2016

KTM HEALTH CARE, INC., a Utah Corporation, Plaintiff and Appellee/Cross-Appellant, v. SG Nursing Home LLC, a Delaware limited liability company, doing business as KOLOB CARE AND REHABILITATION OF ST. GEORGE, and APEX HEALTHCARE SOLUTIONS, LLC, an Illinois limited liability Company, Defendants and Appellants/Cross-Appellees. : Brief of Appellee

Utah Court of Appeals

275

IN THE UTAH COURT OF APPEALS

KTM HEALTH CARE, INC., a Utah Corporation,

Plaintiff and Appellee/Cross-Appellant,

v.

SG NURSING HOME, LLC, a Delaware limited liability company, doing business as KOLOB CARE AND REHABILITATION OF ST. GEORGE, and APEX HEALTHCARE SOLUTIONS, LLC, an Illinois limited liability Company,

Defendants and Appellants/Cross-Appellees.

BRIEF OF APPELLEE/CROSS-APPELLANT

Appellate Case No. 20160558-CA
District Court Case No. 100503405

Appeal from a Final Order of the Fifth Judicial District Court, in and for Washington County. Trial Judge Jeffrey C. Wilcox

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I. ADDITIONAL PARTIES

There are no additional parties to this appeal that are not set forth in the cover page caption.

II. STATEMENT OF JURISDICTION

Plaintiff/Appellee/Cross-Appellant KTM Health Care, Inc. ("Appellee" or "KTM") appeal the final judgment issued by the trial court on March 25, 2016. [R. at 3966]. On July 5, 2016, the Utah Supreme Court assigned the appeal to the Utah Court of Appeals. [R. at 4106]. This Court has appellate jurisdiction over the appeal and cross-appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

III. STATEMENT OF ISSUES

A. Appellants' Issues.[1]

1. Whether the trial court erred when it held that the jury's initial special verdict form, in which the jury determined both that (a) the Appellants had breached the relevant contract, and (b) a mutual mistake existed between the parties at the time the contract was signed, was so inconsistent that it required the jury to reconvene and complete a second special verdict form to correct the perceived inconsistency. [R. 2569; 3898, p. 328].

2. Whether the trial court erred when it denied Appellants' Motion for New Trial based on the insufficiency of evidence where the jury awarded

[1] Appellants' "Issues" are directly quoted from Appellants' Brief. [Appellants' Brief, pp. 6-7].

consequential damages to plaintiff based on costs incurred by a non-party entity. [R. 4091].[2]

B. Appellee's Issues.

1. Issue No. 1: Did the trial court err in excluding testimony from KTM's expert, Bryan Nichols (as to renewable contracts in the industry), on the basis that such testimony was "not relevant because it would not help the trier of fact to understand the evidence or to determine a fact issue in this case."?

   a. *Standard of Review*: Abuse of discretion. *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794; *State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103.

   b. *Issue Preserved At*: [R. 0347-0349; 0350-0389; 0427-0438; 0441-0448; 1033-1034].[3]

2. Issue No. 2: Did the trial court err in determining that the economic loss rule and doctrine of election of remedies required a dismissal of KTM's fraud-based claims?

   a. *Standard of Review:* Correctness. *Overstock.com, Inc. v.*

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[2] As discussed hereinafter, the costs incurred were part of certain demands made by Appellants that required that a third-party be hired.

[3] Citations to the record are indicated by the letter "R" followed by the page ranges where the documents are located in the record. Citations to the trial transcript are indicated by the record number assigned to the corresponding volume, followed by the page number and the line number which are separated by colon. Where the citation includes multiple pages, the starting page/line number is separated from the ending page/line number by a hyphen (e.g. R. 3895, 13:6-14:5 would indicate that the citation begins on page 13, line 6 and continues through page 14, line 5).

SmartBargains, Inc., 2008 UT 55, ¶ 12, 192 P.3d 858.

b. *Issue Preserved At:* September 5, 2014 Minute Entry (attached as Addendum 1); [R. 1455-1465; 1489-1494; 1530-1535; 1767-1768; 1828-1829; 2261-2262; 2263-2288; 2291-2292; 2324-2326; 2339-2347; 2432-2434]; [R. 3898, 248:7-14; 250:2-5].

3. Issue No. 3: Did the trial court err in determining that KTM was not entitled to prejudgment interest under the statute?

a. *Standard of Review*: Correctness. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 16, 82 P.3d 1064.

b. *Issue Preserved At*: [February 10, 2016 Minute Entry, attached as Addendum 2]; [R. 2702-2726; 3899-3912; 3913-3924; 3925-3927; 3930-3934; 3937-3943; 3959-3960].

IV. DETERMINATIVE PROVISIONS

Utah R. Evid. 401. Test for Relevant Evidence
Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Utah R. Evid. 702. Testimony by Experts
(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
(1) are reliable,
(2) are based upon sufficient facts or data, and
(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah Code Ann. §15-1-1. Interest rates—Contracted rate—Legal Rate

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

V. STATEMENT OF THE CASE

A. Nature of the Case.

This case involves claims by KTM against Kolob and Apex arising out of a contract whereby KTM was to exclusively provide pharmacy services to a rehabilitation center operated by Kolob. KTM alleges that Kolob and Apex fraudulently induced KTM to enter into the contract and then subsequently re-negotiated an already existing contract with their current provider (SCP Pharmacy, hereinafter "SCP") for an additional extended period. KTM asserts that Kolob and Apex used their contract with KTM as leverage to option better terms with SCP.[4] After a trial on the matter, the jury awarded KTM breach of contract damages and also consequential damages.

On cross-appeal, KTM alleges that the trial court erred by: (1) refusing to allow KTM's expert, Bryan Nichols, to testify as to the industry standard regarding the term of

[4] SCP is sometimes referred to as "Omnicare" in the record.

closed-door pharmacy contracts; (2) dismissing KTM's fraud-based claims due to the economic loss rule and election of remedies doctrines; and (3) refusing to grant KTM statutory prejudgment interest pursuant to Utah Code Ann. § 15-1-1(2).

On direct appeal Kolob and Apex allege that the trial court erred by: (1) allowing the jury to clarify the inconsistent finding that: (a) Apex and Kolob breached the contract and covenant of good faith and fair dealing (entitling KTM to a damage award as well as attorney's fees) and (b) a mutual mistake existed at the time the parties executed the contract; and (2) denying Appellants' Motion for New Trial based on insufficiency of evidence to support the jury's award of consequential damages.

B. Course of Proceedings and Disposition of Trial Court.

1. KTM filed a Verified Complaint on October 1, 2010 against Appellant SG Nursing Home, LLC dba Kolob Care and Rehabilitation of St. George ("Kolob"). [R. 0001-0015].

2. KTM's Verified Complaint alleged that Kolob had breached a certain "Facility Agreement with Provider Pharmacy" (the "Contract"). [R. 0002]. [A copy of the Contract is found at R. 3895, Tr. Exhibit 1].

3. In general, the Contract required Kolob to use KTM "for all of its requirements for pharmacy-related Services and Products. . . ." [R. 007].

4. KTM filed an Amended Complaint on February 2, 2011, which Amended Complaint was based upon the same factual allegations as the initial Complaint but which included claims for: (i) breach of contract, (ii) promissory estoppel/detrimental reliance, (iii) negligence, (iv) fraud in the inducement, (v)

constructive fraud, (vi) intentional misrepresentation, and (vii) negligent misrepresentation. [R. 0035-0067].

5. On April 25, 2012, KTM filed a second amended complaint adding Appellant Apex Health Care Solutions, Inc. ("Apex") as an additional defendant. [R. at 0292-0344].

6. In the second amended complaint, KTM alleged that Apex was Kolob's "parent company" and was therefore liable to KTM for damages under theories of alter ego, agency, joint venture and respondeat superior. [R. 0293, ¶¶ 3-6; 0300, ¶54].

7. KTM's claim against Kolob generally remained unchanged. [R. at 0292-0344].

8. Appellants subsequently filed answers to the second amended complaint in which they asserted, *inter alia*, that KTM's claims "are barred, in whole or in part, based on a mutual mistake." [R. 0402; 0426].

Kolob's Motion to Strike Testimony of Bryan Nichols

9. On April 30, 2012, Kolob made a motion to strike one of KTM's proposed experts, Bryan Nichols. Kolob argued that Mr. Nichols' testimony as to the industry standard regarding the terms and duration of closed-door pharmacy contracts (including renewal periods) should be stricken because Mr. Nichols' proposed testimony was: (1) inadmissible under Utah R. Evid. 702, (2) irrelevant and (3) purely speculative. [R. 0347-0389].[5]

[5] The Contract was for an initial term from June 28, 2010 to June 28, 2011. However, the Contract also includes a provision that "[a]ny renewals of this Agreement shall be made thirty (30) days prior to the end of this Agreement and evidence by a Memorandum of Renewal to be attached to this original Agreement." [R. 0007, see ¶ 1].

10. KTM filed a memorandum in opposition to the motion to strike asserting that Mr. Nichols' testimony was relevant under Utah R. Evid. 401 because his testimony would be valuable to the jury in their determining the number of years for which KTM would be able to recover under an "expectation damages" analysis. KTM also argued that Mr. Nichols' testimony was not speculative or unreliable and that the determination of reliability of the testimony should be left to the trier of fact (i.e. the jury). [R. 0427-0438]

11. Kolob filed a reply memorandum in support of the motion to strike. [R. 0041-0448].

12. After conducting a hearing on the matter, the trial court entered an order striking Mr. Nichols' testimony finding that "...there are not sufficient facts in this case to support the proposed testimony of KTM's expert, Bryan Nichols, that Kolob would have renewed its pharmacy provider agreement with KTM for at least six years had Kolob begun using KTM for its pharmaceutical needs in 2010. Therefore, such testimony is not relevant because it would not help the trier of fact to understand the evidence or to determine a fact in issue in this case." [R. 1034].

Election of Remedies/Economic Loss

13. On or about May 7, 2014, during a pretrial/motions hearing, the Court affirmed its ruling that KTM could maintain its fraud and negligence-based claims. [R. 1768].

14. During the pretrial conference of June 5, 2014, Appellants renewed their request that the Court exclude KTM's fraud claim pursuant to a theory of election of

remedies. The Court permitted the parties the opportunity to provide supplemental briefing on the issue. [June 5, 2014 Minute Entry, attached as Addendum 3].

15. Both parties provided additional briefing. [R. 2098-2104; 2122-2131]. On September 5, 2014, the trial court issued a ruling dismissing KTM's fraud-based claims under an election of remedies analysis. The trial court also noted that any *post-contract tort claims* based on the breach of contract were precluded by the economic loss rule [*See* September 5, 2014 Minute Entry, Addendum1].

16. KTM filed a Motion to Reconsider the dismissal of the fraud-based claims arguing that the economic loss doctrine did not bar common law fraud and misrepresentation claims that are based on independent duties. [R. 2263-2288].

17. Appellants opposed arguing that the trial court's dismissal of KTM's fraud claims was based primarily on the doctrine of election of remedies, not on the economic loss rule. [R. 2339-2347].

18. KTM responded in its Reply that at the September 5, 2014 hearing, the trial court's reliance on the election of remedies doctrine was limited to pre-contract torts. Because KTM's allegations of fraudulent conduct were related to the period *after the Contract was executed*, those torts were not precluded by the economic loss doctrine. [R. 2433].

19. On October 8, 2014, in ruling on the election of remedies question, the trial court determined that under the theory that it had been fraudulently induced into signing the Contract, KTM was required to either avoid the contract and seek damages (such as reliance and punitive damages) or alternatively affirm the contract and

seek breach of contract damages. The trial court found that KTM had chosen to affirm the Contract and was therefore precluded by the doctrine of election of remedies and the economic loss rule from pursuing its remaining tort claims (i.e. fraud in the inducement, constructive fraud, intentional misrepresentation and negligent representation). The trial court dismissed all of those claims. [R. 2324-2326].

