

2002

Western United Mines, Inc., a Utah corporation,
Syndicators, Inc., a Utah corporation, J.R. Kirk, Jr.,
an individual, and Steven D. Martens, and
individual v. Dan K. Shaw, an individual, and Del-
Rio Resources, Inc., a Utah Corporation : Brief of
Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Snow, Christensen and Marineau; Max D. Wheeler; Rex E. Madsen; Keith A. Call; Attorneys for Appellants Western United Mines, Inc.; Syndicators, Inc.; J.R. Kird, Jr., and Steven D. Martens Anderson and Karrenberg; Thomas R. Karrenberg; Stephen P. Horvat; Attorneys for Appellee Del-Rio Resources, Inc.

Recommended Citation

Brief of Appellee, *Western United Mines, Inc., Syndicators, Inc., J.R. Kirk, Jr., Steven D. Martens v Dan K. Shaw, Del-Rio Resources, Inc.*, No. 20021064 (Utah Court of Appeals, 2002).
https://digitalcommons.law.byu.edu/byu_ca2/4102

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

WESTERN UNITED MINES, INC., a Utah corporation, SYNDICATORS, INC., a Utah corporation, J.R. KIRK, JR., an individual, and STEVEN D. MARTENS, an individual,

Plaintiffs/Appellants,

Third District Court No. 010906368

DAN K. SHAW, an individual, and
DEL-RIO RESOURCES, INC., a Utah
corporation,

Defendants/Appellees.

**SNOW, CHRISTENSEN &
MARTINEAU**
Max D. Wheeler (A3439)
Rex E. Madsen (A2052)
Keith A. Call (A6708)
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400
**Attorneys for Appellants Western
United Mines, Inc.; Syndicators, Inc.;
J.R. Kirk, Jr., and Steven D. Martens**

FILED
UTAH APPELLATE COURTS
MAY 12 2004

WESTERN UNITED MINES, INC., a
Utah corporation, SYNDICATORS,
INC., a Utah corporation, J.R. KIRK,
JR., an individual, and STEVEN D.
MARTENS, an individual,

Plaintiffs/Appellants,

vs.

DAN K. SHAW, an individual, and
DEL-RIO RESOURCES, INC., a Utah
corporation,

Defendants/Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE ROGER A. LIVINGSTON PRESIDING

ANDERSON & KARRENBURG
Thomas R. Karrenberg (#3726)
Stephen P. Horvat (#6249)
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2006
Telephone: (801) 534-1700
Facsimile: (801) 364-7697
**Attorneys for Appellee Del-Rio
Resources, Inc.**

TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF ISSUES</u>	1
<u>DETERMINATIVE PROVISIONS</u>	2
<u>STATEMENT OF THE CASE</u>	2
A. Factual Background	2
B. The 1995 Agreement	4
C. The Settlement of the Federal Litigation	7
D. The Litigation	8
<u>SUMMARY OF ARGUMENT</u>	12
<u>ARGUMENT</u>	14
<u>POINT ONE</u>	14
<u>THE TRIAL COURT PROPERLY DISMISSED APPELLANTS'</u> <u>CLAIMS FOR AN INTEREST IN THE OIL CANYON LEASES</u>	14
A. Appellants' claims were based exclusively on the 1995 Agreement, not on Shaw's purported "litigation funding agreement" or any other agreement	14
1. <u>Appellants' Complaint was based entirely on the 1995 Agreement</u> .	15
2. <u>Appellants did not assert rights under the funding agreement before the trial court</u>	18
B. The 1995 Agreement does not grant Appellants any definable or enforceable rights in any of the Oil Canyon Leases	19

1.	<u>Appellants have admitted that the 1995 Agreement does not grant them rights in the Oil Canyon Leases</u>	19
2.	<u>The 1995 Agreement, by its plain language, did not grant Appellants any rights in the Oil Canyon Leases</u>	20
a.	<u>Paragraphs 4 and 4.1 of the 1995 Agreement are too indefinite to be enforceable by Appellants</u>	20
b.	<u>For similar reasons, it would be pure speculation for Appellants to claim that the 1995 Agreement entitles them to any particular interest in any particular leases</u>	26
c.	<u>Because of the fundamental indefiniteness of the 1995 Agreement, Appellants' attempts to raise a triable issue of fact are unavailing</u>	30
d.	<u>The Oil Canyon Leases, as a matter of law, cannot reasonably be the "additional leases" referenced in the 1995 Agreement</u>	35
C.	The trial court acted within its discretion in denying Appellants' request for additional discovery time under Rule 56(f)	39
	<u>POINT TWO</u>	43
	<u>THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CLAIMS FOR AN INTEREST IN THE SETTLEMENT PROCEEDS</u>	43
	<u>CONCLUSION</u>	45
	<u>CERTIFICATE OF SERVICE</u>	46
	<u>ADDENDUM</u>	47

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Allisen v. American Legion Post 134</u> , 763 P.2d 806 (Utah 1988)	18
<u>Brown's Shoe Fit v. Olch</u> , 955 P.2d 357 (Utah Ct. App. 1998).....	21-24
<u>Busch Corp. v. State Farm Fire & Cas. Co.</u> , 743 P.2d 1217 (Utah 1987)	19
<u>Callioux v. Progressive Ins. Co.</u> , 745 P.2d 838 (Utah Ct. App. 1987)	39
<u>Carter v. Sorenson</u> , 2004 UT 33, 498 Utah Adv. Rep. 3, 2004 WL 834216 (April 20, 2004)	28, 29
<u>Chu v. Ronstadt</u> , 498 P.2d 560 (Ariz. Ct. App. 1972).....	22
<u>Conkle v. Jeong</u> , 73 F.3d 909 (9th Cir. 1995).....	41
<u>Davis v. Mulholland</u> , 25 Utah 2d 56, 475 P.2d 834 (1970).....	18
<u>Franklin Fin. v. New Empire Dev. Co.</u> , 659 P.2d 1040 (Utah 1983)	19
<u>GLS Dev't v. Wal-Mart Stores</u> , 944 F. Supp. 1384 (N.D. Ill. 1996)	24
<u>Harmon v. Greenwood</u> , 596 P.2d 636 (Utah 1979)	21
<u>Holmes v. American States Ins. Co.</u> , 2000 UT App 85, 1 P.3d 552	2, 39, 40
<u>Jensen v. IHC Hospitals</u> , 944 P.2d 327 (Utah 1997)	38
<u>Mahmood v. Ross</u> , 990 P.2d 933 (Utah 1999).....	44
<u>Miller v. Martineau & Co.</u> , 1999 UT App 216, 983 P.2d 1107	42
<u>Orlob v. Wasatch Management</u> , 2001 UT App 287, 33 P.3d 1078	36
<u>Pinnacle Books v. Harlequin Enters. Ltd.</u> , 519 F. Supp. 118 (S.D.N.Y. 1981).....	24
<u>Sandy City v. Salt Lake County</u> , 794 P.2d 482 (Utah Ct. App. 1990).....	39
<u>Simmons Oil Corp. v. Tesoro Petroleum Corp.</u> , 86 F.3d 1138 (Fed. Cir. 1996).....	41

<u>Utah Golf Association v. City of North Salt Lake</u> , 2003 UT 38, 79 P.3d 919	33
<u>Valcarce v. Bitters</u> , 12 Utah 2d 61, 362 P.2d 427 (1961)	21

Rules

CJA 4-501(2)(B) (repealed eff. Nov. 1, 2003; now at Utah R. Civ. P. 7(c)(3)(A))	38
Utah R. Civ. P. 46	19

Other

8 William & Meyers, Oil and Gas Law, Manual of Terms (2001)	23
-------------------------------------------------------------------	----

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j), as this matter was appealed to the Utah Supreme Court from a judgment of the Third District Court certified as final under Rule 54(b) of the Utah Rules of Civil Procedure, and the appeal was transferred to this Court.

STATEMENT OF ISSUES

1. Whether the trial court correctly dismissed on summary judgment Appellants' claims against Defendant Del Rio, Inc. ("Del Rio"), for a declaration of an interest in the Oil Canyon Leases pursuant to the 1995 Agreement.

This issue involves the following sub-issues, among others:

- a. Whether the 1995 Agreement granted Appellants any rights in any leases.
- b. Whether it would be reasonable to interpret the term "additional leases" in the 1995 Agreement as referring to the Oil Canyon Leases, which were already in existence.
- c. Whether the trial court acted within its discretion in denying, fifteen months after the litigation began and three months after the summary judgment motion was filed, Appellants' request under Rule 56(f) of the Utah Rules of Civil Procedure to delay ruling on the summary judgment motion to allow Appellants to depose Defendant Dan Shaw and non-party Gerald Nielson.

A grant of summary judgment is reviewed for correctness. See, e.g., Brockbank v. Brockbank, 2001 UT App 251, ¶ 10, 32 P.3d 990. A court may interpret and apply a

contract on a motion for summary judgment when the terms are "complete, clear, and unambiguous." Aspenwood, L.L.C. v. C.A.T., L.L.C., 2003 UT App 28, ¶ 30, 73 P.3d 947.

A trial court's ruling on a Rule 56(f) request is reviewed for an abuse of discretion. An appellate court will not reverse a trial court's denial of such a request "unless the decision exceeds the limits of reasonability." Holmes v. American States Ins. Co., 2000 UT App 85, ¶ 26, 1 P.3d 552.

2. Whether the trial court correctly dismissed on summary judgment Appellants' claims against Del Rio for a declaration that Appellants were entitled to a share in the cash settlement proceeds that the Defendants had received pursuant to the settlement of the Federal Litigation.

Please see issue number one for the applicable standard of review.

DETERMINATIVE PROVISIONS

Not applicable.

STATEMENT OF THE CASE

A. Factual Background.

This lawsuit focuses primarily on ten leases of federal land for oil and gas exploration and development (the "Oil Canyon Leases"). (See Complaint, Addendum Exhibit 1, ¶¶ 16-19, R. 3.) The Oil Canyon Leases, formerly part of the "Oil Canyon II Drilling Unit," involve some 16,280 acres of land on the Uintah and Ouray Indian Reservation in the Book Cliffs area of central Utah. Since the early 1980s, the record title and working interests in the Oil Canyon Leases have been held by non-party Del-Rio

Drilling Programs, Inc. ("Del-Rio Drilling"), a subsidiary of Defendant/Appellee Del-Rio Resources, Inc. ("Del Rio"), and numerous other entities and individuals.¹ (R. 166-67.) Del-Rio Drilling was the "operator" of the Oil Canyon II Unit and was thus responsible for the day-to-day exploration, drilling and production operations on all of the leases within the Unit. (R. 84.)

In 1983, access to the leased lands was cut off by the surface owner, the Ute Indian Tribe, which action was supported by the Bureau of Indian Affairs and the Bureau of Land Management, two divisions within the United States Department of the Interior. (R. 84-85.) In September 1986, after access still had not been restored, litigation was initiated in the United States Court of Claims (the "Federal Litigation") by Del-Rio Drilling and other parties who held interests in the Oil Canyon Leases (the "Federal Plaintiffs"). (R. 138-58.) There were a total of twenty-seven Federal Plaintiffs. (R. 138.) The four plaintiffs/appellants in this action, Jay Kirk, Steven Martens, Syndicators, Inc., and Western United Mines, Inc. ("Western"),² collectively referred to herein as "Appellants,"³ were among the Federal Plaintiffs. (Id.) Defendant Del Rio was also one of the Federal Plaintiffs, but Defendant Daniel Shaw was not. (Id.) Mr. Gerald Nielson,

¹ Interests in oil and gas leases may consist of working interests, overriding royalty interests, net profits interests, record title interests, etc.

² Upon information and belief, Martens is the President of Syndicators; Kirk is the President of Western; and both Kirk and Martens are directors of Syndicators and Western. Additionally, both Kirk and Martens were also officers and directors of Del Rio until 1995. (R. 85.)

³ Del Rio recognizes that use of this reference is disfavored under Rule 24(d) but respectfully submits that using any other descriptive term would cause confusion or be unwieldy.

Esq., represented the Federal Plaintiffs, in exchange for a 25% interest in the Oil Canyon Leases and wells drilled on the land covered by those Leases. (R. 170-71.)

When the Federal Litigation began, record title and working interests in the Oil Canyon Leases were held in varying percentages by a number of companies and individuals, including Del-Rio Drilling, Syndicators, Natural Gas Corporation of California or its subsidiaries, Mono Power Company, Exxon Corporation, and Joan Chorney. (See R. 166-68.) There were also a number of overriding royalty owners and owners with rights to net profits. (R. 167.)

Not all of the record title and working interest owners agreed to participate in the Federal Litigation. (R. 167-68.) Those owners, including Natural Gas Corporation of California, Mono Power Company, Exxon, and Joan Chorney chose not to maintain their interests in the Oil Canyon Leases and agreed to assign their interest to Del-Rio Drilling. (Id.) A number of those assignments were executed and delivered to the BLM in 1987 and 1988 but were rejected by the BLM as untimely due to the termination of the leases. (Id.)

During the fifteen-year pendency of the Federal Litigation,⁴ the Oil Canyon Leases expired.⁵ (R. 168.)

⁴ The Federal Litigation generated at least three published opinions. See Del-Rio Drilling Programs, Inc. v. United States, 35 Fed. Cl. 186 (1996), *opinion withdrawn and superseded by* 37 Fed. Cl. 157 (1997), *rev'd*, 146 F.3d 1358 (Fed. Cir. 1998).

⁵ Like other federal oil and gas leases, the leases at issue in this case required that oil and gas be produced in paying quantities within a certain period of time, or else the leases would expire automatically.

B. The 1995 Agreement.

In November 1993, Shaw agreed to loan a sum of money to Del Rio to rework wells located on two *other* federal leases (leases U-10166 and U-19837). (R. 104.) (These other federal leases were not part of the Federal Litigation and are not at issue in this case.) As security for the loan, Syndicators, Western, and Del Rio pledged to Shaw their interests in those two federal leases and two additional *state* oil and gas leases (ML-44317 and ML-44318) (which also are not at issue). (R. 104.) Syndicators and Western were jointly liable with Del Rio to repay the amounts that Shaw advanced. (R. 104.)

Shaw advanced \$791,260 to Del Rio, but neither Del Rio, Syndicators, nor Western was able to repay him. (R. 104.) Accordingly, on May 12, 1995, Shaw entered into an agreement with Del Rio, Kirk, Martens, Syndicators, and Western (the "1995 Agreement"), in which Del Rio, Kirk, Martens, Syndicators, and Western conveyed outright to Shaw all of their interests in the two federal leases and the two state leases that had earlier been pledged as security. (1995 Agreement, Addendum Exhibit 2 hereto, R. 104-137.) In exchange, Shaw agreed to forgive the \$791,600 debt. (Id.)

