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Arbitrator

BEFORE ARBITRATION

Bruce JONES, an individual Petitioner/Counter-Respondent, vs. UTAH TRANSIT AUTHORITY, Respondent/Counter-Petitioner.	**INTERIM REASONED AWARD** **Arbitrator George Haley**

This matter having come to an evidentiary hearing at the offices of Holland and Hart in Salt Lake City for 5 days from May 17 through May 21, 2021, before a single Arbitrator, George Haley. Bruce Jones (Jones) was represented by Richard Burbidge, Carolyn LeDuc and Michael Henderson of the law firm Burbidge Mitchell. Utah Transit Authority (UTA) was represented by Sam Alba, Scott Young and Matthew Purcell of the law firm Snow, Christensen and Martineau. Eleven fact witnesses were called and cross-examined, 6 expert witnesses were called, submitted reports and were cross examined. The parties filed extensive written post-hearing briefs, including legal authorities cited. The parties also submitted post-hearing deposition designations

and counter-designations. The undersigned having heard the testimony and reviewed the foregoing material hereby enters the following Interim Reasoned Award.

JURISDICTION

Each of three contracts at issue in this matter, the 2006 Contract (Ex. P6), the 2007 Contract (Ex. P23) and the 2010 Contract (Ex. P91), require that disputes be resolved via arbitration with a single arbitration to take place in Salt Lake City.

The parties selected the undersigned to act as the sole arbitrator. Jurisdiction and venue are both appropriate, the arbitration having taken place at the Salt Lake City office of Holland and Hart before the arbitrator George Haley.

This case was well tried with very capable and experienced trial counsel on both sides. It was a difficult decision for the undersigned to reach.

NO CONFLICT OF INTEREST

I agree with Jones' expert, Dennis Astill, that there was no conflict of interest in Jones negotiating with Mr. Colby ("Colby") and Mr. Hughes ("Hughes") to agree on terms of his 2006, 2007 and 2010 Employment Contracts with UTA. I find the Washington Court of Appeals decision *Chism v. Tri-State Construction, Inc.*, 374 P.3d 193, 197 (Wash. Ct. App. 2016), persuasive. I found the Amicus Curie brief of the Association of Corporate Counsel (ACC) particularly instructive.

I find that Rule 1.8(a) of the Utah Rules of Professional Conduct ("RPC") does not apply to the negotiations for in-house counsel compensation agreements and that Mr. Jones negotiating his employment agreements with Colby and Hughes did not create a conflict of interest. A negotiation of an employment agreement between an in-house lawyer and his employer is not a

"business transaction" within the meaning of Rule 1.8(a). UTA cites no authority to the contrary, and there is no language in the rule itself to support UTA's position.

Rule 1.5 applies to outside counsel fee agreements not in-house attorney compensation agreements. Rule 1.7(a)(2) also does not apply. It only applies in circumstances where a lawyer is representing a "client." Jones was not acting as a lawyer for UTA in the negotiations. *See Chism*, 374 P.3d at 208 (concluding that the district court's ruling that there was a conflict of interest "dubious")[1]; ACC Amicus Brief at pgs. 11-12 (arguing that Chism was representing his own interest rather than the client throughout the negotiations). Colby and Hughes both testified to that fact.

Colby and Hughes were both well aware that Jones was advancing his own interests and they were looking out for the interests of UTA. Colby and Hughes both also testified to that fact. The Corporate bylaws gave Colby and Hughes the power to negotiate executive employment contracts on behalf of the Board (*see* Ex. P6). They are both sophisticated parties with a great deal of experience in negotiating contracts. To impose the requirements of Rules 1.7 and 1.8 on all employment negotiations between in-house lawyers requiring each party to retain separate outside counsel might be a boon for the legal profession but is certainly not in the interest of the entity and would be unworkable. The comments to Rule 1.8 state: ". . . In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client . . . In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in

[1] I note that the Washington Supreme Court denied Tri-State's petition to review the Court of Appeals decision. *See Chism v. Tri-State Constr., Inc.*, 380 P.3d 497 (Wash. 2016).

paragraph (a) are unnecessary and impracticable." The negotiation for an employment contract between an in-house lawyer and his employer is akin to a standard commercial transaction.

