

2005

Jamal Yanaki v. Iomed, Inc, Robert J. Lollini and Mary Crowther : Brief of Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH COURT OF APPEALS
BRIEF

JAMAL YANAKI,

Plaintiff-Appellant,

vs.

IOMED, INC., a Utah Corporation,
ROBERT J. LOLLINI, and MARY
CROWTHER,

Defendants-Appellees.

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Case No. 20040185-CA

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I. JURISDICTIONAL STATEMENT.

This case is an appeal from a grant of dismissal in favor of Defendants. This matter was transferred by the Utah Supreme Court to the Utah Court of Appeals under UTAH CODE ANN. § 78-2-2(4). Pursuant to UTAH CODE ANN. § 78-2-2(3)(j), this Court has appellate jurisdiction.

II. ISSUES PRESENTED FOR REVIEW AND STANDARD FOR APPELLATE REVIEW.

Issues Presented for Appeal:

Issue 1: Did the trial court err in dismissing the complaint?

Standard for Appellate Review:

The propriety of dismissal is a matter of law, reviewed under a correctness standard, giving no deference to the trial court's determination. *See Coroles v. Sabey*, 79 P.3d 974, 979 (Utah Ct. App. 2003).

Issue 2: Did the trial court err in refusing to order consolidation?

Standard for Appellate Review:

A trial court's refusal to consolidate matters is reviewed under an abuse of discretion standard. *See Hassing v. Mutual Life Ins. Co.*, 159 P.2d 117 (Utah 1945) ("But if the actions were such as could have been consolidated, it was within the discretion of the Court to make, or refuse to make, the order. Unless otherwise provided by statute, the consolidation of actions, even when permissible, cannot be demanded as a matter of right; the matter rests

within the discretion of the court, which will not be interfered with, unless clearly abused, *particularly where the consolidation is denied.*” (emphasis in original) (quoting with approval from *St. George v. Boucher*, 274 P. 489, 491 (Mont. 1929)).

III. DETERMINATIVE STATUTES AND RULES.

Utah R. Civ. P. 13(a) is the determinative rule implicated by Yanaki’s appeal. [See Addendum Exhibit “A,” which is a copy of this rule.]

IV. STATEMENT OF THE CASE.

Iomed employed Yanaki from 1992 until 2002. Governing Yanaki’s employment at Iomed was an agreement precluding Yanaki, during or after employment, from disclosing Iomed’s trade secrets (the “IP Agreement”). [See Record on Appeal (“R.”) 2 at ¶ 6.]

Yanaki enjoyed a successful career at Iomed, eventually becoming Iomed’s General Manager. On February 9, 2000, Yanaki received a promotion to General Manager, Clinical Systems. His annual salary at that time was \$150,000.00, with an annual bonus, a stock incentive plan, educational benefits, and health benefits. [See R. 124 at ¶ 18.] For example, Yanaki entered into an Education Agreement with Iomed which allowed him to obtain an Executive MBA at the University of Utah at Iomed’s expense. Under that agreement, Yanaki promised to repay Iomed for tuition paid on his behalf if he left Iomed voluntarily, which he did in January 2002. [See R. 124 at ¶¶ 19-20.]

At the time of his voluntary resignation, Yanaki had supervisory responsibility over the following critical areas of Iomed’s commercial business operations: (1) Manufacturing,

Quality Control, Design and Engineering; (2) Customer Relations, Marketing and National Sales; (3) Product Management and Product Development; (4) Regulatory Affairs; and (5) Reimbursement. [See R. 125 at ¶ 21.] In his position, Yanaki attended executive meetings in which he participated in regular discussions involving Iomed's most confidential information, including business strategies, research and development plans, the status of ongoing research, confidential communications with Iomed's intellectual property advisors, including legal counsel, sales, marketing and financial information. Few, if any, Iomed employees had more intimate knowledge of the company's confidential information than Yanaki. [See R. 125 at ¶ 21.]

When Yanaki chose to leave Iomed in early 2002, he took with him Iomed's trade secrets. Rather than honoring his long-standing obligations under the IP Agreement, Yanaki and others took an Iomed invention to Iomed's chief competitor, Empi, Inc., with an offer to jointly develop and sell a product incorporating Iomed's confidential information. [See R. 134-35 at ¶¶ 64-70.] Eventually, an errant e-mail sent to Yanaki's old Iomed e-mail address revealed his scheme. [See R. 136-37 at ¶¶ 79-80.]

Having discovered Yanaki's misconduct, Iomed filed an action on April 9, 2002. [See R. 42, Complaint.] Shortly thereafter, Iomed sought and received a Court order allowing Iomed to seize certain Iomed documents and a computer hard drive located in Yanaki's home office, and deposit them with the Court in order to preserve it. [See R. 31 at fn. 1.]

In its lawsuit, Iomed sought enforcement of the IP Agreement, as well as the Education Agreement, since Yanaki had failed to repay approximately \$15,000.00 in tuition owed to Iomed under the clear terms of the Education Agreement. [See R. 153-54 at ¶¶ 169-77.]

In response to Iomed's lawsuit, Yanaki brought a counterclaim against Iomed for refusing to allow him to compete as allowed under the IP Agreement. [See R. 113-14 at ¶¶ 1-7.] He also sued Iomed's CEO, Robert Lollini, and its Director of Human Resources, Mary Crowther, for defamation. [See R. 115 at ¶¶ 9-11.] Yanaki subsequently filed several other lawsuits to pressure Iomed to settle the Original Litigation. Among those lawsuits were two federal complaints alleging that Iomed, Lollini, Crowther, and Iomed's legal counsel had violated the civil rights of Yanaki and his fiancée in preserving the evidence in Yanaki's home office. [See R. 31 at fn. 1.]

The case now before this Court represents the latest front in Yanaki's campaign of litigation against Iomed, its officers, and its legal counsel. Yanaki now alleges that by seeking to enforce the IP Agreement in order to protect its trade secrets and seeking recovery under the Education Agreement, Iomed somehow has discriminated against Yanaki. [See R. 7 at ¶ 26.]

Because Yanaki's discrimination claims arise out of the same transactions and occurrences underlying the original litigation, Rule 13(a) of the *Utah Rules of Civil Procedure* compelled Yanaki to bring such claims, if at all, as part of his counterclaim

against Iomed, Lollini, and Crowther in the original litigation. In particular, Yanaki cannot escape the fact that both the Original Litigation and this case focus largely on Iomed's attempts to enforce the IP Agreement and Education Agreement.

