

2001

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Mark Tech Corp v. Utah Resources International, Inc*, No. 20010261 (Utah Court of Appeals, 2001).
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IN THE UTAH COURT OF APPEALS

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

Plaintiff/Appellants,

vs.

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

Defendant/Appellees.

BRIEF OF APPELLANT

Court of Appeals No. 20010261-CA

District Court No. 980900576

Priority No. 15

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

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FILED

NOV 28 2001

COURT OF APPEALS

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JURISDICTION

This appeal was within the appellate jurisdiction of the Utah Supreme Court pursuant to Utah Code Ann. § 78-2-2 (3)(j). The case was transferred to the Court of Appeals pursuant to Utah Code. Ann. § 78-2-2 (4) by an order dated May 17, 2001. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-4 (2)(j).

STATEMENT OF THE ISSUES

1. Did the Court err in granting summary judgment on Jones and MTC's claims relating to Fife's employment agreement by failing to recognize that the Stock Purchase Agreement was incorporated by reference in the Settlement Agreement, and erroneously concluding that the claim was moot? This issue seeks review of a grant of summary judgment, and is therefore reviewed for correctness, according no deference to the trial court's legal conclusions. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991). This issue was preserved on appeal in the Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment on Plaintiffs' First, Second, Third, Fourth, Seventh and Eighth Claims for Relief (hereinafter, "Plaintiffs' Memorandum in Opposition"). (R. 933-37).

2. Did the Court err in finding that Jones and MTC had failed to raise a genuine issue of disputed fact regarding whether URI and Fife had used their best efforts to unwind URI's relationship with Morgan Gas and Oil Morgan Oil claims. This issue seeks review of a grant of summary judgment, and is therefore reviewed for correctness,

according no deference to the trial court's legal conclusions. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991). This issue was preserved on appeal in the Plaintiffs' Memorandum in Opposition. (R. 937-40).

3. Did the Court err in granting summary judgment on Jones and MTC's claims relating to the purported stock options of Hurd and Brown included in Schedule 2.2 to the Stock Purchase Agreement? This issue seeks review of a grant of summary judgment, and is therefore reviewed for correctness, according no deference to the trial court's legal conclusions. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991). This issue was preserved on appeal in the Plaintiffs' Memorandum in Opposition. (R. 940-944).

4. Did the Court err in granting summary judgment on Jones and MTC's claims for payment of expenses by finding that Jones and MTC had failed to provide admissible evidence of expenses covered by the Settlement Agreement, and by finding that Jones had failed to raise a genuine issue of fact concerning URI's policy of reimbursing Director expenses. This issue seeks review of a grant of summary judgment, and is therefore reviewed for correctness, according no deference to the trial court's legal conclusions. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991). This issue was preserved on appeal in the Plaintiffs' Memorandum in Opposition. (R. 944-45).

5. Did the Court err in awarding the Defendants \$162,028.87 of attorneys fees? The determination that Defendants were the prevailing party and entitled to attorneys fees is reviewed for correctness. *First Southwestern Financial Services v.*

Sessions, 875 P.2d 553, 554 (Utah 1994). The trial court's interpretation of the contract provision relating to attorneys fees is also reviewed for correctness. *Murdock v. Monumental Life Insurance Co.*, 2 P.3d 963, 965 (Utah App. 2000). The court's determination of the amount of the award is reviewed for abuse of discretion. *Campbell v. State Farm Mutual Automobile Insurance Co.*, 432 Utah Adv. Rep. 44 (Utah, October 19, 2001). This issue was preserved for appeal in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Order Awarding Attorney's Fees and Costs Against Plaintiffs. (R. 1726-31).

DETERMINATIVE LAW

There are no constitutional, statutory, or other provisions of law, the interpretation of which is determinative of the issues presented herein.

STATEMENT OF THE CASE

A. Background.

This lawsuit involves the operation and management of the Defendant Utah Resources International, Inc. ("URI") and the conduct of four of its principals, John Fife ("Fife"), David Fife, Lyle D. Hurd, Jr. ("Hurd"), and Gerry Brown ("Brown"). The action was brought by Mark Technologies Corp. ("MTC") and its controlling shareholder, Mark Jones ("Jones"), who own collectively approximately 13 percent of the outstanding shares of URI common stock. The lawsuit arises out of a Settlement Agreement¹

¹The Settlement Agreement was a global settlement of claims asserted by different parties in three different lawsuits, including a case captioned Mark Technologies Corp., et al. v. Utah Resources International, Inc., Civil no. 960903332 CV, which was then pending in the Third Judicial District Court for Salt Lake County, Utah.

executed on or about June 26, 1996, to which Jones, MTC, URI, Hurd, and Fife were all signers. A copy of the Settlement Agreement is included in the addendum as Exhibit "A." As provided by the Settlement Agreement, URI and Fife also entered into the Stock Purchase Agreement, a copy of which is included in the record at page 717-759.

The purpose of this lawsuit was to seek judicial enforcement of several provisions of the Settlement Agreement. Specifically, the Amended Complaint identified four areas in which the Defendants had breached the Agreement: (1) failure to execute a written employment agreement with Fife, as provided in paragraph 1.f.xii of the Settlement Agreement; (2) failure to unwind and/or terminate URI's contractual relationships with Morgan Gas & Oil ("MGO"), as required by paragraph 1.1 of the Agreement; (3) inclusion in a schedule to the Stock Purchase Agreement of stock options purportedly held by Hurd and Brown which were never authorized or granted by URI; and (4) refusal to pay various expenses incurred by MTC and Jones in connection with the Settlement Agreement. The Amended Complaint raised these issues in ten separate claims for relief, the following seven of which are at issue here:²

1. Breach of Settlement Agreement (covenant of good faith and fair dealing) relating to the Fife employment agreement.
2. Breach of Settlement Agreement relating to the unwinding of URI's relationship with MGO.
- 3-4. Breach of Settlement Agreement relating to the purported stock options of Hurd and Brown.

²Jones and MTC do not appeal dismissal of the Sixth, Eighth and Ninth Claims for Relief, and these claims are therefore not addressed herein.

5. Breach of Settlement Agreement relating to payment of clerical expenses incurred in connection with the Settlement Agreement.
7. Declaratory Judgment relating to the purported stock options of Hurd and Brown.
10. Breach of contract for failure to pay expenses incurred by Jones as a Director of URI.

B. Procedural History.³

MTC and Jones filed their Complaint on January 20, 1998. (R. 1). Shortly after the complaint was filed, the Defendants convened a meeting to address how they would respond to the lawsuit. As a result of the meeting, URI entered a written employment contract with Fife on February 27, 1998, a copy of which is included in the appendix as Exhibit “B.” On March 2, 1998, URI then obtained from Hurd and Brown written waivers of any interest they may have claimed in the stock options that were the subject of the lawsuit. (R. 687-88).

URI ultimately responded to the Complaint with a Motion to Dismiss the claims relating to Fife’s employment contract and the purported stock options of Hurd and Brown on the basis that such claims were moot. (R. 55). It filed a separate Motion for Summary Judgment on the remaining claims on March 3, 1998. (R. 164). Fife, David Fife, Hurd and Brown joined in the Motions. (R. 167). The Court made two separate rulings on these Motions. First, at the close of oral argument, the Court ruled from the bench that (1) URI was not required to reimburse Jones for legal fees incurred after the

³The statements contained herein can also be referenced to the entries on the docket which is part of the record on appeal. All references to the record are to the first page of the relevant document.

execution of the Settlement Agreement; (2) Jones would bear the burden of proof on the issue of a URI company policy to reimburse director expenses; and (3) Jones Rule 56 (f) request for additional time to perform discovery would be granted and the Motion for Summary Judgment would be denied. (R. 449-51). Several days later, the trial court issued a Memorandum Decision denying the Motion to dismiss the claims relating to Fife's employment agreement and the stock options, in which it stated as follows:

In this matter, URI failed to initiate its compliance with the terms of the Settlement Agreement until after MTC filed suit, approximately a year and a half after the date of the Agreement. Presumably, it was because of the litigation that URI took the actions to enter into the employment agreement and for defendants Hurd and Brown to waive their URI stock options. These actions clearly constitute unilateral actions by the defendants.

Further, in this matter, plaintiffs have alleged that they have been created (sic) a valid employment agreement and valid waivers of stock options. Whether the purported actions of defendants satisfy these requirements are issues that remain to be resolved.

Finally, even if it is ultimately determined that the actions of the defendants satisfy the requirements of the Settlement Agreement, the issue of plaintiffs' claim for attorneys fees and costs remains in dispute.

(R. 460-61).

On August 17, 1998, the Defendants filed an Answer, which included Counterclaims against MTC and Jones for breach of the Settlement Agreement and for payment of attorneys fees. On the same day, Jones and MTC filed their Amended Complaint and Demand for Jury. (R. 502). The Defendants Answered the Amended Complaint on August 31, 1998. (R. 548).

On January 1, 1999, Defendants filed a new Motion for Summary Judgment on all claims. (R. 561). On June 11, 1999, MTC and Jones responded to that Motion and filed a Cross-Motion for Summary Judgment on their First, Second, Third, Fourth, Seventh and Eighth Claims for Relief. (R. 906, 910). The Motions were heard on November 12, 1999, and the Court entered a Memorandum Decision on January 5, 2000 granting summary judgment and dismissing all of MTC and Jones' claims. (R. 1515, 1516).

On February 17, 2000, the Defendants moved for an order awarding attorneys fees and costs against MTC and Jones. On March 17, 2000, the Defendants moved for voluntary dismissal of count 1 of their Counterclaim. The Motion for voluntary dismissal was granted by a minute entry dated November 17, 2000. (R. 1830). After briefing and argument, the Motion for attorney's fees was granted by a Memorandum Decision dated January 4, 2001.⁴ (R. 1834). A final Judgment Order was entered on February 26, 2001. (R. 1927). MTC and Jones filed their Notice of Appeal on March 1, 2001. (R. 1933).

C. Facts relevant to the issues on appeal.

The following facts are relevant to the issues presented on appeal.

1. Facts relevant to Fife's employment agreement.

Paragraph 1.f.xii of the Settlement Agreement provided as follows:

f. The transactions contemplated in the IMC letter of Intent shall close in accordance with the provisions of that contemplated Stock Purchase Agreement between URI and IMC (the "Stock Purchase Agreement"), the current form of which is attached hereto and incorporated herein by this reference as Exhibit "C",

⁴The Memorandum Decision was authored by Judge Pat Brian, who heard the matter in place of Judge Stirba.

subject to negotiation and execution of the definitive Stock Purchase agreement and approval of its terms by the URI Board of Directors; provided, however, that the definitive Stock Purchase Agreement must contain the following material provisions:

* * *

xii. URI shall hire Fife under a written employment agreement which shall provide reasonable compensation for services rendered, which compensation in any year shall not exceed \$200,000. The payment of compensation in excess of that provided in the employment agreement shall be used to reduce any obligations due or to come due under the Note.

(Addendum Exhibit "A," at 5, 7).

Following execution of the Settlement Agreement, URI did not immediately enter a written employment agreement. Throughout the balance of 1996 and all of 1997, Jones persistently requested that URI and Fife honor the agreement by executing a written employment contract, but no contract was ever proposed or entered. (R. 963-64). In fact, at one Board of Directors meeting in October of 1996, Hurd moved to table consideration of the employment agreement, and the motion was approved over the objection of Jones. (R. 998).

