leases with Monex covering miscellaneous office equipment, furniture and computer software, etc.
7. Lease with Pitney Bowes covering office equipment.
8. Lease of Railroad Equipment between Western and Pullman Leasing Company dated July 19, 1989 covering railcars.



Schedule 4.9  
to Asset Purchase Agreement

PERMITS

[ATTACHED]

# ENVIRONMENTAL PERMITS

## LANDMARK PETROLEUM, INC. Current Outstanding Permits

1992 Point Source Inven. #	Source Description	Permit #
6	TK-55088 Float Roof Tank	89ME401-2
8	TK-55089 Float Roof Tank	89ME401-1
10	Two Sorbent Silos	89ME319
14	Removed Clayton E-60 Stm. Gen.	91ME684
28	FL-4402 High Press. Flare	89ME277
35	F-4004 Steam Boiler #4	C12,958
39	F-3400 Platformer Furnace	83ME106
53	TK-40080	C-10,577
54	TK-40081	C-10,577
82	TK-55082	C-12,917
83	RR Coke Ldng Facil.& Bin Vent Filter	C-11,008
84	TK-80087	C-13365-1
85	F-4401 Pitch Tank Heater	C-13,365-2
86	TK-30065	C-13,014
87	TK-20066	C-13,015
88	F-2501 Hydrogen Furnace	82ME360
89	TK-55090	83ME107-3
90	TK-5086	83ME107-2
91	TK-20074	83ME107-1
92	TK-20067	C-13,016
93	TK-55083 Heater #1	C-12,008-1
94	F-2201 Hydrocracking Furnace	82ME358-1
95	F-2202 Hydrocracking Furnace	82ME358-2
96	F-2204 HC Fractionator Reboiler	82ME358-3
97	F-2203 HC Stabilizer Reboiler	82ME358-4
98	SRU Tail Gas Incinerator	82ME359I
99	Claus Plt. (Same source as pt.98)	82ME359I
APEN/Pmt	TK-55083 Heater #2	C-12,008-2
APEN/Pmt	TK-55083 Heater #3	C-12,008-3
APEN/Pmt	TK-55084	C-12,917
APEN/Pmt	Gilsonite/Green Coke Unloading	C-12,725-1
APEN/Pmt	Gilsonite/Green Coke Storage	C-12,725-2
APEN/Pmt	Calcined Coke Handling/Storage	C-12,725-3
APEN/Pmt	K-4614 Baghouse (railcar loading)	C-12,725-4
APEN/Pmt	K-4615 Baghouse (railcar loading)	C-12,725-5
	NPDES Water Discharge Permit	CO-0000078
	Stormwater Permit	COR-020251
	(The above 2 permits will be combined in the NPDES discharge permit in the Fall of 1993.)	
	Radiation Source Control Permit	COLO 232-03

**COLORADO CERTIFICATE OF BOILER  
OR PRESSURE VESSEL INSPECTION**

<u>Certificate No.</u>	<u>Vessel Mfg.</u>
238843	ABCO
238844	BAWI
238845	DETA
238846	DETA
238847	COEN
238848	NEBR
238849	BAWI
238850	HOFA
238851	MCGI
238852	KITE

FEB-16-1994 18:26 FROM LANDMARK PETROLEUM CO. TO

17132211212 P.04

STATE SERIAL NO.  
19857CERTIFICATE NO.  
238843DATE INSPECTED  
09/07/1993THIS CERTIFICATE EXPIRES  
05/07/1994VESSEL MANUFACTURER  
ABCOMFR SERIAL/NO NUMBER  
NB2196

PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

## COLORADO

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH  
FEE: 23.00

INSPECTED BY

AUSTIN - COLC

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a lock box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

WELDED REPAIRS TO STEEL BOILERS, WHEN REQUIRED, SHALL BE PERFORMED & DOCUMENTED BY INDIVIDUALS/ORGANIZATIONS QUALIFIED TO CHAPTER III OF THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

B-1 R (10-91)

STATE SERIAL NO.  
5333CERTIFICATE NO.  
238844DATE INSPECTED  
09/07/1993THIS CERTIFICATE EXPIRES  
05/07/1994VESSEL MANUFACTURER  
BAWIMFR SERIAL/NO NUMBER  
NB19516

PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC.  
1493 HWY 6 E 50  
FRUITA

## COLORADO

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH  
FEE: 23.00

INSPECTED BY

AUSTIN - COLC

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## REMARKS:

WELDED REPAIRS TO STEEL BOILERS, WHEN REQUIRED, SHALL BE PERFORMED & DOCUMENTED BY INDIVIDUALS/ORGANIZATIONS QUALIFIED TO CHAPTER III OF THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

FEB-16-1994 18:27 FROM LANDMARK PETROLEUM CO. TO

17132211212 P.05

COLORADO

STATE SERIAL NO.  
39442

CERTIFICATE NO.

238845

DATE INSPECTED

09/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER

DETA

MFR SERIAL/NB NUMBER

NB219



PRESSURE ALLOWED (LBS.) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 1301  
DENVER  
CO 80203

\* PAID \*

09/27/1993

BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN

- COLD

## LOCATION OF BOILER OR PRESSURE VESSEL

WESTERN SLOPE REFINING  
1493 HWY 6 E 50  
FRUITA

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a tool box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

WELDED REPAIRS TO STEEL BOILERS, WHEN REQUIRED, SHALL BE PERFORMED & DOCUMENTED BY INDIVIDUALS/ORGANIZATIONS QUALIFIED TO CHAPTER III OF THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

B-1 R(10-91).

STATE SERIAL NO.  
39443

CERTIFICATE NO.

238846

DATE INSPECTED

07/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER

DETA

MFR SERIAL/NB NUMBER

NB219



PRESSURE ALLOWED (LBS.) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

COLORADO

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 1301  
DENVER  
CO 80203

\* PAID \*

09/27/1993

BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN

- COLD

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a tool box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

WELDED REPAIRS TO STEEL BOILERS, WHEN REQUIRED, SHALL BE PERFORMED & DOCUMENTED BY INDIVIDUALS/ORGANIZATIONS QUALIFIED TO CHAPTER III OF THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

FEB-16-1994 18:29

FROM LANDMARK PETROLEUM CO.

10

COLORADO

STATE SERIAL NO.  
5623

CERTIFICATE NO.

238847

DATE INSPECTED

09/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER  
CDEN

MFR SERIAL/NS NUMBER

6192



PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM, INC\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH  
FEE: 23.00

INSPECTED BY

AUSTIN

- COLO

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

\*\*\* THIS CERTIFICATE  
WILL BE VALID ONLY  
WHEN ALL REQUIREMENTS  
ARE IN COMPLIANCE \*\*\*

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a tool box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

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B-1 R (10-91)

STATE SERIAL NO.  
40088

CERTIFICATE NO.

238848

DATE INSPECTED

09/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER  
NEBR

MFR SERIAL/NS NUMBER

NB1849



PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
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HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

COLORADO  
BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH  
FEE: 23.00

INSPECTED BY

AUSTIN

COLO

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a tool box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

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TOTAL P.08

FEB-16-1994 18:28 FROM LANDMARK PETROLEUM CO. TO

17132211212 P.07  
COLORADOSTATE SERIAL NO.  
5332

CERTIFICATE NO.

238849

DATE INSPECTED

09/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER

BAWI

MFR SERIAL/NS NUMBER

N819515



PRESSURE ALLOWED (LBS) P&amp;I

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
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OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

BOILER INSPECTION BRANCH  
1120 LINCOLN ST. SUITE 130  
DENVER  
CO 80203

\* PAID \*

09/27/1993

BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN

- COLO

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

Post this certificate in the equipment room or, if portable, in metal container fastened to the vessel or in a tool box near the vessel. (May be revoked for failure to keep the vessel in safe condition.)

## REMARKS:

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THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

8-1 A (10-93)

STATE SERIAL NO.  
19810

CERTIFICATE NO.

238850

DATE INSPECTED

09/07/1993

THIS CERTIFICATE EXPIRES

05/07/1994

VESSEL MANUFACTURER

HOFA

MFR SERIAL/NS NUMBER

N8343



PRESSURE ALLOWED (LBS) P&amp;I

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THE LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC\*\*\*  
1493 HWY 6 E 50  
FRUITA CO 81521

COLORADO  
BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*

09/27/1993

BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN

- COLO

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC.  
1493 HWY 6 E 50  
FRUITA

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## REMARKS:

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DOCUMENTED BY INDIVIDUALS/ORGANIZATIONS QUALIFIED TO CHAPTER III OF  
THE CURRENT NAT'L BOARD INSPECTION CODE. QUESTIONS-(303) 894-7535.

FEB-16-1994 18:27 FROM LANDMARK PETROLEUM CO. TO

17132211212 P.06  
COLORADOSTATE SERIAL NO.  
45375CERTIFICATE NO.  
238851DATE INSPECTED  
09/07/1993THIS CERTIFICATE EXPIRES  
05/07/1994VESSEL MANUFACTURER  
HCGIMFR SERIAL/NO NUMBER  
7391

PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THIS LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM INC

1493 HWY. 6 E 50  
FRUITA CO 81521

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM  
1493 HWY 6 E 50  
FRUITA

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN - CCLC

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## REMARKS:

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B-1 R (10-91)

STATE SERIAL NO.  
19813CERTIFICATE NO.  
238852DATE INSPECTED  
09/02/1993THIS CERTIFICATE EXPIRES  
05/07/1994VESSEL MANUFACTURER  
KITEMFR SERIAL/NO NUMBER  
N87

PRESSURE ALLOWED (LBS) P.S.I.

CERTIFICATE OF  
BOILER or  
PRESSURE VESSEL INSPECTION

THIS IS TO CERTIFY THAT THE  
BOILER OR PRESSURE VESSEL  
HEREIN DESCRIBED MAY BE  
OPERATED FOR THE PERIOD AND  
AT A PRESSURE NOT TO EXCEED  
THAT SHOWN AND  
ONLY AT THIS LOCATION  
SPECIFIED HEREON.

## OWNER/USER

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA CO 81521

## LOCATION OF BOILER OR PRESSURE VESSEL

LANDMARK PETROLEUM, INC  
1493 HWY 6 E 50  
FRUITA

COLORADO

BOILER INSPECTION BRANCH  
1120 LINCOLN ST, SUITE 130  
DENVER  
CO 80203

\* PAID \*  
09/27/1993  
BOILER INSPECTION BRANCH

FEE: 23.00

INSPECTED BY

AUSTIN - COLC

\*\*\* THIS CERTIFICATE  
WILL BE VALID ONLY  
WHEN ALL REQUIREMENTS  
ARE IN COMPLIANCE \*\*\*

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## REMARKS:

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Schedule 4.10  
to Asset Purchase Agreement

INSURANCE POLICIES

[ATTACHED]

DATE March 8, 1993  
INSURED Landmark Petroleum Inc.  
1493 Highway 6 & 50  
Fruita, CO 81521

Alexander & Alexander

Office at Denver

SCHEDULE OF INSURANCE

Page 1 of 2

Contacts: Thad Call  
Phone: 303/858-9811  
Account Manager: Shelley Urwiller  
Account Executive: Bobbie Fitzgerald  
Phone: 303/297-4682, 297-4688

Type of Policy/Plan	Term	Premium	Average Annual Cost	Expiration	Policy No.	Company
<b>PROPERTY</b>	<b>3 Year</b>	<b>\$305,950</b>		<b>11/06/94</b>	<b>SPFDN9332649</b>	<b>Hartford Steam Boiler</b>

Limit of Liability: \$50,000,000

Sublimits:

\$ 10,000,000 Earthquake - Aggregate  
10,000,000 Flood - Aggregate  
Included Business Interruption  
250,000 Transit  
100,000 EDP Media - Extra Expense

Deductibles:

\$500,000 Property Damage - per occurrence  
15 Day Business Interruption - per occurrence

<b>LIABILITY</b>	<b>1 Year</b>	<b>\$36,487</b>	<b>11/06/93</b>	<b>GL5439351</b>	<b>National Union</b>
------------------	---------------	-----------------	-----------------	------------------	-----------------------

\$2,000,000 General Aggregate  
1,000,000 Products/Completed Operations Aggregate Limit  
1,000,000 Personal and Advertising Injury Limit  
1,000,000 Each Occurrence Limit  
50,000 Fire Damage Limit (any one fire)  
5,000 Medical Expense Limit (any one person)

THIS SCHEDULE DOES NOT TAKE THE PLACE OF OR ALTER ANY OF THE CONDITIONS, EXCLUSIONS OR OTHER TERMS OF THE INSURANCE POLICIES LISTED; IT IS MERELY A SHORT DESCRIPTIVE GUIDE TO THE POLICIES IN FORCE, FOR CONVENIENT REFERENCE. THE POLICIES THEMSELVES SHOULD BE REVIEWED CAREFULLY, AND QUESTIONS ON COVERAGE, CLAIMS AND ALL OTHER INSURANCE MATTERS SHOULD BE REFERRED TO YOUR A&A CONTACTS.

DATE **March 8, 1993**  
INSURED **Landmark Petroleum Inc.**  
**1493 Highway 6 & 50**  
**Fruita, CO 81521**

**Alexander & Alexander**  
Office at **Denver**

Page 4 of 4

Contacts: **Thad Call**  
Phone: **303/858-9811**  
Account Manager: **Shelley Urwiller**  
Account Executive: **Bobbie Fitzgerald**  
Phone: **303/297-4682, 297-4688**

**SCHEDULE OF INSURANCE**

Type of Policy/Plan	Term	Premium	Average Annual Cost	Expiration	Policy No.	Company
<b>AUTOMOBILE</b>	<b>1 Year</b>	<b>\$2,076</b>		<b>11/06/93</b>	<b>34UENEQ5829</b>	<b>Hartford Ins. Co.</b>
<b>\$1,000,000 Liability</b>						
<b>Basic Personal Injury Protection</b>						
<b>1,000 Medical Payments</b>						
<b>1,000,000 Uninsured Motorist</b>						
<b>1,000,000 Hired and Non-Owned Liability</b>						
<b>1984 Ford Pickup, #1347</b>						
<b>1989 Ford Pickup, #0692</b>						
<b>1989 Ford Pickup, #9648</b>						
<b>1989 Ford, #K1G1</b>						
<b>UMBRELLA</b>	<b>1 Year</b>	<b>\$40,000</b>		<b>11/06/93</b>	<b>ZU0000160</b>	<b>Pacific Ins. Co.</b>
<b>\$10,000,000 Excess Over Primary</b>						
<b>25,000 Self-Insured Retention</b>						

THIS SCHEDULE DOES NOT TAKE THE PLACE OF OR ALTER ANY OF THE CONDITIONS, EXCLUSIONS OR OTHER TERMS OF THE INSURANCE POLICIES LISTED; IT IS MERELY A SHORT DESCRIPTIVE GUIDE TO THE POLICIES IN FORCE, FOR CONVENIENT REFERENCE. THE POLICIES THEMSELVES SHOULD BE REVIEWED CAREFULLY, AND QUESTIONS ON COVERAGE, CLAIMS AND ALL OTHER INSURANCE MATTERS SHOULD BE REFERRED TO YOUR A&A CONTACTS.



Alexander & Alexander Inc.  
Denver Place-Plaza Tower  
1099 Eighteenth Street, Suite 3000  
Denver, Colorado 80202-1930  
Telephone 303 297-3020  
Fax 303 297-4675

June 17, 1993

Mr. Thad Call  
General Manager - Administration  
Landmark Petroleum  
1493 Highway 6 & 50  
Fruita, CO 81521

Re: Directors & Officers Liability  
#4369218

Dear Thad:

Enclosed are endorsements 17 - 21. The are as follows.

- Endorsement 17 - Changes the your location to Utah
- Endorsement 18 - Extends the policy to April 15, 1994
- Endorsement 19 - Deletes the Texas Amendatories
- Endorsement 20 - Adds the Utah Cancellation Amendatory
- Endorsement 21 - Changes the Broker of Record to A&A

Please attach these endorsements to the current Directors & Officers Liability insurance policy. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Shelley Urwiller'.

Shelley Urwiller  
Account Manager

/su

Enclosure

**ENDORSEMENT # 18**

This endorsement, effective 12:01 A.M. , April 15, 1993,  
forms a part of policy number 436 92 18  
issued to LANDMARK PETROLEUM

By: National Union Fire Insurance Company of Pittsburgh, Pa.

In consideration of the premium charged it is hereby  
understood and agreed that Item 3 of the  
Policy Declarations, POLICY PERIOD:, is amended to read as follows:

From: January 15, 1991 To: April 15, 1994.

It is further understood and agreed that for purposes of  
determining the Policy Period herein, the annual aggregate  
Limit of Liability is amended to be inclusive of and  
apply to the following:

From: January 15, 1991 To: April 15, 1994.



Authorized Representative

Vice-President - National Union

**ENDORSEMENT# 20**

This endorsement, effective **12:01 AM, April 15, 1993** forms a part of  
policy number **436-92-18**  
issued to **LANDMARK PETROLEUM**

by **National Union Fire Insurance Company of Pittsburgh, Pa.**

**UTAH**  
**CANCELLATION/NONRENEWAL ENDORSEMENT**

Wherever used in this endorsement: 1) "we", "us", "our", and "insurer" mean the insurance company which issued this policy; and 2) "you", "your", "named insured", "First Named Insured", and "insured" mean the Named Corporation, Named Organization, Named Sponsor, Named Insured, or insured stated in the declarations page; and 3) "Other Insured(s)" means all other persons or entities afforded coverage under the policy.

It is hereby agreed that this insurance policy, if in effect for 60 days or more, may not be cancelled by the insurer except for failure to pay a premium when due or for one of the following reasons:

1. Material misrepresentation;
2. Substantial breaches of contractual duties, conditions or warranties;
3. Attainment of the age specified as the terminal age for coverage (notice is necessary, see Notice Section below);
4. With automobile insurance revocation or suspension of the driver's license of the named insured or any other person who customarily drives the car;
5. Substantial change in the risk assumed, unless the insurer should reasonably have foreseen the change or contemplated the risk when entering into the contract.

Insurance policies in effect for less than 60 days may be cancelled for any reason.

**NOTICE OF CANCELLATION/NONRENEWAL**

- A. Cancellation, except for nonpayment of premium, is effective 30 days after the delivery or first class mailing of a written notice to the policyholder.
- B. Cancellation for nonpayment of premium is effective 10 days after delivery or first class mailing of the notice. This notice shall include a statement of the reason for cancellation.
- C. The above sections do not apply to any insurance contract that has not been previously renewed if the contract has been in effect less than sixty (60) days when the notice of cancellation is mailed or delivered. Cancellation in this circumstance is effective at least ten (10) days after delivery to the insured of a written notice. If notice is sent by first class mail, postage prepaid, to the insured at his last known address, delivery is considered accomplished after the passing of the statutory mailing time.



**AUTHORIZED REPRESENTATIVE**  
**Vice-President - National Union**

ENDORSEMENT #21

This endorsement, effective 12:01 A.M., January 15, 1993  
forms a part of policy number 436 92 18  
issued to LANDMARK PETROLEUM, INC.  
by National Union Fire Insurance Company of Pittsburgh, Pa.

In consideration of the premium charged, it is hereby  
understood and agreed, that the Broker of Record as set  
forth in the Declarations, is amended to read as follows:

Alexander & Alexander, Inc.  
Denver Place - Plaza Tower  
1099 18th Street, Ste. 3000  
Denver, CO 80202-1930

All other terms and conditions remain the same



AUTHORIZED REPRESENTATIVE  
Vice-President - National Union

Schedule 5  
to Asset Purchase Agreement

CONTRACTS TO BE ASSIGNED

1. Purchase Agreement (GWEC) dated as of June 3, 1992 between Seller, Gary-Williams Energy Corporation ("GWEC") and Chase, and all agreements and other instruments executed by Seller, GWEC and/or Chase in connection therewith or pursuant thereto as and to the extent of any rights against GWEC thereunder in respect of the Transferred Assets. Notwithstanding the foregoing, no part of the Chase Liens will be assigned to Wescourt in connection with the transactions contemplated hereby.
2. Special Tax Indemnity Agreement dated as of [June 3, 1992] by GWEC in favor of Seller and Chase, relating to the Purchase Agreement (GWEC) set forth in No. 2 above, as and to the extent it relates to the Transferred Assets.
3. Mutual Access Easement and Use Agreement between Western and Seller dated November 5, 1990 as and to the extent it relates to the Transferred Assets.
4. Equipment Lease Agreement between Western Slope Refining Company ("Western") and First Interstate Leasing Company (formerly UCB Leasing Corp.) dated November 9, 1981, as amended, and assigned to Seller on November 6, 1990, solely as the same relates to the following equipment:
  - (a) Computer monitored loading system
  - (b) Lab bottle washer
  - (c) HP gas chromatograph



Schedule 6  
to Asset Purchase Agreement

CONTRACTS TO BE TERMINATED

1. Consultation and Services Agreement dated as of June 19, 1992 between Seller, Flying J Inc. and Big West Oil Company ("BWOC").
2. Option Agreement (CPI) dated as of June 24, 1992 between Seller and Colorado Processing, Inc.
3. Option Agreement (Chase) dated as of June 24, 1992 between BWOC and Chase.

Tab C

Exhibit A  
to Purchase Agreement

**MARKETING AGREEMENT**

THIS MARKETING AGREEMENT ("Agreement") is entered into as of February 28, 1994, between FRUITA MARKETING & MANAGEMENT, INC., a Delaware corporation ("Wescourt") LANDMARK PETROLEUM, INC., a Delaware corporation ("Landmark") with the consent of THE CHASE MANHATTAN BANK, N.A. ("Chase") as set forth on the signature page hereof.

**RECITALS**

A. Landmark owns an oil refinery located at 1493 Highway 6 & 50, Fruita, Colorado, and comprised of certain real property, fixtures, personal property and other assets (all as more fully described in the Purchase Agreement, the "Refinery Assets").

B. Simultaneously herewith, Landmark and Wescourt Group, Inc., an affiliate of Wescourt ("Purchaser"), are entering into an Asset Purchase Agreement (the "Purchase Agreement") pursuant to which Purchaser is acquiring from Landmark the portion of the Refinery Assets constituting the refinery's offices, laboratories, maintenance building, parking facilities, rail sidings, loading/unloading docks, storage tanks and truck and loading racks, all as more fully described in the Purchase Agreement (the "Transferred Assets").

C. Landmark wishes to appoint Wescourt, and Wescourt wishes to accept Landmark's appointment, as Landmark's exclusive representative for the marketing and sale to third parties of all Refinery Assets other than the Transferred Assets (such other Refinery Assets, the "Assets") on the terms and conditions set forth in this Agreement.

D. The Assets are subject to certain liens and security interests in favor of Chase (the "Chase Liens") securing the obligations of Landmark under the Amended and Restated Credit Agreement dated as of June 24, 1992, as amended from time to time prior to the date hereof, between Landmark and Chase (the "Loan Agreement").

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing premises, and for other good and valuable consideration, Wescourt and Landmark hereby agree as follows:

## ARTICLE 1.

### APPOINTMENT

1.1 Appointment. On the terms and conditions set forth in this Agreement, Landmark hereby appoints Wescourt, and Wescourt hereby accepts appointment, as Landmark's exclusive representative for the marketing and sale of the Assets to third parties.

## ARTICLE 2.

### ASSET SALES

2.1 Basic Duties of the Wescourt. During the term of this Agreement, Wescourt shall, at its sole cost and expense (subject to reimbursement from sale proceeds as provided in Section 2.4) (a) use its reasonable commercial efforts to identify, solicit and pursue opportunities for the sale of Assets and (b) endeavor in good faith to negotiate and consummate sales of Assets ("Sales") on the terms and conditions set forth herein.

2.2 Terms of Sale. The parties agree that, in carrying out its obligations hereunder, Wescourt shall have complete authority over, and discretion in the management of, the disposition of the Assets by Landmark, including, without limitation, selecting the Assets to be offered for sale, determining the order and timing of sales, identifying sales leads, pursuing sales leads, negotiating sales terms, consummating sales, and preparing Assets for sale and subsequent delivery, subject only to the following limitations:

(a) Maximizing Sales Proceeds. Wescourt shall conduct Sales on an arms-length basis with the goal of maximizing the aggregate proceeds to Landmark of the Sales;

(b) Minimizing Retained Liabilities. Unless Landmark expressly agrees in writing, Landmark shall not be responsible for any post-Sale liabilities with respect to Assets;

(c) Tax Lien. Wescourt shall make all Sales free and clear of, and without any reduction in the sales price for, the Tax Lien (as defined in Section 7.2) except such reduction as is applicable solely to the amount, if any, that would otherwise be payable to Wescourt as Commission on such Sale under Article 3;

(d) "As-Is" Sales. Wescourt shall arrange all Sales on an "as-is, where-is" basis. Wescourt shall not make any representation or warranty on Landmark's behalf with respect to the Assets (other than as to Landmark's title thereto) without the prior written consent of Landmark. Wescourt shall not be under any obligation to make any representation or warranty on its own behalf with respect to the Assets;

(e) Major Sales. Wescourt shall provide Landmark and Chase with written notice of, and an opportunity to object to, any "Major Sale" as provided for (and defined in) Section 2.3; and

(f) Payment of Purchase Price. Wescourt shall require all purchasers of Assets to pay the purchase price therefor directly into the "Deposit Account" as provided for (and defined in) Section 2.4.

### 2.3 Major Sales.

(a) Definition. As used herein, the term "Major Sale" means any Sale involving (i) individually or in the aggregate together with other related Sales, a total purchase price in excess of Two Hundred Fifty Thousand Dollars (\$250,000) or (ii) the transfer of title to any of the Assets listed in attached Schedule 1;

(b) Notice. Prior to consummating any Major Sale, Wescourt shall provide Landmark and Chase with a written notice ("Sales Notice") of the proposed Sale describing the Assets subject to the proposed Sale, the proposed purchaser, the proposed purchase price, and any other material terms and conditions of the proposed Sale;

(c) Right to Object. Either Landmark or Chase shall have the right to object, for any reason, to any Major Sale within 10 days after receiving the applicable Sales Notice (the "Objection Period"). Any such objection ("Objection") shall be in writing, shall be delivered to Wescourt within the Objection Period, and shall identify the Major Sale to which it relates and the reasons for the Objection. If Wescourt fails to receive an Objection to any Major Sale within the applicable Objection Period, Wescourt shall be free to consummate such Sale (on the terms described in the applicable Sales Notice or on terms more favorable to Landmark). If Wescourt receives an Objection to any Major Sale within the applicable Objection Period and otherwise conforming with the foregoing, Wescourt shall not proceed with such Sale, but such Objection shall not preclude Wescourt from pursuing other Major Sales on

substantially the same terms provided that Landmark and Chase are provided with an additional Sales Notice, and opportunity to object, to any such other Major Sales.

2.4 Payment of Purchase Price; Reimbursement of Sales Expenses.

(a) Establishment of Deposit Account. Prior to the consummation of the first Sale, Wescourt shall establish on behalf of Landmark at Chase a special purpose restricted deposit account in Landmark's name (the "Deposit Account") with respect to which Chase shall have the sole right to make withdrawals as hereafter provided. Landmark hereby grants to Chase a security interest and right of setoff in the Deposit Account to secure the Chase Claim (as defined in Section 5.2). Wescourt shall require all purchasers of Assets to pay the purchase price therefor directly into the Deposit Account.

(b) Wescourt Account; Withdrawals from Deposit Account. Prior to the consummation of the first Sale, Wescourt shall establish at Chase a deposit account in Wescourt's name (the "Wescourt Account"). Upon the request of Wescourt in compliance with the terms hereof, Chase will immediately make transfers from the Deposit Account into the Wescourt Account to pay "Sale Expenses," as follows:

(i) Sale Expenses. As used herein, the term "Sale Expenses" means the following: (A) all reasonable costs and expenses incurred by Wescourt, its affiliates, or any of their respective officers, directors, employees, or agents (each a "Wescourt Person") in the assessment, maintenance, marketing or sale of the Assets, including, without limitation, costs incurred in (1) assessing the initial condition and marketability of the Assets, both before and after the date hereof (including costs incurred by Purchaser under the Purchase Agreement for attorney's fees (after the first \$20,000 thereof), surveying, subdividing, obtaining title insurance with respect to, and assessing the environmental condition of, the Refinery Assets (up to a maximum of \$20,000 for such environmental assessment) provided that the aggregate of all such expenses incurred in respect of transactions contemplated by the Purchase Agreement shall not exceed \$150,000, (2) settling any obligations or liabilities relating to the Assets and arising out of activities of Landmark prior to Closing, including, without limitation, any such obligations or liabilities for taxes (other than the Tax Obligations as defined in Section 7.2), (3) preparing inventories of the Assets and related permits and maintaining the Assets and such permits pending the

completion of the Sales, (4) maintaining and insuring the Assets pending the completion of the Sales, (5) marketing the Assets (including for the reasonable fees of attorneys, appraisers, and brokers), and (6) preparing the Assets for sale (including dividing, partitioning, and packaging the Assets); (B) all taxes (other than the Tax Obligations), levies, fees, and assessments imposed or assessed by any governmental authority on the Assets or any Sale, (C) all reasonable costs and expenses incurred in complying with reporting and access requirements under Article 3, (D) all reasonable costs and expenses incurred by any Wescourt Person under the Management Agreement, (E) any Commission payable to Wescourt pursuant to Section 3.1.

(ii) Sales Expenses - Environmental Matters. Without limiting the foregoing, Sales Expenses shall include an allocable portion of the salary and benefits of any employees of Wescourt Persons performing services relating to the environmental condition of the Assets, including assessments of the environmental condition of the Assets and remediation and compliance activities with respect thereto. In addition, in the event that a release, threatened release, disposal, discharge, spillage, loss, seepage, transport or migration of Hazardous Materials (as defined in the Asset Purchase Agreement) shall occur on the Assets during the term of this Agreement, including any release of asbestos in connection with the partition of Assets or preparation of Assets for Sale, all remediation and compliance costs incurred in connection therewith shall be a Sales Expense provided that the same does not result from the gross negligence or willful misconduct of Wescourt.

(iii) Withdrawals. Wescourt shall make a written request ("Withdrawal Notice") to Chase for transfer from the Deposit Account to pay or to reimburse Sales Expenses, such request to reasonably detail such Sales Expenses. Upon receipt of such written request, Chase shall immediately make the requested transfer into the Wescourt Account (unless the expense described in such request cannot reasonably be deemed a Sales Expense); provided, that, with respect to any individual Sales Expense exceeding Two Thousand Five Hundred Dollars (\$2,500) Chase shall have the right to object if, within 10 days after receiving the applicable Withdrawal Notice, it reasonably deems that the Sales Expense described therein is excessive or not reasonably related to the satisfaction of Wescourt's duties hereunder. Any such objection ("Objection") shall be in writing, shall be made within the such 10 day period, and shall identify the Sales Expense to which it relates and the reasons for the Objection in reasonable detail. Chase shall, within such 10 day period, either make an Objection

as provided herein, or transfer the requested amount from the Deposit Account to the Wescourt Account. Chase shall have no duty or obligation to Landmark with respect to any Withdrawal Notice or its determination of the reasonableness thereof.

(c) Cash Sweep.

(i) Determination of Projected Monthly Expenses. On or promptly after the first business day of in June 1994, and thereafter on or promptly after the first business day of each succeeding February, May, August and November during the term of this Agreement, Wescourt, Landmark and Chase shall meet (in person or by telephone conference) in an effort, based on Sales Expenses incurred during the immediately preceding three calender months, to agree upon projected monthly Sales Expenses ("Projected Monthly Expenses") for the next succeeding three calender months (e.g. in the case of the May meeting, Projected Monthly Expenses for the months of June, July and August). Projected Monthly Expenses, as of any date, shall be either (a) as agreed upon by Wescourt, Landmark and Chase at the most recent such meeting or (b) if the parties fail to agree on Projected Monthly Expenses at any such meeting by the 15th day of the month during which such meeting is to take place, the average of the monthly Sales Expenses incurred during the two immediately preceding calender months (e.g. in the case of the May meeting, average Sales Expenses during the months of March and April).

(ii) Deposit of Projected Monthly Expenses. Commencing on the first business day of June 1994, and continuing thereafter on the first business day of each succeeding calender month, Chase shall automatically, and without the further request of Wescourt, transfer from the Deposit Account to the Wescourt Account an amount equal to the Projected Monthly Expenses for such calender month (or such lesser amount as is the total amount then on deposit in the Deposit Account) less the then-current balance in the Wescourt Account. Wescourt shall have the right to use all funds so transferred to the Wescourt Account for payment or reimbursement of Sales Expenses; provided, that, Wescourt shall first provide Chase with a Withdrawal Notice as to any individual Sales Expense exceeding Two Thousand Five Hundred Dollars (\$2,500) and Chase shall have the right to object thereto as provided in Section 2.4 if, within 10 days after receiving such Withdrawal Notice, it reasonably deems that the Sales Expense described therein is excessive or not reasonably related to the satisfaction of Wescourt's duties hereunder.



(iii) Cash Sweep. After making the deposit to the Wescourt Account described in the preceding paragraph (ii), Chase may deduct from the Chase Account all "Excess Proceeds" and apply such amounts to the Chase Claim (as defined in Section 5.2(a)). As used herein, the term "Excess Proceeds" means the excess, if any, by which the amount on deposit in the Deposit Account as of the first day of any calendar month exceeds two times the Projected Monthly Expenses for such calendar month. Until the Chase claim has been paid in full, Landmark hereby irrevocably authorizes Chase to deduct and apply Excess Proceeds to the Chase Claim as provided in the preceding sentence. If Sales Expenses exceed, at any time, the amount on deposit in the Deposit Account, Chase agrees to pay Sales Expenses to Wescourt on demand; provided that in no event shall the total amount of such payments by Chase to Wescourt exceed the total amount of Excess Proceeds previously deducted by Chase from the Deposit Account and further, provided, that, in any such event, the Chase Claim shall be reinstated and revived to the extent of such payment.

2.5 Dispute Resolution. Any dispute concerning any Sales Expense or Withdrawal that cannot be promptly resolved by the parties shall be referred to Coopers & Lybrand for resolution. The determination of such accounting firm shall be made promptly and in writing and shall be final, binding and conclusive as to all items in dispute. If the foregoing accounting firm refuses or is unable to participate in the resolution of any such dispute, then the parties hereto shall, acting in good faith, appoint an alternative national accounting firm acceptable to all parties.

### ARTICLE 3.

#### COMMISSIONS; REPORTING

3.1 Commission. In consideration of Wescourt's services hereunder, after proceeds of "Subject Sales" (as defined below), net of Sales Expenses and taxes (hereinafter called "Net Proceeds") in an aggregate amount of \$5,250,000 have been deposited in the Deposit Account pursuant to Section 2.4 and made available for application to the Chase Claim, Wescourt shall receive a sales commission ("Commission") equal to thirty five percent (35%) of all subsequent Net Proceeds. As used herein, the term "Subject Sales" means any sale or other disposition of Assets consummated (a) during the term of this Agreement, or (b) after the term of this Agreement to a purchaser (or affiliate of a purchaser) identified by Wescourt during the term of this Agreement or notified to Landmark within 10

days after the expiration or earlier termination of this Agreement. Any Commission payable to Wescourt hereunder shall be a "Sales Expense" subject to the applicable terms of Section 2 hereof.

### 3.2 Reporting.

(a) Expense Reporting. Promptly after the closing under the Purchase Agreement, Wescourt shall forward to Landmark and Chase a statement describing, in reasonable detail on an item by item basis, all Sales Expenses incurred prior to such closing. Promptly after the end of each calender month, Wescourt shall forward to Landmark and Chase a statement describing, in reasonable detail on an item by item basis, all Sales Expenses incurred during such calender month.

(b) Sales Reporting. Promptly after the end of each calender quarter, Wescourt shall forward to Landmark and Chase a statement describing, in reasonable detail, (i) all Sales consummated by Wescourt during such calender quarter and (ii) all Sales projected to be consummated by Wescourt during the next-succeeding six calender months.

3.3 Access. During the term of this Agreement, Wescourt shall afford Landmark, Chase and their respective representatives with such access, upon reasonable notice and during Wescourt's regular business hours, to Wescourt's financial records of its activities hereunder as Landmark or Chase may reasonably request in order to verify the accuracy of the reports provided by Wescourt pursuant to the preceding Section 3.2.

## ARTICLE 4.

### COVENANTS OF LANDMARK

4.1 Negative Covenants. Landmark hereby covenants and agrees that, until the expiration or earlier termination of this Agreement in accordance with its terms:

(a) No Solicitation. Except as otherwise expressly contemplated by this Agreement, Landmark shall not, and shall not grant to any other person the right to, solicit or pursue opportunities for the sale of Assets;

(b) No Sale. Except as otherwise expressly contemplated by this Agreement, Landmark shall not sell, lease, assign, convey, transfer, or otherwise dispose of any Assets;

(c) No Liens. Except for the Chase Liens and such liens existing on the date of this Agreement, Landmark shall not create, incur, assume or suffer to exist any encumbrance, lien, mortgage, pledge, or other security interest with respect to the Assets; and

(d) No Operation of Refinery. Landmark shall not operate, or permit the operation, of the Assets or any portion thereof.

4.2 Affirmative Covenants. Landmark hereby covenants and agrees that, until the expiration or earlier termination of this Agreement in accordance with its terms:

(a) Employees. Landmark shall make its employees ("Employees") (other than Richard Means to the extent that he is no longer employed at the Refinery), available to Wescourt and its affiliates on a full-time basis to assist in the maintenance and disposition of the Assets pursuant hereto and shall use reasonable commercial efforts to retain the Employees in Landmark's employ; provided, however, that Landmark shall be under no obligation to replace any Employee who elects to quit notwithstanding Landmark's efforts to the contrary hereunder; and provided, further, that Wescourt shall be responsible for the Employees' compensation, subject to reimbursement pursuant to Section 2.4;

(b) Referral of Sales Leads. If notwithstanding Section 4.1(a), Landmark becomes aware of any opportunities for the sale of Assets to third parties, Landmark shall promptly appraise Wescourt of such opportunities and cooperate with Wescourt's pursuit thereof;

(c) Further Assurances. In addition to such acts as are expressly required of Landmark hereunder, Landmark shall promptly upon request by Wescourt take such further acts as Wescourt may reasonably request from time to time in order to effectuate the purposes of this Agreement, including, without limitation, executing and delivering such documents as may be necessary or appropriate, in Wescourt's judgment, to maintain the Assets (including the permits applicable thereto) in their existing condition, and to prepare the Assets for, and consummate, Sales.

## ARTICLE 5.

### COVENANTS OF CHASE

5.1 Release of Chase Liens. By execution below, Chase hereby agrees that upon the Sale of any Asset in

compliance with the terms of this Agreement, the Chase Liens shall automatically, and without any further action by Chase, be released as to the sold Assets. Chase agrees promptly upon deposit of the Sales proceeds into the Deposit Account, and in any event within 20 days thereafter, to execute and deliver to Wescourt such documents as Wescourt may reasonably request and Chase may reasonably approve in order to evidence any such release provided that Wescourt (a) makes such request in writing (identifying with reasonable specificity the Assets subject to Sale), (b) certifies that the Sale complies in all material respects with the provisions hereof and (c) agrees to deliver such documents (and to file such documents in appropriate jurisdictions) only on or after the consummation of the applicable Sale.

## 5.2 Enforcement.

(a) Definitions. As used herein, (i) the term "Enforcement" means, collectively or individually, for Chase to exercise any right or remedy under the Chase Liens, including, without limitation, to repossess any Refinery Assets, or to commence a judicial or non-judicial enforcement of any of the rights and remedies relating thereto; (ii) the term "Insolvency Proceeding" means, collectively or individually, any case, action or proceeding before any court or other governmental authority relating to bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, and (iii) the term "Chase Claim" means all present and future obligations of Landmark to Chase in connection with or in any way related to the Loan Agreement, any Security Instrument (as such term is defined therein), or any other documents related thereto or executed in connection therewith (and any modifications, amendments, supplements, restatements, renewals, and extensions thereof).

(b) Enforcement. For so long as (i) this Agreement remains in force and effect in accordance with its terms and (ii) Wescourt remains in material compliance with the terms hereof, Chase agrees that it shall not commence or maintain any Enforcement, including, without limitation, any attachment, levy, distraint, or foreclosure upon or against any of the Refinery Assets; provided, however, that Chase shall have the right to (A) seek relief from the automatic stay imposed in any Insolvency Proceeding with respect to Landmark, and upon obtaining such relief to commence and maintain a foreclosure proceeding with respect to the Assets, and (B) commence and maintain such other Enforcement as may be required to protect the priority or perfection of

the Chase Liens from the claims of third parties (other than Landmark); provided, further, that any amounts realized by Chase in such foreclosure proceeding or other Enforcement (or any subsequent sale of the Assets or any portion thereof) shall constitute Sale proceeds subject to the terms hereof, including, without limitation, Wescourt's commission rights under Section 3.1;

(c) Insolvency Proceeding. For so long as (i) this Agreement remains in force and effect in accordance with its terms and (ii) Wescourt remains in material compliance with the terms hereof, Chase agrees that it shall not commence or maintain any Insolvency Proceeding with respect to Landmark; provided, however, that Chase shall have the right to commence and maintain an Insolvency Proceeding to the extent that such proceeding would serve to void or stay a wrongful or fraudulent conveyance of assets by Landmark that Chase otherwise is unable to prevent or enjoin.