Recognizing that this litigation is inextricably intertwined with the Original Litigation, the trial court correctly granted Iomed's motion to dismiss this litigation under Rule 13(a).

IV. STATEMENT OF FACTS.

1. On April 9, 2002, Iomed filed a lawsuit against Jamal Yanaki alleging, *inter alia*, that Yanaki breached an Intellectual Property and Invention Agreement (the "IP Agreement") by successfully shopping Iomed's trade secrets to its chief competitor, Empi. ("Original Litigation") [R. 42-84.] Iomed also alleges that Yanaki breached an Education Agreement between the parties by refusing to repay over \$15,000.00 in tuition advanced on his behalf by Iomed upon his voluntary termination of employment. [See R. 50-51 at ¶¶ 99-107.] On December 6, 2002, Iomed filed its First Amended Complaint against Yanaki and others. [See R. 119-63.]

2. On September 9, 2002, Yanaki filed charges of discrimination against Iomed with the Utah Anti-Discrimination and Labor Division and the Equal Opportunity Commission. UALD No. A2-0836 and EEOC No. 35C-A2-0836. [R. 7 at ¶ 27.]

3. On January 10, 2003, Yanaki filed an Answer and Counterclaim to the First Amended Complaint in the Original Litigation ("Answer and Counterclaim"). [See R. 86-117.] In his counterclaim, Yanaki claims that Iomed breached the IP Agreement by failing

to allow him to compete with Iomed. [*See* R. 113-14 at ¶ 1-7.] Not only did Yanaki sue Iomed, Yanaki also sued Iomed’s CEO, Robert Lollini, and Iomed’s Human Resources Director, Mary Crowther, for \$5 million under a defamation theory. [R. 115 at ¶¶ 9-11.] Thus, in the Original Litigation, Iomed, Yanaki, Crowther, and Lollini are all parties. [R. 86.]

4. On March 26, 2003, the EEOC completed its investigation of Yanaki’s discrimination claims, and found that “the information in the file does not indicate that any further investigation of your case would necessarily result in any finding of discrimination,” and issued Yanaki his right to sue letter. [*See* R. 15.]

5. On April 14, 2003, Yanaki and his fiancée filed two more lawsuits, seeking \$15 million from against Iomed, Lollini, Crowther, and Iomed’s legal counsel, this time alleging that a Court-approved seizure of incriminating evidence from Yanaki’s home office violated the civil rights of Yanaki and his fiancée. [*See* R. 31 at fn. 1.] Judge Dee Benson dismissed that action, and Yanaki also has appealed that ruling.

6. On June 24, 2003, Yanaki filed this lawsuit, alleging that Iomed failed to allow him to compete under the IP Agreement. [*See* R. 1-15.] His allegations in this regard are nearly identical to those set forth in his Answer and Counterclaim. [*Compare* R. 1-15 with R. 86-117.]

7. In this lawsuit, just as in the Original Litigation, Yanaki also addresses the Education Agreement, claiming that it does not require him to repay tuition advanced by

Iomed, and that Iomed's demand for repayment in the Original Litigation violates his civil rights under U.S.C. § 1981 and constitutes retaliatory discrimination in violation of Title VII and UTAH CODE ANN. § 34A-5-106. [See R. 3, 8-10 at ¶¶ 9, 34, 39, and 42.]

8. In the Original Litigation, Iomed claims that Yanaki was a key, senior Iomed employee who was well-compensated, but chose to voluntarily leave Iomed and unfairly compete against Iomed by using Iomed's proprietary confidential information, including vendor lists, customer lists, pricing information, and information about a developmental product at Iomed which Yanaki oversaw in his capacity of General Manager. [See R. 124-25 at ¶¶ 19-21.] Iomed further alleges that Yanaki carefully prepared for his departure by deleting incriminating e-mails, taking key files over a weekend shortly before he left Iomed, and lying to Iomed about his post-employment intentions. [See R. 134-35 at ¶¶ 64-70.]

9. In this lawsuit, Yanaki alleges that the mere filing of the Original Litigation constitutes ongoing retaliatory discrimination in violation of Title VII and UTAH CODE ANN. § 34A-5-106. [See R. 7, 9-10 at ¶¶ 26, 39, 42.] Yet Yanaki admits that he left Iomed voluntarily to pursue consulting opportunities with two other Defendants in the Original Litigation, JRW Technologies and Ceramatec, Inc. [See R. 5 at ¶¶ 16-17.]

10. As is readily apparent from a review of the Complaint in the Original Litigation and the Complaint filed herein, there is nearly complete factual overlap between the claims brought by Iomed in the Original Litigation and the claims raised by Yanaki in this, his latest lawsuit. [Compare R. 7-8 at ¶¶ 26-28 and 34 with R. 113-14 at ¶¶ 1-7.] Because of the

substantial factual overlap, Iomed moved to dismiss this action under *Utah R. Civ. P.*, 13(a), arguing that such claims should have been brought as compulsory counterclaims in the Original Litigation. [See R. 26-28.]

11. The trial court granted Iomed's motion, concluding that there was substantial factual overlap between the two matters and that this action and the original litigation were inextricably intertwined. [See R. 234-35, Minute Entry, a copy of which is attached to the Addendum as Exhibit "B".] The court also based its ruling on the concern that permitting parallel litigation of similar legal and factual issues would increase the risk of inconsistent judicial findings. [See R. 234, Addendum, Exhibit "B".]

VI. SUMMARY OF THE ARGUMENT

Rules 13(a) and 13(b) of the *Utah Rules of Civil Procedure* divide counterclaims into two basic categories — compulsory and permissive. A counterclaim is designated as either compulsory or permissive based on its relationship to the opposing party's claim. Accordingly, a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" falls under Rule 13(a) and is compulsory. On the other hand, if the claim does not arise out of the transaction or occurrence which is the subject matter of the opposing party's claim, that claim is not a compulsory counterclaim, but may be brought permissively under Rule 13(b). See *Utah R. Civ. P.* 13.

