

2004

Medisys Technologies, Inc., a Utah Corporation v.
Interstate Transfer Co., Brett Phillips, E. Carl
Anderson, William H. Morris, Marilyn Morris and
Barbara Larkins : Brief of Appellee

Utah Court of Appeals

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Michael D. Ward; Bleakley, Cypher, Parent, Warren & Quinn; Attorneys for Appellants.

Mark W. Dykes; Jennifer A. Brown; LeBoeuf. Lamb, Greene & McRae; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

MEDISYS TECHNOLOGIES, INC., a
Utah Corporation

Plaintiff/Appellants

vs.

INTERSTATE TRANSFER CO.,

Defendant

BRETT PHILLIPS, E. CARL
ANDERSON, WILLIAM H. MORRIS,
MARILYN MORRIS AND BARBARA
LARKINS,

Interveners/Appellees.

Case No. 20020817-CA

20040029-CA
District Case No. 990908251

Priority No. 15

BRIEF OF INTERVENERS/APPELLEES

**APPEAL FROM THE APRIL 2, 2001 AND DECEMBER 1, 2003 ORDERS
OF THE HONORABLE RONALD E. NEHRING, THIRD JUDICIAL
DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,**

Michael D. Ward, P43632
Bleakley, Cypher, Parent, Warren
& Quinn
120 Ionia Avenue, S.W., Suite 300
Grand Rapids, MI 49503
Telephone: (616) 234-0813
Facsimile: (616) 774-7016
Attorneys for Medisys Technologies, Inc.

Mark W. Dykes, #5709
Jennifer A. Brown, #9514
LeBoeuf, Lamb, Greene & MacRae
136 South Main Street, Suite 1000
Salt Lake City, UT 84101
Telephone: (801) 320-6700
Facsimile: (801) 774-7016
Attorneys for Intervenor and
Appellees

FILED
UTAH APPELLATE COURTS

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Facsimile: (616) 774-7016
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Mark W. Dykes, #5709
Jennifer A. Brown, #9514
LeBoeuf, Lamb, Greene & MacRae
136 South Main Street, Suite 1000
Salt Lake City, UT 84101
Telephone: (801) 320-6700
Facsimile: (801) 774-7016
Attorneys for Intervenors and
Appellees

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JURISDICTION

Intervenors (identified in the caption above) do not dispute the statement of jurisdiction made by appellant Medisys Technologies, Inc. ("Medisys").

STATEMENT OF THE ISSUES

1. Did the trial court err in awarding fees to the Intervenors in connection with their efforts to defeat a "wrongful" injunction within the meaning of Utah R. Civ.P. 65A(c)(2)?¹

Standard of Review: If a party defeats a wrongfully issued injunction, that party is entitled to fees and costs. *Green River Canal Co. v. Thayn*, 84 P.3d 1134 (Utah 2003). It thus appears to be an abuse of discretion not to make such an award.

2. Regardless whether Rule 65A(c)(2) applies here, did the trial court err in awarding attorney's fees and costs based on its own inherent powers, when Medisys failed to disclose critical facts when it obtained the injunction, and the trial court ruled that it never would have issued the injunction had it known the facts?

Standard of Review: The decision whether a litigant's behavior was sufficiently egregious to justify an award of fees under this standard is one of fact, reviewed for clear error. *Rohan v. Boseman*, 46 P.3d 753, 759 (Utah App. 2002).

¹A copy of Rule 65A appears as Exhibit A hereto.

3. Did the trial court abuse its discretion in awarding the amount of fees and costs at issue?

Standard of Review: Abuse of Discretion. *Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1188 (Utah 2002).

COURSE OF THE PROCEEDINGS

The Interveners held shares in Medisys. The Interveners sued Medisys' directors in Florida, alleging breaches of fiduciary duty. Medisys' directors caused Medisys to sue the Interveners in Louisiana, seeking to rescind the merger transaction pursuant to which the Interveners obtained their Medisys shares.

In aid of the Louisiana litigation, Medisys and its stock transfer agent, Interstate -- with no notice to Interveners -- filed a collusive lawsuit in the Third Judicial District Court for Salt Lake County, pursuant to which Medisys "sued" Interstate for an injunction enjoining Interstate from honoring any transfers of the Interveners' Medisys shares. Rather than contest the "lawsuit," Interstate immediately consented to entry of judgment, the result of which was an injunction -- of which no notice was given to the Interveners -- killing all sales of the Interveners' stock.

The Interveners learned of the injunction only when one of the them tried to sell shares and was refused. The Interveners ultimately succeeded in dissolving the injunction, and then moved for an award of fees and costs under Utah R. Civ.P.

65A(c)(2) because the injunction was wrongful. Relying both on Rule 65A(c)(2) and the court's inherent powers, the trial court awarded fees and costs, finding that Medisys had failed to disclose material facts in seeking the injunction, and that had it been apprised of the facts, the court would never have entered the injunction.

STATEMENT OF FACTS

I. The Interveners.

1. Intervener Brett J. Phillips was a director of Medisys from December 22, 1998 until May 10, 2000. *Rec.* at 26, ¶ 2 (Affidavit of Bret J. Phillips ("Phillips Aff.")).

2. At the time the injunction in this case issued, Phillips owned in excess of 3,350,000 shares of Medisys stock. *Id.* and *Rec.* at 29 - 33 (copies of Phillips' share certificates).

3. None of Phillips' stock had been cancelled when the injunction issued. *Phillips Aff.*, *Rec.* at 26, ¶ 2.

4. Intervener Carl Anderson was a director of Medisys from December 22, 1998 to May 10, 2000. *Rec.* at 37, ¶ 2 (Affidavit of Carl Anderson ("Anderson Aff.")).

5. At the time the injunction in this case issued, Anderson owned 4,795,489 shares of Medisys stock. *Id.* and *Rec.* at 43 - 49 (Anderson's share certificates).

6. None of Anderson's stock had been cancelled when the injunction issued. *Anderson Aff.*, *Rec.* at 37, ¶ 2.

7. Intervener William H. Morris was a director of Medisys from December 22, 1998 until May 10, 2000. *Rec.* at 50, ¶ 2 (Affidavit of William H. Morris ("Morris Aff.")).

8. At the time the injunction in this case issued, Morris, together with his wife Marilyn, owned 5,020,684 shares of Medisys stock. *Id.* and *Rec.* at 53 - 61 (Morris's share certificates).

9. None of Morris's stock had been cancelled when the injunction issued. *Morris Aff.*, *Rec.* at 50, ¶ 2.

10. At the time the injunction in this case issued, Medisys' stock was trading for about \$1.00 a share. *Rec.* at 28.

11. According to a Form 8-K which Medisys filed with the Securities and Exchange Commission, *Statement of Facts, infra*, ¶ 21, the trial court's injunction restrained the sale of 13,500,000 shares.

II. Prior Pending Litigation between the Interveners and Medisys.

12. At the time the injunction in this case issued, interveners Anderson, Phillips and Morris had filed an action in the United States District Court for the Middle District of Florida against the Medisys directors, alleging the commission of various improper acts in connection with their management of the company.

13. At the time the injunction in this case issued, Medisys' directors had caused Medisys to sue the Interveners in the United States District Court for the Middle District of Louisiana, seeking rescission of the merger between Medisys and Phillips Pharmatech, a company founded by the Interveners and merged into Medisys, pursuant to which Interveners had obtained their Medisys stock. *Rec.* at 165 (Louisiana complaint).

