2010

McNeil Engineering, Inc; McNeil Engineering and Land Surveying, LLC; and Scott McNeil, an individual v. Benchmark Engineering and Land Surveying, LLC; Benchmark Cad Services, LLC; Land Development Cadd, Inc; Dale K. Bennett, an individual; and Florence B. Alhambra, an individual : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

McNEIL ENGINEERING, INC; McNEIL ENGINEERING AND LAND SURVEYING, LLC; and SCOTT McNEIL, an individual, Plaintiffs, Counterclaim Defendants, and Appellant, vs. BENCHMARK ENGINEERING AND LAND SURVEYING, LLC; BENCHMARK CAD SERVICES, LLC; LAND DEVELOPMENT CADD, INC; DALE K. BENNETT, an individual; and FLORENCE B. ALHAMBRA, an individual, Defendants, Counter Claimants, and Appellee.	**BRIEF OF APPELLANT** Case No. 20100862-CA

APPEAL FROM AN ORDER AND JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, HONORABLE L.A. DEVER

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LIST OF ALL PARTIES

Below is a complete list of all parties to the proceeding in the District Court whose judgment or order is sought to be reviewed:

1. McNeil Engineering and Land Surveying, LLC ("**ME&LS**"), Appellant before this Court and Plaintiff below.

2. Dale K. Bennett ("**Bennett**"), Appellee before this Court and Defendant below.

3. McNeil Engineering, Inc.

4. Scott F. McNeil.

5. Benchmark Engineering and Land Surveying, LLC.

6. Benchmark CAD Services, LLC.

7. Land Development CADD, Inc.

8. Florence B. Alhambra.

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JURISDICTION OF APPELLATE COURT

The Utah Court of Appeals has jurisdiction over this appeal under Utah Code Ann. § 78A-4-103(2)(j) pursuant to an Order of the Utah Supreme Court entered November 1, 2010.

ISSUES PRESENTED FOR REVIEW

I. Did the District Court Err in its Interpretation of the Word "Employment" in Amendment No. 2 to the Operating Agreement by Concluding as a Matter of Law that it Cannot Include Leased Employment?

Standard of Review:

The trial court's interpretation of a contract presents a question of law which this Court reviews for correctness. *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶16, 84 P.3d 1134. Agreements relating to the ownership of business entities are reviewed under the rules for interpretation of contracts. *Dansie, et al. v. City of Herriman, et al.*, 2006 UT 23, ¶¶5-6, 134 P.3d 1139 (interpreting articles of incorporation); *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶15, 94 P.3d 193 (applying rules of contract interpretation to shareholder agreement).

Preservation Below:

This issue was preserved below in Appellant's Motions and Memoranda filed in the District Court. (R. 2510-2581, 2682-2689, 6567-6641, 6765-6772.)

II. Did the Trial Court Err by Failing to Consider Extrinsic Evidence in Determining Whether Amendment No. 2 of the Operating Agreement is Ambiguous?

Standard of Review:

Determining whether a contract is ambiguous presents a threshold question of law which this Court reviews for correctness. *Interwest Construction v. Palmer, et* al, 923 P.2d 1350, 1358 (Utah 1996).

Preservation Below:

This issue was preserved below in Appellant's Motions and Memoranda filed in the District Court. (R. 2510-2581, 2682-2689, 6567-6641, 6765-6772.)

III. Did the District Court Err in Entering the Order and Judgment Despite Genuine Issues of Fact in the Record?

Standard of Review:

This Court reviews a District Court's summary judgment ruling for correctness. The Court considers only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed. *Kessler v. Mortenson, et al.*, 2000 UT 95, ¶5, 16 P.3d 1225.

Preservation Below:

This issue was preserved below in Appellant's Memoranda filed in the District Court. (R. 6517-6559.)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no constitutional provisions, ordinances, rules, or regulations whose interpretation is determinative or of central importance to this appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

Appellant ME&LS filed suit below against Bennett and other defendants based upon conduct both before and after his resignation. Bennett resigned in August 2005 and formed his own civil engineering firm in competition with ME&LS, and has not worked for ME&LS ever since then. Upon Bennett's resignation, ME&LS asserted its right to repurchase his membership interest based upon the ME&LS operating agreement. Bennett would not agree to the repurchase, however, and argued he was still a member of ME&LS even though he had left to start his own firm. The primary issue in this appeal is whether Bennett's resignation of employment triggered his withdrawal as a member of ME&LS and the right of ME&LS to repurchase his interest.

B. Course of Proceedings.

Both ME&LS and Bennett filed Motions for Summary Judgment on the issue of whether Bennett's resignation of employment triggered his withdrawal as a member of ME&LS. The Motions were briefed and argued before the Third District Court for Salt Lake County, the Honorable Ann Boyden. Judge Boyden ruled that Bennett did not withdraw as a member by resigning, and entered an Order on December 21, 2006. (Addendum 4.)

Bennett filed a Motion seeking the entry of a final judgment in his favor. In the Motion, Bennett argued he did not withdraw as a member of ME&LS upon his resignation of employment, and he also sought a share of company profits for time periods after he resigned. Judge Brian granted the Motion and entered an Order and Judgment on April 3, 2008 (the "**Judgment**"). (Addendum 5.)

ME&LS filed its first appeal in April 2008 and this Court issued a Memorandum Decision on May 21, 2009 ruling that the Judgment was not final for purposes of appeal. (Addendum 6.)

Upon remand the District Court again ruled that the Judgment is final for purposes of appeal, issuing a Minute Entry on September 21, 2010. (Addendum 7.) ME&LS filed a Motion to Alter or Amend seeking to ensure that the District Court's ruling fully complied with this Court's Memorandum Decision in the prior appeal. The District Court then entered an Amended Order Certifying Order and Judgment as Final on October 19, 2010, making the findings and ruling required by the Memorandum Decision. (Addendum 8.)

C. Disposition Below.

The District Court entered the Judgment on April 3, 2008. (Addendum 5.) The Judgment was based upon the prior Orders of December 21, 2006 and April 2, 2008 which found that Bennett was still a member of ME&LS. The Judgment awarded $142,174.93 in favor of Bennett and against ME&LS, "which Bennett claims represents his share of cash distributions" from ME&LS. (Addendum 5.) Through the course of proceedings described above the District Court entered an Amended Order Certifying

Order and Judgment as Final on October 19, 2010 certifying the Judgment as final under Rule 54(b) and determining that there is no just reason for delaying an appeal from the Order and Judgment. ME&LS filed its Notice of Appeal on October 20, 2010. (Addendum 9.)

STATEMENT OF RELEVANT FACTS

A. The McNeil Companies.

1. In 1983, Scott F. McNeil ("**McNeil**") formed McNeil Engineering, Inc. ("**MEI**") as a civil and structural engineering firm in Salt Lake City. (R. 2840.) McNeil was the sole owner of MEI.

2. In 1996, three limited liability companies were created, including ME&LS, to divide and take over the operations of MEI. (R. 6625-6626.)

3. The business was "divided up into three departments or subcompanies ... under the [MEI] umbrella." Afterward, MEI became an administrative entity and did not perform engineering services. The staff of MEI performed administrative functions for the limited liability companies. (R. 6625, 6627-6628.)

4. From the beginning ME&LS and the other companies leased all of their employees from MEI. Bennett was an employee of MEI who was leased to and worked only for ME&LS. (R. 6583-6585, 6628.) MEI then had no other role besides leasing employees and performing administrative functions. (R. 6628.)

B. ME&LS Operating Agreement.

5. In December 1996, each Member of the newly-formed ME&LS, including Bennett, signed the Operating Agreement for ME&LS (the "**Operating Agreement**"). (Addendum 1.) (R. 6583, 6615.)

6. On August 1, 2000, the Members formally amended the Operating Agreement by signing Amendment No. 1. The terms of that Amendment are not at issue in this appeal.

7. On November 1, 2001, the Members again revised the Operating Agreement by signing Amendment No. 2 (the "**Second Amendment**"). The Second Amendment was signed by all of the Members including Bennett. (Addendum 2 at 4-5.)

8. The Second Amendment, added new provisions governing the dissociation of Members of ME&LS. (*Id.*)

9. The Operating Agreement originally provided for the withdrawal of a Member only "with the consent of a Majority of the remaining Members ...." (Addendum 1, § 12.1(a).) It did not define what would constitute the "withdrawal" of a Member of ME&LS. (Addendum 1, Article XII.)

10. With the Second Amendment, the consent of other Members was no longer required for withdrawal. Section 12.1 now provided that a person "**shall cease to be a Member upon** the happening of any of the following events: (a) **the withdrawal of a Member** ...." (Addendum 2 at 2 (emphasis added).)

11. The Second Amendment also added Section 12.3 describing what constitutes the withdrawal of a Member and giving ME&LS an option to purchase a withdrawing Member's interest. (Addendum 2 at 3.)

12. Section 12.3 states: "In the event a Member withdraws from the Company prior to the expiration of the Term, the Company ... shall have an option to purchase the withdrawing Member's Membership Interest." (*Id.*)

13. Section 12.3(a) then provides: "For purposes of this Section, **a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with the Company for reasons other than bankruptcy, death, disability or incompetency**." (*Id.* (emphasis added).)

14. Section 12.3(b) also states: "The option to purchase a withdrawing Member's Membership Interest shall be exercised by giving written notice thereof to the withdrawing Member." (*Id.*)

15. "The purchase price shall be an amount equal to the book value of the Member's Membership Interest in the Company (as defined in Section 11.3.4 above), to be paid over a period not to exceed five years." (*Id.* § 12.3(c).)

16. The Operating Agreement defines the term "Company" as ME&LS. (Addendum 1 at 2.)

B. Bennett's Employment and Resignation.

17. From the beginning in 1996, ME&LS and the other LLCs leased all of their employees from MEI. (R. 6627-6628.)

18. Bennett was employed by MEI but was leased to and worked only for ME&LS. (R. 6583-6585.) Bennett testified that after the limited liability companies were formed "everything ... was supposed to have gone through the LCs, as far as the jobs, and ... [MEI] was more of an administration ...." (R. 2569, 6585.)

19. He testified the purpose of MEI was to keep "the three companies together, even though some of us had no interest in the other companies" and also "to just continue to keep the employees so that they had their same – the number of years that they had worked for a company instead of having to start over with a new company ...." (R. 6584-6585.)

20. Bennett concedes that ME&LS provided him with a personal vehicle and other benefits, and that he was responsible for directing the work of other leased employees of ME&LS. (R. 6586, 6571, 6699.)

21. The term "employment" as used in Section 12.3(a) is not defined in the Operating Agreement or the Second Amendment. (*See* Addenda 1 and 2.)

22. By the time Bennett signed the Second Amendment to the Operating Agreement on November 1, 2001, he had been a leased employee of ME&LS for about 5 years. (*See* Addenda 1 and 2.)

23. Each other Member of ME&LS who signed the Second Amendment also was a leased employee of ME&LS. (R. 6627-6628.)

24. On August 17, 2005, Bennett submitted a letter of resignation to McNeil (the "**Resignation Letter**"). (*See* Addendum 3.) The Resignation Letter states Bennett resigned voluntarily to "pursue other options." (Addendum 3 at 1.)

25. Bennett has not worked for ME&LS or any of the McNeil companies since his resignation in August 2005. (R. 6588.)

26. The Resignation Letter indicates Bennett expected the repurchase of his membership interest in ME&LS following his resignation. It states: "Due to the fact that I have contributed so much in building up the Company over the years, **I feel it fair that I receive at least current book value for my 252 interests ... in a timely manner.**" (Addendum 3 at 2 (emphasis added).)

C. Bennett's Membership Interest.

27. At the creation of ME&LS, Bennett received an ownership interest and became a Managing Member. He began with a 25% interest for which he paid $250, or $1 per share. (Addendum 1 at *Ex. A*; R. 6616.) His percentage was later increased to 26.53%. (R. 6698.)

28. Bennett had no ownership interest in MEI or any other McNeil company besides ME&LS. (R. 2580.)

29. Pursuant to Section 12.3 of the Second Amendment, ME&LS exercised its option to repurchase Bennett's membership interest after he resigned. (R. 2577-2578.)

30. Bennett rejected the offer and asserted his resignation did not trigger withdrawal as a Member of ME&LS. (R. 2580-2581.)

D. December 21, 2006 Order on Cross Motions.

31. ME&LS filed a Motion for Partial Summary Judgment asking the District Court to rule that when Bennett resigned and terminated his leased employment with ME&LS, he withdrew as a Member. (R. 2510-2581.)

32. Bennett filed a Cross Motion arguing he resigned only from MEI, not ME&LS, and therefore did not withdraw as a Member of ME&LS. (R. 2585-2644.)

33. On December 21, 2006, the District Court entered an Order ruling that Bennett did not withdraw from ME&LS and was still a member. The Order states that the Members of ME&LS "intended the term 'employment' to refer only to employment specifically with ME&LS, and that the parties did not intend the term to be broad enough to include employees leased from other businesses." (Addendum 4.)

E. The Judgment.

34. On January 7, 2008, Bennett filed a Motion asking the Court to enter judgment against ME&LS "as to the amounts of member distributions which were paid in the years 2005 and 2006." (R. 6432-6433.)

35. The Motion argued "there is no 'just reason for delay' in entering judgment for the amounts owed to Bennett." (R. 6447.)

36. ME&LS opposed the Motion by arguing among other things that Bennett was not entitled to a share of payments to Members, even if he was still a Member of ME&LS. (R. 6517-6527.)

37. On April 3, 2008, the District Court entered the Judgment in favor of Bennett and against ME&LS in the amount of $142,174.93. (Addendum 5.) The

Judgment was based upon the District Court's prior Order of December 21, 2006 and also its Order of April 2, 2008.

i. Bennett is Not Entitled to Guaranteed Payments.

38. In early 2006, a majority of the Members agreed that ME&LS profits should be paid to Members based upon "productivity" instead of ownership interests. (R. 6520.)

39. ME&LS asked its accountant, Mark J. Duffin, CPA ("**Duffin**"), how to pay its Members "for services performed" and Duffin recommended the option of guaranteed payments. Duffin testified that IRS regulations allow a limited liability company to elect to compensate Members by way of "guaranteed payments" based upon their service, production, or capital. (R. 6525, 6538-6542.) *See* 26 U.S.C. §707(c); 26 C.F.R. §1.707-1(c).

40. ME&LS made that election in 2006 and all payments to Members during 2006 were made as "guaranteed payments." (R. 6523.)

ii. ME&LS Has Offsetting Damages Claims.

41. At the hearing on November 17, 2006, when Judge Boyden ruled Bennett was still a Member, the District Court declined to make an award of any other "rights and benefits" as Bennett requested, both because an accounting was ordered and "more importantly" because there remained a question of "whether there are any offsets, and the other issues that may come up in that accounting." (R. 6893, T. 40-41)

42. Therefore, the Order of December 21, 2006 does not include an award of any rights or benefits of Bennett's membership. (Addendum 4.)

43. ME&LS argued that damages from its pending claims "could more than offset any amounts that may be due to Bennett." (R. 6526.)

44. By Order entered January 29, 2008 the District Court found that there were material issues of fact which required a trial on the Plaintiffs' claims of interference with business relations, breach of the ME&LS Operating Agreement, and trademark violations, among others. (R. 6560-6566.)

