

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  
Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JONES & TREVOR MARKETING,  
INC.,

Petitioner,

v.

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

Respondents,

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**RESPONDENTS' BRIEF**

Case No. 20100449

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On Certiorari to the Utah Court of Appeals

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DEC 30 2010

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## **I. STATEMENT OF JURISDICTION**

Of the two issues included in Petitioner's Petition for Writ of Certiorari, this Court accepted jurisdiction over a single issue for certiorari review by its Order entered on August 26, 2010 ("August 26 Order") pursuant to Utah Code Ann. § 78A-3-102(3)(a) (2010) and Rule 51(a) of the Utah Rules of Appellate Procedure. (A copy of the August 26 Order is attached in the Addendum at Tab A.)

## **II. QUESTION PRESENTED FOR REVIEW**

**Issue:** Whether the court of appeals erred in affirming the district court's grant of summary judgment on the issue of Respondents' liability under the alter ego doctrine.

**Standard of Review:** "When reviewing a case on certiorari, [this Court] review[s] the court of appeals' decision for correctness," focusing "on whether [the court of appeals] correctly reviewed the trial court's decision under the appropriate standard of review." *Massey v. Griffiths*, 2007 UT 10, ¶8, 152 P.3d 312 (further quotation and citation omitted; second alteration in original). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. Pro. 56(c). "[W]hen 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.'" *Massey*, 2007 UT 10 at ¶8 (further citation omitted). "A trial court's decision not 'to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment.'" *d'Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶21, 147 P.3d 515 (quoting *Colman v. Colman*, 743 P.2d 782, 787 (Utah Ct. App. 1987)).



### **III. CONTROLLING STATUTORY PROVISIONS AND ORDINANCES**

As recognized by Petitioner Jones & Trevor Marketing, Inc. (“J&T Marketing” or “Petitioner”), there are no constitutional or statutory provisions material to this appeal.

### **IV. STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This appeal arises out of a lawsuit filed by J&T Marketing on August 29, 2002. [R. 49.] The original complaint named Financial Development Services, Inc. (“FDS”), Jeremy Warburton (“Warburton”), and John Neubauer (“Neubauer”) as defendants and contained six causes of action. [R. 39-49.] All of J&T Marketing’s claims against the defendants arose out of, or were related to, a Sales and Marketing Agreement (“Agreement”) entered into between FDS and J&T Marketing in February, 2002. [R. 33-37.] (A copy of the Agreement is included in the Addendum hereto at Tab B.) Petitioner acknowledges that “[t]his case generally revolves around a contract dispute.” *Brief of Petitioner* at 3.

On May 6, 2004, the district court granted J&T Marketing leave to amend its complaint and allege claims against FDS, Warburton, Neubauer, Jonathan L. Lowry (“Lowry”), Nathan Kinsella (“Kinsella”), and Esbex.com, Inc. (“Esbex.com”) [R. 994-996.] J&T Marketing filed its Amended Complaint on June 18, 2004, alleging nine causes of action: breach of contract, theft by conversion, fraudulent misrepresentation, breach of duty of good faith and fair dealing, accounting, injunctive relief, constructive fraud, fraudulent non-disclosure, and intentional interference with business relations. [R. 1027-44.] Five of these causes of action contained tort claim allegations individually

against Lowry, Kinsella (collectively “Respondents”) and others, including FDS. [*See id.*] Three of the causes of action (breach of contract, breach of good faith and fair dealing, and accounting) were brought solely against FDS. [*See id.*] A claim based upon alter ego was not mentioned or pleaded in the Amended Complaint. [*See id.*]

### **B. Course of Proceedings and Disposition in Lower Courts.**

On May 20, 2005, Respondents Lowry and Kinsella filed a Motion for Summary Judgment, seeking dismissal of J&T Marketing’s second, third, seventh, eighth, and ninth causes of action as they applied to Lowry and Kinsella, *i.e.*, all of the causes of action that alleged tort claims against them.<sup>1</sup> [R. 1198-1200.] In opposing Respondents’ motion, J&T Marketing relied heavily upon a deposition of John Neubauer that had been taken in Neubauer’s separate bankruptcy proceeding. [R. 1292-1322.] Respondents had not been parties in that proceeding and had not participated in the deposition. Accordingly, Respondents Lowry and Kinsella objected to J&T Marketing’s use of Neubauer’s bankruptcy deposition and moved to strike it. [R. 1570-1571.] A hearing was held, and the district court granted Respondents’ motion to strike Neubauer’s bankruptcy deposition,<sup>2</sup> but it allowed J&T Marketing additional time to conduct a new deposition of Neubauer in the instant case. [R. 1629.] The district court ordered that after participating in this new deposition, supplemental memoranda could be filed by each party. [R. 1629,

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<sup>1</sup> J&T Marketing’s first, fourth, and fifth causes of action were brought only against FDS. [R. 1034-35, 1031-32.] J&T Marketing’s sixth cause of action for injunctive relief was brought against Lowry, Kinsella, Warburton, FDS and Esbex.com. [R. 1030-31.]

<sup>2</sup> J&T Marketing did not appeal the trial court’s decision to strike Neubauer’s bankruptcy deposition.

1635-37.]

