

1994

# John Diston v. Enviropak Medical Products Inc., a Utah Corporation, and surgical Technologies Inc., formerly, Oinnacle Envirnomental, Inc., a Delaware Corporation : Brief of Appellee

Utah Court of Appeals

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JOHN DISTON,

Plaintiff/Appellee/Cross-  
Appellant,

**v.**

ENVIROPAK MEDICAL PRODUCTS INC.,  
a Utah corporation, and SURGICAL  
TECHNOLOGIES INC., formerly,  
PINNACLE ENVIRNOMENTAL, INC., a  
Delaware Corporation.

Defendants/Appellants/  
Cross-Appellants.

Court of Appeals  
No. 940062-CA

Priority 15

## BRIEF OF APPELLEE

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE DAVID ROTH  
DISTRICT JUDGE (RETIRED)

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UTAH COURT OF APPEALS  
1967

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	iv
JURISDICTION OF THE APPELLATE COURT . . . . .	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW . . . . .	1
DETERMINATIVE STATUTES . . . . .	1
STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS . . . . .	2
A. Nature of the Case. . . . .	2
B. Course of Proceedings. . . . .	2
C. Statement of Facts. . . . .	3
SUMMARY OF ARGUMENT . . . . .	9
I. DEFENDANTS HAVE FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT. . .	9
II. THE TRIAL COURT CORRECTLY FOUND THAT MR. DISTON'S EMPLOYMENT AGREEMENT CONSTITUTES AN ENFORCEABLE AGREEMENT. . . . .	9
III. THE TRIAL COURT, HAVING FOUND THAT ENVIROPAK WAS THE ALTER-EGO OF SURGICAL, ERRED IN TERMINATING THE DAMAGES AS OF THE DATE ENVIROPAK CEASED BUSINESS. .	11
IV. THE TRIAL COURT IMPROPERLY REFUSED TO AWARD THE MONTHLY CAR ALLOWANCE PROVIDED FOR IN THE CONTRACT. . . . .	11
ARGUMENT . . . . .	12
I. DEFENDANTS HAVE FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT. .	12
II. THE TRIAL COURT CORRECTLY FOUND THAT MR. DISTON'S EMPLOYMENT AGREEMENT CONSTITUTES AN ENFORCEABLE AGREEMENT. . . . .	15
A. The Employment Agreement Contains all Essential Elements and is an Enforceable Contract. . . . .	15
B. Both Parties who Negotiated the Employment Agreement Intended, and Consider, the Agreement to be Binding. . . . .	18

C.	The Statute of Frauds Does Not Render the Employment Agreement Unenforceable. . . . .	20
D.	Mr. Ninow Had Both Actual and Apparent Authority to Bind EnviroPak, Making it Reasonable for Mr. Diston to Rely Upon Mr. Ninow's Authority. . . . .	24
III.	THE TRIAL COURT, HAVING FOUND THAT ENVIROPAK WAS THE ALTER-EGO OF SURGICAL, ERRED IN TERMINATING THE DAMAGES AS OF THE DATE ENVIROPAK CEASED BUSINESS. .	28
IV.	THE TRIAL COURT IMPROPERLY REFUSED TO AWARD THE MONTHLY CAR ALLOWANCE PROVIDED FOR IN THE CONTRACT. . . . .	33
CONCLUSION	. . . . .	35
CERTIFICATE OF SERVICE	. . . . .	36
INDEX TO ADDENDUM	. . . . .	37

## TABLE OF AUTHORITIES

<u>Abba v. Smyth</u> , 59 P. 756 (1899) . . . . .	23
<u>Air Service Co. v. Sheehan</u> , 594 P.2d 1155, 1156 (Nevada 1979) .	23
<u>Amfac Foods, Inc. v. Intern Systems and Controls Corp.</u> , 630 P.2d 868 (Or. App. 1981) . . . . .	32
<u>Anderson v. Board of Trustees</u> , 681 P.2d 1326, 1331 (Wy. 1984) .	17
<u>Barker v. Francis</u> , 741 P.2d 548 (Utah App. 1987) . . . . .	22
<u>Beehive Brick v. Robinson Brick Company</u> , 780 P.2d 827 (Ct. App. Utah 1989) . . . . .	24
<u>Bekins Bar V Ranch v. Huth</u> , 664 P.2d 455 (Utah 1983) . . . . .	32
<u>Biesinger v. Behunin</u> , 584 P.2d 801 (Utah 1978) . . . . .	32
<u>Birdzell v. Utah Oil Refining Co.</u> , 242 P.2d 578 (Utah 1952) . .	24
<u>Bradshaw v. McBride</u> , 649 P.2d 74 (Utah 1982) . . . . .	24
<u>Bunnell v. Bills</u> , 368 P.2d 597 (Utah 1962) . . . . .	16,17,22
<u>C.J. Realty, Inc. v. Willey</u> , 758 P.2d 923 (Utah App. 1988) .	21,22
<u>Chatterly v. Omnico, Inc.</u> , 485 P.2d 667 (Utah 1971) . . . . .	31
<u>Coleman Engineering v. North American Aviation</u> , 420 P.2d 713, 720 (Cal. 1966) . . . . .	17
<u>Collette v. Goodrich</u> , 231 P.2d 730 (Utah 1951) . . . . .	24
<u>Colman v. Colman</u> , 743 P.2d 782 (Utah App. 1987) . . . . .	30
<u>Davison v. Robbins</u> , 517 P.2d 1026 (Utah 1973) . . . . .	24
<u>Engineering Associates, Inc. v. Irving Place Associates, Inc.</u> , 622 P.2d 784 (Utah 1980) . . . . .	24
<u>Estate of Bonnie</u> , 600 P.2d 548 (Utah 1979) . . . . .	22
<u>Gilbert v. Nampa School Dist. No. 131</u> , 657 P.2d 1 (Idaho 1983)	17
<u>Gillmor v. Gillmor</u> , 745 P.2d 461 (Utah App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988) . . . . .	13

<u>Gilmore v. Salt Lake Area Community Action Program,</u> 775 P.2d 940 (Utah App. 1989) . . . . .	16
<u>GM Development Corporation v. Community Mortgage Corp.,</u> 795 P.2d 827 (Ariz. App. 1990) . . . . .	27,28
<u>Grayson Roper Ltd. v. Finlinson,</u> 782 P.2d 467 (Utah 1989) . .	1,13
<u>Machan Hamshire Properties, Inc. v. Western Real Estate &amp; Development Co.,</u> 779 P.2d 230 (Utah App. 1989) . . . . .	23
<u>Martin v. Scholl,</u> 678, P.2d 274 (Utah 1983) . . . . .	21
<u>Memorial Hospital Assoc. v. Pacific Grape,</u> 45 Cal.2d 634, 290 P.2d 481 (Cal. 1955) . . . . .	27
<u>Ney v. Harrison,</u> 299 P.2d 1114 (Utah 1956) . . . . .	22
<u>Northern Illinois Gas Co. v. Total Energy Leasing Corp.,</u> 502 F.Supp. 412 (N.D. Ill. 1980) . . . . .	32
<u>Reid v. Alvey,</u> 610 P.2d 1374 (Utah 1980) . . . . .	22
<u>Resource Management Co. v. Weston Ranch and Livestock Co., Inc.,</u> 706 P.2d 1028 (Utah 1985) . . . . .	22
<u>Rio Algom Corp. v. Jimco, Ltd.,</u> 618 P.2d 497 (Utah 1980) . . .	24
<u>Robb v. Anderton,</u> 863 P.2d 1322 (Utah App. 1993) . . . . .	13
<u>Saunders v. Sharp,</u> 806 P.2d 198 (Utah 1991) . . . . .	13
<u>Skyland Food Corp. v. Meier,</u> 382 P.2d 996 (Colo. 1963) . . . .	27
<u>Southland Corp. v. Potter,</u> 760 P.2d 320 (Utah App. 1988) . . .	24
<u>Sucia v. Amfac Dist,</u> 675 P.2d 1333 (Ariz. App. 1983) . . . . .	23
<u>Transamerica Cash Reserve v. Dixie Power,</u> 789 P.2d 24 (Utah App. 1990) . . . . .	30
<u>Valcarce v. Bitters,</u> 362 P.2d 427 (Utah 1961) . . . . .	24

