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Ronald J. Chilton, et al. v. ALLEN K. YOUNG; YOUNG KESTER & PETRO, GERRY L. SPENCE, LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKEY; PLOTKIN & JACOBS : Brief of Appellant

Utah Court of Appeals

IN THE SALT LAKE COUNTY, STATE OF UTAH APPELLATE COURT

RONALD J. CHILTON, et al., Plaintiffs and Appellants, vs. ALLEN K. YOUNG; YOUNG KESTER & PETRO, GERRY L. SPENCE, LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKEY; PLOTKIN & JACOBS, Defendants and Appellees, Does 1-5, Co-Defendants, whose true identity is unknown to plaintiffs.	Appellate Case No. 20080363 District Ct. No. 030105887

BRIEF OF APPEALANT

EXHIBIT 1#

IN THE SALT LAKE COUNTY, STATE OF UTAH APPELLATE COURT

RONALD J. CHILTON, et al., Plaintiffs and Appellants, vs. ALLEN K. YOUNG; YOUNG KESTER & PETRO, GERRY L. SPENCE, LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKEY; PLOTKIN & JACOBS, Defendants and Appellees, Does 1-5, Co-Defendants, whose true identity is unknown to plaintiffs.	Appellate Case No. 20080363 District Ct. No. 030105887

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BRIEF OF APPEALANT

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(3), Utah Code Ann. §78A-4-103(2).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Should the Court have granted a new trial after Plaintiffs lost their "deficient" legal counsel for the 2nd time and were forced to become Pro Se litigants. This issue was preserved by motion and/or objection when denied the motion.

Standard of Review. This issue presents a question based not only on the deficiencies of legal council, but did the deficiencies affect the outcome of the trial? State v. Winward, 941 P.2d 627, 635 (Utah Ct.App. 1997), State v. Garrett, 849 P.2d 578, 579 (Utah Ct.App. 1993), State v. Weaver, 2005 UT 49, State v. Hansen, 2002 UT 114.

2. Did the lower court commit reversible error when it allowed the Defense to illegally overturn the Federal Court ruling of Judge Jenkins' of March 5, 1995 when Defendants' misrepresented correct vacation pay dates, the words "terminate" versus "discharge", and through Judge Pat Brian's Memorandum Decision misquoting from the BLA (Basic Labor Agreement) Forfeiture Language by stating that the Plaintiffs' were "effectively discharge" (**Exhibit I, page 11, paragraph 2**).

Standard of Review. This issue presents questions of law which are reviewed for correctness. Basic Labor Agreement BLA §12-A-1-b, BLA §12-A-3, UCC §2-106 (3), Employee Retirement Income Security Act (ERISA), Judge Pat Brian's Memorandum Decision (Sept 22, 2005), Tony Pickering v. USX Corp. (case no. 87-C-8381 and consolidated cases), Seaman v. Arvida Realty Sales, 985 F.2d 543 (11th Cir. 1993), Currier v. Holden, 862 P.2d 1357 (Utah App. 1993). Hill v. Allred. 2001 UT 16 28 P3d 1271. Alexander v. Oklahoma. 382 F.3d 1206 (10th Cir. 2004), Morris v. Wise, 1955 OK 297, Robinson v. Morrow, 2004 UT App 285, Wells Fargo Bank v. Temple View Investments. 2003 UT App 441 82 P.3d 655.

3. Should the court have corrected its own error when the Defense mislead the lower Court into the judicial errors by misrepresenting the accrued 1987 vacation pay as accrued 1988 vacation pay? (**Reference Exhibit I, J, and C**). This issue was preserved by motion and/or objection.

Standard of Review. This issue presents a question of law which is reviewed for correctness. ERISA, BLA §12-A-3, UCC §2-106.

4. Did the lower court commit reversible judicial errors when it dismissed this case for Statute of Limitations even though Appellant did not discover the Defendants' made misrepresentation to the Court until mid 2006 when Plaintiffs' legal council withdrew. (Ref: **Exhibit B** (pages 39-41) and **Exhibit N**).

Standard of Review. This issue presents a question of law pertaining to tolling time period under the Discovery Rule which is reviewed for correctness. Hill v. Allred, 2001 UT 16, 28 P.3d 1271, Discovery Rule.

5. Did the lower court commit judicial errors when it dismissed this case for Statute of Limitations in the face of appellee misrepresentations, appellant preservations, unresolved material facts, and no party had motioned for Statute of Limitations? Additionally, because Statute of Limitations issue had already been won in Pat Brian's Memorandum Decision December 5, 2003 (**Exhibit D**).

Standard of Review. This issue is a proven fact (**see Exhibit D**) and review for correctness.

6. Did the lower court commit judicial errors when it dismissed this case for Statute of Limitations in the face of its own prior judicial errors of which it had been noticed by appellant's motions and objections? (**Reference Exhibit C**). Additionally, the history of this case clearly shows that nearly two years of this delay was caused by the court's own conflict of interests and deficiencies of Plaintiffs' counsel.

Standard of Review. This issue presents a question of law which is reviewed for correctness. Wells Fargo Bank v. Temple View Investments, 2003 UT App 441 82 P.3d

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7. Defendants' entered unauthenticated inadmissible accounting documents into evidence(**Exhibit L**) in which Plaintiffs filed objections and memorandum in the attempt to stop and correct. Should the court have reviewed Plaintiffs' material issues and provided argument time for the motions on these issues instead of ignoring the issues? .

Standard of Review. This issue presents a question of law pertaining to summary judgment when material facts remain in question which is reviewed for correctness. Gardner v. County, 2008 UT 6 178 P.3d 893.

8. Did the lower court commit reversible error when it illegally modified the meaning of the Basic Labor Agreement by switching the word "terminate" for the words "effectively discharge"? And also when it misinterpreted and then misquoted the vacation pay eligibility requirements? And again when it ignored Plaintiffs opposing evidence pertaining to BLA § 8-A and 8-B Suspension and Discharge Procedures that absolutely prove that Plaintiffs were terminated, but not discharged?

Standard of Review. This issue presents a question of law pertaining to summary judgment when material facts remain in question, of overturning a prior Federal Court ruling, and of non-parties modification of the Basic Labor Agreement which is reviewed for correctness. Wells Fargo Bank v. Temple View Investments, 2003 UT App 441 82 P.3d 655. UCC 2-106(3), BLA §12-A-1-b, BLA §12-A-3, BLA § 8-A and 8-B, UCC §2-106 (3).

CONTROLLING STATUTORY PROVISIONS

The following relevant statutes, codes, agreements are attached in Addendum A:

UCC §2-106(3) (Contracts)
ERISA (Employee Retirement Income Security Act of 1974) §502(a)
BLA §12-A-3 (Forfeiture clause for vacation pay)
BLA § 8-A and 8-B (Suspension and Discharge Procedures)
BLA §12-A-1-b (Vacation Pay Eligibility Requirements)

STATEMENT OF THE CASE

We the pro se Plaintiffs appeal from the decisions and judgments of the Third District Court in its denying the pro se Plaintiffs a fair chance to plead their case. The lower court ignored Plaintiffs objections, motions, and evidence and then unjustly dismissed on Statue of Limitations. Plaintiffs were not given opportunity to argue the dismissal. There were material issues pending.

This case was filed on July 30, 2001 and is about Fraudulent Misrepresentation, Legal Malpractice (Breach of Contract), Legal Malpractice (Breach of Fiduciary Duty), Legal Malpractice (Negligence), Accounting, and Breach of Trust. Specifically, this case is about Alan Young's handling of the *Pickering v. USX* case, the monies Alan Young received in the *Picking v. USX* case and, why he has not paid the correct award monies owed to Plaintiffs from the *Pickering v. USX* case. This lawsuit questions what Alan Young do with the award money and vacation pay in the form of transparent and auditable accounting of the source, amount, and distribution. Additionally, this case is about lost increased pensions through negligence and fraud as well as unaccounted for legal fees. However, Alan Young attempted to turn this case into an argument about

whether money was owed at all and has never shown Plaintiffs any true authenticated accounting records toward his defense.

Originally, Plaintiffs' were not self represented as pro see litigants, but two attempts to hire counsel resulted in their attorneys withdrawing from the case. Plaintiffs were forced to become pro se litigants in June of 2006. Plaintiffs' two attorneys failed to plead the facts of the case and failed to preserving critical issues. When Plaintiffs confronted their attorneys for not performing, the attorneys withdrew from this lawsuit.

Attorney Alan Young was the lead attorney representing Plaintiffs in a previous case of *Pickering v. USX* filed on or about April 10, 1987 (RE: CV00838). In the Pickering case, Alan Young controlled the distribution of the settlement funds. On or about April 2001, while some Plaintiffs were attending a lawsuit of *Chamberlain v. Young* and while listening to the testimony of Judge Scott Daniels on the topic of distribution of "slush fund" monies from the *Pickering v. USX* case, Plaintiffs discovered that Alan Young still owed to Plaintiffs additional award monies, including vacation pay from the Pickering case. Plaintiff Chilton communicated with the court on these facts as can be seen in Judge Pat Brian's Memorandum Decision (Defendant's Motion to Dismiss) dated December 5, 2003, (**Exhibit D, page 3, paragraph 3**) and related letters from Plaintiff Chilton (**Exhibit G**).

In July of 2001, Plaintiffs hired attorney James Haskins to sue attorney Alan Young along with the other attorneys who worked with Alan Young on the *Pickering v. USX* case to recover those remaining award monies and in so doing, gave rise to this

instant lawsuit.

On December 16, 2001, Alan Young filed a motion to dismiss. On January 2, 2002, Judge Tyron Medley dismissed this case without prejudice for Attorney Haskins' failure to serve papers to Alan Young in the proper time. This case was refiled in February 08, 2002 and served on April 16, 2002. The case then stalled in the 4th district court in Provo where no judge would hear the case because of a conflict of interest on the grounds that they were friends with Defendant Alan Young. Months later, Judge Claudia Laycock was appointed to the case. In or about September 2002, Laycock set a status hearing and at that hearing, Laycock recused herself from the case on the grounds of conflict of interest in that she had been recommended by Attorney Micheal Petro who was at that time, Alan Young's counsel attorney in this lawsuit.

On or about July 08, 2003 this case was assigned to a Non-Senior Judge Pat Brian to sit in a Court of Equal Jurisdiction in a Different Judicial District. A Notice of Status Hearing was set on July 30, 2003 and scheduled on or about September 23, 2003. However, between November 14th and 20th of 2003, Plaintiff Ronald Chilton communicated with the Court via two (2) letters expressing that Plaintiffs' counsel James Haskins had failed to submit key documents pertaining to the dates when Plaintiffs discovered that Alan Young owed vacation pay award monies to the Plaintiffs from the *Pickering v. USX* case.

On or about December 05, 2003 Judge Pat Brian issued a memorandum decision denying Defendant's December 12, 2003 motion to dismiss (**Exhibit D, page 5**) which

was treated as a summary judgment motion.

The scheduling order was completed by April 27, 2004. By June 08, 2004, Plaintiff David Glazier hired Attorney Evan Schmutz as new Counsel. Some plaintiffs remained with James Haskins and others signed on to be represented with new counsel Evan Schmutz.

From June 08. 2004 until December 06, 2004 the case proceeded normally aligning issues such as Initial Disclosures, motions for amened complaint, a simple substitution of party, and finally, order granting leave to amened the complaint.

On April 06, 2005 Defendants filed a Joint Motion for Summary Judgment and on June 02. 2005 Plaintiffs responded with Memorandums in Opposition. From July 01, 2005 until August 08, 2005 the parties filed numerous papers that were concluded in Judge Pat Brian's September 22, 2005 Memorandum Decision when Judge Brian made an error against Plaintiffs by altering and misinterpreting the meaning of the BLA contract. In the BLA contract, which Judge Brian used as the key subject matter to make his final ruling. Judge Brian erred in his memorandum when he referenced the BLA because he replaced the word terminate with the word discharge. Pat Brian also misquoted the BLA pertaining to a reference of time for eligibility for vacation pay (**Exhibit I, page 3, 9, 10, 11**), but the correct regulation can be found in BLA §12-A-1(b) (**exhibit F**).

On October 13, 2005 Defendants filed for Summary Judgment on all remaining issues. This argument continued on paper until January 12, 2006 when Judge Pat Brian filed a Memorandum Decision dismissing all remaining causes of action except for the

Defendants' fiduciary duty as to how Defendants created and distributed the slush fund. Judge Brian dismissed all of these other causes because they were related to the vacation pay issue. The grounds for this dismissal were based on Defendant's false evidence and the courts misinterpretations of the BLA.

On or about June 30, 2006 Plaintiffs' counsel Evan Schmutz withdrew from representing three of the Plaintiffs an on or about that same date, Plaintiffs filed a motion for reconsideration. Between July 6th and 14th of 2006 two abandoned Plaintiffs were forced to file Notice of Entry of Appearance as Pro-Se. The third dismissed himself from the case.

Between August 16, 2006 and April 16, 2007 both parties filed numerous arguments over the motion to reconsider the current issues (including the vacation pay issue), several applications and motions to extend time and/or to file over length memorandums, a reply regarding Evan Schmutz withdraw of counsel, several letters, a subpoena, and a request to submit for decision.

From May 07, 2007 and August 30, 2007 all clients of Evan Schmutz withdrew from him and filed their Notices of Entry of Appearance as Pro Se.

At this point, the case had become so convoluted from switching counsel that Plaintiffs did not have a complete documented history of the case, and the two former counsel of Plaintiffs had not preserved a single judicial error nor violation of the Rules of Evidence. Pro se Plaintiffs had no choice but to file a Motion for New Trial on or about September 04. 2007. The events and circumstances of this lawsuit could be construed as

exceptional circumstances under the exceptional circumstances doctrine.

September 10, 2007 Defendants objected to Motion for New trial and on September 17, 2007 Plaintiffs objected to the denial of their Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct its Judicial Errors. Still, Plaintiffs have yet to be heard on the fiduciary breach claims even though the Defendants' have never provided any authenticated accounting records. Additionally, the Plaintiffs demanded a jury trial on all issues so triable, but none has been provided.

From September 17, 2007 until October 29, 2007 both parties filed arguments and objections on all current dispositions, including 4 letters, and a submit for decision filed October 2. 2007.

On or about March 15. 2008 the Court issued its Memorandum Decision and Order denying Plaintiffs on all issues. The Court did not acknowledge, address, nor provide hearing time on any Plaintiffs motions or issues, but simply denied Plaintiffs on the sudden, unexpected, and erroneous ground of Statute of Limitations. This was an unjust ruling fabricated as an escape hatch to avoid all the wrong doing and errors since the onset of this lawsuit.

STAEMENT OF RELEVANT FACTS

Early in this case, Plaintiffs were burdened with ineffective assistance of counsel, but were unaware of the insufficiencies until they lost their representation for the second time in June of 2006 leaving in disarray.

This suit had been in four different courts, 3 different jurisdictions, handled by 3 different judges, two different attorneys for Plaintiffs, and then certain plaintiffs file as pro se for the second time. All of these events are part and parcel of that which constitutes the fundamental irregularities [Utah Civil Procedure Rule 59(a)(1)].

Plaintiffs were forced to subpoena documents from Alan Young, Attorney Evan Schmutz and James Haskins (**Exhibit M**), but only received a partial history of the case. That is when Plaintiffs became Pro Se litigants.

Plaintiffs counsel failed to object on pivotal issues. Plaintiffs counsel did not argue against hearsay evidence pertaining to the Basic Labor Agreement, unauthenticated accounting records, unsupported arguments pertaining to the Basic Labor Agreement, and also failed to enter Plaintiffs evidence showing when the Plaintiffs discovered that the Fraud had been committed. Furthermore, Plaintiffs counsel failed to include lost increased pensions in the complaint under the Fraud cause of action. The issue of Plaintiffs' lost increased pensions was discovered only after Plaintiffs became pro se in 2006 following their loss of counsel.

The Defendants inadmissible unauthenticated accounting records were self serving records that were used for the purpose of convincing Plaintiffs that Defendant followed Judge Jenkins' instructions in his Federal Ruling from *Pickering v. USX,* but no real, transparent, verifiable, authenticated documents were provided to substantiate the Defendant's unauthenticated accounting records. Plaintiffs counsel should have demanded proof and objected to the lack thereof, but failed to preserve on completely

erroneous interpretations of the Basic Labor agreement (BLA).

The BLA is contract between Plaintiffs and USX and issues such as vacation pay were never in dispute; not in the previous case of *Pickering v. USX* and not legally in this case. Instead of owning up to the fact that they breached their fiduciary duty to the Plaintiffs the Defendants' would attempt to argue that the Plaintiffs were not entitled to vacation pay. However, the problem with their approach is that the issues were never in dispute in the Pickering case and the defendants are not a party to the BLA and do not have the right to determine its meaning for themselves. Particularly while using hearsay evidence and unsupported argument. Following that, the court then ignored Plaintiffs' opposition to such objectionable procedures. If they could conjure up an expert witness, one who could bring "prior course of dealings" as per UCC law, or some legal admissible form of evidence to substantiate their defense, then OK, but they never provided admissible evidence. These self serving interpretations included convincing the court to go as far as redefining "terminate" into the words "effectively discharged" because they could not substantiate actual "Discharge". The meanings are entirely different and most certainly have entirely different effects and conclusions as they pertain to the Basic Labor Agreement. The Defendants did this and more and they did it with no authority and no proof; it was done completely by brute force of the court and Plaintiffs counsel stood idly by without peeping a single "OBJECTION!" After pulling off this hijacking of the BLA, the Plaintiffs were forced to suddenly become pro se Plaintiffs, but the case was in shambles. The Plaintiffs still managed to notice the court and preserve with objections

and motions. On or about September 2007, and as a matter of law, the Defendants were boxed in by Plaintiffs' motions and supporting memorandums. The courts only choice was to reverse the errors or to provide the Plaintiffs with a new trial, but the lower court had the unmitigated gull to dismiss this case in the face of its own errors even though it had notice of those errors. The court initiated on its own accord an unjust ruling of statute of limitations as an unfair escape route for the Defendants. In doing this. the court overturned a prior ruling favoring the plaintiffs on this issue without providing any opportunity for Plaintiffs to argue. It did this after four years of litigation because the Plaintiffs finally defeated the Defendants on the material fact issues.

These deficiencies of Plaintiffs' counsel allowed the Defense to use faulty evidence to mislead the District Court into artificial "new light" causing the illegal overturning of the prior Federal Court ruling on the *Pickering v. USX* case. Plaintiffs in Pro Se preserved by objection and notified the Trial Court of errors (refer to Plaintiffs' "Memorandum In Support of Motion for New Trial" filed September 4, 2007). The Court did err in not correcting these issues.

Plaintiffs' twice deficient counsel followed by loss of counsel were exceptional circumstances that hindered the process of flow of the case, and when counsel was present, he was entirely ineffective on several key areas: 1. The complaint was missing a cause of action pertaining to the lost pension issue. 2. Counsel failed to preserve with objections, including the Defendants' obvious, unauthenticated, hand-drawn accounting documents used to erroneously formulated lost wages using 0.53 instead of page 193 and

231 of Judge Jenkins' Federal Ruling instructions to use 0.58 (**Exhibit E**). 3. Counsel allowed the Defense, a non-party to the BLA, to illegally interpreted the BLA by twisting its meaning in the attempt to equate "terminate" with "discharge" and then applying this non-existent straw-man type argument, an argument with no genuine material facts and no supporting substance; only fabrications. (**Exhibit C, page 2, paragraph 2**).

Following that foisting of false facts, the court also misquoted the eligibility requirements by inserting a 6 month time stamp that simply did not exist. 4. Counsel stood passively while Judge Pat Brian erroneously altered the language of the BLA (**Exhibit I, page 11, paragraph 2**) and never objected to the fact that there was no party to the BLA contract present to make such a legal claim and 5. Plaintiffs' Counsel allowed all these acts to go unobstructed by not objecting to the overturning of the Jenkins Federal ruling when the Defense's misrepresented facts on vacation pay eligibility dates and the courts misquotes of the BLA (**Exhibit I** pages 2, 3, 9, 10, 11). Standard of Review speaks to these issues:

> When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed "plain error," (2) "exceptional circumstances" exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue. State v. Weaver, 2005 UT 49, ¶ 18, 122 P.3d 566; State v. Hansen, 2002 UT 114, ¶ 21 n. 2, 61 P.3d 1062.

Specifically, The Defense unlawfully reinterpreted the Basic Labor Agreement (BLA) and in this way, misled the Court when the Defense replaced a critical defining word "terminate" with the word "discharge" that would then modify the terms of the BLA. The Trial Court granted summary judgment to the Defendants based on this

deceptive argument. Additionally, a line was taken out of context from BLA §12-A-3 without including the entire paragraph. These word swaps and twists were the erroneous new light the Defense used to cause the Court to illegally overturn a Federal Ruling on vacation pay that was originally correct, was never in dispute in *Pickering v. USX*, and the Defense never provided any expert witness testimony, no proof of prior course of dealings, nor any admissible evidence of any kind. The Defense instead provided hearsay and an unauthenticated piece of paper all of which the Plaintiffs completely crushed with totally substantiated proof, but the lower court ignored that proof even though Plaintiffs preserved and filed a motion for reconsideration and new trial. Pro Se Plaintiffs preserved on these errors and tried to correct them. Refer to Plaintiffs' "Memorandum In Support of Motion for New Trial" (**Exhibit A**) and also, "Memorandum in Support of Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct its Judicial Errors (**Exhibit C**).

