

2010

Jones and Trevor Marketing, Inc. v. Jonathan L.  
Lowry, Nathan Kinsella, Financial Development  
Services, INC., Jeremy Warburton, John  
Neubaruer, and ESBEX.COM, INC. : Brief of  
Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JONES & TREVOR MARKETING, INC.,

Petitioner,

vs.

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

Respondents.

**BRIEF OF PETITIONER**

Supreme Court Case No. 20100449-SC  
Court of Appeals Case No. 20080904-CA  
District Court Case No. 050100038

---

Appeal from the Utah Court of Appeals

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## STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-3-102(3)(a) (2010).

## STATEMENT OF THE ISSUES

**1. Whether the Utah Court of Appeals erred in finding that evidence of one of the *Colman v. Colman* factors is insufficient to establish the first prong of the alter ego doctrine.**

Standard of Review: This Court reviews “the court of appeals’ decision for correctness. The review focuses on whether the court of appeals correctly reviewed the trial court’s decision . . . under the appropriate standard of review.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal citations omitted). “When an appellate court reviews a district court’s grant of summary judgment, the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party, while the district court’s legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness.” *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312 (internal quotations and citations omitted).

Presented in Petition for Writ of Certiorari at page 1.

**2. Whether the Utah Court of Appeals erred in finding that two inconsistent rulings on a motion for summary judgment by the same court on the same claim cannot constitute a genuine issue of material fact sufficient to prevent the entry of summary judgment on a cause of action.**

Standard of Review: This Court reviews “the court of appeals’ decision for correctness. The review focuses on whether the court of appeals correctly reviewed the trial court’s decision . . . under the appropriate standard of review.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal citations omitted). “When an appellate court reviews a district court’s grant of summary judgment, the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party, while the district court’s legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness.” *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312 (internal quotations and citations omitted).

Presented in Petition for Writ of Certiorari at page 1.

### **CONTROLLING PROVISIONS**

There is no constitutional or statutory or other provision material to this appeal.



## STATEMENT OF THE CASE

This case generally revolves around a contract dispute and involves an appeal from a grant of summary judgment as to the personal liability of Respondents, Jonathan L. Lowry (“Lowry”) and Nathan Kinsella (“Kinsella”).

### Procedural History

Petitioner Jones & Trevor Marketing (“J&T”) filed this case on August 29, 2002. (R. 33-49.) On June 17, 2004, J&T filed an amended complaint, including Respondents Lowry and Kinsella as defendants and alleging against them theft, fraudulent misrepresentation, constructive fraud, fraudulent non-disclosure, and intentional interference with business relations.<sup>1</sup> (R. 1021-44.)

Lowry and Kinsella filed a joint motion for summary judgment on or about May 20, 2005. (R. 1198-1200.) After hearing oral argument on September 22, 2005 and allowing the parties to redepose John Neubauer, the district court granted the motion on February 1, 2006, holding that the corporate veil could not be pierced under the alter ego doctrine because there was insufficient evidence that Lowry and Kinsella “acted in their personal capacity or took funds improperly.”<sup>2</sup> (R. 1699.) The Honorable Derek P. Pullan signed the order partially granting the motion on March 31, 2006. (R. 2019-22.) Only J&T’s claim of fraudulent misrepresentation against Lowry survived the 2005 motion for summary judgment, because the judge determined that there was a genuine issue of

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<sup>1</sup> On September 17, 2007, a default judgment was entered against Defendants Financial Development Services, Inc. and Esbex.com, Inc. (R. 2215-17.)

<sup>2</sup> This ruling is attached hereto as Addendum B.

material fact in dispute on that claim. (R. 1702.) Lowry eventually filed a separate motion for summary judgment on that claim on June 23, 2008. (R. 2259-2285.) In the interim between the 2005 and the 2008 motions for summary judgment, little if any additional discovery was conducted by either party.<sup>3</sup> The Honorable David N. Mortensen granted the motion and issued a final order in the case on October 8, 2008, holding that there were no genuine issues of material fact to prevent the entry of summary judgment.<sup>4</sup> (R. 2378-2385.) In an opinion dated May 6, 2010, the Utah Court of Appeals affirmed both orders.<sup>5</sup> *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113, 233 P.3d 538.

### **Statement of Facts**

The Plaintiff/Appellant, Jones & Trevor Marketing, Inc., is a Nevada corporation engaged in the sale of training courses developed by its owner and principal, Ted Thomas. (R. 1293, 1691.) Financial Development Services, Inc., (“FDS”) one of the corporate defendants, was a Utah corporation engaged in sales and telemarketing activities. (R. 1293, 1691.) FDS was dissolved on November 3, 2004. (R. 1293, 1691.) Esbex.com, Inc., (“Esbex”) the other corporate defendant, was originally a dba of FDS and was eventually incorporated as a wholly owned subsidiary of FDS. (R. 1294-95, 1692.) Esbex was dissolved on November 29, 2004. (R. 1295, 1692.) At all relevant times, Lowry and Kinsella were the sole shareholders and directors of FDS and Esbex.

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<sup>3</sup> The trial court docket reflects no discovery activity after the October 7, 2005 return of service of a subpoena to John Neubauer.

<sup>4</sup> This order is attached hereto as Addendum C.

<sup>5</sup> This opinion is attached hereto as Addendum A.

(R. 1296, 1300, 1693.)

On or about January 31, 2002, J&T entered into a Sales and Marketing Agreement with FDS. (R. 1691, 1230-1234.) Under the agreement, J&T provided to FDS training courses and sales leads. (R. 1230-31.) In exchange, FDS was to market and sell J&T's training courses and provide coaching services, earning a commission of 60% of the gross sales. (R. 1230.) Esbex, though not in privity of contract with J&T, provided coaching services to purchasers of the J&T courses. (R. 1295.) In a letter dated July 19, 2001, Lowry sent a letter to J&T terminating the contract. (R. 2342.) After the relationship between the parties soured, J&T brought suit against FDS and Esbex and eventually against Lowry and Kinsella personally. (R. 33-49, 1021-44.)

