

2015

Reggie Lewis vs Rodney Nelson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

Appellate No. 20141086 - COA

District Court Number: 120500402

OPENING BRIEF OF APPELLANT RODNEY NELSON

FILED
UTAH APPELLATE COURTS

MAR 18 2015

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I
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TREATISES:

None

IV
JURISDICTION OF APPELLATE COURT

The Utah Court of Appeals has appellate jurisdiction of this matter as stated in Utah Code Annotated §78A-4-103(2)(j).

V
STATEMENT OF ISSUES

1. Did Judge Shumate err in failing to identify the alleged undisputed facts upon which he allegedly relied when issuing his Oral Ruling granting Mr. Lewis' motion for summary judgment, orally rendered on March 24, 2014? (Docket, pages 529-610).

Standard of Review:

The failure of a trial court to specify what undisputed facts the trial court relied upon in its grant of summary judgment is reviewed as a matter of law and an appellate court correctness and grants no deference to the trial court's conclusions of law. State v. Orr, 127 P.3d 1213, 2005 UT 92 (Utah 2005).

2. Did Judge Shumate err in failing to specify the legal theory upon which he relied in granting Mr. Lewis' motion for summary judgment, orally rendered on March 24, 2014? (Docket, pages 529-610).

Standard of Review:

Mr. Nelson could not find any standard of review for a situation where a court fails to identify the legal theory upon which it is granting summary judgment, and Mr. Nelson doubts if such a standard exists. Mr. Nelson respectfully asserts

that the statement of this Court in Adams v. Board of Review of Indus. Com'n, 821 P.2d 1 (Utah App. 1991) to wit: "*Inasmuch as our standard of review varies depending upon whether Adams failed to prove legal or medical causation, the Commission's failure to identify whether Adams failed to prove legal or medical causation prevents us from reviewing that conclusion,*" is controlling, as the standard of review for a contract claim is different from an equitable claim, and without any indication as to whether Judge Shumate and/or Judge Westfall granted Lewis' motion for summary judgment on Lewis' breach of an oral contract claim, or his unjust enrichment claim, and, therefore, Mr. Nelson cannot identify a proper standard of review.

3. Did Judge Westfall err in signing, and entering, the Order Granting Plaintiff's Motion for Summary Judgment, entered on May 20, 2014? (Docket, pages 529-610).

Standard of Review:

Grants of summary judgment are reviewed for correctness. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998).

"Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906, 910 (Utah 1996). Because "a challenge to summary judgment presents only a question of law," we review it for correctness. West v. Thomson Newspapers, 872 P.2d 999, 1004 (Utah 1994). In reviewing a grant of summary judgment, "[w]e determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

4. Did the district court err in entering the Judgment, entered on May 20, 2014? (Docket, pages 616-810).

Standard of Review:

Grants of summary judgment are reviewed for correctness. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998).

5. Did Judge Westfall err in issuing his Memorandum Decision and Order denying Mr. Nelson's Motion to Alter or Amend the Plaintiff's Motion for Summary Judgment, and his Motion to Alter or Amend the Judgment, entered October 20, 2014? (Docket, pages 895-900).

Standard of Review:

Grants of summary judgment are reviewed for correctness. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998).

6. Did the district court err in entering the Amended Judgment, entered on November 11, 2014, against Mr. Nelson? (Docket, pages 898-900).

Standard of Review:

Grants of summary judgment are reviewed for correctness. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998).

7. Did Judge Shumate err denying Mr. Nelson's Motion to file an Amended Answer and Amended Counterclaim? (Docket, pages 155-156, 197-200).

Standard of Review:

An appellate court reviews a trial court's denial of a motion to amend for an

abuse of discretion. Kelly v. Hard Money Funding, Inc., 2004 UT 44, ¶14, 87 P.3d 734.

VI
**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
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The relevant Constitutional Provisions, Statutes, Ordinances, Rules and Regulations are printed in the Addendum.

VII
STATEMENT OF THE CASE

This case concerns the purchase of an “exclusive” Nutty Guys route, to provide various retail locations with snacks, and the alleged breach of the “agreement” for the purchase of the “exclusive” Nutty Guys route.

NATURE OF THE CASE

The litigation of this case involves a grant of summary judgment in favor of Lewis, based on the alleged breach of an unsigned and undated written contract, or an alleged oral contract, or unjust enrichment by Mr. Nelson.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Lewis filed a complaint, against Mr. Nelson, on July 2, 2012.

Lewis filed an amended complaint on July 7, 2012.

Mr. Nelson, acting pro se, moved to dismiss the amended complaint on September 27, 2012. That motion was denied on January 2, 2013.

Mr. Nelson answered Lewis' amended complaint on January 25, 2013.

Lewis served Mr. Nelson with 13 interrogatories, 30 requests for admissions, and 13 requests for production of documents and things on March 22, 2013. That discovery stated that it was served as provided in Rules 7036 and 9014 of the Federal Rules of Bankruptcy Procedure.

Mr. Nelson objected to the discovery, on April 22, 2013, because it was submitted pursuant to Rules 7036 and 9014 of the Federal Rules of Bankruptcy Procedure.

On May 6, 2013, Lewis responded to Mr. Nelson's objection. On May 6, 2013, Lewis also sent Mr. Nelson revised interrogatories, requests for admissions, and requests for production of documents and things. This revised discovery stated that it was served pursuant to the Utah Rules of Civil Procedure. However, Lewis again sent 13 interrogatories 30 requests for admissions and 13 requests for production of documents.

On May 8, 2014, Mr. Nelson filed a counterclaim.

On May 23, 2014, Judge Shumate ordered Mr. Nelson to answer all 13 interrogatories, all 30 requests for admissions, and all 13 requests for production of documents, from Lewis, by June 27, 2013, even though the discovery stated that it was submitted under Rules 7036 and 9014 of Federal Rules of Bankruptcy Procedure.

On June 27, 2013, Mr. Nelson filed a motion, for leave of the court, to file

an Amended Counterclaim, as a Compulsory Counterclaim.

On July 9, 2013, Lewis filed his response to Mr. Nelson's Motion to File an Amended Counterclaim.

On October 11, 2013, the district court entered an order denying Mr. Nelson's Motion to file an Amended Counterclaim.

On January 10, 2014, Lewis filed a motion for summary judgment.

Mr. Nelson filed a memorandum opposing Lewis' motion for summary judgment on February 5, 2014.

Lewis filed his reply memorandum, in support of his motion for summary judgment, on February 6, 2014.

Judge Shumate held oral arguments on Lewis' motion for summary judgment on March 24, 2014. At the conclusion of that hearing, Judge Shumate granted Lewis' motion for summary judgment, without identifying any undisputed facts upon which he allegedly relied in granting Lewis' motion for summary judgment, and without specifying on what legal theory he was granting Lewis summary judgment.

On May 20, 2014, the court entered an Order Granting Plaintiff's Motion for Summary Judgment, and a Judgment. This Order granted Lewis summary judgment on both his claim for breach of an oral contract, and unjust enrichment.

On June 2, 2014, Mr. Nelson filed a Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, and the Judgment.

On June 16, 2014, Lewis filed a memorandum in opposition to Mr. Nelson's Motion to Alter or Amend the Judgment, and Mr. Nelson's Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment.

A hearing was held on Mr. Nelson's Motions to Alter or Amend on September 9, 2014.

On October 10, 2014, Judge Westfall entered a memorandum decision denying Mr. Nelson's Motion to Alter or Amend the Judgment, and Mr. Nelson's Motion to Alter the Order on Summary Judgment.

An Amended Judgment was entered on November 17, 2014.

On November 19, 2014, Mr. Nelson filed a Notice of Appeal.

Mr. Nelson filed a Motion for Stay of Judgment Pending Appeal on November 20, 2014.

Mr. Nelson filed a Request to Submit for Decision his Motion for a Stay Pending Appeal, on December 10, 2014, and Request for an Expedited Decision of that Motion, on December 11, 2014.

The Clerk of the court issued a writ of execution on December 11, 2014.

On December 11, 2014, Mr. Nelson filed a Motion to Quash the Writ of Execution.

Judge Westfall would not rule on Mr. Nelson's Motion for Stay Pending Appeal. Therefore, on February 11, 2015, Mr. Nelson filed a motion with this

Court, asking the Court to order Judge Westfall to rule on his Motion for a Stay Pending Appeal.

On February 12, 2015, Judge Pearce entered an order granting Mr. Nelson's Motion for Stay on Appeal.

DISPOSITION IN THE DISTRICT COURT

Judge Shumate orally granted Lewis' motion for summary judgment on March 24, 2014.

Judge Westfall signed the Order Granting Plaintiff's Motion for Summary Judgment and authorized the entry of a judgment against Mr. Nelson on May 20, 2014.

Judge Westfall denied Mr. Nelson's Motions to Alter or Amend on October 10, 2014.

On November 19, 2014, Mr. Nelson filed a Notice of Appeal.

Mr. Nelson filed a Motion for Stay of Judgment Pending Appeal on November 20, 2014.

Mr. Nelson filed a Request to Submit for Decision his Motion for a Stay Pending Appeal, on December 10, 2014, and Request for an Expedited Decision of that Motion, on December 11, 2014.

Judge Westfall would not rule on Mr. Nelson's Motion for Stay Pending Appeal. Therefore, on February 11, 2015, Mr. Nelson filed a motion with this

Court, asking the Court to order Judge Westfall to rule on his Motion for a Stay Pending Appeal.

On February 12, 2015, Judge Pearce entered an order granting Mr. Nelson's Motion for Stay on Appeal.

On February 24, 2015, Mr. Nelson filed a supersedeas bond with the district court in the amount of \$41,408.46.

On March 2, 2015, Lewis filed an objection to Mr. Nelson's Supersedeas Bond, claiming that Mr. Nelson must post a supersedeas bond in the amount of \$63,513.49, consisting of an additional amount of \$9,930.03, post judgment interest from May 20, 2014, and continuing for three years; and \$12,167.00, post judgment attorney fees.

On March 6, 2015, Mr. Nelson filed a Reply Memorandum in Support of his Motion to Accept and Approve his Supersedeas Bond filed with the district court on February 24, 2015.

On March 3, 2015, Judge Westfall had "*Minutes for ORDER TO SHOW CAUSE IST APPE*," filed on the district court's docket for this case.

VIII **RELEVANT FACTS**

1. In the fall of 2010, Mr. Nelson answered an ad on KSI.com by Lewis, offering to sell an "exclusive" Nutty Guys distribution route in Southern Utah. (Docket page 412).

2. After several phone calls, Mr. Nelson agreed to accompany Lewis for deliveries on January 1, 2011. (Docket page 412).

3. Lewis said that he needed to sell the business so he could take a job with UTA in Salt Lake City. (Docket page 412).

4. After accompanying Lewis on the delivery, Nelson told Lewis he was not interested in purchasing the business, but that he would help with deliveries occasionally. (Docket page 412).

5. One week later, Lewis called Mr. Nelson and said he had the UTA job and asked Mr. Nelson to take over the Nutty Guys route. (Docket page 412).

6. Mr. Nelson agreed to do the next round of deliveries and subsequently agreed to take over the Nutty Guys route. (Docket page 412-413).

7. Mr. Nelson met with Lewis at his in-laws home, where Lewis showed Mr. Nelson how to do invoices and run the business. (Docket page 413).

8. After some discussion, Mr. Nelson and Lewis agreed on terms for the purchase of the Nutty Guys route, and Mr. Nelson wrote an agreement, which both he and Lewis signed. (Docket page 413).

9. The agreement contained only the basic terms of the sale. (Docket page 413).

10. Lewis retained the handwritten agreement, because he was going to take it to his uncle, who is an attorney, to have a complete contract prepared. (Docket page 413).

11. Because Lewis kept the contract, Mr. Nelson is unable to remember the exact content of the handwritten agreement. (Docket page 413).

12. Lewis explained that the sale of the Nutty Guys route had to be approved by Nathan Murray, the owner of Nutty Guys. (Docket page 414).

13. Mr. Murray subsequently approved the sale of the Nutty Guys route. (Docket page 414).

14. After taking over the Nutty Guys route, Mr. Nelson had trouble reaching Lewis with questions, or when he needed help. (Docket page 414).

15. In June 2011, Lewis went to Mr. Nelson's warehouse in Hurricane, Utah, to get him to sign a commission check that had been written to Mr. Nelson by mistake. (Docket page 414).

16. During this visit, Lewis gave Mr. Nelson a new contract, and asked Mr. Nelson to sign it. (Docket page 414).

17. After reading the contract, Mr. Nelson realized that it was entirely different than the handwritten agreement Lewis and Mr. Nelson signed. (Docket page 414).

18. Mr. Nelson told Lewis that he would not sign Lewis' contract, and that Lewis needed to get him an accurate accounting of the remaining balance owed for the sale of the Nutty Guys route, and provide him with proof that the area was an "exclusive" area. Exclusivity was an essential term of the agreement. (Docket page 414).

19. Mr. Nelson also asked Lewis for a copy of the original handwritten agreement. (Docket page 414).

20. Several weeks later, Lewis sent Mr. Nelson a text with an amount that he claimed Mr. Nelson owed, and demanded payment. (Docket page 414).

21. Mr. Nelson responded that Lewis needed to provide him with an accurate, itemized accounting, with payments, credits, and accounts receivable, because Mr. Nelson's figures differed substantially from Lewis'. (Docket page 414).

22. Rather than providing Mr. Nelson with the requested documentation, Lewis continued to demand payment, threatened legal action, and stated that he would come and take over the Nutty Guys route. (Docket page 414).

23. During this time, Mr. Nelson continued to ask for an accounting, original documentation, and proof of an "exclusive" area. (Docket page 414).

24. During the time that Mr. Nelson owned and operated the Nutty Guys route, other Nutty Guys distributors had openly contracted Mr. Nelson's customers, in the supposed "exclusive" area, causing a substantial loss of business for Mr. Nelson. (Docket page 415).

25. On April 18, 2012, Mr. Nelson received an email from Ryan Olivier, an owner of Nutty Guys, stating that Mr. Nelson was just a sales agent, not a distributor. (Docket page 415).

26. Mr. Nelson never would have agreed to purchase the Nutty Guy route

from Lewis if he had known that he was not purchasing an “exclusive” area.

(Docket page 415).

27. Lewis filed a complaint against Mr. Nelson on July 2, 2012. (Docket, page 1).

28. On July 7, 2012, Lewis filed an amended complaint. (Docket, page 21).

29. Mr. Nelson answered Lewis’ complaint on January 25, 2013, and served Lewis with requests for production of documents, asking Lewis to produce all documents that he intend to introduce as exhibits at the trial, and copies of forms 1099, issued to Lewis, by Nutty Guys of Salt Lake City for tax years 2010 and 2011, so that he could determine how much Lewis had actually been paid by Nutty Guys. (Docket, pages 62- 67).

30. Lewis refused to provide Mr. Nelson with any documents. (Docket, page 73).

31. Lewis served Mr. Nelson with 13 interrogatories, 30 requests for admissions, and 13 requests for production of documents and things on March 22, 2013. (Docket, page 76).

32. That discovery stated that it was served according to Rules 7036 and 9014 of the Federal Rules of Bankruptcy Procedure. (Docket, page 76).

33. Mr. Nelson objected to the discovery because it was submitted pursuant to the Federal Rules of Bankruptcy Procedure. (Docket, page 79).

34. On May 6, 2013, Lewis sent Mr. Nelson revised interrogatories,

requests for admissions, and requests for production of documents and things.(Docket, page 82). This discovery stated it was served pursuant to the Utah Rules of Civil Procedure. However, Lewis again submitted 13 interrogatories, 30 requests for admissions and 13 requests for production of documents. (Lewis' revised first set of requests for admissions, interrogatories, and requests for production of documents to defendant, which is included in the Addendum to this Brief).

35. On May 8, 2014, Mr. Nelson filed a counterclaim. (Docket, page 11).

36. On May 23, 2014, Judge Shumate ordered Mr. Nelson to answer all 13 interrogatories, all 30 requests for admissions and all 13 requests for production of documents by June 27, 2013, even though the discovery stated it was submitted under the Rules 7036 and 9014 of Federal Rules of Bankruptcy procedure. (Docket, page 152).

37. In Lewis' amended complaint, he asked for a judgment for damages in an amount of "\$15,020." (Docket, page 21).

38. Because Lewis asked for a judgment for damages in an amount of \$15,020, pursuant to the provisions of Rule 26(c) URCP, this case became a "Tier 1" case. (Docket, page 21, Rule 26(c)(3), and Rule 26(c)(5), URCP)

39. On June 27, 2013, Mr. Nelson submitted responses to Lewis' revised discovery. (Docket, page 154).

40. Because this case is a Tier 1 case, Mr. Nelson only answered the first

five of Lewis' 30 requests for admissions, and requests for production of documents. Mr. Nelson did not respond to the interrogatories. (Mr. Nelson's Response to Lewis discover, contained in the Addendum to this Brief).

41. On June 28, 2013, Mr. Nelson filed a Motion and Memorandum for Leave of Court to File an Amended Counterclaim, as Compulsory Counterclaim. (Docket, page 155).

42. On October 11, 2013, the district court entered an order denying Mr. Nelson's Motion to file an Amended Counterclaim. Judge Shumate said that all counterclaim issues would be handled at trial. (Docket, page 230).

43. On January 10, 2014, Lewis filed a motion for summary judgment. (Docket, page 295).

44. In the memorandum, submitted in support of his motion for summary judgment, Lewis relied on the 25 requests for admission to which Mr. Nelson did not respond, claiming that those requests for admissions were deemed admitted. (Docket, page 297).

45. Mr. Nelson filed a memorandum opposing Lewis' motion for summary judgment, and a declaration, on February 5, 2014. (Docket, page 368).

46. Judge Shumate held oral arguments on Lewis' motion for summary judgment on March 24, 2014. (Docket, page 450).

47. At the conclusion of that hearing, Judge Shumate granted Lewis' motion for summary judgment, without identifying any undisputed facts upon which he

allegedly relied in granting Lewis' motion for summary judgment, and without specifying on what legal theory he was granting summary judgment. (Transcript of Hearing on Lewis motion for summary judgment, contained in the Addendum to this Brief).

48. On May 20, 2014, Judgment was entered in favor of Lewis, and an Order Granting Lewis' Motion for Summary Judgment was also entered. This Order granted Lewis summary judgment on both his claim for breach of an oral contract, and unjust enrichment. (Docket, pages 506 and 492).

49. On June 2, 2014, Mr. Nelson filed a Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, and the Judgment entered by the court on May 20, 2014. (Docket, page 529, and 616).

50. A hearing was held on Mr. Nelson's Motions to Alter or Amend on September 9, 2014. (There is no entry on the Docket prepared by the District Court in St. George. However, in on the docket for the electronic filing, there is a, entry No. 191, that states "*2014-09-09 Minutes for MOTION TO ALTER JUDGMENT*").

51. On October 10, 2014, Judge Westfall entered a ruling on Mr. Nelson's Motion to Alter or Amend the Judgment, and on his Motion to Alter the Order Granting Plaintiff's Motion for Summary Judgment, denying Mr. Nelson's Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment,

but making small changes to the Judgment, entered on May 20, 2014.¹ (Docket, pages 883).

52. In denying Mr. Nelson's Motion to Alter or Amend the Judgment, and his Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, Judge Westfall indicated that he was denying the Motions, because Mr. Nelson did not respond to the 25 requests for admission Lewis submitted to Mr. Nelson, in addition to the five requests for admissions to which Mr. Nelson responded. (Docket, pages 884-5).

53. An Amended Judgment was entered on November 17, 2014. (Docket, page 958).

54. On November 19, 2014, Mr. Nelson filed a Notice of Appeal, appealing Judge Westfall's Amended Judgment entered November 11, 2014; the Memorandum Decision and Order on Plaintiff's Motion to Alter or Amend Order Granting Summary Judgment, and Motion to Alter or Amend Judgment, entered October 10, 2014; the Judgment, entered May 20, 2014; the Order Granting Plaintiffs Motion for Summary Judgment, entered May 20, 2014; the Oral Ruling on motion for summary judgment, entered March 24, 2014; and the Order denying

1. Judge Westfall granted Mr. Nelson's Motion to Alter or Amend the May 20, 2014, judgment, to remove unauthorized costs from the judgment, i.e., postage, copying costs, and something called "*Tracers People Search CSR Investigations*," costs that would never have been allowed, had Judge Westfall actually read the judgment before signing it.

Mr. Nelson's Motion to file an Amended Answer and Amended Counterclaim, entered October 11, 2013. (Docket, page 977).

55. Mr. Nelson filed a Motion for Stay of Judgment Pending Appeal on November 20, 2014. (Docket, page 985).

56. Lewis filed a memorandum in opposition to Mr. Nelson's Motion for Stay of Judgment Pending Appeal on December 4, 2014. (Docket, page 1009).

57. Mr. Nelson filed a reply memorandum in support of his Motion for Stay Pending Appeal on December 9, 2014. (Docket, page 1027).

58. Mr. Nelson filed a Request to Submit for Decision his Motion for a Stay Pending Appeal, on December 10, 2014, and Request for an Expedited Decision of that Motion, on December 11, 2014. (Docket, page 1042, and 1057).

59. Judge Westfall would not rule on Mr. Nelson's Motion for a Stay Pending appeal, so on February 11, 2015, Mr. Lewis filed a motion asking this Court to order Judge Westfall to rule on his Motion for a stay pending appeal. (Because the Motion was filed with this Court, it does not appear on the district court's docket).

60. On February 12, 2015, Judge Pearce issued an order granting Mr. Nelson's Motion for Stay Pending Appeal. (Because the Docket prepared by he District Court in St. George ends at February 1, 2015, everything that transpired after that date is not on the Docket submitted to this Court. (Because the Docket prepared by the District Court in St. George ends at February 1, 2015, everything

that transpired after that date is not on the Docket submitted to this Court.

However, in the Docket for the electronic filing for this case, entry No. 328 indicates that on 2015-02-12, a Court of Appeals Order was filed in this Case).

61. The Clerk of the Court issued a writ of execution, authorizing the sheriff to sell Mr. Nelson's properties, on December 11, 2014. (Docket, page 1039).

62. Mr. Nelson filed a Motion to Quash the Writ of Execution on December 11, 2014. (Docket, page 1051).

63. Mr. Nelson filed a request to submit for decision his Motion to Quash the Writ of Execution, on January 15, 2014. (Docket, page 1088).

64. Lewis did not file a timely response to Mr. Nelson's Motion to Quash the Writ of Execution, and did not file any response, until after Mr. Nelson had filed a request for decision of his Motion to Quash the Writ of Execution. (Docket, page 1093).

65. On February 13, 2015, after receiving Judge Pearce's order granting his Motion for Stay Pending Appeal, Mr. Nelson filed a second Motion to Quash the Writ of Execution issued by Judge Westfall, and a Motion to Quash the scheduled Sheriff Sale of his real properties. (District Court's Electronic Filing Docket, entries Nos. 329 and 330).

66. Judge Westfall has not ruled on either Mr. Nelson's Motion to Quash the Writ of Execution or his Motion to Quash the Sheriff's Sale. (District Court's Electronic Filing Docket, entry No. 345).

67. On February 24, 2015, Mr. Nelson filed a supersedeas bond, in the form

of cash, with the district court. (District Court's Electronic Filing Docket, entries Nos. 335, 335 and 336).

68. On February 24, 2015, Mr. Nelson filed a supersedeas bond with the district court in the amount of \$41,408.46. (District Court's Electronic Filing Docket, entries Nos. 335, 335 and 336).

69. On March 2, 2015, Lewis filed an objection to Mr. Nelson's Supersedeas Bond, claiming that Mr. Nelson must post a supersedeas bond in the amount of \$63,513.49, consisting of an additional amount of \$9,930.03, post judgment interest from May 20, 2014, and continuing for three years; and \$12,167.00, post judgment attorney fees. (District Court's Electronic Filing Docket, entry No. 342).

70. On March 6, 2015, Mr. Nelson filed a Reply Memorandum in Support of his Motion to Accept and Approve his Supersedeas Bond filed with the district court on February 24, 2015. (District Court's Electronic Filing Docket, entry No. 346).

71. On March 3, 2015, Judge Westfall had "*Minutes for ORDER TO SHOW CAUSE 1ST APPE*," filed on the district court's docket for this case. (District Court's Electronic Filing Docket, entry No. 345).

SUMMARY OF ARGUMENT

Judge Shumate erred, as a matter of law, when he failed to specify the legal theory upon which he was granting Lewis' motion for summary judgment, and when he failed to identify any undisputed facts, upon which he allegedly relied, in granting Lewis' motion for summary judgment. Judge Westfall erred, as a matter of law, when he signed the Order Granting Plaintiff's Motion for Summary Judgment, prepared by Lewis' attorney, when he failed to grant Mr. Nelson's Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, and when he authorized the entry of the judgment against Mr. Nelson, entered on May 20, 2014, and when he authorized the entry of an amended judgment against Mr. Nelson, on November 17, 2014.

DETAIL OF ARGUMENT

MARSHALING OF EVIDENCE

Because Judge Shumate did not specify the legal theory upon which he orally granted Lewis' motion for summary judgment, or any facts, that he concluded were undisputed facts, it is nearly impossible to marshal the evidence to support his oral grant of summary judgment in favor of Lewis. Nonetheless, Mr. Nelson will attempt to identify every bit of evidence that he believes could possibly be considered to support any of the two possible legal theories, on which Judge Shumate could have granted Lewis' motion for summary judgment, as well as all evidence upon which Judge Westfall could have relied in denying Mr. Nelson's Motions to Alter or Amend.