5.3 Affirmative Covenants. Chase hereby agrees that, until the expiration or earlier termination of this Agreement in accordance with its terms, if Chase becomes aware of any opportunities for the sale of Assets to third parties, Chase shall promptly appraise Wescourt of such opportunities and cooperate with Wescourt's pursuit thereof.

5.4 No Other Obligations. Wescourt acknowledges that Chase's relationship with Landmark is solely that of secured lender/borrower and agrees that Chase shall have no obligations to Wescourt other than those expressly set forth herein and in the Chase Consent (as defined in the Asset Purchase Agreement) to be executed simultaneously herewith.

## ARTICLE 6.

### TERM AND TERMINATION

6.1 Term. This Agreement shall commence on the date hereof and, unless earlier terminated in accordance with the terms hereof, shall remain in effect until the second (2nd) anniversary of the date hereof. The term of this Agreement shall not be extended without the prior written consent of Wescourt, Landmark and Chase.

6.2 Termination. If Wescourt defaults in the performance of any of its material obligations hereunder or under the Management Agreement dated as of the date hereof between Wescourt and Landmark (the "Management Agreement"), Landmark or Chase may give written notice to Wescourt

thereof. If such default is not corrected or otherwise addressed by Wescourt to the reasonable satisfaction of the party giving such notice within sixty (60) days after Wescourt's receipt of such notice, then the party giving such notice may terminate this Agreement upon thirty (30) days prior written notice to Wescourt. If Wescourt elects to terminate the Management Agreement, Landmark or Chase may terminate this Agreement, upon written notice to Wescourt, within 30 days after the effectiveness of the termination of the Management Agreement. The fact that Wescourt has not consummated Sales, or has consummated a limited number of Sales, during any period will not itself constitute a default hereunder provided that Wescourt is using reasonable commercial efforts to identify, solicit and pursue opportunities for Sales on the terms and conditions set forth herein.

6.3 Rights upon Termination. Upon the expiration or earlier termination of this Agreement, Wescourt's status as Landmark's representative hereunder shall terminate and Wescourt shall immediately cease to represent that it is Landmark's representative and to solicit and pursue prospective Sales. No such expiration or termination of this Agreement shall limit Wescourt's right to reimbursement of Sales Expenses incurred prior to the effective date thereof or affect the validity of Section 3.1 (including Wescourt's right to receive Commissions on Subject Sales as provided therein), this Article 6, or Articles 7 or 8, each of which shall survive.

## ARTICLE 7.

### ATTORNEY-IN-FACT; INDEMNIFICATION

7.1 Attorney-in-Fact. In connection with any Sales consummated pursuant to the terms of this Agreement, Wescourt shall convey the Assets so sold pursuant to the terms of a bill of sale in substantially the form attached hereto as Exhibit A. Landmark hereby irrevocably constitutes and appoints Wescourt as Landmark's true and lawful attorney-in-fact, with full authority in the place and stead of Landmark, from time to time in Wescourt's discretion, to take any action and to execute any document or instrument which Wescourt may deem necessary or desirable to accomplish the purposes of this Agreement. Notwithstanding the foregoing, Wescourt shall not have any rights, duties or responsibilities except those expressly set forth herein, nor shall Wescourt have or be deemed to have any fiduciary relationship with Landmark, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement other than to act in good faith in connection herewith.

7.2 Settlement of Tax Lien. As of the date hereof, the Refinery Assets are subject to a tax lien in favor of the tax authorities of the County of Mesa, Colorado (the "Tax Lien") securing the obligation of Landmark to pay past due property taxes on the Refinery Assets in an aggregate amount of \$1,024,000 (the "Tax Obligation"). Pursuant to Landmark's appointment of Wescourt as Landmark's attorney-in-fact under Section 7.1, Wescourt shall have full authority, in the place and stead of Landmark, from time to time in Wescourt's discretion, to negotiate concerning the payment, discharge, settlement, compromise, or adjustment of the taxes giving rise to the Tax Lien and the release of the Tax Lien from all or any portion of the Refinery Assets; provided, in each case, that any such payment, discharge, settlement, compromise, or adjustment shall be at the sole cost and expense of Wescourt and its Affiliates and shall not be a Sales Expense that may be reimbursed out of the proceeds of Asset Sales.

7.3 Delegation of Duties. Wescourt may execute any of its duties under this Agreement by or through agents, employees or attorneys-in-fact. Wescourt shall not be responsible for the negligence or misconduct of any agent or attorney-in-fact that it selects with reasonable care.

7.4 Reliance by Wescourt. Wescourt shall be fully justified in failing or refusing to take any action that it reasonably deems to be beyond the scope of its Sales-related obligations under this Agreement unless it shall first receive such advice or concurrence of Landmark and Chase as it deems appropriate and, if it so requests, it shall first be indemnified to its satisfaction by Landmark against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action.

7.5 Indemnification.

(a) Landmark Indemnification. Landmark hereby indemnifies the Wescourt Persons from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses and disbursements of any kind whatsoever which may at any time (including at any time following the termination of this Agreement) be imposed on, incurred by or asserted against any such person in any way relating to or arising out of this Agreement, or any document contemplated by or referred to herein or the transactions contemplated hereby or any action taken or omitted by any such Person under or in connection with any of the foregoing; except to the extent resulting from such person's gross negligence or willful misconduct.

(b) Wescourt Indemnification. Wescourt hereby indemnifies Landmark and its officers, directors, employees and agents (collectively, the "Landmark Persons") from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses and disbursements of any kind whatsoever which may at anytime (including at anytime following the termination of this Agreement) be imposed on, incurred by or asserted against any such person in any way relating to or arising out of a breach by the Wescourt Persons of this Agreement or the gross negligence or willful misconduct of any Wescourt Person in carrying out its obligations hereunder; except to the extent that the same results from the gross negligence or willful misconduct of Landmark.

7.6 Limitation of Liability. Notwithstanding any other provision hereof, no Wescourt Person shall (a) be liable for any action taken or omitted to be taken by any of them under or in connection with this Agreement (except for a breach by a Wescourt Person of this Agreement or its own gross negligence or willful misconduct), or (b) be responsible in any manner to Chase or to any third party for any recital, statement, representation or warranty made by Landmark in this Agreement or in any certificate, report, or other document referred to or provided for in this Agreement. WITHOUT LIMITING THE FOREGOING, IN NO EVENT SHALL ANY WESCOURT PERSON BE LIABLE TO ANY PARTY FOR ANY CONSEQUENTIAL DAMAGES (MEANING DAMAGES THAT DO NOT ARISE OUT OF THE SUBJECT TRANSACTION BETWEEN THE PARTIES HERETO OR CHASE BUT DAMAGES THAT ARISE OUT OF THE DEALINGS BETWEEN LANDMARK OR CHASE AND A THIRD-PARTY), INCLUDING, WITHOUT LIMITATION, ARISING OUT OF THE SALE OF THE ASSETS, WHETHER UNDER A THEORY OF CONTRACT, TORT, INDEMNITY, OR OTHERWISE; OR PUNITIVE DAMAGES OF ANY KIND. IN NO EVENT SHALL THE TOTAL LIABILITY OF ALL WESCOURT PERSONS HEREUNDER EXCEED THE TOTAL COMMISSIONS PAID TO WESCOURT HEREUNDER, EXCEPT TO THE EXTENT THAT THE SAME RESULTS FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF WESCOURT.

## ARTICLE 8.

### GENERAL PROVISIONS

8.1 Assignment. No party may assign its rights and obligations under this Agreement except that Wescourt may assign all or a portion of its rights hereunder to one or more of its wholly-owned affiliates.

8.2 Communications. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been given



(a) when delivered personally, or (b) 48 hours after being sent by facsimile with duplicate sent by courier service. Such communications shall be directed as follows:

To Wescourt at:

Fruita Marketing & Management, Inc.  
c/o Wescourt Group, Inc.  
2401 River Road  
Grand Junction, Colorado 81505  
Att'n: Keith Holder  
Fax: (303) 241-5319

To Landmark at:

Landmark Petroleum, Inc.  
1493 Highway 6 & 50  
Fruita, Colorado 81521  
Att'n: Mr. Richard Means  
Fax: (303) 858-9194

with copies to:

The Chase Manhattan Bank, N.A.  
One Chase Manhattan Plaza  
Tenth Floor  
New York, New York 10081  
Att'n: Mr. Stanley M. Guralnick  
Fax: (212) 422-6249

To Chase at:

The Chase Manhattan Bank, N.A.  
One Chase Manhattan Plaza  
New York, NY 10081  
Att'n: Stanley M. Guralnick  
Fax: (212) 422-6249

Any party may change its address for purposes of this section by giving the other parties notice of the new address in the manner set forth above.

8.3 Captions and Headings. The captions contained herein are for convenience and reference only and shall not affect the meaning, scope, intent, or interpretation of this Agreement or its provisions.

8.4 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings, written and oral with respect thereto. No

prior draft of this Agreement nor any parole evidence shall be admissible to prove the meaning or intent of any provision of this Agreement.

8.5 Amendment or Modification. This Agreement may only be amended, modified or supplemented by a written instrument specifically referring to this Agreement and signed by Wescourt, Landmark and Chase.

8.6 Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York.

8.7 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of any such provision in any other jurisdiction, unless such prohibition or unenforceability frustrates the overall objective of this Agreement.

8.8 Counterparts. This Agreement will be executed in counterparts, and the several counterparts shall constitute one executed Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the date first written above.

FRUITA MARKETING & MANAGEMENT, INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Keith R. Holder, President

LANDMARK PETROLEUM, INC.  
a Delaware corporation

By: \_\_\_\_\_  
Richard Means, Vice President

THE CHASE MANHATTAN BANK, N.A. EXECUTES BELOW TO CONSENT TO  
THE FOREGOING AND TO AGREE TO THE SPECIFIC TERMS THEREOF  
APPLICABLE TO IT:

THE CHASE MANHATTAN BANK, N.A.

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

Schedule 1  
to Marketing Agreement

MAJOR ASSETS

"Major Assets" means the following Refinery Assets:

1. Vacuum Crude Unit
2. Coker
3. Reformer
4. Hydrogen Plant
5. Hydrocracker
6. The Retained Real Property (as defined in the Purchase Agreement)

Exhibit A  
to Marketing Agreement

BILL OF SALE

THIS BILL OF SALE ("Bill of Sale"), dated as of \_\_\_\_\_, is made by LANDMARK PETROLEUM, INC., a Delaware corporation ("Landmark") in favor of \_\_\_\_\_ ("Purchaser").

For good and valuable consideration, receipt of which is hereby acknowledged, Landmark hereby sells, conveys, transfers, assigns and delivers unto Purchaser, its successors and assigns, all of Landmark's right, title and interest in the assets described in attached Schedule 1 (the "Assets").

THE ASSETS ARE SOLD, CONVEYED, TRANSFERRED, ASSIGNED AND DELIVERED UNTO PURCHASER ON AN "AS IS, WHERE IS" BASIS, WITHOUT ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER WITH RESPECT THERETO, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, except that Landmark hereby represents and warrants to the Purchaser that, upon delivery hereof, the Purchaser shall receive good and marketable title to the Assets, free and clear of all liens and encumbrances, other than those listed on Exhibit A, if any.

BY EXECUTING THIS BILL OF SALE, THE PURCHASER HEREBY ACKNOWLEDGES THAT THIS BILL OF SALE IS BEING EXECUTED ON BEHALF OF LANDMARK BY FRUITA MARKETING & MANAGEMENT, INC. ("WESCOURT") SOLELY IN ITS CAPACITY AS LANDMARK'S SALES REPRESENTATIVE UNDER A MARKETING AGREEMENT DATED FEBRUARY 28, 1994 AND THAT WESCOURT IS MAKING NO REPRESENTATIONS OR WARRANTIES WHATSOEVER WITH RESPECT TO THE ASSETS, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, BY EXECUTING THIS BILL OF SALE, THE PURCHASER ACKNOWLEDGES AND AGREES THAT ITS SOLE RECOURSE IN THE EVENT OF ANY CLAIM OR DISPUTE WHATSOEVER WITH RESPECT TO OR ARISING OUT OF THE PURCHASER'S ACQUISITION OF THE ASSETS SHALL BE AGAINST LANDMARK, AND THAT THE PURCHASER SHALL NOT HAVE, AND HEREBY IRREVOCABLY WAIVES, ANY CLAIM AGAINST WESCOURT (WHETHER AS AGENT FOR LANDMARK OR IN ITS INDIVIDUAL CAPACITY).

To have and to hold the Assets unto the Purchaser, its successors and assigns, for its and their use forever.

IN WITNESS WHEREOF, Landmark has caused this Bill  
of Sale to be executed as of the date first above written.

LANDMARK PETROLEUM, INC., a  
Delaware corporation

By: \_\_\_\_\_  
as Agent

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

Tab D

Exhibit B  
to Purchase Agreement

**CONSENT AND AGREEMENT**

THIS CONSENT AND AGREEMENT (this "Consent") is made as of February 28, 1994, by THE CHASE MANHATTAN BANK, N.A., a national banking association ("Chase").

**RECITALS**

A. Landmark Petroleum, Inc., a Delaware Corporation ("Seller"), owns an oil refinery located at 1493 Highway 6 & 50, Fruita, Colorado, and comprised of certain real property, fixtures, personal property and other assets (collectively, the "Assets").

B. The Assets are subject to certain liens and security interests in favor of Chase (the "Chase Liens") securing the obligations of Seller under the Amended and Restated Credit Agreement dated as of June 24, 1992, as amended from time to time prior to the date hereof, between Seller and Chase.

C. The Assets are also subject to a tax lien in favor of the tax authorities of the County of Mesa, Colorado (the "Tax Lien") securing the obligation of Seller to pay past due property taxes on the Assets in an aggregate amount of \$1,024,000.

D. Seller wishes to sell to Wescourt Group, Inc., a Delaware corporation ("Buyer"), a portion of the Assets comprised of the Transferred Assets, as defined in and pursuant to the terms of, an Asset Purchase Agreement dated as of the date hereof between Seller and Buyer (the "Purchase Agreement").

E. Seller also wishes to appoint Buyer's affiliate, Fruita Marketing & Management, Inc., a Delaware corporation ("Wescourt"), as Seller's exclusive representative for the marketing and sale to third parties of all Assets other than the Transferred Assets (such other Assets, the "Retained Assets") pursuant to the terms of a Marketing Agreement dated as of the date hereof between Seller, Buyer and Chase (the "Marketing Agreement").

**CONSENT AND AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing premises, and for other good and valuable consideration, Chase hereby agrees as follows:



1. Definitions. Capitalized terms used herein and not otherwise defined have the meanings specified in Schedule 1 to the Purchase Agreement.

2. Consent to Transfer.

(a) Acknowledgement. Chase hereby acknowledges notice of the proposed sale to Buyer of the Transferred Assets and its receipt and review of a copy of the Purchase Agreement.

(b) Consent. Chase hereby consents to all of the terms of the Purchase Agreement, including, without limitation, the sale by Seller to Buyer of all of Seller's right, title and interest in and to the Transferred Assets, subject to the following limitations;

(i) If the Retained Assets remain subject to the Tax Lien on the Closing Date, then Chase's consent hereunder is conditioned upon the Transferred Assets remaining subject to the Chase Liens following such transfer until the occurrence of an event specified in Section 4 below; and

(ii) If the Tax Lien is released as to the Retained Assets on or prior to the Closing Date, Chase agrees that the Chase Liens shall automatically, and without any further action by Chase, be released as to the Transferred Assets and that, at Closing, Buyer shall take title to the Transferred Assets free and clear thereof. In such event, Chase further agrees promptly, and in any event within 20 days, to execute and deliver to Buyer such documents as Buyer may reasonably request and Chase may reasonably approve in order to evidence such release.

(c) Acknowledgment of Termination of Certain Agreements. Chase hereby acknowledges notice of and consents to the termination of certain documents in accordance with the terms of and as set forth in the Purchase Agreement.

3. Enforcement; Limited Recourse.

(a) Enforcement. Until the earlier to occur of (i) the second (2nd) anniversary of this Consent, (ii) the entry of a final, non-appealable judgment or order in a judicial or non-judicial proceeding enforcing the rights of the taxing authorities under the Tax Lien and proposing to divest Seller or Buyer, as the case may be, of possession of any Asset, and (iii) termination of the Marketing Agreement as a result of a default by Wescourt in

the performance of any of its material obligations thereunder or Wescourt's election to terminate the Marketing Agreement, Chase agrees that it shall not commence or maintain any Enforcement (as defined in the Marketing Agreement) upon or against any of the Transferred Assets, including, without limitation, any attachment, levy, distraint, or foreclosure proceeding.

(b) Limited Recourse. If Chase commences or maintains any Enforcement upon or against the Transferred Assets, Chase agrees that its recovery thereunder shall be limited to an amount equal to the lesser of (i) amount required to satisfy the Tax Lien on the Retained Assets at the time of the Enforcement and (ii) \$5,250,000 minus the aggregate Net Proceeds (as defined in the Marketing Agreement) received by Chase under the Marketing Agreement (such lesser amount, the "Lien Satisfaction Amount"). Notwithstanding anything to the contrary contained herein, Chase agrees to look to the Transferred Assets for payment and performance of the Chase Claim (as defined in the Marketing Agreement) solely to the extent of the Lien Satisfaction Amount and not to assert or attempt to assert any additional liability for payment or performance of Seller's obligations to Chase in excess of the Lien Satisfaction Amount against Buyer or its assets, including the Transferred Assets.

(c) Proceeds in Trust. If, notwithstanding the foregoing, Chase shall receive, or be entitled to receive, proceeds from any Enforcement with respect to the Transferred Assets in excess of the Lien Satisfaction Amount, such excess amount shall be held by Chase in trust for the benefit of Buyer and shall be promptly paid over and delivered to Buyer on demand. Seller agrees that, the obligations of Seller with respect to the Chase Claim shall be reinstated and revived to the extent of any amounts paid over and delivered to Buyer by Chase pursuant to the preceding sentence.

4. Agreement to Release Lien Upon the Occurrence of Certain Events. Chase hereby agrees that the Chase Liens shall automatically, and without any further action by Chase, be released as to the Transferred Assets upon the earliest to occur of (i) the date on which Wescourt shall have deposited aggregate Net Proceeds (as defined in the Marketing Agreement) available for application to the Chase Claim of \$5,250,000, or (ii) the date on which the Tax Lien is released as to all of the Retained Assets. Chase agrees promptly, and in any event within 20 days, to execute and deliver to Buyer such documents as Buyer may reasonably request and Chase may reasonably approve in order to evidence any such release.

5. Settlement of Tax Lien. Chase hereby acknowledges and confirms Buyer's right under the Marketing Agreement to negotiate concerning the payment, discharge, settlement, compromise, or adjustment of the taxes giving rise to the Tax Lien and the release of the Tax Lien from all or any portion of the Refinery Assets; provided, that, in each case, any payment, discharge, settlement, compromise, or adjustment thereof shall be at the sole cost and expense of Buyer and its Affiliates and shall not be a Sales Expense that may be reimbursed out of the proceeds of Sales (as each of the foregoing terms is defined in the Marketing Agreement).

6. Representations and Warranties. Chase hereby represents and warrants to Buyer and Seller that:

(a) Power and Authority. Chase has full corporate power and corporate authority to enter into this Consent and to perform its obligations hereunder;

(b) Due Authorization. The execution, delivery and performance by Chase of this Consent have been duly authorized by all necessary corporate action;

(c) Binding Effect. This Consent constitutes a valid and binding obligation of Chase, enforceable against Chase in accordance with its terms except as enforceability may be limited by bankruptcy, insolvency and other similar laws affecting creditors' rights generally or by general equitable principles; and

(d) No Consent. No consent, approval, authorization, registration or qualification of or by any person is required in connection with the execution, delivery and performance of this Consent or the performance by Chase of its obligations hereunder.

7. Communications. All notices, requests, demands and other communications under this Consent shall be in writing and shall be deemed to have been given (a) when delivered personally, or (b) 48 hours after being sent by facsimile with duplicate sent by courier service. Such communications shall be directed to Chase at the address for communications with Chase set forth in the Marketing Agreement.

8. Governing Law. This Consent will be governed by, and construed and enforced in accordance with, the laws of the State of New York.

9. Severability. Any provision of this Consent which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Consent or affecting the validity or enforceability of any such provision in any other jurisdiction, unless such prohibition or unenforceability frustrates the overall objective of this Consent.

IN WITNESS WHEREOF, Chase has duly executed this Consent and Agreement as of the date first written above.

THE CHASE MANHATTAN BANK, N.A.

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

WESCOURT GROUP, INC. EXECUTES BELOW TO ACKNOWLEDGE ITS CONSENT TO THE FOREGOING AND TO AGREE TO THE SPECIFIC TERMS THEREOF APPLICABLE TO IT:

WESCOURT GROUP, INC.,  
a Delaware corporation

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

LANDMARK PETROLEUM, INC. EXECUTES BELOW TO ACKNOWLEDGE ITS CONSENT TO THE FOREGOING AND TO AGREE TO THE TERMS OF SECTION 3 (C):

LANDMARK PETROLEUM, INC.  
a Delaware corporation

By: \_\_\_\_\_  
Richard Means, Vice President

**SPECIAL WARRANTY DEED**

LANDMARK PETROLEUM, INC., a Delaware Corporation (Grantor), whose address is 1493 Highway 6 & 50, Fruita, Colorado 81521, for the consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, in hand paid, hereby sells and conveys to FRUITA RP HOLDING, INC., a Delaware corporation (Grantee), whose legal address is 6500 Stapleton Drive South, Suite F204, Denver, Colorado 80216, County of Denver and State of Colorado, the following real property in the County of Mesa and State of Colorado, to-wit:

That certain real property described upon Exhibit A, attached hereto and incorporated herein by this reference; and,

Those certain easements which are described upon Exhibit B, attached hereto and incorporated herein by this reference, which are appurtenant to the property described in Exhibit A and are for the benefit of Grantee, its successors and assigns, provided with respect to such easements Grantor shall retain for itself and its successors and assigns the right to pave over and access over, along and across said easements to the extent such use does not unreasonably interfere with the use of such easements by Grantee,

also known as street and number 1493 Highway 6 & 50, Fruita, Colorado 81521, with all its appurtenances and warrants the title against all persons claiming under it.

This Special Warranty Deed is made and accepted subject to any and all restrictions, easements, reservations (including but not limited to all reservations of oil, gas and minerals) and/or encumbrances, if any, relating to the property conveyed hereby, to the extent, and only to the extent, that the same may still be in force and effect, and shown of record in the appropriate real property records of Mesa County, Colorado.

Signed and delivered this \_\_\_\_\_ day of February, 1994.

GRANTOR:

LANDMARK PETROLEUM, INC., a  
Delaware corporation

By \_\_\_\_\_

STATE OF COLORADO     )  
                              ) SS.  
COUNTY OF MESA         )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of February, 1994, by \_\_\_\_\_, the \_\_\_\_\_ of Landmark Petroleum, Inc., a Delaware corporation.

My commission expires: \_\_\_\_\_

(SEAL)

\_\_\_\_\_  
Notary Public

Name and Address of Person Creating Newly Created Legal Description (38-35-106.5 C.R.S.): Dennis W. Johnson, PLS, Professional Surveying Services, P.O. Box 4506, Grand Junction, CO 81502.

## PARCEL 1 OF TRACT A

A parcel of land located in the SE1/4 of Section 2, and East 1/2 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County, Colorado, being more particularly described as follows;

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00" E a distance of 2629.24 feet for a basis of bearings, with all bearings contained herein relative thereto; thence S 00°07'00" E a distance of 872.57 feet along the East line of the Northeast quarter (NE1/4) of Section 11 to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad, and the TRUE POINT OF BEGINNING; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 1756.67 feet to the Northeast corner of the SE1/4 of Section 11 (E 1/4 corner); thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 1332.18 feet to the Northeast corner of the SE1/4 SE1/4 of Section 11; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 713.82 feet to a point on the North bank of the Colorado River; thence along said North bank North 47 degrees 12 minutes 04 seconds West (N 47°12'04" W), a distance of 577.89 feet; thence leaving said North bank North 44 degrees 02 minutes 01 seconds East (N 44°02'01" E), a distance of 564.53 feet; thence North 00 degrees 07 minutes 00 seconds West (N 00°07'00" W), a distance of 611.55 feet; thence South 89 degrees 53 minutes 00 seconds West (S 89°53'00" W), a distance of 363.28 feet; thence North 00 degrees 06 minutes 58 seconds West (N 00°06'58" W), a distance of 374.74 feet; thence North 70 degrees 59 minutes 23 seconds East (N 70°59'23" E), a distance of 383.96 feet; thence North 00 degrees 07 minutes 00 seconds West (N 00°07'00" W), a distance of 842.93 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 289.73 feet; thence South 33 degrees 42 minutes 50 seconds West (S 33°42'50" W), a distance of 234.64 feet; thence North 58 degrees 50 minutes 11 seconds West (N 58°50'11" W), a distance of 115.86 feet; thence North 31 degrees 19 minutes 33 seconds East (N 31°19'33" E), a distance of 240.00 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 418.13 feet; thence North 07 degrees 30 minutes 19 seconds East (N 07°30'19" E), a distance of 94.49 feet; thence North 58 degrees 04 minutes 10 seconds West (N 58°04'10" W), a distance of 261.08 feet; thence South 52 degrees 42 minutes 15 seconds West (S 52°42'15" W), a distance of 81.06 feet; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 414.12 feet; thence South 33 degrees 24 minutes 17 seconds West (S 33°24'17" W), a distance of 90.58 feet; thence North 57 degrees 40 minutes 48 seconds West (N 57°40'48" W), a distance of 52.07 feet; thence North 33 degrees 24 minutes 17 seconds East (N 33°24'17" E), a distance of 115.46 feet; thence South 56 degrees 35 minutes 40 seconds East (S 56°35'40" E), a distance of 258.17 feet; thence North 33 degrees 49 minutes 38 seconds East (N 33°49'38" E), a distance of 472.87 feet; thence North 56 degrees 34 minutes 02 seconds West (N 56°34'02" W), a distance of 665.06 feet; thence North 33 degrees 53 minutes 32 seconds East (N 33°53'32" E), a distance of 384.57 feet to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence along said right-of-way South 56 degrees 41 minutes 00 seconds East (S 56°41'00" E), a distance of 1473.79 feet to the TRUE POINT OF BEGINNING. Said Parcel containing 37.816 acres as described.

Said parcel being subject to easements and right-of-ways of record as recorded in the Mesa County Clerk and Recorder's Office.

Prepared by: Dennis W. Johnson, PLS  
Professional Surveying Services  
PO Box 4506  
Grand Junction, CO 81502  
303-241-3841  
Jan. 27, 1994  
9391A6.LGL



**EXHIBIT B**

**EASEMENT DESCRIPTIONS**

**EASEMENT NO. 1**

A 25.0 foot wide easement for non-exclusive ingress, egress and the installation and maintenance of utilities located in the NE1/4 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows;

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00 E a distance of 2629.24 for a basis of bearings, with all bearings contained herein relative thereto; thence South 26 degrees 13 minutes 35 seconds West (S 26°13'35" W), a distance of 1628.11 feet to a point on the boundary of Parcel 1 of Tract A as described in Book \_\_\_\_\_, Page \_\_\_\_\_ of the Records of the Mesa County Clerk and Recorder), and the TRUE POINT OF BEGINNING; thence North 56 degrees 17 minutes 10 seconds West (N 56°17'10" W), a distance of 329.06 feet; thence North 52 degrees 42 minutes 14 seconds East (N 52°42'14" E), a distance of 26.44 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 308.15 feet; thence South 07 degrees 30 minutes 20 seconds West (S 07°30'20" W), a distance of 27.86 feet to the TRUE POINT OF BEGINNING; and containing .183 acres, or 7965 square feet as described.

**EASEMENT #2**

An easement for non-exclusive ingress, egress and the installation and maintenance of utilities located in the NE1/4 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows;

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00 E a distance of 2629.24 for a basis of bearings, with all bearings contained herein relative thereto; thence South 54 degrees 05 minutes 51 seconds West (S 54°05'51" W), a distance of 1696.92 feet to a point on the boundary of Parcel 1 of Tract A as described in Book \_\_\_\_\_, Page \_\_\_\_\_ of the Records of the Mesa County Clerk and Recorder), and the TRUE POINT OF BEGINNING; thence South 33 degrees 24 minutes 17 seconds West (S 33°24'17" W), a distance of 25.00 feet; thence North 56 degrees 35 minutes 43 seconds West (N 56°35'43" W), a distance of 613.78 feet; thence South 33 degrees 19 minutes 13 seconds West (S 33°19'13" W), a distance of 78.44 feet; thence North 56 degrees 51 minutes 30 seconds West (N 56°51'30" W), a distance of 106.51 feet; thence North 33 degrees 08 minutes 30 seconds East (N 33°08'30" E), a distance of 103.93 feet; thence South 56 degrees 35 minutes 43 seconds East (S 56°35'43" E), a distance of 720.65 feet to the TRUE POINT OF BEGINNING; and containing .606 acres, or 26405 square feet. as described.

**EASEMENT #3**

A 10.0 foot electric easement located in the NE1/4 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows;

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00" E a distance of 2629.24 for a basis of bearings, with all bearings contained herein relative thereto; thence South 70 degrees 11 minutes 32 seconds West (S 70°11'32" W), a distance of 1982.17 feet to a point on the boundary of Easement No. 2 as described above and the TRUE POINT OF BEGINNING; thence North 57 degrees 03 minutes 35 seconds West (N 57°03'35" W), a distance of 10.00 feet; thence North 32 degrees 28 minutes 32 seconds East (N 32°28'32" E), a distance of 502.06 feet; thence South 57 degrees 31 minutes 28 seconds East (S 57°31'28" E), a distance of 10.00 feet; thence South 32 degrees 28 minutes 32 seconds West (S 32°28'32" W), a distance of 502.14 feet to the TRUE POINT OF BEGINNING; and containing .115 acres, or 5021 square feet as described..

Prepared by: Dennis W. Johnson, PLS  
Professional Surveying Services  
PO Box 4506  
Grand Junction, CO 81502  
303-241-3841  
Jan. 21, 1994

to Purchase Agreement

**SPECIAL WARRANTY DEED**

FRUITA RP HOLDING, INC., a Delaware corporation (Grantor), whose address is 6500 Stapleton Drive South, Suite F204, Denver, Colorado 80216, for the consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, in hand paid, hereby sells and quit claims to LANDMARK PETROLEUM, INC., a Delaware corporation (Grantee), whose address is 1493 Highway 6 & 50, Fruita, Colorado 81521, the following real property, in the County of Mesa and State of Colorado, to-wit:

That certain easement for ingress and egress described upon Exhibit A, attached hereto and incorporated herein by this reference, for the benefit of Grantee, its successors and assigns,

with all its appurtenances and warrants the title against all persons claiming under it.

Signed and delivered this \_\_\_\_\_ day of February, 1994.

FRUITA RP HOLDING, INC., a  
Delaware corporation

By \_\_\_\_\_  
KEITH HOLDER, President

STATE OF COLORADO     )  
                                  ) SS.  
COUNTY OF MESA         )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of February, 1994, by \_\_\_\_\_, the \_\_\_\_\_ of FRUITA RP Holding, Inc., a Delaware corporation.

My commission expires: \_\_\_\_\_

(SEAL)

\_\_\_\_\_  
Notary Public

Name and Address of Person Creating Newly Created Legal Description (38-35-106.5 C.R.S.): Jeffray C. Fletcher, PLS, Professional Surveying Services, P.O. Box 4506, Grand Junction, Colorado 81502.

EXHIBIT A

INGRESS / EGRESS EASEMENT

An Ingress / Egress easement over and across the following parcel of land situated in the NE 1/4 of Section 11, Township 1 North, Range 3 West of the Ute Meridian, Mesa County, Colorado, being more particularly described as follows:

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, from whence the East 1/4 corner of Section 11 bears South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E) a distance of 2629.24 feet for a basis of bearings, with all bearings contained herein relative thereto; thence South 00 degrees 07 minutes 00 seconds East (S00°07'00" E) a distance of 872.57 feet along the East line of the Northeast quarter (NE1/4) of Section 11 to a point on the Southerly right-of-way line of the Denver and Rio Grand Railway, and the TRUE POINT OF BEGINNING; thence South 00 degrees 07 minutes 00 seconds East (S00°07'00"E) a distance of 1080.56 feet; thence North 89 degrees 53 minutes 00 seconds West (N 89°53'00" W) a distance of 30.00 feet; thence North 00 degrees 07 minutes 00 seconds West (N 00°07'00" W) a distance of 1100.27 feet to a point on the Southerly right-of-way line of the Denver and Rio Grand Railway; thence South 56 degrees 41 minutes 00 seconds East (S 56°41'00" E) a distance of 35.95 feet to the TRUE POINT OF BEGINNING.

Containing 0.73 acres as described.

Prepared by Jeffrey C. Fletcher, PLS  
Professional Surveying Services  
PO Box 4506  
Grand Junction, CO 81502  
303-241-3841  
Feb. 10, 1994  
9391Ing.LGL

SPECIAL WARRANTY DEED

LANDMARK PETROLEUM, INC., a Delaware Corporation (Grantor), whose address is 1493 Highway 6 & 50, Fruita, Colorado 81521, for the consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, in hand paid, hereby sells and conveys to LANDMARK PETROLEUM, INC. a Delaware Corporation (Grantee), whose address is 1493 Highway 6 & 50, Fruita, Colorado 81521, the following real property in the County of Mesa and State of Colorado, to-wit:

That certain real property described upon Exhibit A, attached hereto and incorporated herein by this reference,

also known as street and number 1493 Highway 6 & 50, Fruita, Colorado 81521, with all its appurtenances and warrants the title against all persons claiming under it.

Signed and delivered this \_\_\_\_\_ day of February, 1994.

GRANTOR:

LANDMARK PETROLEUM, INC., a  
Delaware corporation

By \_\_\_\_\_

STATE OF COLORADO     )  
                                  ) SS.  
COUNTY OF MESA         )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of February, 1994, by \_\_\_\_\_, the \_\_\_\_\_ of Landmark Petroleum, Inc., a Delaware corporation.

My commission expires: \_\_\_\_\_

(SEAL)

\_\_\_\_\_  
Notary Public

Name and Address of Person Creating Newly Created Legal Description (38-35-106.5 C.R.S.): Dennis W. Johnson, PLS, Professional Surveying Services, P.O. Box 4506, Grand Junction, CO 81502.

EXHIBIT A

PARCEL 2 OF TRACT A

A parcel of land located in the SE1/4 of Section 2, the NE1/4 of Section 10, and Section 11 Township 1 North, Range 3 West of the Ute Meridian, Mesa County Colorado, being more particularly described as follows:

Commencing at the Northeast corner of Section 11, Township 1 North, Range 3 West, whence the East 1/4 corner of Section 11 bears S 00°07'00" E a distance of 2629.24 feet for a basis of bearings, with all bearings contained herein relative thereto; thence S 00°07'00" E a distance of 872.57 feet along the East line of the Northeast quarter (NE1/4) of Section 11 to a point on the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence North 56 degrees 41 minutes 00 seconds West (N 56°41'00" W), a distance of 1473.79 feet along said railroad right-of-way, to the TRUE POINT OF BEGINNING; thence South 33 degrees 53 minutes 32 seconds West (S 33°53'32" W), a distance of 384.57 feet; thence South 56 degrees 34 minutes 02 seconds East (S 56°34'02" E), a distance of 665.06 feet; thence South 33 degrees 49 minutes 38 seconds West (S 33°49'38" W), a distance of 472.87 feet; thence North 56 degrees 35 minutes 40 seconds West (N 56°35'40" W), a distance of 258.17 feet; thence South 33 degrees 24 minutes 17 seconds West (S 33°24'17" W), a distance of 115.46 feet; thence South 57 degrees 40 minutes 48 seconds East (S 57°40'48" E), a distance of 52.07 feet; thence North 33 degrees 24 minutes 17 seconds East (N 33°24'17" E), a distance of 90.58 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 414.12 feet; thence North 52 degrees 42 minutes 15 seconds East (N 52°42'15" E), a distance of 81.06 feet; thence South 58 degrees 04 minutes 10 seconds East (S 58°04'10" E), a distance of 261.08 feet; thence South 07 degrees 30 minutes 19 seconds West (S 07°30'19" W), a distance of 94.49 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 418.13 feet; thence South 31 degrees 19 minutes 33 seconds West (S 31°19'33" W), a distance of 240.00 feet; thence South 58 degrees 50 minutes 11 seconds East (S 58°50'11" E), a distance of 115.86 feet; thence North 33 degrees 42 minutes 50 seconds East (N 33°42'50" E), a distance of 234.64 feet; thence South 56 degrees 17 minutes 10 seconds East (S 56°17'10" E), a distance of 289.73 feet; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 842.93 feet; thence South 70 degrees 59 minutes 23 seconds West (S 70°59'23" W), a distance of 383.97 feet; thence South 00 degrees 06 minutes 58 seconds East (S 00°06'58" E), a distance of 374.74 feet; thence North 89 degrees 53 minutes 00 seconds East (N 89°53'00" E), a distance of 363.28 feet; thence South 00 degrees 07 minutes 00 seconds East (S 00°07'00" E), a distance of 611.55 feet; thence South 44 degrees 02 minutes 01 seconds West (S 44°02'01" W), a distance of 564.53 feet to a point on the North bank of the Colorado River; thence the following 4 courses along the North bank of the Colorado River: (1) North 61 degrees 31 minutes 53 seconds West (N 61°31'53" W), a distance of 541.72 feet; (2) North 85 degrees 19 minutes 06 seconds West (N 85°19'06" W), a distance of 615.61 feet; (3) South 69 degrees 33 minutes 17 seconds West (S 69°33'17" W), a distance of 1015.56 feet; (4) South 45 degrees 30 minutes 57 seconds West (S 45°30'57" W), a distance of 384.19 feet to a point on the Northerly right-of-way of Interstate 70; thence the following 4 courses along the Northerly right-of-way of Interstate 70; (1) along a curve to the right having a radius of 11359.20 feet, arc length of 4261.46 feet, delta angle of 21 degrees 29 minutes 41 seconds (21°29'41"), a chord bearing of North 51 degrees 44 minutes 01 seconds West (N 51°44'01" W), and a chord length of 4236.51 feet; (2) North 40 degrees 59 minutes 10 seconds West (N

40°59'10" W), a distance of 400.50 feet; (3) North 32 degrees 26 minutes 20 seconds West (N 32°26'20" W), a distance of 309.30 feet; (4) along a curve to the left having a radius of 3969.70 feet, arc length of 130.31 feet, delta angle of 1 degree 52 minutes 51 seconds (1°52'51"), a chord bearing of North 44 degrees 10 minutes 50 seconds West (N 44°10'50" W), and a chord length of 130.30 feet; thence leaving said right-of-way North 00 degrees 50 minutes 33 seconds West (N 00°50'33" W), a distance of 644.86 feet; thence North 89 degrees 09 minutes 42 seconds East (N 89°09'42" E), a distance of 22.71 feet; thence South 32 degrees 55 minutes 25 seconds East (S 32°55'25" E), a distance of 264.97 feet; thence South 11 degrees 48 minutes 58 seconds West (S 11°43'58" W), a distance of 270.91 feet; thence South 48 degrees 11 minutes 15 seconds East (S 48°11'15" E), a distance of 859.15 feet; thence South 41 degrees 40 minutes 17 seconds East (S 41°40'17" E), a distance of 148.14 feet; thence South 20 degrees 12 minutes 02 seconds East (S 20°12'02" E), a distance of 434.73 feet; thence South 31 degrees 42 minutes 25 seconds East (S 31°42'25" E), a distance of 203.83 feet; thence South 63 degrees 51 minutes 48 seconds East (S 63°51'48" E), a distance of 484.33 feet; thence South 86 degrees 31 minutes 14 seconds East (S 86°31'14" E), a distance of 158.42 feet; thence North 41 degrees 43 minutes 28 seconds East (N 41°43'28" E), a distance of 62.52 feet; thence South 89 degrees 56 minutes 00 seconds East (S 89°56'00" E), a distance of 767.57 feet; thence South 01 degrees 13 minutes 31 seconds East (S 01°13'31" E), a distance of 58.91 feet; thence South 89 degrees 34 minutes 20 seconds East (S 89°34'20" E), a distance of 1003.06 feet; thence North 09 degrees 38 minutes 43 seconds West (N 09°38'43" W), a distance of 249.49 feet; thence North 39 degrees 13 minutes 56 seconds West (N 39°13'56" W), a distance of 131.38 feet; thence North 59 degrees 12 minutes 29 seconds West (N 59°12'29" W), a distance of 125.97 feet; thence North 00 degrees 34 minutes 39 seconds East (N 00°34'39" E), a distance of 318.00 feet; thence North 09 degrees 38 minutes 07 seconds East (N 09°38'07" E), a distance of 551.22 feet; thence North 69 degrees 50 minutes 17 seconds East (N 69°50'17" E), a distance of 307.09 feet; thence South 56 degrees 47 minutes 45 seconds East (S 56°47'45" E), a distance of 612.77 feet; thence South 32 degrees 13 minutes 29 seconds West (S 32°13'29" W), a distance of 178.70 feet; thence South 56 degrees 44 minutes 51 seconds East (S 56°44'51" E), a distance of 66.38 feet; thence South 28 degrees 52 minutes 33 seconds West (S 28°52'33" W), a distance of 433.57 feet; thence South 68 degrees 32 minutes 14 seconds East (S 68°32'14" E), a distance of 737.09 feet; thence South 61 degrees 16 minutes 50 seconds East (S 61°16'50" E), a distance of 299.30 feet; thence North 31 degrees 46 minutes 50 seconds East (N 31°46'50" E), a distance of 101.53 feet; thence North 58 degrees 27 minutes 39 seconds West (N 58°27'39" W), a distance of 298.31 feet; thence North 01 degrees 32 minutes 36 seconds West (N 01°32'36" W), a distance of 218.60 feet; thence North 32 degrees 56 minutes 45 seconds East (N 32°56'45" E), a distance of 345.01 feet; thence North 56 degrees 22 minutes 59 seconds West (N 56°22'59" W), a distance of 698.15 feet; thence North 22 degrees 46 minutes 44 seconds West (N 22°46'44" W), a distance of 312.10 feet; thence North 33 degrees 18 minutes 45 seconds East (N 33°18'45" E), a distance of 296.66 feet; thence North 56 degrees 35 minutes 17 seconds West (N 56°35'17" W), a distance of 214.74 feet; thence South 32 degrees 28 minutes 42 seconds West (S 32°28'42" W), a distance of 631.90 feet; thence North 47 degrees 11 minutes 13 seconds West (N 47°11'13" W), a distance of 209.61 feet; thence North 42 degrees 34 minutes 43 seconds East (N 42°34'43" E), a distance of 544.55 feet; thence North 29 degrees 35 minutes 16 seconds West (N 29°35'16" W), a distance of 298.77 feet; thence North 34 degrees 27 minutes 49 seconds East (N 34°27'49" E), a distance of 271.33 feet; thence South 59 degrees 05 minutes 40 seconds East (S 59°05'40" E), a distance of 298.49 feet; thence North 32 degrees 06 minutes 52 seconds East

(N 32°05'52" E), a distance of 166.80 feet; thence South 44 degrees 31 minutes 02 seconds East (S 44°31'02" E), a distance of 218.40 feet; thence North 33 degrees 33 minutes 41 seconds East (N 33°33'41" E), a distance of 45.53 feet; thence North 57 degrees 02 minutes 42 seconds West (N 57°02'42" W), a distance of 131.96 feet; thence North 33 degrees 33 minutes 52 seconds East (N 33°33'52" E), a distance of 68.49 feet; thence South 60 degrees 44 minutes 32 seconds East (S 60°44'32" E), a distance of 33.52 feet; thence North 33 degrees 29 minutes 45 seconds East (N 33°29'45" E), a distance of 86.70 feet; thence South 56 degrees 35 minutes 23 seconds East (S 56°35'23" E), a distance of 131.91 feet; thence North 33 degrees 04 minutes 32 seconds East (N 33°04'32" E), a distance of 21.50 feet; thence North 56 degrees 55 minutes 28 seconds West (N 56°55'28" W), a distance of 31.33 feet; thence North 33 degrees 43 minutes 06 seconds East (N 33°43'06" E), a distance of 36.91 feet; thence South 56 degrees 25 minutes 59 seconds East (S 56°25'59" E), a distance of 101.55 feet; thence South 33 degrees 01 minutes 00 seconds West (S 33°01'00" W), a distance of 13.57 feet; thence South 57 degrees 02 minutes 09 seconds East (S 57°02'09" E), a distance of 34.90 feet; thence South 32 degrees 57 minutes 51 seconds West (S 32°57'51" W), a distance of 4.35 feet; thence South 56 degrees 29 minutes 07 seconds East (S 56°29'07" E), a distance of 111.95 feet; thence North 33 degrees 22 minutes 49 seconds East (N 33°22'49" E), a distance of 41.69 feet; thence North 56 degrees 58 minutes 03 seconds West (N 56°58'03" W), a distance of 65.92 feet; thence North 32 degrees 32 minutes 02 seconds East (N 32°32'02" E), a distance of 65.75 feet; thence North 56 degrees 58 minutes 09 seconds West (N 56°58'09" W), a distance of 89.51 feet; thence North 32 degrees 22 minutes 45 seconds East (N 32°22'45" E), a distance of 35.88 feet; thence South 57 degrees 07 minutes 02 seconds East (S 57°07'02" E), a distance of 76.98 feet; thence North 43 degrees 10 minutes 35 seconds East (N 43°10'35" E), a distance of 142.24 feet; thence North 55 degrees 25 minutes 58 seconds East (N 55°25'58" E), a distance of 33.39 feet; thence North 33 degrees 18 minutes 50 seconds East (N 33°18'50" E), a distance of 106.81 feet; thence North 56 degrees 36 minutes 08 seconds East (N 56°36'08" E), a distance of 88.73 feet; thence North 32 degrees 34 minutes 45 seconds East (N 32°34'45" E), a distance of 152.28 feet to the Southerly right-of-way line of the Denver and Rio Grand Railroad; thence South 56 degrees 41 minutes 00 seconds East (S 56°41'00" E), a distance of 348.21 feet to the TRUE POINT OF BEGINNING. Said parcel containing 280.186 acres as described.

