

2004

Mark Technologies Corp., a California Corporation, and Mark Jones, Plaintiffs/  
Appellants, vs. Utah Resources International, Inc., a Utah Corporation, John Fife, David Fife, Lyle D. Hurd, Jr., Gerry Brown, individuals, Defendants/  
Appellees : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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MARK TECHNOLOGIES CORP., a  
California Corporation, and MARK  
JONES,

Plaintiffs/Appellants,

vs.

UTAH RESOURCES  
INTERNATIONAL, INC., a Utah  
Corporation, JOHN FIFE, DAVID FIFE,  
LYLE D. HURD, Jr., GERRY BROWN,  
individuals,

Defendants/Appellees.

**BRIEF OF APPELLANT**

Court of Appeals No. 20041103-CA

District Court No. 980900576

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Appeal from the Judgment and Order of the Third Judicial  
District Court of Salt Lake County, State of Utah, Honorable Joseph C. Fratto

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## **JURISDICTION**

This appeal was within the appellate jurisdiction of the Utah Supreme Court pursuant to Utah Code Ann. § 78-2-(3)(j)(1953)(as amended). The case was transferred to the Court of Appeals pursuant to Utah Code. Ann. § 78-2-2 (4) by an order dated December 23, 2004. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-4 (2)(j).

## **STATEMENT OF THE ISSUES**

1. Whether the trial court erred in applying a legal standard of “best efforts” that was the functional equivalent of the less exacting “good faith” standard by failing to consider a party’s diligence as the touchstone of its “best efforts” analysis. The trial court’s interpretation of a contract is a legal conclusion reviewed for correctness. *Pack v. Case*, 30 P.3d 436, 440 (Utah App. 2001). This issue was preserved on appeal during closing arguments of the trial held February 10-12, 2004. (R. at 3466; Transcript at 688.)

2. Whether the trial court erred in concluding that Defendants had used their “best efforts” in resolving URI’s relationship with Morgan Gas & Oil as required by the Settlement Agreement dated June 26, 1996. This issue presents a question of fact, which is reviewed to determine whether it is clearly erroneous. *Pack v. Case*, 30 P.3d 436, 440 (Utah App. 2001). This issue was preserved on appeal during closing arguments of the trial held February 10-12, 2004. (R. at 3466; Transcript at 688.)

3. Whether the trial court erred in awarding attorneys fees to Defendants based on its finding that Defendants were the prevailing party on Plaintiffs' claim that Defendants failed to use their "best efforts" to unwind URI's relationships with Morgan Gas & Oil where Defendants' tardy compliance with the unwinding requirement only came about as a result of Plaintiffs' lawsuit seeking judicial enforcement of the unwinding. The question of whether the Defendants were entitled to an award of fees is a question of law reviewed for correctness. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1145 (Utah 2001). The amount of the award is a fact question which is reviewed to determine whether it is clearly erroneous. *Id.* This issue was preserved on appeal during closing arguments of the trial held February 10-12, 2004. (R. at 3466; Transcript at 677.)

### **DETERMINATIVE LAW**

There are no constitutional, statutory, or other provisions of law, the interpretation of which is determinative of the issues presented herein.

### **STATEMENT OF THE CASE**

#### **A. The Settlement Agreement**

A multiplicity of litigation involving a multitude of parties was settled by way of a settlement agreement (the "Settlement Agreement") entered into on June 26, 1996. A copy of the Settlement Agreement is included in the addendum as Exhibit "A." Parties to the Settlement Agreement included Plaintiffs Mark Jones ("Jones") and Mark



Technologies Corp. (“MTC”) and Defendants John Fife (“Fife”), Lyle D. Hurd (“Hurd”) and Utah Resources International (“URI”).

The Settlement Agreement was comprised of many provisions whereby both the Plaintiffs and Defendants assumed responsibility for the completion of various agreed upon obligations. At issue in this case, is an obligation found in Paragraph 1.1 of the Settlement Agreement which provides:

1. Unless otherwise provided, the following events shall occur at Closing (as defined herein):

\* \* \*

1. The Parties hereto shall exercise their best efforts to account for, pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.

(Addendum, Exhibit “A,” at 3, 8).

The plain language of this provision requires the Defendants to exercise their “best efforts” to effectively unwind and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co. (“MGO”). The essence of this case is the Plaintiffs’ contention that the Defendants breached their duty to exercise their “best efforts” in unwinding the contractual relationships between URI and MGO.

B. The unwinding of URI from MGO.<sup>1</sup>

From the time the Settlement Agreement was entered into in June of 1996, throughout the balance of 1996 and throughout all of 1997, Plaintiffs persistently requested that Defendants comply with the Settlement Agreement by taking action to wind up URI's relationship with MGO. (R. at 966.) In fact, in June of 1997, Jones made a motion in one of the cases settled by the Settlement Agreement requesting that the court enforce the Settlement Agreement by ordering Defendants to wind up URI's relationship with MGO. URI opposed the Motion. (R. at 964.) Shortly thereafter, Fife told Jones that URI would never pay money to MGO to wind up the relationship unless MGO filed a lawsuit. (R. at 1099.) By separate letters dated August 21, 1997 and October 10, 1997, Jones requested in writing that URI comply with the Settlement Agreement with regard to MGO. (R. at 1099.) Jones received no response to his requests. (R. at 1099.) Throughout the period, URI provided no information to Jones or its other directors of any actions it had taken or was planning to take to wind up the relationship with MGO, and

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<sup>1</sup> The facts set forth in this section do not represent the Plaintiffs' fulfillment of the marshaling requirement that is imposed on a party challenging a trial court's finding of fact. *See Jacobs v. Hafen*, 875 P.2d 559, 561 (Utah App. 1994). Section II of the Argument section contains the Plaintiffs' compliance with the marshaling requirement where the Plaintiffs have marshaled every piece of evidence, received both orally and through documentary exhibits, that supports the trial court's finding of fact that Defendants used their "best efforts" to unwind URI's business and contractual relationships with MGO. However, the facts as set forth in this section are solely intended to provide this Court with a factual footing necessary to adjudicating the issues raised on appeal.

ignored all requests from Jones and MTC for information concerning such actions. (R. at 966.) As of the time the Plaintiffs' complaint was filed on January 20, 1998 seeking to enforce the unwinding provision, no substantial action had been taken to unwind URI's relationships with MGO.

Once Plaintiffs filed their complaint, the Defendants sprung into action in order to unwind URI from MGO. The first mention of the MGO unwinding in the minutes of URI's board of directors meetings occurred on February 27, 1998, where Fife made a motion for a resolution authorizing URI's officers to use their best efforts to wind up the contractual relationships with MGO by the end of 1998. (R. at 15; Plaintiffs' Exhibit 5w.) Prior to that meeting, the MGO unwinding had never been addressed by URI's board of directors. (R. at 15; Plaintiffs' Exhibits 5a-w.)

Despite the resolution, URI took no further action to unwind the MGO relationship for several months. On June 25, 1998, the trial court heard argument on URI's first Motion for Summary Judgment on the MGO claim, and denied the Motion. (R. at 449-451.) The following week, Fife and URI began their first serious discussions towards unwinding the relationship. (R. at 925.) URI and Fife ultimately scheduled a conference call for July 15, 1998, and on July 20, 1998, Fife made a written proposal to MGO. (R. at 15; Plaintiffs' Exhibit 12c.) The July 20, 1998 proposal consisted of less than two pages and was the first proposal of any kind made by URI since the Settlement Agreement was entered two years earlier. (R. at 15; Plaintiffs' Exhibit 12c.)

After brief discussions, Fife made a revised proposal on August 1, 1998, which MGO's president verbally approved. (R. at 15; Plaintiffs' Exhibit 12e.) The parties made further revisions to the proposal and drafted a Letter of Intent dated August 21, 1998 which was approved by URI's Board of Directors on September 2, 1998. (R. at 15; Plaintiffs' Exhibit 5z.) The process was completed when the parties executed a Partnership Settlement Agreement on December 15, 1998. (R. at 15; Plaintiffs' Exhibit 15.)

Once Defendants actually began to actively address the MGO unwinding, the entire process was completed and documents signed within a period of five months. However, from June of 1996 through July of 1998, the only documentary evidence of Defendants' effort to unwind from MGO was a two-page spreadsheet prepared on May 30, 1997 and a board resolution authorizing the officers to act on February 27, 1998. (R. at 15; Defendants' Exhibit 19; Plaintiffs' Exhibit 5w.)

C. Procedural History.

On January 20, 1998, MTC and Jones filed a complaint alleging, among other things, that Defendants had breached the terms of the Settlement Agreement by failing to use their "best efforts" to unwind URI's relationship with MGO. (R. at 1.) On August 17, 1998, the Defendants filed an Answer, which included Counterclaims against MTC and Jones for breach of the Settlement Agreement and for payment of attorneys fees. (R. at 470.) On January 1, 1999, Defendants filed a Motion for Summary Judgment on all

claims. (R. at 561.) The Motions were heard on November 12, 1999, and the Court entered a Memorandum Decision on January 5, 2000 granting summary judgment and dismissing all of MTC and Jones' claims. (R. at 1515, 1516.)

On February 17, 2000, the Defendants moved for an order awarding attorneys fees and costs against Plaintiffs. After briefing and argument, the Motion for attorney's fees was granted by a Memorandum Decision dated January 4, 2001. (R. at 1834.) A final Judgment Order was entered on February 26, 2001. (R. at 1927.) Plaintiffs filed a Notice of Appeal on March 1, 2001. (R. at 1933.)

On appeal, this Court reversed the trial court's grant of summary judgment on several of Plaintiffs' claims, including the claim that Defendants had failed to use their "best efforts" to unwind the relationships between URI and MGO. (R. at 1956.) This Court remanded that issue to the trial court for resolution of the unresolved fact question of whether Defendants had breached the terms of the Settlement Agreement by failing to use their "best efforts" in unwinding URI's relationships from MGO, and for a determination of which party was the "prevailing party" on the claim for purposes of awarding attorneys fees. (R. at 1958-1960.)

After a trial addressing the issues remanded to the trial court, the trial court held that Plaintiffs had failed to satisfy their burden of proof to demonstrate, to a preponderance of the evidence, that Defendants had not used their "best efforts" to unwind and/or terminate all existing contractual relationships with MGO. (R. at 2121.)

On November 17, 2004, the trial court entered an Order Regarding Attorneys' Fees in which the court awarded attorneys fees and costs to the Plaintiffs in the amount of \$34,834.02 and attorneys fees and costs to the Defendants in the amount of \$110,187.77. (R. at 3413.) The court then set the Plaintiffs' award off against the award to Defendants and held that Defendants were entitled to attorneys fees and costs in the net amount of \$75,353.75. (R. at 3413.)

On December 17, 2004, Plaintiffs filed their notice of appeal (R. at 3418,) and on January 7, 2005, Plaintiffs filed their Docketing Statement with this Court.

### **SUMMARY OF THE ARGUMENT**

The trial court committed an error of law by applying an interpretation of "best efforts" that fails to consider a party's diligence as the touchstone of the "best efforts" analysis. Courts which have distinguished between the "best efforts" standard and that of "good faith" have noted that a party's diligence in fulfilling its agreed upon obligation is the distinguishing factor between the more exacting "best efforts" standard and the less stringent standard of "good faith." While the trial court purported to apply a "best efforts" analysis in this case, its failure to scrutinize the diligence with which the Defendants attempted to unwind from MGO coupled with the court's focus on the reasonableness and intent of the Defendants' actions, and inactions, rendered the trial court's "best efforts" analysis the functional equivalent of the less exacting "good faith" standard.

