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Ray Okelberry, Appellee, Cross-Appellant vs. West Daniels Land Association, Appellant, Cross-Appellee : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RAY OKELBERRY, Appellee/Cross-Appellant, vs. WEST DANIELS LAND ASSOCIATION, Appellant/Cross-Appellee.	Case No. 20030389-CA

APPELLEE/CROSS-APPELLANT'S BRIEF

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT, WASATCH COUNTY, HONORABLE DONALD J. EYRE.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated section 78-2a-3(2)(j) (2004).

ISSUES PRESENTED & STANDARDS OF REVIEW

1. Whether the trial was correct in ruling that West Daniels Land Association breached its fiduciary duties to Ray Okelberry where the Association chose to lease Association-owned land to a non-shareholder.

The issue of whether a corporation has breached its fiduciary duties presents a mixed question of law and fact for which trial court is granted "ample" and "broad" discretion. C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 53 (Utah Ct. App. 1995).

2. Whether the trial court erred in ruling that provisions in the bylaws requiring members of the West Daniels Land Association to own valid grazing permits from the Forest Service conflicted with the Articles of Incorporation.

Under Utah law, articles of incorporation and bylaws of a corporation are treated as contracts between the member and the corporation. Turner v. Hi-Country Homeowners Ass'n, 910 P.2d 1223, 1225 (Utah 1996). The issue of whether a trial court erred in interpreting a contract presents a question of law that is reviewed for correctness. See Pack v. Case, 2001 UT App 232, ¶16, 30 P.3d 436. This issue was preserved below at R. 291.

All other issues and standards of review as presented in West Daniels' opening brief. See Utah R. App. P. 24(b)(1).

DETERMINATIVE STATUTE

Rule 54(c)(1) of the Utah Rules of Civil Procedure, which states in relevant part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

STATEMENT OF THE CASE

Statement of Facts

In 1952, a group of cattlemen and ranchers banded together to form the West Daniels Land Association (West Daniels). (See Attachment A). Under the Articles of Incorporation that were enacted at that time, West Daniels was to "exist for ninety-nine years from the date of incorporation for the purpose to hold and own and manage grazing land for the purpose of grazing animals as shall be determined by the board of directors of said corporation." (Attachment A) (Emphasis added.).

Pursuant to its corporate charter, West Daniels eventually acquired approximately 5200 acres on which its individual members were allowed to graze their cattle. (Attachment B, Findings at ¶7). That land was used as a spring/fall range. (Attachment B, Findings at ¶8). During the summers, members of West Daniels moved their cattle onto neighboring lands that were owned by the United States

Forest Service; use of those lands, however, required the individuals to acquire grazing permits. (Attachment B, Findings at ¶¶ 7-8).

In accordance with West Daniels' livestock-centered purpose, the Articles of Incorporation (the Articles) expressly linked ownership of the shares of stock in West Daniels to ownership of grazing-capable livestock. The Articles thus provided that "two shares [of stock] shall be issued for each head of livestock." (Attachment A). At the close of the Articles, a table was included listing the respective number of shares owned by each of the founding members. (Attachment A). The Articles also set forth some initial procedures that were to be followed vis a vis membership and voting in the Association. Specifically, the Articles stated that "each share of stock may cast one vote" in Association meetings, and that "[n]ew members shall be received by a majority vote of the stockholders present at a duly called meeting." (Attachment A).

West Daniels also adopted Bylaws to further clarify and govern its corporate affairs. (Attachment C).[1] Under the terms of Article III of the Bylaws, membership in West Daniels was now limited to persons who qualified as "permittee member[s] of the Association." In order to become a permittee member, one had to show that he or she held "a permit to graze cattle on the West Daniels Cattle Association Range." (Attachment C). Under Article IV of the Bylaws, service as an officer or member of

[1] At trial, there was some discussion as to whether the Bylaws were properly adopted. After hearing the evidence, the trial court determined that the Bylaws were in fact properly adopted and were thus binding. (Attachment B, Findings at ¶6). West Daniels has not challenged that ruling.

the board of directors of West Daniels was also limited to those who held permits to graze on Forest Service land. (Attachment C).

On April 28, 1999, Ray Okelberry (Okelberry), a cattle rancher who was at that time the president of West Daniels, filed a verified complaint against the corporation, alleging various claims arising out of disputes over corporate voting rights and property decisions. (R. at 36).

In February 2002, the board of West Daniels met and decided to lease the land that had previously been used by the shareholders for their grazing out to the highest bidder. (Attachment B, Findings at ¶15). The Board then advertised the property for lease in "several periodicals, local periodicals, and statewide periodicals," (R. 569 at 143-44), and, after receiving a high bid, decided to lease out the grazing rights to a non-shareholder. When later asked about his opinion of the decision to lease that land to a non-shareholder, Okelberry stated that he was "outraged at it." (R. 569 at p.87). When asked why he didn't simply bid for the right to lease that land, he indicated that there were two reasons for his failure to do so. First, Okelberry stated that because he "was already a member of the corporation," he thought that he already "had a right to use it" without having to pay any extra money. (R. 569 at p.92). Second, Okelberry also testified that he wasn't even initially aware that the board of directors had taken the step of advertising the land out to prospective leaseholders. (R. 569 at p.90). Instead, Okelberry testified that he had thought that the corporation was simply

studying the issue, (R. 569 at p.90), and that when he learned that the corporation had actually chosen to lease the land out, he immediately objected. (R. 569 at p.91).

An amended complaint was filed on January 19, 2001. (R. at 347; Attachment D). In his amended complaint, Okelberry asked for relief based on two separate causes of action. In his first cause of action, Okelberry asked for declaratory relief. As part of the declaratory relief claim, Okelberry first alleged that certain members of West Daniels had lost their Forest Service permits. Insofar as shares in West Daniels had been conditioned on the ownership of those permits, Okelberry asked the court to declare that the shares of those members who no longer had valid permits should accordingly be transferred to permit-owning members. (Attachment D at ¶¶ 21-32). In paragraph 33 of the declaratory relief claim, Okelberry also included an allegation that properties owned by West Daniels were owned collectively, and that, as such, use of those properties must be open to all members. (Attachment D at ¶ 33).

In his second cause of action, Okelberry asked for relief based on a violation of his contractual rights. Specifically, Okelberry alleged that his membership in West Daniels gave him a contractual right to use the West Daniels land for the grazing of his livestock, that certain decisions of the West Daniels leadership had deprived him of that right, and that he had thus incurred compensable damages as a result of those decisions. (Attachment D at ¶¶ 34-40).

On May 21, 2001, the trial court dismissed Okelberry's claim that membership in West Daniels should be limited to those who own valid grazing permits. (R. at 399; Attachment E at pp. 4-5). The trial court held that those provisions of the Bylaws that required ownership of grazing permits were in conflict with the Articles, and therefore struck them as invalid. (Attachment E at pp. 4-5). In that same ruling, however, the trial court expressly held that Okelberry was entitled to a trial on (i) his request for a declaratory ruling that he was entitled to use of West Daniels property for grazing and (ii) his request for damages stemming from the alleged breach of his contractual rights with respect to that land. (Attachment E at pp. 5-6).

A bench trial was held on these claims on July 22-23, 2002. (R. at 503). At the conclusion of the trial, the court entered findings of fact and conclusions of law. (R. at 503; Attachment B). In those findings, the trial court found that the purpose of West Daniels is to "provide grazing lands for the livestock owned by the shareholders." (Attachment B, Findings at ¶16) (Emphasis added.). The court further determined that West Daniels had breached its fiduciary duties to Okelberry by leasing its 5200 acres of land to a non-member bidder, (Attachment B, Findings at ¶¶ 15-16), and that Okelberry was entitled to damages as a result. (Attachment B, Findings at ¶¶ 19-24).

On April 30, 2003, West Daniels filed notice of appeal. On May 13, 2003, Okelberry filed a notice of cross-appeal.

SUMMARY OF THE ARGUMENT

This Court should reject West Daniels' arguments relating to its breach of its fiduciary duties. This Court should instead hold: (A) that the business judgment rule does not protect West Daniels' decision to lease its land to non-members because this decision was not authorized under the corporate charter; (B) that West Daniels' obligations with respect to the property were appropriately considered under Rule 54(c) of the Utah Rules of Civil Procedure; and (C) that the trial court did not err by refusing to require Okelberry to comply with the requirements for filing a derivative action.

Additionally, this Court should hold that Judge Schofield erred in dismissing Okelberry's declaratory judgment claims. This Court should instead hold that Okelberry was entitled to a trial on the issues raised in the claim relating to the proper preconditions for stock ownership.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT WEST DANIELS BREACHED ITS FIDUCIARY DUTIES BY LEASING ITS LAND TO NON-SHAREHOLDERS.

In awarding damages to Okelberry, the trial court found that West Daniels had breached its fiduciary duties to him by leasing its land to a non-member. West Daniels now attacks that ruling, arguing that (A) the decision to lease the land was protected by the business judgment rule, (B) the decision to lease the land was not properly

before the court, and (C) that any effort by Okelberry to sue for a breach of those fiduciary duties should have been subjected to the requirements for filing a derivative action. Each of these arguments should be rejected by this Court.

A. THE DECISION TO LEASE THE LAND TO NON-SHAREHOLDERS WAS NOT PROTECTED BY THE BUSINESS JUDGMENT RULE.

West Daniels first argues that the decision to lease West Daniels land was protected by the business judgment rule and therefore not subject to judicial scrutiny. According to West Daniels, Utah Code Annotated section 16-6a-822(6) (2004) acts as a codification of the business judgment rule, wherein decisions of a nonprofit corporation's board of directors are not reviewable absent a showing of willful misconduct or intentional infliction of harm on the corporation.

This argument should be rejected, however, for three separate reasons. First, by its express terms, section 16-6a-822(6) only applies where a claimant seeks to hold a director personally liable for decisions that were made in the director's corporate capacity. Because the claims in this case do not seek such liability, section 16-6a-822(6) is simply inapplicable. Second, the fact that section 16-6a-822(6) has been referred to as a codification of the "business judgment rule" does not bring this claim within its purview. Third, although it is well-settled that although corporate decisions are typically given a certain degree of deference, that deference is limited where the corporate decision was not authorized under the corporate charter.

1. By its express terms, Utah Code Annotated Section 16-6a-822(6) simply does not require a showing of willful misconduct or intentional infliction of harm where the claim is made against a corporation, rather than against directors in their individual capacities.

"When interpreting statutes, we look first to the plain language." Diener v. Diener, 2004 UT App 314 ,¶10, 98 P.3d 1178 (quotations and citation omitted). "When interpreting the plain language of a statute, we assume that each term in the statute was used advisedly; thus, the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." Florida Asset Fin. Corp. v. Utah Labor Comm'n, 2004 UT App 273, ¶10, 98 P.3d 436 (quotations and citation omitted).

Under the terms of section 16-6a-822(6), it is true that, in some circumstances, a plaintiff cannot hold a defendant liable for a breach of fiduciary duties absent a showing of "wilful misconduct" or "intentional infliction of harm." By its express statutory terms, however, that heightened standard is only applicable in certain instances. Specifically, subsection 16-6a-822(6) states that

> [a] director or officer is not liable to the nonprofit corporation [or] its members . . . for any action taken, or any failure to take any action, as an officer or director, as the case may be, unless:
>
> (a) the director or officer has breached or failed to perform the duties of the office as set forth in this section; and
>
> (b) the breach or failure to perform constitutes:
>
> (i) willful misconduct; or
>
> (ii) intentional infliction of harm on:
>
> (A) the nonprofit corporation; or
>
> (B) the members of the nonprofit corporation.

(Emphasis added.).

As is indicated in the emphasized language, the willful misconduct/intentional infliction of harm requirement is only operative when the claim seeks to hold a director or officer personally liable for actions that were taken in his or her capacity as a corporate officer. There is no language anywhere in this statute, however, that would apply this same stringent standard of review to claims that are made against the corporation generally.

An examination of the two cases cited by West Daniels supports this conclusion. West Daniels first cites C & Y Corp. v. General Biometrics, 896 P.2d 47 (Utah Ct. App. 1995), wherein the corporation itself was the plaintiff, and where its claim was that two of its former directors should have been held individually liable for alleged breaches of their fiduciary duties. See id. at 53-55. West Daniels next cites Reedeker v. Salisbury, 952 P.2d 577 (Utah Ct. App. 1998), which also involved a claim that "several past and present trustees and officers" should have been held "personally liable" for their alleged breaches of fiduciary duties. Reedeker, 952 P.2d at 581 (emphasis added). Neither of these cases involved situations where the heightened standard of section 16-6a-822(6) was applied to a corporation, as opposed to its individual directors, and neither of these cases in any way purported to extend that standard to such cases in the future. Aside from these two cases, West Daniels has cited no other authority that would support such an extension.