There was no disparity in bargaining position between Jones and Colby and Jones and Hughes. Both Colby and Hughes were well aware of the pension benefit that Jones was requesting. Jones' salary was clearly below market for someone of his experience and background. He was straight forward in the negotiations. All testified that he was willing to take a below-market salary if he could backload the pension portion of his agreement to provide him more money in retirement. This seems to me to be a "win/win" for both parties. UTA paid less in executive compensation, retained a highly qualified, experienced and competent general counsel and Jones funded his retirement.

Jones was an "at will" employee at all times. If UTA was unhappy with Mr. Jones' performance or the terms of the Contract, they could have terminated the Contract and cut off his salary benefits, pension and/or the TOD Incentive Bonus in the 2007 and 2010 agreement at any time. The testimony of Colby, Hughes and Mr. H. David Burton (Burton), were unanimous Jones' performance exceeded their expectations. I found all three gentlemen's testimony credible concerning the negotiations of the subject agreements. The Board issued a unanimous Board Resolution commending Jones upon his retirement (March 25, 2015, Board Minutes at pg. 3). UTA got what it bargained for in Mr. Jones' Employment Contract. It was only after Mr. Jones retired and new management came in that UTA wanted to "Void" the Contract and deprive Mr. Jones of the benefit of his bargain. I find this unconscionable.

The question in my mind is whether UTA can void the Contract because the compensation was not set by the Board Resolution pursuant to Utah Code Ann. § 17B-2a-810(3)

(2007) and because the agreements are only signed by one corporate officer, which UTA argues violates section 3.1.1 of the Corporate Policy.

CORPORATE POLICY § 3.1.1.

On its face, Corporate Policy § 3.1.1 (Ex. P7) only applies to employees executing contracts on behalf of UTA, not to members of the Board. Mr. Jones reported directly to the Board. Mr. Jones was not an employee of UTA under Corporate Policy § 3.1.1, and I find that it does not apply to employment contracts for the General Counsel.

Colby testified that section 3.1.1 did not apply to Board Members. I find his testimony credible. The bylaws gave Colby the power and authority to negotiate employment contracts. (Ex. P6) Colby, Hughes and Jones all testified that section 3.1.1 does not apply to Mr. Jones' Contracts. Most of the employment agreements in evidence only had one signature (*see* Exhs. P23, P91, P203, P204, P206, P207, P208). Significantly, Mr. Inglish and Mr. Allegra's Employment Agreements only had one signature (*see* Exhs. P203, P204, P206, P207, P208).

The weight of the evidence establishes that during the relevant time period (2006-2015), it was UTA's custom and practice to have only one signature on employment agreements with its officers and executives. The attempt to use that as a basis to void the agreements lacks merit. If section 3.1.1 did apply, its requirements were waived. Even if section 3.1.1 was not waived, I find not having the second signature would not be a material breach that would render the Contracts "void."

THE 2007 AND 2010 CONTRACTS WERE RATIFIED BY UTA

Essentially, UTA's argument is that the UTA Board could only set Mr. Jones' compensation through a formal resolution, that Colby's and Hughes' failure to do so was beyond

their statutory authority and that, therefore, the Contracts were ultra vires and thus void.

UTA cites *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51, in support of its position. A close reading of *Ockey* shows that, rather than support UTA's argument, it in fact supports Jones'. The argument boils down to whether Mr. Jones' Contracts are void ab initio, and therefore not subject to ratification, or voidable and subject to ratification. There, the Utah Supreme Court explained and held:

> The distinction between void and voidable is important, although the terms are not always used precisely. A contract or a deed that is void cannot be ratified or accepted, and anyone can attack its validity in court. In contrast, a contract or deed that is voidable may be ratified at the election of the injured party. Once ratified, the voidable contract or deed is deemed valid. A deed that is voidable is valid against the world, including the grantor, because only the injured party has standing to ask the court to set it aside.
>
> In general, the difference between void and voidable contracts is whether they offend public policy. Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable. Only contracts that offend public policy or harm the public are void ab initio.
>
> In this case, Ockey asks us to hold that the 1994 conveyance was void because the trustees lacked authority to transfer the ranch property to IMHG after the trusts terminated. We decline, concluding that the 1994 conveyance was merely voidable because the trustee's actions were not contrary to public policy and did not injure anyone other than Ockey himself.
>
> **In determining whether the 1994 conveyance was void or voidable, we start with the presumption that contracts are voidable unless they clearly violate public policy. This presumption stems from the general rule that "the law favors the right of men of full age and competent understanding to contract freely." For a contract to be void on the basis of public policy, "there must be a showing free from doubt that the contract is against public policy."**
>
> For example, in *Millard County School District v. State Bank of Millard County*, 2008 UT 37, we considered whether a contract was void or voidable. At issue was whether the bank acted in excess of its statutory power by issuing securities that were different from those that the bank was statutorily authorized to issue. Acknowledging that the bank exceeded its authority by issuing the securities, we disagreed that this ultra vires act rendered the securities void. "[B]y the great