J&T Marketing took Neubauer's deposition on October 18, 2005, and both parties thereafter filed supplemental briefs. [R. 1651-59; 1672-83.] Following oral argument, the district court issued its *Ruling Granting In Part Defendants Lowry and Kinsella's Motion for Summary Judgment*, on February 1, 2006 (a copy of this ruling is included in the Addendum hereto at Tab C). The district court granted complete summary judgment to Respondents Lowry and Kinsella on the second, seventh, eighth, and ninth causes of action of the Amended Complaint. [R. 1691-97.] With respect to J&T Marketing's third cause of action claiming fraudulent misrepresentation, however, the district court granted complete summary judgment as to Kinsella but not as to Lowry. In declining to grant Lowry judgment on this cause of action, the district court concluded there was an issue concerning "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.'" The district court explained that "[d]rawing all reasonable inferences in favor of the Plaintiff, the Court denies Defendant Lowry's motion for summary judgment as to this claim." [R. 1692 (emphasis added).] The ruling granting summary judgment to Lowry and Kinsella except as to this limited claim against Lowry was later summarized in the district court's *Order on Defendants Lowry's and Kinsella's Motion for Summary Judgment* entered on March 21, 2006 ("2006 Order") (a copy of which is included in the Addendum hereto at Tab D). [R. 2021.]

Following the entry of the 2006 Order, J&T Marketing took no immediate action to pursue the lingering claim against Lowry. Instead, J&T Marketing sought and obtained

a default judgment against FDS and Esbex.com on September 13, 2007. [R. 2215-17.] The September 13, 2007 default judgment did not address J&T Marketing's remaining claim against Lowry for fraudulent misrepresentation.

With no final disposition of the lingering claim against Lowry, J&T Marketing filed a Notice of Appeal on October 5, 2008, seeking review of the district court's 2006 Order. [R. 2225.] Because no final disposition had been made as to all claims and parties, Respondents argued that the matter was not ripe for appeal. As a result, J&T Marketing voluntarily dismissed its appeal, [R. 2246], and the matter was remitted to the district court, [R. 2251.] On June 23, 2008, Lowry filed a summary judgment motion with the district court focusing on J&T Marketing's remaining fraudulent misrepresentation claim. [R. 2272-85.] Exercising its discretion to re-examine the fraudulent misrepresentation claim as provided in Rule 54(b) of the Utah Rules of Civil Procedure, the district court granted summary judgment to Lowry on October 8, 2008, holding that there was no evidence that Lowry made the alleged statement that FDS would "cease using Thomas's name and leads" and that any related statements made by Lowry were not statements of a "currently existing material fact." [R. 2380-83.] (A copy of the *Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment* ("2008 Order") is included in the Addendum hereto at Tab E). J&T Marketing appealed the 2006 Order and the 2008 Order on October 16, 2008 to the Utah Supreme Court. [R. 2403.] On November 3, 2008, the Utah Supreme Court transferred J&T Marketing's appeal to the Utah Court of Appeals.

After briefing and oral argument, the court of appeals affirmed the decision of the

district court to grant summary judgment to Lowry and Kinsella, concluding that the Petitioner had failed to demonstrate that there were any material facts in dispute. *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113, ¶18, 233 P.3d 538. (A copy of this Opinion is included in the Addendum hereto at Tab F.) In ruling that Petitioner had not shown the necessary elements of an alter ego claim, the court of appeals determined that “the evidence presented to the district court and called to [the court of appeals’] attention on appeal, viewed in the light most favorable to [Petitioner], does not support the contention that the money was taken ‘without proper accounting.’” *Id.* at ¶9. On the contrary, the court of appeals concluded that the undisputed record established that “the money was accounted for, and no evidence was produced that this accounting was done improperly.” *Id.*

In addition, the court of appeals stated that even if it were to “uncritically” accept Petitioner’s accusations “that the money taken was improperly accounted for or wrongly distributed and used for purely personal purposes,” it did not agree that this fact standing alone was sufficient to preclude summary judgment. *Id.* at ¶10. “Without any evidence of the other alter ego factors, [the court of appeals could not] gauge the materiality of the one factor on which evidence was presented.” *Id.* Therefore, the court of appeals concluded that there was insufficient evidence “to show a material dispute of fact relative to whether Lowry and Kinsella were alter egos of FDS or Esbex.” *Id.*

Second, the court of appeals addressed Petitioner’s allegation that Respondents were personally liable for damages arising from their acts as corporate officers because of their participation in wrongful activity. *Id.* at ¶11. The court of appeals held that

Petitioner's evidence concerning its claims that Lowry or Kinsella should be held personally liable for tortious conduct was not adequately supported by the record "or, even if viewed in the light most favorable to [Petitioner], was misstated." *Id.* at ¶15. Petitioner did not petition this Court to review the court of appeals' decision to grant summary judgment to Lowry and Kinsella's on any of J&T Marketing's tort claims.

### **C. Statement of Relevant Facts<sup>3</sup>**

J&T Marketing's claims arise out of performance under a contract between FDS and J&T Marketing entered into in February 2002, which allowed FDS to sell J&T Marketing's Ted Thomas Courses. [R. 33-37, 1320.] Pursuant to the contract, J&T Marketing supplied FDS with the names, addresses, and phone numbers of sales leads, and FDS marketed and sold the courses and remitted to J&T Marketing a portion of the sales proceeds. [R. 1320.] The contract provided that FDS could also enroll purchasers of the Ted Thomas Courses in FDS's own program to provide coaching services on its own account. [R. at 1320, 1701.] Approximately five and a half months after entering into the contract, *i.e.*, on July 19, 2002, FDS cancelled the contract and informed J&T Marketing

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<sup>3</sup> J&T Marketing's citations to the record in the *Brief of Petitioner* do not support its factual allegations. Indeed, some of the citations actually refer to J&T Marketing's argument section of its *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment*. [R. 1293-1308.] Other citations refer to Neubauer's October 18, 2005 deposition, portions of which were attached to J&T Marketing's *Supplemental Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment*. [R. 1640-49.] However, the pages of the record cited to do not contain evidence supporting J&T Marketing's factual statements. This Court has repeatedly held that "this court need not, and will not consider any facts not properly cited to, or supported by, the record." *Cabaness v. Thomas*, 2010 UT 32, ¶20, 232 P.3d 486 (quoting *Carrier v. Salt Lake County*, 2004 UT 98, ¶21, 104 P.3d 1208)).

that J&T Marketing was in breach of contract based upon its failure to deliver the Ted Thomas Courses to customers after FDS had made sales. [R. 1316, 1598, 1699.] In reaction to FDS's cancellation of the Agreement, J&T Marketing filed its original complaint against FDS and others on August 29, 2002. [R. 1316, 1699.]

