

2001

# Mark Tech Corp v. Utah Resources International, Inc : Brief of Appellee

Utah Court of Appeals

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# In The Utah Court of Appeals

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**MARK TECHNOLOGIES CORP.**, a  
California Corporation, and **MARK  
JONES**,

*Plaintiffs-Appellants,*

v.

**UTAH RESOURCES  
INTERNATIONAL, INC.**, a Utah  
Corporation, **JOHN FIFE**, **DAVID  
FIFE**, **LYLE D. HURD, Jr.** and  
**GERRY BROWN**, individuals,

*Defendants-Appellees.*

## BRIEF OF APPELLEES

Court of Appeals No. 20010261-CA

—  
District Court No. 980900576  
—

Priority No. 15

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Appeal from the Judgement and Order of the Third Judicial District  
Court of Salt Lake County, State of Utah, Honorable Anne M. Stirba

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**FILED**  
Utah Court of Appeals

JAN 28 2002

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## **JURISDICTION**

Defendant Utah Resources International, Inc. (“URI”) and Defendants John Fife, David Fife, Lyle Hurd and Gerry Brown (collectively the “individual defendants”) adopt Plaintiffs’ statement of jurisdiction. (Br. 1).<sup>1</sup>

## **STATEMENT OF ISSUES**

Although the district court entered judgment against them on all ten claims they raised below, on appeal, Jones and MTC dispute the district court’s judgment only with respect to Claims 1-5, 7 and 10. (Br. 14). Jones and MTC also dispute the district court’s award, pursuant to a contractual provision, of the reasonable attorneys’ fees that URI and the individual defendants incurred in defending against Claims 1-10. (Br. 16). The issues on appeal therefore boil down to two:

1. Whether the district court correctly determined that no genuine issue of material fact existed and URI and the individual defendants were entitled to judgment as a matter of law on Jones’s and MTC’s Claims 1-5, 7 and 10, because Jones and MTC either lacked standing to bring the claims, their claims legally did not exist, or they failed to controvert URI’s evidence to raise a disputed issue of material fact. (R. 1516-25, Add. Ex. C).

2. Whether the district court abused its discretion when it determined that URI and the individual defendants, who won judgment in their favor on all of Jones’s and

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<sup>1</sup>All citations to “Br.” refer to Plaintiffs-Appellants’ brief on appeal; all citations to “Add. Ex.” refer to an exhibit in the Plaintiffs-Appellants’ addendum.



MTC's ten claims, were a "prevailing party" entitled to their reasonable attorneys' fees of \$162,028.87 plus post-judgment interest, under the parties' contract allowing the "prevailing party" to recover fees. (R. 1834-38, Add. Ex. D; R. 1927-28, Add. Ex. E).

### **STANDARD OF REVIEW AND STATEMENT REGARDING PRESERVATION OF ISSUES**

This Court must review *de novo* the district court's grant of summary judgment on Claims 1-5, 7 and 10. See Archer v. Board of State Lands and Forestry, 907 P.2d 1142, 1145 (Utah 1995). This Court will affirm a grant of summary judgment if there are no disputed issues of material fact and the moving party was entitled to judgment as a matter of law. See Sorenson's Ranch School v. Oram, 36 P.3d 528, 530 (Utah Ct. App. 2001). Defendants concede that Jones and MTC preserved their right to appeal Claims 1-5, 7 and 10. Defendants had contested these claims in their main and reply memoranda in support of their motion for summary judgment and in the accompanying exhibits (R. 565-594; R. 1453-75; R. 1271-1452). Whatever Defendants' arguments, however, this Court may affirm on any ground supported in the record. See Dipoma v. McPhie, 29 P.3d 1225, 1230 (Utah 2001).

This Court reviews an attorneys' fees award under the abuse of discretion standard. See Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1998). A district court has "broad discretion in determining what constitutes a reasonable fee." Id. at 991. URI and the individual defendants concede that Jones and MTC preserved most of their arguments regarding fees below (R. 1724-1734), with the exception of their new and unsubstantiated argument that some of their claims did not arise from the Settlement

Agreement and their contention that the district court's judgment on at least one claim was based on "mootness" and so fees for that claim were unwarranted. (Br. 31). URI and the individual defendants raised their own arguments with respect to attorneys' fees in their main motion for an order awarding attorneys' fees and costs and in their supporting reply memorandum (R. 1545-1712; R. 1743-1761), though again, the Court may affirm the fee award on any ground supported in the record. See Dipoma, 29 P.3d at 1230.

## **STATEMENT OF THE CASE**

### **A. Background**

Utah Resources International, Inc. ("URI") is a small real estate development company that owns land in St. George, Utah. As evidenced from the Settlement Agreement at issue in this case, from 1987 through the first half of 1996, URI was awash in shareholder litigation directed at its founder, John H. Morgan, Jr., and against the court-approved Board of Directors that assumed control of the company in 1993 upon Mr. Morgan's ouster from control. (R. 973-988, Add. Ex. A; R. 362-64; R. 1285, pp. 50-52; R. 1291, p.75). Minority shareholders sued to prevent the Morgan family, who owned a majority of shares, from influencing the company's affairs. Members of the Morgan family sued to stop the Board from doing anything inconsistent with the desires of the controlling shareholders. After nine years of internal strife, URI was paralyzed, out of money, and had a thinly-traded public stock price of less than a dollar per share. (R. 955-59; R. 973-988, Add. Ex. A; R. 1344-46, pp. 66, 73-74; R. 1349, pp. 99-100).

Plaintiffs-Appellants recognized a distressed company that was ripe for the taking. In 1995, Mark Jones (“Jones”) and his personal holding company, Mark Technologies Corp. (“MTC”), acquired URI shares in private purchases from entities owned by the Morgan family. The future husband of Mr. Morgan’s daughter, Victoria, Jones was appointed to URI’s Board of Directors. In early 1996, Jones and MTC made their bid for control of URI at \$3.00 per share.