In the present case, it is true that the amended complaint did list several members of the board as individual defendants. (See Attachment D). The stated reason for this, however, was not to hold those members "liable" for any decision that was made in their capacities as officers, but rather to simply obtain a declaratory adjudication as to their ability as individual shareholders to actually hold stock in the corporation. (See Attachment D at ¶¶21-32). Paragraph 25 of the Amended Complaint thus specifically stated that the claim against the "individually listed defendants" was based on those members' "claim[s] to hold shares of membership in the Association." By contrast, the request for monetary damages was only made in the context of the breach of contract claim, which (i) was expressly predicated on a claim against West Daniels as a corporation, and (ii) did not at any point ask for relief from any individual board member. (See Attachment D at ¶¶ 34-40).

Under Utah law, "statutory rights may not be enlarged . . . unless the Act expressly states such a right." Snow Flower Homeowners Ass'n v. Snow Flower, Ltd., 2001 UT App 207, ¶24, 31 P.3d 576. Here, because the plain language of 16-6a-822(6) limits its applicability to claims that are made against the corporation generally, an extension of the willful misconduct/intentional infliction of harm standard to this case would simply be unwarranted in the absence of any statutory authority to the contrary. As such, West Daniels' claim that Okelberry was required to establish that

the West Daniels board had acted with willful misconduct or intentional infliction of harm is simply unsupported under Utah law, and should therefore be rejected.[2]

2. The fact that section 16-6a-822 has been referred to as a codification of the "business judgment rule" does not mean that the corporate decision itself is subject to the same degree of scrutiny that is applied to a claim against an individual corporate director.

As noted by West Daniels, some Utah courts have stated that section 16-6a-822's parallel statutes or prior incarnations act as codifications of the "business judgment rule." See, e.g., C & Y Corp., 896 P.2d at 55. Contrary to West Daniels' assertions, however, the fact that section 16-6a-822 has been referred to as "the business judgment rule" does not mean that its heightened standard applies to judicial review of a corporation's business decisions.

Academic commentators that have examined the business judgment rule have concluded that there is no one formulation of the rule or its scope. One commentator concluded that the rule is a "multi-faceted one" that has multiple iterations across the country. Douglas M. Branson, The Rule That Isn't a Rule–The Business Judgment Rule, 36 Val. U. L. Rev. 631, 632 (2002). Another commentator argued that "despite all of the attention lavished on it, the business judgment rule remains poorly understood," and there is not a "coherent and unified theory that explains" its proper

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[2]In its brief, West Daniels has also asserted that the trial court's failure to enter findings of wilful misconduct or intentional harm was reversible error. Because this standard was inapplicable to these specific claims, this Court should now reject that argument as well.

application. Stephen M. Bainbridge, The Business Judgment Rule As Abstention Doctrine, 57 Vand. L. Rev. 83, 84 (2004). In general terms, however, the commentators have identified two separate strains of the rule, each with its own purpose, history, and legal standard.

In the first strain, the business judgment rule has traditionally been applied as a means of preventing courts from unduly meddling with the business decisions of a corporate board. Explaining this strain, one commentator argued that the rule is best understood as "a doctrine of abstention pursuant to which courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied." Id. at 87. This strain recognizes "the need to preserve the board of directors' decision-making discretion," id. at 84, and thus "recognizes the legitimacy of the board as a decision maker and the substantial judicial deference to be accorded thereto." Joseph Hinsey, Business Judgment & the American Law Institute's Corporate Governance Project, 52 Geo. Wash. L. Rev. 609, 612 (1984).

This classical strain was applied in the famous Shlensky v. Wrigley decision, wherein the Illinois Court of Appeals refused to intervene in the intra-corporate dispute as to whether the owners of the Chicago Cubs should begin playing night games. See generally Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968). In Utah, this strain of the business judgment rule has been applied in such cases as Chapman v. Troy Laundry Co., 47 P.2d 1054 (Utah 1935), wherein the court held that

"[i]t is the duty of the courts to determine whether or not the directors have acted in good faith with their corporation. If so, then it is the duty of the courts to uphold the actions of the directors, even though it may appear that the things done were in fact not advantageous to the corporation." Id. at 1064; see also Summit Range & Livestock Co. v. Rees, 265 P.2d 381, 382 (Utah 1953).

By contrast, the modern approach to the business judgment rule instead focuses on the situations in which a corporation's directors should be subjected to individual liability for their participation in corporate decisions. See Bainbridge, 57 Vand. L. Rev. at 90 ("The modern trend is to treat the business judgment rule as a substantive standard of liability."). Rather than focusing on the board's ability to make a particular decision, this modern strain instead focuses on whether an individual director can be held liable for a decision's adverse consequences. See also Kenneth B. Davis, Once More, The Business Judgment Rule, 2000 Wis. L. Rev. 573, 587-88 (2000); Hinsey, 52 Geo. Wash. L. Rev. at 611-13. It is within this framework that such decisions as C & Y Corp. and Reedeker (the two decisions cited by West Daniels in its brief) are more properly understood.

Though undeniably related, it is clear that these two strains of the business judgment rule are in fact distinct–not only in purpose and scope, but also often distinct in the precise legal standards that govern their application. See Bainbridge, 57 Vand. L. Rev. at 87 ("Because the two conceptions contemplate dramatically different

approaches to judicial review, the choice between them can have outcome-determinative effects."). While the decision-protective strain of the business judgment rule simply seeks to allow corporations the freedom to take calculated business risks, for example, the director-protective strain is more specifically designed to ensure that qualified individuals do not feel the need to refrain from corporate service as the result of potential legal liabilities. See Davis, 2000 Wis. L. Rev. at 573-75; see also, Bainbridge, 57 Vand. L. Rev. at 87-89; Hinsey, 52 Geo. Wash. L. Rev. at 611-12.

For purposes of this case, two principles are thus important. First, the differences in purpose between these two formulations are such that the courts and statutes have often created different standards to govern their application. See, e.g., Gries Sports Enters, Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 964-65 (Ohio 1986); Davis, 2000 Wis. L. Rev. at 588 (stating that, given the relative purposes, courts "need not be as protective" of a corporation's decisions as they are of individual directors). Second, given these differences, it is important to recognize there are in fact also situations where it has been found entirely appropriate for a court to review the substance of a corporation's decision, while still protecting the corporate directors from individual liability. See Hinsey, 52 Geo Wash. L. Rev. at 613.

Returning to the case at hand, the ultimate problem with West Daniels' argument is that it presupposes that just because Utah has statutorily created a heightened willful misconduct/intentional infliction of harm standard to govern

director liability cases, that that same heightened standard should also be applied to cases where the court is instead only examining the propriety of the corporate decision itself. Had the Legislature intended such a result, it certainly could have written language into section 16-6a-822 that would have been broad enough to bring such corporate decisions within its purview. It did not do so, however, instead choosing only to provide that extra statutory protection to cases in which the claim seeks to hold the directors personally liable.

Because of the differences between these two types of situations, this Court simply cannot assume that the Legislature intended to shield corporate decisions with the same degree of protection that is afforded to corporate directors. As such, the fact that section 16-6a-822 has been referred to as a "business judgment rule" codification simply does not mean that its own heightened standard is in any applicable to this case.

3. The decision to lease the land to non-shareholders was an ultra-vires act that is not protected by the business judgment rule.

As discussed above, corporate decisions are generally protected from judicial review under Utah law as long as the directors acted in "good faith," Chapman, 47 P.2d at 1064, or as long as the actions are not "fraudulent or so discriminatory as to be confiscatory of the rights of the defendant." Summit Range & Livestock Co. v. Rees, 265 P.2d 381, 382 (Utah 1953). In so holding, however, Utah law also recognizes that the protection that is generally afforded to corporate decisions does not apply where

the corporate decision is not authorized by the corporate charter. In Summit Range & Livestock Co., for example, the Utah Supreme Court held that a corporate action "will not be interfered with so long as it is within the framework of the purposes and powers included in the corporate charter." Id. (emphasis added).

This rule has been consistently applied by other courts that have examined similar questions. The editors of American Jurisprudence thus state as a general rule that "[g]rounds for court interference may arise where the action of the board of directors is an abuse of discretion, forbidden by statute, against public policy or ultra vires." 18B Am.Jur.2d Corporations §1296 (emphasis added); cf. Black's Law Dictionary, Ultra Vires (8th ed. 2004) (defining "ultra vires" acts as acts that are "[u]nauthorized; beyond the scope of power allowed or granted by the corporate charter or by law").[3]

In accordance with this principle, one federal district court has recently noted that while "the business judgment rule [] generally insulates decisions made by a corporation's board of directors from judicial review absent a showing that the corporate officers acted in bad faith," "a decision by directors that . . . ultra vires

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[3]Importantly, this limitation on the application of the business judgment rule also extends to situations where the claim seeks liability from an individual director, rather than just review of the corporate decision. See 18B Am.Jur.2d Corporations §1473 ("The privilege of a corporate officer to use his or her discretion in acting on behalf of a corporation ceases to exist if the corporate officer acts outside the scope of his or her corporate authority.... A director is not required to have intentionally acted to harm the corporation, in order to be liable for breach of the duty to exercise appropriate attention to potentially illegal corporate activities.").

conduct would serve the best interests of the corporation is not protected by the business judgment rule." Goldstein v. Lincoln Nat'l Convertible Sec. Fund, Inc., 140 F.Supp. 424, 437 (E.D. Penn. 2001), vacated on other grounds by 2003 WL 1846095. The New Jersey Court of Appeals similarly held that "the first question in any . . . dispute [between shareholders and corporate officers] is whether the board's action was ultra vires." Verna v. Links at Valleybrook Neighborhood Ass'n, Inc., 852 A.2d 202, 211 (N.J. App. 2004). Examining the issue in that case, the Verna court held that

> because the [disputed corporate action] was ultra vires, the board's conduct cannot be shielded by the 'business judgment' rule, which applies only when a board has the authority to make such a decision. Only when a board's actions are authorized and of the type that justify application of the 'business judgment' rule, will a court refrain from second-guessing its actions.

Id. at 212 (emphasis added). This rule has also been consistently applied by various other courts that have examined the issue. See, e.g., Paglin v. Saztec Int'l, Inc., 834 F.Supp. 1184, 1200 (W.D. Mo. 1993) (holding that "the business judgment rule does not apply when the act complained of is ultra vires"); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350 (Del. 1985) ("Of course, the business judgment rule can only sustain corporate decision making or transactions that are within the power or authority of the Board."); Kuznik v. Bees Ferry Ass'n, 538 S.E.2d 15, 25 (S.C. Ct. App. 2001) (holding that "the business judgment rule applies to intra vires action of corporation, not to ultra vires acts") (quoting Seabrook Island Property Owners Ass'n v. Pelzer, 356 S.E.2d 411 (S.C. Ct. App. 1987)).

Turning to the case at hand, it is true that Utah law generally grants nonprofit corporations the power to sell land. As noted by West Daniels, section 16-6a-302 of the Utah Code does state that such corporations do have the power to "purchase, receive, lease, or otherwise acquire" land. Utah Code Ann. § 16-6a-302(2)(d) (2004). This power, however, is necessarily circumscribed by "the purposes and powers included in the corporate charter." Summit Range & Livestock Co., 265 P.2d at 382. Indeed, this limitation is implicitly recognized in the first sentence of § 16-6a-302 itself, which states that a nonprofit corporation has the enumerated powers "[u]nless its articles of incorporation provide otherwise." Subsection 16-6a-302(2) similarly states that the corporation's otherwise unlimited power to "do all things necessary or convenient" is only operative where that activity is a "permitted activit[y]" for that particular corporation.

Here, after hearing the testimony and evidence at trial, the trial court entered a finding of fact stating that "the purpose of the corporation as set forth in the Affidavit is to obtain lands for grazing purposes to assist in helping its members." (Attachment B, Findings at ¶2) (emphasis added). The court also entered a finding of fact stating that the founders of the corporation "anticipated that the shareholders would put their livestock on the land to be acquired by the Association." (Attachment B, Findings at ¶3). The court further found that the board of West Daniels chose to lease out its 5200 acres of land in 2002 to "the highest bidder," regardless of whether that bidder was a

member of the corporation. (Attachment B, Findings at ¶15). Tying these findings together, the court thus concluded that this decision violated the corporation's fiduciary duties because it was not within the "purpose[s] of the corporation, which the Court has previously ruled is to provide grazing lands for the livestock owned by the shareholders." (Attachment B, Findings at ¶16) (emphases added).[4]

Notably, West Daniels has not challenged the Court's specific factual finding that the purpose of the corporation was to "provide grazing lands for the livestock owned by the shareholders," (emphasis added), nor has it challenged the court's finding that, as part of the corporate purpose, it was "anticipated that the shareholders would put their livestock on the land to be acquired by the Association." As findings of fact, such challenges would necessarily have involved a marshaling of the supporting evidence, see Utah R. App. P. 24(a)(9); in the absence of such a challenge or of marshaling, this Court is therefore obligated to assume that the evidence does in fact support these findings. See Johnson v. Higley, 1999 UT App 278, ¶37, 989 P.2d 61.