In its opposition and supplemental opposition to Lowry and Kinsella's motion for summary judgment, J&T presented the following evidence regarding Lowry and Kinsella's direction and use of FDS and Esbex with regard to the J&T contract.

- Lowry and Kinsella were, at all times relevant to this appeal, the sole shareholders, officers, and directors of FDS and Esbex. (R. 1296, 1300, 1693.)
- Lowry and Kinsella ran FDS and Esbex as if the two corporations were one entity. (R. 1294-95.)
- Lowry and Kinsella were both aware and in control of all of the financial transactions that took place at FDS and Esbex and determined the allocation of monies to the two entities. (R. 1642-43, 1695.)
- When customers returned J&T products, Lowry and Kinsella kept the refunds

from J&T and, instead of sending the product back to J&T, resold the product to new customers. (R. 1642.)

- Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds. (R. 1643-44.)
- Lowry and Kinsella instructed their employees to omit from their reports to J&T the ongoing monthly fees that Esbex and FDS collected from coaching services. (R. 1644.)
- Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting and in disregard of the money needed to run the corporations. (R. 1642-46.)
- Kinsella took money from FDS without telling Lowry. (R. 1644-45.)
- After FDS terminated the agreement with J&T, Lowry and Kinsella made the decision to continue selling coaching, to instruct their employees not tell J&T about it, and to keep the money derived from the sales. (R. 1641-42.)
- That FDS and Esbex in fact continued to sell coaching services and continued to use Ted Thomas's name in their sales materials. (R. 1323-1567.)
- In November 2002, FDS and Esbex were deemed insolvent and dissolved. (R. 1695.)

Despite the above evidence, the trial court held that there was no genuine issue of fact as to whether Lowry and Kinsella were the alter egos of the corporations or whether

Lowry and Kinsella personally committed torts in connection with the contract with J&T.

The court of appeals affirmed. *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113, 233 P.3d 538. J&T now seeks review of the case by this Court.

## SUMMARY OF THE ARGUMENT

The court of appeals erred in affirming the trial court's grant of summary judgment on two of Petitioner's claims. First, the court erred in holding that the entry of summary judgment was proper where J&T provided evidence that Lowry and Kinsella failed to observe the corporate form and met at least one of the *Colman v Colman* factors. While most of J&T's evidence went toward showing that one of the *Colman* factors had been met, J&T also provided evidence of some of the other factors. Further, there is no justification for failing to consider the application of the alter ego doctrine simply because the evidence primarily supports only one of the *Colman* factors.

Second, the court erred in holding that two contradictory decisions on motions for summary judgment on J&T's fraud claim against Lowry failed to constitute a genuine issue of material fact. Though Petitioner acknowledges that a district court judge is permitted to change his mind prior to the entry of a final order, there must be sufficient justification for doing so. In this case, the fact that two different factfinders made contradictory decisions on a motion for summary judgment with essentially the same evidence before them, demonstrates that there was an issue of material fact as to whether the elements of fraud had been met and that Petitioner's fraudulent misrepresentation claim against Lowry should have been preserved for trial.

Petitioner therefore respectfully requests that this Court reverse the court of appeals and remand this case to the trial court for a trial on Petitioner's alter ego claim against both Lowry and Kinsella and on Petitioner's fraud claim against Lowry.

## ARGUMENT

The court of appeals erred in its analysis of the alter ego doctrine, particularly with respect to the application of the *Colman* factors, and it erred in finding that two inconsistent rulings on a motion for summary judgment cannot constitute a genuine issue of material fact sufficient to preclude the entry of summary judgment.

This Court reviews “the court of appeals’ decision for correctness. The review focuses on whether the court of appeals correctly reviewed the trial court’s decision . . . under the appropriate standard of review.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal citations omitted). “When an appellate court reviews a district court’s grant of summary judgment, the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party, while the district court’s legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness.” *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312 (internal quotations and citations omitted). With respect to legal conclusions and judgment, this Court gives “no deference to the district court.” *Raab v. Utah Ry. Co.*, 2009 UT 61, ¶ 10, 221 P.3d 219.

Viewing the facts in the light most favorable to J&T, the nonmoving party, summary judgment was inappropriate as to J&T’s alter ego claim and its fraud claim against Lowry. This Court should therefore reverse the court of appeals’ decision and remand for a trial on those two causes of action.

**I. THE COURT OF APPEALS ERRED IN HOLDING THAT EVIDENCE OF ONLY ONE OF THE *COLMAN* FACTORS IS INSUFFICIENT TO ESTABLISH THE FIRST PRONG OF THE ALTER EGO DOCTRINE.**

The court of appeals incorrectly affirmed the district court's ruling on the grounds that there was insufficient evidence to support the application of the alter ego doctrine because Petitioner presented evidence of only one of the *Colman* factors.

Under Utah law, a court will pierce the corporate veil and hold individuals liable under the equitable alter ego doctrine where

(1) there [is] such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

*Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979). The rationale behind the alter ego doctrine in Utah has been explained as follows: “[I]f a principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one, he is without standing to complain when an injured party does the same.” *Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987) (citing *Bone Constr. Co. v. Lewis*, 250 S.E.2d 851, 853 (Ga. Ct. App. 1978)). Notably, the alter ego doctrine “is an equitable doctrine requiring that each case be determined upon its peculiar facts.” *Salt Lake City Corp. v. James Constructors*, 761 P.2d 42, 47 (Utah Ct. App. 1988) (citing *Nat’l Bond Fin. Co. v. Gen. Motors Corp.*, 341 F.2d 1022, 1023 (8th Cir. 1965)).