Denial of Prejudgment Interest

20. Trial was held trial on KTM's remaining claims on October 27-31, 2014. The jury found that Kolob breached the Contract as well as the covenant of good faith and fair dealing and that KTM had suffered "loss profit" damages in the amount of $143,989.00 as well as consequential damages in the amount of $120,000.00. [*See* Second Special Verdict Form, R. 2554-2562].

21. After the trial, KTM delivered a proposed judgment document that included an award of prejudgment interest at the Contract's stated rate of 1.5% in the total additional amount of $339,961.00. KTM's inclusion of prejudgment interest was based on paragraphs 2(a) and 4(a) and (c) of the Contract.

22. Appellants objected to KTM's inclusion of prejudgment interest on the grounds that the prejudgment interest penalty only applied to situations where KTM would have *actually* provided prescription drugs/supplies and supplied invoices to Kolob (a situation that never arose due to the fact that the breach of contract occurred prior to KTM supplying anything to Kolob). [R. 2702-2726].

23. KTM countered that it had obtained a judgment for "lost profits." Because that sum had been identified, Kolob and Apex were required to pay interest on that amount at the rate of 1.5% as mandated by the Contract. KTM also argued that Utah Code Ann. § 15-1-1(2) allows for a 10% per annum interest rate unless the contract specifies a different specific rate of interest. [R. 3899-3912].

24. Appellants responded that prejudgment interest may only be awarded in Utah "where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy." *Jorgensen v. John Clay & Co.*, 660 P.2d 229, 233 (Utah 1983). Additionally, Appellants argued that Utah law recognizes a distinction between interest specifically stated in a contract before the contract is breached and interest that is recoverable by way of damage after a breach. The appropriate interest rate is the 10% statutory interest provided for by Utah Code Ann. § 15-1-1(2). [R. 3930-3934]. Under this approach, the total judgment including prejudgment interest is $363,081.37.

25. On February 10, 2016, the trial court held a hearing on the matter and determined that KTM was not entitled to *any* prejudgment interest (*despite the fact that Kolob and Apex had previously admitted that KTM was entitled to statutory prejudgment interest*). [February 10, 2016 Minute Entry, pp. 16-19, attached as Addendum 2]. In reaching this decision, the trial court relied on *Shoreline Dev. v. Utah County*, 835 P.2d 207 (Utah Ct. App. 1992). Even though the jury had awarded a set amount of damages based upon the specific terms of the one-year Contract, the trial court found that the jury's award of damages was based on "best judgment"

as opposed to "fixed standards of valuation." As a result, the trial court declined to award prejudgment interest.

Inconsistent Jury Verdict and Consequential Damages

26. The district court conducted a trial in this matter on October 27-30, 2014, during which a jury heard KTM's claim for breach of contract against defendants Kolob and Apex. [R. 3895-3898].

27. Jury instructions were read to the jury prior to closing arguments. [R. 3898, 263:17-281:1].

28. At the conclusion of the parties' closing arguments, the trial court provided the jury with the Special Verdict Form to answer in deliberations. [R. 2545-2553].

29. The jury completed its Special Verdict Form and announced that it had reached a verdict on the parties' claims and defenses. [R. 3898, 321:18-322:5].

30. As to the breach of contract claim formation and breach, the jury found that Kolob had entered into and then breached the Contract and had also breached the implied covenant of good faith and fair dealing. [R. 3898, 323:6-17; R. 2545-2553].

31. At the same time, the jury found that Kolob and KTM relied upon the assumption or fact that Kolob could terminate its contract with SCP, and that at the time the Contract was formed between KTM and Kolob, both KTM and Kolob were mistaken regarding Kolob's ability to terminate the Contract. [R. 3898, 323:18-324:9; R. 2545-2553].

32. The jury then found that KTM had suffered lost profits in the amount of $143,989.00, and awarded that amount to KTM. The jury also wrote in into the

verdict form, "plus attorney fees." [R. 3898, 322:10-17, 324:16-325:12; R. 2545-2553].

33. After the jury's verdict was announced, the trial court noted and explained inconsistencies in the jury's verdict and asked them to return to deliberations. [R. 3898, 326:2-7].

34. First, the trial court noted that it was inconsistent for the jury to find both a breach of the contract (resulting in an award of damages and attorney's fees) *and* mutual mistake. [R. 3898, 326:8-12].

35. The trial court explained that mutual mistake is an affirmative defense to a claim for breach of contract and that if there was a mutual mistake, then there was no contract, and if there was no contract, damages could not be awarded. [R. 3898, 326:8-14].

36. The trial court determined that it was necessary for the jury to return to their deliberations to consider and decide if there had been clear and convincing evidence that there was a mutual mistake; if the jury did find that there was a mutual mistake, the jury could not find a contract or award damages. [R. 3898, 326:14-19].

37. The court also addressed the portion of the jury's verdict regarding an award of "attorney's fees" and explained that attorney's fees could only be awarded on a contractual or statutory basis. Because there was no applicable statutory or contractual provision to support an award of attorney's fees, the verdict granting such fees was not appropriate [R. 3898, 326:19-327:4].

38. The trial court then sent the jury back to deliberate and fill out the Second Special Verdict Form (which was identical to the initial Special Verdict Form). [R. 3898:327:5-330:5; R. 2554-2562].

39. Before the jury was sent back to deliberate, the trial court clarified to the jury that, while "not asking [them] to change [their] mind" on the issue, if they found that there was a mutual mistake, they "really shouldn't go further" and should sign the jury form *without damages* or making a finding on vicarious liability. [R. 3898, 327:7-20].

40. The jury returned with the Second Special Verdict in which they reversed the prior finding on Kolob's affirmative defense of mutual mistake and instead found no mutual mistake. [R. 2556].

41. The Second Special Verdict reconfirmed damages for lost profits in the amount of $143,989.00 in favor of KTM. The award of attorney's fees was removed as instructed previously by the trial court, but in their new verdict, the jury awarded consequential damages in the amount of $120,000.00 making the total damage award $263,989.00. [R. 3898, 333:1-14].

42. Ultimately, the trial court upheld the jury's Second Special Verdict Form in its entirety over the objections raised by counsel for Kolob and Apex, and final judgment was entered by the court on March 25, 2016. [R. 3966-3968].

43. On November 20, 2014, prior to the entry of final judgment, Kolob and Apex moved the trial court to reconsider its decision that the jury's first special verdict form was inconsistent. [R. 2569]. The trial court ultimately denied this motion. [R.

at 2698]. The trial court subsequently issued a final judgment on March 25, 2016. [R. at 3966].

44. On April 8, 2016, Appellants moved the district court for a new trial pursuant to Utah Rule of Civil Procedure 59(a)(6). [R. 3971]. Kolob and Apex argued that there was insufficient evidence to support the $120,000.00 consequential damages award contained in the jury's Second Special Verdict Form. The district court denied Appellants' motion for new trial on May 31, 2016. [R. 4091].

VI. STATEMENT OF FACTS

A. Background

1. Adam Katschke ("Mr. Katschke") is a licensed pharmacist who has worked at and operated pharmacies since 2000. [R. 3896, 114: 12-22].

2. In August 2009, Mr. Katschke and his business partner, Lane Truman ("Mr. Truman"), formed KTM Healthcare Solutions, Inc. ("KTM"). [R. 3896, 117:21-25].

3. KTM opened a retail pharmacy in Enterprise, Utah, known as Enterprise Valley Pharmacy ("Enterprise Valley"). [R. 3896, 117:21-118:1].

4. At the time KTM was formed, Mr. Katschke also owned and operated another retail pharmacy in Caliente, Nevada, known as Meadow Valley Pharmacy ("Meadow Valley"). [R. 3896, 116:15-117:19].

5. KTM and Meadow Valley are entirely separate entities that have separate organizational documents and tax ID numbers, and they maintain separate accounting books and records. [R. 3896, 223:16-224:11]

6. KTM and Meadow Valley do not have identical ownership. Mr. Katschke is the sole owner of Meadow Valley. KTM is co-owned by Mr. Katschke and Mr. Truman. [R. 3896, 224:15-20]

7. KTM was started as a "closed-door" pharmacy. [R. 3896, 123:11-124:2]

8. A closed-door pharmacy is significantly different than a retail pharmacy because it is not open to the general public. Rather, a closed-door pharmacy provides services to a defined and exclusive group of patients, such as long-term care facilities, skilled nursing facilities and assisted living communities. [R. 3896, 119:1-9].

9. The advantage of operating a closed-door pharmacy is that the pharmacy receives certain manufacturer rebates that are not available to retail pharmacies. Per federal regulations, a closed-door pharmacy is also entitled to charge insurance companies a higher dispensing fee for its services. [R. 3896, 119:10-120:3].

B. Negotiations Between Kolob and KTM.

1. Kolob is a skilled nursing facility located in St. George, Utah. [R. 0294].

2. Kolob provides short term and long term rehabilitation including recovery, palliative care, and memory care. [R. 0294].

3. Kolob requires and makes use of pharmaceutical products and services on a daily basis in order to provide care for its residents. [R. 0294].

4. Apex is a management company whose employees had supervisory authority over Kolob and its operations. [R.3895, 238:16-240:20].

5. In or about December 2009, KTM contacted Kolob to see whether Kolob would consider contracting with KTM to provide Kolob with its pharmaceutical needs. [R. 2896, 123:19-25].

6. At the time of initial contact, Kolob was already under contract with another closed-door pharmacy, SCP, to fill its residents' prescriptions. [R. 3895, Tr. Exhibit 23; 3896, 45:15-19].

7. However, Kolob was experiencing service issues with SCP. [R. 3895, Tr. Exhibit 23; 3896, 48:8-10].

8. After Kolob expressed interest in using KTM's services, Mr. Katschke called Greg Seeger ("Mr. Seeger"), the regional manager for Kolob. [R. 3896, 124:15-125:7].

9. During that phone call, Mr. Seeger, with "a lot of excitement in his voice" told Mr. Katschke that Kolob had been looking for something because they were "very unhappy with the service [they were] receiving [from SCP]" and asked to schedule a meeting. [R. 3896, 124:23-125:7].

10. In January 2010, Mr. Katschke met with Kolob's administrator, Jerry Olson ("Mr. Olson"), the "director of nursing" Bess Litton ("Ms. Litton"), and Mr. Seeger. [R. 3896, 125:3-18].

11. During this meeting, Kolob expressed "great" interest and eventually told Mr. Katschke: "you put something together, we would like to see it, we would like to work with you." [R. 3896, 125:19-126:6].

12. On March 23, 2010, Mr. Katschke again met with Mr. Olson and Mr. Seeger to discuss the possibility of Kolob contracting for KTM's services. [R. 3896, 126:22-23].

13. During this meeting, Mr. Olson and Mr. Seeger represented that they were unhappy with SCP's services. Specifically, they stated the SCP pharmacist had yelled at some of Kolob's nurses and that they were experiencing other problems with SCP as well. [R. 3896, 127:9-16].

14. Mr. Olson and Mr. Seeger told Mr. Katschke "we are ready to use your services" and "[w]e know you'll be a great service." [R. 3896, 127:12-19].

15. However, Mr. Olson and Mr. Seeger wanted to be assured that Mr. Katschke would be the *actual* pharmacist in charge of servicing Kolob, as opposed to some other employee. Mr. Olson and Mr. Seeger specifically told Mr. Katschke that the "one little issue" they had was "that you're the guy, Adam" and "[w]e want you there". [R. 3896, 127:16-19, 131:7-13].

16. In response, Mr. Katschke promised that he would *personally* work at the KTM pharmacy in order to service Kolob's residents, and told them that *he would need to hire another pharmacist to replace him at Meadow Valley* as he was the only pharmacist there at the time and that he was not personally working at the KTM pharmacy. [R. 3896, 127:20-25, 131:7-13].

17. No contract between Kolob and KTM was actually signed during the aforementioned March 23, 2010 meeting. [R. 3896, 130:5-12].