The outside directors of URI solicited other suitors. John Fife (“Fife”) and his company, InterMountain Capital Corp. (“IMC”), successfully outbid Jones and MTC for the purchase of controlling interest in URI at \$3.35 per share. (R. 568; R. 571; R. 664). Rather than compete in the bidding, Jones and MTC sued to stop the sale to Fife and IMC. (R. 219; R. 472-473). That lawsuit, Mark Technologies Corp. et al v. Utah Resources International, Inc., et al., Civ. No. 96 090 3332CV, as well as the other pending shareholder suits (Ernest Muth, et al. v. John Morgan, Jr., et al, Civ. No. C-87-1632 & Anne Morgan, et al. v. R. Dee Erickson, et al., Civ. No. 95 CV 0661C) were resolved by the June 26, 1996 Settlement Agreement that is the subject of this case. (R. 473; R. 973-988, Add. Ex. A). MTC was paid \$136,145.79 for its attorney’s fees by URI pursuant to the settlement. (R. 568; R. 691-92).

The Settlement Agreement (R. 973-988, Add. Ex. A) had three primary objectives: dispose of all the shareholder litigation that was strangling URI; set forth the material terms of a Stock Purchase Agreement to be negotiated and executed between URI and IMC; and set out the terms of a “going private” transaction (via reverse stock split) for URI whereby small shareholders in URI would be cashed out. (R. 152-154). The Stock

Purchase Agreement (R. 96-132) was eventually negotiated, executed on July 3, 1996, and performed. Neither Jones nor MTC is a party to that contract. IMC acquired 50.5 percent of URI as a result. (R. 473). All of the pending shareholder suits were dismissed. (R. 458). The “going private” transaction was completed (with SEC approval) in March, 1999. (R. 954-956).

URI’s Board of Directors at the time of the 1996 Settlement Agreement consisted of Jones, Jenny Morgan, Lyle D. Hurd, R. Dee Erickson, and E. Jay Sheen. Pursuant to paragraph 1(e) of the Settlement Agreement, Fife and his brother, David, were elected to the Board to replace Mr. Erickson and Mr. Sheen. (R. 996-999). Jones, along with Jenny Morgan, served as a director until December, 1997. (R. 219; R. 1320 p.191; R. 1447). During this time, Gerry Brown was a mere employee of URI. Jones filed this lawsuit against URI, Fife, David Fife, Lyle Hurd, and Gerry Brown on January 20, 1998.

**B. Nature Of The Case**

The Amended Complaint (R. 502-537) filed by Jones and MTC cited the following alleged “breaches” of the 1996 Settlement Agreement:

- Claim One -- Failure by URI to make a written employment agreement with Fife in violation of paragraph 1(f)(xii) of the Settlement Agreement.
- Claim Two -- Failure by URI to use “best efforts” to unwind existing contractual relationships with Morgan Gas & Oil Co. in violation of paragraph 1(l) of the Settlement Agreement.
- Claim Three -- Failure by URI to revoke any alleged stock options held by Lyle D. Hurd and Gerry Brown in violation of paragraph 1(f) of the Settlement Agreement.

- Claim Four -- Failure by URI to terminate any alleged stock options held by Lyle D. Hurd in violation of paragraph 1(j) of the Settlement Agreement.
- Claim Five -- Failure by URI to pay certain alleged out-of-pocket expenses incurred by MTC in violation of paragraph 1(h)(i) of the Settlement Agreement.
- Claim Six -- Fraud-in-the-inducement by Fife and Hurd in executing the Settlement Agreement without any intent to perform.
- Claim Seven -- Failure to declare alleged stock options void.
- Claim Eight -- Breach of fiduciary duties owed to Jones and MTC by Fife, David Fife, Lyle Hurd, and Gerry Brown.
- Claim Nine -- Breach of fiduciary duties by URI's directors.
- Claim Ten -- Failure by URI to reimburse Jones for alleged out-of-pocket expenses incurred in 1996-1997 while serving as a URI director.

Each claim incorporated by reference the allegations in each preceding claim, and all claims arose from the Settlement Agreement. (Id.).

Jones and MTC have abandoned any appeal from the judgment against them on Claims Six, Eight, and Nine. (Br. 4, fn. 2). Of the remaining claims, only Claims Five and Ten (both involving alleged out-of-pocket expenses) describe any economic harm suffered by Jones and/or MTC as a result of an alleged "breach" of contract by URI. Each of the remaining claims rests upon allegations of URI's failure to act in a timely fashion in performing covenants directed at persons and entities other than Jones and MTC. (R. 567-568). Nowhere in the Amended Complaint (R. 502-537) did Jones or MTC describe any causal connection between these alleged URI "breaches" and any injury to themselves. No causal nexus could be alleged because neither Jones nor MTC

would suffer any loss from URI's alleged failures to write a contract with its president, pursue third-party transactions with "best efforts", or to specifically tell employees that they had no stock options.

**C. Defenses**

Shortly after filing this lawsuit in the Third Judicial District, Salt Lake County, Jones and MTC filed another lawsuit in the Fifth Judicial District, Washington County, against URI, Fife, David Fife, Lyle Hurd, and Gerry Brown (hereinafter "St. George Action"). (R. 475). The St. George Action commenced on April 17, 1998. It seeks judicial dissolution of URI for alleged "oppression" of Jones and MTC pursuant to Utah Code Ann. §16-10a-1430. Because the alleged acts of "oppression" pled in the St. George Action include acts by URI prior to the June 26, 1996 and also include URI activities required by the Settlement Agreement, URI cited that lawsuit in its Affirmative Defenses and Counterclaims as support for its claim that Jones and MTC had violated the release and covenant-not-to-sue provisions of the Settlement Agreement. (R. 475; R. 492). Because of the final judgment in favor of URI and the award of attorney's fees and costs to URI pursuant to Count II of URI's Counterclaim, Count I of URI's Counterclaim was voluntarily dismissed. (R. 1792-1831). The St. George Action is pending today. It was cited by the trial court as a basis for judgment against the plaintiffs on Claim Nine. (R. 1524, Add. Ex. C).

**D. Judgments In The Trial Court**

Jones and MTC appeal from two separate and distinct judgment orders entered by the trial court. The first is the January 7, 2000 order by Judge Stirba granting summary

judgment in favor of the defendants on each of plaintiffs' ten claims and denying plaintiffs' cross-motion for summary judgment. (R. 1516-1526, Add. Ex. C). The second judgment is the January 8, 2001 order, by Judge Brian for Judge Stirba, that granted Defendants' Motion For Judgment Order Awarding Attorney's Fees and Costs Against Plaintiff. It awarded \$162,028.87 in fees and costs plus interest as requested in Count II of defendants' Counterclaim. (R. 1834-1838, Add. Ex. D; R. 1927-1929, Add. Ex. E).