III. In Connection with the Louisiana Lawsuit, Medisys and Interstate Collude in Utah to Enjoin Interveners from Transferring Shares.

14. As it later explained in the Form 8-K that filed with the Securities and Exchange Commission, *Statement of Facts, infra*, ¶ 21, Medisys decided that it wanted, in connection with the Louisiana suit, to enjoin the Interveners from selling their Medisys shares pending resolution of that suit.

15. Yet Medisys did not seek an injunction against the Interveners in the Louisiana lawsuit: relying on the fact that a sale of stock cannot be completed until the stock transfer agent for the issuer (Medisys) registers the transfer of shares, Medisys convinced Interstate, Medisys' transfer agent (and a Utah company), not to honor any transfers of the Interveners' Medisys shares, thus effectively killing all sales.

16. To carry out this scheme, Medisys and Interstate -- giving no notice to the Interveners -- filed the following papers in the Third Judicial District Court, Salt Lake County, Utah, on June 6, 2000:

- (a) Medisys "sued" Interstate seeking to enjoin Interstate from registering the transfer of Interveners Medisys' shares, thus precluding Interveners from selling their Medisys stock. *Rec.* at 1. (Complaint).
- (b) Interstate answered the complaint and admitted everything, save for a few details denied on the lack of information and belief. *Rec.* at 9.
- (c) Medisys filed a motion for judgment on the pleadings, on the basis that Interstate had admitted all of the allegations. *Rec.* at 12.
- (d) Interstate responded that "Defendant does not intend to dispute any of the factual allegations of Plaintiff's Complaint, waives any further time for response and joins with Plaintiff to request a decision." *Rec.* at 14.

17. Based on these papers, on June 28, 2000, the trial court entered an injunction restraining Interstate from registering any transfer of the Interveners' Medisys shares. *Rec.* at 62 - 63. The court interlineated the order to reflect that Interstate consented to the relief sought. *Rec.* at 62.

IV. Medisys Confirms that the Utah Injunction was Directed Against the Interveners and was Part of the Louisiana Effort.

18. In its "complaint" against Interstate, Medisys alleged that "Plaintiff seeks an injunction to prevent the transfer of the Medisys Technologies, Inc. stock issued in the above alleged reorganization," and then identified the Interveners' stock certificates. *Rec.* at 4, ¶ 16.

19. Although it had thus identified the Interveners' shares as the target of its injunction, Medisys alleged in the complaint's very next paragraph that "this action and this Court's order does not and is not intended to have res adjudicata effect on present holders of the Medisys certificates and shares. *Rec.*, at 4, ¶ 17

20. The order which Medisys drafted for the trial court recited as follows:

Based on this Cour 's further finding that the shares for which transfer is being enjoined are restricted . . . and on the further holding of this Court that this injunction and these findings are not res adjudicata to the holder of shares, a minimum bond should be required

21. Yet the injunction operated directly against the Interveners by stopping all sales of their stock, a point Medisys made very clearly in a July 21, 2000 Form 8-K filed with the Securities and Exchange Commission, *Rec.* at 40 - 42,² wherein Medisys noted that the Interveners were indeed the target of the injunction, and that the injunction had been undertaken in connection with the Louisiana lawsuit:

In connection with the Company's March 16, 2000 [Louisiana] lawsuit, [Medisys] filed with the Third District Court, Salt Lake County, Utah, an action *seeking an injunction to prevent the sale and/or transfer of shares of the Company's common stock by various defendants in the Company's suit* and other parties. On June 28, 2000, the Utah Court issued an injunction and order enjoining from transfer approximately 13,500,000 shares of the Company's common stock. The Company believes that it is vital to the success of this suit *to prevent certain persons from selling and/or transferring shares prior to the resolution of the action. Pursuant to the Court's order,*

²Intervener Carl Anderson authenticated the 8-K. *Anderson Aff.*, *Rec.* at 39, ¶ 10.

the aforementioned shares are to be deemed “restricted securities” and all certificates representing said share (sic) shall bear an appropriate restricted legend. (emphasis added).

Rec. at 42.³ (A copy of the 8-K is also included as Exhibit B hereto).

22. Although Medisys was telling the SEC (and the investing public) that it was the Utah trial court who had ordered the Interveners' shares restricted, Medisys told the trial court in the Medisys complaint -- verified by Edward Sutherland, Medisys' president, *Rec.* at 6 -- that the shares were *already* restricted and indeed could not be sold at all:

As the shares issued in connection with the reorganization, the transfer of which is sought to be enjoined herein are restricted and bear a restrictive legend preventing their sale and transfer, any bond supporting this injunction should be minimal.

Rec. at 4, ¶ 18.

23. The shares, because they had not been registered with the SEC, indeed bore the standard "restricted" legend for unregistered shares.⁴ That legend did *not*

³The 8-K nowhere identifies the defendants in the Medisys Utah suit, leaving the clear, distinct, and wrong impression that Medisys had moved against the Interveners themselves in Utah and obtained relief.

⁴ "THE SECURITIES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AND MAY NOT BE SOLD, TRANSFERRED, ASSIGNED, PLEDGED OR HYPOTHECATED ABSENT AN EFFECTIVE REGISTRATION THEREOF UNDER SUCH ACT OR COMPLIANCE WITH AN AVAILABLE EXEMPTION FROM REGISTRATION. THE COMPANY MAY REFUSE TO AUTHORIZE ANY TRANSFER OF THE SECURITIES IN RELIANCE ON AN EXEMPTION FROM THE REGISTRATION UNTIL IT HAS

(continued . . .)

forbid the shares' sale, but instead -- as is the case with any unregistered shares -- required an exemption to apply.

24. The applicable exemption here is Rule 144 issued by the SEC under the 1933 Securities Act, 17 CFR 230.144. The Interveners are "affiliates" of Medisys as defined in Rule 144(a)(1) ("An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.").

25. Rule 144(e)(1)(i) permits an affiliate to sell, every 90 days, an amount of restricted shares that is not greater than "[o]ne percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer."

26. As Medisys and Interstate knew quite well, Interveners had sold stock under this exemption before, and had provided Interstate with Rule 144 opinions for these sales to proceed. *Phillips Aff.*, *Rec.* at 27, ¶ 4. An exemplar of such an opinion appears at *Rec.* at 35. *See also infra*, ¶¶ 53 - 55 (Medisys' president testified in Interveners' Florida litigation that he knew the Interveners' shares could be sold).

RECEIVED AN OPINION OF COUNSEL SATISFACTORY TO THE
COMPANY AND ITS COUNSEL. THAT SUCH REGISTRATION IS NOT
REQUIRED."

Rec. at 29.

27. Under Rule 144, had the trial court not issued its injunction, each Intervener could have sold approximately 540,000 shares of that Intervener's Medisys stock during any given 90 day period. *Phillips Aff.*, *Rec.* at 28, ¶ 8; *Anderson Aff.*, *Rec.* at 38, ¶ 8, *Morris Aff.*, *Rec.* at 51, ¶ 7.

V. The Interveners Learn of the Injunction and Immediately Seek to Intervene in the Utah Lawsuit.

28. Medisys did not notify any of the Interveners that it was going to seek an injunction restraining the Interveners' sales of shares. *Phillips Aff.*, *Rec.* at 26 - 27, ¶ 3; *Anderson Aff.*, *Rec.* at 37 - 38, ¶ 3; *Morris Aff.*, *Rec.* at 51, ¶ 3.

