

2016

**Charley Patterson, an Individual, Plaintiff/Appellee vs. Jed Knight,
and Individual, and Alisha Knight, and Individual, Defendants/
Appellants**

Utah Court of Appeals

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No. 20150885-CA

IN THE
UTAH COURT OF APPEALS

CHARLEY PATTERSON,

Plaintiff and Appellee,

v.

JED KNIGHT and ALISHA KNIGHT,

Defendants and Appellants.

RESPONSE BRIEF OF PLAINTIFF-APPELLEE

On appeal from the Third Judicial District Court, Honorable
James Gardner, District Court No. 140906572

<p>Erik A. Olson MARSHALL OLSON & HULL, P.C. Newhouse Building Ten Exchange Place, Suite 350 Salt Lake City, Utah 84111</p> <p>Bruce R. Baird BRUCE R. BAIRD, PLLC 2150 S. 1300 E., 5th Floor Salt Lake City, Utah 84106 <i>Attorneys for Defendants/Appellants</i></p>	<p>J. Ryan Mitchell (9362) MITCHELL BARLOW & MANSFIELD, P.C. 9 Exchange Place, Suite 600 Salt Lake City, Utah 84111</p> <p><i>Attorneys for Plaintiff/Appellee</i></p>
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Erik A. Olson
MARSHALL OLSON & HULL, P.C.
Newhouse Building
Ten Exchange Place, Suite 350
Salt Lake City, Utah 84111

Bruce R. Baird
BRUCE R. BAIRD, PLLC
2150 S. 1300 E., 5th Floor
Salt Lake City, Utah 84106
Attorneys for Defendants/Appellants

J. Ryan Mitchell (9362)
MITCHELL BARLOW & MANSFIELD, P.C.
9 Exchange Place, Suite 600
Salt Lake City, Utah 84111

Attorneys for Plaintiff/Appellee

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW.....	1
STATEMENT OF THE CASE	2
I. Nature of the Case	2
II. Course of Proceedings and Disposition Below.....	2
III. Relevant Facts.....	4
A. The parties agree to combine their Nu Skin distributorships and share equally all Nu Skin-related payments.....	4
B. Patterson complies with the JV Agreement, but discovers the Knights have been keeping substantial Nu Skin commissions in violation of the JV Agreement.....	5
C. Patterson files this lawsuit, the Knights request early mediation, and the parties settle their dispute at the mediation.....	7
D. The terms of the Mediation Agreement.....	8
E. After executing the Mediation Agreement, the Knights experience “settlers’ remorse” and attempt to back out of the settlement.....	10
SUMMARY OF ARGUMENT.....	13
ARGUMENT.....	15
I. The Knights Have Failed To Carry Their Burden Of Persuasion Because They Have Failed To Show That The Trial Court’s Decision Was Clearly Erroneous.....	15
II. The Trial Court Did Not Clearly Err In Finding That The Parties Reached A Meeting Of The Minds On The Essential Terms Of A Binding Settlement Agreement.....	17

III.	The Trial Court Did Not Clearly Err In Finding That The Additional Agreements Contemplated By The Mediation Agreement Were Not Essential, Missing Terms That Precluded The Parties From Reaching A Meeting Of The Minds.....	20
1.	The trial court did not clearly err in rejecting the Knights' argument that a binding settlement was contingent on negotiating and executing new Spearhead and GYN agreements.....	21
2.	Agreement on the specific language and parameters of the mutual non-disparagement provision was not an essential condition to a binding settlement.....	26
CONCLUSION.....		30

TABLE OF AUTHORITIES

Cases

<i>Brasher v. Christensen</i> , 2016 UT App 100, -- P.3d --	1, 16, 23
<i>Cea v. Hoffman</i> , 2012 UT App 101, 276 P.3d 1178.....	20
<i>Cessna Fin Corp. v. Meyer</i> , 575 P.2d 1048 (Utah 1978).....	17, 22, 28
<i>Dillard v. Starcon Int'l Inc.</i> , 483 F.3d 502 (7th Cir. 2007).....	28
<i>Electrical Contractors, Inc. v. Westwater Farms, LLC</i> , 2016 UT App. 60 , -- P.3d --.....	18
<i>Hartle v. Hartle</i> , 2012 UT App 312, 289 P.3d 621.....	15
<i>Higbee v. Sentry Insurance Co.</i> , 253 F.3d 994 (7th Cir. 2001).....	28, 29
<i>J.M.W. v. T.I.Z. (In Re Adoption of Baby E.Z.)</i> , 2011 UT 38, 266 P.3d 702.....	26
<i>Lawrence Const. Co. v. Holmquist</i> , 642 P.2d 382 (Utah 1982).....	21
<i>LD III, LLC v. BBRD, LC</i> , 2009 UT App 301, 221 P.3d 867.....	1, 13, 15, 17, 20
<i>LeBaron & Assoc., Inc. v. Rebel Enterprises, Inc.</i> , 823 P.2d 479 (Utah App. Ct. 1991).....	27
<i>Miller v. Basic Research, LLC</i> , 2:07-CV-871 TS, 2013 WL 1194721 (D. Utah Mar 22, 2013).....	21
<i>Nielsen v. Gold's Gym</i> , 2003 UT 37, 78 P.3d 600.....	17
<i>Patterson v. Patterson</i> , 2011 UT 68, 266 P.3d 828.....	25, 26
<i>Pratt v. Nelson</i> , 2007 UT 41, 164 P.3d 366.....	27
<i>State v. Brown</i> , 856 P.2d 358 (Utah App. Ct. 1993).....	27
<i>State v. Nielsen</i> , 2014 UT 10, 326 P.2d 645.....	16
<i>State v. Worwood</i> , 2007 UT 47, 164 P.3d 397	27

<i>Terry v. Bacon</i> , 2011 UT App. 432, 269 P.3d 188.....	1
<i>Tolbert v. Kelly</i> , 2013 UT App. 149, 305 P.3d 192.....	1
<i>Tracy-Collins Bank & Trust Co. v. Travelstead</i> , 592 P.2d 605 (Utah 1979).....	17
<i>Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.</i> , 781 P2d 478 (Utah Ct. App. 1989).....	17, 21

Statutes

Utah Code § 78A-4-103(2)(j).....	1
----------------------------------	---

Other Authorities

Restatement (Second) of Contracts § 33(2).....	20
--	----

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(j) based on the transfer of this appeal from the Utah Supreme Court.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Did the trial court clearly err in finding that the parties reached a meeting of the minds on the essential terms of a binding settlement agreement when the settlement terms were reached after a full-day mediation, and where the settlement terms were put in writing, reviewed by the parties and their counsel, and then signed by the parties?

