

2004

Jamis M. Johnson v. Jayson Orvis : Brief of Appellant

Utah Court of Appeals

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

JAMIS M. JOHNSON,

Appellant,

vs.

JAYSON ORVIS,

Appellee.

Utah Supreme Court Case No.

Utah Court of Appeals Case
No. 20041122

Utah Third District Court Case
No. 010907449

ADDENDUM TO APPELLANT'S BRIEF

Review by Writ of Certiorari from the Utah Court of Appeals Panel Decision
by Judges Russell W. Bench, Pamela T. Greenwood and Gregory K. Orme.
for an appeal from a decision and orders of Third District Court
Judge Timothy Hanson

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UTAH APPELLATE COURTS
APR 11 2007

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JAMIS M. JOHNSON,	:	VERIFIED MEMORANDUM IN
	:	SUPPORT OF THE MOTION
Appellant	:	FOR SUMMARY DISPOSITION
vs.	:	
	:	
JAYSON ORVIS,	:	Ct. of Appeals no. 20041122
	:	
Appellee	:	

Appellant, Jamis M. Johnson, appearing pro se, respectfully submits this Verified Memorandum Of Law In Support Of The Motion For Summary Disposition.

INTRODUCTION

The grounds for reversing summary judgment below are as follows:

1. The district court committed reversible manifest error by erroneously applying the doctrine of judicial estoppel to dismiss Appellant's cause of action where the elements necessary for applying the doctrine were not met or satisfied.

2. The district court improperly weighed the contested facts and Appellant's credibility when it concluded that it was satisfied that Appellant was "avoiding creditors" in an unrelated prior case and, therefore, he could not maintain a partnership action

against Appellee in this case, and the court entered a declaratory judgment against Appellant declaring that no partnership existed between Appellant and Appellee.

As shown herein, this Court should grant this motion for summary disposition and reverse the grant of summary judgment below as a matter of law for manifest error on the foregoing grounds and as further argued herein below.

TABLE OF AUTHORITIES

STATUTES

PARTNERSHIP:

Utah Code Ann. §§ 48-1-3(1)(a) and 48-1-4(4)

CASES

MANIFEST ERROR STANDARD:

1. *Mary J. Bailey (Adams) v. Spencer Adams*, 1990.UT.213, 798 P.2d 1142, 143 Utah Adv. Rep. 39 (Utah Appeal 09/19/90)

JUDICIAL ESTOPPEL;

2. *Tracy Loan & Trust Co., v. Openshaw Inv. Co.*, 102 Utah 509, 132 P.2d 388, 390 (Utah 1942)

3. *Nebeker v. Utah State Tax Commission*, 2001 UT 74, 34 P.3d 180

4. *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, (Utah 1996)

5. *Masters v. Worsley*, 1989.UT.175, 777 P.2d 499, 112 Utah Adv. Rep. 39 (Utah Appeal 1989),

6. *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044 (Utah 1971)

PROHIBITION OF ATTORNEY BUYING JUDGMENT AGAINST CLIENT:

7. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 1999 UT 49, 369 Utah Adv. Rep. 36 (Utah 1999)

SUMMARY JUDGMENT STANDARD:

a. Facts viewed in light most favorable to Appellant below:

8. *Wheeler v. Mann*, 763 P.2d 758, 759 (Utah 1988)

b. Credibility not to be weighed in Motion for Summary Judgment:

9. *Winegar v. Froerer et. al.*, 1991.UT.110, 813 P.2d 104, 161 Utah Adv. Rep. 22 (Utah 1991)

EXHIBIT LIST

- Exhibit 1: Deposition of Will Vigil
- Exhibit 2: Deposition of Tommy Triplett
- Exhibit 3: Deposition of Jade Griffen
- Exhibit 4: Demand for Audit and Accounting to Orvis, August 2001
- Exhibit 5: SBA Deposition of DaNell Johnson, April 1999
- Exhibit 6: Memorandum in Support of Plaintiff Jayson Orvis' Motion for Summary Judgment; and Affidavit of Jayson Orvis.
- Exhibit 7: SBA Deposition of Jamis Johnson, November 1999.
- Exhibit 8: Memorandum of Jamis Johnson in Opposition to Jayson Orvis' Motion for Summary Judgment.
- Exhibit 9: Transcript of Hearing on Plaintiff's Motion for Summary Judgment.
- Exhibit 10: Minute Entry, District Court, Judge Timothy Hanson, October 20, 2004
- Exhibit 11: Judgment; and Findings of Facts and Conclusions of Law
- Exhibit 12: 1999 Orvis-Johnson Partnership Agreement
- Exhibit 13: 1994 Partnership Memorandum
- Exhibit 14: Assignment of Trade Name, January 2001
- Exhibit 15: Orvis Supplemental Answer To Interrogatory No. 11
- Exhibit 16: Sundry Orvis-Johnson correspondence reflecting profit share and partnership.
- Exhibit 17: Jamis Johnson Deposition in this case, June 2002
- Exhibit 18: Letter To Dan Berman, August 2001

FACTS

The facts relied upon herein are supported by the sworn verification of Appellant Johnson. The facts demonstrating the partnership between Appellant Johnson and

Appellee Orvis will be presented first to present a proper background of the matter as was presented to the district court. Because of the district court's improper application of the doctrine of judicial estoppel based on a purported inconsistent statement by Appellant in a prior unrelated proceeding between the SBA and Appellant, said facts will be included here as well to illustrate the clear manifest error by the district court. For clarity, the parties will be intermittently referred to hereinafter by their proper names rather than their appellate designations.

1. Brief Outline of Factual and Procedural History

1. Appellee Orvis (Plaintiff below) and Appellant Johnson (and wife DaNell) have a partnership extending back to 1994 and dividing profit share on a group of credit repair businesses.

2. The partnership is documented and evidenced by written agreements, course of performance and financial records.

3. The partnership and businesses grew to be extremely profitable now involving millions of dollars.

4. Appellant asserts that Appellee Orvis first began embezzling and misappropriating partnership profit share as early as 1997. Discovery to date, particularly deposition testimony of Appellee employees, confirm this. (See the deposition testimony of Will Vigil excerpted herein on pages 14 and 15, *infra*, and in Exhibit 1; See the deposition testimony of Tommy Triplett excerpted herein on pages 15 through 17, *infra*, and in Exhibit 2; and see the deposition testimony of Jade Griffen, excerpted herein on pages 14 and 15, *infra*, and in Exhibit 3.)

5. In July 2001, Appellant made demand on Appellee for an accounting and an

audit. (See Demand For Audit and Accounting, Exhibit 4.)

6. In August 2001, Appellee Orvis, using partnership funds, purchased an SBA judgment against Appellant to use offensively to mask the preceding fraud, to attempt to extinguish the partnership, and to seize profit share distribution; and upon acquiring the SBA judgment did withhold, seize, and convert profit share that had hitherto been distributed to the Johnsons.

7. The SBA judgment was purchased with the counsel and participation of Victor Lawrence, attorney for DaNell Johnson and for Appellant, in the SBA case, and numerous other personal matters, and in business affairs of the partnership. (Triplett Deposition, Exhibit 2, See excerpts and discussion, pages 15 through 17 *infra*; See SBA deposition of DaNell Johnson, Exhibit 5, and discussion and excerpts thereof, page 19 and 20 *infra*.)

8. These actions by Lawrence and Orvis are in breach of attorney fiduciary duty and partner fiduciary duty; the object of this conspiracy by Lawrence and Orvis was to take the profit share owed to the Johnsons, which at this date would exceed \$1.5 Million (based on the last six months of actual profit share) and is closer to \$5 Million based on amounts concealed and converted by Mr. Orvis; Mr. Orvis and Mr. Lawrence profited by these acts by converting Appellant profit share and dividing it between themselves.

9. In August 2001, after Appellant's demand for accounting, and in concert with his purchase of the SBA judgment, Appellant Orvis brought this suit in Third District Court against Appellant seeking a declaratory judgment that Appellant had no partnership with Appellee or alternatively such interest was limited to 25% of two specific businesses.

10. Appellant counterclaimed for an accounting and for profits; DaNell Johnson was joined as a Third Party Plaintiff, and Victor Lawrence and others as Third Party Defendants.

11. On March 29, 2004 Appellee Orvis moved for summary judgment. (Exhibit 6 contains both the Memorandum in Support of Plaintiff Jayson Orvis' Motion for Summary Judgment, and the Affidavit of Jayson Orvis.) Citing only an 1857 Tennessee case as support, Appellee asserted that Appellant was judicially estopped from asserting a partnership interest with Appellee Orvis; this estoppel was based of an Orvis' interpretation of a response by Appellant in a deposition taken by the SBA in an unrelated prior case between the SBA and Appellant. Appellee Orvis asserted that Johnson responded to the SBA that he did not have partnerships. (It is the judgment in this SBA case that was purchased by Appellee.) (Exhibit 7 is the November 1999 SBA Deposition of Jamis Johnson.)

12. Appellant opposed the summary judgment motion. (Exhibit 8 is the Memorandum of Jamis Johnson in Opposition to Jayson Orvis' Motion for Summary Judgment.) Appellant asserted that i.) the quote was misconstrued, but was irrelevant regardless under the doctrine of judicial estoppel, and ii.) the doctrine of judicial estoppel, to be operative here, requires that the prior (SBA) action and this present action be between the same parties; the prior action involve the same issues as this action; the prior action be "successfully maintained"; and that Appellee must have detrimentally relied on the statement in the SBA deposition. Appellant argued that Appellee met none of the requirements for the doctrine of judicial estoppel to be applicable in this case.

13. The court heard oral argument on August 9, 2004. (Exhibit 9 is the transcript of Plaintiff's Motion for Summary Judgment.)

14. In its minute entry of October 20, 2004, the Court granted summary judgment to Appellee, stating "...there was no question of mistake, Johnson testified as he did [in the prior unrelated SBA deposition] so as to avoid collection efforts from the Small Business Administration." [Emphasis added]; the court found that Appellant Johnson should be judicially estopped in this case from asserting a partnership based on the contested SBA deposition statement; and the court granted summary judgment to Appellee Orvis. (Exhibit 10 is the district court's minute entry dated October 20, 2004.)

15. Appellee drafted a Judgment and a Findings of Facts and Conclusions of Law which were executed by the district court on October 20, 2004. That findings of fact were entered is evidence alone of improper weighing of facts as opposed to issues of law which is the only consideration for granting summary judgment. (Exhibit 11 contains both the Judgment, and the Findings of Facts and Conclusions of Law.)

2. Evidence of the partnership between Mr. Johnson and Mr. Orvis.

16. Extensive and substantial evidence exists documenting the partnership between Mr. Orvis and Mr. Johnson. The evidence includes not only written partnership agreements, and profit share distribution checks, but letters, recorded oral statements of the parties and witness testimony. The evidence is so extensive that only portions were presented in district court in support of the opposition to the motion for summary judgment. Discovery was not complete when summary judgment was entered. Here, only a portion of the existing evidence submitted below will be

referenced but sufficient evidence to demonstrate a partnership under Utah statutes and case law. The evidence of the partnership is presented here by type: first documentary evidence then deposition testimony of third parties and of Mr. and Mrs. Johnson.

A. Written Documentation of the Orvis-Johnson Partnership.

17. There are numerous documents providing clear evidence of the Orvis-Johnson partnership and that that Orvis and Johnson operated a partnership or joint venture to engage in activities broadly described as the "credit repair" business.

i.) The Partnership Agreement

18 Perhaps most compelling of these documents is an "Agreement", a copy of which Mr. Orvis produced in discovery. (Attached as Exhibit 12 is the Agreement). Though undated, the Agreement was signed by both Mr. Orvis and Mr. Johnson in May of 1999 along with other documents. (Hereinafter this said Agreement is referred to as the "1999 Orvis-Johnson Partnership Agreement".) It memorializes and sets forth the terms of a pre-existing and continuing arrangement between the Orvis and the Johnsons to share profits from businesses providing "credit repair services." This is, of course, the very definition of a partnership. Utah Code Ann. §§ 48-1-3(1)(a) ("a partnership is an association of two or more persons to carry on as co-owners a business for profit"), 48-1-4(4) ("[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." . . .)

19. In its recital paragraphs, the 1999 Orvis-Johnson Partnership Agreement recounts the history of the business relationship between Mr. Orvis and Mr. Johnson. It states "Orvis and Johnson have developed over the last several years enterprises

that provide credit repair services to a nationwide clientele." 1999 Orvis-Johnson Partnership Agreement, at 1 (emphasis added).

20. The 1999 Orvis-Johnson Partnership Agreement then details the credit repair services of these "enterprises," and explains their growth: "Such credit repair services include, but are not limited to a range of activities, including telemarketing, internet marketing, consulting, law representation, and the enterprises have grown over the years and have acquired a variety of tangible and intangible assets including, without limitation, for example equipment, computers, software, furniture, knowledge, methods, techniques in marketing, lead sources, internet operations." *Id.* (emphasis added).

21. The 1999 Orvis-Johnson Partnership Agreement also states that "the parties acknowledge that they have governed and operated these enterprises under an outline agreement and under a course of performance that they desire to continue." *Id.* (emphasis added).

22. The 1999 Orvis-Johnson Partnership Agreement also explains, to some extent, what has occasioned its execution. It states "the parties desire to provide for the unimpaired continuation and growth of the business to the mutual benefit of the parties," and that "an agreement was put in place reciting that all assets of this enterprise are placed in the name of Jayson Orvis so as to protect these assets and provide for the continued growth and mutual profitability." *Id.*

23. Against the backdrop of these recitals – which are acknowledged and agreed to by both Orvis and Johnson – the parties then expressly agree (1) that "[g]overnance and compensation/allocation of profits shall continue in the percentages

as heretofore provided under the operating arrangements and as the enterprise continues to grow"; (2) that "all monies shall be paid to Jayson Orvis or his business entity . . . and Jayson Orvis shall provide Johnson's share or allocation to any party directed by Johnson"; and (3) that "the intent being that these enterprises shall continue to grow, expand, multiply as directed by the parties under their outline agreement and course of performance to their mutual economic benefit." *Id.* (emphasis added).

ii.) The 1994 Memorandum

24. The 1999 Partnership Agreement alone, is blatant, unequivocal evidence of the Orvis-Johnson partnership; it is executed by the parties and specifically identifies and defines the ongoing partnership. But it is hardly the only document evidencing the partnership. For instance, as early as 1994, there is a memorandum dated September 1, 1994 from Jamis Johnson, Jayson Orvis, and others, and addressed to these same individuals, which memorializes the formation of an entity called "The Genesis Project." Mr. Orvis produced a copy of this memorandum. (Exhibit 13 is the Genesis Project Agreement.) The Memorandum reflects that, in consideration for their respective contributions (which are specified in the Memorandum), the parties expressly agree (1) to establish "The Genesis Project," "whose purpose is to create and manage profitable entities for the five partners," *id.* (emphasis added), and (2) to "[d]ivide equally the equity and profits of The Genesis Project." *Id.* (emphasis added). This memorandum is further evidentiary support" for the partnership, with, as Johnsons claim, it inception back as far as 1994.

iii.) **Assignment of trade name January 20001 is evidence of Orvis-Johnson partnership**

25. On January 12, 2001, Mr. Johnson executed an Assignment to Mr. Orvis assigning the trade name "Lexington Law Firms" to Mr. Orvis to hold for the mutual benefit of both. (Exhibit 14 is the Assignment of trade name.)

26. Mr. Orvis obtained this Assignment from Mr. Johnson, references it in his Complaint and produced it in discovery. He recorded it and it is on file with the Department of Commerce.

27. This Assignment is clear evidence of the ongoing Orvis-Johnson partnership. It states:

WHEREAS, the said trade name [Lexington Law Firms] is an asset actually owned jointly by Jamis M. Johnson and Jayson Orvis, and

WHEREAS, Jamis M. Johnson and Jayson own intellectual property and tangible and intangible assets for the business of credit repair and per prior agreement, this trade name is to be assigned by Jamis M. Johnson to Jayson Orvis, and

WHEREAS, Jayson Orvis has established a limited liability company called Attorneys For People, LLC., of which he is the only member in which he was to hold some of these joint assets and through which he administrates [sic] some of the credit repair business, and

WHEREAS, Jamis M. Johnson desires to assign the trade name to Jayson Orvis/Attorneys For People and it shall form and is part of these assets jointly owned by Johnson and Orvis and administrated by Orvis;

NOW, THEREFORE, based on the foregoing recitals and upon the prior agreement of the parties ... [Johnson assigns trade name to Orvis]
[Emphasis added]

28. Thus, only a few months before Mr. Orvis secretly purchased the SBA judgment and filed this lawsuit claiming Mr. Johnson had no partnership, Mr. Orvis and Mr. Johnson are passing a legal document between them clearly describing the

ongoing partnership.

iv.) Documents Evidencing Payments of "Profit Share" to Johnsons

29. The partnership, from the start of 1998, had an unbroken chain of profit share checks distributing profits between the partners on an agreed upon formula. The payments distributed to Johnson, by agreement from 1996, were consistently distributed to Mrs. DaNell Johnson, wife of Appellant, (or to her business entities) who per prior agreement held the beneficial interest and received the distribution. Such profit share distribution is demonstrated by these checks from late 1997 until August of 2001 when Appellee Orvis simultaneously purchased the SBA judgment (referenced herein) and filed this suit for a declaratory judgment that there was no partnership and withheld all further profit share distribution. Mr. Orvis, in discovery, produced a partial but nonetheless extensive list of the profit share distribution to Johnsons. That list is set out in Mr. Orvis' response to discovery. In Supplemental Responses to Mr. Johnson's First Set of Interrogatories, Mr. Orvis admits that he (or the Orvis entities) made substantial payments to Johnson on a regular basis until August of 2001. See Plaintiff, Counter Defendant and Third-party Defendant Jayson Orvis' Supplemental Responses to Defendant, Counterclaimant and Third-party Plaintiff Jamis Johnson's First Set of Interrogatories and Requests for Production of Documents, at 8-9 (Interrogatory No. 11) (Attached as Exhibit 15; see also Complaint, ¶ 24). Other documents evidence the shared profits from the credit repair business. There is, for example, a memo authored and signed by Mr. Orvis, addressed to Mr. Johnson, and dated March 2, 1998, which refers to the parties' "profit shares." (A copy of this memo is attached hereto as Exhibit 10 thereto.)

30. In his interrogatory answers, Mr. Orvis, while admitting the substantial distributions, characterizes this long history of payments as "voluntar[y], and in Orvis' full discretion as to both amount and frequency," id. This answer, that the profit share distributions were essentially a gift to Mr. Johnson, obviously lacks basic credibility. The payments are substantial (some as much as \$34,000), regularly made on a specific monthly basis, and per the agreed on formula, and the payments continue without interruption from 1998 through August of 2001, when Mr. Johnson demanded an accounting and audit of the partnership, and Mr. Orvis filed his declaratory judgment Complaint. This continual history of payments referred to by both parties as profit share is concrete course of performance and blunt evidence of the Orvis-Johnson partnership.

v.) Correspondence Between Orvis and Johnson Concerning Their Business Relationship.

31. In addition to these documents, there is a long history of correspondence exchanged between Mr. Johnson and Mr. Orvis between 1999 and 2001 right up to a few days before Mr. Orvis filed this lawsuit, concerning their profit share and ongoing partnership. This correspondence provides further evidence of the Orvis-Johnson partnership.

32. By the end of 1998, Mr. Johnson was facing enormous professional problems. He was facing disbarment. See *In the Matter of the Discipline of Jamis M. Johnson*, 48 P.3d 881 (2002) (upholding the same district court's summary judgment order disbaring Johnson).¹

1. Judge Timothy Hanson, Third District Judge, was both the trial judge in this matter and in the bar

33. And, through failed business ventures several money judgments had been entered against him, including a substantial judgment in favor of the Small Business Administration. Further, the State of Tennessee had brought suit against Mr. Johnson in his capacity as the "dba" of Lexington Law Firm, one of the entities managed by the Orvis-Johnson partnership.

34. Mr. Orvis insisted that he manage the partnership assets for the partnership. (See the 1999 Orvis-Johnson Partnership Agreement, Exhibit 12.) Nevertheless, throughout this period, both Mr. Orvis and Mr. Johnson worked for the benefit of the partnership; profit share was distributed, the SBA was provided discovery by Mr. Orvis and Mr. Lawrence; Mr. Johnson negotiated a consent order with Tennessee; Mr. Orvis and Mr. Johnson dealt with the bar matter and installed Victor Lawrence as the directing attorney for Lexington Law Firm with Mr. Johnson resigning that post; and throughout this time, profit share was distributed. Their written exchanges reflect the continued existence of a partnership through this period: The following (copies of which are collected in Exhibit 16) are some excerpts of these exchanges:

a. January 22, 199 [sic] [actual date: 1999] Letter from Orvis to Johnson – In this letter, Mr. Orvis tells Mr. Johnson that "I really don't want to spend more of my time on your contingency plan. I would like you to work that out and let me know what your plan is when you feel ready." He then sets forth five criteria it must meet to be acceptable to him, one of which is that "those of us with profit share and salary

disciplinary matter against Mr. Johnson.

commitments will continue to receive our same compensation and will continue to receive it in proportion to growth and revenue." (emphasis added). In the letter, Mr. Orvis also states that he is glad Mr. Johnson "turned away from the idea of a straight buyout, as I was becoming increasingly uncomfortable with the figures being discussed."

b. November 1, 1999 Letter from Johnson to Orvis – (produced by Mr. Orvis) In this letter, Mr. Johnson "outline[s] the substance of our conversations and understanding regarding the management and operations of our ventures and the way forward." He then states that he understands Mr. Orvis "will continue to manage these businesses for our joint benefit." To that end, Johnson agrees Orvis "may have 'control' to manage these businesses and [he/Johnson] will not attempt to exercise managerial control over these endeavors." Johnson closes by saying "I sincerely hope that all this may result in business growth, exceptional mutual prosperity, and partnership tranquility between us."

c. January 3, 2000 Letter from Johnson to Orvis (produced by Orvis). In this letter, Johnson says that he is "going to jump into the void," and try to exercise faith and trust in Orvis because "I am coming to believe that you deserve the trust." He then says "in the ongoing attempt to keep the spirit of whatever our contract is, try to get me to \$45,000 per month from the growth."

d. August 29, 2000 Memo from Johnson to Orvis (produced by Orvis) In this memo, Johnson raises "a few issues that have come up in the last month or so that we deed [sic] to get resolution on." He then sets forth his view regarding "Lexington's and affiliated companies' work on a move to a new location," payment of an extra fee to

Orvis and "Sam" for personally guaranteeing a company lease, and the fact that "[p]rofit share was down in July as you predicted. . . . I have great hopes for profit share at the end of this month but even greater hopes for the fourth quarter of the year."

e. August 30, 2000 Memo from Orvis responding to Johnson: Orvis says he "feel[s] awkward discussing the particulars of firm management" but he is "pleased to continue paying your company as an adjunct consultant to my consulting services agency. . . . While the terms of the compensation I pay your company are foggy at best, I believe that you have been pleased with the amount of compensation afforded."

Mr. Orvis closes with the following:

"Might I make a suggestion? I would suggest that we just let our foggy, little business relationship continue down it's [sic] foggy, little course. You have no reason to believe that I will stop compensating your company for consulting services along the lines already established. Attempting to fortify your position can only heat up the debate. I am committed to making a bigger pie for as long as is feasible, and that has been nothing but good for both of us."

f. August 13, 2001. Orvis telephone message to Johnson. In a message left on Mr. Johnson's telephone discussing profit share, just days prior to his bringing a suit for a declaratory judgment that there is no partnership or profit share, Mr. Orvis calls Mr. Johnson and discusses profit share being slow this month and volunteers to get more to Mr. Johnson. The transcription was taken by attorney Cheryl Mori-Atkinson and submitted under her affidavit to the district court.

g. In addition to the foregoing, Mr. Johnson kept a running journal, produced to Mr. Orvis and a monthly accounting of Mr. Orvis' "accounting" for monthly profit share. These are not attached as Exhibits.

FINAL DEMAND FOR ACCOUNTING AND AUDIT

35. The chain of correspondence continues through August 16, 2001. Then, on that date, Johnson writes to say "for various reasons of which you are aware, we have come to the point where we need a full accounting of all business operations since our inception." Memo from J. Johnson to J. Orvis, dated August 16, 2001. ("Demand For Audit and Accounting" of "Demand") (Exhibit 4 is the Demand For Audit and Accounting). Mr. Orvis' declaratory judgment Complaint was filed within two weeks of Mr. Johnson's Demand to Mr. Orvis.

B. Testimony of Witnesses evidence the Orvis-Johnson partnership.

36. The testimony of individuals also provides evidentiary support for Mr. Johnson's claim that a partnership existed between him and Mr. Orvis, and that it continued until the filing of the lawsuit. Several witnesses have testified that Mr. Orvis referred to Mr. Johnson as his "partner" or otherwise held Johnson out as a partner, both before and after the SBA deposition of November, 1999. (Witnesses have also testified that Mr. Orvis was actively hiding partnership funds and misappropriating partnership funds—a further proof of the partnership, also dealt with herein below.)

37. For instance, under questioning from Orvis counsel, Wilfred M. Vigil, employee of Orvis and attorney Lawrence, testified, at his deposition, as follows:

Q. Did you – during your employment with Lexington at any time before or after '99, or during, obviously did you have any conversations with Jayson Orvis with regard to his business relationship with Jamis Johnson?

A. Yes.

Q. What did he say?

A. He said basically that Jamis was a partner in the firm, that he was getting certain amounts of money from the firm.

Q. And when was it that he told you that?

A. I'd say it would have to be back in – I don't know the precise date.

We talked numerous times. I would say probably 2000, roughly.

Q. Did that testimony – did that conversation, did that position ever change? Did he ever tell you anything about a change in that position?

A. No. As a matter of fact, we did talk a lot about it when there was a confrontation between he and Jamis.

Deposition of Wilfred M. Vigil, at 135 (Attached as Exhibit 1.)

38. Witnesses have similarly testified that they understood Orvis and Johnson were sharing profits from the credit repair businesses. For instance, Jade Griffen testified as follows:

Q. . . . Are you aware – do you know who took the bulk of the funds out of

Lexington Law Firms and out of Johnson & Associates?

A. Yes.

Q. How do you know this?

A. We would sit and go over money and what it looked like, and I knew that you [Jamis Johnson] were receiving monies, and I had an idea what the percentages were.

Q. You used the term profit share. What's your understanding of profit share?

A. A certain percentage of the profits were put away from employees and for certain benefits for them. There was a portion set apart for the principals, what we called the principals, Jamis Johnson, Jayson Orvis, and Griffin.

Q. Okay.

A. And if there was money after bills were paid each month, those amounts were split up and disbursed.

Q. So its your understanding that profit share came out after bills?

A. Right.

Deposition of Jade W. Griffin (taken in Tennessee v. Lexington Law Firm, Civil No.

3-96-0344, M.D. Tenn.), at 21-22 (Attached as Exhibit 3 with the pages for the cited

statement.) Finally, witnesses have testified that Orvis began taking steps to exclude

Mr. Johnson from the partnership, to hide its operations and finances from him, and to

manipulate its finances to minimize Johnson's share. Jade Griffin, for instance,

testified:

Q. Was there also a representation that Jayson would manipulate the incomes of the businesses to prevent Jamis Johnson from making any monies?

A. Yes.

Q. What was it that Jayson said?

A. Basically that he would cut Jamis Johnson off if things got too ugly.

Id. at 25; see also Deposition of Wilfred M. Vigil, Ex. 1, at 104-06 (Jayson Orvis directed Mr. Vigil to move clients away from certain credit repair entities in order to reduce payments to Johnson). See Exhibits 1 and 3.

39. The deposition testimony of Orvis' personal assistant, Tommy Triplett, taken in this case provides additional evidence which illustrates the nature of Orvis' and Johnson's partnership and profit sharing agreement, and Mr. Orvis' misappropriation of partnership property. (Exhibit 2.)

Q. Other than the fact Mr. Orvis and Mr. Johnson didn't seem to have a particularly close relation, did you ever get an explanation from Mr. Orvis about why Mr. Orvis was providing goodwill checks to Mr. Johnson?

A. Yes, quite a few times. Basically how it breaks down is, and this is the extent to which I know it, there was several partners involved in the founding of the company. I think it was NADA or NACA or something like that.

Q. NACA?

A. North American Credit Association. And it began to trickle apart. Then the Lexington was formed after that, Johnson & Associates was formed, and this was primarily through Jayson and Jamis.

(Triplett Deposition p. 20 line 24 - p. 21 line 13, Exhibit 2)

Q Going back to this relationship between Mr. Orvis and Mr. Johnson. I take it Mr. Orvis had indicated to you that he was trying to keep Mr. Johnson at bay. At bay, did he tell you at bay with respect to what?

A. With respect to his control over the company and control over profit shares and basically money.

Q. Control over the company, which company do you have in mind?

A. Johnson & Associates and Lexington Law Firm.

Q To your knowledge, did Mr. Johnson claim ownership in those entities?

A. I knew he felt he was entitled to money. I don't know if he ever claimed

ownership. I mean, the name Johnson & Associates, Johnson referring to Jamis Johnson, he founded in some way or another, so I know that he was an original partner.

(Triplett Deposition at p. 22 line 21 - p. 23 line 10, Exhibit 2)

That's the extent which I know. I know that the suit was against Jamis Johnson, that it was his -- his I guess you'd say butt on the line that was kind of under fire. And that's one of the things that he did mention when he was always cutting a check to Jamis Johnson.

(Triplett Deposition, p. 38, lines 7-12, Exhibit 2)

40. Mr. Triplett's testimony also provides specific evidence of Orvis' scheme to defraud Johnson by misrepresentations and other means. This sworn testimony of Orvis' personal assistant also demonstrates Orvis' intent to figure out a means to stop paying the share of partnership profits owed to Johnsons.