29. The Interveners first learned of the injunction when one of them tried to sell shares, and received back from Interstate not a confirmation, but instead from Interstate a faxed copy of the injunction, sent July 10, 2000 (the injunction had issued June 28). *Affidavit of Ronald Anderson*, *Rec.* at 67, ¶ 4; *Affidavit of Barbara Larkin*, *Rec.* at 25, ¶ 4.

30. When the Interveners realized that they had been enjoined from selling shares, they filed, on July 28, 2000, an emergency motion to intervene in the Utah action and to dissolve the injunction, together with supporting affidavits and evidence. *Rec.* at 23 - 138.

31. The trial court's clerk then called the Interveners' Utah counsel stating that the court had room on its calendar on August 2, 2000 to hear the emergency

motions. *Transcript of August 2, 2000 Hearing on Motion to Dissolve* ("August 2, 2000 Trans.") at 1, lns. 8 - 9.

32. Counsel for the Interveners and counsel for Interstate attended the hearing, but no one, including the court, could locate Medisys' local counsel. *Id.* at 1, lns. 12 - 15 at 2, lns. 6 - 18.

33. In their motion to dissolve the injunction, Interveners argued that the case was a sham.

34. Medisys rejoined in response, "Proposed interveners have complained that there was collusion between Plaintiff and Defendant. So what?" *Memorandum in Response to Motion to Dissolve Injunction, Rec.* at 150.

VI. Once the Interveners Became Parties, the Trial Court Treated the Injunction as an Ex Parte Temporary Restraining Order Against them.

35. At the August 2 hearing, the trial court noted that while Medisys and Interstate had stipulated to the relief sought, the Interveners' claim put matters in a new light:

This order is entirely appropriate, and it is durable. This is a stipulated temporary restraining order between these parties whose names appear on the caption. Nothing wrong with this. This is fine. It didn't have to dissolve with ten days. It could exist in perpetuity, and no one would complain, and nobody on the fifth floor, given the opportunity, would disturb it.

It's not until you present a claim that I recognize for intervention that any kind of problem arises

August 2, 2000 Trans. at 6, lns. 11 - 19.

36. Once the Interveners were in the case, the order unquestionably became an ex parte TRO against them:

More likely than not, I'm going to grant the motion to intervene. Here's the practical consequence of that. It is that the Interveners are going to be parties defendant who are subject to an ex-parte TRO. What that means is that they're in a position where they can request a preliminary injunction hearing, or a hearing on the TRO, within 48 hours. So that is the right, I guess, that I'm recognizing here this afternoon and the way I'm treating this.

August 2, 2000 Trans. at 5, lns. 5 - 13.

37. The trial court set August 4 as the hearing date for the Interveners' motion to dissolve the TRO. *See also id.* at 7, lns. 3 - 5 (noting that if plaintiff's counsel had a problem with a hearing on two days' notice, "well, quite frankly it kind of goes with the territory of ex-parte temporary restraining orders.")

38. The court specifically noted that an evidentiary hearing would be required, and allotted two and a half hours. *August 2, 2000 Trans.* at 7, lns. 14 - 20. *See also id.* at 7, ln. 17 (Interstate's counsel agreeing that hearing would be evidentiary).

39. This put the Interveners in a bind, because the Interveners' chief argument was that the Utah injunction was a subterfuge engaged in by Medisys to avoid having to litigate the injunction issues directly with the Interveners in

Louisiana, and thus that the injunction should be immediately dissolved and Medisys directed to seek relief, if at all, in Louisiana.

40. The trial court acknowledged this problem, but could do little to assuage it:

You're facing a dilemma because you think that this matter ought to be heard in Louisiana, and you don't want to assemble witnesses and prepare a case for Friday in Salt Lake City, something that I respect. And here I'm speculating about what you're going to tell me because I don't want you to tell me your position on this because Leedy's not here.

Mr. Dykes: Right.

The Court: Without him, I don't want to weigh in. My point is, you'd better put chips on both the red and the black, and you'd better be ready to cover both of those on Friday. And for all I know, I may say go to Louisiana. So you'd better explain to your witnesses that they may be here for naught, but on the other hand, we may end up having a hearing.

August 2, 2000 Trans. at 8, lns. 10 - 23.

41. The parties, Interveners (and Medisys) included, thus had no choice but to get ready for a full evidentiary hearing on August 4. Although the record of appearances does not reflect his attendance, *August 4, 2000 Transcript*, the Interveners' lead counsel (Mr. Spencer) flew in for the hearing. Mr. Dykes, the Interveners' local counsel, appeared as well. Two of the Interveners, Carl Anderson and William Morris, were ready to testify.

42. Medisys' lead counsel (Mr. Ward) flew in with Medisys' witnesses, including Mr. Sutherland. Medisys' local counsel (Mr. Leedy) also attended.

43. Interveners' issued a subpoena to Medisys' accountants (after the Court granted Interveners' emergency motion to shorten time for a response, *Rec.* at 145), exhibits were arranged, and general trial preparation undertaken.

44. Instead of holding the anticipated evidentiary hearing, however, the trial court took oral argument from the parties on whether the issues then at bar should be heard in Louisiana. Transcript of August 4, 2000 Hearing ("*August 4 Trans.*"), *passim*.

45. At the conclusion of the August 4 hearing, the trial court continued the injunction for 10 days, and directed Medisys, if it wished further relief, to seek an injunction against the Interveners in the Louisiana action. *August 4 Trans.* at 17, lns. 20 - 24.

46. Medisys did not obtain a Louisiana injunction within the 10 day period, whereupon the trial court granted a brief extension.

47. Although the court did not execute the formal order directing the same until September 11, 2000, *Rec.* at 238, the court ultimately ordered in open court that the injunction would dissolve permanently on August 22, 2000.

VII. The Florida Testimony.

48. On September 7, 2000, *Rec.* at 225, after the injunction had dissolved, Medisys filed a motion to release the \$5,000 bond, arguing that the Interveners had suffered no damage from the injunction.

49. Interveners objected, *Rec.* at 243, arguing that they were going to file a motion for fees and costs from being wrongfully enjoined, and that the bond should remain in place pending resolution of the same.

50. As noted earlier, the Interveners had filed a lawsuit in Florida against Medisys' officers alleging misdeeds with the company.

51. An injunction hearing came up in the Florida case in the middle of the injunction battle in Utah. Although Medisys' officers never testified in Utah, they did testify, in response to the Interveners' counsel's questions, in Florida about the Utah injunction.

52. In their objection to release of the bond, the Interveners were able to provide this testimony to the Utah court as a preview of their argument for fees.

53. As the Interveners showed in that objection, Mr. Sutherland of Medisys testified in Florida that he knew the Interveners' shares could be sold in private under Rule 144. *Rec.* at 246 - 247.⁵

⁵The record citations contained above are to the briefs where Interveners quoted the Florida testimony. The Florida testimony itself appears at *Rec.* 253 - 269
(continued . . .)

54. Mr. Sutherland said that he knew little about Rule 144, yet Mr. Kiesel, a Medisys lawyer, testified that Mr. Sutherland had himself sold shares under Rule 144. *Rec.* at 247 n.3.

55. While Medisys told the trial court below that the Interveners' shares had been "cancelled," and an injunction was needed so that Medisys would not have to honor the sale of dead shares, Mr. Sutherland testified in Florida that the shares had not been cancelled "in commerce." *Rec.* at 248.

