

1994

John Diston v. Enviropak Medical Products Inc., a Utah corporation, et al. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN DISTON,

Plaintiff,

vs.

ENVIROPAK MEDICAL PRODUCTS
INC., a Utah corporation, et al.,

Defendant.

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Court of Appeals
No. 940062-CA

Priority 15

BRIEF OF APPELLANTS

Appeal From Final Judgment Entered By the Third Judicial
District Court, Salt Lake County, State of Utah
Honorable David Roth
Third District Court Judge (Retired)

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APPEALS

STATE

UTAH

FILED
Utah Court of Appeals

MAR 29 1994

DOCKET NO. 940062

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

JOHN DISTON,)	
)	
)	
Plaintiff,)	
)	Court of Appeals
vs.)	No. 940062-CA
)	
ENVIROPAK MEDICAL PRODUCTS)	Priority 15
INC., a Utah corporation, et al.,)	
)	
Defendant.)	

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District Court, Salt Lake County, State of Utah
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2. Findings of Fact and Conclusions of Law dated November 13, 1993
3. Letter of Intent dated September 20, 1991
4. Executive Employment Agreement dated October 1, 1991
5. Organization Agreement dated September 19, 1991
6. Excerpt from Business Plan
7. Letter of Intent
8. Excerpts from deposition of Rochelle Mills-LaRocca

STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction of this appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j). This appeal was poured over to the Court of Appeals on February 2, 1994, under UTAH CODE ANN. § 78-2a-3(2)(k).

ISSUES PRESENTED AND STANDARD OF REVIEW

Issue: Whether the trial court erred in concluding that the document entitled "Letter of Intent to Enter Employment Agreement" constituted a contract of employment between appellant EnviroPak Medical Products, Inc. ("EnviroPak") and appellee John Diston.

Standard of Review: Correction of error. *Buehner Block Co. v. U.W.C. Associates*, 752 P.2d 892 (Utah 1988); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884 (Utah 1988).

Issue: Whether the trial court erred in concluding that Frederick Ninow had apparent authority to hire Diston as an employee of EnviroPak.

Standard of Review: Correction of error. *Mountain Fuel Supply Co.*, 752 P.2d 884.

DETERMINATIVE STATUTES

The only determinative statute in this matter is the statute of frauds. That provision provides in relevant part as follows:

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement . . .

UTAH CODE ANN. § 25-5-4(1).

STATEMENT OF THE CASE

Nature of the Case: This is an action by plaintiff/appellee John Diston ("Diston") alleging breach of an employment contract between Diston and defendant/appellant EnviroPak Medical Products, Inc. ("EnviroPak"). Diston asserted that a document titled "Letter of Intent to Enter Employment Agreement" ("letter of intent") constituted a binding contract and that EnviroPak had breached the contract by refusing to employ him in accordance with the terms of the letter of intent. EnviroPak denied that the letter of intent was a binding contract and further denied that Frederick Ninow, who signed the letter of intent had authority to do so on behalf of EnviroPak. Diston further claimed that defendant/appellant Surgical Technologies, Inc. ("Surgical") was liable as the alter ego of EnviroPak.

Course of Proceedings and Disposition Below: The complaint was filed on April 21, 1992 and included claims for breach of contract, including a separate third-party beneficiary claim, intentional interference with economic relations and fraud. Appellants brought a motion for summary judgment on May 26, 1993. The trial court granted that motion as to the claims for third-party beneficiary rights and fraud. The remaining claims were tried on July 19 and 20, 1993. The trial court entered findings of fact and conclusions of law on November 16, 1993, and the judgment was entered on November 18, 1993. The trial court awarded Diston a judgment in the amount of \$54,834.60 against both EnviroPak and Surgical. Appellants filed a notice of appeal on December 9, 1993. The appeal was poured over from the Supreme Court on February 2, 1994.

STATEMENT OF FACTS¹

In 1991, plaintiff/appellee John Diston (Diston) was employed as the assistant director of peri-operative services at Holy Cross Hospital where he was paid a yearly salary of \$40,000. (R. 00624, FF 5.) He did not receive the use of a car (or a car allowance), stock options or bonuses as part of his compensation. (R. 00624-25.) At the same time, Frederick P. Ninow (Ninow) was employed by a company called Professional Medical in the area of marketing. (R. 00734, FF 6.) During his employment with Professional Medical, Ninow began planning for Professional Medical's possible manufacture and marketing of a new product line, consisting of pre-packaged, reusable surgical gowns and equipment. (R. 00736-37, FF 7.)

Ninow became acquainted with Diston as a result of Ninow's efforts to promote the new products. (R. 00734-35, 36, FF 8.) Ninow's efforts were aimed at having Professional Medical produce and market the new products. (R. 00737.) Diston arranged for the products to be tested at Holy Cross Hospital. (R. 00583.) As their relationship developed, Ninow suggested the possibility of Diston coming to work for Professional Medical, and Diston eventually met with another representative of Professional Medical, although employment discussions went no further. (R. 00739, 00626.) Professional Medical began marketing the products to Holy Cross Hospital but was unable to undertake large-scale production or marketing. (R. 00740-41.)

Ninow and Diston began planning for the formation of a new company to market the products on a large scale. (R. 00741, FF 9.) Ninow, Diston and others participated in preparing a business plan for the new company. (R. 00742, FF 9-11.) The plan included a list of names and corresponding positions within the proposed company. (R. 00627, 00587-89, 0592-95.) Ninow and Diston met several times throughout the spring and fall of 1991 to discuss formation

¹ Citations to the findings of fact are abbreviated FF, followed by the paragraph number. The findings of fact and conclusions of law are found at pages 00516 through 00527 of the record and are attached as appendix 2.

of the new company and Diston's involvement and eventual employment. (R. 00593.) All of this activity occurred prior to any contact with Surgical. (R. 00025-27.)

Ninow was unable to arrange funding for his own company. In the summer of 1991, Ninow was introduced to the principals of Surgical. (R. 00745, FF 12.) After a period of negotiation, Ninow and Surgical agreed to form EnviroPak as a wholly owned subsidiary of Surgical for purposes of manufacturing and marketing the products. (R. 00845, 00671-72, FF 13.) EnviroPak was incorporated as a wholly owned subsidiary of Surgical, and an Organization Agreement for EnviroPak was prepared on September 19, 1991. (R. 00671, FF 13-15.) Diston had no involvement in organizing EnviroPak. (R. 00627-28.) Diston had not even heard of Surgical until Ninow informed him in September of 1991 that Surgical was going to finance the new company. (R. 00597-98, 599.) In September of 1991, Diston's only source of information about Surgical and EnviroPak was Ninow. (R. 00598.)

Ninow became employed with EnviroPak on October 1, 1991, as the president, a director, and chairman of the board of directors. During the period of the negotiations between Surgical and Ninow leading up to the formation of EnviroPak, there was no contact of any kind between Surgical and Diston. (R. 00627-28.) Diston's sole contact was with Ninow. (R. 00598.) No one at EnviroPak or Surgical was aware that Diston was expecting to be employed by EnviroPak (R. 00852, 00670), and no one was aware that Ninow had been discussing employment with Diston. (R. 00672-74,75.)

On September 20, 1991, two weeks prior to his actual employment with EnviroPak, Ninow went to Diston's home where he met with Diston and Rochelle Mills-LaRocca, another employee of Holy Cross Hospital. (FF 25.) Ninow had also been discussing employment with

Ms. Mills-LaRocca. (Mills-LaRocca depo at 12.)² Ninow gave Diston a document titled Letter of Intent to Enter Employment Agreement (letter of intent) (*see* appendix 3) and gave a virtually identical letter to Rochelle Mills-LaRocca. (R. 00803, 00762A, 00601, 00757; Mills-LaRocca depo. at 6-7, 10, 11; appendix 7.)

Ninow did not consult with EnviroPak before giving the letter of intent to Diston. (R. 00758, FF 23.) Ninow also showed Diston parts of the EnviroPak organization agreement (R. 00602), as well as a copy of Ninow's own employment agreement. (R. 00760; Mills-LaRocca depo. at 12, 14.) Ninow's employment agreement provided that he would become employed with EnviroPak as of October 1, 1991 (appendix 4).

Mills-LaRocca met with Ninow and Diston on September 20, 1991, when Ninow brought both letters of intent. (Mills-LaRocca depo. at 10, FF 25.) Ninow's own employment agreement had not been executed (FF 19), and Ninow's employment did not commence until October 1, 1991 (appendix 4.) Although Diston claimed that Ninow displayed the EnviroPak organization agreement at this meeting, Mills-LaRocca stated that she had never seen it. (Mills-LaRocca depo. at 31.)

The letter of intent (appendix 3) states, among other things, that Diston and EnviroPak would enter into an employment agreement on or before October 31, 1991, and that Diston, as an incentive to enter into that agreement, would be provided with unspecified stock options. (R. 00759-60; appendix 3.) No one from EnviroPak had authorized Ninow to hire any employees for the new company despite several attempts by Ninow to do so. (R. 00846-50.)

² The Mills-LaRocca deposition was received by the trial court in its entirety. (R. 00576.) The deposition was apparently misplaced and was not included as part of the record on appeal. Appellants have, therefore, attached as part of the appendix (#8) to this brief the portions of the deposition cited in this brief.

Diston expected that a formal, complete written agreement would be prepared. (R. 00634, FF 28.)

The letter of intent provides in full as follows:

THIS LETTER OF INTENT TO ENTER INTO AN EMPLOYMENT AGREEMENT (this "Letter of intent") dated September 20, 1991, by and between ENVIROPAK MEDICAL PRODUCTS INC., a corporation organized and existing under the state of Utah (the "Company") and JOHN DISTON ("Employee").

1. INTENT. The Company intends to enter into an employment agreement with Employee on or before October 31, 1991.

2. Term. The initial term of the employment agreement shall be for three years.

3. Compensation.

(a) For all services rendered by Employee, the Company shall pay a salary of \$72,000 per year payable as earned in twenty-four (24) equal semi-monthly payments. All salary shall be subject to withholdings and other applicable taxes. Such salary shall be reviewed annually and shall remain fixed or be increased to the extent deemed appropriate by the board of directors of the Company.

(b) As an incentive compensation, Employee shall participate in the Company's cash incentive compensation pool.

(c) The Company shall provide health and medical insurance to be chosen by the Company for its full time employees.

(d) The Company shall provide Employee a monthly automobile allowance.

(e) The Company shall provide Employee with stock options as incentive to enter into an Employment Agreement with the Company. The Company shall also provide Employee with future stock options as part of the Company incentive program. These options will be determined by the Company at the time of employment.

(f) The Company will pay for actual and reasonable expenses incurred by Employee in connection with the business of the company, including expenses for entertainment, travel and similar items.

(g) The Employee shall be entitled each year to a paid vacation of at least two (2) weeks.

Diston wanted to know what his job title and duties would be. (R 00604.) He was told by Ninow that he would be the vice-president in charge of quality control and production. (R. 00604.) Diston was also told that an employment agreement much like Ninow's would be prepared to reflect Diston's employment with EnviroPak. (R. 00760.) Diston believed he was being hired as a vice president of EnviroPak. (R. 00604.) Diston also believed he might be appointed to the EnviroPak board of directors. (R. 00640.) He acted with the understanding that EnviroPak was going to follow the business plan he and Ninow had prepared. (R. 00652.)

Surgical organized an informational meeting on October 3, 1991 to explain and demonstrate the new product. (R. 00850, 00674A.) Diston attended the meeting at Ninow's invitation. (R. 00674A, 00611.) He was introduced first to Todd Crosland, an officer and director of EnviroPak, as an employee of Holy Cross Hospital where the new product was being used. (R. 00850.) Although he had already received the letter of intent, Diston said nothing to the Surgical or EnviroPak representatives about working for EnviroPak. (R. 00850, 00675.) At the meeting itself, Diston was introduced as a representative of Holy Cross, and he discussed the hospital's ongoing use of the products. (R. 00753, 00674A-75; Mills-LaRocca depo. at 20.) Ninow continued to mention Diston as a potential employee (R. 00675), but never mentioned the letter of intent to anyone. (R. 00680.) Diston gave notice to Holy Cross Hospital on October 9, 1991 that he would be leaving. (FF 31.)

During the middle of October, Surgical held a series of meetings with stockbrokers to discuss the new products and the formation of EnviroPak. (R. 00851, 00678.) Diston was

invited to those meetings by Ninow. (R. 00679.) On each occasion, Diston was introduced as a representative of Holy Cross, a current product user. (R. 00851, 00679, 00637-38.) Diston never said anything to the EnviroPak representatives about employment. (R. 00851, 00679-80, 00635-38.) After one of the meetings, Diston was asked by Rochelle Schutjer, an officer and director of EnviroPak, how Diston was able to attend these meetings and be away from Holy Cross. Diston replied only that he was taking vacation time. (R. 00880.)

At Ninow's request, Mills-LaRocca met with Crosland and Schutjer during the middle of October to negotiate the terms of her employment. (Mills-LaRocca depo. at 21-22.) During the meeting she realized that Ninow did not have the authority to hire employees as he had claimed. (*Id.* at 17, 21.) She realized that the other principals of EnviroPak were not aware of her letter of intent and that her employment terms would not necessarily match what Ninow had put in the letter of intent. She did not even mention the letter during her interview. (*Id.* at 21, 23-26; R. 00676.) All of the terms of her employment were negotiated during that meeting and, although her letter of intent provided otherwise, she did not receive stock options and was given only a one-year employment term. (*Id.* at 23; R. 00677-78; *cf.* appendix 7.)

