

2004

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

Plaintiff-Appellants,

vs.

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

Defendants-Appellees

BRIEF OF APPELLEES

Court of Appeals No. 20041103-CA

District Court No. 980900576

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

Appellees Utah Resources International, Inc. (“URI”), John Fife (“Mr. Fife”), Lyle D. Hurd, Jr. (“Mr. Hurd”), David Fife (“Mr. David Fife”) and Gerry Brown (“Mr. Brown”)¹ adopt the statement of jurisdiction of Appellants Mark Technologies Corp. (“MTC”) and Mark Jones (“Mr. Jones”) (collectively, “Appellants”). (Br. 1).²

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly apply the law and correctly weigh the evidence when it determined that URI exercised its “best efforts” in successfully unwinding URI’s complicated, multi-layered relationships with Morgan Gas and Oil (“MGO”)?

URI does not contest MTC’s and Mr. Jones’s statement that the issue was preserved for appeal. (Br. 1). URI itself offered extensive testimony at trial regarding its best efforts to unwind the URI-MGO relationships, from former URI Board member Lyle Hurd, Jr., URI Chief Executive Officer John Fife, and MGO employee Michael Bennion. See Tr. 156-161; 417-437; 500-23; 559-620. This Court reviews the trial court’s legal conclusions regarding the “best efforts” standard for correctness and its factual findings

¹ Appellants do not present any arguments in this appeal against Mr. Fife, Mr. Hurd, Mr. David Fife or Mr. Brown as individuals, but refer only to actions taken in their capacity as URI Board Members or, in the case of Mr. Brown, as a URI employee. Thus, none of these gentlemen appear to be Appellees in their individual capacities. They are included in this brief for the sake of completeness, and all arguments on behalf of URI apply with equal force to these individuals.

² Citation conventions in this brief are as follows: “Br.” refers to Appellants’ brief on appeal, “Add. Ex.” refers to an exhibit in the Appellants’ Addendum, Tr. refers to the trial transcript of February 10-12, 2004, Pl. Ex. or Def. Ex. refers to the trial exhibits included in the record on appeal, and R. refers to the record on appeal.

for clear error. See Nunley v. Westates Casing Servs., Inc., 1999 UT 100. In addition, the Court may affirm on any ground supported in the record. See Dipoma v. McPhie, 2001 UT 61.

2. Did the trial court correctly award attorneys' fees to URI as the "prevailing party" on the "best efforts" claim?

This Court reviews the trial court's legal conclusion that URI was the prevailing party for purposes of the attorneys' fees award for clear error. See Nunley, 1999 UT 100. Appellants are not contesting the propriety of the amount of the fee award. Rather, Appellants argue that no fees should have been awarded in the first place because URI should not have been named the prevailing party on the best efforts claim. URI does not contest MTC's and Mr. Jones's statement that the issue was preserved for appeal. (Br. 2). URI offered extensive testimony that it exercised its best efforts in unwinding the MGO relationships and so properly was held to be the "prevailing party" on this issue. See Tr. 156-161; 417-437; 500-23; 559-620.

STATEMENT OF DETERMINATIVE LAW

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

I. Nature of the Case.

This case concerns the alleged breach of a "best efforts" clause contained in a June 26, 1996 Settlement Agreement ("Settlement Agreement"). (Add. Ex. A, p.1). The legal interpretation of the term "best efforts" under Utah law and under the Settlement

Agreement itself is at issue. Also at issue is whether the trial court clearly erred when it determined that the facts did not demonstrate a breach of URI's obligation under the best efforts clause.

II. Course of Proceedings.

Mr. Jones and his company, MTC, filed this lawsuit against URI, Mr. Fife, Mr. David Fife, Mr. Hurd, and Mr. Brown on January 20, 1998. (R. 1). The Amended Complaint (R. 502-537) filed by Mr. Jones and MTC cited ten alleged "breaches" of the Settlement Agreement.

After extensive discovery was conducted, on January 5, 2000, Judge Anne M. Stirba granted summary judgment in defendants' favor on all ten claims. (R. 1516-1526). With respect to the "best efforts" claim at issue here, Judge Stirba held: "Plaintiffs allege defendants took no meaningful action to wind up until this lawsuit was filed. However, URI presented uncontroverted evidence that it had been in the process of unwinding the partnerships identified in the Settlement Agreement, according to the terms of the Agreement, for an extended time prior to the filing of Plaintiffs' lawsuit." (R.1519-20).

Mr. Jones and MTC appealed. On February 6, 2003, this Court affirmed judgment against them on four claims, and sent three claims back to the trial court for further fact-finding, including the best efforts claim at issue here. (R. 1956-1961). This Court also requested the trial court to determine who the "prevailing party" was for purposes of attorneys' fees with respect to two additional claims. (Id.).

Judge Joseph C. Fratto conducted a trial on the remanded claims, including the best efforts claim, on February 10-12, 2004. (R. 3464-3466).