When Plaintiffs became Pro Se in June 30, 2006 and began to garner information about how the case had been handled, they saw the errors of their former counsel, but also discovered new evidence that justified court correction or a new trial. Once operating as Pro Se litigants in 2006, Plaintiffs discovered: 1. The accrued 1987 vacation pay dates had been misrepresented as accrued 1988 from the original Federal Ruling. To add insult to injury, Pat Brian's also misquoted the BLA pertaining to time eligibility requirements for vacation pay in his Memorandum Decision September 22, 2005 on page 11. line 3

(**Exhibit I**) and see a copy of the BLA at BLA §12-A1(b). This caused Judge Pat Brian to overturn the Federal ruling which caused Plaintiffs to lose the vacation pay earned in 1987 that would have become available in 1988. 2. When the vacation pay issue was overturned, Pat Brain dismissed all the other causes of action that were related to the vacation pay issue issue. 3. Lost wage calculations were formulated as 0.53 (**Exhibit L**), but should have been 0.58 (**Exhibit E** page 75 and 90) and these errors were unsupported, but were accompanied only by unauthenticated documents hand-drawn by Defendants' with no genuine accounting records to substantiate them. The formula further deviated from the Federal instruction by using 1984-1986 W2 forms to figure average wages rather than the required 80 plus hour pay periods as awarded by Judge Jenkins in *Pickering v. USX* (**Exhibit E** page 31 paragraph 2).

Plaintiffs did earn 1987 vacation pay that should have been paid in 1988 and is a default asset not an award as per UCC 2-106(3) pertaining to surviving terms. If this issue had been in dispute, it would have been raised in the *Pickering v. USX* trial. Plaintiffs' objections and evidence was ignored by the lower court, but should have been reviewed by way of Plaintiffs"s motion to reconsider and preservations.

Plaintiffs's preserved on the court's errors because Pat Brian altered the BLA contract terminology of "terminate" and "discharge", on the misquotes of time eligibility, and also preserved when the Defendants were found having entered inadmissible evidence in the form of unauthenticated documents. Plaintiffs also preserved on the use of incorrect formulas for lost wage calculations, misrepresented vacation pay eligibility

dates, and in offering hearsay evidence in the illegally redefining of the BLA contract.

Prior to dismissal, Plaintiffs filed Motion for New Trial, and notified the Court of judicial errors, evidence violations, misrepresentation of facts, the concealment of actual facts, and the erroneous application of mathematical formulas to calculate lost wages. Additionally, pro se Plaintiffs were never given court time to argue the fiduciary breach issues on pension and lost wage and were never given the jury trial they demanded. See Plaintiffs' September 4, 2007 Memorandum in Support of New Trial (page 2, item 4).

The Trial Court abused its discretion when it overturned the Federal Ruling on the vacation pay issue and again when it failed to respond to Plaintiffs' objections and motions to correct the errors and the evidence violations.

> "Although the admission or exclusion of evidence is a question of law, we review a trial court's decision to admit or exclude specific evidence for an abuse of discretion." State v. Cruz-Meza, 2003 UT 32, ¶ 8, 76 P.3d 1165.

The May 8, 1995 Judge Jenkins's Federal ruling outlined the correct multiplier to be 0.58 (7 months of a year) when calculating the Plaintiffs' lost wages. However, when the Defendant Young calculated the wages he did not follow the Jenkins ruling. but instead used an erroneous multiplier of 0.53. Defendants' accounting records were unsupported by authenticated, transparent facts, but instead were self-created unauthenticated accounting documents that should never had been admitted into the court record without authenticated records to substantiate the Defendants' own documentation and in doing so, violated evidence rules. Defendants miscalculated lost wages by using the number .53 instead of the Judge Jenkins ruling that instructed a .58 calculation. In

these same calculations, the Defendants used a 3 year average, but the Jenkins' decision demanded that only 80 plus hour pay periods be used. Plaintiffs objected and proved with full documentation the corrected formula. The objections were ignored, but should have been reviewed by way of Plaintiffs' motion to reconsider.

Another big problem was that Counsel for the Plaintiffs failed to raise issues pertaining to lost pension caused by Defendants' fiduciary breach and negligence. This issue was never included in the complaint, but should have been, and now it manifests an ongoing wrong doctrine. By the time the Plaintiffs were forced into Pro Se status, it was all they could do just trying to recover the vacation pay issue and object to preserve current issues. They didn't have time and resources to take backward steps in order to recover from Counsel's earlier deficient representation and is all part and parcel of the exceptional circumstances.

> An ineffective assistance of counsel claim, raised for the first time on appeal, presents a question of law. See State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998). As stated earlier, to prevail on an ineffective assistance claim. Defendant must show not only "that his trial counsel's performance . . . fell below an objective standard of reasonableness," but also that his counsel's deficient representation "prejudiced the outcome of the trial." Id. (internal quotation marks omitted).

In the Trial Court's final ruling, Judge Roth dismissed on statute of limitations, but Plaintiffs are not barred for the following reasons:

a) No party motioned for statute of limitations nor was any argument availed to Plaintiffs on this issue.

b) In the Judge Brian's Memorandum Decision December 05, 2003 (**Exhibit D**), Statute of Limitations had already been argued and won favoring Plaintiffs.

c) There were issues and judicial errors pending; Pro Se Plaintiffs preserved (**Exhibit A**). The Trial Court was obligated to correct the errors once they were raised by motion and objection.

d) The Defense used concealment to hide and misrepresent facts about the vacation pay dates; objections were made, but Trial Court did not correct.

e) Plaintiffs did not become aware of the insufficiencies of their counsel's mishandling of the case, nor of the Defense as a non-party to the BLA, illegally redefining the BLA, and the falsifying and misrepresentation of evidence and formulas on the vacation pay and lost wages issues until late 2006, well within Statute of Limitations.

The district court abused its discretion when failing to review Plaintiffs' objections and again when dismissing on grounds of Statute of limitations.

The accounting documents that were entered into the record by the Defense were unauthenticated, inadmissible evidence. These same documents were used to falsely substantiate the erroneous accounting information; Plaintiffs objected and motioned the court to look at the problem, but the court failed to revisit the issue and Plaintiffs' motions were ignored.

There is also an issue of the Defendants' double dipping contingency fees that is exposed in his self-created unauthenticated documents and this issue was shown to the court at the oral hearing on September 17, 2007, but has yet to be addressed by the trial court although Plaintiffs raised this material issue by objection. In Judge Roth's memorandum decision March 15, 2008, Roth restated the double dipping issue and said, "Plaintiffs complained the contingency fee is too high", a misrepresentation of the facts.

The vacation pay issue of Judge Jenkins was illegally overturned by misrepresentation of facts regarding vacation pay dates and controlling terms in the Basic

Labor Agreement. Plaintiffs objected properly, but were ignored.

The lower court had no right to overturn the Jenkins ruling on the vacation pay issue, but was misled when the Defendants concealed the true dates for which vacation pay was accrued. The lower court should have corrected the error when Plaintiffs filed objections and motions to correct the errors so they could recover their lost vacation pay.

The court made errors when it failed to revers upon notice by motions and objections to Defendants hearsay in redefining the Basic Labor Agreement between the Plaintiffs and USX Corp. Further, the Defendants are not a party to the BLA contract nor were they authorities on the definition and terms of the BLA as it applies to the Plaintiffs. As a defense to their fiduciary breach and fraud, Defendants' provided no expert testimony or prior course of dealing and yet had the audacity to attack the Basic Labor Agreement terms that are clearly protected by the UCC 2-106(3) and were never in dispute at anytime in the *Pickering v USX* case.

From the Defendants repeatedly using the word "discharged" in their their documents to redefine the BLA, the court erred when it illegally changed the terminology of the contract by replacing the word "terminate" with the word "discharge" **(Exhibit I)**, then made a ruling by way of these changes and in so doing, victimized the Plaintiffs with a false and fabricated set of agreements that were not applicable to the Plaintiffs. The following are attached:

a) Plaintiffs Memorandum in Support of Motion for New Trail (Exhibit A from the docketing statement).

b) Judge Roth's March 15, 2008 final Memorandum Decision and Order

(Defendants' Third Summary Judgment Motion and Other Pending Motions) (Exhibit B from the docketing statement)

c) Memorandum in Support of Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct its Judicial Errors.

d) Memorandum Decision of Judge Pat Brian issued December 5, 2003.

e) Certain pages of Judge Jenkins' Ruling on Vacation Pay Eligibility issued May 5. 1995.

f) Certain pages of the Basic Labor Agreement: BLA §12-A-1(b) (Vac Pay Eligibility), BLA §12-A-3 (Forfeit Language), BLA §8-A and 8-B (Suspension and Discharge)

g) Chilton Letters showing SOL clock start on discovery

h) Memorandum Decision of Pat Brian issued January 12, 2006.

i) Memorandum Decision of Pat Brian dated September 22, 2005.

j) Memorandum in Support of Certain Plaintiffs' Motion for Reconsideration of the Courts First Entry of Summary Judgment (Vacation Pay Issue) and Opposition to the Defendants' Joint Motions to Strike the Motions for Reconsideration of Chilton and Glacier, November 6, 2006.

k) Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration.

l) Unauthenticated documents submitted by the Defendants

m) Subpoenas issued to Allen Young, Evan Schmutz, James Haskins

n) Evan Schmutz withdrawal as counsel

SUMMARY OF ARGUMENT

Dismissing this lawsuit on th grounds of statute of limitations is not appropriate.

Denying Plaintiffs their surviving contract terms in the Basic Labor Agreement has

been based entirely on false premises. The Defendants have never provided a single shred of admissible evidence in their defense. The pro se Plaintiffs have proven their claims. The Plaintiffs have proven their claims with facts, evidence, and supporting laws and have identified under no uncertain terms the misrepresentations of the Defense that were used to confuse and mislead the court for the purposes of twisting the truth.

For the Plaintiffs lawsuit to be dismissed on statute of limitations after all the time invested and at the moment the Defendants were defeated suggests that this result has always been a foregone conclusion in the mind of Mr. Roth. That the lower court, under Judge Roth, had never intended on providing Plaintiffs a trial let alone a fair one.

Plaintiffs did the right thing by sending the court the letters indicating that they were concerned about the adequacy of their counsel early in the lawsuit because it achieved two important things: (1) it got the documentation filed in the record and (2) it substantiates that the Plaintiffs are not simply blaming their counsel last minute, but that they saw the problem early on in this lawsuit.

One fact is clear, the fact that Plaintiffs counsel was critically deficient in the most important areas and moments of this lawsuit. There would be a different result if counsel had performed even the most elementary of tools of trial litigation. Instead, they didn't even perform a single objection to confront some of the most obvious and blatant violations of the rules of evidence, let alone try to expose the Defenses erroneous and even fictitious arguments.

The court should have reversed and corrected the vacation pay issue. The court

should not have given Defendants' summary judgment on lost wages and vacation pay, but should have reversed the summary judgment when noticed of the errors. The court should have recognized that Plaintiffs were not getting a fair trial and were prejudiced by losing council twice and these events did affect the outcome of the trial.

ARGUMENT

I.

PLAINTIFFS COUNSEL IS DEFECIENT AND FAILES TO PRESERVE AGAINST DEFENDANTS' FICTICIOUS ARGUMENTS, UNAUTHENTICATED DOCUMENTS, HEARSAY, AND ILLEGALY REDEFING THE BLA (BASIC LABOR AGREEMENT).

Plaintiffs argue that their counsel was ineffective in failing to object to Defendant's hand written, unauthenticated accounting record. The Defendant's accounting record violates evidence rules and fails to substantiate any true paper trail nor is the record transparent or auditable in any way, shape, or form.

After the Plaintiffs lost their counsel the second time and became pro se plaintiffs in mid 2006, the Plaintiffs found these discrepancies and objected with motions to initiate a correction. Plaintiffs also filed a subpoena to demand Defendant Alan Young to provide a transparent accounting record of the source and distribution of Pickering v. USX award monies, but the Defendant never provided a true, correct, authenticated, accounting record of any kind. Not even so much as a deposit slip. Plaintiffs' counsel was completely ineffective in properly fighting this lawsuit and made no effort to stop inadmissible evidence from entering the record.

"An effective assistance of counsel claim raised for the first time on appeal presents a question of law."*State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. To establish ineffective assistance of counsel, Plaintiffs must demonstrate both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment," and that " counsel's deficient performance was prejudicial."*State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

To establish the first prong of the *Strickland* test, Plaintiffs must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy."*Litherland*, 2000 UT 76, ¶ 19 (citations and internal quotation marks omitted). If a court can conceive of a tactical basis for counsels actions, then counsel is not deficient under the first *Strickland* prong. See *State v. Parker*, 2000 UT 51, ¶ 11,4 P.3d 778 (first prong of *Strickland* not satisfied because conceivable that counsel's conduct resulted from deliberate and tactical choice); *State v. Holbert*, 2002 UT App 426, ¶ 58, 61 P.3d 291 (same). To establish the second prong, Plaintiff must show prejudice, that is, they "must show . . . a reasonable probability exists that but for the deficient conduct Plaintiffs would have obtained a more favorable outcome at trial." *Clark,* 2004 UT 25, ¶ 6 (citing *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996)); *Strickland* 466 U.S. at 687.

A. Here, Plaintiffs can show deficient performance and prejudice. Plaintiffs can show deficient performance because a conceivable tactical basis did not exist for counsel having not objecting to unauthenticated, hand written, accounting records.

Because the Defendant's unauthenticated accounting record is not transparent, is not auditable, and does not show the source and distribution of *Pickering v. USX* award monies nor does the Defendant's accounting record show a auditable and transparent use the legal fees that were paid by Plaintiffs, there is no reasonable legal tactic or strategy that could benefit Plaintiffs in the outcome of this lawsuit by Plaintiffs counsel not opposing and objecting to Defendant's unauthenticated, handwritten, accounting record (**Exhibit L**). Conversely, by not objecting to the Defendant's self serving handwritten records, the court acted on the Defendant's fictitious records as if they were real and accurate and therefore. Plaintiffs were denied a fair trial. Plaintiffs counsel, Evan Schmutz failed to request documents, or file a subpoena for Defendants' true accounting records nor did Plaintiffs' counsel object to the Defendant's use of unauthenticated handwritten accounting records.

Plaintiffs can show prejudice because the conduct of the Plaintiffs' counsel unquestionably prejudiced the outcome of this trial on this issue. If counsel had performed his job to at least a normal standard, the outcome would most certainly have been different. Furthermore, because the Defense never produced authenticated documents, Plaintiffs counsel should have moved for summary judgment for the Plaintiffs, but he did not. From the behavior of the Plaintiffs counsel, one could conclude that counsel was working against his client in support of the opposing side.

B. Here, Plaintiffs can again show deficient performance and prejudice. Plaintiffs can show deficient performance because a conceivable tactical basis did not

exist for counsel's not objecting to the Defendant's redefining of the meaning of the BLA pertaining to Plaintiffs vacation pay eligibility. The Plaintiffs counsel was deficient when he failed to object to several legal errors pertaining to Defendant's raising and altering of the meaning to the BLA contract with USX, and in this failure, the Plaintiffs were prejudiced because there absolutely is a different outcome of this case that would have resulted. Plaintiffs Counsel failed to oppose the Defendant's committing of the following legal errors when they redefined and misinterpreted the Basic Labor Agreement (BLA):

1. Alan Young raised a non-existent "straw-man" argument that fictitiously placed him in the position of Defendant in the *Pickering v. USX* case and then, with erroneous and false premises, proceeded to argue away Plaintiffs rights by redefining and misrepresenting the terms of the BLA. *Pickering v. USX* is a closed case where Plaintiffs had already been given the accrued 1987 vacation pay by default and that issue was never in dispute between the parties in *Pickering v. USX*. Vacation pay is a surviving right of the contract (UCC 2-106(3)) and that is why it was never in dispute in the *Pickering v. USX* case. The only mention of vacation pay in Pickering v. USX was the final Federal Court ruling outlining everything Plaintiffs will be awarded (**Exhibit E** page 193). However, in this lawsuit, Defendant Alan Young created a fictitious vacation pay dispute between himself and Plaintiffs as a defense against his fiduciary breach for not paying vacation pay monies he owed to Plaintiffs. Plaintiffs counsel, Evan Schmutz never objected to this error in law (**Utah Civil Procedure Rule 59(a)(6)** "Insufficiency of the evidence" and **Rule 59(a)(7)** "Error in Law").

2. After Alan Young tricked the court into allowing his fictitious argument to ensue with no opposition from Plaintiffs' counsel, he then created another false and fictitious argument about the vacation pay dates claiming that the Plaintiffs were not entitled to accrued 1988 vacation pay, which would be true, but is moot since it was accrued 1987 vacation to be paid in 1988, but again, this is not a legitimate argument because vacation pay had not been in dispute, was a closed Federal case, was a done deal by default of Pickering v. USX, is protected by UCC 2-106(3), and is therefore, again "Error in Law" let alone all the evidence rules that were violated. Yet, Plaintiffs counsel Evan Schmutz never objected and so the court allowed Alan Young to win on Summary Judgment on these erroneous issues with no opposition from Plaintiffs Counsel Evan Schmutz. Therefore and under no uncertain terms, this was deficient performance of counsel and prejudiced the outcome of the case.

3. Alan Young created yet again another false argument over non-issues from *Pickering v. USX* and claimed that the Plaintiffs were "discharged" when in fact, they were terminated (something entirely different from being discharge). When terminated, there are surviving terms such as vacation pay (UCC §2-106 (3)), but when discharged, there are no surviving benefits except vested pensions. In this fabrication, Alan Young attempts to redefine the BLA (Basic Labor Agreement) by erroneously claiming Plaintiffs were discharged (an action against individual criminal behavior) from USX instead of terminated (a company caused job loss) as a way to avoid his fiduciary breach. This manipulation and reinterpretation of the BLA is not only completely erroneous, it is

illegal because there was no dispute between the BLA parties. Alan Young is not a party to the BLA and he cannot pretend to be one as a defense to fiduciary breach. Alan Young did this as a distraction to his fiduciary breach for not paying Plaintiffs the vacation monies owed to them. The lower court favored Defendant's in a summary judgment because of no opposition from Plaintiffs Counsel. The Defendants arguments were without merit and were false and because they went unopposed by Plaintiffs counsel. did prejudice the outcome of the case. If Defendants had been forced to argue and prove their defense, the outcome of the case would be different, but their argument, while unsupported in law, went unopposed because of deficient counsel. Plaintiffs' counsel did not defend these errors nor object in any way, but stood passively while Defendants bamboozled the court and legal process. In the memorandum decisions of both September 27, 2005 and also January 12, 2006, Judge Pat Brian included the words "effectively discharged" when ruling against the Plaintiffs. The court had no authority to modify the meaning a the BLA agreement by adding words "effectively discharged". For the lower court to try a case over terms of the BLA, the court would need to have a dispute between the parties to the BLA itself or, would need a true form of evidence defining the terms of the BLA such as a expert witness or a BLA historical prior course of dealing to support the ruling and yet Plaintiffs counsel again stood passively and failed to object. The result of counsel's deficiencies prejudiced the Plaintiffs because a corrected interpretation of the BLA would yield a different result. Judge Brian also misquoted the BLA §12-A-1-b on page 11 of his September 27, 2005 memorandum decision pertaining

to a 6 months time element, but Plaintiffs were never allowed to correct this error on account of their counsel Evan Schmutz failing again to argue the issue and object to the Judge's erroneous interpretation.

4. Defendants argued the terms of the BLA with no proof, no authorities, no experts or direct party testimony, and no admissible conclusive documents, but instead used nothing more than hearsay; all oral or written interpretations of the BLA and claims by the defense were HEARSAY and are inadmissible (Utah Rule 803). Plaintiffs counsel again stood passively, did not object to any evidence violations. and allowed the Defendants to file an unopposed summary judgment motion. The Plaintiffs counsel never requested nor demanded a history of the BLA and its prior course of dealings nor did Defendants provide any. Any of the common legal practices, if utilized by the Plaintiffs counsel could have yielded a different outcome in the case and therefore, shows both deficiencies of counsel and that those deficiencies prejudiced the Plaintiffs in this case.

C. Plaintiffs"s counsel again failed to act in the interest of Plaintiffs when the Defendants used incorrect formula to calculate lost wages as per the instructions of the Federal court ruling in *Pickering v USX*. Defendants used 0.53 in place of 0.58 and the Defense counsel said nothing to raise the issue and protect the interest of the Plaintiffs. This most certainly shows a different outcome would have resulted and did prejudice the Plaintiffs.

Subsequent arguments pertaining to vacation pay and lost wages will show that there is no way this case could have been lost but for the deep deficiencies of counsel

because the evidence violations and and the facts surrounding vacation pay and lost wages are so blatantly obvious and self evident that no counsel even on the most basic level should have not managed the case differently.

ARGUMENT II

THE LOWER COURT ERRS WHEN IT DENIES PLAINTIFFS' CONTRACTUAL SURVIVING RIGHTS PERTAINING TO THE BASIC LABOR AGREEMENT. BASED ON ERRONEOUS INFORMATION, THE LOWER COURT COMMITS REVERSABLE ERROR WHEN OVERTURNING THE PRIOR FEDERAL COURT RULING OF JUDGE JENKINS.