If a counterclaim is deemed compulsory, then failure by a party to assert it in an answer forever bars that claim from being brought in separate litigation. See *Slim Olson, Inc.*

v. Winegar, 246 P.2d 608 (Utah 1952) (failure to plead a compulsory counterclaim precludes the party from asserting it in a subsequent action); *Todaro v. Gardner*, 285 P.2d 839 (Utah 1955) (a counterclaim not presented to the court on a matter involving the same transaction addressed by the original plaintiff's complaint is forever barred); *see also Raile Family Trust v. Promax Div., Corp.*, 24 P.3d 980 983 (Utah 2001) (same); *Fox v. Maulding*, 112 F.3d 453, 457 (10th Cir. 1997) (same).

In the case now before this Court, the claims brought by Yanaki arise out of the same transactions or occurrences at issue in the Original Litigation. Indeed, Iomed's alleged breaches of two of the critical agreements at issue in the Original Litigation – the IP Agreement and the Education Agreement – as well as initiation of the Original Litigation itself form the fundamental factual bases for Yanaki's claims here. Consequently, the trial court properly dismissed Yanaki's claims in this matter because they should have been brought in the Original Litigation.

Yanaki argues that the trial court should not have dismissed at least his Title VII claims because those claims had not matured at the time he filed his Answer and Counterclaim on January 10, 2003. However, under established case law, Yanaki should have asserted his Title VII claims in the Original Litigation and either requested a stay or leave to amend. *See Wilkes v. Wyoming Dep't of Employment*, 314 F.3d 501 (10th Cir. 2002).

Yanaki also contends that his discrimination claims against Iomed's CEO, Robert Lollini, and Iomed's Human Resource Director, Mary Crowther, are not subject to Rule 13(a)'s compulsory counterclaim requirement because they were not plaintiffs in the Original Litigation. Yanaki is simply wrong as a matter of law.

Rule 13(a) mandates that all claims any party has against any other party relating to the same transactions or occurrences must be brought in one action. Here, Yanaki brought claims against Lollini and Crowther in the Original Litigation. These claims related to things Lollini and Crowther purportedly said about Yanaki relating to his employment at Iomed. If Yanaki also had discrimination claims against Lollini and Crowther arising from Yanaki's employment with Iomed, he had to bring them at the same time. *See AMP Inc. v. Zacharias*, 1987 U.S. Dist. LEXIS 5295 (N.D. Ill. 1987).

In the event this Court disagrees with the trial court's dismissal of Yanaki's claims, the Court should nevertheless uphold the dismissal under Utah's judicial proceedings privilege. This privilege protects all conduct involved in seeking to enforce rights through litigation. Here, all of Yanaki's claims hinge upon Iomed's decision to enforce its contractual rights by litigating against Yanaki for stealing and then peddling Iomed's trade secrets to its primary competitor, Empi, Inc. Because Iomed's conduct is protected by the judicial proceedings privilege, Yanaki's claims must fail as a matter of law in any event.

VII. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT YANAKI'S CLAIMS WERE COMPULSORY COUNTERCLAIMS THAT SHOULD HAVE BEEN RAISED IN THE ORIGINAL LITIGATION.

1. THE TRIAL COURT PROPERLY RULED THAT THIS LAWSUIT AND THE ORIGINAL LITIGATION ARISE LARGELY UNDER THE SAME SERIES OF TRANSACTIONS AND OCCURRENCES.

The best way for this Court to analyze whether the Original Litigation and this action arise out of the same series of transactions or occurrences is to compare the allegations of three operative documents: (1) Iomed's First Amended Complaint in the Original Litigation; (2) Yanaki's Answer and Counterclaim in the Original Litigation; and (3) Yanaki's Complaint in this case. A review of those three pleadings demonstrates that the key documents in each case are the IP Agreement and the Education Agreement. [*Compare* R. 119-162 *with* R. 86-116 and *with* R. 1-11.] Moreover, the critical facts at issue in all three pleadings are the circumstances occurring before, during and subsequent to Yanaki's voluntary departure from Iomed.

Courts have repeatedly found in situations similar to the one facing this Court that all claims relating to an employment relationship should be litigated in one action. For example, in *Klein v. London Star Ltd.*, 26 F. Supp. 2d 689 (S.D.N.Y. 1998), the court found that claims of employment discrimination by the employee were so intertwined with the employer's counterclaim alleging theft of trade secrets that the claims must be tried together. Specifically, the court held as follows:

Klein claims that he was constructively discharged because of alleged age discrimination. Defendants' answer provides an alternative basis for why Klein left Star Group's employ—i.e., that Klein left because he knew he would be discharged for his theft of Star Group's trade secrets. **The counterclaim against Klein is based on the same transaction and occurrence that is the subject matter of this action as it arises out of Klein's employment with defendants and the constructive discharge from his employment.** Any discovery concerning Klein's performance while employed with defendants is relevant to this claim and Klein will not be prejudiced by burdensome discovery outside the scope of the initial claims and counterclaims asserted in this action.

Klein, 26 F. Supp. 2d at 697 (emphasis added).¹

Numerous other courts agree with this reasoning. For example, in a case involving an agreement very similar to the Education Agreement, the court in *Baroody v. Bankair, Inc.*, 2003 U.S. Dist. LEXIS 970 (January 21, 2003), found a counterclaim brought by the employer in response to a discrimination claim by the employee to be compulsory. Specifically, the employer sought to enforce the terms of a contract requiring the employee to repay a loan to the employer upon termination. The employee had argued that because of the discrimination, he did not have to repay the loan. *See Baroody*, 2003 U.S. Dist. LEXIS 2003, *4. Similar arguments have been raised in this proceeding and the proceeding before Judge Medley.

¹ In his Brief, Yanaki cites to a single case in which it was found that an employer's counterclaim for theft of trade secrets was not compulsory in an action by the employee for discrimination. [See Appellant's Brief at pg. 16.] However, in that case the employer expressly admitted that its counterclaim was entirely unrelated to plaintiff's claims. As a result of that concession, the court found that the employer's counterclaims were not compulsory. *See Spencer v. Banco Real, S.A.*, 623 F. Supp. 1008, 1012 (S.D.N.Y. 1985). There is no such concession here.