Q. Were there any discussions to which you were present regarding -- between Mr. Orvis and Mr. Lawrence regarding means to exert pressure on Mr. Johnson or prevent him from filing the lawsuit?

A. Well, there was the monthly payment. I mean, Jayson told me, I don't know if he ever said this to Jamis, but he said to me that if Jamis ever, you know, got teeth and tried to bite he would just stop sending the checks, and he would use that money to hire the best attorney he could and fight him back. I don't know if he ever said that to Jamis. I would assume he would as a means to keep Jamis at bay, but I don't ever recall him ever saying that to him.

(Triplett Deposition p. 44 line 23 - p. 45 line 10, Exhibit 2)

41. When Mr. Orvis' misappropriation of partnership funds was suspected by his partner, Mr. Johnson, Orvis became more aggressive in his attacks on Johnson's partnership interests. Here, Mr. Triplett provides testimony regarding a consultation Orvis sought with attorney Victor Lawrence (attorney who had represented Johnson and his wife, among in before the SBA and elsewhere, and also represented Orvis and the

Orvis-Johnson partnership). Orvis seeks advice from the attorney Lawrence concerning the purchase and use of the judgment that arose from the SBA case.

Q. Do you recall any discussions with Mr. Orvis regarding any judgments, legal judgments against Mr. Johnson?

A. Oh, yeah. Yeah, that was in that conversation, too.

Q. That conversation?

A. The conversation that Victor had with Jayson Orvis.

Q. That we discussed a little while ago?

A. Yeah, that was -- Jamis had some judgments against him, and Jayson had come to Victor and asked him if -- what, you know, he's like, can I buy these against him. And Victor said to the effect that -- this is all Jayson recounting this to me. At one time he said, well, you can, but you're pretty ruthless. And so I believe Jayson went and bought those as sort of another means to control Jamis.

(Triplett Deposition, p. 45 line 11 - p. 46 line 2, Exhibit 2)

C. Mr. Johnson's testimony evidences the claims.

42. Mr. Johnson has also provided testimony in this case, and it provides further evidentiary support for his claims. First, he testified that "I have a partnership agreement with Jayson Orvis that we share all the credit repair business that he does." Deposition of Jamis Johnson, June 11, 2002, at 20, Ex. 11; see also Deposition of Jamis Johnson, June 5, 2002, at 12-13, a copy of pages with the statement is attached hereto as Exhibit 17. ("Mr. Orvis and I had an ongoing partnership that did a lot of credit repair business and what could also be called credit repair law").

43. Second, he testified that as a result of his looming Utah State Bar problems and other issues including the Tennessee litigation, he, Mr. Orvis, and others, commences to develop "contingency plans" to protect the credit repair enterprises, and that these plans included, among other things, "tak[ing] Victor [Lawrence], who was already [an employee lawyer] running portions of the credit law practice, and put him in

[as a new directing attorney of Lexington Law Firm]and Jayson and I would deal with our ownership of assets as well in contemporaneous agreements." [Emphasis added.] Id. at 22. See Exhibit 17.

44. Third, he testified that in this time frame he and Orvis entered an agreement (see supra) pursuant to which "all of the assets, intellectual property that we own jointly would be held in Jayson's name for our mutual benefit and that the payment arrangements and profit shares would continue and that the businesses would expand and our profit share would expand." Id. at 86. Fourth, he testified that "[f]rom the outset of our partnership, I had explained that the beneficial interest of this endeavor would be owned by my wife or her entity and that the payments should go to my wife or her entity and that's what happened." Deposition of Jamis Johnson, June 11, 2002, at 68-69. See Exhibit 17.

45. Mr. Johnson's testimony clearly provides "evidentiary support" for the claims he asserted in Johnson's Answer to Complaint and Third Party Complaint.

II. Mr. and Mrs. Johnson's Testimony in the prior unrelated SBA case

46. The prior law suit between the SBA and Mr. Johnson arises from an entirely different matter unrelated to the partnership case before the district court.

47. In the late 1980's Mr. Johnson guaranteed an SBA loan to a small manufacturing company in Vernal, Utah. The business failed and the SBA sued Mr. Johnson on a foreclosure deficiency and under his guarantee and after protracted litigation, a judgment was entered against Mr. Johnson.

48. As referred to above, Mr. Johnson and Mr. Orvis were concerned about the impact of this judgment and others on their credit repair business. Mr. Orvis insisted

that he take control of all partnership assets and that Mr. Johnson take a more "passive" role. That led to their agreement to (1) title all of the partnership property "in the name of Jayson Orvis so as to protect these assets," and (2) agreeing that Orvis would continue to "provide Johnson's share or allocation to any party directed by Johnson" i.e. Continue to provide profit share to the beneficial interest of DaNell Johnson or entitles controlled by her as had transpired for several years.

49. Following the entry of SBA judgment, the SBA commenced post judgment discovery to aid in its attempt to collect the judgment. The post judgment discovery included depositions of Mr. and Mrs. Johnson and interrogatories and document productions from the credit repair business.

50. Mr. Orvis and company attorney Mr. Lawrence assisted Mr. Spendlove in complying with the interrogatories and document production and the company attorney Mr. Victor Lawrence (who was also the Johnsons' attorney in other matters) entered an appearance for Mrs. Johnson in the SBA matter, defended her position before the SBA, and also scheduled the depositions of Mr. Johnson and counseled him therein. Mr. Orvis, Mr. Spendlove who ran operations, Mr. Lawrence the attorney and Mr. and Mrs. Johnson all worked in concert with the SBA to present an accurate picture.

a. SBA deposition of Mrs. Johnson (questioned by attorney Victor Lawrence) demonstrates profit share distributed by Orvis-Johnson partnership to beneficial interest of Mrs. Johnson.

51. In April of 1999, the SBA subpoenaed DaNell Johnson for deposition on May 18, 1999.

52. At that deposition, DaNell Johnson was represented by attorney Victor Lawrence. (Mr. Lawrence had represented Mrs. Johnson on several other matters as well.) At this deposition, DaNell Johnson truthfully disclosed her business

relationships.

53. Victor Lawrence himself questioned DaNell Johnson thusly:

[Q= Questioning by Mr. Victor Lawrence.]

A= Answer by DaNell Johnson

Q *Okay. When that business first started, it was just a handful of friends and associates"*

A *Right.*

Q *Now that has somewhat blossomed, but you don't know really what the company does now, is that correct?*

A *Yes, because it has expanded quite a bit.*

Q *In fact, aren't the funds that you received a profit share that you receive?*

A *That's what I understood it to be, yes.*

Q *Are you being paid for anything else? Do you do any type of consulting for Johnson and Associates right now?*

A *(Nodded no.)*

Q *You have to answer audibly.*

A *I'm sorry.*

Q *Do you do any consulting for Johnson and Associates?*

A *No.*

Q *Do you do any consulting for Lexington Law Firm?*

A *No.*

Q *You may sit on the board and you may receive a compensation for that, but you are aware that you receive a compensation in some type of profit sharing arrangement, is that correct?*

A *That's right.*

54. Thus here, guided by attorney Victor Lawrence, Mrs. Johnson explains that profit share comes to her from the operations.

(Exhibit 5 is the relevant pages of the SBA Deposition of DaNell Johnson.)

b. Mr. Johnson's SBA Testimony

55. It was under these circumstances when in November 1999 at Mr. Johnson's third SBA deposition wherein the purported inconsistent statement was made.

56. Attached as Exhibit 7 is a true copy of the 1999 SBA Deposition of Jamis

Johnson.

57. In his deposition, Jamis Johnson accurately disclosed the information requested by the SBA. The following are excerpts and references of some of the deposition:

Jamis' role at D.M. Johnson and Associates, LLC., (DaNell Johnson's LLC)

(Jamis Johnson SBA Deposition, p. 14 lines 1-3, Exhibit 7.)

Q. Are you a member of D.M. Johnson & Associates, LLC?

A. No.

Ownership of Lexington dba:

(Jamis Johnson SBA Deposition, p. 22 lines 14-25 and p. 23, Exhibit 7).

Q. Do you still operate your law practice under the assume name of Lexington Law Firms?

A. I never operated my practice under an assumed name of Lexington Law Firms.

Q. Okay. The state records show that the d.b.a. is registered to you and has been ever since 1994 and will be until the year 2000.

A. I think that's accurate. The state records show that.

Q. So who do you claim uses the name?

A. Oh, Lexington Law Firms?

Q. Yes.

A. I think we provided you with a bunch of that information before, and you should know that, and I'm surprised you don't. But I resigned with any involvement in Lexington Law Firms because of the pending bar problem.

Bar Status affects Jamis' operational Lexington role

(Jamis Johnson SBA Deposition p. 24 lines 1 – 10, Exhibit 7).

A. _ I don't know if we've ever registered the fact that it was assigned [to Orvis]. I was sued by the State of Tennessee, you know, personally because Lexington Law Firms was in my name, but since that time and with my bar problem I have completely relinquished any interest. They paid me a little bit, made my payment, and I resigned. Now, if it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating without me.

Interests in any partnerships

(Jamis Johnson SBA Deposition p.30 lines 16-25 and p. 31 lines 1-24, Exhibit 7.)

Q. Do you have any interest in any partnerships?

A. No. I mean, you know, often I'll have a joint endeavor with somebody, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go up to summit county and buy a lot.

Q. So a joint venture?

A. Yeah, you can call it that, but I don't have any outgoing partnerships.

Q. Any interest in any limited liability companies?

A. No. I had an interest in a limited liability company in California called Simmons Shores, LLC. The property got foreclosed out from underneath it. I made some money from raising loans for it, but I know that no longer exists. I had an interest in an outfit called Western Equities, LLC, but that is no longer functional. I have no interest in LLCs or corporations.

Q. How about Summit Insured Equity Limited Partnership?

A. I had – that was a – I had shares of stock in Summit that I got in exchange for legal work and sold them, I'm thinking, in either late 1997 or '98, early '98.

Q. So you now longer have any interest in that limited partnership.

A. No.

Q. And you received no income.

A. No. It was a small amount of money. I got three grand from it.

DaNell sits on the board at J&A:

(Jamis Johnson SBA Deposition, p. 32 lines 12-15, Exhibit 7.)

Q. Currently is she employed by anybody?

A. Yeah. Well, she's not employed. She doesn't get a W-2. She sits on the board of Johnson & Associates.

Q. Does she earn any money for that?

A. Yeah, I think she does. I think she covered all of that with you. _

DaNell's Lexington compensation for board position and certain contributions:

(Jamis Johnson SBA Deposition p. 42 lines 1-5 and lines 17-25, p.43 lines 1-3, Exhibit 7.)

Q. So if Johnson & Associates pays your wife money it's for her services as a trustee.

A. Yeah. She sits on the board. She also – yeah, she also – she did some other things for them occasionally, but not much.

Q. So your wife goes into the office there and does work or –

A. She does some work, yeah. She does some minimal work. She's also on the board. She also donated, you know, as she told you in her deposition, early on a bunch of computers and furniture and, you know, a lot of facilities to get it started. It's got a combination of things there. I mean, I think you know this because we've given you the checks, or she's given you the checks or Johnson & Associates have given you the checks. All of those checks have been made available to you.

DaNell still on board of J & A:

(Jamis Johnson SBA Deposition, p. 80 lines 10-12, Exhibit 7.)

Q. So your wife at this time is still on the board of Johnson & Associates.

A. Yes. What was that you just turned off?

DaNell Johnson's LLC's sources of income. Lexington makes regular payments to DaNell

(Jamis Johnson SBA Deposition, p. 87 lines 3-15, Exhibit 7.)

Q. So the LLC's main source of income right now is the DaNell's trusteeship in Johnson & Associates and some of these hard money deals. And anything else?

A. Lex. You mentioned \$465 payment from Lex.

Q. Lexington Law Firm does credit repair, right?

A. Uh-huh. DaNell gets payments from Lex. Then she also has – well, if a big deal comes along she gets some of that money. We sold some of that real estate. We bought some lots and sold them in the fall. I mean in the spring.

58. When viewed in light of the entire deposition and the series of questions before and after the alleged disavowing of a partnership interest in the credit repair partnership, the more likely interpretation is that Mr. Johnson was responding to a question that in his mind was referring to real estate partnership or LLC. No where in the entire deposition did Mr. Johnson expressly or implicitly disavowed any interest in the credit repair business.

SUMMARY OF ARGUMENT

Manifest Error

- I. THE DISTRICT COURT MANIFESTLY ERRED BY IMPROPERLY APPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL TO DISMISS APPELLANT'S CAUSE OF ACTION WHEN THE ELEMENTS OF THE DOCTRINE WERE NOT MET OR SATISFIED.
 - A. Reliance is a critical and indispensable requirement for judicial estoppel; Mr. Orvis did not rely on any statement made by Mr. Johnson during his SBA deposition.
 - B. The parties in the prior case and the instant case are not the same and so the doctrine of judicial estoppel is inapplicable.
 - C. The subject matter of the prior case is different from the subject matter of the present case.
 - D. The prior position must be "successfully maintained" for judicial estoppel to apply, and in the SBA case there was no position maintained; and Mr. Johnson could not have successfully maintained a position that he had no partnership interest in the credit repair business because he did not take that position during the SBA post judgment discovery.
- II. IT WAS REVERSIBLE MANIFEST ERROR FOR THE DISTRICT COURT TO WEIGH FACTUAL ISSUES AND MR. JOHNSON'S CREDIBILITY IN RULING ON SUMMARY JUDGMENT.

ARGUMENT

Manifest Error

Manifest error is clear in this case where the evidence of the partnership is so overwhelming and the district court decided to ignore all of it on the basis of a "no" response to a vague and ambiguous question from a post judgment deposition in a prior unrelated case. Manifest error exists where the lower court clearly misapplies the law to the facts of the case. Please see *Mary J. Bailey (Adams) v. Spencer Adams*, 1990.UT.213, 798 P.2d 1142, 143 Utah Adv. Rep. 39 (Ut Appeal 09/19/90) [District

Court committed manifest error when it applied Utah Code Ann. § 78-45-7.5(2) (Supp. 1990) to reduce child support without a motion to modify the support order or any evidence of change of circumstances.]. Similarly here, and as shown below, the district court committed manifest error. This it did in two ways: First, the district court committed manifest error when it granted summary judgment dismissing Appellant's partnership claim on the basis of the misapplication of the doctrine of judicial estoppel. Moreover, and second, in granting summary judgment against Appellant, the district court must have weighed Appellant's version of his SBA deposition testimony in the prior unrelated SBA case, and deemed Appellant's version incredible which clearly constitutes manifest error when ruling on a motion for summary judgment. Both instances of manifest error, the misapplication of the law of judicial estoppel and the improper weighing of Appellant's credibility and material facts interpreting the SBA deposition statement, will be discussed herein below.

I. THE DISTRICT COURT MANIFESTLY ERRED BY IMPROPERLY APPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL TO DISMISS APPELLANT'S CAUSE OF ACTION WHEN THE ELEMENTS OF THE DOCTRINE WERE NOT MET OR SATISFIED.

The doctrine of judicial estoppel is well settled in Utah and its application requires the district court to find several separate and independent elements: (1) The person seeking relief, Mr. Orvis, under the doctrine of judicial estoppel must have relied on the prior deposition statement by Mr. Johnson. *Tracy Loan & Trust Co., v. Openshaw Inv. Co.*, 102 Utah 509, 515, 132 P.2d 388, 390 (Utah 1942). 2) The prior proceeding (the SBA proceeding) must be between "the same persons or their privies" as the parties in this case; (3) The prior action must involve "the same subject matter"

as this case; and (4) The prior position must have been "successfully maintained." *Nebeker v. Utah State Tax Commission*, 2001 UT 74, ¶ 15, 34 P.3d 180, 187; *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 734 (Utah 1996).

The district court simply concluded the doctrine of judicial estoppel bars Mr. Johnson's partnership claim without analyzing the applicability of the four elements of the doctrine. As shown next, the district court should not have applied the doctrine of judicial estoppel on the disputed facts asserted by Mr. Orvis.

A. Reliance is a critical and indispensable requirement for judicial estoppel; Mr. Orvis did not rely on any statement made by Mr. Johnson during his SBA deposition.

As in any estoppel, the essential element of judicial estoppel is detrimental reliance. Mr. Orvis, as his offensive strategy, tries to claim that Mr. Johnson's ambiguous SBA statement about "no" partnerships is a misstatement, but unless Mr. Orvis actually *relied* on that statement made to the SBA, it cannot operate to estop Mr. Johnson from asserting his partnership claims and pursuing the misappropriation, against Mr. Orvis. Reliance by Mr. Orvis on any statement by Mr. Johnson is critical to the application of the doctrine of judicial estoppel, yet the district court ignored this element altogether. In *Masters v. Worsley*, 1989.UT.175, 777 P.2d 499, 112 Utah Adv. Rep. 39 (Utah Appeal 1989), the court of appeals reiterated the Supreme Court's holding on this issue:

In *Tracy Loan & Trust Co. v Openshaw Inv. Co.*, 102 Utah 509, 132 P.2d 388, 390 (1942), the Utah Supreme Court said that a party invoking judicial estoppel must show that he or she has done something or omitted to do something in reliance on the other party's testimony in the earlier proceeding, and will be prejudiced if the facts are different from those upon which he or she relied. Id. However, "there is no estoppel where there was no reliance and the

parties had equal knowledge of the facts." Id. at 390-91. However, in *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971), the court clarified that the doctrine was really akin to collateral estoppel and applied only to issues actually litigated, not those which merely could have been determined. [Emphasis added.]

The glaring error with the district court's ruling is the blatant failure by Mr. Orvis to establish that "he . . . has done something or omitted to do something in reliance on...[Mr. Johnson's] testimony in the earlier proceeding." Mr. Orvis has not and cannot establish the essential element of reliance thus making the doctrine of judicial estoppel wholly inapplicable. For this reason alone, the district court has committed manifest error.

First, Mr. Orvis has never, in any way, pled or claimed reliance on the Johnson SBA statement—not in his motion for summary judgment, nor in his affidavit, nor in any other pleading.

Nor is it possible to infer reliance by Mr. Orvis because there are no facts, actual or alleged, anywhere in this case, from which reliance may be inferred.

Further, Mr. Orvis' actual actions are the antithesis of reliance.

Perhaps most telling (and most pernicious), when Mr. Johnson, concerned about misappropriation of partnership funds, demanded from Mr. Orvis an audit and an accounting, in July of 2001, (Exhibit 4), Mr. Orvis did the following: As discovery indicates, (Deposition testimony of Orvis employee, Mr. Triplett, Exhibit 2) Mr. Orvis consulted with Mr. Victor Lawrence (attorney for DaNell and Jamis Johnson in the SBA matter and in the partnership matters). Mr. Orvis and Mr. Lawrence determined to acquire the SBA judgment as a means to extinguish the partnership with Johnson and

mask the fraud that had preceded, and take and divide the Johnson profit share. Mr. Orvis, within days of the demand letter (using the instrumentality of a defunct Utah LLC, and using partnership monies), paid to the SBA the exact sum that Mr. Orvis and Mr. Lawrence knew had been offered to the SBA by Mr. Johnson in prior negotiations. Thus, the SBA judgment was acquired to be used to deal with the existing Orvis-Johnson partnership. This very act by both Mr. Orvis and Mr. Lawrence in buying the judgment to use against Mr. Johnson also voids the judgment. Please see *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 1999 UT 49, 369 Utah Adv. Rep. 36 (Utah 1999). A few days thereafter, Mr. Orvis brought this Complaint, and withheld all further partnership distribution.

While this act of buying the SBA judgment in itself constitutes breach of fiduciary duty by Mr. Orvis as partner, and Mr. Lawrence as lawyer, it clearly also demonstrates that Mr. Orvis did not detrimentally rely on Mr. Johnson SBA deposition statement in November 1999. Mr. Orvis paid to acquire the SBA judgment three years after the SBA statement. Indeed, Mr. Orvis did not have to be in the position he is in now by having purchased the SBA judgment. He came to the SBA judgment to use it for a fraudulent and aggressive purpose. And his purpose was to use the SBA judgment to attempt to extinguish the existing partnership that he knew existed. His very act of buying the SBA judgment is itself proof that he understood that he had a partnership with Johnson and was seeking an offensive weapon. This is the opposite of reliance.

Indeed, once the SBA judgment was acquired, Mr. Johnson was summoned to the offices of Berman, Tomsic & Savage, where attorney Dan Berman informed Mr. Johnson that Mr. Orvis had purchased the SBA judgment and that Mr. Johnson must

abandon the partnership. Mr. Johnson wrote a confirmatory letter to Mr. Berman and that letter acknowledges that Mr. Orvis purchased the judgment and would pay Johnson between \$16,000 and \$18,000 per month for two years. (Exhibit 17, Letter to Dan Berman.) The letter is attached because it reveals the mind and intent of Mr. Orvis.

The payment of \$16,000 to \$18,000 per month is for the purpose of settling the partnership claim and having Mr. Johnson thereafter abandon the partnership with Mr. Orvis. Thus, Mr. Orvis believes there is a partnership and his purpose in acquiring the SBA judgment is to use it to offset and extinguish the on-going partnership. Again, this is precisely the opposite of what would constitute detrimental reliance on a response in an SBA deposition three years earlier, by Mr. Orvis.

Additionally, Mr. Orvis' actions toward the SBA prevent there from being any reliance. Mr. Orvis did not rely nor cannot claim reliance on the SBA statement because he helped Mr. Johnson outline the information to the SBA. The conclusion seems unavoidable that Mr. Orvis clearly understood what he was doing and was apprised of the SBA matter. Mr. Orvis and attorney Victor Lawrence were actually part of the team that prepared discovery to the SBA showing the flow of profit share checks and their distribution. Attorney Victor Lawrence (with the knowledge of Mr. Orvis and while working also for Mr. Orvis) actually represented and counseled DaNell Johnson in her deposition by the SBA where, at his directed questioning, she laid out to the SBA the profit share distribution—this only months before Mr. Johnson's SBA deposition. Mr. Lawrence counseled Mr. Johnson also in his depositions. Mr. Lawrence and Mr. Orvis and Mr. Johnson jointly conferred on the depositions and the discovery. Mr. Orvis and Mr. Lawrence knew so much about the SBA judgment that they actually knew the

amount Mr. Johnson was negotiating to settle this claim with the SBA and using that inside knowledge (gained from the attorney fiduciary relationship) they took advantage of it and paid the SBA exactly that amount to buy the judgment instead of settle it. Mr. Orvis and Mr. Lawrence cannot (without deliberate misrepresentation) state that they did not understand the nature of the partnership and the profit share distribution or that they did not assist in establishing and outlining to the SBA an accurate picture of the partnership. "There is no estoppel...where the parties had the same knowledge of the facts." Again, Mr. Orvis cannot claim to detrimentally rely on the SBA statement of Mr. Johnson.

After November 1999, the date of the SBA deposition, Mr. Orvis did not change his position from being a partner with Mr. Johnson to a position that Mr. Johnson had no partnership with him. Instead Mr. Orvis did the opposite. Profit share distribution (distributed by Mr. Orvis) not only continued uninterrupted on a monthly basis but increased dramatically over the next two years up to as high as \$35,000 per month just before Mr. Orvis filed this lawsuit; Mr. Orvis and Mr. Johnson continued to execute and exchange written documents regarding the partnership, and; their active course of performance after the SBA statement also evidences the ongoing partnership

There is absolutely no evidence whatsoever that Mr. Orvis relied in any way on the SBA statement by Mr. Johnson.

"There is no estoppel where there was no reliance" is the controlling principal here. Since the district court failed to place the burden on Mr. Orvis to show his reliance; and there is no evidence, nor can there be evidence of reliance, the grant of summary judgment was clear manifest error that calls for summary reversal of the

district court. Appellant respectfully urges the court for summary disposition reversing the grant of summary judgment below.

B. The parties in the prior case and the instant case are not the same and so the doctrine of judicial estoppel is inapplicable.

For judicial estoppel to apply, the parties in the prior case and in this case must be the same. The parties are not the same for three reasons:

- i.) The actual parties are not the same.
- ii.) Mr. Orvis, who claims to be a privy to the SBA because he purchased the SBA judgment, did so with monies misappropriated from the partnership, and he is not, therefore, the "privy" because the SBA judgment would actually be the property of the partnership, which would be the "privy";
- iii.) The SBA judgment was purchased in violation of partner and lawyer fiduciary duties and is void in Mr. Orvis' hands.

The parties in the prior case were Mr. Johnson and the United States Government (the SBA). The parties in this current matter are Mr. Johnson and Mr. Orvis and several others. The parties are clearly not the same. However, Mr. Orvis claimed, and the district court agreed, that Mr. Orvis was a privy with the SBA. The district court held that Mr. Orvis was in privy with the SBA since he purchased the SBA judgment against Mr. Johnson. The facts regarding the issue of being a privy are however, legitimately very much in dispute. Mr. Johnson asserts that Mr. Orvis was embezzling partnership money and purchased the SBA judgment using partnership funds wrongly taken from the partnership. If this is so, then the SBA judgment that he purchased would be the property not of Mr. Orvis but of the partnership. Accordingly,

this would make the partnership a "privy" of the SBA, not Mr. Orvis. Since this is a genuine factual issue raised below that had to be tried, this element of whether the parties are the same or privies precludes summary judgment. Further, Mr. Johnson, as partner, charges Mr. Orvis and Mr. Victor Lawrence with fraud, conspiracy to defraud, breach of both partner and attorney fiduciary duties, embezzlement, theft and criminal conversion by taking partnership assets and purchasing the SBA judgment for the malicious purpose of using it to deny Mr. Johnson his profit share and his partnership interest and also to mask their own ongoing fraud. There is significant testimony to this effect in the depositions of Tommy Triplett, (Orvis employee), Will Vigil (Lawrence and Orvis employee) and Jade Griffen, (Orvis employee). The substance of and references to these depositions were amply spread before the district court in the relevant pleadings. Such acts would void the SBA judgment in the hands of Mr. Orvis, and he would not be a privy. Also argued in the district court, is that Mr. Victor Lawrence and Mr. Orvis manage, work for, and profit by Lexington law firm, Mr. Lawrence's firm. Mr. Lawrence is also the attorney for the Johnsons in the SBA matter and in partnership matters. It is patently illegal for him, and for Mr. Orvis, in conspiracy with him, to acquire a judgment against a client. This act, if proven, not only voids the SBA judgment in the hands of Mr. Orvis and Mr. Lawrence, (Snow, Nuffer et al v. Tannasse, supra) but it is a criminal offense.

These are all substantial and material issues of fact raised below but ignored by the district court in its grant of summary judgment to Mr. Orvis. And again, these issues would go directly to whether Mr. Orvis may claim to be a "privy" or not for purposes of judicial estoppel. Mr. Orvis' status as a "privy" is a material issue of fact prematurely

and erroneously ruled on by the district court.

C. The subject matter of the prior case is different from the subject matter of the present case.

The prior case was a contract guarantee action and a foreclosure deficiency action brought by the SBA against Mr. Johnson. The SBA obtained a money judgment against Mr. Johnson. In the present action, Mr. Orvis seeks a declaratory judgment that would extinguish Mr. Johnson's partnership interest in their credit repair business, and Mr. Johnson is counterclaiming for an accounting, for conspiracy, and related claims.

The subject matters of the prior action and this action are clearly different.

This distinction between the subject matter of the prior SBA case and this case is made clearer by a 1971 Utah Supreme Court clarification of the doctrine of judicial estoppel by holding that "the doctrine [judicial estoppel] was really akin to collateral estoppel and applied only to issues actually litigated, not those which could have been determined."

Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971). The only issue litigated in the prior SBA action was the foreclosure action and the guarantee contract.

The specific partnership of the credit repair business in this case was not litigated in the prior SBA action, and no determination was there made as well. A vague and ambiguous "No" response to a general question followed by a statement showing Mr. Johnson thinking about real estate partnerships as he admitted to have had joint ventures is not a determination, let alone a litigated determination, that Mr. Johnson has no partnership interest in the credit repair partnership.

There is no litigated determination regarding these responses; the only subject matters in the SBA case that have passed through litigated determination, so as to conform with

the standard set out in *Richards* above, are issues relating to the contract and real estate. And thus these would be the only issues arising from the SBA case that may be considered in analyzing the applicability of judicial estoppel and because these SBA issues are different from those issues pending in this case, judicial estoppel is not applicable. It is reversible manifest error for the district court to have granted summary judgment through the application of the doctrine of judicial estoppel when the issues here are different from the issues in the prior case.

- D. The prior position must be “successfully maintained” for judicial estoppel to apply, and in the SBA case there was no position maintained; and Mr. Johnson could not have successfully maintained a position that he had no partnership interest in the credit repair business because he did not take that position during the SBA post judgment discovery.**

The doctrine of judicial estoppel requires, as one of its tests of applicability, that the prior position be “successfully maintained”. As cited above, this court, citing *Richards v. Hodson* with approval, stated:

...in *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971), the court clarified that the doctrine [of judicial estoppel] was really akin to collateral estoppel and applied only to issues actually litigated, not those which merely could have been determined.

There was no discernable action by the SBA or by Mr. Johnson, which was “maintained” or pursued, let alone concluded “successfully” involving the “position”, i.e. that there was no Orvis-Johnson partnership. The district court manifestly erred in looking to the SBA statement of Mr. Johnson as the basis to grant summary judgment and to declare that no partnership existed between Mr. Orvis and Mr. Johnson.