III. Disposition in Court Below.

The trial court issued its Memorandum Decision in this matter on March 17, 2004. (Id.; Add. Ex. C, R. 2118-2123). With respect to the best efforts claim, the trial court held that: “[T]he court is not convinced to a preponderance of the evidence that best efforts were not made by defendants, and finds no cause of action.” (Add. Ex. C, R. 2122). In support of its holding, the trial court made the following findings of law and fact:

- Defendants had a “fiduciary obligation to accomplish their contractual obligation” under the best efforts clause “to the benefit of URI.” (Add. Ex. C., R. 2121).
- “Severing the relationship with MGO would be a relatively easy task, if URI’s best interests are ignored.” (Id.)
- “The unwinding of URI’s relationship with MGO is a business proposition involving business decision and strategies.” (Id.)
- “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.” (Id.)
- “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.” (Id.)

- The MGO unwinding was not the “top most” priority of John Fife’s responsibilities, but “best efforts” does not mean that this task had to be elevated “above all others.” Instead, best efforts required “the best effort possible in the context of the circumstances and situation.” (Id.)
- “Although there was no direct communication with some members of the MGO team” during a period of time identified by Appellants, “contact with John Morgan did continue.” Moreover, “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.” (Id.)

The trial court also determined that URI was the prevailing party on the best efforts claim and awarded URI a portion of its attorneys’ fees incurred in defending the claim. (Add. Ex. D).

IV. Statement of Facts.

A. The “Best Efforts” Clause.

The particular “best efforts” clause at issue in this appeal provides:

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.

(Add. Ex. A, p.8, ¶ 1).

The “Parties” referred to in the clause include Appellees URI, Mr. Hurd, and Mr. Fife; Appellants MTC and Mr. Jones; and seven other parties who signed the Settlement Agreement (R. Dee Erickson, E. Jay Sheen, Anne Morgan, Victoria Morgan, Inter-

Mountain Capital Corporation (“IMCC”), and Robinson & Sheen LLC). (Id.). Notably, Morgan Gas & Oil Co. (“MGO”) was not a party to the Settlement Agreement.

B. The Settlement Agreement And Its Aftermath.

Although the sole focus of this appeal is the “best efforts” clause regarding the unwinding of the MGO relationships, that one-sentence clause was just one small part of the thirteen-page Settlement Agreement between the eleven persons listed above. (Add. Ex. A).

The bulk of the Settlement Agreement does not concern the MGO relationships, but instead addresses three completely different primary objectives: (1) to dispose of a multitude of historical shareholder litigation involving the eleven settling parties; (2) to set forth the material terms of a Stock Purchase Agreement to be negotiated and executed between URI and IMCC (a company in which Mr. Fife is the sole shareholder); and (3) to describe the terms of a “going private” transaction (via reverse stock split) for URI whereby small shareholders in URI would be cashed out. See id. The Stock Purchase Agreement (R. 96-132) was eventually negotiated, executed on July 3, 1996, and performed. IMCC acquired 50.5 percent of URI as a result. (R. 473). All of the pending shareholder suits were dismissed. (R. 458). The “going private” transaction was completed (with SEC approval) in March, 1999. (R. 954-956).

The Settlement Agreement facilitated the transfer of control of URI to IMCC (and its controlling shareholder, John Fife) and represented a fresh start for URI. (Pl. Ex. 9, p.3). Indeed, Mr. Fife took a struggling company that was constantly in the red and turned it into a profitable one. See, e.g., Def. Ex. 21 (summarizing URI’s financial data

from 1996 through 2002). Part of the turn-around process, however, required Mr. Fife and his new Board of Directors to complete all of their obligations under the Settlement Agreement, including under the best efforts clause involving the unwinding of the MGO relationships that are at issue here. Tr. 156-161; 417-437; 500-23; 559-620. Everything was done. The complaint of Appellants is simply that everything should have been done faster.

C. The Unwinding Of URI And MGO.

1. The Tumultuous History And The Hope For The Future.

URI had been closely involved in a number of contractual relationships with MGO over the years, given that MGO's principal, John Morgan, formerly helped to run URI. (R. 55). In fact, Mr. Morgan's father was involved in founding both companies. (Id.). Mr. Michael Bennion, an MGO employee and former URI employee, testified that when URI's management changed in 1993, the two companies started to talk about extracting or "unwinding" themselves from those relationships. (Tr. 385-86). Former URI Board member, Lyle Hurd, recalled that URI and MGO had discussions about unwinding "as far back as 1995," which did not go anywhere. (Tr. 156). Indeed, URI's Board Minutes dated April 22, 1996, before John Fife arrived on the scene, demonstrated a good deal of acrimony toward MGO which prevented an unwinding. Those minutes stated:

Mr. Hurd asked the minutes of this meeting reflect his opinion that the Board should consider and address at the earliest possible time, possible actions by URI against MGO. . . . Mr. Erickson said it would be desirable to avoid litigation, but "when your house is being bombed, and you see rooms disappear, and you get down to one room, it changes the landscape." (Def. Ex. 11).

