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Chad A. Spor, Ray Spor, Paul C. Spor, Spor Brothers Motor Company, A Utah Corporation; And Spors Incorporated, A Utah Corporation, And Gold Spor Mining Company, A Wyoming Corporation : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHAD A. SPOR, RAY SPOR, PAUL C. SPOR, SPOR BROTHERS MOTOR COMPANY, a Utah corporation; and SPORS INCORPORATED, a Utah corporation, and GOLD SPOR MINING COMPANY, a Wyoming corporation, Plaintiffs-Respondents, v. CRESTED BUTTE SILVER MINING INCORPORATED, a Colorado corporation, Defendant and Third-Party Plaintiff-Appellant, v. CANDELARIA METALS, INCORPORATED, a Nevada corporation, Third-Party Defendant-Respondent.	Case No. 19403 BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

In July 1979, Plaintiffs Chad, Ray and Paul Spor met in Riverton, Wyoming with John (Jack) Larsen, chairman of the board of directors of Defendant Crested Butte Mining Company. During this and a second meeting in July, a venture was discussed which entailed the contribution of certain equipment and mining claims by Respondents and the contribution of a mining mill (peanut mill) and acquisition of a heavy media sink-float plant by Appellant, Crested Butte. Crested Butte was to also provide financing of the venture. The contributions were to be made to a corporation (Gold Spor Mining Company) which was incorporated by the Spors in late July, 1979.

A so-called "preincorporation agreement" was prepared by Crested Butte and signed by Respondents Spor in December 1979. Crested Butte signed about January 2, 1980. (Exh. P-12).

Respondents, as required by the preincorporation agreement, proceeded to transfer the equipment and mining claims to Gold Spor Mining Company in exchange for stock. In February, 1980, Paul Spor wrote to Harold Herron that he had "just about completed the instruments necessary to . . . convey the remaining properties to be conveyed by Spors into Gold Spor Mining Company." (Exh. P-16). All of the Spor property was transferred to Gold Spor Mining Company and stock was issued to Spors. The peanut mill was never transferred by Crested Butte, a heavy media plant was ever acquired by it; and no stock was issued by Appellant Crested Butte.

On May 30, 1980, the attorney for Respondents Spor wrote to the attorney for Crested Butte referring to a telephone conversation of May 8, 1980. The letter (Exh. P-17) referred to Crested Butte's failure to transfer the mill or obtain a plant. The letter proposed that a release be executed releasing, inter-alia, any claim Crested Butte might claim in Gold Spor. Prior to this time $125,000.00 of a required $150,000.00 had been loaned to Gold Spor by Crested Butte pursuant to the terms of the "preincorporation agreement." The preincorporation agreement called for this to be repaid over five years. The letter offered to prepay this loan with interest.

A meeting was held on August 18, 1980 between Spors, their counsel, and Mr. Larsen and counsel for Crested Butte wherein a rescission of the preincorporation agreement was discussed. The paties' agreement resolved all issues except the prepayment date of the loan. Following the meeting, Crested Butte's counsel wrote to Spor's counsel, the letter stating that Crested Butte was "awaiting Spor's response regarding our final offer on the prepayment of the loan." (Exh. P-18).

On September 15, 1980 a check in the amount of $9,052.43 was sent to Crested Butte with a letter stating the entire loan would be paid by April 1, 1981.

On October 6, 1980 Crested Butte wrote purporting to reject the tender claiming that the tender was not in accordance with the discussion held on August 18, 1980. The check, however, was never returned.

On October 13, 1980, counsel for Spors wrote stating that the payment was in accord with the August 18 meeting and asked for an explanation of Crested Butte's understanding of any agreement to the contrary. On October 17, 1980, Mr. Evans of Crested Butte wrote stating that the amount was to have been paid "shortly after" the August 18 meeting.

On October 29, counsel for the Spors wrote stating that there was no "shortly after" condition to the August 18 discussion. On November 3, 1980, another letter and a check in the amount of $10,849.40 was sent. Monthly payments continued to be paid to Crested Butte until May 22, 1981 when the final installment was sent with a release (attached to Exh. P-29).

On May 22, 1981, Gold Spor's legal counsel wrote to Jack Larsen of Crested Butte stating that all checks had cleared the bank except the check dated November 3, 1980. (Exh. P-29). The letter asked for the check to be deposited; a release was included in the letter whereby Crested Butte was to release any claim in Gold Spor. On June 9, 1981 a replacement check was requested by Crested Butte. No mention of the release was made.

On June 19, 1981, a replacement check in the amount of $10,849.40 was sent, together with a second copy of the release. This check was retained and cashed by Crested Butte. The release was not returned, instead ten days later Crested Butte demanded one-half of the stock of Gold Spor.