Further, based simply on the information submitted to the SBA by the Johnsons, both in depositions, and through document production (provided in part by Mr. Orvis and Mr. Lawrence), it is highly improbable, even if Mr. Johnson had wanted to, that he could have successfully maintained a position that he had no interest in the credit repair businesses. This is because there is, in fact, a partnership interest in the credit repair businesses and the totality of the discovery to the SBA reflects this. There was a variety of evidence submitted to the SBA in discovery (collected and submitted in large part—profit share checks for example—by Mr. Orvis himself and Mr. Lawrence, for the partnership) and elicited from Mr. and Mrs. Johnson in multiple depositions. This evidence taken in context, accurately demonstrate the nature of their business relationship with Mr. Orvis.

Mr. Orvis, who had access to all the SBA depositions and document production (because he bought the SBA judgment) submitted to the district court only a one word quote “no” from nearly 1,000 pages of discovery over four years, to support his claim that Mr. Johnson stated there was no partnership. Mr. Orvis had to ignore hundreds of pages of depositions and hundreds of produced documents, checks, agreements, etc., to try and persuade the district court. And the district court uncritically assumed Mr. Orvis' posture.

Any reasonably complete review of the entire discovery responses to the SBA's post judgment discovery will clearly show that Mrs. Johnson, supported by their attorney Victor Lawrence and business associates Mr. Orvis and others, held, for many years, the beneficial interest and was receiving profit share distribution in the credit repair businesses. Additionally, Mr. Johnson was resigning from being the directing attorney

for Lexington and Johnson and Associates, and was to take a more passive role in the business with Mr. Orvis managing the day to day affairs of the businesses. The SBA had substantial documentary (including checks) and testimonial evidence of this position. While there was no legal determination for or against the assertion of this position, this was the position that was the thrust of the responses to the SBA discovery requests. Mr. Johnson was asked in various depositions about the credit repair businesses, Lexington and Johnson and Associates, as was Mrs. Johnson. Mr. Johnson's responses were accurate. In addition to those questions, Mr. Johnson was asked about other partnerships. His answer containing the "no" response clearly reflects that he understood the SBA to be inquiring, in this line of questioning, about real estate partnerships. And this answer was in conjunction with his other answers about Lexington and about Johnson and Associates which he responded to earlier in the deposition and would respond to later in the deposition. The SBA already knew what his position was from his and DaNell Johnson's prior depositions.

Further, the position taken by the Johnsons vis a vis the SBA was not a recent concoction to defend against the SBA but was the manner the Johnsons have conducted their financial affairs for years. The Johnson's separated real property ownership and taxation in 1989. In 1994 the Johnsons operated an interest in a medical facility in Louisiana with Mrs. Johnson holding the beneficial interest, sitting on the board, etc. In 1996 Mr. Johnson and his wife DaNell Johnson entered into an agreement wherein DaNell would be the owner of all their properties including the beneficial interest in various business ventures including the partnership venture with Mr. Orvis. This information was given to the SBA in depositions in 1997, 1998, and

1999 by Mr. Johnson and by Mrs. Johnson. What is more, this was explained to the district court in Mr. Johnson's opposition to Mr. Orvis' motion for summary judgment. The entirety of Mr. Johnson's deposition testimony espouses this fact very clearly especially as to the credit repair business. Indeed, nowhere in Mr. Johnson or Mrs. Johnson's deposition was any testimony that they did not have any interest in the credit repair business. Nonetheless the district court found that Mr. Johnson took the position that he had no partnership interest in the credit repair business, and that is absolutely incorrect. If Mr. Johnson did not take the position that he had no interest in the credit repair business than he could not have successfully maintained that position.

Moreover, the issue of what Mr. Johnson said, the meaning, the intent of both the examiner and deponent, the understanding by deponent of the question and a host of other incidental issues are fraught with multiple interpretations that would, under any circumstances, need to be examined by a trier of fact rather than ignoring them as the district court did on summary judgment.

II. **IT WAS REVERSIBLE MANIFEST ERROR FOR THE DISTRICT COURT TO WEIGH FACTUAL ISSUES AND MR. JOHNSON'S CREDIBILITY IN RULING ON SUMMARY JUDGMENT.**

The district court stated in its minute entry that it was satisfied that Mr. Johnson was avoiding creditors.² This statement clearly reveals the mental processes the court engaged in when deciding to grant the motion for summary judgment on the basis of

2. The district Judge Hanson manifested pronounced bias in open court against Appellant. At the first hearing in this case, the Judge indicated that he had read only the Movant's brief, (Mr. Lawrence, at this time); he had not then read the Appellant's brief, nor could clearly recall the complaint's causes of action, but had decided that Appellant was "lying" to the SBA and should be reported to the U.S. Attorney—adopting the inflammatory view of the Lawrence brief. That brief was significantly in factual error as has since come to light. This judge, having previously handled the Utah Bar matter against Appellant seems to have maintained an undue bias in this case. Appellant asserts that this bias may be the reason the

judicial estoppel. To be satisfied that Mr. Johnson was avoiding creditors, the court must have adopted Appellee Orvis' contested interpretation of deposition testimony. Mr. Orvis claimed that Mr. Johnson meant by a response therein that he does not have a partnership interest in the credit repair businesses. Mr. Johnson claims the opposite - that his response when taken in context and all the discovery responses up to and after the deposition clearly shows that he never disavowed his partnership interest in the credit repair businesses that he had for years with Mr. Orvis. [Mr. Johnson's version or position as to this factual issue must, as a matter of law, be accepted for purposes of ruling on the motion for summary judgment. *Wheeler v. Mann*, 763 P.2d 758, 759 (Utah 1988)].

To be satisfied that Mr. Johnson was avoiding creditors, the district court was indeed accepting the version of the facts presented by Mr. Orvis and rejecting Mr. Johnson's version that he never disavowed his partnership interest in the credit repair businesses with Mr. Orvis. To be satisfied of one set of facts over another involves a weighing of the two sets of facts. This of course is not permissible, as a matter of law, on a motion for summary judgment. *Winegar v. Froerer et. al.*, 1991.UT.110, 813 P.2d 104, 161 Utah Adv. Rep. 22 (Utah 1991). Moreover, since Mr. Johnson's set of facts involves the issue of his credibility, the district court's rejection of his version of the facts, is a clear repudiation of his credibility as well. Weighing parties' credibility is also improper and it is another manifest error by the district court requiring this court to grant summary disposition reversing the lower court's grant of summary judgment.

court here seemed to ignore well established standards for deciding a motion for summary judgment.

Maters v. Worsley, 1989.UT.17, 777 P.2d 499, 112 Utah Adv. Rep. 39 (Utah Appeal 1989).

CONCLUSION

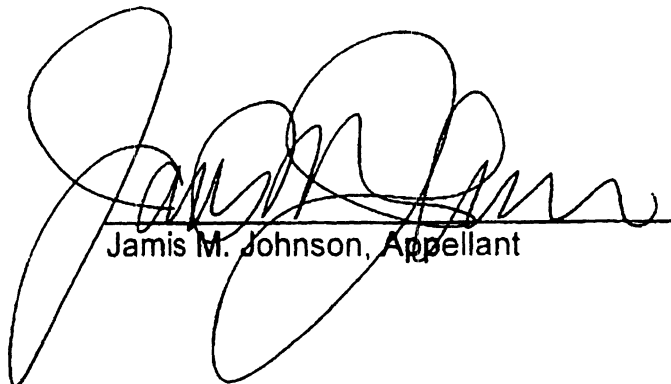
Certain matters are clear here. Mr. Orvis and Mr. Johnson have a partnership. Mr. Orvis purchased the SBA judgment against Mr. Johnson to use it as a defense against Mr. Johnson's partnership claims. Mr. Orvis, extracts the word "no" from a 52 word quote, found in one of the SBA depositions he owns and uses this truncated quote as a means to argue to the district court that Mr. Johnson has made a misrepresentation to the SBA or has alternatively "disavowed" the Orvis-Johnson partnership. This argument forms the basis for Mr. Orvis' summary judgment motion. The district court erred in finding that Mr. Johnson was "avoiding creditors" and finding that Mr. Johnson is judicially estopped from any claim of partnership with Mr. Orvis. The district court committed manifest error with this ruling because the court misapplied the doctrine of judicial estoppel and he improperly weighed Mr. Johnsons' credibility and contested facts. It is clear that judicial estoppel has no applicability because not one of the four requirements are met. First, reliance is a critical element of judicial estoppel and Mr. Orvis did not rely on the SBA statement, nor did he plead any reliance and his actions in buying the SBA judgment are the opposite of reliance, and as this court has noted "where there is no reliance, there is no estoppel; Second, the parties in the SBA case and in this case are different. Mr. Orvis cannot claim to be a privy because he purchased the SBA judgment with misappropriated partnership assets and the real owner of the SBA judgment and the "privy" is the Orvis-Johnson

partnership. Further the judgment is void in the hands of Orvis for breach of partner fiduciary duty, and conspiracy with attorney Lawrence to breach attorney fiduciary duty;

Third, the issues in the SBA case and the issues here are different and preclude the application of judicial estoppel, and only litigated issues may be considered and the litigated SBA issues are totally different from issues here; and Fourth, the prior position must be successfully maintained, and there is no discernable evidence that there was any effort at maintaining any position with regard to the SBA judgment.

For the foregoing reasons, the district court committed manifest error and the decision of the district court granting summary judgment in favor of Appellee Mr. Orvis should be summarily reversed.

DATED this 18th day of February, 2005



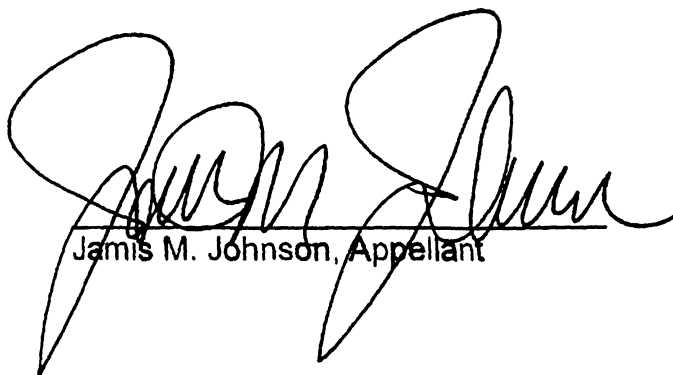
Jamis M. Johnson, Appellant

VERIFICATION

State of Utah)
) ss:
County of Salt Lake)

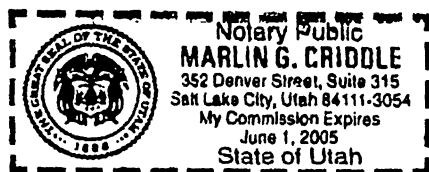
I hereby verify under oath that the foregoing facts set forth in, and the exhibits attached to, the foregoing Verified Memorandum In Support Of The Motion For Summary Disposition, are true and correct to best of my knowledge and belief.

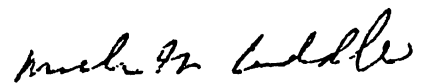
DATED this 21st day of February, 2005


Jamis M. Johnson, Appellant

Subscribed and sworn to before me this 21st day of February, 2005

SEAL

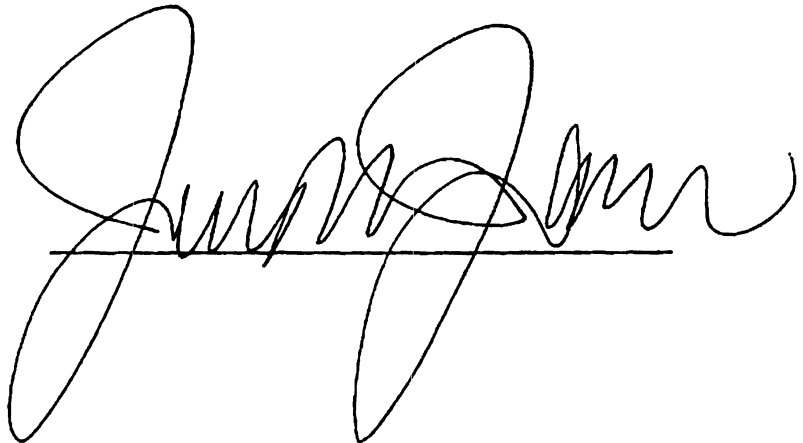




Notary
Residing at:

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and exact copy of the foregoing Verified Memorandum in Support of the Motion For Summary Disposition to Peggy A Tomsic, attorney for Appellee, at 136 East South Temple #800, Salt Lake City, UT 84111, this 21st day of February, 2005.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and cursive, appearing to read "J. M. [unclear]".

Jamis M. Johnson
Appellant *Pro Se*
352 South Denver Street, Suite 304
Salt Lake City, Utah 84111
Telephone: 801 530 0100
Fax: 801 530 0900

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JAMIS M. JOHNSON,	:	EXHIBITS ATTACHED TO
	:	VERIFIED MEMORANDUM IN
	:	SUPPORT OF THE MOTION
Appellant	:	FOR SUMMARY DISPOSITION
vs.	:	
	:	
JAYSON ORVIS.	:	Ct. of Appeals no. 20041122
	:	
Appellee	:	

EXHIBIT LIST

- Exhibit 1: Deposition of Will Vigil
- Exhibit 2: Deposition of Tommy Triplett
- Exhibit 3: Deposition of Jade Griffen
- Exhibit 4: Demand for Audit and Accounting to Orvis, August 2001
- Exhibit 5: SBA Deposition of DaNell Johnson, April 1999
- Exhibit 6: Memorandum in Support of Plaintiff Jayson Orvis' Motion for Summary Judgment; and Affidavit of Jayson Orvis.
- Exhibit 7: SBA Deposition of Jamis Johnson, November 1999.

- Exhibit 8: Memorandum of Jamis Johnson in Opposition to Jayson Orvis' Motion for Summary Judgment.
- Exhibit 9: Transcript of Hearing on Plaintiff's Motion for Summary Judgment.
- Exhibit 10: Minute Entry, District Court, Judge Timothy Hanson, October 20, 2004
- Exhibit 11: Judgment; and Findings of Facts and Conclusions of Law
- Exhibit 12: 1999 Orvis-Johnson Partnership Agreement
- Exhibit 13: 1994 Partnership Memorandum
- Exhibit 14: Assignment of Trade Name, January 2001
- Exhibit 15: Orvis Supplemental Answer To Interrogatory No. 11
- Exhibit 16: Sundry Orvis-Johnson correspondence reflecting profit share and partnership.
- Exhibit 17: Jamis Johnson Deposition in this case, June 2002
- Exhibit 18: Letter To Dan Berman, August 2001

Exhibit 1

COPY OF TRANSCRIPT

IN THE THIRD DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

JAYSON ORVIS,

Plaintiff,

vs.

JAMIS JOHNSON,

Defendant.

JAMIS JOHNSON and DaNELL
JOHNSON,

Third-Party Plaintiffs,

vs.

JAYSON ORVIS, SAM SPENDLOVE,
DION SCHNELLING, VICTOR
LAWRENCE and JOHN DOES 1-15,

Third-Party Defendants.

Deposition of:

WILFRED M. VIGIL

Civil No.: 010907449

Judge Timothy R. Hanson

August 21, 2002 - 9:39 a.m.

Location: Bendinger, Crockett, Peterson & Casey
170 S. Main, Suite 400
Salt Lake City, Utah

Reporter: Vicky McDaniel, RMR
Notary Public in and for the State of Utah



CitiCourt, LLC
THE REPORTING GROUP

50 South Main, Suite 920
Salt Lake City, Utah 84144

1 something that you weren't aware of?

2 A. Absolutely.

3 Q. They might have been reporting to Mr. Orvis
4 or Mr. Griffith; is that correct?

5 A. Yes.

6 Q. Do you know whether the lawyers were paid
7 for their services?

8 A. I don't know there was that compensation,
9 but I did overhear certain instances of profit sharing.

10 Q. You don't know how they were paid?

11 A. No, I don't know.

12 Q. You testified about a point in time when
13 there was a shifting of some clients from Lexington Law
14 Firm to Johnson & Associates. Do you recall that?

15 A. Yes.

16 Q. And tell me how you were aware of that.

17 A. I was aware of that in that I was the
18 fulfillment manager. I was directed to send the
19 clients, the E-clients, the lower end paying clients
20 from our firm, Lexington Law Firm, over to Johnson &
21 Associates.

22 Q. Who instructed you to do that?

23 A. Jayson Orvis.

24 Q. Did he tell you why he wanted you to do
25 that?

1 A. No.

2 Q. Did you have an understanding of why that
3 was being done?

4 A. Yes.

5 Q. And where did that understanding come from?

6 A. From previous conversations with Mr. Orvis.

7 Q. Tell me about that. First of all, what was
8 your understanding?

9 A. My understanding was that we were looking
10 to -- my understanding was that there wasn't much focus
11 on Lexington Law Firm building its profits, and my
12 understanding was also that we were to send over the
13 E-clients over to the Johnson & Associates department
14 simply because the money was being divided up amongst
15 different individuals.

16 Q. From Johnson & Associates?

17 A. Exactly.

18 Q. And from Lexington Law Firm?

19 A. Exactly.

20 Q. Did that shifting of clients, in your
21 understanding, have anything to do with Jamis Johnson?

22 A. In my understanding?

23 Q. Yeah.

24 A. Yes.

25 Q. What was that?

Exhibit 2

COPY OF TRANSCRIPT

IN THE THIRD DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

JAYSON ORVIS,
Plaintiff,

VS.

JAMIS JOHNSON,
Defendant.

Deposition of:

THOMAS TRIPLETT

Civil No.: 010907449

Judge Timothy R. Hanson

JAMIS JOHNSON and DaNELL
JOHNSON,

Third-Party Plaintiffs,

VS.

JAYSON ORVIS, SAM SPENDLOVE,
DION SCHNELLING, VICTOR
LAWRENCE and JOHN DOES 1-15,

Third-Party Defendants.

August 22, 2002 - 9:44 a.m.

Location: Bendinger, Crockett, Peterson & Casey
170 S. Main, Suite 400
Salt Lake City, Utah

Reporter: Vicky McDaniel, RMR
Notary Public in and for the State of Utah



CitiCourt, LLC
THE REPORTING GROUP

50 South Main, Suite 920
Salt Lake City, Utah 84144

1 25 to 35 thousand were simply calculations that he
2 pulled out of his rear, that had no bearing on any of
3 the accounting practices or any of the -- you know,
4 regardless of what Jamis -- or Johnson & Associates was
5 doing.

6 Q. So the checks were not even a rough function
7 of profits or checks coming out of Johnson &
8 Associates, to your understanding?

9 A. Right. But they would reflect -- if Johnson
10 & Associates did well that month, the checks would
11 generally be a little larger.

12 Q. Why was this a hot topic?

13 A. It was something we talked about from time
14 to time. There was some -- there was animosity between
15 Jamis and Jayson. So it was -- Jamis worked, you know,
16 in a separate office, and I got the impression that
17 Jayson didn't like to go visit him and that's why he
18 always sent me to deliver the checks. So I was just
19 the go-between for both of them. And throughout the
20 course of my employment they exchanged a few -- they
21 talked about a number of things, and I don't think they
22 ever threatened each other, but they were tense
23 conversations.

24 Q. Other than the fact Mr. Orvis and
25 Mr. Johnson didn't seem to have a particularly close

1 relation, did you ever get an explanation from
2 Mr. Orvis about why Mr. Orvis was providing goodwill
3 checks to Mr. Johnson?

4 A. Yes, quite a few times. Basically how it
5 breaks down is, and this is the extent to which I know
6 it, there was several partners involved in the founding
7 of the company. I think it was NADA or NACA or
8 something like that.

9 Q. NACA?

10 A. North American Credit Association. And it
11 began to trickle apart. Then the Lexington was formed
12 after that, Johnson & Associates was formed, and this
13 was primarily through Jayson and Jamis. The details
14 I'm never -- I've never -- he's never told me and I've
15 never been clear about.

16 At some point in time Jamis got out of the
17 deal, either a buyout or he left or something, I have
18 no clue. But at any rate, he lost, you know, some sort
19 of profit shares or didn't have any profit shares or
20 any claim to any of the profits, so -- but Jayson
21 always said that just out of his goodwill -- it really
22 wasn't out of a goodwill but just to -- this is the way
23 he would phrase it, just to keep him off my back and to
24 keep him from suing me. Which he said even if he did
25 it would be futile, but I just don't want to -- I'd

1 rather just pay him money and keep him at bay and we go
2 on with our merry lives.

3 Q. Did you form a view about what Mr. Orvis's
4 monthly gross income was?

5 A. Yes.

6 Q. What was your view?

7 MR. ATKIN: Objection, lacks foundation.

8 A. First month -- during the interview when he
9 hired me he told me that he made \$96,000 that month.
10 Later he said that for the last five or six months
11 before my employment was when the checks started really
12 getting big, around to the \$90,000 mark. Throughout my
13 employment they increased, one month \$125,000. Towards
14 the end it was about \$153,000.

15 Q. How did you come to have this feeling?

16 A. I deposited the checks, so I had a pretty
17 good idea of what was coming in. And he told me half
18 the time, so I was pretty in the loop.

19 Q. Going back to this relationship between
20 Mr. Orvis and Mr. Johnson. I take it Mr. Orvis had
21 indicated to you that he was trying to keep Mr. Johnson
22 at bay. At bay, did he tell you at bay with respect to
23 what?

24 A. With respect to his control over the company
25 and control over profit shares and basically money.

1 Q. Control over the company, which company do
2 you have in mind?

3 A. Johnson & Associates and Lexington Law Firm.

4 Q. To your knowledge, did Mr. Johnson claim
5 ownership in those entities?

6 A. I knew he felt he was entitled to money. I
7 don't know if he ever claimed ownership. I mean, the
8 name Johnson & Associates, Johnson referring to Jamis
9 Johnson, he founded in some way or another, so I know
10 that he was an original partner. And to what extent
11 he -- and I have no idea how he lost it or got out of
12 running and managing the company or being a part of the
13 profit sharing. I have no idea how he I guess got out
14 of control.

15 Q. Aside from Mr. Orvis's statements that
16 Mr. Johnson was not a partner, do you have any other
17 reason to believe Mr. Johnson was not a partner in
18 these enterprises?

19 A. No, not offhand.

20 Q. Did Mr. Orvis, to your knowledge, have any
21 partners in these credit repair enterprises?

22 A. Yeah, he -- I was settled as partner and I
23 believe -- oh, gol. Sam Spendlove and Spence -- I
24 cannot remember his name.

25 Q. Bingham?

1 Did you -- during your employment with
2 Lexington at any time before or after '99, or during,
3 obviously, did you have any conversations with Jayson
4 Orvis with regard to his business relationship with
5 Jamis Johnson?

6 A. Yes.

7 Q. What did he say?

8 A. He said that basically that Jamis was a
9 partner in the firm, that he was getting certain
10 amounts of money from the firm.

11 Q. And when was it that he told you that?

12 A. I'd say it would have to be back in -- I
13 don't know the precise date. We talked numerous times.
14 I would say probably 2000, roughly.

15 Q. Did that testimony -- did that conversation,
16 did that position ever change? Did he ever tell you
17 anything about a change in that position?

18 A. No. As a matter of fact, we did talk a lot
19 about it when there was the confrontation between he
20 and Jamis.

21 Q. And when was?

22 A. That was around 2000.

23 Q. And what did you talk about with regards to
24 that?

25 A. The fact that we were supposed to not engage

1 A. The fact that the less profits we had at
2 Lexington, you know, the less money we got paid,
3 Mr. Johnson got paid.

4 Q. How did you have that understanding?

5 A. Because I was told that by Mr. Orvis in
6 conversations.

7 Q. And when did those conversations take place?

8 A. They took place periodically around the time
9 of the move, which was about the latter part of 2000.

10 Q. And do you recall specifically what
11 Mr. Orvis told you with regard to the intent to shift
12 clients from Lexington to Johnson & Associates and the
13 effect that it would have on Jamis Johnson's payment?

14 MR. BOGART: Objection.

15 A. Not directly.

16 Q. You don't recall what he said?

17 A. I don't recall.

18 Q. That was just the understanding you had had
19 from the conversations?

20 A. Yes.

21 Q. Is it possible that you might have
22 misunderstood what Mr. Orvis was intending with that
23 shifting of clients?

24 A. Yes.

25 MR. ATKIN: Take a few minutes break.

1 that they're pretty vague in general. The regulations,
2 telemarketing and Internet regulations on how to sign
3 up clients, retain clients, and represent them were a
4 little unclear and that they were able to clarify them.
5 And he said it actually turned out to be in their
6 favor.

7 That's the extent which I know. I know that
8 the suit was against Jamis Johnson, that it was his --
9 his I guess you'd say butt on the line that was kind of
10 under fire. And that's one of the things that he did
11 mention when he was always cutting a check to Jamis
12 Johnson. It was one of the things he would mention,
13 Jamis did put in -- he did stick out his neck a little
14 bit for the company and because of the lawsuit and
15 that, you know, there was -- because there was the
16 threat of worst case scenario, there was the threat of
17 him being disbarred and things. So in that sense he
18 said that was one of his motivations for giving him the
19 monthly check of, you know, 30 thousand.

20 Q. These conversations you had with Mr. Orvis
21 regarding the Tennessee litigation, did Mr. Orvis ever
22 tell you that the litigation concerned only Mr. Johnson
23 and did not concern Johnson & Associates or Lexington
24 Law Firm?

25 A. No. Well, he could have. I don't know. I

1 Q. Was that the only meeting you sat in on with
2 between Mr. Orvis and Mr. Lawrence?

3 A. I believe so.

4 Q. In that meeting was there any discussion of
5 Mr. Johnson?

6 A. Yes.

7 Q. What was the discussion with respect to
8 Mr. Johnson?

9 MR. ATKIN: Objection, lacks foundation.

10 A. Nothing that -- nothing specific I can
11 recall. They were upset at him because of some of the
12 things that were done, and there were a few like
13 derogatory comments made but nothing -- nothing --
14 nothing specific that I can think of.

15 Q. Whether at this meeting or in some telephone
16 conference or otherwise, do you recall any discussions
17 to which you were present between Mr. Orvis and
18 Mr. Lawrence regarding removal of Mr. Johnson from
19 Johnson & Associates or Lexington Law Firms?

20 A. It was my understanding that when I came to
21 work for Jayson that Jamis Johnson was already removed
22 from the companies.

23 Q. Were there any discussions to which you were
24 present regarding -- between Mr. Orvis and Mr. Lawrence
25 regarding means to exert pressure on Mr. Johnson or

1 prevent him from filing the lawsuit?

2 A. Well, there was the monthly payment. I
3 mean, Jayson told me, I don't know if he ever said this
4 to Jamis, but he said to me that if Jamis ever, you
5 know, got teeth and tried to bite he would just stop
6 sending the checks, and he would use that money to hire
7 the best attorney he could and fight him back. I don't
8 know if he ever said that to Jamis. I would assume he
9 would as a means to keep Jamis at bay, but I don't ever
10 recall him ever saying that to him.

11 Q. Do you recall any discussions with Mr. Orvis
12 regarding any judgments, legal judgments against
13 Mr. Johnson?

14 A. Oh, yeah. Yeah, that was in that
15 conversation, too.

16 Q. That conversation?

17 A. The conversation that Victor had with Jayson
18 Orvis.

19 Q. That we discussed a little while ago?

20 A. Yeah, that was -- Jamis had some judgments
21 against him, and Jayson had come to Victor and asked
22 him if -- what, you know, he's like, can I buy these
23 against him. And Victor said to the effect that --
24 this is all Jayson recounting this to me. At one time
25 he said, well, you can, but you're pretty ruthless.

1 And so I believe Jayson went and bought those as sort
2 of another means to control Jamis.

3 Q. Why do you believe Mr. Orvis bought the
4 judgments?

5 MR. ATKIN: Objection, lacks foundation.

6 A. He was tired -- what I understood was that
7 he was tired of harassments and the constant
8 accusations that he got from Jamis Johnson.

9 Q. Maybe that question was phrased poorly. I'm
10 not asking what Mr. Orvis's motivation was. I'm
11 asking, you said you believe that Mr. Orvis actually
12 bought the judgments.

13 A. Oh, yes.

14 Q. And what I want to know is, why do you have
15 that belief?

16 A. I never actually saw any paperwork regarding
17 it, but I believe Jayson said it and I remember talking
18 to Jayson -- or Jamis on one occasion saying that
19 Jayson had -- that Jamis had found out from one means
20 or another that Jamis owned those -- Jayson owned those
21 or had attempted to own them or something like that,
22 and -- but I never saw any actual paperwork or anything
23 regarding that.

24 Q. So you didn't write the checks in connection
25 with that?

Exhibit 3

PAGE 21

21

1 you, as a partner, a ten percent Lexington person --
 2 A. Right.
 3 Q. -- would forego some money so that the
 4 Johnson & Associates side of things could make it
 5 financially?
 6 A. Right.
 7 Q. Did you ever get reimbursed for those --
 8 A. No.
 9 Q. -- checks?
 10 A. No.
 11 Q. No. Are you aware -- do you know who took
 12 the bulk of the funds out of Lexington Law Firms and out
 13 of Johnson & Associates?
 14 A. Jayson Orvis.
 15 Q. Jayson Orvis? What about Jamis Johnson?
 16 Was he also getting funds from both organizations?
 17 A. Yes.
 18 Q. How do you know this?
 19 A. We would sit and go over money and what it
 20 looked like, and I knew that you were receiving monies,
 21 and I had an idea what the percentages were.
 2 Q. You used the term profit share. What's your
 3 understanding of profit share?
 4 A. A certain percentage of the profits were put
 5 away from employees and for certain benefits for them.