Standard of Review: A binding settlement agreement exists if the parties reach a meeting of the minds on the essential terms of the agreement and the terms are sufficiently definite so as to be capable of being enforced. *See LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 14, 221 P.3d 867, 871. Whether the “parties had a meeting of the minds sufficient to create a binding contract is an issue of fact” that is “review[ed] for clear error [and] revers[ed] only where the finding is against the clear weight of the evidence, or if [the Court] otherwise reach[es] a firm conviction that a mistake has been made.” *Id.*, at ¶ 13 (internal quotations and citations omitted).¹

¹ *See also Brasher v. Christensen*, 2016 UT App 100, ¶ 13, -- P.3d -- (whether parties reached meeting of the minds on an enforceable contract is a question of fact that is reviewed for clear error); *Tolbert v. Kelly*, 2013 UT App. 149, ¶ 3, 305 P.3d 192 (“Whether the parties had a meeting of the minds sufficient to create a binding contract is an issue of fact which appellate courts review for clear error.”); *Terry v. Bacon*, 2011 UT App. 432, ¶ 11, 269 P.3d 188 (same).

STATEMENT OF THE CASE

I. Nature Of The Case

At bottom, this is a breach of contract case. Plaintiff/Appellee Charley Paterson (“Patterson”) and Defendants/Appellants Jed Knight and Alisha Knight (the “Knights”) entered into a joint-venture agreement to combine their Nu Skin distributorships and share equally all amounts received from the distribution of Nu Skin products. [0001-21.] Patterson upheld his end of the deal. The Knights did not. Instead, the Knights retained for themselves significant commissions that were being paid under an undisclosed deal with Spearhead, another Nu Skin distributor. [*Id.*] Under this agreement, Spearhead paid the Knights substantial commissions based on the sale of Nu Skin products made by the representatives in Paterson’s and Knight’s combined Nu Skin distributorship. [0597.] Despite Patterson’s demand, the Knights have refused to pay Patterson a dime of the Spearhead payments, which forced Patterson to file this action. [0001-21.]

II. Course Of Proceedings And Disposition Below

Patterson filed his Complaint in September 2014, the gravamen of which is his claim that the Knights have improperly refused to pay Patterson his fifty-percent share of Nu Skin-related payments that the Knights have received from Spearhead. [*Id.*] The Knights denied Patterson’s claims and asserted various counterclaims, which Patterson denied. [0035-50; 0069-79.] Shortly after all pleadings had been filed, the Knights requested that the parties engage in early mediation to try to resolve their dispute. [0195.] On February 4, 2015, the parties engaged in a formal mediation with the

Honorable Frank G. Noel (retired). [0247-48.] After several hours of mediation, the parties reached an agreement to fully settle their dispute and end the litigation. [*Id.*] The parties' agreement was reduced to writing, reviewed by the parties and their respective legal counsel, and then executed (the "Mediation Agreement"). [*Id.*; Addendum B ("Add. B"), at 0251-53, which is attached to Appellants' Brief.]

The Mediation Agreement provides, among other things, that the Knights will split all Spearhead commissions with Patterson "50/50"; that the Knights will pay Patterson \$125,000, plus his attorneys' fees incurred in bringing this action; and that the parties will modify the way they share certain commissions and operate certain aspects of their Nu Skin distributorship. [Add. B, at 0251.] The parties also agreed that these terms, which were memorialized in the handwritten Mediation Agreement, would be transferred into more formal documents and the action would be dismissed with prejudice. [*Id.*, at 253.] About a week after the mediation, and as contemplated by the Mediation Agreement, Patterson's counsel sent the Knights' counsel drafts of the agreements that set forth more formally the terms agreed to in the Mediation Agreement. [0176-77; 0192; 0199-235.] After sitting on the more formal agreements for nearly three weeks, the Knights' counsel informed Patterson's counsel—without any explanation—that the Knights were refusing to sign the more formal documents, and were purporting to terminate the Mediation Agreement. [0236-44.]

Patterson then filed a motion asking the trial court to enforce the parties' settlement that had been reached at mediation. [0167-88.] After extensive briefing and a two-hour hearing, the trial court granted in part Patterson's motion. [Addendum A

(“Add. A”), at 0552-0553, which is attached to Appellants’ Brief.] The trial court found that “[a]t the conclusion of a lengthy mediation, the parties reached a meeting of the minds on the essential terms of an agreement, it was put into writing, reviewed by the parties and their counsel, and it was signed.” [*Id.*] The trial court therefore “conclude[ed] that the [Mediation] Agreement was an enforceable and binding agreement that should be enforced,” and dismissed the action with prejudice. [*Id.* at 0552, 0557.]

III. Relevant Facts

A. The parties agree to combine their Nu Skin distributorships and share equally all Nu Skin related payments.

1. Patterson and the Knights are distributors for Nu Skin Enterprises, Inc., a direct sales company that markets personal care, beauty, nutrition, and technology products through its network of worldwide distributors. [0173; 0001-0016.]

2. Patterson and the Knights each had built a team of Nu Skin distributors, commonly referred to as a “downline.” [*Id.*] Patterson and the Knights received commissions for their own personal sales of Nu Skin products as well as commissions for the sale of Nu Skin products made by individuals in their respective downlines. [*Id.*]

3. In September 2004, Patterson and the Knights agreed to combine their Nu Skin distributorships and to share equally all amounts received from the distribution

of Nu Skin products. To memorialize this agreement, the parties entered into a written joint-venture agreement (the “JV Agreement”).² [*Id.*; 0018-0021.]

4. The JV Agreement provided, among other things, that all amounts received by the parties related to the distribution of Nu Skin products would be shared equally:

Division of Receipts. All amounts received by Knight and Patterson (or Zeros Inc.) with respect to distribution of Nu Skin products for the September, 2004 commission period forward shall be divided equally between Knight, Fry and Patterson. All receipts, whether from product sales by the parties or commissions on product sales by the parties’ front line distributors, shall be subject to the terms of this Agreement. Each party may direct that his share of receipts be paid to a corporation owned by such party.

[0018, at ¶ 2.]

5. To ensure that the parties would not skirt their obligation to share all Nu Skin- related payments equally, the JV Agreement included an “Exclusivity” provision providing that “[n]o party will create any Nu Skin distributorships that are not subject to the terms of this Agreement.” [0019, at ¶ 5.]

B. Patterson complies with the JV Agreement, but discovers the Knights have been keeping substantial Nu Skin commissions in violation of the JV Agreement.