As such, this Court is now left with the task of reviewing the trial court's determination that the decision to lease its land to a non-member (or, alternatively, to require a current shareholder to be the highest bidder in order to continue grazing on

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[4]Though shareholders typically must file a derivative action in order to assert that an action was ultra vires, see Utah Code Annotated §16-6a-304 (2004), such an action is allowed in a non-derivative context if the action is brought by a corporate director. See id. at § 16-6a-304(2)(a)(i). When he filed the original complaint in 1999, Okelberry was actually serving as the president of the corporation, (see Attachment B, Findings at ¶9), and was therefore authorized to file that suit non-derivatively.

that land) was an ultra vires act in light of the accepted facts that (i) the purpose of the corporation was to provide grazing lands for its members, and (ii) that it was always anticipated that the shareholders would have the ability to put their livestock on that very land.

In light of these facts, there are two clear reasons why this Court should affirm the conclusion that the decision to lease the land was in fact ultra vires. First, as a statement of general contractual language, the corporate charter simply does not authorize the leasing or selling of the land, whether to a member or non-member. Instead, the Articles only authorized West Daniels to perform three specific actions as part of its efforts to "obtain lands for grazing purposes to assist in helping its members." Specifically, West Daniels was authorized (i) to "hold" grazing land; (ii) to "own" grazing land; and (iii) to "manage grazing land." Significantly, there was no mention there of any authority to either "lease" the grazing land or to "sell" grazing land. Given that the Articles were drafted by an attorney, this silence is striking and should be presumed as intentional.

Second, the suggestion that West Daniels was authorized to lease its grazing land out to bidders is simply untenable with the stated purposes of the corporation. If it was in fact the corporate purpose to provide grazing land to the shareholders, then the leasing out of that very land would by definition be an act that deprived those shareholders of the central right to which they were specifically entitled. Further,

contrary to West Daniels' suggestion, the unlawfulness of this result is not changed if the high bidder was in fact a shareholder. Even if Okelberry himself had been the high bidder, for example, his status as the sole leaseholder would have necessarily prevented another shareholder from enjoying his or her own grazing rights. In this manner, the entire corporate purpose would have been stymied.

The unauthorized nature of this act is made clear by taking West Daniels' argument to its logical conclusion. Suppose that instead of deciding to lease its land, the West Daniels board had instead decided to sell it outright. Under West Daniels' argument, this action would have been authorized under the general grant of powers given to nonprofit corporations under section 16-6a-302. At that point, however, West Daniels would have been manifestly unable to continue fulfilling its corporate purpose of "manag[ing] grazing land" for its members. As is made clear by this example, West Daniels' specific corporate purpose required it to continue to own land and to continue making that land available for use by its shareholders; insofar as this specific purpose contradicts the general language of section 16-6a-302, it is clear that 16-6a-302 is inapplicable.[5]

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[5]Given the absence of any discussion in the Articles regarding the eventual disgorgement of corporate-owned lands, the question naturally arises as to whether West Daniels would be required to hold those lands indefinitely. In interpreting articles of incorporation or bylaws, "the parties' intentions are controlling." Turner, 910 P.2d at 1225. Here, the stated corporate purpose was to provide grazing land for the members of the corporation for a period of "ninety-nine years from the date of incorporation." (Attachment A). Presumably, West Daniels would be authorized to sell off its lands at the end of that ninety-nine year period as a means of winding down the corporate affairs.

Thus, though 16-6a-302(2)(d) does authorize leasing or selling land in ordinary situations, 16-6a-302(2)(d) simply should not be read to allow the leasing of corporate land (i) where there is no authority provided in the corporate documents, and (ii) where the leasing and selling of the land would in fact violate the stated corporate purposes of the corporation. At the time that this decision was made, Okelberry was a dues paying, assessment-compliant shareholder in good standing, and he was therefore entitled to use that land for grazing purposes without having to outbid other persons for that right. The decision to lease this land out was therefore an ultra vires act that is simply outside the scope of the business judgment rule.

B. THE TRIAL COURT HAD AUTHORITY UNDER RULE 54(c) OF THE UTAH RULES OF CIVIL PROCEDURE TO DETERMINE THAT THE WEST DANIELS LAND ASSOCIATION BREACHED ITS FIDUCIARY DUTIES.

Next, it is true that though Okelberry's pleadings did not specifically ask for relief based on West Daniels' breach of its fiduciary duties, the trial court ultimately based its award of relief on the finding that a breach of fiduciary duties had occurred. Contrary to West Daniels' assertions, however, the fact that Okelberry did not ask for such relief in his pleadings does not mean that the trial court's ultimate conclusion in error.

Such an action would presumably be appropriate under those circumstances only because the corporate purpose of providing grazing land to its members for ninety-nine years would at that time have been fulfilled. Where the ninety-nine year corporate period has not yet expired, however, such an action should in fact be deemed inconsistent with the overarching corporate purpose.

Under rule 54(c)(1) of the Utah Rules of Civil Procedure, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." In Richards v. Baum, 914 P.2d 719 (Utah 1996), the Utah Supreme Court stated that rule 54(c)(1) "has been invoked by this Court on numerous occasions . . . so that substantive law, rather than a procedural technicality based on an insignificant lapse in the pleadings governs the outcome of a case." Id. at 723. Thus, "the policy of our rules of procedure is to decide cases on the merits rather than pleading technicalities." Guardian State Bank v. F.C. Stangl III, 778 P.2d 1, 8 (Utah 1989).

In analyzing the similar federal rule, Wright & Miller have thus noted that "[t]he question is not whether plaintiff has asked for the proper remedy but whether plaintiff is entitled to any remedy." Wright & Miller, 10 Federal Practice & Procedure 3d § 2664 (2004).[6] Wright & Miller then list multiple examples where rule 54(c) was properly invoked, including (i) a case where the court awarded attorney fees even though it was not demanded in the pleadings, (ii) a case where the complaint had asked for cancellation and rescission of a contract, and the court went on to instead order specific performance, and (iii) a case where the suit had asked for a declaration of rights under a contract, and where the judge had instead determined that the defendant

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[6] "It is well-established that decisions and treatises examining the federal rules of civil procedure can be considered as guidance in interpreting Utah's own rules of civil procedure." Kelly v. Hard Money Funding, 2004 UT App 44, ¶37 n.7, 87 P.3d 734.

should be liable for conversion. See 10 Federal Practice & Procedure 3d at § 2664. As is clear from these and other examples, Rule 54(c) therefore allows the court to "award[] a different type of relief from that demanded in the complaint." Id.

Under Utah jurisprudence, rule 54(c)(1) allows a court to rule on issues that were not specifically alleged in the pleadings if the relief is "supported by the evidence" and "a permissible form of relief for the claims litigated," and if there is no prejudice to the other party. Butler v. Wilkinson, 740 P.2d 1244, 1263 (Utah 1987); accord Buehner Block Co. v. Glezos, 310 P.2d 517, 519-20 (Utah 1957). In the present case, Okelberry sought relief based on his contention that West Daniels had conducted various unauthorized actions that had impaired his rights as both a shareholder and an individual. As discussed more fully above, Okelberry's complaint asked for relief under two separate theories: first, as a declaratory relief action, and second as a breach of contract action. (See Attachment D). Additionally, paragraph 33 of the Amended Complaint also alleged that Okelberry was entitled to an express judgment that Okelberry was in fact entitled to use of all corporate assets.

At trial, the issue of whether Okelberry was deprived of his rights to the use of corporate assets by the decisions of the West Daniels board was a central part of the presentations. For example, after being called to the stand as part of the plaintiff's case-in-chief, Okelberry spent considerable time discussing the damages that he had personally incurred because of West Daniels' decision to lease the land to a non-

shareholder. (See, e.g., R. 568 at pp. 72-79). Discussing the decision to lease the land to a non-shareholder, Okelberry opined that the directors "are entitled to do what they want with what they got, but to lease it out to a complete nonmember, and then I have to find other pasture, there's something wrong here." (R. 568 at p. 80). After Okelberry had finished testifying, his counsel then called an expert to the stand to testify regarding the economic damage (such as through unnecessary shrinkage of cattle) that Okelberry had suffered as a direct result of the corporation's decision to lease the land to a non-shareholder. (See R. 568 at pp. 100-121).

After receiving this testimony, a colloquy occurred wherein the trial court expressly informed West Daniels' counsel that it regarded the decision to lease the land to a non-shareholder an unauthorized act. Specifically, after the court expressed its concern that West Daniels' actions had "totally den[ied]" Okelberry use of the property and that this action was "clearly a violation of the articles of incorporation," West Daniels' counsel responded by acknowledging that he was in fact "prepared to address" the issues regarding "misuse of corporate assets." (R. 568 at p. 126). As part of that effort, for example, West Daniels' counsel openly and actively participated in the questioning of various witnesses regarding the process by which West Daniels' land was submitted for public bidding. (See R. 569 at pp. 105-106). Finally, the issue of whether the corporation had a right to lease out the land was a central part of both parties' closing statements. Okelberry's counsel, for example, argued that "one thing

that we're asking this Court to rule upon [was] that he has a right to use that private property, not just on a restricted amount, but for the full use of the 401 head of cattle that he has," (R. 569 at 124-125), while West Daniels' counsel made contradictory representations in his own presentation. (See R. 569 at 128-129).

In light of the fact-specific nature of fiduciary duty determinations, see C &Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 54 n.7 (Utah Ct. App. 1995) (holding that "the law of breach of fiduciary duty by corporate directors is 'highly fact-dependant'"), trial courts are given "broad" or "ample discretion" in adjudicating possible breaches of fiduciary duties. Id. at 54, 55. Here, the central contention that was pleaded and then litigated at trial was that the board of West Daniels did not have the authority to lease out corporate land to non-members, and that Okelberry was therefore personally entitled to damages stemming from that decision. After hearing the evidence, the trial court was thus well within its rule 54(c) authority when it determined that this evidence in fact supported an award based on a violation of fiduciary duties.[7]

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[7] On page 23 of its brief, West Daniels suggests that "the only logical reason" for the trial court's failure to rule on the contract claim was that "there simply was no contract between the Board and Okelberry." In ascribing negative connotations to the court's silence, West Daniels obviously overlooks the equally plausible positive interpretation–namely, that after determining that Okelberry was entitled to relief based on a fiduciary duty claim, the trial court could have then simply determined that a ruling on the contract claim was now unnecessary. Though arguments can be made for or against each of these interpretations, the simple fact remains that the trial court, for whatever reason, did not in fact issue a ruling on the contract claim itself.

It is well accepted in Utah that the appellate courts should avoid issuing rulings on

C. THE TRIAL COURT DID NOT ERR BY REFUSING TO REQUIRE OKELBERRY TO COMPLY WITH THE DERIVATIVE SUIT REQUIREMENTS.

West Daniels next argues that the trial court erred by failing to apply the Utah derivative lawsuit requirements to this case. As noted by West Daniels, Utah law does state that claims for corporate mismanagement or breach of fiduciary duties are corporate claims for which a plaintiff is ordinarily required to file a derivative action. See Warner v. DMG Color, Inc., 2000 UT 102, ¶12, 20 P.3d 868. Further, as was also noted by West Daniels, the Utah Nonprofit Act does ordinarily require a plaintiff to make a demand on a nonprofit corporation prior to filing a derivative action. See Utah Code Ann. § 16-6a-612(3)(a)(i) through -612(3)(a)(ii). In spite of these unquestioned principles, there are two separate reasons why Okelberry's failure to comply with the derivative action requirements in this case do not constitute reversible error.

First, though compliance with the derivative action requirements would have been necessary for Okelberry to have filed any fiduciary duty claims, the salient fact is that Okelberry did not actually file such claims as part of his original prayer for relief.

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issues that were not ruled on below. See Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.2d 280, 284 n.1 (Utah Ct. App. 1996) ("[B]ecause the trial court did not rule on this issue, it is not properly before us and we decline to address it."); see also Lipscomb v. Chilton, 793 P.2d 379, 381 (Utah 1990) ("In view of the fact that the trial court did not reach this defense and did not rule on its merits, we do not reach this issue."). As such, should this Court now overturn the fiduciary duty ruling, Okelberry respectfully requests that this Court then remand this case to the trial court with instructions that the trial court enter a ruling on the contract claim.

Instead, Okelberry chose to ask for declaratory relief and contractual relief. As discussed above, however, the trial court disregarded Okelberry's framing of the issues after it had heard the evidence, and instead determined that relief was instead justified due to West Daniels' breach of its fiduciary duties.