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1 There was a portion set apart for the principals, what
 2 we called the principals, Jamis Johnson, Jayson Orvis
 3 and Griffin.
 4 Q. Okay.
 5 A. And if there was money after bills were paid
 6 each month, those amounts were split up and disbursed.
 7 Q. So it's your understanding that profit share
 8 came out after bills?
 9 A. Right.
 10 Q. Now, you left the organization, I think you
 11 said.
 12 Do you recall the date generally, the period
 13 of time?
 14 A. Probably would have been fall of '99.
 15 Q. Was the Tennessee case pending when you
 16 left, to your knowledge?
 17 A. Yes.
 18 Q. When you left, you wanted to be bought out,
 19 I think you said, your partnership bought out, and you
 20 sold it to a guy named Deon.
 21 Did anyone else offer to buy that from you?
 2 A. Yes.
 3 Q. Who?
 4 A. Jamis Johnson and Jayson Orvis.
 5 Q. Jayson Orvis offered to buy it, Jamis

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1 Johnson offered to buy it, and Deon Steckling offered to
 2 buy it?
 3 A. Yes.
 4 Q. Now, who is Deon Steckling?
 5 A. A friend of Jayson Orvis's.
 6 Q. What kind of friend? You mean an
 7 acquaintance?
 8 A. Yeah, at the time just an acquaintance.
 9 Q. Well, what is his job? Is he a credit
 10 repair guy?
 11 A. No. At the time he was just a friend of
 12 Jayson Orvis's.
 13 Q. I've heard the term "Impact." Do you know
 14 what that is?
 15 A. Yes.
 16 Q. Some sort of training for positive thinking
 17 and such things; is that correct?
 18 A. Experiential training, sort of a gestalt
 19 training.
 20 Q. Was he involved in running the Impact
 21 courses?
 22 A. Yes. He was one of the trainers at the
 23 Impact Institute.
 24 Q. Who owned it?
 25 A. My understanding is a man named Hans Berger.

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24

1 Q. Who owns it now?
 2 A. Hans Berger.
 3 Q. Now, Jayson was heavily involved in Impact,
 4 was he not?
 5 A. Yes.
 6 Q. And he had you take the training as well,
 7 did he not?
 8 A. Yes.
 9 Q. And he was a friend of Deon's from this
 10 experiential --
 11 A. Right.
 12 Q. -- this Impact training?
 13 A. Right.
 14 Q. When you were offered to be purchased, to be
 15 bought out, Jamis Johnson wanted to buy you out, you
 16 declined to sell it to him, or what happened?
 17 A. I didn't care who bought it. I just wanted
 18 out. I needed the money --
 19 Q. Okay.
 20 A. -- and he offered to buy it. Jayson Orvis
 21 offered to buy it, Jamis Johnson offered to buy it, but
 22 Jayson Orvis wouldn't allow -- said he would block the
 23 sale if I sold it to Jamis Johnson.
 24 Q. Did you call Jamis Johnson and inform him of
 25 that?

HEET 4 PAGE 25

25

A. Yes.

Q. And tell him that buying your interest would be a problem?

A. Yes.

Q. Was there also a representation that Jayson would manipulate the incomes of the businesses to prevent Jamis Johnson from making any monies?

A. Yes.

Q. What was it that Jayson said?

A. Basically that he would cut Jamis Johnson off if things got too ugly.

Q. Did he say anything about manipulating finances? In other words, see that there would be no return to Johnson because he controlled the monies?

A. Yes.

Q. Did you convey that to Jamis Johnson?

A. Yes.

Q. Did Jamis Johnson buy your interest?

A. No.

Q. And it was purchased by Jayson's friend, Deon?

A. Right. Jayson wanted a third party because he didn't want -- he wanted there to be more balance in the decision making processes.

Q. Okay. After this buyout and you left, did

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you talk with Jayson much?

A. Not really.

Q. Now --

A. From time to time.

Q. From time to time?

A. Yes.

Q. And currently have you renewed your acquaintanceship a little more in the last year or what?

A. I speak with him fairly often. I don't speak with him day-to-day like I used to.

Q. Sure. Have you heard from Jayson Orvis whether or not the Tennessee case was ever settled?

A. Yeah. He was told that it was.

Q. What did he tell you about that?

A. That there had been a favorable settlement reached and that the FTC was satisfied with any changes that had been made to the organization.

Q. Now, Jamis Johnson and Jayson Orvis, do you know what the nature of their relationship became after you left? Did you ever have discussions with Jayson Orvis about it?

A. Yes.

Q. Do you know what happened, and let me ask you this, first of all.

Do you know who Victor Lawrence is?

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A. Yes.

Q. Who is Victor Lawrence and when did you come to know him?

A. Mr. Lawrence is an attorney here in town that Jayson Orvis brought in to serve as another point of contact for clients.

Q. In Lexington, do you recall, was it uncommon from time to time for Johnson and Orvis to bring in three or four attorneys to sort of fill positions?

A. That was common.

Q. I mean, do you recall Doug Stoel, for example?

A. Doug Stowell, Jim Mickelson.

Q. Linda Smith?

A. Linda Smith.

Q. Victor Lawrence?

A. Victor Lawrence.

Q. And a few others from time to time?

A. Uh-huh (yes).

Q. Was Victor Lawrence brought in in that time?

A. Yes.

Q. Do you have any knowledge -- when you left, I guess I should say, was Johnson & Associates and Lexington Law Firms still functioning in this building?

A. Yes.

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Q. And essentially side by side, as it were?

A. Yes.

Q. Well, do you have any knowledge of what happened to the relationship between Orvis and Johnson, and, again, I would admonish you to keep in mind that you have to answer expansively and truthfully to the best of your knowledge.

Do you have any knowledge of how their relationship evolved after you left?

A. Yes. It was my understanding that Jayson Orvis was going to be working to remove Jamis Johnson's name from the organization, from any relationship to the organization, to protect the organization, because he felt that Jamis Johnson had some problems with the Bar and may not even be able to retain his law license and that he was a liability, that he would still honor his financial obligations to Jamis Johnson as long as Jamis Johnson didn't cause problems.

Q. Let me ask you this: So was it your understanding that Johnson would become passive, or would he still be active?

A. Yes, passive.

Q. Was there some sort of agreement that was entered into between Jayson and Johnson?

A. I believe so.

Exhibit 4

Jayson AUGUST 16, 2001

We need to deal with the following:

1. I need the figures for profit share splits for June and July. I didn't get them for either month.
2. This confirms that for the month of July the payment (for June's profit share) was reduced by \$23,000 because of my guarantee of the Paul Schewenke note.
3. You have stated to me that the bill for our Tennessee counsel has finally been paid up to date for the Tennessee litigation.
4. Re: Office payment. I have learned that you have not been paying the office rent due. Johnson and Associates always paid this. I haven't paid it. There is a demand for it and I need it paid. Kim has the full amount. I will need it reimbursed to me.
5. That raises the costs for the other rent. We've discussed it but it has not been resolved. I am going to move to new quarters. I will need the benefits that I was receiving before the operations moved. That includes phone, receptioning, office amenities (copying, fax, etc.). We have discussed this but never resolved it. Sam works out of the house now. I don't. I may also need temporary office space during the transition. I don't want to be at Johnson and Associates but I may lodge there for a month. I won't know for two weeks.
6. There are regulatory problems where I am hanging out still and I need assurance of continued protection. Bar complaints. The bar has responded to my former counsel regarding potential bar complaints you have against me. They are asking if I am self reporting. I have told Sam that I want all trust account checks. He says they are in your control, not his. I need all of them.
7. Accounting. For various reasons of which you are aware, we have come to the point where we need a full accounting for all business operations since our inception. I am prepared to engage the CPA firm to do this and I have

talked to one. The cost of this should be borne by the companies. If you won't pay for this then I will pay for this unless there are discrepancies in which case it will be paid for by the businesses. This review needs to be of all operations. I want to start this September 15. You have said you have put a controller in place so perhaps he is the first place to start. I suggest we meet with him. Incidentally I have learned that there is a debt settlement operation and I have never had any accounting for it. Steve Paige has also raised concerns about large amounts of money coming in that are being diverted out of our partnership arrangement. For these and all other reasons we need an accounting.

8. Regulatory problems. Regulatory problems still exist.
 - a. Div. Of Consumer Affairs: You called me on Friday May 25 to warn me about a former employee/attorney named Jan, no last name given. You indicated that there was a file a foot thick about me at the Div of Consumer Affairs at Utah and Jan had been contacted by them. You indicated that you had promised that I would not follow this up including contacting the Division or him because he was so upset about their inquiry and you would take care of this. I agreed to let you handle this for awhile but have heard nothing. This concerns me.
 - b. State of Tennessee/FTC. This is hanging and unresolved. I can't wait to get it resolved any further. You indicated two weeks ago that you had finally gotten our Tennessee counsel's bill paid current. That was why I was told that profit share was lower.
 - c. State Bar. This is unresolved. As you know you threatened to bring numerous bar complaints against me if we litigated including for the trust account problem that was already investigated by the bar for the trust account that was managed by you and Sam. The bar has responded to my former counsel but as yet not directly to me. I still don't have the checks from Sam or you. This needs to be investigated and settled.

9. I just got notice that my families health insurance has lapsed again for oversight from Trina I guess. I have kids all over the world and I immediately need that reinstated. I am having Kim call about that.

There are some other pending problems that I only have some notice of. There is my IRS obligation for Johnson and Associates that I was told was resolved finally but I have no data on that. We need to discuss these and several other matters. Obviously the big matter is the accounting.

As I have told you, I have been involved heavily in litigation and in this San Diego deal over the past several months as you run the operations but I am getting increasingly less info. I hope to have some relief shortly. However, we need to meet. There are obviously several other issues that I don't mention here. I would ask that we meet to catch up. If you want to bring your attorney along feel free. Please call Kim and set an appointment when I can be available or I will call you.

Jamis

P.S. You indicated and I also recall that I was to be paid more for time profit share (payment in John) but we haven't done that yet. \bar{V} .
Could you arrange that. Thx.

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * *

UNITED STATES OF AMERICA,)	
)	
Judgment Creditor,	)	Civil No. 2:95CV-838W
)	
vs.	)	Deposition of:
)	
JAMIS M. JOHNSON,	)	DANELL JOHNSON
)	
Judgment Debtor.)	

* * *

BE IT REMEMBERED that on the 18th day of May, 1999, the deposition of DANELL JOHNSON, produced as a witness herein at the instance of the Plaintiff in the above-entitled action now pending in the above-named court, was taken before Larene Pearce, a Certified Court Reporter and Notary Public in and for the State of Utah, commencing at the hour of 10:45 a.m. of said day at the offices of the Small Business Administration, 125 South State Street, Conference Room 2222, Salt Lake City, Utah.

ORIGINAL

Larene Pearce
License No.
22-104852-7801

INDEPENDENT REPORTING
& VIDEOGRAPHY

1220 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
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One-Source Court Reporting

A P P E A R A N C E S

For the Judgment Creditor: John S. Gygi
Special Assistant United States
Attorney
125 South State Street, Room 2237
Salt Lake City, Utah 84138

For the Witness: Victor Lawrence
220 South 200 East, Suite 300
Salt Lake City, Utah 84111

Also Present: Jamis M. Johnson

* * *

I N D E X

WITNESS

DANELL JOHNSON

EXAMINATION

PAGE

By Mr. Gygi	3
By Mr. Lawrence	25
By Mr. Gygi	36

EXHIBITS

No. 1	Johnson and Associates Profit and Loss	13
No. 2	Johnson and Associates 1996 U. S. Corporation Income Tax Return	15
No. 3	DaNell Johnson 1997 U. S. Individual Income Tax Return	15
No. 4	DaNell Johnson 1996 U. S. Individual Income Tax Return	15

1 MR. LAWRENCE: And we can get the papers to find out
2 who is on that now.

3 MR. GYGI: Okay.

4 Q (By Mr. Lawrence) But you know at one time you were
5 on the board?

6 A Oh, yeah.

7 Q But right now you think you still are on the board?

8 A I thought Jamis said something about the board
9 dissolving just in the conversation here.

10 MR. LAWRENCE: We'll go ahead and provide the current
11 status.

12 Q (By Mr. Lawrence) But right now you think you're on
13 the board?

14 A Oh, yeah.

15 Q In regard to the payments that you received from
16 Johnson and Associates and whatnot, initially didn't you
17 contribute -- I think you stated you contributed some carpet and
18 some furniture, right, when the business was first starting?

19 MR. JOHNSON: Computers.

20 Q (By Mr. Lawrence) Is that right?

21 A Yes.

22 Q Did you contribute any computers as well?

23 A Oh, yes.

24 Q Okay. When that business first started, it was just
25 a handful of friends and associates?

1 A Right.

2 Q Now that has somewhat blossomed, but you don't know
3 really what the company does now, is that correct?

4 A Yes, because it has expanded quite a bit.

5 Q In fact, aren't the funds that you received a profit
6 share that you receive?

7 A That's what I understood it to be, yes.

8 Q Are you being paid for anything else? Do you do any
9 type of consulting for Johnson and Associates right now?

10 A (Nodded no.)

11 Q You have to answer audibly.

12 A I'm sorry.

13 Q Do you do any consulting for Johnson and Associates?

14 A No.

15 Q Do you do any consulting for Lexington Law firms?

16 A No.

17 Q You may sit on the board and you may receive a
18 compensation for that, but you are aware that you receive a
19 compensation in some type of profit sharing arrangement, is that
20 correct?

21 A That's right.

22 Q And if Johnson and Associates has something to that
23 effect, you can go ahead or I can get that for you and turn that
24 over to Mr. Gygi?

25 A Okay.

Exhibit 6

Honorable Timothy R. Hanson

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Jayson Orvis is the Plaintiff in this Declaratory Judgment action against the Defendant Jamis Johnson. Plaintiff seeks, in this action, a judgment declaring that the Defendant has no right, title or interest relative to any business or venture in which Plaintiff has any ownership interest relating to the credit repair business; any real or personal property or other assets relative to such businesses or ventures; or any proceeds or profits relative to such businesses or ventures.

2. Mr. Johnson was sued by the Small Business Administration and judgment was entered against him in that case on September 29, 1997. Exhibit 4 to Affidavit of Jayson Orvis.

3. In post-judgment supplemental proceedings for collection purposes, Mr. Johnson was deposed by the Small Business Administration. In that deposition, Mr. Johnson categorically testified that he had no interest in or relationship with any partnership or limited liability company, including Lexington Law Firm:

Lexington Law Firm, Victor Lawrence and another attorney have taken over all of that. I've indemnified them, they have indemnified me. I've resigned from any relationship. . . . Lexington Law Firm[] was in my name, but since that time and with my bar problem, I have completely relinquished any interest. They paid me a little, made my payment, and I resigned. Now, it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating now without me.

Deposition of Jamis Johnson, November 17, 1999, Exhibit 5 to Affidavit of Jayson Orvis, at 23:6-24:10.

4. Defendant Johnson also testified before the SBA that he did not have any interest in any partnership or limited liability company: "Q. Do you have any interest in any partnership? A. No." "Q. Any interest in any limited liability companies? A. No." Deposition of Jamis Johnson, November 17, 1999, Exhibit 6 to Affidavit of Jayson Orvis, at 30:16-31:4.

ARGUMENT

The Court should enter judgment in favor of the Plaintiff Mr. Orvis and against the Defendant Mr. Johnson, declaring that Mr. Johnson has no claim to or interest in any credit repair business entity or enterprise of the Plaintiff. The Court should enter that Declaratory Judgment on the single ground of judicial estoppel.

In testimony before the Small Business Administration, Mr. Johnson, under oath, completely disavowed any interest, partnership or otherwise, in the credit repair business of Mr. Orvis. Before this Court, he now claims an interest in such business.¹ Judicial estoppel will not allow Mr. Johnson to contradict his testimony before the Small Business Administration and, accordingly, his current claim to an interest in Mr. Orvis's business must fail.

¹To decide the case on grounds of judicial estoppel, it is not necessary to determine on what (apparently shifting) basis Mr. Johnson rests his claim to interest in Mr. Orvis's credit repair business.

The doctrine of judicial estoppel first made its appearance in 1857 in a case before the Tennessee Supreme Court. See Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 1857 WL 2547 (1857).² The facts there are instructive. Plaintiff Hamilton alleged that for several years he had been a secret partner of defendant Zimmerman in a drug store;³ Zimmerman claimed that Hamilton was only a store clerk. In deciding the case, the court pointed to pleadings from an earlier action wherein Hamilton had testified that allegations describing Hamilton as a store clerk were "substantially true." 1857 WL at *4. The Tennessee Supreme Court held that Hamilton's answer was an implicit admission, under oath, that he was a clerk in the employ of Zimmerman, and that this answer estopped Hamilton from asserting in the case before the court that he and Zimmerman were partners:

This is at least an implied admission of the truth of the statement of Zimmerman - that Hamilton was merely his clerk. And for all the purposes of this present bill, the admission must be taken as true, without enquiring whether, as a matter of fact, it be so or not. The law, as against the complainant presumes that it is true

Id. The court explained the policy behind the judicial estoppel doctrine:

This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act according

²Mr. Orvis attaches a copy of this case for the Court's convenience.

³As the court found, Hamilton was a secret partner because, "as against his creditors, it was a matter of absolute necessity to conceal his true relation to the business as partner" 1857 WL at *2.

to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. And this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.

Id. (emphases added).

While the Supreme Court of Tennessee was the first court to apply the doctrine of judicial estoppel, it certainly has not been the last. Utah courts have adopted the doctrine, and courts throughout the country regularly apply it to prevent litigants from doing precisely what Mr. Johnson attempts to do here, that is, to engage the judicial system in a farce and a fraud. These courts have used a variety of colorful metaphors to describe judicial estoppel, "characterizing it as a rule against "'playing 'fast and loose with the courts,'" 'blowing hot and cold as the occasion demands,' or 'hav[ing] [one's] cake and eat[ing] it too.'" Reynolds v. Commissioner of Internal Revenue, 861 F.2d 469, 472 (6th Cir. 1988) (internal cites omitted; alteration in original).⁴ But however described, the purpose of the doctrine is, as the Supreme Court of Utah has explained, "to uphold the sanctity of oaths, thereby safeguarding the integrity of the judicial

⁴As the court in Reynolds observed: "Emerson's dictum that 'a foolish consistency is the hobgoblin of little minds' cuts no ice in this context." 861 F.2d at 472-73.

process from conduct such as knowing misrepresentations or fraud on the court." Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995).

The doctrine of judicial estoppel, unlike equitable estoppel, focuses solely "on the relationship between the litigant and the judicial system, and seeks to preserve the integrity of the system."⁵ Delgrosso v. Spang & Co., 903 F.2d 234, 241 (3d Cir. 1990); see also Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996) ("[J]udicial estoppel is designed to protect the integrity of the courts rather than any interests of the litigants."); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988) ("Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties . . .").⁶

Indeed, the Supreme Court of Wyoming has held that a court may raise and apply the issue of judicial estoppel *sua sponte* and for the first time on appeal:

We are not a bit concerned that the matter of judicial estoppel was not raised in the lower court or argued by either of the parties. This court has general superintending control over all the courts of the state and the Wyoming judicial system in general. It is our duty to protect its integrity and prohibit dealing lightly with its proceedings. We are at liberty to decide a case upon any point which in our opinion the ends of justice require, particularly on a point so fundamental that we must take cognizance of it.

⁵"[E]quitable estoppel . . . focuses on the relationship between the parties" Delgrosso, 903 F.2d at 241.

⁶For this reason, Mr. Orvis and his relationship to Mr. Johnson are entirely irrelevant to the inquiry here.

Allen v. Allen, 550 P.2d 1137, 1142 (Wyo. 1976). The facts of Allen are also instructive. There, the defendant had testified in divorce proceedings against his wife that he owned a parcel of land in name only and therefore did not have an interest in it. Later, in a dispute over the ownership of the land between the putative owner (the defendant's father) and the defendant, the defendant argued that he did in fact own the land. The Supreme Court of Wyoming emphatically denied the defendant's claim:

[I]t would be highly inequitable for the defendant to have a decree in his divorce case holding the property not to be his and at the same time to be held the owner of an interest in this proceeding. It is that very inconsistency that judicial estoppel will not tolerate. Defendant's statements in the previous action are the very highest order of evidence against him and are entitled to judicial sanctity. He cannot play hanky-panky with the courts of this state and thus interfere with the integrity of the judicial system.

Id. (emphasis added).

The reasoning of Allen applies with full force here. Mr. Johnson has lied - either, under oath, before the United States government in the form of the Small Business Administration or, under oath, before this Court. Judicial estoppel exists to "raise[] the cost of [such] lying." Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993). The cost to Mr. Johnson is that he must be held to his testimony before the Small Business Administration. To this end, this Court should declare, on grounds of judicial estoppel, that Mr. Johnson has no claim to or interest in any credit repair

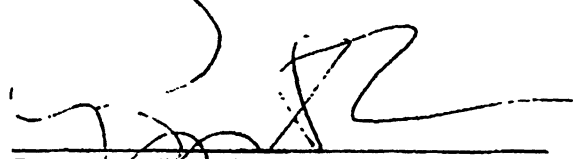
business entity or enterprise of Mr. Orvis, and enter a judgment in favor of the Plaintiff on his Declaratory Judgment claim.

CONCLUSION

Based on the foregoing, the Court should grant Plaintiff's Motion for Summary Judgment and enter judgment in favor of Plaintiff on his Declaratory Judgment claim.

DATED: March 30, 2004.

BERMAN, TOMSIC & SAVAGE



Peggy A. Tomsic, Esq.
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Attorneys for Plaintiff and Third-Party
Defendant Jayson Orvis

CERTIFICATE OF MAILING

I hereby certify that on March 30, 2004, I caused a true and correct copy of
MEMORANDUM IN SUPPORT OF PLAINTIFF JAYSON ORVIS'S MOTION FOR
SUMMARY JUDGMENT to be mailed, postage prepaid, to the following:

Jamis M. Johnson
Johnson & Associates
352 South Denver Street
#304
Salt Lake City, UT 84111

Blake S. Atkin
Atkin & Hawkins
136 South Main Street, #610
Salt Lake City, Utah 84101
Attorney for Third Party Defendants

Brenda Hiltcrease

P

Supreme Court of Tennessee.

M. HAMILTON
 v.
 JOHN M. ZIMMERMAN.

December Term, 1857.

West Headnotes

Estoppel ⚡3(3)
 156k3(3) Most Cited Cases

Where the complainant in a bill against his alleged partner for a settlement of partnership accounts, declared himself a secret partner in the concern, and entitled to half the profits thereof, which the defendant denied, alleging that the complainant was, during the whole time, only a salaried clerk; and it appeared in proof, that in some collateral litigation in which both parties were defendants, that the defendant, in his answer, among other things, averred that the complainant was his clerk--and the complainant in his answer admitted that the facts stated in defendant's answer were substantially true; it is held in a case where the proof is conflicting and irreconcilable, and in the absence of any satisfactory explanation of said admission, that the complainant is thereby estopped from denying that he was a clerk as charged.

Estoppel ⚡5
 156k5 Most Cited Cases

Estoppel ⚡88(1)
 156k88(1) Most Cited Cases

Evidence ⚡205(1)
 157k205(1) Most Cited Cases

While admissions or declarations made in pais are often entitled to little or no consideration, because made inconsiderately or in ignorance of the facts, or not correctly understood or reported; yet, the

doctrine of estoppel applies with peculiar force, to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. But in either case, if it satisfactorily appear that the party made such admissions inconsiderately or without full knowledge of the facts, it is proper that the court should relieve him from the consequences of his error.

Estoppel ⚡52(2)
 156k52(2) Most Cited Cases

The doctrine of estoppel has its foundation in the obligation under which every man is placed, to speak and act, according to the truth of the case; and in the policy of the law to suppress the mischief which would arise from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which, by their solemn and deliberate acts, they have declared to be true.

Evidence ⚡596(1)
 157k596(1) Most Cited Cases

Pretrial Procedure ⚡552
 307Ak552 Most Cited Cases

It is a rule of practice alike applicable in equity as at law, that the party who asserts a claim or right against another, must establish such claim or right, by competent and satisfactory proof; and the test of what is satisfactory proof, is the sufficiency of the evidence to satisfy the mind of the probable truth of the fact alleged, upon which the right is grounded. If unable to do so, the court cannot do otherwise than dismiss his suit.

Exemptions ⚡15
 163k15 Most Cited Cases

Husband and Wife ⚡4
 205k4 Most Cited Cases

Child Support ⚡24
 76Ek24 Most Cited Cases
 (Formerly 285k3.1(2))

The debtor is under a positive obligation in law as well as morals, to support and maintain his wife and infant children. This is his first and most imperative duty. But while this is so, and while he will be countenanced by the law in its proper discharge, he cannot make it the pretext for covering up and protecting from the just claims of creditors, any surplus fund accruing from his labor or vocation, whatever it may be.

FROM DAVIDSON.

*1 The complainant filed this bill in the chancery court at Nashville, for a settlement of partnership accounts between himself and the defendant, with whom he claims to have been a secret partner in the business of druggist. The facts are fully given in the opinion. At the November term, 1857, Chancellor Frierson, rendered a decree for the complainant. The defendant appealed.

E. H. Swing and W. F. Cooper, for the complainant; John Trimble and Foster, for the defendant.

McKinney, J., delivered the opinion of the court.

This was a bill for a partnership account. The complainant alleges that, for several years, he was a secret partner with the defendant in a drug store in the city of Nashville, carried on in the name of J. M. Zimmerman, under a verbal agreement between them, to share equally the profits of the business. The fact of partnership is expressly denied by the defendant. To establish his interest as a partner in the concern, the complainant relies on the oral admission of the defendant, made to various persons, at different periods during the continuance of the alleged partnership. And to show that such was not the fact, and that the complainant's only connection with the business was in the capacity of clerk, in the employ of defendant, resort is had to the same sort evidence, namely, the verbal declarations of the complainant, often repeated, to the effect that he was not a partner with defendant in the business, but simply a salaried clerk; and, in addition, the defendant relies upon the complainant's implied admission in a more solemn form, contained in his answer to a bill in chancery, to disprove the allegation of the present bill. It seems, from the allegations and proof in the cause,

that on the 18th of November, 1850, McNairy & Hamilton, druggists, of Nashville (the firm consisting of the complainant, M. Hamilton, and W. H. McNairy), being about to fail, sold and transferred their stock to the defendant, Zimmerman, who executed his several notes for the consideration agreed to be paid payable in future installments which notes were transferred by McNairy & Hamilton to N. A. McNairy, as collateral security, to indemnify him on account of his liabilities for the firm of McNairy & Hamilton.

The bill, in substance, charges that about the time of the sale by McNairy & Hamilton to Zimmerman, the complainant, reduced to poverty by the failure of said firm, and deprived of the means of support for his family, proposed to Zimmerman, who was comparatively a stranger in Nashville, that he, the complainant, who was familiar with the business, and had an extensive acquaintance in the community, would, as a secret partner, join with the former in the purchase of the said stock of drugs and medicines from McNairy & Hamilton, and in carrying on said business in Nashville, upon the terms that they should equally share the profits of the business. To this proposition, as the bill alleges, Zimmerman readily assented. The bill further states, in substance, that, being insolvent, and looking to his interest in the profits of this new business as the only means of furnishing a support for his increasing family, "it was absolutely necessary that his (complainant's) connection with Zimmerman in the purchase should be kept secret, otherwise the whole object had in view might at any moment be defeated. Accordingly the fact was not made known to the public," and complainant "went into the new business, ostensibly, as clerk, and so held himself out to the world," etc. But that in reality he was a full and equal partner in the business, and so continued up to some time in 1856, when Zimmerman sold out the entire establishment, and denied that complainant had any interest as partner in the same, or any right to a share of the profits. The bill alleges that the complainant withdrew from the concern upwards of \$4,000, and the defendant nearly \$8,000; and that after this deduction, and an adjustment of all the liabilities of the concern, there remains a balance of clear profits of from \$10,000 to \$14,000 to be divided; and to one-half of which, complainant, by the agreement, is entitled.

*2 The answer denies, in strong terms, the

existence of any agreement or understanding that Hamilton was to have any interest, or that he ever had any interest, as partner, in the purchase of the stock of drugs and medicines, or in the business carried on by the defendant, and positively asserts that he was merely employed and taken into the store as clerk, in the early part of the year 1852; and that he remained, and served in that capacity alone, until in 1856, when defendant sold out the establishment; and that the money stated to have been drawn from the concern by the complainant was received as compensation for his services as clerk, and not otherwise.

This is an extraordinary case. The solemn asseverations of the parties in the bill and answer--both of which are sworn to--are positively contradicted and disproved by the previous repeated declarations of the parties. It is satisfactorily proved that the defendant, on different occasions, during the continuance of the business, distinctly admitted the interest of complainant as a partner, and that, as such, he was entitled to a share of the profits. And, on the other hand, it is as fully established that the complainant denied more frequently, perhaps, that he had any interest whatever as partner; and asserted that he was merely a clerk, receiving a salary for his services.

Perhaps no case of conflicting evidence, of more difficult solution than the present, can be imagined, if we look merely to the oral admissions and declarations of the parties. It is impossible to reconcile the statements of the parties with each other; and it is no less impossible to reconcile the statements of either, made prior to this suit, with his own allegations in the pleadings. The attempt to do so would be alike painful and fruitless. If there were nothing more in the case, we should feel driven to the necessity of resorting to the principle, alike applicable in equity as at law, that the party asserting a claim or right against another must establish such claim or right by competent and satisfactory proof; and the test of what is satisfactory proof is the sufficiency of the evidence to satisfy the mind of the probable truth of the fact alleged, upon which the party grounds his right. If unable to do this, the judicial tribunal appealed to cannot do otherwise than dismiss his suit. But it has been argued for the complainant, with great ingenuity, that the supposed inconsistency of his previous declarations with the sworn statement of

the bill is apparent rather than real; that such declarations are entitled to no force, and should not be permitted to prejudice his rights, because they are shown to be compatible with the intention of the parties, and the end to be accomplished--which was to secure the means of support for himself and family; and that, to effect this end as against his creditors, it was a matter of absolute necessity to conceal his true relation to the business as partner, and to hold him out to the public in the relation of clerk merely.

