

2004

Western United Mines, Inc., a Utah corporation,  
Syndicators Inc., J.R. Kirk, Jr., and Steven D.  
Martens v. Del Rio Resources, Inc., Del Rio Drilling  
Programs, Inc., Dan K. Shaw and Does 1-XXXXXX :  
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WESTERN UNITED MINES, INC., a  
Utah corporation, SYNDICATORS,  
INC., J.R. KIRK, JR., and STEVEN D.  
MARTENS,  
  
Plaintiffs/Appellants,  
  
vs.  
  
DEL-RIO RESOURCES, INC., DEL-  
RIO DRILLING PROGRAMS, INC.,  
DAN K. SHAW and DOES I-XXXXXX,  
  
Defendants/Appellees.

Case 20041009CA

Eighth District Court 030800426

**Defendants/Appellees.**

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FILED  
UTAH APPELLATE COURTS

JUN 01 2005

WESTERN UNITED MINES, INC., a  
Utah corporation, SYNDICATORS,  
INC., J.R. KIRK, JR., and STEVEN D.  
MARTENS,  
  
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DEL-RIO RESOURCES, INC., DEL-  
RIO DRILLING PROGRAMS, INC.,  
DAN K. SHAW and DOES I-XXXXX,  
  
Defendants/Appellees.

ON APPEAL FROM A JUDGMENT OF THE EIGHTH JUDICIAL DISTRICT  
COURT, UINTAH COUNTY, STATE OF UTAH  
THE HONORABLE JOHN R. ANDERSON PRESIDING

Resources, Inc. and Del-Rio Drilling  
Programs, Inc.

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j), as this matter was appealed to the Utah Supreme Court from a final judgment of the Eighth District Court, and the appeal was transferred to this Court. The district court's ruling is at Addendum Exhibit A hereto.

## **STATEMENT OF ISSUES and STANDARD OF REVIEW**

### **Issue Presented**

Whether the trial court correctly granted summary judgment dismissing Plaintiffs'/Appellants' claims for an interest in ten oil and gas leases in Uintah County under a joint venture theory, when Plaintiffs had already unsuccessfully pursued a claim against the same defendants for an interest in the same leases under a *different* theory.

### **Standard of Review**

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

## **DETERMINATIVE PROVISIONS**

Not applicable.

## **STATEMENT OF THE CASE**

### **A. The Prior Action: Third District Court.**

This case represents another episode in the Plaintiffs' continuing attempts to obtain an interest in ten federal oil and gas leases in the Book Cliffs area owned by defendants Del-Rio Resources, Inc., and/or its wholly-owned subsidiary, Del-Rio Drilling Programs,



Inc. (collectively "Del-Rio").<sup>1</sup> In July 2001, Plaintiffs filed a lawsuit in the Third District Court against Del-Rio Resources and Dan Shaw, claiming an interest in those leases and seeking damages. (Third District Court Complaint, Addendum Exhibit B hereto, R. 289-93.) The only basis given for Plaintiffs' rights was a May 1995 agreement between Plaintiffs and Defendants Shaw and Del-Rio Resources. (*Id.*) The claim against Del-Rio Resources was dismissed with prejudice on summary judgment, based on the court's ruling that the 1995 Agreement did not grant Plaintiffs any rights in the leases. (R. 278-82.) That order was certified as final under Rule 54(b). (R. 278.)

Plaintiffs subsequently appealed the decision dismissing their claims (R. 275-76) and sought leave to amend in the Third District Court action to claim an interest in the leases under a purported "joint venture partnership" theory (R. 262-70). In their motion for leave to amend, Plaintiffs admitted that they consciously chose not to raise the joint venture claim sooner, because "they thought their rights and interest were clear from the 1995 Agreement." (R. 263.) The Third District Court denied the motion for leave to amend.<sup>2</sup> (R. 248.)

**B. The Present Action: Eighth District Court.**

A few weeks later, on June 23, 2003, Plaintiffs filed an action in the *Eighth* District Court, once again claiming an interest in the same leases, this time under the joint venture theory. (Eighth District Court Complaint, Add. Ex. C, R. 2-9.) This action is the one now before the Court on this appeal. Contradicting the claims they made in the Third

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<sup>1</sup> Del-Rio Drilling Programs was dissolved in May 1990.

<sup>2</sup> That ruling was appealed as well, but Plaintiffs subsequently dismissed that second appeal.

District Court, Plaintiffs' Complaint in the Eighth District Court alleges that prior to 1995, Plaintiffs and Del-Rio were members of a joint venture, and that Del-Rio's interests in the ten leases really belongs to the joint venture. (Id.)

On June 4, 2004, Del-Rio moved for summary judgment, asserting that Plaintiffs' claims were barred by the claim preclusion branch of res judicata, because the present case involved the same plaintiffs attempting to obtain an interest in the same land from the same defendants. (R. 245-313.) Del-Rio noted that the claim in the present action, for an interest in the ten leases, was either the same as the claim in the Third District Court action or a claim that could have and should have been brought in the Third District Court; either way, res judicata barred the present claim. Del-Rio also pointed out Plaintiffs' admission in the Third District Court action that they had *considered* bringing the joint venture theory but consciously chose not to do so.

In opposition, Plaintiffs admitted that the Eighth District Court action involved the same parties as the Third District Court, or their privies, and that the Third District Court action had resulted in a final judgment on the merits. (R. 328.) Plaintiffs contended, however, that the Eighth District Court action did not involve the same "claim," because the Third District Court action was based only on the 1995 Agreement, and the Eighth District Court action was based on allegations of the joint venture, which involved different facts and evidence. (R. 323-28.) Plaintiffs also insisted that res judicata did not apply because the Third District Court action was styled as a claim for "declaratory relief," while the present one was styled as a claim to "quiet title" and for "constructive trust." (R. 321-22.)

In its reply memorandum below, Del-Rio pointed out that under a 1999 ruling by this Court, American Estate Management v. International Investment & Development Corp., 1999 UT App 232, 986 P.2d 765, 767-68 (hereinafter "AEM"), the claim preclusion branch of res judicata clearly barred a subsequent action asserting an interest in the same real property. (R. 340-48.) Del-Rio explained that in AEM, this Court unequivocally held that if a plaintiff unsuccessfully sues for an interest in real property, that plaintiff may not bring a successive action based on a theory that was also available to the plaintiff when the first action was filed, even if the second theory depends on different facts or evidence. Del-Rio also explained that Plaintiffs' choice to call their initial action one for declaratory relief did not affect the res judicata effect of the dismissal of that action, because, among other things, a declaratory judgment action relating to real property interests is indistinguishable from a quiet title action.

The trial court (Hon. John R. Anderson) granted Del-Rio's motion for summary judgment. (Ruling, Add. Ex. A, R. 353-54.) The trial court adopted the reasoning set forth in AEM:

Although plaintiffs have attempted to raise a new and independent cause of action from the preceding action filed in the Third District Court, ***plaintiffs' prior and present actions assert essentially only one claim - the final determination of rights in the 10 leases.*** As such, the present claims are subject to claim preclusion as they are res judicata. ***Plaintiffs[] consciously chose not to raise the theory of breach of the joint venture partnership in the present [sic] action, even though the issue was ripe when plaintiffs[] filed the action in the Third District Court. As a result, plaintiffs[] cannot attempt to relitigate the same claim simply based upon a new legal theory of liability.***

(Id. (emphasis added).) This appeal followed.

**C. The Appeal of the Third District Court Action.**

Plaintiffs appealed the summary judgment ruling in the Third District Court. In a published opinion dated February 25, 2005, this Court vacated the summary judgment and ordered the matter remanded for further proceedings, directing the trial court to consider and rule on a Rule 56(f) affidavit that the Plaintiffs had filed in opposition to the summary judgment motion. See Energy Management Services v. Shaw, 2005 UT App 90, ¶ 14, 110 P.3d 158. The Court did not address the merits of the trial court's substantive ruling that the 1995 Agreement granted Plaintiffs no rights in the leases. Id.

**D. Undisputed Material Facts.**

To aid in the Court's assessment of this appeal, and to demonstrate how and why the trial court correctly ruled that Del-Rio is entitled to judgment as a matter of law that the claim preclusion branch of res judicata bars the present action, Del-Rio restates some of the undisputed material facts:

1. In this action, Plaintiffs claim an interest in ten leases of federal land for oil and gas exploration and development on land in the Book Cliffs area of central Utah. (See, e.g., Complaint, Add. Ex. C, ¶¶ 49-57, R. 2-3.)
2. In the Third District Court Action, Plaintiffs claimed an interest in the same leases. (See, e.g., Third District Court Complaint, Add. Ex. B, ¶ 19, R. 291.)

3. The Plaintiffs in this action are Jay Kirk, Steven Martens, Syndicators, Inc., and Western United Mines, Inc.<sup>3</sup> (Add. Ex. C, R. 9.)

4. The Plaintiffs in the Third District Court action were Jay Kirk, Steven Martens, Syndicators, Inc., and Western United Mines, Inc. (Add. Ex. B, R. 293.)

5. Defendant Del-Rio Resources, Inc., and its wholly-owned subsidiary, Del-Rio Drilling Programs, Inc., are defendants in the present action. (Add. Ex. C, R. 9.)

6. Defendant Del-Rio Resources, Inc., was a defendant in the Third District Court action. (Add. Ex. B, R. 293.)

7. In their Complaint, Plaintiffs ask for (i) a determination of the "interests of the parties in the subject property"; (ii) a constructive trust on the property in favor of the Plaintiffs; and (iii) damages for the Defendants' alleged failure to recognize Plaintiffs' interests in the subject leases. (Add. Ex. C, ¶¶ 54, 57, 58, R. 2-3.)

8. In the complaint in the Third District Court action, Plaintiffs asked for (i) a declaration of a "beneficial interest in the 10 federal oil and gas leases"; and (ii) damages for the Defendants' alleged failure to recognize Plaintiffs' interests in the subject leases. (Add. Ex. B, R. 289.)

9. In the present action, Plaintiffs claim to be entitled to an interest in the ten leases by virtue of their participation in the alleged "joint venture partnership." (Add. Ex. C, ¶ 49, R. 3.)

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<sup>3</sup> On information and belief, Kirk is an officer or director of Syndicators; Martens is an officer or director of Western. However, both Kirk and Martens were officers and directors of Del Rio Resources until 1995. (R. 311.)

10. In the Third District Court Action, Plaintiffs claimed to be entitled to an interest in the leases under an agreement reached in May 1995 (the "1995 Agreement"). (Add. Ex. B, ¶¶ 19, 26-27, 32, R. 290-91.)

11. In November 2002, the Third District Court (Judge Livingston) entered an order granting summary judgment in Del-Rio's favor, dismissing all claims against Del-Rio, but granted Appellants leave to file an amended complaint to state a new claim against co-defendant Dan Shaw. The Third District Court certified the judgment as final under Rule 54(b). (Order and Summary Judgment, Add. Ex. D, R. 278-82.)

12. Plaintiffs subsequently appealed the Third District Court Order. (R. 275-76.)

13. Plaintiffs also moved the Third District Court for leave to amend, attempting to add a claim against Del-Rio for a "declaration of [Plaintiffs'] actual interest" in the leases and settlement proceeds, claiming that Plaintiffs had a right to an interest in the leases as members of a joint venture with Del-Rio. (Third District Proposed Amended Complaint, Add. Ex. E, ¶¶ 23-25, R. 267.)

14. In the memorandum supporting their motion for leave to amend, Plaintiffs asserted that they "did not think it was necessary" to raise their joint venture claim sooner, because "they thought their rights and interest were clear from the 1995 Agreement." (Third District Court Memorandum (Leave to Amend), Add. Ex. F, at 2, R. 263.)

15. In the reply memorandum supporting their motion for leave to amend, Plaintiffs reiterated their position and stated as follows:

In reality, the amendment of plaintiffs' claim against Del-Rio was necessitated by the Court's ruling on defendants' Motion for Summary Judgment. *Plaintiffs thought that the 1995 Agreement clearly established their rights in the 10 oil and gas leases that are and have been the subject of this action. There would have been no need for the amendment if the unambiguous provisions of the Agreement had been enforced.*

(Third District Court Reply Memorandum (Leave to Amend), Add. Ex. G, at 2, R. 259 (emphasis added).)

16. The Third District Court denied Plaintiffs' motion for leave to amend in the prior action. (R. 248.)

### SUMMARY OF ARGUMENT

The Eighth District Court's ruling should be affirmed, as the claim preclusion branch of res judicata clearly bars Plaintiffs' second bite at the same apple, i.e., Plaintiffs' second lawsuit seeking to obtain an interest in the ten leases. The Third District Court action clearly involved the same parties as the present action, and ended in a final judgment on the merits. And the claims brought in the present case, i.e., that Plaintiffs have a right to the leases through their participation in an alleged joint venture, clearly should have been brought in the prior lawsuit.

Indeed, it has long been recognized that where real property interests are at stake, the demands of res judicata are at their strongest. Accordingly, in AEM, this Court held that a party may not bring successive actions to obtain an interest in the same real property where the second action is based on grounds that existed when the first action was filed. Otherwise, res judicata would be meaningless. AEM followed earlier on-point Utah Supreme Court authority, as well as cases from several other jurisdictions. AEM,

*which Plaintiffs do not even cite in their brief*, is controlling, notwithstanding any dicta from Macris.

Moreover, that Plaintiffs typed the words "declaratory relief" instead of "quiet title" on their complaint in the Third District Court does not affect the operation of res judicata. The case law makes clear that there is no difference between an action for a "declaration" of interests in real property and an action to quiet title, and that if a quiet title action is cast in declaratory form, it has the same preclusive effects as any other quiet title action.