**STATUTES**

Utah Code Ann. §25-5-8 . . . . .	1
Utah Code Annotated §25-5-4(1) . . . . .	1
Utah Code Ann. § 78-2a-3(2)(k) . . . . .	1

**OTHER AUTHORITY**

Rule 52(a) Utah Rules of Civil Procedure . . . . .	1
§61(a)(1) Internal Revenue Code of 1986 . . . . .	34
§162 Internal Revenue Code of 1986 . . . . .	34
IRS Regs. §1.61-21(a)(1) . . . . .	34
IRS Regs. § 1.162-1 . . . . .	34



### JURISDICTION OF THE APPELLATE COURT

The Utah Court of Appeals has jurisdiction over this appeal under Utah Code Ann. §78-2a-3(2)(k) as a case poured over from the Utah Supreme Court.

### STATEMENT OF ISSUES AND STANDARD OF REVIEW

In addition to Appellants' statements of issues, the following also are at issue:

A. Whether the trial court, having found and held that EnviroPak was the alter-ego of Surgical, erred in terminating the accrual of damages as of the date EnviroPak's business activities ended, rather than awarding damages through the entire agreed contract term when Surgical has continued to exist during all relevant times.

Standard of Review: Correction of Error. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989).

B. Whether the trial court erred in finding that Mr. Diston was not able to recover damages for the agreed-upon, and fixed amount of, automobile allowance absent evidence of the amount for which the automobile would be used for the business.

Standard of Review: Clear error. Rule 52(a) Utah Rules of Civil Procedure.

### DETERMINATIVE STATUTES

The only statute at issue herein is the statute of frauds, Utah Code Annotated §25-5-4(1) and §25-5-8.

### STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

A. Nature of the Case. Mr. John Diston, Plaintiff below and Appellee/Cross-Appellant herein ("Mr. Diston"), generally accepts the "Statement of the Case" contained in Appellants' Brief.

B. Course of Proceedings. Mr. Diston accepts the Appellants' Statement of "Course of Proceedings and Disposition Below," except as to the following additional points:

Mr. Diston filed a notice of cross-appeal on December 1, 1993 (R539)<sup>1</sup>. EnviroPak Medical Products, Inc. ("EnviroPak") and Surgical Technologies, Inc., formerly known as Pinnacle Environmental, Inc. ("Surgical"), Defendants below and Appellants/Cross-Appellees herein (collectively, "Defendants") have not addressed Mr. Diston's cross-appeal in their brief. Mr. Diston cross-appeals upon two issues: First, while the trial court found that EnviroPak was merely the alter ego of Surgical, the court did not award damages for the full contract period during which Surgical and/or its alter-ego EnviroPak were doing business; Second, the court declined to award damages for an agreed fixed sum of a car allowance on the rationale that no evidence was before the court as to the percentage of time or use Mr. Diston was required to use the car in connection with Mr. Diston's employment.

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<sup>1</sup> Citations to the findings of fact are denoted "FF," followed by its paragraph number. References to exhibits are denoted "Ex," followed by the number. Other citations to the Record are denoted "R," followed by the page number and other identifying information as appropriate. The main three contract exhibits, the Findings of Fact and Conclusions of Law and the Judgment are attached hereto as Addenda.

C. Statement of Facts. In late 1990 and early 1991, Frederick P. Ninow ("Mr. Ninow") was employed with a company named Professional Medical (FF6). During this time, Mr. Ninow began planning and efforts for the manufacture and marketing of pre-packaged surgical supply packets featuring principal components to be laundered, sterilized and prepacked for repeated use in surgical and other health care procedures (FF7, R581). During his process of planning, Mr. Ninow became acquainted with, and approached, John Diston ("Mr. Diston") for ideas and suggestions; and this developed into Mr. Ninow's determination to form his own company for that purpose (FF8,9; R580-582). At that time, Mr. Diston was employed by Holy Cross Hospital as Director of Peri-Operative Services (FF5; R24); and he was happy in that job and had exceptional job performance evaluations (R579). As a result of the discussions, Mr. Ninow and Mr. Diston ultimately agreed that Mr. Diston would be a key employee of the company, to serve as Director/Operations, which included being vice-president of quality control and production (FF10; R604, 639, 751, 762).

In the Summer of 1991, to obtain funding to proceed with marketing and sale of these products, Mr. Ninow met with principals of Surgical Technologies, Inc. ("Surgical") (FF12), a publicly-traded company having other subsidiaries (R665-66,688,690). These meetings led to agreement for Surgical to form EnviroPak Medical Products, Inc. ("EnviroPak"), as a wholly-owned subsidiary of Surgical to manufacture and market the products (FF13). Pursuant to

documentation prepared by Surgical's counsel and at Surgical's direction, EnviroPak was incorporated as a wholly-owned subsidiary of Surgical (FF14,16).

Mr. Ninow and Surgical, on September 19, 1991, entered into an Organization Agreement to establish EnviroPak (FF15; Ex1). This Organization Agreement was unique as far as Surgical's dealings with its other subsidiaries (R702). The Organization Agreement provided, among other things, that Mr. Ninow would be director, chairman of the board, and president of EnviroPak and that EnviroPak would enter into an Executive Employment Agreement with Mr. Ninow contemporaneous with the execution of the Organization Agreement (FF16; Ex1). Mr. Ninow, in the negotiations, insisted that EnviroPak have considerable autonomy in operation (FF16; R703, 750); and such a provision was inserted in the Organization Agreement (R703; Ex1,13).

At the same time as the Organization Agreement was prepared, Mr. Ninow, Surgical and EnviroPak agreed upon an Executive Employment Agreement in the form normally used by Surgical (FF19; R757; Ex2). That Executive Employment Agreement provides, among other things, that Mr. Ninow would serve at the pleasure of, and with such additional duties provided by, either EnviroPak or any parent of that company (FF20;Ex2). It further provides that Mr. Ninow was employed as president, as director, as chairman of the board of directors, and as chief operating executive, with "all of the rights, powers and obligations normally associated with such position" (FF20; Ex2).

In order to enter into the agreements among Surgical, EnviroPak and Mr. Ninow, Todd Crosland (son of Surgical's president and chairman of the board) signed both the Organization Agreement and the Executive Employment Agreement as "president" of EnviroPak, absent any resolution of the directors, but with Defendants accepting his authority (R688,696-97).

On the same date the Organization Agreement was signed, Surgical prepared and distributed a public news release concerning EnviroPak's formation (FF21; Ex5). Surgical always tried to make sure its press releases were accurate (R692A), and it was the purpose of that press release to tell people what had happened with EnviroPak (R699). That public release referred to Mr. Mr. Ninow's role on behalf of EnviroPak as president (as referred to in the Organization Agreement and in the Executive Employment Agreement) and as CEO (as referred to only in the Executive Employment Agreement) (FF21; R704; Ex5).

