

2010

Alpine Orthopaedic Specialists, L.L.C., a Utah Corporation v. Utah State University, and Intermountain Healthcare, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALPINE ORTHOPAEDIC
SPECIALISTS, L.L.C., a Utah
Corporation,

Plaintiff/Appellant,

v.

UTAH STATE UNIVERSITY, and
INTERMOUNTAIN HEALTHCARE,
INC.,

Defendants/Appellees.

Case No. 20100275

REPLY BRIEF OF THE APPELLANT

**ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH
The Honorable Clint S. Judkins, Presiding
Trial Court Case No. 060102502**

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**FILED
UTAH APPELLATE COURTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ARGUMENT.....1

 I. THIS ACTION WAS TIMELY FILED BECAUSE STATUTE OF
 LIMITATIONS FOR THE BREACH OF A VALID, EXISTING
 CONTRACT IS SIX YEARS.....1

 A. The 2001 Contract Between Alpine and USU Was Outside the Utah
 Procurement Code Therefore the Fourteen Day Time for Appeal Does
 Not Apply.....1

 B. Utah Code Ann. § 63G-6-817(c) is the Relevant, Applicable Provision
 Should This Court Determine that the Utah Procurement Code
 Applies.....4

 II. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE ALPINE
 HAS PROPERLY MITIGATED ITS DAMAGES.....5

CONCLUSION.....6

CERTIFICATE OF SERVICE.....7

ADDENDUM.....8

TABLE OF AUTHORITIES

STATUTES

Utah Code Ann. § 63-6-801 (2008).....3

Utah Code Ann. § 63G-6-815 et seq. (2008).....3,4,5

Utah Code Ann. § 63G-6-817 et seq. (2008).....3,4,5

Utah Code Ann. § 78B-2-309 (2008).....4,5

ARGUMENT

I. THIS ACTION WAS TIMELY FILED BECAUSE STATUTE OF LIMITATIONS FOR THE BREACH OF A VALID, EXISTING CONTRACT IS SIX YEARS

A. The 2001 Contract Between Alpine and USU Was Outside the Utah Procurement Code Therefore the Fourteen Day Time for Appeal Does Not Apply

In 2001 Alpine and USU entered into a five year contract that contained an automatic renewal provision which extended the contract five additional years. In 2006, USU's actions and inactions constituted a breach of the contract including not honoring the contract's automatic renewal provision. Alpine sought redress for the breach of contract in state district court.

On April 9, 2009 the district court issued a Memorandum Decision in which it was held that, "In 2001, USU determined that the Physician Service Agreement ("PSA") was outside of the procurement code and chose to ratify and affirm the PSA. Thus, all the provisions of the PSA are valid and binding, including the automatic renewal term." *See* Brief of Appellee, Addendum "E" at 12-13. USU has not challenged the district court's holding and has conceded that the contract was outside of the procurement code. Thus, it is undisputed that USU and Alpine had a valid, binding contract that was outside of the Utah Procurement Code in 2006 when USU issued a request for proposal for the team physician services. It is

disingenuous for USU to argue that the Utah Procurement Code now applies to the 2001 contract between USU and Alpine.

Alpine is aggrieved by USU's breach of contract (the 2001 contract) and not the solicitation or award of any contract in 2006. USU attempts to argue that the solicitation of the new contract was the sole breach of contract. *See* Brief of Appellee at 6. In reality, the award of the contract in 2006 was just one of many actions that USU took, or failed to take, that constitute USU's breach of the 2001 contract. Assuming *arguendo* that USU never solicited or awarded another bid, USU still breached the contract through their other actions or inactions. In the First Amended Complaint, Alpine listed the solicitation and award among six other actions or failures to act including but not limited to the following:

- a) Failure to reasonably investigate or comply with any and all legal conditions precedent which may have been necessary prior to entering into the Agreement;
- b) Failure to provide written notice to Alpine of any proposed amendments to the Agreement as required under the Agreement;
- c) Failure to comply with the terms of the Agreement by failing to recognize that the Agreement automatically renewed under the terms of the Agreement;

- d) Attempting to void the Agreement by stating that the contract was illegally entered into, when compliance with the law was solely USU's duty and responsibility and not the duty nor responsibility of Alpine;
- e) Failure to fulfill its obligation to renew the Agreement under the terms of the Agreement, and honor the Agreement's Renewal Term;
- f) USU's failure to take further actions and execute additional documents and instruments as necessary to perfect and complete the Agreement.