This case involves the same plaintiffs as the Third District Court action, suing the same defendants for an interest in the same property, based on grounds that "existed" (if they existed at all) when the first action was filed. Res judicata clearly applies here. The trial court's ruling should therefore be affirmed.

### **ARGUMENT**

#### **THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS' CLAIM FOR AN INTEREST IN THE OIL CANYON LEASES WAS BARRED BY THE THIRD DISTRICT COURT'S DISMISSAL OF PLAINTIFF'S PRIOR CLAIM FOR AN INTEREST IN THOSE LEASES.**

The trial court correctly ruled that the "claim preclusion" branch of res judicata barred, as a matter of law, Plaintiffs' claims in the Eighth District Court action. In the first action, Plaintiffs asked the Third District Court to award Plaintiffs an interest in the ten leases. That claim was dismissed with prejudice, and a final judgment was entered. In the *second* action, the Plaintiffs asked the *Eighth* District Court to award them an interest in the same leases. The only difference between this action and the prior one is



that the Plaintiffs pursued a new legal theory -- a theory Plaintiffs admit they considered and rejected in the prior action.

The doctrine of claim preclusion provides that when a plaintiff pursues a claim against a defendant, and that claim is litigated to a conclusion, the plaintiff may not raise that claim, or a closely related claim, in a *new* action against the same defendant. Thus, the doctrine "precludes the relitigation of all issues that *could have been litigated* as well as those that were, in fact, litigated in the prior action." Macris & Assocs. v. Neways, Inc., 2000 UT 93, ¶ 19, 16 P.3d 1214, 1219 (emphasis added) (citations and internal punctuation omitted). A subsequent claim will be barred if (1) both cases involve the same parties or their privies; (2) the first suit resulted in a final judgment on the merits; and (3) the claim either (a) was presented in the first suit, or (b) could have and should have been presented in the first suit. Id. All elements are satisfied here.

**A. The prior action involved the same parties as the present action.**

First, the claims in prior action involved the same parties as the claims in the present action, or their privies. The plaintiffs in the prior action were Western United Mines, Inc., Syndicators, Inc., J.R. Kirk, Jr., and Steven D. Martens. The plaintiffs in the present action are Western United Mines, Inc., Syndicators, Inc., J. Rex Kirk, Jr., and Steven D. Martens. The prior claim was brought against Del-Rio Resources, Inc. The present claim is brought against Del-Rio Resources, Inc., and its wholly owned subsidiary, Del-Rio Drilling Programs, Inc.<sup>4</sup> Indeed, Plaintiffs have conceded that the

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<sup>4</sup> Del-Rio Drilling Programs was in privity with Del-Rio Resources because Plaintiffs have treated them as having the same relationship to the subject matter of the litigation.

"same parties" element is satisfied. (See Appellants' Br. at 8 ("Although Plaintiffs conceded the existence of the first two factors in this case . . .").)

**B. The prior action resulted in a final judgment on the merits.**

Similarly, the first action resulted in a final judgment on the merits. On November 14, 2002, the Third District Court (Judge Livingston) entered an order granting Del-Rio's summary judgment motion and certifying the order as final pursuant to Rule 54(b). A judgment certified as final under Rule 54(b) is just like any other final judgment. See, e.g., 10 Wright, Miller & Kane Federal Practice and Procedure: Civil 3d § 2661 (1998) (noting that Rule 54(b) judgments have the same effect as other final judgments regarding appeal time, issue preclusion and collateral estoppel, judgment liens and enforcement procedures, and accrual of postjudgment interest).

It is true that, as of the time this brief is being written, the Third District Court judgment has been vacated. However, in ruling on the appeal, the Court of Appeals did *not* hold that the Third District Court ruling was substantively erroneous. Rather, this Court merely held that because the district court had not addressed a pending Rule 56(f) motion on the record, the matter had to be remanded for the district court to address that motion. See Energy Management Services v. Shaw, 2005 UT App 90, ¶ 14, 110 P.3d at 161-62. The Court expressly did not address the *merits* of the district court's ruling on

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tion, i.e., they have treated both as owners of the ten leases, without distinguishing between them. See Press Publishing v. Matol Botanical Intl., 2001 UT 106, ¶¶ 20-22, 37 P.3d 1121, 1128. Indeed, Del-Rio Drilling Programs was dissolved over ten years ago. Accordingly, Plaintiffs have agreed that the Third District Court judgment has the same preclusive effect on the claims against Del-Rio Drilling Programs that it does on the claims against Del-Rio Resources.

summary judgment. Thus, the district court's ruling that the Plaintiffs' claim to the leases fails as a matter of law remains intact.

Further, the remittitur matter was only recently issued (May 5, 2005). Del-Rio anticipates that the proceedings on the Rule 56(f) affidavit will be completed, and the Third District Court judgment reinstated, well before the proceedings on this appeal are completed.

**C. The claim in the Eighth District Court action was either the same claim as in the Third District Court or was a claim that could have and should have been brought in the Third District Court action.**

1. That Plaintiffs are pursuing a different legal theory in the Eighth District Court action does not mean that the actions involve "different claims" for res judicata purposes.

The claims in the present action are claims that were pursued in the Third District Court, or at the very least are claims that should have been pursued in the prior action. Plaintiffs ask for the same relief in this action (a determination that they have interests in the leases, or alternatively, damages) that they sought in the prior action. The only difference between the two actions is that in the prior action, the Plaintiffs based their claims on the 1995 Agreement, while the present action is based on an alleged joint venture. In other words, the present action is identical to the prior one, except that the Plaintiffs are pursuing a new (and contradictory) legal theory. The law is clear, however, that coming up with a new legal theory does not create a new "claim" for res judicata purposes. See, e.g., AEM, 1999 UT App 232, ¶ 11, 986 P.2d at 767-68.

- a. The law is clear that a plaintiff may not pursue successive actions seeking an interest in the same real property.

Ultimately, however, the Court need not decide whether the claim presented in the present action is technically "different" from the claim presented in the Third District Court action, because even if the claims are different, the claim in the present action clearly could have and should have been raised in the first action. See id. ¶ 12, 986 P.2d at 768 (emphasis added).) Claim preclusion serves "vital public interests," including

(1) fostering reliance on prior adjudications; (2) preventing inconsistent decisions; (3) relieving parties of the cost and vexation of multiple lawsuits; and (4) conserving judicial resources. The "doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts...."

State Office of Recovery Services v. V.G.P., 845 P.2d 944, 946 (Utah Ct. App. 1992)

(citations omitted).

These policy concerns are particularly important in real property disputes. As the United States Supreme Court declared in 1865, "Where questions arise which affect titles to land *it is of great importance to the public that when they are once decided they should no longer be considered open.* Such decisions become rules of property, and many titles may be injuriously affected by their change." Minnesota Co. v. National Co., 70 U.S. 332, 3 Wall. 332 (1865 term) (emphasis added). See also Nevada v. United States, 463 U.S. 110, 129 n.10, 103 S. Ct. 2906, 2918 n.10 (1983) (emphasis added) ("The policies advanced by the doctrine of res judicata perhaps *are at their zenith in cases concerning real property, land and water.*"). Accordingly, case law from this Court, the Utah

Supreme Court, and elsewhere establishes that if a plaintiff is seeking an interest in real property, the plaintiff must raise all claims that are then available to him or her, and that if the plaintiff's first action fails, the plaintiff may not pursue a successive action based on other theories, even if those theories are based on different facts or evidence.

AEM is the most significant case for our purposes, and one that is fatal to Plaintiffs' claim.<sup>5</sup> AEM, 1999 UT App 232, 946 P.2d 765. (A copy of AEM is attached as Addendum Exhibit H hereto.) In AEM, the plaintiff had acquired an apartment building from the defendants. The plaintiff sued, seeking damages and specific performance for an alleged breach of an agreement to convey title to an adjoining lot. Id. ¶ 4, 986 P.2d at 766. After that suit was dismissed on summary judgment, the plaintiff filed another action, this time claiming title to the same lot through adverse possession. Id. ¶ 5. The trial court held that the second lawsuit was barred by res judicata, and this Court affirmed.

The plaintiff in AEM made the same argument as the plaintiffs in the present appeal: That the adverse possession action involved a different "claim" from the one in the initial lawsuit, because the adverse possession claim "did not arise out of the

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<sup>5</sup> Indeed, it is surprising, and disappointing, that Plaintiffs' brief does not even *cite* AEM. (See, e.g., Appellants' Br. at iii-iv (Table of Authorities).) Plaintiffs were obviously aware of AEM, as Del-Rio quoted AEM extensively in the trial court pleadings and even included a copy of AEM as an exhibit to Del-Rio's reply memorandum. (See R. 332-37 (copy of AEM).) Presumably, Plaintiffs plan to present some reason why AEM is distinguishable or otherwise should not be followed in this case. But by waiting until their reply brief to even mention AEM, Plaintiffs have unfairly ensured that Del-Rio has no opportunity to respond to any such arguments. Del-Rio respectfully asks the Court to take this into consideration in weighing anything Plaintiffs say about AEM in their reply brief.

Separation Agreement, the transaction out of which the prior breach of contract claim arose, and [] proof of the adverse possession claim requires presentation of different facts and evidence." Id. ¶ 8, 986 P.2d at 767. The plaintiff also asserted that res judicata did not apply because the plaintiff was unaware of its adverse possession claim when it filed the first lawsuit. Id. This Court squarely rejected both arguments.

First, the Court expressly rejected the plaintiff's argument that merely because different facts or evidence were involved, the adverse possession action necessarily involved a separate "claim." The Court noted that because the case dealt with ownership of real property, it was especially important for all legal theories affecting that ownership to be brought in one action:

Defining the scope of a claim or cause of action is not an exact science and, in fact, is at times driven by the relative importance of the finality of the judgment. [Citations omitted.] ***When, as in this case, title to real property is at issue, the need for finality is at its apex.*** See *Farrell v. Brown*, [], 729 P.2d 1090, 1093 ([Idaho] Ct. App. 1986); 18 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4408, at 65 (1981).

Id. ¶ 10, 986 P.2d at 767 (emphasis added). Accordingly, the court concluded that "[c]ontrary to AEM's characterization, both its prior and present actions assert *one claim - a claim of title to the parking lot parcel* -- albeit under two different legal theories. Other jurisdictions have so ruled, and have held subsequent suits barred." Id. ¶ 11, 986 P.2d at 767-68 (emphasis added) (citations omitted).

The Court went on to explain that it did not even matter whether the second case technically involved the same claim as the first, "because we readily conclude that AEM *could have and should have brought its adverse possession claim in the prior suit.*" Id.

¶ 12 (emphasis added). The court cited the important policy considerations requiring that all claims and all theories be brought together:

Claim preclusion reflects the expectation that *parties who are given the capacity to present their entire controversies shall in fact do so*. *Ringwood*, 786 P.2d at 1357 (quoting Restatement (Second) of Judgments § 24 cmt a. (1982)). If a party fails, purposely or negligently, to make good his cause of action, by all proper means within his control, he will not afterward be permitted to deny the correctness of that determination, nor to relitigate the same matters between the same parties.

....

When [AEM] filed its complaint in the prior action in 1990, it had possessed the parking lot for the requisite seven years. Hence, its adverse possession claim was then ripe. AEM had a second chance to raise a claim of adverse possession when it amended its complaint in 1995, but did not. *As in Ringwood, the only reason AEM's claim of adverse possession was not decided in the prior action was because AEM failed to raise it. And, as in Ringwood, the claim preclusion branch of res judicata bars AEM from doing so now.*

Id. ¶¶ 12-14, 986 P.2d at 768-69 (some citations and internal punctuation omitted, emphasis added).

AEM's reasoning fits the present case *exactly*. As in AEM, title and ownership of real property is at issue, and the "need for finality is at its apex." In fact, the need for finality is even more critical in the present situation, as Plaintiffs' relentless litigation has been preventing development of the leases. As in AEM, Plaintiffs' purported claim to the leases through their participation in the alleged joint venture was ripe when the first lawsuit was filed, and there was *absolutely no reason why that theory could not have been raised in the first action*.

Plaintiffs devote a good deal of space in their brief to explaining that the only theory they actually pursued in the Third District Court action was the claim under the 1995 Agreement. (See Appellants' Br. at 8-14.) But that argument misses the point. Under AEM, it does not matter whether Plaintiffs actually raised the joint venture theory in the Third District Court action. Rather, what matters is whether Plaintiffs "could have and should have" raised that theory in the Third District Court. Because the joint venture claim was ripe when the Third District Court action was commenced (or as ripe as a meritless claim can be), Plaintiffs clearly could have raised that theory in the Third District Court. And as established by AEM, Plaintiffs clearly *should have* raised that theory. Indeed, just as in AEM, "the only reason [Plaintiffs'] claim of [joint venture] was not decided in the prior action was because [Plaintiffs] failed to raise it." Id. ¶ 14, 986 P.2d at 768. Plaintiffs cannot rely on their own deliberate failure to pursue the joint venture theory as an excuse to avoid the operation of res judicata.

The Utah Supreme Court has *also* held that res judicata prevents a party from pursuing successive claims to the same real property under different legal theories based on different facts. See Wheadon v. Pearson, 14 Utah 2d 45, 376 P.2d 946 (1962) (cited in AEM ¶ 14, 986 P.2d at 768). In Wheadon, the plaintiff sought a right of way over the defendants' adjoining land and asserted a prescriptive easement. Summary judgment was granted for the defendants because the adverse use had not existed for the requisite twenty years. The plaintiff therefore filed a second action, asserting an implied easement, and *that* action was dismissed on res judicata grounds. The Utah Supreme Court affirmed:



We believe that the above-quoted statement supports the ruling of the lower court. *Here, we have the same parties litigating the same subject matter -- an asserted right of way over defendants' property.* While plaintiffs endeavored to establish this right of way by prescriptive easement in the first action, *the issue or theory of implied easement, now urged in this second action, could have been urged and adjudicated in the first action.* This is particularly true under our Rules of Civil Procedure which expressly permits two or more statements of a claim.

Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid at rest. *He should be denied a second attempt at substantially the same objective under a different guise.*

Id., 14 Utah 2d at 47, 376 P.2d at 947-48 (emphasis added).

Wheadon is still good law and therefore binding on the Court. Moreover, under State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993), this Court's holding in AEM is binding as well. Further, the AEM court cited at least *eight* out-of-state cases holding that a party seeking to obtain an interest in property must pursue all claims and theories in that action, and may not raise a new theory in a subsequent action after the first action turns out unsuccessful.<sup>6</sup> Finally, as noted above, the United States Supreme Court, in

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<sup>6</sup> See AEM ¶ 11 (citing Blance v. Alley, 697 A.2d 828, 830-31 (Me. 1997) (adverse possession claim barred by judgments in two prior actions to establish title to same property under other theories); Hyman v. Hillelson, 434 N.Y.S.2d 742, 745 (App. Div. 1980) (adverse possession action not separate from prior reformation suit where both involved conveyance of adjoining lots); Myers v. Thomas, No. 01A01-9111-CH-00412, 1992 WL 56993, at \*4, 1992 Tenn. App. Lexis 260, at \*9-10 (Tenn. Ct. App. Mar. 25, 1992) (addition of adverse possession claim insufficient to distinguish later suit from prior suit involving same property); Green v. Parrack, 974 S.W.2d 200, 203 (Tex. Ct. App. 1998) (prior judgment establishing ownership to strip of land precluded subsequent competing claims to same strip under different theories)); AEM ¶ 14 (citing Irving Pulp & Paper v. Kelly, 654 A.2d 416, 418 (Me. 1995) (plaintiff or privies precluded from having or claiming right or title by adverse possession that could have been brought in earlier adverse possession action); Bagley v. Moxley, 555 N.E.2d 229, 232 (Mass. 1990) (plaintiff barred from pursuing claim of ownership through "piecemeal

upholding the dismissal of a water adjudication case on res judicata, has also affirmed that "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water." Nevada v. United States, 463 U.S. 110, 129 n.10, 103 S. Ct. 2906, 2918 n.10 (1983). The trial court's ruling in the present action was clearly supported by the law.

b. Macris does not compel a different result.

In light of the sheer weight of this authority, Plaintiffs' reliance on dicta from Macris & Associates v. Neways, 2000 UT 93, 16 P.3d 1214, is misplaced. In Macris, the plaintiff sued the defendant for wrongfully suspending and terminating a distributorship agreement. *While that lawsuit was pending*, the defendant transferred its assets to a newly formed corporation. Id. ¶ 5, 16 P.3d at 1216. The plaintiff filed a separate action against the new company for fraudulent transfer and successor/alter ego liability. Id. ¶ 7, 16 P.2d at 1216-17. In the second action, the new company moved for summary judgment, arguing that the resolution of the first action barred the second action. Id. ¶ 9, 16 P.2d at 1217. On certiorari review, the Utah Supreme Court held that because those claims arose after the first lawsuit had been filed, claim preclusion, as a matter of law, could not apply. See id. ¶¶ 20-27, 16 P.3d at 1219-20. The court went on to conclude that "[m]oreover," claim preclusion did not apply because the claims in the two actions

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litigation, offering one legal theory to the court while holding others in reserve”)); AEM ¶ 14 n.3 (citing West Mich. Park Ass'n v. Fogg, 404 N.W.2d 644, 648 (Mich. Ct. App. 1987) (plaintiff barred from making claim for adverse possession that could have been made in prior action); Hangman v. Bruening, 530 N.W.2d 247, 249 (Neb. 1995) (barring claim of adverse possession that could have been brought in earlier quiet title action)).

were different, as they relied on different facts and evidence. Id. ¶¶ 28-31, 16 P.3d at 1221.

First, the "different facts and evidence" discussion in Macris is not binding, because it is dicta. As noted in the preceding paragraph, the Macris court ruled that claim preclusion, as a matter of law, could *not* apply to the subsequent action, because the subsequent action was based on events that happened after the initial complaint was filed. See Macris ¶¶ 20-27, 16 P.3d at 1219-20. Thus, the outcome of the case, i.e., affirmance of the Court of Appeals' ruling that claim preclusion did not apply, would have been the same had the court ruled the other way on the "different facts" issue, or even if the court had not addressed that issue at all. Under any of these scenarios, the claim preclusion portion of the Court of Appeals ruling would have been affirmed. Therefore, because the court's discussion of the "different facts" issue was unnecessary to the outcome or holding of the case, that discussion is dicta and is not binding on the court in the present case.<sup>7</sup>

Second, the discussion in Macris is not applicable to the present case, because Macris did not involve successive real property claims, or other "status" claims, based on

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<sup>7</sup> See, e.g. Koske v. Townsend Eng'g, 551 N.E.2d 437, 443 (Ind. 1990) (statements in prior case were obiter dicta, because such language was not necessary to determination of issues presented: "[the statements] are not binding and do not become law"); Creach v. Angulo, 925 P.2d 689, 692-693 (Ariz. Ct. App. 1996) (language from prior case was non-binding dicta, because the question was not necessary to resolving issue before the court in prior case); Shepherd Fleets, Inc. v. Opryland USA, Inc., 759 S.W.2d 914, 921-22 (Tenn. Ct. App. 1988) ("Court decisions must be read with special reference to the questions involved and necessary to be decided, and language used which is not decisive of the case or decided therein is not binding as precedent"); People v. Heflin, 456 N.W.2d 10, 17 n.13 (Mich. 1990) (stating obiter dictum does not constitute binding precedent); 5 Am. Jur. 2d *Appellate Review* § 603 (1995) ("[S]tatements in state appellate opinions which are not necessary in the determination of the issues presented are obiter dictum; they are not binding and do not become law.").

legal theories and facts that existed *when the first action was commenced*. Rather, both actions in Macris involved claims to contract damages, and the second claim arose out of actions that took place after the first lawsuit was filed. Indeed, because the claims in the second action did not even exist when the first action commenced, the court in Macris did not even *address* the "could and should have been brought" prong of claim preclusion. As such, Macris has no bearing on that issue, which was addressed squarely in AEM, Wheadon, and the other cases.

It makes perfect sense that the case law treats basic damages claims differently from real property claims for res judicata purposes. A damages claim involves obtaining a remedy for past conduct. When two claims are based on *different* actions, taking place over different periods of time, it makes sense to allow two separate lawsuits. But a claim to determine ownership of land focuses on the present and the future: The purpose of the action is not to remedy something that happened in the past, but rather to decide, once and for all, who owns the property now and therefore has the right to control the property in the future. An important feature of such a status determination is the finality of the determination, and to ensure the finality of the determination made in such an action, it is important that the party bringing the action raise and litigate *all reasons* why he or she asserts an interest in that property.

Thus, a case like Macris, which does not involve successive claims to real property, is not binding authority on whether it is permissible to bring successive claims to real property, especially in light of the long-standing authority that bars such successive claims. Del-Rio respectfully submits that if the Utah Supreme Court had intended in

Macris to overrule Wheadon, AEM, and common law principles dating back to the Civil War, the court would have said so. Instead, the Macris court was clearly addressing only the case in front of the court at the time, and as such dicta from Macris has no bearing on this case.<sup>8</sup>

Finally, it is highly significant that Plaintiffs expressly *admitted* in the prior action that they considered pursuing the joint venture theory and consciously *chose* not to do so. Plaintiffs' failure to bring such a claim, even though the claim was supposedly ripe when the Third District Court litigation was initiated, bars that claim now. Once again, the only reason the claim was not litigated was because Plaintiffs chose to rely entirely on the 1995 Agreement.

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<sup>8</sup> The Macris court relied in part on Schaer v. State, 657 P.2d 1337 (Utah 1983). And while Schaer involved claims relating to "property," the holding in Schaer was perfectly consistent with the principles set forth in Wheadon, AEM, and the other cases discussed in the text. In Schaer, the initial action, in 1967, was a condemnation proceeding *against* a property owner. The issue was not ownership of land, but rather the damages to be paid the owner for the taking. Schaer, 657 P.2d at 1338. In the second action, filed in 1979, the owner sued for a declaration that an existing access road constituted a "public thoroughfare."

Schaer thus did not involve successive actions by the same person to establish ownership of the same property. The first action was against the owner, involving damages. The second action was by the owner. Neither action was to determine who owned the property at issue. Moreover, the second action in Schaer did not involve a claim that could have or should have been brought in the first action, as the court recognized that conditions could easily have changed in the intervening twelve years, so that a determination in 1967 could not prevent the plaintiff from pursuing a claim in 1979: "[T]here is nothing in its [1967] findings that would preclude another court twelve years later from finding that access is now reasonable, economical, and feasible by way of the dugway road." Id. at 1341.

In contrast, the case presently before the Court involves successive actions by the same plaintiffs for ownership of the same property, both of which were based on events that took place before the first action was filed.

The doctrine of claim preclusion ensures that courts and litigants are not burdened by repetitive claims. In the present case, the Plaintiffs have already brought and litigated their claim to the leases. If res judicata did not apply to this situation, there would be nothing to prevent Plaintiffs from bringing suit after suit claiming an interest in the leases, until they run out of legal theories. This is exactly what the doctrine of res judicata is designed to prevent.

2. Judge Hilder did not "recognize" the difference between the claims.

The Court should immediately reject any suggestion by Plaintiffs that Judge Hilder "recognized" the "difference" between the claim under the 1995 Agreement and the claim under the joint venture theory. (See Appellants' Br. at 9.) First, the propriety of the Eighth District Court action, which had not even been filed yet, was not (and could not have been) at issue before Judge Hilder in the Third District Court Action. When Plaintiffs moved to amend their complaint in that action to add their joint venture theory, Del-Rio opposed the motion on three grounds: (1) Amendment was not possible because the claim against Del-Rio had already been dismissed and appealed; (2) Plaintiffs should not be allowed to add a theory they had intentionally decided not to raise earlier; and (3) The proposed amendment was futile because Plaintiffs failed to allege any facts showing what interest they actually had in the leases. (See R. 347.) Nowhere in its opposition papers did Del-Rio even mention, let alone argue, whether res judicata would affect a second action raising the same claims. Nor, obviously, did Del-Rio cite any authority on the issue.

Moreover, contrary to Plaintiffs' representation, Judge Hilder did not "expressly rule . . . that Plaintiffs could, in any event, pursue" a second action. (Appellants' Br. at 9.)

Rather, Judge Hilder's discussion proceeded as follows:

Plaintiffs are probably right on two points they urge. First, if they prevail on appeal and the matter is returned to this court, amendment is likely available. Second, if the statute of limitations has not run, they can file an independent action, if their new claim does, in fact, have an independent basis. What they cannot do is amend their claim against Del-Rio in this action at this time.

(Order Denying Leave to Amend, R. 248.) Thus, Judge Hilder did not analyze the issue, consider the authority, and make a ruling. Rather, Judge Hilder merely expressed his opinion, having read no argument on the issue, that Plaintiffs were "*probably*" right that they could file a separate action. But it is clear that Judge Hilder was not making any ruling on the res judicata issue -- and even if he had, such a ruling clearly would not have any binding effect on either the Eighth District Court or *this* Court. (And if he was making such an advisory ruling, such a ruling would have been incorrect.)

3. That the prior action was styled as a claim for "declaratory relief" rather than to "quiet title" makes no difference.

Finally, Plaintiffs cannot avoid res judicata simply because their prior action was styled as a claim for "declaratory relief" instead of one to "quiet title." In their brief, Plaintiffs rely on a purported "rule," set forth in section 33 of the Restatement (Second) of Judgments, that certain declaratory judgment actions have limited preclusive effect. Plaintiffs cite no Utah authority, however, adopting that rule. Moreover, that rule would not govern the present case, for at least three reasons.

First, Plaintiffs' prior lawsuit sought not only declaratory relief, but also "damages consistent with the Agreement and according to proof." (Third District Court Complaint, Add. Ex. B, R. 289.) One exception to the declaratory judgment rule is that when a complaint seeks "coercive" relief in addition to purely "declaratory" relief, the resolution of that action has the same res judicata effect as any other lawsuit. See, e.g., Winter v. Northcutt, 879 S.W.2d 701, 706 (Mo. Ct. App. 1994).

Second, and more importantly, the "rule" on which Plaintiffs rely also has an exception for cases in which a party brings a "standard" action cast in declaratory form. Instead, when a plaintiff brings such an action, *including a quiet title action*, the ruling in that action has the same preclusive effect as any other action:

Pleadings sometimes interpolate declaratory prayers redundantly in standard actions but this should not produce differences in the res judicata consequences of those actions. Thus a pleader demanding money damages may also ask for a corresponding declaration. For res judicata purposes the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of merger, bar, and issue preclusion. . . . ***So also an action to adjudicate interests in property, such as an action to quiet title, or to establish a status, such as divorce, may be cast in declaratory form. This should not alter the res judicata effects of the judgments.***

Restatement (Second) of Judgments § 33, cmt. d (1982) (emphasis added).

Thus, even if Plaintiffs' supposed rule were applicable in Utah, Plaintiffs' claim would still be barred, because as explained in the comment to section 33 of the Restatement, one cannot avoid the consequences of res judicata simply by typing the words "declaratory relief" on the front of a complaint instead of the words "quiet title." Rather, in determining the res judicata effect of an action, a court will look to the *substance* of the



action. And the substance of the prior action is exactly the same as the substance of the present one: The prior action asked for the court to "declar[e]" that Plaintiffs had rights in the leases (Add. Ex. B, R. 289), and the present one asks the Court to "determine" that Plaintiffs have such rights (Add. Ex. C, R. 3).