This litigation arose out of paragraphs 4, 4.1, and 4.2 of the 1995 Agreement. Paragraph 4 acknowledged that "various individuals and companies" were plaintiffs in the Federal Litigation, involving the ten Oil Canyon Leases, and stated that Shaw would use his best efforts to enter into an agreement with the "plaintiffs of such lawsuit" to provide up to \$30,000 in funding for litigation expenses:

Various individuals and companies are plaintiffs in a lawsuit filed against the United States in the United States Claims Court[] involving a claim for oil and gas leases and money damages (Case No. 569-86L). Plaintiffs

require additional money to fund additional on-going litigation expenses. As additional consideration for Del-Rio, Western, Syndicators, Kirk[,] Caldwell and Martens entering into this Agreement, ***Shaw shall use his best efforts to enter into an agreement with the plaintiffs of such [Federal] lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation.***"

(1995 Agreement, ¶ 4 (emphasis added).)

The 1995 Agreement further stated that any agreement between "the plaintiffs and Shaw" would provide that if "additional" leases were awarded as a result of the litigation, those leases would be assigned to Shaw, but that the "plaintiffs" would be entitled to a "fifty percent (50%) beneficial interest" in such leases:

Any agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, ***plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases.***

(1995 Agreement ¶ 4.1 (emphasis added).)

Finally, the 1995 Agreement contained similar terms relating to the disposition of any cash that may be recovered as a result of the Federal Litigation:

Any agreement between plaintiff(s) and Shaw shall provide that [if], as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and ***the balance of the proceeds shall be delivered free and clear of the claims of Shaw, to plaintiffs*** as damages and for payment of other expenses and costs of the litigation.

(1995 Agreement ¶ 4.2 (emphasis added).)

Two months before the 1995 Agreement was executed, Appellants' own attorney, Robert McDonald, acknowledged that paragraph 4 was "an unenforceable 'agreement to agree.'" (Letter from Robert McDonald to A.O. Headman, March 23, 1995, R. 211.)

Regarding paragraph 4.1 of the 1995 Agreement, Mr. McDonald advised that "I have difficulty understanding how this paragraph can be implemented inasmuch as all of the plaintiffs in the litigation are not parties to this agreement." (Id.) Plaintiff Kirk was also advised that "[i]t is extremely difficult to successfully enforce a 'best effort' obligation inasmuch as there is no clear standard to measure the obligor's performance." (Letter from Robert McDonald to Jay Kirk, April 26, 1995, R. 215.)

C. The Settlement of the Federal Litigation.

Shaw and the Federal Plaintiffs never reached a funding agreement as contemplated by the 1995 Agreement, though Shaw did advance approximately \$20,000 to Del Rio for litigation costs. (R. 173-74.) The Federal Litigation was resolved by a Settlement Agreement dated March 13, 2001. (R. 159-64.) The Settlement Agreement did not award the Federal Plaintiffs any new leases. The Settlement Agreement did provide, however, that the terms of the Oil Canyon Leases would be deemed "tolled" during the pendency of the Litigation and "extended" for three years after the dismissal of the Litigation. (R. 159.) The Settlement Agreement also provided that the BLM would pay the Federal Plaintiffs \$300,000 in damages. (R. 159.)

Since finalization of the Settlement Agreement and consistent therewith, Del Rio and Del-Rio Drilling have recognized the historical record title, working, and royalty ownership interests of the parties who owned interests in the Oil Canyon Leases when the Federal Litigation began. (R. 87.) None of the interests in any of those Leases was assigned to Shaw. (R. 174.) Del Rio also attempted to distribute the settlement proceeds consistent with the respective ownership interests of the Federal Plaintiffs. (R. 87.)

Appellants Kirk and Martens, however, demanded for themselves and their companies a fifty percent interest in the Oil Canyon Leases, regardless of the interests of the other parties involved in the Federal Litigation who owned those leases when the Litigation began. (R. 87.) Appellants also demand a significant portion of the settlement proceeds. (Id.) When Del Rio and Shaw refused to accede to Appellants' demands, Appellants initiated this action.

D. The Litigation.

On July 23, 2001, Appellants filed this lawsuit. The Complaint alleged that the Appellants and the Defendants were parties to the 1995 Agreement and averred that Appellants were "entitled to a beneficial interest in the 10 leases according to the [1995] Agreement." (Complaint, Add. Ex. 1, ¶ 19, R. 3.) The Complaint further alleged that the Appellants were entitled to a beneficial interest in eight additional sections of land "according to the Agreement," and that Appellants were entitled to a share of the cash settlement "according to the Agreement." (Complaint ¶¶ 22, 24.) The Complaint alleged that the Defendants "proposed distribution of the settlement with the United States in a manner that is inconsistent with the Agreement," and asserted that the Appellants were "entitled to declaration of a beneficial interest in the 10 federal oil and gas leases that is consistent with the Agreement." (Complaint ¶¶ 25, 32.) Finally, the Complaint stated that the Appellants were entitled to a declaration of a beneficial interest in the 8 tracts or sections and the cash settlement, both "consistent with the Agreement." (Complaint ¶¶ 33-34.)

On August 7, 2002, Shaw and Del Rio moved for summary judgment. Shaw and Del Rio argued as follows:

1. The 1995 Agreement did not convey any interests in the Oil Canyon Leases or the settlement proceeds to any of the Appellants. The 1995 Agreement purported only to require Shaw to use his "best efforts" to negotiate a funding agreement with the Federal Plaintiffs, and *that* agreement was supposed to convey interests to the Federal Plaintiffs. Thus, paragraphs 4, 4.1, and 4.2 amounted only to an "agreement to agree." (See Defs.' Dan K. Shaw and Del Rio Resources, Inc.'s Joint Mem. in Supp. of Mot. for Summ. J. ("Defs.' Mem."), R. 92-98.)

2. The language of paragraphs 4 and 4.1 was too indefinite to support a claim by the Appellants that *they* were entitled to receive interests in the leases or the settlement. Because there were twenty-seven distinct individuals and entities who were "plaintiffs" in the Federal Litigation, ten separate leases at issue, and a number of different types of "beneficial interests" in any particular lease, it would be impossible for Appellants to show that they were entitled to receive any particular interest in any particular lease. (Defs.' Mem., R. 93-100.)

3. The Oil Canyon Leases were not the "additional" leases referenced in the 1995 Agreement. Because the Oil Canyon Leases were already in existence when the 1995 Agreement was reached, and were already owned by several individuals and entities, it would not be reasonable to consider those leases as "additional" leases that Shaw and the Federal Plaintiffs could divide among themselves. (Defs.' Mem., R. 100-02.)

Appellants filed their response on September 6, 2002. (Mem. in Opp. to Defs.' Mot. for Summ. J. ("Pls.' Mem."), R. 243-55.) Appellants disputed only a few of Defendants' proposed facts, and argued that (1) the 1995 Agreement was not unenforceable for indefiniteness, because any missing terms could be "supplied by implication" (id. at R. 248), and (2) that summary judgment should not be granted on the "additional leases" term because the term was ambiguous (id. at R. 252-54.). Additionally, Appellants filed an affidavit by their counsel pursuant to Rule 56(f) stating that he wished to depose Defendant Shaw and Mr. Gerald Nielson. (R. 256-59.) This affidavit did not explain why Appellants had not deposed Shaw or Nielson during the 13-plus months that the case had been pending up until that point.

The hearing took place on October 28, 2002. (R. 279.) Even though it had been nearly three months since Shaw and Del Rio filed their motion, Appellants still had not deposed Shaw or Mr. Nielson. At the hearing, the trial court granted the summary judgment motion and ordered the claims against Shaw and Del Rio dismissed with prejudice, but granted Appellants leave to file an amended complaint to state a claim against Shaw for breach of the "best efforts" provision of paragraph 4 of the 1995 Agreement. This order was formalized in writing on November 14, 2002. (Order and Summary Judgment, Add. Ex. 3, R. 288-89, ¶¶ 1-2.) In the order, the trial court certified the judgment as final pursuant to Rule 54(b). (Id. at R. 289.) Appellants appealed that ruling to this Court on December 13, 2002.

On November 12, 2002, while the order was awaiting the trial court's signature, Appellants filed their amended complaint, which not only included a claim against Shaw

for breach of the best efforts provision, but also included a new claim against Del Rio, asserting *for the very first time* that they had an interest in the Oil Canyon Leases as "joint venture partners" with Del Rio in the development of "some or all of the property that was subject to the [Federal] Litigation." (First Amended Complaint ¶¶ 23, R. 283.) On November 14, 2002, Appellants filed a motion for leave to state this new claim against Del Rio. In this motion, Appellants admitted that they deliberately *chose* not to pursue their joint venture theory sooner:

At the time this action was filed, plaintiffs *did not think it was necessary to state such a claim* because they thought their rights and interest were clear from the 1995 Agreement.

(Mem. in Supp. of Mot. for Leave to File First Amended Complaint, Add. Ex. 4, R. 292-94 (emphasis added).) Del Rio opposed the motion, pointing out that because Del Rio had already been dismissed from the action with prejudice, no new claims could be stated against it. Del Rio also asserted that, given Appellants' admission that they consciously chose to rely entirely on the 1995 Agreement originally, it would be improper to allow them to add new theories after that theory proved unsuccessful. On March 29, 2003, the trial court denied Appellants' motion for leave to amend, concluding that Appellants could not amend their complaint to state new claims against Del Rio after their original complaint had been dismissed and the dismissal was pending on this appeal. (R. 354.)⁶

⁶ Appellants separately appealed that ruling on April 24, 2003 (R. 357-58), but that appeal was subsequently dismissed. Moreover, on November 12, 2003, Appellants voluntarily dismissed without prejudice their remaining claims against Shaw. (R. 457-58.)

SUMMARY OF ARGUMENT

The case that the Appellants present before this Court is significantly different from the case they pleaded and argued below. Before the trial court, the Appellants unambiguously relied entirely on the 1995 Agreement as the source of their alleged rights in the Oil Canyon Leases. Now, however, Appellants admit that the 1995 Agreement does not grant them the rights they seek, and instead insist that their claims were actually based on *other* agreements, most importantly, a hypothetical litigation funding agreement that Shaw supposedly reached with one or more unnamed Federal Plaintiffs, that just *may have* granted one or more of the Appellants some rights in one or more of the Oil Canyon Leases.

Appellants' new arguments are no more valid than their original ones. While Appellants deny that their claims below were based entirely on the 1995 Agreement, their own Complaint proves otherwise. Moreover, when Del Rio and Shaw moved for summary judgment below, Appellants did not rely on anything other than the 1995 Agreement as the source of their purported rights in the Oil Canyon Leases. Thus, it is improper for Appellants to pursue new theories now. Instead, their claims are limited to the claims they made below, i.e., under the 1995 Agreement.

And the 1995 Agreement clearly does not support Appellants' claims. First, and most importantly, the plain language of the 1995 Agreement shows that it does not grant any rights in the Oil Canyon Leases. Instead, the 1995 Agreement merely states that Shaw would enter into a subsequent funding agreement with the "plaintiffs" of the Federal Litigation, and that this subsequent funding agreement was supposed to grant

those "plaintiffs" interests in the Leases. Thus, any claim based on the 1995 Agreement fails as a matter of law.

Further, the key language in the 1995 Agreement is far too indefinite to support Appellants' claims. The 1995 Agreement posits that fifty percent of the "beneficial interests" in the "additional leases" will ultimately be assigned to "plaintiffs [of the Federal Litigation]." But there were ten leases, several types of "interests," and twenty-seven such plaintiffs. It is simply impossible for Appellants to establish that any one of them was supposed to receive any particular interest in any particular lease. In short, Appellants' claims are based on pure speculation.

Moreover, the 1995 Agreement states only that interests in "additional" leases might be assigned to the "plaintiffs," and the Oil Canyon Leases, which were in existence already, are not "additional" leases. The interests in the Oil Canyon Leases were already owned by several individuals and entities who were not parties to the 1995 Agreement, and it would not be reasonable to conclude that the parties to the 1995 Agreement would purport to divide among themselves rights that belonged to others.

Finally, the trial court did not abuse its ample discretion in rejecting Appellants' request under Rule 56(f) of the Utah Rules of Civil Procedure for additional time to depose Defendant Shaw and Mr. Gerald Nielson. When Del Rio and Shaw moved for summary judgment, the case had been pending for over a year, and an additional three months passed after the motion was filed before the hearing on the motion took place. Yet Appellants did not move to depose Shaw or Nielson, or anyone else, nor have they explained why. Additionally, because the summary judgment motion was based on the

plain language of the 1995 Agreement, and other indisputable facts, the additional discovery Appellants purportedly sought would not have had an effect on the outcome of the motion. The Agreement says what it says, regardless of what discovery is done. Moreover, Appellants' argument that there *might* be a litigation funding agreement, and that the agreement *might* grant them some rights, is nothing but speculation, which does not compel relief under Rule 56(f).

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CLAIMS FOR AN INTEREST IN THE OIL CANYON LEASES

A. Appellants' claims were based exclusively on the 1995 Agreement, not on Shaw's purported "litigation funding agreement" or any other agreement.

Appellants have apparently recognized, as Del Rio and Shaw argued below, that the 1995 Agreement did not grant, or even *profess* to grant, any "beneficial interests" in any of the Oil Canyon Leases. Therefore, Appellants have shifted their strategy on appeal, insisting instead that their claim to the leases is based on a "combination" of factors, and that the 1995 Agreement "is only the starting point, not the beginning and the end, of a proper analysis of Plaintiffs' claims." (Aplts.' Br. at 15, 18.) Essentially, Appellants argue that summary judgment was improper because they *might have been* granted lease interests in a "litigation funding agreement" that Shaw *might have entered into* with some of the plaintiffs in the Federal Litigation. (See, e.g., Aplts.' Br. at 12.)

The Court should summarily reject Appellants' eleventh-hour attempt to base their claims on anything other than the 1995 Agreement. Of course, Appellants cite no

evidence in the record suggesting that a funding agreement was ever reached with the Federal Plaintiffs, that the purported funding agreement granted interests in any of the leases to Appellants, or what interests the funding agreement granted Appellants. More importantly, however, the Court need not even address the merits of the supposed "funding agreement," because Appellants never pursued any claims based on the purported funding agreement, or on anything other than the 1995 Agreement, before the trial court.