The trial court also erred in concluding as a factual matter that Defendants used their “best efforts” to unwind URI’s relationships with MGO. After marshaling the evidence in support of the trial court’s findings, Plaintiffs contend that the clear weight of evidence in this case not only shows the trial court erred in holding that Defendants used their “best efforts” in unwinding URI’s relationship with MGO, but that Defendants expended virtually no effort whatsoever to fulfill its obligation to unwind from MGO for a period of twenty months.

Additionally, the clear weight of evidence contradicts the Defendants’ assertion that URI’s unwinding with MGO was a complex issue requiring twenty months of delay. Moreover, the facts show that Defendants only began to dedicate any effort whatsoever to the unwinding after the Plaintiffs had commenced legal action seeking to judicially enforce the unwinding. The clear weight of the evidence in this case shows that the trial court’s finding that Defendants used their “best efforts” in fulfilling their obligation to unwind its relationships with MGO was clearly erroneous.

Finally, Plaintiffs contend that this Court should remand the award of attorneys fees to the trial court for a recalculation of the award based on a finding that Plaintiffs are the prevailing party on their claim that Defendants breached the Settlement Agreement by failing to use their “best efforts.” Plaintiffs contend that because the Defendants only complied with the unwinding provision as a result of the Plaintiffs’ lawsuit, that the Plaintiffs should be deemed the prevailing party as to this claim and the trial court should

modify its fee award to reflect this conclusion. Plaintiffs do not challenge the method implemented by the trial court in calculating the award of attorneys fees; but rather, contend that the trial court should recalculate those fees consistent with a ruling that Plaintiffs were the prevailing party.

### **ARGUMENT**

- I. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY FAILING TO CONSIDER THE DEFENDANTS' DILIGENCE AS THE TOUCHSTONE OF ITS "BEST EFFORTS" STANDARD, AND THEREBY APPLIED A LEGAL STANDARD THAT WAS THE FUNCTIONAL EQUIVALENT OF THE LESS EXACTING STANDARD OF "GOOD FAITH."

*The trial court erred in applying a legal standard of "best efforts" as provided in the Settlement Agreement that was the functional equivalent of a less exacting "good faith" standard. The Seventh Circuit has noted that courts applying the "best efforts" and "good faith" standards have at times "muddled" these two concepts. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1445 (7th Cir. 1992). Jones contends that by focusing on the reasonableness and intent of the Defendants' actions rather than considering the diligence with which Defendants attempted to unwind URI's relationships with MGO, the trial court effectively "muddled" the distinction between the more stringent "best efforts" standard and the less exacting standard of "good faith.*



**A. The Legal Standard of “Best Efforts” is More Exacting Than That of “Good Faith.”**

A party required to use its “best efforts” in the fulfilment of a contractual obligation is held to a higher standard of performance than a party required to exercise “good faith.” The Utah Supreme Court has held that to satisfy the contractual obligation of “good faith,” a party’s actions “must be consistent with the agreed upon common purpose and the justified expectations of the other party.” *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 199-200 (Utah 1991). Pursuant to its plain language, “good faith” does not require that a party engage in any specific, timely, or consistent efforts to achieve its obligation; but rather, that whatever efforts the party does make, however minimal, not be contrary to the other party’s expectations. In short, “good faith” is a baseline standard which only requires that a party’s actions not manifest an attempt to sabotage the agreed upon obligation or undermine the other party’s expectations.

In contrast, “best efforts” demands a higher standard of performance and accountability. Black’s Law Dictionary defines “best efforts” as “[d]iligent attempts to carry out an obligation,” and that “[a]s a standard, a best-efforts obligation is stronger than a good-faith obligation.” Black’s Law Dictionary 152 (7th ed. 1999)(emphasis added.) Pursuant to this definition, the distinction between the “stronger” obligation of “best efforts” and the less exacting standard of “good faith” is a party’s diligent effort to fulfill its obligation rather than merely not acting contrary to another party’s expectations.

In *Carlson Distrib. Co. v. Salt Lake Brewing Co.*, 95 P.3d 1171, 1179 (Utah App. 2004), this Court held that “best efforts is primarily a subjective standard under which a party agrees to do the best that it can regardless of the capabilities of others.” This definition is further explained by decisions of courts in other jurisdictions. In *Macksey v. Egan*, 633 N.E.2d 408, 414 (Mass.App.Ct. 1994), the Massachusetts Court of Appeals held that in the natural sense of the words “[b]est efforts means that a party put its muscles to work to perform with the full energy and fairness that the promises and reasonable implications of the contract require.”<sup>2</sup> Additionally, in *Gilson v. Rainin Instrument, LLC*, 2005 WL 1899471 (W.D.Wis. 2005), the court held that the “duty to use best efforts requires the defendant to use “reasonable efforts and due diligence” in the promotion of the plaintiff’s medical supplies. *Id.* at 5<sup>3</sup> The court also stated that “[b]est efforts is a standard that has diligence as its essence” and that when compared to the “good-faith” standard “best efforts is the more exacting.” 2005 WL 1899471 at 5 quoting E. Allan Farnsworth, *On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*, 46 U.Pitt. L.Rev. 1, 8 (1984).

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<sup>2</sup> Other courts have followed this reasoning as evidence by *Western Geophysical Co. v. Bolt Assoc.*, 584 F.2d 1164, 1170-1171 (2d Cir. 1978); *Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225-226 (1st. Cir. 1987); *Polyglycoat Corp. v. C.P.C. Distrib., Inc.*, 534 F. Supp. 200, 203 (S.D.N.Y. 1982).

<sup>3</sup> As an unpublished opinion, a copy of the *Gilson* decisions has been included in the addendum and is marked as Exhibit “B.”

In the natural sense of the words, “best efforts” requires that a party not merely intend to do well but that it actually “put its muscles to work” with all “due diligence” and “full energy” in attempting to fulfill its obligation. Plaintiffs contend that based on this Court’s standard for determining “best efforts,” a trial court must look to a party’s diligence in order to properly determine whether that party has in fact exercised “best efforts” or whether it has merely acted in “good faith.” Given the propensity of courts to muddle these two concepts, it is imperative that trial courts consider the diligence of a party as the touchstone of its analysis when determining whether “best efforts” have been exerted.

**B. The Trial Court Failed to Apply the Appropriate Standard for Determining “Best Efforts” By Neglecting to Consider the Defendants’ Diligence in Unwinding URI’s Relationships with MGO.**

The trial court committed an error of law in this case by applying a legal standard of “best efforts” that omitted as its touchstone evidence of a party’s diligence, thereby rendering its analysis virtually identical to the less stringent standard of “good faith.” The trial court began its analysis by holding that “best efforts” means to “make the best effort possible in the context of the circumstances and situation.” (R. at 2122.) While at first blush this articulation may appear identical to the “best efforts” standard set forth by this Court in *Carlson*, the trial court erred by applying its own definition which focused on the reasonableness and intent of the Defendants’ actions rather than considering the Defendants’ diligence, or lack thereof, in attempting to unwind URI’s relationships with

MGO. The trial court's emphasis on the reasonableness of the Defendants' actions and the Defendants' intent is essentially a "good faith" rather than "best efforts" analysis.

The trial court concluded that it could not be said that Defendants failed to use their "best efforts" to unwind URI's relationships with MGO where "[d]efendants also had a fiduciary obligation to accomplish their contractual obligation to the benefit of URI" and that "[s]evering the relationship with MGO would be a relatively easy task, if URI's best interests were ignored." (R. at 2122.) Moreover, the trial court concluded that Fife had to first "resolve specific situations both directly and indirectly connected to the MGO unwinding" and that Fife was justified in assigning varying degrees of priority to different tasks "both within the unwinding process, and in relation to all activities connected with his performance as president of the corporation." (R. at 2122.) In short, the trial court rationalized the Defendants' lack of diligence on the grounds of reasonableness, rather than applying a "best efforts" standard that focuses on a party's diligence.

The fact that Fife chose to "first marshal, organize and analyze the records of URI," (r at 2122,) before taking action may be considered reasonable, and thereby satisfy the "good faith" standard, but a twenty month gap wherein URI had absolutely no communications with MGO to discuss the unwinding is clearly indicative of a lack of diligence. Fife's decision to prioritize other matters ahead of the unwinding may have been reasonable given the disorganized state of URI, but the failure to even mention the

unwinding with MGO at URI's board meetings from July 30, 1996 through February 27, 1998 again indicates a complete lack of diligence. While there was no evidence that Fife or the other Defendants intended to frustrate or sabotage the unwinding with MGO, such evidence only satisfies a "good faith" standard and not the more exacting standard of "best efforts."

It is interesting to note that only after Plaintiffs filed their lawsuit on January 20, 1998 to enforce the terms of the Settlement Agreement did Defendants suddenly engage in a flurry of activity in an attempt to unwind URI from MGO. This sudden burst of activity, in immediate response to the lawsuit begs the question of what circumstances changed from one day to the next that suddenly allowed URI to put its muscles to work in unwinding its affairs with MGO. Plaintiffs contend that Defendants' level of activity regarding the MGO unwinding after the Plaintiffs' lawsuit was filed is representative of what constitutes the Defendants' "best efforts" in this case.

The trial court committed an error of law by failing to consider the Defendants' diligence as the touchstone of the "best efforts" analysis. Plaintiffs contends that only by considering the degree of diligence a party has undertaken to fulfill its contractual obligation can the "best efforts" standard be determined and distinguished from the less exacting standard of "good faith." In this case, the trial court conducted a subjective analysis that looked to the Defendants' intent and reasonableness of actions rather than scrutinizing URI's diligence, or lack thereof, in the fulfillment of its contractual

obligation to unwind from Morgan. Accordingly, the trial court committed an error of law by effectively muddling the “best efforts” standard with that of “good faith.”

II. THE TRIAL COURT’S FINDING THAT DEFENDANTS USED THEIR “BEST-EFFORTS” IN UNWINDING URI’S RELATIONSHIP WITH MGO IS SO LACKING IN SUPPORT AS TO BE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE IN THIS CASE.

Plaintiffs also contend that the trial court’s finding that Defendants used their “best-efforts” in unwinding URI’s relationships with MGO was clearly erroneous based on the facts in evidence. To successfully challenge a trial court’s factual findings, “[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be ‘against the clear weight of the evidence,’ thus making them ‘clearly erroneous.’” *Jacobs v. Hafen*, 875 P.2d 559, 561 (Utah App. 1994) quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989). In this case, despite marshaling all of the evidence that supports the trial court’s factual finding that Defendants used their “best efforts,” the trial court’s finding was against the clear weight of evidence and is clearly erroneous.

The trial court’s holding that Defendants used their “best efforts” in unwinding URI’s relationships with MGO was based primarily on Fife’s testimony that there were complex issues involved and that Fife needed time to navigate his way through those issues and to ease John Morgan (“Morgan”) into the complexities of the deal. Fife also testified that he met with Morgan various times to discuss the unwinding, and that there were other priorities that URI needed to dispense of before it could fulfill its obligation to

unwind from Morgan. Plaintiffs have marshaled the evidence that supports the trial court's findings below with appropriate citations to the record and trial transcript and has categorized the evidence in support of the trial court's findings as either: (1) evidence in the form of oral testimony taken at trial, or (2) evidence in the form of exhibits submitted at trial.