Mills-LaRocca told Diston that same day that she had met with the principals of EnviroPak and that the terms of her employment differed from the letter of intent. (*Id.* at 25-26.) Diston did not discuss employment with the directors of EnviroPak during October 1991 -- his sole contact continued to be Ninow. (R. 00643.) Diston assumed, but without consulting anyone, that he would be hired based on the letter of intent. (R. 00643.)

During that same period of time, Ninow and the other principals of EnviroPak were discussing potential employment terms with Dick Hollingshead. (R. 00633). Diston was aware of these negotiations and that Hollingshead was unhappy about the terms being proposed. (R. 00632-33.) Although Hollingshead was listed in the business plan and was originally

intended to be part of the new company (R. 00632), he was not hired by EnviroPak. (R. 00633). Rochelle Mills was not listed in the plan, but she was hired. (R. 00677-78; appendix 6.) At the time Diston claims he told Ninow that he accepted the job according to the letter of intent, Diston had not had any conversations with anyone from EnviroPak. (R. 00637.)

The principals of EnviroPak later learned that Ninow had been negotiating employment terms with Diston, as well as others, and that Ninow had been making other unauthorized representations and taking other unauthorized actions on behalf of EnviroPak. (R. 00846-50, 00524.) As a result, Ninow was terminated from EnviroPak in December 1991. (R. 00683-84, 00708, FF 38.) On October 31, 1991, EnviroPak learned of the letter of intent Ninow had given to Diston, and the officers contacted Diston to discuss the situation. (R. 00680-82.) Although the position Diston wanted did not exist (R. 00685, 00712), and Diston did not have the technical experience to manage the EnviroPak plant, (R. 00683), he was offered employment with EnviroPak primarily in the area of sales, at a salary of \$60,000 per year, plus a company car. (R. 00615, 00682-85, 00324, FF 40.)

He declined that offer, claiming that he was entitled to have a job title and to know what duties he was to perform. (R. 00614-16, 00645, FF 40-41.) It was explained to Diston that titles were not essential because the company was so new and that everyone would have to assist in getting the company started. (R. 00615, 00685.) Diston later accepted employment with FHP at \$35,000 per year with no written contract. (R. 00615-16, 00618, 00625, 00646.) EnviroPak remained in business until December of 1992, but then ceased operations because it was losing money. (R. 00678, 00865-66, 00525, FF 43.)

PROCEDURAL BACKGROUND

Diston brought this action on April 21, 1992, alleging breach of contract, intentional interference with economic relations (against Surgical), third party beneficiary rights under the EnviroPak Organization Agreement and fraud. (R. 00002-00015.) The trial court granted summary judgment to defendants-appellants as to the third party beneficiary and fraud claims. (R. 00380.) The remainder of the case was tried before the Honorable David E. Roth on July 19 and 20, 1993. The court ruled in plaintiff's favor and awarded damages for breach of contract for the period during which Diston would have been employed with EnviroPak. After considering defendants' objections to plaintiff's proposed findings of fact and conclusions of law, the court entered findings and conclusions on November 16, 1993, and entered judgment in favor of plaintiff on November 18, 1993, in the amount of \$54,834.60, plus pre and post-judgment interest. (R. 531-32.)

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE LETTER OF INTENT WAS A CONTRACT OF EMPLOYMENT BETWEEN ENVIROPAK AND DISTON

The letter of intent is not an employment contract. It lacks the two fundamental terms of an employment agreement: compensation and duties. Without these terms, which together constitute the mutuality of obligation required for any enforceable agreement, there was never anything more than a notion that a contract might be formed in the future. Diston himself admitted that he expected a written agreement that would include all of the terms of his employment.

In addition, because the letter of intent purports to cover a three-year employment term, it is governed by the statute of frauds. As a result, it must be complete on its face as to all of its essential terms -- in this case compensation and duties -- before it rises to the level of an

enforceable contract. The letter fails that test. It is far too vague, leaving much for future negotiation, for the trial court to have concluded that there was a meeting of the minds of the parties. It is at best an agreement to agree, an offer to negotiate -- or as its title suggests, a letter of intent to make a contract later.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT NINOW HAD APPARENT AUTHORITY TO EXECUTE THE LETTER OF INTENT ON BEHALF OF ENVIROPAK

Diston relied solely and unreasonably on Ninow in believing that he would be employed by EnviroPak. From the beginning, before he ever gave his termination notice to Holy Cross Hospital, Ninow's representations of authority were suspect. EnviroPak did nothing to support any kind of reliance on Ninow. Diston admits that his sole contact was Ninow. He was thus under a duty to ascertain Ninow's true authority. But Diston had more than a legal duty. He had many clear signals that EnviroPak had no intention of employing him, and definitely not according to the letter of intent.

EnviroPak continually represented Diston as an employee of Holy Cross Hospital, a user of the new product. Diston never asked anyone about employment despite numerous opportunities to do so and numerous circumstances strongly suggesting that he should. The facts of this case throw into question just exactly what Diston was supposedly relying on. It is undisputed that Diston had no contact at all with EnviroPak prior to October 3, and his only contact after that point would have convinced anyone to at least inquire as to Ninow's authority. Instead, Diston did nothing. Because Diston did not ascertain Ninow's true authority, Ninow had no apparent authority to hire Diston.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE LETTER OF INTENT WAS A CONTRACT OF EMPLOYMENT BETWEEN ENVIROPAK AND DISTON

"A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced." *Valcarce v. Bitters*, 362 P.2d 427, 428 (Utah 1961). *See also Bunnell v. Bills*, 368 P.2d 597, 600 (Utah 1962) ("a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed.") Thus, when an essential term of an agreement remains subject to future negotiation, there is at best "a mere expression of a purpose to make a contract in the future . . ." *Davison v. Robins*, 517 P.2d 1026, 1028-29 (Utah 1973).

Mutual assent to the essential terms of a proposed agreement is required before a contract is formed. *Engineering Associates v. Irving Place Assoc.*, 622 P.2d 784, 787 (Utah 1980). When a purported employment contract is in issue, it must, at the very least, contain terms reflecting the duties of, and compensation for, the proposed employment. *See* J. CALAMARI & J. PERILLO, *CONTRACTS* § 2-13, at 43, n.17. In *Bishop v. Hendrickson*, 695 P.2d 1313 (Mont. 1985), the plaintiff brought an action against his law partner to enforce an oral agreement to employ his daughter at their law firm. Recognizing that the terms of an agreement must be "reasonably certain," the court held that a promise to employ someone that does not include the proposed position "and factors such as salary and terms of employment" is not enforceable as an employment agreement because it lacks certainty. *Id.* at 1314-15, *citing* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979).³

³ Section 33 of the RESTATEMENT (SECOND) OF CONTRACTS provides, in full, as follows:

"An offer cannot be accepted so as to form a contract unless there is sufficient specification of terms so that the obligations involved can be ascertained." *K-Line Builders, Inc. v. First Federal Savings & Loan Assoc.*, 677 P.2d 1317, 1320 (Ariz. App. 1983), *rew. denied*. See also *Page & Wirtz Construction Co. v. Van Doran Bri-Tico Co.*, 432 S.W.2d 731 (Tex. App. 1968); 3 WILLISTON ON CONTRACTS § 7:14, at 307 (4th ed. 1992). This is just another way of describing the requirement of certainty -- the first indicator that there has been a meeting of the minds. See *Engineering Associates*, 622 P.2d at 787; *Valcarce*, 362 P.2d at 428.

Under certain circumstances, a contract term may be left for future determination (as opposed to negotiation) based on an agreed formula, such as for the price of goods, see RESTATEMENT (SECOND) OF CONTRACTS, § 33, comment a. An agreement governed by the statute of frauds is not permitted such latitude. To satisfy the statute of frauds, the agreement must be complete on its face as to all its essential terms. In order to comply with the statute of frauds, the writing on which a party relies must specify the obligation of the parties or it is unenforceable. *Abba v. Smyth*, 59 P.756, 757-58 (Utah 1899); *Birdzell v. Utah Oil Refining Co.*, 242 P.2d 578, 580 (Utah 1952); *Machan Hampshire Properties v. Western Real Estate & Dev. Co.*, 779 P.2d 230, 234 (Utah App. 1989).⁴

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

⁴ Accord, *Nay v. Harrison*, 299 P.2d 1114, 1118 (Utah 1956). (In order to satisfy the statute of frauds, the memorandum must identify the parties, the subject matter and "set out the conditions of the transaction with adequate certainty.") See also *Collett v. Goodrich*, 231 P.2d 730, 732 (Utah 1951) ("the memorandum must show what the contract was, and not merely note the fact that some contract was made").

In *Birdzell*, plaintiff attempted to enforce an extension of a sublease based on oral discussions and a letter containing several terms, but which left the monthly rental open to future negotiations. 242 P.2d at 579. At issue was whether the letter was a sufficient memorandum under the statute of frauds, which governed inasmuch as the proposed sublease was for a period longer than one year. *Id.* at 580. "By its very language, the letter [purported] to be nothing more than an expression of willingness" to enter into an agreement. *Id.* Without the essential term of the monthly payment, the memorandum failed to satisfy the statute of frauds.

When the statute of frauds applies, parol evidence may not be used to supply any essential terms of the agreement. *Abba*, 59 P. at 757-58. A court is not permitted to supply missing terms. *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980). *See also Barker v. Francis*, 741 P.2d 548 (Utah App. 1987) (parties must agree on the essential elements for contract to be formed).⁵

A. The Letter of Intent by Itself Demonstrates That Essential Terms Were Left For Future Negotiation and the Execution of a Formal Written Agreement

The title of the letter of intent, "Letter of Intent to Enter Employment Agreement," is certainly indicative of what Ninow and Diston intended. Indeed, Ninow told Diston to expect "another document that would be exactly like mine or very similar to mine, with some changes, of course, reflecting [Diston's] arrangement. (R. 00760.) The most glaring omission from the letter of intent is any mention of job title and duties. These were essential to Diston. (R. 00614-16, 00645.)

Further, the letter itself provides:

⁵ *See also Neeley v. Bankers Trust Co. of Texas*, 757 F.2d 621, 628 and n.5 (5th Cir. 1985), *reh'g denied* (holding that when promises are indefinite and speak to an essential element of the contract, the entire purported agreement fails and observing that the court may not supply such terms) (quoting *Willowood Condominium Assoc. v. HNC Realty*, 531 F.2d 1249, 1252 (5th Cir. 1976).

1. INTENT. [EnviroPak] intends to enter into an employment agreement with employee on or before October 31, 1991.

(appendix 3)

If EnviroPak were indeed intending to enter into an employment agreement more than two weeks after the date of the letter of intent, then it is impossible for the letter of intent itself to be that employment agreement. Moreover, the letter of intent appears to be intended to encourage Diston to negotiate further. With respect to proposed stock options, the letter provides as follows:

The Company shall provide Employee with stock options *as incentive to enter into an Employment Agreement* with the Company.

(*Id.*)

Importantly, the stock option provision appears as part of Diston's purported compensation. As an essential term of an employment agreement, compensation must be specifically set forth. However, the letter of intent provides that the stock options "will be determined by [EnviroPak] at the time of employment." Diston had never even seen the stock option plan under which he claimed a right to participation. (R. 00650-51.) Moreover, there could not possibly have been a meeting of the minds as to Diston's compensation based on such an open-ended term.

Similarly, although the letter refers to additional compensation in the form of a cash incentive pool, there are no terms as to Diston's proposed rights in that incentive pool. By its very terms, therefore, like the letter in *Birdzell*, Diston's letter of intent is, at best, exactly what its title says, with many details left to negotiate. As such, it is nothing more than an expression of willingness and an invitation to negotiate.⁶

⁶ Such letters of intent are frequently exchanged as preliminary to an agreement and part of the negotiation dance. As such, they are "usually understood to be non-committal statements preliminary to a contract." CALAMARI & PERILLO at 33. Therefore, even though Ninow and Diston may have *believed* that they formed an agreement

Some of the alleged terms of employment, which in this case are critical because they were part of Diston's anticipated compensation, were so indefinite that the trial court was unable to award damages based on them. (R. 00472-73.) If, as the trial court found, the letter of intent is in reality an enforceable employment contract, then Diston's compensation must be clear because it is fundamental to an employment agreement. However, with respect to the stock options, the court concluded that "there are too many unknowns . . . to determine what, if any, value those options would have had to the plaintiff." (R. 00472.)⁷

The same was true with respect to the cash incentive compensation pool mentioned in the letter of intent. There was simply no evidence as to the terms of plaintiff's participation. (R. 00473.) For the same reasons of indefiniteness, the court declined to award damages for the car allowance. (R. 00473.) With so many unknowns regarding Diston's compensation, to say nothing of the omission of any duties of employment, it was error for the court to conclude that an enforceable contract existed.

B. The Letter of Intent is Not an Enforceable Agreement Because Diston Himself Expected That a Written Agreement was Forthcoming

Diston fully understood that the letter of intent was only preliminary and that a complete written agreement would be prepared. He testified as follows:

Q: Did you contemplate [at the time you received the letter of intent] that there would be a more detailed agreement entered into?

A: Uh -- yes. I felt with the provisions that were in our original agreement, yes.