During all times leading to EnviroPak's incorporation, Mr. Ninow kept Mr. Diston informed, expecting and understanding that Mr. Diston would be employed as a key EnviroPak employee (FF22). Mr. Ninow also showed Mr. Diston a portion of the Organization Agreement showing Mr. Ninow's offices as director, chairman and president of EnviroPak (R602, 642, 647) as well as a copy of his own Executive Employment Agreement which also showed Mr. Ninow as chief operating executive (R760).

On September 19, 1991, the same day as the signing of the Organization Agreement and of publication of the public news release,

Mr. Ninow, without knowledge of Surgical principals, delivered to Mr. Diston a signed Letter of Intent to Enter Employment Agreement (the "Employment Agreement") (FF23,26; Ex3). That Employment Agreement provided that EnviroPak would employ Mr. Diston for three years commencing on or before October 31, 1991, and that Mr. Diston 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 (FF27; Ex3). Mr. Diston and Mr. Ninow subsequently agreed and clarified that the automobile allowance was to be a fixed \$360.00 per month (FF29; R603, 647, 760) and that Mr. Diston's participation in the stock option program would be for 25,000 shares of the total 100,000 shares allocated from Surgical to EnviroPak for that purpose (R604, 619, 761). While Mr. Diston and Mr. Ninow contemplated subsequent entry into a more formal agreement, consistent with the Employment Agreement, both Mr. Ninow and Mr. Diston considered the Employment Agreement to be fully binding on Mr. Diston and on EnviroPak (FF28, 32; R760-62, 773).

Based upon the Organization Agreement and the publication of the public news release, Pinnacle and EnviroPak had vested Mr. Ninow with authority as chief operating executive, director, chairman of the board and president of EnviroPak; it was reasonable for Mr. Diston,

under these circumstances, to rely upon the authority of Mr. Ninow to bind EnviroPak under the Employment Agreement (FF33).

Mr. Diston, after receipt of EnviroPak's signed Employment Agreement, accepted the terms of that Agreement and informed Mr. Ninow that he accepted the agreement (R636, 804) and that he would give notice to terminate his employment at Holy Cross Hospital (FF30; R606, 762). On or about October 9, 1991, Mr. Diston, relying upon the Employment Agreement, notified Holy Cross Hospital of his intent to terminate his employment effective October 31, 1991 (FF31; R607; Ex7). Mr. Diston's reliance on his Employment Agreement with EnviroPak, and his termination of employment with Holy Cross Hospital, were reasonable under the circumstances (FF34). Both Mr. Ninow and Mr. Diston, the persons who negotiated the Employment Agreement, have at all times continued to consider the Employment Agreement binding upon Mr. Diston and on EnviroPak (FF32; R616, 634, 643, 761, 773, 803). EnviroPak, though, breached the Employment Agreement (F526).

After giving notice of termination to Holy Cross Hospital, Mr. Diston, for the first time, became aware of disputes between Surgical and Mr. Ninow and its effect on Mr. Diston's employment with EnviroPak (FF35; R609-10, 809). As a result, Mr. Diston asked Holy Cross Hospital if he could receive his job back. Holy Cross representatives informed Mr. Diston that Holy Cross had made arrangements and commitments with other personnel and was not able to reinstate the job (FF36; R610-11). Mr. Diston subsequently met with

Todd B. Crosland and Rockwell P. Schutjer (FF40; R59-60). During discussions, these Surgical and EnviroPak representatives offered Mr. Diston employment with EnviroPak for \$60,000, but without the other benefits Mr. Diston believed he was entitled to under the Employment Agreement (FF40). Moreover, Crosland and Schutjer refused to specify the nature of the employment duties, refused to consent to any written agreement, and merely offered an employee-at-will agreement (FF40; R615, 721). Accordingly, Mr. Diston declined this "offer" (F41). Under the circumstances, Mr. Diston reasonably rejected EnviroPak's proposed employment-at-will arrangement (FF42). Mr. Diston then obtained employment with FHP Health Care, commencing February 24, 1992 (FF45; R577, 617). EnviroPak ceased doing business December 31, 1992 (FF43).

The trial court found, as established by the Findings of Fact, that Surgical, as the sole shareholder of EnviroPak, failed to observe the separate corporation structures; provided for EnviroPak to be seriously undercapitalized, making it illusory and trifling; did not observe corporate formalities and separateness; was the sole source of funding for EnviroPak; and retained significant control over EnviroPak. This resulted in the reasonable and likely potential of inequitable results (FF37). As a result, EnviroPak was a hollow shell and an alter-ego of Surgical (R527).

The Court, therefore, held the substantive portions of the Employment Agreement enforceable, (R526) except that there was insufficient evidence to award damages for stock options and



incentive bonus (FF49). There being no evidence as to the amount of actual car usage to be made in connection with EnviroPak's business, the court refused to award damages for the agreed-upon monthly car allowance of \$360.00 per month (FF50). Since EnviroPak was merely an alter-ego of Surgical, the Court ruled that both companies, therefore, were jointly and severally liable for the damages to Mr. Diston; but the Court awarded damages only to the date EnviroPak ceased business and not for the entire term of the Employment Agreement.

The Court entered its final Findings of Fact and Conclusions of Law on November 16, 1993, entered judgment in favor of Plaintiff November 18, 1993, in the principal amount of \$54,834.60, plus pre-judgment and post-judgment interest. Defendants filed this appeal, and Mr. Diston cross-appealed.

#### **SUMMARY OF ARGUMENT**

**I. DEFENDANTS HAVE FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT.**

Because the Defendants have failed to marshall the evidence in support of the trial court's findings of fact, the Defendants have not met the necessary standard of review and cannot challenge the trial court's findings of fact and conclusions of law.

**II. THE TRIAL COURT CORRECTLY FOUND THAT MR. DISTON'S EMPLOYMENT AGREEMENT CONSTITUTES AN ENFORCEABLE AGREEMENT.**

Mr. Fred Ninow, on behalf of EnviroPak, and pursuant to his discussions with John Diston, prepared an employment agreement for

Mr. Diston's employment with EnviroPak. That agreement, as clarified by the negotiators, provided for a three year employment term, a \$72,000 annual salary, the times of payment, provisions for potential raises, a \$360.00 per month car allowance, participation in the company's health insurance program, two weeks paid vacation and participation in an incentive compensation pool and stock option program. Both Mr. Ninow and Mr. Diston also understood and agreed that Mr. Diston's role at the company would be as director/operations, which included the vice president of quality control and production. Mr. Diston, in reliance on that agreement, terminated his prior employment with Holy Cross Hospital.

The Employment Agreement contains all of the essential elements of Mr. Diston's employment with EnviroPak and constitutes an enforceable agreement. Both Mr. Ninow and Mr. Diston, the parties who negotiated the agreement, have consistently considered the agreement to be clear and enforceable; and Mr. Diston, in reliance on the agreement, terminated his employment with Holy Cross Hospital anticipating his employment with EnviroPak pursuant to the negotiated Employment Agreement. The terms of the employment agreement, the clarification by the parties of the terms not specifically spelled out (such as details of the amount of the car allowance and of the number of shares involved in the stock option) and Mr. Diston's reliance upon and performance under the Employment Agreement eliminate any question of unenforceability under the statute of frauds.

Mr. Ninow negotiated the agreement through the authority given him by the Defendants as president, chief operating executive, director, and chairman of the board of EnviroPak. These agreed-to offices cloak Mr. Ninow with both apparent and actual authority to bind EnviroPak to those agreements, and Mr. Diston reasonably relied upon Mr. Ninow's authority.

