

2008

Jones and Trevor Marketing, Inc. v. Financial  
Development Services Inc., Jeremy warburton,  
John Neubauer, Jonathan L. Lowry, Nathan  
Kinsella, and Esbex.com, Inc. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen Quesenberry: Jessica Griffin Anderson; Hill Johnson & Schmutz; Attorneys for Plaintiff/Appellant.

Earl Jay Peck; R. Christopher Preston; Smith Hartvigsen, PLLC; Attorneys for Defendants/Appellees.

---

#### Recommended Citation

Brief of Appellant, *Jones and Trevor Marketing, Inc. v. Financial Development Services*, No. 20080904 (Utah Court of Appeals, 2008).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/1247](https://digitalcommons.law.byu.edu/byu_ca3/1247)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

JONES & TREVOR MARKETING,  
INC.,

Plaintiff/Appellant,

v.

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

Defendants/Appellees,

**BRIEF OF APPELLEES**

Utah Court of Appeals Case No.  
20080904CA

---

Appeal from the Fourth Judicial District Court, Utah County, State of Utah  
The Honorable David N. Mortensen

---

Stephen Quesenberry (No. 8073)  
Jessica Griffin Anderson (No. 11500)  
**HILL, JOHNSON & SCHMUTZ**  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, Utah 84604  
*Attorneys for Plaintiff/Appellant*

Earl Jay Peck (No. 2562)  
R. Christopher Preston (No. 9195)  
**SMITH HARTVIGSEN, PLLC**  
215 South State Street, Suite 650  
Salt Lake City, Utah 84111  
*Attorneys for Defendants/Appellees*

---

IN THE UTAH COURT OF APPEALS

---

JONES & TREVOR MARKETING,  
INC.,

Plaintiff/Appellant,

v.

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

Defendants/Appellees,

**BRIEF OF APPELLEES**

Utah Court of Appeals Case No.  
20080904CA

---

Appeal from the Fourth Judicial District Court, Utah County, State of Utah  
The Honorable David N. Mortensen

---

Stephen Quesenberry (No. 8073)  
Jessica Griffin Anderson (No. 11500)  
**HILL, JOHNSON & SCHMUTZ**  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, Utah 84604  
*Attorneys for Plaintiff/Appellant*

Earl Jay Peck (No. 2562)  
R. Christopher Preston (No. 9195)  
**SMITH HARTVIGSEN, PLLC**  
215 South State Street, Suite 650  
Salt Lake City, Utah 84111  
*Attorneys for Defendants/Appellees*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES / STANDARD OF REVIEW .....	1
STATEMENT OF THE CASE .....	2
I.    NATURE OF THE CASE .....	2
II.   PROCEEDINGS BELOW .....	3
III.  STATEMENT OF UNDISPUTED FACTS .....	6
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	11
I.    UNDER THE APPLICABLE STANDARD OF REVIEW, THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LOWRY AND KINSELLA ON J&T MARKETING'S CLAIMS BECAUSE NO GENUINE ISSUES OF MATERIAL FACT WERE ESTABLISHED .....	11
II.   THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON J&T MARKETING'S ALTER EGO CLAIMS .....	13
A.  J&T Marketing Did Not Provide Sufficient Evidence to Support the Unity of Interest Prong of the Alter Ego Theory. ....	15
B.  The Trial Court Did Not Provide Evidence to Support the Fraud, Injustice, or Inequitable Result Prong of the Alter Ego Theory. ....	17
III.  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. ....	20
A.  The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Theft by Conversion Against Lowry and Kinsella. ....	21

B. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Constructive Fraud Against Lowry and Kinsella.....	25
C. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Fraudulent Non-Disclosure Against Lowry and Kinsella.....	27
D. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Intentional Interference with Business Relations Against Lowry and Kinsella.....	29
E. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Fraudulent Misrepresentation Against Lowry and Kinsella..	31
IV. THE ECONOMIC LOSS RULE ALSO PRECLUDES J&T MARKETING FROM RECOVERING ON ITS CLAIMS.....	35
CONCLUSION .....	38
CERTIFICATE OF SERVICE.....	40
ADDENDUM.....	41
Tab A Sales and Marketing Agreement	
Tab B <i>Ruling Granting In Part Defendants Lowry and Kinsella's Motion for Summary Judgment</i> , entered on February 1, 2006	
Tab C <i>Order on Defendants Lowry's and Kinsella's Motion for Summary Judgment</i> entered on March 21, 2006	
Tab D <i>Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment</i> , entered October 8, 2008	

## TABLE OF AUTHORITIES

### Cases

<i>Abdulkadir v. Western Pac. R.R. Co.</i> , 318 P.2d 339 (Utah 1957) .....	20
<i>American Towers Owners Ass'n v. CCI Mechanical, Inc.</i> , 930 P.2d 1182 (Utah 1996) .....	
.....	36, 37
<i>Anderson Development Co. v. Tobias</i> , 2005 UT 36, 116 P.3d 323 .....	13, 29, 30, 31
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	13, 34
<i>Armed Forces Ins. Exch. v. Harrison</i> , 2003 UT 14, 70 P.3d 35 .....	20, 21
<i>Bennett v. Huish</i> , 2007 UT App 19, 155 P.3d 917 .....	22, 24
<i>Burns v. Cannondale Bicycle Co.</i> , 876 P.2d 415 (Utah Ct. App. 1994) .....	13
<i>Busche v. Salt Lake County</i> , 2001 UT App 111, 26 P.3d 862 .....	35
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	13
<i>Colman v. Colman</i> , 743 P.2d 782, 786 (Utah Ct. App. 1987) .....	15, 19
<i>d'Elia v. Rice Dev., Inc.</i> , 2006 UT App 416, 147 P.3d 515 .....	21, 25
<i>Dilworth v. Lauritzen</i> , 18 Utah 2d 386, 424 P.2d 136 (Utah 1967) .....	28
<i>Dockstader v. Walker</i> , 510 P.2d 526 (Utah 1973) .....	14
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097 (Utah 1995) .....	12
<i>Fennell v. Green</i> , 2003 UT App 291, 77 P.3d 339 .....	36
<i>First Security Bank of Utah, N.A. v. Banberry Dev. Corp.</i> , 786 P.2d 1326 (Utah 1989) ..	25
<i>Franco v. Church of Jesus Christ of Latter-day Saints</i> , 2001 UT 25, 21 P.3d 198 .....	34
<i>Gerbich v. Numed Inc.</i> , 1999 UT 37, 977 P.2d 1205 .....	12

<i>Grynberg v. Agri Tech, Inc.</i> , 10 P.3d 1267 (Colo. 2000).....	36
<i>Grynberg v. Questar Pipeline Co.</i> , 2003 UT 8, 70 P.3d 1 .....	36
<i>Hal Taylor Assocs., v. Unionamerica Inc.</i> , 657 P.2d 743 (Utah 1982) .....	25
<i>Hermansen v. Tasulis</i> , 2002 UT 52, 48 P.3d 235 .....	11, 28, 35, 36, 37
<i>In re Discipline of Sonnenreich</i> , 2004 UT 3, 86 P.3d 712 .....	10, 12
<i>Jensen v. IHC Hosps., Inc.</i> , 944 P.2d 327 (Utah 1997) .....	12
<i>Klienert v. Kimball Elevator Co.</i> , 854 P.2d 1025 (Utah Ct. App. 1993) .....	13
<i>Kuhre v. Goodfellow</i> , 2003 UT App 85, 69 P.3d 286.....	26
<i>Leigh Furniture &amp; Carpet Co. v. Isom</i> , 657 P.2d 293 (Utah 1982) .....	29
<i>Maack v. Resource Design &amp; Constr., Inc.</i> , 875 P.2d 570 (Utah Ct. App. 1994) .....	37
<i>Norman v. Murray First Thrift &amp; Loan Co.</i> , 596 P.2d 1028 (Utah 1979) .....	15
<i>Orton v. Carter</i> , 970 P.2d 1254 (Utah 1998) .....	35
<i>Pratt v. Prodata, Inc.</i> , 885 P.2d 786 (Utah 1994) .....	30
<i>Prince v. Bear River Mutual Ins. Co.</i> , 2002 UT 68, 56 P.3d 524 .....	32
<i>Reedeker v. Salisbury</i> , 952 P.2d 577 (Utah Ct. App. 1998).....	14, 21, 26
<i>Salt Lake City Corp. v. James Constructors, Inc.</i> , 761 P.2d 42 (Utah Ct. App. 1988).....	
.....	14, 18
<i>Schafir v. Harrigan</i> , 879 P.2d 1384 (Utah Ct. App. 1994) .....	14
<i>SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc.</i> , 2001 UT 54, 28	
P.3d 669 .....	35, 36, 37
<i>Smith v. Grand Canyon Expeditions Co.</i> , 2003 UT 57, 84 P.3d 1154.....	10, 14
<i>State Bank of S. Utah v. Troy Hygro Sys., Inc.</i> , 894 P.2d 1270 (Utah Ct.App.1995) .....	26