ARGUMENT

The preincorporation agreement required Crested Butte to "transfer, assign and deliver" certain equipment, i.e., peanut mill and heavy media sink-float plant, to the new corporation. This Crested Butte failed to do. The preincorporation agreement required the Spors to contribute certain personal and real property, which they did. Both Crested Butte and Spors agreed on August 18, 1980 to rescind the preincorporation agreement and that Spors would prepay the loan from Crested Butte. Pursuant to the terms of rescission decided upon at the meeting, Spors prepaid by over four years the $125,000.00 loan it had received from Crested Butte with interst. Crested Butte accepted the offer of rescission by subsequently cashing each loan installment check; even asking for a replacement check which it cashed, but failed to sign two releases which had been sent along with the final two installment payments. The alleged misconduct of the Spors has nothing to do with the August 18, 1980 rescission agreement which did not commence until three months later. No relationship exists between the alleged misconduct and the rescission. For the following reasons, Spors pray that the district court's judgment be affirmed.

POINT I

CRESTED BUTTE'S ACCEPTANCE AND CASHING OF THE EARLY PREPAYMENT MONIES CONSTITUTED ACCEPTANCE OF THE SPORS' RESCISSION OFFER AND AN ACCORD AND SATISFACTION OF THE ENTIRE PREINCORPORATION AGREEMENT

Appellant contends that a factual dispute exists "as to

whether or not an accord and satisfaction occurred between the parties rescinding the preincorporation contract." (Appellant's brief at 10). Appellant Crested Butte breaks down its argument into two subparts: (1) Crested Butte considered repayment of the loan, not as consideration for a rescission or an accord and satisfaction, but as a precondition to settlement; and (2) Crested Butte's acceptance of the loan prepayments did not work an accord and satisfaction of its claim for a 50% interest in the Gold Spor Mining Company. By way of response, Respondents argue that an offer to rescind was made by the Spors to Crested Butte which was accepted by Crested Butte's (1) cashing of the repayment checks; (2) receipt of a written release (in addition to the release printed on the back of the final repayment check) to be executed along with the final repayment check; (3) requesting a replacement check in accordance with the May 22, 1981 letter; (4) receipt of the replacement check along with a second copy of the release with another request that it be executed; and (5) acceptance of the check and while ignoring the release. Respondents also argue that the context in which the prepayments were made, considering the actions and correspondence of the parties, evidence an intention of the parties to rescind the preincorporattion agreement. A review of the evidence indicates that the acceptance of the checks constitutes an accord and satisfaction.

A. Did Gold Spor Mining Company pay Crested Butte four years in advance just so it could enter into further negotiations with Crested Butte regarding the termination of the preincorporation agreement?

On May 30, 1980, Richard Lawrence, legal counsel for Gold Spor Mining Company, wrote to Daniel P. Svilar, legal counsel for Defendant Crested Butte Silver Mining, Inc. stating:

> In view of this and your phone conversation with Paul Spor on approximately May 8, 1980, our clients are led to believe that your client desires to terminate the previous agreement with them. (Exh. P-17) (emphasis added).

The statement that as of May 30, 1980 Gold Spor Mining Company had notified Crested Butte that it understood Crested Butte desired to terminate the preincorporation agreement is undisputed. The same letter proposed how this might be accomplished. In pertinent part, the proposals were:

1. Resignation of two Crested Butte personnel from the Board of Directors. (In point of fact, there is no indication that either of them were ever elected as a director).

2. Crested Butte would furnish a release releasing any and all interest they may have had or may have in Gold Spor Mining Company and the assets transferred to it by the Spors.

3. Gold Spor Mining Company would repay a $125,000.00 loan Crested Butte had made by July 1, 1984.

4. Gold Spor would furnish Crested Butte with a release of any and all liability which they may have as a result of any breach of the agreement to incorporate. (Exh. P-17) (emphasis added).

From Mr. Svilar's letter of August 21, 1980, it is evident that the parties did in fact meet on August 18, 1980 to consider termination of the preincorporation agreement. In this same letter (Exh. P-18), Mr. Svilar responded to Mr.

Lawrence's statement that Crested Butte had breached the preincorporation agreement stating "Crested Butte is ready, willing and able to complete" the terms of the preincorporation agreement "when and if" the parties could resolve certain issues. There is no evidence that these issues were ever resolved or that the parties ever attempted to do so.

In reference to the August meeting in Salt Lake City, Mr. Svilar states "[W]e are also awaiting your response regarding our final offer on the prepayment of the loan." (Exh. P-18) (emphasis added). Why had prepayment been discussed? Mr. Lawrence's letter of May 30, 1980 had proposed only repayment within the time provided by the preincorporation agreement, i.e., 1984. There is no indication from the record that apart from a rescission that Crested Butte was entitled to prepayment of its loan. Crested Butte had not agreed to repayment by 1984 and had demanded prepayment prior to 1984 and had demanded as much at the August 18, 1980 meeting. Examination of the other correspondence (Exh. P-17 through P-31) reveals that "prepayment of the loan" was the only issue regarding rescission which may not have been fully resolved at the August 18, 1980 meeting. The correspondence after the August 18, 1980 meeting between the parties makes no further mention of the other proposals for rescission submitted by Mr. Lawrence in his letter dated May 30, 1980 and leads to the conclusion that all issues but prepayment of the loan had been resolved.

In response to Mr. Svilar's inquiry regarding "prepayment of the loan", Mr. Lawrence responded by letter dated September 15, 1980 and by tendering a check in the amount of $9,052.43 stating that the full balance with interest would be repaid within six and one-half months. (Exh. P-19).