*3 This argument involves a conclusion as hard to be maintained, perhaps, in law, as in sound casuistry.

We fully assent to the correctness of the position assumed by the counsel for the complainant, that since the abolishment of the arrest or imprisonment of the body of a debtor the creditor has no more power over the person than over the will of his debtor. He cannot be heard to insist that his debtor shall apply himself to labor, either of mind or body, so as thereby from his daily earnings to accumulate a fund for the benefit of creditors. In law-- however it may be in morals--the debtor may resign himself to hopeless and endless want, or he may limit his exertions to just such an extent as may be adequate to furnish him the means of a scanty subsistence; and in all this he violates no legal right of his creditor. And, for the same reason, it would seem that he might in favor of his wife and children create a sort of lien, so to speak, upon the earnings of his daily labor, for their maintenance, in defiance of creditors. And this might be blameless in morals as well as in law, under some circumstances.

The debtor is certainly under a moral obligation to use all reasonable exertions to satisfy the just claims of creditors; but he is under a positive obligation, in law as well as morals, to support and maintain his wife and infant children. This is his first and most imperative duty. But while this is so, and while he will be countenanced by the law in its proper discharge, he cannot make it the pretext for covering up and protecting from the just claims of creditors any surplus fund accruing from his labor or vocation, whatever it may be. He has an election to labor or not, as he may please, with which the law will not interfere so long as he keeps himself from without the scope and operation of such police regulations as, in the economy of every

5 Sneed (TN) 39
(Cite as: 1857 WL 2547 (Tenn.))

well-ordered state, are deemed necessary. But beyond the necessary wants of his family there is a limit which the law will not allow him to transcend. He cannot treasure up a fund, no matter from what source derived, and claim that it shall be protected for the benefit of himself or family, against the demands of creditors.

If the foregoing reasoning be correct, there existed no sufficient reason for concealment of the truth, or representation of an untruth, if nothing more were contemplated by the complainant's connection with the business than to obtain the means of an adequate support for his family; and if more than this was intended, and the concealment was a mere subterfuge, such intention must be regarded as a meditated fraud upon creditors. And from the complainant's own showing it is somewhat difficult to escape the latter conclusion; for, after \$4,000, or upwards, had been received by him, which was about \$1,000 a year, during the period he remained in the store, and double that sum had been withdrawn by the defendant, there still remained a neat balance of from \$10,000 to \$14,000 profits to be equally divided, upon the assumption of the bill.

*4 In this view, the argument denying the complainant a status in a court of equity is plausible, to say no more of it. We do not, however, rest the decision of the case upon this ground alone, but mainly upon a different one. It has been already stated that the notes executed by Zimmerman to McNairy & Hamilton were transferred for the indemnity of N. A. McNairy. And the complainant in his bill alleges that on the 13th of March, 1852, he and his former partner, to whom said notes were made, together with the personal representative of N. A. McNairy, filed a bill against Zimmerman to enforce the specific execution of the contract between the parties, and to have his stock of drugs, medicines, etc., attached, for the purpose of discharging said notes, upon the express allegations that Zimmerman had failed to meet the payment of some of said notes, and that he had declared freely his design to leave the state, and had offered to sell out his entire establishment with a view of doing so, and other charges of like import.

Zimmerman, in his answer to that bill, after an express denial of all the charges against him, made the following statement: "Resp't, by way of showing the great injustice done him by the charges in the

bill, states that, at the time this bill was filed, one of the complainants in the bill" (meaning Hamilton) "was then in the house of resp't as clerk, and had full knowledge of the whole business of resp't, and knew perfectly well that the debts resp't owed the firm of McNairy & Hamilton were perfectly good," etc. At the same time, Zimmerman filed a cross-bill, to obtain a credit for certain claims alleged to be due from McNairy & Hamilton to him.

And in his answer to said cross-bill, Hamilton, the present complainant, states, "that he has read carefully the answer of Zimmerman, and also his bill, and believes that the allegations in said answer and bill are substantially true."

This is at least an implied admission of the truth of the statement of Zimmerman--that Hamilton was merely his clerk. And for all the purposes of the present bill, the admission must be taken as true, without enquiring whether, as a matter of fact, it be so or not. The law, as against the complainant, presumes that it is true; and this presumption proceeds upon the doctrine of estoppel, which, from motives of public policy or expediency, will not, in some instances, suffer a man to contradict or gainsay what, under particular circumstances, he may have previously said or done. This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. And this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.

*5 Admissions or declarations made in pais are often entitled to little or no consideration, because made inconsiderately or in ignorance of the facts, or not correctly understood or reported. And even when made with more deliberation, and under oath, it may be made to appear that they were made inconsiderately or by mistake; and if this be so, the party ought certainly to be relieved from the consequences of his error.

In the present instance no explanation is given of the admission, either in the bill or in the proof. And it is vain to attempt to evade its force by saying that the statement was an immaterial matter in the former suit, and therefore not likely to have challenged the attention of Hamilton, or to have been one of the "allegations" the truth of which he intended to admit. As a matter of law, the statement may have been of no importance in that cause; but as a matter of fact, from the obvious import of the statement, it was material to Hamilton, if the truth were otherwise.

There are other inferences arising from the fact of filing the former bill, and from the allegations made, and the relief sought thereby, which, unexplained as they are, cannot fail to prejudice the complainant's right to bring the present bill. But we leave the case, resting its determination mainly upon the legal principle that the complainant is precluded by his admission, without undertaking to adjudge how the truth of the matter really is.

The entire costs of the cause will be equally divided between the parties.

Decree reversed, and bill dismissed.

37 Tenn. 39, 5 Sneed (TN) 39. 1857 WL 2547 (Tenn.)

END OF DOCUMENT

Peggy A. Tomsic (3879)
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50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: (801) 328-2200

Attorneys for Plaintiff and Third Party
Defendant, Jayson Orvis

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAYSON ORVIS,)	
)	
Plaintiff,	)	AFFIDAVIT OF JAYSON ORVIS
)	
vs.)	
	)	Case No. 010907449
JAMIS JOHNSON,)	
)	
Defendant.	)	Honorable Timothy R. Hanson
)	
_____)	
JAMIS JOHNSON,)	
)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
JAYSON ORVIS, SAM SPENDLOVE,)	
DEON STECKLING, VICTOR)	
LAWRENCE, and JOHN DOES 1-15,)	
)	
Third-Party Defendants.)	
_____)	

Jayson Orvis, being first duly sworn, states as follows:

1. I am the plaintiff in this Declaratory Judgment action against the defendant Jamis Johnson. I am seeking, in this action, a judgment declaring that the defendant has no right, title or interest relative to any business or venture in which I have any ownership interest relating to the credit repair business; any real or personal property or other assets relative to such businesses or ventures; or any proceeds or profits relative to such businesses or ventures.

2. I have been involved in businesses relating to credit repair since at least 1993. As a result of my involvement with credit repair businesses, I have up until the present designed and licensed software, trademarks, trade names and processes used in credit repair businesses through various entities which I have created and in which I own an interest.

3. In addition to owning and licensing intellectual property and processes used in the credit repair business, I also provide expert consulting and services to companies and law firms that are engaged in the credit repair business.

4. I first became acquainted with the defendant Jamis Johnson in approximately 1994, as a result of my association with a now-defunct credit repair marketing entity. In approximately January of 1995, I assisted Mr. Johnson in setting up the business processes, software and marketing for a credit repair law firm owned solely at the time by Mr. Johnson, who was at the time an attorney. This law firm

adopted the name Lexington Law Firm. In early 1996, I assisted Mr. Johnson in establishing J&A, which was formed to act as the "fulfillment" department, that is, the department where the actual credit repair work was done for Lexington. I developed and owned intellectual property and processes that I licensed to Lexington and J&A and that were utilized by the defendant to provide credit repair services to his clients. Defendant Johnson had no involvement in the development, improvement or ownership of any of the intellectual property or processes. Defendant Johnson's role and interest in the credit repair business was limited to his ownership of the law firm and J&A, and his position as directing lawyer responsible for supervising the actual legal work being done by employee non-attorneys.

5. In April of 1997, defendant Johnson and I formalized our agreement with regard to the defendant's utilization of the intellectual property and processes that I had developed and owned. That agreement simply reflected in writing the status of our respective ownership rights and business relationship prior to that time and after that time. In that agreement, the defendant also relinquished any possible claim to the trade name, Lexington Law Firm, and assigned such to me. A copy of this agreement is attached as Exhibit 1.

6. Sometime after April of 1997 and before May of 1999, I entered into a written agreement with the defendant memorializing our working relationship and verbal agreements and clarifying that the defendant would continue to be compensated

in a manner consistent with previous compensation as long as he served as and performed the duties of the directing attorney of Lexington/J&A. At the same time, I was actively providing my credit repair consulting services, properties, marketing and software to other credit repair firms and companies, to the full knowledge of Mr. Johnson, and without any compensation flowing to him as a result of these activities, outside of Lexington. Our understanding at the time we executed this agreement was that the defendant was and would be compensated for performing his duties as directing attorney for Lexington and J&A alone and that Mr. Johnson did not have an interest in any business endeavor of mine other than that of the law firm owned and supervised by Mr. Johnson. That agreement is attached as Exhibit 2.

7. Sometime in late 1998 or early 1999, the Utah State Bar filed a disciplinary action against the defendant for conduct predating and unrelated to his involvement with Lexington or J&A. That action eventually led to the defendant being disbarred as a lawyer in Utah.

8. As a result of defendant Johnson's troubles with the Utah State Bar, defendant Johnson could no longer perform his duties and obligations as the directing attorney. He therefore transferred all his credit repair clients to attorney Victor Lawrence who assumed and continues to perform credit repair-type legal services utilizing my processes, software, marketing and consulting services. A copy of this agreement is attached as Exhibit 3.

9. The defendant had no right, title, interest or involvement with Lexington or J&A or relative to any of my businesses or ventures relating to credit repair after he was disbarred, resigned his position as directing attorney and transferred the Lexington credit repair law clients to Mr. Lawrence on May 21, 1999. After that date, Mr. Johnson had no managerial, financial, or other involvement with Lexington or J&A.

10. When the defendant was disbarred and transferred his credit repair clients to Victor Lawrence, I had become aware that, in addition to problems with the Utah State Bar, the defendant was having problems with a number of creditors. The defendant, contrary to our agreement, began to make demands and claims relative to my businesses. I made it clear to the defendant that all obligations had been fulfilled to the defendant and that our business relationship had been terminated by his actions. However, because we were friends at that time and to avoid any further problems, I told the defendant that, at my discretion and as long as he did not serve as a nuisance, I would pay him an amount on a monthly basis based on my own subjective decision. I made it clear to the defendant, however, that I had no obligation or duty and he had no right relative to any further payments or compensation.

11. Defendant Johnson was sued by the Small Business Administration ("SBA"), and judgment was entered against him in that case on September 29, 1997. This judgment is attached as Exhibit 4.

12. In post-judgment supplemental proceedings for collection purposes, defendant Johnson was deposed by the SBA. In that deposition, the defendant categorically testified that he had no interest in or relationship with any partnership or limited liability company, including Lexington Law Firm:

A: Lexington Law Firm, Victor Lawrence and another attorney have taken over all of that. I've indemnified them, they have indemnified me. I've resigned from any relationship. . . . Lexington Law Firm was in my name, but since that time and with my bar problem, I have completely relinquished any interest. They paid me a little, made my payment, and I resigned. Now, it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating now without me.

Exhibit 5, Deposition of Jamis Johnson, November 17, 1999 at 23:6-24:10.

Q: Do you have any interest in any partnership?

A: No.

Q: Any interest in any limited liability companies?

A: No.


Exhibit 6, Deposition of Jamis Johnson, November 17, 1999 at 30:16-31:4.

13. I was never deposed by the SBA nor have I had any interaction with it.

14. I have never agreed, reached any understanding, or made any commitment which was intended to or in fact defrauded any creditor of the defendant, including the SBA. I have never agreed, reached any understanding or made any commitment that was intended to conceal or transfer or concealed or transferred any

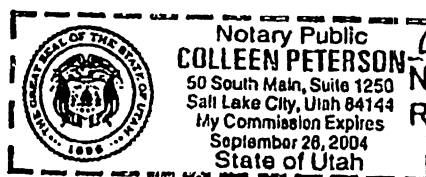
asset of the defendant from any creditor of defendant, including the SBA, nor would I have ever had a reason to do so.

DATED: March 31, 2004.



Jayson Orvis

SUBSCRIBED and sworn to before me this 31 day of March, 2004.





Notary Public

Residing at:

Salt Lake County

CERTIFICATE OF MAILING

I hereby certify that on March 31, 2004, I caused a true and correct copy
of AFFIDAVIT OF JAYSON ORVIS to be mailed, postage prepaid, to the following:

Jamis M. Johnson
Johnson & Associates
352 South Denver Street
#304
Salt Lake City, UT 84111

Blake S. Atkin
Atkin & Hawkins
136 South Main Street, #610
Salt Lake City, Utah 84101
Attorney for Third Party Defendants

Brenda Gilcrease

Exhibit 7

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

-oOo-

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	Case No. 2:95-cv-838W
)	
vs.	)	Deposition of:
	)	JAMIS M. JOHNSON
JAMIS M. JOHNSON,)	
)	
Defendant.)	

-oOo-

BE IT REMEMBERED that on the 17th day of November, 1999, the deposition of JAMIS M. JOHNSON, produced as a witness herein at the instance of the Plaintiff, in the above-entitled action now pending in the above-named court, was taken before Jerry Martin, Registered Professional Reporter and Notary Public in and for the State of Utah, commencing at the hour of 11:00 a.m. of said day at the Federal Building, 125 South State Street, Room 2231, Salt Lake City, Utah

ORIGINAL

1 Q. Are you a member of D.M. Johnson &
2 Associates, LLC?

3 A. No.

4 Q. Now, your wife previously provided tax
5 returns for D.M. Johnson, LLC, and it shows you as a
6 50 percent owner.

7 A. I think what it showed -- I don't think
8 it showed me as a 50 percent owner.

9 Q. That's what the schedule K-1 shows.

10 A. What happens is they -- you would have to
11 ask my tax preparer -- they take an LLC, and if
12 you've had income they allocate that income, and you
13 pay taxes personally on whatever flows through, and
14 I'm not listed as a member of D.M. Johnson, LLC.
15 There are two other members. I have done some work
16 that I have billed D.M. Johnson for. But it's just a
17 standard LLC. It's --

18 Q. I understand how an LLC works, and I
19 understand tax returns for LLCs. For 1996 and 1997
20 the LLC shows they gave you Schedule K-1. They gave
21 you K-1 returns as a 50 percent owner, allocating
22 income and losses. Is that inaccurate?

23 A. No. They allocated the income and
24 losses, but I'm not an owner.

25 Q. But you're getting 50 percent of the

1 Q. When is your tax preparer supposed to
2 have your 1998 returns done?

3 A. Well, he should have them done now. In
4 October we discussed that he was missing a couple of
5 items. I actually got those items, and I think
6 really within the next 30 days I should have them
7 done. You know, it will be for '98.

8 Q. Have you given him all the information he
9 needs to prepare them?

10 A. Yeah. Yeah, there were a couple of
11 items. He needed some from Danell and some from me.
12 I think we've got them. We're trying to get them
13 together.

14 Q. Do you still operate your law practice
15 under the assumed name of Lexington Law Firms?

16 A. I never operated my law practice under an
17 assumed name of Lexington Law Firms.

18 Q. Okay. The state records show that the
19 d.b.a. is registered to you and has been ever since
20 1994 and will be until the year 2000.

21 A. I think that's accurate. The state
22 records do show that.

23 Q. So who do you claim uses the name?

24 A. Oh, Lexington Law Firms?

25 Q. Yes.

1 A. I think we provided you a bunch of that
2 information before, and you should know that, and I'm
3 surprised you don't. But I resigned with any
4 involvement in Lexington Law Firms because of the
5 pending bar problem.

6 Q. Aren't we talking Johnson & Associates,
7 not Lexington Law Firms?

8 A. No. I resigned from anything. I have
9 practiced law under Jamis M. Johnson and Jamis M.
10 Johnson & Associates. Johnson & Associates is a
11 not-for-profit corporation, and you've been told
12 this. Nobody has shares of stock. I resigned from
13 that. Lexington Law Firm, Victor Lawrence and
14 another attorneys have taken over all of that. I've
15 indemnified them, they have indemnified me. I've
16 resigned from any relationship. Lexington Law Firm
17 was just an operating entity that was doing credit
18 repair.

19 Q. Now, Lexington Law Firms is not an
20 entity. It's an assumed name registered to you.

21 A. Actually, I think what happened -- and
22 I'll have to recall this -- but I assigned -- a
23 couple of years ago there was a corporation being set
24 up, but that was assigned -- the name was assigned
25 to -- it was going to be assigned into a corporation.

1 I don't know if we've ever registered the fact that
2 it was assigned. I was sued by the State of
3 Tennessee, you know, personally because Lexington Law
4 Firms was in my name, but since that time and with my
5 bar problem I have completely relinquished any
6 interest. They paid me a little bit, made my
7 payment, and I resigned. Now, if it's listed as an
8 assumed name by Jamis Johnson, they're going have to
9 go in and change that. But, you know, they're
10 operating now without me.

11 Q. So you don't use that name in any way.

12 A. I have actually never actively used it.
13 I registered it.

14 Q. Haven't you written checks with the name
15 on it?

16 A. There was a -- there were checks written
17 that had my signature, computer-generated signature,
18 and I was on the account. Actually, I don't think
19 I've ever signed one of those checks. It was a
20 fairly big organization. It was just a marketing
21 entity.

22 Q. Do you want me to show you all checks
23 that you've handwritten out, checks that say
24 Lexington Law Firm?

25 A. Yeah, why don't you. My recollection is

1 Q. But there's no cash value in either
2 policy?

3 A. No, there is no cash value on any
4 insurance policy.

5 Q. Doesn't the universal life policy have
6 cash value by its nature?

7 A. You know, it may. That's owned by my
8 wife, but I would be glad to have you look at it. If
9 it does have some accrual, it might be a thousand
10 bucks. That's a good question. I could find that
11 out. I don't know if anybody would care. But again
12 it's the property of -- it's not property the SBA
13 could grab. As I recall, it's about \$150,000, you
14 know, that policy. The other one is a million bucks.
15 The term is a million bucks.

16 Q. Do you have any interest in any
17 partnerships?

18 A. No. I mean, you know, often I'll have a
19 joint endeavor with somebody, but I don't have a
20 partnership or set up a partnership or an LLC. You
21 know, if I get a deal I say, Hey, do you want to do
22 this deal together? We'll go up to summit county and
23 buy a lot.

24 Q. So a joint venture.

25 A. Yeah, you can call it that, but I don't

1 have any outgoing partnerships.

2 Q. Any interest in any limited liability
3 companies?

4 A. No. I had an interest in an limited
5 liability company in California called Simmons
6 Shores, LLC. The property got foreclosed out from
7 underneath it. I made some money from raising loans
8 for it, but I know that no longer exists.

9 I had an interest in an outfit called
10 Western Equities, LLC, but that is no longer
11 functional. I have no interest in LLCs or
12 corporations.

13 Q. How about Summit Insured Equity Limited
14 Partnership?

15 A. I had -- that was a -- I had shares of
16 stock in Summit that I got in exchange for legal work
17 and sold them, I'm thinking, in either late 1997 or
18 '98, early '98.

19 Q. So you no longer have any interest in
20 that limited partnership.

21 A. No.

22 Q. And you received no income.

23 A. No. It was a small amount of money. I
24 got three grand from it.

25 Q. Do you own any real estate?

1 A. No. I would have to be crazy to own real
2 estate with the SBA trying to get all my real estate.
3 I've been working on this SBA loan when it was first
4 taken out, I think, in '85, and we, as you know, had
5 a lot of litigation. I don't have any real estate.

6 Q. What's your wife's occupation?

7 A. She's a mom and she does a little bit of
8 paralegal work, and she had some real estate business
9 for a while. She was working with a hospital, kind
10 of a billing situation. She wants to go back to
11 school.

12 Q. Currently is she employed by anybody?

13 A. Yeah. Well, she's not employed. She
14 doesn't get a W-2. She sits on the board of
15 Johnson & Associates.

16 Q. Does she earn any money for that?

17 A. Yeah, I think she does. I think she
18 covered all that with you. I can't recall. Yeah,
19 she was on the board of Johnson & Associates. I
20 think she's -- well, she's no longer on the board of
21 the Caldwell Memorial Hospital. That ended. She
22 wants to go back now and she wants to get a job and
23 come to work for the SBA, I think.

24 Q. Good.

25 A. You get paid so well.

1 Q. So if Johnson & Associate pays your wife
2 money it's for her services as a trustee.

3 A. Yeah. She sits on the board. She
4 Also -- yeah, she also -- she did some other things
5 for them occasionally, but not much.

6 Also, you know, I think our income will
7 be substantially less. I think mine will be higher
8 and hers will be lower. Caldwell is gone. It's no
9 longer around, so, you know.....

10 Q. I've noticed that Lexington Law Firms
11 would pay her checks of \$465. What would that be?

12 A. That's like services.

13 Q. What kind of services?

14 A. Well, let's see. The same kind of
15 services that the 20 other people up there provide
16 generally, whatever. I know initially --

17 Q. So your wife goes into the office there
18 and does work or --

19 A. She does some work, yeah. She does some
20 minimal work. She's also on the board. She also
21 donated, you know, as she told you in her deposition,
22 early on a bunch of computers and furniture and, you
23 know, a lot of facilities to get it started. It's
24 got a combination of things there. I mean, I think
25 you know this because we've given you the checks, or

42

1 she's given you the checks or Johnson & Associate
2 have given you the checks. All of those checks have
3 been made available to you.

4 Question. Never mind. Hey, what do you
5 think the SBA would like to take to settle this? Is
6 it up to \$400,000 yet, this loan? It's over three.

7 Q. I don't know. You keep saying you'll
8 make an offer and you dcn't.

9 A. It's because I'm only now starting to
10 recover. We talked about my suing Kent Davis. Kent
11 Davis is around. You recall that whole argument.
12 Kent Davis was the source of this problem. I mean,
13 you have heard me say that, you know, we've got this
14 SBA loan. I demanded an accounting. He actually got
15 a TRO and prevented me from going to the business. I
16 sued them, got the IRS on them, and then the business
17 collapsed. He went bankrupt. I negotiated with the
18 SBA to try and sell the property. We actually had a
19 deal of \$60,000, a settlement from me. It didn't
20 happen.

21 They sold the property to the same guy
22 for \$60,000. They went after me for the deficiency.
23 I litigated that and I lost. Judge Winter gave me
24 about a 20-page opinion. And so by the time we're
25 all done you want \$300,000 from me, but Kent Davis,

1 charge, but they're just giving it to us. That whole
2 basement is just basically half deserted now, so
3 they're not having to pay rent.

4 Q. So Wasatch Credit is not there?

5 A. Wasatch Credit is no longer there.

6 Q. And you're just paying the 175 bucks a
7 month?

8 A. I'm just showing up and paying it. I try
9 to keep my overhead pretty low.

10 Q. So your wife at this time is still on the
11 board of Johnson & Associates.

12 A. Yes. What was that you just turned off?

13 Q. That was just this leather chair here.

14 A. I thought maybe you turned something off.
15 I thought you had an infrared polygraph beam you were
16 beaming at me or something, some new government
17 scheme.

18 What do you think the SBA would take if I
19 came in and gave them some money?

20 Q. I don't know.

21 A. You don't you have enough information to
22 extrapolate my financial condition. Would you sell
23 me the judgment if I -- would you sell it to me if I
24 wanted to buy it?

25 Q. Well, what good would that do you?

1 income from Louisiana.

2 A. No.

3 Q. So the LLC's main source of income right
4 now is Danell's trusteeship in Johnson & Associates
5 and some of these hard money deals. And anything
6 else?

7 A. Lex. You mentioned \$465 payment from
8 Lex.

9 Q. Lexington Law Firm does credit repair,
10 right?

11 A. Uh-huh. Danell gets payments from Lex.
12 Then she also has -- well, if a big deal comes along
13 she gets some of that money. We sold some of that
14 real estate. We bought some lots and sold them in
15 the fall. I mean in the spring.

16 Q. The spring of 1999?

17 A. Yeah, the tax sale when we went up to
18 Summit County. I mentioned that to you. And, you
19 know, the payments on the house coming from Knudsen
20 would probably be treated as income to her to the
21 extent it pays out on that first mortgage \$3,700 a
22 month. That's about -- that comes out to be \$45,000
23 a year or something, I mean on the receipt of the
24 payments of that house.

25 Q. So is your wife in the lawsuit trying to
87

Exhibit 8

Defendant, Jamis M. Johnson, by counsel, Joe Cartwright, hereby submits Jamis Johnson's Memorandum in Opposition To Jayson Orvis' Motion For Summary Judgment, as follows:

FACTS

Please note that the below paragraphs are supported by the Affidavit of Jamis Johnson filed concurrently herewith, and each paragraph below matches the corresponding paragraph of the said Affidavit. Reference will not be made in each paragraph to the affidavit.

1. This case involves millions of dollars.
2. It is estimated that Jayson Orvis is today personally taking \$500,000 to \$800,000 monthly from the credit repair ventures, one third of which belongs to the Johnsons. (Ex. 1, Vigil Deposition p. 70 line 6-15) (Lexington web page: lexingtonlaw.com) (Ex. 2, Deposition of Tommy Triplett p. 20, l. 9, where Orvis takes in \$153,000 in one month several years ago.)
3. Lexington Law Firms has 75,000 to 150,000 clients each paying \$35 monthly and Orvis takes the lion's portion of this money. (Ex. 1, Vigil Deposition *supra*.)
4. This case is an effort by Orvis to end the partnership of Orvis and the Johnsons and involves claims by the Johnsons of embezzlement, fraud and concealment by Orvis of profit share; establishment of secret companies to siphon profits from Johnsons, use of sham companies to hide from the U.S. Government the Orvis purchase of an SBA judgment; it involves the active complicity of a Utah attorney. The actual damages to Johnsons exceed several million dollars.
5. In or about 1994, Jamis Johnson, Jayson Orvis, and three others, John Hollingshead, Merrill Chandler, and Steve Paige, founded a consumer services enterprise to engage in the business of "credit repair".

6. DaNell Johnson, wife of Jamis Johnson, would hold the beneficial interest in this business venture, and she would receive monies derived therefrom, and would separately incur and pay the tax liability thereof. Jamis Johnson would work with the venture representing their interest and interfacing with Orvis and the other partners.

7. This arrangement between DaNell and Jamis Johnson is evidenced by, among other things, Powers of Attorney dated in 1995 and 1996. (Ex. 3 Powers of Attorney) and is long-standing with similar arrangements between them extending back to as early as 1987. It is reflected in prior business ventures involving the Johnsons such as in the Caldwell Memorial Hospital business. (Ex. 4 Deposition of Jamis Johnson, March '98 page 20 line 3 and on.)

8. DaNell Johnson was to, and did, receive the profit share from this venture and Jamis Johnson would do much of the work (Ex. 3, Powers of Attorney), interface with the business, and would also incur significant personal liability.

9. The credit repair venture used many different business entities, two of which were Johnson and Associates, a Utah non profit corporation (sometimes referred to as "J&A") and Lexington Law Firms (sometime referred to as "Lexington").

10. Three of the founding partners would depart from the partnership for various reasons at different times. They were Chandler, Paige, and Hollingshead. Hollingshead left the partnership in approximately September of 1997.

11. Hollingshead's departure left Orvis and the Johnsons remaining in the partnership and conducting the credit repair business.

12. DaNell sat on the Board of J&A along with Orvis, Victor Lawrence, Sam Spendlove, etc. (Ex. 5. Resolutions By Unanimous Consent of The Board of Trustee of Johnson and Associates.)

13. Orvis ran the marketing of J&A and Lexington and an entity called eClient and provided the day-to-day management. Orvis controlled all money and performed all accounting and financial controls, and interacted primarily with Jamis Johnson for the Johnsons (per the Power s of Attorney, and the practice and arrangement of the Johnsons).

14. Jamis Johnson was the signatory on all checks for Lexington and J&A. His computerized signature appeared on thousands of checks. The trade name Lexington Law Firms was held in his name.

15. By September of 1997, Jamis Johnson had incurred significant personal liability for the ventures, thus shielding DaNell Johnson and Orvis: The State of Tennessee had sued him under a federal regulation; (State of Tennessee vs. Jamis Johnson, U.S. District Court, Middle District of Tennessee, Civil No: 3-96-0344) The Utah Division of Consumer Affairs, , and The Utah State Bar were pursuing an administrative action relative to the credit repair business; and Johnson & Associates had incurred back tax liability placed in the name of Jamis Johnson though he was not on the Board of Trustees (Orvis and DaNell Johnson were on the Board).

16. Indeed, Orvis would acknowledge that he felt compelled to keep paying profit share because of the ongoing liability of Jamis Johnson. (Ex. 2, Triplett deposition. page 38 line 10-12)

17. Jamis Johnson and Orvis would engage as many as four attorneys to help with Lexington and with J&A. Jamis Johnson was originally designated as "directing attorney" for J&A and Lexington.

18. One of these attorneys hired in approximately early 1997 was Victor Lawrence. Victor Lawrence received a modest salary and free office, telephone, reception, etc.

19. Victor Lawrence also represented DaNell Johnson in significant individual business matters for example, in litigation with Bruce Giffen, as a creditor in the Utah Agrisource Bankruptcy, against First Security Bank to recover on an agriculture lien on cattle; and also Victor Lawrence represented separately Jamis Johnson in his Utah Bar matters and several other matters including briefly with the SBA.

20. DaNell Johnson profit share checks were sporadic in the credit repair ventures at first.

21. By late 1997 to early 1998, the credit repair ventures started to consistently generate revenue for profit share. Orvis provided verbal monthly accountings of revenue for eClient, Lexington and J&A which Jamis Johnson either kept in a journal or were recorded on "invoices".