<i>State v. Twitchell</i> , 832 P.2d 866 (Utah Ct. App. 1992).....	21
<i>State v. Whittle</i> , 1999 UT 96, 989 P.2d 52.....	1, 2, 4
<i>Sunridge Dev. Corp. v. RB&amp;G Eng'g, Inc.</i> , 2008 UT App 29, 177 P.3d 644.....	1, 2
<i>Town of Alma v. Azco Constr., Inc.</i> , 10 P.3d 1256 (Colo. 2000).....	36, 37
<i>Von Hake v. Thomas</i> , 705 P.2d 766 (Utah 1985).....	25, 33, 34
<i>West v. Inter-Financial, Inc.</i> , 2006 UT App 222, 139 P.3d 1059.....	36
<i>Yazd v. Woodside Homes Corp.</i> , 2006 UT 47, 143 P.3d 283 .....	28

## Statutes

Utah Code Ann. § 78A-3-102(3)(j) (2008).....	1
Utah Code Ann. § 78A-3-102(4).....	1
Utah Code Ann. § 78A-4-103(2)(j).....	1

## Rules

Fed. R. Civ. Pro. 56(c) .....	13
Utah R. Civ. Pro. 32(a).....	4
Utah R. Civ. Pro. 56(c).....	12



## STATEMENT OF JURISDICTION

This appeal was properly before the Supreme Court under Utah Code Ann. § 78A-3-102(3)(j) (2008). Pursuant to Utah Code Ann. § 78A-3-102(4), the Utah Supreme Court transferred the case to this Court on November 3, 2008. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF ISSUES / STANDARD OF REVIEW

Issues presented on appeal:

1. Did the trial court err in granting summary judgment in favor of Appellees Jonathan Lowry and Nathan Kinsella on March 21, 2006, by determining that Appellees were entitled to judgment as a matter of law on all of Appellant's claims against Kinsella and all but one part of one of Appellant's claims against Lowry?

*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, 177 P.3d 644 (quoting *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52) (further citations omitted). [R. 1691-1703; 2020-22.]

2. Did the trial court err in granting summary judgment in favor of Appellee Jonathan Lowry, on October 8, 2008, by determining that Appellee Lowry was entitled to judgment as a matter of law on Appellant's one remaining claim against Lowry?

*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.*, 2008 UT App 29 at ¶7, 177 P.3d 644 (quoting *Whittle*, 1999 UT 96, at ¶20, 989 P.2d 52) (further citations omitted). [R. 2378-85.]

## 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 original 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.]

On May 6, 2004, the trial court granted J&T Marketing leave to amend its complaint and allege claims against Jonathan L. Lowry and Nathan Kinsella (collectively "Appellees") individually. [R. 994-996.] J&T Marketing filed its Amended Complaint on June 18, 2004, alleging nine cause of action: 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.<sup>1</sup> [R. 1027-44.] Five of these causes of action alleged tort claims against both Appellees individually and others, including FDS. [See *id.*]

## II. Proceedings Below

On May 20, 2005, 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, *i.e.* all of the causes of action that contained tort allegations against them.<sup>2</sup> [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.<sup>3</sup> [R.

---

<sup>1</sup> The trial court denied J&T Marketing's Modified Motion to Amend Complaint 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]. Despite these rulings by the trial court, J&T Marketing attempted to raise factual issues in its summary judgment motions by referencing these invalid claims. See Plaintiff's Memorandum in Opposition to Defendant's Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment at vii (claiming that Lowry and Kinsella had "omitted Jones's conspiracy cause of action"). [R. 1315.]

<sup>2</sup> 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 was brought against Lowry, Kinsella, Jeremy Warburton, FDS and Esbex and dealt with injunctive relief. [R. 1030-31.]

<sup>3</sup> J&T Marketing also relied upon the Affidavit of Chad Jenkins. [R. 1309-10.]

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 deposition<sup>4</sup> but allowed J&T Marketing additional 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 then 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 complete 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 one remaining cause of action, *i.e.*, the third cause of action

---

However, portions of Mr. Jenkins's affidavit relied on by J&T Marketing had expressly been stricken by the trial court on May 6, 2004. [R. 995-96.]

<sup>4</sup> 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.

claiming fraudulent misrepresentation, however, the trial court granted complete summary judgment as to Defendant Kinsella but only partial summary judgment as to Defendant Lowry. Regarding one written statement allegedly made by Lowry, the trial court explained 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).] The ruling granting summary judgment to Lowry and Kinsella except as to this claim and issue was later summarized in the trial court’s *Order on Defendants Lowry’s and Kinsella’s Motion for Summary Judgment* entered on March 21, 2006 (“2006 Order”) (a copy of which is included in the Addendum hereto at Tab C). [R. 2021.]

Following the entry of the Order on March 21, 2006, confirming the trial court’s February 1, 2006 ruling, J&T Marketing took no immediate action to pursue the lingering claim against Appellee Lowry upon which the trial court refused to grant summary judgment. 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 remaining claim against Appellee Lowry for fraudulent misrepresentation.

On October 5, 2007, J&T Marketing filed a Notice of Appeal, seeking review of the trial court’s 2006 Order. [R. 2225.] However, after Appellees argued that the matter was not ripe for appeal, J&T Marketing voluntarily dismissed its appeal, [R. 2246], and the matter was remitted to the trial court [R. 2251]. Lowry filed a summary judgment

motion on J&T Marketing's remaining fraudulent misrepresentation claim on June 23, 2008 [R. 2272-85]. Exercising its discretion to re-examine the remaining claim of fraudulent misrepresentation against Lowry, the trial court granted summary judgment to Lowry on the remaining fraudulent misrepresentation claim on October 8, 2008. [R. 2378-85] (a copy of the *Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment* ("2008 Order") is included in the Addendum hereto at Tab D). J&T Marketing appealed the 2006 Order and the 2008 Order on October 16, 2008.

