

2012

# Kevin E. Kendall v. Discover Bank : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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KEVIN E. KENDALL,

Defendant/Appellant,

vs.

DISCOVER BANK,

Plaintiff/Appellee.

BRIEF OF APPELLANT

Appellate Case No. 20120498

District Case No. 110707987

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This is an appeal from a summary judgment order, entered May 9, 2012,  
from the Second Judicial District Court, Farmington Department

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a summary judgment order, entered May 9, 2012, from the Second Judicial District Court, Farmington Department. This Court has jurisdiction over this matter pursuant to Utah Code § 78A-4-103(2)(j).

## **STATEMENT OF THE ISSUES & STANDARD OF REVIEW**

The following issues are presented on appeal:

**APPELLANT'S ISSUE NO. 1:** Did the trial court err in concluding that Appellee is entitled to summary judgment in spite of, and apparently ignoring, a deemed admission that raised a material dispute of fact?

**STANDARD OF REVIEW FOR ISSUE NO. 1:** Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). "An appellate court reviews a [lower] court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Jones & Trevor Mktg. v.*

*Lowry*, 2012 UT 39, P9 (Utah 2012) (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation marks omitted)).

Utah R. Civ. P. 36(c) provides that “any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” The court may permit withdrawal or amendment only “on motion” and only “if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party.” *Id.* Where a party makes no effort to have the admissions amended or withdrawn, “[t]he trial court does not have discretion to unilaterally disregard the admissions.” Langeland v. Monarch Motors, 952 P.2d 1058, 1060 (Utah 1988) (emphasis in original); *see also* Jensen v. Pioneer Dodge Ctr., 702 P.2d 98, 100 (Utah 1985); Whitaker v. Nikols, 699 P.2d 685, 686-87 (Utah 1985); Kotter v. Kotter, 206 P.3d 633, 639-640 (Utah Ct. App. 2009). Where a party does not make proper independent efforts to excuse itself from the effects of Rule 36, the matters contained in the request for admissions “are conclusively deemed admitted.” Whitaker, 699 P.2d at 687.

PRESERVATION OF ISSUE NO. 1: This issue was preserved below in Kevin Kendall’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment (R. 118-119) and in Defendant’s Memorandum in Support of Motion for Summary Judgment

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Based on Deemed Admissions (R. 63, 65-69).

APPELLANT’S ISSUE NO. 2: Did the trial court err by not requiring the withdrawal

or amendment of the deemed admissions before granting Plaintiff's Motion for Summary Judgment?

STANDARD OF REVIEW FOR ISSUE NO. 2: Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). "An appellate court reviews a [lower] court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Jones & Trevor Mktg. v. Lowry*, 2012 UT 39, P9 (Utah 2012) (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation marks omitted)).

Utah R. Civ. P. 36(c) provides that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." The court may permit withdrawal or amendment only "on motion" and only "if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party." *Id.* Where a party makes no effort to have the admissions amended or withdrawn, "[t]he trial court does not have discretion to unilaterally disregard the admissions." *Langeland v. Monarch Motors*, 952 P.2d 1058, 1060 (Utah 1988) (emphasis in original); *see also Jensen v. Pioneer Dodge Ctr.*, 702 P.2d 98, 100 (Utah 1985); *Whitaker v. Nikols*, 699 P.2d 685, 686-87 (Utah 1985); *Kotter v. Kotter*, 206 P.3d 633, 639-640 (Utah Ct. App. 2009). Where a party does not make

proper independent efforts to excuse itself from the effects of Rule 36, the matters contained in the request for admissions “are conclusively deemed admitted.” Whitaker, 699 P.2d at 687.

PRESERVATION OF ISSUE NO. 2: This issue was preserved below in Kevin Kendall’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment (R. 118-119) and in Defendant’s Memorandum in Support of Motion for Summary Judgment Based on Deemed Admissions (R. 63, 65-69).

APPELLANT’S ISSUE NO. 3: Did the trial court err by failing to state any grounds for its summary judgment determination?