56. Mr. Kiesel confirmed that no court had adjudged the shares to be cancelled. *Rec.* at 249.

57. The Florida court asked Mr. Sutherland how Medisys could tell the Utah court that a bond of only \$5,000 was required for the Utah injunction, when Medisys knew that the Interveners had sold, and could sell, stock in excess of that amount, and asked further whether Mr. Sutherland believed that the Utah court had been misled. *Rec.* at 247.

58. Mr. Sutherland opined that the Utah court had not been misled. *Id.*

VIII. Medisys' Louisiana Case is Dismissed because of a Forum Selection Clause; Medisys Refiles in the United States District Court for the District of Utah and Loses its Motion for a Preliminary Injunction.

("Transcript of Preliminary Injunction Hearing, August 17, 2000, E. Carl Anderson v. Kiesel, United States District Court for the Middle District of Florida, Case No. 8:00-CV-905-4-24F").

59. While all this was going on in Utah, the Interveners were arguing in Louisiana that Medisys' lawsuit against the Interveners in that state had to be dismissed, because the merger agreement pursuant to which the Interveners obtained the Medisys shares had a choice of law provision requiring suit to be brought in Utah.

60. The Louisiana court agreed, and dismissed the Louisiana case without prejudice. *Rec.* at 298.

61. Medisys then refiled its case against the Interveners, this time in the United States District Court for the District of Utah.

62. While Medisys had represented to the Utah state court, in the complaint initiating this action, that Interstate could not be sued in Louisiana because jurisdiction over it did not obtain there, *Rec.* at 3, § 13,⁶ Medisys did *not* join Interstate to its Utah federal court suit, where jurisdiction indisputably existed, but instead sued the Interveners directly.

63. In its new Utah federal court suit, Medisys sought an injunction against Interveners' sale of stock. The Interveners stipulated to a brief injunction so that the parties could focus their attention on preparing for an evidentiary

⁶A highly dubious proposition, given that Interstate was Medisys' agent for the transfer of stock, and Medisys was subject to Louisiana's jurisdiction.

hearing (held September 10 and 11, *Rec.* at 380) on Medisys' motion for a preliminary injunction.

64. At the conclusion of that hearing, the Utah federal court denied Medisys' motion for a preliminary injunction and dissolved the injunction stopping the Interveners' sales of shares, finding, *Rec.* at 380, that Medisys had not shown a substantial likelihood that it would prevail on the merits.

IX. Interveners File a Motion for Fees and Costs; the Trial Court Rules that the Injunction was Wrongful.

65. On October 12, 2000, the Interveners filed a motion for fees and costs incurred in their efforts to dissolve the Utah injunction. *Rec.* at 310. The matter was extensively briefed.

66. Therein, Interveners noted that:

- (a) The lawsuit was a sham, undertaken by Medisys and Interstate in Utah to avoid going through the proper procedures for seeking injunctive relief against the Interveners;
- (b) The Medisys Florida testimony -- coupled with the 8-K -- showed that Medisys knew the Interveners were entitled to sell their shares, and that the shares had not in fact been "cancelled";
- (c) Medisys claimed it could not sue Interstate in the Louisiana action because jurisdiction did not obtain there, yet Medisys did not sue Interstate when it brought its federal case in Utah (where jurisdiction indisputably existed), thus emphasizing that Interstate was a straw-man;
- (d) When the actual merits between Medisys and the Interveners were put in issue before the Utah federal district court, the court found that

Medisys had not shown a substantial likelihood of success on the merits of Medisys' substantive claims and denied relief.

67. Oral argument on the motion for fees was held on January 19, 2001, at the conclusion of which the trial court ruled:

[W]as the injunction wrongful? Answer, yes, the injunction was wrongful. It was a collusive action. The transfer agent had, as we're coming to the last hours of the Clinton administration we can use these for the last time, had no dog in this fight, and it had no interest to serve other than the interest of Medisys in my view. And that there is no interpretation of the intent of the complaint available other than the interpretation that the interveners were the intended target of the relief. Do the interveners have available to them the opportunity to seek and recover relief for wrongful injunction? Answer, yes. If for no other reason than the general equitable powers of a Court that flow from injunction relief authority and relief general.

Would I having been armed with what I know now about the character of the stock, it's (sic) status as 144 stock, the nature of the Louisiana action, have granted this injunction? The short answer is no way. It never would happen. And based on that finding I am granting the motion by the interveners to recover attorney's fees.

Transcript of January 19, 2001 Hearing ("January 19 Trans.") at 36, lns. 5 - 23.

X. The Trial Court Grants Medisys the Opportunity for an Evidentiary Hearing on Fees; Medisys Declines.

68. At the conclusion of the January 19, 2001 hearing, the trial court explicitly recognized, *January 19 Trans. at 37, lns. 5 - 8*, a party's right under Utah law to request an evidentiary hearing on the amount of fees to be awarded, and thus extended to Medisys "ten days with which, in which to file papers challenging

reasonableness and, if they so desire, to include within those papers a request for hearing." *January 19 Trans.* at 37, lns. 9 - 12.

69. The court's subsequent order, issued, February 6, 2001, *Rec.* at 456, ¶ 3, thus provided that:

Within 10 days of January 19, 2001, Medisys may file an objection to the amount of fees requested by the Interveners. Medisys may request, in such objection, if one is file, an evidentiary hearing on the reasonableness of the fees requested.

70. In its subsequent "Supplemental Brief on the Reasonableness of Interveners' Request for Fees," *Rec.* at 430, Medisys acknowledged the trial court's prior instruction that objections were to be filed within ten days, nowhere requested a hearing, and instead relied on the affidavit of Mr. Ward, Medisys' counsel, to rebut the amount of fees sought.

71. Interveners noted on the first page of their response in support of their motion for fees, *Rec.* at 443, that Medisys had declined the trial court's invitation to request an evidentiary hearing, that the Interveners likewise were not requesting a hearing, and thus the matter could be resolved on the papers.

72. Medisys said nothing in response.

XI. The Amount of Fees Sought.

73. According to the Medisys 8-K, the injunction restrained the sale of 13,500,000 shares of stock.

74. In connection with -- on an expedited basis -- learning the facts of the case, drafting the motion to intervene, complaint in intervention, motion and supporting memorandum (a complex document) to dissolve the injunction, and in preparation for what the court had said could be a serious evidentiary hearing, Mr. Dykes applied, *Rec.* at 383, for a total of 73.90 hours of work at \$240.00 per hour for a total of \$17,736. All time was itemized. *Id.* at 384 - 85. (Medisys did not challenge counsels' hourly rates).

75. Mr. Spencer applied for 65.55 hours at \$200 an hour for a total of \$13,110, and, as did Mr. Dykes, submitted an affidavit and itemized time. *Rec.* at 386 - 388 (affidavit), at 389 - 90 (time charges). Mr. Spencer's work was likewise informed by a sense of urgency, as shown by his time entries, given that a response to an ex parte TRO was at issue.

76. Because the original affidavits of Messrs. Dykes and Spencer were done before the January 19 hearing on the motion for fees was held, counsel filed, after the trial court determined to award fees, supplemental affidavits detailing the time spent preparing for the fee hearing itself. *Rec.* at 459.

