

2007

Jones & Trevor Marketing, Inc. v. Financial
Development Services, Inc., Jeremy Warburton,
John Neubauer, Jonathon L. Lowry, Nathan
Kinsella, and Esbex.com, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JONES & TREVOR MARKETING,
INC.,

BRIEF OF APPELLEE

Plaintiff/Appellant,

v.

Utah Court of Appeals Case No.
20070842CA

FINANCIAL DEVELOPMENT
SERVICES, INC., JEREMY
WARBURTON, JOHN NEUBAUER,
JONATHAN L. LOWRY, NATHAN
KINSELLA, and ESBEX.COM, INC.

Defendants/Appellees.

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard

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STATEMENT OF JURISDICTION

The Utah Supreme Court had original appellate jurisdiction of this appeal under the provisions of Utah Code Ann. §78-2-2(3)(j). Pursuant to its authority under Utah Code Ann. §78-2-2(4), the Utah Supreme Court transferred this case to the Court of Appeals on October 15, 2007. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF ISSUES / STANDARD OF REVIEW

Issues presented on appeal:

1. Does the Court of Appeals have jurisdiction to consider Appellant's appeal?

Standard of review: "Whether appellate jurisdiction exists is a question of law." *Kuhre v. Goodfellow*, 2003 UT App 85, ¶ 6, 69 P.3d 286 (further quotation and citation omitted). "[L]ack of jurisdiction can be raised at any time by either party or by the court." *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960, 964 (Utah 1986).

2. Did the trial court err in granting summary judgment in favor of Appellees Jonathan Lowry and Nathan Kinsella, by determining that Appellees were entitled to judgment as a matter of law on Appellant's alter ego claims?

Standard of review: "Whether a party is entitled to summary judgment presents a question of law, and [appellate courts] grant no deference to the trial court's legal conclusions and review them for correctness. Yet, '[a] trial court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion.'" *Sunridge Dev. Corp. v. RB&G Eng'g, Inc.*, 2008 UT App 29, ¶ 7, ___ P.3d ___ (quoting *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52) (further

citations omitted). [R. 1149-1197, 1198-1200, 1201-1285, 1584-1599, 1660-1683.]

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises out of a lawsuit filed by Jones & Trevor Marketing, Inc. (“J&T Marketing” or “Appellant”) on August 29, 2002. [R. 49.] The complaint named Financial Development Services, Inc. (“FDS”), Jeremy Warburton, and John Neubauer as defendants and contained six causes of action. [R. 39-49.] All of J&T Marketing’s claims against these defendants arose out of or were related to a Sales and Marketing Agreement (“Agreement”) entered into between FDS and J&T Marketing and made effective as of January 31, 2002. [R. 33-37.] (A copy of the Agreement is included in the Addendum hereto at Tab A.) Pursuant to the Agreement, J&T Marketing supplied FDS with the names, addresses and phone numbers of sales leads, and FDS marketed and sold Ted Thomas Courses through telemarketing and other sales efforts. [R. 1702.] After conducting some discovery, J&T Marketing filed a motion for leave to amend its complaint. [R. 301-02.] The trial court granted J&T Marketing’s motion in part, permitting J&T Marketing to file an amended complaint that for the first time named Jonathan L. Lowry and Nathan Kinsella (collectively “Appellees”) individually as defendants.¹ [R. 994-996.] J&T Marketing filed its Amended Complaint on June 18,

¹ The trial court denied J&T Marketing’s Motion to Amend as it pertained to two new causes of action alleging civil liability for violations of Utah’s Pattern of Unlawful Activity Act and the federal Racketeer Influenced Corrupt Organizations Act. [R. 995.] J&T Marketing subsequently filed a Modified Motion for Leave to File Amended Complaint seeking to add an additional cause of action alleging conspiracy, [R. 886-87], but the trial court denied this motion in its entirety, [R. 1015-17].

2004, alleging nine cause of action, including breach of contract, theft by conversion, fraudulent misrepresentation, breach of duty of good faith and fair dealing, accounting, injunctive relief, constructive fraud, fraudulent non-disclosure, and intentional interference with business relations. [R. 1027-44.]

II. Proceedings Below

Appellees Lowry and Kinsella filed a Motion for Summary Judgment, requesting summary judgment on J&T Marketing's second, third, seventh, eighth, and ninth causes of action as they applied to Lowry and Kinsella.² [R. 1198-1200.] Opposing Appellees' motion, J&T Marketing relied heavily upon statements made by John Neubauer in a deposition taken in Mr. Neubauer's separate bankruptcy proceeding. [R. 1292-1322.] Appellees Lowry and Kinsella objected to J&T Marketing's submission of Mr. Neubauer's bankruptcy deposition and moved to have it stricken from the record. [R. 1570-1571.] At the hearing held to consider Lowry and Kinsella's motions, the trial court granted Appellees' motion to strike the deposition³ but granted J&T Marketing additional

² J&T Marketing's First, Fourth, and Fifth causes of action were brought only against FDS. [R. 1034-35, 1031-32.] J&T Marketing's Sixth cause of action dealt with injunctive relief. [R. 1030-31.]

³ Lowry and Kinsella moved to strike Mr. Neubauer's bankruptcy deposition because they did not have notice of or attend the deposition, as required by Rule 32(a) of the Utah Rules of Civil Procedure, and because the portions relied on by J&T Marketing lacked foundation, were irrelevant, or were speculative and misleading. [R. 1577-83.] The trial court granted this motion on September 22, 2005. [R. 1629.] It was within the discretion of the trial court to exclude the bankruptcy proceeding testimony while granting J&T Marketing additional time to take Mr. Neubauer's deposition in this case. *See Whittle*, 1999 UT 96 at ¶ 20. J&T Marketing has not appealed the trial court's decision to strike Mr. Neubauer's bankruptcy deposition, and it cannot now support any factual allegations by relying on that stricken deposition testimony.

time to conduct a new deposition of Mr. Neubauer. [R. 1629.] The trial court ordered that after participating in this new deposition, supplemental briefs could be filed by each party. [R. 1629, 1635-37.]

J&T Marketing took the deposition of Mr. Neubauer on October 18, 2005, and supplemental briefs were filed by both parties whereupon the trial court granted Appellees' motion in part. [R. 1691-1703] In its *Ruling Granting In Part Defendants Lowry and Kinsella's Motion for Summary Judgment*, entered on February 1, 2006 (a copy of which is included in the Addendum hereto at Tab B), the trial court granted summary judgment to Appellees Lowry and Kinsella on the second, seventh, eighth, and ninth causes of action of the Amended Complaint. [R. 1691-97.] With respect to J&T Marketing's third cause of action (J&T Marketing's claim for fraudulent misrepresentation) however, the trial court granted only partial summary judgment, explaining in regards to one written statement allegedly made by Lowry that "[d]rawing all reasonable inferences in favor of the Plaintiff, the Court denies Defendant Lowry's motion for summary judgment as to this claim." [R. 1692 (emphasis added).] This ruling denying summary judgment on this claim is set forth in the trial court's *Order on Defendants Lowry's and Kinsella's Motion for Summary Judgment* entered on March 21, 2006 ("Order") (a copy of which is included in the Addendum hereto at Tab C). [R. 2021.] In making its determinations, the trial court noted that "Neubauer's bankruptcy deposition has been stricken in its entirety, and is only reliable inasmuch as it is corroborated by the October 18, 2005 deposition." [R. 1695.]

Following the entry of the Order on March 21, 2006, confirming the trial court's

February 1, 2006 ruling, J&T Marketing took no further action to pursue the remaining active claim upon which the trial court refused to grant summary judgment. After entry of this Order, which left an active unresolved claim, the trial court was never asked to certify and in fact never certified the March 21, 2006 Order as final for purposes of appeal pursuant to Rule 54(b). J&T Marketing, however, did obtain a default judgment against Defendants FDS and Exbex.com on September 13, 2007, resolving its claims against those two defendants. [R. 2215-17.] The September 13, 2007 default judgment did not in any way address J&T Marketing's outstanding claim against Appellee Lowry for fraudulent misrepresentation as alleged in the third cause of action of the Amended Complaint and on which the trial court had expressly refused to grant summary judgment in the ruling of February 1, 2006.

III. Statement of Undisputed Facts⁴

J&T Marketing's claims arise out of a contractual dispute between FDS and J&T

⁴ J&T Marketing's citations to the record in its Statement of Facts of the *Brief of Appellant* do not appear to correspond to pages in the record that actually support the stated facts. Indeed, some of the citations actually refer to J&T Marketing's argument section of its *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment*. [R. 1293-1308.] J&T Marketing's Memorandum relies heavily upon the bankruptcy deposition of John Neubauer, which the trial court specifically struck from the record in its entirety. [R. 1695.] J&T Marketing's Statement of Facts also apparently cites to the new Declaration of John Neubauer (dated October 15, 2005), attached to its *Supplemental Memorandum*. [R. 1640-49.] However, these citations also do not correspond to evidence that would create disputed material facts regarding Lowry and Kinsella's liability. In addition to this citation problem, Lowry and Kinsella note that Mr. Neubauer's new deposition testimony demonstrates serious foundational flaws. Mr. Neubauer stated several times that he can no longer recollect much concerning the day-to-day business of FDS or Esbex.com. [R. 1641, 1645; Neubauer Dep. at 12:10-23; 23:10-14; 39:1-9; 40:11-14.] Thus, J&T Marketing's citations to the record fail to support the facts contained in its Statement of Facts.