STANDARD OF REVIEW FOR ISSUE NO. 3: Although “the trial court need not enter findings of fact and conclusions of law in rulings on motions . . . [t]he court *shall*, however, issue a brief written statement of the ground for its decision on all motions granted under [Rule 56].” Salt Lake County Comm’n v. Short, 1999 UT 73, P10 (Utah 1999) (quoting Utah R. Civ. P. 52(a)) (emphasis added).

PRESERVATION OF ISSUE NO. 3: This issue was preserved below in Kevin Kendall’s Objection to “Judgment and Order.” (R. 135-136.)

APPELLANT’S ISSUE NO. 4: As a matter of law, based on the deemed admissions, should the trial court have been required to grant Defendant’s/Appellant’s Motion for

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Summary Judgment Based on Deemed Admissions?

STANDARD OF REVIEW FOR ISSUE NO. 4: Summary judgment is

appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). “An appellate court reviews a [lower] court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Jones & Trevor Mktg. v. Lowry*, 2012 UT 39, P9 (Utah 2012) (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation marks omitted)).

Utah R. Civ. P. 36(c) provides that “any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” The court may permit withdrawal or amendment only “on motion” and only “if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party.” *Id.* Where a party makes no effort to have the admissions amended or withdrawn, “[t]he trial court does not have discretion to unilaterally disregard the admissions.” *Langeland v. Monarch Motors*, 952 P.2d 1058, 1060 (Utah 1988) (emphasis in original); see also *Jensen v. Pioneer Dodge Ctr.*, 702 P.2d 98, 100 (Utah 1985); *Whitaker v. Nikols*, 699 P.2d 685, 686-87 (Utah 1985); *Kotter v. Kotter*, 206 P.3d 633, 639-640 (Utah Ct. App. 2009). Where a party does not make proper independent efforts to excuse itself from the effects of Rule 36, the matters contained in the request for admissions “are conclusively deemed admitted.” *Whitaker*, 699 P.2d at 687. “Since Rule 36 admissions, whether express or by default, are

conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage.” Carney v. IRS (In re Carney), 258 F.3d 415 (5th Cir. Tex. 2001).

PRESERVATION OF ISSUE NO. 4: This issue was preserved below in Appellant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment (R. 118-119), Memorandum in Support of Motion for Summary Judgment Based on Deemed Admissions (R. 69-70), and in his Objection to “Judgment and Order.” (R. 135-136.)

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Utah R. Civ. Pro. 36.

Utah R. Civ. Pro. 52.

Utah R. Civ. Pro. 56.

### **STATEMENT OF THE CASE**

#### **NATURE OF THE CASE**

This appeal is from an Order and Judgment of the Second District Court, entered on May 9, 2012 pursuant to a Motion for Summary Judgment by Plaintiff/Appellee Discover Bank, an FDIC insured Delaware State Bank (hereinafter “Discover Bank” or “Plaintiff” or “Appellee”).

Under Utah law, when a party fails to respond to requests for admissions within twenty-eight (28) days of service, the matters at issue are deemed admitted as fact and are conclusively established unless the court *upon motion* permits withdrawal or amendment of the admission. If the party against whom the admissions are admitted fails to move to

withdraw or amend the admissions, the court may not unilaterally disregard such admissions.

Where Appellee failed to respond to Appellant's Requests for Admission and other discovery by the requisite twenty-eight-day deadline established by Utah R. Civ. P. 36, the matters contained within Appellant's Requests for Admission were therefore deemed admitted. However, two and a half months beyond the discovery deadline and *after* Appellant had filed his Motion for Summary Judgment, Appellee filed belated denials of the admissions and also filed its own Cross Motion for Summary Judgment. Appellee *never* moved to amend or withdraw the deemed admissions as required by Rule 36(c). Notwithstanding, the trial court unilaterally disregarded Appellee's deemed admissions and granted summary judgment for Appellee. Under Utah law, the trial court's grant of summary judgment was improper based on the deemed admissions which have not been withdrawn or amended.