Alpine's First Amended Complaint at ¶ 76. (A true and correct copy is attached hereto in Addendum "A")

USU argues that the Utah Procurement Code applies to the 2001 contract even though the district court determined that it was outside of the Utah Procurement Code. *See* Brief of Appellee at 6. Contrary to USU's assertions, Utah Code Ann. § 63G-6-801 does not apply because the contract was outside the procurement code and the breach was not "in connection with the solicitation or award of a contract." By the same logic, Utah Code Ann. § 63G-6-815(1)(a) does not apply because Alpine is not "aggrieved in connection with the solicitation or award of a contract." Finally, Utah Code Ann. § 63G-6-817(1) does not apply for the same reasons. The applicable statute of limitations for a breach of contract

outside of the procurement code is six years. *See* Utah Code Ann. § 78B-2-309 (2008).

B. Utah Code Ann. § 63G-6-817(c) is the Relevant, Applicable Provision Should this Court Determine that the Utah Procurement Code Applies

Additionally, USU argues that, through principles of statutory construction, Utah Code Ann. § 63G-6-817(a) should supersede 817(c) on the grounds that a specific provision should be applied over a more general one. *See* Brief of Appellee at 9. 817(a) is not more specific than 817(c), the two provisions are equally specific and are meant to address two different issues. 817(a) refers specifically to § 63G-6-815(1)(a) and is meant to govern contractors aggrieved over the solicitation or award of a contract. As stated above, the solicitation or award of the contract was not the only, or even the most important, breach of the 2001 contract and therefore 817(a) should not apply. 817(c) specifically refers to § 63G-6-815(3) which permits a cause of action that arises under or by virtue of a contract. Reading 817(c) in this context does not render 817(a) meaningless as stated by USU. *See* Brief of Appellee at 9. Rather, 817(c) gives meaning to a cause of action for breach of an actual contract. It shows that the legislature recognized that there could be a breach of an *existing contract* that was not through the solicitation or award of a new contract.

The Utah Procurement Code allows any party that has entered into a valid and binding contract to sue within the same time frame as private parties for breach of contract. The Legislature contemplated the breach of an existing contract and allowed for “[t]he statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Section 63G-6-815(1)(c).” Utah Code Ann. § 63G-6-817(3) (2008). When USU ignored the automatic renewal provision it constituted a breach of contract. Thus, Alpine had six years to file suit against USU for breach of contract. *See* Utah Code Ann. § 78B-2-309 (2008).

II. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE ALPINE HAS PROPERLY MITIGATED ITS DAMAGES

USU claims that Alpine failed to mitigate damages because Alpine failed to file a timely action in the proper court. The district court held that USU and Alpine had a binding contract. The applicable statute of limitations for a breach of contract claim is six years. *See* Utah Code Ann. § 78B-2-309 (2008). Alpine was within the six-year statute of limitation when it filed this action.

Alpine further attempted to mitigate damages by submitting a proposal to USU’s RFP even though Alpine was under no obligation to do so, and let USU know of this position. Regardless, USU unlawfully breached its contract with Alpine by failing to honor the automatic renewal provision. Alpine attempted to mitigate the damages caused by USU’s breach by submitting a proposal to the new

RFP. At the time of the submission Alpine already had a valid breach of contract claim against USU. Alpine has diligently pursued all legal remedies and has not failed to mitigate its damages.

CONCLUSION

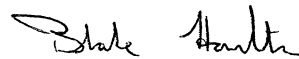
The district court erred in assigning a fourteen-day time to appeal to the breach of a valid contract and should be reversed. Outside of the Utah Procurement Code, Alpine and USU had a binding, legal contract with a provision for automatic renewal. USU breached the contract and the appropriate statute of limitations as contemplated by the Legislature is six years.

Additionally, the lower court's order granting summary judgment on the statute of limitations must be overturned. The mitigation of damages is directly tied to the statute of limitations, and Alpine has done everything within its power to mitigate damages. This court must apply the correct statute of limitations and overturn the lower court's order.

Respectfully submitted this 9th day of February 2011.

STIRBA & ASSOCIATES

By:



PETER STIRBA
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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2011, I caused the original and nine copies and one CD of the foregoing **REPLY BRIEF OF THE APPELLANTS** to be filed with the Clerk of the Supreme Court, and two copies to:

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Addendum

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**IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR
CACHE COUNTY, STATE OF UTAH**

**ALPINE ORTHOPAEDIC SPECIALISTS,
L.L.C., a Utah Corporation,**

Plaintiff,

v.

**UTAH STATE UNIVERSITY and
INTERMOUNTAIN HEALTHCARE, INC.,**

Defendants.