By correspondence dated November 7, 1996, Jones specifically requested that URI and Fife negotiate and execute an employment agreement, and even provided a draft agreement to begin the process. Jones received no response to his correspondence. (R. 963-64). In his deposition, Hurd could recall no discussions between Fife and URI regarding the employment agreement from the time it was tabled in October of 1996 until after the lawsuit was filed in January of 1998. (R. 1017-1018).

On February 28, 1998, the Board of Directors of URI held a Special Meeting for the purpose of considering a response to the lawsuit. (R. 1022). As a part of the Special Meeting, the Board approved a resolution to enter an employment agreement. (R. 1026). URI and Fife then executed an Employment Agreement, the complete text of which is as follows:

Utah Resources International, Inc. ("URI") agrees to employ John M. Fife as its president and chief executive officer on an at-will basis commencing as of July 13, 1996 at an annual salary of \$195,000.00 per year.

(Addendum, Exhibit "B").

Fife admits that the employment agreement is skimpy as to the types of things that would normally be included in such an agreement. (R. 1045). The salary figure of \$195,000.00 was merely "thrown out" by Fife, and the entire agreement was provided to the Directors immediately before the Special Meeting, with only Fife performing some minimal research beforehand regarding salaries of comparable executives. (R. 1038-40, 1040-41). No other member of the Board performed any other research of its own as to the amount of salary that would be reasonable. (R. 1044). Although Fife claims that he negotiated with the Board of Directors, neither he nor Hurd, who was also a director, was aware of any Board member that had been appointed to conduct such a negotiations. (R. 1041-43; 1016-17). Moreover, there were no substantial discussions at the Special Meeting regarding the amount of Fife's salary. (R. 1046).

2. Facts relative to winding up the contractual relationships with MGO.

Paragraph 1.1 of the Settlement Agreement provided as follows:

1. Unless otherwise provided, the following events shall occur at Closing (as defined herein):

* * *

1. The Parties hereto shall exercise their best efforts to account for, pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.

(Addendum, Exhibit "A," at 3, 8).

At the time of the Settlement Agreement, URI was involved in various partnerships with MGO and was obligated to MGO on various notes. (R. 923, 1087). From the time of the Settlement Agreement, throughout the balance of 1996 and throughout all of 1997, Jones requested that URI, Fife and Hurd comply with the Settlement Agreement by taking action to wind up the relationship with MGO. (R. 966). In fact, in June of 1997, Jones made a motion in one of the cases settled by the Settlement Agreement requesting the Court to enforce the Settlement Agreement by ordering URI, Fife and Hurd to wind up the relationship with MGO. URI opposed the Motion. (R. 964). Shortly thereafter, Fife told Jones that URI would never pay money to MGO to wind up the relationship unless MGO filed a lawsuit. (R. 1099). By separate letters dated August 21, 1997 and October 10, 1997, Jones requested in writing that URI comply with the Settlement Agreement with regard to MGO. (R. 1099). Jones received no response to his requests. (R. 1099). Throughout the period, URI provided no information to Jones or its other directors on any actions it had taken or was planning to take to wind up the relationship with MGO, and ignored all requests from Jones and MTC for information concerning such actions. (R.

966). As of the time the Complaint was filed, no substantial action had been taken to unwind the relationship with MGO.

At the February 27, 1998 Special Meeting called by the Board of Directors to formulate a response to this lawsuit, Fife made a motion for a resolution authorizing URI's officers to use their best efforts to wind up the contractual relationships with MGO by the end of 1998, which action had never previously been taken. (R. 1026). At his deposition, Fife testified that he believed such a resolution was necessary in order to go forward in winding up the relationship. (R. 1055-57).

On June 25, 1998, the trial court heard argument on URI's first Motion for Summary Judgment relative to the MGO claim, and denied the Motion. (R. 449-51). The following week, Fife and URI began efforts to unwind the relationship. (R. 925). URI and Fife ultimately scheduled a conference call for July 15, 1998, and on July 20, 1998, Fife made a written proposal to MGO. (R. 1108-09). The July 20, 1998 proposal consisted of less than two pages and was the first proposal made by URI since the Settlement Agreement was entered two years earlier. (R. 1061-62).

After brief discussions, Fife made a revised proposal on August 1, 1998, which MGO's president verbally approved. (R. 1110-13). The parties made further revisions to the proposal and drafted a Letter of Intent dated August 21, 1998 which was approved by URI's Board of Directors on September 2, 1998. (R. 926). The process was completed when the parties executed a Partnership Settlement Agreement on December 15, 1998. (R. 597-606).

3. Facts relevant to the purported stock options of Hurd and Brown.

In 1994, URI's Board of Directors approved a Stock Option Plan under which Hurd and Brown, among others, received options on 25,000 shares of URI stock. (R. 1136-37). The parties appear to agree that other than these options granted under this plan, the Company has not granted any additional options. (R. 576; 1253-57).

Pursuant to section 1.f.xiii of the Settlement Agreement, the Stock Purchase Agreement was provided to Jones and MTC prior to its execution. At that time, Schedule 2.2 of the Stock Purchase Agreement was blank, and Jones understood that it would be completed to reflect only the outstanding options granted under the Stock Option Plan. (R. 1100). When the Stock Purchase Agreement was approved by URI's Board of Directors on July 3, 1996, Schedule 2.2 was still blank. (R. 1100). Sometime shortly after July 3, 1996, a completed Schedule 2.2. was appended to the executed agreement which reflected that Hurd and Brown each held options on 50,000 shares of URI stock. (R. 1100).

At a meeting of the Board of Directors dated July 30, 1996, Jones requested a review to determine whether the additional 25,000 options of Hurd and Brown reflected on the Schedule were valid. (R. 1143). Hurd and Brown took the position that the options were valid and were granted to them as part of their employment agreements with URI. (R. 928). Upon review, Fife was unable to find any Board authorization for the options, and Fife agrees that the options could not have been granted without such authorization. (R. 1054). Discovery in the case failed to produce any evidence that the

options had been granted, and the public filings of URI expressly state that there is no long-term incentive compensation plan other than the Stock Option Plan. (R. 929).

Throughout 1997, Jones raised this issue with URI and its Board of Directors, but no action was taken. (R. 930). Shortly after the lawsuit was filed, however, the Board of Directors directed Brown and Hurd to waive their additional options, which they did by a written document dated March 2, 1998. (R. 687-88).

4. Facts relative to Jones and MTC's claims for payment of expenses.

Paragraph 1.h.i. of the Settlement Agreement provides as follows:

1. Unless otherwise provided, the following events shall occur at Closing (as defined herein):

* * *

h. Legal fees and expenses and other costs associated with the pending Litigation and the documents and negotiations to complete and implement the settlement contemplated by this Agreement shall be paid as follows:

(i) All legal fees, costs and out-of-pocket expenses incurred or paid by Jones, IMC, Fife, Erickson, Sheen, Hurd and MTC from January 1, 1996 to Closing shall be reimbursed or paid by URI.

(R. 979-80).

On June 28, 1996, Jones and MTC provided to URI a summary of expenses for which they sought reimbursement. The request included time entries for Patricia Lee and Karen Pliszka, employees of MTC, for time incurred prior to the Closing. (R. 1101).

The total amount sought as reimbursement for the services of Ms. Lee and Ms. Pliszka was \$5,991.00. (R. 1101). Jones later provided written documentation of these expenses,

including copies of weekly time sheets. (R. 1155-88). URI has refused or otherwise failed to reimburse these expenses.

Jones has also submitted expenses incurred in performing his duties as a Director, requesting a total of \$44,313.63. (R. 933, 1203-21). Jones provided the trial court with the following evidence that it was URI's policy to reimburse directors for such expenses: (1) Jones testified that he understood as a director that his expenses would be reimbursed, and that the Company has never adopted a policy requiring pre-approval of expenses (R. 1102-03); (2) E. Jay Sheen was paid \$102,000.00 in 1995 (R. 1102); R. Dee Erikson was paid \$102,000.00 in 1995, and was reimbursed for such items as postage, copy services, telephone calls, supplies and other expenses (R. 1102, 1189-1202); URI pays rent on Fife's office in Chicago without pre-approval (R. 1075).

5. Facts relative to the award of attorneys fees.

There are no additional facts necessary for consideration of the award of attorneys fees to be set forth, except as may be referenced in the body of the argument below.

SUMMARY OF THE ARGUMENT

Jones and MTC contend that the trial court erred in dismissing on summary judgment the First, Second, Third, Fourth, Fifth, Seventh and Tenth Claims for Relief of the Amended Complaint.

Jones and MTC contend that the Settlement Agreement, when read together with the Stock Purchase Agreement which was expressly incorporated therein, clearly obligates URI and Fife to enter a written employment agreement, which they failed to do. It was error for the trial court to hold that URI and Fife discharged their contractual

obligation to Jones and MTC in this regard merely by including language requiring a contract in the Stock Purchase Agreement.

Jones and MTC contend that the trial court erred in holding that no genuine issue of material fact existed as to whether URI and Fife had used their best efforts to unwind URI's relationship with MGO. In light of the extensive evidence presented by Jones establishing, directly and by inference, that URI and Fife ignored the MGO relationship until after the lawsuit was filed, it was error for the trial court to find that no genuine issue of fact was presented for trial.

Jones and MTC contend that the trial court erred in dismissing its Third, Fourth, and Seventh Claims for Relief relative to stock options which were included in Schedule 2.2 of the Stock Purchase Agreement, even though they had never been authorized or granted by the company. The Third Claim for Relief properly establishes that the erroneous inclusion of the options violated provision of the Settlement Agreement requiring execution of the Stock Purchase Agreement in proper form and subject to Jones' review. The trial court dismissed the claim on the mistaken belief that Jones and MTC were required to show an affirmative duty to cancel the options, which is not present in the Stock Purchase Agreement. The Fourth Claim for Relief properly establishes that Hurd's claimed entitlement to his options as part of an employment contract violated provisions of the Settlement Agreement denying effect to or otherwise terminating any such employment agreements. The trial court erred in dismissing this claim on the mistaken belief that the Jones and MTC were required to demonstrate that an employment agreement had actually been consummated. Finally, although Jones and

MTC acknowledge that their claim for declaratory relief has been rendered moot by Hurd and Brown's voluntary waivers of their options, they contend that they are thus the prevailing parties on this claim and are entitled to an award of attorneys fees.

Jones and MTC contend that the trial court erred in dismissing their claim for expenses incurred in connection with the Settlement Agreement. The trial court erred in concluding that no evidence had been presented to establish the claim, because Jones' sworn affidavit testimony and back-up documents, together with the plain language of the Settlement Agreement, establish Jones and MTC's entitlement to payment. Jones also contends that the Court erred in dismissing his claim for reimbursement of expenses incurred as a Director. Jones presented sufficient evidence to establish that URI's policy was to reimburse its Directors, and that he is entitled to recover on this claim.

Finally, Jones and MTC contend that the trial court erred in awarding attorneys fees of \$162,028.87. To the extent that the judgment was based on a claim of mootness, Jones and MTC were actually the prevailing parties because Defendants acquiesced in their claims after commencement of the case. The award was also erroneous because it failed to allocate fees to account for claims upon which there was no entitlement to fees or upon which Defendants were not the prevailing party. Finally, the award was improper because the amount of fees should have been reduced to account for duplicative and unnecessary expenditures of time by the numerous attorneys representing Defendants.