In order to determine whether the individual and the corporate form have merged,



and the first prong of the alter ego doctrine met, Utah courts generally consider the following “significant, although not conclusive.” factors:

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

*Colman*, 743 P.2d at 786 (citing *Ramsey v Adams*, 603 P.2d 1025, 1028 (Kan. Ct. App. 1979); *Amoco Chems Corp v Bach*, 567 P.2d 1337, 1341-42 (Kan. 1977)). In addition to the above factors, courts “look[] through form to substance and ha[ve] often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner.” *Id* at 786 (quoting *Lyons v Lyons*, 340 So. 2d 450, 451 (Ala. Civ. App. 1976)).

Though Utah courts often consider a number of the *Colman* factors in order to determine whether the first prong of the alter ego doctrine has been satisfied, there is often stronger evidence relating to one prong and some factors tend to weigh more heavily in favor of piercing the corporate veil. In *Colman*, the court expounded particularly on the seventh, façade, factor: “[f]ailure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses without proper accounting, and failure to maintain complete corporate and financial records are looked upon with extreme disfavour.” *Id* at 786 n.3 (citing *Roylex, Inc. v. Langson Bros Constr Co*, 585 S.W.2d 768, 772 (Tex. Civ. App. 1979)). The *James Constructors*

court. too. placed emphasis on the “extent to which the corporate formalities . . . are observed.” *James Constructors*, 761 P.2d at 47.

Utah courts frequently disregard the corporate form where only a few of the above elements are present in the case, as the court did in *Colman*. In *Colman*, the court noted with approval the *Lyons* case. In *Lyons*, the court disregarded the corporate form and held a shareholder personally liable for, among other things, essentially violating the façade *Colman* factor by commingling corporate funds with his own and failing to keep proper corporate records. *Lyons*, 340 So. 2d at 451.

In this case, in addition to the evidence in support of the façade factor, J&T presented evidence that supported several of the *Colman* factors. J&T presented evidence that there was “siphoning of corporate funds by the dominant stockholder.” In fact, there was evidence that Kinsella took money from FDS without telling Lowry. (R. 1644-45.) J&T also presented evidence that Lowry and Kinsella used “the corporate entity in promoting injustice or fraud.” Evidence was submitted that showed that Lowry and Kinsella kept returned products and resold the product to new customers (R. 1642) and that Lowry and Kinsella knew that they were taking money earmarked for customer refunds (R. 1643-44). There was also evidence that Lowry and Kinsella knowingly sold on-going coaching services and failed to report those fees to J&T as required by the contract. (R. 1644.) Finally, J&T presented evidence that both FDS and Esbex were undercapitalized, as demonstrated by the insolvency and dissolution of both entities in November 2004. (R. 1695.)

Despite the above evidence, the court of appeals noted that “J&T’s argument focuses almost exclusively on . . . [one of the *Colman* factors,] ‘the use of the corporation as a façade for operations of the dominant stockholder or stockholders.’” *Jones & Trevor Marketing v. Lowry*, 2010 UT App 113, ¶ 8, 233 P.3d 538 (quoting *D’Elia v. Rice Dev. Inc.*, 2006 UT App 416, ¶ 30, 147 P.3d 515). The court then held that “[w]ithout any evidence of the other alter ego factors, we cannot gauge the materiality of the one factor on which evidence was presented.” *Id.* at ¶ 10.

While the *Colman* factors are a good tool for determining whether the alter ego doctrine applies, Utah courts should, and most often do, take a substance over form approach. In fact, the *Colman* court even acknowledged that its factors are not meant to be conclusive and that courts should, in fact, look to the substance over form. *Colman*, 743 P.2d at 786. Indeed, the *Colman* factors are just a set of tools that assist a court in determining whether “there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals.” *Norman*, 596 P.2d at 1030.

As noted by the court of appeals, J&T presented significant evidence that Lowry and Kinsella completely disregarded the corporate form when it suited their needs and used their corporations “as a façade for operations of the dominant stockholder or stockholders.” *Jones*, 2010 UT App 113, ¶¶ 8-10. Specifically, J&T presented evidence that Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting. (R. 1643.) There was

evidence, also, that Kinsella took money from FDS without telling Lowry (R. 1644-45), and that Lowry and Kinsella took money from FDS and Esbex to fund their personal interests, without proper accounting and in disregard of the money needed to run the corporations (R. 1642-46). Viewing these facts in the light most favourable to J&T, there is a genuine issue of material fact as to whether enough corporate formalities were disregarded as to invoke the alter ego doctrine.

This Court should reverse the court of appeals and hold that evidence of one of the *Colman* factors or simply evidence that the separate personalities of the corporation and the individuals no longer exist can be sufficient to satisfy the first prong of the alter ego doctrine.

## **II. THE COURT OF APPEALS ERRED IN HOLDING THAT TWO INCONSISTENT RULINGS ON A MOTION FOR SUMMARY JUDGMENT CANNOT CONSTITUTE A GENUINE ISSUE OF MATERIAL FACT.**

In this case, the district court initially found that J&T had presented evidence sufficient to withstand summary judgment with respect to its fraudulent misrepresentation claim against Lowry. Upon a second motion for summary judgment on the fraudulent misrepresentation claim, the district court found that there was no genuine issue of material fact that prevented the entry of summary judgment.

Under Utah law, the elements of a claim for fraudulent misrepresentation are:

(1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its

falsity: (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

*Larsen v Exclusive Cars, Inc* . 2004 UT App 259. ¶7, 97 P.3d 714 (citing *Dugan v Jones*, 615 P.2d 1239, 1246 (Utah 1980)).

