

1994

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

Utah Court of Appeals

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JOHN DISTON,	)	
	)	
Plaintiff/Appellee	)	
Cross-Appellant,	)	
	)	
vs.	)	
	)	Case No. 940062-CA
ENVIROPAK MEDICAL PRODUCTS	)	
INC., a Utah corporation, et al.,	)	Priority 15
	)	
Defendants/Appellants	)	
Cross-Appellees.	)	

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

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANTS  
AND BRIEF OF CROSS-APPELLEES

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Appeal From Final Judgment Entered By the Third Judicial  
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## **DETERMINATIVE STATUTES**

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

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

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

UTAH CODE ANN. § 25-5-4(1).

## **ARGUMENT**

### **I. APPELLANTS HAVE CHALLENGED THE TRIAL COURT'S LEGAL CONCLUSIONS ONLY AND NOT ANY FINDINGS OF FACT AND THUS HAVE NO DUTY TO MARSHAL EVIDENCE FOR THIS APPEAL.**

Diston asserts that appellants have not properly marshaled the evidence. (Brief of Appellee at 12-15.) When challenging findings of fact, an appellant "must marshal all of the evidence which supports the trial court's findings and show that, in the light most favorable to the findings, it is against the 'clear weight of the evidence' and is thus clearly erroneous when applied to the [governing] legal principles.'" *Grahn v. Gregory*, 800 P.2d 320, 327 (Utah App. 1990) (quoting *Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1224 (Utah App. 1990)). *See also Grayson Roper Ltd. Partnership v. Finlinson*, 782 P.2d 467, 470 (Utah 1989). A conclusion of law, on the other hand, is reviewed without deference and based solely on a correction of error standard. *Bountiful v. Riley*, 784 P.2d 1174, 1175 (Utah 1989).

In this case, appellants have not challenged the court's findings of fact. This appeal is limited to purely legal issues based on the trial court's conclusions of law. The trial court's first conclusion of law was that Ninow "had the apparent authority to enter into the Employment Agreement with Mr. Diston." (R. 526.) The trial court also concluded that the letter of intent constituted "a valid agreement between EnviroPak and Mr. Diston." *Id.* ¶ 3. (*See also id.* at ¶ 4 "the statute of frauds does not apply; and the [letter of intent] constitutes an enforceable agreement.")<sup>1</sup> As stated plainly in appellant's brief, EnviroPak has challenged the court's legal conclusions with respect to the issues of agency and whether a valid contract existed. Thus, Diston's argument as to the marshaling requirement is off the mark.

## **II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE LETTER OF INTENT WAS A VALID EMPLOYMENT CONTRACT.**

### ***A. The Letter of Intent is Fatally Indefinite with Respect to the Essential Terms of an Employment Agreement.***

"An agreement [that] depends upon the wish, will or pleasure of one of the parties is unenforceable." *De Los Santos v. Great Western Sugar Co.*, 348 N.W.2d 842, 844 (Neb. 1984). Mutual assent to the essential terms of an agreement is required before a contract is formed. *Engineering Assoc. v. Irving Place Assoc.*, 622 P.2d 784, 787 (Utah 1980). Thus, an agreement that is "subject to the future mutual agreement of the parties . . . [constitutes] a mere expression of a purpose to make a contract in the future [because], the whole matter [is] contingent on

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<sup>1</sup> Whether a contract exists is a question of law. *John Deere Co. v. A&H Equipment*, 241 UTAH ADV. REP. 17, 18 (Utah App. 1994); *Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582, 583 (Utah App. 1992).

further negotiations." *Davison v. Robbins*, 517 P.2d 1026, 1029 (Utah 1973). *See also Vasels v. LoGuidice*, 740 P.2d 1375, 1377 (Utah App. 1987) (contract for sale of land failed to include property description and was thus unenforceable because of missing essential term).

Whether described as certainty, mutuality of obligation or mutual assent, the point remains the same -- where critical terms of the agreement are either missing or are subject to future negotiation, the writing does not "constitute a valid, enforceable contract." *Vasels*, 740 P.2d at 1377. *See also Southland Corporation v. Potter*, 760 P.2d 320, 322 (Utah App. 1988) ("when the parties leave material matters so obscure and undefined that the court cannot say whether the minds of the parties met upon all the essentials or upon what substantial terms they agreed," there is no enforceable agreement). *See also Bunnell v. Bills*, 368 P.2d 597 (Utah 1962).<sup>2</sup>

This court recently repeated this principal of mutual assent in unmistakable terms:

Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms. Determining whether the specific terms omitted were essential to the agreement requires an examination of

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<sup>2</sup> The court in *Neeley v. Banker's Trust Co. of Texas*, 757 F.2d 621 (5th Cir. 1985) (*reh'ng. denied*) fleshed out the dual nature of the question of the certainty required to form a contract:

On the one hand, the parties' failure to express clearly their bargain undercuts the inference that they intended their mutual promises to bind them. In that sense the indefiniteness doctrine focuses upon the formation stage of the contract and involves inquiry into whether the parties meant to contract at all. The other concern relates to the denouement of the agreement rather than its incipience. It stems from the practical difficulties of *enforcing* obscure, imprecise, or otherwise incomplete promises. Although distinct, the two concerns tend to merge in the formulations courts have fashioned to guide determinations of indefiniteness questions. Thus, [we have stated] that "a contract is sufficiently definite if a court is able to determine the respective legal obligations of the parties.