**PLAINTIFF'S
FIRST AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL**

Case No. 060102502

Judge Clint S. Judkins

Plaintiff, Alpine Orthopaedic Specialists, LLC, (“Alpine O.S.”), by and through undersigned counsel, hereby files this First Amended Complaint against Defendants, Utah State University (“Utah State”), and Intermountain Health Care, Inc., (“IHC”), and alleges and avers as follows:

PARTIES

1. Plaintiff Alpine O.S. is a corporation organized under the laws of the state of Utah with its principal place of business in Cache County, Utah.

2. Defendant Utah State is a state institution of higher education primarily located in Cache County, Utah. Utah State is a political entity of the State of Utah.
3. Defendant IHC is a corporation organized under the laws of the State of Utah, with a principal place of business in Salt Lake County, Utah.

JURISDICTION AND VENUE

4. This Court has original jurisdiction over this matter pursuant to UTAH CODE ANN. § 78-3-4(1) (2006).
5. This Court has subject matter jurisdiction over this matter pursuant to UTAH CODE ANN. § 65-56-815(c) (2006).
6. Venue in this action is proper in this Court pursuant to UTAH CODE ANN. § 78-13-4 (2006) and § 78-13-7 (2006), as Utah State resides in Cache County, Utah.

GENERAL ALLEGATIONS

7. On or about October of 2000, Utah State circulated a Request for Proposal (“RFP”) to ten healthcare providers, including Alpine O.S., seeking proposed bids from health care organizations interested in providing specialized healthcare and team physicians for Utah State’s Intercollegiate Athletic Programs (“Intercollegiate Athletic Services.”)
8. On March 13, 2001, Alpine O.S. and Utah State entered into a written Personal Services Agreement (“the Agreement”) wherein Alpine O.S. agreed to provide Intercollegiate Athletic Services to Utah State’s men’s and women’s intercollegiate athletics programs.

Under the Agreement, Alpine O.S., was to receive compensation for providing these specialized Intercollegiate Athletic Services.

9. Prior to March 13, 2001, Alpine O.S. was already providing team physician services as well as the medical facilities for Intercollegiate Athletics at Utah State.
10. The Agreement stated that it would become effective on March 13, 2001 and shall continue for an initial term of five years. The Agreement then states: “Thereafter, this Agreement shall automatically renew for an additional period of five (5) years unless otherwise agreed upon[.]”
11. The Agreement, signed and entered into by Utah State, contained language requiring representation and warranty from Alpine O.S. that, as of the effective date of the Agreement, Alpine O.S. had the legal right to enter into the Agreement and to perform the Intercollegiate Athletic Services.
12. The Agreement contains a severability clause. The Agreement additionally states that the parties shall take further actions and execute additional documents and instruments as necessary in order to perfect and complete the Agreement.
13. The Agreement averred that Utah State desired that Alpine O.S. continue to provide Intercollegiate Athletic Services, as it had prior to the Agreement, in exchange for consideration as outlined within the Agreement.

14. As it had done prior to entering the Agreement, Alpine O.S. provided the Intercollegiate Athletic Services according to the Agreement beginning March 13, 2001 and continuing on and past March 13, 2006.
15. As of March 13, 2001, Dr. Eric Honing was employed by Alpine O.S., and was the designated physician who provided the majority of the Intercollegiate Athletic Services to Utah State.
16. Dr. Honing left the employ of Alpine O.S. in spring of 2001.
17. Following Dr. Honing's departure from Alpine O.S., Alpine O.S. recruited and hired Dr. Jonathan Finnoff.
18. Alpine O.S. hired Dr. Finnoff to serve as the primary designated physician who would provide the Intercollegiate Athletic Services pursuant to the Agreement.
19. Dr. Finnoff started working for Alpine in May of 2001, and started providing the Intercollegiate Athletics Services and working as the team physician for Utah State Intercollegiate Athletics shortly thereafter.
20. In the course of his responsibilities, Dr. Finnoff worked extensively with Dale Mildenberger, the Head Athletic Trainer for Utah State.
21. After the parties executed the Personal Services Agreement in March of 2001, Mr. Mildenberger contacted and communicated with numerous IHC employees, physicians, and administrators, including, but not limited to, Rich Smith, Bob Cash, Terry Chase-Dunn, and Jana Huffman, regarding the quality of Alpine O.S.'s provision of the