1. Appellants' Complaint was based entirely on the 1995 Agreement.

Appellants' Complaint makes it absolutely clear that Appellants were asserting claims in the Oil Canyon Leases based solely on the 1995 Agreement signed by themselves, Shaw, and Del Rio. (See Complaint, Add. Ex. 1, R. 1-7.) The first seven paragraphs of the Complaint identified the parties (¶¶ 1-6) and alleged jurisdiction and venue (¶ 7). The Complaint then alleged as follows:

8. The parties hereto are *parties to an "Agreement" dated May 12, 1995*, a true and correct copy of which is attached hereto.
9. *The Agreement provides* in pertinent part for the assignment, to Shaw, of interests in two federal oil and gas leases . . . and two state oil and gas leases
10. *The Agreement also provides* for the funding, by Shaw, of litigation against the United States in which the parties hereto, excluding Shaw, were plaintiffs
11. *The Agreement provides* that Shaw would "use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation."

12. *The Agreement provides* that with respect to the \$30,000 in litigation expenses, "[n]o expenses shall be paid by Shaw directly to persons who are plaintiffs in the litigation or to affiliates of plaintiffs."
13. *The Agreement provides* that "[a]ny agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiff [*sic*] shall be entitled to a fifty percent (50%) beneficial interest in such additional leases."
14. Shaw did in fact fund the lawsuit pursuant to agreement with plaintiffs.
15. The lawsuit was settled pursuant to the terms of a "Settlement Agreement," a true and correct copy of which is attached hereto.
16. The Settlement Agreement provides in pertinent part for extension of the terms of 10 federal oil and gas leases, which do not include the two in the Agreement.
-
19. Plaintiffs are entitled to a beneficial interest in the 10 leases *according to the Agreement*.
-
25. Defendants in this case have proposed distribution of the settlement with the United States in a manner that is inconsistent *with the Agreement*.
26. Specifically, defendants have denied plaintiffs Western United Mines, Inc., J.R. Kirk, Jr. and Steven D. Martens any interest in the 10 federal oil and gas leases.
27. Defendants have proposed a distribution of interest in the leases to plaintiff Syndicators, Inc., that is *less than what is provided for by the Agreement*.
-

32. Plaintiffs are entitled to declaration of a beneficial interest in the 10 federal oil and gas leases that is *consistent with the Agreement*.

These passages from the Complaint demonstrate beyond doubt that the Appellants' claim was based exclusively on the 1995 Agreement. In fact, there is only one place in the entire Complaint where Appellants actually claim to be entitled to interests in the Oil Canyon Leases: paragraph 19, which unequivocally avers that Appellants are entitled to an interest in the leases "according to the Agreement." (Complaint ¶ 19.) Indeed, the Complaint also alleges that the Appellants are entitled to interests in 8 other tracts of land "according to the Agreement" and a portion of the cash settlement "according to the Agreement." (Complaint ¶¶ 22, 24.) The wrong that the defendants allegedly committed, according to the Complaint, was to "propose[] distribution of the settlement with the United States in a manner that is *inconsistent with the Agreement*," in part by proposing a distribution of lease interests to Plaintiff Syndicators "that is *less than what is provided for by the Agreement*." (Complaint ¶¶ 25, 27.) Therefore, according to Appellants, they were entitled to a "declaration of beneficial interest" in the Oil Canyon Leases "*consistent with the Agreement*." (Complaint ¶ 32.)

Every equitable or legal right must have a *source*. The only source claimed for the Appellants' alleged rights in the Oil Canyon Leases was the 1995 Agreement. In fact, when they sought leave to amend to pursue a joint venture theory against Del Rio, Appellants admitted that they consciously *chose* to rely only on the 1995 Agreement because "they thought their rights and interest were clear from the 1995 Agreement." (Mem. in Supp. of Mot. for Leave to File First Amended Complaint, Add. Ex. 4, R. 293.)

Appellants further explained that they "*thought that the 1995 Agreement clearly established their rights in the 10 oil and gas leases that are and have been the subject of this action. There would have been no need for the amendment if the unambiguous provisions of the Agreement had been enforced.*" (R. 333.)⁷ Accordingly, any attempt now by Appellants to assert that they have rights deriving from a *different* source should be rejected. See, e.g., Allisen v. American Legion Post 134, 763 P.2d 806, 809 (Utah 1988) (refusing to consider appellant's common law negligence claim on appeal because complaint was brought only under Dram Shop Act); Davis v. Mulholland, 25 Utah 2d 56, 475 P.2d 834, 834-35 (1970) ("Ordinarily an appellant cannot change his theory of the case on appeal from that presented to the court below.").

2. Appellants did not assert rights under the funding agreement before the trial court.

Further, in response to Del Rio's summary judgment motion, Appellants did not assert that they had any rights in the Oil Canyon Leases under the purported funding agreement that Appellants assert Shaw reached with the Federal Plaintiffs. Instead, Appellants argued only (1) that the 1995 Agreement was not too indefinite to enforce, because the missing terms could be "added by implication"; and (2) that the 1995

⁷ Indeed, it is significant that even Appellants' proposed *amended* complaint against Del Rio, filed after their original complaint was dismissed with prejudice, still did not assert any ownership interests in any of the Oil Canyon Leases under the purported funding agreement. Rather, the Amended Complaint attempted to claim rights pursuant to a purported *joint venture* among themselves and Del Rio. Thus, it is apparent that the Appellants did not even *think* of claiming any interests in the Oil Canyon Leases derived from the purported funding agreement until after they initiated their appeal.

Agreement was ambiguous with respect to whether the leases were "additional leases."
(See Pls.' Oppo. Mem., R. 243-55.)

"[I]t is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal." Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983). Thus, Rule 46 of the Utah Rules of Civil Procedure expressly requires that a party wishing to challenge a ruling or order must "make[] known to the court the action which he desires the court to take or his objection to the action of the court *and his grounds therefor*." Utah R. Civ. P. 46 (emphasis added). The record must "clearly show that [the issue] was timely presented to the trial court *in a manner sufficient to obtain a ruling thereon*." Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217, 1219 (Utah 1987) (emphasis added) (quoting Franklin, 659 P.2d at 1045). Here, the Appellants never argued to the trial court that summary judgment was improper because the Appellants were, or may have been, granted rights in the leases in the purported funding agreement between Shaw and the Federal Plaintiffs. Appellants are thus precluded from pursuing such an argument on appeal.

B. The 1995 Agreement does not grant Appellants any definable or enforceable rights in any of the Oil Canyon Leases.

1. Appellants have admitted that the 1995 Agreement does not grant them rights in the Oil Canyon Leases.

Appellants *admit* in their brief that they are no longer claiming that the 1995 Agreement grants them any rights in the Oil Canyon Leases:

Appellants do not claim that the 1995 Agreement, in and of itself, grants them interests in the Oil Canyon Leases and the settlement cash proceeds.

(Aplts.' Br. at 15 (emphasis added).) By this admission, Appellants have conceded that the only theory they pursued in their Complaint, and the only theory they argued below is insufficient to support a judgment in their favor. Thus, the trial court's ruling dismissing Appellants' claims with prejudice should be affirmed, and the Court need not consider the matter any further.

2. The 1995 Agreement, by its plain language, did not grant Appellants any rights in the Oil Canyon Leases.

a. Paragraphs 4 and 4.1 of the 1995 Agreement are too indefinite to be enforceable by Appellants.

As established in the preceding section, Appellants' claim to an interest in the Oil Canyon Leases and the cash settlement was based entirely on paragraphs 4 and 4.1 of the 1995 Agreement. But as shown above, and as Appellants have admitted, these provisions did not grant Appellants any lease interests. Instead, paragraph 4 of the 1995 Agreement states that Shaw would use his "best efforts" to "enter into an agreement" with the Federal Plaintiffs to fund the Federal Litigation, and paragraph 4.1 states that the *litigation funding agreement* would provide that *the Federal Plaintiffs* would be entitled to an interest in any "additional leases" that were awarded as a result of the Federal Litigation. Thus, paragraphs 4 and 4.1 of the 1995 Agreement were nothing more than an "agreement to agree" on a transfer and distribution of lease interests. Further, paragraphs 4 and 4.1 of the 1995 Agreement are too indefinite to be enforceable, because there are no guidelines for determining what interest any of the Federal Plaintiffs was supposed to receive under the contemplated funding agreement. Instead, the distribution of interests was left for subsequent determination.

For *any* alleged contract to be enforceable, "there must be a meeting of the minds of the parties which must be spelled out, either expressly or impliedly, *with sufficient definiteness to be enforced.*" Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427, 428 (1961) (emphasis added). Accordingly, "'agreements to agree' are generally unenforceable because they leave open material terms for future consideration, and *the courts cannot create these terms for the parties.*" Harmon v. Greenwood, 596 P.2d 636, 639 (Utah 1979) (emphasis added).

Applying these principles, this Court has held that a lease option requiring the parties to agree on a rental rate was too indefinite to be enforced. See Brown's Shoe Fit v. Olch, 955 P.2d 357, 362-65 (Utah Ct. App. 1998). In Brown's, the would-be tenant and the landlord signed an interim agreement providing for a three-year lease, with two option periods. The agreement did not specify the rent that the tenant would pay during the option periods; instead, the agreement stated that the parties "must agree on the gross volume figure from which to base additional rent" for the option period.⁸ The court held that the option portion of the interim agreement was too indefinite to be enforceable.

The Court noted that while an "agreement to agree" is not *per se* unenforceable, such an agreement may be enforced only when the terms of the final agreement are spelled out in sufficient detail to demonstrate that the parties have actually agreed on the material terms:

⁸ The rent in Brown's was made up of two components: a per-square-foot base rent, plus "additional rent," i.e., a percentage of the plaintiff's sales above a certain gross-volume threshold. The agreement in Brown's specified the base rent for the option period, but the gross-volume threshold for the additional rent was left undetermined.

[A] contract will not be prevented from ... operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof. If all the conditions of the postponed writing are specified in such agreement, it is an agreement *in praesenti*, and as such becomes immediately enforceable. **But where the conditions of the deferred contract are not set out in the provision one, or where material conditions are omitted, it is not a contract *in praesenti* because the minds of the parties have not met and may never meet.**

Id. at 363 (quoting Chu v. Ronstadt, 498 P.2d 560, 563 (Ariz. Ct. App. 1972)) (bold added; italics, brackets, and ellipses in original). The court further determined that because the price term was an essential element of the lease option agreement, the omission of such a term in the interim agreement rendered the agreement fatally defective. Id. at 364.

The reasoning of Brown's applies in the present case and renders paragraphs 4 and 4.1 of the 1995 Agreement unenforceable. Paragraphs 4 and 4.1 contemplate that Shaw and the Federal Plaintiffs would enter into a subsequent agreement that would provide Shaw and the Federal Plaintiffs each with fifty percent of the beneficial interests in any additional leases awarded through the Federal Litigation. However, paragraphs 4 and 4.1 provide no guidelines to determine which of the twenty-seven Federal Plaintiffs was supposed to enter into the subsequent agreement with Shaw, what type of interest (i.e., record title, working interest, overriding royalty) was to be assigned, or the extent of each type of interest any of the Federal Plaintiffs was to have received.

For example, paragraphs 4 and 4.1 of the 1995 Agreement do not specify whether all twenty-seven Federal Plaintiffs were going to receive equal interests⁹ or unequal

⁹ This option would give each of the Federal Plaintiffs a 1.85% interest in the

interests. Also, assuming that the Federal Plaintiffs were not going to receive identical interests, the 1995 Agreement does not indicate what interest each of the Federal Plaintiffs was to receive or how such interests were to be calculated. The 1995 Agreement also does not specify whether each Federal Plaintiff was to receive an interest in each of the ten leases, or whether leases would be apportioned among different groups of persons (e.g., a particular person or entity may have an interest in one lease but no interest in any of the other nine). The 1995 Agreement does not even specify whether all of the Federal Plaintiffs were supposed to receive lease interests, or only some of them, or if so, which ones. Finally, there are several different types of "interests" possible in an oil and gas lease, including cost-bearing interests (working interests, back-in interests), non-cost bearing interests (overriding royalty interests, net profits interests), and carried interests. See generally 8 William & Meyers, Oil and Gas Law, Manual of Terms (2001). But the 1995 Agreement does not specify what type of interest any of the Federal Plaintiffs would have agreed to accept.

Was Syndicators supposed to receive a ten percent record title interest in lease U-6610 and a fifteen percent working receipts interest in lease U-10162, or the other way around? Was Western supposed to receive a net profits interest or a working interest? Was Martens, Syndicators' president, supposed to receive interests in addition to the ones that Syndicators was to receive? Was Mono Power Company, a non-party to this action, going to give up all of its interests in all of the leases? Some of its interests in some of

leases (50% divided by 27).

the leases? These are just a few of the questions that the 1995 Agreement does *not* answer.¹⁰

Indeed, the Appellants' position in the present case is even weaker than the tenant's position in Brown's, because the 1995 Agreement did not even require Shaw and the Federal Plaintiffs to actually "agree" on funding for the Federal Litigation; instead, Shaw was asked only to "use his *best efforts* to enter into an agreement with the plaintiffs of such [Federal] lawsuit." (1995 Agreement, Add. Ex. 1, ¶ 4 (emphasis added).) The "best efforts" provision adds another layer of indefiniteness to the 1995 Agreement, as a best efforts agreement is unenforceable unless the agreement includes a "clear set of guidelines against which the parties' 'best efforts' may be measured." Pinnacle Books v. Harlequin Enters. Ltd., 519 F. Supp. 118, 121 (S.D.N.Y. 1981); see also GLS Dev't v. Wal-Mart Stores, 944 F. Supp. 1384, 1392 (N.D. Ill. 1996) (agreement in which developer agreed to use "best efforts" to locate another location was too indefinite to be enforceable). As set forth above, the 1995 Agreement provides no way to determine what, if any, interest any of the parties was supposed to receive in the new leases.

Appellants' position is also weaker than the tenant's position in Brown's because paragraphs 4 and 4.1 of the 1995 Agreement purportedly require Shaw to reach an agreement with the twenty or so Federal Plaintiffs *who were not even parties to the 1995 Agreement*. In Brown's, the landlord and tenant were both parties to the interim lease

¹⁰ Indeed, Appellants are wrong when they assert that Defendants "cannot, and do not, contend that the term 'beneficial interest' is vague." (Aplts.' Br. at 28.) To the contrary, "beneficial interest" was not defined in the 1995 Agreement; instead, it was left to be negotiated at a later date.

agreement that required them to agree on the rental rate for the option periods. It was thus at least plausible to argue that by binding themselves to reach a further agreement, they made a commitment that was definite enough to be enforceable. In the present case, however, it is not plausible to suggest that any of the parties to the 1995 Agreement (i.e., Kirk, Martens, Syndicators, Western, Caldwell, or Del Rio) had the authority to bind the other Federal Plaintiffs to reach an agreement with Shaw.¹¹

Further, for any of the Appellants to establish a right to a certain interest in a lease, he or it would have to establish that the *other* Federal Plaintiffs were bound to agree *not* to claim that interest. For example, if Kirk and Martens were to contend that they were entitled to a forty percent interest in the additional leases, they would have to establish that the other Federal Plaintiffs agreed or would have agreed to accept interests adding up to only ten percent. It would be ludicrous for the Appellants to suggest that the 1995 Agreement, upon which their claims are based, binds the Federal Plaintiffs to accept a certain percentage of the interests from any "additional leases" to be awarded through the Federal Litigation.¹²

Significantly, Appellants have known all along that paragraphs 4 and 4.1 of the 1995 Agreement are too indefinite to be enforceable. As explained in the Statement of

¹¹ Appellants are missing the point when they argue that the 1995 Agreement was a complete agreement. (Aplts.' Br. at 21.) Del Rio and Shaw do not contend that the 1995 Agreement as a whole is not an integrated agreement. Rather, it is paragraphs 4 and 4.1 of the 1995 Agreement that are unenforceable, insofar as Appellants claim that these paragraphs entitle Appellants to rights in the Oil Canyon Leases.