18. Rather, Kolob asked KTM to draw up a contract and to provide Kolob with some "proofs" to review. [R. 3896, 130:5-12].

19. Mr. Katschke then took a tour of Kolob's facility with Mr. Seeger and Mr. Olson in attendance. At the conclusion of the tour, the parties "congratulated each other that [they] were going to start a new venture." [R. 3896, 130:13-21].

20. Following the March 23, 2010 meeting, Mr. Seeger called Mr. Katschke to let him know that Mr. Katschke would be receiving some proposals so that Kolob could evaluate whether KTM offered better pricing/service than SCP. [R. 3896, 273:13-22].

21. Also following the March 23, 2010 meeting, Mr. Katschke engaged in negotiations with a pharmacist named Trent Decker ("Mr. Decker") to replace him at the Meadow Valley pharmacy. Mr. Decker requested a five-year employment contract. After negotiations, Mr. Decker settled on a three-year employment contract. [R. 3896, 134:13-21, 137:6-25].

22. Subsequently, on April 17, 2010, Meadow Valley signed the three-year employment contract with Mr. Decker, which included a $120,000 annual salary plus benefits such as extra paid vacation. [R. 3896, 135:12-17, Tr. Exhibit 84, 136:7-19].

23. Mr. Katschke would not have hired Mr. Decker to be an employee of Meadow Valley had he not started KTM. [R. 3896, 139:20-22]. In fact, Mr. Katschke hired Mr. Decker because he "made a promise to Jerry" that he would be the pharmacist to personally take care of Kolob. [R. 3896, 140:13-141:2].

24. Mr. Decker's employment contract with Meadow Valley does not mention KTM and Mr. Decker never did any work for KTM. [R. 3896, 277:4-288:11].

25. On April 15, 2010, Mr. Seeger sent an email to Mr. Katschke that contained a proposal from Don Eads ("Mr. Eads") at SCP. [R. 3896, 272:19-24; Tr. Exhibit 43].

26. By that time KTM and Kolob already had a verbal agreement to do business together. [R. 3896, 271:16-21, 274:3-9].

27. Based on his discussion with Mr. Seeger and Mr. Olson, Mr. Katschke understood that Kolob had terminated (or at least *could* terminate) the agreement with SCP and that the service agreement between KTM and Kolob could go into effect by the previously negotiated date of June 28, 2010. [R. 3897, 6:19-7:2].

28. Mr. Katschke expressly asked Mr. Olson and Mr. Seeger to allow him a couple of months to get the proof of a contract ready because he and KTM needed time to become licensed and ready to operate as a closed-door pharmacy. [R. 3896, 141:11-142:18].

29. In order to become ready as a closed-door pharmacy, KTM needed to incur certain expenses to comply with both state and federal regulations, including for instance installing new shelving, countertops, alarm system, and refrigeration equipment; purchasing a new computer and software system; and other costs related to licensing, training, and third-party insurance contracting. [R. 3896, 185:8-187:23; Tr. Exhibit 34].

30. The total for the costs outlined above, which were necessary for KTM to be able to perform its part of the Contract, was $33,302.54. [R. 3896, 187:24-25; Tr. Exhibit 34].

31. The majority of these costs were incurred by KTM between January and April 2010, with the computers being purchased in early May 2010, prior to the execution of the Contract with Kolob, but following the January 2010 meeting in which Kolob told Mr. Katschke that they "wanted to pursue working" with KTM. [R. 3896, 226:24-227:7; Tr. Exhibit 34; 227:8-18].

32. Mr. Seeger testified that after Kolob's meeting with KTM on March 23, 2010, he reviewed Kolob's contract with SCP including the termination clause and spoke with the local SCP representative to verify the correct date that Kolob could terminate services with SCP and transition to KTM. [R. 3896, 49:7-20].

33. Based on this information, Mr. Olson testified that he and Mr. Seeger were under the impression that Kolob was on a month-to-month contract with SCP which could be terminated with 30-days notice. [R. 3895, 136:3-13].

34. On May 25, 2010, Mr. Katschke met with Mr. Olson and Ms. Litton at Mr. Olson's office at Kolob's facility. Mr. Seeger participated via telephone. [R. 3896, 146:3-16].

35. Mr. Olson indicated that Kolob wanted to make a few minor changes to the proposed contract. Mr. Katschke made those changes on his laptop during the meeting and printed out the Contract between KTM and Kolob. The final Contract

was faxed to Mr. Seeger for signature on behalf of Kolob. [R. 3896, 146:19-147:4].

36. Mr. Seeger signed the Contract on behalf of Kolob and emailed and faxed it back so Mr. Katschke could sign it on behalf of KTM. [R. 3896, 147:4-7].

37. Paragraph one of the Contract indicates that the initial service date is June 28, 2010. [R. 3896, 50:13-17; Tr. Exhibit 1].

38. Mr. Seeger testified that this start-date was chosen to allow Kolob at least thirty-days to notify SCP of Kolob's decision to cancel its existing pharmaceutical contract. [R. 3896, p. 50).

C. Post-Contract Developments

1. On the same day that KTM and Kolob signed the Contract (May 25, 2010), Mr. Olson contacted SCP's local manager, Steve Woods ("Mr. Woods"), to let him know that Kolob would no longer be using SCP for its pharmaceutical needs. [R. 3895, 131:23-132:6].

2. Mr. Woods responded by stating that Kolob's contract was still in effect. [R. 3895, 132:9-10].

3. Later on May 25, 2010, Mr. Olson sent an email to Mr. Katschke stating that he disagreed with Kolob's interpretation of their contract and that Kolob was "locked in for 5 more months." Mr. Olson indicated that Kolob disagreed with SCP's interpretation and that Kolob should be able to give a 30-days notice as originally planned. [R. 3895, 134:11; Tr. Exhibit 2].

4. Mr. Seeger also contacted Mr. Katschke and explained the situation to Mr. Katschke and told him that Kolob wanted to begin service with KTM as soon as Kolob could terminate its current contract with SCP . [R. 3896, 50:21-51:8].

5. On June 7, 2010, Mr. Olson sent another email to Mr. Katschke indicating "apparently we are not going to be able to get out of our contract with Omni [i.e. SCP] until the end of October". [R. 3895, 151:17; Tr. Exhibit 4].

6. When asked at trial to read the November 1, 2007 contract between Kolob and SCP, Mr. Olson testified that he understood that the Kolob/SCP contract was to continue through October 31, 2009 and then would be *automatically renewed for additional one-year periods unless either party notified the other in writing no less than 120 days prior to the expiration of the initial term.* [R. 3895, 165:11-166:11].

7. When asked at trial if a notice of non-renewal was sent to SCP prior to the initial term's conclusion, Mr. Olson responded "[n]ot to my knowledge." Mr. Olson also stated that his understanding was that Kolob's contract with SCP had been automatically extended for another one-year period, thereby terminating on October 31, 2010. [R. 3895, 166:12-167:2].

8. Mr. Olson testified that, at the time of negotiations with Mr. Katschke, he believed the Contract between Kolob and SCP had been previously terminated because of a mutual agreement between Mr. Seeger and Mr. Eads. [R. 3895, 167:23-168:1].

9. Contrary to Mr. Olson's testimony, Mr. Seeger testified that on June 24, 2010, Mr. Olson, on behalf of Kolob, signed an entirely new contract with SCP. SCP countersigned the contract on June 28, 2010. This new contract was executed only

four days before the effective date of Kolob's Contract with KTM was to commence. [R. 3896, 55:13-19, Tr. Exhibit 8].

10. On July 1, 2010, the new contract between SCP and Kolob became effective (only two days after KTM's contract became effective). [R. 3895, 168:16-169:8, Tr. Exhibit 8].

11. At trial, counsel for KTM asked Mr. Olson: "So my question to you is, why did you create a new contract [with SCP] when your term was, a, autorenewing and, b, wasn't going to expire for another five months—four months?" [R. 3895, 170:5-8].

12. Mr. Olson testified that he did not know why he signed an entirely new contract with SCP when the original contract term was not going to expire for another four or five months and would auto-renew in any case. [R. 3895, 170:5-18].

13. Neither Mr. Seeger nor Mr. Olson disclosed to Mr. Katschke that a new contract had been signed between Kolob and SCP. In fact, Mr. Katschke was unaware that Kolob and SCP had signed a second contract until discovery in this case.

14. On July 11, 2010, Mr. Olson emailed Mr. Katschke notifying him that Kolob had made the decision to "stick with SCP for at least another year". [R. 3895, 154:4; Tr. Exhibit 5].

15. On July 20, 2010, Mr. Katschke emailed Mr. Seeger with his concerns and told him "[KTM is] willing to wait until the end of October if need be" but anything beyond those three months was unreasonable and the appropriate compensation

would need to be made if the Contract wasn't honored. [R. 3895, 159:21; Tr. Exhibit 6].

16. Kolob refused to honor the Contract and moved forward with SCP under their newly negotiated contract.

VII. SUMMARY OF ARGUMENTS

A. Appellee's Response to Appellants' Arguments

1. The trial court properly allowed the jury to reconsider inconsistencies in the jury verdict.

2. The jury's award of consequential damages is supportable and should not be overturned.

B. Appellee's Arguments on Cross-Appeal

1. The trial court abused its discretion by excluding the expert testimony of Bryan Nichols, which testimony was related to the typical duration and term of closed-door pharmaceutical agreements. Mr. Nichol's testimony was relevant, helpful and reliable and the jury (as trier of fact) should have been allowed to hear and consider his expert testimony.

3. KTM's fraud-based claims were improperly dismissed by the trial court. Neither the economic loss rule nor the election of remedies doctrine bar KTM's fraud-based claims in this case.

4. The trial court improperly denied KTM statutory interest of 10% under Utah Code Ann. § 15-15-1. Sufficient evidence and testimony were presented at trial to establish that KTM's loss had been fixed as of a

definite time and that the amount of the loss was calculated with mathematical accuracy in accordance with well-established rules of damages.

VIII. APPELLEE'S RESPONSE TO ARGUMENTS ON DIRECT APPEAL

A. The trial court correctly determined that the jury's initial special verdict form was so inconsistent that it required the jury to reconvene and complete a second special verdict form to correct the perceived inconsistency.

After trial in this case, the jury completed a Special Verdict Form. Of relevance to Appellants' arguments and Appellee's response on direct appeal are the following Special Verdict Form findings:

(1) Kolob entered into a contract with KTM and breached both the Contract and the covenant of good faith and fair dealing. [R. 2546; 3898, 323:6-17];

(2) Kolob's ability to terminate its contract with SCP was a basic assumption or important fact upon which both KTM and Kolob had knowledge and based their Contract and both KTM and Kolob were mistaken regarding Kolob's ability to terminate its contract with SCP prior to the date of performance of the Contract. [R. 2547; 3898, 323:18-324:9];

(3) KTM suffered damages as a result of Kolob's breach of contract and breach of the covenant of good faith and fair dealing in the amount of $143,989.00 for lost profits; [R. 2549; 3898, 324:16-20]

(4) The total damages to be awarded to KTM are $143,989.00 for lost profits *plus attorney fees.* [R. 2550; 3898, 325:2-12].