Said parcel being subject to easements and right-of-ways of record as recorded in the Mesa County Clerk and Recorder's Office.

Prepared by: Dennis W. Johnson, PLS  
Professional Surveying Services  
PO Box 4506  
Grand Junction, CO 81502  
303-241-3841  
Jan. 27, 1994



**ASSIGNMENT OF RIGHTS**

THIS ASSIGNMENT OF RIGHTS (this "Assignment"), dated as of February 28, 1994, between Landmark Petroleum, Inc., a Delaware corporation ("Assignor"), and Wescourt Group, Inc., a Delaware corporation ("Assignee").

**RECITALS**

A. Assignor owns an oil refinery located at 1493 Highway 6 & 50, Fruita, Colorado, and comprised of certain real property, fixtures, personal property and other assets (collectively, the "Assets").

B. Assignor is a party to the agreements described on attached Schedule 1 (the "Assigned Agreements") with respect to certain of the Assets.

C. Assignor has agreed to sell to Assignee and Assignee has agreed to purchase from Assignor a portion of the Assets on the terms and subject to the conditions set forth in that certain Asset Purchase Agreement dated the date hereof between Assignor and Assignee (the "Asset Purchase Agreement").

D. Pursuant to the terms of the Asset Purchase Agreement, Assignee has agreed to execute and deliver this Assignment evidencing the assignment and assumption of certain rights and obligations under the Assigned Agreements.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing premises, and for other good and valuable consideration, Assignor and Assignee hereby agree as follows:

1. Assignment. Effective as of the date hereof and subject to the terms and conditions of the Asset Purchase Agreement, Assignor does hereby sell, transfer, assign, convey and deliver to Assignee all of Assignor's right, title and interest in and to each Assigned Agreement as and to the extent, but only to the extent, that such Assigned Agreement relates to the Transferred Assets.

2. Acceptance and Assumption. Effective as of the date hereof and subject to the terms and conditions of the Asset Purchase Agreement, Assignee hereby accepts the

assignment set forth in Section 1 hereof and agrees to assume, perform, and discharge all of the liabilities, obligations and duties of Assignor, if any, under each Assigned Agreement as and to the extent such Assigned Agreement relates to the Transferred Assets, but only to the extent such liabilities, obligations and duties arise after the date hereof.

3. No Amendment. This Assignment shall not alter, modify or amend the terms of any Assigned Agreement in any respect, nor shall it subject the Assignee or any other party to any Assigned Agreement to any greater liabilities, obligations or duties in connection therewith than would have been enforceable against the Assignor or such party if the assignment and assumption described herein had never occurred.

4. Binding Effect. This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

5. Governing Law. This Assignment will be governed by and construed and enforced in accordance with the laws of the State of New York.

6. Conflicts. To the extent there is a conflict between the terms and provisions of this Assignment and the Asset Purchase Agreement, the terms and provisions of the Asset Purchase Agreement will govern.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment as of the date first above written.

LANDMARK PETROLEUM, INC.,  
a Delaware Corporation

By: \_\_\_\_\_  
Richard Means,  
Vice President

WESCOURT GROUP, INC.,  
a Delaware Corporation

By: \_\_\_\_\_  
Keith R. Holder,  
President

Tab E

Tab F

## MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT ("Agreement") is entered into as of February 28, 1994, between FRUITA MARKETING & MANAGEMENT, INC., a Delaware corporation ("Wescourt"), and LANDMARK PETROLEUM, INC., a Delaware corporation ("Landmark").

### RECITALS

A. Landmark owns an oil refinery located at 1493 Highway 6 & 50, Fruita, Colorado, and comprised of certain real property, fixtures, personal property and other assets (collectively, the "Refinery Assets").

B. Simultaneously herewith, Landmark and Wescourt Group, Inc. ("Purchaser") are entering into an Asset Purchase Agreement pursuant to which Purchaser is acquiring from Landmark the portion of the Refinery Assets constituting the refinery's offices, laboratories, maintenance building, parking facilities, rail sidings, loading/unloading docks, storage tanks and truck and loading racks, all as more fully described in the Asset Purchase Agreement (the "Transferred Assets").

C. Simultaneously herewith, Landmark and Wescourt are entering into a Marketing Agreement (the "Marketing Agreement") pursuant to which Wescourt will act as Landmark's exclusive representative for the marketing and sale to third parties, in one or more sales ("Sales"), of all Refinery Assets other than the Transferred Assets (such other Refinery Assets, the "Assets").

D. In order to facilitate the Sales:

(1) prior to the date hereof, Landmark has prepared the Assets for sale by terminating all operations at the refinery and storing the Assets in accordance with industry practice, in each case in compliance with applicable legal requirements; and

(2) Landmark wishes to provide for the management of the Assets pending the Sales on the terms and conditions described herein.

E. Capitalized terms used in this Agreement without definition have the respective meanings set forth in the Marketing Agreement.

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing premises, and for other good and valuable consideration, Landmark and Wescourt hereby agree as follows:

### 1. Appointment of Wescourt.

1.1 Scope of Appointment. Landmark hereby appoints Wescourt as manager of the Assets with the responsibility for (1) overseeing the on-site maintenance and servicing of the Assets by Landmark's employees pending the Sales, (2) overseeing such steps as Wescourt may deem necessary or appropriate to facilitate the Sales, including, without limitation, to segregate Assets in preparation for Sales, (3) maintaining in effect existing permits for the Assets to the extent consistent with, and in the judgement of Wescourt helpful in facilitating, the Sales, and (4) providing the other services described on attached Exhibit A (collectively, the "Management Services"). Landmark and Wescourt expressly acknowledge and agree that the Management Services shall in no event be construed to include any obligation on the part of Wescourt to operate the Assets or any portion thereof.

1.2 Specific Duties of Wescourt. Without limiting the foregoing, the Management Services shall include the following specific duties:

(a) Repairs and Maintenance. Wescourt shall make, or cause to be made, all repairs and shall perform, or cause to be performed, all maintenance on the buildings, equipment, appurtenances and grounds constituting the Assets in accordance with industry standards for maintenance of a decommissioned refinery facility. Wescourt shall arrange for periodic inspections of the Assets in accordance with industry practice in the area in which the Assets are located;

(b) Equipment and Supplies. Wescourt shall make all arrangements for the furnishing to the Assets of utility, maintenance and other services and for the acquisition of such equipment and supplies as may be necessary for the maintenance and servicing of the Assets, in their decommissioned state, pending the Sales;

(c) Personnel. Wescourt shall employ as employees of Wescourt or other Wescourt Persons, such personnel as Wescourt may reasonably deem necessary for the performance of its obligations hereunder;

(d) Insurance. Wescourt shall cause to be kept in force and effect the forms of insurance currently in effect with respect to the Assets, subject to such modifications as may reasonably be required by Landmark (or reasonably decided upon by Wescourt with Landmark's consent in the absence of Landmark's express instructions), including, without limitation, officer's and director's insurance, public liability insurance, fire and extended coverage insurance, and burglary and theft insurance. Wescourt shall promptly investigate and make a timely written report to Landmark as to all accidents and claims of which Wescourt has knowledge relating to the ownership and maintenance of the Assets, or any damage or destruction to the Assets, and shall prepare any and all reports required by any insurance company in connection therewith. Wescourt shall have no right to settle, compromise or otherwise dispose of any claims, demands or liabilities, whether or not covered by insurance, without prior written consent of Landmark;

(e) Notices. Wescourt shall deliver forthwith to Landmark copies of all material written notices received by Wescourt from any governmental or official entity with respect to the Assets; and

(f) Wescourt shall provide the services described on attached Exhibit A.

1.3 Management of the Assets. Wescourt shall devote reasonable commercial efforts to the management of the Assets, and shall perform its duties hereunder in accordance with industry standards.

1.4 Use and Maintenance of the Assets. Landmark and Wescourt each agrees not to permit the use of the Assets for any purpose or in any manner that might void any policy of insurance with respect to the Assets or that would be in violation of any applicable law or governmental regulation.

## 2. Records, Reports.

2.1 Financial Records. Wescourt shall maintain a comprehensive system of office records, books and accounts, all of which shall belong to Landmark. Landmark and others designated by Landmark shall have access to such records, accounts and books upon reasonable notice during regular business hours.

2.2 Reports. Wescourt shall furnish to Landmark, within thirty (30) days after the end of each of Wescourt's fiscal quarters, a report describing the activities of

Wescourt hereunder during the then-ended quarter and any material change in the condition of the Assets.

3. Compensation for Management Services. Wescourt shall be entitled to receive out of the proceeds of any Sales, reimbursement for its actual costs in performing the Management Services hereunder. Any payments made pursuant to the terms hereof shall be Sales Expenses under the Marketing Agreement and shall be reimburseable to Wescourt as provided therein.

4. Term and Termination.

4.1 Term. This Agreement shall commence on the date hereof and, subject to Section 4.2, continue in effect for a period of five (5) years (the "Term").

4.2 Termination.

(a) By Landmark. If Wescourt defaults in the performance of any of its material obligations hereunder, Landmark may give written notice to Wescourt thereof. If such default is not corrected or otherwise addressed by Wescourt to Landmark's reasonable satisfaction within sixty (60) days after Wescourt's receipt of such notice, then Landmark may terminate this Agreement upon thirty (30) days prior written notice to Wescourt.

(b) By Wescourt. Wescourt may, at any time during the Term, terminate this Agreement immediately upon written notice to Landmark if Landmark defaults in its material obligations to Wescourt hereunder or if Wescourt concludes that its continued performance of the Management Services, including its performance of any tasks specifically requested by Landmark hereunder, could reasonably be expected to result in material liabilities to Wescourt.

5. Landmark's Approval. Whenever Landmark's approval or consent is required pursuant to this Agreement with respect to a matter concerning the management of the Assets by Wescourt, such approval or consent shall be deemed granted unless Landmark notifies Wescourt, within ten (10) business days following receipt by Landmark of Wescourt's written request for such approval or consent, that Landmark is withholding its approval or consent.



6. Indemnification.

6.1 Landmark's Indemnity. Landmark shall protect, indemnify and hold harmless each Wescourt Person from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, and expenses of any kind whatsoever (collectively, "Losses") which may at any time be imposed on, incurred by or asserted against any Wescourt Person resulting from the performance of the Management Services by Wescourt or any act or omission which Wescourt is required or instructed to do hereunder, except to the extent arising out of such Wescourt Person's gross negligence or willful misconduct.

6.2 Wescourt's Indemnity. Wescourt shall protect, indemnify and hold harmless Landmark, its officers, employees and agents from and against any and all Losses which may at any time be imposed on, incurred by or asserted against any such person as a result of (i) any breach or default by Wescourt hereunder or (ii) the gross negligence or willful misconduct of Wescourt.

6.3 Limitation of Liability. NOT WITHSTANDING ANY OTHER PROVISION HEREOF, IN NO EVENT SHALL ANY WESCOURT PERSON BE LIABLE TO ANY PARTY FOR ANY CONSEQUENTIAL DAMAGES (MEANING DAMAGES THAT DO NOT ARISE OUT OF THE SUBJECT TRANSACTION BETWEEN THE PARTIES HERETO OR CHASE BUT DAMAGES THAT ARISE OUT OF THE DEALINGS BETWEEN LANDMARK OR CHASE AND A THIRD-PARTY), INCLUDING, WITHOUT LIMITATION, ARISING OUT OF THE SALE OF THE ASSETS, WHETHER UNDER A THEORY OF CONTRACT, TORT, INDEMNITY, OR OTHERWISE; OR PUNITIVE DAMAGES OF ANY KIND. IN NO EVENT SHALL THE TOTAL LIABILITY OF ALL WESCOURT PERSONS HEREUNDER EXCEED THE TOTAL COMMISSIONS PAID TO WESCOURT HEREUNDER, EXCEPT TO THE EXTENT THAT THE SAME RESULTS FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF WESCOURT.

7. No Agency. Wescourt shall be responsible for all of its employees and employees of any affiliate, the supervision of all persons performing services in connection with the performance of all of Wescourt's obligations relating to the maintenance and operation of the Assets, and for determining the manner and time of performance of all acts hereunder. Nothing herein contained shall be construed to establish Wescourt as agent of Landmark.

8. Assignment. Wescourt may not assign this Agreement without the prior written approval of Landmark, which approval may be withheld by Landmark in its sole discretion. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

9. Communications. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been given (a) when delivered personally, or (b) 48 hours after being sent by facsimile with duplicate sent by courier service. Such communications shall be directed as follows:

To Landmark at:

Landmark Petroleum  
1493 Highway 6 & 50  
Fruita, Colorado 81521  
Att'n: Mr. Richard Means  
Fax: (303) 858-9194

with copies to:

The Chase Manhattan Bank, N.A.  
One Chase Manhattan Plaza  
Tenth Floor  
New York, New York 10081  
Att'n: Mr. Stanley M. Guralnick  
Fax: (212) 422-6249

To Wescourt at:

Fruita Marketing & Management, Inc.  
c/o Wescourt Group, Inc.  
2401 River Road  
Grand Junction, Colorado 81505  
Att'n: Keith Holder  
Fax: (303) 241-5319

Any party may change its address for purposes of this Section 9 by giving the other party notice of the new address in the manner set forth above.

10. Captions and Headings. The captions contained herein are for convenience and reference only and shall not affect the meaning, scope, intent, or interpretation of this Agreement or its provisions.

11. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings, written and oral with respect thereto. No prior draft of this Agreement nor any parole evidence shall be admissible to prove the meaning or intent of any provision of this Agreement.

12. Amendment or Modification. This Agreement may only be amended, modified or supplemented by a written instrument specifically referring to this Agreement and signed by Landmark and Wescourt.


13. Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York.

14. Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of any such provision in any other jurisdiction, unless such prohibition or unenforceability frustrates the overall objective of this Agreement.

15. Counterparts. This Agreement will be executed in counterparts, and the several counterparts shall constitute one executed Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the date first written above.

FRUITA MARKETING & MANAGEMENT, INC.,  
a Delaware corporation

By:   
~~Keith R. Holder~~, President  
JAMES J. STEMNICK

LANDMARK PETROLEUM, INC.  
a Delaware corporation

By: \_\_\_\_\_  
Richard Means, Vice President

12. Amendment or Modification. This Agreement may only be amended, modified or supplemented by a written instrument specifically referring to this Agreement and signed by Landmark and Wescourt.

13. Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York.

14. Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of any such provision in any other jurisdiction, unless such prohibition or unenforceability frustrates the overall objective of this Agreement.

15. Counterparts. This Agreement will be executed in counterparts, and the several counterparts shall constitute one executed Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the date first written above.

FRUITA MARKETING & MANAGEMENT, INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Keith R. Holder, President

LANDMARK PETROLEUM, INC.  
a Delaware corporation

By: Richard L. Means  
Richard Means, Vice President

Exhibit A  
to Management Agreement

Additional Services

1. Wescourt shall perform all day-to-day accounting functions of Landmark relating to the ownership of the Assets including the preparation and timely filing of all tax returns and employment filings. At Landmark's request from time to time, Wescourt shall promptly deliver evidence of such filings to Landmark.

2. Wescourt shall be responsible for paying on behalf of Landmark, from and to the extent of Sales Proceeds, all costs relating to the operation of the Assets including, without limitation, the payment of employee wages (including, during the first two years of the term hereof, the payment of \$5,000.00 per calendar quarter to the individual appointed to the position of vice president for Landmark) ad valorem taxes, all other taxes and benefits incurred with respect to the Assets, insurance, and all other day-to-day expenses charged to Landmark and related to the ownership of the Assets. Such day-to-day expenses shall include reimbursement of Landmark for reasonable attorneys' fees incurred by Landmark in connection with (i) Landmark's continued compliance with the terms of the Management Agreement, Marketing Agreement and the Asset Purchase Agreement and (ii) the maintenance of the corporate existence of Landmark, including the preparation of documentation for annual meetings and other customary and necessary actions.

3. Wescourt shall use all reasonable efforts to ensure that Landmark complies fully with all federal, state and municipal laws, ordinances, regulations and orders relative to the Assets and shall prepare and file all regulatory filings required to be filed by Landmark to maintain permits required for the ownership (in a decommissioned state) and sale of the Assets.

1       it was L.B. Consultants who were the owners of  
2       Landmark, and then they brought in other people  
3       did they?

4           A.       Yes.

5           Q.       Who did they bring in?

6           A.       There was quite a few people  
7       involved. As a matter of fact, the people that  
8       went to work at the refinery, they could buy  
9       shares at 5,000 in \$8 increments and be a  
10      shareholder in the company.

11                   The three biggest ones were -- well,  
12      I can't remember his name offhand, but he used  
13      to own a chemical company and Chase Manhattan.  
14      I did have those papers that showed all that,  
15      but --

16          Q.       Do those papers exist somewhere?

17          A.       Yes.

18          Q.       Where is the location of those  
19      papers?

20          A.       I think I have a copy of them.

21          Q.       Okay.

22          A.       Gordon Smith, that's who the other  
23      one was.

24          Q.       Okay. And where is Gordon Smith?

25          A.       Somewhere in -- I think he's in

Joppa H. Smith

1           there.

2           THE WITNESS:   Oh, okay.

3           A.       Originally I was to stay as a  
4       Landmark employee.   Wescourt said they didn't  
5       want to keep me that way because they had to keep  
6       two payrolls, and it was an extra expense, so  
7       Chase Manhattan agreed to put me on the Wescourt  
8       payroll, because Chase was actually paying my  
9       wages.   Wescourt was paying my wages, but Chase  
10      was reimbursing Wescourt for my expenses, for my  
11      salary.

12          Q.       Okay.   Let's stop there for a minute  
13      and we'll get back into that.

14                 I need just a few names.   Who at  
15      Chase Manhattan was the responsible party for  
16      this transaction?

17          A.       At that time it was Charlie, and I  
18      can't think of his last name, but I can find it  
19      in the records probably.

20          Q.       Okay.

21          A.       The last person that I talked to was  
22      Nat Worsterstein, he was representing --

23          Q.       Could you spell that?

24          A.       Oh, boy.

25          Q.       Nat, N-a-t, I'll help you on that

Joppa H. Smith

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970-242-3074

1       it to you.

2           Q.       Great. Now, when you said at that  
3       time, are you talking about February of '95?

4           A.       That was in March of '94 that they  
5       decided to do that.

6           Q.       Okay. Now, when you say Chase  
7       Manhattan, you mean the bank?

8           A.       Yes, Chase Manhattan of New York  
9       City.

10          Q.       Okay. What was Chase Manhattan's  
11       relationship to Landmark and to Wescourt?

12          A.       To Landmark Petroleum, they loaned  
13       money to Landmark to run the refinery. They  
14       also owned about 12 percent of the shares in  
15       Landmark.

16          Q.       Okay. How about Wescourt, what was  
17       their relation to Wescourt?

18          A.       They were just -- we were getting the  
19       contract with Wescourt to manage all of the  
20       Landmark assets.

21          Q.       Who is we?

22          A.       Landmark and Chase Manhattan.

23          Q.       And were you doing that in February  
24       of 1995?

25          A.       No, that was already done, we started

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Grand Junction, Colorado 81502  
970-242-3074



1       that -- actually, we started negotiating that in  
2       January of '94.

3           Q.       In February of 1995 had that been  
4       implemented?

5           A.       Yes, it had.

6           Q.       To where you were managing Wescourt's  
7       assets on behalf of Chase?

8           A.       No, I was not managing anything  
9       on --

10          Q.       This whole thing is confusing.

11          A.       Yes, it is.

12          Q.       And I'm trying to get a handle on it,  
13       okay.

14          A.       What I was doing, I was maintaining  
15       the Landmark assets for Wescourt and Chase  
16       Manhattan, to keep them in a sellable condition,  
17       and also to clean up and do environmental work  
18       and do mothballing to -- clean the tanks so they  
19       would be sellable, clean all the oil, get all the  
20       oil pumped out, get the tanks cleaned, get the  
21       units cleaned, so that they would be safe to work  
22       on and sell.

23          Q.       Whose product was in the Joe Mecham  
24       tank in January of 1995?

25          A.       Well, there was a contract, which I

Joppa H. Smith

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Tab G

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JOANNE MCNEE CLERK  
BY                      DEPUTY

BARBARA L. MAW #4081  
A Professional Corporation  
Attorney for Defendant  
Chase Manhattan  
185 South State Street, Suite 340  
Salt Lake City, Utah 84111  
Telephone: (801) 533-9700  
Fax: (801) 533-8111

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IN THE EIGHTH JUDICIAL DISTRICT COURT

---

~~IN AND FOR UTAH COUNTY, STATE OF UTAH~~

---

JOSEPH MECHAM,	)	ORDER
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BAND-IT IDEX, INC., a Delaware	)	Civil No. 960800543
corporation, LANDMARK PETROLEUM,	)	
INC., a Delaware corporation,	)	
WESTCOURT MANAGEMENT, INC., a	)	Judge A. Lynn Payne
Colorado corporation, PORTFIELD	)	
INVESTMENTS, INC., a Colorado	)	
corporation, FRUITA MARKETING &	)	
MANAGEMENT, INC., a Delaware	)	
corporation, CONSOLIDATED OIL &	)	
GAS, a Colorado corporation, LARR'S,	)	
INC., a Wyoming corporation, CHASE	)	
MANHATTAN BANK, a New York	)	
corporation, and JOHN DOES 1 through 9,	)	
	)	
Defendants.	)	

---

Defendant, Chase Manhattan Bank's Motion for Summary Judgment came before the Honorable Judge Lynn Payne on April 11, 2000, Barbara L. Maw appearing on behalf of Chase Manhattan Bank and Wayne Freestone and David Cundick appearing on behalf of plaintiff, Joseph Mecham. Defendant filed a Motion for Summary Judgment and a Memorandum in Support thereof, plaintiff filed a Response to Defendant's Motion and Memorandum. Oral argument was requested and heard. After having read the briefs of counsel, having heard oral argument and being fully advised in the premises, the Court finds as follows:

A. Plaintiff conceded on the following issues.

1. Chase Manhattan Bank ("Chase") is not an employer or independent contractor, so there is no issue in this regard and summary judgment is granted as to this issue in favor of Chase.

2. There is no basis to pierce the corporate veil. As to this issue, summary judgment is granted in favor of Chase

3. No liability arises against defendant Chase Manhattan Bank based upon any ownership of stock. As to this issue, summary judgment is granted in favor of Chase.

4. Plaintiff acknowledges Chase does not have possession of the property, and as such incurs no direct liability as a possessor. As to this issue, summary judgment is granted in favor of Chase

B. As to the remaining allegations in which plaintiff claims that Chase Manhattan Bank and Landmark Petroleum, Inc., has a principal/agency relationship, the Court finds as follows.

1. Chase did not have veto power over the sale of the asserts, rather Chase had the power to agree or disagree. If they disagreed over the sale of an asset, the contract provided that the average of the previous two months expenses were used.

~~2. Chase exercised some control over the sale of the assets. It did so because of~~  
its position as a lienholder, not because of any principal/agency relationship. The Court found that a lienholder has a legitimate interest in approving sales of secured assets, otherwise assets would just disappear.

3. The Court acknowledged that Means continued to be employed by Landmark Petroleum, Inc., at the insistence of Chase. However, the Court noted that Means' wages came out of the approved monthly expenses. Because the wages came from the approved monthly expenses, the Court held that this does not establish a principal/agency relationship.

4. The Court found no allegation or evidence that Chase took part in any management of the company or had any input as to how the sale of assets was performed.

5. The Court determined that having Means onsite to oversee the sale did not establish an agency relationship unless Chase exercised some actual control. The Court found that Chase did not exert any actual control.

6. The Court found that Chase is not a principal of Landmark Petroleum, Inc.. The Court determined that Chase acted as a secured party and held that Chase was entitled to take steps to secure its interest in the property and to maintain control over it. The Court did not find anything unusual about Chase's position in this regard and found that it acted as a reasonable secured party under the circumstances.

7. The Court reasoned that a creditor should not be required to release its security interest as the result of a sale unless the amount is appropriate. Otherwise, fraud can be perpetrated on the secured party by selling the assets for a nominal amount. For this reason, the Court determined that the actions of Chase were appropriate and it did not exceed its position as a leinholder.

8. Lastly, the Court held there was a strong public policy interest in allowing a secured party to take reasonable steps to ascertain the value of its security interests and also be involved in how those assets are disposed of. In this regard, the Court found there was nothing Chase did to cross the line and become other than a secured creditor.

Based on the above findings, the Court held no principle/agency relationship was established between Chase and any other entity or individual and granted Summary Judgment in favor of Defendant Chase Manhattan Bank.

DATED this 3 day of <sup>July</sup>~~June~~, 2000.

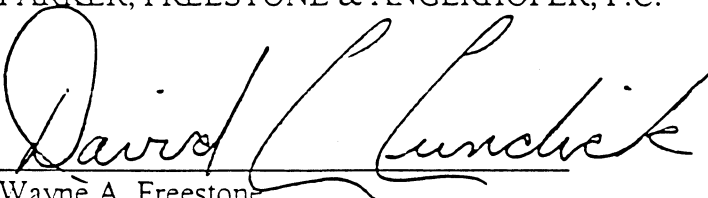
BY THE COURT:

  
\_\_\_\_\_  
HONORABLE A. LYNN PAYNE

APPROVAL AS TO FORM:

---

PARKER, FREESTONE & ANGERHOFER, P.C.

  
\_\_\_\_\_  
Wayne A. Freestone  
David C. Cundick  
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 2000, a true and correct copy of the foregoing ORDER was mailed, first-class postage prepaid, to the following:

Attorneys for Plaintiff:

Wayne A. Freestone

David C. Cundick

PARKER, FREESTONE & ANGERHOFER, P.C.

50 West 300 South, Suite 900

Salt Lake City, UT 84101

---

Attorneys for Defendant Fruita Marketing & Mgt., Inc.:

Kevin D. Swenson

STRONG & HANNI

Nine Exchange Place

Sixth Floor, Boston Building

Salt Lake City, UT 84111

Gandice Bradshaw



Tab H

CLARK B ALLRED - 0055  
CLARK A. McCLELLAN - 6113  
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.  
121 West Main Street  
Vernal, Utah 84078  
Telephone: (435) 789-4908

ATTORNEYS FOR DEFENDANT  
CONSOLIDATED OIL & TRANSPORTATION COMPANY, INC.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

JOSEPH MECHAM,

Plaintiff,

vs.

BAND-IT IDEX, INC., a Delaware,  
Corporation, SEAL FAST INC.,  
a Texas Corporation, KEYWAY  
INTERNATIONAL, INC., a Texas  
Corporation, MORCON SPECIALTY  
INC., A Utah corporation, RED MAN  
PIPE & SUPPLY, an Oklahoma  
corporation, LANDMARK PETROLEUM,  
INC., a Delaware corporation,  
WESTCOURT MANAGEMENT, INC., a  
Colorado corporation, PORTFIELD  
INVESTMENTS INC., a Colorado  
corporation, FRUITA MARKETING &  
MANAGEMENT, INC., a Delaware  
corporation, CONSOLIDATED OIL &  
GAS, a Colorado corporation,  
LARR's, INC., a Wyoming  
CHASE MANHATTAN BANK, a New York  
corporation, THE FIRESTONE TIRE &  
RUBBER COMPANY, and JOHN DOES 1  
through 9,

Defendants.

ORDER

Civil No. 960800543

Judge A. Lynn Payne

The above captioned matter came before the Court pursuant to Consolidated Oil & Transportation Company, Inc.'s Motion to Dismiss for Lack of Jurisdiction. Consolidated Oil & Transportation Company, Inc. was represented by its attorneys Clark B Allred and Clark A. McClellan. The Plaintiff was represented by his attorneys Wayne Freestone and David Cundick. Consolidated Oil & Transportation Company, Inc. is the correct name for the Defendant identified in the Complaint as Consolidated Oil & Gas. The Court had reviewed the pleadings and the memorandum filed by the parties as well as the affidavit submitted by Shirley Hebert of Consolidated Oil & Transportation Company, Inc. and has also reviewed the cases and statutes relied on by counsel. After receiving arguments from both parties, the Court finds and orders as follows:

1. The Court has relied on the facts as alleged in the Amended Complaint, the attachments to the memoranda and the facts set forth in the affidavit. As to any conflict, the Court considered those facts in a light most favorable to the Plaintiff.

2. The Plaintiff has the burden of proof on jurisdiction.

3. Consolidated Oil & Transportation, Inc. has had minimal contacts with the state of Utah.

4. The claims of the Plaintiff against the Defendant are tort claims arising from an accident. The accident and the Plaintiff's injuries occurred in the state of Colorado.

5. There is no relationship between the Plaintiff's injuries and the minimal contact the Defendant had with the state of Utah.

6. It is not alleged in the Amended Complaint and there has been no showing of any substantial and continuous activity in the state of Utah by Defendant that would give the Court jurisdiction.

7. The case of Arquello vs Industrial Woodworking Mach. Co., 828 P.2d 1120 (Utah 1992) is dispositive of this case.

8. There is not a sufficient nexus between the injury and the contacts of the Defendant in the state of Utah to give the Court jurisdiction under Arquello.

The Court therefore grants Consolidated Oil & Transportation Company, Inc.'s Motion to Dismiss for Lack of Jurisdiction and Orders that the Amended Complaint as to Defendant Consolidated Oil and Transportation Company, Inc. is dismissed for lack of jurisdiction.

DATED this 14 day of <sup>April</sup>~~March~~, 2000.

Approved As To Form:

David C. Cundick  
David C. Cundick, attorney  
for Plaintiff

MB  
A. Lynn Payne  
District Judge

t:\consolid\order

Tab I

Wayne A. Freestone, #4481  
David C. Cundick, #4817  
Attorneys for Plaintiff  
PARKER, FREESTONE, ANGERHOFER & HARDING, PC  
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Salt Lake City, Utah 84101  
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Fax No.: (801) 328-5651

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH  
COUNTY OF UINTAH

---

JOSEPH MECHAM,

Plaintiff,

-VS-

BAND-IT IDEX, INC., a Delaware  
corporation, SEAL FAST INCORPORATED,  
a Texas corporation, KEYWAY  
INTERNATIONAL, INC., a Texas  
corporation, MORCON SPECIALTY,  
INC., a Utah corporation, RED MAN PIPE &  
SUPPLY, an Oklahoma corporation,  
LANDMARK PETROLEUM, INC. a  
Delaware corporation, WESTCOURT  
MANAGEMENT INC., a Colorado  
corporation, PORTFIELD INVESTMENTS  
INC., a Colorado corporation, FRUITA  
MARKETING & MANAGEMENT,  
INC., a Delaware corporation,  
CONSOLIDATED OIL & GAS, a  
Colorado corporation, LAIR'S, INC. a  
Wyoming corporation, CHASE  
MANHATTAN BANK, a Delaware  
corporation, and JOHN DOES 1 through 9,

Defendants.

**SECOND AMENDED COMPLAINT**

Case No.

COMES NOW Plaintiff Joseph Mecham and for cause of action alleges against the defendants and each of them as follows.

### **I. PARTIES**

1. Plaintiff Joseph Mecham (“**MECHAM**”) is an individual who at all relevant times has resided at 2430 East 3500 South, City of Vernal, State of Utah.

2. Defendant Band-it IDEX, Inc. (“**BAND-IT**”) is a Delaware corporation doing business in the State of Utah with its corporate headquarters located at 225 Executive Drive, Moores Town, New Jersey. Defendant Band-it is engaged in the manufacturing of clamps and air tools.

3. Seal Fast Incorporated (“**SEAL FAST**”) is a Texas corporation doing business in the State of Utah with its corporate headquarters located at 5603 Harvey Wilson Drive, Houston, Texas. Defendant Seal Fast is engaged in the manufacturing and sales of couplings.

4. Keyway International, Inc. (“**KEYWAY**”) is a Texas corporation doing business in the State of Utah with its corporate headquarters located at 515 Stesco Avenue, Wichita Falls, Texas. Defendant Keyway is engaged in the oil refining business and has tanks located within the State of Utah.

5. Defendant Morcon Specialty, Inc. (“**MORCON**”) is a Utah corporation with its corporate headquarters located at 1222 East Highway 40, Vernal, Utah. Defendant Morcon is engaged in the business of, inter alia, attaching couplings and clamps to hoses.

6. Defendant Red Man Pipe & Supply (“**RED MAN**”) is an Oklahoma corporation doing business in within the State of Utah. Defendant Red Man is engaged in the business of selling couplings and/or hoses.

7. Defendant Landmark Petroleum, Inc. (“**LANDMARK**”) is a Delaware corporation doing business in the state of Utah. At all relevant times herein Defendant Landmark was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

8. Defendant Westcourt Management Inc. (“**WESTCOURT**”) is a Colorado corporation doing business in the State of Utah and the State of Colorado. At all relevant times herein Defendant Westcourt was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

9. Defendant Portfield Investments Inc. (“**PORTFIELD**”) is a Colorado corporation doing business in the State of Utah and State of Colorado. At all relevant times herein Defendant Portfield was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

10. Defendant Fruita Marketing & Management, Inc. (“**FRUITA**”) is a Delaware corporation doing business in the State of Utah and the State of Colorado. At all relevant times herein Defendant Fruita was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

11. Defendant Larr’s Inc. (“**LARR’S**”) is a Wyoming corporation doing business in the State of Utah and the State of Colorado. At all relevant times herein Defendant Larr’s was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

12. Defendant Chase Manhattan Bank (“**CHASE MANHATTAN**”) is believed to be a Delaware corporation doing business in the State of Utah and the State of Colorado. At all relevant times herein Defendant Chase Manhattan was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff’s injuries occurred.

13. Defendant Consolidated Oil & Gas, Inc. (“**CONSOLIDATED**”) is believed to be a Colorado corporation doing business in the state of Utah and the state of Colorado. At all relevant



times herein Defendant Consolidated was the owner and/or co-owner, operator and/or co-operator of certain portions of the land and/or petroleum products and/or storage tanks on which the incident causing plaintiff's injuries occurred.

14. Defendants Westcourt, Portfield, Fruita, Consolidated, Larr's and Chase Manhattan are hereinafter referred to jointly as "**PROPERTY OWNER/OPERATOR DEFENDANTS**".

15. John Does 1 - 9 are defendants whose true names and capacities are unknown to plaintiff at this time. Plaintiff believes that such defendants have been negligent in a duty owed to plaintiff or otherwise responsible in some manner for the events and happenings herein referred to, and negligently or otherwise caused injuries and damages proximately thereby to the plaintiff as alleged herein. Plaintiff's complaint will be amended to include the true identities of John Does 1 - 9 when such identities become known to plaintiff.

## **II. JURISDICTION**

16. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 15 as though fully set forth herein.

17. Plaintiff is a resident of the City of Vernal, County of Uintah. The acts complained of occurred, in most part in the County of Uintah. The contract which is the subject of this lawsuit was entered into within the State of Utah and many of the witnesses to the events stated herein reside in the State of Utah.

18. The amounts complained of are greater than \$1,000,000. Jurisdiction and venue are properly before this Court.

## **III. FACTS**

19. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

20. At all times relevant herein, plaintiff was employed by Adler Hot Oil Service, Inc. (“ADLER”). Adler is engaged in the business of cleaning sludge from petroleum storage tanks.

21. The service which Adler performs consist of pumping hot oil from a truck owned and operated by Adler into a storage tank. The hot oil melts the sludge and returns from the storage tanks into the Adler truck with the hot oil that was pumped into the storage tank.

22. Plaintiff’s duties included driving the hot oil truck to various storage tanks. Plaintiff’s procedure in cleaning the storage tanks included connecting a hose between the hot oil truck and the storage tank. The hose has a coupling on each end. The coupling is secured by a band.

23. After Plaintiff fastened the coupling to the hot oil truck and the storage tank, Plaintiff would proceed to heat oil in his truck. After the oil was heated, plaintiff would pump the oil through the storage tank and back into the truck.

24. On or about the 10th day of March, 1995, Plaintiff was directed by Adler to pump the sludge out of a storage tank owned by the Property Owner/Operator Defendants.

25. Plaintiff drove his hot oil truck to the Property Owner/Operator Defendants’ premises and connected the hose to the hot oil truck and the pipe leading to the storage tank. After the oil was heated, Plaintiff began to pump the hot oil into the storage tank.

26. While the hot oil was being pumped into the storage tank, plaintiff observed the coupling begin to slip off of the hose.

27. Plaintiff attempted to rush to the shut off switch on the hot oil truck. Prior to his being able to shut off the operation, the hose failed at the coupling area and hot oil sprayed plaintiff’s person.

