

2001

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

Utah Court of Appeals

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Reid W. Lambert; Woodbury & Kessler; Attorney for Appellants.

Craig M. White; Wildman, Harrold, Allen & Dixon; Rebecca S. Parr; Bendinger, Crockett, Peterson & Casey; Attorneys for Appellees.

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**IN THE UTAH COURT OF APPEALS**

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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.

**REPLY BRIEF OF APPELLANT**

Court of Appeals No. 20010261-CA

District Court No. 980900576

Priority No. 15

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

Attorney for Defendants/Appellees

Craig M. White  
WILDMAN HARROLD ALLEN & DIXON  
225 West Wacker Drive, Suite 3000  
Chicago, IL 60606-1229

Reid W. Lambert  
WOODBURY & KESLER, P.C.  
265 East 100 South, Suite 300  
P.O. Box 3358  
Salt Lake City, UT 84111-3358

Attorney for the Plaintiff/Appellants

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Utah Court of Appeals

MAR 2 2002

Paulette Stagg  
Clerk of the Court

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## **INTRODUCTION**

This case involves claims brought by Mark Jones (“Jones”) and his company, Mark Technologies Corp. (“MTC”), arising from a Settlement Agreement entered in June of 1996. Part of the Settlement Agreement, which involved multiple parties and settled multiple lawsuits, was an accompanying Stock Purchase Agreement under which John Fife (“Fife”) and his company, Inter-Mountain Capital Corp., would acquire a majority of the outstanding shares of stock in Utah Resources International, Inc. (“URI”). Shortly after execution of the Settlement Agreement, however, it became apparent to Jones and MTC that URI, under Fife’s leadership, was unwilling to abide by many of the express terms of the Settlement Agreement. Jones and MTC made a series of demands on URI and Fife to comply with various terms of the Settlement Agreement and were routinely met with stonewalling, inaction, or outright refusal. Ultimately, Jones and MTC filed this lawsuit as a last resort means of obtaining the benefit of what they had bargained for in the Settlement Agreement.

URI responded to the lawsuit in part by belatedly complying with some of the key provisions of the Settlement Agreement. After receipt of the Complaint, URI finally entered a written employment contract—albeit a hasty and incomplete one—with Fife, and it obtained waivers of certain stock options that were erroneously added in the Settlement Agreement as being granted to Lyle D. Hurd, Jr. (“Hurd”) and Gerry Brown (“Brown”). URI moved to dismiss Jones and MTC’s claim regarding its obligation to unwind its relationship with Morgan Gas and Oil Co. (“MGO”) on procedural grounds, and when

the Motion was denied, it immediately began winding up the relationship, a process that took less than five weeks.

Ultimately, the matter came before the trial court on cross motions for summary judgment, and the trial court dismissed the case. Although the trial court's legal basis for dismissal of each claim was independently stated, the themes of the trial court's ruling were primarily that Jones and MTC did not have standing to enforce the rights for which they had bargained under the Settlement Agreement and that Jones and MTC had suffered no significant injury, particularly since URI's post-lawsuit actions had rendered the claims moot.

Jones and MTC have brought this appeal to correct the errors of the trial court in refusing to acknowledge Jones and MTC's rights under the Settlement Agreement and in failing to acknowledge the disputed issues of fact presented on the record. Jones and MTC urge this Court to reverse the Judgment of the trial court and remand the matter for a trial on the merits as to Claims One through Five, Seven and Ten of the Amended Complaint.

### **FACTS RELEVANT TO THE APPEAL**

The Statement of the Case set forth in Jones and MTC's principal brief adequately addresses the factual basis for the Arguments herein, particularly in light of the fact that URI has not undertaken to controvert any of these facts in its own Statement of the Case. Therefore, Jones will not restate the facts here, except to respond to a few specific factual assertions set forth in URI's brief.

URI dedicates substantial space in its brief to describing the intentions of the parties in negotiating and signing the Settlement Agreement. This narrative is apparently offered as support for the proposition that Jones is not a party to the Stock Purchase Agreement and is not entitled to enforce its terms. Jones and MTC would merely note that virtually none of the narrative is supported by the record, and that they strongly dispute the suggestion that they were not intended to have the right to enforce the terms of the Stock Purchase Agreement that are expressly incorporated in the Settlement Agreement.