After determining that the finding of mutual mistake was inconsistent with an award of damages *and* finding that the award of attorney's fees was not supported by contract or statute, the trial court correctly instructed the jury as follows:

> Folks, perhaps because the verdict form was not plain enough, there are inconsistencies here.
>
> ....
>
> You have found that there's been a breach of the contract. An affirmative defense to the breach of contract is mutual mistake, and you found that there was mutual mistake. If there was a mutual mistake made, then there was no contract. It never formed, and so you couldn't award damages. And rather than have this go up on appeal with that instruction, I would like you to go back and consider if, in fact, you found by clear and convincing evidence that there was mutual mistake based on Questions 4 and 5, then you can't find a contract and find damages. As a matter of fact, the only time attorney's fees can be awarded is if it's in the contract or if there's a statute. There was no statute that would be involved, and if you read -- and I'm sure that you did -- the contract did not have an attorney's fees clause. If there had been one, we would have been arguing about it and about the amount. And since it's not, your suggestion here plus attorney's fees is also I guess as a matter of law I can't do that.
>
> Do we have a -- Judy, can we get another special verdict form printed out quickly, and I'll let you take this in with you. But my question to you is, on page 3 [of the Special Verdict Form]—and I'm not asking you to change your -- your -- your mind on this. If you found by clear and convincing evidence that there was a mutual mistake, **then you really shouldn't go further, and you sign the jury verdict form without damages**, and you don't need to have any sort of a finding of vicarious liability. Perhaps on this one we should have said if you find mutual mistake it said to proceed to Question No. 6. We should have said stop your deliberations, sign the jury verdict form and return it. Does that make some sense to you? Do we have a new one printed out?
>
> ....
>
> We're going to hand you a new one, and I'm going to give you this old one to review. And we're going to -- when you leave we'll have some statement made on the record. So let's all rise for the jury.
>
> [R. 3898, 326:2-328:2]. (Emphasis added).

After sending the jury back with the above-noted oral instructions, and a blank Second Special Verdict Form, Mr. Guelker, attorney for Appellants entered the following objection:

> I would object to sending the jury back in the manner in which you did. It's our position that once they found that there was a mutual mistake, any further findings were irrelevant because once there's mutual mistake the contract was unenforceable, and there should have been no damages. So even despite the **mistake on the verdict form**, once they found mutual mistake, that really ended the matter and everything leading after that is really null and void. (Emphasis added).
>
> [R. 3898, 328:10-20].

The jury returned with the completed Second Special Verdict Form. The Second Special Verdict Form indicated the following findings:

(1) Kolob entered into a contract with KTM and breached both the Contract and the covenant of good faith and fair dealing. [R. 2555].

(2) Kolob's ability to terminate its contract with SCP was not a basic assumption or important fact upon which both KTM and Kolob had knowledge and based their Contract and KTM and Kolob were not mistaken regarding Kolob's ability to terminate its contract with SCP prior to the date of performance of the Contract. (In other words, the jury reversed the finding of mutual mistake). [R. 2556].

(3) KTM suffered damages as a result of Kolob's breach of contract and breach of the covenant of good faith and fair dealing in the amount of $143,989.00 for lost profits [R. 2558].

(4) KTM suffered additional losses reasonably anticipated within the contemplation of the parties in the amount of $120,000.00. [R. 2559].

(5) The final award of damages was $143,989.00 in lost profit and $120,000.00 in consequential damages for a total award of $263,989.00.

1. While a court must attempt to reconcile special verdicts if possible, the trial court did not err in sending the jury back to reconsider the first Special Verdict Form.

On appeal, Kolob and Apex have raised the same issues and cited the same cases referred to in their Motion to Reconsider after trial. [R. 2569-2589]. Appellants rely on three key cases for their assertion that the trial court erred in sending the jury back to reconcile their finding of mutual mistake and the award of damages and attorney's fees in the first Special Verdict Form. Those cases are: *Bennion v. LeGrand Johnson Constr. Co.,* 701 P.2d 1078; *Tooele Associates Ltd. Partnership v. Tooele City,* 2012 UT App 214, 284 P.3d 709; and *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847 (10th Cir. 2000). As set forth hereinafter, the cases relied upon by Appellants are factually inapposite to the case at bar and actually support KTM's position.

In *Bennion* the defendants, on appeal, asserted that the jurors had answered questionnaires with inconsistent verdicts. This Court determined that this was not the case by simply looking at the wording of the questionnaires:

> In answer to special interrogatories 5(a) and 5(b), the jury found that the Bennions were negligent, but that their negligence was not a "proximate cause" of their damages. In answer to interrogatory 7(b) the jury found that Bennions' negligence was "a cause" of the Bennions' damages to the extent of being 20% at fault. Johnson Construction argues that the answer to 5(a), that Plaintiffs were negligent, is inconsistent with 5(b), that their negligence was not the proximate cause of the damage, and that the answer to 5(b), that

> Plaintiff's negligence was not a proximate cause of the damage, is in consistent to the answer to 7(b), that plaintiff's negligence was a 20% cause of the damage.
>
> ....
>
> In our view, the answers to interrogatories 5(a), 5(b) and 7(b) can, and therefore must, be read harmoniously. Certainly there is no inconsistency necessary or otherwise, between findings of negligence and no proximate cause. (Internal citations omitted). Nor were the jury's answer to interrogatory 5(b), that Plaintiffs were not a proximate cause of the damage inconsistent with the answer to 7(b), that Plaintiffs were "a cause" of the damage.
>
> *Bennion v. LeGrand Johnson Constr. Co.,* 701 P.2d at1082-83.

In other words, the interrogatories the jury responded to were, in fact, compatible *and legally accurate*. The *Bennion* court then stated:

> Furthermore, Johnson Construction failed to object to the verdict before the jury was discharged. When special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or move that the cause be resubmitted to the jury for clarification. If a party fails to take appropriate action before the discharge of the verdict, that party generally may not later move for a new trial on the ground that the verdict was defective.
> ...
>
> **The rule requiring an objection if there is some ambiguity serves the objective of avoiding the expense and additional time for a new trial by having the jury which heard the facts clarify the ambiguity while it is able to do so.** (Emphasis added) (Internal citations omitted).
>
> *Bennion*, at 1083.

At the time that the trial court sent the jury back to resolve the ambiguity in the verdict, counsel for Appellants, Mr. Guelker, objected. However, in his own objection, Mr. Guelker acknowledged the "mistake in the verdict form." [R. 3898, 328:10-20].

Bennion mandates that once an inconsistency in a special interrogatory or verdicts is discovered, it is an actual *requirement* that legal counsel object and request the matter to be resubmitted to the jury for clarification. After reading the initial verdict form into the record and identifying the inconsistency, the trial court requested that counsel approach the bench. The trial court then asked counsel what they would like to do with respect to the apparent ambiguity in the jury's verdict. [R. 3898, 325:22-327:20]. The suggestion was made by KTM's counsel that the matter be sent back to the jury to resolve the inconsistency. The trial court agreed with this suggestion and the jury was given a Second Special Verdict form. However, before allowing the jury to leave, the trial court gave the following instructions: (1) the jury had found a breach of the contract, (2) mutual mistake is an affirmative defense to the breach of contract, (3) if there was mutual mistake, no contract ever formed and so no award of damages could be given. [R. 3898, 326:8-14]. The trial court then stated: "[a]nd *rather than have this go up on appeal* with that instruction, I would like you to go back and consider if, in fact, you found by clear and convincing evidence that there was mutual mistake based on Questions 4 and 5, then you can't find a contract and find damages." [R. 3898, 326:14-19]. The trial court also clearly indicated that it was not asking the jury to "change its mind"—but that if mutual mistake was found, then the jury need go no further and the verdict form should be signed without any damages. [R. 3898, 327:7-14].

The trial court also explained that the jury could not award attorney's fees in the case because there was no statutory or contractual basis for the fees. [R. 3898, 326:19-372:4]. The unexpected inclusion of attorney's fees by the jury was *obviously intended to*

penalize Appellants. However, it presented a secondary ambiguity that the trial court wished to clarify with the jury. It should be noted that the trial court's explanation to the jury about the inappropriateness of attorney's fees was actually favorable to the Appellants.

Unlike *Bennion* (where the interrogatories were found to be consistent), there is no possible way that damages and attorney's fees could be "awarded" in the instant case if a mutual mistake was also found. Similarly, there could not be mutual mistake if damages were awarded. Defendants attempt to gloss over this point by indicating the damage award was "advisory."[6]

Appellants' argument misses three specific points. First, the award of damages would be inconsistent to the affirmative defense as explained. Second, it is an actual rule that the sitting jury must have an opportunity to clarify any ambiguity. Third, the jury initially award attorney's fees in addition to damages—something which would never be warranted if the contract was void in the first place due to mutual mistake.

One of the fundamental flaws of Appellants' argument is that it requires this Court to assume that the jury originally had no intention to *award* actual damages to KTM, but that somehow, upon reconsideration, the jury completely reversed its position. Appellant's also fail to realize that it was equally possible that the jury could have eliminated the damage award and simply found mutual mistake after revisiting the initial verdict—but the jury *did not*. It also bears repeating that the jury specifically found that a

[6] Note that the damages in the Special Verdict Form are classified as an "award" and were merely an empty "calculation" as suggested by Appellants. [R. 2550; 3898, 325:2-12].

contract had been formed and that Appellants had breached both the Contract *and* the covenant of good faith and fair dealing.

The court in *Tooele Associates* offers the following guidance: "When reconciling apparent inconsistencies on a special verdict form, 'the answers to the questions are to be construed in the context of the surrounding circumstances of the case and in connection with the pleadings, instructions, and issues submitted.'" *Tooele Associates Ltd. Partnership v. Tooele City,* 2012 Ut. App 214, ¶ 11 (internal citations omitted). In the case at bar, the jury was given the opportunity to orally verify if the Second Special Verdict rendered was their verdict. The jurors each made a unanimous statement in the affirmative. [R. 3898, 333:24-335:6]. Given the rule that the jury should be allowed the opportunity to clarify any apparent inconsistencies, and given the fact the jurors (to the person) confirmed the same damage amount as well as additional consequential damages in the Second Special Verdict Form it is clear that the jury intended to award KTM damages.

The third case cited by Kolob and Apex in support of their argument that the trial court erred in requiring the jury to clarify its verdict is *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847 (10th Cir. 2000). *Heno* is actually helpful to KTM's position. In that case, the Tenth Circuit Court addressed the issue of inconsistent verdicts and stated:

> Sprint argues, however, that the inconsistent verdicts should be resolved by granting judgment as a matter of law in its favor. It relies heavily upon the First Circuit's decision in *de Feliciano v. de Jesus*, 873 F.2d 447 (1st Cir. 1989). . . . *de Feliciano* acknowledged a split in authority on this point, but regardless, cases must be read against their facts and *de Feliciano* is distinguishable. First, the court noted that "we cannot blame the district courts' failure to send the jury back to reconsider any more on the

> defendants than on the plaintiffs" because the trial court raised the issue itself and held that the verdicts were reconcilable. If Sprint had raised the issue before the jury was dismissed, **the inconsistent verdicts could simply have been resolved by sending the matter back for clarification.**
>
> *Heno*, at 853. (Emphasis added).

Such guidance is both practical and reasonable. The *Heno* court advises that inconsistent verdicts should simply be resolved by sending the matter back to the jury for clarification. In the case at bar, the inconsistent verdicts were resolved by doing exactly what the *Heno* court advised. The jury first returned with an apparent inconsistent verdict. The trial court asked counsel what they would like to do. The suggestion was made that the matter be sent back to the jury to resolve the apparent inconsistency. The trial court agreed with this suggestion, and the jury was given the Second Verdict form with the instructions that the jury must find either mutual mistake or damages—but not both. Through this simple, direct, and efficient process, the jury resolved the apparent inconsistency, judicial economy was preserved, and the rule of law was followed.

2. It is inconsistent for the jury to find mutual mistake, but to also award damages for breach of contract, breach of covenant of good faith and fair dealing and attorney's fees.

In their brief on appeal, Appellants argue that the determination of mutual mistake was *not* inconsistent with an award of damages (and attorney's fees) because the award of damages for "breach of contract" does not address whether the contract itself is void due to mutual mistake. Appellants' argument is flawed for the following reasons:

1. Counsel for Appellants admitted that the Special Verdict Form included a "mistake." This mistake was the failure of the verdict form to properly

guide the jury in understanding that a finding of mutual mistake would necessarily void the Contract and prohibit an award of damages. This mistake is something that the trial court clearly clarified before sending the jury back to reconsider the verdict;

2. The jury awarded attorney's fees to KTM even though there was no line in the Special Verdict Form for such an award;

3. The jury found both breach of contract *and* breach of the covenant of good faith and fair dealing;

4. When the jury returned with the Second Special Verdict Form, the jury awarded the same lost profit damage amount, but also added an additional $120,000.00—thereby clearly indicating the jury's view of Appellants' actions.