22. Profit share was divided between Orvis and DaNell Johnson at a ratio where Orvis received twice what DaNell Johnson received. In other words, Orvis $\frac{2}{3}$ rd - DaNell Johnson $\frac{1}{3}$ of profit share. (Ex. 6. Outline Agreement, unsigned, dated 9-23-97.) These ratios were based on Jayson's day to day management of the business affairs and marketing, and on the Johnsons' less active role after the ventures were established.

23. After Hollingshead's departure, and as the Johnsons and Orvis continued to operate the credit repair businesses, tensions arose between the parties.

24. Johnsons would later learn that Orvis, during this time, was secretly taking partnership funds and setting up separate parallel companies to conceal profits and divert profits and not truthfully disclosing profit share revenues by greatly under representing revenues to Johnsons. (Ex. 2, Deposition of Tommy Triplett p. 22, l. 23–p. 26, l. 22–p. 28, l. 25–p 39, l. 8) (See also Vigil Deposition Ex. 1 *supra*, page 49 line 5, page 53 line 10).

25. In September 15, 1997, the SBA obtained a judgment against Jamis Johnson. (Ex. 7, Order For Entry of Judgment, U.S. v. Jamis Johnson.)

26. In March of 1998, the SBA deposed Jamis Johnson in post-judgment proceedings. There Jamis Johnson explained the arrangement between DaNell Johnson and himself where they worked together and she was allocated the profit share, as evidenced, for example, by the Caldwell Memorial Hospital business.

27. In early May of 1999 at the request of Orvis and after discussion, the parties entered into various agreements:

28. First, Orvis and Jamis Johnson executed an agreement wherein Orvis would hold all of the assets of the credit repair ventures of the Johnsons and Orvis, for the economic benefit of Orvis and the Johnsons. This is referred to as the Orvis-Johnson Profit Share Agreement. (Ex. 8, Orvis-Johnson Profit Share Agreement.)

29. This Orvis-Johnson Profit Share Agreement states in relevant part as follows:

WHEREAS, Orvis and Johnson have developed over the last several years, enterprises that provide credit repair services to a nationwide clientele. Such credit repair services include, but are not limited to a range of activities, including telemarketing, internet marketing, consulting, law representation, and the enterprises have grown over the years, and have a variety of tangible and intangible assets including, without limitation, for

example, equipment, computers, software, furniture, knowledge, methods, techniques in marketing, lead sources, internet operations; and

WHEREAS, the parties desire to provide for the unimpaired continuation and growth of the business to the mutual benefit of the parties; and

WHEREAS, the parties acknowledge that an agreement was put in place reciting that all assets of this enterprise are placed in the name of Jayson Orvis so as to protect these assets and provide for continued growth and mutual profitability; and

WHEREAS, the parties acknowledge that they have governed and operated these enterprises under an outline agreement and under a course of performance that they desire to continue;

1. Governance and compensation/allocation of profits shall continue in the percentages as heretofore provided under the operating arrangements and as the enterprise continues to grow, however, all monies shall be paid to Jayson Orvis or his business entity as may be established and Jayson Orvis shall provide Johnson's share or allocation to any party directed by Johnson. The intent herein being that these enterprises shall continue to grow, expand, multiply as directed by the parties under their outline agreement and course of performance to their mutual economic benefit. (Emphasis added).

30. References therein to the "course of performance" and the "percentages" are references to ratios of profit share paid to DaNell Johnson or her entities. The outline agreement refers to Ex. 6, the unsigned document that sets out the ratios of Johnson and Orvis, etc.

31. In the second of these agreements, Johnson resigned as directing attorney for Lexington and J&A, and Victor Lawrence stepped into that position. (Ex. 9, Victor Lawrence Agreement) This agreement required Lawrence to continue to use the credit repair marketing of Orvis (and Orvis had entered into the above

Orvis-Johnson Profit Share Agreement holding all for the joint profit of Orvis and the Johnsons.)

32. In resigning as directing attorney, Jamis Johnson did not relinquish the partnership interest and profit share that he and DaNell Johnson held. The Orvis-Johnson Partnership Agreement (evidencing the ongoing partnership of the Johnsons and the prior course of performance) and the Victor Lawrence Agreement (where Jamis Johnson resigned as directing attorney) were executed simultaneously. Thus even though Johnson resigned as directing attorney, the partnership with Orvis was intended to continue and indeed did continue until Orvis filed this lawsuit.

33. Profit share accounting and profit share checks divided between Orvis and Johnsons continued unabated after this time, regardless of the resignation of Jamis Johnson as directing attorney.

34. In April of 1999, the SBA subpoenaed DaNell Johnson for deposition on May 18, 1999.

35. At that deposition, DaNell Johnson was represented by Victor Lawrence. At this deposition, DaNell Johnson truthfully disclosed her business relationships.

36. Victor Lawrence himself questioned DaNell Johnson thusly:

[Q= Questioning by Mr. Victor Lawrence.]

A= Answer by Danell Johnson

Q Okay. When that business first started, it was just a handful of friends and associates"

A Right.

Q Now that has somewhat blossomed, but you don't know really what the company does now, is that correct?

A Yes, because it has expanded quite a bit.

Q In fact, aren't the funds that you received a profit share that you receive?

A That's what I understood it to be, yes.

Q Are you being paid for anything else? Do you do any type of consulting for Johnson and Associates right now?

A (Nodded no.)

Q You have to answer audibly.

A I'm sorry.

Q Do you do any consulting for Johnson and Associates?

A No

Q Do you do any consulting for Lexington Law Firm?

A No.

Q You may sit on the board and you may receive a compensation for that, but you are aware that you receive a compensation in some type of profit sharing arrangement, is that correct?

A That's right.

(Ex. 10, Deposition of DaNell Johnson.)

37. Later, in this litigation against the Johnsons to deprive them of their profit share interest, Victor Lawrence would argue that the Johnson's had no profit share interest and specifically ignored DaNell Johnson's profit share interest, in direct repudiation of the sworn testimony that she gave to the SBA under his representation and counsel.

38. November 17, 1999, the SBA deposed Jamis Johnson. (Ex. 11, Jamis Johnson Deposition, November, 1999)

39. In his deposition, Jamis Johnson accurately disclosed the information requested by the SBA. The following are excerpts and references of some of the deposition:

Jamis Jamis' role at D.M. Johnson and Associates, LLC., (DaNell Johnson's LLC)
P14 lines 1-3

Q. Are you a member of D.M. Johnson & Associates, LLC?

A. No.

and further.

Ownership of Lexington dba

P22 14-25 and P23

Q. Do you still operate your law practice under the assume name of Lexington Law Firms?

A. I never operated my practice under an assumed name of Lexington Law Firms.

Q. Okay. The state records show that the d.b.a. is registered to you and has been ever since 1994 and will be until the year 2000.

A. I think that's accurate. The state records show that.

Q. So who do you claim uses the name?

A. Oh, Lexington Law Firms?

Q. Yes.

A. I think we provided you with a bunch of that information before, and you should know that, and I'm surprised you don't. But I resigned with any involvement in Lexington Law Firms because of the pending bar problem.

Bar Status affects Jamis' operational Lexington role

P24 lines 1 – 10

A. ...I don't know if we've ever registered the fact that it was assigned [to Orvis]. I was sued by the State of Tennessee, you know, personally because Lexington Law Firms was in my name, but since that time and with my bar problem I have completely relinquished any interest. They paid me a little bit, made my payment, and I resigned. Now, if it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating without me.

Interests in any partnerships –

P30 lines 16-25 and P31 lines 1-24

Q. Do you have any interest in any partnerships?

A. No. I mean, you know, often I'll have a joint endeavor with somebody, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go up to summit county and buy a lot.

Q. So a joint venture?

A. Yeah, you can call it that, but I don't have any outgoing partnerships.

Q. Any interest in any limited liability companies?

A. No. I had an interest in an limited liability company in California called Simmons Shores, LLC. The property got foreclosed out from underneath it. I made some money from raising loans for it, but I know that no longer exists.

I had an interest in an outfit called Western Equities, LLC, but that is no longer functional. I have no interest in LLCs or corporations.

Q. How about Summit Insured Equity Limited Partnership?

A. I had—that was a—I had shares of stock in Summit that I got in exchange for legal work and sold them, I'm thinking, in either late 1997 or '98, early '98.

Q. So you now longer have any interest in that limited partnership.

A. No.

Q. And you received no income.

A. No. It was a small amount of money. I got three grand from it.

DaNell sits on the board at J&A

P32 lines 12-15

Q. Currently is she employed by anybody?

A. Yeah. Well, she's not employed. She doesn't get a W-2. She sits on the board of Johnson & Associates.

Q. Does she earn any money for that?

A. Yeah, I think she does. I think she covered all of that with you....

DaNell's Lexington compensation for board position and certain contributions

Page 42 lines 1-5 and lines 17-25(page 43 lines 1-3)

Q. So if Johnson & Associates pays your wife money it's for her services as a trustee.

A. Yeah. She sits on the board. She also—yeah, she also—she did some other things for them occasionally, but not much.

* * *

Q. So your wife goes into the office there and does work or—

A. She does some work, yeah. She does some minimal work. She's also on the board. She also donated, you know, as she told you in her deposition, early on a bunch of computers and furniture and, you know, a lot of facilities to get it started. It's got a combination of things there. I mean, I think you know this because we've given you the checks, or she's given you the checks or Johnson & Associates have given you the checks. All of those checks have been made available to you.

DaNell still on board of J & A

Page 80 lines 10-12

Q. So your wife at this time is still on the board of Johnson & Associates.

A. Yes. What was that you just turned off?

DaNell Johnson's LLC's sources of income. Lexington makes regular payments to DaNell

Page 87 lines 3-15

Q. So the LLC's main source of income right now is the DaNells trusteeship in Johnson & Associates and some of these hard money deals. And anything else?

A. Lex. You mentioned \$465 payment from Lex.

Q. Lexington Law Firm does credit repair, right?

A. Uh-huh. DaNell gets payments from Lex. Then she also has--well, if a big deal comes along she gets some of that money. We sold some of that real estate. We bought some lots and sold them in the fall. I mean in the spring.

Jamis' holdings/assets

Questions about Jamis' personal accounts and holdings (checking, etc.)

Page 24 lines 1-25

DaNell's sources of income, which are separate from Jamis'

Pages 33, 37, 38-39,40

DaNell and Jamis pay separate taxes

Page 70 lines 1-3

40. After several years of work, Johnson obtained a favorable settlement of the federal action against Lexington in Tennessee. (Ex. 12, Consent Agreement, State of Tenn. vs. Jamis Johnson.) On August 28, 2000, Johnson wrote Jayson Orvis to advise him that the Tennessee case had been settled and of the steps to take to make sure there was compliance with the Tennessee Federal District Court Consent Agreement. (Ex. 13 Letter: Johnson to Orvis re. TN compliance 8-28-00;)

41. Orvis responds by letter of August 30, 2000 that includes the following statement:

Might I make as suggestion? I would suggest that we just let our foggy little business relationship continue down its foggy little course...
...I am committed to making a bigger pie for as long as it is feasible and that has been nothing but good for both of us.

(Ex. 13, Letter of Orvis, 8-30-01) Orvis clearly references a business relationship with Johnson.

42. The trade name, Lexington Law Firms has remained in the name of Jamis Johnson throughout this time.

42. On January 12, 2001, Johnson assigns the Trade Name to Orvis. (Ex. 14, Assignment of trade name)

43. The Assignment specifically sets out the existing and ongoing partnership. It says:

WHEREAS, the said trade name [Lexington Law Firms] is an asset actually owned jointly by Jamis M. Johnson and Jayson Orvis, and

WHEREAS, Jamis M. Johnson and Jayson own intellectual property and tangible and intangible assets for the business of credit repair and per prior agreement, this trade name is to be assigned by Jamis M. Johnson to Jayson Orvis, and

WHEREAS, Jayson Orvis has established a limited liability company called Attorneys For People, LLC., of which he is the only member in which he was to hold some of these joint assets and through which he administrates [sic] some of the credit repair business, and

WHEREAS, Jamis M. Johnson desires to assign the trade name to Jayson Orvis/Attorneys For People and it shall form and is part of these assets jointly owned by Johnson and Orvis and administrated by Orvis;

NOW, THEREFORE, based on the foregoing recitals and upon the prior agreement of the parties ... [Johnson assigns trade name to Orvis] [Emphasis added]

46. This Assignment is retrieved from Johnson's office by Tommy Triplett who signed a receipt for it, and it is accepted by Orvis who acknowledges that he accepts the Assignment in the complaint he filed.

47. The Assignment by its very terms and recitals evidences the ongoing partnership. It is unambiguous. And clearly the assignment is per the Orvis-

Johnson Partnership Agreement of May 1999, and the trade name is still a joint asset.

48. In an astounding display of hubris, after the Assignment, which clearly reaffirms the existence of a partnership with the Johnsons, Orvis had his assistant, Tommy Triplett, deliver a mock agreement that is intended to mock Johnsons and to reveal to Johnsons that Orvis thinks he has successfully taken away the Johnsons' partnership interest.

49. That mock document states in various parts:

ASSIGNMENT made this day by Jayson Orvis (hereinafter referred to as "Lord") and Jamis M. Johnson (hereinafter referred to as "Peasant")

WHEREAS, Lord holds complete and sole ownership of everything Peasant wants, including all credit repair methodologies, strategies, operations, computers, [and Peasant's] career...Firstborn, ...hookers...friends...wife...

WHEREAS, Jamis M. Johnson ("Peasant") owns absolutely nothing and can do doodley squat about it...

WHEREAS, Lord delights in torturing Peasant and making him wonder every month ...[regarding profit share]...

[signature line] Jayson Orvis, Master of the Universe

(Ex. 15 Mock Assignment)

50. Johnson senses that Orvis is not truthfully accounting, and is setting up parallel and secret companies to divert profit share. This will; turn out to be correct. (Ex. 2, Triplett Deposition. See references in para. 24 of this Affidavit, *supra*. See also the deposition of Will Vigil attached as Ex. 1)

51. On August 16, 2002 Johnson sends Orvis a demand for an accounting. (Ex. 16, Demand for Accounting from Johnson). Such will reveal that Orvis has not been honestly accounting for profit share.

52. On August 11, 2001 Orvis will purchase the SBA judgment against Johnson. (Ex. 17, Assignment of SBA judgment to Orvis by All Starr Financial, LLC.)

53. He will not reveal his identity to the SBA but rather will engage a suspended Utah LLC., All Star Financial, LLC to negotiate with the US Government to buy the SBA judgment. All Star is operated by the brother-in-law of Dion Steckling, a party to this lawsuit.

54. All Star Financial, will not disclose to the SBA that it is a Lexington affiliate that is seeking to acquire the judgment and upon information and belief, the money to acquire the judgment flowed through All Star from Orvis. All Star will get the judgment on August 10, 2001 and within 24 hours, it will be re-assigned to Orvis. (Ex. 17.).

55. On August 30, Johnson will be summoned to the office of Dan Berman who, with Orvis present, informs Johnson that

- i. Orvis had purchased the SBA judgment against Johnson;
- ii. Orvis had sued Johnson to end the partnership,
- iii. Orvis has acquired the judgments to use to end the partnership and will satisfy the judgments if Johnson will accept a settlement and end the Partnership; and
- iv. It will cost Johnson probably \$300,000 to litigate this so settlement is advisable.

56. Johnson writes a confirmatory letter to Berman outlining the above. (Ex. 18. August 30, 2001 Letter of Jamis Johnson to Dan Berman.)

57. Johnson later learns that Victor Lawrence, former counsel to DaNell with the SBA, participated in counseling and aiding Orvis in acquiring the judgment. (Triplett Deposition page 45 lines 11-25). Victor Lawrence will further attempt to buy another action involving Johnson and former partner Hollingshead.

58. On information and belief, Victor Lawrence has received a significant increase in personal revenue once the Johnson profit share was stopped upon the filing of the Orvis lawsuit. Orvis controls Lexington Law Firm through his marketing agreement with Victor Lawrence. (Ex. 19, Orvis-Lawrence Marketing Agreement.)

59. The SBA judgment was purchased at precisely the discount that Johnson was discussing with the SBA and had discussed with Victor Lawrence. And, the fact that the SBA judgment could be obtained at a discount, was never revealed by Victor Lawrence to his client, DaNell Johnson or his former client, Jamis Johnson.

60. Currently, In this month, May of 2004, Orvis has, as the assignee of the SBA judgment, subpoena both Jamis Johnson and DaNell Johnson, in an exercise in post judgment discovery. This action is in federal court and the Johnson will seek to void the judgment in the hands of Orvis because of the duplicity discussed herein.

SUMMARY OF ARGUMENT

1. THE TESTIMONY OF JAMIS JOHNSON TO THE SBA IS CONSISTENT WITH THE FACTS AND IS NOT A MISREPRESENTATION; ORVIS MISCONSTRUES THE JOHNSON QUOTES ON WHICH HE RELIES; AND SUMMARY JUDGMENT IS UNSUPPORTABLE BASED ON THESE QUOTES;

A. JAMIS JOHNSON DID NOT DISAVOW AN INTEREST IN ORVIS CREDIT REPAIR BUSINESSES BY HIS RESIGNATION AS

DIRECTING ATTORNEY OF LEXINGTON AND J&A, NOR BY DISCLOSING THAT IN HIS SBA DEPOSITION.

B. JAMIS JOHNSON DID NOT DISCLAIM CREDIT REPAIR PARTNERSHIP INTEREST; NOR DID HE MERELY ANSWER "NO" TO THE SBA QUESTION AT ISSUE.

2. IF THERE IS AMBIGUITY IN SUCH SBA TESTIMONY, THE INTERPRETATION OF SUCH TESTIMONY IS A MATERIAL ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT.

3. THE DOCTRINE OF JUDICIAL ESTOPPEL IS INAPPLICABLE AND CANNOT SUPPORT SUMMARY JUDGMENT.

ARGUMENT

1. THE TESTIMONY OF JAMIS JOHNSON TO THE SBA IS CONSISTENT WITH THE FACTS AND IS NOT A MISREPRESENTATION; ORVIS MISCONSTRUES THE JOHNSON QUOTES ON WHICH HE RELIES; AND SUMMARY JUDGMENT IS UNSUPPORTABLE BASED ON THESE QUOTES;

In support of his motion for summary judgment, Orvis submits only two quotes by Jamis Johnson from the November 1999 SBA deposition: (i). One quote is to the effect that Jamis Johnson withdrew and resigned as directing attorney for Lexington Law Firms and J&A.; and (ii) the other quote is supposedly that Jamis Johnson answered "no" when asked about any partnerships.

These quotes are misconstrued by Plaintiff and do not mean what he claims they mean. They are not dispositive of this action.

A. JAMIS JOHNSON DID NOT DISCLAIM CREDIT REPAIR PARTNERSHIP INTEREST; NOR DID HE MERELY ANSWER "NO" TO THE SBA QUESTION AT ISSUE.

Orvis quotes a section of Jamis Johnson's SBA deposition wherein Johnson accurately discloses to the SBA that he resigned from Lexington and Johnson & Associates as directing attorney.

Orvis then states that Johnson "completely disavowed any interest, partnership or otherwise, ***in the credit repair business of Jayson Orvis.***" (emphasis added). It does not follow from Johnson's statements concerning resignation as directing attorney that all interests in the credit repair partnership had been disavowed.

Orvis does marketing for, and operates credit repair businesses. He does this for law firms as well as non-law firms. Orvis does *not* claim to be a partner in the law firms for which he does marketing. (See the marketing agreement between Orvis and Victor Lawrence. Ex. 19)

Likewise, DaNell and Jamis Johnson do *not* claim to have a profit share interest in Victor Lawrence's law practice or Lexington Law Firms of J&A (which is a non-profit organization and so no one could have a partnership therein). Their claim is directly against Orvis for a profit share of the credit repair entities that they helped develop jointly.

Indeed Orvis' initial lawsuit starting this action against Johnson was to declare that Johnson had no partnership with *him*, (not with Victor Lawrence or Lexington and J&A), and Orvis sought by his lawsuit to both cut off the profit share that was monthly divided by Orvis with the Johnsons up to that time, and to avoid the accounting demanded by the Johnsons for misappropriated profit share.

At the time Jamis Johnson resigned as directing attorney in May of 1999, he entered into an agreement with Victor Lawrence providing for continued representation of the clients, and continued use of the Orvis credit repair businesses in which Johnsons had an interest.

Simultaneously with Johnson's resignation as directing attorney in May of 1999, Orvis and Johnson reaffirmed their ongoing partnership arrangement between Orvis and DaNell and Jamis Johnson. That Orvis-Johnson Partnership Agreement states unequivocally that the partnership between Orvis and the Johnsons continues unabated. Please see paragraph 29 above. That document states clearly the partnership.

Here, Orvis squarely acknowledges the ongoing partnership arrangement with the Johnsons that had existed prior to this agreement and continued after. Orvis had accounted for profit share to Jamis Johnson and divided profit share with DaNell Johnson as agreed and as directed by Jamis Johnson before, during and after the May 1999 resignation of Jamis Johnson from Lexington and J&A, and the execution of this Orvis-Johnson partnership agreement.

The claim that Jamis Johnson "disavowed" any interest in the credit repair businesses of Orvis is false and will not support summary judgment.

C. B. JAMIS JOHNSON DID NOT DISCLAIM CREDIT REPAIR PARTNERSHIP INTEREST; NOR DID HE MERELY ANSWER "NO" TO THE SBA QUESTION AT ISSUE.

Orvis alleges that Jamis Johnson answers "No." when asked if he had 'any partnerships'. To support this motion, Orvis extracts only one word, 'No', out of a 52 word quote.

The complete and uncut version is:

Q. Do you have any interest in any partnerships?

A. No. I mean, you know, often I'll have a joint endeavor with somebody, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go to Summitt County and buy a lot.

In this deposition, both before and after this response, Johnson would discuss Lexington and J&A and the beneficial interest of DaNell Johnson and the flow of monies. It is clear from the deposition that Jamis Johnson, when asked here about "any partnerships" by the SBA was not thinking that the SBA was asking about the Lexington and J&A credit repair businesses since those had already been discussed in the deposition previously by Johnson and would be discussed again later in the deposition.

The un-cut quote of that answer to the question about "any partnership interests" reveals that Johnson was thinking about other joint endeavors and real estate in particular, and whether he actually "set up" or prepared partnership documents. (*... I don't set up a partnership or an LLC" and "You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go to Summitt County and buy a lot."*)

Further, in context, this question to Johnson about any interest in partnerships comes in a series of general questions about stocks, trusts, cash value in life insurance, partnerships, limited partnerships, etc.

The Orvis memo relies on the single word "No" to support Plaintiffs motion. This clearly distorts the context of Johnson's answer.

Further, any full reading of the Jamis Johnson deposition to the SBA demonstrates that Jamis Johnson's statements are reasonable and accurate responses. In the full SBA deposition, Johnson covers his and DaNell Johnson's relationship to Lexington Law Firms, and to Johnson and Associates. He explains that DaNell receives the flow of funds related to Lexington and J&A, not himself. He also explains their long standing business arrangement where she holds the beneficial interest in other businesses. (See paragraph 39 above for a synopsis of the foregoing.)

The SBA deposition testimony of Jamis Johnson is congruent with the actual situation and does not disavow an Orvis partnership.

2. IF THERE IS AMBIGUITY IN SUCH SBA TESTIMONY, THE INTERPRETATION OF SUCH TESTIMONY IS A MATERIAL ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT.

Because Jamis Johnson's SBA testimony is truthful and unambiguous, and does not support the interpretation of Orvis, the Orvis summary judgment motion cannot be sustained. Moreover, it is sufficient here, to defeat summary judgment, to demonstrate that Johnson's SBA testimony, on which Orvis' motion relies, is susceptible to a credible difference of interpretation.

Again, this ambiguity raises a material issue of fact which precludes summary judgment.

3. THE DOCTRINE OF JUDICIAL ESTOPPEL IS INAPPLICABLE AND CANNOT SUPPORT SUMMARY JUDGMENT.

Orvis claims that Jamis Johnson contradicts his position in this lawsuit when he made statements to the SBA in a deposition to the SBA. Thus, claims Orvis, Johnson is 'judicially estopped' from maintaining his counterclaim against Orvis here for a share of the staggeringly huge profits from these partnership businesses, and so, Orvis argues, Jamis Johnson's counterclaim here must be summarily dismissed.

Even if Orvis' contested interpretation of Johnson's deposition is correct, such SBA deposition testimony simply cannot estop Mr. Johnson from claiming a partnership in this case.

Under Utah law, three elements must be shown before a court may judicially estop a litigant from denying a position taken in a prior judicial proceeding: (1) the prior proceeding must be between "the same persons or their privies"; (2) it must involve "the same subject matter"; and (3) the prior position must have been "successfully maintained." Nebeker v. Utah State Tax

Commission, 2001 UT 74, ¶ 15, 34 P.3d 180, 187; Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1996); Tracy Loan & Trust Co., v. Openshaw Inv. Co., 132 P.2d 388, 390 (Utah 1942).

None of these elements is present here.

First, the SBA litigation was clearly between different parties than the Orvis-Johnsons litigation.

Second, the SBA case concerned a different subject matter. The SBA case dealt with foreclosure on real property and a guarantee.

Third, there is no indication that Johnson "successfully maintained" any position. The SBA case was already closed resulting, in a judgment. The deposition was merely incident to general post-judgment discovery. No hearing or procedure was looming and no position was to be advocated, argued, litigated, adjudicated or "maintained".

Of far graver concern, and in direct opposition to the Orvis claim about the Jamis Johnson quotes, is that Orvis and Victor Lawrence actually helped Jamis and DaNell Johnson set out their position to the SBA ~~the~~ same position that Orvis now, and Lawrence earlier, repudiate. **Victor Lawrence actually represented DaNell Johnson to the SBA** in a separate earlier deposition only months before the Jamis Johnson deposition at issue here. There DaNell, under Lawrence's counsel, explained the nature of her beneficial interest regarding Lex, J&A, Jamis Johnson and Orvis. (Lawrence has never disclosed to the court that he actually represented DaNell Johnson in the very SBA case he, earlier, and Orvis, now use.

Lawrence never disclosed to the Court that he in reality had actual knowledge of the specific profit share arrangement with the Johnsons).

Orvis helped to provide to the SBA sundry J&A and Lexington documents that support DaNell's testimony and the position of Jamis Johnson.

The current Orvis arguments are incredible in light of his and Lawrence's aiding of the SBA's understanding of the DaNell Johnson-Jamis Johnson relationship. If any person should be estopped from an assertion, it is Orvis here (and Victor Lawrence in a prior summary judgment) where they fail to disclose to

the Court that they actually helped shape and verify the Johnson's' partnership position vis-à-vis Orvis, that Orvis now seeks to avoid by this motion.

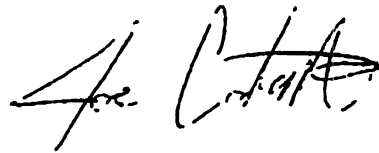
The quotes cited by Orvis in the Jamis Johnson SBA deposition, do not support, under any standard, summary judgment, based on the doctrine of judicial estoppel.

CONCLUSION

For the foregoing reasons, the motion of Orvis for summary judgment should be denied. Johnson did not misrepresent anything to the SBA; he did not disavow an interest in the profit share of the credit repair enterprises; and the doctrine of judicial estoppel is inapplicable.

Dated this 27th day of May, 2004

CARTWRIGHT LAW FIRM

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

Joe Cartwright

Attorney for Defendant, Jamis Johnson

CERTIFICATE OF MAILING

I hereby certify that on May 27, 2004, I caused a true and correct copy of JAMIS JOHNSON'S MEMORANDUM IN OPPOSITION TO JASON ORVIS' MOTION FOR SUMMARY JUDGMENT

Peggy A. Tomsic (3879)
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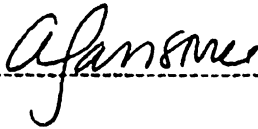


Exhibit 9

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAYSON ORVIS, et al.,	:	Case No. 010907449
	:	
Plaintiff,	:	Appellate Case No. 20041122-CA
	:	
v	:	
	:	
JAMIS JOHNSON, et al.,	:	
	:	
Defendant.	:	

HEARING ON MOTIONS AUGUST 9, 2004

BEFORE

THE HONORABLE TIMOTHY R. HANSON

FILED DISTRICT COURT
Third Judicial District

FEB 17 2005

By bn SALT LAKE COUNTY

Deputy Clerk

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

7-7128

APPEARANCES

For the Plaintiff:

PEGGY A. TOMSIC
BERMAN, GAUFIN,
TOMSIC & SAVAGE
328-2200

For the Defendant:

D. JOSEPH CARTWRIGHT
ATTORNEY AT LAW
801-363-5255

* * *

ORAL ARGUMENTS

Ms. Tomsic

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Mr. Cartwright

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1 SALT LAKE CITY, UTAH - AUGUST 9, 2004

2 JUDGE TIMOTHY R. HANSON PRESIDING

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

4 THE COURT: Good afternoon.

5 MS. TOMSIC: Good afternoon, Your Honor.

6 THE COURT: Jayson Orvis v. Jamis Johnson, 010907449.
7 Appearances please.

8 MS. TOMSIC: Peggy Tomsic representing the plaintiff,
9 Jayson Orvis. Today Your Honor, I have with me Heather Keoyo
10 who has just joined our firm but has not as yet been admitted
11 to the bar, who's helping me. Mr. Orvis, the plaintiff and his
12 wife, Pam Orvis, are also present in the courtroom.