### III. Statement of Undisputed Facts<sup>5</sup>

J&T Marketing's claims arise out of performance under a contract between FDS and J&T Marketing entered into in February 2002, which allowed FDS to sell J&T Marketing's Ted Thomas Courses. [R. 33-37, 1320.] Pursuant to the contract, J&T Marketing supplied FDS with the names, addresses and phone numbers of sales leads,

---

<sup>5</sup> 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, finding it reliable only to the extent it was corroborated by Mr. Neubauer's October 18, 2005 deposition. [R. 1695.] J&T Marketing's Statement of Facts also apparently intended to cite to Mr. Neubauer's October 18, 2005 deposition, portions of which were attached to its *Supplemental Memorandum*. [R. 1640-49.] However, J&T Marketing's citations do not correspond to the actual pages of Mr. Neubauer's new deposition or 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. [R. 1641, 1645, 1668, 1682.] Thus, J&T Marketing's citations to the record fail to support the facts alleged in its Statement of Facts.

and FDS marketed and sold the courses and remitted to J&T Marketing a portion of the sales proceeds. [R. 1320.] The contract provided that FDS could enroll purchasers of the Ted Thomas Courses in FDS's own program to provide coaching services for \$99 per month on its own account. [R. at 1701.] Approximately five and a half months after entering into the contract, i.e., on July 19, 2002, FDS cancelled the contract and informed J&T Marketing that J&T Marketing was in breach of contract based upon its failure to supply the Ted Thomas Courses to customers after FDS had made sales. [R. 1316, 1598.] In reaction to FDS's cancellation, J&T Marketing filed its original complaint against FDS and others on August 29, 2002. [R. 1316.] J&T Marketing subsequently amended its complaint alleging that Lowry and Kinsella should be held personally liable for certain actions related to the contract between FDS and J&T Marketing. [R. 1315-16.]

The putative reasons that J&T Marketing delayed or halted some shipments of its Ted Thomas Courses included the following: J&T Marketing would delay shipment of the product if FDS's 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, Inc. ("Esbex") while not providing Ted Thomas Courses *per se*, provided coaching/mentoring services for a monthly fee to some purchasers of the Ted Thomas Courses. [R. 1319.] One of the payment issues was whether a percentage of the fees was owed to J&T Marketing 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 should have split coaching fees under the contract, the only evidence presented to the trial court was 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.]

In its Amended Complaint, J&T Marketing asserted that Lowry individually and fraudulently misrepresented that FDS would stop selling Ted Thomas products, and the trial court initially denied Lowry summary judgment on this issue. [R. 1692.] However, Lowry gave instructions not to sell Ted Thomas products, and that he never rescinded this instruction. [R. 2286, 2289-91, 2292, 2308, 2381.] Lowry did not authorize any transaction involving the sale of a Ted Thomas product or any contact with a Ted Thomas lead after July 19, 2002. [R. 2307.] No evidence was submitted by J&T Marketing to demonstrate that Lowry or Kinsella individually hid evidence of sales of Ted Thomas products after July 19, 2002. [R. 2381.]

Lowry and Kinsella were shareholders, officers and directors of FDS and Esbex. [R. 1318, 1916.] John Neubauer was the Chief Operating Officer and Chief Financial Officer of FDS, and both FDS and Esbex 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 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 as chief financial officer he accounted for and kept track of such withdrawals. [R. 1641, Neubauer Dep. 40:3-14.] The only evidence in the record is to the effect that FDS and Esbex followed corporate formalities. [R. 1196.] There is no evidence or submission presented to the trial court 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. Further, J&T Marketing failed to present evidence that would support a conclusion that Lowry or Kinsella are or should be held personally liable for the alleged tort actions of conversion, fraudulent misrepresentation, constructive fraud, fraudulent misrepresentation, or intentional interference with contractual relations alleged against them. [R. 1691-94.]

### SUMMARY OF THE ARGUMENT

J&T Marketing specifically appeals an order entered by the trial court on March 21, 2006, granting Lowry and Kinsella’s motion for summary judgment on all but one portion of the fraudulent misrepresentation claim against Lowry. J&T Marketing also appeals from the order entered by the trial court on October 8, 2008, wherein Lowry was granted summary judgment on that one remaining fraudulent misrepresentation claim.

It is respectfully submitted that this Court should uphold the trial court’s decision to grant Lowry and Kinsella’s motions 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 before the trial court that would have supported a conclusion that genuine issues of material fact existed regarding J&T Marketing’s alter ego theory claims.

The alter ego theory only arises if both factors of a two prong test 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 utterly failed to present evidence that would support a conclusion of genuine issues of fact on any element of its claims for personal liability against Lowry and Kinsella. On the other hand, the undisputed evidence demonstrates that neither Lowry nor Kinsella are personally liable for any of J&T Marketing’s alleged injuries arising out of its contractual agreement with FDS. J&T Marketing did not present evidence to establish essential elements of its claims against Lowry and Kinsella for Theft by Conversion, Constructive Fraud, Fraudulent Nondisclosure, Intentional Interference with Contractual Relations, or Fraudulent Misrepresentation. Instead, the undisputed facts demonstrated that Lowry and Kinsella did not personally contribute to any damages allegedly sustained by J&T Marketing. 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.

In addition to these arguments, the trial court's decision to grant them summary judgment may also be upheld under the economic loss rule. The economic loss rule marks the boundary between contract and tort law. In this case, J&T Marketing allege facts to support breach of the contract between itself and FDS. On these same facts, J&T Marketing alleges tort claims against Lowry and Kinsella individually. Under Utah law, a party suffering only economic damages arising out of breach of an express contract may not also assert a tort claim for the same action absent an independent duty of care. *See Hermansen v. Tasulis*, 2002 UT 52, ¶16, 48 P.3d 235. J&T Marketing sought damages arising out of the alleged breach of contract. J&T Marketing's contractual damages are the root for its alleged tort damages. [R 1028-35.] Further, J&T Marketing identified no independent duty outside of the contract. Therefore the economic loss rule should also apply to prohibit J&T Marketing from maintaining its five tort causes of action against Lowry and Kinsella.

## ARGUMENT

- I. **UNDER THE APPLICABLE STANDARD OF REVIEW, THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LOWRY AND KINSELLA ON J&T MARKETING'S CLAIMS BECAUSE NO GENUINE ISSUES OF MATERIAL FACT WERE ESTABLISHED.**

This Court should affirm the trial court's 2006 Order and 2008 Order and deny J&T Marketing's 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 are 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). It is also well established 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. This is not, however, the standard to which plaintiffs are held. 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, having the burden of proof, “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))). Since J&T Marketing did not set forth facts sufficient to establish the existence of essential elements of its claims against Lowry and Kinsella, the trial court properly concluded that there was no genuine issue as to any material fact and properly granted summary judgment against J&T Marketing. See *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶23, 116 P.3d 323.

## **II. 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.<sup>6</sup> 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,

---

<sup>6</sup> J&T Marketing did not expressly assert an alter ego theory in its Amended Complaint. However, J&T Marketing did raise the alter ego doctrine in its *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment*. [R. 1321.]

1030 (Utah 1979)). J&T Marketing claims that it presented “enough disputed facts” on the corporate veil issue to overcome Lowry and Kinsella’s motion for summary judgment. *Brief of Appellant* at 12. The record shows otherwise.

**A. J&T Marketing Did Not Provide Sufficient 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, however, that Lowry or Kinsella failed to distinguish their funds from the corporation’s, that they commingled corporate funds with their own, or that they failed to keep proper records. On the contrary, Lowry and



Kinsella presented undisputed evidence that FDS and Esbex actually maintained corporate formalities. [R. 1196.]

J&T Marketing would have this Court find the unity of interest prong satisfied by evidence that Lowry and Kinsella took money from the corporation for their personal use. *See Brief of Appellee* at 14.<sup>7</sup> J&T Marketing suggests that the mere fact that Lowry and Kinsella were distributed money out of the corporation, standing alone, raises a genuine issue of material fact concerning the unity of interest prong of the alter ego theory. *See id.* But, J&T presented no evidence that any such disbursement represented improper siphoning of the corporation's funds, that the disbursements were not properly and separately accounted for on the records of the corporation, 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 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 refunds to customers. [R. 1644; Neubauer Dep. 25:7-23.]