*Id.* at 627 (quoting *Southampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1122 (5th Cir. 1984).

the entire agreement and the circumstances under which the agreement was entered into.

*John Deere Co. v. A&H Equipment*, 241 UTAH ADV. REP. 17, 19 (quoting *Crismon v. Western Co. of North America*, 742 P.2d 1219 (Utah App. 1987) and *Cessna Finance Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978)).

Where the language of the alleged agreement indicates that negotiations are ongoing, no contract is formed. *See Crismon*, 742 P.2d at 1221-22. In *Crismon*, a key letter one of the parties sought to enforce as an agreement stated only that a lease would be agreed upon in the future and that changes would be made prior to a "final agreement." That lack of certainty prevented the formation of a contract. 742 P.2d at 1222. *See also Davison*, 517 P.2d at 1028-29 (no contract exists where an essential term is subject to future negotiation). Until the terms of an agreement "provide a basis for determining the existence of a breach and for giving an appropriate remedy," they are not certain enough to form an agreement. RESTATEMENT (SECOND) OF CONTRACTS § 33(2).

Diston argues that the letter of intent "addressed all the essential elements and economic arrangements required in an employment agreement between parties. . . ." (Brief of Appellee at 16.) That assertion is simply not true. With respect to compensation, the letter of intent does provide an annual salary, but that element is only part of the compensation. The letter is silent with respect to the car allowance, the bonus pool and the stock option plan. These last three items were all to be part of the compensation package, according to the letter itself.

Compensation is an essential term of an employment agreement, and here it was left partly to future negotiation.

Diston failed to address the issue of his duties -- the second essential term of an employment agreement. There could, of course, not have been any mutual assent to a term that does not appear in the purported agreement. Those duties were apparently left to future negotiation -- or unilateral determination by EnviroPak -- and that gaping hole alone renders the letter of intent unenforceable. Because Diston had not promised to do anything, there was no mutuality of obligation and thus no mutual assent.

The language of the letter demonstrates that it was, at best, an invitation to bargain. The letter, for example, never *promises* Diston any stock options; rather, the options were an encouragement to bargain:

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.

(Letter of Intent, ¶ 3(e)) (emphasis added.)

There is no agreement here. There is no mutual assent as to Diston's duties and no mutual assent as to his compensation. The difference between a stock option and a "future stock option" is unclear, but whatever Ninow meant when he wrote this language, he was not

committing EnviroPak to anything enforceable. Diston was promised an opportunity to negotiate and nothing more.<sup>3</sup>

Diston ignores the statute of frauds and argues that an alleged separate oral agreement between he and Ninow supplied the omitted terms. Diston also ignores the fact that, at the time the letter of intent was delivered and its terms allegedly negotiated, Ninow was not yet employed by EnviroPak, a fact that Diston knew. (R. 760; FF. 19.) (*See* Brief of Appellee at 16.) Therefore, Diston could not have believed that he was negotiating an employment agreement with EnviroPak.

Diston recognizes that the enforceability of the letter of intent depends, in his words, "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." (Brief of Appellee at 17.) Critical terms must be spelled out or there is no agreement. At an irreducible minimum, an employment agreement must set forth compensation and duties. The letter of intent provides only a fragment of the compensation package and is

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<sup>3</sup> The letter of intent does not even constitute an offer. "An offer cannot be accepted so as to form a contract unless there is sufficient specification of terms so that the obligations involved can be ascertained." *K-Line Builders, Inc. v. First Fed. Savings and Loan Assoc.*, 677 P.2d 1317, 1320 (Ariz. 1984). This is also the formulation of the RESTATEMENT (SECOND) OF CONTRACTS § 33 (1982).

utterly silent with respect to duties. Diston himself could not even decide what his duties would be. (R. 639-40, 604.)<sup>4</sup>

***B. Enforceability of the Letter of Intent Does Not Depend on Whether Diston and Ninow Believed that it was a Binding Contract.***

Diston argues that the letter of intent is an enforceable agreement because he and Ninow believed that it was. (Brief of Appellee at 18.) This argument reflects an appeal to the subjective theory of contracts long abandoned in American contract law. A contract must stand on its own from an objective perspective:

Although the parties may have had and manifested an intention to make a contract, if the content of their agreement is unduly uncertain and indefinite no contract is formed. . . . The rule is that an "offer must be so definite as to its material terms *or require such definite terms in the acceptance* that the promises and performances to be rendered by each party are reasonably certain."