The fundamental flaws in the claims made by Jones and MTC were:

- (a) They lacked standing to assert the claims; or
- (b) They could not meet their burden of presenting evidence sufficient to show a question of fact on any material issue that would justify a trial of their claims; or
- (c) They sought to invent terms for the Settlement Agreement that are not present in the fully-integrated written document, such as specific time periods for URI's performance of various covenants. (R. 561-563).

In short, the claims in this case were meritless. Jones had MTC purchase URI shares in 1995 in the hope that he could assume control of the company. Being unsuccessful, Jones and MTC were left as unhappy minority shareholders in a company that, by design, became owned by less than 100 shareholders. (R. 1953, p 16). In an effort to force URI to spend its precious cash buying out MTC's shares, Jones and MTC resorted to the historical intimidation method used in the past by URI shareholders who

wanted the company to act for their individual benefit rather than everyone's benefit -- litigation.<sup>2</sup> It did not work because it should not work. (R. 212-214).

### **SUMMARY OF ARGUMENT**

All of the claims that Jones and his company MTC raise, in the context of breaches of the 1996 Settlement Agreement, demonstrate that the Plaintiffs are unwilling to move forward and accept that John Fife and Fife's company, IMC, are the controlling force behind URI today. The Settlement Agreement that Jones and MTC signed was supposed to allow Fife and URI to go forward with an outsider, Fife, assuming control of URI (formerly dominated by the Morgan family) because he purchased the right to do so. Although the purchase of controlling interest happened, Jones and MTC could not abide the change in circumstance. As soon as Jones dropped off URI's Board of Directors, he sought leverage to assert influence over URI by filing this lawsuit. The district court, who became very knowledgeable about the parties in this case, wholeheartedly rejected all of Jones's and MTC's claims, as should this Court.

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<sup>2</sup> In 1998, Morgan Oil & Gas Co. commenced litigation against MTC and Jones to rescind its 1995 sale of 201,210 URI common shares. This litigation was ultimately resolved by arbitration in San Francisco. (R. 1905).

Jones and MTC were ordered to return the shares to Morgan Gas & Oil Co. by a April 17, 2001 judgment on the arbitration award entered in the U.S. District Court for the Northern District of California, Case No. C01-08245BA. Thus, MTC's current shares in URI consist of 125,000 shares (125 shares post-split) which MTC purchased in early 1996 from the Morgan Family Charitable Trust. The 125 shares are 5.2% of URI's outstanding stock. (R. 1891).



A close examination of the Settlement Agreement in this case demonstrates why under the contract's plain language, Jones and MTC have no case. The integrated Settlement Agreement grants them no right to sue under the Stock Purchase Agreement, and so Claims One and Three, which are based upon the Stock Purchase Agreement, necessarily fail. Nor were there any breaches of the Settlement Agreement itself. URI and the individual defendants fulfilled their obligations under it in a timely and reasonable fashion. Claim One, that URI and Fife did not execute the kind of employment agreement that Jones and MTC supposedly wanted demonstrates no breach: the Settlement Agreement did not even require an employment agreement to be executed (though a written employment agreement was executed by Fife and URI regardless). Claim Two, that URI did not use best efforts to wind up some partnerships, was wholly unsupported. URI proved that it investigated and wound up the partnerships as required by the Settlement Agreement. Claims Three, Four, and Seven, that URI did not void Hurd's and Brown's stock options, when the Settlement Agreement does not require URI to void options, were likewise lacking in proof. URI did not know if the options existed, and Hurd and Brown voluntarily terminated them anyway. There could not be a contractual breach. Claims Five and Ten, that URI did not pay some of Jones's and MTC's alleged reimbursable expenses, also had no legal basis. Jones and MTC failed to controvert URI's evidence that the expenses had been reimbursed or were not reimbursable.

All of Jones's and MTC's claims show only their desire to second-guess URI's business judgment for how (and when) URI complied with the Settlement Agreement and

how URI chose to set its priorities and run the corporation. Many of Jones's and MTC's claims also demonstrate that they are trying to sue on contractual provisions included in the Settlement Agreement that have no bearing upon them and that could not impact them. Because of the complete lack of merit of all of Jones's and MTC's claims, including the three they chose not to appeal, the district court was correct in granting summary judgment and finding that URI and the individual defendants were the prevailing parties. As such, the district court awarded URI and the individual defendants their reasonable attorneys' fees under the Settlement Agreement provision allowing this recovery.

The attorneys' fees award must likewise be affirmed. URI and the individual defendants prevailed on every single one of the ten claims, all of which were grounded in the Settlement Agreement. The district court's detailed factual findings in evaluating the reasonableness of the fees shows that the district court did not abuse its discretion. Jones and MTC have no meaningful challenge to the district court's findings. Instead, they raise meritless objections, at least two of which they failed to raise in the district court. Ample support in the record exists for this Court to affirm the judgment and fee award in all respects.

## **ARGUMENT**

### **I. The District Court Properly Granted Summary Judgment On Claims One, Two, Three, Four, Five, Seven and Ten.**

#### **A. The District Court Correctly Awarded Summary Judgment On Claim One Relating To Fife's Employment Agreement With URI.**

##### **1. The Settlement Agreement Grants No Right To Jones Or MTC To Sue Under The Stock Purchase Agreement.**

The district court correctly held that the Settlement Agreement under which Jones and MTC purport to sue contains no provision requiring John Fife and URI to enter into an employment agreement, and so Jones and MTC have no right to bring a claim attacking the employment agreement that was ultimately executed. (R. 1519, Add. Ex. C). Jones and MTC admit that the Settlement Agreement does not give them a direct right to sue regarding Fife's employment agreement with URI. Jones and MTC instead attempt to derive a right from the Settlement Agreement to sue under the Stock Purchase Agreement between IMC and URI. This position defies the plain language of paragraph 1(f)(xiii) of the Settlement Agreement. Paragraph 1(f) of the Settlement Agreement states explicitly that the Stock Purchase Agreement was between URI and IMC. (R. 977). Only URI or IMC therefore would have standing to sue for a violation of the Stock Purchase Agreement. See, e.g., State v. Mace, 921 P.2d 1372, 1378 (Utah 1996) (plaintiff who makes no claim of specific injury which was causally related to alleged illegal activity has no standing to sue); Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1993) (same).