Mr. Neubauer's testimony as the CFO of FDS and Esbex was that he prepared the

---

<sup>7</sup> J&T Marketing's citations to the record here do not align with actual pages in the record containing any alleged evidence 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 bankruptcy deposition in its entirety and held that it could only be relied upon to the extent it was corroborated by his October 18, 2005 deposition testimony. [R. 1695.] J&T Marketing has not appealed the trial court's decision on that issue.



financial records including monthly income statements and net profit and loss statements for the corporation, [R. 1642; Neubauer Dep. 36:18-25], and that from his perspective neither FDS nor Esbex 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, 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 was absent, or that proper financial records were not kept. Indeed, the undisputed evidence as stated above shows exactly the opposite. And J&T Marketing presented no evidence tending to show that Lowry and Kinsella’s actions in any way jeopardized the integrity of the corporation or were otherwise commercially unreasonable in governing the affairs and operating FDS and Esbex. [R. 1194-96.]

Since J&T Marketing failed to present a single disputed issue 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.

**B. 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, however, the trial court had no need to consider the

second prong of the test. [R. 1694.] Nevertheless, Lowry and Kinsella submit that even if the trial court had ruled that J&T Marketing had satisfied the first prong of the alter ego test, J&T Marketing still 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 demonstrated 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*, this 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.* The facts of the instant case are clearly distinguishable. There is no parent-subsidary relationship in this case. No evidence was presented that would tend to show either that Lowry or Kinsella personally paid debts of FDS or Esbex or that these entities paid Lowry and Kinsella's personal debts. There is no evidence that financial transactions were made without formal documentation or that funds were advanced on an as needed basis. Instead, the undisputed evidence is that all financial transactions were documented and accounted for by Mr. Neubauer. [R. 1641; Neubauer Dep. 40: 11-14.]

J&T Marketing additionally relies on 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 had used the entities to hide personal assets or vice versa. Rather, the evidence simply shows that when J&T Marketing halted its performance under the contract, FDS and Esbex were left without the supplies to meet its obligations. [R. 1317.] Without a legal basis, J&T Marketing improperly seeks restitution out of the personal finances of the corporate officers of FDS and Esbex.

J&T Marketing asserts that FDS and Esbex 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 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. No evidence was introduced that tended to show the amount of distributions made to Lowry and Kinsella, that the amounts were unreasonable, or that the distributions contributed to insolvency.

J&T Marketing has presented no evidence sufficient to create a genuine dispute 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.

**III. 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 Utah 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, J&T Marketing failed to establish a factual basis upon which it could recover against Lowry and Kinsella individually. The trial court, recognizing this failure of evidence, properly granted summary judgment to Lowry and Kinsella through both the 2006 Order and the 2008 Order. Allowing this matter to proceed would have been an inefficient and unnecessary waste of judicial resources.

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). Indeed, the general rule is that “[a] director is not personally liable for his corporation’s contractual breaches unless he assumed personal liability, acted in bad faith or committed a tort in connection with the performance of the contract.” *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (further citation and quotation omitted). As noted by J&T Marketing, Lowry and Kinsella “cannot be held liable for fraudulent acts that [they] did not know of or participate in that were committed by other agents of the corporation or by the corporation itself.” *Harrison*, 2003 UT 14 at ¶20, *Brief of Appellant* at 17. While an officer or director may be held individually liable for torts in which they personally participate, *see d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶¶39 and 43, 147 P.3d 515, 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.

**A. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing’s Claim of Theft by Conversion Against Lowry and Kinsella.**

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 866, 870 (Utah Ct. App. 1992). “A party alleging conversion must show that he or she is entitled to *immediate possession* of the property at the time of the alleged conversion.”

*Bennett v. Huish*, 2007 UT App 19, ¶31, 155 P.3d 917 (quotations and citations omitted) (emphasis in original). J&T Marketing assert that Lowry and Kinsella individually interfered with J&T Marketing's product, leads, client lists, and money. These allegations arise out of J&T Marketing's interpretation of the contractual obligations of FDS found in the Agreement. *See* Tab A. [R. 33-37.] The cited evidence in support of these allegations, however, fails to demonstrate that Lowry and Kinsella converted any of J&T Marketing's property.

J&T Marketing presented no evidence that Lowry or Kinsella converted J&T Marketing's property to their own use. In fact, the actual evidence was to the contrary. [R. 1193-94.] J&T Marketing's evidence does not support the allegation that Lowry or Kinsella kept refunded product from J&T Marketing. Under the Agreement, FDS would notify J&T Marketing when a customer purchased a Ted Thomas product and J&T Marketing was supposed to ship the product to the customer. [R. 2311.] It is undisputed that J&T Marketing stopped shipping Ted Thomas product, [R. 1317], and there is some evidence that FDS used some of the returned product to fill orders which J&T had stopped filling, [R. 1597]. However, there is no evidence that this in any way adversely affected J&T Marketing. In fact, the only evidence J&T Marketing puts forward is Mr. Neubauer's statement that "[w]e were trying to fulfill [sic] to make people happy and prevent a refund or cancellation." [R. at 1647, Neubauer Dep. 16:13-14.] J&T Marketing has presented no evidence that such reuse of product constituted a violation of the Agreement, that it adversely affected J&T Marketing, or in any way created a personal liability of Lowry or Kinsella.

Further, J&T Marketing's cited evidence does not support its allegation that Lowry and Kinsella took money they knew was earmarked for J&T customer refunds. First, this "converted property," even if any evidence existed to support this claim, did not belong to J&T Marketing, and J&T Marketing had no right to immediately possession of the property. Rather it would have belonged to J&T Marketing's customers, who are not parties to this matter. Second, and more importantly, the evidence cited by J&T Marketing establishes only that Mr. Neubauer informed Lowry and Kinsella of lists of people who had been approved for refunds, and that instead of knowingly and personally appropriating money earmarked for refunds for themselves, Lowry and Kinsella instructed Mr. Neubauer to "try to find a way to free up expenses and free up cash flow." [R. 1644-45, Neubauer Dep. at 24:20 through 25:25.] While Lowry and Kinsella do not dispute the fact that refunds were anticipated under the contract, there is no evidence that they knowingly and personally appropriated earmarked refund money for their own use.

Finally, J&T Marketing claims that FDS did not report the coaching fees that it charged and received and that J&T Marketing was entitled to a percentage of the coaching fees collected by FDS. 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 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.] J&T Marketing fails to show any contractual provision that would have entitled it to a share of these fees.



The factual support for its claim initially rested exclusively upon Mr. Neubauer's bankruptcy deposition, which the trial court expressly struck from the record. [R. 1695.] J&T Marketing was permitted to retake Mr. Neubauer's deposition and did so on October 18, 2005. J&T Marketing fails to demonstrate that it attempted to solicit any relevant information in Mr. Neubauer's second deposition that materially supported its claim. What J&T Marketing does cite to is testimony from Mr. Neubauer's second deposition indicating only that Mr. Neubauer would have consulted with Lowry and Kinsella about sending out refunded product to new purchasers. [R. 1647.] This is not evidence that he actual consulted with them or that if he did consult with him, what Lowry or Kinsella might have said. Thus, J&T Marketing's own evidence fails to establish that Lowry and Kinsella intentionally converted property belonging to others.

In any event, J&T Marketing could only pursue its claim for theft by conversion if the evidence demonstrated that Lowry and Kinsella had personally interfered without legal justification with J&T Marketing's property that J&T Marketing was entitled to immediate possession. *See Bennett*, 2007 UT App 19 at ¶31. The dispute in this case is contractual, hinging on interpretation of the Agreement as to each aspect of J&T Marketing's conversion claim. Because its allegations regarding the theft by conversion claim are unsubstantiated, J&T Marketing failed in its burden to establish elements essential to its case.

Without any evidence tending to prove that Lowry or Kinsella converted the property of J&T Marketing, the trial court had no alternative but to grant summary judgment in favor of Appellees.