Appellants rely on *Neff v. Neff,* 2011 UT 6, 247 P.3d 380 for the general proposition that a jury verdict that is inconsistent on its face should be "read harmoniously" so that "any reasonable view of the case makes the jury's answer consistent. Appellee does not dispute these legal guidelines. However, it is important to note that *Neff* involved a case where the trial court granted a JNOV motion that reversed the jury's verdict as to a finding of slander of title and breach of fiduciary duty. On appeal, the Utah Supreme Court found that the trial court erred when it overturned the jury verdict on slander of title, but did not err on overturning the jury verdict on breach of fiduciary duty. *Id.*, ¶¶ 75-86. Clearly, the *Neff* case is both procedurally and factually different than the case at bar. In the instant case, none of the parties made a JNOV motion

in an effort to reverse the jury's verdict. On the contrary, the jury was allowed to reconsider the inconsistencies in the initial Special Verdict Form after the trial court clearly explained the role of mutual mistake vis-à-vis a finding of breach of contract and award of damages and attorney's fees.

Appellants also insist that the trial court should have merely excused the jury and then independently determined as a matter law that the jury had no intent to award actual damages due to the finding of mutual mistake. Ostensibly, the trial court could have attempted such a fiat. Instead, however, the trial court exercised appropriate care and allowed the jury to clarify *exactly what it intended*—and the Second Special Verdict Form clearly demonstrates exactly what the jury intended as far as compensating KTM for Appellants' actions.

B. The trial court properly denied Appellants' Motion for New Trial.

Under Utah R. Civ. P. 59, a trial judge may grant a new trial where there is an "[i]nsufficiency of the evidence to justify the verdict or other decision." Utah R. Civ. P. 59(a)(6). "If the trial court can reasonably conclude that there was insufficient evidence to justify the verdict," then an order granting a new trial is appropriate. *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 804 (Utah 1991).

A trial court's denial of a motion for a new trial under Rule 59(a)(6) will be only be reversed if the reviewing court "concludes that the evidence, when viewed most favorably for the prevailing party, is insufficient to support the verdict." *Tingey v. Christensen*, 1999 UT 68, ¶ 7, 987 P.2d 588. Appellants also have the burden of

marshaling the evidence in support of the verdict and showing that the evidence, viewed in the light most favorable to the verdict, is insufficient. *Id.*

First, Appellants have failed to properly marshal the evidence in favor of the jury's finding for consequential damages. Even under the modified standard articulated by in *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, an appellant is still required to marshal sufficient evidence to support the verdict that appellant is challenging or else risk failing to carry its burden of persuasion.

Furthermore, the $120,000.00 presented as a consequential damage correlates exactly to the number offered by Mr. Katschke as the yearly amount paid to hire Mr. Decker—his replacement at Meadow Valley. [R. 3896, 204:10-16]. As part of the terms of their agreement, Mr. Olson and Mr. Seeger demanded that Mr. Katschke serve as the *actual* pharmacist in charge of servicing Kolob, as opposed to some other employee. Mr. Olson and Mr. Seeger specifically told Mr. Katschke that the "one little issue" they had was "that you're the guy, Adam" and "[w]e want you there". [R. 3896, 127:16-19, 131:7-In response, Mr. Katschke promised that he would personally work at the KTM pharmacy in order to service Kolob's residents. Mr. Katschke directly notified Mr. Olson and Mr. Seeger that *he would need to hire another pharmacist to replace him at Meadow Valley* as he was the only pharmacist there at the time and that he was not personally working at the KTM pharmacy. [R. 3896, 127:20-25, 131:7-13].

Furthermore, KTM incurred costs related to construction, computers, an alarm system, state and federal licensing costs, books and employee training. [R. at 3896, 186:1-187:18, Tr. Exhibit 34]. These costs were incurred as a direct consequence of the

negotiations of the parties. During negotiations, Appellants were fully aware that Appellee was not in a position to service their pharmaceutical needs, so Appellants requested that Appellee prepare to accommodate the agreement between the parties by transitioning from an open to a closed-door pharmacy. [R. 3896, 139:1-141:25].

Legal damages serve the important purpose of compensating an injured party for actual injury sustained, so that she may be restored, as nearly as possible, to the position she was in prior to the injury." *Castillo v. Atlanta Cas. Co.*, 939 P.2d 1204, 1209 (Utah Ct. App. 1997). A court may award consequential damages when the non-breaching party proves: "(1) that consequential damages were caused by the contract breach; (2) that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and (3) the amount of consequential damages within a reasonable certainty." *Mahmood v. Ross*, 1999 UT 104, ¶ 20, 990 P.2d 933. Each of these elements is met in the instant case.

Furthermore, when determining whether evidence is sufficient to sustain a finding by a jury, the jury is generally allowed wide discretion in the assessment of damages. *Cornia v. Wilcox*, 898 P.2d 1379, 1383 (Utah 1995). A new trial is appropriate only "[i]f the trial court can reasonably conclude that there was insufficient evidence to justify the verdict." *Crookston v. Fire Ins. Exchange*, 817 P.2d at 804. KTM presented evidence showing it incurred costs in changing its facility status by: obtaining computers compatible with the new system, administering extensive in-state and out-of-state employee training, obtaining licensing fees, spending considerable time preparing to

properly administer Contract, and replacing Mr. Katschke with Mr. Decker as required by Kolob.

IX. APPELLEE'S ARGUMENTS ON CROSS-APPEAL

A. The trial court erred in excluding testimony from Appellee's expert, Bryan Nichols.

Appellants made a motion to strike the expert testimony of one of Appellee's experts, Brian Nichols.[7] Bryan Nichols is a specialist in geropharmacology and geriatric care who provides consulting services for skilled nursing facilities. [R. 0428]. Appellee hired Mr. Nichols to (among other things) provide testimony in an expert capacity concerning the industry standard duration of most closed door pharmaceutical agreements. One of the primary issues in question was whether Appellee was entitled to damages from Appellants' breach of the Contract for *only* the one-year period explicitly set forth in the Contract, or whether Appellee was entitled to expect damages for the additional renewal periods that were contemplated by the Contract. Mr. Nichols was expected to testify that such closed-door pharmaceutical agreements like the Contract at issue in the instant lawsuit are almost always one-year contracts with auto-renewal clauses that are honored by the parties. [R. 0430-0432].

Ultimately, the trial court ruled that Utah R. Evid. 702 requires the trial court to "first exercise its 'gatekeeper' responsibility and examine the proposed expert testimony to ascertain whether the testimony's subject matter is sufficiently tied to the facts of the

[7] See Appellants' Motion to Strike KTM Health Care's Proposed Expert Testimony and Memorandum in Support. [R.0347-0389]. See also, Appellee's Memorandum in Opposition [R. 0427-0438] and Appellants' Reply Memorandum [R. 0441-0448].

case before the Court" (internal citations omitted). [R. 1034]. After noting this responsibility the trial court determined:

> . . . there are not sufficient facts in this case to support the proposed testimony of KTM's expert, Bryan Nichols, that Kolob would have renewed its pharmacy provider agreement with KTM for at least six years had Kolob begun using KTM for its pharmaceutical needs in 2010. Therefore, such testimony is not relevant because it would not help the trier of fact to understand the evidence or to determine a fact in issue in this case. [R. 1034].

Utah courts are granted broad discretion in fulfilling their "gatekeeping" duty, which serves to ensure that only reliable expert testimony is presented to a jury. See *Gunn Hill Dairy Props. LLC v. Los Angeles Dept. of Water & Power*, 2012 UT App 20, ¶ 31, 269 P.3d 980, 991.

Utah R. Evid. 702 governs the admissibility of expert testimony and provides:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
> (1) are reliable,
> (2) are based upon sufficient facts or data, and
> (3) have been reliably applied to the facts.
> (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

KTM asserts on appeal that the trial court abused its discretion in excluding Mr. Nichols' expert testimony concerning the typical duration and term of closed-door pharmaceutical agreements. Under the abuse of discretion standard, Appellee must

establish that the trial court's decision to exclude the testimony "exceeds the limits of reasonability." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted).

1. Mr. Nichols' expert testimony was relevant inasmuch as it would have helped the trier of fact (the jury) to understand the evidence and determine facts.

Appellants moved to strike the opinion of Mr. Nichols on grounds that Mr. Nichols' opinion did not meet Rule 702's standard of relevance. [R. 0350-0389]. Rule 702 requires that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." In the instant case, the initial question for the trial court to determine was whether Mr. Nichols' testimony would have *helped the jury* understand any provision of Contract

The Utah Supreme Court has indicated that a determination of helpfulness under Rule 702 involves consideration of "whether the subject is within the knowledge or experience of the average individual." *State v. Larsen*, 865 P.2d at 1361 (citing *Dixon v. Stewart*, 658 P.2d 591, 597 (Utah 1982)). "It is not necessary that the subject of the testimony be so erudite or arcane that the jurors could not possibly understand it without the aid of expert testimony, nor is it a requirement that the subject be beyond the comprehension of each and every juror." *Id.* In *Larsen*, the Supreme Court upheld admission of expert testimony regarding whether certain information omitted from securities documents was material, finding that "'the technical nature of securities is not within the knowledge of the average layman or a subject within the common experience and would help the jury understand the issues before them.'" *Id.* (quoting *State v. Larsen*, 828 P.2d 487, 492-93 (Utah App. 1992)).

Utah R. Evid. 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the action." Furthermore, "evidence that has even the *slightest probative value* is relevant under the definition in rule 401." *State v. Jaeger*, 1999 UT 1, ¶ 12, 973 P.2d 404. (Emphasis added; citation and internal quotation marks omitted).

Appellants argued to the trial court that Mr. Nichols' testimony was not helpful to the trier of fact because Mr. Nichols' testimony bore no relevance to the case at bar. [R. 0356-0358]. However, Appellee's Complaint sought expectation damages for lost profits due to Appellant's breach of the parties' Contract. Mr. Nichols' export report contains his opinion regarding the industry standard for the duration of closed door pharmaceutical agreements. In other words, Mr. Nichols' testimony is highly relevant as to one of the primary issues in this case and is highly valuable to the trier of fact in determining the number of years for which KTM could have recovered damages under the Agreement. Like the securities documents in *Larsen*, the technical nature of closed door pharmaceutical agreement is not within the knowledge of the average layman or a subject within the common experience. Consistent with the relevance definition in Rule 401, Mr. Nichols' testimony would have had a tendency to make KTM's position on the duration of the Agreement more likely, and the duration of the Agreement was "of consequence in determining" damages in this case.

2. Mr. Nichol's expert opinion met the threshold standard of reliability and should have been admitted as expert testimony.

This Court has previously stated that Rule 702(b) requires "*only a basic foundational showing of indicia of reliability* for the testimony to be admissible, not that the opinion is indisputably correct." *Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power*, 2012 UT App 20, ¶ 33, 269 P.3d 980 (emphasis in original) (quoting Utah R. Evid. 702 advisory committee note). Additionally, "a trial court's consideration of whether expert testimony satisfies a threshold showing of reliability marks only the *beginning* of a reliability determination," properly leaving the determination of the ultimate reliability of the expert testimony as a matter for the trier of fact. *Id.* at ¶ 33 (emphasis in original).

The requirements to establish a threshold showing of reliability for the purposes of Rule 702(b) varies depending on the complexity of the case. *Eskelson v. Davis Hosp. and Med. Ctr.*, 2010 UT 59, ¶ 15, 242 P.3d 762. Cases that do not require complex expert testimony carry a low threshold of reliability. *Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power*, 2012 UT App 20, ¶ 32. As indicated in Rule 702(c), the required threshold showing is satisfied "if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community," and the Utah Supreme Court has found that expert testimony regarding personal experience within an industry and dealing with situations similar to the one at issue constitutes a threshold showing of reliability. *See Eskelson v. Davis Hosp. and Med. Ctr.*, 2010 UT 59, ¶ 15.