Far from giving Jones and MTC the right to sue under the Settlement Agreement, the Settlement Agreement itself deliberately limited any input that Jones was allowed to

have regarding the Stock Purchase Agreement. Paragraph 1(f)(xiii) of the Settlement Agreement provides unambiguously that Jones's only right was one of review of the final "definitive" Stock Purchase Agreement "for consistency with the provisions [in paragraphs 1(f)(i) through 1(f)(xii)] above." (R. 979, Add, Ex. A) (emphasis added). The whole point of paragraph 1(f) then, by its own clear terms, was to reflect the items the final version of the Stock Purchase Agreement had to include, not, as Jones now contends, to give Jones the right to sue under the Stock Purchase Agreement itself. As the district court so aptly noted, the terms of the Settlement Agreement must be given their plain and ordinary meaning. See Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n, 899 P.2d 779, 782-83 (Utah Ct. App. 1995). Jones and MTC accordingly cannot sue under the Stock Purchase Agreement, to which they are not parties (R. 1519, Add. Ex. C), particularly where the only contract they did sign allowed them only to review the Stock Purchase Agreement for consistency with the Settlement Agreement. They have no independent right to sue under the Stock Purchase Agreement. This Court must therefore reject Jones's and MTC's contrary argument, which would ignore the plain and ordinary meaning of the Settlement Agreement's provisions.

**2. The So-Called "Incorporation Clause" Of Paragraph (f) Does Not Permit Jones Or MTC To Sue Under The Stock Purchase Agreement.**

Jones's and MTC's argument that paragraph (f) of the Settlement Agreement "incorporated by reference" a draft Stock Purchase Agreement and so bestows upon them the right to sue under the Stock Purchase Agreement flies in the face of paragraph (f)'s plain language. A quick review of paragraph (f) reveals that the draft Stock Purchase

Agreement was attached only for ease of reference so that the parties would know the draft that was at issue. Paragraph (f) plainly states that the Stock Purchase Agreement in its then “current form” (in other words, a draft) was attached and incorporated by reference. The very next clause says that the draft was “subject to negotiation and execution of the definitive Stock Purchase Agreement and approval of its terms by the URI Board of Directors.” (R. 977, Add. Ex. A) (emphasis added). Paragraph (f) gives absolutely no rights to Jones or MTC individually; only the URI Board in toto had the right to approve the Stock Purchase Agreement. These unambiguous terms must be given their plain effect. Warburton, 889 P.2d at 782-83.<sup>3</sup>

**3. Even If Jones Could Sue Under The Stock Purchase Agreement, Neither The Stock Purchase Agreement Nor The Employment Agreement Itself Was Breached.**

The district court’s holding that Jones and MTC had no right to bring a claim for breach of the Stock Purchase Agreement completely disposes of Jones’s Claim One. But even if Jones or MTC could derive a right from the Settlement Agreement to allow them to sue under the Stock Purchase Agreement, they have no claim for breach of the Stock Purchase Agreement. The items that the Settlement Agreement required the Stock Purchase Agreement to include are defined in paragraphs 1(f)(i) through 1(f)(xii). (R. 977-79). It is undisputed that, per paragraph 1(f)(xii) of the Settlement Agreement, the

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<sup>3</sup>Not only does the plain language of the “incorporation clause” defeat Jones’s and MTC’s argument, but the fact that the incorporated draft itself did not even refer to the employment agreement further demonstrates Jones’s and MTC’s inability to sue under the Stock Purchase Agreement.

Stock Purchase Agreement did ultimately contain the required clause about Fife's employment agreement that Jones now complains of here. The Stock Purchase Agreement said that URI would hire Fife under a written employment agreement capping yearly compensation for services rendered at \$200,000. (R. 979, Add. Ex. A; R. 572-73; R. 1519, Add. Ex. C). As the district court held, nothing more was required. (R. 1519, Add. Ex. C).

Nor was there a breach of the terms of the employment agreement itself, though it is baffling how Jones and MTC could possibly have individual standing to sue under the employment agreement between Fife and URI. A written employment agreement, capping Fife's yearly compensation at \$195,000, was executed. (R. 684). Although Jones and MTC complain about the timeliness with which the employment agreement was executed, nothing in the Stock Purchase Agreement stated that the written employment agreement had to be executed by a certain time. (Id.). Moreover, the only injury sufficient to confer standing (via a true shareholder derivative action) would occur if the employment agreement compensated Fife with payment of more than \$200,000 per year. (R. 1459). In that instance, the shareholders would arguably have been harmed. But this did not occur. Because there was no breach, Jones and MTC try to skew the facts to create one by claiming that the employment agreement should have contained "more" than it did. Such contentions are meritless: the employment agreement contained all that was needed. There is no dispute that Fife knew what his duties were under URI's by-laws. (R. 573; R. 1344, p. 59). Fife did not need an employment agreement to spell out those duties, or to give him extra perks, when, as Fife himself testified, his concern

was not to get a fat employment contract, but to save a failing company from destruction. (R. 1344-46, pp. 66, 68, 73-74). Jones and MTC are merely attempting to second-guess URI's reasonable business judgment in what the employment agreement needed to contain. This effort must be rejected as without foundation in law or fact. See, e.g., C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47 (Utah Ct. App. 1995) (business judgment rule presumes that directors act in good faith and in accord with sound business principles) (citing cases); Utah Code Ann. § 16-10a-840 (codifying business judgment rule). For all these reasons, the district court's grant of summary judgment on the employment agreement issue was entirely correct.

**B. Summary Judgment On Claim Two Was Appropriate Because Jones And MTC Failed To Controvert That Best Efforts Were Used To Unwind Partnerships With MGO.**

When IMC became URI's controlling shareholder in 1996, it faced the unenviable task of deciphering the functions of the various partnerships in which URI was involved.<sup>4</sup> Adding to the complexity of the task, Fife had to discern the role played in those partnerships by another entity, Morgan Gas and Oil Co. ("MGO") (operated by John Morgan, who formerly ran URI). This is because paragraph 1(l) of the Settlement Agreement required that "the Parties hereto shall exercise their best efforts to account for,

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<sup>4</sup>Specifically, URI was a general partner in Southgate Resort Limited Partnership, a Utah limited partnership; a general and limited partner in Country Club Partnership, a Utah general partnership; a general partner in URI-MGO Health Venture, a Utah general partnership; a general and limited partner in Tonaquint Indian Hills Partnership, a Utah limited partnership; and a general and limited partner in Service Station Limited Partnership, a Utah limited partnership. (See R. 574-575).

pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.” (R. 980, Add. Ex. A).