Marketing over the performance of a contract solely between J&T Marketing and FDS. [R. 33-37, 1320.] FDS and J&T Marketing entered into this contractual relationship at or near the beginning of February 2002. [R. 33, 37, 1320.] Pursuant to the contract, J&T Marketing supplied FDS with the names, addresses and phone numbers of sales leads, and FDS marketed and sold through telemarketing and other sales efforts the “Ted Thomas Courses” supplied by J&T Marketing. [R. 1320.] Approximately five and a half months after entering into the contract, i.e., on July 19, 2002, FDS informed J&T Marketing that J&T Marketing was in breach of contract inasmuch as it had failed to supply the Ted Thomas Courses FDS was selling and gave notice of cancellation of the agreement. [R. 1316, 1598.] In reaction to FDS’s cancellation, J&T Marketing filed suit against FDS and others on August 29, 2002. [R. 1316.] The initial complaint did not name Lowry or Kinsella as defendants. [R. 49.] However, when the trial court permitted J&T Marketing to amend its complaint, the Amended Complaint increased the causes of action alleged from six to nine, with five of the causes of action seeking to hold Lowry and Kinsella personally liable for their alleged activities arising out of or related to the contract between FDS and J&T Marketing. [R. 1315-16.]

It is undisputed that J&T Marketing delayed or halted some shipments of its Ted Thomas Courses to FDS for a number of reasons including the following: J&T Marketing would delay shipment of the product if payment was delayed; J&T Marketing employed temporary shipping clerks to do product shipment, which resulted in staff turnover and ongoing training and supervision issues; and J&T Marketing finally ceased shipping Ted Thomas Courses altogether due to a contract dispute with FDS over payment issues. [R.

1317.] A third-entity, Esbex.com, while not providing Ted Thomas Courses *per se*, provided coaching/mentoring services for a monthly fee to purchasers of the Ted Thomas Courses. [R. 1319.] Payment issues included the question of whether fees were due on such coaching services. When J&T Marketing failed to ship product to FDS, FDS filled some orders by shipping products that had been returned by other clients because it “was trying to fulfill to make people happy and prevent a refund or cancellation.” [R. 1647; Deposition of John Neubauer (dated October 18, 2005) (“Neubauer Dep.”) 16:4-14.] In addition, although J&T Marketing asserts that FDS and Esbex.com should have split coaching fees under the contract, the only evidence is that FDS believed that the coaching fees were not covered by the contract and were not to be shared with J&T Marketing. [R. 1644; Neubauer Dep. 26:10 to 28:12.]

Lowry and Kinsella were shareholders, officers and directors of FDS and Esbex.com. [R. 1318, 1916.] John Neubauer was the Chief Operating Officer and Chief Financial Officer of FDS, and both FDS and Esbex.com used Mr. Neubauer to perform their accounting. [R. 1598, 1917.] Mr. Neubauer was FDS’s principal agent in dealing with J&T Marketing, and all communication with J&T marketing went through Mr. Neubauer. [R. 1318-19, 1916-17.] In his deposition taken in this case on October 18, 2005, Mr. Neubauer testified that FDS and Esbex.com were legitimate companies, stating that he “wouldn’t have worked there if [he] didn’t feel that way.” [R. 1640, Neubauer Dep. 42:4-11.] Mr. Neubauer also testified that while Lowry and Kinsella took money from the business, he does not remember exactly how the money was accounted for, but he did specifically recall that he accounted for such withdrawals as instructed. [R. 1641,

Neubauer Dep. 40:3-14.] The only evidence in the record is to the effect that FDS and Esbex.com followed corporate formalities. [R. 1196.] There is no evidence that Appellees Lowry or Kinsella co-mingled funds or acted outside of the scope of their corporate responsibilities at any time relevant to this matter.

SUMMARY OF THE ARGUMENT

J&T Marketing specifically appeals an order entered by the trial court on March 21, 2006, partially granting Lowry and Kinsella's motion for summary judgment. This order was not final, having been granted only in part, and leaves at issue a portion of one of J&T Marketing's causes of action against Lowry. Given the fact that there is an unadjudicated issue still pending before the trial court, this Court does not have jurisdiction over the appeal. Therefore, this Court only has the authority to dismiss the appeal for lack of jurisdiction.

If, however, this Court determines that it can exercise jurisdiction over J&T Marketing's appeal, then it should uphold the trial court's decision to grant Lowry and Kinsella's motion for summary judgment. On a motion for summary judgment, "the non-moving party has an obligation to come forward with sufficient proof to show that the non-moving party is entitled to proceed to trial." *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 41, 86 P.3d 712. In the matter before this Court, J&T Marketing failed to present evidence establishing any genuine issues of material fact existed regarding J&T Marketing's alter ego theory claims. The alter ego theory only arises if two factors are shown: (1) that there is a unity of interest or ownership between the individual and the corporation, and (2) that maintaining the corporate form would sanction fraud, promote

injustice or create an inequitable result. *See Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 36, 84P.3d 1154. J&T Marketing failed to present evidence establishing genuine issues of material fact regarding either of these two prongs. In addition, J&T Marketing failed to present genuine issues of fact on every element of its claims for personal liability against Lowry and Kinsella. On the other hand, the undisputed evidence demonstrates that neither Lowry nor Kinsella should be held personally liable for any of J&T Marketing's alleged injuries arising out of its contractual agreement with FDS. Considering the submissions before it, the trial court correctly ruled that there were no material issues of fact on the issue of summary judgment and correctly granted Lowry and Kinsella summary judgment as a matter of law.

Therefore, this Court should uphold the trial court's decision to grant summary judgment to Lowry and Kinsella or dismiss the appeal for lack of jurisdiction.

ARGUMENT

I. THE COURT OF APPEALS DOES NOT HAVE JURISDICTION TO HEAR J&T MARKETING'S APPEAL

Rule 54(b) of the Utah Rules of Civil Procedure provides a procedure for the trial court to certify as final a judgment that addresses "fewer than all of the claims or parties." A judgment that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and that is not certified as final by the trial court does "not terminate the action as to any of the claims or parties," Utah R. Civ. Pro. 54(b), and is not final for purposes of appeal. "A trial court's granting of a motion for summary judgment which does not dispose of all claims of all parties, and which has not been certified as a

final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, is not a final judgment for purposes of appellate jurisdiction.” *Sneddon v. Graham*, 821 P.2d 1185, 1189 (Utah Ct. App. 1991).

A. The Trial Court’s Order on Defendants Lowry’s and Kinsella’s Motion for Summary Judgment is not Final for Purposes of Appeal

Appellate courts “[d]o not have jurisdiction over an appeal unless it is taken from a final judgment, or qualifies for an exception to the final judgment rule.” *Loffredo v. Holt*, 2001 UT 97, ¶ 10, 37 P.3d 1070. J&T Marketing, in its Docketing Statement, informed this Court that after reviewing the submissions on Appellees’ Motion for Summary Judgment “[t]he District Court then concluded that *none* of Appellant’s claims could be sustained against Lowry and Kinsella personally and granted Lowry and Kinsella’s motion for summary judgment.” *Docketing Statement* at 3-4 (emphasis added). (The *Docketing Statement* is included in the Addendum hereto at Tab D.) However, J&T Marketing correctly noted in a footnote that summary judgment was granted “as to every claim against Lowry and Kinsella personally, *with the exception of the fraudulent misrepresentation claim against Lowry.*” *Id.* at 4 n.1 (emphasis added). Despite its recognition that trial court’s Order is not final, *i.e.*, it did not finally adjudicate all claims, J&T Marketing nevertheless asserts that this Court has jurisdiction over the appeal.

“[T]o be considered a final order, the trial court’s decision must dispose of the claims of all parties.” *Loffredo*, 2001 UT 97 at ¶ 12. “An order that does not wholly dispose of a claim or a party is not final, and therefore not appealable.” *Sneddon*, 821 P.2d at 1189 (Utah Ct. App. 1991). By noting in its Docketing Statement that the

summary judgment order did not dispose of one of its claims, J&T Marketing admits that the trial court's summary judgment order did not wholly dispose of its claims against Lowry and Kinsella and the order was therefore not final for purpose of appeal. "Where the final judgment rule is not satisfied, the proper remedy for this court is dismissal." *Loffredo*, 2001 UT 97 at ¶ 11.

B. J&T Marketing's Appeal does Not Qualify for an Exception to the Final Judgment Rule

Were J&T Marketing to assert that its appeal qualifies for an exception to the final judgment rule, its argument would fail. This Court could assert jurisdiction over the trial court's non-final order granting Appellees' motion for summary judgment if the appeal qualifies for one of three special exceptions to the final judgment rule. *See id.* at ¶15. A non-final judgment may be appealed (1) "if the three requirements of rule 54(b) of the Utah Rules of Civil Procedure have been satisfied;" (2) if "a parties obtains [the appellate court's] permission under rule 5 of the Utah Rules of Appellate Procedure;" or (3) "if an appeal is permitted by statute." *Id.*

J&T Marketing did not comply with the procedures specified for certification under rule 54(b) and none of the three requirements of Rule 54(b) has been satisfied⁵; Even if Appellant had complied with Rule 54(b), the period for filing an appeal expired

⁵ "First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that "there is no just reason for delay" of the appeal." *Pate v. Marathon Steel Co.*, 692 P.2d 765, 767 (Utah 1984); *see also* Utah R. Civ. Pro. 54(b). The trial court never made, nor was it ever asked to make, the required findings to certify the Order as final.

long before the appeal was filed since the order J&T Marketing has appealed from was entered on March 21, 2006, and the Notice of Appeal was not filed until October 9, 2007, nearly a year and a half later. Moreover, J&T Marketing's appeal fails to satisfy the requirements of Rule 5. Rule 5 requires a petition for permission to appeal to be filed within twenty days "after the entry of the order of the trial court." Utah R. App. Pro. 5(a). J&T Marketing has filed no such petition. Finally, J&T Marketing has pointed to no applicable statute that would allow it to appeal the trial court's non-final Order entered on March 21, 2006.

Though Lowry and Kinsella believe that the trial court correctly awarded summary judgment in their favor and that their arguments on the merits of the appeal, which follow, would result in an affirmance by this Court, they note that "acquiescence of the parties is insufficient to confer jurisdiction and that a lack of jurisdiction can be raised at any time by either party or by the court." *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960, 964 (Utah 1986). As this Court is without jurisdiction to hear J&T Marketing's appeal, it appears that the only remaining available action to this Court is dismissal.

II. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF LOWRY AND KINSELLA BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT

A. Under the Applicable Standard of Review, the Trial Court Correctly Granted Summary Judgment on J&T Marketing's Claims

Should this court determine that it has jurisdiction, Lowry and Kinsella assert that this Court should affirm the trial court's ruling on their summary judgment motion and deny the appeal. Rule 56 of the Utah Rules of Civil Procedure states that summary

judgment may be obtained “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. Pro. 56(c). However, Utah courts have held that

[o]nce the allegations in a complaint are challenged, the non-moving party has an obligation to come forward *with sufficient proof to show that the non-moving party is entitled to proceed to trial*. It is not enough to rest on allegations alone, *particularly when the parties have had an opportunity for discovery*.

In re Discipline of Sonnenreich, 2004 UT 3, ¶ 41, 86 P.3d 712 (emphasis added).

J&T Marketing erroneously urges this Court to conduct a single inquiry into whether there are disputes of material facts and cites to the 1995 case of *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995), for the proposition that it is not required to prove all the elements of its claims against Lowry and Kinsella. The Utah Supreme Court held in *Gerbich v. Numed Inc.*, 1999 UT 37, ¶ 12, 977 P.2d 1205, *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 339 (Utah 1997), and *Sonnenreich*, 2004 UT 3 at ¶ 41, that while the moving party must show that there is no material issue of fact, “in opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action.” *Numed Inc.*, 1999 UT 37 at ¶ 12 (quoting *Jensen*, 944 P.2d at 339); *accord Sonnenreich*, 2004 UT 3 at ¶41.

Appellees acknowledge that “a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist.” *Estate of Bernardo*, 888 P.2d at 1100. However, when contending against a motion for summary judgment, a plaintiff “has the obligation to come forward with sufficient proof to show that [it is]

entitled to proceed to trial.” *Numed, Inc.*, 1999 UT 37 at ¶ 12. Evidence is sufficient when it raises “a genuine issue of fact.” *Klienert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). When the plaintiff as the non-moving party does not submit evidence to support an element of its claim, the trial court should grant summary judgment on that claim.

Utah court decisions on this standard are consistent with United States Supreme Court decisions interpreting the federal equivalent of Utah’s Rule 56.

When a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case . . . there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Thus, the standard for summary judgment “mirrors the standard for a directed verdict,” in that a moving party, who has otherwise made its case, is entitled to judgment as a matter of law where the “nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.”

Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419-20 (Utah Ct. App. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (quoting Fed. R. Civ. Pro. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986))).

B. The Trial Court Correctly Granted Summary Judgment on J&T Marketing’s Alter Ego Claims

The trial court correctly granted summary judgment to Lowry and Kinsella on J&T Marketing’s alter ego theory because there were no genuine issues of material fact making summary judgment appropriate as a matter of law. In Utah “a corporation is regarded as a legal entity, separate and apart from its stockholders.” *Dockstader v. Walker*, 510 P.2d 526, 528 (Utah 1973); accord *Salt Lake City Corp. v. James*

Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988). “In so immunizing corporate directors from personal liability, the law has proceeded on the theory that in so acting they are but the agents of the corporation and that the breach is that of the corporation, and hence it alone is answerable therefore [sic].” *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (quotations and citations omitted). Utah Courts “have stated that ‘[c]ourts must balance piercing and insulating policies and [should] only reluctantly and cautiously pierce the corporate veil.’” *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah Ct. App. 1994) (quoting *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 46 (Utah Ct. App. 1988)).

Two elements must exist for a court to pierce the corporate veil. “The corporate form may be disregarded when there is ‘such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist . . . and the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.’” *Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 36, 84 P.3d 1154 (quoting *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979)). J&T Marketing claims that it presented “enough disputed facts” to overcome Lowry and Kinsella’s motion for summary judgment. *Brief of Appellant* at 12. The evidence, or rather lack thereof, before the trial court suggests otherwise.

1. J&T Marketing Did Not Provide Evidence to Support the Unity of Interest Prong of the Alter Ego Theory

J&T Marketing’s claims boil down to a contract dispute between itself and FDS, and all of J&T Marketing’s allegations regarding fraud and misrepresentation rest solely

on its unilateral interpretation of the contract terms. In Utah, factors have been identified that guide a determination of whether the unity-of-interest prong has been violated. These factors include the following:

(1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987).

As J&T Marketing noted in its brief, Utah courts have stated that “[f]ailure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses without proper accounting, and failure to maintain complete corporate and financial records are looked upon with extreme disfavor.” *Colman*, 743 P.2d at 786 n.

3. J&T Marketing has presented no evidence that Lowry or Kinsella commingled corporate funds with their own. Instead, J&T Marketing points to the evidence that Lowry and Kinsella took money from the corporation for their personal use. *See Brief of Appellee* at 14.⁶ J&T Marketing suggests that the mere fact that Lowry and Kinsella were distributed money out of the corporation, standing alone, raises questions of fact concerning the unity of interest prong of the alter ego theory. *See id.* However, J&T

⁶ J&T Marketing’s citations to the record here do not align with actual pages in the record supporting its claims. To the extent J&T Marketing’s citations refer to portions of its original *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella’s Motion for Summary Judgment* that rely on the bankruptcy declaration of Mr. Neubauer, the citations provide no support since the trial court struck Mr. Neubauer’s deposition in its entirety. [R. 1695.] J&T Marketing has not appealed the trial court’s decision on that issue.

presented no evidence that these disbursements represented improper siphoning of the corporation's funds or that the corporation's funds were co-mingled with those of these shareholders. Mr. Neubauer testified that he, as the CFO of FDS and Esbex.com accounted for the money withdrawn by Lowry and Kinsella as instructed. [R. 1641, Neubauer Dep. 40:8-14.] It would be hard to find a successful corporation that did not provide funds to its shareholders. In addition, Mr. Neubauer testified that Lowry and Kinsella instructed him to "find a way to free up expenses and free up cash flow" to provide refund checks to customers. [R. 1644; Neubauer Dep. 25:7-23.]

Mr. Neubauer's testimony as the CFO of FDS and Esbex.com was that he prepared the financial records including monthly income statements and net profit and loss statements, [R. 1642; Neubauer Dep. 36:18-25], and that from his perspective neither FDS nor Esbex.com had fraudulent purposes, [R. 1640; Neubauer Dep. 42:9-10]. Mr. Neubauer agreed that Lowry and Kinsella desired to make a profit but such was "true of every business." [R. 1668; Neubauer Dep. 11:9-25.] No testimony showed that Lowry or Kinsella, as owners of both FDS and Esbex.com, failed to comply with corporate formalities. The fact that Lowry and Kinsella took money out of the corporation does not show that corporate funds were treated as personal property, that proper accounting did not occur, or that proper financial records were not kept. Indeed, the evidence as stated above shows exactly the opposite. And J&T Marketing presented no evidence to dispute that Lowry and Kinsella took steps they believed to be commercially reasonable in managing and operating FDS and Esbex.com. [R. 1194-96.]

Since J&T Marketing failed to present a dispute of material fact concerning the

unity of interest and ownership factor, the trial court correctly granted summary judgment to Lowry and Kinsella on this prong alone.

2. The Trial Court Did Not Provide Evidence to Support the Fraud, Injustice, or Inequitable Result Prong of the Alter Ego Theory

J&T Marketing argues in its brief that the trial court incorrectly failed to consider the second prong of the alter ego theory. *Brief of Appellant* at 15. Once the trial court had determined that J&T Marketing had not presented evidence to support its claim that the unity of interest prong was met [R. 1694], however, the trial court had no need to consider the second prong of the test. Nevertheless, Lowry and Kinsella submit that J&T Marketing did not present evidence probative to the establishment of a genuine issue of material fact as to the second prong of the alter ego theory.

To support its argument, J&T Marketing relies on a Utah case in which the court found that the evidence of undercapitalization in that case showed that maintaining the corporate shield would be unfair and unjust. *See Brief of Appellant* at 15 (citing *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 47 (Utah Ct. App. 1988)). In *James Constructors*, the court noted that among other things the evidence showed that the subsidiary's officers did not act independently from the parent, that the parent financed the subsidiary and paid some of its debts, and that funds were advanced by the corporate parent only "on an 'as needed' basis, without formal documentation and with no particular requirements for repayment." *Id.* There was no parent-subsidary relationship in this case. There was no evidence presented that would tend to show either that Lowry or Kinsella personally paid debts of FDS or Esbex.com or that these entities paid their

personal debts. There is no evidence that financial transactions were made without formal documentation. Instead, there is evidence that all financial transactions were documented and accounted for by Mr. Neubauer. [R. 1641; Neubauer Dep. 40: 11-14.]

J&T Marketing additionally points to a divorce case in which upholding the corporate form was determined to be unjust because “plaintiff’s post-settlement agreement business transactions would convert substantial assets, which otherwise would be regarded as marital property, to corporate assets in which plaintiff had no interest.” *Colman v. Colman*, 743 P.2d 782, 788 (Utah Ct. App. 1987). In *Colman*, the wife claimed that the husband was hiding marital assets behind corporate entities, which assets would otherwise be subject to a written property settlement agreement. *See id.* at 783-84. In this case, there is no evidence tending to show either that Lowry and Kinsella were using the entities to hide personal assets or vice versa. Rather, J&T Marketing halted its performance under the contract which rendered FDS and Esbex.com to be without the supplies to meet its obligations. [R. 1317.] Without a legal basis, J&T Marketing is improperly seeking restitution out of the personal finances of the corporate officers of FDS and Esbex.com.

J&T Marketing asserts that FDS and Esbex.com were “clearly undercapitalized,” relying solely on its contention that the entities had relatively short life-spans, that Lowry and Kinsella took money out of the companies, and that the companies are now insolvent. *Brief of Appellant* at 16. Insolvency does not make maintaining the corporate form unjust or inequitable. Appellant submits no evidence that would tend to support its claim that insolvency was actually caused by undercapitalization. Such a claim would at the very

least require a showing of how much capital was invested verses how much was needed. Appellant presents no evidence on either point. The undisputed evidence is that FDS and Esbex.com maintained their corporate formalities [R. 1196] and that Mr. Neubauer accounted for all draws made by Lowry and Kinsella, [R. 1641; Neubauer Dep. 40: 11-14].