The district court originally found that Lowry's statements made in conjunction with the termination of the contract created a question of fact precluding summary judgment on the fraudulent misrepresentation claim. (R. 1702.) Specifically, the court held that, though there was generally there was little evidence to support the fraudulent misrepresentation. the exception was

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

*Id* Later, on Lowry's second motion for summary judgment, a different, regularly assigned district court judge found that the same statement by Lowry did not “satisfy the element that there be a misrepresentation of a currently existing material fact.” (R. 2381-2382.)

The court of appeals held that the two different rulings did not constitute a genuine issue of material fact because “a judge can change his or her mind any time up until the entry of final judgment.” *Jones and Trevor Marketing, Inc v Lowry*. 2010 UT App 113. ¶ 14, 233 P.3d 538 (citing *State v. Ruiz*, 2009 UT App 121. ¶ 10, 210 P.3d 955, *cert. granted*, 221 P.3d 837 (Utah 2009)).

However, the very fact that one factfinder<sup>6</sup> can make two different rulings based on essentially the same facts indicates that there is a genuine issue of material fact that precludes the entry of summary judgment on J&T's fraudulent misrepresentation claim. In addition, little or no additional discovery was conducted by either party between the ruling on the first motion for summary judgment on the fraud claim and the ruling on the second motion for summary judgment on the fraud claim. Two judges, ruling on precisely the same evidence, made two contradictory conclusions.

Further, J&T did present evidence sufficient to withstand a motion for summary judgment on this claim. J&T presented evidence in support of the following. The parties entered into a written contract. (R. 1230-1234.) On or about July 19, 2001, FDS, via a letter from Lowry, terminated the contract with J&T. (R. 2342.) At that point, the termination provisions came into effect, including that FDS would "immediately cease: (i) [a]ny contact with Jones' leads; (ii) [s]elling Jones' products; (iii) [i]n any way representing to any party that it is a seller of Jones products; and [t]he use of Jones' trademarks service marks or other Confidential Information." (R. 1233.) After the termination date of July 19, 2001, FDS through Lowry and Kinsella, continued to use Jones' name and leads and to sell Jones' products. (R. 1323-1567.) In fact, J&T presented evidence that Lowry and Kinsella made a conscious decision to continue selling

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<sup>6</sup> In this case, two different judges made these two different rulings, but, as the court of appeals noted, "two judges, while different persons, constitute a single judicial office." *Jones & Trevor Marketing*, 2010 UT App 133 at ¶ 14 (citing *Ruiz*, 2009 UT App 121, ¶ 10).

Jones products after the termination. (R. 1641-42.)

In light of the opposing decisions on essentially the same motion for summary judgment and the evidence J&T presented in support of its fraud claim, this court should reverse the court of appeals and remand this case to the trial court for a trial on whether Lowry committed fraudulent misrepresentation.

## CONCLUSION

Therefore, Petitioner respectfully requests that this Court reverse the opinion of the Court of Appeals and remand this case to the trial court for a trial on whether the corporate veil has been pierced via the alter ego doctrine and whether Lowry is liable for fraud.

RESPECTFULLY SUBMITTED this 8th day of October 2010.

HILL, JOHNSON & SCHMUTZ, LC

A handwritten signature in black ink, appearing to read "Jessica Griffin Anderson", written over a horizontal line.

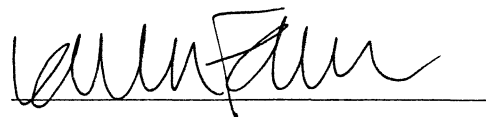
Stephen Quesenberry  
Jessica Griffin Anderson  
*Attorneys for Petitioner*



**PROOF OF SERVICE**

I hereby certify that, on the 8th day of October 2010, two true and correct copies of the foregoing **BRIEF OF PETITIONER** were mailed, first-class, postage prepaid, to the following:

Earl Jay Peck  
R. Christopher Preston  
SMITH HARTVIGSEN, PLLC  
215 South State Street, Suite 650  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Earl Jay Peck", is written over a horizontal line.

## **ADDENDA**

**Addendum A** – Opinion of the Utah Court of Appeals in *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113, 233 P.3d 538 (May 6, 2010)

**Addendum B** – Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment (February 1, 2006)

**Addendum C** – Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment (October 8, 2008)

## Addendum “A”

This opinion is subject to revision before  
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Jones & Trevor Marketing, Inc.,	)	OPINION
	)	(For Official Publication)
Plaintiff and Appellant,	)	Case No. 20080904-CA
	)	
v.	)	F I L E D
	)	(May 6, 2010)
<u>Jonathan L. Lowry; Nathan</u>	)	
<u>Kinsella</u> ; Financial	)	2010 UT App 113
Development Services, Inc.;	)	
Jeremy Warburton; John	)	
Neubauer; and Esbex.com, Inc.,	)	
	)	
Defendants and Appellees.	)	

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Fourth District, American Fork Department, 050100038  
The Honorable Derek Pullan  
The Honorable David N. Mortensen

Attorneys: Stephen Quesenberry and Jessica Griffin Anderson,  
Provo, for Appellant  
Earl Jay Peck and R. Christopher Preston, Salt Lake  
City, for Appellees

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Before Judges Orme, Bench, and Greenwood.<sup>1</sup>

ORME, Judge:

¶1 Plaintiff Jones & Trevor Marketing, Inc. (J&T) appeals the district court's grant of summary judgment in favor of defendants Jonathan L. Lowry and Nathan Kinsella. We affirm.