Third, there is simply no practical or substantive difference between an action seeking to establish an interest in property through a declaratory judgment and one seeking to establish an interest by quieting title.<sup>9</sup> Indeed, courts have repeatedly recognized that the two types of actions are interchangeable. See, e.g., Winter, 879 S.W.2d at 706 (Mo. Ct. App. 1994) (action for slander of title was barred under res judicata by prior action for declaratory judgment; court noted that "there may be little, if any, difference between an action to quiet title and an action for declaratory judgment"); Southwest Guaranty Trust Co. v. Hardy Road 13.4 Joint Venture, 981 S.W.2d 951, 956-57 (Tex. Ct. App. 1998) (where plaintiff sought declaratory judgment that lien was void, attorney fees were not proper because the "declaratory judgment claim is really one to quiet title. Both claims seek to clear the property's title, are based on the same facts, and request similar relief."); Shapiro v. Prince George's County, 149 A.2d 396, 303 (Md. Ct. App. 1959) ("[T]here is nothing novel in bringing a declaratory action for the purpose of quieting

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<sup>9</sup> There is no difference between a "declaration" as authorized by the Declaratory Judgment Act (Utah Code Ann. § 78-33-1) and a "determination" as authorized by the Quiet Title Act (Utah Code Ann. § 78-40-1 et seq.). Obviously, before a court "declares" what someone's rights are, the court will (hopefully) "determine" what those rights are. Similarly, for a court's "determination" of interests in property to have any effect, the court must "declare" what those interests are. Put another way, a declaration without a prior determination is just a guess, and a determination without a subsequent declaration is just a private thought.

title."); Kirstein v. Kirstein, 306 S.E.2d 552, 553 (N.C. Ct. App. 1983) ("[A] Declaratory Judgment is the appropriate action to perform the duty of quieting title to real property."). In fact, the treatise upon which Plaintiffs rely for the declaratory judgment rule, *Actions for Declaratory Judgments*, also recognizes that "[a] declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. Indeed, *an action to quiet title is essentially an action for declaratory relief.*" 2 Walter H. Anderson, Actions for Declaratory Judgments § 604, at 1354-55 (2d ed. 1951) (emphasis added).

The Third District Court action had exactly the same purpose and effect as a basic quiet title action: To obtain an interest in the leases. And had Plaintiffs prevailed in the Third District Court, that would have had the same effect as if they had prevailed in a quiet title action: Del-Rio would have lost a portion of its interests in the leases. There is simply no basis for Plaintiffs' argument that a declaratory judgment action is somehow "different" from a quiet title action.

Res judicata is not about labels, but about important policy considerations of finality, judicial economy, and outright fairness. It is simply unfair for Del-Rio to have to keep defending its ownership of the leases. Once again, if Plaintiffs' position were correct, they could keep filing claims against the leases, pursuing one legal theory at a time, as long as they purported to seek a "declaratory" judgment each time. This, of course, would be absurd.

The bottom line is that there is *no* justification for allowing Plaintiffs to proceed with this claim. As they admitted, Plaintiffs made a strategic choice when they filed their first action to proceed solely on the basis of the 1995 Agreement. Under the rules of res

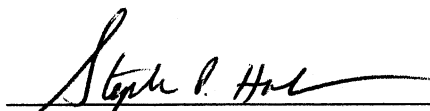
judicata, Plaintiffs have to live with that choice. Accordingly, the trial court correctly ruled that the present action, which sought the same relief as the prior one, should be dismissed with prejudice.

### **CONCLUSION**

Enough is enough. Res judicata exists to prevent repeated litigation of the same claims, and to ensure that the parties' complete dispute is resolved in a single action. Allowing Plaintiffs to flout these principles by pursuing this successive action, bringing claims that clearly could have and should have been brought in the first action, would make a mockery of the doctrine of res judicata. The trial court's grant of summary judgment in Del-Rio's favor should therefore be affirmed.

DATED: June 1, 2005.

**ANDERSON & KARRENBURG**



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Thomas R. Karrenberg

Stephen P. Horvat

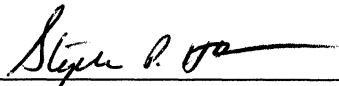
**Attorneys for Appellees Del-Rio Resources,  
Inc. and Del-Rio Drilling Programs, Inc.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a licensed attorney and a member and/or associate of the law firm of Anderson & Karrenberg, 50 West Broadway, Suite 700, Salt Lake City, Utah 84101, and that on the 1st day of June, 2005, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES DEL-RIO RESOURCES, INC. AND DEL-RIO DRILLING PROGRAMS, INC.** to be served, via U.S. mail, postage prepaid, upon the following:

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

Max D. Wheeler  
Rex E. Madsen  
Stanley J. Preston  
Bryan M. Scott  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145  
**Attorneys for Appellants**

  
\_\_\_\_\_

## **ADDENDUM**

- A. Ruling [Eighth District Court], September 21, 2004
- B. Complaint for Declaratory Relief; Money Damages [Third District Court]
- C. Complaint [Eighth District Court]
- D. Order and Summary Judgment [Third District Court], November 14, 2002
- E. [Proposed] First Amended Complaint [Third District Court]
- F. Memorandum in Support of Motion for Leave to File First Amended Complaint [Third District Court]
- G. Memorandum in Reply to Memorandum Opposing Plaintiffs' Motion for Leave to File First Amended Complaint Against Del Rio Resources [Third District Court]
- H. American Estate Management v. International Investment & Development Corp., 1999 UT App 232, 986 P.2d 765

## Exhibit A

FILED  
DISTRICT COURT  
UINTAH COUNTY, UTAH  
SEP 22 2004  
BY JOANNE MCKEE, CLERK  
DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT  
IN AND FOR UINTAH COUNTY, STATE OF UTAH

WESTERN UNITED MINES, INC.,  
SYNDICATORS, INC., J.R. KIRK, JR.,  
and STEVEN D. MARTENS,

Plaintiffs,

vs.

DEL-RIO RESOURCES, INC., DEL-RIO  
DRILLING PROGRAMS, INC., DAN K.  
SHAW, DOES 1 - XXXXX

Defendants.

RULING

Case No. 030800426

Judge John R. Anderson

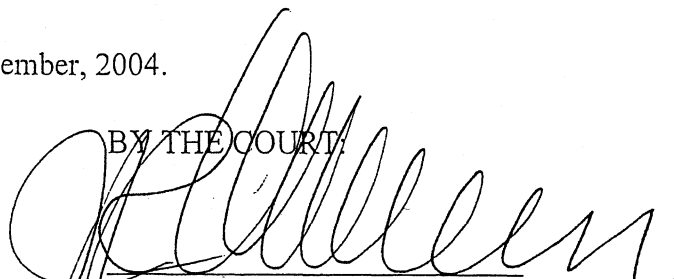
The Court having received defendants' Motion for Summary Judgment, plaintiff's Memorandum in Opposition, and defendant's Reply, having reviewed the pleadings and being otherwise fully informed, the Court enters the following:

Although plaintiffs have attempted to raise a new and independent cause of action from the preceding action filed in the Third District Court, plaintiffs' prior and present actions assert essentially only one claim - the final determination of rights in the 10 leases. As such, the present claims are subject to claim preclusion as they are res judicata. Plaintiffs' consciously chose not to raise the theory of breach of the joint venture partnership in the present action, even though the issue was ripe when plaintiffs' filed the action in the Third District Court. As a result, plaintiffs' cannot attempt to relitigate the same claim simply based upon a new legal theory of liability.

Based upon the above, and the reasoning contained in defendant's Memorandum in Support and Reply, it is hereby ORDERED that defendant's Motion for Summary Judgment is GRANTED.

Dated this 21<sup>st</sup> day of September, 2004.

BY THE COURT

  
John R. Anderson, District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that on September 22, 2004, I mailed, postage prepaid, a true and correct copy of the foregoing Ruling to the following:

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

Del-Rio Resources, Inc.  
Del-Rio Drilling Programs, Inc.  
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3737 Honeycutt Road  
Salt Lake City, Utah 84106

Western United Mines, Inc.  
Syndicators, Inc.  
J. Rex Kirk, Jr.  
Steven D. Martens  
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Deputy Clerk



## Exhibit B

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Post Office Box 58084  
Salt Lake City, Utah 84158  
Telephone: (801) 583-2510

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

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

Plaintiffs,

Vs.

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

Defendants.

COMPLAINT FOR  
DECLARATORY RELIEF; MONEY  
DAMAGES

Case No. 010906368

Honorable Roger A. Livingston

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

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

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

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

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

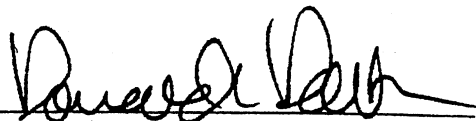
21. Plaintiffs do not know if any of the 8 tracts or sections has been offered for lease.
22. If so, plaintiffs are entitled to a beneficial interest in the 8 tracts or sections according to the Agreement.
23. The Settlement Agreement also provides for a cash award to plaintiffs of \$300,000.
24. Plaintiffs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

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

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

DATED this 19<sup>th</sup> day of July, 2001.

DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Plaintiffs

## Exhibit C

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

**EIGHTH JUDICIAL DISTRICT COURT**  
**UINTAH COUNTY, STATE OF UTAH**

FILED  
DISTRICT COURT  
UINTAH COUNTY, UTAH  
JUL 2 2002  
JOANNE WHEELER CLERK  
DEPUTY

WESTERN UNITED MINES, INC.,  
SYNDICATORS, INC., J. REX KIRK, JR. and  
STEVEN D. MARTENS,

Plaintiffs,

Vs.

DEL-RIO RESOURCES, INC., DEL-RIO  
DRILLING PROGRAMS, INC., DAN K.  
SHAW, DOES I-XXXXX,

Defendants.

**COMPLAINT**

Case No. 030800426 PR

Honorable John R. Anderson

Plaintiffs, by and through their attorneys, complain of defendants, and for causes of action, allege as follows:

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



2. Plaintiff Syndicators, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah with its principal place of business in Salt Lake County.
3. Plaintiff J. R. Kirk, Jr. is an individual residing in Tooele County.
4. Plaintiff Steven D. Martens is an individual residing in Salt Lake County.
5. Defendant Del-Rio Resources, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah with its principal place of business in Uintah County.
6. Defendant Del-Rio Drilling Programs, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah with its principal place of business in Uintah County.
7. Defendant Dan K. Shaw is an individual residing in Utah County.
8. Does I-XXXXXX are persons claiming interest in the oil and gas or geothermal property that is the subject of this action.
9. The property is located entirely within Uintah County.
10. It is known generally as the "Flatrock Property."
11. The property was originally developed and/or reworked by plaintiffs Western United and Syndicators, along with defendant Del-Rio Resources, acting as "Joint Venture Partners."
12. The parties made reference to the Joint Venture Partnership in documents that were intended for the public.

13. As further evidence of the Joint Venture Partnership, the parties had interlocking officers and directors.
14. In accordance with the terms of the Joint Venture Partnership, the three parties were to share equally in the development of the property.
15. Del-Rio Resources was the designated operator of the Joint Venture Partnership, and its wholly-owned subsidiary, defendant Del-Rio Drilling Programs, was the designated operator of the Oil Canyon II Unit.
16. However, each of the Joint Venture Partners contributed financial resources to the development of the property.
17. In accordance with the Joint Venture Partnership, and acting as Joint Venture Partners, Western United, Syndicators and Del-Rio Resources successfully completed one oil and gas well (Flatrock (Oil Canyon) 29-1A) and re-worked two additional wells (Flatrock 30-1A, 30-2A).
18. They then drilled an additional well (30-3A), but it was abandoned because of the collapse of a drilling rig.
19. They then drilled one additional well (26-1A) that was within the Oil Canyon II Unit.
20. Production from this well would have held the leases in the Oil Canyon II Unit.
21. The Joint Venture Partnership spent a minimum of \$2,935,811.00 in the above drilling program.
22. In addition, they incurred substantial expense constructing a pipeline to accommodate those wells.

23. By drilling the wells, they also obtained the exclusive right to drill additional wells in the area, the value of which was enhanced by the proven production from the existing wells (BLM Lease U-10166).
24. However, the Joint Venture Partnership drilling program ground to a halt when surface access was denied by the Ute Indian Tribe.
25. Negotiations with the U.S. Government, through the Joint Venture Partnership's legal counsel, came to no effect.
26. As a result, the Joint Venture Partners, along with others claiming minor interests in certain of the property, filed suit against the U.S. Government: *Del-Rio Drilling Programs, Inc., et al. v. United States*, United States Court of Federal Claims, No. 569-86L (the "Claims Court Litigation").
27. There were others with interests in the property, but they did not want to become involved in the Claims Court Litigation, and as a matter of "good oil field practice," their interests in the property were assigned to Del-Rio Drilling Programs as the designated operator of the unit.
28. The same goes for title to the Joint Venture Partnership's interest in the property.
29. In accordance with good oil field practice, most of the property was titled in the name of the Unit operator, defendant Del-Rio Drilling Programs.
30. However, no one objected to the fact that Western United, Syndicators and plaintiffs J. Rex Kirk, Jr. and Steven D. Martens were named as plaintiffs in

the Claims Court Litigation with interest in the property according to the Joint Venture Partnership and otherwise.