Jones and MTC request that this Court vacate the judgment of the trial court and remand the matter for a trial on the merits of these claims.

ARGUMENT

I. THE COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS REGARDING FIFE'S EMPLOYMENT AGREEMENT.

The trial court dismissed Plaintiffs' claims regarding Fife's employment agreement, holding that although the Settlement Agreement expressly required that the Stock Purchase Agreement must include language requiring URI to enter an employment contract with Fife, it did not independently require that an employment agreement actually be entered. Thus, the trial court held that Defendants performed all of the terms of the Settlement Agreement relating to the employment contract when they included the required provision in the text of the Stock Purchase Agreement. Based on its assertion that Jones and MTC did not have the right to enforce the Stock Purchase Agreement, the trial court thus dismissed the claims on summary judgment. Jones and MTC contend herein that the trial court erred, and that the Plaintiffs should have prevailed on their claims relating to the employment agreement.

A. The Stock Purchase Agreement was incorporated by reference as part of the Settlement Agreement.

As a starting point for discussion, Jones and MTC submit that the trial court erred in holding that Jones and MTC could not enforce the terms of the Stock Purchase Agreement. The substantive terms of the Stock Purchase Agreement were precisely the consideration for which Jones and MTC bargained, as made plain in paragraph 1.f. of the Settlement Agreement. Moreover, the Stock Purchase Agreement was expressly incorporated as a part of the Settlement Agreement as follows:

f. The transactions contemplated in the IMC Letter of Intent shall close in accordance with the provisions of that contemplated Stock Purchase Agreement between URI and IMC (the “Stock Purchase Agreement”), the current form of which is attached hereto and incorporated herein by this reference as Exhibit “C.”

(R. 977)(emphasis added).

Under Utah law, contracting parties may incorporate other documents by reference, and the documents thus become a part of the contract. *Consolidated Realty Group, v. Sizzling Platter, Inc.*, 930 P.2d 268 (Utah App. 1997). In this regard, the case of *Zions First National Bank v. Allen*, 688 F.Supp. 1495 (D. Utah 1988) is instructive. In that case, the plaintiffs sought to establish jurisdiction under a partnership agreement which was not signed by any defendant. *Id.* at 1498. The Court noted, however, that since each defendant had signed a subscription agreement which incorporated the partnership agreement by reference, the forum selection clause contained in the partnership agreement could be enforced against them. *Id.* See also *Iadanza v. Mather*, 820 F.Supp. 1371, 1386 (D. Utah 1993)(applying Utah law and holding that where an interrelated document is intended to be incorporated by reference as part of the same transaction, the contracts are to be construed as a whole).

In this case, the Stock Purchase Agreement was expressly incorporated into the Settlement Agreement by reference, and the terms of the Stock Purchase Agreement thus became a substantive part of the Settlement Agreement. As such, the Defendants were not merely obligated to put acceptable language regarding the employment contract into the Stock Purchase Agreement, but were in fact bound to enter a written employment contract.

Jones and MTC submit that the trial court's refusal to incorporate the terms of the Stock Purchase Agreement into the Settlement Agreement eviscerates the intentions of the parties in two ways. First, it reads the express incorporation of the Stock Purchase Agreement completely out of the Settlement Agreement by flatly ignoring its presence. And second, it frustrates the purpose of the contract for Jones and MTC who clearly bargained for a requirement that an employment contract be negotiated and entered, but would instead only receive nothing more than an empty promise to write the obligation into a separate document which they could not enforce. Jones and MTC submit that where the Settlement Agreement expressly incorporates the terms of the Stock Purchase Agreement, they are entitled to enforce the terms of the Stock Purchase Agreement and thus vindicate the benefit of their bargain. This Court should reverse the trial court with regard to the employment contract claim, and the matter should be returned to the trial court for a determination.

B. The Defendants breached the Settlement Agreement with regard to Fife's employment contract.

Accepting that Jones and MTC were entitled to enforce the contract to enter an employment agreement, there remains very little question that a breach occurred. For approximately 20 months following the execution of the Settlement Agreement, Jones and MTC requested that an agreement be drafted and executed. Only after the filing of this litigation did Defendants undertake to comply, and even then, they did so in a one-sentence agreement, drafted without substantial negotiation or input as to terms, the inadequacy and unreasonableness of which is virtually apparent on its face. Jones and

MTC urge this Court to rule that a breach has occurred, and that the case therefore must be returned to the trial court only for the limited purpose of ascertaining a proper remedy.⁵

II. THE COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS REGARDING THE WINDING UP OF URI'S RELATIONSHIP WITH MGO.

The trial court's entire opinion with regard to the MGO relationship was as follows:

The Settlement Agreement requires that "[t]he parties hereto shall exercise their best efforts to account for, pay, compromise, unwind and/or terminate all existing contractual relationships between URI and Morgan Gas and Oil." Plaintiffs allege defendants took no meaningful action to wind up until this lawsuit was filed. However, 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). In effect, the trial court ruled that the all of the evidence presented by Jones and MTC was insufficient to raise a genuine issue of material fact as to whether URI and Fife had exercised their best efforts to wind up URI's relationship with MGO.

Jones and MTC contend herein that the trial court's ruling was error as a matter of law. On a motion for summary judgment, it is inappropriate for the trial court to weigh disputed material facts, and it does not matter that evidence on one side of issue may

⁵In their Amended Complaint, Jones and MTC have prayed for an order of specific performance of the contract and for damages as may be proven. Jones and MTC would note that even if no actual or substantial damages are ultimately proven, they would nevertheless be entitled to nominal damages as a matter of law. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P 2d 667 (Utah 1982)

appear to be strong or even compelling; one sworn statement is all that is needed to raise create an issue of fact precluding summary judgment. *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750 (Utah App. 1988). Thus, courts may consider only those facts that are genuinely not in dispute, and may enter judgment only when facts upon which judgment is based are clearly established or admitted. *Sorenson v. Beers*, 585 P.2d 458 (Utah 1978). Moreover, if there is any doubt or uncertainty concerning a question of fact, that doubt must be resolved in favor of the non-moving party, with all evidence and all inferences that can reasonably be drawn from the evidence drawn in a light most favorable to the non-moving party. *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982).

In this case, Jones and MTC presented substantial evidence establishing that URI and Fife did not use their best efforts to unwind the MGO relationship. Without entirely restating the relevant facts set forth above, Jones and MTC submit that they have shown (1) that during the 19 months between the execution of the Settlement Agreement and the filing of the lawsuit, Jones continually requested, both orally and in writing, that URI and Fife take action toward unwinding the MGO relationship without any response from URI or Fife whatsoever; (2) that URI opposed Jones and MTC's effort to enforce the Settlement Agreement in the underlying action as it related to unwinding the MGO relationship; (3) that Fife told Jones that URI would never pay money to MGO to unwind the relationship unless MGO filed a lawsuit, even though money was clearly owing from URI to MGO; (4) that the MGO relationship was not discussed in Directors meetings and no information was provided to Directors regarding the relationship until after the lawsuit was filed; (5) that no written proposal or correspondence was exchanged between URI

and MGO until July of 1998, immediately after the trial court denied URI's Motion to Dismiss the claim; (6) that the first Board action to authorize Fife to deal with the MGO issue was taken at the February 27, 1998 Special Meeting called by the Board of Directors in response to this lawsuit, even though Fife believed that such a resolution was necessary to go forward in unwinding the MGO relationship; (7) that immediately after the trial court denied URI's Motion to Dismiss the MGO Claim, Fife and URI contacted MGO and were able to reach an agreement in principal to wind up the relationship within no more than a few days.

Jones and MTC submit that the trial court's assertion that Defendants provided "uncontroverted" evidence that they were working on the issue before the lawsuit was filed simply cannot justify summary judgment in the face of the evidence summarized above. This evidence, together with the inferences that can be drawn therefrom, directly controvert the self-serving and conclusory statements of Fife and Hurd to the effect that they were generally working on issues relating to the MGO relationship throughout the period. In short, the fact-sensitive inquiry of whether URI, Fife and Hurd employed their "best efforts" to unwind the MGO relationship prior to the filing of the lawsuit is the subject of substantial evidence on both sides of the issue, and the trial court erred in finding that there was no genuine issue of material fact remaining in dispute.

III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE STOCK OPTION CLAIMS.

Jones and MTC asserted three claims arising from the inclusion in Schedule 2.2 of the Stock Purchase Agreement of 25,000 stock options each for Hurd and Brown which

were never authorized or issued by URI. The Third Claim for Relief alleged that inclusion of the purported options on Schedule 2.2 violated paragraph 1.f. of the Settlement Agreement, which made closing of the Stock Purchase Agreement an essential term of the settlement, and incorporated the Stock Purchase Agreement by reference. The Fourth Claim for Relief alleged that inclusion of the purported options on Schedule 2.2 violated paragraph 1.j. of the Settlement Agreement which provided that any employment agreement of Hurd that had been contemplated, negotiated or executed would not be effectuated, and if already effectuated, would be terminated. The Seventh Claim for Relief sought a declaratory judgment that the purported options were void.⁶

The trial court granted summary judgment dismissing Jones and MTC's Third Claim for Relief addressing the purported stock options of Hurd and Brown solely because it observed that the Settlement Agreement contains no express term obligating URI, Brown, or Hurd to rescind stock options. The trial court relied in particular on its observation that the Settlement Agreement was an integrated agreement, and thus not subject to the addition of any terms not expressly contained therein.

Jones and MTC contend that the trial court's ruling manifests a fundamental misreading of the Third Claim for Relief. The breach of contract for which Jones and MTC seek relief is not the failure to rescind or redact the purported options, but the inclusion of the options in Schedule 2.2 in the first instance. Jones contends that inclusion in the Schedule of options that had not been authorized or granted by the

⁶Jones and MTC's sixth, eighth, and ninth claims also address the purported options but are not a subject of this appeal and therefore not discussed herein.

Company breached paragraph 1.f. of the Settlement Agreement which provided for execution of the Stock Purchase Agreement in the specified form and upon review by Jones.

As described above, the Stock Purchase Agreement was incorporated by reference into the Settlement Agreement, and the closing of the Stock Purchase Agreement was a material term of the settlement. Paragraph 1.f.xiii of the Settlement Agreement also provided that the final Stock Purchase Agreement would be provided to Jones for review at least two days prior to closing. When the Settlement Agreement and the Stock Purchase Agreement were circulated to Jones, when the Settlement Agreement was executed, and when the Stock Purchase Agreement was presented to URI's board of directors, Schedule 2.2. setting forth all outstanding stock options was left blank. As such, Jones and MTC executed the Settlement Agreement on the assumption that Schedule 2.2 would set forth the 150,000 options granted under the Stock Option Plan and no others. Jones and MTC contend that is was a breach of the Settlement Agreement for URI, Hurd, Brown, and Fife to append a new Schedule 2.2 to the Stock Purchase Agreement setting forth new options in favor of Hurd and Brown that were never authorized or granted by the company. Nothing in paragraph 1.f. allows URI, Fife, Hurd and Brown to use the Stock Purchase Agreement as a vehicle for granting options not authorized by the Board of Directors, and their conduct in doing so constitutes a breach.