A. BREACH OF ORAL CONTRACT.

The evidence which could possibly support a holding that Lewis was entitled to summary judgment, based on breach of an oral contract claim, is as follows:

1. At the hearing on Lewis motion for summary judgment, Lewis' counsel states: "... or otherwise he says that the contract was never signed, but the case law is clear in Utah that you can have an oral contract."

2. In his declaration, in paragraph 7, Lewis states:

Although neither Nelson nor I signed the Agreement, we both orally agreed that its terms and conditions would bind us and govern Nelson's acquisition of the right to operate the Route from me."

B. UNJUST ENRICHMENT.

The evidence which could possibly support a holding that Lewis was entitled to summary judgment, based on an unjust enrichment claim, is as follows:

1. Lewis claimed Mr. Nelson agreed to pay him \$25,000.00 for the purchase of the Nutty Guys route.

2. Lewis claimed that Mr. Nelson only paid him \$11,00.00, of the \$25,000.00, for the purchase of the Nutty Guys route.

3. Mr. Lewis claimed that Mr. Nelson owed him \$22,000.00, in addition to the \$11,000.00, Mr. Nelson paid Lewis, for the Nutty Guys route.

4. Mr. Nelson operated the Nutty Guys route from sometime in January 2011, until May 2014.

POINT I

JUDGE SHUMATE ERRED, AS A MATTER OF LAW, IN FAILING TO IDENTIFY THE ALLEGED UNDISPUTED FACTS, UPON WHICH HE RELIED, WHEN GRANTING LEWIS' MOTION FOR SUMMARY JUDGMENT, ORALLY RENDERED ON MARCH 24, 2014. JUDGE WESTFALL ERRED, AS A MATTER OF LAW, WHEN HE SIGNED AND AUTHORIZED THE ENTRY OF THE ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, WHEN HE HAD ABSOLUTELY NO IDEA OF WHAT ALLEGED FACTS, UPON WHICH JUDGE WESTFALL ALLEGEDLY RELIED, WHEN HE ORALLY GRANTED LEWIS' MOTION FOR SUMMARY JUDGMENT, ON MARCH 24, 2014.

Nowhere in his oral ruling, granting Mr. Lewis's motion for summary judgment, does Judge Shumate identify any facts, that he believes are undisputed facts, upon which he allegedly relied, when granting Mr. Lewis' motion for summary judgment, in spite of his statement that he wanted a clean record for Mr. Nelson's appeal.

In Platts v. Parents Helping Parents, 947 P.2d 658 (Utah 1997), the Utah Supreme Court Stated:

It is unclear what undisputed facts the trial court relied upon in its grant of summary judgment wherein it concluded that Turnabout was a "health care provider." Without an adequate basis of undisputed facts, summary judgment is inappropriate. Without an adequate indication as to the undisputed facts that were applied to the law, it is impossible to determine on appeal whether the trial court erred in its application of the law to those facts. Therefore, the court of appeals should have remanded the matter to the trial court to set out an adequate basis of undisputed facts to justify its grant of summary judgment or, if necessary, to hold further proceedings to make adequate factual determinations.

Nowhere in Judge Westfall's memorandum decision denying Mr. Nelson's Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, does Judge Westfall identify any alleged facts that he considers to be

undisputed facts, upon which he allegedly relied to affirm Judge Shumate's grant of summary judgment in favor of Lewis.

Based on the Platts decision, at a minimum, this Court must reverse Judge Shumate's, and Judge Westfall's, grants of summary judgment in favor of Lewis, and remand this case back to the district court, with instructions to identify the alleged undisputed facts upon which Judge Shumate, and/or Judge Westfall relied in granting Lewis' motion for summary judgment, so this Court can determine if either Judge Shumate, or Judge Westfall, properly applied the appropriate law, whatever law they allegedly applied, to the alleged undisputed facts, whatever those alleged undisputed facts are.

POINT II

JUDGE SHUMATE ERRED, AS A MATTER OF LAW, IN FAILING TO SPECIFY THE LEGAL THEORY UPON WHICH HE RELIED, WHEN GRANTING MR. LEWIS' MOTION FOR SUMMARY JUDGMENT, ORALLY RENDERED ON MARCH 24, 2014. JUDGE WESTFALL ERRED, AS A MATTER OF LAW, WHEN HE SIGNED AND AUTHORIZED THE ENTRY OF THE ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, WHEN HE HAD ABSOLUTELY NO IDEA OF THE LEGAL THEORY, UPON WHICH JUDGE WESTFALL ALLEGEDLY RELIED, WHEN HE ORALLY GRANTED LEWIS' MOTION FOR SUMMARY JUDGMENT, ON MARCH 24, 2014.

Because Judge Shumate never identified the legal theory, upon which he relied in granting Mr. Lewis' motion for summary judgment, it is impossible for this Court to determine if Judge Shumate properly applied the law, whatever law he allegedly applied, to the alleged undisputed facts, whatever the alleged undisputed facts are.

Judge Westfall does not identify any legal theory upon which he relied in affirming Judge Shumate's grant of summary judgment. Therefore, at a minimum, this Court must reverse Judge Shumate's, and Judge Westfall's, grants of summary judgment in favor of Lewis, and remand this case back to the district court, with instructions to Judge Shumate, and/or Judge Westfall, to specify the legal theory upon which they granted Lewis' motion for summary judgment, so this Court can determine if they properly applied the law, whatever law they applied, to the undisputed facts, whatever the alleged disputed facts are. Platts v. Parents Helping Parents, supra.

POINT III

JUDGE WESTFALL ERRED, AS A MATTER OF LAW, IN SIGNING, AND AUTHORIZING THE ENTRY OF THE ORDER GRANTING LEWIS' MOTION FOR SUMMARY JUDGMENT.

A. JUDGE WESTFALL ERRED, AS A MATTER OF LAW, WHEN HE SIGNED THE ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, WHEN HE HAD ABSOLUTELY NO IDEA OF THE LEGAL THEORY, UPON WHICH JUDGE SHUMATE RELIED, WHEN HE ORALLY GRANTED LEWIS' MOTION FOR SUMMARY JUDGMENT.

As proven in Points I and II, of this brief, in his oral ruling on Lewis' motion for summary judgment, Judge Shumate never stated the legal theory on which he was granting Lewis' motion for summary judgment. Therefore, it is impossible to determine whether Judge Shumate granted Lewis' motion for summary judgment on his claim for breach of an alleged oral contract, or unjust enrichment.

The only "reason" Judge Shumate appeared to give for granting Lewis'

summary judgment motion is his statement that: *"My job, however, gentlemen, is to issue a ruling. Looking at the form of this lawsuit and the form of the pleadings under Rule 7 as we have, I'm going to grant the motion for summary judgment"* (Transcript of Summary Judgment Hearing, pages 20-21, lines 24-2). However, Judge Shumate never explains, or gives any guidance, as to what *"Looking at the form of this lawsuit and the form of the pleadings under Rule 7 as we have, I'm going to grant the motion for summary judgment"* means.

Because Judge Shumate never specified the legal theory on which he granted Lewis' motion for summary judgment, as a matter of law, Lewis' counsel could not prepare an Order Granting Plaintiff's Motion for Summary Judgment, when Judge Shumate never stated the legal theory, on which he was relying, when he orally granted Lewis' motion for summary judgment.

Lewis' counsel is not authorized to determine the legal theory(s) upon which Judge Shumate was relying, when he orally granted Lewis' motion for summary judgment. Therefore, Judge Westfall erred, as a matter of law when he signed Lewis' Order Granting Plaintiff's Motion for Summary Judgment, when neither he, nor Lewis' counsel, had any idea of the legal theory on which Judge Shumate was relying, when he orally granted Lewis' motion for summary judgment.

B. BECAUSE JUDGE SHUMATE DID NOT MAKE ANY FACTUAL FINDINGS, BOTH AS A MATTER OF FACT, AND AS A MATTER OF LAW, LEWIS' COUNSEL COULD NOT IDENTIFY ANY ALLEGED UNDISPUTED FACTS, UPON WHICH JUDGE SHUMATE ALLEGEDLY RELIED, WHEN ORALLY GRANTING LEWIS' MOTION FOR SUMMARY JUDGMENT, AND JUDGE WESTFALL ERRED, AS A MATTER OF LAW, WHEN HE SIGNED THE ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WHEN HE HAD ABSOLUTELY NO IDEA OF WHAT ALLEGED FACTS, UPON WHICH JUDGE WESTFALL ALLEGEDLY RELIED WHEN HE ORALLY GRANTED LEWIS' MOTION FOR SUMMARY JUDGMENT, ON MARCH 24, 2014.

Again, it is undisputed that Judge Shumate never identified any alleged undisputed facts, upon which he allegedly relied, when granting Lewis' motion for summary judgment, in spite of his statement that he wanted a clean record for Mr. Nelson's appeal.

As stated in Platts v. Parents Helping Parents, *supra*,

It is unclear what undisputed facts the trial court relied upon in its grant of summary judgment wherein it concluded that Turnabout was a "health care provider." Without an adequate basis of undisputed facts, summary judgment is inappropriate. Without an adequate indication as to the undisputed facts that were applied to the law, it is impossible to determine on appeal whether the trial court erred in its application of the law to those facts. Therefore, the court of appeals should have remanded the matter to the trial court to set out an adequate basis of undisputed facts to justify its grant of summary judgment or, if necessary, to hold further proceedings to make adequate factual determinations.

Although Judge Shumate stated, during the hearing on Lewis' motion for summary judgment, that "There are undisputed issues of fact in the various statements and declarations as well as the arguments, but - and you can include those, because I want there to be a clear record for Mr. Nelson to appeal," (Transcript of Summary Judgment Hearing, page 21, lines 3-7), because Judge

Shumate did not identify the “*undisputed issues of fact*,” Lewis’ counsel was not lawfully entitled to determine to what, alleged, “*undisputed issues of fact*” Judge Shumate was referring, and include them in the Order Granting Plaintiff’s Motion for Summary Judgment, because Lewis’ counsel had absolutely no idea of what alleged facts Judge Shumate supposedly considered “*undisputed issues of fact*.”

Because Judge Shumate never identified any alleged undisputed facts, upon which he was relying, when granting Lewis’ motion for summary judgment, Judge Westfall erred, as a matter of law, when he signed the Order Granting Plaintiff’s Motion for Summary Judgment, containing alleged facts, that Judge Shumate did not make, suggest, or even allude to, as neither he, nor Lewis’s counsel, had any idea on what alleged undisputed facts Judge Shumate was allegedly relying when he orally granted Lewis’ motion for summary judgment.

C. AS A MATTER OF LAW, JUDGE SHUMATE COULD NOT HAVE GRANTED LEWIS’ MOTION FOR SUMMARY JUDGMENT BASED ON A BREACH OF AN ALLEGED ORAL CONTRACT.

In his amended complaint, Lewis asserted a cause of action, based on an alleged oral contract. However, Lewis also claimed he was entitled to summary judgment, on a claim of unjust enrichment.

In paragraph 1, subparagraph e., of Lewis’ alleged undisputed facts, contained in his Order Granting Plaintiff’s Motion for Summary Judgment, Lewis claims:

After a period of negotiation, Nelson agreed to purchase, and Lewis agreed

to sell, the right to operate the Route in accordance with the terms and conditions set forth in a written Asset Purchase Agreement (the "AGREEMENT").

A copy of Lewis' Order Granting Plaintiff's Motion for Summary Judgment is included in the Addendum to this Brief.

In subparagraph f., of paragraph 1, of Lewis' Order Granting Plaintiff's Motion for Summary Judgment, Lewis states:

Although neither of the parties signed the Agreement, they orally agreed that its terms and conditions would bind both parties and govern Nelson's acquisition of the right to operate the Route from Lewis..

Subparagraphs e., and f., of paragraph 1, of Lewis' Order Granting Plaintiff's Motion for Summary Judgment, are not undisputed facts, as Lewis falsely claims, and Judge Shumate never stated that the statements made in subparagraphs e., and f., of paragraph 1, of Lewis' Order Granting Plaintiff's Motion for Summary Judgment are undisputed facts.

Although Judge Shumate never stated that he was granting Lewis' motion for summary judgment based on an alleged oral agreement, as a matter of law, he could not have, lawfully, granted summary judgment, on Lewis' false claim that he and Mr. Nelson entered into an oral agreement, and agreed that the alleged oral agreement would be governed by the terms of the Asset Purchase Agreement.

During the hearing on Lewis' motion for summary judgment, Lewis' counsel states:

Mr. Nelson claims there is no contract, because either - he says that he didn't get this exclusive area, but that doesn't mean there's no contract. That just means there's breach, and so he's not - I don't or otherwise he

says that the contract was never signed, but the case law is clear in Utah that you can have an oral contract. This isn't covered by the Statute of Frauds. And so to the extent he claims that we didn't convey an exclusive area, that doesn't mean there's no contract, that just means that there's a potential breach.

(Transcript of Hearing on Motion for Summary Judgment, page 8, lines 4-7).

However, Lewis' counsel does not specifically state that Lewis is entitled to summary judgment on any alleged "oral contract," and neither Judge Shumate nor Lewis' counsel mentions an oral contract after the referenced comment.

In his Declaration in Opposition to Lewis' motion for summary judgment, Mr. Nelson states:

1. I, Rodney Nelson, am the defendant in the above-captioned case, and I am at least 18 years old. I have personal knowledge and am competent to testify regarding the matters herein. I make this declaration in opposition to Plaintiff's Motion for Summary Judgment.

2. In the fall of 2010 I answered an ad on KSI.com by Reggie Lewis offering an "exclusive" Nutty Guys distribution route in Southern Utah.

3. After several phone calls with Lewis, I agreed to accompany Lewis for deliveries on January 1, 2011.

8. I met with Lewis at his in-laws home in South Salt Lake where he showed me how to do invoices and run the business.

9. After some discussion, we agreed to terms on the purchase of the business and I hand wrote an agreement which both Lewis and I signed.

10. This agreement contained only basic terms of our agreement.

11. Lewis retained the handwritten agreement and was going to take it to his uncle, who is an attorney, to draft a legal contract.

12. Due to the fact that Lewis maintained the contract, I am unable to remember the entire contract.

14. Lewis explained that the sale of the route had to be approved by Nate Murray, the owner of Nutty Guys.

15. Murray approved the sale of the route.

16. After taking over the route, it became very difficult to reach Lewis when I had questions or needed help.

17. In June 2011, Lewis came to my warehouse in Hurricane, Utah, to get me to sign a Nutty Guys commission check that had been written to me by mistake.

18. During this visit, he presented me with a new contract and attempted to get me to sign it attached hereto as EXHIBIT A-1.

19. After reading over the contract it was easily evident that this was an entirely different contract.

20. I told Lewis that I would not sign the contract and he needed to get me an accurate accounting of the balance remaining and proof of the "exclusive area" as contracted.

30. I would never have entered into this agreement if I had known that I was not purchasing an exclusive area as I was led to believe.

A copy of Mr. Nelson's Declaration is included in the Addendum to his Brief.

Mr. Nelson specifically disputed that he agreed to any oral contract, and specifically disputed that the terms of the Asset Purchase Agreement represented the terms of his preliminary agreement, with Lewis, for the purchase of an "exclusive" Nutty Guys route. Therefore, Lewis' assertion that: *"Although neither of the parties signed the Agreement, they orally agreed that its terms and conditions would bind both parties and govern Nelson's acquisition of the right to operate the Route from Lewis..,"* is not an undisputed fact, as Lewis falsely claims in his Order Granting Plaintiff's Motion for Summary Judgment, and cannot be

relied on to grant summary judgment, based on a claim of an oral contract.

Because Mr. Nelson specifically disputed that the Asset Purchase Agreement represented the terms of his preliminary agreement, with Lewis, for the purchase of an “exclusive” Nutty Guys route, as a matter of law, Judge Shumate could not have granted Lewis Summary Judgment based on an alleged oral contract, as “[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.” Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995), and summary judgment is precluded, as a matter of law, when there are issues of material fact.

By definition, summary judgment cannot be granted where there are disputed facts. Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994) (“Summary judgment is proper only when no genuine issues of material fact remain....”).

Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996).

Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah Ct. App. 1995).

Young v. Fire Insurance Exchange, 182 P.3d 911, 2008 UT App 114 (Utah App. 2008).

Because Mr. Nelson specifically disputed that he ever agreed to the terms of the Asset Purchase Agreement, and specifically stated that it was never agreed the terms of the Asset Purchase Agreement would apply to any alleged oral contract, because Mr. Nelson agreed to purchase an “exclusive” Nutty Guys route, while

Lewis knew he did not have an "exclusive" Nutty Guys route to sell, there was never a meeting of the minds, on any alleged oral contract, or the unsigned undated Asset Purchase Agreement, that was allegedly the basis for the alleged oral contract, and thus, no oral contract was ever formed. Additionally, Lewis' fraudulent claim that he was selling Mr. Nelson an "exclusive" Nutty Guys route, renders any alleged oral contract void, and because Mr. Nelson specifically disputed that he ever entered into any oral agreement with Lewis for the purchase of any Nutty Guy Route, as a matter of law, Judge Shumate could not have, lawfully, granted summary judgment based on any alleged oral agreement.

Additionally, because the Order Granting Plaintiff's Motion for Summary Judgment, signed by Judge Westfall on May 20, 2014, and entered by the court on the same date, specifically states that Lewis is granted summary judgment on both his claim for breach of an oral contract, and his claim of unjust enrichment, it is invalid, as a matter of law, because judgment cannot be entered on both a contract claim, and an unjust enrichment claim.² Therefore, Judge Westfall, erred as a

2. E & M Sales West, Inc. v. Diversified Metal Products, Inc., 221 P.3d 838, 2009 UT App 299 (Utah App. 2009)

(" The [unjust enrichment] doctrine is designed to provide an equitable remedy where one does not exist at law. "). " In other words, if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment. "

and as stated in Anderson & Karrenberg v. Warnick, 289 P.3d 600, 2012 UT App 275 (Utah App. 2012):

matter of law when he signed the Order Granting Plaintiff's Motion for Summary Judgment, and authorized the court to enter it.

D. IT IS MOST PROBABLE THAT JUDGE SHUMATE GRANTED LEWIS' MOTION FOR SUMMARY JUDGMENT BASED ON AN UNJUST ENRICHMENT THEORY, ALTHOUGH, AS A MATTER OF LAW, HE WAS PRECLUDED FROM DOING SO.

During the hearing on Lewis' motion for summary judgment, Judge Shumate makes this statement: *"The thing that I am curious about that I'd like you to address is whether or not the record, under Rule 7, supports your motion on that theory of unjust enrichment out of the affidavit that we have from Mr. Lewis, his statement,"* (Transcript of Summary Judgment Hearing, page 5 lines 9-12). That statement is a strong indication that Judge Shumate was considering granting Lewis' motion for summary judgment based on an unjust enrichment theory, although he never actually stated that he was doing so. Judge Shumate also makes this statement: *"But if my analysis is incorrect and this is truly an unjust enrichment case, that's the way I read it based upon the record that's before the Court, but the minute - the process goes like this."* (Transcript of Summary Judgment Hearing, page 21, lines 11-14).

In response to Judge Shumate's statement that *"The thing that I am curious about that I'd like you to address is whether or not the record, under Rule 7,*

(" Under our precedent, a claim of unjust enrichment cannot arise where there is an express contract governing the ' subject matter' of a dispute.").

supports your motion on that theory of unjust enrichment out of the affidavit that we have from Mr. Lewis, his statement," Lewis' counsel replies:

Your Honor, on the unjust enrichment issue, I would like to turn the Court's attention to what isn't marked, but is, in fact, page 10 of the defendant's opposition memo."

It states. "It is agreed that the purchase assets that Lewis conferred a benefit to Nelson, and that Nelson knew of and appreciated this benefit. It is also undisputed that that - Nelson accepted and retained this benefit while knowing that Lewis expected full compensation for the same." Those are all three of the elements that are required for unjust enrichment. So my position is he's not disputing that in his argument. And it goes on, and it says, "However, Lewis never conferred that which he contracted to confer." The contract is an entirely different issue.

And then it goes on, "Without the ability to confer an exclusive area for Nutty Guys in Southern Utah, Lewis effectively only conveyed a list of existing customers that were able to be poached or taken by any Nutty Guys' representatives," but there's no - if we're talking about unjust enrichment, there's - he admits he received the benefit. There's - the language regarding exclusive area would be irrelevant for the unjust enrichment. He's claiming that under the contract there was an agreement as regarding the conveyance of an exclusive area.

(Transcript of Summary Judgment Hearing, page 6-7, lines 17-12).

In response to Lewis' counsel's statements, Judge Shumate states:

So, counsel, your argument to me is basically that from a conceptual and logical reasoned approach to the issues before the Court that there is really no way that the concept exclusive area can have an impact can be material to the elements of unjustment - unjust enrichment for the reason that an exclusive area would have been a contract term. And that the Court, in facing the logical dilemma, can only rule in your favor, because the elements of unjust enrichment haven't been admitted, and Mr. Lewis' affidavit establishes the facts based upon which the Court can render judgment?

(Transcript of Summary Judgment Hearing, page 7, lines 13-23).

Lewis counsel responds: "Yes, and the exclusive area language would be

relevant to the existence of a contract.” (Transcript of Summary Judgment Hearing, page 7, lines 24-25).

It is an undisputed fact that Mr. Nelson paid Lewis \$11,000.00 for an “exclusive” Nutty Guys route. See Lewis’ declaration, paragraph 10, where Lewis states: “From February to May 2011, Nelson made several payments to me totaling approximately \$11,000.00.” See also, paragraph 8, subparagraph 1 of Lewis’ declaration., wherein Lewis states:

[Lewis] has owned and operated a business known as “Southern Utah Nutty Guys” (the “Business”) which is an exclusive area and route assigned to him by the Nutty Guys LLC. The Business consists of the exclusive area in Southern Utah and other assets described below. (Emphasis supplied).

A copy of Lewis’ declaration is included in the addendum to this Brief.

It is an undisputed fact that Mr. Nelson did not get an “exclusive” Nutty Guys route, because Lewis did not have an “exclusive” route to sell. See page 60, lines 8-23, of the transcript of the deposition of Nathan Murray, a copy of which is included in the Addendum to this Brief.

Because it is undeniable that Lewis was paid \$11,000.00 for an “exclusive” Nutty Guys route, but only conveyed a list of existing customers that were able to be poached or taken by any Nutty Guys representative, Judge Shumate would have to have made a factual finding that Mr. Nelson was unjustly enriched by receiving a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, rather than the “exclusive” Nutty Guys route, that Lewis represented he was selling to Mr. Nelson, in order to grant Lewis summary judgment on his unjust enrichment claim.

Judge Shumate would also have to have made a factual finding that paying \$11,000.00 for a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, was not reasonable compensation to Lewis, when Lewis agreed to provide Mr. Nelson with an “exclusive” Nutty Guys route, in order to grant Lewis summary judgment on his unjust enrichment claim.

A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995) (“On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist.”), viewing the facts and all reasonable inferences to be drawn there from in a light most favorable to the nonmoving party. Tretheway v. Miracle Mortgage, Inc., 2000 UT 12, ¶ 2, 995 P.2d 599.

Pigs Gun Club, Inc. v. Sanpete County, 42 P.3d 379 (Utah, 2002).

Because Judge Shumate would have to have made a factual finding that Mr. Nelson was, in fact, unjustly enriched by receiving a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, rather than the “exclusive” Nutty Guys route, that Lewis falsely represented he was selling to Mr. Nelson, and because Judge Shumate would have to have made a factual determination as to what extent Mr. Nelson was, allegedly, unjustly enriched by receiving a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, rather than the “exclusive” Nutty Guys route, that Lewis falsely represented he was selling to Mr. Nelson, in order to grant Lewis summary judgment on his unjust enrichment claim, things that, as a matter of law, Judge Shumate was specifically precluded from doing on summary judgment, as a matter of law, Judge Shumate could not have granted

Lewis' summary judgment on an unjust enrichment claim.

Because Judge Shumate never stated that he was granting Lewis summary judgment on his claim for unjust enrichment, because, as a matter of law, Judge Shumate could not have granted Lewis summary judgment on his unjust enrichment claim, as a matter of law, Judge Westfall also could not grant Lewis summary judgment on his claim of unjust enrichment, without making a factual finding that Mr. Nelson was, in fact, unjustly enriched by receiving a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, rather than the "exclusive" Nutty Guys route, that Lewis falsely represented he was selling to Mr. Nelson, and because Judge Westfall would also have had to make a factual determination as to the extent Mr. Nelson was, allegedly, unjustly enriched by receiving a list of existing customers, that were able to be poached or taken by any Nutty Guys representative, rather than the "exclusive" Nutty Guys route, that Lewis falsely represented he was selling to Mr. Nelson, in order to grant Lewis summary judgment on his unjust enrichment claim, things that, as a matter of law, Judge Westfall was also specifically precluded from doing on summary judgment, Judge Westfall erred, as a matter of law when he signed Lewis' Order Granting Plaintiff's Motion for Summary Judgment, granting Lewis summary judgment on his unjust enrichment claim. Furthermore, as a matter of law, Judge Westfall could not lawfully sign the Order Granting Plaintiff's Motion for Summary Judgment, because it grants Lewis summary judgment on both his claim of an oral contract and his claim for unjust

enrichment, when a court, as a matter of law, cannot grant judgment on both a contract claim and unjust enrichment. E & M Sales West, Inc. v. Diversified Metal Products, Inc., and Anderson & Karrenberg v. Warnick, supra.

Under clear and controlling law, neither Judge Shumate, nor Judge Westfall could lawfully grant Lewis summary judgment on his claim of unjust enrichment.