URI also asserts that because each claim of Jones and MTC's Complaint incorporates all other allegations of the Complaint, all claims of the Complaint are therefore deemed to arise out of the Settlement Agreement. Jones and MTC are aware of no authority for the proposition that a reference by which the factual allegations of one claim are incorporated into another transforms the legal theory and factual basis of one claim into that of another. Jones and MTC submit that the character of each claim for relief must be determined from the legal theory upon which the claim is based and the factual allegations relevant thereto. The fact that other factual allegations of the Complaint are incorporated as part of the claim is not determinative.

In its brief, URI also discusses the action currently pending in St. George, Utah, which was mentioned by the Court in dismissing Jones and MTC's Ninth Claim for Relief. Jones submits that the Ninth Claim for Relief is not a subject of this appeal, and the St. George action is thus irrelevant to these proceedings.



Because URI's Statement of the Case does not directly controvert the facts set forth in Jones and MTC's brief, all factual disputes relevant to the issues on appeal will be discussed further in the context of the Argument below.

## **ARGUMENT**

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

In its brief, URI concedes that it did not enter a written employment agreement with Fife until after the lawsuit was filed. URI also concedes, at least tacitly, that but for the lawsuit, URI would not have entered the written employment Agreement. Instead, URI defends the trial court's dismissal of the First Claim for Relief on two levels: (1) that under the plain language of the Settlement Agreement, Jones had no right to sue under the Stock Purchase Agreement; and (2) that URI's failure to enter a written employment contract was not a breach.

With regard to Jones and MTC's standing to sue, the Defendants correctly point out that the Stock Purchase Agreement was between URI and IMC. (Br. 12). Defendants fail to acknowledge, however, that the purpose of the Settlement Agreement was to allow interested parties, including Jones and MTC, to establish the terms under which IMC would be allowed to purchase shares of URI stock. The Stock Purchase Agreement, as shown by the Settlement Agreement, was in part the culmination of the lawsuit contesting the sale of URI. To portray the Stock Purchase Agreement as independent from the Settlement Agreement contorts the plain meaning of the Settlement Agreement and does

not comport with Jones and MTC's intent concerning the consideration they bargained for in negotiating the Settlement Agreement.

To support their position, URI cites to *State v. Mace*, 921 P.2d 1372 (Utah 1996) and *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1993) which URI claims stand for the proposition that where a plaintiff can make no showing of injury, he has no standing to sue. However, URI's analysis fails to acknowledge the axiomatic principal of contract law that where a party to a contract does not receive the performance bargained for, he has standing to sue to enforce the contract.

Moreover, even if URI's theory were accepted on its face, URI's brief fails to complete the analysis, addressing only the first prong of what is actually a three-part test. The first step of the test is to assess whether the plaintiff has been adversely affected, and whether there is a causal connection between the adverse affect, the Defendant's actions, and the relief requested. *Mace*, 921 P.2d at 1379. While URI directs its attack at this step of the test, Jones and MTC submit that the adverse effect they have suffered is that they have not received the benefit of what they bargained for in the Settlement Agreement. The Defendants' alleged actions are the breach of that Agreement, and the relief requested is enforcement of the contract, or in the alternative, an award of actual or nominal damages, together with an award of attorneys fees. The causal connection between the injury, Defendants' conduct, and the remedy requested is thus apparent.

Even if standing were not found under the first step of the test, however, the inquiry would not end. The Court would then analyze whether anyone else would have a

“more direct interest in the issues who can more adequately litigate the issues.” *Id.* In this case, the only party in a better position to enforce the rights of the parties under the Settlement Agreement would be John Fife. As he is a defendant and the very officer of URI whose conduct has given rise to the current dispute, the Court may conclude that no other party is in a better position to enforce the rights of the parties to the Settlement Agreement.

Finally, if there are no better litigants, the third step is to decide whether the issues raised by the Complaint are of sufficient importance to justify standing on their own merits. *Id.* In this case, the issues raised concern the performance of obligations clearly undertaken in a written Settlement Agreement. Jones and MTC submit that the importance of enforcing written agreements justifies allowing Jones and MTC access to the courts to pursue enforcement of the various agreements at issue.