The putative reasons that J&T Marketing delayed or halted some shipments of its Ted Thomas Courses to customers included the following: J&T Marketing would delay shipment of product to purchaser if FDS's payment was delayed; J&T Marketing employed temporary shipping clerks to do product shipment, which resulted in staff turnover and ongoing training and supervision issues; and J&T Marketing finally ceased shipping Ted Thomas Courses altogether due to a contract dispute with FDS over payment issues. [R. 1317, 1699-1700.]

A third entity, Esbex.com, was affiliated with FDS. While not providing Ted Thomas Courses, it provided coaching/mentoring services for a monthly fee to some purchasers of the Ted Thomas Courses. [R. 1319, 1701.] One of the payment issues that arose was whether a percentage of the coaching fees charged for coaching/mentoring services provided by Esbex.com was owed to J&T Marketing; FDS and Esbex.com did not believe that coaching services were included under the Agreement. [R. 1698.] When J&T Marketing failed to ship product to FDS, FDS filled some orders by shipping products that had been returned by other clients because it was trying to keep customers and prevent more refunds or cancellations. [R. 1647, Deposition of John Neubauer (dated October 18, 2005) ("Neubauer Dep.") 16:4-14.] While J&T Marketing asserts that FDS and Esbex.com should have split coaching fees under the Agreement, the only evidence

presented to the district court was that the coaching fees were not covered by the contract and, therefore there was no obligation to share them with J&T Marketing. [R. 1644, Neubauer Dep. 26:10 to 28:12.]

Lowry and Kinsella were shareholders, officers and directors of FDS and Esbex.com. [R. 1318, 1700.] Neubauer was the Chief Operating Officer and Chief Financial Officer of FDS, and both FDS and Esbex.com used Neubauer to perform their accounting. [R. 1598, 1701.] Neubauer was FDS's principal agent in dealing with J&T Marketing, and all communication with J&T Marketing went through Neubauer. [R. 1318-19, 1700-01.] In his deposition taken in this case on October 18, 2005, Neubauer testified that FDS and Esbex.com were legitimate companies, stating that he "wouldn't have worked there if [he] didn't feel that way." [R. 1640, Neubauer Dep. 42:4-11.] Neubauer also testified that Lowry and Kinsella received money from the business, and as chief financial officer he accounted for and kept track of such withdrawals. [R. 1641, Neubauer Dep. 40:3-14.] Indeed, Neubauer audited the records himself and prepared weekly conciliation reports. [R. 1643, Neubauer Dep. 29:13-21.]

The undisputed evidence in the record establishes only that FDS and Esbex.com followed corporate formalities. [R. 1196.] No evidence presented to the district court shows that Lowry or Kinsella co-mingled funds or acted outside of the scope of their corporate responsibilities at any time relevant to this matter. In November 2004, almost three years after entering into the Agreement, and just under two years after J&T Marketing filed its original complaint, FDS and Esbex.com were dissolved. [R. 1698.]

Lowry presented uncontroverted evidence to the district court that he had given



instructions not to sell Ted Thomas products, and that he never rescinded this instruction. [R. 2286, 2289-91, 2292, 2308, 2381.] Uncontroverted evidence was presented that Lowry did not authorize any transaction involving the sale of a Ted Thomas product or any sales contact with a Ted Thomas lead after July 19, 2002. [R. 2307.] No evidence was submitted by J&T Marketing to demonstrate that that Lowry or Kinsella individually hid evidence of sales of Ted Thomas products after July 19, 2002. [R. 2381.]

**V. SUMMARY OF ARGUMENT**

Petitioner J&T Marketing originally brought mainly contract claims against FDS in this lawsuit. [R. at 40-44.] After conducting discovery which included taking may depositions, J&T Marketing amended its complaint, continuing to allege contract claims but also including tort claims against officers and employees of FDS. J&T Marketing later sought to pierce the corporate veil to hold Lowry and Kinsella liable for damages in the place of FDS. Lowry and Kinsella submitted that piercing the corporate veil is an equitable doctrine that courts should be extraordinarily reluctant to impose in contract cases. Despite a record that demonstrates a considerable volume of discovery having been conducted, J&T Marketing has utterly failed to present any evidence to justify piercing the corporate veil under the alter ego test. The evidence in the record fails to raise an issue of material fact regarding whether a unity of interest existed between Respondents and FDS and/or Esbex.com. Instead, the undisputed record evidence demonstrates that corporate formalities were followed and that corporate finances were properly accounted for by FDS. In addition, no evidence in the record indicates that Lowry or Kinsella acted outside of the scope of their positions within the corporations.

Without any evidence to justify piercing the corporate veil under the alter ego doctrine, the court of appeals correctly affirmed the district court's decision to grant summary judgment to Lowry and Kinsella on J&T Marketing's claims.

## **VI. ARGUMENT**

### **A. The Court of Appeals Correctly Affirmed the District Court's Grant of Summary Judgment in Favor of Lowry and Kinsella on J&T Marketing's Alter Ego Claims Because No Genuine Issues of Material Fact were Established.**

"When reviewing a case on certiorari, [this Court] review[s] the court of appeals' decision for correctness," focusing "on whether [the court of appeals] correctly reviewed the trial court's decision under the appropriate standard of review." *Massey v. Griffiths*, 2007 UT 10, ¶8, 152 P.3d 312 (further quotation and citation omitted). Rule 56 of the Utah Rules of Civil Procedure states that summary judgment may be obtained "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. Pro. 56(c). However, when contending against a motion for summary judgment, a plaintiff having the burden of proof "has the obligation to come forward with sufficient proof to show that [it is] entitled to proceed to trial." *Gerbich v. Numed Inc.*, 1999 UT 37, ¶12, 977 P.2d 1205. This is particularly true "when the parties [have] had an opportunity to conduct discovery." *Id.* Evidence is sufficient when it raises "a genuine issue of fact." *Klienert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993); *see also* Utah R. Civ. Pro. 56(e) ("When a motion for summary judgment is made and supported as provided in

[Rule 56], an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”). If the plaintiff as the non-moving party does not submit any evidence to support an element of its claim, the district court should grant summary judgment on that claim.