- Intercollegiate Athletic Services and regarding Dr. Finnoff's capabilities and performance in his capacity as the Utah State Intercollegiate Athletics team physician.
22. Upon information and belief, in the Winter of 2003, IHC representatives told Dale Mildenerger that IHC desired to contract with Utah State for the Intercollegiate Athletic Services, and that it wished to recruit Dr. Finnoff to provide those services as an employee of IHC.
 23. In the Winter of 2003, and at all times during Dale Mildenerger's communications with IHC representatives, the Personal Services Agreement was in full force and effect, and neither party to the Agreement had advised the other regarding any deficiencies in the Agreement or any deficiencies in their respective performances under the Agreement.
 24. In January of 2004, Dale Mildenerger told Dr. Finnoff that IHC was extremely interested in providing the Intercollegiate Athletic Services for Utah State.
 25. Upon information and belief, at the time Dale Mildenerger made such statements to Dr. Finnoff, Dale Mildenerger had full knowledge that IHC would contact Dr. Finnoff in an attempt to recruit Dr. Finnoff to work for IHC, and he was fully aware that the Personal Services Agreement was in full force and effect.
 26. In January of 2004, Dale Mildenerger told Dr. Finnoff that there was no way that Alpine O.S. could compete with IHC, should IHC endeavor to obtain a contract with Utah State for the Intercollegiate Athletic Services, and that IHC would be awarded the contract for the Intercollegiate Athletic Services due to that fact.

27. At the time Mr. Mildenberger made the aforementioned statements to Dr. Finnoff in January of 2004, Dr. Finnoff was a partner and employee of Alpine O.S., and was providing the Intercollegiate Athletic Services to Utah State and acting as the team physician for Intercollegiate Athletics pursuant to the Agreement.
28. At the time Mr. Mildenberger made the aforementioned statements to Dr. Finnoff in 2004, the Personal Services Agreement was in full force and effect, and neither party to the Agreement had advised the other regarding any deficiencies in the Agreement or any deficiencies in their respective performances under the Agreement.
29. In the summer of 2004, Dr. Finnoff was contacted by representatives of IHC, who told Dr. Finnoff that IHC wished to recruit him to come work with IHC.
30. IHC representatives told Dr. Finnoff that he was being recruited to work as the team physician for Utah State and that he was being recruited to provide the Intercollegiate Athletic Services to Utah State.
31. At the time IHC contacted Dr. Finnoff, the Personal Services Agreement was in full force and effect, and neither party to the Agreement had advised the other regarding any deficiencies in the Agreement or their respective performances under the Agreement.
32. At all times during IHC's discussions and negotiations with Dr. Finnoff, IHC represented to Dr. Finnoff that it would be awarded a contract to provide the Intercollegiate Athletic Services, despite the fact that the Personal Services Agreement between Alpine O.S. and

Utah State was in full force and effect, and that the renewal provision contained therein was also in full force and effect.

33. As a result of IHC's representation to Dr. Finnoff that it would be awarded the contract for the Intercollegiate Athletic Services, Dr. Finnoff became concerned that his employment with Alpine O.S. was at risk.
34. Dr. Finnoff was concerned that his employment with Alpine O.S. was at risk because Alpine O.S. had recruited and hired him for the primary purpose of providing the Intercollegiate Athletic Services pursuant to the Personal Services Agreement. Dr. Finnoff believed that, if the Personal Services Agreement was breached by Utah State, the reason for his employment relationship with Alpine O.S. would no longer exist.
35. As a result of IHC's representations that it would be awarded a contract with Utah State for the Intercollegiate Athletics Services, Dr. Finnoff met in person with representatives of IHC, including the Director of Physician Services at Logan Regional Hospital, on at least two occasions, during which the specifics of an employment position with IHC as the Utah State team physician were discussed.
36. During those meetings, IHC representatives acted as though they already had an agreement or contract in place with Utah State for the team physician and the Intercollegiate Athletic Services, despite the fact that the Agreement between Alpine O.S. and Utah State remained in full force and effect.

37. Dr. Finnoff rejected IHC's recruitment offer, but, as a result of IHC's representations and conduct, he remained concerned that Utah State would breach the Agreement, and that his employment was therefore at risk.
38. Upon information and belief, IHC's attempted recruitment of Dr. Finnoff was motivated by a primary purpose to injure and cause damages to Plaintiff Alpine O.S.
39. Ultimately, in the spring of 2005, as a result of IHC's attempts to recruit him and his concern that the Agreement would not be honored, Dr. Finnoff terminated his ownership interest in Alpine O.S., and moved away from the Cache Valley.
40. As a result of Dr. Finnoff's departure, Alpine O.S. was forced to initiate a new recruitment process to find a new physician to serve as the USU team physician and to provide the Intercollegiate Athletic Services to Utah State pursuant to the Agreement.
41. Alpine O.S. incurred significant expense in attempting to recruit a new physician to provide the Intercollegiate Athletic Services to Utah State pursuant to the Agreement.
42. Upon information and belief, IHC acted with the intent to cause Dr. Finnoff to terminate his employment and ownership interest in Alpine O.S., and with the intent to cause Alpine O.S. to incur expense and damages in attempting to hire a new physician to take his place.
43. Upon information and belief, IHC attempted to recruit Dr. Finnoff with knowledge and intent that if Dr. Finnoff left Alpine O.S., IHC could more easily persuade

