

2011

# Mojo Syndicate Inc., and A Bar Named Sue LLC v. 3928 LLC and John Fredrickson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MOJO SYNDICATE, INC., a Utah  
corporation, and A BAR NAMED SUE  
LLC, a limited liability company,

Plaintiffs / Appellants,

v.

3928, LLC, a limited liability company,  
JASON RASMUSSEN, an individual,  
JOHN FREDRICKSON, an individual,  
and JOHN DOES I-IV,

Defendants / Appellees.

Court of Appeals Case No. 20110995-  
CA

District Court Case No. 100904277

**APPELLEES 3928, LLC AND JOHN FREDRICKSON'S  
OPENING BRIEF ON APPEAL**

Appeal from the Order of the Third District Court,  
Salt Lake County, Salt Lake Division, The Honorable Judge Sandra Peuler

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**LIST OF ALL PARTIES TO THE PROCEEDING BELOW**

**Plaintiffs / Appellants:**

Mojo Syndicate, Inc., a Utah corporation, and A Bar Named Sue, LLC, a Utah limited liability company (collectively, the “Mojo Plaintiffs”).

**Defendants / Appellees:**

3928, LLC, a Utah limited liability company, and John Fredrickson, an individual (collectively, the “Fredrickson Defendants”).

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## Other Authorities

None

## **JURISDICTIONAL STATEMENT**

Because the Mojo Plaintiffs' did not timely file a notice of appeal, as set forth below in the Part I of the Argument, this Court lacks jurisdiction and the appeal should be dismissed. "If an appeal is not timely filed, [the appellate court] lacks jurisdiction to hear the appeal and must dismiss." *Saratoga Holdings, LLC v. Hall*, 2011 UT App 166, ¶ 2, 257 P.3d 488. If this Court concludes that the Mojo Plaintiffs' notice of appeal was timely filed, then jurisdiction is proper in this Court on appeal from the district court's order below. *See* Utah Code Ann. § 78A-3-102.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

### **Issue No. 1**

Whether the Mojo Plaintiffs' appeal should be dismissed because they failed to timely file a notice of appeal.

Standard of Review: Not applicable.

Preservation of Issue: This issue was not presented to the district court below.

The "[f]ailure to timely file a notice of appeal bars jurisdiction in the appellate court." *Reisbeck v. HCA Health Services of Utah, Inc.*, 2000 UT 48, ¶ 16, 2 P.3d 447. "Issues regarding [the appellate court's] jurisdiction may be raised by the court or either party at any time." *State v. Little*, 2010 UT App 222, ¶ 2, 238 P.3d 1079.

## Issue No. 2

Whether the Mojo Plaintiffs can assert ineffective assistance of counsel in a civil matter and, if so, whether summary judgment should be reversed on the basis of the purportedly inadequate representation provided by the Mojo Plaintiffs' counsel.

Standard of Review: "Constitutional challenges constitute questions of general law" and are reviewed for correctness. *Harmon v. Ogden City Civil Service Com'n*, 2007 UT App 336, ¶ 7, 171 P.3d 474. In the criminal context, "where the ineffective assistance claim is raised for the first time on direct appeal, [the appellate court] must decide whether [appellant] was deprived of the effective assistance of counsel as a matter of law." *State v. Tennyson*, 850 P.2d 461, 466 (Utah App. 1993). Importantly, "appellate review of counsel's performance must be highly deferential; otherwise, the distorting effects of hindsight would produce too great a temptation for courts to second-guess trial counsel's performance on the basis of an inanimate record." *Id.* (internal quotation omitted).

Preservation of Issue: This issue was not presented to the district court below.

## Issue No. 3

Whether the district court properly granted summary judgment to the Fredrickson Defendants based on the Mojo Plaintiffs' repeated failure to comply with Utah R. Civ. P. 7 and 56.

Standard of Review: "We review a district court's grant of summary judgment for correctness, affording no deference to the district court. . . . However, the district court

has discretion in requiring compliance with [rule 7 of the Utah Rules of Civil Procedure].” *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 5, 156 P.3d 175 (internal quotation omitted; second alteration in original). When reviewing a grant of summary judgment based on a party’s failure to comply with Rule 7, the appellate court “must determine whether the district court abused its discretion in deeming admitted those facts . . . submitted in support of the motion that [the opposing party] did not include in its own memorandum in accordance with rule 7(c)(3)(B).” *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 23, 208 P.3d 1077.

Preservation of Issue: The Fredrickson Defendants’ preserved this issue in their Reply Memorandum in Support the Summary Judgment Motion (R. 1246–47) and in their Amended Reply Memorandum in Support of the Summary Judgment Motion (R. 1578–80).

#### **Issue No. 4**

Whether the district court properly granted summary judgment to the Fredrickson Defendants given that no genuine issues of material fact exist and the undisputed evidence demonstrates that the Fredrickson Defendants are entitled to judgment as a matter of law.

Standard of Review: An appellate court considers a grant of summary judgment “under a *de novo* standard of review, granting no deference to the district court’s analysis.” *L.C. Canyon Partners, L.L.C. v. Salt Lake County*, 2011 UT 63, ¶ 8, 266 P.3d 797.

Preservation of Issue: The Fredrickson Defendants' preserved this issue in their Motion for Summary Judgment (R. 700), in their Supporting Memorandum (R. 703–36), in their Reply Memorandum in Support the Summary Judgment Motion (R. 1246–47), and in their Amended Reply Memorandum in Support of the Summary Judgment Motion (R. 1578–80).

### **Issue No. 5**

Whether the district court properly awarded 3928, LLC its attorneys' fees and costs incurred defending against the Mojo Plaintiffs' claims pursuant to the attorneys' fee provision of the parties' agreement.

Standard of Review: “Whether a party is entitled to an award of attorney fees is a legal conclusion—in this case a matter of contract interpretation—which [this appellate court] review[s] for correctness.” *IHC Health Services, Inc. v. D&K Management, Inc.*, 2008 UT 73, ¶ 38, 196 P.3d 588. However, once a party's right to recover attorneys' fees has been determined, the “[c]alculation of reasonable attorneys fees is in the sound discretion of the trial court . . . and will not be overturned [on appeal] in the absence of a showing of a clear abuse of discretion.” *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988); *see also Baldwin v. Burton*, 850 P.2d 1188, 1198 (Utah 1993) (“When reviewing an award of attorney fees, we will affirm the trial court's ruling absent an abuse of discretion.”)

Preservation of Issue: 3928, LLC preserved this issue at the hearing on the Summary Judgment Motion (R. 2125, Tr. 45:7–18), in its Motion for Attorneys' Fees and

Costs and supporting paperwork (R. 1746–96), in its Reply Memorandum in Support of its Motion for Attorneys’ Fees and Costs (R. 1814–21), and in its Amended Declaration of Attorneys’ Fees and Costs (R. 1842–61).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND  
REGULATIONS AT ISSUE ON APPEAL**

Utah R. Civ. P. 7(c)(3)(A)–(B), set forth in Addendum 6.

**STATEMENT OF THE CASE**

**Nature of the Case**

The Mojo Plaintiffs’ brought this action against the Fredrickson Defendants several months after the Fredrickson Defendants purchased the assets of a bar owned and operated by the Mojo Plaintiffs called a Bar Named Sue for the agreed upon price of \$80,000.00. The Mojo Plaintiffs asserted five claims: (i) rescission of contract based on a supposed breach and fraud, (ii) intentional interference with prospective economic relations, (iii) civil conspiracy, (iv) breach of fiduciary duty, and (v) breach of contract. After deposing the Mojo Plaintiffs’ principals—Mark Peterson (“M. Peterson”) and his mother, Judith Peterson (“J. Peterson”)—the Fredrickson Defendants moved for summary judgment on each of the claims asserted against them arguing that the undisputed facts demonstrated the Mojo Plaintiffs could not prevail on any of their claims. The district court agreed, granting summary judgment on all claims, and subsequently entered an award of attorneys’ fees and costs to Defendant/Appellee 3928, LLC pursuant to a contractual attorneys’ fee provision because it was the prevailing party. The Mojo Plaintiffs then appealed.

### **Course of Proceedings and Disposition in the Court Below**

The Mojo Plaintiffs filed their Complaint against the Fredrickson Defendants on March 15, 2010. (R. 1–12.) The Fredrickson Defendants filed their answer and, shortly thereafter, issued subpoenas duces tecum and deposition subpoenas to the Mojo Plaintiffs' two principals, M. Peterson and J. Peterson. (R. 15–25; R. 28–43.) Before those depositions were conducted, the Mojo Plaintiffs filed a Motion for Preliminary Injunction or Receiver and a Motion to Amend Complaint and noticed a hearing before the district court on those motions. (R. 68–69; R. 47–47A; R. 66–67; R. 70–71.) The Fredrickson Defendants opposed both motions. (R. 183–322.) At the hearing, the Mojo Plaintiffs withdrew both motions. (R. 180.) Thereafter, the Fredrickson Defendants deposed M. Peterson and J. Peterson. (R. 327–44; R. 738; R. 913.)

Following those depositions, the case entered a protracted period of motion practice. The Mojo Plaintiffs filed another motion to amend their complaint, seeking to increase the number of claims asserted from five to sixteen. (R. 345–52; R. 1015–70.) Before the time to oppose the motion to amend had passed, the Mojo Plaintiffs submitted it for decision, obtained an order of the district court approving the proposed amended complaint, and filed their amended complaint. (R. 1011–12; R. 1013–14; R. 1015–70.) The Fredrickson Defendants promptly moved to strike the amended complaint and set aside the district court's order that had been erroneously obtained. (R. 1142–52.) The Fredrickson Defendants also timely filed an opposition to the Mojo Plaintiffs' motion to amend their complaint demonstrating the futility of asserting each of the claims asserted in the proposed amended complaint. (R. 1155–1240.) While these motions were

pending, the Mojo Plaintiffs attempted to obtain the Fredrickson Plaintiffs' default in connection with their proposed amended complaint. (R. 1290–93; R. 1328–29; R. 1398–99.) On October 8, 2010, the district court granted the Fredrickson Defendants' motion to strike and set aside its erroneously obtained order regarding the amended complaint. (R. 1393–97.) In that same ruling, the court also denied the Mojo Plaintiffs' motion to amend their complaint and rebuffed the Mojo Plaintiffs' attempt to obtain the Fredrickson Defendants' default. (*Id.*)

During the same period, the Fredrickson Defendants filed their Motion for Summary Judgment (the “Summary Judgment Motion”), together with a memorandum in support (the “Supporting Memorandum”). (R. 699–1010.) The Mojo Plaintiffs filed their Response to Defendants Motion for Summary Judgment (the “First Opposition Memorandum”) (R. 1075–1137), after which the Fredrickson Defendants filed a reply memorandum. (R. 1244–56; R. 1260–62.) In its October 8, 2010, minute entry, the district court determined that the Mojo Plaintiffs' First Opposition Memorandum did not comply with Utah R. Civ. P. 7(c)(3)(B), struck the noncompliant memorandum, and gave the Mojo Plaintiffs a second opportunity to oppose the Summary Judgment Motion. (R. 1395–96.)

The Mojo Plaintiffs filed their second Response to Defendants' Motion for Summary Judgment (the “Second Opposition Memorandum”) (R. 1421–1562), after which the Fredrickson Defendants filed another reply memorandum. (R. 1565–89; R. 1598–1601.) The district court held a hearing on the Fredrickson Defendants' Summary Judgment Motion on November 30, 2010, at which, following the conclusion of

counsel's argument, the court ruled in favor of the Fredrickson Defendants on all claims and directed their counsel to prepare a conforming order. (R. 1728; R. 2125.)

Counsel for the Fredrickson Defendants' circulated a proposed order, to which the Mojo Plaintiffs' objected. (R. 1743; R. 1731–35.) The district court overruled the Mojo Plaintiffs' objections and entered its order granting the Summary Judgment Motion on January 6, 2011. (R. 1738–43.) In that order, the district court reserved the issue of the Fredrickson Defendants' claim of attorneys' fees and costs as the prevailing party. (R. 1742, ¶ 4.) The Fredrickson Defendants subsequently filed a motion for attorneys' fees and costs, supported by a memorandum and fee affidavit (R. 1746–96), which the Mojo Plaintiffs opposed (R. 1802–09). On April 12, 2011, the Court directed the Fredrickson Defendants to file an amended fee affidavit. (R. 1837.) Following the submission of the amended fee affidavit and the Mojo Plaintiffs' opposition, the court granted the Fredrickson Defendants' requested fees and entered a Judgment against the Mojo Plaintiffs on July 12, 2011. (R. 1842–61; R. 1862–94; R. 1904–11.)

On July 26, 2011, the Mojo Plaintiffs filed a Motion to Set Aside Summary Judgment (R. 1919–59), which the Fredrickson Defendants opposed (R. 2076–88). On August 29, 2011, the district court, in a minute entry that constituted its final order, denied the Motion to Set Aside. (R. 2104–07.) Thereafter, on September 29, 2011, the Mojo Plaintiffs' filed their notice of appeal. (R. 2113–14.)

### **Facts Relevant to the Issues Presented for Review**

1. The business that is the subject of this lawsuit, a bar called A Bar Named Sue, first opened for business in November 2008. (R. 740, 19:9–17.) Plaintiffs /

Appellants Mojo Syndicate, Inc. and Bar Named Sue, LLC, were formed by M. Peterson and J. Peterson to own and operate the bar. (R. 864, ¶ 3.) Attorney John F. Bates drafted and filed the paperwork for the formation of these entities. (*Id.*)

2. Initially, A Bar Named Sue was run primarily by M. Peterson and Jason Rasmussen (“Rasmussen”).<sup>1</sup> (R. 740–41, 19:18–20:1.)

3. In or around June 2009, problems arose between M. Peterson and Rasmussen regarding the bar and allegations that Rasmussen was taking money from the business. (R. 751–55, 64:22–65:16; 68:11–18.)

4. J. Peterson, who was M. Peterson’s mother and who had provided the funds to start the business, suggested that M. Peterson talk with Fredrickson, whom the family had known for some time and who had previous experience operating other bars. (R. 752–53, 65:19–66:8.)

5. According to M. Peterson, he and Fredrickson began talking towards the end of July or the beginning of August 2009 about Fredrickson becoming involved in A Bar Named Sue and acquiring some type of ownership interest in the business. (R. 762–63, 140:24–141:17.)

6. On September 30, 2009, M. Peterson, on behalf of Bar Named Sue, LLC, and J. Peterson, on behalf of Mojo Syndicate, Inc., executed documents drafted by Mr.

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<sup>1</sup> Although Rasmussen was involved in the bar early on and has been named as a defendant in this case, the Mojo Plaintiffs never served him with process and he has not appeared in this proceeding.

Bates that appointed Fredrickson as the agent of each of the Mojo Plaintiffs to help with the struggling bar. (R. 796, 798, 864, ¶ 5.)

7. Also on September 30, 2009, M. Peterson, J. Peterson, and Fredrickson executed a document—effective October 2, 2009—that granted Fredrickson “50 per cent control, ownership, and assigned shares of MOJO SYNDICATE INC., and a BAR NAMED SUE LLC.” (R. 868.)

8. On the same day that they appointed Fredrickson as agent for the Mojo Plaintiffs, M. Peterson and J. Peterson hired attorney Sean Egan (“Mr. Egan”) to represent them in dealing with Rasmussen. (R. 870–71.)

9. October 1, 2009, was Fredrickson’s first day managing A Bar Named Sue. On that day he learned that the bar’s financial condition was much worse than he had been led to believe by M. Peterson. Among the many problems that Fredrickson discovered were difficulties with the fire marshal concerning the bar’s safety permit, the landlord concerning unpaid rent, and various suppliers, which required Fredrickson to spend approximately \$40,000.00 out of his pocket to keep the business open. (R. 803, ¶¶ 11–13.)

10. Fredrickson soon discovered that both M. Peterson and Rasmussen had apparently falsified the bar’s sales tax records with the Utah State Tax Commission. (R. 874, ¶¶ 5–6.)

11. Specifically, Fredrickson discovered that during the first quarter of 2009, A Bar Named Sue earned actual sales revenue of at least \$261,335.42 but only reported

sales of \$165,566.09 in its first quarter sales tax return. (R. 875, ¶ 7.) Rasmussen apparently signed the first quarter 2009 sales tax return for A Bar Named Sue. (*Id.*)

12. Fredrickson also discovered that during the second quarter of 2009, A Bar Named Sue earned actual sales revenue of at least \$232,837.90 but only reported sales of \$132,837.00 in its second quarter sales tax return. (*Id.* ¶ 8.) M. Peterson apparently signed this second quarter 2009 sales tax return for the bar that underreported its actual sales by exactly \$100,000.00. (R. 757, 83:12–22.)

13. At about this time, M. Peterson, J. Peterson, and Fredrickson agreed that Fredrickson would purchase all of A Bar Named Sue's assets and take over the bar's ownership. (R. 805, ¶ 21.)

14. Fredrickson hired attorney Jeff Hollingworth to represent him in the purchase of A Bar Named Sue's assets. (R. 927, ¶ 3.)

15. On October 22, 2009, Mr. Hollingworth sent a draft Asset Purchase Agreement to Mr. Bates, who he understood was representing M. Peterson and J. Peterson in connection with the asset sale. (*Id.* ¶ 9.)

16. Four days later, Mr. Bates sent a response email to Mr. Hollingworth suggesting four specific revisions to the content of Mr. Hollingworth's draft Asset Purchase Agreement. (*Id.* ¶ 10.)

17. Mr. Hollingworth incorporated Mr. Bates' proposed revisions and finalized the Asset Purchase Agreement, which the parties then signed on October 27, 2009. (*Id.* ¶ 11; R. 820–27.)

18. At or around the same time the parties executed the Asset Purchase Agreement, 3928 executed a Promissory Note in the amount of \$40,000.00 and delivered it to J. Peterson. (R. 806, ¶ 24.)

19. Pursuant to the Promissory Note, Fredrickson began making monthly payments of \$2,000.00 to J. Peterson beginning in December 2009. (*Id.*; R. 917–18, 89:5–90:1.) The Mojo Plaintiffs’ counsel acknowledged to the district court that Fredrickson’s monthly payments had been deposited into his firm’s trust account. (R. 2125, Tr. 34:13–15.)

20. Over a week later, on November 10, 2009, M. Peterson, J. Peterson, and Fredrickson each signed a Closing Memorandum. (R. 985.)

21. Despite 3928’s timely and consistent monthly payments, however, Plaintiffs initiated this lawsuit on March 15, 2010. (R. 1–12.)

22. In his deposition, M. Peterson acknowledged that the last time Fredrickson allegedly spoke with him or J. Peterson about an alleged oral agreement to be partners in owning A Bar Named Sue was October 27, 2009, when they each signed the Asset Purchase Agreement. (R. 768, 156:5–8; R. 766–67, 154:22–155:19; R. 782–83, 232:9–233:2; R. 990–91, ¶¶ 22–25.)

23. It is undisputed that nothing in the Asset Purchase Agreement or the related documents establishes the existence of a partnership agreement involving either M. Peterson or J. Peterson and Fredrickson. (R. 775, 193:4–13; R. 785–86, 235:20–236:1.)

24. There is no written or other documentary evidence supporting the Mojo Plaintiffs' allegations that Fredrickson agreed to bring M. Peterson into the bar as a partner. (R. 787–88, 265:21–266:1.)

### **SUMMARY OF THE ARGUMENTS**

The Mojo Plaintiffs' appeal should be dismissed for lack of jurisdiction because it is untimely for two reasons: first, the notice of appeal was filed thirty-one days after the district court entered its order denying Mojo Plaintiffs' Rule 59(a) motion and, second, the Rule 59(a) motion was not an adequate motion for a new trial under recent Utah Supreme Court precedent and therefore did not extend the time to appeal. If this Court considers the merits of the appeal, the district court's grant of summary judgment and award of attorneys' fees should be affirmed. First, there is no legal or factual basis on which the summary judgment can be set aside because of the Mojo Plaintiffs' dissatisfaction with the actions of their counsel before the district court. Second, the district court did not abuse its discretion when it granted summary judgment based on the Mojo Plaintiffs' repeated failure to comply with Utah R. Civ. P. 7(c)(3)(B) when opposing the summary judgment motion. Third, the district court correctly concluded that no genuine issue of material fact exists and the Mojo Plaintiffs are unable to prevail on any of the claims as a matter of law. Finally, the district court did not abuse its discretion in awarding attorneys' fees to 3928, LLC as the prevailing party under the attorneys' fee provision of the parties' agreement.

## ARGUMENT

### **I. THE MOJO PLAINTIFFS' APPEAL SHOULD BE DISMISSED BECAUSE THEY DID NOT TIMELY FILE A NOTICE OF APPEAL.**

#### **A. The Mojo Plaintiffs' notice of appeal was not timely under Appellate Rule 4(a).**

Utah Rule of Appellate Procedure 4(a) requires that a party file its notice of appeal within thirty days of the entry of judgment. Utah R. App. P. 4(a). A motion for a new trial filed pursuant to Utah R. Civ. P. 59(a) extends the time for appeal until after the prescribed period beginning after the district court enters its order on the Rule 59(a) motion. *Id.*, 4(b)(2). “If an appeal is not timely filed, [the appellate court] lacks jurisdiction to hear the appeal and must dismiss.” *Saratoga Holdings, LLC v. Hall*, 2011 UT App 166, ¶ 2, 257 P.3d 488. In this case, the district court entered its order denying the Mojo Plaintiffs Rule 59(a) motion on August 29, 2011. (R. 2104–07.) The Mojo Plaintiffs did not file their appeal until September 29, 2011—thirty-one days after the entry of the district court’s order. (R. 2113–14.)