Mr. Nichols' expert opinion was based, not on assumptions or speculation, but rather on his extensive personal experience in the closed door pharmacy industry. As detailed in his expert report, Mr. Nichols has been a pharmacist for more than 20 years and has personally been involved with the formation of six independent closed door pharmacies in the State of Utah. [R. 0432]. Mr. Nichols has specialized in geropharmacology and geriatric care and has been employed as a consultant for nine skilled nursing facilities. Mr. Nichols is also an adjunct professor at the University of Utah College of Pharmacy and the Roseman College of Pharmacy where he teaches students about industry standards for closed door pharmacy practice. [R. 0432].

In seeking to have Mr. Nichols' testimony excluded, Appellants argued to the trial court that it is "undisputed" that the Contract was only for a single year period. [R. 0351-0354]. While the Contract does indicate an *initial* period of one year, it also contains two renewal provisions—one of which is an *auto-renewal* provision providing: "When the initial term ends, this term shall renew automatically for successive periods of one year each." [R. 0351]. [See Facility Agreement with Provider Pharmacy ("Contract"), ¶ 6, attached as Addendum 1].

The very purpose of Mr. Nichols' testimony was to provide support for KTM's claim that industry contracts between pharmacy providers and facilities, by their very nature are necessarily long-term due to the cost and expenses incurred by both parties in preparing for such a business relationship. Mr. Nichols' personal experience as a pharmacist for closed door pharmacies, and dealing with closed door pharmaceutical agreements in the long-term care industry, constitutes a threshold showing of reliability

for purposes of Rule 702(b) and, therefore, Mr. Nichols' expert testimony should have been allowed so that the jury could hear his testimony and make a determination as to its viability and persuasiveness.

3. The determination of reliability of expert testimony is not an issue of admissibility, but a matter of "weight" to be determined by the trier of fact.

The trial court's decision to exclude the testimony of Mr. Nichols was based on a finding that Mr. Nichols' testimony was not relevant because "it would not help the trier of fact to understand the evidence or to determine a fact in issue in this case." [R. 1034]. In other words, the trial court made a determination on the ultimate reliability of the expert opinion—a matter that is properly left to the trier of fact (i.e. the jury). "'It is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony.'" *Eskelson v. Davis Hosp. and Med. Ctr.*, 2010 UT 59 at ¶ 16 (quoting *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed.Cir. 2003)). The Utah Supreme Court has acknowledged that "an expert can rely on his own interpretation of facts that have a foundation in the evidence, even if those facts are in dispute." *Id.* (citing *Yowell v. Occidental Life Ins. Co.*, 110 P.2d 566, 569 (Utah 1941)). Additionally, an expert witness may base his testimony on "'reports, writings[,] or observations not in evidence which were made or compiled by others, so long as they are of a type reasonably relied upon by experts in that particular field.'" *Balderas v. Starks*, 2006 UT App 218, ¶ 29, 138 P.3d 75 (quoting *State v. Clayton*, 646 P.2d 723, 726 (Utah 1982)). A party wishing to challenge the reliability of such materials may do so on cross-examination, "but such challenge goes to the weight to be given the testimony, not to its admissibility." *Id.*

The trial court could not properly exclude Mr. Nichols' testimony merely because Appellants did not agree with Mr. Nichols' testimony—such a challenge is a challenge to the weight to be given the testimony, not to its admissibility. Appellants were entitled to challenge Mr. Nichol's testimony on cross-examination at trial or to retain their own expert witness to present rebuttal expert testimony.

4. The trial court improperly excluded Mr. Nichol's expert testimony on a motion to strike.

In order for the trial court to determine that Mr. Nichols' proposed testimony should be excluded, the trial court would have had to first reach the threshold determination that the Contract *would not* have continued beyond one year (had Appellants not breached the Contract) and that KTM's damages were limited to one year of profits. As a procedural matter, that determination was not before the trial court at the time it ruled to exclude Mr. Nichols' testimony. The trial court's exclusion was based on a "motion to strike" (not a motion for summary judgment) which was made several years before trial.

Because Appellants sought to exclude Mr. Nichols' testimony via a motion to strike, the trial court was not procedurally in a position to make a dispositive ruling about the ultimate duration of the Contract at issue. Factual disputes between the parties as to the duration of the Contract should have prevented the Court from granting Appellants' motion to strike. Furthermore, as previously noted, the Contract itself contained conflicting provisions that rendered the Contract ambiguous—a fact that Appellants admit to in their motion to strike. [R. 0351]. In the presence of such contractual

ambiguity, the intent of the parties becomes a question for the trier of fact. See *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990).

For the foregoing reasons, this Court should determine that the trial court abused its discretion in preemptively excluding the testimony of KTM's expert, Mr. Bryan Nichols.

B. The trial court erred in determining that the economic loss rule and doctrine of election of remedies required a dismissal of Appellee's fraud-based claims.

Appellee's Second Amended Complaint asserted three fraud-based claims against: (1) fraud in the inducement, (2) constructive fraud, and (3) intentional misrepresentation. [R. 0314-0319].

Initially, the Court affirmed that KTM could maintain its fraud and negligence-based claims. [R. 1768]. However, during the pretrial conference on June 5, 2014, Appellants renewed their request that the Court exclude KTM's fraud claim pursuant to a theory of election of remedies. [See Addendum 2].

Both parties provided additional briefing. [R. 2098-2104; 2122-2131]. After additional briefing by the parties, the trial court issued a ruling on September 5, 2014, dismissing KTM's fraud-based claims under an election of remedies analysis. The trial court also noted that any *post-contract tort claims* based on the breach of contract were precluded by the economic loss rule [*See* September 5, 2014 Minute Entry, Addendum 3].

KTM filed a Motion to Reconsider the dismissal of the fraud-based claims arguing that the economic loss doctrine did not bar common law fraud and misrepresentation

claims that are based on independent duties. [R. 2263-2288]. Appellants opposed, arguing that the trial court's dismissal of KTM's fraud claims was based primarily on the doctrine of election of remedies, not on the economic loss rule. [R. 2339-2347].

KTM responded in its Reply that at the September 5, 2014 hearing, the trial court's reliance on the election of remedies doctrine was limited to pre-contract torts. Because KTM's allegations of fraudulent conduct were related to the period *after the Contract was executed*, those torts were not precluded by the economic loss doctrine. [R. 2433].

On October 8, 2014, in ruling on the election of remedies question, the trial court determined that as a result of KTM's fraudulent inducement claim, KTM was required to either avoid the contract and seek damages (such as reliance and punitive damages) or alternatively affirm the contract and seek breach of contract damages. The trial court found that KTM had chosen to affirm the Contract and was therefore precluded by the doctrine of election of remedies and the economic loss rule from pursuing its remaining tort claims (i.e. fraud in the inducement, constructive fraud, intentional misrepresentation and negligent representation). The trial court dismissed all of those claims. [R. 2324-2326].

For purposes of this appeal, KTM only alleges error as to dismissal of the fraud-based claims. Because the fraud-based claims were dismissed via motion, the correction-of-error standard applies. *Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶ 12.

1. The doctrine of election of remedies should not bar KTM's fraud-based claims.

KTM made clear to the trial court on several occasions that I was electing the remedy of monetary damages and had no interest in seeking to void or rescind the contract. [R. 1490, 2124]. The doctrine of election of remedies is a "technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, and knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others." *Palmer v. Hayes*, 892 P.2d 1059, 1061-62 (Utah Ct. App. 1995) (internal quotation omitted).

Restatement (Second) Contracts, § 378 (Election Among Remedies) further explains the doctrine:

> If a party has more than one remedy under the rules stated in this Chapter, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation.

Comment "a" of section 378 further clarifies the doctrine:

> Election among remedies. The rules stated in this Chapter give a party three basic types of remedies: [1] damages (Topic 2), [2] specific performance or an injunction (Topic 3), and [3] restitution (Topic 4).

KTM repeatedly asserted to the trial court that it was seeking monetary damages (not specific performance, injunction, or restitution). KTM also explained to the trial court that *Palmer v. Hayes* actually supported position. [R. 1491-1493].

In *Palmer*, a buyer and seller entered into a purchase contract for a certain piece of property wherein the buyer paid the seller a sum of earnest money. The buyer, however,

breached the contract and requested the return of the earnest money. The seller refused to return the earnest money and subsequently initiated a lawsuit against the buyer for breach of contract. Ultimately, the court that the determined the buyer was entitled to summary judgment because the seller had elected to keep the earnest money as liquidated damages, and the doctrine of election of remedies precluded the seller from maintaining an action for additional damages. The court explained that "before a seller may pursue a remedy other than liquidated damages, the seller must release any claim to the deposit money." *Palmer v. Hayes*, 892 P.2d at 1062.

Palmer is clearly distinguishable from the matter before this Court. In *Palmer*, the doctrine of election of remedies applied because the remedies sought were inconsistent. The seller would receive a windfall if he were allowed to keep the liquidated damage amount *and* bring an additional lawsuit for the damages caused by the breach because the liquidated damages were meant to remedy the same wrong as the suit for damages. Thus, allowing both remedies would provide a double recovery for the same harm. In the current matter, no similar windfall was possible because KTM was not seeking inconsistent or duplicative remedies.

Appellee sought only to recover the damages associated with Appellants' fraudulent (and negligent) acts and for the breach of the contract. KTM's damages are divided into reliance damages (i.e. expenses incurred for preparation of the closed-door pharmacy and not within the scope of the Contract), lost profits, and punitive/treble damages upon proving fraud. Each of these three types of damages would compensate

KTM for the harms associated therewith (pre and post contract). These categories of damages *do not overlap or provide duplicative remedies for the same harm.*

By improperly dismissing KTM's fraud claims several months before jury trial, the trial court effectively eliminated KTM's ability to seek punitive/treble damages under Utah Code Ann. §78B-8-201—an award of which would have been based on KTM first establishing damages under its breach of contract claim.

2. The economic loss doctrine does not bar KTM's fraud-based claims.

The economic loss doctrine prohibits tort actions to recover purely economic losses when the parties have a written contract governing the parties' conduct. *See SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 32, 28 P.3d 669 ("[t]he economic loss rule is a judicially created doctrine that marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care." (Internal citations and quotations omitted)). "Thus, our formulation of the economic loss rule is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Hermansen v. Tasulis*, 2002 UT 52, ¶ 16, 48 P.3d 235 (quoting *Grynberg v. Agric. Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000)).

To determine whether the economic loss doctrine applies to a particular claim, courts must focus on whether the tort claims arise from a duty independent from those encompassed by the contract. *Hermansen*, 2002 UT 52, ¶ 16 ("[t]herefore, the initial

inquiry in cases where the line between contract and tort blurs is whether a duty exists independent of any contractual obligations between the parties. When an independent duty exists, the economic loss rule does not bar a tort claim 'because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule.'" (Quoting *Town of Alma v. Azco Const.,Inc.*, 10 P.3d 1256, 1263 (Colo. 2000)).

KTM's fraud-based claims were based upon an independent duty, separate and distinct from the duties encompassed under the Contract. Specifically, KTM's tort claims alleged that Appellants orchestrated a fraudulent scheme whereby Appellants utilized the parties' negotiations, and ultimate contract with KTM—not for the purpose of changing pharmaceutical providers—but for acquiring leverage by which to negotiate a more favorable renewal contract with their *current* provider, SCP. In sum, KTM's fraud claims were based on the assertion that Kolob and Apex never intended to honor their contract with KTM but merely used KTM as a means to obtain leverage over a third party. This theory was proven inasmuch as the jury determined that Appellants breached the covenant of good faith and fair dealing.