Likewise, in *Keith A. Keisser Insurance Agency v. Nationwide Mutual Insurance Company*, 2046 F. Supp. 2d 833 (N.D. Ohio 2003), the court considered a motion to dismiss very similar to the one brought by Iomed. In analyzing whether claims by the former insurance agent against his insurance agency should have been raised as compulsory counterclaims in the original action, the court looked at whether the claims arose from the same transaction or occurrence. *Id.* at 835.

In making its ruling, the court cited with approval the following authority: “Multiple claims are compulsory counterclaims where they ‘involve many of the same factual issues, or the same factual legal issues, or where they are offshoots of the same basic controversy between the parties.’ *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634.”

The court then held as follows:

I conclude the plaintiff’s claims in this case are logically related to the defendant’s claims in the state court action. They all arise from the parties’ former relationship as principal and agent. At the core of both sets of claims is the contention that the other party breached one or more of their contractual obligations to the other. The individual claims, whether state or federal, contract or tort, common law or statutory, arise from that relationship and share that common core. Plaintiff’s arguments to the contrary and their attempt to break the nexus between their claims and defendant’s claims in the state court action are not persuasive.

Id. Just as in the *Keisser* matter, here Yanaki attempts to bring statutory claims independently of a large ongoing litigation matter in which nearly the entire employment relationship between Yanaki and Iomed is at issue, and in which the dispositive agreements

between the parties, the IP Agreement and the Education Agreement, form the fundamental bases for each parties' claims against the other in each of the two separate legal proceedings.

In commenting on the public policy reasons for not allowing the plaintiff in that matter to do what Yanaki seeks to do here, the court in *Keisser* made the following comment:

In addition . . . the need to avoid inconsistent adjudications [and] considerations of judicial economy would lead to the same conclusion. Each suit involves construction of the corporate agency agreement and other contractual understandings between the parties. Whenever two courts look at the same contract, differing interpretations are possible, even if not likely. Even if both courts read the contract in the same way, one of them will have spent its time doing so unnecessarily. This is the sort of exercise that the compulsory counterclaim rule seeks to avoid, just as it also seeks to prevent inconsistent outcomes.

Id. at 836. The court also noted that “[c]laims have also been deemed to be compulsory where, as here, they arise from the parties’ former occupational relationship. Thus, in *Morgan Adhesives Inc. v. Datchuk*, 2001 Ohio App. LEXIS 8, 2001 WL 73 83, *2 (Ohio App.), the court held that a former employee’s claims for handicap discrimination and retaliation were compulsory counterclaims in his former employer’s suit for fraud and falsification.” *Id.*

It would be patently unfair for Yanaki to be allowed to litigate nearly identical claims based on identical facts with the apparent hope that he may prevail in one of the two forums. In particular, it would be unfair to force Iomed to continue to expend additional resources to defend Yanaki’s claims about the IP Agreement and the Education Agreement in the

counterclaim in the Original Litigation as well as in this matter, which is really the identical claim dressed up in the guise of a discrimination claim.

2. IOMED DID NOT WAIVE ITS COMPULSORY COUNTERCLAIM DEFENSE IN PROCEEDINGS BEFORE THE UALD AND EEOC.

Yanaki argues that Defendants cannot move to dismiss this Complaint because Iomed did not raise the compulsory counterclaim argument in earlier proceedings before the UALD or the EEOC. Defendants' assertion of a Rule 13(a) compulsory counterclaim defense would not have been relevant or appropriate to bring in the UALD or EEOC proceedings. Iomed's responses to the UALD and EEOC claims focused, as they should have, on the factual allegations of Yanaki's claims, not the procedural requirements of a subsequent court action.

Consequently, Iomed cannot be found to have somehow waived its right to bring a motion to dismiss under Rule 13(a).

3. THE TRIAL COURT PROPERLY DISMISSED YANAKI'S TITLE VII CLAIMS.

Yanaki argues that his Title VII claim cannot be included in the compulsory counterclaim requirement because it was not a mature claim at the time Iomed initiated the Original Litigation. While Yanaki is correct that he was required to receive the right to sue letter before he could pursue his claim in court, he should have asserted a "placeholder" claim in the Original Litigation.

The case of *Wilkes v. Wyoming Dep't of Employment*, 314 F.3d 501 (10th Cir. 2002) provides helpful precedent in this regard. In *Wilkes*, plaintiff filed suit against her former

employer for equal pay under section 206(d) of the Fair Labor Standards Act. That claim was resolved through an offer of judgment. She later filed a second lawsuit based on gender discrimination and retaliation under Title VII. The employer moved for judgment on the pleadings, arguing that the facts giving rise to both the first and second claims for relief were properly defined as the employment relationship, and that the Title VII claims should have been brought, if at all, in the prior lawsuit. Plaintiff argued, just as Yanaki does here, that her Title VII claims could not have been brought in the first action because she had not received her right to sue letter from the EEOC at the time she filed the first lawsuit. Rejecting this argument, the trial court found that plaintiff should have brought the Title VII claim in the first action and requested a stay until exhaustion of administrative remedies. *Wilkes*, 314 F.3d at 505. The appellate court agreed, affirming that the Title VII claims were barred because they had not been raised in the prior action.

Further, there is no doubt that Yanaki was aware of the facts giving rise to potential claims of discrimination long before he filed his Answer and Counterclaim on January 10, 2003. Indeed, some four months earlier, Yanaki had brought allegations of discrimination to the UALD and the EEOC.

Where a litigant is aware of such facts, the compulsory counterclaim rule bars subsequent litigation based on such facts. For example, in *Crutcher v. Aetna Life Ins. Co.* 746 F.2d 1076, 1080 (5th Cir. 1984), the appellate court ruled as follows:

The district judge held the facts which formed the basis of Crutcher's tort claim rendered it a compulsory counterclaim that Crutcher was required to raise in the

earlier guarantee lawsuit with Aetna (first case) since the facts were known to him at that time. As a result, the district court dismissed the claim as barred under Rule 13(a). We agree. Failure to bring a compulsory tort counterclaim in an action on the contract will bar a later independent action on the tort. *Cleckner v. Republic Van and Storage Co.*, 556 F.2d 766 (5th Cir.1977).

Moreover, the trial court in this matter dismissed Yanaki's claims without prejudice, allowing Yanaki to seek leave to amend his counterclaim in the Original Litigation. *See Utah R. Civ. P.* 13(d) ("A claim which . . . matured after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.").