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

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

*Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419-20 (Utah Ct. App. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (internal citations omitted)). Since J&T Marketing did not set forth facts sufficient to raise a dispute over the existence of any material fact supporting the essential elements of an alter ego claim against Lowry and Kinsella, the district court properly concluded that there was no genuine issue as to any material fact and properly granted summary judgment against J&T Marketing on this issue. *See Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶23, 116 P.3d 323.

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

The court of appeals correctly affirmed the district court’s grant of summary

judgment to Lowry and Kinsella on J&T Marketing's alter ego theory because J&T Marketing failed to establish any material facts relevant to the alter ego factors, making summary judgment appropriate as a matter of law.<sup>4</sup>

1. *Courts Should be Extraordinarily Reluctant Lift the Corporate Veil in Contract Disputes.*

Each of J&T Marketing's claims in the Amended Complaint specifically identifies FDS as a defendant. J&T Marketing's first, fourth, and fifth claims for relief (breach of contract, breach of good faith and fair dealing, and accounting) are directly related to the contract dispute. J&T Marketing's remaining claims against FDS also boil down to the contract dispute between J&T Marketing and FDS.

In Utah "a corporation is regarded as a legal entity, separate and apart from its stockholders." *Dockstader v. Walker*, 510 P.2d 526, 528 (Utah 1973). "The general rule is that a corporation is an entity separate and distinct from its officers, shareholders and directors and that they will not be held personally liable for the corporations' debts and obligations." *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (quotations and citations omitted). "In so immunizing corporate directors from personal liability, the law has proceeded on the theory that in so acting they are but the agents of the corporation and that the breach is that of the corporation, and hence it alone is answerable therefore [sic]." *Id.*

The alter ego theory "is an equitable doctrine requiring that each case be

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<sup>4</sup> J&T Marketing did not expressly assert an alter ego theory in its Amended Complaint. However, J&T Marketing did raise the alter ego doctrine in its *Memorandum in Opposition to Defendants Jonathan L. Lowry and Nathan Kinsella's Motion for Summary Judgment*. [R. 1321.]

determined upon its peculiar facts.” *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 47 (Utah Ct. App. 1988). In applicable situations, the alter ego theory justifies piercing the corporate veil, “permitting creditors of the corporation to reach the assets of a controlling shareholder.” *Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc.*, 789 P.2d 24, 26 (Utah 1990). Utah Courts “have stated that ‘[c]ourts must balance piercing and insulating policies and [should] only reluctantly and cautiously pierce the corporate veil.’” *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah Ct. App. 1994) (quoting *James Constructors*, 761 P.2d at 46). In contract disputes, “[c]ourts have been extraordinarily reluctant to lift the veil in contract cases, such as this one, where the ‘creditor has willingly transacted business’ with the corporation.” *d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶28, 147 P.3d 515 (further citations omitted).

## 2. *The Alter Ego Doctrine Test*

To invoke the equitable alter ego doctrine and disregard the corporate entity, two circumstances must exist. “[First], there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist . . . ; and [second], 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).

Utah courts have identified significant factors that guide a determination of whether the unity-of-interest prong (or “formalities requirement”) has been violated. These factors include the following:

- (1) undercapitalization of a one-man corporation;
- (2) failure to observe

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

*Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987). Satisfaction of the second prong (or “fairness requirement”) is “left to the conscience of the court.” *d’Elia*, 2006 UT App 416 at ¶30. However, the second prong “is not met simply because a trial court finds that that form would in some way prevent a creditor of a controlling shareholder from quickly being made whole . . . . [I]t is not enough for the creditor to complain that it must proceed against the shareholder’s assets . . . rather than simply levying on the corporation’s assets.” *Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc.*, 789 P.2d 24, 26 (Utah 1990). Rather, “it must be shown that the corporation itself played a role in the inequitable conduct at issue.” *Id.*

**C. J&T Marketing Did Not Produce Any Credible Evidence to Support the Unity of Interest Prong of the Alter Ego Doctrine.**

J&T Marketing claims that it “presented evidence that supported several of the *Colman* factors.” *Brief of Petitioner* at 12.<sup>5</sup> The record shows otherwise. As noted by the court of appeals, “[t]he disputed fact recited by J&T [Marketing] 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 theory.” *Jones & Trevor Marketing, Inc. v. Lowry*, 2010

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<sup>5</sup> To the extent that J&T Marketing’s citations to the record refers to or references Neubauer’s stricken bankruptcy deposition, Respondents object to such citations.

UT App 113, ¶6, 233 P.3d 538.

*1. Lowry and Kinsella Presented Undisputed Evidence to Show that Corporate Formalities were Followed.*

As noted by the court of appeals, J&T Marketing’s argument “focuses almost exclusively” on the seventh factor of the unity-of-interest prong, “the use of the corporation as a façade for operations of the dominant stockholder or stockholders.” *Id.* at ¶8; *see also* Brief of Petitioner at 11-14. Regarding the seventh factor, Utah courts have stated that “[f]ailure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses *without proper accounting*, and failure to maintain complete corporate and financial records are looked upon with extreme disfavor.” *Colman*, 743 P.2d at 786 n.3 (emphasis added). J&T Marketing has presented no evidence, however, that Lowry or Kinsella failed to distinguish their funds from the corporation’s, that they commingled corporate funds with their own, or that they failed to keep proper records.