J&T Marketing have not presented evidence creating disputes of material fact on the second prong of the alter ego theory. Therefore, the trial court correctly granted summary judgment on that issue to Lowry and Kinsella, and this Court should affirm.

C. The Trial Court Correctly Granted Summary Judgment on J&T Marketing's Causes of Action Against Lowry and Kinsella Since J&T Marketing Did Not Present Material Evidence to Support These Claims

It is well settled in this State that if facts “would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure.” *Abdulkadir v. Western Pac. R.R. Co.*, 318 P.2d 339, 341 (Utah 1957). Despite conducting comprehensive discovery into all aspects of the operations of FDS and Esbex.com, J&T Marketing failed to establish a factual basis upon which it could recover against Lowry and Kinsella.⁷ The trial court, recognizing this failure of evidence, properly granted summary judgment to Lowry and Kinsella, Allowing this matter to proceed would have been a useless, inefficient, and expensive endeavor.

⁷ Noting, however, that the trial court did not grant summary judgment on a portion of J&T Marketing's fraudulent misrepresentation claim.

J&T Marketing asserts that the trial court incorrectly held that no personal liability could attach to Lowry and Kinsella. *Brief of Appellant* at 16. The Utah Supreme Court has held that a director or officer of a corporation may only be held “individually liable for fraudulent acts or false representations of *his own or in which he participates*.” *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 19, 70 P.3d 35 (emphasis in original, further citations omitted). The fact that a corporate officer’s “duties generally include[] overseeing the business activities of the corporation does not alone establish facts supporting a claim that she is *personally* liable for fraud.” *Id.* at ¶ 20 (emphasis in original). While an officer or director may be held individually liable for corporate torts in which they personally participate, *see d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶¶ 39, 43, 147 P.3d 515,⁸ J&T Marketing failed to provide evidentiary support for each element of its claims. Thus, J&T Marketing’s claims fail as a matter of law, and the trial court properly granted summary judgment dismissing those claims.

1. Theft by Conversion

The trial court correctly granted Lowry and Kinsella summary judgment on J&T Marketing’s second cause of action for theft by conversion. Theft by conversion requires the “willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession.” *State v. Twitchell*, 832 P.2d

⁸ J&T Marketing’s argument that corporate officer may be held personally liable for corporate torts in which they participate, which is distinct from piercing the corporate veil, is a new argument brought for the first time on appeal. “With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal.” *Centennial Inv. Co., LLC v. Nuttall*, 2007 UT App 321, ¶ 27 n. 7, 171 P.3d 458.

866, 870 (Utah Ct. App. 1992). J&T Marketing assert that Lowry and Kinsella individually interfered with J&T Marketing's product, leads, client lists, and money. This allegation arises out of J&T Marketing's interpretation of the contractual obligations of FDS found in the Sales and Marketing Agreement. *See* Tab A.

J&T Marketing presented no evidence that Lowry or Kinsella converted J&T Marketing's property to their own use. To the contrary, the only evidence presented to the trial court was that neither Lowry nor Kinsella ever converted the property of J&T Marketing to their own personal use. [R. 1193-94.] FDS did not report coaching fees because those fees were not part of the contract with J&T Marketing. [R. 1644; Neubauer Dep. 26:10 through 28:12.] Mr. Neubauer testified that FDS and Esbex.com did not have fraudulent purposes in interpreting the contract and that he had no information concerning fraudulent actions with respect to Kinsella or Lowry in connection with the Ted Thomas account. [R. 1640; Neubauer Dep. 42:12-15.]

Without any evidence tending to prove that Lowry or Kinsella converted the property of J&T Marketing, what alternative did the trial court have but to grant summary judgment in favor of Appellees?

2. Fraudulent Misrepresentation

J&T Marketing's third cause of action alleged fraudulent misrepresentation against Lowry, Kinsella, Mr. Neubauer and FDS. As mentioned previously, the trial court only granted partial summary judgment on this issue. *See infra* Part I.⁹

⁹ Appellees here note that although trial court did not fully grant the motion for summary judgment on this issue, they do not concede that J&T Marketing's remaining fraudulent

J&T Marketing's claim on this cause of action rests on alleged failures to perform promises found in the contract. [R. 1033-34.] These allegations cannot properly be characterized as fraudulent misrepresentations at all, but are rather, on their face, simply allegations of breach of contract. J&T Marketing rests these so-styled tort claims on the supposed evidence supposedly provided by Mr. Neubauer that FDS withheld income from coaching fees and made misrepresentations as to the volume of sales. *Brief of Appellant* at 18. Appellant had opportunity to take Mr. Neubauer's deposition in this and solicit information admissible in this case to support this claim. This Appellant failed to do. Instead, Mr. Neubauer stated in his deposition taken in this case that FDS did not believe that coaching fees fell under the Agreement with J&T Marketing. [R. 1644; Neubauer Dep. 26:10 to 28:12.] Even if the excluded testimony were to be considered, J&T Marketing presents no evidence¹⁰ to establish that Lowry or Kinsella individually or personally made any misrepresentations.

In order to succeed on a claim for fraud in Utah, a plaintiff must prove the following elements, by clear and convincing evidence:

- (1) [t]hat a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a)

misrepresentation claim has any merit or that J&T Marketing can prevail on this issue at trial.

¹⁰ Again, J&T Marketing's citations to the record here do not seem to align with actual pages in the record supporting its claims. To the extent J&T Marketing's citations refer to portions of its original *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment* that rely on the bankruptcy declaration of Mr. Neubauer, the citations fail to hold any weigh since the trial court struck Mr. Neubauer's deposition in its entirety. [R. 1695.] J&T Marketing has not appealed the trial court's decision on that issue.

knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Prince v. Bear River Mutual Ins. Co., 2002 UT 68, ¶41. 56 P.3d 524. In this case, there are no issues of material fact with respect to several of the above-identified elements. Since J&T Marketing presented no material facts to support each element of its fraudulent misrepresentation allegation, summary judgment was appropriate.

3. Constructive Fraud

The trial court properly concluded that constructive fraud could not be maintained against Lowry or Kinsella as a matter of law. “A confidential relationship is a prerequisite to proving constructive fraud.” *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). “The doctrine of confidential relationships rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other.” *Id.* The only relationship here between the parties arose out of the Agreement between J&T Marketing and FDS. Utah courts have held that the “confidential relationship” required by Utah law to establish constructive fraud does not include business dealings similar to the one here. *See Kuhre v. Goodfellow*, 2003 UT App 85, ¶¶ 19-2069 P.3d 286, 290-91 (no confidential relationship between a buyer and seller of property); *State Bank of S. Utah v. Troy Hygro Sys., Inc.*, 894 P.2d 1270, 1275 (Utah Ct.App.1995) (finding confidential relationship claim failed as a matter of law between bank and customer). Just as FDS was not in a position of confidence and trust superior to that of the J&T Marketing, neither Lowry nor Kinsella could be held liable for

constructive fraud. The trial court properly granted summary judgment on J&T Marketing's constructive fraud claim as a matter of law.

4. Fraudulent Non-Disclosure

The trial court properly granted summary judgment on J&T Marketing's cause of action for fraudulent non-disclosure against Lowry and Kinsella. A party alleging fraudulent non-disclosure must prove at least the following three elements: "(1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate." *Hermansen v. Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235.¹¹ In this matter, J&T Marketing never presented evidence to support a legal basis for a duty to communicate such information. [R. 1294-95.] Without a legal duty to communicate, Lowry and Kinsella could not be held liable for fraudulent non-disclosure as a matter of law.

Since evidence establishing one of the essential elements of fraudulent non-disclosure was absent, J&T Marketing failed to establish a basis for recovering on this claim, and summary judgment was appropriate as a matter of law.

5. Intentional Interference with Business Relations

Finally, the trial court correctly granted summary judgment to Lowry and Kinsella on J&T Marketing's ninth cause of action for intentional interference with business relations. To succeed on a claim for intentional interference with economic relations, "a

¹¹ There must also be proof that the fraud caused damages. *Dilworth v. Lauritzen*, 18 Utah 2d 386, 390, 424 P.2d 136, 138 (Utah 1967) (trial judge justified in finding for defendant on further ground that no competent evidence was given regarding the damages which might have been sustained even if there had been fraud).

plaintiff must demonstrate that ‘(1) . . . the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.’” *Anderson Development Co. v. Tobias*, 2005 UT 36, ¶ 20, 116 P.3d 323. J&T Marketing merely alleges that Lowry and Kinsella intentionally interfered with J&T Marketing’s business leads. A poor attempt to repackage the breach of contract claim and disregard the corporate form, this claim is not supported by evidence. [R. 1293-94.] J&T Marketing has not shown a single instance where Lowry or Kinsella personally and intentionally interfered with one of J&T Marketing’s current or prospective business relationships. Without evidence to support the elements of this claim, J&T Marketing lacks a basis for recovering on this claim, and this court should affirm the trial court’s decision on this matter.

For all of the specific causes of action J&T Marketing alleged against Lowry and Kinsella, the evidence presented to the trial court by J&T Marketing was at best “merely colorable” and “not significantly probative.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). As such its submissions were insufficient to demonstrate genuine issues of material fact. *See id.* at 249-50 Thus, the trial court correctly granted summary judgment because J&T Marketing failed to meet its burden of presenting evidence establishing a reasonable inference that leads to Lowry and Kinsella’s individual liability. Therefore, Defendants Lowry and Kinsella respectfully request that this Court uphold the decision of the trial court and deny J&T Marketing’s Appeal.

CONCLUSION

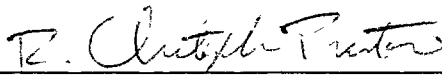
Since this Court does not have jurisdiction to consider non-final orders on appeal,

Lowry and Kinsella respectfully request that J&T Marketing's appeal be immediately dismissed. Should this Court determine that it has jurisdiction, Lowry and Kinsella assert that the evidence presented to the trial court was insufficient to demonstrate a genuine issue of material fact. Accordingly, Appellees were entitled to summary judgment as a matter of law.