The May 6, 1996 Board Minutes were even more contentious as the URI Board members discussed ongoing litigation between URI and MGO and the potential for future litigation:

Mr. Sheen said Mr. Jones had the information URI requested, and in the present discussion, Mr. Jones seemed to be avoiding the issue, and Mr. Sheen wanted to vote on the MGO action now lest actions by MGO preclude URI being able to seek remedies. Mr. Sheen said time was the ally of MGO and not the ally of URI. Mr. Jones said Mr. Sheen's comments were spoken like a "true litigator" and said "that's what we need in this Company is more people like you" (interpreted to be sarcastic). Mr. Sheen said he was amazed how vague, ambiguous and off of the point Mr. Jones answers were. . . Mr. Erickson said MGO could re-file its lawsuit at any time, and that he thought it would be inappropriate to discuss strategies and timing issues with a MGO Board Member present (referring to Mr. Jones).

(Def. Ex. 13, pp, 12-17).

As reflected in the Board Minutes, URI and MGO, prior to the time that IMCC acquired control of URI, were distrustful of each other and unwilling to share information. The URI Board was also concerned about Appellant, Mr. Jones's, divided loyalties given his membership on both Boards.

When control of URI shifted to IMCC and John Fife in 1996, Mr. Bennion noted that the new URI Board was much more cooperative and "receptive" to unwinding the URI-MGO relationships than the prior Board, which never managed to progress in the goal despite talking about it a lot. (Tr. 385-386; 417-418). Mr. Bennion acknowledged, however, that the new Board was at an informational disadvantage and had to catch up to MGO in terms of knowledge about the partnerships. (Tr. 429). Even the other side in the

negotiations knew that URI had to “get up to speed” and develop a working factual and legal knowledge of the claims at issue so that MGO would not be in a superior bargaining position to dictate terms to URI. (Id.).

2. Making Sense Of The Past.

To accomplish the URI-MGO unwinding, Mr. Fife first had to educate himself about the functions of the various partnerships³ in which URI was involved and then discern the role played in those partnerships by MGO. Accordingly, from July 1996 through December 1998—including the time during which this matter was being litigated—URI, under John Fife’s leadership, marshaled and analyzed the records, investigated the partnerships, identified the functions, assets and liabilities of the viable partnerships, and took steps to dissolve and distribute the assets of the others—all the while getting on with the business of resurrecting a company that had been run into the ground. (R. 575; R. 709-710; R. 1344-46, pp. 66, 73-74; R. 1349, pp. 99-100). Everything had to be done in a way that avoided litigation with MGO—a typical outcome for breakups of business partnerships.

Initially, John Fife entrusted one of URI’s employees at the time, Ladd Eldredge, to meet and work with Mr. Bennion of MGO to resolve factual issues related to the

³ URI was a general partner in Southgate Resort Limited Partnership, a Utah limited partnership; a general and limited partner in Country Club Partnership, a Utah general partnership; a general partner in URI-MGO Health Venture, a Utah general partnership; a general and limited partner in Tonaquint Indian Hills Partnership, a Utah limited partnership; and a general and limited partner in Service Station Limited Partnership, a Utah limited partnership. (See R. 574-575; Pl. Ex. 15).

unwinding. (Tr. 500, 564). Mr. Bennion and Mr. Eldredge met and discussed matters a few times. A September 18, 1996 memorandum from Mr. Bennion to Mr. Morgan regarding his meeting with Mr. Eldredge demonstrated that there were a number of unknown receivables on both sides, as well as unknown liabilities and disagreements regarding liabilities. (Def. Ex. 8). For example, there was an unknown \$1,102 receivable to URI from MGO, a purported debt to Mr. Morgan of \$7,000, additional unknown funds purportedly owed to the Service Station Partnership, discrepancies in the Country Club Mall Partnership, discrepancies regarding funds owed in the URI-MGO Health Venture Partnership, and numerous other outstanding issues that required investigation. (Id.) Mr. Bennion also admitted he did not have the partnership agreements and that in the future, "It may be better for me to meet with Ladd where all the partnership agreements and records are." (Id.)

Mr. Bennion met with Mr. Eldredge again in October of 1996. Mr. Bennion noted several additional liabilities of MGO that he discovered as a result of the meeting. (Pl. Ex. 10). Mr. Bennion also stated that Mr. Eldredge still needed to locate additional "back up information" in order for MGO to proceed in the negotiations. (Id.).

