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Jose S. Salazar and Mildred O. Salazar v. Thrifty Nickel of Orem, Inc., a Utah Corporation; Want Ads of Salt Lake City, Inc., a Utah corporation; Souther Cross, Inc., a Utah corporation; Robert L. Christensen, an individual; and Norman Wilkinson, an individual : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JOSE S. SALAZAR and MILDRED O.
SALAZAR,

Plaintiffs and Appellants.

vs.)
)
) Case No. 20010297-CA

Case No. 20010297-CA

THRIFTY NICKEL OF OREM, INC., a
Utah corporation; WANT ADS OF SALT
LAKE CITY, INC., a Utah corporation;
SOUTHERN CROSS, INC., a Utah
corporation; ROBERT L.
CHRISTENSEN, an individual; and
NORMAN WILKINSON, an individual,

Defendants and Appellees.)
)
)
)

BRIEF OF APPELLEE

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Appeal from the Order of Dismissal of Defendant Robert L. Christensen
By the Honorable J. Dennis Frederick
Third Judicial District Court of Salt Lake County, Utah

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SEP 25 2001

JOSE S. SALAZAR and MILDRED O.
SALAZAR,

VS.

THRIFTY NICKEL OF OREM, INC., a Utah corporation; WANT ADS OF SALT LAKE CITY, INC., a Utah corporation; SOUTHERN CROSS, INC., a Utah corporation; ROBERT L. CHRISTENSEN, an individual; and NORMAN WILKINSON, an individual,

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JURISDICTIONAL STATEMENT

Jurisdiction in this court is proper pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF ISSUES

1. Did the trial court correctly dismiss the Appellants Jose and Mildred Salazars' ("Salazars") Complaint against Appellee Robert L. Christensen ("Christensen" or "Appellee") pursuant to Utah R. Civ. P. 12(b)(6), where the Salazars sued Christensen personally for breach of a contract to which he was neither a signatory nor a party and the Salazars are unable to plead any facts to support any theory under which Christensen could be individually liable. STANDARD OF REVIEW: The propriety of a Utah R. Civ. P. 12(b) dismissal is a question of law and the trial court's ruling is given no deference and reviewed under a correctness standard. Ho v. Jim's Enterprises, Inc., 426 Utah Adv. Rep. 32, 2001 UT 63 (Utah 2001).

2. Did the trial court abuse its discretion in denying the Salazars leave to amend their Complaint where: (1) the Salazars failed to follow well-established procedure for amendment, never making a motion as required by Utah R. Civ. P. 7(b) and never submitting or filing any proposed amendment despite that they were free to do so at any time prior to dismissal, instead making only a fleeting reference to amend in one sentence of their memorandum in opposition to dismiss; (2) leave to amend would have been futile because the Salazars have demonstrated that even if they amended their complaint, they still would be unable to state any claim against

Christensen individually; and 3) the Salazars' argument that they require discovery to attempt to find some claim against Christensen is contrary to well-established law and policy against discovery fishing expeditions? STANDARD OF REVIEW: The standard of review of denial to amend pleadings is abuse of discretion. Kasco Servs. Corp. v. Benson, 831 P.2d 86, 92 (Utah 1992); Sulzen v. Williams, 977 P.2d 497, 500 (Utah Ct. App. 1999). A trial court's ruling on a motion to amend a complaint will not be disturbed absent a clear abuse of discretion; under that standard, the Court of Appeals will not reverse the decision unless it exceeds the limits of reasonability. Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994); Jirard v. Appleby, 660 P.2d 245, 248 (Utah 1983); Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994).

STATEMENT OF THE CASE

This breach of contract action was originally commenced by the Salazars in August 2000 against Thrifty Nickel of Orem, Inc. ("Thrifty Nickel of Orem") and two other corporate entities, Want Ads of Salt Lake City, Inc., and Southern Cross, Inc., as well as two individuals, Norman Wilkinson and Appellee, Robert L. Christensen. (See Complaint at p. 1; R. 1.) Within one month of filing the Complaint, Appellants recognized the baselessness of the claims against Norman Wilkinson and voluntarily stipulated to their dismissal. (See Stipulation and Order of Dismissal; R. 15-16; R. 31-32.) Shortly thereafter, the Court dismissed with prejudice all claims asserted by Appellants against Southern Cross, Inc. (See Order of Dismissal; R. 90-91.)

The Salazars' Complaint asserts three separate contract-based causes of action arising out of their alleged employment agreement ("Agreement") with Defendant Thrifty Nickel of Orem. (See Complaint at ¶¶ 7-41; R. 2-6.) The Salazars asserted these same claims against all of the corporate and individual defendants, including Christensen. (See Complaint at ¶¶ 7-41; R. 2-6.) The Salazars seek to hold Christensen personally liable under the Agreement, despite the plain fact that Christensen is neither a named party to the Agreement, nor a signatory to it. (See Agreement attached to Complaint; R. 8, 10.) In asserting the claims against Christensen, the Salazars introduce a novel concept to contract and tort law: liability based solely on perceived personal wealth.