Appellees respectfully request that this Court affirm the trial court's order granting summary judgment and deny J&T Marketing's appeal.

Dated this 11th day of February, 2008,

SMITH HARTVIGSEN, PLLC

A handwritten signature in cursive script, appearing to read "R. Christopher Preston", is written over a horizontal line.

Earl Jay Peck

R. Christopher Preston

Attorneys for Jonathan L. Lowry and Nathan Kinsella

CERTIFICATE OF SERVICE

On the 11th day of February, 2008, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were mailed, first-class United States mail, postage prepaid, to each of the following:

Stephen Quesenberry
Jessica Griffin Anderson
HILL, JOHNSON & SCHMUTZ
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604



ADDENDUM

- Tab A Sales and Marketing Agreement
- Tab B *Ruling Granting In Part Defendants Lowry and Kinsella's Motion for Summary Judgment*, entered on February 1, 2006
- Tab C *Order on Defendants Lowry's and Kinsella's Motion for Summary Judgment* entered on March 21, 2006
- Tab D *Docketing Statement* filed on October 26, 2007

Tab A

SALES AND MARKETING AGREEMENT

This Sales and Marketing Agreement is made and is effective this 31 of January 2002, by and between FDS ("Seller") and Jones & Trevor Marketing, Inc. (hereinafter referred to as ("Jones")).

RECITAL

Seller desires to perform certain sales and telemarketing services as on the terms and conditions set forth to herein.

PROVISIONS

NOW, THEREFORE, the parties agree as follows:

1. Scope of the Agreement: Seller agrees as an independent contractor, to sell these products designated for sale by Jones ("Jones' products") to those leads, supplied by Jones ("Jones' leads") as further defined by the terms and conditions hereinafter set forth.

2. Seller's Services:

- A. Seller will market and sell Jones products to Jones leads during the term of this agreement.
- B. Seller will work toward developing marketing strategies (and will inform Jones) for distribution of Jones' products to Jones' leads; provided however, before implementing any marketing strategies the strategies will be approved by Jones in writing.
- C. Seller will get credit card approvals for sales of Jones' products using FDS' merchant account.
- D. Sales paid by check will be made payable to Jones and Trevor Marketing, Inc.
- E. Seller can make available, if needed, a dedicated 800 number so that Jones can include this number in its products.
- F. Seller will use marketing scripts already being used and included as Exhibit A.
- G. Seller will do its best to keep returns below 15% and generate at least \$200 per lead after cancels.
- H. Seller will also be able to sell its own 4 week start-up coaching program for a one-time fee of \$995 plus charge a \$99 ongoing monthly coaching service fee.
- I. Seller will fax or email orders, for Jones' products, daily to Jones.

3. Services by Jones:

- A. Jones shall provide Seller leads, which will include the names, addresses, and phone numbers, to allow Seller to perform its duties hereunder.

B. Seller will submit a report of Seller's previous week's sales and the compensation and reimbursement due Jones as defined in Section 5. Report shall be sent by Seller each Friday for the sales made the two weeks prior. Report will include, but not be limited to:

(i) A breakdown and total, by order, showing the monies due to Jones as defined in Section 5, Compensation and Reimbursement.

(ii) A breakdown of each bad check, customer return and credit card chargeback. These are defined as "Cancels" and the commissions previously retained by Seller for these sales will be deducted on each weekly wire made by the Seller.

C. Jones shall provide Seller leads on each Friday.

D. Seller will process all credit card sales on Seller's merchant accounts.

4. Seller's Representations, Warranties, & Covenants:

A. Seller represents and warrants that it is not a party to any agreement, which would be breached by execution, delivery, and performance of the terms of this Agreement to be performed by the Seller.

B. Seller represents and warrants that it has all rights to any material used and furnished by it in connection with performance of its service hereunder.

C. Seller acknowledges that as a result of its agreement hereunder, it shall be making use of, acquiring or adding to confidential information of a special unique nature and value relating to any Jones' trade secrets, systems, programs, procedures, manuals, confidential reports, and communications and customer lists (including Jones' customer list) ("Confidential Information"). Seller further acknowledges that this information is a valuable, special, and unique asset of Jones and that such information is and shall remain the property of Jones. Additionally, Seller acknowledges that Jones may suffer substantial harm if the Confidential Information or any confidential information is disclosed including, without limitation, the list of Jones' leads. Therefore, Seller covenants and agrees to hold the Confidential Information in confidence and neither to use the Confidential Information for its own benefit or for the benefit of another, nor disclose the Confidential Information, now or in the future, except for the use and disclosure with the prior written consent of Jones or in the performance of Seller's duties for Jones' benefit during the term of and under this Agreement. Additionally, Seller covenants and agrees not to directly or indirectly by phone, mail, fax, email, website, or otherwise solicit Jones' leads except in the performance of its duties for Jones' benefit under and during the term of this Agreement. The covenants set forth in this paragraph shall survive termination of the Seller's engagement under this Agreement indefinitely.

D. Seller covenants and agrees that it shall not, directly or indirectly, as an employee, shareholder, partner, independent contractor or otherwise, for any reason whatsoever, during the term of this Agreement and for a period of three (3) years following termination of this Agreement, for any reason, solicit, recruit, or in any manner attempt to solicit or recruit a person that is an employee of Jones to leave such employment relationship or induce such person to leave such relationship.

E. Seller covenants and agrees that upon termination of this Agreement, it shall return all Jones' materials provide by Jones (or an entity designated by Jones) to be sold by Seller hereunder or to be used by the Seller to assist Seller's selling efforts hereunder including, but not limited to, Jones' products, videos, audio reproductions, or testimonial letters.

F. Seller covenants and agrees that it shall perform its services diligently on behalf of Jones and shall refrain from engaging in any activity which directly or indirectly could be considered misleading, puffing, false, or deceptive.

G. Seller covenants and agrees that it shall either itself or through its attorneys review and comply with the laws of the state in which it markets and sells Jones' products to Jones' leads and the laws of the United States of America including, without limitation, Federal Trade Commission Rules, Federal Trade Commission Deceptive Practices Laws, State Home Solicitation Acts and State Deceptive Trade Practices Act.

5. Compensation and Reimbursement:

A. In consideration of Seller performing its services hereunder, Jones agrees to pay and reimburse seller:

(i) A commission equal to 60% of all gross sales made by Seller not including shipping charges by Jones. Out of that 60%, Seller will place 10% of all gross sales into a reserve fund for any Cancels that may occur. Any Cancels, defined as all returns, bad checks, and credit card chargebacks, will be paid from that reserve fund and reported in a weekly reconciliation report. At the end of six months, a financial reconciliation of that reserve will be completed and provided to Jones.

(ii) Commissions are to be sent via bank wire each Friday for the previous week.

6. Holdback:

A. Seller will hold back 2.5% (two and one half percent) of the sales due to Jones each week until Seller has on reserve of Jones \$100,000. These funds will be used as a reserve against bad checks, credit card returns and chargebacks for sales that were made prior to the termination of this agreement. Jones' sales portion of all bad checks, credit card returns and chargebacks that occur after the termination of this agreement will be deducted from this reserve.

B. Since the credit card chargebacks process may occur up to 6 months after the date of the sale and take another 6 months in the paperwork process (total of 12 months) the remaining reserve will be returned as follows:

(i) \$10,000 per month beginning 3 months after the termination of this agreement.

7. Independent Contractor:

A. The parties acknowledge that the relationship established by this agreement is one of independent contractor/contractor and not employee/employer. The parties are responsible for paying their own respective employees, any taxes resulting from sales made or commissions paid or earned pursuant to this Agreement, withholding takes,

unemployment taxes, state, federal and local taxes and the like. Neither party may hold itself out as a representative of the other party except as specifically set forth in this Agreement.

8. Indemnification:

A. Seller agrees to defend, hold harmless and indemnify Jones from any and all liabilities, expenses, actions, suits, proceedings, damages or judgments including, but not limited to, reasonable attorneys' fees, arising from any act or commission of seller in the performance of services hereunder or selling Jones' products or as a result of a breach of any term, condition, representation, warranty, or covenant contained in this Agreement by Seller.

B. Jones' shall defend, hold harmless indemnify Seller from any and all liabilities, expenses, actions, suits, claims' proceedings, damages or judgments including, but not limited to, reasonable attorneys' fees, arising from any act or commission of seller in the performance of services hereunder or selling Jones' products or as a result of a breach of any term, condition, representation, warranty or covenant contained in this Agreement by Jones.

9. Term:

A. The term of this Agreement shall be for twelve (12) months. This Agreement shall automatically renew for twelve (12) months if its termination is not confirmed in writing anytime prior to the end of the current term. This Agreement may be terminated prior to the end of the term as follows:

- (i) Seller may terminate this Agreement upon breach by Jones of any term or condition to be performed by Jones in this Agreement which is not cured by Jones within ten (10) days of the written notice from Seller.
- (ii) Jones may terminate this Agreement at anytime upon 45 days notice to Seller. Upon Termination any funds held back by Seller under Paragraph 6A will be returned to seller in a manner consistent with 6B(I).

10. Obligations on Termination:

A. Upon termination of this Agreement, Seller shall immediately cease:

- (i) Any contact with Jones' leads;
- (ii) Selling Jones' products;
- (iii) In any way representing to any party that it is a seller of Jones products; and
- (iv) The use of Jones' trademarks service marks or other Confidential Information.

B. Upon termination of this Agreement, Seller shall provide Jones a final accounting of compensation and reimbursement due Jones and forward funds within 10 business days by bank wire transfer.

C. Upon termination of this Agreement, Seller shall return to Jones all Jones' Confidential Information, including Jones' customer leads or lists, and all Jones' products, within forty eight (48) hours of termination by overnight delivery service.