45. Plaintiffs retained a damages expert and submitted the required expert report and disclosures. Bennett did not depose the expert or designate one of his own. ME&LS argued its damages claims at least offset any amounts Bennett claims to be owed. (R. 6895, T. 42-43.)

46. The District Court specifically found that "Defendants did not contest Plaintiffs' evidence of damages in their Motion for Summary Judgment. All issues related to Plaintiffs' evidence of damages are preserved for trial." (R. 6562.)

SUMMARY OF ARGUMENTS

The District Court adopted an unreasonably narrow interpretation of the word "employment" as found in the Second Amendment to the Operating Agreement. By interpreting it to exclude leased employment, the District Court ignored the common, daily usage of the word. "Employment" is broadly defined and liberally construed in Utah law. *Pro-Benefit Staffing, Inc. v. Board of Review of the Industrial Commission of Utah, et al.*, 771 P.2d 1110, 1113 (Utah Ct. App. 1989). The District Court's rulings also failed to acknowledge that ME&LS is where Bennett performed all of the work that

constituted his "employment." It is undisputed that Bennett was leased to and worked only for ME&LS. Utah statutory and case law acknowledge the common practice of leasing employees among Utah businesses, and the employment of leased employees is determined by focusing on the company for whom their work is done.

The District Court also improperly failed to interpret the Operating Agreement and the Second Amendment "in an attempt to harmonize and give effect to all of the contract provisions." *Nielsen v. O'Reilly, et al.*, 848 P.2d 664, 665 (Utah 1992). The unduly narrow interpretation on which the Judgment and the underlying Orders is based renders most of the Second Amendment meaningless and leads to absurd results. Under the District Court's interpretation, for example, the withdrawal provisions of the Second Amendment would never have any application and no Member of ME&LS could ever withdraw by resigning employment.

Bennett's resignation was clearly voluntary, and there is no question it ended his leased employment and all of his work for ME&LS. Bennett maintains he only resigned from MEI, however, and that somehow the resignation did not terminate his employment with ME&LS. His strained argument is based on the fundamentally illogical premise that he had no "employment with ME&LS" where he did all of his work, and had "employment" only with MEI where he did no work. Giving effect to all provisions of the Second Amendment, and ignoring none, compels the holding that Bennett withdrew as a Member of ME&LS when he resigned on August 17, 2005.

Considering extrinsic evidence, at least preliminarily, also supports ME&LS' interpretation of the Second Amendment. Relevant extrinsic evidence includes

the facts that ME&LS always leased all of its employees from MEI, that Bennett and each other Member who signed the Second Amendment were working as leased employees of ME&LS when they signed it, and that Bennett worked exclusively for ME&LS and did no work for MEI. Moreover, Bennett's own resignation letter calls for the repurchase of his membership interest, tacitly admitting that his resignation was deemed a withdrawal as a Member of ME&LS.

For those reasons, as more fully explained in the Argument section below, this Court should rule that the District Court erred in its interpretation of the Operating Agreement and the Second Amendment. The Court should hold that Bennett's resignation brought about his withdrawal as a Member of ME&LS, and should reverse the Judgment and the underlying Orders of December 21, 2006 and April 2, 2008.

ARGUMENT

POINT I

ME&LS PROPERLY APPEALS THE JUDGMENT AND THE UNDERLYING ORDERS.

ME&LS has properly appealed both the Judgment and the underlying Orders of December 21, 2006 and April 2, 2008. The District Court certified the Judgment as final under Rule 54(b) of the Utah Rules of Civil Procedure. The Notice of Appeal properly states that the appeal is taken from the Judgment and each of the underlying Orders.

A. The Judgment is Properly Certified as Final.

A party may appeal all final orders and judgments from a district court except as otherwise provided by law. *Powell, et al. v. Cannon, et al.*, 2008 UT 19, ¶11, 179 P.3d 799; Utah R. App. P. 3(a). A judgment that does not dispose of all claims below is still appealable "when the district court certifies [it] as final under rule 54(b) of the Utah Rules of Civil Procedure." *Powell*, 2008 UT 19, ¶13; *see also Bradbury, et al. v. Valencia, et al.*, 2000 UT 50, ¶12, 5 P.3d 649; *Don Houston, M.D., Inc., et al. v. Intermountain Health Care, Inc., et al.*, 933 P.2d 403, 406 (Utah Ct. App. 1997).

The Utah Supreme Court has identified three requirements for proper certification under Rule 54(b). First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court in its discretion must make a determination that "there is no just reason for delay" of the appeal. *Kennecott Corp., et al. v. Utah State Tax Commission, et al.*, 814 P.2d 1099, 1101 (Utah 1991) (*quoting Pate v. Marathon Steel Co.*, 692 P.2d 765, 767 (Utah 1984)).

In this case, all three requirements have been satisfied. As indicated above, there are multiple claims for relief and multiple parties in this action. Also, the ruling upon which the Judgment was entered would be appealable as a final order but for the fact that there are claims or parties remaining in the case below. The District Court ordered ME&LS to pay $142,174.93 to Bennett by certified check delivered "no later

than 5:00 p.m. on April 1, 2008." (Addendum 5.) But for the other claims and parties remaining in the case, this would have been a final order appealable without certification.

Finally, the District Court exercised its discretion and determined that appeal of the Judgment should not be delayed. This Court's Memorandum Decision in the prior appeal held that the Order and Judgment of April 3, 2008 was not properly certified as final under Rule 54(b), and the appeal was dismissed for lack of subject matter jurisdiction. Then the District Court entered an Amended Order Certifying Order and Judgment as Final on October 19, 2010 (the "**Amended Order**"). This Amended Order follows the instructions of the Memorandum Decision and the requirements of Rule 54(b). It makes the express direction for entry of a final judgment as to one or more but fewer than all the claims or parties in this action. It also states: "The Court also determines that there is no just reason for delaying an appeal from the Order and Judgment." (Addendum 8.) The Amended Order then makes the determination that the operative facts underlying the claims on appeal are separate and distinct from those underlying the claims which remain in the District Court. (Addendum 8.)

For those reasons, this Court should conclude that the Amended Order satisfies each of the requirements for proper certification under Rule 54(b). Based thereon the Court should hold that the Judgment was properly certified as final and that the Court has jurisdiction to hear this appeal.

B. The Notice of Appeal Properly Identifies the Judgment and the Underlying Orders.

Rule 3(d) of the Utah Rules of Appellate Procedure provides that the notice of appeal "shall designate the judgment or order, or part thereof, appealed from ...." Utah R. App. P. 3(d). The Rule generally does not require an appellant to "indicate that the appeal also concerns intermediate orders or events that have led to that final judgment." *Zions First National Bank, N.A. v. Rocky Mountain Irrigation Co., et al.*, 931 P.2d 142, 144 (Utah 1997); *see also U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, ¶¶10-23, 990 P.2d 945 (and several cases cited therein). If a party appeals a final judgment that is unrelated to an earlier summary judgment ruling, however, then Rule 3(d) requires the notice to explicitly state that the earlier ruling is being appealed, or the appellate court lacks jurisdiction over it. *Jensen v. Intermountain Power Agency, et al.*, 1999 UT 10, ¶¶7-9, 977 P.2d 474.

In this case the Notice of Appeal explicitly states that ME&LS appeals from the Judgment and also from the Orders entered December 21, 2006 and April 2, 2008. (*See* Addendum 9.) The underlying Orders are related because the Judgment is premised on the ruling that Bennett was still a Member of ME&LS. Thus, the Notice of Appeal fully complies with the requirements of Rule 3(d) under either the general rule stated in *Rocky Mountain Irrigation* or the exception described in *Jensen*. This Court has jurisdiction to review the Judgment and each of the underlying Orders.

POINT II

BENNETT CEASED TO BE A MEMBER OF ME&LS UPON RESIGNING HIS EMPLOYMENT.

a. Bennett's Employment.

It is undisputed that from the time ME&LS was created in late 1996, Bennett was a leased employee. While technically employed by MEI, Bennett was leased to and worked exclusively for ME&LS. (R. 6583-6585.) All of ME&LS' employees were leased employees. (R. 6627-6628.) Bennett was responsible for directing the work of other leased employees of ME&LS. (R. 6571, 6699.)

Bennett's argument and the District Court's Order focused on the word "employment" in Section 12.3(a) of the Second Amendment. (*See* Addendum 2 at 3; *see also* Addendum 4.) The word "employment" is not defined in the Operating Agreement or in the Second Amendment. The District Court's Order narrowly construed it to exclude leased employment, and the interpretation was improper for the reasons set forth below.

The Utah Supreme Court has held that "[i]n the interpretation of a contract, the parties' intentions are controlling." *Turner v. Hi-Country Homeowner's Assn.*, 910 P.2d 1223, 1225 (Utah 1996). "When parties to a contract disagree about the meaning of a provision, principles of contract interpretation require us to give effect to the meaning intended by the parties at the time they entered into the agreement." *Uintah Basin Medical Center v. Hardy, M.D.*, 2005 UT App 92, ¶12, 110 P.3d 168. When the contract is not ambiguous, the Court determines the intent of the parties from the plain meaning of

the contract language. *Id.*

Organic documents creating a business entity are interpreted as a contract. *Dansie, et al. v. City of Herriman, et al.*, 2006 UT 23, ¶¶5-6, 134, P.3d 1139 (articles of incorporation); *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶¶13-14, 94 P.3d 193 (shareholder agreements); *Okelberry v. West Daniels Land Association*, 2005 UT App 327, ¶14, 120 P.3d 34 (articles of incorporation for non-profit corporation). The interpretation of such a contract must make sense based upon the nature of the business entity and the person's ownership interest. *Okelberry*, 2005 UT App 327, ¶16.

Utah courts have also held that in the construction of contracts and statutes, words "which are used in common, daily, non-technical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage." *Mesa Development Co., Inc. v. Sandy City Corp.*, 948 P.2d 366, 369 (Utah Ct. App. 1997) (*quoting Government Employees Ins. Co. v. Dennis*, 645 P.2d 672, 675 (Utah 1982)). In *Mesa Development* this Court considered the definition of the word "resident" in a standard non-legal dictionary "as a helpful guide to its general meaning." *Mesa Development*, 948 P.2d at 369.

Here, the word "employment" is a common term used in daily, non-technical speech. It means the "activity in which one engages or is employed." *Merriam-Webster OnLine*, <http://www.Merriam-Webster.com/dictionary>. This definition supports an interpretation of "employment" that focuses on the work an employee performs in his or her job and the company for whom the work is done. The common, ordinary meaning of "employment" is not limited to a technical legal

relationship the employee may have with a leasing employer for whom he or she does no work. Utah case law and statutes hold that the substance of the employment relationship is found where the leased employee does his or her work.

This Court has held in such circumstances that the term "'Employment' is broadly defined and liberally construed ...." *Pro-Benefit Staffing, Inc. v. Board of Review of the Industrial Commission of Utah, et al.*, 771 P.2d 1110, 1113 (Utah Ct. App. 1989). In that case, Pro-Benefit leased employees to various clients and the employees did their work for those clients. For purposes of the Employment Security Act this Court held that the client, and not Pro-Benefit, was the employer of the leased employees. Pro-Benefit lacked "the requisite decision-making power to qualify as an employer." *Id.* at 1113. The client performed all of the essential elements of an employer's role. The leased employees were held to be employees of the client where they did all of their work, and not employees of Pro-Benefit who was only their technical employer. *Id.* at 1113-14. Thus, the client and not Pro-Benefit was responsible for paying unemployment contributions for the leased employees. *Id.* at 1114.

Various provisions of the Utah Code also treat a leased employee as in the employment of the lessee or client where the employee does his or her work. For example, the Workers Compensation Act provides that in the case of a "professional employer organization," which is often an employee leasing company, "the client ... is considered the employer of a covered employee" and is required to secure workers compensation benefits for the leased employee. Utah Code Ann. § 34A-2-103(3)(a). The policy of this statute thus focuses on the "client" company where the leased employees do

their work.

In another context, a Utah statute provides that the term "member" of the Utah State Retirement System "includes leased employees within the meaning of Section 414(n)(2) of the Internal Revenue Code ...." Utah Code Ann. § 49-11-102(25). Thus, leased employees may participate in a retirement system through the government entity where they work, even though their technical employer is a leasing company.

These authorities support the conclusion that the word "employment" should be broadly interpreted to mean the work in which Bennett engaged or was employed, and should focus on ME&LS where all of his work was done. His "employment" under Section 12.3(a) of the Second Amendment thus includes his leased employment with ME&LS.

B. Bennett's Resignation.

Section 12.1 of the Second Amendment provides that: "**A person shall cease to be a Member upon** the happening of any of the following events: (a) **the withdrawal of a Member** ...." (Addendum 2 at 2 (emphasis added).) Section 12.3(a) states: "For purposes of this Section, **a Member shall be deemed to withdraw when the member voluntarily resigns or terminates the Member's employment with the Company [ME&LS] for reasons other than bankruptcy, death, disability or incompetency**." (*Id.* at 3 (emphasis added).)

On August 17, 2005, Bennett tendered the Resignation Letter and voluntarily resigned his employment in order to "pursue other options." (Addendum 3.) Because Bennett was and always had been a leased employee of ME&LS, the resignation

"voluntarily ... terminate[d]" his leased employment with ME&LS as well as his technical employment relationship with MEI. Bennett concedes he no longer worked for ME&LS or any other McNeil company after his resignation. (R. 6588.) Before his resignation Bennett performed all of his work for ME&LS and did no work for MEI. (R. 6583-6585.) In fact, Bennett's Resignation Letter states he spent an "incredible" amount of time "building the reputation and profitability of McNeil Engineering and Land Surveying, L.C." (Addendum 3 at 2; R. 6631.) Bennett said he had "a key role in the success of [ME&LS] ever since it has been organized." (Addendum 3 at 1; R. 6630.) His work for ME&LS was "employment" because it was the "activity in which [he] engage[d] or [was] employed." *Merriam-Webster OnLine*, <http://www.Merriam-Webster.com/dictionary>. The word is "broadly defined and liberally construed" in Utah law. *Pro-Benefit*, 771 P.2d at 1113. This Court should broadly and liberally interpret the word "employment" in Section 12.3(a) to include Bennett's leased employment at ME&LS. (Addendum 2 at 3.)

It ignores reality to argue, as Bennett does, that his resignation only terminated his technical legal relationship with MEI and not his leased employment with ME&LS, where all of his work was done. Clearly, all of his work for ME&LS ended with his resignation. (R. 6588.) Bennett voluntarily "terminate[d]" his work for ME&LS when he resigned from MEI. It also defies logic to maintain, as Bennett does, that he had no "employment" with ME&LS where he did all of his work, and had "employment" only with MEI where he did no work. Bennett withdrew as a Member of ME&LS when

he resigned on August 17, 2005 because the resignation voluntarily terminated his employment with ME&LS.