As a fall-back position, the trial court noted that because Hurd and Brown executed waivers of their options in March of 1998, the issue would be moot. Jones and MTC submit that this assertion fails for two reasons. First, although Hurd and Brown's

post-Complaint waivers may render moot any claim for specific performance, the waiver does not render moot a claim for damages, since nominal damages are always available in a contract action, even where no actual damage has been suffered. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667 (Utah 1982). Moreover, where the filing of the Complaint was necessary to bring about the parties' compliance with the Settlement Agreement, Jones and MTC should be deemed the prevailing parties on the claim, and would thereby be entitled to recover attorneys fees under the contract. *See Highland Construction Co. v. Stevenson*, 636 P.2d 1034, 1038 (Utah 1981)(holding that it makes no substantive difference in determining entitlement to attorneys fees if one becomes a prevailing party by obtaining a judgment or as a result of voluntary action of the opposing party after the filing of a Complaint).

Jones and MTC's Fourth Claim for Relief was based upon section 1.j. of the Settlement Agreement which provides as follows:

All employment agreements contemplated, negotiated or executed between URI and Sheen, Hurd, and Erickson shall not be effectuated and if effectuated, shall be terminated.

(R. 980). The trial court dismissed this claim on the basis that "none of the aforementioned individuals have given effect to any employment agreements. Consequently, there was nothing to terminate." (R. 1521).

Again, the trial court has misconstrued the Fourth Claim for Relief. Jones and MTC were not requesting the trial court to terminate the employment contract of Hurd. They were merely arguing that where Hurd had testified that he received the options as part of an employment agreement (R. 1008-09), it was a breach of Section 1.j. of the

Settlement Agreement to give effect to the alleged employment agreement by including the options in the Schedule.

In short, the trial court's mistaken understanding of the Third and Fourth Claims for Relief lead it to dismiss the claims without ever really considering the substance of the claims. Jones and MTC submit that the record includes substantial evidence establishing that the inclusion of the purported options in Schedule 2.2 to the Stock Purchase Agreement ran afoul of the contractual obligations undertaken in the Settlement Agreement, and urges the Court to return the matter to the trial court for a resolution on the merits.

The Seventh Claim for Relief seeks a declaratory judgment in the form of an order declaring that the options are void. Hurd and Brown essentially acquiesced in this claim when they executed waivers of their options in March of 1998. Jones and MTC thus agree with the trial court's substantive ruling that execution of the waivers rendered the underlying claim for declaratory judgment moot. Jones and MTC would point out, however, that insofar as the claim arose from the Settlement Agreement, Jones and MTC, as the prevailing parties, are entitled to recover their attorneys fees. Jones and MTC request that the issue be remanded to the trial court for the limited purpose of addressing the issue of attorneys fees.

IV. THE TRIAL COURT ERRED IN DISMISSING JONES AND MTC'S CLAIMS FOR PAYMENT OF EXPENSES.

Jones and MTC's Fifth Claim for Relief seeks reimbursement of expenses they incurred in connection with the Settlement Agreement. The Tenth Claim for Relief seeks

reimbursement of expenses incurred by Jones in his capacity as a Director of URI. Jones and MTC appeal the dismissal of both claims.

A. Jones and MTC are entitled to recover expenses incurred in connection with the Settlement Agreement.

Paragraph 1.h.(i) of the Settlement Agreement provides for payment of all of Jones' expenses "associated with the Pending Litigation and the documents and negotiations to complete and implement the settlement" incurred between January 1, 1996 and Closing. Pursuant to this provision, Jones prepared and submitted detailed statements of his expenses, a portion of which were then paid by URI. In dispute here are expenses for time expended by two MTC employees, Karen Pliszka and Patricia Lee, totaling \$5,991.20 for clerical expenses incurred in connection with the Settlement Agreement.

The trial court dismissed the claims of Jones and MTC for these expenses on the basis that Plaintiffs had failed to "present admissible evidence of any expenses, costs and fees properly submitted for payment during this time." The trial court noted that Jones and MTC had even admitted that at least some of the costs may have included costs incurred after the closing.

Jones and MTC submit that the trial court clearly erred in granting summary judgment on these claims. The trial court's decision tacitly acknowledges that Jones and MTC did submit statements for payment. Moreover, Mark Jones stated by affidavit that he provided to URI a summary of fees, costs, and out-of-pocket expenses with documentation from January 1, 1996 through Jun 30, 1996, which included clerical

expenses of \$5,991.00. (R. 1101-02). Jones further testified that he provided weekly time sheets for the relevant employees, which time sheets are also a part of the record. (R. 1155-88).

In the face of this sworn testimony and the clear language of the Settlement Agreement, the trial court could not reasonably conclude that Jones and MTC's claim failed to raise a genuine issue of disputed fact. The summary judgment should be vacated with regard to this claim, the matter remanded for the trial court to fix the precise amount of expenses recoverable by Jones and MTC.

B. Jones is entitled to recover expenses incurred as a Director of URI.

The Tenth Claim for relief is similar. Jones has asserted that he is entitled to reimbursement of expenses incurred as a Director of URI. Defendants have opposed the claim, arguing that URI's policy does not allow for reimbursement of expenses without prior authorization. The trial court concluded that Jones failed to discharge his burden of presenting evidence to refute URI's position, and dismissed the case.

Jones submits that the evidence he presented, particularly in light of the inferences that can be drawn therefrom, was sufficient to raise a material issue of fact. Specifically, Jones presented testimony that he understood as a director that his expenses would be reimbursed, and that during his tenure as a Director, the Company did not have a policy requiring pre-approval of expenses. He further presented evidence that Directors E. Jay Sheen and R. Dee Erikson were paid \$102,000.00 in 1995, and that Erikson was reimbursed for such items as postage, copy services, telephone calls, supplies and other expenses throughout his tenure as a Director. Jones further presented evidence that URI

pays rent on Fife's office in Chicago without pre-approval. In short, Jones provided evidence that based on his experience as a Director and the general course of operation of the company there has never been a policy that Director expenses must be pre-approved.

Jones submits that this evidence is more than sufficient to raise a disputed issue of material fact, and the trial court erred in dismissing the Tenth Claim for Relief.

V. THE TRIAL COURT ERRED IN AWARDING \$162,028.87 OF COSTS AND ATTORNEYS FEES TO THE DEFENDANT.

Following the trial court's Memorandum Decision granting summary judgment, Defendants moved for an award of attorneys fees. The trial court, after briefing and argument, determined that Defendants were the prevailing party and awarded fees in the amount of \$162,028.87. Jones and MTC submit that the fee award was improper and should be vacated.

A. Defendants were not the prevailing party.

It is axiomatic that if the trial court's ruling on the underlying claims discussed above is vacated, the fee award must be vacated as well. Jones and MTC also acknowledge that if the trial courts' judgment is affirmed on grounds other than mootness, Defendants would be entitled to some award of fees under the Settlement Agreement as prevailing parties. Jones and MTC submit, however, that to the extent the award is based on mootness, it was error to conclude that Defendants were prevailing parties, and the fee award must be reversed.

The trial court's dismissal of the Third and Fourth claims for relief were based in part on the mootness of the claims resulting from Hurd and Brown's voluntary waiver of

their purported stock options. The dismissal of the Seventh Claim for Relief was based entirely on mootness, the trial court concluding that “a declaration is unnecessary as all parties who plaintiffs contend have claims for stock options have disclaimed any such interest.” (R. 1523). On these claims, Jones and MTC submit that it was error for the trial court to determine that Defendants were the prevailing party.

A similar issue was addressed in *Highland Construction Co. v. Stevenson*, 636 P.2d 1034 (Utah 1981). In that case, the plaintiff sued for damages arising from a construction agreement. After the complaint was filed, but before judgment, the defendant admitted that he owed money and voluntarily paid. *Id.* at 1038. The plaintiff then requested attorneys fees on the claim, asserting that it was the prevailing party. *Id.* The Utah Supreme Court wrote as follows:

It should make no difference whether the plaintiff recovers money from the defendant during the course of action by voluntary payment or whether the plaintiff recovers that amount by a judgment. In both instances, the plaintiff has recovered money by virtue of its action. In the instant case, the \$10,300.78 was long past due when paid by [defendant] and since it was paid, albeit voluntarily, after plaintiff’s action was commenced the plaintiff Highland was indeed the “prevailing party” on that particular cause of action.

Id.

In this case, Jones and MTC were clearly the prevailing parties on the Seventh Claim for Relief, and to the extent that the Third and Fourth Claims for Relief were dismissed based on mootness, Jones and MTC are the prevailing parties there as well.

The fee award must be vacated and remanded to reconsider the award with Jones and MTC deemed the prevailing parties as described herein.⁷

B. The fee award should be vacated for failure to allocate fees.

The Utah Supreme Court has required those seeking attorneys fees to allocate their fees as follows:

[W]e have mandated that a party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for (1) successful claims for which there may be entitlement to attorneys fees; (2) unsuccessful claims for which there would have been entitlement to attorneys fees had the claims been successful; and (3) claims for which there is no entitlement to attorneys fees.

Foot v. Clark, 962 P.2d 52, 55 (Utah 1998). In *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998), the Utah Supreme Court held that it was error to award the full amount of fees incurred where some of the time was spent on unsuccessful issues.

In this case, the Court erred in refusing to require the Plaintiff to allocate its fees in two respects. First, the award ultimately included fees incurred on the Sixth, Eighth and Ninth Claims for relief, which were not based upon the contract and upon which there was therefore no entitlement to fees. Second, the award also included fees that were incurred in pursuing issues upon which the Defendants did not actually prevail. For instance, Defendants' initial motions to dismiss for mootness were unsuccessful, Count 1 of Defendants' Counterclaim was voluntarily dismissed, and Plaintiff's Seventh Claim for

⁷Jones and MTC would note that the although the trial court did not rely on the doctrine of mootness in dismissing the First Claim for Relief, the same analysis would apply since Fife and URI clearly executed the employment agreement as a direct result of the lawsuit.

Relief was dismissed only because Defendants' acquiescence rendered it moot. The fee award should be remanded so that an appropriate allocation can be conducted.

C. The amount of the fee award was unreasonable.

In simplest terms, Jones and MTC contend that Plaintiffs attorneys fees and costs in this matter of over \$160,000.00 were grossly excessive in light of the work actually required on the case. The trial court recited the applicable legal standard from *Barker v. Utah Public Service Commission*, 970 P.2d 702, 708 (Utah 1998), but did not address any of the specific items raised in Jones and MTC's detailed Memorandum. In light of the trial court's failure directly to address the issues raised, Jones and MTC request this Court to conduct its own review.

Jones and MTC submit that the billings were unreasonable and the trial court erred in awarding the full amount for the following reasons. First, the involvement of two firms and at least 8 total lawyers inevitably resulted in inefficiencies and duplication. For example, entries for Alan Roth at \$240.00 per hour dated January 21, 22, 23; February 2, 11, 13, 16, 17, 18, 19, 20, 24, 25, and 26; March 3; April 7 and 14; May 1, 4 and 5; June 1, 26 and 30; July 8, 9 and 17; and August 4, 5, 6, 9, 10 and 20, 1998, were all incurred in reviewing papers, meeting with other counsel, and other similar activities, none of which directly contributed to moving the action forward. Similarly, entries throughout February and March of 1998 show repeated entries for attorney meetings and reviewing of pleadings, none of which would typically be required if the case were assigned to a two or three-person litigation team.