> weight of judicial authority it is well recognized that there is a distinction between an illegal or void contract and one merely ultra vires," which could become enforceable by ratification or estoppel. We explained that only "contracts and corporate acts and transactions which are malum in se or malum prohibitum, which contravene some rule of public policy, [or] violate some public duty ... are illegal and void." Although the bank had acted in excess of its authority, its action did not violate the general policy of state so egregiously that the contract was void."

Id. ¶¶ 18–22 (citations omitted) (emphasis added).

There is nothing about Mr. Jones' pension plan or bonus that are *malum in se* or *malum prohibitum* or that contravenes some rule of public policy. As discussed above, the negotiations and resulting Contracts did not violate the Utah Rules of Professional Conduct or some other public policy. It was an arm's length negotiation between Mr. Jones and Colby and Hughes. They were all *"right men of full age and competent understanding to contract freely." See id.* ¶ 21 (citation and internal quotation marks omitted) (emphasis added).

Colby testified that the contract was designed to induce Mr. Jones to stay as General Counsel until his retirement. I find Colby's testimony credible. He testified that he had no personal relationship with Mr. Jones and had not spoken to him since Colby retired from UTA until the first day of the hearing. Colby and Mr. Jones freely made an agreement where Mr. Jones agreed to accept below market rate for his salary in exchange of a better pension benefit, an incentive bonus for additional responsibilities, additional hours, evenings and weekends to develop the TOD Project. UTA in exchange retained a valuable General Counsel until he retired and who developed a profitable TOD Project and maintained a positive relationship with the Utah Legislature. Both parties to the agreement got what they bargained for. Nothing about that agreement violates public policy. Even if Colby and Hughes lacked the authority to enter into the subject contracts, it merely renders them voidable and therefore subject to ratification.

UTA also cites *Pioneer Craft House, Inc. v. City of South Salt Lake,* No. 2:13-cv-705, 2016 U.S. Dist. LEXIS 27186 (D. Utah Mar. 1, 2016), a 2016 memoranda decision wherein Judge Nuffer granted a motion to dismiss a section 1983 action holding that the plaintiff failed to allege an unconstitutional violation of constitutionally protected property interest. There, the court held:

> The City exceeded its authority under Utah Code § 10-8-2 by entering into the 2008 Lease Agreement with PCH without first holding a public hearing on the matter. Failure to conform to this statutory requirement means the lease was void from the beginning.

Id. at *9

I find *Pioneer Craft House* to be inconsistent with the Utah Supreme Court decision in *Ockey* and distinguishable. It doesn't appear that the void vs. voidable argument was made in *Pioneer Craft House,* nor was the ratification argument presented.

While I understand why UTA would include the quoted language from *Pioneer Craft House,* I did not find it instructive or controlling on the issues before me.

Borde v. Boards of County Commissioners of Lima County, N.M., 514 F. App'x 795 (10th Cir. 2013), another case on which UTA relied, also does not support UTA's claim. In that section 1983 action, the 10th Circuit, in interpreting New Mexico law, held that the contracts at issue were unenforceable because they violated the New Mexico Constitution that limited a county's ability to go into debt. *Id.* at 806. As such, the court held that the contracts were void ab initio and that the plaintiffs, therefore, did not have a protected property interest to support a section 1983 claim. *Id.* Neither the void vs. voidable issue, nor the ratification issue were before the court, therefore, I don't find it persuasive.