Beyond the standing issue, URI also seeks to justify the trial court’s ruling by arguing that URI did not in fact breach its obligations with regard to the employment contract. First, URI espouses the position that the mere inclusion of a clause requiring a written agreement in the final Stock Purchase Agreement fully satisfied URI’s obligations under the Settlement Agreement. Jones and MTC submit that this logic eviscerates the Settlement Agreement of all meaning. Indeed, if the logic of the Trial Court were applied to the other clauses expressly enumerated for inclusion in the Stock Purchase Agreement, URI could have avoided paying the first year’s interest at closing (para. f(iv)), securing the Note by a pledge of IMC’s URI stock (para. f(v)), having Fife personally guarantee

the Note (para. f(vi)), and so forth. Such was clearly not the intent of the parties to the Settlement Agreement, and such was certainly not what Jones and MTC bargained for in accepting and executing the Settlement Agreement.

In this same vein, URI has made much of the fact that it has at least nominally complied with the requirement of hiring John Fife under a written employment contract. However, the record is clear that no such contract was entered until after Jones and MTC filed their lawsuit. Defendants attempt to obscure their failure to comply with the terms of the Stock Purchase Agreement by characterizing Jones and MTC's claim as one limited to displeasure concerning the timing of compliance only. Such is not the case. While Jones was on the Board of Directors of URI, he made repeated requests for URI to comply with the requirement of entering a written employment contract with Fife. His requests were met with silence and refusal. It was only in response to Jones and MTC's lawsuit that any action was ever taken.

Defendants finally assert that their conduct with regard to the employment contract is protected under the "business judgment rule." That position fails for two reasons. First, the business judgment rule does not apply to contract claims. The rule protects corporate officers from "errors or mistakes in judgment pertaining to law or fact where they have acted on a matter calling for the exercise of their judgment or discretion, when they have used such judgment and have so acted in good faith." *Financial Industrial Fund, Inc. v. McDonnell Douglas Corporation*, 474 F.2d 514, 519 (10<sup>th</sup> Cir. 1973). It simply does not protect corporations or their boards from the consequences of breaching

contracts. Second, to the extent the rule has any application to the facts of this case, the issue of URI's "good faith" would certainly be called into issue. The factual record contains substantial evidence of Jones' demands to URI to comply with the contract, and URI's persistent refusal to do so throughout the period. It is difficult to imagine how URI's obstructionist tactics in refusing to comply with the nondiscretionary requirements of the Settlement Agreement and Stock Purchase Agreement could be viewed by any court as constituting "good faith" as a matter of undisputed fact.

In summary, URI obligated itself to enter a written employment agreement with Fife. Despite the persistent demands of Jones that it do so, URI brazenly refused to do so until after being served with this lawsuit. The Court erred in dismissing this claim on summary judgment, and the Judgment should be reversed in this regard and remanded to the trial court for adjudication on the merits.

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

The parties do not dispute that the Settlement Agreement obligated URI to use "best efforts" to unwind the MGO relationship. The parties also agree that the MGO relationship was not wound up until August 1, 1998, when MGO's president verbally approved a written proposal made by Fife. Despite the fact that this "winding up" did not occur until more than two years after execution of the Settlement Agreement, the trial court found that URI presented "uncontroverted evidence that it had been in the process of unwinding the partnerships identified in the Settlement Agreement." The principal

thrust of URI's brief on the subject has been to restate this purportedly uncontroverted evidence, which consists primarily of self-serving statements of URI principals regarding the complexity of the MGO relationships and the need for investigation before anything could be done.

Jones and MTC submit that the trial court simply erred in failing to consider the substantial evidence presented to controvert URI's assertions. That evidence is described in detail on page 21 of Jones and MTC's principal brief, and will not be restated here. Jones and MTC would emphasize, however, that sufficient inferences to raise a disputed issue of fact as to URI's exercise of "best efforts" can be drawn from the simple fact that the entire process of winding up the relationships did not begin until immediately after the Court denied URI's initial motion to dismiss the claim in June of 1998, and the process was completed within five weeks. Neither the trial court nor URI has ever offered an explanation why this fact, together with the catalog of direct and circumstantial evidence produced by Jones and MTC, is not sufficient to call into dispute the factual question of whether URI had exercised its best efforts to unwind the relationships.