POINT IV

THE DISTRICT COURT ERRED IN ENTERING THE JUDGMENT, ENTERED ON MAY 20, 2014.

A. AS A MATTER OF LAW, JUDGMENT COULD NOT HAVE BEEN ENTERED, IN FAVOR OF LEWIS, BASED ON ANY ALLEGED ORAL AGREEMENT.

As proven in Point III, C, of this Brief, as a matter of law, neither Judge Shumate, nor Judge Westfall, could grant Lewis summary judgment on the basis of an alleged oral contract. Therefore, as a matter of law, judgment could not be lawfully entered against Mr. Nelson, on May 20, 2014, based on the alleged breach of an oral contract.

B. AS A MATTER OF LAW, JUDGE WESTFALL, COULD NOT ENTER JUDGMENT IN FAVOR OF LEWIS BASED ON AN UNJUST ENRICHMENT CLAIM.

As proven in Point III, D, of this Brief, as a matter of law, neither Judge Shumate, nor Judge Westfall, could grant Lewis summary judgment on the basis of unjust enrichment. Therefore, as a matter of law, judgment could not be lawfully entered against Mr. Nelson on the basis of unjust enrichment.

C. AS A MATTER OF LAW, JUDGE WESTFALL, COULD NOT AWARD LEWIS ANY ATTORNEY FEES, OR INTEREST, BASED ON AN ALLEGED ORAL CONTRACT OR ON AN UNJUST ENRICHMENT CLAIM.

Lewis apparently relies on paragraph 5.4, of the Asset Purchase Agreement, for his request for interest at the rate of 8%, and for an award of attorney fees. Paragraph 5.4 of the Asset Purchase Agreement states:

Default. In the event of a payment default by the Buyer under either paragraphs 2.1 or 2.2 above, Seller may elect to either sue on the debt created by those paragraphs or may elect to recover and obtain the Business as set forth above. Any payment not made within 30 days of the due date as set forth above shall be considered a payment default and shall entitle Seller to elect his remedies as set forth above. In any action pursuant to a default declared under this section, the prevailing party shall be entitled to recover costs and expenses including attorney fees.

"In Utah, attorney fees are awardable only if authorized by statute or by contract." Softsolutions, Inc. v. Brigham Young University, 1 P.3d 1095 (Utah 2000), See also, Chase v. Scott, 38 P.3d 1001, 2001 UT App 404 (Utah App. 2001), citing, Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App.1993), stating "¶ 12 "In Utah, attorney fees are awarded only if authorized by statute or contract."

I. As A Matter Of Law, Judge Westfall Could Not Award Lewis Attorney Fees Or Interest, Based On Any Alleged Oral Contract.

As proven in Point III, C, of this Brief, as a matter of law, neither Judge Shumate, nor Judge Westfall could not have granted Lewis summary judgment based on any alleged oral contract. Therefore, as a matter of law, neither Judge Shumate, nor Judge Westfall, could award Lewis any attorney fees based any

alleged oral contract. Furthermore, because Judge Westfall stated in the Order Granting Plaintiff's Motion for Summary Judgment that Lewis was granted summary judgment on his unjust enrichment claim, as a matter of law, Judge Westfall could not grant Lewis summary judgment on a breach of an alleged oral agreement, because as stated in E & M Sales West, Inc. v. Diversified Metal Products, Inc., supra,

(" The [unjust enrichment] doctrine is designed to provide an equitable remedy where one does not exist at law."). " In other words, if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment. "

and as stated in Anderson & Karrenberg v. Warnick, supra,

(" Under our precedent, a claim of unjust enrichment cannot arise where there is an express contract governing the ' subject matter ' of a dispute. "),

and in Utah attorney fees can only be awarded by contract or statute.

Softsolutions, Inc. v. Brigham Young University, 1 P.3d 1095 (Utah 2000), See also, Chase v. Scott, 38 P.3d 1001, 2001 UT App 404 (Utah App. 2001), citing, Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App.1993).

Because the Order Granting Plaintiff's Motion for Summary Judgment specifically states that Lewis is granted summary judgment on his claim of unjust enrichment, as a matter of law, Judge Westfall, could not lawfully award Lewis attorney fees, or prejudgment interest, and he erred, as a matter of law, in doing so.

II. As A Matter Of Law, Judge Westfall Could Not Award Lewis Attorney Fees Or Interest, Based On A Claim of Unjust Enrichment.

As a matter of law, Judge Westfall could not award Lewis attorney fees on an unjust enrichment claim, because attorney fees are not recoverable in an unjust enrichment cause of action.

Judge Westfall stated in the Order Granting Plaintiff's Motion for Summary Judgment, that he was granting Lewis summary judgment based on his oral contract claim. However, as a matter of law, as stated in E & M Sales West, Inc. v. Diversified Metal Products, Inc., supra, unjust enrichment is not available if there is a legal remedy available. *" In other words, if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment,"* and as stated in Anderson & Karrenberg v. Warnick, supra, *" Under our precedent, a claim of unjust enrichment cannot arise where there is an express contract governing the ' subject matter' of a dispute."* Therefore, as a matter of law, Judge Westfall could not grant Lewis attorney fees on his claim of unjust enrichment, because he granted Lewis summary judgment on his claim of the breach of an oral contract, and as a matter of law, granting a claim on a claim of a breach of contract, precludes a grant of judgment on an unjust enrichment claim.

The Order signed by Judge Westfall, and entered by the court on May 20, 2014, also awards Lewis prejudgment interest at the rate of 8%. However, as a matter of law, Judge Westfall could not award Lewis interest on his claim of

unjust enrichment, because the Order states that Lewis is granted summary judgment on his false claim of an oral contract.

Additionally, because the Order grants Lewis prejudgment interest on his unjust enrichment claim, Judge Westfall erred, as a matter of law, in awarding Lewis prejudgment interest at any rate, because Lewis never sought prejudgment interest, directly as damages, in his unjust enrichment claim, Shoreline Development, Inc. v. Utah County, 835 P.2d 207 (Utah App. 1992, supra).

Judge Westfall simply could not award Lewis attorney fees, or interest, on any theory, and he erred, as a matter of law, in doing so.

POINT V

JUDGE WESTFALL ERRED, AS A MATTER OF LAW, WHEN ISSUING HIS MEMORANDUM DECISION AND ORDER ON MR. NELSON'S MOTION TO ALTER OR AMEND THE ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND HIS MOTION TO ALTER OR AMEND THE JUDGMENT, ENTERED MAY 20, 2014.

A. JUDGE WESTFALL'S RULING THAT THE WRITTEN FINDINGS OF FACT, AND CONCLUSIONS OF LAW, CONTAINED IN THE ORDER GRANTING MOTION FOR SUMMARY JUDGEMENT, PREPARED BY LEWIS' ATTORNEY, ARE CONTROLLING OVER JUDGE SHUMATE'S ORAL RULING IS INCORRECT, AS A MATTER OF LAW.

Once again, it is an indisputable fact that Judge Shumate never specified the legal theory, upon which he was relying, when he orally granted Lewis' motion for summary judgment. And, once again, it is also an indisputable fact that Judge Shumate never identified any facts, that he found to be undisputed

facts, upon which he relied, when he orally granted Lewis' motion for summary judgment. Although Judge Shumate did make the following statement: "*There are undisputed issues of fact in the various statements and declarations as well as the arguments,...*"

In his Memorandum Decision and Order denying Mr. Nelson's Motions to Alter or Amend, Judge Westfall states that the Order Granting Plaintiff's Motion for Summary Judgment, prepared by Lewis' counsel, is valid because it prevails over Judge Shumate's oral ruling, with respect to undisputed facts, even though Judge Shumate never identified any alleged facts that, he considered to be undisputed facts.

Because Judge Shumate never identified any alleged facts, that he considered "undisputed facts," Judge Westfall's statement that:

Our case law is clear that where a court's oral ruling differs from a final written order, the latter controls. "MF. v. IF. 2013 UT App 247, 116, 312 P.3d 946, quoting Evans v. State, 963 P.2d 177, 180 (Utah 1998). The Court notes, therefore, that to the extent there were any deficiencies in the prior oral ruling on summary judgment or any discrepancies between that ruling and the written order, the written order obviously prevails,

while accurately representing statements contained in those cases, is irrelevant to the facts of this case.

A cursory review of FM. v. IF. and Evans v. State, proves that they are not even remotely applicable to the facts of this case. First, the judges that signed the written orders in M.F. v. J.F. and Evans v. State, were the same judges that issued the oral rulings, unlike this case, where Judge Shumate made the oral ruling on

Lewis' motion for summary judgment, while Judge Westfall signed the written order, prepared by Lewis' counsel, even though he did not attend the hearing on Lewis' motion for summary judgment, and knew absolutely nothing about what transpired at the hearing, had any idea of the legal theory Judge Shumate relied on when granting Lewis' motion for summary judgment, or had any idea of what facts Judge Shumate considered to be undisputed facts, upon which he could grant Lewis' motion for summary judgment. Additionally, the written orders signed by the judges in M.F. v. J.F. and Evans v. State made only minor changes to the actual rulings, orally made by the judges who actually presided at the hearings.

In this case, the Order Granting Plaintiff's Motion for Summary Judgment, prepared by Lewis' counsel, contains findings and rulings, Judge Shumate never made, or even alluded to, at the hearing on Lewis' motion for summary judgment. Furthermore, the findings and rulings contained in the Order Granting Plaintiff's Motion for Summary Judgment, are supposedly based on Mr. Nelson's failure to respond to Lewis' requests for admissions, that exceeded the number of requests permitted under Rule 26(c)(3), and Rule 26(c)(5), URCP, which, contrary to Judge Westfall's assertion, are not admitted because Mr. Nelson failed to respond to them, especially when Mr. Nelson was ordered to respond to 30 requests for admission, submitted to him, under the Rules of Bankruptcy Procedure. See excerpts from the Hearing on Lewis Motion for Summary Judgment, *infra*.

Because the Order Granting Plaintiff's Motion for Summary Judgment contains, alleged undisputed facts, that Judge Shumate never stated, suggested, or even implied, were undisputed facts, and because neither Lewis' attorney, nor Judge Westfall had any idea of what alleged facts, Judge Shumate allegedly considered undisputed facts, Judge Westfall erred, as a matter of law, in his assertion that the alleged undisputed facts, in the written Order Granting Plaintiff's Motion for Summary Judgment, prepared by Lewis' counsel, control over the undisputed facts, that Judge Shumate never made, is wrong, as a matter of law.

B. JUDGE WESTFALL'S RULING THAT MR. NELSON ADMITTED THE TWENTY-FIVE REQUESTS FOR ADMISSION, BEYOND THE FIVE REQUESTS FOR ADMISSION THAT LEWIS WAS ENTITLED TO SUBMIT, UNDER THE PROVISIONS OF RULE 26 URCP, IS SIMPLY WRONG, AS A MATTER OF LAW.

Judge Westfall's reliance on Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1061 (Utah 1998); Jensen v. Pioneer Dodge Ctr., 702 P.2d 98, 100 (Utah 1985); Kotter v. Kotter, 2009 UT App 60, 16-17, 206 P.3d 633; Barnes v. Clarkson, 2008 UT App 44, IT 11, 178 P.3d 930; and In re E.R., 2000 UT App 143, 13, 2 P.3d 948, for his incorrect assertion that the requests for admissions submitted to Mr. Nelson, by Lewis, beyond the five requests permitted under Rule 26(c)(3) and Rule 26(c)(5) URCP, is admitted, is misplaced.

The current version of Rule 26 URCP, that was in effect at the time Lewis submitted his discovery to Mr. Nelson, specifies that actions claiming \$50,000, or

less in damages, are permitted standard discovery as described for Tier 1 cases. Rule 26(c)(5) URCP states that only five requests for admissions are permitted in Tier 1 cases.

It is indisputable that this case is a Tier 1 case. Lewis filed this case on July 2, 2012. Lewis' amended complaint states that Mr. Nelson owes him \$15,020.00. Therefore, under the express provisions of the present version of Rule 26(c)(5) URCP, enacted November 2011, Lewis was only permitted to ask five requests for admissions of Mr. Nelson.

Langeland v. Monarch Motors, Inc.; Jensen v. Pioneer Dodge Ctr.; Kotter v. Kotter; Barnes v. Clarkson; and In re E.R., supra, the cases cited by Judge Westfall, for his erroneous assertion that Mr. Nelson admitted the 25 additional requests for admission, submitted by Lewis, beyond the five requests for admission Lewis is permitted to ask, under the provisions of Rule 26(c)(5) URCP, are all cases that were decided prior to the November 2011 enactment of the present Rule 26. Additionally, the requests for admission, that were deemed admitted, in Langeland v. Monarch Motors, Inc.; Jensen v. Pioneer Dodge Ctr.; Kotter v. Kotter; Barnes v. Clarkson; and In re E.R., did not exceed the number of requests for admission permitted under the version of the URCP, that was in effect, at the time the requests for admissions were submitted, as Lewis' requests for admissions did in this case. Therefore, the holdings of Langeland v. Monarch Motors, Inc.; Jensen v. Pioneer Dodge Ctr.; Kotter v. Kotter; Barnes v. Clarkson;

and In re E.R., with respect to requests for admissions being deemed admitted, are completely irrelevant to the requests for admissions Lewis submitted to Mr. Nelson beyond the five requests for admission permitted under Rule 26(c)(5) URCP.

A court is not permitted to interpret a Rule of Civil Procedure in a manner that makes a part of the Rule, or another Rule, meaningless. See Wright v. University of Utah, 876 P.2d 380 (Utah App. 1994), holding that:

Permitting Wright to proceed again after she neither amended her complaint as a matter of right nor properly sought leave to do so would render Rule 12(b)(6) meaningless and restrict trial courts seeking to dispose of motions brought under that rule. This we cannot do.

See also: State v. Barrett, 2005 UT 88, ¶ 29, 127 P.3d 682, wherein, the Utah Supreme Court, citing Burns v. Boyden, 2006 UT 14, ¶ 19, 133 P.3d 370, stated:

Our objective in interpreting a court rule is to give effect to the intent of the body that promulgated it. [14] Thus, we interpret a court rule in accordance with its plain meaning, [15] and we construe the rule so that it is in harmony with related rules. [16]

Mr. Nelson answered the first five of Lewis' requests for admissions, the maximum number of requests for admission permitted under Rule 26(c)(3), and 26(c)(5), URCP. And although Lewis submitted an additional twenty-five requests for admissions to Mr. Nelson, under the provisions of Rule 26(c)(3), and 26(c)(5), URCP, Mr. Nelson was not obligated to respond to any of those additional requests for admissions.

Rule 26(c)(6) URCP states:

Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

Lewis did not seek, nor obtain, any court authorization for any “Extraordinary discovery,” permitted under the provisions of Rule 26(c) URCP. Therefore, Mr. Nelson was not obligated to answer the additional twenty-five requests for admissions submitted by Lewis. And Mr. Nelson’s failure to respond to the unauthorized requests for admissions, as a matter of law, cannot result in those requests for admissions being deemed admitted, and/or used for any purpose, whatsoever, in the litigation of this case.

Judge Westfall’s assertion that Mr. Nelson’s failure to deny the request for admission, beyond the five permitted under the provisions of Rule 26(c)(3) and Rule 26(c)(5) URCP, resulted in those additional admissions being admitted, is blatantly incorrect, as a matter of law, because Judge Westfall is not permitted to interpret Rule 26 in such a way to make the provisions of Rule 26(c)(3), and 26(c)(5), URCP, limiting the number of requests for admissions that may be submitted meaningless. Judge Westfall is also not permitted to interpret Rule

26(c)(6) URCP, that specifies the requirements for submission of additional requests for admissions, meaningless, as he did, in this case, by ruling that the additional twenty-five requests for admission, submitted by Lewis, were admitted, because Mr. Nelson did not respond to them.

POINT VI
THE DISTRICT COURT ERRED IN ENTERING THE AMENDED JUDGMENT, AGAINST MR. NELSON, ENTERED NOVEMBER 17, 2014.

Because, as previously established in this Brief, both Judge Shumate, and Judge Westfall, erred, as a matter of law, in granting Lewis' motion for summary judgment, Judge Westfall, also erred, as a matter of law, in authorizing the entry of the Amended Judgment, entered November 17, 2014, that awarded Lewis attorney fees, when there is no valid contract, written or oral, or any statute, entitling Lewis to collect attorney fees, and Lewis cannot be awarded attorney fees on an unjust enrichment claim.

In his memorandum decision, denying Mr. Nelson's Motions to Alter or Amend, Judge Westfall states: *"Finally, the Court previously found that the contract allows 'the prevailing party ... to recover costs and expenses including attorney fees.'"* Judge Westfall would have to be referring to the alleged oral contract between Mr. Nelson and him, as Lewis never asserted a claim for breach of a written contract in either his amended complaint, or in his memorandum in support of his motion for summary judgment. However, Judge Shumate never stated, suggested, or even implied, that Lewis is entitled to costs, expenses, and/or

attorney fees, at the hearing on Lewis' motion for summary judgment. And the language "*the contract allows the prevailing party ... to recover costs and expenses including attorney fees*" does not appear anywhere in the Transcript of the Hearing on Lewis' Motion for Summary Judgment. However, it is not surprising that Judge Shumate does not mention interest and attorney fees at the Hearing on Lewis' motion for Summary Judgment, because Judge Shumate appears to grant summary judgment on an unjust enrichment theory not a written contract, and, as a matter of law, attorney fees could not be awarded on Lewis' unjust enrichment claim, and Lewis failed to request interest as damages, in his amended complaint, as he was required to do under the holding of Shoreline Development, Inc. v. Utah County, *supra*.

As previously established in this Brief, in his Declaration in Opposition to Lewis' motion for summary judgment, Mr. Nelson states:

I met with Lewis at his in-laws home in South Salt Lake where he showed me how to do invoices and run the business.

(Mr. Nelson's Declaration, ¶8).

After some discussion, we agreed to terms on the purchase of the business and I hand wrote an agreement which both Lewis and I signed.

(Mr. Nelson's Declaration, ¶9).

In June 2011, Lewis came to my warehouse in Hurricane, Utah, to get me to sign a Nutty Guys commission check that had been written to me by mistake. (Mr. Nelson's Declaration, ¶17).

During this visit, he presented me with a new contract and attempted to get me to sign it attached hereto as EXHIBIT A-1.

(Mr. Nelson's Declaration, ¶18).

After reading over the contract it was easily evident that this was an entirely different contract. (Mr. Nelson's Declaration, ¶19).

I told Lewis that I would not sign the contract and he needed to get me an accurate accounting of the balance remaining and proof of the "exclusive area" as contracted.

(Mr. Nelson's Declaration, ¶20).

I also asked for a copy of the original contract.

(Mr. Nelson's Declaration, ¶21).

See, Mr. Nelson's Declaration included in the Addendum to his Brief.

Because Mr. Nelson specifically stated, in his Declaration, filed in opposition to Lewis's motion for summary judgment, that the unsigned, undated Asset Purchase Agreement, Lewis submitted to the court, did not represent the terms of the preliminary agreement between Lewis and him, for the sale of an "exclusive" Nutty Guys route, and because Judge Shumate specifically stated in the hearing on Lewis' motion for summary judgment, that *"The fact that we don't have a written agreement the fact that everybody is of one accord on at least one point, and that is that nothing got signed, and that there were things proposed back and forth, but nobody signed anything impresses the court that this may, in deed, be an unjust enrichment kind of case if your client would prevail,"* neither Judge Shumate, nor Judge Westfall, could lawfully grant summary judgment based on the alleged oral contract, as *"[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact."* Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995),

and summary judgment is precluded, as a matter of law, when there are issues of material fact.

By definition, summary judgment cannot be granted where there are disputed facts. Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994) ("Summary judgment is proper only when no genuine issues of material fact remain....").

Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996).

Summary judgment is only appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."

Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah Ct. App. 1995).

Young v. Fire Insurance Exchange, 182 P.3d 911, 2008 UT App 114 (Utah App.

2008). Additionally, as a matter of law, judgment could not be entered against Mr. Nelson, because in the Order Granting Plaintiff's Motion for Summary Judgment, Judge Westfall granted Lewis summary judgment on both his claim of an oral contract and his claim of unjust enrichment.

As previously established in this Brief, judgment based on a contract claim, as a matter of law, precludes judgment on a claim of unjust enrichment. Likewise, as a matter of law, judgment on a claim of unjust enrichment precludes judgment on a contract claim. Therefore, as a matter of law, Judge Westfall erred when he authorized the entry of the Judgment, entered on May 20, 2014, and the Amended Judgment entered on November 17, 2014.

Judge Westfall granted Mr. Nelson's Motion to Alter or Amend the May 20, 2014, judgment to remove unauthorized costs from the judgment, i.e., postage, copying costs, and something called "*Tracers People Search CSR Investigations*," costs that would never have been allowed, had Judge Westfall actually read the judgment before signing it.

As a matter of law, the judgment could not be entered because Judge Westfall, as a matter of law, could not grant Lewis summary judgment on both his contract claim and his unjust enrichment claim. Judge Westfall could not lawfully authorize the entry of the Amended Judgment, awarding Lewis attorney fees and/or prejudgment interest, even assuming, arguendo, that he could otherwise enter any judgment in favor of Lewis, which he lawfully could not do.

POINT VII
**JUDGE SHUMATE ERRED IN DENYING MR. NELSON'S MOTION TO
FILE AN AMENDED ANSWER AND AMENDED COUNTERCLAIM.**

Although a trial court has discretion to deny a party's request to file a counterclaim, Kelly v. Hard Money Funding, Inc., supra, it is an abuse of discretion, and error, for a trial court to refuse to permit the filing of a counterclaim if the request to do so is filed, prior to the trial, so that it will not delay a scheduled trial. See, East River Bottom Water Co. v. Dunford, 167 P.2d 693, 109 Utah 510 (Utah 1946).

Because Mr. Nelson filed his Motion to File a Counterclaim long before this case was scheduled for trial, because the issues presented in Mr. Nelson's

proposed counterclaim require the same evidence as does Lewis' Amended Complaint, because Lewis fraudulently induced Mr. Nelson to enter into an agreement to purchase an "exclusive" Nutty Guys route, when Lewis knew that he did not have an "exclusive" Nutty Guys route to sell, because Lewis claims that Mr. Nelson agreed to pay \$25,000.00 for an "exclusive" Nutty Guys route, that Lewis knew he did not have, and thus, could not sell, yet asked the district court to award him not the \$25,000.00, less the \$11,000.00 that he admits Mr. Nelson paid him, but rather \$33,000.00, less the \$11,000.00, Mr. Nelson paid him, and because Judge Shumate stated that Mr. Nelson's counterclaim issues would be addressed at trial, including Lewis' fraud, and his demand for more money than he admits Mr. Nelson agreed to pay him for an "exclusive" Nutty Guys route, that Lewis fraudulently claimed he had to sell, Judge Shumate erred in denying Mr. Nelson's Motion to File an Amended Complaint.

CONCLUSION AND REQUEST FOR RELIEF

Both Judge Shumate and Judge Westfall erred, as a matter of law, in granting Lewis' motion for summary judgment. Judge Westfall also erred, as a matter of law, when he authorized the entry of the Order Granting Plaintiff's Motion for Summary Judgment, the Judgment on May 20, 2014, and the Amended Judgment on November 17, 2014. Judge Westfall further erred as a matter of law, when he denied Mr. Nelson's Motion to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment, and when he only partially

amended the May 20, 2014 Judgment. Therefore, this Court must reverse the grants of summary judgment, vacate the Amended Judgment, and remand this case to the district court for a trial on the merits, before another judge that is not biased and prejudiced against Mr. Nelson.

Mr. Nelson is also entitled to recover his costs and attorney fees incurred in prosecuting this appeal, as provided by Utah Code §78B-5-826.

Respectfully submitted this 17th day of March 2015.

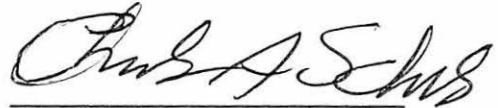
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Charles A. Schultz
Attorney for Rodney Nelson

CERTIFICATION OF COMPLIANCE WITH RULE 24(f)(1) UTAH
RULES OF APPELLATE PROCEDURE

I, Charles Schultz, hereby certify that this brief complies with the type volume limitation of Utah R. App. 24(f)(1) because it is 13,671 words, as determined by my word processor, that is Word X3.

Dated this 17th day of March 2015.

A handwritten signature in cursive script, reading "Charles A. Schultz".

Charles A. Schultz
Attorney for Rodney Nelson

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of March 2015, I mailed two true and copies of this to Brief Penrod W Keith, Michael F. Leavitt, and Elijah L. Milne, at the address listed below.

DURHAM JONES & PINEGAR, P.C.,
111 East Broadway, Suite 900,
PO. Box 4050 Salt Lake City, Utah 84110-4050

A handwritten signature in black ink, appearing to read "Charles A. Schultz", written over a horizontal line.

Charles A. Schultz
Attorney for Rodney Nelson

ADDENDUM

Rule 26 Utah Rules of Civil Procedure

Utah Code §78A-4-103(2)(j):

Amended Complaint

Counterclaim

Order denying Counterclaim

Requests for Admission

Response to Requests for admissions

Memorandum in support of motion for summary judgment

Memorandum in Opposition to Motion for Summary Judgment

Hearing on Summary Judgment Motion.