The Vacation Pay issues that were erroneously ruled upon by way of Defendants otherwise inadmissible evidence are:

a. Confusion over the dates of 1987 and 1988 for eligibility.

b. Confusion over meaning of Terminated and Discharged.

We will show the court that Plaintiffs do qualify for vacation pay and in so doing, show the court where and how the Defendants have mislead the lower court into judicial error on this issue. We will also show that the original Federal ruling of Judge Jenkins was correct and that the lower court should not have overturned the ruling, but should have corrected the error as soon as Plaintiffs brought forth the evidence, facts, and laws in support of as much.

We will also show that law and argument, including some argument from the Defense, actually supports Plaintiffs position.

Although Plaintiffs' lower court memorandums in support of motion for reconsideration and new trial along with our objections to the Defense and lower court's

errors establishes in solid terms the legal foundation on these issues. We will attempt to create here an even more contrasting conclusion favoring Plaintiffs.

The BLA sections we will look at are: 12-A-1 (Eligibility) and 12-A-3 (Forfeiture).

The first order of business in clearing up the Vacation Pay issue is to show how the Defense misconstrued the accrued 1987 vacation pay dates. Following that. we will show how the Defense then attempted to disqualify Plaintiffs for vacation pay by misconstruing the effects of BLA terms regarding "Termination" versus "Discharge and their attempt to equate the terms as having the same meaning.

Fact1: Plaintiffs earned an accrued 1987 vacation pay. Accrued vacation pay is normally paid in the following year. Therefore, the 1987 accrued vacation pay would be paid out n 1988. However, the 1988 date is irrelevant because the only thing that matters is that Plaintiffs are owed their accrued 1987 vacation pay which is now overdue. That's the simple truth regarding these dates.

Fact 2: Because the 1987 vacation pay would have been paid in 1988, the Defense has played into these dates and confused the court into thinking it is 1988 vacation pay that the Plaintiffs are seeking, but they are not. They are seeking 1987 vacation pay; that's all!

The Defense spoke incorrectly about these dates in their arguments so many times that in so doing, convinced the court that Plaintiffs did not qualify for 1987 vacation. They did this by referring to 1987 vacation pay that would have been paid in 1988 as

though it were accrued 1988 vacation which of course, the steelworkers did not accrue.

Example for clarification: If the workers had accrued 1988 vacation pay, it would be scheduled to be paid in 1989. However, we are not talking about accrued 1988 vacation pay to be paid in 1989. What we are talking about is accrued 1987 vacation pay that would have been scheduled to be paid in 1988 (the following year from the year of accrual). In fact, the 1987 vacation pay could, in some instances, be collected while in 1987, but usually workers wait for the following year.

To say that plaintiffs did not qualify for 1988 vacation pay would be a true statement. but to say that they did not qualify to be paid their 1987 vacation pay in the year of 1988 would be a false statement.

It was this simple area where the meaning of these dates was mixed up and misconstrued. Look at Defendants argument in (**Exhibit K, page 5**), the Defenses Motion to Strike Plaintiffs Motion for Reconsideration. Read lines 1 through 11 to see how they worded their statements to see the problem they caused. You will also notice that they were able to get the original and correct Judge Jenkins Federal Court ruling overturned based on their erroneous and misconstrued argument. It is very sad and frustrating that the Plaintiffs have had to suffer so much litigation just trying to solve this simple issue, but the fact that Plaintiffs were forced to argue these issues at this point and time in this lawsuit substantiates their "deficiencies of counsel" claim found in other parts of this brief to show that Plaintiffs are entitle to this appeal.

On page 8 of **Exhibit K**, lines 10 through 15 very clearly shows how the court was

confused on this Vacation Pay date issue and how the Defense misled the court. Defense counsel Mr. Burbidge states in quoting Judge Jenkins's Federal Court ruling,

> "Judge Brian correctly ruled that the steelworker were only entitled to 1988 vacation pay if they were still employed as of January 1, 1988. Because Judge Jenkins had ruled that all of the steelworker were terminated when USX sold the Geneva steel plant to Basic Minerals and Technologies, Inc. effective August 31, 1987, the steelworkers were not entitled to 1988 vacation pay."

So while Pat Brian's ruling was correct, his application was wrong because qualification for 1988 vacation pay is a moot point. No Plaintiffs are seeking 1988 vacation pay, but are seeking 1987 vacation pay. However, in reading the above from Judge Brian's ruling, Judge Brian has also establish the fact that Plaintiffs were entitled to 1987 benefits and they were "terminated", not "discharged. Therefore, favoring Plaintiffs on the Vacation Pay issue, and possibly other issues pertaining to the steelworkers surviving benefits in the year of 1987 is a matter of Summary Judgment favoring the Plaintiffs as admitted by Defense counsel's own document, **Exhibit K**, page 8.

This **Exhibit K** also authentically documents other facts at issue. First, it shows that the original Jenkins (the Federal Ruling) was overturned and, when looking at other upcoming facts, it will show that it was overturned in judicial error. For now, look at **Exhibit K**, page 2 in the Title/Description of the document. This document title substantiates that Plaintiffs did try to correct this issue since **Exhibit K** is an opposing motion against Plaintiffs attempt to get reconsideration on this issue.

The next step in this tour of the destruction of Plaintiffs rights is to to be sure that Jenkins did give Plaintiffs 1987 vacation pay to be paid in 1998. Looking again at

Exhibit K on page 5, look at lines 7 and 8 where it discusses the Geneva plant sales date as being August 31, 1987. This is the key to 1987 Vacation Pay qualification to be paid in 1988. Although Exhibit K substantiates this date on its own by way of the page 5 discussion, it is good to see it for ourselves from the Judges pen. Look at **Exhibit E** page 193 (identified at the bottom of the page), paragraph 289, at the 3rd line in that paragraph. Here we can see that Jenkins did in fact include vacation pay. However, let us also see where the 1987 vacation pay is fully substantiated. **Exhibit E** on the West Law page identified as page 6, 1st paragraph under **Idling ("Active" and "Management) Plaintiffs** shows why Jenkins awarded all benefits for which Plaintiffs would qualify under the terms of the August 31, 1987 sale of the Geneva Plant. This shows us that the original Jenkins ruling calculated employee benefits as if the plant had remained opened until August 31, 1987 and vacation pay for 1987 is included in those benefits as has already been shown.

Another problem that was caused by the Defensed was when they took out of context from the "Forfeiture Language" of the Basic Labor Agreement (BLA). To see where the Defense misled the court in this way, return to **Exhibit K**, page 5, lines 10 and 11. Here we see that Defense counsel Mr. Burbidge states,

> ". . . a steelworker was not entitled to vacation pay in 1988 if he or she was discharged prior to January 1, 1988."

The above quote from the Defense counsel's memorandum contains two errors. The first is the repeated misstatement pertaining to 1988 vacation pay. Again, 1988 is moot and is irrelevant in this lawsuit. Plaintiffs are seeking their 1987 vacation pay, not

1988. Second, the Plaintiffs were never "discharged" and as we shall see, this became another area where the Defense misguided the court into an erroneous conclusion which led to the denial of Plaintiffs rights.

DISCHARGE VERSUS TERMINATE

In the Defense counsel's misrepresentation of terminate versus discharge. the defense has equated the two terms as if they are the same when in fact they are not. The intention of the Defendants is to escape their malfeasance buy confusing the court on this issue. The Defense has caused the lower to make a judicial error by claiming the effects of discharge are equal to terminate. This area of logic is one in which courts should be very careful to examine else cause substantial injustice.

Fact 1: Discharge is caused by an act of an employee.

Fact 2: Termination is caused by an act of the company.

Exhibit E (the Federal court ruling) on the West Law page identified as page 6, 1st paragraph under **Idling ("Active" and "Management) Plaintiffs** on the 14th through 20th lines in that paragraph shows that Judge Jenkins stated.

> ". . . they had remained active employees who were terminated when Geneva was sold to BM&T in August of 1987."

This shows under no uncertain terms that the Plaintiffs were "terminated", but were NOT "discharge". Reading further, Jenkins also states,

> "the "idling" Plaintiffs' individual remedies must be determined with reference to the seven-month "idling" period from February 1, 1987 through August 31, 1987.

This sets up the understanding as to why the Plaintiffs did qualify for all the 1987

benefits that survive as a matter of law. This is not limited to the BLA, but is a very common in most industries, including government employees. When terminated, all accrued benefits can still be collected and is the surviving rights of a contract UCC §2-106(3).

> UCC §2-106(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

As can be seen in the UCC, executory obligations get "discharged", but this does not refer to employees. This UCC also shows us that on "termination", rights based on "prior performance" survives. This would apply to vacation pay and other benefits. A very important showing in this UCC is that "discharge" IS NOT equated to "terminate". Hence, the bad case law. It is a fact and a maxim that anything similar IS NOT the same. Discharge and terminate may have some similarities, but they are absolutely not the same. However, their differences are contrasting enough that they should be obvious and should not be confused with one another.

In the Basic Labor Agreement, the differences between discharge and terminate are very clear. When discharged, all benefits other than vested pensions are lost. **Exhibit F**, page 50 and 51 of the 1987 BLA in BLA §8-A and BLA §8-B defines Discharge and no where in this section is the word "terminate".

Plaintiffs were never discharge. Not at any time were they ever discharge from USX. The Federal ruling on this issue is clear. The only reason the terminate and

discharge comparison came into question in this lawsuit of Chilton v. Young is because of the Defendants' malfeasance when they were counsel in the *Pickering v. USX* case. They now attempt to escape their wrong doing by raising this fabricated, erroneous, straw-man type discharge/terminate argument and then foisting it onto the Plaintiffs.

The argument pertaining to whether Plaintiffs were discharge or terminated is another sad and frustrating area because Plaintiffs have again been forced to argue an issue that should otherwise be totally obvious but for the Defendant's misrepresentation of the "terminate" versus "discharge" issue. Additionally. the fact that Plaintiffs have noticed the court, preserved on these errors, and are trying to recover from the erroneous lower court conclusion that Plaintiffs were "discharge", again substantiates the deficiencies of Plaintiffs original counsel and the justification for this appeal.

There is some bad case law that does equate an employee's being discharged to be the same as being terminated. This case law should be limited in use or perhaps overturned, but at the very least, it should not be allowed to penetrate a well established contract between a company and over 100,000 employees when the contract is already very well established as to its meaning. Additionally, this case law should only be viewed from a purely logical point of view. For example, if we were to assume that discharge is the same as terminate, must we then say that terminate is the same as discharge? No! If discharge triggered termination (which it can't under the BLA nor under UCC §2-106(3)), it would not be correct to say termination also will triggered discharge. Again, even if the court were to determine that an employee who is "discharged" is also "effectively

terminated", it would still be incorrect to say an employee who is "terminated" is also "effectively discharge". The one is not the other. It does work in reverse even if the court could get it to work in one direction. It is not a two way logical conclusion. There are too many factors. However, the issue is moot anyway because as a matter of law, they are not the same. The logic doesn't work. Therefore, terminate cannot be the same as discharge even if one were to find that discharge is the same as terminate. Besides, by inserting the word. "effectively" the contract has been tampered with. Their is no "effectively discharged". You either are or you are not discharged. The steelworkers were not discharged. For the lower court to dismiss this cause of action using the words, "effectively discharged" is a form of peremptory discharge with cannot be done according to the BLA. To discharge a steelworker as per the BLA, it requires management involvement and is based on a conclusion employee conduct.

According to the BLA §8-B, to be discharged, the following rules apply:

1. Cannot be peremptorily discharged

2. Management must conclude the justification of suspension or discharge based on employee conduct.

3. A copy of the discharge notice must shall be promptly furnished to such employee's grievance committee.

None of the above processes have taken place and therefore, there is no possible way the steelworkers could be deemed to have been discharge nor "effectively discharged". All of these vacation pay issues were generated by the Defense to distort the

truth about the meaning of the BLA and to foist false argument against the Plaintiffs. it's outrageous!

ARGUMENT III

DEFENDANTS FAILED TO CORRECTLY CALCULATE LOST WAGES AS OUTLINED IN THE FEDERAL COURT'S INSTRUCTION. THE LOWER COURT MADE ERRORS WHEN IT DISMISSED THE LOST WAGES ISSUE IN THE FACE OF PLAINTIFFS' MOTIONS TO RECONSIDER AND OBJECTIONS. A HEARING ON THE LOST WAGES ISSUE HAS NEVER BEEN PROVIDED.

Because this issue is addressed in the preceding pages, we will attempt to stick to simple facts and references to evidence.

The following "Lost Wages" issue is brought to this court because of the following reasons: (1) The Plaintiffs counsel of HJS failed to argue the issue which speaks to previous argument in this brief pertaining to Deficiencies of Counsel. (2) Defendants used the wrong formula to calculate wages and this resulted in substantial losses to Plaintiffs. (3) Plaintiffs preserved and raised this issue to the lower court, but were ignored. Plaintiffs were not given so much as a hearing.

Fact 1: Allen Young used a 0.53 multiplier instead of a 0.58 multiplier when calculating wages.

Fact 2: Allen Young used years 1984 through 1986 to calculate average wages.

Exhibit L, item "Hearing Worksheet for Idling Plaintiffs" shows that Allen Young did use 0.53 as the multiplier. However, Young should have used 0.58. **Exhibit E**, page 75 and page 89 shows the correct multiplier of 0.58 as per Federal court ruling.

Exhibit L. item "Hearing Worksheet for Idling Plaintiffs" shows that Defendant

Young did use 1984 through 1986 for calculating average wages. However, Allen Young should have used back pay based upon income earned during pay periods in which a plaintiff worked 80 or more hours. **Exhibit E**, page 31, paragraph 2 outlines the proper formula for averaging wages.

All these facts were never argued by Plaintiffs counsel further substantiating deficiencies of counsel argument earlier in this brief. When Plaintiffs raised these material issues by way of Motions for Reconsideration and Objections, the lower court ignored Plaintiffs.

ARGUMENT IV

PLAINTIFFS COUNSEL FAILES TO INCLUDE LOST INCREASED PENSIONS AS PART OF THE SETTLEMENT AGREEMENT.

Lost Pensions is part of the Defendants fiduciary breach that Plaintiffs earlier counsel failed to include in the complaint. This again speaks to the deficiencies of counsel issue.

ARGUMENT V

THE LOWER COURT COMMITS A GROSSLY UNJUST ERROR WHEN DISMISSING ON STATUTE OF LIMITATIONS AND RAISES ISSUES OF CONSIPRACY AGAINST PLAINTIFFS

Judge Roth should have waved his right to Statute of Limitations (hereafter referred to as SOL) for allowing this case to go on for several years. In other words, there should be a SOL for using SOL when a law case has already ensued for eight (8) years. Roth came into this case in 2004, and now at the end of 2008, he raises SOL. This is unjust for several reasons.

SOL was defeated when Plaintiffs showed Judge Pat Brian in December 2003 that no Plaintiff knew that the Defendants had deceived them until they sat in the court hearing of Chamberlain v. Young of 2001 where Thomas Chamberlain was suing Alan Young for a finders fee. They had a witness on the stand by the name of Scott Daniels, a retired judge who stated after he read Judge Jenkins' ruling that Alan Young owed all of the Plaintiffs vacation pay. That's when the Plaintiffs found out that they were owed vacation pay. No Plaintiff knew anything about vacation pay because Defendant Allan Young never at any time explained what the pay was for; just that it was your losses as he calculated them. Plaintiffs did not know what he calculated. Plaintiffs had never seen a ruling from Judge Jenkins. Plaintiffs did not know what the calculation figures from the Jenkins ruling were nor how they told Alan Young to use them. At that time they did not know about the calculations, but after their attorney Evan Schmutz withdrew from the case, they found out and have brought all of this forth and put it in front of Judge Roth, but Judge Roth has turned a blind eye to everything pro se Plaintiffs have given him.

This instant law case was filed in 2001, approximately 30 days after Plaintiffs heard Judge Scott Daniels say on the witness stand that Alan Young owed Plaintiffs vacation pay that was accrued in 1987 to be paid in 1988.

Because of the promise that Alan Young made to Plaintiffs that the settlement was 100% plus more of Judge Jenkins' ruling, no Plaintiff had any reason to go looking for anything if it was 100% plus more of Judge Jenkins ruling that they were entitled to receive, but no Plaintiff knew what Judge Jenkins had ruled except the Defendant

attorneys.

At that time, Plaintiffs counsel James Haskins did not file these facts into the court record that would show the court when the Plaintiffs made this discovery of new evidence of Defendant Alan Young owing Plaintiffs money. Plaintiffs were expecting their counsel James Haskins to file this information into the court, but he did not file the information as instructed. This was pertaining to the SOL and was the purpose for filing the facts of discovery of new evidence. Allan Young had filed to have the case dismissed on the grounds of SOL, but Defendant was denied that motion because Ron Chilton had sent a letter. around his attorney, to Judge Pat Brian telling him that Plaintiffs attorney had not included the dates when they found out that they were owed vacation pay which was in the trial between Allan Young and Tom Chamberlain in May of 2001.

It can be construed that the attorneys knew that Plaintiffs did not understand that Plaintiffs were owed money for vacation pay because it was never disclosed to the Plaintiffs.

What Judge Roth is trying to do now is ignore the fact that if he were going to dismiss this case on SOL he should have attempted to dismiss it at the beginning, not after four years litigation under Roth, and four years before that under Judge Pat Brian. Isn't there an SOL for when the judge can decide an SOL dismissal? There should be! No party raised the issue; Roth brought SOL in on his own accord. But even so, SOL had already been argued and won favoring Plaintiffs with Judge Pat Brain at the onset of this lawsuit. Judge Brain believed the Plaintiffs were telling the truth when the events took

place and Brain has the discretion to make that decision. The SOL doesn't have a strong enough ground to stand on against the gravity of the material facts of this case, if this case is to be construed so to do substantial justice, which the law commands. Because (1) Plaintiffs already won SOL in Judge Pat Brian's December 5, 2003 decision (2) The court allowed the case to go for eight years, (four of which was with Judge Roth) before Roth decided to steal the case from the Plaintiffs with SOL. (3) Roth didn't hand out this unjust SOL dismissal until Plaintiffs defeated the Defendants at the last minute as a matter of law by providing clear, concise, articulate, accurate, and legally supported argument in Plaintiffs memorandums and objections. (4) The court is using the law to defeat the law (5) The court must weigh the test between the gravity of the 184 innocent victim Plaintiffs and their families that have been affected by the Defendants Misfeasance versus the very small group of guilty victimizing Defendant attorneys who have done nothing but distort the truth of the truth and who should have been penalized for their deceit in this lawsuit. (6) Exceptional circumstances come into play (7) Fraudulent concealment that Defendants knew that Plaintiffs did not know they were owed money. (8) Ongoing Wrong Doctrine (9) UCC 2-106(3) surviving rights of a contract.

Defendants knew that the Plaintiffs were owed money and they knew that the Plaintiffs did not know that they were owed money. Defendants knew that the Plaintiffs were relying entirely on the information provided to them by counsel. After all, that is why the Plaintiffs hired counsel, to protect their interest no different from when a home buyer hires a title company to be certain the house is clear of any liens or other

encumbrances. In this lawsuit, Alan Young and associates was the Title company the Plaintiffs hired to make sure they would get all they were entitled to receive. Just as when a Title company must be responsible for their mistakes (title insurance), the Defendants must be responsible for their mistakes. It is exactly the same in comparison. Because the Plaintiffs hired Allan Young to determine what is the result of the USX plant closing down as it pertains to their rights and interests. How would this event effect the Plaintiffs situation? The Plaintiffs had no knowledge of these things. They relied entirely on their Counsel for exactly this purpose. Just like in the example with the Title company, Plaintiffs hired the attorneys to determine the issues and if the attorneys did not do the job correctly, then it is the attorneys that must bare the costs of their mistakes, just as does a title company. See **Exhibit D** and pay attention to page 4 and 5 where the case law was found to deny Defendant's motion to dismiss and treated that motion as summary judgment favoring Plaintiffs.

It wasn't the Plaintiffs job to interpret the laws and determine the rights of the Plaintiffs when their company goes out of business; Plaintiffs hired the attorneys to interpret the laws so that when the attorneys came to the Plaintiffs and gave them the conclusion of the attorneys determination, Plaintiffs had a right to rely on the information and believe that the Plaintiffs counsel made the correct determination and were being told the truth. The Plaintiffs trusted what they were told by their counsel; they had no reason not to trust counsel at that time. When Plaintiffs were told by their counsel the results, Plaintiffs thought that was it, they hired an attorney who found out what the rights of the

Plaintiffs were and what the Plaintiffs were entitled to receive and that was it. That was the professionalism of the lawyers and Plaintiffs trusted that they were being told the truth. At that time, Plaintiffs never thought they were not being told the truth. But then later, Plaintiffs find out by happen chance that the information from their counsel was not true: that Plaintiffs were suppose to get more money. Well, who is supposed to be responsible for that; for deceiving and telling Plaintiffs what their rights were? Plaintiffs were negotiating a final deal via counsel. What was the result of that final deal? Plaintiffs thought that the information was the result of the final deal that everybody had agreed to and that it was the best they could do and come up in the Plaintiffs interest, but Plaintiffs didn't know that they had anything remaining left over. Plaintiffs didn't know what the Basic Labor Agreement (BLA) meant under these conditions. The BLA did not address anything about the USX plant going out of business. Plaintiffs didn't know anything about UCC 2-106(3) about surviving rights. The Plaintiffs attorneys held this information from the Plaintiffs; they concealed it from their clients. They concealed it fraudulently by not letting the clients know that they were owed money and the clients never found out until they were sitting in a court hearing when a witness, brought it up; and who was that witness? In that hearing, Thomas Chamberlain was suing Allan Young for a finders fee and a witness, Judge Scott Daniels brought up the topic of monies that were still owne to the steelworkers from the Pickering v. USX case.