In *First Equity Corp. v. Utah State University,* 544 P.2d 887 (Utah 1975), the Utah Supreme Court held that Utah law prohibited Utah State University (USU) from purchasing common stock and that USU therefore did not have the power to purchase common stock, so any agreement to purchase would be ultra vires and the agreement to pay commission was unenforceable. *Id.* at 893. The court further held that one who does business with a public entity is charged with the knowledge that the contract is ultra vires and unenforceable. *Id.*

Similar to UTA's other authorities, I don't find *First Equity* to be persuasive. The void vs. voidable issue was not argued. Neither was ratification. The facts are very distinguishable. In *First Equity,* USU revoked the authority of the broker prior to the purchase of the stock in question. *Id.* at 889. USU never purchased nor took possession of the stock. *Id.* In order for the facts of *First Equity* to be meaningful here, USU would have had to purchase the stock, take possession, realize a significant gain and then tell the broker, "too bad" we lacked authority to purchase the stock and therefore we are going to keep your commission. That is not what *First Equity* holds.

There is also the real question as to whether the actions of Colby and Hughes were in fact ultra vires. They both testified that it was and is UTA's practice to "fix" compensation through the annual budget that is approved through resolution of the Board. I find that this was UTA's pattern and practice during the time frame relevant to this dispute.

I find the 2006 and 2010 Contracts enforceable. At best, any deficiency would render those Contracts voidable and, therefore, subject to ratification. UTA accepted Jones' full performance and honored both Contracts for many years only on Mr. Jones' retirement did it seek to void the Contracts.

Under Utah law, when two parties with similar bargaining positions negotiate and an agreement is reduced to writing that is unambiguous, absent compelling legal argument, that contract should be enforced. The doctrines of ratification, waiver and estoppel apply to UTA under the facts of this case.

In *Bullock v. UDOT*, 966 P.2d 1215 (Utah Ct. App. 1998), the Court of Appeals held:

> It is well-established under Utah law that "subsequent affirmance by a principal of a contract made on his behalf who had at the time neither actual or apparent authority constitutes a ratification, which in general is as effectual as an original authorization." . . . Ratification, like original authority, need not be express. Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient. Even silence with full knowledge of the facts may manifest affirmances and thus operate as a ratification.

Id. at 1218 (citations omitted).

Further, "[a] principal's retention of the fruits of a contract can also serve as an implied ratification of the contract." *Id* at 1219.

The doctrines of ratification, waiver and estoppel can be applied to governmental entities and quasi-government entities under Utah law to cure technical deficiencies in the creation of contracts. *See Midwest Realty v. City of West Jordan,* 541 P.2d 1109, 1111 (Utah 1975), *Celebrity Club v. Utah Liquor Comm'n,* 602 P.2d 689, 694 (Utah 1979) (applying estoppel); *see also,* 73A C.J.S., Public Contracts § 8; 56 Am. Jur. 2d, Municipal Corporations, § 433, ("[A] contract that is not approved by a relevant municipal or governmental body, as required by law,

Rule of Regulation, may be ratified by the municipality or government body by subsequent conduct, such as by making payments pursuant to the contract.").

Mr. Jones' compensation was fully vetted during the 2013-14 legislative audit. The audit was critical of the UTA's executive compensation agreements with Mr. Jones. The Board, through the Chair and Vice Chair—Burton and Hughes respectively—defended those arrangements in an op ed published in the Salt Lake Tribune and in the Board's response to the audit. (Exs. P136, P121.)

In mid-2014, with full knowledge of the terms of the legislative audit, the new Chairman, Burton, approached Mr. Jones and asked him to postpone his retirement until after the end of the next legislative session. Burton gave assurances to Mr. Jones that the postponement of his retirement would not affect his TOD Incentive Bonus. Based on those assurances, Mr. Jones did postpone his retirement by months. After postponing his retirement, Mr. Jones received yet another statement calculating the value of his 2-for-1 pension benefit based upon the new retirement date. Mr. Jones did postpone his retirement and continued to act as General Counsel and performed his duties admirably.

UTA got what it bargained for under the agreements. There was no evidence presented as to any complaints from the Board or Management concerning Mr. Jones' performance until after he retired. Mr. Jones was the driving force behind repairing UTA's relationship with the legislature, obtaining a sales tax increase for UTA, getting the TOD legislation through the legislature identifying and obtaining the TOD projects.

Upon his retirement, the Board unanimously voted to commend him for his service. (Ex. P154.)

I find the foregoing constitutes ratification of the 2006, 2007 and 2010 Contracts, and waiver of any deficiencies in their formation.