28. The hot oil supplied by the Property Owner/Operator Defendants had an extremely low flash point, below industry standards, resulting in a fire and an explosion.

29. Despite being covered in hot oil and being burned over 50% of his body, Plaintiff managed to shut off the operation.

### III. NEGLIGENCE (ALL DEFENDANTS)

30. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 29 as though fully set forth herein.

31. At all times herein mentioned, Defendants Band-it, Seal Fast, Morcon and Red Man, and each of them (hereinafter referred to as “**PRODUCT LIABILITY DEFENDANTS**”), were engaged in the business of manufacturing, designing, assembling, compounding, testing, inspecting, packaging, labeling, fabricating, constructing, analyzing, distributing, servicing, merchandising, recommending, advertising, promoting, marketing, and/or selling hoses, bands oil, hot oil pumping systems, and/or couplings for resale to and use by members of the general public for purposes of use in the business of removing sludge from storage tanks.

32. At all time herein mentioned, Defendants John Does 1 through 9, and each of them, were engaged in the business of manufacturing, designing, assembling, compounding, testing, inspecting, fabricating, constructing, analyzing, distributing, servicing, merchandising, recommending, advertising, promoting, marketing, and/or selling hoses, bands oil, hot oil pumping systems and/or couplings for resale to and use by members of the general public for purposes of use in the business of removing sludge from storage tanks.

33. At all times herein mentioned, the Product Liability Defendants, acting through its officers, agents, servants or employees, and each of them, knew, or in the exercise of ordinary and reasonable care should have known that the said hose, band oil, hot oil pumping system and/or coupling was a product of such a nature that if it was not properly manufactured, designed, assembled, compounded, tested, inspected, fabricated, constructed, analyzed, distributed, serviced, merchandised, recommended, advertised, promoted, marketed and sold, for the use and purpose for which it was intended, it was likely to injure the person or persons be whom it was used.

34. The Product Liability Defendants, and each of them, acting through their officers, agents, servants, representatives or employees, negligently and carelessly manufactured, developed, designed

assembled, compounded, tested, inspected, fabricated, constructed, analyzed, distributed, serviced, merchandised, recommended, advertised, promoted, marketed and sold the said hose, band oil, hot oil pumping system and/or coupling, so that it was in a dangerous and defective condition, and was unsafe for the use and purpose for which it was intended when used as recommended by the defendants, and each of them.

35. The defective and dangerous character and condition of the said hose, band oil, hot oil pumping system and/or coupling, made the hose, band, oil, hot oil pumping system and/or coupling unsafe for the use and purpose for which they were intended when used as recommended by the Product Liability Defendants, was known to such defendants and each of them, or in the exercise of ordinary and reasonable care should have been known and discovered by such defendants and each of them. Furthermore, the dangerous and defective character and condition of the said hose, band, oil, hot oil pumping system and/or coupling was not made known to the plaintiff by the Product Liability Defendants and each of them.

36. Some time prior to March 10, 1995, Adler purchased and obtained the hose, band, oil, hot oil pumping system and coupling from the Product Liability Defendants for the purpose of using said hose, band, oil, hot oil pumping system and coupling in connection with the business of cleaning sludge from storage tanks.

37. On or about, March 10, 1995, while plaintiff was using the hose, band, oil, hot oil pumping system and coupling for its intended purpose, and as a proximate result of the negligence and carelessness of the defendant, the hose, band, oil, hot oil pumping system and/or coupling failed, thereby causing plaintiff to sustain burns over 50% of his body and medical expenses in excess of \$500,000. Such medical expenses are still accruing and will continue to accrue in the future.

38. Prior to March 10, 1995, the Property Owner/Operator Defendants retained plaintiff's services through Adler to clean out the tanks. The Property Owner/Operator Defendants supplied the oil that plaintiff was instructed to use. At all times herein mentioned, the Property

Owner/Operator Defendants, were under a duty to supply plaintiff with oil that had a flash point at or above industry standards. The Property Owner/Operator Defendants knew, or in the exercise of ordinary and reasonable care should have known that the oil supplied to plaintiff to clean the tanks had a very low flash point, below industry standards, and was easily combustible causing risk of injury to the person or persons who use it.

39. The industry standards provide that the owner/operator of a refinery is responsible for insuring that procedures such as the use and involvement of hot oil trucks are properly supervised to insure the safety of the operator of a hot oil truck.

40. The Property Owner/Operator Defendants had a duty to insure that the hot oil procedure was conducted in a safe manner.

41. The Property Owner/Operator Defendants breached their duty to plaintiff by failing to insure that the hot oil procedure was conducted in a safe manner thereby negligently causing the injuries suffered by plaintiff.

42. Plaintiff has suffered severe and excruciating pain and distressing mental anguish as a result of the injuries. Plaintiff has suffered, and for a long period of time to come will continue to suffer said pain and mental anguish as a result of said injuries.

43. As a direct and proximate result of said negligence and carelessness of Product Liability Defendants and Property Owner/Operator Defendants, and each of them, plaintiff has incurred, and will incur, medical expenses, loss of income, wages, and other pecuniary losses, the full nature and extent of which are not yet known to plaintiff but which will be shown at trial and are in a minimum amount of \$1,000,000.

#### **IV. BREACH OF EXPRESS WARRANTY (PRODUCT LIABILITY DEFENDANTS)**

44. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 43 as though fully set forth herein.

45. At all times relevant herein, on and prior to March 10, 1995, the Product Liability Defendants and each of them, acting through their officers, agents, servants, representatives, and employees utilized advertising media, professional publications and detail person to urge the use and purchase of said hose, band, oil, hot oil pumping system and coupling, and expressly warranting to plaintiff by advertisements, directed to the public and particularly to ultimate consumers, that those consumers, including this plaintiff, could safely use the hose, band, oil, hot oil pumping system and/or coupling. The Product Liability Defendants, and each of them, urged the use and purchase of said hose, band, oil, hot oil pumping system, and coupling, and expressly warranted to members of the general public, including Alder and the plaintiff that the said hose, band, oil, hot oil pumping system, and coupling was effective, proper and safe for its intended use.

46. Plaintiff relied upon the skill and judgment of the Product Liability Defendants, and each of them, and on the express warranty representations of the defendants, and each of them, directed towards the public, and in particular the ultimate consumer, including the plaintiff, in use of said hose, band, oil, hot oil pumping system and coupling, and that the hose, band, oil, hot oil pumping system and/or coupling could be safely used for the purpose of cleaning sludge from oil storage tanks.

47. The said hose, band, oil, hot oil pumping system and coupling was not effective, proper and safe for its intended use as expressly warranted by Product Liability Defendants and each of them, in that the said hose, band, oil, hot oil pumping system and/or coupling was defective, thereby causing plaintiff's injuries when said hose, band, oil, hot oil pumping system and coupling were being put to their intended use.

48. As a proximate result of the breach of the said express warranty, plaintiff sustained the injuries and damages hereinabove set forth.

## **V. BREACH OF IMPLIED WARRANTY (PRODUCT LIABILITY DEFENDANTS)**

49. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 48 as though fully set forth herein.

50. Prior to March 10, 1995, and prior to the time that the said hose, band, oil, hot oil pumping system and coupling were being used by plaintiff at the time of the injuries, the Product Liability Defendants and each of them acting through their officers, agents, servants, representatives and employees impliedly warranted to members of the general public, including the plaintiff herein, that the said hose, band, oil, hot oil pumping system and coupling was of merchantable quality and safe for the use for which it was intended by the defendants, namely, for the purpose of use in the business of removing sludge from storage tanks.

51. Plaintiff relied upon the skill and judgment of the Product Liability Defendants and each of them in the use of the hose, band, oil, hot oil pumping system and coupling.

52. The said hose, band, oil, hot oil pumping system and/or coupling was not fit for its intended use or purpose nor was it of merchantable quality as warranted by the Product Liability Defendants in that it failed thereby causing plaintiff the injuries complained of.

53. As a proximate result of the breach of the said express warranty, plaintiff sustained the injuries and damages hereinabove set forth.

## **VI. STRICT LIABILITY (PRODUCT LIABILITY DEFENDANTS)**

54. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 53 as though fully set forth herein.

55. Defendants and each of them manufactured, designed, assembled, compounded, tested or failed to test, inspected or failed to inspect, constructed, analyzed, distributed, serviced, merchandised, recommended, advertised, promoted, marketed, and soled a certain hose, band, oil, hot oil pumping system and coupling and its component parts which was intended by the defendants

and each of them to be used for the purpose of removing sludge from storage tanks by use of a hot oil truck.

56. Defendants and each of them, acting through their officers, agents, servants, representatives and employees, knew and intended that said hose, band, oil, hot oil pumping system and coupling was to be purchased and used in the condition in which it was sold in an ultra hazardous activity, without inspection for defects by plaintiff and the general public.

57. The said hose, band, oil, hot oil pumping system and/or coupling was unsafe for its intended use by reason of defects in its manufacture, design, testing and components so that it would not safely serve its purpose, but would instead expose the users of said product to serious injury because of the failure of defendants, and each of them, to properly guard and protect the plaintiff from the defects of the said hose, band, oil, hot oil pumping system and coupling.

58. Plaintiff was not aware of the defects at any time prior to the injuries sustained by the plaintiff.

59. As a proximate result of the defects of the hose, band, oil, hot oil pumping system and/or coupling, plaintiff sustained the injuries and damages set forth above.

## **VII. STRICT LIABILITY (PROPERTY OWNER/OPERATOR DEFENDANTS)**

60. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 59 as though fully set forth herein.

61. The Property Owner/Operator Defendants and each of them were involved with the operation of a refinery that involved ultra-hazardous materials and the processes associated in handling ultra-hazardous materials including the use and operations of a hot oil truck.

62. The Property Owner/Operator Defendants and each of them, acting through their officers, agents, servants, representatives and employees, knew and intended that the hot oil truck would be used in a ultra hazardous activity.



63. The procedures for which the Property Owner/Operator Defendants retained the services of the plaintiff were inherently unsafe and the manner in which the plaintiff was instructed by the Property Owner/Operator Defendants to conduct the hot oil pumping process was inherently unsafe.

64. Plaintiff was not aware that the procedures that he was being directed by the Property Owner/Operator Defendants to employ in operating the hot oil truck were inherently unsafe.

65. As a proximate result of the procedures employed by Property Owner/Operator Defendants, plaintiff sustained the injuries and damages set forth above.

### **VIII. FALSE REPRESENTATION (PRODUCT LIABILITY DEFENDANTS)**

66. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 65 as though fully set forth herein.

67. At the time when the Product Liability Defendants, and each of them, manufactured, designed, assembled, compounded, tested or failed to test, inspected or failed to inspect, constructed, analyzed, distributed, serviced, merchandised, recommended, advertised, promoted, marketed, and sold the said hose, band oil, hot oil pumping system and coupling, the Product Liability Defendants, and each of them, expressly and impliedly represented to members of the general public, including the plaintiff herein, that the said hose, band, oil, hot oil pumping system and coupling were of merchantable quality, and safe for the use for which they were intended.

68. Plaintiff relief upon said representation of the Product Liability Defendants, and each of them, in the selection, purchase, and use of said hose, band, oil, hot oil pumping system and coupling.

69. Said representations by the Product Liability Defendants, and each of them, were false and untrue, in that the said hose, band, oil, hot oil pumping system and coupling were not safe for their intended use, nor were they of merchantable quality as represented by the Product Liability Defendants, and each of them, in that they had very dangerous properties and defects where such defects caused injury and damage to plaintiff, thereby threatening the life of Plaintiff.

70. As a proximate result of said false representations by the Product Liability Defendants, Plaintiff sustained the injuries and damages set forth above.

### **IX. PUNITIVE DAMAGES (ALL DEFENDANTS)**

71. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 70 as though fully set forth herein.

72. The conduct and acts of defendants, and each of them, as set forth above, in allowing such an extremely dangerous product to be used by a member of the general public, include the Plaintiff constitute a conscious disregard of the safety of the Plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages, which would serve to punish and make examples of defendants, and each of them.

### **X. RELIEF**

WHEREFORE, Plaintiff prays that this Court:

1. For judgment on his first claim for relief (Negligence) against all defendants in the minimum amount of \$1,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable;

2. For judgment on his second claim for relief (Breach of Express Warranty) against the Product Liability Defendants in the minimum amount of \$1,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable;

3. For judgment on his third claim for relief (Breach of Implied Warranty) against the Product Liability Defendants in the minimum amount of \$1,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable;

4. For judgment on his fourth claim for relief (Strict Liability) against all defendants in the minimum amount of \$1,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable;

5. For judgment on his fifth claim for relief (False Representation) against the Product Liability Defendants in the minimum amount of \$1,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable; and,

6. For judgment on his sixth claim for relief (Punitive Damages) against all defendants in the minimum amount of \$5,000,000 as proven at the trial of this matter together with costs, interest and such further relief as the Court feels is just and equitable.

DATED this \_\_\_\_\_ day of June, 1998.

\_\_\_\_\_  
David C. Cundick

Plaintiff's address:

2430 East 3500 South  
Vernal, Utah

Tab J

1 Q. Well, that's what I wanted to ask you about a  
2 minute, if you know.

3 Landmark is a defendant in this lawsuit. Did you  
4 have dealings with Landmark?

5 A. No.

6 Q. You had dealings with Consolidated Oil?

7 A. Yes.

8 Q. They hired you to do what you were going to do on  
9 the 27th of February '95?

10 A. Yes.

11 Q. Who at Consolidated Oil hired you?

12 A. Excuse me?

13 Q. What human being did you deal with at Consolidated  
14 Oil?

15 A. Shirley -- well, you know, I can't think of her  
16 last name. Shirley something, Shirley -- seems like Holdis  
17 or Holquist or something like that.

18 Q. Where is Shirley located?

19 A. Denver, Colorado.

20 Q. Have you ever met her in person?

21 A. No, I haven't.

22 Q. When did you first start getting jobs from  
23 Shirley?

24 A. You know, I'd have to go back and look, I can't  
25 really -- I know we did one tank, recirculated it, seems like

1 it was in the fall. What the deal was, we heated that tank,  
2 we circulated it and got it going for him and then he  
3 released us. And then they have their own heater and their  
4 own pump, and once we got circulation going, then he used his  
5 heater, Landmark Petroleum used their heater to heat the tank  
6 on up.

7 Q. Are you telling me about some job other than the  
8 one --

9 A. No, this is it.

10 Q. Mr. Mecham's February 27, '95 job?

11 A. No, no, that was before. Oh, I'm sorry. Okay.  
12 That was the first job we did for them.

13 Q. Okay.

14 A. Joe was on it too.

15 Q. Was it at the same general --

16 A. Very same location.

17 Q. And where was that?

18 A. At Landmark, Fruita.

19 Q. Fruita, Colorado?

20 A. Right.

21 Q. Was that in the fall of 1994, keeping in mind --

22 A. I believe so. Yeah, I believe it was. And it had  
23 to have been in the fall that we did that job. I don't think  
24 there was snow on the ground or anything like that.

25 Q. But did Mr. Mecham's accident happen at what I'd

Tab K

**COPY**

EIGHTH DISTRICT COURT - VERNAL  
UINTAH COUNTY, STATE OF UTAH

\*\*\*.

JOSEPH MECHAM, )

Plaintiff,) )

vs. )

Case No. 960800543

BAND-IT IDEX, INC., )

Defendant.)

\*\*\*

BEFORE THE HONORABLE A. LYNN PAYNE

April 11, 2000

2:30 P.M.

TRANSCRIPT OF VIDEO TAPE OF  
MOTION FOR SUMMARY JUDGMENT.

Transcribed by:  
Pam Smith, CSR, RMR  
3454 Creek Road  
Salt Lake City, Utah 84121  
(801) 942-6430



1 APPEARANCE OF COUNSEL:

2 For the Plaintiff:

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Sandy, Utah 84070

5 For the Defendant:

BARBARA L. MAW  
Attorney at Law  
185 S. State, #340  
Salt Lake City, Utah 84111

1                                    APRIL 11, 2000, VERNAL, UTAH

2                                    PROCEEDINGS.

3                    THE COURT:     Mecham versus Band-It.

4                    Okay. Ms. Maw, you're here on the -- your motion  
5 for summary judgment.

6                    MS. MAW:        That's correct, Your Honor.

7                    THE COURT:     Mr. Cundick's present.

8                    MR. CUNDICK:     Yes, Your Honor, as well as Mr.  
9 Freestone.

10                   THE COURT:     And Mr. Freestone. Okay. You may  
11 proceed.

12                   MS. MAW:        Your Honor, I'm sure as you're aware  
13 this is Chase Manhattan Bank's motion for summary judgement.  
14 It's our position that Chase Manhattan Bank with respect to  
15 this refinery in Fruita, Colorado, has always been a lender.  
16 They have never been in any other relationship with any of  
17 the parties.

18                   What controls this relationship are the contracts  
19 that were entered into between Landmark, Westcourt and only  
20 with Chase Manhattan Bank's consent.

21                   Is the court familiar with these contracts?

22                   THE COURT:     I've read your memorandum and your  
23 references in your memorandum to the contracts have been  
24 read. And I've read the opposing parties' response and your  
25 reply.

1 MS. MAW: Okay. Well then I'll make it fairly  
2 brief since the court has had an opportunity to review this.

3 Basically if you look at the agreements the ones  
4 at issue here, the major ones were the marketing agreement,  
5 the management agreement, the asset purchase agreement and  
6 Chase's actual consent. If you look at all those agreements  
7 with the exception of Chase's agreement they're all between  
8 Landmark and Westcourt. Those are the parties to that  
9 agreement. Chase just consents to it.

10 Chase initially loaned a large sum of money to  
11 this refinery to get it up and running starting back in '90  
12 and then back again in 1992. In 1993 the refinery closed and  
13 Dick Means was appointed the plant manager at that time.

14 Subsequent to that in 1994 these agreements were  
15 entered into and in part to avoid foreclosure, levy or any of  
16 the other remedies that are available to Chase when they  
17 can't get -- they have security interest in this property and  
18 they can't rely on their loan and get reimbursement on their  
19 loan.

20 So in lieu of doing that the decision was made  
21 that Landmark would sell the assets to Westcourt Corporation  
22 and Chase would then benefit from the sale of those assets.  
23 That is clearly outlined in the marketing agreement.

24 THE COURT: Part of the assets.

25 MS. MAW: Part of the assets. They retained

1 some of them. Then they transferred assets. Then the assets  
2 were for sale. Dick Means were appointed to make sure those  
3 assets were kept in saleable condition so they could be sold.

4 In order to deal with the monies and the handling  
5 of this in the course of the sales they created two bank  
6 accounts that are reflected in Section 2.4 of that marketing  
7 agreement, and that included the first one was a special  
8 purpose account that was set up in Landmark's name -- from  
9 Chase Manhattan Bank.

10 THE COURT: Which Chase had complete control  
11 over.

12 MS. MAW: Well, Chase didn't have complete  
13 control over it. They -- it was in Landmark's name. The  
14 checks that were issued were Westcourt checks on it. Landmark  
15 had consent in terms of -- not Landmark, I'm sorry, Chase  
16 had consent. Westcourt would make a -- there was a second  
17 account setup on Westcourt's account and that was to transfer  
18 funds from the special purpose account, the deposit account  
19 into the Westcourt account. And the purpose of the Westcourt  
20 account was so they were able to as exclusive representative  
21 for Landmark, they would be able to pay for the cost inherent  
22 in the sale of the assets including employees' salaries.

23 THE COURT: Let me get this in my mind because  
24 it has been a time since I read it. As I recall, when the  
25 assets were sold it went into this account, the first account

1       you talked about.

2               MS. MAW:     Correct.

3               THE COURT:    The monies, proceeds, okay. And my  
4       recollection was that Chase had control over that asset  
5       account except that if there was a disagreement -- well, the  
6       second bank account was the one that went in to pay the  
7       operating costs. And that was funded out of the first account  
8       and Chase and several other parties had to come to an  
9       agreement as to how much to transfer from the first bank  
10      account into the second bank account.

11              MS. MAW:     Correct.

12              THE COURT:    If there was a disagreement then it  
13      went according to the average for the last two months, is  
14      that right?

15              MS. MAW:     That is correct.

16              THE COURT:    Okay. And now the other thing I  
17      recall specifically from the contract is that Chase had  
18      control of that first account. You tell me it didn't but  
19      I --

20              MS. MAW:     Chase had control of that first  
21      account.

22              THE COURT:    Okay. All right. So I'm clear.  
23      We're clear on that.

24              MS. MAW:     Yeah, we're clear on that. It was --  
25      it was clearly -- it was in Landmark's name but Chase was

1 the one who would authorize.

2 THE COURT: Sure.

3 MS. MAW: Or, you know, when Westcourt made its  
4 demand to transfer the funds into the Westcourt account to  
5 pay the bills for the sale of these assets.

6 THE COURT: All right.

7 MS. MAW: Okay. But even so the agreement if  
8 there was a dispute as to what got transferred and what  
9 didn't that was between Landmark, Westcourt and Chase to  
10 resolve and the court is correct that they based it on if  
11 there was a dispute the two months prior. What it leaves  
12 essentially two months prior would make the determination if  
13 there was a dispute as to the amount.

14 THE COURT: Landmark, Chase and Westcourt, the  
15 three of them.

16 MS. MAW: The three of them.

17 THE COURT: So, again, the bank's involved in  
18 that process.

19 MS. MAW: Well, the bank's involved in that --

20 THE COURT: If they said no they could stop a  
21 particular amount from being transferred and then you'd have  
22 to go to the default provisions which would say use the prior  
23 two months average. In other words unless they said yes, no  
24 money was coming out unless it was the average that we talked  
25 about, is that right?

1 MS. MAW: That's correct.

2 THE COURT: Okay.

3 MS. MAW: In doing that. But that control over  
4 their funds, over the monies from the assets is they had  
5 security interests in all the equipment and everything on  
6 their.

7 THE COURT: I understand. I understand.

8 MS. MAW: So that control does not evidence any  
9 other relationship other than their lender.

10 THE COURT: I'm not contesting the matter with  
11 you.

12 MS. MAW: Okay.

13 THE COURT: You said something that caused me to  
14 think that my memory may have been different from what you  
15 were saying.

16 MS. MAW: No.

17 THE COURT: So I wanted to make sure that we  
18 were all right.

19 MS. MAW: No. No. The court is correct on that.  
20 That's kind of one of the major provisions. That  
21 seems to be one of the major provisions in dispute as to who  
22 paid Dick Means' salary which then gave to the argument that  
23 somehow there was an agency principal relationship between  
24 Chase and Dick Means.

25 THE COURT: Yeah.

1 MS. MAW: But even prior before you reach that  
2 issue you have to look at who was the representative here on  
3 this site to facilitate the sale and that was Landmark  
4 appointed Westcourt. Westcourt then had Dick Means to aid and  
5 facilitate in the sale of these assets. There's no  
6 relationship between Chase and Westcourt in this case at all.

7 THE COURT: But you do acknowledge that Means  
8 was -- continued in that position at the insistence of  
9 Chase.

10 MS. MAW: No, I do not. That's -- I don't  
11 acknowledge that.

12 THE COURT: That's part of what you contest as  
13 the facts, is that right?

14 MR. CUNDICK: That's correct, Your Honor.

15 MS. MAW: Okay. If you look at the agreement,  
16 that marketing agreement, Landmark was going to produce Dick  
17 Means if he was still employed with Landmark. Landmark  
18 appointed Dick Means in 1993 to manage this plant, to  
19 facilitate the closing, maintain the assets.

20 THE COURT: Okay.

21 MS. MAW: You know, for the subsequent sale of  
22 these assets. But I don't know where that -- they've not  
23 produced any evidence to say that Chase has any relationship.

24 THE COURT: Well.

25 MS. MAW: To Dick Means but at any rate if you



1 look at provision 5.4 in the contract that's entered into  
2 between Landmark and Westcourt that specifically addresses  
3 what the relationship is of these parties, and that provision  
4 provides that Chase is -- I mean it is clear, it says that  
5 Chase's only relationship was that as a lender.

6 I think the case law is clear on that issue that  
7 this -- this segment where you have a lender who's trying to  
8 recoup on the monies they'd loaned out, some millions and  
9 millions of dollars on this refinery here with all the  
10 security interests in it, because they had control over the  
11 sale of the assets -- they don't control the sale of the  
12 assets but the monies and how they're spent to facilitate  
13 further sales, does not make them an employer, does not put  
14 him in a principal agency relationship.

15 Under our law of principle agency with Dick Means  
16 there has to be a meeting of the minds. There has to be an  
17 intent to form that relationship. There has to be authority  
18 given, and there is no documentation that evidences any  
19 relationship, any authority given between Chase Manhattan  
20 Bank and Dick Means in this case at all.

21 I believe that the documents are clear on their  
22 face in this instance. I think that if the -- if the court is  
23 concerned over the manner in which Dick Means was  
24 compensated, if that becomes an issue I have spoken to him  
25 and I'll be happy to produce his affidavit and he will

1 explain exactly the understanding that we've had, the two  
2 purpose accounts that we had, and the transfer between the  
3 accounts, and that his check was a Westcourt check. It was  
4 on a Chase Manhattan Bank account but it was a Westcourt  
5 check.

6 And that's the only relationship, the only piece  
7 of evidence that plaintiff is relying on to keep Chase in  
8 here. I think it would be a travesty of public policy to take  
9 a lender who's lending millions and millions of dollars put  
10 security interests and because they want to control the  
11 monies from the sale of their assets to realize on their lien  
12 which they never did realize on, and to protect their  
13 security interests to then find some kind of an agency  
14 relationship.

15 It's just not supported by Utah law. It's not  
16 supported by law in any other jurisdiction.

17 THE COURT: You said that they didn't have any  
18 control over the sale of the assets but indeed they did have  
19 some control over the sale of the assets. And also the cost  
20 of sales. They had to approve the sale of any asset that has  
21 certain value, is that right?

22 MS. MAW: Well, they had to approve the sale to  
23 have certain value but it was an unfettered discretion that  
24 they had to do that.

25 THE COURT: What were the criteria then? If it

1 was an unfettered discretion what was the criteria?

2 MS. MAW: Well, you went into the -- in the  
3 event they didn't approve the sale it couldn't be  
4 unreasonably withheld but you go into the regular default  
5 provisions in that contract.

6 THE COURT: What were the default -- I didn't  
7 see any default provision with respect to what happens if the  
8 -- if the owner wants to sell for a certain price and the  
9 secured lender said, no, you can't. Just seemed to me that  
10 they could say we can't sell.

11 MS. MAW: Well, I think the contract contains a  
12 reasonable clause in there and there's an objection provision  
13 in there as well.

14 THE COURT: So what you're saying is that they  
15 -- the obligation of the secured party was to not withhold  
16 permission unreasonably.

17 MS. MAW: Right. And also there's a dispute  
18 resolution clause in paragraph 2.5 which concerns the sales.  
19 That goes more to sales expenses or withdrawal.

20 THE COURT: Which they had to approve also.

21 MS. MAW: Well.

22 THE COURT: Initially if they didn't approve it  
23 then you go into some process for resolving the dispute.

24 MS. MAW: Yeah, including putting it before  
25 Coopers and Lybrand for resolution as well.

1 THE COURT: Yeah.

2 MS. MAW: The accounting firm. But this isn't  
3 -- I mean the bank loans the money. They have security  
4 interest. They have a right to look at their assets and  
5 protect those assets.

6 THE COURT: I understand.

7 MS. MAW: Okay.

8 THE COURT: Okay. Who will be addressing the  
9 issue.

10 MR. CUNDICK: Your Honor.

11 Your Honor, essentially the plaintiffs argument is  
12 this and that is that there's one of two theories that we can  
13 rely under. There's two basis by which to find Chase as a --  
14 either a principal of Landmark or as a principal of Dick  
15 Means. If we can show facts which would support a finding of  
16 control of either of those two then Chase needs to stay in.

17 First one is that they were -- is the law is quite  
18 clear that if they step over the line, if Chase steps over  
19 the line from a lender to running the business of Landmark  
20 then they lose the status of becoming a creditor and then  
21 become the principal of the debtor.

22 That's set forth in the restatement of agency. And  
23 we believe that the facts are sufficient to where a jury  
24 could find that that amount of control was exerted and those  
25 facts are stated forth in the memorandum which -- you've

1 discussed those issues with --

2 THE COURT: Some of them.

3 MR. CUNDICK: With counsel and I think they're  
4 -- I think -- I think there are enough there to show that  
5 there were control and that is -- I think the big one is that  
6 there's a bank account.

7 There's a bank account that Chase setup in Chase's  
8 bank. Chase is the one that signs the checks on that. Chase  
9 is the one that approves everything. Any asset, major asset  
10 that is sold out of the refinery they have the right to  
11 object to and to nix the deal on. They have the right to  
12 cancel the whole marketing agreement and management agreement  
13 if they find a default.

14 Page 11 of Exhibit 10 to Chase's exhibits. Bottom  
15 paragraph." If Westcourt defaults in the performance of any  
16 of its material obligations hereunder or under the management  
17 agreement," so the marketing agreement or the management  
18 agreement," dated as the date hereof between Westcourt and  
19 Landmark, then Landmark or Chase may give written notice to  
20 Westcourt thereof. If such default is not corrected then it  
21 can be terminated."

22 So they've retained the right to terminate the  
23 agreement. They retained virtually the entire control over  
24 the refinery, over the funds, over the assets that are going  
25 out, over the marketing agreements and management agreements

1 which are the underlying basis of the relationship. They can  
2 -- they have control over all of that. I think that is  
3 sufficient to submit to a jury to show they have stepped over  
4 the line, that they are no longer a lender but they have  
5 become the principal of Landmark.

6 Secondly that Richard Means was the agent of  
7 Chase. This is from Richard Means' deposition.

8 Answer. " Originally I was to stay as a Landmark  
9 employee. Westcourt said they didn't want to keep me that way  
10 because they had to keep two payrolls and it was an extra  
11 expense. So Chase Manhattan agreed to put me on the  
12 Westcourt payroll because Chase was actually paying my wages.  
13 Westcourt was paying my wages but Chase was reimbursing  
14 Westcourt for my expenses, for my salary."

15 So what we had was any monies that were collected  
16 went into this Chase account, okay? And then Chase would put  
17 -- send over the expenses to reimburse Westcourt, and then  
18 whatever was remaining was Chase's.

19 So in the -- essentially, yes, Chase was paying  
20 the salary of Dick Means because they chose to allow that to  
21 be an expense to ship over to Westcourt. If they wanted  
22 to --.

23 THE COURT: Well, if an expense they're not  
24 paying. I mean that wouldn't be a credit against the loan,  
25 would it? Let me put this in --.

1                   MR. CUNDICK:     Well, it would be a credit against  
2 the loan. It would have been a credit against the loan but  
3 for they wanted Dick Means to stay on the property to keep  
4 the assets in a saleable condition. Chase did. So it was a  
5 -- by paying -- by paying Dick Means, insisting that he be  
6 on Westcourt's salary it ended up to be a net against the  
7 loan.

8                   THE COURT:     Okay. Because less --

9                   MR. CUNDICK:     Less --

10                  THE COURT:     Might otherwise be available.

11                  MR. CUNDICK:     Exactly. And Dick Means --

12                  THE COURT:     That assumes that the loan's never  
13 paid. If it was paid then it's not an expense.

14                  MR. CUNDICK:     Exactly. Thank you.

15                         And I think it's clear that it was Dick Means  
16 responsibility to keep the assets saleable. That was the  
17 authority that Chase gave to Dick Means. That's where the  
18 agency between Chase and Dick Means is created in that they  
19 wanted him to work there and they wanted him to work there  
20 because they wanted to give him the authority to keep the  
21 assets in a saleable condition.

22                         So I think clearly there is evidence by which a  
23 jury can find that Dick Means was the agent of Chase  
24 Manhattan. And if he was the agent of Chase Manhattan  
25 there's the theory of liability.

1           Same with the previous argument, that is, that  
2 Chase was the principal of Landmark because they stepped over  
3 the line. There's sufficient evidence on both those issues to  
4 submit to a jury by which they could come to that conclusion.

5           And I would submit it on that, Your Honor. If you  
6 have any questions.

7           THE COURT:     I do. And I didn't mention I read --  
8 I don't know if I read all of the cases. I don't think I did  
9 but I read your cases on -- on situation where a lender had  
10 been found to be a -- an agent. Or that the --

11          MR. CUNDICK:   Where the lender had been found to  
12 be a principal?

13          THE COURT:     A principal, yes. And one was an  
14 apartment situation in New York, as I recall, or someplace  
15 like that.

16          MR. CUNDICK:   Right. Right.

17          THE COURT:     But it seemed to me that these were  
18 ongoing businesses and so when you made the statement, you  
19 said that they have got so far into the business that they  
20 stepped over the line in running the business, it caused me  
21 to wonder what business was being run.

22          MR. CUNDICK:   The business was the liquidation  
23 of the assets. That's -- I think that's --

24          THE COURT:     Isn't the secured party entitled to  
25 be deeply involved in how assets they have security interest



1 in are disposed of?

2 MR. CUNDICK: I -- no doubt that they have the  
3 right to be deeply involved in that but they still have the  
4 -- the law that states if you then -- if you step over the  
5 line of being deeply involved and start running the business  
6 of the debtor then you become the principal of the debtor.

7 THE COURT: Well, that gets me back to the issue  
8 of how they were running the business and --

9 MR. CUNDICK: And my answer is they were running  
10 the business because they were the ones that were -- the  
11 business -- the entire business of Landmark at that point was  
12 liquidation. That was their business. Selling off their  
13 assets. That is carrying on business and Chase was the one  
14 that was doing that. They were running the business for  
15 Landmark.

16 THE COURT: There were two contracts, one of  
17 them in essence dealt with how the property would be disposed  
18 of, and the other one talked about the management of the  
19 assets to retain their value until the assets could be sold.

20 The management aspect of that, how was Chase  
21 involved in the daily operation or management of the  
22 company? I couldn't see anything in what you brought to the  
23 court's attention other than what you talked about in terms  
24 of what would happen if assets were sold where you allege  
25 that they were involved in managing that operation.

1                   MR. CUNDICK:     As far as the day-to-day  
2 operations the connection -- the nexus would be that Chase  
3 was the one that -- I'm sorry. Let me gather my thoughts.

4                   The nexus is that Chase had Dick Means, their  
5 agent, working there because they wanted to keep the assets  
6 in saleable condition.

7                   Your Honor, if -- could I allow Mr. Freestone to  
8 address the court?

9                   THE COURT:     Sure. Mr. Freestone.

10                  MR. FREESTONE:     Thank you, Your Honor. One  
11 thing that I thought of, if the bank actually engages in  
12 liquidation of an asset they are actually the principal that  
13 hires an agent in order to liquidate that asset. That's their  
14 business. And that's what they're doing here is actually  
15 hiring Westcourt to liquidate this asset.

16                  THE COURT:     So what you're saying is if they  
17 would have taken over and exercised their rights and security  
18 interest and then this would have happened there wouldn't be  
19 an issue. They would be on the line because they would have  
20 had control over it.

21                  MR. FREESTONE:     Exactly.

22                  MR. CUNDICK:     Thank you, Your Honor.

23                  THE COURT:     I'm still trying to think in my own  
24 mind and as I thought this through I said it seemed to me  
25 that what they were concerned with is not necessarily find a

1 operating the refinery. Westcourt didn't want him. Chase  
2 demanded that he be there. Their guy is on the site. Okay?

3 They've got control over all the expenses that are  
4 paid because they've got veto power over it. They've got  
5 control over the sales in excess of two hundred fifty  
6 thousand dollars. They've got veto over that and I understand  
7 there's really some more involved.

8 So they've got control over every aspect of that  
9 business and they're -- in addition they're communicating  
10 with Richard Means. He testified in his deposition that he  
11 was talking --" the last person I talked to was Nat  
12 Worstenstein. He was representing Chase."

13 THE COURT: That's not in your memo.

14 MR. CUNDICK: No, it's not.

15 THE COURT: You can't bring that up now.

16 MR. CUNDICK: Okay. I apologize for that.

17 THE COURT: Okay.

18 MR. CUNDICK: It seemed like there were a few  
19 things that were being brought up that weren't actually in  
20 memos.

21 THE COURT: And that was really a question I had  
22 when I went through it. Just seemed to me that it's one thing  
23 for a secured party to put their person in and in control.  
24 It's another thing to say I insist upon having somebody there  
25 that will control. In the first instance you're involved in

X/

1 the control of it. In the second instance you're just putting  
2 somebody there who will control it and you're not exercising  
3 any control over it.

4 I didn't see anything in your memorandum that  
5 said, look, they exercised control over the operation of that  
6 thing. You said that they were paying for him but you didn't  
7 say that he operated under their control.

8 MR. CUNDICK: I think they are because they're  
9 paying his salary and he testified that they were paying his  
10 salary. I think that is control.

11 THE COURT: So, that in and of itself is enough  
12 to say that there's an agency if you pay the salary.

13 MR. CUNDICK: I believe so.

14 THE COURT: Okay.

15 MR. CUNDICK: That in addition to the admission  
16 that he was there to keep the assets in a saleable condition.  
17 He was -- he was --

18 THE COURT: Arguably isn't he working for  
19 everybody on that? I mean, doesn't the owner -- doesn't the  
20 owner benefit for somebody if somebody's there keeping the  
21 asset in saleable condition?

22 MR. CUNDICK: The owner, Landmark, has virtually  
23 no connection with the business at this point. The only  
24 connection with the business of liquidation or the assets are  
25 Westcourt and Chase. Westcourt's interest is they get a

1 commission off what they sell.

2 THE COURT: Sure. Sure. And doesn't Landmark  
3 benefit if somebody keeps the assets so that they're not  
4 going down in value?

5 MR. CUNDICK: They benefit because -- yes.

6 THE COURT: Because their debt will be less.

7 MR. CUNDICK: Debt will be less. But the real  
8 beneficiary in all of this is Chase. Chase is the one --  
9 Westcourt's benefit is a commission. Landmark's not got any  
10 control over this at all at this point anyway. The one that  
11 has control and the one that's getting the benefit is Chase.

12 THE COURT: All right. Thank you. Anything  
13 further from you?

14 MS. MAW: I just want to point out first of all  
15 Dick Means' testimony doesn't come in unless the court  
16 determines the contracts are ambiguous because of parole  
17 evidence rule would prevent that from coming in.

18 The second thing --

19 THE COURT: Let me stop you there. You're here  
20 on the motion for summary judgment.

21 MS. MAW: Correct.

22 THE COURT: And I think it's perfectly -- I  
23 understand what you're saying. You're saying I've got a  
24 bunch of contracts here and the rules of interpretation for  
25 contract provide that you don't get parole unless it's

1     ambiguous. But there maybe a situation where the contract is  
2     perfectly clear and there's no ambiguity but the parties are  
3     acting differently from the contract. And so you can't  
4     preclude them from bringing forth their evidence on how the  
5     parties actually acted by saying what the contract, the  
6     contract, the contract.

7                 So I'm not -- I'm not interested in whether or  
8     not it's ambiguous for purposes of interpreting the contract  
9     I would. I would be interested but this isn't really an issue  
10    of contract interpretation. It's an issue of whether or not  
11    there's an agency relationship outside the contract perhaps  
12    which is brought into effect through the party's conduct.  
13    You see what I'm saying?

14                MS. MAW:     Yes.

15                THE COURT:    Okay. So I've heard you say that  
16    several times. We're bound by the contract and I don't  
17    believe it. I don't believe we are bound by the contract. I  
18    think we're -- the contract's interesting and I read it and I  
19    think that there's some things to be learned from the  
20    contract but if the parties act different from the contract  
21    then I have to look at that also for purposes of this motion  
22    at least.

23                MS. MAW:     I understand that but under Utah law  
24    of agency principles you don't have the evidence here. You  
25    don't have the meeting of the minds. You don't have the

1 consent. You don't have the apparent implied authority on  
2 Dick Means.

3 They're making -- Dick Means was in that position  
4 long before the agreements were entered into. Dick Means may  
5 or may not have worked for Westcourt depending -- I mean the  
6 contract if he was an employee of Landmark, if Landmark  
7 couldn't produce Dick Means as an employee to Westcourt there  
8 is no -- there is no agreement there is nothing that creates  
9 a relationship between Chase and Dick Means.

10 To import duties between the two Chase was a  
11 lender, an absentee lender. Chase never realized anything on  
12 their means. I think they got maybe 50,000 out of this.

13 You don't have the apparent implied authority on  
14 Dick Means. They're making -- Dick Means was in that  
15 position long before the agreements were entered into. Dick  
16 Means may or may not have worked for Westcourt depending --  
17 I mean the contract if he was an employee of Landmark, if  
18 Landmark couldn't produce Dick Means as an employee of  
19 Westcourt. There is no -- there is no agreement. There is  
20 nothing that creates a relationship between Chase and Dick  
21 Means. To import duties between the two Chase was a lender,  
22 an absentee lender. Chase never realized anything on their  
23 millions. I think they got maybe 50,000 out of this whole  
24 thing.

25 Also if you look at the cash sweep where they have

1 that defined in the contract Chase didn't get anything until  
2 there were excess proceeds, and then they were applied to the  
3 Chase claim. So they were -- this was not a deal where they  
4 were going to make all this money on these assets. All this  
5 was was in lieu of foreclosure. That's what they wanted to  
6 do. They didn't want to have to foreclose because they'd  
7 probably get nothing if they threw the refinery into  
8 bankruptcy.