The Plaintiffs didn't know the truth until the 2001 hearing of Chamberlain v. Young. If 1677 Pickering v. USX Plaintiffs did not say prior to that hearing, "Where's my

vacation pay?", that proves that no one understood that they were entitled to any further monies. That's the average; that would tell you that no one knew, except the client counsel. Out of 1677 people, the likelihood that someone would raise their voice and say, "I want my vacation pay" is so extremely likely if they knew, that it would literally be impossible that someone would not raise such an argument. The fact that no one raised the issue is proof that no one knew they were entitled to anything more. No steelworkers understood that anything more was owed to them. They didn't understand what their rights were, that's why they hired an attorney to find out. Their understanding was entirely based on what their counsel told them. That's telling us that no worker understood what their rights were under the conditions of the USX plant closing down. Everyone thought their attorney was telling the truth. The attorney has a duty to tell them and they had the right to rely on their counsel's words.

Now Judge Roth is trying to say that the steelworkers could have known. Could the steelworkers have read the BLA? Could they have known? No, because they didn't know what it would mean when a plant closes down. The steelworkers don't understand complex contracts, they are steelworkers, but even for those who could read, the facts of the situation were hidden from them.

The Statute of Limitations (SOL) issue has so little weight compared to the damage that has been done by these criminal attorneys and is so small in comparison that the weight of the damages far out weighs the question of SOL (if any). For Judge Roth to put so much weight on SOL after all this litigation work right at the moment the Plaintiffs

prove their position is an injustice being committed on a technicality to avoid the truth. Supreme court case law says that is not supposed to happen.

So Judge Roth did not correct any of the errors that Pat Brian made in his January 12, 2006 and September 27, 2005 memorandums pertaining to vacation pay eligibility, forfeiture, nor any other BLA regulation even after Plaintiffs showed to Judge Roth the errors. However, Roth did see fit to overturn Pat Brian's December 5, 2003 memorandum decision on Statute of Limitations that did favor the Plaintiffs. These facts make it entirely clear that presuming a conspiracy exists to defeat the Plaintiffs at any turn is not only possible, but probable, including unjustly placing a 5th Ace in the deck of cards and calling it Statute of Limitations right at the moment when Plaintiffs check mate the Defense.

CONCLUSION AND PRECISE REILIEF SOUGHT

In this lawsuit, Plaintiffs counsel was entirely deficient and it is this reason the Defendants were able to get away with breaking evidence rules, distorting the meaning of the Basic Labor Agreement, and fabricating false arguments with no opposition. It is possible that Plaintiffs counsel Evan Schmutz was in over his head. Mr. Schmutz probably should not have taken on this case and it seems that he may have had trouble keeping up with the facts of the case, but prior to withdrawing from the case, Evan Schmutz's action could be perceived as having been working to help the other side. The reason for this line of thinking is because he did absolutely nothing to stop the Defense in the face of what should have been the most obvious weaknesses that if opposed would

surely have won Plaintiffs the case.

Once the Plaintiffs became pro se litigants and although it required some time for the pro se Plaintiffs to grasp how poorly this case had been handled and garner an understanding for the legal process, in the end, the Plaintiffs had the better legal hand. The Defendants had no substantive argument while the Plaintiffs had the facts, the law, and the evidence on their side, but for some reason, whatever reason that may be, Judge Roth decided to help them escape by entering on his own accord a ruling of statute of limitations. Yet, if statute of limitations were an issue. it would have and could have been decided along time ago. So why did Judge Roth wait until the last minute of the case to issue the ruling of statute of limitations, especially after Plaintiffs built the winning argument? Because the Defendants had been caught with their hand in the cookie jar so to speak. The Defendants lost this case as a matter of law and they knew it. Judge Roth knew it also. So why did Roth help them escape? Was it to help big name lawyers save face? We the Plaintiffs do not know that answer and can only speculate, but what we do know is that Judge Roth's ruling was entirely unfair and unjust. Statute of Limitations had already been decided upon in the Federal Court and for Roth to use that as an escape hatch for the Defendants was not only an unjustified overturning of a Federal Ruling by the lower court, but was another of the many dishonest and unfair actions toward pro se Plaintiffs. The Defendants thought they could easily defeat the Plaintiffs and never thought the Plaintiffs would be able to figure out the dirty tricks the Defendants were attempting.

It is not fair that the pro se Plaintiffs went through so much energy and effort to get to the truth and then once they succeeded at recovering and winning a portion of this case as a matter of law, that the win should be stolen from them under the guise of statute of limitations. The Plaintiffs won this case; the Defendants know it and Judge Roth knows it. An honest study of the material will conclude the Plaintiffs did win as fact.

The reason that the Plaintiffs motion to reconsider, motion for new trial, and objections to the dirty tricks, errors in law, and rules of evidence violations were ignored is because to address them and argue them would mean certain loss for the Defendants. Statute of Limitations was the 5th Ace in the deck of cards. It was their way to "use the law to defeat the law"; also an illegality. It seems that these Defendants can't win anything without cheating.

As remedy to the Plaintiffs horribly deficient representation, as a solution to the near (in not) criminal defendants, as a reward to pro se Plaintiffs who stuck to it and established the truth as a matter of law, Plaintiffs propose to this Court the following possible forms of relief:

Option 1: An entirely new trial. Because Plaintiffs now understand all the tricks played by the Defendants, and because Plaintiffs now have a functional understanding of the legal process, pro se Plaintiffs should be able to wrap this case up fairly quickly in a new trial.

Option 2: Summary judgment favoring Plaintiffs on the vacation pay issue and a New Trial on all remaining issues.

Option 3: Because Defendants never produced a single authenticated accounting record, it would be proper for summary judgment favoring plaintiffs on all issues pertaining to this lawsuit.

Supplement to option 3: In addition to Option 3, it would be very pleasing to Plaintiffs that they could have a New Trial on the Lost increased pensions issue because their counsel failed to include it as a form of relief in the original complaint.

Plaintiffs are seeking relief by the lower court reversing and favoring Plaintiffs on the vacation pay issue, and on the lost wages issue. Plaintiffs are also seeking a new trial on the breach of fiduciary duty issue pertaining to increased pensions or a new trial on all issues. Or summary judgment from the appeals court on the vacation pay issue.

RESPECTFULLY SUBMITTED this December _____ 2008.

Ronald Chilton, pro se Plaintiff

David Glaizer, pro se Plaintiff

Addendum A

UCC §2-106(3) (Contracts) A1
ERISA (Employee Retirement Income Security Act of 1974) §502 . . . . . A1
BLA §12-A-1-b (Vacation Pay Eligibility Requirements) A2
BLA §12-A-3 (Forfeiture clause for vacation pay) A3
BLA § 8-A and 8-B (Suspension and Discharge Procedures) . . . . . A4 - A5

UCC 2-106(3)

"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

29 U.S.C. 1132. Civil enforcement (ERISA sec. 502(a))

(a) Persons empowered to bring a civil action

A civil action may be brought -

- (1) by a participant or beneficiary -
  - (A) for the relief provided for in subsection (c) of this section, or
- (B) to recover benefits due to him under the terms of his plan,
  to enforce his rights under the terms of the plan, or
  to clarify his rights to future benefits under the terms of the plan;
- (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
- (3) by a participant, beneficiary, or fiduciary
  - (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
- (B) to obtain other appropriate equitable relief
    - (i) to redress such violations or
- (ii) to enforce any provisions of this subchapter or the terms of the plan;
- (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
- (5) except as otherwise provided in subsection (b) of this section, by the Secretary
  - (A) to enjoin any act or practice which violates any provision of this subchapter, or
- (B) to obtain other appropriate equitable relief
    - (i) to redress such violation or
- (ii) to enforce any provision of this subchapter; or
- (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

BLA §12-A-1-b (Vacation Pay Eligibility Requirements)

preceding the weekly pay period in which the Holiday occurs.

7. If an eligible employee performs work on a Holiday, but works less than 8 hours, he shall be entitled to the benefits of this Subsection to the extent that the number of hours worked by him on the Holiday is less than 8. This Subsection applies in addition to the provisions of Subsection E of Section 10, where applicable. 11.20

E. Nonduplication

1. Payment of overtime rates shall not be duplicated for the same hours worked, but the higher of the applicable rates shall be used. Hours compensated for at overtime rates shall not be counted further for any purpose in determining overtime liability under the same or any other provisions, provided, however, that a Holiday, whether worked or not, shall be counted for purposes of computing overtime liability under the provisions of Subsection C-1-c,-d, or -e above and hours worked on a Holiday shall be counted for purposes of computing overtime liability under the provisions of Subsection C-1-a above. 11.21
2. Except as above provided, hours paid for but not worked shall not be counted in determining overtime liability. 11.22

SECTION 12 — VACATIONS

A. Eligibility

1. To be eligible for a vacation in any calendar year during the term of this Agreement, the employee must: 12.1
   a. Have one year or more of continuous service; and 12.2
   b. Not have been absent from work for six consecutive months or more in the preceding calendar year; except that in case of an employee who completes one year of continuous service in such calendar year, he shall not have been absent from work for six consecutive months or more during the 12 months following the date of his original employment; provided, that an employee with more than one year of continuous service who in any year shall be ineligible for a vacation by reason of the provisions of this paragraph as a result of an absence on account of layoff or illness shall receive one week's vacation with pay in such year if he shall not have been absent from work for six consecutive months or more in the 12 consecutive calendar months next preceding such vacation. Any period of absence of an employee while on vacation pursuant to this Section or while absent due to a compensable disability in the year in which he incurred such disability, or while in military service in the year of his reinstatement to employment, shall be deducted in determining the length of a period of absence from work for the purposes of this Subsection A-1-b. 12.3
2. Continuous service shall date from: (a) the date of first employment at the plant (in the case of transferred employees from any plant listed in Appendix B the date shall be the date of first employment at the plant from which first transferred); or (b) subsequent date of employment following a break in continuous service, whichever of the above two dates is the later. Such continuous service shall be calculated in the same manner as the calculation of continuous service set forth in Subsection C, Section 13 — Seniority, of this Agreement except that there shall be no accumulation of service in excess of the first two years of any continuous period of absence on account of layoff or physical disability (except, in the case of compensable disability, as provided in Subsection C-4, Section 13 — Seniority) in the calculation of service for vacation eligibility. 12.4

BLA §12-A-3 (Forfeiture clause for vacation pay)

3. An employee, even though otherwise eligible under this Subsection A, forfeits the right to receive vacation benefits under this Section if he quits, retires, dies, or is discharged prior to January 1 of the vacation year. 12.5

B. **Length of Vacation**

1. **Effective for calendar year 1987,** an eligible employee who has attained the years of continuous service indicated in the following table in **calendar year 1987** shall receive a vacation corresponding to such years of continuous service as shown in the following table: 12.6

Years of Service	Weeks of Vacation
1 but less than 3	1
3 but less than 17	2
17 but less than 25	3
25 or more	4

2. **Effective for calendar year 1988, an eligible employee who had attained the years of continuous service indicated in the following table in any calendar year during the continuation of this Agreement shall receive a vacation corresponding to such years of continuous service as shown in the following table:** 12.7

Years of Service	Weeks of Vacation
1 but less than 3	1
3 but less than 10	2
10 but less than 17	3
17 but less than 25	4
25 or more	5

3. A week of vacation shall consist of 7 consecutive days. 12.8

C. **Scheduling of Vacations**

1. **General**

a. On or promptly after October 1 of each year, each employee entitled or expected to become entitled to take vacation time off in 12.9

the following year will be requested to specify in writing (not later than 30 days after the receipt of such request), on a form provided by the Company, the vacation period or periods he desires.

b. Notice will be given an employee at least 60 days in advance of the date his vacation period is scheduled to start, but in any event not later than January 1 of the year in which the vacation is to be taken. 12.10

c. Vacations will, so far as practicable, be granted at times most desired by employees (longer service employees being given preference as to choice); but the final right to allot vacation periods and to change such allotments is exclusively reserved to the Company in order to insure the orderly operation of the plants. 12.11

d. Any employee absent from work because of layoff, disability or leave of absence at the time employees are requested to specify the vacation periods they desire and who has not previously requested and been allotted a vacation period for the calendar year, may be notified by Management that a period is being allotted as his vacation period but that he has the right within 14 days to request some other vacation period. If any such employee notifies Management in writing, within 14 days after such notice is sent, that he desires some other vacation period, he shall be entitled to have his vacation scheduled in accordance with paragraph C-1-c. 12.12

e. If an employee is on layoff from the plant at any time before the beginning of his scheduled vacation hereunder, he may request to have his vacation start at any time during such layoff and if Management agrees to grant his request, it shall have the 12.13

BLA § 8-A and 8-B (Suspension and Discharge Procedures) (part 1)

developed by the parties before and at the hearing and shall include a brief written explanation of the basis for his conclusion. These decisions shall not be cited as a precedent in any discussion at any step of the grievance or arbitration procedure. The authority of the arbitrator shall be the same as that provided in Sections 7-A and 8 of the Agreement.

4. Any grievance appealed to this expedited arbitration procedure must be confined to issues which do not involve novel problems and which have limited contractual significance or complexity. If the Union appeals a grievance to the Board of Arbitration under circumstances where it is clear from the issue embodied in the grievance that jurisdiction to resolve the grievance lies solely within the expedited arbitration procedure and should the Board conclude that it lacks jurisdiction over the grievance, the Union, after such award, may not thereafter appeal such grievance to expedited arbitration; provided, however, that if it is unclear from the issue embodied in such grievance whether jurisdiction to resolve the grievance lies solely within the expedited arbitration procedure, but the Board concludes that it lacks jurisdiction, the Union may appeal such grievance to expedited arbitration within ten (10) days of the date of such award. 7.31

SECTION 8 — SUSPENSION AND DISCHARGE CASES

A. Purpose

The purpose of this Section is to provide for the disposition of complaints involving suspension or discharge and to establish a special procedure for the prompt review of cases involving discharge or 8.1

suspension of more than 4 calendar days. Complaints concerning suspensions of 4 calendar days or less shall be handled in accordance with Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration. Complaints concerning suspensions of 5 calendar days or more and discharges shall be handled in accordance with the procedure set forth below, including Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration.

B. Procedure

An employee shall not be peremptorily discharged. In all cases in which Management may conclude that an employee's conduct may justify suspension or discharge, he shall be suspended initially for not more than 5 calendar days, and given written notice of such action. In all cases of discharge, or of suspension for any period of time, a copy of the discharge or suspension notice shall be promptly furnished to such employee's grievance committeeman. 8.2

If such initial suspension is for not more than 4 calendar days and the employee affected believes that he has been unjustly dealt with, he may initiate a complaint and have it processed in accordance with Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration. 8.3

If such initial suspension is for 5 calendar days and if the employee affected believes he has been unjustly dealt with, he may request and shall be granted, during this period, a hearing and a statement of the offense before a representative (status of department head or higher) designated by the general manager of the plant with or without an assistant grievance committeeman or grievance committeeman present as the employee may choose. At such hearing the facts concerning the case shall be made available to both parties. After such hear- 8.4

BLA § 8-B (Suspension and Discharge Procedures) (part 2)

ing, or if no such hearing is requested, Management may conclude whether the suspension shall be affirmed, modified, extended, revoked, or converted into a discharge. In the event the suspension is affirmed, modified, extended, or converted into a discharge, the employee may, within 5 calendar days after notice of such action, file a grievance in the **Second** Step of the complaint and grievance procedure. Final decision shall be made by the Company in this Step within 5 calendar days from the date of the filing thereof. Such grievance shall thereupon be handled in accordance with the procedures of Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration. Grievances involving discharge which are appealed to the Board shall be docketed, heard, and decided within sixty (60) days of appeal, unless the Board determines that circumstances require otherwise. Such grievances shall be identified by the Union as discharge grievances in the appeal to the Board.

An initial suspension for not more than 4 8.5
calendar days to be extended or converted into a discharge must be so extended or converted within the 4-day period, in which case the procedure outlined in the immediately preceding paragraph shall be followed and the 5-calendar-day period for requesting a hearing shall begin when the employee receives notice of such extension or discharge.

The Company in arbitration proceedings will 8.6
not make use of any personnel records of previous disciplinary action against the employee involved where the disciplinary action occurred five or more years prior to the date of the event which is the subject of such arbitration.

An employee who is summoned to meet in an 8.7
office with a supervisor other than his own immediate supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his grievance committeeman or assistant grievance committeeman if he requests

such representation, provided such representative is then available, and provided further that, if such representative is not then available, the employee's required attendance at such meeting shall be deferred only for such time during that shift as is necessary to provide opportunity for him to secure the attendance of such representative.

C. Revocation of Suspensions or Discharges

Should any initial suspension, or affirmation, 8.8
modification, or extension thereof, or discharge be revoked by the Company, the Company shall reinstate and compensate the employee affected on the basis of an equitable lump sum payment mutually agreed to by the parties or, in the absence of agreement, make him whole in the manner set forth in Section 8-D below.

D. Jurisdiction of the Board

Should it be determined by the Board that an 8.9
employee has been suspended or discharged without proper cause therefor, the Company shall reinstate the employee and make him whole for the period of his suspension or discharge, which shall include providing him such earnings and other benefits as he would have received except for such suspension or discharge, and offsetting such earnings or other amounts as he would not have received except for such suspension or discharge. In suspension and discharge cases only, the Board may, where circumstances warrant, modify or eliminate the offset of such earnings or other amounts as would not have been received except for such suspension or discharge.

Should it be determined by the Board that an 8.10
employee has been suspended or discharged for proper cause therefor, the Board shall not have jurisdiction to modify the degree of discipline imposed by the Company; provided, however, that in a discharge case arising out of a strike or work stoppage the Board shall have discretion, if it finds that the Company has proper cause for discipline but

Exhibit A

Exhibit A: Plaintiffs Memorandum in Support of Motion for New Trail

Refer to Exhibit A of the Docketing Statement. It is the same as Exhibit A in this brief. We avoided attaching it directly here to save the bulk of the 25 pages.

Exhibit B

otherwise reasonably discoverable, "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Williams*, 970 P.2d at 1284 (Utah 1998) (citations and internal quotation marks omitted).

The undisputed facts show that plaintiffs were in possession of sufficient facts to give them notice of their damages when they received their final settlement checks–the point at which their cause of action accrued; and they had sufficient information to attribute such damages to breaches of duty by defendants at the same time. While a determination whether a discovery exception is applicable is usually "highly fact-dependent" and precludes summary judgment "in all but the clearest of cases" (*In the matter of the Malualani B. Hoopiiaina Trusts v. Hoopiiaina*, 2005 UT App. 272, ¶¶23-24), plaintiffs here have not provided any evidence that actions of the defendants prevented the discovery of the plaintiffs' cause of action. Similarly, the plaintiffs have not shown that they did not know and could not reasonably have discovered and filed their claims against the defendants within the statutory period. *See Russell Packard Development*, 2005 UT 14, at ¶26).

The exception to the statute of limitation they seek to employ is a *discovery* rule; it requires those who seek its protection to show that certain evidence necessary to establish one or more of the elements of their claim for relief was concealed from them, and that reasonably diligent plaintiffs in their circumstances would not have discovered such evidence until too late to file a claim within the statute of limitations period, given the defendants' actions. *See Allred*, 2008 UT 22, at ¶36 (for the discovery exception to apply, plaintiffs must first show that they "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within [the limitations period]" (citation and internal quotation marks omitted)). Yet plaintiffs have not identified any pertinent material evidence that was discovered only after the passage of the limitations period and that could not have been discovered earlier with the use of reasonable diligence. Even where fraudulent concealment is alleged, summary judgment is appropriate where

"the facts underlying the allegation of fraudulent concealment are so tenuous, vague, or insufficiently established that . . . the claim fails as a matter of law." *Russell Packard Development*, 2005 UT 14, at ¶39. Such is the case here.

The court concludes that, even viewing the facts in the light most favorable to plaintiffs, either before or during the limitations period, they had sufficient information that, had they "acted in a reasonable and diligent manner," they could timely have filed their case. The court further concludes that plaintiffs have not born the burden of establishing a question of material fact as to the application of either the concealment prong or the exceptional circumstances prong of the discovery exception to the statute of limitations. Plaintiffs did not file suit within the four-year limitations period, and they have failed to show that "given the defendant[s'] actions, a reasonable plaintiff would not have brought suit within the statutory period." *See Russell Packard Development*, 2005 UT 14, at ¶26.

2. **Exceptional Circumstances.**

The exceptional circumstances prong of the discovery rule does not require a showing of concealment. "Under this doctrine, the limitations period is tolled where there are exceptional circumstances such that the application of the general rule would be irrational or unjust, regardless of any showing that the defendant . . . prevented the discovery of the cause of action." *Allred*, 2008 UT 22, at ¶36 (citations and internal quotation marks omitted); *Williams*, 970 P.2d at 1285.