Although there are no facts pled in the Complaint that would rationally support the inclusion of Christensen as a defendant in this case, at the hearing on Christensen's motion to dismiss, the Salazars' counsel succinctly articulated the real basis for the Salazars' claims against Christensen: "He is the father of this organization. The - it's his family, he's a mega-multi-millionaire well on his way to being a billionaire" (Transcript of hearing at p. 9:11, 18-20; R. 171.) (Emphasis added.) The Salazars' shocking disclosure of the true basis for their claims against Christensen suggests not only an extreme departure from Utah R. Civ. P. 8(a), but also invokes the strictures of Utah R. Civ. P. 11(b). Possibly even more outrageous, the Salazars candidly concede in their brief that they need discovery to find a claim against Christensen, stating that there are "facts yet to be discovered" (see Brief of Salazars at p. 37), "undiscovered

important issues” (see Brief of Salazars at p. 17), an “exhaustive list of areas that need to be explored to determine Robert Christensen’s involvement in the case” (see Brief of Salazars at p. 29).

After full briefing and a hearing, the Honorable J. Dennis Frederick dismissed the Salazars’ claims against Appellee Robert Christensen with prejudice on March 5, 2001. (See Order of Dismissal; R. 159-160.) The Salazars do not really attack the propriety of the dismissal of their original complaint or make any substantive attempt to demonstrate that the few allegations in the Complaint concerning Christensen are sufficient to state a claim against him. Rather, the relief sought by the Salazars on appeal is amendment of the complaint so that they can conduct discovery to find facts upon which to base such amendment. (See Brief of Salazars at pp. 31, 36-37.) Yet, at the trial court level, other than a passing reference to amendment at the end of their memorandum in opposition to the motion to dismiss (see Salazars’ Memorandum in Opposition at p. 8; R. 103), the Salazars made no attempt to comply with Utah R. Civ. P. 7(b)(1)’s requirement of submitting a motion for leave to amend stating with particularity the reasons therefor and never prepared or proffered an amended complaint, much less filed one, which they were perfectly free to do under the rules. See Utah R. Civ. P. 7(b)(1); Utah R. Civ. P. 15(a). Instead, the Salazars lament that they were never allowed to conduct discovery that may have some day provided them with facts sufficient to state a claim against Christensen. (See Brief of Salazars at pp. 31, 36.) The Salazars’ belated, inappropriate, and legally insufficient request to amend

to conduct discovery in order to find a claim against Christensen is a direct admission that, not only does the Complaint fail to state a claim upon which relief can be granted, but also that the Salazars possess no facts that would allow them to state any claim against Christensen.

STATEMENT OF FACTS

The Salazars filed their Complaint against three separate corporate entities and two individuals, including Christensen, alleging “Breach of Contract” as the first “Cause of Action,” “Failure to Maintain Medical Insurance” as the second “Cause of Action,” and “Failure to Pay Vacation Pay” as the third “Cause of Action,” against all of the Defendants under an alleged employment agreement between only the Salazars and Thrifty Nickel of Orem. (See Complaint at ¶¶ 38-47; R. 5-6.) The only parties to the alleged agreement attached to the Complaint are the Salazars and Thrifty Nickel of Orem. (See Agreement attached to Complaint; R. 8, 10.) Christensen was not a signatory or a named party to the alleged agreement. (See id.)

The few “factual” allegations even mentioning Christensen are set forth below:

- “Thrifty Nickel was and is owned in whole or in part by Defendant Christensen.” (See Complaint at ¶ 21; R. 3.)
- “Defendant Christensen is the controlling shareholder of more or less eighty-six (86) entities publishing classified advertisement newspapers throughout

the United States, most of which publish under the banner ‘Thrifty Nickel.’”

(See Complaint at ¶ 28; R. 4.)

- “Defendant Christensen is the sole shareholder of Want Ads of Salt Lake City, Inc. [“WASL”] and Southern Cross,” two of the other corporate Defendants. (See Complaint at ¶ 29; R. 4.)
- “‘ADVERTISE IT IN YOUR DYNAMIC THRIFTY NICKEL WANT ADS’ is a trademark registered on July 13, 1992 in Utah and owned by Defendant Christensen or an entity ultimately owned and/or controlled by Defendant Christensen.” (See Complaint at ¶ 30; R. 4.)
- “In addition to being the sole shareholder of WASL, Defendant Christensen is a member of its board of directors.” (See Complaint at ¶ 32; R. 4.)

Based on these few neutral allegations, the Salazars allege in a conclusory fashion, contrary to fundamental tenets of corporate law, that “there should be no corporate veil distinguishing or protecting the assets of any of the five defendants.” (See Complaint at ¶ 37; R. 5.)