Evidence Received at Trial as Oral Testimony:

Testimony of Lyle D. Hurd:

- After the Settlement Agreement, the board had an ongoing dialogue regarding how to take care of the unwinding with Morgan pursuant to the Settlement Agreement. (R. at 3464; Transcript at 157.)
- Unwinding with Morgan was probably one of Mr. Jones' very strong priorities. (R. at 3464; Transcript at 159.)

Testimony of Mark Jones:

- Liability for an environmental remediation and a promissory note obligation served as obstacles to completing the unwinding of URI and Morgan. (R. at 3464; Transcript at 184-185.)
- The unwinding of URI from Morgan came up at URI board meetings and the board simply said they were working on it. (R. at 3464; Transcript at 205.)
- Discussions at numerous board meetings discussing the progress with that unwinding. (R. at 3465; Transcript at 311.)
- There may have been one conversation between Mr. Bennion and Mr. Eldgredge concerning the winding up. (R. at 3465; Transcript at 314.)
- URI participated in negotiations with at least one other party to enter into a partition agreement regarding the Southgate Resort Limited Partnership. (R. at 3465; Transcript at 318-319.)

Testimony of J. Michael Bennion:

- Remembered meeting with Ladd Eldredge of URI to discuss the separation of URI and Morgan on October 4, 1996. (R..at 3465; Transcript at 395.)
- Ladd Eldredge of URI had prepared a spreadsheet in November of 1995 to discuss the financial interests shared between URI and Morgan and important debts that Morgan owed to URI. (R. at 3465; Transcript at 396.)
- Was satisfied that between July 1, 1998 and August 26, 1998, URI was using its best efforts to bring about a resolution. (R. at 3465; Transcript at 413.)
- Was satisfied that between August 26, 1998 and December 15, 1998, URI was using its best efforts to finalize the deal. (R. at 3465; Transcript at 414.)
- Because the assets and liabilities of Morgan, the Morgan Sheltered Trust, John H. Morgan, Jr., individually, and the John H. Morgan, Sr. Estate, that the parties were concerned about how those assets and liabilities would be accounted for in any final settlement between URI and Morgan. (R. at 3465; Transcript at 420.)
- Agreed that any unwinding of the Service Station had to consider the interests and liabilities or tax consequences that might be assigned to each limited partner. (R. at 3465; Transcript at 421.)
- Agreed that any unwinding of Southgate Plaza Limited Partnership, or the Southgate Plaza general partnership also had to consider the interests of the other partners. (R. at 3465; Transcript at 423.)
- Agreed that after his departure from URI in 1994, URI's records were not in the most organized state. (R. at 3465; Transcript at 426.)
- Stated that he was aware that URI had other things on its plate that required its attention. (R. at 3465; Transcript at 428.)
- Agreed that in 1996, URI had a new board and that the board was at an informational disadvantage in terms of understanding all of the issues that had been in existence for many years. (R. at 3465; Transcript at 429.)
- Some time was likely required on URI's part to figure out the muddle of surviving issues. (R. at 3465; Transcript at 429.)
- Agreed that there was back-up information that had to be located. (R. at 3465; Transcript at 433.)



- The Southgate Plaza partition was integrally tied to the winding up of URI and Morgan because Morgan was a one-third partner in it. (R. at 3465; Transcript at 441.)

Testimony of John Fife:

- When he arrived on the scene in 1996 he and URI spent a considerable amount of time in the investigative process getting to know the parties involved in the different asset partnerships. (R. at 3466; Transcript at 500.)
- Testified that he spoke to Allen Roth about the issues and the complexities of the partnership tax and exposure and liabilities URI might have. (R. at 3466; Transcript at 500.)
- During 1997 URI sold the service station which he believed to be a required step in the unwinding. (R. at 3466; Transcript at 501.)
- Believed the sale of the service station was vital because URI could not separate out an environmentally contaminated building and land to any particular partner and that URI had to liquidate the service station and pay out the assets. (R. at 3466; Transcript at 501.)
- Fife personally and URI took on an environmental remediation obligation after the sale of the service station. (R. at 3466; Transcript at 506.)
- During 1997 URI had to deal with the Plaza General Partnership which had about 6.6 acres of commercial grade land to facilitate the unwinding with Morgan. (R. at 3466; Transcript at 507.)
- A partition of the Plaza General Partnership was necessary to effectuate the unwinding with Morgan. (R. at 3466; Transcript at 509.)
- Spoke with John Morgan a lot to keep Morgan informed of what URI was doing with respect to the Service Station and Plaza General plot of ground. (R. at 3466; Transcript at 510.)
- URI prioritized its obligations pursuant to the settlement agreement according to what they deemed to be the most significant and the most economic and that there were numerous complexities that faced URI. (R. at 3466; Transcript at 510-514.)
- URI prepared documents summarizing payments, assets, liabilities and partnerships involving Morgan. (R. at 3466; Transcript at 514-518.)
- URI and Fife used their best efforts to bring about the unwinding of URI and Morgan. (R. at 3466; Transcript at 559.)

- His priority was to focus on those things that were the most economic and provided the largest savings for URI. (R. at 3466; Transcript at 562.)
- URI had to dedicate many of its efforts to dissolving varying partnerships revolving around URI's relationship with Morgan in order to unwind. (R. at 3466; Transcript at 577-580.)
- He had to spend time to give John Morgan the chance to understand issues, think about the implications, and feel comfortable with everything in order to complete the unwinding and that he could not push John Morgan along. (R. at 3466; Transcript at 591.)
- He met with John Morgan whenever he could and other directors of Morgan to discuss, among other things, the unwinding of URI and Morgan. (R. at 3466; Transcript at 591-592.)
- The whole matter of unwinding with Morgan and dissolving its associated partnerships and dealing with the surviving liabilities as well as complying with other terms of the Settlement Agreement was more complicated than he originally thought and that he had to bring in legal counsel to help sort through the information. (R. at 3466; Transcript at 622-623.)

Evidence Received at Trial as Exhibits that Support the Trial Court's Factual Finding:

- Letter from John Fife to Mark Jones dated April 12, 1997 explaining the complexity of unwinding with Morgan. (R. at 15; Defendants' Exhibit 18.)
- Summary spreadsheet summarizing partnerships involving Morgan prepared May 30, 1997. (R. at 15; Defendants' Exhibit 19.)
- URI Board Minutes for Friday, February 27, 1998. Resolution authorizing use of best efforts to complete the wind up of the MGO contracts by year-end 1998. (R. at 15; Plaintiffs' Exhibit 5w.)
- Letter from John Fife to John Morgan regarding URI/Morgan unwinding dated July 20, 1998. (R. at 15; Plaintiffs' Exhibit 12c.)
- Letter from John Fife to John Morgan regarding URI/Morgan unwinding dated August 1, 1998. (R. at 15; Plaintiffs' Exhibit 12e.)
- Letter from John Fife to John Morgan regarding URI/Morgan unwinding dated August 7, 1998. (R. at 15; Plaintiffs' Exhibit 12i.)
- Letter from John Fife to John Morgan regarding URI/Morgan unwinding dated August 21, 1998. (R. at 15; Plaintiffs' Exhibit 12k.)

- Letter from John Fife to John Morgan regarding URI/Morgan unwinding dated August 26, 1998. (R. at 15; Plaintiffs' Exhibit 12m.)
- URI Board Minutes for September 2, 1998: Fife reports that he is working with John Morgan to complete the URI/Morgan unwinding. (R. at 15; Plaintiffs' Exhibit 5z.)
- URI Board Minutes for November 11, 1998: Fife reported on the URI/Morgan wind up. (R. at 15; Plaintiffs' Exhibit 5aa.)

Despite the evidence marshaled above, Plaintiffs contends that the clear weight of the evidence in this case contradicts the trial court's finding that Defendants used their "best efforts" to unwind URI's relationships with MGO and the finding should be reversed as clearly erroneous. The trial court's finding is contradicted by the weight of evidence in this case that establishes: (1) the unwinding between URI and MGO had already been contemplated and was not as complicated nor intricate a matter as Defendants contend, and (2) it was only after Plaintiffs filed their lawsuit to enforce the terms of the Settlement Agreement that Defendants began to exert any diligence at all in attempting to complete the unwinding process

**A. The Clear Weight Of The Evidence Establishes That The Unwinding Between URI And MGO Had Previously Been Contemplated And Was Neither a Complicated Nor Intricate Matter Requiring Thirty Months To Complete.**

The trial court's finding that Defendants used their "best efforts" to unwind URI's relationship with MGO was erroneous based on evidence that shows that the unwinding was not so complex a matter as to justify the lengthy delay in unwinding. While Defendants presented some evidence that its unwinding with MGO presented numerous

complexities including liabilities, expenses and assets that needed to be liquidated, the clear weight of evidence shows that even before the Settlement Agreement was executed, the two parties had already discussed most of the issues relating to the unwinding. The evidence shows that MGO was completely cooperative and willing to unwind from the outset, and that the issues Defendants contend were integral to the unwinding were neither essential nor complex at all. In the end, the evidence shows that once Defendants stopped ignoring the issue and began serious efforts toward unwinding the relationship, an agreement in principle was reached within several days and the whole matter was concluded in less than five months.

Testimony was received at trial that established that both URI and MGO had been involved in serious discussions prior to the Settlement Agreement addressing specific issues regarding their unwinding, and that MGO had already sent several correspondences to URI setting forth the manner in which the relationship could be unwound properly. (R. at 3464; Transcript at 193-194.) The fact that URI and MGO had already engaged in serious discussion involving the issues regarding the unwinding shows that the two parties had already laid the groundwork for completing the unwinding. Moreover, testimony was given stating that MGO was completely interested and willing to complete the unwinding. (R. at 3465; Transcript at 397.)

Defendants also attempted to show that there were numerous issues involved in the unwinding that required lengthy and prolonged analysis. This contention is contradicted

by the evidence of this case. Evidence was received at trial that MGO's interest in Service Station No. 2 did not require the sale of the Service Station, and that such a sale had no bearing whatsoever on the unwinding between URI and MGO. (R. at 3465; Transcript at 367-368.) Additionally, the partition regarding the Southgate Plaza General Partnership and Southgate Resort General Partnership land was not a necessary prerequisite to unwinding either. (R. at 3465; Transcript at 368.)

While Defendants may have assigned a lower priority to fulfilling its obligation to unwind its relationship with MGO, even with a lower priority, the unwinding should not have taken over two years to effectuate, particularly given the willingness of MGO to complete the unwinding and the groundwork that had already been established to complete it. Additionally, the resolution of issues such as the sale of Service Station No. 2 and the Southgate Partition were not essential nor integral to the MGO unwinding. Accordingly, the evidence shows that Defendants did not use their "best efforts" to unwind its relationship with MGO.

**B. The Clear Weight Of The Evidence Establishes That Defendants Only Began To Exert Their "Best Efforts" To Complete The Unwinding With MGO When Plaintiffs Filed Their Lawsuit To Enforce the Terms Of The Settlement Agreement.**

The clear weight of evidence shows that Defendants only began to diligently pursue the unwinding with MGO as a result of the Plaintiffs' lawsuit to seek judicial enforcement of the unwinding. The evidence is clear that: (1) there were no correspondence from the Defendants to MGO regarding the unwinding until after the

Plaintiffs' lawsuit was filed; (2) there was never any mention of the MGO unwinding in any of URI's board meetings prior to the Plaintiffs' lawsuit; and (3) there were no internal memoranda or work product aside from a single two-page spreadsheet prepared in May of 1997 prior to the filing of the Plaintiffs' lawsuit. In short, the Defendants only exercised their "best efforts" to unwind URI's relationship from MGO after the Plaintiffs filed their lawsuit.