On October 6, 1980, Max Evans, President of Crested Butte stated, "We reject this tender as not being in accordance with what was discussed in Salt Lake City on August 18, 1980." (Exh. P-20). Even so, the tender was accepted; the check was retained and cashed. By way of response, Mr. Lawrence wrote to Mr. Evans and explained that the prepayment schedule he had outlined was not inconsistent with the terms of the August meeting. He further stated that the Spors would continue to pay as he had previously outlined. (Exh. P-23). Mr. Lawrence also stated that "[I]f you believe the terms of any agreement to be different than as set forth in my prior letter, please indicate to me in writing your understanding of any agreement." (Exh. P-21). Crested Butte apparently did not disagree with Mr. Lawrence's explanation and continued to accept subsequent tenders. For example, when the Spors tendered another payment in November there was no sign of a rejection from Crested Butte. (Exh. P-24). Nor was there any sign of a rejection from Crested Butte when the other monthly payments were made. In fact, the checks were cashed without comment. (Exh. P-23 through P-28).

On May 22, 1981, counsel for Gold Spor Mining Company wrote to Mr. Larsen tendering a release signed by respondents stating:

> [S]ince the full repayment of this loan is the final matter to be taken care of in regard to the Gold Spor Company matters with Crested Butte I have prepared and enclosed a Receipt and Release for signature by Crested Butte. (Exh. P-29) (emphasis added)

Spors' counsel also requested that the check sent with the November 3, 1980 letter be cashed. (Exh. P-29) Instead of notifying Spors' counsel that Crested Butte rejected this tender as a full release from the preincorporation agreement, Crested Butte requested another check be issued. Crested Butte did not mention the release. The tendered release (Exh. P-29) shows what the Spors' intent was. (See Appendix "A"). Without any notice of disagreement with the release or the Spors' intent, Crested Butte requested a replacement check to make prepayment complete. (Exh. P-30).

Pursuant to Crested Butte's request, the Spors issued a replacement check and tendered it along with a second executed copy of the release. (Exh. P-31). At this point no one can logically maintain that the Spors' intent was anything but clear that a rescission was intended.

The issue presented by the actions of the parties is "What did Crested Butte do with this check and the release that would indicate that it was not accepting Gold Spor's offer?" Crested Butte accepted the check, cashed it and subsequently purported to refuse the condition upon which it was offered.

Appellant contends that the evidence is conflicting as to whether an offer to rescind was ever made. To support this contention Appellant refers the Court to Mr. Svilar's deposition testimony to support their contention that "Crested Butte demanded immediate repayment, not as a term of settlement, but as a precondition of settlement." (Appellant's Brief, p. 11). The record is absent of any testimony or statement upon which the parties had agreed Gold Spor Mining Company was paying Crested Butte four years in advance just so it could enter into further negotiations with Crested Butte regarding the termination of the preincorporation agreement. In fact, Mr. Larsen's testimony advances the fact that there was no such agreement. He did not consider the repayments as a precondition to "further settlement negotiations" as Appellant suggests:

A. ". . . we wanted immediate return of that money and if we got immediate return of that money, we might be able to terminate all our agreements.

Q. You might be able to?

A. Cash right now and if you do anything different, we're not sure.

Q. So a precondition to even discussing that with the board of directors was an immediate repayment of all the money?

A. That's right. If he had made that offer, we would have taken it to the board of directors and we would have probably got it resolved, but that did not happen.

(J. Larsen Depo. at 77-78) (emphasis added)

To assert that the parties had agreed upon prepayment as a precondition to further settlement negotiations is not supported by the evidence and is without merit.

Moreover, prepayment of the loan amount by Gold Spor was not a precondition of settlement. The plan formulated by Crested Butte was to accept all of the payments and then commence litigation:

> Q. Now I take it the checks were not cashed as they came in, is that correct?
>
> A. That's true.
>
> Q. Why were they held before they were cashed?
>
> A. I just told you. I suggested we don't cash them and mark void on them and after I talked to Mr. Hooper, he said we ought to get the money we could and then file litigation.
>
> (J. Larsen Depo. at 69) (emphasis added)

Appellant's assertion that Respondents prepay the loan four years in advance as a precondition to entering into settlement negotiations with Crested Butte is without support in the record and in the words of Mr. Larsen simply "did not happen."

B. Did Crested Butte's acceptance of the loan prepayments work an accord and satisfaction of its claim for a 50% interest in Gold Spor Mining Company?

Appellant argues that its acceptance of the early loan payments did not constitute an accord and satisfaction of its claim for a 50% interest in Gold Spor Mining Company. In making this argument, Appellant failed to indicate (1) the

background and circumstances which reveals the intent of the parties; and (2) any mention of the written release which accompanied the last installment payment and replacement check. Respondents argue (1) that an accord and satisfaction was reached settling all disputes between the parties; (2) that the consideration given was early prepayment of Crested Butte's loan and resolution of disputed claims (i.e., when and if Crested Butte was to perform its obligations under the preincorporation agreement); and (3) that the sending of the prepayment checks and Crested Butte's cashing of those checks while ignoring the releases, gave a plain definite indication of the Spors' intent to rescind which Crested Butte cannot deny.