¹² In fact, Kirk and Martens have demanded that they and their companies be given the *entire* fifty percent interest that was supposed to be assigned to the Federal Plaintiffs. Thus, Kirk and Martens are essentially contending that the other 23 Federal Plaintiffs

Facts, Appellants were informed by their counsel both that paragraph 4 was "an unenforceable 'agreement to agree'" and that paragraph 4.1 could not be implimented "inasmuch as all of the plaintiffs in the litigation are not parties to this agreement." (See R. 211.) Thus, Appellants knew that the 1995 Agreement provided them with no interest in any leases that might have been awarded through the Federal Litigation, but Appellants went ahead and executed the Agreement anyway. This demonstrates that Appellants concluded that the consideration they received in the 1995 Agreement, i.e., Shaw's agreement to forgive nearly \$800,000 in debt, was a fair return in exchange for the consideration they gave Shaw under the 1995 Agreement (assigning lease interests that had already been pledged as security for the debt). Granting the Appellants interests in the Oil Canyon Leases would therefore be giving the Appellants more than they agreed to accept (and Shaw and Del Rio agreed to grant) in the 1995 Agreement. This Court should not step in and give Appellants a better deal than they were able to reach for themselves.

- b. For similar reasons, it would be pure speculation for Appellants to claim that the 1995 Agreement entitles them to any particular interest in any particular leases.

Further, even if paragraphs 4 and 4.1 of the Agreement were enforceable in the abstract, Appellants would still have no valid claim to any interest in the leases, because there is no way Appellants can prove that they were supposed to receive any of the interests in the additional leases that were supposed to be assigned pursuant to the funding agreement. As explained in the preceding section, paragraph 4.1 did not specify how the fifty percent interest in the additional leases was supposed to be distributed

agreed or would have agreed to give up all of their interests.

among the Federal Plaintiffs. And, even more importantly, there is nothing in the 1995 Agreement specifying that any of the Appellants in this action, i.e., Kirk, Martens, Syndicators, or Western, would be among the Federal Plaintiffs receiving interests in the leases. Thus, it is entirely possible that the entire fifty percent interest would have been allocated to one or more of the twenty-three Federal Plaintiffs who are *not* among the Appellants.

For example, under the terms of paragraph 4.1 of the Agreement, the funding agreement between Shaw and the Federal Plaintiffs could have assigned twenty-five percent interests each to Hiko Bell Mining & Oil Company and Mono Power Company, two of the other Federal Plaintiffs. Such an assignment would have satisfied paragraph 4.1's requirement that fifty percent of the interests be awarded to the Federal Plaintiffs, while leaving no interests for Kirk, Martens, Syndicators, or Western. Notably, in claiming that Shaw did in fact enter into a "funding agreement," Appellants posited that the funding agreement may have been between Shaw and Del Rio as the "lead plaintiff." (Aplts.' Br. at 29.) But if an agreement by Shaw with Del Rio would satisfy paragraph 4's requirement of an agreement "with the plaintiffs of such [federal] lawsuit," then an assignment of the leasehold interests to Del Rio would satisfy paragraph 4.1's requirement that "plaintiffs" receive a fifty percent interest in the additional leases. (1995 Agreement ¶¶ 4, Add. Ex. 2, 4.1.) In other words, Shaw could have entered into an agreement to assign fifty percent of the leasehold interests to Del Rio alone, which would have satisfied paragraph 4.1, and Appellants still would not have any rights in any of the leases.

Notably, Appellants presented no evidence below regarding the negotiation of the 1995 Agreement, or of their understanding of the meaning of paragraphs 4 and 4.1. Appellants requested additional time under Rule 56(f) to depose Shaw and Gerald Nielson, but the Appellants themselves were parties to the 1995 Agreement, and there was certainly nothing preventing Appellants from filing affidavits presenting their own testimony. Therefore, if Appellants had any understanding or belief that a subsequent funding agreement between Shaw and the Federal Plaintiffs was going to provide them with any specific interests in any specific leases, they could have presented evidence of such an understanding below. They did not present such evidence, which suggests that they had no such an understanding. Their silence on this matter speaks volumes.

There are countless ways in which the fifty percent "beneficial" interest could have been divided among only the twenty-three Federal Plaintiffs who were not plaintiffs in this action. Each of these possible distributions would have satisfied paragraph 4.1, but each would have resulted in no interests going to any of the Appellants. Consequently, any ruling that any of the Appellants is entitled to a particular interest in a particular lease would be nothing more than rank speculation.

The reasoning of a recent Utah Supreme Court decision is instructive in this regard. See Carter v. Sorenson, 2004 UT 33, 498 Utah Adv. Rep. 3, 2004 WL 834216 (April 20, 2004). In Carter, the defendant agreed that if he bought the plaintiff's ranch property at a foreclosure sale, he would grant the plaintiff an option to buy the property at the same price that he paid. Id. ¶ 2. The defendant bought the ranch for an appraised price of \$355,000, and the plaintiff attempted to buy a portion of the property, the

appurtenant water shares. Id. ¶¶ 3-4. When the parties could not agree on a price for the water shares, the plaintiff deposited a sum of money in escrow and sued to obtain the shares. The Supreme Court upheld summary judgment for the defendant, concluding that because the parties' agreement did not set forth a price for any particular portion of the property, the option lacked a price term and was therefore unenforceable. Id. ¶¶ 7-11.

The court noted that even though the parties "clearly intended to create an enforceable option agreement allowing Carter to buy back all or part of his farm from Sorenson," they "failed to do so because they did not include an identifiable price term for a purchase of less than the entire property." Id. ¶ 8. The court also reasoned that "what is left is the sole fact that Sorenson paid \$355,000 for the entire property. There exists no mechanism for determining what price Sorenson paid for any fraction of the property." Id. ¶ 11. The court concluded that "[t]he legal consequence of a missing price term is the unenforceability of the agreement." Id.

The reasoning of Carter applies here. Just as in Carter, the 1995 Agreement specifies the *total* interest that was supposed to be allocated to the Federal Plaintiffs in the funding agreement Shaw was to reach: fifty percent of any "additional leases." But just as in Carter, "there exists no mechanism" for determining what *fraction* of this interest was supposed to be allocated to any or all of the Appellants. Thus, as in Carter, the consequence of the failure of the 1995 Agreement to specify what interests the Appellants were supposed to receive is the unenforceability of the agreement by the Appellants.

- c. Because of the fundamental indefiniteness of the 1995 Agreement, Appellants' attempts to raise a triable issue of fact are unavailing.

Because the 1995 Agreement provides no guidance as to what, if any, interests were to be assigned to which Plaintiff, the judgment should be affirmed, notwithstanding Appellants' arguments on appeal. For example, in their "basic contentions" section, Appellants assert that "they are entitled to a distribution of the Federal Litigation Settlement Res in accordance with *the formula set forth in the 1995 Agreement.*" (Aplts.' Br. at 12 (emphasis added).) But Del Rio and Shaw's whole point is that there *was* no "formula" set forth in the 1995 Agreement -- only that fifty percent of the various cost-bearing and non-cost-bearing interests in the ten Oil Canyon Leases were somehow to be allocated among some or all of the twenty-seven Federal Plaintiffs. Similarly, Appellants contend that because Shaw ended up paying for some litigation expenses, the Court can "infer[] that the funding agreement was entered into pursuant to, *and contained the terms required by, the 1995 Agreement.*" (Aplts.' Br. at 16 (emphasis added).) Appellants also assert that "there is no reason to believe that [Shaw] provided the funding on any terms *other than the terms required by the 1995 Agreement.*" (Aplts.' Br. at 22.) Once again, however, the only "terms" required by the 1995 Agreement are too indefinite for Appellants to rely on. Appellants also argue that the 1995 Agreement was not an "agreement to agree" because "the parties have concluded their discussions and have reached agreement *on all material terms.*" (Aplts.' Br. at 19 (emphasis added).) Again, no agreement was reached on fundamental terms like who was going to get what interests in which leases.

Attempting to avoid this problem, Appellants surprisingly argue that "[t]he interest of the Federal Litigation plaintiffs were specified in the pleadings in the Federal Litigation," and that whatever interests "a party" received "as a result of the litigation" would be assigned one hundred percent to Shaw, with Shaw then assigning fifty percent of that interest back to the "party." (See Aplt's. Br. at 30.) Thus, applying this formula to Appellants' own claims, Appellants appear to contend that under the 1995 Agreement, they are entitled to exactly fifty percent of the interests they held at the start of the Federal Litigation. So because Plaintiff Steven Martens originally had a right to receive 1.32% of all payments received from the sale of oil and gas generated from Oil Canyon wells (R. 147), Martens now apparently has a right to receive 0.66% of all such payments, under the 1995 Agreement, with the other 0.66% being assigned to Shaw.

This argument does not really help Appellants. First, they never raised this contention below. That is, they never claimed that the interests they were to receive pursuant to the 1995 Agreement could be determined by reference to the interests they held during the Federal Litigation, or that those interests would be exactly half of the interests they originally held. If they had, this case never would have been filed, because Defendants have always recognized the record title, working, and royalty ownership interests that existed in the Oil Canyon Leases when the Federal Litigation began. As Del Rio explained to the trial court (and as Appellants never denied), Appellants have been demanding that they receive fifty percent of *all* the interests in the Oil Canyon Leases, not just fifty percent of what they held previously. Appellants have apparently adopted this argument now, to try to salvage *something* from this case, but it is simply too late.

Because nothing in the 1995 Agreement, or elsewhere in the record, suggests that the Appellants would receive any specific rights in any specific leases, Appellants' "condition precedent" argument fails as well. (Aplts.' Br. at 19.) Appellants attempt to characterize the requirement that Shaw use his "best efforts" to reach a funding agreement with the Federal Plaintiffs to be nothing more than a "condition precedent." Appellants further claim that because it can be "inferred" that Shaw entered into such an agreement,¹³ the Appellants are therefore entitled to interests in the leases. But this argument misses two critical steps. First, Appellants' argument is contradicted by the plain language of the 1995 Agreement itself. The 1995 Agreement does not state that the Appellants (or the Federal Plaintiffs) would automatically receive a fifty percent interest in the leases simply if a funding agreement were reached. Thus, a funding agreement was not merely a condition precedent to the vesting of the lease interests. Rather, the 1995 Agreement is unmistakably clear that it was a *subsequent agreement*, i.e., the funding agreement, that was to provide for the assignment of any interests in any "additional" leases.

Second, even if reaching a funding agreement were just a condition precedent, the indefiniteness of paragraph 4.1 would still defeat Appellants' claim. Even if interests in the leases were to automatically vest in the Federal Plaintiffs when Shaw entered into a

¹³ Of course, Del Rio and Shaw do not concede that such an agreement may be inferred. Shaw specifically testified in his affidavit that he did not reach a funding agreement with the federal plaintiffs (R. 173-74), and no evidence was submitted to controvert his testimony. Therefore, it is established as a matter of law that Shaw did not reach such an agreement. But as explained in the text, this issue ultimately does not matter for purposes of the appeal, because regardless of whether it can be inferred that Shaw actually entered into a funding agreement, there is still no basis for Appellants' claim that they are entitled to any specific rights in any specific leases.

funding agreement, there is still no basis to determine that any interests were to vest in *Kirk, Martens, Western, or Syndicators*. Thus, because there is no basis for any claim by the Appellants that they are entitled to any particular interest, they cannot claim to have been deprived of any particular interest.¹⁴

Indeed, many of Appellants' arguments conflate the issues of (1) whether Appellants have a claim for declaration of an interest in the Oil Canyon Leases; and (2) whether Appellants have a claim for breach of the best efforts provision. Only the former issue is before the Court on this appeal. Thus, even if Appellants were correct that the 1995 Agreement is "enforceable," in that Shaw was legally obligated to use his best efforts to reach a funding agreement with the Federal Plaintiffs, that would not help them on this appeal. If Shaw undertook an enforceable obligation to use his best efforts to enter into a litigation funding agreement along certain terms, and if Shaw breached this

¹⁴ The Court should not be misled by Appellants' reliance on Utah Golf Association v. City of North Salt Lake, 2003 UT 38, 79 P.3d 919, because that case has absolutely no bearing on the present case. Utah Golf involved a complex land transaction between the Golf Association and North Salt Lake City. As part of this transaction, the parties agreed that the Association would receive the proceeds of a sale of a piece of property if the Association entered into a twenty-year lease with the City. The Utah Supreme Court held that the twenty-year lease provision was a condition precedent, and not an agreement to agree, because the agreement "did not purport to obligate either party to enter into a twenty-year lease." Id. ¶ 14. Instead, the agreement merely provided what would happen *if* such a lease was agreed upon. Id.

The situation in the present case is precisely the opposite. That is, the 1995 Agreement does purport to require Shaw to use his "best efforts" to enter into a funding agreement, rather than making such efforts optional. However, the 1995 Agreement does *not* provide that any rights would accrue if such efforts are used or such an agreement is reached. Instead, the determination of precisely what leasehold interests would accrue, and to whom, was left to the funding agreement itself.

obligation, and if Appellants could somehow establish damages,¹⁵ then Appellants might have a claim against Shaw for breach of contract. The trial court authorized Appellants to amend their complaint to state such a claim, and the Appellants did so.¹⁶ But even if there were a basis for such a claim against Shaw, that would not support a claim by these Appellants for interests in the Oil Canyon Leases.

Finally, and for similar reasons, Appellants' repeated assertion that it can be "inferred" that Shaw reached a funding agreement is another red herring. It ultimately does not matter whether Shaw reached a funding agreement, because Appellants cannot show that Shaw's reaching an agreement would entitle any of the Appellants to an interest in any of the Oil Canyon Leases.