#### COURSE OF PROCEEDINGS

Discover Bank has not sought to amend or withdraw the deemed admissions; there is no such motion before the Court.

#### DISPOSITION IN COURT BELOW

On May 9, 2012, the trial court entered a Judgment and Order in favor of Discover Bank, and certified the Summary Judgment rulings as final and appealable pursuant to Rule 54(b).

## STATEMENT OF FACTS

1. On November 28, 2011, Appellee Discover Bank filed a lawsuit asserting claims against Appellee Kevin E. Kendall as having defaulted on a credit card balance.

(R. 2.)

2. Appellant filed an answer in December, 2011. (R. 13-14.)

3. On December 6, 2011, Appellant served his First Set of Interrogatories, Requests for Admission, and Requests for Production of Documents (“Discovery Requests”) to Appellee. (R. 16.)

4. Among the requested admissions was Request for Admission No. 4, which asked Appellee to “[a]dmit that Kevin E. Kendall has paid off the account that you allege [he] owe[s] money on, and that he has fulfilled all of his contractual obligations to you.” (R. 125.)

5. Appellant did not receive any response by the time the requisite twenty-eight (28) days expired on or about January 3, 2012. (R. 63.) Under operation of Utah R. Civ. P. 36, therefore, the admissions were deemed admitted. (R. 63-64.)

6. While not required to do so, on or about January 25, 2012, Appellant sent a letter to the Appellee asking Appellee to respond to Appellant’s Discovery Requests within ten (10) days. (R. 35 and 59.)

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7. Receiving no response to the letter or a subsequent Motion to Compel (R. 31-32), on February 22, 2012, Appellant filed a Motion for Summary Judgment based upon Deemed Admissions. (R. 60.)

8. Appellee never moved to amend or withdraw its deemed admissions, as required by Rule 36(c). Instead, on or about March 13, 2012, well after the twenty-eight (28) days required by law had expired, and after Appellant filed his motion for summary judgment, Appellee filed a response to Appellant's initial discovery requests denying the admissions. (R. 88.)

9. In addition, Appellee filed a Memorandum in Opposition to Appellant's Motion for Summary Judgment, which stated only: "The Defendants' Motion is moot. The Plaintiff has sent its discovery responses to counsel for the Defendant on this date. Therefore, there is no relief for the Court to grant and the Motion should be dismissed." (R. 86.)

10. Concurrent with its responses to discovery requests and its response to Appellant's Motion for Summary Judgment, the Appellee filed its own Cross Motion for Summary Judgment on March 13, 2012. (R. 89.)

11. On March 23, 2012, the Appellant filed his Reply Memorandum in Support of his Motion for Summary Judgment. (R. 112.)

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12. On March 29, 2012 Appellant filed his Opposition to Plaintiff's Motion for Summary Judgment. (R. 119.)

13. The Appellee did not file a Reply Memorandum in Support of its Motion for Summary Judgment, but filed a Notice to Submit on May 4, 2012. (R. 129.)

14. Accompanying its Notice to Submit, Appellee also submitted a Judgment and Order, which was executed by the Second District Court, granting Appellee's Motion for Summary Judgment in the amount of \$20,601.76, on May 8, 2012 and entered on May 9, 2012. (R. 138-139.)

15. Appellant objected to the Judgment and Order in a timely manner on May 7, 2012. (R. 135-136.)

16. The Judgment and Order was entered without a hearing or any ruling or other memoranda, such as grounds for the determination, findings of fact or conclusions of law, to help the parties understand why the Court was granting Appellee's Motion and disregarding Appellant's Cross Motion for Summary Judgment. (R. 135-136.)

### **SUMMARY OF ARGUMENTS**

The trial court erred when it granted summary judgment to Appellee, as there were facts on record, based on deemed admissions that were never amended or withdrawn, that directly contradicted the court's summary judgment decision. To this date, there has not been any motion by Appellee to amend or withdraw the deemed admissions, and, as such, the deemed admissions are conclusively established, and merit summary judgment in favor of Appellant rather than Appellee.