**B. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Constructive Fraud Against Lowry and Kinsella.**

The trial court properly concluded that constructive fraud could not be maintained against Lowry or Kinsella as a matter of law. "To demonstrate constructive fraud in Utah, a party [must] demonstrate 'two elements: (i) a confidential relationship between the parties; and (ii) a failure to disclose material facts.'" *D'Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶51, 147 P.3d 515 (further citations omitted). As to the first question, J&T Marketing has failed to present any evidence that would tend to create a confidential relationship. "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.*

While a confidential relationship "may be created by contract or by circumstances where equity will imply a higher duty in a relationship because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise," *Hal Taylor Assocs., v. Unionamerica Inc.*, 657 P.2d 743, 749 (Utah 1982), there is no evidence that Lowry and Kinsella entered into such a relationship with J&T Marketing. J&T Marketing presented "no overmastering influence, dependence, or trust justifiably (and with mutual understanding) reposed" in Lowry and Kinsella. *First Security Bank of Utah, N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1989). Nor "was there any evidence of weakness of age, mental strength, business experience or intelligence" to establish a confidential relationship. *Id.* at 1333-34.

The only relationship here between the parties arose out of the Agreement between J&T Marketing and FDS. Utah courts have determined 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, ¶¶19-20, 69 P.3d 286 (no confidential relationship between a buyer and seller of *any* 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). Under the Agreement, FDS agreed, as an independent contractor, to sell J&T Marketing’s products to leads it supplied. [R. 37.] While a typical contractual relationship was established between FDS and J&T Marketing, no evidence was presented that would tend to prove that that relationship ever met the standard of a “confidential relationship” necessary to proceed with a constructive fraud claim under the facts alleged by J&T Marketing. Importantly, it must be noted that as to Lowry and Kinsella, J&T Marketing allege that there is a contractual relationship individually with Appellees, but J&T Marketing fails to put forth any evidence to support this claim.

It is quite clear that “a contract between [one party] and a corporation is not a contract between [that party] and those individuals who direct or manage the corporation.” *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998). It is undisputed that FDS maintained its corporate formalities and that Lowry and Kinsella, acting in their corporate capacities, took actions that they felt were commercially reasonable. [R. 1194-96.] Further there is no evidence that Lowry and Kinsella personally had the obligation or failed to disclose material facts to J&T Marketing under

the Agreement.

As with much of its other cited evidence, J&T Marketing relies almost exclusively upon Mr. Neubauer's bankruptcy deposition, which the trial court expressly struck in its entirety. [R. 1695.] To the extent Mr. Neubauer's subsequent deposition in this case is relied upon, the evidence fails to support any claim that Lowry and Kinsella personally failed to disclose any material facts known to them.<sup>8</sup> Therefore, Lowry nor Kinsella cannot 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.

**C. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Fraudulent Non-Disclosure Against Lowry and Kinsella.**

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.*

---

<sup>8</sup> J&T Marketing cites to evidence it asserts demonstrates that Lowry and Kinsella were involved in the decision to sell coaching without reporting to J&T Marketing. [R. 1615.] Mr. Neubauer's testimony was only to the effect that he did not report coaching fees because he was instructed that the fees belonged to FDS. [R. 1644, Neubauer Dep. 27:22 through 28:1.] Indeed Mr. Neubauer stated "I'm not going to say he told me not to report it because I might have done that on my own, given the circumstances." [R. 1644, Neubauer Dep. 18:5-7.] The evidence presented by J&T Marketing does not show that coaching sales had to be reported to J&T Marketing under the Agreement, or that disclosing such sales was material to any confidential relationship between J&T Marketing and Lowry or Kinsella. [R. 33-37.]

*Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235.<sup>9</sup> Utah Courts have held that “[a] person who possesses important, even vital information of interest to another has no legal duty to communicate the information where no relationship between the parties exists.” *Yazd v. Woodside Homes Corp.*, 2006 UT 47 ¶17, 143 P.3d 283. 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.

The relationship between J&T Marketing and FDS arose out of the Agreement. Pursuant to this agreement FDS had to “fax or email orders, for Jones’ products, daily to Jones.” [R. 37.] FDS was also required to provide a report of the previous week’s sales and the compensation and reimbursement due to J&T Marketing and a report of the “sales made the two weeks prior.” [R. 36.] The purpose of the was to allow FDS, “as an independent contractor, to sell these products designated for sale by Jones (‘Jones’ products’) to those leads, [sic] supplied by Jones (‘Jones’ leads’).” [R. 37.] It is undisputed that Esbex, not FDS, provided the coaching/mentoring services and that no contract existed between Esbex and J&T Marketing [R. 1319.] The person whose responsibility it was to provide these reports was John Neubauer. [R. 1318-19.] There is no evidence that Mr. Neubauer was not a capable and responsible person to perform this task. There is no evidence that Lowry and Kinsella interfered with this process or that

---

<sup>9</sup> 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).

they had undertaken a personal obligation to report coaching fees to J&T Marketing. There is no evidence show that either (i) Lowry and Kinsella had a personal legal obligation to communicate information to J&T Marketing, or (ii) that they failed to communicate any other information that they individually had a legal obligation to communicate to J&T Marketing. J&T Marketing's claims against Lowry and Kinsella thus failed as a matter of law.

Because evidence establishing 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.

**D. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Intentional Interference with Business Relations Against Lowry and Kinsella.**

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 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 (citing *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)). To establish improper purpose, "the plaintiff must show that the defendant's 'predominant purpose was to injure the plaintiff.'" *Id.* To establish improper means, "a plaintiff must show 'that the defendant's means of interference were contrary to statutory, regulatory, or common law or violated an established standard of a

trade or profession.” *Id.* (quoting *Pratt v. Prodata, Inc.*, 885 P.2d 786, 787 (Utah 1994)). In support of this claim, 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 supported a single alleged instance where Lowry or Kinsella personally and intentionally interfered with one of J&T Marketing’s current or prospective business relationships.

While J&T Marketing asserts that FDS resold refunded product to new customers, [R. 1314], the evidence J&T Marketing cites to does not support its claims that Lowry and Kinsella intentionally interfered for an improper purpose. It is not disputed that even while the contract remained in force, J&T Marketing had discontinued shipping product to customers who had ordered the product as a result of FDS sales. [R. 1317.] FDS filled some orders by shipping products that had been returned by other clients, but Mr. Neubauer’s testimony was that he did so to try “to fulfill to make people happy and prevent a refund or cancellation.” [R. 1647, Neubauer Dep. at 16:4-14.] There is no evidence that by using refunded product to fill these customer orders FDS did anything improper or caused any harm to J&T Marketing’s existing or potential economic relations or that such action was done for an improper purpose or by improper means.

Beyond FDS’s actions, there is no evidence that any alleged actions by Lowry and Kinsella’s were made with the predominant purpose of injuring J&T Marketing, *see Tobias*, 2005 UT 36 at ¶20, or that Lowry and Kinsella’s alleged actions were contrary to statutory, regulatory, or common law or violated an established standard of a trade or

profession, *see id.* J&T Marketing allege that Lowry and Kinsella treated its customers poorly, but its evidence supporting this claim arises solely out of the stricken deposition testimony of Mr. Neubauer. *See Brief of Appellant* at 20. And there is no evidence that FDS could not continue to sell coaching after terminating the Agreement. *See Agreement* at Tab A. Finally, J&T Marketing has failed to provide any evidence that continuing to sell coaching intentionally interfered with J&T Marketing's existing or potential relations; that continuing to sell coaching was done for an improper purpose or by improper means; or that continuing to sell coaching caused injury to J&T Marketing.

Without evidence to support the elements of its claim of intentional interference with economic relations, J&T Marketing lacks a basis for recovering on this claim, and this court should affirm the trial court's decision to grant Lowry and Kinsella summary judgment on this matter.