11. Miscellaneous:

A. This Agreement:

- (i) Shall constitute the entire agreement between the parties hereto and supersedes all prior agreements, written or oral, concerning the subject matter herein and there are no oral understandings, statements or stipulations bearing upon the effect of this Agreement which have not been incorporated herein.
- (ii) May be modified or amended only by a written instrument signed by each of the parties hereto.
- (iii) Shall bind and insure to the benefit of the parties hereto and their respective heirs, Successors and assigns.

B. All notices hereunder shall be in writing and shall be deemed to have been delivered on the day of mailing if sent by registered or certified mail, postage prepaid and return receipt requested to the addresses set forth at the beginning of this Agreement or such other address known by party sending notice hereunder.

C. Any litigation involving this Agreement shall be adjudicated in a court with jurisdiction located in Utah County, Orem, Utah and the parties irrevocably consent to the personal jurisdiction and venue of such court.

D. If any provision of this Agreement shall be held invalid or unenforceable by competent authority, such provision shall be constructed so as to be limited or reduced to be enforceable to the maximum extent compatible with the law as it shall then appear. The total invalidity or enforceability of any particular provision of this Agreement shall not affect the other provisions hereof and this Agreement shall be consumed in all respects as if such invalid or unenforceable provision were omitted.

E. In the event of litigation to enforce the terms and conditions of this Agreement, the losing party agrees to pay the prevailing party's cost and expenses incurred including, without limitation, reasonable attorneys' fees.

IN WITNESS WHEREOF, the parties have executed this Agreement on the first date above written.

Jones & Trevor Marketing, Inc.

By: Trevor Jones

Its: Sec-Treas

Date: 2/4/02

FDS

By: [Signature]

Its: President

Date: Feb 4, 02

Tab B

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4TH DISTRICT COURT
AMERICAN FORK DEPT
STATE OF UTAH
CLERK

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

<p>JONES & TREVOR MARKETING, INC.</p> <p>Plaintiff,</p> <p>v.</p> <p>FINANCIAL DEVELOPMENT SERVICES, INC., JEREMY WARBURTON, JOHN NEUBAUER, JONATHAN L. LOWRY, NATHAN KINSELLA and ESBEX, LLC,</p> <p>Defendants.</p>	<p>RULING GRANTING IN PART DEFENDANTS LOWRY'S AND KINSELLA'S MOTION FOR SUMMARY JUDGMENT</p> <p>Case No. 050100038</p> <p>Judge Derek P. Pullan</p>
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This matter came before the Court on Defendants' Jonathan L. Lowry's and Nathan Kinsella's ("Defendants") Motion for Summary Judgment, filed on May 21, 2005. Plaintiff Jones & Trevor Marketing ("Plaintiff" or "J & T Marketing") filed a Memorandum in Opposition on June 24, 2005. On July 21, 2005, Defendants' filed their Memorandum in Reply in conjunction with a motion to strike the bankruptcy deposition of John Neubauer. Plaintiff opposed the motion to strike on August 1, 2005. The Court heard oral argument on both motions on September 22, 2005. The Plaintiff was represented by Mr. Stephen Quesenberry, the Defendants were represented by Mr. Benjamin T. Wilson.

At the hearing, the Court granted Defendants' motion to strike, but allowed J&T Marketing the opportunity to depose Mr. Neubauer again, this time in the presence of Defendants' counsel. On

November 22, 2005, subsequent to the taking of Mr. Neubauer's deposition, Plaintiff filed a Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment. On December 12, 2005, Defendants filed a Supplemental Memorandum in Support of their motion for summary judgment. Both parties filed notices to submit for decision, and neither request asked the Court to hear oral argument again on the matter.

UNDISPUTED FACTS

After careful review of the pleadings, the Court finds the following facts are not in dispute:

- 1 Plaintiff J&T Marketing is a Nevada corporation that sells training courses developed by its owner and principal, Ted Thomas. These courses offer information to those who purchase them about how to buy tax lien certificates and engage in other similar activities to make money (Amd. Cpl. ¶¶ 1, 10).
- 2 Defendant FDS was a Utah corporation from June 22, 1998 until November 3, 2004 when it was dissolved (Amd. Cpl. ¶ 2, Dept. of Commerce Record). During its existence, FDS was engaged in sales and telemarketing activities (Amd. Cpl. ¶ 11, Lowry Aff. ¶ 2).
3. In late 2001 or early 2002, an employee of FDS, Steve Bullpit, contacted Ted Thomas (President of J&T Marketing) on behalf of FDS to explore the potential for a business relationship (Thomas Depo. p. 20-22).
- 4 On January 31, 2002, J&T Marketing entered into a "Sales and Marketing Agreement" with FDS whereby J&T Marketing supplied FDS with the names, addresses and phone numbers of sales leads and FDS marketed and sold Ted Thomas courses through telemarketing and other sales efforts (Amd. Cpl. ¶ 12, 28, Sales and Marketing Agreement, Lowry Aff. ¶ 12).

5. The Contract provided, among other things that FDS could enroll purchasers of Ted Thomas courses in a program to provide coaching services for \$99 per month. (Amd. Cpl. ¶ 13; Sales and Marketing Agreement).
6. The Agreement allowed FDS to sell its coaching program and charge monthly on-going service fees. (Thomas Aff. ¶ 2H). The Agreement also required Jones to pay FDS a “commission equal to 60% of all gross sales made by Seller.” (Id at ¶ 5(a)(i)).
6. Defendant Esbex.com was created in September 2000 by Defendants Lowry and Kinsella as a product fulfillment company to fulfill product and service orders received through the sales and telemarketing efforts of FDS and other telemarketing companies (Kinsella I Depo. 11:19-25; Neubauer Depo. p. 43)
7. Esbex.com was a DBA of FDS until June 2002, when it became Esbex.com , Inc., a Utah corporation. (Amd. Cpl. ¶ 7; Dept. of Chamber of Commerce Record). Esbex.com provided coaching/mentoring services to purchasers of the Ted Thomas courses. (Amd. Cpl. ¶¶ 11, 14). Esbex.com was dissolved on November 29, 2004. (Dept. Of Commerce Record).
8. Defendant John Neubauer is a former employee and the Chief Financial Officer and Chief Operating Officer of FDS. From the time Mr. Neubauer took over responsibility for the finances of FDS in February 2002 until he left a year later, FDS struggled and found it difficult to make payroll for its approximately 40 employees. (Neubauer Depo. p. 16-17, 40-41; Lowry Depo. 9:19-21).
9. Neubauer was FDS’s principal agent in dealing with J&T Marketing. All communications with J&T Marketing came through Neubauer. He was FDS’s point person and ran the business on a

day-to-day basis. (Neubauer 16:19-21; Lukas Depo p.17). Neubauer left FDS in early 2003. (Kinsella I Depo. 18:1-2; Lowry Depo. 29:11-13).

10. Defendant Jeremy Warburton was a former employee of FDS and manager of FDS's telemarketing department. In that position, Mr. Warburton helped coordinate FDS's sales and marketing efforts. (Amd. Cpl. ¶¶ 3, 17; Lowry Aff. ¶ 7).
11. Defendants Lowry and Kinsella were the only two shareholders, officers, and directors of FDS and Esbex.com, until those companies dissolved in 2004. (Amd. Cpl. ¶¶ 5-6; Kinsella I Depo. 8:10-15, 11:19-25; Lowry Depo. pp. 17-18).
12. Esbex.com provided product fulfillment services for not only FDS, but also for other companies. (Delia Kinsella Depo. II 9:11, 15-20).
13. FDS experienced trouble using its Visa and MasterCard merchant accounts to clear money on purchases. Because the credit card purchases were expensive and transacted over the phone, they resulted in a large number of refunds and charge backs and, occasionally, frozen merchant accounts. (Neubauer Depo. 18: 10-22).
14. FDS's problems with its merchant accounts culminated when a major merchant account containing credit card charges for Plaintiff's Ted Thomas courses was frozen. (Neubauer 35:11-25, 39:22-25, 40:1-24; Lowry Aff. ¶ 13).
15. Plaintiff J&T Marketing delayed or halted some shipments of its Ted Thomas courses for a number of reasons, including: J&T Marketing would delay shipment of the product if payment was delayed (Lukas Depo. 26:25-27:1. 63:10-22), J&T Marketing employed temporary shipping clerks to assist with product shipment, which resulted in staff turnover and ongoing training and

supervision issues. (Lukas Depo. pp. 65-73; Neubauer Depo. p. 34)

16. J&T Marketing also ceased shipping its Ted Thomas courses due to the dispute over payment. (Lowry Aff. ¶ 13). Failure to receive the courses they had purchased with their credit cards resulted in dissatisfied customers, and charge backs on FDS's credit card merchant accounts. (Neubauer 25:10-18, pp. 33-34, 93:11-17; Lowry Depo. p. 39-40).
17. J&T Marketing withheld delivery on orders because FDS had not timely paid J&T Marketing. FDS withheld payment to J&T Marketing because a percentage of its sales would not go through resulting in charge backs. (Lowry Depo. 49:6-23; Thomas 263: 13-17).
18. On or about July 19, 2002, FDS communicated to J&T Marketing that FDS believed that J&T Marketing was in breach of the Sales and Marketing Agreement. (Lowry Aff. ¶ 14). Lowry, FDS's President, sent J&T Marketing the letter canceling the Agreement.
19. On or about August 29, 2002, J&T Marketing filed suit against FDS and several of its officers and employees (Amd. Cpl.) and on or about November 15, 2002 FDS filed a counterclaim. (Answer, Counterclaim and Jury Demand 11/15/2002).
20. J&T Marketing's Amended Complaint, dated June 17, 2004, alleges the following causes of action:
 - a. Breach of Contract against FDS for selling courses after the contract had been terminated.
 - b. Theft by Conversion against Lowry, Kinsella, Neubauer and FDS by willfully interfering with J&T Marketing's chattel.
 - c. Fraudulent Misrepresentation against Lowry, Kinsella, Neubauer and FDS related to FDS's performance of the contract.