Additionally, the Salazars cite to allegations in affidavits and other materials outside of their Complaint in support of their claims, the most telling of which is that Christensen is a “mega multi-millionaire.” (See Tr. of Hearing at p. 9:11, 18-20; R. 171.) The extraneously filed affidavits additionally assert that the Salazars were friends of Christensen (see Affidavits of Jose and Mildred Salazar at ¶ 7; R. 111, 115) and that

Christensen discussed the alleged agreement around the dinner table with his son. (See Affidavit of Tim Taylor at ¶ 4; R. 107.) However, the trial court apparently did not consider these extraneous materials and properly decided the case solely on the pleadings under Utah R. Civ. P. 12(b)(6). (See Order of Dismissal; R. 159-160.) Because the dismissal was based only on the allegations contained in the Complaint, pursuant to Utah R. Civ. P. 12(b)(6), the affidavits and other extraneous information cited by the Salazars are completely irrelevant to the legal sufficiency of the Complaint itself. See Utah R. Civ. P. 12(b)(6); Colman v. Utah Land Bd., 795 P.2d 622, 624 (Utah 1990). These materials outside the pleadings, therefore, should not be considered by the Court of Appeals. Id. Nevertheless, as discussed below, even if these deficient materials are considered, the Salazars are still unable to allege sufficient facts to hold Christensen liable for any claim.

SUMMARY OF ARGUMENTS

The trial court correctly dismissed the Salazars' Complaint with prejudice pursuant to Utah R. Civ. P. 12(b)(6), because the Salazars have not demonstrated that they pled or could plead any set of facts that would result in Christensen being personally liable for breach of an employment agreement between the Salazars and Thrifty Nickel of Orem. Even if this Court considers all of the Salazars' allegations and extraneous filings, the Salazars still cannot state any cognizable claim against

Christensen individually. See infra. This Court should therefore affirm the trial court's decision.

The trial court did not abuse its discretion by denying leave to amend the Complaint where: 1) the Salazars never filed a motion for leave to amend and never proposed or filed any amendment despite that they were free to at any time prior to dismissal; instead they merely requested leave in one sentence in their opposition to the motion to dismiss; 2) leave to amend would have been futile because even if the Salazars' Complaint and other extraneous materials presented by the Salazars are considered, there are no conceivable set of facts under which Christensen could be personally liable to the Salazars; and 3) the Salazars' argument that they should be allowed to conduct discovery in an attempt to find some yet unknown claim against Christensen upon which to base their amendment is directly contrary to well-established law and policy. See infra. This Court should therefore affirm the trial court's sound decision.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE SALAZARS DID NOT AND CANNOT STATE A COGNIZABLE CLAIM AGAINST CHRISTENSEN.

Pursuant to Utah R. Civ. P. 12(b)(6), a party may obtain dismissal of a complaint where the complaint fails to state a claim upon which relief may be granted. "[T]he purpose of a Rule 12(b)(6) motion is to challenge the form or sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." Whipple v. Am. Fork Irr. Co., 910 P.2d 1218, 1220 (Utah 1996) (citing Charles A. Wright and Arthur R. Miller, Fed. Practice and Procedure, § 1356 (1990)).¹ If it is apparent that as a matter of law the plaintiff could not recover under the facts alleged, then the court should dismiss the plaintiff's complaint. Harmon City, Inc. v. Nelson & Senior, 907 P.2d 1162, 1167 (Utah 1995).

Although all well-plead facts in the complaint are accepted as true on a motion to dismiss, "[l]iberal construction has its limits, for the pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists upon which relief could be accorded the pleader. If it fails to do so, a motion under Rule 12(b)(6) will be granted." James Wm. Moore, Moore's Fed. Practice, § 12.341(b)

¹ Because Utah R. Civ. P. 12(b)(6) is identical to its counterpart under the Federal Rules of Civil Procedure, cases interpreting Rule 12(b)(6) of the Federal Rules of Civil Procedure are persuasive when considering their state counterparts. See Barton v. Utah Transp. Auth., 872 P.2d 1036 (Utah 1994); First Sec. Bank of Utah Nat'l Assoc. v. Conlin, 817 P.2d 298 (Utah 1991).

(3rd ed. 1997). Where a complainant fails to allege essential elements of a cause of action, the complainant fails to give "fair notice" and, therefore, the complaint should be dismissed. See Connley v. Gibson, 355 U.S. 41, 47 (1957); See also Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 912 (11th Cir. 1993).

Dismissal of a cause of action is entirely proper where the party fails to state facts demonstrating all of the elements of a cause of action. DeBry v. Valley Mortgage Co., 835 P.2d 1000, 1008-1009 (Utah Ct. App. 1992); Boisjoly v. Morton Thiokol, Inc., 706 F. Supp 795, 801 (D. Utah 1988); Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389 (6th Cir. 1998); Ledesma v. Dillard Dept. Stores, Inc., 818 F. Supp. 1983, 1984 (D.C. Tex. 1993) ("If a complaint omits facts concerning pivotal elements of the pleader's claim, the court is justified in assuming the nonexistence of such facts.") Furthermore, mere conclusory allegations are insufficient to prevent the granting of a motion to dismiss. DeBry, 835 P.2d at 1008-1009; Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991); Bauchman v. W. High Sch., 900 F. Supp. 254, 259 (D. Utah 1995).