Interestingly, even a seemingly simple matter such as retrieving and examining all of the URI-MGO records was a complex task. Mr. Bennion stated regarding the records, "I think a lot were put into storage and I'm not sure that Ladd Eldredge really understood what was what or what was where," and that the records were not in the most organized state. (Tr. 426). Also, Mr. Bennion testified that many URI-MGO transactions were not documented and required investigation and location of back-up documentation. (Tr. 429,

433). Mr. Bennion also admitted that under URI's accounts starting in 1993, "things got quite muddled," and once John Fife took over, URI had to sort through that muddle. (Tr. 429). In fact, Mr. Fife discovered that many useful records were kept in a trailer in St. George, Utah, and "there was no order . . . there was no organization whatsoever. And Ladd's files were horrible. There were---there were just papers every place and no---no labeling of anything, and when I would try to talk to him about what's the real business transaction that took place that's behind these entries, it was, you know, a 15-minute conversation of---of just stuff that made no sense. And at the end of the day, I was---you know, I got more information from Mike Bennion than I did from Ladd, and he was on the other side." (Tr. 610-11).

While URI's messy records were being sorted out, Mr. Fife requested that URI's legal counsel, Alan Roth and his associates, conduct their own investigations and analysis. In particular, Mr. Fife requested legal counsel to examine issues regarding partnership taxes and URI's exposures and liabilities arising from each of the URI-MGO partnerships. Tr. 500-513; 517-18; 574-614. Mr. Roth complied with the request. See Def. Ex. 19 and Def. Ex. 20 (spreadsheets from Mr. Roth, faxed on May 30, 1997, summarizing assets and liabilities of each of the partners in the URI-MGO partnerships and of the partnerships themselves). Although Def. Ex. 19 is only two pages (as repeatedly noted by Appellants), the information contained in both of these spreadsheets took considerable time and effort to compile and analyze. (Tr. 500-513; 517-18; 574-614). See also, Def. Ex. 23 (containing correspondence from Alan Roth to Mark Jones and others during April, August and September of 1997, regarding the sale of property

owned by Service Station Limited Partnership #2 and regarding a Partition Agreement of property owned by the partners in Southgate Resort General Partnership and Southgate Plaza General Partnership, undertaken to assist in unwinding these partnerships.)

The dissolution of each partnership presented unique challenges. For example, the Service Station Partnership involved extensive issues of environmental law, including a clean-up and remediation due to a leaky underground storage tank. (Tr. 502-506). The remediation was still on-going at the time of trial. (Tr. 503). MGO insisted that URI take on all of the liabilities resulting from the leaky underground storage tank. (Tr. 506). URI ended up negotiating a sale of the property in 1997, but retained the environmental liabilities. (Tr. 504). Mr. Jones offered his opinion at trial that the sale of the Service Station was not necessary to complete the unwinding between URI and MGO. (Tr. 367-68; Br. 23). Although Mr. Jones is entitled to his opinion, Mr. Fife disagreed, and believed that sale of all of the assets and a distribution was the best way to reach a dissolution of the Service Station Partnership. (Tr. 503). Moreover, Mr. Fife's approach resolved litigation with the owners of a hotel that adjoined the Service Station property. The hotel owners claimed that they had an option to buy the Service Station property, and they are the ones who ultimately purchased the land. (Tr. 501-502). Rather than contest their option in a costly legal battle, Mr. Fife achieved a settlement with benefits for the Service Station Partnership. (Tr. 502-503).

Another significant accomplishment that facilitated the ultimate URI-MGO unwinding occurred in 1997. To promote dissolution of the Southgate Partnerships, a Partition Agreement of property owned by the Partnerships was negotiated and executed

among the partners. (Tr. 507-509). As Mr. Fife testified, the Partition Agreement was “a way to get these other partners out. I couldn’t go in and just favor one partner and buy them out.” (Tr. 509). Under the Partition Agreement, URI and MGO jointly retained ownership of one parcel of land and the two other partners retained ownership of separate parcels. In the global URI-MGO Partnership Settlement Agreement executed in 1998, URI negotiated for and obtained full ownership of the parcel. (Tr. 510).

3. The John Morgan Factor.

Once URI had a solid grasp of the issues relating to the various URI-MGO partnerships, and after it had addressed major issues such as the sale of the Service Station and the completion of the Partition Agreement relating to the Southgate partnerships, URI was able to begin negotiations with Mr. John Morgan, the Chief Executive Officer of MGO in approximately July 1997.

Mr. Morgan and his attorney, Richard Ferrari, proved to be shrewd negotiators. See, e.g., Tr. 505, 506, 564). Nor could Mr. Morgan be “pushed.” (Tr. 591). He wanted to take things at his own pace, and John Fife had many meetings with him at his club on Main Street to discuss whatever was on his mind. (Tr. 592).

The task of unwinding the MGO partnerships required attention to Mr. Morgan’s concerns about settling other obligations relating to his Estate, various Morgan family trusts, and other familial and personal obligations. (Tr. 420-21). As Mr. Fife testified, Mr. Morgan viewed everything as “all wrapped together; him personally, MGO, all of his friends, all of his trusts, all these other people that he had prior relationships with. . .

[H]e was not looking at this at all as just an MGO thing. He was trying to unwind all these activities of the past.” (Tr. 579).