**III. THE TRIAL COURT, HAVING FOUND THAT ENVIROPAK WAS THE ALTER-EGO OF SURGICAL, ERRED IN TERMINATING THE DAMAGES AS OF THE DATE ENVIROPAK CEASED BUSINESS.**

The trial court found that Surgical, as the sole shareholder of EnviroPak, failed to observe the separate corporations' structure; provided for EnviroPak to be seriously undercapitalized which made the existence of EnviroPak illusory and trifling; did not observe corporate formalities and separateness; was the sole source of funding for EnviroPak; and retained significant control over EnviroPak. As a result, EnviroPak was merely a hollow shell and an alter-ego of Surgical. The court, having determined the existence of the alter-ego arrangement, though, incorrectly terminated the time for calculation of damages to the date EnviroPak ceased to do business. Since EnviroPak was merely the alter-ego of Surgical, Surgical continues to be liable for EnviroPak's obligations under the Employment Agreement throughout the entire term of the agreement.

**IV. THE TRIAL COURT IMPROPERLY REFUSED TO AWARD THE MONTHLY CAR ALLOWANCE PROVIDED FOR IN THE CONTRACT.**

Mr. Ninow and Mr. Diston agreed that, as part of Mr. Diston's compensation under the Employment Agreement, Mr. Diston would be paid a car allowance of \$360.00 per month. The trial court, though,

incorrectly reading into the contract, wrongfully determined that Mr. Diston, in order to be entitled to the car allowance, was obligated to prove the percentage of time of the use of the car in connection with his employment with EnviroPak.

The court, with no factual basis to make the determination, incorrectly determined as a matter of law that the car allowance required additional evidence and, there being no evidence as to percentage of usage, refused to enforce that allowance.

#### **ARGUMENT**

##### **POINT I**

##### **DEFENDANTS HAVE FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT.**

Defendants must either accept and rely upon the trial court's findings of fact in order to challenge its conclusions of law under the proposed "correction of error" standard of review or they must directly challenge the trial court's findings of fact under the "clearly erroneous" standard of review. In this case, Defendants approach this appeal as a re-trial by presenting the law as they see it and asking this Court to apply that law to their version of the facts. Defendants have presented many facts that are in conflict with the trial court's findings of fact, thereby implicitly challenging the trial court's findings of fact and invoking the "clearly erroneous" standard of review. Defendants cannot prevail on appeal because they cannot satisfy the applicable standard of review.

The well-established condition to challenging findings of fact is a complete marshalling of the evidence concerning the findings in

question. This Court recently summarized this requirement in Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993), as follows:

As a prerequisite to an appellant's attack on findings of fact, appellant must marshall all the evidence in support of the findings and demonstrate "that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings...." Grayson Roper Ltd., v. Finlinson, 782 P.2d 467, 470 (Utah 1989); See also [Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).] The marshaling requirement provides the meaningful and expedient review of facts challenged on appeal. See Wright v. Westside Nursery, 787 P.2d 508, 512 n.2 (Utah App. 1990).

Robb, 863 P.2d at 1328.

Defendants have provided no basis for this Court to overturn the facts upon which the trial court based its conclusions of law. Defendants have not identified the findings of fact that they are challenging. More importantly, they have not marshalled the evidence in support of the trial court's findings. Finally, they have not demonstrated that the marshaled evidence, and the reasonable inferences therefrom, when viewed in the light most favorable to the trial court's findings, is clearly erroneous, *i.e.*, it is against the clear weight of all such evidence and reasonable inferences. See Robb, 863 P.2d at 1327-1328, citing Reid, 776 P.2d at 899-900 and Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988). As a result, the facts as set forth in the court's findings must be affirmed by this Court. See also, Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991).

Defendants have implicitly challenged at least the following findings of fact upon which the trial court based its conclusions of

law that are the subject of Defendants' appeal: Mr. Diston was to be a member of the new company as Director/Operations (F10,22); the Organization Agreement, the Executive Employment Agreement and the press release made Mr. Ninow director, chairman of the board, president and chief operating executive of EnviroPak, "with all the rights, powers and obligations normally associated with such position" (FF16,20,21); EnviroPak was to have considerable autonomy in operation (FF16); Mr. Diston and Mr. Ninow specified that the agreed-on car allowance would be \$360.00 per month (Ff29); Mr. Diston told Mr. Ninow that he accepted the agreement, that he intended to give notice to Holy Cross Hospital of his termination, and that he relied on the Employment Agreement in terminating his Holy Cross employment (FF30,31); Mr. Diston and Mr. Ninow have always considered the Employment Agreement binding (FF32); Mr. Ninow believed, from the agreements with Surgical and EnviroPak, that he had authority to execute the Employment Agreement (FF24); Mr. Diston reasonably relied on Mr. Ninow's authority (FF33), and Mr. Diston's reliance on the Employment Agreement and his terminating his employment with Holy Cross Hospital were reasonable (FF34); Mr. Diston was not aware of any problems with the agreement until after he gave notice to Holy Cross (FF35); Mr. Diston was not able to get his Holy Cross job back (FF36); Surgical failed to observe separate corporate structure and operation for the two corporations by requiring Mr. Ninow to serve at the pleasure of the board of either corporation, by being the sole source of funding for EnviroPak, by grossly undercapitalizing

EnviroPak, by failing to maintain corporate formalities and separateness, and by creating the potential of inequitable results (FF37); and Mr. Diston reasonably rejected the subsequent proposed "offer" from Surgical and EnviroPak after disputes arose herein (FF40,41).

## **POINT II**

### **THE TRIAL COURT CORRECTLY FOUND THAT MR. DISTON'S EMPLOYMENT AGREEMENT CONSTITUTES AN ENFORCEABLE AGREEMENT.**

#### **A. The Employment Agreement Contains all Essential Elements and is an Enforceable Contract.**

Defendants challenge the Employment Agreement as insufficiently detailed and lacking essential elements to constitute an enforceable agreement. This assertion, though, is contrary to the findings in this case. The Defendants' assertion that the Employment Agreement lacks essential elements and details flies in the face of the trial court's specific conclusion -- after hearing the evidence -- that the Employment Agreement did contain the essential provisions of that employment arrangement and that it was a valid agreement (R526).

It is also significant that the Defendants rejected that agreement before they had even read its terms (R713, 715-17), raises questions regarding Defendants' credibility as they argue against the Employment Agreement's supposed indefiniteness or unenforceability, before they had even read its terms. Regardless, Defendants' position ignores the Court's findings as to the written terms of the agreement itself and, also, the oral understandings and agreements to clarify it and Mr. Diston's reasonable reliance thereon.

Mr. Diston's employment agreement with EnviroPak addressed all the essential elements and economic arrangements required in an employment agreement between parties -- the parties had agreed upon the three-year term of the agreement, the \$72,000 annual salary, the number and times the annual salary would be paid, potential raises, a car allowance, participation in the company's health insurance program, two weeks paid vacation, and participation in an incentive compensation pool and stock option program (FF27). Prior to Mr. Diston's acceptance of his Employment Agreement and his giving notice to Holy Cross Hospital of his termination of that employment, Mr. Diston and Mr. Ninow agreed that the car allowance was to be \$360.00 per month (FF29; R603,647,760). They further agreed that Mr. Diston's participation in the stock option program would be for 25,000 shares of the total 100,000 shares allocated from Surgical to EnviroPak for that purpose (R604,619,761).

With such specificity in the Agreement, as undisputedly testified to the negotiating parties, one may fairly ask what essential elements were not agreed to between the parties.

To determine the nature of an employment contract, courts require that the parties' intent and the totality of the circumstances be considered. Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940, 943 (Utah App. 1989).