BACKGROUND

¶2 Lowry and Kinsella created and were the sole shareholders, officers, and directors of defendant Financial Development

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<sup>1</sup>Judges Russell W. Bench and Pamela T. Greenwood heard this case as regular members of the Utah Court of Appeals. They both retired from the court on January 1, 2010, before voting on this case and before this decision issued. Hence, they are designated herein as Senior Judges. See Utah Code Ann. § 78A-3-103(2) (2008); Sup. Ct. R. of Prof'l Practice 11-201(6).

Services, Inc. (FDS), created in 1998 to provide sales and telemarketing services, and of defendant Esbex.com (Esbex), created in 2000 to fill the orders FDS received. In January 2002, J&T and FDS entered into a Sales and Marketing Agreement (the Contract) whereby FDS marketed and sold, in exchange for commissions, certain courses developed by J&T.<sup>2</sup> Defendant John Neubauer, the FDS employee responsible for its day-to-day operations, was the main contact with J&T and prepared the weekly reconciliation reports sent to J&T.

¶3 Due to recurring problems with FDS's payments to J&T and with J&T's product shipments, the relationship dissolved, culminating in FDS sending a letter, dated July 19, 2002, and signed by Lowry, purporting to cancel the Contract. J&T then filed a complaint alleging FDS breached the Contract and making other claims against FDS and its employees and officers. This appeal focuses solely on J&T's claims against Lowry and Kinsella, which included alter ego and a laundry list of torts: theft by conversion, fraudulent misrepresentation, constructive fraud, fraudulent nondisclosure, and intentional interference with business relations. The district court granted Lowry and Kinsella summary judgment, dismissing the claims against them and reserving only J&T's fraudulent misrepresentation claim as against Lowry. The court subsequently granted summary judgment in favor of Lowry on this claim as well. J&T now appeals.<sup>3</sup>

#### ISSUE AND STANDARD OF REVIEW

¶4 J&T asserts on appeal that disputed facts existed that should have precluded the district court from granting Lowry and Kinsella summary judgment. Summary judgment is properly entered when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

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<sup>2</sup>These courses offered instruction on "how to buy tax lien certificates and engage in other similar activities to make money."

<sup>3</sup>During the course of the litigation, both FDS and Esbex dissolved due to insolvency, and a default judgment was entered against them. The case against named defendant Jeremy Warburton was dismissed with prejudice. A previous appeal, filed before the second summary judgment order, was voluntarily dismissed, and the case was remitted to the district court. After entering the order granting Lowry summary judgment on the fraudulent misrepresentation claim, the district court entered certification of finality pursuant to rule 58A of the Utah Rules of Civil Procedure.

Utah R. Civ. P. 56(c). On appeal, "[w]e evaluate the evidence in the light most favorable to the party opposing summary judgment," Doctors' Co. v. Drezga, 2009 UT 60, ¶ 9, 218 P.3d 598, and "review a district court's decision to grant summary judgment for correctness, giving no deference to the district court," Raab v. Utah Ry. Co., 2009 UT 61, ¶ 10, 221 P.3d 219.

## ANALYSIS

### I. Alter Ego

¶5 J&T argues that because genuine issues of material fact existed, the district court incorrectly granted Lowry and Kinsella summary judgment on J&T's alter ego claims.<sup>4</sup> Specifically, J&T asserts that "[a]lthough FDS and Esbex were struggling to meet their financial responsibilities, Lowry and Kinsella often took money from the corporations for their personal use" and that, "[s]tanding alone," this evidence creates a genuine issue of fact that precludes summary judgment. We disagree.

¶6 To preclude summary judgment, a disputed fact must be material. See Utah R. Civ. P. 56(c) (stating that summary judgment is allowed when "there is no genuine issue as to any material fact") (emphasis added). The disputed fact recited by J&T is not material because even if it were true, it is not enough, by itself, to suggest applicability of the alter ego theory, especially in the absence of any facts bearing on the other elements and factors required to prove the alter ego

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<sup>4</sup>We note that our opinion considers J&T's argument as framed on appeal, that is, that summary judgment was inappropriate because disputed facts existed. See generally Utah R. Civ. P. 56(c). J&T did not meaningfully argue here or to the district court that summary judgment was procedurally inappropriate, i.e., that the court improperly shifted the burden to J&T to prematurely prove its case, see generally Orvis v. Johnson, 2008 UT 2, ¶ 18, 177 P.3d 600, or that the court improperly refused a request to extend discovery under rule 56(f), see Utah R. Civ. P. 56(f) (allowing a court, upon a party's adequate showing, to deny summary judgment or grant a continuance so additional depositions or discovery may be completed). Accordingly, we have no occasion to consider such questions on appeal. See State v. Robison, 2006 UT 65, ¶ 22, 147 P.3d 448 (stating that "[o]ther than for jurisdictional reasons [the court of appeals] should not normally search the record for unargued and unbriefed reasons to reverse a [district] court judgment") (alterations in original) (citation and internal quotation marks omitted).

theory. See generally Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979) (setting forth the requirements to prove alter ego).

¶7 The alter ego doctrine's first prong requires proof of "[s]uch a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals[.]" D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶ 30, 147 P.3d 515 (first alteration in original) (citation and internal quotation marks omitted). Accord Norman, 596 P.2d at 1030. "Significant factors" considered by courts "under the first prong are":

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

D'Elia, 2006 UT App 416, ¶ 30 (emphasis added) (quoting Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987)).

¶8 J&T's argument focuses almost exclusively on the emphasized factor,<sup>5</sup> "the use of the corporation as a facade for operations of the dominant stockholder or stockholders." Id. Evidence that may establish this factor includes a "[f]ailure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses without proper accounting, and failure to maintain complete corporate and financial records[.]" Colman, 743 P.2d at 786 n.3 (emphasis added).