6. To manage and administer the operations of the parties’ combined Nu Skin distributorships, Patterson and the Knights formed, and are the sole shareholders

² The JV Agreement was originally entered into by Patterson, Jed Knight, and Ryan Fry. [0018-0020.] In approximately February 2007, however, Patterson and Jed Knight purchased Mr. Fry’s interest in the joint venture and Mr. Fry ceased any involvement with the combined Nu Skin distributorship. [0004, at ¶ 22.] At about this same time, Patterson, Jed Knight, and Alisha Knight executed a February 17, 2007, Supplemental Agreement that provided for Alisha to receive a portion of the Nu Skin payments that Jed Knight was entitled to receive under the JV Agreement. [*Id.*, at ¶ 23; 0173, at ¶ 5.]

of, a company named Got Your Number, Inc. (“GYN”) [0366, at n. 2; 0574, at 0583, 0596-97, 0625-26.] The parties have operated their combined Nu Skin distributorship through GYN. [*Id.*]

7. After the JV Agreement was executed, Patterson complied with its terms and shared fifty percent of all Nu Skin related payments with the Knights. [0005, at ¶ 26; 0008, at ¶ 48.]

8. Based on the JV Agreement’s provisions, as well as representations made by the Knights, Patterson believed he was receiving fifty-percent of all the Nu Skin related payments that the Knights were receiving. [0003-0016; 0174, at ¶6.]

9. Patterson discovered, however, that the Knights for years had been receiving Nu Skin-related payments that they were not sharing with Patterson. [*Id.*, at ¶ 7.] Specifically, the Knights were receiving substantial commissions under an agreement with another Nu Skin distributor group named Spearhead, whereby Spearhead paid the Knights commissions based on the volume of Nu Skin products sold by Patterson’s and the Knights’ combined distributorship. [0007, at ¶¶ 37-40; 0174, at ¶¶ 7-8.]

10. From September 2004 through the present, the Knights have not paid Patterson any portion of the Spearhead payments, even though his Nu Skin downline is largely responsible for the commissions the Knights have been paid. [*Id.*, at ¶ 7.]

11. After discovering that the Knights had failed to share the Spearhead payments as required by the JV Agreement, Patterson demanded that the Knights

comply with the JV Agreement's terms and account to him for all amounts they had received from Spearhead. [*Id.*, at ¶¶ 7-8.] The Knights refused. [*Id.*]

C. Patterson files this lawsuit, the Knights request early mediation, and the parties settle their dispute at the mediation.

12. On September 22, 2014, Patterson filed this action, the gravamen of which is Patterson's claim that he is entitled to fifty percent of all future Spearhead payments and an accounting and payment for his fifty-percent share of all past Spearhead payments since September 2004. [0001-0021; 0174, at ¶ 9.]

13. Less than two months after this action was filed, the Knights wanted to mediate, stating "they were certainly open to making a good faith effort to resolve the matter with the assistance of a mediator." [0195.]

14. Based on the Knights' request and representation that they would mediate in good faith, Patterson agreed to early mediation. Accordingly, on February 4, 2015, the parties held a full-day mediation with retired Judge Frank G. Noel. [0175, at ¶ 13; 0247, at ¶¶ 3-5.]

15. After several hours of negotiations, Patterson and the Knights reached an agreement to resolve their disputes and settle the lawsuit. [0175, at ¶ 16; 0247, at ¶¶ 6-8.]

16. The terms of the parties' settlement agreement were set forth in a handwritten document prepared by Patterson's counsel. [0175, at ¶¶ 17-18; 0248, at ¶ 9.]

17. The Knights and their counsel reviewed the handwritten agreement and proposed certain changes. Patterson agreed to the Knights' changes, which were then added to the handwritten agreement. [0175, at ¶¶ 18-19; 0248, at ¶¶ 9-11.]

18. After the Knights' requested changes were made and agreed to, each of the parties executed the handwritten agreement (the "Mediation Agreement"). [*Id.*]

19. Once the Mediation Agreement was signed, no one expressed any belief that there were any unresolved material issues or that the settlement was contingent on the drafting of more formal documents. [0248, at ¶ 14.]

D. The terms of the Mediation Agreement.

20. The Mediation Agreement contains nine provisions. [*See* Addendum B, ("Add. B."), which is attached to Appellants' Brief.]

21. Provisions one through seven contain the material terms of the parties' settlement that resolve the dispute over past and future Spearhead payments; modify how certain GYN commissions will be shared and how certain GYN expenses and responsibilities will be managed; and provide that the Knights will pay Patterson the attorneys' fees he was forced to incur in bringing this action. [Add. B, at ¶¶ 1-7.]

22. Specifically, provisions one through seven provide:

1. Beginning Jan 2015 commissions Spearhead going forward 50/50 split. New Agreement [with] Spearhead/Nathan.
2. Jed & Alisha pay Charley \$125,000, payable at \$1,000 per month for 10½ years or until fully paid. Payment made by 25th day of each month. No interest. Failure to pay by 25th then interest [at] 12%. If payment default lasts 60 days then entire amount is due and owing.

3. New legs 100% of BB Account or BBB Account goes to individual who builds the line. The GYN portion of commission split 50/50.

4. Current GYN lines split 50/50.

5. Jed and Alisha resp[onsible] for maintaining min[imum] parent and seven Executives, [and] Charley resp[onsible] for maintaining min[imum] 8 Executives. Failure to maintain results in 100% of commissions going to party who maintains.

6. Expenses for business paid before commissions. Expenses are for reasonable air, hotel, rental car (ex. airfare booked at least 2 weeks [in] advance, economy seating. Hotel economy level lodging, economy rental car) Any expenses over \$2,500 will be discussed between the parties.

7. Charley's Atty Fees paid by Jed & Alisha paid 12 months. Charley will provide accounting. Approx. \$40k est.

7. Cont. – Attorney fees shall be paid at \$1,000 per month over 35-40 months, as provided in point 2. In other words, total amount due for fees & past is 155—165 paid at \$1,000 per month over approx. 15 yrs.

23. Provisions eight and nine, by contrast, contain the procedural mechanism for putting the Mediation Agreement's material terms in more formal documents and dismissing this action with prejudice:

8. Subject to drafting mutually acceptable settlement agreement [with] above provisions and mutual non-disparagement, and new GYN [and] Spearhead agreements.

9. Upon execution of final settlement documents and new GYN and new Spearhead [agreements] Parties will file a stipulated motion and order to dismiss the litigation [with] prejudice.

[Add. B, at ¶¶ 8-9.]

E. After executing the Mediation Agreement, the Knights experience “settlers’ remorse” and attempt to back out of the settlement.

24. As contemplated, the more formal documents incorporating the Mediation Agreement’s terms were drafted and provided to the Knights’ counsel on February 12, 2015, about one week after the mediation. [0176-77, at ¶¶ 22-26; 0192, at ¶¶ 5-8; 0199-0235.]