EQUITALBE ESTOPPEL

Equitable Estoppel may be asserted against a governmental entity when "necessary to prevent manifest injustice." *Celebrity Club v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979). "Equitable estoppel may be applied against the State, even when acting in a governmental capacity, if necessary, to prevent manifest injustice, and the exercise of governmental powers will not be impaired as a result…

"The elements essential to invoke the doctrine of equitable estoppel are:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted,

(2) action by the other party on the faith of such admission, statement, or act, and

(3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act."

Id. at 694.

UTA did not attempt to void the Contracts until 2015. Both parties performed under those agreements for 5 years, 8 years and 9 years, respectively. All Contracts were within UTA's possession the entire time. It is clear UTA and its Board were aware of the terms of the agreements and particularly the TOD bonus and 2-for-1 pension provision, which are at the heart of this dispute. (*See* Exs. P18, P19, P25, P26, P29, P109, P127,

P132.) The 2-for-1 provision found at paragraph 4(c) of Mr. Jones' 2006 Contract is quoted verbatim in many of those exhibits.

Likewise, the TOD incentive bonus was also known to the Board and UTA. (*See* Ex. P132 at Ex. 1). Mr. Jones, Colby, Hughes, Terry Deihl and Carlton Christensen all testified that Mr. Jones' compensation and benefits, including the TOD Incentive Bonus were included in the annual budget and approved by the Board after careful review.

It was uncontroverted at the hearing that both the 2-for-1 pension benefit and the TOD Incentive Bonus were part of UTA's employee retention plan. UTA was convinced that they would lose their valuable officers including Mr. Jones.

Not only were the 2-for-1 pension benefit and the TOD Incentive Bonus provision known to the Board, those provisions were also known by the General Manger/CEO, John Inglish and Michael Allegra; the CFO's, Ken Montague and Robert Biles; the Senior Pension Administrator, Linda Knudson; the Senior HR Officer, Nancy Malek; the Controller, Glen Pratt; and others. In fact, UTA would annually send to Mr. Jones a calculation as to the value of the 2-for-1 benefit upon his retirement (*see* Exs. P117, P119, P150).

In 2013, UTA's Pension Administrator sent to UTA's CFO a calculation of Mr. Jones' TOD Incentive Bonus and various payment dates including his anticipated retirement date. It is clear that UTA's authorized representative signed the employment agreements at issue promising Mr. Jones certain incentives to stay at UTA. Jones fully performed his services under the Contract until retirement in reliance on those contractual provisions and the calculations of their value he received from the pension administrator. He kept working until retirement in reliance on those statements by various UTA officers, employees, and board members as mentioned

above. Only after all that did UTA change its position and argue that the Contracts are void and that Jones should not receive the pension benefits he was promised. It would be a manifest injustice to allow that to happen. This clearly meets the standard to evoke equitable estoppel in under Utah law. UTA's defense of unclean hands is not supported by the evidence. I find that UTA is estopped from seeking to void the subject agreements.

UTA'S BREACH OF THE 2006, 2007, 2010 AGREEMENTS

I find it troubling that after the Contracts were fully performed and UTA obtained the benefit of its bargain, that Mr. Jones' replacement, Mr. Blakesly, convinced the Board to attempt to void the agreements based on false accusations and little to no due diligence.

He falsely accused Mr. Jones of destroying evidence, wiping his hard drive clean and that a box of documents had gone missing. He falsely accused Mr. Jones of being the Target of a federal investigation of UTA. No documents were lost and all of Mr. Jones' computer data was retained on UTA's server. Mr. Jones was never the Target of the Federal investigation. Blakesly decided to void the contracts without talking to Colby, Hughes or Mr. Jones, the percipient witnesses to the formation of those contracts. With basically no due diligence, Blakesly convinced the Board to attempt to void Mr. Jones' Employment Agreements on the grounds that the agreements needed to be ratified by a formal resolution of the Board (under Utah Code Ann. § 17B-2a-810(3)) and that UTA policy required two signatures on all agreements (Corporate Policy § 3.1.1). Colby testified that he was embarrassed and ashamed of what UTA was doing to Mr. Jones, and Hughes testified that he was "absolutely baffled" at the decision to sue to void the contracts.