J. CALAMARI & J. PERILLO, CONTRACTS, § 2-13, at 43-44 (2d. ed. 1978) (emphasis in original).

Professor Corbin also addressed this issue in very similar language:

A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.

1 A. CORBIN, CONTRACTS § 95, at 394 (1963).

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<sup>4</sup> Diston testified that he was going to be the director of operations. (R. 639-40.) Then, after looking at the letter of intent to refresh his memory, he testified that he was going to be the vice president in charge of quality control and production. (R. 604.)

To determine whether a contract exists at all, the court naturally looks first to the four corners of the document itself to find definite terms. *Anesthesiologists Assoc. v. St. Benedict's Hospital*, 852 P.2d 1030, 1035 (Utah App. 1993); *see also Vasels*, 740 P.2d at 1377. Therefore, it does not matter what Diston and Ninow believed about the letter of intent. What matters is whether the letter of intent itself contains terms sufficiently certain to demonstrate the mutual assent of the parties.

***C. The Failure of the Letter of Intent to Satisfy the Statute of Frauds Alone Renders it Unenforceable.***

Diston quotes the statute of frauds correctly but then fails to apply it properly to this case. Any agreement that cannot be performed within one year must be in writing. UTAH CODE ANN. § 25-5-4. Diston argues the specific performance exception to the statute, which is triggered upon part performance by one party to the purported agreement. UTAH CODE ANN. § 25-5-8. This is not and never has been a case for specific performance. This has always been an action at law for breach of an alleged contract. Employment agreements are not candidates for specific enforcement.<sup>5</sup>

Diston's citation to *Marvin v. Scholl*, 678 P.2d 274, 275 (Utah 1983) does not support his position. That case holds that partial performance only applies if "the oral contract and its terms [are] clear and definite. . . ." *Id.* The issue of partial performance is reached only after it is

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<sup>5</sup> See, e.g., *Delivery Service & Transfer Co. v. Heiner Equipment and Supply Co.*, 635 P.2d 21 (Utah 1981).



determined that the underlying agreement is certain -- clear and definite enough to ascertain the obligations of the parties. *See K-Line Builders*, 677 P.2d at 1320.

In this case, no oral agreement was alleged. Diston instead has claimed that the letter of intent constitutes the written contract and is sufficient to satisfy the statute. In order for that to be true, however, it "must contain all the essential terms and provisions of the contract." *Birdzell v Utah Oil Refining Co.*, 242 P.2d 578, 580 (Utah 1952). *See also Machan Hampshire Properties v. Western Real Estate & Development Co.*, 779 P.2d 230, 234 (Utah App. 1989).<sup>6</sup>

Two questions are raised when an alleged agreement is attacked using the statute of frauds: Whether the contract is by its terms within the statute and, if so, whether there is a sufficient written memorandum to satisfy the statute. *See McKinney v. National Dairy Council*, 491 F. Supp 1108 (D. Mass. 1980). In this case, Diston's purported agreement--a three-year employment contract-- is definitely within the statute. UTAH CODE ANN. § 25-5-4(1).

The only remaining question is the crux of this case--whether the letter of intent contains the essential elements with sufficient clarity to demonstrate that there was mutual assent. *See Machan Hampshire Properties*, 779 P.2d at 234. For example, the plaintiff in *McKinney* sued for breach of an alleged agreement to employ him "until his normal retirement date . . . ." 491 F. Supp. at 1114.

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<sup>6</sup> Accord, *Nay v. Harrison*, 299 P.2d 1114, 1118 (Utah 1956) (In order to satisfy the statute of frauds, the memorandum must identify the parties, the subject matter and "set out the conditions of the transaction with adequate certainty.") *See also Collett v. Goodrich*, 231 P.2d 730, 732 (Utah 1951)("the memorandum must show what the contract was, and not merely note the fact that some contract was made").

The plaintiff attempted to piece together an agreement from several documents. He used a memo he wrote to the employer stating that, because he was turning sixty, he needed to earn the “highest possible [salary] to generate maximum retirement income.” *Id.* at 1115. He used a response to that memo, denying him a raise and explaining that he need not maximize his salary at age sixty. Plaintiff offered a letter from the employer regarding early retirement and describing the benefits he would receive upon retiring. Plaintiff also offered an unsigned document describing his benefits in the event of termination prior to retirement. This document also correctly stated McKinney’s retirement date. *Id.*

Construing these documents together in its search for a contract, the court could only conclude that the documents were ambiguous “on the critical term of the contract in question, the promise . . . to employ [plaintiff] until his normal retirement date.” The evidence was insufficient to establish this critical term. The alleged agreement thus failed to satisfy the statute of frauds. *Id.* at 1116.<sup>7</sup>

Although Diston's letter of intent is certain as to the length of the alleged employment, its certainty ends there. The letter of intent says nothing about duties and only partially stipulates Diston’s compensation. Moreover, the stock option term is expressly left open for future determination to encourage Diston to enter into an as yet undrafted employment agreement.