representatives of Utah State, specifically Dale Mildenerger, to breach the Agreement between Alpine O.S. and Utah State.

44. Alpine O.S. fully honored the Personal Services Agreement following Dr. Finnoff's departure, and continued to provide the Intercollegiate Athletic Services pursuant to the Agreement.
45. After Dr. Finnoff left Alpine O.S. in the Spring of 2005, Dale Mildenerger remained in contact with IHC representatives, who continued to express to Dale Mildenerger IHC's intent to obtain a contract with Utah State for the Intercollegiate Athletic Services.
46. In the Fall of 2005, IHC representatives, including, but not limited to, Rich Hall, invited Dale Mildenerger to play nine holes of golf with Rich Hall and a physician whom IHC was attempting to recruit for the team physician position and to provide the Intercollegiate Athletic Services.
47. IHC representatives invited Dale Mildenerger to play golf so that he could explain the specific requirements of the team physician position and the Intercollegiate Athletic Services.
48. Upon information and belief, IHC representatives asked Dale Mildenerger to play golf with the physician they were attempting to recruit in order to persuade Utah State, by and through Dale Mildenerger, as a representative of Utah State, to breach the Agreement with Alpine O.S.

49. Upon information and belief, in the Fall of 2005, representatives of IHC improperly induced and persuaded Utah State to breach its contract with Alpine O.S. by telling Dale Mildenberger that, if IHC were awarded a contract with Utah State to provide the Intercollegiate Athletic Services, IHC would make monetary donations to Utah State Intercollegiate Athletics, would donate medical and athletic equipment and supplies to Utah State Intercollegiate Athletics, and would independently fund an additional athletic trainer to serve the team physician and Utah State Intercollegiate Athletics.
50. Alpine O.S. and Utah State never agreed not to renew the Agreement, and therefore, on March 13, 2006, pursuant to the express terms of the Agreement, the Agreement automatically renewed for an additional term of five (5) years (“the Renewal Term”). The Renewal Term runs from March 13, 2006 until March 13, 2011.
51. At no time prior to March 13, 2006 did Utah State provide written notice to Alpine O.S. that Alpine O.S. had violated any of the material terms of the Agreement.
52. At no time prior to March 13, 2006 did either party to the Agreement notify the other party that it reasonably believed that the continued operations under the Agreement were no longer in the best interest of the parties.
53. At no time did either party to the Agreement seek to amend the Agreement by mutual written consent. The Agreement states that in the event either party to the Agreement becomes aware of any action relating to the Agreement regarding the rights, obligations or duties of the other party, such party shall provide timely notice to the other party.

54. At no point did Utah State provide Alpine O.S. with notice that it did not intend to renew the Agreement or that it intended to issue a second RFP for the Intercollegiate Athletic Services.
55. On or about February 24, 2006, absent any other correspondence or notice directly addressing or modifying the Agreement, and absent any agreement not to renew the Agreement, Alpine O.S. received an RFP from Bud Covington, purchasing contact at Utah State, with a stated due date of proposed bids for Intercollegiate Athletic Services of March 15, 2006 at 3:00 p.m. MST.
56. The February 24, 2006 RFP requests only potential bids regarding the Intercollegiate Athletic Services, specifically, the team physician services.
57. The February 24, 2006 RFP does *not* solicit bids for the provision of athletic equipment or supplies, medial equipment or supplies, or athletic trainers.
58. As such, the February 24, 2006 RFP does not give all potential bidders the opportunity to bid on providing such goods or services and Alpine O.S. was never given the opportunity to bid or present offers or proposals on its ability to provide similar donations of monies, supplies, or equipment.
59. Upon information and belief, IHC's improper inducement of Dale Mildenerger and improper offers of monetary donations and athletic equipment caused Utah State to breach its Agreement with Alpine O.S. and caused Dale Mildenerger to push for the issuance of the February 24, 2006 RFP regarding the Intercollegiate Athletic Services.