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<sup>5</sup>We note that J&T makes a conclusory reference to FDS and Esbex being "undercapitalized because of the actions of Lowry and Kinsella." Because this characterization lacks any record citation or argument related specifically to the requirements of undercapitalization, see Utah R. App. P. 24(a)(9); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 47 n.10 (Utah Ct. App. 1988) (discussing undercapitalization), we assume this contention is closely related to J&T's claim that Lowry and Kinsella took money from FDS for their personal use and do not separately consider undercapitalization.

¶9 Although J&T makes broad accusations that "Lowry and Kinsella . . . freely took money from the corporations' accounts without proper accounting," the evidence presented to the district court and called to our attention on appeal, viewed in the light most favorable to J&T, does not support the contention that the money was taken "without proper accounting." Id. Cf. Franco v. Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 36, 21 P.3d 198 ("[M]ere conclusory allegations . . . , unsupported by a recitation of relevant surrounding facts, are insufficient to preclude . . . summary judgment.") (second omission in original) (citations and internal quotation marks omitted). The evidence properly of record<sup>6</sup> showed that although Lowry and Kinsella took money from FDS when it was struggling to meet its other financial obligations, the money was accounted for, and no evidence was produced that this accounting was done improperly. Cf. D'Elia, 2006 UT App 416, ¶¶ 28, 32, 34 (refusing to pierce the corporate veil when, inter alia, the court determined that although the owner received distributions, they "were not inappropriate").

¶10 Even if we were to accept uncritically the accusations that the money taken was improperly accounted for or wrongly distributed and used for purely personal purposes, we do not agree with J&T's statement that "[s]tanding alone" this is enough to preclude summary judgment.<sup>7</sup> Without any evidence of the other

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<sup>6</sup>We note that some of the evidence referred to in J&T's brief derives solely from Neubauer's stricken bankruptcy deposition testimony and, as such, we do not consider that evidence.

<sup>7</sup>J&T asserts that producing evidence on one of the eight factors evaluated in the first prong of alter ego analysis "is sufficient to raise a question of fact" that would preclude summary judgment. However, the cases J&T cited all analyzed more than a single factor to establish the alter ego doctrine's first prong--a point that J&T seems to concede by stating, with our emphasis, that "[c]ourts frequently disregard the corporate form where only a few of the [factors] are present in the case." See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 43, 47 (Utah Ct. App. 1988) (determining summary judgment that dismissed an alter ego claim was inappropriate when the evidence showed that parent corporation owned 100% of subsidiary corporation's stock and "has paid some of its debts," that subsidiary was undercapitalized, and that subsidiary's "directors and officers d[id] not act independently of" parent corporation); Colman v. Colman, 743 P.2d 782, 787-88 (Utah Ct. App. 1987) (affirming a trial court's finding of alter ego when substantial

(continued...)



alter ego factors, we cannot gauge the materiality of the one factor on which evidence was presented. Therefore, we conclude that summary judgment was appropriate because the evidence was insufficient to show a material dispute of fact relative to whether Lowry and Kinsella were alter egos of FDS or Esbex.<sup>8</sup>

## II. Torts

¶11 J&T also argues that the district court erred in granting summary judgment on its various tort claims. Aside from liability premised on an alter ego theory, "an officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity." D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶¶ 38-39, 147 P.3d 515 (emphasis in original) (citation and internal quotation marks omitted).

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<sup>7</sup>(...continued)

evidence showed corporate formalities were ignored; personal and business property was not kept separate; "officers and directors played little, if any, role in the operation of [the] corporate entities"; "there was an almost complete failure to keep and maintain corporate records"; and the corporate entities "were used as a facade for defendant's personal business operations"); Lyons v. Lyons, 340 So. 2d 450, 451 (Ala. Civ. App. 1976) ("Defendant operated the corporation as his alter ego, intermingling the corporate funds with those of his own. There were no corporate meetings, minutes or records regularly kept except a bank account. Defendant was not paid a salary by the corporation but used funds in the corporate account as if they were his own. He failed to deposit thousands of dollars in corporate cash receipts and used such cash as his personal funds.").

<sup>8</sup>Because J&T fails to demonstrate a meaningfully factual dispute relevant to the first prong, we do not discuss the second prong, or "fairness requirement," of the alter ego doctrine, i.e., "if [unity of interest is] observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity." D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶ 30, 147 P.3d 515 (citation and internal quotation marks omitted). Accord Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979).

## A. Fraudulent Misrepresentation

¶12 J&T asserts that summary judgment was inappropriate on its fraudulent misrepresentation claim because disputed material facts existed.<sup>9</sup> The alleged misrepresentations occurred when FDS, having submitted its letter purporting to terminate the Contract and stating that FDS would no longer sell J&T's products, continued to sell J&T's products in violation of the Contract provision stating that FDS would cease selling the products upon the Contract's termination. However, J&T fails to persuade us that these statements were material misstatements of present fact, as is required to show fraud.<sup>10</sup> See generally Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶ 41, 56 P.3d 524. When a party claims, as J&T does here, that the misrepresentations concerned a promise of future performance, the promise will only be treated as "concerning a presently existing material fact," id., if the party shows that when the promise was made it was "made with a present intent not to perform and made to induce a party to act in reliance on that promise," Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985).

¶13 Even if we were to accept that the evidence showed that sales were made after the Contract was terminated by the

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<sup>9</sup>As with its alter ego claim, see supra note 4, J&T focused its argument on the existence of disputed facts and not on summary judgment being procedurally inappropriate. Therefore, we limit our discussion to J&T's specific argument.

