

1994

# Lan C. England v. Eugene Horbach, an individual, Medicode, Incorporated, a Utah corporation, and Does I through V: Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Samuel D. McVey; Randy T. Austin; Kirton and McConkie.

Stephen G. Crockett; Wesley D. Felix; Giaunque, Crockett, Bendinger and Peterson.

---

## Recommended Citation

Brief of Appellant, *England v. Horbach*, No. 940695 (Utah Court of Appeals, 1994).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/6306](https://digitalcommons.law.byu.edu/byu_ca1/6306)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

LAN C. ENGLAND,

Plaintiff and Appellant,

vs.

EUGENE HORBACH, an individual,  
MEDICODE, INCORPORATED, a Utah  
corporation, and DOES I through V,

Defendants and Appellees.

:  
:  
:  
: Case No. 940695-CA  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

(Priority No. 15)

---

PLAINTIFF/APPELLANT'S ADDENDUM

---

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
JUDGE J. DENNIS FREDERICK

Stephen G. Crockett  
Wesley D. Felix  
GIAUQUE, CROCKETT,  
BENDINGER & PETERSON  
170 South Main, #400  
Salt Lake City, Utah 84101

Samuel D. McVey (A4083)  
Randy T. Austin (A6171)  
KIRTON & McCONKIE  
1800 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111-1004

FILED

JAN 20 1995

LAN C. ENGLAND,

**VS.**

### Defendants and Appellees.

(Priority No. 15)

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
JUDGE J. DENNIS FREDERICK

**Samuel D. McVey (A4083)**  
**Randy T. Austin (A6171)**  
**KIRTON & McCONKIE**  
**1800 Eagle Gate Tower**  
**60 East South Temple**  
**Salt Lake City, Utah 84111-1004**

**PLAINTIFF/APPELLANT'S ADDENDUM**

**TABLE OF CONTENTS**

JURISDICTION	1
COMPLAINT	2-17
ANSWER	18-22
SCHEDULING ORDERS/MOTIONS RE CONTINUANCE	23-35
TRIAL MEMORANDUM EXCERPT	36-39
FINDINGS OF FACT AND CONCLUSIONS OF LAW	40-46
ENGLAND DEPOSITION EXCERPT	47-54
DEFENDANT'S TRIAL MEMORANDUM EXCERPT	55-82
DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION EXCERPT	83-84
JUDGE'S RULING	85-89
PLAINTIFF'S TRIAL BRIEF	90-97

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

November 14, 1994

RECEIVED

NOV 17 1994

KIRTON & McCONKIE

OFFICE OF THE CLERK

---

Samuel D. McVey  
KIRTON, McCONKIE & POELMAN  
Attorneys at Law  
1800 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111-1004

Lan C. England,  
Plaintiff and Appellant,  
v.  
Eugene Horbach, Medicode  
Incorporated,  
Defendants and Appellees.

No. 940284  
930901271CV

Pursuant to the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. The address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler  
Clerk

930980/26

RICHARD D. BURBIDGE, Esq. (#0492)  
STEPHEN B. MITCHELL, Esq. (#2278)  
DOUGLAS H. HOLBROOK, Esq. (#5718)  
BURBIDGE & MITCHELL  
Attorneys for Plaintiff  
139 E. South Temple, Suite 2001  
Salt Lake City, Utah 84111  
(801) 355-6677

FILED  
DISTRICT COURT

MAR 15 2 23 PM '83

BY *Ann B. Hanks*

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

LAN C. ENGLAND,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
-vs-	)	(JURY TRIAL DEMANDED)
	)	
EUGENE HORBACH, an individual,	)	
MEDICODE, INCORPORATED, a	)	
Utah corporation, and DOES	)	
I through V,	)	
	)	Civil No. 930901471 CV
Defendants.	)	Judge
	)	

Plaintiff, demanding trial by jury, complains of  
Defendants as follows:

PARTIES

1. Plaintiff Lan C. England ("England") is an individual resident of Salt Lake County, State of Utah and was the founder of the predecessor of Defendant Medicode, Incorporated ("Medicode"). England entered into an agreement with respect to the sale of the stock in Medicode to Defendant Eugene Horbach ("Horbach"), which is the subject of this lawsuit.

2. Defendant Horbach is an individual resident of Bellevue, Washington. Mr. Horbach is a majority owner of shares of stock in Medicode, and in that respect and in others, regularly and consistently conducts business in Salt Lake County, State of Utah, and has done so over a substantial period of time including, but not limited to, the period of the agreements subject of this action.

3. Defendant Medicode is a Utah corporation, having its principal place of business in Salt Lake County, State of Utah. The shares of stock subject of this Complaint are common shares in Medicode, which controls and facilitates the transfer of such shares. Horbach in turn, by reason of his stock ownership in Medicode, exercises complete domination and control over that corporation. Medicode is a necessary party to this action in that full and complete relief for England will require an acknowledgement by Medicode of the stock interest of England and will require Medicode to effectuate a transfer of shares of Medicode from Horbach to England.

4. Defendants Does I through V are persons or entities who engaged in activities in conjunction or conspiracy with Horbach subject to the claims herein, whose identities are presently unknown to England. By reason of such activities, Defendant Does I through V are jointly and severally liable with Horbach to England. When the true identity of said Does are discovered by England, they will be more formally named in the Complaint.

#### JURISDICTION AND VENUE

5. Jurisdiction is proper in this court pursuant to the provisions of Utah Code Annotated §§ 78-3-4, 78-33-1 and 78-22-27, et seq. Specifically, Horbach is subject to the jurisdiction of this court because of his ownership and operation of the business of Medicode in Utah, his regular and continuous transaction of business in this state and because the agreements subject of this Complaint were entered into and were to be performed in the State of Utah.

6. Venue of this action is proper in this court pursuant to the provisions of §§ 78-13-7, Utah Code Annotated, in that England and Medicode are residents of the State of Utah, the agreement subject of the Complaint was entered into and to be performed in Salt Lake County, State of Utah, and the activities giving rise to the claims occurred and accrued in Salt Lake County, State of Utah.

#### BACKGROUND FACTS

7. England was the founder of the predecessor of Medicode and one of its principal shareholders. In or about the fall of 1989, England owned approximately 256,633 shares of Medicode stock, constituting approximately 18.6% of the issued and outstanding stock.

8. After the development of Medicode and the establishment of its operations, Horbach contacted England and entered into an oral agreement with England pursuant to which Horbach agreed to purchase England's stock in Medicode for the



sum of \$2.75 per share (the "Original Agreement"). Under the terms of the Original Agreement, Horbach agreed to pay in cash, in or about the latter part of 1989, the total consideration due pursuant to the Original Agreement, in exchange for which England would execute and deliver over to Horbach a stock certificate representing the shares agreed to be purchased by Horbach.

9. In breach of the Original Agreement between the parties, Horbach failed and refused to pay the purchase price due and, as of May 23, 1991, had paid to England only a portion of the purchase price due under the Original Agreement, and Horbach was seriously delinquent under the Original Agreement.

10. At a meeting held on or about May 23, 1991, Horbach requested that England execute and deliver to him the stock certificate representing England's shares of Medicode and Horbach agreed to pay to England the sum of \$25,000.00, representing the outstanding principal due under the Original Agreement. At that time, England did not have the obligation to deliver the shares inasmuch as Horbach was in substantial breach of the Original Agreement. At that time, the parties entered into a new agreement (hereinafter the "Substitute Agreement") pursuant to which England agreed to transfer the shares, Horbach agreed to pay the remaining principal balance and, as additional consideration for England to waive his legal rights and claims with respect to the breaches by Horbach, Horbach agreed to convey to and hold in trust for England a

sufficient number of shares of Medicode which would equal 2% of the issued and outstanding shares of Medicode and to deliver such shares to England at his direction. Pursuant to the Substitute Agreement, Horbach drafted and executed the written document, a true and correct copy of which is appended hereto as Exhibit "A" and incorporated herein by reference.

11. In breach of the Substitute Agreement, the check given to England by Horbach for payment of the remaining principal balance of the purchase price was drawn on an account that was closed and the check was not negotiable. Only after demands made by England for performance under the Substitute Agreement did Horbach eventually pay the principal sum represented by the bad check.

12. In accordance with the Substitute Agreement, and by letter dated December 2, 1992, a true and correct copy of which is appended hereto as Exhibit "B", England made demand upon Horbach for the issuance to England of his 26,952 shares of Medicode held in trust by Horbach, constituting 2% of the issued and outstanding shares of Medicode. Despite said written instruction, and in breach of the Substitute Agreement between the parties, Horbach failed and refused to cause the issuance of such shares. Thereafter, counsel for England made demand upon counsel for Horbach for the issuance of such shares pursuant to a letter dated January 20, 1993, a true and correct copy of which is appended hereto as Exhibit "C". Again, in breach of the Substitute Agreement between the parties, Horbach failed and

refused to cause the issuance and transfer of said shares to England.

13. In addition to the direct, intentional and material breach of the Substitute Agreement between the parties by Horbach and his failure and refusal to issue or transfer the subject shares to England, counsel for Horbach instructed counsel for England that Horbach would only agree to provide to England shares equal to 2% of the 18.6% of the shares conveyed by England and then only after Medicode had engaged in a merger and an anticipated public offering. Horbach thereby repudiated and breached a substantial and material portion of the Substitute Agreement and deprived England of a substantial and material portion of the consideration he was to receive pursuant to the Substitute Agreement by which Horbach acquired the 18.6% of the said issued and outstanding shares of Medicode.

FIRST CLAIM FOR RELIEF

(Breach of Contract Against Horbach)  
(Rescission)

14. For purposes of this First Claim for Relief, Plaintiff incorporates the averments of paragraphs 1 through 13 above.

15. By reason of Horbach's willful, substantial and material breach of the Substitute Agreement between the parties, England is entitled to an order and judgment of rescission rescinding the Substitute Agreement between himself and Horbach. England hereby tenders to Horbach return of all amounts received

by England for purchase of the stock and is entitled to an order compelling Horbach to return to England the 18.6% of the shares of Medicode.

SECOND CLAIM FOR RELIEF

(Breach of Contract Against Horbach)  
(Specific Performance)

16. For purposes of this Second Claim for Relief, Plaintiff incorporates the averments of paragraphs 1 through 15 above.

17. In the alternative to England's claims for rescission of the Substitute Agreement, in the event it is determined that England is not entitled to rescission, England is entitled to specific performance of the Substitute Agreement as against Horbach and an order requiring him to forthwith convey to England a stock certificate representing 2% of the issued and outstanding stock of Medicode.

18. In the alterative, England is entitled to all damages incurred by England as a result of Horbach's material and substantial breach of the Substitute Agreement between the parties, including costs and attorney's fees incurred herein.

THIRD CLAIM FOR RELIEF

(Declaratory Relief Against Horbach and Medicode)

19. For purposes of this Third Claim for Relief, England incorporates the averments of paragraphs 1 through 18 above.

20. By reason of Horbach's failure and refusal to abide by the terms of the Substitute Agreement and his material and substantial breach and repudiation thereof, and by reason of Medicode's failure and refusal to acknowledge the ownership and interest of England in Medicode, an actual dispute has arisen and does now exist between the parties. England contends that he is entitled to rescind the agreement with Horbach and England is therefore the beneficial owner of 18.6% of Medicode's stock, or, in the alternative, England contends that he is the beneficial owner of 2% of the issued and outstanding stock of Medicode, that Horbach is required to convey such stock to England and that Medicode is required to recognize England as a stockholder and to issue a stock certificate to him. Defendants deny such contentions.

21. England is entitled to a judgment and order against Horbach and Medicode determining England's rights to stock in Medicode now held by Horbach and is entitled to a judgment ordering Medicode to forthwith effect a transfer to England of such on the official books and records of the corporation so as to reflect his ownership and interest therein and to recognize England as a stockholder. Such relief is necessary in order for the parties to ascertain their rights in the premises and in order to avoid a multiplicity of legal actions.

FOURTH CLAIM FOR RELIEF

(Breach of Fiduciary Duties Against Horbach)

22. For purposes of this Fourth Claim for Relief, England incorporates the averments of paragraphs 1 through 21 above.

23. Pursuant to the Substitute Agreement, Horbach undertook duties as a fiduciary to hold shares of Medicode constituting 2% of the issued and outstanding shares of Medicode in trust for England and to deliver said shares to England at his direction.

24. England has given to Horbach direct and specific written instructions for the issuance of the subject shares to England, which directions Horbach has intentionally refused to comply with and breached in direct violation of Horbach's fiduciary duties to England.

25. By reason of Horbach's breach of fiduciary duty, England has been substantially damaged in an amount not presently fully determined, but in an amount not less than \$500,000.00 and England is entitled to judgment against Horbach in a sum of not less than \$500,000.00 plus costs and attorney's fees incurred in bringing this action.

26. By reason of the intentional and willful breach of fiduciary duties by Horbach, England is entitled to punitive and exemplary damages against Horbach in a sum not less than \$500,000.00.

FIFTH CLAIM FOR RELIEF

(Injunction as Against Horbach and Medicode)

27. For purposes of this Fifth Claim for Relief, England incorporates the averments of paragraphs 1 through 26 above.

28. England is informed and believes that Medicode is in the process of effecting a merger with a new corporation and that thereafter it intends to conduct a public offering for its shares. England is informed and believes that Horbach intends to transfer shares held in his name, some of which shares are held in trust by him for England and otherwise which are subject of this action, which shares are to be transferred without the authorization of England and in direct derogation of his rights therein.

29. If the transfers referenced above take place, England will suffer immediate and irreparable harm in that his interest in Medicode will be transferred in violation of his rights, he will be deprived of the right and opportunity to participate in decisions concerning the merger, and he will irrevocably lose his interest in Medicode, all in derogation of his rights.

30. Accordingly, England is entitled to an injunction enjoining Horbach from causing the transfer of any of the Medicode shares subject of this action, including the shares held by him in trust for England and enjoining Medicode from

effecting any transfer or transaction which would effect a transfer of such shares to any other person or entity.