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<sup>7</sup> Because of a choice of law issue, the court applied New York’s statute of frauds, N.Y. GEN OBLIG. LAW § 5-701, which is virtually the same as Utah’s. The court’s focus was whether the agreement to employ plaintiff until his normal retirement age could be performed within one year. Because it could not, the statute applied. 491 F. Supp. at 1114-15.

This, he fully expected to do. (R. 634, 640, 760, 645, 614.) His reliance on the letter of intent was only an afterthought.

Diston cites *C. J. Realty, Inv. v. Willey*, 758 P.2d 923 (Utah App. 1988) in support of his argument that an imperfect writing may still satisfy the statute of frauds. That is correct. However, *Willey* clearly explained why it enforced a finder's agreement in the face of a challenge under the statute of frauds. In that case, "[t]he contract include[d] 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. . . ." *Id.* at 928 (emphasis added). In other words, the agreement contained the rights and mutual obligations of the parties.

As *Willey* indicates, the statute of frauds does not address ambiguity--that is left for judicial construction. The statute of frauds addresses completeness--the soul of every contract. Either an agreement governed by the statute is complete on its face, or it is not. The letter of intent has too many terms left missing--and too much left to negotiate--to be an enforceable contract.<sup>8</sup>

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<sup>8</sup> Diston expends considerable energy arguing that this and other courts have enforced contracts despite ambiguity. See Brief of Appellee at 21-24. While the letter of intent is certainly rife with ambiguity, that problem of contract interpretation is only in issue when the document being construed is a contract. The issue in this case is whether a contract existed at all. In every case in which ambiguity is alleged, the contract will be interpreted and thus enforced one way or the other. In *Anesthesiologists Assoc.*, 852 P.2d 1030, for example, the court construed a document that everyone conceded was a contract. The court observed as follows:

In a case like the one before us, where "the document appears to incompletely express the parties' agreement or . . . is ambiguous in expressing that agreement," the trial court may rely on extrinsic evidence to determine the intent of the parties with respect to disputed terms.

Diston also cites *Suciu v. AMFAC Distributing Corp.*, 675 P.2d 1333 (Ariz. App. 1983), for the proposition that employment contracts “need not detail every condition of the employment” in order to be valid. This statement of the painfully obvious only begs the question in this case: whether the letter of intent is certain enough. In *Suciu*, the employer’s testimony demonstrated that it intended to hire plaintiff for a specific purpose--his job duties and salary were never in dispute.<sup>9</sup> Moreover, Diston fails to mention that the plaintiff in *Suciu* was actually fired by the defendant. There was, therefore, never a dispute about whether the plaintiff had been hired despite the defendant’s contention that the oral employment agreement was too indefinite.

*Suciu* is, once again, not this case. Diston himself could not decide what his position or duties would be (R. 639-40, 604), and the letter of intent does not specify the full compensation. The difference between this case and those relied on by Diston is that here there are no terms with which to form an employment agreement. The letter of intent, which because of the statute of frauds is the only piece of evidence capable of supporting Diston’s claim, does not meet the certainty test.

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*Id.* at 1036 (quoting *Ron Case Roofing & Asphalt Paving, Inc. v. Campbell*, 733 P.2d 1382, 1385 (Utah 1989)).

<sup>9</sup> Specifically, the court noted as follows:

The testimony of both [defendant] and [plaintiff] shows that [plaintiff] was to facilitate the transition of the business [as the result of a purchase] from Central Pipe to AMFAC and in so doing to do whatever AMFAC required of him and for whatever length of time was required. For this he was to receive the salary which he was already receiving from Central Pipe. This was sufficiently definite

**III. NINOW LACKED APPARENT AUTHORITY TO BIND ENVIROPAK BECAUSE HE WAS NOT EMPLOYED AT THE TIME HE DELIVERED THE LETTER OF INTENT AND BECAUSE NEITHER ENVIROPAK NOR SURGICAL DID ANYTHING TO LEAD DISTON TO BELIEVE THAT NINOW HAD SUCH AUTHORITY.**

Only the acts of the principal can create that variation of agency known as apparent authority. *Zions First National Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094 (Utah 1988). Apparent authority is not easily created and requires affirmative conduct on the part of the principal that reaches the third party, causing that person to believe reasonably that the agent may act for the principal. For example, in *City Electric v. Dean Evans Chrysler-Plymouth*, 672 P.2d 89 (Utah 1983), the court observed:

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

*Id.* at 90 (citations omitted) (emphasis added), citing *Bank of Salt Lake v. Corporation of Pres. of Ch., etc.*, 534 P.2d 887 (Utah 1975).<sup>10</sup>