The special circumstances plaintiffs appear to assert implicate their status as a "collectively . . . undereducated group of skilled and unskilled laborers, many of whom were unable to read effectively," who, as laymen, "depended entirely on Defendants, as their legal counsel, for advice and information about the nature and extent of their rights and entitlements regarding the settlement proceed[s]." Plaintiff's Memorandum, at 26. In this regard, plaintiffs assert that they could not be expected to have discerned problems with defendants' "dissemination of work history and other

information," have "ascertained the existence of actual and legal injury, or have known about "professional standards and practices among attorneys when accounting for and distributing settlement funds" or "their legal right to demand a fair and principled distribution of settlement funds, base on their individual circumstances." Plaintiffs' Memorandum, at 26.

Like the concealment prong of the discovery exception, however, "[f]or this exception to apply, an initial showing must be made that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within [the limitations period]." *Allred*, 2008 UT 22, at ¶36 (citations and internal quotation marks omitted). As discussed above, plaintiffs have failed to make this initial showing.

3. **Conclusion.**

Finally, plaintiffs have presented no evidence pointing to any particular "discovery," occurring after the passage of the statutory period, when knowledge of a recently discovered fact completed the puzzle and thereby allowed a plaintiff at some identifiable point to realize that defendants had wronged him or her, a realization that had not reasonably been possible at an earlier time due to concealment or exceptional circumstances. This complete failure to identify a particular event or moment when they finally discovered facts indicating that defendants had breached a duty in setting up the hearing process makes it impossible to discern the point in time that the plaintiffs claim that the statute of limitations should have begun to run, if not at the time the Hearing Award Decision was issued or the final settlement checks distributed.

Like the plaintiff in *Williams*, plaintiffs here do not "offer a reasonable explanation as to why [they]–either pro se or with assistance of legal counsel–could not have filed an action against [the defendants] at some time between" March 1996 and March 2000. *Williams*, 970 P.2d at 1286. Without such a showing, plaintiffs have failed to present a viable case for application of either the

Exhibit C

Exhibit C:
Memorandum in Support of Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct its Judicial Errors.

Refer to Exhibit C of the Docketing Statement. It is the same as Exhibit C in this brief. We avoided attaching it directly here to save the bulk of the pages.

Exhibit D

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

RONALD J. CHILTON, *et al.*, Plaintiffs,	:	MEMORANDUM DECISION (Defendant's Motion to Dismiss)
vs.	:	Case No. 030105887 (Previous Case No. 020404957)
ALLEN K. YOUNG, *et al.*, Defendants.	:	Judge PAT B. BRIAN

The above matter came before the Court for status hearing on September 22, 2003. At that hearing, the parties informed the Court that Allen K. Young's (Defendant) motion to dismiss was pending and was ready for decision on the papers. Upon review of the parties filings, applicable statutes and case law, the Court DENIES Defendant's motion to dismiss, which this Court treated as a motion for summary judgment, based on following decision.

BACKGROUND

Plaintiffs filed this law suit against their former attorney alleging legal malpractice and fraudulent misrepresentation in litigation against Plaintiffs former employer. A motion to dismiss admits the facts as pleaded in the complaint as true, therefore, the following facts are derived from the complaint. The 124 Plaintiffs are all former employees of the Orem facility of United States Steel corporation ("USX") who were laid off during a "hot idle" period. On behalf of Plaintiffs as their attorney, Defendant caused to filed a law suit against USX, *Pickering v. USX Corporation*, (federal case) in the United States District Court which was assigned to Judge Bruce S. Jenkins (Judge Jenkins). One of the many issues in the federal case was whether Plaintiffs were entitled to a monetary award for vacation pay for the 1988 calendar year.

In the federal case, some plaintiffs were designated as "bellweather" plaintiffs. Many of the issues involving the bellweather plaintiffs were heard and determined on the merits. For example, Judge Jenkins awarded bellweather plaintiff William Thomas back pay, wages, sick pay, vacation pay, incentive pay and other employee compensation equal to the compensation he would have received during the idling period less any amount of income earned by him through employment during the same period.

Subsequently, Defendant negotiated a proposed settlement of the USX case with the USX defendants. Defendant addressed the terms of the proposed settlement with Plaintiffs at a meeting held on June 28, 1995 at Mountain View High School in Orem, Utah (meeting). At the meeting, Defendant represented to Plaintiffs that the proposed settlement would give them everything Judge Jenkins had awarded the bellweather plaintiffs. In reliance upon Defendant's representation that they would receive what the bellweather plaintiffs had received, the Plaintiffs accepted the proposed settlement upon the terms suggested to them by Defendant at the meeting.

Defendant obtained releases for any liability as a result of the settlement achieved in the federal case. Plaintiffs executed the releases in reliance upon the representations made to them in the meeting. Defendant's representations made to Plaintiffs at the meeting were false because they did not receive vacation pay for 1988 like some of the bellweather plaintiffs.

On November 5, 2002, Plaintiffs filed the present law suit alleging causes of action against Defendant for (1) fraudulent misrepresentation, (2) legal malpractice - breach of contract, (3) legal malpractice - breach of fiduciary duty and (4) legal malpractice - negligence.[1]

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[1] The Court notes that the law suit was filed in the Fourth District Court. However, the Fourth District Court was recused from the case by its presiding judge and the case was

On December 16, 2002, Defendant filed the present motion to dismiss claiming that Plaintiffs failed to state a claim upon which relief may be granted because the statute of limitations has run on all of Plaintiffs causes of action. On January 2, 2003, Plaintiffs filed their opposition to Defendant's motion to dismiss. On January 15, 2003, Defendant filed his reply to Plaintiffs opposition.

On September 22, 2003, a status hearing was held and the parties informed the Court that the motion to dismiss was ready for decision on the papers.

On November 14, 2003, Ronald Chilton (Chilton), one of the plaintiff's, filed a letter stating that he was concerned about the status of the case and the representation by his counsel. Chilton argues that the Plaintiffs could not have discovered Defendant's alleged fraud until a trial in the Chamberlain/Young case in April and May of 2001. Chilton states that Judge Scott Daniels stated in his opinion after reading Judge Jenkins ruling that Young owed vacation pay to all Plaintiffs in the Pickering/USX case.

LAW

Utah R. Civ. P. 12(b)(6) provides a court may dismiss a cause of action if a party fails to state a claim upon which relief may be granted. A Rule 12(b) motion to dismiss "admits the facts alleged in the complaint, but challenges the plaintiff's right to relief based on those facts." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991). If matters outside the pleading are presented to and not excluded by the court in a Rule 12(b)(6) motion, then the motion shall be treated as one for summary judgment and disposed of as provided in Utah R.

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transferred to the Third District Court and assigned to the West Valley Department.

Here, Plaintiffs opposition and the letter from a single Plaintiff were submitted. These were not excluded by the Court, therefore, the Court treats the motion as a motion for summary judgment.

Rule 56(c) provides a court may grant summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. The court shall view all facts in favor of the nonmoving party.

Generally, a statute of limitations begins to run when the cause of action arises. *Davidson Lumber v. Bonneville Inv.*, 794 P.2d 11, 19 (Utah 1990). However, the judicially created equitable "exceptional circumstances" rule permits the discovery rule to toll the statute of limitations. *Sevy v. Security Title Co.*, 902 P.2d 629 (Utah 1995); *see also Sevey v. Security Title Co.*, 857 P.2d 958 (Utah Ct. App. 1993). The discovery rule is that a party shall exercise reasonable diligence to discover a cause of action against defendants or the cause of action shall be barred by the statute of limitations. *Anderson v. Dean Witter Reynolds, Inc.*, 294 Utah Adv. Rep. 30 (Utah Ct. App. 1996).

Utah Code Ann. § 78-12-26 provides a three year statute of limitations in cases of fraud and begins to accrue when aggrieved party of the facts constituting the fraud or mistake may be reasonably discovered. Plaintiffs are required to exercise "reasonable diligence" in discovering fraud. *Baldwin v. Burton*, 850 P.2d 1188 (Utah 1993). A cause of action for breach of contract shall be filed within six years of the breach. Utah Code Ann. § 78-12-23; *see also Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987). Causes of action for negligence and breach of

fiduciary duty shall be filed within four years of discovery of the breach. Utah Code Ann. § 78-12-25.

ANALYSIS

Here, Plaintiffs were clients of Defendant attorney in a complex, class action litigation, who relied on the advice of counsel. Viewing the facts in a light most favorable to Plaintiffs, the Court concludes that genuine issues of material fact exist, therefore, Defendant is not entitled to summary judgment. For example, genuine issues of material fact exist with regard to whether Plaintiffs made a reasonable effort to discover and when Plaintiffs may have reasonably discovered Defendant's fraud, breach of contract, breach of fiduciary duty and negligence and, therefore, when the statute of limitations began to accrue. There are insufficient facts before the Court to decide as a matter of law that Defendant is entitled to summary judgment.

The Court DENIES Defendant's motion to dismiss, which this Court treated as a motion for summary judgment.

So ordered this 2 day of December, 2003. By the Court:

PAT B. BRIAN
Third District Court Judge

Exhibit E

after this second phase of trial. *See* Part VI, *infra*.

"Idling" ("Active" and "Management") Plaintiffs

As to the "Active" and "Management" plaintiffs whose pension benefits were impaired by the indefinite idling of Geneva in February 1987, following the end of the work stoppage, this Court found in *Pickering I* that "the plaintiffs are entitled to continued benefits as if Geneva had not been idled at that time. Further, these benefits continued to accrue up to the moment in time in which USX lawfully shut down, sold or otherwise disposed of Geneva." 809 F.Supp. at 1552. This Court then concluded that "the Active and Management plaintiffs' damages or measure of relief must be measured within the terms of the 1987 BLA as if they had remained active employees who were terminated when Geneva was sold to BM & T in August of 1987." *Id.* Under *Pickering I*, the "Idling" plaintiffs' individual remedies must be determined with reference to the seven-month "idling" period from February 1, 1987 through August 31, 1987.

Plaintiffs had argued for accrual of benefits through an assumed shutdown date of October 1989, based upon a public promise made by the company's chairman. This Court rejected the October 1989 date in *Pickering I* for the reason that USX was not "legally bound by its promise to keep Geneva open." *Id. See generally Local 1330, United Steel Workers of America v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir.1980) (company not bound by public promise to keep plant open so long as plant remains profitable). This Court also found that the plaintiffs had "failed to establish a *prima facie* case" showing that USX had sold Geneva to BM & T for the purpose of interfering with plaintiffs' attainment of pension benefit rights, particularly rights which would accrue upon a total plant shutdown. *Id.* at 1556, 1558.

*7 In this second phase of trial, plaintiffs have overhauled their argument concerning the sale of Geneva to BM & T and the October 1989 date. [FN5] Plaintiffs now aver that "but for" the indefinite idling of Geneva following the end of the work stoppage in 1986--which this Court previously found to have been prompted by unlawful motives, violating § 510--Geneva would not have been sold to BM & T at all. Instead, plaintiffs postulate, Geneva would have resumed normal operations and, driven by the demands of Pit-Cal, would have continued operations until at least October of 1989. *See* Part IV, *infra*. Plaintiffs suggest that the Court need not find that the sale of Geneva was prompted by unlawful anti-pension benefit animus in order to extend the remedial period under § 510 through the October 1989 date. *Cf. Gaddy v. ABEX Corp.*, 884 F.2d 312, 319 (7th Cir.1989); *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1138 (10th Cir.1983).

Plaintiffs adamantly insist that the Court address the question of the proper remedial period in terms of this "but for" analysis, citing cases such as *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463 (10th Cir.1993):

> The purpose of a back pay award is to make the employee whole--*i.e.*, restore the economic status quo that would have obtained *but for* the wrongdoing on the part of the employer and the union.... It is improper, however, to award back pay if it can be shown that the employees would have lost their jobs at a later date even if they had been treated fairly.... The burden is on the defendant to prove by a preponderance of the evidence that an employee would have been discharged or laid off at a later date, or that the employee's job would have been phased out, even if no [wrongful conduct] had occurred, ... and the defendant has a right to present such evidence in defending a claim for damages....

993 F.2d at 1473 (emphasis added & citations omitted).

"LaRoche" and "Idling" Plaintiffs' Section 204(h) Claims

With respect to the "LaRoche" and "Idling" plaintiffs' claims under § 204(h) of ERISA, this Court earlier determined that the appropriate remedy would be to compute plaintiffs' pension benefits as if the unlawful amendment had not occurred. *See Pickering I*, 809 F.Supp. at 1564; *cf. Pratt v. Petroleum Prod. Management Employee Sav. Plan & Trust*, 920 F.2d 651, (10th Cir.1990) ("[s]ubsequent unilateral adoption of an amendment which is then used to defeat or diminish the plaintiff's fully vested rights under the governing plan document is not only ineffective, but also arbitrary and capricious."). [FN6]

should be calculated on the basis of each plaintiffs' income at USX as reflected in USX payroll records and utilized by Dr. Randle and Mr. Norman, without adjustments based upon the BM & T experience.

As to the question of whether Dr. Randle overstates plaintiffs' back pay by using 80-plus-hour pay periods as a starting point, it almost looks as though USX's assertion that plaintiffs' back pay should be computed based upon the historical average of hours worked during a pay period whipsaws plaintiffs between the operation of Geneva absent the labor reduction program and the 80- plus-hour minimum standard that USX asserts plaintiffs must meet in order to show a likelihood of recall. (*See* Tr. 11/4/93, at 287-346 (testimony of David Braithwaite).) If one listens to USX on *entitlement*, plaintiffs should only receive back pay for those pay periods where there was eighty hours or more of work for them to do. If one listens to USX on *amount*, back pay should be computed on the basis that the prevailing plaintiff would have worked less than those same eighty-or-more hours.

The Court has considered the eighty-or-more hours analysis as a factor in determining individual plaintiffs' entitlement to a remedy for USX's failure to recall and it seems fair to evaluate the back pay to be awarded in that same light. [FN48] The Court adopts Dr. Randle's analysis of back pay based upon income earned during pay periods in which a plaintiff worked 80 or more hours, and rejects Mr. Norman's proffered adjustment to base projected earnings on actual historical averages.

*43 In terms of lost employee welfare benefits, such as health or medical insurance coverage lost during layoff periods, the Court has concluded that recovery under § 502(a)(3) of ERISA for those losses should be limited to out- of-pocket health, medical, or insurance premium costs, rather than the computed "cost of the benefit" to USX. *Cf. Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir.1989); *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 718 & n. 1a (10th Cir.1978).

Offsets Against Backpay Awards

Besides hotly contesting the availability of a back pay remedy under § 502(a)(3) after *Mertens*, USX also claims a series of offsets against any back pay award that this Court may make in favor of any of the bellwether plaintiffs on their § 510 claims.

(1) *Plaintiffs' Duty to Mitigate*

Plaintiffs do not dispute that they have a general duty to mitigate losses flowing from USX's wrongful conduct in failing to recall them to work at Geneva following a layoff, or in deciding to "indefinitely idle" the plant following the end of the work stoppage in February, 1987. *See, e.g., United States v. Lee Way Motor Freight*, 625 F.2d 918, 936-38 (10th Cir.1979); *Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir.1980). They concede that at least some income earned from other employment should be offset against amounts of back pay awarded on the theory that they should have been back to work at Geneva at the same time. (*See* Tr. 10/13/93 (Pretrial Conference) at 36:12-18 (Mr. Orlofsky).) They do assert that the burden of proving offsets or a failure to mitigate falls properly upon USX. Plaintiffs' Post-Trial Memorandum on Legal Issues, dated December 13, 1993 (dkt. no. 758), at 18. Following the Title VII analogy, USX must show that (1) a particular plaintiff failed to exercise reasonable diligence to mitigate his or her damages, and (2) there was a reasonable likelihood that the plaintiff would have found comparable work by exercising reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir.1989); *see also, Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d at 627.

(2) *Earned Income (Wages, Salary, etc.)*

Plaintiffs' own back pay calculations reflect an adjustment for "mitigating income," defined as "all income received from employment other than USX employment during this period of time, not including income earned from investments." (Tr. 10/19/93, at 489:19-21 (testimony of Dr. Paul Randle).) Dr. Randle included vacation pay in his calculation of mitigating income. (*Id.* at 490:14-16. *See* PX 546A.)

Plaintiffs submit that the proper method for calculation of offsets based upon wages, salaries or other compensation earned by a particular plaintiff during the same period for which he or she receives an award of back pay under § 502(a)(3) is the "pay period" approach exemplified by the National Labor Relations Board's formula approved in

286. The Court finds that Mr. Christopherson's continuous service at USX, adjusted to account for the Court's findings herein (*viz.* an additional seven months (0.58 years), would total 31.71 years of service, yielding an additional benefit accrual of $11.60. (*See* DT 132-C; Tr. 11/5/93, at 525:1-25 (testimony of Arthur Hallett).)

287. The Court finds that Mr. Christopherson is eligible to receive a USX "Rule of 65" pension immediately upon quitting or otherwise losing his employment at BM&T.[103]

288. Mr. Christopherson is also entitled to receive retiree medical insurance under the Program of Hospital-Medical Benefits for Eligible Pensioners and Surviving Spouses, and USX retiree life insurance coverage. (DT 345; Tr. 11/9/93, at 674:11-25 (testimony of William Roderick).)

289. Mr. Christopherson has established his entitlement to "other appropriate equitable relief" on his claims under § 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985) "to redress such violations," which includes an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation he would have received during the "idling" period set forth above, less any amount of income earned by him through other employment during the same period.

Pension Remedy - Section 204(h) of ERISA

290. As a result of Mr. Christopherson's BM&T service and this Court's ruling under Section 204(h), he earned an additional accrued benefit of $130.13 per month. (DT 132-C; Tr. 11/5/93, at 521:10-528:11, 591:16-598:16 (testimony of Arthur Hallett).) Mr. Christopherson's

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[103] *See also*, Defendant's Post-Hearing Memorandum (Damage Phase), dated December 13, 1993 (dkt. no. 757), at 4.

idled Geneva following the end of the work stoppage, Mr. Vincent would have been recalled to work on or about February 14, 1987.

407. Plaintiffs have established by a preponderance of the evidence that USX failed to recall employees, including Mr. Vincent, following the end of the work stoppage on February 1, 1987, as a proximate consequence of USX's decision to indefinitely idle Geneva. The intent "to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan" in violation of § 510 of ERISA, 11 U.S.C.A. § 1140 (1985), was a substantial motivating factor in USX's decision to idle the plant.

408. Absent an award of injunctive and "other appropriate equitable relief" to plaintiffs under § 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985), USX would realize substantial savings in terms of benefit expenses by reason of its decision to indefinitely idle the Geneva plant in 1987.

Equitable Relief - Section 510 of ERISA

409. Mr. Vincent has established his entitlement to an order enjoining acts and practices of USX which perpetuate its violation of § 510 of ERISA, 11 U.S.C.A. § 1140 (1985), and requiring that the accrual of pension benefits in favor of Mr. Vincent under the USX pension plan be adjusted so as to take into account the reconstruction of his employment history as set forth above.

410. The Court finds that Mr. Vincent's continuous service at USX, adjusted to account for the Court's findings herein (*viz.* an additional seven months (0.58 years)), would total 19.0 years of service, yielding an additional benefit accrual of $11.78. (*See* DT 132-C.)

USX's decision to idle the plant.

*119 408. Absent an award of injunctive and "other appropriate equitable relief" to plaintiffs under § 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985), USX would realize substantial savings in terms of benefit expenses by reason of its decision to indefinitely idle the Geneva plant in 1987.

Equitable Relief--Section 510 of ERISA

409. Mr. Vincent has established his entitlement to an order enjoining acts and practices of USX which perpetuate its violation of § 510 of ERISA, 11 U.S.C.A. § 1140 (1985), and requiring that the accrual of pension benefits in favor of Mr. Vincent under the USX pension plan be adjusted so as to take into account the reconstruction of his employment history as set forth above.

410. The Court finds that Mr. Vincent's continuous service at USX, adjusted to account for the Court's findings herein (*viz.* an additional seven months (0.58 years)), would total 19.0 years of service, yielding an additional benefit accrual of $11.78. (*See* DT 132-C.)

411. Mr. Vincent has established his entitlement to "other appropriate equitable relief" on his claims under § 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985) "to redress such violations," which includes an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation he would have received during the "idling" period set forth above, less any amount of income earned by him through other employment during the same period.

Pension Remedy--Section 204(h) of ERISA

412. As a result of Mr. Vincent's BM & T service and this Court's ruling under Section 204(h), he earned an additional accrued benefit of $109.91 per month. (DT 132-C) Mr. Vincent's balance in the BM & T pension plan as of February 1, 1993, was $8,989.09. (DT 307-C) At the time of Mr. Vincent's retirement under the terms of the USX pension plan, his accrued benefit of $109.91 per month, reduced to present value, will be offset by the amount of his account balance in the BM & T pension plan as of February 1, 1993, plus interest up to the date of his retirement.

LAROCHE PLAINTIFF

Rex Christensen

413. Mr. Christensen was born on August 15, 1934 and began his employment with USX on October 20, 1954. (PTO Uncontroverted Facts ¶ 137.)

414. Mr. Christensen is a Count IX--LaRoche plaintiff. While at USX he worked primarily as an operator and laborer; he is a union represented employee. (PTO at 5; PTO Uncontroverted Facts ¶ 138.)

415. Mr. Christensen was transferred to LaRoche Industries upon sale of the nitrogen facilities by USX to LaRoche Industries. He has continued his employment at LaRoche as a laborer since the time of the sale. Throughout his employment at LaRoche, Mr. Christensen has been a participant in the retirement and other employee benefit plans offered at LaRoche. He is eligible for a 30- year sole option pension. (PTO Uncontroverted Facts ¶ 139.)