In taking steps to investigate and ultimately dissolve the MGO partnerships, Fife and IMC were at all times in complete compliance with paragraph 1(l) regarding best efforts. As the district court correctly determined, “URI presented uncontroverted evidence that it had been in the process of unwinding the partnerships identified in the Settlement Agreement, according to the terms of the Agreement, for an extended time prior to the filing of Plaintiffs’ lawsuit.” (R. 1520, Add. Ex. C). From 1996 through 1998, including the time during which this matter was being litigated, URI under John Fife’s leadership investigated the partnerships, identified the functions, assets and liabilities of the viable partnerships, and took steps to dissolve and distribute the assets of the others—all the while getting on with the business of resurrecting a company that had been run into the ground. (R. 575; R. 709-710; R. 1344-46, pp. 66, 73-74; R. 1349, pp. 99-100). Once Fife and URI had completed their investigations, URI was able to enter into settlements with MGO to dissolve MGO’s affiliations. (R. 575; R. 597-650; R. 1350, p. 107). A cursory review of the partnership settlement agreement reveals the complexity of the issues upon which URI had to educate itself to be able to propose a deal to MGO that would be in URI’s interest and avoid protracted litigation with MGO. (R. 597-605). Jones never disputed these facts below.

It is eminently proper for a court to grant summary judgment where no genuine issue of material fact exists. See, e.g., Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980). Jones and MTC simply did not meet their burden of raising a genuine



issue of material fact. They raised only immaterial facts complaining that URI did not terminate its partnerships with MGO as fast or in the way that they would have liked. (Br. 10-11). The “best efforts” provision relating to MGO contains no time-table, however, and the parties to the Settlement Agreement knew how to include a provision for speed in using best efforts, had they wanted it. Compare Settlement Agreement, paragraph 1(a) (“The Parties agree that they will use best efforts immediately following the Closing to petition the Court in the First State Action for the purpose of terminating the 1993 Settlement Agreement.”) (emphasis added). Moreover, URI’s results in achieving, in under two years, a termination of the MGO partnerships that had existed for many years demonstrates that “best efforts” were used to “account for, pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.” (R. 980, Add. Ex. A). Again, Jones and MTC simply failed to raise a genuine dispute of material fact to the contrary. Compare Foster Wheeler Broome County, Inc. v. County of Broome, 275 A.D.2d 592, 593 (N.Y. App. Ct. 2000) (summary judgment granted on contractual “best efforts” claim where unrebutted evidence was presented of genuine efforts made to assist plaintiff in obtaining permit); EEOC v. R.J. Gallagher Co., 181 F.3d 645, 652 (5th Cir. 1999) (summary judgment granted on “best efforts” claim because genuine efforts were demonstrated; as a matter of law clause did not mean that defendant had to devote twenty-four hours a day, or even every waking hour, to advancing R. J. Gallagher’s interests).

Even if Jones and MTC had succeeded in raising an issue of material fact on the best efforts issue, this Court can nonetheless affirm on any ground supported by the

record. The record supports that Jones and MTC had no standing to challenge the speed with which partnerships were unwound. No injury resulted to them from the methods used by Fife and URI in unwinding the partnerships. Mace, 921 P.2d at 1378 Jenkins v. Swan, 675 P.2d at 1150. Nor can Jones and MTC show that the “best efforts” provision of the Settlement Agreement was even intended for their benefit, as opposed to that of the other signatories to the Agreement who were affiliated with MGO. See, e.g., Settlement Agreement paragraph 1(e) (Sheen & Erickson covenant not to seek election or accept future nominations to serve as officers or directors of URI or MGO). (R. 975, Add. Ex. C). Jones’s and MTC’s complaint regarding the “best efforts” used to unwind the MGO partnerships is nothing more than another attack on the ways and means URI uses in exercising business judgment. Such an attack is unwarranted in the absence of a breach of a duty to all shareholders. See, e.g., C&Y Corp., 896 P.2d at 55; Utah Code Ann. § 16-10a-840. For any or all of these reasons, the district court’s grant of summary judgment on “best efforts” must be affirmed.

**C. Summary Judgment On Claims Three, Four and Seven, All Relating To Purported Stock Options, Was Correct; The Claims Are Uniformly Lacking In Substance.**

The district court rightly rejected all of Jones’s and MTC’s three claims regarding purported stock options. In so doing, the district court recognized that Jones and MTC were suing, without the benefit of a contract granting them a right to sue, to have stock options declared void even though the alleged options had never been given effect. On Claim Three, for breach of paragraph 1(f) of the Settlement Agreement, the district court held that paragraph 1(f) did not refer to or require any action regarding stock options and

no such clause would be read into an integrated contract. (R. 1520, Add. Ex. C). On Claim Four, for breach of paragraph 1(j) of the Settlement Agreement, the district court held that no employment agreements had been effectuated that needed termination, including any employment agreement granting stock options to anyone, and so there was no breach. (R. 1521, Add. Ex. C). On Claim Seven, the district court referred to its ruling on Claim Three and refused to issue a declaratory judgment declaring that the stock options were void. As with all other claims, the district court granted summary judgment on Claims Three, Four and Seven because there were no genuine disputes of material fact. (R. 1517-18, 1525).

**1. Claim Three Fails Because Paragraph 1(f) Of The Settlement Agreement Did Not Refer To Stock Options And So There Was No Breach Of Paragraph 1(f).**

Jones and MTC contend that URI, Fife and Hurd “breached” paragraph 1(f) of the Settlement Agreement because they did not redact purported stock options from Schedule 2.2 of the Stock Purchase Agreement . (R. 508-511). As the district court held, however, Paragraph 1(f) does not even mention stock options, much less require that any options be voided, and so there could be no breach of a non-existent obligation. (R. 1520, Add. Ex. C). The district court, citing Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985), also rightly refused to read a clause regarding options into an integrated contract. (Id.).

Just as they argued with respect to Fife’s employment agreement, however, Jones and MTC again contend that their right to sue under the Stock Purchase Agreement derives from the fact that a draft of Schedule 2.2 was attached to the Stock Purchase

Agreement and a draft of the Stock Purchase Agreement was attached to the Settlement Agreement as an exhibit. For all of the reasons exhaustively detailed supra at pp. 12-14 of this brief, Jones and MTC have absolutely no standing to challenge anything in the Stock Purchase Agreement. The Settlement Agreement itself bars them from doing this because it allowed Jones only the opportunity to review the final Stock Purchase Agreement for consistency with the Settlement Agreement's few explicit provisos in paragraph 1(f). (Id.).