Order Granting Plaintiff's Motion for Summary Judgment

May 20, 2014 Judgment

Memorandum decision on Motions to Alter or Amend

November 17, 2014, Amended Judgment

Declaration of Reggie Lewis

Declaration of Rodney Nelson

Selected pages of Murray Deposition

"Minutes for ORDER TO SHOW CAUSE 1ST APPE,"

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**IN THE FIFTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH,
WASHINGTON COUNTY, ST. GEORGE DIVISION**

REGGIE LEWIS, Plaintiff, v. RODNEY NELSON Defendant.	AMENDED COMPLAINT AND JURY DEMAND Civil No. 120500402 Judge James L. Shumate
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Plaintiff Reggie Lewis ("Plaintiff" or "Lewis"), complains of defendant Rodney Nelson ("Defendant" or "Nelson"), and alleges as follows:

A. PARTIES, JURISDICTION & VENUE

1. Plaintiff Reggie Lewis is an individual residing in Salt Lake County, Utah.
2. Defendant Rodney Nelson is an individual residing in St. George, Washington

County, Utah and doing business in Washington County Utah and potentially elsewhere.

Plaintiff believes that the Defendant's street address is 415 South Dixie Drive #10, St. George Utah.

3. This Court has jurisdiction over this matter pursuant to Utah Code 78A-5-102(1).

4. Venue is proper in this Court pursuant to the parties' contract, identified below, and pursuant to Utah Statute because a substantial part of the events giving rise to the dispute occurred in this district, a substantial part of the property that is the subject of the action is situated in this district, and this Court has personal jurisdiction over each of the parties as alleged throughout this complaint.

B. STATEMENT OF FACTS

1. In or about December of 2010, Plaintiff owned and operated a supply route for Nutty Guys Inc. (the "NG Route"). Nutty Guys is a business located in Salt Lake City, Utah which distributes various comestible items to retail outlets.

2. Plaintiff acquired the NG Route from Chuck Lamb in or about October of 2009 for a total purchase price of \$30,000. Plaintiff operated the NG Route continuously from July of 2009 until January of 2011.

3. In or about November or December of 2010, Defendant approached Plaintiff about purchasing the NG Route. After some period of negotiation, Plaintiff agreed to sell the NG Route to the Defendant under the terms of an oral contract.

4. The Plaintiff and Defendant had discussed a written contract and had produced a draft written contract. That draft written contract is attached hereto as **Exhibit 1**. However, the Plaintiff and Defendant decided to go forward with a "handshake" agreement instead of executing the written agreement attached hereto. Nevertheless, the written agreement in Section 1 and 2 accurately describes the assets to be sold and the purchase price for the NG Route and related assets and the essential payment terms agreed to orally by the Parties.

5. The essential terms of the oral agreement between the parties are as follows:

(a) The assets to be sold by Plaintiff to Defendant included 1) the NG Route, 2) assignment of the existing account receivables and the reserve held by Nutty Guys LLC in the approximate amount of \$8,000 ("the Reserve Account") and 3) all other inventory, accounts, business names and other good will and intangible property associated with the NG Route. (the "Purchased Assets").

(b) the total purchase price of the Purchased Assets was \$25,000 as a base payment plus the value of the Reserve account (approximately \$8,000).

(c) The Defendant committed to make regular payments from his commission checks from Nutty Guys throughout the coming year with the balance due on February 1, 2012 exactly under the terms set forth in paragraph 2.1 of Exhibit 1 hereto.

6. The Plaintiff in or about January of 2011 transferred all of the Purchased Assets to the Defendant and notified Nutty Guys of the transfer of the NG Route.

7. The Defendant made several payments totaling approximately \$11,000 from February 2011 until May of 2011. After making the last payment, Defendant failed to make any payments as contemplated by the oral agreement.

8. Plaintiff became alarmed at the cessation of payments by Defendant in the summer of 2011 and sent Defendant, through counsel, the letters attached hereto as Exhibit 2 in September of 2011.

9. Defendant responded by sending the emails attached hereto as Exhibit 3. Defendant essentially acknowledged his obligation but asked for more information.

10. Plaintiff was confused by the response since information about Defendant's payments to that point pursuant to the oral agreement were contained in the demand letter.

11. As set forth under the contract and after expiration of a grace period, all amounts under the contract were to be paid by July of 2012. Defendant has failed to make payment as required by the contract.

12. Defendant has failed to pay and owes Plaintiff the unpaid balance of the \$25,000 base payment plus all amounts obtained by Defendant from the Reserve Account. Defendant owes the Plaintiff, pursuant to the contract, approximately \$15,020, pursuant to the purchase price set forth in the contract and additional amount for the unpaid balance in the reserve account as set forth below.

FIRST CLAIM FOR RELIEF

(Breach of Contract)

13. Plaintiff incorporates all prior allegations in this complaint as though set forth in this claim for relief.

14. The oral agreement between Plaintiff and Defendant constitutes a binding contract between the parties.

15. By engaging in the conduct described above and specifically by failing to make interim payments and final payment, Defendant has materially breached the payment provisions in the oral agreement.

16. Prior to Defendant's material breaches, Plaintiff performed fully each and every material condition, covenant and obligation imposed upon it under the terms of the Agreement.

17. As a result of Defendant's material breaches and threatened breaches set forth above, Plaintiff has been severely harmed and damaged and has suffered and will continue to

suffer damages in the approximate amount of \$15,020 plus interest and additional amount attributable to the reserve account.

18. Plaintiff is entitled to damages for breach of contract in the foregoing amount or for such other amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(Unjust Enrichment, Alternative Count)

19. Plaintiff incorporates herein each of the above paragraphs.

20. Pursuant to the transfer of the Purchased Assets, Defendant has obtained significant rights and property from the Defendant.

21. Defendant has failed to adequately compensate Plaintiff for the value of the Purchased Assets. Based on previous sales of the NG Route, the Purchased Assets were worth at least \$25,000 at the time they were transferred from Plaintiff to Defendant. Defendant also obtained value from the Reserve Account transferred to him by Plaintiff.

22. Defendant's conduct in failing to pay the Plaintiff the value of the Purchased Assets is inequitable.

23. Plaintiff is therefore entitled to damages from Defendant in the amount of \$15,020 plus interest and any amounts realized from the unpaid value of the Reserve Account.

C. PRAYER FOR RELIEF

WHEREFORE, Lewis demands judgment in its favor and against defendant as follows:

1. A judgment for damages in an amount of \$15,020 plus interest and an accounting on the balance of the reserve account or an amount to be determined at trial;
2. A judgment for the costs and reasonable attorney fees incurred in connection with this action and in enforcing the Agreement to the extent permitted by law or the oral agreement between the parties; and
3. Such other and further relief as the Court deems appropriate.

DATED this 2nd day of July, 2012.

DURHAM JONES & PINEGAR, P.C.

By: /s/ Penrod W. Keith
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Attorneys for Plaintiff

Plaintiff's address:
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2416 Bonanza Court
South Jordan, UT 84095

RODNEY NELSON
PRO SE
PO BOX 69
BRIGHAM CITY, UT 84302

FILED
FIFTH DISTRICT COURT
2013 MAY -8 AM 11:14
WASHINGTON COUNTY

FIFTH DISTRICT COURT FOR THE STATE OF UTAH
BY _____

WASHINGTON COUNTY, ST. GEORGE

206 West Tabernacle Suite 100 St. George, UT 84770

Reggie Lewis

Complainant

v

Rodney Nelson

Defendant

COUNTERCLAIM

Civil Number 12050⁰402

JUDGE: JAMES L SHUMATE

Complaint consists of 32 pages.

Counterclaim Plaintiff, Rodney Nelson, alleges as follows based on information and belief.

JURISDICTION AND VENUE

Counterclaim Plaintiff, Rodney Nelson, (hereafter referred to as Counterclaim Plaintiff), is a resident of Box Elder County, with business interests throughout Utah.

Cross Defendant, Reggie Lewis, (hereafter referred to as Lewis), is a resident of Salt Lake County, and appears to have business interests in Washington County Utah.

The Court has jurisdiction over this case as the events of the case occurred in Washington County, Utah.

BACKGROUND AND STATEMENTS OF FACTS

1. In December of 2011 Lewis, Reggie Lewis, offered to Counterclaim Plaintiff, Rodney Nelson, a business which he represented as his sole business, named "Southern Utah Nutty Guys".
2. Lewis alleged that the Route, to be sold, consisted of exclusive rights to a designated area of Southern Utah for which he was the sole distributor and owner.
3. Lewis made every effort to lead Counterclaim Plaintiff to believe that he had the legal right to sell the route. Lewis stated the contract he had with Nutty Guys was being rewritten by Nutty Guys, and He would forward Counterclaim Plaintiff a copy, however when Counterclaim Plaintiff request a copy, he received no reply.
4. Lewis's offer consisted of terms of payment and the transfer of assets, which were noted on a piece of paper during the negotiations, and kept by Lewis for the purpose of incorporating the agreed terms together with the necessary legal information into a contract they could both sign to consummate their deal.
5. Lewis was in a hurry to sell the route due to a new job in Salt Lake city
6. Lewis negotiated with Counterclaim Plaintiff to take

over the business and allow him to receive Counterclaim Plaintiff's pay from Nutty Guys for a period of approximately four months.

7. The checks Lewis was to receive were commission checks paid to him by Nutty Guys as though he was still working the route, however the money was earned by Counterclaim Plaintiff

8. Counterclaim Plaintiff worked the route and collected the over due amounts and paid the money to Nutty Guys for Lewis past due accounts, with the understanding that for the amounts collected Lewis would give Counterclaim Plaintiff credit of twenty five percent of the collected money as additional payment towards the purchase of the Route.

9. Therefore, Counterclaim Plaintiff was to receive credit for the commission checks and the percentage of the past due money collected as credit towards the purchase of the business.

10. In April 2012, Counterclaim Plaintiff met with his accountant to discuss his taxes for the tax year 2011, he explained the terms of the verbal agreement and his lack of correspondence from the Lewis regarding the payments made to Lewis by Nutty Guys.

11. The Accountant was concerned that the money paid by Nutty Guys would be required to be claimed as income on his return or

that of his business. The actual treatment of the income as self employment income or as payment to acquire a business opportunity fall under two entirely different IRC Codes and application of the tax code is governed by the type of income and expense. The accountant agreed to correspond with Lewis and also research the terms of the proposed sale.

12. Lewis did not reply to the accountants request for a copy of the contract of sale that had been promised as well as an accounting of the payments and credits received by Lewis.

13. In June of 2012 Lewis presented a Contract (see Exhibit C)to Counterclaim Plaintiff. Counterclaim Plaintiff did not sign it, and requested it be corrected to include payments made and disclosure information.

14. In June 2012 Counterclaim Plaintiff request an accounting of the amounts paid to Lewis by Nutty Guys for the period Cross Plaintiff had worked the route. Lewis did not reply.

15. In July 2012 Counterclaim Plaintiff requested an accounting of the amounts paid to Lewis by Nutty Guys for the period Cross Plaintiff had worked the route. Lewis did not reply.

16. In August of 2012 correspondence began by email. (See Exhibits (A) & (B)

17. It was at this time it appeared obvious that Cross Complainant was a victim of fraud and most likely unlawful

conversion.

18. Counterclaim Plaintiff never received a corrected contract, with the required disclosures or the payment information, therefore never signed a contract.

19. Lewis attached Exhibit A, (see EXHIBIT C), to the Complaint filed by him in July of 2012, which he suggests incorporates the contract entered into for the purchase of the Route.

20. Counterclaim Plaintiff would not sign the contract presented as Exhibit A, (see EXHIBIT C). The contract was incorrect and lacked the essential information required. An accounting of the payments made and the following needed to be included in the contract:

(a.) A detailed explanation of the terms of the contract, accurately, clearly, and concisely stated, in a legible, written document to be agreed to and signed prior to any commitment to a contract of purchase.

(b) A factual description of the business opportunity offered to be sold by the Lewis.

(c) A statement of the total funds which must be paid to Lewis or to a person affiliated with the business opportunity seller, or which the business opportunity seller or such

affiliated person imposes or collects in whole or in part on behalf of a third party, in order to obtain or commence the business opportunity operation, such as initial business opportunity fees, deposits, down payments, prepaid rent, and equipment and inventory purchases. If all or part of these fees or deposits are returnable under certain conditions, these conditions shall be set forth; and if not returnable, such fact shall be disclosed.

(d) A statement describing any recurring funds required to be paid, in connection with carrying on the business opportunity business, by the business opportunity purchaser to the business opportunity seller or to a person affiliated with the business opportunity seller, or which the business opportunity seller or such affiliated person imposes or collects in whole or in part on behalf of a third party, including, but not limited to, royalty, lease, advertising, training, and sign rental fees, and equipment or inventory purchases.

(e) A statement setting forth the name of each person (including the business opportunity seller) the business opportunity purchaser is directly or indirectly required or advised to do business with by the business opportunity seller, where such persons are affiliated with the business opportunity seller.

(f) A statement describing any real estate, services, supplies, products, inventories, signs, fixtures, or equipment relating to the establishment or the operation of the business

opportunity business which the business opportunity purchaser is directly or indirectly required by the business opportunity seller to purchase, lease or rent; and if such purchases, leases or rentals must be made from specific persons (including the business opportunity seller), a list of the names and addresses of each such person. Such list may be made in a separate document delivered to the prospective business opportunity purchaser with the prospectus if the existence of such separate document is disclosed in the prospectus.

(g) A description of the basis for calculating, and, if such information is readily available, the actual amount of, any revenue or other consideration to be received by the business opportunity seller or persons affiliated with the business opportunity seller from suppliers to the prospective business opportunity purchaser in consideration for goods or services which the business opportunity seller requires or advises the business opportunity purchaser to obtain from such suppliers.

(h) A statement of all the material terms and conditions of any financing arrangement offered directly or indirectly by the business opportunity seller, or any person affiliated with the business opportunity seller, to the prospective business opportunity purchaser; and

(i) A description of the terms by which any payment is to be received by the business opportunity seller from:

(a) Any person offering financing to a prospective business opportunity purchaser; and

(b) Any person arranging for financing for a prospective business opportunity purchaser.

(j) A statement describing the material facts of whether, by the terms of the business opportunity agreement or other device or practice, the business opportunity purchaser is:

(k) Limited in the goods or services he or she may offer for sale;

(ii) Limited in the customers to whom he or she may sell such goods or services;

(iii) Limited in the geographic area in which he or she may offer for sale or sell goods or services; or

(iv) Granted territorial protection by the business opportunity seller, by which, with respect to a territory or area,

(1) The business opportunity seller will not establish another, or more than any fixed number of, business opportunities or company-owned outlets, either operating under, or selling, offering, or distributing goods, commodities or services, identified by any mark set forth under paragraph (a)(1)(iii) of this section; or

(m) The business opportunity seller or its parent will not establish other business opportunities or company-owned outlets selling or leasing the same or similar products or services under a different trade name, trademark, service mark, advertising or other commercial symbol.

(n) A statement of the extent to which the business opportunity seller requires the business opportunity purchaser (or, if the business opportunity purchaser is a corporation, any person affiliated with the business opportunity purchaser) to participate personally in the direct operation of the business opportunity.

(o) A statement disclosing, with respect to the business opportunity agreement and any related agreements:

(i) The term (i.e., duration of arrangement), if any, of such agreement, and whether such term is or may be affected by any agreement (including leases or subleases) other than the one from which such term arises;

(ii) The conditions under which the business opportunity purchaser may renew or extend;

(iii) The conditions under which the business opportunity seller may refuse to renew or extend;

(iv) The conditions under which the business opportunity purchaser may terminate;

(v) The conditions under which the business opportunity seller may terminate;

(vi) the obligations (including lease or sublease obligations) of the business

FACTS AND POINTS OF AUTHORITY

21. Per the Federal Register/ Vol. 72, No. 61 / Friday, March 30, 2007 / Rules and Regulations, the above disclosures, (see 24.

(a)-(P)(vi)), are required by law, to protect prospective purchasers from fraud and misleading representations made by business opportunity sellers in the United States.

22. FTC RULES GOVERNING DISCLOSURE OF INFORMATION BY A BUSINESS OPPORTUNITY SELLER FTC and UTAH State law prohibit sales of business opportunities unless the seller gives potential purchasers a pre-sale disclosure document that has first been filed with a designated state agency. (see Utah Code Ann. §13-15) ("The seller will be subject to a statutory fine of \$2,500.00 for each violation of the statute. In addition, the seller is subject to an order to cease and desist if the information is not filed within fifteen (15) days of receiving the division's written demand. If the seller violates this order, it will be subject to a civil penalty of \$5,000.00 for each violation. Further, if the seller also fails to provide the information in a single disclosure statement or prospectus to the purchaser at least ten days prior to execution of the agreement or payment, then the purchaser is entitled to rescind the agreement, to an award of attorney's fees in enforcing that rescission, and to a judgment for the amount of the greater of \$2,000.00 or actual damages")

2. Fraud, Deceit, Or Misrepresentation

23. The Counterclaim Plaintiff asserts that the Lewis obtained the Counterclaim Plaintiffs' consent to the agreement through fraud, deceit, or misrepresentation by the plaintiff, and

as a result the contract is invalid.

24. Counterclaim Plaintiff claims that Lewis fraudulently misrepresented the Route he was selling as his business opportunity which included exclusive rights to the sales area. Counterclaim Plaintiff claims Lewis engaged in the elements of fraud through:

(1) false representation

(2) His intention to induce the plaintiff to act

(4) Counterclaim Plaintiff justifiably relied on Lewis's stated terms and the opportunity offered.

(5) Therefore caused damage to the Counterclaim plaintiff. (Pyle v. City of Cedartown, 240 Ga.App. 445, 447(1), 524 S.E.2d 7 (1999)).

25. In 2012 Nutty Guys requested that Counterclaim Plaintiff engage in contract negotiations that would allow him to be a Nutty Guys distributor in Southern Utah.

26. Counterclaim Plaintiff has since paid to Nutty Guys of Salt Lake City over twenty thousand dollars necessary to maintain the southern Utah sales route, and be a distributor for Nutty Guys.

27. Counterclaim Plaintiff has information that stipulates He can not sell the Nutty Guy Route he still services and he also has no right to ownership. Information provided to him during negotiations and in his contract clarify the fact that Nutty Guys does not provide for ownership of the customer list the routes distributors have and they do not allow the use of their trade

mark or any other exclusive rights to distributors. Counterclaim Plaintiff is not an exclusive distributor, does not have rights to the sale of the route and is in no way the owner of the route.

28. Counterclaim Plaintiff therefore suggests the contract he has been required to enter into, to be able to distribute, with Nutty Guys of Salt Lake City, Utah stands as sufficient evidence that Lewis committed an unlawful act of conversion by offering to sell Counterclaim Plaintiff a business that was not his to sell.

29. Counterclaim Plaintiff sites OCGA § 11-2-201(1) states that a contract for the sale of goods for the price of \$500.00 or more is not enforceable unless there is a written contract between the parties.

PRAYER FOR RELIEF REQUEST FOR DAMAGES

WHEREFOR, RODNEY NELSON, demands judgement in his favor and against Lewis as follows:

1. Judgment in an amount to be proven at trial, but not less than \$17,676.46.

(A) Commission moneys paid to Lewis from January 23, 2011 through April 1st 2012, ten thousand nine hundred fifty one dollars and 8 cent. (\$10,951.08) Total per Cross Complaints records. (see EXHIBIT A)

(B)The outstanding amounts collected for Lewis by Counterclaim Plaintiff at the rate of 25% twelve hundred eighty nine dollars and fifty cents. (1,289.50). (SEE EXHIBIT A)

(C) Cost for attorney consultations necessary in this case, three thousand dollars. (\$3,000).

(D) Accounting costs for invoiced correspondence and consultant time billed by Counterclaim Plaintiffs Accountant \$1,700.

(E) Document preparation fee, one thousand two hundred dollars. (\$1,200)

(F) Interest on \$14,240.58, for the period of time Lewis had use of Cross Complaints money at 5%, Compounded continuously for the period of one year \$790.38. (Interest figured at the rate an investment would pay. (see EXHIBIT E)

2. Such other relief the court deems appropriate.

Dated this day of 2013

Rodney Nelson Pre Se

respectively submitted,
pro se.



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

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

**[PROPOSED] ORDER GRANTING
MOTION TO DISMISS COUNTERCLAIM**

Case No. 120500402
Judge James L. Shumate

This matter came regularly before the Court on Plaintiff Reggie Lewis's *Motion to Dismiss Counterclaim*. Defendant Rodney Nelson did not file a memorandum in opposition to this motion. Having reviewed and considered the motion, memoranda, exhibits, and other documents on file, and for good cause appearing, the Court FINDS and CONCLUDES as

follows:

The Counterclaim which Defendant Rodney Nelson filed in this case on or about May 8, 2013, should be dismissed with prejudice for the reasons set forth in Plaintiff's *Motion to Dismiss Counterclaim*.

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH,
WASHINGTON COUNTY, ST. GEORGE DIVISION

REGGIE LEWIS, Plaintiff, v. RODNEY NELSON Defendant.	PLAINTIFF'S REVISED FIRST SET OF REQUESTS FOR ADMISSION, INTERROGATORIES, AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT Civil No. 120500402 Judge James L. Shumate
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Pursuant to Rules 26, 33, 34, 36 and 37 of the Utah Rules of Civil Procedure, Reggie Lewis, hereby requests that Rodney Nelson defendant, separately and fully respond in writing, to the Requests for Admission, Interrogatories, and Requests for Production of Documents hereinafter set forth, and serve a copy of such responses on the undersigned within twenty eight (28) days after service of said Requests for Admission. Pursuant to Rule 36, the matters addressed by the Requests for Admission shall be deemed admitted unless the Requests for Admission are responded to within thirty (28) days after service of said requests.

Pursuant to Rules 33 and 26 of the Utah Rules of Civil Procedure, Reggie Lewis hereby requests that Rodney Nelson answer, separately and fully in writing, under oath, the following interrogatories and serve the answers within twenty-eight (28) days after service of the interrogatories, and thereafter supplement the answers as required by the Utah Rules of Civil Procedure.

Pursuant to Rules 26 and 34 of the Utah Rules of Civil Procedure, Reggie Lewis hereby requests that Rodney Nelson respond, separately and fully, including in writing as necessary, to the following requests for production of documents and serve the responses and deliver the documents within twenty eight (28) days after service of the requests. In connection with the responses, identify each document withheld or intended to be withheld from production and, with respect to each such document, state the privilege claimed or other ground for withholding it from production.

DEFINITIONS AND INSTRUCTIONS

1. “You,” “your” and “defendant” shall refer to Rodney Nelson and his affiliates, agents, and designees as may be required by the context of any discovery request below.
2. **Complaint** shall refer to the Complaint filed in the Fifth Judicial District Court in and for Washington County, State of Utah, civil no. 120500402, brought by Reggie Lewis as Plaintiff against Rodney Nelson, an individual.
3. “Answer” shall refer to the answer filed by Rodney Nelson to the Complaint.
4. “Electronic Storage” means the following in your possession, custody, or control, whether on or off business premises:

- a. Networks;
- b. Computer or other information retrieval systems (hardware and software), including systems no longer in use, sometimes called “legacy” systems;

- c. Servers;
- d. Archive disks and tapes and other forms of offline storage;
- e. Backup or disaster recovery systems;
- f. Tapes, discs, drives, cartridges and other storage media;
- g. Mobile phones and paging devices;
- h. Audio systems, including voicemail;
- i. Internet data and web pages and cookies;
- j. Laptop computers;
- k. Workstations;
- l. Minicomputers;
- m. Mainframes;
- n. Personal digital assistants (“PDAs”); and
- o. Memory cards and memory sticks.

5. **“Electronic Information”** means the following, stored or recorded on or in any Electronic Storage:

- a. E-mail messages, including attached files and metadata (“**metadata**” in this context refers to information about when an email message was created, to whom it was sent, when it was opened, responded to, and who received blind copies, etc.);

b. Word processing documents, including attachments, exhibits, schedules and enclosures, and metadata (“**metadata**” in this context refers to information about when a document was created, who created it, who looked at it, who edited it, what amendments and changes were made to it, who made them, and when they were made, etc.);

c. Spreadsheets and metadata (“**metadata**” in this context refers to information about when a spreadsheet was created, who created it, who looked at it, who edited it, what amendments and changes were made to it, who made them, and when they were made, etc.);

d. Presentation documents such as PowerPoint and metadata (“**metadata**” in this context refers to information about when a presentation document was created, who created it, who looked at it, who edited it, what amendments and changes were made to it, who made them, and when they were made, etc.);

e. Audio/video/audiovisual records;

f. Voicemail; and

g. Data and data compilations.

6. A “**document**,” whether singular or plural, means all written, recorded, graphic, and electronic materials of every kind in your possession, custody, or control that directly or indirectly relates in any way to the subject matter of these discovery requests, and includes, without limitation, originals and all other copies no matter how prepared, and all memoranda, drafts, and notes (whether typed, penciled, or otherwise), whether used or not. The term “**documents**” includes all Electronic Information in all Electronic Storage media. Any

responsive data or data compilations kept in electronic form are to be produced in paper form where such is possible; otherwise, they are to be downloaded to disk and produced with instructions and all other materials necessary to use or interpret the data.

By way of example only, and not by way of limitation, the foregoing definition of “**document**” includes the following:

- a. Memoranda, notes, notebooks, correspondence, letters, and telegrams, whether received or sent;
- b. Minutes of meetings or any notes taken at meetings;
- c. Contracts, agreements, understandings, commitments, proposals, and other business dealings;
- d. Recordings, transcriptions, and memoranda or notes made of any telephone communications or face-to-face oral conversations between or among any persons;
- e. Dictated tapes or other sound recordings;
- f. Computer printouts, files, e-mail communications and/or reports, and any information stored in a computer; and
- g. Pictures, blueprints, drawings, photographs or other photographic representations.