25. About a week later, on February 18, 2015, Patterson’s counsel emailed the Knights’ counsel asking for an update on whether the Knights had reviewed the more formal agreements that were sent on February 12. [0236.]

26. The Knights’ counsel responded the same day stating the Knights had the documents and he “will put a ‘bug in their ear’ to get with it.” [0238.]

27. After nearly two more weeks passed without any response from the Knights, Patterson’s counsel again emailed the Knights’ counsel on March 2, 2015, seeking an update and expressing Patterson’s concern with the Knights’ delay. [0240.] Later that evening, the Knights’ counsel responded with the following email purporting to terminate the Mediation Agreement without any explanation or reason. [0242.]

Subject: RE: Charley Patterson v. Jed & Alisha Knight

Date: Monday, March 2, 2015 at 7:54:29 PM Mountain Standard Time

From: B. Ray Zoll

To: J. Ryan Mitchell, jon

CC: Ruby Redshaw

ryan:

Unfortunately I have been advised by my clients that they cannot agree to the terms as drafted and they will be terminating the mediation proposed agreement that was subject to an agreeable final agreement.

Please note that I do not believe it is legal for Jed and Alisha's moneys to be unilaterally withheld in a fictitious escrow account.

I will be bringing in the litigation team in my stead next week after they enter into the necessary engagement letters with Jed and Alisha.

It is unfortunate that the mediation failed but know they are prepared to litigate for what they deem only fair and Sandie Tillotson has entered her support for her daughter.

I will have the entry of appearance with new council submitted to you as soon as I get it.

Best regards,

Ray

28. Patterson's counsel responded later that night, informing the Knights' counsel that Patterson believed the Mediation Agreement was binding and requesting an explanation as to why the Knights were purporting terminate the Mediation Agreement. [0244.]

Subject: Re: Charley Patterson v. Jed & Alisha Knight
Date: Monday, March 2, 2015 at 11:35:22 PM Mountain Standard Time
From: J. Ryan Mitchell
To: B. Ray Zoll, jon
CC: Ruby Redshaw

Ray,

As I'm sure you can understand, I am extremely surprised by your clients' attempt to reject the agreement our clients reached during last month's mediation. It's particularly troubling considering your clients are simply saying "they cannot agree to the terms as drafted" without identifying the specific terms with which they disagree or providing any proposed revisions that would alleviate their purported concerns. Please let me know as soon as possible which specific terms are unacceptable and why. To be clear, we believe the agreement reached by the parties during mediation is legally binding. Nevertheless, we would prefer to avoid the time and expense involved in asking the court to enforce the agreement, and would rather try to understand and resolve your clients' concerns with the agreements if possible. Thus, please let me know by tomorrow what specific terms are unacceptable and the reason(s) why, and whether your clients would like to attempt to resolve such issues or whether they will be maintaining their position that the agreement reached during mediation is terminated.

Best Regards,
Ryan



J. Ryan Mitchell
Mitchell Barlow & Mansfield, P.C.
Boston Building
9 Exchange Place, Suite 600
Salt Lake City, Utah 84111
ph: (801) 998-8888
fax: (801) 998-8077
rmitchell@mbmlawyers.com
www.mbmlawyers.com

29. The Knights' counsel never responded to Patterson's counsel's email.

[0191, at 0193, ¶ 14.]

30. Accordingly, Patterson filed a motion asking the trial court to enforce the parties' settlement that had been reached at mediation. [0167-170.] The trial court granted Patterson's motion in part, finding that "[a]t the conclusion of a lengthy mediation, the parties reached a meeting of the minds on the essential terms of an agreement, it was put into writing, reviewed by the parties and their counsel, and it was signed." The Court therefore concluded that the Mediation Agreement "is an

enforceable and binding agreement that should be enforced,” and dismissed the action with prejudice. [Add. A, at 0550, 0552-53, 0557.]³

SUMMARY OF ARGUMENT

The Court should affirm the trial court’s September 17, 2015 Order for three reasons. First, the trial court’s ruling should be affirmed because the Knights have failed to carry their burden of demonstrating that the trial court clearly erred in finding the parties had a meeting of the minds sufficient to create a binding contract. Rather than marshaling the evidence and attempting to show that trial court’s finding was against the clear weight of all the evidence, the Knights incorrectly argue that the trial court’s finding is a legal question that is reviewed for correctness, and that as a matter of law the trial court erred in finding the parties reached a meeting of the minds on a settlement. [Brief of Appellants (“App. Br.”), at pp. 1, 9.] Utah law is well settled, however, that whether “parties had a meeting of the minds sufficient to create a binding contract is an issue of fact” that is “review[ed] for clear error [and] revers[ed] only where the finding is against the clear weight of the evidence, or if [the Court] otherwise reach[es] a firm conviction that a mistake has been made.” *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867, 871 (internal quotations and citations omitted). Because the Knights have not even attempted to marshal the evidence or to demonstrate that the trial court’s finding was “against the clear weight of the evidence,” the Knights have failed to meet their burden of persuasion and their appeal should be denied.

³ Patterson also asked the trial court to enforce the more formal agreements that had been drafted, but the trial court declined this request. [App. A, at 0557.]

Second, the trial court's ruling should be affirmed because it did not err—and certainly did not clearly err—in finding that the parties reached a meeting of the minds on the essential terms of a settlement, and that the settlement terms were sufficiently definite to be enforced. The settlement terms were agreed to at the end of a lengthy mediation, where each party was represented by counsel and assisted by an experienced mediator. After the parties reached agreement on the terms of their settlement, the terms were put into writing, reviewed by the parties and their counsel, and then signed by the parties. The Mediation Agreement's terms are sufficiently definite so as to be capable of being enforced because a court could determine whether the terms were breached and could fashion an appropriate remedy if a breach occurs.

Third, the trial court's ruling should be affirmed because it did not clearly err by rejecting the Knights' argument that the more formal documents contemplated by the Mediation Agreement or the specific parameters of a mutual non-disparagement provision were essential, missing terms that precluded the parties from reaching a meeting of the minds on a binding settlement. After considering the entire Mediation Agreement and the circumstances under which it was entered, the trial court correctly found that although the Mediation Agreement contained a provision providing that more formal documents would be drafted, this provision “does not contemplate further negotiations over material terms, but instead contemplates (1) that the parties will take the handwritten [Mediation] Agreement and formalize it in a written format; and (2) [the] parties will amend existing agreements to include the provisions set forth in the [Mediation] Agreement.” [Add. A, at 0553.] As the trial court recognized, the practice

of drafting more formal documents that incorporate the terms of an agreed settlement “is common place in settlements that take place at mediation,” and such a provision does not effect the enforceability of such a settlement agreement under Utah law. [*Id.*, at 0553-54 (citations omitted).]