URI has failed to produce any documentary evidence to show that it either contacted Morgan regarding the wind-up or even discussed the wind-up internally. From the time the Settlement Agreement was entered into in June of 1996 until the time the Plaintiffs filed their lawsuit to enforce the terms of the Settlement Agreement in January of 1998, the only documentary evidence that shows Defendants' attempt to unwind is a single two-page spreadsheet prepared on May 30, 1997 that details the various asset and liability values of URI and MGO's shared partnerships. (R. at 15; Defendants' Exhibit 19.) This is the extent of Defendants' documentary evidence showing they used their "best efforts" in attempting to unwind with MGO prior to the lawsuit in January of 1998. During this gap period there are no letters written to MGO discussing the various issues involving the wind-up or internal memoranda analyzing the wind-up. There are no minutes or notes from meetings between URI and MGO and there are no proposals prepared by URI to send to MGO for its approval. There is simply a two-page spreadsheet listing assets and liabilities of the shared partnerships.

Moreover, on May 21, 1997, Jones' legal counsel sent a letter to Fife's legal counsel inquiring as to why nothing had been accomplished with respect to the unwinding from MGO per the terms of the Settlement Agreement and accusing URI of failing to fulfill its obligation to use "best efforts." (R. at 15; Plaintiffs' Exhibit 7.) Interestingly, when Fife's attorney responded to this accusatory letter, he made no mention of a single thing URI had been doing to refute Jones' claims that URI was failing in its duty to use "best efforts." (R. at 15; Plaintiffs' Exhibit 8.) There was no mention in the letter of any efforts or actions the Defendants had taken in furtherance of the unwinding. Instead, the letter simply stated that Defendants had other priorities and that Jones had no right to tell Defendants what they should be doing. (R. at 15; Plaintiffs' Exhibit 8.)

The only activity that Defendants took to advance the unwinding with MGO came about solely as a result of the legal action commenced by the Plaintiffs in 1998. Plaintiffs submitted into evidence the minutes from URI's board meetings that were held from June 5, 1996 through November 11, 1998. (R. at 15; Plaintiffs' Exhibit 5a-aa.) The first time the subject of unwinding with MGO is even mentioned comes in the first meeting following the filing of the Plaintiffs' lawsuit held on February 17, 1998, when a resolution was passed authorizing use of best efforts to complete the wind up of the MGO contracts by year-end 1998. (R. at 15; Plaintiffs' Exhibit 5w.) The minutes show that there was absolutely no discussion at all in any of the board meetings regarding the MGO unwinding until after the Plaintiffs' lawsuit had been filed. However, once the lawsuit

was filed, the minutes from every subsequent board meeting included notes on the unwinding with MGO. (R. at 15; Plaintiffs' Exhibit 5w-aa.) Additionally, the only time any internal memorandum appear discussing the unwinding occurs after the lawsuit was filed. (R. at 15; Plaintiffs' Exhibit 12a-u.) Defendants' flurry of activity to unwind its relationships with MGO occurred only after Plaintiffs initiated legal proceedings in an attempt to compel the Defendants to honor the terms of the Settlement Agreement entered almost two-years prior. The sudden proliferation of internal memoranda regarding the unwinding along with the sudden interest the URI board took in discussing the unwinding were both nonexistent until Plaintiffs filed their lawsuit.

The trial court's finding that Defendants used their "best efforts" in the resolution and unwinding of its relationship with MGO is contrary to the clear weight of evidence in this case. Defendants' contention that the unwinding was a complex matter that necessitated a prolonged delay is erroneous when the evidence showed that URI's sale of Service Station No. 2 had no relevance to the unwinding with MGO and that the Southgate Plaza Limited Partnership partition only involved assigning a one-third value of the 6.6 acre plot to MGO. Additionally, the evidence shows that MGO was a willing partner in the wind-up and that the two parties had discussed the relevant issues of the wind-up prior to the Settlement Agreement's directive. Furthermore, the clear weight of evidence shows that the Defendants only exercised their "best efforts" to unwind with MGO as a result of the Plaintiffs' lawsuit.



The evidence, as marshaled above, does not support a finding that Defendants used their “best efforts” until after the Plaintiffs filed their lawsuit. Accordingly, the trial court’s conclusion that Defendants used their “best efforts” to unwind URI’s relationships with MGO should be reversed as clearly erroneous, and Plaintiffs should be deemed the prevailing party on their claim.

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES TO THE DEFENDANTS AS THE PREVAILING PARTY WHERE DEFENDANTS ONLY WOUND UP URI’S RELATIONSHIP WITH MGO AS A RESULT OF THE PLAINTIFFS’ LAWSUIT SEEKING JUDICIAL ENFORCEMENT OF THE WIND-UP PROVISION.

Plaintiffs contend that Defendants were not entitled to an award of attorneys fees as the prevailing party where Defendants only wound up URI’s relationship with MGO as the result of the Plaintiffs’ lawsuit. The Utah Supreme Court has held that a party is a “prevailing party” if the opposing party’s tardy compliance with an obligation comes as a result of a lawsuit. *Highland Constr. Co. v. Stevenson*, 636 P.2d 1034, 1038 (Utah 1981). In this case, Plaintiffs do not challenge the method used by the trial court to calculate its fee award, but rather, Plaintiffs contend that they should be considered the prevailing party since the evidence shows that Defendants’ tardy compliance with the wind-up provision came about only as a result of the Plaintiffs’ lawsuit.

As briefed extensively above, the record shows that only after the Plaintiffs filed their lawsuit in January of 1998 did the Defendants begin to display any diligence at all in attempting to unwind from MGO. Once the Plaintiffs filed their lawsuit, the Defendants

sprung into action and discussed the MGO unwinding at URI's subsequent board meetings, sent numerous correspondence to MGO regarding the unwinding and completed the unwinding in less than five months, whereas for the twenty months prior to the January, 1998 lawsuit, the Defendants sole effort to unwind took the form of a two-page spreadsheet.

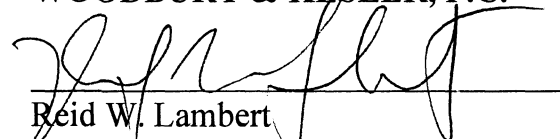
The clear weight of evidence shows that Defendants' compliance with the Settlement Agreement's directive to unwind URI's relationships with MGO came about solely as the result of Plaintiffs' lawsuit. Therefore, according to the Utah Supreme Court's decision in *Highland Construction*, the Plaintiffs should be deemed the "prevailing party" for purposes of its claim that Defendants failed to use their "best efforts" in unwinding, and the fee award should be vacated and remanded to the trial court for a recalculation of the award consistent with a finding that the Plaintiffs were the prevailing party on their claim.

### CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully ask this Court to reverse the decision of the trial court.

DATED this 16<sup>th</sup> day of November, 2005.

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



Reid W. Lambert

Anthony M. Grover

Attorneys for Plaintiffs

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 16<sup>th</sup> day of November, 2005, I mailed a true and correct copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, by First-Class U.S. Mail to the following:

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## **ADDENDUM**

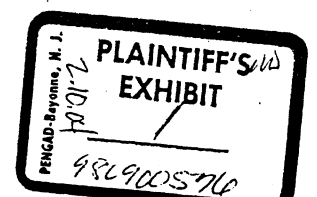
<b><u>Exhibit</u></b>	<b><u>Item</u></b>
Exhibit A	Settlement Agreement
Exhibit B	<i>Gilson v. Rainin Instrument, LLC</i> , 2005 WL 1899471 (W.D.Wis. 2005)
Exhibit C	Memorandum Decision, dated March 19, 2004
Exhibit D	Order Regarding Attorneys' Fees, dated November 17, 2004

# EXHIBIT “A”

## SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into the \_\_\_\_ day of June, 1996 among the following parties (collectively referred to herein as the "Parties"):

1. Utah Resources International, Inc., a Utah corporation ("URI").
2. R. Dee Erickson ("Erickson").
3. E. Jay Sheen ("Sheen").
4. Lyle D. Hurd ("Hurd").
5. Mark G. Jones ("Jones").
6. Mark Technologies Corporation, a California corporation ("MTC").
7. Anne Morgan ("A Morgan").
8. Victoria Morgan ("V Morgan").
9. Inter-Mountain Capital Corp., a Delaware corporation ("IMC").
10. John Fife ("Fife").
11. Robinson & Sheen, L.L.C.



## RECITALS

A. The Parties are involved in various disputes and controversies involving the operation, management, ownership of and business activities of URI, including, but not limited to, matters which are the subject of the First State Action, the Second State Action and the First Federal Action as defined below (collectively, the "Pending Litigation").

B. A shareholders derivative action captioned as Ernest Muth, et al. v. John H. Morgan, Jr. et al. was filed as Civil Number C-87-1632 in the Third Judicial District Court of Salt Lake County, Utah (the "First State Action").

C. A settlement agreement was entered into in the First State Action on April 6, 1993 (the "1993 Settlement Agreement").

D. Subsequently, URI brought an action to enforce the 1993 Settlement Agreement in the First State Action which resulted in certain findings of fact and conclusions of law and an order enforcing the Settlement Agreement entered by Judge Michael R. Murphy on October 4, 1995 (the "Murphy Order"). The Murphy Order has been appealed by JH Morgan and DR Morgan and cross-appealed by URI.

E. An Order to Show Cause has been filed in the First State Action by URI against JH Morgan, DR Morgan, Mark Jones, MTC, Anne Morgan and Victoria Morgan, which is pending.

F. A shareholders derivative action captioned as Anne Morgan et. al v. R. Dee Erickson et. al was filed as Case Number 2:95CV-0661C in the United States District Court for the District of Utah, Central Division (the "First Federal Action").

G. Pursuant to a Plan of Share Exchange and Share Exchange Agreement dated February 16, 1995 among URI, Midwest Railroad Construction and Maintenance Corporation of Wyoming, a Wyoming corporation ("Midwest"), Robert D. Wolff ("RD Wolff") and Judith J. Wolff ("JJ Wolff"), URI acquired all outstanding shares of Midwest from RD Wolff and JJ Wolff in exchange for 590,000 restricted shares of authorized but unissued shares of URI (the "Share Exchange Agreement").

H. In April of 1996 URI and Midwest, RD Wolff and JJ Wolff entered into a Split-Off Agreement pursuant to which the Share Exchange Agreement was rescinded in a transaction intended to qualify as a tax-free spin-off under the provisions of Section 355 of the *Internal Revenue Code of 1986* (the "Recision Agreement").

I. On April 5, 1996 URI entered into a letter of intent with IMC to sell a controlling interest in URI to IMC upon terms and conditions set forth therein (the "IMC Letter of Intent"), attached as Exhibit A and by this reference made a part hereof. The IMC Letter of Intent was

modified pursuant to a letter of May 31, 1996, a copy of which is attached as Exhibit B and by this reference made a part hereof. The IMC Letter of Intent is modified pursuant to the terms and conditions of this Agreement.

J. Fife is the sole shareholder of IMC.

K. On May 17, 1996, a Complaint captioned as Mark Technology Corp., et. al. v. Utah Resources International, Inc., et. al. was filed as Civil No. 96 090 3332CV in the Third Judicial Court of Salt Lake County, Utah (the "Second State Action").