7. The term “**communications**” means any contact, oral or written, formal or informal, at any time or place and under any circumstances whatsoever, by which information of any nature was transmitted or transferred, including, without limitation, the giving or exchanging

of information by speech, gestures, documents, or any other means, or any request for information by any such means.

8. The term “**person**” means, without limitation, any natural person, corporation, partnership, proprietorship, joint venture, association, government entity (including, without limitation, any governmental agency or political subdivision of any government), any group, or any other form of public or private business or legal entity.

9. “**Relating to**” means—in whole or in part—constituting, containing, relating, concerning, discussing, describing, analyzing, identifying, evidencing, referring to, or stating.

10. “**And**” and “**or**” have both conjunctive and disjunctive meanings.

11. A request that you “**identify**” a document requires that you describe the document by type (e.g., whether letter, videotape or film, electronic data, voice recording, etc.), that you state the date upon which the document was generated, its author, the intended recipient, the identity of all individuals who received copies of the document, whether the document still exists and, if so, its present location or custodian.

12. A request that you “**identify**” communications requires that you describe the information that was communicated, including where possible the precise verbiage used; explain how the communication was made (e.g., by letter, email, face-to-face or telephonic verbal speech, etc.); state the date the communication occurred; identify where the communication occurred; and name the parties and witnesses to the communications.

13. If a document is responsive to a request for production and is in your control, but is not in your possession or custody, identify the person with possession or custody of such document.

14. If any document was, but is no longer, in your possession or subject to your control, state what disposition was made of it, by whom, and the actual or approximate date or dates on which such disposition was made, and why.

15. Singular forms of any nouns or pronouns include the plural, and vice versa. Masculine forms of any nouns or pronouns include the feminine and neuter genders. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

16. Documents produced pursuant to these discovery requests should be tendered in the precise form and manner as they are kept in the usual course of business or organized and labeled to correspond to the categories that follow in the following individually numbered discovery requests.

17. If you withhold production of any document or refuse to respond to an interrogatory because of a claim of privilege, set forth the privilege claimed, the facts upon which you rely to support the claim of privilege, and identify (by date, author and subject matter) all documents for which such privilege is claimed.

REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that you entered into an agreement with Reggie Lewis (the "Agreement") to purchase a supply route for Nutty Guys Inc (the "Supply Route").

REQUEST NO. 2: Admit that the "Supply Route" was transferred from Reggie Lewis to you.

REQUEST NO. 3: Admit that the document attached hereto as Exhibit 1 contains all of the material terms and conditions of your Agreement with Reggie Lewis to purchase the Supply Route.

REQUEST NO. 4: Admit that you never signed the document attached here as Exhibit 1.

REQUEST NO. 5: Admit that there are no other terms or conditions that govern the purchase of the Supply Route other than those contained in Exhibit 1.

REQUEST NO. 6: Admit that you orally agreed to all of the terms and conditions contained in the document attached hereto as Exhibit 1.

REQUEST NO. 7: Admit that you agreed that the terms and conditions contained in Exhibit 1 would govern your purchase of the Supply Route.

REQUEST NO. 8: Admit that you agreed to pay \$25,000 as a cash/base payment for the Supply Route.

REQUEST NO. 9: Admit that you also agreed to pay Reggie Lewis the value of the "reserve account" established by Reggie Lewis related to the Supply Route.

REQUEST NO. 10: Admit that Reggie Lewis on or about January of 2011 transferred all of his rights and interests in the Supply Route to you.

REQUEST NO. 11: Admit that the value of the Reserve Account on the date you were transferred the Supply Route was approximately \$8,000.

REQUEST NO. 12: Admit that the total compensation owed by you to Reggie Lewis under your Agreement to purchase the Supply Route was \$33,000 plus interest as specified in the document attached hereto as Exhibit 1 ("Purchase Price").

REQUEST NO. 13: Admit that since February of 2011, you have exclusively operated the Supply Route.

REQUEST NO. 14: Admit that you agreed to pay Reggie Lewis the Purchase Price by regular monthly payments.

REQUEST NO. 15: Admit that you agreed to assign your commission check from the operation of the Supply Route as a monthly payment to Reggie Lewis.

REQUEST NO. 16: Admit that you paid Reggie Lewis a total of \$11,000 for the Supply Route under the Agreement.

REQUEST NO. 17: Admit that you failed to pay Reggie Lewis the remaining \$22,000 owed under the Agreement.

REQUEST NO. 18: Admit that despite demand by Reggie Lewis, you have continued to refuse to pay the remaining amount due on the Supply Route.

REQUEST NO. 19: Admit that you have recognized through emails sent to Reggie Lewis or his agents that you have remaining payment obligations due to Reggie Lewis.

REQUEST NO. 20: Admit that you agreed to be responsible for attorney fees in the event it became necessary to enforce the Agreement through Legal Process.

REQUEST NO. 21: Admit that all payments under your Agreement were to be completed by July of 2012.

REQUEST NO. 22: Admit that until July of 2012, Reggie Lewis attempted to persuade you to pay the past due amounts under the Agreement.

REQUEST NO. 23: Admit that you have failed to respond to any request to pay the past due amounts under the Agreement.

REQUEST NO. 24: Admit that all money received since June of 2011 due to your operation of the Supply Route has not been paid to Reggie Lewis.

REQUEST NO. 25: Admit that you have failed to perform the payment terms under the Agreement.

REQUEST NO. 26: Admit that you have no legal defense to the payment terms.

REQUEST NO. 27: Admit that the Agreement between you and Reggie Lewis did not contemplate the delivery of any document related to the Supply Route.

REQUEST NO. 28: Admit that you have been fully accepted by Nutty Guys Inc. as the rightful owner and operator of the Supply Route.

REQUEST NO. 29: Admit that Nutty Guys Inc. did not require any proof from you of your ownership of the Supply Route.

REQUEST NO. 30: Admit that, at the time of the Agreement, Nutty Guys Inc. tracks the owner/operators of their Supply Routes internally and do not issue any type of ownership/operator license.

INTERROGATORIES

INTERROGATORY NO. 1: If you deny any of the Requests for Admission served herewith for any reason, state the factual basis for your denial including lack of information.

INTERROGATORY NO. 2: If you answer any of the Requests for Admission other than with an unqualified admission, explain the basis for your answer.

INTERROGATORY NO. 3: Identify all individuals with whom you have had any communications concerning the Complaint or your Answer and provide a reasonable description of the content of such communications.

INTERROGATORY NO. 4: Identify all communications between you and Reggie Lewis or his counsel relating to the subject matter of the Complaint and your Answer.

INTERROGATORY NO. 5: Identify all communications between you and any person, including Reggie Lewis and Nutty Guys Inc., relating to the subject matter of the Complaint and your Answer.

INTERROGATORY NO. 6: Identify all individuals with any knowledge of the facts in the Complaint.

INTERROGATORY NO. 7: Identify all documents relating to the subject matter of the Complaint including those that support or establish the allegations made in the Complaint including contracts, invoices, notes and the like.

INTERROGATORY NO. 8: Identify all electronic information in your possession, custody or control relating to the subject matter of the Complaint.

INTERROGATORY NO. 9: State the factual basis for your defenses set forth in your Answer including your defense of Breach of Covenant of Good Faith, Estoppel, Unclean Hands, Bad Faith Filing, Ambiguity, Failure to state cause of Action, Failure of Condition Precedent, No Damage, Breach of Contract by Plaintiff, Laches, Fraud, and Frustration of Purpose.

INTERROGATORY NO. 10: Identify and describe in writing all money received by you from Nutty Guys, Inc. or any successor, affiliate or related company, from February of 2011 until the date of this document.

INTERROGATORY NO. 11: Identify the amount and date of every payment made by you to Reggie Lewis and identify every document which supports such payments.

INTERROGATORY NO. 12: Identify and describe any term or condition of your Agreement with Reggie Lewis which is not included in the document attached as Exhibit 1.

INTERROGATORY NO. 13: Identify and describe in detail every act which you assert Reggie Lewis did to interfere with your operation of the Supply Route including the dates of such acts.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All documents relied upon by you to answer the Interrogatories and Requests for Admission served herewith.

REQUEST NO. 2: All documents that support your responses to the either the Complaint or the Interrogatories and Requests for Admission served herewith.

REQUEST NO. 3: All documents in your possession, custody or control relating to the allegations made in the Complaint.

REQUEST NO. 4: All electronic information in your possession, custody or control relating to either the allegations/facts in the Complaint or your Answer.

REQUEST NO. 5: All documents you have received from any third party that relate in any way to the allegations made in the Complaint or Answer.

REQUEST NO. 6: All documents that support your allegations in the Answer.

REQUEST NO. 7: All correspondence or communications with Reggie Lewis or his counsel.

REQUEST NO. 8: All correspondence or communications with Nutty Guys Inc.

REQUEST NO. 9: All documents of any kind which evidence money received by you from Nutty Guys, Inc. or its affiliated, successors or related companies.

REQUEST NO. 10: All documents relating to your operation of the Supply Route.

REQUEST NO. 11: All other documents in your possession which related in any manner to the allegations set forth in Complaint and Answer.

REQUEST NO. 12: All documents relating to any research or due diligence you conducted relating to Reggie Lewis.

REQUEST NO. 13: All documents you believe, intend, or have a reasonable basis to believe you will introduce or rely upon in any way relating to this action instituted by the Complaint or any hearing related thereto.

DATED this 6th day of May, 2013.

/s/

Penrod W. Keith
Attorneys for Plaintiff
Durham Jones & Pinegar, P.C.

Rodney Nelson
P.O. Box 69
Brigham City, UT 84302

**FIFTH DISTRICT COURT FOR THE STATE OF UTAH
WASHINGTON COUNTY, ST. GEORGE, DIVISION
206 West Tabernacle Suite 100 St. George, UT 84770**

REGGIE LEWIS
PLAINTIFF

VS.

RODNEY NELSON
DEFENDANT

Civil # 120500402

JUDGE: JAMES L. SHUMATE

ANSWER TO REVISED SET OF REQUESTS
FOR ADMISSION, INTERROGATORIES,
REQUESTS FOR PRODUCTION OF
DOCUMENTS

1. ANSWER TO REVISED SET OF REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that you entered into an agreement with Reggie Lewis (the "Agreement") to purchase a supply route for Nutty Guys Inc (the "Supply Route").

Deny

REQUEST NO. 2: Admit that the Supply Route" was transferred from Reggie Lewis to you.

Deny

REQUEST NO. 3: Admit that the document attached hereto Exhibit 1 contains all of the material terms and conditions of your agreement with Reggie Lewis to purchase the Supply Route".

Deny

REQUEST NO. 4: Admit that you never signed the document attached here as Exhibit 1.

Admit

REQUEST NO. 5: Admit that there are no other terms or conditions contained in the document attached hereto as Exhibit 1.

Deny

2. INTERROGATORIES

I decline to respond to any interrogatories, as no interrogatories are permitted in a tier 1 case under the provisions of Rule 26(c)(5) URCP.

3. REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All documents relied upon by you to answer the Interrogatories.
None

REQUEST NO. 2: All documents that support your responses to either to the Complaint or the Interrogatories and Request for Admissions served herewith.
Defendant relied on only the documents submitted by Plaintiff.

REQUEST NO. 3: All documents in your possession, custody or control relating to either the allegations made in the Complaint.
Defendant relied on only the documents submitted by Plaintiff.

REQUEST NO. 4: All electronic information in your possession, custody or control relating to either the allegations/facts in the Complaint or your answer.
None

REQUEST NO. 5: All documents you have received from any third party that relate in any way to the allegations made in the Complaint or answer.
See attached Exhibit 1 and 2

SIGNED


RODNEY NELSON

DATED:

6/26/13

Penrod W. Keith (4860)
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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

REGGIE LEWIS, Plaintiff, vs. RODNEY NELSON, Defendant.	Memorandum in Support of Plaintiff's Motion for Summary Judgment <i>Hearing Requested</i> Case No. 120500402 Judge James L. Shumate
--	---

Plaintiff Reggie Lewis submits this memorandum in support of his motion for summary judgment against Defendant Rodney Nelson.

QUESTIONS PRESENTED

1. A person is entitled to a judgment for breach of contract where it is undisputed that he performed his obligations under a contract and has been damaged by another

party's failure to perform its corresponding commitments. Lewis can show that, while he performed his contractual obligations, he has suffered damages due to Nelson's refusal to make payments under their contract. Nelson cannot show otherwise. Is Lewis entitled to a judgment for breach of contract?

2. A person is entitled to judgment for unjust enrichment where it is undisputed that he conferred a benefit upon someone who accepted the benefit while knowing that a return payment was expected in exchange. Lewis can show that he transferred his right to operate a supply route to Nelson, which benefit Nelson accepted while knowing that Lewis expected payment in return. Nelson cannot show otherwise. Is Lewis entitled to a judgment for unjust enrichment?

STATEMENT OF MATERIAL FACTS

1. Nutty Guys is a business located in Salt Lake City, Utah, that distributes comestible items to retail outlets. (Lewis Decl. ¶ 2 ("EXHIBIT A").)
2. Lewis paid \$30,000.00 to acquire the right to operate a Nutty Guys supply route (the "ROUTE") from the Route's prior operator. (Ex. A ¶ 3.)
3. Lewis operated the Route continuously from July 2009 to January 2011. (Ex. A ¶ 4.)
4. At the end of 2010, Rodney Nelson approached Lewis about acquiring the right to operate the Route. (Ex. A ¶ 5.)

5. After a period of negotiation, Nelson agreed to purchase, and Lewis agreed to sell, the right to operate the Route in accordance with the terms and conditions set forth in a written *Asset Purchase Agreement* (the "AGREEMENT") that Nelson prepared. (Ex. A ¶ 6; Reqs. for Admis., Nos. 6-7, at 8 ("EXHIBIT B").)*

6. Although neither of the parties signed the Agreement, they orally agreed that its terms and conditions would bind both parties and govern Nelson's acquisition of the right to operate the Route from Lewis. (Ex. A ¶ 7; Ex. B, Nos. 4, 6-9, at 8; Def.'s Answer to Reqs. for Admis., No. 4, at 1 ("EXHIBIT C").)*

7. Among other things, the Agreement states:

1. [Lewis] has owned and operated a business known as "Southern Utah Nutty Guys" (the "Business") which is an exclusive area and route assigned to him by the Nutty Guys LLC. The Business consists of the exclusive area in Southern Utah and other assets described below.

2. [Nelson] desires to purchase and [Lewis] desires to sell the Business and related assets as described above subject to associated and specified liabilities, hereinafter together referred to as the "Purchased Assets" on the terms and conditions set forth herein and defined below.

....
1.1 The Sale. At the Closing . . . , [Lewis] shall sell, transfer, assign and deliver to [Nelson] and [Nelson] shall purchase, receive and assume, all right, title, interest and liability, both legal and equitable, in the Purchased Assets, as hereinafter defined (the "Sale").

1.2 Purchased Assets. The "Purchased Assets" shall include the assets of the Business including 1) the exclusive Nutty Guys Southern Utah area and route, 2) assignment of the existing account receivables and the reserve held by

* The Court ordered Nelson to answer all of Lewis's discovery requests by June 27, 2013. (Court's Ruling (May 23, 2013) (on file with the Court).) Nelson has never responded to Lewis's requests for admission nos. 5 through 30. (See Ex. C.) Accordingly, all such requests for admission are now automatically deemed admitted. See UTAH R. CIV. P. 36(b)(1).

Nutty Guys LLC in the approximate amount of \$8,000 ("the Reserve Account") subject to the payment provisions set forth in Section 2.2 below, 3) all other inventory, accounts, business names and other good will and intangible property associated with the Nutty Guys Southern Utah area.

....
2.1 Purchase Price. The total purchase price (the "Purchase Price") to be paid by [Nelson] for the Purchased Assets shall be Twenty Five Thousand and No/100 Dollars (\$25,000.00), which Purchase Price shall be payable as follows and as set forth in paragraph 2.2 below: Two Thousand dollars (\$2,000) to be paid on April 1, 2011, and then subsequently [Nelson] shall pay and assign all subsequent commission checks received from Nutty Guys LLC from January 23, 2011 until April 30, 2011 (with all payments due prior to the execution of this agreement acknowledge received by [Lewis]) and then subsequently [Nelson] shall pay 30% of Nutty Guys LLC commission checks beginning May 1, 2011 until the [\$25,000.00] Purchase Price is paid in full. In the event the Purchase Price is not paid in full by February 1, 2012, any unpaid balance shall accrue interest at the rate of 8% until the Purchase Price is paid in full. All payments pursuant to this paragraph shall be made no later than July 1, 2012.

2.2 Payment for Reserve Account. In connection with the assignment of the Reserve Account, [Nelson] shall pay to [Lewis] the value of the Reserve Account by delivering to [Lewis] as received all collections on accounts receivable attributable to [Lewis's] operation of the Business arising on or before _____ [date seller took over operations]. To the extent the collection and payment to [Lewis] of such accounts does not equal the value of the Reserve Account, [Nelson] on or before February 1, 2012 shall pay the difference between the value of the Reserve Account (approximately \$8,000) and the payments previously made from the collection of the accounts receivable.

....
5.4 Default. . . . In any action pursuant to a default under this section, the prevailing party shall be entitled to recover costs and expenses including attorney fees.

(Ex. A ¶ 8; see Ex. B, Nos. 6-9, 11-12, 14-15, 20-21, 27, at 8-10.)

8. In accordance with the Agreement, Lewis transferred all of the "Purchased Assets" (as defined on page 1 of the Agreement) to Nelson in or about January 2011.

(Ex. A ¶ 9; Ex. B, Nos. 10, 13, 27-30, at 8-10.)

9. From February to May 2011, Nelson made several payments to Lewis totaling approximately \$11,000.00. (Ex. A ¶ 10; Ex. B, No. 16, at 9.)

10. Nelson has not made any payments to Lewis since May 2011. (Ex. A ¶ 11; Ex. B, Nos. 16-18, 22-26, at 9-10.)

11. Because of Nelson's cessation of payments, Lewis's attorney sent a letter to Nelson on September 12, 2011, stating:

Last year, you entered into an oral agreement with Reggie Lewis for the sale of a certain "Nutty Guys" route in Southern Utah. Many of the terms of that agreement were embodied in a writing prepared by you, including the purchase price for such route and the terms of purchase.

You have failed to remit payment in accordance with your obligations under the contract. Demand is made that you submit the unpaid balance of the contract in accordance with its terms. . . .

(Ex. A ¶ 12.)

12. Nelson responded to this letter via e-mail on September 14, 2011, as follows:

. . . I have on several occasions during the past few months requested from [Lewis] documentation supporting his figures in this matter. . . . As of this date I have not received these items. . . . I would really appreciate it if you could forward all applicable documents to [my accountant] and provide answers to any questions she has and I am confident this matter can be resolved without further frustration on either side.

(Ex. A ¶ 13.)

13. On September 26, 2011, Lewis's attorney replied to Nelson's e-mail thus:

In your email you requested in effect an accounting setting forth payments made by you on the contract referenced in my September 12, 2011 letter. We

are surprised that you do not have this information and we also note that this information has been sent to you before by Mr. Lewis directly. . . .

(Ex. A ¶ 14.)

14. On October 4, 2011, Nelson sent the following response to counsel's letter:

In your demand letter you infer that I am in breach of the agreement because I have not made payment when in fact on August 9[,] 2011[,] I offered Mr. Lewis a payment in full of \$11,000.00. This was an amount I guessed to be due because Mr. Lewis refused to give me the accounting I am still requesting. . . .

(Ex. A ¶ 15.)

15. The total amount of unpaid principal due under the Agreement is currently at least \$22,000.00. (Ex. A ¶ 16; Ex. B, Nos. 8-9, 11-12, 17-19, 24-26, at 8-10.) This figure includes \$14,000.00 for the unpaid balance of the Purchase Price (as defined in Section 2.1 of the Agreement), and \$8,000.00 for the unpaid value of the Reserve Account (as defined in Section 1.2 of the Agreement). (See Ex. A ¶ 16; Ex. B ¶¶ 8-9, 11-12, 14-19, 24-26.) This figure does not include any additional payments that may be due under Section 2.2 of the Agreement; it also does not include interest, costs, or attorney fees. (Ex. A ¶ 16; Ex. B ¶¶ 12, 20.)

ARGUMENT

A. Judgment should be entered against Nelson for breach of contract.

Lewis is entitled to a judgment as a matter of law on his first cause of action for breach of contract against Nelson. "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of

the contract by the other party, and (4) damages." *Bair v. Axiom*, 2001 UT 20, ¶ 14, 20 P.3d 388 (citation omitted).

It is undisputed that the parties entered into an agreement. (*See supra* Statement of Facts ¶¶ 5-7, 12, 14.) It is undisputed that Lewis fully performed his obligations under the agreement when he transferred all of the Purchased Assets to Nelson. (*See id.* ¶¶ 7-8.) It is undisputed that Nelson breached the agreement when he ceased making payments to Lewis in May 2011. (*See id.* ¶¶ 7, 9-10, 15.) And it is undisputed that Nelson's breach has caused Lewis to suffer damages in the principal amount of at least \$22,000.00, together with interest, attorney fees, and other costs. (*See id.* ¶ 15.)

Because there is no genuine issue of material fact with respect to Lewis's first cause of action, he is entitled to a judgment as a matter of law against Nelson for breach of contract in the principal amount of at least \$22,000.00, together with interest, attorney fees, and other costs. (*See id.* ¶ 15.) An evidentiary hearing should be scheduled to determine what additional amounts Nelson owes in excess of this \$22,000.00.

B. Alternatively, judgment should be entered against Nelson for unjust enrichment.

In the alternative, Lewis is entitled to judgment on his second cause of action against Nelson for unjust enrichment. To recover for unjust enrichment, a plaintiff must establish three elements: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or

retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998) (internal quotation omitted).

It is undisputed that the Purchased Assets that Lewis provided to Nelson conferred a benefit on Nelson. (See *supra* Statement of Facts ¶¶ 2, 5, 8, 14.) It is undisputed that Lewis knew of and appreciated this benefit. (See *id.* ¶¶ 4-9, 11-14.) And it is undisputed that Nelson has accepted and retained this benefit while knowing that Lewis expected full compensation for the same. (See *id.* ¶¶ 4-7, 9, 12, 14.) As a result, Lewis is entitled to a judgment as a matter of law for unjust enrichment against Nelson in the principal amount of at least \$22,000.00, together with interest and other costs. (See *id.* ¶ 15.) An evidentiary hearing should be scheduled to determine what additional amounts Nelson owes in excess of this \$22,000.00.

CONCLUSION

Because there is no genuine issue as to any material fact, Lewis is entitled to a judgment as a matter of law against Nelson. Upon granting this motion, an evidentiary hearing should be scheduled to determine what additional amounts Nelson owes in excess of \$22,000.00.

Rodney Nelson
P.O. Box 69
Brigham City, UT 84302

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

REGGIE LEWIS)	MEMORANDUM IN OPPOSITION
PLAINTIFF)	TO PLAINTIFF'S MOTION FOR
VS.)	SUMMARY JUDGMENT
)	
RODNEY NELSON)	Case No. 120500402
DEFENDANT)	Judge James L. Schumate

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, Defendant Rodney Nelson ("Defendant") hereby submits his Memorandum in Opposition to Plaintiff Reggie Lewis's ("Plaintiff") Motion for Summary Judgment.

RESPONSE TO STATEMENT OF MATERIAL FACTS

1. Nutty Guys is a business located in Salt Lake City, Utah, that distributes comestible items to retail outlets. (Lewis Decl. ¶ 2 (EXHIBIT A").)

RESPONSE: This statement is not disputed.

2. Lewis paid \$30,000.00 to acquire the right to operate a Nutty Guys supply route (the "ROUTE") from the Route's prior operator. (Ex. A ¶ 3.)

RESPONSE: Nelson has no personal knowledge of this statement.

3. Lewis operated the Route continuously from July 2009 to January 2011. (Ex. A ¶ 4.)

RESPONSE: Nelson has no personal knowledge of this statement.

4. At the end of 2010, Rodney Nelson approached Lewis about acquiring the right to operate the Route. (Ex. A ¶ 5.)

RESPONSE: Paragraph 4 of Plaintiff's Memorandum is disputed. Lewis advertised the sale of an exclusive Nutty Guys route in Southern Utah on ksl.com. Nelson only approached Lewis in response to this advertisement. (Nelson Decl. ¶2 ("EXHIBIT D).)

5. After a period of negotiation, Nelson agreed to purchase, and Lewis agreed to sell, the right to operate the Route in accordance with the terms and conditions set forth in a written *Asset Purchase Agreement* (the AGREEMENT") that Nelson prepared. (Ex. A ¶ 6; Reqs. for Admis., Nos. 6-7, at 8 ("EXHIBIT B").)

RESPONSE: Paragraph 5 of the Plaintiff's Memorandum is disputed. Nelson and Lewis prepared a hand-written contract with basic terms of the agreement. (Ex.D ¶ 9-10.) Lewis maintained possession of the agreement. (Ex. D ¶ 11.) Five months later, Lewis presented Nelson with a new *Asset Purchase Agreement* with dozens of new terms and legalese prepared by another party. Nelson refused to sign the new agreement and demanded a copy of the original agreement. (Ex. D ¶ 18.)

6. Although neither of the parties signed the Agreement, they orally agreed that the terms and conditions would bind both parties and govern Nelson's acquisition of the right to operate the Route from Lewis. (Ex. A ¶ 7; Ex. B, Nos. 4, 6-9, at 8; Def.'s Answer to Reqs. for Admis., No. 4, at 1 ("EXHIBIT C").)