Given this somewhat unique scenario, the question now before this Court is whether a trial court's authority to award relief under rule 54(c) is limited where the relief that is ultimately granted would have required specialized pleading if it had been included in the complaint itself. In essence, West Daniels' argument here is that although rule 54(c) expressly authorizes a judgment on grounds that were not actually pleaded, such a judgment is nevertheless impermissible when the plaintiff has failed to properly plead those claims. On its face, this argument simply makes no sense–either rule 54(c) allows relief in the absence of proper pleading, or it doesn't. There does not appear to be any authority, either in rule 54 itself or in the supporting cases, that would impose a proper-pleading requirement on a rule that expressly allows relief in the absence of any pleading at all. Taken to its logical conclusions, West Daniels' argument would effectively eviscerate rule 54(c). As such, this Court should hold that Okelberry's failure to satisfy the derivative action requirements is not fatal to the ultimate award of relief under fiduciary duty theories.

The illogic of such a rule becomes further clear when applied to other claims for which special pleading rules are required. Suppose, for example, that a plaintiff filed a

claim alleging breach of contract and that, after reviewing the evidence, the trial court determined that the plaintiff was instead entitled to damages under a fraud theory. It would be folly in that circumstance to suggest that the plaintiff's right to receive that compensation is limited due to a failure to plead fraud with particularity as is ordinarily required by rule 9 of the Utah Rules of Civil Procedure. Imposing such a requirement would defeat the very purpose of rule 54–which is to ensure that a litigant receives "the relief to which [he or she] is entitled," Utah R. Civ. P. 54(c)(1), regardless of whether there has been a lapse in the pleadings.

Second, as discussed by West Daniels in its opening brief, this Court has recognized that an exception to the derivative suit requirement exists in certain situations. Specifically, a shareholder is allowed to "bring an individual cause of action if the harm to the corporation also damaged the shareholder as an individual rather than as a shareholder." DLB Collection Trust v. Harris, 893 P.2d 593, 596 (Utah Ct. App. 1995) (emphasis in original). In such situations, the plaintiff must be able to show that he or she has "suffered [an] injury that was direct to his [or her] own person, property, or personal legal status," and which would have been suffered "irrespective of his status as a shareholder." Bio-Thrust, Inc. v. Division of Corp., 2003 UT App 360, ¶12, 80 P.3d 164. Under this exception, an individual action may therefore be filed where "the wrong itself amounts to a breach of duty owed to the shareholder personally," id., or where the affected right is one that "belong[s] severally" to the

shareholder. Richardson v. Arizona Fuels Corp., 614 P.2d 636, 639 (Utah 1980); accord 19 Am.Jur.2d Corporations § 1940 (noting that the violated duty must have "its origin in circumstances independent of the plaintiff's status as a stockholder").

Admittedly, an application of the DLB exception to the present case would require a slight extension of the exception's scope. Such an extension is warranted, however, because the facts of this case present a unique comingling of corporate and private interests that has not similarly been involved in any of the prior cases. Specifically, there is no question that the damage that Okelberry suffered as a result of the improper corporate actions was to his own livestock and to his own livestock operation. Under this particular corporate scheme, Okelberry still personally owned his livestock, still personally ran his own livestock operation, and West Daniels did not in any way acquire any sort of ownership or pecuniary interest in either Okelberry's livestock or his livestock operation. As such, the trial court's unchallenged factual finding that Okelberry suffered $13,716 in damage, (Attachment B, Findings at ¶23), does in fact represent an "injury that was direct to his own person, property, [and] personal legal status," Bio-Thrust, Inc., 2003 UT App 360 at ¶12, and was in fact a "harm specific to plaintiff, as opposed to [a] harm [that] affect[ed] other shareholders or creditors of the corporation." Warner v. DMG Color, Inc., 2000 UT 102, ¶16, 20 P.3d 868. Further, there is no question that the affected livestock "belong severally" to Okelberry, Richardson, 614 P.2d at 639, and that any claim for damages

that would have served as the basis for his derivative action would in fact have been predicated on his own personal loss.

The wrinkle here, however, lies in the admitted fact that Okelberry was only entitled to graze his livestock on the affected lands because of his membership in the corporation. Thus, where the DLB exception normally contemplates that the corporate violation will damage corporate-derived or corporate-provided assets (such as stock), the present case presents a somewhat different situation where the damage was done to Okelberry's personal assets, but where Okelberry was only in a position to be harmed because of his status as a shareholder.

In essence, this situation is made possible only because of the somewhat unique nature of West Daniels' corporate scheme. As discussed above, the motivating thrust behind the formation of this corporation was the desire of certain independent livestock owners to collectively purchase and manage property, and to then allow each individual owner to run his or her own livestock operation, independent of the others, using the collectively purchased and managed land. Under this particular scheme, it can therefore be argued that the duties that were owed to each individual member were dualistic in nature, thereby concomitantly and contractually running to each individual member as both an individual business owner and as a shareholder.

As such, this Court should extend the DLB exception so as to allow a shareholder whose membership in a corporation is expressly and directly intertwined

with his or her own independent business or property interests to have the opportunity to seek redress as an individual, rather than as a shareholder. Applied to the facts of this case, this extension of the rule would simply mean that, even if Okelberry had chosen to plead causes of action stemming from fiduciary duties and corporate mismanagement, his unique position as an affected individual entitled him to bring those actions directly.

II. THE TRIAL COURT DID NOT ERR IN DENYING WEST DANIELS' MOTION FOR A NEW TRIAL.

Finally, West Daniels asks this Court to overturn the trial court's denial of its motion for a new trial. As indicated in its brief, the motion for a new trial was based on the trial court's rulings with respect to (i) the alleged application of the business judgment rule and (ii) the alleged application of Utah's derivative judgment requirements. For the reasons discussed above, this Court should now hold that neither ruling was erroneous, and that the failure to grant a new trial based on these arguments was therefore correct.

III. JUDGE SCHOFIELD ERRED IN DISMISSING OKELBERRY'S CLAIMS RELATING TO THE PRECONDITIONS FOR OWNERSHIP OF WEST DANIELS STOCK.

In addition to rejecting the arguments put forth by West Daniels, this Court should also determine that Judge Schofield erred in dismissing Okelberry's claims relating to the preconditions for ownership of West Daniels stock.

In the amended complaint, Okelberry asserted that various members of West Daniels had sold their rights to the Forest Service permits "without relinquishing their shares in the Association," (Attachment D at ¶13), and that this was improper because the shares were "tied to the permits." (Attachment D at ¶13). Okelberry further alleged that, insofar as "the right to run cattle is the express purpose of the non-profit corporation," (Attachment D at ¶24), "the right to run cattle is necessary to be a member of the Association." (Attachment D at ¶23). As such, Okelberry asked for an order transferring the shares of stock owned by non-permit owning members to members who still held valid Forest Service permits. (Attachment D at ¶28). Okelberry also asked for "judgment from the Court determining membership in the Association and the amount of shares held." (Attachment D at ¶31).

In the May 21, 2001 ruling issued by Judge Schofield, the court dismissed Okelberry's declaratory judgment claim. (See Attachment E at pp. 4-5). Judge Schofield thereby ruled that "the articles of incorporation do not contain any preconditions to stock ownership, such as grazing permits or cattle," and that any argument to the contrary would necessarily be violative of the Articles and thus void. (Attachment E at p. 4).

Contrary to Judge Schofield's ruling, however, the Articles do contain language that places limitations on the ownership of stock in West Daniels. Specifically, the Articles state that the "two shares shall be issued for each head of livestock,"

(Attachment A), thus expressly tying the amount of stock that a shareholder could own to the number of cattle that the shareholder was grazing on corporation land. Rather than dismissing Okelberry's claim in the pre-trial stages, Judge Schofield therefore should have allowed Okelberry to proceed to trial for the purposes of introducing evidence regarding the numbers of shareholders in West Daniels who did or didn't currently graze livestock, and the court then should have issued a ruling that settled the question of whether those members who no longer grazed livestock on West Daniels land were still entitled to possess shares of stock in the corporation.[8]

Judge Schofield's ruling that there is no precondition to ownership of stock also is incorrect because it allows a shareholder to possess stock in West Daniels even if that shareholder is literally incapable of participating in the specific, narrowly-defined corporate purposes for which West Daniels was created. As discussed above, the Articles expressly state that West Daniels' purpose was "to hold and own and manage grazing land for the purpose of grazing animals." (Attachment A). As such, Judge Schofield's ruling is incorrect because it would allow a person to hold stock in this nonprofit grazing corporation, even if the person did not still graze cattle on corporate lands.

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[8]Even if the court were to have determined that the "two shares shall be issued for each head of livestock" language was ambiguous, then it still should have allowed Okelberry to proceed to trial for the purposes of proving the intent of the parties with respect to that contractual language. See Turner, 910 P.2d at 1225 (holding that, in interpreting articles of incorporation or bylaws, "the parties' intentions are controlling").

The corporate inequities produced by this ruling are clear. Whereas the Articles expressly condition ownership of stock on a two share/head basis, Judge Schofield's ruling now allows a shareholder to theoretically own stock on a 10 share/head ratio, a 20 share/head ratio, or even beyond. Indeed, a member could theoretically have sold all of his or her cattle, and yet could still have retained ownership of his or her shares of West Daniels stock. As a result, these non-livestock owning members would then only have had an interest in the West Daniels land as a potentially profitable piece of property that was ripe for lease, sell, or development, rather than as a piece of land necessary for their individual grazing operations.[9] It was this concern that was at the heart of Okelberry's declaratory judgment complaint, and Okelberry was therefore entitled to a trial on the issues of whether those members who no longer graze cattle should be allowed to retain their stock.

Additionally, Judge Schofield's ruling was also incorrect insofar as it expressly allowed shareholders to maintain stock in the corporation even after selling their Forest Service permits. The error of this ruling can only be properly understood in context. Judge Eyre correctly noted in his post-trial findings of fact that the 5200 acre of land owned by West Daniels did not have enough forage to allow for year-round

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[9]As exemplified by the decision to lease out West Daniels grazing land to a non-shareholder, such a shift in corporate purpose has in fact occurred, thus potentially changing this nonprofit grazing corporation into a speculative, land-leasing profitable enterprise.

grazing by the livestock that were owned by West Daniels members.[10] For this reason, members of West Daniels only grazed their animals on the West Daniels lands "in the spring and the fall for a one-month to a six-week period of time." (Attachment B, Findings at ¶8). During the summer months, however, the livestock were moved onto the adjoining Forest Service lands and were grazed there for the entirety of the summer season. Given these grazing cycles, the West Daniels lands were thus only "used prior to going onto the Forest Service lands and then coming off the Forest Service lands." (Attachment B, Findings at ¶8).[11]

Given this reality, a West Daniels member who did not maintain a valid Forest Service permit would not have had adjacent land on which to graze his or her livestock during the summer months, and therefore would not have been able to continue maintaining a livestock operation on West Daniels land at all. In this manner, ownership of Forest Service permits essentially became a de facto requirement for continued grazing of livestock and continued participation in the corporate scheme.

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[10]Specifically, there was testimony from West Daniels' own witness at trial that the West Daniels lands only had enough forage to be able to support 200 head of livestock in a given summer, far below the amount that would be needed to support the cattle that were owned by the collective members of the West Daniels. (See R. 569 at 44).

[11]This practice is entirely consonant with standard ranching procedures. As explained by the expert witness who was called to discuss the livestock issues in this case, "a good operating ranch has winter ranges that they put the cattle on in the winter and they go from the winter right to the spring range, and then the summer range back on the fall range. It's a natural circle, natural flow." (R. 568 at 104). When asked whether that "natural flow [would] be important for the operation of Mr. Okelberry's" ranch, that same expert stated that it would be. (See R. 568 at 104-05).

Thus, when members of West Daniels began selling off their Forest Service permits, it wasn't simply a function of them dividing their livestock operations. Rather, it was instead an indicator that they were in fact getting out of the livestock business altogether. Under these circumstances, it was thus improper to allow West Daniels members to sell their Forest Permits, stop running cattle on West Daniels land, and yet still retain stock and voting rights in a corporation whose stated purpose was to graze cattle.[12]

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[12]In spite of the fact that Judge Schofield's ruling prevented Okelberry from bringing forth evidence regarding the link between Forest Service permits and West Daniels stock at trial, some evidence regarding this link still emerged at trial. One of West Daniels' own witnesses, for example, stated on the stand that he couldn't think of <u>one instance</u> prior to 1990 in which a person had bought stock in West Daniels without concomitantly obtaining the rights to the Forest Service Permits. (R.569 at p.32). There was also some testimony at trial that indicated in passing that the corporate framers of West Daniels in fact always intended stock in West Daniels to be linked to ownership of Forest Service permits. (See, e.g., R. 569 at 66). Finally, the Bylaws themselves expressly create such a link, therein providing that shareholders can only serve on the Board of Directors if they also own valid Forest Service permits. (See Attachment C at Article IV).