L. The Second State Action included a request by MTC and others for a temporary restraining order and injunction against the transactions contemplated in the IMC Letter of Intent, which request shall be rescinded in accordance with the terms and conditions of this Agreement.

M. The Parties believe this Agreement is fair to and in the best interest of URI and all shareholders of URI.

N. The Parties have agreed to compromise and settle all of their disputes and claims known or unknown, now existing or hereafter accruing, including, but not limited to, those which are the subject of the Pending Litigation, upon the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Unless otherwise provided, the following events shall occur at Closing (as defined herein):

a. The Parties agree they will use best efforts immediately following the Closing to petition the Court in the First State Action for the purpose of terminating the 1993 Settlement Agreement. Pending such termination, the Parties agree the 1993 Settlement Agreement and the Murphy Order shall continue in accordance with their respective terms and provisions.

b. The Parties agree to dismiss the Pending Litigation with prejudice, to dismiss the Order to Show Cause referenced in the Recitals above, and agree to request the Court to remove the temporary restraining order granted in the Second State Action on the date of execution of this Agreement. The Parties agree, upon execution of this Agreement, to take immediate steps to file for dismissal of the Pending Litigation. The Parties will use their best efforts, in good faith, to obtain the dismissals within 60 days of the date hereof. Notice shall be given to shareholders of URI in such manner as each court directs.



c. The closing of the transactions contemplated herein ("Closing") shall occur at the offices of Robinson & Sheen in Salt Lake City, Utah, no later than seven (7) calendar days after the date hereof.

d. Except for those matters specifically set forth in this Agreement which create continuing future rights and obligations of the Parties, the Parties hereto, and each of them, for themselves, their respective predecessors, subsidiaries, controlled and controlling affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), heirs, assigns, predecessors and successors in interest, and each of them, effective upon Closing of this Agreement, hereby acknowledge full and complete satisfaction of, and do hereby release and discharge and covenant not to sue the other of them, including their respective heirs, assigns and successors in interest, parents, predecessors, subsidiaries, controlled and controlling affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), and each of them, from any and all claims, demands, and causes or sources of action of whatever kind or nature, known or unknown, suspected or unsuspected, including all rights of and claims for contribution and indemnification, and judgments, which any of them now owns or holds or has at any time heretofore owned or held through the date of the Closing of this Agreement against any of the other of them, including, but not limited to, those which: (i) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file, or papers in the Pending Litigation; or (ii) arise out of, or are related to, or are in any way connected directly or indirectly with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the Pending Litigation. This provision shall receive the broadest possible interpretation as a general and complete release.

URI agrees to and shall fully indemnify hold harmless, and defend all other Parties to this Agreement including their respective heirs, assigns and successors in interest, parents, predecessors, subsidiaries, controlled and affiliated corporations and entities, past and present, as well as the respective directors, officers, stockholders, partners, agents, attorneys, servants, and employees, past and present, and affiliates or nominees of parties (as defined under the Securities Exchange Act of 1934), and each of them, from and against any and all claims, demands, and causes or sources of action of whatever kind or nature, known or unknown, suspected or unsuspected, including all rights of and claims for contribution and indemnification, and judgments, which Midwest, RD Wolff or JJ Wolff now owns or holds or has at any time heretofore owned or held through the date of the Closing of this Agreement against any of the Parties hereto other than URI, including, but not limited to, those which (i) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file,

or papers in the First State Action; or (ii) arise out of, or are related to, or are in any way connected directly or indirectly with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the First State Action; (iii) are or could have been alleged or set forth in any of the pleadings, any interlocutory or final orders, rulings, file, or papers in the Second State action; or (iv) arise out of or are related or are in any way connected directly or indirectly with any transaction, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in the Second State Action; or (v) arise out of, or are related to, or are in any way connected with any transactions, occurrences, acts or omissions set forth, or facts alleged, in the papers on file in said Federal Action; (vi) arise out of, are related to, or are in any way connected directly or indirectly with the Share Exchange Agreement or the Recision Agreement; (vii) arise out of, are related to, or are in any way connected directly or indirectly with the 1993 Settlement Agreement; or (viii) arise out of, or are related to, or are in any way connected directly or indirectly with the IMC Letter of Intent.

e. The Parties agree that Jones shall serve as a director of URI for no less than one year from the date of Closing, and the Parties agree to take all actions necessary to maintain Jones as a director for said one year period. Sheen and Erickson shall resign as members of the Board of Directors of URI as of the date of Closing. The successors to Sheen and Erickson as members of the Board of Directors of URI shall be appointed in accordance with the terms of the 1993 Settlement Agreement. That Board shall elect Fife President and the other appropriate officers of URI. Erickson and Sheen agree that they will not seek election as, and will not accept any future nominations to serve as, an officer or director of URI or Morgan Gas & Oil Co.

f. The transactions contemplated in the IMC Letter of Intent shall close in accordance with the provisions of that contemplated Stock Purchase Agreement between URI and IMC (the "Stock Purchase Agreement"), the current form of which is attached hereto and incorporated herein by this reference as Exhibit "C," subject to negotiation and execution of the definitive Stock Purchase Agreement and approval of its terms by the URI Board of Directors; provided, however, that the definitive Stock Purchase Agreement must contain the following material provisions:

i. IMC shall purchase and URI shall issue and sell shares at the Closing so that IMC will own following the purchase 50.5% of the total outstanding common stock of URI at \$3.35 per share as of the Closing, and URI shall issue an option for one hundred fifty thousand (150,000) or more additional shares of the capital stock of the Company at an exercise price of \$3.35 per share, payable in the same fashion as the shares purchased by IMC to obtain 50.5% of the total outstanding stock of URI, such that IMC shall have at all times the right to own 50.5% of the outstanding common stock of URI; provided, however, that the options may only be exercised as corresponding outstanding options held by others are exercised; and further provided that IMC shall be entitled to maintain its 50.5% ownership of the outstanding common stock of URI in connection with any

stock split, recapitalization, combination, or reorganization; and further provided that IMC shall be entitled to maintain its 50.5% ownership of the outstanding common stock of URI in connection with any new issuance of stock or the issuance of instruments convertible into stock, at the offering price of such new issuance, on payment terms similar to those set forth herein;

ii. IMC shall pay 15% of the purchase price in cash at closing;

iii. the balance of the purchase price shall be evidenced by a note ("Note") which bears interest at a rate equal to the short-term applicable federal rate published by the Internal Revenue Service, pursuant to Section 1274(d) of the Internal Revenue Code of 1986, as amended, in effect at the time of the Closing, adjusted on each anniversary date of this Agreement until the purchase price has been paid in full.

iv. IMC shall pay the first year's interest in cash at Closing, discounted at the interest rate noted in (iii) above, and interest shall be paid annually in arrears on each anniversary of the Note thereafter, beginning with the second year's anniversary date, with the principal due and payable August 1, 2001;

v. the Note shall be secured by a pledge of IMC's URI stock;

vi. John Fife, the sole shareholder and president of IMC, will personally guarantee twenty-five percent (25%) of the outstanding balance of the Note;

vii. after closing, any distributions and other payments otherwise payable to IMC on its URI stock will be applied to reduce the outstanding principal balance of the Note;

viii. subsequent to closing, IMC shall cause URI to cause a 1,000 to 1 share reverse split at \$3.35 per share;

ix. fractional shareholders of record as of the date of the reverse split shall be given the option to purchase additional fractional shares to round up to the next whole share;

x. URI indemnifies IMC, its shareholders, officers, directors, agents, employees and attorneys, including but not limited to those arising out of the negotiation, execution and consummation of this Agreement, and including advancement of their legal fees and costs, and from and against liability arising out of the IMC Letter of Intent, the Stock Purchase Agreement and transactions contemplated hereby;

xi. IMC shall take all actions necessary to cause URI to honor its obligations to indemnify its officers and directors, agents, employees and attorneys, including but not limited to those arising out of the negotiation, execution and consummation of this Agreement, and

including advancement of their legal fees and costs, in connection with all present and future litigation.

xii. URI shall hire Fife under a written employment agreement which shall provide reasonable compensation for services rendered, which compensation in any year shall not exceed \$200,000. The payment of compensation in excess of that provided in the employment agreement shall be used to reduce any obligations due or to become due under the Note.

xiii. The Parties covenant to provide a copy of the definitive Stock Purchase Agreement to Jones and counsel of his choosing at least two days prior to the Closing, to review for consistency with the provisions above.

f. The number of shares acquired by URI in the reverse split contemplated in the Stock Purchase Agreement shall be available for purchase by all remaining shareholders of URI, other than IMC, as of a record date five days prior to the effectuation of the reverse split at a price of \$3.35 per share; provided, however, that URI shall not be required to make the shares available for purchase if to do so would be in violation of federal or state securities laws after after URI has taken all actions necessary to comply. Notice shall be given to the shareholders of the availability of such purchase and to the extent the amount of shares available is oversubscribed, each person subscribing for such shares shall be allowed to purchase a pro-rata portion of the available shares. The terms of the purchase of such shares by each shareholder shall be a cash down payment of 25% with the balance payable in three years with simple interest at the short term applicable federal rate for the month of this Agreement which interest shall be payable annually in arrears. The obligation shall be secured by a pledge of the stock acquired pursuant to a stock pledge agreement to be drafted by counsel for URI. Any distributions to shareholders of URI shall first be applied to the unpaid balance of any amounts owing URI hereunder.

g. The 40,552 outstanding shares of URI stock owned by A Morgan and V Morgan, which they represent and warrant are all the URI shares they own, shall be purchased by URI for a cash price of \$3.35 per share which purchase shall occur at Closing of this Agreement.

h. Legal fees and expenses and other costs associated with the Pending Litigation and the documents and negotiations to complete and implement the settlement contemplated by this Agreement shall be paid as follows:

(i) All legal fees, costs and out-of-pocket expenses incurred or paid by Jones, IMC, Fife, Erickson, Sheen, Hurd and MTC from January 1, 1996 to Closing shall be reimbursed or paid by URI.

(ii) All legal fees, costs and out-of-pocket expenses incurred or paid by V. Morgan and A Morgan, subject to a dollar limitation of \$81,000, shall be reimbursed or paid by URI.

(iii) All other expenses incurred, except as provided above, shall be paid by the Party incurring such expense.

i. From the date of this Agreement URI shall be allowed to conduct its affairs in the normal course of business, except as otherwise limited or modified by the First State Action, the 1993 Settlement Agreement and the Murphy Order.

j. All employment agreements contemplated, negotiated or executed between URI and Sheen, Hurd, and Erickson shall not be effectuated and, if effectuated, shall be terminated.

k. Except for completion of pending matters approved by the Board, Robinson & Sheen, L.L.C. shall resign as legal counsel for URI effective at Closing.

l. The Parties hereto shall exercise their best efforts to account for, pay, compromise, unwind, and/or terminate all existing contractual relationships between URI and Morgan Gas & Oil Co.