(R. 00761), the purported agreement must stand on its own from an objective theory rather than the long abandoned subjective theory of contracts. "If the content of the [proposed] agreement is unduly uncertain and indefinite no contract is formed. . . ." CALAMARI & PERILLO, at 43.

⁷ The court described the many missing terms in connection with the stock option. There was no agreement as to the number of shares, the price or the exercise period. (R. 00472.)

Q: And so you expected a written agreement at some point in the future?

A: Yes. I felt that a little bit more formalized, yes.

(R. 00634.)

In addition, because Diston had no understanding as to his participation in the stock option program, including the exercise price and time limitations (R. 00628-32), as well as his rights, if any, under the cash incentive compensation pool (appendix 3; R. 00473), he could not possibly have believed reasonably that the letter of intent constituted his employment agreement. That is consistent with his testimony that he anticipated a subsequent agreement (R. 00634), and with the fact that Ninow told him an employment agreement just like Ninow's would be prepared. (R. 00760.) The differences between the letter of intent (appendix 3) and Ninow's agreement (appendix 4) are self-evident. Diston conceded, for example, that the circumstances under which he could be terminated would be included in his employment contract. (R. 00640.)

Moreover, Diston believed strongly that he was entitled to a job title and description, detailing his duties so that, in his words, he would not be "cleaning toilets." (R. 00645, 00614.) Diston's instincts were accurate as an employee's duties are an essential element of an employment contract. *CALAMARI & PERILLO* at 43; *Bishop*, 695 P.2d at 1315. The letter of intent, of course, says nothing about Diston's title or duties. In fact, Diston later refused to accept a job offer from EnviroPak, even though that offer was still \$20,000 more than what he had been receiving at Holy Cross Hospital and \$25,000 more than he now receives at FHP, because he was not promised a particular title. (R. 00615-616, 00645.)⁸

⁸ Diston believed that he was free to create his own title and duties. Although he expected to be a director of operations under the business plan (R. 00639-40), at trial Diston actually referred to the letter of intent "to refresh [his] memory, just as to what role [he] was to play and what [his] job title was going to be." (R. 00604.) One wonders just what language in the letter of intent refreshed Diston's recollection that he would be the "vice president in charge of quality control and production." *Id.*

C. The Letter of Intent is Not an Enforceable Contract Because it Fails to Satisfy the Statute of Frauds.

Any agreement, "that by its terms is not to be performed within one year from the making thereof" must be in writing. UTAH CODE ANN. § 25-5-4(1). Moreover, "[i]t is fundamental that the memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract. *Birdzell*, 242 P.2d at 580. *See also Machan Hampshire Properties*, 779 P.2d at 234.

The letter of intent states that the proposed employment term is three years, thus bringing it within the statute of frauds. As a result, the letter must be complete in all its essential terms before it is enforceable. There are numerous deficiencies in the letter of intent. The very language of the letter of intent specifies several items of compensation that remain to be negotiated, and it utterly omits other terms customarily found in employment agreements such as termination provisions, remedies, vacation and sick leave. Most importantly, the letter of intent is silent with respect to Diston's proposed duties. This was an essential term to Diston. (R. 00614-16, 00645.)

To satisfy the statute of frauds, the essential terms of such an agreement must be in writing. The letter of intent refers to compensation beyond a base salary in the form of stock options, cash incentives and a car allowance, but leaves them entirely open to negotiation. Without a description of Diston's duties, the letter is, at best, nothing more than an expression of willingness to negotiate. As such, it is not an enforceable contract.

D. The Letter of Intent is, at Best, Only an Agreement to Agree in the Future and is Thus Unenforceable

Agreements to agree are unenforceable. *See, e.g., Wharf Restaurant, Inc. v. Port of Seattle*, 605 P.2d 334 (Wash. App. 1979) (agreement to negotiate a contract in the future is nothing more than negotiation); *Weil & Assoc. v. Urban Renewal Agency of Wichita*, 479 P.2d

875, 883 (Kan. 1971). "The logic is that an agreement to agree on a particular term shows a lack of present agreement and also leaves the agreement indefinite." CALAMARI & PERILLO, at 51.

An agreement providing that an essential term "was subject to the future mutual agreement of the parties . . . constituted a mere expression of a purpose to make a contract in the future, for the whole matter was contingent on further negotiations." *Davison*, 517 P.2d at 1028-29. *See also Engineering Associates*, 622 P.2d at 787 (where the parties make it clear that they do not intend legal consequences until a formal writing is executed, there is no contract until that time).⁹

By its very terms, the letter of intent states that the parties would enter into an employment agreement in the future. It contemplates expressly that certain terms were left to future negotiation and agreement. The two most essential terms of an employment agreement, namely compensation and duties, remain unspecified. While Diston's proposed yearly salary is specified, that is only part of the alleged compensation package. His purported stock options and cash incentive participation remain undefined, as does his automobile reimbursement. Moreover, Diston promises to do nothing under the letter of intent despite his concern with his titles and duties. (R. 00614-16, 00645, 00695.).¹⁰

⁹ *See also Southland Corporation v. Potter*, 760 P.2d 320, 322 (Utah App. 1988) (there is no agreement when it cannot be determined "whether the minds of the parties met upon all the essentials or upon what substantial terms they agreed. . . .")

¹⁰ Akin to this point is the underlying requirement of any contract that there be consideration on both sides. Under the terms of the letter of intent, there is no consideration on Diston's part because he has not committed himself to do anything in exchange for the yearly salary and other unspecified compensation. Sometimes referred to as mutuality of obligation, the requirement of consideration is inescapable and is lacking here. *See Resource Management Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028 (Utah 1985); *Bess v. Jensen*, 782 P.2d 542 (Utah App. 1989).

II. THE TRIAL COURT ERRED IN CONCLUDING THAT NINOW HAD APPARENT AUTHORITY TO EXECUTE THE LETTER OF INTENT ON BEHALF OF ENVIROPAK

"[A]n agent cannot make its principal responsible for the agent's actions unless the agent is acting pursuant to either actual or apparent authority." *Zions First National Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094 (Utah 1988).¹¹ Apparent authority "flows only from the acts and conduct of the principal," and then only when a third party is aware of, and reasonably relies on, that conduct. *Clark Clinic*, 762 P.2d at 1095. In *Walker Bank & Trust Co. v. Jones*, 672 P.2d 73, 75 (Utah 1983), the court observed that "apparent authority exists 'where a person has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first person . . .'" (quoting *Winn v. McMahon Ford Co.*, 414 S.W.2d 330, 336 (Mo. App. 1967).

In *City Electric v. Dean Evans Chrysler-Plymouth*, 672 P.2d 89 (Utah 1983), the Supreme Court stated as follows:

It is well settled law that the apparent or ostensible authority of an agent can be inferred only from the acts and conduct of the principal. . . . Where corporate liability is sought for acts of its agent under apparent authority, liability is premised upon the corporation's knowledge of and acquiescence in the conduct of its agent which has led third parties to rely upon the agent's actions. . . . Nor is the authority of the agent "apparent" merely because it looks so to the person with whom he deals. It is the principal who must cause third parties to believe that the agent is clothed with apparent authority. . . . It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations.

Id. at 90 (citations omitted) (emphasis added) (citing *Bank of Salt Lake v. Corporation of Pres. of Ch., Etc.*, 534 P.2d 887 (Utah 1975); *Kiniski v. Archway Motel, Inc.*, 586 P.2d 502 (Wash.

¹¹ There is no issue in this case as to any actual authority allowing Ninow to execute the letter of intent, or any other agreement for that matter, on behalf of EnviroPak. The court expressly found only apparent authority. (R. 00468.) For a discussion of the contours of actual authority, which will be found whenever there is express or implied authority, see *Clark Clinic*, 762 P.2d at 1094-95.

App. 1978); RESTATEMENT (SECOND) OF AGENCY § 43 (1980); *Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981), *reh'g denied* (1982); *Forsyth v. Pendleton*, 617 P.2d 358 (Utah 1980); *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982); *Luddington v. Bodeninvest Ltd.*, 855 P.2d 204, 209 (Utah 1993).

A. EnviroPak Did Nothing to Cause Diston to Believe Ninow Had Authority to Execute Contracts or Hire Employees on its Behalf, and EnviroPak Had No Knowledge of and Did Not Acquiesce In Ninow's Conduct

Ninow admitted that he did not discuss the letter of intent with anyone at EnviroPak and that he prepared it without any involvement by anyone at EnviroPak. (R. 00758.) Diston knew that Ninow had prepared the letter himself. Ninow's employment agreement and the Organization Agreement were prepared by EnviroPak's attorney. (R. 00642-642A, 00520.) Moreover, Diston admits to having had no contact whatsoever with anyone from EnviroPak until October 3, 1991, three weeks after he received the letter of intent from Ninow. (R. 00597-98, 99, 00627-28.)

Even then, EnviroPak did nothing to cause Diston to believe that Ninow had authority to do anything or to cause Diston to believe that Diston would be hired by EnviroPak. (R. 00753, 00674A-75, 00680.) Indeed, even at the October 3, 1991 shareholders meeting and the subsequent meetings with stockbrokers (R. 00851), Diston was consistently introduced *by EnviroPak representatives* as a representative of Holy Cross Hospital, which was then the only user of the product. (R. 00753, 00674A-75, 00851, 00679, 00637-38; Mills-LaRocca depo. at 20.)

The organization agreement for EnviroPak was executed on September 19, 1991. (R. 00671.) Although the organization agreement does refer to an employment agreement with Ninow, that employment agreement, which Diston read, was not effective until October 1, 1991.

(R. 00760; appendix 4.) It was not even executed when Diston saw it. (FF 19.) It was not EnviroPak that showed these agreements to Diston. Ninow did that himself. (R 00602.)

Either Ninow misrepresented when his employment with EnviroPak began, and there is no question that he was not yet employed when he prepared and delivered the letter of intent, or Diston failed to read Ninow's employment agreement. In either event, EnviroPak did nothing to cause Diston to believe that Ninow could hire Diston or otherwise bind EnviroPak to any agreement. Nor did EnviroPak do anything to cause Diston to believe he was going to be hired.

Diston will undoubtedly point to EnviroPak's press release of September 19, 1991, announcing its formation and stating that Ninow would be an executive officer. (R. 00756.) However, there is no evidence of any kind even suggesting that Diston ever saw the press release.

B. Diston Failed To Inquire Into Ninow's Authority Despite His Obligation To Do So

Reasonable reliance is an essential element of apparent authority. *Clark Clinic*, 762 P.2d at 1095; *Walker Bank & Trust*, 672 P.2d at 75. "The 'apparent' aspect of apparent authority requires observation of irregularities as well as indicia of authority. Where such irregularities cast reasonable doubt and suspicion as to the apparent authority of a fiduciary, there comes into being a duty of inquiry as to his authority." *Bridgeport Fireman's Sick and Death Benefit Assoc. v. Deseret Federal Savings & Loan Assoc.*, 633 F.Supp. 516, 522 (D. Utah 1986). Once the duty to inquire arises, and it always does when one deals *exclusively* with a purported agent, *Bradshaw*, 649 P.2d at 78, it is not reasonable for the person to rely on agent's conduct or statements. *Deseret Federal*, 633 F.Supp. at 522. *See also Walker Bank & Trust*, 672 P.2d at 74. In other words, any reliance must be reasonable and prudent under the circumstances before apparent authority can exist. *Id.*

In *J&J Food Centers v. Selig*, 456 P.2d 691 (Wash. 1969), relied on in *Deseret Federal*, the court stated as follows:

Facts and circumstances are sufficient to establish apparent authority only when a person exercising ordinary prudence, acting in good faith and conversant with business practices and customs, would be misled thereby, and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry.

456 P.2d at 694, *quoted in Deseret Federal*, 633 F.Supp. at 522.

In *Deseret Federal*, the court concluded that certain irregularities in a transaction were sufficient to raise a duty of further inquiry and, failing such inquiry, reliance on the agent's representations was unreasonable. 633 F.Supp. at 522. A bank had released funds, despite an irregularity on the face of a document indicating that the person withdrawing the funds may not have had authority to do so. Specifically, a signature that indicated apparent authority actually belonged to a past corporate officer no longer capable of signing for the corporation. *Id.* at 520. Based on a second letter showing that the officer had already been removed, the bank "was on notice" that the signature could not bind plaintiff and thus could not confer apparent authority. *Id.* See also *Luddington*, 855 P.2d at 209-10.

Because Diston admits to having dealt exclusively with Ninow (R. 00598, 00643), he was obligated to ascertain Ninow's authority "despite [Ninow's] representations" that he had authority. *Bradshaw*, 649 P.2d at 78. This he did not do. At best, Diston may have asked Ninow about Ninow's authority (R. 00602.) That inquiry is insufficient, for a purported agent cannot establish his or her own authority. *Id.* Diston's obligation was to inquire of EnviroPak. *Id.*¹² Where Diston's contact was limited exclusively to Ninow, there was never even an

¹² Diston claims that, because he was dealing with the president and chairman of the board, he did not need to inquire further. (R. 00643.) Diston could not, of course, have actually believed that because Ninow's own employment did not begin until October 1, 1991--two weeks after Diston received the letter of intent. (appendix 4.)

opportunity for EnviroPak to create the impression vis-à-vis Diston that Ninow was authorized to hire employees.