As a general principle of law, there may be an oral rescission of a written contract. Knapp v. Hoerner, 591 P.2d 1276, 1278 (Wash. App. 1979). As stated in West River Equipment Co. v. Holzworth Construction Company, 335 P.2d 298 (Mont. 1958):

> The parties to the executory written agreement were privileged to terminate it at any time by mutual consent independently of any express agreement so providing and it is immaterial whether such termination be characterized as abandonment, cancellation, mutual rescission or waiver. The effect is the same--to relieve the parties from going forward under the written instrument, and this may be accomplished by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties. . . .
>
> There can be no question but what a contract may be mutually abandoned or modified by the parties at any stage of performance, and each of the parties release from the further obligation on account thereof; that it may be accomplished by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties.

> It is clear then that a written contract may be canceled by mutual consent and that the cancellation may be oral.

Id. at 301 (citations omitted).

The language of the West River court defines exactly what occurred in the instant case. Respondents and Appellant agreed on August 18, 1980 to rescind the preincorporation agreement. Appellant states in its letter of October 17, 1980 (Exh. P-22) that the terms of the August 18, 1980 meeting required prepayment of the loan Crested Butte had made shortly after the meeting. Appellant does not argue that this offer ever lapsed or was withdrawn. The fact is that prepayment of the loan commenced on September 15, 1980 and continued until May 22, 1981. At no time did Crested Butte reject these tenders, but rather cashed each check.

The Oregon Supreme Court was asked to decide in Edgley v. Jackson, 276 Or. 313, 554 P.2d 476 (1976) whether acceptance of a check constituted acceptance of a rescission offer thereby working an accord and satisfaction. Edgley involved a seller of real property attempting to rescind a land sale contract by returning buyer's earnest money deposit. On the back of the check was written "Refund of Ernest [sic] money in full." After numerous attempts to return the deposit and buyer's successive rejections of the check, buyer endorsed the check and deposited it. Three days thereafter, buyer brought suit against seller for specific performance under the contract. At trial, the buyer testified that by his endorsement of the check he never intended to relinquish his rights under the sale

agreement. Id. at 478. The court noted that buyer's filing of a lawsuit evidenced that intent. In response, the court stated:

> Nevertheless, in analogous situations, it has been held that one who accepts and cashes a check which purports by notation or by the terms upon which it was tendered to be in full satisfaction of a disputed claim between the parties has accepted the payment on those terms.

Id. at 478 (emphasis added) See also Sims v. Veneman, 580 P.2d 466 (Nev. 1978); Reppert & Co. v. Plaid Pantries, Inc., 42 Or. App. 313, 600 P.2d 494 (Or.App. 1979). The Spors' intent was evidenced, if not obvious from their counsel's correspondence, by the executed release which detailed the terms upon which the final payment was tendered. Crested Butte accepted the check, cashed it and like in Edgley refused "the terms upon which it was tendered," i.e., failed to execute the release and then threatened suit ten days later.

Appellant's acceptance of the payments and the terms upon which it was tendered, constitues an acceptance of Respondents' offer to rescind. The Edgley court further stated:

> A rescission of a contract, like an accord and satisfaction, is accomplished by agreement of the parties, whether expressed in words or manifested by conduct. In either context, when one party says, in effect, "here is your money; if you accept it it is understood that you have no further claims against me," and the other indicates acceptance by taking and using the money, the acceptance is final.
>
> In the present case the writing on the check and the prior dealings between the parties leave no doubt that the defendants intended, by return of the $1,000, to terminate the agreement. Plaintiffs must have understood this to be the purpose of the refund. Acceptance and use of the check, under the circumstances, amounted to acceptance of defendants' offer to rescind."

554 P.2d at 479 (emphasis added)

Even if a meeting of the minds as to rescission had not been reached in August of 1980, Crested Butte's acceptance of the prepayments with knowledge that those payments were being made pursuant to Respondents' intent to rescind the agreement, constitutes an acceptance of the rescission offer.

Appellant argues that no consideration was given to Crested Butte for its abandonment of its interest in Gold Spor Mining Company. It is a general principle of law that in the event of an unliquidated claim, "consideration may rest upon the settlement of a dispute . . . . " 1 Am Jur 2d Accord and Satisfaction §12; Lawrence Construction Co. v. Holmquist, 642 P.2d 382, 384 (Utah 1982); Cox Construction Co., Inc. v. State Road Commission, 583 P.2d 85, 86 (Utah, 1978); Ralph A. Badger & Co. v. Fidelity Building & Loan Association, 75 P.2d 669 (Utah 1938). Respondents' law suit involved a claim for breach of contract. (Exh. P.-17). Appellant said that it would perform its portion of the contract of the contract "when and if" certain matters were agreed upon. (Exh. P-18). Respondents submit that settlement of such disputed claims constituted consideration. Appellant relies on Bennett v. Robinson's Medical Mart, Inc., 417 P.2d 761 (1966), in which this Court agreed with the proposition that "where there is a dispute about a claim and one party makes an offer of settlement which is accepted and performed by the other, that constitutes an accord and satisfaction." Id. at 764. This

Court declined to follow this general principle of law because the particular facts of the Bennett case rendered the principle's application inappropriate. Respondents submit that the facts of the instant case are unlike the facts in Bennett and therefore warrant the principle's application. Unlike the plaintiff in Bennett, who upon receipt of the check approached the defendant informing it that he did not regard the check as payment in full and that other issues remained to be resolved, Crested Butte accepted all payments by keeping the checks, allowing Gold Spor to continue prepayment over a several month period and asking for a replacement check in June while remaining silent on the signed release it had received.