**2. Claim Four Fails Because No Employment Agreements Were Given Effect And So Disclaimers Of Any Related Stock Options Were Not Needed.**

Jones and MTC did not fare any better under Claim Four. That claim asserted that Hurd had claimed stock options under an employment agreement with URI that required termination under Settlement Agreement paragraph 1(j). (R. 511). Paragraph 1(j) of the Settlement Agreement does provide that "all employment agreements contemplated, negotiated or executed between URI and . . . Hurd . . . shall not be effectuated, and if effectuated, shall be terminated." Only an effectuated employment agreement could be terminated. As the district court correctly held, however, Jones and MTC failed to controvert the defendants' evidence that no employment agreement, including one granting stock options, had been given effect. (R. 1466; R. 1521, Add. Ex. C). The district court therefore appropriately concluded that "there was nothing to terminate." (Id.). Perhaps recognizing the impossibility of challenging the district court's ruling, Jones and MTC argue that the district court misunderstood their request for relief under

Claim Four. (Br. 25). There was no misunderstanding on the district court's part of what Jones and MTC sought; the court just held that they were not entitled to any relief.

**3. Claim Seven Fails Because No Genuine Issue Of Material Fact Existed To Warrant A Declaratory Judgment Regarding Stock Options.**

Nor did Jones and MTC prevail on Claim Seven. In that claim, which incorporated all previous allegations regarding purported breaches of the Settlement Agreement, (R. 515), Jones and MTC sought a declaration "that the purported stock options are null, void and of no legal force or effect." The district court refused to issue such a declaration. It referenced the reasons it gave for denying Claim Three, where the district court concluded that Jones and MTC had no standing to seek to void stock options under a non-existent clause of the Settlement Agreement. (R. 1520, Add. Ex. C). The district court then stated that no declaration was necessary because Brown and Hurd had voluntarily disclaimed any stock options that may have existed. (R. 687-88; R. 1523, Add. Ex. C). The court never determined whether options had in fact existed that needed to be declared void. It just refused to issue the declaration Jones and MTC requested. (R. 1523, Add. Ex. C). Because stock options and employment contracts are exclusively business agreements between URI and individuals, and because there was no dispute between URI and the individuals which required court intervention, a declaratory judgment remedy was plainly unavailable on the facts to anyone -- and certainly not Jones or MTC.

**4. Jones And MTC Regardless Lacked Standing To Sue On Any Of Their Stock Options Claims Because They Were Not Injured.**

Just as with the previously discussed claims, even if Jones and MTC had been able to allege a viable cause of action regarding stock options, they would lack standing, as individuals, to pursue a claim for damages where they were not personally injured by the conduct they challenge. Because no one ever took any action to enforce or utilize the stock options there was no harm sufficient to allow suit. Mace, 921 P.2d at 1378; Jenkins, 675 P.2d at 1150. Jones and MTC simply complain about URI's business judgment with respect to the manner in which URI and the Board handled the stock option issue. The Board chose to focus on more pressing issues relating to stabilizing the company's financial health, instead of trying to determine what stock options did and did not exist. (R. 1347-48, pp. 83-89; R. 1349, p. 98). This legitimate business judgment cannot be faulted. See, e.g., C&Y Corp., 896 P.2d at 55; Utah Code Ann. § 16-10a-840.

**D. Summary Judgment On Claims Five And Ten Was Proper Because Jones And MTC Failed To Controvert Defendants' Evidence To Establish A Right To Particular Expense Reimbursements.**

As the district court determined when it granted summary judgment, neither of Jones's two claims for expenses allegedly not reimbursed has any merit. Claim Five sought expenses for costs incurred under the Settlement Agreement. The district court correctly held in its July 17, 1998 Order granting partial summary judgment that the Settlement Agreement was clear and unambiguous on its face, and did not allow for reimbursement of legal fees, costs and out-of-pocket expenses incurred or paid by Jones and MTC after July 3, 1996. (R. 449). Jones and MTC do not appeal that Order. In its

decision granting complete summary judgment, the district court further held that URI paid all expenses, costs and fees properly submitted for the relevant period of time and that Jones and MTC proffered no admissible evidence to controvert this fact. (R. 1522, Add. Ex. C). They pointed only to post-closing expenses for which the Agreement did not allow recovery (R. 1467) and to inadmissible evidence such as unauthenticated records to recover for overhead expenses. (R. 1468; R. 1155-88). Indeed, a quick review of the inadmissible records demonstrates that the employees recorded time for such tasks as learning how to use basic word processing programs. Jones's affidavit (R. 1098-1104) contains no statement verifying the legitimacy of the expenses or that the expenses were in fact paid. Rather, the affidavit contains only unsubstantiated accusations and conclusions, contrary to Utah law. See, e.g., Trelogann v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (respondent's affidavit must contain specific evidentiary facts showing a genuine issue for trial). Jones's "evidence" was not sufficient to defeat summary judgment on the issue that Jones had been paid for all properly documented expenses. See A.P. Winter v. Northwest Pipeline Corp., 820 P.2d 916, 918-919 (Utah 1991) (affidavit's conclusions raise no genuine issue of fact).

Under Claim Ten, Jones sought reimbursement for expenses that he allegedly incurred as a URI director. The district court held that Jones failed to controvert URI's evidence, via multiple affidavits, that it compensates directors for attendance at Board meetings and for expenses that receive prior authorization. (R. 592, R. 1473, R. 1524, Add. Ex. C). Nor did Jones controvert that he incurred expenses in the face of URI's written warnings to him that pre-approval was needed. (R. 580; R. 693; R. 695-98).

The district court held in its July 17, 1998 Order that Jones bore the burden of showing a corporate policy different from preapproval (R. 451), given that corporate law recognizes that directors are generally not entitled to reimbursement of expenses without prior approval. See, e.g., Fletcher Cyclopedia of Corporations § 2109 (5th Ed. 1995). The bare contentions in Jones's affidavit failed to present any evidence to controvert URI's or to present a dispute of material fact to this Court.<sup>5</sup> Massey, 609 P.2d at 938 (Utah 1980).