On the other hand, the court of appeals has held that evidence demonstrating that the corporation observed the requisite corporate formalities is sufficient to preclude piercing the corporate veil under the alter ego theory. *See Schafir v. Harrigan*, 879 P.2d 1384, 1390 (Utah Ct. App. 1994). In *Schafir*, the district court relied upon copies of the corporation’s articles of incorporation, minutes from board of director’s meetings, corporate annual reports filed with the State of Utah, and corporate tax returns for 1983 and 1984. *See id.* The record in this case contains similar evidence, undisputed by J&T Marketing, that FDS and Esbex.com maintained corporate formalities.

In this case, Lowry and Kinsella submitted articles of incorporation for FDS and Esbex.com, as well as other corporate documents, demonstrating the maintenance of corporate formalities. [R. 1149-1200.] Lowry explained by affidavit that the affairs of FDS and Esbex.com were kept separate and distinct and that he and Kinsella kept their own personal and financial affairs separate and distinct from both FDS and Esbex.com. [R. 1196.] Further, Neubauer, the Chief Financial Officer of FDS and Esbex.com, testified that he accounted for and kept track of all withdrawals by Lowry and Kinsella and audited the records himself and prepared weekly conciliation reports. [R. 1641, Neubauer Dep. 40:3-14; R. 1643, Neubauer Dep. 29:13-21.] Neubauer prepared the financial records, including monthly income statements and net profit and loss statements, for the corporations, [R. 1642; Neubauer Dep. 36:18-25], and neither FDS nor Esbex.com had fraudulent purposes, [R. 1640; Neubauer Dep. 42:9-10]. Neubauer agreed that Lowry and Kinsella desired to make a profit but such was “true of every business.” [R. 1668; Neubauer Dep. 11:9-25.] The fact that Lowry and Kinsella took money out of the corporation does not show that corporate funds were treated as personal property, that proper accounting was absent, or that proper financial records were not kept. Indeed, the undisputed evidence as stated above establishes exactly the opposite.

J&T Marketing presented no evidence that would tend to show that Lowry and Kinsella’s actions in any way jeopardized the integrity of the corporation or were otherwise commercially unreasonable in governing the affairs and operating FDS and Esbex.com. [R. 1194-96.] Indeed, Neubauer testified that Lowry and Kinsella instructed him to “find a way to free up expenses and free up cash flow” to provide refunds to



customers. [R. 1644; Neubauer Dep. 25:7-23.] Again, J&T Marketing presented no evidence contradict or dispute these facts.

In its brief to this Court, J&T Marketing asserts that the court of appeals noted that J&T Marketing had presented “significant evidence” to show that Lowry and Kinsella took money from the corporation for their personal use without proper documentation. *See Brief of Petitioner* at 13. On the contrary, the court of appeals stated “the evidence presented to the district court and called to [its] attention on appeal, viewed in the light most favorable to J&T [Marketing], does not support the contention that the money was taken ‘without proper accounting.’” *Jones & Trevor Marketing, Inc.*, 2010 UT App 113 at ¶9 (further citation omitted). Instead of supporting J&T Marketing’s contention, the court of appeals stated that “[t]he evidence properly of record 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.” *Id.* The evidence cited to this Court by J&T Marketing has not changed, contains no new information, and does not show that the court of appeals erred in reaching its conclusion to affirm the district court’s ruling on summary judgment for Lowry and Kinsella.

The mere fact that Lowry and Kinsella were distributed money out of the corporation, standing alone, does not raise any genuine issue of material fact concerning the unity of interest prong of the alter ego theory. *Cf. Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶37, 84 P.3d 1154 (holding that the fact that though tax refund payments in an “S” corporation are passed through to shareholders without being exposed

to taxation on the corporate level “does not carry with it a suggestion of impropriety or inequality”). In *d’Elia*, the court of appeals noted that the record in that case demonstrated that the corporation “appropriately followed certain internal corporate formalities.” *d’Elia*, 2006 UT App 416 at ¶32. The court of appeals further determined that distributions made to the president and sole-shareholder of the corporation “were not inappropriate.” *Id.* at ¶32.

J&T Marketing relies solely upon its bare allegation that the withdrawals and distributions to Lowry and Kinsella were made “without proper documentation or accounting;” J&T Marketing has produced no evidence to support this claim. Respondents filed their first motion for summary judgment on May 24, 2005, more than two and a half years after J&T Marketing had filed its original complaint. [R. 32, 1200.] In other words, J&T Marketing had 30 months to conduct discovery. Indeed, by February 4, 2004, J&T Marketing had already conducted the depositions of Jon Lowry, Nathan Kinsella, Doug Buyers, John Neubauer, Jeremy Warburton, and Will Snowden. [R. 574.] In addition, J&T Marketing had conducted twenty-seven short telephonic depositions and had sent out notices to conduct nine additional depositions. [R. 573-74.] Further, J&T Marketing had sent out nine sets of discovery requests. [R. 1070.] After this elapse of time and this expenditure of effort, J&T Marketing has submitted no evidence to support its alter ego claims. “[A]n adverse 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.” Utah R. Civ. Pro. 56(e). Since J&T Marketing failed to present a single disputed issue of material fact concerning the seventh factor of unity of interest and

ownership prong, the district court correctly granted summary judgment to Lowry and Kinsella on this factor alone.

2. *J&T Marketing Did Not Present any Genuine Issue of Material Fact on Any Other Factors of the Unity-of-Interest Prong.*

In an effort to demonstrate that it was not relying solely on the seventh factor, J&T Marketing attempts to cite to record evidence related to other unit-of-interest factors. None of the record evidence cited to establishes a genuine issue of material fact that would preclude this Court from affirming the court of appeals' decision.