WHEREFORE, Plaintiff prays for judgment as against Defendants as follows:

1. Under the First Claim for Relief, for judgment as against Horbach for rescission of the Original Agreement pursuant to which England agreed to convey and did convey 18.6% of the issued and outstanding stock of Medicode and which judgment will compel Horbach to immediately convey to England such shares of common stock in Medicode equal to 18.6% of the issued and outstanding stock of Medicode in exchange for England's tendering of all amounts received by him for purchase of such stock such that the parties can be placed in the position that they were in before they entered into the Substitute Agreement and prior to Horbach's willful, material and substantial breach thereof;

2. In the alternative, under the Second Claim for Relief, for an order compelling and commanding Horbach to convey forthwith to England shares of common stock in Medicode equal to 2% of the issued and outstanding stock in Medicode. In the alternative to the order of specific performance, a judgment awarding England damages as against Horbach in a sum to be determined at trial;

3. Under the Third Claim for Relief, for a declaratory judgment determining the number of shares held by Horbach in Medicode to which England is entitled, whether by rescission or



by specific performance pursuant to the terms of the Substitute Agreement and an order compelling Horbach to transfer said shares to England and requiring Medicode to cause such transfer and ordering that neither Horbach nor Medicode cause or effect the transfer of such shares to any other person or entity;

4. Under the Fourth Claim for Relief, for judgment against Horbach in a sum according to proof, but not less than \$500,000.00 in damages, together with punitive damages in an amount not less than \$500,000.00;

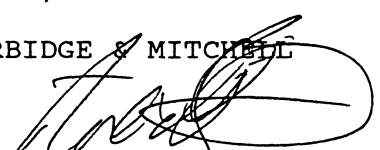
5. Under the Fifth Claim for Relief, for an order temporarily and permanently enjoining Horbach and Medicode from transferring any of the shares subject of this action to any other person or entity until the rights of England therein can be determined;

6. For costs and attorneys fees incurred in bringing this claim; and

7. For such other and further relief as is deemed just in the premises.

DATED this 15<sup>th</sup> day of March, 1993.

BURBIDGE & MITCHELL

  
Richard D. Burbidge  
Attorneys for Plaintiff

Plaintiff's Address:  
P.O. Box 526145  
Salt Lake City, Utah 84152-6145

js england.com

Medicode

Parent Company of  
Med-Index and  
Medical Data Research

5-23-91

Dear LAN —

I will hold 2% of  
MEDICODE STOCK IN TRUST  
FOR YOU FOREVER UNLESS  
I HAVE DIFFERENT INSTRUCTION  
BY YOU ON DISPOSITION  
OF THAT ~~OF THAT~~ STOCK —

E. Horbach

Medicode Inc.  
3125 Wilshire Blvd., Suite 1000  
Santa Monica, Calif. 90404  
Phone (310) 316-1500  
Fax (310) 316-1501

5-23-91

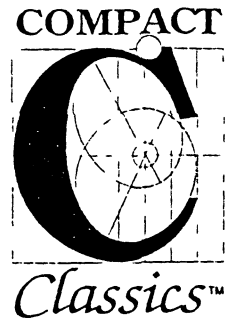
Dear Lan —

I will hold 2% of Medicode stock in  
trust for you forever unless I have  
different instructions by you on  
disposition of that stock—

E. Horbach

EXHIBIT A

00015



Eugene Horbach  
E&H Properties  
1220 116th Ave., NE  
2nd Floor  
Bellevue, WA 98004

December 2, 1992

Dear Gene,

I have had an offer for my remaining 2% (26,952 shares) of Medicode stock. A copy of this offer is attached. As per our agreement, I am asking you to instruct the appropriate personnel to effectuate this transaction as soon as possible. This is in no way an enticement to encourage you or the company to purchase my shares. I am sensitive to the challenging times you have faced. Mr. Porter's offer is legitimate and he is a qualified investor--he has been interested in Med-Index/Medicode for several years. As a shareholder, he would certainly be an asset to the Company.

Again, please expedite this transaction as soon as possible. The offer is time sensitive, and we need the funds to meet publishing deadlines which are critical to us at this time of year.

Best wishes,

Lan C. England  
801-268-9777  
FAX 801-485-7803

cc: Eileen Shanon  
Brent Anderson  
Max Farbman  
Sandra Horbach

**EXHIBIT B**

00016

RAY, QUINNEY & NEBEKER  
PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

ALONZO W. WATSON, JR.  
STEPHEN B. NEBEKER  
HERSCHEL J. SAPERSTEIN  
MITCHELL MELICH  
DON B. ALLEN  
CLARK P. GILES  
ROBERT M. GRAHAM  
NARRVEL E. HALL  
JAMES L. WILDE  
HERBERT C. LIVSEY  
WILLIAM A. MARSHALL  
JAMES Z. DAVIS  
PAUL S. FELT  
D. JAY CURTIS  
GERALD T. SNOW  
ALAN A. ENKE  
WESTON L. HARRIS  
JONATHAN A. DIBBLE  
SCOTT H. CLARK  
STEVEN H. GUNN  
JAMES S. JARDINE  
ALLAN T. BRINKERHOFF  
JANET HUGIE SMITH

DOUGLAS MATSUMORI  
ROBERT P. HILL  
RICHARD G. ALLEN  
ANTHONY W. SCHOFIELD  
ALLEN L. ORR  
BRAD D. HARDY  
BRIAN E. KATZ  
A. ROBERT THORUP  
JOHN P. HARRINGTON  
BRENT W. TODD  
LARRY G. MOORE  
DALE M. OKERLUND  
BRUCE L. OLSON  
JOHN A. ADAMS  
DOUGLAS M. MONSON  
CRAIG CARLILE  
STEVEN W. HARRIS  
RICHARD H. CASPER  
JAMES M. DESTER  
DEE R. CHAMBERS  
KEVIN G. GLADE  
LESTER K. ESSIG  
IRA B. RUBINFELD

BOYD A. FERGUSON  
STEVEN T. WATERMAN  
STEPHEN C. TINGEY  
CRAIG L. TAYLOR  
KELLY J. FLINT  
JOHN R. MADSEN  
STEVEN J. AESCHBACHER  
KEITH A. KELLY  
RICK L. ROSE  
RICK B. HOGGARD  
LISA A. YERKOVICH  
BRENT D. WRIDE  
MICHAEL E. BLUE  
SCOTT A. HAGEN  
STEVEN W. CALL  
CAMERON M. HANCOCK  
ELAINE A. MONSON  
SYLVIA IANNUCCI  
KATIE A. ECCLES  
JARED M. HARRIS  
GEORGE S. ADONDAKIS  
DAVID A. CUTT  
JULIA M. HOUSER

400 DESERET BUILDING  
79 SOUTH MAIN STREET  
P. O. BOX 45385  
SALT LAKE CITY, UTAH 84145-0385  
TELEPHONE (801) 532-1500  
FACSIMILE NO. (801) 532-7543

210 FIRST SECURITY BANK BLDG.  
92 NORTH UNIVERSITY AVENUE  
PROVO, UTAH 84601-4420  
TELEPHONE (801) 226-7210  
FACSIMILE NO. (801) 375-8379

1020 FIRST SECURITY BANK BLDG.  
2404 WASHINGTON BOULEVARD  
OGDEN, UTAH 84401-2306  
TELEPHONE (801) 621-0713  
FACSIMILE NO. (801) 392-6068

OF COUNSEL  
ALBERT R. BOWEN  
ROBERT GORDON  
M. JOHN ASHTON  
KENT H. MURDOCK

January 20, 1993

FACSIMILE TRANSMISSION

George Tingo, Jr., Esq.  
Golden and Tingo  
21-C-Alta Street  
San Francisco 94133

Re: Medicode, Inc.

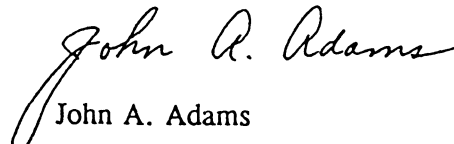
Dear Mr. Tingo:

On behalf of Lan C. England, we hereby demand the immediate issue of a stock certificate in Mr. England's name for 26,952 shares of common stock of Medicode, Incorporated (the "Company"), representing two percent (2%) of the stock of the Company. Enclosed herewith is a copy of the document signed by Eugene Horbach evidencing Mr. England's ownership interest.

This is to advise you that we will immediately take appropriate legal action in the event that the stock certificate is not issued within seven days of the receipt of this letter. Mr. England has received an offer to purchase his interest in the Company, an offer that Mr. England risks losing if the stock certificate is not issued to him in a timely fashion. In the event Mr. England is unable to consummate this sale, we will seek recovery of the purchase price offered to Mr. England as well as damages for lost opportunity and such other consequential damages as are appropriate with respect to any business investment losses.

Sincerely yours,

RAY, QUINNEY & NEBEKER

  
John A. Adams

JAA:lj  
cc: Lan C. England  
10054.SII

EXHIBIT C  
00017

Addendum 17

Steven L. Taylor (3210)  
Of Counsel With  
SMITH & HANNA, P.C.  
Attorney for Defendant  
311 South State, Suite 450  
Salt Lake City, Utah 84111  
Telephone: (801) 521-8900

*Lu Ann B. Hanna*

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

---

LAN C. ENGLAND,	)	
Plaintiff,	)	HORBACH'S ANSWER TO
vs.	)	COMPLAINT
EUGENE HORBACH, an	)	Civil No. 930901471CV
individual, MEDICODE,	)	Judge J. Dennis Frederick
INCORPORATED, a Utah	)	
corporation, and DOES I	)	
through V,	)	
Defendants.	)	

---

Eugene Horbach ("Horbach"), by and through his attorney,  
hereby answers the Complaint of plaintiff and alleges as follows:

**FIRST DEFENSE**

Plaintiff's Complaint fails to state a claim against  
Horbach upon which relief can be granted.

**SECOND DEFENSE**

Responding to the particular allegations contained in the  
Complaint, Horbach admits, denies and alleges as follows:

1. Horbach admits the allegations of paragraph 1.
2. Horbach admits the allegations of paragraph 2.
3. Horbach admits that Medicode is a Utah corporation  
and that Horbach is an owner of common shares of Medicode. Being  
uncertain as to plaintiff's allegation that Medicode controls and

facilitates the transfer of Medicode common shares, Horbach denies that allegation. Horbach denies the remaining allegations of paragraph 3.

4. Horbach is without sufficient knowledge or information to admit or deny the allegations of paragraph 4 and therefore denies them.

5. As to paragraph 5, Horbach denies that he operates the business of Medicode in Utah and alleges that ownership of common shares in Medicode is insufficient to confer jurisdiction in this Court. Further, Horbach denies that he regularly and continuously transacts business in Utah. Finally, Horbach admits that his agreement with plaintiff to purchase plaintiff's shares in Medicode was entered into in Utah and that plaintiff's Exhibit "A" was drafted in Utah but denies that either the agreement nor the document designated Exhibit "A" were to be performed in Utah.

6. Horbach admits that plaintiff and Medicode are residents of Utah, admits that the agreement to purchase plaintiff's shares in Medicode was entered into in Salt Lake County and denies the remainder of the allegations of paragraph 6.

7. Horbach is without sufficient knowledge or information to admit or deny the allegations of paragraph 7 and therefore denies them.

8. Upon information and belief, Horbach denies the allegation regarding initial contact between Horbach and plaintiff. Horbach admits the remaining allegations of paragraph 8.

9. Horbach denies the allegations of paragraph 9 and affirmatively alleges that Horbach was, at all material times, in substantial compliance and that plaintiff never declared a breach under the original agreement.

10. Horbach admits the allegations in the first sentence of paragraph 10. Horbach denies the allegations of the second sentence of paragraph 10 and affirmatively alleges that Horbach was in substantial performance of the original agreement and that there was no material breach on Horbach's part. With respect to the third sentence of paragraph 10, Horbach admits that he agreed to pay the remaining balance due on purchase of plaintiff's shares and denies the remaining allegations of that sentence. As to the last sentence of paragraph 4, Horbach admits that he executed the document designated Exhibit "A" and denies the remaining allegations of that sentence.

11. Horbach admits that he discharged the original agreement by paying plaintiff any remaining sum due plaintiff, denies that Horbach was in breach of plaintiff's alleged substitute agreement, and denies the remaining allegations of paragraph 11.

12. Horbach denies that there was a substitute agreement as alleged by plaintiff, admits the existence of the documents designated as Exhibits "B" and "C" to plaintiff's Complaint and denies the remaining allegations of paragraph 12.

13. Horbach admits that Horbach offered to provide to plaintiff shares equal to 2% of the 18.6% of the shares owned by Horbach, affirmatively alleges that such offer was an offer of

settlement only and denies the remaining allegations of paragraph 13.

14. Responding to paragraph 14, Horbach incorporates his responses to paragraphs 1 through 13 as if fully set forth herein.

15. Horbach denies the allegations of paragraph 15.

16. Responding to paragraph 16, Horbach incorporates his responses to paragraphs 1 through 15 as if fully set forth herein.

17. Horbach denies the allegations of paragraph 17 and affirmatively alleges that the alleged substitute agreement is void.

18. Horbach denies the allegations of paragraph 18.

19. Responding to paragraph 19, Horbach incorporates his responses to paragraphs 1 through 18 as if fully set forth herein.

20. Horbach denies the allegations of paragraph 20.

21. Horbach denies the allegations of paragraph 21.

22. Responding to paragraph 22, Horbach incorporates his responses to paragraphs 1 through 21 as if fully set forth herein.

23. Horbach denies the allegations of paragraph 23.

24. Horbach denies the allegations of paragraph 24.

25. Horbach denies the allegations of paragraph 25.

26. Horbach denies the allegations of paragraph 26.

27. Responding to paragraph 27, Horbach incorporates his responses to paragraphs 1 through 26 as if fully set forth herein.

28. Horbach denies the allegations of paragraph 28.

29. Horbach denies the allegations of paragraph 29 and affirmatively alleges that only shareholders of record, pursuant to



applicable Utah law, are entitled to notice of and participation in a merger.

30. Horbach denies the allegations of paragraph 30.

THIRD DEFENSE

Plaintiff's Complaint should be dismissed, in that the agreements have been fully performed, satisfied and discharged.

FOURTH DEFENSE

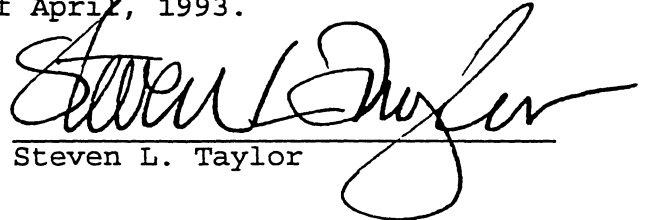
Plaintiff's claims against Horbach under the "substitute agreement" should be dismissed because that agreement violates the Rule Against Perpetuities and is, therefore, null and void.