The Mojo Plaintiffs cannot rely on Appellate Rule 22(d), which provides for an additional three days following service by mail, to salvage their untimely appeal. By its express terms, Rule 22(d) only extends a deadline calculated from service of a paper by U.S. Mail. The deadline to file a notice of appeal is calculated from the date of entry of the judgment or order appealed from, not from the service of the judgment or order. Utah R. App. P. 4(a). This Court has held that a notice of appeal was not timely filed “on the basis that the notice must be filed with thirty days of the judgment’s entry, and not of its service ‘by mail’ on the [appellant] within the meaning of [Rule 22(d)].” *State v. Palmer*,

777 P.2d 521, 522 (Utah Ct. App. 1989) (per curiam ruling); *see also Carsten v. Carsten*, 2006 UT App 275 (same) (unpublished opinion, a copy of which is included in the addendum). Thus, the Mojo Plaintiffs' notice of appeal was not timely filed and their appeal should be dismissed for lack of jurisdiction.

**B. The Mojo Plaintiffs' notice of appeal was not timely filed because they did not file an adequate Rule 59(a) motion.**

Appellate Rule 4(b) provides that a motion for a new trial under Utah R. Civ. P. 59(a) extends the time to file an appeal. In this case, the Mojo Plaintiffs' did not file an adequate Rule 59(a) motion and so the deadline to appeal was not extended. In *B.A.M. Development, L.L.C. v. Salt Lake County*, 2012 UT 26, ¶ 13, --- P.3d ----, the Utah Supreme Court held that an adequate motion for new trial pursuant to Utah R. Civ. P. 59(a) displays three characteristics: the motion is captioned as a motion for new trial, it cites to rule 59, and it requests a new trial. *B.A.M. Development*, 2012 UT 26, ¶ 13. The Mojo Plaintiffs' Rule 59(a) motion only satisfies one of these three characteristics—it cites to Rule 59. (R. 1919–30.) The Mojo Plaintiffs' motion was captioned as a “Motion to Set Aside Summary Judgment and Request for Hearing”—not a motion for new trial. (R. 1919.) And the relief requested in the motion was not a new trial but rather that the summary judgment entered against the Mojo Plaintiffs be set aside. (*Id.*) Because the Mojo Plaintiffs did not adequately move for a new trial under Rule 59(a), the time to appeal commenced upon the district court's entry of its Judgment on July 12, 2012. (R. 1909–11.) The Mojo Plaintiffs' notice of appeal was filed on September 29, 2012, well

after the mandatory thirty-day deadline. Because their notice of appeal was not timely filed, this Court lacks jurisdiction and should dismiss the Mojo Plaintiffs' appeal.

**II. THE MOJO PLAINTIFFS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILS BECAUSE NO SUCH RIGHT EXISTS IN CIVIL CASES AND, EVEN IF IT DID, THE MOJO PLAINTIFFS CANNOT DEMONSTRATE THAT THEIR COUNSEL WAS INEFFECTIVE.**

The first issue presented for review by the Mojo Plaintiffs is whether summary judgment should be reversed based on their counsel's purported inadequate representation. The Mojo Plaintiffs assert that their counsel's inadequate representation resulted in a denial of their "constitutional claim" to effective assistance of counsel. *See* Appellants' Brief, p. 1. This argument fails because the Mojo Plaintiffs do not have a constitutional right to effective assistance of counsel in this civil proceeding and, even if the Mojo Plaintiffs were entitled to effective assistance of counsel in this civil matter, they have not demonstrated that their counsel's conduct was both deficient and prejudicial. Finally, even if the Mojo Plaintiffs were entitled to effective assistance of counsel in this civil matter and established that their counsel's performance was both deficient and prejudicial, the proper remedy would be a malpractice action, not reversal of summary judgment.

**A. The Mojo Plaintiffs do not have a constitutional right to effective assistance of counsel.**

The Mojo Plaintiffs assert that this Court "should reverse the summary judgment ruling dismissing [their] claims because [their] Trial Counsel, Charles C. Brown ("Brown"), displayed inappropriate conduct during his representation of Mojo Plaintiffs." *See* Appellants' Brief, p. 16. In their statement of the issues presented, the Mojo

Plaintiffs cite *State v. Lenkart*, 2011 UT 27, 262 P.3d 1, a criminal case addressing the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Appellants' Brief, p. 1. But as this Court recognized in *Davis v. Grand County Service Area*, 905 P.2d 888, 894 (Utah Ct. App. 1995), *overruled on other grounds by Gillett v. Price*, 2006 UT 24, ¶ 8, 135 P.3d 861 (Utah 2006), "[t]he doctrine of ineffective assistance of counsel arises out of the Sixth Amendment to the United States Constitution and has no parallel in the civil context." The Mojo Plaintiffs are unable to cite any authority establishing a right to effective counsel in a civil proceeding. See Appellants' Brief, pp. 15–19. Instead, they rely on court rules and case law involving attorney standards of practice and discipline. Nothing in the cited authority, however, establishes a right to effective counsel in a civil case—only that there are standards of professional practice imposed on attorneys.

**B. The Mojo Plaintiffs have not demonstrated that Mr. Brown's representation was ineffective or that they were prejudiced.**

Even if they had a right to effective assistance of counsel, which they do not, the Mojo Plaintiffs have not demonstrated that their prior counsel's representation was ineffective or that they were prejudiced by the allegedly ineffective representation. Applying the ineffective assistance of counsel analysis from the criminal context to this case, "[i]n order to bring a successful ineffective assistance of counsel claim, appellant must show that his trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the outcome of the trial." *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (internal

quotation omitted). An appellate court must “indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). In this case, the Mojo Plaintiffs have not presented sufficient evidence on the record to overcome this presumption. Indeed, much of the identified conduct either does not relate to this case or relates to Mr. Brown being placed on disability status well over a year after the summary judgment proceedings before the district court. *See* Appellants’ Brief, pp. 16–17.

Regarding the first element of an ineffective assistance claim, the Mojo Plaintiffs have not demonstrated that Mr. Brown was deficient. The record reflects that Mr. Brown opposed each motion filed by the Fredrickson Defendants and appeared at each scheduled hearing. He also filed a number of motions on his own. The fact that there were irregularities with his motion practice does not demonstrate, without more, that his performance was deficient. Regarding the second element, the Mojo Plaintiffs have not shown prejudice. Notwithstanding the irregularities in Mr. Brown’s motion practice, the district court afforded the Mojo Plaintiffs a second opportunity to properly oppose the Summary Judgment Motion (R. 1395) and, in the end, considered the substance of each claim raised by the Mojo Plaintiffs’ Complaint, together with the evidence supporting those claims. (R. 1739–42; R. 2125, Tr. 42:22–45:6.)

The Mojo Plaintiffs’ claim of prejudice is fatally undermined by the fact that the arguments made by Mr. Brown in opposition to the Summary Judgment Motion, which were considered and rejected by the district court, are the same arguments now asserted

on appeal. The following chart summarizes the arguments now asserted on appeal that were raised with the district court below:

<b>Arguments on Appeal</b>	<b>Arguments Before the District Court</b>
Fredrickson made oral representations that contradicted the Asset Purchase Agreement or modified the Agreement after execution. (Appellants' Brief, pp. 25–27.)	Fredrickson made oral representations that contradicted the Asset Purchase Agreement or modified the Agreement after execution. (R. 1278, ¶ 27; R. 1271, ¶ 22.)
The Mojo Plaintiffs were not represented by counsel in connection with the Asset Purchase Agreement. (Appellants' Brief, pp. 27–28.)	The Mojo Plaintiffs were not represented by counsel in connection with the Asset Purchase Agreement. (R. 1277, ¶ 24; R. 1265–66, 1437.)
The Fredrickson Defendants failed to make timely payments under the Asset Purchase Agreement. (Appellants' Brief, p. 28.)	The Mojo Plaintiffs never received payments under the Asset Purchase Agreement. (R. 1272, ¶ 27; R. 1498–99, Tr. 145:4–146:9.)
The Fredrickson Defendants interfered with Mojo Plaintiffs' economic relations. (Appellants' Brief, pp. 28–30.)	Fredrickson Defendants interfered with Mojo Plaintiffs' economic relations. (R. 782–83, 1505, ¶ 27; R. 1504, ¶¶ 20, 22; R. 1498–99, 145:4–146:9; R. 751, 64:3–15.)
Fredrickson Defendants committed civil conspiracy. (Appellants' Brief, pp. 28–30.)	Fredrickson Defendants committed civil conspiracy. (R. 1272, ¶ 27; R. 782–83, 1505, ¶¶ 28–29; R. 751, 64:3–15.)
John Fredrickson owed a fiduciary duty to Mojo Plaintiffs and M. Peterson and Judith Peterson. (Appellants' Brief, pp. 31–33.)	John Fredrickson owed a fiduciary duty to Mojo Plaintiffs and M. Peterson and Judith Peterson. (R. 1077–78, 1442.)
The award of attorneys' fees was unreasonable. (Appellants' Brief, p. 34–37.)	The amount of attorneys' fees requested by the Fredrickson Defendants was unreasonable. (R. 1862–94.)

In ruling on the Fredrickson Defendants' Summary Judgment Motion, the district court considered each of the arguments raised by Brown, as well as the evidence presented in support thereof, and nonetheless granted summary judgment against the Mojo Plaintiffs on the merits of the case. (R. 1739–42; R. 2125, Tr. 42:22–45:6.) Thus, the Mojo Plaintiffs were not prejudiced by Mr. Brown's allegedly ineffective representation because he made the same arguments now pressed by the Mojo Plaintiffs

on appeal. Accordingly, even if the Mojo Plaintiffs were entitled to effective assistance of counsel in this civil matter, their claim would fail because they were not prejudiced by Mr. Brown's allegedly deficient performance.

**C. The Record of Brown's Ineffective Assistance in the Proceedings Below is Inadequate to Permit Decision by this Court.**

The record below is inadequate to demonstrate Mr. Brown's alleged ineffectiveness or disability below. In the criminal context, "proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (internal quotation omitted). "When a defendant raises an ineffective assistance claim for the first time on appeal, the claim will be reviewed only 'if the . . . record is adequate to permit decision of the issue.'" *Id.* (internal quotation omitted). Because the record is inadequate to establish the alleged ineffectiveness or disability, the Mojo Plaintiffs' rely instead on unfounded speculation and evidence not in the record.<sup>2</sup> See Appellants' Brief, pp. 16–17 (pointing to evidence outside the record of instances of alleged misconduct by Mr. Brown's law firm and speculating that such events "likely" distracted Mr. Brown in this case). Thus, even if the Court were to apply the ineffective assistance of counsel analysis from the criminal context in this case, which it should not, the Mojo Plaintiffs' argument would fail.

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<sup>2</sup> The Fredrickson Defendants have moved to strike those portions of the addendum to Appellants' brief containing materials outside the record that are not proper for consideration in connection with this appeal. The Court should not consider such when addressing the merits of the Mojo Plaintiffs' appeal.

**D. Reversal of the district court is not the proper remedy for Ineffective Assistance of Counsel.**

As this Court noted in *Davis*, “[t]he general rule is that in civil cases a new trial will not be granted based upon the incompetence or negligence of one’s own trial counsel.” *Davis*, 905 P.2d at 894 (internal citations omitted). “In the civil context, malpractice action, not a new trial, is frequently suggested as the appropriate remedy for the client whose counsel’s performance falls below the standard of professional competence.” *Id.* In *Chilton v. Young*, 2009 UT App 265, 220 P.3d 171, this Court rejected the very argument the Mojo Plaintiffs now assert—that summary judgment against them should be set aside on the grounds of ineffective assistance of counsel. As the *Chilton* court recognized, “[d]efendants properly point out that this is a civil matter in which there is no constitutional right to effective representation and argue that [plaintiffs’] sole remedy is to bring an independent malpractice action against their subsequent counsel.” *Id.* ¶ 10. As in *Chilton*, the Mojo Plaintiffs in this case have not presented any authority supporting their request to reverse summary judgment on the basis of their allegedly ineffective counsel before the district court.

**III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S SUMMARY JUDGMENT RULING ON THE GROUNDS THAT THE MOJO PLAINTIFFS' FAILED TO COMPLY WITH UTAH R. CIV. P 7 AND 56 BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SO RULING.**

**A. This Court reviews the district court's decision not to accept the Mojo Plaintiffs' noncompliant Second Opposition Memorandum under the abuse of discretion standard.**

The proper standard of review for this Court to apply when considering the district court's grant of summary judgment because of the Mojo Plaintiffs' failure to comply with Utah Rules of Civil Procedure 7 and 56 when opposing the Summary Judgment Motion is not correctness, as the Mojo Plaintiffs assert, but rather abuse of discretion. "We review a district court's grant of summary judgment for correctness, affording no deference to the district court. . . . However, the district court has discretion in requiring compliance with [rule 7 of the Utah Rules of Civil Procedure]." *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 5, 156 P.3d 175 (internal quotation omitted; second alteration in original). When reviewing a grant of summary judgment based on a party's failure to comply with Rule 7, the appellate court "must determine whether the district court abused its discretion in deeming admitted those facts . . . submitted in support of the motion that [the opposing party] did not include in its own memorandum in accordance with rule 7(c)(3)(B)." *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 23, 208 P.3d 1077.

The Mojo Plaintiffs assert that this Court's review should apply the correctness standard, granting no deference to district court. *See* Appellants' Brief, p. 2. In support of this argument, the Mojo Plaintiffs rely on *Sanderson v. First Sec. Leasing Co.*, 855

P.2d 303, 306 (Utah 1992), and *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600. Both of these cases are inapposite, however, because neither dealt with the losing party's failure to comply with Rule 7. The proper standard of review applicable to this issue is abuse of discretion, under which the appellate court "will reverse only if there is no reasonable basis for the decision." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064 (internal quotation omitted).

**B. The district court did not abuse its discretion when granting summary judgment on the basis of the Mojo Plaintiffs' noncompliant Second Opposition Memorandum.**

Rule 7 requires that a memorandum opposing a motion for summary judgment "contain a verbatim restatement of each of the moving party's facts that is controverted" and "provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." Utah R. Civ. P. 7(c)(3)(B). "Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." *Id.* 7(c)(3)(A). The Mojo Plaintiffs' Second Opposition Memorandum did not comply with this rule but was noncompliant in various material ways. (R. 1425–41.) First, the Second Opposition Memorandum apparently purports to dispute each of the 38 statements of fact asserted in the Fredrickson Defendants' Supporting Memorandum (R. 706–23) because it contains numbering 1 through 38, (R. 1425–40). However, many of the Fredrickson Defendants' factual assertions are not quoted verbatim as required. (R. 1437–40). Second, the Mojo Plaintiffs' explanation of the supposed disputes of material fact consists of little more than a lengthy series of unanswered rhetorical questions without

citation to relevant supporting materials. (R. 1425–40). Third, most of the Mojo Plaintiffs’ few citations to supporting materials actually refer to documents or affidavits provided by the Fredrickson Defendants, and none of the cited materials demonstrate a dispute of material fact. (*Id.*) Fourth, the Mojo Plaintiffs’ citations do not contain sufficient pinpoint citations identifying the evidence supposedly creating the dispute of fact. (*Id.*)

As itemized in the Fredrickson Defendants’ Second Reply Memorandum, these unanswered rhetorical questions and vague citations do not, in fact, identify a single material fact in dispute. (R. 1568–77.) Merely posing unanswered and irrelevant questions does not demonstrate a disputed fact. “A district court is not obliged to comb the record to determine whether a genuine issue as to any material fact exists to prevent summary judgment. Rather, it is the nonmoving party’s burden to demonstrate that such a conflict exists.” *Jennings*, 2009 UT App 119, ¶ 26. The Mojo Plaintiffs’ Second Opposition Memorandum (like their First Opposition Memorandum) wholly failed to comply with “[t]he major purpose of summary judgment, [which is] is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder.” *Brown v. Jorgensen*, 2006 UT App 168, ¶ 20, 136 P.3d 1252 (internal quotation omitted). To further this purpose, “specific facts are required to show whether there is a genuine issue for trial.” *Id.* (internal quotation omitted).

This Court addressed almost the exact same circumstances presented by this case in *Jennings*, 2009 UT App 119. In *Jennings*, the district court relied on the nonmoving

party's failure to comply with Rule 7(c)(3)(B) in granting summary judgment, accepting the moving party's facts as uncontroverted. *Jennings*, 2009 UT App 119, ¶¶ 21–22. In appealing the adverse summary judgment ruling, the nonmoving party argued that it had “substantially complied” with Rule 7(c)(3)(B) because the disputed facts were supposedly set forth in an affidavit accompanying its opposition memorandum. *Id.* ¶ 23. The *Jennings* court recognized the district court's discretion to grant summary judgment based on noncompliance with Rule 7, holding that “the district court did not abuse its discretion when it determined that [the nonmoving party] did not properly contest [the moving party's] alleged facts.” *Id.* ¶ 28.

As in *Jennings*, the district court in this case relied in part on the Mojo Plaintiffs' failure to comply with Rule 7 in granting the Fredrickson Defendants' motion for summary judgment. (R. 2125, Tr. 43:1–5; R. 1739, ¶ 1). As in *Jennings*, the Mojo Plaintiffs have argued on appeal that they substantially complied with Rule 7. *See* Appellants' Brief, pp. 2, 19. As in *Jennings*, the noncompliant opposition filed by the Mojo Plaintiffs does not demonstrate a disputed fact. (R. 1425–40; *see also* Part IV, *infra.*) And, as in *Jennings*, this Court should conclude that the district court did not abuse its discretion when it granted summary judgment based on the Mojo Plaintiffs' noncompliance with Rule 7.

The Mojo Plaintiffs rely on *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, 89 P.3d 155, in arguing for reversal of summary judgment because the failure to comply with Rule 7 was “harmless error.” *See* Appellants' Brief, pp. 20–21. *Metro West*, however, is inapposite to the present case because “the disputed facts were clearly

provided in the body of the memorandum with applicable record references.” *Metro West*, 2004 UT 23, ¶ 23 n.4. In contrast, no part of the Mojo Plaintiffs’ First Opposition Memorandum or Second Opposition Memorandum clearly identify the disputed facts with citation to applicable record references. (R. 1075–82; R. 1421–51); *see also Bluffdale City v. Smith*, 2007 UT App 25, ¶ 10, 156 P.3d 175 (distinguishing *Metro West* based on the failure to identify specific facts with appropriate citations).

The Mojo Plaintiffs identify three examples in which they argue that their Second Opposition Memorandum complied with Rule 7. *See* Appellant’s Brief, pp. 23–24. None of these examples, however, demonstrate compliance with Rule 7 or a disputed material fact. The first example, regarding paragraph 7 of the Fredrickson Defendants’ Supporting Memorandum, is not compliant. In their Supporting Memorandum, the Fredrickson Defendants state that Mr. Bates provided legal services to the Mojo Plaintiffs and drafted certain legal documents for them, specifically a corporate resolution and a limited liability company certificate of agency. (R. 707, ¶ 7.) In support of this statement, the Fredrickson Defendants cited to Mr. Bates’ own affidavit (which had been obtained by the Mojo Plaintiffs themselves) stating that he drafted the specified documents. (*Id.*) In their Second Opposition Memorandum, the Mojo Plaintiffs simply cite to Mr. Bates’ affidavit—the very same document that the Fredrickson Defendants cited in support of paragraph 7—and ask a vague, unanswered rhetorical question. (R. 1428, ¶ 7.) Indeed, Mr. Bates’ affidavit, cited by the Mojo Plaintiffs, expressly and unequivocally *confirms* the facts stated in paragraph 7 of the Fredrickson Defendants’ Supporting Memorandum. (R. 707, ¶ 7; R. 1470, ¶ 5.)

The second example, regarding paragraph 13 of the Fredrickson Defendants' Supporting Memorandum, also fails to comply with Rule 7. Paragraph 13 of the Supporting Memorandum identifies apparent fraud in the bar's sales tax return for the first quarter of 2009 that was apparently signed by Jason Rasmussen. (R. 709–10, ¶ 13.) In responding to this fact, the Mojo Plaintiffs expressly disclaim any knowledge of the tax return discrepancy identified in the Fredrickson Defendants' paragraph 13. (R. 1433; R. 760–61, 97:15–98:20.) Furthermore, the Mojo Plaintiffs' opposition cites to a portion of M. Peterson's deposition testimony in which he disclaimed knowledge of the bar's sales tax return for the *second quarter* of 2009, not the sales tax return for the *first quarter* of 2009 that was the subject of paragraph 13. (R. 1433.) Thus, the Mojo Plaintiffs' cited material does not even relate to the same subject as the facts stated in paragraph 13 and therefore cannot demonstrate a disputed fact. Later in his deposition, moreover, M. Peterson also disclaimed any knowledge of the bar's second quarter sales tax return for 2009. (R. 760–61, 97:15–98:20.) Disclaiming knowledge of a fact does not comply with Rule 7 or demonstrate a disputed material fact.