For Crested Butte's acceptance and cashing of the prepayment checks and written releases to amount to an accord and satisfaction of all claims, "the conditions must be plain, definite and certain" that such check is in complete settlement of the account between the parties and that acceptance thereof shall close the account or controversy. Ashby v. Hubbard, 593 P.2d 402, 404 (Idaho 1979). Prepayment of the loan, the written executed release and the conduct of the parties evidence a "plain, definite and certain" indication that prepayment was made in full satisfaction of an agreement to rescind. Specifically, Respondents' counsel wrote to Appellant's president on October 13, 1980 stating:

> You indicated in your letter [Exh. P-20] that the payment received by you is not acceptable and is not in accordance with the agreement made on August 18, 1980. I am not aware of this payment being in any way different from the terms

> which were proposed at the meeting . . . . our client will continue to pay under the terms set forth in my letter of September 15, 1980. (Exh. P-21).

Subsequently, Respondents' counsel wrote again to Appellant's president, stating:

> My client will continue to pay as I have outlined in my previous letters. (Exh. P-23).

If the foregoing were for some reason insufficient to alert Appellant that Respondents intended the prepayments to constitute nothing less than a full rescission, even more plain evidence exists. On May 22, 1981, counsel for Respondents wrote Crested Butte stating the November 3, 1980 check in the amount of $10,849.40 had not cleared the bank. He further stated:

> Since the full repayment of this loan is the final matter to be taken care of in regard to the Gold Spor Company matters with Crested Butte, I have prepared and enclosed a release for signature by Crested Butte. As soon as you have deposited the check described above, please sign and date both copies of the enclosed document and return one copy to me. (Exh. P-29) (emphasis added).

The release (See Appendix "A") had been signed by the Spors who had executed the preincorporation agreement. The release stated that each party to the preincorporation agreement would "waive and release any and all claims" against one another arising from the preincorporation agreement "or out of any and all actions or failures to act pursuant to said agreement," or "in connection with the incorporation and operationg of Gold Spor Mining Company prior to the date hereof." Subsequently, Appellant responded asking that another

check be issued in the place of the November 3, 1980 check (Exh. P-30). In that letter, Appellant said nothing about the written release. This, however, would not have alerted anyone of any intent on the part of Crested Butte not to sign the release because Crested Butte had not been asked to sign and return the release until after the check had been deposited. (Exh. P-29).

On June 19, 1981, the replacement check was sent as requested by Crested Butte (Exh. P-31) along with a second copy of the release asking for Crested Butte's signatures on the release. Crested Butte cashed the check but did not sign the release. One cannot read the release and imagine that an accord and satisfaction was not intended. Despite Respondents' reliance upon the written executed release evidencing an accord and satisfaction of the entire preincorporation agreement, Appellant in its brief failed to mention the release and the accompanying correspondence.

If an accord and satisfaction of the entire preincorporation agreement was not intended, what value would Gold Spor stock have to Crested Butte after the loan had been prepaid? Examination of the significance of the loan by Crested Butte to the corporation leads one to logically conclude that rescission of the entire agreement was intended. The loan constituted the operating capital of Gold Spor Mining Company. The Spors contributed mineral properties which were of no value without capital to exploit the potential mineral

deposits. Crested Butte was to contribute equipment which would take money to purchase and rehabilitate. Appellant allowed the loan to be prepaid to it when it knew that the loaned funds were an essential part of the preincorporation agreement and that with such funds being repaid there was no way that the agreement could be completed. Upon completing the prepayments, Appellant had to know that even if a sink-float plant acquisition and the peanut mill location were agreed upon that the purposes of the agreement could not be carried out because the loan--the means of paying expenses until the project could be started--had been repaid to Appellant in full. The repayment of the loan monies by the Spors would render the corporation lifeless to pursue its conceived purpose. The Spors' intent, as evidenced by the releases and correspondence, was clear that the early payment of loan monies constituted settlement of all claims that either party could assert against each other.

Appellant arques "that nowhere in the correspondence of the record . . . is it stated by the Spors or their representatives that the tender of the checks was conditioned upon total rescission of all aspects of the contract." (Appellant's brief, P. 15). A review of the correspondence and executed release as referred to above, renders Appellant's assertion without merit.

Appellant cites the Court to the endorsement language on the back of the March 30, 1981 repayment check (Exh. P-31) in

support of its contention that only one of several respective obligations of the parties to the contract had been resolved. This assertion completely ignores the fact that Gold Spor Mining Company was not a signatory to the preincorporation agreement. Gold Spor Mining Company had no reason to place a more comprehensive endorsement condition on the back of its check.