31. The Claims Court Litigation was filed in 1986 and lasted for 14 years.
32. In 2000, there were settlement discussions that led to the Claims Court Litigation being settled.
33. In accordance with the terms of the Settlement Agreement, which was signed on or around March 15, 2001, there was a cash payment of \$300,000.
34. In addition, the primary terms of 10 leases (BLM Leases U-6610, 6612, U-6632, U-6634, U-10162, U-10163, U-10164, U-10165, U-18726, and U-27043) were "tolled during the pendency of this [Litigation], and the primary lease terms [were] extended to three (3) years from the date the case is dismissed."
35. That date was later confirmed as April 20, 2001.
36. Each of these leases was within the Oil Canyon II Unit.
37. In fact, the 26-1A well was drilled on Lease U-10165.
38. In addition, eight tracts of land were offered for leases, those tracts being:  
T14S, R20E Sec. 31, 33; T14S, R20E Sec. 34; T14S, R19E Sec. 26, 35; T15S, R20E Sec. 3, 4, 5.
39. No one denied plaintiffs' interest in the settlement proceeds or in the above property, all located within Uintah County, until after the Claims Court Litigation was settled, which was prior to execution of the Settlement Agreement.

40. At that time, February 21, 2001, Del-Rio Resources, “acting on behalf of Del Rio Drilling Programs, [as] the lead plaintiff in the [Claims Court Litigation],” proposed distribution of the settlement assets in a manner that was inconsistent with the Joint Venture Partnership and otherwise.
41. Even though the Settlement Agreement had not at that time been signed, Del-Rio Resources unilaterally imposed a deadline of March 7, 2001 by which to respond to the “Proposed Settlement Asset Distribution.”
42. Plaintiffs retained counsel who responded on March 6, 2001 objecting to the proposed distribution.
43. At that time, plaintiffs objected on the basis of an Agreement between the parties dated May 12, 1995, which did not concern the Joint Venture Partnership, but rather its financial arrangements with defendant Dan K. Shaw.
44. The discussions that followed did not lead to a negotiated settlement.
45. Therefore, plaintiffs filed action in the District Court, Salt Lake County, *Western United Mines, Inc., et al. v. Shaw, et al.*, Case No. 010906368.
46. Later in the action, plaintiffs attempted to join these claims, but, for technical reasons, the District Court denied Plaintiff’s Motion for Leave.
47. In doing so, the Court specifically ruled (Minute Entry and Order dated March 29, 2003): “If the statute of limitations has not run, [plaintiffs herein] can file an independent action, if their new claim [sic] does, in fact, have an independent basis.”

48. The statute of limitations is 4-years from the date of defendants' Proposed Settlement Asset Distribution, and plaintiffs' new claims do, in fact, have a basis that is independent of the May 12, 1995 Agreement.

FIRST CLAIM FOR RELIEF  
(Quiet Title)

49. Defendants claim an interest in the property that is the subject of this action that is adverse to the interest of plaintiffs under the Joint Venture Partnership and otherwise.
50. Specifically, defendants claim that Western United, J. Rex Kirk, Jr. and Steven D. Martens have no interest in the subject property even though they were plaintiffs in the Claims Court Litigation.
51. Furthermore, defendants claim that Syndicators only has interest in three of the Leases that were the subject of the Claims Court Litigation.
52. Plaintiffs are informed and believe and on that basis allege that with the single exception noted above, Del-Rio Drilling Programs claims all right, title and interest in and to the subject property.
53. However, plaintiffs are further informed and believe and on that basis allege that defendant Dan K. Shaw claims some interest in the subject property though it is not presently of record.
54. The interests of the parties in the subject property should be determined in accordance with the Joint Venture Partnership and otherwise pursuant to UCA § 78-40-1, et seq.

SECOND CLAIM FOR RELIEF  
(Constructive Trust)

55. Even though Del-Rio Drilling Programs holds title to most of the property that is the subject of this action, its wholly-owning parent (Del-Rio Resources) is under an equitable duty to convey title to plaintiffs in accordance with the Joint Venture Partnership and otherwise.
56. Del-Rio Resources and its wholly-owned subsidiary would be unjustly enriched if they were permitted to retain title.
57. The property is subject to a constructive in favor of plaintiffs.

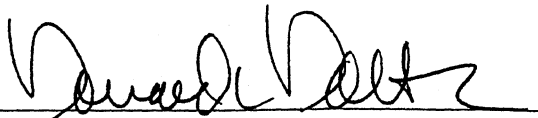
THIRD CLAIM FOR RELIEF  
(Breach of the Joint Venture Partnership)

58. If for whatever reason plaintiffs' interest in the real property cannot be determined and conveyed in accordance with the Joint Venture Partnership and otherwise, defendant Del-Rio Resources is liable for damages for breach of the Joint Venture Partnership.

WHEREFORE, plaintiffs pray for Judgment against defendants in accordance with the allegations above and their proof at trial or otherwise; and for such other and further relief as is just and proper.

DATED this 19th day of June, 2003.

DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Plaintiffs

## Exhibit D



**FILED DISTRICT COURT**  
Third Judicial District

NOV 14 2002

**Lyn**

By \_\_\_\_\_

SALT LAKE COUNTY

Deputy Clerk

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

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

---

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

---

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

vs. :

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

**ORDER AND**  
**SUMMARY JUDGMENT**

Case No. 010906368  
Judge Roger A. Livingston

:

---

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

### ORDER AND SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

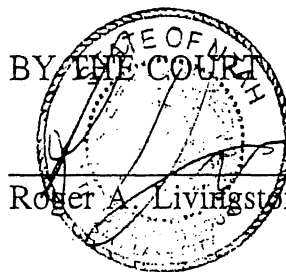
settlement. In granting such right to amend, the Court in no way rules as to the merit of Plaintiffs' claim. Plaintiffs shall file such amendment within ten days of the entry of this Order and Judgment.

3. Each party shall bear its respective costs herein.

### **RULE 54(b) CERTIFICATION OF FINAL JUDGMENT**

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

Dated this 14<sup>th</sup> day of November, 2002.



Roger A. Livingston, District Court Judge

Approved as to Form:

DALTON & KELLEY

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

ANDERSON & KARRENBURG

By: The Law

## Exhibit E

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

---

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

---

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

Plaintiffs,

Vs.

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

Defendants.

FIRST AMENDED COMPLAINT

Case No. 010906368

Honorable Robert K. Hilder

Plaintiffs, by and through their attorneys, complain of defendants for causes of  
action for breach of contract and/or declaratory relief, alleging as follows:

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

2. Plaintiff Syndicators, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah, with its principal place of business in Salt Lake County.
3. Plaintiff J. R. Kirk, Jr. is an individual residing in Tooele County.
4. Plaintiff Steven D. Martens is an individual residing in Salt Lake County.
5. Defendant Dan K. Shaw is an individual residing in Utah County.
6. Defendant Del-Rio Resources, Inc. is a corporation organized and presently existing, in good standing, under the laws of the State of Utah, with its principal place of business in Uintah County.
7. Defendants are subject to the jurisdiction of this Court, and the case may be tried in this Court for the convenience of the parties. Utah Code Ann. § 78-13-1.

FIRST CAUSE OF ACTION  
(Breach of Contract; Dan K. Shaw)

8. The parties hereto are parties to an "Agreement" dated May 12, 1995, a true and correct copy of which is attached to plaintiffs' Complaint.
9. The Agreement provides in pertinent part for the assignment, to defendant Dan K. Shaw ("Shaw"), of interests in two federal oil and gas leases (Mineral Lease No. U 10166 & U 019837) and two state oil and gas leases (Mineral Lease No. 44317 & 44318).
10. The Agreement also provides for the funding, by Shaw, of litigation against the United States in which the parties hereto, excluding Shaw, were plaintiffs, *Del-Rio*



*Drilling Programs, Inc., et al. v. The United States*, United States Claims Court, Case No. 569-86L (the "Claims Court Litigation").

11. The 1995 Agreement provides that Shaw would "use his best efforts to enter into an agreement with the plaintiffs of such lawsuit to provide a maximum of thirty thousand dollars (\$30,000) to fund certain future expenses incurred by plaintiffs in such litigation."
12. The 1995 Agreement provides that "[a]ny agreement between the plaintiffs and Shaw shall provide that if, as a result of the litigation, additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiff shall be entitled to a fifty percent (50%) beneficial interest in such additional leases."
13. Shaw did in fact fund the Claims Court Litigation, but denies that this was pursuant to an agreement with plaintiffs.
14. Plaintiffs are informed and believe and on that basis allege that if Shaw failed to enter into an agreement with plaintiffs in the Claims Court Litigation, Shaw failed to use best efforts and breached the 1995 Agreement.

SECOND CAUSE OF ACTION  
(Declaratory Relief and/or Breach of Contract;  
Del-Rio Resources, Inc.)

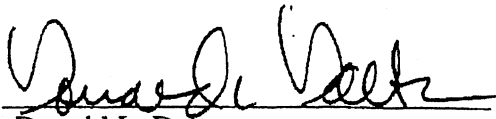
15. The Claims Court Litigation was settled pursuant to the terms of a "Settlement Agreement," a true and correct copy of which is attached to plaintiffs' Complaint.
16. The Settlement Agreement provides in pertinent part for extension of the terms of 10 federal oil and gas leases, which do not include the two in the Agreement.

17. The Settlement Agreement also provides for a cash award to plaintiffs of \$300,000.
18. Defendant Del-Rio Resources, Inc. ("Del-Rio") has proposed distribution of the settlement with the United States in a manner that is inconsistent with the claims that were made by plaintiffs in the Claims Court Litigation and plaintiffs' actual rights and interest therein.
19. Specifically, Del-Rio has denied plaintiffs Western United Mines, Inc., J. R. Kirk, Jr. and Steven D. Martens any interest in the 10 federal oil and gas leases though they appeared as plaintiffs in the Claims Court Litigation with specific interests in the leases.
20. Del-Rio has proposed a distribution of interest in the leases to plaintiff Syndicators, Inc. that is less than its actual right and interest.
21. Finally, Del-Rio has denied plaintiffs any interest in the cash award.
22. According to Del-Rio, "the majority of the leases will eventually be returned to Del Rio Drilling Programs," for whom Del-Rio was admittedly acting in the Claims Court Litigation.
23. However, Del-Rio and plaintiffs Western United Mines, Inc. and Syndicators, Inc. were "joint venture partners" in the development of some or all of the property that was the subject of the Claims Court Litigation in which they were to equally share.
24. Plaintiffs are entitled to declaration of their actual interest in the oil and gas leases and cash award from the Claims Court Litigation.
25. Alternatively, plaintiffs are entitled to damages consistent with the joint venture partnership and according to proof.

WHEREFORE, plaintiffs pray for Judgment (1) against Shaw for damages for breach of the 1995 Agreement; and (2) against Del-Rio for declaration of plaintiffs' actual interest in the oil and gas leases and cash award that resulted from the settlement of the Claims Court Litigation; and alternatively, for damages for breach of the joint venture partnership; and for such other and further relief as just and proper.

DATED this 12<sup>th</sup> day of November, 2002.

DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that I caused a true and correct copy of the within and foregoing "First Amended Complaint" to be mailed, postage prepaid, this 12<sup>th</sup> day of November, 2002 to:

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

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



## Exhibit F

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

---

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

---

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

Plaintiffs,

Vs.

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

Defendants.

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

Case No. 010906368

Honorable Robert K. Hilder

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

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

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

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

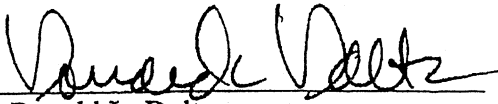
Plaintiffs' amended claim against defendant Del-Rio Resources, Inc. is not based on the 1995 Agreement. As evidenced by the pleadings on file in the Claims Court Litigation, plaintiffs have rights and interest in the leases and cash award that are independent of the 1995 Agreement.

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

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

DATED this 12th day of November, 2002.

DALTON & KELLEY

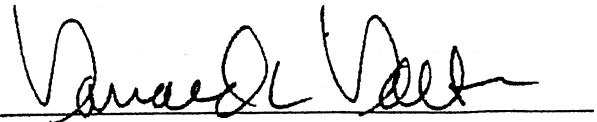
By   
Donald L. Dalton  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

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

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



## Exhibit G



received  
01-10-03

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

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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

Plaintiffs,

Vs.

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

Defendants.

MEMORANDUM IN REPLY TO  
MEMORANDUM OPPOSING  
PLAINTIFFS' MOTION FOR  
LEAVE TO FILE FIRST  
AMENDED COMPLAINT  
AGAINST DEL RIO RESOURCES

Case No. 010906368

Honorable Robert K. Hilder

Plaintiffs, by and through their attorneys, respectfully submit the following  
Memorandum in Reply to Memorandum Opposing Plaintiffs' Motion for Leave to File  
First Amended Complaint Against Del Rio Resources ("Del-Rio"):

INTRODUCTION

Del-Rio makes too much out of the fact that plaintiffs' Complaint against Del-Rio  
was dismissed. Under normal circumstances, the dismissal would not have affected the  
pendency of this action in which plaintiffs, according to the leave that "shall be freely

given” under URCP 15, would have been permitted to amend their claims against Del-Rio. In fact, since the dismissal did not adjudicate the rights and liabilities of all the parties, the Order and Summary Judgment would have been “subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” URCP 54(b)

The only thing that changed this normal order of business was the Court’s certification of the Order and Summary Judgment as final under URCP 54(b). This made the Order and Judgment final and appealable even though it did not adjudicate the rights and liabilities of all the parties. Because of this, plaintiffs were required to appeal, which they did in a timely fashion. (Case No. Case No. 20021064-SC) What Del-Rio has failed to mention is that if plaintiffs prevail on their appeal, Del-Rio will be right back in this action on plaintiffs’ original claim. This should answer Del-Rio’s contention about “prejudice.”

In reality, the amendment of plaintiffs’ claim against Del-Rio was necessitated by the Court’s ruling on defendants’ Motion for Summary Judgment. Plaintiffs thought that the 1995 Agreement clearly established their rights in the 10 oil and gas leases that are and have been the subject of this action. There would have been no need for the amendment if the unambiguous provisions of the Agreement had been enforced. Since that claim is closely related to the one that plaintiffs have asserted against Del-Rio in their First Amended Complaint, it makes sense to keep them in the same case.