**II. The District Court Did Not Abuse Its Discretion By Granting URI's And The Individual Defendants' Petition For Reasonable Attorneys' Fees.**

**A. URI And The Individual Defendants Were The Prevailing Party On All Ten Of Jones's and MTC's Claims.**

The judgment below was completely in favor of URI, John Fife, David Fife, Lyle Hurd and Gerry Brown, on all ten claims. (R. 1525, Add. Ex. C). Defendants therefore were the "prevailing party" on all of these claims and the district court rightly found that they were entitled to recover their reasonable attorneys' fees and costs as described in paragraph 11(j) of the Settlement Agreement. (R. 982, Add. Ex. C; R. 1834-38, Add. Ex. D). See Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 555 (Utah Ct. App. 1989) ("quite simple" to determine the prevailing party; "if a defendant successfully defends and avoids an adverse judgment, defendant has prevailed").

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<sup>5</sup>Again, Jones's affidavit, his only evidence, makes inappropriate allegations. For example, he makes claims about other directors' expenses on "information and belief" which violates Utah R. Civ. P. 56. The district court was correct not to rely on such allegations. Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538, 542 (Utah 1973).



Jones and MTC raise a few meritless arguments in opposition to the fee award. First, they claim, for the first time on appeal,<sup>6</sup> that to the extent the district court's judgment on Claim Seven was based on "mootness," they and not Defendants prevailed. To the extent the Court chooses to address this new argument over Defendants' objection, it is noteworthy first of all that Jones and MTC misuse the term "mootness." They use the term in the common sense to refer to a point that "is deprived of practical significance: made abstract or purely academic,"<sup>7</sup> as opposed to the legal meaning of "mootness" which refers to a case or controversy that has been rendered inactive. The district court never made a finding of legal mootness: that a previously active case or controversy had been rendered inactive. If anything, the district court made a finding of a lack of ripeness: that it was not necessary to issue a declaratory judgment because any alleged options had been disclaimed by Hurd and Brown. As this Court stated in Boyle v. National Union Fire Ins. Co., "Ripeness occurs when a conflict over the application of a legal provision [has] sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. Where there exists no more than a difference of opinion regarding the hypothetical application of [a stock option] to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication." 866 P.2d 595, 598 (Utah Ct. App. 1993) (internal citations and quotations

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<sup>6</sup> Jones and MTC's memorandum in opposition to the fee petition is located at R. 1724-1734.

<sup>7</sup> See Merriam-Webster's Collegiate Dictionary (10th Ed. 2000).

omitted). In the case at hand, Hurd and Brown never evidenced any intention to “clash” with the Plaintiffs about enforcing stock options and they even disclaimed any interest in purported stock options to demonstrate their good faith. Jones and MTC just wasted their own time and the resources of the courts by seeking to have options declared void when no one had declared them valid or enforceable in the first instance.<sup>8</sup> Jones and MTC never asserted a ripe claim with respect to stock options. The district court recognized this in refusing to issue a declaratory judgment and granting judgment in the Defendants’ favor instead. (R. 1523, 1525, Add. Ex. C).<sup>9</sup>

Plaintiffs present another new argument for the first time on appeal: that the award included fees for Claims Six, Eight and Nine “which were not based upon the contract.” (Br. 31). If this Court addresses the argument over Defendants’ objection, Jones’s and MTC’s own Amended Complaint itself defeats their point. There, they incorporated every claim after Claim One into every subsequent claim. Moreover, all claims were

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<sup>8</sup>In his deposition, John Fife explained that he believed URI’s former corporate counsel, John Dahlstrom, inserted the reference to options in Schedule 2.2 sometime in 1996 while working on the Settlement Agreement. (R. 1347-48, pp. 83-89). Fife did not believe URI had ever approved the options, though he explained that upon taking the reins to URI, he wished to investigate the issue thoroughly before taking any actions to invalidate the options. (Id.). Fife never reached the point of urging the Board to invalidate the options because Hurd and Brown disclaimed them in an effort to not waste resources on litigation. (R. 1349, p. 98; R. 687-88).

<sup>9</sup>In the interest of complete disclosure, it is true that Defendants themselves inartfully used the term “mootness” in its every-day sense when making a “ripeness” argument in their motion to dismiss. (R. 154). But on the first page of that pleading, Defendants correctly introduced their brief with the statement that “Plaintiffs’ claims are neither ripe for adjudication nor are they properly the subject of this Court’s judicial scrutiny.” (R. 152-153).

grounded in obligations supposedly located in the Settlement Agreement. (R. 502-22). For example, Claim Six was a claim against Fife and Hurd for fraudulently inducing Jones and MTC into entering into the Settlement Agreement. (R. 514). Claims Eight and Nine, for breaches of fiduciary duties, were based on alleged breaches for failures to take certain actions under the Settlement Agreement. (R. 516). The Settlement Agreement itself allows recovery for fees incurred by the prevailing party in defending an action “under the contract.” (R. 982, Add. Ex. A). Nothing in the Settlement Agreement limits recovery to “breach of contract” claims alone: any action “under the contract” is covered. Claims 1-10 were all factually related and all sounded in contract. It was appropriate to award the fees incurred in defending against all of those claims. See Dejavue, Inc. v. U.S. Energy Corp., 993 P.2d 222, 227 (Utah Ct. App. 1999) (all related claims covered under attorneys’ fees agreement). Cf. Foote v. Clark, 962 P.2d 52 (Utah 1998) (tort claims not covered by contract).

Jones and MTC also argue that the fee award included fees for “pursuing issues upon which the Defendants did not actually prevail.” This argument, which was made below, was soundly rejected. As the district court held, fees are awarded if a party prevailed ultimately on the claim, as opposed to every “issue” or “argument” raised in contesting the claim. (R. 1835, Add. Ex. D). The one case that Jones and MTC cite in support of their view supports the district court. See Valcarce v. Fitzgerald, 961 P.2d 305, 317 (Utah 1998) (holding that “a trial court’s award of attorney fees must distinguish between . . . successful and unsuccessful claims”) (emphasis added).

**B. The District Court Did Not Abuse Its Discretion In Awarding What It Determined Were Reasonable Attorneys' Fees.**

The district court also provided a careful evaluation of the reasonableness of the fees, based on the facts in the record. These findings are accorded deference under the abuse of discretion standard of review. Dixie State Bank, 764 P.2d at 988-89.