60. On March 20, 2006, Scott Brown, CEO of Alpine O.S., sent a letter to Bud Covington requesting clarification regarding the RFP because, under the express terms of the Agreement, the Agreement had automatically renewed on March 13, 2006, continuing for the duration of the Renewal Term.
61. On March 22, 2006, Randall Spetman, Director of Athletics for Utah State wrote Mr. Brown advising that Utah State would continue to solicit proposals as indicated in the RFP and award a contract as outlined therein. Mr. Spetman stated that the Agreement of the parties terminated as of March 12, 2006, making no mention of any problem with the performance of Alpine O.S. under the Agreement.
62. Mr. Spetman also stated in the March 22, 2006 letter, as a pretext to terminate the Agreement and to allow IHC to bid on Utah State's Intercollegiate Athletic Services, that the Agreement is a contract against public policy and is unenforceable. This was the first time Utah State provided Alpine O.S. any notice of the Agreement containing any purported deficiency, much less that the Agreement was unenforceable.
63. On or about March 30, 2006, Alpine O.S. sent another letter to Bud Covington stating that Alpine O.S. was of the position that the Agreement had renewed for another five (5) years under the renewal provision contained in the Agreement. Alpine O.S. requested clarification as to whether or not the RFP was necessary in light of the existing Agreement, and the fact that the Renewal Term had commenced on March 13, 2006. Utah State classified this request as an RFP appeal.

64. Although Alpine O.S. continued to rely upon the terms of the March 13, 2001 Agreement as renewed on March 13, 2006, and fully believing that Utah State had no authority to receive bids for a new Agreement, Alpine O.S. submitted a timely Response to the RFP on April 1, 2006.
65. On April 3, 2006, Bud Covington sent an e-mail to Alpine O.S. indicating that there had only been two bid proposals, one from IHC's Logan Regional Hospital and one from Alpine O.S. He further indicated that the review of the proposals was on hold until contractual issues were resolved.
66. On April 14, 2006 Bud Covington had a letter delivered to Alpine O.S. stating the decision on Alpine O.S.'s appeal (protest) regarding Utah State's solicitation of bids was that the Agreement between the parties constituted a contract against public policy because it was not awarded in compliance with Utah law and, consequently, was invalid and unenforceable.
67. Bud Covington's April 14, 2006 letter provides at least two interpretations of the renewal provision in the Agreement, evidencing that Utah State was attempting to create an ambiguous contract term such that they could breach the Agreement and enter into a new Intercollegiate Athletic Services Agreement with IHC.
68. On May 18, 2006, Bud Covington sent another letter to Alpine O.S. stating that the contract for services was going to be awarded to IHC's Logan Regional Hospital.

69. Upon information and belief, Utah State elected to breach its Agreement with Alpine O.S. and to enter into a contract with IHC in order to receive the monetary donations and equipment donations improperly offered by IHC.
70. Dale Mildenberger told a reporter for the Salt Lake Tribune that “[a]s a public institution, we couldn’t simply ignore the donation of equipment and supplies that we would otherwise have to spend tax dollars to acquire[.]”
71. Dale Mildenberger’s statement to the Salt Lake Tribune evidences that Utah State relied on IHC’s improper inducements and improper offers of donating monies and supplies when deciding to breach its Agreement with Alpine O.S.
72. On or about June 15, 2006, Dr. Keith Nelson, on behalf of Alpine O.S., hand delivered a letter from legal counsel to Utah State President Stan Albrecht indicating that Alpine O.S. would like to resolve any discrepancies under the Agreement short of litigation.
73. Utah State’s legal counsel has communicated to Alpine O.S.’s legal counsel that given the new agreement with IHC, Utah State could not change its position, in part, because it believed that it would then be in breach of its new contract with IHC.

FIRST CAUSE OF ACTION
(Breach of Contract)

74. Plaintiff hereby incorporates paragraphs 1 through 73 above.
75. In entering into the Agreement with Utah State, Alpine O.S. fully relied upon Utah State’s authority to enter into and bind itself to the terms of the Agreement.