There really is no good reason to deny plaintiffs’ Motion. If they are not permitted to amend their Complaint against Del-Rio in this case, they will simply file another.

(There is no problem with the statute of limitations.) There is no way that it would more “prejudicial” for Del-Rio to answer a new claim in this action than to answer another Complaint in a new action.

### STATEMENT OF FACTS

Attached hereto is a “Proposed Settlement Asset Distribution.” This was prepared by Del-Rio and was in reference to settlement of the Court of Claims Litigation, “*Del Rio et al vs. USA*,” which, in its Memorandum in Opposition, Del-Rio calls the “Federal Litigation.”

This is what started the litigation in this case. Del-Rio proposed a distribution of the settlement proceeds that was not in accordance with the parties’ interests. For example, even though Western United Mines, Inc., J.R. Kirk, Jr. and Steven D. Martens were plaintiffs in the Federal Litigation, they were denied any interest in the proposed asset distribution.

At the time they filed this action, plaintiffs were informed that defendant Dan K. Shaw had, in accordance with his obligations under the 1995 Agreement, entered into an agreement with plaintiffs in the Federal Litigation to provide funding for litigation expenses. Evidence of this was the undisputed fact that Shaw, who otherwise had no interest in the Federal Litigation, provided upwards of \$18,000 in litigation funding.

Plaintiffs were further informed that Shaw had entered into agreement with Del-Rio to acquire some interest in the 10 Federal oil and gas leases that were the subject of the Federal Litigation. In fact, even though it denies having made such an agreement with Shaw, Del-Rio has never denied that it intends to make such an agreement with Shaw.

Therefore, plaintiffs claimed interest in those leases according to the following provision from the 1995 Agreement: "Any agreement between the plaintiffs and Shaw shall provide that if, as a result of the [Federal Litigation], additional leases are awarded, such leases shall be assigned to Shaw (or his affiliates); provided, however, plaintiffs shall be entitled to a fifty percent (50%) beneficial interest in such additional leases."

That was the basis for plaintiffs' claims against Del-Rio and Shaw in this action. It never occurred to them that the 1995 Agreement granted them no interest, not even a possibly executory interest, in those leases. In fact, defendants never made such a claim in this case. Obviously, the Court thought otherwise. However, it did so for a reason that was not raised by defendants in their Motion for Summary Judgment.

The Court concluded, as a matter of law, that the 1995 Agreement granted plaintiffs no interest in any leases, not even the "additional leases" mentioned in the Agreement. That ruling seems plainly contraindicated by the express language of the 1995 Agreement. In any event, that plain and express language is the basis for plaintiffs' appeal.

The claim that plaintiffs are raising against Del-Rio is not dependent on the 1995 Agreement. Plaintiffs have clearly alleged (§23) the existence of a "joint venture partnership" between Del-Rio and plaintiffs Western United Mines, Inc. and Syndicators, Inc. by which they were to "equally share" in the development of the leases at issue.

In the very first paragraph of the Proposed Settlement Asset Distribution, Del-Rio states that it was "acting on behalf of Del Rio Drilling Programs" in the Federal Litigation. Del-Rio went on to state that it was "the lead plaintiff in the above named lawsuit." This

only stands to reason since Del-Rio has conceded that Del Rio Drilling Programs is its "subsidiary." (Pg. 2)

Therefore, even though "the majority of the leases will eventually be returned to Del Rio Drilling Programs," it is clear that the actual party in interest is Del-Rio, corporate parent of Del Rio Drilling Programs and "lead plaintiff" in the Federal Litigation. If necessary, plaintiffs can further amend their Complaint to add Del-Rio Drilling Programs. However, plaintiffs do not believe that Del-Rio would make this argument except in opposition to a non-dispositive motion for leave to amend.

There were 27 plaintiffs in the Federal Litigation. However, most of them had claim against one well (26-1A). This is evident from pg. 3 of the Proposed Settlement Asset Distribution. This is also evident from the following statement from pg. 3: "As previously mentioned, it appears that the leaseholders will consist mainly of Del Rio Drilling Programs and Gerald Nielson." Nielson was the attorney who represented the plaintiffs in the Federal Litigation. Nielson has a 25% contingency in the leases.

### ARGUMENT

#### I.

The Court did not enter a "final" judgment. It entered a judgment that was "certified" as final under URCP 54(b). This makes all the difference as seen in the case cited by Del-Rio.

In *Nichols v. State*, 554 P.2d 231 (Utah 1976), plaintiff's case was dismissed in its entirety with no leave to amend. Plaintiff waited nine months following the order of dismissal before bringing a motion for leave to amend.

The obvious difference between the two cases is the fact that the Court in this case granted plaintiffs leave to amend their Complaint. True, leave was only granted to amend the Complaint against Shaw, but that makes no difference since the basis for the decision in *Nichols* was that the trial court was “without jurisdiction to entertain [the] motion [for leave],....” The trial court in this case reserved jurisdiction by granting leave for amendment of plaintiffs’ Complaint against Shaw.

In making its decision, the Court cited as authority 3 *Moore's Federal Practice*, Sec. 15.10 pp. 959-960. The Court characterized that provision as follows: “[T]here is an admonition that the careful practitioner will make sure that any order of dismissal contains a provision for leave to amend, unless the court is not disposed to grant it. The author further suggests that to be on the safe side, the practitioner should make his motion not later than ten days (Rule 59(e), U.R.C.P.), after entry of the judgment of dismissal, where there is no provision therein giving leave to amend.”

In this case, plaintiffs filed their Motion for Leave on November 12, 2002. This was two days prior to entry of the Court’s Order and Summary Judgment and nearly two weeks before it was required by the terms of the Order and Summary Judgment (¶2, pg. 5). Therefore, if need be, the Court can treat plaintiffs’ Motion for Leave as a “motion to alter or amend the judgment” in accordance with URCP 59(e). In either case, plaintiffs’ Motion is perfectly, legally justified.

## II.

There is nothing wrong with the timeliness of the Motion. Even though the action has been pending since July, 2001, plaintiffs have explained why the Motion was

necessitated by the Court's ruling on defendants' Motion for Summary Judgment.

Therefore, timeliness should be evaluated from the date of the Court's ruling, not from when the case was first filed.

It is also significant to note that defendants' Motion for Summary Judgment was not filed until August, 2002. There are reasons, good reasons, including substantive settlement discussions between the parties, why the case took so long to get to this point. By Del-Rio's logic, its Motion for Summary Judgment was incredibly late (more than one year from the filing of the action).

However, the better point is that it is not so "late" in the proceeding as Del-Rio makes it sound. Defendants' Motion for Summary Judgment was filed at a time when the parties had conducted no discovery. Once again, plaintiffs would be happy to explain the reasons, but it is not like the parties have conducted all their discovery, and the case is ready to be tried. Discovery is going to start as soon as the pleadings are settled. Therefore, it is actually quite "early" in the proceeding.

In plaintiffs' view, there are two claims that could have been brought against Del-Rio. The first was under the 1995 Agreement. The second was under the joint venture partnership between Western, Syndicators and Del-Rio. However, both claims have a common genesis: the Proposed Settlement Asset Distribution. In other words, both claims are simply faces of the same coin that plaintiffs have been denied their proper interest in the distribution of the settlement proceeds from the Federal Litigation, which is how this dispute arose.

Therefore, in terms of the Utah Rules of Civil Procedure, plaintiffs' new claim against Del-Rio" arose [in some measure] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,..." URCP 15(c) It is not like plaintiffs brought a claim against Del-Rio with absolutely no relation to the rest of the action. The two claims are intimately related, and it makes sense to have them heard in the same action.

In fact, because of what is said above, it is possible that plaintiffs did not need to amend their Complaint in order to state their new "claim." However, given Del-Rio's opposition to the Motion, justice was probably better served by plaintiffs making their intentions clear regarding the claims against Del-Rio.

Del-Rio's prejudice argument has been met by what was stated above. If leave to amend is denied in this case, plaintiffs will simply file a separate action. To plaintiffs, it makes sense to keep the claim against Del-Rio in this case. Del-Rio never objected to its joinder in the first place.<sup>1</sup> Plaintiffs have already demonstrated that if they are successful on appeal, Del-Rio will be back in the case anyway. Del-Rio has failed to demonstrate that leave to amend in this action will contribute to any prejudice they have identified.

None of Del-Rio's cases support denial of plaintiffs' Motion in this case. *Arcitty v. San Juan County School District*, 967 P.2d 1261 (Utah App. 1998) is Del-Rio's leading

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<sup>1</sup> Del-Rio waited until now to raise a claim of "misjoinder." (Pg. 10, n.2) However, they filed no motion in this regard. In any event, the claims against Shaw and Del-Rio clearly have the 10 Federal oil and gas leases in common, which is more than enough to justify joinder even if the claims are not made "jointly, severally, or alternatively."



case, but it is easy to see why it does not apply here. Plaintiff did not file his motion until two and a half months after the discovery cut-off, indicating that the parties had completed their discovery. Furthermore, plaintiff's motion attempted to insert completely "new issues" (though the Court of Appeals did not say what they were). The Court mentioned nothing about prejudice to the party resisting the motion.

*Harper v. Summit County*, 963 P.2d 768 (Utah App. 1998) presented the same problems. Plaintiffs waited until after the discovery cut-off before bringing their motion. The Court noted that this was "well after partial summary judgment was entered and discovery was completed." In addition, plaintiffs sought to bring two new claims, but one of them was against a completely new party. The Court noted that "granting the amendment would delay a trial in a case that had already been pending for years because it would involve the Railroad as a new party."

In *Hill v. State Farm Mutual Auto Insurance Co.*, 829 P.2d 142 (Utah App. 1992), leave to amend was sought "on the eve of trial." Furthermore, amendment was sought six years into the litigation. By that time, summary judgment had already been granted once, the case was back from appeal to the Utah Supreme Court, and a second motion for summary judgment was pending before the trial court. Those are plainly not the circumstances here.

### III.

The answer to Del-Rio's first contention is simple: ¶23 of the First Amended Complaint alleges as follows: "Del-Rio and plaintiffs Western United Mines, Inc. and



Syndicators, Inc. were 'joint venture partners' in the development of some or all of the property that was the subject of the Claims Court Litigation in which they were to equally share." We thought it was obvious, but plaintiffs Western and Syndicators seek a two-third's share of Del-Rio's distribution from the Federal Litigation. It is hard to be more specific than that.

Which also answers Del-Rio's contention about the joinder of additional parties. Western and Syndicators did not have a joint venture partnership with those other parties. Accordingly, they have no claim against those other parties. Plaintiffs' claim in this case will not affect the interests of those other parties.

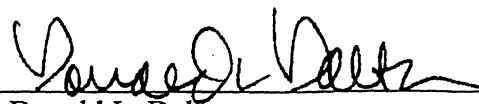
More to the point, we have already demonstrated that those other parties have claim in one well, not in the leases. As shown above, Del-Rio has stated that "the leaseholders will consist mainly of Del Rio Drilling Programs and Gerald Nielson." There is nothing wrong with the pleading of plaintiffs' First Amended Complaint.

#### CONCLUSION

For the foregoing, additional reasons, plaintiffs' Motion for Leave to File First Amended Complaint should be GRANTED.

DATED this 15<sup>th</sup> day of January, 2003.

DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that I caused a true and correct copy of the within and foregoing "Memorandum in Reply to Memorandum Opposing Plaintiffs' Motion for Leave to File First Amended Complaint Against Del Rio Resources" to be mailed, postage prepaid, this 15<sup>th</sup> day of January, 2003 to:

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

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

  
\_\_\_\_\_

## Exhibit H

¶ 45 I CONCUR IN THE RESULT: JUDITH M. BILLINGS, Judge.



1999 UT App 232

**AMERICAN ESTATE MANAGEMENT CORPORATION**, a Utah corporation,  
Plaintiff and Appellant,

v.

**INTERNATIONAL INVESTMENT AND DEVELOPMENT CORPORATION**, a Utah corporation; and John Does I-X,  
Defendants and Appellees.

No. 980264-CA.

Court of Appeals of Utah.

July 29, 1999.

Deed grantee brought adverse possession claim against grantor, relating to parking lot adjacent to the deeded apartment complex. The District Court, Salt Lake Department, J. Dennis Frederick, J., granted summary judgment to grantor. Grantee appealed. The Court of Appeals, Orme, J., held that the adverse possession claim was barred by claim preclusion, relating to grantee's prior action against grantor for allegedly breaching business separation agreement.

Affirmed.

#### 1. Judgment ¶540

Defining the scope of a claim or cause of action for purposes of claim preclusion is not an exact science and, in fact, is at times driven by the relative importance of the finality of judgment.

1. Although IID styled its motion as a motion to dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure, it was properly treated as a motion for summary judgment by the trial court

#### 2. Judgment ¶747(5)

When title to real property is at issue, the need for finality by claim preclusion is at its apex.

#### 3. Judgment ¶587

Deed grantee's theory that grantee acquired parking lot adjacent to apartment complex by adverse possession could and should have been raised by grantee in grantee's prior action alleging that grantor's failure to include parking lot in deed to apartment complex breached business separation agreement between grantor and grantee, as element for barring adverse possession claim under claim preclusion.

#### 4. Judgment ¶569

Trial court's summary judgment for deed grantor in grantee's earlier action alleging in part that grantor breached business separation agreement by failing to include parking lot adjacent to apartment complex in deed to apartment complex was a final judgment on the merits, as element for barring grantee's subsequent adverse possession claim under claim preclusion.

Ronald G. Russell, Parr Waddoups Brown Gee Loveless, Salt Lake City, for Appellant.