In its opening brief, URI focuses on the meaning of "best efforts," and cites cases from the New York Court of Appeals and the Fifth Circuit where summary judgment was entered on a "best efforts" claim. URI then argues that the fact that it made some efforts was sufficient to constitute "best efforts" as a matter of law. The Utah Supreme Court, however, has held that even significant efforts undertaken by a party may not rise to the

level of having used “best efforts.” *Olympus Hills Shopping Center, LTD v. Landes*, 821 P.2d 451, 455-56 (Utah 1991). *See also Sinajini v. Board of Education of the San Juan School District*, 233 F.3d 1236, 1241 (10<sup>th</sup> Cir. 2000) (holding that while “best efforts” does not obligate one to accomplish the task, it does constitute an enforceable legal standard). The determination of whether a party has met the standard of using “best efforts” is a factual inquiry reaching into subjective intent, similar to inquiries into good faith and specific intent. *United Telecommunications, Inc. v. American Television and Communications Corp.*, 536 F.2d 1310, 1317 (10<sup>th</sup> Cir. 1976). Such inquiries into intent and motive are factual judgments generally inappropriate for summary judgment. *See Hotel & Restaurant Employees & Bartenders International Union v. Rollison*, 615 F.2d 788 (9<sup>th</sup> Cir. 1980).

Jones and MTC submit that even if the Court were to accept URI’s sketchy assertions that during the two years following the Settlement Agreement it was “investigating” the partnerships and “identifying” the assets of the partnerships and “taking steps” to wind things up, a fact finder may nevertheless infer simply from the timing of events that URI had failed to use best efforts. But the evidence in this case goes even further. Jones has presented substantial evidence calling into question whether URI had in fact done anything during that time period, including specific testimony that Fife expressly refused to consider paying money to MGO, even though he knew that payments may be necessary to wind up the relationships. Jones and MTC submit that in the case the fact finder must not only resolve the factual dispute concerning what URI actually

did, but it must then measure that conclusion against the language of the Settlement Agreement and determine whether the acts constitute URI's "best efforts" to unwind the relationships.

Jones and MTC contend that the trial court erred in rejecting substantial evidence showing that URI failed to use its best efforts to unwind the MGO relationships. The evidence and the inferences drawn therefrom, particularly when viewed in a light favorable to Jones and MTC, present a disputed issue of fact that cannot properly be resolved on summary judgment. The Judgment of the trial court on this claim should be reversed and remanded to the trial court for a determination at trial.<sup>1</sup>

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

The arguments set forth in URI's brief with respect to the stock option claims are adequately addressed in Jones and MTC's principal brief. Jones will not restate that argument here except to address briefly URI's assertion that Jones and MTC suffered no cognizable injury. Jones and MTC would point out that the law does not require any actual injury as an element of a contract case. A contract case is proven upon evidence of contract and breach. Where no actual damages have resulted, nominal damages are

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<sup>1</sup>URI also argues that the relevant provision of the Settlement Agreement was not intended to benefit Jones and MTC and that they are therefore not entitled to sue to enforce the provision. This assertion is not supported by any reference to case law or any limiting language in the contract. Jones and MTC submit that as parties to the Contract, they may sue to enforce its terms, and if the breach at issue has not resulted in any actual or substantial damages, they may recover nominal damages. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667 (Utah 1982).



awarded to enforce the terms of the contract. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667 (Utah 1982). In simplest terms, where URI has breached its contract with Jones and MTC, the fact of the breach itself is all the injury that need be proven in order for Jones and MTC to prevail.

In its brief, URI weaves its discussion of “injury” into a further discussion of the business judgment rule. As set forth above, however, the business judgment rule does not excuse breaches of contract. Moreover, where the business judgment rule essentially calls for a “good faith” test relative to the conduct of URI in honoring the contract, the record does not support a holding that such “good faith” was established as a matter of law.

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

The argumentation in URI’s brief on the subject of Jones’ unreimbursed expenses focuses primarily on the quality and the quantity of evidence presented on the subject. By its very nature, the discussion betrays the trial court’s error in granting summary judgment in the face of factual record that gives rise to substantial issues of fact.