For all these reasons, as discussed more fully below, the Court should affirm the trial court’s ruling.

ARGUMENT

I. The Knights Have Failed To Carry Their Burden Of Persuasion Because They Have Failed To Show That The Trial Court’s Decision Was Clearly Erroneous.

The sole issue on appeal is whether the trial court’s finding that the parties reached a meeting of the minds on the essential terms of an enforceable settlement agreement is reversible error. [App. Br. at 1, 8-9.] The Knights’ claim whether there was a meeting of the minds between parties is a question of law reviewed for correctness. [*Id.*] The Knights are wrong. Utah law is well established that “whether the parties had a meeting of the minds sufficient to create a binding contract is an issue of fact [that the Court] will review for clear error, reversing only where the finding is against the clear weight of the evidence, or if the court otherwise reaches a firm conviction that a mistake has been made.” *LD III, LLC*, 2009 UT App 301, at ¶ 13.

To reverse the trial court’s finding under the clear error standard, the Knights therefore “must first marshal all the evidence in support of the [trial court’s] finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the trial court.” *Hartle v. Hartle*, 2012 UT App 312, ¶ 2, 289

P.3d 621, 623 (citations omitted). In marshaling the evidence, the Knights cannot simply present the facts and excerpts from the record that support their argument, but instead must present the evidence in the light most favorable to the trial court. *Id.*, at ¶ 3. Put differently, “[i]n marshaling the evidence, it is an appellant’s burden to ‘establish[] a basis for overcoming the healthy dose of deference owed to factual findings.’” *Brasher v. Christensen*, 2016 UT App 100, ¶ 24, -- P.3d -- (quoting *State v. Nielsen*, 2014 UT 10, ¶¶ 41, 326 P.2d 645, 653). A party who fails to marshal the evidence and who fails to identify and deal with evidence supporting a trial court’s factual findings “will almost certainly fail to carry its burden of persuasion on appeal” *State v. Nielsen*, 2014 UT 10, at ¶¶ 40-42.

The Knights have failed to carry their burden of persuasion here because they have not even attempted to marshal the evidence supporting the trial court’s finding or attempted to show that the trial court’s finding was against the clear weight of the evidence. Rather, the Knights ignore most of the Mediation Agreement’s terms as well as the facts and circumstances surrounding its execution, and myopically focus only on a few select snippets from the Mediation Agreement to sweepingly assert that because the Mediation Agreement contemplated drafting additional agreements, the trial court’s finding that a meeting of the minds had been reached was error “as a matter of law.” [Appellants’ Br. at 8-20.] The Knights’ conclusory assertions, however, fall woefully short of carrying their burden of marshaling the evidence and “establishing a basis for overcoming the healthy does of deference owed to the factual findings.” *Brasher*, 2016 UT App 100, at ¶ 24. Because the Knights have failed to carry their burden of persuasion on appeal—by failing to marshal all the evidence and then

demonstrating that the trial court's finding was against the clear weight of the evidence—the trial court's ruling should be affirmed.

II. The Trial Court Did Not Clearly Err In Finding That The Parties Reached A Meeting Of The Minds On The Essential Terms Of A Binding Settlement Agreement.

Utah law favors voluntary settlement of legal disputes. *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979) (stating that “settlements are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the judicial system.”). To further Utah's policy favoring settlement, courts should enforce a settlement agreement if the “record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial.” *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah Ct. App. 1989) (internal citations and quotations omitted). To determine whether a binding settlement agreement exists, courts employ the basic rules of contract formation. *See LD III*, 2009 UT App 301, at ¶ 14. An enforceable contract exists if the parties reach a meeting of the minds on the essential or material terms of the agreement and the terms are sufficiently definite as to be capable of being enforced. *Id.* Whether a term is essential or material to a contract “requires an examination of the entire agreement and the circumstances under which the agreement was entered into.” *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 13, 78 P.3d 600, 602 (quoting *Cessna Fin Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978)). Importantly, a settlement agreement may be enforced even though some terms may be missing or left to be agreed upon. *See Id.*, at ¶ 12 (stating “[a] contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the

agreement has been kept or broken, there is no contract.”) (citations and internal quotations omitted); *Electrical Contractors, Inc. v. Westwater Farms, LLC*, 2016 UT App. 60, ¶ 11, -- P.3d --.

Based on an examination of all the Mediation Agreement’s terms and the circumstances under which it was entered, the trial court did not err—and certainly did not clearly err—in finding that the parties reached a meeting of the minds on the essential terms of a settlement. The record before the trial court established that in 2004, the parties entered into the JV Agreement whereby they agreed to combine their Nu Skin distributorships and to share equally all Nu Skin-related revenue. [Fact 3.]⁴ Despite this agreement, the Knights failed to share with Patterson significant Nu Skin revenue they were receiving under an undisclosed agreement with Spearhead, another Nu Skin distributor. [*Id.*, at 9-10.] After Patterson discovered the Knights’ agreement with Spearhead, Patterson demanded that the Knights share all Spearhead commissions equally as required by the JV Agreement. [*Id.*, at 11.] The Knights refused. [*Id.*]

Patterson then filed this action, the gravamen of which seeks damages for his fifty-percent share of the Spearhead commissions the Knights wrongfully withheld and a judgment declaring that the Knights must pay Patterson fifty percent of all future Spearhead commissions. [*Id.*, at 12.] Shortly after this action was filed, the Knights proposed early mediation and represented they would “make[] a good faith effort to resolve the matter with the assistance of a mediator.” [*Id.*, at 13.] The parties then held a full-day mediation with retired Judge Frank G. Noel. At the mediation, the parties, who were each represented by legal

⁴ Citations to the Relevant Facts section of this brief are cited as [Fact 3.]

counsel, spent the day working with Judge Noel to reach a settlement of their disputes. [*Id.*, at 14] After several hours of negotiations, the parties reached an agreement to settle their disputes. [*Id.*, at 15.] The parties' agreement was put in writing, reviewed by the parties and their counsel, and signed. [*Id.*, at 16-18.] After signing the Mediation Agreement, no one stated or suggested that it was not a binding settlement, or that these terms were simply negotiating points for further discussion. [*Id.*, at 19.]