For example, J&T Marketing asserts that there was “siphoning of corporate funds by the dominant stockholder” because the record evidenced that Kinsella took money from FDS without telling Lowry. *Brief of Petitioner* at 12; *Colman*, 743 P.2d at 786. The record citation provided by J&T Marketing, however, does not support such a claim. However, there is some testimony in Neubauer’s deposition that in his bankruptcy deposition Neubauer mentioned that he thought he had discovered that Kinsella was “stealing” from Lowry. [R. 1643; Neubauer Dep. at 30:8 to 32:4.] There is no foundational support for this “thought.” Any reference to the “thought” mostly arises out of Neubauer’s stricken bankruptcy deposition. The record does not indicate where the funds were taken from, only that Neubauer informed Lowry of his belief. [R. 1643; Neubauer Dep. 31:3 (quoting from Neubauer’s stricken bankruptcy deposition. J&T Marketing has not appealed the ruling of the district court striking the bankruptcy deposition).] Even if the deposition testimony was taken at face value, the Court would have to assume that Kinsella was “stealing” corporate funds, that those corporate funds

belonged to FDS not to Esbex.com, that Kinsella was the dominant stockholder, and that the amount taken was significant. There is no evidence that Kinsella was the dominant stockholder, that the amount was significant, and most importantly no foundation for Neubauer's thought or belief was ever established. The undisputed evidence is that Lowry and Kinsella jointly were shareholders, officers, and directors of FDS and Esbex.com. [R. 1700.]

Second, J&T Marketing claims that evidence was presented to show that Lowry and Kinsella used FDS "in promoting injustice or fraud." *Brief of Petitioner* at 12; *Colman*, 743 P.2d at 786. To support its claims, J&T Marketing argues that Lowry and Kinsella kept returned products and resold them to new customers, that Lowry and Kinsella knew they were taking money earmarked for customer refunds, and that Lowry and Kinsella knowingly sold on-going coaching services and failed to report those fees to J&T Marketing. *Brief of Petitioner* at 12. In each instance, the record citations provided by J&T Marketing fail to lend support to these claims.

The returned products were "products that people didn't want" that were sent back to FDS for a refund. [R. at 1647; Neubauer Dep 16:5-7.] According to the evidence, these returned products were resold to new clients "during the period of time when [J&T Marketing] was not shipping" product to FDS. [R. at 1647; Neubauer Dep. 16:11-13.] While the evidence indicates that Neubauer consulted with Lowry and/or Kinsella whether to fill orders with refunded product, [R. at 1647: Neubauer Dep. 16:20-21], no evidence in the record indicates that that Lowry and/or Kinsella "were acting outside of their positions within the corporations." [R. at 1694.] The evidence in the record

indicates that Lowry and Kinsella were informed of customers that should receive refunds and that Lowry and Kinsella instructed Neubauer “to find a way to free up expenses and free up cash flow.” [R. at 1644; Neubauer Dep. at 25:21-22.] However, the evidence does not show that Lowry and Kinsella were taking money earmarked for customer refunds. Finally, Neubauer testified that he did not report coaching fees to J&T Marketing because he believed it was money belonging to FDS and/or Esbex.com. Neubauer testified “I am not going to say [Lowry] told me not to report it because I might have done that on my own, given the circumstances.” [R. at 1644; Neubauer Dep. 28:5-7.] Again, nothing in these statements from Neubauer’s deposition indicates that Respondents were acting outside of the corporate positions, and no other evidence has been produced by J&T Marketing.

Even if one were to assume that there was merit to any of these arguments, the arguments all arise out of the interpretation of the Agreement between J&T Marketing and FDS. In other words, J&T Marketing could argue that the contract did not allow use of funds for such a purpose, and FDS could argue that the contract allowed said use. In reality, the question raised by J&T Marketing is not what Lowry and Kinsella did, but what FDS did.<sup>6</sup> Finally, as noted by the court of appeals, the record evidence “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.” *Jones & Trevor Marketing, Inc.*,

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<sup>6</sup> The court of appeals has already ruled on Lowry and Kinsella’s individual liability for tortious conduct, and that decision is not before this Court on certiorari review. *See Jones & Trevor Marketing*, 2010 UT App 113 at ¶¶11-17.

2010 UT App 113 at ¶9. J&T Marketing never alleged or argued that the amounts received by Lowry or Kinsella were excessive or inappropriate.

Finally, J&T Marketing asserts that it presented evidence that FDS and Esbex.com were undercapitalized by virtue of their insolvency and dissolution in November 2004. *Brief of Petitioner* at 12. Neither FDS nor Esbex.com was “a one-man corporation.” *Colman*, 743 P.2d at 786. Insolvency does not make maintaining the corporate form unjust or inequitable. J&T Marketing submits no evidence that would tend to support its claim that insolvency was caused by undercapitalization. On the other hand, the record more persuasively shows that the financial struggles of FDS were more likely caused by J&T Marketing’s actions. [R. 1699.] There is no evidence that FDS and Esbex.com were undercapitalized at the time FDS entered into the Agreement with J&T Marketing in February 2002 or at the time that J&T Marketing filed its complaint in August 2002. Instead, both FDS and Esbex.com continued to operate after J&T Marketing filed its initial complaint and neither voluntarily dissolved until November 2004. [R. 1698.] Yet the fact of their voluntary dissolution is J&T Marketing’s sole evidence of undercapitalization.

None of the record evidence cited to by J&T Marketing establishes a genuine issue of material fact that would preclude entry of summary judgment for Lowry and Kinsella on J&T Marketing’s alter ego claims. Instead, the undisputed record evidence shows that FDS and Esbex.com maintained corporate formalities. Without evidence to establish any of the factors for the unity-of-interest prong, J&T Marketing’s alter ego claims must fail as a matter of law.