ANALYSIS

The parties agree that Mr. Christensen's only remaining claim in this case is under ERISA § 204(h). (PTO Uncontroverted Facts ¶ 140.) He claims the present value of six years' accrual under the USX pension plan. (Tr. 10/13/93 (Pretrial Conference) at 64.)

*120 USX argues that Mr. Christensen is not entitled to any remedy under § 204(h) of ERISA because the accrued benefit he earned under the USX pension plan during his employment at LaRoche through February 1, 1993 was less than the accrued pension benefit earned under the LaRoche pension plan during that time. (DT 132-B, at 2; DT 132-C; Tr. 11/5/93, at 519:5-521:9 (testimony of Arthur Hallett).) It may be more accurate to say that Mr. Christensen is entitled to the additional accruals under § 204(h), subject to offsetting accruals under the LaRoche plan. According to Arthur Hallett, assuming Mr. Christensen retired during November 1993 "[t]he result would be that the $139.52 [USX accrual] would be totally offset by the $152.75 [LaRoche accrual]. And USX's obligation would be to pay

Exhibit F

3. An employee, even though otherwise eligible under this Subsection A, forfeits the right to receive vacation benefits under this Section if he quits, retires, dies, or is discharged prior to January 1 of the vacation year. 12.5

B. Length of Vacation

1. **Effective for calendar year 1987,** an eligible employee who has attained the years of continuous service indicated in the following table in **calendar year 1987** shall receive a vacation corresponding to such years of continuous service as shown in the following table: 12.6

Years of Service	Weeks of Vacation
1 but less than 3	1
3 but less than 17	2
17 but less than 25	3
25 or more	4

2. **Effective for calendar year 1988, an eligible employee who had attained the years of continuous service indicated in the following table in any calendar year during the continuation of this Agreement shall receive a vacation corresponding to such years of continuous service as shown in the following table:** 12.7

Years of Service	Weeks of Vacation
1 but less than 3	1
3 but less than 10	2
10 but less than 17	3
17 but less than 25	4
25 or more	5

3. A week of vacation shall consist of 7 consecutive days. 12.8

C. Scheduling of Vacations

1. **General**

a. On or promptly after October 1 of each year, each employee entitled or expected to become entitled to take vacation time off in 12.9

the following year will be requested to specify in writing (not later than 30 days after the receipt of such request), on a form provided by the Company, the vacation period or periods he desires.

b. Notice will be given an employee at least 60 days in advance of the date his vacation period is scheduled to start, but in any event not later than January 1 of the year in which the vacation is to be taken. 12.1

c. Vacations will, so far as practicable, be granted at times most desired by employees (longer service employees being given preference as to choice); but the final right to allot vacation periods and to change such allotments is exclusively reserved to the Company in order to insure the orderly operation of the plants. 12.1

d. Any employee absent from work because of layoff, disability or leave of absence at the time employees are requested to specify the vacation periods they desire and who has not previously requested and been allotted a vacation period for the calendar year, may be notified by Management that a period is being allotted as his vacation period but that he has the right within 14 days to request some other vacation period. If any such employee notifies Management in writing, within 14 days after such notice is sent, that he desires some other vacation period, he shall be entitled to have his vacation scheduled in accordance with paragraph C-1-c. 12.1

e. If an employee is on layoff from the plant at any time before the beginning of his scheduled vacation hereunder, he may request to have his vacation start at any time during such layoff and if Management agrees to grant his request, it shall have the 12.13

preceding the weekly pay period in which the Holiday occurs.

7. If an eligible employee performs work on a Holiday, but works less than 8 hours, he shall be entitled to the benefits of this Subsection to the extent that the number of hours worked by him on the Holiday is less than 8. This Subsection applies in addition to the provisions of Subsection E of Section 10, where applicable. 11.20

E. Nonduplication

1. Payment of overtime rates shall not be duplicated for the same hours worked, but the higher of the applicable rates shall be used. Hours compensated for at overtime rates shall not be counted further for any purpose in determining overtime liability under the same or any other provisions, provided, however, that a Holiday, whether worked or not, shall be counted for purposes of computing overtime liability under the provisions of Subsection C-1-c,-d, or -e above and hours worked on a Holiday shall be counted for purposes of computing overtime liability under the provisions of Subsection C-1-a above. 11.21
2. Except as above provided, hours paid for but not worked shall not be counted in determining overtime liability. 11.22

SECTION 12 — VACATIONS

A. Eligibility

1. To be eligible for a vacation in any calendar year during the term of this Agreement, the employee must: 12.1
   a. Have one year or more of continuous service; and 12.2
   b. Not have been absent from work for six consecutive months or more in the preceding calendar year; except that in case of an employee who completes one year of continuous service in such calendar year, he shall not have been absent from work for six consecutive months or more during the 12 months following the date of his original employment; provided, that an employee with more than one year of continuous service who in any year shall be ineligible for a vacation by reason of the provisions of this paragraph as a result of an absence on account of layoff or illness shall receive one week's vacation with pay in such year if he shall not have been absent from work for six consecutive months or more in the 12 consecutive calendar months next preceding such vacation. Any period of absence of an employee while on vacation pursuant to this Section or while absent due to a compensable disability in the year in which he incurred such disability, or while in military service in the year of his reinstatement to employment, shall be deducted in determining the length of a period of absence from work for the purposes of this Subsection A-1-b. 12.3
2. Continuous service shall date from: (a) the date of first employment at the plant (in the case of transferred employees from any plant listed in Appendix B the date shall be the date of first employment at the plant from which first transferred); or (b) subsequent date of employment following a break in continuous service, whichever of the above two dates is the later. Such continuous service shall be calculated in the same manner as the calculation of continuous service set forth in Subsection C, Section 13 — Seniority, of this Agreement except that there shall be no accumulation of service in excess of the first two years of any continuous period of absence on account of layoff or physical disability (except, in the case of compensable disability, as provided in Subsection C-4, Section 13 — Seniority) in the calculation of service for vacation eligibility. 12.4

developed by the parties before and at the hearing and shall include a brief written explanation of the basis for his conclusion. These decisions shall not be cited as a precedent in any discussion at any step of the grievance or arbitration procedure. The authority of the arbitrator shall be the same as that provided in Sections 7-A and 8 of the Agreement.

4. Any grievance appealed to this expedited arbitration procedure must be confined to issues which do not involve novel problems and which have limited contractual significance or complexity. If the Union appeals a grievance to the Board of Arbitration under circumstances where it is clear from the issue embodied in the grievance that jurisdiction to resolve the grievance lies solely within the expedited arbitration procedure and should the Board conclude that it lacks jurisdiction over the grievance, the Union, after such award, may not thereafter appeal such grievance to expedited arbitration; provided, however, that if it is unclear from the issue embodied in such grievance whether jurisdiction to resolve the grievance lies solely within the expedited arbitration procedure, but the Board concludes that it lacks jurisdiction, the Union may appeal such grievance to expedited arbitration within ten (10) days of the date of such award. 7.31

SECTION 8 — SUSPENSION AND DISCHARGE CASES

A. Purpose

The purpose of this Section is to provide for the disposition of complaints involving suspension or discharge and to establish a special procedure for the prompt review of cases involving discharge or 8.1

suspension of more than 4 calendar days. Complaints concerning suspensions of 4 calendar days or less shall be handled in accordance with Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration. Complaints concerning suspensions of 5 calendar days or more and discharges shall be handled in accordance with the procedure set forth below, including Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration.

B. Procedure

An employee shall not be peremptorily discharged. In all cases in which Management may conclude that an employee's conduct may justify suspension or discharge, he shall be suspended initially for not more than 5 calendar days, and given written notice of such action. In all cases of discharge, or of suspension for any period of time, a copy of the discharge or suspension notice shall be promptly furnished to such employee's grievance committeeman. 8.2

If such initial suspension is for not more than 4 calendar days and the employee affected believes that he has been unjustly dealt with, he may initiate a complaint and have it processed in accordance with Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration. 8.3

If such initial suspension is for 5 calendar days and if the employee affected believes he has been unjustly dealt with, he may request and shall be granted, during this period, a hearing and a statement of the offense before a representative (status of department head or higher) designated by the general manager of the plant with or without an assistant grievance committeeman or grievance committeeman present as the employee may choose. At such hearing the facts concerning the case shall be made available to both parties. After such hear- 8.4

parties and the Board of Arbitration or (iii) refer the matters back to the plant without resolution in which event the specific disputes will be handled under the provisions of this section at the time they may arise.

J. District Director/Company Labor Relations Representative

It is the intent of the parties that the members of the joint plant contracting out committee shall engage in discussions of the problem involved in this field in a good-faith effort to arrive at mutual understanding so that disputes and grievances can be avoided. If either the Company or the Union members of the committee feel that this is not being done, they may appeal to the District Director of the Union who has jurisdiction of the plant in question and the appropriate representative of the Company Headquarters for review of the complaint about the failure of the committee to properly function. Such appeal shall result in a prompt investigation by the District Director or his designated representative and the Company's labor relations representative designated for such review. This provision should in no way affect the rights of the parties in connection with the processing of any grievance relating to the subject of contracting out. 2.44

SECTION 3 — MANAGEMENT

The Company retains the exclusive rights to manage the business and plants and to direct the working forces. The Company, in the exercise of its rights, shall observe the provisions of this Agreement. 3.1

The rights to manage the business and plants and to direct the working forces include the right to hire, suspend or discharge for proper cause, or 3.2

transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons.

SECTION 4 — RESPONSIBILITIES OF THE PARTIES

Each of the parties hereto acknowledges the rights and responsibilities of the other party and agrees to discharge its responsibilities under this Agreement. 4.1

The Union (its officers and representatives, at all levels) and all employees are bound to observe the provisions of this Agreement. 4.2

The Company (its officers and representatives, at all levels) is bound to observe the provisions of this Agreement. 4.3

In addition to the responsibilities that may be provided elsewhere in this Agreement, the following shall be observed: 4.4

1. There shall be no intimidation or coercion of employees into joining the Union or continuing their membership therein. 4.5
2. There shall be no Union activity on Company time. 4.6
3. There shall be no strikes, work stoppages, or interruption or impeding of work. No officer or representative of the Union shall authorize, instigate, aid, or condone any such activities. No employee shall participate in any such activities. 4.7
4. The applicable procedures of the Agreement will be followed for the settlement of all complaints or grievances. 4.8
5. There shall be no interference with the right of employees to become or continue as members of the Union. 4.9
6. There shall be no discrimination, restraint, or coercion against any employee because of membership in the Union. 4.10

Exhibit G

Ronald Chilton
214 East 1350 North
Lehi, Utah 84043
November 20, 2003

Honorable Judge Pat Brian
3rd District Court
West Valley, Utah

Civil # 030105887

Dear Judge Pat Brian,

This letter is in reference to a my letter, on November 13, 2003 filed with the court. (Enclosed is a copy of said letter). The reasons for my letters to the court is to establish an" alternative starting date" of when we the plaintiffs became aware of the alleged fraud. We discovered the vacation pay issue in the (Chamberlain /Young)Case # 9700400240 in the Orem, Utah 4th district court, April-May 2001.
Also enclosed is a copy of the first court filing, case # 010403553 4th District Court, Provo, Utah/ Filed on July 30, 2001. (This was only two months after we became aware of Vacation Pay fraud.)
This case was later sent to 3rd district Court, in Salt Lake City. And assigned to
Judge Tyron Medley, and assigned a new case # 020906405. Enclosed is a copy of Judge Medleys' Ruling to dismiss this case WITH OUT PREDIJUCE because of our attorney, James C. Haskins was negligent in serving Allen Young in a timely manner.
On the 26 of Sept. in your court, you asked both parties if they had everything in their briefs concerning our case, however, I feel you need this new information, (facts) as our attorney has not represented the plaintiffs fairly in this "(alternative starting date)" (April / May 2001). As I stated before, my attorney will not return any calls, or accept mail, enclosed is a copy of my letter that was marked " unclaimed" to James C. Haskins.
Please let us have our day in Court.

Sincerely,

Ronald J Chilton
Ronald Chilton

P.S. if you need more information from me my phone # is 801-768-3455

Thank you.

STL-1656

Ronald Chilton
214 East 1350 North
Lehi, Utah 84043
November 13, 2003

Honorable Judge Pat Brian
3rd District Court
West Valley, Utah

Civil # 030105887

Dear Judge Pat Brian

I am a client of James C. Haskins In the Third District Court action (Ronald Chilton / Allen Young). I came to the courthouse, 3rd. District in West Valley and pulled up our case documents, to make sure The facts as discussed with Mr. Haskins and assured by Mr. Thomas Thompson were in the brief submitted to the court. While he has argued several issues of our case, I find that he has not responded to several key issues, whether by negligence or intentional oversight I am not sure. But after three + years trying to get this to court it makes a person wonder. I have tried to talk to my attorney by phone, but he will not return my calls, I have sent him registered mail and it is returned to me marked (/REJECTED) By Mr. Haskins. My only other option is to try to address the court, I can only hope you have the time to read my facts.
In the Baldwin case cited by both attorneys Mr. Young states that the court cited (DUE DILEGENCE) As a factor where the aggrieved parties could have found the alleged fraud with due diligence (such as going thru a Title Company.) We the plaintive in the (Pickering / U.S.X) case, felt like we hired a title company namely, our attorney Mr. Young, to advise the clients as to the meaning of Judge Jenkins ruling. If a title company gives a client the wrong information they are at fault, and must pay any damages the client incurred. The same applies to our attorney who misrepresented to the clients Judge Jenkins ruling. In the court clerks findings he states that neither party offers a starting date as to the time when we discovered the alleged fraud. I discussed this at length with Mr. Haskins and he still neglected to put it in court.
We discovered the fraud at the (Chamberlain / Young) trial (date April and May of 2001). When Judge Scott Daniels sat on the witness chair and stated in his opinion after reading Judge Jenkins ruling That Mr. Young owed Vacation Pay to all Plaintiffs in the Pickering / U.S.X. case. This was the time I found out he owed vacation pay. I contacted Mr. Haskins concerning the possibility of a law suit to recover lost monies. The STARTING DATE for the clock to start on the statue of limitation was May 2001. In my opinion we the plaintiffs in the Pickering / Young trial were diligent in hiring our attorneys, Mr. Young and his associates to evaluate Judge Jenkins ruling and had every right to rely on their opinion. In fact not a right but an obligation to trust them. (BALDWIN / BURTON) 850 p2d 1188 (1993) saying that the start time is measured from the time the fraud is DISCOVERED. I can only hope we get our day in court in front of a jury of our peers, Win, Lose, or Draw that is all we can ask. Thank you.

Ronald Chilton

Ronald J Chilton

Copys sent to : James Haskins
Utah State Bar

Exhibit H

with BM&T. *Pickering* decision at 5, 40. Judge Jenkins found that none of the plaintiff steelworkers were employed by USX as of January 1, 1988. Section 502(a)(3) remedies were to be measured in context of the 1987 BLA and Pension Agreements as if steelworker plaintiffs were terminated when Geneva was sold to BM&T on August 31, 1987.

After Judge Jenkins' decision, a settlement for $47 million was reached and a meeting was held with the steelworkers regarding the settlement. The settlement was approved by all the steelworkers and the money was paid out to each steelworker in two payments. The final payment was made in March 1996. The Plaintiffs' claims all relate to the settlement agreement and the Defendants' handling thereof.

PROCEDURAL HISTORY

In 2002, Plaintiffs filed the present law suit, which some Plaintiffs by and through different counsel later amended by the third amended complaint. One group of Plaintiffs are represented by Haskins & Associates. These Plaintiffs have dismissed their claims. The other group of Plaintiffs are represented by Hill, Johnson & Schmutz ("HJS Plaintiffs"). The HJS Plaintiffs filed the third amended complaint which is the operating complaint for the present second motion for summary judgment. The HJS Plaintifs allege six causes of action, specifically, (1) fraudulent misrepresentation, (2) legal malpractice--breach of contract, (3) legal malpractice—breach of fiduciary duty, (4) legal malpractice—negligence, (5) accounting, and (6) breach of trust/breach of fiduciary duty cause of action.

On April 6, 2005, the Defendants filed a motion for summary judgment. Defendants also

249-250 (1986). In other words, unsupported opinions and conclusions will not defeat summary judgment. *Robertson v. Utah Fuel Company*, 889 P.2d 1382, 1388 n. 4 (Utah App. 1995); *Norton v. Blackham*, 669 P.2d 857 (Utah 1983). A party is required to come forward with admissible evidence to support their claims. *Preston v. Lamb*, 436 P.2d 1021, 1022 (Utah 1968).

FRAUDULENT MISREPRESENTATION

The First Cause of Action alleged by the Plaintiffs in the Third Amended Complaint is "Fraudulent Misrepresentation." The Plaintiffs claim the Defendants misrepresented that the "Plaintiffs would receive in the proposed settlement everything Judge Jenkins awarded to the 'bellwether' plaintiffs in the USX case, and more" because the settlement did not include any amount for vacation pay to be paid in 1988 and "other elements and components of the compensation awarded by Judge Jenkins to the 'bellwether' USX plaintiffs." (Third Am. Compl. ¶¶ 38 and 39).

Defendants move for summary judgment on this issue for two reasons. First, the claim was not pled with particularity as required by Rule 9(b) of the Utah Rules of Civil Procedure, particularly in light of the fact that this Court already ruled that Judge Jenkins did not award vacation pay for 1988 and the claims based upon this alleged misrepresentation have been dismissed. Second, there is no evidence, and Plaintiffs have provided none, to support the statement that "other elements and components" awarded by Judge Jenkins were not included. At trial, Plaintiffs would be required to prove each element of their fraud claim by clear and convincing evidence and must, therefore, meet that same standard in opposing summary judgment by coming forward with evidence from which a reasonable jury could find the

Exhibit I

dismissed with prejudice on May 31, 1994, and January 3, 1995, respectively. *Pickering* decision at 3. Judge Jenkins concluded that under §502(a)(3) of ERISA, 29 USCA §1132(a)(3)(1985), equitable relief would include "an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation [him or her] would have received during the periods of recall to employment at Geneva, . . . less any amount of income earned by [him or her] through other employment during those same periods." *See e.g., Pickering* decision at 56.

Section 502(a)(3) remedies were to be measured in context of the 1987 BLA and Pension Agreement as if the steelworker plaintiffs were terminated when Geneva was sold to BM&T on August 31, 1987. Under the 1987 BLA, an employee was entitled to a full years vacation pay to be paid the next calendar year if the employee was employed for six consecutive months in any year. If an employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. The BLA was amended by Appendix R to permit eligibility if one of three conditions was satisfied, either "(1) The employee is recalled to work in 1987, (2) The employee worked between June 15, 1986, and July 31, 1986, or (3) The employee satisfied the eligibility provisions of Section 12-A-1-b of the Collective Bargaining Agreement." Appendix R is silent on the issue of forfeit.

Judge Jenkins found that USX sold the Geneva steel plant to Basic Manufacture and Technology (BM&T) effective August 31, 1987. The steelworker union, United Steelworkers of America (the Union) ratified the June 8 agreement and June 12 collective bargaining agreement with BM&T. *Pickering* decision at 5, 40. None of the plaintiff steelworkers were employed by USX as of January 1, 1988.

opposition were without merit. The Defendants expanded significantly on these arguments at the hearing.

The Plaintiffs had no opportunity to reply under the procedural rules to the Defendants supplemental affidavits and additional twelve exhibits. The Defendants, as the moving party, determined the scope of their motion for summary judgment. Only two issues were raised by the Defendants motion. To permit the Defendants to expand the scope of their motion for summary judgment in their reply would be against the "letter and spirit" of the summary judgment rule and permitting summary judgment to be "a vehicle of injustice." Accordingly, the Court concludes that the scope of the Defendants motion for summary judgment is limited to two issues, specifically, (1) whether the Plaintiffs were entitled to received vacation pay and (2) whether the Plaintiffs were entitled to attorney's fees. However, should summary judgment be revisited with a proper pleading providing the undisputed facts and applicable law for each cause of action, the Court may grant summary judgment on some of the causes of action that were argued at the hearing.

A
VACATION PAY

Defendants argue the Plaintiffs were not entitled to receive vacation pay accrued in 1987, to be paid out in 1988, because section 12-A-3 of the BLA provides that such vacation pay is forfeited if the employees are no longer employed there on January 1, 1998. In *Pickering*, the court found that all of the steelworkers were terminated on August 31, 1987, when USX sold the Geneva steel plant to BM&T. Since no employee worked at USX on January 1, 1998, no employee qualified for the vacation pay accrued in 1987, to be payable in 1998.

In opposition, the Plaintiffs argue that they are entitled to vacation pay that accrued in 1987, because Appendix R to the BLA amended the eligibility requirements for 1987 vacation pay and therefore, the forfeit provision did not apply. Under Appendix R the Plaintiffs only had to satisfy one of the criteria to qualify for deferred vacation pay in the next year. Therefore, the Plaintiffs became eligible for deferred vacation pay in 1988, that had been vested or accrued in 1987. Specifically, the Plaintiffs argue that Appendix Q, II, reflects that in light of the "continuing concern" shared by "the Union and the Company," that USX assured the Plaintiffs that the criteria introduced *via* Appendix R would remain and did remain in place with respect to vacation years 1987-1988.