**E. The Trial Court Properly Granted Summary Judgment Dismissing J&T Marketing's Claim of Fraudulent Misrepresentation Against Lowry and Kinsella.**

J&T Marketing's Third cause of action in the Amended Complaint alleged fraudulent misrepresentation against Lowry, Kinsella, Mr. Neubauer and FDS. 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 at most. J&T Marketing rests these so-styled tort claims on the supposed testimony of 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 case and had every opportunity to 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 J&T Marketing had appealed the trial court's decision to exclude Mr. Neubauer's bankruptcy deposition, and that decision were to be reversed, and the excluded testimony were to be considered, J&T Marketing presents no evidence<sup>10</sup> that would 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) 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

---

<sup>10</sup> 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 support their allegations since the trial court struck Mr. Neubauer's bankruptcy deposition in its entirety and held that it could only be relied upon to the extent it was corroborated by his October 18, 2005 deposition testimony. [R. 1695.] J&T Marketing has not appealed the trial court's decision on that issue.



elements. Initially, the trial court determined that a statement attributed to Lowry by J&T Marketing to the effect that “FDS would cease selling Thomas’s product and cease using Thomas’s name and leads” was disregarded by FDS. [R. 1908.] J&T Marketing could not produce any writing by Lowry to demonstrate that he in fact made the statement attributed to him.

It is not disputed that the Agreement states that upon termination FDS was to “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 [sic] products; and (iv) The use of Jones’ trademarks [sic] service marks or other Confidential Information. [R. 34.] By its very nature, a contractual promise to perform in the future is not a statement of a presently existing material fact unless the promise is made without any intent to perform, that is, “a promise of future performance, when made with a present intent not to perform and made to induce a party to act in reliance on that promise, constitutes actionable deceit and fraud.” *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985). J&T Marketing failed to present any evidence to demonstrate that Lowry had no intent to perform any obligations under the Agreement when he signed the Agreement on behalf of FDS. [R. 2382.] Indeed, in both the 2006 Order and the 2008 Order, the trial court concluded that J&T Marketing had presented no evidence to show that Lowry or Kinsella had a present interest not to perform at the time of the contract. [R. 1908-09, 2382.]

It is not disputed that FDS informed J&T Marketing would “cease using Thomas’s name and leads.” [R. 2345-47.] It is also not disputed that Lowry instructed FDS employees not to sell Jones product and that that instruction was never rescinded. [R.

2343-44; 2380-81.] It is undisputed that any sale of Jones product after July 19, 2002 occurred without Lowry's knowledge. [R. 2343-44, 2381.] J&T Marketing failed to present any evidence that the statement made by Lowry that FDS would "cease using Thomas's name and leads" was made with "no presently existing intent to perform." See *Von Hake*, 705 P.2d at 770. [R. 2381.]

In addition, J&T Marketing failed to present any evidence supporting other elements required to establish a claim for fraud. For example, J&T Marketing presented no evidence that it was induced to rely upon any alleged misrepresentations made by Lowry or Kinsella. [R. 1908-09, 2380.] J&T Marketing failed to present any evidence that its reliance on any alleged representations was reasonable. [*Id.*] J&T Marketing failed to present any evidence of its damages that arose out of the alleged misrepresentations. [R. 2379.] "[M]ere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts are insufficient to preclude . . . summary judgment." *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶36, 21 P.3d 198. Since J&T Marketing presented no material facts to support each element of its fraudulent misrepresentation allegation, summary judgment was appropriate.

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.

#### **IV. THE ECONOMIC LOSS RULE ALSO PRECLUDES J&T MARKETING FROM RECOVERING ON ITS CLAIMS.**

Application of the economic loss rule should also prevent J&T Marketing from maintaining its claims against Lowry or Kinsella. Although this argument was not raised before the trial court, "[i]n Utah, 'an appellate court may affirm a judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis of its ruling.'" *Busche v. Salt Lake County*, 2001 UT App 111, ¶7, 26 P.3d 862 (quoting *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998)) (further quotations omitted).

"The economic loss rule is a judicially created doctrine that marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care." *SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc.*, 2001 UT 54, ¶32, 28 P.3d 669. In *Hermansen v. Tasulis*, 2002 UT 52, 48 P.3d 235, the Utah Supreme Court in turn adopted the interpretation of the economic loss rule that had been previously adopted by the Colorado Supreme Court. *See id.* at ¶17. Under this interpretation,

The initial inquiry in cases where the line between contract and tort blurs is whether a duty exists independent of any contractual obligations between the parties. When an independent duty exists, the economic loss rule does not bar a tort claim "because the claim is based on a recognized

independent duty of care and thus does not fall within the scope of the rule.”

*Id.* (quoting *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000)). According to this interpretation, “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.” *Id.* at ¶16 (quoting *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000)) (emphasis added in *Hermansen*).<sup>11</sup> The Utah Supreme Court has since noted that it has “expressly adopted the independent duty-based rule articulated in *Town of Alma*.” *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶49, 70 P.3d 1. This Court recently applied the rule adopted by Supreme Court in *Hermansen*, when it considered whether real estate appraisers owe an independent duty to non-contracting buyers. *See West v. Inter-Financial, Inc.*, 2006 UT App 222, ¶19, 139 P.3d 1059.<sup>12</sup>

For purposes of this rule, economic loss is defined as follows:

[D]amages for inadequate value, cost of repair and replacement of the

---

<sup>11</sup> We note that other Utah cases have held that economic damages may not be recovered for negligence but may be recovered “in cases involving intentional torts.” *SME Indus., Inc.*, 2001 UT 54 at ¶32 and n.8; *American Towers Owners Ass’n v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1190 and n.11 (Utah 1996). However, the Utah Supreme Court, reviewing the economic loss rule as it applied to contracts subject to Wyoming law, stated that “we do not find *American Tower Owners Ass’n* and *SME Industries* persuasive authority regarding the current state of the economic loss rule in Wyoming or Utah.” *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶49, 70 P.3d 1 (emphasis added).

<sup>12</sup> However, we also note that this Court distinguished *Hermansen* in another case and reverted to the *American Towers* interpretation of the economic loss rule that “economic damages are not recoverable in negligence absent physical property damage or bodily injury.” *Fennell v. Green*, 2003 UT App 291, ¶15 and n.7, 77 P.3d 339 (quoting *American Towers*, 930 P.2d at 1189).

defective product, or consequent loss of profits – without any claim of personal injury or damage to other property . . . as well as ‘the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’”

*American Towers*, 930 P.2d at 1189 (quoting *Maack v. Resource Design & Constr., Inc.*, 875 P.2d 570, 579-80 (Utah Ct. App. 1994) (further citation omitted)).

The Colorado interpretation of the economic loss rule as adopted by the Utah Supreme Court is based upon the understanding that “[c]ontract law is intended to enforce the expectancy interests created by parties’ promises so that they can allocate risks and costs during their bargaining.” *Town of Alma*, 10 P.3d at 1262. Further, “[l]imiting tort liability when a contract exists between parties is appropriate because a product’s potential nonperformance can be adequately addressed by rational economic actors bargaining at arms length to shape the terms of the contract.” *Id.* Thus, “the law serves to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties’ efforts to build these cost considerations into the contract.” *Id.* Though the economic loss rule initially arose out of the product liability context, Utah courts have not limited the rule to that context. *See SME Industries*, 2001 UT 54 at ¶35 (applying the economic loss rule “in the construction setting”); *Hermansen*, 2002 UT 52 at ¶17 (applying the economic loss rule in a real estate transaction, but adopting a rule without expressly limiting the context in which it would apply).

In this case, J&T Marketing has not identified any independent duty other than the contractual duties negotiated by FDS and J&T Marketing. *Brief of Appellants* at 19.

Outside of the contract, J&T Marketing has presented no evidence of any other facts giving rise to a duty owed by Lowry and Kinsella to J&T Marketing. In addition, the damages sought by J&T Marketing, to the extent damages are alleged to have been caused by Lowry and Kinsella, are economic damages that J&T Marketing may recover, if at all, pursuant to the application of contract law. [R. 1028-29, 1032, 1034.] Each of the tort claims brought against Kinsella and Lowry was also brought against FDS. [R. 1028-29, 1032-34.] J&T Marketing alleged damages couched in tort terms. [R. 1028-29, 1032-34.] However, all of the damages alleged by J&T Marketing when it sought default judgment against FDS and Esbex were rooted in the contract and calculated in terms of the contract.<sup>13</sup> [R. 2187-89.] Therefore, the economic loss rule should preclude J&T Marketing from pursuing its tort claims against Lowry and Kinsella.