Defendants, alleging that the Employment Agreement is only an agreement to agree, cite Bunnell v. Bills, 368 P.2d 597 (Utah 1962) for the proposition that a contract can be enforced only if the



obligations are set forth with sufficient definiteness in the writing. In Bunnell, it was argued that there was at most, an "agreement to agree" because the terms were not set forth with specificity. However, the Utah Supreme Court said:

[W]hen the receipt is interpreted under the circumstances that existed at the time of its creation, and in light of the conduct and statements of the parties, it is clear that the transfer of Bunnell's property was intended as part of the whole agreement. The fact that part of the performance is that the parties will enter into a contract in the future does not render the original agreement any less binding. (Citations omitted).

Bunnell, 368 P.2d at 600.

Furthermore, it is well settled that an agreement to make a written contract, where the terms are mutually understood and agreed to in all respects, is as binding as a more detailed written agreement would have been were it subsequently accepted.

Anderson v. Board of Trustees, 681 P.2d 1326, 1331 (Wy. 1984). Even if a contract contains a promise to agree, its enforceability depends on the relative importance and severability of the matters left to the future and is a question of degree to be settled by determining whether the terms to be decided in the future are so essential to the bargain that to enforce the promise strictly according to the settled terms would make the arrangement unfair. "Where the matters left for the future are unessential, each party will be forced to accept a reasonable determination ...". Coleman Engineering v. North American Aviation, 420 P.2d 713, 720 (Cal. 1966). See also, Gilbert v. Nampa School Dist. No. 131, 657 P.2d 1 (Idaho 1983).

**B. Both Parties who Negotiated the Employment Agreement Intended, and Consider, the Agreement to be Binding.**

The trial court found, upon consideration of all testimony and evidence, that the parties who negotiated the Employment Agreement intended it to be enforceable and, indeed, continue to consider it to be enforceable and binding (FF32; R616, 634, 643, 761, 773, 803). This case, therefore, differs from the normal dispute wherein one of the actual negotiating parties disputes an agreement's enforceability. Defendants in this case, attempting to overcome the negotiating parties' contrary testimony, take selected portions of that testimony out of context to assert that the negotiating parties really did not mean what they say they meant. Defendants, for example, quote selected testimony referring to the expectation that a subsequent, more formal, form of the agreement would be prepared. In doing so, Defendants ignore the consistent testimony that the Employment Agreement was considered binding and that any subsequent document was not a renegotiation of terms but, rather, would be solely to state the already agreed terms into a more formal form (R634). Defendants ignore the fact that, if Mr. Diston did not consider the agreement enforceable, he would not have quit his existing job with which he was happy (R579). Defendants, quoting selected testimony of Mr. Diston, also ignore Mr. Diston's other testimony:

Q (By Mr. Sabin) What was your attitude, as far as the agreement that you had entered into with Fred Ninow?

A I told -- I made the comment to them at that time that this did not spell out what is in my agreement. This is the agreement that they need to live up to. . . (R616)

Q Now, when Mr. Ninow gave you the letter of intent, and I think you have testified it was some time within a day or two of September 20th; is that right?

A Right.

Q Did you contemplate at that time 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.

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.

Q You testified this morning, I think, that you and Fred discussed it right then that same day that he gave you the letter of intent?

A Well, of course.

Q And you discussed a car allowance and all those things?

A Of course.

Q Why didn't you just write them down on the letter of intent, at that time?

A I felt it was a legal document and I didn't want to scribble on that document. (R634)

Q And did you then make inquiries yourself about whether you would be employed on the terms set forth in your letter of intent?

A No. I assumed that I would be. (R643)

Defendants also ignore Mr. Ninow's similar testimony which is consistent with Mr. Diston's understanding:

Q Was there any other discussion with John concerning the letter of intent?

A Yes. We discussed that it would. I showed him a copy of my employment agreement, and I told him that we would eventually have some type of another document that would be exactly like mine or very similar to mine, with some changes, of course, reflecting the arrangement.

Q Would it have changed the terms of what was in this letter of intent?

A. No. (R760)

**C. The Statute of Frauds Does Not Render the Employment Agreement Unenforceable.**

Defendants argue and, indeed, seem to imply that as a matter of law, that the statute of frauds precludes enforcement of the Employment Agreement. Defendants ignore the pertinent language of the statute of frauds:

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 . . .

Utah Code Ann. §25-5-4 (Emphasis supplied.)

The Defendants' assertion as to applicability of the statute of frauds also ignores the exception to the statute of frauds through Mr. Diston's part performance of the Employment Agreement. The pertinent language is:

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

Utah Code Ann. §25-5-8.

Mr. Diston quit his job with Holy Cross Hospital in order to begin his employment with EnviroPak (FF30,31), and was unable to get

that job back (FF35,36), when he later discovered there was a problem. Even absent the specificity of the written agreement, this partial performance "allows a court of equity to enforce an oral agreement, if it has been partially performed, notwithstanding the statute." Martin v. Scholl, 678, P.2d 274, 275 (Utah 1983).

The writing which evidences the parties' intent and entry into an enforceable agreement does not have to be a perfect written agreement. In C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988), this Court enforced a finder's agreement despite protestations that the statute of frauds precluded its enforcement because of ambiguities in the agreement. This Court stated:

In the present case, the written contract concerning the finder's agreement between the parties was a sufficient "note or memorandum" of the parties' agreement to satisfy the Statute of Frauds provision of Section 25-5-4(5). The contract includes the critical terms of the finder's agreement: it identifies the finder, the finder's clients, the property owner who will owe a commission to the finder if a transaction is closed with any of the finder's clients, and the commission rate . . . . [t]his agreement is ambiguous in one respect, namely, whether it applies to all properties sold by the owner to the finder's clients or just to certain properties.

Finding such an agreement to be a "sufficient note or memorandum, is not inconsistent with the Statute of Frauds." As one commentator has recognized:

[N]o writing or memorandum can ever be the complete and perfect witness sufficient in itself to establish the contract and its terms

. . . .

It seems clear that parole evidence is admissible to explain and apply a note or memorandum of an oral contract within the statute of frauds whenever it would be admissible for the purpose of interpreting or

determining the operation of an integrated contract or a writing that purports to be the operative expression of the will of its creator. Indeed, oral evidence is admitted with considerably greater liberality in cases under the statute than in cases of integrated contracts.

. . .

If the contract is ambiguous, "extrinsic evidence as to the parties' intent must be received and considered in an effort to glean what the parties actually agreed to." (Citations omitted) C.J. Realty, Inc., 758 P.2d at 928-929.

It is illustrative to sample other Utah cases in which the courts have found "ambiguous" contracts to be binding: Barker v. Francis, 741 P.2d 548 (Utah App. 1987) [upholding an earnest money agreement permitting extraneous evidence to specify the property description]; Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985) [reversing the lower court's holding of unenforceability and remanding for findings of fact]; Reid v. Alvey, 610 P.2d 1374 (Utah 1980) [enforcing a realty sale contract despite lack of specificity in property descriptions]; Estate of Bonnie, 600 P.2d 548 (Utah 1979) [sustaining the quieting of title by considering together three receipts as a sufficient memoranda to satisfy the statute of frauds and permitting the exact description of property to be determined by parole evidence]; Bunnell, supra, [upholding an earnest money receipt when part of the performance was to be entered into in the future]; Ney v. Harrison, 299 P.2d 1114 (Utah 1956) [upholding a commission under an earnest money receipt and a listing agreement after considering the oral agreement for

payment of commission]; Abba v. Smyth, 59 P. 756 (1899) [admitting parole evidence to permit enforcement of an oral agreement for employment].