Ultimately, Mr. Morgan was pleased with the progress that he and John Fife made in the unwinding process. Mr. Morgan wrote a July 20, 1998 letter to John Fife thanking him for all of his help and cooperation “over the last year or so and particularly in the last month.” (Pl. Ex. 12(c)). The “last year or so” would have referred to the period of approximately July 1997 to July 1998. Again, Mr. Morgan made plain that URI had been diligently working on the MGO-URI unwindings since John Fife arrived on the scene. Once Mr. Fife and URI had completed their investigations, URI was able to enter into a Partnership Settlement Agreement with MGO to dissolve MGO’s affiliations, on terms beneficial to both companies. (R. 575; R 597-650, Pl. Ex. 15). Thanks to URI’s and John Fife’s initiative, the partnerships were finally unwound when the Partnership Settlement Agreement was signed in December of 1998.

4. The Mark Jones Factor.

In contrast to the cordial relationship between Mr. Fife and Mr. Morgan, Appellant Mark Jones did little but create strife. For example, John Morgan wrote in a September 22, 1998 letter to John Fife:

As you know, we—and you—have been wrestling with this Settlement between URI and MGO for a long time now; and we appreciate, very much, your good faith efforts to get it settled. . . Will you kindly keep in mind that I am concerned about two guys who are very anxious to find something wrong with the Settlement that we are trying to put together. This is Mark Jones and Jay Sheen. Mark Jones is really upset with us, because we are making very good progress against him, in our conflicts with him. . . . (Def. Ex. 7).

Similarly, Mr. Bennion testified that Mr. Morgan was “very gun-shy” and wanted to avoid another lawsuit with Mr. Jones. Thus, Mr. Morgan’s concerns about Mr. Jones delayed the unwinding process. (Tr. 431). In contrast, URI facilitated the unwinding process by allaying Mr. Morgan’s concerns. See supra, pp. 13-14. Mr. Morgan specifically acknowledged that he and John Fife had been working on the global settlement “for a long time now,”—not just the “five months” of August 1998 through December 1998 that Appellants claim was the only time URI was diligent. (Br. 28).

Mr. Jones’s actions throughout the MGO unwinding process demonstrate not only his contentious personality, but also his conflict of interest as a shareholder of both URI and MGO and a Board member of both companies. He tried to negotiate for both companies to the detriment of the other. Various of URI’s Board members recognized Mr. Jones’s divided loyalties. For example, Mr. Hurd testified, “I may have had a concern about all of this, because of Mr. Jones’ position with MGO, and whether or not it was in the best interests of MGO or in the best interests of URI or either.” (Tr. 160).

Mr. Jones tried to work the MGO side first. On April 19, 1996, Mr. Jones wrote to John Morgan of MGO regarding his intent to “use my best efforts to have URI pay to MGO the full amount due under the Note Receivable from the Service Station Limited Partnership in the amount of \$120,000, and allow a credit to that amount . . . to URI in exchange for return of all MGO stock held by URI. . . . Thus, MGO should be able to retire the MGO stock held by URI without having to actually come up with the additional funds. . . .” (Def. Ex. 6). When his proposal was not accepted, Mr. Jones made another proposal to URI by a letter dated November 24, 1997, wherein he urged “a full cash

payment of \$245,000 to MGO” by URI. (Pl. Ex. 11). He also inexplicably stated: “I hereby demand that Ladd Eldredge of URI and Mike Bennion of MGO finalize the precise amounts of the various obligations. . . and prepare simple assignment documents of the various limited partnership interests within the next two weeks.” (Id.). Ironically, regardless of the standing of Mr. Jones to demand that URI move quickly in the direction he preferred, MGO did not have to listen to him at all.

URI rejected Mr. Jones’s attempts to interfere in the unwinding because Mr. Jones’ proposal would have cost the company \$245,000. (Tr. 332; Pl. Ex. 11). Ultimately, URI paid only \$80,491.00 to MGO via a promissory note. (Pl. Ex. 15, p.3). Nor did URI wish to entrust Mr. Eldredge with significant responsibility, despite Mr. Jones’s demands, because Mr. Eldredge had not proved to be very reliable or organized. (Tr. 500). Moreover, URI wanted to achieve a complete unwinding, with a global settlement and mutual releases. That is precisely what URI achieved, as reflected in the Partnership Settlement Agreement. (Pl. Ex. 15). Mr. Jones refused to admit that the result URI achieved was better than the one he proposed. (Tr. 332-333). Regardless of Mr. Jones’s opinions regarding what should have been done or should not have been done, he and MTC failed to meet their burden of demonstrating that URI failed to use its best efforts throughout the unwinding process. All they proved is that URI and Mr. Jones/MTC disagreed about how and when the unwinding should have been accomplished. As the trial court determined, these facts do not establish a claim for breach of the Settlement Agreement’s best efforts clause by URI. (R. 2121).