9 So that was the whole purpose behind this. There  
10 is no agency relationship. The cases they cite out of the  
11 other states even say that a lender has a right to consent  
12 when its money is at issue and that's the position we're  
13 going to take. They have not shown any facts to show we had  
14 any control over the daily operations or management. To the  
15 contrary, Westcourt did.

16 THE COURT: Okay. Let me clarify that last issue  
17 then we'll get on with this. You made a statement, Mr.  
18 Cundick, that everything in this account if they didn't send  
19 it over to the second account all went into Chase but that's  
20 really not what happened. As I understand that account was to  
21 exist until the process was to wind up and at that point in  
22 time if there was excess it would go back to -- into Chase's  
23 account to apply against the loan. Am I correct in that?

24 MR. CUNDICK: Yes, Your Honor.

25 THE COURT: Okay. All right. Anything further?



1 The matter's submitted?

2           There are some clean up issues that we need to  
3 talk about. The plaintiffs conceded that there was no issue  
4 as to being an employee of an independent contractor, and  
5 there was -- the plaintiff's conceded on the issue of  
6 corporate veil and also that no liability arises based upon  
7 the ownership of the stock. And that was in the pleadings and  
8 so summary judgment will be issued on those -- on those  
9 issues.

10           It hasn't been further argued here but there was  
11 some allegation that there was liability based upon Chase  
12 having actual possession of the refinery. Actually the  
13 response from the plaintiff to the motion filed by Chase  
14 pretty much gave that up I thought in that they said -- they  
15 acknowledged that Chase did not have actual possession of the  
16 refinery. And so whatever liability with respect to ownership  
17 would have to be tied in -- it wouldn't be direct  
18 responsibility. It would have to be tied in to their agency  
19 principals.

20           But based upon direct liability the court will  
21 grant summary judgment on that issue.

22           Now, we have two issues based upon the issue of  
23 agency principals. First was that Means was an employee of  
24 Chase who was acting under his direction and we've talked  
25 about that. The one issue that I think is kind of out there

1 but I'm going to accept in the light most favorable to the  
2 plaintiff was that Chase was being -- was -- you read that  
3 part of the deposition again that Chase had insisted that  
4 Means be there. And that Mr. Means' salary was being paid out  
5 of the operating expenses.

6 Paragraph three of your memorandum, plaintiff's  
7 memorandum, asserted that Chase exerted much control and  
8 exercised virtually all the decision making power and then  
9 referred the court to Exhibit 10 for authority, and I have  
10 read Exhibit Number 10. But when the plaintiff referred the  
11 court to that document for authority they did not specify  
12 what part of the document they were looking at.

13 I am obligated to read that document and I don't  
14 -- I'm not obligated to accept the Plaintiff's  
15 characterization and submissions providing virtually all  
16 decision making power with respect to the refinery in Chase.  
17 In fact it doesn't. It doesn't do that.

18 The court also notes that page 5, paragraph H, of  
19 plaintiff's memorandum indicates that Chase had a veto power  
20 over the monthly expenses. We've talked about that. Actually  
21 Chase didn't have a veto power. They had the power to agree  
22 or disagree. If they disagreed it went back or fall back to  
23 the position where the average of the previous two months  
24 expense was used.

25 Although the various documents and statements and

1 records do demonstrate that Chase exercised some control over  
2 the sale of the assets, I don't think that anything that  
3 Chase did here was unusual in view of Chase's position as a  
4 lien holder, and I think that a lien holder has a legitimate  
5 interest in approving sales of secured assets. Otherwise  
6 assets just disappear.

7 And the fact that Mr. Means continued to be  
8 employed at the insistence of Chase and that Chase indirectly  
9 -- well, I don't want to say they paid their wages. The way  
10 I understand it is the way we talked about. Those wages came  
11 out of the approved monthly expenses. The fact that those  
12 wages came out of the approved monthly expenses doesn't  
13 necessarily indicate agency.

14 I would have been more interested in what the  
15 plaintiff may have said as to control outside of the process  
16 of -- of locating buyers and arranging for sales and I didn't  
17 see any allegation that Chase took any part in the daily  
18 management of the company as to how the job was done.

19 And as I indicate I don't think that having Means  
20 there and even if Chase insisted that somebody be there to  
21 oversee this it doesn't indicate an agency relationship  
22 unless Chase exercised some actual control over those things,  
23 and I don't see that they did.

24 So I'm going to deny -- I'm going to grant your  
25 motion for summary judgment as to the issue of agency as it

1 relates to Mr. Means and kind of for the same issues the  
2 plaintiff alleges that Chase was a principal of Landmark.  
3 Again, there isn't really anything outside of what I think  
4 the -- a secured party is entitled to do to secure their  
5 interest in the property to maintain control over that.  
6 Plaintiff maintains that Chase had control over the refinery,  
7 was therefore liable for the acts of Landmark in connection  
8 with the refinery including, incidently, a breach of duty to  
9 an invitee on the premises.

10 I don't think that there's anything unusual that  
11 happened or that was outside the usual conduct for reasonable  
12 secured party under the circumstances. Control over the -- by  
13 the creditor over proceeds of the sale is almost always  
14 required and creditors should not be required to release  
15 their security interest as a result of a sale unless there is  
16 an appropriate amount taken as a result of that sale.

17 If it were otherwise, that is if the debt -- if  
18 the secured party didn't have anything to say about these  
19 things fraud could be perpetrated on the secured party by  
20 just selling the assets for a nominal amount and certainly  
21 against that prospect that Chase had a legitimate interest in  
22 being there.

23 I think that there is -- Ms. Maw indicated that  
24 there is a strong public policy in allowing secured parties  
25 to take reasonable steps to ascertain value in their security

1 interest and also be involved in how those assets are  
2 disposed of. Nothing in the record indicates that Chase had  
3 crossed the line.

4 So I'm going to grant your motion as to that. So  
5 your motion for summary judgment is granted. Okay.

6 MS. MAW: Would you like me to prepare the  
7 order?

8 THE COURT: I don't think they will. Would you  
9 do that? Submit it to parties. Does that take care of  
10 everything for today?

11 MR. CUNDICK: Yes, Your Honor.

12 THE COURT: Okay. Thank you.

13 (Whereupon, court was held in recess at 3:15.)  
14  
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1 STATE OF UTAH )

2 : ss

3 COUNTY OF SALT LAKE )

4 I, PAMELA C. SMITH, Certified Shorthand Reporter,  
5 Registered Merit Reporter and Notary Public within and for  
6 the County of Salt Lake, State of Utah, do hereby certify:

7 That I was NOT present at the foregoing court  
8 proceedings;.

9 That the foregoing record was preserved by  
10 videotape;.

11 That thereafter, I stenographically recorded the  
12 requested portion of the video and translated the same using  
13 computer-aided transcription, followed by a proofreading  
14 against the video.

15 That the foregoing pages contain to the best of my  
16 ability a full, true and correct transcript of the same.

17 In witness whereof, I have subscribed my name and  
18 affixed my seal this \_\_\_\_ day of \_\_\_\_\_, 2001.

19

20

21 PAMELA C. SMITH, C.S.R., R.M.R.  
22 Notary Public

23

24

My Commission Expires:

25 \_\_\_\_\_.

Tab L

**COPY**

EIGHTH DISTRICT COURT - VERNAL

UINTAH COUNTY, STATE OF UTAH

\*\*\*

JOHN MECHAM, )

Plaintiff, )

vs. )

Case Number 960800543

BAND-IT IDEX, INC., )

Defendant.)

\*\*\*

BEFORE THE HONORABLE A. LYNN PAYNE

February 29, 2000

2:00 P.M.

TRANSCRIPT OF VIDEO TAPE RECORDING OF MOTION HEARING

Transcribed by:  
Pam Smith, CSR, RMR  
3454 Creek Road  
Salt Lake City, Utah 84121  
(801) 942-6430



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APPEARANCE OF COUNSEL:

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and Transportation Company,  
Inc.:

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McKeachnie, Allred & McClellan  
121 W. Main Street  
Vernal, Utah 84078

1                                FEBRUARY 29, 2000, VERNAL, UTAH

2                                PROCEEDINGS.

3                        THE COURT:      Could I ask you to make your  
4                        appearances since I'm really old and don't remember  
5                        everything I should remember.

6                        MR. SWENSON:      Kevin Swenson representing  
7                        Portfield Investments, Fruita and Westcourt.

8                        THE COURT:      All right. So you'll be  
9                        participating on the motion for summary judgment.

10                       MR. SWENSON:      That's correct.

11                       THE COURT:      Mr. Allred, I do recognize you.

12                       MR. ALLRED:      I represent Consolidated Oil and  
13                       Transportation Company, Inc.

14                       THE COURT:      Okay. Thank you.

15                       MR. CUNDICK:      Your Honor, Dave Cundick and Wayne  
16                       Freestone representing the plaintiff.

17                       THE COURT:      All right. Do any of you have any  
18                       preference as to which we take first?

19                       MR. ALLRED:      I'd suggest the motion for summary  
20                       judgment. Mr. McClellan who assisted me on this I think was  
21                       hoping to be here so perhaps -- I don't know. It turns out  
22                       he had to go to Roosevelt. (Inaudible.)

23                       THE COURT:      Okay. Mr. Swenson. The record  
24                       indicate that I've received this morning your reply.

25                       MR. SWENSON:      All right.

1 THE COURT: And I've read all of the motions.

2 MR. SWENSON: All right.

3 THE COURT: And the pleadings with respect to  
4 your motion for summary judgment.

5 MR. SWENSON: Okay. This is a 1996 lawsuit. This  
6 is a case that has been around for awhile and quite a bit of  
7 discovery has been completed in the case. The facts giving  
8 rise to the lawsuit occurred on February 27, 1995, in an oil  
9 field or an oil refinery in Fruita, Colorado. The plaintiff  
10 sued, among others, Fruita Marketing & Management for  
11 negligence.

12 And part of the discovery is we have identified  
13 all the witnesses, expert witnesses that will be used in the  
14 case. The plaintiff's only expert witness is a gentleman by  
15 the name of Don Stinson, and he is the only expert who will  
16 talk at all about liability. And we have had the opportunity  
17 to depose Mr. Stinson a couple of times to get it finished  
18 and this basically comes down to the plaintiffs cannot prove  
19 that Fruita had any involvement in the case.

20 Don Stinson, again, their only liability expert  
21 was asked what the -- they've defined as property owner  
22 defendants which includes Fruita and others. Did -- that in  
23 any way caused or contributed to the accident, and he  
24 responded that there were two things that they did. The first  
25 one was that the wrong oil was provided to Mr. Mecham. And

1 second thing is that Mr. Mecham was instructed to park or  
2 hook up to the battery head in the wrong location.

3 And for purposes of this motion today we don't  
4 intend to get into whether or not those things were right or  
5 wrong. We do expect that those will come up later.

6 Mr. Stinson was asked several times after that if  
7 there was anything else that they did and he said no. Those  
8 are the two things that the property owner defendants did.

9 So we started taking a look at this and it's clear  
10 that the two areas where he claims that there's fault Fruita  
11 had no involvement with either of those areas. The oil that  
12 was provided was provided to the plaintiff by Mr. Means,  
13 Richard Means. He was an employee of Landmark and then became  
14 part of the Westcourt payroll. He provided to the -- he  
15 provided the oil to the plaintiff.

16 Plaintiff knew what kind of oil it was and  
17 approved of using it, and whether it's the wrong oil or not I  
18 again mentioned we're not going to get into that today. But  
19 Means was not an employee or an agent of Fruita and the  
20 evidence in the case is clear. Mr. Means has been deposed.  
21 Several others have been deposed. He was a Landmark employee  
22 who was then put on the Westcourt payroll to keep him  
23 functioning to clean up the refinery is basically what  
24 they're doing.

25 This refinery went out of business in 1993 and now

1 they're just trying to keep it clean enough that they can  
2 sell the parts off.

3 Landmark went out of business. And there were a  
4 couple of contracts entered into with Westcourt to manage the  
5 property and then a contract with Fruita to sell the property  
6 off. To market whatever property they could get rid of.

7 Mr. Means when he was deposed indicated he was not  
8 an employee of Fruita. The plaintiff, however, argues that  
9 Mr. Means is an agent of Fruita. They acknowledge in their  
10 brief that he's not an employee, and then they skip ahead and  
11 say but he is an agent. No support. No backup of any kind.

12 The only argument that they have raised is that  
13 Fruita had some involvement on the property. And Fruita did  
14 have, like I said based on the contract, the authority to  
15 market all of the property that was left there that they  
16 could sell. And they were doing that with, you know, several  
17 agreements between Westcourt, Fruita, Chase Manhattan and  
18 Landmark to try to clear up this property.

19 But the oil that was provided was not owned by  
20 Fruita. The property where the incident occurred was not  
21 owned by Fruita. Dick Means has testified that he was not an  
22 employee of Fruita or was not acting on Fruita's behalf. The  
23 deal came down between Consolidated Oil, who owned part of  
24 the oil in the tank, and Landmark who owned part of the oil  
25 in the tank, and they had requested that -- or Consolidated

1 had bought that oil. The oil wasn't able to come out of the  
2 tank because it was so heavy.

3 They brought in Adler Hot Oil which is the  
4 employer of the plaintiff. And the purpose of that was to  
5 heat that tank and get circulation going so they could bring  
6 that oil out and then sell it.

7 But, again, Fruita had no -- no involvement with  
8 that oil. They were not involved in the sale of that oil.  
9 They were not involved in the discussions as to how that  
10 would be brought out of the refinery, who it would be sold  
11 to, anything to do with Consolidated Oil.

12 The second issue is where they -- where he was  
13 instructed -- where the plaintiff was instructed to park.  
14 And, again, that becomes an issue of was Mr. Means an agent  
15 for Fruita. And there's no testimony at all that the  
16 plaintiffs can point to, and it's not because we haven't had  
17 time. Like I said, this is a 1996 case. Mr. Means has been  
18 deposed. Several other people have been deposed and nobody  
19 has indicated that in any way Dick Means is an agent for  
20 Fruita. There's no documentation that indicates that Dick  
21 Means is an agent for Fruita.

22 This is simply a case where the plaintiffs cannot  
23 make any showing of agency. And without that showing the two  
24 issues that their expert has claimed we were at fault in or  
25 the property owners were at fault in do not go to Fruita. And

1 because of that and the lack of evidence that the plaintiffs  
2 have -- have we would move for summary judgment.

3 THE COURT: Thank you, Mr. Swenson.

4 Who will speak for the plaintiff?

5 MR. FREESTONE: Wayne Freestone, Your Honor.

6 THE COURT: Mr. Freestone.

7 MR. FREESTONE: Your Honor, to cut right to the  
8 chase, the -- the relationship between Fruita and Westcourt  
9 is pretty muddled at least. As we set forth in our response  
10 the marketing agreement that was entered into by the property  
11 owner, Landmark, and Fruita, specifically has or mentions  
12 that Fruita's to be referred to as Westcourt. The same thing  
13 with the management agreement.

14 You know, I set forth the language in there. And  
15 in fact Mr. Swenson in his own words as he was addressing the  
16 court said that there was a contract between Landmark and  
17 Westcourt to manage the property. If in fact Westcourt was  
18 managing the property we know Fruita was managing the  
19 property because we have waivers that were being signed that  
20 the court has already -- we've already discussed in court  
21 before. A waiver that Mr. Mecham was required to sign that  
22 said that Fruita was the one that was managing the property.

23 Obviously Westcourt was involved in managing the  
24 property because Mr. Means who, granted, was on Westcourt's  
25 payroll, was there and facilitating the extraction of the oil

1 at the time.

2 It appears from the documentation from the  
3 contracts that for purposes of the contracts and it appears  
4 from their own practice that Fruita and Westcourt were acting  
5 as the same. Whether they were acting as the same or not our  
6 expert testifies that there was a duty on the part of Fruita  
7 who was managing the refinery to make sure that there was  
8 someone there who could facilitate the extraction of that oil  
9 in a safe manner.

10 There was a duty on the part of the company that  
11 was managing the refinery to make sure that that was done  
12 properly. And that duty was breached. Consequently, we have  
13 Fruita and to the extent that Westcourt was involved in  
14 management of the property as well who breached a duty  
15 according to our expert, and consequently there's negligence  
16 there. There's at least a question that needs to be  
17 presented, a question of fact as to whether or not there's  
18 actually an agency relationship there. On its face according  
19 to these documents there is. On its face they're one in the  
20 same.

21 THE COURT: Thank you.

22 MR. FREESTONE: That's it, Your Honor.

23 THE COURT: Anything more from you, Mr.  
24 Swenson?

25 MR. SWENSON: Let me just point out quickly, he



1 says they're one in the same yet they've sued two different  
2 entities. I mean it's clear that they're two separate  
3 entities. Westcourt is a Colorado corporation. Fruita is a  
4 Delaware corporation. They're two separate entities. They've  
5 known that from the beginning when they filed the lawsuit and  
6 yet they've still presented absolutely no evidence of agency  
7 other than to say, well, it's kind of muddled and there may  
8 be agency.

9 There's no showing of agency that -- the testimony  
10 is clear that Dick Means was working as an employee of  
11 Westcourt and not of Fruita and had no relationship with  
12 Fruita.

13 THE COURT: I knew I was going to do that. I  
14 would like to ask you a couple of questions, Mr. Swenson.

15 MR. SWENSON: Sure.

16 THE COURT: Let me indicate to you that my  
17 feeling is that this is a matter where there are lots of  
18 issues which are yet to be resolved and I cannot issue an  
19 order of summary judgment because the issue of agency's not  
20 clear. The contract that Fruita signed where they themselves,  
21 I mean they were acting in a capacity of a contracting party  
22 and referred to themselves in that contract as Westcourt.  
23 Doesn't that by itself create an issue as to agency that  
24 can't be resolved through a motion for summary judgment.

25 If I have a party that says A, B, C, bracket D, if

1 Fruita is referring to themselves as Westcourt shouldn't they  
2 be allowed the opportunity to -- to use that as evidence that  
3 at least goes to the issue of whether or not Westcourt and  
4 Fruita are the same?

5 MR. SWENSON: No, I don't think so because what  
6 the specific acts that they're talking about are the acts of  
7 one employee and there is no showing that that employee has  
8 any relationship to Fruita. We're not saying that Fruita  
9 doesn't have the role in the refinery. What we're saying is  
10 that role in the refinery has nothing to do with anything  
11 that they have said caused or contributed to the accident.

12 THE COURT: You haven't got to what I want you  
13 to address. If Fruita is referring to themselves as  
14 Westcourt, can't they do the same thing? I mean that's  
15 something that Fruita themselves did. If it's a problem that  
16 was created it was created by them, and I think that that  
17 creates a problem of whether or not there is an agency  
18 relationship because they're referring to themselves in a  
19 contract under two names, both Fruita and Westcourt, and  
20 according to what you've told me Mr. Means is an employee of  
21 one.

22 If those two have either an agency or a  
23 relationship or they are the same entity in fact that  
24 confusion can only -- is only apparent because of what they  
25 themselves did by referring -- referring to themselves as

1 Westcourt. My way of thinking about it.

2 MR. SWENSON: Okay. Well, they referred to  
3 themselves as Westcourt but there's a separate company that  
4 is Westcourt Management, Inc., which is a separate  
5 corporation. I don't see the reference to Westcourt as  
6 muddying that.

7 THE COURT: Is -- is there three entities here?  
8 Is there a Westcourt Management and a Westcourt and Fruita or  
9 is there just two corporations here?

10 MR. SWENSON: There are several Westcourt  
11 entities.

12 THE COURT: Involved on the property there in  
13 Colorado?

14 MR. SWENSON: Yes. And they're separate from  
15 Westcourt, Westcourt Management, Inc., which is kind of the  
16 parent holding company. Westcourt Labs and several other  
17 parts, Westcourt Marketing.

18 THE COURT: Okay. Well, I'm ready to rule unless  
19 you have -- the motion I think needs to be denied, will be  
20 denied based primarily upon the reasons that I've already  
21 indicated.

22 It's your obligation with respect to a motion for  
23 summary judgment to convince me that there is no material  
24 issue of fact and the defendant or the moving party is  
25 entitled to a judgment as a matter of law.

1                   When I went through this, looked to me like there  
2 was a real fact issue in view of the fact that we have Mr.  
3 Means passing out the waiver of liability at the gate, the  
4 Westcourt employee seeking to insulate Fruita from liability.  
5 In view of the fact that Mr. Means provided the oil, and  
6 that's part of the record. That's in dispute.

7                   MR. SWENSON:     Your Honor, you mentioned Mr.  
8 Means handing out the liability release.

9                   THE COURT:     Well, somebody was there.

10                  MR. SWENSON:     Yeah, there's a private security  
11 company that's there. Has nothing to do with Mr. Means.

12                  THE COURT:     Okay.

13                  MR. SWENSON:     All right.

14                  THE COURT:     The issue rather is whether or not  
15 Means is an agent of Fruita and I'm not convinced that you've  
16 -- it's not clear enough in my mind that I feel like they  
17 shouldn't have their chance.

18                  You brought up something that really hadn't been  
19 brought up to me that there's several Westcourts but that  
20 wasn't part of what I saw anywhere in your pleadings. And  
21 based upon the fact that at least Mr. Means is a person who's  
22 alleged to have done a couple of things that led to the  
23 liability, and based upon the fact that he was an employee of  
24 a Westcourt, I don't think -- you really haven't put me in a  
25 position where I feel like I can issue -- can grant a motion

1 for summary judgment.

2 I think the issue is open based upon the fact that  
3 Fruita Management is referring to themselves as Westcourt.  
4 And if you've got something more, then convince me that there  
5 are two or three Westcourts, this is a different one, I guess  
6 I'd be glad to do it. Sorry. Motion is denied.

7 The other motion -- are you resolved, Mr. Sam, on  
8 your issue?

9 MR. SAM: There's an issue that (Inaudible.)

10 THE COURT: We'll wait until we've taken care of  
11 these folks then. That's fine.

12 Mr. Allred.

13 MR. ALLRED: Thank you, Your Honor. I indicated  
14 I represent Consolidated Oil and Transportation Company,  
15 Inc., an entity served the latter part of December of 1999.  
16 Apparently this case had been going on for several years.

17 Our motion is to dismiss this defendant now for  
18 lack of jurisdiction in the State of Utah. The pleadings --  
19 and there's also an affidavit we submitted indicate the  
20 accident occurred in Colorado, in Fruita, Colorado, was on a  
21 refinery and real property in the State of Colorado. The  
22 product and conduct alleged to have caused liability for  
23 Consolidated Oil all occurred in Colorado. The injury to the  
24 plaintiff and his damages occurred in Colorado and  
25 Consolidated Oil is a Colorado corporation with its offices

1 in Colorado and its employees and everything there.

2 Based on that we fail to see anything that would  
3 provide State of Utah jurisdiction over this particular  
4 defendant. We've gone into extensive discussion in our  
5 memorandums. Some case law and I will -- this court indicates  
6 it's read so rather than go through that I'm going to just  
7 touch briefly on the issues.

8 THE COURT: I've read the pleadings and I think  
9 I only read two or three cases. I read the one you kept  
10 referring to. The old federal case that you -- .

11 MR. CUNDICK: (Inaudible).

12 THE COURT: Yes. But I'd like when you talk to  
13 me to distinguish -- you never referred to Mr. Allred's case  
14 which I thought may be dispositive. So I'd like you to --  
15 I'd like you to in your discussions with me when you get an  
16 opportunity whoever is going to present that -- it wasn't  
17 done in the pleadings. And I was surprised that I didn't have  
18 any reference in the pleadings to Arguello versus Industrial  
19 Woodworking Machine Company, and I have read those two cases  
20 at least.

21 MR. ALLRED: Well, in summary state can claim  
22 jurisdiction over a defendant, an out of state defendant, a  
23 nonresident defendant under one of two areas, either specific  
24 jurisdiction or general jurisdiction.

25 Specific jurisdiction generally is tied to Utah

1 Code Annotated 78-27-24 which says that if the injury arises  
2 out of some specific acts enumerated therein then you claim  
3 jurisdiction.

4 Basically what -- to claim jurisdiction you've  
5 got to show that an act occurred in the State of Utah that  
6 gave rise to the injury or to the cause of action and that  
7 also there's a requirement of significant mental contact.

8 In this case the accident, the injury, everything  
9 was in Colorado. - Doesn't seem to be any basis to be claiming  
10 specific jurisdiction. So that gets you to the general  
11 jurisdiction issue, and in that the plaintiff has to show the  
12 defendant conducted substantial continuous local activity in  
13 the state. That's language out of Arguello and Nuway case and  
14 several others.

15 There's a case we didn't cite called Bundadick,  
16 something like that -- actually it's fact for the court to  
17 look at in determining that -- suggesting that you look at  
18 whether the defendant engaged in business in the state, was  
19 licensed in the state, owned property in the state,  
20 maintained employees, agents, bank accounts in the state, had  
21 shareholders residing in the state, had phone listing in the  
22 state, advertised in the state, traveled to the state, paid  
23 taxes, recruited employees, or created a substantial  
24 percentage of national sales income in the state. That fact  
25 is Bundadick versus State Line Hotel case looked at.

1           Really the only contact it appears that the  
2       general manner that Consolidated has in the State of Utah  
3       that's been addressed by the plaintiffs, one is set forth in  
4       an affidavit is that occasionally Consolidated would make  
5       spot sales in the sale of petroleum products.

6           The other is an argument they made that somehow a  
7       web site creates jurisdiction in the state. Neither of those  
8       come anywhere near the conduct and substantial continuous  
9       local activity in the state that's required to have Jones  
10      jurisdiction. The case on the web site versus federal, once  
11      we refer to those in general they say that by just common  
12      informational type web site does not give general  
13      jurisdiction. That's really what this web site was was  
14      information about the company, the numbers you could contact  
15      if you were interested in their products.

16          Spot sales are unrelated to the injury here. Again  
17      do not show a continuous and substantial activity in the  
18      state. There just is not sufficient basis to sue the  
19      defendant in the state. If Consolidated Oil is liable it  
20      ought be sued in the State of Colorado where the accident  
21      occurred, where property and everything occurred.

22          It appears to us the only thing in this state is  
23      that the plaintiff happens to live here and that does not  
24      give the state jurisdiction over a nonresident defendant.

25          THE COURT:     There was a contract communication.



1                   MR. ALLRED:     Not between the defendant and the  
2 plaintiff. There is an argument that Consolidated had  
3 contacted the plaintiff's employer about doing some -- the  
4 work in Colorado. But there's no contact between the  
5 plaintiff --

6                   THE COURT:     The same person that signed your  
7 affidavit that --

8                   MR. ALLRED:     That. There was some spot sales.

9                   THE COURT:     Asked them to come down twice so  
10 there's -- there is something in the State of Utah. It's not  
11 well --

12                   MR. ALLRED:     I think the affidavit that's signed  
13 by our person says that -- I've got it here. That there were  
14 occasional purchases made by Consolidated of petroleum  
15 products in the state which are unrelated to this particular  
16 matter.

17                   THE COURT:     Somewhere in there, Mr. Allred,  
18 probably (Inaudible) they said that they had contacted the  
19 employer of the plaintiff on two occasions to come down and  
20 use the hot oil truck, Adler, I guess.

21                   MR. ALLRED:     That's correct.

22                   THE COURT:     So that there was some contact in  
23 the State of Utah.

24                   MR. ALLRED:     The affidavits of Consolidated  
25 contact in Utah are limited to electronic communications to

1 accomplish purchase of transfer involved product and then  
2 there is the pleadings of the matter and the involvement as  
3 alleged by the plaintiff says that Consolidated contacted  
4 Adler Hot Oil to go do some work occasionally in Colorado. So  
5 that would be the extent of contact.

6 There was no contact between Consolidated and the  
7 plaintiff and the lawsuit doesn't -- isn't a claim of some  
8 violation of contract but as a tort claim arising out of an  
9 accident and injuries in Colorado. So I don't see that those  
10 contacts give the State of Utah jurisdiction over this  
11 defendant.

12 THE COURT: Okay.

13 MR. ALLRED: Thank you.

14 THE COURT: Mr. Cundick.

15 MR. CUNDICK: Thank you, Your Honor.

16 Your Honor, a --.

17 THE COURT: You know I saw you frantically  
18 trying to get a hold --

19 MR. CUNDICK: I've got it.

20 THE COURT: Are you ready to deal with --

21 MR. CUNDICK: I'm ready to deal with it, Your  
22 Honor, and perhaps -- perhaps I could just start out by  
23 saying what part of the Arguello -- what is the issue that  
24 concerns you and let me address it.

25 THE COURT: Okay. What I'm concerned about is --

1 I don't know if its fair to you -- as I went through here,  
2 here are my problems.

3 It looked like according to all the definitions  
4 that I could see that there wasn't general jurisdiction. That  
5 is that there must be specific, some kind of specific contact  
6 with the State of Utah. I couldn't see that you alleged facts  
7 which would show --

8 MR. CUNDICK: So if there's no jurisdiction --

9 THE COURT: General jurisdiction that's  
10 specific.

11 MR. CUNDICK: Your Honor, while you're looking  
12 at it let me just address general jurisdiction first.

13 THE COURT: All right. This is what the  
14 Arguello case says about general jurisdiction. There must be  
15 substantial and continuous local activity. That's in the  
16 State of Utah. Substantial and continuous. And I just -- I  
17 didn't see anything that I could look at and even come close  
18 to what would be substantial and continuous local activity in  
19 the State of Utah. So I -- I'll let you address that issue.  
20 And you ought to be aware that as I read through what I saw  
21 that I just didn't see enough for general jurisdiction.

22 And then my problem is is that the contacts here,  
23 and this is I think really the holding of Arguello is that  
24 you look at the nature of the contact and the claim. The  
25 nature of the contact here was a contract action. If this

1       were a suit in contract I would feel great about it.

2               MR. CUNDICK:     Sure.

3               THE COURT:     But this isn't suit in contract. The  
4       contacts with the State of Utah didn't directly relate to the  
5       tort action which arose in the State of Colorado. And I think  
6       that's what Arguello says that there's not only got to be  
7       contact but for specific jurisdiction there needs to be a  
8       relationship between the contract and the cause of action.  
9       It's not a " but-for" test.

10              MR. CUNDICK:     I agree.

11              THE COURT:     It's not " but for" them calling we  
12       wouldn't have gone to Colorado. And so I, you know, quite  
13       frankly that's the issue that I have and that's why I think  
14       Arguello is the controlling case in this matter.

15              MR. CUNDICK:     And let me speak to those then.  
16       Thank you very much, Your Honor.

17              Speaking first to the specific jurisdiction. I  
18       need to show for specific jurisdiction to be asserted I've  
19       got to rely on Utah's long arm statute, and the first item  
20       that I need to show is the defendant was transacting business  
21       in the State of Utah.

22              THE COURT:     I'll give you that.

23              MR. CUNDICK:     We both agree with that.

24              THE COURT:     I'll give you that.

25              MR. CUNDICK:     Okay. So let's move on to the

1 next one. I've got to show -- once I show that it's  
2 transacted in the State of Utah then I have to show that the  
3 claim arises out of that transaction.

4 THE COURT: Right.

5 MR. CUNDICK: And that's what you're struggling  
6 with and that's what I'd like to answer. And it's -- our  
7 view is that Consolidated calls up Utah Adler Oil, Hot Oil,  
8 and says we want you to perform ultra hazardous activity in  
9 the State of Utah. Adler says, okay, we'll do it. So they go  
10 to -- they send in -- State of Utah. State of Colorado.  
11 What did I say?

12 MR. ALLRED: Utah.

13 MR. CUNDICK: Thank you. So Adler says, Adler  
14 Oil sends their representative, Joseph Mecham goes to  
15 Colorado to perform the contract, and it's in performing the  
16 contract, this ultra hazardous activity that he's injured.  
17 So the nexus right there is the performance of the contract  
18 caused the injury. That is --

19 THE COURT: Because it was ultra hazardous?

20 MR. CUNDICK: Exactly. And that's what our  
21 complaint states, too, in paragraphs 60 through 65 there --.

22 THE COURT: If this were just a call to service  
23 a xerox machine under the same circumstances only for some  
24 reason the machine blew up the minute the person touched it  
25 then you would say there's no jurisdiction.

1 MR. CUNDICK: Right. Because there's no  
2 relationship there. Here there's a direct relationship.  
3 They're asking him to perform an ultra hazardous contract.  
4 They're asking him to go on to a hot oil site or on to a  
5 refinery where it's very rare to even have an open flame,  
6 take a hot oil truck that's full of flame and perform an act  
7 of heating up this oil to take it out.

8 So it's the contract itself that they've -- that  
9 they asked -- they asked Adler to perform an ultra hazardous  
10 activity. And that -- and the injury occurs in performance of  
11 that ultra hazardous activity. Clearly then to us the claim  
12 arises out of the activity in Utah. The activity in Utah is  
13 arranging for the contract and then performing it, it clearly  
14 arises out of it.

15 Once that's established then we just go on to the  
16 fundamental fairness whether it was foreseeable that  
17 litigation relating to that contract could be brought in  
18 Utah. This was discussed in (Inaudible). I think we're  
19 clearly in that one, too. We're clearly in the transacting  
20 business. We're clearly in the fundamental fairness and  
21 notions of fair play and substantial justice. The only  
22 question is did it arise out of it. I think it's clear that  
23 it did. I think it's clear that it did.

24 And, Your Honor, let me move on to the general  
25 jurisdiction.

1                   THE COURT:     So you are arguing general  
2 jurisdiction.

3                   MR. CUNDICK:    Yes, excuse me.

4                   THE COURT:     What have you pled that would say  
5 that there's (Inaudible) and substantial business in the  
6 State of Utah?

7                   MR. CUNDICK:    Thank you. This Arguello case was  
8 decided back in 1992 before the Brash and International,  
9 okay? Now in my response memorandum I quote a case from Utah  
10 which quotes a Zippo case. The Zippo case is a fairly famous  
11 case. It's referred to in virtually every  
12 Internet/jurisdiction case. It's kind of set down the law,  
13 and it says there's a scale here of jurisdiction.

14                   There's the -- there's the personal jurisdiction  
15 is established when a defendant clearly does business over  
16 the Internet such as entering into contacts which require the  
17 knowing and repeated transmission of computer files over the  
18 Internet.

19                   Well of course this would -- this would satisfy  
20 that presence in the State of Utah. I can flip on my  
21 computer, pull up a site. Everybody in Utah can pull up a  
22 site on their computer from Consolidated Oil, from the  
23 defendant.

24                   Now -- but that in and of itself is not enough.  
25 Just pulling up the site that's not a presence in Utah

1 because that would be similar to just an advertisement.

2 THE COURT: Well, didn't those cases also  
3 distinguish between -- and you talked about the transference  
4 of files.

5 MR. CUNDICK: Exactly.

6 THE COURT: And I looked at the Internet site  
7 and it wasn't interactive. In other words you don't log on to  
8 that and make an order onto that Internet site.

9 MR. CUNDICK: They request you to contact them  
10 to setup an order.

11 THE COURT: Okay. But that's different than the  
12 case that you cited. Said if there is an electronic  
13 transference of files.

14 MR. CUNDICK: Exactly.

15 THE COURT: And --

16 MR. CUNDICK: But if -- Your Honor, if you look  
17 at their -- if you look at their memoranda their opening  
18 memoranda and the affidavit that's attached thereto you look  
19 and it's paragraph eight of the affidavit of Sherry Ebert,  
20 Consolidated contacts with Utah are limited to electronic  
21 communications that accomplish purchase and transportation of  
22 both product, that seems to be exchanging Internet file are  
23 -- or computer files over the Internet which satisfies the  
24 general jurisdiction test for -- that was set out in Zippo.

25 Now, Your Honor, I don't know if that statement in



1 the affidavit of Sherry Ebert in and of itself is enough.  
2 Okay? Because it doesn't really clearly say that they're  
3 doing it over the Internet, that they're exchanging computer  
4 files, and I don't know if it's enough.

5 So what I am here is requesting this. I think  
6 there's enough for the court to find specific jurisdiction so  
7 it doesn't even have to meet the general jurisdiction issue.  
8 I think the fact that they asked Adler to perform ultra  
9 hazardous activity and the plaintiff was injured in  
10 performance of that ultra hazardous activity satisfies the  
11 arising out of test that's set forth in Arguello and also  
12 restated in Novamud (phonetically).

13 I think there's enough there to find specific  
14 jurisdiction. If the court feels that that is not enough,  
15 that we have not shown specific jurisdiction then I would  
16 request the court give us leave to conduct limited discovery  
17 on the issue of this Internet. Because if they are -- if  
18 Consolidated Oil is transacting business in the State of Utah  
19 over the Internet they have satisfied the general  
20 jurisdiction issues.

21 THE COURT: (Inaudible) fair, Mr. Allred, I kind  
22 of tipped my hand and said I don't think you've got it here  
23 and now you're arguing that you should be given more time and  
24 you only argue that after I say, well, I don't think you've  
25 got general jurisdiction. You didn't file a Rule 56(f), I

1 think it is, request for additional discovery.

2 MR. CUNDICK: No, I did not.

3 THE COURT: It seems like it would be highly  
4 unfair to somebody to allow you to come in and argue the case  
5 and listen to what I have to say and then say, well, I can  
6 kind of see, judge, that you're not in agreement with what --  
7 what I think as to general jurisdiction so what I really want  
8 is some more time to develop that. I think you have to do  
9 that before you get here.

10 MR. CUNDICK: Your Honor, that may well be but I  
11 think -- I certainly think there's enough for specific  
12 jurisdiction. I think we also have set out a case for general  
13 jurisdiction.

14 I think that what has been stated in the affidavit  
15 of Shirley Hebert and what's been stated in the opening  
16 memoranda by Consolidated gives rise to general jurisdiction  
17 just over the relatively new Internet law. They have now  
18 made a presence in Utah because they have a site where they  
19 give -- it's more than a passive site. It's just not an  
20 advertisement. It's something where they've got -- it was  
21 attached to our reply memorandum, or response memorandum.

22 There's page after page giving information about  
23 the company and urging you to contact them to contract with  
24 them, and I think that plus the affidavit of Sherry Hebert  
25 where she admits that they're -- they're making electronic

1       communications over the Internet -- over the Internet gives  
2       the court sufficient evidence to find general jurisdiction.

3               I think we've got specific jurisdiction. I think  
4       we've got general jurisdiction.

5               THE COURT:     Okay. Mr. Allred, do you have  
6       anything else you'd like to say?

7               MR. ALLRED:     I might, Your Honor, touch briefly  
8       on that Internet issue. First of all I note that all the  
9       cases that have been cited out of the federal circuit are all  
10      specific jurisdiction cases generally involve something in  
11      addition to a web site and the use of it. Might also indicate  
12      basically what the courts are saying is you've got  
13      informational which is -- doesn't give any jurisdiction.  
14      You've got interactive, which does, and then you may have  
15      something in between.

16              Patriot case that's attached to our memorandum, a  
17      Federal case, actually talks about a web site very similar to  
18      this. On page seven there it cites a case out of the Second  
19      Circuit, Bunsen Restaurants versus King which says defendants  
20      maintenance of an Internet web site with a telephone number  
21      to order allegedly infringing product is insufficient to  
22      support jurisdiction of the defendant.

23              That's what we had here. We had information that  
24      said if you're interested here's a number to call. It wasn't  
25      interactive. It didn't meet any of the rest. There just is

1 really no basis here for general jurisdiction.

2 The court noted, I think, Arguello is the most on  
3 point Utah case here. Also I think Roskelly and Nuway also  
4 have some involvement there. I don't think there's basis for  
5 specific jurisdiction. The argument by counsel being made is  
6 that Consolidated made a phone call, made a contract with  
7 Adler who was the employer of this guy who then went over to  
8 Colorado and was injured. That's kind of a bootstrapping  
9 theory.

10 Again the Patriot case, the federal case rejected  
11 that kind of argument. Said you can't bootstrap into it.  
12 The cause of action you claim has got to rise out of the  
13 conduct.

14 And here's a tort claim for ultra hazardous  
15 activity as to type for specific jurisdiction. The conduct  
16 that causes the injury or gives rise to the claim has to  
17 occur in Utah. It didn't. The conduct that is alleged to  
18 have occurred being the owning of a product or ultra  
19 hazardous activity in Colorado. All occurred in Colorado.

20 There just is very limited involvement of our  
21 client in this state. And really I'm at kind of a loss as I  
22 got into this case why it wasn't ever filed in Colorado where  
23 everything happened. We'd ask the court to grant our motion.

24 THE COURT: Anything further?

25 MR. CUNDICK: I just -- and I appreciate the

1 court letting me just on -- if you just look at the pages and  
2 pages off the Internet, approximately eleven, twelve times  
3 they're requesting that you contact them or E-mail them.  
4 They even have a place where they say click here to E-mail.

5 Mr. Freestone indicates it's 21 times they invite  
6 you to -- I think that's more than just a passing (Inaudible)  
7 on passive advertisement on the web site.

8 THE COURT: As you point out I think that  
9 there's a certain aspect to developing law. The underlying  
10 ideas whether or not there's fundamental fairness to -- I  
11 think that's not going to change the mechanism to apply the  
12 fundamental fairness doctrine will be tweaked with as we have  
13 developing technology.

14 The issue when you get right down to it is whether  
15 it's fair for someone in the State of Utah who contacts Adler  
16 Oil and asks them to come over and perform a hot oil  
17 treatment on the oil in Colorado, whether or not they should  
18 be required to defend themselves in the State of Utah. It's  
19 not dispositive as to a cause of action. It's only  
20 dispositive as to the location of the action and it means a  
21 great deal, I think, to the attorneys and to clients also, I  
22 believe, especially the plaintiff in this case who is a  
23 resident of, I think this community. I think he's a resident  
24 of the Vernal area.