### CONCLUSION

Lowry and Kinsella assert that the evidence presented to the trial court was insufficient to demonstrate a genuine issue of material fact. Accordingly, they were entitled to summary judgment as a matter of law on all of the claims brought against them personally. Under the economic loss rule, this Court may also properly affirm the trial

---

<sup>13</sup> In obtaining default judgment against FDS and Esbex, J&T Marketing identified a "contractual and special damages" amount and then used this amount to calculate general damages (multiplying the contractual damages by three) and punitive damages (using the same amount it had identified for contractual damages) plus attorney fees. [R. 2187-89, 2216.] Thus, J&T Marketing obtained a default judgment against FDS and Esbex not only for its damages arising out of the protections negotiated in the Agreement with FDS, but also for tort damages arising out of the same alleged conduct constituting breach of contract, giving J&T Marketing the benefit of a windfall award of damages over and above the protections J&T Marketing had bargained for in its contract. Should this Court overturn the district court's ruling, and allow J&T Marketing to pursue its tort claims, it is certain that these same damages will be pursued against Lowry and Kinsella.

court's decision to granted Lowry and Kinsella summary judgment against J&T Marketing's tort claims. Therefore, Lowry and Kinsella respectfully request that this Court affirm the trial court's 2006 and 2008 Orders.

Dated this 8<sup>th</sup> day of June, 2009,

SMITH HARTVIGSEN, PLLC

R. Christopher Preston

Earl Jay Peck

R. Christopher Preston

*Attorneys for Jonathan L. Lowry and Nathan Kinsella*

## 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      *Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment*, entered October 8, 2008



## Exhibit 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 construed 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

Its: Sec-Treas

Date: 2/4/02

FDS

By: [Signature]

Its: President

Date: Feb 4, 02

0033

**Exhibit B**

2006 FEB - 11 P 3:27

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

<p>JONES &amp; 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><b>RULING GRANTING IN PART DEFENDANTS LOWRY'S AND KINSELLA'S MOTION FOR SUMMARY JUDGMENT</b></p> <p>Case No. 050100038</p> <p>Judge Derek P. Pullan</p>
---	--

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

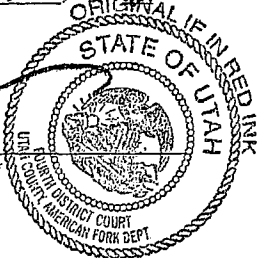
Defendant argues that this is merely a restatement of J&T Marketing's claims for breach of contract and fraud. There is no evidence that Defendants interfered with one of Plaintiff's current or prospective business relationships.

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



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050100038 by the method and on the date specified.

METHOD	NAME
Mail	ESBEXCOM INC DEFENDANT 51 W CENTER ST 403 OREM, UT 84057
Mail	FINANCIAL DEVELOPMENT SERVICES DEFENDANT 51 W CENTER ST NO 403 OREM UT 84057
Mail	JOHN NEUBAUER DEFENDANT 7954 CYPRESS PINE CV SANDY UT 84070
Mail	JEREMY WARBURTON DEFENDANT 1160 S WASHINGTON FIELDS RD#37 WASHINGTON UT 84780
Mail	EARL J PECK ATTORNEY DEF 215 S STATE ST #650 SALT LAKE CITY UT 84111
Mail	STEPHEN QUESENBERRY ATTORNEY PLA 3319 N UNIVERSITY AVE PROVO UT 84604

Dated this 1 day of February, 2006.

  
Deputy Court Clerk

Exhibit C

FILED

Earl Jay Peck (2562)  
Steven H. Stewart (3114)  
R. Christopher Preston (9195)  
**SMITH HARTVIGSEN, PLLC**  
215 S. State Street, Suite 650  
Salt Lake City, Utah 84111  
Telephone (801) 413-1600  
Facsimile (801) 413-1620  
*Attorneys for Defendants*  
*Jonathan L. Lowry and Nathan Kinsella*

MAR 21 2006

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

---

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



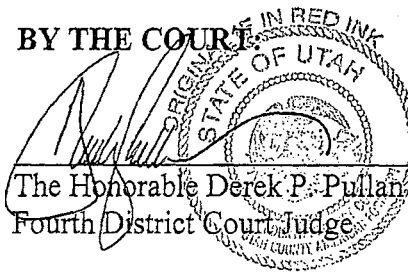
by both parties. This Court having heard the arguments of counsel, having reviewed all the memoranda of each party, being duly advised in the premises, with good cause appearing, issued a Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment filed on February 1, 2006 ("Ruling"), 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:

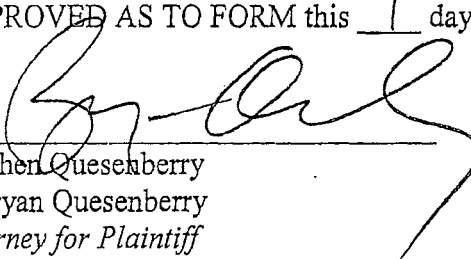
1. Defendants' motion for summary judgment dismissing Plaintiff's Second Cause of Action (Theft by Conversion) against Defendants Lowry and Kinsella is granted.
2. Defendants' motion for summary judgment dismissing Plaintiff's Third Cause of Action (Fraudulent Misrepresentation) against Defendant Kinsella 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.



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 10<sup>th</sup> 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*

*R. Christopher Paster*

Exhibit D

Earl Jay Peck (2562)  
R. Christopher Preston (9195)  
**SMITH HARTVIGSEN, PLLC**  
215 S. State Street, Suite 650  
Salt Lake City, Utah 84111  
Telephone (801) 413-1600  
Facsimile (801) 413-1620  
*Attorneys for Defendant*  
*Jonathan L. Lowry*

OCT 8 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

---

**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 GRANTING DEFENDANT  
JONATHAN L. LOWRY'S MOTION  
FOR  
SUMMARY JUDGMENT**

Case No. 050100038  
Division 9 – American Fork

Judge: Howard Maetani

---

The individual Defendants Jonathan L. Lowry and Nathan Kinsella jointly moved for Summary Judgment on the allegations of the Amended Complaint on May 20, 2005; the matter was briefed and argued; and, in February 2006, the Court ruled, granting the motion completely as to Defendant Kinsella and granting the motion partially as to Defendant Lowry, reserving solely the issue of a claim for a specific alleged fraudulent misrepresentation on the part of Mr. Lowry under the Third Cause of Action of the Amended Complaint. (The February 1, 2006 Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment is referred to herein as "Ruling".) The reservation went to only Mr. Lowry's alleged

misrepresentation that "FDS would cease selling Thomas's (Plaintiff's) product and cease using Thomas's name and Leads."

On October 9, 2007, Plaintiff appealed the February 2006 Ruling and the attendant Order entered in March 2006, but Plaintiff voluntarily dismissed the appeal in February 2008 on the ground that the appeal had been taken before a final order had been entered, *i.e.*, the remaining issue of fraudulent misrepresentation had not been disposed of. Upon remand, the Court held a scheduling conference on May 5, 2008, and a discussion was had at the conference among the Court and counsel for Plaintiff and Defendant Lowry about the remaining issue. At the conclusion of the conference the Court represented that the Court would exercise its discretion to revisit the remaining issue on a Motion for Summary Judgment. Accordingly a briefing schedule was established at the conference.

Subsequently, Defendant Jonathan L. Lowry, the only remaining individual Defendant, filed a Motion for Summary Judgment with supporting memorandum and submissions dated June 23, 2008, on the sole remaining issue. Plaintiff responded with its memorandum and submissions on July 16, 2008. Defendant filed a reply memorandum on July 28, 2008.