Any argument Appellants pursue will ultimately run up against the inescapable truth that even if the 1995 Agreement granted, or required Del Rio or Shaw to grant, interests in the Oil Canyon Leases to the "plaintiffs of such [federal] litigation," Kirk, Martens, Western, and Syndicators would not necessarily have received any interests in the leases. The bottom line is that the 1995 Agreement simply does not, directly or indirectly, grant Appellants any interests in the Oil Canyon Leases, and Appellants cannot make it do so.

¹⁵ Of course, because it would be pure speculation for any of the Appellants to assert that he or it would have received "X" interest in "Y" lease, any claim for damages would be purely speculative as well.

¹⁶ Appellants, however, did nothing to pursue this claim since the Amended Complaint was filed with the trial court in November 2002, and the claim was ultimately dismissed without prejudice in November 2003.

- d. The Oil Canyon Leases, as a matter of law, cannot reasonably be the "additional leases" referenced in the 1995 Agreement.

Appellants also have no interests in the Oil Canyon Leases because as a matter of law, those leases are not the "additional leases" contemplated by paragraph 4.1 of the 1995 Agreement. Instead, the term "additional leases" can only refer to leases that may have been awarded *in addition to the leases that the Federal Plaintiffs already held* and on which the litigation focused. No such additional leases were awarded, so Appellants' claims fail on this basis as well.

When the Federal Litigation began, some of the Federal Plaintiffs, including Plaintiff Syndicators, already held record title interests in some of the Oil Canyon Leases. The Settlement Agreement terminating the Federal Litigation merely provided that the terms of those leases were "tolled" during the litigation and "extended" for three years after the Federal Litigation was dismissed. (Settlement Agreement, R. 159-60.) No new leases were awarded. Thus, there *are* no "additional leases" in which Appellants can claim an interest.

It would be completely unreasonable for the term "additional leases" in paragraph 4.1 of the 1995 Agreement to refer to the ten Oil Canyon Leases already at issue in the Federal Litigation. First, it defies logic to use the term "additional" to refer to leases already in existence. More importantly, however, of the parties to the 1995 Agreement, only Syndicators and Del Rio's subsidiary Del-Rio Drilling owned record title interests in the Oil Canyon Leases. The majority of interests in most of the Oil Canyon Leases was owned by third parties. For example, nonparty Dalen Resources (successor to Natural

Gas Corporation of California) owned record title and operating rights interests in leases U-6610, 6612, 6632, 6634, 10165, and 18726; nonparties Joan and Raymond Chorney owned record title and operating rights interests in leases U-6610, 6612, 6632, 6634, and 10165; and nonparty Exxon Corporation owned record title and operating rights interests in lease U-10165. (R. 167.) Finally, Gerald Nielson, the attorney representing the plaintiffs in the Federal Litigation, was and is entitled to a 25% interest in the Oil Canyon Leases as compensation for his representation. It would be, therefore, impossible for Shaw, Del Rio, and the Appellants to carry out an agreement to assign to themselves interests to leases owned by others.

Utah law is clear that if a contract has only one reasonable interpretation, then the interpretation of that contract is a matter of law for the court. E.g., Orlob v. Wasatch Management, 2001 UT App 287, ¶ 12, 33 P.3d 1078. Appellants' proposed interpretation of the "additional leases" term in paragraph 4.1 -- that the term refers to the ten already-existing Oil Canyon Leases -- would mean that the parties to the 1995 Agreement were agreeing to divide among themselves *leases with significant interests owned by third parties*. Such an interpretation is simply unreasonable as a matter of law; the only reasonable interpretation is that "additional" leases referred to other leases -- leases that were not yet in existence or were not already owned by the parties and others.¹⁷ Accordingly, Appellants as a matter of law cannot prevail on their claim for an interest in the Federal Leases under the 1995 Agreement.

¹⁷ Indeed, Appellants' Complaint expressly referred to a "proposal that 8 tracts or sections of land be offered for lease." (Complaint ¶ 20.)

Appellants' arguments on this point can be rejected, because, at bottom it is simply not reasonable to conclude that the Oil Canyon Leases, which were already in existence and merely extended by the Settlement Agreement, constituted "additional" leases. Appellants attempt to argue that when the 1995 Agreement was reached, the parties had an "understanding" that the Oil Canyon Leases had expired, but Appellants cite no *evidence* that anyone actually had this understanding. Once again, while Appellants asserted that they needed additional time to depose Shaw and Gerald Nielson, there was nothing preventing Appellants from submitting affidavits from Kirk or Martens, if in fact either of them actually was operating under the so-called understanding that Appellants now claim.

Similarly, the record below defeats Appellants' attempt to dispute Mr. Nielson's claim to a 25 percent interest in the Oil Canyon Leases. Appellants appear to suggest that Mr. Nielson's claim is in doubt because the contingency fee agreement was not actually filed below, but this argument is specious. Most importantly, ***Appellants conceded below that Mr. Nielson had a twenty-five percent interest in the leases.*** Paragraph 11 of Del Rio's Statement of Undisputed Material Facts asserted that "as of the date of the 1995 Agreement, Gerald Niels[o]n, the attorney representing the plaintiffs in the Federal Litigation, was entitled to a 25% interest in the leases and wells drilled on the land covered by the leases as compensation for the representation." (R. 90.) In response, Appellants conceded that "no genuine issue exists as to the facts stated in ¶ 11." (R. 245.) Thus, the fact that Mr. Nielson has a twenty-five percent interest in the Oil Canyon Leases is

"deemed admitted for the purpose of summary judgment." CJA 4-501(2)(B) (repealed eff. Nov. 1, 2003; now at Utah R. Civ. P. 7(c)(3)(A)).¹⁸

A party wishing to oppose a motion for summary judgment must present evidence sufficient to raise a genuine issue of material fact; he or she may not merely rest on pleadings or speculate that some evidence may be found that *might* defeat the moving party's motion. Appellants bore the burden of establishing their claims. Thus, Appellants were obligated to present evidence supporting those claims. See, e.g., Jensen v. IHC Hospitals, 944 P.2d 327, 339 (Utah 1997) (citations and internal punctuation omitted) ("Put another way, once the moving party has brought forth evidence either tending to prove a lack of genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of providing some evidence, by affidavit or otherwise, in support of the essential elements of his or her claim."). In the present case, Appellants were required to present evidence below that the term "additional leases" in the 1995 Agreement could reasonably mean the Oil Canyon Leases. Appellants failed to do so. Accordingly, the summary judgment can be upheld on this ground as well.

¹⁸ Additionally, Appellants' attempt to raise questions concerning Mr. Nielson's interest, simply because Del Rio did not submit a copy of the contingency fee agreement for the public record, is specious. Mr. Nielson obviously has personal knowledge of the terms of his own agreement with the Federal Plaintiffs, and his affidavit testimony, which Appellants never moved to strike, is therefore competent evidence that such an agreement existed. And that evidence was never controverted.

C. The trial court acted within its discretion in denying Appellants' request for additional discovery time under Rule 56(f).

Finally, the Court can reject Appellants' claim that the summary judgment should be reversed because the Appellants were entitled to additional discovery time under Rule 56(f). This Court has explained that a Rule 56(f) request will not be granted where the request is "dilatory or lacking in merit." E.g., Sandy City v. Salt Lake County, 794 P.2d 482, 488 (Utah Ct. App. 1990), rev'd on other grounds 827 P.2d 212 (Utah 1992). Moreover, a Rule 56(f) request will not be granted where the party seeking the delay is merely on a "fishing expedition" for "purely speculative facts." Id. at 489 (quoting Callioux v. Progressive Ins. Co., 745 P.2d 838, 841 (Utah Ct. App. 1987)). A trial court has substantial discretion to consider and rule on a 56(f) request; this Court has explained that it "will not reverse [a] trial court's denial of a Rule 56(f) motion unless the decision *exceeds the limits of reasonability*." Holmes v. American States Ins. Co., 2000 UT App 85, ¶ 26, 1 P.3d 552 (emphasis added) (citations and internal punctuation omitted).

Appellants have not established that the trial court's denial of their 56(f) request "exceed[ed] the limits of reasonability." First, Appellants had ample opportunity to depose Shaw, Nielson, and anyone else they wanted before the trial court granted summary judgment. Second, as Appellants' brief illustrates, the discovery they sought was nothing more than a fishing expedition, and it is pure speculation for Appellants to suggest that this discovery would have yielded any information supporting their claims.

Appellants clearly had plenty of time to depose Shaw and Nielson. Appellants filed their complaint in July 2001, and Del Rio and Shaw did not move for summary

judgment until August 7, 2002, a full year later. Appellants have failed to explain why they did not depose Shaw or Nielson during that year. Moreover, the hearing on the summary judgment motion did not take place until October 28, 2002, *almost three months after Del Rio and Shaw filed it*. Appellants assert in a footnote that the summary judgment motion "moved rapidly to decision" (Aplts.' Br. at 37 n.30), but this is simply wrong: there is absolutely no reason why Appellants could not have deposed Shaw or Nielson before the October 28 hearing. Thus, given Appellants' failure to take advantage of the ample opportunity they had to depose Shaw and Nielson, the trial court was not required to grant them additional time under Rule 56(f).¹⁹

Moreover, the discovery that Appellants wanted to pursue would not have affected the outcome of the motion. As shown above, Appellants' claim for a declaration of interests in the Oil Canyon Leases fails as a matter of law because the 1995 Agreement simply does not grant any such interests, and because the Appellants' provision cannot show that *they* were supposed to receive any particular interests in any particular leases. These conclusions are based on the plain language of the 1995 Agreement, plus the undisputed facts that (1) the Oil Canyon Leases included ten different leases, and (2) there were twenty-seven "plaintiffs" to whom the beneficial interests were supposed to be allocated. All the discovery in the world is not going to change any of these facts. As such, the trial court was well within its discretion in concluding that there was no point in delaying a ruling to allow discovery. See, e.g., Holmes, 2000 UT App 85 at ¶ 26, 1 P.3d

¹⁹ Indeed, Appellants did not even depose Shaw during the additional year that their claim against him for breach of the "best efforts" provision remained pending before

at 558 (upholding denial of 56(f) request: "Because appellant's claims fail as a matter of law, there was no need to allow further discovery.").

Perhaps recognizing this problem, Appellants argue that it was necessary for them to depose Shaw and Nielson so they could "discover ... the rest of the story concerning this mysterious funding agreement." (Aplts.' Br. at 38.) But this is just a fishing expedition. Appellants have cited nothing in the record suggesting that there is any "story" about the "mysterious" funding agreement, or that learning more about this supposed story would support a judgment in their favor on their claims for an interest in any of the Oil Canyon Leases.²⁰

A party seeking Rule 56(f) relief "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Simmons Oil Corp. v. Tesoro Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir. 1996). "It is not enough simply to assert, a la Wilkins Micawber, that 'something will turn up.'" Id. Moreover, "[t]he burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence exists." Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995). At best, Appellants appear to be arguing that if they deposed Shaw and Nielson, they *might* be able to uncover evidence that Shaw entered into a litigation funding agreement with one or more of the Federal Plaintiffs, and that this agreement *might* have granted

the trial court.

²⁰ Appellants' brief also discusses supposed "facts" that Appellants purportedly "later discovered" concerning Shaw's alleged purchase of stock in Del Rio and a supposed joint venture between Shaw and non-party Wind River Resources Corporation, ***but there is absolutely no evidence in the record, or elsewhere, supporting Appellants' allegations regarding these matters.*** (See Aplts.' Br. at 38.)

Appellants interests in some of the Oil Canyon Leases. But this, once again, is pure speculation, as the Appellants have presented no evidence suggesting either that the hypothetical funding agreement was reached, or that the agreement granted them any interests.

Obviously, none of the Appellants were parties to this hypothetical litigation funding agreement. If any of the Appellants was a party to that agreement, Appellants would have submitted an affidavit to that effect, and they did not do so. Thus, Appellants' entire claim is based on the hypothesis that they are third party beneficiaries, of an agreement of which they have no evidence.

Of course, Appellants did not plead, or argue below, any claims as third-party beneficiaries. Moreover, to prevail on a third-party beneficiary claim, Appellants would have to prove that Shaw and one or more unnamed Federal Plaintiffs entered into an agreement, and that the "clear intent" of those parties was to confer a benefit on the Appellants by assigning them interests in the Oil Canyon Leases. See, e.g., Miller v. Martineau & Co., 1999 UT App 216, ¶ 37, 983 P.2d 1107, 1114 ("The intent of the contracting parties to confer a separate and distinct benefit must be clear."). Given that there is no evidence that such an agreement even exists, there would be no basis for Appellants to contend that discovery into this hypothetical agreement would have revealed a "clear" intent to confer benefits on Appellants by assigning Appellants interests in the leases.²¹

²¹ Indeed, the language of paragraphs 4 and 4.1 of the 1995 Agreement defeat Appellants' suggestion that a funding agreement between Shaw would have granted *them*

Once again, to prevail on this issue on appeal, Appellants have to demonstrate that it "exceeded the limits of reasonability" for the trial court to deny their 56(f) request. Appellants must establish that the trial court was obligated to let them conduct additional discovery, discovery that Appellants chose not to undertake during the first fifteen months the case was pending, in pursuit of a claim that Appellants did not plead, based on a theory of the case that was unsupported by any evidence. Obviously, Appellants have not established that the trial court abused its discretion in denying the 56(f) request, and as such the dismissal of Appellants' claims for a declaration of an interest in the Oil Canyon Leases.

POINT TWO

THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CLAIMS FOR AN INTEREST IN THE SETTLEMENT PROCEEDS

For largely the same reasons, the trial court properly granted summary judgment dismissing Appellants' claims for a share of the \$300,000 in cash that was obtained in settlement of the Federal Litigation. Once again, Appellants based their claim for the

any rights in the Oil Canyon Leases. Paragraph 4 says that Shaw was to use his best efforts to enter into an agreement with "the plaintiffs of such [federal] lawsuit" to fund certain expenses "incurred by plaintiffs in such litigation." (1995 Agreement, Add. Ex. 2, hereto, ¶ 4.) Paragraph 4.1 said that any agreement between the "plaintiffs" and Shaw was to provide that the "plaintiffs" would be entitled to a fifty percent beneficial interest in the additional leases. (*Id.* ¶ 4.1.) In other words, the 1995 Agreement used the same term to refer both to the persons with whom Shaw was to reach the funding agreement and to the persons who were to receive interests in the leases. Therefore, the 1995 Agreement clearly contemplated that the persons who entered into the funding agreement with Shaw would be the ones receiving interests in the leases. The Appellants obviously did not enter into a funding agreement with Shaw. Therefore, there is no reason to believe that the persons who *did* enter into a funding agreement with Shaw (and again,

settlement proceeds entirely on the 1995 Agreement (see Complaint, Add. Ex. 1, ¶ 24.), but the 1995 Agreement neither directly nor indirectly grants the Appellants any interest in the settlement proceeds. Further, because there were twenty-seven Federal Plaintiffs, the provision in paragraph 4.2 of the 1995 Agreement that the balance of the settlement proceeds should be delivered free and clear to "plaintiffs" is simply too indefinite to support any claims by Kirk, Martens, Western, or Syndicators to any particular sum of money. Finally, Appellants presented no evidence that they had any understanding that they would receive any particular portion of the settlement proceeds. Thus, Appellants have not established that the trial court erred in dismissing their claims for a share of the settlement proceeds.²²

this assumes that such an agreement was reached) would have agreed to grant interests in the leases to the Appellants.