<sup>10</sup>As summarized by our Supreme Court, "[t]o successfully establish a fraud claim, the party asserting fraud must show by clear and convincing evidence"

(1) [t]hat a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶ 41, 56 P.3d 524 (second alteration in original) (emphasis added) (citation and internal quotation marks omitted).

letter,<sup>11</sup> no evidence was presented to suggest that at the time Lowry signed the Contract or sent the termination letter that he intended not to perform the promise to cease selling J&T products after termination of the Contract. To the contrary, evidence was presented by Lowry that showed he gave an instruction to Neubauer, which was never rescinded, to cease selling J&T's products.

¶14 J&T also asserts that because two different judges decided summary judgment on the fraudulent misrepresentation claim differently, it must be concluded that material facts existed.<sup>-2</sup> We disagree. "[A] judge can change his or her mind any time up until the entry of final judgment, which is true even if the judge has taken over the case from another judge, . . . because . . . the two judges, while different persons, constitute a single judicial office[.]" State v. Ruiz, 2009 UT App 121, ¶ 10, 210 P.3d 955 (citations and internal quotation marks omitted), cert. granted, 221 P.3d 837 (Utah 2009). Therefore, we affirm the district court's grant of summary judgment on J&T's fraudulent misrepresentation claim.

#### B. J&T's Other Tort Claims

¶15 As for J&T's contention that disputed material facts prevented summary judgment on its conversion claim,<sup>13</sup> we conclude

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<sup>-1</sup>J&T's record citation supporting its contention that sales were made after the Contract's termination included 244 pages, part of which was Neubauer's stricken deposition. Our review of the evidence cited has revealed no evidence about sales being made after the Contract was cancelled on July 19, 2002. However, because the district court and the parties seem to have assumed that it had been established that sales were made after the termination of the Contract, we treat the issue on this basis.

<sup>-4</sup>We note that the first time the district court considered the fraudulent misrepresentation claim, it determined that evidence existed showing "that FDS disregarded" the directive to cease selling J&T's products. However, FDS disregarding the directive does not make Lowry personally liable unless it can be shown that Lowry "participat[ed] in the wrongful activity," D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶ 38, 147 P.3d 515 (emphasis, citation, and internal quotation marks omitted).

<sup>13</sup>To prove conversion, a party must establish "an act of willful interference with property, done without lawful justification, by which the person entitled to property is  
(continued...)

that the evidence relied on was not adequately supported by the record citations given or, even if viewed in the light most favorable to J&T, was misstated. For example, J&T claims that "Lowry and Kinsella repeatedly hid payments from J&T," but relies solely on Neubauer's stricken bankruptcy deposition testimony to support this statement. And, contrary to this statement, there was undisputed evidence that showed Neubauer--not Lowry or Kinsella--prepared the reconciliation reports that determined what J&T would be paid. Because the allegedly disputed facts were not supported by record evidence, the district court correctly granted Lowry and Kinsella summary judgment on J&T's conversion claim.

¶16 The district court also correctly granted summary judgment on J&T's constructive fraud claim.<sup>14</sup> Although J&T claims that a confidential relationship existed by virtue of the Contract, it did not demonstrate how the Contract created a confidential relationship nor did it point to evidence that J&T had "been induced to relax the care and vigilance [it] would ordinarily exercise," as would have been otherwise required to establish a confidential relationship based on the Contract. Wardley Corp. v. Welsh, 962 P.2d 86, 90 n.5 (Utah Ct. App. 1998) (citation and internal quotation marks omitted). J&T's related fraudulent nondisclosure claim fails for a similar reason, i.e., no evidence was presented to support the proposition that Lowry and Kinsella had "a legal duty to communicate."<sup>15</sup> Yazd v. Woodside Homes Corp., 2006 UT 47, ¶ 35, 143 P.3d 283.

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<sup>13</sup>(...continued)  
deprived of its use and possession," and that the party "is entitled to immediate possession of the property at the time of the alleged conversion." Bennett v. Huish, 2007 UT App 19, ¶ 31, 155 P.3d 917 (emphasis, citations, and internal quotation marks omitted).

<sup>14</sup>To establish constructive fraud, two elements must be shown: "(1) a confidential relationship between the parties; and (11) a failure to disclose material facts." D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶ 51, 147 P.3d 515 (citation and internal quotation marks omitted).

<sup>15</sup>"The three elements of fraudulent concealment are . . . : (1) there is a legal duty to communicate information, (2) the nondisclosed information is known to the party failing to disclose, and (3) the nondisclosed information is material." Yazd v. Woodside Homes Corp., 2006 UT 47, ¶ 35, 143 P.3d 283.

¶17 Finally, we affirm the district court's grant of summary judgment on J&T's claim of intentional interference with a contractual relationship.<sup>-6</sup> Once again, the evidence J&T references to support its claim is found in Neubauer's stricken deposition testimony or is not supported by J&T's record citations. And even if the allegations were supported by evidence, they do not demonstrate an improper purpose or means, i.e., that Lowry and Kinsella's "predominant purpose was to injure" J&T or that Lowry and Kinsella's "means of interference were contrary to statutory, regulatory, or common law or violated an established standard of a trade or profession." Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 20, 116 P.3d 323 (citations and internal quotation marks omitted). Therefore, the district court also properly granted Lowry and Kinsella summary judgment on the claim of intentional interference with a contractual relationship.

#### CONCLUSION

¶18 J&T has failed to demonstrate that material facts were in dispute. We therefore affirm the district court's grant of summary judgment in favor of Lowry and Kinsella.

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Gregory K. Orme, Judge

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¶19 WE CONCUR:

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Russell W. Bench,  
Senior Judge

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Pamela T. Greenwood,

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<sup>16</sup>To establish a claim for intentional interference with a contractual relationship, "a plaintiff must demonstrate that '(1) . . . the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.'" Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 20, 116 P.3d 323 (omission in original) (citation omitted).