Second, Chicago billing rates and travel time should have been adjusted to reflect the rates that would have reasonably been charged in the Salt Lake market. The Utah Supreme Court in *Barker* included “the fee customarily charged in the locality for similar legal services” as a consideration in making a fee award. *Id.* at 708. Certainly Jones and MTC do not challenge Defendants’ right to select out of state counsel to conduct litigation in Utah if they so desire. When that choice multiplies fees beyond what would be acceptable “in the locality,” however, such fees are not recoverable under *Barker*, and must be born by the Defendants.

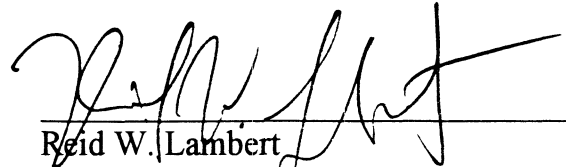
Third, Jones and MTC submit that local counsel costs, which in this case included entries for attendance at hearings without participation, review of documents transmitted for filing, and participation in attorney conferences should not be allowed. Jones and MTC contend that fees for local counsel should only be awarded for entries where it can be established that local counsel contributed something more than just its physical presence as an accommodation for the out of state lawyers. Again, it is clearly a party’s choice to hire out of state counsel, but the additional costs that accrue as a result of that choice should not be included in an award of reasonable attorneys fees.

CONCLUSION

For all of the reasons set forth above, Jones and MTC urge this Court to reverse the trial court’s grant of summary judgment and remand the case for a trial on the merits.

DATED this 28th day of November, 2001.

WOODBURY & KESLER, P.C.

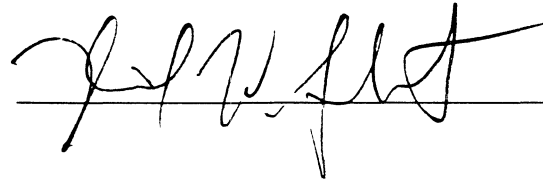


Reid W. Lambert
Attorney for Jones and MTC

CERTIFICATE OF DELIVERY

This certifies that I did deliver a true and correct copy of the BRIEF OF APPELLANT to the following by first class U.S. Mail this 28th day of November, 2001:

Rebecca S. Parr
BENDINGER, CROCKETT, PETERSON & CASEY
170 South Main, Suite 400
Salt Lake City, Utah 84101



ADDENDUM

<u>Exhibit</u>	<u>Item</u>
Exhibit A	Settlement Agreement
Exhibit B	Employment Agreement, dated February 27, 1998
Exhibit C	Memorandum Decision, dated January 5, 2000
Exhibit D	Memorandum Decision, dated January 8, 2001
Exhibit E	Judgment Order, dated February 26, 2001

EXHIBIT “A”

EXHIBIT A

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into the ____ day of 1996 among the following parties (collectively referred to herein as the "Parties"):

1. Utah Resources International, Inc., a Utah corporation ("URI").
2. R. Dee Erickson ("Erickson").
3. E. Jay Sheen ("Sheen").
4. Lyle D. Hurd ("Hurd").
5. Mark G. Jones ("Jones").
6. Mark Technologies Corporation, a California corporation ("MTC").
7. Anne Morgan ("A Morgan").
8. Victoria Morgan ("V Morgan").
9. Inter-Mountain Capital Corp., a Delaware corporation ("IMC").
10. John Fife ("Fife").
11. Robinson & Sheen, L.L.C.

RECITALS

A. The Parties are involved in various disputes and controversies involving the operation, management, ownership of and business activities of URI, including, but not limited to, matters which are the subject of the First State Action, the Second State Action and the First Federal Action as defined below (collectively, the "Pending Litigation").

B. A shareholders derivative action captioned as Ernest Muth, et al. v. John H. Morgan, Jr. et al. was filed as Civil Number C-87-1632 in the Third Judicial District Court of Salt Lake County, Utah (the "First State Action").

C. A settlement agreement was entered into in the First State Action on April 6, 1993 (the "1993 Settlement Agreement").

D. Subsequently, URI brought an action to enforce the 1993 Settlement Agreement in the First State Action which resulted in certain findings of fact and conclusions of law and an order enforcing the Settlement Agreement entered by Judge Michael R. Murphy on October 4, 1995 (the "Murphy Order"). The Murphy Order has been appealed by JH Morgan and DR Morgan and cross-appealed by URI.

E. An Order to Show Cause has been filed in the First State Action by URI against JH Morgan, DR Morgan, Mark Jones, MTC, Anne Morgan and Victoria Morgan, which is pending.

F. A shareholders derivative action captioned as Anne Morgan et. al v. R. Dee Erickson et. al was filed as Case Number 2:95CV-0661C in the United States District Court for the District of Utah, Central Division (the "First Federal Action").

G. Pursuant to a Plan of Share Exchange and Share Exchange Agreement dated February 16, 1995 among URI, Midwest Railroad Construction and Maintenance Corporation of Wyoming, a Wyoming corporation ("Midwest"), Robert D. Wolff ("RD Wolff") and Judith J. Wolff ("JJ Wolff"), URI acquired all outstanding shares of Midwest from RD Wolff and JJ Wolff in exchange for 590,000 restricted shares of authorized but unissued shares of URI (the "Share Exchange Agreement").

H. In April of 1996 URI and Midwest, RD Wolff and JJ Wolff entered into a Split-Off Agreement pursuant to which the Share Exchange Agreement was rescinded in a transaction intended to qualify as a tax-free spin-off under the provisions of Section 355 of the *Internal Revenue Code of 1986* (the "Recision Agreement").

I. On April 5, 1996 URI entered into a letter of intent with IMC to sell a controlling interest in URI to IMC upon terms and conditions set forth therein (the "IMC Letter of Intent"), attached as Exhibit A and by this reference made a part hereof. The IMC Letter of Intent was

modified pursuant to a letter of May 31, 1996, a copy of which is attached as Exhibit B and by this reference made a part hereof. The LMC Letter of Intent is modified pursuant to the terms and conditions of this Agreement.

J. Fife is the sole shareholder of LMC.

K. On May 17, 1996, a Complaint captioned as Mark Technology Corp., et. al. v. Utah Resources International, Inc., et. al. was filed as Civil No. 96 090 3332CV in the Third Judicial Court of Salt Lake County, Utah (the "Second State Action").

L. The Second State Action included a request by MTC and others for a temporary restraining order and injunction against the transactions contemplated in the LMC Letter of Intent, which request shall be rescinded in accordance with the terms and conditions of this Agreement.

M. The Parties believe this Agreement is fair to and in the best interest of URI and all shareholders of URI.

N. The Parties have agreed to compromise and settle all of their disputes and claims known or unknown, now existing or hereafter accruing, including, but not limited to, those which are the subject of the Pending Litigation, upon the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Unless otherwise provided, the following events shall occur at Closing (as defined herein):

a. The Parties agree 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. Pending such termination, the Parties agree the 1993 Settlement Agreement and the Murphy Order shall continue in accordance with their respective terms and provisions.

b. The Parties agree to dismiss the Pending Litigation with prejudice, to dismiss the Order to Show Cause referenced in the Recitals above, and agree to request the Court to remove the temporary restraining order granted in the Second State Action on the date of execution of this Agreement. The Parties agree, upon execution of this Agreement, to take immediate steps to file for dismissal of the Pending Litigation. The Parties will use their best efforts, in good faith, to obtain the dismissals within 60 days of the date hereof. Notice shall be given to shareholders of URI in such manner as each court directs.

c. The closing of the transactions contemplated herein ("Closing") shall occur at the offices of Robinson & Sheen in Salt Lake City, Utah, no later than seven (7) calendar days after the date hereof.

d. Except for those matters specifically set forth in this Agreement which create continuing future rights and obligations of the Parties, the Parties hereto, and each of them, for themselves, their respective predecessors, subsidiaries, controlled and controlling affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), heirs, assigns, predecessors and successors in interest, and each of them, effective upon Closing of this Agreement, hereby acknowledge full and complete satisfaction of, and do hereby release and discharge and covenant not to sue the other of them, including their respective heirs, assigns and successors in interest, parents, predecessors, subsidiaries, controlled and controlling affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), and each of them, from any and all claims, demands, and causes or sources of action of whatever kind or nature, known or unknown, suspected or unsuspected, including all rights of and claims for contribution and indemnification, and judgments, which any of them now owns or holds or has at any time heretofore owned or held through the date of the Closing of this Agreement against any of the other of them, including, but not limited to, those which: (i) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file, or papers in the Pending Litigation; or (ii) arise out of, or are related to, or are in any way connected directly or indirectly with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the Pending Litigation. This provision shall receive the broadest possible interpretation as a general and complete release.

URI agrees to and shall fully indemnify hold harmless, and defend all other Parties to this Agreement including their respective heirs, assigns and successors in interest, parents, predecessors, subsidiaries, controlled and affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), and each of them, from and against any and all claims, demands, and causes or sources of action of whatever kind or nature, known or unknown, suspected or unsuspected, including all rights of and claims for contribution and indemnification, and judgments; which Midwest, RD Wolff or JJ Wolff now owns or holds or has at any time heretofore owned or held through the date of the Closing of this Agreement against any of the Parties hereto other than URI, including, but not limited to, those which (i) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file,

or papers in the First State Action; or (ii) arise out of, or are related to, or are in any way connected directly or indirectly with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the First State Action; (iii) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file, or papers in the Second State action; or (iv) arise out of or are related or are in any way connected directly or indirectly with any transaction, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the Second State Action; or (v) arise out of, or are related to, or are in any way connected with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in said Federal Action; (vi) arise out of, are related to, or are in any way connected directly or indirectly with the Share Exchange Agreement or the Recision Agreement; (vii) arise out of, are related to, or are in any way connected directly or indirectly with the 1993 Settlement Agreement; or (viii) arise out of, or are related to, or are in any way connected directly or indirectly with the IMC Letter of Intent.

e. The Parties agree that Jones shall serve as a director of URI for no less than one year from the date of Closing, and the Parties agree to take all actions necessary to maintain Jones as a director for said one year period. Sheen and Erickson shall resign as members of the Board of Directors of URI as of the date of Closing. The successors to Sheen and Erickson as members of the Board of Directors of URI shall be appointed in accordance with the terms of the 1993 Settlement Agreement. That Board shall elect Fife President and the other appropriate officers of URI. Erickson and Sheen agree that they will not seek election as, and will not accept any future nominations to serve as, an officer or director of URI or Morgan Gas & Oil Co.