Defendant Jon Lowry's Motion for Summary Judgment came on regularly for hearing on Friday August 22, 2008, at 1:30 p.m. Earl Jay Peck of the law firm of Smith Hartvigsen, PLLC, appeared on behalf of Defendant Jon Lowry. Jessica Griffin Anderson of the law firm of Hill, Johnson and Schmutz, LC appeared on behalf of Plaintiffs.

NOW THEREFORE, the Court having heard the arguments of counsel and considered the respective memoranda and submissions, the Court finds, concludes and orders as follows:

1. The Court has exercised its discretion to re-examine the remaining claim of fraudulent misrepresentation against individual Defendant Jonathan Lowry.

2. The Court finds and concludes that Plaintiff has failed to show evidence of a disputed material fact, *i.e.*, that the alleged statement was made.

a. As stated in its Ruling of February 1, 2006, “[i]n 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, (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, 536.

b. Mr. Lowry argues that he did not make the alleged representation. Plaintiff argues that the contract contains a provision that upon termination FDS would stop selling Plaintiff’s product and cease using its name and leads.

c. By its very nature a contractual promise to perform in the future is not a statement of a presently existing material fact unless the promise is made with out any intent to perform, that is, “a promise of future performance, when made with a present intent not to perform and made to induce a party to act in reliance on that promise, constitutes actionable deceit and fraud,” *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985).

d. The Court finds and concludes that Plaintiff neither presented nor proposed any evidence or argument that would allow a reasonable person to

( )

conclude that Mr. Lowry had no intent to perform the obligations in the contract between the parties when he signed the contract between FDS and Plaintiff.

e. Nothing was submitted to cause the Court to change its conclusion found in the prior Ruling that “[t]here is no evidence at the time of the contract the Defendants had a present intent not to perform. (Ruling at 11.) The Court concludes, therefore, that as a matter of law the statements in the contract between the parties do not satisfy the requirement that the alleged misrepresentation purport to be a statement of a currently existing material fact.

f. Plaintiff also argues that Mr. Lowry made the subject alleged misrepresentation in a letter he signed and sent to Plaintiff dated July 19, 2002. In the July 16, 2001, letter, however, Mr. Lowry does not state that “FDS would . . . cease using Thomas’s name and leads.” (C.f. Ruling at 12.) In the July 19, 2002, letter Mr. Lowry does state that “We [FDS] are no longer selling any more Ted Thomas product effective today.” (Exhibit B to Memorandum in Support of Defendant Jonathan L. Lowry’s Motion for Summary Judgment (“Defendant’s Memorandum”).) As stated in Paragraph 2.c. above, in order for this representation to support or satisfy the requirements of a misrepresentation of a presently existing material fact, the statement would have had to have been made with an intention on Mr. Lowry’s part that FDS would not cease selling the Ted Thomas product. As to this latter statement, Defendant Lowry states in his declaration that he believed that his representation was true when he made it. (Lowry Decl. at Para. 15-16.) Mr. Neubauer who was FDS’s Chief Operating



Officer and Chief Financial Officer at the time states in his declaration that he had received instructions from Mr. Lowry to cease selling Plaintiff's product effective July 19, 2002. (Neubauer Decl. at Paras. 8, 13-14; Lowry Decl. at Paras. 13-16)

g. The only claimed evidence of "no presently existing intent to perform" is the argument put forth in Plaintiff's Memorandum that Mr. Lowry hid evidence of sales of Ted Thomas product after the July 19<sup>th</sup> letter. (Plaintiff's Opposition to Defendant Jonathan L. Lowry's Motion for Summary Judgment ("Plaintiff's Memorandum") at p. 12). This allegation is made in Plaintiff's Memorandum, but is not supported by any submission. On the other hand, it is undisputed that Mr. Lowry never rescinded this instruction not to sell Ted Thomas products. (Neubauer Decl. at Para. 10.)

h. The only remaining argument that Plaintiff makes in support of its argument that a misrepresentation occurred is that by sending the July 19, 2002 letter, Mr. Lowry intended to terminate the contract and by terminating the contract he was in effect representing what FDS would do upon termination, as stated in the contract between the parties. The Court rejects this argument and finds that Plaintiff has submitted nothing that would directly or by implication refute Defendant's submissions which contained sworn statements that he fully intended that FDS would cease selling Ted Thomas products when he sent his letter of July 19, 2002. The Court concludes that the July 19, 2002 letter does not constitute a current representation that the termination terms would all be

complied with and does not satisfy the element that there be a misrepresentation of a currently existing material fact.

3. Defendant Lowry also argues that he is entitled to Summary Judgment on the ground that Amended Complaint fails to plead the essential elements of fraud. In this regard the Court finds and concludes that:

a. The Amended Complaint makes no allegation that, and no submission is offered by Plaintiff that, would support a finding that Plaintiff was induced to rely upon the alleged misrepresentation. This is particularly important because given the nature and content of the alleged misrepresentation as well as the circumstances under which it was alleged to have been made it is difficult to imagine how reliance could have been induced. Thus, the context in which the alleged misrepresentation was allegedly made does not either infer reliance or allow for a finding of implied reliance. Utah courts hold that "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude...summary judgment." *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 36, 21 P.3d 198. In the instant case, Plaintiff has failed both to allege induced reliance and failed to offer evidence by submission that would support a finding of induced reliance.

b. Similarly, and for the same reasons set forth above in Para. 3.a above, the Court finds and concludes that the Amended Complaint fails to contain allegations, and Plaintiff fails to otherwise support the necessary element that its reliance on the representation was reasonable.

c. Finally, Plaintiff fails to allege the essential element of damages. Paragraph 52 of the Amended Complaint contains the allegation that "Defendants' fraudulent conduct has injured Plaintiff in an amount no less than \$100,000 by withholding from [Plaintiff] its contractual percent of compensation, by ruining [Plaintiff's] reputation and relationship with its clients, by continuing to use [Plaintiff's] name, Product, leads, etc., by continuing to associate itself with [Plaintiff] and Thomas, and in other ways." This allegation of damages, however, does not describe damages of the type and nature that one could infer would flow from the alleged fraudulent representation here. On the contrary, the referenced damages appear to be contract damages or damages related to some other cause of action. Again the decision in the *Franco v. Church of Jesus Christ of Latter-day Saints*, is applicable: "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude...summary judgment." 2001 UT 25 at ¶ 36

4. All of the foregoing must be examined in light of the burden of proof that a fraud claimant faces. "As a general rule, fraud is not presumed. When it is alleged, each element of fraud must be established by clear and convincing evidence." 37 *Am. Jur.* 2d Fraud and Deceit, Section 471. "For the evidence to be clear and convincing, it must at least have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence." (MUJI 2.19.) In other words, as to the burden to show induced reliance, *i.e.*, that the Defendant made the representation for the purpose of causing the plaintiff to take some action, or causing the Plaintiff not to act, Plaintiff would have to show that there is no substantial

doubt as to the truth or correctness of the allegation of induced reliance. The Court finds and concludes that based upon the parties' submissions to the Court that reasonable minds could not reasonably conclude that Plaintiff would be able to establish any of the elements of fraud in this case by clear and convincing evidence.

5. For the foregoing reasons and the additional reasons set forth in Defendant's Memoranda,

IT IS HEREBY ORDERED that Defendant's Motion for complete Summary Judgment is hereby granted in favor of Defendant Jonathan L. Lowry on the Third Cause of Action of the Amended Complaint; the Court hereby modifies and amends any previously entered judgment or ruling herein which is inconsistent with the findings and conclusions hereinabove; and, Defendant Jonathan Lowry is awarded his costs.

DATED this 29 day of September, 2008



By the Court:

Honorable Howard Maetani

APPROVED AS TO FORM:

Stephen Quesenberry  
Jessica Griffin Anderson  
*Attorneys for Plaintiff*