76. Utah State breached the terms of the Agreement with Alpine O.S. Such breaches include, but are not limited to:
- a) Failure to reasonably investigate or comply with any and all legal conditions precedent which may have been necessary prior to entering into the Agreement;
 - b) Failure to provide written notice to Alpine O.S. of any proposed amendments to the Agreement as required under the Agreement;
 - c) Failure to comply with the terms of the Agreement by failing to recognize that the Agreement automatically renewed under the terms of the Agreement;
 - d) Pursuing bids from other contractors to provide the same services while the existing Agreement remained in effect;
 - e) Attempting to void the Agreement by stating that the contract was illegally entered into, when compliance with the law was solely Utah State's duty and responsibility and not the duty nor responsibility Alpine O.S.;
 - f) Failure to fulfill its obligation to renew the Agreement under the terms of the Agreement, and honor the Agreement's Renewal Term;
 - g) Utah State's failure to take further actions and execute additional documents and instruments as necessary to perfect and complete the Agreement.
77. As a direct and proximate result of Utah State's contractual breach(es), Alpine O.S. has been deprived of the benefits of the Agreement and the renewal of the Agreement which Alpine O.S. reasonably expected to remain in effect, and has and will continue to suffer

financial damages, loss of business and business relationships, and damages to its status in the community in a monetary amount to be proven at trial.

78. As a direct and proximate result of Utah State's contractual breach(es), Alpine O.S. has and will continue to incur costs and attorney's fees.

SECOND CAUSE OF ACTION
(Promissory Estoppel)

79. Plaintiff hereby incorporates paragraphs 1 through 78 above.
80. In reliance on Utah State's promise that it would take further actions and execute additional documents and instruments as necessary in order to perfect and complete the Agreement, Alpine O.S. performed under the Agreement for five years without receiving any notice of Utah State's opinion about the unlawfulness of the Agreement, until after the Agreement had automatically renewed.
81. Alpine O.S. performed under the Agreement for five years, and relied to its detriment on the automatic renewal provision and Utah State's failure to honor the Renewal Term, absent any attempt by Utah State to take further actions and/or execute additional documents and instruments to remedy the Agreement during the entire initial five year term of the Agreement.
82. Alpine O.S. relied to their financial detriment on the promises contained in the Agreement. Such reliance was both reasonable and foreseeable.

83. As a direct and proximate result of Alpine O.S.'s reliance on the promises made by Utah State, Alpine O.S. has suffered and will suffer damages unless Utah State is estopped from continuing to disregard its obligations to Alpine O.S.

THIRD CAUSE OF ACTION
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

84. Plaintiff hereby incorporates paragraphs 1 through 83 above.

85. The Agreement between Alpine O.S. and Utah State contained an implied covenant of good faith and fair dealing. Under this covenant, each party impliedly promised not to intentionally or purposely do anything that would destroy or injure the other party's right to receive the fruits of the contract.

86. Utah State breached the foregoing implied covenant of good faith and fair dealing. Such breaches include, but are not limited to:

- a) Utah State's refusal to recognize the Agreement with Alpine O.S. and act within the contractual terms of the Agreement;
- b) Utah State's direct talks and negotiations with IHC regarding Alpine O.S.'s performance under the Agreement and Dr. Finoff's potential employment with IHC;
- c) Utah State's solicitation of a bid from IHC pursuant to the February 24, 2006 RFP to usurp and displace Alpine O.S. from performing services that were already contracted for and being performed under the Agreement;
- d) Utah State's finding a pretextual reason to claim the Agreement was unenforceable to avoid the Renewal Term; and

- e) Utah State's failure to honor the Renewal Term as contained in the Agreement, and negotiating a new contract for the Intercollegiate Athletic Services with IHC in light of the Agreement and the Renewal Term.
87. As a direct and proximate result of Utah State's breach of the implied covenant of good faith and fair dealing, Alpine O.S. has and will continue to suffer financial damages and damages to its business relationships in a monetary amount to be proven at trial.
88. As a direct and proximate result of Utah State's breach of the implied covenant of good faith and fair dealing, Alpine O.S. has and will continue to incur costs and attorney's fees.

FOURTH CAUSE OF ACTION
(Repudiation)

89. Plaintiff hereby incorporates paragraphs 1 through 88 above.
90. The Agreement provided that the contract for services would continue for the Renewal Term, which was to run from March 13, 2006 until March 13, 2011. No act of the parties changed the Agreement's terms, or the Renewal Term.
91. Utah State repudiated the Agreement when it solicited other vendors to provide the same services provided by Alpine O.S. under the existing Agreement, indicating its intent not to perform its obligations under the existing Agreement.
92. As a direct and proximate result of Utah State's repudiation, Alpine O.S. suffered the deprivation of the renewal of the contract for five years and damages incident to that loss.

93. As a direct and proximate result of Utah State's repudiation, Alpine O.S. has and will continue to incur costs and attorney's fees.