The Mojo Plaintiffs' third example, which points to garnishment paperwork served on Fredrickson in connection with a tax commission proceeding against Plaintiff/Appellant A Bar Named Sue, LLC in which the Fredrickson Defendants were purportedly using M. Peterson's federal EIN number for A Bar Named Sue, LLC (the "EIN Number") cannot be an example of the Mojo Plaintiffs' compliance with Rule 7. Nothing in the 38 statements of fact set forth in the Supporting Memorandum related in any way to the referenced garnishment paperwork or the EIN Number. (R. 706–23.)

Indeed, the Mojo Plaintiffs do not—and cannot—cite any portion of the Supporting Memorandum discussing this issue. *See* Appellants’ Brief, p. 23. Moreover, the document cited in the Mojo Plaintiffs’ brief—a Writ of Continuing Garnishment issued to Fredrickson from a wholly unrelated tax commission lawsuit against Plaintiff/Appellate A Bar Named Sue, LLC (R. 1508–11)—does not demonstrate that the Fredrickson Defendants were using the EIN Number. To the contrary, the Writ of Continuing Garnishment was issued *to* Fredrickson as a garnishee by the Third District Court and doubtless was prepared on behalf of the Utah State Tax Commission as the plaintiff in that lawsuit. (*Id.*) Simply put, the Writ of Continuing Garnishment does not demonstrate the Mojo Plaintiffs’ compliance with Rule 7, nor does it stand for the asserted proposition that the Fredrickson Defendants were somehow misusing the EIN Number.

The district court did not abuse its discretion in granting summary judgment based on the Mojo Plaintiffs’ failure to comply with Rule 7, particularly where the district court gave them two opportunities to do so. (R. 1395.) The Mojo Plaintiffs themselves do not argue that the district court’s granting of summary judgment on this ground amounted to an abuse of discretion. Summary judgment should therefore be affirmed.

**IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT’S SUMMARY JUDGMENT RULING ON THE GROUNDS THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND THE FREDRICKSON DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT.**

Summary judgment pursuant to Utah Rule of Civil Procedure 56(c) is appropriate if, viewing the evidence in the light most favorable to the non-moving party, the evidence shows that “there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). Where a summary judgment movant presents evidence in support of its motion, as did the Fredrickson Defendants in this case, the nonmoving party “‘may not rest upon the mere allegations or denials of the pleadings,’ but ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600 (citing Utah R. Civ. P. 56(e)). “[S]ummary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Schafir v. Harrigan*, 879 P.2d 1384, 1392–93 (Utah Ct. App. 1994). The district court correctly ruled that the undisputed facts in this case demonstrate that the Fredrickson Defendants are entitled to summary judgment on each of the Mojo Plaintiffs’ claims against them.

**A. The district court correctly determined that there are no genuine issues of material fact supporting the Mojo Plaintiffs’ claim for rescission of contract for breach and fraud.**

None of the three purported issues raised in the Mojo Plaintiffs’ brief demonstrate the existence of a triable issue of fact.

- i. The undisputed evidence shows that the Fredrickson Defendants did not verbally modify the Asset Purchase Agreement after it was signed.

In arguing that they demonstrated the existence of a genuine issue of material fact showing the verbal modification of the Asset Purchase Agreement after its execution, the Mojo Plaintiffs rely on unsubstantiated speculation rather than actual disputes supported by evidence. The Mojo Plaintiffs repeatedly qualify their arguments by saying “if” the facts were as supposed, an issue of fact would exist. First, they argue that if the

Fredrickson Defendants verbally modified the terms of the written, integrated Asset Purchase Agreement after it was executed, a triable issue of fact could exist. *See* Appellants' Brief, pp. 25, 26. Second, they argue that if J. Peterson owned the bar's assets, the asset sale could not have been completed without her approval. *See id.* pp. 26–27. Third, they argue that if the Fredrickson Defendants did not make the contractual monthly payments, then they would have been in breach of contract. *See id.* p. 27. Such speculation does not carry their burden on appeal.

More importantly, the undisputed facts on the record demonstrate that the supposed events potentially giving rise to disputed facts actually did not occur. First, it is undisputed that Fredrickson did not talk with M. Peterson or J. Peterson after the Asset Purchase Agreement was signed, so there could not have been a subsequent verbal modification to its terms. (R. 768, 156:5–8; R. 766–67, 154:25–155:19; R. 782–83, 232:9–233:2; R. 990–91, ¶¶ 20–25.) As M. Peterson testified, “the last time that [he] or [J. Peterson] talked with [Fredrickson] about the [supposed] partnership was October 27th,” when the parties signed the Asset Purchase Agreement. (R. 768, 156:5–8.) Second, it is undisputed that both M. Peterson and J. Peterson acknowledged that the Mojo Plaintiffs—not J. Peterson personally—owned the bar's assets that were the subject of the Asset Purchase Agreement. (R. 823, ¶¶ 6(a)(iv)–(v).) Moreover, J. Peterson herself *did* personally approve of the sale of the bar's assets because she personally signed the Asset Purchase Agreement. (R. 827; R. 916, 72:18–19.) Third, it is undisputed that the Mojo Plaintiffs actually received the monthly payments specified in the Asset Purchase Agreement from Fredrickson. (R. 917, 89:5–23.) At the hearing on

the Fredrickson Defendants' Summary Judgment Motion, the Mojo Plaintiffs' counsel admitted that the monthly payments had been received and deposited into his firm's trust account. (R. 2125, Tr. 34:13–15.)

The Mojo Plaintiffs also point to several unsubstantiated statements in J. Peterson's affidavit trying to show a dispute of fact where none exists. *See* Appellants' Brief, p. 26. These efforts are unavailing because they simply recite J. Peterson's belief or intent, which is not competent evidence to controvert the plain terms of the unambiguous, fully integrated Asset Purchase Agreement that both J. Peterson and M. Peterson acknowledge they signed. *See* Utah R. Civ. P. 56(e) (requiring summary judgment to be opposed by evidence that would be admissible at trial); *see also Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 750 (Utah 1983) (stating that a party's "subjective and uncommunicated intent" regarding the terms of an agreement "is insufficient to raise an issue of fact").

Further, the Mojo Plaintiffs misquote J. Peterson's affidavit when they assert that the "Fredrickson Defendants did not pay her \$2,000 per month or \$40,000 up front for his partnership in the bar." *See* Appellants' Brief, p. 26. J. Peterson's actual statement in her deposition was that Fredrickson told her that he (Fredrickson) would pay her \$2,000 per month, \$3,000 per month to M. Peterson "under the table and \$40,000 up front for partnership in the bar." (R. 1272, ¶ 27.) This unsubstantiated statement does not create an issue of fact, however, because the undisputed payment terms set forth in the integrated Asset Purchase Agreement, which both J. Peterson and M. Peterson signed, do not require a \$3,000 payment to M. Peterson. *See John Call Engineering, Inc. v. Manti*

*City Corp.*, 743 P.2d 1205, 1208 (Utah 1987) (recognizing “the panoply of contract law upholding the principle that a party is bound by the contract which he or she voluntarily and knowingly signs.”).

As J. Peterson testified in her deposition (and as her attorney acknowledged in oral argument before the district court), she actually received the monthly \$2,000 payments from Fredrickson. (R. 917, 89:5–23; R. 2125, Tr. 34:13–15.) The Mojo Plaintiffs cannot create a dispute of fact to defeat summary judgment by contradicting their own deposition testimony with a subsequently executed, self-serving affidavit. This Court has recognized that “when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy. *Traco Steel Erectors, Inc. v. Control, Inc.*, 2007 UT App 407, ¶ 38, 175 P.3d 572 (internal quotation omitted). J. Peterson’s declaration contains no such explanation. (R. 1268–73.) And nowhere does the Asset Purchase Agreement provide for Fredrickson to obtain a “partnership” in the bar—only for the Fredrickson Defendants’ purchase of its assets. (R. 820–27.) M. Peterson acknowledged that the Asset Purchase Agreement provided for the sale of the bar’s assets, not a partnership. (R. 774, 192:23–193:13.)

- ii. The undisputed evidence shows that the Mojo Plaintiffs received legal counsel in connection with the Asset Purchase Agreement.

The Mojo Plaintiffs next argue that disputes of fact exist regarding whether they were represented by counsel in the drafting and execution of the Asset Purchase Agreement. *See* Appellants’ Brief, p. 27. This argument fails for two reasons. First,

even if the Mojo Plaintiffs were not represented by counsel, that fact would not present a triable issue supporting their claim for rescission of contract. Parties are not required to have counsel before entering into contracts, and both M. Peterson and J. Peterson acknowledged that, in signing the Asset Purchase Agreement, they had “had full and sufficient opportunity to obtain separate tax advice and legal counsel in the matters related to this Agreement.” (R. 826, ¶ 16.) Second, the undisputed facts show that Mr. Bates, an attorney who had previously provided legal services to the Mojo Plaintiffs, did in fact review a draft of the Asset Purchase Agreement and comment substantively on its terms. (R. 864–65, ¶¶ 7–8.) The Mojo Plaintiffs’ conclusory assertions that they did not retain Mr. Bates in connection with the sale of the bar’s assets does not dispute the fact of Mr. Bates’ review and comment on the Asset Purchase Agreement. The record citation provided by the Mojo Plaintiffs in their brief for the assertion that they had no intention of selling the bar’s assets (R. 1437) is merely the unsupported, unfounded assertion of their counsel—it is not admissible evidence showing a genuine issue of material fact.

- iii. The undisputed evidence shows that the Mojo Plaintiffs received the payments required under the Asset Purchase Agreement.

The Mojo Plaintiffs’ third argument is that there is a dispute of fact whether the Fredrickson Defendants adhered to the payment terms of the Asset Purchase Agreement and the related promissory note. *See* Appellants’ Brief, p. 28. As noted previously, the unfounded assertion in J. Peterson’s affidavit that Fredrickson “stated he was going to pay me \$2,000 a month and \$3,000 a month to M. Peterson under the table and \$40,000 up front for partnership in the bar” does not create a triable issue of fact in light of the

unambiguous, fully integrated Asset Purchase Agreement detailing the actual payment terms agreed to by the parties. (R. 1272, ¶ 27.) The Asset Purchase Agreement sets forth the terms of payment: \$80,000.00 total purchase price, with \$40,000.00 due at the closing and the other \$40,000.00 financed by a promissory note to be delivered at closing. (R. 821, § 2.) The terms of the promissory note delivered at closing required monthly payments of \$2,000.00. (R. 949.) It is undisputed that Fredrickson made the monthly \$2,000.00 payments.<sup>3</sup> (R. 917, 89:5–23; R. 2125, Tr. 34:13–15.)

Further, the \$40,000.00 due at closing would be offset by amounts advanced by the Fredrickson Defendants to cover the bar's operations prior to the closing. (R. 821, § 2.) In the Closing Memorandum, signed by both J. Peterson and M. Peterson, the parties agreed that this credit would be \$40,000.00. (R. 960.) Although the Mojo Plaintiffs argue that no accounting was provided in connection with this \$40,000.00 credit, they point to no provision of the parties' agreement requiring such an accounting. No provision of the Asset Purchase Agreement required an accounting of the credit and each of the principals involved in the transaction—M. Peterson, J. Peterson, and Fredrickson—signed the Closing Memorandum agreeing that amount of the credit would be \$40,000.00. (R. 960.) *See John Call Engineering*, 743 P.2d at 1208 (“[A] party is bound by the contract which he or she voluntarily and knowingly signs.”). The undisputed evidence demonstrates that the Fredrickson Defendants adhered to the Asset Purchase Agreement's payment terms and that no triable facts exist on this issue.

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<sup>3</sup> Tellingly, the Mojo Plaintiffs did not assert the supposed obligation to pay \$3,000.00 “under the table” until months after this litigation began.

**B. The district court correctly determined that there are no genuine issues of material fact supporting the Mojo Plaintiffs' claim for intentional interference with economic relations.**

The district court correctly ruled that the undisputed evidence demonstrates that the Mojo Plaintiffs' cannot prevail on their claim for intentional interference, which requires that they present evidence of, among other things, either an improper purpose or improper means by the Fredrickson Defendants and resulting injury.<sup>4</sup> *See Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). None of the Mojo Plaintiffs' assertions on appeal demonstrate disputed facts that, if true, would establish a triable issue on this claim. Once again, the Mojo Plaintiffs assert that Fredrickson represented that M. Peterson would be a partner in the bar. *See* Appellants' Brief, p. 29. However, the undisputed evidence shows that any such representations (which Fredrickson denies) were made before M. Peterson and J. Peterson signed the Asset Purchase Agreement. (R. 768, 156:5–8; R. 766–67, 154:25–155:19; R. 782–83, 232:9–233:2; R. 990–91, ¶¶ 20–25.) M. Peterson cannot have believed any representations that he would be a partner in the business when he knowingly signed the Asset Purchase Agreement, a document that he acknowledges conveyed the bar's assets to the Fredrickson Defendants. (R. 774–75, 192:18–193:13.) “Under the law of this state, a party cannot reasonably rely upon oral statements by the opposing party in light of contrary written information.” *See Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1067 (Utah 1996).

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<sup>4</sup> Nowhere in their brief do the Mojo Plaintiffs argue that the asserted facts support the “improper means” component of the intentional interference tort.

The Mojo Plaintiffs' claim that they never agreed to sell the bar and its assets for \$80,000.00. *See* Appellant's Brief, p. 29. However, the undisputed evidence demonstrates that both M. Peterson and J. Peterson actually did sign the Asset Purchase Agreement providing for the sale of the bar's assets for \$80,000.00. (R. 820–27.) The Mojo Plaintiffs claim that there is no executed promissory note, but it is undisputed that they did receive the required monthly payments detailed in the promissory note. (R. 917, 89:5–23; R. 2125, Tr. 34:13–15.) The Mojo Plaintiffs claim that J. Peterson never received an accounting of the \$40,000.00 in connection with the Closing Memorandum, but the undisputed evidence establishes that no accounting was required by the Asset Purchase Agreement (R. 820–27) and that, in fact, both J. Peterson and M. Peterson agreed to the \$40,000.00 amount of the credit (R. 835).

The Mojo Plaintiffs again point to the statement in J. Peterson's deposition that she believed she personally—as opposed to the Mojo Plaintiffs—actually owned the assets conveyed by the Asset Purchase Agreement. Even if true, this would not demonstrate an improper purpose on the part of the Fredrickson Defendants, as there is absolutely no evidence that they knew of J. Peterson's supposed belief that she personally owned the assets. By signing the Asset Purchase Agreement, the Mojo Plaintiffs represented that they owned the assets and were able to convey them without the consent of any other party. (R. 823, ¶¶ 6(a)(iv)–(v).) Furthermore, the Mojo Plaintiffs should be estopped from asserting J. Peterson's ownership of assets given that they represented to the Fredrickson Defendants that they owned the assets and the Fredrickson Defendants reasonably relied on that representation when entering into the Asset Purchase

Agreement. *See Richards v. Brown*, 2009 UT App 315, ¶ 45, 222 P.3d 69 (listing elements of promissory estoppel).

As a matter of law, the Mojo Plaintiffs' cannot assert demonstrably false statements in affidavits in order to defeat summary judgment. *See Utah R. Civ. P. 56(c)* (defeating summary judgment requires *genuine* issue of material fact) (emphasis added). As the Utah Supreme Court has recognized, a person "who complains of being injured by . . . a false representation cannot heedlessly accept as true whatever is told him, but he has the duty of exercising such degree of care to protect his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances." *Gold Standard*, 915 P.2d at 1068 (internal quotation omitted). Because the Mojo Plaintiffs did not exercise such care, they are "precluded from holding [the Fredrickson Defendants] to account for the consequences of [their] own neglect." *Id.* (internal quotation omitted). Not only are the Mojo Plaintiffs' assertions contrary to the undisputed evidence on the record, but the assertions also fail to support the claim for intentional interference because they do not show that the Fredrickson Defendants' "predominant purpose" was to harm the Mojo Plaintiffs. *See Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 20, 116 P.3d 323 (internal citations omitted).

Lastly, the Mojo Plaintiffs argue that they presented disputed facts that could support the damages aspect of their intentional interference claim. *See Appellants' Brief*, p. 30. The only portion of the record they cite in support of this argument is J. Peterson's unsubstantiated assertion in her affidavit. (R. 1272, ¶ 27.) But the undisputed evidence shows that J. Peterson actually did receive the required monthly payments. (R. 917,

89:5–23; R. 2125, Tr. 34:13–15.) The Mojo Plaintiffs cannot create a dispute of fact to save this claim from summary judgment by contradicting their own sworn deposition testimony with subsequently executed, self-serving affidavit. *Traco Steel*, 2007 UT App 407, ¶ 38. The undisputed evidence shows that the Mojo Plaintiffs agreed to sell the bar's assets to the Fredrickson Defendants for \$80,000.00 and that the Fredrickson Defendants tendered the agreed payment. The Mojo Plaintiffs have not been injured and the district court properly granted summary judgment on this claim.

**C. The district court correctly ruled that no genuine issue of material fact exists regarding the Mojo Plaintiffs' claim for civil conspiracy and properly granted summary judgment.**

The district court correctly granted summary judgment on the Mojo Plaintiffs' claim for civil conspiracy because there is no evidence of any unlawful or wrongful conduct by the Fredrickson Defendants, which is a required element for a civil conspiracy claim. *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 12, 42 P.3d 1253 (internal quotations omitted). The Mojo Plaintiffs assert that the following three purported facts demonstrate the Fredrickson's wrongful conduct in furtherance of the alleged conspiracy: (i) obtaining the bar's assets without paying full value, (ii) failing to uphold the alleged promise to make M. Peterson a partner in the bar, and (iii) taking assets personally owed by J. Peterson. *See* Appellants' Brief, p. 31. None of these purported facts demonstrates grounds for reversal of the district court's ruling.

The first asserted fact is not unlawful or wrongful. It is undisputed that M. Peterson and J. Peterson voluntarily<sup>5</sup> entered into the Asset Purchase Agreement. (R. 820–27; R. 772, 177:21–23; R. 916, 72:18–19.) The Mojo Plaintiffs present nothing to suggest that the agreed-upon purchase price was not full value and, even if it were not, the sale for less than full value would not constitute unlawful or wrongful conduct. The second asserted fact fails for the same reason—it does not show unlawful or wrongful conduct. To the extent the Mojo Plaintiffs’ attempt to use this purported fact (which the Fredrickson Defendants do not concede) to show an underlying tort of misrepresentation to support their civil conspiracy claim, such a claim fails because the Mojo Plaintiffs cannot show the required element of reasonable reliance necessary for an intentional misrepresentation claim. *See Gold Standard*, 915 P.2d at 1066–68. Moreover, the undisputed facts show that, whatever may have been said prior to the execution of the Asset Purchase Agreement, the plain terms of the asset sale were fully disclosed to the Mojo Plaintiffs in the Asset Purchase Agreement itself and no subsequent representations regarding a partnership with M. Peterson were ever made. (R. 768, 156:5–8; R. 766–67, 154:25–155:19; R. 782–83, 232:9–233:2; R. 990–91, ¶¶ 20–25.)

The third asserted fact in support of the civil conspiracy claim likewise fails. At the time of the asset sale, J. Peterson acknowledged that the Mojo Plaintiffs owned the assets and not her personally. (R. 823, ¶¶ 6(a)(iv)–(v).) If J. Peterson did own the assets and the Mojo Plaintiffs unlawfully sold J. Peterson’s personal property to the Fredrickson

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<sup>5</sup> In this appeal, the Mojo Plaintiffs have abandoned their wholly unsubstantiated duress argument presented to the district court.

Defendants in the Asset Purchase Agreement, that would be unlawful conduct of *the Mojo Plaintiffs*, not the Fredrickson Defendants. There is no evidence that the Fredrickson Defendants had any knowledge, or reason to suspect, that J. Peterson owned the bar's assets personally. Summary judgment was properly granted on this claim.

**D. The district court correctly granted summary judgment on the Mojo Plaintiffs' claim for breach of fiduciary duty.**

In arguing that the Fredrickson Defendants owed them fiduciary duties, the Mojo Plaintiffs rely exclusively on the agreement of October 2, 2009, granting Fredrickson a 50% ownership interest in each of the Mojo Plaintiffs. *See* Appellants' Brief, p. 32 (citing R. 815).<sup>6</sup> This argument misapprehends the nature of the October 2 agreement, which was not a partnership but rather an agreement that granted Fredrickson a 50% ownership interest in each of two companies—Mojo Syndicate, Inc. and Bar Named Sue LLC. (R. 815.) Thus, this document does not establish that the Fredrickson Defendants owed partnership fiduciary duties to the Mojo Plaintiffs, only that Fredrickson become a co-owner of the Mojo Plaintiffs. (*Id.*) The Mojo Plaintiffs also misapprehend the nature of the district court's ruling on this claim when they argue that the court "failed to acknowledge the parties were partners with one another *before* they entered into the Asset Purchase Agreement." *See* Appellants' Brief, p. 32. In its ruling at the hearing on the

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<sup>6</sup> The Mojo Plaintiffs' brief also argues that Fredrickson owed fiduciary duties to M. Peterson and J. Peterson individually by virtue of the October 2 agreement. However, neither M. Peterson nor J. Peterson is a party to this lawsuit or has personally asserted claims against the Fredrickson Defendants. As such, any possible fiduciary duty owed to M. Peterson or J. Peterson is irrelevant to the Mojo Plaintiffs' claims or whether summary judgment was properly entered against the Mojo Plaintiffs.