By its Order of December 21, 2006, the District Court ruled that because Bennett was a leased employee he had no "employment" at ME&LS within the meaning of Section 12.3, and the provisions of the Second Amendment did not apply. This unduly narrow interpretation erroneously excludes leased employees and ignores the undisputed fact that ME&LS had nothing but leased employees. (R. 6571, 6699.) These facts were known to Bennett and the other Members when they signed the Second Amendment. ME&LS had been in business with nothing but leased employees for nearly 5 years by the time the Second Amendment was signed, and each Member who signed it was himself a leased employee. Moreover, the Order ignores the common practice of employee leasing among Utah businesses which is reflected by the authorities cited above. This Court should conclude that the District Court's ruling was in error, and accordingly should reverse the Orders and the Judgment.

POINT III

THE COURT SHOULD GIVE EFFECT TO ALL CONTRACT PROVISIONS AND IGNORE NONE.

A. Abundant Utah Case Law.

It is well established in Utah law that a contract should be interpreted "in an attempt to harmonize and give effect to all of the contract provisions." *Nielsen v. O'Reilly, et al.*, 848 P.2d 664, 665 (Utah 1992); *Kraatz v. Heritage Imports, et al.*, 2003 UT App 201, ¶26, 71 P.3d 188 (same); *Chase v. Scott, et al.*, 2001 UT App 404, ¶20, 38

P.3d 1001 (same); *Lee, et al. v. Barnes, et al.*, 1999 UT App 126, ¶11, 977 P.2d 550. "Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none." *Plateau Mining Co. v. Utah Division of State Lands and Forestry*, 802 P.2d 720, 725 (Utah 1990) (*citing Utah Valley Bank v. Tanner*, 636 P.2d 1060, 1061-62 (Utah 1981)); *Richins Drilling, Inc. v. Golf Services Group, Inc., et al.*, 2008 UT App 262, ¶15, 189 P.3d 1280 (the Court should avoid an interpretation which would render contract provisions "meaningless") (Davis, J., concurring and dissenting). The Court will "presume" that the contract language "was included for the purpose stated and ... give [it] effect according to its usual and ordinary meaning." *Bear River Mutual Insurance Co. v. Wright, et al.*, 770 P.2d 1019, 1020 (Utah Ct. App. 1989) (*citing Marriot v. Pacific National Life Assurance Co.*, 24 Utah 2d 182, 467 P.2d 981 (1970)).

Under these rules of construction Utah courts have rejected contract interpretations that would render a provision meaningless or create an absurd result. For example, in *Novell, Inc. v. The Canopy Group, Inc.*, 2004 UT App 162, 92 P.3d 768, this Court interpreted a contract provision relating to computer source codes. The Court rejected the defendant's interpretation of the term "proceeds" because it would "render meaningless the deductions portion of the definition of 'Gross Revenue.'" *Id.* ¶27. In *Kraatz*, this Court rejected an interpretation of the term "costs" which "would reduce the costs and fees recovery provision 'to absurdity.'" *Kraatz*, 2003 UT App 201, ¶¶26-28. The interpretation "would render other parts of the contract meaningless." *Id.* ¶32. Finally, in *Okelberry*, the Court rejected the plaintiff's interpretation that every time

cattle die or are sold the shareholder would lose shares, and every time a calf is born the shareholder would gain shares. The Court stated: "The corporate secretary would be voiding and issuing shares on a daily basis. *We may not endorse such an absurd interpretation.*" *Okelberry*, 2005 UT App 327, ¶24 (emphasis added).

B. Café Rio.

In the recent decision of *Café Rio, Inc., et al. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, 207 P.3d 1235, the Utah Supreme Court applied this rule of construction to interpret a cross-easement agreement. The case illustrates how Utah courts apply the rule to resolve competing interpretations of contract language. Larkin-Gifford-Overton ("**LGO**") owned a parcel of commercial property in St. George, Utah. The Vera R. Hughes Grandchildren's Trust (the "**Trust**") owned an adjacent parcel, of which Café Rio was a tenant. LGO, the Trust, and four other adjacent property owners signed a cross-easement agreement establishing open space in the center of the six parcels as common areas and governing the use of those common areas. *Café Rio*, 2009 UT 27, 6, ¶¶8-10. Later, LGO began constructing a new building on its parcel. Café Rio and the Trust filed suit to enjoin the construction claiming it was an "obstruction" prohibited by the cross-easement agreement. (*Id.* ¶14.) The district court granted summary judgment for the Trust and Café Rio, interpreting the cross-easement agreement to prohibit LGO's building construction. (*Id.* ¶17.)

On appeal, the Utah Supreme Court reversed the judgment below. Construing multiple provisions of the cross-easement agreement, the Court ruled that it must "'consider each contract provision . . . in relation to all of the others, with a view

toward giving effect to all and ignoring none.'" *Café Rio*, 2009 UT 27, ¶25 (*quoting Green River Canal Co. v. Thayn*, 2003 UT 50, ¶17, 84 P.3d 1134). Interpreting the word "'obstruction' to include buildings would eviscerate LGO's ability to construct a building on Parcel 5 – a right explicitly bargained and provided for. *We will not interpret a general contractual term such that it renders an explicit right meaningless.*" *Café Rio*, 2009 UT 27, ¶33 (emphasis added). Accordingly, the district court's grant of summary judgment was reversed and remanded for entry of summary judgment in favor of LGO. (*Id.* ¶38.)

In the present case, the ruling in *Café Rio* applies with equal force. To accept Bennett's narrow interpretation of "employment," as the District Court did, eliminates the possibility of withdrawal upon a Member's resignation and would do away with ME&LS' right to repurchase that Member's interest. These are explicit rights bargained for in the Operating Agreement and the Second Amendment. Following the Supreme Court's guidance, this Court should not "interpret a general contractual term [employment] such that it renders an explicit right meaningless." *Café Rio*, 2009 UT 27, ¶33.

C. The Second Amendment.

Applying these rules of construction to the Second Amendment requires reversal of the Judgment and the underlying Orders. The District Court's interpretation of the word "employment" to exclude leased employment renders most of the Second Amendment meaningless. The decision nullifies parts of Sections 12.1 and 12.2 and nearly all of Section 12.3 by holding they do not apply to leased employees.

(Addendum 4; R. 3121.) The obvious intent of the withdrawal provisions in Sections 12.1 and 12.3 was to create a mechanism for ME&LS to break ties with a Member who resigns and to provide for repurchase of the Member's interest. Bennett does not dispute that this was the intended purpose. (R. 6697-6708.) The language plainly shows the Members intended withdrawal to occur upon resignation; in fact, resignation was the primary event that would trigger withdrawal. (Addendum 2 at 3.) Under the District Court's ruling, however, no Member could ever withdraw from ME&LS by resigning. Narrowly construing the word "employment" to exclude leased employment thus frustrates the intended purpose of the Second Amendment.

Moreover, the District Court's ruling leads to the absurd result that the Second Amendment could never apply to the Members of ME&LS, the very people for whom it was written. The only kind of "employment" anyone ever had with ME&LS was leased employment. Bennett admits he worked exclusively for ME&LS as a leased employee (R. 6583-6585) but contends he had no "employment" with the company.[1] If a leased employee had no "employment" then no one ever had "employment" at ME&LS, and no Member would ever withdraw from ME&LS by voluntary resignation. Thus, the Second Amendment would become a wasted and futile effort.

The District Court's ruling also leads to the absurd result of Bennett remaining a Member after he chose to leave and form his own engineering firm in

[1] Bennett makes the illogical argument that "a member who was employed by ME&LS directly could resign membership by resigning employment." (R. 6705.) Yet that argument flies in the face of Bennett's admission that *all* ME&LS employees were leased employees and no one was ever employed "directly" by ME&LS. (R. 2569, 6583-6585, 6627-6628.)

competition with ME&LS. It allows Bennett to keep one foot on each side of the fence, by earning profits from his own new firm and still demanding a share of profits from ME&LS. This result is flatly contrary to Bennett's intent and that of other Members as reflected in the language of Section 12.3 of the Second Amendment. (Addendum 2 at 3.) The Resignation Letter states Bennett's intent by including his request that ME&LS repurchase his membership interest. (Addendum 3 at 2.)

It is significant to note that Section 12.3 did not exist in the original Operating Agreement. (*See* Addendum 1.) That document has only one brief reference to withdrawal of a Member in Section 12.1, which required a majority consent of the Members. (*Id.*) Some five years after ME&LS was formed, however, all Members including Bennett signed the Second Amendment which added Section 12.3 and created a process for withdrawal "when the Member voluntarily resigns or terminates the Member's employment with the Company ...." (Addendum 2, § 12.3(a).) Under Bennett's argument, they signed a contract that could never have any effect. They provided for the resignation of "employment" from a company which, under Bennett's theory, had no "employment" whatsoever. Bennett's interpretation, as adopted in the Orders and the Judgment, renders Section 12.3 meaningless and of no effect.

By contrast, ME&LS' interpretation would give effect to all provisions of the Operating Agreement and the Second Amendment. Its interpretation is that the word "employment" was meant to include "leased employment" because that is the only kind of employment anyone ever had with ME&LS. This interpretation gives effect to all contract provisions and ignores none. Withdrawal is possible as the Members

contemplated when a voluntary resignation terminates the Member's employment. The repurchase of the Member's interest would then occur as the Second Amendment provides. No provision of the Operating Agreement or the Second Amendment is rendered meaningless by this interpretation and there will be no absurd result. Under established Utah law, therefore, the Court should adopt this interpretation and rule that the word "employment" includes Bennett's leased employment and that the resignation triggered his withdrawal as a Member of ME&LS.

POINT IV

EXTRINSIC EVIDENCE SUPPORTS THE CONCLUSION THAT "EMPLOYMENT" INCLUDES LEASED EMPLOYMENT.

If the question cannot be resolved within the four corners of the contract, then the Court should consider extrinsic evidence about the meaning of the word "employment." The issue of whether a contract is ambiguous is decided by the Court as a matter of law. *Hardy*, 2005 UT App 92, ¶13. A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, ¶10, 94 P.3d 292 (*citing Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991)).

However, a contract provision is not ambiguous just because one party gives that provision a different meaning than another party does. To demonstrate ambiguity, the contrary positions of the parties each much be "tenable." *The Canopy Group*, 2004 UT App 162, ¶24. To be tenable, an interpretation must make sense in light

of the facts surrounding the creation of the contract and the nature of the organization involved. *See Okelberry*, 2005 UT App 327, ¶16; *Hardy*, 2005 UT App 92, ¶12. The Court should avoid finding ambiguities as the result of a "forced or strained construction" of the contract. *Utah Transit Authority v. Salt Lake City Southern Railroad Co., Inc.*, 2006 UT App 46, ¶12, 131 P.3d 288.

Moreover, "[a] construction given to a contractual provision by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the court." *Okelberry*, 2005 UT App 327, ¶16.

In determining whether a contract is ambiguous the Court is not bound to consider only the language of the contract itself. *Peterson v. The Sunrider Corp., et al.*, 2002 UT 43, ¶19, 48 P.3d 918. Any relevant evidence must be considered so the Court can place itself in the same situation the parties found themselves at the time of contracting. *Id.* (*citing Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Utah 1995)). "The only evidence relevant to that inquiry is evidence of facts known to the parties at the time they entered the [agreement]." *Yeargin, Inc. v. Utah State Tax Commission*, 2001 UT 11, ¶39, 20 P.3d 287.

In this case, to decide whether the word "employment" is ambiguous, the Court should consider at least the following relevant evidence known to the parties at the time the Second Amendment was signed:

1. From its inception ME&LS leased all of its employees from MEI. Thus, the only kind of "employment" ME&LS ever had was leased employment.

2. Bennett and each other Member of ME&LS who signed the Second Amendment were working as leased employees of ME&LS at the time of contracting, and had been for nearly 5 years.

3. Bennett worked exclusively for ME&LS and did no work for MEI.

4. All of the employees worked for the limited liability companies and not for MEI. Bennett testified "everything ... was supposed to have gone through the LCs, as far as the jobs, and that [MEI] was more of an administration ...." (R. 2569, 6585.)

5. Bennett was responsible for directing other leased employees of ME&LS.

In light of these facts known to the parties when they signed the Second Amendment, this Court may easily hold that the word "employment" includes Bennett's leased employment with ME&LS. Because each Member of ME&LS was a leased employee, it is unreasonable to suggest they meant the word "employment" to exclude leased employment. Bennett's attempt to narrow the general meaning of the word "employment" to exclude leased employment would strain its interpretation beyond anything possibly intended by the Members.

Moreover, a construction given to a contract provision "by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the Court." *Okelberry*, 2005 UT App 327, ¶16. Here, Bennett's Resignation Letter reveals that he in fact believed his resignation was a withdrawal which required the

repurchase of his membership interest. The Resignation Letter states Bennett expected to "receive at least current book value for my 252 interests ... in a timely manner." (Addendum 3 at 2.) By that statement Bennett tacitly admits he was resigning or terminating his employment with ME&LS which he knew would give ME&LS the option to repurchase his membership interest. No other event had occurred besides his resignation which could bring about his "dissociation" as a Member, *e.g.*, bankruptcy, expulsion, death, or disability. (Addendum 2, § 12.1.) Nothing else could trigger the repurchase of Bennett's membership interest except his withdrawal by resignation. Giving "great weight" to this statement supports the conclusion that Bennett understood his resignation terminated his employment with ME&LS.

For those reasons, the consideration of extrinsic evidence supports the interpretation that the word "employment" includes Bennett's leased employment with ME&LS. After considering this extrinsic evidence, the Court should conclude that ME&LS' interpretation is reasonably supported by the language of the Second Amendment, and that the evidence is admissible to resolve conflicting interpretations of the word "employment." *The Sunrider Corp.*, 2002 UT 43, ¶19, 48 P.3d 918 (*quoting Ward*, 907 P.2d at 268).

D. <u>Alternatively, the Issue Should be Remanded for Trial</u>.

In the alternative, if the Court finds there are issues of fact with respect to the Members' intent concerning the Operating Agreement and the Second Amendment, then the Court should reverse the Judgment and the Orders accordingly. If this Court concludes there are genuine issues of material fact as to the meaning of term

"employment" in the Second Amendment, then the Court should reverse the Judgment and the underlying Orders of December 21, 2006 and April 2, 2008 as improperly entered under Rule 56(c) of the Utah Rules of Civil Procedure. The issue of whether Bennett withdrew as a Member of ME&LS then should be remanded for trial.

POINT V

GENUINE ISSUES OF FACT PRECLUDED ENTRY OF THE JUDGMENT.

If the Court affirms the District Court's interpretation of the word "employment," as set forth in the Orders of December 21, 2006 and April 2, 2008, the Court nevertheless should hold that the District Court improperly entered the Judgment because of genuine issues of fact in the record. The Judgment was entered upon Bennett's motion and not after an evidentiary hearing or trial. Accordingly, it should be reviewed under the standards for summary judgments in Rule 56 of the Utah Rules of Civil Procedure.

The Judgment should be reversed for at least two reasons. First, the record contains genuine issues of material fact as to whether Bennett is entitled to the amount awarded, even if he is determined to be a Member of ME&LS. Most of the amount awarded in the Judgment is a share of "guaranteed payments" that ME&LS made to its Members in 2006, and Bennett was not entitled to a share of such guaranteed payments.