RESPONSE: Paragraph 6 of the Plaintiff's Memorandum is disputed. Nelson disagreed to the terms of the new Agreement presented him by Lewis and refused to sign it. There was never an oral agreement to be bound by the terms of the new agreement. (Ex. D ¶ 20.)

7. Among other things, the Agreement states:

1. [Lewis] has owned and operated a business known as "Southern Utah Nutty Guys" (the "Business") which is an exclusive area and route assigned him by the Nutty Guys LLC. The Business consists of the exclusive area in Southern Utah and other assets described below.
2. [Nelson] desires to purchase and [Lewis] desires to sell the Business and related assets as described above subject to associated and specified liabilities, hereinafter together referred to as the "Purchased Assets" on the terms and conditions set forth herein and defined below.

....

1.1 The Sale. At the Closing..., [Lewis] shall sell, transfer, assign and deliver to [Nelson] and [Nelson] shall purchase, receive and assume, all right, title, interest and liability, both legal and equitable, in the Purchased Assets, as hereinafter defined (the "Sale").

1.2 Purchased Assets. The "Purchased Assets" shall include the assets of the Business including 1) the exclusive Nutty Guys Southern Utah area and route, 2) assignment of the existing account receivables and the reserve held by Nutty Guys LLC in the approximate amount of \$8,000 ("the Reserve Account") subject to the payment provisions set forth in Section 2.2 below, 3) all other inventory, accounts, business names and other good will and intangible property associated with the Nutty Guys Southern Utah area.

....

2.1 Purchase Price. The total purchase price (the "Purchase Price") to be paid by [Nelson] for the Purchased Assets shall be Twenty Five Thousand and no/ 100 Dollars (\$25,000.00), which Purchase Price shall be payable as follows and as set forth in paragraph 2.2 below: Two Thousand dollars (\$2,000) to be paid on April 1, 2011, and then subsequently [Nelson] shall pay and assign all subsequent commission checks received from Nutty guys LLC from January 23, 2011 until April 30, 2011 (with all payments due prior to the execution of this agreement acknowledge received by [Lewis]) and then subsequently [Nelson] shall pay 30% of Nutty Guys LLC commission checks beginning May 1, 2011 until the [\$25,000.00] Purchase Price is paid in full. In the event the Purchase Price is not paid in full by February 1, 2012, any unpaid balance shall accrue interest at the rate of 8% until the Purchase Price is paid in full. All payments pursuant to this paragraph shall be made no later than July 1, 2012.

2.2 Payment for Reserve Account. In connection with the assignment of the Reserve Account, [Nelson] shall pay to [Lewis] as received all collections on accounts receivable attributable to [Lewis's] operation of the Business arising on or before _____ [date seller took over operations]. To the extent the collection and payment to [Lewis] of such accounts does not equal the value of the difference between the value of the Reserve Account (approximately \$8,000) and the payments previously made from the collection of the accounts receivable.

.....

5.4 Default. . . In any action pursuant to a default under this section, the prevailing party shall be entitled to recover costs and expenses including attorney fees.

(Ex. A ¶ 8; see Ex. B, Nos. 6-9, 11-12, 14-15, 20-21, 27, at 8-10.)

RESPONSE: Paragraph 7 of the Plaintiff's Memorandum is disputed. Due to the fact that Nelson never signed this agreement and the fact that Lewis is unwilling to provide

Nelson or the Court with the original handwritten agreement, this agreement is non-binding. If the Court finds this agreement as evidence of the handwritten contract, Nelson will respond to the following paragraphs. Paragraph 1 is disputed because the agreement states that Lewis owned an "exclusive area" for Nutty Guys in Southern Utah; however, Nutty Guys never contracted with Lewis for this "exclusive area" (Ex. D-1), and therefore, Lewis should not be able to receive value for this imaginary "exclusive area". Paragraph 1.1 of the agreement is disputed as there was never a closing. Paragraph 1.2 is disputed as it again claims to sell an "exclusive area" for Nutty Guys. In addition, Nelson had no benefit from or control of the \$8,000.00 reserve account held by Lewis with Nutty Guys (Ex. D ¶ 28). Paragraph 2.1 is disputed due to the fact that a \$2,000.00 payment was never made by Nelson. (Ex. D ¶28). All of statements in 2.1 were not part of the original agreement. Paragraph 2.2 is disputed. Lewis never transferred or assigned and Nelson never received possession or control of the reserve account. (Ex. D ¶ 28). Paragraph 5.4 is disputed as default provisions including costs, expenses, and especially attorneys' fees were never included in the original handwritten agreement or even discussed. (Ex. D ¶13).

8. In accordance with the Agreement, Lewis transferred all of the "Purchased Assets" (as defined on page 1 of the Agreement) to Nelson in or about January 2011. (Ex. A ¶ 9; Ex. B, Nos. 10, 13, 27-30, at 8-10.)

RESPONSE: Paragraph 8 is agreed in that Lewis provided to Nelson a list of current customers that he had dealt with in Southern Utah; however, it is disputed because Lewis was unable to provide the exclusive area that he had originally contracted with Nelson. (Ex. D-1)

9. From February to May 2011, Nelson made several payments to Lewis totaling approximately \$11,00.00. (Ex. A 10; Ex. B, No. 16, at 9.)

RESPONSE: Paragraph 9 is not disputed as to the approximate amount; however, Nelson has requested a detailed accounting of the payments made to Lewis by Nutty Guys and has not received a satisfactory response. (Ex. D ¶20, Ex. A-2, Ex. A-5)

10. Nelson has not made any payments to Lewis since May 2011. (Ex. A ¶ 11; Ex. B, Nos. 16-18, 22-26, at 9-10.)

RESPONSE: This statement is not disputed.

11. Because of Nelson's cessation of payments, Lewis's attorney sent a letter to Nelson on September 12, 2011, stating:

Last year, you entered into an oral agreement with Reggie Lewis for the sale of a certain "Nutty Guys" route in Southern Utah. Many of the terms of the agreement were embodied in a writing prepared by you, including the purchase price for such route and the terms of purchase.

You have failed to remit payment in accordance with your obligations under the contract. Demand is made that you submit the unpaid balance of the contract in accordance with its terms. . . .

(Ex. A ¶ 12.)

RESPONSE: This statement is not disputed.

12. Nelson responded to this letter via e-mail on September 14, 2011, as follows:

...I have on several occasions during the past few months requested from [Lewis] documentation supporting his figures in this matter. . . .As of this date I have not received these items. . . .I would really appreciate it if you could forward all applicable documents to [my accountant] and provide answers to any questions she has and I am confident this matter can be resolved without further frustration on either side.

RESPONSE: This statement is not disputed and shows Nelson's attempt at trying to get applicable documents for accounting purposes.

13. On September 26, 2011, Lewis's attorney replied to Nelson's e-mail thus:

In your email you requested in effect an accounting setting forth payments made by you on the contract referenced in my September 12, 2011 letter. We are surprised that you do not have this information and we also note that this information has been sent to you before by Mr. Lewis directly. . . .

(Ex. A ¶ 14.)

RESPONSE: This statement is not disputed that Nelson received this email except to the extent that Lewis never sent Nelson a detailed accounting. (Ex. A)

14. On October 4, 2011, Nelson sent the following response to counsel's letter:

In your demand letter you infer that I am in breach of the agreement because I have not made payment when in fact on August 9[,] 2011[,] I offered Mr. Lewis a payment in full of \$11,000.00. This was an amount I guessed to be due because Mr. Lewis refused to give me the accounting I am still requesting. . . .
(Ex. A ¶ 15.)

RESPONSE: This statement is not disputed.

15. The total amount of unpaid principal due under the Agreement is currently at least \$22,000.00. (Ex. A ¶ 16; Ex. B, Nos. 8-9, 11-12, 17-19, 24-26, at 8-10.) This figure includes \$14,000.00 for the unpaid balance of the Purchase Price (as defined in Section 2.1 of the Agreement), and \$8,000.00 for the unpaid value of the Reserve Account (as defined in Section 1.2 of the Agreement). (See Ex. A 16; Ex. B 8-9, 11.12, 14.19, 24-26.) This figure does not include any additional payments that may be due under Section 2.2 of the Agreement; it also does not include interest, costs, or attorney fees. (Ex. A 16; Ex. B ¶¶ 12, 20.)

RESPONSE: This statement is disputed as it relies upon a contract that was never signed that contradicted many of the terms of an original handwritten contract that is in possession of the Plaintiff. (Ex. D ¶ 9-11).

* The Court ordered Nelson to answer all of Lewis's discovery requests by June 27, 2013. (Court's Ruling (May 23, 2013) (on file with the Court).) Nelson has never responded to Lewis's requests for admission nos. 5 through 30. (See Ex. C.) Accordingly, all such requests for admission are not automatically deemed admitted. See Utah R. CIV. P. 36(b)(1).

RESPONSE: This statement is disputed. The Court ordered Nelson to answer Lewis's discovery requests in accordance with URCP 26(c)(5) that place this as a Tier 1 case under \$50,000.00. As a Tier 1 case, each side is only given five total requests for admission. Nelson responded to the first five requests for admission in accordance with the Court's order. (Ex. B)

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted only where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56. *Anderson Liberty Lobby, Inc.* 477 U.S. 242, 249-250, 106 S.Ct. 2505 (1986); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. . . . A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 921, 926 (10th Cir. 2001) (reversing district court's grant of summary judgment for defendant because there were genuine issues of material fact)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In applying the summary judgment standard, the Court must view the evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. The non-movant's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Id.*; *Anderson*, 477 U.S. at 255. All doubts should be resolved in favor of the presence of triable fact issues. *World of Sheep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985), cert denied, 474 U.S. 823 (1985). At summary judgment the court's role "is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate fact finder, to sustain [plaintiff's] claim." *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1216 (10th Cir. 2003).

II. LEWIS FAILS TO MEET THE ELEMENTS FOR BREACH OF CONTRACT UNDER HIS FIRST CAUSE OF ACTION

^

Lewis is unable to meet the elements for a breach of contract action. "The elements for a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom*, 2001 UT 20, ¶ 14, 20 P.3d 388.

Nelson was fraudulently induced into entering into a contract with Lewis. To prove fraudulent inducement, Nelson must prove all of the following by clear and convincing evidence: (1) Lewis represented that he was selling an "exclusive area" for Nutty Guys in Southern Utah; (2) The representation was about a presently existing fact that was important; (3) The representation was false and Lewis either knew that the representation was false or made the representation recklessly or without sufficient knowledge upon which to base the representation; (4) Lewis made the representation to induce Nelson to agree to the contract; (5) Nelson reasonably relied on this representation without knowledge of its falsity; (6) Nelson entered into the contract; (7) Nelson would not have entered into the contract if [he] had known that the representation was not true.

It is clear from the new contract that Lewis presented Nelson that he was selling an "exclusive area" for Nutty Guys in Southern Utah. The fact that Nelson was purchasing an exclusive area instead of a customer list increased the value of Nelson's investment so the fact was important. Lewis likely knew that he did not have an exclusive area with Nutty Guys or recklessly made the representation to Nelson to induce him into a higher price for the purchase assets. Nelson reasonably relied on the representation in determining the purchase price and viability of the purchase assets. The parties did in fact enter into a handwritten agreement. Nelson has stated that he would never have entered into the contract without the exclusive area contracted through Nutty

Guys as the purchase assets would otherwise amount to only a current customer list that could be poached or taken by any Nutty Guys representative. (Ex. D ¶ 30).

In the alternative, if the Court finds that Nelson was not fraudulently induced into the original contract then a finding of negligent misrepresentation would be appropriate.

If the Court does not find fraudulent inducement or negligent misrepresentation then it should be noted that the original agreement was drafted in Nelson's handwriting and given to Lewis outlining the terms of the agreement. After several months, Lewis attempted to get Nelson to sign a new contract that contained substantially different terms than the original contract. Nelson refused to sign the new contract. The new contract has no evidentiary value except as to its use as evidence of undisputed terms of the original agreement.

Lewis was unable to or did not perform several essential elements of the contract. Lewis initially contracted with Nelson to sell an "exclusive area" for Nutty Guys in Southern Utah. Lewis was likely aware at the time that he did not have an exclusive agreement with Nutty Guys at that time. Lewis was unable to provide to Nelson an "exclusive area" for Nutty Guys in Southern Utah.

It is obvious that there are genuine issues of material fact with respect to Plaintiff's first cause of action and Plaintiff is not entitled to judgment as a matter of law against Nelson for breach of contract.

III. NELSON WAS NOT UNJUSTLY ENRICHED

Lewis attempts to conceal his lack of a signed contract with an unjust enrichment claim. However, the facts do not support this conclusion. To recover for unjust enrichment, a plaintiff must establish three elements: "(1) a benefit conferred on one

person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.”

Jeffs v. Stubbs, 970 P.2d 1234, 1248 (Utah 1998).

It is agreed that the Purchased Assets that Lewis conferred a benefit to Nelson and that Nelson knew of and appreciated this benefit. It is also undisputed that that Nelson accepted and retained this benefit while knowing that Lewis expected full compensation for the same. However, Lewis never conferred that which he contracted to confer. Without the ability to confer an “exclusive area” for Nutty Guys in Southern Utah, Lewis effectively only conveyed a list of existing customers that were able to be poached or taken by any Nutty Guys representative. Lewis still received approximately \$11,000.00 for his customer list which seems like an extremely fair amount considering the fact that he misrepresented the original income numbers to Nelson.

As a result of Nelson receiving substantially less than what he bargained for, Nelson was not unjustly enriched and may have paid Lewis more than the value in which he received.

CONCLUSION

For the foregoing reasons, Defendant Nelson respectfully requests the Plaintiff’s Motion for Summary Judgment to be denied in its entirety.

RESPECTFULLY SUBMITTED, this 27th day of January, 2014.

/s/ Rodney Nelson
RODNEY NELSON
Defendant

WASHINGTON COUNTY, STATE OF UTAH

Defendant.

: With Keyword Index

THE HONORABLE JAMES L. SHUMATE

801-523-1186

APPEARANCES

For the Plaintiff:

Penrod W. Keith
Elijah L. Milne
Attorneys at Law

For the Defendant:

Pro Se

* * *

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1 ST. GEORGE, UTAH - MARCH 24, 2014

2 JUDGE JAMES L. SHUMATE

3 (Transcriber's note: Identification of speakers
4 may not be accurate with audio recordings)

5 P R O C E E D I N G S

6 THE COURT: Thank you, everyone. We're back on the
7 record of March 24, 2014. The matter before the Court is
8 Reggie Lewis vs. Rodney Nelson. File number is 120500402.
9 The matter before the Court has a motion for a continuance
10 from Mr. Nelson first, and the plaintiff has taken the
11 position that we don't have a problem with a continuance. It
12 lies - at least as long as we can hear the motion for summary
13 judgment, and that is plaintiff's position.

14 Is that correct, counsel?

15 MR. KEITH: I don't think so, Your Honor, and I'm
16 not sure if we filed a reply to -

17 MR. MILNE: I think the problem was, Your Honor, is
18 we had discussed with Mr. Nelson's prior attorney, Wesley
19 Windsor, the possibility of doing a - seeking a continuance,
20 and I believe he subsequently informed Mr. Keith that they
21 were not interested in that. So we're prepared to go forward
22 with the hearing and with the trial.

23 THE COURT: All right. Mr. Nelson, you are now
24 representing yourself. Mr. Windsor has withdrawn, and I got
25 from the withdrawal that the request to this charge, Mr.

1 Windsor, was specifically yours. You did not want him to
2 represent you, and that you had determined that you better go
3 forward on your own. Have I got that right, or am I mistaken
4 somehow, sir?

5 MR. NELSON: No, I believe you got it right.

6 THE COURT: Okay. Then let's - as the Court has
7 previously ruled, I determined that the motion for summary
8 judgment should be addressed first. And let me see if I can
9 lay the framework so that everyone can know what I see in the
10 case right now. This case is about the exchange of the
11 rights to service - a distribution area, we'll call it - for
12 a business called Nutty Guys, who is headquartered out of the
13 Wasatch Front somewhere. Just up north we'll say, and that
14 the distribution area is in Southern Utah here. Not just in
15 Washington County, but in other southern counties of the
16 state. Now, the motion for summary judgment is basically -
17 it comes to the Court in two different fashions. Number one
18 as a breach of contract. That there was an unsigned
19 agreement between the parties, and that the exchange of value
20 - the consideration for the contract has failed because full
21 payment, as negotiated between you, Mr. Nelson, and you, Mr.
22 Lewis, has never been made completely. That's the breach of
23 contract claim.

24 The other claim is sort of the flip side of a
25 contract action. An unjust enrichment is a circumstance

1 under which, if there is not a contract and yet the parties
2 behavior goes on as though there might have been a contract
3 and one party gains an advantage unjustly - and that is an
4 interesting way of putting it - but without appropriate
5 fairness in a mutual exchange between the parties, then the
6 measure of damages is what is being proposed.

7 Now, the motion for summary judgment is based upon
8 the statement, the affidavit of Mr. Lewis outlining the
9 course of conduct leading up to the exchange of the route
10 rights. That's an odd way of putting it, but I love
11 alliteration. So maybe route rights is the best way to do
12 it.

13 And then you, Mr. Nelson, in your response have
14 asserted claims at variance from the claims made by Mr. Lewis
15 in his statement in support of the motion for summary
16 judgment, and it has been your position that there are
17 justiciable issues of fact that need to be determined by the
18 court at trial.

19 Counsel, have I got that set up? Mr. Keith, is
20 that the way you all look at it?

21 MR. KEITH: That is correct, Your Honor. We would
22 also contend that the motion for summary judgment is
23 supported by admissions by the defendant under appropriate
24 rules that governs admissions, and that -

25 THE COURT: And - and -

1 MR. KEITH: - he has admitted the core part of the
2 case, but that is - I think that is a fair characterization
3 of it.

4 THE COURT: And, Mr. Nelson, it's important that I
5 make sure that you understand that when I address what the
6 record shows on a motion for summary judgment, it's my
7 responsibility to confine myself with what is in the record
8 and the form that the record is made out. Therefore, if
9 there are admissions that have been placed into the record in
10 response to discovery and those kinds of things, then those
11 admissions are undisputed facts that come before the court.
12 If there are disputed facts, then the court's next
13 determination is whether or not those facts, even if they're
14 disputed, are material to the issue before the court.

15 Rule 7 of the Utah Rules of Criminal Procedure
16 demands that I focus my inquiry to the existing record that's
17 before us now, and, Mr. Lewis, in your affidavit - your
18 statement - you set forth the factual framework in which this
19 transaction took place as you see it.

20 Mr. Nelson, in your responsive pleading, you
21 contested certain of those facts that you believe are
22 material to the motion itself, and that's what we're going to
23 talk about right now.

24 Mr. Keith, let me tell you where the Court's head
25 is in looking at these matters right now, and then I'll give

1 you a chance to argue anything addition if you think I've got
2 it wrong somewhere.

3 The fact that we don't have a written agreement -
4 the fact that everybody is of one accord on at least one
5 point, and that is that nothing got signed, and that there
6 were things proposed back and forth, but nobody signed
7 anything impresses the court that this may, in deed, be an
8 unjust enrichment kind of case if your client would prevail.
9 The thing that I am curious about that I'd like you to
10 address is whether or not the record, under Rule 7, supports
11 your motion on that theory of unjust enrichment out of the
12 affidavit that we have from Mr. Lewis, his statement.

13 So counsel, tell me about that, because looking at
14 this one, I'm a lot more comfortable with an unjust
15 enrichment, and, Mr. Milne, you're going to take the laboring
16 war?

17 MR. KEITH: Yes, he is.

18 MR. MILNE: Thank you, Your Honor.

19 THE COURT: All right. Then we'll go to the man on
20 the far - well, I'm not going to say far left. We can't have
21 a far left in the state of Utah.

22 MR. MILNE: Your Honor, on the unjust enrichment
23 issue, I would like to turn the Court's attention to what
24 isn't marked, but is, in fact, page 10 of the defendant's
25 opposition memo.

1 THE COURT: All right. Counsel, give me just a
2 second, and I'll pull it out, because I did have it marked
3 for the hearing. Okay. Here's the opposition memo, and here
4 it comes up. That's page one, two, three, four, five -
5 response - or which argument, counsel?

6 MR. MILNE: Number three - Roman numeral three.
7 "Nelson was not unjustly enriched."

8 THE COURT: I've got you. Okay.

9 MR. MILNE: Okay. Well, I actually want to look at
10 the last paragraph of that section, though.

11 THE COURT: All right. I'll go to the next page
12 here.

13 MR. MILNE: Well, the second to the last.

14 THE COURT: Okay. "It is agreed that?"

15 MR. MILNE: Yes.

16 THE COURT: Okay.

17 MR. MILNE: It states. "It is agreed that the
18 purchase assets that Lewis conferred a benefit to Nelson, and
19 that Nelson knew of and appreciated this benefit. It is also
20 undisputed that that - Nelson accepted and retained this
21 benefit while knowing that Lewis expected full compensation
22 for the same." Those are all three of the elements that are
23 required for unjust enrichment. So my position is he's not
24 disputing that in his argument.

25 And it goes on, and it says, "However, Lewis never

1 conferred that which he contracted to confer." The contract
2 is an entirely different issue.

3 And then it goes on, "Without the ability to confer
4 an exclusive area for Nutty Guys in Southern Utah, Lewis
5 effectively only conveyed a list of existing customers that
6 were able to be poached or taken by any Nutty Guys'
7 representatives," but there's no - if we're talking about
8 unjust enrichment, there's - he admits he received the
9 benefit. There's - the language regarding exclusive area
10 would be irrelevant for the unjust enrichment. He's claiming
11 that under the contract there was an agreement as regarding
12 the conveyance of an exclusive area.

13 THE COURT: So, counsel, your argument to me is
14 basically that from a conceptual and logical reasoned
15 approach to the issues before the Court that there is really
16 no way that the concept exclusive area can have an impact -
17 can be material to the elements of unjustment - unjust
18 enrichment for the reason that an exclusive area would have
19 been a contract term. And that the Court, in facing the
20 logical dilemma, can only rule in your favor, because the
21 elements of unjust enrichment haven't been admitted, and Mr.
22 Lewis' affidavit establishes the facts based upon which the
23 Court can render judgment?

24 MR. MILNE: Yes, and the exclusive area language
25 would be relevant to the existence of a contract. My

1 understanding is that the - Mr. Nelson claims there is no
2 contract, because either - he says that he didn't get this
3 exclusive area, but that doesn't mean there's no contract.
4 That just means there's breach, and so he's not - I don't -
5 or otherwise he says that the contract was never signed, but
6 the case law is clear in Utah that you can have an oral
7 contract. This isn't covered by the Statute of Frauds. And
8 so to the extent he claims that we didn't convey an exclusive
9 area, that doesn't mean there's no contract, that just means
10 that there's a potential breach.

11 THE COURT: Counsel, one of the things that Mr.
12 Nelson's response brings to my mind is that damages for
13 breach might be impacted by - it sounds like a Fish & Game
14 case, but the impact of poachers - the way he's put it, that
15 is that if there was not an exclusive area but there was an
16 unjust enrichment, that the measure of damages could be
17 impacted by what Mr. Nelson has pled and argued, that other
18 people have come in and taken over the opportunity to
19 distribute Nutty Guys product. What do you want to tell me
20 about that concept?

21 MR. MILNE: I would like to refer the Court to Mr.
22 Nelson's declaration, which is attached, I believe, as
23 Exhibit D to his opposition -

24 THE COURT: Let me get -

25 MR. MILNE: - memoranda.

1 THE COURT: Let me get down to it, counsel. And C,
2 D. All right. I am in his declaration. Where do you want
3 to go? Paragraph?

4 MR. MILNE: Well, essentially the only language I
5 can see regarding - well, paragraph 30. It says, "I would
6 never have entered into this agreement if I had known that I
7 was not purchasing an exclusive area as I was led to
8 believe." So in my mind I read that as an admission that he
9 entered into this agreement.

10 Regarding the exclusive area, I don't see anywhere
11 in the declaration that he states that my client failed to
12 provide an exclusive area. He does state in paragraph 26,
13 "During the time that I have owned and operated the route,
14 other Nutty Guys distributors have openly contracted with
15 customers in the exclusive Southern Utah area causing a
16 substantial loss of business," but that doesn't say that my
17 client didn't provide an exclusive area. That just says that
18 other Nutty Guys distributors are acting inappropriately by
19 violating that exclusive area with Nutty Guys.

20 THE COURT: Well, counsel, are you asking me to
21 infer that if other Nutty Guys distributors are coming into
22 this territory that Mr. Nelson's relief is with Nutty Guys,
23 and complaining to them about allowing other distributors to
24 come into this area, and that it's really a breach of a
25 franchise agreement, or something along those lines?

1 MR. MILNE: Yes. I don't see anything in the
2 agreement - in the declaration stating that Mr. Lewis failed
3 to provide an exclusive area. All I see is he claims that
4 the exclusive area was infringed upon by others, not by any
5 failure on Mr. Nelson's part. But more importantly I would
6 like to refer the Court to the fact that Mr. Nelson has
7 failed to respond to our client's request for admission. We
8 attached a copy of those requests as Exhibit B to our opening
9 memorandum.

10 THE COURT: Well, and Mr. Nelson has provided it to
11 me in his Exhibit B, that is the plaintiff's revised first
12 set of request for admission?