FIFTH CAUSE OF ACTION
(Declaratory Judgment - U.C.A. §§ 78-33-1 to 13)

94. Plaintiff hereby incorporates paragraphs 1 through 93 above.
95. The district courts have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed; and such declaration shall have the force and effect of a final judgment or decree.
96. The Agreement is a written contract.
97. Alpine O.S. is entitled under the Utah Declaratory Judgment Act to have determined any question of construction or validity arising under the Agreement and to obtain a declaration of rights, status or other legal relations thereunder.

SIXTH CAUSE OF ACTION
(Intentional Interference with Economic Relations)

98. Plaintiff hereby incorporates paragraphs 1 through 97 above.
99. IHC, for an improper purpose and with improper means, and with a primary motivation and purpose to injure and cause damage to Plaintiff Alpine O.S., intentionally interfered with Plaintiff's existing and prospective economic relations, by and through its attempted recruitment of Dr. John Finnoff, during the time when Dr. Finnoff was an employee and business partner of Alpine O.S., and during the time when the Agreement was in full force and effect.

100. IHC, for an improper purpose and with improper means, and with a primary motivation and purpose to injure and cause damage to Plaintiff Alpine O.S., intentionally interfered with Plaintiff's existing and prospective economic relations during the time the Agreement was in full force and effect, by communicating and conspiring with Dale Mildenberger, and enticing and inducing Utah State, by and through Dale Mildenberger, as a representative of Utah State, to breach the Agreement and its renewal provisions, by conditioning the donation of monies, athletic and medical equipment, and the funding of a new Athletic Trainer position, upon Utah State's breaching its contract with Alpine O.S., and awarding a contract to IHC.
101. IHC's means of interference were contrary to law and violated an established standard of trade or profession.
102. IHC's conduct proximately and directly caused injury and damages to Plaintiff, to be proven at trial.

SEVENTH CAUSE OF ACTION
(Intentional Interference with Contract)

103. Plaintiff hereby incorporates paragraphs 1 through 95 above.
104. IHC, for an improper purpose and with improper means, and with a primary motivation and purpose to injure and cause damage to Plaintiff Alpine O.S., intentionally interfered with Plaintiff's existing contractual relations, by and through its attempted recruitment of Dr. John Finnoff, during the time when Dr. Finnoff was an employee and business

partner of Alpine O.S., and during the time when the Agreement was in full force and effect.

105. Utah State was induced to breach its contract with Alpine O.S. by reason of IHC's intentional, wrongful and improper attempts to recruit Dr. John Finnoff.
106. IHC, for an improper purpose and with improper means, and with a primary motivation and purpose to injure and cause damage to Plaintiff Alpine O.S., intentionally interfered with Plaintiff's contractual relations during the time the Agreement was in full force and effect, by communicating and conspiring with Dale Mildenerger, and enticing and inducing Utah State, by and through Dale Mildenerger as a representative of Utah State, to breach the Agreement and its renewal provisions, by conditioning the donation of monies, athletic equipment, and the funding of a new Athletic Trainer position, upon Utah State's breaching its contract with Alpine O.S., and awarding a contract to IHC.
107. Utah State was induced to breach its contract with Alpine O.S. by reason of IHC's intentional, wrongful and improper communications to Dale Mildenerger and its conditioning the donations and provision of funds to Utah State based upon a breach of the Agreement between Alpine O.S. and Utah State.
108. IHC's conduct proximately and directly caused injury and damages to Plaintiff, to be proven at trial.

PRAYER FOR RELIEF

WHEREAS, Alpine O.S. prays for relief as follows:

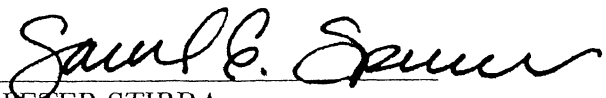
1. Judgment against Defendants for incidental and consequential damages in an amount to be determined at trial;
2. Judgment against Defendants for interest at the highest allowable rate, expenses and attorney's fees incurred herein;
3. Judgment against Defendant IHC for punitive damages resulting from its intentional tortious conduct;
4. A declaratory judgment, declaring that Utah State breached the Agreement; and
5. Any other relief the Court deems just and appropriate.

JURY TRIAL DEMANDED

Plaintiff respectfully requests this matter be tried to a jury.

DATED this 19th day of July, 2007.

STIRBA & ASSOCIATES

By: 
PETER STIRBA
SARAH E. SPENCER
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2007, I caused to be served a true copy of the foregoing **PLAINTIFF'S FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** by the method indicated below, to the following:

Robert D. Barclay
Assistant Attorney General
155 Old Main, Utah State University
Logan, Utah 84322-1465
Attorney for Defendant

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Anne S. MacLeod