In January 2006, shortly after Bennett left ME&LS, the Members agreed that profits of the company should be paid based on "productivity" instead of ownership interest. (R. 6530-6532.) Duffin advised ME&LS that tax law allows an LLC to pay

guaranteed payments to its Members based on their service, production, or capital. (R. 6538-6542.) A "guaranteed payment" is a payment made by a partnership to a partner for services or the use of capital and is determined without regard to the income of the partnership.[2] *See* 26 U.S.C. § 707; *see also* 26 C.F.R. §1.707-1(c). ME&LS wanted to make guaranteed payments to the people who were performing services for the company. (R. 6543-6546.) Because Bennett had left and was no longer performing services for ME&LS, he was not entitled to a share of guaranteed payments.

Second, any amount Bennett may claim as a share of distributions or guaranteed payments is subject to an offset by the damages claims of ME&LS against Bennett. Following the hearing held December 11, 2007 and the District Court's Order of January 29, 2008, ME&LS has damages claims pending against Bennett which require a trial on the merits. The District Court ruled that those claims present genuine issues of fact which must be resolved by the jury. The District Court also acknowledged that Bennett did not contest Plaintiffs' evidence of damages arising from these claims. (R. 6562.) Damages based upon those claims could more than offset any amounts that may be due to Bennett.

Therefore, even if this Court concludes Bennett is still a Member of ME&LS, the Court should reverse the Judgment and remand for a trial on the issues of whether Bennett is entitled to a share of guaranteed payments made by ME&LS after

[2] A limited liability company may elect to be taxed as a corporation, an S-corporation, or a partnership. ME&LS elected to be taxed as a partnership. (R. 5293-5294.)

Bennett's resignation, and whether any such amount would be offset by ME&LS' damages claims against Bennett.

CONCLUSION

For those reasons, the Court should apply governing principles of Utah contract law by interpreting the common, ordinary meaning of the word "employment," and by giving effect to all provisions of the Operating Agreement and the Second Amendment and ignoring none of them. The Court should consider extrinsic evidence in its review, at least preliminarily. The Court should then conclude that Bennett's resignation terminated his leased employment with ME&LS and triggered his withdrawal as a Member. Based thereon, the Court should reverse the Judgment and the Orders of December 21, 2006 and April 2, 2008. Alternatively, the Court should reverse the Judgment because there are genuine issues of fact as to whether Bennett is entitled to a share of guaranteed payments made to ME&LS Members, and as to whether any such amount would be offset by ME&LS' damages claims against Bennett.

DATED this 8 day of February, 2011.

RICHARDS BRANDT MILLER NELSON

MATTHEW C. BARNECK
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing BRIEF OF APPELLANT were sent by first-class mail, postage prepaid, on February 8, 2011, to the following:

Reed L. Martineau, Esq.
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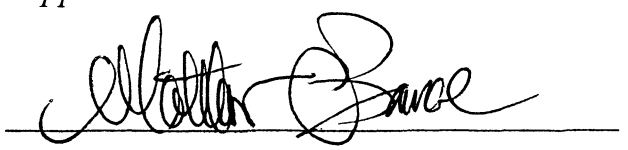
Attorneys for Appellee



ADDENDA

ADDENDUM 1 – Operating Agreement

ADDENDUM 2 – Amendment No. 2 to Operating Agreement

ADDENDUM 3 – Letter of Resignation dated August 17, 2005

ADDENDUM 4 – Orders of December 21, 2006 and April 2, 2008

ADDENDUM 5 – Order and Judgment of April 3, 2008

ADDENDUM 6 – Memorandum Decision of Utah Court of Appeals filed May 21, 2009

ADDENDUM 7 – Minute Entry entered September 21, 2010,

ADDENDUM 8 – Amended Order Certifying Order and Judgment as Final entered October 19, 2010

ADDENDUM 9 – Notice of Appeal filed October 20, 2010

ADDENDUM 1

OPERATING AGREEMENT
OF
McNEIL ENGINEERING AND LAND SURVEYING, LC

This Operating Agreement of McNEIL ENGINEERING AND LAND SURVEYING, L.C., a limited liability company organized pursuant to the Utah Limited Liability Company Act, is entered into and shall be effective as of the Effective Date, by and among the Company and the persons executing this Agreement as Members.

ARTICLE I
DEFINITIONS

For purposes of this Operating Agreement (as defined below), unless the context clearly indicates otherwise, the following terms shall have the following meanings:

1.1 **Act** - The Utah Limited Liability Company Act and all amendments to the Act.

1.2 **Additional Member** - A Member other than an Initial Member or a Substitute Member who has acquired a Membership Interest from the Company.

1.3 **Admission Agreement** - The Agreement between an Additional Member and the Company described in Article XIII.

1.4 **Articles** - The Articles of Organization of the Company as properly adopted and amended from time to time by the Members and filed with the Division of Corporations and Commercial Code.

1.5 **Assignee** - A transferee of a Membership Interest who has not been admitted as a Substituted Member.

1.6 **Bankrupt Member** - A member who: (a) has become the subject of an Order for Relief under the United States Bankruptcy Code, (b) has initiated, either in an original Proceeding or by way of answer in any state insolvency or receivership proceeding, an action for liquidation arrangement, composition, readjustment, dissolution, or similar relief.

1.7 **Capital Account** - The account maintained for a Member or Assignee

determined in accordance with Article VIII.

1.8 **Capital Contribution** - Any contribution of Property, services or the obligation to contribute Property or services made by or on behalf of a Member or Assignee.

1.9 **Code** - The Internal Revenue Code of 1986, as amended from time to time.

1.10 **Company** - McNEIL ENGINEERING AND LAND SURVEYING, LC, a limited liability companyformed under the laws of Utah, and any successor limited liability company.

1.11 **Operating Agreement** - This Operating Agreement including all Admission Agreements and amendments adopted in accordance with the Operating Agreement and the Act.

1.12 **Company Liability** - Any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

1.13 **Company Minimum Gain** - An amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding Taxable Year with the Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with §704 of the Code the Regulations issued thereunder, as the same may be issued and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any Taxable Year equals: the sum of Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of that Member's (and that Member's predecessors' in interest) aggregate share of the net decreases in Company Minimum Gain plus their

aggregate share of decreases resulting from revaluations of Company Property subject to one or more Company Nonrecourse Liabilities.

1.14 **Company Nonrecourse Liability** - A company Liability to the extent that no Member or Related Person bears the economic risk of loss (as defined in §1.752-2 of the Regulations) with respect to the liability.

1.15 **Default Interest Rate** - The then-current prime rate quoted by the largest commercial bank in the jurisdiction of the Principal Office plus two percent.

1.16 **Distribution** - A transfer of Property to a member on account of a Membership Interest as described in Article IX.

1.17 **Disposition (Dispose)** - Any sale, assignment, transfer, exchange, mortgage, pledge, grant hypothecation, or other transfer, absolute or as security or encumbrance (including dispositions by operation of law).

1.18 **Dissociation** - Any action which causes a Person to cease to be Member as described in Article XII hereof.

1.19 **Dissolution Event** - An event, the occurrence of which will result in the dissolution of the Company under Article XIV unless the Members agree to the contrary.

1.20 **Effective Date** - January 1, 1997.

1.21 **Immediate Family** - A Member's Immediate Family includes the Member's spouse, children (including natural, adopted and stepchildren), grandchildren, parents, and siblings.

1.22 **Initial Capital Contribution** - The Capital Contribution agreed to be made by the Initial Members as described in Article VIII.

1.23 **Initial Members** - Those persons identified on Exhibit A attached hereto and made a part hereof by this reference who have executed this Operating Agreement.

1.24 **Majority** - The affirmative vote or consent of Members described as a "Majority" in Article VI hereof.

1.25 **Management Right** - The right of a Member to participate in the management

of the Company, including the rights to information and to consent or approve actions of the Company.

1.26 **Managers** - Two Members selected to manage the affairs of the Company under Article VII hereof.

1.27 **Member** - Initial Member, Substituted Member or Additional Member, and, unless the context expressly indicates to the contrary, includes Managers and Assignees.

1.28 **Member Minimum Gain** - An amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding Taxable Year with the Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in member Minimum Gain are intended to be computed in accordance with §704 of the Code the Regulations issued thereunder, as the same may be issued and interpreted from time to time.

1.29 **Member Nonrecourse Liability**- Any Company Liability to the extent the liability is nonrecourse under state law, and on which a Member or Related Person bears the economic risk of loss under §1.752-2 of the Code because, for example, the Member or Related Person is the creditor or a guarantor.

1.30 **Membership Interest** - The rights of a Member or, in the case of an Assignee, the rights of the assigning Member in Distributions (liquidating or otherwise) and allocations of the profits, losses, gains, deductions, and credits of the Company.

1.31 **Net Losses** - The losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.32 **Net Profits** - The income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.33 **Nonrecourse Liabilities** - Nonrecourse liabilities include Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

1.34 **Notice** - Notice shall be in writing. Notice to the Company shall be considered given when mailed by first class mail postage prepaid addressed to the Managers in care of the Company at the address of Principal Office. Notice to a Member shall be considered given when mailed by first class mail postage prepaid addressed to the Member at the address reflected in the Operating Agreement, unless the Member has given the Company a Notice of a different address.

1.35 **Offsettable Decrease** - Any allocation that unexpectedly causes or increases a deficit in the Member's Capital Account as of the end of the taxable year to which the allocation relates attributable to depletion allowances under §1.704(b)(2)(iv)(k) of the Regulations, allocations of loss and deductions under §§704(e)(2) or 706 of the Code or under §1.751-1 of the Regulations, or distributions that, as of the end of the year are reasonably expected to be made to the extent they exceed the offsetting increases to such Member's Capital Account that reasonably are expected to occur during (or prior to) the taxable years in which the such distributions are expected to be made (other than increases pursuant to a Minimum Gain Chargeback).

1.36 **Organization** - A Person other than a natural person. Organization includes, without limitation, corporations (both non-profit and other corporations), partnerships (both limited and general), joint ventures, limited liability companies, grantor trusts and unincorporated associations, but the term does not include joint tenancies and tenancies by the entirety.

1.37 **Organization Expenses** - Those expenses incurred in the organization of the Company including the costs of preparation of the Operating Agreement and Articles.

1.38 **Permitted Transferee** - Any member of the Member's Immediate Family, or an Organization controlled by such Member or by members of the Member's Immediate Family.

1.39 **Person** - An individual, trust, estate, or any incorporated or unincorporated

organization permitted to be a member of a limited liability company under the laws of Utah.

1.40 **Proceeding** - Any administrative, judicial, or other adversary proceeding, including, without limitation, litigation, arbitration, administrative adjudication, mediation, and appeal or review of any of the foregoing.

1.41 **Property** - Any property real or personal, tangible or intangible, including money and any legal or equitable interest in such property, but excluding services and promises to perform services in the future.

1.42 **Regulations** - Except where the context indicates otherwise, the permanent, temporary, proposed, or proposed and temporary regulations of Department of the Treasury under the Code as such regulations may be lawfully changed from time to time.

1.43 **Related Person** - A person having a relationship to a Member that is described in §1.752-4(b) of the Regulations.

1.44 **Sharing Ratio** - With respect to any Member, a fraction (expressed as a percentage), the numerator of which is the total of the Member's Capital Account and the denominator is the total of all Capital Accounts of all Members and Assignees.

1.45 **Substitute Member** - An assignee who has been admitted to all of the rights of membership pursuant to the Operating Agreement.

1.46 **Taxable Year** - The taxable year of the Company as determined pursuant to §706 of the Code.

1.47 **Taxing Jurisdiction** - Any state, local, or foreign government that collects tax, interest or penalties, however designated, on any member's share of the income or gain attributable to the Company.

ARTICLE II
FORMATION

2.1 **Organization** - The Members hereby organize the Company as a Utah limited liability company pursuant to the provisions of the Act.

2.2 **Agreement** - For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Members executing this Operating Agreement hereby agree to the terms and conditions of the Operating Agreement, as it may from time to time be amended according to its terms. It is the express intention of the Members that the Operating Agreement shall be the sole source of agreement of the parties, and, except to the extent a provision of the Operating Agreement expressly incorporates federal income tax rules by reference to sections of the Code or Regulations or is expressly prohibited or ineffective under the Act, the Operating Agreement shall govern, even when inconsistent with, or different than, the provisions of the Act or any other law or rule. To the extent any provision of the Operating Agreement is prohibited or ineffective under the Act, the Operating Agreement shall be considered amended to the smallest degree possible in order to make the agreement effective under the Act. In the event the Act is subsequently amended or interpreted in such a way to make any provision of the Operating Agreement that was formerly invalid valid, such provision shall be considered to be valid from the effective date of such interpretation of amendment.

2.3 **Name** - The name of the Company is **McNEIL ENGINEERING AND LAND SURVEYING, LC.**

2.4 **Effective Date** -This Operating Agreement shall become effective upon the Effective Date, as defined in Article I.

2.5 **Term** - The Company shall be dissolved and its affairs wound up in accordance with the Act and the Operating Agreement on December 31, 2036, unless the term shall be extended by amendment to the Operating Agreement and the Articles of Organization, or unless the Company shall be sooner dissolved and its affairs wound up in accordance with the Act or the Operating Agreement.

2.6 **Registered Agent and Office** - The name and street address of the initial agent for service of process required to be maintained by the Act is: Scott F. McNeil, 6895 South 900 East, Midvale, Utah 84047. The Managers, may, from time to time, change the registered agent or office through appropriate filings with the Division of Corporations and Commercial Code.

2.7 **Principal Office** - The Principal Office of the Company shall be located at: 6895 South 900 East, Midvale, Utah 84047.

ARTICLE III
NATURE OF BUSINESS

The purpose of this Company is to engage in the business of providing civil engineering and land surveying services and all related activities and any other lawful business agreed by a Majority of the Members.

ARTICLE IV
ACCOUNTING AND RECORDS

4.1 **Records to be Maintained** - The Company shall maintain the following records at the Principal Office:

4.1.1 A current list in alphabetical order of the full name and last known business street address of each Member;

4.1.2 A copy of the Articles of Organization and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate of amendment has been executed;

4.1.3 Copies of the Company's federal, state and local income tax returns and reports, if any, for the three most recent years;

4.1.4 Copies of the Operating Agreement including all amendments thereto;

4.1.5 Any financial statements of the Company for the three most recent years;

4.1.6 A writing or other data compilation from which information can be obtained through retrieval devices into reasonably usable form setting forth the following:

(a) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each Member and which each Member has agreed to contribute;

(b) the times at which or events on the happening of which any additional contributions agreed to be made by each Member are to be made;

(c) any right of a Member to receive distributions which include a return of all or any part of the Member's Capital Contribution; and

(d) any events upon the happening of which the Company is to be dissolved and its affairs wound up.

4.2 **Reports to Members:**

4.2.1 The Managers shall provide reports at least annually to the Members other than Assignees at such time and in such manner as the Managers may determine reasonable.

4.2.2. The Managers shall provide all Members with those information returns required by the Code and the Act.

4.3 **Accounts** - The Managers shall maintain a record of Capital Account for each Member in accordance with Article VIII.

ARTICLE V
NAMES AND ADDRESSES OF MEMBERS

The names and addresses of the Initial Members are as reflected on Exhibit A attached hereto and by this reference made a part hereof.