In this case, Diston dealt exclusively with Ninow until well after the letter of intent was signed. He first met Todd Crosland, Rockwell Schutjer and other representatives of EnviroPak

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<sup>10</sup> See also *Kinisky v. Archway Motel, Inc.*, 586 P.2d 502 (Wash. App. 1978); RESTATEMENT (SECOND) OF AGENCY, § 43 (1980); *Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981), *reh'g denied* (1982); *Forsyth v. Pendleton*, 671 P.2d 358 (Utah 1980); *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982); *Luddington v. Bodeninvest Ltd.*, 855 P.2d 204, 209 (Utah 1993).

in October, weeks after he received the letter of intent. (R. 597-98, 594, 627-28.) EnviroPak thus could not have done anything to lead Diston to believe that Ninow had authority to hire employees.

***A. Ninow was not yet Employed by EnviroPak when he gave Diston the Letter of Intent.***

Much of Diston's argument on the issue of authority centers on the notion that the president and chief executive officer of any corporation has plenary power to do as he or she pleases, at least with respect to the hiring of new employees. Regardless of the truth of that proposition, and its truth is highly questionable, this argument begs the issue. Ninow was not employed by EnviroPak -- or Surgical for that matter -- at the time he gave the letter of intent to Diston. (R. 760, FF. 19.) Ninow's employment was not effective until two weeks later, and Diston knew this. *Id.* Therefore, all Diston has attempted in this argument is to smuggle in the notion of actual or implied authority in place of the court's conclusion that Ninow had apparent authority. There was never a dispute about any actual authority of Ninow. He had none. (FF. 19.)

***B. Neither Enviropak nor Surgical did Anything to give the Appearance that Ninow Could hire new Employees on his own.***

Diston admitted that he had no contact whatsoever with anyone from EnviroPak until October 3, 1991, three weeks after he received the letter of intent from Ninow. (R. 597-98, 99, 627-28.) Diston knew that Ninow had prepared the letter of intent himself. (R. 642-642A, 520.) These facts, coupled with Diston's knowledge that Ninow's own employment did not begin until

two weeks after Diston received the letter of intent (R. 760, FF. 19), dispose of the apparent authority argument. Even when Diston finally did meet someone from EnviroPak on October 3, at a shareholder's meeting, the EnviroPak representatives introduced him there, and at other meetings, as an employee of Holy Cross Hospital. (R. 753, 674A-75, 851, 679, 637-38; Mills-LaRocca Depo. at 20.)

Moreover, and most importantly, no one from EnviroPak, or Surgical, showed any of the agreements -- the organization agreement or Ninow's employment agreement -- to Diston. Ninow did that himself. (R. 597-98, 99, 627-28.) The mere preparation of an agreement not yet effective cannot possibly be construed as a representation by EnviroPak capable of creating the impression that Ninow had the authority to hire Diston. There was no reason for EnviroPak to keep its organization or employment agreement secret, but that is the logical result of the trial court's conclusion that apparent authority existed merely because Diston saw these documents. There was no evidence that EnviroPak had contact with Diston. His sole contact was Ninow. (R. 598, 643.)

Related to the court's conclusion of law that Ninow possessed apparent authority to hire Diston (R. 526), is the court's conclusion of law that Diston relied reasonably on Ninow's apparent authority to enter into the letter of intent. *Id.* This conclusion is clearly wrong. Because Diston admits to having dealt exclusively with Ninow (R. 598, 643), he was obligated to ascertain Ninow's authority "despite [Ninow's] representations" that he had authority. *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982).

Diston testified that, because he was dealing with the president and chairman of the board, he did not need to inquire further. (R. 643.) That is not true. Diston knew that he was not dealing with the president and chairman of the board because Ninow's own employment did not begin until after Diston received the letter of intent. Diston's obligation was to inquire into Ninow's authority. He was obligated to observe "irregularities as well as indicia of authority. Where such irregularities cast reasonable doubt and suspicion as to the apparent authority of a fiduciary, there comes into being a duty of inquiry as to his authority." *Bridgeport Fireman's Sick and Death Benefit Assoc. v. Deseret Federal Savings & Loan Assoc.*, 633 F. Supp 516, 522 (D. Utah 1986).