From the foregoing, the fact that Respondents' intent to rescind the entire preincorporation agreement is clear. Appellant is estopped from asserting that it did not agree to rescind the contract. "The doctrine of estoppel has as its purpose to prevent injury arising from actions or declarations which have been acted on in good faith and which would be inequitable to permit a party to retract." Jankovsky v. Halladay motors, 482 P.2d 129, 132 (Wyo. 1971). In Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979), the court set forth the elements of estoppel as:

> (1) an admission, statement, or act inconsistent with the claim afterwards asserted,
>
> (2) action by the other party on the faith of such admission, statement, or act, and
>
> (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."

Id. at 694.

In the instant case, the first element of estoppel is present by Appellant's oral agreement to rescind the preincorporaton contract and/or its actions of accepting

prepayment. Likewise the second element is present in that Respondents prepaid the loan relying upon Appellant's statements and acts and proceeded to negotiate the lease of mineral properties to Candelaria Metals within a few days of the August 18, 1980 meeting in order to do so. Lastly, Respondents will be injured if the rescission is not enforced. Appellant seeks to set aside the lease of the mineral properties. Candelaria has invested money in the leases and will be caused to suffer injury if the lease is set aside. To allow Appellant to contend that it did not agree to rescind the agreement results in injury to Respondent as well as Candelaria Metals who has also acted in reliance on the lease. The elements of estoppel having been met, the Court should find Appellant estopped from arguing that it did not agree to rescind the contract.

Respondents' position is that Appellant could not (1) receive the written release with the request that it be signed by Crested Butte; (2) request a replacement check in accordance with the May 22, 1981 letter; (3) receive the replacement check along with a second copy of the release with another request that it be executed; and (4) accept the check and ignore the release. Appellant would have the Court conclude that Gold Spor prepaid the loan (that was to constitute its operating capital) four years in advance of its due date merely for the privilege of entering into "further settlement negotiations". Mr. Larsen himself testified that this "did not happen". (J.

Larsen Depo. at 78). In fact, the stated plan by Appellant was to accept the checks and then sue. (J. Larsen Depo. at 69).

Respondents contend that acceptance of the checks referred to in the correspondence constitutes an accord and satisfaction. The point upon which there can be no doubt, however, is the fact that Appellant could not receive Exhibits P-19 and P-30, request and cash the checks referred to therein, and then claim that it is not bound by the release. The intent of the parties is shown by the correspondence, particularly the releases. The Court should affirm the lower court's ruling that the entire preincorporation agreement has been rescinded.

POINT II

THE ACCORD AND SATISFACTION BETWEEN THE PARTIES CANNOT BE VITIATED BY THE DEFENDANT-APPELLANT'S CLAIM OF FRAUD

Appellant contends that assuming that the preincorporation agreement was rescinded, either expressly or by acquiescence, any such rescission agreement was rendered unenforceable by the Spors' alleged fraud. Specifically, Appellant in Point II of its brief identifies the alleged misconduct as:

1. The Spors issued stock in Gold Spor Mining Company to themselves and relatives before they had performed under the preincorporation agreement.

2. The Spors allegedly gave only ineffectual notice of a board meeting of Gold Spor to Crested Butte's representatives on the board.

3. Messrs. Larsen and Svilar were barred from the second board meeting and the Spors refused to relate the substance of their agreement with Candelaria.

4. Messrs. Evans and Herron knew nothing of the lease of mineral properties with Candelaria.

From these four allegations, the Court is asked to conclude that there is a dispute of material fact on the question of fraud which should be submitted to the trier of fact. Even if true, these claims do not warrant setting aside the accord and satisfaction reached by the parties. Respondents will examine each claim in a light most favorable to Appellant and determine whether it constitues a basis upon which it can contend that the accord and satisfaction may be set aside.

Preliminarily, it should be noted that each of the four claims relate to directors or board of directors meetings. A review of Article VIII of the Articles of Incorporation (as prepared by Crested Butte) reveals the names of the directors: Chad Spor, Paul Spor and Ray Spor (Exh. D-1). No other individuals were elected, served, or added to the board. (Chad Spor deposition at 47). Mr. Larsen never was at any time a director of Gold Spor Mining Company. (J. Larsen depo. at 10) and there is no evidence that Mr. Svilar served as a director of Gold Spor Mining Company.

With respect to Appellant's first claim, it is true that the board of directors issued stock to themselves and the other plaintiffs who were to make capital contributions. The record would also reveal that the stock certificates may have been dated a week or ten days ahead of final transfer of the capital assets to the corporation. The record indicates that Crested Butte was aware that the transfers were being made. Mr. Svilar, legal counsel for Crested Butte, admits that he had

knowledge of a written consent for the issuance of the stock to the Spors and admits that he did not submit such a consent to Crested Butte. (Svilar depo. at 22). There is no dispute, however, that Spors finalized all capital contributions within days of the stock issue. Crested Butte was to receive Gold Spor Mining Company stock upon performance of its obligations under the preincorporation agreement, i.e., transfer of the peanut mill and acquisition of a heavy media sink-float plant. (Exh. D-1 Section I, Para. 1(b)). Crested Butte stated in writing however, that it was willing to convey the equipment to the corporation only "when and if" certain essential terms could be agreed upon. (Exh. P-18). Therefore, Crested Butte was not entitled to receive its shares in Gold Spor according to the terms of the preincorporation agreement. The Spors had performed all transfers and conveyances they were required to do pursuant to the terms of the preincorporation agreement. (Exh. P-16). Most importantly, the misconduct allegation of Appellant has nothing to do with rescission discussions which did not even commence until three months later. No harm came to the corporation or any stockholders as a result of the stock issuance and none has been alleged.