- d. Breach of Duty of Good Faith and Fair Dealing against FDS
 - e. Accounting against FDS.
 - f. Injunctive Relief against Lowry, Kinsella, Warburton, FDS and Esbex.com to enjoin them from future sales and marketing of the Ted Thomas courses.
 - g. Constructive Fraud against Lowry, Kinsella, Warburton and FDS because they “shared a confidential relationship based on their business activities” and “failed to disclose material facts to J&T Marketing.”
 - h. Fraudulent Non-Disclosure against Lowry, Kinsella and FDS related to Defendants’ activities vis-a-vis Plaintiff’s customers and clients.
 - i. Intentional Interference with Business Relations against Lowry, Kinsella and FDS for interfering with Plaintiff’s existing and potential economic relations with clients and sales leads.
- 21. On or about November 3, 2004, FDS and Esbex.com determined that they were insolvent and dissolved. (Lowry Aff. ¶ 18).
 - 22. FDS and Esbex.com considered the coaching services to not be included under the Sales and Marketing Agreement.
 - 23. FDS received refunded Ted Thomas products, and turned around and shipped them out to its customers. (Bankruptcy Depo 62:14-22; Oct. 18 Depo. 16:4-8).
 - 24. The owners, Lowry and Kinsella took money out of the business. (Neubauer Bankruptcy Depo. 92:3-13).
 - 25. Lowry and Kinsella determined the allocation of monies of FDS and Esbex. (Bank. Depo. 93:13-

14, 94:9-12.

CONCLUSIONS OF LAW

Defendants move for summary judgment on J&T Marketing's second cause of action for conversion, third cause of action for fraudulent misrepresentation, seventh cause of action for fraud, eighth cause of action for fraudulent non-disclosure, and ninth cause of action for intentional interference with business relations.

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The court is to view all the facts and all reasonable inferences that can be drawn therefrom in the light most favorable to the non-moving party. Bowen v. Riverton City, 656 P.2d 434, 426 (Utah 1982). In opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving elements of his or her cause of action. "When a party fails to make a sufficient showing of an element essential to the party's case...there can be no genuine issue of material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex Corp v. Catrett, 477 U.S. 317, 321 (1986).

The Alter Ego Doctrine and Piercing the Corporate Veil

A corporation is a legal entity separate and apart from its shareholders. Dockstader v. Walker, 510 P.2d 526, 528 (Utah 1973); see also, Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 26 (Utah 1990). The limited liability afforded to shareholders permit them to make capital contributions to business enterprises without placing personal assets at risk. David H. Barber, Piercing the Corporate Veil, 17 Willamette L. Rev. 371, 371-373 (1981); accord Salt Lake City Corp. v. James

Constructors, 761 P.2d 42, 46 n.9 (Utah Ct. App. 1988).

The alter ego doctrine is an exception to this rule. Shareholders can be personally liable if there is “such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals.” Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987). Additionally, the court must find that observing the corporate form under such circumstances would “sanction a fraud, promote injustice, or result in an inequity.” Id.

Courts will “only reluctantly and cautiously pierce the corporate veil.” Schafir v. Harrigan, 879 P.2d 1384, 1389 (Utah Ct. App. 1994) (quoting Salt Lake City Corp. v. James Constr., Inc., 761 P.2d 42, 26 (Utah Ct. App. 1988)). “A key feature of the alter ego theory is that it is an equitable doctrine requiring that each case be determined upon its peculiar facts.” Salt Lake City Corp., 761 P.2d 42, 26 (Utah Ct. App. 1988); (quoting National Bond Fin. Co. v. General Motors Corp., 341 F.2d 1022, 1023 (8th Cir. 1965)). The Court should examine the following factors to determine whether there is such unity of interest that the corporate veil should be pierced:

(1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987). Many of Plaintiff’s causes of action against Defendants rest on the alter ego doctrine.

Defendants argue that there is no evidence in the record that would allow Plaintiff to pierce the

corporate veil. Defendants were at all times acting in their corporate capacities and not personally. Defendants also argue that many of Plaintiff's causes of action are really summed up in the breach of contract claim, which would not implicate the Defendants personally. Limited liability to encourage investment is the purpose of a corporation, and as noted, the corporate veil should be reluctantly pierced.

Plaintiff contends that there are material issues of fact in dispute as to whether FDS and Esbex.com were merely the alter egos of Defendants. Plaintiff cites to the Neubauer depositions to demonstrate that Kinsella and Lowry failed to observe corporate formalities, siphoned corporate funds for personal use, and used the corporate entity to promote an injustice or fraud. Neubauer's bankruptcy deposition has been stricken in its entirety, and is only reliable inasmuch as it is corroborated by the October 18, 2005 deposition.

Plaintiff's citation to the Neubauer depositions does not create an issue as to a material fact as to whether FDS and Esbex.com were the alter egos of Defendants. Plaintiff points to Neubauer's statements regarding the decision to continue selling coaching, and to keep the money derived from these sales. Neubauer testified that he understood proceeds from the coaching services to not be covered under the Sales and Marketing Agreement, so that these funds were not supposed to be remitted to J&T Marketing, whether it was before or after the cancellation of the Agreement (the timing of which is unclear from the deposition). Plaintiff's claim is properly characterized as breach of contract based on its interpretation of the contract, and does not implicate the Defendants personally.

Plaintiff cites to Neubauer's testimony that "FDS received refunded Ted Thomas products, and turned around and shipped them out to its customers." While Neubauer testified that he would consult with one of the Defendants before sending out these products, the statement is that FDS performed these

activities. There is no indication that the Defendants were acting outside the scope of their positions within the corporations.

While Neubauer states that Kinsella and Lowry took money from the businesses, he does not state that it was done improperly. In fact, Neubauer states that he doesn't remember how the money was taken out by Kinsella and Lowry, whether by official paycheck or otherwise. (Neubauer Oct. Depo. 40:3-14). He also testified that he did not have information with regards to whether the Defendants acted fraudulently with respect to J&T Marketing, and that he thought FDS and Esbex.com were legitimate companies. (Neubauer Oct Depo. 42:4-15). Significantly, Plaintiff acknowledges that it was Neubauer who ran the day-to-day operations of the businesses and handled communication with J&T Marketing.

Without evidence to show that the Defendants acted in their personal capacity or took funds improperly, Plaintiff cannot sustain its allegation of alter ego.

Conversion

Theft by conversion requires the "willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." State v. Twitchell, 832 P.2d 866, 870 (Utah Ct. App. 1992).

The Defendants argue that there is no evidence in the record that they converted the property of J&T Marketing to their own use. FDS allegedly failed to remit 40% of sales to J&T Marketing, but even accepting this fact as true, it does not show the Defendants converted J&T Marketing property to Defendants' personal use. Failure to remit is a claim for breach of contract, not conversion.

Plaintiff contends that FDS and Esbex.com were merely the alter egos of Defendants. Plaintiff contends that Kinsella and Lowry failed to observe corporate formalities, siphoned corporate funds for

personal use, and used the corporate entity to promote an injustice or fraud. The Court has already decided that the alter ego doctrine does not apply to the acts of Defendants, and the corporate veil should not be pierced. The Court grants Defendants motion for summary judgment as to the conversion claim.

Fraudulent Misrepresentation

In order to prove fraud, the Plaintiff must show (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor knew to be false or made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it, (8) and was thereby induced to act, (9) to his injury and damage. Prince v. Bear River Mutual Ins. Co., 56 P.3d 524, 536 (Utah 2002).

The Defendant argues that contractual promises are not statements of presently existing material facts, unless a party makes those promises without any intent to perform.

The Plaintiff argues that the Defendants made fraudulent statements by inducing J&T Marketing to enter into the contract with FDS without any intention to fully perform. Plaintiff contends that Defendants misrepresented sales and refunds in weekly reconciliation reports and used Ted Thomas' name after the Agreement had been canceled.

There is no evidence at the time of the contract the Defendants had a present intent not to perform. Whether the Sales and Marketing Agreement entitled J&T Marketing to a percentage of the sales from the coaching services is a question of contract interpretation. The Court has already found that Plaintiff cannot pierce the corporate veil. Any misrepresentations as to weekly reconciliation reports or regarding the volume and type of sales made, do not implicate the Defendants personally. There is

also no evidence that either Defendant made statements of presently existing material facts that were false.

One exception is Lowry's written statement that on termination of the contract "FDS would cease selling Thomas's product and cease using Thomas's name and leads." There is evidence in the record that FDS disregarded this representation completely. Drawing all reasonable inferences in favor of the Plaintiff, the Court denies Defendant Lowry's motion for summary judgment as to this claim against Lowry.

Constructive Fraud

Constructive fraud requires Plaintiff to establish by clear and convincing evidence that Plaintiff reposed trust in the Defendants based on an existing fiduciary relationship. Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985).

Defendants argue that no fiduciary relationship existed between the parties. Plaintiff contends that FDS had confidential customer lists and that this is the basis for finding a confidential relationship.

As a matter of law, there was no confidential relationship between J&T Marketing and FDS which extended to its officers and directors. Both businesses negotiated a commercial contract at arms length. That contractual relationship did not grant to FDS the exclusive control over J&T Marketing's interests that would give rise to a confidential relationship. See, Kuhre v. Goodfellow, 69 P.3d 286, 291 (Utah 2003). Nothing in the record demonstrates that the Defendants as officers and directors were responsible for failures to disclose.

Fraudulent Non-disclosure

A party alleging fraudulent non-disclosure must prove the following three elements, (1) the

nondisclosed information was material, (2) the nondisclosed information is know to the party failing to disclose, and (3) there is a legal duty to communicate. Hermansen v. Tasulis, 48 P.3d 235, 241-242 (Utah 2002).

The Plaintiff cites no case law supporting its argument that the Defendants had a legal duty to speak. Absent a relationship that would give rise to this duty, Defendants did not have a duty to communicate to Plaintiff. Moreover, there is nothing in the record to demonstrate that the Defendants should be personally liable under this cause of action.