FIFTH DEFENSE

Plaintiff's claims are barred by the doctrines of laches, waiver or estoppel.

WHEREFORE, Horbach prays that the Complaint be dismissed with prejudice and upon the merits, and that he be awarded his costs incurred, together with all other such relief to which he may prove to be entitled.

DATED this 30th day of April, 1993.

  
Steven L. Taylor

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

---

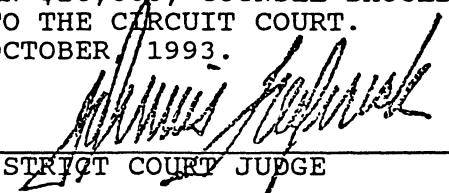
ENGLAND, LAN C	:	
PLAINTIFF,	:	
	:	SCHEDULING ORDER AND
	:	TRIAL NOTICE
-VS-	:	
	:	CASE NO. 930901471 CV
HORBACH, EUGENE	:	
MEDICODE INCORPORATED	:	HONORABLE J. DENNIS FREDERICK
DEFENDANT.	:	

---

PURSUANT TO THE SCHEDULING CONFERENCE HELD ON OCTOBER 5, 1993  
THE FOLLOWING DATES WERE SET AND MATTERS DISCUSSED:

1. THIS CASE IS SET FOR TRIAL ON DECEMBER 21, 1993 AT 10:00 A.M.
2. ANTICIPATED TRIAL TIME IS 02 DAYS.
3. THE CASE IS SET FOR JURY TRIAL. COUNSEL ARE TO  
SUBMIT AN AGREED SET OF JURY INSTRUCTIONS TO THE COURT BY  
DECEMBER 21, 1993 AT 10:00 A.M. . OBJECTED TO INSTRUCTIONS ARE T  
SEPARATELY.
4. ALL DISCOVERY INCLUDING RESPONSES MUST BE CONCLUDED BY  
NOVEMBER 12, 1993 AT 5:00 P.M.
5. ALL DISPOSITIVE MOTIONS ARE TO BE HEARD BY 30 DAYS PRIOR TO TR
6. EXHIBIT AND WITNESS LISTS ARE TO BE EXCHANGED BY
7. A FINAL PRETRIAL SETTLEMENT CONFERENCE WILL BE HELD ON  
DECEMBER 13, 1993 AT 8:30 A .M. TRIAL COUNSEL AND CLIENTS, OR  
AN INDIVIDUAL WITH AUTHORITY TO SETTLE THIS CASE ARE TO BE  
PRESENT. OUT OF STATE PARTIES MUST BE AVAILABLE BY PHONE AT THE  
TIME OF THE PRETRIAL SETTLEMENT CONFERENCE.
8. FAILURE TO APPEAR AT THE PRETRIAL SETTLEMENT CONFERENCE  
MAY RESULT IN A DEFAULT.
9. THE FOREGOING DATES SHOULD BE CONSIDERED FIRM SETTINGS  
AND WILL NOT BE MODIFIED WITHOUT COURT ORDER, AND THEN ONLY  
UPON A SHOWING OF MANIFEST INJUSTICE. COUNSEL ARE INSTRUCTED TO  
STAY IN CONTACT WITH THE CLERK OF THIS COURT AS THE TRIAL DATE  
APPROACHES REGARDING THE TRIAL SETTING.
10. IF PLAINTIFF'S COUNSEL ANTICIPATES THAT EVIDENCE AT TRIAL  
WILL SHOW DAMAGES OF LESS THAN \$20,000, COUNSEL SHOULD PREPARE AN  
ORDER TRANSFERRING THE CASE TO THE CIRCUIT COURT.

DATED THIS 5TH DAY OF OCTOBER 1993.

  
DISTRICT COURT JUDGE

COPIES MAILED TO PARTIES AT THE ADDRESSES INDICATED ON THE  
ATTACHED MAILING CERTIFICATE.

00168

STEVEN L. TAYLOR (#3210)  
Of Counsel with  
MURPHY, TOLBOE & MABEY  
124 South 600 East, Suite 100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

DEC 1 1993  
By C. Beverley  
SALT LAKE COUNTY

Attorneys for Defendant Eugene Horbach

---

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

---

LAN C. ENGLAND	)	
	)	
Plaintiff,	)	MOTION FOR: CONTINUANCE
	)	OF TRIAL, LEAVE TO FILE
vs.	)	COUNTERCLAIM, AND TO
	)	EXTEND DISCOVERY PERIOD
	)	
EUGENE HORBACH, an individual,	)	
MEDICODE, INCORPORATED, a	)	Civil No. 930901471 CV
Utah corporation, and DOES I	)	
through V,	)	JUDGE J. Dennis Frederick
	)	
Defendants.	)	

---

Defendant Horbach hereby moves the court for a continuance of trial, for leave to file a counterclaim, and to extend discovery in this matter. The grounds for this Motion are set forth herein.

**FACTS**

The Complaint in this matter was filed on or about March 15, 1993 and was subsequently served on Defendant Horbach, a non-resident. Defendant Horbach filed an answer on or about April 30, 1993. Discussions were then entered into between Plaintiff's counsel at that time and Defendant Horbach's counsel regarding discovery. Some time during the week of July 26, 1993, Plaintiff

changed counsel and Plaintiff's current counsel filed a writ of attachment, which was issued ex-parte because Defendant's counsel was out of town that week.

On August 5, 1993, a hearing was held regarding the writ of attachment and the court issued an order extending the writ during the pendency of the action. Subsequent to that hearing, no additional discovery had occurred. On August 25, 1993, Plaintiff filed a certification of readiness for trial and a motion for pretrial conference. On October 5, 1993, the parties and the court entered into a scheduling order and trial notice. At that time, no discovery had been accomplished. In the scheduling order, the court ordered, inter alia, that all discovery be concluded by November 12, 1993. At the time of the scheduling order, Defendant's counsel believed the time frames set forth therein to be realistic.

Shortly after the entry of the scheduling order, however, the Plaintiff left the country for several weeks. Consequently, Defendant was unable to depose Plaintiff until November 18, 1993. In addition, Plaintiff was unable to depose Defendant until November 22, 1993. This delay of approximately six (6) weeks has materially affected the time frame set forth in the scheduling order.

In the context of the Complaint and Answer as filed, there appeared to be no issue as to cash consideration owed and paid to Plaintiff by Defendant. In Plaintiff's deposition, however,

Plaintiff raised, for the first time, the possibility that Plaintiff was still owed by Defendant \$50,000.00. England deposition, pgs. 27-28. Prior to this time, Defendant had no reason to believe that he still owed Plaintiff any cash consideration. Subsequently to Plaintiff's deposition, Defendant commenced an internal review of this matter. By the date of Defendant's deposition, a preliminary review revealed that, during the period of time Defendant was tendering installment payments to Plaintiff, Defendant's accounting department was issuing checks on at least three, and possibly four, bank accounts and that the payments to Plaintiff attributable to the purchase of the shares which is the subject matter of this lawsuit, appeared to exceed the agreed upon price between Plaintiff and Defendant. Because this was the first notice Defendant had of the possibility of overpayment, Defendant ordered his accounting department to locate the canceled checks. Defendant's staff is, however, experiencing difficulty obtaining those records because they are in storage and in an order to attempt to expedite the acquisition of these records, Defendant is prepared to pay the additional expense of ordering copies from the various banking institutions. That however cannot be accomplished prior to the scheduled trial date of December 21, 1993.

In addition, counsel for Defendant had requested, at Plaintiff's deposition, copies of certain documents in Plaintiff's possession. Plaintiff agreed to provide those documents. To date

Plaintiff has not provided the documents, despite further requests from Defendant's counsel. The reason for the delay has been stated that the documents are in storage and difficult to locate. That reason was again provided by Plaintiff to Defendant's counsel on December 13, 1993, immediately prior to the settlement conference with the court.

#### ARGUMENT

Based upon Defendant's newly discovered evidence and depending upon additional documents discovery as stated above, Defendant may have a counterclaim which fits squarely within paragraph (a) of Rule 13, U.R.C.P. Defendant's counterclaim arises out of the subject-matter of this lawsuit and should be adjudicated at the same time as Plaintiff's claims. To deny Defendant leave to file a counterclaim in this matter would work a substantial prejudice and manifest injustice to Defendant. Such denial may mean that Defendant would lose the right to adjudicate his counterclaim before this court. Alternatively, the sensible course in this matter would be to allow the parties additional time to complete discovery on this newly discovered evidence and allow the court to fully adjudicate all of the issues between the parties arising out of the subject matter of this litigation.

Because of the delay in accomplishing deposition discovery caused by Plaintiff's excursion out of the country, counsel for the parties have attempted to accomplish discovery on an "informal" basis. At this point in time, however, that has not been

successfully accomplished because of difficulty, on the part of both parties, of locating documents requested.

Subsequent to Plaintiff's deposition, and subsequent to Defendant's deposition, and based upon the newly discovered evidence on Defendant's part, counsel for Defendant has requested the assistance of counsel for Plaintiff in seeking an extension of the trial date in order to fully accomplish discovery. Plaintiff has, for whatever reasons, refused. The granting, however, of Defendant's Motion will not, in any way, prejudice Plaintiff. There is currently in escrow in Salt Lake City, Utah, the sum of \$369,000.00 to secure Plaintiff's claims should he prevail. Pursuant to the order of this court, that amount will remain in escrow pending resolution of the issues between the parties.

CONCLUSION

Based upon the foregoing, Defendant respectfully requests the court grant Defendant's Motion. It is clear that the amount in controversy is not insubstantial and that additional time is clearly needed for discovery. This court has the power to grant Defendant's Motion in the interest of justice and in order to prevent substantial prejudice and manifest injustice to Defendant.

RESPECTFULLY SUBMITTED this

14<sup>th</sup> day of Dec,

1993.



STEVEN L. TAYLOR, of counsel  
Murphy, Tolboe & Mabey  
Attorneys for Defendant Horbach

a:\horbach\m-contin.ext

Samuel D. McVey (A4083)  
Randy T. Austin (A6171)  
KIRTON, McCONKIE & POELMAN  
Attorneys for Plaintiff  
1800 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3600

FILED  
FEB 15 2017  
JULIE KIRTON

---

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

---

LAN C. ENGLAND,	:	MEMORANDUM IN
	:	OPPOSITION TO DEFENDANT
Plaintiff,	:	HORBACH'S MOTION FOR
	:	CONTINUANCE OF TRIAL,
vs.	:	LEAVE TO FILE A
	:	COUNTERCLAIM, AND TO
EUGENE HORBACH, MEDICODE	:	EXTEND DISCOVERY PERIOD
INCORPORATED,	:	
	:	Civil No. 930901471 CV
Defendants.	:	Judge J. Dennis Frederick
	:	

---

Plaintiff Lan C. England ("England") submits the following Memorandum in Opposition to Defendant Eugene Horbach's ("Horbach") Motion for Continuance of Trial, Leave to File a Counterclaim and to Extend Discovery Period.

00193



### RELEVANT FACTS

This matter was set for trial on December 21, 1993, at a pretrial hearing held October 5, 1993. Horbach asks the Court to continue that trial date and allow him to file a counterclaim based on newly discovered evidence. England disputes the validity of Horbach's request.

Horbach contends that delay in deposing England has prejudiced his ability to prepare for trial. England's deposition was taken on November 18, 1993. However, Horbach has waited until just a few days before trial to indicate that this delay has hindered his ability to prepare for trial. England encountered similar difficulty in deposing Horbach. England was unable to depose Horbach until November 22, 1993. Nonetheless, England is presently prepared to proceed to trial on this matter.

Horbach also suggests that England has added a claim that Horbach owes him \$50,000.00. That is not the case. No new claim has been added. Horbach indicates that the deposition of England has created new issues. He also suggests that his review of documents subsequent to the England's deposition uncovered additional relevant evidence. However, this so-called newly discovered evidence is irrelevant. The evidence concerns other transactions and deals between England and Horbach unrelated to the resolution of the issues before the Court. Further, this evidence was

admittedly always in the possession of Horbach, and any delay or failure to discover this evidence is directly attributable to lack of diligence on Horbach's part.

Horbach also contends that England has failed to produce certain documents requested at England's deposition. England has provided copies of all documents he has been able to find to date and will continue to produce documents discovered between now and trial.

England's contention in his pleadings and throughout the course of this matter has been that Horbach failed to transfer two percent (2%) of the stock of Medicode as promised in an agreement between the parties. The Court should be aware that Horbach has made no settlement offer during the course of these proceedings while England has tried to open settlement discussions repeatedly and has made two written and one oral offer.

### **ARGUMENT**

The decision to grant or deny continuance of trial lies within the sound discretion of the trial court and will not be disturbed on appeal absent abuse of that discretion. *State v. Horton*, 848 P.2d 708, 714 (Utah App. 1983). The Court should deny the Motion for a Continuance in this matter for several reasons.

First, despite the fact that all "newly discovered evidence" was in control of Horbach, Horbach failed to notify England or the Court of this newly discovered

evidence until the final pretrial settlement conference on December 13, 1993--just eight (8) days before trial.

Second, continuance of the trial at this late date, based on Horbach's lack of diligence, will seriously prejudice the interests of England. While Horbach contends that England will not be prejudiced because any damages which may be proved at trial have been placed in an escrow account, England disputes this contention. England will suffer serious prejudice. He will be denied the use of those funds for the period in which the trial is delayed. Moreover, England's efforts to try this matter expeditiously will be frustrated.

Finally, the Court should reject Horbach's argument that he will be prejudiced if the trial is not delayed. In fact, the only possible prejudice which Horbach may suffer is due to his own lack of diligence. England's efforts to secure a speedy trial in this matter should not be frustrated due to Horbach's lack of diligence.

In addition, the Court should reject Horbach's request for leave to file a counterclaim. First, at the pretrial settlement conference, Horbach was authorized to file a Motion for Continuance but not a Motion for Leave to File a Counterclaim. Second, untimely motions to file counterclaims must be denied. (*See Trip v. Vaughn*, 746 P.2d 794 (Utah Ct. App. 1987) (court refused to allow a defendant to bring a counterclaim which was filed thirteen (13) months after the answer to the complaint).

Accordingly, the Court should not at this late date grant Horbach leave to file a counterclaim. Particularly, in light of the fact that the supposed evidence giving rise to the counterclaim has always been in Horbach's control.