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## ARGUMENT

### **I. ADMISSIONS WERE DEEMED CONCLUSIVELY ESTABLISHED UNDER RULE 36(C) WHEN APPELLEE FAILED TO RESPOND WITHIN THE PRESCRIBED 28-DAY PERIOD.**

Under Utah Rules of Civil Procedure Rule 36(a) (2011), a party may serve upon any other party “a written request to admit the truth of any discoverable matter set forth in the request.” The request “shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.”

*Id.* “The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.” Utah R. Civ. P. 36(b). Once a matter is admitted under this rule, it is “conclusively established unless the court *on motion* permits withdrawal or amendment of the admission.” Utah R. Civ. P. 36(c) (emphasis added).

The Utah Supreme Court explained in Langeland that:

[T]he policy behind *rule 36* is to facilitate and expedite the discovery process by allowing parties to obtain admissions as to certain undisputed matters and thus avoid the effort and expense of having to conduct discovery as to those matters. The penalty provided in rule 36(b), automatically admitting and establishing requests not responded to within thirty days, was conceived as a means of preventing abuse of the discovery process and facilitating the smooth administration of justice. *Requests for admission must be taken seriously, and answers or objections must be served promptly. The penalty for delay or abuse is intentionally harsh, and parties who fail to comply with the procedural requirements of rule 36 should not lightly escape the consequences of the rule.*

952 P.2d 1058, 1061 (Utah 1988) (emphasis added). The Langeland Court strongly

castigated a party who ignored requests for admissions for months, despite reminders that replies were outstanding, and only sought to withdraw and amend its deemed admissions *after* a motion for summary judgment was filed. *Id.* at 1064. The Court noted that

Litigation must come to an end sometime, and the rules of procedure are intended to provide an orderly schedule for moving cases along their track to conclusion . . . Consequently, the court will not come to the rescue of a party who flagrantly ignores these rules at the expense of a party who attempts to conform with them.

*Id.* Ultimately, the Court held, “having failed to satisfy the rule 36(b) prerequisites to the trial court’s discretion to grant leave to withdraw or amend the admissions, the offender must live with the consequences of its actions.” *Id.*

In Jensen v. Pioneer Dodge Ctr., the defendant responded to the plaintiff’s request for admissions three months after the request was served by delivering the responses to plaintiff’s counsel at the hearing on plaintiff’s motion for summary judgment. 702 P.2d 98, 100 (Utah 1985). Since the defendant had never applied to the trial court for an extension of time to serve the answers, objected to the form of the request for admissions, or asked for a protective order, the Utah Supreme Court ruled that late filing of the answers was not excused, and the matters contained in the request for admissions were conclusively deemed admitted. *Id.*

Similarly, in Barnes v. Clarkson, the Utah Court of Appeals found that where plaintiff did not respond to defendant’s requests for admissions until three weeks after the agreed-upon deadline, despite an extension of time beyond the usual thirty days for

response, the requests for admission were deemed admitted. 178 P.3d 930, 931 (Utah Ct. App. 2008).

The situation in the case at hand is substantially similar to Langeland, Jensen, and Barnes. Appellant served its Requests for Admissions on December 6, 2011 (R. 16).

Pursuant to Rule 36(a), Appellant's Requests notified Appellee that Appellee's answers were due "within thirty (30) days from the date of service"<sup>1</sup> and that should the Appellee fail to deny any of the Requests for Admissions, they would be "deemed admitted pursuant to Rule 36 of the Utah Rules of Civil Procedure" (R 122). The requisite 28 days expired on January 3, 2012 without a response from Appellee, and the admissions were therefore deemed admitted. Just as in Langeland, Appellant sent Appellee a letter urging Appellee to respond to discovery requests and reminding Appellee that the admissions were deemed admitted (R. 35 and 59). Like the Langeland defendant, Appellee still ignored the admissions requests until *after* Appellant filed its Motion for Summary Judgment on February 22, 2012 more than two months after the expiration of the response due date. And like the defendant in Jensen, Appellee never applied to the trial court for an extension of time to serve the answers, never objected to the form of the request for