The Salazars failed to plead facts necessary to state a claim against Christensen for breach of the alleged employment agreement between the Salazars and Thrifty Nickel of Orem and cannot provide any factual basis for any other claims. Indeed, by filing three affidavits in an attempt to avoid dismissal of the Complaint, the Salazars tacitly conceded that the Complaint against Christensen was defective. The trial court

was therefore correct in dismissing the deficient complaint as a matter of law and this Court should affirm.

A. Christensen Cannot Be Personally Liable On An Employment Agreement Between The Salazars And Thrifty Nickel Of Orem.

1. Christensen Cannot Be Personally Liable Under the Agreement, Because He is Neither a Party Nor a Signatory to the Alleged Agreement.

The Salazars' claims are based entirely on a written contract attached to the Complaint entitled "Employment Agreement," allegedly between the Salazars and "Thrifty Nickel." (See Agreement attached to Complaint; R. 8-10.) Thrifty Nickel is defined in the Complaint as "Thrifty Nickel of Orem, Inc." (See Complaint at ¶ 2; R. 2.) Thrifty Nickel of Orem, Inc. is a named defendant and is identified in both the caption and opening paragraph of the Complaint as a "Utah corporation." (Complaint at p. 1; R. 1.)

Christensen is neither a party nor a signatory to the contract attached to the Salazars' Complaint. (See Agreement attached to Complaint; R. 8, 10.) Where allegations are contrary to the clear and unambiguous terms of a written agreement attached to the complaint, the agreement controls and mere conclusions to the contrary should be rejected. Olpin v. Ideal Nat'l Ins. Co., 419 F.2d 1250, 1255 (10th Cir. 1969); cert. denied, 397 U.S. 1074 (1970). As the court noted in Zeligson v. Hartman-Blair, Inc., 126 F.2d 595, 597 (10th Cir. 1942), "[t]he writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms

rather than by the allegations of the pleader.” (Citations omitted.) Id.; see also Utah R. Civ. P. 10(c). The writing here, the alleged agreement attached to the Complaint, is thus fundamentally inconsistent with any claim that Christensen is liable under it because he is neither a party nor a signatory to the agreement.

A party is not liable on a contract where he is not a signatory. Shire Dev. v. Frontier Invs., 799 P.2d 221, 223 (Utah App. 1990); County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 63 (2d Cir. 1984). Thus, absent some other theory of liability, Christensen cannot be held liable under an alleged agreement to which he is not a party. Id. Yet, no separate claims against Christensen have been alleged in the Complaint.

**2. As a Mere Shareholder of Thrifty Nickel of Orem,
Christensen is Not Personally Liable for Its Debts.**

It is a fundamental principle of corporate law that shareholders are not personally liable for the debts of a corporation. Harry G. Henn, Law of Corporations, §§ 73, 202 (2nd ed. 1970). Utah has explicitly codified this principle in Utah Code Ann. § 16-10(a)-622(2). It provides in pertinent part, “. . . a shareholder or subscriber for shares of a corporation is not personally liable for the acts or debts of the corporation solely by reason of the ownership of the corporation’s shares.” Utah Code Ann. § 16-10(a)-622(2); Salt Lake City Corp. v. James Constr., 761 P.2d 42, 46 (Utah Ct. App. 1988). In James, the Court explained the policy behind this principle, stating, “Ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders.

The purpose of such separation is to insulate the stockholders from the liabilities of the corporation, thus limiting their liability to only the amount that the stockholders voluntarily put at risk.” James, 761 P.2d at 46. Thus, absent some other factual basis to establish liability, the Salazars’ allegation that Christensen is a mere shareholder of Thrifty Nickel of Orem bars their action against him.

B. The Salazars Did Not Allege Any Facts To Support A Claim Of Piercing The Corporate Veil Of Thrifty Nickel Of Orem To Hold Christensen Personally Liable.

The Salazars vaguely alluded in their Complaint to a “corporate veil distinguishing or protecting the assets of any of the five defendants.” (See Complaint at ¶ 37; R. 5.) But the Salazars have not and are completely unable to plead or show any of the requisite facts or necessary elements to support a piercing of the corporate veil claim against Christensen.

Utah courts will only reluctantly and cautiously pierce the corporate veil. See James, 761 P.2d at 46; Cascade Energy and Metals Corp. v. Banks, 896 F.2d 1557 (10th Cir. 1990) (interpreting Utah veil-piercing law). Accordingly, in order to pierce a corporate veil and hold Christensen personally liable for the debts of Thrifty Nickel of Orem, Utah law requires that the Salazars satisfy two distinct elements. In Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979), the Utah Supreme Court explained these two elements, adopting a two-prong test to determine when disregarding the corporate entity is justified:

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

Id. at 1030.