13 MR. MILNE: Yes.

14 THE COURT: I've got it right here, Mr. Nelson.

15 MR. MILNE: He responded to the first five of those,
16 and nowhere in his response does he mention any of the other
17 paragraphs - any of the other requests for admission.
18 There's no objection made to any of those. The Court did
19 enter a ruling.

20 THE COURT: Establishing those facts as proven,
21 counsel.

22 MR. MILNE: Well, establish - ordering the defendant
23 to respond to all of the requests for admission -

24 THE COURT: Okay.

25 MR. MILNE: - and he did not do so.

1 THE COURT: So they must be deemed proven by the
2 Rules of Civil Procedure?

3 MR. MILNE: Yes, and there has been no motion to
4 withdraw those admissions or to amend them.

5 THE COURT: Okay.

6 MR. MILNE: There - in fact, it not only has - even
7 if there were a motion, however, Mr. Nelson would need to -
8 according to Utah case law - the case for *Barnes v. Clarkson*,
9 and I cite to it in our reply memorandum. That case stands
10 for the proposition that if you're going to withdraw - in
11 order to withdraw your admission, you need to set forth
12 specific detailed facts - evidence to contradict the
13 admissions, and that's not here in this declaration. There's
14 nothing in the declaration that provides with detail anything
15 that specifically contradicts the admissions in our request
16 for admission, and the truth is again there's no motion to
17 set those aside.

18 THE COURT: All right, thank you, counsel.

19 MR. MILNE: Thank you, Your Honor.

20 THE COURT: Mr. Nelson, you've been listening very
21 carefully to our discussion. So it's time to give you a
22 chance to put your side forward. If you'd be more
23 comfortable sitting at the table with the paperwork in front
24 of you, that's fine. That's a good mic. But if you want to
25 use the podium, the taxpayers paid for that too, and you're

1 entitled to use it as well.

2 MR. NELSON: I appreciate that, Your Honor. I can
3 see better if I'm standing, if the truth be known.

4 THE COURT: All right. Well, I can talk better if
5 I'm standing up, but I couldn't practice law in my own
6 courtroom anymore.

7 MR. NELSON: I may have to go back there for some
8 more paperwork, but we'll start it out this way.

9 Your Honor, I appreciate the chance to stand here
10 as a pro se litigant and defend myself against these
11 allegations. I have no legal training, nor do I profess to
12 have any complete knowledge of the law.

13 THE COURT: You have excellent draftsmanship skills.
14 I've read your pleadings, Mr. Nelson, and I think you sell
15 yourself a bit short. I think you've done a pretty good job.

16 MR. NELSON: I have - I have done my best to comply
17 with all the requirements as I understand them and as I've
18 learned them.

19 The case goes back to the very number one piece of
20 paper in it, and that paper would be the agreement, asset
21 purchase agreement that the plaintiff provided the court.
22 Now, in my affidavit - let's see if I can find which
23 paragraph it is.

24 THE COURT: I've got your affidavit right here -
25 your declaration anyway.

1 MR. NELSON: Paragraph nine.

2 THE COURT: Okay.

3 MR. NELSON: "After some discussion, plaintiff and
4 I" - we agreed to terms on the purchase of the business, and
5 I handwrote an agreement, which both Lewis and I signed.

6 THE COURT: Has anybody been able to put that
7 agreement in front of us?

8 MR. NELSON: Your Honor, that agreement was given to
9 Mr. Lewis, and he was taking it to his uncle, who was an
10 attorney, to have a contract drafted.

11 THE COURT: Based upon the terms on that agreement?

12 MR. NELSON: Based upon those terms.

13 THE COURT: And you've never seen it since?

14 MR. NELSON: I have not seen it, and I've asked for
15 it on several occasions.

16 THE COURT: Okay.

17 MR. NELSON: If that document were to be provided,
18 then there's a lot more information that could be established
19 from that. I have - I've stated many times, and I have put
20 it in many legal documents that I disagree with the asset
21 purchase agreement. The plaintiff has put in his paperwork
22 that - that I, in fact, was the drafter of that asset
23 purchase agreement. This is false.

24 THE COURT: The both of you worked on it together,
25 as I read your affidavit. Is that your position?

1 MR. NELSON: We worked on the one that I signed.

2 THE COURT: Okay.

3 MR. NELSON: And there is one that is signed, Your
4 Honor, and so that should take precedent, and I disagree with
5 the one that is put before this Court today, and I agree -
6 disagree with the terms in that.

7 THE COURT: Well, and you never signed it because of
8 that very reason, if I get you right?

9 MR. NELSON: I never signed it. Actually, it was
10 only about a month ago that I actually understood what the
11 plaintiff had put in his pleadings arguing that I was, in
12 deed, the one that drafted that document.

13 THE COURT: Uh-huh (affirmative), and you dispute
14 that whole heartedly?

15 MR. NELSON: I dispute that contract whole
16 heartedly. There are, however, terms and conditions in there
17 that I -

18 THE COURT: You've agreed to?

19 MR. NELSON: - were a part of the original agreement
20 but there are stretches in there that I do not agree with and
21 cannot agree with.

22 Your Honor, the plaintiff would ask you to rule
23 against me due to procedural error. I did not answer all the
24 questions in their discovery for - or I failed to answer
25 admissions. I would say there's been errors on both sides in

1 this case. The reason for the ruling back in - well, I can't
2 tell you for sure when the ruling was, but it's in - anyway -

3 THE COURT: I think the order to compel response to
4 the -

5 MR. NELSON: Yeah.

6 THE COURT: - discovery.

7 MR. NELSON: The order to compel happened because
8 plaintiff put in their motion for discovery based on
9 bankruptcy law. Obviously, it was an error. But if that
10 error is overruled or looked over, then so should some of
11 mine, I guess.

12 THE COURT: So you're asking - if they made a
13 mistake and you made a mistake, it all ought to about even
14 out?

15 MR. NELSON: Maybe. But when you go back to the
16 discovery issues and what they say that I admitted to, it is
17 my understanding that under a tier one lawsuit under \$50,000
18 you're limited to three hours of deposition, five - it's in
19 here somewhere.

20 THE COURT: Let me just pull this up real quick.
21 What I'm actually doing, Mr. Nelson, is going back to the
22 filing date of the complaint to find out if this was filed
23 before we went into the new discovery rules, and it was. The
24 discovery rules came into effect November 1 of 2012. This
25 one was filed in July of 2012. So it preceded the tier

1 concept coming into discovery.

2 And, counsel, that's your position? Am I correct?
3 This is a prior - this is prior to the tier process?

4 MR. MILNE: Then this is in 2012. So the tier
5 process would apply to the -

6 THE COURT: Oh, it's 2011?

7 MR. MILNE: Yeah.

8 THE COURT: Well, what's a year amongst friends?

9 MR. MILNE: Well, it was filed -

10 THE COURT: My apologies.

11 MR. MILNE: - in 2-2012, right?

12 THE COURT: It was filed in July of 2012.

13 MR. MILNE: Yeah. So we would be under the new
14 rules.

15 THE COURT: Okay. So we're in the tier system. My
16 apologies everybody.

17 MR. MILNE: I have a response, but I won't.

18 THE COURT: Oh, that's okay. We'll let Mr. Nelson
19 go on then. Then he's got - he's got something to do with -
20 and he's concerned that the discovery itself exceeds a tier
21 one level case.

22 MR. NELSON: Again, Your Honor, I answered the first
23 five questions of that discovery, which is - my understanding
24 - I was required to do under the tier one.

25 THE COURT: Uh-huh (affirmative).

1 MR. NELSON: If tier one did not come into play in
2 this case, the answer six through 30 that -

3 THE COURT: They're complaining about it.

4 MR. NELSON: - the plaintiff is asking to be
5 admitted to - if you read those same questions, they are
6 different ways of asking the same first five questions, and
7 every one of the answers to those next 24 questions would be
8 referred back to the first five.

9 THE COURT: Okay.

10 MR. NELSON: They're - they're - they have not
11 produced the document - a contract or any documents that I
12 can agree with - to even argue here.

13 THE COURT: Okay. All right. That's really quite
14 clear, Mr. Nelson. Anything else that you need to tell me
15 about it other than what you've already put in - and I - I am
16 going to complement you again. These are really well drafted
17 pleadings. Your responses are very straightforward and
18 outline your position very clearly. I don't mean to cut you
19 off. If there are things you want to say, I'll listen, but
20 you've put it before me masterfully. Anything else you'd
21 like to say?

22 MR. NELSON: I would like to touch on the unjust
23 enrichment claim.

24 THE COURT: Please.

25 MR. NELSON: I would agree with that. I believe the

1 plaintiff has been unjustly rewarded in this case. He
2 brought to this court an asset purchase agreement that he
3 calls the contract, and he has asked me to live up to that
4 contract, which I did not agree to or sign. I did, however,
5 live up to the agreement that I signed, if it was produced.
6 After five months of living up to that agreement, the
7 plaintiff brought to be the asset purchase agreement and said
8 here, sign this. That is the time when I says no. This does
9 not agree with what we signed on the previous document.

10 THE COURT: This isn't our deal?

11 MR. NELSON: This is not our deal. There is no
12 exclusive territory that Mr. Lewis ever owned down here. And
13 through deposition, we found out that he does not have, nor
14 did he ever have, a contract with Nutty Guys. So he did not
15 have anything to sell, but he represented it in an
16 advertisement for sale on KSL.com, which I answered. He
17 advertised an exclusive territory in Southern Utah with Nutty
18 Guys. I agreed to purchase, based on those facts -

19 THE COURT: Just so I get a flavor for it, Mr.
20 Nelson. When you are servicing this area, what is it that
21 you are distributing to buyers?

22 MR. NELSON: Nuts, candy, dried fruit, popcorn.

23 THE COURT: Okay. The sort of thing you walk into
24 the convenient store, and there it is?

25 MR. NELSON: Uh-huh (affirmative).

1 THE COURT: You don't use -

2 MR. NELSON: You should have seen -

3 THE COURT: - Maverick because they supply their own
4 stuff? But anybody who ain't a Maverick is fair game?

5 MR. NELSON: Actually, Nutty Guys' corporate office
6 went into the Maverick -

7 THE COURT: Okay.

8 MR. NELSON: - for a short period of time and -

9 THE COURT: During the time that you were operating
10 your route?

11 MR. NELSON: Yes, and they also had made sales in
12 this area and made deliveries in this area around me, which I
13 got no compensation for. This we also found out in
14 deposition of the owner of Nutty Guys, Nate Murray.

15 THE COURT: Okay.

16 MR. NELSON: So it's not exclusive.

17 Now, when I purchased it, it was an exclusive area,
18 and I had these terms that I had to follow to keep it
19 exclusive. This was explained to me by Mr. Lewis as it was
20 explained to me by Nate Murray, who was at the time the owner
21 of Nutty Guys.

22 THE COURT: Okay.

23 MR. NELSON: At that time, I asked for a contract
24 stipulating those terms. At that time, Mr. Murray said the
25 lawyer was redrafting it, and he would get it to me.

1 THE COURT: But it never came?

2 MR. NELSON: It never came. Subsequently, when -
3 five months later and Mr. Lewis came with a contract for me
4 to sign, and I said I disagree with this contract, and I need
5 you to provide me with a detailed accounting of the monies
6 you've been paid, and then we can square this all up and get
7 it taken care of. And to this date, Your Honor, I have not
8 received an accurate accounting of the monies that he paid.
9 Now, I have been able to find bits and pieces that I can put
10 together with some guessing on my part, but I cannot get an
11 accurate accounting, nor does the plaintiff provide one in
12 their pleadings.

13 THE COURT: Okay. Anything else you'd like to
14 cover, sir? I think I've got your argument. You've covered
15 the same ground you did in the paperwork. But if there's
16 anything else you want to emphasize, I'm here to listen.

17 MR. NELSON: No, Your Honor. I think - I just
18 appreciate your understanding of the sides of this and your
19 patience with me.

20 THE COURT: Well, you've done a good job. It
21 doesn't take very much patience to listen to you, sir.

22 MR. NELSON: Thanks, sir.

23 THE COURT: All right, thank you.

24 My job, however, gentlemen, is to issue a ruling.
25 Looking at the form of this lawsuit and the form of the

1 pleadings under Rule 7 as we have, I'm going to grant the
2 motion for summary judgment.

3 Now, remember, Mr. Milne and Mr. Keith, that we do
4 not issue findings of fact. There are undisputed issues of
5 fact in the various statements and declarations as well as
6 the arguments, but - and you can include those, because I
7 want there to be a clear record for Mr. Nelson to appeal.

8 Mr. Nelson, the reason I say this is that if my analysis
9 of this is wrong, I want the Court of Appeals to tell me
10 that. I don't think it is. I think Mr. Lewis is entitled to
11 his recovery as he's prayed for. But if my analysis is
12 incorrect and this is truly an unjust enrichment case, that's
13 the way I read it based upon the record that's before the
14 Court, but the minute - the process goes like this. Counsel
15 will prepare a proposed order granting the motion for summary
16 judgment based upon the facts in the record as we have them
17 and the pleadings before the court. There will be a judgment
18 then separate and apart from that. Counsel has a
19 responsibility under the Rules of Civil Procedure to get that
20 to you at least five days, and counsel, let's make it eight
21 days. Make sure - it's the electronic world, and sometime
22 people forget about the mailing portion, but eight days
23 before it's submitted back to the court. Now, in eight days,
24 I'll no longer be a district judge. I'll be a senior judge,
25 but either in my capacity as a senior judge I can sign it or

1 my successor, Judge Westfall, will receive it and be in a
2 position to put a signature on it. In that eight day period
3 of time, you'll have a chance to look at what the documents
4 say that they're going to submit to the court for signature.
5 You can file objections to those, and Judge Westfall could
6 rule on them, or you could just look at those and say this
7 record does not support that claim. And based upon this
8 record not supporting that claim, the order should not be
9 signed, and Judge Westfall could have a hearing on it and
10 make that decision. Or if he denied it, he would sign the
11 order. But the minute that the order is signed, that's when
12 your appeal time - that 30-day appeal time starts to run.
13 All you have to do is file a notice of appeal and the
14 security bond requirement, which is a \$300 bond. File that
15 with the clerk of the court. You could take it up to the
16 Court of Appeals, but I just - I don't want you to be
17 whipsawed by the calendar running out on you. I want you to
18 look for that process. Counsel will be submitting these in
19 the next few days, and then, frankly, I've got to check with
20 my superiors to see if I can sign it. Even though I granted
21 it today while I was still a real judge - when I turn into a
22 pumpkin April 1st at midnight, I don't know if my authority
23 is going to continue beyond that, especially in cases that
24 would wrap up right now. Sensibly, it should. It shouldn't
25 have anybody else's fingerprints. But before I did sign it,

1 I'd check the file and look at your objections if you signed
2 them.

3 Thank you everyone.

4 We'll stand adjourned.

5 MR. KEITH: Thank you, Your Honor.

6 MR. NELSON: Thank you.

7 (Whereupon the hearing was concluded)

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[1] 11:14 pull [2] 6:2 15:20 pumpkin [1] 22:22 purchase [6] 6:18 12:21 13:4,21, 23 18:2,7,18 purchased [1] 19:17 purchasing [1] 9:7 putting [2] 3:4,10</p> <hr/> <p>Q</p> <p>questions [5] 14:24 16:23 17:5,6, 7 quick [1] 15:20 quite [1] 17:13</p> <hr/> <p>R</p> <p>read [5] 9:8 12:14 13:25 17:5 21: 13</p>	<p>real [2] 15:20 22:21 reason [4] 7:18 14:8 15:1 21:8 reasoned [1] 7:14 receive [1] 22:1 received [2] 7:8 20:8 record [12] 1:7 4:6,7,8,9,16 5:10 21:7,13,16 22:7,8 recordings [1] 1:4 recovery [1] 21:11 redrafting [1] 19:25 refer [2] 8:21 10:6 referred [1] 17:8 regarding [4] 7:9,11 9:5,10 reggie [1] 1:8 relevant [1] 7:25 relief [1] 9:22 remember [1] 21:3 render [1] 7:23 reply [2] 1:16 11:9 represent [1] 2:2 representatives [1] 7:7 represented [1] 18:15 representing [1] 1:24 request [4] 1:25 10:7,12 11:15 requests [3] 10:8,17,23 required [2] 6:23 16:24 requirement [1] 22:14 requirements [1] 12:17 respond [2] 10:7,23 responded [1] 10:15 response [7] 3:13 4:10 6:5 8:12 10:16 15:3 16:17 responses [1] 17:17 responsibility [2] 4:7 21:19 responsive [1] 4:20 retained [1] 6:20 revised [1] 10:11 rewarded [1] 18:1 rights [3] 2:11 3:10,11 rodney [1] 1:8 roman [1] 6:6 route [4] 3:9,11 9:13 19:10 rule [6] 4:15 5:10 7:20 14:22 21:1 22:6 ruled [1] 2:7 rules [7] 3:24 4:15 11:2 15:23,24 16:14 21:19 ruling [4] 10:19 15:1,2 20:24 run [1] 22:12 running [1] 22:17</p> <hr/> <p>S</p> <p>sale [1] 18:16 sales [1] 19:11 se [1] 12:10 second [2] 6:2,13 section [1] 6:10 security [1] 22:14 seeking [1] 1:19 sell [2] 12:14 18:15 senior [2] 21:24,25 sensibly [1] 22:24 separate [1] 21:18 service [1] 2:11 servicing [1] 18:20 set [5] 3:19 4:18 10:12 11:11,17 several [1] 13:15</p>	<p>short [2] 12:15 19:8 shouldn't [1] 22:24 shows [1] 4:6 shumate [1] 1:2 side [2] 2:24 11:22 sides [2] 14:25 20:18 sign [7] 18:4,8 20:4 21:25 22:10,20, 25 signature [2] 22:2,4 signed [13] 5:5,6 8:5 13:5 14:1,3,7, 9 18:5,9 22:9,11 23:1 since [1] 13:13 sitting [1] 11:23 six [1] 17:2 skills [1] 12:13 somehow [1] 2:4 sometime [1] 21:21 somewhere [3] 2:13 5:2 15:19 sort [2] 2:24 18:23 sounds [1] 8:13 southern [5] 2:14,15 7:4 9:15 18: 17 speakers [1] 1:3 specific [1] 11:12 specifically [2] 2:1 11:15 square [1] 20:6 st [1] 1:1 stand [2] 12:9 23:4 standing [2] 12:3,5 stands [1] 11:9 start [1] 12:8 starts [1] 22:12 state [3] 2:16 5:21 9:12 stated [1] 13:19 statement [4] 3:8,15 4:18 5:12 statements [1] 21:5 states [2] 6:17 9:11 stating [1] 10:2 statute [1] 8:7 still [1] 22:21 stipulating [1] 19:24 store [1] 18:24 straightforward [1] 17:17 stretches [1] 14:20 stuff [1] 19:4 submit [1] 22:4 submitted [1] 21:23 submitting [1] 22:18 subsequently [2] 1:20 20:2 substantial [1] 9:16 successor [1] 22:1 summary [9] 1:12 2:7,16 3:7,15, 22 4:6 21:2,15 superiors [1] 22:20 supply [1] 19:3 support [2] 3:15 22:7 supported [1] 3:23 supporting [1] 22:8 supports [1] 5:10 system [1] 16:15</p> <hr/> <p>T</p> <p>table [1] 11:23 taxpayers [1] 11:25 term [1] 7:19 terms [7] 13:4,11,12 14:6,16 19:18, 24</p>	<p>territory [3] 9:22 18:12,17 thanks [1] 20:22 theory [1] 5:11 therefore [1] 4:8 though [3] 3:2 6:10 22:20 tier [8] 15:17,25 16:3,4,15,20,24 17: 1 together [2] 13:24 20:10 took [1] 4:19 touch [1] 17:22 training [1] 12:11 transaction [1] 4:19 transcriber's [1] 1:3 truly [1] 21:12 truth [2] 11:16 12:3 turn [2] 5:23 22:21</p> <hr/> <p>U</p> <p>uncle [1] 13:9 understand [2] 4:5 12:17 understanding [4] 8:1 15:17 16: 23 20:18 understood [1] 14:10 undisputed [3] 4:11 6:20 21:4 unjust [13] 2:25 5:8,11,14,22 6:23 7:8,10,17,21 8:16 17:22 21:12 unjustly [3] 3:3 6:7 18:1 unjustment [1] 7:17 unsigned [1] 2:18 utah [9] 1:1 2:14 4:15 5:21 7:4 8:6 9:15 11:8 18:17</p> <hr/> <p>V</p> <p>value [1] 2:19 variance [1] 3:14 various [1] 21:5 violating [1] 9:19 vs [1] 1:8</p> <hr/> <p>W</p> <p>walk [1] 18:23 war [1] 5:16 wasatch [1] 2:13 washington [1] 2:15 way [8] 3:4,10,11,20 7:16 8:14 12: 8 21:13 ways [1] 17:6 wesley [1] 1:18 westfall [3] 22:1,5,9 whereupon [1] 23:7 whipsawed [1] 22:17 whole [2] 14:14,15 windsor [3] 1:19,24 2:1 withdraw [3] 11:4,10,11 withdrawal [1] 1:25 withdrawn [1] 1:24 without [2] 3:4 7:3 worked [2] 13:24 14:1 world [1] 21:21 wrap [1] 22:24 written [1] 5:3</p> <hr/> <p>Y</p> <p>year [1] 16:8</p>
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The Order of Court is stated below:

Dated: May 20, 2014
03:52:11 PM

/s/ G MICHAEL WESTFALL
District Court Judge



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

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

**Order Granting Plaintiff's
Motion for Summary Judgment**

Case No. 120500402
Judge James L. Shumate

On March 24, 2014, a hearing was held before the Honorable James L. Shumate on *Plaintiff's Motion for Summary Judgment*. Plaintiff Reggie Lewis was present and was represented by his attorneys Penrod Keith and Eli Milne of the law firm of Durham Jones & Pinegar, P.C. Defendant Rodney Nelson was present and represented himself pro se. Having reviewed and considered the pleadings, motion, memoranda, exhibits, documents on file, and oral arguments of the parties, and for good cause appearing, the Court hereby FINDS and CONCLUDES as follows:

1. All of the following material facts are undisputed:
 - a. Nutty Guys is a business located in Salt Lake City, Utah, that distributes

comestible items to retail outlets.

b. Lewis paid \$30,000.00 to acquire the right to operate a Nutty Guys supply route (the "ROUTE") from the Route's prior operator.

c. Lewis operated the Route continuously from July 2009 to January 2011.

d. At the end of 2010, Rodney Nelson approached Lewis about acquiring the right to operate the Route.

e. After a period of negotiation, Nelson agreed to purchase, and Lewis agreed to sell, the right to operate the Route in accordance with the terms and conditions set forth in a written *Asset Purchase Agreement* (the "AGREEMENT").

f. Although neither of the parties signed the Agreement, they orally agreed that its terms and conditions would bind both parties and govern Nelson's acquisition of the right to operate the Route from Lewis.

g. Among other things, the Agreement states

1. [Lewis] has owned and operated a business known as "Southern Utah Nutty Guys" (the "Business") which is an exclusive area and route assigned to him by the Nutty Guys LLC. The Business consists of the exclusive area in Southern Utah and other assets described below.

2. [Nelson] desires to purchase and [Lewis] desires to sell the Business and related assets as described above subject to associated and specified liabilities, hereinafter together referred to as the "Purchased Assets" on the terms and conditions set forth herein and defined below.

....
1.1 The Sale. At the Closing . . . , [Lewis] shall sell, transfer, assign and deliver to [Nelson] and [Nelson] shall purchase, receive and assume, all right, title, interest and liability, both legal and equitable, in the Purchased Assets, as hereinafter defined (the "Sale").

1.2 Purchased Assets. The "Purchased Assets" shall include the assets of the Business including 1) the exclusive Nutty Guys Southern Utah area and route, 2) assignment of the existing account receivables and the reserve held by Nutty

Guys LLC in the approximate amount of \$8,000 ("the Reserve Account") subject to the payment provisions set forth in Section 2.2 below, 3) all other inventory, accounts, business names and other good will and intangible property associated with the Nutty Guys Southern Utah area.

....
2.1 Purchase Price. The total purchase price (the "Purchase Price") to be paid by [Nelson] for the Purchased Assets shall be Twenty Five Thousand and No/100 Dollars (\$25,000.00), which Purchase Price shall be payable as follows and as set forth in paragraph 2.2 below: Two Thousand dollars (\$2,000) to be paid on April 1, 2011, and then subsequently [Nelson] shall pay and assign all subsequent commission checks received from Nutty Guys LLC from January 23, 2011 until April 30, 2011 (with all payments due prior to the execution of this agreement acknowledge received by [Lewis]) and then subsequently [Nelson] shall pay 30% of Nutty Guys LLC commission checks beginning May 1, 2011 until the [\$25,000.00] Purchase Price is paid in full. In the event the Purchase Price is not paid in full by February 1, 2012, any unpaid balance shall accrue interest at the rate of 8% until the Purchase Price is paid in full. All payments pursuant to this paragraph shall be made no later than July 1, 2012.

2.2 Payment for Reserve Account. In connection with the assignment of the Reserve Account, [Nelson] shall pay to [Lewis] the value of the Reserve Account by delivering to [Lewis] as received all collections on accounts receivable attributable to [Lewis's] operation of the Business arising on or before _____ [date seller took over operations]. To the extent the collection and payment to [Lewis] of such accounts does not equal the value of the Reserve Account, [Nelson] on or before February 1, 2012 shall pay the difference between the value of the Reserve Account (approximately \$8,000) and the payments previously made from the collection of the accounts receivable.