f. The transactions contemplated in the IMC Letter of Intent shall close in accordance with the provisions of that contemplated Stock Purchase Agreement between URI and IMC (the "Stock Purchase Agreement"), the current form of which is attached hereto and incorporated herein by this reference as Exhibit "C," subject to negotiation and execution of the definitive Stock Purchase Agreement and approval of its terms by the URI Board of Directors; provided, however, that the definitive Stock Purchase Agreement must contain the following material provisions:

i. IMC shall purchase and URI shall issue and sell shares at the Closing so that IMC will own following the purchase 50.5% of the total outstanding common stock of URI at \$3.35 per share as of the Closing, and URI shall issue an option for one hundred fifty thousand (150,000) or more additional shares of the capital stock of the Company at an exercise price of \$3.35 per share, payable in the same fashion as the shares purchased by IMC to obtain 50.5% of the total outstanding stock of URI, such that IMC shall have at all times the right to own 50.5% of the outstanding common stock of URI; provided, however, that the options may only be exercised as corresponding outstanding options held by others are exercised; and further provided that IMC shall be entitled to maintain its 50.5% ownership of the outstanding common stock of URI in connection with any

stock split, recapitalization, combination, or reorganization; and further provided that: IMC shall be entitled to maintain its 50.5% ownership of the outstanding common stock of URI in connection with any new issuance of stock or the issuance of instruments convertible into stock, at the offering price of such new issuance, on payment terms similar to those set forth herein;

ii. IMC shall pay 15% of the purchase price in cash at closing;

iii. the balance of the purchase price shall be evidenced by a note ("Note") which bears interest at a rate equal to the short-term applicable federal rate published by the Internal Revenue Service, pursuant to Section 1274(d) of the Internal Revenue Code of 1986, as amended, in effect at the time of the Closing, adjusted on each anniversary date of this Agreement until the purchase price has been paid in full.

iv. IMC shall pay the first year's interest in cash at Closing, discounted at the interest rate noted in (iii) above, and interest shall be paid annually in arrears on each anniversary of the Note thereafter, beginning with the second year's anniversary date, with the principal due and payable August 1, 2001;

v. the Note shall be secured by a pledge of IMC's URI stock;

vi. John Fife, the sole shareholder and president of IMC, will personally guarantee twenty-five percent (25%) of the outstanding balance of the Note;

vii. after closing, any distributions and other payments otherwise payable to IMC on its URI stock will be applied to reduce the outstanding principal balance of the Note;

viii. subsequent to closing, IMC shall cause URI to cause a 1,000 to 1 share reverse split at \$3.35 per share;

ix. fractional shareholders of record as of the date of the reverse split shall be given the option to purchase additional fractional shares to round up to the next whole share;

x. URI indemnifies IMC, its shareholders, officers, directors, agents, employees and attorneys, including but not limited to those arising out of the negotiation, execution and consummation of this Agreement and including advancement of their legal fees and costs, and from and against liability arising out of the IMC Letter of Intent, the Stock Purchase Agreement and transactions contemplated hereby;

xi. IMC shall take all actions necessary to cause URI to honor its obligations to indemnify its officers and directors, agents, employees and attorneys, including but not limited to those arising out of the negotiation, execution and consummation of this Agreement, and

including advancement of their legal fees and costs, in connection with all present and future litigation.

xii. URI shall hire Fife under a written employment agreement which shall provide reasonable compensation for services rendered, which compensation in any year shall not exceed \$200,000. The payment of compensation in excess of that provided in the employment agreement shall be used to reduce any obligations due or to become due under the Note.

xiii. The Parties covenant to provide a copy of the definitive Stock Purchase Agreement to Jones and counsel of his choosing at least two days prior to the Closing, to review for consistency with the provisions above.

f. The number of shares acquired by URI in the reverse split contemplated in the Stock Purchase Agreement shall be available for purchase by all remaining shareholders of URI, other than IMC, as of a record date five days prior to the effectuation of the reverse split at a price of \$3.35 per share; provided, however, that URI shall not be required to make the shares available for purchase if to do so would be in violation of federal or state securities laws after after URI has taken all actions necessary to comply. Notice shall be given to the shareholders of the availability of such purchase and to the extent the amount of shares available is oversubscribed, each person subscribing for such shares shall be allowed to purchase a pro-rata portion of the available shares. The terms of the purchase of such shares by each shareholder shall be a cash down payment of 25% with the balance payable in three years with simple interest at the short term applicable federal rate for the month of this Agreement which interest shall be payable annually in arrears. The obligation shall be secured by a pledge of the stock acquired pursuant to a stock pledge agreement to be drafted by counsel for URI. Any distributions to shareholders of URI shall first be applied to the unpaid balance of any amounts owing URI hereunder.

g. The 40,552 outstanding shares of URI stock owned by A Morgan and V Morgan, which they represent and warrant are all the URI shares they own, shall be purchased by URI for a cash price of \$3.35 per share which purchase shall occur at Closing of this Agreement.

h. Legal fees and expenses and other costs associated with the Pending Litigation and the documents and negotiations to complete and implement the settlement contemplated by this Agreement shall be paid as follows:

(i) All legal fees, costs and out-of-pocket expenses incurred or paid by Jones, IMC, Fife, Erickson, Sheen, Hurd and MTC from January 1, 1996 to Closing shall be reimbursed or paid by URI.

(ii) All legal fees, costs and out of pocket expenses incurred or paid by V. Morgan and A Morgan, subject to a dollar limitation of \$81,000, shall be reimbursed or paid by URI.

(iii) All other expenses incurred, except as provided above, shall be paid by the Party incurring such expense.

i. From the date of this Agreement URI shall be allowed to conduct its affairs in the normal course of business, except as otherwise limited or modified by the First State Action, the 1993 Settlement Agreement and the Murphy Order.

j. All employment agreements contemplated, negotiated or executed between URI and Sheen, Hurd, and Erickson shall not be effectuated and, if effectuated, shall be terminated.

k. Except for completion of pending matters approved by the Board, Robinson & Sheen, L.L.C. shall resign as legal counsel for URI effective at Closing.

l. The Parties hereto shall exercise their best efforts to account for, pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.

4. Representations and Warranties of the Parties.

a. The corporate Parties, URI, MTC, and IMC represent and warrant that they are validly existing and in good standing in the state of their organization and have the full legal right, power and authority to execute and deliver this Agreement and to carry out all transactions contemplated herein. Each individual signing this Agreement on behalf of a corporation, partnership, trust, or other entity, represents and warrants that he or she has the authority to do so.

b. All Parties represent and warrant that they have negotiated at arms-length with a view to arriving at a fair and equitable settlement of their differences.

c. All Parties represent and warrant that, to the best of their belief, the terms of this Agreement are fair to and in the best interests of URI and its shareholders.

d. All Parties covenant that no actions of any kind shall be undertaken by the Parties to affirmatively prosecute the Pending Litigation, nor will the Parties instigate any new legal proceedings against any of the other Parties.

c. All Parties represent and warrant that they have not assigned or transferred any claims against any of the other Parties, including any interest in the Pending Litigation, to any third party not a party to this Agreement.

5. This Agreement has been freely and voluntarily executed by all Parties hereto after having been apprised of all relevant information and having been represented by counsel. No party hereto has relied upon any inducements, promises or representations made by any other party or other party's attorney, other than those specifically set out in this Agreement, which constitutes the entire, integrated understanding among the Parties.

6. Each party agrees to perform such other further acts and to execute and deliver such further documents as may be necessary to effectuate the purposes of this Agreement.

7. The Parties hereto, and each of them, acknowledge that this Agreement is the compromise and settlement of the claims and demands between and among the Parties and nothing contained herein shall be construed as an admission of their validity or invalidity against the interests of the Parties hereto, or any of them, except that this disclaimer does not affect the validity or truthfulness of the affirmative statements, admissions, affidavits, filings, notices, and writings made and agreed to be made under the terms of this Agreement.

8. Except as to continuing covenants and obligations set forth in the 1993 Settlement Agreement and the Murphy Order, all claims, rights, causes of action, or defenses of the Parties issued in the Pending Litigation are herewith merged into and fully resolved as a part of this Agreement.

9. All Parties to this Agreement have read and fully comprehend and understand the terms and provisions of this Agreement and of the ancillary exhibits and documents incorporated herein. All Parties have been advised by legal counsel who presently represent them in connection with this settlement as to the content, meaning and execution of this Agreement. All Parties to this Agreement have voluntarily and without coercion signed the same and understand and agree to each and every paragraph hereof.

10. No Party hereto shall, directly or indirectly, solicit or seek to solicit any person to challenge any provision hereof or to file suit comparable to any suit dismissed hereunder or to contest the dismissal of the Pending Litigation. This covenant of good faith shall be central to this Agreement and any Party damaged by a breach thereof shall be entitled to all remedies available at law or in equity as well as a recovery of reasonable attorney's fees and costs.

11. General Provisions.

a. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the heirs, legal representatives, successors and assigns, as

applicable, of the respective parties hereto, and any entities resulting from: the reorganization, consolidation or merger of any party hereto.

b. Headings. The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to limit or affect in any way the meaning or interpretation of any of the terms or provisions of this Agreement.

c. Counterparts. This Agreement may be signed upon any number of counterparts with the same effect as if the signature to any counterpart were upon the same instrument.

d. Entire Agreement. This Agreement, together with the exhibits and schedules hereto (which are incorporated herein by this reference), constitutes the entire agreement and understanding between and among the parties with respect to the subject matter hereof and shall supersede any prior agreements and understandings among the parties with respect to such subject matter.

e. Severability. The provisions of this Agreement are severable, and should any provision hereof be found to be void, voidable or unenforceable, such void, voidable or unenforceable provision shall not affect any other portion or provision of this Agreement.

f. Survival of Representations, Warranties and Covenants. The representations, warranties and covenants of the Parties shall survive the Closing.

g. Waiver. Any waiver by any party hereto of any breach of any kind or character whatsoever by any other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver or consent to any subsequent breach of this Agreement on the part of the other party.

h. Modification. This Agreement may not be modified except by an instrument in writing signed by all of the parties hereto.

i. Governing Law. This Agreement shall be interpreted, construed and enforced according to the laws of the State of Utah.

j. Attorney's Fees. In the event any action or proceeding is brought by any Party against any other Party under this Agreement, the prevailing party shall be entitled to recover attorney's fees and costs in such amount as the court may adjudge reasonable.

k. Notice. All notices or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given when personally served or deposited in the United States mail, postage prepaid,

registered or certified, with return receipt requested, or by prepaid telegram, telecopy or deposited with a recognized courier for overnight delivery. Notice given in any such manner shall be effective when received or three (3) days after mailing or sending. The addresses of the parties shall be as set forth on Schedule 11.j. attached hereto.

Each Party shall have the right to change its address for purposes of this section to any other location within the continental United States by giving thirty (30) days' notice to the other Parties in the manner set forth in this section.

11. In the event that Closing does not occur for any reason, the term of the 1993 Settlement Agreement shall be extended by the number of days elapsing between the date hereof and the date of the event causing the failure to close.


DATED the date and year first set forth above.

URI:

Utah Resources International, Inc., a Utah corporation

By: _____
Its: _____

ERICKSON:


R. Dee Erickson


SHEEN:


E. Jay Sheen

HURD:

Lyle D. Hurd

JONES:


Mark G. Jones

MTC:

Mark Technologies Corporation, a
California corporation

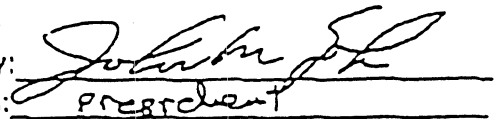
By: 
Its: PRESIDENT

A MORGAN:

Anne Morgan, individually.
V MORGAN:

Victoria Morgan


INTER-MOUNTAIN CAPITAL CORP, a
Delaware corporation

By: 
Its: PRESIDENT

FIFE


John Fife

ROBINSON & SHEEN, L.L.C.