Appellant contends in its second, third and fourth claims that the Spors gave only ineffectual notice of a board meeting; Messrs. Larsen and Svilar were barred from the second meeting; and that the Spors refused to discuss the substance of their agreement with Candelaria. In response, it must be remembered

that Larsen and Svilar were not directors and taking the facts most favorable to Appellant it is not alleged that they were directors. Respondents maintain that these gentlemen were not barred from attending the meeting but that the directors meeting had concluded.

With respect to Appellant's claim, specifically that the Spors refused to discuss the substance of their agrement with Candelaria, Appellant argues that Larsen and Svilar demanded to know the terms of the Candelaria contract. However, Appellant does not contend that the terms of the Candelaria contract had been negotiated at that time. Significantly, representatives of Crested Butte were informed of the negotiations between Gold Spor and Candelaria. Mr. Svilar admitted that he was aware that Gold Spor was considering selling its principal assets. (Svilar depo. at 20-21, 25). Mr. Svilar came to be apprised of the proposed sale in a telephone conversation with Paul Spor in May of 1980. Also in mid-May 1980, Chad Spor informed Mr. Larsen that negotiations were being entered into. (Paul Spor depo. at 23-24). As previously stated, neither Mr. Evans nor Mr. Herron ever served as a director. (Chad Spor depo. at 47). The record before the Court is insufficient to raise even a hint that the directors failed to fulfill their duty to the corporation and its shareholders.

Appellant's argument that the alleged accord and satisfaction is voidable because it was tainted by fraud must fail. Respondents disclosed to representatives of Crested

Butte, Messrs. Larsen and Svilar, that negotiations were taking place with Candelaria. Appellant fails to cite from the record that this was not the case.

Although Appellant has argued that the four claims of misconduct tainted the accord and satisfaction, it has failed to demonstrate a relationship between these acts and the rescission discussions which occurred three months later in August 1980. Moreover, Crested Butte accepted early loan prepayments all the while being aware and having knowledge of the acts of misconduct or fraud which it alleges in its brief. Such knowledge of misconduct did not prevent Crested Butte from accepting the prepayment checks and the release.

Respondents sent a letter containing a release to Crested Butte in May 1981 (Exh. P-29) Crested Butte requested that a replacement check be sent (Exh. P-30). A replacement check and a second copy of the release (executed by Respondents to be executed by Appellant) was sent in June. (Exh. P-31). Ten days after receipt of the replacement check, Crested Butte gave notice of its intention to sue (Exh. P-32). There is absolutely no indication of any kind that anything happened during that ten-day period which would excuse Crested Butte's acceptance of the last check.

POINT III

THE ALLEGED FRAUDULENT MISREPRESENTATIONS INCIDENT TO THE RESCISSION AND ACCORD AND SATISFACTION DO NOT PRESENT A QUESTION OF MATERIAL FACT

Appellant asserts that two material issues of fact were

improperly ruled upon by the trial court. First, was there a meeting of the minds that repayment of the loan by Gold Spor worked an accord and satisfaction to release the Spors from the other provisions of the preincorporation agreement. Second, the trier of fact must be allowed to determine whether the Spors alleged misconduct contributed to Crested Butte's acceptance of the rescission offer.

Appellant's first assertion of the existence of a material fact goes to the heart of what the parties had agreed upon and intended. There can be no misunderstanding that Respondents desired to rescind their agreement with Crested Butte. Such intent is evidenced by the May 30, 1980 letter of Spors' counsel (Exh. P-17). The parties met on August 18, 1980 to discuss the proposals in Mr. Lawrence's May 30 letter. Subsequent to the August 18, 1980 meeting, Mr. Svilar requested the Spors to respond to the prepayment of the monies loaned to Gold Spor by Crested Butte (Exh. P-18). No further mention of the other proposals by Spors' legal counsel was made. The only issue remaining was the prepayment of the loan. It is significant to note that no steps were taken by either party after May 1980 to fulfill the terms of the preincorporation agreement.

Appellant's argument that a material fact exists is without merit because on May 22, 1981 counsel for Respondents wrote stating that the November 3, 1980 check had not cleared the bank. The letter further stated the "full repayment of the

loan is the final matter to be taken care of in regard to the Gold Spor Company matters with Crested Butte. . . ." (Exh. P-29) In light of this fact, counsel enclosed a release for Crested Butte's signature to be signed after the check was deposited. The release returned both parties to the status quo, releasing each from all claims relating to the preincorporation agreement.