Thus, in order to state a claim of piercing a corporate veil, the Salazars must be able to at least allege facts demonstrating that (1) there was such a unity of interest and ownership between Christensen and Thrifty Nickel of Orem such that Thrifty Nickel of Orem no longer existed but was instead the alter ego of Christensen; and (2) that the observance of the corporate form of Thrifty Nickel of Orem would sanction a fraud, promote injustice, or that an inequitable result would follow. Id. The Salazars utterly failed to plead or otherwise show facts to satisfy either of these pleading requirements, much less both of them, as they must.

Instead, the only allegation in the complaint even mentioning a “corporate veil” is Paragraph 37 of the Complaint, stating: “There should be no corporate veil distinguishing or protecting any assets of the five defendants.” (See Complaint ¶ at 37; R. 5.) This single, conclusory reference to a “corporate veil,” without any specific mention of Christensen, or any facts alleged to establish the requisite elements of a veil-piercing claim against Christensen, is entirely inadequate to sustain a veil-piercing claim. See infra.

1. The Salazars Cannot Allege Facts to Satisfy the Alter Ego Prong Required to Support a Veil-Piercing Theory.

Although the Salazars alleged that Christensen was a shareholder of Thrifty Nickel of Orem, the Salazars did not allege that the corporate form of Thrifty Nickel of Orem did not exist but was instead the alter ego of one or a few individuals. The alter ego prong requires further factual allegations that the statutory formalities regarding corporations have not been met and can only be established “upon a showing of the corporation’s failure to observe said statutory formalities.” Messick v. PHD Trucking Serv., Inc., 678 P.2d 791, 794 (Utah 1984). No such allegations exist that Thrifty Nickel of Orem failed to follow statutory formalities. Although the Salazars alleged in the Complaint that “Thrifty Nickel was and is owned in whole or part by defendant Christensen” (see Complaint at ¶ 21; R. 3), alleged in their opposition memorandum that Christensen is the “kingpin” of the “Thrifty Nickel Empire” (See Salazars Memorandum in Opposition at p. 2; R. 97), and alleged at the hearing on the motion to dismiss that, “[Christensen] is the kingpin of this organization, the godfather, the president, whatever we want to refer to him ...” (See Tr. of Hearing at p. 11:9-10; R. 171), these meaningless, gratuitous allegations do not in any way relate to, much less satisfy, the alter ego prong. Supra.

2. The Salazars Cannot Allege Facts to Satisfy the Fraud/Inequities Prong Required to Support a Veil-Piercing Theory.

The Salazars likewise cannot meet the inequities requirement of the second prong. Even if they could satisfy the alter ego prong, the Salazars must also meet the second prong, the inequities prong, to pierce the corporate veil. Norman, 596 P.2d at 1030. But the inequities prong is not satisfied simply because it may be difficult for the Salazars to be made whole. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 26 (Utah 1990). Rather, the Salazars must allege facts demonstrating that Christensen used the corporate form of Thrifty Nickel of Orem to promote injustice or sanction fraud. E.g., Norman, 596 P.2d at 1090; Baldwin v. Matthew R. White Invs., Inc., 669 F.Supp. 1054, 1057 (D. Utah 1987).

Not surprisingly, there is not a single allegation by the Salazars that Christensen engaged in any inequitable conduct that would sanction a fraud or promote injustice. However, after having been educated on the bare elements for a veil-piercing claim by Christensen's motion to dismiss, the Salazars, for the very first time, state in their appellate brief that, "In the instant case, allowing Mr. Christensen to hide behind the corporate form would sanction fraud, promote injustice, and result in inequity." (See Salazars' Brief at p. 35.) The Salazars now offer this completely conclusory statement, yet they entirely fail to state what fraud has been sanctioned, what injustice has been promoted and/or what inequity has resulted from the observance of the corporate form of Thrifty Nickel of Orem. The Salazars' new allegation of Christensen promoting

fraud, made for the first time on appeal, cannot, and does not, save their Complaint and further fails to meet the requirement of Utah R. Civ. P. 9(b) that averments of fraud be set forth with particularity. Utah R. Civ. P. 9(b).

Indeed, Utah R. Civ. P. 9(b)'s particularity requirement "reach[es] all circumstances where the pleader alleges the kind of misrepresentation, omissions, or other deceptions covered by the term 'fraud' in its broadest dimensions." Williams v. State Farm Ins. Co., 656 P.2d 966, 972 (Utah 1982). A simple allegation of "fraud" is a general accusation and will not withstand a motion to dismiss. Heathman v. Hatch, 372 P.2d 990, 991 (Utah 1962). Rather, the basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges. Id.

Within the context of piercing the corporate veil, federal Rule 9(b), identical to Utah R. Civ. P. 9(b), is consistently interpreted as requiring a pleader to satisfy the specificity requirements of Rule 9(b) where an allegation of fraud is used to support a corporate veil-piercing claim. See Laborers Combined Funds of Western Pennsylvania v. Ruscitto, 848 F.Supp. 598 (W.D. Pa. 1994); Gabriel Capital, L.P. v. NatWest Fin., Inc., 122 F.Supp.2d 407 (S.D.N.Y. 2000); Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc., 915 F.Supp. 939 (N.D. Ill. 1996); Jack LaLanne Fitness Centers, Inc. v. Jimlar, Inc., 884 F.Supp. 162 (D.N.J. 1995). The Salazars have never set forth any facts, much less facts with the particularity required to support a fraud allegation. Thus, even if the conclusory statement from their appellate

brief had been alleged in the Complaint, it still would not suffice to state a claim to pierce the corporate veil of Thrifty Nickel of Orem. See id.