ARTICLE VI
RIGHTS AND DUTIES OF MEMBERS

6.1 **Management Rights** - All Members (other than Assignees) who have not Dissociated shall be entitled to vote on any matter submitted to a vote of the Members. Notwithstanding the foregoing, the following actions require the consent of a Majority of the Members:

(a) any amendment to this Operating Agreement;

(b) the admission of Assignees to Management Rights; and

(c) the continuation of the Company after a Dissolution Event.

6.2 **Majority** - Whenever any matter is required or allowed to be approved by a Majority of the Members or a Majority of the Remaining Members under the Act or the Operating Agreement, such matter shall be considered approved or consented to upon the receipt of the affirmative approval or consent, either in writing or at a meeting of the Members, of Members having Sharing Ratios in excess of one half of the Sharing Ratios of all the Members entitled to vote on a particular matter. Assignees and, in the case of approvals to withdrawal where consent of the remaining Members is required, dissociating Members shall not be considered Members entitled to vote for the purpose of determining a Majority. In the case of a Member who has Disposed of that Member's entire Membership Interest to an Assignee, but has not been removed as provided below, the Sharing Ratio of such Assignee shall be considered in determining a Majority and such Member's vote or consent shall be determined by such Sharing Ratio.

6.3 **Liability of Members** - No Member shall be liable as such for the liabilities of the Company. The failure of a limited liability company to observe any formalities or requirements relating to the exercise of its powers or management of its business or affairs under this agreement or the Act shall not be grounds for imposing personal liability on the Members or Managers for liabilities of the limited liability company.

6.4 **Indemnification** - The Company shall indemnify the Members, Managers, and agents for all costs, losses, liabilities, and damages paid or accrued by such Member, Managers or agent in connection with the business of the Company, to the fullest extent provided or allowed by the laws of the state of Utah.

6.5 **Representations and Warranties** - Each member, and in the case of an organization, the person(s) executing the Operating Agreement on behalf of the organization, hereby represents and warrants to the Company and each other Member that: (a) if that Member is a organization, that it is duly organized, validly existing, and in good standing under the law of its state of organization and that it has full organizational power to execute and agree to the Operating Agreement to perform its obligations hereunder; (b) that the Member is acquiring its interest in the Company for the Member's own account as an

investment and without an intent to distribute the interest; (c) the Member acknowledges that the interests have not been registered under the Securities Act of 1933 or any state securities laws, and may not be resold or transferred by the Member without appropriate registration or the availability of an exemption from such requirements.

6.6 **Conflicts of Interests**

6.6.1 A Member, including a Manager, shall be entitled to enter into transactions that may be considered to be competitive with, or a business opportunity that may be beneficial to, the Company, it being expressly understood that some of the Members may enter into transactions into which the Company may enter. Notwithstanding the foregoing, Members shall account to the Company and hold as trustee for it any property, profit, or benefit derived by the Member, without the consent of the other Members, in the conduct and winding up of the Company business or from a use of appropriation by the Member of Company property including information developed exclusively for the Company and opportunities expressly offered to the Company.

6.6.2 A Member, including a Manager does not violate a duty or obligation to the Company merely because the Member's conduct furthers the Member's own interest. A Member may lend money to and transact other business with the Company. The rights and obligations of a Member who lends money to or transacts business with the Company are the same as those of a person who is not a Member, subject to other applicable law. No transaction with the Company shall be voidable solely because a Member has a direct or indirect interest in the transaction if either the transaction is fair to the Company or the disinterested Managers or disinterested Members, in either case knowing the material facts of the transaction and the Member's interest, authorize, approve, or ratify the transaction.

ARTICLE VII
MANAGERS

7.1 **Original Managers** - The ordinary and usual decisions concerning the business affairs of the Company shall be made by the Managers. The Managers

must be Members of the Company. The initial Managers shall be **Scott F. McNeil** and **Dale K. Bennett**.

7.2 **Term of Office as Managers** - No Manager shall have any contractual right to such position. Each Manager shall serve until the earliest of (a) the Dissociation of such Manager, or (b) the removal of the Manager.

7.3 **Authority of Members to Bind the Company** - The Members hereby agree that only the Managers and authorized agents of the Company shall have the authority to bind the Company. No Member other than a Manager shall take any action as a Member to bind the Company, and shall indemnify the Company for any costs or damages incurred by the Company as a result of the unauthorized action of such Member. The Managers have the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company, including, without limitation:

(a) the institution, prosecution and defense of any Proceeding in the Company's name;

(b) the purchase, receipt, lease or other acquisition, ownership, holding, improvement, use and other dealing with, Property, wherever located;

(c) the sale, conveyance, mortgage, pledge, lease, exchange, and other disposition of Property;

(d) the entering into contracts and guaranties; incurring of liabilities; borrowing money, issuance of notes, bonds, and other obligations; and the securing of any of its obligations by mortgage or pledge of any of its Property or income;

(e) the lending of money, investment and reinvestment of the Company's funds, and receipt and holding of Property as security for repayment, including, without limitation, the loaning of money to, and otherwise helping Members, officers, employees, and agents;

(f) the conduct of the Company's business, the establishment of Company offices, and the exercise of the powers of the Company within or without Utah;

(g) the appointment of employees and agents of the Company, the defining of their duties and the establishment of their compensation;

(h) the payment of pensions and establishment of pension plans, pension trusts, profit sharing plans, and benefit and incentive plans for all or any of the current or former Members, employees, and agents of the Company;

(i) the making of donations to the public welfare or for religious, charitable, scientific, literary or educational purposes;

(j) the payment or donation, or any other act that furthers the business and affairs of the Company;

(k) the payment of compensation, or additional compensation to any or all Members, and employees on account of services previously rendered to the limited liability company, whether or not an agreement to pay such compensation was made before such services were rendered;

(l) the purchase of insurance the life of any of its Members, or employees for the benefit of the Company;

(m) the participation in partnership agreements, joint ventures, or other associations of any kind with any person or persons; and

(n) the indemnification of Members or any other Person.

7.4 **Actions of the Managers** - The Managers have the power to bind the Company as provided in this Article VII. No person dealing with the Company shall have any obligation to inquire into the power or authority of the Managers acting on behalf of the Company. Whenever a matter is required or allowed to be approved by the Managers under the Act or the Operating Agreement, such matter shall be considered approved or consented to upon the receipt of the affirmative approval or consent, of Managers having Sharing Ratios in excess of one half of the Sharing Ratios of all Managers.

7.5 **Compensation of Managers** - The Managers shall be reimbursed for all reasonable expenses incurred in managing the Company and shall be entitled to

compensation, in an amount to be determined from time to time by the affirmative vote of a Majority of the Members.

7.6 **Managers' Standard of Care** - The Managers' duty of care in the discharge of the Managers' duties to the Company and the other Members is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. In discharging their duties, the Managers shall be fully protected in relying in good faith upon the records required to be maintained under Article IV and upon such information, opinions, reports or statements by any of its other Members, or agents, or by any other person, as to matters the Managers reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the Company or any other facts pertinent to the existence and amount of assets from which distributions to members might properly be paid.

7.7 **Removal of Managers** - A Manager may be removed by the affirmative vote of a Majority of the Members.

ARTICLE VIII
CONTRIBUTIONS AND CAPITAL ACCOUNTS

8.1 **Initial Contributions** - Each Initial Member has made the Capital Contributions described for that Member on Exhibit A. The value of the Capital Contributions shall be as set forth on Exhibit A. No interest shall accrue on any Capital Contribution and no Member shall have the right to withdraw or be repaid any Capital Contribution except as provided in this Operating Agreement. Each Additional Member shall make the Initial Capital Contribution described in the Admission Agreement. The value of the Additional Member's Initial Capital Contribution and the time for making such contribution shall be set forth in the Admission Agreement.

8.2 **Additional Contributions** - In addition to the initial Capital Contributions, the Managers, with the approval of a Majority of the Members, may determine from time to time that additional contributions are needed to enable the Company to conduct its business. Upon making such a determination, the Managers shall give Notice to all Members in writing at least

thirty (30) business days prior to the date on which such contribution is due. Such Notice shall set forth the amount of additional contribution needed, the purpose for which the contribution is needed, and the date by which the Members should contribute. Any additional contributions not paid when due shall bear interest at the Default Interest Rate. The Company shall have the right to offset any delinquent contributions from distributions of Company earnings or profits of a Member.

8.3 **Maintenance of Capital Accounts** - The Company shall establish and maintain Capital Accounts for each Member and Assignee. Each Member's Capital Account shall be increased by (a) the amount of any Money actually contributed by the Member to the capital of the Company, (b) the fair market value of any Property contributed, as determined by the Company and the contributing Member at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the company takes such Property, within the meaning of §752 of the Code), and (c) the Member's share of Net Profits and of any separately allocated items of income or gain except adjustments of the Code (including any gain and income from unrealized income with respect to accounts receivable allocated to the Member to reflect the difference between the book value and tax basis of assets contributed by the Member). Each Member's Capital Account shall be decreased by (i) the amount of any Money distributed to the Member by the Company, (ii) the fair market value of any Property distributed to the Member (net of liabilities of the Company assumed by the Member or subject to which the Member takes such Property within the meaning of §752 of the Code), and (iii) the Member's share of Net Losses and of any separately allocated items of deduction or loss (including any loss or deduction allocated to the Member to reflect the difference between the book value and tax basis of assets contributed by the Member).

8.4 **Distribution of Assets** - If the Company at any time distributes any of its assets in-kind to any Member, the Capital Account of each Member shall be adjusted to account for that Member's allocable share (as determined under Article IX below) of the Net Profits or Net Losses that would have been realized by the Company had it sold the assets that were distributed at their respective fair market values immediately prior to their distribution.

8.5 **Sale or Exchange of Interest** - In the event of a sale or exchange of some or all of a Member's Interest in the Company, the Capital Account of the

Transferring Member shall become the capital account of the assignee, to the extent it relates to the portion of the Interest Transferred.

8.6 **Compliance with Section 704(b) of the Code** - The provisions of this Article VIII as they relate to the maintenance of Capital Accounts are intended, and shall be construed, and, if necessary, modified to cause the allocations of profits, losses, income, gain and credit pursuant to Article IX to have substantial economic effect under the Regulations promulgated under §704(b) of the Code, in light of the distributions made pursuant to Articles IX and XIV and the Capital Contributions made pursuant to this Article VIII. Notwithstanding anything herein to the contrary, this Operating Agreement shall not be construed as creating a deficit restoration obligation or otherwise personally obligate any Member to make a Capital Contribution in excess of the Initial Capital Contribution.

ARTICLE IX
ALLOCATIONS AND DISTRIBUTIONS

9.1 **Allocations of Net Profits and Net Losses from Operations** - Except as may be required by §704(c) of the Code, and Section 9.2, 9.3 and 9.4, net profits, net losses, and other items of income, gain, loss, deduction and credit shall be apportioned among the Members in proportion to their Sharing Ratios.

9.2 **Company Minimum Gain Chargeback** - If there is a net decrease in Company Minimum Gain for a Taxable Year, each Member must be allocated items of income and gain for that Taxable Year equal to that Member's share of the net decrease in Company Minimum Gain. A Member's share of the net decrease in Company Minimum Gain is the amount of the total net decrease multiplied by the Member's percentage share of the Company Minimum Gain at the end of the immediately preceding Taxable Year. A Member's share of any decrease in Company Minimum Gain resulting from a revaluation of Company Property equals the increase in the Member's Capital Account attributable to the revaluation to the extent the reduction in minimum gain is caused by the revaluation. A Member is not subject to the Company Minimum Gain Chargeback Requirement to the extent the Member's share of the net decrease in Company Minimum Gain is caused by a guarantee, refinancing, or other change in the debt instrument causing it to become partially or wholly a Recourse Liability or a Member Nonrecourse Liability, and the Member bears the

economic risk of loss (within the meaning of §1.752-2 of the regulations) for the newly guaranteed, refinanced, or otherwise changed liability.

9.3 **Member Minimum Gain Chargeback** - If during a Taxable Year there is a net decrease in member Minimum Gain, any Member with a share of that Member Minimum Gain (as determined under §1.704-2(i)(5) of the Regulations) as of the beginning of that Taxable Year must be allocated items of income and gain for that Taxable Year (and, if necessary, for succeeding Taxable Years) equal to that Member's share of the net decrease in the Company Minimum Gain. A Member's share of the net decrease in Member Minimum Gain is determined in a manner consistent with the provisions of paragraph 9.2. A Member is not subject to this Member Minimum Gain Chargeback, however, to the extent the net decrease in member Minimum Gain arises because the liability ceases to be Member Nonrecourse Liability due to a conversion, refinancing, or other change in the debt instrument that causes it to become partially or wholly a Company Nonrecourse Liability. The amount that would otherwise be subject to the Member Minimum Gain Chargeback is added to the Member's share of Company Minimum Gain. In addition, rules consistent with those applicable to Company Minimum Gain shall be applied to determine the shares of Member Minimum Gain and Member Minimum Gain Chargeback to the extent provided under the Regulations issued pursuant to §704(b) of the Code.

9.4 **Qualified Income Offset** - In the event any Member, in such capacity, unexpectedly receives an Offsettable Decrease, such Member will be allocated items of income and gain (consisting of a pro rata portion of each item of partnership income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible.

9.5 **Interim Distributions** - From time to time, the Managers shall determine in their reasonable judgment to what extent, if any, the Company's cash on hand exceeds the current and anticipated needs, including, without limitation, needs for operating expenses, debt service, acquisitions, reserves, and mandatory distributions, if any. To the extent such excess exists, the Managers may make distributions to the Members in accordance with their Sharing Ratios. Such distributions shall be in cash or Property (which need not be distributed proportionately) or partly in both, as determined by the Managers.

9.6 **Limitations on Distributions** - No distribution shall be declared and paid unless, after the distribution is made, the assets of the Company are in excess of all liabilities of the Company, except liabilities to Members on account of their Capital Accounts.

ARTICLE X
TAXES

10.1 **Elections** - The Managers may make any tax elections for the Company allowed under the Code or the tax laws of any state or other jurisdiction having taxing jurisdiction over the Company.

10.2 **Taxes of Taxing Jurisdictions** - To the extent that the laws of any Taxing Jurisdiction requires, each Member requested to do so by the Managers will submit an agreement indicating that the Member will make timely income tax payments to the Taxing Jurisdiction and that the Member accepts personal jurisdiction of the Taxing Jurisdiction with regard to the collection of income taxes attributable to the Member's income, and interest, and penalties assessed on such income. If the Member fails to provide such agreement, the Company may withhold and pay over to such Taxing Jurisdiction the amount of tax, penalty and interest determined under the laws of the Taxing Jurisdiction with respect to such income. Any such payments with respect to the income of a Member shall be treated as a distribution for purposes of Article IX. The Managers may, where permitted by the rules of any Taxing Jurisdiction, file a composite, combined or aggregate tax return reflecting the income of the Company and pay the tax, interest and penalties of some or all of the Members on such income to the Taxing Jurisdiction, in which case the Company shall inform the Members of the amount of such tax interest and penalties so paid.