With regard to the settlement expenses addressed in Jones and MTC’s Fifth Claim for Relief, the parties do not dispute that only “pre-settlement” expenses are payable. Jones and MTC have submitted substantial sworn testimony of Jones and numerous handwritten business records establishing their claim that certain pre-settlement expenses remain unpaid. In fact, the court tacitly acknowledges that Jones presented at least some

evidence of pre-settlement expenses by noting that “some of the costs submitted for reimbursement include expenses incurred after closing.” On summary judgment, the evidence that there were at least some unpaid pre-settlement expenses should have been accepted in a light most favorable to Jones and MTC, and the Court should have drawn all inferences from that evidence in Jones and MTC’s favor. *Tretheway v. Miracle Mortgage, Inc.*, 995 P.2d 599 (Utah 2000). It was error for the trial court to ignore this evidence and its inferences, and hold that there were no unpaid expenses as a matter of law.

With regard to the directors expenses, the parties do not appear to dispute that Jones incurred substantial expenses as a director of URI that were not reimbursed. The factual question at issue was whether URI had a policy in place that denied reimbursement unless expenses had been pre-approved. Not surprisingly, URI’s principals all testified that URI had such policy, and that Jones was not entitled to reimbursement. The trial court agreed, and held that Jones had “not produced any evidence” to the contrary, and URI’s brief merely reiterates this assertion.

From Jones and MTC’s perspective, the mystery of this matter is the fact that neither the trial court nor URI have ever offered an explanation why Jones’ affidavit testimony, sworn out on personal knowledge as a former director of URI, may be disregarded on this issue. Without rehashing the facts set forth in the principal brief, Jones testified that he was a director and that there was no policy requiring pre-approval. He also testified that he personally observed that expenses of other directors were

routinely paid without pre-approval of any kind. In short, Jones offered substantial evidence that controverted, both directly and by inference, URI's evidence relating to reimbursement of director expenses.<sup>2</sup>

As a general rule, "[a] single sworn statement is sufficient to create an issue of fact." *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 616 (Utah 1985) *quoting*, *Webster v. Sill*, 675 P.2d 1170 (Utah 1983). Moreover, on summary judgment, the court may not weigh the evidence or assess credibility, but must view all evidence and draw all inferences in a light favorable to the non-moving party. *Id.* In this case, it was simply error for the trial court to find that Jones' testimony was insufficient to outweigh the evidence offered by the URI principals.

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

In the principal brief, Jones and MTC raise three issues with regard to attorneys fees. First, Jones & MTC argue that to the extent that the Third, Fourth, and Seventh Claims for Relief Judgment were dismissed on grounds of mootness, Jones was in fact the prevailing party. URI has responded to this argument primarily by questioning use of the term "mootness," and then by insisting that the stock options at issue were never

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<sup>2</sup>Without citation to the record, URI asserts in its footnote 5 that Jones' testimony in this regard is made "on information and belief." A review of the affidavit, the relevant parts of which are at pages 1102-1103 of the record, reveals that all allegations relating to this matter were made on personal knowledge.

exercised and had never been declared “valid or enforceable in the first instance.” URI Brief, at 27.

It is Jones and MTC’s position that inclusion of the Stock Options in schedule 2.2 of the Settlement Agreement constituted recognition of the options as valid and enforceable. Jones and MTC made due demand on URI to cancel the options, and URI, Hurd, and Brown refused to cancel or disclaim their rights under the options. On the day the lawsuit was filed, therefore, URI, Brown and Hurd all recognized the options as valid and enforceable. Only after the lawsuit was filed did Hurd and Brown agree to disclaim the options. In fact, Hurd and Brown disclaimed their options expressly in response to the lawsuit.

It is clear that the trial court based its dismissal of the stock options claims in substantial part upon its view that because Brown and Hurd had waived their interest in the options, “the issue would be moot.” (R. 1520). Jones and URI apparently disagree with the trial court’s use of the term “moot,” but they offer no evidence that absent the lawsuit, Brown and Hurd would have waived their options. Jones and MTC submit that if the stock option claims are dismissed based exclusively on Brown and Hurd having now waived their rights, then Jones and MTC must be deemed the prevailing parties since URI’s compliance resulted from the filing of the lawsuit. As such, Jones and MTC should be awarded fees, and not URI.