In reply, the Defendants argue that Appendix R only related to 1987 vacation eligibility and has no bearing on 1988 vacation pay. Defendants argue that Appendix Q, II had "absolutely nothing to do with vacation pay, but only constituted a joint commitment by USX and the Union to participate in the work of the Geneva Advisory Board to study and review the feasibility regarding "market conditions for Geneva as a steel-making facility." Defendants argue that there is nothing in the six steelworkers' affidavits providing that they were ever assured that Appendix R concerning 1987 vacation pay would remain in effect for 1988 vacation pay.

Under the 1987 BLA, an employee was entitled to a full years vacation pay to be paid the next calendar year if the employee was employed for six consecutive months in any year. If an employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. The BLA was amended by Appendix R to permit eligibility if one of three conditions was satisfied, either "(1) The employee is recalled to work in 1987, (2) The employee worked between June 15, 1986 and

July 31, 1986, or (3) The employee satisfied the eligibility provisions of Section 12-A-1-b of the Collective Bargaining Agreement." Appendix R is silent on the issue of forfeit.

Reviewing §12-A-1-b of the BLA, to be eligible for vacation pay in 1987, an employee must be employed for six months. However, such right is forfeited if the employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. Appendix R amends the eligibility requirements to include two additional ways to be eligible for vacation pay, but is silent on the forfeit issue. Although the Plaintiffs desire that the Court view Appendix R as striking the forfeit exception, the Court cannot do so. Appendix R addresses eligibility and therefore, amends 12-A-1-b to include two additional ways to be eligible. However, this increase in eligibility does not strike or amend the forfeit language. Appendix Q also does not strike or amend the forfeit language. Without express language striking or amending the forfeit language, the Court must read the BLA as a whole, which includes the forfeit language of §12-A-3. The Court concludes that any vacation that might have accrued in 1987, to those eligible was not payable in 1988 because such vacation pay was forfeited when they were all effectively discharged on August 31, 1987, which was prior to January 1, 1988. As found in *Pickering*, none of the plaintiff steelworkers were employed by USX as of January 1, 1988. Therefore, this Court concludes that none of them were entitled to vacation pay accrued in 1987, that was payable in 1988. Accordingly, no genuine issues of material fact exist and the Defendant is entitled to summary judgment on the limited issue of whether the Plaintiffs were entitled to vacation pay accrued in 1987, to be paid out in 1988.

Exhibit J

Ronald J. Chilton
214 East 1350 North
Lehi, Utah 84043
PRO-SE

David L. Glazier
939 East 1000South
Springville, Utah 84663
PRO-SE

I IN THE THIRD JUDICIAL DISTRICT COURT,
WEST JORDAN DEPARTMENT SALT LAKE COUNTY,
STATE OF UTAH

Ronald J. Chilton, et al., Plaintiff V. ALLEN K. YOUNG, YOUNG, KESTER & PETRO, GERRY L. SPENCE, LYNN C. HARRIS, SPENCE, MORIARTY & SCHUSTER, JONAH ORLOFSKY, PLOTKIN & JACOBS, LTD, JOHN DOES 1-V, INDIVIDUALS WHOSE TRUE IDENTITY IS UNKNOWN TO PLAINTIFFS, DEFENDANTS	Civil No. 030105887 Judge Stephen Roth Memorandum in support of certain plaintiffs motion for reconsideration of the courts first entry of summary judgment (Vacation pay issue) and opposition to defendants joint motion's to strike the motion for reconsideration of Chilton, & Glazier.

The defendants in this case are the attorneys who represented about 1800 former steel workers at U.S.X. Corp. Geneva works Steel Plant in a lawsuit lasting over 8 years and two trials before Honorable Judge Bruce Jenkins, after the first trial, Judge Bruce Jenkins ruled in 1992 that USX had violated ERISA by failing to recall categories of plaintiff steel workers during the period following the end of the work stoppage on Jan. 31, 1987, until USX sold Geneva to Basic Manufacturing & technology on Aug. 31, 1987. After the second trial, Judge Jenkins issued his decision in 1995 (the Jenkins Decision) ruling that the plaintiffs were entitled to recover certain benefits from USX as though they had worked from 2/1/87 thru 8/31/87. Judge Jenkins ruled that 22 of the 24 bell weather plaintiffs whose case's were typical of the other approxenly 1700 steel Workers were entitled to an award of back pay) **WHICH INCLUDES WAGES, SICK LEAVE, VACATION PAY, INCENTIVE PAY OR OTHER EMPLOYEE COMPENSATION.** Equal to the amount they would have received at USX during the period between 1/31/87 and 8/31/87 . No one is arguing Judge Jenkins ruling, it stands by it's self, as it is, for what it is . What is being argued is the interpretation of the ruling. Everyone agrees on what he ruled, WHICH INCLUDES WAGES, SICK LEAVE, VACATION PAY, INCENTIVE PAY, OR OTHER EMPLOYEE COMPENSATION, AND BENEFITS, AS THOUGH YOU HAD WORKED.

Allen Young knew on 6/19/95 Nine days before the settlement meeting the USX WORKER WERE AWARDED ACCRUING PENSION THRU 8/31/87 and **ACCRUING BENEFITS** thru 2/1/93 (See EXHIBIT -1-) Everyone knows the BASIC LABOR AGREEMENT is a contract between USX and UNITED STEEL WORKERS OF AMERICA No one including Honorable Pat Brian has the right to change the Honorable Federal Judge Bruce Jenkins ruling and words. All parties have to live with in the **FOUR CORNERS OF THIS CONTRACT** . The Basic Labor Agreement is very specific, giving the Company, USX the right to manage its business as it sees fit, **as long as it does not violate the Basic Labor Agreement**, (EXHIBIT 2 PAGE 24, Section 3, 3-2) which reads, **The rights to manage the business and Plants and to direct the working forces include the right to hire, suspend and DISCHARGE FOR PROPER CAUSE or transfer and the right to relieve employees from duty because of lack of work or for other legitimate reasons.**

Again the defendants either willfully or mistakenly misquote the BLA SECTION 12 (a-3). This SECTION is very clear and plain, it states it's a A forfeit clause that pertains to an employee who **(QUITS, RETIRES, DIES, OR IS DISCHARGED). NOT FOR ANY OTHER REASON.** If for an example as the defendant state, IF AN EMPLOYEE WAS NOT WORKING JANUARY 1, OF THE VACATION YEAR, WHAT HAPPENS TO ALL THE EMPLOYEES WHOSE SCHEDULE HAS THEM OFF ON JANUARY 1 ? (Do those employees forfeit there accrued vacation, **OF COURSE NOT. THEY NEVER HAVE BEFORE WHY NOW. THE JUDGE ORDERED IT AS WE HAD WORKED .** This is why you Mr. Burbidge and the Defendants can not use a line or a word or a sentence out of context. You must read the **WHOLE SECTION** with the rest of the BLA. To get the true meaning of the BLA. Again on page five on your motion dated 10/24/06 Mr. Burbidge crosses the line by saying Judge Jenkins said all STEEL WORKERS were lawfully terminated (with which we agree,) and then in the same breath says all STEAL WORKERS were discharged. (WITH WHICH WE DON'T AGREE.) Mr. Burbidge knows the BLA is very specific about the steps required for discharge. (NOBODY WAS DISCHARGED NOR AFFECTIVELY DISCHARGED). The problem is the Defendants know the forfeiture language is for quit, die, retire or discharged for proper cause. The defendants keep trying to throw discharged in the courts face, this in essence was the mistake Honorable Pat Brian made when he listened to the defendants SAY, " All the Steelworkers were discharged, and his ruling states **"AFFECTIVELY DISCHARGED." HONORABLE JUDGE PAT BRIAN HAD NO RIGHT TO CHANGE TERMINATED TO EFFETELY DISCHARGED.** by doing so he made an erroneous mistake, granting the defendants first motion for summary judgment. By doing so he also erred in granting their second motion for summary judgment. By granting the first motion for summary judgment he removed all issue pertaining to the 2nd motion for summary Judgment. As I have told the court before, and I will say it again, (I do not blame Honorable Judge Brian for making this mistake, I blame both the defendants attorney and the plaintiffs attorney for not making the issue of terminating, and discharged as used in the BLA clear to the Honorable Judge Brian. As to Mr. Burbidge saying Ronald Chilton is now PRO-SE ten months after

Judge Pat Brian memorandum decision is WRONG. Chilton went Pro-se in the early part of 2004. At this time because of the letters sent to the court by Chilton, the plaintiffs won, when Honorable Pat Brian refused to grant the first motion of summary judgment to the defendants on 12/24/03.
I Hired Mr. Evan Schmutz the early part of 2004 after being coaxed by other clients and Mr. Schmutz. Evan neglected to do as he promised his clients he would do. The clients done all we could do to get him to keep his promise, when he refused , I Ronald went around Mr. Schmutz and sent a letter for help to the court. Neither Haskins who was my first attorney, nor Evan who was my 2nd attorney done what they promised. Therefore when Evan withdrew as my council Chilton filed to go pro-se and David Glazier soon followed. We filed our Reconsideration Motion immediately within 10 days. As for voluminous briefing and lengthily oral arguments, " That is a Joke." Mr. Burbidge used most of the court time in both of the Motion Summary Judgment . while Mr Schmutz done nothing. NOW, finally after Chilton & Glaizer went Pro-Se , Evan has filed his motion for reconsideration and an objection to defendants Motion to Strike Chilton & Glazier Motion for Reconsideration. As for Chilton and Glazier being grossly tardy, this is more of Mr. Burbidge hog-wash and gibberish.
Mr. Burbidge knows when the defendants filed their first MSJ they were Adamantly persuasive that all USX employees were discharged. Now the plaintiffs have proven they were not discharged, but terminated due to the plant closing, Mr. Burbidge has changed his position to terminated. But still tries to use the forfeit language of discharge on termination. No where is there any language in the BLA which says forfeiture of benefits if terminated. The defendants continually say " If you were not working on January first you are not entitled to vacation pay that year. (What about the 100s of employees whose working schedule had the employee off on Jan. first Did they forfeit their vacation pay. **NO-NO-NO. THIS HAS BEEN A PRACTICE FOR 40 + YEARS TO HAVE PEOPLE OFF DUE TO WORK SCHEDULE ON January the first of every year.**
In defendants Exhibit C on page 11 the attorney Mr. Burbidge again misquotes the BLA on page 90 section 12 (a-3) Mr. Burbidge says, while the BLA provides that working a certain amount of time in 1987 Entitles a steel worker to vacation pay in 1988. Burbidge says: "This is only true if you worked Jan. the first 1988", Nowhere in the BLA does it say this...It is

a figment of Mr. Burbidge's imagination. Mr. Burbidge misquotes the BLA... Section 12 (a-3) of the BLA is very clear and plain. Mr. Burbidge— read what is written, not what you would like it to say...It says an employee even though otherwise elegible under this sub section A-3 FORFEITS THE RIGHT TO RECEIVE VACATION BENEFITS UNDER THIS SECTION IF HE **QUITS, DIES, RETIRES OR IS DISCHARGE FOR PROPER CAUSE;** prior to Jan. 1 of the vacation year. Since no one quit, died, or was discharged, **THIS FORFEIT LANGUAGE DOES NOT APPLY.** When the BLA is read in the right light, as it was intended, It completely invalidates all of Mr. Burbidge's deduction, and arguments on this issue. Another Misquote of Mr. Burbidge, on page 12 line 5 of his ruling, you misquote Honorable Judge Jenkins saying, he only awarded benefits received in 1987. This is total complete balderdash. This is not what he said. He awarded BENEFITS EARNED AND ACCURDED IN 1987, "**AS IF YOU HAD WORKED" (In at least 22 places in Judge Jenkins ruling.)** Some of these accrued benefits continue for up to TWO YEARS & MORE after the date of sale. 8/31/87. **Mr. Young knew that some of these accrued benefits continued until 1993. (See exhibit one.)** As far as section B of Burbidge's motion, (the attorney fee claim). Not one of the plaintiffs looked into any crystal ball, and said, (Judge Jenkins would award attorney fees.)(Pickering / USX). It was the defendant attorneys who told USX the judge would probley award attorney fees if the case went to adjudication. What the plaintiffs complained of was the fraudulent misuse of these funds. No attorney has the right to syphon off the top of any award in an out of court settlement, of any fees until that money is distributed to all clients. Then the attorney gets his continuency fee at that time...**NOT BEFORE.**

NO one except Mr. Burbidge and his clients fanticises in Never Never Land, they misconstrue what is said , they misquote the BLA. He has attacked my handicaps and attacked my integrity, saying, " Chilton has been in court over 35 times and went pro-se in some of those cases. SO WHAT. How many times has Burbidge been to court? It does not matter. What matters is the fact he has to stoop to this kind of garbage to try to win his case. SORRY Burbidge I will not stoop to your level. All we have ever ask in the last

Five and one half years is our day in court. It is not the pro-se plaintiffs

who is dragging this out. It is the lawyers. I do understand why you are afraid of the motion to reconsider. If you are sure of the position you are defending, you have nothing to worry about. I am sure of my position. And I know the Honorable Judge Roth will make the correct decision now he has a copy of Judge Scott Daniels deposition-Allen Young deposition- Mountain View Transcript -Judge Jenkins ruling- the BLA. And assorted documents. The defendants position, is that no benefits were paid after 8/31/87 is not right.

As to page 13 again Mr. Burbidge you are putting words in Honorable Judge Jenkins mouth. True, he did say we were terminated as of 8/31/87. He never said, We were not entitled to VACATION PAY under Section 12A-3, because we were terminated. As Mr. Burbidge says, the language of the BLA Section A-3 relates to discharge prier to Jan 1,1988. The problem with Mr. Burbidge scenario is, he keeps getting terminated and discharged mixed up, using the two words as though they are the same. **NOT SO.** Termination is an act by the company in its normal course of business. The employee has no input to this action according to the BLA. Vacation is an accrued benefit the same as pension, sub pay, profit sharing, incentive pay. These and other benefits are accrued over a period of time, and are payable when due. In the case of pension they are accrued over a period of many years, and are payable when a person reached retirement. They are not lost when the company terminates an employee. The same holds true for sub pay benefits, they are accrued over a period of time, and are not lost upon termination. They go on for years after termination. Vacation pay is accrued over a period of time, and are only paid when they become due. In other words the following year. These are all accrued benefits and are not **LOST** upon termination. If you use **Mr. Burbidge** reasoning, that because you were **TERMINATED** you were **EFFECTIVELY DISCHARGED,** so you **FORFEIT** your **BENEFITS...**

THIS IS TOTALLY UNTRUE! ! !

Come on Mr. Burbidge, your arguments on forfeiture do not make any sense. Forfeiture was written for the express purpose of **quit, die, retire, or discharge.** not for any other reason.

When Mr. Young and his Associate's stood on the floor at the settlement meeting and held Honorable Judge Jenkins Ruling in their hands, saying, "In our heart of hearts we believe this settlement which we have

reached with USX gives all of you 100% + More of honorable Judge Jenkins Ruling, they the defendants took all of USX obligations on their selves. They negotiated this settlement with USX and sold it to their clients thru a lie, by saying 100% + MORE. Here is the promise 100 % + MORE where is our money? That's what we want to Know! As you say Mr. Burbidge the Plaintiffs attorney was lacking in his arguments of the BLA. That is why we are asking the court for a reconsideration.

DATED this__1__day of November, 2006

Ronald J. Chilton PRO-SE

David L. Glazier PRO-SE

Exhibits: 2 inc.

Exhibit K

RICHARD D. BURBIDGE (#0492)
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Attorneys for Jonah Orlofsky and
Plotkin, Jacobs & Orlofsky, Ltd.

10-24-06

IN THE THIRD JUDICIAL DISTRICT COURT, WEST VALLEY DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

RONALD J. CHILTON, et al., Plaintiffs, v. ALLEN K. YOUNG; YOUNG, KESTER & PETRO; GERRY L. SPENCE; LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKY; PLOTKIN & JACOBS; and JOHN DOES I-V, individuals whose true identity is unknown to plaintiffs, Defendants.	)	Civil No. 030105887 Judge Stephen Roth

DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF MOTION TO STRIKE MOTION OF "CERTAIN PLAINTIFFS" FOR RECONSIDERATION OF THE COURT'S FIRST ENTRY OF SUMMARY JUDGMENT (VACATION PAY ISSUE) AND OPPOSITION TO A PORTION OF DEFENDANTS' JOINT MOTION TO STRIKE THE MOTIONS FOR RECONSIDERATION OF RONALD J. CHILTON AND DAVID L. GLAZIER

Defendants Allen K. Young, Young, Kester & Petro, Jonah Orlofsky, Plotkin, Jacobs & Orlofsky, Ltd., Gerry L. Spence, Lynn C. Harris, and Spence, Moriarity & Schuster (hereinafter jointly referred to as "Counsel") jointly file this memorandum in support of their motion to strike the motion of the Plaintiffs represented by Hill, Johnson & Schmutz (the "HJS Plaintiffs") to reconsider the Honorable Pat B. Brian's decision rendered September 22, 2005 granting Counsel's first motion for summary judgment on Plaintiffs' vacation pay claim, and to strike the HJS Plaintiffs' opposition to Counsel's joint motion to strike the motions for reconsideration filed by Ronald J. Chilton ("Chilton") and David L. Glazier ("Glazier").

INTRODUCTION

The Defendants in this case (hereinafter collectively referred to as "Counsel") are the attorneys who represented over 1,800 former steelworkers at USX Corporation's Geneva Works steel plant in a titanic battle with USX lasting over eight years and through two lengthy trials before the Honorable Bruce S. Jenkins, in both of which Counsel were successful for their clients. After the first trial, Judge Jenkins ruled in 1992 that USX had

violated ERISA by failing to recall categories of Plaintiff steelworkers during the period following the end of a work stoppage on January 31, 1987, until USX sold Geneva to Basic Minerals and Technologies, Inc. ("BM&T") on August 31, 1987. After the second trial, Judge Jenkins issued his decision in 1995 (the "Jenkins Decision") ruling that all but two of the 24 "bellwether" Plaintiffs whose claims were considered to be typical of the different categories of the remaining Plaintiffs were entitled to recover back pay from USX during varying periods between February 1 through August 31, 1987 that Judge Jenkins ruled the bellwether individual Plaintiffs should have been recalled, less income earned by the bellwether Plaintiffs from other sources during the damage periods. The ***amount*** of damages the bellwether Plaintiffs were entitled to recover and the damage claims of the remaining many hundreds of steelworkers remained to be tried.[1]

As a result of this remarkable effort, Counsel were finally able to obtain a settlement which obviated the need for hundreds of trials over a period of several years. Under the Settlement Agreement, USX Corporation agreed to and did in fact pay $47 Million in cash in two installments in September 1995 and March 1996 and agreed to various pension benefits for the steelworkers. The settlement with USX gave the steelworkers everything that Judge Jenkins' Decision would have given them after many more years of litigation plus $3.714 Million above actual damages based upon Counsel's

[1] For example, it remained for each individual steelworker not only to prove the amount of his or her damages, but (except for the bellwether Plaintiffs) to prove when he or she would have been recalled to work by USX following the end of the work stoppage on January 31, 1987 if USX had not been motivated by a desire to interfere with the steelworkers' pension benefits.

argument to USX that Judge Jenkins would probably ultimately award the steelworkers attorneys' fees, although in ERISA actions the court has discretion whether to award attorneys' fees to either party and attorneys' fees are not to be awarded as a matter of course.

After full disclosure of the terms of the settlement in written documents and during a lengthy meeting held with the steelworkers at Mountain View High School on June 28, 1995, the 1,677 settling steelworkers ***unanimously*** approved the settlement in writing and later each, in writing, released Counsel from any liability in connection with the settlement. The steelworkers were paid every dime of their settlement.[2]

Despite the truly landmark victory won by Counsel for their clients, a small minority of the steelworkers filed this lawsuit in July 2001 - - a full six years after the settlement - - making meritless claims against attorney Allen Young concerning the settlement that all steelworkers unanimously accepted so many years ago. Three years later, in 2004, the majority of the Plaintiffs obtained new counsel, Hill, Johnson & Schmutz ("HJS"), and filed a Third Amended Complaint adding the remaining Counsel as Defendants nine years after the settlement.

The genesis of the lawsuit, and the principal claim originally asserted by Plaintiffs against Counsel, was that they misrepresented that the USX settlement would give the

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[2] Of the original approximately 1,892 Plaintiff steelworkers, the claims of approximately 200 retired steelworkers had been dismissed by Judge Jenkins' first decision in 1992 because they had retired prior to the work stoppage. USX paid $5,000 to each retiree in 1993 to settle their claims.

Plaintiffs everything that the Jenkins Decision would give them and more, but that representation was allegedly false because Judge Jenkins allegedly awarded Plaintiffs 1988 vacation pay but the settlement did not. On September 22, 2005, Judge Pat B. Brian issued his Memorandum Decision (the "First Brian Decision"), a copy of which is attached hereto as Exhibit A, granting Counsel summary judgment dismissing that claim. Judge Brian ruled that because Judge Jenkins had ruled in the USX case that all of the steel workers were lawfully terminated as USX employees when USX sold the Geneva plant effective August 31, 1987, no steelworkers were entitled to vacation pay in 1988 because under the Basic Labor Agreement between USX and United Steelworkers of America (the "Union") a steelworker was not entitled to vacation pay in 1988 if he or she was discharged prior to January 1, 1988.