Merrill F. Nelson and David M. Wahlquist, Kirton & McConkie, Salt Lake City, for Appellees.

Before Judges BENCH, DAVIS, and ORME.

#### OPINION

ORME, Judge:

¶ 1 American Estate Management Corporation (AEM) appeals the trial court's grant of summary judgment in favor of International Investment and Development Corporation (IID), arguing the trial court incorrectly determined that AEM's adverse possession claim is barred by the claim preclusion branch of res judicata.<sup>1</sup> AEM claims title by

because IID supported its motion with sources outside the pleadings. See Utah R. Civ. P. 12(b); *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 838 n. 3 (Utah 1996).

adverse possession to a parcel of land used as a parking lot adjacent to the Highland Terrace Apartment Complex. AEM acquired the apartment complex by warranty deed from IID in 1982 and claims the description of the parking lot parcel was inadvertently omitted from the deed. We conclude that the trial court's ruling was correct, and we affirm its judgment.

#### BACKGROUND

¶ 2 In 1982, business partners Po and Beatrice Chang and Tony and Sandra Lin agreed to disentangle some of their joint business enterprises and, to that end, executed a Separation Agreement. Prior to the separation, AEM and IID had been jointly owned by the Changs and the Lins. Pursuant to the agreement, the Changs became the exclusive owners of AEM and the Lins acquired exclusive ownership of IID.

¶ 3 The Separation Agreement further provided that AEM would receive IID's interest in the Highland Terrace Apartment Complex. IID executed a special warranty deed conveying the apartment complex parcel to AEM, but the adjacent parking lot parcel was not described in the deed. Allegedly unaware that the parking lot had not been deeded, AEM took possession of the complex and the parking lot parcel and began paying taxes on both. Later the same year, the parties executed a document entitled "Satisfaction of Debt," agreeing that all debts owed by IID to AEM were satisfied unless specifically identified in other documents.

¶ 4 Several years later, the parties' business relationship deteriorated, and, in 1990, AEM filed a complaint against the Lins, owners of IID, raising numerous allegations of wrongdoing. In 1995, AEM amended its complaint to name IID as a party and to add and amend claims. One of AEM's claims sought damages for breach of the 1982 Separation Agreement and another requested specific performance thereof. AEM alleged in its complaint that IID had breached the Separation Agreement when it failed to deed certain property to AEM. Answers to inter-

rogatories referred to the parking lot parcel as one of the properties AEM alleged should have been deeded. The trial court ultimately granted summary judgment in favor of the Lins and IID on all claims related to the Separation Agreement, ruling that the 1982 Satisfaction of Debt "specifically disposed of claims arising from the Separation Agreement."

¶ 5 In 1997, AEM instituted this second action against IID claiming ownership of the parking lot parcel by adverse possession. The trial court granted summary judgment to IID, concluding that AEM's adverse possession claim was precluded by the trial court's judgment in the earlier action.

#### ISSUES AND STANDARD OF REVIEW

¶ 6 AEM argues on appeal that claim preclusion does not bar its adverse possession claim because (1) the breach of contract claim in the prior action arose out of a different, earlier transaction or occurrence than the adverse possession claim in the pending action and (2) the breach of contract action did not result in a final judgment on the merits.<sup>2</sup> We review the trial court's grant of summary judgment for correctness, determining whether the court correctly concluded that no genuine issue of material fact existed and whether the court correctly applied the governing law. See *Harline v. Barker*, 912 P.2d 433, 438 (Utah 1996).

#### ANALYSIS

Claim preclusion bars a cause of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

*Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988). Accord *Estate of Covington v. Jo-*

2. Because our ruling on the claim preclusion issue is dispositive, we have no occasion to ad-

dress the parties' alternative arguments concerning issue preclusion.

Cite as 986 P.2d 765 (Utah App. 1999)

*sephson*, 888 P.2d 675, 677 (Utah Ct.App. 1994), *cert. denied*, 910 P.2d 425 (Utah 1995). If these three requirements are met, "the result in the prior action constitutes the full relief available to the parties on the same claim or cause of action." *Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1357 (Utah Ct.App.), *cert. denied*, 795 P.2d 1138 (Utah 1990). Claim preclusion serves "vital public interests[,] includ[ing] (1) fostering reliance on prior adjudications; (2) preventing inconsistent decisions; (3) relieving parties of the cost and vexation of multiple lawsuits; and (4) conserving judicial resources." *Office of Recovery Servs. v. V.G.P.*, 845 P.2d 944, 946 (Utah Ct.App.1992).

¶ 7 AEM does not dispute that it brought both suits against the same parties, the Lins, and their privy, IID. Nevertheless, it argues its adverse possession claim is not barred because the second and third requirements of claim preclusion are not met. Specifically, AEM argues its adverse possession claim was not brought in the prior action, nor could or should it have been, and that the first action did not result in a final judgment on the merits.

#### A. Adverse Possession Could and Should Have Been Raised

¶ 8 AEM's adverse possession claim is barred by the judgment in the prior action if both suits raised the same claim or cause of action, or if AEM could and should have raised its adverse possession claim in the prior action. See *Madsen*, 769 P.2d at 247. While AEM concedes that its entitlement to the parking lot parcel was at issue in both actions, it argues its prior claim to title based on the Separation Agreement did not raise the same claim or cause of action raised in the present action, i.e., to quiet title to the parking lot parcel on the ground of adverse possession. AEM asserts that the adverse possession claim did not arise out of the Separation Agreement, the transaction out of which the prior breach of contract claim arose, and that proof of the adverse possession claim requires presentation of different facts and evidence. Further, AEM argues its adverse possession claim was not one that could and should have been brought in the prior action because AEM was unaware

when it filed its complaint in the prior action that title to the parking lot parcel remained with IID and because AEM had no duty to amend its complaint to add the adverse possession claim.

¶ 9 The Utah Supreme Court has defined claim or cause of action as

"the aggregate of operative facts which give rise to a right enforceable in the courts." A claim is the "situation or state of facts which entitles a party to sustain an action and gives him the right to seek judicial interference in his behalf." A claim petitions the court to award a remedy for injury suffered by the plaintiff. A cause of action is necessarily comprised of specific elements which must be proven before relief is granted. A claim or cause of action is resolved by a judicial pronouncement providing or denying the requested remedy.

*Swainston v. Intermountain Health Care, Inc.*, 766 P.2d 1059, 1061 (Utah 1988) (citations omitted).

[1, 2] ¶ 10 Defining the scope of a claim or cause of action is not an exact science and, in fact, is at times driven by the relative importance of the finality of judgment. Compare *In re J.J.T.*, 877 P.2d 161, 163-64 (Utah Ct.App.1994) ("[I]t cannot be persuasively argued that judicial economy or the convenience afforded by finality of legal controversies must override the concern for a child's welfare.") with *Office of Recovery Servs.*, 845 P.2d at 947 ("[P]olicies advanced by the doctrine of res judicata have particular importance in this case because the child's right not to be bastardized far outweighs defendant's interest in asserting non-paternity more than six years after having acknowledged paternity."). When, as in this case, title to real property is at issue, the need for finality is at its apex. See *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090, 1093 (Ct.App.1986); 18 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4408, at 65 (1981).

¶ 11 Contrary to AEM's characterization, both its prior and present actions assert one claim—a claim of title to the parking lot parcel—albeit under two different legal theo-

ries. Other jurisdictions have so ruled, and have held subsequent suits barred. *See, e.g., Blance v. Alley*, 697 A.2d 828, 830-31 (Me. 1997) (holding claim of adverse possession barred by judgments in two prior actions to establish title to same property via other legal theories); *Hyman v. Hillelson*, 79 A.D.2d 725, 434 N.Y.S.2d 742, 745 (N.Y.App. Div.1980) (ruling subsequent adverse possession action and prior suit for reformation of deed not separate and distinct where both involved dispute over conveyance of adjoining lots), *aff'd*, 55 N.Y.2d 624, 446 N.Y.S.2d 251, 430 N.E.2d 1304 (1981); *Myers v. Thomas*, No. 01A01-9111-CH-00412, 1992 WL 56993, at \*4, 1992 Tenn.App. LEXIS 260, at \*9-10 (Tenn.Ct.App. Mar. 25, 1992) (holding addition of adverse possession claim insufficient to distinguish later suit from prior suit involving same property); *Green v. Parrack*, 974 S.W.2d 200, 203 (Tex.Ct.App.1998) (holding prior judgment establishing ownership to strip of land precluded subsequent competing claims to same strip by same parties under different legal theories).

[3] ¶ 12 Nevertheless, we need not definitively determine whether AEM has raised one claim or two because we readily conclude that AEM could and should have brought its adverse possession claim in the prior suit. Claim preclusion “reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.” *Ringwood*, 786 P.2d at 1357 (quoting Restatement (Second) of Judgments § 24 cmt. a (1982)). If a party fails, purposely or negligently, to “‘make good his cause of action . . . ‘by all proper means within his control, . . . he will not afterward be permitted to deny the correctness of that determination, nor to relitigate the same matters between the same parties.’” *Horner v. Whitta*, No. 13-93-33, 1994 WL 114881, at \*2, 1994 Ohio App. LEXIS 1248, at \*6-7 (Ohio Ct.App. Mar. 16, 1994) (citations omitted in original), *appeal denied*, 70 Ohio St.3d 1416, 637 N.E.2d 12 (1994).

¶ 13 In *Ringwood v. Foreign Auto Works, Inc.*, Ringwood filed two separate complaints against individuals to whom he had sold stock in Foreign Auto Works, Inc. *See* 786 P.2d at 1352-53. Ringwood’s first

suit was dismissed because it was based on a promissory note the trial court found had merged into a later agreement. *See id.* at 1357-58. Ringwood then brought suit for breach of the later agreement. *See id.* at 1353. This court reversed the trial court’s ruling that Ringwood’s second action was not barred by res judicata, concluding that any “claim by Ringwood under the November agreement could have been decided in the prior action, as the agreement was extant and was in default. The only reason it was not decided was because Ringwood failed to raise the claim. . . . Therefore, we find that res judicata bars Ringwood’s claims[.]” *Id.*

¶ 14 AEM’s situation is similar. When it filed its complaint in the prior action in 1990, it had possessed the parking lot parcel for the requisite seven years. *See* Utah Code Ann. § 78-12-12 (1996). Hence, its adverse possession claim was then ripe. AEM had a second chance to raise a claim of adverse possession when it amended its complaint in 1995, but did not. As in *Ringwood*, the only reason AEM’s claim of adverse possession was not decided in the prior action is because AEM failed to raise it. And, as in *Ringwood*, the claim preclusion branch of res judicata bars AEM from doing so now. *See Wheadon v. Pearson*, 14 Utah 2d 45, 47, 376 P.2d 946, 947-48 (1962) (“Here, we have the same parties litigating the same subject matter—an asserted right of way over defendants’ property. . . . [T]he issue or theory of implied easement, now urged in this second action, could have been urged and adjudicated in the first action.”). *Accord Irving Pulp & Paper Ltd. v. Kelly*, 654 A.2d 416, 418 (Me.1995) (Adverse possession was “an issue that might have been tried in the 1951 action. Under the doctrine of res judicata, [appellee] and his privies are therefore precluded from having or claiming any right or title adverse to [appellant] for any period prior to November 1951.”); *Bagley v. Moxley*, 407 Mass. 633, 555 N.E.2d 229, 232 (1990) (“[P]laintiffs were not entitled to pursue their claim of ownership through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation



should the first prove unsuccessful.”).<sup>3</sup>

B. The Prior Action Resulted In a Final Judgment on the Merits

[4] ¶ 15 Having determined that AEM could and should have raised its adverse possession claim in the prior action, we now consider AEM’s argument that *res judicata* does not bar its current suit for title to the parking lot parcel by adverse possession because the prior action did not result in a final judgment on the merits.<sup>4</sup> We also reject this argument.

¶ 16 First, the trial court’s Memorandum Decision unequivocally granted summary judgment to the defendants on AEM’s claims of breach of the 1982 Separation Agreement. AEM’s fifth claim for relief in its amended complaint alleged, at paragraph 44(g), that “[t]he Lins have breached the March 1982 Separation Agreement . . . [b]y failing to deed certain properties to Plaintiffs as contemplated by the agreement.” In an interrogatory, AEM was asked to “[p]rovide the legal description of all properties you reference in paragraph 44(g).” AEM responded: “The legal description of these properties will be produced in connection with the production of documents, but includes a one-foot strip along the boundary of the Draper property and a parcel of property associated with the Highland Terrace Apartments.” The tri-

3. Many other courts have come to the same conclusion when a second action alleging adverse possession has been brought by the party who failed to prove its entitlement to real property in a prior action premised on some other theory. See, e.g., *West Mich. Park Ass’n v. Fogg*, 158 Mich.App. 160, 404 N.W.2d 644, 648 (1987) (“While it is true that the plaintiffs did not claim the property by adverse possession in [the prior action], that claim could have been made in [the prior action]. It is therefore barred[.]”), *appeal denied*, No. 80701 (Mich. Aug. 28, 1987); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247, 249 (1995) (“The theory of adverse possession could have been raised in the earlier quiet title litigation. All matters which could have been litigated in the earlier proceedings are barred by the doctrine of *res judicata*.”); *Hyman*, 434 N.Y.S.2d at 745 (“At the time the first action for reformation was commenced, the cause of action for adverse possession was also viable and could also have been pleaded in the prior complaint and determined in the prior action.”).

al court’s Memorandum Decision, specifically incorporated into its Final Order, stated:

Defendants claim that they are entitled to dismissal of claim 5 (Breach of Separation Agreement) under a theory of accord, satisfaction, and release. They contend that any problems regarding the separation agreement were worked out by the parties when they signed a March 1, 1982 “Satisfaction of Debt.” . . . Defendants['] argument appears to be well taken. The release specifically disposed of claims arising from the Separation Agreement. Thus the Court concludes that the “Satisfaction of Debt” releases this claim and defendants’ motion [for summary judgment] is granted as to this claim.