I find that those false accusations had a material impact on the Board's decision to declare the subject agreements void. The false accusation taints the Board decision to attempt to void the subject agreements. Under the circumstances as discussed above, I find that UTA's action in failing to honor the terms of the subject agreements constitutes a breach of contract entitling Mr. Jones to damages to place him in the same position as if the Contracts were fully performed.

UTA'S COUNTERCLAIM

STANDARD OF CARE

I find that UTA failed to meet its burden of proof to establish the standard of care in Utah for in-house lawyers negotiating their employment contracts with their employer. Neither of UTA's legal experts, Mr. Snow and Mr. Asphaug, cited any case law or other authority to support their opinions. Mr. Snow did cite to various Rules of Professional Conduct that he believed Mr. Jones violated. However, paragraph 20 of the Preamble to the Rules states "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a care that a legal duty has been breached . . ."

In *Tamarse v. Snow*, 929 P.2d 351, 355-56 (Utah Ct. App. 1996), the Utah Court of Appeals held that violations of ethical rules do not create a cause of action.

I find Mr. Astill's opinion persuasive that the standard of care for in-house lawyers is to negotiate their own contracts. *Chism v. Tri-State,* 374 P.3d 193 (Wash. Ct. App. 2016) is right on point. I found the amicus brief proffered in that case by the Association of Corporate Counsel to be compelling in establishing the standard of care articulated by Mr. Astill. UTA failed to provide any counter authorities on this point and failed to meet its burden of proof.

I find that it is not a violation of the standard of care for in-house lawyers in Utah to negotiate their own employment contracts. Also, I find that Jones breached no legal duty owed to UTA, including any duty of care, duty of loyalty, duty of honesty or duty of disclosure. UTA's legal malpractice claims fail as a result.

BREACH OF FIDUCIARY DUTY

In addition to UTA's failure to meet its burden of proof to establish the appropriate standard of care, I also find that UTA failed to establish that Jones was in superior position of knowledge to Colby or Hughes to understand the 2006, 2007 or 2010 contract negotiations. For the reasons set forth above, Colby and Hughes were in an equal position to Jones to understand the 2 for 1 Pension benefit, the TOD bonus, the application (or in-applications) of Policy 3.1.1 and U.C.A. § 17B-2a-810. As a result, UTA's Breach of Fiduciary Duty also fails.

CAUSATION

I find that UTA failed to meet its burden of proof to establish a nexus to any of its claim for damages (causation) and any actionable conduct of Mr. Jones. UTA failed to establish that Mr. Jones' alleged malpractice was the cause for the Federal Investigation and for UTA to incur attorney fees in order to honor its statutory obligation to provide a defense for its officers and employees. Mr. Jones was not indicted, was never a "target" of the investigation, was not an unindicted co-conspirator. He is presumed to be innocent. Mr. Jones' failure to have two signatures on his Employment Agreement or negotiating his agreement with Colby and Hughes without them having separate outside counsel, or in having the Board not issue a separate resolution approving it did not cause the Federal Investigation, the attorneys' fees UTA incurred

in defending Mr. Jones, nor the cost of the Federal Monitorship.[2] UTA also failed to meet its burden of proof to establish that it had suffered any loss of goodwill as a result of any actional conduct of Mr. Jones. In fact, in 2014, UTA received the Transit Authority of the Year Award. (*See* Ex. P125.) There is no causation linking any actionable conduct of Jones to UTA's claims for damages.

FRAUDULENT NON-DISCLOSURE CLAIM AND FRAUDULENT INDUCEMENT CLAIM

I find UTA failed to establish by clear and convincing evidence, or any evidence at all, that the Board and UTA were unaware of the 2-for-1 Pension Benefit and the TOD Bonus. Certainly Colby and Hughes as well as numerous officers and employees were aware of the terms of the Agreement and the cost of those agreements to UTA (see above) that knowledge is imputed to the Board and UTA. *See Wardley Better Homes & Gardens v. Cannon,* 2002 UT 99, ¶¶ 16-24, 61 P.3d 1009. The fact that UTA is a quasi-governmental entity does not change this imputation of knowledge. *See Wood v. SLC Corp.,* 2016 UT App. 112, ¶ 10, 374 P.3d 1080 (recognizing that knowledge can be imputed to a governmental entity but disagreeing that doing so was appropriate under the facts. I find that the Board was aware of the 2-for-1 Pension Benefit and TOD Bonus (*see* above).