25 He'd have to go down, and I don't know whether or

1 not his lawyers from the State of Utah would have -- would  
2 have the ability to go down or whether or not that would even  
3 be financially practical for them to go down and to represent  
4 him in the State of Colorado. But it doesn't dispose of the  
5 action.

6 And I do and I'll -- I read, I think, the two  
7 cases that I think I need to read. And I read all of the  
8 motions. I've read all of the paperwork and I don't think  
9 that there's jurisdiction. I -- I think that there needs to  
10 be a closer connection between the cause of action and the  
11 Utah contacts. And where the Utah contacts at best can be  
12 described as purchasing things in the State of Utah over the  
13 web -- not over the web but over the Internet and receiving  
14 orders over the Internet from the State of Utah, I don't  
15 think -- this is what I view my obligation here.

16 I think that Justice Zimmerman made it clear that  
17 I am to resolve all conflicts in this matter in your favor,  
18 plaintiff's favor as to jurisdiction. But it remains the  
19 burden of the plaintiff to prove jurisdiction. So if there's  
20 no conflict I just take the facts as I find them. If there is  
21 a conflict then I take the facts in the light most favorable  
22 to the plaintiff. And then I must find that jurisdiction has  
23 been established according to the due process requirements  
24 that I've outlined.

25 I -- there's nothing in the affidavits or any

1 place. They talk about some Internet contact but there's  
2 nothing (inaudible) which would show substantial and  
3 continuous local activity in the State of Utah.

4           The volume I think is important and the affidavit  
5 -- is it Stinson? Is that her name? The lady that provided  
6 the affidavit, and also referring to what Mr. Allred said in  
7 his memoranda which you referred to, viewing those things  
8 even in the light most favorable where there is a conflict  
9 and where there's not a conflict I'm just taking -- when  
10 there's not a conflict there's no -- there's no dispute as to  
11 the evidence.

12           So I'm not weighing the evidence but I must make a  
13 finding that the plaintiff has met it's burden of showing  
14 jurisdiction, and I do not think there's been substantial and  
15 continuous local activity within the State of Utah such to  
16 give the court jurisdiction over any cause of action.

17           You must remember I think that what they're  
18 talking about in general jurisdiction is that you can serve  
19 -- sue that person for any reason in the State of Utah  
20 based upon their contacts in the State of Utah. It doesn't  
21 have to relate to anything that happened in the State of  
22 Utah. It just has to relate to that person who's conducting  
23 substantial and continuous local activity in the State of  
24 Utah, and I just can't see that.

25           The long arm statute I think that there is a --

1     there's no allegation that the tort action occurred in the  
2     State of Utah. But there is an allegation that the defendant  
3     conducted business in the State of Utah. I think that's  
4     sufficient to meet the first step of the analysis that's set  
5     forth in the Arguello case. But then the court after looking  
6     at that as the court found in Arguello, I must find that  
7     there's a relationship between the contacts and the cause of  
8     action, and it's not just a " but for" analysis.

9             And I think that the same thing could have been  
10     argued in the Arguello case where these people came to the  
11     State of Utah and advised a person in Logan as to the wood  
12     making machine as I recall, didn't perform any services on it  
13     but told them what to do in order to correct a mistake. And  
14     I guess you could argue that that was a contract to come to  
15     the State of Utah to advise somebody as to substantive -- as  
16     to fixing a machine that may be very destructive. In fact  
17     Mr. Arguello was, I think, according to the case, was  
18     seriously injured as a result of that.

19             The language that I'm referring to in the Arguello  
20     case is on page -- well, this page number won't help you.  
21     Says, " These cases demonstrate that due process is not  
22     satisfied by the quantity of context." And I note here that  
23     there's very, very -- there's not a real high quantity of  
24     contacts.

25             Continuing." Satisfied by the quantity of contacts



1 with the state but rather their quality and nature of the  
2 minimum contacts and their relationship to the claims."

3 And I just don't think that there's a  
4 relationship. I think that calling somebody to perform a  
5 contract in the State of Colorado does not, based upon these  
6 facts, grant jurisdiction for a tort that subsequently  
7 happens in the State of Colorado. This is something that my  
8 views I guess don't matter, and it may be a matter that you  
9 want to visit with the Court of Appeals or the Supreme Court  
10 on, and I'm certainly not offended by that.

11 I just -- I mean, I read it. I looked at it. I  
12 considered it, and sometimes I really have to struggle with  
13 things, and my only struggle really, to be honest with you,  
14 is I think it's hard on this plaintiff. My decision if I --  
15 if I had to choose personally between corporations and people  
16 I'm probably going to choose people.

17 But based upon the law I'm convinced that this  
18 court doesn't have jurisdiction. And I think that to go  
19 through this and for me to deny this motion and even go up to  
20 the point of judgment and jurisdiction is something that can  
21 be raised any time. It's been specifically raised in this  
22 case and in my judgment I've done you a favor because if you  
23 got the judgment it wouldn't be any good in my -- at least  
24 against this plaintiff who's -- (Inaudible).

25 I -- like I say, I didn't mind handling the case

1 and I don't invite appeals but if you'd like to take this up,  
2 that's fine. Frankly, I didn't think it was that close of a  
3 legal issue when I got into it.

4 So I'll grant the motion to dismiss for lack of  
5 jurisdiction.

6 The pleadings have been supplemented by the  
7 affidavits. Your other ground was that they failed to plead.  
8 I'll grant your motion on the issue of general jurisdiction  
9 because I don't think they even pled that. Specific  
10 jurisdiction, I think that that was adequately raised by the  
11 pleadings.

12 And, Mr. Allred, would you prepare court's --  
13 findings are not appropriate because this is something that  
14 the Supreme Court will review as a matter of law. So,  
15 findings are in order. I suppose there's a degree in there  
16 where I have to evaluate the contacts, and I think that they  
17 were minimal. To that extent you better have some findings  
18 that I just -- I just thought that they were minimal.  
19 Didn't have base. But you prepare that.

20 Mr. Freestone, you prepare the court's ruling on  
21 the motion for summary judgment.

22 MR. ALLRED: Yes, Your Honor.

23 THE COURT: What can I do to help you? Anything  
24 further? I guess I've wrecked some ships here today.

25 MR. CUNDICK: Your Honor, probably what we need

1 to do is get Barbara Maw on the line and setup a time for her  
2 motion for summary judgment. She wanted to appear by phone  
3 today.

4 THE COURT: Oh.

5 MR. SWENSON: As well other scheduling issues  
6 which we had agreed to discuss.

7 THE COURT: Okay. I wonder if you'd come into  
8 chambers. I'd like to take care of Mr. Sam and this young  
9 lady back there.

10 (Whereupon, court was held in recess at 2:51.)

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1 STATE OF UTAH )

2 : ss

3 COUNTY OF SALT LAKE )

4 I, PAMELA C. SMITH, Certified Shorthand Reporter,  
5 Registered Merit Reporter and Notary Public within and for  
6 the County of Salt Lake, State of Utah, do hereby certify:

7 That I was NOT present at the foregoing court  
8 proceedings;.

9 That the foregoing record was preserved by  
10 videotape;.

11 That thereafter, I stenographically recorded the  
12 requested portion of the video and translated the same using  
13 computer-aided transcription, followed by a proofreading  
14 against the video.

15 That the foregoing pages contain to the best of my  
16 ability a full, true and correct transcript of the same.

17 In witness whereof, I have subscribed my name and  
18 affixed my seal this \_\_\_\_ day of \_\_\_\_\_, 2001.

19

20

21 PAMELA C. SMITH, C.S.R., R.M.R.  
22 Notary Public

23

24

25 My Commission Expires:.

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned Pro se appellant of record certifies that the following listed persons have an interest in the outcome of this case.

### **A. Parties:**

Appellant: ROBIN F. BURGNER

Appellee: Utah Labor Commission  
Equal Employment Opportunity Commission  
and LAB CORP, Inc.

### **B. Attorneys And Others:**

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## TABLE OF AUTHORITIES

*The Americans with Disabilities Act of 1960, as Amended, and the Utah Anti-discrimination Act of 1965, as Amended,*

*Section 34A-5-107(5)(d), U.C.A."*

*Utah Code 34A-5-106"*

*Vollmert v. Wisconsin Dep't of Transp.*, 197 F.3d 293, 297 (7th Cir. 1999).

*Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

*In Weigel v. Target Stores*, 122 F.3d 461, 469 (7th Cir. 1997),

*In Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998),

*"Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996).

*. "Hendricks- Robinson*, 154 F.3d at 693 (internal citations omitted);

*see also Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 486-87 (7th Cir. 1997) (holding that the employer must "ascertain whether he has some job that the employee might be able to fill.")

*See Hendricks*, 154 F.3d at 693;

*Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996).

*Third, , the Ninth Circuit Court of Appeals ruled on a very important case of disability discrimination, where a Non-disabled employee won a ADA case. The Court held that an employee who was not, in fact, disabled, but who the employer "regarded as disabled" as a result of his workers compensation claim, is still protected from discrimination under ADA... On June 26*

*HOLIHAN, v. LUCKY STORES, INC.*, No. 95-55409, 9th CA, (96 C.D.O.S. 4714)

Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999),

The Americans with Disabilities Act of 1960 sec. 12111(9) of the ADA requires an employer to reassign a disabled employee to a vacant position for which the employee is otherwise qualified.

See Gile, 95 F.3d at 499; Hendricks-Robinson, 154 F.3d at 694-95;

Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998);

DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th Cir. 1998).

Hendricks-Robinson, 154 F.3d at 694



## **STATEMENT OF JURISDICTION**

**Robin Burgener appeals for a judgment from the Utah Court of Appeals.**

**Rule 54(b). This appeal is from an order in a multiple multiple claim case in which the order has been certified as a final order by the Utah Labor Commission pursuant to Rule 54(b), Utah Rules of Civil Procedure.**

**The Utah Court Of Appeals has jurisdiction pursuant to Section 78-2a-3 Utah Code Ann.1953 As Amended**

**LabCorp employed more than 15 employees and Robin F. Burgener filed this complaint within 180 days from the last date of the harm. Thus, all jurisdictional requirements have been met as required by the Americans with Disabilities Act of 1990, as amended, Utah Anti-discrimination Act Utah Code Ann. Title 34A. Chapter 5)**

## **STATEMENT OF ISSUES**

**I      SSUE 1: Whether Ms Burgener has met the prima facie case of discrimination based upon her disability and. was disabled under the meaning of the applicable statues ;**

- a. and her impairment sustantially limited one or more major life activity.**
- b. and her impairment is either permanent and or long-term**
- c. and that her medication does not “cure” or “correct”**
- d. and that LabCorp both knew of her disability, and acknowledged that, they “regarded as” [Ms. Burgener] to be disabled”**
- e. that Ms. Burgener repeatedly requested reasonable accommodation with a transfer to the day shift from the graveyard shift because of her disability.**

**ISSUE 2: Whether Ms Burgener was discriminated against when she was denied a reasonable accommodation based on her disability and that LabCorp knew of her disability**

**ISSUE 3: Whether Ms Burgener was further discriminated against when she was denied a day shift position stating she was not qualified for it;**

- a. in favor of a non-disabled employee who was selected to “underfill” the position and transferred from the night shift, who had exactly the same education**

## STATUTES AND RULES

28 U.S.C. ' 1291.....	1
42 U.S.C. ' 2000e-2(a)(1) and (3) .....	3
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## STATEMENT OF CASE

### A. Course of proceedings and disposition in the court below.

On September 23, 1997, Burgener filed a complaint with the EEOC the UALD charging that her termination effective September 24, 1997, violated The Americans with Disabilities Act of 1960, as Amended, and the Utah Anti-discrimination Act of 1965, as Amended, because she believed she was discriminated against based on her Disability; Anxiety Disorder (with Severe Panic Attacks), Major Depression and Sleep Disorder.

On May 5, 1999 a fact finding conference was scheduled by the Utah Labor Commission, Anti-discrimination and Labor Division to determine “the merits of the Charge of Discrimination”; and “whether the respondent (LabCorp) should be ordered to provide relief to the Charging Party (Robin Burgener) as authorized by Section 34A-5-107(5)(d), U.C.A.”. LabCorp requested a continuance. The initial hearing was finally conducted on May 18, 1999

At the conclusion of that hearing as well as an extensive investigation conducted by Bel J. Randall, Presiding Officer of the Anti-discrimination and Labor Division, a Findings Of Facts and Determination was submitted for review and re-evaluated by both his immediate supervisor, and the Utah Labor Commission Director of the Anti-discrimination and Labor Division, Joseph Gallegos Jr. (76-86). It is important to note that the merits and facts of Burgener’s case passed all three individuals re-evaluations,

and all three concurred with the decision. On April 17, 2000 a Determination was issued which concluded that: **“the evidence is sufficient for the Division to conclude that the Respondent (LabCorp) failed to provide reasonable accommodation to the Charging Party (Robin Burgener) and that the Charging Party (Robin Burgener) was subsequently discharged resultant from her disability”. “The evidence is also sufficient for the Division to conclude that the Respondent’s (LabCorp) position that not having provided a reasonable accommodation in the form of a transfer to the day shift Medical Technologist position was she not qualified is unworthy of credence.” (76-86)**

On May 5, 2000 LabCorp wrote a letter of formal request to appeal the Order dated April 17, 2000.

On August 30<sup>th</sup>, 2002 an Order of Denial was issued to Burgener which wrongly reversed the prior Decision and Order by the adjudication division of the Utah Labor Commission stating their reason to be because:

**“Ms. Burgener factually and leagly failed to qualify as disabled under provisions of Utah Code 34A-5-106”.**

The **rational used to derive at that conclusion** was and I quote:

**“Ms Burgener’s initial onset of depression and anxiety in fact constituted an**

**impairment that substantially limited her with respect to the major life activities of: (1) sleep; (2) self care; (3) parenting, and; (4) management of her household. However, after the first six weeks following the death of her mother, Ms. Burgener successfully corrected and mitigated her depression with Prozac.**

Burgener filed a Motion for Review on May 25, 2002 and recieved a denial on .

Burgener

filed a motion for reconsideration on September 19, 2002 which also was denied on October 31, 2002.

Burgener filed a petition for review with the Utah Court of Appeals and assigned appellate court number 20021000-CA, on November 29, 2002.

## **STATEMENT OF FACTS**

Robin Burgener graduated from Bear River High School in 1974. After working over thirteen years as a Receiving Supervisor and Industrial Engineering Technician at American Greetings, the company closed all of it's Utah operations and relocated to the State of Kentucky. Rather than transfer to Kentucky, she decided to return to school and continue her Collage education. Ms. Burgener enrolled at Weber State University, in the Clinical Laboratory Sciences Program, where she successfully earned a Associated Of Science Degree on With a GPA of 3.40

Burgener worked over six years for LabCorp as a Medical Laboratory Technician

in the Hematology department at the Murray, Utah facility. After earning an Associated of Science Degree in Clinical Laboratory Sciences and successfully completing the Association Society of Clinical Pathology, Registry, Burgener was very happy with her employment position at LabCorp.

Although Burgener worked the graveyard shift , running from 8:00 p.m. to 6:30 a.m., and without complaint over the next five years, she received excellent performance evaluations describing her as a “excellent employee” “a valuable asset” and a “very competent, thorough and accurate employee”. Burgener had been full time employed at LabCorp for over six years, was fully vested in the company and had every intention of remaining with the company until retirement.

Subsequent to her Mother’s death, ( her Mother had lived with **Burgener** for all but five years of Burgener’s life and continuos for the seven years prior to her death), Burgener took three days bereavement between March 24<sup>th</sup>, 1997 and March 27<sup>th</sup>, 1997. . Burgener attempted to return to work on Friday, March 28<sup>th</sup>, 1997, and had an emotional "breakdown" at work. She started crying uncontrollably and told supervisor Yvonne Hendrick’s that she “thought she was losing her mind”. Burgener tried resting for a spell then returning to work, but was still unable to focus, concentrate, or remember what she was doing, as well as, again experiencing severe Anxiety and Panic Attacks. She was sent home by her supervisor, Yvonne Hendrickson.

Burgener attempted to return to work the following night, and was again

unsuccessful. Burgener was still unable to focus, concentrate, or remember what she was doing, experiencing the same symptoms of severe Anxiety and Panic Attacks. She was once again sent home by her supervisor. who had told her that in fact she was not released to return to work as yet anyway, and that she needed to go to her doctor for an evaluation prior to attempting to return to her duties for the third time. Burgener was able to get an appointment with her then family physician, Dr. Douglas Douville on April 3rd, 1997. Burgener reported to her doctor her **feelings of hopelessness and helplessness and how she suffered from insomnia and constant anxiety. She slept only a few hours a day, struggled to perform routine household chores, got lost while driving and felt perpetually fatigued, was irritable, was easily distracted, and had difficulty with the ability to focus and concentrate.** After a complete examination, tests and evaluation with Dr. Douville, Burgener was diagnosed with “Severe Depression” and he wrote a note to LabCorp which stated she should be excused from work until April 6<sup>th</sup>, 1997. On April 3<sup>rd</sup>, 1997 Dr. Douville’s notes stated that: **Since her Mother’s death, she has significant grief reaction with all of the classic signs of depression**”. [Exhibit “P-11”]

On April 7<sup>th</sup>, 1997, Burgener returned to her doctor prior to her shift for further follow up. At that time Dr. Douville determined that she **was still suffering from “Severe Depression”** Dr. Douville observed that “ **Burgener had significant problems sleeping**” and **prescribed Valium.**[id.]. On that date he recorded in his notes: “**The depression persists and is very problematic as she cannot concentrate**”. **ASSESSMENT: Grief**



reaction which is looking more like a major depression”.. He again wrote a note to LabCorp which stated she was still unable to return to work due to the “Severe Depression”. He further stated she should probably be able to return to work on April 14<sup>th</sup>, 1997.

On April 18<sup>th</sup>, 1997, . Burgener again had a follow up appointment prior to what was to be her first scheduled shift after April 14<sup>th</sup>, 1997. After several medical tests, Dr. Douville determined that. Burgener was still suffering from “Anxiety and Severe Depression”, which continued to make her unable to return to work. On that same date, Dr. Douville began Burgener on Prozac 10 mg, and advised her that she **had suffered a complete physical and emotional breakdown as a result of the years of graveyard work.** He stated her body and mind were reacting to **complete burnout**, and that **she should no longer work a grave yard shift.** He stated that her Mother’s death in the middle of the night quite **probably** was the final trigger point **coupled with the sleep deprivation that she had been experiencing for several years.** He again wrote LabCorp a note which stated she would be re-evaluated on April 28<sup>th</sup>, 1997. At that point he made the recommendation that . Burgener be transferred to a daytime position when she returns to work. (Please see note from Dr. Douville dated 4/18/97 in the first hearing file with Bel Randell). Dr. Douville’s note stated: “Robin’s **anxiety and depression** continues to make **her unable work...Recommend she be moved to daytime work when she returns.**”

**ASSESSMENT: Grief reaction which is looking more like a major depression.**

On April 18<sup>th</sup>, 1997, immediately following her doctor appointment, Burgener went

to LabCorp with her note from Dr. Douville, which stated she was still unable to return to work and with his recommendation for a transfer from the graveyard shift. While at LabCorp, Burgener went to the Human Resources Department and made a request for a transfer to a day shift. She stated to the Human Resource Manager, Vicky Romero, that it was at her doctors Medical Advice which was documented in his note. Romero immediately responded to Burgener, “that it was not possible for her to change shifts”. Romero further stated that if Burgener was “not able to immediately return to her graveyard shift, her only option was to go on Short Term Disability”.

On April 28<sup>th</sup>, 1997, Burgener once again returned to her doctor for follow up. Dr. Douville again stated that Burgener continued to suffer from **“Severe Depression”** and was still **unable to return to evening or night shift work**. On that same date Dr. Douville provided Burgener with a work release note **with the stipulation** that she **was able** to return to work **as long as it was to a daytime shift**. He advised her that she **still remained unable to work the graveyard shift and most likely would not ever be able to work nights again**. After **four weeks** of unsuccessful treatment for the Major Depression, He [Douville] referred her to a mental health professional for further evaluation and treatment if necessary He further stated she would be re-evaluated on May 12<sup>th</sup>, 1997. When she submitted her Medical Note to LabCorp she again requested a transfer to a day shift position so that she could return to work as soon as possible. Once again . Burgener was told that she would not be able to transfer to a day shift. Burgener also contacted her Human Resources

Manager, Vicky Romero about the Employee Assistance Program provider and was given Dr. Donna Moxley-Castleton's name.

On May 2<sup>nd</sup>, 1997 . Burgener saw Dr. Donna Moxley- Castleton, DSW, LCSW, BCD for counseling [Exhibit "P-10"] . Dr. Castleton noted that . Burgener "could not concentrate" and was "forgetful", [id.] Dr. Castleton initially diagnosed Burgener with: DSM IV

Axis. I:	296.3x	Major Depression
	300.00	Anxiety Disorder
	309.28	Adjustment Disorder
	V62.82	Bereavement
Axis. II:	V71.09	No Diagnosis
Axis. III:		Mental and Physical Exhaustion
Axis IV:		Severe

On May 12<sup>th</sup>, 1997 . Burgener was once again re-evaluated by Dr. Douville. He explained to . Burgener that the combination of working **nights** for six years, **suffering from sleep deprivation for the few years prior**, along with all the **stress** with her Mother's care and raising her daughter as a single parent contributed to the **burnout**, "**Severe Depression**", "**Anxiety**" and "**Panic Disorder**". He went on to say, that her Mother's death in the middle of the night, (which would have been during **her** graveyard shift if it had not been her day off) was the final trigger point causing the **breakdown**. Dr. Douville likened

it to **PTSD (Post Traumatic Stress Disorder)**. At the conclusion of that visit Dr. Douville stated yet again, that . Burgener was **still unable to work evening and night shifts** due to **“Serious Depression”**. He further advised . Burgener that **for health reasons she was no longer able to work evening and night shifts.**

On May 15<sup>th</sup>, 1997 Dr. Douville stated “Robin continues to be unable to work night shifts due to **‘Severe Depression’** [Exhibit P-11"]

On July 3<sup>rd</sup>, 1997 Dr. Castleton wrote a note to LabCorp, Human Resource Manager, Vicki Romero which stated: “Robin Burgener has been a patient of mine since May 2<sup>nd</sup>, 1997 for **Major Depression** following her Mother’s death. She stated . Burgener is **medically unable to work evenings or nights.** [id].

On August 29<sup>th</sup>, 1997 Dr. Castleton wrote a letter stating: “Robin Burgener has been under my care for the treatment of Depression and Panic Disorder since May 2<sup>nd</sup>, 1997. I am coordinating treatment with her family physician who is monitoring her medication. He recently increased Robin’s anti-depressant medications in an attempt to stabilize her **current condition**. Given Robin’s **current psychiatric state**, I, (Dr. Castleton), **am exploring more intensive treatment alternatives which may include day treatment and/or possibly an inpatient stay**”. [id]

Burgener testified at both hearings that her depression affected her in a manner she equated to **feeling like she “living underwater”**. She stated that: “ **nothing came into focus for her**”. Burgener said she **“got out of bed late or not at all.”** She stated that she

**“lacked the ability to parent her daughter including the provisions of discipline” or “even help with her homework”.** Burgener testified, she **“went days without bathing or grooming”,** and **“performed no housework”** Burgener further testified, that because **“lost the ability to handle her finances”,** she lost her home to foreclosure.

Burgener stated that **“because her mind drifted” “she couldn’t watch tv” “or read books”** She further testified about how she **“got lost on walks or driving in her neighborhood”** Burgener further testified about **“the problems she experienced with sleeping”**

Dr. Douville made several written statements in the record

**“that on 4/3/97 she had**

**significant grief reaction” “with all of the classic signs of depression”**

**“that on 4/7/97 the depression persists and...” “is very problematic as she...”**

**“cannot concentrate”**

His assessment on April 7<sup>th</sup>, 1997 was

**“Grief reaction which is looking more like...”**

**“Major Depression”**

Dr. Douville noted Robin’s

**“Anxiety and Depression continue to make her unable to work”**

**“Recommend she be moved to day time work when she returns”**

On April 18<sup>th</sup>, 1997 after several medical tests, Dr. Douville determined that . Burgener was

**“still suffering from Anxiety and Severe Depression”**

**“advised her she had suffered a physical and emotional breakdown”...**

**“as a result of years of graveyard work”**

**“her body and mind were reacting to complete burnout”**

**“that she should no longer work a graveyard shift”**

He further stated on that date, that her Mother’s death

**“unable to return to evening or night shift work”**

**“quite probably was the final trigger point”**

**“coupled with the sleep deprivation that she had experienced for several years”**

**“made the recommendation that . Burgener be transferred to a daytime position when she returns to work”**

Dr. Douville’s notes stated

**“Robin’s Anxiety and Depression continues to make her unable to work”**

**“Recommend she be moved to daytime work when she returns.”**

**“prescribed 10mg of Prozac”**

On April 28<sup>th</sup>, 1997 Dr. Douville advised . Burgener that she

**“still remained unable to work the graveyard shift”**

**“and most likely would not ever be able to work nights again”**

On April 28<sup>th</sup>, 1997, Dr. Douville referred . Burgener to Dr. Donna Moxley Castleton for evaluation and counseling if needed.

**“for the Major Depression and Anxiety”**

On that same date, April 28<sup>th</sup>, 1997 Dr. Douville provided . Burgener with a work release note which stated **“. Burgener continues to suffer from Severe Depression”**

That work release note further **stipulated** that Burgener was:

**“able to return to work as long as it was to a daytime shift”**

On May 2<sup>nd</sup>, . Burgener saw Dr. Donna Moxley Castleton evaluation. Dr. Castleton noted

**“could not concentrate” “was forgetful”**

Dr. Castleton initially diagnosed . Burgener with

**“Major Depression” “Anxiety Disorder” “Adjustment Disorder”**

**“Bereavement” “Mental and Physical Exhaustion”** And rated her condition as

**“Severe”**

On May 12<sup>th</sup>, Dr. Douville explained to . Burgener that the combination of working nights

for six years **“suffering from sleep deprivation for the few years prior”** along with

**“all the stress with her Mother’s care” “her Mother’s sudden death in the middle of**

**the night”** and **“raising her daughter as a single parent”** contributed to the **“burnout”**

**“Severe Depression” “Anxiety” “Panic Disorder” “final breakdown”**

Dr. Douville likened it to

**“PTSD (Post Traumatic Stress Disorder)**

On May 15<sup>th</sup>, 1997, Dr. Douville stated

**“Robin continues to be unable to work night shifts due to Severe Depression”**

On July 3rd, 1997, Dr. Castleton wrote a note to LabCorp which stated . Burgener has

**“been a patient of mine since May 2<sup>nd</sup>, 1997”**

**“for Major Depression” “following her mother’s death”**

**“and is medically unable to work evenings or nights”**

**“She is anxious to return work but requires a day time job”.**

On July 7<sup>th</sup>, 1997, Dr. Douville wrote a note to LabCorp which stated:

**“Robin continues to be unable to work night shifts secondary to Depression and**

**Anxiety associated with working these shifts”**

On August 20<sup>th</sup>, 1997 Dr. Douville wrote a note to LabCorp which stated:

**“Robin continues to be unable to work nights”**

**“I am referring her to a psychiatrist”**

**“and increasing her medication”**

On August 29<sup>th</sup>, 1997 Dr. Castleton wrote a letter stating:

**“Robin Burgener has been under my care for the treatment of Depression and**

**Panic Disorder since May 2<sup>nd</sup>, 1997.”**

**“I am coordinating treatment with her family physician who is monitoring her medication.”**

**“He recently increased her medications in an attempt to stabilize her current condition”**

**“I have many concerns about her mental health at this time to effectively cope**



**with added stress and worry”**

Dr. Castleton further stated in that letter dated August 29<sup>th</sup>, 1997, that:

**“Given Robin’s current psychiatric state, I” (Dr. Castleton)**

**“am exploring more intensive treatment alternatives”**

**“which may include day treatment”**

**“and/or possibly an inpatient stay”**

Burgener told both her family Doctor and her Therapist that she had been able to sleep only a few hours a day for the past few years prior to her Mother’s death. She further reported that she "could not function properly" and felt like was "going crazy." Both Dr. Douville and Dr. Donna Moxley-Castleton diagnosed Burgener with Depression and Anxiety Disorder and Panic Disorder because Burgener was suffering from feelings of "hopelessness and helplessness" and experiencing "fatigue, irritability, distractibility, [and] difficulty concentrating."

Dr. Castleton noted that Burgener's anticipatory anxiety over getting enough sleep each night and the sheer exhaustion from insomnia exacerbated Burgener’s condition, and she continuously instructed Burgener to seek a transfer to a daytime shift.

Continuously throughout her treatment with Dr. Douville for this condition, he maintained the medical opinion that she was medically unable to continue working at night,, and went on to state that it was **“unlikely she would ever be able to work nights again”**, without the probability of suffering another complete physical and emotional breakdown.

## SUMMARY OF ARGUMENT

A. First, LabCorp claims that there lacked sufficient evidentiary basis to find that Burgener was a qualified individual with a disability under the ADA. Specifically, LabCorp argues that Burgener did not provide them with a reasonable basis to find that her requested accommodation--a transfer from the night shift to a daytime shift--would have enabled her to perform the essential functions of her job. The ADA requires accommodation only for a "qualified individual with a disability" who can perform her job with or without reasonable accommodation. See *Vollmert v. Wisconsin Dep't of Transp.*, 197 F.3d 293, 297 (7th Cir. 1999). The ADA thus mandates that an employer make reasonable accommodations only if accommodation would permit the disabled employee to perform her job, and an employer need not grant a disabled employee's request for an accommodation that would be an "inefficacious change." *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995). In *Weigel v. Target Stores*, 122 F.3d 461, 469 (7th Cir. 1997),

Burgener repeatedly demonstrated **that she was a qualified individual under the ADA.**, and " **that she could return to work with her requested accommodation of a change of shift from graveyard to a day shift**, which the employer had rejected..

Unlike LabCorp, Ms. Burgener presented an endless stream of documentation from her Doctors as well as her medical records concerning both her physical and psychological symptoms including the need for a transfer to a daytime shift.

Furthermore, Burgener testified that the anticipatory anxiety over being able to get enough sleep each night and the sheer exhaustion from insomnia exacerbated her [Burgener's] condition. Dr Castleton and Burgener explained to Romero that regular daytime work would have stabilized her sleep patterns and reduced the anxiety and stress attendant to her psychological conditions.

Although a shift transfer may not have cured Burgener's condition altogether, a rational decision easily could conclude that a shift transfer would have alleviated her symptoms such that Burgener could have performed her job. Indeed, once Burgener returned to work on daytime shifts in January 1998, Burgener's condition did benefit from the regular work and sleep schedule. Burgener sufficiently established that she was a qualified individual with a disability who could have performed her job with reasonable accommodation.

Second, In *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998), the respective obligations of employer and disabled employee in executing the accommodation process. The employee first must act by informing the employer of her disability. See *id.* Burgener duly notified LabCorp of her disability and requested accommodation, in excess of 16 times. Dr Douville wrote over 8 medical notes to LabCorp and Fortis (LabCorp's Long and Short Term Disability provider), over a nine month period, stressing the need for Burgener to be transferred to a day shift due to her disability. In addition, Dr Castleton reported to LabCorp (as part of the Employee

Assistance Program evaluation for fitness for duty), **and wrote 3 notes and 1 letter**, also stating the necessity for LabCorp to transfer Burgener to a day shift. At that point, the ADA obligates the employer to "engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996). This step "imposes a duty upon employers to engage in a flexible, interactive process with the disabled employee needing accommodation so that, together, they might identify the employee's precise limitations and discuss accommodation which might enable the employee to continue working." *Hendricks-Robinson*, 154 F.3d at 693 (internal citations omitted); see also *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 486-87 (7th Cir. 1997) (holding that the employer must "ascertain whether he has some job that the employee might be able to fill."). Although LabCorp argues that Burgener's proposed accommodation would have been ineffective, LabCorp had the affirmative obligation to seek Burgener out and work with her to craft a reasonable accommodation, if possible, that would have permitted her return to work. See *Hendricks*, 154 F.3d at 693; *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1286 (7<sup>th</sup> Cir. 1996).

LabCorp failed its obligations under the ADA. In the face of Burgener's repeated pleas for a shift transfer. **LabCorp refused her request for a modest accommodation, then did nothing to engage with Burgener in determining alternative accommodations** that might permit Burgener to continue working. Romero provided no help at all except to

suggest that

**"Ms Burgener just go on Short-term Disability. LabCorp's only action in the subsequent months was to terminate Burgener on September 24, 1997--a move that LabCorp subsequently denied was related to her disability. LabCorp made no effort to accommodate Burgener.**

Third, On June 26, the Ninth Circuit Court of Appeals ruled on a very important case of disability discrimination, where a Non-disabled employee won a ADA case. The Court held that an employee who was not, in fact, disabled, but who the employer "regarded as disabled" as a result of his workers compensation claim, is still protected from discrimination under ADA...

In Holihan v. Lucky Stores, the employee was on medical leave of absence when he started working two other jobs. The company terminated his employment. He reapplied for employment but there were no openings at his level. Rather than accepting a lower job, the employee sued. Management then offered Holihan a choice of either suspension pending Lucky's investigation into the allegations, or a standard leave of absence if he contacted Lucky's Employee Assistance Program (EAP) for counseling. Holihan contacted the EAP and began a medical leave of absence. The EAP referred Holihan to Dr. Jonathan Strickler, a psychologist, who diagnosed Holihan as "experiencing stress related problems precipitated by work" and recommended he not return to work for about 6 months. This diagnosis was forwarded to Lucky., The Court of Appeals held that Holihan was not disabled under the

Americans with Disabilities Act (ADA) because his mental impairment did not substantially limit any of his major life activities. Even if Holihan couldn't perform his store manager job, the fact that he worked in the sign-making business and in real estate showed that he was not disabled. **However, the Court went on to hold that even if Holihan were not actually disabled, the ADA prohibits discrimination against individuals "regarded as" disabled. If Lucky regarded Holihan as disabled, Holihan would have a "disability."**

Since Lucky knew about the doctors' reports diagnosing Holihan with depression, anxiety and stress, Lucky could have regarded Holihan as suffering from a disabling mental condition that substantially limited his ability to work. Therefore, the Court ordered Lucky to go to trial on the case. *Holhan v. Lucky Stores, Inc* No. 95-55409, 9th CA, (96 C.D.O.S. 4714)

This case has significant impact on management's response to employees with disabilities. It indicated that even where management applies policies consistently for legitimate business reasons, there is potential liability involved in even routine decisions about firing employees who have been on workers compensation.

When Romero provided no help at all except to suggest that "Ms Burgener just go on Short-term Disability Benefits, and in fact placed Burgener on Short Term Disability until her termination on September 24, 1997, LabCorp proved they **"regarded [Burgener] as" disabled, and as such, Burgener** was still protected from discrimination under ADA.. **Since LabCorp regarded Burgener as disabled, Burgener would have had a**

"disability". Fourth, LabCorp's argument raised only in appeal, said that the assessment of Burgener's disability was made without regard to mitigating measures, namely the medications that Burgener took to treat her depression and anxiety. A year after the initial hearing's close, the Supreme Court decided in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999), and held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."

**LabCorp alleges only that Burgener's condition improved under medication, and therefore the conclusion that Burgener was not disabled when medicated. In fact, Burgener suffered significant impairment despite the medication. Burgener began taking medication in April 1997, and nearly all the relevant events of the case occurred while Burgener was taking regular medication but still suffering serious depression and anxiety. Burgener continues to suffer from Major Depression (Chronic and Recurrent), Severe Anxiety (Chronic and Recurrent ) and Panic Attacks (Recurrent). She continues to be treated for the Major Depression, Severe Anxiety, and Panic Attacks, and continues to be prescribed a daily antidepressant and anti-anxiety medication, as evidenced by copies of her medication (Prozac) labels for as recent as last month.. Please note the dosage is now 40 mg per day compared to the 10 mg dosage she was on when this claim was initially filed. Over the past seven and a half years Burgener's medication dosage has been increased four times thus far, each time because the medication level was**

**ineffective in minimizing the severe symptoms associated with the Chronic Major Depression , Anxiety Disorder and Panic Attacks.**

It is Burgener's contention that Sutton in the context that it has been cited for this case does not support the denial of disability determination. The Court in Sutton, concluded;

[i]t is apparent that if a person is taking measures to **correct for or, or mitigate**, a physical or mental impairment, the effects of those measures- positive and negative- must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus 'disabled' under the Act.

\*\*\*\*\*

**To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment**, but **if the impairment is corrected** it does not 'substantially limi[t]' a major life activity.id

The medication helps to reduce the symptoms of her diagnosed Major Depression, Severe Anxiety and Panic Attacks. **It does not cure or 'correct'** the Major Depression, Severe Anxiety and Panic Attacks. **Even with the medication, Burgener remains unable to work the "graveyard" and "night" shift. Those shifts increase and elevate the symptoms of the Severe Anxiety and Panic Attacks, which in turn causes her to experience a Major Depressive Reaction With Anxiety State Features. Burgener's current employer has provided. Burgener with the same reasonable accommodations**



she requested from LabCorp, that is a day shift laboratory position.

The Court in Sutton went on to hold that:

The term “substantially limits” means among other things, “[u]nable to perform a major life activity that the average person in the general population can perform;” or “[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same life activity.” (Citation omitted). Finally, “[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” (Citation omitted). id

The average person in the general population is able to perform their job duties on the graveyard shift without experiencing episodes of the disabling symptoms of severe Anxiety and Panic Attacks and most often resulting in a Major Depressive Reaction With severe Anxiety and Panic Attacks.. Burgener was at the time she filed her charge of discrimination, [and remains even today], unable to work the graveyard shift without experiencing episodes of the disabling symptoms of severe Anxiety and Panic Attacks and which most often do result in a Major Depressive Reaction With Anxiety and

### **Panic Attacks.**

Fifth, The ALJ correctly ruled in part that **“the preponderance of evidence in this case confirm that after the death of her mother on March 24, 1997 Ms Burgener suffered a bout of severe disability , anxiety, and bereavement”**. The ALJ went on to say, **“the undisputed facts in this case confirm that”...**the impairment caused by Ms Burgener’s depression and anxiety limited her major life activities of: ( 1) sleep; (2) self care; (3) parenting, and; (4) management of her household..

The part that is in dispute is where the ALJ erred when he ruled that **“after the first six weeks following the death of her mother, the preponderance of the evidence in this case demonstrated tha Ms Burgener successfully managed her depression with Prozac”**.

The medication helps to reduce the symptoms of her diagnosed Major Depression, Severe Anxiety and Panic Attacks. **It does not cure or ‘correct’** the Major Depression, Severe Anxiety and Panic Attacks. **Even with the medication, Burgener remains unable to work the “ graveyard” and “ night” shift. Those shifts increase and elevate the symptoms of the Severe Anxiety and Panic Attacks, which in turn causes her to experience a Major Depressive Reaction With Anxiety State Features. Burgener’s current employer has provided. Burgener with the same reasonable accommodations she requested from LabCorp, that is a day shift laboratory position.**

Sixth, LabCorp failed to provide Burgener with the reasonable accommodation of a transfer from the graveyard shift to a day shift. LabCorp concedes that a daytime position was vacant throughout the period during which Burgener was requesting a transfer, but stated that Ms. Burgener was not qualified for the position that she requested. The late part of August and early of September, 1997, Burgener applied for a day shift Medical Technologist position in the Hematology Department at the Murray facility.

Burgener was not selected reportedly because she did not have a four year degree, and therefore, reportedly, did not meet the minimum qualifications for the position. However, it is important to note that LabCorp selected another employee for that same Medical Technologist position who did not meet the minimum qualifications in that she also did not have a four year degree. LabCorp's rationale for selecting another employee for the position in question was that even though the employee did not meet the minimum qualifications for the position, she was assigned the position temporarily because she had experience working in the Hematology Department. Burgener had been employed by LabCorp in the Hematology Department continuously from August 26<sup>th</sup>, 1991 as a full time Medical Laboratory Technician, thus had six (6) years experience. LabCorp asserted that Burgener did not have the necessary experience and therefore, was not as qualified as the selected employee and that Ms. Burgener would have required some additional training to make her proficient in the position. In addition, LabCorp further asserted that there are certain functions which the selected employee could not perform because she is not a

Medical Technologist. LabCorp stated those functions are assigned to other Medical Technologists from other Departments.