Because of the presumption that shareholders are not personally responsible for the debts of a corporation, because the Salazars have alleged that Christensen is a shareholder of Thrifty Nickel of Orem, and because the Salazars have not and cannot plead facts demonstrating elements necessary to pierce the corporate veil as to Christensen, the trial court correctly dismissed their claims against Christensen with prejudice pursuant to Utah R. Civ. P. 12(b)(6). See supra. This Court should therefore affirm the sound decision of the trial court.

C. Even If The Trial Court Considered The Defective Affidavits And Other Extraneous Materials Filed In Opposition To The Motion To Dismiss, The Salazars Still Could Not State A Claim Against Christensen.

Because Christensen's Utah R. Civ. P. 12(b)(6) motion was based solely on the allegations contained in the Complaint, the trial court was only to consider whether those allegations stated a claim and this Court should likewise only consider the allegations and documents attached to the original complaint. See Colman, 795 P.2d at 624. The trial court found the allegations and material attached to the Complaint failed, as a matter of law, to state a claim against Christensen. (See Order of Dismissal; R.

159-160.) Nevertheless, even if the trial court had considered the defective affidavits² filed in opposition to Christensen's motion to dismiss (see Affidavits attached to Salazars' opposition to motion to dismiss; R. 106-116), there are no facts stated in those affidavits that would support a claim against Christensen.

The affidavits claimed that the agreement "was suggested by, discussed around the table with, and approved by . . . Christensen and his wife" (see Affidavit of Tim Taylor at ¶ 4; R. 107.) and that Tim Taylor, as Christensen's agent, signed the agreement.³ (See Affidavit of Tim Taylor at ¶ 5; R. 107.) The Salazars also asserted in their opposition memorandum that Christensen "personally benefited from the services of [the Salazars]," that Christensen and the Salazars had a "close friendship evidenced by many specific requests for personal services and inviting them over for holiday meals," and that Christensen "valued their significant contributions to the growing organization." (See Salazars' Memorandum in Opposition at p. 7; R. 102.)

² Statements that would not be admissible at trial may not properly be set forth in an affidavit and must be stricken. Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538, 542 (Utah 1973). Courts routinely exclude or disregard affidavits containing statements that are without foundation, conclusory, or unsubstantiated opinions and beliefs. See, e.g., Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983).

³ Taylor's statement in paragraph 5 of his affidavit that he signed the agreement "as an agent for . . . Christensen" (see Taylor Affidavit at ¶ 5; R. 107) was an unsupported legal conclusion without any foundation which was properly disregarded by the trial court. Moreover, it was inconsistent with the terms of the alleged Employment Agreement itself which nowhere mentions Christensen. (See Agreement attached to Complaint; R. 8, 10.) At most, Taylor signed personally or as an agent of Thrifty Nickel of Orem.

A shareholder's suggestion that an entity obtain an employment agreement or even approval of an agreement that is not signed by the shareholder in his individual capacity does not bind the shareholder to the agreement. See, e.g., Shire Dev., 799 P.2d at 223. That Christensen and the Salazars allegedly had a close friendship and that he may have obtained some indirect benefit from an employee's service to a corporation in which he had an equity or stock interest likewise does not create a legally binding obligation upon Christensen personally. Id.; James, 761 P.2d at 46. To the contrary, the Salazars were quite clear in their affidavits that they worked for "several Thrifty Nickel companies," not Christensen. (See Affidavits of Jose and Mildred Salazar at ¶ 5; R. 111, R. 115.)

The Salazars alleged that Christensen "reaffirmed the validity of the employment agreement and his commitments to it in return for the Salazars' services in August 1999 when transferring Salazars to another Thrifty Nickel company." (See Salazars' Memorandum in Opposition at p. 7; R. 102.) This contention misstated the admissible contents of the affidavits. The affidavits allege that the Salazars have worked for other "Thrifty Nickel Companies" (see Affidavits of Tim Taylor and the Salazars at ¶¶ 8 and 5, respectively; R. 111; R. 115), and that when the Salazars went to work in Salt Lake City, Christensen said, "all will be the same." (See Affidavits of Jose and Mildred Salazar at ¶ 9; R. 111-112; R. 115-116.) Any such alleged statement by Christensen does not amount to a personal assumption of the obligations of any corporate entity, much less any specific obligations under the Agreement. See, e.g., James, 761 P.2d at