STATUTE OF LIMITATIONS

I further find that the legal malpractice, breach of fiduciary duty, fraudulent non-disclosure, negligent misrepresentation, fraudulent inducement of the 2010 agreements, substantive unconscionability -2010 agreement, procedural unconscionability -2010 agreement,

[2] The issue of the Arbitration fees are addressed below.

breach of contract 2007 agreement are barred by the statute of limitations. *See* Utah Code Ann. §§ 78B-2-305(3) (3 years), 78B-2-307(3) (4 years), and 78B-2-309 (6 years).

The Tolling Agreement was entered on July 9, 2015. Both Contracts were in possession of UTA the entire time, numerous employees and officers had access to these Agreements. Colby, Hughes and Deihl all testified that the Board was knew of the terms of 2006, 2007 and 2010 contracts including the 2-for-1 pension benefit and the TOD performance bonus. I found the testimony to be credible on this issue. UTA's legal department recognized these statute of limitation problems prior to filing any action. In an August 13, 2015 memorandum from Senior Counsel, Rob Hughes to then General Counsel, Jayme Blakesly, Hughes stated:

> **As a preliminary matter, it should be noted that statutes of limitations will pose a challenge to any potential claim. The negotiations for the 2010 contract, and many of the actions taken with respect to the TOD sites, took place several years ago. Courts will sometimes apply a "discovery rule," and toll the running of the statute of limitations until the plaintiff knows (or should know) that a cause of action exists. Since UTA was in possession of the 2010 contract and the agreements pertaining to various TOD deals, it will be difficult to assert that UTA was unaware of potential causes of action.**

(Ex. P 175.) The Board either discovered or through the exercise of reasonable diligence could have discovered its perceived claims at any time after the Contracts were signed. The knowledge of Colby and Hughes is imputed to the Board and UTA. *See Wardley*, 2002 UT 99, ¶¶ 16-24.

I find that the statute of limitations as to all UTA affirmative claims (other than Breach of the 2010 Employment Agreement) expired prior to the signing of the July 9, 2015 Tolling Agreement. A change of administration and a change to the culture of an organization can't change the terms of a valid contract and cannot revive a stale claim. One of the reasons for the statute of limitations is that memories fade and documents get lost. This is what happened here. Recordings of the meeting no longer exist and minutes of the meeting could not be found. This

prejudiced Mr. Jones. I further find no basis to equitable tolling of the various statute of limitations. Also, as set out above, I find that Mr. Jones did not breach either the 2006, 2007 0r the 2010 contracts and that UTA did breach those contracts.

FIRST TO BREACH

Mr. Jones did not breach either the 2006, 2007 or 2010 contracts. As Colby, Hughes, Burton and Deihl all testified, Mr. Jones fully performed his obligations under the contracts. The only witness that was critical of Mr. Jones' performance was Paul Drake. I did not find his testimony credible. UTA was first to breach the contract in 2015 when it attempted to void the contracts and stop paying what was due to Mr. Jones under those contracts.

SUBSTANTIVE AND PROCUDURAL UNCONSCIONALITY

I find that there was nothing either substantively or procedurally unconscionable about either the formation or the terms of the agreement. UTA got what it bargained for, was pleased with Mr. Jones' performance and sang his praises until, after the fact, Mr. Blakesly appeared, and new management was installed. It was only then that UTA went on a search for ways to dishonor its contract with Mr. Jones.

FAILURE OF CONSIDERATION

This is an issue I asked the parties to address. I am convinced that there was no failure of consideration on Mr. Jones' part. All of the Board members who worked with Mr. Jones were pleased with his performance. (*See* Ex. P154.) The only witness that testified negatively about Mr. Jones performance was Paul Drake. I disregarded his testimony because I did not find him credible either in his factual testimony or in his testimony where he attempted to give opinion testimony without adequate notice or foundation.

YOUNG ARBITRATION ISSUES

I'm denying attorneys' fees and costs associated with the Young Arbitration to both parties. Neither party followed the provisions of ¶ 14 of the 2010 contract. Upon receipt of Mr. Olsen's letter of December 6, 2017 (Ex.J86), UTA, rather than simply refusing to participate in the arbitration as per the December 18, 2017 letter (Ex. J85), should have sought relief from the court pursuant to Utah Code Ann. § 78B-11-107(2). On the other hand, Mr. Jones failed to follow the provisions of ¶ 14 (B) of the 2010 Contract. Upon receipt of the letter (Ex. J85), Mr. Jones should have filed a motion pursuant to Utah Code Ann. § 78B-11-108(1)(b) to "seek court appointment of an arbitrator pursuant to this act." (2010 contract ¶ 14(B).)