The district court upheld the reasonableness of the fees charged by the Chicago office of Wildman, Harrold, Allen & Dixon. Rejecting Jones's and MTC's contentions that the work of Wildman partners Alan Roth and Craig White was inefficient or duplicative of the work of other lawyers on the case (Br. 32), the district court recognized that these attorneys in fact were primarily responsible for strategy and review of work that they delegated to junior associates. (R. 1837, Add. Ex. D). This method of case-management kept costs down. (Id.). The district court also found that the Chicago billing rates were reasonable in light of the experience and qualifications of the attorneys involved, the complexity of the issues and the results achieved. (R. 1836, Add. Ex. D).

Jones and MTC offered no evidence to dispute the reasonableness of the fees of Defendants' attorneys. For example, they offered no affidavits from outside attorneys from comparable law firms and with comparable experience (in either Salt Lake City or Chicago) regarding reasonable fees charged for the type of litigation at issue. Compare, e.g., Morrison v. Federico, 232 P.2d 374, 379 (Utah 1951) (considering affidavit from attorney in same locality regarding reasonableness of fees). Their only "evidence" was Jones' and MTC's own then-attorney's affidavit, listing his own billing rate and that of one partner in his firm. (R. 1734). The affidavit supplied no information about the range

of rates charged by other attorneys in Salt Lake City with experience and qualifications comparable to that of Mr. White and Mr. Roth. (Id.). Jones and MTC failed to present evidence to establish that Mr. White's and Mr. Roth's billing rates were unreasonable by Salt Lake City standards, and indeed, the fees are not unreasonable. Although Mr. White's rate at the time was \$270 per hour and Mr. Roth's was \$240 per hour, the Barker case relied upon by Plaintiffs itself determined that a billing rate of \$250 per hour for a highly qualified Salt Lake City litigator was reasonable. See Barker v. Utah Public Serv. Comm'n, 970 P.2d 702, 708 (Utah 1998). These numbers establish only that there is a range of rates available for attorneys everywhere depending on experience, qualifications and other intangibles.

Jones and MTC generalize without support that "Chicago billing rates" should have been adjusted to reflect those charged in Salt Lake, but it is undisputed that associates Karena Bierman (billing out at \$125-130 per hour) and Jeffrey Eich (billing out at \$190-195 per hour) performed the bulk of the work on the case. (R. 1748). Jones and MTC thus ignore that much of Wildman's work was performed by attorneys billing at rates that they term "reasonable," with the more senior attorneys acting in a supervisory role to minimize costs. (R. 1837, Add. Ex. D).

The district court also looked closely at the billing records of URI's local Utah counsel at Bendinger, Crockett, Peterson & Casey (formerly known as Giauque, Crockett, Bendinger & Peterson), likewise concluding that these fees were reasonable and that the services performed were not superfluous. The court specifically took note

that Giauque, Crockett contributed value to the case by reviewing and analyzing pleadings and preparing for and attending dispositive hearings. (R. 1837, Add. Ex. D).

To disguise their lack of evidence to dispute URI's reasonable attorneys fees, Jones and MTC argue that the fee award does not meet one factor of the test articulated by the Utah Supreme Court in Barker, 970 P.2d at 708 (Utah 1998): that of charging a fee that is reasonable "in the locality." Neither the Barker decision nor any other Utah case that Defendants have found defines what "in the locality" means. Jones and MTC posit that "in the locality" must mean where the litigation is taking place, as opposed to where the parties are from (Jones is from California, the Defendants reside in Illinois and Utah) or where the lawyers are from (Illinois and Utah). This speculation raises questions about whether the "in the locality" test would then result in irrational discrimination against out-of-state parties with out-of-state counsel in collecting reasonable attorneys' fees awards, despite the fact that all counsel and parties wish to access the courts equally. Compare Mountain States Legal Foundation v. Utah Pub. Serv. Comm'n, 636 P.2d 1047 (Utah 1981) (rational basis needed for treating similarly situated consumers differently). It appears unlikely that the Utah courts, with their policy of openness towards litigants, see, e.g., Jenkins v. Percival, 962 P.2d 796, 799 (Utah 1998), would wish to take such a step.

Regardless of the meaning of "in the locality" however, as established above, Defendants' attorneys fees were reasonable under either Chicago or Salt Lake City standards. Nor can Jones and MTC claim any surprise that URI hired Chicago lawyers who may be slightly more expensive than some Utah lawyers: they knew from the time

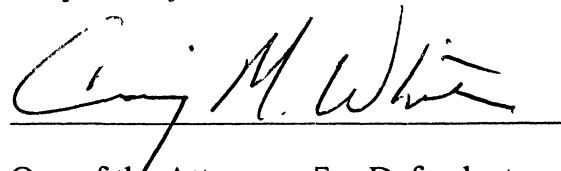
the Settlement Agreement was negotiated in 1996 that URI would shift its primary business office to Chicago and employ Chicago attorneys. (R. 1751). Jones and MTC were clearly not deterred by the possibility of paying Chicago attorneys' fees when they signed the Settlement Agreement nor when they brought their meritless case.

### CONCLUSION

For the foregoing reasons, defendants URI, John Fife, David Fife, Lyle Hurd and Gerry Brown respectfully request that this honorable Court affirm the district court's judgment in all respects and affirm the award of attorneys' fees in its entirety.

Dated: January 28, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Craig M. White", is written over a horizontal line.

One of the Attorneys For Defendants  
URI, John Fife, David Fife, Lyle Hurd  
and Gerry Brown

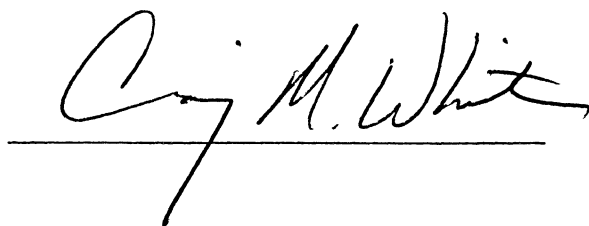
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**CERTIFICATE OF SERVICE**

I, Craig M. White, an attorney, hereby certify that on the 28th day of January, 2002, I caused two true and correct copies of the foregoing Appellees' Brief to be mailed, by Federal Express, to the following:

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A handwritten signature in black ink, reading "Craig M. White", is written over a horizontal line.

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