....
5.4 Default. . . In any action pursuant to a default under this section, the prevailing party shall be entitled to recover costs and expenses including attorney fees.

h. In accordance with the Agreement, Lewis transferred all of the "Purchased Assets" (as defined in the Agreement) to Nelson in or about January 2011.

i. From February to May 2011, Nelson made several payments to Lewis totaling approximately \$11,000.00.

j. Nelson has not made any payments to Lewis since May 2011.

k. Because of Nelson's cessation of payments, Lewis's attorney sent a letter to Nelson on September 12, 2011, stating:

Last year, you entered into an oral agreement with Reggie Lewis for the sale of a certain "Nutty Guys" route in Southern Utah. Many of the terms of that agreement were embodied in a writing prepared by you, including the purchase price for such route and the terms of purchase.

You have failed to remit payment in accordance with your obligations under the contract. Demand is made that you submit the unpaid balance of the contract in accordance with its terms. . . .

l. Nelson responded to this letter via e-mail on September 14, 2011, as follows:

. . . I have on several occasions during the past few months requested from [Lewis] documentation supporting his figures in this matter. . . . As of this date I have not received these items. . . . I would really appreciate it if you could forward all applicable documents to [my accountant] and provide answers to any questions she has and I am confident this matter can be resolved without further frustration on either side.

m. On September 26, 2011, Lewis's attorney replied to Nelson's e-mail thus:

In your e-mail you requested in effect an accounting setting forth payments made by you on the contract referenced in my September 12, 2011 letter. We are surprised that you do not have this information and we also note that this information has been sent to you before by Mr. Lewis directly. . . .

n. On October 4, 2011, Nelson sent the following response to counsel's letter:

In your demand letter you infer that I am in breach of the agreement because I have not made payment when in fact on August 9[,] 2011[,] I offered Mr. Lewis a payment in full of \$11,000.00. This was an amount I guessed to be due because Mr. Lewis refused to give me the accounting I am still requesting. . . .

o. The total amount of unpaid principal due under the Agreement is currently at least \$22,000.00. This figure includes \$14,000.00 for the unpaid balance of the

Purchase Price (as defined in Section 2.1 of the Agreement), and \$8,000.00 for the unpaid value of the Reserve Account (as defined in Section 1.2 of the Agreement). This figure does not include any additional payments that may be due under Section 2.2 of the Agreement; it also does not include interest, costs, or attorney fees.

2. There is no genuine issue as to any material fact in this case.

3. For the reasons set forth in *Plaintiffs' Motion for Summary Judgment* and the memoranda that Lewis submitted in support of the same, Lewis is entitled to a judgment as a matter of law on his First and Second Causes of Action for breach of contract and unjust enrichment, respectively, against Nelson in the principal amount of \$22,000.00, together with pre- and post-judgment interest at the contract rate of 8% per annum beginning February 1, 2012, and attorney fees and costs in an amount to be established by affidavit.

Wherefore, for the foregoing reasons, the Court hereby GRANTS *Plaintiff's Motion for Summary Judgment*.

IT IS SO ORDERED.

* * *

APPROVED AS TO FORM:

Rodney Nelson
Defendant, pro se

The Order of Court is stated below:

Dated: May 20, 2014
04:03:20 PM

/s/ G MICHAEL WESTFALL
District Court Judge



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

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

Final Judgment

Case No. 120500402
Judge James L. Shumate

The Court, having granted *Plaintiff's Motion for Summary Judgment* against Defendant Rodney Nelson, now hereby ORDERS, DECLARES, and ADJUDICATES as follows:

1. Plaintiff Reggie Lewis is awarded judgment against Defendant Rodney Nelson as follows:

\$22,000.00	Principal
\$3,818.96	Interest as of April 3, 2014
\$864.12	Costs as of April 3, 2014
\$14,979.50	Attorney fees as of April 3, 2014
\$41,662.58	Total Judgment

2. This judgment, and all amounts due hereunder, shall accrue interest at the post-

judgment rate of 8% per annum, and shall be further augmented in the amount of reasonable costs and attorney fees incurred in collecting said judgment by execution or otherwise as shall be established by affidavit.

3. This order shall constitute the final order of the Court in this case, and no additional order is necessary.

IT IS SO ORDERED.

* * *

APPROVED AS TO FORM:

Rodney Nelson
Defendant, pro se

FILED

2014 OCT 10 PM 3:30

FIFTH DISTRICT COURT
WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

BY _____

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON.,

Defendant.

**MEMORANDUM DECISION AND
ORDER ON MOTION TO ALTER OR
AMEND JUDGMENT AND MOTION TO
ALTER OR AMEND ORDER
GRANTING SUMMARY JUDGMENT**

Case No. 120500402

Judge G. Michael Westfall

Before the Court are Defendant's (1) Motion to Alter or Amend Judgment and (2) Motion to Alter or Amend Order on Plaintiff's Motion for Summary Judgment. The Court heard oral argument on the motions on September 9, 2014. Having considered the motions, memoranda, and arguments of counsel, and being fully advised, the Court finds and orders as follows:

"Our case law is clear that where a court's oral ruling differs from a final written order, the latter controls." *M.F. v. J.F.* 2013 UT App 247, ¶ 6, 312 P.3d 946, quoting *Evans v. State*, 963 P.2d 177, 180 (Utah 1998). The Court notes, therefore, that to the extent there were any deficiencies in the prior oral ruling on summary judgment or any discrepancies between that ruling and the written order, the written order obviously prevails.

Although Defendant now raises the statute of frauds to contest the summary judgment in this matter, it was not previously set forth in the answer as required by Utah Rule of Civil

948, (alteration in original) (quoting Utah R. Civ. P. 36(a)(2) (current version id. R. 36(b)(1))).

(Emphasis added.) The fact that Plaintiff may have exceeded the number of requests for admission set forth under URCP 26(c)(5) for a Tier 1 case does not justify Defendant's apparent decision to ignore the requests and hope for the best; rather, Defendant should have objected or otherwise sought the Court's intervention on the discovery dispute prior to summary judgment.

Finally, the Court previously found that the contract allows "the prevailing party ... to recover costs and expenses including attorney fees." Defendant argues that Plaintiff's recovery for postage, copying costs, and "Tracers People Search CSR Investigations" should be disallowed, and the Court agrees. These items are sufficiently unusual that it seems quite unlikely they were contemplated by the parties to be "costs" allowed by the contract. *See Stevensen 3rd East, LC v. Watts*, 2009 UT App 137, ¶¶ 62–63, 210 P.3d 977, 993.

ORDER

Based on the foregoing, Defendant's Motion to Alter or Amend Judgment and Motion to Alter or Amend Order on Plaintiff's Motion for Summary Judgment are DENIED, except as to the costs for postage, copying, and "Tracers People Search CSR Investigations." Plaintiff's counsel is directed to prepare an Amended Order on Plaintiff's Motion for Summary Judgment reflecting the change to these three items in the foregoing ruling.

DATED this 10 day of October, 2014.


JUDGE G. MICHAEL WESTFALL
FIFTH DISTRICT COURT
COURT COUNTY



The Order of Court is stated below:

Dated: November 17, 2014
11:23:07 AM

/s/ G MICHAEL WESTFALL
District Court Judge



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

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

Amended Judgment

Case No. 120500402
Judge G. Michael Westfall

For the reasons set forth in the Court's October 10, 2014 Memorandum Decision and Order on Motion to Alter or Amend Judgment and Motion to Alter or Amend Order Granting Summary Judgment, the Final Judgment that the Court entered against Defendant Rodney Nelson in this matter on May 20, 2014, is hereby AMENDED as set forth below, and the Court hereby ORDERS, DECLARES, and ADJUDICATES as follows:

1. Plaintiff Reggie Lewis is awarded judgment against Defendant Rodney Nelson as follows:

\$22,000.00	Principal
\$3,818.96	Interest as of April 3, 2014
\$610.00	Costs as of April 3, 2014

\$14,979.50 Attorney fees as of April 3, 2014

\$41,408.46 Total Judgment

2. This judgment, and all amounts due hereunder, shall accrue interest at the post-judgment rate of 8% per annum beginning May 20, 2014, and shall be further augmented in the amount of reasonable costs and attorney fees incurred in collecting said judgment by execution or otherwise as shall be established by affidavit.

3. This order shall constitute the final order of the Court in this case, and no additional order is necessary.

IT IS SO ORDERED.

[The Court's signature appears at the top of the first page of this Order.]

END OF ORDER

Approved as to form:

CHARLES A. SCHULTZ
Attorney for Rodney Nelson

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Elijah L. Milne (11171)
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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

REGGIE LEWIS,

Plaintiff,

vs.

RODNEY NELSON,

Defendant.

**Declaration of Reggie Lewis
in Support of Plaintiff's
Motion for Summary Judgment**

Case No. 120500402
Judge James L. Shumate

The undersigned makes the following declaration pursuant to Utah Code
§ 78B-5-705.

1. I, Reggie Lewis, am the plaintiff in the above-captioned case, and I am at least
18 years old. I have personal knowledge and am competent to testify regarding the
matters herein. I make this declaration in support of *Plaintiff's Motion for Summary*

Judgment.

2. Nutty Guys is a business located in Salt Lake City, Utah, that distributes comestible items to retail outlets.
3. I paid \$30,000.00 to acquire the right to operate a Nutty Guys supply route (the "ROUTE") from the Route's prior operator.
4. I operated the Route continuously from July 2009 to January 2011.
5. At the end of 2010, Rodney Nelson approached me about acquiring the right to operate the Route.
6. After a period of negotiation, Nelson agreed to purchase, and I agreed to sell, the right to operate the Route in accordance with the terms and conditions set forth in a written *Asset Purchase Agreement* (the "AGREEMENT") that Nelson prepared. A true and correct copy of the Agreement is attached hereto as EXHIBIT A-1.
7. Although neither Nelson nor I signed the Agreement, we both orally agreed that its terms and conditions would bind us and govern Nelson's acquisition of the right to operate the Route from me.
8. Among other things, the Agreement states:
 1. [Lewis] has owned and operated a business known as "Southern Utah Nutty Guys" (the "Business") which is an exclusive area and route assigned to him by the Nutty Guys LLC. The Business consists of the exclusive area in Southern Utah and other assets described below.
 2. [Nelson] desires to purchase and [Lewis] desires to sell the Business and related assets as described above subject to associated and specified

liabilities, hereinafter together referred to as the "Purchased Assets" on the terms and conditions set forth herein and defined below.

....
1.1 The Sale. At the Closing . . . , [Lewis] shall sell, transfer, assign and deliver to [Nelson] and [Nelson] shall purchase, receive and assume, all right, title, interest and liability, both legal and equitable, in the Purchased Assets, as hereinafter defined (the "Sale").

1.2 Purchased Assets. The "Purchased Assets" shall include the assets of the Business including 1) the exclusive Nutty Guys Southern Utah area and route, 2) assignment of the existing account receivables and the reserve held by Nutty Guys LLC in the approximate amount of \$8,000 ("the Reserve Account") subject to the payment provisions set forth in Section 2.2 below, 3) all other inventory, accounts, business names and other good will and intangible property associated with the Nutty Guys Southern Utah area.

....
2.1 Purchase Price. The total purchase price (the "Purchase Price") to be paid by [Nelson] for the Purchased Assets shall be Twenty Five Thousand and No/100 Dollars (\$25,000.00), which Purchase Price shall be payable as follows and as set forth in paragraph 2.2 below: Two Thousand dollars (\$2,000) to be paid on April 1, 2011, and then subsequently [Nelson] shall pay and assign all subsequent commission checks received from Nutty Guys LLC from January 23, 2011 until April 30, 2011 (with all payments due prior to the execution of this agreement acknowledge received by [Lewis]) and then subsequently [Nelson] shall pay 30% of Nutty Guys LLC commission checks beginning May 1, 2011 until the [\$25,000.00] Purchase Price is paid in full. In the event the Purchase Price is not paid in full by February 1, 2012, any unpaid balance shall accrue interest at the rate of 8% until the Purchase Price is paid in full. All payments pursuant to this paragraph shall be made no later than July 1, 2012.

2.2 Payment for Reserve Account. In connection with the assignment of the Reserve Account, [Nelson] shall pay to [Lewis] the value of the Reserve Account by delivering to [Lewis] as received all collections on accounts receivable attributable to [Lewis's] operation of the Business arising on or before _____ [date seller took over operations]. To the extent the collection and payment to [Lewis] of such accounts does not equal the value of the Reserve Account, [Nelson] on or before February 1, 2012 shall pay the difference between the value of the Reserve Account (approximately \$8,000) and the payments previously made from the collection of the accounts receivable.

....
5.4 Default . . In any action pursuant to a default under this section, the prevailing party shall be entitled to recover costs and expenses including attorney fees.

(Ex. A-1, at 1-3, 5.)

9. In accordance with the Agreement, I transferred all of the "Purchased Assets" (as defined on page 1 of the Agreement) to Nelson in or about January 2011. (See Ex. A-1 at 1.)

10. From February to May 2011, Nelson made several payments to me totaling approximately \$11,000.00.

11. Nelson has not made any payments to me since May 2011.

12. Because of Nelson's cessation of payments, my attorney sent a letter to Nelson on September 12, 2011, stating:

Last year, you entered into an oral agreement with Reggie Lewis for the sale of a certain "Nutty Guys" route in Southern Utah. Many of the terms of that agreement were embodied in a writing prepared by you, including the purchase price for such route and the terms of purchase.

You have failed to remit payment in accordance with your obligations under the contract. Demand is made that you submit the unpaid balance of the contract in accordance with its terms. . . .

A true and correct copy of my attorney's letter is attached hereto as EXHIBIT A-2.

13. Nelson responded to my attorney's letter via e-mail on September 14, 2011, as follows:

. . . I have on several occasions during the past few months requested from [Lewis] documentation supporting his figures in this matter. . . . As of this date

I have not received these items. . . . I would really appreciate it if you could forward all applicable documents to [my accountant] and provide answers to any questions she has and I am confident this matter can be resolved without further frustration on either side.

A true and correct copy of Nelson's e-mail is attached hereto as EXHIBIT A-3.

14. On September 26, 2011, my attorney replied to Nelson's e-mail thus:

In your email you requested in effect an accounting setting forth payments made by you on the contract referenced in my September 12, 2011 letter. We are surprised that you do not have this information and we also note that this information has been sent to you before by Mr. Lewis directly. . . .

A true and correct copy of my attorney's reply is attached hereto as EXHIBIT A-4.

15. On October 4, 2011, Nelson sent the following response to my attorney:

In your demand letter you infer that I am in breach of the agreement because I have not made payment when in fact on August 9[,] 2011[,] I offered Mr. Lewis a payment in full of \$11,000.00. This was an amount I guessed to be due because Mr. Lewis refused to give me the accounting I am still requesting. . . .


A true and correct copy of Nelson's response is attached hereto as EXHIBIT A-5.

16. The total amount of unpaid principal due under the Agreement is currently at least \$22,000.00. (See Ex. A-1 §§ 1.2, 2.1, 2.2, at 1-3.) This figure includes \$14,000.00 for the unpaid balance of the Purchase Price (as defined in Section 2.1 of the Agreement), and \$8,000.00 for the unpaid value of the Reserve Account (as defined in Section 1.2 of the Agreement). (See *id.*) This figure does not include any additional payments that may be due under Section 2.2 of the Agreement; it also does not include interest, costs, or attorney fees. (See *id.* §§ 2.1, 2.2, 5.4, at 2-3, 5.)

* * *

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED: January 10, 2014.



REGGIE LEWIS

Rodney Nelson
P.O. Box 69
Brigham City, UT 84302

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

REGGIE LEWIS
PLAINTIFF
VS.

RODNEY NELSON
DEFENDANT

) **DECLARATION OF RODNEY NELSON**
) **IN OPPOSITION TO PLAINTIFF'S MOTION**
) **FOR SUMMARY JUDGMENT**

)
) Case No. 120500402
) Judge James L. Schumate

The undersigned makes the following declaration pursuant to Utah Code §78B-5-705.

1. I, Rodney Nelson, am the defendant in the above-captioned case, and I am at least 18 years old. I have personal knowledge and am competent to testify regarding the matters herein. I make this declaration in opposition to *Plaintiff's Motion for Summary Judgment*.
2. In the fall of 2010 I answered an ad on KSL.com by Reggie Lewis offering an "exclusive" Nutty Guys distribution route in Southern Utah.
3. After several phone calls with Lewis, I agreed to accompany Lewis for deliveries on January 1, 2011.
4. Lewis explained he needed to sell the business so he could take a job with UTA in Salt Lake City.
5. Following this delivery, I told Lewis that I was not interested in purchasing the business, but I would help with deliveries on occasion.
6. One week later, Lewis called me and said that he had the UTA job and asked if I would take over the route.
7. I agreed to do the next round of deliveries and subsequently agreed to take over the route.

8. I met with Lewis at his in-laws home in South Salt Lake where he showed me how to do invoices and run the business.
9. After some discussion, we agreed to terms on the purchase of the business and I hand wrote an agreement which both Lewis and I signed.
10. This agreement contained only basic terms of our agreement.
11. Lewis retained the handwritten agreement and was going to take it to his uncle, who is an attorney, to draft a legal contract.
12. Due to the fact that Lewis maintained the contract, I am unable to remember the entire contract.
13. The contract terms I do remember are as follows:

- I agreed to purchase an exclusive Southern Utah Nutty Guys distributorship, the existing customer base, and all other rights included in the business.

- The purchase was \$25,000.00.

- For the first five months following the handwritten contract, Lewis was to receive 100% of the commission checks that Nelson received through Nutty Guys.

- Any amount of the purchase price still owing following the initial five months would be paid out by 30% of the commission checks until paid in full.

- No interest would be charged in the first year and in February 2012, any outstanding balance would be charged an 8% interest.

- I would receive 25% of existing accounts receivable that I collected credited toward the purchase price.

- Lewis agreed to help with any questions I had during the initial months of ownership and agreed to run the route if I needed time off.

14. Lewis explained that the sale of the route had to be approved by Nate Murray, the owner of Nutty Guys.

15. Murray approved the sale of the route.

16. After taking over the route, it became very difficult to reach Lewis when I had questions or needed help.

17. In June 2011, Lewis came to my warehouse in Hurricane, Utah, to get me to sign a Nutty Guys commission check that had been written to me by mistake.

18. During this visit, he presented me with a new contract and attempted to get me to sign it attached hereto as EXHIBIT A-1.

19. After reading over the contract it was easily evident that this was an entirely different contract.

20. I told Lewis that I would not sign the contract and he needed to get me an accurate accounting of the balance remaining and proof of the "exclusive area" as contracted.

21. I also asked a copy of the original contract.

22. Several weeks later Lewis texted a dollar amount owing and demanded payment.

23. I responded that he needed to provide an accurate, itemized accounting with payments, credits, and accounts receivable, as my figures differed substantially from his.

24. Lewis continued to demand payment, threatened legal action, and that he would come and take over the route.

25. Over this time, I continued to ask for an accounting, original documentation, and provide proof of an exclusive Nutty Guys area in Southern Utah.

26. During the time that I have owned and operated the route, other Nutty Guys distributors have openly contracted with customers in the "exclusive" Southern Utah area causing a substantial loss of business.

27. On April 18, 2012, I received an email from Ryan Ollivier, an owner of Nutty Guys, stating that I was just a sales agent and not a distributor. (Ex. D-1.)

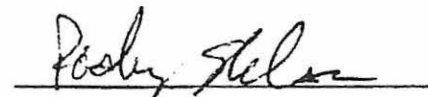
28. At no time have I ever received benefit or control over the disputed reserve account that Lewis held in his name.

29. I never made an initial \$2,000.00 as described in the contract that Lewis tried to have me sign.

30. I would never have entered into this agreement if I had known that I was not purchasing an exclusive area as I was led to believe.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

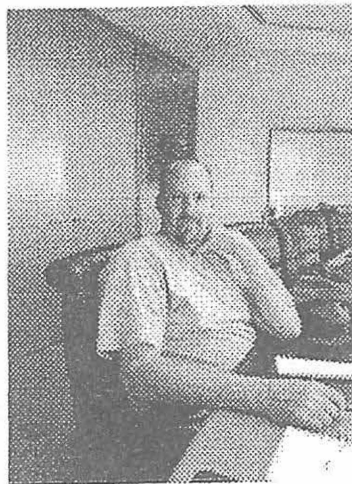
DATED: January 27, 2014.



RODNEY NELSON

Alpine **COURT REPORTING**

Reggie Lewis
vs.
Rodney Nelson
Case No. 120500402



Deposition of:
Nathan Murray
Date: March 17, 2014

Alpine Court Reporting
Locations in Provo and Salt Lake City

1 know.

2 Q. Okay.

3 A. I would have hoped that he would have.

4 Q. In the contract that you would have had
5 written between Nutty Guys and a sales rep, that
6 contract would give them an exclusive territory for
7 their route?

8 A. Mm-hmm.

9 Q. And they would have specific criteria that
10 they had to perform to keep that route?

11 A. Yes.

12 Q. What would be in that contract that would
13 allow Nutty Guys to retain it in the -- in the -- if
14 the representative did not fulfill their obligation?

15 A. One of them would be if they didn't add
16 enough new accounts. Because if you had an area that
17 had 10 million people and the guy had six accounts
18 and years later somebody else wanted it and they
19 still only had six accounts, we'd say you have to
20 grow the area or we can take it away from you or
21 reduce your area. Reduce it.

22 The other thing would be if there was too
23 many customer complaints, if things were not being
24 done properly, then we also retained the right to
25 pull the area.

1 Q. So if there was not a contract in force --

2 A. Mm-hmm.

3 Q. -- what would the options be for Nutty Guys
4 at that time?

5 A. Well, with no contract, I suppose we could
6 just take an area over. We don't have to have a
7 contract. We don't have to give notice.

8 Q. Okay. So at this point, you do not know of
9 any legal document signed by Reggie Lewis and Nutty
10 Guys giving Reggie a -- an exclusive Nutty Guys
11 route?

12 A. I don't know for sure, no.

13 Q. Okay. If production of this document could
14 end the lawsuit and produce a payment to you or to
15 anybody else, how long would you think it would take
16 to produce that document, if it existed?

17 A. Well, I would think they should be able to
18 find it within an hour or two of looking, if it
19 exists.

20 Q. Okay. So two years would be substantial
21 time to produce that document if it existed?

22 A. Sure.

23 Q. Okay.

24 MR. NELSON: I think that's all I have
25 questions for at this time.

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH

REGGIE LEWIS,	:	MINUTES
Plaintiff,	:	ORDER TO SHOW CAUSE 1ST
	:	APPEARANCE/SUPPLEMENTAL ORDERS
	:	
vs.	:	Case No: 120500402 CN
RODNEY NELSON,	:	Judge: G MICHAEL WESTFALL
Defendant.	:	Date: March 3, 2015

Clerk: jamieap
No Parties Present
Audio
Tape Number: 3C Tape Count: 9:38/9:43

HEARING

TIME: 9:38 AM

No one is present but the Court wants to make a record of its review of the file. Court is aware that there are two motions pending. Motion to Quash the Order to Show Cause and Motion to Quash a Writ of Execution. Court believes that the stay which was issued by the Court of Appeals on the condition that a supersedous bond be posted that that stay would preclude the execution provided that bond had been filed timely. However, there is an issue as to whether or not the bond was timely filed. The bond that has been posted is in the amount of approximately \$41,000. The Court is not resolving the issue of the bond but the Court has some concerns because the Court of Appeals' decision which was received by the Court on February 12, 2015, indicated that the Defendant was to file a supersedous bond within 14 days of the date of that order which means that it was due on February 26, 2015. They were to file that bond and a Motion for Approval of that bond by the district court. If no bond was timely filed, then the stay would be dissolved. The Motion was filed to approve the supersedious bond and that was timely filed on the last date that it could have been filed and an objection to that motion was filed. That needs to be set for hearing on a civil law and motion calendar and resolve the issue of the bond.

This Court does not beleive that even if the stay were to continue that was issued by the Court of Apepals that that would affect a parties' failure to appear for supplemental proceedings and order to show cause for failure to appear. The failure to appear pursuant to a court order is a totally separate and distinct action from an enforcement and collection on a judgment. There is a Motion to Quash the Order to Show

Case No: 120500402 Date: Mar 03, 2015

Cause and there was a objection and this Court expected that the Defendant would be here on the Order to Show Cause. Court is concerned about whether the Order to Show Cause was properly served on the Defendant. Court reviews the file.

It is the Court's position that the Order to Show Cause is a valid, enforceable order but it does not have a return of service. Court grants permission to redate and reserve the Order to Show Cause. If the Defendant is served with the Order to Show Cause, the Defendant would be required to appear and if the Defendant did not appear then a warrant would be issued for the Defendant's arrest. At this point, since no one is present and no return of service on the Order to Show Cause, the Court take no further action in the matter. Copy of this minute entry to be sent to counsel.

CERTIFICATE OF NOTIFICATION

Rule 26. General provisions governing disclosure and discovery.

(a) **Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) **Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) **Exemptions.**

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or

(B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) **Pretrial disclosures.**

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) **Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) **Electronically stored information.** A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) **Statement previously made about the action.** A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) **Trial preparation; experts.**

(b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) **Trial-preparation protection for communications between a party's attorney and expert witnesses.** Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) **Claims of privilege or protection of trial preparation materials.**

(b)(8)(A) **Information withheld.** If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) **Information produced.** If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) **Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.**

(c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party

may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) **Definition of tiers for standard discovery.** Actions claiming \$50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) **Definition of damages.** For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120
2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
3	\$300,000 or more	30	20	20	20	210

(c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the

court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) **Filing.** Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

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