Counsel thereafter filed a second joint motion for summary judgment on the Plaintiffs' remaining alleged claims for fraud, legal malpractice-breach of contract, legal malpractice-breach of fiduciary duty, legal malpractice-negligence and accounting. In response to the motion, the 38 Plaintiffs represented by Haskins & Associates, having had their claims for 1988 vacation pay which generated the lawsuit dismissed by Judge Brian, voluntarily dismissed their claims with prejudice. The remaining approximately 180 Plaintiffs represented by HJS attempted to stay in court by asserting a hodgepodge of supposed wrongdoing by Counsel which they argued entitled them to relief. The remaining Plaintiffs resorted to asserting new claims in opposition to the second summary judgment motion that were not even alleged in their Third Amended Complaint.

ARGUMENT

THE HJS PLAINTIFFS HAVE WHOLLY FAILED TO DEMONSTRATE ANY BASIS FOR RECONSIDERING JUDGE BRIAN'S DECISION.

The claim which gave birth to this lawsuit was the Plaintiffs' erroneous notion that under Judge Jenkins' decision in the USX case all of the steelworkers were entitled to vacation pay in 1988 and that because the USX settlement did not include any amount for 1988 vacation pay, Counsel's representation to the steelworkers that the settlement gave them everything that Judge Jenkins' decision would have given them after many more years of litigation was false. The Plaintiffs asserted claims for fraud, legal malpractice-breach of contract, legal malpractice-negligence and legal malpractice-breach of fiduciary duty based upon Counsel's alleged failure to obtain 1988 vacation pay as part of the settlement. After lengthy briefing and argument, Judge Brian granted summary judgment dismissing Plaintiffs' 1988 vacation pay claims on September 22, 2005. Judge Brian correctly ruled that the steelworkers were only entitled to 1988 vacation pay if they were still employed by USX as of January 1, 1988. Because Judge Jenkins had ruled that all of the steelworkers were terminated when USX sold the Geneva steel plant to Basic Minerals and Technologies, Inc. effective August 31, 1987, the steelworkers were not entitled to 1988 vacation pay.

When the HJS Plaintiffs opposed the second summary judgment motion months after the first summary judgment motion was decided, they did not seek to have Judge Brian reconsider his decision on the vacation pay claim. Now, one year after Judge Brian's decision, the HJS Plaintiffs have jumped on the bandwagon of *pro se* Plaintiffs Chilton and Glazier to belatedly argue that Judge Brian incorrectly ruled that the Plaintiffs were not entitled to 1988 vacation pay under Judge Jenkins' decision because they were discharged as employees when USX Corporation ("USX") sold the Geneva steel plant effective August 31, 1987 and, thus, were no longer employed on January 1, 1988, which was a requirement to receive 1988 vacation pay. Unlike Chilton and Glazier, the HJS Plaintiffs make no attempt to have the court reconsider Judge Brian's decision on Counsel's second motion for summary judgment.[4]

The HJS Plaintiffs' motion for reconsideration on the vacation pay claim is made on the very same basis as the Chilton and Glazier motions for reconsideration on that claim: That Judge Jenkins determined that all of the steelworkers' employment had been terminated as of August 31, 1987 at the time of the Geneva sale, but that under the Basis Labor Agreement ("BLA") between the Union and USX a "discharge" is supposedly

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[4] Perhaps this is because, as the court will see when it hears and determines Counsel's third motion for summary judgment on the remaining breach of fiduciary duty claim, the HJS Plaintiffs attempt to essentially ignore Judge Brian's second decision by improperly reasserting (under a breach of fiduciary duty rubric) the very same factual claims that Judge Brian has already dismissed.

different than a "termination." Although the HJS Plaintiffs concede the interpretation of the BLA was a question of law for Judge Brian to decide [HJS Pls' Memo. at 2-3], they erroneously argue Judge Brian's interpretation of the BLA was wrong.

The one notable difference between the motions for reconsideration filed by Chilton and Glazier on the vacation pay claim and the motion for reconsideration filed by the HJS Plaintiffs on the vacation pay claim is that the HJS Plaintiffs do not argue that any newly discovered evidence justifies reconsideration.[5] Rather, the HJS Plaintiffs attempt to justify their extravagantly tardy motion for reconsideration by castigating Judge Brian over and over again in their memorandum for supposedly not interpreting the provisions of the Basic Labor Agreement (the "BLA") as a whole and ignoring the provisions of the BLA concerning "discharge."[6]

The short and dispositive answer to this baseless and remarkably unfair criticism of Judge Brian is that the HJS Plaintiffs' legal argument concerning the purported meaning of "discharge" under the BLA is an entirely new argument that was not made in any fashion by the HJS Plaintiffs before Judge Brian. Indeed, glaringly absent from the

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[5] Chilton and Glazier erroneously argued that a pay stub which supposedly showed that a single steelworker received 1988 vacation pay constituted new evidence. As pointed out by Counsel in their motion to strike, that pay stub shows no such thing and it was not newly discovered.

[6] Courts recognize that a "discharge" of an employee means "termination" of the employee. *See, e.g., Fishgold v. Sullivan Dry Dock & Repair Corp.*, 66 S. Ct. 1105, 1112 (1946) ("discharge normally means termination of the employment relationship or loss of a position."); *Phelps Dodge Corp. v. Brown*, 540 P.2d 651, 654 (Ariz. 1975); *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 869 (Del. 1969) ("'discharge' normally means the termination of the employment relationship . . . .").

new argument that the HJS Plaintiffs have belatedly raised is not based upon any relevant new evidence, but could have been asserted had the HJS Plaintiffs' counsel chosen to do so in opposition to the first summary judgment motion 16 months ago. They should not now be permitted to try on for size a new argument that could have been made at the time the first summary judgment motion was considered by Judge Brian.

The HJS Plaintiffs attempt to justify raising their new argument for the first time 16 months after their original opposition by telling the court that they could not have anticipated that Judge Brian would rule against them on the 1988 vacation pay claim on the basis that they had been discharged from their employment prior to January 1, 1988 and, therefore, were not entitled to 1988 vacation pay under Judge Jenkins' decision. The HJS Plaintiffs are not being candid with the court. Their argument flies in the face of, and seriously distorts, the record in this case.

The parties are in agreement that in his decision Judge Jenkins ruled all of the steelworkers were terminated by USX as of August 31, 1987 when USX sold Geneva and that their rights to benefits had to be determined as if they had remained active employees who were terminated at that time. [*See* Defs' memo. in support of motion to strike Chilton motion at 17.] In turn, Section 12A.3 of the BLA provided that:

> An employee even though otherwise eligible under this Subsection A, forfeits the right to vacation benefits under this Section if he quits, retires, dies, or ***is discharged prior to January 1 of the vacation year.*** [Emphasis added]

The ***sole*** argument asserted by Counsel for summary judgment on the vacation pay claim was that because Judge Jenkins ruled all employees were lawfully terminated as of August 31, 1987, they were not entitled to 1988 vacation pay under Section 12A.3 as they had been terminated, or the in the language of Section 12A.3 "discharged", prior to January 1, 1988. [Attached hereto as Exhibit C is an excerpt of the relevant pages of Counsel's memorandum in support of the first motion for summary judgment.] **This is the precise basis upon which Judge Brian granted summary judgment on the vacation pay claim.**

In their opposition memorandum and at oral argument, the HJS Plaintiffs did not say a word about any supposed difference between "termination" and "discharge" or raise in any fashion their new argument that although the steelworkers were "terminated", they were not "discharged". Instead, the HJS Plaintiffs tacitly acknowledged that on its face Section 12A.3 of the BLA barred their 1988 vacation pay claim, but argued that Section 12A.3 was amended by Appendix R and Appendix QII to the BLA. [An excerpt of the relevant pages of the HJS Plaintiffs' memorandum in opposition to the first summary judgment motion is attached hereto as Exhibit D.]

Appendix R entitled "Letter Agreement on 1987 Vacation Eligibility" only related to ***1987*** vacation eligibility, did not in any way affect the requirements of Section 12A.3 of the BLA and had no bearing whatsoever on ***1988*** vacation pay, as Judge Brian correctly determined. [*See* Judge Brian's 9/22/05 Decision at 10-11.] Appendix QII to the

Exhibit L

Defendant Young's Settlement Summary for Bill Wright

Settlement Summary for Bill Wright

Sign in front of a witness and return on or before February 26, 1996, only if it is correct.

Your Second Payment Gross Amount is $17,978.00 (before taxes and attorney's fees).

By looking at the page four Chart entitled Final Gross Payout by Group, you can determine your category. You can also see how the two payments combined total the amount promised in our meetings and in the release agreements. The total amount received was increased by the return of any costs you paid and it may be increased if you received an award from the hearings process. The total amount received is reduced by your attorney's fees of 33 1/3%, unpaid costs and the hearings fees charge, if any. Also, some taxes (usually not enough) have been and will be withheld from your gross installment checks by USX. The following paragraphs detail your upcoming check:

Calculation of Second Installment Check (before taxes):				
Second Payment Gross Amount:		**$17,978.00**		
Less Unpaid Costs ($1,100 - Costs paid):	-	$0.00		
		$17,978.00		
Less Atty's Fees (1/3 of Gross - Unpd Costs):		$5,992.67		
		$11,985.33		**$11,985.33**
Less Attorney's Fee on Pension#		$0.00		
Less Hearings Fee (if applicable)		$100.00		
Total costs		$100.00	-	$100.00
				$11,885.33
Add Hearings Amount (if any)^	+	$7,411.93		
Less Atty's Fee on Hearing Amt (1/3 of Amt)		$2,437.31		
Hearing Amount subtotal		$4,974.62	+	$4,974.62

Gross Check Amount to You (*before Taxes*) $16,859.95*

I, Bill Wright, do hereby accept and understand the breakdown set forth above and that my share of the final settlement proceeds arising from Pickering v. U.S.X. and related cases is **$16,859.95.*** I ask that my check be mailed to the address above on or about March 4, 1996, and I do hereby acknowledge that the figures above are correct, and I do hereby release my attorneys from any claim relating to the settlement.

SIGNED and DATED this 22 day of February, 1996.

Address 273 So 200 W
Payson UT 84651
801-465-9607

Bill Wright
Soc Sec #: REDACTED

Witnessed by: Blaine L Wright Witness name printed: Blaine L. Wright

#We reserve the right to collect additional attorney's fees on any definable benefit as a result of increased pension rights received as a result of the Pickering litigation.

*We reserve the right to change this number if a significant calculation error or category error is made, only after notice to and a meeting with the client.

^A copy of Judge Daniel's brief ruling about your individual case, and the case in general, is available upon request.

FINAL GROSS PAYOUT BY GROUP

Plaintiff Groups All payments are before taxes and attorneys' fees	1st Payment Sept. 1995	2nd Payment Mar. 1996	Total Payment per Plaintiff *Before taxes and attorney's fees	Total Amount
Idling Plaintiffs: (1320) Those Union represented plaintiffs and non-Exempt, non-represented plaintiffs who were not recalled to work at USX on or after February 1, 1987, but who were actively employed just prior to the work stoppage on July 31, 1986.	$10,475.00	$16,025.00	$26,500.00①	$34,980,000.00
Recalled Idling Plaintiffs: (54) Those Union represented plaintiffs who were recalled to keep the plant on hot idle on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00①	$648,000.00
Managers: (44) Management plaintiffs who were recalled or were working on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00①	$528,000.00
Laid Off Managers: (17) Management plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$13,045.00	$19,955.00	$33,000.00①	$561,000.00
Recall Plaintiffs: (214) Union represented plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$11,752.00	$17,978.00	$29,730.00①	$6,362,220.00
LaRoche: (28) Union representatives who were sold to LaRoche Industries in May, 1986.	$4,744.00	$7,256.00	$12,000.00①	$336,000.00
			Subtotal	$43,415,220.00②
			Costs	$ 1,805,731.00
			Hearings Awards	$ 2,349,332.28③
			Minus Cost Charge③	$ 570,283.28
			Total	$47,000,000.00

Gross Amount Awarded	$47,000,000.00	Fees	$45,194,269.00
Costs	$ 1,805,731.00	Calculation	divided by 3
Net to be divided	$45,194,269.00	Attorneys Fees=	$15,064,756.33④

① Amounts may be increased by pension payments and hearings proceeds.
② Attorney's Fees were taken from these amounts minus the cost charges only (See calculation above).
③ The Cost Charge came from amounts subtracted from clients who did not pay their costs. This sum was distributed by Judge Daniels as part of the hearings proceeds.
④ Fees were divided between Young & Kester, Spence, Moriarity & Schuster, Plotkin & Jacobs, Lynn C. Harris, Doug Baxter, Vickie Rinne, Michael Goldsmith, Bill Corbet and Howard Egleft.

Hearing Worksheet for Idling Plaintiffs

Settlement				Plaintiff
$36,072.00		Average Wage for years 1984-1986		$_____
0.53	x	194/365 days (percentage)	x	0.53
$19,118.00		Average Lost Wage (Gross)		$_____
$ 1,500.00	-	Deductions:. Wages Paid (2/16-8/31/87)		$_____
$ 1,500.00	-	Sub (2/16-8/31/87)		$_____
$16,118.00		Total Gross Wage Loss		$_____
1.644	x	Compound Interest	x	1.644
$26,500.00		Total Damages (Incl. Int & Atty's Fees)		_____

If your calculations exceed $26,500.00 then you should probably request a hearing. If your calculations do not exceed $26,500.00 you may still request a hearing if you have special facts or circumstances which may entitle you to additional money from the surplus fund.

Total Gross Payout by Group

Everyone will be repaid up to $1,100.00 based upon what costs each plaintiff paid in addition to the payments listed below.

Plaintiff Groups All payments are before taxes and attorney's fees	1st Payment Aug/Sept, 1995	2nd Payment Feb/Mar, 1996	Total Payment per Plaintiff *Before taxes and attorney's fees	Total Amount
Idling Plaintiffs: (1316) Those Union represented plaintiffs, and non-Exempt, non-represented plaintiffs who were not recalled to work at USX on or after February 1, 1987, but who were actively employed just prior to the work stoppage on July 31, 1986.	$10,475.00	$16,075.00	$26,500.00*	$34,874,000.00
Recalled Idling Plaintiffs: (55) Those Union represented plaintiffs who were recalled to keep the plant on hot idle on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00*	$ 660,000.00
Managers: (50) Management plaintiffs who were recalled or were working on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00*	$ 600,000.00
Laid Off Managers: (14) Management plaintiffs who were laid off prior to December 31, 1986 and not recalled to work on or after February 1, 1987.	$13,045.00	$19,955.00	$33,000.00*	$ 462,000.00
Recall Plaintiffs: (211) Union represented plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$11,752.00	$17,978.00	$29,730.00*	$ 6,273,030.00
LaRoche: (28) Union represented plaintiffs who were sold to LaRoche Industries in May, 1986.	$4,744.00	$7,256.00	$12,000.00*	$ 336,000.00
			Subtotal	$43,205,030.00
			Costs	$ 1,841,400.00
			Reserve	$ 1,453,570.00**
			Total	$46,500,000.00**

***These amounts may be increased by pension payments and hearings proceeds if applicable.**

****Amounts will be increased by $500,000.00 if all claims are resolved by the date of the second payment.**

Exhibit G
Defendant Young's Hearing Worksheet for Idling Plaintiffs

Hearing Worksheet for Idling Plaintiffs

Settlement				Plaintiff
$36,072.00		Average Wage for years 1984-1986		$
0.53	x	194/365 days (percentage)	x	0.53
$19,118.00		Average Lost Wage (Gross)		$
$ 1,500.00	-	Deductions: Wages Paid (2/16-8/31/87)	-	$
$ 1,500.00	-	Sub (2/16-8/31/87)	-	$
$16,118.00		Total Gross Wage Loss		$
1.644	x	Compound Interest	x	1.644
$26,500.00		Total Damages (Incl. Int & Atty's Fees)		

If your calculations exceed $26,500.00 then you should probably request a hearing. If your calculations do not exceed $26,500.00 you may still request a hearing if you have special facts or circumstances which may entitle you to additional money from the surplus fund.

Exhibit M

In The Third Judicial District Court Of Salt Lake County
West Jordan Department, State of Utah

Chilton et-all
Plaintiff,

vs.

Young et-all
Defendant.

SUBPOENA

Case No. 030105887

To: EVAN Schmutz- Hill-Johnson-Schmutz

YOU ARE COMMANDED:

[ ] to appear in the Third District Court, West Jordan Department at 8080 S. Redwood Rd., West Jordan, Utah on the date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

all Files your Former clients Paid you To produce all communication with defendents- all accounting Files produced by our accounting Firm. all other documents Produced by you pertaining to case # 030105887. We your clients paid For them, and we want them!

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

MAR 03 2008

*ISSUING OFFICER'S SIGNATURE DATE

(check box below to indicate title)

[X] Deputy Court Clerk

[X] ~~Attorney~~ for Plaintiff - Pro-se

[ ] Attorney for Defendant

Ronald Chilton

Phone- 687-5222

*The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court. Rule 45(a)(3) Utah Rules of Civil Procedure.

Exhibit C
Ronald J. Chilton's Subpoena demand for inspection of documents, December 4, 2006, Page 1 & 2

Subpoena

December 4, 2006
Page 1 of 2

Dave Glazier Pro-Se
939 East 1000 South
Springville, Utah 84663
Telephone (801)885-2058

Ronald J. Chilton Pro-Se
214 East 1350 North
Lehi, Utah , 84043
N/A

IN THE 4TH DISTRICT COURT, PROVO, STATE OF UTAH
UTAH COUNTY

Pickering

V

U.S.X.

SUBPOENA

Civil 87-C-838J 88-C-763J 91-C-636J

To: Allen K. Young
Address: 75 South 300 West
Provo, Utah

YOU ARE COMMANDED. To produce or permit inspection and copying of the following documents at the place and date and time specified below:
The four boxes of Dr. Paul Randall exhibits, that you removed from the Federal Court, in S.L.C. and all other document concerning:
Pickering/U.S.X. consolidated case Civil # 87-C-838J, Civil # 88-C-763J, Civil # 91-C-636J.
These files are needed in case # 030105887 Chilton /Young
3rd District Court, Salt Lake County, State of Utah West Jordan Department
If necessary we would be happy to come to your office within the next 14 days, at your earliest convenience to inspect or copy this information.

Thank you:

David L. Glazier Pro Se

Ronald J. Chilton Pro Se

12/7/

ISSUING OFFICER'S SIGNATURE AND TITLE DATE
(INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

In The Third Judicial District Court Of Salt Lake County
West Jordan Department, State of Utah

Ronald Chilton et-al
Plaintiff,

vs.

Allan K Young-et-all
Defendant.

SUBPOENA

Case No. 020404957

To: James Haskins

YOU ARE COMMANDED:

[ ] to appear in the Third District Court, West Jordan Department at 8080 S. Redwood Rd., West Jordan, Utah on the date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

all Files-and documents produced by you. all Copy's of all documents Copyed at Christensen and Jensen-TOM Chamberlain's documents

[ ] to permit inspection of the following premises at the date and time specified below:

Your Clients paid For this service and we demand that you produce them with in 10 days of service

PLACE We will Come To your office TO DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

Pick Them up

MAR 0 3 2008

*ISSUING OFFICER'S SIGNATURE DATE

(check box below to indicate title)

[X] Deputy Court Clerk

[X] ~~Attorney~~ for Plaintiff Pro-se

[ ] Attorney for Defendant

Ronald Chilton

Phone- 697-5222.

*The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court. Rule 45(a)(3) Utah Rules of Civil Procedure.

Exhibit N

Evan A. Schmutz (3860)
Theodore F. Linn (8234)
HILL, JOHNSON & SCHMUTZ, L.C.
Jamestown Square, Suite 200
3319 North University Avenue
Provo, Utah 84604
Telephone (801) 375-6600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

RONALD J. CHILTON, *et al*, Plaintiffs, v. ALLEN K. YOUNG; YOUNG, KESTER & PETRO; GERRY L. SPENCE; LYNN C. HARRIS; SPENCE, MORIARTY & SCHUSTER; JONAH ORLOFSKY; PLOTKIN & JACOBS and John Does I - V, individuals whose true identity is unknown to the Plaintiffs, Defendants.	**NOTICE OF WITHDRAWAL OF COUNSEL** Civil No. 030105887 Judge Stephen Roth

---

Evan A. Schmutz and the law firm of Hill, Johnson & Schmutz, L.C. hereby give notice of their withdrawal as counsel for Plaintiff Ronald Chilton. There are no motions pending and no trial date has been set. The last known address of the Plaintiff is:

Ronald Chilton
214 E. 1350 No.
Lehi, Utah 84043

CERTIFICATE OF MAILING

I hereby certify that I delivered a true and correct copy of the foregoing Brief of Appellant was mailed first class on _____ to the following:

Burbidge & Mitchell
215 S. State Street
Suite 920
Salt Lake City, Utah 84111
Phone: (801) 355-6677

12-20-2008, 2008

Julie Edwards
170 S. Main Suite 400
Salt Lake City Ut. 84101
Phone (801) 533-8383

Ronald Chilton
Ronald Chilton, Plaintiff in Pro Se
Designated for the Plaintiffs

David L. Glazier
David L. Glazier Plaintiff in Pro Se
Designated for the Plaintiffs

Michael Skolnick
10 Exchange Place Suite 400
Salt Lake City, Utah 84111
Phone (801) 521-3773