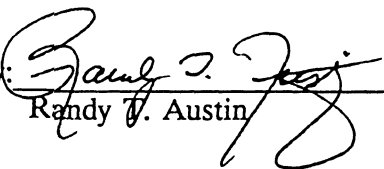
Finally, Horbach's contention that additional discovery is required in this matter is without merit. Simply stated, if Horbach is not prepared to go to trial, he has no one to blame but himself.

#### CONCLUSION

Because the "newly-discovered evidence" has always been in the possession of Horbach and because any failure to discover such evidence is due to lack of diligence on Horbach's part, the Court should reject the Motion for Continuance of the Trial Date. England is prepared to proceed to trial and should not be prejudiced by Horbach's lack of diligence. Moreover, the Court should reject Horbach's request to file an amended counterclaim and extend discovery. As indicated above, the Motion to File a Counterclaim has not been timely filed and was not authorized by the Court at the final pretrial conference.

DATED this 15<sup>th</sup> day of December, 1993.

KIRTON, McCONKIE & POELMAN

By:   
Randy T. Austin

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

---

ENGLAND, LAN C	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 930901471 CV
	:	DATE 12/20/93
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
HORBACH, EUGENE	:	COURT CLERK CLB
MEDICODE INCORPORATE DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY.  
D. ATTY.

---

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE  
NOTICE TO SUBMIT FOR DECISION DATED DECEMBER 15, 1993,  
THE COURT RULES AS FOLLOWS:

1. DEFENDANT HORBACH'S MOTION FOR CONTINUANCE OF TRIAL,  
ETC. IS DENIED, FOR THE REASONS STATED IN PLAINTIFF'S  
MEMORANDUM IN OPPOSITION.

2. COUNSEL FOR PLAINTIFF TO PREPARE THE ORDER.

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

---

ENGLAND, LAN C	:	
PLAINTIFF,	:	
	:	SCHEDULING ORDER AND
-VS-	:	TRIAL NOTICE
	:	
	:	CASE NO. 930901471 CV
HORBACH, EUGENE	:	
MEDICODE INCORPORATED	:	HONORABLE J. DENNIS FREDERICK
DEFENDANT.	:	

---

PURSUANT TO THE SCHEDULING CONFERENCE HELD ON JANUARY 25, 1994  
THE FOLLOWING DATES WERE SET AND MATTERS DISCUSSED:

1. THIS CASE IS SET FOR TRIAL ON MARCH 22, 1994 AT 10:00 A.M.
2. ANTICIPATED TRIAL TIME IS 01 DAYS.
3. THE CASE IS SET FOR NON JURY TRIAL
4. ALL DISCOVERY INCLUDING RESPONSES MUST BE CONCLUDED BY  
MARCH 11, 1994 AT 5:00 P.M.
5. ALL DISPOSITIVE MOTIONS ARE TO BE HEARD BY 30 DAYS PRIOR TO <sup>TRIAL</sup> ~~THE~~
6. EXHIBIT AND WITNESS LISTS ARE TO BE EXCHANGED BY

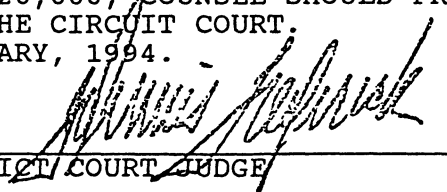
7. A FINAL PRETRIAL SETTLEMENT CONFERENCE WILL BE HELD ON  
MARCH 14, 1994 AT 8:30 A.M. TRIAL COUNSEL AND CLIENTS, OR  
AN INDIVIDUAL WITH AUTHORITY TO SETTLE THIS CASE ARE TO BE  
PRESENT. OUT OF STATE PARTIES MUST BE AVAILABLE BY PHONE AT THE  
TIME OF THE PRETRIAL SETTLEMENT CONFERENCE.

8. FAILURE TO APPEAR AT THE PRETRIAL SETTLEMENT CONFERENCE  
MAY RESULT IN A DEFAULT.

9. THE FOREGOING DATES SHOULD BE CONSIDERED FIRM SETTINGS  
AND WILL NOT BE MODIFIED WITHOUT COURT ORDER, AND THEN ONLY  
UPON A SHOWING OF MANIFEST INJUSTICE. COUNSEL ARE INSTRUCTED TO  
STAY IN CONTACT WITH THE CLERK OF THIS COURT AS THE TRIAL DATE  
APPROACHES REGARDING THE TRIAL SETTING.

10. IF PLAINTIFF'S COUNSEL ANTICIPATES THAT EVIDENCE AT TRIAL  
WILL SHOW DAMAGES OF LESS THAN \$20,000, COUNSEL SHOULD PREPARE AN  
ORDER TRANSFERRING THE CASE TO THE CIRCUIT COURT.

DATED THIS 25TH DAY OF JANUARY, 1994.

  
\_\_\_\_\_  
DISTRICT COURT JUDGE

COPIES MAILED TO PARTIES AT THE ADDRESSES INDICATED ON THE  
ATTACHED MAILING CERTIFICATE.

00204

FILED IN COURT

MAR 22 1994

SALT LAKE COUNTY

Stephen G. Crockett (#0766)  
Wesley D. Felix (#6539)  
GIAUQUE, CROCKETT, BENDINGER &  
PETERSON  
170 South Main, #400  
Salt Lake City, Utah 84101  
Telephone: (801) 533-8383

Steven L. Taylor (#3210)  
Of Counsel with  
MURPHY, TOLBOE & MABEY  
124 S. 600 E. #100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505  
Attorneys for Defendant

---

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

---

LAN C. ENGLAND,

Plaintiff,

vs.

EUGENE HORBACH, an individual,  
MEDICODE, INCORPORATED, a  
Utah corporation, and DOES I  
through V,

Defendants.

TRIAL MEMORANDUM

Civil No. 930901471CV

Judge J. Dennis Frederick

---

INTRODUCTION

Defendant, Eugene Horbach ("Horbach"), submits this memorandum to assist the Court in determining the law applicable to the factual issues in this case. In particular, this case requires the Court to determine the status of an alleged substitute agreement between Plaintiff, Lan England ("England"),

00219

unfulfilled condition precedent for longer than the maximum period [of the rule]. [I]t is, therefore, not enough to sustain the validity of a limitation that the condition precedent thereof is highly likely to be fulfilled, or that it is in fact fulfilled, within the maximum period. Such fulfillment must have been certain to occur, in order to have the limitation valid." Restatement of Property, § 370, comment k (1944); see also Scott, The Law of Trusts, § 62.10 (4th ed. 1987).

In the instant case, the alleged trust note fails under the rule for both of the above reasons: that is (1) by its terms, the trust outlasts the rule, and (2) no vested interest is created by the document, vesting being subject to a power of appointment which by its terms is not certain to occur within the period of the rule. Thus, the purported trust created by the note is ineffective and void.

### III. OVERPAYMENT OF A CONTRACT OBLIGATION DUE TO MISTAKE IS REMEDIABLE BY RESTITUTION

Horbach mistakenly overpaid England in the amount of approximately \$350,000. Some \$200,000 of this represents overpayment for 250,000 shares of MDR stock which Horbach agreed to purchase for \$200,000. The remaining amount resulted from Horbach's overpayment with respect to his purchase of 258,363 shares of Medicode stock from England. These overpayments should be returned to Horbach.



Unilateral mistake is remediable when it is a mistake in performance which results in overpayment.<sup>13</sup> In cases of mistaken overpayment a remedy in restitution is well established under theories of quasi-contract and unjust enrichment. Dan B. Dobbs, Law of Remedies, 757 (2d ed. 1993); Messersmith v. G.T. Murray & Co., 667 P.2d 655, 657 (Wyo. 1983) ("[M]oney paid under a mistake of fact, which would not otherwise have been paid, may be recovered unless the payee has changed his position to the extent that it would be unjust to require a refund.") Restitution is to be equivalent to the full amount of overpayment. Id. Thus, in this case, Horbach is entitled to

---

<sup>13</sup> An action for restitution on the ground of overpayment is, properly, a counterclaim. This counterclaim was not expressly raised by the Defendant in the pleadings. Nevertheless, the total payment made and received for the purchase of the 18.6 percent of Medicode stock in issue has been regarded by both parties as a central contention from the beginning of this case. Defendant only recently, obtained adequate documentary evidence to support his claim of overpayment. And Plaintiff has had a full opportunity to prepare a response to Defendant's claims. Indeed, at a settlement hearing before this court on March 14, 1994, counsel for the Plaintiff indicated that he would not be prejudiced by the introduction of evidence going to overpayment by the Defendant.

Rule 13(f) of the Utah Rules of Civil Procedure suggests that the Court should liberally allow amendment to add counterclaims "where justice requires." See Gillman v. Hansen, 486 P.2d 1045 (1971) (holding that failure to allow amendment of answer to include newly discovered counterclaim was an abuse of discretion). In the instant case, on the one hand, ignoring evidence of overpayment in the amount of nearly \$350,000 by the Defendant would perpetrate a substantial injustice. On the other hand, allowing such evidence to be introduced would not prejudice any legitimate interest of the Plaintiff.

restitution in the amount of \$349,101.10 from England as this figure represents the full amount of his overpayment.<sup>14</sup>


CONCLUSION

The evidence in the case will show that Horbach never intended, by way of the May 23 "note", to grant to England 2% of Medicode stock. Even if the Court determines that this is the most reasonable interpretation of the "note," it was not part of a bargained for exchange, was unsupported by consideration, and is unenforceable. In addition, the "note" is void as it violates the rule against perpetuities. Finally, the evidence will demonstrate that Horbach mistakenly overpaid England by the amount of \$349,101.25 and that he should receive an equal amount in restitution.

RESPECTFULLY submitted this 22nd day of March, 1994.

GIAUQUE, CROCKETT, BENDINGER  
& PETERSON

  
\_\_\_\_\_  
Stephen G. Crockett  
Wesley D. Felix

  
\_\_\_\_\_  
Steven L. Taylor

---

<sup>14</sup> This figure excludes payments made to gratuitously, but intentionally made to England, for example, the \$25,000 payment made in response to England's December 20, 1990 request.

Stephen G. Crockett (#0766)  
Wesley D. Felix (#6539)  
GIAUQUE, CROCKETT, BENDINGER &  
PETERSON  
170 South Main, #400  
Salt Lake City, Utah 84101  
Telephone: (801) 533-8383

Steven L. Taylor (#3210)  
Of Counsel with  
MURPHY, TOLBOE & MABEY  
124 South 600 East, #100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

Attorneys for Defendant

FILED

APR 18 1994

SALT LAKE COUNTY

C. Beverly

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LAN C. ENGLAND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
EUGENE HORBACH, an individual,	)	
MEDICODE, INCORPORATED, a	)	
Utah corporation, and DOES I	)	Civil No. 930901471CV
through V,	)	
	)	
Defendants.	)	Judge J. Dennis Frederick
	)	

The above-entitled matter came on regularly for trial before the Honorable J. Dennis Frederick, sitting without a jury, on May 22, 1994. Samuel D. McVey and Randy Austin appeared as counsel for the Plaintiff and Stephen G. Crockett, Steven L. Taylor, and Wesley D. Felix appeared as counsel for Defendant. The Court having considered the oral and documentary evidence

00254

presented at trial and the briefs submitted by the parties, and being fully advised in this matter, now makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Utah Rules of Civil Procedure.

#### FINDINGS OF FACT

1. The Plaintiff, Lan C. England, sought by his Complaint a determination that the Defendant, Eugene Horbach, breached his purported contract of May 23rd, 1991, wherein the Defendant allegedly agreed to hold in perpetuity two percent of the Medicode stock in question in trust for the Plaintiff. Additionally, the Plaintiff sought declaratory and injunctive relief against the Defendant on the theory that the Plaintiff is entitled to the stock in question and sought an order from this Court enjoining the Defendant from disposing of that stock pending the outcome of this litigation.

2. This Court conducted an evidentiary hearing on August the 5th of 1993 on the temporary restraining order issued by Judge Timothy Hanson and converted the temporary restraining order to a preliminary injunction to prohibit disposal of said two percent of the stock. The parties by stipulation now have sold the stock and the proceeds, \$369,140.60, have been placed into escrow account no. 30804165 with Guardian State Bank of Salt Lake City, Utah awaiting this Court's decision as to ownership of the proceeds.

3. The escrow agreement for the above-referenced account directs the Escrow Agent to disburse the escrow funds upon the written direction of the parties, or upon the order of the Third Judicial District Court.

4. The Court finds that in late 1989, the Plaintiff and the Defendant entered into an oral stock purchase agreement whereby the Defendant agreed to purchase from the Plaintiff 258,363 shares of stock in Medicode, Inc. at a price of \$2.75 per share for a total purchase price of \$710,498.25.

5. The Court finds that the Defendant made his first payment toward the purchase price on December 29, 1989 in the amount of \$60,000.00. Defendant also paid \$4,599.35 to reimburse the Plaintiff for certain expenses incurred.

6. The Court finds that the Defendant made certain payments toward purchase of the Medicode stock between December 29, 1989 and September 11, 1990. As of September 11, 1990 the Defendant had paid to the Plaintiff for the stock a total of \$855,000. The Court finds that no portion of these payments were made for services rendered by Plaintiff or for Plaintiff's agreement to go forward with the merger.

7. The Court finds that even if all payments alleged by the Plaintiff to be for services and not for the purchase of stock were omitted from the calculation of the total paid by the Defendant toward purchase of Medicode stock, Defendant would

still have paid more than required under the 1989 agreement as of May 23, 1991.

8. The Court finds that the Plaintiff's testimony, stating that he had an agreement to perform real estate inspection or consulting services for the Defendant, is not credible in light of the Plaintiff's inability to adduce any evidence regarding the rate of pay, the duration of the agreement, or the nature of the services presumably performed.

9. The Court finds that as of September 14, 1990, Defendant had overpaid the Plaintiff by \$144,501.75. Plaintiff, thus, had been overpaid by \$144,501.75 as of May 23, 1991, the date of the disputed two percent agreement.

10. The Court finds that on May 23, 1991 the Plaintiff and the Defendant met at the offices of Medicode, Inc. for the purpose of transferring 258,363 shares of Medicode stock to the Defendant.

11. The Court finds that at the May 23rd meeting both the Plaintiff and the Defendant mistakenly believed that \$25,000 remained owing under the 1989 stock purchase agreement. At trial the Plaintiff admitted that as of May 23, 1991 no money was owed on the stock purchase agreement as of that date.