The absence of further evidence in this regard, however, actually points to the fundamental problem with Judge Schofield's ruling. Okelberry expressly argued in his complaint that ownership of Forest Service permits was a requirement for continued ownership of stock in West Daniels under the terms and purposes of the corporate charter. Given that questions regarding the meaning of a corporation's articles of incorporation call for an analysis of the corporate framers' intent, Okelberry was at the very least entitled to a trial at which he could have presented his evidence regarding the longstanding and originally-intended link between the permits and the stock. Judge Schofield's ruling prevented him from having this trial, however, and thereby prematurely settled an issue that should only have been settled after the presentation of the evidence.

As such, this Court can and should hold that ownership of Forest Service permits was required in order to continue holding West Daniels stock. In the alternative, this Court should at the very least determine that Okelberry is entitled to a trial on the issue of whether a person can hold stock in West Daniels without concurrently owning valid Forest Service permits as well.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the trial court that the decision to lease West Daniels land to non-members was a breach of fiduciary duty. Further, this Court should overturn the decision below that prevented Okelberry from also trying the issues relating to the preconditions for ownership of stock in West Daniels.

DATED this 24 day of November, 2004.

Ryan D. Tenney

DON R. PETERSEN and
RYAN D. TENNEY, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellee

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 24 day of November, 2004.

Bradley R. Cahoon
Wade R. Budge
Peter H. Donaldson
Snell & Wilmer
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, UT 84101

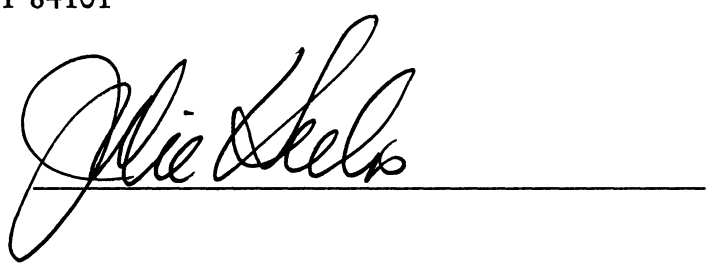

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Exhibit A

Ray's

Stanley Jensen Attys
54 No. Main, Heber UT

28240

RECEIVED
OCT 16 1944
SECRETARY OF STATE

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF WASATCH)

I do solemnly swear that at a meeting of the members of the West Daniels Land Association, residing in Wasatch County, held at Charleston, Wasatch County, Utah, upon notice to the incorporators by written notice sent by mail, it was decided by a majority vote of the members present at said meeting to incorporate said association within said limits with such rights and obligations as may be prescribed by law, to be known as the WEST DANIELS LAND ASSOCIATION; to exist for ninety-nine years from the date of incorporation for the purpose to hold and own and manage grazing land for the purpose of grazing animals as shall be determined by the board of directors of said corporation; with principal place of business at Heber City, Wasatch County, Utah; with a board of directors consisting of five members, one of which will be elected president, one vice-president, and one secretary of whom any three shall form a quorum, to be elected annually at the annual meeting of said corporation which will be held at the principal place of business of said corporation on the fourth Monday in January of each year in the following manner:

That each share of stock may cast one vote and that the five members who will be elected directors will be elected by a majority of the votes cast, and to qualify by each giving bonds to the corporation to be filed with the secretary thereof in the sum of $500.00; and that the first officers and board of directors who shall hold office until the first annual election will be as follows: Casnus R. Casper, president; Phil Edwards, vice-president; Oliver Edwards, secretary; Mix Johnson, director, and Floyd Bonner, director; that by-laws may be enacted by a majority vote of the members present at a duly called special meeting or at the regular annual meeting; that the members of said corporation and their private property shall not be liable for said corporation's obligations; that said corporation shall have authorized three-thousand shares of common stock at the price of $1.00 per share and that two shares shall be issued for each head of livestock.

The following shall be the original stockholders and they shall own the number of shares as set opposite their names.

PLAINTIFF'S EXHIBIT 1

EXHIBIT A

687.5 Cows = 1375 Shares

Parley Anderson	50	Elmer Johnson	46
Allen T. Fethers	70	Mix Johnson	48
Nancy A. Fesendorfer	38	Ralph Cake	20
Henry Fethers	34	C. D. Thacker	137
Rex Fethers	30	Horton Thacker	88
Cashus Casper	50	Calvin Probst	10
Leroy Casper	10	Grant Webster	16
Dean M. Casper	30	Clark Webster	4
Floyd Bonner	74	Heber R. Winterton	188
Douglas Edwards	50	Stafford Winterton	30
Floyd Edwards	52	Vern J. Wright	30
Reed Edwards	70	Oliver Edwards	40
Thomas Howarth	4	Phil Edwards	156 correct ✓ Shares 1375 — 2.687.5 Co.

New members shall be received by a majority vote of the stock-holders present at a duly called meeting and a member may be removed by a vote of two-thirds of the members present at a duly called and constituted meeting.

Phil Edwards
Chairman of the meeting.

Subscribed and sworn to before me this 27th day of Sept., A.D., 1952.

S. Rex Fethers
Notary Public

My Commission Expires:
June 15, 1954

Residing in Provo, Utah

O A T H O F O F F I C E

STATE OF UTAH)
: SS.
COUNTY OF WASATCH)

Cashus R. Cooper the duly elected president of the WEST DANIELS LAND ASSOCIATION; Phil Edwards the duly elected vice president of the West Daniels Land Association; Olivia Edwards the duly elected secretary of the West Daniels Land Association do each hereby seperately depose and affirm that:

They will discharge the duties of such office to the best of their judgement and that they will not do nor consent to the doing of any matter or thing belating to the business of the corporation with intent to defraud any stockholder or creditor or the public.

Dated this 27th day of September, A.D., 1952.

Cashus R. Cooper

Phil Edwards

Olivia Edwards

Subscribed and sworn to before me this 27th day of September, A.D., 1952.

/s/ S. Rex Lewis
Notary Public

My Commission Expires:
1/15/54

Residing in Provo, Ut.

CLERK'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF WASATCH)

I, Wayne C. Whiting, County Clerk in and for Wasatch County, State of Utah, do certify and declare that the attached AFFIDAVIT and OATH OF OFFICE of the WEST DANIELS LAND ASSOCIATION, are full, true, and correct copies of the originals which were filed in my office the 2nd day of October, A. D., 1952, and which are now on file and of record in my office.

WITNESS my hand and official seal hereunto affixed at my office in Heber City, Utah, this 2nd day of October, A. D., 1952.

(SEAL)

Wayne C. Whiting, County Clerk
Wasatch County

By Georgia Dawn Clegg Deputy

AFFIDAVIT

STATE OF UTAH)
:
COUNTY OF WASATCH)

We, the undersigned officers of the West Daniels Land Association DO SOLEMNLY SWEAR that the West Daniels Land Association is a bona fide association, the object of which is not for pecuniary profit, that it is organized with actual participating members; that it will not be used for promoting gambling or any other viloation of law or ordinance.

Obert Edwards

Caroline R. Cox

Alvin Edwards

Subscribed and sworn to before me this 27th day of Sept., 1952.

Notary Public

Residing in

Provo, Utah

My Commission Expires:

Jan-15, 1954

Exhibit B

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P O Box 1248
Provo Utah 84603
Telephone (801) 373-6345
Facsimile (801) 377-4991

Our File No 25,774

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

RAY OKELBERRY, Plaintiff. vs. WEST DANIELS LAND ASSOCIATION; DAN WRIGHT; STEVE BETHERS, ELDON WRIGHT; JOHN BESSENDORFER; JAMES MORONI BESSENDORFER; BOB GAPPMAYER; and MRS. BONNER NELSON, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 9990500174 Judge Donald J. Eyre

This matter came on regularly for trial on July 22 and 23, 2002. The plaintiff appeared in person and was represented by his attorney, Don R. Petersen Officers of the defendant West Daniels Land Association appeared in person and were represented by their attorney, Joseph T. Dunbeck, Jr. The Court having previously ruled on certain issues, which rulings are dated January 5, 2000, and May 21, 2001, and now being fully advised in the premises, makes and enters the following:

FINDINGS OF FACT

1. West Daniels Land Association is a duly organized non-profit corporation under the laws of the State of Utah.

2. The Affidavit of Incorporation presented as Exhibit 1 in this case shows that there are 1,390 outstanding shares of the corporation, and that the purpose of the corporation as set forth in the Affidavit is to obtain lands for grazing purposes to assist in helping its members.

3. Shares of the organization were based upon two shares per one head of livestock. It was anticipated that the shareholders would put their livestock on the land to be acquired by the Association.

4. The Court finds that there was only one organization, although there have been two organizations named throughout the lawsuit, those being West Daniels Land Association and West Daniels Cattle Association. The Court finds these entities to be one and the same. Up until recent times, individuals associated with those organizations were the same individuals, having the same common meetings to a large extent. The individuals who signed the Bylaws for the West Daniels Cattle Association initially were all shareholders in the West Daniels Land Association. It was further represented in applications to the U.S. Forest Service that West Daniels Cattle Association was a duly organized corporation under the laws of the State of Utah.

5. The Court finds that there was no evidence presented that there was ever such an entity known as West Daniels Cattle Association created under the laws of the State of Utah. Further, the Court finds that in making application to the U.S. Forest Service, West Daniels Cattle Association used the property that was the real property of the West Daniels Land Association to obtain the grazing permit.

6. The Court finds that the Bylaws for West Daniels Land Association, Exhibit 2, have never been rescinded or amended, which is confirmed by the fact that in 1997, these Bylaws were submitted as part of the application to obtain the grazing agreement with the Forest Service.

7. The Court finds that from its creation and acquisition, the private lands that have been testified to in court of approximately 5,200 acres are owned by the defendant West Daniels Land Association. These lands were traditionally used in conjunction with the Forest Service lands and the Forest Service permits that were either owned outright by the shareholders of the corporation or were pooled as part of obtaining permits in the name of West Daniels Cattle Association with the Forest Service.

8. The Court finds that traditionally the private lands were used in the spring and the fall for a one-month to a six-week period of time. These lands were used prior to going onto the Forest Service lands and then coming off the Forest Service lands. The traditional use was changed pursuant to a letter received from the Forest Service dated August 18, 1997, wherein the Forest Service cancelled the 160-head permit owned by the West Daniels Land Association. This is reflected in Exhibit 17. The cancellation of the 160-head permit resulted in a decision made at the annual meeting of the defendant held February 27, 1998, wherein it was voted by the Association to create two herds, one herd to go onto the Forest Service land and one herd to remain on the private property.

9. The Court finds that the plaintiff Ray Okelberry is a shareholder in the West Daniels Land Association and has served as an officer at various times, that he has owned stock in the corporation and was the President of said Association in 1998 and 1999.

10. The Court finds that the minutes of the February 27, 1998 annual meeting reflect the plaintiff voting against creation of the two herds and asked that they continue the operation as previously conducted. This motion was not seconded. The motion to create two herds passed by a majority of the shareholders voting at that time.

11. The vote of the February 27, 1998 meeting resulted eventually in the filing of the lawsuit now before the Court, which was filed in the year 2000, wherein the plaintiff asked for declaratory judgment with respect to certain interpretations of the Articles of Incorporation and the Bylaws of the corporation and asked for monetary damages resulting from the alleged breach of the obligations of the defendant corporation towards the plaintiff.

12. The Court finds that the damages claimed by the plaintiff for 1998 will not be allowed. The Court finds that the plaintiff did have the use of the private lands of the defendant wherein he was permitted to have 60 head of cattle upon those private lands during the fall grazing period of 1998.

13. The Court will disallow the plaintiff's claim for damages for 1999 in that the organization, by and through him as President, chose not to use their Forest Service permit in that year and that the plaintiff chose not to use the private land himself because he did not have the use of the Forest Service permit property adjoined thereto. There was testimony to the effect that the plaintiff could have used it if he had desired.

14. The Court finds that with respect to the grazing years 2000 and 2001, the Board of Directors of the corporation chose not to use the private land for grazing by anyone. The Court finds that they have the right to do so pursuant to their rights in the Bylaws of the corporation to manage those lands and, therefore, the Court will not award any damages for the years 2000 and 2001.

15. With respect to the year 2002, the Court finds that in reviewing the minutes of the annual meeting held this year on February 5, 2002, the defendant West Daniels Land Association decided to lease the 5,200 acres. It was set forth in that meeting that it was for the purpose of generating money to pay expenses. The Court finds that based upon the testimony of the plaintiff and a Mr. Gappmayer, that they advertised the property for lease in several periodicals, local periodicals, statewide periodicals and awarded the lease of the 5,200 acres to the highest bidder. The Court finds that there was testimony that if a shareholder desired to do so, they could have bid themselves.

16. The Court finds that the solicitation to the general public prior to inquiring of shareholders themselves is a breach by the defendant corporation's Board of Director's duty to look after the best interests of the shareholders. The Court finds that the Board of Directors of the defendant corporation has a fiduciary duty to use that land in the best interests of the shareholders and to promote the purpose of the corporation, which the Court has previously ruled is to provide grazing lands for the livestock owned by the shareholders.