As a matter of law, it is unreasonable for a third party to rely solely on an agent's conduct or statements of authority when the duty to inquire arises. *Deseret Federal*, 633 F. Supp. at 522; *see also Walker Bank & Trust Co. v. Jones*, 672 P.2d 73, 74 (Utah 1983), *cert denied sub nom*, 466 U.S. 937 (1983). This duty *always* exists when one deals exclusively with a purported agent. *Bradshaw*, 649 P.2d at 78. Diston failed to fulfill this affirmative obligation.<sup>11</sup> Because Ninow's own employment had not yet begun, it was unreasonable for Diston to rely on the

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<sup>11</sup> Diston contends that, because EnviroPak was to have some degree of autonomy, with Ninow as its president, Diston's obligation to ascertain the true extent of Ninow's authority, if any, was discharged. This argument again misses the point. Had Ninow been employed at the time he delivered the letter of intent the issue here would be the extent and scope of Ninow's *express* authority. The case here, however, involves the issue of Ninow's authority *prior* to his employment with EnviroPak.



organization agreement. That leaves Diston with only Ninow's conduct, and that is incapable no matter how convincing of creating apparent authority.<sup>12</sup>

### **RESPONSE TO CROSS-APPEAL**

Diston has cross-appealed on two issues, namely, whether the trial court erred in limiting the damages awarded to Diston to the period during which EnviroPak was in business and whether the trial court erred in refusing to award damages for an alleged automobile allowance offered to Diston in the letter of intent. These issues are addressed in turn.

#### **IV. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT ANY DAMAGES TO WHICH DISTON IS ENTITLED ARE LIMITED TO THE TIME DURING WHICH ENVIROPAK WAS IN BUSINESS**

Ordinarily, "stockholders of a corporation are not liable, as such, for any obligations of the corporation regardless of how they were incurred. . . ." *Parker v Telegift Int'l, Inc* , 505 P.2d 301, 302 (Utah 1973). *See also Salt Lake City Corp v James Constructors, Inc* , 761 P.2d 42, 46 (Utah App. 1988) ("ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders.") (quoting *Dockstader v Walker*, 510 P.2d 526, 528 (Utah 1973)). This

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<sup>12</sup> With respect to the issue of apparent authority, the court's finding of fact no 33 is particularly curious and proposes a *non-sequitur*. The court found as follows: "Because of the acts of EnviroPak and [Surgical] 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." (R. 522). When apparent authority is at issue, it does not matter at all what the purported agent believes about his or her own authority. The issue is whether the principal has engaged in conduct that reasonably leads a third party to believe that the agent has authority to perform certain acts on the principal's behalf. It does not matter what *Ninow* reasonably believed. Moreover, there was never any evidence that Diston even saw the press release referred to in this finding of fact.

same protection applies in the parent-subsidary relationship. *See Salt Lake City Corp.*, 761 P.2d at 46-47 (Utah App. 1988).

That distinction between an owner and a corporation will be disregarded, however, when there is a "unity of interest and ownership [such] that the separate personalities of the corporation and the [owner] no longer exist and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Id.* at 47. Once the corporate veil is pierced, the shareholder is liable only to the same extent as the corporation. *See, e.g., Transamerica Cash Reserve v. Dixie Power*, 789 P.2d 24, 26 (Utah App. 1990).

In this case, the trial court pierced EnviroPak's corporate veil and held Surgical liable for the breach of contract. Diston argues, however, that the trial court erred when it cut off the damages awarded under the letter of intent as of the time EnviroPak ceased doing business. (Brief of Appellee at 28-31.) Diston cites *Chatterly v. Omnico, Inc.*, 485 P.2d 667 (Utah 1971) to support this position. *Chatterly* says no such thing. Instead, *Chatterly* is merely an example of the general rule that, once the corporate veil is pierced, the parent corporation is liable to the same extent as its subsidiary.

In *Chatterly*, employees sued for unpaid wages, and the trial court ignored the distinction between the subsidiary and the parent and ordered that the parent pay the damages award, in part because the subsidiary corporation had ceased business and given that the two corporations had failed to observe their separate corporate identities. The court concluded that an injustice would

have occurred had the plaintiffs gone without a recovery. *Chatterly* says nothing about a damages award when the employment agreement exceeds the existence of the subsidiary.

Although *Chatterly* is silent on the issue of whether a contract term that exceeds the life of the subsidiary obligates the parent, it is clear in this case that it does not. First, Diston agrees that the liability of the parent is limited by the liability of the subsidiary. (Brief of Appellee at 30.) Second, the trial court expressly found that Surgical did not purposely and prematurely end EnviroPak's existence -- Surgical stood to gain if EnviroPak could be made profitable and indeed injected substantial capital to keep the company in business. (See R. 527, ¶ 9; FF. 44 and 48.)

The precise issue here is whether Diston would have had a cause of action against EnviroPak based on the remaining term of his contract after the company ceased operations. Any claim Diston would have brought would have been defeated by the defense of frustration of purpose. Frustration occurs--thus discharging the obligations under a contract--where “a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made . . . .” RESTATEMENT (SECOND) OF CONTRACTS § 265. See *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980).

In the employment context, that the employer will continue to exist as a viable entity is just such a basic assumption of the employment contract. In *McKinney*, for example, the court observed that, “in the absence of an express or implied agreement to the contrary, if [either the employee dies or the employer ceases to exist], the period during which the employee must

perform services and for which the employer must pay terminates.” *Id.* at 1111. *Cf. Madreperla v. Williard Co.*, 606 F. Supp. 874 (E.D. Pa. 1985) (continued existence of employer defeated frustration defense).