12. The Court finds that on May 23, 1991, the Defendant under the mistaken belief, sponsored by the Plaintiff, that \$25,000 remained due and owing on the 1989 agreement,

executed the note, entered into evidence as Exhibit 3, which is the basis of Plaintiff's alleged substitute agreement.

13. Subsequent to the purported May 23rd agreement, and in reliance upon the mistaken belief that \$25,000 remained owing, the Defendant paid an additional \$25,000 to the Plaintiff.

14. The Court finds that as of the date of trial, the Defendant had overpaid the Plaintiff on the 1989 stock purchase agreement in the amount of \$169,501.75

15. The Defendant has moved, pursuant to Rule 15(b) of the Utah Rules of Civil Procedure, to amend the pleadings to conform to the evidence. Evidence going to overpayment was introduced by counsel for both the Plaintiff and the Defendant. No objection was entered to the introduction of such evidence on the ground that it was not within the issues of the case, and the issue of overpayment was tried by the express and implied consent of the parties.

#### CONCLUSIONS OF LAW

16. Defendant argues that the May 23, 1991 agreement is unenforceable because lacking consideration. The burden of proving consideration rests with the Plaintiff in an action for breach of contract. The Plaintiff presented no credible evidence demonstrating consideration.

17. As of May 23, 1991, Defendant had fully performed his obligations under the 1989 stock purchase agreement and the

Plaintiff was legally obligated to convey his 258,363 shares of Medicode stock to Defendant.

18. The performance of a preexisting duty does not provide consideration for a valid contract.

19. Any concession extracted from the Defendant by the Plaintiff in the May 23rd alleged agreement lacks consideration and the agreement, therefore, is unenforceable.

20. The May 23rd purported agreement was executed under the mistaken belief that \$25,000 remained owing on the original agreement; thus, the May 23rd agreement was made under a mutual mistake of fact which went to its essence and, therefore, the putative agreement is unenforceable.

21. Pursuant to the above findings the Court should enter an order directing Guardian State Bank Escrow Agent to disburse the funds of the escrow account to the Defendant, Eugene Horbach, or to his attorneys of record.

22. Defendant asks for restitution in the amount of his overpayment for Plaintiff's Medicode stock. Unilateral mistake is remediable when it is a mistake in performance which results in overpayment. In cases of mistaken overpayment a remedy of restitution is available.

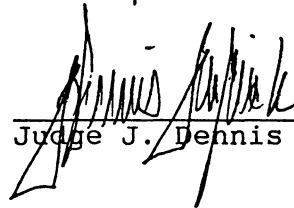
23. In summary, the Court finds no cause of action on the Plaintiff's Complaint and awards to the Defendant those funds held in escrow account no. 30804165 at Guardian State Bank, Salt Lake City, Utah with accrued interest, as well as judgment

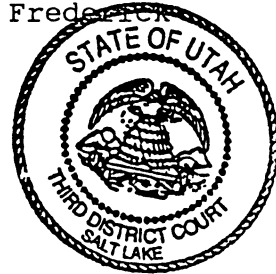


against the Plaintiff for sums overpaid in the amount of  
\$169,501.75.

IT IS SO ORDERED

DATED this 18<sup>th</sup> day of April, 1994  
BY THE COURT:

  
\_\_\_\_\_  
Judge J. Dennis Frederick



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

3 \* \* \*

Third Judicial District

4 LAN C. ENGLAND, )  
5 Plaintiff, )  
6 -vs- )  
7 EUGENE HORBACK, )  
8 MEDICODE INCORPORATED, )  
9 Defendants. )

MAR 22 1994

SALT LAKE COUNTY  
By C. B. [Signature]  
Case No. 930901471 CV  
Judge Frederick

10

ORIGINAL

11

12

Deposition of:

LAN C. ENGLAND

13

14

Taken:

Thursday, November 18, 1993

15

2:30 p.m.

16

17

Place:

124 S. 600 East #100

18

Salt Lake City, Utah

19

20

Reported by:

Carlton S. Way, CSR RPR

21

STACY & ASSOCIATES  
Certified Shorthand Reporters  
717 Boston Building  
Salt Lake City, UT 84111  
801-328-1188

22

23

24

25

1 Q. It would be just in and around this same  
2 time frame. I really can't....

3 Q. Okay, we've pegged it then at the latter  
4 part of 1989?

5 A. Okay.

6 Q. That's exactly what you said in your  
7 Complaint, and I'm wondering if, since the Complaint  
8 was drafted, if you have any --

9 A. I haven't reviewed the documents. You  
10 knew the original. So that's good enough.

11 Q. Okay. I guess I could have gotten to  
12 that a lot quicker if --

13 A. If you had just said it.

14 Q. Said it, yes.

15 Did you have a written agreement?

16 A. No, which is quite typical of Gene's  
17 style.

18 Q. Okay. What -- what were the terms that  
19 you agreed upon orally with him?

20 A. The terms that we agreed upon was that  
21 the price of the stock would be paid within just a  
22 short a period of time and that it would be paid in  
23 full, \$2.75 cents a share.

24 Q. What did "a short period of time" mean  
25 to you?

1           A.       Gene, I believe, suggested a month or  
2       two.

3           Q.       Did he pay you anything at that time?

4           A.       Yes, I'm sure he did. He probably  
5       tendered a check of some amount. I can't remember the  
6       amount. It was....

7           Q.       What was the total purchase price, then,  
8       as you recall?

9           A.       Honestly, we'd have to do some  
10      calculating, but I believe it was about 26,000 shares;  
11      is that correct? 26,000? No, no, no. I am sorry.  
12      It was 300, you know, 300 something thousand shares.

13          Q.       Let me refresh your memory. Your  
14      Complaint says 256,633 shares.

15          A.       Okay, that would be correct.

16          Q.       And if we times that by \$2.75 cents,  
17      that's close to \$706,000.

18          A.       Okay.

19          Q.       Now, do you have any recollection how  
20      much of that amount Gene paid to you at the meeting  
21      where you agreed to sell them?

22          A.       I don't remember the exact amount.

23          Q.       Do you have a rough figure?

24          A.       My guess would be 50,000.

25                 MR. TAYLOR: Let me --

1 Q. Approximately how many months?

2 A. I don't know. We'd just have to check.  
3 Ten, 14 months. I am not sure.

4 Q. Let's go up to the period stated in your  
5 Complaint, May 23rd, 1991. You've alleged that you  
6 had a meeting with Gene on that date. Do you recall  
7 where that meeting was?

8 A. Yes, that was held at Medicode in their  
9 conference room.

10 Q. Who was present?

11 A. Gene Horback and myself, and in the  
12 waiting room were Brent Anderson and I believe Byron  
13 Smith and possibly Eileen Shanon.

14 Q. You said Brent Anderson, and who's the  
15 second person?

16 A. Possibly Byron Smith.

17 Q. Were those three people employees of  
18 Medicode?

19 A. Yes.

20 Q. Were they all also stockholders?

21 A. And officers, I believe. And  
22 directors.

23 Q. Are all three of them still employed by  
24 Medicode?

25 A. Just one at this time.

1 Q. Who's that?

2 A. Eileen Shanon.

3 Q. But they were not in the room during

4 your meeting with Gene?

5 A. No, they were there as we -- they

6 actually called me at my office to come to meet with

7 Gene because Gene wanted to -- he wanted me to sign

8 the stock certificate. And he was going to exchange

9 it -- a check for the stock certificate and an

10 agreement for two percent of the company. So I came

11 in and met with him.

12 Q. Okay, tell me what was discussed to your

13 best recollection?

14 A. With Gene?

15 Q. Yes, in this meeting on May 21st (sic)

16 1991.

17 A. Previous to this meeting for nearly a

18 year, Gene, as we'd talk and he realized that he was

19 delinquent on meeting his obligations and his

20 commitment to buy my 18.6 percent -- Gene had agreed

21 to giving me two to three percent of the company. And

22 that was -- that was understood during the course of

23 several months before this meeting.

24 When I met with Gene, he -- I believe it

25 was on Medicode letterhead -- wrote the note to assure

1           A.       Just what you'd expect, you know, "Gene,  
2 this -- I don't need them if you can't make them  
3 good."

4           Q.       Well, did you ever consider, during that  
5 period of time, just saying "the deal's off"?

6           A.       Absolutely. And I should have done it  
7 earlier than at this point. But had I known Gene  
8 would have given me a bad check at the date of the  
9 certificate, I certainly would have.

10          Q.       But that final bad check was essentially  
11 made good, wasn't it?

12          A.       A year later.

13          Q.       Is that "yes"?

14          A.       That check, yes, it was made good.

15          Q.       All right.

16                   Were you concerned about that final  
17 \$25,000 check being good at the time Gene gave it to  
18 you?

19          A.       No, I obviously wasn't or I wouldn't  
20 have handed him the certificate.

21          Q.       I believe you testified that you didn't  
22 hand him the certificate.

23          A.       Well, Brent had me sign it right there,  
24 and he was handed the certificate. Whether Brent  
25 handed it to him or not, I don't know. I don't know

1 if it was me or Brent, but he obviously was in front  
2 of me long enough to sign it.

3 Actually, Gene handed me the  
4 certificate, I believe, because he was in the room  
5 with it. Brent would have handed it to him.

6 Q. At any rate, in terms of the cash  
7 consideration that Gene agreed to pay you for the  
8 stock, you have received all of that; is that correct?

9 A. As I mentioned, I am uncertain on that  
10 \$50,000 portion at this time. But other than that,  
11 that's correct.

12 Q. Well, you've alleged in your Complaint  
13 that as of that meeting on May 23rd, 1991, that Gene  
14 had only paid you a portion of the purchase price and  
15 was, quote, seriously delinquent, closed quote. By my  
16 calculations, he had paid well over 90 percent of the  
17 purchase price by that point in time. Does that agree  
18 with you? Do you agree with me, rather?

19 A. The delinquency is more an issue of  
20 time. In other words, a year -- a year, year and a  
21 half, had gone by that -- long -- the monies should  
22 have been paid. You know, that -- long before this  
23 time.

24 Q. Well, and yet you continued to accept  
25 checks whether they cashed the first time or not over



1 that ten- or fourteen-month period; didn't you?

2 A. Yes. I had -- I had no choice. I had a  
3 business I was running.

4 Q. I submit that you will always have a  
5 choice.

6 MR. MC VEY: Well, objection;  
7 argumentative. Don't answer that.

8 MR. TAYLOR: I'll withdraw it.

9 You have also alleged in your Complaint  
10 that counsel for Gene made some statements with regard  
11 to providing two percent of 18.6 percent of the  
12 Medicode Stock only if Medicode did a merger and a  
13 public offering.

14 Number one, can you tell me who that  
15 counsel was for Horback?

16 A. I'll need to give you some background  
17 because the -- in order to help you understand that.  
18 As per this agreement that is in front of me that Gene  
19 signed on 5-23-91, on, what, December of 1992, I had  
20 an offer for my stock from a qualified investor, and I  
21 submitted a request for my stock at that time to Gene,  
22 which is normal corporate protocol. And I faxed the  
23 request to both the board and to Gene. And Gene  
24 called me immediately and said that it wasn't a good  
25 time and asked me essentially to reconsider. I needed

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

Third Judicial District

LAN C. ENGLAND,

Plaintiff,

vs.

EUGENE HORBACH, MEDICODE  
INCORPORATED,

Defendant.

AUG 5 1994  
By: [Signature]  
SALT LAKE COUNTY  
TRIAL  
Civil No. CIV 930901471 CV

---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

---

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, March 22, 1994

---

For the Plaintiff:

SAMUEL D. McVEY  
RANDY AUSTIN  
60 East South Temple, #1800  
Salt Lake City, Utah 84111  
328-3600

For the Defendant  
Horbach:

STEPHEN G. CROCKETT  
WES FELIX  
136 South Main, #500  
Salt Lake City, Utah 84101  
533-8383

STEVEN L. TAYLOR  
311 South State, #450  
Salt Lake City, Utah 84111  
521-8900

---

ANNA M. BENNETT, C.S.R.

License No. 220  
240 East 400 South  
Salt Lake City, Utah 84111  
(801) 535-5203

1           Q     (By Mr. McVey) Please continue what your under-  
2 standing was.

3           A     Just that, that the percentage again that I would  
4 have lost based on valuations of the MDR pre-merger, what the  
5 valuations were I would have lost in the ending Medicode  
6 valuation, that was just an additional sum that was paid just  
7 before the merger and we concluded that and went forward with  
8 the new Medicode.

9           Q     So as of 29 December, 1989, or thereabouts, when  
10 this \$64,599 check was negotiated, did you understand at that  
11 time that you had received everything basically that you were  
12 owed to date for the MDR stock and whatever else you were due  
13 at that time?

14          A     Yes, I did.

15          Q     Now we get up to the time frame of late December,  
16 early January 1990. At that point, was there an agreement  
17 struck, in your opinion, between you and Mr. Horbach for the  
18 purchase of Medicode stock?

19          A     Yes, there was. It was verbal, but we did.

20          Q     What was the agreement?

21          A     The agreement was to sell the remaining portion of  
22 my Medicode stock to Mr. Horbach at -- I think we listed  
23 there the \$2.75 per share.

24          Q     How much stock were you selling to him?

25          A     I'm not sure of the exact amount. It's just under

1 300,000. It was 257,000. Again Mr. Ensign could give you  
2 the exact number.

3 Q What percentage of the company was that?

4 A That was 18.6 percent.

5 Q Were there any terms agreed to as far as payment  
6 for these 18.6 percent shares of stock was concerned?

7 A It was my understanding --

8 MR. CROCKETT: Objection, your Honor, foundation.

9 THE COURT: Counsel, I think that's appropriate.  
10 We have apparently no writing memorializing this alleged oral  
11 agreement. I think, therefore, foundation is a proper objec-  
12 tion and sustained.

13 Q (By Mr. McVey) Were there any conversations  
14 between you and Mr. Horbach in which Mr. Horbach explained to  
15 you what he was going to do and where you explained to him  
16 what you were going to do in connection with this  
17 transaction?

18 A He asked me if I would be interested in selling my  
19 Medicode stock and --

20 MR. CROCKETT: Could we have a time?

21 THE COURT: Yes. You can answer that question yes  
22 or no and then Counsel will get more into the particulars of  
23 what was discussed.

24 Go ahead, Mr. McVey.

25 Q (By Mr. McVey) Okay. When did these -- well, the

1b

1 answer is yes?