Senior Judge

## Addendum “B”

FILED IN  
4TH DISTRICT COURT  
AMERICAN FORK DEPT  
STATE OF UTAH  
UTAH COUNTY

2006 FEB -11 P 3:27

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

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

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



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

### **UNDISPUTED FACTS**

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

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

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

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

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

- supervision issues. (Lukas Depo. pp. 65-73; Neubauer Depo. p. 34)
16. J&T Marketing also ceased shipping its Ted Thomas courses due to the dispute over payment. (Lowry Aff. ¶ 13). Failure to receive the courses they had purchased with their credit cards resulted in dissatisfied customers, and charge backs on FDS's credit card merchant accounts. (Neubauer 25:10-18, pp. 33-34, 93:11-17; Lowry Depo. p. 39-40).
  17. J&T Marketing withheld delivery on orders because FDS had not timely paid J&T Marketing. FDS withheld payment to J&T Marketing because a percentage of its sales would not go through resulting in charge backs. (Lowry Depo. 49:6-23; Thomas 263: 13-17).
  18. On or about July 19, 2002, FDS communicated to J&T Marketing that FDS believed that J&T Marketing was in breach of the Sales and Marketing Agreement. (Lowry Aff. ¶ 14). Lowry, FDS's President, sent J&T Marketing the letter canceling the Agreement.
  19. On or about August 29, 2002, J&T Marketing filed suit against FDS and several of its officers and employees (Amd. Cpl.) and on or about November 15, 2002 FDS filed a counterclaim. (Answer, Counterclaim and Jury Demand 11/15/2002).
  20. J&T Marketing's Amended Complaint, dated June 17, 2004, alleges the following causes of action:
    - a. Breach of Contract against FDS for selling courses after the contract had been terminated.
    - b. Theft by Conversion against Lowry, Kinsella, Neubauer and FDS by willfully interfering with J&T Marketing's chattel.
    - c. Fraudulent Misrepresentation against Lowry, Kinsella, Neubauer and FDS related to FDS's performance of the contract.

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

14, 94:9-12.

### CONCLUSIONS OF LAW

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

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

### The Alter Ego Doctrine and Piercing the Corporate Veil

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

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

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

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

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

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

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

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

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

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

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



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

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

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

### Conversion

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

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

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

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

### **Fraudulent Misrepresentation**

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

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

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

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

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

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

#### Constructive Fraud

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

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

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

#### Fraudulent Non-disclosure

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

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

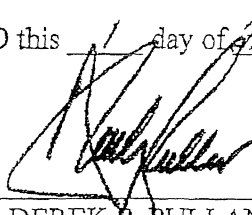
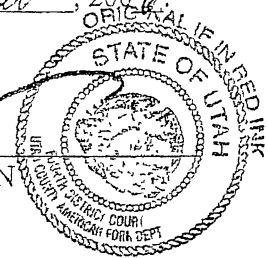
The Plaintiff cites no case law supporting its argument that the Defendants had a legal duty to speak. Absent a relationship that would give rise to this duty, Defendants did not have a duty to communicate to Plaintiff. Moreover, there is nothing in the record to demonstrate that the Defendants should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

#### Intentional Interference with Contractual Relations

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

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

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

DATED this 1 day of Feb, 2006  
  
JUDGE DEREK P. PULLAN  


## **Addendum “C”**

RECEIVED  
OCT 14 2008  
SMITH HARTVIGSEN

OCT 8 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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*Jonathan L. Lowry*

*Copy*

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

---

JONES & TREVOR MARKETING, INC.,  
Plaintiff,

vs.

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

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

Case No. 050100038  
Division 9 – American Fork

Judge: ~~Howard Maertani~~

*Mo Jensen*

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

misrepresentation that “FDS would cease selling Thomas’s (Plaintiff’s) product and cease using Thomas’s name and Leads.”

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

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

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

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

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

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

a. As stated in its Ruling of February 1, 2006, “[i]n order to prove fraud the Plaintiff must show (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor knew to be false or made recklessly knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) and was thereby induced to act, (7) to his injury and damage.” *Prince v. Bear River Mutual Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536

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

c. By its very nature a contractual promise to perform in the future is not a statement of a presently existing material fact unless the promise is made without any intent to perform, that is, “a promise of future performance, when made with a present intent not to perform and made to induce a party to act in reliance on that promise, constitutes actionable deceit and fraud.” *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985)

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



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

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

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

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

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

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

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

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

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

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

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

4 All of the foregoing must be examined in light of the burden of proof that a fraud claimant faces. “As a general rule, fraud is not presumed. When it is alleged, each element of fraud must be established by clear and convincing evidence.” 37 *Am. Jur.* 2d Fraud and Deceit, Section 471. “For the evidence to be clear and convincing, it must at least have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence.” (MUJI 2:19.) In other words, as to the burden to show induced reliance, i.e., that the Defendant made the representation for the purpose of causing the plaintiff to take some action, or causing the Plaintiff not to act, Plaintiff would have to show that there is no substantial

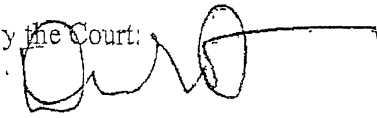
doubt as to the truth or correctness of the allegation of induced reliance. The Court finds and concludes that based upon the parties' submissions to the Court that reasonable minds could not reasonably conclude that Plaintiff would be able to establish any of the elements of fraud in this case by clear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

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

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

DATED this 8th day of September, 2008

By the Court:

  
Honorable Howard Maetani

*D. Maetani*

APPROVED AS TO FORM:

\_\_\_\_\_  
Stephen Quesenberry  
Jessica Griffin Anderson  
*Attorneys for Plaintiff*