Even after he learned that the letter of intent was not the basis for employment at EnviroPak and that Mills-LaRocca had negotiated her employment with the board of directors (Mills-LaRocca depo. at 25-26), Diston did nothing. He knew that Mills-LaRocca, who had an identical letter of intent from Ninow, had to meet with the entire board before her employment terms were established. (R. 00643.) Diston also knew that an employment contract still had to be prepared. (R. 00760, 00634.)¹³

Diston was also aware of EnviroPak's negotiations with Dick Hollingshead, who Diston knew was included in the business plan as the proposed president. (R. 00632-33; appendix 6.) In September of 1991, Diston knew that Hollingshead had been negotiating with EnviroPak (not just Ninow) regarding his employment and was never hired. (R. 00632-33.) Diston believed that Surgical was involved in these negotiations and believed that Surgical was "adamant" that Ninow be president of EnviroPak. (R. 00633.) Despite these facts, Diston "assumed" without ever asking that he would be employed based solely on the letter of intent. (R. 00643.)

Diston first met with representatives from EnviroPak on October 3, 1991 at a shareholder's meeting. (R. 00850.) That meeting occurred six days before Diston tendered his resignation at Holy Cross Hospital. (R. 00636.) Despite the opportunity to do so, Diston said nothing about employment, instead relying entirely on Ninow's representations. Diston again met with representatives of EnviroPak in mid-October, immediately after he tendered his

¹³ Diston testified rather unconvincingly that he thought Mills-LaRocca's meeting with the members of the EnviroPak board of directors "was merely a courtesy." (R. 00643.) He could not reasonably have believed that, having seen that Hollingshead had been in similar negotiations (R. 00632-33) and learning from Mills-LaRocca herself that those very same directors had negotiated terms of employment that differed from the letter of intent. (Mills-LaRocca depo. at 25-26.)

resignation (R. 00851, 00678), and still said nothing about employment. (R. 00680, 00675.) At all of these meetings, Diston was introduced strictly as a Holy Cross Hospital representative, and nothing was said concerning employment. (R. 00753, 00674A-75, 00851, 00679, 00637-38; Mills-LaRocca depo. at 20.)

This failure to make inquiry is particularly disturbing in light of the fact that Diston was leaving a job he had held for fourteen years and was about to embark on an entirely new venture at twice his former salary, plus stock options in a company about which he knew nothing. (R. 00597-99.) Indeed, Diston believed he was a "key employee," that he was going to be the next vice president of EnviroPak with a right to share in the profits, and even possibly a member of the board of directors. (R. 00603-04, 00640, 00645.)

"The duty of inquiry may be easily discharged by making simple inquiry directly with the principal. If this had been done in the case at bar, the problem here presented would have been avoided." 633 F.Supp at 522. What was true in *Deseret Federal* is also true here. Had Diston asked even once during the many opportunities he had, he would have learned that Ninow had no authority to bind EnviroPak to an employment agreement and that EnviroPak had no intention of hiring him under what terms there are in the letter of intent.

Instead, Diston did nothing, despite clear signals that he could not rely on Ninow. In fact, all indications were that EnviroPak thought of Diston only as a Holy Cross Hospital representative and that EnviroPak knew nothing at all of the letter of intent. (R. 00637-38, 00679; Mills-LaRocca depo. at 20, 25-26.)

CONCLUSION

The letter of intent is exactly what it purports to be and nothing more. It fails as an enforceable contract because it is merely an agreement to agree and because it does not satisfy the statute of frauds.

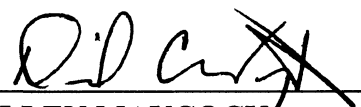
Ninow did not have apparent authority to hire employees for EnviroPak. Diston concedes that his sole contact, before and after EnviroPak was formed, was Ninow. EnviroPak did nothing to cause Diston to believe that Ninow was authorized to negotiate employment agreements entirely on his own -- without the involvement of the rest of the board. All indications were to the contrary. Mills-LaRocca's meeting with the board that resulted in terms different from the letter of intent and the failed Hollingshead negotiations, coupled with the fact that EnviroPak continually represented Diston as an employee of Holy Cross Hospital, render Diston's "reliance" on Ninow's authority completely unreasonable. Diston failed to discharge his duty to inquire about Ninow's authority and thus had no right to rely on Ninow's representations.

This Court should reverse the judgment of the trial court for any or all of the above reasons and enter a judgment of no cause of action.

Respectfully submitted,

DATED this 29th day of March, 1994.

KRUSE, LANDA & MAYCOCK, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

By 
ELLEN MAYCOCK
DAVID C. WRIGHT
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 1994, I mailed true and correct copies of the foregoing **Brief of Appellants**, via the U. S. mail, postage prepaid, to the following:

Neil R. Sabin
Marilynn P. Fineshriber
Nielsen & Senior, P.C.
1100 Eagle Gate Tower
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Salt Lake City, Utah 84111



ADDENDUM

Tab 1

FILED DISTRICT COURT
Third Judicial District

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NOV 16 1993

By B. Klein
SALT LAKE COUNTY
Deputy Clerk

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

JOHN DISTON,)	
)	
Plaintiff,)	JUDGMENT
)	
v.)	2187453
)	11-18-93 8:19am
ENVIROPAK MEDICAL PRODUCTS,)	
INC., a Utah corporation, and)	
SURGICAL TECHNOLOGIES, INC.,)	Civil No. 920902269CN
formerly PINNACLE)	
ENVIRONMENTAL, INC., a)	Judge Frank G. Noel
Delaware corporation,)	
)	
Defendants.)	

This matter came on regularly for trial on July 19 and July 20, 1993, before the Honorable David Roth, Judge presiding, and the Court having entered its Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

The Plaintiff is awarded judgment against the Defendants, jointly and severally, for:

1. The sum of \$54,834.60; plus

EXHIBIT A

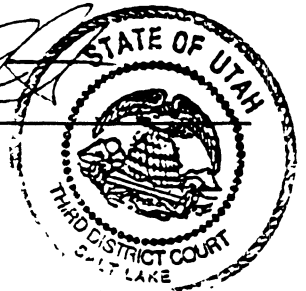
2. \$7,329.48, representing pre-judgment interest from the date each payment was respectively due to September 1, 1993, with pre-judgment interest at \$15.24 per day until entry of the Judgment herein; plus

3. Interest from and after date of judgment at the legal rate until paid.

DATED this 13 day of November, 1993.

BY THE COURT:

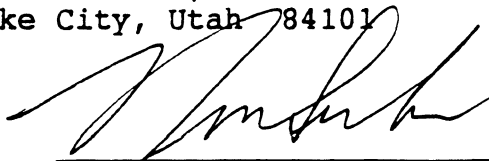

DISTRICT COURT JUDGE



CERTIFICATE OF MAILING

I hereby certify that on this 28th day of September, 1993, I served upon the following a true and correct copy of the foregoing JUDGMENT, by causing the same to be mailed, postage pre-paid, to the following:

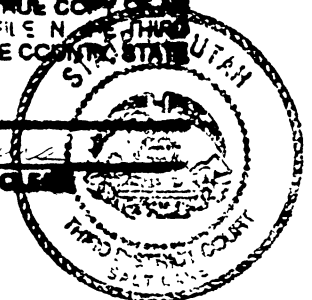
Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
50 West 300 South, Suite 800
Salt Lake City, Utah 84101



FORWARDED THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: 12/22/93


DEPUTY COURT CLERK



Tab 2

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY

NOV 16 1993

By B. Kline
Deputy Clerk

Neil R. Sabin (2840)
of NIELSEN & SENIOR, P.C.
Attorneys for Plaintiff
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone (801) 532-1900

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

JOHN DISTON,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	
)	
ENVIROPAK MEDICAL PRODUCTS,)	
INC., a Utah corporation, and)	
SURGICAL TECHNOLOGIES, INC.,)	
formerly PINNACLE)	Civil No. 920902269CN
ENVIRONMENTAL, INC., a)	
Delaware corporation,)	Judge Frank G. Noel
)	
Defendants.)	

This matter came on regularly for trial on July 19 and July 20, 1993, before the above-entitled Court, the Honorable David Roth, Judge, presiding and hearing all evidence. Plaintiff appeared in person by and through his attorney, Neil R. Sabin. The Defendants appeared through their representatives and their attorney, Ellen Maycock. The Court, having reviewed the pleadings and documents on file herein, having heard testimony and observed and considered the respective credibility and the testimony of the witnesses, having heard arguments and reviewed

EXHIBIT B

memoranda and documentation submitted by the parties, and being fully advised in the premises now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, John Diston ("Mr. Diston") is an individual and resident of Salt Lake County, State of Utah.

2. Defendant EnviroPak Medical Products, Inc. ("EnviroPak"), was incorporated as a Utah corporation and at all times relevant herein had its principal place of business in Salt Lake County, Utah.

3. Defendant Surgical Technologies, Inc. ("Surgical"), is a Delaware corporation, having its principal place of business in Salt Lake County, Utah. Surgical was formerly known as Pinnacle Environmental, Inc. The name of that corporation was changed to its current name April 15, 1992. At all relevant times, Pinnacle was qualified and authorized to do business in the State of Utah.

4. Surgical is a public company, having various subsidiaries.

5. Mr. Diston was employed at Holy Cross Hospital in Salt Lake City, Utah, from 1977 until October 31, 1991. As of the termination of this employment, his title was Assistant Director of Peri-Operative Services.

6. During late 1990 and early 1991, Frederick P. Ninow ("Mr. Ninow") was associated with a company called Professional Medical.

7. While associated with Professional Medical, Mr. Ninow undertook planning and efforts anticipating Professional Medical's possible manufacture and marketing of pre-packaged supply packets featuring principal components that are laundered, sterilized and pre-packed for repeated use in surgical and other health care procedures (the "Product").

8. Mr. Ninow and Mr. Diston became acquainted while Mr. Ninow was investigating the anticipated Product and the nature of a possible market for that Product.

9. When Professional Medical was unwilling or unable to attempt to market the Product on a large scale, Mr. Ninow decided to leave Professional Medical, to form his own company and to raise money for marketing the Product.

10. During this time, Mr. Ninow and Mr. Diston began discussing their respective roles with that new company, with the understanding that Mr. Diston was to be a member of that new company and to serve as Director/Operations. Preliminary discussions were also made with other persons for future involvement with the new company.

11. During that time, Mr. Ninow, with some input from Mr. Diston and others, wrote a rough and general business plan

regarding the proposed company financing, operation and marketing of the Product.

12. Mr. Ninow was acquainted with a son of Rex Crosland, chairman of Surgical. As a result of discussions between those persons, Mr. Ninow became introduced to principals of Surgical, including Rex Crosland, Todd Crosland and Rockwell Schutjer in the Summer of 1991, several months after his association began with Mr. Diston.

13. Pursuant to the discussions between Mr. Ninow and the Surgical representatives, those parties agreed to establish EnviroPak, as a wholly-owned subsidiary of Surgical, for marketing of the Product.

14. Surgical caused Surgical's counsel to prepare the Articles of Incorporation for EnviroPak, an Organization Agreement among Surgical, EnviroPak and Mr. Ninow, and an Employment Agreement between EnviroPak and Mr. Ninow.

15. Mr. Ninow, EnviroPak and Surgical, as the sole shareholder of EnviroPak, executed the Organization Agreement, dated September 19, 1991.

16. The Organization Agreement provided, among other things, that: EnviroPak was a wholly-owned subsidiary of Surgical; that Mr. Ninow would be director, chairman of the board and president of EnviroPak; that EnviroPak would enter into an Executive Employment Agreement with Mr. Ninow contemporaneously

with the execution of the Organization Agreement; that Mr. Ninow assigned to EnviroPak his business plan; that Surgical could designate two directors of EnviroPak; that Mr. Ninow could also choose another director of EnviroPak; and that EnviroPak would have considerable autonomy of operation.

17. Todd Crosland and Rockwell Schutjer served as directors of EnviroPak as designated by Surgical.

18. The Organization Agreement was silent on the issue of whether Mr. Ninow had the authority to hire employees for EnviroPak and to make a commitment for any particular salary.

19. The parties executed an Executive Employment Agreement, between EnviroPak and Mr. Ninow, also prepared by EnviroPak's counsel. This was subsequently executed.

20. The Executive Employment Agreement provided that Mr. Ninow was employed by EnviroPak as president, as director, as chairman of the board of directors, and as chief operating officer "with all of the rights, powers and obligations normally associated with such position."

21. On September 19, 1991, the same date as the Organization Agreement, Surgical prepared and caused release of a news release regarding the formation of EnviroPak and, in that release, referred to Mr. Ninow as "EnviroPak President and CEO."

22. Throughout his discussions with Surgical, Mr. Ninow advised Mr. Diston as to the nature of Mr. Ninow's discussions

with Surgical, since both individuals expected Mr. Diston to be part of the company marketing the Product.

23. There was no evidence that Rockwell Schutjer or Todd Crosland knew Mr. Ninow had offered employment to Mr. Diston until after execution of the letter of intent between EnviroPak and Mr. Diston.

24. Because of Mr. Ninow's specific responsibilities with EnviroPak, pursuant to the Organization Agreement and the Executive Employment Agreement, Mr. Ninow believed that he had the authority to enter into an employment arrangement with Mr. Diston.

25. Mr. Ninow delivered the letter of intent to Mr. Diston and, also, delivered a letter of intent to Rochelle Mills-LaRocco on or about September 20, 1991.