Summary Judgment Motion, the court stated that a fiduciary duty may have existed before the Asset Purchase Agreement was executed but that the execution of that agreement in an arms-length transaction superseded any such duty. (R. 2125, Tr. 45:1–5.) As the district court properly observed, “when the parties deal at arm’s length or in an adversarial relationship, no fiduciary relationship can be said to exist.” *Gold Standard*, 915 P.2d at 1064. Thus, any fiduciary relationship that the Fredrickson Defendants may have owed to the Mojo Plaintiffs was superseded by the parties’ negotiation and execution of the fully integrated, unambiguous Asset Purchase Agreement in an arms-length transaction. (R. 820–27; R. 621–22.)

Moreover, even if a fiduciary duty continued during the negotiation and execution of the Asset Purchase Agreement, the only thing that the Mojo Plaintiffs claim Fredrickson did to breach his alleged duty was fail to inform them of his conduct. *See* Appellants’ Brief, p. 33. The undisputed evidence belies the validity of this argument because it is clear that the Fredrickson Defendants’ actions *were* fully disclosed to the Mojo Plaintiffs, including that the Fredrickson Defendants would acquire a liquor license (R. 824, ¶ 7(a)(ii)), and that M. Peterson would not be a partner with the Fredrickson Defendants or entitled to view the bar’s accounting records after executing the Asset Purchase Agreement (R. 820–27; R. 775, 193:4–13). “Under Utah law, each party has the burden to read and understand the terms of a contract before he or she affixes his or her signature to it. A party may not sign a contract and thereafter assert ignorance or failure to read the contract as a defense.” *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*,

2010 UT 65, ¶ 28, 245 P.3d 184. Summary judgment on the Mojo Plaintiffs' claim for breach of fiduciary duty was therefore proper.

**E. The district court properly granted summary judgment on the Mojo Plaintiffs' claim for breach of contract.**

As previously discussed in Part IV.A above, the district court did not err when it granted summary judgment on the Mojo Plaintiffs' fifth claim asserting breach of contract. On appeal, the Mojo Plaintiffs' point to the allegations of their complaint in support of their argument that summary judgment on this claim should be reversed. *See* Appellants' Brief, pp. 33–34. However, “where the movant supports a motion for summary judgment with affidavits or other sworn evidence, the nonmoving party may not rely on bare allegations from the pleadings to raise a dispute of fact.” *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439. Thus, the Mojo Plaintiffs' allegations in the complaint do not provide a basis for reversal of the summary judgment award.

Similarly, the purported facts asserted by the Mojo Plaintiffs do not establish a dispute of material fact. Again, they rely on the affidavit statement of J. Peterson regarding Fredrickson's supposed statement about the payments he would make. *See* Appellants' Brief, p. 34 (citing R. 1272, ¶ 27.) As discussed, however, this subsequent affidavit testimony contradicts J. Peterson's deposition testimony in which she acknowledged having received the \$2,000.00 monthly payments specified under the Asset Purchase Agreement. (R. 917, 89:5–23.) The Mojo Plaintiffs' own counsel acknowledged before the district court that he had deposited the payments into his firm's trust account. (R. 2125, Tr. 34:13–15.) It is undisputed that J. Peterson's assertion that

Fredrickson agreed to pay M. Peterson \$3,000.00 each month under the table has no support in the record and, in fact, is directly contradicted by the unambiguous payment terms of the fully integrated Asset Purchase Agreement. (R. 821, § 2.)

The Mojo Plaintiffs also make a novel assertion in arguing for reversal of this claim on appeal—that it may have been a breach of contract for the Fredrickson Defendants to not provide an accounting of the \$40,000.00 credit agreed to by the parties in the Closing Memorandum. *See* Appellants’ Brief, p. 34. Notably, the Mojo Plaintiffs do not cite to any provision of the Asset Purchase Agreement, or the other related documents, in support of this argument. Rather, they simply speculate that “if” the Fredrickson Defendants had made such a promise and broken it, that broken promise could constitute a breach of contract. *See id.* However, there is simply no provision of the Asset Purchase Agreement, or the related documents, that required the Fredrickson Defendants to provide such an accounting. (R. 820–27.) To the extent the Mojo Plaintiffs are attempting to salvage their breach of contract claim by alleging a new, verbal agreement to provide an accounting beyond what is specified in the Asset Purchase Agreement, such a claim is beyond the scope of their pleadings and was not raised with the district court below and, regardless, any such purported agreement would not be supported by consideration and would be precluded by the integration clause of the Asset Purchase Agreement. (R. 825, ¶ 13.)

Most importantly, the undisputed evidence in the record demonstrates that both J. Peterson and M. Peterson (acting on behalf of the Mojo Plaintiffs) agreed that the amount of the credit given to the Fredrickson Defendants’ at closing—as memorialized in the

Closing Memorandum—was \$40,000.00. (R. 835.) As the Utah Supreme Court recently stated, “[p]ersons dealing at arm’s length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain. . . . It is not our prerogative to step in and renegotiate the contract of the parties.” *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, ¶ 38, --- P.3d ----. The district court did not err when it ruled that the undisputed facts show that the Fredrickson Defendants did not breach their contractual obligations to the Mojo Plaintiffs and the court properly granted summary judgment on this claim.

**V. THIS COURT SHOULD AFFIRM THE DISTRICT COURT’S AWARD OF ATTORNEYS’ FEES IN FAVOR OF THE FREDRICKSON DEFENDANTS.**

**A. Whether a party is entitled to recover its attorneys’ fees pursuant to a contractual provision is reviewed by this Court for correctness, but the amount of reasonable attorneys’ fees awarded is reviewed by this Court for abuse of discretion.**

“Whether a party is entitled to an award of attorney fees is a legal conclusion—in this case a matter of contract interpretation—which [this appellate court] review[s] for correctness.” *IHC Health Services, Inc. v. D&K Management, Inc.*, 2008 UT 73, ¶ 38, 196 P.3d 588. However, once a party’s right to recover attorneys’ fees has been determined, the “[c]alculation of reasonable attorneys fees is in the sound discretion of the trial court . . . and will not be overturned [on appeal] in the absence of a showing of a clear abuse of discretion.” *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988).

The Mojo Plaintiffs misstate the applicable standard of review applicable to this issue when they assert that only the correctness standard of review applies to their appeal of the district court's attorneys' fee award. *See* Appellants' Brief, p. 4. They also take the language of *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998), out of context when identifying the standard of review. The *Meadowbrook* court's actual statement dealt with the legal issue of the waiver of a request for attorneys' fees, not the standard of review of the district court's award of attorneys' fees. *Meadowbrook*, 959 P.2d at 116 ("A trial court's conclusion that a request for attorney fees is waived if not made at trial is a legal conclusion. We review a trial court's conclusions of law for correctness, granting no deference to the trial judge's legal determinations.").

In this appeal, the Mojo Plaintiffs' argument is two-fold. First, they argue that the Fredrickson Defendants are not entitled to recover their attorneys' fees in connection with defending against the non-contract claims. *See* Appellants' Brief, p. 35. This first argument presents a matter of contractual interpretation and therefore is reviewed for correctness. Second, they also argue that the amount of the fees awarded to the Fredrickson Defendants was unreasonable. *See id.* pp. 35–36. The standard of review applicable to this second argument is abuse of discretion.

**B. The Mojo Plaintiffs failed to preserve their argument that the Fredrickson Defendants are not entitled to recover attorneys' fees incurred defending against the non-contract claims.**

This Court should not consider the Mojo Plaintiffs' argument that the Fredrickson Defendants are not entitled to recover their attorneys' fees incurred defending against the non-contract claims because the argument was not preserved below. An appellate court

“generally will not consider an issue unless it has been preserved for appeal. . . . An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on [it].” *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (internal quotation omitted; second alteration in original). This “puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding.” *438 Main Street v. East Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. “For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion[,], (2) the issue must be specifically raised[,], and (3) the challenging party must introduce supporting evidence or relevant legal authority.” *Id.* (internal quotation omitted; alterations in original). “Issues that are not raised at trial are usually deemed waived.” *Id.*

The Mojo Plaintiffs point to two places where they claim to have preserved their challenge to the award of attorneys’ fees to the Fredrickson Defendants—the two opposing memoranda that they filed in opposition to the Fredrickson Defendants’ submission of attorneys’ fees. (R. 1802–09; R. 1862–94.) However, in both of these opposing memoranda the Mojo Plaintiffs argue only that the amount of the fee award is unreasonable—they do not argue that that Fredrickson Defendants should not be permitted to recover attorneys’ fees incurred defending against the non-contract claims. (*Id.*) As such, the argument was not presented to the district and that court did not have the opportunity to rule on it. The Mojo Plaintiffs have therefore waived this argument and it should not be considered for the first time on appeal. The only issue properly

before this Court regarding the award of attorneys' fees is the reasonableness of the amount of the award, which is reviewed for abuse of discretion.

**C. The district court's award of attorneys' fees was not an abuse of discretion but was reasonable in light of the manner in which the Mojo Plaintiffs asserted their claims before the district court.**

Even if the Mojo Plaintiffs had preserved the issue, the district court properly awarded 3928 its attorneys' fees. "In Utah, attorney fees are awardable only if authorized by statute or by contract." *Jones v. Richie*, 2009 UT App 196, ¶ 1, 216 P.3d 357 (quoting *Dixie State Bank* 764 P.2d at 988). "If the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so strictly in accordance with the contract's terms." *Id.* ¶ 2. The Asset Purchase Agreement provides for the recovery of attorneys' fees by the prevailing if any party to the contract brings an action to enforce or interpret the agreement. (R. 825, ¶ 12.) Accordingly, the district court properly awarded 3928, LLC its attorneys' fees and costs. (R. 1904–08.)

There is no question that 3928, LLC was the prevailing party. The Mojo Plaintiffs' Complaint asserted five causes of action, all of which were asserted against both Fredrickson and 3928, LLC. As such, 3928, LLC was required to defend itself against each cause of action asserted in the Complaint. Nor is there any question that this lawsuit is one to enforce or interpret the Asset Purchase Agreement. Each of the five causes of action required the district court to analyze the Asset Purchase Agreement and to interpret the parties' respective duties and obligations thereunder, including the non-contract claims. Specifically regarding the non-contract claims, the district court

concluded that (i) the Mojo Plaintiffs' intentional interference claim failed as a matter of law because "the undisputed evidence shows that the parties entered into a valid written agreement and that [the Fredrickson] Defendants fully performed that agreement by timely paying all of the agreed-upon amounts to [the Mojo] Plaintiffs," (R. 1740, ¶ 2(b)); (ii) their civil conspiracy claim failed as a matter of law because the Fredrickson "Defendants' lawful intent to purchase the assets of A Bar Named Sue, as well as the terms of that purchase, were fully disclosed and well-documented in the parties' written agreement and the related documents," (R. 1741, ¶ 2(c)); and (iii) their breach of fiduciary duty claim failed as a matter of law because the "undisputed evidence in this case shows that the parties dealt at arm's length with each other throughout the negotiation and execution of their agreement," (R. 1741, ¶ 2(d)).

Furthermore, the time spent by 3928's counsel in this matter was necessary and reasonable in light of the manner in which the Mojo Plaintiffs pursued their claims in this lawsuit. Nothing in the record supports a determination that the district court abused its discretion in determining that the requested attorneys' fees and costs were reasonable, nor do the Mojo Plaintiffs argue an abuse of discretion. *See* Appellants' Brief, pp. 34–37. A significant portion of 3928's fees were incurred in connection with Plaintiffs' motion for preliminary injunction and motion to amend complaint, which motions the Plaintiffs withdrew at the hearing after all briefing had been completed. (R. 180.) As the district court properly observed, the Mojo Plaintiffs' "filings generated a substantial amount of defendants' attorney fees as they required defendants to perform additional work to

adequately defend this matter.” (R. 1906.) The district court’s award of attorneys’ fees and costs was reasonable and certainly not an abuse of discretion.

**D. The district court’s attorneys’ fee award should be supplemented by the attorneys’ fees and costs incurred on appeal if the Fredrickson Defendants are successful.**

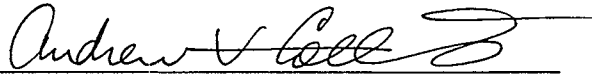
Under Utah law, a party that recovers attorneys’ fees at the district court level as the prevailing party pursuant to the terms of a contract is also entitled to an award of its attorneys’ fees incurred if it is also the prevailing party on appeal. *See R & R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1081 (Utah 1997) (“Since [defendant] has once again fully prevailed, an award of attorney fees on appeal is proper. We remand to the trial court for a determination of the amount of reasonable attorney fees spent by [defendant] on this appeal and order that [defendant] be awarded the amount determined by the trial court.”); *see also Meadowbrook*, 959 P.2d at 120 (stating that “where a party entitled to attorney fees below prevails on appeal, [an] award of attorney fees on appeal is proper”) (citing *R & R Energies*). To the extent that the Fredrickson Defendants prevail on this appeal, the Court should also order that the attorneys’ fee award entered by the district court below be supplemented by the amount of the reasonable attorneys’ fees and costs incurred on appeal. Utah R. App. P. 34(a).

## CONCLUSION

For the foregoing reasons, the Court should (i) affirm the district court's rulings that granted summary judgment to the Fredrickson Defendants on all claims against them and that awarded them attorneys' fees and costs as the prevailing party, and (ii) order that the district court's award of attorneys' fees and costs be supplemented with the fees and costs incurred on appeal.

DATED this 27 day of August 2012.

MITCHELL & BARLOW, P.C.

A handwritten signature in cursive script, appearing to read "Andrew V. Collins", written over a horizontal line.

J. Ryan Mitchell

Andrew V. Collins

*Attorneys for the Fredrickson Defendants*

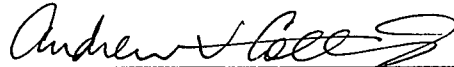
### CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 13,887 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word version 14.2.3 in size 13 Times New Roman font.

DATED this 27 day of August 2012.

MITCHELL & BARLOW, P.C.



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J. Ryan Mitchell

Andrew V. Collins

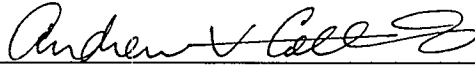
*Attorneys for the Fredrickson Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27 day of August 2012, I served two true and correct copies and an electronic copy of the foregoing via hand delivery on the following:

Denver C. Snuffer, Jr.  
Daniel B. Garriott  
Tahnee L. Hamilton  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, UT 84070

MITCHELL & BARLOW, P.C.



---

J. Ryan Mitchell  
Andrew V. Collins  
*Attorneys for the Fredrickson Defendants*

ADDENDUM 1 — APPELLEES' BRIEF

ASSET PURCHASE AGREEMENT

## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT ("Agreement") is made this 27<sup>th</sup> day of October, 2009 by and between MOJO SYNDICATE, INC., a Utah corporation, and BAR NAMED SUE, LLC, a Utah limited liability company (collectively "Seller") and 3928 LLC, a Utah limited liability company ("Buyer").

WHEREAS, Seller owns and operates a nightclub and bar known as "A Bar Named Sue" located at 3928 South Highland Drive in Holladay, Utah 84124 (the "Business") and Seller desires to sell certain assets of the Business to Buyer; and

WHEREAS, Buyer desires to purchase certain assets of the Business on the terms set forth in this Agreement,

NOW, THEREFORE, in consideration of the mutual representations, warranties, covenants and promises contained herein, the parties agree as follows:

1. Purchase and Sale. Seller hereby agrees to sell to Buyer, and Buyer hereby agrees to purchase from Seller, all of Seller's right, title and interest in and to the assets described as follows (the "Assets"):

- (a) All of the inventory and merchandise of the Business;
- (b) All of the furniture, leasehold improvements, equipment, inventory, supplies and furnishing which are described on attached Exhibit 1(b);
- (c) At Buyer's option, all of Seller's right, title and interest in and to that certain lease between \_\_\_\_\_, as Landlord, and Seller, dated \_\_\_\_\_, 20\_\_\_\_ (the "Lease");
- (d) All advertising and promotional materials, customer information, customer lists, customer files, customer contracts, software programs, post office boxes, related telephone numbers, websites, URLs, and documents relating to the current and continued operation of the Business, including but not limited to those identified on attached Exhibit 1(d)-1. Specifically excluded from the Assets sold hereunder are those items identified on attached Exhibit 1(d)-2;
- (e) Any trademarks, patents, copyrights, licenses, trade names or other proprietary information used or otherwise relating to the continued operation of the Business, including but not limited to those shown on attached Exhibit 1(e);
- (f) The business name "Bar Named Sue" and any reasonable variations thereof;
- (g) All accounts receivable, certificates of deposit, lease deposits and cash in accounts relating to the operation of the Business including those identified on attached Exhibit 1(g);
- (h) All good will, favorable consideration and every positive advantage associated with Seller's operation of the Business; and

(i) Buyer and Seller acknowledge and agree that Buyer does not assume any liabilities, debts, accounts payable or other obligations of Seller or the Business except those set forth on attached Exhibit 1(i).

2. Purchase Price. The total purchase price for the Assets, Business and representations, warranties and covenants of Seller contained herein, shall be Eighty Thousand Dollars (\$80,000.00) (the "Purchase Price"). The Purchase Price shall be paid as follows:

(a) At Closing Buyer shall pay Seller the sum of Forty Thousand Dollars (\$40,000.00) (the "Closing Payment"); and

(b) At Closing Buyer shall deliver to Seller a Promissory Note in the amount of Forty Thousand Dollars (\$40,000.00) in the form attached hereto as Exhibit 2.

Buyer shall receive a dollar for dollar credit against the Purchase Price for all amounts Buyer or its principles have advanced to the Business to cover operations prior to the Closing. The dollar for dollar credit shall be applied first as a credit to the Closing Payment and then, if any, to the amount due under the Promissory Note. At Closing, Buyer and Seller shall execute a closing memorandum in the form attached as Exhibit 2-A documenting and agreeing upon the Purchase Price credits.

After Closing, if Buyer pays one or more of Seller's vendor or supplier debts incurred by Seller in connection with Seller's operation of the Business prior to Closing, in order to have such vendor or supplier continue to provide products or supplies to Seller's operation of the Assets, then Buyer shall receive a dollar for dollar credit against the amount due under the Promissory Note.

3. Closing. The closing of the transaction contemplated under this Agreement (the "Closing") shall take place at the offices of Nelson, Christensen, Helsten, Hollingworth & Williams, 68 South Main Street, 6<sup>th</sup> Floor, Salt Lake City, Utah 84101 or such other place as may be mutually agreeable to the parties. Closing shall occur within twenty-four (24) hours of Buyer's satisfaction or waiver of the Contingencies identified in Section 7(a) of this Agreement.

4. Deliveries by Seller. At Closing, Seller shall:

(a) Deliver physical possession of all of the Assets to Buyer;

(b) Execute and deliver to Buyer a Bill of Sale for the Assets, substantially in the form attached hereto as Exhibit 4(b);

(c) At the option of Buyer, execute and deliver an Assignment of Lease, substantially in the form attached hereto as Exhibit 4(c); and

(d) Such other and further documents or instruments as may be reasonably requested by Buyer to consummate the transaction contemplated by this Agreement.

5. Covenants.

(a) Seller hereby covenants and agrees with Buyer as follows:

(i) From the date of this Agreement through Closing, Seller shall not cause any material detriment to the profitability or operation of the Business and shall operate the Business in a good and businesslike manner, and shall take no action therein, including but not limited to incurring any new debt, except in the ordinary course of the Business, and then only with the prior knowledge and consent of Buyer; and all such actions shall be properly reflected in Seller's books and records;

(ii) From the date of this Agreement through Closing, Seller shall cause or permit no material change in the quality or condition of the Assets, normal wear and tear excepted;

(iii) From the date of this Agreement through Closing, Seller shall allow Buyer and its agents reasonable access to the Assets including Seller's books and records, for purposes of investigating and preparing for Closing;

(iv) The existence and terms of this Agreement, the information contained in Seller's books and records and any other verbal or written agreements entered into in connection herewith shall remain confidential and shall not be disclosed at any time by Seller or its respective officers, directors, shareholders, agents or employees, except: (A) as and when required by law, (B) as necessary for the consummation of the transactions contemplated herein, or (C) for the proper reporting thereof for tax or accounting purposes;

(v) Seller shall use its best efforts to timely perform all of its obligations and covenants under this Agreement, and to satisfy all conditions of Closing; and

(vi) Seller shall execute and deliver such other Bills of Sale, Assignments and other documents necessary to carry out the purposes of this Agreement.

(vii) Upon the parties' execution of this Agreement, Seller shall change its name from "Bar Named Sue" in order to enable Buyer to register such name as a name under which Buyer will be doing business after Closing.