13 THE COURT: Thank you.

14 MR. CARTWRIGHT: Joe Cartwright here representing Mr.
15 Johnson, Your Honor.

16 THE COURT: Thank you. This is on for Plaintiff's
17 Motion for Summary Judgment. I've reviewed the pleadings that
18 you've filed counsel, so if you'd like to proceed Ms. Tomsic,
19 you may.

20 MS. TOMSIC: Your Honor, as you know this action is a
21 declaratory judgment action that was brought by the plaintiff,
22 Jayson Orvis, seeking a declaration from this Court that the
23 defendant, Jamis Johnson holds no interest, title, or right to
24 the credit repair businesses of Mr. Orvis and seeking the costs
25 involved in that case. Mr. Johnson has filed a counterclaim

1 asserting various claims against Mr. Orvis and other third
2 parties, two of whom you've already granted summary judgment
3 on, all of which, regardless of the label are predicated on the
4 assumption that Mr. Johnson has a partnership with Mr. Orvis
5 relative to these credit repair businesses.

6 Previously Your Honor, just in terms of history, two
7 of the defendants, Mr. Lawrence and a Mr. Spendlove moved the
8 court for summary judgment and the Court had granted that
9 Motion for Summary Judgment basically on two grounds, one of
10 which was judicial estoppel. Mr. Orvis has moved this Court
11 for summary judgment on one ground, Your Honor, and that is
12 judicial estoppel, that is that as a matter of law, Mr.
13 Johnson, Jamis Johnson, the defendant and counterclaim
14 plaintiff and third party plaintiff in this action, cannot
15 assert that he has a partnership interest or any right or title
16 to the credit repair businesses of Mr. Orvis or the proceeds or
17 profits from those businesses.

18 Your Honor, as you know, judicial estoppel is a
19 doctrine that was created in the late 1800s and has been
20 adopted by those courts who have considered it including the
21 Supreme Court of the United States and obviously was applied by
22 this Court in granting the summary judgments for Mr. Lawrence
23 and Mr. Spendlove. Judicial estoppel is a doctrine that the
24 courts have created which is an equitable doctrine; that it is
25 a doctrine that is applied by a court as in matter of law where

1 you have a party coming into court and asserting a position or
2 making a claim that is inconsistent with a position or claim
3 that they have asserted in a prior case. And in this case,
4 Your Honor, we have a situation where Mr. Johnson was sued by
5 the Small Business Administration, SBA, back in 1997 and they
6 got a judgment against him for money owed. The SBA
7 subsequently engaged in supp hearings to determine whether Mr.
8 Johnson had any assets including any interest in any
9 partnerships, any limited liability companies, any businesses
10 on which the SBA could execute to collect on its judgment.

11 In the course of those supp hearings, the SBA in
12 1999, took the deposition of Mr. Johnson. Mr. Johnson was
13 sworn to tell the truth in that deposition as all deponents are
14 and given an opportunity to correct the deposition prior to the
15 time it becomes final. In this case, while Mr. Johnson
16 testified to tell the truth and purported to tell the truth, he
17 never corrected that deposition and never made any changes and
18 in fact has never made any assertions before this Court that in
19 anyway that his testimony before the SBA was somehow mistaken
20 or wrong, and in fact, has stood by that testimony.

21 We have submitted the testimony that Mr. Johnson gave
22 in the SBA proceeding and that testimony, Your Honor, flatly
23 contradicts Mr. Johnson's position in this case both by way of
24 a defense and in its counterclaim and third party claims that
25 he has a partnership issue in these credit repair businesses.

1 And Your Honor, what I'd like to do is I'd just like
2 to read from the pages that I have attached to Mr. Orvis'
3 affidavit. They are attached as Exhibits 5 and 6, if I could,
4 and I'm beginning on page 23 on line 3 and again, this is the
5 supp hearing that is being conducted by the SBA to determine
6 whether Mr. Johnson holds any interest in anything that they
7 can execute on and this is Mr. Johnson's testimony beginning at
8 line 3 on page 23 and he states, testifies under oath, "But I
9 have resigned with any involvement in Lexington Law Firms
10 because of the pending bar problem." Question, "Aren't we
11 talking about Johnson and Associates, not Lexington Law Firms?"
12 Answer, "No. I resigned from anything. I have practiced law
13 under Jamis M. Johnson and Jamis M. Johnson and Associates.
14 Johnson and Associates is a not-for-profit corporation and
15 you've been told this. Ncbody has shares of stock. I resigned
16 from that. Lexington Law Firm, Victor Lawrence and another
17 attorney have taken over all of that. I've indemnified them.
18 They have indemnified me. I've resigned from any relationship.
19 Lexington Law Firm was just an operating entity that was doing
20 credit repair." Question, "Now Lexington Law Firm is not an
21 entity, it's an assumed name registered to you?" Question by
22 Mr. Hügey. Answer, "Actually, I think what happened, and I'll
23 have to recall this but I assigned, a couple of years ago there
24 was a corporation being set up but that was assigned, the name
25 was assigned to - it was going to be assigned into a

1 corporation. I don't know if we've ever registered the fact
2 that it was assigned." And then he goes on to talk about a
3 suit by the state of Tennessee and this is the next page, page
4 24. Beginning on line 4 he says, "But since that time" that's
5 the time of the Tennessee suit and his problems with the bar,
6 "and with my bar problem, I have completely relinquished any
7 interest. They paid me a little bit, made my payment and I
8 resigned. Now if it's listed as an assumed name by Jamis
9 Johnson, they're going to have to go in and change that but,
10 you know, they're operating now without me." So he testified
11 to that in terms of Lexington Law Firm which was the credit
12 repair business that was being run by Mr. Johnson and then by
13 Mr. Lawrence and it was a credit repair business that was
14 utilizing intellectual property and equipment of Mr. Orvis,
15 part of the intellectual property and equipment that's at issue
16 here but Mr. Johnson didn't stop his testimony there, Your
17 Honor. The attorney for the SBA really wanted to find out
18 geez, okay, we're talking about Lexington Law Firm and we're
19 talking about Johnson Associates, you're saying you've resigned
20 any interest, you don't have anything at all, well, I'm going
21 to be real categorical about this and beginning on page 30 at
22 line 16 the lawyer says, question, "Do you have any interest in
23 any partnerships?" On line 18 Mr. Johnson testifies under
24 oath, "No." Now he does go on to say in that he says, "I mean,
25 you know, often I'll have a joint venture with somebody but I

1 don't have a partnership or set up a partnership or an LLC.
2 You know, if I get a deal I say, hey, do you want to do this
3 deal together? We'll go up to Summit County and buy a lot."
4 Question, "So a joint venture." "Yeah, you could call it that
5 but I don't have any outgoing partnerships." I believe that's
6 a typo. I believe it's ongoing, Your Honor, partnerships.
7 Question, "Any interests in any limited liability companies?"
8 Answer, "No." And then he goes on on line 11 on page 31 and
9 says, "I have no interest in LLCs or corporations."

10 Clearly Your Honor, the supp hearing was to determine
11 what if any interests he held in anything. The questions were
12 specifically put to him under oath as to whether he had any
13 interest in Lexington Law firm, Johnson and Associates, any
14 partnership, any LLC, any corporation and he categorically said
15 no.

16 In this proceeding Your Honor, Mr. Johnson has done
17 an entire about face and his answer, all you have to do is look
18 at his answer to the declaratory judgment in this action and
19 his counterclaim and third party claim and he says "I, Jamis
20 Johnson, am a partner with Jayson Orvis. I have a partnership
21 interest in these credit repair business." That is the
22 foundation of his defense. That is the foundation of every
23 single claim he has made against Mr. Orvis, the plaintiff in
24 this case and every third party defendant including the two
25 third party defendants who were let out of this case on summary

1 judgment.

2 Your Honor, so I would say as a matter of law, under
3 the doctrine of judicial estoppel, Mr. Johnson is estopped from
4 claiming he owns a partnership and Mr. Orvis, as a matter of
5 law, is entitled to a declaratory judgment that Mr. Johnson
6 does not have an ownership interest.

7 And I want to address a couple of issues that were
8 raised by Mr. Johnson in his opposition because I think that
9 they're ones that I'd like to address in my opening and then if
10 there are further issues, I'd like to deal with that in my
11 rebuttal.

12 Mr. Johnson takes the position that the doctrine of
13 judicial estoppel does not apply here even though this Court
14 applied it relative to Mr. Lawrence and Mr. Spendlove because
15 he says that under Utah law, you have to have been a party or
16 privy with a party in this prior action and it had to involve
17 the same subject matter and he cites to a Utah Supreme Court
18 case that quotes from a 1942 decision, the Tracy Loan case by
19 the Utah Supreme Court and says that's the state of the law.

20 Well, Your Honor, the problem with that position is
21 that the Utah Supreme Court subsequent to that Tracy decision
22 stated that in fact to the extent there was that type of broad
23 language in the Tracy case, that it had been revisited and
24 reconstructed in a later decision by the Supreme Court, the
25 Hodge decision which he said has clarified what that is and in

1 the Hodge decision, Your Honor, they were talking about
2 collateral estoppel and on collateral estoppel there had been
3 prior case law just like there had been on judicial estoppel,
4 that you had to be same parties in the same suit or privy on
5 the same subject matter and the Court made it clear that that
6 is not correct. What you have to demonstrate is that in fact
7 you have someone in a prior proceeding who takes a position and
8 if they're doing it under oath before a tribunal or in a case,
9 and that position is contrary to a position they're not
10 asserting before a court, that you do not have to be the same
11 parties, that what you have to show is they are contrary
12 positions and in this case, the defendant got a benefit out of
13 it. Well, clearly in this case Your Honor, Mr. Johnson got a
14 benefit out of it because the SBA didn't collect on anything
15 because he claimed he didn't own anything including this
16 partnership interest.

17 And so Your Honor, I would say there is not a Supreme
18 Court case after the Supreme Court basically overruled the
19 Tracy decision on the grounds of having to have identities of
20 parties and subject matter. Where this Court, being the
21 Supreme Court, Court of Appeals, or even a district court has
22 held that in order to utilize judicial estoppel, you have to be
23 the same parties in the same action. And that's important,
24 Your Honor, because as you stated in your opinion explaining
25 why you had granted summary judgment to Mr. Lawrence and Mr.

1 Spendlove, the purpose for judicial estoppel is to make sure
2 that the courts are not being utilized to commit fraud and that
3 they are not allowing people to lie in one tribunal and use it
4 to their benefit in another tribunal and, Your Honor, I would
5 say that the issue that this Court decided relative to Mr.
6 Lawrence and Mr. Spendlove on the issue of judicial estoppel is
7 identical as that raised by Mr. Orvis.

8 The courts are clear that when you're talking about
9 judicial estoppel versus equitable estoppel, the relationship
10 you're looking at is the relationship between a party of the
11 tribunal. The question is, are you misusing the justice
12 system? And that's the relationship you're looking at and on
13 the summary judgment motion against Mr. Johnson by Mr.
14 Spendlove and Mr. Lawrence, this Court stated and I'm quoting
15 Your Honor from page 4 of your opinion in that case that was
16 entered, I believe, more than a year ago in February 2003, you
17 stated, "Mr. Johnson is also estopped from asserting any claims
18 in this action which are based on the partnership he denied
19 under oath when questioned by the SBA." "Estoppel is a bar or
20 impediment which precludes allegations denial of a certain fact
21 or state of facts in consequence of a previous allegation or
22 denial or conduct or admission. It operates to put a party
23 entitled to its benefits in the same position as if the thing
24 represented were true." And you're quoting Black's Law
25 Dictionary. And then you go on to say, judicial estoppel

1 "prevents a party from seeking judicial relief by offering
2 statements inconsistent with its own sworn statements in a
3 prior judicial proceeding."

4 You then go on to state on page 5, "Mr. Johnson seeks
5 judicial relief in this matter by offering statements that are
6 inconsistent with his own sworn statements in the proceedings
7 brought against him by the SBA. In a sworn deposition, Mr.
8 Johnson told the SBA that he had no interest in and had no
9 right to receive payments from Lexington Law Firm. He went on
10 to aver that he had no partnership interest nor interest in a
11 limited liability company. Because each of the claims asserted
12 against Lawrence and Spendlove are expressly negated in Mr.
13 Johnson's prior testimony where he was attempting to avoid
14 payment to the SBA, the claims must be dismissed." And again,
15 those claims, Your Honor, were all predicated on an assumption
16 that Mr. Johnson owned a partnership interest or had a
17 partnership with Mr. Orvis.

18 So I would say Your Honor, one, you have visited this
19 issue with regard to other defendants. You clearly have laid
20 out what judicial estoppel is and what the purpose behind it is
21 and why it would apply in this situation.

22 Your Honor, the arguments that the Defendant Johnson
23 asserts here are exactly the arguments that he asserted in
24 opposition to Mr. Spendlove and Mr. Lawrence's motion and which
25 were rejected by the court in finding summary judgment based at

1 least in part on the judicial estoppel doctrine.

2 Finally Your Honor, the argument that Mr. Johnson
3 raises again which he raised in the last hearing on the other
4 summary judgment motion, is that, well, geez, you know, my wife
5 and I both have this interest in the partnership and it's
6 really her interest in the partnership. Well, Your Honor, we
7 attach as Exhibit A to our reply an order from this court that
8 was signed and was basically reflected your ruling at the oral
9 argument in connection with the last Motion for Summary
10 Judgment, that his wife, Danelle Johnson is not a proper party
11 before this Court and you ordered that any reference to her in
12 any pleadings, be stricken and the reason this had arisen is
13 because the Memorandum in Opposition, just as the Memorandum in
14 Opposition to our motion was styled, Jamis and Danelle
15 Johnson's opposition and your point was, she's not a proper
16 party in this case. She's not a party. She cannot be
17 asserting claims and that is not before the court. Well, that
18 was back in February 2003, Your Honor, and here we are again
19 with the same point.

20 And I might point out, Your Honor, even if she were a
21 party to this action, it would make no difference and that is
22 because to the extent she's claiming any interest and I believe
23 that Jamis has described it as a "beneficial interest" it all
24 derives and is part and parcel of his claim that he is a
25 partner and has a partnership interest with Mr. Orvis in credit

1 repair and that he has given the benefit of that, that is in
2 profit sharing to his wife. So even if she were before this
3 court which she's not, it would make no difference because
4 judicial estoppel, estops Mr. Johnson from making that claim
5 and he can't give a benefit to his wife that he's estopped from
6 claiming.

7 Finally Your Honor, I would just say, this is an
8 issue that is firmly established in the law. The record is
9 uncontroverted in this record that Mr. Johnson made those
10 statements under oath before the SBA. They are inconsistent
11 with the position he has taken here and as a matter of law, the
12 Court should grant our Motion for Summary Judgment, both on our
13 declaratory judgments and on his counterclaim and third party
14 claims predicated on him having an ownership interest. We
15 would ask that our motion be granted.

16 THE COURT: Thank you.

17 Mr. Cartwright?

18 MR. CARTWRIGHT: Good afternoon, Your Honor. I'm
19 somewhat new to this case and I want to first address a
20 misunderstanding I had when I first got involved in the case
21 because I think that may be a misunderstanding that is taking
22 place here in the way this motion is being presented. What had
23 happened here as explained in Mr. Johnson's affidavit was there
24 were initially five guys who created a partnership in doing
25 credit repair, the credit repair business, where they dispute

1 certain things on people's credit and challenge them. After a
2 period of time three of those partners dropped out and there
3 were just two guys left, Mr. Orvis and Mr. Johnson. They were
4 the two remaining partners. Now this credit repair partnership
5 that existed between the two of them - and here's where my
6 misunderstanding was - was not called Lexington Law Firm. This
7 partnership had many different organizations that it was
8 managing, some LLCs, this law firm. It hired attorneys to
9 manage the law firm including Lexington Law Firm but the
10 partnership existed outside and separately of Lexington Law
11 Firm. So later on Mr. Johnson, there was a judgment obtained
12 against him by the SBA and after that judgment there was a
13 deposition and he was asked about his interest in Lexington Law
14 Firm and at that time Mr. Johnson truthfully stated that he had
15 disclaimed all interest in Lexington Law Firm. Now even though
16 he didn't have that interest in Lexington Law Firm, there still
17 remained this partnership between Mr. Johnson and Mr. Orvis and
18 Mr. Orvis isn't an attorney but this was the marketing arm that
19 was generating clients for Lexington Law Firm, contract between
20 the law firm and Mr. Orvis, where all this money was being
21 poured into the partnership and therefore, in accordance with
22 the partnership agreement between Mr. Johnson and Mr. Orvis, he
23 was receiving a cut of that. So I just want to clarify that
24 issue right now. It isn't - Mr. Johnson still isn't claiming I
25 own Lexington Law Firm. He's saying I have a partnership with

1 | Mr. Orvis.

2 | THE COURT: That's swell but why did he tell the SBA
3 | he didn't have any interest in any partnerships?

4 | MR. CARTWRIGHT: Let me look at the broader context
5 | of this statement. Mr. Johnson earlier in this deposition had
6 | talked about - and in his other deposition with the SBA and in
7 | his wife Danelle's deposition with the SBA, explained that
8 | there was a lot of money coming to Danelle Johnson. Danelle
9 | was pretty much a figurehead. Jamis was the one with the
10 | involvement and was doing the work and so they had talked about
11 | that in this deposition and in previous ones. Now we get to
12 | the specific question where they asked about partnerships and
13 | that was done in the context of the laundry list of things do
14 | you own or not own. Do you own stocks? No. Bonds? No. It's
15 | a big list and it gets down to partnerships. No. Now in Mr.
16 | Johnson's mind set as explained in his affidavit, he thought
17 | that had to do with real estate or other partnerships not
18 | having to do with this one that he'd already talked about
19 | extensively with the SBA and that his wife had talked about
20 | extensively with the SBA.

21 | THE COURT: So being a lawyer, he, of course, said to
22 | the question, are you just talking about the Lexington Law Firm
23 | or what partnerships are you talking about?

24 | MR. CARTWRIGHT: I don't think that he was being that
25 | tap dancing around the issue at that time.

1 THE COURT: Of course he didn't because he said no.

2 MR. CARTWRIGHT: He said no in the context of his
3 mind that they'd already talked about these other issues and
4 that that question meant other than the partnership that
5 Danelle's already talked about, that you've already talked
6 about, that the SBA knew that money was coming to Danelle and
7 so in his mind it wasn't even a tap dance. It was thinking in
8 the context of the entire deposition, other partnership
9 interests other than the one with Mr. Orvis. So in his mind,
10 he answered that question truthfully. It wasn't referring to
11 that and it wasn't any legal lawyer tap dancing around the
12 issue asking about definition. He was just answering a
13 question to the best of his knowledge with his understanding,
14 as he explains in his affidavit, that the SBA was well aware of
15 the relationship of the partnership and the money going to
16 Danelle Johnson and Jamis' involvement in the partnership.

17 Now that's what he's testified in his affidavit. It
18 doesn't have to do with Lexington Law Firm. He doesn't assert
19 an ownership in that. He asserts a continuing partnership
20 relationship. He says no there but the reason he says no, his
21 intent is that he's already talked about that and that was
22 related to real estate holdings or other types of partnerships
23 that he was involved in.

24 Now, having said that, we shouldn't even get as far
25 as his answers in this prior proceeding because the law I agree

1 is clear that judicial estoppel does not apply in this case. I
2 think counsel has clearly, is clearly mistaken as to what the
3 law of judicial estoppel is in the state of Utah. She
4 indicated that there was no more recent law in the United
5 States Supreme Court than this Hodge case in 1971 and that
6 ignores two separate cases that are far newer. One is in 2001
7 and one is in the year 2000 and following these cases, we don't
8 even get to what's in this deposition. In Nebeker which we
9 cited in our Memorandum in Opposition, the Utah Supreme Court
10 outlines what judicial estoppel is. "Under judicial estoppel a
11 person may not, to the prejudice of another person, deny any
12 position taken in a prior judicial proceeding 'between the same
13 persons or their privies involving the same subject matter and
14 if such prior position was successfully maintained.'" So the
15 Utah Supreme Court is setting forth three requirements; number
16 one, between the same persons or their privies; number two,
17 involving the same subject matter; and number three, if such
18 prior position was successfully maintained. Those elements are
19 clearly not satisfied here. Number one, it isn't the same
20 persons or privies. In that case it was the SBA. In this case
21 it's Mr. Orvis. Number two, involving the same subject matter.
22 In the SBA case they were litigating issues over the contract
23 liability under the SBA loan. After a judgment was entered,
24 this isn't litigating a claim, he made a statement that can be
25 construed several different ways in a post judgment,

1 supplemental proceeding. And number three, I don't see how
2 this can be met under any reasoning, if such prior position was
3 successfully maintained. There was no position taken in there
4 that was asserted or litigated or decided by anyone. He lost
5 that case. He made a statement in a post judgment deposition.
6 There wasn't any successfully maintaining this. Interestingly,
7 in the plaintiff's memorandum, they say that this element is
8 met successfully maintained because the SBA hasn't received a
9 cent from Johnson on the judgment and that that constitutes
10 meeting this element. Well, the fact of the matter is, they
11 didn't tell the Court that Mr. Orvis bought that judgment from
12 the SBA. The SBA got I believe \$30,000. That's a lot more
13 than not receiving a cent on this and it certainly doesn't
14 satisfy if such a prior position was successfully maintained.
15 Simply put, under judicial estoppel, it doesn't meet any of the
16 requirements set forth by the Utah Supreme Court.

17 The Utah Supreme Court, this is 2001 in Nebeker
18 Trucking versus the Utah State Tax Commission and that's not
19 the only case that talks about it. The Nebeker Court actually
20 - it cites I believe to a 2000 case, Salt Lake City versus
21 Silver Fork Pipeline Corporation and in that they talk about
22 the requirements that you have to have for judicial estoppel to
23 apply. In this, SFPC claimed that Salt Lake City was
24 judicially estopped and the Utah Supreme Court again said,
25 SFPC's contention is untenable for two reasons. First, SFPC

1 | was not a party to Progress, that's another party, that
2 | detrimentally changed its position by reason of Salt Lake's
3 | inaccurate representation of Utah's water law in progress.
4 | Then they cite the law. Under judicial estoppel, a person may
5 | not, to the prejudice of another person, deny any position
6 | taken in a prior judicial proceeding, one - and these are my
7 | ones - between the same persons or their privies; that doesn't
8 | apply in this case; (2) involving the same subject matter; SBA
9 | subject matter and this one is different; and (3) if such prior
10 | position was successfully maintained. The exact same elements
11 | and they're citing an earlier case involving the same parties
12 | and they also cite Tracy Loan and Trust Company versus
13 | Openshaw. Again, there's two Supreme Court cases, 2000 and
14 | 2001 which directly say here's the elements to judicial
15 | estoppel and in this case they say because these elements
16 | weren't met, judicial estoppel does not apply.

17 | Now, this 2000 case also cites to AMJUR, talking
18 | about what the judicial estoppel is. Now AMJUR, if you go to
19 | section 70, it lists the requirements. Number one, the
20 | inconsistent position first asserted must have been
21 | successfully maintained; two, a judgment must have been
22 | rendered; three, the positions must be clearly inconsistent;
23 | four, the parties in question must be the same; five, the party
24 | claiming estoppel must have been misled and have changed his
25 | position; and six, it must appear unjust to one party or permit

1 the other to change. Now these elements in AMJUR also aren't
2 met here. The parties in question must be the same. Clearly
3 they're different parties in the SBA case and this one. The
4 party claiming estoppel must have been misled and have changed
5 its position. Here there's been zero reliance by Mr. Orvis
6 upon any statements made in this SBA deposition. In fact, he
7 wasn't just misled, he actually bought that judgment and he is
8 right now continuing to trying to collect on that judgment in
9 federal court and we've been over there in federal court just a
10 couple of weeks ago arguing this other case and there's been no
11 - he wasn't misled and Mr. Orvis has never changed his
12 position.

13 And the last requirement, it must appear unjust to
14 one party to permit the other to change, that clearly hasn't
15 happened here because after this deposition was taken by the
16 SBA, post judgment, Mr. Orvis continued to provide checks to
17 Danelle Johnson and one actually to Jamis Johnson every month
18 for, well, that's what we're fighting about, what those
19 payments are for and this is significant money. It went all
20 the way up to \$35,000 a month. It's not that he changed his
21 position or was unjust, he continued to make these payments
22 and, in fact, we have partnership agreements that we presented
23 to the court and we have statements by Mr. Orvis indicating a
24 business relationship between the two that we presented to the
25 court and there are also depositions taken after the Victor

1 Lawrence judgment was done that indicate Mr. Orvis was being
2 deceitful about the accounting provided to Mr. Johnson and the
3 monies that were owed to the Johnsons. But we can't even get
4 to what was said in the deposition or how the court or a jury
5 should characterize that because judicial estoppel simply
6 doesn't apply. Interestingly in AMJUR, section 70-

7 THE COURT: Wait a minute. What do you mean we can't
8 get to it?

9 MR. CARTWRIGHT: Well, judicial estoppel doesn't
10 apply..

11 THE COURT: Okay. That's fine. You can still get to
12 it. You have to get to it to decide whether it's judicial
13 estoppel.

14 MR. CARTWRIGHT: You're right, and I guess what I
15 mean is that the plaintiffs are making certain
16 characterizations on what he meant by saying no in the context
17 of the deposition and I'm saying we don't get that far to the
18 saying no because it doesn't meet any of the elements of
19 judicial estoppel. Let's assume that Mr. Johnson was the most
20 dishonest person in the world and he sat there and lied during
21 his deposition, which he didn't and the evidence shows he
22 didn't, but assume that he did. Even if he did and was the
23 biggest liar in the world which he's not, it doesn't matter in
24 this case. It would be evidence against him that could be
25 presented to the jury but it's not judicial estoppel because

1 the requirements aren't met. That's what I mean about not
2 getting that far.

3 Now the plaintiffs have indicated that, I believe
4 their language is that Tracy has been expressly overruled.
5 That's simply mistaken. Tracy was not expressly overruled.
6 There's two cases they cite where they talk about how Tracy
7 shouldn't apply and I notice they don't even mention, it's
8 almost pretending like the 2002 and 2001 Supreme Court
9 decisions don't exist. But what they argue - they're pretty
10 much trying to ignore judicial estoppel and go into cases that
11 talk about res judicata versus collateral estoppel. What they
12 say supports their position, they're talking about the
13 International Resources v. Cremfield case and there the Utah
14 Supreme Court said, "Concerning the doctrine of res judicata it
15 is said that both parties the issues must have been the same
16 and also judgment is conclusive and then certain issues tried.
17 This court explains - and then it talks about res adjudicata
18 versus collateral estoppel, not judicial estoppel, collateral
19 estoppel and there they talk about how you can have different
20 parties in collateral estoppel unlike res judicata where you
21 need the same parties.

22 THE COURT: I understand the difference.

23 MR. CARTWRIGHT: But they even say in collateral
24 estoppel that operates only as to issues which were actually
25 asserted "and tried" in that case. There's no allegation here

1 that these statements made in a post judgment supp order was
2 tried in the prior case. It simply wasn't and it indicates if
3 the material issue was not actually asserted and determined,
4 there is no basis upon which it could be concluded that it had
5 actually taken a different position on the issues. So even
6 arguing this collateral estoppel, that doesn't go but when it's
7 talking about the difference between the two, there's a
8 footnote in the case and this is where the plaintiffs say Tracy
9 was expressly or explicitly overruled. Here's the footnote,
10 "We so state an awareness of a conceitedly, over broad
11 statement in our case of Tracy Loan and Trust to the effect
12 that one would not be judicially estopped unless the parties
13 and the issues are the same in the instant and the prior suit.
14 Any misstatement of the rule was corrected and superceded by
15 our decision in Richard v. Hodson." So this is the first time
16 they talk about judicial estoppel in this case. They were
17 talking about collateral estoppel before and they refer to
18 Richard v. Hodson. Going to Richard v. Hodson where they say
19 this is where they clarified it, and again, it doesn't talk
20 about judicial estoppel. It talks about collateral estoppel
21 versus res judicata. It talks about the difference between the
22 two and then it says, "This doctrine known as collateral
23 estoppel differs from res judicata not only in the fact that
24 all the parties need not be the same, but also in the fact that
25 the estoppel applies only to issues actually litigated and not

1 as to those that could be determined." So again, talking about
2 collateral estoppel and issues actually litigated.

3 THE COURT: The Supreme Court doesn't know what
4 judicial estoppel is.

5 MR. CARTWRIGHT: No, I think what I'm saying is-

6 THE COURT: Wait a minute. Didn't they say in the
7 footnote judicial estoppel?

8 MR. CARTWRIGHT: Yeah.

9 THE COURT: And they referred to a case that talks
10 about only collateral estoppel?

11 MR. CARTWRIGHT: That's correct.

12 THE COURT: Then I guess they don't know what they're
13 talking about, huh?

14 MR. CARTWRIGHT: I can't figure out why they were
15 saying that because in International Resources they're talking
16 about res judicata versus collateral estoppel. They have a
17 footnote that says our Tracy Loan and Trust with judicial
18 estoppel as clarified by this other case. I go to the other
19 case and I see them talking about collateral estoppel and res
20 judicata in talking about elements there. I can't fit those
21 cases together and I'm not sure why they talk about that. All
22 I'm left with is - and this Hodson case is 1971. All I'm left
23 with is two Supreme Court cases in the year 2000 and 2001 that
24 don't deal with collateral estoppel but talk about judicial
25 estoppel and it outlines the specific requirements there.

1 Putting aside the issues of law that judicial
2 estoppel doesn't apply here, I'd like to point out to the Court
3 that judicial estoppel is the only claim asserted before the
4 Court in this motion and judicial estoppel based upon really
5 one thing and that one thing only is what he said in this
6 deposition transcript. In the reply memorandum we get for the
7 first time new arguments and that new argument talks about a
8 prior order that the judge entered in this court in regards to
9 Victor Lawrence.