4. Representations and Warranties of the Parties.

a. The corporate Parties, URI, MTC, and IMC represent and warrant that they are validly existing and in good standing in the state of their organization and have the full legal right, power and authority to execute and deliver this Agreement and to carry out all transactions contemplated herein. Each individual signing this Agreement on behalf of a corporation, partnership, trust, or other entity, represents and warrants that he or she has the authority to do so.

b. All Parties represent and warrant that they have negotiated at arms-length with a view to arriving at a fair and equitable settlement of their differences.

c. All Parties represent and warrant that, to the best of their belief, the terms of this Agreement are fair to and in the best interests of URI and its shareholders.

d. All Parties covenant that no actions of any kind shall be undertaken by the Parties to affirmatively prosecute the Pending Litigation, nor will the Parties instigate any new legal proceedings against any of the other Parties.

e. All Parties represent and warrant that they have not assigned or transferred any claims against any of the other Parties, including any interest in the Pending Litigation, to any third party not a party to this Agreement.

5. This Agreement has been freely and voluntarily executed by all Parties hereto after having been apprised of all relevant information and having been represented by counsel. No party hereto has relied upon any inducements, promises or representations made by any other party or other party's attorney, other than those specifically set out in this Agreement, which constitutes the entire, integrated understanding among the Parties.

6. Each party agrees to perform such other further acts and to execute and deliver such further documents as may be necessary to effectuate the purposes of this Agreement.

7. The Parties hereto, and each of them, acknowledge that this Agreement is the compromise and settlement of the claims and demands between and among the Parties and nothing contained herein shall be construed as an admission of their validity or invalidity against the interests of the Parties hereto, or any of them, except that this disclaimer does not affect the validity or truthfulness of the affirmative statements, admissions, affidavits, filings, notices, and writings made and agreed to be made under the terms of this Agreement.

8. Except as to continuing covenants and obligations set forth in the 1993 Settlement Agreement and the Murphy Order, all claims, rights, causes of action, or defenses of the Parties raised in the Pending Litigation are herewith merged into and fully resolved as a part of this Agreement.

9. All Parties to this Agreement have read and fully comprehend and understand the terms and provisions of this Agreement and of the ancillary exhibits and documents incorporated herein. All Parties have been advised by legal counsel who presently represent them in connection with this settlement as to the content, meaning and execution of this Agreement. All Parties to this Agreement have voluntarily and without coercion signed the same and understand and agree to each and every paragraph hereof.

10. No Party hereto shall, directly or indirectly, solicit or seek to solicit any person to challenge any provision hereof or to file suit comparable to any suit dismissed hereunder or to contest the dismissal of the Pending Litigation. This covenant of good faith shall be central to this Agreement and any Party damaged by a breach thereof shall be entitled to all remedies available at law or in equity as well as a recovery of reasonable attorney's fees and costs.

11. General Provisions.

a. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the heirs, legal representatives, successors and assigns, as

applicable, of the respective parties hereto, and any entities resulting from the reorganization, consolidation or merger of any party hereto.

b. Headings. The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to limit or affect in any way the meaning or interpretation of any of the terms or provisions of this Agreement.

c. Counterparts. This Agreement may be signed upon any number of counterparts with the same effect as if the signature to any counterpart were upon the same instrument.

d. Entire Agreement. This Agreement, together with the exhibits and schedules hereto (which are incorporated herein by this reference), constitutes the entire agreement and understanding between and among the parties with respect to the subject matter hereof and shall supersede any prior agreements and understandings among the parties with respect to such subject matter.

e. Severability. The provisions of this Agreement are severable, and should any provision hereof be found to be void, voidable or unenforceable, such void, voidable or unenforceable provision shall not affect any other portion or provision of this Agreement.

f. Survival of Representations, Warranties and Covenants. The representations, warranties and covenants of the Parties shall survive the Closing.

g. Waiver. Any waiver by any party hereto of any breach of any kind or character whatsoever by any other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver or consent to any subsequent breach of this Agreement on the part of the other party.

h. Modification. This Agreement may not be modified except by an instrument in writing signed by all of the parties hereto.

i. Governing Law. This Agreement shall be interpreted, construed and enforced according to the laws of the State of Utah.

j. Attorney's Fees. In the event any action or proceeding is brought by any Party against any other Party under this Agreement, the prevailing party shall be entitled to recover attorney's fees and costs in such amount as the court may adjudge reasonable.

k. Notice. All notices or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given when personally served or deposited in the United States mail, postage prepaid,

registered or certified, with return receipt requested, or by prepaid telegram, telecopy or deposited with a recognized courier for overnight delivery. Notice given in any such manner shall be effective when received or three (3) days after mailing or sending. The addresses of the parties shall be as set forth on Schedule 11.j. attached hereto.

Each Party shall have the right to change its address for purposes of this section to any other location within the continental United States by giving thirty (30) days' notice to the other Parties in the manner set forth in this section.

11. In the event that Closing does not occur for any reason, the term of the 1993 Settlement Agreement shall be extended by the number of days elapsing between the date hereof and the date of the event causing the failure to close.


DATED the date and year first set forth above.

URI:

Utah Resources International, Inc., a Utah corporation

By: \_\_\_\_\_  
Its: \_\_\_\_\_

ERICKSON:

  
\_\_\_\_\_  
R. Dee Erickson

SHEEN:

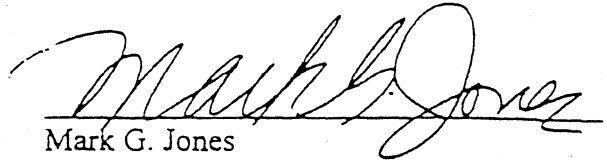
  
\_\_\_\_\_  
E. Jay Sheen

HURD:

\_\_\_\_\_  
Lyle D. Hurd

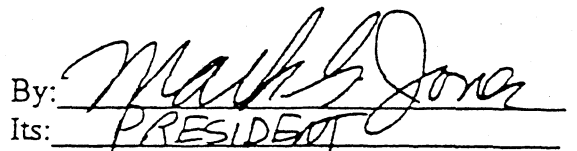


JONES:

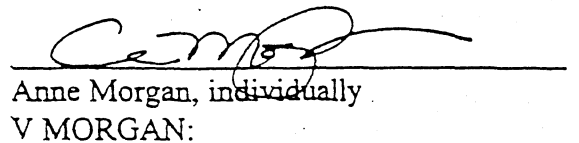
  
Mark G. Jones

MTC:

Mark Technologies Corporation, a  
California corporation

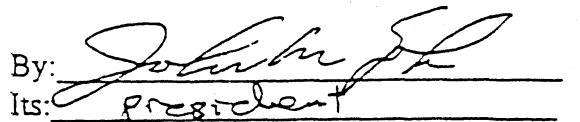
By:   
Its: PRESIDENT

A MORGAN:

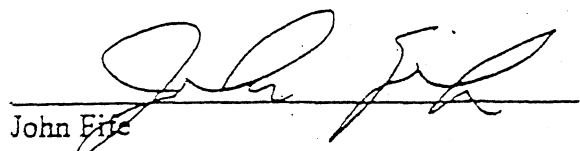
  
Anne Morgan, individually  
V MORGAN:

\_\_\_\_\_  
Victoria Morgan


INTER-MOUNTAIN CAPITAL CORP, a  
Delaware corporation

By:   
Its: president

FIFE

  
John Fife

ROBINSON & SHEEN, L.L.C.

By:   
Its: Member

APPROVED: \_\_\_\_\_  
Jenny T. Morgan

# EXHIBIT “B”

Westlaw.

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**H**

Only the Westlaw citation is currently available.

United States District Court,  
W.D. Wisconsin.

Robert E. GILSON, M.D., Wisconsin Alumni  
Research Foundation, Gilson Inc., and  
Gilson S.A.S. Plaintiffs,

v.

RAININ INSTRUMENT, LLC, Rainin Group, Inc.,  
and Mettler-Toledo, Inc.,  
Defendants.

No. 04-C-852-S.

Aug. 9, 2005.

Allen A. Arntsen, Foley & Lardner LLP, Madison,  
WI, for Plaintiffs.

Bruce A. Schultz, Coyne Niess Schultz Becker &  
Bauer, Madison, WI, for Defendants.

## MEMORANDUM AND ORDER

SHABAZ, J.

\*1 This action for breach of contract and violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) & (B), was tried to a jury which returned a verdict in plaintiffs' favor finding that defendants materially breached the parties' exclusive distributorship contract. Plaintiffs opted to terminate the contract, and the jury awarded damages to plaintiffs Robert E. Gilson and the Wisconsin Alumni Research Foundation for lost royalties in the amount of \$70,000 and to plaintiff Gilson S.A.S. for lost profits in the amount of \$500,000. Judgment was entered accordingly. The matter is presently before the Court on plaintiffs' and defendants' Rule 50(b) renewed motions for judgment as a matter of law.

## MEMORANDUM

In considering a motion for judgment as a matter of

law pursuant to Rule 50(b) the Court determines whether the evidence presented, viewed in the light most favorable to the prevailing party and combined with all reasonable inferences that may be drawn in favor of the prevailing party, is sufficient to support the verdict. *Tennes v. Mass. Dep't of Revenue*, 944 F.2d 372, 377 (7th Cir.1991). The Court does not reevaluate the credibility of witnesses nor otherwise weigh the evidence. *Id.*

*Liability Verdict:*

At the close of the liability phase of trial, the jury was asked two special verdict questions relating to plaintiffs' breach of contract claim:

1. Did defendant Rainin materially breach its obligation to use its best efforts to promote and sell plaintiff Gilson's Pipetman?
2. Did Rainin materially breach its obligation to promote and sell in good faith Gilson's Pipetman?

The jury answered "no" to the first question and "yes" to the second.

*Implied Covenant of Good Faith and Fair Dealing*

Defendants maintain two objections to the second question. First, they contend that their failure to promote and sell in good faith does not support a cause of action for breach of contract. Second, they repeat their summary judgment argument that the parties agreed to an objective performance standard by which their compliance with this obligation should be measured, which they satisfied by selling at least 43,336 Gilson pipettes per year.

Defendants' first challenge relies on the mantra, acknowledged by the Court on summary judgment, that the implied duty of good faith and fair dealing in § 1-203 of the Uniform Commercial Code (UCC), Wis. Stat. § 401.203, "does not support an independent cause of action for failure to perform or enforce in good faith." Wis. Stat. § 401.203 cmt.; *Hauer v. Union State Bank*, 192 Wis.2d 576, 597,

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532 N.W.2d 456, 464 (Ct.App.1995). The UCC Permanent Editorial Board (PEB) added this statement to the § 1-203 Official Comment in 1994. The addition reads in full as follows:

This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

\*2 Wis. Stat. § 401.203 cmt. The PEB issued Commentary No. 10 to clarify the meaning of this addition, and the Wisconsin Court of Appeals has quoted this Commentary with approval. *Hauer*, 192 Wis.2d at 597 n. 7, 532 N.W.2d at 464 n. 7. It explains:

The inherent flaw in the view that § 1-203 supports an independent cause of action is the belief that the obligation of good faith has an existence which is conceptually separate from the underlying agreement.... [T]his is an incorrect view of the duty. "A party cannot simply 'act in good faith.' One acts in good faith relative to the agreement of the parties. Thus the real question is 'What is the Agreement of the parties?' " Put differently, good faith merely directs attention to the parties' reasonable expectations; it is not an independent source from which rights and duties evolve.... Consequently, resort to principles of law or equity outside the Code are not appropriate to create rights, duties, and liabilities inconsistent with those stated in the Code. For example, a breach of a contract or duty within the Code arising from a failure to act in good faith does not give rise to a claim for punitive damages unless specifically permitted.