Similar cases from other jurisdictions are also instructive. In Air Service Co. v. Sheehan, 594 P.2d 1155, 1156 (Nevada 1979), the court addressed a situation analogous to the case at bar. The parties had negotiated a contract to employ the plaintiff. And the plaintiff, in reliance upon that contractual agreement, had quit his job. Subsequently, the defendant refused to sign the documents and perform part of the contract. The court found that the parties had reached a complete oral agreement by which they were bound. Likewise, in Sucia v. Amfac Dist, 675 P.2d 1333 (Ariz. App. 1983), the defendants argued that, because an employment agreement did not detail the services to be performed or specify whether the employee was considered full or part-time, there was no meeting of the minds. The parties had agreed on a salary of \$40,000 per year, a car, group health and life insurance and 30 percent of the stock. The court held that employment contracts need not detail every condition of the employment and that the contract was sufficiently definite to be enforceable.

Defendants' supporting cases, contrary to the case at hand, arise where there was no written memorandum or where the contracts lacked essential elements. See, e.g., Machan Hamshire Properties, Inc. v. Western Real Estate & Development Co., 779 P.2d 230 (Utah App. 1989), [no written memorandum acknowledging or recognizing an

oral contract]; Southland Corp. v. Potter, 760 P.2d 320 (Utah App. 1988) [no enforcement of an easement or price absent a written memo]; Bradshaw v. McBride, 649 P.2d 74 (Utah 1982) [solely an oral contract to sell real property]; Engineering Associates, Inc. v. Irving Place Associates, Inc., 622 P.2d 784 (Utah 1980) [clear evidence that the parties did not intend legal consequences absent future formal written commitment]; Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497 (Utah 1980) [refusal to enforce rights not supported by a contract]; Davison v. Robbins, 517 P.2d 1026 (Utah 1973), [lands not specified]; Valcarce v. Bitters, 362 P.2d 427 (Utah 1961), [purported "side agreement" absent written memorandum]; Birdzell v. Utah Oil Refining Co., 242 P.2d 578 (Utah 1952) [oral sublease without rent specified]; Collette v. Goodrich, 231 P.2d 730 (Utah 1951) [oral agreement only]; Beehive Brick v. Robinson Brick Company, 780 P.2d 827 (Ct. App. Utah 1989), [order not authenticated by other party].

Accordingly, Defendants' authorities are not persuasive in the present case.

**D. Mr. Ninow Had Both Actual and Apparent Authority to Bind EnviroPak, Making it Reasonable for Mr. Diston to Rely Upon Mr. Ninow's Authority.**

It was reasonable, as the trial court found (FF33), for Mr. Diston to rely upon the authority of Mr. Ninow because he was clothed with all indicia of the authority to control and bind EnviroPak; that is, he was identified as its president, director, chairman of the board of directors and chief operating executive. Mr. Ninow had showed Mr. Diston the relevant part of the Organization Agreement



and, also, his own Employment Agreement (R602,642,647,760). For this reason, Mr. Diston could reasonably rely upon Mr. Ninow's authority and, because of Mr. Ninow's actual and apparent agency on behalf of EnviroPak, could rely upon the legitimacy of the Employment Agreement. The court did, in fact, conclude from the evidence that Mr. Ninow in this case did have the apparent authority, and Mr. Diston relied on that authority, to enter into the Employment Agreement (R526). The evidence fully supported those findings.

Mr. Ninow insisted that EnviroPak be largely autonomous (FF16; R703,750). That he had prevailed and obtained concurrence by Surgical was reflected in both the Organization Agreement and the Executive Employment Agreement, whereby Mr. Ninow was granted virtually unlimited authority as president, director, chairman of the board of directors and chief operating executive "with all of the rights, powers and obligations normally associated with such position." (Ex2).

Given the Defendants' sophistication in business and their counsel's preparation of the agreements with their approval, it can be presumed that the degree of autonomy and power of authority given Mr. Ninow were not lightly considered but, rather, were integral parts of the business relationship. Hence, Surgical and EnviroPak deferred or acquiesced to Mr. Ninow's important powers and authority allowing him to undertake such actions as executing the Employment Agreement. Surgical's counsel prepared the Organization Agreement and the Executive Employment Agreement, which has been negotiated

between Surgical and Mr. Ninow and which empowered Mr. Ninow to take actions (FF14). Surgical also publicized Mr. Ninow's role with EnviroPak (FF21;Ex5). Surgical, a publicly traded company with various subsidiaries, presumably had both sophisticated principals and counsel. One may fairly presume that Surgical's principals and legal counsel intended that, and knew, the language in the agreements would control. The Defendants, therefore, have a hollow ring to their argument that they had nothing to do with Mr. Diston relying on Mr. Ninow's authority. The Defendants lit the fuse and now complain about the explosion.

The Defendants' argument as to Mr. Ninow's supposed lack of authority is particularly disingenuous when it is remembered that Surgical itself had previously recognized Todd Crosland's authority as president to sign on behalf of EnviroPak, absent any resolution by the board of Directors (the board not even yet being formed) and absent his holding any other office in the corporation at that time. (R696-97). Yet Defendants dispute the binding signature of the person who the Defendants agreed was the president and director and chairman of the board and chief executive officer of EnviroPak.

Ignoring, for sake of argument, the Defendant's prior recognition of Todd Crosland's authority as president to sign the agreements with Mr. Ninow, and if Mr. Ninow had simply held a single office, such as president, Defendants might have some argument as to the scope of his authority. In some jurisdictions, the president of a corporation has no authority to enter into employment contracts or

agencies merely by virtue of his office. In other jurisdictions, though, the president has prima facie authority to make a contract on behalf of the corporation for the employment of the services of others. For instance, the Colorado Supreme Court has stated:

As to defendants' contention that Reed made the promise to pay the \$150.00 per month personally, this record is to the contrary. He at all times was president of the defendant corporation and as its principal administrative officer bound the company for activities within the scope of his authority which would include the hiring of employees. (Citations omitted).

Skyland Food Corp. v. Meier, 382 P.2d 996, 998 (Colo. 1963).

When, though, the president is also the business head of a corporation, such as general manager or chief operating officer, as Mr. Ninow' is in this case, contracts of employment or agency are within the scope of his authority. The president of a corporation who is also a general manager having power to superintend and conduct its business has implied authority to make any contract appropriate in the ordinary course of its business; and in such cases, his powers are greater than he would have as president alone. See Memorial Hospital Assoc. v. Pacific Grape, 45 Cal.2d 634, 290 P.2d 481 (Cal. 1955).

More recently, the court in GM Development Corporation v. Community Mortgage Corp., 795 P.2d 827 (Ariz. App. 1990). explained:

. . . . In the instant case, it is undisputed that Shares [guarantor] selected Beck to be president, chief executive officer, and chairman of its board of directors. By placing him in the three most powerful positions within its corporate management structure, we conclude that Shares held Beck out as possessing authority to act on its behalf.

Although the title given an officer of a corporation is not determinative of his authority, when he is clothed with titles implying general powers (i.e., president, chief executive officer and chairman of the board), the business public and courts may fairly presume that he is what the corporation holds him out to be.

GM Development Corp, 795 P.2d at 833.

Mr. Ninow not only was a director but, also, had the right under the Organization Agreement to appoint a second director, sufficient to comprise his control of 50% of the board of directors of EnviroPak (Ex1, ¶3). He also was designated as chairman of that board, president and chief operating executive. It stretches credulity to presume Mr. Ninow had no authority to act on behalf of the company or that Mr. Diston had no legitimate basis to rely upon Mr. Ninow's express and apparent authority. The trial court's conclusions on these issues are amply supported by the facts in evidence and the pertinent law and authorities.