Furthermore, Utah courts have previously held that the legal theory of fraud is an intentional tort not subject to the economic loss doctrine. *See SME Indus.*, 2001 UT 54, ¶ 32 n.8 (citing *American Towers Owners Ass'n v. CCI Mech., Inc*, 930 P.2d 1182, 1190 n.11 (Utah 1996)) ("[P]laintiffs may recover purely economic losses in cases involving intentional torts such as fraud, business disparagement, and intentional interference with contract."); *see also, Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 38, 221 P.3d 234 ("And despite the recovery of

what would otherwise be considered economic loss damages, claims arising under a fiduciary duty, **similar to fraud claims**, lie outside the scope of the economic loss rule." (Emphasis added) (citing *Town of Alma*, 10 P.3d at 1263 ("[S]ome torts are expressly designed to remedy pure economic loss (e.g., professional negligence, fraud, and breach of fiduciary duty)." (Emphasis added)).

KTM asserted that Appellants acted with fraudulent intent during the course of contract negotiations and then fraudulently used the new Contract with KTM to re-negotiate their original agreement with SCP . During trial, Mr. Olson was unable to explain why Kolob would sign an entirely new contract with SCP (shortly after signing the Contract with KTM) where the original contract with SCP was *still in effect* and would have been auto-renewed in October 2010 in any case.

KTM should have been allowed to bring its fraud-based claims given the fact that neither the election of remedies doctrine nor the economic loss rule apply. Accordingly, this Court should reverse the trial court's dismissal of KTM's fraud-based claims under the correctness standard of review.

C. The trial court erred in determining that Appellee was not entitled to prejudgment interest under the terms of the Contract or, alternatively, by statute.

After trial in this matter, the jury found that Kolob had breached the relevant contract as well as the covenant of good faith and fair dealing and that KTM had suffered "loss profit" damages in the amount of $143,989.00 as well as consequential damages in the amount of $120,000.00. [See Second Special Verdict Form, R. 2554-2562]. KTM delivered a proposed judgment document to Appellants that included an award of

prejudgment interest at the rate of 1.5%. This interest rate was based on paragraphs 2(a) and 4(a) and (c) of the Contract

Appellants objected to KTM's inclusion of prejudgment interest based on the Contract. However, Appellants *agreed* that KTM was entitled to statutory prejudgment interest of 10% per annum based on Utah Code Ann. §15-1-1(2) stating:

> The 1.5% penalty provision, by its terms, does not apply to contractual breaches. Therefore, there is no basis for this court to calculate prejudgment interest at 1.5% per month rate. Rather, the appropriate rate of interest is "10% per annum," which is the default rate of interest for cases involving a breach of contract. See *Francis v. National DME*, 2015 UT App 119, ¶¶ 39-44 (citing Utah Code Ann. § 15-1-1(2)). Under this approach, the appropriate judgment, including prejudgment interest, is $363,081.37.
>
> [R. 3933].

On February 10, 2016, the trial court held a hearing on the matter and determined that KTM was not entitled to *any prejudgment interest whatsoever*. In reaching this decision, the trial court relied on *Shoreline Dev. v. Utah County*, 835 P.2d 207 (Utah Ct. App. 1992). [R. 3959-3960].

For purposes of this appeal, KTM does not argue that it is entitled to the contractual 1.5% per annum interest. However, KTM does assert on appeal that the trial court erred in denying KTM the 10% per annum prejudgment interest in accordance with Utah Code Ann. § 15-1-1(2).

During the February 10, 2016 hearing, the trial court felt compelled to deny statutory prejudgment interest to KTM because of specific language found in the *Shoreline Dev.* case. The language that concerned the trial court is as follows:

> The determining factor in awarding prejudgment interest is whether the damages upon which prejudgment interest is sought can be calculated with mathematical certainty. A court can award prejudgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy. If the jury must determine the loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate. *Shoreline Dev.*, 835 P.2d at 207 (Internal citations and quotations omitted).

The trial court indicated:

> This is the language I'm having a problem with. If the jury must determine the loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate. I think that prejudgment interest is inappropriate because this jury did not – and I see no evidence, and I re – I don't see anything in the special jury verdict form where they were giving a mathematical – they were giving a mathematical way to calculate what those damages were.
>
> Again, if there would have been a monthly on such and such a month, these profits were lost, then I would – I would think that I could – there would be a date and a time certain when that prejudgment interest would run. They could not, as far as I can see – I mean they had to simply – there was no fixed standards of valuation, and I think that prejudgment interest is inappropriate.
> [R. 4235].

The trial court, however, failed to consider the very next paragraph in the *Shoreline Dev.* case. That paragraph clarifies that the Utah Supreme Court has indicated that the lack of mathematical certainty generally prevents an award of prejudgment interest in *equity claims* (as opposed to claims on a written contract). The *Shoreline Dev.* court then quotes the following language from *Bellon v. Malnar*, 808 P.2d 1089, 1097 (Utah 1991):

> A survey of our cases where prejudgment interest was awarded indicates that interest has been allowed in actions for damage to personal property, in **actions brought on a written contract**, and in an action to recover a liquidated overpayment of water subscription charges. In many of these

> cases, we stressed that **the loss had been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages**. No case has been cited to us where we have allowed prejudgment interest in an action such as the instant case, which is for equitable relief. A suit of this nature . . . invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court. In view of the highly equitable nature of this action where the court has discretion in determining the amount, if any, to be [awarded to the plaintiff], we find no error in the denial of prejudgment interest. (emphasis added) (citations omitted) (quoting *Fullmer v. Blood*, 546 P.2d 606, 610 (Utah 1976)).

The plaintiff in *Shoreline Dev.* had prevailed on an unjust enrichment claim against Utah County for the amount of $94,000.00. The trial court did not award general prejudgment interest due to the nebulous nature of the way in which the damage amount was determined—and the Court of Appeals did not reverse that initial determination.

The case at bar does not involve an equitable claim—rather, the damages awarded by the jury were based on breach of a *written contract* that contained an initial one-year term.

Smith v. Fairfax Realty, Inc., 2003 UT 41, 82 P.3d 1064 is instructive as to the standards under which prejudgment interest should be awarded. In that case, the defendant was found liable for conversion, breach of partnership agreements and breach of fiduciary duties. At trial, the plaintiffs were awarded compensatory damages including prejudgment interest and punitive damages. *Id.* at. ¶ 1. On appeal, the defendant raised several arguments including the argument that the plaintiffs were not entitled to prejudgment interest.

The Utah Supreme Court upheld the award of prejudgment interest. In doing so, the Court made several important observations. First, the Court cited to the earlier case of

Fell v. Union Pacific Railway Co. noting that "Utah courts award prejudgment interest in cases where 'damages are complete' and can be measured by 'fixed rules of evidence and known standards of value.'" *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 17 (citing *Fell v. Union Pacific Railway Co.*, 32 Utah 101, 88 P. 1003, 1007 (Utah 1907). The Court also indicated that while the trial court had awarded prejudgment interest based upon the breach of fiduciary duties by the defendant, the award was still supportable under the criteria established in the *Fell* case. The Court then quoted the *Fell* decision again:

> The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value.
>
> *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 20 (citing *Fell v. Union Pacific Railway Co.*, 88 P. at 1007).

The *Smith* Court explains that while damages *need not be liquidated*, prejudgment interest is typically denied where damage amounts are to be determined by the broad discretion of the jury including all personal injury cases, cases of death by wrongful act, libel, slander, false imprisonment and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial. *Id.*

Importantly, the *Smith* Court indicates that fair market valuations of real property are within the category of damages upon which prejudgment interest may be properly

awarded. Quoting language from *San Pedro, Los Angeles & Salt Lake R.R. Co. v. Bd. of Educ.*, 35 Utah 13, 99 P. 263, 267 (Utah 1909), the *Smith* Court reiterates:

> We, therefore, have a case in which, for the purpose of fixing damages, the injury is complete; the damages are ascertained by the ordinary rules of evidence and according to a known standard or measure of value. And all this must be determined from competent evidence, which is binding upon both the court and jury. **The jury, therefore, only had a right to exercise their judgment within the limits of the evidence upon the question of value**. It is not a case where it was left to the jury to determine the amount of damages from a mere description of the wrongs done or injuries inflicted whether to person, property or reputation.
>
> *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 22 (internal citations omitted) (emphasis added).

The *Smith* Court concludes its analysis with the following statement:

> Where, as here, damages were complete as of the day the property was transferred to the REIT and the jury based its award of damages on competent testimony from an appraiser who used generally accepted principles in determining the market value of the real property, an award of prejudgment interest is appropriate. The fact that the parties disputed the value of the property at trial does not change our conclusion that the jury's determination of the property's value was "ascertained . . . in accordance with fixed rules of evidence and known standards of value." *Fell*, 88 P. at 1007. Therefore, we uphold the trial court's decision to award prejudgment interest.
>
> *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 23.

In sum, the *Smith* case stands for the proposition that a jury is permitted to *exercise its judgment based on the evidence to determine a value*: (1) so long as the injury is "complete" and (2) "damages are ascertained by the ordinary rules of evidence and according to a known standard or measure of value." In such cases *an award of prejudgment interest is appropriate*.

It is undisputed that in the instant case, the injury to KTM was "complete" and that the damages were ascertained by the ordinary rules of evidence and according to a known standard or measure of value. As a result, the jury exercised its judgment based on evidence to determine the value of the Appellants breach of contract. That value was placed at loss profit damages in the amount of $143,989.00 and consequential damages in the amount of $120,000.00.

The trial court's primary concern was that the special verdict form did not include a "mathematical way to calculate what those damages were." The trial court expressed that if there would have been a "monthly" way to calculate lost profits (as opposed to the damages based on the entire 1-year period), then prejudgment interest might be warranted. [R. 4235-4236]. This concern, however, was based upon the trial court misconstruing *Shoreline Dev.* (a case, as previously pointed out, that was based on an equitable award of damages, not a contract-based award of damages). The trial court interpreted *Shoreline Dev.* to require a level of exactitude in determining damages that is simply not required. As indicated in the *Smith* case, a jury is entitled to reach a valuation of damages based on the evidence presented and in accordance with a known standard/measure of value. There is no requirement that the jury verdict form contain a specific mathematical equation for reaching damages.

It is clear upon review of the trial transcript that the jury received evidence that was presented in accordance with a known standard/measure of value. In fact, both the third day of trial and the fourth day of trial included extensive examination of Appellant's expert (David Kammerer) concerning the profit or loss that KTM would have realized if

Appellants had not breached the Contract. [*See e.g.* R. 3897, 103:20-104:20; 3898, 7:22-193:6]. During trial, Appellants submitted a profit & loss summary (admitted as Defendants' exhibit 81) and a projected revenue/cost for Kolob's Medicare Part A & Managed Care Residents admitted as Defendants' exhibit 85). [R. 3898: 24:2; 65:10]. KTM also submitted Meadow Valley Pharmacy's profit & loss statement for 2010 (admitted as Plaintiff's exhibit 49) and Meadow Valley Pharmacy's profit & loss statement for 2011 (admitted as Plaintiff's exhibit 50). [R. 3897, 13:1; 16:13].

The Contract itself was for an initial term of one year. The jury relied upon the term of the Contract, the numerical data and testimony of Appellants' expert to reach its final valuation of damages.[8] This approach is "mathematically" sufficient under the standard outlined in *Smith* to support an award of prejudgment interest in favor of KTM starting from the beginning date of the Contract.

Finally, it bears repeating that Appellants acknowledged KTM's statutory right to prejudgment interest under Utah Code Ann. §15-1-1(2) both in their motion and during the February 10, 2016 hearing.[9] [R. 3930-3934; 4223]. Under the "correctness standard," this Court should reverse the trial court's determination that KTM was not entitled to

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[8] KTM's expert on damages, Scott Kimber, was not called to testify because Appellants' expert, David Kammerer, provided sufficient testimony and evidence of KTM's damages.