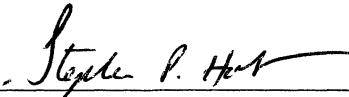
²² Appellants do not assert on appeal that they are entitled to damages in lieu of interests in the Oil Canyon Leases and the settlement proceeds. Accordingly, the portion of their claim below that sought damages was properly dismissed as well. Indeed, the indefiniteness of the 1995 Agreement plainly would defeat any such claim. Contract damages put the nonbreaching party "in as good a position as if the contract had been performed." E.g., Mahmood v. Ross, 990 P.2d 933, 940 (Utah 1999). Thus, a plaintiff claiming damages must show that if the contract had been performed, he would have been in a certain position (owning certain property, receiving certain funds, etc.), but instead, because the contract was not performed, he or she is in a less advantageous position. Thus, for any of the Appellants to recover damages, he would have to prove that if the contract had been performed -- i.e., if Shaw had used his best efforts to negotiate a funding agreement -- he "would have been" in a particular position. Once again, however, Appellants cannot do this, because as a matter of law, there is no way to reasonably predict what interests any of the Appellants would have received under a funding agreement that Shaw and the Federal Plaintiffs may have reached.

CONCLUSION

Defendant Del-Rio Resources, Inc., therefore respectfully requests that the Court affirm the grant of summary judgment dismissing with prejudice Appellants' claims against it, and that the Court award Del Rio the costs incurred on this appeal.

DATED: May 12, 2004.

ANDERSON & KARRENBURG



Thomas R. Karrenberg
Stephen P. Horvat
Attorneys for Del-Rio Resources, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney and a member and/or associate of the law firm of Anderson & Karrenberg, 50 West Broadway, Suite 700, Salt Lake City, Utah 84101, and that on the 12th day of May, 2004, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE DEL-RIO RESOURCES, INC.** to be served, via U.S. mail, postage prepaid, upon the following:

Dan K. Shaw
630 Trade Center Drive
Las Vegas, NV 89119

Max D. Wheeler
Rex E. Madsen
Keith A. Call
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
**Attorneys for Appellants Western United
Mines, Inc., Syndicators, Inc., J.R. Kirk, Jr.,
and Steven D. Martens**



ADDENDUM

1. Complaint
2. 1995 Agreement (attachments omitted)
3. Order and Summary Judgment
4. Memorandum in Support of Motion for Leave to File First Amended Complaint

Tab 1

FILED DISTRICT COURT
Third Judicial District

JUL 23 2001

SALT LAKE COUNTY

By KS
Deputy Clerk

DONALD L. DALTON - 4305
DALTON & KELLEY
Attorneys for Plaintiffs
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

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

WESTERN UNITED MINES, INC., a Utah
corporation, SYNDICATORS, INC., a Utah
corporation, J. R. KIRK, JR., an individual, and
STEVEN D. MARTENS, an individual,

Plaintiffs,

Vs.

DAN K. SHAW, an individual, and DEL-RIO
RESOURCES, INC., a Utah corporation,

Defendants.

COMPLAINT FOR
DECLARATORY RELIEF; MONEY
DAMAGES

Case No. 010906368

Honorable Livingston

Plaintiffs, by and through their attorneys, complain of defendants for declaratory relief and money damages, alleging as follows:

1. Plaintiff Western United Mines, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah, with its principal place of business in Tooele County.

2. Plaintiff Syndicators, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah, with its principal place of business in Salt Lake County.
3. Plaintiff J. R. Kirk, Jr. is an individual residing in Tooele County.
4. Plaintiff Steven D. Martens is an individual residing in Salt Lake County.
5. Defendant Dan K. Shaw is an individual residing in Utah County.
6. Defendant Del-Rio Resources, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah, with its principal place of business in Uintah County.
7. Defendants are subject to the jurisdiction of this Court, and the case may be tried in this Court for the convenience of the parties. Utah Code Ann. § 78-13-1.
8. The parties hereto are parties to an “Agreement” dated May 12, 1995, a true and correct copy of which is attached hereto.
9. The Agreement provides in pertinent part for the assignment, to Shaw, of interests in two federal oil and gas leases (Mineral Lease No. U 10166 & U 019837) and two state oil and gas leases (Mineral Lease No. 44317 & 44318).
10. The Agreement also provides for the funding, by Shaw, of litigation against the United States in which the parties hereto, excluding Shaw, were plaintiffs, *Del-Rio Drilling Programs, Inc., et al. v. The United States*, United States Claims Court, Case No. 569-86L.
11. The Agreement provides that Shaw would “use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty

thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation.”

12. The Agreement provides that with respect to the \$30,000 in litigation expenses, “[n]o expenses shall be paid by Shaw directly to persons who are plaintiffs in the litigation or to affiliates of plaintiffs.”
13. The Agreement provides that “[a]ny agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiff shall be entitled to a fifty percent (50%) beneficial interest in such additional leases.”
14. Shaw did in fact fund the lawsuit pursuant to agreement with plaintiffs.
15. The lawsuit was settled pursuant to the terms of a “Settlement Agreement,” a true and correct copy of which is attached hereto.
16. The Settlement Agreement provides in pertinent part for extension of the terms of 10 federal oil and gas leases, which do not include the two in the Agreement.
17. The terms of the 10 leases would have expired without the litigation and the agreement contained in the Settlement Agreement extending their terms.
18. Defendants herein expressly characterized those 10 leases as “returned leases.”
19. Plaintiffs are entitled to a beneficial interest in the 10 leases according to the Agreement.
20. The Settlement Agreement also provides for a proposal that 8 tracts or sections of land be offered for lease.

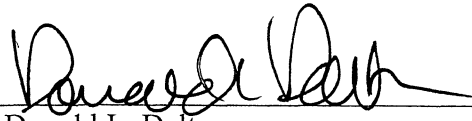
21. Plaintiffs do not know if any of the 8 tracts or sections has been offered for lease.
22. If so, plaintiffs are entitled to a beneficial interest in the 8 tracts or sections according to the Agreement.
23. The Settlement Agreement also provides for a cash award to plaintiffs of \$300,000.
24. Plaintiffs are entitled to interest in the \$300,000 cash award according to the Agreement.
25. Defendants in this case have proposed distribution of the settlement with the United States in a manner that is inconsistent with the Agreement.
26. Specifically, defendants have denied plaintiffs Western United Mines, Inc., J. R. Kirk, Jr. and Steven D. Martens any interest in the 10 federal oil and gas leases.
27. Defendants have proposed a distribution of interest in the leases to plaintiff Syndicators, Inc. that is less than what is provided for by the Agreement.
28. Defendants have denied plaintiffs any interest in the cash award.
29. Defendants have proposed a reimbursement to Shaw for litigation expenses that is inconsistent with the Settlement Agreement.
30. Plaintiffs objected, in writing, to the proposed distribution.
31. However, defendants notified plaintiffs that they intended to proceed with the proposed distribution notwithstanding plaintiffs' objection.
32. Plaintiffs are entitled to declaration of a beneficial interest in the 10 federal oil and gas leases that is consistent with the Agreement.
33. Plaintiffs are entitled to declaration of a beneficial interest in the 8 tracts or sections, assuming they have been offered for lease, consistent with the Agreement.

34. Plaintiffs are entitled to a declaration of interest in the \$300,000 cash award that is consistent with the Agreement.
35. Alternatively, plaintiffs are entitled to damages consistent with the Agreement and according to proof.

WHEREFORE, plaintiffs pray for Judgment against defendants for (1) declaration of a beneficial interest in the 10 federal oil and gas leases that is consistent with the Agreement; (2) declaration of a beneficial interest in the 8 tracts or sections, assuming they have been offered for lease, which is consistent with the Agreement; (3) declaration of an interest in the \$300,000 cash award that is consistent with the Agreement; (4) alternatively, damages consistent with the Agreement and according to proof; and (5) such other and further relief as is just and proper.

DATED this 19th day of July, 2001.

DALTON & KELLEY

By 
Donald L. Dalton
Attorneys for Plaintiffs

COVER SHEET FOR CIVIL ACTIONS

PARTY IDENTIFICATION (ATTACH ADDITIONAL SHEETS AS NECESSARY)

PLAINTIFF/PETITIONER

Name *Western United Mines, Inc.*
Address

Day Time Telephone

PLAINTIFF/PETITIONER

Name *Syndicators, Inc.*
Address

Day Time Telephone

DEFENDANT/RESPONDENT

Name *Bank, Shaw*
Address

Day Time Telephone

DEFENDANT/RESPONDENT

Name *Del-Rio Resources, Inc.*
Address

Day Time Telephone

ATTY FOR PLAINTIFF/PETITIONER

Name *Donald L. Walton*
Address *PO Box 58084*
SLC UT 84158

Day Time Telephone *583-2510*

ATTY FOR PLAINTIFF/PETITIONER

Name *Same*
Address

Day Time Telephone

ATTY FOR DEFENDANT/RESPONDENT

Name *A. John Davis III*
Address *Suite 1850, Blue Bird Life*
SLC UT 84111

Day Time Telephone *531-8446*

ATTY FOR DEFENDANT/RESPONDENT

Name *Same*
Address

Day Time Telephone

TOTAL CLAIM FOR DAMAGES

According to proof

JURY DEMAND

☐ Yes

☒ No

SCHEDULE OF FEES: §21-1-5. CHECK ANY THAT APPLY. (SEE CASE TYPES FOR FILING FEES FOR COMPLAINTS OTHER THAN CLAIM FOR DAMAGES)

COMPLAINT FOR DAMAGES	
<input type="checkbox"/> Civil, Interpleader or Small Claims: \$2000 or less	\$57
<input type="checkbox"/> Small Claims: \$2001-\$5000	\$60
<input type="checkbox"/> Civil or Interpleader: \$2001 - \$9999	\$80

<input type="checkbox"/> Civil or Interpleader: \$10,000 and over	\$120
<input checked="" type="checkbox"/> Civil Unspecified	\$120
MISCELLANEOUS	
<input type="checkbox"/> Jury Demand	\$50
<input type="checkbox"/> Vital Statistics §26-2-25	\$2

COVER SHEET FOR CIVIL ACTIONS

CASE TYPE (CHECK ONLY ONE CATEGORY)

Fee

Case Type

APPEALS

- \$120 ☐ Administrative Agency Review
\$70 ☐ Small Claims Trial de Novo

GENERAL CIVIL

- \$120 ☐ Attorney Discipline
Sch ☐ Civil Rights
\$120 ☐ Condemnation
Sch ☒ Contract
Sch ☐ Debt Collection
\$50 ☐ Expungement (Fee is \$0 under circumstances of §77-18-10(2))
Sch ☐ Forcible Entry and Detainer
\$120 ☐ Forfeiture of Property
Sch ☐ Interpleader
Sch ☐ Lien/Mortgage Foreclosure
Sch ☐ Malpractice
Sch ☐ Miscellaneous Civil
\$120 ☐ Extraordinary Relief
Sch ☐ Personal Injury
\$120 ☐ Post Conviction Relief: Capital
\$120 ☐ Post Conviction Relief: Non-capital
Sch ☐ Property Damage
Sch ☐ Property/Quiet Title
Sch ☐ Sexual Harassment
Sch ☐ Small Claims
Sch ☐ Tax
Sch ☐ Water Rights
Sch ☐ Wrongful Death
Sch ☐ Wrongful Termination

DOMESTIC

- \$0 ☐ Cohabitation Abuse
\$120 ☐ Common Law Marriage
\$120 ☐ Custody/Visitation/Support
\$80 ☐ Divorce/Annulment
☐ Check if child support, custody or visitation will be part of decree
\$120 ☐ Paternity
\$80 ☐ Separate Maintenance
\$120 ☐ Uniform Child Custody Jurisdiction Act (UCCJA)

Fee

Case Type

- \$120 ☐ Uniform Interstate Family Support Act (UIFSA)

JUDGMENTS

- \$25 ☐ Abstract of Foreign Judgment or Decree
\$40 ☐ Abstract of Judgment or Order of Utah Court or Agency
\$50 ☐ Abstract of Judgment or Order of Utah State Tax Commission
\$25 ☐ Judgment by Confession
\$0 ☐ Renew Judgment

PROBATE

- \$120 ☐ Adoption
\$120 ☐ Conservatorship
\$120 ☐ Estate Personal Rep - Formal
\$120 ☐ Estate Personal Rep - Informal
\$120 ☐ Guardianship
\$120 ☐ Involuntary Commitment
\$120 ☐ Minor's Settlement
\$120 ☐ Name Change
\$120 ☐ Supervised Administration
\$120 ☐ Trusts
\$120 ☐ Unspecified Probate

SPECIAL MATTERS

- \$0 ☐ Administrative Search Warrant
\$25 ☐ Arbitration Award
\$0 ☐ Criminal Investigation Search Warrant
\$0 ☐ Deposit of Will
\$0 ☐ Determination of Competency in Criminal Case
\$0 ☐ Extradition
\$25 ☐ Foreign Probate or Child Custody Document
\$0 ☐ Hospital Lien
\$25 ☐ Judicial Approval of Document not part of a Pending Case
\$25 ☐ Notice of deposition in out-of-state case

Tab 2

AGREEMENT

Agreement entered into this 12 day of May, 1995, by and among Dan K. Shaw ("Shaw"), Del Rio Resources, Inc., a Utah corporation ("Del Rio"); Western United Mines, Inc., a Utah corporation ("Western"); Syndicators, Inc., a Utah Corporation ("Syndicators"), Lawrence C. Caldwell, II ("Caldwell"); Jay R. Kirk, Jr. ("Kirk") and Steven D. Martens ("Martens")

RECITALS:

WHEREAS, Del Rio is the "Lessee" of certain mineral, oil and gas leases (the "Federal Leases" between Del Rio as Lessee and the United States Government as Lessor. A description of the Federal Leases is set forth in Exhibit "A" attached hereto and by this reference made a part hereof; and

WHEREAS, Western and Syndicators previously owned an interest in the Federal Leases; and

WHEREAS, Kirk is the "Lessee" of record of certain mineral, oil and gas leases (the "State Leases") between Kirk as Lessee and the State of Utah as Lessor. A description of the State Leases is set forth in Exhibit "B" attached hereto and by this reference made a part hereof; and

WHEREAS, Kirk is the record holder of the State Leases; and

WHEREAS, pursuant to an Agreement dated November 30, 1993 (the "November 1993 Agreement"), Shaw has provided funding to Del Rio in the amount of \$791,260 to rework the following wells number 30-1 and 29-A located in the Federal leases described in Exhibit "B" attached hereto (the "Wells"); and

WHEREAS, pursuant to his rights under the November 1993 Agreement, Shaw has demanded repayment of the amounts advanced for reworking the Wells, together with interest thereon but none of Del Rio, Western or Syndicators have the financial capability of repaying such advanced funds; and

WHEREAS, under the November 1993 Agreement Del Rio, Western and Syndicators have assigned their interests in the Federal and State Leases to Shaw as collateral security for the advancement of funds used to rework the Wells pursuant to his rights under the November 1993 Agreement; and

WHEREAS, Shaw has agreed to enter a settlement agreement relating to the funds owed to him and other matters in consideration for Del Rio, Syndicators, Western,

Kirk, Caldwell and Martens assigning all of their right title and interest in the Federal and State Leases to him;

NOW THEREFORE, in consideration of the promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Assignment of Lease and Other Interests. Del Rio, Western, Syndicators, Caldwell, Martens and Kirk (all of which are hereafter collectively referred to as the "assignors") each hereby assign, transfer and convey to Shaw (or to any assignee of Shaw), any and all of their right, title and interest in and to:

- (i) the Federal Leases and the State Leases;
- (ii) the surface property which is the subject of the Federal and State Leases;
- (iii) the Wells and any other wells drilled under the Federal and State Leases;
- (iv) all reports made to the United States Government Minerals Management Services and all Oil and Gas Reports made to the Utah State Tax Commission relating to the Federal or State Leases from 1989 to the present;
- (v) any reports, logs, agreements, or other records of any type or kind relating to the Federal or State Leases or the Wells; and
- (vi) all personal property and fixtures used at or in the Wells, including, but not limited to, pumps, pipes, casing and other equipment.