(b) Buyer hereby covenants and agrees with Seller as follows:

(i) Buyer shall bear the all costs incurred in connection with its investigation of the Business and Assets, the preparation of this Agreement and the documents referenced herein, and the Closing;

(ii) The existence and terms of this Agreement, the information contained in Seller's books and records and any other verbal or written agreements entered into in connection herewith shall remain confidential and shall not be disclosed by Buyer or its managers, members, agents or employees, except: (A) as and when required by law; (B) as necessary for the consummation of the transactions contemplated herein; (C) for the

proper reporting thereof for tax or accounting purposes; or (D) for the further operation of the Business by Buyer; and

(iii) Buyer shall use its good faith reasonable efforts to timely perform all of its obligations and covenants under this Agreement, and to satisfy all conditions of Closing.

(c) The covenants and agreements made herein by Buyer and Seller herein shall survive Closing.

6. Representations and Warranties.

(a) Seller hereby represents and warrants to Buyer as follows:

(i) Seller is not in default under the Lease or any other agreements, covenants or arrangements, whether written or oral, pertaining to the Business or the operation thereof;

(ii) Each Seller is duly organized and in good standing under the laws of the State of Utah, is authorized and qualified to conduct business in Utah, and has all licenses and permits necessary to lawfully conduct business in Utah;

(iii) Each Seller has full power and authority, including but not limited to the consent of its officers, directors, shareholders, members and managers to enter into this Agreement and to carry out the transactions contemplated herein. This Agreement and all other documents executed by Seller in connection with this Agreement are valid and binding agreements of Seller, enforceable against Seller in accordance with their terms;

(iv) Seller has and will convey to Buyer at Closing, good and marketable title to all of the Assets, free and clear of all liens, claims, encumbrances, liabilities and restrictions;

(v) The Assets transferred hereby are freely assignable without the consent of any third party and include all of the assets essential to the continued, uninterrupted and lawful operation of the Business;

(vi) There are no other contracts or agreements to sell or encumber any of the Assets, nor are any of the Assets subject to any other contract, agreement, commitment or condition restricting, limiting or in any way affecting their transferability;

(vii) Seller enjoys exclusive, peaceful and undisturbed possession of the premises under the Lease which are, subject to the landlord's consent, freely assignable and leasable and not subject to any lease, contract, agreement, commitment or condition restricting, limiting or in any way affecting Seller's ability to assign the Lease to Buyer at Closing;

(viii) Except as specifically described on attached Exhibit 6(a)(viii), neither Seller nor the Business has any unpaid liabilities for taxes, or for penalties or interest

thereon, except for taxes not yet due. Except as specifically described on attached Exhibit 6(a)(viii), neither Seller nor the Business are, nor have been within the past three (3) years, the subject of any audit or other administrative proceeding regarding any tax liabilities;

(ix) Neither Seller nor the Business is in violation of any applicable law, rule, regulation or requirement of any governmental authority in any way relating to Seller's operation of the Business; and

(x) There are no claims, actions, proceedings, investigations, orders or judgments pending or threatened against Seller or the Business before any court or governmental authority, domestic or foreign, relating to or affecting Seller, the Business or the Assets or the transactions contemplated.

(b) Buyer hereby represents and warrants to Seller as follows:

(i) Buyer is a Utah limited liability company in good standing in the State of Utah; and

(ii) Buyer has the legal power and authority to enter into this Agreement and to perform all of its obligations hereunder. This Agreement and all other documents executed by Buyer in connection herewith are valid and binding agreements of Buyer, enforceable against Buyer in accordance with their terms.

(c) The representations and warranties made herein by Buyer and Seller shall survive Closing.

#### 7. Conditions to Closing.

(a) Buyer's obligation to close shall be conditioned upon occurrence of the following closing conditions:

(i) Buyer's satisfaction of the condition of the Business as a going concern as of Closing;

(ii) Buyer's receipt of all required consents to transfer the liquor license for the Business;

(iii) At Buyer's option and discretion, either (A) receipt of Landlord's written consent to the assignment of the Lease and any amendments thereto as may be deemed necessary by Buyer, or (B) Buyer's approval and execution of a new lease for the existing Business premises;

(iv) Full performance of all of Seller's obligations and covenants to be performed at or prior to Closing;

(v) The accuracy at Closing of all of the representations and warranties made herein by Seller; and

(vi) Receipt of the Assets at Closing.

(b) Seller's obligation to close shall be conditioned upon:

(i) Full performance of all Buyer's obligations and covenants to be performed at or prior to Closing;

(ii) The accuracy at Closing of all of the representations and warranties made herein by Buyer; and

(iii) Seller's receipt of the amount to be paid by Buyer at Closing.

8. Indemnification by Seller. Seller hereby agrees to indemnify, defend and hold harmless Buyer, its managers, agents and employees, from and against all demands, claims, actions or causes of action, taxes, assessments, losses, damages, liabilities, costs and expenses, including interest, penalties and reasonable attorneys' fees, resulting from Seller's operation of the Business through the date of Closing, or breach by Seller of any representations, warranties, covenants or other obligations of Seller hereunder or under bills of sale, assignments or other documents provided at closing.

9. Indemnification by Buyer. Buyer hereby agrees to indemnify, defend and hold harmless Seller, its officers, directors, shareholders, agents and employees, from and against all demands, claims, actions or causes of action, taxes, assessments, losses, damages, liabilities, costs and expenses, including interest, penalties and reasonable attorneys' fees, resulting from Buyer's operation of the Business after the date of Closing, or any breach by Buyer of any representations, warranties, covenants or other obligations of Buyer hereunder, except as may be attributable to the negligence or misconduct of Seller.

10. Broker. The parties acknowledge and agree that no brokerage commissions or finder's fees shall be payable in connection with this Agreement.

11. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the successors, heirs, assigns and personal representatives of each party.

12. Attorneys' Fees and Governing Law. If either party brings an action at law or in equity to enforce or interpret this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, court costs and expert witness fees. This Agreement shall be governed by the laws of the State of Utah. All claims and disputes arising hereunder shall be subject only to the jurisdiction of the state and federal courts in Utah and to the courts to which appeals may be taken from such Utah state or federal courts.

13. Entire Agreement. It is expressly understood that this Agreement and the documents referenced herein constitute the entire agreement of the parties with respect to the subject matter hereof. Any and all prior understandings or commitments of any kind, oral or written, pertaining thereto are hereby canceled.

14. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

15. Interpretations. The headings of this Agreement are included solely for convenience of reference and shall not be construed as limiting or in any other way modifying the text of the Agreement.

16. Fairness. Each party represents and agrees that the terms of this Agreement, and the transactions contemplated herein, are fair and reasonable to such party, taking into account all existing circumstances affecting the parties. The parties further represent and agree that they have had full and sufficient opportunity to obtain separate tax advice and legal counsel in the matters related to this Agreement.

17. Effective Date. This Agreement shall become effective upon execution by all parties named below. The sale of the Assets as described herein shall become effective at Closing.

18. Time for Performance. Time is of the essence in all matters pertaining to this Agreement.

19. Severability. If any part of this Agreement shall be declared or held illegal, void, voidable, or unenforceable, the remaining portions of this Agreement shall continue to be valid and in full force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first set forth above. :

SELLER:

MOJO SYNDICATE, INC.  
a Utah corporation

BUYER:

3928, LLC  
a Utah limited liability company

By: Adith C. Peterson  
Its: Secretary

By: John Fredrickson  
Its: Manager and Member

BAR NAMED SUE, LLC

By: MARK PETERSON  
Its: MANAGER

ADDENDUM 2 — APPELLEES' BRIEF

CLOSING MEMORANDUM

## CLOSING MEMORANDUM

THIS CLOSING MEMORANDUM is entered into by and between MOJO SYNDICATE, INC., a Utah corporation, and IT COULD HAVE BEEN FUN, LLC, fka, BAR NAMED SUE, LLC, a Utah limited liability company (collectively "Seller") and 3928 LLC, a Utah limited liability company ("Buyer") pursuant to Section 2 of the Asset Purchase Agreement between the parties.

Capitalized terms used but not defined herein shall have the meanings given them in the Asset Purchase Agreement.

Buyer and Seller acknowledge and agree that Seller has changed its name from Bar Named Sue, LLC to It Could Have Been Fun, LLC.

Buyer and Seller agree that the dollar for dollar credit described in Section 2 of the Asset Purchase Agreement as of Closing shall be Forty Thousand Dollars (\$40,000.00).

DATED this 10<sup>th</sup> day of November, 2009.

SELLER:

MOJO SYNDICATE, INC.  
a Utah corporation  
company:

By: Judith C. Peterson  
Its: Secretary

BUYER:

3928, LLC  
a Utah limited liability

By: John Fredrickson  
Its: Manager and Member

BAR NAMED SUE, LLC  
a Utah limited liability company

By: MARK PETERSON  
Its: MANAGER/PRESIDENT

ADDENDUM 3 — APPELLEES' BRIEF

PLAINTIFF'S [SECOND] RESPONSE TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FILED  
THIRD DISTRICT COURT

10 OCT 25 AM 9:22

SALT LAKE DEPARTMENT

BY   
DEPUTY CLERK

Charles Craig Brown, Bar No, 0447  
CC BROWN LAW LLC  
193 East Fort Union Blvd., Suite 300  
Salt Lake City, UT. 84104  
Mailing 1338 S. Foothill Dr., #300  
Salt Lake City, UT. 84103  
801-953-0088 Tel.  
801-993-0840 Fax.  
Attorney for Plaintiffs

**THIRD DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH**

---

**MOJO SYNDICATE, INC.  
A BAR NAMED SUE LLC.**

Plaintiffs,

**3928 LLC., JASON RASMUSSEN,  
JOHN FREDRICKSON, SEAN EGAN  
& JOHN DOES I-IV**  
Defendants.

**PLAINTIFF'S RESPONSE  
TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

Civil No. 100904277

Judge Peuler

---

Plaintiffs' response to Defendants' Motion and Memorandum according to the Court's Minutes and order dated October 8, 2010 in an effort to meet the Court's view of compliance with Rule 7(c)(3)(B) by following said Rule and Defendants' format of its Memorandum in Support of their Motion for Summary Judgment as follows:

## INTRODUCTION

Plaintiffs' take the position that the Fredrickson Defendants wrongfully acquired ownership of A Bar Named Sue through fraud, deceit, breach of Fiduciary duties and through a civil conspiracy involving the DABC and Sam Granato as well as John Does named in the Complaint.

The transaction was not negotiated as Plaintiffs had no independent legal counsel advising them in the signing of the Asset Purchase Agreement on October 27, 2009 including closing same at the attorney's office who was obtained by John Fredrickson to draft same all as stated in the Agreement. The Defendants did not pay the Plaintiffs nor do they provide an accounting of the \$80,000.00 for the purchase of the bar as Defendants' state in the introduction of their Memorandum in Support of Defendants 3928 LLC and John Fredrickson's Motion for Summary Judgment.

Fredrickson Defendants will not provide any accounting of payment for the bar that they claim they paid for and still have retained all of the financial records of Mojo Syndicate, LLC., Bar Named Sue, LLC and A Bar Named Sue as well as personal property of Mark Peterson and his financial records.

On October 27, 2009, Plaintiffs, 3928 LLC and John Fredrickson signed an asset purchase agreement that was not negotiated nor with legal counsel present. Prior to signing,

Agreement under the guise that Mark Peterson still had a liquor license and he would be partners in the ownership of the bar with John Fredrickson (See Exhibit 3, Three-Party Agreement).

Plaintiffs had no independent legal counsel representing them as Sean Egan ceased his legal representation of Mark Peterson, president of Mojo Syndicate, Inc., on October 14, 2009. John Bates did not represent the Plaintiffs in the transaction and was not aware that there would be any sale of A Bar Named Sue (See Exhibit 4, John Bates' Affidavit).

John Fredrickson did not provide any accounting of the \$40,000.00 he claims he had invested in A Bar Named Sue prior to the "asset sale" as verified by Judith Peterson in her deposition and second affidavit (See Exhibit 5, Judith Peterson's Second Affidavit).

Defendants claim 3928 signed and delivered a promissory note for the remaining \$40,000.00 of the purchase price that required monthly payments of \$2,000.00. Fredrickson claims he delivered this note to Judith Peterson, but she never received a promissory note. Fredrickson produced a blank promissory note as evidence (See Exhibit 6, Blank Promissory Note).

Plaintiffs received four monthly payments in the guise that they were still partners in ownership of the bar while Mark Peterson was trying to gain access to the bar. John Fredrickson claimed he bought the bar and would not let Mark Peterson back in. Fredrickson had gained full ownership with a non-negotiated Asset Purchase Agreement and a liquor license he obtained in one week from the DABC while Mark still had ownership of A Bar Named Sue.

Plaintiffs have new evidence and facts that prove that Fredrickson wrongfully obtained ownership of A Bar Named Sue with fraudulent intent and fraudulent actions with the help of Sam Granato, Fredrickson's uncle and Director of the DABC and other John Does named in the Complaint.

Fredrickson wrongfully gained possession of A Bar Named Sue by becoming a Fiduciary Agent of Mojo Syndicate, Inc. and Bar Named Sue, LLC for the purposes of removing Jason Rasmussen from operations of the bar and with this agency proceeded on a course of action to gain ownership of A Bar Named Sue.

Before this time, Fredrickson entered into a three-party agreement with Judith Peterson and Mark Peterson to gain 50 percent of the shares of A Bar Named Sue, thus entering into a partnership with Plaintiffs. Fredrickson then proceeded to remove Mark Peterson from A Bar Named Sue and with the assistance of Sean Egan, attorney who had entered into an agreement of representation with Mark and Judy first, then with John and Judy. They manipulated Judith Peterson into signing documents that she was not competent to sign (See Exhibit 7, Judith's Medical Document) to remove Mark Peterson from operations of the bar.

These actions enabled John Fredrickson to proceed on a course of action to wrongfully obtain possession of A Bar Named Sue in the last two weeks of October 2009 by forming a corporation 3928 LLC, getting a business license and obtaining a liquor license in one week while Mark was still the licensee for A Bar Named Sue. Fredrickson is Sam Granato's nephew and was assisted by the DABC to get the liquor license (See Exhibit 2, DABC Application).

Fredrickson never revealed his course of action to Plaintiffs. If Mark Peterson had known that Fredrickson was proceeding on this course of action, he would have removed him immediately from A Bar Named Sue and would never have signed an Asset Purchase Agreement that he believed would seal the deal of being partners in the ownership of A Bar Named Sue.

**(STATEMENT OF UNDISPUTED MATERIAL FACTS)**

**Objection.** It should be noted that Plaintiffs Memorandum has a section entitled “Statement of Undisputed Material Facts” in violation of Rule 7 (c ) (3) (A) which requires that ....the moving party state material facts which they contend that no genuine issue exists. The undisputed facts 1 through 9 are not controverted but still raise genuine issues of material fact.

1. “A Bar Named Sue first opened for business in November 2008.” The genuine issue in Mark Peterson starting a Bar Named Sue is whether or not he intended later to sell the bar and if so on what terms and conditions. The second issue, how and when did John Fredrickson hear about a Bar Named Sue and why and when did he first approach Mark Peterson and what was said. (See Exhibit 8, Affidavit of John Fredrickson) The third issue, is what did John Fredrickson discuss with Judy Peterson regarding her investment of A Bar Named Sue and her giving Mark money to open the Bar. (See Exhibit 8, Paragraph 7, Affidavit of John Fredrickson)

2. “Initially, A Bar Named Sue was run primarily by Mark and Jason Rasmussen (“Rasmussen”). Mark’s responsibilities included bar tending, light managing, and hosting. Rasmussen’s responsibilities included managing, bookkeeping, and ordering supplies for the

bar.” The genuine issue is during this time was Jason Rasmussen stealing money from the bar and if so, why does counsel for Defendants refuse to hand over the documents that John Fredrickson took from Mark Peterson that are Mark’s documents? Were all of the documents produced at Mark Peterson’s deposition or are there more documents that opposing counsel and Defendant refuse to produce? Did Rasmussen’s duties include theft from the bar? (See Exhibit 9, Sean Egan’s Email to Jason Rasmussen)

3. “In or around 2009, one of A Bar Named Sue’s cooks told Mark that Rasmussen had told him (the cook) that Rasmussen was taking \$8,000.00 a month from A Bar Named Sue. At the same time, Mark and Rasmussen were struggling with each other over who would have control of the bar’s operations.” The genuine issue is do such documents that Defendant retained, show anything about Jason Rasmussen taking \$8,000.00 a month from the bar? Do any documents show Mark Peterson taking money from the bar?

At that time John states in his affidavit, “As our discussions progressed, Mark and Judy said they would make me a partner in the Bar if I could get Rasmussen removed from the Bar and if I would agree to invest some money in the Bar. I agreed to help Mark and Judy, and on September 30, 2009, Mark and Judy had their attorney, John Bates, draft a corporate resolution appointing me an agent of the Bar to investigate Rasmussen’s’ illegal conduct and to otherwise help manage the bar.” (See Exhibit 8, Paragraph 8, John Fredrickson’s Affidavit) Why then did John Fredrickson physically remove Mark Peterson from the Bar on October 2, 2009, because John would “be in trouble” if he was seen with Mark?

4. “When Mark and Judy discussed the ongoing problems that Mark was having with Rasmussen at A Bar Named Sue, Judy suggested that Mark talk with Fredrickson. Both Mark and Judy had become acquainted with Fredrickson years earlier when Fredrickson was their next-door neighbor.” “Additionally, Fredrickson had experience with two other bars that he had owned”

- a. There are no files at DABC on these two bars that Fredrickson owned and therefore he misrepresented his credentials. (See Exhibit 11, DABC Email to Angie Brown)
- b. Why does the DABC state that the two files that John Fredrickson claimed to own cannot be found? (See Exhibit 11, Email from Vera Pitt DABC)

5. “According to Mark, he and Fredrickson began talking towards the end of July or the beginning of August 2009 about Fredrickson becoming involved in a Bar Named Sue and acquiring some type of ownership in the business. Mark’s characterization of his discussions with Fredrickson was that both Mark and Fredrickson would be partners in A Bar Named Sue.”

- a. John Fredrickson states in his affidavit on page 3, number 8, that, “Mark and Judy said they would make me a partner in the Bar if I (Fredrickson) could get Rasmussen removed from the Bar and if I would agree to invest some money in the bar.”
- b. Sean Egan, in an email to Jason Rasmussen, accuses Jason Rasmussen of stealing money from the Bar and threatened criminal action against him. Why then did

Egan and Fredrickson allow Jason to take all of the money from the Bar Named Sue checking account in October 2009, take his personal belongings, and have not had him reported to the authorities for this theft? (See Exhibit 9, Sean Egan's Email to Jason Rasmussen)

6. "On September 30, 2009, Mark, on behalf of Bar Named Sue, LLC, and Judy, on behalf of Mojo Syndicate, Inc., each executed similar documents appointing Fredrickson as the agent of Bar Named Sue, LLC and Mojo Syndicate, Inc. "for the purposes of removing Jason Rasmussen from the existence and operation of" Bar Named Sue, LLC's and Mojo Syndicate, Inc's business." Did Rasmussen's duties include theft from the bar? What evidence was communicated to the principals about this falsification? (See Exhibit 9, Sean Egan's Email to Jason Rasmussen).

7. "John Bates ("Mr. Bates"), who represented Mark and Judy in connection with corporate matters involving Mojo Syndicate, Inc. and Bar Named Sue, LLC, drafted the Agency appointment and the Resolution." Bates' Affidavit states, "I agreed to help Mark and Judy, and on September 30, 2009, Mark and Judy had their attorney John Bates, draft a corporate resolution appointing me an agent of the Bar to investigate Rasmussen's alleged illegal conduct and to otherwise help manage the Bar."

What was the true scope of John Bates' representation? (See Exhibit 4, John Bates' Affidavit), which clearly limits his review of the Asset Purchase Agreement.

Another issue is, if this Fiduciary Agreement was for the purposes of removing Jason Rasmussen from operations of A Bar Named Sue, then why did Fredrickson physically remove Mark Peterson on October 2, 2009 after the three –party-agreement was signed effective October 2, 2009 and accusations of malfeasance against Mark were made in mid-October 2009? (See Exhibit 8, John Fredrickson’s affidavit)

Do such documents that Defendant retained, show anything about Rasmussen taking \$8,000.00 a month from the bar? Who is the private investigator that John Fredrickson hired to check Jason Rasmussen’s background and what did that investigator find? (See John Fredrickson’s affidavit, Page 3, Paragraph 9) Who is the accountant that John claims examined the bar’s financial records?

8. “Also on September 30, 2009, Mark, Judy, and Fredrickson executed a document – effective October 2, 2009, - that granted Fredrickson “50 percent control, ownership, and assigned shares of MOJO SYNDICATE INC, and BAR NAMED SUE LLC.”