Summary judgment on the Separation Agreement claims constituted a judgment on the merits which became final upon entry of the Final Order.<sup>5</sup>

¶ 17 Moreover, AEM’s claims for breach of the Separation Agreement were not among those claims voluntarily dismissed by stipulation, as AEM argues. The trial court’s Final Order indicates specifically which claims were dismissed by stipulation. Claims relating to the Separation Agreement were not among them. Thus, dismissal of the breach of Separation Agreement claims was not a voluntary dismissal without prejudice. See Utah R. Civ. P. 41. The third requirement of claim preclusion, that the pri-

4. It is inarguable that a final judgment was entered in the prior action. AEM’s contention in this appeal is really that that judgment did not encompass various claims in issue between the parties, including ownership of the parking lot parcel.

5. Because the trial court specifically addressed the breach of Separation Agreement claims and granted summary judgment thereon in favor of the defendants, those claims are not implicated by the trial court’s statement in the Final Order that “[a]ll claims of the parties set forth in their pleadings not reduced to summary judgment herein or otherwise dealt with by this Order are hereby dismissed.” We therefore have no occasion to consider AEM’s argument that the trial court’s language concerning these stray claims effected a dismissal without prejudice under Rule 41 of the Utah Rules of Civil Procedure.

or action must have resulted in a final judgment on the merits, is therefore met.

#### CONCLUSION

¶ 18 AEM's claim of title to the parking lot parcel is barred under the claim preclusion branch of res judicata. AEM could and should have raised its adverse possession claim in the prior action alleging breach of the 1982 Separation Agreement. Further, the prior action resulted in a final judgment on the merits. Accordingly, the trial court

correctly granted IID's motion for summary judgment on res judicata grounds.

¶ 19 Affirmed.

¶ 20 WE CONCUR: RUSSELL W. BENCH, Judge, and JAMES Z. DAVIS, Judge.



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**Attorneys for James Connelley and Lori Ann Atchley**

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

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**CHRISTY OAKS,**

Plaintiff,

vs.

**JAMES CONNELLEY; and  
LORI ANN ATCHLEY,**

Defendants

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**JAMES CONNELLEY and  
LORI ANN ATCHLEY,**

Counterclaim Plaintiffs,

vs.

**CHRISTY OAKS,**

Counterclaim Defendant.

**MEMORANDUM IN SUPPORT  
OF JAMES CONNELLEY AND  
LORI ANN ATCHLEY'S  
MOTION FOR PREJUDGMENT  
WRIT OF REPLEVIN**

Civil No. 050907655

Judge L. A. Dever

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James Connelley and Lori Ann Atchley, by and through their counsel, and pursuant to Rules 64, 64A and 64B of the Utah Rules of Civil Procedure, respectfully submit this Memorandum in Support of their Motion for Prejudgment Writ of Replevin against Plaintiff and Counterclaim Defendant Christy Oaks.

## **STATEMENT OF FACTS**

### **Background**

1. Danny G. Connelley ("Danny"), husband of Ms. Oaks and father of Mr. Connelley and Ms. Atchley, died on November 10, 2004.
2. Ms. Oaks had herself appointed as personal representative of Danny's Estate ("Personal Representative").
3. On March 22, 2005, Plaintiff, Mr. Connelley and Ms. Atchley each signed an Agreement Among Heirs, the purpose of which was to "resolve [the] disputes regarding the administration of the Estate [of Danny] and also to settle [the] rights, claims and interest in the Estate of Danny." (See Agreement Among Heirs ("Agreement") attached hereto as Ex. \_\_\_, Recital C.)
4. Pursuant to the Agreement, Ms. Oaks was to receive \$50,000.00 from the Estate or from Mr. Connelley and Ms. Atchley in satisfaction of her claims and rights as surviving spouse or creditor of Danny.
5. However, subsequent to signing the Agreement Among Heirs Mr. Connelley and Ms. Atchley became aware that in negotiating the Agreement that Ms. Oaks had made material

misrepresentations regarding the Estate and her wrongful actions while she was Personal Representative, and that Ms. Oaks breached her fiduciary duties as Personal Representative.

6. When Mr. Connelley and Ms. Atchley became aware of Ms. Oaks' wrongful acts as Personal Representative, they offered her \$37,500.00 to settle the dispute between them. However, in an April 19, 2005, letter, a copy of which is attached hereto as Exhibit \_\_\_, Craig J. Wangsgard ("Mr. Wangsgard"), Ms. Oaks' counsel, stated that she was "unwilling to accept a lesser amount than the \$50,000 agreed to in the Agreement Among Heirs." Ms. Oaks' counsel stated that Ms. Oaks planned on filing litigation if she did not receive the entire \$50,000 by April 21, 2005. (See Ex. \_\_\_.)

7. On about April 23, 2005, Ms. Atchley dropped off a \$40,000.00 cashier's check to Ms. Oaks ("Cashier's Check"), a copy of which is attached hereto as Exhibit \_\_\_, which contained a clear statement that it was tendered as full satisfaction of all claims. (See Ex. \_\_\_.)

8. In an April 25, 2005, letter, a copy of which is attached hereto as Exhibit \_\_\_, Mr. Wangsgard stated that the Agreement called for a payment of \$50,000.00, and that he would file litigation if the entire \$50,000.00 was not paid by April 27, 2005.

9. On April 26, 2005, Ms. Oaks filed suit against Mr. Connelley and Ms. Atchley. In the suit, Ms. Oaks alleged that Defendants had failed to pay \$50,000.00 due her under the Agreement and requested a judgment for the entire \$50,000.00. (See Complaint filed herein at ¶ 16, and Prayer for Relief at ¶ 2.)

10. On May 20, 2005, Defendants filed an Answer and Counterclaim alleging that the Agreement is void, inter alia, because of Plaintiff's fraudulent and negligent misrepresentations

regarding Ms. Oaks' wrongful acts as Personal Representative and the status of the Estate's assets. Mr. Connelley and Ms. Atchley also seek damages from Plaintiff due to her breach of fiduciary duties while she was Personal Representative. (*See Answer and Counterclaim, filed herein.*)

11. On Friday, May 20, 2005, despite having previously rejected the Settlement Offer and despite alleging that Mr. Connelley and Ms. Atchley owed her \$50,000.00 pursuant to the Agreement in her Complaint, Ms. Oaks' wrongfully cashed the \$40,000.00 cashier's check that Mr. Connelley and Ms. Oaks had tendered as part of the Settlement Offer. (*See May 26, 2005, letter from Nathan Wilcox to Craig Wangsgard, Ex. \_\_\_\_; Cashier's Check, Ex. \_\_\_\_.*)

12. On May 23, 2005, after Mr. Connelley and Ms. Atchley filed a motion herein to disqualify Mr. Wangsgard as counsel for Ms. Oaks in this matter, Mr. Wangsgard wrote a letter, a copy of which is attached hereto as Exhibit \_\_\_\_, to Nathan B. Wilcox ("Mr. Wilcox") of Anderson & Karrenberg, counsel for Mr. Connelley and Ms. Atchley, offering to dismiss Ms. Oaks' Complaint for the "\$40,000 already presented to her, and an assignment of any interest of any interest that James Connelley, Lori Atchley and the Estate of Danny G. Connelley may have in the wrongful death of Danny G. Connelley." (*See Ex. \_\_\_\_.*) Mr. Wangsgard did not mention that his client had already cashed the check. (*See Ex. \_\_\_\_.*)

13. In a May 26, 2005, letter, a copy of which is attached hereto as Exhibit \_\_\_\_, Mr. Wilcox demanded that if Ms. Oaks return the \$40,000.00 proceeds from the Cashier's Check by Wednesday, May 25, 2005, or Mr. Connelley and Ms. Atchley would be forced to file this Motion with the Court. (*See Ex. \_\_\_\_.*)

14. Ms. Oaks has failed to return the \$40,000.00 to Mr. Connelley and Ms. Atchley.

### **ARGUMENT**

#### **Pursuant to Rules 64, 64A and 64B of the Utah Rules of Civil Procedure, Mr. Connelley and Ms. Atchley Are Entitled To a Prejudgment Writ of Replevin**

Mr. Connelley and Ms. Atchley respectfully request that the Court enter a prejudgment writ of replevin against Christy Oaks, requiring Ms. Oaks to return Mr. Connelley's and Ms. Atchley's \$40,000.00 or to deposit that sum into the Court.

A writ of replevin is available "to compel delivery to the plaintiff of specific personal property held by the defendant." Utah R. Civ. P. 64B(a). Pursuant to Rules 64A and 64B, the Court may issue a prejudgment writ of replevin against Ms. Oaks if Mr. Connelley and Ms. Atchley show: (1) that the \$40,000.00 that Ms. Oaks wrongfully took is not earnings and not exempt from execution; (2) that the writ is not sought to hinder, delay or defraud Ms. Oaks; (3) there is a substantial likelihood that Mr. Connelley and Ms. Atchley will prevail on the merits of their underlying claims; (4) that Mr. Connelley and Ms. Atchley have an ownership or special interest in the \$40,000; and (5) that Ms. Oaks is wrongfully detaining Mr. Connelley and Ms. Atchley's \$40,000.00. Utah R. Civ. P. 64A(c)(1)-(3), (5); 64B(b)(1)-(2). Mr. Connelley and Ms. Atchley easily meet all of the requirements.

#### **A. Mr. Connelley and Ms. Atchley's \$40,000.00 Is Not Ms. Oaks' and Is Not Exempt From Execution.**

First, as is clear from the April 25, 2005, letter from Ms. Oak's counsel, the \$40,000.00 Cashier's Check does not represent the earnings of Ms. Oaks. Instead, this amount was part of the Settlement Offer, which Ms. Oaks chose not to accept. Ms. Oaks never accepted. Rather

than return the Cashier's Check, Ms. Oaks simply cashed it and took Mr. Connelley and Ms. Atchley's \$40,000.00 in complete disregard of their rights and the terms of the Settlement Offer. Furthermore, the \$40,000.00 is not exempt from execution through a writ of replevin.

B. Mr. Connelley and Ms. Atchley Do Not Seek a Prejudgment Writ of Replevin to Hinder, Delay or Defraud Ms. Oaks.

Second, the prejudgment writ of replevin is not sought to hinder, delay or defraud Ms. Oaks. Obviously the \$40,000.00 belongs to Mr. Connelley and Ms. Atchley. Ms. Oaks did not accept the Settlement Offer, and Mr. Connelley and Ms. Atchley merely seek to recover the \$40,000.00, to which Ms. Oaks has no claim.

C. Mr. Connelley and Ms. Atchley are Substantially Likely to Prevail on Their Underlying Claims Against Ms. Oaks.

Third, there is a substantial likelihood that Mr. Connelley and Ms. Atchley will prevail both on the merits of their defenses against Ms. Oaks' claims against them, as well as on their own breach of fiduciary claims against Ms. Oaks. As outlined in both Mr. Connelley and Ms. Atchley's Memorandum in Support of Motion to Disqualify Counsel and Answer and Counterclaim, both of which are hereby incorporated by reference, Ms. Oaks utterly failed to properly perform her duties as Personal Representative. Indeed, Ms. Oaks only became Personal Representative by misrepresenting her priority to be such to the Court presiding over the Estate.

Ms. Oaks made other material misrepresentations regarding the profitability of the Estate's major asset, A-1 Appliance, Inc., and that she and the counsel for the Estate that she retained acted in the best interests of the Estate, rather than solely for her personal interests. Mr. Connelley and Ms. Atchley did not know of, and had no reason to know of, Ms. Oaks' wrongful



acts when they signed the Agreement. Ms. Oaks' actions made it highly likely that the Agreement will be avoided and that Ms. Oaks will be liable in damages to Mr. Connelley and Ms. Atchley.

D. Mr. Connelley and Ms. Atchley Are Entitled to Their \$40,000.00 that Ms. Oaks Is Wrongfully Detaining.

Fourth, there can be no question that Mr. Connelley and Ms. Atchley are entitled to the return of their \$40,000.00. Mr. Connelley and Ms. Atchley tendered the Cashier's Check on the condition that Ms. Oaks accept the Settlement Offer. However, Ms. Oaks took the check, rejected the Settlement Offer, initiated this *suit for the entire \$50,000.00 she purports that Mr Connelley and Ms. Atchley owe her, and then cashed the cashier's check anyway!* Ms. Oaks is wrongfully detaining the \$40,000.00, entitling Mr. Connelley and Ms. Atchley to a writ of replevin.

**CONCLUSION**

Mr. Connelley and Ms. Atchley have clearly met the requirements for a prejudgment writ of replevin against Ms. Oaks, requiring Ms. Oaks to return the \$40,000.00 to Mr. Connelley and Ms. Atchley or deposit it with the Court. Accordingly, Mr. Connelley and Ms. Atchley request that the Court grant their Motion for Prejudgment Writ of Replevin, and enter the proposed Order submitted concurrently herewith, authorizing the issuance of a Prejudgment Writ of Replevin.

DATED: June 1, 2005.

ANDERSON & KARRENBURG

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Nathan B. Wilcox

John A. Bluth

**Attorneys for James Connelley and  
Lori Ann Atchley**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that June 1, 2005, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF Mr. CONNELLEY AND MS. ATCHLEY'S MOTION FOR PREJUDGMENT WRIT OF REPLEVIN**, to be delivered via first class mail, postage prepaid addressed to the following person(s):

Craig J. Wangsgard  
WANGSGARD & ASSOCIATES  
57 West 200 South, Suite 400  
Salt Lake City, Utah 84101

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