17. The defendant Association is similar to an irrigation company which owns water rights that it pools for the joint benefit of the shareholders. The solicitation of bids for the grazing rights on the private land appears to be similar to an irrigation company thinking that it can raise more money by advertising the bidding of water to the highest bidder than by permitting its shareholders, who have a right to use that water on their farms, to use it for their farming operations.

18. The Court finds that there was a breach of the obligation of management which the defendant corporation had to the plaintiff, and that the plaintiff is entitled to damages resulting from that breach.

19. In reviewing the claim of damages set forth by the plaintiff, the Court finds that his claim with respect to the need to purchase additional feed is an appropriate damage which resulted from the breach. The plaintiff calculated this amount based upon 401 head of cattle. The Court finds that the plaintiff is really only entitled to 341 head of cattle on the Forest Service permits, and that the Court has determined based upon the $15-per-month AUM that that amount comes to $10,230.00.

20. The Court finds that the plaintiff's request for transportation is too speculative for the Court to determine an appropriate amount. The Court finds that there will be no award for damages for transportation.

21. The Court finds that the claim of the plaintiff for labor is too speculative and will make no award for labor.

22. With respect to the claim of the plaintiff for shrinkage of his livestock, the Court finds that there was a loss of weight produced on calves that can be calculated, and the 3% calculation used by the plaintiff and his expert witness, Mr. Boswell, is reasonable. Said calculation is not to be based upon 401 calves but on 341 calves. The Court finds that amount to be $3,486.00.

23. The Court finds that the shrinkage of the cows and bulls is too speculative and not immediately determined because the cows and bulls are not sold at the end of the season as are the calves.

24. The Court finds that the plaintiff is entitled to judgment against the defendant in the amount of $13,716.00.

25 The Court finds that Judge Anthony W. Schofield has previously ruled upon one issue, and that ruling is incorporated herein.

26. The Court finds that as previously indicated by the Bylaws, Exhibit 2, that these Bylaws are for the corporation and shall govern the corporation to the extent that they are not in conflict with the Affidavit of Incorporation as set forth by Judge Schofield in his rulings.

27. The Court finds that any decision, as has been reflected in the minutes of the defendant, will require a two-thirds approval of the shareholders to sell the property. This shall govern the operation of the defendant corporation until and unless those Bylaws are amended.

28. The Court finds that the lease entered into by the defendant corporation for 2002 was improper, and that any such leases in the future would be improper.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court incorporates the rulings of Judge Anthony W. Schofield, which rulings are dated January 6, 2000 and May 21, 2001.

2. The West Daniels Land Association is a duly organized non-profit corporation under the laws of the State of Utah.

3. There are currently 1,390 shares of stock outstanding in the corporation.

4. The purpose of the corporation is to obtain lands for grazing purposes to assist in helping its members.

5. The shares in the corporation are based upon two shares per one head of livestock. It was anticipated that shareholders would use their livestock on the land that was to be acquired by the Association.

6. The Court concludes that there is only one organization, even though two organizations have been named throughout the lawsuit, those being West Daniels Land

Association and West Daniels Cattle Association. The Court concludes that those entities are one in the same.

7. The Bylaws of the defendant Association received as Exhibit 2 have never been rescinded or amended.

8. The defendant corporation has acquired approximately 5,200 acres of real property. This private property was used in connection with Forest Service lands that adjoined the private property. The Forest Service permits were either owned outright by shareholders of the corporation or were pooled as part of obtaining permits in the name of West Daniels Cattle Association with the Forest Service.

9. The private lands (5,200 acres) were used in the spring and the fall for a one-month to a six-week period prior to going onto the Forest Service lands and then coming off the Forest Service lands.

10. The traditional use of the private land was changed by a letter received from the Forest Service dated August 18, 1997, wherein it cancelled the 160-head permit owned by the West Daniels Cattle Association as set forth in Exhibit 17. That cancellation resulted in a decision made at the annual meeting of the defendant held February 27, 1998, wherein it was voted by the Association to create two herds, one herd to go onto the Forest Service permit property and one herd to remain on the private property.

11. The plaintiff Ray Okelberry is a shareholder in West Daniels Land Association and has served as an officer at various times. He owned stock in the defendant corporation and served as President of the Association in 1998 and 1999.

12. The minutes of the February 27, 1998 meeting reflect that the plaintiff voted against creating two herds and asked that they continue the operation as previously conducted.

That was not seconded. The motion to create two herds passed by a majority of the shareholders.

13. The claim of the plaintiff for damages for 1998 will not be allowed.

14. The claim of the plaintiff for damages for 1999 will not be allowed.

15. The claim of the plaintiff for damages for the years 2000 and 2001 will not be allowed.

16. The solicitation for bids for the year 2002 by the Board of Directors of the defendant corporation was a breach of its fiduciary duty. The directors had a duty to look after the best interests of the shareholders of the corporation. The directors had a fiduciary duty to use the private property in the best interest of the shareholders and to promote the purpose of the corporation which is to provide grazing lands for livestock owned by the shareholders.

17. There was a breach of the obligation of the management of the defendant corporation with respect to Mr. Okelberry. The Court concludes that the plaintiff is entitled to damages resulting from the breach of the duty owed to him.

18. The plaintiff is entitled to judgment against the defendant in the amount of $10,230.00, which represents 341 head of cattle at the rate of $15.00 per month AUM.

19. The request for transportation claimed by the plaintiff is too speculative.

20. The Court concludes that the claim for labor made by plaintiff is too speculative.

21. The plaintiff is entitled to judgment against the defendant in the amount of $3,486.00 for shrinkage based on a calculation of 341 calves.

22. The plaintiff's claim for shrinkage of cows and bulls is too speculative.

23. The plaintiff is entitled to a total judgment against the defendant in the amount of $13,716.00.

24. Any decision by the Board of Directors to sell the private property will require a two-thirds approval of the shareholders until and unless the bylaws of the corporation are amended.

25. The Board of Directors of the defendant corporation is hereby prohibited from making any leases concerning the private property for grazing purposes.

DATED this 27th day of November, 2002.

BY THE COURT

STATE OF UTAH
FOURTH DISTRICT COURT
WASATCH COUNTY

J. BYRE
COURT JUDGE

APPROVED AS TO FORM:

JOSEPH T. DUNBECK, JR., ESQ.
Attorney for Defendants

NOTICE TO DEFENDANTS' ATTORNEY

TO: JOSEPH T. DUNBECK, JR.

You will please take notice that the undersigned, attorney for plaintiff, will submit the above and foregoing Findings of Fact and Conclusions of Law to the Honorable Donald J. Eyre for his signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of August, 2002.

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 30 day of August, 2002.

Joseph T. Dunbeck, Jr., Esq.
123 South Main Street, #1
Heber City, UT 84032

SECRETARY

G \DRP\OKELBERR FOF

Exhibit C

BY Laws

WEST DANIELS CATTLE ASSOCIATION BY-LAWS

ARTICLE I

Section 1.. The name of this association shall be West Daniels Cattle Association.

ARTICLE II

Section 1.. This association will promote and protect the business of raising cattle, work in cooperation with the Forest Service in the administration and use of the Forest Service administered grazing lands for which this association will be recognized; do any and all things lawful, just, and necessary to further the interests of this association in grazing and related matters and otherwise in connection with the livestock industry.

ARTICLE III

Section 1.. Any person, firm, or corporation holding a permit to graze cattle on the West Daniel Cattle Association range may be come a permittee member of the association by signing the roll and paying such initiation fee as may be required.

ARTICLE IV

Section 1.. The officers of the association, and the members of the board of directors shall be elected from members of the association who hold permits to graze on Forest Service administered land the kind of livestock for which this association is recognized by the Forest Service. The officers of said association shall consist of a president, vice-president, secretary-treasurer. There shall also be two (2) additional members. The president, vice-president, secretary-treasurer, and the two additional members shall constitute the board of directors.

Section 2.. Officers of the association and members of the board of directors, shall be elected from members who hold grazing permits on the area represented by the Association. The officers of the association and board members shall be elected by ballot by permittee members and installed at the annual meeting or at a special meeting and shall hold office until the next annual meeting after their election or thereafter until their successors have been elected and installed.

B

ARTICLE V

Section 1.. It shall be the duty of the President to preside at all meetings of the association and board of directors, to supervise the work of the association, and direct the work of its officers. He shall approve and countersign all checks for the expenditure of money for the association and shall perform all the duties that devolve upon such office.

ARTICLE VI

Section 1.. The Vice-President shall perform all duties of the president in the absence of the president or in the event of his inability to act.

ARTICLE VII

Section 1.. It shall be the duty of the secretary-treasurer to conduct the correspondence of the association; to keep all records and accounts; to make out and turn over to the association a list of all assessments ordered by the association or the board of directors, showing each member's portion; to collect from the members of the association the assessments made by it or by the board and to issue receipts therefor; to keep in a book for that purpose an accurate account of the same; and to do all things necessary in the conduct of the business of the association which may be assigned to him by the association or the board. He shall sign all checks and vouchers for disbursing the funds of the association or funds received by him by reason of his office as secretary-treasurer of the association, and the vouchers shall show for what purpose such moneys are paid. He shall submit a written report to the association at its annual meeting, giving account of the business transactions of the association for the year just closed, amounts received and disbursed, from whom and on what account received, and for what purpose paid out. The books of the secretary-treasurer shall be audited at least yearly by such persons as the association may designate and a report of the audit shall be submitted to the association at each annual meeting. The books of the secretary-treasurer shall be open for inspection by any member of the association and the forest supervisor at any and all times. He shall report promptly to the said forest supervisor for receipts of all moneys from assessments, all changes in the personnel of the officers, board of directors, and members of the association, and all changes in the by-laws. He shall also submit to the said forest supervisor, when requested, an annual statement not later than

January 15 of each year, covering all moneys received during the preceding calendar year under assessments levied, and indicating therein, in detail, the purpose for which such moneys were expended.

Section 2.. The secretary-treasurer of the association shall be the secretary of the board of Directors.

ARTICLE VIII

Section 1.. The board of directors may on behalf of the association enter into agreements, borrow money, assume obligations, ~~levy~~ assessments, prescribe requirements pertaining to the use and occupancy of the range for which this association is recognized. It shall transact the general business of the association, and each and every act of the board in such matters shall be binding upon the association: Provided, That before the board may act in any matter which may require a payment by any member of a sum in excess of $ 10.00 authority for such action must be given by a 2/3 majority of the permittee membership at the annual or at a special meeting.

ARTICLE IX

Section 1.. For the purpose of providing expenses, all members of the association shall be assessed upon the total number of livestock under permit and which are affected by the assessments, and the board of directors shall determine the number of livestock of each member to be affected by the assessment: Provided, That when an assessment is levied in connection with the handling of livestock on the range for which this association is recognized, or any subdivision thereof, it will be based upon the number of livestock grazed thereon by each member under permit during the grazing season in which the assessment is to be enforced.

ARTICLE X

Section 1.. The annual meeting of this association shall be held at _____ on _____ of each year.

Section 2.. Special meetings shall be held at such times and places as may be designated by the president or a majority of the board. Written notice of all meetings of the association shall be sent to the last-known address of each member by the secretary-treasurer at least 7 days before the date of such meeting. Notices covering special meetings shall state the purpose for which called. No business shall be transacted at a special meeting except as stated

in the notice unless the members in good standing present at the meeting give their unanimous consent thereto.

Section 3.. Meetings of the board of directors shall be called by the secretary-treasurer upon request from the president, by a majority of the board, or by the forest supervisor.

ARTICLE XI

Section 1.. Any officer of the association authorized to receive or disburse money for or on behalf of the association may be required to give the association such bond for the proper discharge of his duty as the association may direct: Provided, That a joint bond may be given where more than one officer is designated to handle the funds.

Section 2.. All disbursements of the funds of the association shall be made by check.

ARTICLE XII

Section 1.. Amendments to the bylaws may be made only at the annual meeting by a 2/3 majority vote of the permittee members in good standing. Voting by proxy at the election of officers or board members, or on amendments to the bylaws shall only be empowered by the secretary of said association after having procured on an association proxy form containing signature and authority to act for said permittee.

ARTICLE XIII

Section 1.. No business of the association shall be transacted at any meeting unless a quorum is present. A quorum for association meetings shall consist of a majority of the permittee members of the association who are present and in good standing at the time of the meeting. Except upon amendments to the bylaws a 2/3 majority vote when a quorum is present shall carry. Unless a permittee member is in good standing he shall not be entitled to vote or to be elected to office. A permittee member shall not be in good standing unless he shall have signed and complied with all of the requirements adopted by or on behalf of the association under the bylaws.. A quorum for board of directors meetings shall consist of a majority of the board.

Section 2.. Each permittee member in good standing shall be entitled to one vote for each grazing head. Except where otherwise provided, voting by proxy may be permitted in connection with any business of the association after having complied with Section 1, Article XII.

ARTICLE XIV

Section 1.. The president, vice-president, and members of the board of directors shall receive a salary for services rendered in their respective positions, but the secretary-treasurer shall be allowed for his services whatever compensation the association may authorize.