**D. J&T Marketing Did Not Produce Any Evidence to Support the Fairness Prong of the Alter Ego Doctrine.**

The equitable alter ego doctrine may only be invoked to disregard the corporate entity if both prongs of the alter ego doctrine are met. *See Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979). According to the second prong, the corporate veil will be pierced only if “the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.” *Id.* Because it determined that J&T Marketing failed “to demonstrate a meaningfully factual dispute relevant to the first prong” of the alter ego doctrine, the court of appeals did not address the second prong. *Jones & Trevor Marketing, Inc.*, 2010 Ct App 113 at ¶10 n8. Even if this prong were found to be relevant, J&T Marketing presents no evidence in its brief to this Court to show that the second prong has been met. Because J&T Marketing’s claims all arise out of its contractual agreement with FDS, it is difficult to see how maintaining the integrity of corporate veil and limiting J&T Marketing’s remedies to those that it freely and willfully bargained for in the Agreement would “sanction a fraud, promote injustice,” or conclude in “an inequitable result.”

J&T Marketing has presented no evidence sufficient to create a genuine dispute of material fact on the second prong of the alter ego theory. Therefore, the district court correctly granted summary judgment on that issue to Lowry and Kinsella, and this Court should affirm.

**VII. CONCLUSION**

J&T Marketing entered into a contractual agreement with FDS in February 2002.

For various reasons, the business arrangement fell apart. Unsatisfied with its contractual remedies against FDS, J&T Marketing sought to hold Lowry and Kinsella individually liable for the claimed wrongs. However, J&T Marketing has not demonstrated genuine issues of material fact that would preclude this Court from affirming the court of appeals' and the district court's determinations that the alter ego doctrine should not apply to pierce the corporate veil. Therefore, Respondents Lowry and Kinsella respectfully request this Court to affirm the decision of the court of appeals, holding that Lowry and Kinsella are entitled to summary judgment on J&T Marketing's alter ego claim.

Dated this 30<sup>th</sup> day of December, 2010,

**SMITH HARTVIGSEN, PLLC**

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

Earl Jay Peck

R. Christopher Preston

*Attorneys for Jonathan L. Lowry and Nathan Kinsella*



## CERTIFICATE OF SERVICE

On the 30<sup>th</sup> day of December, 2010, two true and correct copies of the foregoing **RESPONDENTS' BRIEF** were mailed, first-class United States mail, postage prepaid, to each of the following:

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

R. Clayton Porter

## ADDENDA

- Tab A Utah Supreme Court Order, dated August 26, 2010
- Tab B Sales and Marketing Agreement, dated January 31, 2002
- Tab C *Ruling Granting In Part Defendants Lowry and Kinsella's Motion for Summary Judgment*, entered on February 1, 2006
- Tab D *Order on Defendants Lowry's and Kinsella's Motion for Summary Judgment* entered on March 21, 2006
- Tab E *Order Granting Defendant Jonathan L. Lowry's Motion for Summary Judgment*, entered October 8, 2008
- Tab F Ruling by the Utah Court of Appeals: *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113

Tab A

RECEIVED  
AUG 31 2010  
SMITH HARTVIGSEN

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED  
UTAH APPELLATE COURTS

JUL 26 2010

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Jones & Trevor Marketing, Inc.,

Plaintiff and Petitioner,

v.

Case No. 20100449-SC

Jonathan L. Lowry; Nathan  
Kinsella; Financial  
Development Services, Inc.;  
Jeremy Warburton; John  
Neubauer; and Esbex.com, Inc.,

Defendants and Respondents.

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**ORDER**

This matter is before the court upon a Petition for Writ of Certiorari, filed on June 4, 2010.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah' Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue.

Whether the court of appeals erred in affirming the district court's grant of summary judgment on the issue of Respondents' liability under the alter ego doctrine.

A briefing schedule will be established hereafter.

For The Court:

Dated

8-26-10



Matthew B. Durrant  
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

STEPHEN QUESENBERRY  
JESSICA GRIFFIN ANDERSON  
HILL JOHNSON & SCHMUTZ LC  
4844 N 300 W STE 300  
PROVO UT 84604

EARL JAY PECK  
R. CHRISTOPHER PRESTON  
SMITH HARTVIGSEN PLLC  
WALKER CENTER  
175 S MAIN ST STE 300  
SALT LAKE CITY UT 84111

LISA COLLINS  
COURT OF APPEALS  
450 S STATE ST  
PO BOX 140230  
SALT LAKE CITY UT 84114-0230

FOURTH DISTRICT, AMERICAN FORK  
ATTN: SHARON JONES  
75 E 80 N STE 202 BX 460  
AMERICAN FORK UT 84003-1660

Dated this August 27, 2010.

By   
Judicial Assistant

Utah Supreme Court Case No. 20100449  
FOURTH DISTRICT, AMERICAN FORK Case No. 050100038  
Court of Appeals Case No. 20080904

Tab B

## SALES AND MARKETING AGREEMENT

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

### RECITAL

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

### PROVISIONS

NOW, THEREFORE, the parties agree as follows:

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

**2. Seller's Services:**

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

**3. Services by Jones:**

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

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

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

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

C. Jones shall provide Seller leads on each Friday.

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

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

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

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

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

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



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

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

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

#### **5. Compensation and Reimbursement:**

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

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

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

#### **6. Holdback:**

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

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

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

#### **7. Independent Contractor:**

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

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

**8. Indemnification:**

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

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

**9. Term:**

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

(i) Seller may terminate this Agreement upon breach by Jones of any term or condition to be performed by Jones in this Agreement which is not cured by Jones within ten (10) days of the written notice from Seller.

(ii) Jones may terminate this Agreement at anytime upon 45 days notice to Seller. Upon Termination any funds held back by Seller under Paragraph 6A will be returned to seller in a manner consistent with 6B(I).