2 A Yes.

3 Q And when did these conversations take place?

4 A The initial discussion was in January of 1990.

5 Q And did these discussions take place on more than  
6 one occasion?

7 A The initial discussion certainly laid out my needs  
8 and occurred, the initial discussion, in January of 1990.  
9 There were certainly numbers of discussions throughout the  
10 next months.

11 Q And what was said in that discussion?

12 A That initial discussion?

13 Q Yes.

14 A That again, we laid out the price per share and the  
15 time frame which I expected to be paid in and --

16 THE COURT: Just a minute. Counsel, we need to  
17 have what was said and by whom at the meeting in January of  
18 1990.

19 Q (By Mr. McVey) Okay. What did Mr. Horbach say he  
20 was going to do in connection with the stock sale?

21 A He said that he would be purchasing my stock at  
22 \$2.75 per share.

23 Q And what did you say?

24 A I agreed that that sounded fine and requested that  
25 it be done in short order and I expected that to be the first

1 quarter.

2 MR. CROCKETT: Objection, the expectation.

3 THE COURT: Objection is sustained. Counsel, we  
4 need to know what was said and by whom.

5 Q (By Mr. McVey) Were any statements made about when  
6 that payment would be made, and if so, who made the  
7 statements?

8 MR. CROCKETT: Judge, just can't we say who said  
9 what?

10 THE COURT: Well, I don't know how long the meeting  
11 lasted. I don't want to hear everything.

12 THE WITNESS: I'm having trouble answering this  
13 because I'm just trying to give a straightforward answer. It  
14 was my recollection and it is my understanding that it was to  
15 be paid in two or three months. I don't know how else to  
16 answer that.

17 Q (By Mr. McVey) Do you recall that being --

18 THE COURT: He's answered the best he can, Counsel.  
19 Let's move on. He's given his perception without who said  
20 what.

21 Q (By Mr. McVey) Were there subsequent meetings in  
22 January where this sale was discussed?

23 A Between --

24 Q Between you and Mr. Horbach.

25 A Okay. There may have been one or two discussions

1 -- I don't recall when or where -- after this initial, you  
2 know, discussion. I might add, Gene would come into town,  
3 you know, at least every month and we would have dinner or  
4 breakfast meetings and discuss the events of the company.

5 Q Now, at some point, did you begin receiving --  
6 well, did you transfer 18.6 percent stock certificates over  
7 to Mr. Horbach at that time?

8 A No, I did not.

9 Q At some point did you begin receiving payments from  
10 Mr. Horbach?

11 A Yes, I did.

12 Q And when was the first payment?

13 A Okay, the first payment was in January of 1990.

14 Q For how much?

15 A \$50,000.

16 Q And you received that money?

17 A Yes.

18 Q And was there a statement of any kind by  
19 Mr. Horbach about what that payment was to be for?

20 A I'm sure that it was stated that it was for --

21 THE COURT: No, that's not the question.

22 Q (By Mr. McVey) I want you to say just if you heard  
23 something from him.

24 A I don't recall.

25 Q Okay. What was your understanding of what the

1 payment was for?

2 MR. CROCKETT: Objection, no foundation.

3 THE COURT: Counsel, again, is there any dispute  
4 with regard to the payments made by Mr. Horbach? Not the  
5 purpose, but the amounts and the dates as delineated and  
6 Proposed Exhibit 1B?

7 MR. CROCKETT: No, your Honor.

8 THE COURT: All right.

9 MR. McVEY: Thank you.

10 Q (By Mr. McVey) Did you have a follow-up meeting  
11 with Mr. Horbach during the time that he was making these  
12 payments to you where this transaction was discussed?

13 A Yes. I recall very specifically a meeting on May  
14 15th, 1990.

15 Q Where was that?

16 A That was at Little America. It was a breakfast  
17 meeting.

18 Q In Salt Lake?

19 A Yes, it was.

20 Q Who was there?

21 A Mr. Horbach and myself.

22 Q Tell me what conversations, the actual words that  
23 passed at that time between you and Mr. Horbach.

24 A Mr. Horbach asked me who I would select as the next  
25 president and CEO of Medicode, and I gave him that



1 information as to be Eileen Shanon. That was one topic we  
2 discussed.

3 We discussed, I'm sure, several other corporate  
4 issues. I did express my concern at that time that the stock  
5 payments had come in slowly and at that time the stock in  
6 Medicode hadn't been paid for.

7 Q Did Mr. Horbach respond in any way to that concern?

8 A Yes, he did. In fact, it was at that meeting that  
9 we originally discussed the two to three percent.

10 Q I want you to just say what he said, okay, and what  
11 you said in response.

12 A Okay. He -- his actual words were, and this  
13 occurred on a number of discussions, but that I will take  
14 care of you. Those were his exact words. We talked about he  
15 wanted me to have some interest in the company because of my  
16 contributions, and at that time originally discussed his  
17 giving me two or three percent of the stock.

18 Q Now, who discussed that? Who made the statement  
19 about the two to three percent?

20 A Gene did.

21 Q And what were the words that he used?

22 A That I will give you two to three percent of the  
23 stock.

24 Q Did you receive -- now, over to the side of the  
25 date 18 May, 1990, you have a \$50,000 amount in brackets.

1 everyone was provided a copy of this document and there was  
2 some discussion.

3 MR. McVEY: Your Honor, the significance of that is  
4 that Mr. Horbach had a copy of this document.

5 THE COURT: Well, you see, you're arguing your case  
6 to me. I don't know that.

7 MR. McVEY: Well, that would be the inference, your  
8 Honor, and we would ask the Court to -- basically the reason  
9 why the document is offered is it refers to Mr. England's  
10 rendering services and it's just offered to show that that  
11 was discussed at the time.

12 THE COURT: And I understand your reason for want-  
13 ing to offer it, but I likewise understand the reason the  
14 Defense wants to keep it out.

15 The point is there needs to be further foundation.  
16 If you wish, I will take under advisement the offer at this  
17 point as to pages 1 and 2 of this exhibit, pending if you  
18 choose to call Mr. Horbach, to see if indeed he was provided  
19 a copy and this meeting did take place.

20 MR. McVEY: Thank you, your Honor.

21 THE COURT: The third page of that document we will  
22 characterize as a new exhibit and receive it. It will be  
23 known henceforth as Exhibit 12.

24 MR. McVEY: Thank you, your Honor.

25 Q (By Mr. McVey) Now, following the 18 May, 1990

1 meeting and the subsequent payments which nobody disputes,  
2 did you have a subsequent meeting with Mr. Horbach at which  
3 the delivery of the stock certificate for these 18.6 shares,  
4 percent of the shares, was discussed?

5 A Yes, that meeting was on May 23rd, I believe.

6 Q Of what year?

7 A 1991.

8 Q Who was present?

9 A Eugene Horbach and myself.

10 Q And who was there? -- I'm sorry. And where was  
11 that?

12 A Where was it? It was at the offices of Medicode.

13 Q I'd like you to say what your statements were at  
14 that meeting and what Mr. Horbach said, if anything, in  
15 response.

16 A We had discussed that we'd like to get everything  
17 cleared up, get the past taken care of, and we both mutually  
18 agreed that the \$25,000 was --

19 Q Okay, but tell me what statements Mr. Horbach made  
20 that would relate to this \$25,000.

21 A That that was the remainder owing for the purchase  
22 of the stock and then we discussed the two to three percent  
23 that he had earlier stated that he would give to me and that  
24 he wrote that, to that effect on letterhead of Medicode and I  
25 handed him or I signed the stock certificate and we

1 adjourned.

2 MR. McVEY: At this time, your Honor, I'd like to  
3 provide the witness with what has been marked as Plaintiff's  
4 Exhibit P-3.

5 Q (By Mr. McVey) Do you recognize what's been marked  
6 as Plaintiff's Exhibit P-3?

7 A Yes, I do.

8 Q When was the first time that you saw that?

9 A On May 23rd, 1991.

10 Q What, if anything, did you observe preceded your  
11 seeing this exhibit?

12 A Just our discussion on that day and the discussion  
13 earlier in May of 1990.

14 Q Did you see Mr. Horbach write this exhibit?

15 A Yes, I did.

16 Q Tell me what happened with regard to that.

17 A He wrote it and signed it and gave me a check and I  
18 signed over the stock certificate and we adjourned.

19 Q Now, down at the bottom of that exhibit there's  
20 some typewritten language. Is that something that you've  
21 added in?

22 A It is, yes.

23 Q So that's not something Mr. Horbach did?

24 A No, it is not.

25 Q Did Mr. Horbach make any statements about why he

1 was giving you this note? And once again, just what he said.

2 A That it was in consideration for the delinquencies  
3 in payments and the time frame that everything had taken, you  
4 know, to get done and that's why, that's why we were trans-  
5 acting this.

6 MR. McVEY: Your Honor, at this time I'd request  
7 that Plaintiff's Exhibit P-3 be admitted.

8 THE COURT: Any objection?

9 MR. CROCKETT: No objection, your Honor.

10 THE COURT: It's received.

11 Q (By Mr. McVey) I'm handing the witness what's been  
12 marked as Plaintiff's Exhibit P-4, ask if you recognize that.

13 A Yes, I do.

14 Q What's that?

15 A That is the check given to me for \$25,000, given to  
16 me on May 23rd, '91, dated June 5th, '91.

17 Q Did Mr. Horbach make any statements about why he  
18 was giving you that check? And once again, focus on his  
19 statements.

20 A Yes, it was final payment for the stock purchases  
21 that had occurred.

22 Q Now, you said that was final payment for the stock  
23 purchases. Was there anything discussed as to why he was  
24 giving you both the check and the note that reflects the two  
25 percent of the stock?

2a

1           A     The two percent, as I suggested earlier, was given  
2 because of the --

3           MR. CROCKETT: Your Honor, could we have what he  
4 said again?

5           Q     (By Mr. McVey) What did he say?

6           A     He --

7           MR. CROCKETT: I think it's repetitious.

8           THE COURT: It is.. He's already testified as to  
9 what was said.

10          MR. McVEY: Your Honor, at this time I'd like to  
11 hand the witness what's been marked as Plaintiff's Exhibit  
12 P-5, but before asking him questions on that, I'd like to ask  
13 that the check marked as Exhibit P-4 be admitted.

14          MR. CROCKETT: This is not included in the packet  
15 of other checks?

16          THE COURT: It is.

17          MR. McVEY: It is indeed. It's just the original.

18          MR. CROCKETT: I think we should mark it twice.  
19 It's just repetitious, Judge. I have no real objection if  
20 Counsel wants to use it.

21          THE COURT: All right. It's received.

22          Q     (By Mr. McVey) Do you recognize what's been marked  
23 as Plaintiff's Exhibit P-5?

24          A     Yes, I do.

25          Q     What's that?

1           A     Yes, I do.

2           Q     And actually, there are four checks beginning on  
3 page 25 and continuing through page 28; is that correct?

4           A     Uh-huh (affirmative).

5           Q     Is it your understanding that those were the checks  
6 that were paid to you to make up this \$25,000 bounced check?

7           A     Yes.

8           Q     And the last payment is reflected on a check dated  
9 2-17-92; is that correct?

10          A     Yes.

11          Q     Now, on the back of that check which is on page 28  
12 of Exhibit P-1, there appear to be some handwritten words,  
13 "Final payment for stock purchase."

14          A     Yes.

15          Q     Did you write those in?

16          A     No, I did not. Mr. Horbach did.

17          Q     At some point did you request that Mr. Horbach  
18 deliver to you the two percent of the stock that's reflected  
19 in the note, the handwritten note from the May meeting?

20          A     Yes, I did.

21          Q     Do you recall when that was?

22          A     It's the December -- was it 1992? I think the  
23 exhibits have been --

24          Q     Well, let me provide you with what's been marked as  
25 Plaintiff's Exhibit P-6. I'd ask you if you recognize

1 Plaintiff's Exhibit P-6.

2 A Yes, I do.

3 Q Can you tell me what the first page of that exhibit  
4 is?

5 A Yes. On December 2nd, 1992, I sent this letter to  
6 Gene. I believe I faxed it to him as well, and I had had an  
7 offer for the two percent, 26, 27,000 shares of Medicode  
8 stock as is appropriate on those occasions if we desire to  
9 sell, we have to make this offer, and this is an offer from a  
10 Mr. Porter. He'd been interested in --

11 Q Okay. That's fine. Did Mr. Horbach respond in any  
12 way to this letter?

13 A Yes, he did.

14 Q How did that response take place?

15 A He called me.

16 Q When did he call?

17 A He called me either the day of this fax or the day  
18 after. It was very close to this time.

19 Q Tell me who said what in that telephone  
20 conversation.

21 A Gene called me and he made mention of this offer  
22 and he said it was not good timing.

23 Q Did he ever say anything denying that he owed you  
24 two percent of the stock?

25 A He did not.



1           Q     Now, the third page of that exhibit purports to be  
2 a letter signed by John A. Adams. Do you see that?

3           A     Yes, uh-huh.

4           Q     And up at the top there's also a name, George  
5 Tingo.

6           A     Yes.

7           Q     Do you know if that letter was sent?

8           A     Yes, I believe it was sent.

9           Q     Was that done pursuant to your request?

10          A     Yes.

11          Q     Now, up to this time, that is, the December 1992  
12 time frame, had Mr. Horbach given you two percent of the  
13 stock?

14          A     No, he had not.

15          Q     And to this date, has he ever given you two percent  
16 of the stock in Medicode?

17          A     No, he has not.

18          Q     Now, you indicated that you had a reason for wait-  
19 ing until February 1992 to ask for the two percent of the  
20 stock. What was your reason? In other words, why did you  
21 wait from the time that he gave you this note clear until  
22 December of 1992 to ask for the stock?

23          A     Well, the value was growing in the company.

24          Q     Other than the written letter that's been marked as  
25 Exhibit P-6, did you make any -- have any other conversations

1           Q     And you were being asked because you were aware the  
2     corporation had asked Mr. Horbach to give them some security  
3     for loans he had with the corporation?  
4           A     No, I'm not.  
5           Q     Okay, but you thought at that point in time you  
6     were still owed some money, didn't you, as of May 23rd, 1991?  
7           A     That's correct.  
8           Q     In fact, you thought you were owed anywhere between  
9     25 and 75 thousand dollars as of that point in time, didn't  
10    you?  
11          A     Yes, uh-huh.  
12          Q     And you weren't sure which; isn't that also  
13    correct?  
14          A     I can't answer that. I don't know.  
15          Q     You don't know if you knew how much you were owed  
16    as of that point in time?  
17          A     I can't give you the exact amount, no.  
18          Q     Okay. Can you tell me if it was 25 or can you tell  
19    me if it \$75,000?  
20          A     I believe it was \$50,000.  
21          Q     Now, you told that to Mr. Horbach at the time,  
22    didn't you?  
23          A     No, not at that time.  
24          Q     At the May meeting you didn't say you were still  
25    owed money?