A review of the selected employee's performance file and her appraisal dated November 12, 1997, reflects the employee needed additional training to become proficient in this temporary assignment". Insert source pg . **A review of Burgener's employment history and educational level, reflects she had the same two year degree, a degree in Clinical Laboratory Science, fulfilled all of the knowledge and competency requirements to be certified as a Medical Laboratory Technician by the Board Of Registry, American Society of Clinical Pathologist. In addition, Ms, Burgener had more experience as a Medical Laboratory Technician and had been employed by LabCorp longer than the selected employee. Furthermore, LabCorp's representatives testified at the initial hearing, that Burgener was an excellent employee.**

The preponderance of the evidence clearly shows that both Dr's Douville and Castleton repeatedly and continuously wrote notes to LabCorp stating that Ms. Burgener was unable to return to work on the graveyard shift, and that Ms. Burgener needed a transfer to the day shift. .Dr. Douville wrote **EIGHT** Notes to LabCorp repeatedly telling them [ LabCorp] that Burgener needed to transfer to a day shift. Dr.Castleton wrote **THREE** Notes , 1 letter and verbally reported to LabCorp (as LabCorp's Employee Assistance provider and evaluator for employee's fitness for duty), on a regular basis, each time reemphasizing Burgener's inability to work

**graveyard shift and the need for Burgener to transfer to a day shift. In addition, Burgener formally asked LabCorp for a transfer to a day shift from the graveyard shift over 16 times.**

**LabCorp made no determined attempt to provide a reasonable accommodation for Burgener by allowing her to under fill the day shift Medical Technologist position. The record further reflects LabCorp allowed another Medical Technician to under fill the position but did not consider Burgener, despite her superior qualifications. In addition, LabCorp provided no evidence to suggest that to allow Ms. Burgener to under fill the position would have created an undue hardship. LabCorp's position has been that Burgener would have required additional training to be proficient in the position. The record reflects that the employee who was ultimately placed in the position also required additional training. Furthermore, the temporary assignment which was given to Medical Technician began in September, 1997 and continued until the incumbent resigned her full time employment with LabCorp, in February, 1999.**

**LabCorp acknowledges that a daytime positions was open throughout all the events of this case prior to her termination, and that Burgener had applied for it.**

**Under the circumstances, the ADA requires that LabCorp transfer Burgener to a vacant daytime position. Although the ADA does not obligate employers to "bump" other employees or create new positions, sec. 12111(9) of the ADA requires an employer to reassign a disabled employee to a vacant position for which the**

employee is otherwise qualified. See Gile, 95 F.3d at 499; Hendricks-Robinson, 154 F.3d at 694-95; Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998); DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th Cir. 1998). The employer is obligated to "identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites" and consider "transferring the employee to any of these other jobs. " Dalton, 141 F.3d at 678. is wrong to say that it constitutes "affirmative action" to reassign Burgener to a vacant position for which she was entitled by equal qualifications and seniority and which would have accommodated her disability.

Although the ADA does not require the employer to abandon its legitimate policies regarding job qualifications and entitlements to company transfers, LabCorp cannot seriously claim that the procedural requirement of selecting the other employee with exactly the same educational credentials and less seniority was too important for LabCorp to bypass when a daytime position was open and Burgener had applied for it. In Hendricks-Robinson, the defendant's policy of posting job openings and insisting that disabled employees independently learn of and apply for new positions was insufficient to satisfy the employer's duty under the ADA to investigate the possibility of transferring disabled employees. Hendricks-Robinson, 154 F.3d at 694. LabCorp did not notify or invite Burgener of the posted position opening. Burgener saw it posted on the bulletin board one of the many times she went into Human Resources requesting a transfer to a day shift. Likewise, LabCorp

failed its duty of reasonable accommodation because it took no action other than to reject Burgener's request. By refusing her request and assuming no further duty to accommodate her requests for a shift transfer failed its ADA obligation.

Seventh, The ALJ erred when he ruled that Burgener's disability only lasted six weeks. It was four weeks before Dr Douville "referred, Burgener to a mental health professional for evaluation and treatment if necessary", because Dr. Douville was unable to stabilize any of Burgener's disabling conditions, which included but were not limited to her Major Depression, Anxiety Disorder, Panic Attacks and Sleep Disorder as well as the numerous disabling problems associated with the above, with the "mitigating medications".

Burgener remained in therapy with Dr Castleton, at her own expense, nearly two months after she was terminated as evidenced by the attached billing statement dated 12/01/97. From March 24, 1997 through December 1, 1997, is in excess of seven months, considerably longer than the six weeks the ALJ claimed. that point in time,

Burgener's medical and prescription records since December 1997 verify that Burgener is still being treated for the Major Depression and Anxiety Disorder.

Employee Assistance benefits terminated along with her employment, and since Burgener was wrongfully unemployed, [she] did not have the financial resources to continue her therapy treatment with Dr. Castleton. Burgener continues to be treated for her Major

Depression, Anxiety Disorder and intermittent Panic Attacks, by her family physician who evaluates, prescribes and monitors Burgener's medications. Burgener has remained in treatment for the Major Depression, Anxiety Disorder, and Panic Attacks continuously since April 3, 1997. as well as treatment for her sleep disorder



anxiety, and panic attacks.

Burgener continues to be treated for her Major Depression, Anxiety Disorder and intermittent Panic Attacks, by her family physician who evaluates, prescribes and monitors Burgeners medications. Burgener has remained in treatment for the Major Depression, Anxiety Disorder, and Panic Attacks continuously since April 3, 1997. as well as treatment for her sleep disorder. Burgener now uses a C-Pap Maching each night to help

The medication does not cure or correct the depression or anxiety disorder. Even with the medication,, and even now, more than seven years after [her] charge of io discrimination, Burgener remains unable to work the “graveyard” and night shifts. Those shifts increase the elevation of symptoms associated with the depression severe anxiety disorder, causing the panic attacks, which in turn causes Burgener to experience a major depressive reaction and anxiety state.

Burgener’s medical doctors have advised Burgener that these conditions are a lifetime diagnosis, which medication which medication and therapy will help, but not cure or correct. The diagnosed conditions are chronic and recurrent. Burgener was disabled within the meaning of the Act when this UALD/EEOC AND ADA charge of discrimination was filed on September 24, 1997, and Burgener continues to be “disabled” within the meaning of the Act today, now a full seven years later. Burgener met the test of “disabled” within the meaning of the Act, when {she} was repeatedly diagnosed and treated for both physical and mental impairment which substantially limited her with respect to several major life activities . of: ( 1) sleep; (2) self care; (3) parenting, and; (4) management of her household..

.Burgener was entitled to reaasonable accommodations by LabCorp in order for [her] to be able to return to gainful employment. Burgener was, and remains able to work in her field on a daytime shift, (The reasonable accomodation she requested from LabCorp over 16 times, that **Dr. Douville** also requested over 8 times, on her behalf from both **LabCorp** and **Fortis**, and that addition, and finally, that **Dr. Castleton**, LabCorp's EAP therapist also reported the need for Burgener to transfer to the day shift from the grave yard shift.

Burgener was able to work in her field on a day shift "(the reasonable accommodation" Burgener filed this chsrge of discrimination case over) as evidenced by her successful daytime position at the University Hospital which Burgener has held for the past six years

Eighth,

a)This appeal should be decided based on whether Burgener met the definition of "disabled" from April, 1997 when Burgener had her breakdown and requested "reasonable accommodation", and

b)when [she] was denied an opportunity to underfill a day shift position she applied for in the Hematology department, in favor of an individual who was selected to under-fill the position, who had exactly the same educational degree and training, with less seniority than Burgener; and who was not disabled. That position was filled the early part of September, 1997, just prior to Burgener's wrongful termination.

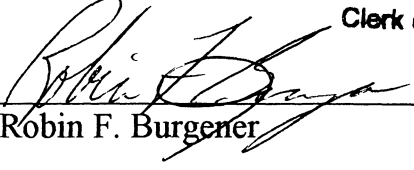
c)whether Burgener is entitled to the remedies, including but not limited to loss of wages, benefits, retirement etc, [she] was originally awarded as a result of the first findings of fact and conclusions of law, along with compensation for all costs and expenses, spent or incurred thus far to defend this charge of discrimination against LabCorp, and to make Burgener whole, along with any and all other remedies This Court may find beneficial to Burgener, as a result and consequence of LabCorp's discrimination against Burgener

I hereby certify that the foregoing BRIEF OF APPELLANT has been respectively  
submitted and filed in the office of the Clerk for the Utah State Court of Appeals on  
this 26th day of June , 2003.

**FILED**  
Utah Court of Appeals

NOV 06 2003

Paulette Stagg  
Clerk of the Court

  
Robin F. Burgener

## CERTIFICATE OF SERVICE


I hereby certify that the foregoing BRIEF OF APPELLANT has been filed in the office of the Clerk for the Utah State Court of Appeals for the Third District, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 26<sup>th</sup> day of June, 2003.

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\_\_\_\_\_  
Robin F. Burgener



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Robin F. Burgener,  
Charging Party

vs.

UALD No. 97-0722  
EEOC No. 35C-97-0844

Lab Corp.  
Respondent.

**DETERMINATION**

Under the authority vested in me by the Utah Antidiscrimination Act of 1965, as amended, I issue for the Division the following Determination as to the merits of the subject charge.

**I. JURISDICTION**

Lab Corp. employed more than 15 employees and Robin F. Burgener filed this complaint within 180 days from the last date of the alleged harm. Thus, all jurisdictional requirements have been met as required by the Americans with Disabilities Act of 1990, as amended, and the Utah Antidiscrimination Act of 1965, as amended.

**II. SUMMARY OF CHARGE**

On September 23, 1997, Robin F. Burgener, hereinafter "Charging Party," alleged that Lab Corp., hereinafter "Respondent," discriminated against her based on her Disability, Anxiety Disorder and Depression.

PAGE 2

Robin F. Burgener

DETERMINATION

### III. SUMMARY OF RESPONSE

Respondent categorically denies that the Charging Party was subjected to any discriminatory treatment. Respondent cites that Charging Party's position was eliminated due to business needs and a reduction in the size of their workforce at their Murray, Utah facility as the reason for terminating the Charging Party.

### IV. SUMMARY OF INVESTIGATION

#### A. Charging Party's Allegations

Charging Party alleges from April 28, 1997 through September 1997, she made requests for reasonable accommodation in the form of being transferred to a day shift. In addition, she alleges a day shift position that she was qualified for became available. Charging Party alleges she was told by the Respondent that she could not transfer into the position because she did not meet the minimum qualifications for the position. Charging Party alleges she was told that she could not be assigned to the position because the minimum qualification were being changed and she would need a Bachelor of Science degree in order to qualify for the position. Furthermore, Charging Party alleges that the Respondent transferred an unqualified employee into the position. Charging Party alleges that the employee who was transferred into the position had an Associate Degree and had less seniority than the Charging Party.

#### B. Respondent's Answer to Charging Party's Allegations

Respondent indicates that Charging Party began Medical Leave of Absence (Short-Term Disability) on March 24, 1997. Respondent asserts that Charging Party's position was eliminated due to business needs and a reduction in the size of the workforce in its Murray, Utah facility. Respondent acknowledges that on April 28, 1997 it received a note from the Charging Party's physician which indicated that the claimant remained unable to return to her third shift position and would be evaluated on May 12, 1997.

Respondent asserts that in May 1997, Charging Party contacted the Respondent's Human Resource Representative and informed them that she could return to perform her duties as a Medical Technician. The Charging Party then reminded the Human Resources representative that she could not work a night shift and it would be necessary to transfer her to the day shift. The Human Resources representative informed the Charging Party that there were no open Medical Technician positions available on the day shift.

PAGE 3

Robin F. Burgener  
DETERMINATION

Respondent asserts that there were three (3) options available to the Charging Party: 1) she could continue to receive Short Term Disability (STD) benefits (not to exceed six months) until she was released by her physician to return to her third shift position; 2) she could transfer to an equivalent position on the day shift, provided Respondent had an available position; or 3) she could apply for any other available position on the day shift for which she was qualified. Respondent asserts that the Charging Party elected to continue receiving STD benefits.

Respondent indicates that in June 1997, corporate management made the decision to downsize various departments at its Murray, Utah facility in order to remain cost effective due to a reduction in the volume of work being performed at the laboratory. Respondent also states that during the first week of July 1997, management began downsizing various positions at the facility. Respondent also states that between July and September 1997, a total of thirteen (13) positions were eliminated. Charging Party's job was one of the positions authorized by management to be eliminated.

Respondent explains that it refrains from eliminating positions when an employee is participating in the Company's STD plan. The employee continues to receive disability benefits as long as the disability is certified by its insurance carrier. In addition, Respondent asserts that upon the employee's return to work, the employee's position is then eliminated in accordance with the Company's severance policy. Respondent states that this is done in order to give the employee the benefit of continued disability payments. Furthermore, Respondent claims that in the event disability continues to the end of the Plan's qualifying period, the employee is removed from the active payroll and becomes eligible to apply for long-term disability benefits.

Respondent indicates in early September 1997, a Medical Technologist position became open on the day shift in the Hematology Department, and Charging Party submitted an in-house application for the position. Respondent states the minimum qualifications for the Medical Technologist position required the employee to have a 4 year degree; and the Charging Party had a two year degree and, therefore, was not qualified for the position.

Respondent submits that on approximately September 22 or 23, 1997, Charging Party called the Respondent's Human Resources Representative and informed her that her STD benefits would end on September 23, 1997 and requested Human Resources guidance regarding her employment options with the Respondent. In addition, Respondent states Charging Party informed Human Resources once again that she wanted to return to work on a day shift. After contacting the Corporate Human Resources office, the local Human Resources representative informed the Charging Party that there was not a Medical Technician position available in the Hematology Department on the day shift, and that the Charging Party had two options: 1) she could accept an available position on the day shift at a lesser pay rate; or 2) she could accept a severance package



PAGE 4

Robin F. Burgener  
DETERMINATION

because her position had been terminated.

Respondent indicates on September 24, 1997, Charging Party informed the local Human Resources representative that she would accept the severance package because she would not accept a day position at a lesser pay rate.

Respondent states the Charging Party's allegation that the position of Medical Technologist was given to a technician with a two year degree and less seniority is not factual. Respondent asserts that a Serology Department Medical Technician was temporarily assigned to assist with certain duties on the day shift. Respondent asserts the Medical Technician was assigned to this position because she had experience working in the Hematology Department. Respondent asserts that the Medical Technician assigned to this position was trained to work in all areas of the laboratory and had experience running STAT (emergency) tests for all the departments and Charging Party did not. Respondent asserts that had Charging Party been hired into this temporary position, it would have required training the Charging Party to perform all functions.

Furthermore, the Respondent asserts that there are functions which the Medical Technician who was given the temporary assignment cannot perform because she is not a Medical Technologist. Therefore, Medical Technologists from other departments are providing coverage for these functions in the Hematology Department. Respondent asserts that at the time it submitted its position statement, the open position had not been filled and Respondent's management continues to evaluate the need for a regular position. Respondent asserts that the minimum qualifications for the Medical Technologist position were not changed, and that the position has always required a Bachelor's Degree in Medical Technology or a related field.

## V. ANALYSIS

Charging Party brought this action against the Respondent alleging violation of the Americans with Disabilities Act of 1990, as amended, and the Utah Antidiscrimination Act of 1965, U.C.A. §34A-5-101 et seq., which provide that it is unlawful to discriminate on the basis of Disability, Depression and Anxiety Disorder.

### A. Prima Facie Case of Discrimination

In order to prove a prima facie case of discrimination based upon disability, Charging Party must show she is disabled under the meaning of the applicable statutes and that the Respondent knew of her disability. Charging Party must also show that she is qualified for her position and could perform the essential functions of her position with or without a reasonable accommodation.

PAGE 5

Robin F. Burgener  
DETERMINATION

Further, Charging Party must: a) have requested a reasonable accommodation and/or been subject to an adverse employment action; and b) show that Respondent failed to provide a reasonable accommodation and/or that there is a causal connection between the adverse employment action and her disability.

A disability is defined as a "physical or mental impairment that substantially limits one or more major life activities." The impairment must be substantial, as distinct from minor, and must limit a major life activity such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. There is sufficient medical evidence in the file to indicate the Charging Party is an individual with a disability. Further, the record reflects Respondent was aware of Charging Party's medical condition and does not dispute the fact that Charging Party was on Short Term Disability Leave (STD) for six months.

The record indicates that Charging Party could perform the essential functions of her position with an accommodation, which was to work the day shift. The record further indicates that Charging Party requested this accommodation on more than one (1) occasion.

The Charging Party was subjected to an adverse employment action in that she was subjected to a reduction in force. The reduction in force was necessitated due to business needs and a reduction in the size of the workforce at the Respondent's Murray, Utah facility. Her position was one of thirteen (13) positions eliminated from the facility.

Regarding evidence of a causal connection between the Charging Party's disability and the adverse employment action, the record reflects Charging Party received a medical release to work a day shift by her physician as early as April 18, 1997, April 28, 1997 and again on May 13, 1997. On each of these occasions Charging Party requested a transfer to the day shift. Respondent has articulated that on each request for a transfer made by the Charging Party, they had no available open positions as a Medical Technician on the day shift.

The record reflects that the Charging Party applied for a day shift Medical Technologist position in September 1997, and was not selected because she did not have a four year degree and, therefore, did not meet the minimum qualifications for the position. A further review of the record reflects the Respondent selected another employee for the Medical Technologist position who did not meet the minimum qualifications in that she also did not have a four year degree. Respondent's rationale for selecting another employee for the position in question was that even though the employee did not meet the minimum qualifications for the position, she was assigned the position temporarily because she had experience working in the Hematology Department and the employee was trained to work in all areas of the laboratory, and had experience running STAT tests for all the departments. Respondent asserts Charging Party did not have the

PAGE 6

Robin F. Burgener  
DETERMINATION

necessary experience and, therefore, was not as qualified as the selected employee and Charging Party would have required some additional training to make her proficient in the position. In addition, the Respondent asserts that there are certain functions which the selected employee cannot perform because she is not a Medical Technologist. Respondent has stated these functions are assigned to other Medical Technologists from other departments.

A review of the selected employee's personnel file and her performance appraisal dated November 12, 1997, reflects the employee needed additional training to become proficient in this temporary assignment. In reviewing the Charging Party's employment history and educational level, it reflects she had a two year degree, a degree in Clinical Laboratory Technician and had fulfilled all of the knowledge and competency requirements to be certified as a Medical Laboratory Technician by the Board of Registry, American Society of Clinical Pathologists. In addition, the Charging Party had more experience as a Medical Laboratory Technician and had been employed by the Respondent longer than the selected employee had been employed. Furthermore, according to Respondent's representative, Charging Party was an excellent employee.

The preponderance of the evidence suggests that the Respondent made no determined attempt to provide a reasonable accommodation for the Charging Party by allowing her to under fill the day shift Medical Technologist position. The record reflects Respondent allowed another Medical Technician to under fill the position but did not consider the Charging Party, despite her superior qualifications. In addition, the Respondent provided no evidence to suggest that to allow Charging Party to under fill the position would have created an undue hardship. Respondent's position has been that Charging Party would have required additional training to be proficient in the position. The record reflects that the employee who was ultimately placed in the position also required additional training. Furthermore, the temporary assignment which was given to another Medical Technician began in September, 1997 and continued until February, 1999, at which time the incumbent resigned her position.

## VI. CONCLUSION

The evidence is sufficient for the Division to conclude that the Respondent failed to provide reasonable accommodation to the Charging Party and that the Charging Party was subsequently discharged resultant from her disability. The evidence is also sufficient for the Division to conclude that the Respondent's position that not having provided a reasonable accommodation in the form of a transfer to the day shift Medical Technologist position because she was not qualified is unworthy of credence.

THE LABOR COMMISSION OF UTAH  
ANTIDISCRIMINATION & LABOR DIVISION  
UALD NO. 97-0722  
EEOC NO. 35C-97-0844

Robin F Burgener

Charging Party,

vs.

Labcorp

Respondent.

**ORDER**

On 4/17/2000, the Antidiscrimination & Labor Division (Division) of the Labor Commission (Commission) issued a determination that the Respondent has violated the Utah Antidiscrimination Act, Chapter 5, Title 34A, Utah Code Annotated, as amended, and the Americans with Disabilities Act of 1990, as amended.

In order to conclude this matter, Bel J. Randall will contact Labcorp within 10 days of the date of this order to schedule a conciliation conference. The purpose of the conference is to provide relief to the Charging Party. **The Respondent is ordered to provide relief.** Minimum relief includes, but is not limited to, the following:

RELIEF

1. Placing the Charging Party in a position commensurate to the one previously held, Medical Laboratory Technician, effective immediately.
2. Payment of all lost wages and benefits, less interim earnings, plus interest, since November 23, 1997. As of April 15, 2000, this has been computed at \$33,042.65. Lost wages and benefits will accrue at the rate of \$14.11 per day (including interest) until the Charging Party is placed in a commensurate position.
3. Reimbursement of reasonable, applicable, and relevant costs for attorney's fees and associated expenses.
4. Cease and desist any further discriminatory treatment based on disability.
5. Non-retaliation against the Charging Party for having exercised his/her right to file this request

us

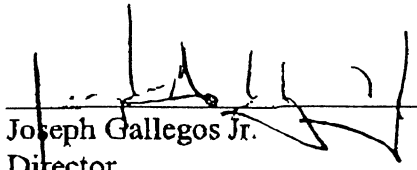
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for agency action.

6. Expungement of the Charging Party's personnel file of any and all documentation pertaining to her charge of employment discrimination. A separate file may be kept for legal purposes only.
7. Take such affirmative steps as may be necessary to eliminate and keep from its environment any employment discrimination prohibited by the Utah Antidiscrimination Act.

Failure to reach satisfactory resolution in this matter may result in the commencement of a civil enforcement action.

The Respondent may appeal this Order by filing a written request for a formal hearing with the Director of the Division within 30 days from the date of this Order. If the Director receives no timely request for a hearing, this Order becomes the final order of the Commission and is not subject to further appeal.

  
\_\_\_\_\_  
Joseph Gallegos Jr.  
Director

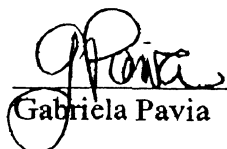
4/17/2000  
\_\_\_\_\_  
Date

## CERTIFICATE OF MAILING

I certify that on April 17, 2000, I mailed a copy of the attached Determination and Order by putting them into the state mail system to the following parties at the following addresses:

Robin F Burgener  
11302 Bell Ridge Dr  
Sandy UT 84094

Linda I. Woody  
LABCORP  
P O Box 2230  
1447 York Court  
Burlington NC 27216



---

Gabriela Pavia

April 29, 1997



Robin Burgener  
2744 S Centerbrook Dr  
W Valley City, UT 84119

**Fortis Benefits  
Insurance Company**  
Large Case Claims Team  
P.O. Box 419876  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6060

Re: LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

Return to work date: Undetermined

We have approved your disability through **5/4/97** as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information.

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,

A handwritten signature in black ink that reads "Karen Kinnett".

Karen Kinnett  
Benefit Specialist - Large Case Team  
(800) 909-8717 Ext. 8924

cc: Yvonne Hendrickson-Supervisor-FAX#801-269-8811  
Vicki Romero-Human Resources-FAX#801-269-8811 (Org. 42)

May 9, 1997

Robin Burgener  
2744 S Centerbrook Dr  
West Valley City, UT 84119



*Fortis Benefits  
Insurance Company  
Large Case Claims Team  
P.O. Box 419876  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6060*

LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

Return to work date: Undetermined

We have approved your disability through **5/18/97** as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information. **Medical records will be needed for any further certification of benefits.**

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,

A handwritten signature in cursive script that reads "Karen Kinnett".

Karen Kinnett  
Benefit Specialist - Large Case Team  
(800) 909-8717 Ext. 8924

cc: Vicki Romero-Human Resources-FAX#801-269-8811(ORG 42)  
Yvonne Hendrickson-Supervisor-FAX#801-269-8811



June 6, 1997

***fortis***

Robin Burgener  
1378 Green St  
Salt Lake City, NV 84105

*Fortis Benefits  
Insurance Company  
Large Case Claims Team  
P.O. Box 419876  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6060*

Re: LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

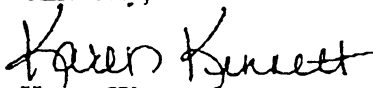
Return to work date: Undetermined

We have approved your disability through 7/13/97 as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information.

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,



Karen Kinnett

Benefit Specialist - Large Case Team  
(800) 909-8717 Ext. 8924

cc: Yvonne Hendrickson-Supervisor-FAX#801-269-8811  
Vicki Romero-Human Resources-FAX#801-269-8811 (Org. 42)

July 18, 1997

**fortis**

Robin Burgener  
1378 Green St  
Salt Lake City, UT 84105

**Fortis Benefits  
Insurance Company**  
Large Case Claims Team  
P.O. Box 419744  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6060

Re: LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

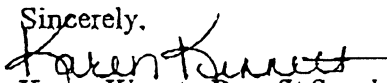
Return to work date: Undetermined

We have approved your disability through 8/17/97 as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information. **If a return to work date is listed above and you are not able to return to work on that date, you will need to contact our office and your Human Resources within 3 consecutive working days of the return to work date to avoid possible termination.**

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,



Karen Kinnett, Benefit Specialist - Large Case Team  
(800) 909-8717 Ext. 8924

cc: Yvonne Hendrickson - Supervisor FAX# 801-269-8811  
Vicki Romero - Human Resources FAX# 801-269-8811 (Org. 42 )

August 21, 1997

Robin Burgener  
1378 Green St  
Salt Lake City, UT

**fortis**

**Fortis Benefits  
Insurance Company  
Large Case Claims Team  
P.O. Box 419876  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6060**

Re: LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

Return to work date: Undetermined\*

We have approved your disability through 9/23/97 as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information.

***\*You will be receiving a Long Term Disability Claim Statement under separate cover from LapCorp in Burlington, N.C. You should complete the employee portion of the form and have your physician complete the Attending Physician portion. The entire form should then be sent to this office as soon as possible to avoid any delays in handling your Long Term Disability claim. If you do not receive this form, please contact Kim Beck in the Burlington office at 1-800-222-7566 ext 4173.***

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,

  
Karen Kinnett

Benefit Specialist - Large Case Team, (800)909-8717 Ext. 8924

cc: Yvonne Hendrickson-Supervisor - FAX#801-269-8811

Vicki Romero -Human Resources - FAX#801-269-8811 (Org. 42 )

September 23, 1997



Robin Burgener  
1378 Green St  
Salt Lake City, UT 84105

**Fortis Benefits  
Insurance Company**  
Large Case Team

P O Box 419744  
Kansas City, MO 64141-6744  
Fax (816) 474-2408

RE: LabCorp Long Term Disability  
Gr#67599

Dear Ms. Burgener:

We have reviewed your claim for Long Term Disability benefits.

Long Term Disability benefits provide coverage for loss of income under the following definition:

During the first 24 months of a period of disability (including the qualifying period), an injury, or sickness or pregnancy requires that you be under the regular care and attendance of a doctor, and prevents you from performing at least one of the material duties of your regular occupation;

Based on a review of the medical information received from Dr. Douville, we can find no evidence of limitation preventing you from going back to your occupation of a medical technician. According to Dr. Douville, you can perform the material duties of a medical technician in a day time position. Since you are able to perform the material duties of your regular occupation, no benefits would be available.

Enclosed is Benefits Insurance Group Claim Denial Review Procedure. This represents your notification of denial as well as the applicable claim denial review procedure in the event you wish to appeal this decision.

Sincerely,

A handwritten signature in cursive script that reads "Karen Kinnett".

Karen Kinnett  
Benefit Specialist  
Large Case Team

cc: Kim Beck, LabCorp  
Jane Wagoner-LabCorp  
Vicki Romero-LabCorp

To the Claimant:

As you will note from the attached letter, we have found it necessary to deny all or a portion of your claim for benefits under the plan. Please refer to the contents of the letter for the specific reason(s) for the denial as well as the extent of the denial. We regret that we were unable to reach a more favorable decision on your behalf, but hope that you can understand that our claim decisions must conform to the requirements of the plan.

The procedure set forth below is a general statement of the Group Claim Denial Review Procedure which may be used by any claimant who desires a formal review of a claim denial. If you wish a formal review of the claim denial and have any questions regarding the procedure, please contact the Plan Administrator (normally, the person to whom you submitted your claim initially), or, of course, you may contact us directly.

FORTIS BENEFITS INSURANCE COMPANY  
GROUP CLAIM DENIAL REVIEW PROCEDURE

The claimant is entitled to a full and fair review of the denial of the claim, which may be obtained by making a request to the Plan Administrator or appropriate named fiduciary, if other than the Plan Administrator. The procedure for such review is as follows:

1. The request for review must be in writing and made within 60 days of receipt of written notice of denial
2. The claimant may review pertinent documents and submit issues and comments in writing.
3. The Plan Administrator will forward the request for review to Fortis Benefits Insurance Company.
4. Fortis Benefits Insurance Company will make a decision upon review within 60 calendar days after its receipt of the request for review, unless special circumstances require an extension of time for processing, in which case the time limit shall not be later than 120 days after such receipt. The decision on review will be in writing, will include the specific reasons for the decision and specific references to the pertinent plan provisions on which the decision is based.

# ShopKo.

## HUMAN LINK

RX: 6267124    DATE: 05/20/1999

PATIENT: BURGNER, ROBIN

DOCTOR: OTT, DARIN

SHOPKO PHARMACY #2083  
2165 E. 9400 SOUTH  
SANDY CITY UT  
RPh-DAHL, KIM  
(801)942-8555

DRUG NAME: PROZAC 20MG

CAP DIST

GENERIC NAME: FLUOXETINE (floo-OX-uh-teen)

**COMMON USES:** This medicine is a selective serotonin reuptake inhibitor (SSRI) used to treat depression, obsessive-compulsive disorder (OCD), or bulimia. It may also be used to treat other conditions as determined by your doctor.

**HOW TO USE THIS MEDICINE:** Follow the directions for using this medicine provided by your doctor. TAKE THIS MEDICINE WITH FOOD if it upsets your stomach. STORE THIS MEDICINE at room temperature, away from heat and light. CONTINUE TO TAKE THIS MEDICINE even if you feel better. Do not miss any doses. IF YOU MISS A DOSE OF THIS MEDICINE, skip the missed dose and go back to your regular dosing schedule. Do not take 2 doses at once.

**CAUTIONS:** UP TO 4 WEEKS MAY PASS before this medicine reaches its full effect. Do not stop taking this medicine without checking with your doctor. DO NOT DRIVE, OPERATE MACHINERY, OR DO ANYTHING ELSE THAT COULD BE DANGEROUS until you know how you react to this medicine. Using this medicine alone, with other medicines, or with alcohol may lessen your ability to drive or to perform other potentially dangerous tasks. THIS MEDICINE WILL ADD TO THE EFFECTS of alcohol and other depressants. Ask your pharmacist if you have questions about which medicines are depressants. BEFORE YOU BEGIN TAKING ANY NEW MEDICINE, either prescription or over-the-counter, check with your doctor or pharmacist. This includes any medicines which contain dextromethorphan.

**POSSIBLE SIDE EFFECTS:** SIDE EFFECTS, that may go away during treatment, include nervousness, trouble sleeping, headache, drowsiness, fatigue, nausea, vomiting, diarrhea, loss of appetite, dry mouth, sweating, dizziness, lightheadedness, muscle spasms, or changes in sexual function. If they continue or are bothersome, check with your doctor. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

The information in this monograph is not intended to cover all possible uses, directions, precautions, drug interactions, or adverse effects. This information is generalized and is not intended as specific medical advice. If you have questions about the medicines you are taking or would like more information, check with your doctor,



394

11479 S. STATE STREET  
DRAPER, UT 84020

Fill Date 05/20/02

Phone (801) 619-0650

Rx # 155058 Prescriber JUDY L. DAVIS

ROBIN BURGNER

TAKE 1 CAPSULE DAILY

PROZAC 40MG PULVULE By DISTA

BA6718780

000777-3107-30



CAUTION: Federal Law PROHIBITS the transfer of this drug to any person other than the patient for whom it was prescribed.

Orig. 5/16/02  
Date

Refill 0 By

Qty. 90 RPh ROB MS

**ShopKo®**

Human  
LINK™

RX: 6267124 DATE: 05/20/1999

PATIENT: BURGNER, ROBIN

DOCTOR: OTT, DARIN

DRUG NAME: PROZAC 20MG

CAP DIST

SHOPKO PHARMACY #2083  
2165 E. 9400 SOUTH  
SANDY CITY UT  
RPh-DAHL, KIM  
(801) 942-8555

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Edition 99.2 Information Expires July 30, 1999



Name Kelvin Burgener Age 17

BELOW MUST APPEAR GREEN Date 4/18/97



Rachel's Anxiety and depression  
continue to make her unable  
to work. I will re-evaluate  
her on 28 Apr 97. Recommend  
she be moved to day time work  
when she returns.

Refill\_\_\_\_times PRN NR

Refill \_\_\_\_\_ times PRN NR

\_\_\_\_\_  
M.D.  
Substitution Permitted

\_\_\_\_\_  
M.D.  
Dispense as Written

DEA # \_\_\_\_\_ DOUGLAS R. DOUVILLE, M.D.  
FAMILY PRACTICE  
GRANGER MEDICAL CLINIC  
3280 WEST 3500 SOUTH  
WEST VALLEY, UT 84119  
(801) 965-3470

NAME Robin Burger  
ADDRESS \_\_\_\_\_ DATE 4/28/97

**R**

*Robin continues to suffer from  
depression and is unable  
to return to evening/night  
shift work. We will re-evaluate  
her on 12 May 97.*

☐ Label

Refill \_\_\_\_\_ times PRN NR

\_\_\_\_\_  
Substitution Permitted M.D.

*Douville* M.D.  
Dispense as Written

Attn:  
Karen

DOUGLAS R. DOUVILLE, M.D.  
FAMILY PRACTICE  
GRANGER MEDICAL CLINIC  
3280 WEST 3500 SOUTH  
WEST VALLEY, UT 84119

(801) 965-3470

Name Rolin Bergman Age \_\_\_\_\_

Address \_\_\_\_\_

BELOW MUST APPEAR GREEN Date 5/13/97

R

DEA # \_\_\_\_\_



Rolin continue to be  
unable to work night/PMs  
shifts due to severe  
depression.

80001306 07

**FAKED**

☐ Label

Refill \_\_\_\_\_ times PRN NR

Rolin Bergman M.D.

Substitution Permitted

M.D.

Dispense as Written

DOUGLAS R. DOUVILLE, M.D.  
FAMILY PRACTICE  
CHANGER MEDICAL CLINIC  
3280 WEST 3500 SOUTH  
WEST VALLEY, UT 84119  
(801) 965-3470

Name: *Kelvin Berger* Age: \_\_\_\_\_  
Address: \_\_\_\_\_

BELOW MUST APPEAR GREEN Date: *7/7/11*

*Continue to be  
unable to work night  
shifts secondary to  
depression and anxiety associated  
with working these shifts*

Label: *R* times: *PRN* NR: \_\_\_\_\_  
M.D. *[Signature]* M.D.

Substitution Permitted Dispense as Written

DOUGLAS R. DOUVILLE, M.D.  
FAMILY PRACTICE  
GRANGER MEDICAL CLINIC  
3280 WEST 3500 SOUTH  
WEST VALLEY, UT 84119

(801) 965-3470

Name Robin Burgener Age \_\_\_\_\_

Address \_\_\_\_\_

BELOW MUST APPEAR GREEN Date 8/30/97

R

DEA # \_\_\_\_\_

Robin continues to be unable  
to work nights. I am referring  
her to a psychiatrist and  
increasing her medication

☐ Label

Refill \_\_\_\_\_ times PRN NR

Dunn

M.D.

Karen,

Here is the latest note from my Dr.  
I am still anxious to return to work for  
LabCorp in a day position. I have heard  
nothing on my application for day-shift  
Hematology

Robin Burgener  
801-487-3590

60004908-07



April 18, 1997

Robin Burgener  
2744 S Centerbrook Dr  
W Valley City, UT 84119

*Fortis Benefits  
Insurance Company  
Large Case Claims Team  
P.O. Box 419876  
Kansas City, MO 64141  
WATS (800) 909-8717  
Fax (816) 881-6050*

Re: LabCorp Managed Disability Program, Notice of Disability Benefits

Dear Ms. Burgener:

This letter is in reply to your request for disability benefits. We have provided the following information to your employer:

Date we received request: April 4, 1997

Your last day worked: March 21, 1997

Your first day of disability: March 24, 1997

Return to work date: April 16, 1997

We have approved your disability through 4/15/97 as long as you remain disabled from your job. If you are able to return to work before this date please contact your employer or our office to avoid any overpayment on your claim. Extension of your disability will be based on contact with your attending physician, review of medical records and/or other relevant information.

LabCorp has asked us to inform you that this leave of absence will run concurrently with any leave to which you are entitled under the Family Medical Leave Act. Please contact your Human Resources Department for more specific information about your FMLA entitlement.

If you have any questions, or if you feel you have additional information, please do not hesitate to contact us at the toll-free number listed below.

Sincerely,

A handwritten signature in cursive script that reads "Karen Kinnett".

Karen Kinnett  
Benefit Specialist - Large Case Team  
(800) 909-8717 Ext. 8924

cc: Yvonne Hendrickson-Supervisor-FAX#801-269-8811  
Vicki Romero-Human Resources-FAX#801-269-8811 (Org. 42)

CLIENT NAME Robin Sargener  
DATE 5-2-97

COMPANY NAME Lab Corp

RESENTING PROBLEM (duration, intensity, precipitating event): Robin has been a devoted daughter who cared for her 80 year old mother and worked graveyard shift in order to do so. Mom died 3-24-97 and Robin's world shattered. Crisis situation & evaluating her in time life. Guilt, depression & inability to function  
Pertinent family, relationship, marital hx: no contact & ex-husband & she divorced shortly after birth of daughter (now 16) never remarried

Psychiatric hx, prior tx hx, medication: no history until mother's death. Under MD care & Rx anti depressants

Mental status: Clear & oriented no evidence of hallucinations, delusions, average in intelligence, cooperative, insightfully motivated, good grooming, denied suicidal ideation, affect appropriate to situation  
Risks: Suicidal ideation. No ☒ Yes ☐ If yes, outline sx and tx plan

Homicidal ideation/threat of violence. No ☒ Yes ☐ If yes, outline type of threat and plan of action

Child or elder abuse. No ☒ Yes ☐ Report filed No ☐ Yes ☐ If yes to either explain

	Alcohol	Cannabis	Amphet.	Cocaine	Halluc.	Barbit.	Opioids	RX
Amount	<u>0</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>
Frequency	<u>0</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>
Duration	<u>0</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>

Drug/Alcohol tx hx, periods of abstentions, additional info: None

Work issues: Has worked nights to be able to care for mom. Completes all work left behind by others. Doesn't leave 'til work is totally completed - feels taken advantage of  
Support systems/strengths: Good support from daughter, 1 sister and close friend.

DSM DIAGNOSIS: (Please complete all five axes along with a code and a description).

Axis I V 62.82 Bereavement I 309.28 Adjustment Disorder-anxiety & depression  
Axis II V 71.09  
Axis III mental & physical fatigue  
Axis IV STRESSORS: Mom's death SEVERITY: Severe  
Axis V Current GAF: 50 Highest GAF past year: 80

Action plan, recommendations: Continue individual treatment to address loss & grief as well as defining role in life. Complete tx in 6 sessions

Consultant Donna Costello DSM

CLIENT NAME: Kolin Burgener COMPANY: Lab Corp.

SSN: 5 2 8 - 9 0 - 9 6 0 3

DATE	TIME OF DAY	ELAPSED TIME*	CONTACT TYPE*	CASE NOTES
5-2-97		60	1	<p>Mom died 3-24-97. Aged 80 lived w her for 6 yrs. Dad died when Robin was 13.</p> <p>Returned to college - library science, grad. age 16 - moved to SLC 8 yrs ago.</p> <p>Great kid except for grades.</p> <p>He worked grave yards 8:30pm - 7:30am to care for Mom = very little sleep and lots of stress.</p> <p>could not function - could not concentrate forgetful.</p> <p>left work after 15 min. tried to go back 12 1/2 hrs left after 15 min. - Going to sister's for Mother's Day.</p> <p>"I miss my family" P - 5-15-97 @ 1:00</p> <p>(Donna Castleton)</p>



## EAP INFORMATION and CLOSING

SSN 528-90-9603

COMPANY Lab Corp

NAME Burgener Robin  
Last First

DIVISION Utah

ADDRESS 1378 Green St  
Street

LOCATION Murray, Ut

SLC Ut 84105  
City State Zip

HOME PHONE (801) 487-3590

WORK PHONE (801) 288-9000 Ext 429

FIRST APPT. DATE 05-02-97

EAP CONSULTANT Donna Castleton

### PRIMARY EAP ASSESSMENT

LETTER NUMBER  
(If applicable)  
1) E 5

### SECONDARY EAP ASSESSMENT

LETTER NUMBER  
(If applicable)  
2) E 4

- A. Alcohol (Client)
- B. Drug (Client)
- C. Impacted by Alcohol use of Family/Significant Other
- D. Impacted by Drug Use of Family/Significant Other
- E. Emotional/Psychological (Client)
  - 1. Adjustment disorder
  - 2. Anxiety disorder
  - 3. Attention deficit disorder
  - 4. Bereavement
  - 5. Depression
  - 6. Impulse control problem
  - 7. Significant threat to others
  - 8. Significant threat to self/gravely disabled
- F. Impacted by Emotional/Psych Problem of Family/S.O.
- G. Eating Disorder
- H. Family Problems
  - 1. Child behavioral problems
  - 2. Blended family
  - 3. Extended family
  - 4. Reaction to divorce/separation
  - 5. School problems
  - 6. Single parent
- I. Marital/Couple Problem
- J. Violence/Sexual Abuse
  - 1. Abuse of child
  - 2. Abuse of adult

### K. Medical Problem

### L. Legal

- 1. Bankruptcy
- 2. Divorce/custody
- 3. DUI/arrest/possession
- 4. Landlord/tenant
- 5. Real Estate

### M. Financial Problem

### N. Work Related Concern

- 1. Absenteeism/tardiness
- 2. Career/vocational
- 3. Critical incident
- 4. Interpersonal: co-worker(s)
- 5. Interpersonal: supervisor
- 6. Layoff
- 7. Perceived harassment/discrimination
- 8. Performance/production
- 9. Reorganization/change
- 10. Retirement
- 11. Termination
- 12. Work related injury

### O. Dependent Care

- 1. Adult-disabled
- 2. Child
- 3. Elderly

### P. Other Issues

- 1. Ethnic/racial
- 2. Religion
- 3. Gender/sexual orientation
- 4. Stage of life
- 5. Problem pregnancy
- 6. Nicotine addiction
- 7. Weight control

## RECOMMENDATION 1) A 2) I

- A. EAP consultation only
  - 1. In-person
  - 2. Phone (in-house use only)
- B. Category not in use
- C. Medical doctor referral
- D. Psychiatric meds. eval/tx
- E. Alcohol/drug detoxification
- F. Inpatient alcohol/drug treatment

- G. Partial hospital alcohol/drug treatment
- H. Structured outpatient alcohol/drug treatment
- I. Non-hospital residential facility
- J. Community based recovery program
- K. Inpatient psychiatric treatment
- L. Partial hospital psychiatric
- M. Outpatient mental health (office)
- N. Psychological testing

- O. Social agency, public program/mental health
- P. Self-help/support group
- Q. Employer, H.R., management, benefits, etc.
- R. Childcare/eldercare resources
- S. Legal resource
- T. Financial resource
- U. Career/vocational counseling
- V. Education

**DR. DONNA MOXLEY-CASTLETON**  
**3468 BROCKBANK DRIVE**  
**SALT LAKE CITY, UT 84124-4759**  
**(801)278-9890**

Aug. 29, 1997

Salt Lake County Youth Services Staff:

Robin Burgener has been under my care for the treatment of depression and panic disorder. I am coordinating treatment with her family physician who is monitoring her medication. He recently increased Robin's anti-depressant medications in an attempt to stabilize her current condition.