The three party agreement signed on September 30, 2009, effective October 2, 2009, only granted John Fredrickson a 50 percent interest, not 50 percent control. Does the foregoing issues commence a partnership? (See Exhibit 3, Three Party Agreement)

Does this three party agreement form a partnership as was John’s intent in stating Judy and Mark would make him a partner in the Bar if he could get Rasmussen removed from the Bar and if he agreed to invest some money in the Bar as stated in Fredrickson’s affidavit? (See Exhibit 8) Do such documents that Defendant retained, show anything about Jason Rasmussen

taking \$8,000.00 a month from the bar? Do any documents show Mark Peterson taking money from the bar? (See Exhibit 8, John Fredrickson's Affidavit and Exhibit 10, Sean Egan's Letter to Mark Peterson)

9. "On the same day that Mark and Judy appointed Fredrickson as agent for Mojo Syndicate Inc. and Bar Named Sue, LLC, Mark and Judy hired attorney Sean Egan ("Mr. Egan") to represent them in dealing with Rasmussen."

If John claims he did not know Sean Egan prior to September 30, 2009, and the Petersons retained Egan on September 30, 2009, why then did Sean Egan hold a meeting with Rasmussen's attorney. First issue is why did John Fredrickson in his affidavit state that he did not know Mr. Egan when Fredrickson told Mark that John had found a lawyer named Sean Egan in September 2009?

The second issue is on or about September 6, 2009, why did Sean Egan hold a meeting with Rasmussen's attorney? Why did John Fredrickson exclude the Petersons from this meeting because "they were too emotionally involved." Why did John say he would represent the Petersons in this meeting before he was appointed as an agent of Mojo Syndicate, Inc. and Bar Named Sue, LLC and exclude the principals from this meeting with Sean Egan? What did Jason Rasmussen say in this meeting and what was the outcome of this meeting with Sean Egan?

John's characterization of his involvement in the bar was as partners. See Three Party Agreement characterizing it as a 50 percent interest with Mark Peterson. (See Exhibit 8, John Fredrickson's Affidavit, See Exhibit 3, Three Party Agreement)

Why did John Fredrickson allow Jason Rasmussen to take all the money from the Bar Named Sue bank account in October and take his personal property instead of having him charged with embezzlement? (See Exhibit 8, John Fredrickson's Affidavit) Do these create a Fiduciary duty to the principal? The other issue is, what basis did Sean Egan have to tell Mark Peterson that he was involved in the same conduct as Jason Rasmussen?

On September 29, 2009, and thereafter, was a Fiduciary duty created and set by said attorney/client relationship?

10. "October 1, 2009, was Fredrickson's first day managing A Bar Named Sue. On that day he learned that the bar's financial condition was much worse than he had been led to believe by Mark." "Fredrickson had to immediately pay several thousand dollars for the fire suppression system so that the bar would stay open."

(a) Fredrickson has provided no accounting to Plaintiffs that he paid several thousand dollars for the fire suppression system and that an audit had been conducted by an insurance provider. Fredrickson has not provided any documentation of this claim he made in his affidavit. (See Exhibit 8, John Fredrickson's First Affidavit). What was the condition of the bar and what did Mark Peterson state to lead him to believe otherwise? Nothing was communicated to Mark about the fire marshal. Should Fredrickson have informed his principal about the condition of the bar, the fire marshal issue and the audit from the insurance provider?

(b) On or about the same day, A Bar Named Sue's landlord told Fredrickson that if the most recent rent check was not paid, and if the check did not clear, that she would immediately

begin preparing default papers. Plaintiffs have no proof or documentation of this claim as this was only stated by John Fredrickson in his affidavit. There is no communication of any of these claims to his principals.

“In the weeks following October 1, 2009, Fredrickson paid approximately \$40,000. of his own money to A Bar Named Sue’s vendors so that it would stay open.” (b) Plaintiffs have no documentation or proof of this claim, as this was only stated by John Fredrickson in his affidavit. There is no communication of any of these claims to his principal (See Exhibit 8, John Fredrickson’s Affidavit)

“In the weeks following October 1, 2009, Fredrickson paid approximately \$40,000.00 of his own money to A Bar Named Sue’s vendors so that it could stay open.” (c) Why hasn’t Fredrickson provided an accounting of the \$40,000.00 to his principals? (See Exhibit 12, Judith Peterson’s Deposition Page 136). Why hasn’t Fredrickson provided proof of saying that Mark Peterson bounced checks to vendors and those vendors would not take a check from Fredrickson?

11. “Acting pursuant to his agency authority, Fredrickson began investigating Rasmussen’s activity with A Bar Named Sue, including an examination of the bar’s financial records with an accountant.” Who was the accountant and why won’t opposing counsel produce the financial records that were given to them?

12. “Fredrickson’s investigation soon revealed that both Mark and Rasmussen had falsified A Bar Named Sue’s sales tax records with the Utah State Commission.”

Is there evidence of Mark Peterson's falsifying tax records and if so where is the evidence of this? Who reported this to the principal and what is the evidence of this malfeasance? The Utah State Tax Commission's investigation revealed that John Fredrickson is liable for the taxes of A Bar Named Sue. Fredrickson is now being garnished for the taxes on A Bar Named Sue (See Exhibit 14, John Fredrickson's Tax Garnishment). The ongoing accusations of tax fraud against Mark Peterson seem to be the major theme of opposing counsel's claim in their motion. The sales tax records are not relevant in this case. What evidence was communicated to the principals about this falsification?

13. "Fredrickson discovered that during the first quarter of 2009, A Bar Named Sue earned actual sales revenue of at least \$261,335.42 but only reported sales of \$165,566.09 in its first quarter sales tax return." Rasmussen apparently signed the first quarter 2009 sales tax return for A Bar Named Sue. "

Mark testifies in his deposition Volume I, 83, 12-22, that he has never seen the documents and indeed those were the documents taken by John Fredrickson to a CPA on or about October 1, 2009, and refuses to return these documents to Mark Peterson. (See Exhibit 13, Mark Peterson's Second Affidavit)

14 & 15 "Fredrickson also discovered that during the second quarter of 2009, A Bar Named Sue earned actual sales revenue of at least \$232,837.90 but only reported sales of \$132,837.00 in the second quarter sales tax return. Mark apparently signed this second quarter

2009 sales tax return for A Bar Named Sue that underreported its actual sales tax by exactly \$100,000.”

Mark has denied it was his signature on the second quarter sales tax return. So was there any malfeasance on Mark’s part? (See Exhibit 13, Mark Peterson’s Second Affidavit, Page 3, 4) Was Sean Egan wrong when he accused Mark of the same conduct as Jason Rasmussen and is that a breach of Attorney/client relationship with Sean Egan?

15. “Based on the falsified tax returns and other evidence of malfeasance by both Mark and Rasmussen, and acting as the appointed agent of Bar Named Sue LLC, and Mojo Syndicate, Inc., Fredrickson (with Judy’s knowing approval and support) decided that both Mark and Rasmussen needed to be removed from A Bar Named Sue’s management and ownership.”

There is no evidence of falsified tax returns and “the other evidence of malfeasance by Mark Peterson” and has not been communicated to him by the Agent. (See Exhibit 14, Tax Garnishment John Fredrickson) Who forged Mark Peterson’s signature on the second quarter tax return? There is no evidence stating that the tax returns are falsified. John Fredrickson’s intent was to remove Mark Peterson from operations and ownership of the bar because Mark was the licensee for the bar and John’s intent was to obtain a liquor license in his own name to obtain ownership of the Bar. Isn’t that a breach of Fiduciary Agent duty to his principals? (See Exhibit 2, DABC Documents)

16. "On October 13, 2009, Judy and Fredrickson signed an engagement letter with Mr. Egan, which provided among other things that Mr. Egan would represent them in asserting claims against Rasmussen and Mark."

Judith Peterson signed this agreement with Sean Egan and John Fredrickson. (See Exhibit 15, Agreement with Sean Egan) She did not know that a lawsuit would be filed by Mojo Syndicate, Inc. against Mark Peterson to remove him from operations of A Bar Named Sue. Sean Egan represented both parties having opposite positions in terms of the operations of the Bar. Is this a conflict of interest? In fact, during October 2009, John Fredrickson filed this lawsuit against Mark Peterson while defaming Mark to Judith Peterson and by manipulating her to proceed to obtain a liquor license and gain ownership of A Bar Named Sue. (See Exhibit 16, Lawsuit filed by Fredrickson) Were there any waivers that would comply with the Rules of Conduct?

17. "The next day, Mark signed a letter agreement with Mr. Egan in which Mr. Egan informed Mark that the investigation had shown that Mark was involved in much of the same wrongful conduct as Rasmussen and that consequently Mr. Egan was withdrawing as Mark's counsel."

Mark was not informed of any wrongdoing in A Bar Named Sue at that time. He signed the letter ending the attorney/client relationship not knowing that Judith and Fredrickson would continue to be represented with different interests by one attorney who created a conflict of interest. Mark was never aware of Fredrickson's intent to remove Mark from all operations of A

Bar Named Sue to obtain full possession of A Bar Named Sue through a course of action with the assistance of Mr. Egan, and other John Does named in the Complaint. (See Exhibit 5, Mark Peterson's Affidavit and Exhibit 2, DABC Documents) Was there sufficient disclosure for Mark to make an informed consent? Were there any waivers?

18. "At about that time, Mark, Judy, and Fredrickson agreed that Fredrickson would purchase all of A Bar Named Sue's assets and take over the bar's ownership."

Fredrickson's affidavit is self-serving and Judith Peterson and Mark Peterson never intended to sell A Bar Named Sue. See the three-party agreement cited previously, and John Fredrickson's reference to partnership in his affidavit. (Exhibits 3 and 8). Fredrickson never revealed to Plaintiffs that he could obtain a liquor license in one week with the assistance of his uncle who is the commissioner of the DABC and obtain ownership of A Bar Named Sue with an Asset Purchase Agreement that was never negotiated and explained to the Petersons by counsel and not closed with legal counsel.

Fredrickson obtained a liquor license in one week. Did he have assistance from Sam Granato to do this? Did he violate DABC legislative laws? Was his true intent to gain a liquor license and own the bar from the beginning contrary from his third party agreement and affidavit. (Refer to three-party agreement and John Fredrickson's affidavit, Exhibits 3 & 8) Fredrickson in his affidavit claims the Petersons wanted to sell the bar to him. Is this a conclusion contrary to the prior evidence cited or just another self-serving part of Fredrickson's affidavit?

19. "Fredrickson hired attorney Jeff Hollingworth ("Mr. Hollingworth") to represent him in the purchase of a Bar Named Sue's assets." Did Fredrickson ever reveal to Mr. Hollingworth that he had obtained a liquor license in one week and what his true intent was to gain ownership of the bar? Why was the asset purchase agreement not closed in Mr. Hollingworth's office as stated in the asset purchase agreement that it would occur Mr. Hollingworth's office within twenty-four (24) hours of signing the asset purchase agreement? (See Page 2, Asset Purchase Agreement, Exhibit 17)

20, 21 & 22. "On October 22, 2009, Mr. Hollingworth sent a draft Asset Purchase Agreement to Mr. Bates, who he understood was representing Mark and Judy in connection with the asset sale."

Mr. Bates was not hired by the Plaintiffs in connection with the asset sale as they had no intention of selling A Bar Named Sue and were unaware that there was going to be a sale of A Bar Named Sue. (See Exhibit 13) Mr. Bates was not aware that there would be a sale of A Bar Named Sue (See Exhibit 4, John Bates' Affidavit). Did this constitute complete representation by Bates of Petersons in the purchase and sale of the bar? Did these miniscule changes constitute full representation of Peterson by a competent attorney at the drafting, execution and closing of the Asset Sales Agreement?

23-27. "The Asset Purchase Agreement contains among, others, the following provisions:"

The Asset Purchase Agreement has statements that speak for itself except for the illegal provision to transfer the liquor license. (See Exhibit 17, Asset Purchase Agreement) Did the Peterson's have legal representation?

28-30. "Over a week later, on November 10, 2009, Mark executed an Assignment and Bill of Sale and Mark, Judy, and Fredrickson each signed the Closing Memorandum" In number 30, Following the closing the asset sale, 3928 made-and Plaintiffs accepted -the \$2,000.00 monthly payments specified by the Promissory Note."

Did the closing ever occur properly in the attorney's office as required in the agreement? (See Exhibit 17, Asset Purchase Agreement) There is an illegal clause in the Asset Purchase Agreement as follows: 7. Conditions to Closing. (a) Buyer's obligation to close shall be conditioned upon occurrence of the following closing conditions: (ii) **Buyer's receipt of all required consents to transfer the liquor license for the Business.** According to Utah Code 32A-5-107(26)(a) "A club licensee may not sell, transfer, assign, exchange, barter, give, or attempt in any way to dispose of the club license to another person, whether for monetary gain or not.

31-34 "It is undisputed that nothing in the Asset Purchase Agreement establishes the existence of a partnership agreement involving either Mark or Judy and Fredrickson" Could this Asset Purchase Agreement be reasonably construed to be a partnership from prior documents and promises of John Fredrickson? (See Exhibit 17, Asset Purchase Agreement) If Fredrickson thinks contract is valid, then why isn't the President of Mojo Syndicate, Inc. not on the

agreement since he was never removed from Mojo? If said contract was not a partnership, why was Mark Peterson's business license and liquor license valid proving his ownership of the Bar? Why didn't Mark Peterson invalidate his business license and liquor license prior to signing the Asset Purchase Agreement and give John authority to proceed? Why didn't John Fredrickson disclose to Mark Peterson that he had obtained a liquor license prior to signing the Asset Purchase Agreement? (See Exhibit 2, DABC Documents)

35.-37        In number 36, "According to Mark's own testimony, at no time did Mark, Judy, and Fredrickson agree to the terms of any alleged partnership agreement." All the documentation taken together and representations can be construed to be a partnership. (See Exhibit 3, Three Party Agreement)

38.        "Plaintiffs' principals – Mark and Judy – have made numerous, false representations under oath in their papers filed with the Court in this case."

Regarding the numbers, both Judy and Mark did not have an actual accounting of the amount of money put into the bar due to the fact that Fredrickson stole all of their documents and opposing counsel has refused to produce them. They merely took what they surmised was the amount of cash, property, the value of labor and what the bar was worth into account. As to exact figures, Judith testified in her deposition she got the numbers from her daughter and that her daughter would have to be talked to about the total numbers. Judy's memory is not very good. (See Exhibit 7, Judith's Medical Statement)

In Number 37(d) "In her affidavit, Judy stated that she "gave John [Fredrickson] \$10,000.00 and \$5,000.00 at about that time [September and October 2009] as good faith money to ensure his partnership in the bar and keep Mark as partner." Judith Peterson and Mark Peterson did in fact give John Fredrickson this good faith money and money to pay Sean Egan's retainer to represent them in removing Jason Rasmussen from the operations of the bar.

John Frederickson and opposing counsel refuse to give the financial records of Mark Peterson to Plaintiff's counsel and keep making false accusations and denials of malfeasance and not receiving money from Plaintiffs. At no time did Mark Peterson intend to sell A Bar Named Sue. Since he was the liquor licensee for A Bar Named Sue, he signed the Asset Purchase Agreement with John Fredrickson with the intention of holding the liquor license for the Bar and being partners with John in ownership of A Bar Named Sue.

If Plaintiffs had the financial records that John Fredrickson retained, these false accusations and denials could be dealt with in this action.

## ARGUMENT

### **I. SUMMARY JUDGMENT STANDARD**

Defendants claim where a summary judgment movant presents evidence in support of its motion, the nonmoving party "may not rest upon the mere allegations or denials of the

pleadings,' but must set forth specific facts showing that there is genuine issue for trial." *Orvis v. Johnson*, 2008 UT 2 18, 177 p.3d 600 (citing Utah R. Civ. P. 56(e))

There are still material facts to be presented in this case. During October 2009, John Fredrickson was a duly appointed agent for Mojo Syndicate, Inc. and Bar Named Sue, LLC, for the purposes of removing Jason Rasmussen from all operations of A Bar Named Sue because Mark discovered Jason was embezzling a significant amount of money from the Bar and needed assistance in removing Rasmussen from the operations of the Bar. (See Exhibit 1, A John Fredrickson)

Mr. Fredrickson through misrepresentation of intent and omissions to disclose, proceeded on a course of action to obtain full ownership of the bar without paying for the value of the business, by removing Mark from the operations of the bar through fear and threats, by obtaining a liquor license in his own name in one week where upon information and belief his Uncle, the commissioner of the DABC, pushed it through.

Without disclosing what he was doing or his true intent, he breached fiduciary duties as an agent of Mojo Syndicate, Inc. and Bar Named Sue, LLC, thus stripping Mark Peterson of his liquor license, and by defaming Mark Peterson and by lying to and manipulating Judith into signing documents that would be of harm to Mark.

**II. Plaintiffs claim that numerous issues of fact exist and that the Court cannot Make a Summary Judgment as a matter of law.**

Mark Peterson and Judy Peterson individually entered into the starting of a partnership with Mr. Fredrickson by signing a three party agreement (See Exhibit 3, Three Party Agreement), and relied on him to remove Jason Rasmussen from the operations of the company when Mark discovered that Jason was stealing money from the bar. Mojo appointed him as a fiduciary agent to do so (See Exhibit 1, Appointment). As a fiduciary Fredrickson was to act with the up most loyalty and the Plaintiffs had every right to rely on him in his dealings with them that he would act in their best interest.

John Fredrickson acted with fraudulent intent to gain control of A Bar Named Sue. Fredrickson breached his duty as a Fiduciary Agent. A Fiduciary Agent is a person required to act for the benefit of another (the principal) with the duties of good faith, trust, confidence, reasonable care and diligence, loyalty, disclosure, accounting and candor. This duty obligates the Fiduciary Agent to act in the best interest of the principal.

Fredrickson's course of action included only acting in the benefit of himself. Plaintiffs have lost their business and their reputation has been damaged in the community. They are suffering from extreme psychological, emotional and financial distress. Fredrickson has set on a course of action that is damaging Mark Peterson's reputation and career. This course of action is not the capacity a Fiduciary Agent would act in, yet Fredrickson has acted as such, being a Fiduciary Agent for Mojo Syndicate, Inc.

Fredrickson has gained control over the bar and all of the records that were kept before John was appointed as an agent of Mojo Syndicate, Inc. He is using these financial records to

accuse Mark Peterson of wrongdoings with taxes that are baseless and false. The tax records are not relevant in this case. Fredrickson, in fact, is being garnished at this time for the taxes on A Bar Named Sue by the Utah State Tax Commission. He is also using Mark Peterson's EIN number for Bar Named Sue, LLC to file taxes on the bar since taking possession. (See Exhibit 14, Garnishment of John Fredrickson)

There are new facts and evidence that make it clear that the Fredrickson Defendants, namely John Fredrickson, have breached liquor laws by falsifying information to gain a business license, and obtain a liquor license in the state of Utah to gain ownership of A Bar Named Sue through fraud and deceit. (See Exhibit 2, DABC Documents)

Mark never agreed or intended to transfer his liquor license as he wanted to remain as the licensee for the bar in the partnership with John Fredrickson. There was a fraudulent misrepresentation in the Asset Purchase Agreement that the liquor license would be transferred from seller to buyer. John Fredrickson caused the Asset Purchase Agreement, which would be void with this phrase in it. (See 7(a)(ii) Asset Purchase Agreement) Of course, Fredrickson was not uninformed because his affidavit says he owned two bars previously and had gotten his own license without disclosure to the Sellers. Mark and Judy were first time owners and were without counsel.

Defendants claim the Plaintiffs had the benefit of independent legal advice and counsel in connection with the asset sale.

Defendants claim that Plaintiffs had two attorneys representing them. John Bates, attorney, represented the Petersons only in matters related to the formation of their corporations. Mr. Bates is the registered agent for Mojo Syndicate, Inc and Bar Named Sue, LLC. Mr. Bates did not represent the Petersons when the Asset Purchase Agreement was signed (See **Exhibit 4, Affidavit of John Bates**). In fact, no attorney represented them to advise them what signing the Asset Agreement might be claimed to mean. The instructions of the attorney that drafted the document put instructions that it was to be closed in his office. Fredrickson ignored that to get quick uninformed signatures.

Sean Egan, attorney, was retained by Mark and Judy Peterson on September 29, 2010 to assist them in removing Jason Rasmussen from the operations of A Bar Named Sue. Sean Egan was referred to the Petersons by John Fredrickson. Fredrickson did not sign the fee agreement on this date. On October 13, 2010, Judith Peterson and John Fredrickson signed a fee agreement with Sean Egan. The following day, October 14, 2010, Mark Peterson signed a letter from Sean Egan who withdrew his representation of Mark Peterson.

Sean Egan represented both parties having opposite positions in terms of the sale of the Bar., thus creating a conflict of interest. In fact, during October, John Fredrickson was rushing to get his liquor license and business license not getting Jason out of the Bar.

There was no opportunity for Plaintiffs to understand the terms of the Asset Purchase Agreement or have the agreement reviewed and/or negotiated by an attorney. Moreover, there was no negotiation whatsoever. The party in charge of things at the time was John Fredrickson

and he brought the contract already drafted. Judith the weaker party had no idea what she was signing only that Mark and John were going to be partners in the Bar. She felt compelled to sign right then in front of them.