1           A     Yes, I said \$25,000.

2           Q     Okay. You told him you were owed 25,000 as of May  
3 1991 instead of 50,000?

4           A     Right. There was some question as to some service  
5 fees in the back, but that was what we had agreed upon is  
6 \$25,000.

7           Q     Okay, and so whatever happened in May was predi-  
8 cated on the mutual expressed assumption that you were owed  
9 \$25,000; is that fair?

10          A     Fair enough. That was our final agreement.

11          Q     Okay. Now, you were reluctant to sign over the  
12 stock certificate unless you had some sort of way to know you  
13 were going to get paid and you expressed that, didn't you?

14          A     No, I didn't express that.

15          Q     You were reluctant to sign it over, though, weren't  
16 you, unless you knew you were going to get paid?

17          A     Well, that wasn't the reason. I don't understand  
18 your question.

19          Q     Sir, you were being asked to sign over the stock  
20 certificate. Were you willing to simply sign it over without  
21 doing something to get paid, or did you want to make sure you  
22 were going to get paid?

23          A     I was handed a check for \$25,000. I was also  
24 handed the two percent agreement. That was sufficient con-  
25 sideration for what we had been through. We both agreed on

1       that.

2               Q     Okay, so you required both a two percent agreement  
3       and the \$25,000 in order to sign over the stock certificate;  
4       is that fair?

5               A     That had been our agreement.

6               Q     Okay. Now, as of that point in time -- first, I  
7       want to go to this agreement, and you said it was January  
8       1990 and we're talking the Medicode stock now.

9               A     Uh-huh (affirmative).

10              Q     And isn't it true, sir, that the first time you've  
11       testified that it was in 1990 was after you received the  
12       checks and were shown that you had, if you included the  
13       December 1989 payment, you were already fully paid up by the  
14       May 23rd, 1991 meeting?

15              MR. McVEY:  Objection, your Honor, misstates the  
16       testimony.  The testimony was late --

17              THE COURT:  Well, it may or may not misstate the  
18       testimony.  I think this is cross-examination regarding some  
19       prior testimony given by the witness.  It's proper  
20       impeachment.

21              Go ahead.

22              THE WITNESS:  Steve, would you restate the  
23       question?

24              Q     (By Mr. Crockett)  I would be happy to, sir.  
25       The first time you've taken the position that

1 Mr. Horbach, would you have any argument that it's different,  
2 or would you contend it's different than the 809,599.35?

3 A No, that would be correct.

4 Q Okay. Now, I'm going to assume for a second for  
5 purpose of the question, I want to do the stock shares in  
6 evidence and it's 258,363, correct?

7 A Correct.

8 Q The 2.75 a share, that was the agreed price?

9 A Correct.

10 Q So that equals \$710,498.25?

11 A Correct.

12 Q And that's what you had coming for those shares of  
13 stock, isn't it? That's what you agreed to sell them for in  
14 any event?

15 A Yes, in the initial agreement.

16 Q Okay. Now, if in fact the 64,000 or any part of it  
17 and the 50,000 -- well, let me break it out here.

18 Let's assume that both of those are not included  
19 for a minute.

20 A Okay.

21 Q Exclude both of them, which is essentially what  
22 you've done on your chart, correct?

23 A Correct.

24 Q That would mean as of May 1981, you had been paid  
25 \$695,000. Would you quarrel with that?

1           A     No, I would not quarrel with that.

2           Q     So that's 695,000 of 710,498.25; you would agree

3     that happens to be the case as of now, correct?

4           A     Correct.

5           Q     So when you told Mr. Horbach and he agreed with you

6     that he was \$25,000 down in May of 1991, you were both wrong,

7     weren't you?

8           A     Mathematically, yes.

9           Q     Well --

10          A     Yes.

11          Q     Okay, so you were both in error on that assumption

12     on that date in terms of what was left due and owing; is that

13     a fair statement?

14          A     No.

15          Q     Putting aside the two to three percent, I'm just

16     talking dollars for the stock.

17          A     Dollars for the stock, correct.

18          Q     You were both in error?

19          A     Uh-huh (affirmative).

20          Q     Okay. Now, sir, what he paid you then, and I've

21     done that -- I only did this once, though, it's close to 98

22     percent, 97.9 percent, I think it's accurate.

23                 Now, after that -- let me find something here.

24                 Sir, you're aware that one of the disputes goes to

25     the purpose of this payment here. You say it was personal

1 reimbursement for the expenses which he claimed he incurred  
2 in visiting Seattle.

3 Q Was that more than one trip in visiting Seattle?

4 A Yes.

5 Q All right. Now, you've heard the testimony about  
6 his stock being two to three percent decreased or something  
7 like that.

8 A Not in my mind because if you go to the prior  
9 transaction, which is the MDR transaction, he got paid over  
10 \$400,000 there, about 400 on the dot.

11 MR. McVEY: Objection, nonresponsive.

12 THE COURT: Mr. Horbach, listen fully to the  
13 question if you will, sir.

14 THE WITNESS: Will do.

15 THE COURT: And answer the question.

16 Q (By Mr. Crockett) Okay. Now, for the MDR stock  
17 how much did you pay?

18 A \$400,000.

19 Q And after you paid that, do you know if you bought  
20 -- well, strike that. Let me back up here a little bit.

21 When you bought the MDR stock, was that all of the  
22 MDR stock, to your knowledge, that Mr. England had?

23 A No, I bought 250,000 shares.

24 Q All right, and you paid that amount -- I mean, he  
25 received 400,000 for those shares?

1 Q Did you find some checks in a drawer?

2 A We did find some checks which we didn't have access  
3 to it, yes.

4 Q Okay, so it's been in the last 30 days you've known  
5 the extent?

6 A Correct.

7 Q At the point in time that you signed the two per-  
8 cent document, I think it's marked and received as Exhibit 3,  
9 P-3, at the point in time that you signed that, did you have  
10 a belief that you owed Mr. England money?

11 A We thought that we still owed him \$25,000.

12 Q And you've subsequently determined that was in  
13 error?

14 A Yes.

15 MR. McVEY: Objection, foundation.

16 THE COURT: Sustained, unless you want to withdraw  
17 the question.

18 Q (By Mr. Crockett) Sir, what was the purpose, what  
19 was your purpose in filling out Exhibit 3?

20 A To provide Mr. England with a collateral for his  
21 what he claimed to be remaining payments on the stock  
22 purchase.

23 MR. McVEY: Your Honor, we will object to that on  
24 the basis of parole evidence, and I know we have a running  
25 objection, but we would make an objection.



1           Q     You are involved in -- you're an investor or have  
2     been an investor in approximately 30 or 40 companies over the  
3     last 30 years?

4           A     Yes.

5           Q     And in fact, you read the Wall Street Journal on  
6     occasion?

7           A     Yes, indeed.

8           Q     And you personally wrote the note you testified  
9     that was dated May 23rd, 1991, correct?

10          A     Yes.

11          Q     At the May 23rd, 1991 meeting, was there ever any  
12     agreement in your mind on what the parties felt was actually  
13     owed for the remainder of the Medicode payments?

14          A     Mr. England claimed \$25,000 and I believed him.

15          Q     What did you claim?

16          A     I agreed with him.

17          Q     Did you call your accounting staff?

18          A     No.

19          Q     Why did you pay Mr. England this additional  
20     \$25,000? In other words, what were you hoping to get back in  
21     exchange for that?

22          A     Simply that we would complete the transaction on  
23     that particular day which was the release of his stock to the  
24     Medicode.

25          Q     And neither of you felt that without that \$25,000

1 payment, Mr. England would have to turn over that certificate  
2 for the 18.6 percent of the stock; is that correct?

3 A I don't remember my feeling. I simply tried to  
4 expedite the transaction, so I agreed to pay \$25,000 and give  
5 him the note saying that he would get two percent of his  
6 stock as a collateral for the \$25,000.

7 Q Now, throughout the time that you've dealt with  
8 Mr. England from 1988 up through May, or actually February  
9 1992, you have made payments to him for things other than  
10 stock; is that correct?

11 A Just one.

12 Q And in fact, Mr. England has performed services for  
13 E & H Investments during that time?

14 A No, he has not performed any services for E & H  
15 Investments. Mr. England has continuously approached us to  
16 invest money in some of his schemes.

17 Q But Mr. England has performed services for you?

18 A He has not performed any services for me, period.  
19 Mr. England continuously approached us and other people to  
20 invest money in his new business opportunities and the  
21 companies which he was forming.

22 Q Now, you don't have any records of the MDR stock  
23 purchase other than these checks that you've produced; is  
24 that correct?

25 A That's correct.

1           A     I told you I have never seen this document until  
2     recently.

3           Q     But the question is, do you recall -- I didn't ask  
4     you about the document. I asked you if you'd heard any  
5     statements to the effect that Mr. England might be signing on  
6     with E & H Investments as a consultant or in a similar  
7     capacity?

8           A     No.

9           Q     Thank you.

10          A     And I want to bring up that --

11          Q     Excuse me, you'll have -- there's no question.

12                 Was it your understanding that Mr. England would  
13     not have given you the 18.6 percent share certificate had you  
14     not given him the \$25,000 check and the note that you wrote  
15     out for the two percent of the stock?

16          A     That was my impression.

17                 MR. McVEY: Thank you. No further questions.

18                 THE COURT: All right. Anything further?

19                 MR. CROCKETT: No, your Honor.

20                 THE COURT: Mr. Horbach, you may step down.

21                 THE WITNESS: Thank you.

22                 MR. CROCKETT: Call Keith England.

23                         KEITH ENGLAND,

24     called as a witness by and on behalf of the Defendant, having  
25     been first duly sworn, was examined and testified as follows:

1           A     Last summer.

2           Q     So the summer of '93?

3           A     Correct.

4           Q     Was she under a doctor's care before that?

5           A     No.

6           Q     Now, one more brief question. With respect to the  
7     \$64,000 payment time frame, 29 December, 1989, what was your  
8     understanding of your ability to stop the merger?

9           MR. CROCKETT: Objection, your Honor. It calls for  
10    a conclusion, actually a conclusion in this instance, and  
11    there's no foundation for it.

12          THE COURT: Well, moreover, I don't think, Counsel,  
13    that this was gone into by the Defense. The witness has  
14    testified as to what he perceived to be the considerable  
15    importance which Mr. Horbach placed on this acquisition of  
16    stock, and I think that I've heard enough on that issue.

17          MR. McVEY: At this time the, we would have no  
18    other questions. We would rest in rebuttal.

19          THE COURT: Is there anything?

20                   CROSS-EXAMINATION

21    BY MR. CROCKETT:

22          Q     Mr. England, have you ever told Mr. Horbach your  
23    wife is diabetic?

24          A     Yes, uh-huh.

25          Q     Has she been diabetic for a number of years?

1           A     Oh, many years, uh-huh (affirmative).

2           MR. CROCKETT: Thank you. Nothing further.

3           THE COURT: You may step down, Mr. England.

4           Counsel, the evidence in this case now having con-  
5 cluded, my view at this point is we should recess and I will  
6 work on my opinion. I believe that the issues are quite  
7 straightforward and accordingly, I choose at this point to  
8 dispense with closing argument. I've received a trial memo-  
9 randum from the Defense. If you have a submission you want  
10 to give me at this point, Mr. McVey, I'll receive it.

11           I'll ask you to stay in the area. We'll be in  
12 brief recess and when I'm ready to come back, the Bailiff  
13 will notify you.

14           MR. CROCKETT: Your Honor, before you make your  
15 decision, I think we need to formally move to conform the  
16 pleadings to conform to the evidence.

17           THE COURT: Counsel, I took note of that in your  
18 trial memorandum.

19           MR. CROCKETT: Okay.

20           (Whereupon, a recess was taken, after which time  
21 the Court delivered its ruling, which ruling has been  
22 previously transcribed and is contained within a separate  
23 transcript volume.)

24                   \* \* \*

5a

25

RECEIVED  
AUG 12 1994

GIAUQUE, CROCKETT, BENDINGER & PETERSON  
Stephen G. Crockett (#0766)  
Wesley D. Felix (#6539)  
First Interstate Plaza  
170 South Main, #400  
Salt Lake City, Utah 84101  
Telephone: (801) 533-8383

Steven L. Taylor (#3210)  
Of Counsel with  
MURPHY, TOLBOE & MABEY  
124 South 600 East, #100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

Attorneys for Defendant

---

IN THE SUPREME COURT FOR THE STATE OF UTAH

---

LAN C. ENGLAND,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
Plaintiff and	)	APPELLEE'S MOTION FOR
Appellant,	)	SUMMARY DISPOSITION
vs.	)	
	)	Appeal No. 940284
EUGENE HORBACH, an individual,	)	Subject to Assignment to the
MEDICODE, INCORPORATED, a	)	Court of Appeals on Appeal
Utah corporation, and DOES I	)	from a Decision by Third
through V,	)	District Court Judge
	)	J. Dennis Frederick
Defendants and	)	
Appellees.	)	

---

Appellee, Eugene Horbach, by and through his counsel,  
respectfully submits this memorandum of points and authorities in  
support of his Motion for Summary Disposition.

BACKGROUND

This case arises out of a stock purchase agreement  
entered into by Lan England ("England") and Eugene Horbach  
("Horbach") in the latter part of 1989, whereby Horbach agreed to  
purchase from England 258,363 shares of stock in Medicode, Inc.

England's grounds for appellate review are so insubstantial as not to warrant further consideration by this Court.

#### ARGUMENT

The trial court's judgment is endowed with a presumption of validity. The evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to the trial court's conclusion. Cheney v. Rucker, 381 P.2d 86, 89 (Utah 1963). Against this presumption, England, as the party attacking the judgment, must be able to affirmatively demonstrate clear error.<sup>2</sup> This England cannot do.