**10. Obligations on Termination:**

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

(i) Any contact with Jones' leads;

(ii) Selling Jones' products;

(iii) In any way representing to any party that it is a seller of Jones products; and

(iv) The use of Jones' trademarks service marks or other Confidential Information.

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

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

**11. Miscellaneous:**

**A. This Agreement:**

(i) Shall constitute the entire agreement between the parties hereto and supersedes all prior agreements, written or oral, concerning the subject matter herein and there are no oral understandings, statements or stipulations bearing upon the effect of this Agreement which have not been incorporated herein.

(ii) May be modified or amended only by a written instrument signed by each of the parties hereto.

(iii) Shall bind and insure to the benefit of the parties hereto and their respective heirs, Successors and assigns.

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

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

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

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

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

Jones & Trevor Marketing, Inc.

By: Trevor Jones

Its: Sec-Treas

Date: 2/4/02

FDS

By: [Signature]

Its: President

Date: Feb 4, 02

Tab C

FILED IN  
4TH DISTRICT COURT  
AMERICAN FORK DEPT  
STATE OF UTAH  
JAN 11 2006

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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**

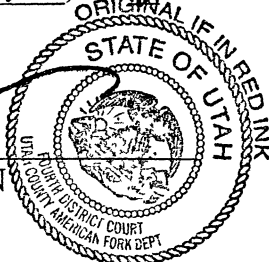
Defendant argues that this is merely a restatement of J&T Marketing's claims for breach of contract and fraud. There is no evidence that Defendants interfered with one of Plaintiff's current or prospective business relationships.

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 July, 2006

  
JUDGE DEREK P. PULLAN



CERTIFICATE OF NOTIFICATION

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

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

Dated this 1 day of January, 2006.

W. J. Smith  
Deputy Court Clerk

Tab D

FILED

MAR 21 2006

71/ 4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

Earl Jay Peck (2562)  
Steven H. Stewart (3114)  
R. Christopher Preston (9195)  
**SMITH HARTVIGSEN, PLLC**  
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Facsimile (801) 413-1620  
*Attorneys for Defendants*  
*Jonathan L. Lowry and Nathan Kinsella*

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

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JONES & TREVOR MARKETING, INC.,

Plaintiff,

vs.

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

Defendants.

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

Case No. 050100038  
Division 9 – American Fork

Judge: Derek P. Pullan

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

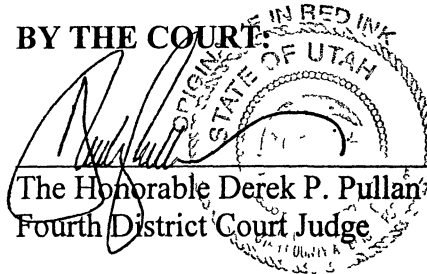
by both parties. This Court having heard the arguments of counsel, having reviewed all the memoranda of each party, being duly advised in the premises, with good cause appearing, issued a Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment filed on February 1, 2006 ("Ruling"),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

IT IS HEREBY ORDERED:

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

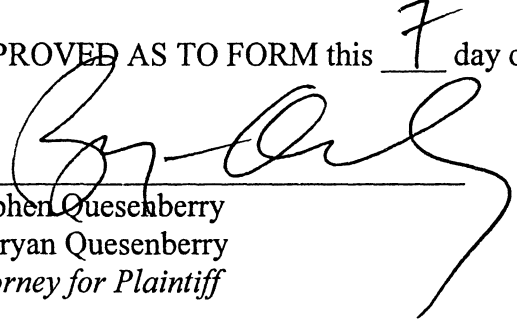
DATED this 21 day of March, 2006.

BY THE COURT:



The Honorable Derek P. Pullan  
Fourth District Court Judge

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



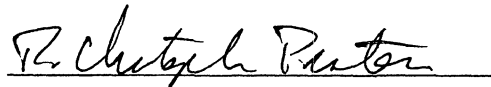
Stephen Quesenberry  
J. Bryan Quesenberry  
*Attorney for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of March, 2006, I served upon the following a true and correct copy of the foregoing **(proposed) ORDER ON DEFENDANTS LOWRY'S AND KINSELLA'S MOTION FOR SUMMARY JUDGMENT** by causing the same to be delivered by U.S. Mail, postage pre-paid, to the following:

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

*Attorneys for Plaintiff*



Tab E



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

OCT 8 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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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 Maetani

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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, (8) and was thereby induced to act, (9) to his injury and damage. *Prince v. Bear River Mutual Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

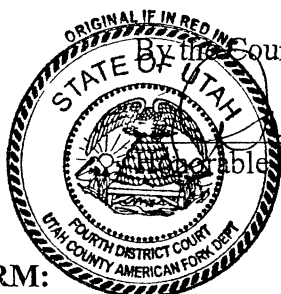
4. All of the foregoing must be examined in light of the burden of proof that a fraud claimant faces. “As a general rule, fraud is not presumed. When it is alleged, each element of fraud must be established by clear and convincing evidence.” 37 *Am. Jur.* 2d Fraud and Deceit, Section 471. “For the evidence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

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

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

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

DATED this 22 day of September, 2008

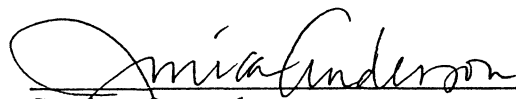


By the Court:

  
Honorable Howard Maetani



APPROVED AS TO FORM:

  
Stephen Quesenberry  
Jessica Griffin Anderson  
Attorneys for Plaintiff



Tab F

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; Financial</u>	)	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>12</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>11</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>12</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: "(i) a confidential relationship between the parties; and (ii) a failure to disclose material facts." D'Elia v. Rice Dev., Inc., 2006 UT App 416, ¶ 51, 147 P.3d 515 (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>16</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