77. Mr. Dykes itemized 10.90 hours, for a total of \$2,616, spent on the fee hearing. *Rec.* at 471 - 72.

78. Mr. Spencer itemized 44.80 hours (including travel time) at \$200.00 for a total of 8,960.00, plus travel expenses (which the trial court ultimately disallowed). *Rec.* at 469 - 70.

79. In his supplemental affidavit, Mr. Spencer also responded to the objections made by Medisys' counsel, Mr. Ward, to the amount of fees sought in the Interveners' original fee application. *Rec.* at 462 - 68.

XII. The Court's Initial Fee Award and Subsequent Clarification.

80. In an April 2, 2001 minute ruling, Exhibit C hereto, the trial court issued an award:

Intervenor's (sic) Motion for Award of Fees was presented to me for decision pursuant to a Notice to Submit filed on March 8, 2001. I have previously determined that the intervenor is entitled to an award of attorney's fees in connection with its defense of the above-captioned action for injunctive relief. I now find that the amount of attorney's fees sought by the intervenor, \$30,846, is reasonable in light of the complexity of the litigation. I further find the hourly rates charged by intervenor's counsel to be reasonable. I reject plaintiff's contention that the activities of Mr. Dykes and Mr. Spencer were excessive in light of the issues presented. Lastly, I reject the contention that the fee application was inflated by double billing.

Rec. at 475.

81. This minute ruling, however, did not refer one way or the other to the Intervenor's supplemental affidavits, in which they itemized the amount of time

spent in connection with the final work done on the fee issue, including the hearing.

82. Interveners thus moved, *Rec.* at 478, for clarification of the fee award, to find out whether the trial court had considered and denied the request for the remaining fees, or had simply overlooked that request.

83. Medisys, which by then had new local counsel, *Rec.* at 473, filed a "Response to Interveners' Motion to Clarify Fee Award," *Rec.* at 497, in which Medisys not only opposed the award for fees expended in connection with the fee hearing, but further argued -- despite the fact that Medisys had already had its opportunity to object to amounts and the trial court had already ruled on the initial fee application -- that *no* fees should be awarded for anything.

84. In their "Reply Memorandum of Defendant Interveners in Support of Motion for Clarification," *Rec.* at 524, Interveners pointed out that Medisys' objection was really a disguised motion for reconsideration of the court's initial fee award, that Medisys had already made its objections, had lost, and had offered no reason for reconsidering what had already been decided.

85. In a June 18, 2001 minute entry, Exhibit D hereto, the trial court ruled:

Intervenor's Motion for Clarification was presented to me for decision pursuant to a Notice to Submit filed on May 10, 2001. My review of the file confirms the intervenor's observation that I overlooked the intervenor's application for fees associated with

intervenor's application for a fee award. I reject the argument advanced by Medisys that Rule 65A does not authorize fee awards of this nature. I decline, however, to award fees associated with travel time and travel expenses.

I decline to accept Medisys' invitation to revisit my original fee determination.

Intervenor's counsel shall prepare an Order consistent with this Minute Entry.

Rec. at 535.

86. Interveners subtracted the disallowed fees and costs from the amount sought, and submitted an order for \$36,321.80, which the court signed. *Rec.* at 557.

XIII. The First Appeal.

87. Medisys then applied to the trial court for approval of a supersedeas bond in the amount of fees awarded (\$36,321.80).

88. The Interveners timely objected, *Rec.* at 574, on the grounds, *inter alia*, that the bond did not include amounts for fees to be incurred upon appeal.

89. Although the Interveners' objection to the bond was timely, the trial court signed an order approving the bond before the Interveners' objection was filed. *Rec.* at 548.

90. The Interveners moved for reconsideration, *Rec.* at 579, on the grounds that the trial court had approved the bond before the Interveners' objection was ruled upon.

91. The trial court then issued a minute ruling acknowledging that it had approved the bond before Interveners' time to object had expired, and directing Medisys to increase the bond to the amount of \$59,000 to reflect attorney's fees on appeal.

92. Medisys complied, *Rec.* at 616, and then appealed the fee order.

93. Intervene's moved to dismiss the appeal on the grounds that the trial court had never dismissed the underlying case, and that the fee award could not be appealed until the case was over.

94. Medisys (who had retained new local counsel again), agreed that the appeal filed by prior counsel was premature, and this Court then dismissed.

95. On December 1, 2003, the Hon. Anthony Quinn, who had taken over the case after Judge Nehring's appointment to the Utah Supreme Court, dismissed the underlying case without prejudice. *Rec.* at 684.

96. Medisys then appealed.

SUMMARY OF ARGUMENTS

Medisys obtained an ex parte temporary restraining order, the effect of which was to restrain the Interveners from selling Medisys' shares. The Interveners successfully moved to dissolve that order, and then sought fees.

The trial court properly found that Medisys had failed to disclose material facts when it sought the injunction, that the injunction was wrongful, and that the

court would award fees and costs to the Interveners, both under Utah Rule Civ. P. 65A(c) and pursuant to the court's inherent power.

Interveners supported their fee applications with itemized affidavits. The trial court properly exercised its discretion in considering the amounts awarded.

ARGUMENT

I.

Standards Governing Fees and Costs.

"The Utah Rules of Civil Procedure allow a wrongfully restrained party to recover attorney fees incurred in connection with a temporary restraining order or injunction." *Green River Canal Co. v. Thayn*, 84 P.3d 1134 (Utah 2003) (citing Utah R.Civ.P. 65A(c)(2)). Although the enjoined party is not entitled "to fees incurred in litigating the underlying lawsuit associated with an injunction," *Tholen v. Sandy City*, 849 P.2d 592, 597 (Utah App. 1993), here, the entire case was the injunction.

Moreover,

The amount of attorney fees and expenses recovered may not be limited by the bond posted, as Rule 65A(c) (2) expressly mandates: "The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order . . . or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined."

Green River Canal Co., 84 P.3d at 1148 n. 11.

An injunction is wrongful "if is finally determined that the applicant was not entitled to the injunction." *Mountain States Tel & Tel. v. Atkin, Wright & Mills*, 681 P.2d 1258, 1262 (Utah 1984). "[T]he test is not whether the injunction is erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented all of the facts." *Knappet v. Locke*, 600 P.2d 1257, 1259 (Wash. 1979) (internal citation omitted). *See also Tholen v. Sandy City, supra*, 849 P.2d at 597 (citing *Knappet* approvingly). The trial court made those precise findings:

[W]as the injunction wrongful? Answer, yes, the injunction was wrongful. It was a collusive action.⁷ The transfer agent had, as we're coming to the last hours of the Clinton administration we can use these for the last time, had no dog in this fight, and it had no interest to serve other than the interest of Medisys in my view

....

Would I having been armed with what I know now about the character of the stock, it's (sic) status as 144 stock, the nature of the Louisiana action, have granted this injunction? The short answer is no way. It never would happen. And based on that finding I am granting the motion by the interveners to recover attorney's fees.

January 19 Tran., at 36.

⁷As we have seen, Medisys agrees ("Proposed interveners have complained that there was collusion between Plaintiff and Defendant. So what?"). *Rec.* at 150. One big "so what" is that the "lawsuit" was never justiciable to begin with. *See Gould v. Control Laser Corp.*, 866 F.2d 1391, 1394 (Fed. Cir. 1989) ("The fact that seemingly adverse parties appear on two sides of an action is not controlling. If one party is actually and formally in control of the other party, adjudication must be refused.").