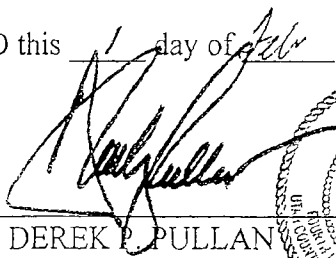
Intentional Interference with Contractual Relations

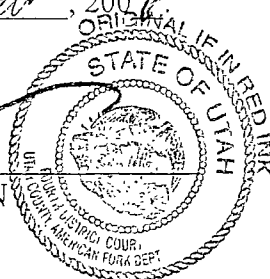
Defendant argues that this is merely a restatement of J&T Marketing's claims for breach of contract and fraud. There is no evidence that Defendants interfered with one of Plaintiff's current or prospective business relationships.

Plaintiff argues that it was FDS that interfered with J&T Marketing's business relationships, but that the corporate veil should be pierced.

Without piercing the corporate veil, this cause of action cannot implicate the Defendants personally.

DATED this 1 day of Feb, 2006


JUDGE DEREK P. PULLAN



Tab C

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4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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Jonathan L. Lowry and Nathan Kinsella

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

JONES & TREVOR MARKETING, INC.,
Plaintiff,

vs.

FINANCIAL DEVELOPMENT SERVICES,
INC., JEREMY Warburton, JOHN
NEUBAUER, JONATHAN L. LOWRY,
NATHAN KINSELLA and ESBEX.COM,
Defendants.

**ORDER ON DEFENDANTS
LOWRY'S AND KINSELLA'S
MOTION FOR SUMMARY
JUDGMENT**

Case No. 050100038
Division 9 – American Fork

Judge: Derek P. Pullan

Defendants Jonathan L. Lowry and Nathan Kinsella (“Defendants”) submitted a Motion for Summary Judgment on May 20, 2005. Oral arguments were heard by the above-entitled Court on September 22, 2005, before the Honorable Derek P. Pullan, Fourth District Court Judge. Defendants appeared and were represented by their attorney, Benjamin T. Wilson; Plaintiff Jones & Trevor Marketing, Inc., appeared and was represented by its attorney, Stephen Quesenberry. On October 19, 2005, this Court issued its Order RE: Defendants Motion for Summary Judgment, permitting Plaintiff to take the deposition of John Neubauer and submit an amended memorandum in opposition to Defendants’ summary judgment motion. The deposition of John Neubauer was held on October 18, 2005, and supplemental memoranda were submitted

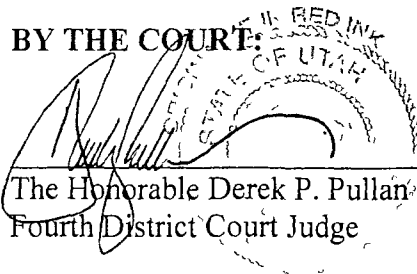
by both parties. This Court having heard the arguments of counsel, having reviewed all the memoranda of each party, being duly advised in the premises, with good cause appearing, issued a Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment filed on February 1, 2006 ("Ruling"), the entirety of which is hereby incorporated by reference. Based upon the Undisputed Facts and the Conclusions of Law contained in the Ruling,

IT IS HEREBY ORDERED:

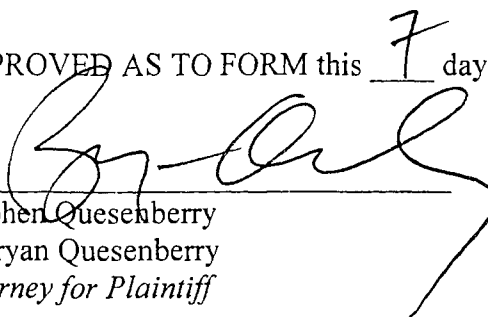
1. Defendants' motion for summary judgment dismissing Plaintiff's Second Cause of Action (Theft by Conversion) against Defendants Lowry and Kinsella is granted.
2. Defendants' motion for summary judgment dismissing Plaintiff's Third Cause of Action (Fraudulent Misrepresentation) against Defendant Kinsella is granted. Defendants' motion for summary judgment dismissing Plaintiff's Third Cause of Action (Fraudulent Misrepresentation) against Defendant Lowry is granted except as to Plaintiff's claim of fraudulent misrepresentation based on Defendant Lowry's alleged written statement that on termination of the contract "FDS would cease selling Thomas's product and cease using Thomas's name and leads."
3. Defendants' motion for summary judgment dismissing Plaintiff's Seventh Cause of Action (Constructive Fraud) against Defendants Lowry and Kinsella is granted.
4. Defendants' motion for summary judgment dismissing Plaintiff's Eighth Cause of Action (Fraudulent Non-Disclosure) against Defendants Lowry and Kinsella is granted.
5. Defendants' motion for summary judgment dismissing Plaintiff's Ninth Cause of Action (Intentional Interference with Business Relations) is granted.

DATED this 21 day of March, 2006.

BY THE COURT:


The Honorable Derek P. Pullan
Fourth District Court Judge

APPROVED AS TO FORM this 7 day of March, 2006.

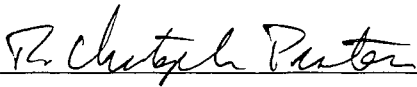

Stephen Quesenberry
J. Bryan Quesenberry
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2006. I served upon the following a true and correct copy of the foregoing **(proposed) ORDER ON DEFENDANTS LOWRY'S AND KINSELLA'S MOTION FOR SUMMARY JUDGMENT** by causing the same to be delivered by U S Mail, postage pre-paid, to the following

Stephen Quesenberry
J Bryan Quesenberry
Jamestown Square
3319 North University Avenue
Provo, Utah 84604

Attorneys for Plaintiff



Tab D

ORIGINAL

FILED
UTAH APPELLATE COURTS
OCT 26 2007

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IN THE UTAH COURT OF APPEALS

<p>JONES & TREVOR MARKETING, INC.,</p> <p>Plaintiff/Appellant,</p> <p>vs.</p> <p>FINANCIAL DEVELOPMENT SERVICES, INC., JEREMY WARBURTON, JOHN NEUBAUER, JONATHAN L. LOWRY, NATHAN KINSELLA, and ESBEX.COM INC.,</p> <p>Defendants/Appellees.</p>	<p>DOCKETING STATEMENT</p> <p>Case No. 20070842</p> <p>District Court Case No. 050100038</p>
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1. NATURE OF THE PROCEEDING

This appeal is from a final judgment of the Fourth District Court of Utah.

2. JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals pursuant to Utah Code Ann. section 78-2a-3(2)(j) (2007).

3. DATE OF ENTRY OF JUDGMENT OR ORDER APPEALED FROM

This appeal is from a final order and judgment of the Fourth District Court dated September 14, 2007. A copy of this order and judgment is attached hereto as **Exhibit A**. Plaintiff specifically appeals the order entered by the trial court on March 21, 2006 partially granting Defendants Jonathan L. Lowry and Nathan Kinsella's motion for summary judgment. A copy of this order is attached hereto as **Exhibit B**.

4. DATE OF FILING OF NOTICE OF APPEAL

The Notice of Appeal was filed on October 9, 2007. A copy of the Notice is attached hereto as **Exhibit C**.

5. DATE ANY POST-JUDGMENT MOTIONS WERE FILED & THE DATE AND EFFECT OF ANY ORDERS DISPOSING OF SUCH MOTIONS

There have been no post-judgment motions filed in this case. There have been no orders disposing of post-judgment motions in this case.

6. ISSUE ON APPEAL

Did the trial court err in partially granting Appellees Jonathan Lowry and Nathan Kinsella's motion for summary judgment?

Standard of review: De novo. "Because, by definition, a district court does not resolve issues of fact at summary judgment, we consider the record as a whole and review the district court's grant of summary judgment de novo, reciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party." *Poteet v. White*, 2006 UT 63, ¶7, 147 P.3d 439.

7. STATEMENT OF FACTS

1. On or about June 17, 2004, Appellant filed an Amended Complaint, alleging theft by conversion, fraudulent misrepresentation, constructive fraud, fraudulent nondisclosure, and intentional interference with business relations against, among other entities and individuals, Jonathan L. Lowry ("Lowry") and Nathan Kinsella ("Kinsella") personally.

2 Lowry and Kinsella were principals of Financial Development Services, Inc. ("FDS") and Esbex.com, Inc. ("Esbex").

3. On or about May 20, 2005, Lowry and Kinsella filed a motion for summary judgment on the ground that they bore no personal liability and were protected by the corporate shield as principals of FDS and Esbex.

4. On or about June 23, 2005, Appellant filed an opposition to the motion for summary judgment asserting, among other things, that issues of fact existed as to whether FDS and/or Esbex were the alter egos of Lowry and Kinsella. The opposition also pointed out other issues of fact, such as whether there was a confidential relationship between the parties.

5. Eventually, the District Court found, as a matter of law, that FDS and Esbex were not alter egos of Jonathan L. Lowry and Nathan Kinsella and refused to pierce the corporate veil

6. The District Court then concluded that none of Appellant's claims could be sustained

against Lowry and Kinsella personally and granted Lowry and Kinsella's motion for summary judgment.¹

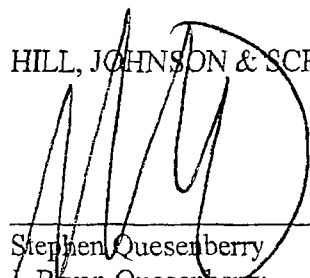
7. Appellant obtained a default judgment against Financial Development Services, Inc. and Esbex.com, Inc. on September 14, 2007.

8. RELATED APPEALS

There are no related appeals.

DATED this 22 day of October 2007.

HILL, JOHNSON & SCHMUTZ, L.C.



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Attorneys for Plaintiff/Appellant

¹ The Court granted summary judgment to Lowry and Kinsella as to every claim against Lowry and Kinsella personally, with the exception of the fraudulent misrepresentation claim against Lowry.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24 day of October 2007 she caused a true and correct copy of the foregoing to be delivered to the following:

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Sent Via:

☐ Hand -Delivery
☐ Facsimile
☒ Mailed (postage prepaid)