For purposes of this Agreement, all of the rights assigned by Assignors to Shaw hereunder are hereafter referred to as the "Lease Rights". The parties hereby agree that the assignment of Lease Rights made hereby, shall be a complete and total assignment to Shaw of any and all rights and interest of each of the Assignors in the Lease Rights. Shaw is hereby authorized by Assignors to take such additional action as is reasonably necessary to effect the assignment of the Lease Rights made herein. Each of the Assignors will execute such additional documents and take such additional action as Shaw deems reasonably necessary to effect the assignment of the Lease Rights and to perfect title of the Lease Rights in Shaw.

2. Cancellation of Debt. In consideration of assignment of the Lease Rights by Assignors to Shaw, Shaw hereby forgives and cancels all debts owed to Shaw by Del Rio, Western and Syndicators which debts include, but are not limited to, the following:

<u>Debtor</u>	<u>Amounts Owed To Shaw</u>
Del Rio	\$6,122.82
Western	\$337.87
Syndicators	\$2,065.89
Del Rio, Western & Syndicator jointly	\$791,600.00

Shaw will take such action as may be necessary to release all security interests securing any of such debt.

2.1 In consideration of Caldwell, Kirk and Martens assigning any and all of their rights in the Lease Rights to Shaw, Shaw hereby indemnifies, holds harmless and releases Caldwell, Kirk and Martens from any debt owed by Caldwell, Kirk or Martens to Shaw and from any debt owed to Shaw by any other person and guaranteed by Caldwell, Kirk and Martens.

3. Resolution of Vernal Investors Matter. Del Rio sold shares of its common stock to certain investors (the "Investors") in a private offering and in connection therewith received offering proceeds of approximately \$132,000. Some of the Investors have expressed dissatisfaction with their investment in Del Rio and have questioned the adequacy of the disclosure given by Del Rio to the Investors in connection with their purchase of Del Rio securities. As additional consideration for the Assignors assigning all of their right, title and interest in the Lease Rights to Shaw, Shaw hereby agrees to use his best efforts to resolve questions or concerns that the Investors may have in connection with their investment in Del Rio. Shaw may, in an attempt to resolve such questions or concerns purchase the shares of Del Rio common stock which the Investors acquired from Del Rio. Shaw hereby agrees to indemnify Del Rio, Caldwell, Kirk and Martens and save them harmless from any and all claims, damages and causes of action made by the Investors.

4. Funding for Existing Litigation. Various individuals and companies are plaintiffs in a lawsuit filed against the United States in the United States Claims Courts involving a claim for oil and gas leases and money damages (Case No. 569-86L).

Plaintiffs require additional money to fund additional on-going litigation expenses. As additional consideration for Del Rio, Western, Syndicators, Kirk Caldwell and Martens entering into this Agreement, Shaw shall use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation. The funds to be provided by Shaw shall not be used for legal fees but may be used for other litigation expenses. No expenses shall be paid by Shaw directly to persons who are plaintiffs in the litigation or to affiliates of plaintiffs.

4.1 Any agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases. Shaw shall be the operator of such additional leases and the plaintiffs shall enter into a standard operating agreement with Shaw. If for any reason, the additional leases cannot, under the terms of any court decree or law, be put in the name of Shaw the parties shall take such action as may be necessary to provide Shaw with a fifty percent (50%) beneficial interest in such additional leases and to enter into an operating agreement with Shaw.

4.2 Any agreement between plaintiff(s) and Shaw shall provide that, as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and the balance of the proceeds shall be delivered free and clear of the claims of Shaw, to plaintiffs as damages and for payment of other expenses and costs of the litigation.

5. Resignation of Officers and Directors of Del Rio. Subsequent to the execution of this Agreement and the assignment of the Lease Rights, Kirk and Martens shall resign as officers and directors of Del Rio. Whether prior to or subsequent to such resignation, Kirk and Martens shall use their best efforts to provide Shaw with all documentation and information in their possession or control necessary to effect the assignment of the Lease Rights and to provide Caldwell with all documentation and information in their possession necessary to prepare and file all tax returns of Del Rio, to prepare and have executed all directors minutes for current and previous actions of Del Rio's Board of Directors and to execute any other documents required to bring Del Rio current and in good standing in all of its reports, returns and filings and to effect the agreement of the parties contained herein. Each of Caldwell, Kirk and Martens shall fully cooperate with each other to provide information required by any of them necessary to prepare and file their individual tax returns.

6. Appointment of New Directors and Officers. Within ten days after the resignations required by the preceding paragraph, Caldwell, as the remaining director, shall appoint two individuals to fill the vacancies on the Board of Directors in accordance with the provisions of Utah Code Ann. § 16-10a-810. In the alternative, Caldwell shall schedule a special meeting of the shareholders to be held within twenty days of the date

of this Agreement to elect directors to fill the vacancies. Within ten days after the appointment or election of the new directors, the newly appointed or elected directors shall vote on a resolution authorizing Del Rio to execute and deliver to Kirk a Promissory Note in the form attached hereto as Exhibit "C".

7. Conditions Precedent. The execution of the Promissory Note (Exhibit "C") in accordance with the procedures and within the time periods specified in the preceding paragraph shall constitute a condition precedent to the enforceability of this agreement as to Kirk. Kirk shall not be obligated to perform in accordance with the terms and provisions of this Agreement until said condition precedent has been fulfilled. In the event Del Rio does not execute the Promissory Note (Exhibit "C"), this Agreement shall be null and void.

8. Representations and Warranties of Del Rio, Western and Syndicators. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens represent and warrant that as to itself or himself, the following:

8.1. Corporate Authority. Each of Del Rio, Western and Syndicators represent and warrant as to itself, that it has the full corporate power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly and validly authorized by the Boards of Directors of Del Rio, Western and Syndicators and no other corporate proceedings on their part are necessary to authorize this Agreement or to consummate the transactions so contemplated. Subject to the laws of bankruptcy, insolvency, general creditor's rights and equitable principles, this Agreement has been duly and validly executed and delivered by Del Rio, Western and Syndicators and constitutes a valid and binding agreement of each of Del Rio, Western and Syndicators, enforceable against each of Del Rio, Western and Syndicators in accordance with its terms.

8.2. Authorization and Approval of Agreement. Each of Caldwell, Kirk and Martens separately represent and warrant as to himself only that he has the full power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. Subject to the laws of bankruptcy, insolvency, general creditors' rights and equitable principles, this Agreement has been duly and validly executed and delivered by each of Caldwell, Kirk and Martens and constitutes a valid and binding agreement enforceable against Caldwell, Kirk and Martens in accordance with its terms.

8.3. Organization. Each of Del Rio, Western and Syndicators each separately represent and warrant as to itself that it is a corporation duly organized, validly existing and in good standing under the laws of the State of Utah and has all requisite licenses, qualifications, corporate power and authority to own, lease and operate its assets and to carry on its business as now being conducted, except where

the failure to be so existing and in good standing or to have such qualifications, licenses, power and authority would not in the aggregate have a material adverse effect on its respective business, operations or financial condition.

8.4. Approvals and Consents; Noncontravention. Each of Del Rio, Western and Syndicators separately represent as to itself.

8.4.1. Except as described in Exhibit "D", no consent or approval or other action by, or notice to or registration or filing with any governmental or administrative agency or authority is required or necessary to be obtained by it Del Rio, Western or Syndicators in connection with the execution, delivery or performance of this Agreement by it or the consummation of the transactions contemplated by this Agreement.

8.4.2. No consent, approval, waiver or other action by any person under any material contract, agreement, instrument or other document, or obligation to which it is a party or by which it or any of its assets are bound, is required or necessary for the execution, delivery and performance of this Agreement or the consummation of the transactions contemplated by this Agreement.

8.4.3. The execution, delivery and performance of this Agreement by and the consummation of the transactions contemplated by this Agreement will not: (i) violate or conflict with its charter documents or Bylaws; (ii) violate or conflict with any law, regulation, order, judgment, award, administrative interpretation, injunction, writ or decree applicable to or by which it or any of its assets are bound, or any agreement or understanding between any administrative or regulatory authority, on the one hand, and it on the other hand; or (iii) violate or conflict with, result in a breach of, result in or permit the acceleration or termination of, or constitute a default under any agreement, instrument or understanding to which it is a party or by which it or any of its assets are bound.

8.5. Title and Related Matters. The Federal Leases are in the name of Del Rio or Del Rio, Western and Syndicators as Lessees. The State Leases are in the name of Kirk. All of the Assignors represent and warrant that to the best of their knowledge, except as set forth in Exhibit "E" attached hereto, good and marketable title to the Federal Leases and the State Leases, free and clear of any liens, claims, encumbrances, royalty interests or other restrictions or limitations of any nature whatsoever, will be assigned to Shaw. Assignors each represent and warrant that to the best of their knowledge, the Federal and State Leases are in full force and effect and that there has been no breach of the lease agreement.

8.6. Litigation and Proceedings. Each of the Assignors represents that it or he is not involved in any pending material litigation or governmental

investigation or proceeding relating to the Lease Rights and, to the best of his or its, knowledge no material litigation, claim, assessment or governmental investigation or proceeding is threatened against the Federal or State Leases, any Assignor or their assets, nor, to the best of his or its knowledge of is there any basis for such action.

8.7. Contracts. Exhibit "F" sets forth complete and correct copies of all material contracts, agreements, franchises, licensees, or other commitments related to or effecting the Lease Rights, including, but not limited to, the underlying lease agreements, assignment of lease agreements, working interest agreements, royalty agreements and operating agreements to which any Assignor is a party or by which any of the Lease Rights are bound, subject or effected. To the best of each of their knowledge, no Assignor is a party to any other material agreement, contract, license, franchise or commitment relating to or effecting the Lease Rights. To the best of each of their knowledge and subject to the laws of bankruptcy, insolvency, general creditor's rights, and equitable principles, all contracts, agreements, franchises, licensees, and other commitments to which any Assignor is a party relating to or effecting the Lease Rights, are material to its operations taken as a whole, are valid and enforceable in all material respects.

8.8. Material Contract Defaults. To the best knowledge of each Assignor, such Assignor is not in default in any material respect under the terms of the Federal Lease or the State Lease or any outstanding contract, agreement, license, lease or other commitment which is material to the operation of the Lease Rights and there is no event of default or other event which, with notice or lapse of time or both, would constitute a default in any material respect under any such contract, agreement, lease or other commitment in respect of which such Assignor has not taken adequate steps to prevent such a default from occurring.

8.9 Information. Subject to the limitations noted in this paragraph and in the following paragraph, the information concerning Assignors set forth in this Agreement and in the Exhibits attached hereto, is complete and accurate in all material respects and does not contain any untrue statement of material fact or omit to state a material fact required to make the statements made in light of the circumstances under which they were made not misleading. Shaw expressly acknowledges that his decision to enter into this Agreement and the Del Rio Subscription Agreement is based upon his independent investigation and information supplied solely by Larry Caldwell. Shaw further acknowledges that he has not requested, received or relied upon any information, warranties or representations from Del Rio, Western, Syndicators, Kirk or Martens except as expressly stated in this Agreement as being made by Del Rio, Western, Syndicators, Kirk or Martens.

8.10 Limitation on Warranties and Representations. The warranties and representations of Western and Syndicators are made by the corporate entities only and

shall not be considered or relied upon as a warranty or representation of any officer, director, agent or employee of Western or Syndicators including, but not limited to, the officers, directors, agents or employees who execute this Agreement on behalf of Western and Syndicators. The warranties and representations of Del Rio are made by that corporate entity only and its officer and director, Larry Caldwell, and shall not be considered or relied upon as a warranty or representation of any other officer, director, agent or employee of Del Rio. J. R. Kirk, President of Western, represents only that the representations and warranties of Western stated in this Agreement are accurate to the best of his information, knowledge and belief. Steve Martens, President of Syndicators, represents only that the warranties and representations of Syndicators stated in this Agreement are accurate to the best of his information, knowledge and belief.

9. Representations and Warranties of Purchaser. Shaw represents and warrants to Assignors as follows:

9.1. Authorization and Approval of Agreement. Shaw has the full power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. Subject to the laws of bankruptcy, insolvency, general creditor's rights and equitable principles, this Agreement has been duly and validly executed and delivered by Shaw and constitutes a valid and binding agreement of Shaw, enforceable against Shaw in accordance with its terms.

9.2 Approvals and Consents; Noncontravention. To the best knowledge of Shaw, no consent, approval, waiver or other action by any person under any material contract, agreement, instrument or other document, or obligation to which Shaw is a party or by which it or any of his assets are bound, is required or necessary for the execution, delivery and performance of this Agreement by Shaw or the consummation of the transactions contemplated by this Agreement.