In *Alabama Football, Inc. v. Wright*, 452 F. Supp. 182 (N.D. Tex. 1977), *aff’d. without opinion* 607 F.2d 1004 (5th Cir. 1979), plaintiff signed a three-year contract with a professional football team in the World Football League. After the contract was signed, the league dissolved, leaving the team unable to play and causing it to fold. The team sued to recover a bonus paid under the contract, and the player counterclaimed for breach. The player argued that “the remaining provisions of the contract have been breached by Alabama in failing to provide a forum where [he] could perform the agreed services and that such failure is not excused because Alabama assumed the risk that its football team might fail.” *Id.* at 185.

Alabama countered that “because of financial circumstances beyond its control and for which it has never assumed the risk the remaining provisions of the contract are impossible to be performed.” *Id.* The court decided the issue in favor of the team, noting that the failure of the league, as well as the team, made it impossible for either party to perform under the agreement.

*Id.*<sup>13</sup> The court stated as follows:

Alabama could not have reasonably foreseen such sudden demise of its team and the World Football League. Finally, it is undisputed that the dissolve of Alabama’s team and [the league] has made performance of the remaining

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<sup>13</sup> With respect to the risk of failure, including the team’s bankruptcy, the court observed that the contract was silent with respect to “the parties’ rights in the event [the team] or [the league] failed, and there is no evidence of discussion concerning this possibility between the parties at any time.” 452 F. Supp. at 186.

[portions] of the contract impossible. Accordingly, the parties are excused from further performance in compliance with the contract.

*Id.*

*Wright* is consistent with the Utah position on frustration and impossibility. In *Castagno v. Church*, 552 P.2d 1282 (Utah 1976), the court described frustration of purpose as follows:

The applicability of this doctrine depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was made. Although performance remains possible, the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event; which supervenes to cause an actual, but not literal, failure of consideration.

*Id.* at 1283. *Cf. Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah App. 1989) (city's disapproval of development project rendered performance of development contract impossible).

When the trial court pierced EnviroPak's corporate veil, it did so to prevent what in the court's view would have been the injustice of leaving Diston without a recovery. Diston would have worked for EnviroPak for fourteen months; thus the trial court found that Surgical would be responsible for the salary he would have earned during that time. Given that the theory of damages for breach of contract is the lost benefit of the bargain,<sup>14</sup> this is the extent of Diston's recovery. The trial court properly concluded, therefore, that, even though Surgical is liable for

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<sup>14</sup> *Anesthesiologists Assoc.*, 852 P.2d at 1036; *Alexander v. Brown*, 646 P.2d 692, 695 (Utah 1982).

damages for breach of contract, those damages are limited to the fourteen months during which EnviroPak was in business.<sup>15</sup>

So long as EnviroPak's demise was legitimate, as the court found that it was--a finding Diston has not challenged--that would have ended the relationship between EnviroPak and Diston. In other words, Diston would not have had a claim for breach of contract against EnviroPak merely because EnviroPak ceased doing business. As a result, Surgical cannot be held liable for *more* than EnviroPak would have under the same claim.

**V. THE TRIAL COURT CORRECTLY DECLINED TO AWARD DAMAGES IN THE FORM OF A CAR ALLOWANCE BECAUSE THERE WAS NO ENFORCEABLE AGREEMENT AS TO THE AMOUNT**

***A. The Reference to a car Allowance in the Letter of Intent is Insufficient and far too Indefinite to Enforce or to form the Basis of a Damages Award***

Whether taken as a whole or broken down to its individual terms, a meeting of the minds--mutual assent--is required before an enforceable agreement is formed. *Engineering Associates*, 622 P.2d at 787. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 33. As already pointed out,

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<sup>15</sup> Diston correctly states at page 31 of his brief that "[t]he fact that EnviroPak went out of business does not extinguish its liabilities." No one is arguing that it does. Whatever obligations EnviroPak incurred during the period of its operation would be the responsibility of Surgical based on the court's conclusion that EnviroPak was the alter ego of Surgical. However, Diston's apocalyptic conclusion that "[t]o hold otherwise would allow parent corporations to circumvent and avoid contractual obligations at will is ridiculous. (Brief of Appellee at 31.) Upon a piercing of the corporate veil, Surgical is *as a matter of law* liable to Diston for the obligations of EnviroPak incurred by EnviroPak during its existence. That is a legal result, and one parent corporations cannot possibly avoid merely by shutting the subsidiary down. The only question is what obligations were incurred by the subsidiary. In this case, assuming that the letter of intent is an enforceable contract and that Ninow had the proper authority to

certainty--the element that allows a court to determine the rights and obligations of the parties--is the most basic prerequisite to the existence of an enforceable contract. *Southland Corp* , 760 P 2d at 311; *John Deere Co* , 241 UTAH ADV. REP. at 19.