By: 
Its: Member

APPROVED: _____
Jenny T. Morgan

registered or certified, with return receipt requested, or by prepaid telegram, telecopy or deposited with a recognized carrier for overnight delivery. Notice given in any such manner shall be effective when received or three (3) days after mailing or sending. The addresses of the parties shall be as set forth on Schedule 11.f, attached hereto.

Each Party shall have the right to change its address for purposes of this section to any other location within the continental United States by giving thirty (30) days' notice to the other Party in the manner set forth in this section.

11. In the event that Closing does not occur for any reason, the term of the 1993 Settlement Agreement shall be extended by the number of days elapsing between the date hereof and the date of the event causing the failure to close.

DATED the date and year first set forth above.

URI:

Utah Resources International, Inc. a Utah corporation

By: [Signature]
Its: [Signature]

ERICKSON:

[Signature]
R. Dee Erickson

SHEEN:

[Signature]
E. Jay Sheen

HURD:

[Signature]
Lyle D. Hurd

manner shall be effective when received or three (3) days after mailing or sending. The addresses of the parties shall be as set forth on Schedule 1/12, attached hereto.

Each Party shall have the right to change its office or principal place of business of this section to any other location within the United States by giving thirty (30) days' notice to the other Parties in the manner set forth in the attached Schedule 1/12.

11. In the event that Closing does not occur for any reason the term of the 1992 Settlement Agreement shall be governed by the number of days elapsing between the date hereof and the date of the event causing the failure to close.

DATED the date and year first set forth above.

URI:

Utah Resources International, Inc., a Utah corporation

By: _____
For: _____

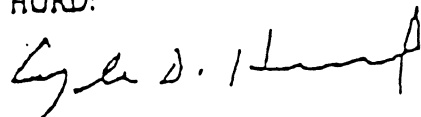
ERICKSON:

R. Dee Erickson

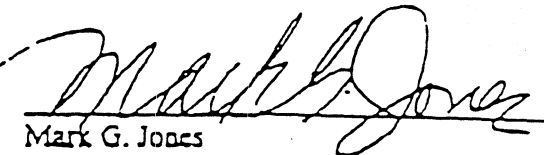
SHEEN:

E. Jay Sheen

HURD:


Kyle D. Hurd

JONES:

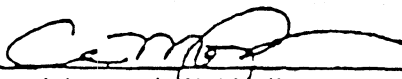

Mark G. Jones

MTC:

Mark Technologies Corporation, a
California corporation

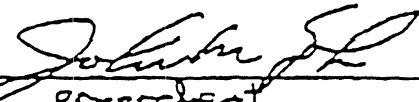
By: 
Its: PRESIDENT

A MORGAN:


Anne Morgan, individually.
V MORGAN:

Victoria Morgan

INTER-MOUNTAIN CAPITAL CORP, a
Delaware corporation

By: 
Its: President

FIFE

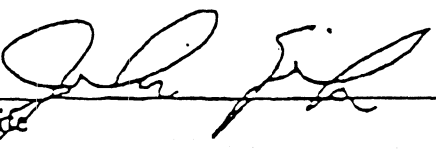

John Fife

EXHIBIT “B”

EMPLOYMENT AGREEMENT

Utah Resources International, Inc. ("URI") agrees to employ John M. Fife as its president and chief executive officer on an at-will basis commencing as of July 13, 1998 at an annual salary of \$195,000.00 per year.

Dated as of 02-27-98

Utah Resources International, Inc.

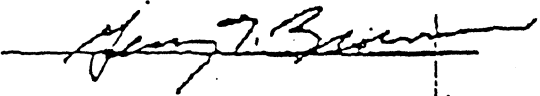
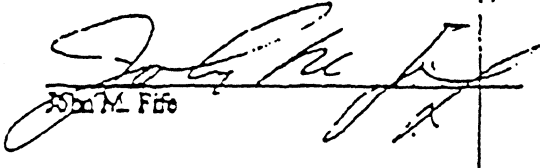


John M. Fife

EXHIBIT “C”

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK TECHNOLOGIES CORP., a
California corporation, and
MARK JONES,

Plaintiffs,

vs.

UTAH RESOURCES INTERNATIONAL,
INC., a Utah corporation, JOHN
FIFE, DAVID FIFE, LYLE D. HURD
JR., GERRY BROWN individuals,

Defendants.

MEMORANDUM DECISION

Case No. 980900576MI

Honorable ANNE M. STIRBA

Court Clerk: Marcy Thorne

January 5, 2000

The above-entitled matter comes before the Court pursuant to Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment on Plaintiffs' First, Second, Third, Fourth, Seventh, and Eighth Claims for Relief. The Court heard oral argument with respect to these motions on November 11, 1999. Following the hearing the matters were taken under advisement.

The Court having considered the motions, memoranda, exhibits attached thereto, and for the good cause that has been shown hereby enters the following ruling.

UNDISPUTED FACTS

1. Mark Jones (Jones") was a director of Utah Resources International, Inc. ("URI") from January, 1996 through

December 11, 1997,

2. Jones is the controlling shareholder of Mark Technologies Corporation ("MTC"), a California corporation with offices located in San Francisco, California.
3. MTC is a shareholder of URI.
4. URI is a Utah corporation with its principal place of business located in St. George, Utah.
5. John Fife is the President and Chief Executive Officer of URI.
6. In April of 1996, URI entered into a letter of intent with Inter-Mountain Capital Corporation ("IMCC") for the sale to IMCC of a controlling number of URI shares.
7. Jones and MTC sued URI, certain then-directors, IMCC, Fife, and others to enjoin the sale of a controlling interest in URI.
8. In June 1996, Jones, MTC, URI and several other parties entered into a Settlement Agreement.
9. Jones and MTC filed this suit alleging breach of the Settlement Agreement.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is proper when the affidavits and evidence on file demonstrate that plaintiff cannot establish any set of facts that would entitle him to judgment. Abdulkadir v. Western

Pacific R.R., 318 P.2d 339 (Utah 1957). Summary judgment is used to dispense with unnecessary and unjustified litigation.

Reliable Furn. Co. v. Fidelity & Guaranty Ins. Underwriters, 398 P.2d 685 (Utah 1965). A party may not rely upon allegations in the pleadings to counter affidavits made upon personal knowledge stating facts contrary to those alleged in the pleadings. Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1975). "[B]are contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment." Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980).

ANALYSIS

Turning first to the Settlement Agreement itself, it is important to note that it contains an integration clause on page 9, §5, and on page 10, §11(d). This is critical because a contract that includes a term indicating it is integrated is presumed to be integrated. Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985). Furthermore, a contract that is integrated must have its integrity maintained by not admitting parole evidence. Id. Accordingly, the terms of the Settlement Agreement should be given their plain and ordinary meaning. Warburton v. Va. Beach Fed's Savings & Loan Ass'n, 889 P.2d 779, 783-84, (Utah ct. App. 1995).

A. Claim One

Claim One involves an alleged promise by John Fife and URI to enter into a contract of employment. Plaintiffs allege defendants breached an implied covenant of good faith and fair dealing arising from the Settlement Agreement because they failed to timely enter into an appropriate contract of employment. A plain reading of the Settlement Agreement, however, shows it merely requires that the Stock Purchase Agreement include a clause requiring an employment agreement-which the Stock Purchase Agreement does.

Accordingly, because the Settlement Agreement does not require an employment agreement, and because Fife and URI fulfilled the requirement by including the clause in the Stock Purchase Agreement, there was no breach of good faith and fair dealing as alleged by plaintiffs. Further, plaintiffs have no right to enforce the Stock Purchase Agreement. Indeed, neither the law nor the Settlement Agreement grant plaintiffs the right to sue on contracts they did not sign.

B. Claim Two

The Settlement Agreement requires that "[t]he parties hereto shall exercise their best efforts to account for, pay, compromise, unwind and/or terminate all existing contractual relationships between URI and Morgan Gas and Oil." Plaintiffs

allege defendants took no meaningful action to wind up until this lawsuit was filed. However, 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.

C. Claim Three

The third claim involves promises made by and between URI, Gerry Brown and Lyle Hurd. Specifically, plaintiffs contend these defendants are obligated under the Settlement Agreement to rescind outstanding stock options, or, in the alternative, to redact Schedule 2.2 of the Stock Purchase Agreement.

After reviewing the Settlement Agreement, it is clear there is no term within it which requires the defendants to rescind any purported stock options. Plaintiffs ask the Court to read a clause into the integrated Settlement Agreement that requires the redaction of the purported stock options. However, the clause does not exist and any attempt to read it into an integrated contract is impermissible. Finally, even if URI was required to rescind the Schedule 2.2 of the Stock Purchase Agreement, the issue would be moot as Brown and Hurd have waived, in writing, any claim to URI stock options. Accordingly, there is nothing for URI to rescind or redact.

D. Claim Four

With this claim, plaintiffs seek to have the stock options, which were allegedly part of the employment agreements, terminated. Specifically, plaintiffs note that pursuant to the Settlement Agreement, "[a]ll employment agreements contemplated, negotiated or executed between URI and Sheen, Hurd, and Erickson shall not be effectuated, and if effectuated, shall be terminated."

According to the uncontroverted affidavits provided by defendants, however, none of the aforementioned individuals have given effect to any employment agreements. Consequently, there was nothing to terminate. Further, there is no evidence that anyone has even attempted to give effect to the stock options since the waivers were executed in March 1998 or since the Settlement Agreement was signed. Accordingly, because under the Agreement's plain language URI is not required to terminate employment agreements which have not been given any effect, there is no breach and summary judgment in defendants' favor is appropriate.

E. Claim Five

Pursuant to paragraph 1.h of the Settlement Agreement, "[a]ll legal fees , costs and out-of-pocket expenses incurred or paid by Jones. . . and MTC from January 1, 1996 to Closing shall

be reimbursed or paid by URI." In accordance with this provision, plaintiffs, in their fifth claim for relief seek reimbursement of clerical expenses.

In its July 17, 1998 Order, this Court held that the Settlement Agreement is clear and unambiguous on its face and it does not allow for reimbursement of legal fees, costs and out-of-pocket expenses incurred or paid by plaintiffs after July 3, 1996 for matters covered by the Settlement Agreement. According to defendants, they have paid all expenses, costs and fees properly submitted for payment during this time. Plaintiffs have not presented admissible evidence of any expenses covered under the Settlement Agreement that have not already been paid. Indeed, plaintiffs admit in their response to URI's undisputed facts that at least some of the costs submitted for reimbursement include expenses incurred after closing, and these are not reimbursable. Based upon the forgoing, and in accord with the Court's prior ruling, summary judgment in defendants' favor on this issue is appropriate.

F. Claim Six

With this claim, plaintiffs allege that John Fife and Lyle Hurd signed the Settlement Agreement without ever intending to perform in the future. To succeed on this claim, plaintiffs must prove by clear and convincing evidence that at the time Fife and

Hurd signed the agreement they had no intention to perform. Republic Group, Inc. v. Won-Door Corp, 883 P.2d 285 (Utah Ct. App. 1994). In the instant case, however, plaintiffs have only provided the alleged opinion of Mark Jones in the Amended Complaint. Even viewing the facts in the light most favorable to plaintiffs, this allegation does not satisfy the clear and convincing burden.