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<sup>1</sup> The 30-day response period was prescribed in the version of Rule 36 effective November 1, 1999 to November 1, 2011. As amended effective November 1, 2011, Rule 36 provides that matters will be deemed admitted unless the party responds within twenty-eight (28) days after service of the request. While the 2011 amendment applies to this case, the extra two days provided in Appellant's notice to Appellee are inconsequential, since they work only to Appellee's benefit, and Appellee long exceeded the response period in any event.

admissions, and never asked for a protective order. Appellee simply ignored Appellant's request for more than three months. Under Rule 36(b), therefore, Appellee's admissions were deemed admitted.

**II. WHERE APPELLEE DID NOT MOVE TO AMEND OR WITHDRAW ITS ADMISSIONS, SUCH ADMISSIONS WERE DEEMED CONCLUSIVELY ESTABLISHED AND SHOULD HAVE BEEN TREATED AS SUCH BY THE TRIAL COURT.**

Rule 36(c), formerly rule 36(b), provides that "any matter admitted under this rule is conclusively established *unless the court on motion permits withdrawal or amendment of the admission.*" (emphasis added). The court may permit withdrawal or amendment only "on motion" and only "if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party." *Id.*

Where a party makes no effort to have the admissions amended or withdrawn, "[t]he trial court does not have discretion to unilaterally disregard the admissions." *Id.* at 1060 (emphasis in original); *see also* Jensen, 702 P.2d at 100; Whitaker v. Nikols, 699 P.2d 685, 686-87 (Utah 1985); Kotter v. Kotter, 206 P.3d 633, 639-640 (Utah Ct. App. 2009). Where a party does not make proper independent efforts to excuse itself from the effects of Rule 36, the matters contained in the request for admissions "are conclusively deemed admitted." Whitaker, 699 P.2d at 687. Similarly, where a party makes "no effort to have the admissions amended or withdrawn... [but] merely present[s] additional evidence on [the] issue," the court will not engage in further analysis but will find the

admissions “conclusively established and legally binding.” Kotter, 206 P.3d at 640; *see also* W.W. & W.B. Gardner, Inc. v. Park W. Village, 568 P.2d 734, 736-737 (Utah 1977) (holding that where defendant made no motion to withdraw or amend admissions but merely submitted an affidavit supporting its belated denial of admissions, the matters deemed admitted were conclusively established).

If a motion to withdraw or amend deemed admissions is made and a trial court makes a determination regarding the same, an appeals court reviews that decision below by engaging in a two-step analysis, “what might be called a ‘conditional’ discretionary standard.” Langeland v. Monarch Motors, 952 P.2d at 1060. The Utah Supreme Court in Langeland stated:

In the first step, we review the trial court’s determinations as to whether amendment or withdrawal would serve the presentation of the merits and whether amendment or withdrawal would result in prejudice to the nonmoving party. In the second step, we review the trial court’s discretion to grant or deny the motion. The trial court has discretion to deny a motion to amend, but its discretion to grant such a motion comes into play only after the preliminary requirements are satisfied . . . [B]ecause the rule does not give the trial court discretion to disregard the preliminary conditions of *rule 36(b)*, its judgment as to whether those conditions have been satisfied is subject to a somewhat more exacting standard of review.

*Id.* at 1061-62. The Court further explained the first step by giving another two-part test to determine whether presentation of the merits of an action would be served by amendment or withdrawal. The party seeking amendment or withdrawal must:

(1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, and

(2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue.

*Id.* at 1062. If the party seeking amendment or withdrawal fails to satisfy the requirements of this test, the nonmoving party is relieved of the burden of showing that he would suffer prejudice as a result of the withdrawal or amendment of the admissions. *Id.* at 1063.