**III. Defendants are responsible for intentional interference, prospective economic advantage or relations in that John Fredrickson asked Mark Peterson for a good faith deposit and to come back in as a partner with Fredrickson when things were cleared up with the mismanagement and embezzlement of Jason Rasmussen.**

Plaintiffs had no legal counsel to advise them in the signing of the Asset Purchase Agreement and were not advised by counsel that there would be an actual sale of the whole bar itself. There was no payment of \$80,000.00 in exchange for the assets of A Bar Named Sue as Defendants have provided no accounting to Plaintiffs or Plaintiffs' counsel. Judith Peterson personally bought the assets for A Bar Named Sue from her retirement account in the amount of \$160,000.00. Plaintiffs had no intentions of selling the bar, especially at the price of \$80,000.00

Plaintiffs have substantial evidence that shows Fredrickson acted with improper and improper means to obtain ownership of A Bar Named Sue by obtaining a liquor license without ownership of A Bar Named Sue. (See Exhibit 2, DABC Documents)

The Plaintiffs did not know and understand the transaction they were consummating because John Fredrickson never revealed to Mark Peterson his true intent and actions to obtain ownership of the DABC by violating many liquor laws to do so.

Mark never agreed or intended to transfer his liquor license as he wanted to be the licensee for the bar in the partnership with John Fredrickson. There was a fraudulent

misrepresentation in the Asset Purchase Agreement that the liquor license would be transferred from seller to buyer. John Fredrickson caused the Asset Purchase Agreement, which would be void with this phrase in it. It makes the uninformed think that if he was the seller he would be needed thereafter. Of course, Fredrickson was not uninformed because his affidavit says he owned two bars previously and had gotten his own license without disclosure to the Sellers. Mark and Judy were first time owners and were without counsel (See Asset Purchase Agreement 7(a)(ii)). Fredrickson also breached this paragraph.

These facts would force Defendants to answer the Third Claim for Relief, Civil Conspiracy to Deprive Plaintiffs of Their Property and Injure Plaintiffs Reputation. John Fredrickson along with Sean Egan, Sam Granato, Defendants and others not yet identified conspired to obtain the operation of the Bar for little or no money.

"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." (Doctors' Co. v. Superior Court (1989) 49 Cal.3d 44, citing Mox Incorporated v. Woods (1927) 202 Cal. 675, 677-78.)' ('Id. at 511).

Upon information and belief, the use of John Doe II who is the uncle of John Fredrickson and Commissioner of the DABC assisted Fredrickson to obtain a liquor license in one week to

obtain possession of A Bar Named Sue in October 2009. This course of action was never once revealed to Plaintiffs and throughout it was assumed that John Fredrickson and Mark Peterson would be partners in the ownership of A Bar Named Sue because Mark Peterson would continue to hold the liquor license in his name and would continue to operate the bar after Jason Rasmussen was removed from all operations of the bar through John Fredrickson's fiduciary appointment of Mojo Syndicate, Inc. and Bar Named Sue, LLC.

This three party agreement was breached as John Fredrickson proceeded to act in his own self-interest to gain ownership of the bar, which was a breach of the three party agreement by having an asset person agreement done between the Plaintiffs companies and his company. Petersons thought this was just the furtherance of his duty as a fiduciary and did not question it much. It was between companies and not them individually. The agreement that they already had individually and pursuant to Fredrickson's duty as an agent of Mojo Syndicate, Inc. on September 30, 2010 for the "purposes of removing Jason Rasmussen from all facets of the existence and operation of the Company" (See Exhibit 1, Agency Appointment). This appointment as an agent left Fredrickson as a fiduciary agent for Mojo Syndicate, Inc. and Bar Named Sue, LLC. However, John Fredrickson acted with fraudulent intent to gain control of the bar. Fredrickson breached his duty as a Fiduciary Agent.

Black's Law Dictionary describes a fiduciary relationship as "one founded on trust or confidence reposed by one person in the integrity and fidelity of another." A fiduciary has a duty to act primarily for the client's benefit in matters connected with the undertaking and not for the

fiduciary's own personal interest. Business shrewdness, hard bargaining, and taking advantage of the forgetfulness or negligence of the client are totally prohibited by a fiduciary.

"The person acquired or retained property as a result of their own breach of a fiduciary duty (e.g., *Keech v. Sandford*, *Chan v. Zacharia*, *Boardman v. Phipps*). John Fredrickson claims the same, but should not be permitted to do so... Fredrickson's course of action included only acting in the benefit of him. Fredrickson obtained the property of the Plaintiffs by breaching his fiduciary duty.

Mr. Fredrickson created his own corporation, 3928 LLC, in mid-October 2009, and has obtained a business name Bar Named Sue, dba, so close to Mark's business name, Bar Named Sue, LLC, that Mr. Fredrickson went so far as to file taxes since his possession of the Bar under Mark Peterson's EIN number. Such is clear fraud let alone breach of a fiduciary duty.

The Asset Purchase Agreement was not negotiated. In fact none of the contracts involved in this case were ever negotiated. The Plaintiffs did not have legal advice regarding the signing of the Asset Purchase Agreement and no counsel was present when this agreement was signed at their residence. (See Exhibit 4, John Bates' Affidavit)

Even if the Plaintiffs' agreed to the asset purchase contract, the contract is not binding as Judith Peterson, the secretary, signed for Mojo Syndicate, Inc. as secretary. Mark Peterson, president of Mojo, did not sign for the company. Judith Peterson's assets paid for the assets personally. She still owns them. (See Exhibit 17, Asset Purchase Agreement Signature)

The Asset Purchase Agreement was not negotiated. In fact none of the contracts involved in this case were ever negotiated. The Plaintiffs did not have legal advice regarding the signing of the Asset Purchase Agreement and no counsel was present when this agreement was signed at their residence. (See Exhibit 4, John Bates' Affidavit)

Even if the Plaintiffs' agreed to the asset purchase contract, the contract is not binding as Judith Peterson, the secretary, signed for Mojo Syndicate, Inc. as secretary. Mark Peterson, president of Mojo, did not sign for the company. Judith Peterson's assets paid for the assets personally. She still owns them. (See Exhibit 17, Asset Purchase Agreement Signature)

Judy Peterson has never received an accounting of the \$40,000.00 John Fredrickson claims he paid in October for the operations of the bar, as he stated in his first affidavit and she verifies in her deposition (See Exhibit 12, Judith Peterson's Deposition), and Defendants are now in breach of payment and no signed note has been found.

In fact, John Fredrickson expanded A Bar Named Sue in December 2009 (See Exhibit , DABC Blueprint), but never paid the Petersons \$80,000.00 that Defendants claim they paid in John Fredrickson's Motion for Summary Judgment, that was not supported by any evidence or accounting.

### CONCLUSION

The affidavits of Mark and Judy Peterson filed herewith support this Memorandum Response and raise genuine issues of fact that Defendants claim to be undisputed. Citations are

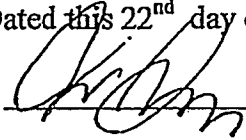
made to affidavits, depositions in part, and other discovered records from the DABC. These records are addition evidence and show a major breach of laws The conduct of John Fredrickson in getting a liquor license in one week while Mark had his license during the time that he was a fiduciary and represented by an Attorney, Sean Egan who by the way did nothing to get Jason Rasmussen out of the Bar. To the contrary Egan and Fredrickson allowed Jason to clean money out of bank accounts, gave him money and let him leave while filing no criminal charges.

Sean Egan John Fredrickson were deceitful. Unfortunately they have brought into scrutiny Sam Granato, John's Uncle and commission of the DAB. John Fredrickson at the same time not only breached the trust that Plaintiffs reasonably lied on to their damage .This case cannot be resolved without the deposition of John Fredrickson whose counsel refuses and continues to refuse to provide documents demanded. Enough genie issues of fact exist and inferences from the facts to preclude Summary Judgment.

In fact the Motion was premature before even the fact finding time agreed to was over. It was calculated to cut Plaintiffs off from gaining incriminating documents. This should not be allowed by the Court and a new schedule should be made. Plaintiffs need to take the deposition of Sam Granada, people at the DABC. They need to serve John Fredrickson and Jimmy Dublino who upon information and belief are very much a part of the issue that John is using to claim that Mark Peterson is responsible for the disparity in gross income and adjusted income in the Bar before Fredrickson was even brought in and which John Turned around to accuse Mark of tax fraud. This was a confidence game with threats to keep the owners away and included upon

information and belief a physical attack on counsel that put him in the hospital with a brain injury.

Dated this 22<sup>nd</sup> day of October 2010.

A handwritten signature in dark ink, appearing to read 'C. Brown', is written over a horizontal line.

Charles C. Brown

ADDENDUM 4 — APPELLEES' BRIEF

EXCERPTS OF DEPOSITION TRANSCRIPT OF MARK PETERSON

IN THE THIRD DISTRICT COURT FOR THE STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY

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MOJO SYNDICATE, INC., a	)	
corporation; and A BAR NAMED	)	Civil No. 100904277
SUE, LLC, a Limited	)	
Liability Company,	)	Deposition of:
	)	<u>MARK PETERSON, VOL I</u>
Plaintiffs,	)	
vs. .	)	
	)	
3928 LLC, a Limited	)	
Liability Company; JASON	)	
RASMUSSEN, an individual;	)	
JOHN FREDRICKSON, an	)	
individual, AND JOHN DOES	)	
I-IV,	)	
	)	
Defendants.	)	

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July 6, 2010  
10:08 a.m.

LOCATION:  
MITCHELL & BARLOW  
6465 South 3000 East, Suite 203  
Salt Lake City, UT 84121

\* \* \*

Karen Christensen  
- Registered Professional Reporter -  
- Certified Shorthand Reporter -

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

MOJO SYNDICATE, INC., a	)	
corporation, and A BAR	)	
NAMED SUE LLC, a	)	
limited liability	)	
company,	)	Case No. 100904277
Plaintiffs,	)	Judge Sandra Peuler
	)	
vs.	)	
	)	
3928 LLC, a limited	)	
liability company,	)	
JASON RASMUSSEN, an	)	
individual, JOHN	)	
FREDRICKSON, an	)	
individual, and JOHN	)	
DOES I-V,	)	
Defendants.	)	

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DEPOSITION UPON ORAL EXAMINATION OF  
MARK PETERSON  
VOLUME II

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TAKEN AT: Mitchell & Barlow  
6465 South 3000 East, Suite 203  
Salt Lake City, Utah

DATE: July 7, 2010

REPORTED BY: DANIELLE LITTLE, RPR, CSR

1 Q. 2009. Excuse me. Thank you.

2 A. Yes.

3 Q. And prior to October 2009, where were you  
4 employed?

5 A. At A Bar Named Sue.

6 Q. We'll be talking about that in a little bit  
7 more detail today.

8 A. Sure.

9 Q. How long did you work at A Bar Named Sue?

10 A. Almost a year. I worked there from November  
11 of -- well, it opened on November 19th, 2008, but started  
12 building on it and cleaning it up, because it was a  
13 shell, gutted out, in about actually May of 2008. And  
14 then all summer long worked on it, built it up, cleaned  
15 it up. Worked with Trinity Property on that, as well,  
16 and got that going up and then just worked in the bar up  
17 until the end -- well, about the 2nd of October of 2009.

18 Q. Okay. So you -- it sounds like  
19 construction-related work beginning in May 2008 and then  
20 actual work in the bar once it opened in November?

21 A. Yes, bartending, light managing, mainly  
22 hosting.

23 Q. What does that consist of, hosting at a bar?

24 A. Hosting, just making sure everybody is doing  
25 all right, making sure there's no fights going on,

1 booking bands for the bar, things like that.

2 Q. Okay. Prior to your involvement with A Bar  
3 Named Sue, what was your employment?

4 A. Prior to that I worked at Boulevard  
5 Restaurant.

6 Q. I'm not familiar with that particular  
7 restaurant. What is --

8 A. Well, it used to be by Gepetto's, just down  
9 the road on Murray-Holladay and 2300 East.

10 Q. And what did you do there?

11 A. I was a server.

12 Q. And how long were you there at that time,  
13 Boulevard Restaurant?

14 A. I was there for about a year, if that.

15 Q. So maybe a little bit less than a year?

16 A. Yeah, maybe.

17 Q. So that would have taken us back to, what,  
18 maybe June or July of '07 when you started there?

19 A. Right.

20 Q. Prior to that, where did you work?

21 A. Prior to that, I had my own landscaping  
22 company calls Blooming Desert Landscape.

23 Q. And when did you start that?

24 A. I started that in 1997/'98.

25 Q. And you did that until you went to work for

1           So before we resume questioning, Mark, you  
2 had something you wanted to say?

3           A.    Yeah.  The money that we got from Judy  
4 purchasing the assets, you know, I was saying that it was  
5 a loan.  But we never had a loan agreement or anything  
6 with her, so she personally purchased the assets and  
7 everything.  So for initial setup and to the vendors and  
8 purveyors and...

9           Q.    And that was for the bar?

10          A.    That was for the bar; right.

11          Q.    So it was never a circumstance where the bar  
12 opened up a checking account and Judy transferred in  
13 \$20,000 or \$30,000?

14          A.    Never.  It came straight from her, so she was  
15 buying all the assets personally.

16          Q.    Was there anything else you wanted to clarify  
17 from your prior --

18          A.    No, that was it, and just the numbers that  
19 we've gotten figured out now, so...

20          Q.    Okay.  And thank you for doing that.

21          A.    Sure, no problem.

22          Q.    Just before we broke, we were talking about  
23 Jason Rasmussen.  And I think you had said that the bar's  
24 cook, Jeff Bailey --

25          A.    Yes.

1 Q. -- told you that Jason had told him that he,  
2 Jason, was taking \$8,000 a month from the bar?

3 A. Right.

4 Q. So when did Jeff tell you about this?

5 A. He told me about this in about -- oh, June of  
6 2009.

7 Q. Other than the stealing \$8,000 month problem,  
8 were there other problems that Jason had at the bar?

9 A. None of that, just more of like a conflict --  
10 like power struggle between everything, so...

11 Q. And who was involved in that power struggle?

12 A. Jason and I.

13 Q. And what was the nature of that issue?

14 A. Just wanting full control, running  
15 everything, not giving me any leeway to do anything and  
16 just kind of butting heads, so...

17 Q. So what did you do, I mean, after Jeff told  
18 you Jason is stealing \$8,000 a month from the bar?

19 A. Talked with Audra Roberts, because she had a  
20 few friends that were lawyers, as well, and she said she  
21 would look into it. Then my mother had known about John  
22 Fredrickson, since he was a neighborhood friend, and his  
23 previous experience with two other bars that he had owned  
24 before..

25 And John had come in before even all this

1 stuff because he just lives up the street from A Bar  
2 Named Sue. And he would come in and say, "Great  
3 operation. I like what you guys have done here. I'd  
4 really like to get involved in this." And it was like at  
5 the time, no. And then when this arose, after telling my  
6 mother that he'd come in before and shown an interest,  
7 she says, "Well, why don't you talk with John and see  
8 what he can do to help?"

9 Q. Okay. So was there ever a point where you  
10 went to Jason and confronted him about the alleged --

11 A. There was. After we talked about Sean Egan  
12 and John Fredrickson and my mother, Sean Egan said, "Why  
13 don't you have him removed" and all this stuff. So we  
14 went to talk with Jason to have him removed.

15 We were at the bar. John was in the bar, as  
16 well, but he was in there as a customer, kind of on the  
17 low key because he didn't want Jason to know what he was  
18 being asked by us, the Petersons, for him to do was to  
19 help get rid of Jason Rasmussen.

20 Q. Okay. And I want to talk more about that in  
21 a moment. I want to make sure that I have a full  
22 understanding of the Jason aspect of it, though. Did you  
23 ever confirm? Was he, in fact, stealing \$8,000 a month  
24 from the bar?

25 A. As far as looking through the records, we're

1           A.     Jason Rasmussen, I was and that was it.

2           Q.     Okay. And as far as monitoring income and  
3 expenses for the bar, you didn't do that?

4           A.     No.

5           Q.     Okay. So it would have been easy for Jason  
6 to steal because he was the only one looking at the  
7 books?

8           A.     Exactly.

9           Q.     So it sounds like you did a couple of things  
10 in response to -- well, let me back up.

11                   So Jeff comes to you and says, "Hey, Jason  
12 told me he's stealing X number of dollars a month from  
13 the bar"?

14           A.     Right.

15           Q.     Why do you believe Jeff instead of Jason?

16           A.     Because we were having a power struggle. So  
17 I was looking -- you know, it was like, Oh, really,  
18 something to get rid of Jason on, so...

19           Q.     Okay. Then you mentioned Sean Egan. How did  
20 he get involved in the circumstance?

21           A.     John was looking for an attorney for us to  
22 deal with Jason Rasmussen and he came up -- he said, "I  
23 have a friend who recommended Sean Egan." So that's how  
24 we found Sean Egan, was through John Fredrickson.

25           Q.     So John's involvement predates Sean Egan's?

1 A. I do.

2 Q. Okay. What is it?

3 A. It is just a fee agreement and him  
4 representing us.

5 Q. Who is "him"?

6 A. Sean Egan. I'm sorry.

7 Q. Okay. If you look at the second page there,  
8 is that your signature above "Mark Peterson"?

9 A. Yes.

10 Q. And do you recognize your mom's signature  
11 above "Judy Peterson"?

12 A. I do.

13 Q. And that's Sean Egan's "very truly yours"  
14 signature?

15 A. Yes.

16 Q. And this is dated September 29th, 2009; is  
17 that correct?

18 A. Mine says the 30th.

19 Q. Oh, on the signature lines, yes. The date of  
20 the letter itself is --

21 A. The 29th of September, yes.

22 Q. I don't think that matters, but just to  
23 clarify.

24 The first paragraph of this letter says that  
25 Sean will represent the both of you in connection with

1 MR. COLLINS: Let's go ahead and mark this as  
2 Exhibit 8.

3 (Deposition Exhibit No. 8 was  
4 marked for identification.)

5 Q. (BY MR. COLLINS) This is Exhibit 8. Do you  
6 recognize this document?

7 A. I do not.

8 Q. Okay. At the top of the page in the box in  
9 the upper right it says "Sales and Use Tax Return, Single  
10 Place of Business."

11 A. Right.

12 Q. Is that your signature there on the bottom of  
13 the page?

14 A. It certainly looks like it.

15 Q. Okay. Do you have any reason to think it's  
16 not?

17 A. Because I've never seen this document. I  
18 never did the paperwork as far as the tax returns with --  
19 Jason Rasmussen was in charge of that.

20 Q. Okay. But that appears to be your signature  
21 at the bottom?

22 A. It does.

23 Q. Okay. And in the middle of the document  
24 there is a stamp, it appears, the letters USTC?

25 A. Yes.

1 Q. Okay. Do you know who would?  
2 A. Jason Rasmussen.  
3 Q. Okay. And then if you would turn over,  
4 please, to page DEF0099. Do you recognize this document?  
5 A. No.  
6 Q. Okay. This is the sales report for the  
7 period March 1, 2009 through March 31, 2009.  
8 A. Okay.  
9 Q. And again, would you read that second sales  
10 number there?  
11 A. \$95,769.33.  
12 Q. Okay. Do you know what that number  
13 represents?  
14 A. No.  
15 Q. Okay. Let's go through the same exercise,  
16 please. If we could add up these three sales figures,  
17 beginning with \$78,223.56 for January.  
18 A. Was it six?  
19 Q. It was 96, yes, sir.  
20 A. And 87.  
21 Q. And again on 99.  
22 MR. BROWN: Andrew?  
23 MR. COLLINS: Hang on one second.  
24 Q. (BY MR. COLLINS) What is the total?  
25 A. \$261,335.42.

1 Q. Thank you.

2 MR. BROWN: Where did you get these  
3 documents?

4 MR. COLLINS: Well, we can talk about that  
5 off the record, but right now we're sort of in a line of  
6 questioning that I'd like to finish.

7 MR. BROWN: All right.

8 Q. (BY MR. COLLINS) Okay. So the total is  
9 \$261,335. If we compared that to the Exhibit 10 on  
10 line 7, the net taxable sales and purchases were  
11 reported, as you said earlier, 165 --

12 A. \$165,566.09.

13 Q. Okay. Do you know why the sales computed by  
14 A Bar Named Sue are more than -- \$95,000 more than the  
15 actual sales reported to the Utah State Tax Commission?

16 A. I do not.

17 Q. I'm sorry?

18 A. I do not.

19 Q. Okay. Do you know who would know?

20 A. Jason Rasmussen.

21 Q. And is there anything that you would need to  
22 review that might help you understand more completely why  
23 these two numbers are different?

24 A. There's nothing I have or any document  
25 unless, you know, Jason Rasmussen had something.

1 the account and everything.

2 Q. So Jason's estimate in the summer of 2009 was  
3 that the business was worth a million dollars?

4 A. Right.

5 Q. But you don't know what that was based on?

6 A. I would assume off of this. But no, I do  
7 not.

8 Q. Do you know if Jason had any experience  
9 valuing businesses in the past?

10 A. No.

11 Q. So Jason estimated that his value -- that the  
12 value of his ownership was \$325,000?

13 A. Right.

14 Q. And you and John were talking about --

15 A. Him buying Jason out so he could come in.

16 Q. -- contributing \$325,000 to acquire Jason's  
17 position in the bar?

18 A. Right.

19 Q. Okay. And you said you talked on the phone a  
20 half a dozen times about --

21 A. If he wants to do that. He kept saying, "No,  
22 I can't afford that. I can't afford that. I can't  
23 afford that."