G. Claim Seven

With this claim, plaintiffs seek to have the stock options declared void. As discussed with respect to claim three, however, such a declaration is unnecessary as all parties who plaintiffs contend have claims for stock options have disclaimed any such interests.

H. Claim Eight

With this claim, plaintiffs allege that John Fife, David Fife, Lyle Hurd and Gerry Brown have breached a fiduciary duty owed to them as individuals and further allege that such breach entitles them to specific performance, injunctive relief and damages.

As an initial matter, despite plaintiffs' argument to the contrary, the Court finds that the actual language contained in the Amended Complaint is clearly more akin to a derivative action-which would make these plaintiffs not the proper

plaintiffs to bring this claim as a matter of law. Indeed, any fiduciary duty is owed to the corporation and shareholders collectively, not individually. Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980).

Further, even if the Court were to agree with plaintiffs that they are asserting a direct action, it is well established in Utah that "no fiduciary duty runs from directors and officers to individual shareholders." Lochhead v. Alacano, 662 F. Supp. 230, 233 (D. Utah 1987); Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980); Aurora Credit Services, Inc. v. Liberty West Dev., Inc., 1998 WL 809612 at p.6 (Utah).

I. Claim Nine

Plaintiffs concede that due to the pending lawsuit in St. George they are not proper plaintiffs to maintain the derivative action as asserted in this claim.

J. Claim Ten

With Claim Ten, plaintiffs contend Jones is entitled to reimbursement of expenses he incurred during his tenure as director. Defendants oppose this motion arguing URI compensates directors \$200.00 for every board meeting and reimburses for expenses that received prior authorization.

According to the July 17, 1998 Order of this Court, plaintiffs bear the burden of showing that a different corporate

policy existed. To date, plaintiffs have not produced any evidence to refute defendants' multiple affidavits that URI does not reimburse directors for non-approved expenses.

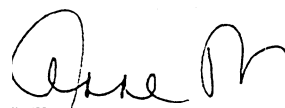
CONCLUSION

Based upon the forgoing, Defendants' Motion for Summary Judgment is granted. Plaintiffs' Motion for Summary Judgment on Plaintiffs' First, Second, Third, Fourth, Seventh, and Eighth Claims for Relief is denied.

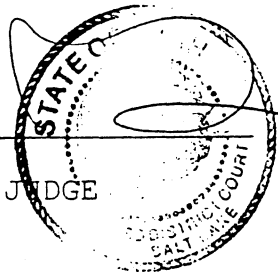
This Memorandum Decision constitutes the order regarding the matters addressed herein. No further order is required.

DATED this 7th day of January, 2000.

BY THE COURT



ANNE M. STIRBA
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980900576 by the method and on the date specified.

METHOD	NAME
Mail	JEFFREY W EICH ATTORNEY DEF 225 WEST WACKER DRIVE SUITE 2800 CHICAGO, IL 60606
Mail	WESLEY D. FELIX ATTORNEY DEF 170 S MAIN ST, STE 400 SALT LAKE CITY UT 84101
Mail	RICARDO B. FERRARI ATTORNEY 310 SOUTH MAIN, SUITE 1200 SALT LAKE CITY UT 841010000
Mail	PERRIN R LOVE ATTORNEY PLA 201 SOUTH MAIN STREET 13TH FLOOR, ONE UTAH CENTER SALT LAKE CITY UT 841112215
Mail	REBECCA S PARR ATTORNEY DEF FIRST INTERSTATE PLAZA 170 S. MAIN STREET, #400 S.L.C., UT 841010000
Mail	CRAIG M WHITE ATTORNEY DEF 225 WEST WACKER DRIVE SUITE 2800 CHICAGO IL 60606
Mail	DWIGHT B WILLIAMS ATTORNEY 900 FIRST INTERSTATE PLAZA 170 SOUTH MAIN STREET SALT LAKE CITY UT 84101

Dated this 1st day of Jan, 2000.

MS

EXHIBIT “D”

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK TECHNOLOGIES CORP., a
California corporation, and
MARK G. JONES, an individual,

Plaintiffs,

vs.

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

Defendants.

MEMORANDUM DECISION

Case No. 980900576MI

Honorable ANNE M. STIRBA

Court Clerk: Marcy Thorne

The above-entitled matter comes before the Court pursuant to "Defendants' Motion for Judgment Order Awarding Attorney's Fees and Costs Against Plaintiffs." The Court heard oral argument with respect to the motion on January 4, 2001. Following th hearing, the matter was taken under advisement.

The Court having considered the motion, memoranda, exhibits attached thereto and for the good cause shown hereby enters the following ruling.

With this motion, defendant, Utah Resources International, Inc. ("URI"), seeks the entry of a judgment order in its favor and against plaintiffs, Mark Technologies Corp. ("MTC") and Mark Jones ("Jones"), jointly and severally, for reasonable attorney's fees and costs in the total (revised) amount of \$162,028.87.

Specifically, URI contends that pursuant to paragraph 11.j. of the Settlement Agreement entered into by the parties, they are entitled to fees and costs as the "prevailing party" in this action.

Plaintiffs oppose the motion arguing URI's motion must be rejected because URI failed to allocate its request between recoverable and non-recoverable fees. Furthermore, it is plaintiffs' position many of the fees are duplicative and/or unreasonable.

Pursuant to paragraph 11.j. of the Settlement Agreement:

In the event any action or proceeding is brought by any Party against any other Party under this Agreement, the prevailing party shall be entitled to recover attorney's fees and costs in such amount as the court may adjudge reasonable.

By virtue of the Court's January 5, 2000 Memorandum Decision, URI is the prevailing party in this matter. Indeed, although Jones did in effect prevail on two motions, URI prevailed on all of Jones' **claims**. This fact, combined with the provision in the Settlement Agreement awarding fees and costs to the prevailing party in "any action or proceeding," entitles URI to recovery of their fees and costs. See Valcarce v. Fitzgerald, 961 P.2d 305, 318. (Utah 1998).

Turning next to the issue of reasonableness of the requested fees, it is important to note that in deciding if a fee is generally reasonable, the Court considers the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

Barker v. Utah Public Service Commission and U.S. West Communications, Inc., 970P.2d 702, 708 (Utah 1998).

After reviewing the submitted fees with the aforementioned in mind, the Court is persuaded the complexity of the issues involved in this case, combined with the experience and qualifications of URI's counsel as well as the results achieved, merit an award of the requested fees. With specific regard to the Chicago law firm of Wildman, Harrold, the Court finds Mr. White's billing rate of \$270 per hour is reasonable given his experience and role in the case. Moreover, the records indicate much of the work was performed by more junior attorneys at Wildman, Harrold, who billed

at substantially lower rates.¹ Furthermore, URI is entitled to reimbursement of its fees and expenses associated with traveling to Salt Lake City for argument on (1) URI's first Motion for Summary Judgment; (2) opposition to Jones' Motion to Extend Discovery Schedule; and (3) URI's second Motion for Summary Judgment. Indeed, although URI has local counsel, the out of state attorneys were the ones who were most familiar with the issues and who drafted the legal memoranda and deposed the pertinent witnesses. Indeed, the mere fact that URI hired a Chicago law firm to defend in this litigation, rather than a Salt Lake City law firm, does not, itself, provide a basis for denial of fees and costs.


Finally, with respect to duplication of efforts, after reviewing the records in this matter, the Court is not persuaded the services of either Wildman, Harrold or Giaque, Crockett's attorneys were repetitive and unnecessary. As noted, the delegation efforts by senior Wildman, Harrold attorneys actually reduced the ultimate fees. Moreover, Giaque, Crockett's review and analysis of pleadings, as well as their preparation for and attendance of dispositive hearings, was reasonable under the circumstances.

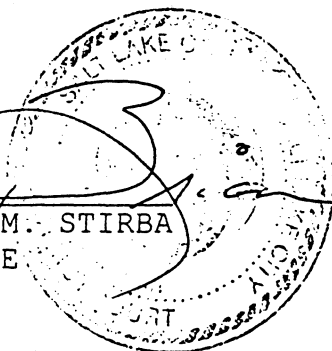
¹Jones takes issue with Mr. White and Mr. Roth's supervision of the junior attorney's. However, under the circumstances, such delegation and supervision was not unreasonable and aided in reducing the overall fees.

Based upon the forgoing, Defendants' Motion for Judgment Order Awarding Attorney's Fees and Costs Against Plaintiffs is granted.

DATED this 8 day of January, 2001.

BY THE COURT


PAT BRIAN for ANNE M. STIRBA
DISTRICT COURT JUDGE

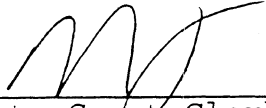


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980900576 by the method and on the date specified.

METHOD	NAME
Mail	JEFFREY W EICH ATTORNEY DEF 225 WEST WACKER DRIVE SUITE 2800 CHICAGO, IL 60606
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Mail	REBECCA S PARR ATTORNEY DEF FIRST INTERSTATE PLAZA 170 S. MAIN STREET, #400 S.L.C., UT 841010000
Mail	CRAIG M WHITE ATTORNEY DEF 225 WEST WACKER DRIVE SUITE 2800 CHICAGO IL 60606

Dated this 3rd day of Jan, 2001.



Deputy Court Clerk

EXHIBIT “E”

BENDINGER, CROCKETT, PETERSON & CASEY
Rebecca S. Parr (#6628)
Wells Fargo Building
170 South Main, Suite 400
Salt Lake City, Utah 84101
(801) 533-8383

WILDMAN, HARROLD, ALLEN & DIXON
Allen B. Roth
Craig M. White
225 West Wacker Drive, Suite 2800
Chicago, Illinois 60606
(312) 201-2000

FILED DISTRICT COURT
Third Judicial District

FEB 26 2001
SALT LAKE COUNTY
By Deputy Clerk

**ENTERED IN REGISTRY
OF JUDGMENTS**
DATE 03/01/01

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK TECHNOLOGIES CORP., a
California corporation, and
MARK JONES,

Plaintiffs,

vs.

UTAH RESOURCES INTERNATIONAL,
INC., a Utah corporation, **JOHN**
FIFE, DAVID FIFE, LYLE D. HURD
JR., GERRY BROWN, individuals,

Defendants.

JUDGMENT ORDER

Civil No. 980900576

Judge Anne M. Stirba

This action came on for final hearing on Defendants' Motion for Judgment Order
Awarding Attorney's Fees and Costs Against Plaintiffs on January 4, 2001. The issues having
been duly considered and the Court having rendered its Memorandum Decision on January 8,
2001.

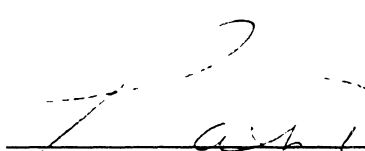
Judgment Order @J


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UTAH RESOURCES

1927

It is Ordered and Adjudged that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover from plaintiffs \$162,028.87, with interest at 8.052% as of the date of this Judgment Order.

DATED this 26 day of February, 2001.


Clerk of the Court



Judgment Debtors:

Mark Technologies Corporation
Mark Jones
12257 Business Park Drive, Ste. 10
Truckee, California 96161

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed, postage prepaid this
_____ day of February, 2001, to the following:

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