26. Pursuant to Mr. Diston's and Mr. Ninow's discussions, on September 20, 1991, Mr. Ninow, signing as the "duly authorized officer" of EnviroPak, executed a Letter of Intent to Enter Employment Agreement (the "Employment Agreement") with Mr. Diston as the employee.

27. The Employment Agreement provided that Mr. Diston would be employed for three years commencing on or before October 31, 1991; would receive a salary of \$72,000 per year, payable bi-weekly; would receive a monthly automobile allowance; would participate in the company's stock option program; would receive

health and accident insurance; would be reimbursed for business expenses; would participate in the incentive compensation program; and would receive two weeks paid vacation.

28. Mr. Diston and Mr. Ninow both contemplated that Mr. Diston would enter into a formal, complete employment agreement, consistent with the Letter of Intent, at a later time.

29. After preparation of the Employment Agreement, Mr. Ninow and Mr. Diston orally agreed to a \$360.00 per month automobile allowance for Mr. Diston.

30. Mr. Diston informed Mr. Ninow that he accepted that agreement and that he intended to give notice to terminate his employment at Holy Cross Hospital.

31. On or about October 9, 1991, Mr. Diston, in reliance on the Employment Agreement, notified Holy Cross Hospital of his intent to terminate his employment effective October 31, 1991.

32. Both Mr. Ninow and Mr. Diston considered the Employment Agreement fully binding upon Mr. Diston and EnviroPak.

33. Because of the acts of EnviroPak and Pinnacle in drafting the Organization Agreement, Employment Agreement and issuing the press release, Mr. Ninow believed he had the authority to execute the Letter of Intent. Under the circumstances of this case, it was reasonable for Mr. Diston to rely on Mr. Ninow's authority.

34. Mr. Diston's reliance on the Letter of Intent and giving notice to Holy Cross Hospital of his termination were reasonable under the circumstances.

35. After giving notice of termination to Holy Cross Hospital, Mr. Diston became aware of problems between Mr. Ninow and Surgical. Mr. Diston was, for the first time, informed of problems affecting the job.

36. Mr. Diston asked Holy Cross Hospital whether he could receive his job back. He was told, however, that Holy Cross Hospital had made arrangements and commitments with other personnel and, accordingly, it was not possible to get the job back.

37. Surgical, as the sole shareholder of EnviroPak failed to observe the separate corporation structure format and operation of EnviroPak which included at least the following:

a. Under paragraph 3 of the Employment Agreement, Mr. Ninow served at the pleasure of the board of either Surgical or EnviroPak, suggesting that Surgical retained significant control over EnviroPak.

b. Surgical was the sole entity and source of the funding of the business and anticipated business of EnviroPak.

c. EnviroPak was capitalized with only \$1,000 capital, which was grossly undercapitalized for the

anticipated business of this type and illusory or trifling compared with the business to be done and the risk of loss.

d. The corporate formalities were not observed between Surgical and EnviroPak. The failure to maintain the corporate formalities and separateness reasonably and likely created the potential of inequitable results leaving EnviroPak totally dependent upon Surgical.

38. Disputes arose between persons who were representatives of Surgical and EnviroPak and Mr. Ninow. Pursuant to these disputes, Mr. Ninow, before December 10, 1991, was terminated for, among other things, failing to consult with the board of directors of EnviroPak on important decisions, including whether to hire employees.

39. Given the nature of the disputes and the actions of Mr. Ninow, it is not unreasonable to determine that Mr. Ninow should have been fired in this case.

40. Mr. Diston subsequently met with Todd B. Crosland and Rockwell P. Schutjer. During discussions, these Surgical and EnviroPak representatives offered Mr. Diston employment with EnviroPak for \$60,000, but without the other benefits which Mr. Diston believed he was entitled to under the Employment Agreement. Moreover, they refused to provide any specificity of the job or any written agreement.

41. As a result, Mr. Diston refused the above job offer.

42. Mr. Diston, having measured the risks of a three year contract which was not honored, together with the risks of a contract offered by Pinnacle without a time period and as an employee at will contract, was reasonable in rejecting the offer.

43. EnviroPak ceased business operations effective December 31, 1992.

44. Insufficient evidence exists for the court to determine that Pinnacle purposely, or negligently, was responsible for the failure of the business of EnviroPak.

45. Mr. Diston was unemployed from October 31, 1991, until February 24, 1992, at which time he became employed with FHP Health Care where he continues to be employed.

46. From February 24, 1992, until December 31 1992, Mr. Diston earned \$29,165.40 as gross income.

47. The difference between what Mr. Diston earned from October 31, 1991, through December 31, 1992, and what Mr. Diston was to be paid under the Employment Agreement was \$54,834.60.

48. Mr. Diston reasonably could not be expected to be entitled to damages beyond the date of December 31, 1992, because the business ceased to exist and the parties understood at the time of entry of their agreement that it was a risky undertaking.

49. Insufficient evidence exists with respect to the terms and calculations of any damages for failure of stock options and for incentive bonuses.

50. With respect to the monthly car allowance, no evidence is before the Court as to what percentage of time or use the Mr. Diston was required to use the car in connection with his Employment with EnviroPak.

CONCLUSIONS OF LAW

1. Mr. Ninow had the apparent authority to enter into the Employment Agreement with Mr. Diston.

2. Mr. Diston reasonably relied upon Mr. Ninow's apparent authority to enter into the Employment Agreement.

3. Mr. Ninow and Mr. Diston agreed on the essential provisions of the Letter of Intent to the extent that it provided for an offer of employment of a term of years and for a specific salary and, hence, there existed a valid agreement between EnviroPak and Mr. Diston.

4. Because of the understandings and agreements contained in the Letter of Intent, and the reliance of Mr. Diston on the contract, the statute of frauds does not apply; and the Employment Agreement constitutes an enforceable agreement.

5. Mr. Diston was ready and willing to perform under the Employment Agreement and was not in breach thereof.

6. EnviroPak breached the Employment Agreement with Mr. Diston and refused to perform thereunder.

7. Because there existed such a unity of interest between Surgical and EnviroPak and the failure to observe separate

corporate form, such arrangements sanctioned the possibility of fraud or otherwise promoted injustice; EnviroPak was a hollow shell and not a viable entity; and EnviroPak was an alter ego of Surgical.

8. As a result, the breach of contract by EnviroPak also constituted a breach of contract by Surgical.

9. There does not exist sufficient evidence for a claim of tortious interference of economic benefits against Surgical.

10. Mr. Diston is entitled to damages for breach of contract in the amount of \$54,834.60, representing the difference that Plaintiff earned from October 31, 1991, through December 31, 1992, and the amounts that he would have been entitled to earn under the contract with EnviroPak, together with interest at the pre-judgment rate for each deficient amount of compensation payment from that date the payment was due.

11. Plaintiff is not entitled to any payments since December 31, 1992, because EnviroPak's business was terminated

12. Because of insufficient evidence, Plaintiff is not entitled to any judgment arising from stock options, incentive bonuses or car allowance.

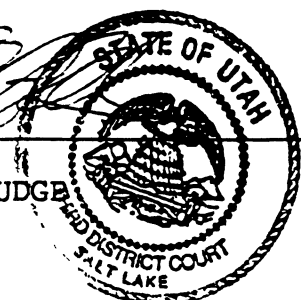
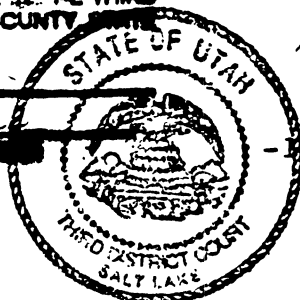
DATED this 13 day of September, 1993.

BY THE COURT:

David Roth
DISTRICT COURT JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH.

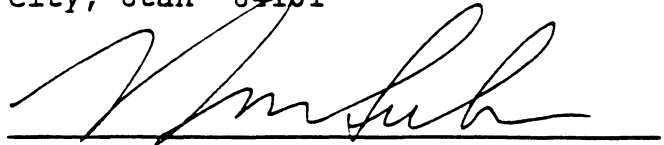
DATE: 2/25/97
J. T. [Signature]
24730, D17 DEPUTY COURT CLERK



CERTIFICATE OF MAILING

I hereby certify that on this 28th day of September, 1993,
I served upon the following a true and correct copy of the
foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, by causing the
same to be mailed, postage pre-paid, to the following:

Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
50 West 300 South, Suite 800
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "E. Maycock", is written over a horizontal line.

Tab 3

LETTER OF INTENT
TO ENTER EMPLOYMENT AGREEMENT

THIS LETTER OF INTENT TO ENTER INTO AN EMPLOYMENT AGREEMENT (this "Letter of intent") dated September 20, 1991, by and between ENVIROPAK MEDICAL PRODUCTS INC., a corporation organized and existing under the state of Utah (the "Company") and JOHN DISTON ("Employee").

1. INTENT. The Company intends to enter into an employment agreement with Employee on or before October 31, 1991.

2. Term. The initial term of the employment agreement shall be for three years.

3. Compensation.

(a) For all services rendered by Employee, the Company shall pay a salary of \$72,000 per year payable as earned in twenty-four (24) equal semi-monthly payments. All salary shall be subject to withholdings and other applicable taxes. Such salary shall be reviewed annually and shall remain fixed or be increased to the extent deemed appropriate by the board of directors of the Company.

(b) As an incentive compensation, Employee shall participate in the Company's cash incentive compensation pool.

(c) The Company shall provide health and medical insurance to be chosen by the Company for its full time employees.

(d) The Company shall provide Employee a monthly automobile allowance.


(e) The Company shall provide Employee with stock options as incentive to enter into an Employment Agreement with the Company. The Company shall also provide Employee with future stock options as part of the Company incentive program. These options will be determined by the company at the time of employment.

(f) The Company will pay for actual and reasonable expenses incurred by Employee in connection with the business of the company, including expenses for entertainment, travel and similar items.

(g) The Employee shall be entitled each year to a paid vacation of at least two (2) weeks.

LETTER OF INTENT as of the date first above written.

ENVIROPAK MEDICAL PRODUCTS, INC.

By 
Duly Authorized Officer

Tab 4

EXECUTIVE EMPLOYMENT AGREEMENT

THIS EXECUTIVE EMPLOYMENT AGREEMENT (this "Agreement") is entered into effective October 1, 1991, by and between ENVIRO PAK MEDICAL PRODUCTS, INC., a corporation organized and existing under the laws of the state of Utah (the "Company"), and FREDERICK NINOW ("Executive").

FOR AND IN CONSIDERATION of the mutual covenants contained herein and of the mutual benefits to the parties to be derived therefrom, the parties agree as follows:

1. **Employment.** The Company hereby employs Executive to perform those duties generally described in this Agreement, and Executive hereby accepts and agrees to such employment on the terms and conditions set forth.

2. **Term.** The initial term of this Agreement shall be for a period of five years commencing on the date of this Agreement, unless earlier terminated in the manner provided herein. If not terminated in writing by the Company or Executive, this Agreement shall continue in effect on a month-to-month basis subsequent to expiration of the initial term. Executive understands and acknowledges that this Agreement may be terminated by the Company during the initial term in accordance with the express provisions of this Agreement and may be terminated at any time subsequent to the initial term, by either the Company or the Executive on 15 days' written notice to the other.

3. **Duties.** During the term of this Agreement, Executive shall be employed by the Company, subject to change by the board of directors, as the chief operating executive of the Company and shall have all of the rights, powers, and obligations normally associated with such position. Executive agrees to serve, at the pleasure of the board of directors of the Company or any parent of the Company, as president, director, and chairman of the board of directors of the Company and in such additional and/or other offices or positions with the Company or any parent or subsidiary of the Company as shall, from time to time, be determined by such board of directors, without compensation other than as set forth herein. Executive shall devote his full working time, attention, and energy to the business of the Company or its parent, subsidiaries, or affiliates and shall not during the term of this Agreement be engaged in any other business activities which will significantly interfere or conflict with the reasonable performance of his duties hereunder.

4. **Best Efforts.** Executive agrees that he will faithfully, industriously, and to the best of his ability, experience, and talents, perform his duties under the terms of this Agreement and will seek to promote and develop the business of the Company.

5. **Compensation**

(a) For all services rendered by Executive, the Company shall pay to Executive a salary of \$100,000 per year, payable as earned in 24 equal semi-monthly payments. All salary payments shall be subject to withholding and other applicable taxes. Such salary shall be reviewed annually and shall remain fixed or be increased to the extent deemed appropriate by the board of directors of the Company.

(b) As incentive compensation, Executive shall participate in the Company's cash incentive compensation pool from which the Company allocates and pays to its key executives cash incentive compensation based on the Company's pretax profits as a percentage of revenues, as follows:

<u>Pre-Tax Profits as a Percentage of Gross Revenues</u>	<u>Percent of Pre-Tax Profits Allocated to Compensation Pool</u>
15%, but less than 20%	1%
20%, but less than 25%	2%
25%, but less than 30%	3%
30%, but less than 35%	4%
35% or more	5%

Revenues shall include all revenues from the sale of products or services by the Company, net of returns and adjustments, and including extraordinary items. Pre-tax profits shall include all profits from whatever source, including extraordinary items, prior to payment of or allowance for income taxes. Such incentive compensation shall be determined and paid annually, in any event within 110 days after the end of the fiscal year. To the extent practicable, prior to the end of the fiscal year the Company shall review its estimated earnings and profits for the year, shall estimate the amount allocable to such incentive compensation pool, shall allocate such pool among the various members of the executive management team, and shall pay such estimated amounts, with final adjustments and reconciliations to be made within 110 days after the end of such year. By way of example, if in a given fiscal year the Company had gross revenues of \$10,000,000 that result in pre-tax profits of \$2,300,000, which is 23% of such revenues, then 2% of such \$2,300,000 of pre-tax profits, or \$46,000, would be allocated to such incentive compensation pool.