The Utah Supreme Court in Langeland established that the burden of proving the truth or falsity of admissions falls on the party moving for amendment, and added,

the time to deny admissions is within thirty days of receiving the request for admissions. Once these matters have been admitted against a party, *something more than a bare denial is required* to convince the court that the admissions should be withdrawn or amended and that the merits of the matter should be argued in court.

*Id.* at 1062 (emphasis added).

It should be noted that an analysis under the conditional discretionary standard put forward in Langeland is not even reached until a motion to withdraw or amend is filed. The court does not have any discretion until a motion to withdraw or amend is before the court.

In the case at hand, Appellee never moved to withdraw or amend its admissions. Instead, Appellee merely filed its denial of the admissions seventy (70) days after the deadline, along with its own Cross-Motion for Summary Judgment and a three-sentence response to Appellant's Motion for Summary Judgment, which asserted baldly that: "The Defendants' Motion is moot. The Plaintiff has sent its discovery responses to counsel for

the Defendant on this date. Therefore, there is no relief for the Court to grant and the Motion should be dismissed.”

Appellee’s response is as incorrect as it is inadequate. Once the deadline to file responses to a request for admissions—30 days under the old Rule 36, and 28 days under the new Rule—had passed, the matters were deemed admitted, and Appellee should have filed a motion to amend or withdraw if it desired to deny the admissions. Since Appellee did not file such a motion, the trial court had no discretion to unilaterally disregard the admissions and should have taken them into account in its summary judgment decision.

Although Appellee did file late responses to the request for admissions and later filed its own Motion for Summary Judgment presenting additional evidence, this was not the same as a motion to amend or withdraw. With the Plaintiff having not fulfilled the preliminary requirements of Rule 36(c), the trial court did not have the discretion to ignore the deemed admissions in its summary judgment determination or to somehow treat Plaintiff’s Motion for Summary Judgment as a motion to withdraw. *See GTE Directories Corp. v. McCartney*, 11 Fed. Appx. 735, 737 (9th Cir. Cal. 2001) (stating that “Rule 36(b) provides the exclusive remedy for withdrawal or amendment of admissions, and it provides that a court may do so ‘on motion,’” and that “introduction of allegedly contradictory evidence cannot serve as an ‘implied’ motion to withdraw.”).

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Even if this Court somehow found that the trial court had the discretion to treat a Motion for Summary Judgment as an implied Motion to Withdraw or Amend Deemed

Admissions, Appellee/Petitioner still has not met the preliminary conditions of Rule 36(b) (showing that “the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party”) and the trial court did not make any factual findings or conclusions of law accordingly.

As in Kotter and Gardner, Appellee’s late responses to the request for admission “merely present additional evidence on the issue” but do not amount to a motion to amend or withdraw the admissions. Appellee’s Motion for Summary Judgment made no attempt to show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, or to introduce evidence of specific facts indicating that the matters deemed against it are in fact untrue. In fact, Appellee’s motion for summary judgment failed to respond to the deemed admissions at all, let alone show that withdrawal of the admissions would serve the presentation of the case on the merits. Having thus failed, Appellee relieved Appellant of the burden of showing that he would suffer prejudice as a result of the withdrawal or amendment of the admissions. Therefore the court would not have had discretion to grant (1) any supposed implied motion to withdraw, or (2) unilaterally disregard the admissions and grant Appellee’s Motion for Summary Judgment. The admissions were conclusively established and legally binding, and the trial court should have treated them as such.

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### **III. THE TRIAL COURT ERRED IN ITS UNILATERAL DISREGARD OF DEEMED ADMISSIONS IN MAKING ITS SUMMARY JUDGMENT DETERMINATION AND IN NOT STATING GROUNDS FOR ITS DECISION.**

Despite the Appellee's failure to file a motion to amend or withdraw admissions, the trial court unilaterally disregarded the deemed admissions and Appellant's Motion for Summary Judgment in order to grant Appellee's Motion for Summary Judgment.

Appellant's Request for Admission No. 4 asked Appellee to admit that Appellant had paid off the account and fulfilled all of his contractual obligations to Appellee. Where this Request for Admission was deemed admitted, the conclusive fact was that Appellant had paid off his account and fulfilled all of his contractual obligations to Appellee.