5. URI's Other Priorities.

In addition to educating itself and pursuing the unwinding of the URI-MGO relationships, URI also had numerous other matters on its plate during 1996 and 1997. Even Mr. Bennion of MGO admitted knowing that URI “had to concentrate on getting their SEC filings up to date.” (Tr. 428). Mr. Fife also testified regarding the need to provide liquidity to minority shareholders via the reverse stock split, and to reverse years of losses.⁴ (Tr. 559-564; Def. Ex. 21). The trial court recognized that in addition to ordering its priorities on the MGO issue, URI had to address company-wide priorities. (Add. Ex. C, R. 2121). Best efforts in a business context must always account for a company’s financial condition and its alternative uses for money and time. The trial court recognized that URI had to and did balance all of its priorities, including in completing the MGO unwinding. (R. 2121, Add. Ex C).

SUMMARY OF ARGUMENT

Appellants assert that the trial court erred in applying the legal standard of best efforts. It did not. The trial court’s findings demonstrate a clear understanding of Utah law regarding contractual best efforts provisions, which acknowledges that “best efforts” is a “subjective standard under which a party agrees to do the best that it can regardless of the capabilities of others.” See Carlson Distributing Co. v. Salt Lake Brewing Co., 2004 UT App. 227.

⁴ Notably, one of Mr. Jones’s proposals from 1997 would have had URI, then a cash-poor company with losses exceeding \$444,000, pay out money to MGO to settle. His solution was to have URI borrow the money to pay MGO. (Tr. 328).

The trial court's findings are also consistent with the context in which the "best efforts" language is used throughout the Settlement Agreement at issue. Elsewhere in the contract, the parties said best efforts had to be used "immediately" or "within sixty days," but in the provision challenged here, there is no time limitation. This Court should not impose a requirement of a certain speed to accomplish a task, when the contracting parties did not see fit to do so.

In addition to legal error, Appellants argue that the trial court committed clear error in its factual findings regarding best efforts. As Appellants themselves acknowledge, however (Br. at 17-21), ample factual support in the record exists for this Court to affirm the trial court's judgment. The trial court simply chose to reject Appellants' arguments that URI should have adopted their proposal and time frame instead of investigating the facts and developing its own strategy over time. Indeed, the strategy that URI adopted was, just as the trial court found, in the company's best interest. (Add. Ex. C, R. 2121).

In essence, Appellants want this Court to second-guess the trial court's factual findings based on a cold record. This practice is disfavored. See State v. Calliham, 2002 UT 86 ("We review most evidentiary rulings and questions of fact with deference to the trial court based on the presumption that the trial judge, having personally observed the quality of the evidence, the tenor of the proceedings, and the demeanor of the parties, is in a better position to perceive the subtleties at issue than we can looking only at the cold record."). The trial court's findings of fact demonstrate that it found the testimony of Mr. Fife, Mr. Hurd, and Mr. Bennion to be more credible than that of Appellant, Mr. Jones. It

cannot be said that the trial court clearly erred in weighing the evidence as it did and in finding in URI's favor.

ARGUMENT

I. The Trial Court Correctly Applied The Law Regarding Best Efforts.

A. The Law In Utah And Other Jurisdictions Supports The Trial Court's Findings Of Law.

Under Utah law, "'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. Under such a definition, evidence of the actions or capabilities of others may still be relevant. However, the two entities must indeed be comparable in the sense that evidence of the performance of one must also be evidence of the capabilities of the other." Carlson Distributing Co. v. Salt Lake Brewing Co., 2004 UT App. 227.

The trial court correctly applied the standard articulated in Carlson. The trial court applied a "subjective standard" when it noted that "particular circumstances" had to be considered in evaluating whether best efforts were used. (Add. Ex. C., R. 2120). The trial court emphasized that "best efforts" meant the "best effort possible in the context of the circumstances and situation." (Add. Ex. C., R. 2121). The particular circumstances identified by the trial court were that John Fife was new to URI, and needed to marshal, organize and analyze the records before he could even begin to prioritize all the tasks that required completion. (Id.). As in Carlson, the trial court recognized that John Fife and URI "did the best that" they could, without considering the capabilities of others. URI's "best efforts" required that John Fife, the new president, and new corporate counsel, Alan

Roth, spend a good deal of time evaluating what precisely each of the partnerships did, who the other partners were, what the assets and liabilities of each partnership were, and resolving numerous other issues from the lengthy and tangled relationship between MGO and URI that had existed for many years. See supra, pp. 9-14. Given these intensive efforts and the complexities of the task at hand, URI cannot be said to have used less than its “best efforts.” Compare Craig Food Indus., Inc. v. Taco Time Int’l, Inc., 469 F. Supp. 516 (D. Utah 1979) (evidence highlighted difficulties faced in trying to accomplish tasks; it was not established that best efforts were not used); EEOC v. R.J. Gallagher Co., 181 F.3d 645, 652 (5th Cir. 1999) (summary judgment on “best efforts” claim was appropriate; genuine efforts were demonstrated even if they did not consume every “waking hour” and best efforts means “such efforts as are reasonable in the light of that party's ability and the means at its disposal and of the other party's justifiable expectations”); Foster Wheeler Broome County, Inc. v. County of Broome, 275 A.D.2d 592, 593 (N.Y. App. Ct. 2000) (summary judgment granted on contractual “best efforts” claim where unrebutted evidence was presented of genuine efforts made to assist plaintiff in obtaining permit). Mr. Jones and MTC simply did not meet their burden of demonstrating a failure of “best efforts” by URI.