**III. THE TRIAL COURT, HAVING FOUND THAT ENVIROPAK WAS THE ALTER-EGO OF SURGICAL, ERRED IN TERMINATING THE DAMAGES AS OF THE DATE ENVIROPAK CEASED BUSINESS.**

Mr. Diston has cross-appealed, asserting that the trial court correctly determined that EnviroPak and Surgical were alter-egos but erred in terminating damages as of the date EnviroPak ceased business. Instead, the trial court should have held Surgical liable for all of the damages arising out of the breach throughout the entire term of the Employment Agreement. The trial court improperly limited the term of the contract to fourteen months instead of three years.

The trial court's two stated reason for limiting damages were that EnviroPak ceased business on December 31, 1992 (FF43) and that the contracting parties knew there was considerable risk that the business would fail (FF48). In so altering the employment contract, the trial court misapplied the alter ego doctrine. The court had already determined that EnviroPak was indeed the alter ego of Surgical. Therefore, it was Surgical that legally entered into the employment contract with Mr. Diston. Surgical did not go out of existence on December 31, 1992, but continues in existence today. Furthermore, even if Surgical had gone out of business with its alter ego, EnviroPak, on December 31, 1992, it would have still been liable for breach of the employment contract.<sup>2</sup> The trial court's limiting the damages was, clearly, unjustified.

The alter ego doctrine is well defined by Utah case law. This Court has described the alter ego doctrine as follows:

Under the equitable "alter ego" doctrine as it originally evolved, courts would, on a proper showing, disregard the integrity of the corporation and view a controlling shareholder as indistinguishable from the corporation, thereby permitting creditors of the corporation to reach the assets of a controlling shareholder. This was done to prevent the legal separation between the corporation and the controlling shareholder or shareholders from being used

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<sup>2</sup> Certainly, Mr. Diston, in such a scenario, would have been obligated to mitigate his damages by seeking other employment after the Defendants breached his contract. And in fact, that is what he did in this case (FF45).

Almost all of Utah's case law, and also that of other jurisdictions, has been created by appeals challenging the applicability of the alter ego doctrine. Its effect, on the other hand, is inherently straight forward, and little case law directly addresses the effect itself.

to perpetuate an injustice on third parties. (Citations omitted).

Transamerica Cash Reserve v. Dixie Power, 789 P.2d 24, 26 (Utah App. 1990).

The rationale used by courts in permitting the corporate veil to be pierced is that if principle shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one, he is without standing to complain when an injured party does the same. ... A court of equity looks through form to substance and has often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner. (Citations omitted).

Colman v. Colman, 743 P.2d 782, 786 (Utah App. 1987).

"Alter ego," according to Black's Law Dictionary, Fifth Edition (1979), means "second self." The two entities are treated as one. This is done, as explained above in Transamerica Cash Reserve and Colman, by "piercing the corporate veil," i.e., by disregarding the legal fiction of the separate corporate entity. Thus when the trial court found that EnviroPak was the alter ego of Surgical, EnviroPak's corporate identity was disregarded and Surgical became responsible and liable for EnviroPak's breach of contract. There are no legally recognizable grounds for altering the terms of Mr. Diston's employment contract based upon one company's ceasing business after it has been determined that the alter ego doctrine is applicable. The terms establishing the three year duration and the compensation and benefits thereunder must be applied to Surgical the same as they would be applied to EnviroPak because the legal fiction of separate corporate identities no longer exists.

A similar 1971 Utah Supreme Court case supports this principle. In Chatterly v. Omnico, Inc., 485 P.2d 667 (Utah 1971), twelve former employees of a subsidiary corporation which had ceased business operations (and which obviously had no assets) sued the parent corporation for unpaid wages, severance pay, and other benefits. The trial court found that the alter ego doctrine was applicable and therefore held the parent corporation liable for the damages. The Supreme Court stated:

[The parent corporation] should not be permitted to manage and operate a business from which it stands to gain whatever profit may be made, have the advantage of the efforts of those who serve it, and then use the nomenclature of another corporation as a facade to insulate it from the responsibility for paying for those services.

Chatterly, 485 P.2d at 670. The Supreme Court affirmed the applicability of the alter ego doctrine and thereby also affirmed the judgment for the unpaid wages, severance pay, and other benefits. In so doing, the Court inherently recognized that the parent was liable for the obligations of its alter ego even though the alter ego no longer existed.<sup>3</sup> That is where the trial court erred in the instant case. The fact that EnviroPak went out of business does not extinguish its liabilities. To hold otherwise would allow parent corporations to circumvent and avoid contractual obligations at will

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<sup>3</sup> The details concerning the nature of the unpaid employment obligations are not given in that case. It is probably safe to assume that the unpaid wages were for hours already worked and that the twelve employees were under an employment at will contract. In the instant case, however, Mr. Diston's employment contract was for a definite and fixed term of three years and the balance of the term is not extinguished merely by the fact that the alter ego ceased to exist.

**IV. THE TRIAL COURT IMPROPERLY REFUSED TO AWARD THE MONTHLY CAR ALLOWANCE PROVIDED FOR IN THE CONTRACT.**

Mr. Diston also appeals the trial court's refusal to award car allowance amounts as part of the damages for the breach of contract. The trial court's refusal is not based on lack of agreement. Rather, the court, without the Defendants having raised this issue, based his determination solely upon Mr. Diston's failure to present to the Court evidence as to the percentage of time or use of the car in connection with Mr. Diston's employment required by the agreement (FF50). In this conclusion, the trial court erred.

The Court, based upon the testimony, found that, as part of the agreement, Mr. Ninow and Mr. Diston agreed that Mr. Diston would receive a monthly automobile allowance. The Court further found that Mr. Ninow and Mr. Diston orally agreed that that amount would be \$360.00 per month. Having found the provisions of the agreement unambiguous, having held the agreement itself enforceable, and having found a breach of the agreement by the Defendants, the trial court improperly read into the contract conditions precedent to Mr. Diston's entitlement to the car allowance, which were not part of the agreement.

No evidence was before the court suggesting that any conditions precedent were contracted or even contemplated. Rather, the undisputed evidence was that the car allowance was for a fixed amount for a fixed period. Mr. Diston was to receive an automobile allowance as part of his compensation, but since he had recently purchased an automobile, the amount of the car allowance was set to



approximate his existing car payment (R603). Based upon the undisputed testimony alone, Mr. Diston is entitled to have the \$360.00 per month car allowance added as part of the damages for breach of contract.

The trial court overlooked the fact that negotiation of employment compensation typically involves the payment of more than simply wages, i.e., health insurance, disability insurance, life insurance, automobile arrangements, "golden parachute" provisions, retirement arrangements and expense accounts. Fringe benefits are a common form of compensation for employees and, unless otherwise provided in the tax laws, are included as gross income to the employee (§61(a)(1) Internal Revenue Code of 1986) and normally deductible to the employer as ordinary and necessary business expenses (§162 Internal Revenue Code of 1986). Included in common examples of fringe benefits are an employer-provided automobile (IRS Regs. §1.61-21(a)(1)). The obligation would be Mr. Diston's to justify any tax return deduction he may claim on his tax return (IRS Regs. § 1.162-1).

It is no more logical or just for the trial court to require extraneous evidence of Mr. Diston's anticipated mileage use than it would be for the court to read into an employment contract: amount of illness anticipated to be caused by work to justify health insurance, anticipated future work-caused disability to justify disability insurance, absolute number of hours to be worked to justify a salary versus an hourly payment for an employee, or amount of hours spent to

justify an annual two-week vacation. For this reason, the trial court's denial of this benefit should be reversed, and Mr. Diston should be awarded the \$360.00 car allowance for each month during the contract period.