The Mediation Agreement contained the essential terms of the parties' settlement: it provided that the Knights would split all future Spearhead commissions with Patterson "50/50"; that the Knights would pay Patterson \$125,000 (under certain payment terms) to settle his claim to past Spearhead commissions; that the Knights would pay Patterson the attorneys' fees he incurred in bringing this action; and modified the way in which the parties operated GYN, the entity that managed their Nu Skin distributorship, including how certain commissions would be shared and how certain expenses would be handled. [*Id.*, at 20-23.] Shortly after the Mediation Agreement was executed, Patterson's counsel provided the Knights' counsel with the more formal agreements that incorporated these terms from the Mediation Agreement. [*Id.*, at 24.] The Knights, however, never communicated with Patterson or his counsel regarding these more formal agreements, but simply sat on them for nearly a month before purporting to terminate the parties' settlement without warning or explanation. [*Id.*, at 25-29.]

Based on this record, the trial court did not clearly err in finding that all of the essential elements of a contract were present: there was an offer, acceptance, consideration, and a meeting of the minds on the essential elements of their agreement. Moreover, the Mediation

Agreement's essential terms are sufficiently definite as to be capable of being enforced because they provide a basis for determining the existence of a breach and for giving an appropriate remedy. *See LD III, LLC*, 2009 UT App 301, at ¶ 14; *Cea v. Hoffman*, 2012 UT App 101, ¶ 24, 276 P.3d 1178 (citing Restatement (Second) of Contracts § 33(2)). For example, paragraph 1, which requires that all future Spearhead commissions be split between the parties 50/50 is sufficiently definite because a court could determine whether the provision has been breached (e.g., the Knights fail to pay Patterson his fifty-percent share of the commissions) and an appropriate remedy for this breach (e.g., an judgment awarding Patterson his share, and an order requiring the Knights to pay Patterson his share of all future commissions). Similarly, paragraph 2 is plainly enforceable because it simply requires the Knights to pay Patterson \$125,000 under certain payment terms. If the Knights fail to pay Patterson this amount—which they indisputably have failed to pay—the court can fashion the appropriate remedy. The remaining essential terms (paragraphs 3-7) also fit the bill and are sufficiently definite because they are capable of being enforced. Accordingly, the trial court's ruling was supported by the factual record and was not a clear error.

III. The Trial Court Did Not Clearly Err In Finding That The Additional Agreements Contemplated By The Mediation Agreement Were Not Essential, Missing Terms That Precluded The Parties From Reaching A Meeting Of The Minds.

The Knights' appeal rests entirely on the assertion that the parties could not have reached a meeting of the minds on a binding settlement because "[a]ny settlement was subject to the negotiation and execution of further agreements, which never happened." [Appellants' Br. at 12.] Specifically, the Knights claim any binding settlement was contingent on first

negotiating and signing new agreements with Spearhead and GYN, and agreeing upon the specific language and parameters of a mutual non-disparagement provision. [*Id.*, at pp. 8-20.] The Knights' argument misses the mark, however, because it misconstrues the Mediation Agreement's terms and ignores the substantial evidence that supported the trial court's findings and decision.

1. The trial court did not clearly err in rejecting the Knights' argument that a binding settlement was contingent on negotiating and executing new Spearhead and GYN agreements.

The Knights argue that the Mediation Agreement was not a binding agreement because it was "subject to the negotiation and execution" of an amended Spearhead agreement, which never happened. [App. Br., p. 12.] But after considering the entire Mediation Agreement and the circumstances surrounding its execution, the trial court rejected this argument, finding the Mediation Agreement's provisions ". . . do[] not contemplate further negotiations over material terms, but instead contemplates (1) that the parties will take the handwritten [Mediation] Agreement and formalize it in a written format; and (2) the parties will amend existing agreements to include the provisions set forth in the [Mediation] Agreement." [App. A, at 0553.] The trial court found that such a process was "common place in settlements that take place at mediation," and that settlements are "enforceable even when the parties expect to put the terms in a more formal document." [*Id.*, at 0553-54, citing *Lawrence Const. Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982); *Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.*, 781 P2d 478, 480 (Utah Ct. App. 1989); *Miller v. Basic Research, LLC*, 2:07-CV-871 TS, 2013 WL 1194721, *2 (D. Utah Mar 22, 2013) appeal dismissed, 750 F.3d 1173 (10th Cir. 2014).] Moreover, the trial court found that the essential term of the parties' settlement was

their agreement to split future Spearhead commissions 50/50, and that “whether those proceeds came directly from Spearhead through an amended agreement or from [the Knights] is not the material issue.” [*Id.*, at 0553 n.3.]

On appeal, the Knights claim the trial court’s findings were incorrect as a matter of law, but again they fail to marshal the evidence and then demonstrate that the trial court’s findings were clear error. Instead, they simply make the sweeping conclusion that a new Spearhead agreement must have been an essential term of any settlement as a matter of law because “[h]ad the new Spearhead agreement not been an essential, material settlement term, it would not have been required in paragraphs, 1, 8, and 9 of the Mediation Agreement” Such conclusory assertions, however, do not demonstrate that the trial court committed clear error.⁵ And these improper conclusions aside, the record evidence amply supports the trial court’s finding that the essential settlement term was the parties’ agreement to split future Spearhead payments equally, not the negotiation—or renegotiation—of an entirely new Spearhead

⁵ The Knights also argue the trial court’s finding was in error because “[t]here is nothing in the Mediation Agreement itself to suggest that Patterson merely wanted—whatever the source—a 50-50 split of [the Spearhead] commissions” [App. Br., at pp. 13-14.] But as the Knights themselves recognize, in determining whether a term is essential to a binding settlement, the trial court is not limited solely to four corners of the Mediation Agreement, but instead must “examin[e] the entire agreement and the circumstances under which the agreement was entered into.” [App. Br., at p. 12 citing *Cessna Fin Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978)). And that is exactly what the trial court did here—it examined the entire Mediation Agreement and the circumstances under which it was entered before finding the material term of the settlement was an agreement to split future Spearhead commissions 50/50, and that whether those payments were made by Spearhead or the Knights was not a material issue. [Add. A, at 0553 n.3.]

Agreement.⁶ First, the crux of this entire action is Patterson’s claim that the Knights breached the parties’ JV Agreement by failing to pay Patterson his fifty-percent share of the Spearhead commissions. [Fact 12.] No other issue related to Spearhead or the existing Spearhead agreement was relevant to Patterson’s claims.