Second, Jones and MTC have argued that the fee award should be allocated among the claims, with no recovery allowed for the claims on which recovery was unavailable or

for issues on which URI did not ultimately prevail. As to the claims where recovery was unavailable, Jones and MTC have argued that their Sixth, Eighth and Ninth Claims for Relief are not founded on contract, and are therefore not subject to the attorneys fees provision of the Settlement Agreement. Defendants rely on *Dejavue, Inc. v. US. Energy Corp*, 993 P.2d 222,227 (Utah Ct. App. 1999) for the proposition that factually related claims, when prevailed upon, form the basis for awarding attorneys' fees on all the claims. However, *Dejavue* requires that the claims arise from "a common core of facts and involve[] related legal theories." *Id.*, quoting *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560, 566 (10<sup>th</sup> Cir. 1993). Furthermore, full recovery depends on the party's success on a "significant, interrelated claim." *Id.*, quoting, *Jane L. v. Bangerter*, 61 F.3d 1505, 1512 (10<sup>th</sup> Cir. 1995).

In the case at hand, the claims at issue share neither a common set of facts nor related legal theories. Plaintiffs' Claims One through Five and Seven all arise from the Settlement Agreement and Stock Purchase Agreement and allege a breach of contract. Claim Six arises from the settlement of the lawsuits predating the Settlement Agreement and alleges that the Defendants made fraudulent representations to induce Jones and MTC to enter the Settlement Agreement. It is based on misrepresentation and arises in tort. Claims Eight and Nine allege breaches of fiduciary duties of various URI officers, and sound in tort. Claim Ten is a separate claim based on the facts and circumstances surrounding URI's failure adequately to reimburse Jones for expenses he incurred as in service on the URI Board of Directors. This claims has nothing to do with the Settlement

Agreement or the Stock Purchase Agreement. Jones and MTC submit that the trial court erred in refusing to allocate the fees among these claims and adjust the fee award accordingly.

With respect to Jones and MTC's assertion that URI should not recover fees incurred pursuing unsuccessful issues, the parties agree that *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) is perhaps the most pertinent Utah case on the subject, but differ as to interpretation of that case. Jones and MTC submit that the discussion in the principal brief is sufficient to state their position on the matter, but would emphasize that in *Valcarce*, the court expressly held that it was error to award the full amount of fees where some of the time was spent pursuing unsuccessful issues. *Id.* at 318.

Jones and MTC's third argument relative to the fee award is that the trial court failed to adjust the fees charged by URI's Chicago counsel to reflect reasonable billing rates in Utah. URI's brief suggests that term "in the locality," as used in *Barker v. Utah Public Service Commission*, 970 P.2d 702 (Utah 1998) has not been defined by the Utah Supreme Court, and argues that the term should be construed broadly to allow attorneys practicing in Utah to charge rates that are reasonable in the locality of their home office. Jones and MTC submit that a fair reading of *Barker* requires that the term "in the locality" be given its plain meaning of in the locality of the Court where the action is pending.

URI suggests that Utah's open court policy would dictate that out-of-state attorneys be allowed to recover fees at their out-of-state billing rate. However, Jones and

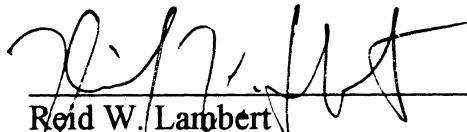
URI would submit that requiring out-of-state attorneys to submit to reasonable local billing rates is no more of a burden than is requiring such attorneys to be admitted to practice in the state, and to agree to abide by the local rules of professional conduct and rules of the court. In short, Jones and MTC contend that *Barker* requires courts to adjust billing rates of out-of-state counsel to meet the standard of reasonableness for the Salt Lake market. Since this was not done in this case, the award should be vacated and remanded for a new determination.

### **CONCLUSION**

For the reasons set forth above and in their principal brief, Jones and MTC request that the Summary Judgment granted against them be reversed, and the matter be returned to the trial court for further proceedings.

DATED this 29<sup>th</sup> day of March, 2002.

**WOODBURY & KESLER, P.C.**

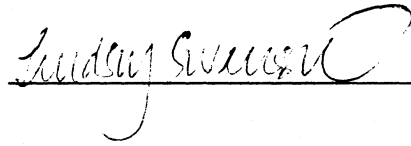
  
Reid W. Lambert  
Attorney for Jones and MTC

**CERTIFICATE OF DELIVERY**

This certifies that I did deliver a true and correct copy of the **REPLY BRIEF OF APPELLANT** to the following by first class U.S. Mail this 24<sup>th</sup> day of March, 2002:

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

Craig M. White  
WILDMAN HARROLD ALLEN & DIXON  
225 West Wacker Drive, Suite 3000  
Chicago, IL 60606-1229

  
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