ARTICLE XV

Section 1.. Meetings of the association shall be conducted informally, but at the discretion of the presiding officer, Roberts' Rules of Order may be invoked to conduct all forms and order of business.

Section 2.. The order of business of any meeting of the association shall be as follows:

1. Call to order
2. Roll call and check standing of members
3. Check for quorum
4. Reading of minutes of last meeting
5. Unfinished business
6. Reports of secretary-treasurer and auditing committees
7. Reading of communications
8. Report of the board of directors
9. Reports of committees
10. New business
11. Election and installation of officers
12. Admission of new members
13. Appointment of committees
14. Adjournment

ARTICLE XVI

Section 1.. It shall be the responsibility of said association members to comply with the "Utah State Livestock Laws", as stated herein. The Utah code, Section 4-12-17 states: "It shall be unlawful to turn loose or range any cattle upon the federal range or forest reserves of this State without keeping therewith during the breeding season of each year one bull for every thirty head or fraction thereof of female breeding cattle so ranged; provided that any person so ranging any

portion of thirty head of female breeding cattle may provide and arrange for an interest in a bull running at large on the federal range of forest reserves where such cattle are ranged."

Section 4-12-28 of the Utah Code states: "It shall be unlawful to own and turn loose or allow to run at large upon the federal range or forest reserves of this state any other than a purebred graded bull of some recognized beef breed. The particular breed and grade of such bull is to be determined by the majority of the users on any given range or grazing district. A purebred bull as contemplated by this section must be a bull having a registration certificate from the breeding association of its particular breed.

Section 2.. It shall be the duty of the association members to decide by a 2/3 majority vote at the annual meeting, the breed and grade of the bulls to be run on theallotment.

Section 3.. It shall be the duty of each member of said association to furnish to the secretary, a copy of the registration certificate of the bull which shall be used for breeding purposes on the allotment and the number of years for which said bull will be permitted as a recognized breeding bull.

Section 4.. It shall be the duty of the board of directors to determine the number of years for which bulls will be recognized as breeding bulls upon said range.

Section 5.. It shall further be the duty of each member to notify in writing, the secretary of said association, the number of female breeding animals to be ranged during the breeding season and further so state the bull for which breeding services has been acquired, and further show receipt for having paid the breeding fees to the recognized owner of the bull running at large on the cattle allotment.

ARTICLE XVII

It shall be the duty of the President of said association, to appoint such board member and/or association members as may be necessary to transact all business, labor, related matters, and otherwise in connection with the following committees:

1. Herding and movement of cattle.
2. Fencing and stabilization of cattle.
3. Water shed, water storage, and ponds.

ARTICLE XVIII

Section 1.. The Board of Directors at their annual meeting, shall establish an equitable and fair wage or salary as may be required for all work completed, or to be completed by association members, persons for hire, machinery, and equipment for the maintenance, preservation, improvement, and continuation of the grazing allotment. Only partial remuneration will be paid to minors for labor completed, provided they are not immediately supervised by a permit holder.

ARTICLE XIX

Section 1.. No permit holder of said association shall transfer, sell, or put for sale all or any fraction thereof of a grazing permit to persons, firms, corporations, etc., without notification in writing with signature attached thereto, to both the president and secretary of said association.

Section 2.. No permit holder of said association shall sell or put for sale all or any fraction thereof of a grazing permit to persons, firms, corporations, etc., other than the immediate members of the family, namely: father, mother, son, daughter, brother or sister, without first providing an opportunity for permit holders in good standing to purchase at a fair and current price as agreed upon by seller and buyer or buyers, for such permit or fraction thereof.

ARTICLE XX

Section 1.. We the undersigned, members of the West Daniels Association, have read, understood, and agree to support the by-laws.

Dated:
Signatures: Allen Bethers
[illegible signatures]

DANIELS CATTLE ASSOCIATION

ARTICLE I

Section 1..The name of this association shall be West Daniels Cattle Association

ARTICLE II

Section 1..This Association will promote and protect the business of raising cattle, work in cooperation with the Forest Service in the administration and use of the Forest Service administered grazing lands for which this Association will be recognized; do any and all things lawful, just, and necessary to further the interests of this Association in grazing and related matters and otherwise in connection with the livestock industry.

ARTICLE III

Section 1..Any person, firm, or corporation holding a permit to graze cattle on the West Daniels Cattle Association Range may become a permittee member of the Association by signing the by-laws and paying such initiation fee as may be required.

ARTICLE IV

Section 1..The officers of the Association, and the members of the board of directors shall be elected from members of the Association who hold permits to graze on Forest Service administered land the kind of livestock for which this Association is recognized by the Forest Service. The officers of said Association shall consist of a president, vice-president, secretary-treasurer. There shall also be two (2) additional members. The president, vice-president, secretary-treasurer, and the two additional members shall constitute the board of directors.

Section 2..Officers of the Association and members of the board of directors shall be elected from members who hold grazing permits on the area represented by the Association. The officers and board members of the Association shall be elected by ballot by permittee members and installed at the annual meeting or at a special meeting and shall hold office until the next annual meeting after their election or, thereafter, until their successors have been elected and installed.

ARTICLE V

Section 1..It shall be the duty of the president to preside at all meetings of the Association and board of directors, to supervise the work of the Assocation, and direct the work of its officers. He shall approve and countersign all checks for the expenditure of money for the Association and shall perform all the duties that devolve upon such office.

ARTICLE VI

Section 1..The vice-president shall perform all duties of the president in the absence of the president or in the event of his inability to act.

ARTICLE VII

Section 1..It shall be the duty of the secretary-treasurer to conduct the correspondence of the Association; to keep all records and accounts; to make out and turn over to the Association a list of all assessments ordered by the Association or the borad of directors, showing each member's portion; to collect from the members of the Association the assessments made by it or by the board and to issue receipts therefore; to keep in a book for that purpose and accurate account of the same; and to do all things necessary in the conduct of the business of the Association which may be assigned to him by the Association or the board. He shall sign all checks and vouchers for disbursing the funds of the Assocation or funds received by him by reason of his office as secretary-treasurer of the Association, and the vouchers shall show for what purpose such moneys are paid. He shall submit a written report to the Association at its annual meeting, giving account of the business transactions of the Association for the year just closed, amounts received and disbursed, from whom and on what account received, and for what purpose paid out. The books of the secretary-treasurer shall be audited at least yearly by such persons as the Association may designate and a report of the audit shall be submitted to the Association at each annual meeting. The books of the secretary-treasurer shall be open for inspection by any member of the Association and the Forest Supervisor at any and all times. He shall report promptly to the said Forest Supervisor for receipts of all money from assessments, all changes in the personnel of the officers, board of directors, and members of the Association, and all changes in the by-laws. He shall also submit to the said Forest Supervisor, when requested, an annual statement not later than January 15 of each year, covering all moneys received during the preceding calendar year under assessments levied, and indicating therein, in detail, the purpose for which such moneys were expended.

Section 2..The secretary-treasurer of the Association shall be the secretary of the board of directors.

ARTICLE VIII

Section 1..The board of drectors may, on behalf of the Association, enter into agreements, borrow money, assume obligations, levy assessments, prescribe requirements pertaining to the use and occupancy of the range for which this Association is recognized. It shall transact the general business of the Association, and each and every act of the board in such matters shall be binding upon the Association: Provided, that before the board may act in any matter which may require a payment by any member of a sum in excess of $10.00

authority for such action must be given by a 2/3 majority of the permittee membership at the annual or at a special meeting.

ARTICLE IX

Section 1..For the purpose of providing expenses, all members of the association shall be assessed upon the total number of livestock under the permit and which are affected by the assessments, and the board of directors shall determine the number of livestock of each member to be affected by the

assessment: Provide[illegible]t when an assessment is le[illegible] connection with the handling of livestock on the range for which this association is recognized, or any subdivision thereof, it will be based upon the number of livestock grazed thereon by each member under the permit during the grazing season in which the assessment is to be enforced.

ARTICLE X

Section 1..The annual meeting of this association shall be held at NEGOTIABLE

on NEGOTIABLE of each year.

Section 2.. Special meetings shall be held at such times and places as may be designated by the president or a majority of the board. Written notice of all meetings of the association shall be sent to the last-known address of each member by the secretary-treasurer at least seven days before the date of such meeting. Notices covering special meetings shall state the purpose for which called. No business shall be transacted at a special meeting except as stated in the notice unless the members in good standing present at the meeting give their unanimous consent thereto.

Section 3..Meetings of the board of directors shall be called by the secretary-treasurer upon request from the president, by a majority of the board, or by the Forest Supervisor.

ARTICLE XI

Section 1..Any officer of the Association authorized to receive or disburse money for or on behalf of the Association may be required to give the Association such bond for the proper discharge of his duty as the Association may direct: Provided, that a joint bond may be given where more than one officer is designated to handle the funds.

Section 2..All disbursements of the funds of the Association shall be made by check.

ARTICLE XII

Section 1..Amendments to the by-laws may be made only at the annual meeting by a 2/3 majority vote of the permittee members in good standing. Voting by proxy at the election of officers or board members, or on amendments to the by-laws shall only be empowered by the secretary of said Association after having procured on an Association Proxy Form containing signature and authority to act for said permittee.

ARTICLE XIII

Section 1..No business of the Association shall be transacted at any meeting unless a quorum is present. A quorum for Association meetings shall consist of a majority of the permittee members of the Association who are present and in good standing at the time of the meeting. Except upon amendments to the by-laws a 2/3 majority vote when a quorum is present shall carry. Unless a permittee member is in good standing he shall not be entitled to vote or to be elected to office. A permittee member shall not be in good standing unless he shall have signed and complied with all of the requirements adopted by or on behalf of the

Association under the By-Laws. A quorum for board of directors meetings shall consist of a majority of the board.

Section 2..Each permittee member in good standing shall be entitled to one vote for each grazing head. Except where otherwise provided, voting by proxy may be permitted in connection with any business of the association after having complied *with Section 1, Article XII.*

ARTICLE XIV

Section 1..The president, vice president, and members of the board of directors shall receive a salary for services rendered in their respective positions, but the secretary-treasurer shall be allowed for his services whatever compensation the Association may authorize.

ARTICLE XV

Section 1..Meetings of the Association shall be conducted informally, but at the discretion of the presiding officer, Roberts' Rules of Order may be invoked to conduct all forms and order of business.

Section 2..The order of business of any meeting of the Association shall be as follows:

1. Call to order
2. Roll call and check standing of members
3. *Check for quorum*
4. Reading of minutes of last meeting
5. Unfinished business
6. Reports of secretary-treasurer and auditing committees
7. Reading of communications
8. Report of the board of directors
9. Reports of committees
10. New business
11. Election and installation of officers
12. Admission of new members
13. Appointment of committees
14. Adjournment

ARTICLE XVI

Section 1..It shall be the responsibility of said Association members to comply with the "Utah State Livestock Laws", as stated herein. The Utah code, Section 4-12-17 states: "It shall be unlawful to turn loose or range any cattle upon the Federal range or Forest reserves of this state without keeping therewith during the breeding season of each year on bull for every thirty head or fraction thereof of female breeding cattle so ranged; provided that any person so ranging any portion of 30 head of female breeding cattle may provide and arrange for an interest in a bull running at large on the Federal range of Forest reserves where such cattle are ranged."

Section 4-12-28 of the Utah Code states: "It shall be unlawful to own and turn loose or allow to run at large upon the Federal range or Forest reserves of this state any other than a purebred graded bull of some recognized beef

Section 2..No permit holder of said Association shall sell or put for sale all or any fraction thereof of a grazing permit to persons, firms, corporations, etc., other than the immediate members of the family, namely: father, mother, son, daughter, brother or sister, without first providing an opportunity for permit holders in good standing to purchase at a fair and current price as agreed upon by seller and buyer or buyers, for such permit or fraction thereof.

ARTICLE XX

Section 1..We the undersigned, members of the West Daniels Association, have read, understood, and agree to support the by-laws.

Date: 5/8/97

Signatures:

Ray Wellberry

Dan Wright

Exhibit D

DON R. PETERSEN (2576), and
SEAN M PETERSEN (8656), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No.

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

RAY OKELBERRY, Plaintiff, vs. WEST DANIELS LAND ASSOCIATION; DAN WRIGHT; STEVE BETHERS; ELDON WRIGHT; JOHN BESSENDORFER; JAMES MORONI BESSENDORFER; BOB GAPPMAYER; and MRS. BONNER NELSON, Defendants.	**AMENDED COMPLAINT** Case No. 9990500174 Judge Anthony W. Schofield Division #8

COMES NOW the plaintiff Ray Okelberry and hereby complains of the defendants as follows:

1. Plaintiff is a member and shareholder of the defendant corporation West Daniels Land Association.

2. Defendant West Daniels Land Association is a Utah non-profit corporation under the laws of the State of Utah with its principal place of business in Charleston, Wasatch County, Utah. The corporation is in good standing under the laws of the State of Utah.