Rather than complying with the contract or the Uniform Arbitration Act, both parties embarked on a misguided litigation adventure that accomplished nothing, or as Judge Corum ruled, it was a 'nullity.' Judge Corum refused to honor the award Arbitrator Young granted but did order this arbitration to proceed. That should have happened in December of 2017 rather than in March of 2020. Each party shall bear their own fees and costs for the arbitration and hearing up to the point this arbitration was initiated.

DAMAGES

The purpose of contract damages is to place the non-breaching party in the same position he would have been had the contract been fully performed. *See Ashby v Ashby*, 2010 UT 7, ¶ 29, 227 P.3d 246. Both parties agreed on the value of the essential elements of Plaintiff's damage claim: salary, benefit, TOD bonus and the 2-for-1 Pension. The only material difference between the experts concerned the appropriate present value discount rate. Mr. Hoffman applies a discount rate of 2.28%, and Mr. Cannon applied both a 7.25% (the rate stipulated in Appendix

C of the Retirement Plan dated Sept. 23, 2015) as well as 6.75%, the rate stipulated in Exhibit C of the Retirement Plan dated January 1, 2021, for the calculation of Lump Sum Retirement Payments.

UTA agreed at the hearing that the 6.75% would be the appropriate present value discount rate to apply should I find liability. I do find liability in favor of Mr. Jones.

Both experts agreed at the hearing that their selection of the appropriate discount rate is a "judgment call" that they make exercising their professional education, training and experience. Both parties agreed that, should I find liability, that I adopt either 2.28% or 6.75% present value discount and not to substitute my own judgment at some discount rate in between. In carefully listening to their live testimony and in reading Mr. Hoffman's and Mr. Cannon's reports after the hearing, I find Mr. Hoffman's logic to be more persuasive.

The purpose of damages is to put Mr. Jones in the position as if the Contracts were fully performed. Mr. Jones elected to get his pension benefits paid over time rather than a lump sum distribution to provide for a safe and secure retirement for he and his wife without worrying about the volatility of the market. He gave up the opportunity for higher potential returns in the market in exchange for the security of the full faith and credit of the State of Utah. It therefore makes more sense to apply the more conservative present value discount rate in the market when UTA issues bonds, *i.e.,* the 2.28% discount rate utilized by Mr. Hoffman.

I, therefore, award damages to Mr. Jones as follows:

1.	Past shortfall on retirement payments with prejudgment interest	$	482,572
2.	Present value of all future retirement payments	$	1,684,447
3.	Health Insurance payment with prejudgment interest	$	94,283

4.	Incentive Payment, with prejudgment interest	$	791,535
	Total	**$**	**3,052,837**

As the prevailing party, pursuant to ¶ 14(D) of the 2010 Contract, I award Mr. Jones his reasonable attorneys' fees incurred in this action, but not the attorney fees associated with the Young Arbitration (as discussed above). I instruct counsel for Mr. Jones to submit an Affidavit of Attorneys' Fees, which should include time entries. The party producing a witness is responsible for paying that witness' fees and expenses. (*See* ¶ 14(D) of the 2010 contract, Ex. P91.) I interpret this to include expert witness fees and costs. Each party shall pay their own expert's fees and costs.

¶ 14(D) also provides that "the arbitrator's fees and expenses…may be apportioned and shall be borne as determined by the arbitrator." Considering that agreement gives me discretion rather than requiring the awarding my fees to the prevailing party, I find that each party is responsible for 50% of my fees and costs.

I don't think it is necessary for either side to submit an expert declaration on the hourly rate of fees or the time spent on discrete items. I don't think that would be helpful in my determination. I feel completely comfortable making those determinations on my own.

I find that none of the defendant's counterclaims have merit and award UTA nothing. I will issue a final award after I determine the amount of Mr. Jones' reasonable attorney fees and costs. Counsel for Mr. Jones is directed to submit their affidavits within 10 days after receipt of this interim award. UTA shall have 10 days to respond.

Dated: July 19, 2021

Arbitrator

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