### **CONCLUSION**

The trial court found, supported by an abundance of evidence, the existence of an employment agreement between EnviroPak and Mr. Diston which contained all of the essential elements of an agreement and which was an enforceable agreement. The trial court further found that Mr. Ninow was, by the Defendants' agreements, clothed with the authority to enter into that agreement and to bind EnviroPak in that matter. The trial court further appropriately found the existence of an alter-ego arrangement between Surgical and EnviroPak. The Defendants have not marshalled the evidence to challenge the legitimacy and reasonableness of the trial court's findings and, accordingly, the findings must be affirmed on appeal. The court's conclusions of law and judgment should also be affirmed.

The trial court, however, erred in terminating Mr. Diston's damages as of the date that EnviroPak ceased doing business, even though Surgical continued in business. Mr. Diston should be awarded damages for the entire thirty-six period of the breached contract

and, further, should have included within those damages the amount of the agreed-upon car allowance of \$360.00 per month.

DATED this 27<sup>th</sup> day of May, 1994.

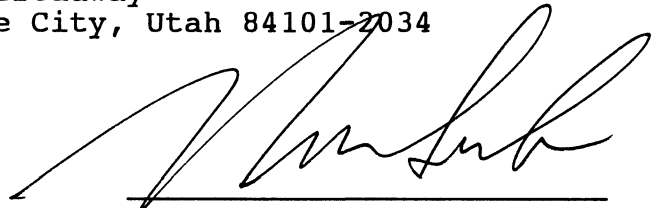


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John Diston

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid this 27<sup>th</sup> day of May, 1994 to the offices of the following counsel of record:

Ellen Maycock  
David C. Wright  
KRUSE, LANDA & MAYCOCK  
800 Bank One Tower  
50 West Broadway  
Salt Lake City, Utah 84101-2034



## **INDEX TO ADDENDUM**

Addendum A	Findings of Fact and Conclusions of Law
Addendum B	Judgment
Addendum C	Letter of Intent to Enter Employment Agreement
Addendum D	Organization Agreement
Addendum E	Executive Employment Agreement

# **ADDENDUM**

Tab A

NOV 16 1993

By: B. K. Linder  
Deputy Clerk

Judge Frank G. Noel

00516

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.

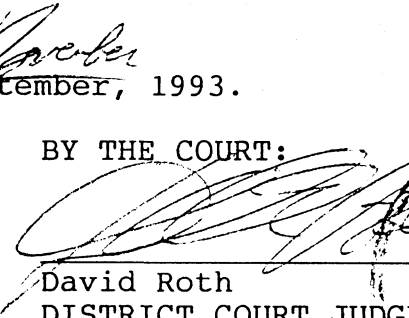
10. Mr. Diston is entitled to damages for breach of contract in the amount of \$54,834.60, representing the difference that Plaintiff earned from October 31, 1991, through December 31, 1992, and the amounts that he would have been entitled to earn under the contract with EnviroPak, together with interest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

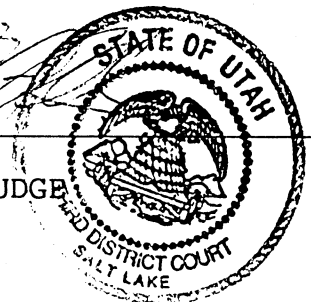
11. Plaintiff is not entitled to any payments since December 31, 1992, because EnviroPak's business was terminated

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

DATED this 3 day of ~~September~~, 1993.

BY THE COURT:

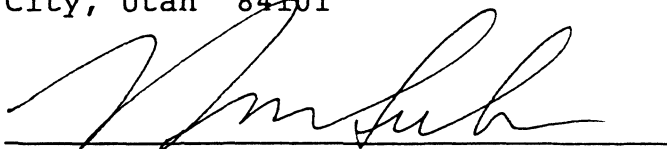
  
David Roth  
DISTRICT COURT JUDGE



CERTIFICATE OF MAILING

I hereby certify that on this 28<sup>th</sup> 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 B

FILED DISTRICT COURT  
Third Judicial District

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

NOV 16 1993

SALT LAKE COUNTY  
By B. K. [Signature]  
Deputy Clerk

---

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

---

JOHN DISTON,

Plaintiff,

v.

ENVIROPAK MEDICAL PRODUCTS,  
INC., a Utah corporation, and  
SURGICAL TECHNOLOGIES, INC.,  
formerly PINNACLE  
ENVIRONMENTAL, INC., a  
Delaware corporation,

Defendants.

)  
)  
) JUDGMENT  
)  
) 2187453  
) 11-18-93 8:19am  
)  
) Civil No. 920902269CN  
)  
) Judge Frank G. Noel  
)  
)  
)

---

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:

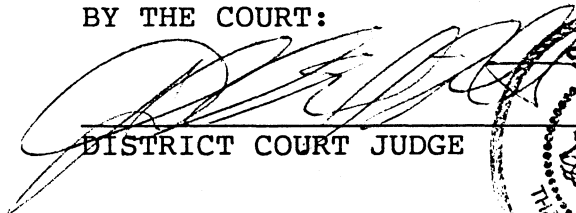
1. The sum of \$54,834.60; plus

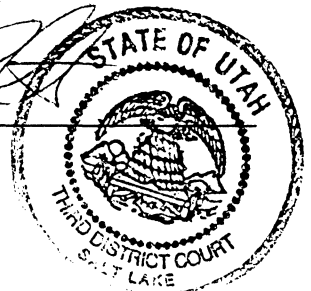
2. \$7,329.48, representing pre-judgment interest from the date each payment was respectively due to September 1, 1993, with pre-judgment interest at \$15.24 per day until entry of the Judgment herein; plus

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

DATED this 15 day of November, 1993.

BY THE COURT:

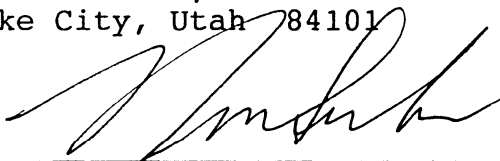
  
DISTRICT COURT JUDGE



**CERTIFICATE OF MAILING**

I hereby certify that on this 28<sup>th</sup> 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

  
\_\_\_\_\_

Tab C

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 D

## 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

00249

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 Bekkemellom 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.

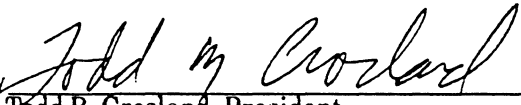
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18. No Assignment. This Agreement cannot be assigned in whole or in part by one of the parties without the prior written consent of all other parties.

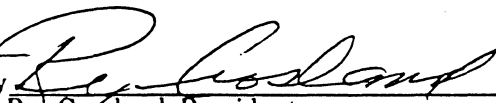
DATED as of the year and date first above written.

  
\_\_\_\_\_  
Frederick Ninow

ENVIRO PAK MEDICAL PRODUCTS, INC.

By   
\_\_\_\_\_  
Todd B. Crosland, President

PINNACLE ENVIRONMENTAL, INC.

By   
\_\_\_\_\_  
Rex Crosland, President

Tab E

## 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.

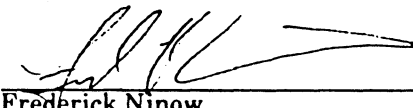
28. Litigation Expenses. If any action, suit, or proceeding is brought by a party with respect to a matter or matters governed by this Agreement, all costs and expenses of the prevailing party incurred in connection with such proceeding, including reasonable attorneys' fees, shall be paid by the nonprevailing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