B. THE TRIAL COURT PROPERLY DISMISSED CLAIMS AGAINST LOLLINI AND CROWTHER.

Yanaki incorrectly argues that his claims against Iomed's CEO, Robert Lollini, and its Human Resources Director, Mary Crowther, should not have been dismissed because Lollini and Crowther were not plaintiffs in the Original Litigation. This argument fails as a matter of law.

Rule 13(a) requires that all claims between and among parties in litigation arising out of the same transactions or occurrences be brought in one action. Yanaki himself brought claims in the Original Litigation against Lollini and Crowther for defamation arising out of Yanaki's employment with Iomed. [*See* R. 113-15.] Here, Yanaki brings claims against Lollini and Crowther for discrimination, also arising out of Yanaki's employment with Iomed. In such circumstances, it is proper to dismiss this action because his discrimination claims against Iomed, Lollini, and Crowther had to be brought in the Original Litigation.

A similar situation arose in *AMP Inc. v. Zacharias*, 1987 U.S. Dist. LEXIS 5295 (N.D. Ill. 1987) (applying Federal Rule 13(a)). Like this case, *AMP* involved a dispute over conduct surrounding trade secrets. There, Precision sued AMP in Florida. Later, AMP sued Precision in Illinois, and also sued certain corporate officers of Precision and another entity. Precision moved to dismiss the Illinois action under Rule 13(a), contending that AMP should have brought the claims against the individuals in the Florida action. In response, AMP argued that Rule 13(a) was not applicable to claims against the individual defendants because they were not parties to the Florida action. The Court disagreed, ruling that:

Rule 13(a) contemplates that a compulsory counterclaim might contain issues not in the original action and might involve additional parties.... **Further, Rule 13(a) is not limited in its application to original parties, but is applicable to parties brought in subsequent to the filing of the original action.** 3 *Moore's Federal Practice*, § 13.02 (1985). In fact, subdivision 13(h) contemplates the situation where additional parties are required for the granting of complete relief in determination of the counterclaim (A sues X and Y, X counterclaims against A and B and C). In the instant case, AMP has brought an action against Precision, a plaintiff in the Tampa suit, and against four additional defendants, each of whom is an officer or key employee of the corporate plaintiffs in the Tampa case.

The paramount concern under Rule 13(a) is judicial economy. The Court should not apply Rule 13(a) woodenly, but should interpret it liberally so as to allow the joinder of all related claims.

AMP, 1987 U.S. Dist. LEXIS 5295 at *7-*8.

Under the same analysis, and for the same policy reasons, this Court should not reverse the trial court's determination that all claims, including claims against Lollini and Crowther, should have been brought in the Original Litigation.

C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO ORDER CONSOLIDATION.

Yanaki contends that the trial court should have consolidated the two cases rather than dismissing this action. The trial court's refusal to consolidate is granted substantially more deference than its ruling to dismiss. *Hassing v. Mutual Life Ins. Co.*, 159 P.2d 117 (Utah 1945). Here, the trial court decided to dismiss Yanaki's claims without prejudice, giving Yanaki the opportunity to attempt to replead the claims in the Original Litigation, where they should have been brought, if at all. Yanaki correctly points out that the court in the Original Litigation could choose not to allow amendment of the Answer and Counterclaim, because the deadline for amending pleadings is long past. However, were it otherwise, a litigant could always seek to evade such deadlines in litigation by filing claims in a subsequent lawsuit which should have been brought in earlier litigation.

In addition, courts have long ruled that where a claim is dismissed under Rule 13(a), an alternative request for consolidation is rendered moot in any event. *See, e.g., Stewart v. Petzold*, 2001 U.S. Dist. LEXIS 24920 (M.D. N.C. 2001).

D. THE TRIAL COURT COULD HAVE DISMISSED THE ACTION UNDER THE LITIGATION PRIVILEGE.

In the proceedings below, Iomed also argued that Yanaki's claims should be dismissed because they rested largely on Iomed's decision to litigate against Yanaki for breaching the IP Agreement and the Education Agreement. Even if this Court were to find that the claim was not properly dismissed under Rule 13(a), the Court could uphold the dismissal based on

Utah's recognized judicial proceedings privilege. Judgment in Iomed's favor may be affirmed:

If it is sustainable on any legal ground or theory apparent from the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was considered or passed on by the lower court.

Bailey v. Bayles, 2002 UT 58, ¶ 10 (quoting *Dipoma v. McPhie*, 2001 UT 61, ¶ 18); *see also Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 23 n.8 (citations omitted). Thus, the Court need not confine itself to affirming the trial court on the basis of the argument relied upon below.

Each of Yanaki's three claims for relief rests on the premise that Iomed discriminated against him by pursuing legal action for misappropriation of Iomed's trade secrets. However, Iomed cannot be found to have discriminated merely because it seeks to enforce its legal rights under contracts with Yanaki. Such conduct is protected by the judicial proceedings privilege. *See Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17 (Utah 2003).

Following the trial court's minute entry, Yanaki's counsel sought to include in the final Order a holding rejecting Iomed's claim of protection under the judicial proceedings privilege. [See R. 248-50.] The trial court rejected this proposed amendment. [See R. 240-41.]

VIII. CONCLUSION.

For the foregoing reasons, the trial court's decision to dismiss this action should be upheld.

DATED this 6th day of January, 2005.

PARR WADDOUPS BROWN GEE & LOVELESS
Clark Waddoups
Jonathan O. Hafen
Justin P. Matkin

By:

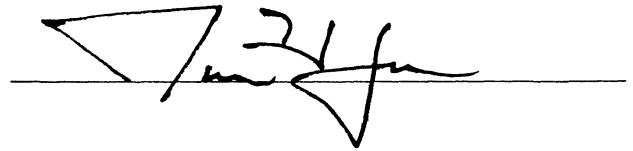

Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2005, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEES** to be mailed by first class U.S. mail, postage prepaid, to the following:

David W. Scofield
PETERS SCOFIELD PRICE
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111

Roger H. Hoole
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Salt Lake City, Utah 84124

A handwritten signature in black ink, appearing to read "David W. Scofield", is written over a horizontal line.