Accordingly, Appellee could not prove any breach of contract by the Appellant or any damages unless or until the deemed admission was withdrawn or amended. See Eleopulos v. McFarland & Hullinger, LLC, 145 P.3d 1157, 1159 (Utah App. 2006) (holding that a breach of contract claim requires four essential elements of proof, one of which is damages.); Bair v. Axiom Design, L.L.C., 20 P.3d 388, 392 (Utah 2001). Since Appellee could not prove a breach of contract by Appellant or any damages, grant of summary judgment in favor of Appellee was inappropriate.

Additionally, the trial court entered the Judgment and Order without a hearing, a ruling, grounds, or any memoranda such as findings of fact or conclusions of law.

Although "the trial court need not enter findings of fact and conclusions of law in rulings

on motions . . . [t]he court shall, however, issue a brief written statement of the ground for its decision on all motions granted under [Rule 56]." Salt Lake County Comm'n v. Short, 1999 UT 73, P10 (Utah 1999) (quoting Utah R. Civ. P. 52(a)). No such ground was given in the trial court's Judgment and Order (R. 138-39). Such unilateral action, in disregard of the provisions of Rules 36, 52, 56 and the case law governing deemed admissions, constitutes error.

#### **IV. APPELLANT IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE DEEMED ADMISSIONS.**

The judgment sought *shall* be rendered if the pleadings, depositions, answers to interrogatories, and *admissions on file*, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Utah R. Civ. P. 56(c) (emphasis added).

The treatment of Federal Rule 36(b) is both logical and persuasive and lends insight to the case at bar.

Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, *they cannot be overcome at the summary judgment stage* by contradictory affidavit testimony or other evidence in the summary judgment record . . . Instead, the proper course for a litigant that wishes to avoid the consequences of failing to timely respond to Rule 36 requests for admission is to move the court to amend or withdraw the default admissions in accordance with the standard outlined in Rule 36(b).

Carney v. IRS (In re Carney), 258 F.3d 415 (5th Cir. Tex. 2001) (emphasis added).

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It has been conclusively established by Admission No. 4 that Appellant has paid off his account and fulfilled all of his contractual obligations to Appellee. Without a

motion to withdraw or amend this admission before the court, there can therefore be no genuine issue of material fact on the subject. Appellee is therefore unable to prove its allegations of a breach of contract by Appellant. The admissions on file are an appropriate basis for granting summary judgment. It is too late for Appellee to file a motion to withdraw or amend the deemed admissions since the litigation has reached the summary judgment stage.

Litigation must come to an end sometime, and the rules of procedure are intended to provide an orderly schedule for moving cases along their track to conclusion—not to squander legal, judicial, and financial resources by generating lawsuits within lawsuits to determine whether the rules must actually be followed. Consequently, the court will not come to the rescue of a party who flagrantly ignores these rules at the expense of a party who attempts to conform with them.

Langeland, 952 P.2d at 1064.

The lower court denied Appellant's Motion for Summary Judgment<sup>2</sup> solely based on the grant of Appellee's Motion for Summary Judgment. Where the grant of Appellee's Motion for Summary Judgment was improper, the denial of Appellant's Motion for Summary Judgment should be reversed. Instead, given the conclusively established facts of the deemed admissions, summary judgment should be awarded in favor of Appellant.

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<sup>2</sup> The lower court did not deny Defendant's Motion for Summary Judgment (June 21, 2012; see Court Docket) until *after* Defendant had filed this appeal (June 7, 2012; see R. 144-145). From a procedural standpoint, this makes the case more difficult where the lower court's denial of that motion is not part of the record submitted to this Court. Appellant respectfully requests that if the case is remanded to the lower court for further proceedings, that this Court provide direction to the lower court and/or to the parties as to how to handle this procedural issue.

### CONCLUSION

The trial court's grant of summary judgment to Appellee was in unilateral disregard of deemed admissions and is therefore unfounded. Accordingly, the trial court's grant of summary judgment in favor of the Appellee should be summarily reversed, and summary judgment granted in favor of the Appellant.