Second, the Mediation Agreement’s material terms relate only to the payment of past and future Spearhead commissions. There is no discussion—or even mention—of any of the other terms of the Spearhead agreement or amending any of its other material terms. It stands to reason that if the parties had agreed to make other changes or amendments to any of the existing agreements, that at a minimum, those purported changes would have at least been mentioned in the Mediation Agreement. Relatedly, and despite the Knights’ repeated assertions, the Mediation Agreement does not state that the parties would *negotiate* new Spearhead terms. [See App. Br., pp. 12, 14, 15.] Instead, the Mediation Agreement contemplates that more formal agreements incorporating the Mediation Agreement’s terms would be drafted. [See Add. B., at 0253 ¶ 8.] And this is exactly what happened: shortly after the mediation concluded, the more formal agreements, including an amended Spearhead Agreement, were drafted and provided to the Knights. [Facts 24-29.] These more formal agreements—including the amended Spearhead Agreement—incorporated the terms agreed to

⁶ Importantly, however, it is not Patterson’s burden to marshal the evidence supporting the trial court’s findings; it is the Knights’ burden to marshal the evidence and then “establish a basis for overcoming the healthy dose of deference owed to factual findings” to show that the finding was against the clear weight of the evidence. *See Brasher*, 2016 UT App 100, ¶ 24 (quoting *Nielsen*, 2014 UT 10, at ¶ 41). The Knights have failed to satisfy their burden, relying instead on only a few handpicked facts that they believe support their claim. Such a tactic is improper.

by the parties in the Mediation Agreement. [0221-34, 0585-86, 0598, 0635, 0665-67, 0674-77.]

To convince the Court that the amended Spearhead Agreement must have been an essential, missing settlement term, the Knights assert “the task at hand was not as simple as formalizing the single term of the new Spearhead agreement referenced in the Mediation Agreement . . . [because] the proposed new Spearhead agreement is 14-pages long, involves unique contractual terms specific to entities in a multi-level marketing company, and contains language not found in the original Spearhead agreement or the Mediation Agreement.” [App. Br., at p. 16.] But what the Knights fail to mention is that the new proposed Spearhead agreement is virtually identical to the Spearhead agreement that Jed Knight signed and under which the Knights had been operating and receiving substantial commissions for more than a decade. [0585-86, 0598, 0635, 0665-67, 0674-77.] The only material difference between the proposed new Spearhead agreement and the existing Spearhead agreement is that the new version incorporates the terms of the Mediation Agreement: it adds all the parties to the agreement and provides for the Knights to receive fifty-percent of future commissions and for Patterson to receive fifty-percent of the future commissions. [*Id.*] These changes are exactly what the parties agreed to at the mediation—they agreed to split all Spearhead commissions with Patterson “50/50” and to draft a new Spearhead agreement to reflect the fact that the Knights and Patterson were each entitled to receive the Spearhead payments.

Even though the Knights neglect to mention this in their brief, the trial court was well aware of the fact that the proposed new Spearhead agreement and existing Spearhead agreement were virtually identical other than including the Knights and Patterson as parties,

and providing for the 50/50 split of all future payments. [*Id.*]⁷ Accordingly, the trial court did not clearly err in finding that the essential term of the parties' settlement was the 50/50 split of future Spearhead commissions and that an amended Spearhead agreement was not a material term, but merely a mechanism to facilitate Patterson receiving his payments directly from Spearhead instead of from the Knights.

In a single paragraph, the Knights argue that for reasons similar to their argument concerning the Spearhead agreement, "the negotiation, creation, and execution of a new 'GYN agreement' was an essential term of any final settlement, as specified in paragraphs 8 and 9 of the Mediation Agreement," and that the trial court "erred in concluding" otherwise. [App. Br., pp. 19-20.] For all the reasons above, the Knights' argument is without merit and should be rejected out of hand. First, the Knights have failed to demonstrate clear error by the trial court. Second, the trial court did not commit any error, and certainly not clear error. Like the proposed new Spearhead agreement, the purpose of the new GYN agreement was simply to take the material terms that had been agreed to in the Mediation Agreement and incorporate them into a more formalized agreement. That is what occurred. [See 0311-19, 0251-53.] As the trial court recognized, the process of taking a handwritten agreement made at mediation and formalizing its terms in a subsequent written agreement "is common place in settlements that take place at mediation." [App. A at 554.] The purpose of the further agreements was not, as

⁷ The Knights argue that the new proposed Spearhead agreement shows no meeting of the minds because it would obligate Alisha Knight to comply with certain restrictive covenants to which she had not previously been subject. The Knights, however, never raised this argument before the trial court, and thus have failed to preserve this issue for appeal. See *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828, 831-32 (stating that Utah appellate courts with generally not consider an issue or argument unless it was first raised before the trial court).

the Knights argue, to serve as some sort of starting place or springboard for future negotiation of proposals or topics that were never discussed—and certainly never agreed to—during the mediation. Accordingly, because the Knights have failed to demonstrate that the trial court’s decision finding that neither the Spearhead agreement or GYN agreement to be essential, missing terms of a binding contract was clear error, the trial court’s decision should be affirmed.

2. *Agreement on the specific language and parameters of the mutual non-disparagement provision was not an essential condition to a binding settlement.*

Finally, the Knights argue the Mediation Agreement is unenforceable because the parties never reached a meeting of the minds on the specific language of the non-disparagement clause referenced in paragraph 8. [App. Br., at pp. 17-19.] This claim fails for at least two reasons: first, the Knights failed to properly raise this issue before the trial court and thus have not preserved it for appeal; second, the evidence shows the specific language or parameters of a non-disparagement clause was not an essential condition precedent to an enforceable settlement, and the Knights have failed to carry their burden to prove otherwise.

Utah appellate courts “generally will not consider an issue unless it has been preserved for appeal.” *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828, 831-32 (citing *J.M.W. v. T.I.Z. (In Re Adoption of Baby E.Z.)*, 2011 UT 38, ¶ 25, 266 P.3d 702). To preserve an issue for appeal, an appellant must have presented the issue to the trial court in such a way that it had a sufficient opportunity to rule on the issue. *Id.* The Knights failed to preserve the issue of whether the specific language and parameters of a mutual non-disparagement clause was an essential settlement term because they failed to sufficiently present this argument to the trial

court. In fact, the only time this issue was referenced during the trial court proceedings was by way of two conclusory sentences in the Knights' opposition to Patterson's motion to enforce the settlement. The Knights' opposition argued that because the Mediation Agreement was subject to drafting further agreements and ". . . no specific terms are discussed as to what the non-disparagement, GYN, and Spearhead agreements will contain," the Mediation Agreement is a non-binding proposal. [0365.] Such a fleeting reference without any further explanation, analysis, or supporting evidence is insufficient to preserve for appeal the issue of whether the specific parameters of the mutual non-disparagement provision was an essential settlement term. *See Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366, 372-73 (stating that party fails to preserve an issue for appeal if at the trial court level the party "merely mention[s] [the] issue without introducing supporting evidence or relevant legal authority.")⁸

Even if the Knights had preserved this issue for appeal, they have failed to present any evidence showing that the specific parameters of the non-disparagement clause were an essential term to the parties' settlement. The Knights, in fact, have not even attempted to adduce any facts or evidence showing that the non-disparagement provision's specific parameters were essential to the parties' settlement. Nor could they. Other than the fleeting reference cited above, the Knights never argued to the trial court that the non-disparagement provision's language or parameters were essential to any agreement—not in their sworn

⁸ *See also State v. Worwood*, 2007 UT 47, ¶ 16, 164 P.3d 397, 404 (stating "that perfunctorily mentioning an issue, without more, does not preserve it for appeal"); *State v. Brown*, 856 P.2d 358, 361 (Utah App. Ct. 1993) ("[t]he 'mere mention' of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal," *quoting LeBaron & Assoc., Inc. v. Rebel Enterprises, Inc.*, 823 P.2d 479, 483 (Utah App. Ct. 1991)).