46. In fact, there was no allegation that the Agreement itself was even mentioned by Christensen to the Salazars. Moreover, as discussed above, the Salazars' counsel's statements at the hearing on the motion to dismiss that, "[Christensen is] the father of this organization. The – it's his family, he's a mega-multi-millionaire, well on his way to being a billionaire ..." (See Tr. of Hearing at p. 9, 18-20; R. 171) or that, "[Christensen] is the kingpin of this organization, the godfather, the president, whatever we want to refer to him ..." (See Tr. of Hearing at p. 10:9-10; R. 171) failed to state any additional viable facts under which Christensen could be held liable for the debts of Thrifty Nickel of Orem. See *supra*. The trial court therefore correctly granted the motion to dismiss with prejudice and this Court should affirm.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND, BECAUSE THE SALAZARS FAILED TO FOLLOW ANY OF THE REQUIREMENTS OR PROCEDURES FOR REQUESTING AMENDMENT, AMENDMENT WOULD BE FUTILE, AND THE SALAZARS SHOULD NOT BE ALLOWED TO CONDUCT DISCOVERY TO FISH OUT A CLAIM AGAINST CHRISTENSEN.

The trial court's decision denying leave to amend should not be disturbed unless the trial court abused its discretion and, under that standard, the Court of Appeals will not reverse the decision unless it exceeds the limits of reasonability. *Neztsosie*, 883 P.2d at 922; *Jirard*, 660 P.2d at 248; *Crossland Sav.*, 877 P.2d at 1243. It was reasonable and thus not an abuse of discretion for the trial court to deny leave where: 1) the Salazars failed to file a motion for leave to amend as required by Utah R. Civ. P. 7(b)(1) and failed to identify what any amendment would be; 2) amendment would be

futile because the Salazars failed to present any facts that could state an additional claim against Christensen even if their extraneously filed materials are considered; and 3) the Salazars should not be allowed to conduct discovery in a desperate attempt to fish out a claim against Christensen. See infra.

A. The Trial Court Did Not Abuse Its Discretion In Denying Leave To Amend, Because The Salazars Utterly Failed To Satisfy The Requirements And Procedure For Requesting Leave.

For an order granting them leave to amend, the Salazars were required to file a motion pursuant to Utah R. Civ. P. 7(b)(1). That Rule provides, “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” Utah R. Civ. P. 7(b)(1). In applying the identical federal Rule 7(b)(1), the Tenth Circuit stated, “normally a court need not grant leave to amend when a party failed to file a formal motion.” Calderon v. Kan. Dept. of Soc. and Rehabilitation Servs., 181 F.3d 1180, 1186 (10th Cir. 1999). The Salazars never filed a proper motion for leave. Instead, they made only a single fleeting reference to amendment in their memorandum in opposition to Christensen’s motion to dismiss (see Salazars’ Memorandum in Opposition at p. 8; R. 103) and they never mentioned amendment at the hearing on the motion to dismiss. (See Tr. of Hearing; R. 171.) Thus, the Salazars woefully failed to meet or even attempt to meet the requirements of Rule 7(b)(1). Moreover, the Salazars were free at any time prior to dismissal to actually file an amended complaint. See Utah R. Civ. P. 15(a) (“A party may amend

his pleading only by leave of court . . . and leave shall be freely given when justice so requires.”) However, they chose not to do so, presumably because they simply could not state a claim against Christensen.

In Calderon, the Tenth Circuit found that the trial court did not abuse its discretion in denying leave to amend where no motion for leave was ever submitted and no amendment to the complaint was ever proposed that would have provided the defendant with sufficient notice or factual basis for any amendment to the complaint. Calderon, 181 F.3d at 1186. Similarly, here the Salazars never filed a motion or specified below what facts they could allege to support any additional claims against Christensen. Neither Christensen nor the trial court could have had any notice whatsoever of what additional claims the amendment would state against Christensen. It was therefore entirely within the sound discretion of the trial court to deny the Salazars’ request to amend and this Court should affirm.

B. The Trial Court Did Not Abuse Its Discretion In Denying Leave, Because Amending The Complaint Would Be Futile.

A trial court does not abuse its discretion in denying leave to amend a complaint where the proposed amendment would fail to plead all of the required elements for the proposed claim, thus rendering amendment futile. DeBry, 835 P.2d at 1008-1009; Koehler v. Bank of Bermuda (New York) Ltd., 209 F.3d 130 (2nd Cir. 2000); see also Hayden v. Grayson, 134 F.3d 449 (1st Cir. 1998), cert. denied, 524 U.S. 953 (1998). In DeBry, the Court of Appeals upheld the dismissal of a claim without leave to amend,

because DeBry was unable to allege all of the required elements for the proposed claim. DeBry, 835 P.2d at 1008-1009. Because the Salazars are similarly unable to allege any factual basis for an additional claim against Christensen, the trial court did not abuse its discretion in dismissing the Salazars' claims with prejudice and the decision should be affirmed.