ADDENDUM TO

BRIEF OF APPELLEES

Tab A

charges of water district, plaintiff waived thirty-day limitations statute (§ 17A-2-315) by failing to plead it in answer to defendant's counterclaim. *Tygesen v. Magna Water Co.*, 13 Utah 2d 397, 375 P.2d 456 (1962).

The statute of limitations defense must be pleaded as an affirmative defense in a responsive pleading, or it is waived, unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a). *Staker v. Huntington Cleveland Irrigation Co.*, 664 P.2d 1188 (Utah 1983); *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102 (Utah 1998).

—Waiver.

Where plaintiff sought to rescind a contract to purchase a business from defendant on ground that the agreement was procured by fraud, and defendant claimed that any fraud had been waived by plaintiff's continued operation of the business, the allegation of waiver was an affirmative defense which should have been pleaded, and failure to do so constituted a waiver of the defense under this rule. *Bezner v. Continental Dry Cleaners, Inc.*, 548 P.2d 898 (Utah 1976).

Cited in *Farrell v. Mennen Co.*, 120 Utah 377, 235 P.2d 128 (1951); *Howard v. Town of North Salt Lake*, 3 Utah 2d 189, 281 P.2d 216 (1955); *Thomas v. Heirs of Braffet*, 6 Utah 2d 57, 305 P.2d 507 (1956); *Bench v. Equitable Life*

Assurance Soc'y, 21 Utah 2d 160, 442 P.2d 924 (1968); *Manger v. Davis*, 619 P.2d 687 (Utah 1980); *Pratt v. City Council*, 639 P.2d 172 (Utah 1981); *Carnes v. Carnes*, 668 P.2d 555 (Utah 1983); *Christenson v. Hayward*, 694 P.2d 612 (Utah 1984); *Charlie Brown Constr. Co. v. Leisure Sports Inc.*, 740 P.2d 1368 (Utah Ct. App. 1987); *Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987); *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222 (Utah 1988); *Arrow Iridus, Inc. v. Zions First Nat'l Bank*, 767 P.2d 935 (Utah 1988); *Lowe v. Sorenson Research Co.*, 779 P.2d 668 (Utah 1989); *Weber v. Snyderville West*, 800 P.2d 316 (Utah Ct. App. 1990), cert. denied, 815 P.2d 241 (Utah 1991); *Moffitt v. Barr*, 837 P.2d 572 (Utah Ct. App. 1992); *DeBry v. Valley Mtg. Co.*, 835 P.2d 1000 (Utah Ct. App. 1992); *Atiya v. Salt Lake County*, 852 P.2d 1007 (Utah Ct. App. 1993); *Richards Irrigation Co. v. Karren*, 880 P.2d 6 (Utah Ct. App. 1994); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252 (Utah 1996); *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389 (Utah 1996); *Valley Colour, Inc. v. Beuchert Bldrs., Inc.*, 944 P.2d 361 (Utah 1997); *Harper v. Summit County*, 963 P.2d 768 (Utah Ct. App. 1998), cert. granted, 982 P.2d 87 (Utah 1999); *Busche v. Salt Lake County*, 2001 UT App 111, 26 P.3d 862; *United States v. Smith*, 225 F. Supp. 2d 1305 (D. Utah 2002); *IHC Health Servs. v. D & K Mgmt.*, 2003 UT 5, 469 Utah Adv. Rep. 3, 73 P.3d 320.

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Costs §§ 46 et seq., 86; 61A Am. Jur. 2d Pleading §§ 125 et seq., 161 to 167, 209 to 222, 225, 230 to 237, 280, 389 et seq.

C.J.S. — 20 C.J.S. Costs §§ 128, 133, 136, 138, 143, 144, 162 et seq., 173; 27 C.J.S. Dismissal and Nonsuit § 67; 71 C.J.S. Pleading §§ 99 et seq., 112 to 116, 121 to 129, 264 to 268, 424 to 449, 463 to 482, 498, 508, 560 to 586.

A.L.R. — Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b), (c) into motion for summary judgment, 2 A.L.R. Fed. 1027.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 A.L.R. Fed. 388.

Necessity of oral argument on motion for summary judgment on pleadings in federal court, 105 A.L.R. Fed. 755.

Rule 13. Counterclaim and cross-claim.

(a) *Compulsory counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) *Permissive counterclaim.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim maturing or acquired after pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) *Omitted counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(f) *Cross-claim against co-party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) *Additional parties may be brought in.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(h) *Separate judgments.* Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

(i) *Cross demands not affected by assignment or death.* When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

(j) *Claims against assignee.* Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.

(Amended effective November 1, 2001.)

Amendment Notes. — The 2001 amendment deleted former Subdivision (k), providing for disposition of a counterclaim, cross-claim, or third-party claim in excess of the court's jurisdiction.

Compiler's Notes. — Subdivisions (a) to (h) of this rule are substantially similar to Rule 13, F.R.C.P.

Cross-References. — Holder in due course, §§ 70A-3-305, 70A-3-602.

Rights of one not holder in due course, § 70A-3-306.

Security interests, assignment, § 70A-9a-403 et seq

NOTES TO DECISIONS

Claims against assignee.

— Contractual alteration of rights.

Compulsory counterclaim.

— Failure to plead.

— Not in small claims court.

— Not proper.

— Opposing party's claim.

— Party not in interest.

— Proper.

— Purpose.

— Requirements.

Cross-claim.

— Offset.

— Promissory notes.

— Prerequisite.

— Prior judgment.

— Timeliness.

— Under Liability Reform Act.

Jurisdiction.

— Appellate.

—Federal.

Omitted counterclaim.

—Newly discovered.

Permissive counterclaim.

—Dismissal of related pending action.

Separate judgments.

—Effect of remand.

Untimely motion to allow counterclaim.

Cited.

Claims against assignee.

—Contractual alteration of rights.

Subdivision (j) does not abrogate the rights of parties to contract freely with respect to their rights and remedies upon assignment. *Lundstrom v. RCA*, 17 Utah 2d 114, 405 P.2d 339 (1965).

Compulsory counterclaim.

—Failure to plead.

Failure to plead a compulsory counterclaim precludes the party from asserting it in a subsequent action. *Slim Olson, Inc. v. Winegar*, 122 Utah 80, 246 P.2d 608 (1952).

A counterclaim not presented to the court on a matter involving the same transaction addressed by the plaintiff's complaint is forever barred. *Tbdaro v. Gardner*, 3 Utah 2d 404, 285 P.2d 839 (1955).