FACTUAL BACKGROUND

3. Plaintiff realleges all previous allegations of this complaint.

4. On October 6, 1952, the non-profit corporation entitled West Daniels Land Association was formed by filing an Affidavit with the Secretary of State. (Affidavit attached hereto as Exhibit "A.")

5. The Affidavit indicates that "each share may cast one vote and that five members will be elected directors." (Exhibit "A," p. 1.)

6. The Affidavit further indicates that "two shares will be issued for each head of livestock." (Exhibit "A," p. 1.)

7. The Affidavit states that "new members shall be received by a majority vote of the stockholders present at a duly called meeting." (Exhibit "A," p. 2.)

8. At least twenty years ago, the Association adopted and signed bylaws for the corporation. (Bylaws attached hereto as Exhibit "B.")

9. The bylaws carry the name West Daniels Cattle Association.

10. The Association has used these bylaws in order to operate various aspects of the company.

11. Historically, the Association ran 695 head of cattle over private land owned by the Association and on U.S. Forest Service ground by way of waiver and permit.

12. Recently, several changes have caused problems to arise among the members of the Association.

13. The individuals listed herein as defendants are members of the Association and have sold their rights in the West Daniels Cattle Association U.S. Forest Service permit without relinquishing their shares in the Association, which were tied to the permits.

14. These individual members do not run cattle equal to half of their current claimed ownership in the Association. Specifically, these members claim the right to own shares for 180 cattle, but only have the right to run 52 head of cattle.

15. The U.S. Forest Service will also no longer manage the private ground owned by the Association.

16. As a result, there is confusion concerning actual membership in the Association and as to the amount of ownership.

17. The Association has held a disputed vote which has caused a hardship to various members of the Association, including the plaintiff.

18. For the first time in the history of the Association, the vote was held by shares instead of "per-head" of cattle as required by the Articles of Incorporation.

19. The vote was complicated by the confusion over ownership and voting rights.

COUNT I

(Declaratory Judgment)

20. Plaintiff realleges all previous allegations of this complaint.

21. Pursuant to Chapter 33 of Title 78 of the Utah Code Annotated, plaintiff seeks a declaratory judgment from the Court interpreting the Affidavit and the Bylaws of the Association in accordance with Utah law.

22. As the Association is a non-profit corporation, ownership and voting rights may be enlarged, limited or denied based upon the Articles of Incorporation and the Bylaws, so long as the Bylaws are not in conflict with the Articles.

23. Plaintiff asserts that the right to run cattle is necessary to be a member of the Association.

24. The right to run cattle is the express purpose of the non-profit corporation.

25. The individually listed defendants herein claim to hold shares of membership in the Association, which they have relinquished by signing a waiver instructing the Association to transfer the right to use the U.S. Forest Service permit to another Association member. In accordance with the transfer order, the right to use the U.S. Forest Service permit has been transferred by the Association to other members; however, the Association did not transfer the necessary shares of membership to the transferee.

26. Such transfers are not permitted by the Articles of Incorporation or Bylaws.

27. The Bylaws specifically require U.S. Forest Service permit ownership as a condition of membership.

28. Plaintiff believes that the shares tied to permit ownership should have been transferred to the member holding the right to run the cattle on the U.S. Forest Service permit owned by the Association.

29. In the alternative, the interests held by members which no longer hold the right to run cattle should be cancelled.

30. The non-profit Association has not been able to reach an amicable resolution to the dispute as to shares and permit ownership.

31. Therefore, plaintiff seeks judgment from the Court determining membership in the Association and the amount of shares held.

32. Without such a determination, the members will continue to divide the use of the assets of the corporation, including, but not limited to, loading chutes, corrals, and the private land, between classes of members that do not exist in the Articles or Bylaws.

33. Plaintiff further seeks judgment establishing that the assets of the corporation are owned by the corporation and cannot be used solely by some of the members of the Association.

COUNT II

(Breach of Contract)

34. Plaintiff realleges all previous allegations of this complaint.

35. As a member of the Association, plaintiff is entitled to run his cattle on the Association's private land.

36. The Association has prohibited this action by illegal and/or improper vote.

37. This breach of the plaintiff's rights has caused damage to the plaintiff.

38. The breach includes, but is not limited to:

a. Two months feed for 341 cattle at $15.00 per month per head.

b. Additional transport costs of $10.00 per head.

c. Additional labor.

d. Loss of use of corrals and loading chutes.

e. Loss of proper income distribution, including hunting revenue.

f. Depreciation on the value of the cattle at approximately $20.00 per head.

39. Damages to be proven at trial exceed $20,000.00.

40. Plaintiff should be entitled to interest, costs and attorney fees.

WHEREFORE, plaintiff prays that the Court issue the following relief:

1. Declaratory judgment establishing the ownership interest of each member in the Association.

2. Damages exceeding $20,000.00 in an amount to be proven at trial.

3. Interest, costs and attorney fees for pursuing this action.

4. Such other relief as the Court deems proper and necessary.

DATED this 18 day of January, 2001.

SEAN M PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

Plaintiff's Address:

P. O. Box 75
Goshen, UT 84633

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 18 day of January, 2001.

Joseph Dunbeck, Esq.
123 South Main St., #1
Heber City, UT 84032

Marla Coomes
SECRETARY

J:\SMP\OKELBRY.COM

Exhibit E

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

RAY OKELBERRY, Plaintiff, vs WEST DANIELS LAND ASSOCIATION, a Utah Corporation, DAN WRIGHT, STEVE BETHERS, ELDON WRIGHT, JOHN BESSENDORFER, JAMES MORONI BESSENDORFER, BOB GAPPMAYER, and MRS BONNER NELSON, Defendants	CASE NUMBER 990500174 DATED MAY 21, 2001 **RULING** ANTHONY W SCHOFIELD, JUDGE

This case is before the court on defendant West Daniels Land Association's motion to dismiss plaintiff's amended complaint I grant in part and deny in part the motion

FACTUAL SETTING AND PROCEDURAL HISTORY

1 Plaintiff Ray Okelberry ("Okleberry") is a member of the defendant West Daniels Land Association (the "association"), incorporated in October 1952

2 The association was established "for the purpose to hold and own and manage grazing land for the purpose of grazing animals as shall be determined by

the board of directors of said corporation " Affidavit of Incorporation, ¶ 1

3. The grazing areas used by the association include United States Forest Service lands as well as privately owned land. Members can graze cattle which they own on either of these lands provided they possess the appropriate grazing permit.

4. According to the affidavit (articles) of incorporation, "each share of stock may cast one vote," and "two shares shall be issued for each head of livestock." Affidavit of Incorporation, ¶ 2. The articles of incorporation do not expressly state that members must own a grazing permit in order to own stock.

5. According to the bylaws, "each permittee member in good standing shall be entitled to one vote for each grazing head." Bylaws, Article XIII, Section 2. The bylaws were prepared in the name "West Daniels Cattle Association " The bylaws are undated but are signed by many individuals, many of whom also signed the affidavit of incorporation.

6. Despite the language of the articles of incorporation, until very recently the association members have always voted based on number of cattle grazed.

7. Beginning in 1981, some members of the association began selling their grazing permits but retained their stock in the association Okleberry purchased some of those grazing permits but was not issued any stock in the association [1]

8. The members continued to cast votes based on number of cattle until recently when, for the first time, the association conducted a vote based on shares

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[1] This did not bother him at the time because the voting presumably was proceeding according to the number of head of cattle.

owned, not head of cattle.

9. Okleberry complained that this new method of voting unfairly diluted his vote and he brought this suit, alleging two causes of action. First, Okleberry sought declaratory judgment establishing the proper method of voting, and determining that the association members who sold their grazing permits must relinquish or forfeit their shares. Second, he alleged a breach of contract, claiming that his contractual rights under the Bylaws were being violated. .

10. On August 13, 1999, the association moved for partial summary judgment seeking to dismiss Okleberry's declaratory judgment cause of action. The motion was granted on January 5, 2000.

11. On February 10, 2000, the association moved for summary judgment seeking to dispose of Okleberry's second cause of action on the basis that the January 5, 2000 ruling rendered his second claim lifeless.

12. Before ruling on this motion, the court gave Okleberry leave to file an amended complaint, which he ultimately did.

13. The amended complaint reasserts what had been the second cause of action (the contract claim) set forth in the original complaint. In addition, the amended complaint restated the declaratory judgment claim that had been rejected by the court on January 5, 2000, the justification being that the court's January 5, 2000 ruling never addressed the issue of whether the articles of incorporation place any restrictions on stock ownership.

14. Defendants now bring this motion seeking dismissal of plaintiff's

amended complaint

ANALYSIS AND RULING

The association moves to dismiss the amended complaint, advancing several arguments First, the amended complaint fails to state a claim for relief as the court, in its January 5, 2000 ruling, already decided that there are no preconditions to stock ownership. Second, the articles of incorporation do not contain any preconditions to stock ownership, such as grazing permits or cattle Further, the articles of incorporation trump anything contained in the bylaws that might suggest otherwise. As a result, the association argues that the revived declaratory judgment claim has no merit and must be dismissed. It concludes that the second cause of action for breach of contract consequently must fall like a domino

I conclude that all but paragraph 33 of the declaratory judgment claim must be dismissed. On a motion to dismiss, in order to determine whether a claim has been stated, a court must accept as true all of the well plead factual allegations of the complaint, including those appearing in the exhibits attached to the complaint [2] *See Wright v. University of Utah*, 876 P.2d 380 (Utah App 1994)

Although the complaint alleges that the articles of incorporation impose restrictions on stock ownership, these allegations are not "well plead" factual assertions because Okelberry's own attachments (copies of the articles and bylaws)

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[2] *See Beam v IPCO*, 838 F.2d 242, 244 (7th Cir 1988) ("under Rule 12(b) the district court is entitled to consider exhibits attached to the complaint as part of the pleadings ")

preclude the existence of such restrictions.[3] Okelberry's strained contention that the corporate purpose, or the method of initial stock distribution, impose conditions to stock ownership is unsupported by the plain language of the document. While it is arguable that the bylaws require cattle and grazing permit ownership, such bylaws would plainly be contrary to the articles of incorporation and are void as a matter of general corporate law.[4] Thus, the complaint and attached documents could never support, even in the best of cases, the position that the governing corporate documents impose the preconditions to stock ownership which Okleberry asserts.[5]

Interestingly, in paragraph 33 Okleberry raises an issue that does not depend upon membership or voting rights for determination: how the association is using its corporate assets. That paragraph raises a factual claim as to which the foregoing analysis does not apply. I conclude that paragraph 33 states a claim upon which relief can be granted. I grant the motion to dismiss the first claim for relief except I deny the motion to dismiss as to paragraph 33.

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[3] The amended complaint says that the articles and bylaws are attached. Perhaps by oversight, they are not. However, I consider them attached for four reasons: 1) they were attached to the original complaint, 2) they plainly were intended to be attached to the amended complaint, 3) the court is well aware of the documents as they were the subject of the first motion for summary judgment, and 4) it is the parties' desire that I look at these documents and construe their content.

[4] *See Utah Code Ann.* §§ 16-6-44, 16-10a-206 which state that bylaws may contain any provision no inconsistent with law or the articles of incorporation.

[5] The court's earlier ruling described the question then to be decided as "whether the articles of incorporation govern voting and membership in the corporation or whether the bylaws govern." This is a clear statement that the earlier ruling addressed both the issue of voting and the issue of membership. The doctrine of law of the case prohibits the court from addressing them again.

I also deny the motion to dismiss the second claim for relief Although a bylaw in contradiction with the articles of incorporation is invalid and ultra vires as a matter of general corporate law, Utah courts currently subscribe to the doctrine that an invalid bylaw may be enforceable on basic contract principals *See McKee v Williams*, 741 P 2d 978, 981-82 (Utah App 1987) (' Under the foregoing analysis, article 12 of the bylaws was perhaps invalid as a matter of general corporate law [but] [a]s a matter of contract law, several material issues of fact exist which preclude entry of partial summary judgment ") [6] Where the case law governing this doctrine has not been briefed by the parties, I deny the present motion with respect to the second cause of action

Pursuant to Rule 4-504, Utah Code of Judicial Administration, defendants' counsel is directed to prepare an appropriate order

Dated this 21 day of May, 2001

BY THE COURT

ANTHONY W SCHOFIELD, JUDGE

[6] Also, as stated in this court's January 5, 2000 ruling a disputed fact may exist as to whether the grazing permits are in fact a precondition set forth in the bylaws - that issue therefore needs further development

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 21st day of May, 2001:

Don Petersen
Sean Petersen
120 East 300 North
P O Box 1248
Provo, UT 84603

Joseph Dunbeck
51 West Center Street
Heber City, UT 84032

CARMA BUSH
CLERK OF THE COURT

By J Christensen
Deputy Clerk