II.

Rule 65A Governed these Proceedings.

According to Medisys, the injunction at bar -- as between Medisys and Interstate, both of whom stipulated to the relief sought -- was a final judgment on the merits, to which Rule 65A (which governs preliminary relief) was irrelevant. *Medisys' Brief on Appeal* at 10 - 12. Thus, Medisys concludes, Rule 65A did not provide a basis to award fees and costs. That argument comes at the expense of what actually happened in this case.

Medisys and the Interveners were embroiled in litigation in Louisiana. Medisys -- as it said in the 8-K that it filed with the Securities and Exchange Commission -- wanted, in connection with the Louisiana suit, to stop the Interveners from selling shares. But instead of seeking preliminary injunctive relief against the Interveners in Louisiana -- a process that most assuredly would have been governed by Fed.R.Civ.P. 65(a), which is identical to Utah R. Civ.P. 65A -- Medisys and Interstate filed a collusive lawsuit in Utah, stipulating to an injunction against the Interveners but never giving them notice of the same.⁸

⁸Medisys of course knew how to find the Interveners, yet gave no notice to them that it was seeking a Utah injunction stopping all sales of the Interveners' stock. This plainly violated Utah R.Civ.P. 65A(b)(1):

No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from
(continued . . .)

When Medisys' Louisiana suit was dismissed, and Medisys refiled the case in the United States District Court for the District of Utah, Medisys did not even join Interstate, but instead sought injunctive relief directly against the Interveners under Fed.R.Civ.P. 65.

In light of the facts, it is thus indeed difficult to see how Medisys can advance the following argument:

Interveners were not a party when the injunction issued, and were not actually "restrained or enjoined" themselves, as Rule 65A(c)(2) requires. The injunction prevented the transfer agent, Interstate Transfer, from registering transfers of certain certificates. The shares owned by Interveners could still be sold by them. If Interveners prevailed in their collateral litigation with Medisys, or obtained appropriate interim relief in that litigation, Medisys, as issuer of the shares, could have been required to order its transfer agent to register the transfer.

Medisys' Brief on Appeal, at 13.⁹

specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

⁹In its "Conditional Consent to Intervention and Request for Hearing," *Rec.* at 20, Medisys made a similar argument:

The case is over. Proposed interveners' rights are specifically not affected by the Injunction. It was envisioned that that proposed interveners would commence a new action to compel transfer of their

(continued . . .)

The Interveners *were* enjoined. The trial court so found ("there is no interpretation of the intent of the complaint available other than the interpretation that the interveners were the intended target of the relief"). As Medisys stated -- indeed, *promoted* -- in its 8-K filed with the Securities and Exchange Commission, the Interveners' shares could *not* be sold once the injunction issued, which was the very goal of the enterprise from the outset.

The only reason the Interveners "were not a party when the injunction issued" is because Medisys, in its desire to avoid the rigors of proper injunction practice in Louisiana, did not join them.¹⁰ Medisys is estopped from relying on its own subterfuge to now claim that the rules it sought to skirt do not apply.

stock wherein this action could not be raised as *res adjudicata*.

The Interveners' rights *were* affected by the injunction. As Medisys itself told the SEC, that was the whole point. Medisys' purported "remedy" -- that the Interveners could sue Medisys somewhere else to force it to tell Interstate to transfer shares -- defies reason.

¹⁰Medisys continually implied below that the Interveners were hypocritical in arguing to the Utah court that it should not have issued the injunction, while at the same time arguing in Louisiana that the Louisiana lawsuit should have been brought in Utah because of the forum clause. The point, of course, is that no matter *where* the federal court case was pending, Medisys improperly brought a *separate* action in Utah state court seeking the entry of an *ex parte* TRO against the Interveners.

The situation is no different than it would have been had Medisys originally filed its federal court action against the Interveners in the United States District Court for the District of Utah, and then walked over one block to the Matheson
(continued . . .)

III.

Even if Rule 65A did not Apply, the Court Regardless had the Inherent Power to Award Fees.

Even "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interests of justice and equity." *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 782 (Utah 1994). *See also Rohan v. Boseman*, 46 P.3d 753, 759 (Utah App. 2002) (citing *Stewart* and affirming award of fees and costs based on trial court's "'inherent authority to govern judicial proceedings and make appropriate sanctions'"")

Stewart and its progeny permit an award of fees not only in "private attorney general actions," but in a host of other contexts involving untoward conduct. *Rohan*, 46 P.3d at 755.¹¹ The trial court clearly understood this, taking care to note in its oral ruling that it was invoking the "general equitable powers of a Court that flow from injunction relief authority and relief general."

And the trial court just as clearly made known its displeasure at what had happened, itemizing the fact that the "lawsuit" was collusive, with Interstate being

Courthouse to file its state court "lawsuit" against Interstate, seeking -- without notice to them -- to enjoin the Interveners from selling shares in aid of the federal action. Indeed, that example perhaps puts into even clearer focus the impropriety of Medisys' actions.

¹¹*Medisys Brief* at 10. *Faust v. KAI Tech., Inc.*, 15 P.3d 1266 (Utah App. 2000).

a straw-man defendant, that Medisys had failed to disclose that the stock could be sold under Rule 144 (contrary to Medisys' claim in the complaint that the court's order would have no real effect because the stock allegedly could not be transferred), and that Medisys had further failed to disclose that the injunction was an end-around the Louisiana litigation. These are ample grounds upon which the court could exercise its inherent equitable powers to award fees.

IV.

Medisys Declined the Trial Court's Invitation to an Evidentiary Hearing on the Amount of Fees Awarded, and Cannot be Heard to Complain Now.

Medisys assigns "reversible error" because instead of allegedly "weighing" the affidavits on the amount of fees to be awarded, the trial court "should have held an evidentiary hearing to resolve the conflicting factual assertions as to the reasonableness and necessity of fees." *Medisys Brief* at 15. Medisys was *given* the chance for a hearing and *declined* it, *Statement of Facts* ¶¶ 68 - 72, deciding instead to proceed solely on the basis of affidavits. Medisys cannot assign error when it expressly sent regrets to the trial court's invitation (Intervenors neither believe nor concede that an evidentiary hearing would have made any difference).

V.

The Trial Court did not Abuse its Discretion in the Amount of Fees Awarded.

The trial court has broad discretion in determining what constitutes a reasonable attorney fee once it has been determined that a party is legally entitled to a fee award, and we will not reverse a trial court's determination of whether a fee is reasonable absent an abuse of discretion. In addition, we review a trial court's calculation of reasonable attorney fees for an abuse of discretion.

Bakowski v. Mountain States Steel, Inc., 52 P.3d 1179, 1188 (Utah 2002). *See also Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1998) (once a trial court decides that a fee is reasonable, "it commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled.").

Although the precise issue addressed by the court (whether expert expenses are awardable) is not at issue here, the Utah Supreme Court has recently suggested that Rule 65(A)(c) be given an expansive reading:

We see no rationale for allowing recovery of attorney fees but denying other litigation expenses. The use of costs and damages in Rule 65A(c) has always been interpreted more broadly than traditional limitations on the term "costs." Like attorney fees, these were costs incurred as a direct result of a wrongful enjoinder. We therefore find that Rule 65A(c) is sufficiently broad to include recovery of the litigation expenses sought by GRCC.

Green River Canal Co. v. Thayn, 84 P.3d 1134, 1148.