6. Working Facilities. The Company shall provide Executive with such reasonable working facilities and services, including an office and secretarial assistance, as are necessary and appropriate for the performance of his duties. Such facilities and services shall be provided to Executive at the Company's principal place of business or such other place as may be reasonably determined by the board of directors of the Company.

7. Employment Benefits. The Company shall provide health and medical insurance for Executive in a form and program to be chosen by the Company for its full-time employees. Executive shall be entitled to participate in any retirement, pension, profit-sharing, stock option, or other plan as now in effect or hereafter adopted by the Company on the same basis as other employees.

8. Vacations. Executive shall be entitled each year to a paid vacation of at least three weeks. Vacation shall be taken by Executive at a time and with starting and ending dates mutually convenient to the Company and Executive. Vacation or portions of vacations not used in one employment year shall carry over to the next succeeding employment year, but shall thereafter expire if not used within such succeeding year.

9. Expenses. The Company will reimburse Executive for actual and reasonable expenses incurred by Executive in connection with the business of the Company, including expenses for entertainment, travel, attendance at conventions, employee training, and similar items, on Executive's periodic presentation of an itemized account of such expenses, together with supporting documentation.

10. Ownership of Discoveries. Executive agrees to fully and completely disclose any and all present and future inventions, improvements, discoveries, techniques, or products (the "Discoveries") related to the business or proposed business of the Company resulting from Executive's activities during the term of this Agreement, whether such activities are performed on or off the premises of the Company. All such Discoveries shall be the sole and exclusive property of the Company. Executive agrees to provide all information and data concerning such Discoveries in his possession or control to the Company and to lend reasonable assistance to the Company concerning the use and application of such Discoveries and shall execute and deliver all such documents and take all such other actions as

are reasonably necessary to vest all right, title, and interest in such Discoveries, including patents, copyrights, and trademarks with respect thereto, in the Company.

11. Covenant Not to Compete During Term of Agreement. During the initial term of this Agreement and any extension subsequent to the expiration of the initial term, Executive agrees not to engage, directly or indirectly, in any business or activity, whether as an employee, equity proprietor, or partner, of any corporation or association that competes in any geographic market with the Company or its parent, subsidiaries, or affiliates. Notwithstanding the foregoing, it shall not be a breach of the provisions of this paragraph for Executive to purchase equity securities in the ordinary course of his investments if Executive's sole affiliation with such business or association is the ownership of 5% or less of the equity of any such business or association.

12. Covenant Not to Compete Subsequent to Term of Agreement. Executive acknowledges that he will acquire and develop certain methods, skills, and expertise in the operation and conduct of the business of the Company during the course of his employment with the Company. Executive agrees that for a period of one year subsequent to the expiration or earlier termination of the initial term of this Agreement or any extension of that initial term, he will not, directly or indirectly, provide services similar to those services to any business, corporation, or other entity that:

(a) Provides services or products similar to or competitive with the services or products provided by the Company to past, present, or prospective customers of the Company;

(b) Competes with the services or products provided by the Company in any geographic market; or

(c) Is undertaking entry into a geographic market that is similar to or competitive with the markets of the Company.

The covenants contained in this paragraph shall be construed as a series of separate covenants, one for each state in the United States of America and one for each country outside the United States of America. Except for geographical coverage, each separate covenant shall be deemed identical in its terms. If in any judicial proceeding, a court shall refuse to enforce any of the separate covenants deemed included in this paragraph, the unenforceable covenant shall be deemed eliminated from this paragraph for the purpose of that proceeding and to the extent necessary to permit the remaining separate covenants (meaning the covenants with respect to the remaining geographical areas) to be enforced.

The provisions of this paragraph shall not be construed as restricting Executive's right to own shares or other equity interests in any corporation or association provided that Executive does not perform services for, or participate in any way in the management of such entity in violation of the provisions of this paragraph and that Executive owns 5% or less of the equity of any such business or association. The provisions of this paragraph shall survive the termination of this Agreement.

13. Nondisclosure of Information. Executive acknowledges that he will have access to confidential data and information which is of a special and unique value to the Company, including, without limitation, the books and records of the Company relating to operations, finances, accounting, sales, personnel, and management; technical information related to proprietary rights of the Company; information with respect to customer names, addresses, and requirements; price lists; costs of operations, services, and products of the Company; and methods of doing business. Executive agrees to keep himself fully informed of the policies and procedures established by the Company for safeguarding its property and will strictly comply with those policies and procedures at all times. Executive agrees he will not, during or after the term of this Agreement, divulge or appropriate to his own use or the use of others, or maliciously divulge to any other person, any trade secret, proprietary item, or any item designated "Confidential" by the Company, its parents, or subsidiaries. For

purposes of this Agreement, the term "trade secret" shall mean any information, process, or procedure utilized by the Company, its parents, and subsidiaries which is not public information and which is maintained on a confidential basis by the Company, specifically including its methods of pricing, bidding processes and procedures, supplier lists, supplier agreements, and training procedures. The term "proprietary item" shall mean any item of information or data and any processes or procedures owned by the Company, its parents, and subsidiaries specifically including its customer lists, methods of operation, and special procedures utilized in its operations. Executive agrees that he will not, except as authorized by the Company, remove any property belonging to the Company from its place of business. Executive hereby covenants and agrees to return all documents, information, and data to the Company immediately upon termination of this Agreement. The provisions of this paragraph shall survive the termination of this Agreement.

14. Remedies on Default. If, at any time, Executive breaches, to any material extent, the provisions of paragraphs 10, 11, 12, or 13 hereof, the Company shall have the right to terminate all of its obligations to make further payments under the terms of this Agreement. Executive hereby specifically acknowledges that monetary damages to the Company for the breach of certain provisions hereunder, specifically including the ownership of Discoveries as set forth in paragraph 10, the covenants not to compete set forth in paragraphs 11 and 12, and the nondisclosure of information set forth in paragraph 13, may be difficult to determine and/or inadequate to compensate the Company for a breach thereof, and hereby agrees that in the event of any breach by Executive of such provisions, the Company, in addition to any other remedies it may have under the terms of this Agreement or at law, shall have the right to bring an action in equity for an injunction against the breach or threatened breach of such obligations or seeking specific performance of the obligations of Executive thereunder. If the provisions of this paragraph shall survive the termination of this Agreement.

15. Disability. If Executive is unable to perform his services by reason of illness or incapacity for a period of more than 12 consecutive weeks, the compensation thereafter payable to him by the Company during the continued period of such illness or incapacity shall be reduced by 50%. Executive's full compensation shall be reinstated on his return to full employment and discharge of his full duties. Notwithstanding anything to the contrary, the Company may terminate this Agreement at any time after Executive shall be absent from his employment, for whatever cause, for a continuous period of more than six months or for an aggregate of nine months in any 24-month period, and all obligations of the Company under the terms of this Agreement shall thereon terminate.

16. Termination by the Company. In addition to its rights to terminate this Agreement set forth elsewhere herein and notwithstanding any other provision of this Agreement, this Agreement and the Executive's employment may be terminated by the Company on the occurrence of any of the following:

(a) Executive's conduct involving the business affairs of the Company constituting common law fraud, conviction of a felony, embezzlement from the Company, or other willful or malicious unlawful conduct of a similar nature;

(b) Any material breach by Executive of the provisions of this Agreement; or

(c) Executive has been grossly negligent in the performance of his duties, has substantially failed to meet reasonable standards established by the Company for the performance of his duties, or has engaged in any material willful misconduct in the performance of his duties hereunder.

If this Agreement is terminated by the Company in accordance with the provisions of this paragraph 16 or as provided elsewhere in this Agreement, the Company shall have no further obligation to make further salary payments to Executive under the terms of this Agreement.

17. Death During Employment. If Executive dies during the term of this Agreement, the Company shall pay to the estate of Executive the compensation that would otherwise be payable to Executive up to the end of the month in which his death occurs.

18. Nontransferability. Neither Executive, his spouse, his designated contingent beneficiary, nor their estates shall have any right to anticipate, encumber, or dispose of any payment due under this Agreement. Such payments and other rights are expressly declared nonassignable and nontransferable except as specifically provided herein.

19. Indemnification. Except for willful misconduct by Executive, the Company shall indemnify Executive and hold him harmless from liability for acts or decisions made by him while performing services for the Company if such indemnification is permitted by the Company's certificate of incorporation and bylaws, including any future amendments. The Company shall use its best efforts to obtain coverage for Executive under any insurance policy now in force or hereinafter obtained during the term of this Agreement insuring officers and directors of the Company against such liability.

20. Assignment. This Agreement may not be assigned by either party without the prior written consent of the other party.

21. Stock Options. The Company's parent, Pinnacle Environmental, Inc. ("Pinnacle"), shall issue to Executive options to purchase common stock under Pinnacle's 1989 Incentive Stock Option and Stock Award Plan options to purchase common stock of Pinnacle as follows:

(a) Pinnacle shall issue to Executive options to purchase an aggregate of 50,000 shares at any time on or before September 30, 1996, at an exercise price of \$2.50 per share, the approximate fair market price of Pinnacle common stock as quoted on the National Association of Securities Dealers, Inc., Automated Quotation system ("NASDAQ") as of the date hereof;

(b) Pinnacle shall issue to Executive options to purchase an aggregate of 50,000 shares of Pinnacle common stock at any time on or before September 30, 1996, at a purchase price of \$2.50 per share; *provided*, that options with respect to 25,000 shares shall expire on September 30, 1992, if at least one repackaging center is not opened and in operation by such date, and *further provided*, that options for an additional 25,000 shares shall expire on September 30, 1993, if Pinnacle has not opened and placed in operation one additional repackaging center by such date; and

(c) An option to purchase 5,000 shares of Pinnacle common stock at any time during a five-year period at an exercise price equivalent to the bid price of the Pinnacle common stock in the over-the-counter market as of the date of grant, for every repackaging center opened prior to September 30, 1996, issuable on the date of such opening.

All options shall be subject to the terms and conditions of the incentive stock option plan and the related form of option that is attached to such plan.

22. Entire Agreement. This Agreement contains the entire agreement between the parties with respect to any written or oral negotiations, commitments, and understandings. No letter, telegram, or other communication passing between the parties hereto shall be deemed a part of this Agreement; nor shall a subsequent communication have the effect of modifying or adding to this Agreement unless it is distinctly stated in such letter, telegram, or other communication that it is to constitute a part of this Agreement and is signed by the parties to this Agreement.

23. Counterparts and Headings. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. All headings in this Agreement are inserted for convenience or reference and shall not affect the meaning or interpretation of this Agreement.

24. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the state of Utah.

25. Arbitration. In the event of a dispute or controversy between the parties as to the provisions or performance of this Agreement, such dispute or controversy shall be submitted to arbitration in accordance with the rules and procedures of the American Arbitration Association. The Company and Executive shall each bear 50% of the third party costs of such arbitration.

26. Severability. If and to the extent that any court of competent jurisdiction holds any provision, or any part thereof, of this Agreement to be invalid or unenforceable, such holding shall in no way affect the validity of the remainder of this Agreement.

27. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach hereof shall constitute a waiver of any such breach, any subsequent breach of the same obligation, or of any other covenant, agreement, term, or condition.

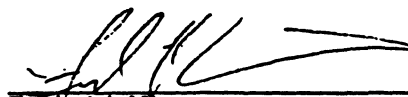
28. Litigation Expenses. If any action, suit, or proceeding is brought by a party with respect to a matter or matters governed by this Agreement, all costs and expenses of the prevailing party incurred in connection with such proceeding, including reasonable attorneys' fees, shall be paid by the nonprevailing party.

AGREED AND ENTERED INTO as of the date first above written.

THE COMPANY: ENVIRO PAK MEDICAL PRODUCTS, INC.

By 
Duly Authorized Officer

EXECUTIVE:


Frederick Ninow

Tab 5

ORGANIZATION AGREEMENT

THIS ORGANIZATION AGREEMENT (this "Agreement") is entered into this 19th day of September, 1991, by and between FREDERICK NINOW, an individual ("Ninow"), ENVIRO PAK MEDICAL PRODUCTS, INC. (the "Company"), a Utah corporation, and PINNACLE ENVIRONMENTAL, INC., a Delaware corporation, and sole shareholder of the Company ("Pinnacle") on the following:

Premises

Ninow has developed a business plan to package, market, and service prepackaged medical supplies for various health care procedures and desires to participate in the organization of a business enterprise to implement such business plan. The Company has or can obtain financial, managerial, and other resources that it can provide to such enterprise. Pinnacle, as the sole shareholders of the Company desires to provide certain incentives to Ninow and other persons associated with the Company. Therefore, the parties desire to join together in organizing a business and operation to implement the business plan developed by Ninow.