PEB Commentary No. 10: Section 1-203 (Feb. 10, 1994), *reprinted in Unif. Commercial Code* app. 2, 3B U.L.A. 135, 136-37 (Supp.2002) (quoting Dennis Patterson, *Good Faith and Lender Liability*

143 (1990)).

Accordingly, the duty of good faith does not provide an independent source of obligations from which a court may draw to reform agreements because they appear with the benefit of hindsight to be inequitable or unreasonable. *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir.1992). "Good faith" requires only that a party to an agreement perform its obligations under the agreement with fidelity to the other party's promise-induced reasonable expectations. As Professor Corbin explains:

If the purpose of contract law is to enforce the reasonable expectations of parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith," as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.

Arthur Linton Corbin, *Corbin on Contracts* § 570 (West Supp.1993), *quoted in* PEB Commentary No. 10: Section 1-203, *supra*, 3B U.L.A. at 138 n. 13. Accordingly, Judge Manion observed for the Seventh Circuit in *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1445 (7th Cir.1992), that although the implied covenant of good faith and fair dealing does not create "an enforceable legal duty to be nice or to behave decently in a general way," it does require each party to an agreement to exercise any discretion afforded it by the agreement in a manner consistent with the reasonable expectations of the other party.

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\*3 This is the standard to which defendants have been held. The special verdict did not ask whether defendants had breached some independent duty of good faith or invite the jury to substitute some amorphous standard of community morality for the parties' reasonable promise-induced and investment-backed expectations. Under the parties' exclusive dealing agreement, defendants had an obligation to promote and sell Gilson's Pipetman pipettes. The agreement left to Rainin discretion to determine how it would do so. Although the agreement allowed Rainin significant discretion in this regard, its discretion was not unlimited. To the contrary, its discretion was fettered by the obligation that it perform its obligation in good faith (i.e., in a manner consistent with Gilson's reasonable promise-induced expectations). Consequently, the Court instructed the jury as follows:

**BREACH OF CONTRACT: DUTY OF GOOD FAITH**

Under Wisconsin law, the contract between Rainin and Gilson requires that each party act in good faith towards the other party and deal fairly with that party when carrying out the terms of the contract. This requirement to act in good faith is a part of the contract just as though the contract stated it.

Rainin had an obligation to use good faith when promoting and selling Gilson pipettes. Gilson claims that Rainin breached its good faith obligation by attempting to convince customers to purchase Rainin's pipettes instead of Gilson's pipettes or by replacing customers' Gilson pipettes with Rainin pipettes.

Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were. Therefore, in deciding whether Rainin breached the duty of good faith by attempting to convince customers to purchase Rainin's pipettes instead of Gilson's pipettes or by replacing customers' Gilson pipettes with Rainin pipettes, you should determine the purpose of the agreement; that is, the benefits the parties expected at the time the agreement was made.

This duty of good faith means honesty in fact and the observance of reasonable commercial

standards of fair dealing in the trade.

The jury was then asked, "Did Rainin materially breach its obligation to promote and sell in good faith Gilson's Pipetman?" Responding in the affirmative, the jury found in Rainin's conduct not a breach of some independent duty but a material breach of contract, the terms of which found meaning in their entirety from the promise-induced expectations of the parties.

Defendants' second challenge repeats their summary judgment argument that the parties agreed to an objective performance standard by which their compliance with their obligation to promote and sell in good faith should be measured, which they argue that they satisfied by selling at least 43,336 Gilson pipettes per year. Although the obligation to perform in good faith may not be disclaimed by agreement, the parties may agree to determine the standard by which the performance of this obligation is to be measured. Wis. Stat. § 401.102(3) ("the obligations of good faith, diligence, reasonableness and care prescribed by chs. 401 to 411 may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable"). However, as the Court found on summary judgment, defendants' argument that the parties here intended to set such a standard is unpersuasive. Defendants point to the following clause within the agreement:

\*4 Provided that Mettler remains the exclusive distributor of all Gilson volume adjustable mechanical pipettes, *if annual sales of PRODUCTS by Mettler in the U.S. in any calendar year are less than one half the unit sales of Current Pipetman Products in calendar year 2000, then the Gilsos shall have the right by written notice to Mettler to convert Mettler's rights under the [1972 Agreement] from exclusive to nonexclusive; provided, however, that such exclusivity shall not lapse in the event such volume limitations are not achieved as a result of significant quality problems, Acts of God, significant logistical problems, or similar events causing a significant disruption in supply.* (emphasis added.) As the Court pointed out on

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summary judgment, this clause provides neither a source nor a measure of contractual obligations. In condition-subsequent form, the clause recognizes a condition the occurrence of which would excuse Gilson's exclusivity commitment to Rainin. It would be manifestly unreasonable to say that a provision of the agreement which does not obligate a party to act or refrain from acting provides the measure by which that party's good faith is to be judged. Were this clause to provide the sole measure of defendants' good faith, then defendants would not be obligated to perform their contractual obligations in good faith. In effect, defendants' interpretation disclaims the duty of good faith contrary to Wis. Stat. § 401.102(3), which expressly precludes such a result.

#### *Implied Covenant of Best Efforts*

Plaintiffs maintain that no reasonable juror could have answered "no" to the first question: "Did defendant Rainin materially breach its obligation to use its best efforts to promote and sell plaintiff Gilson's Pipetman?" Defendants now recognize that they were obligated to use best efforts to promote and sell Gilson's Pipetman pipettes. Prior to the liability verdict they had maintained that they had no such duty or, in the alternative, that their compliance with any duty to use best efforts should be measured by the clause which they now propose to be the proper measure of their obligation to promote and sell in good faith. Defendants argue that the evidence presented at trial was sufficient to support the jury's verdict that they did not materially breach their obligation to use best efforts. They argue further that in light of their obligation to use best efforts, a separate question directed to their good faith should not have been asked.

Defendants' concession that Rainin was obligated to use its best efforts to promote and sell Gilson's Pipetman pipettes verifies, a fortiori, that it was obligated to promote and sell in good faith. The "best efforts" standard implied in exclusive dealing agreements by Wis. Stat. § 402.306(2) obligates the parties "to use reasonable diligence as well as good faith in their performance of the contract." Wis. Stat. § 402.306 cmt.

The Seventh Circuit has observed that courts applying the best-efforts and good-faith standards have at times "muddled" the two concepts. *Beraha*, 956 F.2d at 1443. Professor Farnsworth describes the distinction between the two as follows:

\*5 Because courts sometimes confuse the standard of best efforts with that of good faith, it will be well at the outset to make plain the distinction between the two standards. Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting.

E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. Pitt. L.Rev. 1, 8 (1984) (discussing *Zilg v. Prentice-Hall*, 717 F.2d 671 (2d Cir.1983)).

At trial, the Court understood plaintiffs to suggest breaches both of the diligence and good faith aspects of Rainin's duty to use best efforts. Wary of "muddling" these distinct aspects, the Court adopted plaintiffs' suggestion to provide each with its own instruction and corresponding special verdict question. As discussed, one question focused on Rainin's good faith performance of its obligation to promote and sell Gilson's pipettes. The other, titled "best efforts," addressed the additional diligence aspect of Rainin's duty:

#### BREACH OF CONTRACT: DUTY OF BEST EFFORTS

The contract between Rainin and Gilson requires Rainin to use its "best efforts" to promote and sell Gilson pipettes. The duty to use best efforts requires Rainin to use reasonable efforts and due diligence in the promotion of Gilson's pipettes.

Gilson claims that Rainin breached its best efforts obligation by using various marketing and sales methods to convince customers to purchase Rainin pipettes instead of Gilson pipettes or to replace Gilson pipettes with Rainin pipettes.

There is no dispute that the parties' agreement permits Rainin to manufacture pipettes which compete with Gilson pipettes. Nevertheless,

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Rainin's privilege to compete with Gilson is not absolute. The means that Rainin may employ to compete with Gilson are limited by Rainin's obligation to use reasonable efforts and due diligence in the promotion and sale of Gilson's pipettes. Although Rainin has a general right to promote the sale of a competing brand of pipettes and thereby lessen Gilson's share of the market, there will be a point where Rainin's methods are so manifestly harmful to Gilson as to justify the finding that Rainin has breached its obligation to Gilson.

While compliance with the "best efforts" standard requires good faith plus diligence, this instruction directed the jury to consider only the additional diligence aspect of the obligation. The instruction makes no mention of the "good faith" limits implicit in Rainin's duty to diligently promote and sell Gilson's pipettes. That aspect was separately presented in the other instruction and special verdict question.

At trial, plaintiffs' argument focused on Rainin's disparaging use of the Pipetman to promote and sell its own pipettes. Plaintiffs' argument sounded in the bad faith associated with a party's failure to honor the other party's reasonable promise-induced expectations in the performance of its contractual obligations. The evidence presented thus nestled more comfortably in the good faith instruction. Plaintiffs presented less, if any, evidence directed at the additional "diligence" aspect imposed by the more exacting best efforts standard. Plaintiffs' principal concern was not nonfeasance or competence but malfeasance. Thus the jury reasonably found in plaintiffs' favor as to the good faith verdict question and rejected a finding that Rainin had breached the additional diligence requirement imposed by the duty to use best efforts. As a matter of law, however, defendants' material failure to promote and sell in good faith violated both the "good faith" and the more exacting "best efforts" standards. Consequently, plaintiffs' Rule 50 motion will be granted.

#### *Damages Verdict*

\*6 At the close of the damages phase of trial, the

jury awarded damages to Gilson S.A.S. for lost profits in the amount of \$500,000. Defendants maintain that Gilson S.A.S. is not entitled to recover lost profits from Rainin because Rainin was not obligated to purchase Pipetman pipettes from Gilson.

Plaintiff Dr. Robert E. Gilson and his father Dr. Warren E. Gilson are the named co-inventors of U.S. Patent No. 3,827,305, which was filed for certain adjustable volume manual pipettes on October 24, 1972. In December 1972 Warren and Robert Gilson entered into a "Capital Gains License Agreement" with Rainin Instrument Co., Inc. Under this 1972 Agreement, the Gilsos granted Rainin the exclusive right in the United States to use the method described in the '305 patent and technical information relating to processes, invention and methods relating to the manufacture of pipettes under the patent, including "the exclusive and perpetual right to make, use and sell under the aforesaid technical information and patent application." The '305 patent issued on August 6, 1974.

Gilson S.A.S. has manufactured the pipette disclosed by the '305 patent since 1972. Gilson owns the "Gilson" and "Pipetman" trademarks, under which this pipette was promoted and sold by Rainin throughout the United States. Throughout the course of the parties' relationship, Gilson S.A.S. has sold its pipettes to Rainin for distribution to the public. The Gilson Pipetman pipette is the largest selling pipette in the United States. Known for its reliability and durability, it has become the industry standard. Gilson S.A.S. realized a profit from selling its Pipetman pipettes to Rainin. Additionally, Robert E. Gilson and the Wisconsin Alumni Research Foundation received what the parties describe as a "royalty" of \$8.50 for every Pipetman pipette that Rainin sold.

Defendants argue that Rainin was not obligated to purchase pipettes from Gilson because Rainin could manufacture them itself. Consequently, they argue that Gilson had no expectation of profit resulting from their sale to Rainin.



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(Cite as: 2005 WL 1899471 (W.D.Wis.))