Appellant wrote back asking that a replacement check be sent for the November 3, 1980 check. Nothing was said about the release. On June 19, 1981 counsel for Respondents sent a replacement check along with a second copy of the release asking for Appellant's signature. Appellant cashed the check and failed to sign the release. A reading of the release (attached to Exh. P-29) does not indicate that anything other than an accord and satisfaction of all claims was intended.

Appellant further suggests that the alleged misconduct by the Spors induced Crested Butte to accept the rescission. Appellant's claim is without merit. Assuming that the alleged misconduct is true, Appellant fails to demonstrate a relationship between said conduct and the rescission discussions which were held in August 1980 or during the six-month period of accepting prepayment checks from the Spors. Crested Butte knew of the negotiations between the Spors and Candelaria. Crested Butte knew that the money to prepay the loan was coming from Candelaria. Crested Butte's counsel knew of a written consent relative to the issuance of

stock to the Spors and admits that he did not submit such a consent with respect to Crested Butte. Appellant fails to allege that Messrs. Svilar and Larsen were directors of Gold Spor. With this knowledge of alleged fraudulent activity, Crested Butte continued to accept prepayment checks and two releases without objection. There is no indication of any kind that anything happened from the deposit of the last check until the June 29, 1981 letter of Mr. Hooper intending to sue which would excuse Crested Butte's acceptance of the last check. There simply exists no issues of material fact to be presented to the fact finder.

CONCLUSION

The lower court's entry of summary judgment on behalf of Respondents was appropriate. According to Appellant's own writings, it agreed to rescind on the basis that the loan it had made be prepaid shortly after the August 18, 1980 meeting. Appellant's contention that the loan prepayments were a precondition to entering into settlement negotiations is without merit. Appellant's stated intentions were to receive the payments and then commence suit. Moreover, Appellant could not (1) receive the written release with the request that it be signed by Appellant; (2) request a replacement check; (3) receive the replacement check along with a second copy of the release with another request that it must be executed; and (4) accept the check and ignore the release. Acceptance of the

checks tendered with the clear intention that its acceptance satisfies disputed claims operates as an accord and satisfaction.

Furthermore, Appellant's argument that the alleged misconduct on the part of the Spors renders the rescission agreement voidable is without merit. Taking the allegations of misconduct as true, Appellant fails to demonstrate a relationship between the conduct and the rescission negotiations three months later. Appellant also fails to demonstrate that it learned anything concerning the Candelaria lease during the ten days between the time it received the last payment and release and the time it notified Gold Spor of its intention to sue. Appellant fails to present the Court evidence which would enable the trier of fact to conclude that Crested Butte's acceptance of th rescission offer is not binding.

Respondents respectfully request that the trial court's ruling be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of January, 1984.

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Certificate of Service

I hereby certify that I mailed two copies of the foregoing Brief of Respondents, with postage prepaid thereon, to each of the following this 3rd day of January, 1984:

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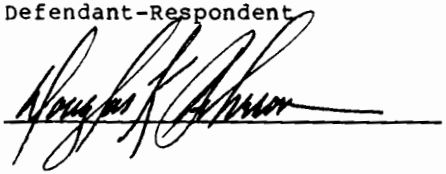

RECEIPT AND RELEASE

In consideration of the mutual releases herein contained, and effective upon the execution hereof by all of the parties named below, the parties hereby agree as follows:

Gold-Spor Mining Company, Chad A. Spor, Ray Spor, Paul C. Spor, Spor Brothers Motor Company, and Spors Incorporated each hereby waive and release any and all claims against Crested Butte Mining Company Incorporated arising under the Agreement to Incorporate entered into with Crested Butte Silver Mining Incorporated and dated July 30, 1979, or out of any and all actions or failures to act pursuant to said Agreement, or in connection with the incorporation and operation of Gold-Spor Mining Company prior to the date hereof.

Crested Butte Mining Company Incorporated hereby waives and releases any and all claims against Gold-Spor Mining Company, Chad A. Spor, Ray Spor, Paul C. Spor, Spor Brothers Motor Company and Spors Incorporated arising under the Agreement to Incorporate entered into with said parties and dated July 30, 1979, or in connection with the loan by Crested Butte Silver Mining to Gold-Spor Mining Company made pursuant to said Agreement, or arising out of any other actions or failures to act pursuant to said Agreement to Incorporate or in connection with the incorporation or operation of Gold-Spor Mining Company prior to the date hereof.

Crested Butte Silver Mining Incorporated further hereby acknowledges receipt and payment in full from Gold-Spor Mining Company of all principal and interest accrued on the loan made to Gold-Spor Mining Company pursuant to said Agreement to Incorporate.

EFFECTIVE as of the ____ day of _____, 1981.

GOLD-SPOR MINING COMPANY

By Chad A. Spor
Its Pres

Chad A. Spor
Chad A. Spor

Ray Spor
Ray Spor

Paul C. Spor
Paul C. Spor

SPORS BROTHERS MOTOR COMPANY

By C. A. Spor
Its Pres

SPORS INCORPORATED

By Chad Spor
Its Pres

CRESTED BUTTE MINING COMPANY
INCORPORATED

By _____
Its _____