DATED and SIGNED this 5 day of November 2012.

LEBARON & JENSEN, P.C.

  
L. Miles LeBaron

**CERTIFICATE OF MAILING**

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant to be served via first class U.S. mail, postage pre-paid, to the following:

Brent G. Messel  
GUGLIELMO & ASSOCIATES  
PO Box 9420  
Salt Lake City, UT 84109

on this 5 day of November 2012.

  
\_\_\_\_\_  
Paralegal

# **ADDENDUM**

## **Applicable Rules**

### **Utah R. Civ. Pro. 36. Request for Admission**

(a) **Request for admission.** A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated and numbered. A copy of the document shall be served with the request unless it has already been furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

**(b) Answer or objection.**

(b)(1) The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The answering party shall restate each request before responding to it. Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless, after reasonable inquiry, the information known or reasonably available is insufficient to enable an admission or denial. A party who considers the subject of a request for admission to be a genuine issue for trial may not object on that ground alone but may, subject to Rule 37(f), deny the matter or state the reasons for the failure to admit or deny.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

**Utah R. Civ. Pro. 52. Findings by the court; correction of the record.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

**Utah R. Civ. Pro. 56. Summary Judgment**

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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**FILED**  
MAY - 9 2012  
SECOND  
DISTRICT COURT  
RECEIVED  
MAY 04 2012  
By \_\_\_\_\_

**Judge: Morris**

1. Plaintiff Discover Bank is awarded judgment against said Defendant Kevin E Kendall, as requested in Plaintiff's Motion for Summary Judgment, in the amount of:

Principal:	\$17,503.17
Accrued interest:	\$2,678.59 (1)
Accrued Costs of Court:	\$420.00
Payments:	\$

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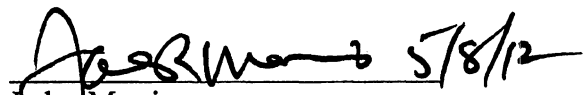
<b>Total Judgment:</b>	<b>\$20,601.76</b>
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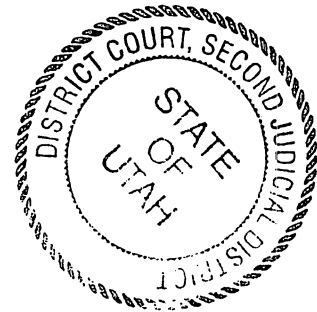
(1) interest calculated @ 17.24% per annum from 5/31/11 – 4/19/12.

With interest on the total judgment at 2.12% per annum as allowed by law from the date of Judgment until paid.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2012.

BY THE COURT

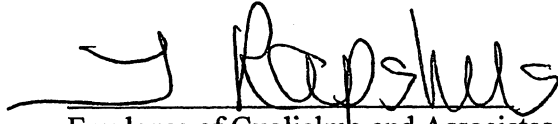
  
Judge Morris



**CERTIFICATE OF MAILING/DELIVERY**

I, the undersigned, hereby certify that a true and correct copy of the foregoing **JUDGMENT**  
**AND ORDER** was on May 3, 2012, mailed first class, postage-prepaid to:


Kevin E Kendall  
L. MILES LEBARON  
LEBARON & BRIGGS  
476 WEST HERITAGE PARK BLVD.  
SUITE 104  
LAYTON UT 84041

  
Employee of Guglielmo and Associates

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:
  - ✓ This brief contains 5,702 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
  - ☐ This brief uses a monospaced typeface and contains \_\_\_\_\_ lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:
  - ✓ This brief has been prepared in a proportionally space typeface using Microsoft Word 2003 in Times New Roman, 13 size font, or
  - ☐ This brief has been prepared in a monospaced typeface using \_\_\_\_\_ [name and version of word processing program] with \_\_\_\_\_ [name of characters per inch and name of type style].

  
L. Miles LeBaron

Dated: 11/05/2012