Defendants' argument overstates its rights under the 1972 Agreement. Pursuant to this agreement, Rainin could manufacture and sell the pipette disclosed by the '305 patent. It could not, however, promote and sell its pipettes under the "Gilson" and "Pipetman" names because it had no right to use these trademarks in connection with the promotion and sale of any pipette not manufactured by Gilson. Nor could it do so when the '305 patent expired in 1991.

Rainin was the exclusive U.S. distributor of the Pipetman pipette. As a consequence of this exclusive distributorship arrangement, Rainin was obligated to promote and sell Pipetman pipettes. Because Gilson was the only source of Pipetman pipettes, Rainin was obligated to purchase Pipetman pipettes from Gilson. Defendants' motion will be denied.

#### ORDER

IT IS ORDERED that defendants' renewed motion for judgment on as a matter of law is DENIED.

\*7 IT IS FURTHER ORDERED that plaintiffs' renewed motion for judgment as a matter of law is GRANTED.

END OF DOCUMENT

# EXHIBIT “C”

MARK TECHNOLOGIES CORP.  
MARK JONES

MEMORANDUM DECISION  
Case No. 980900576  
Judge Fratto

V.

UTAH RESOURCES INTERNATIONAL, INC.  
JOHN FIFE, LYLE D. HURD, JR.  
GERRY BROWN

Following trial, the matter was taken under advisement. The claims and issues are herein addressed as the Utah Court of Appeals has remanded them.

The grant of summary judgment was affirmed for First Claim for Relief (Breach of Implied Covenant of Good Faith and Fair Dealing Against URI, Fife and Hurd), and Seventh Claim for Relief (Declaring the Purported Options are Null and Void Against URI, John Fife, David Fife, Hurd and Brown). These claims are now evaluated to determine whether the actions taken by U.R.I. in approving an employment contract for John Fife, and in nullifying stock options for Hurd, Brown and Fife occurred because of plaintiffs' lawsuit.

The court finds that the Board, at a meeting on October 24, 1996, tabled the issue of the employment contract until thirty days after the shareholders meeting on December 11, 1997. The lawsuit was filed on January 20, 1998, and the Board approved the agreement on February 27, 1998.

The agreement is perfunctory, its only provision, setting the amount of compensation, deals with the only specific provision required by the June 26, 1996 settlement agreement. At the shareholders meeting of March 8, 1999, John Fife makes an admission that there was approval of

the contract, "...in an effort to resolve a legal claim brought by Mr. Jones." Both the timing and substance of events lends weight to plaintiffs' claim.

Concerning the stock options, there was evidence showing that the additional options were never intended, resulted from misunderstandings, were never exercised, and no benefit therefrom inured to defendants. Defendants, even with Jones' urging, did not believe there to be any need or importance in setting the books and records straight concerning these options.

They may be right. However, the mandate is to evaluate whether action was taken as a result of the lawsuit.

The timing of the waiver of the stock options is compelling. The court finds that after urging and inaction, to either disavow or ratify the options, no action was taken until after filing the lawsuit

Consequently, the court is convinced to a preponderance of the evidence that both the approval of the Fife employment contract and the waiver nullifying the additional options occurred because of the lawsuit.

Plaintiffs' fourth claim ties the additional stock options as compensation for an employment agreement between URI and Hurd, and asserts that failure to terminate the contract is a breach of the settlement agreement. The Court of Appeal's mandate requires this court to determine whether such a contract was "effectuated."

Plaintiff's theory is that the additional stock options were compensation for employment, and reflecting those additional options in the corporate record not only demonstrate an employment contract, but also show it was "effectuated."

Hurd had done work for URI in the past that was beyond his duties as a Board member.

As indicated above, there was considerable speculation, and several alternative theories, explaining the additional options: gift, mistake, misunderstanding, clerical error.

There was little evidence that connected the options, beyond the fact that there was a record of options, to any employment contract with Hurd. Specifically, there was no nexus between value of the options and past work for the corporation.

There was an anticipation of employment, but no connection that convincingly established that the stock was compensation for the employment, and, consequently, that the employment agreement had been made effective.

Plaintiff has no cause of action.

In summary, the court is not convinced of an "effectuated" employment contract with Hurd, but does find that the stock options were waived and voided, and the Fife employment agreement entered into because of the lawsuit.

Second Claim for Relief alleges a breach by defendants of a contractual obligation to use their best efforts to "account for, pay, compromise, unwind, and/or terminate all existing contractual relationships" with Morgan Gas Company. Plaintiffs' have the burden of proof to demonstrate, to a preponderance of the evidence, that defendants did not use their best efforts to achieve this goal.

In determining what constitutes "best efforts," particular circumstances must be considered. Each defendant is in a different position to exert an effort to accomplish the goal. Where several people are working toward a goal, they cannot work at cross-purposes. Consequently, the laboring oar might properly be in the hands of one person, the others best serving by doing nothing.

Defendants also had a fiduciary obligation to accomplish their contractual obligation to the benefit of URI. Severing the relationship with MGO would be a relatively easy task, if URI's best interests are ignored.

The unwinding of URI's relationship with MGO is a business proposition involving business decisions and strategies. It is difficult to second guess whether one strategy or decision was incorrect or represented a failure to exert best efforts. John Fife's approach was to first marshal, organize and analyze the records of URI. He then resolved specific situations both directly and indirectly connected to the MGO unwinding, before working on a global resolution.

John Fife, as part of his management obligations, had many responsibilities. He prioritized both the tasks within the unwinding process, and in relation to all activities connected with his performance as president of the corporation.

The MGO unwinding did not occupy the top most priority of all his responsibilities. However, "best efforts" does not mean to elevate the task above all others. It means to make the best effort possible in the context of the circumstances and situation. Further, prioritizing within the unwinding process is appropriate. Fife made determinations that some things needed to be done before other things. It is difficult to find a failure of best efforts, even if there are legitimate concerns with the order of priority.

Plaintiffs' argue that the lengthy period of time wherein URI appears to have no contact with MGO is evidence of failure of best efforts. Although there was no direct communication with some members of the MGO team during this period, contact with John Morgan did continue. Mr. Morgan appears to have been a key to successfully concluding the unwinding. Some of his concerns were considered and actions to resolve them were taken during this period.

When considering strategies, priorities, the other actions taken, the court cannot conclude that this period of no communication represents a failure of best efforts.

Consequently, the court is not convinced to a preponderance of the evidence that best efforts were not made by defendants, and finds no cause of action.

Plaintiff seeks in his tenth claim, reimbursement for certain "expenses", including consultation with attorneys, administrative work, telephone and the like, generally characterized as expenses incurred to fulfill his duties as a member of the Board of Directors.

The court finds that URI is not obligated to pay these charges.

Article III, Sec. 9 of the Articles of Incorporation limit reimbursement of expenses to those incurred for "....attendance at each meeting....," and then only by resolution of the Board. The member is entitled to that which was expended to attend a meeting.(transportation, meals, hotels while away from home. If attending by telephone, long distance charges) Reimbursement of expenses incurred to perform duties, or in preparation for attending a meeting, are not sanctioned by this provision.

The court finds that other Board members were neither incurring nor billing similar expenses.

Plaintiff sent several invoices seeking reimbursement. There appears to have been no attempt to obtain a resolution from the Board for either prior authorization of, or to pay that which had been incurred. There is no resolution that authorizes Jones to incur these types of expenses.

Fife informed plaintiff on several occasions that the invoices would not be reimbursed. Plaintiff continued to incur and bill the expense. There was no action or representation by any

defendant that could reasonably mislead plaintiff into believing that these expenses were or would be authorized.

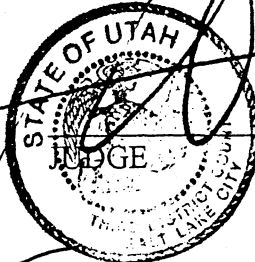
There were discussions about payment of both Board members' "expenses," and attorney fees and costs incurred by individual member associated with litigation. There is nothing in those discussions, or in resolutions approving attorney fees and litigation costs for some members, that convinces the court of some implied or *de facto* authorization of plaintiff's claim. The only discernable policy toward members' expenses beyond attending meetings, was to reimburse for attorney fees and cost if the litigation was associated with Board membership.

Accordingly, plaintiff has no cause of action.

Having determined the prevailing party on each remanded issue and claim, the award of attorney fees must now be resolved. The clerk is directed to set a telephonic scheduling conference.

Dated this 17<sup>th</sup> day of March, 2004

BY THE COURT:






CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980900576 by the method and on the date specified.

METHOD NAME

Mail	REID W LAMBERT ATTORNEY PLA 265 EAST 100 SOUTH, #300 P.O. BOX 3358 SALT LAKE CITY, UT 84111
Mail	LUCY C LISIECKI ATTORNEY DEF 225 W WACKER DR STE 3000 CHICAGO IL 60606-1229
Mail	REBECCA S PARR ATTORNEY DEF WELLS FARGO PLAZA 170 S. MAIN STREET, #400 SALT LAKE CITY UT 84101-0000
Mail	CRAIG M WHITE ATTORNEY DEF 225 WEST WACKER DRIVE SUITE 2800 CHICAGO IL 60606

Dated this 19 day of March, 20 04.

  
\_\_\_\_\_  
Deputy Court Clerk

# EXHIBIT “D”

COPY

FILED DISTRICT COURT

Third Judicial District

NOV 17 2004

SALT LAKE COUNTY

DEPARTMENT Deputy Clerk

Reid Lambert #5744  
WOODBURY & KESLER, P.C.  
265 East 100 South, Suite 300  
P.O. Box 3358  
Salt Lake City, UT 84111-3358

Attorney for Plaintiff

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

MARK TECHNOLOGIES CORP., a  
California Corporation, and MARK JONES,

Plaintiffs,

vs.

UTAH RESOURCES INTERNATIONAL,  
INC., a Utah Corporation, JOHN FIFE,  
DAVID FIFE, LYLE D. HURD, Jr., GERRY  
BROWN, individuals,

Defendants.

ORDER REGARDING ATTORNEYS'  
FEES

Case no. 980900576MI  
Judge Joseph C. Fratto Jr.

The Court having resolved all claims of all of the parties in the above action, now enters its order regarding the parties' cross-motions for attorneys' fees as follows:

This matter is before the Court on the parties' motions for award of attorneys fees. On August 4, 2004, the Court entered a Minute Entry ruling on the parties' entitlement to attorneys fees and a formula for calculating the proper amount of the award. The Parties have now submitted statements of the amount of their respective awards, and no objections to such statements have been filed. Based on the Minute Entry and the parties' statements, the Court therefore makes the following order awarding attorneys fees:

1. Attorneys fees and costs are awarded to the Plaintiffs in the amount of \$34,834.02 as calculated in the Plaintiffs' Statement of Attorneys Fees and Costs Pursuant to Order of August 4, 2004.

2. Attorneys fees and costs are awarded to the Defendants in the amount of \$110,187.77, as calculated in the Defendants' Statement of Attorneys Fees and Costs.

3. The award to the Plaintiffs shall be set off against the award to Defendants, and a final judgment shall issue in favor of the Defendants and against each of Plaintiffs in the Net Amount of \$75,353.75.

DATED this 17 day of November, 2004.

BY THE COURT:

19  
Judge Joseph C. Fratto  
Third Judicial District Court

Approved as to form:

WOODBURY & KESLER, P.C.

[Signature]  
Reid Lambert  
Attorney for Plaintiffs

WILDMAN, HARROLD, ALLEN & DIXON, LLP

[Signature]  
Lucy C. Lisiecki  
Attorney for Defendants