[9] During the February 10, 2016 hearing, counsel for Appellants stated: "Now it doesn't mean KTM isn't entitled to prejudgment interest. I think it's because the Utah code provides a default rate of interest cases involving a breach of contract, and that's in Section 15-1-1, which provides a default rate of 10 percent per annum in cases involved in breach of contract, at least that's how it's been interpreted by the courts.
Using this calculation, we would say that KTM is entitled to prejudgment interest in the amount of $99,092 for a total judgment of $363—$363,087." [R. 4223].

statutory prejudgment interest at the rate of 10% per annum pursuant to Utah Code Ann. §15-1-1(2).

X. CONCLUSION

Based on the foregoing, Appellee respectfully requests that the Court:

1. Uphold the Second Special Verdict Form finding that the trial court did not err in sending the jury back to clarify the inconsistencies in the first Special Verdict Form;
2. Determine that the trial court did not err in denying Appellants' Motion for New Trial;
3. Determine that the trial court erred in excluding the expert testimony of Bryan Nichols as to industry standard contracts in closed-door pharmacy agreements;
4. Determine that Appellee's fraud-based claims were improperly dismissed;
5. Determine that the trial court erred in denying Appellee prejudgment interest in the statutory amount of 10% pursuant to Utah Code Ann. §15-1-1(2).

DATED AND SIGNED May 12, 2017.

HEIDEMAN & ASSOCIATES
/s/Justin D. Heideman
JUSTIN D. HEIDEMAN
Attorney for Plaintiff and Appellee/Cross-Appellant KTM Health Care, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I served the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT** on the Utah Court of Appeals and the following parties via U.S. Mail, postage prepaid:

ATTORNEYS FOR APPELLANTS
Gary R. Guelker
Janet I. Jenson
JENSON & GUELKER
747 East South Temple, Suite 130
Salt Lake City, Utah 84102
Tel: (801) 579-0800
Email: gary@jandglegal.com
janet@jandglegal.com

HEIDEMAN & ASSOCIATES
/s/ Wendy Poulsen
WENDY POULSEN
Legal Assistant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1)(C) the undersigned certifies that this brief contains no more than 16,500 words. That total number of words in the brief is 16,481 pages.

DATED AND SINGED May 12, 2017.

HEIDEMAN & ASSOCIATES
/s/Justin D. Heideman
JUSTIN D. HEIDEMAN
Attorney for Plaintiff and Appellee/Cross-Appellant KTM Health Care, Inc.

ADDENDA TABLE OF CONTENTS

ADDENDUM 1: September 5, 2014 Minute Entry

The above Jury Trial Preparation/Argument hearing will not include Deft's Motion in Limine Re Evidence Of Pharmacist Hired by Meadow Valley Pharmacy, and any other pending Motion(s) before the Court.

09-02-14 FINAL PRE TRIAL CONFERENCE Modified.
Reason: Court order

09-02-14 JURY TRIAL PREPARATION/ARGUE scheduled on October 02, 2014 at 09:00 AM in Courtroom 3D with Judge WILCOX.

09-02-14 Filed: Notice for Case 100503405 ID 16157557

09-05-14 Fee Account created Total Due: 10.00

09-05-14 Fee Account created Total Due: 1.00

09-05-14 AUDIO TAPE COPY Payment Received: 10.00
Note: POSTAGE-COPIES

09-05-14 POSTAGE-COPIES Payment Received: 1.00

09-05-14 Minute Entry - Minutes for MOTION IN LIMINE/ELECTION OF
Judge: JEFFREY C WILCOX
Clerk: judymb
PRESENT
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
Defendant's Attorney(s): GARY R GUELKER
JANET I JENSON
Audio
Tape Number: 3D/jb Tape Count: 10.00-11.00

HEARING

The Court has rec'd all briefs and reviewed the same in depth.

10:03 Mr. Guelker's record proceeds first as he addresses items raised in Mr. Heideman's response to his Motion Requiring Plaintiff to Elect it's Remedies. The Court has no questions for Mr. Guelker.

10:06 Mr. Heideman's response and supporting argument, which refers to legal precedents as stated, is made to the record.

10:13 Court makes a record that it finds Plaintiff KTM Health

Care Inc HAS made it's election. This Court's issue now considered is Post Contract Torte Duties, i.e.
fiduciary, which the Court states it does NOT find there are fiduciary duties to consider.
Mr. Guelker will prepare this Order of finding as directed.

10:26 Mr. Heideman requests the Court confirm the ruling regarding pre contract claim. This is opposed in response by Mr. Guelker, who also addresses his Motion to Exclude Evidence Re: Pharmacists. Arguments on that are heard.

10.54 Court's finding in Denial of Motion in Limine and arguments may be made during the jury trial.
Mr. Heideman will prepare this Order.

Deadline dates are now set for new jury instructions, questionnaire, verdict.

Final PTC and Jury Trial calendar remains as currently set.

Off record.

09-12-14 Note: JURY TRIAL PREPARATION/ARGUE calendar modified.
09-13-14 Filed: Order (Proposed) Regarding Defendants Motion in Limine
09-13-14 Filed: Return of Electronic Notification
09-16-14 Filed order: Order Regarding Defendants Motion in Limine
Judge JEFFREY C WILCOX
Signed September 16, 2014
09-16-14 Filed: Return of Electronic Notification
09-19-14 Filed: Jury Instructions Joint Submission of Disputed and Undisputed Jury Instructions
09-19-14 Filed: Plaintiffs Proposed Special Verdict Form
09-19-14 Filed: Return of Electronic Notification
09-23-14 Filed: : Defendants Proposed Special Verdict Form
09-23-14 Filed: Return of Electronic Notification
09-24-14 Filed: Exhibit List Plaintiffs Third Amended Trial Index
09-24-14 Filed: Return of Electronic Notification
09-24-14 Filed: Motion to Reconsider Order Dismissing Fraud Claims
Filed by: KTM HEALTH CARE INC,
09-24-14 Filed: Memorandum in Support of Motion to Reconsider Order

ADDENDUM 2: February 10, 2016 Minute Entry

206 West Tabernacle
St. George, UT 84770
Before Judge: JEFFREY C WILCOX

Hearing on Objections to Proposed Order
01-14-16 OBJECTION TO PROPOSED ORDER scheduled on February 10, 2016 at 10:30 AM in Courtroom 3D with Judge WILCOX.
01-14-16 Filed: Notice for Case 100503405 ID 17177560
01-14-16 Filed: Other - Unsigned Judgment (Proposed)
01-14-16 Note: Please resubmit judgment after hearing on objections to proposed judgment on 2/10/2016.
01-14-16 Filed: Return of Electronic Notification
02-10-16 Minute Entry - OBJECTION TO PROPOSED ORDER
Judge: JEFFREY C WILCOX
Clerk: judymb
PRESENT
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN
Defendant's Attorney(s): GARY R GUELKER
Audio
Tape Number: 3D/jb Tape Count: 10.41-11.22

Justin Heideman and Gary Guelker are present in the courtroom for the Plaintiff and Defendants, respectively.

Mr. Guelker's objection focuses on two issues; Pre Judgmt Interest and Costs.
10.42 Mr. Guelker supports his objection first as to Pre Jdgmt Interest.
10.52 Mr. Heideman responds on this issue only. Both sides rest.
10.58 The Court finds that pre judgment interest does not apply and refers to the guiding statute.
Mr. Heideman supplements his record as to the effective date of contract, and the Court also cites Rule 54E as to accrual of post judgmt interest from the rendering of the Verdict on Oct 31 2014, for the jury's damage award.

11.12 Mr. Guelker now addresses the issue of costs, including an accounting breakdown for the Court, further requesting denial.
11.16 Mr. Heideman responds; followed by final word of Mr. Guelker.
11.21 Court grants Judgmt for costs, with post judgment interest as stated.

Mr. Heideman prevails and will submit an appropriate Order, following R7, and within a week, as stated.

11.22 Off record.

03-18-16 Filed: Judgment (Proposed)
03-18-16 Filed: Return of Electronic Notification
03-25-16 Filed judgment: Judgment
Judge JEFFREY C WILCOX
Signed March 25, 2016
03-25-16 Judgment #1 Entered $ 286680.65
Debtor: APEX HEALTHCARE SOLUTIONS LLC
Debtor: SG NURSING HOME LLC
Creditor: KTM HEALTH CARE INC
15,048.45 Costs
2.13 PreJdmtInt
271,630.07 Principal
286,680.65 Judgment Grand Total
03-25-16 Filed: Return of Electronic Notification
03-25-16 Case Disposition is Judgment
Disposition Judge is JEFFREY C WILCOX
04-08-16 Filed: Motion For New Trial Under Rule 59 of the Utah Rules of Civil Procedure
Filed by: APEX HEALTHCARE SOLUTIONS LLC,
04-08-16 Filed: Return of Electronic Notification
04-29-16 Filed: Opposition to Defendants Motion for New Trial on the Issue of Consequential Damages
04-29-16 Filed: Return of Electronic Notification
05-13-16 Filed: Reply Memorandum in Support of Motion for New Trial
05-13-16 Filed: Request/Notice to Submit Defendants Motion for New Trial
05-13-16 Filed: Return of Electronic Notification

ADDENDUM 3: June 5, 2014 Minute Entry

Location: Courtroom 3D
St. George Courthouse
206 West Tabernacle
St. George, UT 84770
Before Judge: JEFFREY C WILCOX

06-03-14 Filed: Notice for Case 100503405 ID 15980023
06-03-14 Filed: : Defendants Disputed and Undisputed Jury Instructions
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: : Defendants Disputed Special Verdict Form
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: Jury Instructions Plaintiffs Proposed Jury Instructions and Special Verdict Form
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: : Summaries of Defendants Objections to KTMs Proposed Jury Instructions
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: Affidavit/Declaration: Declaration of Gary R. Guelker Regarding the Timing of His Motion in Limine to Exclude Pharmacist
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: Plaintiffs Deposition Designation (Litton)
06-03-14 Filed: Summary of Plaintiffs Objections to Defendants Proposed Jury Instructions
06-03-14 Filed: Return of Electronic Notification
06-03-14 Filed: Return of Electronic Notification
06-05-14 Filed order: Order Stipulated Order re: Motion in Limine (Kimber)
Judge JEFFREY C WILCOX
Signed June 05, 2014
06-05-14 Filed: Return of Electronic Notification
06-05-14 Filed: Objection to Summary of Plaintiffs Objections to Defendants Proposed Jury Instructions
06-05-14 Filed: Return of Electronic Notification
06-05-14 Minute Entry - Minutes for JURY TRIAL STATUS
Judge: JEFFREY C WILCOX
Clerk: judymb
TELEPHONE CONFERENCE
PRESENT
Plaintiff's Attorney(s): JUSTIN D HEIDEMAN

Defendant's Attorney(s): GARY R GUELKER
JANET I JENSON
Audio
Tape Number: 3D/jb Tape Count: 4.42-5.23

HEARING

All Counsel appear telephonically to review recently filed pleadings which leave issues unresolved and/or unruled. These issues are legal and evidentiary in scope, needing decisions by the Court. Mr.
Heideman feels they can be addressed in the time of the trial, outside the presence of the jurors.

4:45 Ms. Jenson raises concerns as to the remedies sought being unclear thereby hampering her preparation of defense. The Court shares those concerns after this past week's filings.

4:51 The trial set for next week is cancelled and the Court's record is made. 4:54 Heideman responds, citing various authorities in support of his position.

Briefing on the election of remedies is allowed; to be done by Def Counsel. Mr. Heideman may respond if he chooses to do so. ONE brief each and deadlines are set.

One of the two current Motions in Limine may be moot due to the new trial date set. Mr. Guelker verbally withdraws that Motion, leaving one to be ruled on.

New pre trial hearing dates and 3 Day Jury Trial are set as outlined below. Mr. Guelker and Ms. Jenson will prepare today's Order.
MOT IN LIMINE/ELECTION OF REME is scheduled.
Date: 09/05/2014
Time: 10:00 a.m.
Location: Courtroom 3D