Where defendant's counterclaim was compulsory because it arose out of the transaction that was the subject matter of plaintiff's claim, his failure to file a counterclaim resulted in a waiver of the claim. *Kimball v. Campbell*, 699 P.2d 714 (Utah 1985).

Plaintiffs, who had been defendants in an earlier related action, had the obligation under Subdivision (a) to raise any available counterclaims arising out of the same transaction, and because they failed to raise available counterclaims as defendants, they waived the right to raise those same claims in a separate action. *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, 24 P.3d 980.

Parties could not evade the dictates of Subdivision (a) by arguing that they had acted as individuals in the prior related action, but as trustees in the case at bar, after they had asserted affirmative defenses on behalf of the trust in the prior action rather than moving for dismissal for failure to join an indispensable party. *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, 24 P.3d 980.

—Not in small claims court.

Within the limited jurisdiction of the small claims court, a defendant is not compelled to bring a counterclaim though it may arise from the same transaction or occurrence as the subject matter sued on. *Faux v. Mickelsen*, 725 P.2d 1372 (Utah 1986).

—Not proper.

In action by government to condemn parcel of land, counterclaim by part owner of parcel for damage to adjoining parcel as result of condemnation of first parcel was not compulsory under Subdivision (a) and could be pleaded as an amendment to owner's original answer under Subdivision (e). *State ex rel. Eng'g Comm'n v.*

Bird & Evans, Inc., 1 Utah 2d 276, 265 P.2d 639 (1953).

—Opposing party's claim.

The opposing party's claim mentioned in Subdivision (a) refers only to the claim of the opposing party against the party who has the counterclaim, not a claim that the opposing party has against a third person. *State ex rel. Eng'g Comm'n v. Bird & Evans, Inc.*, 1 Utah 2d 276, 265 P.2d 639 (1953).

—Party not in interest.

If named defendants believe that they are not the correct parties in interest and therefore cannot raise counterclaims, they must defend on that ground and place all parties and the court on notice of that defense. *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, 24 P.3d 980.

—Proper.

Portion of open account consisting of charges for parts used in installing oil sump constituted a compulsory counterclaim in debtor's negligence claim against creditor for injuries resulting from faulty installation of oil sump, and could not be obtained in subsequent action by creditor. *Slim Olson, Inc. v. Winegar*, 122 Utah 80, 246 P.2d 608 (1952).

—Purpose.

The purpose of Rule 13(a) is to ensure that all relevant claims arising out of a given transaction are litigated in the same action. *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, 24 P.3d 980.

—Requirements.

A counterclaim that requires a certain adjudication of the plaintiff's main claim for accrual is not a proper counterclaim; a counterclaim that requires proof of a fact, which fact is also a necessary part of the plaintiff's main claim, is a proper counterclaim. *Salt Lake City v. Utah Lake Farmers Ass'n*, 4 Utah 2d 14, 286 P.2d 773 (1955).

Cross-claim.

—Offset.

—Promissory notes.

A claimant on promissory note is entitled to an offset from the amount claimed by a cross-claimant against her on another note, even if the statute of limitations has expired as to claims on the entire amount due under the notes. *Jacobsen v. Bunker*, 699 P.2d 1208 (Utah 1985).

—Prerequisite.

—Prior judgment.

Under Subdivision (f), it is no longer necessary that the liability sued upon in the cross-claim must first have become fixed by a judgment as at common law. *Stanley Title Co. v. Continental Bank & Trust Co.*, 26 Utah 2d 121, 485 P.2d 1400 (1971).

—Timeliness.

The cross-claim, to the extent that it sought contribution for sums the insurance company

paid in defending the plaintiff, related back to the date of the filing of the original complaint and was therefore timely filed. *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (Utah 1997).

—Under Liability Reform Act.

The effect of the Liability Reform Act in prohibiting contribution claims requires joint tortfeasor codefendants to raise cross-claims against each other in the underlying tort action or else such claims may be lost, and, even though this conflicts with Subdivision (f), the Act controls for the purpose of preserving substantive rights thereunder. *National Serv. Indus., Inc. v. B.W. Norton Mfg. Co.*, 937 P.2d 551 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997).

The state liability reform act, §§ 78-27-37 to 78-27-43, prohibits an apportionment claim from being brought outside the underlying tort action, and the apportionment claim must therefore be brought as a cross-claim in the underlying suit if it is not to be lost. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Queen Carpet Corp.*, 5 F. Supp. 2d 1246 (D. Utah 1998).

Jurisdiction.

—Appellate.

The final judgment rule, R.Civ.P. 54(b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. *First Sec. Bank v. Conlin*, 817 P.2d 298 (Utah 1991).

—Federal.

Trial court, in a stockbroker's action against its customer for damages resulting from the customer's failure to deliver a stock certificate, has no jurisdiction to hear the customer's counterclaim alleging violations of federal securities statutes and rules, all of which came under exclusive federal jurisdiction. *Western Capital & Sec., Inc. v. Knudsvig*, 768 P.2d 989 (Utah Ct. App.), cert. denied, 779 P.2d 688 (Utah 1989).

Omitted counterclaim.

—Newly discovered.

In personal injury action in which defendant's insurer was furnishing lawyer to defend

insured and lawyer had not met defendant until just before taking his deposition and therefore did not know that defendant had injuries and believed plaintiff to have been at fault, refusal to allow amendment of answer to include counterclaim was an abuse of discretion since case was one where "justice requires" amendment. *Gillman v. Hansen*, 26 Utah 2d 165, 486 P.2d 1045 (1971).

Permissive counterclaim.

—Dismissal of related pending action.

Where mortgagee brought action to foreclose on one of two mortgages and mortgagor at that time had an action pending against the mortgagee concerning the same mortgages, it was within the court's discretion to dismiss the mortgagor's action since the mortgagor could raise any claim he had against the mortgagee by counterclaim in the foreclosure suit. *Blomquist v. American Sav. & Loan Ass'n*, 17 Utah 2d 381, 412 P.2d 914 (1966).

Separate judgments.

—Effect of remand.