24 Then we talked later on -- I'd say probably  
25 around end of July, start of August, I talked with John.

1 He came into the bar, and I talked with him and told him  
2 that, "I just can't do this with Jason anymore. I have  
3 what the cook, Jeff Bailey, was telling me about Jason.  
4 I don't really know what to do. I need to get rid of  
5 him." John said, "I can handle this. I can get rid of  
6 him."

7 Q. And that was in, you said, July?

8 A. End of July, start of August.

9 Q. 2009?

10 A. Yes.

11 Q. Okay. And so what was said at that  
12 conversation as far as a partnership goes?

13 A. He was going to come in, get rid of Jason and  
14 be my partner -- be Judy's and my partner and do this.

15 Q. And he was going to get that partnership in  
16 exchange for getting rid of Jason?

17 A. Yes.

18 Q. So it was worth -- strike that.

19 Did you agree with Jason's valuation of how  
20 much his partnership was worth, his ownership interest?

21 A. I didn't agree with it, but I didn't really  
22 know. I was like, Wow, if it's worth a million, that  
23 would be great, but I don't see how it's worth a million  
24 because, you know, I haven't seen a million dollars go  
25 through there.

1 A. Yes.

2 Q. So that's when -- was that the first  
3 communication John had had with you since October 2nd?

4 A. With me. With me.

5 Q. And then at that meeting -- in paragraph 23  
6 of your affidavit it says "John kept promising that we  
7 were going to be partners."

8 A. Yep.

9 Q. Was that on the evening of October 27th?

10 A. No, in the morning.

11 Q. I'm sorry. The morning of October 27th?

12 A. Yes.

13 Q. And what time was it that John came to your  
14 mom's home?

15 A. I'm not really sure. I'd say before noon  
16 or -- early morning -- early, midmorning.

17 Q. Okay. So before noon?

18 A. Yeah, somewhere like that.

19 Q. And he came to your house with a copy of the  
20 Asset Purchase Agreement?

21 A. Yes.

22 Q. And then in paragraph 24 it says, "No  
23 negotiations or legal counsel were present and there was  
24 no time to review the terms when we signed this already  
25 drafted agreement at my mother's home." And then in 25

1 it says, "He has since then" -- "then" being  
2 October 27th?

3 A. Yeah, October 27th.

4 Q. -- "ceased all communication with me."

5 A. Yes.

6 Q. And that's --

7 A. And my mother, as well.

8 Q. And your mother?

9 A. Yes.

10 Q. So that's what I was going to ask. Was that  
11 sequence of events correct?

12 A. Yes.

13 Q. So October 27th is really the key date as far  
14 as signing the Asset Purchase Agreement --

15 A. Yes.

16 Q. -- and as far as talking about the  
17 partnership and your allegations about the partnership,  
18 was on October 27th?

19 A. Right. Right.

20 Q. Since then, you haven't spoken with John at  
21 all?

22 A. Well, yeah, because, I mean, the thing that  
23 confused me a bit about that is because we just, you  
24 know, assumed that we were signing the Mojo and A Bar  
25 Named Sue asset, which they didn't own any assets because

1 Judy owned it. But we just signed those and then we  
2 would meet later to get the business going and then we  
3 would meet later to talk about Judy's assets.

4 Q. Okay. I think I understood what you just  
5 said. But before we talk about that -- so the last time  
6 that you or Judy talked with John about the partnership  
7 was October 27th?

8 A. Yes, sir.

9 Q. Okay. Then could you explain to me a little  
10 bit more when you said they were Judy's assets and that  
11 Mojo and --

12 A. Because Mojo and A Bar Named Sue never bought  
13 the assets. Judy paid personally, so she owns the  
14 assets.

15 Q. I thought when we were talking earlier, you  
16 had said that that was her contribution to the bar.

17 A. Not to the bar. She never gave money to the  
18 bar and then the bar would write a check. She wrote the  
19 check, so she bought all the assets personally.

20 Q. And I understand that.

21 A. Yeah.

22 Q. So is it your position that A Bar Named Sue,  
23 the LLC, and Mojo Syndicate never owned anything?

24 A. No, they didn't.

25 Q. It was all Judy's property?

1 Q. Do you not understand what that language  
2 means?

3 A. No.

4 Q. Okay. Is there other language in this  
5 document that you don't understand what it means?

6 A. Well, I mean, I'm sure there's a lot. I  
7 mean, you know -- I mean, at closing the buyer shall  
8 deliver the promissory note. But then, of course, I have  
9 that other document that we just went over that he has a  
10 credit of \$40,000. I'm not really sure. I mean -- and,  
11 I mean, where was it in here that -- I mean, this was  
12 supposed to be closed at some attorney's office and it  
13 was closed in my mom's living room.

14 Q. Okay. And I understand that --

15 A. I mean, I just don't understand. And, I  
16 mean, there was no lawyers present for this, it was just  
17 John, Judy and I.

18 Q. And I understand that. What I'm asking is:  
19 Is there any provision of this agreement -- I understand  
20 that there may be some question about how the deal was  
21 being structured in your mind.

22 A. Yeah.

23 Q. But as far as what this document says, is  
24 there any uncertainty in your mind about what this  
25 document says?

1           A.    No, there's no uncertainty in my mind, per  
2 se, what it says. It's basically saying that -- taking  
3 the whole thing from you.

4           Q.    Is there any provision in this document that  
5 discusses or references a partnership between John  
6 Fredrickson and you?

7           A.    Absolutely not, because we never read through  
8 the whole thing when we signed this.

9           Q.    Okay. So we've got the opportunity now. Can  
10 you identify any provision of this document that refers  
11 to or establishes or identifies a partnership agreement?

12          A.    I don't see anything so far that says  
13 anything in the form of a partnership anywhere.

14          Q.    Okay. Please take your time to review, as  
15 much as you need, this document.

16          A.    There is one thing I do have a question on.

17          Q.    Well, please finish reviewing it and answer  
18 the question pending.

19          MR. BROWN: What was the question?

20          Q.    (BY MR. COLLINS) Is there any reference or  
21 any indication in this document of a partnership  
22 agreement?

23          MR. BROWN: Well, I think that's too broad  
24 and it calls for construction -- anything can be  
25 construed as a partnership by law. And I think it's

1           A.    November.

2           Q.    Okay.  And where were you when you signed  
3 this document?

4           A.    I do believe at my mother's house again, on  
5 this one.

6           Q.    And who else was present when you signed this  
7 document?

8           A.    John Fredrickson and Judy Peterson.

9           Q.    Earlier you said that the last time you and  
10 John spoke -- or you and Judy -- strike that, that didn't  
11 come out right.  That the last time you and John or Judy  
12 and John spoke was that October 27th morning when he came  
13 to sign the Asset Purchase Agreement.

14          A.    Um-humm.

15          Q.    But now you're saying he was present at the  
16 execution of these subsequent documents.  This is almost  
17 a week and a half later?

18          A.    Right.

19          Q.    So you didn't have any conversations then?

20          A.    Not even after all these documents were  
21 signed, still no conversation or contact with him.

22          Q.    Okay.  But this document was signed after  
23 that October 27th?

24          A.    Right.

25          Q.    So you had some contact with him?

1           A.     Right, just to sign documents.

2           Q.     Just to sign documents. And what is your  
3 understanding of the purpose of this document,  
4 Exhibit 29?

5           A.     Like I said earlier, just to sell the  
6 interest in the property described in Section 1 of the  
7 Asset Purchase Agreement.

8           Q.     Okay. And this document is entitled  
9 Assignment and Bill of Sale?

10          A.     Right.

11          Q.     Did you discuss this document, No. 29, with  
12 anyone before you signed it?

13          A.     No.

14                 MR. COLLINS: Okay. Let's go ahead and mark  
15 No. 30, please.

16                 (Deposition Exhibit No. 30 was  
17 marked for identification.)

18          Q.     (BY MR. COLLINS) Do you recognize this  
19 document?

20          A.     Yes.

21          Q.     What is it?

22          A.     It is a Closing Memorandum.

23          Q.     Is this -- was this document executed in  
24 connection with the Asset Purchase Agreement?

25          A.     At the same time?

1 Q. Those are the only two documents dated  
2 November 10th. What is your understanding of the purpose  
3 of this document?

4 A. The understanding of this was just to close  
5 out the names of everything and free and clear the name  
6 up, and we were all still going to be partners.

7 Q. Okay. Now, I'm going to ask this question --  
8 and, Charles, I'm going to try to ask it carefully so I  
9 can be attentive to your previous objection.

10 Referring to Exhibits 26, 27, 28, 29 and 30,  
11 if you could just pull those in front of you -- excuse  
12 me, and 24. So I'm looking at the Promissory Note, the  
13 Certificate of Amendment, the It Could Have Been Fun, LLC  
14 letter, the Lease Termination Agreement, the Assignment  
15 and Bill of Sale and the Closing Memo.

16 A. Okay.

17 Q. Are you up to speed with me on all those  
18 documents?

19 A. Yes.

20 Q. Is there anything in these documents, in your  
21 understanding, that supports the existence of a  
22 partnership agreement?

23 A. No, I don't see anything in there that  
24 supports anything, because all it says is just  
25 transferring of the name, selling of that and the assets

1 and all of that.

2 Q. Okay.

3 MR. BROWN: And I'll object because you  
4 have -- you haven't put in the three-party agreement, and  
5 those in conjunction with that can be construed as a  
6 partnership agreement. A quiet objection.

7 MR. COLLINS: Let's go ahead and mark this as  
8 Exhibit 31.

9 (Deposition Exhibit No. 31 was  
10 marked for identification.)

11 Q. (BY MR. COLLINS) Do you recognize this  
12 document?

13 MR. BROWN: Well, I sent it out, he may not  
14 recognize it.

15 MR. COLLINS: I figured he wouldn't, but...

16 THE WITNESS: No.

17 Q. (BY MR. COLLINS) Okay. If you look at  
18 the -- well, just look at the letter. I'll read it to  
19 you. This is a letter I received from your attorney,  
20 Mr. Brown. The letter reads in its entirety, "Dear  
21 Mr. Collins: My client Mark Peterson has requested that  
22 you arrange for the return of his personal property that  
23 is hanging on the walls at A Bar Named Sue. Attached you  
24 will find a list of this property. I trust that there is  
25 not a problem here. Sincerely, Charles C. Brown."

1 Q. So this exhibit contains copies of two checks.  
2 The first one, check No. 151, do you recognize that at all?  
3 A. I do not.  
4 Q. Okay. The date on this check is September 10,  
5 2009.  
6 A. Okay.  
7 Q. The account is John P. Fredrickson. And it's pay  
8 to the order of Judith Peterson --  
9 A. Right.  
10 Q. -- in the amount of \$5,000. Do you have any sense  
11 of why John would be paying Judy personally \$5,000 in  
12 September of '09?  
13 A. I'm not sure.  
14 Q. Okay. Would there be anything you'd need to look  
15 at that might refresh your recollection about this \$5,000  
16 payment?  
17 A. No.  
18 Q. All right. And then one other point I just wanted  
19 to clarify from yesterday's testimony and then we'll go  
20 through the documents that I received last week. We talked  
21 a lot about this idea of a partnership agreement. So I just  
22 wanted to ask other than your testimony are there any  
23 documents or is there other evidence that supports --  
24 A. A partnership?  
25 Q. -- the existence of a partnership?

1 A: Nothing. It was all verbal.

2 Q: Okay. All right. I'm hopeful that we will be  
3 able to go through these in relatively short order.

4 A: Sure.

5 MR. COLLINS: Let's go ahead and mark this as  
6 Exhibit 33.

7 (Whereupon, Deposition Exhibit No. 33 was marked  
8 for identification.)

9 BY MR. COLLINS:

10 Q: Do you recognize this document?

11 A: Yes.

12 Q: What is it?

13 A: It is the articles of incorporation for Mojo  
14 Syndicate, Inc.

15 Q: How did you acquire a copy of this document?

16 A: Through my attorney John Bates.

17 Q: Okay. If you'd turn over to page 5 of this  
18 document. There's two signatures there. Do you recognize  
19 those?

20 A: John Bates.

21 Q: Okay. And you said a minute ago he was your  
22 attorney?

23 A: Yeah.

24 Q: What legal work did he do in connection with Mojo  
25 Syndicate, Inc.?

C E R T I F I C A T E

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE)

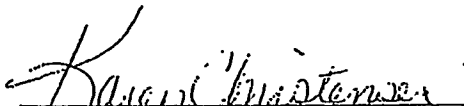
THIS IS TO CERTIFY that the foregoing deposition was taken before me, KAREN CHRISTENSEN, Registered Professional Reporter, Certified Shorthand Reporter and Notary Public in and for the State of Utah.

That the said witness was by me, before examination, duly sworn to testify the truth, the whole truth and nothing but the truth in said cause.

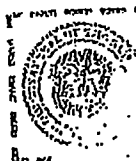
That the testimony of said witness was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages and said witness deposed and said as in the foregoing annexed deposition.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah.

  
KAREN CHRISTENSEN, RPR, CSR

My Commission Expires:  
December 30, 2011



C E R T I F I C A T E

STATE OF UTAH )

COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the foregoing deposition was taken before me, DANIELLE LITTLE, a Certified Shorthand Reporter in and for the State of Utah. .

That the deposition was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true, and correct transcription is set forth in the foregoing pages.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.



ADDENDUM 5 — APPELLEES' BRIEF

EXCERPTS OF DEPOSITION TRANSCRIPT OF JUDITH PETERSON

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

MOJO SYNDICATE, INC., a	)	
corporation, and A BAR	)	
NAMED SUE LLC, a	)	
limited liability	)	
company,	)	Case No. 100904277
Plaintiffs,	)	Judge Sandra Peuler
	)	
vs.	)	
	)	
3928 LLC, a limited	)	
liability company,	)	
JASON RASMUSSEN, an	)	
individual, JOHN	)	
FREDRICKSON, an	)	
individual, and JOHN	)	
DOES I-IV,	)	
Defendants.	)	

---

DEPOSITION UPON ORAL EXAMINATION OF  
JUDITH PETERSON

---

TAKEN AT: Mitchell & Barlow  
6465 South 3000 East, Suite 203  
Salt Lake City, Utah

DATE: July 7, 2010

REPORTED BY: DANIELLE LITTLE, RPR, CSR

1 Q. Okay.

2 A. -- we went into Sean Egan's office. John would  
3 have stuff there, bring it out, stick it in front of me, and  
4 then he would say -- go blah, blah, blah, blah, blah sign.  
5 And that's what I was doing. I was going, okay, you know.

6 Q. So did you not read the documents before you  
7 signed them?

8 A. I maybe read them, but I maybe didn't even  
9 understand them all the way through.

10 Q. Okay.

11 A. I wasn't completely comprehending all of it.

12 Q. Okay. Do you have any -- strike that.

13 Let's go ahead and look here at Exhibit 20. Do  
14 you recognize this document?

15 A. No, I don't. But I'm sure that it's there.

16 Q. Would you look on page 8.

17 A. Yes.

18 Q. Is that your signature?

19 A. Yes, it is.

20 Q. And on the first page of this document it says  
21 that the agreement is made the 27th day of October. Is that  
22 the same day that John brought it to your home?

23 A. I do not remember.

24 Q. Do you remember a meeting at your home where you  
25 signed this document?

1 Q. And then the next page is the June check --  
2 A. Put into an account.  
3 Q. Into Charles Brown's account?  
4 A. Yes.  
5 Q. So did you receive a \$2,000 payment from John  
6 Fredrickson for each month from December 2009 through July  
7 2010?  
8 A. It says I did.  
9 Q. Do you remember receiving those payments?  
10 A. If I received them I have put them in the account.  
11 Every one of them has been accounted for.  
12 Q. So it's two questions. Did you receive that  
13 number of payments? I think it's eight months; December,  
14 January, February, March, April, May, June, July.  
15 A. We've got seven here. So I don't know about  
16 eight, but I've got seven here.  
17 Q. So that's why I'm asking. Have you received  
18 eight?  
19 A. I don't know. I've gotten one every month.  
20 Q. You've gotten one every month?  
21 A. Yes.  
22 Q. Since December 2009?  
23 A. I believe so.  
24 Q. Okay. And those checks all of them have been  
25 deposited into Mr. Brown's trust account?

1 A: Yes.

2 Q. I think there was some different testimony from  
3 Mark on that. Did you want to --

4 MR. BROWN: As an officer of the court I just want  
5 to mention that the checks started to be deposited on this  
6 first one as I recall where it says trust CCB.

7 MR. COLLINS: The May 2010 check?

8 MR. BROWN: Yeah, I didn't even know the -- I  
9 didn't even file the complaint -- when was the complaint  
10 filed?

11 MR. COLLINS: Earlier this year.

12 MR. BROWN: Yeah, March I think.

13 BY MR. COLLINS:

14 Q: So it sounds like that -- does that refresh your  
15 recollection, Judy?

16 A: Recollection of what, excuse me?

17 Q. So Charles just said that this check dated May of  
18 2010 was the first one that was deposited into his trust  
19 account.

20 A: I guess so.

21 Q: Okay. So you don't have a recollection?

22 A: No. Nor do I have a record.

23 Q. Okay.

24 A: Every check that John has sent me has been placed  
25 in that account. The account that is controlled by Charles.

C E R T I F I C A T E

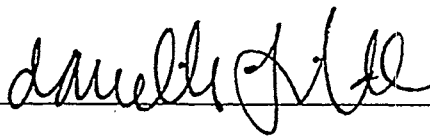
STATE OF UTAH )

COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the foregoing deposition was taken before me, DANIELLE LITTLE, a Certified Shorthand Reporter in and for the State of Utah.

That the deposition was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true, and correct transcription is set forth in the foregoing pages.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.



ADDENDUM 6 — APPELLEES' BRIEF

UTAH RULE OF CIVIL PROCEDURE 7(c)(3)(A)–(B)

### Utah Rule of Civil Procedure 7(c)(3)(A)–(B)

7(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

7(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

ADDENDUM 7 — APPELLEES' BRIEF

*CARSTEN V. CARSTEN*, 2006 UT APP 275,  
2006 WL 1791391 (UTAH CT. APP. JUNE 29, 2006)  
(UNPUBLISHED OPINION)

Not Reported in P.3d, 2006 WL 1791391 (Utah App.), 2006 UT App 275  
(Cite as: 2006 WL 1791391 (Utah App.))

**H**

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Utah.  
Cheryl CARSTEN, Petitioner, Appellee, and Cross-  
appellant,  
v.  
Brian CARSTEN, Respondent, Appellant, and  
Cross-appellee.

No. 20060157-CA.  
June 29, 2006.

Third District, Silver Summit Department,  
034500255; The Honorable Bruce C. Lubeck.  
David B. Thompson and Christina I. Miller, Park  
City, for Appellant and Cross-appellee.

David S. Dolowitz, Dena C. Sarandos, and Thomas  
J. Burns, Salt Lake City, for Appellee and Cross-  
appellant.

Before Judges GREENWOOD, DAVIS, and  
THORNE.

MEMORANDUM DECISION (Not For Official  
Publication)

PER CURIAM:

\*1 Cheryl Carsten seeks to cross-appeal the tri-  
al court's order dated January 24, 2006. This is be-  
fore the court on its own motion for summary dis-  
position based on the lack of jurisdiction due to an  
untimely filed notice of cross-appeal.

It is undisputed that Carsten filed her notice of  
cross-appeal fifteen days after Brian Carsten filed  
his notice of appeal. Pursuant to rule 4(d), if a party  
files a timely notice of appeal, "any other party may  
file a notice of appeal within 14 days after the date  
on which the first notice of appeal was filed." Utah  
R.App. P. 4(d). Under the plain language of rule

4(d), Carsten's notice of cross-appeal was untimely.  
*See id.* As a result, this court lacks jurisdiction over  
the cross-appeal. *See Glezos v. Frontier Invs.*, 826  
P.2d 1230, 1233 (Utah Ct.App.1995).

Carsten asserts that her notice of cross-appeal  
was timely because three days should be added to  
the time period to file under rule 22 of the Utah  
Rules of Appellate Procedure. *See* Utah R.App. P.  
22(d). The filing of notices of appeal and cross-  
appeal, however, are beyond the scope of rule 22.  
Pursuant to rule 22, when a party "is required or  
permitted to do an act within a prescribed period  
after service of a paper and the paper is served by  
mail, 3 days shall be added to the prescribed peri-  
od." *Id.* By its plain language, rule 22 extends the  
time to respond to documents only where the time  
runs from the "service of [the] paper." *Id.*

The time for filing a notice of cross-appeal,  
however, runs from the date of the filing of the no-  
tice of appeal. *See* Utah R.App. P. 4(d). Because  
the time does not run from the service of the notice  
of appeal, but from the filing of it in court, rule 22  
does not apply. Therefore, Carsten's notice of cross-  
appeal was untimely.

When a court lacks jurisdiction over a cross-  
appeal, it must dismiss the cross-appeal. *See Brad-  
bury v. Valencia*, 2000 UT 50, ¶ 8, 5 P.3d 649. Ac-  
cordingly, this cross-appeal is dismissed.

Utah App., 2006.  
Carsten v. Carsten  
Not Reported in P.3d, 2006 WL 1791391 (Utah  
App.), 2006 UT App 275

END OF DOCUMENT