Declarations, briefing, or during the two-hour hearing on Patterson’s motion to enforce settlement. [0404-06; 0419-23; 0573-684.] Rather, the Knights imply this is a material term as a matter of law, stating that “[w]hile no Utah court has addressed whether a non-disparagement clause is an essential term of a settlement agreement,” the Seventh Circuit addressed this issue in *Higbee v. Sentry Insurance Co.*, 253 F.3d 994 (7th Cir. 2001), and held that a non-disparagement clause’s parameters is an essential settlement term. [*Id.*, at p. 18.] The *Higbee* decision, however, is of little help to the Knights because it does not stand for the blanket proposition that the Knights’ claim, and its facts are very different from the facts here.

The Seventh Circuit’s *Higbee* opinion—far from making any sweeping pronouncements—stands merely for the unremarkable proposition that whether a term is an essential contract term depends on the specific facts of the case. *See Higbee*, 253 F.3d 994, at 998.⁹ In fact, the Seventh Circuit expressly clarified the scope of its *Higbee* opinion in *Dillard v. Starcon Int’l Inc.*, 483 F.3d 502 (7th Cir. 2007). In *Dillard*, the plaintiff claimed the parties had not reached a meeting of the minds on all of the essential terms of a settlement and were still negotiating numerous terms when negotiations broke off. *Id.*, at 507. The magistrate judge was not persuaded and found the parties had reached a meeting of the minds on the essential terms of their agreement, and that the remaining terms being negotiated were not essential. *Id.*, at 507-08. The Seventh Circuit affirmed, holding that the magistrate judge did

⁹ The Seventh Circuit and Utah therefore appear to be in accord on this point because Utah law is well settled that whether a term is an essential contract term requires an examination of the entire agreement and the circumstances under which the agreement was entered. *Cessna Fin. Corp.*, 575 P.2d at 1050.

not abuse his discretion in finding that the parties had a meeting of the minds on all material terms essential to their settlement. *Id.*

In affirming the magistrate's decision, the Seventh Circuit clarified that its opinion in "*Higbee* does not stand for the proposition that [non-disparagement] provisions are material as a matter of law." *Id.*, at 509. Rather, the court explained that these provisions were material in *Higbee* because "[t]he plaintiff in *Higbee* made clear during negotiations that she would not settle until the parties hammered out confidentiality and nondisparagement clauses [and thus] [t]he materiality of these terms was never in doubt." *Id.*, at 508-09. In *Dixon*, however, there was no evidence that the parameters of a non-disparagement clause were essential to the parties' settlement, and the magistrate judge therefore did not err in enforcing the parties' settlement agreement. *Id.*

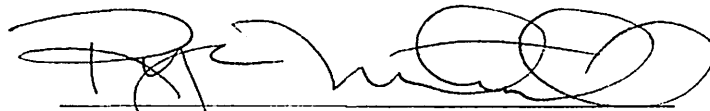
Like the parties in *Dixon*, there is no evidence here that the Knights conditioned their agreement to settlement on first reaching agreement on the specific language and parameters of the mutual non-disparagement clause. And unlike the plaintiff in *Higbee*, the Knights never made clear during negotiations (or at any other time) that they would not settle until the parties hammered out the specific parameters of a mutual non-disparagement provision. As discussed above, other than a conclusory, passing reference, the Knights never even mentioned the non-disparagement issue to the trial court. And considering that the only reference in the record to the mutual non-disparagement provision is to the fact that the parties never specifically discussed its language reasonably indicates that the parties did not consider its language or parameters as being essential to their settlement. Based on the record in this case, there is no evidence that the specific language and parameters of a non-disparagement agreement were

essential to the parties' settlement, and the Knights have thus failed to carry their burden of demonstrating clear error.

CONCLUSION

For the foregoing reasons, Patterson respectfully requests that the Court affirm the ruling of the trial court.

Respectfully submitted this 27th day of June, 2016.

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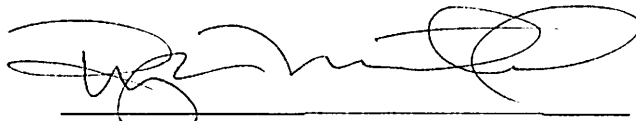
J. Ryan Mitchell
MITCHELL BARLOW & MANSFIELD, P.C.
9 Exchange Place, Suite 600
Salt Lake City, Utah 84111
rmitchell@mbmlawyers.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is in 13-point Times New Roman proportional font and contains 8818 words, and thus complies with the typeface requirements of Rule 27(b) and the type-volume limitation of Rule 24(f) of the Utah Rules of Appellate Procedure.

I have relied on the word count function of Microsoft Office Word 2011, which has calculated the above word total in this brief.

DATED this 27th day of June, 2016.

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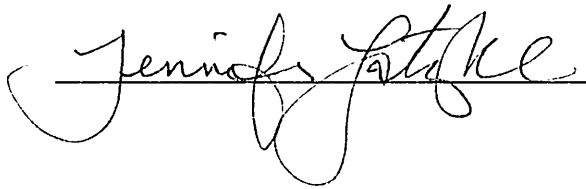
J. Ryan Mitchell
MITCHELL BARLOW & MANSFIELD, P.C.
9 Exchange Place, Suite 600
Salt Lake City, Utah 84111
rmitchell@mbmlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2016, a true and correct copy of
RESPONSE BRIEF OF PLAINTIFF-APPELLEE were served via email and first
class mail to the address below:

Erik A. Olson
MARSHALL OLSON & HULL, P.C.
Newhouse Building
Ten Exchange Place, Suite 350
Salt Lake City, Utah 84111

Bruce R. Baird
BRUCE R. BAIRD, PLLC
2150 S. 1300 E., 5th Floor
Salt Lake City, Utah 84106

A handwritten signature in cursive script, reading "Jennifer F. Hoke", is written over a horizontal line.