In action based on alleged breach of loan agreement, where trial court improperly dismissed plaintiff-corporation's complaint with prejudice and granted defendant-bank judgment on its counterclaim and cross-claim, judgment on cross-claim and counterclaim would be subject, on remand, to revision since all claims presented had not been adjudicated and since trial court made no express determination as required by Rule 54(b). *M & S Constr. & Eng'g Co. v. Clearfield State Bank*, 24 Utah 2d 139, 467 P.2d 410 (1970).

Untimely motion to allow counterclaim.

The trial court did not abuse its discretion in denying motions to allow a counterclaim and to bring in third party defendants which were filed 13 months after an answer to the complaint was filed and two weeks before the scheduled trial date, where reasons for the untimely motion were inadequate and where the parties failed to demonstrate that the court's denial of the motions resulted in prejudice. *Tripp v. Vaughn*, 746 P.2d 794 (Utah Ct. App. 1987).

Cited in *Lincoln Fin. Corp. v. Ferrier*, 567 P.2d 1102 (Utah 1977); *Hood v. Layton*, 751 P.2d 1141 (Utah Ct. App. 1988); *Parkdale Care Ctr. v. Frandsen*, 837 P.2d 989 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 1 et seq.; 20 Am. Jur. 2d Courts § 120; 59 Am. Jur. 2d Parties § 188 et seq.; 61A Am. Jur. 2d Pleading §§ 182 to 186.

C.J.S. — 21 C.J.S. Courts § 66; 50 C.J.S. Judgments § 684; 67A C.J.S. Parties §§ 88 to 110; 71 C.J.S. Pleading §§ 167 to 176; 80 C.J.S. Setoff and Counterclaim §§ 1 et seq., 13, 27, 36, 54.

A.L.R. — Bank's right to apply or set off deposit against debt of depositor not due at

time of his death, 7 A.L.R.3d 908.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff, 36 A.L.R.3d 693.

Right of party-litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 A.L.R.4th 1146.

Necessity and permissibility of raising claim

for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

Who is an “opposing party” against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b), 1 A.L.R. Fed. 815.

Joinder of counterclaim under Rule 13(a) or

13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 A.L.R. Fed. 388.

Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 A.L.R. Fed. 240.

Rule 14. Third-party practice.

(a) *When defendant may bring in third party.* At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff’s claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff’s claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) *When plaintiff may bring in third party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Compiler’s Notes. — This rule is similar to Rule 14(a) and (b), F.R.C.P.

NOTES TO DECISIONS

Appellate jurisdiction.

Third party by defendant.

—Grounds.

Untimely motion to allow counterclaim.

Cited.

Appellate jurisdiction.

The final judgment rule, R.Civ.P. 54(b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. *First Sec. Bank v. Conlin*, 817 P.2d 298 (Utah 1991).

Third party by defendant.

—Grounds.

If one named as a defendant tort-feasor

impleads another alleged joint tort-feasor, the defendant in the initial action does so, not on the ground that a claim for relief then exists against the third-party defendant, but on the ground that the third-party defendant “may be liable” to the defendant in the principal action. *Unigard Ins. Co. v. City of LaVerkin*, 689 P.2d 1344 (Utah 1984).

Untimely motion to allow counterclaim.

The trial court did not abuse its discretion in denying motions to allow a counterclaim and to bring in third party defendants which were filed 13 months after an answer to the complaint was filed and two weeks before the scheduled trial date, where reasons for the untimely motion were inadequate and where the parties failed to demonstrate that the court’s denial of the motions resulted in prejudice. *Tripp v. Vaughn*, 746 P.2d 794 (Utah Ct. App. 1987).

Tab B

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

JAMAL YANAKI, Plaintiffs, vs. IOMED, INC., a Utah corporation, ROBERT J. LOLLINI and MARY CROWTHER, Defendants.	MINUTE ENTRY Case No. 030914206 Hon. J. DENNIS FREDERICK January 5, 2004
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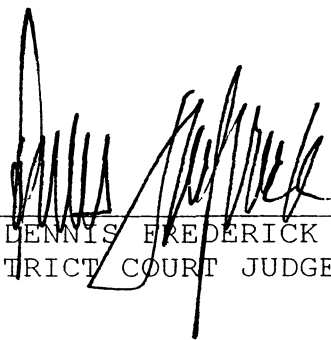
The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss. The Court heard oral argument with respect to the motion on December 5, 2004. Following the hearing, the matter was taken under advisement.

The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

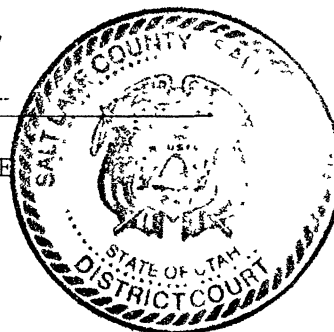
After reviewing the pleadings submitted in this matter, it is clear the current action arises largely from the same series of transactions and occurrences as those underlying Iomed's original lawsuit against Yanaki and others (specifically, the IP Agreement and Education Agreement). Moreover, although not mirror images of each, the claims all center around the former occupational relationship.

Based upon the forgoing, the Court is persuaded the causes of action are so intertwined that the risk of inconsistent rulings is present if this action is allowed to proceed in its present form. Accordingly, the motion to dismiss is granted with certain limitations. Specifically, dismissal is without prejudice and under the circumstances, the Court is not persuaded fees are appropriate. Consequently, this request is denied.

DATED this 6th day of January, 2004.



J. DENNIS FREDERICK
DISTRICT COURT JUDGE



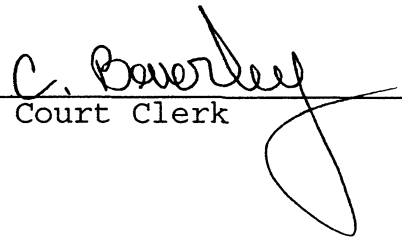
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030914206 by the method and on the date specified.

METHOD NAME

Mail	ROGER H HOOLE ATTORNEY PLA 4276 SOUTH HIGHLAND DRIVE SALT LAKE CITY, UT 84124
Mail	CLARK WADDOUPS ATTORNEY DEF 185 SOUTH STATE SUITE 1300 SALT LAKE CITY UT 84111
Mail	JONATHAN O HAFEN ATTD 185 South State Street Suite 1300 Salt Lake City UT 84111

Dated this 6th day of JAN., 2004.


Deputy Court Clerk