Mr. Jones’ and MTC’s gripe regarding the “best efforts” used to unwind the MGO partnerships is nothing more than another attack on the ways and means URI uses in its business judgment. Such an attack is unwarranted in the absence of a breach of a duty to all shareholders. See, e.g., C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 55 (Utah App. 1995); Utah Code Ann. § 16-10a-840.

The authorities cited by Appellants from numerous other jurisdictions do not demand a different result. (Br. 11- 12). Those cases simply assert that an element of diligence is implicit in the best efforts standard. (Id.) Although to Appellees' knowledge, no Utah court has ever inserted a diligence requirement into the best efforts standard, even if a diligence requirement exists, URI's comprehensive program to unwind from its MGO relationships (while remaining true to the fiduciary duties owed to its shareholders) would more than satisfy any such requirement. See supra, pp. 9-17.

Appellants also argue that the trial court applied an incorrect standard of best efforts by confusing it with a good faith standard. This is not the case. First, in Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1445 (7th Cir. 1992), cited by Appellants to support this argument, the Seventh Circuit merely distinguished between an implied best efforts claim and an implied covenant of good faith and fair dealing claim. Neither of those claims is at issue here, where there is a clear contract with an unambiguous best efforts provision. Second, the trial court did not apply a "good faith" standard. As demonstrated supra at pp. 19-20, the trial court applied precisely the standard that this Court articulated in Carlson.

B. The Settlement Agreement Itself Demonstrates That The Trial Court Applied The Correct "Best Efforts" Standard.

The Settlement Agreement provides further support for affirming the trial court's interpretation of the "best efforts" clause at issue. The clause at issue, Paragraph 1.j of the Settlement Agreement, states:

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.

Notably, the clause provides no time frame for unwinding the MGO partnerships. Two other “best efforts” provision of that same Agreement—paragraphs 1.a and 1.b—do have time frames for using best efforts. Paragraph 1.a. states that best efforts were to be used “immediately following the Closing” and paragraph 1.b states that best efforts were to be used “within 60 days” of the Settlement Agreement. (See Add. Ex. A).

Because the parties did not specify a time frame for unwinding the URI-MGO partnerships, and they were in fact unwound, Appellants’ repeated complaints that it should have taken less time than it did and that it should have been accomplished in a different way, lack any merit. (Br. 2, 6, 9, 14, 15, 21, 22, 23, 26, 27, 28).

Utah law is clear that this Court should not impose a time frame upon or a particular methodology upon the parties when they did not see fit to include such conditions in their contract themselves. See Crowther v. Carter, 767 P.2d 129, 132 (Utah App. 1989). In Crowther, the Appellant wanted the “best efforts” clause to require success in the endeavor, even though the contract did not contain this term, but the Court held “it is not the function of a court to rewrite an unambiguous contract,” citing Provo City Corp. v. Nielson Scott Co., 603 P.2d 803 (Utah 1979). Id. The Court further held that, “Although the parties could have made such an agreement, the clear language... states that Crowther only had to use his best efforts to become the obligor; in return for that and other conduct, respondent became the owner of one-fifth of the partnership.” (Emphasis added). As in Crowther, here, one party wants to re-write the contract to

include a term that could have been included, but was not. This Court should reject Appellants' attempt to impose a time frame or particular conditions upon the URI-MGO unwindings.

Under Utah law, URI did not even have an obligation to ensure the success of the project. The "best efforts" standard acknowledges that there may be subjective circumstances and conditions beyond one party's control that may preclude success of the endeavor, even when best efforts are used. That is why the standard simply requires that the parties try to accomplish the task—in other words, that they make an effort, not that they actually do it. See Rogers v. M.O. Bitner Co., 738 P.2d 1029, 1034 (Utah 1987). In that case, under a trust agreement, "Westcor agreed to use best efforts to reobtain certain real estate contracts previously assigned by Westcor by a designated date, after which Bitner Company would hold Westcor harmless." Id. Thus, once a party used its "best efforts," even if it did not accomplish the task by a given date, its responsibility ended. Here, the parties not only used best efforts, they accomplished the task. URI and MGO accomplished the unwinding of all of their relationships even though MGO—the opposing party in the negotiations—did not sign the 1996 Settlement Agreement and was under no contractual or legal compulsion to "unwind" at all.