Agreement

NOW, THEREFORE, upon these premises which are incorporated herein by reference, and for and in consideration of the mutual promises and covenants set forth herein, it is hereby agreed as follows:

1. Organization of Company. Immediately preceding the execution of this Agreement, the Company has been organized as a Utah corporation with articles of incorporation in the form attached hereto as exhibit A and incorporated herein by reference. As set forth in such articles of incorporation, the sole incorporator and initial director of the Company is Todd B. Crosland. The Company will elect the following persons as officers and directors:

Frederick Ninow	Director, Chairman, and President
Rockwell D. Schutjer	Director and Vice-President
Todd B. Crosland	Director and Secretary/Treasurer

2. Assignment of Business Plan. Ninow hereby assigns, conveys, and sets over unto the Company all of Ninow's right, title, and interest in and to a business plan, procedure, method of practice, and related know-how, information, business contacts, relationships, and other information relating to the initiation and operation of a business enterprise to market to hospitals and other health care providers prepackaged supply packets containing materials frequently used in surgical and other health care procedures, featuring principal components that are laundered, sterilized, and repackaged for repeated use, rather than disposed of, all as more particularly described in the materials attached hereto as exhibit B and incorporated herein by reference (the "Business Plan").

3. Autonomous Operation. During the term hereof, the Company shall have its own management, budget, physical facilities, and accounting books and records so as to retain its separate identity from Pinnacle and its other subsidiaries. During such period, Pinnacle shall cause the board of directors of the Company to consist of four persons, one of whom shall be Ninow, one of whom shall be a person designated by Ninow, and two of them shall be designees of Pinnacle.

4. Financial Support. The Company shall utilize its best efforts to obtain such capital, credit enhancement, and other financing as it may reasonably require to acquire, open, and place in

operation individual repackaging centers serving appropriate market territories to provide the services generally described in the Business Plan at the cost for capital expenditures, startup expenses, and related expenditures as more particular described therein, subject to the achievement of financial performance for centers previously placed in operation generally consist with the results of operations forecast in such Business Plan.

5. Employment Agreement. Contemporaneously with the execution of this Agreement, the Company shall enter into an executive employment agreement with Ninow.

6. Stock Options for Other Key Employees. As the Company assembles its management team of key executives during the next year, Pinnacle shall grant and issue to such key executives as the Company may determine, when they become associated with the Company, options to purchase an aggregate of 100,000 shares of common stock of the Company under and subject to the terms and conditions of Pinnacle's 1989 Stock Option and Stock Award Plan.

7. Incentive Compensation. The Company shall create a cash incentive compensation pool based on the Company's pre-tax profits as a percentage of revenues, to be divided among the various members of the executive management group of the Company, in such manner as the board of directors of the Company may determine. The amount to be allocated to such incentive compensation pool and to be allocated among and paid to such executives shall be determined as follows:

<u>Pre-Tax Profits as a Percentage of Gross Revenues</u>	<u>Percent of Pre-Tax Profits Allocated to Compensation Pool</u>
15%, but less than 20%	1%
20%, but less than 25%	2%
25%, but less than 30%	3%
30%, but less than 35%	4%
35% or more	5%

Revenues shall include all revenues from the sale of products or services by the Company, net of returns and adjustments, and including extraordinary items. Pre-tax profits shall include all profits from whatever source, including extraordinary items, prior to payment of or allowance for income taxes. Such incentive compensation shall be determined and paid annually, in any event within 110 days after the end of the fiscal year. To the extent practicable, prior to the end of the fiscal year the Company shall review its estimated earnings and profits for the year, shall estimate the amount allocable to such incentive compensation pool, shall allocate such pool among the various members of the executive management team, and shall pay such estimated amounts, with final adjustments and reconciliations to be made within 110 days after the end of such year. By way of example, if in a given fiscal year the Company had gross revenues of \$10,000,000 that result in pre-tax profits of \$2,300,000, which is 23% of such revenues, then 2% of such \$2,300,000 of pre-tax profits, or \$46,000, would be allocated to such incentive compensation pool.

8. Standard Textiles Products. The parties shall cooperate and utilize their best efforts to obtain from Standard Textiles such reasonable assurances as Pinnacle and the Company may deem adequate respecting the recognition of the conveyance by Ninow to the Company of the Business Plan described herein, the initiation of such business by the Company, and the grant to the Company of an exclusive marketing territory for selected markets for certain products.

9. Indemnification

(a) Pinnacle hereby agrees to indemnify the Company, its executive officers and directors, against any and all Pinnacle liabilities, obligations, claims for relief, and other losses

or damages that the Company or its executive officers or directors may suffer or incur as a result of any action or failure to act by Pinnacle.

(b) The Company hereby agrees to indemnify Pinnacle, its executive officers and directors, against any and all Company liabilities, obligations, claims for relief, and other losses or damages that Pinnacle or its executive officers or directors may suffer or incur as a result of any action or failure to act by the Company.

10. Term. This Agreement shall remain in full force and effect through September 30, 1996.

11. Notice of Default. No party shall exercise any right or remedy on the alleged default of the other party unless such party shall have failed to remedy such alleged default within 30 days after notice thereof from the nondefaulting party.

12. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the state of Utah.

13. Notices. All notices, demands, requests, or other communications required or authorized hereunder shall be deemed given sufficiently if in writing and if personally delivered; if sent by facsimile transmission, confirmed with a written copy thereof sent by overnight express delivery; if sent by registered mail or certified mail, return receipt requested and postage prepaid; or if sent by overnight express delivery:

If to the Company, to: EnviroPak Medical Products, Inc.
Attn: Todd B. Crosland
774 South 500 West
Salt Lake City, Utah 84101
Facsimile No.: (801) 359-7755

If to Ninow, to: Mr. Frederick Ninow
7490 South Bakkemellom Way
Salt Lake City, Utah 84121

or such other addresses and facsimile numbers as shall be furnished in writing by any party in the manner for giving notices hereunder, and any such notice, demand, request, or other communication shall be deemed to have been given as of the date so delivered or sent by facsimile transmission, three days after the date so mailed, or one day after the date so sent by overnight delivery.

14. Attorneys' Fees. In the event that any party institutes any action or suit to enforce this Agreement or to secure relief from any default hereunder or breach hereof, the breaching party or parties shall reimburse the nonbreaching party or parties for all costs, including reasonable attorneys' fees, incurred in connection therewith and in enforcing or collecting any judgment rendered therein.

15. Specific Performance. The parties acknowledge that the rights in this Agreement are extraordinary and unique, and that remedies at law may be inadequate to compensate the parties for the breach or threatened breach of the terms and conditions of this Agreement. The parties consent to the granting of equitable relief, including specific performance or injunction, whether temporary, preliminary, or final, in favor of the other party without proof of actual damages.

16. Survival; Termination. The representations, warranties, and covenants of the respective parties shall survive the closing date and the consummation of the transactions herein contemplated.

17. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall be but a single instrument.

18. No Assignment. This Agreement cannot be assigned in whole or in part by one of the parties without the prior written consent of all other parties.

DATED as of the year and date first above written.


Frederick Ninow

ENVIRO PAK MEDICAL PRODUCTS, INC.

By 
Todd B. Crosland, President

PINNACLE ENVIRONMENTAL, INC.

By 
Rex Crosland, President

Tab 6

REPACK

MANAGEMENT AND KEY PERSONNEL

Top management and key personnel consists of the following people, each of which brings a unique competence to the management group of Repack Surgical Products.

President / CEO

Richard J. Hollingshead

Chief Financial Officer / Secretary

John Hales

Vice President / Marketing

Frederick Ninow

Vice President / Production and Materials Mgmt.

Joe Murray

Director / Operations

John Diston

Director / Inservice

Susan Kay Van Houten B.S.N, M.B.A.

Director / Research and Development

Jeff Taylor

Director / Facilities Development

Hal M. Magleby *Secretary*

Consultant

Dr. Jerry Rees Nelson *Medical Director*

Consultant

Don McKelvie *Secretary*

Tab 7

LETTER OF INTENT
TO ENTER EMPLOYMENT AGREEMENT

THIS LETTER OF INTENT TO ENTER INTO AN EMPLOYMENT AGREEMENT (this "Letter of intent") dated September 20, 1991, by and between ENVIROPAK MEDICAL PRODUCTS INC., a corporation organized and existing under the state of Utah (the "Company") and ROCHELLE MILLS ("Employee").

1. INTENT. The Company intends to enter into an employment agreement with Employee on or before October 31, 1991.

2. Term. The initial term of the employment agreement shall be for three years.

3. Compensation.

(a) For all services rendered by Employee, the Company shall pay a salary of \$50,000 per year payable as earned in twenty-four (24) equal semi-monthly payments. All salary shall be subject to withholdings and other applicable taxes. Such salary shall be reviewed annually and shall remain fixed or be increased to the extent deemed appropriate by the board of directors of the Company.

(b) As an incentive compensation, Employee shall participate in the Company's cash incentive compensation pool.

(c) The Company shall provide health and medical insurance to be chosen by the Company for its full time employees.

(d) The Company shall provide Employee a COMPANY automobile.

(e) The Company shall provide Employee with stock options as incentive to enter into an Employment Agreement with the Company. The Company shall also provide Employee with future stock options as part of the Company incentive program. These options will be determined by the company at the time of employment.

(f) The Company will pay for actual and reasonable expenses incurred by Employee in connection with the business of the company, including expenses for entertainment, travel and similar items.

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in some stock
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we need some stock to come into
company.
Buy Purpose
Salary
etc

(g) The Employee shall be entitled each year to a paid vacation of at least two (2) weeks.

LETTER OF INTENT as of the date first above written.

ENVIROPAK MEDICAL PRODUCTS, INC.

By [Signature]
Duly Authorized Officer

Notes

Settlement / organization / eli / [Signature]

seems this out of company

Money slip away / gracefully

we treat

hold other offers

Pass on to Jack

they cut a deal

He would

send

2000

Tab 8

CERTIFIED COPY

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

-000-

JOHN DISTON,)

Plaintiff,)

vs.)

ENVIROPAK MEDICAL PRODUCTS)
INC., a Utah corporation,)
et al.,)

Defendants.) Civil No. 92 090 2269 CN

-----) Deposition of:

ENVIROPAK MEDICAL PRODUCTS) Rochelle Mills-LaRocca
INC., a Utah corporation,)

Counterclaimant,) Judge Frank G. Noel
)

vs.)

JOHN DISTON,)

Counterdefendant.)
)

-----)

TRACI L. RAMIREZ, RPR, CSR, NP



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BE IT REMEMBERED that on the 8th day of July, 1993, the deposition of Rochelle Mills-LaRocca, produced as a witness herein at the instance of the defendants herein, in the above-entitled action now pending in the above-named court, was taken before Traci L. Ramirez, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah, commencing at the hour of 2:25 p.m. of said day, at the offices of Kruse, Landa & Maycock, Eighth Floor, Bank One Tower, 50 West Broadway, Salt Lake City, Utah.

That said deposition was taken pursuant to notice.

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A P P E A R A N C E S

For the Plaintiff: Neil R. Sabin
NIELSEN & SENIOR
Attorneys at Law
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

For the Defendants: Ellen Maycock
David C. Wright
KRUSE, LANDA & MAYCOCK
Attorneys at Law
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

Also Present: John Diston

-000-

I N D E X

<u>Witness</u>	<u>Page</u>
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Examination by Ms. Maycock	4
Examination by Mr. Sabin	34
Further Examination by Ms. Maycock	72

-000-

E X H I B I T S

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No. 2	Letter of Intent	9
No. 3	Organization Agreement	12
No. 4	Employment Proposal	23
No. 5	1/9/92 Correspondence	26
No. 6	4/29/92 Correspondence	27

1 Saturday, when you met with Mr. Ninow and Mr. Diston
2 about EnviroPak?

3 A EnviroPak actually wasn't even -- I knew it as
4 Pinnacle. He had become involved with Pinnacle, and he
5 was very excited. And he said that we would be coming to
6 work for him and, hopefully, that we would get to meet the
7 key players there in a relative amount of time.

8 Q So as of September 20th, 1991, had you met
9 anybody from Pinnacle?

10 A Uh-uh (negative).

11 Q Had you dealt with anybody on behalf of
12 EnviroPak or Pinnacle other than Fred Ninow?

13 A Not yet, no.

14 Q Okay. When you say you talked about salary and
15 how long your employment contract would be, and so on, you
16 had only talked to Fred Ninow about that?

17 A Originally, yeah.

18 Q As of the time he gave you this, he's the only
19 person you talked to?

20 A Right.

21 Q Did he show you anything else, at that point?

22 A He showed me his contract that told us that he
23 had the authority to be giving me a letter of intent.

24 (Whereupon, marked Deposition Exhibit 3 for
25 identification.)

1 can't ask John these answers, can I?

2 Q No. We know what he thinks. We want your
3 memory.

4 A Okay.

5 Q If it might help, I think there were some trials
6 of the products that Mr. Ninow was selling in the spring
7 of 1991. Is that when you met him?

8 A Right. I met him through the hospital, working
9 with him on the trials.

10 Q Did there come a time when you began to talk to
11 Mr. Ninow about going to work with him, or for him, or for
12 a company he was associated with?

13 A Yes.

14 Q When did you begin to talk to him about that?

15 A I think it was about a month after I met him.

16 He came to me and asked if I would be interested --
17 because I was so interested in the product, if I might be
18 interested in working for him. And I said that I would
19 be.