10.3 **Tax Matters Partner** - The Manager with the greatest Sharing Ratio shall serve as the *tax matters partner* of the Company pursuant to §6231(a)(7) of the Code. Any Member designated as tax matters partner shall take such action as many be necessary to cause each other Member to become a *notice partner* within the meaning of §6223 of the Code.

ARTICLE XI
DISPOSITION OF MEMBERSHIP INTERESTS

11.1 **First Right** - No Member shall sell or transfer any Membership Interest, or any part thereof, nor enter into any agreement as a result of which any person or organization may become interested therein unless the transferring Member complies with the following conditions:

11.1.1 The Membership Interest shall first be offered in writing to the Company at the price and on the terms of which it is proposed to be sold, and the Company shall have a period of thirty (30) days to accept or reject the offer in whole or in part, at the price (prorated, if the offer is accepted in part) and the terms proposed.

11.1.2 If the offer is rejected in whole or in part by the Company, the Membership Interest, or remaining part thereof, shall next be offered in writing to the other Members for a period of twenty (20) days next following expiration of the thirty (30) day period. The offer to the other Members shall be prorated in accordance with the ratio of the interest of each Member to the total interest of all the Members other than the one making the offer, on the terms and at prices (as to each offeree) determined by prorating the price. If not all the remaining interest is disposed of under the apportionment, each Member desiring to purchase a portion of the remaining interest shall be entitled to purchase the portion that remains undisposed of as such Member's Interest in the Company bears to the interest of all other Members desiring to purchase portions of the remaining interest.

11.1.3 If none or only a portion of the interest of the Member desiring to sell the same is purchased in accordance with Sections 11.1.1 and 11.1.2, then the partner may sell his interest or the remainder to a third person or third persons during a three (3) month period following the expiration of the twenty (20) day period referred to in Section 11.1.2, but at a price not less than the price offered to the Company and Members (prorated if only a portion), and on terms no more favorable than such terms. After the expiration of such three (3) month period, the interest or portion of the remaining interest shall not be sold without first being offered to the Company and the remaining Members in accordance with this Article.

11.1.4 Any sale or transfer or purported sale or transfer of any Membership Interest shall be null and void unless made strictly in accordance with the provisions of this Article The transferee of any Member's interest shall be required to execute a counterpart of this Operating Agreement.

11.1.5. Nothing in this Article, however, shall prevent the Membership Interest of any Member from being transferred or disposed of by Will or intestacy for the benefit of the deceased Member's immediate family or transferred during a Member's lifetime, by sale, gift or inter vivos trust, to or for the benefit of the Member's immediate family, provided however, that in respect to transfers by way of testamentary or inter vivos trust, the trustee or trustees is or are to be a member or member of the Members' immediate family.

11.2 **Limitations** - No Membership Interest shall be Disposed of:

(a) if such disposition, alone or when combined with other transactions, would result in a termination of the Company within the meaning of §708 of the Code;

(b) without an opinion of counsel satisfactory to the Managing Member that such assignment is subject to an effective registration under, or exempt from the registration requirements of, the applicable state and federal securities laws; and

(c) unless and until the Company receives from the Assignee the information and agreements that the Managers may reasonably require, including but not limited to any taxpayer identification number and any agreement that may be required by any Taxing Jurisdiction.

11.3 **Compulsory Sale Upon Expulsion.** Recognizing that a professional service company requires a harmonious and satisfactory personal relationship between the Members, the Members agree that the following grounds shall each constitute a sufficient reason for the holders of a 75% majority interest in the Company to vote a mandatory purchase of a Member's Membership Interest in the Company.

11.3.1 If any Member:

(a) Loses his license to practice engineering in Utah;

(b) Engages in personal misconduct or a breach of this Agreement that makes his continued presence as a Member in the Company personally or professionally obnoxious or detrimental to the other Members of the Company;

(c) Is convicted of a felony, or a crime involving a breach of ethics, moral turpitude, or immoral conduct; or

(d) Becomes insolvent, makes an assignment for the benefit of creditors, or is declared a bankrupt.

11.3.2 No Member shall be expelled without at least 30 days prior written notice, which shall state the reason for expulsion and shall be signed by Members holding a 75% majority interest in the Company.

11.3.3 Upon the expulsion of a Member, the expelled Member shall be entitled to an amount equal to the book value of the Company multiplied by the expelled Member's percentage interest in the Company, less any amounts owing by the expelled Member to the Company.

11.4 **Dispositions not in Compliance with this Article Void.** Any attempted Disposition of a Membership Interest, or any part thereof, not in compliance with this Operating Agreement is null and void *ab initio*.

ARTICLE XII
DISSOCIATION OF A MEMBER

~~12.1~~ **Dissociation** - A Person shall cease to be a Member upon the happening of any of the following events:

(a) the Withdrawal of a Member with the consent of a Majority of the remaining Members prior;

(b) the bankruptcy of a Member;

(c) the expulsion of a Member;

(d) in the case of a Member who is a natural person, the death of the Member or the entry of an order by a court of competent jurisdiction adjudicating the Member incompetent to manage the Member's personal estate;

(e) in the case of a Member who is acting as a Member by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(f) in the case of a Member that is a separate Organization other than a corporation, the dissolution and commencement of winding up of the separate Organization;

(g) in the case of a Member that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(h) in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the limited liability company.

Rights of Dissociating Member - In the event any Member dissociates prior to the expiration of the Term:

(a) if the dissociation causes a dissolution and winding up of the Company under Article XIV, the Member shall be entitled to participate in the winding up of the Company to the same extent as any other Member except that any Distributions to which the Member would have been entitled shall be reduced by the damages sustained by the Company as a result of the Dissolution and winding up;

(b) if the dissociation does not cause a dissolution and winding up of the Company under Article XIV, the Member shall be entitled to an amount equal to the book value of the Member's Membership Interest in the Company, to be paid within six months of the date of dissociation. Notwithstanding the foregoing, if the dissociation is other than as a result of the death or incompetence of the Member, the Managing Members may pay the book value of the Member's Membership Interest in the Company out over a period not to exceed three years, provided that the dissociating Member shall be entitled to participate as an

Assignee in the Company until the value of such interest (plus interest at the Default Interest Rate) is paid in full.

ARTICLE XIII
ADMISSION OF ASSIGNEES AND ADDITIONAL MEMBERS

13.1 **Rights of Assignees** - The Assignee of a Membership Interest has no right to participate in the management of the business and affairs of the Company or to become a Member. The Assignee is only entitled to receive the Distributions and return of capital, and to be allocated the Net Profits and Net Losses attributable the Membership Interest.

13.2 **Admission of Substitute Members** - An Assignee of a Membership Interest shall be admitted as a Substitute Member and admitted to all the rights of the Member who initially assigned the Membership Interest only with the approval of the Managers and a Majority of the Members. The Managers may grant or withhold the approval of such admission for any in their sole and absolute discretion. If so admitted, the Substitute Member has all the rights and powers and is subject to all the restrictions and liabilities of the Member originally assigning the Membership Interest. The admission of a Substitute Member, without more, shall not release the Member originally assigning the Membership Interest from any liability to Company that may existed prior to the approval.

13.3 **Admission of Permitted Transferees** - Notwithstanding Section 13.2, hereof, the Membership Interest of any Member shall be transferable without the consent of the Managers or any of the Members if (i) the transfer occurs by reason of or incident to the death, dissolution, divorce, liquidation, merger or termination of the transferor Member, and (ii) the Transferee is a Permitted Transferee.

13.4 **Admission of Additional Members** - The Managers may permit the admission of Additional Members and determine the Capital Contributions of such Members. Notwithstanding the foregoing, the Additional Members may not become Members unless and until selected to such position as provided herein, and until they have executed an Admission Agreement in a form satisfactory to the Managers.

ARTICLE XIV
DISSOLUTION AND WINDING UP

14.1 **Dissolution** - The Company shall be dissolved and its affairs wound up, upon the first to occur of the following events (which, unless the Members agree to continue the business, shall constitute Dissolution Events):

(a) the expiration of the Term, unless the business of the Company is continued with the consent of a Majority of the Members;

(b) the unanimous written consent of all of the Members; or

(c) the Dissociation of the Managers, unless the business of the Company is continued with the consent of a Majority of the Members within 90 days after such Dissociation.

14.2 **Effect of Dissolution** - Upon dissolution, the Company shall cease carrying on as distinguished from the winding up of the Company business, but the Company is not terminated, but continues until the winding up of the affairs of the Company is completed.

14.3 **Distribution of Assets on Dissolution** - Upon the winding up of the Company, the Company Property shall be distributed:

(a) to creditors, including Members who are creditors, to the extent permitted by law, in satisfaction of Company Liabilities;

(b) to Members in accordance with positive Capital Account balances taking into account all Capital Account adjustments for the Company's taxable year in which the liquidation occurs. Liquidation proceeds shall be paid within 60 days of the end of the Company's taxable year or, if later, within 90 days after the date of liquidation. Such distributions shall be in cash or Property (which need not be distributed proportionately) or partly in both, as determined by the Managers.

14.4 **Winding Up and Certificate of Dissolution** - The winding up of a limited liability company shall be completed when all debts, liabilities, and obligations of the limited liability company have been paid and discharged or reasonably adequate provision therefor has been made, and all of the remaining

property and assets of the limited liability company have been distributed to the members. Upon the completion of winding up of the Company, a certificate of dissolution shall be delivered to the Division of Corporations and Commercial Code for filing. The certificate of dissolution shall set forth the information required by the Act.

ARTICLE XV
AMENDMENT

15.1 **Operating Agreement May Be Modified** - The Operating Agreement may be modified as provided in this Article XV (as the same may, from time to time be amended). No Member or Manager shall have any vested rights in the Operating Agreement.

15.2 **Amendment or Modification of Operating Agreement** - The Operating Agreement may be amended or modified from time to time only by a written instrument adopted by the Managers and executed by a Majority of the Members.

ARTICLE XVI
MISCELLANEOUS PROVISIONS

16.1 **Entire Agreement** - The Operating Agreement together with the Articles of Organization represents the entire agreement among all the Members and between the Members and the Company.

16.2 **No Partnership intended for Nontax Purposes** - The Members have formed the Company under the Act, and expressly do not intend hereby to form a partnership under either the Utah Uniform Partnership Act nor the Utah Uniform Limited Partnership Act. The Members do not intend to be partners one to another, or partners as to any third party. To the extent any Member, by word or action, represents to another person that any other Member is a partner or that the Company is a partnership, the Member making such wrongful representation shall be liable to any other Member who incurs personal liability by reason of such wrongful representation.

16.3 **Rights of Creditors and Third Parties under Operating Agreement** - The Operating Agreement is entered into among the Company and the Members for the exclusive benefit of the Company, its Members, and their successors and assignees. The Operating Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under the Operating Agreement or any agreement between the Company and any Member with respect to any Capital Contribution or otherwise.

16.4 **Counterparts** - This Operating Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, we have executed this Operating Agreement as of the date set forth beside our names.

Date 12-30-96

Scott F. McNeil

Date 12-30-96

Dale K. Bennett

Date 12-30-96

D. Bradford Peterson

Date 12-30-96

Kenneth A. Petty

Date 12-30-96

Stephen J. Fackrell

12-31-96

12-31-96

EXHIBIT "A"

MEMBER	INITIAL CAPITAL CONTRIBUTION	PERCENTAGE INTEREST
Scott F. McNeil	$600.00	60.0%
Dale K. Bennett	250.00	25.0%
D. Bradford Peterson	50.00	5.0%
Kenneth A. Petty	40.00	4.0%
Stephen J. Fackrell	30.00	3.0%
D. Gregg Meyers	15.00	1.5%
Michael D. Hoffman	15.00	1.5%
Total	$1,000.00	100.0%

ADDENDUM 2

AMENDMENT NO. 2
TO
OPERATING AGREEMENT
OF
McNEIL ENGINEERING AND LAND SURVEYING, LC

THIS AMENDMENT NO. 2 TO OPERATING AGREEMENT is made and entered into as of Nov 1, 2001, by and between the parties who have signed this Amendment No. 2 (this "Amendment").

RECITALS

A. Scott F. McNeil, Dale K. Bennett, D. Bradford Petersen, Kenneth A. Petty, D. Gregg Meyers and Michael D. Hoffman entered into an Operating Agreement with an effective date of January 1, 1997, and amended August 1, 2000, by that certain Amendment No. 1 to Operating Agreement (the "Operating Agreement"), for McNEIL ENGINEERING AND LAND SURVEYING, LC (the "Company").

B. The parties hereto desire to amend the Operating Agreement to reflect the transfer of certain interests in the Company, and various other changes in the Operating Agreement.

NOW, THEREFORE, the parties hereto hereby amend the Operating Agreement as follows:

1. The Members of the Company and their percentage interests as of the date of this Amendment are as follows:

MEMBER	ADDRESS	PERCENTAGE INTEREST
Scott F. McNeil	6895 South 900 East Midvale, Utah 84047	57.41%
Dale K. Bennett	6895 South 900 East Midvale, Utah 84047	26.30%
D. Bradford Petersen	6895 South 900 East Midvale, Utah 84047	6.68%
Kenneth A. Petty	6895 South 900 East Midvale, Utah 84047	5.64%
Michael D. Hoffman	6895 South 900 East Midvale, Utah 84047	2.61%

D. Gregg Meyers	6895 South 900 East Midvale, Utah 84047	1.57%

2. Article I is hereby amended by deleting Sections 1.21 and 1.38.

3. Article XI is hereby amended by deleting Section 11.1.5 in its entirety.

4. Article XI is further amended by the addition of the following section:

11.3.4 The term "book value" as used in this Article XI and in the following Article XII, shall mean the book value as determined by the Company's accountant who customarily prepares the Company's financial statements, with the standard adjustments and accruals as are normally reflected in the monthly financial statements, including but not limited to, the accrual of obligations of the Company to McNeil Engineering, Inc.

5. Section 12.1 is hereby amended to read in its entirety as follows:

12.1 Dissociation - A Person shall cease to be a Member upon the happening of any of the following events:

(a) the withdrawal of a Member;

(b) the bankruptcy of a Member;

(c) the expulsion of a Member;

(d) the death of the Member; or

(e) the disability of the Member, which shall be deemed to be a physical or mental condition of the Member which, in the opinion of a licensed physician selected by the remaining Members, renders the affected Member unable to perform the material duties and functions of his or her job with the Company.

6. Section 12.2 is hereby amended to read in its entirety as follows:

12.2 Rights of Dissociating Member - In the event any Member dissociates prior to the expiration of the Term:

(a) If the dissociation is as a result of the death of a Member, the Company shall redeem the Member's Membership Interest in an amount equal to the agreed upon value of the Member's Membership Interest in Company, as determined

annually by the Company's regular accountant who customarily prepares the Company's financial statements. The proceeds of any life insurance payable to the Company as a result of the death of a Member shall not be taken into account in determining the agreed upon value. The purchase price to be paid under this Section 12.2(a) shall be paid within 120 days of the date of death of the deceased Member; provided that the Company shall promptly and diligently proceed to collect the proceeds of any insurance policy held by the company upon the deceased Member's life, and shall immediately pay such proceeds (or such portion thereof as equals the purchase price for the shares being purchased) to the deceased Member's estate.