II. The Trial Court's Factual Findings Regarding Best Efforts Are Supported By The Weight Of The Evidence And Are Not Clearly Erroneous.

The record supporting URI's best efforts in unwinding the MGO relationships during the entire period of 1996 through 1998 is substantial. See supra, pp. 7-17. Appellants themselves marshaled significant evidence in support of URI's position. (Br.

17-21). In the face of all of this evidence, the trial court was correct in according more weight to URI's documentary evidence as well as the testimony of Mr. Fife, Mr. Hurd and Mr. Bennion than to Appellants' evidence.

Although Appellants complain that sufficient "documentary evidence" did not support all of the trial court's conclusions (Br. 6), the trial court was well within its discretion in relying upon John Fife's testimony regarding his on-going interactions with "key" decision-maker, John Morgan of MGO, and regarding Mr. Fife's, Mr. Hurd's and Mr. Bennion's testimony regarding the numerous priorities that demanded URI's attention and the many direct and indirect steps that were required to achieve the ultimate successful unwinding of URI and MGO. (Add. Ex. C, R. 2121; Tr. 156-161; 417-437; 500-23; 559-620). Moreover, in finding in URI's favor, the trial court implicitly rejected the testimony of Mr. Jones. Although Appellants cite to Mr. Jones's trial testimony and his affidavits as "fact" (Br. 4, 5, 23, 26), the trier of fact did not accord it with as much weight as URI's evidence. The trial court's factual findings (summarized supra at pp. 4-5), were well within its discretion. Calliham, 2002 UT 86.

III. The Trial Court Correctly Awarded URI Its Attorneys Fees As The "Prevailing Party" On The Best Efforts Claim.

Appellants contend that URI is not entitled to its attorneys fees because it wound up its relationships with MGO only because of their lawsuit. Appellants further contend that they deserve to be the "prevailing party" because their lawsuit was the impetus for the URI-MGO wind-up, citing Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1038 (Utah 1981).

Factually, Appellants are wrong. Both Judge Stirba and Judge Fratto found that URI had diligently pursued the winding up prior to the lawsuit, as well as during the course of the lawsuit. See supra, pp. 3-5. The weight of the evidence demonstrates that URI used its best efforts to accomplish the “wind-up” from July 1996 until the task was accomplished in December of 1998. See supra, pp. 7-17.

Moreover, under Appellants’ theory, the wind-up would have been accomplished shortly after their lawsuit was filed in January of 1998, instead of when it actually was completed in December of 1998. An eleventh-month delay between the time the lawsuit occurred and the time the URI-MGO relationships were wound up makes any connection between the two tenuous at best. Nor was any evidence offered to support Appellants’ theory besides the fact of the eleventh-month delay itself.

Not only are Appellants unable to support their theory under their facts, they cannot support it under the law, either. Highland is inapposite. In that case, Highland claimed to be “the prevailing party” because 164 days after it filed its action, Stevenson admitted that he owed and voluntarily paid Highland \$10,300.78 of the amount it was suing for. 636 P.2d at 1038. The Court held that, “In view of that payment after the action was started, Highland was ‘the prevailing party’ with regard to that cause of action. . . . It should make no difference whether the plaintiff recovers money from the defendant during the course of the action by voluntary payment or whether the plaintiff recovers that amount by a judgment. In both instances the plaintiff has recovered money by virtue of its action.” Id.

In contrast, in this case, URI certainly has not admitted any liability to Appellants. Nor is there a temporal connection between filing of the lawsuit and the winding up of the MGO partnerships. Mr. Jones admitted that, as a URI Board member, he worked on the MGO problems in 1996 and 1997. (Tr. 317-334). This alone proves that URI was engaged with MGO early on. There is no evidence to support the hypothesis that the lawsuit forced URI to act any faster than it would have without the lawsuit.

Appellants also seek to muddy the “prevailing party” standard. They assert that if they show the lawsuit caused URI to act, then they are the prevailing party. This cannot be the correct standard. The claim itself should be examined. Here, the claim is best efforts. To be deemed the “prevailing party,” Appellants would have to show, as the trial court held, that under a preponderance of the evidence, best efforts were not used. (Add. Ex. C., R. 2122). They failed to meet this burden. (Id.). The trial court correctly held that URI therefore prevailed, and that URI therefore is entitled to recover its reasonable attorneys’ fees and costs as allowed under paragraph 11(j) of the Settlement Agreement (Add. Ex. C; Add. Ex. D). The award in URI’s favor should be affirmed in all respects.

CONCLUSION

For the foregoing reasons, Appellees URI, John Fife, David Fife, Lyle Hurd and Gerry Brown respectfully request that this honorable Court affirm the district court’s judgment on the best efforts claim and affirm the award of attorneys’ fees and costs in URI’s favor.

Dated: February 28, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to be "D. Fife", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of February, 2006, I caused two true and correct copies of the foregoing Appellees' Brief to be sent, by First Class United States Mail, postage prepaid, to the following:

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