20 Q At that time, who would you have been working
21 for, a particular company?

22 A He was trying to get this business together, and
23 I guess it would have been him. He was affiliated with a
24 company called Professional Medical before he became
25 affiliated with Pinnacle. So I was just interested in

1 working with the product. There was a lot of change and a
2 lot of stuff going on as far as -- I didn't really know
3 who I would be working for.

4 Q We should probably clarify for the record what
5 product we're talking about.

6 A Reusable products, reusable surgical products:
7 gowns, drapes, things of that nature.

8 Q As I understand it, the thing that was different
9 from what you had been doing in the operating room at Holy
10 Cross was that the surgical gowns, and so on, had been
11 disposable.

12 A Right.

13 Q And these products that Mr. Ninow was working
14 with were taken out and sterilized and laundered and used
15 again?

16 A Exactly. It was the whole process.

17 Q Okay. When you first began to talk to Mr. Ninow
18 about employment, did you talk about how much money you
19 would make, what your job would be?

20 A We talked about what the job would be. He said
21 there was going to be some changes happening within the
22 company, and he may be starting another company. And so I
23 was real interested on what those changes would be. We
24 had originally gotten together with some other people to
25 talk about doing it on our own, but it looked like a

1 Exhibit 2 a document that's entitled "Letter of Intent to
2 Enter Employment Agreement." That's one of the documents
3 you brought with you today, is it not?

4 A Uh-huh (affirmative).

5 Q Tell me how you got ahold of that document to
6 begin with.

7 A Actually, I got this document at the same time
8 that John got his. We met with Fred on a Saturday
9 afternoon. He brought it out and filled it out in front
10 of us, and signed it.

11 MR. SABIN: Do you have a copy?

12 MR. WRIGHT: Did you get all of the pages?
13 There's writing on the back.

14 THE WITNESS: Oh, but that was another
15 conversation.

16 Q (By MS. MAYCOCK) We've got a meeting with you,
17 Fred Ninow, and John Diston --

18 A Uh-huh (affirmative).

19 Q -- on a Saturday afternoon?

20 A Uh-huh (affirmative).

21 Q Can you give me an approximate date?

22 A It was the date that this was signed. I'm sure
23 September 20th is a Saturday, if we looked back for '91.

24 Q Where were you?

25 A We were at John Diston's house.

1 Q You said, I think, that Fred Ninow filled it
2 out.

3 A Well, he had to obviously do this. We said that
4 we wanted something from him to see that he was serious
5 about a job possibility.

6 Q So did he prepare it right there that day?

7 A No. He had this with him. We had told him what
8 we had talked about. I had told him what I had talked
9 about. And then I don't know when he did this. But he
10 had this with him that day, and he filled it out for us,
11 basically just by signing.

12 Q When you say you had told him what you had
13 talked about, tell me what you mean by that.

14 A Well, I had talked about a three-year
15 compensation, salary rates, things like that.

16 Q With Mr. Ninow?

17 A Uh-huh (affirmative).

18 Q So there had been some discussions between you
19 and Mr. Ninow prior to this Saturday meeting?

20 A A lot of discussions.

21 Q About you going to work for EnviroPak?

22 A Uh-huh (affirmative).

23 Q Or some company?

24 A Yeah, with the reusables.

25 Q Okay. What did you know on that day, that

1 Saturday, when you met with Mr. Ninow and Mr. Diston
2 about EnviroPak?

3 A EnviroPak actually wasn't even -- I knew it as
4 Pinnacle. He had become involved with Pinnacle, and he
5 was very excited. And he said that we would be coming to
6 work for him and, hopefully, that we would get to meet the
7 key players there in a relative amount of time.

8 Q So as of September 20th, 1991, had you met
9 anybody from Pinnacle?

10 A Uh-uh (negative).

11 Q Had you dealt with anybody on behalf of
12 EnviroPak or Pinnacle other than Fred Ninow?

13 A Not yet, no.

14 Q Okay. When you say you talked about salary and
15 how long your employment contract would be, and so on, you
16 had only talked to Fred Ninow about that?

17 A Originally, yeah.

18 Q As of the time he gave you this, he's the only
19 person you talked to?

20 A Right.

21 Q Did he show you anything else, at that point?

22 A He showed me his contract that told us that he
23 had the authority to be giving me a letter of intent.

24 (Whereupon, marked Deposition Exhibit 3 for
25 identification.)

1 A Yeah. I mean, I didn't read it from cover to
2 cover obviously, but this looks -- this is the one,
3 because I remember his salary.

4 Q So we're clear on the record, you think what he
5 showed you in your meeting on September 20th is the
6 "Executive Employment Agreement"?

7 A Yeah.

8 Q Okay. The Exhibit 2 that we've talked about,
9 the "Letter of Intent to Enter Employment Agreement," I
10 assume when Fred Ninow gave it to you, it didn't have any
11 handwriting on it.

12 A No, it didn't.

13 Q Did you write that at a later time?

14 A I wrote this at a later time when I was trying
15 to decide if it was something -- I have a consultant that
16 I work with when I'm going to be making major life
17 changes, and he was who I talked with on the phone. So I
18 just wrote on there --

19 Q You mean before you decided whether you wanted
20 to go to work for EnviroPak, you talked to a consultant?

21 A Yeah.

22 Q That's when you made your notes?

23 A Right. It was in the evening. I can't even
24 remember when.

25 Q Give me a time frame. Within a few days after

1 A I met Rock and I met Todd and I met Rex. Those
2 are the ones that I remember most vividly. And some of
3 the stockholders.

4 Q What did you do at the meeting?

5 A I sat up at the front. There was like a table
6 at the front, and I sat up there. And when it came
7 time -- they had a question and answer period, and I
8 answered questions about my experience with the product.
9 And I also opened up a disposable pack and a reusable pack
10 so they could see the difference of how much waste you
11 would have with the disposable versus a reusable.

12 Q How were you introduced?

13 A Gosh, I feel like I should have just written
14 every single thing down.

15 Q Well, none of us do that.

16 A I think I was introduced as Rochelle Mills,
17 minor surgery coordinator of Holy Cross Hospital.

18 Q Was John Diston also there?

19 A Yes, he was.

20 Q How was he introduced?

21 A Probably -- I would have to say he was probably
22 introduced as the assistant director of the operating
23 room, I think.

24 Q But you were both introduced as people from Holy
25 Cross?

1 A Right.

2 Q Not from EnviroPak?

3 A Oh, no.

4 Q At that time, did you talk to Todd Crosland or
5 Rock Schutjer or Rex Crosland about working for EnviroPak?

6 A No. It wouldn't have been appropriate, at that
7 time. There was no privacy. It was too busy.

8 Q When was the first time that you talked to any
9 of those people about working for EnviroPak?

10 A It was after I had given my notice, and Fred
11 called me up and said, You need to meet with more key
12 players. So that's when I met with them.

13 Q You went to their offices?

14 A Uh-huh (affirmative).

15 Q Who did you meet with?

16 A I met Todd and I met Rock.

17 Q Was Fred in the meeting also?

18 A Uh-huh (affirmative).

19 Q What did you talk about? Let me ask you, first,
20 if you can give me a date.

21 A Oh, gosh. I can't. What was talked about was
22 they said that they wanted me to come to work for them.
23 And it was during that meeting I realized that Fred might
24 not have as much power as he had alluded to. Because they
25 never saw this, this agreement. And we talked money, and

1 we talked about the possibility of coming to work for
2 them. And we set a date.

3 Q Okay. When you say "they never saw this," is
4 that something they said in the meeting, that they had not
5 seen your letter of intent that's Exhibit 2?

6 A No. It was just that when I went into the
7 meeting, it became apparent that Fred didn't have quite as
8 much power as he said he did. And so I didn't think it
9 would be in my best interest to mention this at the time.
10 So I didn't.

11 Q So it wasn't talked about?

12 A It wasn't talked about. And they offered me a
13 job. So I felt like I was okay, thus writing all over
14 this. Obviously, if I thought it was an important
15 document, I probably wouldn't have.

16 Q Well, the handwriting, had you done that before
17 or after you met with Todd and Rock?

18 A I think this was before I met with them.

19 Q Because you just said something about, you
20 wouldn't have written all over it if you thought it was
21 important.

22 A Well, yeah. Because after I met with them and
23 they did a letter of intent, or whatever you want to call
24 it that you see attached there, that's what they did. So
25 I thought, Well, I've got that. And this was laying on

1 the counter when I was taking some notes on the telephone.

2 Q So it got to be the note pad?

3 A That's right. Everything that's close to me, I
4 grab.

5 Q That's what happens in my house.

6 MS. MAYCOCK: Let's mark this.

7 (Whereupon, marked Deposition Exhibit 4 for
8 identification.)

9 Q (By MS. MAYCOCK) We've marked as Deposition
10 Exhibit 4 a document that's entitled "Employment Proposal
11 for Rochelle Mills," and it's signed by Todd Crosland. Is
12 that what came out of your meeting with Todd Crosland and
13 Rock Schutjer and Fred Ninow?

14 A Right.

15 Q Were there differences between that employment
16 proposal and the terms that were on the letter of intent?

17 A There were. The original letter of intent was
18 for three years, and they were not willing to do that.
19 They only wanted to go for one year.

20 Q What else?

21 A I think other than that, it was basically the
22 same. They paid for expenses, automobile. Oh, no. I did
23 not get stock options, and I originally talked about stock
24 options with Fred. So I didn't receive any stock options.
25 And we had originally talked about what you would make the

1 first year, what you would make the second year, and what
2 you'd make the third year, and that is not in the --
3 actually, it's not in either of them.

4 Q But you had discussed with Fred Ninow that you
5 would have annual increases, or something like that?

6 A Right, yeah, if everything went the way we
7 wanted it to.

8 Q The other difference that would seem to me to
9 exist is, Exhibit 4 has a job description, and the letter
10 of intent, Exhibit 2, doesn't describe what your duties
11 were or what your title would be.

12 A That's true.

13 Q When did you begin to work for EnviroPak?

14 A I think that it was October 24th. The same day
15 that I quit Holy, I went to work for EnviroPak. I worked
16 a half a morning at Holy, and then I worked at EnviroPak.

17 Q No days off, huh?

18 A No, I didn't take any time off.

19 Q After you met with Todd and Rock and Fred Ninow,
20 and I think you said you found that Fred Ninow didn't have
21 as much power to do things as you had previously thought,
22 did you report that to John Diston?

23 A What I said to John was that it didn't go the
24 way that I had originally thought that it would go.
25 Because Fred had talked money with me. But then when push

1 came to shove, it was actually Rock who was the one that
2 discussed money. I told John after my meeting that it
3 didn't go exactly the way I wanted, but that I was hired.

4 Q How soon after the meeting did you tell this to
5 John?

6 A Well, the meeting was during my workday. So I
7 left work to go to the meeting, and came back and saw him
8 later.

9 Q So that very same day?

10 A Yeah.

11 Q Did you tell him something to the effect that,
12 Fred Ninow wasn't the sole decisionmaker about these
13 issues of salary and terms of employment?

14 A I can't really remember exactly what I said. I
15 think I just told him that the meeting didn't go exactly
16 as I had planned, but that I was hired.

17 Q Did you give him any advice about his future
18 employment?

19 A Not really. I knew that he was hoping to come
20 to work for them. But when I had the interview, even
21 though John and I had worked really closely together and
22 we were with Fred, we weren't really being hired as a
23 team. So, obviously, I didn't bring his name up when I
24 was interviewing for myself.

25 Q Did you tell John that the terms you got hired

1 on were different from those in the letter of intent?

2 A Uh-huh (affirmative).

3 Q You told him that that same day?

4 A Uh-huh (affirmative).

5 Q We're thinking this meeting is the second or
6 third week of October?

7 A Yeah.

8 Q Is Exhibit 4 the only written agreement that you
9 had with EnviroPak about your employment?

10 A Uh-huh (affirmative).

11 Q Please say yes or no. It's easier for the court
12 reporter.

13 A I'm sorry. I've never done this before.

14 Q Sometimes those uh-huhs and uh-uhs --

15 A I keep wondering what she's doing on there.

16 Q Let me ask you a couple of other things.
17 (Whereupon, marked Deposition Exhibit 5 for
18 identification.)

19 Q (By MS. MAYCOCK) What we've marked as
20 Deposition Exhibit 5 is another document you brought with
21 you today.

22 A Uh-huh (affirmative).

23 Q It seems to be a letter dated January 9, 1992,
24 to a mortgage company. Was this verification of
25 employment, that kind of thing?

1 A Oh, yeah. They were all -- they were great to
2 work for.

3 Q Other than that meeting we've talked about at
4 Little America with Pinnacle shareholders, and so on, did
5 you attend any meetings with stockholders, anything else
6 like that?

7 A You mean just like that one?

8 Q Or kind of like that one.

9 A I attended -- I think it was one or two stock
10 meetings, but I wasn't -- I was just there as an observer,
11 because I had some stock in the company.

12 Q You were more audience than show?

13 A Yeah. I only really did it one time.

14 Q And that was the one at Little America?

15 A Uh-huh (affirmative).

16 Q Do you think you ever saw the "Organization
17 Agreement" that we marked as Exhibit 3, before today?

18 A I don't think it was this one. Because the one
19 that I vividly recall seeing was on my way down to Las
20 Vegas, and that was what he had made that had the \$100,000
21 a year.

22 Q Now I'm confused. The "Executive Employment
23 Agreement"?

24 A Yeah.

25 Q You think you saw that on the way to Las Vegas?