(b) In the event a Member dissociates prior to the expiration of the Term for any event other than the Member's death or withdrawal, the Member shall be entitled to an amount equal to the book value of the Member's Membership Interest in the Company (as defined in Section 11.3.4 above), to be paid over a period not to exceed five years.

7. Article XII is hereby further amended by the addition of the following Section 12.3

12.3 **Option to Purchase in event of Withdrawal** - In the event a Member withdraws from the Company prior to the expiration of the Term, the Company and each other Member shall have an option to purchase the withdrawing Member's Membership Interest. The Company shall have the first option to purchase all, none, or a portion of the withdrawing Member's Membership Interest; provided that the Company may purchase less than all of such interest only if the other Members agree to purchase the remainder of the interest. The non-withdrawing Members shall have the right to purchase any interest not purchased by the Company in the ratio that their ownership percentage bears to the ownership percentages of all Members electing to purchase the remaining interest. The terms and conditions of the option shall be as set forth below in this Section.

(a) For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with the Company for reasons other than bankruptcy, death, disability or incompetency.

(b) The option to purchase a withdrawing Member's Membership Interest shall be exercised by giving written notice thereof to the withdrawing Member.

(c) The purchase price shall be an amount equal to the book value of the Member's Membership Interest in the Company (as defined in Section 11.3.4 above), to be paid over a period not to exceed five years.

(d) The closing of such purchase and sale shall take place at the principal office of the Company at a date designated by the Company, which date shall

not be later than 90 days after the date upon which the option herein referred to is exercised.

8. Section 13.3 is hereby deleted in its entirety.

9. Section 14.1 is hereby amended by the deletion of paragraph (c).

The Operating Agreement shall remain in full force and effect and shall remain unaltered, except to the extent specifically amended herein.

The parties hereto acknowledge and consent to the transfer of certain membership interests. The parties hereto do hereby waive (a) any rights of first refusal, options or other rights they may have with respect to the interests being transferred, and (b) any notice to which they may otherwise be entitled with respect to said transfers.

This Amendment may be signed in several counterparts, through the use of multiple signature pages appended to each original, and all such counterparts shall constitute one and the same instrument. Any counterpart to which is attached the signatures of all parties shall constitute an original of this Amendment.

IN WITNESS WHEREOF, the undersigned have executed this Amendment as of the date first above written.

Scott F. McNeil

Dale K. Bennett

D. Bradford Petersen

Kenneth A. Petty

Michael D. Hoffman

D. Gregg Meyers

mcneil ls op amd2 wpd

ADDENDUM 3

Dale K. Bennett
13687 S. Hackamore Circle
Draper, Utah 84020

August 17, 2005

Scott F. McNeil, P.E., S.E., and L.S.
President
McNeil Engineering, Inc.
6895 S. 900 E.
Midvale, Utah 84047

RE: Letter of Resignation – McNeil Engineering, Inc.

Dear Scott,

Thank you providing me with the opportunity to work with you for so many years. Because of the circumstances that have occurred over the last few weeks, I believe that it is in my best interest to leave the company and pursue other options. I therefore resign as an employee of McNeil Engineering, Inc. My intentions of purchasing your shares along with the 5 other employees were all in good faith. I apologize for any misunderstandings about the purchasing of the company. I never intended it to be a hostile takeover as you mentioned. I believe I have been honest in pursuing the best interests of McNeil Engineering during the course of my career. I disagree with your belittling comment that led me to believe that I don't have any other options and that I must stay here with the company regardless. In a recent meeting we had with the other members, it was implied that I am not pulling my weight and making the company enough money. I disagree with this comment and believe I have been a key role in the success of McNeil Engineering and Land Surveying, L.C. ever since it has been organized. I have put in an enormous amount of time and energy above and beyond my call of duty and away from my family in helping the success of McNeil Engineering. I feel that I need to change my priorities and put my family in front of my career. Please consider this my two weeks notice. I will plan on working 40 hours per week for the next two weeks. If you would like my services longer than two weeks, I would be willing to work out consulting arrangements.

As for Engcad, I'm not interested in selling any of my interests in this company. I have too much time and effort invested in it and establishing life long friendships with the employees. If you would like to sell your portion, please let me know, otherwise, I plan on leaving it set up as it currently is.

I also intend to honor my agreement for the T-ville Carwash.

I have also enclosed with this letter, the books for Engcad, a disbursement check for $4,500 and a check for $36,000 to cover the vehicle. I thought I had it sold before I left for Manila for $35,000. The potential buyer wanted to reduce the amount to $32,000 and so I went ahead and purchased it myself for $33,500. You mentioned to me in an e-mail that I would lose $10,000 the first year. I mentioned to you that the Mitsubishi Diamante cost me over $4,500 per year by the time I sold it

for around $7400 (private party value) and that I could sell my 2004 BMW and lose less than $4,500 the first year. Well I guess I was wrong but close. I used $3,000 of the $7,400 for the deposit on the car and another approx. $2,600 for taxes and licensing. The tint was approx. $190, spoiler approx. $475, and the chrome wheels approx. $2,600 (I paid this and never expected the company to pay for this). The company paid approx. $35k plus $7.4k (less $2,500 I am giving you back) or $39.9k total. I am giving you $36k ($33.5k plus $2.5k for ($7.4k-$3k-$2.6k = $1.8k but I added an additional $700 in good faith).

Please remember the following:

1. I haven't taken a raise in over 6 years.

2. I saved the company at least $24,000 over the past 4 years not taking out medical insurance.

3. I have put in an incredible amount of additional hours away from my family in building the reputation and profitability of McNeil Engineering and Land Surveying, L.C.

I have contributed to your ability to make in excess of $500,000 per year in personal income over a number of years. Due to the fact that I have contributed so much in building up the company over the years, I feel it fair that I receive at least current book value for my 252 interests (at least $695/interest) in a timely manner.

I believe it is in both of our best interests to be as professional as possible during this transition for the sake of our families and current employees of McNeil Engineering, Inc. Should you have any questions or concerns, please feel free to contact my attorney, Reed Martineau at 322-9222 who is very familiar with the situation at hand.

Respectfully yours,

Dale K. Bennett

ADDENDUM 1

REED L. MARTINEAU (2106)
KEITH A. CALL (6708)
DEREK J. WILLIAMS (9864)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

McNEIL ENGINEERING, INC., McNEIL ENGINEERING AND LAND SURVEYING, L.L.C., ENGCAD, L.L.C., and SCOTT McNEIL,

Plaintiffs,

vs.

BENCHMARK ENGINEERING AND LAND SURVEYING, L.L.C., BENCHMARK CAD SERVICES, L.L.C., LAND DEVELOPMENT CADD, INC., DALE K. BENNETT, AND FLORENCE ALHAMBRA, individually,

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Case No. 050917315

Judge Ann Boyden

Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment came before the Court for hearing on Friday, November 17, 2006. Plaintiffs were represented by their counsel of record, Matthew C. Barneck

and Martha Knudson of Richards, Brandt, Miller & Nelson, and Defendants were represented by their counsel of record, Reed L. Martineau and Derek J. Williams of Snow, Christensen & Martineau.

The Court, having reviewed the pleadings associated with each of these motions, and having heard argument from both counsel, for good cause showing, denies Plaintiffs' Motion for Partial Summary Judgment and grants Defendants' Motion for Partial Summary Judgment. This order is based on the reasons stated by the Court at the hearing, including the following:

1. Section 12.3 of the McNeil Engineering and Land Surveying ("ME&LS") Operating Agreement ("Operating Agreement") provides that a member "shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with the Company for reasons other than bankruptcy, death, disability or incompetency."

2. Section 1.10 of the Operating Agreement defines "Company" as McNeil Engineering and Land Surveying." On August 17, 2005, Defendant Dale Bennett voluntarily resigned his employment with McNeil Engineering, Inc. ("MEI"). The Court concludes that the term "employment" as it is used in Section 12.3 of the Operating Agreement is not ambiguous, and that the natural use and meaning of that term as it is used within Section

12.3 is that in order to withdraw as a member, the member must voluntarily resign employment from ME&LS.

3. The Court also concludes that the parties intended the term "employment" to refer only to employment specifically with ME&LS, and that the parties did not intend the term to be broad enough to include employees leased from other businesses. Five years after signing the ME&LS Operating Agreement, the parties made significant amendments to Section 12.3 of the Operating Agreement, and did not make any changes to the definitions or other language which would manifest an intention to broaden the scope of Section 12.3 to include anything other than traditional employees.

4. Because Dale Bennett did not voluntarily resign employment with ME&LS, the Court declares that he is currently, and since its inception, has been a member of ME&LS. As a result, Dale Bennett is entitled to all of the rights, of a member, including, for example the same right to current information, accounting, disbursements, and other benefits that any other member of ME&LS is entitled to receive.

5. Based on the foregoing, the Plaintiffs are ordered to submit to counsel for mr. Bennett and to the Court, within 30 days of November 17, 2006, a full and complete accounting of all

of the rights, disbursements, and other benefits given to members of ME&LS since August 17, 2005, including an accounting of all rights, disbursements, and other benefits that have or have not been given to Dale Bennett. The Plaintiffs are also ordered to immediately produce to Mr. Bennett all of the documents supporting and related to the accounting or which form the basis for making the accounting.

DATED this 21st day of December, 2006.

BY THE COURT:

By _____
The Honorable Ann Boyden
District Court Judge

CERTIFICATE OF SERVICE

I state that I am employed in the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**, Case No. 050917315, Third Judicial District Court, Salt Lake County, State of Utah, upon the following parties by placing a true and correct copy thereof in an envelope to:

Mr. Matthew C. Barneck
Ms. Martha Knudson
Mr. Paul Burghardt
Richards, Brandt, Miller & Nelson
50 South Main Street, 7th Floor
Post Office Box 2465
Salt Lake City, Utah 84110-2465
Attorneys for Plaintiffs

and causing the same to be

☐ mailed first class, postage pre-paid,
☒ hand delivered,

on the 7th day of December, 2006.

N:\22658\1\Pleadings\Order on MPSJ Counterclaim (2).wpd

ADDENDUM 5

REED L. MARTINEAU (2106)
KEITH A. CALL (6708)
DEREK J. WILLIAMS (9864)
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10 Exchange Place, Eleventh Floor
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Salt Lake City, Utah 84145
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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

McNEIL ENGINEERING, INC., McNEIL ENGINEERING AND LAND SURVEYING, L.L.C., ENGCAD,LLC, and SCOTT McNEIL,

Plaintiffs,

vs.

BENCHMARK ENGINEERING AND LAND SURVEYING, L.L.C., BENCHMARK CAD SERVICES, L.L.C., LAND DEVELOPMENT CADD, INC., DALE K. BENNETT and FLORENCE ELHAMBRA, individually,

Defendants.

ORDER AND JUDGMENT

Case No. 050917315

Judge Pat Brian

This matter came before the Court on Defendant Dale Bennett's Motion for Order of Judgment. The motion was fully briefed and came before the Court for oral argument on March 18, 2008. Plaintiffs were represented by Matthew C. Barneck. All Defendants other than Florence Elhambra were represented by Reed L. Martineau, Keith A. Call and Derek J. Williams.

By his motion, Defendant Dale Bennett asked the Court to enter a judgment certain against Plaintiff/Counterclaim Defendant McNeil Engineering & Land Surveying, LLC ("ME&LS") in the amount of $142,174.93, which Bennett claims represents his share of cash distributions for the years 2005 and 2007.

Bennett's motion is hereby **GRANTED.** The Court finds that there is no just reason for delaying entry of judgment as requested by Bennett. **JUDGMENT** is hereby entered in favor of Dale K. Bennett against McNeil Engineering & Land Surveying, LLC in the amount of $142,174.93. This judgment shall bear post-judgment interest at the rate of 5.42% per year from the date this judgment is entered. ME&LS is ordered to deliver a certified check payable to Dale Bennett in the amount of $142,174.93 to the offices of Benchmark Engineering and Land Surveying by no later than 5:00 p.m. on April 1, 2008.

DATED this 3 day of April 2008.

BY THE COURT:

Honorable Pat Brian
District Court Judge

CERTIFICATE OF SERVICE

I state that I am employed in the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **ORDER AND JUDGMENT**, Case No. 050917315, Third Judicial District Court, Salt Lake County, State of Utah, upon the following parties by placing a true and correct copy thereof in an envelope to:

Mr. Matthew C. Barneck
Mr. Paul Burghardt
Richards, Brandt, Miller & Nelson
Wells Fargo Building
299 South Main Street, Suite 1500
Salt Lake City, UT 84111
Attorneys for Plaintiffs

and causing the same to be

☒ mailed first class, postage pre-paid,
☐ hand delivered,

on the 2nd day of March, 2008.

ADDENDUM 6

IN THE UTAH COURT OF APPEALS

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McNeil Engineering and Land Surveying, LLC; McNeil Engineering, Inc.; and Scott McNeil, Plaintiff, Counterclaim Defendant, and Appellant, v. Dale K. Bennett; Benchmark Engineering and Land Surveying, LLC; et al., Defendant, Counterclaim Plaintiff, and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080319-CA F I L E D (May 21, 2009) 2009 UT App 138

Third District, Salt Lake Department, 050917315
The Honorable Pat B. Brian

Attorneys: Matthew C. Barneck and Paul P. Burghardt, Salt Lake City, for Appellant
Reed L. Martineau, Keith A. Call, and Derek J. Williams, Salt Lake City, for Appellee

---

Before Judges Thorne, Bench, and Davis.

DAVIS, Judge:

Appellant McNeil Engineering and Land Surveying, LLC (ME&LS) filed suit against Appellee Dale K. Bennett for various claims, and Bennett asserted several counterclaims. The parties eventually filed cross-motions for summary judgment on the issue of whether Bennett's employment resignation from McNeil Engineering, Inc. triggered his withdrawal as a member of ME&LS. The district court determined that Bennett did not withdraw as a member of ME&LS and was therefore due his share of disbursements. ME&LS filed a motion for reconsideration, which the district court denied. The district court then, on Bennett's motion, determined there was "no just reason for delaying entry of judgment as requested by Bennett" for his share of cash distributions. ME&LS now appeals.

The threshold issue before us is whether we have subject matter jurisdiction to address the other issues that the parties

raise on appeal, that is, we must first determine whether the order being appealed from was properly certified for appeal under rule 54(b) of the Utah Rules of Civil Procedure. Although the parties assert that this case is properly before us via a rule 54(b) certification, this consensus is not dispositive. "'Acquiescence of the parties is insufficient to confer jurisdiction and . . . a lack of jurisdiction can be raised at any time by either party or by the court.'" Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991) (omission in original) (quoting Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986)).

Rule 54(b) of the Utah Rules of Civil Procedure provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Utah R. Civ. P. 54(b). The Utah Supreme Court has further elaborated on the requirements of certification under rule 54(b):

> First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that there is no just reason for delay of the appeal.

Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984) (emphasis added) (internal quotation marks omitted). Thus, proper certification under rule 54(b) does not occur when the district court simply directs that judgment be entered and makes the order final. See id. at 768. The district court must additionally determine "whether there was any just reason for delaying the appeal. If it found none, it would then be free to enter such a certification, permitting the appeal to proceed." Id. Neither of these two determinations alone is sufficient for certification under rule 54(b):

> We must emphasize that all of these requirements must be met. An order that is "final" as to a claim or a party in a multi-claim or multi-party suit is appealable under Rule 54(b) only if it is accompanied by a district court certification that no just reason exists for delaying the appeal; an order that does not wholly dispose of a claim or a party is not "final" under Rule 54(b) and will not be appealable, even with such a certification.

Id. (emphasis added).[1]

The parties argue that the district court properly certified this case under rule 54(b) because the court's Order and Judgment stated, "The Court finds that there is no just reason for delaying entry of judgment as requested by Bennett." Although this reflects the district court's determination that the Order was a final order, it is unclear whether the court meant the Order was a final order for purposes of 54(b).[2] Moreover, the

---

[1]District courts have been directed to provide findings supporting both the determination that a judgment is final under rule 54(b) and the determination that there is no just reason for delay of the appeal. See Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992) ("In order to facilitate this court's review of judgments certified as final under rule 54(b), trial courts should henceforth enter findings supporting the conclusion that such orders are final."); id. ("[T]his court has yet to see a single instance where a trial court has advanced a rationale as to why there was no just reason for delay. Because this determination by the trial court is subject to judicial review under an abuse of discretion standard, a brief explanation should accompany all future certifications so that this court may render an informed decision on that question.").

[2]Under the facts of this case, that determination would be inappropriate in any event. The approach adopted by the Utah Supreme Court "requires that before a claim can be considered separate, the facts underlying it must be different than those underlying other claims in the action." Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1103 (Utah 1991). Thus, to determine whether an issue certified for appeal is separate from the issues remaining in district court, we "focus[] on the degree of factual overlap between [the issues]. When this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for

(continued...)

Order lacks an accompanying determination that there is no just reason for delay in bringing an appeal. This conclusion is underscored by the following exchange at the hearing on Bennett's motion to enforce the prior summary judgment ruling:

> [ME&LS's counsel]: And I presume that order is going to make the--state the language under Rule 54(b) that it's--there's an express determination of final judgment. I think that's what they were asking for.
>
> [Bennett's counsel]: Your Honor, we simply requested a judgment. We didn't request that it be certifiable so it could be appealed on an interlocutory basis.
>
> THE COURT: The Court simply granted the relief prayed for in the motion, and orders counsel for [Bennett] to so reflect in the order.
> All right, next matter.
>
> [ME&LS's counsel]: I'm sorry, Your Honor. I have to ask for some clarification, because I'm at a loss here. [Their] moving papers did ask for a final judgment, and the Court is entering a ruling that is, in fact, a final judgment. You['re] ordering my client to make payment by a date certain.
>
> THE COURT: Is counsel not correct? That was the specific relief that defense counsel sought, and the specific relief the Court granted.
>
> [Bennett's counsel]: We sought a judgment--an order of judgment in that amount, Your Honor. We did not specifically request that it be certified as [a] final order for--as a final judgment for purposes of appeal. So I don't know what--exactly

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[2](...continued)
rule 54(b) purposes." Id. (citations and internal quotation marks omitted). Here, where the majority, if not all, of the issues in this case are related to Bennett's resignation and the events surrounding it, and where there remains pending an ME&LS claim that Bennett breached the operating agreement, there is factual overlap between the claim before us and claims pending in the district court.

> what we're asking for here. We wanted a judgment that we could collect upon. Your Honor, has ruled that the payment is to be made, and--
>
> THE COURT: Cite the specific language in your motion regarding the relief sought, and that is the order of the Court--whatever the specific language of your motion reads.

The district court therefore clearly made no determination as to whether there was any just reason for delaying an appeal but simply granted Bennett's motion, which requested only "an order of judgment for Bennett's share of member distributions."[3] Thus, there was no proper certification under rule 54(b), and we do not have subject matter jurisdiction to consider the issues raised in this appeal.

"When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). We therefore dismiss the appeal.

James Z. Davis, Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

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[3]Bennett's motion was devoid of the "no just reason for delay" language but instead stated, "There is no reason the Court cannot enter a judgment against ME&LS for this amount and order that Plaintiffs pay Bennett this amount." Bennett's supporting memorandum used language closer to that of rule 54(b), stating, "Bennett is entitled to this judgment based upon the Court's prior ruling and there is no just cause for delaying the entry of this judgment." Neither filing, however, requested the court to make a determination that there was no just reason for delaying an appeal.

ADDENDUM 7

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

McNEIL ENGINEERING, INC., McNEIL ENGINEERING AND LAND SURVEYING, LLC, and, SCOTT McNEIL, an individual, Plaintiffs, vs. BENCHMARK ENGINEERING AND LAND SURVEYING, LLC, BENCHMARK CAD SERVICES, LAND DEVEOLOPMENT CADD, INC., DALE K. BENNETT, an individual, and, FLORENCE B. ALHAMBRA, an individual, Defendants..	**MINUTE ENTRY** Case No. 050917315 Judge: L.A. DEVER

The above entitled matter is before the Court on Defendants' Notice to Submit for Decision their Motion to Enforce Judgment and Motion for Leave to (1) Serve Third Set of Interrogatories, (2) File Fourth Request for Production of Documents, and (3) Take Second 30(b)(6) Deposition, filed July 21, 2010. The Court having reviewed Defendants' Motions and Plaintiffs' Opposition thereto, and being duly advised in the premises of each, makes the following ruling.

Defendants' Motion to Enforce Judgment

Defendants request the Court to enforce the April 3, 2008, Order and Judgment

issued by the Honorable Pat Brian. The Order and Judgment entered in favor of Defendant Dale K. Bennett ("Bennett") in the amount of $142,174.93. On April 21, 2008, the parties stipulated a joint motion to stay the pending trial while Plaintiffs appealed in part, the Court's Order entered December 21, 2006, which ruled that Bennett is a member of ME&LS and an Order entered April 2, 2008, which denied reconsideration of the December 21, 2006, ruling.

Pursuant to the terms of the April 21, 2008, stipulation Bennett agreed that the stay of any execution of the Order and Judgment may be entered without the need to post a supersedeas bond. On May 21, 2009, the Court of Appeals dismissed Plaintiffs' appeal for failure to show certification of the finality of the trial court's order. A remittitur was entered on August 10, 2009.

Defendants now seek enforcement of the April 3, 2008, Order and Judgment as the basis for the earlier stipulation no longer apply.

This Court finds the following explanation regarding such matters helpful in its consideration:

> [T]he "law of the case" doctrine is employed to avoid delay and to *prevent injustice. "The purpose of [this] doctrine is that in the interest of* economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case." Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). See Conder v. A. L. Williams & Assocs., Inc., 739 P.2d 634, 636 (Utah Ct. App. 1987). "Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed." People ex. rel. Gallagher v. District Court, 666 P.2d 550, 553 (Colo. 1983).

> The law of the case doctrine is particularly applicable when, in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced. Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984); Richardson v. Grand Central Corp., 572 P.2d at 397; Hammer v. Gibbons & Reed Co., 29 Utah 2d 415, 510 P.2d 1104, 1105 (Utah 1973).

Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah Ct. App. 1988).

Upon review of the case, the Order and Judgment issued on April 3, 2008, was intended to serve as the final order on Defendants' counterclaim for declaratory relief. See e.g. Pasquin v. Pasquin, 1999 UT App 245, ¶12, 988 P.2d 1 ("In this case, the October 21 Order was properly certified because it granted summary judgment for all claims against the Estate. Further, the trial court also made the required finding that there was 'no just reason for delay,' and expressly ordered the entry of judgment as required by Utah Rule of Civil Procedure 54(b).")

Similarly, Judge Brian's Court found "that there is no just reason for delaying entry of judgment as requested by Bennett." The Order and Judgment was entered into the Registry of Judgments on April 9, 2008.

Accordingly, it is HEREBY ADJUDGED AND DECREED that the Order and Judgment, issued and entered on April 3, 2008, is a final order on Defendants' counterclaim for declaratory relief.

Defendants' Motion for Leave

Defendants' seek leave from this Court to continue certain discovery proceedings because of Plaintiffs' alleged actions which are contrary to the ruling of the Honorable

Ann Boyden. Specifically, while Judge Boyden declared in a ruling issued November 17, 2006, that Bennett was entitled to all of the rights of other ME&LS members, Plaintiffs have allegedly been acting contrary to this ruling by failing to provide Bennett with information he is claimed to be entitled to including: tax returns, financial statements, disbursements of any kind to other members, etc.

Defendants fail to present any viable legal argument and analysis to the Court that would address their claimed entitlement to additional discovery in light of a final ruling on Bennett's claim for declaratory relief and dismissal of his accounting claim on January 29, 2008.

Based upon the foregoing, the Court DENIES Defendants' Motion for Leave.

This Ruling serves as the Order of the Court. No further order is required.

Dated 21st day of September, 2010.

BY THE COURT:

L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 21st day of September,2010, postage prepaid, to the following:

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STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

CLERK OF COURT

ADDENDUM 8

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

McNEIL ENGINEERING, INC; McNEIL ENGINEERING AND LAND SURVEYING, LLC; and SCOTT McNEIL, an individual, Plaintiffs and Counterclaim Defendants, vs. BENCHMARK ENGINEERING AND LAND SURVEYING, LLC; BENCHMARK CAD SERVICES, LLC; LAND DEVELOPMENT CADD, INC; and DALE K. BENNETT, an individual; FLORENCE B. ALHAMBRA, an individual, Defendants and Counter Claimants.	**AMENDED ORDER CERTIFYING ORDER AND JUDGMENT AS FINAL** Civil No. 050917315 Judge L.A. Dever

This matter comes before the Court pursuant to the Motion to Alter or Amend Order filed by Plaintiff McNeil Engineering and Land Surveying, LLC ("**ME&LS**") on October 1, 2010, and also the Motion for Certification That The April 3, 2008 Order and Judgment is Final for Purposes of Rule 54(b) and for Appeal, recently filed by the Defendants. Based on the foregoing, the Court hereby finds and ORDERS as follows:

1. An Order and Judgment was entered in this case by the Honorable Pat Brian of the Third District Court for Salt Lake County on April 3, 2008.

2. ME&LS filed a Notice of Appeal on April 8, 2008.

3. The Utah Court of Appeals issued a Memorandum Decision on May 25, 2009 ruling that the Order and Judgment were not final for purposes of Rule 54(b) of the Utah Rules of Civil Procedure. The Court of Appeals specified certain language to be used when the District Court certifies an order as final. Additionally, the Court of Appeals held that the District Court must make a determination that the operative facts underlying the claims to be appealed are separate and distinct from those on which the remaining claims are based.

4. This Court issued a Minute Entry on September 21, 2010 finding that the "Order and Judgment, issued and entered on April 3, 2008, is a final order on Defendants' counterclaim for declaratory relief." The Minute Entry was intended to be the Order of the Court.

5. This Order modifies the Minute Entry and is intended to certify the Order and Judgment as final under Rule 54(b) of the Utah Rules of Civil Procedure. Pursuant to Rule 54(b), this Court makes the express direction for entry of a final judgment as to one or more but fewer than

all of the claims or parties in this action. The Court hereby determines that the Order and Judgment entered April 3, 2008 was and is intended to be final under Rule 54(b). The Court also determines that there is no just reason for delaying an appeal from the Order and Judgment.

6. This Court also makes the determination that the operative facts underlying the adjudicated claims are separate and distinct from those underlying the claims which remain in the District Court. The operative facts relating to Bennett's Counterclaim, in this action on which the Order and Judgment is based, are summarized as follows:

a. The language of the ME&LS Operating Agreement and its amendments.
b. The history of ME&LS and its relationship with McNeil Engineering, Inc. ("**MEI**").
c. The voluntary nature of Bennett's resignation.
d. The payments to members and the changes of ownership in ME&LS after Bennett's resignation.

7. By contrast, the claims of the Plaintiffs which remain in the District Court are based upon a distinctly different set of operative facts, which are summarized as follows:

a. Bennett's subsequent establishment of a competing engineering firm, and whether his conduct before and after departure breached duties to ME&LS or the Operating Agreement of ME&LS.
b. Bennett's interactions with the Engcad entities set up to outsource drafting work to the Philippines, and whether his conduct interfered with ME&LS' business relationship with Engcad or breached duties to Engcad.
c. Bennett's subsequent use of ME&LS' design practices, tools, and procedures, and whether such conduct is a misappropriation of trade secrets.
d. Whether the logo and slogan of Bennett's new company infringe upon the rights of ME&LS and MEI.

8. Based on the foregoing, this Court certifies the Order and Judgment of April 3, 2008 as final for all purposes under Rule 54(b), as described above.

IT IS SO ORDERED.

DATED this 17 day of October, 2010.

BY THE COURT:

HONORABLE L. A. DEVER
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

SNOW CHRISTENSEN & MARTINEAU

REED L. MARTINEAU
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was sent by first-class mail, postage prepaid, on this ___ day of October, 2010, to the following:

Reed L. Martineau, Esq.
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Attorneys for Defendants

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ADDENDUM 9

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

McNEIL ENGINEERING, INC; McNEIL ENGINEERING AND LAND SURVEYING, LLC; and SCOTT McNEIL, an individual, Plaintiffs and Counterclaim Defendants, **vs.** BENCHMARK ENGINEERING AND LAND SURVEYING, LLC; BENCHMARK CAD SERVICES, LLC; LAND DEVELOPMENT CADD, INC; and DALE K. BENNETT, an individual; FLORENCE B. ALHAMBRA, an individual, Defendants and Counter Claimants.	**NOTICE OF APPEAL** Civil No. 050917315 Judge L.A. Dever

Counterclaim Defendant McNeil Engineering and Land Surveying, LLC ("**ME&LS**"), pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure, hereby gives notice that it appeals the Amended Order Certifying Order and Judgment as Final entered in this matter on October 17, 2010, along with interim orders of the Court which led to that final Order, including the Order on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment entered December 21, 2006, the Order on Plaintiffs' Motion for Reconsideration Re: Bennett's Membership in ME&LS entered April 2, 2008, the Order and Judgment entered April 3, 2008, the Minute Entry entered January 19, 2010, and the Minute Entry entered September 21, 2010.

The Court from which the appeal is taken is the Third District Court in and for Salt Lake County, State of Utah, Civil No. 050917315, assigned to the Honorable L.A. Dever. The appeal is taken to the Utah Supreme Court pursuant to Utah Code Ann. § 78A-3-102, subject to possible assignment to the Utah Court of Appeals.

In connection with a previous appeal, ME&LS posted a bond for costs on appeal in the amount of $300 pursuant to Rule 6 of the Utah Rules of Appellate Procedure. That appeal was dismissed for lack of jurisdiction and no costs were awarded. The District Court's official docket in this matter shows that the cost bond remains posted with the Clerk of the Court. Therefore, ME&LS believes the existing cost bond satisfies the requirements of Utah R. App. P. 6 in connection with this Notice of Appeal.

DATED this 20 day of October, 2010.

RICHARDS BRANDT MILLER NELSON

MATTHEW C. BARNECK
PAUL P. BURGHARDT
Attorneys for McNeil Engineering and Land Surveying, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class and postage prepaid, on October 20, 2010, to the following:

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