10. Appointment of Del Rio as Operator. Shaw will appoint Del Rio as the operator of oil and gas wells which are drilled or reworked on the Federal Leases and the State Leases. Such appointment shall be made pursuant to the terms of an operator's agreement provided by shaw.

11. Indemnification.

11.1. Subject to the acknowledgments stated in paragraph 8.9 and the limitations stated in paragraph 8.10, assignors hereby agree to indemnify and hold Shaw harmless from, against and in respect of (and shall on demand reimburse Shaw for):

11.1.1. Any and all loss, liability or damage suffered or incurred by Shaw by reason of any untrue representation, breach of warranty or nonfulfillment of any covenant by Assignors contained herein or in any certificate, document or instrument delivered to Shaw pursuant hereto or in connection herewith;

11.1.2. Any and all loss, liability or damage suffered or incurred by Shaw in respect of or in connection with any liabilities of Assignors not expressly assumed by Shaw pursuant to the terms of this Agreement.

11.1.4. Any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including without limitation, legal fees and expenses, incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof or in enforcing this subsection 11.1.

11.2. Shaw hereby agrees to indemnify and hold Assignors harmless from, against and in respect of (and shall on demand reimburse them for):

11.2.1. Any and all loss, liability or damage resulting from any untrue representation, breach of warranty or non-fulfillment of any covenant or agreement by Shaw contained herein or in any certificate, document or instrument delivered to Assignors hereunder;

11.2.2. Any and all liabilities or obligations of Assignors specifically assumed by Shaw pursuant to this Agreement; and

11.2.3. Any and all actions, suits, proceedings, claims, demands, assessments, judgements, costs and expenses, including without limitation, legal fees and expenses, incident to any of the foregoing or incurred in investigating or attempting to avoid the same or to oppose the imposition thereof or in enforcing this sub Section 11.2.

12. Nature and Survival of Representations. Subject to the acknowledgements stated in Paragraph 8.9 and the limitations stated in Paragraph 8.10, all representations, warranties and covenants made by any party in this Agreement shall survive the Closing hereunder and the consummation of the transactions contemplated hereby. All of the parties hereto are executing and carrying out the provisions of this Agreement in reliance solely on the representations, warranties and covenants and agreements contained in this Agreement or at the Closing of the transactions herein provided for and not upon any representation, warranty, agreement, promise or information, written or oral, made by the other party or any other person other than as specifically set forth herein.

13. Miscellaneous.

13.1 Further Assurances. At any time and from time to time, after the effective date, each party will execute such additional instruments and take such action as may be reasonably requested by the other party to confirm or obtain title to the Lease Rights transferred hereunder or otherwise to carry out the intent and purposes of this Agreement.

13.2 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties, and there are no warranties, representations or other agreements between the parties in connection with the subject matter of this Agreement except as specifically set forth in this Agreement.

13.3 Effect; Assignment. This Agreement and all of the provisions of this Agreement will be binding and inure to the benefit of the parties to this Agreement and their respective successors and permitted assigns.

13.4 Amendments; Waivers. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by all parties to this Agreement. No waiver of any of the provisions of this Agreement will be deemed or will constitute a waiver of any other provision of this Agreement (regardless of whether similar), nor will any such waiver constitute a continuing waiver unless otherwise expressly provided.

13.5 Governing Law. The terms of this Agreement will be governed by, and construed in accordance with, the internal laws of the State of Utah.

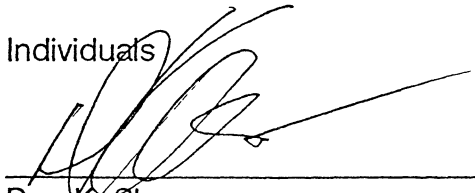
13.6 Headings. The section and subsection headings in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

13.7 Counterparts. This Agreement may be executed concurrently in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

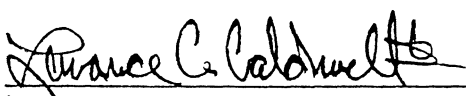
13.8 Severability. If any of this Agreement is deemed to be unenforceable, the balance of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

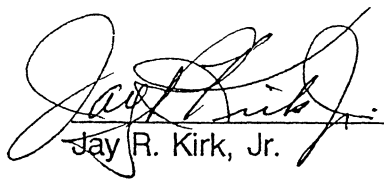
Individuals



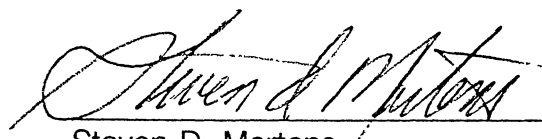
Dan R. Shaw



Lawrence C. Caldwell, II



Jay R. Kirk, Jr.



Steven D. Martens

Del Rio Resources, Inc.

By: 

Its President

Syndicators, Inc.

By: 

Its President

Western United Mines, Inc.

By: 

Its President

EXHIBIT "A"

Description of Federal Leases

Mineral Lease No. U 10166. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens incorporate by reference Assignment of Record Title interest in a Lease for Oil and Gas Geothermal Resources delivered to Dan K. Shaw on or about May 12, 1995.

Mineral Lease No. U 019837. Del Rio, Western, Syndicators, Caldwell, Kirk and Martens incorporate by reference Assignment of Record Title interest in a Lease for Oil and Gas or Geothermal Resources delivered to Dan K. Shaw on or about May 12, 1995.

EXHIBIT "B"

Description of State Leases

Mineral Lease No. 44317. Kirk incorporates by reference the Mineral Lease Assignment Forms for Lease 44317 delivered to Dan K. Shaw on or about May 12, 1995.

Mineral Lease No. 44318. Kirk incorporates by reference the Mineral Lease Assignment Forms for Lease 44318 delivered to Dan K. Shaw on or about May 12, 1995.

Tab 3

FILED DISTRICT COURT
Third Judicial District

NOV 14 2002

Lyn

By _____
Deputy Clerk

A. John Davis (#0825)
Shawn T. Welch (#7113)
PRUITT, GUSHEE & BACHTELL
1850 Beneficial Life Tower
Salt Lake City, Utah 84111
Telephone: (801) 531-8446
Attorneys for Dan K. Shaw

Thomas R. Karrenberg (#3726)
Stephen P. Horvat (#6249)
ANDERSON & KARRENERG
50 W. Broadway, Suite 700
Salt Lake City, Utah 84101
Telephone: (801) 534-1700
Attorneys for Del-Rio Resources, Inc.

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

WESTERN UNITED MINES, :
INC. a Utah corporation, :
SYNDICATORS, INC., a Utah :
corporation, J.R. KIRK, JR., an :
individual, and STEVEN D. :
MARTENS, an individual, :
Plaintiffs, :

vs. :

DAN K. SHAW, an individual, :
and DEL-RIO RESOURCES, :
INC., a Utah corporation, :
Defendants. :

:

:

ORDER AND
SUMMARY JUDGMENT

Case No. 010906368
Judge Roger A. Livingston

The Court heard oral argument on Defendants Dan K. Shaw's and Del-Rio Resources, Inc.'s Joint Motion for Summary Judgment on October 28, 2002 in Salt Lake City, Utah. Thomas A. Karrenberg appeared on behalf of Defendant Del-Rio Resources, Inc.; A. John Davis and Shawn T. Welch appeared on behalf of Defendant Dan K. Shaw; and Donald L. Dalton appeared on behalf of Plaintiffs Western United Mines, Inc., Syndicators, Inc., J.R. Kirk, Jr., and Steven D. Martens. The Court, having reviewed the Defendants' Joint Memorandum in Support of its Motion for Summary Judgment, Plaintiffs' Memorandum in Opposition and Defendants' Joint Reply Memorandum, and having heard counsel's oral arguments, hereby makes the following findings of fact, conclusions of law and order of partial summary judgment in favor of Defendants Shaw and Del-Rio Resources.

ORDER AND SUMMARY JUDGMENT

1. This action concerns an agreement dated May 12, 1995 (the "1995 Agreement"), wherein defendant Del-Rio Resources, Inc. and Plaintiffs assigned certain oil and gas leases to defendant Shaw in settlement of a debt owed to defendant Shaw.

2. Paragraphs 4 through 4.2 of the 1995 Agreement reference a lawsuit then pending in the United States Court of Claims involving a claim for money damages relating to certain oil and gas leases. The case was styled *Del-Rio Drilling Programs, Inc., et al. vs. United States*, Case No. 569-86L (hereinafter the "Federal Action").

The Plaintiffs in the Federal Action included the Plaintiffs herein, Defendant Del-Rio Resources and some 22 other individuals and entities (the “Federal Plaintiffs”).

3. The oil and gas leases at issue in the Federal Action consisted of ten Federal oil and gas leases identified as follows: U-6610, U-6612, U-6632, U-6634, U-10162, U-10163, U-10164, U-10165, U-1876, and U-27043 (“Federal Leases”).

4. Paragraph 4 of the 1995 Agreement references the “various individuals and companies” who were plaintiffs in the Federal Action, and provides:

As additional consideration for Del Rio, Western, Syndicators, Kirk Caldwell and Martens entering into this Agreement, Shaw shall use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000.00) to fund certain future expenses incurred by plaintiffs in such litigation. . . .

5. Paragraph 4.1 of the 1995 Agreement provides, in relevant part: “Any agreement between the Plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a 50% beneficial interest in such additional leases.”

6. Paragraph 4.2 of the 1995 Agreement provides, in relevant part:

Any agreement between plaintiff(s) and Shaw shall provide that, as a result of the litigation, a cash settlement is awarded to plaintiffs, Shaw shall be reimbursed for all expenses of litigation paid by Shaw and the balance of the proceeds shall be delivered free and clear of the claims of Shaw, to plaintiffs as damages and for payment of other expenses and costs of the litigation.

7. The Federal Action was resolved by a Settlement Agreement dated March 13, 2001, which stated that the terms of the ten Federal Leases at issue in the Federal Action were deemed “tolled” during the pendency of the Federal Action and were extended for three years from the date of settlement. In addition, the United States Bureau of Land Management agreed to pay the Federal Plaintiffs \$300,000.00 in damages.

8. Plaintiffs herein sued Defendants asking this Court for a declaration that the 1995 Agreement entitled them to an interest in the ten Federal Leases as well as an interest in the \$300,000.00 cash award, or in the alternative, damages consistent with the 1995 Agreement.

9. The 1995 Agreement does not grant Plaintiffs herein any interest in the ten Federal Leases or the \$300,000 cash award in the Federal Action, and Plaintiffs’ claims thereunder are denied with prejudice.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants Dan K. Shaw and Del-Rio Resources, Inc.’s Joint Motion For Summary Judgment Against Plaintiffs is hereby granted.

2. The Court hereby grants Plaintiffs leave to amend Plaintiffs’ Complaint herein to state a claim for damages against defendant Dan K. Shaw for breach of the “best efforts to enter into an agreement” provision in Paragraph 4 of the 1995

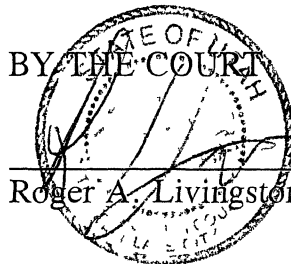
settlement. In granting such right to amend, the Court in no way rules as to the merit of Plaintiffs' claim. Plaintiffs shall file such amendment within ten days of the entry of this Order and Judgment.

3. Each party shall bear its respective costs herein.

RULE 54(b) CERTIFICATION OF FINAL JUDGMENT

Consistent with Rule 54(b) of the Utah Rules of Civil Procedure, the Court hereby directs entry of the above order and judgment as final judgment. In directing a final judgment as to same, the Court specifically and expressly finds that there is no just reason for delay and that judgment shall be and is final as to the above-referenced matters.

Dated this 14th day of November, 2002.



Roger A. Livingston, District Court Judge

Approved as to Form:

DALTON & KELLEY

By: Donald L. Dalton
Donald L. Dalton
Attorneys for Plaintiffs

ANDERSON & KARRENBURG

By: The Law

Tab 4

DONALD L. DALTON - 4305
DALTON & KELLEY
Attorneys for Plaintiffs
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

12/11/11 - 3:51



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

WESTERN UNITED MINES, INC., a Utah
corporation, SYNDICATORS, INC., a Utah
corporation, J. R. KIRK, JR., an individual, and
STEVEN D. MARTENS, an individual,

Plaintiffs,

Vs.

DAN K. SHAW, an individual, and DEL-RIO
RESOURCES, INC., a Utah corporation,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT

Case No. 010906368

Honorable Robert K. Hilder

Plaintiffs, by and through their attorneys, respectfully submit the following
Memorandum in Support of Motion for Leave to File First Amended Complaint:

At the hearing on October 28, 2002, the Court (Honorable Roger A. Livingston)
granted defendants' Motion for Summary Judgment. At the same time, the Court granted
plaintiffs leave to file a First Amended Complaint stating a claim against defendant Dan K.
Shaw for breach of the "best efforts" clause in the 1995 Agreement.

The Court's action has required further amendment of the Complaint, specifically, a claim against defendant Del-Rio Resources, Inc. for declaration of plaintiffs' rights and interest in the oil and gas leases and cash award that resulted from the settlement of the Claims Court Litigation.

In their original Complaint, plaintiffs sought a declaration of their rights and interest in the oil and gas leases and cash award pursuant to the terms of the 1995 Agreement. However, the Court's ruling was that the 1995 Agreement granted plaintiffs no rights or interest in the oil and gas leases or cash award.

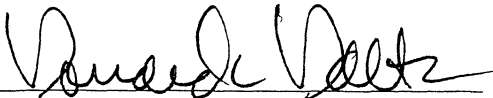
Plaintiffs' amended claim against defendant Del-Rio Resources, Inc. is not based on the 1995 Agreement. As evidenced by the pleadings on file in the Claims Court Litigation, plaintiffs have rights and interest in the leases and cash award that are independent of the 1995 Agreement.

At the time this action was filed, plaintiffs did not think it was necessary to state such a claim because they thought their rights and interest were clear from the 1995 Agreement. Plaintiffs' proposed amendment brings all of plaintiffs' claims to the leases and cash award into this action where they can be decided once and for all.

For the foregoing reasons, plaintiffs request leave to file their First Amended Complaint.

DATED this 12th day of November, 2002.

DALTON & KELLEY

By 
Donald L. Dalton
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that I caused a true and correct copy of the within and foregoing "Memorandum in Support of Motion for Leave to File First Amended Complaint" to be mailed, postage prepaid, this 12th day of November, 2002 to:

A. John Davis, III
Pruitt, Gushee & Bachtell
Suite 1850, Beneficial Life Tower
Salt Lake City UT 84111-1495

Thomas R. Karrenberg
Anderson & Karrenberg
700 Bank One Tower
50 West Broadway
Salt Lake City UT 84101-2006