Under the heading "Compensation," the letter of intent states that, "[t]he Company shall provide Employee a monthly automobile allowance." That is the extent of the language Diston contends forms the basis for additional damages for breach. (Brief of Appellee at 33-34.) Because this undetermined car allowance was purportedly part of Diston's compensation, which is an essential element of an employment agreement, it must contain enough detail for the court to determine whether there was mutual assent and to calculate the damages. RESTATEMENT (SECOND) OF CONTRACTS § 33(2). This vague reference hardly rises to that level and obviously--assuming that the letter is a contract at all--left the amount of the allowance either entirely up to EnviroPak or subject to future negotiation. Either way, no agreement on this term was ever reached.<sup>16</sup>

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bind EnviroPak to its terms, EnviroPak incurred an obligation to Diston for the employment he would have had during EnviroPak's existence. That is the measure of EnviroPak's obligation and thus the measure of Surgical's

<sup>16</sup> "If terms and conditions are left to future negotiations, the requisite meeting of the minds is absent and no contract is formed." *Dumas v First Federal Savings and Loan*, 654 F 2d 359, 360 (5th Cir 1981). Similarly, when one of the parties to a purported agreement has the exclusive power to decide the terms of the agreement, there is no contract because there has been no meeting of the minds. *De Los Santos*, 348 N W 2d at 844, *Engineering Assoc* , 622 P 2d at 787. The car allowance is not alone in its uncertainty. The purported reference to stock options, which "will be determined by the company at the time of employment," likewise lacks definiteness. These items purport to be compensation, yet they cannot be determined. The trial court was unable to award damages under these terms because "[i]nsufficient evidence exist[ed] with respect to the terms and calculations of any damages for failure of stock options and for incentive bonuses." (R 473.) The trial court observed that "there are too many unknowns to determine what, if any, value those [stock] options would have had to [Diston]." (R 472.) This conclusion is correct, *see* RESTATEMENT (SECOND) OF CONTRACTS § 33(2), and is exactly why no contract was ever formed.

***B. Because the Letter of Intent Purports to be for a term of Three Years, it is Governed by the Statute of Frauds, and any Modification with Respect to the car Allowance must be in Writing.***

Utah law is clear that when an agreement is within the statute of frauds, any modification of the agreement "must also conform to the statute of frauds." *Holt v. Katsanevas*, 854 P.2d 575, 579 (Utah App. 1993), *citing Allen v. Kingdon*, 723 P.2d 394, 396-97 (Utah 1986).<sup>17</sup> Moreover, the writing offered to satisfy the statute must be clear and definite. *Machan Hampshire Properties*, 779 P.2d at 234.

In this case, the letter of intent fails the certainty test, and the alleged oral modification as to the car allowance fails under the statute of frauds.<sup>18</sup> This issue does not turn on whether or not the IRS allows an employer to deduct an employee's car allowance as a business expense. That argument once again begs the question. It must first be determined whether an agreement exists obligating the employer to *pay* an allowance. The letter of intent lacks any certainty on this point. Moreover, the language regarding the car allowance is consistent with the rest of the letter: a very general opening to negotiations and an invitation to bargain.

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<sup>17</sup> The only exception to this is where a party has performed the oral modification . . . ." *Holt*, 854 P.2d at 580 (quoting *Allen*, 723 P.2d at 396). This exception does not apply here because Diston never used his vehicle in the performance of any duties for EnviroPak.

<sup>18</sup> In arguing for the car allowance, Diston makes the surprisingly inconsistent statement that the 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." (Brief of Appellee at 34.) This is one of the primary reasons why the letter of intent, which does not specify any of these items, is not a valid contract.



## CONCLUSION

There was no employment contract between EnviroPak and Diston. At best, the letter of intent was an outline the parties could use to negotiate and then formalize--as Diston expected--a formal agreement. Neither EnviroPak nor Diston was obligated to do anything based on the letter of intent.

As for Ninow's authority, Diston had no reason to believe that Ninow could bind EnviroPak. Neither Ninow's employment agreement nor the EnviroPak organization agreement were capable of conveying such authority. Diston had no contact with anyone from EnviroPak. As a result, he could not have relied on anything EnviroPak did or failed to do that could have led anyone to believe reasonably that Ninow had any authority at all.

As to Diston's cross-appeal, the trial court was correct in limiting Diston's damages to the period during which EnviroPak was in business. Finally, recognizing that Diston's right to a car allowance was a matter of contract and not tax law, the trial court was also correct in refusing to award damages for the unspecified car allowance.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing **Reply Brief of Appellants and Brief of Cross-Appellee** to the following, postage prepaid, this 27<sup>th</sup> day of July, 1994:

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