Given Robin's current psychiatric state, I am exploring more intensive treatment alternatives which may include day treatment and/or possibly an in-patient stay. I have many concerns about her mental health at this time to effectively cope with added stress and worry about Randy's safety. I request that you consider this in your treatment/discharge planning for Randy. I understand that Randy may enter Job Corps in 3 weeks time and is reluctant to remain at home during these weeks. I have never met Randy and certainly cannot make treatment recommendations however, I view Job Corps as the choice of last resort for a young woman who has had no anti-social or management history in the past.

I would like the Youth Services team to consider a 45 day residential/foster/group home placement to see if this family could work on their issues with the goal of the family reuniting and Randy returning to her home. I have discussed this with Robin and this is her desire as well.

Please feel free to contact me at 278-9890.

Thank you.



Donna Moxley Castleton, DSW, LCSW, BCD

PLEASE NOTE:

A COPY WAS PROVIDED TO LAB CORP  
AND DELIVERED PER [unclear] !

Dr. Donna Moxley Castleton

7-397

Vickie Romero,

Robin Burgerer has been a patient of mine since May 2, 1997 for major depression following her mother's death.

She is medically unable to work evenings or nights. She is anxious to return to work but requires a day time job.

If you need any further information, please call me at 258-9890.

Donna Castleton

**DR. DONNA MOXLEY CASTLETON**  
**3468 BROCKBANK DRIVE**  
**SALT LAKE CITY, UT 84124-4759**  
**(801)278-9890**

Aug. 29, 1997

Salt Lake County Youth Services Staff:

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Given Robin's current psychiatric state, I am exploring more intensive treatment alternatives which may include day treatment and/or possibly an in-patient stay. I have many concerns about her mental health at this time to effectively cope with added stress and worry about Randy's safety. I request that you consider this in your treatment/discharge planning for Randy. I understand that Randy may enter Job Corps in 3 weeks time and is reluctant to remain at home during these weeks. I have never met Randy and certainly cannot make treatment recommendations however, I view Job Corps as the choice of last resort for a young woman who has had no anti-social or management history in the past.

I would like the Youth Services team to consider a 45 day residential/foster/group home placement to see if this family could work on their issues with the goal of the family reuniting and Randy returning to her home. I have discussed this with Robin and this is her desire as well.

Please feel free to contact me at 278-9890.

Thank you.

A handwritten signature in cursive script, reading "Donna Moxley Castleton". The signature is written in dark ink and is positioned to the right of a large, thin, circular line that starts near the bottom left of the signature and curves around to the left, ending near the top left of the signature.

Donna Moxley Castleton, DSW, LCSW, BCD

# Dr. Donna Moxley Castleton

3468 Brockbank Drive  
Salt Lake City, ut 84124 - 4759  
(801) 272-4875

Statement No. : 3304

Robin Burgener  
1378 Green St.  
Salt Lake City UT 84105

Account : 471

Date : 12/1/97

Previous Balance : \$10,035.00

## Session Charges

Date	Client	Insurance Billed	Session Time (Hrs)	Charge
------	--------	------------------	--------------------	--------

Total Charges :

## Payments Received

Date	Client	Payment Type	Amount
11/1/97	Robin Burgener	Credit	\$10,012.50

Total Payments :

New Balance :

**Dr. Donna Moxley Castleton**

3468 Brockbank Drive  
Salt Lake City, ut 84124 - 4759  
(801) 272-4875

**Statement No. : 3304**

**Robin Burgener**  
1378 Green St.  
Salt Lake City UT 84105

**Account : 471**

**Date : 12/1/97**

**Previous Balance : \$10,035.00**

**Session Charges**

Date	Client	Insurance Billed	Session Time (Hrs)	Charge
------	--------	------------------	--------------------	--------

**Total Charges : \$0.00**

**Payments Received**

Date	Client	Payment Type	Amount
11/1/97	Robin Burgener	Credit	\$10,012.50

*PLEASE NOTE :*

*THERAPIST NOTES ARE NOT*

**Total Payments : \$10,012.50**

*AVAILABLE DUE TO CONFIDENTIALITY  
ISSUES , HOWEVER THIS STATEMENT*

**New Balance : \$22.50**

*DOCUMENTS MS. BURGERS CONTINUED  
TREATMENT BEYOND HER TERMINATION  
DATE OF 9-24-97!*

MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

on iron tablets 300 mg b.i.d. with vitamin C to promote absorption. Thirdly, she has a possible obstructive sleep apnea, although her recent polysomnography was normal. Polysomnography can be quite variable from night to night, and the scoring of upper airway resistance syndrome can be very difficult. Therefore, one negative polysomnogram does not rule out clinically significant upper airway obstruction and sleep. Finally, she also has sleep paralysis. I do not know if this is familial or associated with her sleep schedule disorder and sleep fragmentation due to possible periodic leg movements as described by the bed partner and snoring arousals during sleep. Therefore, she agreed to check with the Dental Clinic about fitting of a dental device for mandibular advancement in sleep to see if we could treat the snoring. She agreed to this plan including a follow-up visit in three weeks to review her sleep logs. I encouraged her to get as much bright light in the morning and as much dim light in the evening as possible.

Christopher R. Jones, M.D.

CRJ:slmt/3/7798 (f7/9)

cc: Joseph Schoenhals, M.D.  
250 East Broadway, Suite 380  
Salt Lake City, UT 84111

Darren Ott, M.D.  
Northeast Family Clinic  
70 South 900 East  
Salt Lake City, UT 84102

<b>07/06/1998</b>	<b>Christopher Jones Sleep Disorder Center - Other Ancillary</b>
<b>04/28/1998</b>	<b>Pamela Faye Farrington Ancillary Daily - Other Ancillary</b>
<b>04/08/1998</b>	<b>Pamela Faye Farrington General Gynecology Clinic (Office Visit Notes)</b> ID: Ms. Burgener was referred by Dr. Terrence Loftus for evaluation of abnormal bleeding. 42-year-old white female, G1 P0101, LMP is uncertain as Ms. Burgener has had persistent bleeding off and on of varying volumes over the past year. Prior to that time she states that her menstrual periods were very regular and she had no significant gynecologic complaints in the past. She conceived her single pregnancy without difficulty. She was on birth control pills for approximately 3 1/2 years when in her 20's. About two years ago she had a Pap smear which was mildly abnormal and a repeat Pap smear was normal and had a normal Pap smear approximately 1 year ago. At that time at an initial evaluation for her irregular

MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

2. Wrote her a script for the gloves she needs and wrote her a script for the Votec so she can get some retraining for supervisory position and hopefully that will allow her the time to be in gloves.

3. Gave her a prescription for Elocon ointment. She can apply that once a day at night and she can wear socks or gloves wherever she has that.

HQR

Cynthia Flugrad, P.A.-C.

09/01/1998	Jay Aldous	Ancillary Daily - Other Ancillary
07/23/1998	Christopher Jones	Sleep Disorder Center - Other Ancillary
07/06/1998	Christopher Jones	Neurology - Clinic (Letter)

CLINIC NOTE

PATIENT: Robin Burgener

MRN: 999436-9

DATE OF VISIT: July 6, 1998

REFERRING PHYSICIAN: Joseph Schoehals, M.D.

The patient is a 42 -year-old white female working as a laboratory technician. She complains of difficulty initiating sleep, snoring and gasping according to her bed partner, after she falls asleep, with fatigue and sleepiness the next day.

She has always been a "night owl". She would never wake up feeling cheerful in the morning. She was able to stay up later than her parents when she was a child, and in her 20's was sleeping from midnight to 4:30 a.m. and feeling "okay" on that little amount of sleep. Then in her late 30's, she found she could sleep in from 9:00 a.m. to noon. Now she is working from 2:00 p.m. to just after midnight. Bedtime is about 1:00 a.m., lights out is about 1:30 a.m., but she watches television until she falls asleep at 3:00 a.m. The television distracts her so she can "quite down my mind" from the worries and stress that she has. Once she is asleep, there is a frightening episode of "trying to wake up, but I can't move". Sometimes this is out of a dream. It occurs about 6:00 or 7:00 a.m., but only about twice per month, which is a decrease in frequency from before. Her final morning wake up time is 9:00 a.m. because of an alarm, otherwise she could easily sleep until noon without the alarm.

Even if she did sleep until noon, she would still be tired and could



MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

still take a nap the next day. In Dr. Schoenhal's office, her Epworth's sleepiness score was 19. She told me that she does not like to take naps, because she does not like how she feels when she wakes up from them. She keeps moving at work, but in the afternoons, especially, she could easily take a nap if she wanted to. She has not noticed herself fighting drowsiness while denied any close calls.

In the evenings, the fatigue and sleepiness subsides somewhat. I could not elicit any convincing description of cataplexy or sleep onset dreams, but she does have sleep paralysis in the middle of the night.

At about 3:00 a.m., when she is most relaxed and starting to get sleepy, she has a leg movement that is "hard to explain". She feels there is almost a "restlessness" in her legs as if she cannot get comfortable. Sometimes this makes her walk about the house for a few minutes, which is helpful in terms of relaxing her legs. It only happens when she is lying down relaxing at about 3:00 a.m. By

Robin Burgener

July 7, 1998

Page 2

9:00 a.m., it seems to be gone. It is a "involuntary movement". It is a brief twitch of short duration, but does bother the bed partner who has complained about these leg kicks and jerks. She is only aware of it herself about one night per week.

In terms of the snoring that has been observed, it is loud, but her bed partner is deaf in one ear and sleeps on the good ear. The snoring is clearly variable from night to night, and there are some gasping awakenings that the patient is not aware of, but her bed partner thinks that she does partly wake up. Discontinuation of cigarettes six months ago has improved the snoring, but it is still present. A nasal airway dilator also helped somewhat but not completely. She has had dreams about breathing but mostly these relate to the episodes of sleep paralysis and her history of asthma. It is difficult to blame them on possible obstructive sleep apnea. She also does have morning headaches, but these last all day and occur about three times per week. She wakes up with a dry mouth and a cough and believes that she is mouth breathing. Her nasal airways are usually well treated during hay fever season with Vancenase topical nasal steroid. Sometimes, she will also use Benadryl to help keep her nose open. She starts out sleeping lateral but ends up sleeping supine, flat and level. She has never been on a dental device for mandibular advancement in sleep. She did have a polysomnography recently, no obstructive hypopneas, apneas or periodic leg movements were scored.

PAST MEDICAL HISTORY: Is notable for iron deficiency anemia as a child and also as an adult without any history of gastric bypass surgery. I did not ask her about a vegetarian diet, but she does

MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

have "severe menstrual bleeding". She believes her hemoglobin is 10-11, and her hematocrit is about 30. She stopped smoking cigarettes six months ago after a 10-pack-year history. She has asthma controlled with Flovent with exacerbations treated with Albuterol, Vancenase for the nasal congestion, Prozac 30 mg per day is helpful for anxiety, depression, and mood swings. In the past, she tried Melatonin 6 mg, but this caused "weird dreams" and she stopped that medication. Her TSH and chemistry panels have all been normal.

**FAMILY HISTORY:** Includes bouts of depression in her mother when the patient was young. Her mother is now deceased. Her father had crescendo snoring and breath holding at night, but there is no known family history of restless legs syndrome and no other history of daytime sleepiness or insomnia.

**SOCIAL HISTORY:** Includes stress related to home, finances and "parenting". She states her work is okay.

**PHYSICAL EXAM:** She is 65" tall, 203 pounds with a 36.5 cm neck circumference and blood pressures of 158/104 to 110, with a heart rate of 70. I checked the blood pressure three different times during the exam, including with a large cuff. The breath sounds are clear on inspiration and forced expiration. Heart sounds are regular. The nasal airways are widely patent, she can sniff in through either side. The oral pharynx is unremarkable. There is no enlargement of uvula, soft palate,

Robin Burgener  
July 7, 1998  
Page 3

tonsils, or tongue. There is no overbite. The chin is not recessed. The strength of facial, jaw, tongue, palate, and neck muscles is all good. The diaphragms move normally by abdominal palpation. There is no tibial edema, and arterial pulsations are easily felt over the feet. In the lower extremities, formal strength testing is quite good throughout. Rapid alternating movements of the feet and heel to shin maneuver were accurate. Plantar responses are downgoing. Vibration sensation at the ankles is good. Deep tendon reflexes are present at the knees and ankles. There is no clonus. The tandem gait was performed fairly easily and the Romberg was stable.

**SUMMARY:** In summary, this 42-year-old white female probably has a combination of three or four factors disrupting her sleep. First of all, she has a constitutional sleep phase delay tendency and is only getting about six hours of sleep per night. As a result of a late sleep onset time, this may not be adequate sleep time for her. Therefore, I discussed the use of early morning bright light, late evening dim light, how to keep sleep logs, and the possibility we would talk about low dose (0.5 mg) Melatonin for sleep. Secondly, she may have restless legs symptoms associated with iron deficiency and, therefore, she agreed to check a ferritin level today and start

MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

Albuterol, at that point she can drop down to 1 puff bid. I suspect that she is not going to be able to do that and she agrees with me. She is comfortable with staying at the 2 puffs bid. Additionally, she is to go 2 days without any antihistamines and start on Allegra D samples (bid for 5 days). If these seem to help more than the Claritin has, she can call for a prescription. If they do not I need to know about it. She is okay with this plan.

HQR:amt

Janet Williams, P.A.-C.

□

04/18/2000

**Roland G Ruegner**

**ARUP Clinic (Office Visit Note)**

Provider : RUEGNER, ROLAND G Provider ID : U1871  
Date of Enc. : 04/18/2000  
Type of Doc : OFV  
Patient Name : Robin Burgener  
MRN : 9994369  
Location : UOFU1 ARUP - EHP AR04

S: This is a 44 year old female here with an asthma exacerbation. She has had asthma for 5 years, also has SAR. She was a smoker, quit 1 1/2 years ago. She has been using Flovent and Albuterol, also was using Accolate for a while, has had none of this for months. States that her asthma had been what she considered to be well controlled until 2 weeks ago when it started worsening. Apparently at that time she was moving to a new home, developed an upper respiratory infection and noticed a change in the weather. She attributes her exacerbation to these 3 things. She has not really had much of a cough with her cold, feels like the coughing she is doing now is from her asthma. She has been using only 1 puff bid of the Flovent (110 mcg) and under normal conditions uses 2 puffs of Albuterol only 1-2 times per week. Over the last 2 weeks it has increased, she is now using 2 puffs 3-4 times a day and feels like she needs more than that. She is additionally taking Claritin D 1 tab per day and Prozac 30 mg q day. She has not had any nocturnal asthma for a number of months until the last few days as well.

O: BP: 150/90

General: This is pleasant woman in no distress.

Lungs: End inspiratory and expiratory wheezes, both upper and lower. Air exchange is poor. PO2 is 95. Peak flow is 310, 300 and 350 (her last of Albuterol was 2 hours ago). She was given a nebulizer treatment, subsequent to that her lung exam was only slightly improved. However her peak flows were 400, 440 and 440. The patient reported subjectively feeling improved.

A: Asthma exacerbation.

P: Given a prescription for Prednisone 20 mg, 3 tab qd x 5 days

MRN: 09994369

**Robin Burgener**

DOB: 11/06/1955 Age: 45 Sex: F

Patient Name : Robin Burgner  
MRN : 9994369  
Location : UOFU1 ARUP - EHP AR04

S: Patient is a 44 year old who punctured herself, with a capillary tube that was full of blood, in her left thumb. She did have her gloves on. It bled pretty good. This was from a tiny infant newborn. As far as we know there are no problems with this child, though we will call the university and have them investigate that. We discussed blood born pathogen exposure with Robin at length and we are going to go ahead and do the test as per our protocol and she will follow up with us as per the protocol. She was counseled. We will follow up with her in a couple of days with the results on the initial draw.

HQR: Roland Ruegner, P.A.-C.  
10/00 Reviewed by Dr. Miller.  
=====Revised: 24-Oct-2000 16:30=====

05/04/2000 Roland G Ruegner ARUP Clinic (Office Visit Note)

Provider : RUEGNER, ROLAND G Provider ID : U1871  
Date of Enc. : 05/04/2000  
Type of Doc : OFV  
Patient Name : Robin Burgener  
MRN : 9994369  
Location : UOFU1 ARUP - EHP AR04

S: This is a 44 year old female here following up on asthma exacerbation. She has finished the Prednisone and has continued to use her Flovent 3 puffs bid. She reports feeling much improved, she has not had to use any Albuterol for 3 days now. Previous to this exacerbation she would use Albuterol 1-2 times per week, it became every few hours during the exacerbation. She is quite happy with the response in that way. On the other hand, she has been taking Claritin D for her allergies, states that this does not appear to be helping at all this year. She is suffering quite a bit from her SAR symptoms. The Claritin had worked well last year however. She has not tried any other prescription medications for allergies. She also takes Prozac, no other medications.

O:

General: Robin is her usual pleasant self and is in no distress.  
Lungs: Peak flows today are 500, 500, and 450. Lungs are bilaterally clear to auscultation and air exchange is good.

A: 1. Asthma exacerbation resolved.  
2. SAR.

P: She is to stay on 3 puffs bid for 2 weeks without using any Albuterol. At that point she can drop down to 2 puffs bid and stay at that dose unless she can go 1 month without any

UALD MC

## GENERAL INTAKE QUESTIONNAIRE

### CHARGING PARTY INFORMATION:

Date: \_\_\_\_\_  
Name: ROBIN F. BURGNER  
Address: 1378 GREEN STREET Apt. # \_\_\_\_\_  
City: SALT LAKE CITY State: UTAH ZIP: 84105 County: SALT LAKE  
Telephone Number: (home): 487-3590 (daytime number): PAGER: 267-2986  
Social Security Number: 528 - 90 - 9603  
Date of Birth: 11-6-55 Gender: F  
☒ White (not Hispanic) ☐ Pacific Islander  
☐ Black (not Hispanic) ☐ American Indian  
☐ Hispanic ☐ Alaskan Native  
☐ Asian

Please provide the name of someone AT A DIFFERENT ADDRESS AND PHONE NUMBER who will always be able to tell us how to contact you.

Name: \_\_\_\_\_ Relationship: \_\_\_\_\_ Telephone Number: \_\_\_\_\_  
Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP: \_\_\_\_\_

### RESPONDENT/EMPLOYER INFORMATION:

I believe I was discriminated against by (check those that apply):

☒ Employer ☐ Union ☐ Employment Agency ☐ Other (Specify) \_\_\_\_\_

#### Work Site:

Organization Name: LABCORP Telephone: 288-9000  
Address: 5199 GREEN STREET Highest Official (at work site): MIKE FERGOSON  
City: MURRAY Approximate # of Employees: In Utah: 80+  
State: UTAH ZIP: \_\_\_\_\_ Outside of Utah: THOUSANDS

#### Corporate Office:

Organization Name: LABCORP Telephone: (910) 584-5171  
Address: 430 SOUTH SPRING ST. Highest Official: ? KD  
City: BURLINGTON ALSO AT:  
State: NC ZIP: 27215 PO BOX 2230  
1447 YORK COURT  
BURLINGTON, NC 27216-2230

### EMPLOYMENT INFORMATION:

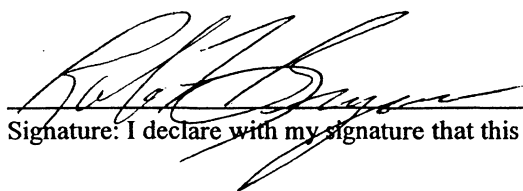
Dates that Discrimination Occurred: Began: 4-28-97 Ended: TO PRESENT  
If Not Hired: Application Date: \_\_\_\_\_ Rejection Date: \_\_\_\_\_  
If Employed: Date of Hire: 8-91 Date of Termination: \_\_\_\_\_ Ending Pay: 12.05 PER HR  
Position Held/Applied for: MEDICAL LABORATORY TECHNICIAN  
Supervisor's Name: YVONNE HENRICKSON Title: HEMOTOLOGY SUPERVISOR

## DISCRIMINATORY ACT:

In your own words describe what happened and why you believe it was discrimination. Please be as specific as possible (including dates and names). You may attach additional pages to this questionnaire.

I WAS NEVER INFORMED ABOUT ANY OF THIS PRIOR NOR WAS I EVER OFFERED ANY OF THESE OPTIONS THAT WERE OFFERED TO THE OTHER EMPLOYEES. I WAS NOT TOLD MY POSITION WAS ELIMINATED, NOR WAS I OFFERED AN ALTERNATIVE JOB, ABILITY TO BUMP BY SENIORITY, AND I WAS NEVER (TO DATE) OFFERED THE SAME SEVERANCE PKG. I MET WITH VICKIE ROMERO, HUMAN RESOURCE MGR. AND JIM HILD, LAB MANAGER AT 10:30 am on 9-18-97 TO DISCUSS my EMPLOYMENT. I AGAIN STATED I JUST WANT TO RETURN TO A DAY SHIFT JOB AS A 2 YR TECH WHICH I AM QUALIFIED FOR. I WAS OFFICIALLY INFORMED OF THE REORGANIZATION OF AUGUST THE DAY PRIOR TO THIS MEETING BY VICKIE ROMERO. AT THE IN PERSON MEETING I WAS TOLD THAT THE ONLY OPE. POSITION ON DAY SHIFT WAS IN CLIENT INQUIRY AT A SUBSTANTIAL REDUCTI IN PAY (2 to 4 DOLLARS LESS PER HOUR). VICKIE ROMERO SAID SHE DID NOT BELIEVE I QUALIFIED AS HAVING A DISABILITY AND NO OTHER ALTERNATIVES WERE AVAILABLE TO ME. I INQUIRED IF I WAS ELIGIBLE FOR THE SAME AS EVERYONE ELSE WAS OFFERED IN TERMS OF THE SEVERANCE PKG. (2 WKS BASE PAY AND 1WK PAY FOR EACH YEAR OF SERVICE). SHE SAID SHE DIDN'T KNOW. I HAVE CALLED AT LEAST TWICE DAILY - STILL NO ANSWERS. VICKIE ROMERO TOLD ME TO "JUST RELAX, THE WORLD WON'T END TUESDAY" (BEING THE LAST DAY OF MY DISABILITY). I AGAIN REQUESTED A DAY JOB SAYING I HAVE BILLS TO PAY, SHE SAID "WELL I HAVE <sup>#</sup>9 in my POCKETT PURSE

PLEASE REMEMBER TO COMPLETE THIS FORM IN ITS ENTIRETY. IF YOU HAVE NOT PROVIDED THE INFORMATION WE NEED, WE MAY BE UNABLE TO TAKE ANY ACTION ON YOUR BEHALF.



Signature: I declare with my signature that this statement is true and correct

9/23/97  
Date

## DISCRIMINATORY ACT:

In your own words describe what happened and why you believe it was discrimination. Please be as specific as possible (including dates and names). You may attach additional pages to this questionnaire.

I HAVE BEEN REPEATEDLY TOLD THAT NO POSITIONS WERE AVAILABLE FOR ME. RECENTLY MY SUPERVISOR, YVONNE HENRICKSON CONTACTED ME AND ADVISED ME TO APPLY FOR THE DAY SHIFT HEMATOLOGY POSITION THAT WAS GOING TO BE VACANT. I CONTACTED HUMAN RESOURCES ABOUT THE POSITION AND WAS TOLD IT WAS BEING CHANGED TO REQUIRE A 4 YR TECH. I AM A 2 YR TECH SO THEY SAID I DIDN'T QUALIFY. I DID APPLY FOR THE POSITION ANYWAY (THE DAY THE POSITION OPENED). I HEARD NOTHING FROM LABCORP REGARDING THIS POSITION. ON 8-28-97 I RECEIVED NOTICE THAT MY SHORTTERM DISABILITY BENEFITS WOULD END ON 9-23-97, BUT THAT I COULD APPLY FOR LONG-TERM DISABILITY. THE SHORT-TERM DISABILITY OFFICE (FORTIS) ALREADY INFORMED I WOULD NOT QUALIFY FOR LONG-TERM BENEFITS SINCE I AM ABLE TO WORK DAYS. THE LETTER I RECEIVED ON 8-28-97 ALSO STATED I WOULD BE TERMINATED FROM LABCORP AS OF THE DATE MY SHORT-TERM DISABILITY BENEFITS END (9-23-97). I HAVE LEARNED (THROUGH ANOTHER EMPLOYEE) THAT THE DAY POSITION IN HEMATOLOGY WAS FILLED BY A 2 YR MED TECH WHO HAD BEEN ON THE NIGHT SHIFT. THIS EMPLOYEE ALSO HAS CONSIDERABLY LESS SENIORITY THAN I DO. I RECENTLY LEARNED THAT IN AUGUST THERE WAS A REDUCTION OR REORGANIZATION OF POSITIONS. EMPLOYEES WERE OFFERED VARIOUS OPTIONS. THEY COULD BUMP OTHER EMPLOYEES ACCORDING TO SENIORITY- THEY WERE OFFERED OTHER POSITIONS AT COMPREABLE WAGES AND DUTIES <sup>OR</sup> AND THEY COULD ACCEPT A SEVERANCE PACKAGE AND DRAW THEIR UNEMPLOYMENT BENEFITS. I FOUND OUT THESE OPTIONS THAT WERE OFFERED OTHER EMPLOYEES LAST WEEK.

**PLEASE REMEMBER TO COMPLETE THIS FORM IN ITS ENTIRETY. IF YOU HAVE NOT PROVIDED THE INFORMATION WE NEED, WE MAY BE UNABLE TO TAKE ANY ACTION ON YOUR BEHALF.**

Signature: I declare with my signature that this statement is true and correct

Date

## DISCRIMINATORY ACT:

In your own words describe what happened and why you believe it was discrimination. Please be as specific as possible (including dates and names). You may attach additional pages to this questionnaire.

MY MOTHER PASSED AWAY ON 3-24-97. I HAD BEEN WORKING  
AT LABCORP FOR 5 1/2 YRS ON NIGHTS. I WAS OFF WORK A WEEK FOR  
THE FUNERAL AND RELATED BUSINESS/ARRANGEMENTS. WHEN I RETURNED  
TO WORK I FOUND I WAS EMOTIONALLY AND PHYSICALLY UNABLE TO. I WAS  
SEVERELY DEPRESSED AND WAS HAVING PANIC ATTACKS. I WENT TO MY  
DOCTOR (DR. DOUVILLE) AND HE GAVE ME A NOTE EXCUSING ME FROM WORK  
UNTIL 4-6-97. I RETURNED TO THE DR. THE FOLLOWING WEEK AT WHICH  
TIME HE PRESCRIBED AN ANTIDEPRESSANT MEDICATION AND EXCUSED ME  
FROM WORK UNTIL 4-14-97. AT THAT TIME I AGAIN ATTEMPTED TO  
RETURN TO WORK. I AGAIN EXPERIENCED EXTREME ANXIETY AND PANIC  
ATTACK AND WAS UNABLE TO CONCENTRATE. I FELT THIS SEVERELY LIMIT  
MY ABILITY TO PERFORM MY JOB. I WAS UNABLE TO SLEEP AT ALL  
DURING THE DAY FROM THAT POINT ON. PRIOR TO MY MOTHERS DEATH  
I WAS UNABLE TO SLEEP MORE THAN 3 TO 4 HRS WHICH WENT ON  
FOR SEVERAL MONTHS AND WHICH RESULTED IN PROBLEMS ASSOCIATED  
WITH SLEEP DEPRIVATION. MY PHYSICIAN RECOMMENDED I SEE A  
THERAPIST WHICH I DID. I BEGAN SEEING DR. DONNA CASTLETON  
ON 5-2-97. BOTH MY PHYSICIAN AND MY THERAPIST AGREED I WAS  
NO LONGER ABLE TO WORK EVENINGS OR NIGHTS. BOTH HAVE RELEASED  
ME TO RETURN TO WORK AS LONG AS IT IS A DAY SHIFT. I HAVE  
TURNED IN MY "RELEASE TO RETURN TO WORK WITH THE STIPULATION  
OF DAY SHIFT" SLIPS. I HAVE REPEATEDLY CONTACTED LABCORP  
REQUESTING A DAY SHIFT POSITION WITH COMPARABLE DUTIES AND PAY  
I HAVE BEEN RECEIVING SHORTTERM DISABILITY THROUGH THIS PROCESS.  
**PLEASE REMEMBER TO COMPLETE THIS FORM IN ITS ENTIRETY. IF YOU HAVE**  
**NOT PROVIDED THE INFORMATION WE NEED, WE MAY BE UNABLE TO TAKE ANY**  
**ACTION ON YOUR BEHALF.**

Signature: I declare with my signature that this statement is true and correct

Date





# WEBER STATE UNIVERSITY

1102 University Circle  
Ogden, UT 84408-1102

RECORD OF: BURGNER, ROBIN

DATE PRINTED : 08/01/01  
ID NUMBER : 528-90-9603  
DATE OF BIRTH: 01/06/1955

ROBIN BURGNER  
11302 BELL RIDGE DRIVE  
SANDY UT 84094

PAGE 1

COURSE	DESCRIPTIVE TITLE	CR	HR	GR	COURSE	DESCRIPTIVE TITLE	CR	HR	GR
*****					MICRO	205 LS	PRINCIPLES MICRO	5.00	B+
EGREE	ASSOCIATE OF APPLIED SCIENCE				CLS	210	CLIN MICROBIOLOGY	5.00	A-
WARDED	WEBER STATE UNIV				CLS	286H	PRACT/HEMATOLOGY	1.00	CR
	OGDEN, UT				CLS	286S	PRACT/SEROLOGY	1.00	CR
ATE	JUNE 07, 1991				CLS	286L	PRACT/LAB PRACTICE	1.00	CR
AJOR	CLINICAL LABORATORY TECHNICIAN						QUARTER GPA	3.50	
*****					WINTER QUARTER 1990-91				
	AUTUMN QUARTER 1974-75				CIS	170 PD	MICROCOMPUTER APPL	4.00	A
NGL	101 EN ENGL COMPOSITION	3.00		C	CLS	202	CLINICAL CHEMISTRY	5.00	A-
THSCI	111 BIOMED SCIENC CORE	5.00		B	CLS	215	TECH CLIN MIBIO II	5.00	B+
THSCI	120 INTRO MED SCIENCE	3.00		B			QUARTER GPA	3.64	
ATH	105 AR INTERM ALGEBRA	5.00		E	SPRING QUARTER 1990-91				
	QUARTER GPA	2.73			CLS	201	INTRO IMMUNOHEMAT	5.00	A-
	WINTER QUARTER 1974-75				CLS	286M	PRACT/MICROBIOLOGY	1.00	CR
NGL	103 EN ENGL COMPOSITION	3.00		B	CLS	286C	PRACT/CLIN CHEM I	1.00	CR
EALTH	200 AR FIRST AID	2.00		D	CLS	286I	PRACT/BLOOD BANK	1.00	CR
THSCI	112 AR BIOMED SCIENCE COR	5.00		D	CLS	299	CORRELATN SEMINAR	1.00	CR
THSCI	130A AR INTRO PATHOPHYSIOL	3.00		E	CLS	302	ADV CLIN CHEM I	5.00	A-
E	121 PE JUDO	1.00		W			QUARTER GPA	3.70	
	QUARTER GPA	3.00			-----				
	SPRING QUARTER 1974-75				GRADUATION QUARTER HOURS				103.00
NGL	250 HL INTRO LITERATURE	3.00		C	TOTAL QUARTER HOURS				103.00
ATH	101 AR 1ST COURSE ALGEBRA	5.00		E	-----				
SYCH	101 SS INTRODUCTORY PSYCH	5.00		C	WSU GPA HRS: 96.00 GPA PTS: 326.70				GPA: 3.40
	ACADEMIC PROBATION				-----				
	QUARTER GPA	2.00			END OF TRANSCRIPT				
	WINTER QUARTER 1989-90								
	ACADEMIC RENEWAL 03/20/90								
LS	101 INTRO CLINICAL LAB	4.00		A-					
LS	232 CLINICAL SEROLOGY	3.00		B+					
THSCI	112 BIOMED SCIENCE COR	5.00		A					
	QUARTER GPA	3.73							
	SPRING QUARTER 1989-90								
LS	121 INTRO HEMATOLOGY	5.00		A					
THSCI	113 BIOMED SCIENC CORE	5.00		A-					
THSCI	120 PD INTRO MED SCIENCE	3.00		A					
	QUARTER GPA	3.88							
	SUMMER QUARTER 1990-91								
HEM	111 PS GEN CHEMISTRY	5.00		A-					
HEM	112 PS ELEM ORGANIC CHEM	5.00		A-					
HEM	113 PS ELEM BIOCHEMISTRY	5.00		B+					
	QUARTER GPA	3.57							
	AUTUMN QUARTER 1990-91								

ISSUED TO STUDENT



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SEE	ASSOCIATE OF APPLIED SCIENCE			CLS 210	CLIN MICROBIOLOGY	5.00	A-
DEED	WEBER STATE UNIV			CLS 286H	PRACT/HEMATOLOGY	1.00	CR
	OGDEN, UT			CLS 286S	PRACT/SEROLOGY	1.00	CR
JUNE 07, 1991				CLS 286L	PRACT/LAB PRACTICE	1.00	CR
OR	CLINICAL LABORATORY TECHNICIAN				QUARTER GPA	3.50	
*****				WINTER QUARTER 1990-91			
	AUTUMN QUARTER 1974-75			CIS 170 PD	MICROCOMPUTER APPL	4.00	A
101 EN	ENGL COMPOSITION	3.00	C	CLS 202	CLINICAL CHEMISTRY	5.00	A-
SCI 111	BIOMED SCIENC CORE	5.00	B	CLS 215	TECH CLIN MIBIO II	5.00	B+
SCI 120	INTRO MED SCIENCE	3.00	B		QUARTER GPA	3.64	
105 AR	INTERM ALGEBRA	5.00	E	SPRING QUARTER 1990-91			
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103 EN	ENGL COMPOSITION	3.00	B	CLS 286C	PRACT/CLIN CHEM I	1.00	CR
TH 200 AR	FIRST AID	2.00	D	CLS 286I	PRACT/BLOOD BANK	1.00	CR
SCI 112 AR	BIOMED SCIENCE COR	5.00	D	CLS 299	CORRELATN SEMINAR	1.00	CR
SCI 130A AR	INTRO PATHOPHYSIOL	3.00	E	CLS 302	ADV CLIN CHEM I	5.00	A-
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SCI 113	BIOMED SCIENC CORE	5.00	A-				
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	QUARTER GPA	3.88					
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112 PS	ELEM ORGANIC CHEM	5.00	A-				
113 PS	ELEM BIOCHEMISTRY	5.00	B+				
	QUARTER GPA	3.57					
	AUTUMN QUARTER 1990-91						

ISSUED TO STUDENT

# Weber State University

as authorized by  
The State Board of Regents and on Recommendation  
of the President and the Faculty has conferred upon

**Robin H. Burgener**

who has satisfactorily completed the Studies required for the

**Associate of Applied Science**

Clinical Laboratory Technician

with all the Rights, Privileges and Honors thereunto appertaining.

Given at Ogden in the State of Utah, on the seventh day of June,  
in the Year Nineteen Hundred and Ninety-one.

*Paul H. Thompson*  
President of the University



*Nm. R. Jensen*  
Commissioner of Higher Education

*Richard Myers*  
Chair of Institutional Council

*Douglas S. Foley*  
Chair of Board of Regents



# MEDICAL LABORATORY TECHNICIAN EXAMINATION MLT(ASCP)

## EXAMINATION CONTENT GUIDELINE

This document should serve as a useful guide for examination preparation. The Board of Registry criterion-referenced examinations are constructed to measure the competencies described in the Professional Levels Definitions (*Laboratory Medicine*, May, 1982). These competency statements are specified into task definitions, linked to each of the content outlines, and measured by the test items. It should be noted that, for the medical laboratory technician, the Professional Levels Definitions refer to skills and abilities expected at career entry, not those that may be acquired with subsequent experience. The Professional Levels Definitions for the technician as published by the Board of Registry are as follows:

### Knowledge

The technician has a working comprehension of the technical and procedural aspects of laboratory tests.

### Technical Skills

The technician is able to read and follow directions and perform those tests in a clinical laboratory that are considered to be of a straight-forward nature. The technician has a practical understanding of quality control which is sufficient to determine whether or not tests are within control limits and to make the requisite adjustments according to specified procedures. The technician is capable of performing simple instrument maintenance.

### Judgment and Decision-making

The technician is able to recognize the existence of common procedural and technical problems, and take corrective action according to predetermined criteria.

### Communication

The technician communicates straight-forward information such as reporting test results and quoting normal ranges and specimen requirements.

### Teaching and Training Responsibilities

The technician is capable of demonstrating learned technical skills.

## THE EXAMINATION MODEL

The Board of Registry criterion-referenced examination model consists of three interrelated components:

**Competency Statements** which describe the entry level skills and tasks performed by Medical Laboratory Technicians and measured on the examination.

**Content Outline** which delineates general categories or subtest areas of the examination.

**Taxonomy** levels which describe the cognitive skills required to answer the question.

**TAXONOMY 1 - Recall:** Ability to recall or recognize previously learned (memorized) knowledge ranging from specific facts to complete theories.

**TAXONOMY 2 - Interpretive Skills:** Ability to utilize recalled knowledge to interpret or apply verbal, numeric or visual data.

**TAXONOMY 3 - Problem Solving:** Ability to utilize recalled knowledge and the interpretation/application of distinct criteria to resolve a problem or situation and/or make an appropriate decision.



# COULTER

## Certificate of Achievement

awarded to

# ROBIN BURGNER

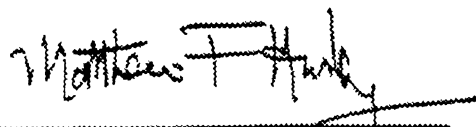
for completion of the Coulter Trained Operator's course on the

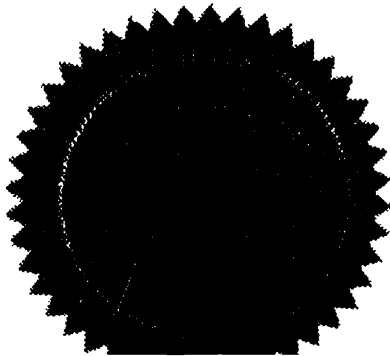
## COULTER® STKS

conducted

March 3 - 7, 1997

Coulter Education Center • 5920 N.W. 142nd Street, Miami Lakes, FL 33014

  
\_\_\_\_\_  
Manager of Technical Training



  
\_\_\_\_\_  
Facilitator

CEUs earned 33 contact hrs

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing CORRECTED BRIEF OF APPELLANT has been filed in the office of the Clerk for the Utah State Court of Appeals for the Third District, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 11<sup>th</sup> day of September, 2003.

ALAN HENNEBOLD  
Utah Labor Commission, UALD & EEOC  
Office of General Counsel  
PO .BOX 146615  
Salt Lake City, Utah 84114-6615

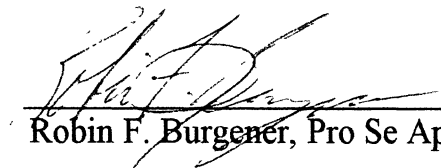
Hand Delivered To Office

Mark Morris, ESQ  
Snell & Wilmer  
15 South Temple, Suite 500  
Salt Lake City, Utah 84101  
For LabCorp

Hand Delivered To Office

ROBIN F. BURGNER, PRO SE:  
6910 South Fargo Road  
West Jordan, Utah 84084

Hand Delivered To Residence

  
Robin F. Burgener, Pro Se Appellant