Counsel itemized the time spent responding to the crises that Medisys and Interstate created. As set forth in counsels' affidavits, a number of pleadings and memoranda had to be drafted in short order. *Statement of Facts*, ¶¶ 74 - 79. Even

though the August 4 hearing ended up taking less than one hour and was handled solely on the basis of oral argument, counsel was expressly told by the trial court on August 2 to make full preparations for an evidentiary hearing on August 4 just in case. *Statement of Facts*, ¶ 40. This was a tremendous undertaking. Counsel for both sides had to prepare their witnesses. Mr. Ward, Medisys' lead counsel, appeared at the August 4 hearing, as did Mr. Leedy, Medisys' local counsel. Mr. Spencer, Interveners' lead counsel, appeared, as did Mr. Dykes.

Medisys did not challenge below the hourly rates at issue, but only the hours spent. The trial court -- which had first-hand experience with the case -- exercised proper care in reviewing these amounts:

I now find that the amount of attorney's fees sought by the intervenor, \$30,846, is reasonable in light of the complexity of the litigation. I further find the hourly rates charged by intervenor's counsel to be reasonable. I reject plaintiff's contention that the activities of Mr. Dykes and Mr. Spencer were excessive in light of the issues presented. Lastly, I reject the contention that the fee application was inflated by double billing.

VI.

The Trial Court Properly Awarded the Interveners their Fees Expended on the Fee Award Itself.

Fee awards properly include fees expended in preparing the underlying fee request. *Brown v. Richards & Co.*, 978 P.2d 470, 476 (Utah App. 1999). *See also Salmon v. Davis County*, 916 P.2d 890 (1996) (general discussion of issue and

cases).¹² Contrary to Medisys' claim, *Medisys' Brief on Appeal* at 15 - 16, there is no requirement that the underlying statute or doctrine permit such an award. Indeed, the "fees for fee" rule is intended to fill *gaps* in fee statutes, in order to ensure that the full purpose of a fee statute is thereby realized. *Salmon*, 916 P.2d at 895 - 96 (citing this Court's opinion in *James Constructors v. Salt Lake City*, 888 P.2d 665, 674 (Utah App. 1994)).¹³

The trial court (after acknowledging, *Statement of Facts*, ¶ 85, that it had initially overlooking that portion of the Interveners' fee request) awarded the Interveners a portion of the fees they incurred in preparing their papers for a fee award. In its award, the trial court declined to award fees for Mr. Spencer's travel time or to award Mr. Spencer's travel expenses. Interveners do not challenge that ruling now. The award of fees for fees was proper.

¹²*Accord*, *Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986) (addressing issue of "Fees for Fee Motions" in 1983 case and affirming award for time spent "for counsel's work on his own fee petitions."); *General Federation of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129 (D.C. App. 1988) (addressing issue in context of bad faith litigation; "The law is well established that, when fees are available to the prevailing party, that party may also be awarded fees on fees, i.e., the reasonable expenses incurred in the recovery of its original costs and fees.").

¹³If the underlying statute or doctrine permitting an award of fees also explicitly allowed "fees for fees," there would of course be no need to litigate the issue of whether such fees are awardable.

VII.

Intervenors are Entitled to their Fees on Appeal

A party that is awarded fees "pursuant to a contract or statute" is also entitled to fees on appeal if that party succeeds. *Zoll & Branch, P.C. v. Asay*, 932 P.2d 592, 596 (Utah 1997). *See also Brown v. Richards*, 840 P.2d 143, 156 (Utah App. 1993) ("The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal."). If Intervenors prevail on appeal, they are entitled to an award of fees expended in that effort.

CONCLUSION

The trial court's award of fees and costs should be affirmed, and this case remanded for a determination of the Intervenors' attorney's fees on appeal.

DATED this 12th day of July, 2004

LEBOEUF, LAMB, GREENE & MACRAE, LLP

By: 

Mark W. Dykes

Counsel for Intervenors/Appellees

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing were served this 12th day of July, 2004, by placing same in the United States first class mail, postage prepaid, addressed to the following:

David W. Scofield
Peters Scofield Price
340 Broadway Centre
111 East Broadway
Salt Lake City, UT 84111

John Michael Coombs
Mabey & Coombs, L.C.
3098 South Highland Drive, Suite 323
Salt Lake City, UT 84106-3085

A handwritten signature in cursive script, reading "Marilyn Oston", written over a horizontal line.

EXHIBIT A

(c)(3) *Jurisdiction over surety.* A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) *Form and scope.* Every restraining order and order granting an injunction shall set forth the reasons for its issuance. It shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. It shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of the order. If a restraining order is granted without notice to the party restrained, it shall state the reasons justifying the court's decision to proceed without notice.

(e) *Grounds.* A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3) The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f) *Domestic relations cases.* Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.

(Amended effective September 1, 1991.)

Advisory Committee Note. — Rule 65A has been materially revised from the former rule. Some of the changes in the rule are the result of suggestions from Utah's judges, all of whom were asked for their comments on specific ways to improve injunction practice. Although most paragraphs have been changed, there are two major revisions. First, under paragraph (b) of the present rule, the court now has explicit authority to order the consolidation of trial on the merits with the hearing on a preliminary injunction. Second, the grounds for the issuance of temporary restraining orders and preliminary injunctions have been modernized and clarified in paragraph (e). Portions of the rule have been reorganized for purposes of clarity.

Paragraph (a). Subparagraph (a)(1) is identical to paragraph (a) of the former rule. It is also identical to the corresponding subparagraph in Rule 65, *Federal Rules of Civil Procedure*. Subparagraph (a)(2) is entirely new to the Utah rules. It is borrowed from subparagraph (a)(2) of the federal rule. It allows the court, in its discretion, to adjudicate the entire case at the time of the preliminary injunction hearing. If the court decides not to consolidate the trial on the merits with the preliminary injunction hearing, admissible evidence received at the preliminary injunction hearing nevertheless becomes part of the trial record and need not be introduced again.

Paragraph (b). This paragraph is similar to paragraph (b) of the former rule. It has been reorganized for clarity and has been modernized in other respects. Subparagraph (1) prohibits the issuance of a temporary restraining order unless two conditions are met. First, as in the former rule, the record must disclose that irreparable injury, loss, or damage will result if the court does not intervene. Second, the applicant or the applicant's attorney must provide written certification of any effort to give notice and the reasons for which notice should not be required. The latter requirement is new. The language in subparagraphs (3) and (4) has been modernized and clarified.

Paragraph (c). This paragraph has been revised to reflect developments in the case law and a new rule in this state on damages for wrongfully issued injunctions. Subparagraph (1) makes it clear that the court may decline to require security if it appears that none of the parties will suffer expense or damages from a wrongful temporary restraining order or preliminary injunction, or if, in the particular case, there is some other substantial reason for dispensing with the requirement of security. See *Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1286-87 (Utah 1978). Otherwise, the court should require security in an appropriate amount. Subparagraph (2), which is new,

Rule 65A. Injunctions.

(a) *Preliminary injunctions.*

(a)(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(a)(2) *Consolidation of hearing.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) *Temporary restraining orders.*

(b)(1) *Notice.* No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(b)(2) *Form of order.* Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(b)(3) *Priority of hearing.* If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.