Furthermore, a court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason. Bauchman v. W. High Sch., 132 F.3d 542, 562 (10th Cir. 1997), citing AM Int'l, Inc. v. Graphic Management Assoc., Inc., 44 F.3d 572, 578 (7th Cir. 1995); Wilson v. Am. Trans. Air, Inc., 874 F.2d 386, 392 (7th Cir. 1989). In Bauchman, the 10th Circuit found that because the proffered amended complaint, along with the supporting evidence and affidavits, failed to cure the deficiencies in the original complaint and could not allege the required elements of the proposed claim, denial of the motion for leave to amend was not an abuse of discretion. Bauchman, 132 F.3d at 562.

Here, the Salazars did not specify below what facts they could allege, consistent with Utah R. Civ. P. 11, that might state a claim against Christensen. Instead, as discussed above regarding the insufficiency of the Complaint and the extraneous filings, the Salazars demonstrated that they could not cure the fatal defects as to Christensen even with all of their additionally supplemented documents. See supra. Thus, any amendment of the Complaint would be futile and the trial court did not abuse its

discretion in denying amendment. DeBry, 835 P.2d at 1008-1009; see supra. This Court should affirm this sound decision of the trial court. Id.

C. The Trial Court Did Not Abuse Its Discretion By Denying Leave And Preventing The Salazars From Going On A Discovery Fishing Expedition In An Attempt To Discover Facts Upon Which To Base A Claim Against Christensen.

Finally, the Salazars argue that they should be entitled to amend, because discovery might provide them with facts enabling them to state a claim against Christensen. (See Salazars' Brief at pp. 29, 37.) This argument only further highlights the desperate and futile nature of the Salazars' claims. More importantly, however, it flies in the face of the sound policy, discussed below, of curbing unnecessary litigation and discouraging legally insufficient claims prior to filing.

A party cannot commence an action without stating a legally cognizable claim and then conduct discovery in an attempt to find one. DeBry, 835 P.2d at 1008-1009; see United Ins. Co. of Am. v. Harris, 939 F.Supp. 1527, 1537 (M.D.Ala. 1996). In Harris, the court succinctly explained the policy behind this rule, stating that if plaintiffs are permitted to "sue first and ask questions later ... all will lose--plaintiffs, defendants, the court system, and the public--for everyone will have lost sight of Rule 11's laudatory goal of curbing litigation by stressing 'the need for some prefiling inquiry into both the facts and the law.'" Harris, 939 F.Supp. 1527 at 1537, *quoting* Advisory Committee Notes to 1983 amendments to the federal rules of civil procedure.

Utah R. Civ. P. 11 is virtually identical to F.R.C.P. 11 and interpretations of the federal rules are persuasive in interpreting the Utah Rules. See supra.

Nevertheless, directly contrary to this policy and law, the Salazars argue, “Appellants should be given an opportunity through discovery to prove that Mr. Christensen was, in fact, a party to the Employment Contract.” (See Salazars’ Brief at p. 17.) The Salazars also baldly claim that discovery will somehow produce facts that will support a claim to hold Christensen liable, stating, “Whether Thrifty Nickel can be shown to be the alter ego of Robert Christensen will [b]e proven upon completion of plaintiffs’ discovery.” (See Salazars’ Brief at p. 31.) This plea to conduct a fishing expedition in an attempt to discover facts upon which to base a claim runs counter to the sound policy of discouraging the filing of complaints that lack any basis. See supra. The Salazars have offered no special reason why they would somehow be exempt from the salutary policy of saving potential defendants and courts from the filing of claims that have no basis and then using discovery in an attempt to desperately find some cognizable claim.

The DeBry case is instructional here. In DeBry, this Court upheld dismissal of the complaint and denial of leave to amend where DeBry could not allege the essential elements of a claim, yet argued for additional discovery in order to find facts to support the claim. DeBry, 835 P.2d at 1008-1009. The Court succinctly stated, “[plaintiff] and their counsel are [not]free to make Valley Mortgage a defendant and hope to turn

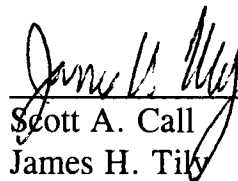
up a claim against them in the course of discovery. There needs to be an end to the time and expense imposed on Valley Mortgage as a defendant in the [plaintiff]'s fishing expedition." DeBry, 835 P.2d at 1009. The Court in DeBry thus expressly condemned exactly what the Salazars are now attempting to do - use discovery to fish out claims. Id. The Salazars have demonstrated that they have no factual basis for any claims against Christensen. There simply needs to be an end to the time and expense imposed on Christensen as a defendant in the Salazars' fishing expedition. The time is now.

CONCLUSION

For the reasons discussed above, Appellee respectfully requests that this Court affirm the trial court's dismissal of the Salazars' Complaint with prejudice.

DATED: September 25, 2001.

ANDERSON & KARRENBURG



Scott A. Call

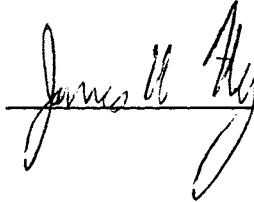
James H. Tily

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2001, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed, via first-class, postage prepaid, to the following:

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A handwritten signature in cursive script, appearing to read "James H. Houser", is written over a horizontal line.