I.           HORBACH'S RULE 15(B) MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE WAS PROPER.

In his trial brief, and by oral motion at trial, Horbach moved to conform the pleadings to the evidence.<sup>3</sup> The trial court granted this motion, and duly considered Horbach's defense of mutual mistake and his counterclaim for restitution in the amount of overpayment.<sup>4</sup> As the complete trial transcript

---

<sup>2</sup> Pursuant to Rule 52(a) of the Utah Rules of Civil Procedure: "Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a) (1994).

<sup>3</sup> Horbach's Trial Brief is attached as Exhibit "B." Trial transcript p. 152 attached as Exhibit "C."

<sup>4</sup> Trial Transcript, at 152, attached as Exhibit "C."

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

LAN C. ENGLAND,

Plaintiff,

vs.

EUGENE HORBACH et al,

Defendant.

Case No. CIV 930901471 CV

REPORTER'S TRANSCRIPT OF  
JUDGE'S RULING  
~~Third Judicial District~~

MAY 6 1994

*Lu Ann B. Manks*  
SALT LAKE COUNTY  
Deputy Clerk

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

on Tuesday, March 22, 1994

APPEARANCES:

For the Plaintiff:

SAMUEL D. McVEY  
RANDY AUSTIN  
Attorneys at Law  
KIRTON, McCONKIE & POELMAN  
1800 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111-1004  
328-3600

For the Defendant:

STEVE CROCKETT  
STEVE TAYLOR  
WES FELIX  
Attorneys at Law  
136 South Main Street #500  
Salt Lake City, Utah 84101  
533-8383

ANNA M. BENNETT, CSR  
License No. 220  
240 East 400 South  
Salt Lake City, Utah 84111  
535-5203



1 \* \* \*

2 THE COURT: The parties and counsel are present.

3 I have had the further opportunity to examine the  
4 exhibits received and consider the evidence adduced in this  
5 matter and am prepared to rule.

6 The plaintiff has sought by his Complaint a  
7 determination by this Court that the sole remaining defendant,  
8 Mr. Horbach, breached his contract of May 23rd, 1991, Exhibit  
9 3, wherein the defendant agreed to hold in perpetuity two  
10 percent of the Medicode stock in question in trust for the  
11 plaintiff. Additionally, plaintiff sought declaratory and  
12 injunctive relief against the defendant on the theory that  
13 the plaintiff is entitled to the stock in question and  
14 sought an order from this Court enjoining the defendant from  
15 disposing of that stock pending the outcome of this litigation.

16 This Court conducted an evidentiary hearing on  
17 August the 5th of 1993 on the temporary restraining order  
18 issued by Judge Hanson and converted the temporary restraining  
19 order to a preliminary injunction to prohibit disposal of  
20 said two percent of the stock.

21 The parties by stipulation now have sold the stock  
22 and the proceeds therefrom have been placed into an escrow  
23 account awaiting a ruling by this Court at trial.

24 On the other hand, the defendant claims that the  
25 pivotal agreement, Exhibit 3, is unenforceable because of

1 failure of consideration and that it is violative of the  
2 rule against perpetuities. Moreover, the defendant overpaid  
3 the plaintiff, it is alleged, for the Medicode stock in  
4 question by several thousand dollars.

5 As is typically the case in disputes of this type  
6 where no written document of agreement or sale is executed,  
7 the principals involved directly dispute the terms of their  
8 oral agreement and this Court must examine the credibility  
9 of the various witnesses who testified.

10 The plaintiff denies the overpayments and claims  
11 that the sums paid over the purchase amount of 710,498.25  
12 representing the sale of 258,363 shares at \$2.75 per share  
13 in accord with Exhibits 5 and 1-B were for special services  
14 rendered by the plaintiff in the form of consultation,  
15 examining real estate, cleanup for the merger, the impending  
16 merger, and incentive; yet, this alleged consulting agreement  
17 denied by the defendant was likewise not in writing and no  
18 billings evidence of such services were submitted.

19 The plaintiff acknowledges that when he met with  
20 the defendant on May 23rd of 1991 when Exhibit 3 was  
21 executed, even he was under the impression there was still  
22 money owed for the original stock purchase agreement.

23 The defendant testified that he paid additional  
24 monies and executed Exhibit 3 because he relied on and believed  
25 the plaintiff who claimed that additional monies were owed.

1           According to Exhibit 1-B, as of the meeting of  
2 May 13, of 1991, \$855,000 had been paid, excluding the  
3 \$4,599.35 paid on December 29, 1989, as part of the 64,000-  
4 plus sum paid at that time.

5           The plaintiff's claims are not credible. Even  
6 if the stock purchase price was arbitrarily established,  
7 nevertheless, it was established to the parties' mutual  
8 satisfaction. This Court is not persuaded that the plaintiff  
9 had an agreement to perform some 114,000 dollars worth  
10 of incentive real estate inspection or consulting services  
11 without so much as even a single billing for those services.  
12 There is no evidence regarding the rate of pay, the duration  
13 of the agreement, or the nature of the services presumably  
14 to be performed.

15           While I recognize that this entire transaction is  
16 what might be characterized as loose, the plaintiff's claims  
17 in this regard stretches one's credibility or credulity.

18           The credible evidence establishes that the  
19 plaintiff has been reimbursed for his legitimate expenses  
20 when given credit for the 4,599.35 paid on December 29, 1989.  
21 Furthermore, the defendant has more than complied, in this  
22 Court's view, with his part of the bargain and indeed,  
23 overpaid the plaintiff some \$169,501.75. That is arrived at  
24 by taking the total amount paid, \$880,000, minus the purchase  
25 price of the stock in question of 710,498.25, in accord with

1 Exhibits 1 and 1-B. The so-called note, Exhibit 3, was  
2 executed under a mutual mistake of fact and was, in this  
3 Court's view, without consideration and therefore unenforceable.

4 The defendant has sought, pursuant to Rule 15(b)  
5 of the Utah Rules of Civil Procedure to amend his pleadings  
6 to conform to the evidence, and this Court is persuaded that  
7 the request is proper and that request should be granted and  
8 therefore is.

9 Accordingly, this Court finds no cause of action  
10 on the plaintiff's Complaint and awards to the defendant  
11 judgment against the plaintiff for sums overpaid in the amount  
12 of \$169,501.75.

13 Counsel, Mr. Crockett, you prepare the Findings  
14 of Fact, Conclusions of Law and Judgment.

15 Are there any questions?

16 Very well. Thank you. We'll be in recess.

17 MR. CROCKETT: Did you say judgment for the  
18 plaintiff? You meant defendant.

19 THE COURT: Mr. Crockett, pardon me?

20 MR. CROCKETT: You said judgment in favor of  
21 plaintiff. I think you meant --

22 THE COURT: Judgment in favor of the defendant in  
23 accord with Rule 15.

24 MR. CROCKETT: Thank you.

25 THE COURT: All right. Thank you.

(Whereupon, the proceedings were concluded.)

MAR 22 1994

SALT LAKE COUNTY

By C. Beverley

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

1  
 2  
 3  
 4  
 5  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525

**Judge J. Dennis Frederick**

## Addendum 90

clarify ambiguous language in a contract, but never to change the plain language of a written agreement. *Id.*

## II. CONSIDERATION FOR HORBACH'S PROMISE TO HOLD 2% OF THE STOCK IN TRUST

Defendant claims he overpaid plaintiff for the 18.6% stock represented by the certificate in Exhibit P-5 and thus received no consideration for the 2% stock transfer. "Consideration is sufficient if there is a benefit to the debtor or an inconvenience or deprivation [detriment] to the creditor, such as a promise by the creditor to refrain from legal proceedings or an extension of time within which the debtor may pay the creditor." *Ludwick v. Bryant*, 697 P.2d 858, 861 (Kan. 1985). Such an agreement can be inferred from the parties' conduct. *See* 17A Am. Jur.2d *Contracts* § 157 and cases cited therein.

Extending the time for payment of a debt constitutes adequate consideration for a contract. *Farmers & Merchants State Bank v. Higgins*, 89 P.2d 916 (Kan. 1939). The simple act of delivering stock constitutes consideration if there is no contractual duty to do so or the duty is reasonably disputed. *See Long v. Forbes*, 136 P.2d 242, 246-47 (Wyo. 1943) ("The doing of anything beyond what one is already bound to do, though of the same kind, and in the same transaction may be a good consideration."); *Safety Fed. Sav. & Loan Ass'n v. Thurston*, 648 P.2d 267, 270 (Kan. Ct. App. 1982) ("It has long been held that any forbearance to prosecute or defend a claim or action, or to do

an act which one is not legally bound to perform, is usually a sufficient consideration for a contract based thereon . . . .").

Any detriment to a promisor will constitute consideration. Thus, England's giving up his right to refuse delivery of the 18.6 % of stock, demand immediate payment, and related rights was also consideration for Horbach's agreement to hold 2% of the stock. In *Gorgoza, Inc. v. Utah State Road Comm'n*, 553 P.2d 413 (Utah 1976), the court stated: "If one party asks for and receives something which he would not otherwise be entitled to from the other, that is adequate consideration." Moreover, the court in *Powers Restaurants, Inc. v. Garrison*, 465 P.2d 761, 763 (Okla. 1970), stated that "any benefit to the promisor or detriment to the promisee" constitutes consideration.

Further, the parties' agreement constitutes an accord and satisfaction--the deal to sell 18.6% of the stock for the original purchase price would be satisfied by the substituted performance of a payment of \$25,000.00 and 2% of the stock in exchange for the transfer of the 18.6% of the stock. "Accord and satisfaction arises when the parties to a contract mutually agree that a performance different than that required by the original contract will be made in substitution of the performance originally agreed upon and that the substituted agreement calling for a different performance will discharge the obligation created under the original agreement." *Neiderhauser Builders v. Campbell*, 824 P.2d 1193 (Utah App. 1992).

### III. RULE AGAINST PERPETUITIES

The rule against perpetuities has been generally stated as follows:

No interest [in property] is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. It is not necessary that the interest vest in possession but merely that "the persons to take it are ascertained and there is no condition precedent attached to the remainder other than the termination of the prior estate."

*Anderson v. Anderson*, 386 P.2d 406, 407 (Utah 1963). Courts have held that the rule does not apply to limit the duration of a trust, but simply applies to the time when legal title must vest in the trustee and the time when all beneficial or equitable interests created in the trust vest in the beneficiaries even though the duration of those vested interests may extend beyond the period of the rule. *Joyner v. Duncan*, 264 S.E.2d 76, 82 (N.C. 1980). The *Joyner* court also stated that an interest is "vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment", . . . and that the rule is concerned solely with the time for vesting in interest of estates and not with the time the estates will vest in possession and enjoyment." *Id.*

The substitute agreement does not violate the rule here. England's interest in and right to possession of the stock is fully vested at the time the agreement was entered into; England has a present fixed right to future possession or enjoyment of the stock. Indeed, Horbach gave England a present, vested, equitable interest in the



stock at the time of transfer, and the rule of perpetuities does not apply to the substitute agreement. As stated by the *Joyner* court, the fact that England did not possess the stock is wholly irrelevant for purposes of the rule. The *Anderson* case is directly on point and controls this case.

#### IV. ORDERING FUNDS TO BE PAID OUT OF ESCROW

England may recover the monies in escrow. The escrowed monies are the proceeds from the sale of 2% of Medicode stock, which England claims Horbach held in trust for him under their substitute agreement. Horbach has converted the stock into cash which England may recover. In *Peterson v. Peterson*, 190 P.2d 135 (Utah 1948), the Utah Supreme Court recognized the right of a beneficiary of a trust to enforce the trust against proceeds in the hands of the trustee or against the trustee personally. See also *In re Crawford*, 795 S.W.2d 835 (Tex. App. 1990) (holding that when one person wrongfully takes the property of another and converts it into a new form, a constructive trust arises and follows the property or its proceeds); *United States Fidelity & Guaranty Company v. Hiles*, 670 S.W.2d 134 (Mo. App. 1984); *St. Paul Fire & Marine Insurance Company v. Seafare Corp.*, 831 F.2d 57 (4th Cir. 1987) (the beneficiary of a constructive trust may assert his rights in the proceeds from the disposition of trust

property). Further, the parties agreed to escrow the funds as security for plaintiff's claim.

#### V. PLAINTIFF CAN ELECT BETWEEN THE REMEDIES RESCISSION/DAMAGES/SPECIFIC PERFORMANCE

Rule 8 U.R.C.P. permits a party to plead and pursue inconsistent remedies for the breach of a contract. See Midvale Motors, Inc. v. Saunders, 432 P.2d 37 (Utah 1967). The Midvale court also stated that while a party has a right to demand election between inconsistent remedies sought by its opponent in the course of litigation, the party against whom the inconsistent remedies are sought does not have authority to make the election for the party seeking the alternative remedies. Id. at 39. Recent cases have indicated that the election between inconsistent remedies need not be made until the time of judgment. In Vinson v. Martin & Associates, 764 P.2d 736 (Ariz. App. 1988), the Arizona Court of Appeals stated:

Although his pleadings requested only specific performance, Vinson had not been put to an election of remedies in the trial court. A person cannot be forced to elect before the conclusion of trial the theory he will advance or the remedy he will seek.

Id. at 739; see also Arter v. Spathas, 779 P.2d 1066 (Or. App. 1989).

In addition, the Utah Supreme Court has stated:

The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one

thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others.

Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979).

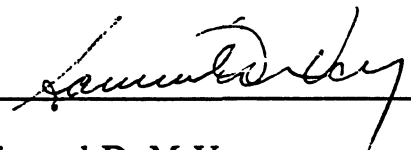
The doctrine is not to be used to prevent a party from pursuing all of its possible remedies. It only precludes double recovery for a single wrong.

## VI. LEGAL INTEREST

Prejudgment interest is awarded when a defendant delays in tendering or refuses to pay an amount clearly owing under an agreement or other obligation. U.C.A. § 15-1-1. *See Baker v. Dataphase, Inc.*, 781 F. Supp. 724 (D. Utah 1992). Section 15-1-1 provides: "(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money goods, or chose in action shall be 10% per annum." Prejudgment interest should be awarded when the loss is fixed as of a particular time and can be calculated with mathematical accuracy. *Jorgensen v. John Clay & Co.*, 660 P.2d 229 (Utah 1983). England's damages were fixed as of the date Horbach refused to transfer the stock when England demanded transfer. Moreover, the damages can be calculated with mathematical accuracy.

Dated this 21 day of March, 1994.

KIRTON, McCONKIE & POELMAN

By:   
Samuel D. McVey

RTA\SDM\3370-2\TRIAL.BRF\032194