(b)(4) *Dissolution or modification.* On two days' notice to the party who obtained the temporary restraining order without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) *Security.*

(c)(1) *Requirement.* The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(c)(2) *Amount not a limitation.* The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully

EXHIBIT B

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 8-K

CURRENT REPORT

**PURSUANT TO SECTION 13 OR 15(d) OF THE
SECURITIES EXCHANGE ACT OF 1934**

Date of Report: June 28, 2000

(Date of earliest event reported)

MEDISYS TECHNOLOGIES, INC.

(Exact name of Registrant as specified in charter)

Utah 0-21441 72-1216734

(State or other juris- (Commission (IRS Employer

diction of incorporation) File No.) Identification No.)

144 Napoleon Street, Baton Rouge, Louisiana 70802

(Address of Principal Executive Offices) (Zip Code)

Registrant's telephone no., including area code: (225) 343-8022

N/A

(Former Name or Former Address, if Changed Since Last Report)

Item 5. Other Events.

**On March 16, 2000, Medisys Technologies, Inc. (the "Company")
filed a Complaint against Brett Phillips, Elbert Carl Anderson,
William H. Morris, Marilyn Morris and Barbara Larkins in the United
States District Court in and for the Middle District of Louisiana,
alleging various securities law violations and related claims in
connection with the 1998 acquisition by the Company from the
defendants of Phillips Pharmatech Labs, Inc. ("Phillips"). The
Company is seeking rescission of the acquisition, damages and other
relief.**

On May 9, 2000, E. Carl Anderson, William Morris and Brett

Phillips, filed a derivative action lawsuit in the United States

District Court, Middle District of Florida, case number

8:00CV905-T 24F, against the Company and the current directors of

the Company. The action was filed by Messrs. Anderson, Morris and Phillips acting by and in behalf of the Company. The complaint alleges corporate waste in the form of excessive salaries and bonuses and other alleged wastes related to Phillips. The complaint seeks injunctive relief and damages. Each of the plaintiffs in this action is also a defendant in the lawsuit previously filed by the Company referenced above.

On May 18, 2000, Phillips ceased all operations. In connection with the Company's March 16, 2000 lawsuit, it filed with the Third District Court, Salt Lake County, Utah, an action seeking an injunction to prevent the sale and/or transfer of shares of the Company's common stock by various defendants in the Company's suit and other parties. On June 28, 2000, the Utah Court issued an injunction and order enjoining from transfer approximately 13,500,000 shares of the Company's common stock. The Company believes that it is vital to the success of its suit to prevent certain persons from selling and/or transferring shares prior to the resolution of the action. Pursuant to the Court's order, the aforementioned shares are to be deemed "restricted securities" and all certificates representing said share shall bear an appropriate restrictive legend.

Item 7. Financial Statements and Exhibits. (c) Exhibits Exhibit No. Description Page No.

99.2 Injunction and Order issued on June 28,2000 Filed Herewith By the Third District Court, Salt Lake County, Utah

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

MEDISYS TECHNOLOGIES, INC.

Dated: July 21, 2000 By: /s/ Kerry M. Frey KERRY M. FREY, President and Chief Operating Officer

INDEX TO EXHIBIT

Exhibit No. Description Page No.

99.2 Injunction and Order issued on June 28, 2000 Filed Herewith By the Third District Court, Salt Lake County, Utah

EXHIBIT C

FILED DISTRICT COURT
Third Judicial District

APR 03 2001

SALT LAKE COUNTY
By _____ Deputy Clerk

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

MEDISYS TECHNOLOGIES, INC.,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 000904474
vs.	:	
INTERSTATE TRANSFER CO.,	:	
Defendant.	:	

Intervenor's Motion for Award of Fees was presented to me for decision pursuant to a Notice to Submit filed on March 8, 2001. I have previously determined that the intervenor is entitled to an award of attorney's fees in connection with its defense of the above-captioned action for injunctive relief. I now find that the amount of attorney's fees sought by the intervenor, \$30,846, is reasonable in light of the complexity of the litigation. I further find the hourly rates charged by intervenor's counsel to be reasonable. I reject plaintiff's contention that the activities of Mr. Dykes and Mr. Spencer were excessive in light of the issues presented. Lastly, I reject the contention that the fee application was inflated by double billing.

MEDISYS TECH. V.
INTERSTATE TRANSFER

PAGE 2

MINUTE ENTRY

Intervenor's counsel shall prepare an Order consistent with this Minute Entry.

Dated this 2 day of ^{April}~~March~~, 2001.

Ronald E. Herring
RONALD E. HERRING
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this_____ day of March, 2001:

Richard J. Leedy
Attorney for Plaintiff
44 West 300 South, Suite 703
Salt Lake City, Utah 84101

Michael D. Ward
Attorney for Plaintiff
5940 Tahoe Drive, SE, Suite 200
Grand Rapids, Michigan 49545

John Michael Coombs
Attorney for Defendant
124 South 600 East, Suite 300
Salt Lake City, Utah 84102

Lon A. Jenkins
Mark W. Dykes
Attorney for Defendants in Intervention
136 S. Main, Suite 100
Salt Lake City, Utah 84101

Thomas E. Spencer
19235 U.S. Highway 41 North
Lutz, Florida 33519

EXHIBIT D

FILED DISTRICT COURT
THIRD JUDICIAL DISTRICT
JUL 10 2001
SALT LAKE COUNTY, UTAH
Deputy Clerk

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

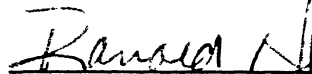
MEDISYS TECHNOLOGIES, INC.,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 000904474
vs.	:	
INTERSTATE TRANSFER CO.,	:	
Defendant.	:	

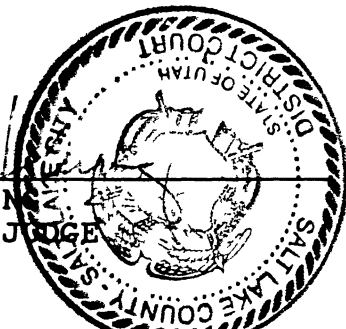
Intervenor's Motion for Clarification was presented to me for decision pursuant to a Notice to Submit filed on May 10, 2001. My review of the file confirms the intervenor's observation that I overlooked the intervenor's application for fees associated with intervenor's application for a fee award. I reject the argument advanced by Medisys that Rule 65A does not authorize fee awards of this nature. I decline, however, to award fees associated with travel time and travel expenses.

I decline to accept Medisys' invitation to revisit my original fee determination.

Intervenor's counsel shall prepare an Order consistent with this Minute Entry.

Dated this 18 day of June, 2001.


RONALD E. NEHRING
DISTRICT COURT JUDGE



MAILING CERTIFICATE

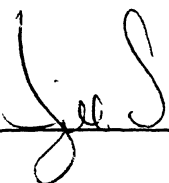
I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 18 day of June, 2001:

Bryon J. Benevento
Matthew M. Boley
Attorneys for Plaintiff
15 W. South Temple, Suite 1200
Salt Lake City, Utah 84101

Michael D. Ward
Attorney for Plaintiff
5940 Tahoe Drive, SE, Suite 200
Grand Rapids, Michigan 49545

John Michael Coombs
Attorney for Defendant
124 South 600 East, Suite 300
Salt Lake City, Utah 84102

Lon A. Jenkins
Mark W. Dykes
Attorney for Defendants in Intervention
136 S. Main, Suite 100
Salt Lake City, Utah 84101

A handwritten signature, possibly reading 'J. S.', is written over a horizontal line.