10 THE COURT: That's me and I said judicial estoppel
11 applied.

12 MR. CARTWRIGHT: That's correct.

13 THE COURT: Did somebody appeal that?

14 MR. CARTWRIGHT: Yes, he should if that's a-

15 THE COURT: Did someone appeal that?

16 MR. CARTWRIGHT: No, because it hasn't been certified
17 as a final order to be appealed.

18 THE COURT: Third party action, wasn't it? Yeah, a
19 third party defendant. I guess that kind of ended the third
20 party complaint, didn't it?

21 MR. CARTWRIGHT: Your Honor, I'm not aware that
22 that's been certified a final issue or not.

23 THE COURT: Why would you have to certify it if it's a
24 third party?

25 MR. CARTWRIGHT: That could be and here's where this

1 argument should not apply. First of all, I haven't had the
2 opportunity to respond to this issue because it was presented
3 to the Court for the first time in the reply memorandum and
4 under Rule 56, what they're stuck with and what they elected to
5 argue then was judicial estoppel based upon the statements that
6 were made in the deposition only and not this subsequent order
7 and if they want to bring this in a subsequent motion, that
8 would allow Mr. Johnson and I the time and the opportunity to
9 fully respond to that and to address the issue of whether it's
10 a final order or not, but they didn't. They raised that issue
11 at the very beginning in their reply memorandum and the Utah
12 Court of Appeals - we filed a Motion to Strike that.

13 THE COURT: I know.

14 MR. CARTWRIGHT: The Utah Court of Appeals indicated
15 that you may grant a Motion to Strike on issues raised for the
16 first time in a reply memorandum and we're not saying that
17 they've lost their chance forever. We're simply saying, we
18 should have the opportunity to submit affidavits and other
19 evidence in response to that, that it's too late now.

20 Number two, I've indicated that it's my understanding
21 that it's not a final order, that they're still able to appeal
22 that or even more importantly, Your Honor can, based upon
23 additional information presented here and the evidence that he
24 presented in his affidavit here is much more comprehensive than
25 it was before, would justify not only denying this motion, if

1 that were at issue, but changing the court's order previously
2 and we're saying that - we haven't made that motion now. We're
3 saying it's not-

4 THE COURT: Assuming a year has gone by and I haven't
5 seen any motion to change it and it hasn't been appealed, final
6 or not, the chances of my changing that are about slim to none.

7 MR. CARTWRIGHT: Okay. Also, Your Honor, there's
8 been things that have happened which doesn't make that - while
9 it may apply to Victor Lawrence, it shouldn't apply to Jayson
10 Orvis and the reason why is the relationships of the parties
11 are completely different. The relationship between Victor
12 Orvis and Mr. Johnson was that of attorney and client. Here
13 this is no attorney. This is partnership, partnership. He was
14 not making partnership claims against Victor Lawrence. He was
15 making various other claims that the Court dismissed. I'm not
16 arguing that those are right or wrongly dismissed. I'm saying
17 that the relationships are very different. The claims that
18 were made against Victor Lawrence are different than Jayson
19 Orvis and that even if they had raised this for the first time
20 and we'd had the opportunity to respond, the circumstances are
21 different.

22 Also, between then and now there's been the
23 additional discovery that Mr. Johnson has obtained that talks
24 further about the relationships between the parties and that
25 includes an assistant of Mr. Orvis that testified in a

1 deposition about Mr. Orvis' payments of monies to Mr. Johnson
2 and how those payments were false and were basically, it was
3 cheating one to the other and also an assistant of Victor
4 Lawrence. And we believe that with that additional testimony
5 presented to the Court, that Your Honor would find differently
6 if that matter were raised now with Mr. Orvis. But in any
7 event, we shouldn't get that far because judicial estoppel -
8 this one isn't even close. These elements don't apply and
9 that's it and that's our position.

10 THE COURT: All right, thank you.

11 MS. TOMSIC: Your Honor, briefly if I could just
12 address a couple of points.

13 THE COURT: Okay.

14 MS. TOMSIC: First of all, Your Honor, relative to
15 the order, obviously it's part of the record in this case and
16 the reason obviously we cited it, was in direct reputation as
17 to their position as to what the required elements for judicial
18 estoppel which is clearly would be contrary to Your Honor's
19 order and it is basically the law of this case at this point
20 given that it was issued almost a year and a half.

21 Second, Your Honor, in terms of Mr. Johnson's
22 purported explanation of his testimony before the SBA, it's all
23 well and good for Mr. Cartwright to stand up here and try to
24 explain it to the Court but we don't have anything before this
25 Court in any way explaining that. If you look at Mr. Johnson's

1 | affidavit, all he talks about is that his testimony was
2 | truthful and he quotes it, it says what it says. He denies he
3 | had any partnership interest. Here he claims he has one.

4 | And I think what else is important, Your Honor, is
5 | when they're taking the position that somehow the SBA lawyer
6 | that knew it was Danelle Johnson who had it, it's just not
7 | true, Your Honor, and I would ask Your Honor to look at pages
8 | 40 through 42 of Mr. Johnson's deposition before the SBA and
9 | I've got a copy for Your Honor and a copy for opposing counsel
10 | if I could. And Your Honor, the SBA - if I may approach?

11 | THE COURT: Yes.

12 | MS. TOMSIC: - is asking them about Danelle Johnson
13 | and where she's getting her income and if you go to I believe
14 | it's page 44, he's talking about getting payments from
15 | Lexington Law Firm to the SBA and Jamis Johnson takes the
16 | position that basically, she's receiving those payments because
17 | she's a trustee on these boards, that she had performed some
18 | services for them that are undescribed and that she had donated
19 | some computer equipment, furniture. There's absolutely no an
20 | assertion in there that says, gee, well, I thought you were
21 | talking to me about me owning a partnership interest. No, my
22 | wife is the one who owns it. So not only did he say he didn't
23 | own a partnership interest contrary to his position here, he
24 | tells the SBA that the reason his wife is getting any money is
25 | because she was doing services, acting as a trustee and had

1 contributed some things. So, Your Honor, I just say, his
2 deposition says what it says. It's unequivocal on its face
3 that he is denying any type of a partnership or any type of an
4 LLC interest or a corporation. His position in this case is
5 absolutely contrary to that. You can see it in their papers.
6 You can see it in their answer to the declaratory judgment and
7 you can see it in his third party complaint and counterclaim.

8 And Your Honor, I think the thing I want to say about
9 Mr. Cartwright's representation of the Utah Supreme Court
10 authority, it's true that the Nebeker and Silver Fork cases
11 were decided after the International case that we cite to Your
12 Honor but I think, Your Honor, in fairness, if you look at
13 those decisions, the issue before the Court in neither of those
14 decisions was whether or not the party asserting judicial
15 estoppel was the same party. That was not the issue on which
16 the court made a decision, and I think if you look at the cases
17 we cited - and I've got copies if you would like a copy.

18 THE COURT: I would, uh-huh (affirmative). I can
19 find them but I guess I better read them.

20 MS. TOMSIC: If you-

21 THE COURT: What do you say about this thing in the
22 footnote the Supreme Court talks about judicial estoppel being
23 clarified in a subsequent case that talks about collateral
24 estoppel?

25 MS. TOMSIC: Your Honor, I think - let me tell you, I

1 can't speak to what's in the minds and heart of the Supreme
2 Court.

3 THE COURT: Neither can I, not can ones that have
4 gone before.

5 MS. TOMSIC: But what I can tell you, Your Honor, is
6 this is that the Tracy Loan case which is really the prodigy
7 that is cited that they rely on in subsequent decisions, the
8 Nebeker decision and the Silver Fork decision, is a case
9 involving judicial estoppel and at the time of that case there
10 also was a law, both with regard to judicial estoppel and
11 collateral estoppel that the parties had to be the same as in
12 the prior suit and when they're citing to Tracy Collins, while
13 they may be looking to a case dealing with collateral estoppel,
14 basically the same principles were being applied on collateral
15 estoppel and judicial estoppel, that is requiring the parties
16 and the subject matters to be the same and the way I read this
17 footnote, Your Honor, is saying, look, we were really broad in
18 our language that we were using in Tracy Collins. Take a look
19 at this Hodson case because what we've done is we've redefined
20 those elements and that would apply with equal force to
21 judicial estoppel and collateral estoppel and that's how I
22 would read it.

23 But Your Honor, I do want to say one other thing. I
24 want to give you the Nebeker case and this Silver Fork case
25 because I think what you'll see is like many courts, they grab

1 a quote out of a case, put it up there, and then they pick the
2 element they're talking about and that's what they decide the
3 case on. If you look at the Nebeker case, the Court is taking
4 the position after it cites that, which really I think if you
5 look at it in terms of the holding of the court is dicta, it
6 says that the reason they're not applying judicial estoppel is
7 because the party hadn't changed its position in the original
8 litigation based on testimony which is obviously contrary in
9 this case because the SBA did change its position. It couldn't
10 collect on a \$250,000 plus judgment and while they ultimately
11 ended up selling it for \$30,000, it changed its position, Your
12 Honor, because it couldn't collect on a partnership that Mr.
13 Johnson is now claiming is worth hundreds, and hundreds, and
14 hundreds or thousands of dollars in this case.

15 So, one, the cite to Tracy Collins was a quote that
16 is dicta in the case if you look at the holding of the case and
17 in terms of the Silver Fork Pipeline case, again, while they
18 quote that whole long quote out of Tracy Collins, that case,
19 the only issue before the court was, can you apply judicial
20 estoppel where there is not a knowing misrepresentation, that
21 is where somebody might be mistaken about something and may not
22 have all the facts and again, neither the Nebeker case nor the
23 Silver Fork Corporation case are situations where a party was
24 arguing, geez, they weren't the same parties, it wasn't the
25 same subject matter. Those were not the issues before those

1 cases and unfortunately, the Supreme Court hasn't said anything
2 about this footnote and there is no case where it has said
3 again, after the International Resources case that it meant
4 something differently.

5 And a point I want to make Your Honor is one, I don't
6 think it's correct that you have to have those requirements
7 because the issue again is really the relationship between the
8 party and the judicial system which means that Mr. Cartwright's
9 argument that your prior order shouldn't apply because the
10 relationships between the parties are different, well, Your
11 Honor, the bottom line is, all you need to do is look at the
12 authorities and they make it clear. This is not equitable
13 estoppel. You're not looking at relationships between parties.
14 You're looking at the relationship between the defendant and
15 the judiciary and what the defendant has done within that
16 judicial system and what's important here, Your Honor, is you
17 take the position that Mr. Johnson, we believe didn't tell the
18 truth. But assuming he - if you're with me and you read it and
19 it's not the truth, what he's saying, Mr. Cartwright is saying,
20 is litigants can go and perpetrate a fraud on the court and
21 then turn around and totally change their position to their
22 benefit using the court again and that exactly the reason that
23 you have judicial estoppel. It's to keep parties from lying to
24 a court and as many courts have said, what it does is it
25 increased the costs of lying. If you lie in a judicial

1 proceeding, you can't then turn around and change your story to
2 get some benefit before another court and that's exactly what
3 we have here.

4 Your Honor, so I'd say again, one, the requirements
5 for judicial estoppel are that you have a litigant, Mr. Johnson
6 in the SBA case, making a statement under oath in a judicial
7 proceeding where the SBA changes its position and then in this
8 case, turns around and take a totally inconsistent position and
9 says he does have a partnership interest, hoping to benefit
10 economically from that and at the same time to have deprived
11 the SBA of that money. And under the doctrine of judicial
12 estoppel it's a deliberate false misrepresentation and it's
13 being used for their benefit and he's trying to use this Court
14 to either lie to the SBA in that case or lie to the Court in
15 this case and under the doctrine of judicial estoppel that is
16 not permitted.

17 Finally I'd say one last thing, Your Honor, and that
18 is, I think even assuming you were to buy the argument that the
19 court didn't mean whatever it said in footnote 4, and again, I
20 just want to state the language because they're talking about
21 collateral estoppel in the body of the text and then the
22 footnote, and they say "We so state an awareness of an
23 conceitedly over broad statement in our case Tracy Loan, to the
24 effect that one would not be 'judicially estopped' unless the
25 parties and the issue are the same in the instant and the prior

1 suit. Any misstatement of the rule was corrected and
2 superceded by our decision in Hodson". And again Hodson dealt
3 with collateral estoppel, but the elements were the same for
4 collateral estoppel and judicial estoppel prior to the Hodson
5 decision where it found you don't have to be the same parties
6 and as long as it was an issue that was actually addressed,
7 you're there.

8 And I think one last thing, Your Honor, and that is
9 that fundamentally in this case, if the Court were to overrule
10 its prior decision relative to Mr. Spendlove and Mr. Lawrence,
11 the bottom line is even if you impose that same party of
12 privity requirement, given that Mr. Orvis is an assignee of the
13 judgment, under Utah law, he is a privy. You know that as well
14 as I do, I mean, clearly the Utah Supreme Court has defined
15 privy to include that, AMJUR defines a privy as that. So Your
16 Honor, one, that's not the law but even assuming that you
17 decided, geez, I'm going to change my opinion and I'm going to
18 decide that's a requirement, it doesn't really matter for
19 purposes of Mr. Orvis.

20 And in terms of changing position, I think I've
21 covered that with the SBA. There was detrimental reliance,
22 Your Honor, selling a judgment that now with interest is
23 probably close to \$350,000 or \$400,000 for \$30,000 is clearly a
24 detrimental reliance on the truth of his testimony in that SBA
25 supp hearing.

1 I thank you for your time, Your Honor. Do you have
2 any questions?

3 THE COURT: I do. What's the date of the case that
4 uses the footnote regarding judicial estoppel?

5 MS. TOMSIC: The name of the case Your Honor is
6 International Resources, and would you like a copy?

7 THE COURT: Uh-huh (affirmative).

8 MS. TOMSIC: May I approach?

9 THE COURT: Yes, of course. That'll answer all the
10 questions I have.

11 MS. TOMSIC: Let me give you the other two cases,
12 Your Honor, if I could. This is the Silver Fork Pipeline case,
13 Your Honor, and this is the Nebeker.

14 THE COURT: Thank you. I'll take a look at these
15 cases. I want to read these to see what they have to say. As
16 a practical matter, the reason I wanted to know the date of the
17 case, I wondered who wrote it and whether or not it was
18 unanimous because I doubt seriously that all five justices
19 (inaudible) talk about when you use the words judicial
20 estoppel. That would be highly unlikely.

21 MR. CARTWRIGHT: May I just respond to one—

22 THE COURT: No sir, you may not. She gets the first
23 and last saying.

24 MR. CARTWRIGHT: But Your Honor there's been a
25 misstatement of the law that I'd like to correct. I don't want

1 to make any arguments but to point out a misstatement that was
2 said.

3 THE COURT: Go ahead.

4 MR. CARTWRIGHT: In the Salt Lake City v. Silver
5 Creek case that you have, paragraph 15, second paragraph,
6 SPFC's contention is untenable for two reasons; first, SPFC was
7 not a party to Progress. That's means the first case, that
8 detrimentally changes its position by reason of Salt Lake's
9 inaccurate representation of Utah water law in Progress. Under
10 judicial estoppel, a person may not to the prejudice the other
11 person, deny any position taken in a prior judicial proceeding
12 between the same persons. One of two reasons this case turns
13 on is it's different parties. That's all. She indicated to
14 the Court that that was not a reason. It simply is. That's
15 one of the two reasons for the decision, different parties.

16 THE COURT: I'll read these cases and let you know.
17 I'll be interested to know whether or not - well, I suppose one
18 way or the other this issue might get addressed by one of the
19 appellate courts but I'll be interested to know whether or not
20 the appellate courts are of the opinion that a person can make
21 a representation in one court and change it in another whether
22 you're the same party or whether you're not. I don't see that
23 it makes any difference but we will see. Thank you counsel.
24 I'll let you know within a day or two.

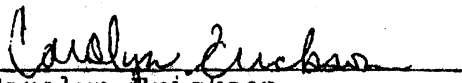
25 (Whereupon the hearing was concluded)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceedings held before Judge Timothy R. Hanson was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 16th day of February, 2005 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

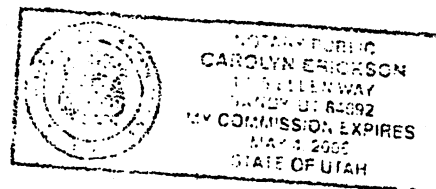


Exhibit 10

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAYSON ORVIS,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 010907449
vs.	:	
JAMIS JOHNSON,	:	
Defendant.	:	
<hr/>		
JAMIS JOHNSON and	:	
DaNELL JOHNSON,	:	
Third Party Plaintiffs,	:	
vs.	:	
JAYSON ORVIS, SAM SPENDLOVE,	:	
DEON STECKLING, VICTOR	:	
LAWRENCE, and JOHN DOES 1-15,	:	
Third Party Defendants.	:	

FILED DISTRICT COURT
Third Judicial District

OCT 20 2004

E. [Signature]
SALT LAKE COUNTY
Deputy Clerk

Before the Court is the plaintiff's Motion for Summary Judgment. Following argument of counsel, the Court took the matter under advisement to further consider the arguments of the parties, particularly the arguments surrounding the issue of judicial estoppel. After taking the matter under advisement, the Court has received correspondence from both the plaintiff and the defendant, with attached case authority.

The Court, since taking this matter under advisement and receiving the supplemental materials of the parties, has revisited this matter on a number of occasions. In doing so, the Court has read the materials submitted by the parties once again, has reviewed this Court's prior rulings dealing with the question of judicial estoppel, and based upon that review, the arguments of counsel, and the persuasive law presented, the Court is satisfied that the plaintiff's Motion for Summary Judgment must be granted as prayed.

The Court continues to be fully satisfied that the doctrine of judicial estoppel applies in this circumstance. Mr. Johnson is judicially estopped from asserting that he had an interest in a partnership where he, in a separate proceeding under oath, testified that he had none. There is no question of mistake. Mr. Johnson testified as he did, so as to avoid collection efforts from the Small Business Administration. The principal of judicial estoppel prohibits Mr. Johnson from in this later action now asserting a different position.

As the claims asserted by Johnson must flow from the existence of an ownership in the partnership, a position that Mr. Johnson previously denied in a separate proceeding, his claims must fail.

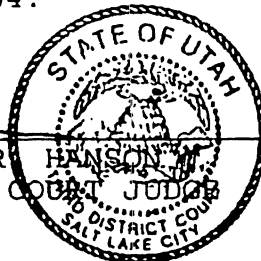
Accordingly, in accordance with the plaintiff's request, the Court will enter a declaratory Judgment indicating that Mr. Johnson

has no claim or interest in the credit repair business or any of the other enterprises in question.

Counsel for the plaintiff is to prepare an appropriate Order granting the relief requested in the Motion for Summary Judgment, and submit the same to the Court for review and signature. The Order should comply with Rule 52(a) of the Utah Rules of Civil Procedure, setting forth in detail the basis upon which this Court grants the plaintiff's Motion.

Dated this 20 day of October, 2004.


TIMOTHY R. HANSON
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 20 day of October, 2004:

Peggy A. Tomsic
Attorney for Plaintiff
50 S. Main, Suite 1250
Salt Lake City, Utah 84144


Joe Cartwright
Attorney for Defendant Jamis Johnson
299 S. Main Street, Suite 1700
Salt Lake City, Utah 84111

Evelyn Thompson

Exhibit 11

FILED DISTRICT COURT
Third Judicial District

NOV 23 2004

By  SALT LAKE COUNTY
Deputy Clerk

Peggy A. Tomsic (3879)
BERMAN, TOMSIC & SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: (801) 328-2200

Attorneys for Plaintiff and Third Party
Defendant, Jayson Orvis

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAYSON ORVIS,

Plaintiff,

vs.

JAMIS JOHNSON,

Defendant.

JAMIS JOHNSON,

Third-Party Plaintiff,

vs.

JAYSON ORVIS, SAM SPENDLOVE,
DEON STECKLING, VICTOR
LAWRENCE, and JOHN DOES 1-15,

Third-Party Defendants.

~~JAYSON ORVIS'S PROPOSED~~ 
JUDGMENT

Case No. 010907449

Honorable Timothy R. Hanson

Based on the Court's Findings of Fact, Conclusions of Law, and Minute Entry dated October 27, 2004, THE COURT HEREBY ENTERS JUDGMENT as follows:

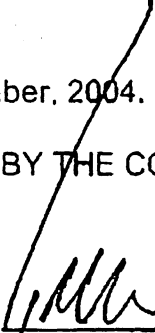
1. The Court enters judgment in favor of Plaintiff and against Defendant on Plaintiff's Declaratory Judgment Complaint and all claims asserted therein. Defendant has no right, claim or interest in any business, enterprise or entity, relating to credit repair, in which Plaintiff has any ownership interest.

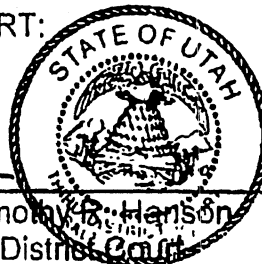
2. The Court enters judgment in favor of Plaintiff and against Defendant on Defendant's Counterclaim against Plaintiff and all claims asserted therein, and the Counterclaim is dismissed with prejudice.

3. The Court enters judgment in favor of Third Party Defendant Deon Steckling and against Defendant on Defendant's Third party Complaint against Deon Steckling and all claims asserted therein, and the Third Party Complaint is dismissed with prejudice.

DATED this 23 of November, 2004.

BY THE COURT:


Honorable Timothy R. Hanson
Third Judicial District Court
Salt Lake County, State of Utah



CERTIFICATE OF MAILING

I hereby certify that on the 29 day of ~~November~~ ^{October}, I caused a true and correct

copy of the JUDGMENT to be mailed, postage prepaid, to the following:

Jamís M. Johnson
Johnson & Associates
352 South Denver Street
#304
Salt Lake City, UT 84111

Blake S. Atkin
Atkin & Hawkins
136 South Main Street, #610
Salt Lake City, Utah 84101
Attorney for Third Party Defendants

Allen Peterson

FILED DISTRICT COURT
Third Judicial District

NOV 23 2004

Peggy A. Tomsic (3879)
BERMAN, TOMSIC & SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: (801) 328-2200

SALT LAKE COUNTY
By Ernest H. Olson
Deputy Clerk

**Attorneys for Plaintiff and Third Party
Defendant, Jayson Orvis**

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAYSON ORVIS,

Plaintiff,

vs.

JAMIS JOHNSON,

Defendant.

JAMIS JOHNSON,

Third-Party Plaintiff,

VS.

JAYSON ORVIS, SAM SPENDLOVE,
DEON STECKLING, VICTOR
LAWRENCE, and JOHN DOES 1-15,

Third-Party Defendants.

~~[ORVIS'S PROPOSED]~~
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 010907449

Honorable Timothy R. Hanson

FINDINGS OF FACT

1. Jayson Orvis is the Plaintiff in this Declaratory Judgment action. Orvis provides consulting to law firms or businesses providing credit repair services. These services consist of assisting in removing false or erroneous entries from the clients' credit reports. Additionally, Orvis owns and licenses software, trademarks and trade names, and other intellectual property used in the credit repair business to these law firms and businesses, through various entities which he has established. Plaintiff seeks, in this action, a judgment declaring that the Defendant has no right, claim or interest relative to any business or venture relating to the credit repair business in which Plaintiff has any ownership.

2. Defendant Johnson, the Defendant in this case, asserts that a partnership exists between him and Orvis and that he is therefore entitled to partnership proceeds from intellectual property lease payments and consulting fees paid to Orvis by various credit repair entities, including an entity called The Lexington Law Firm.

3. In addition to claiming a partnership interest in Orvis's credit repair businesses, Johnson filed a Third Party Complaint against three third-party defendants, including Deon Steckling. In Johnson's Answer and Third Party Complaint, he alleged that Steckling, as well as the other third-party defendants, conspired with Orvis to exclude Johnson from the partnership interest he allegedly had in Orvis's credit repair related businesses. Johnson charged that the third-party defendants had

misappropriated the funds of the alleged partnership and had been unjustly enriched thereby.

4. Prior to Orvis's filing of the Declaratory Judgment Action, Johnson was sued by the Small Business Administration ("SBA"), and judgment was entered against him in that case on September 29, 1997. United States of America v. Jamis Johnson, 2:95-CV-838J, in the United States District Court for the Central District of Utah.

5. In post-judgment supplemental proceedings for collection purposes in the SBA case, Johnson was deposed by the SBA. In his deposition, Johnson, under oath, disavowed any interest, partnership or otherwise, in the credit repair business of Orvis. There was no question of mistake. Johnson testified as he did so as to avoid collection efforts by the SBA. Johnson testified, under oath:

Q: Do you have any interest in any partnership?

A: No.

Q: Any interest in any limited liability companies?

A: No.

[Deposition of Jamis Johnson, November 17, 1999, Exhibit 6 to Affidavit of Jayson Orvis, at 30:16-31:4].

A: Lexington Law Firm, Victor Lawrence and another attorney have taken over all of that. I've indemnified them, they have indemnified me. I've resigned from any relationship. . . . Lexington Law Firm[] was in my name, but since that time and with my bar problem, I have completely relinquished any

interest. They paid me a little, made my payment, and I resigned. Now, it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating now without me.

[Deposition of Jamis Johnson, November 17, 1999, Exhibit 5 to Affidavit of Jayson Orvis, at 23:6-24:10].

6. On August 8, 2001, the SBA assigned its judgment against Johnson in the SBA case to an entity called All Star Financial, L.L.C.

7. On August 11, 2001, All Star Financial, L.L.C. assigned the judgment against Johnson in the SBA case to Orvis.

8. On March 30, 2004, Plaintiff Jayson Orvis filed a Motion for Summary Judgment arguing that the doctrine of judicial estoppel precluded Johnson from claiming a partnership interest in any credit repair business of Orvis because of Johnson's testimony under oath before the SBA. Third-party defendant Steckling joined in Orvis's Motion for Summary Judgment.

11. On August 9, 2004, the Court held a hearing on Orvis's and Steckling's Motion for Summary Judgment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court makes the following conclusions of law.

1. The principle of judicial estoppel prohibits Johnson from asserting a different position in this later action from the position to which he testified under oath in the SBA case. That is, judicial estoppel will not allow Johnson to contradict his testimony before the SBA and claim a partnership interest here. See Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995) (the purpose of judicial estoppel is "to uphold the sanctity of oaths, thereby safeguarding the integrity of the judicial process from conduct such as knowing misrepresentations or fraud on the court.").

2. Judicial estoppel does not require that the parties to the prior and present litigation be the same. See International Resources v. Dunfield, 599 P.2d 515, 517, n.4 (Utah 1979) (noting "a concededly overbroad statement in [the Court's] case of Tracy Loan and Trust Co. v. Openshaw Inv. Co., et al., 102 Utah 509, 132 P.2d 388, to the effect that one would not be 'judicially estopped' unless the parties and the issues are the same in the instant and the prior suit. Any misstatement of the rule was corrected and superseded by our decision in Richards v. Hodson, [485 P.2d 1044 (Utah 1971)]").

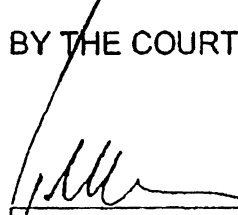
3. Even if Utah law requires that the parties to the prior and present proceedings be the same in order for judicial estoppel to apply, such is not determinative in this case because Orvis, having purchased and having been assigned the judgment owned by the SBA, is in privity with the SBA. See 47 Am. Jur. 2d Judgments § 663 (2004) ("a privity is one who, after the commencement of the action,

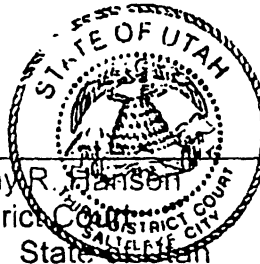
has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by . . . assignment."); Searle Brothers v. Searle, 588 P.2d 689 (1978) (The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property.).

Based on the foregoing, the Court grants Plaintiff's Motion for Summary Judgment and dismisses Johnson's counterclaim against Plaintiff with prejudice. The Court will enter a Declaratory Judgment that Johnson has no right, claim or interest in any business, enterprise or entity, relating to credit repair, in which Orvis has any ownership interest. The Court also grants Deon Steckling's Motion for Summary Judgment and dismisses the Third Party Complaint against him with prejudice.

DATED this 23 of November, 2004.

BY THE COURT:


Honorable Timothy R. Hansen
Third Judicial District Court
Salt Lake County, State of Utah



CERTIFICATE OF MAILING

I hereby certify that on October 29, 2004, I caused a true and correct copy of [JAYSON ORVIS'S PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW to be mailed, postage prepaid, to the following:

Jamis M. Johnson
Johnson & Associates
352 South Denver Street
#304
Salt Lake City, UT 84111

Blake S. Atkin
Atkin & Hawkins
136 South Main Street, #610
Salt Lake City, Utah 84101
Attorney for Third Party Defendants

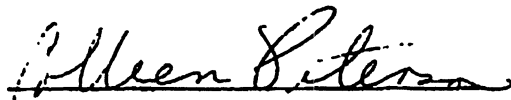
A handwritten signature in cursive script, appearing to read "Allen Kitterman", written over a horizontal line.

Exhibit 12

AGREEMENT

AGREEMENT entered into by and between Jayson Orvis and Jamis Johnson.

RECITALS

WHEREAS, Orvis and Johnson have developed over the last several years enterprises that provide credit repair services to a nationwide clientele. Such credit repair services include, but are not limited to a range of activities, including telemarketing, internet marketing, consulting, law representation, and the enterprises have grown over the years and have acquired a variety of tangible and intangible assets including, without limitation, for example, equipment, computers, software, furniture, knowledge, methods, techniques in marketing, lead sources, internet operations; and

WHEREAS, the parties desire to provide for the unimpaired continuation and growth of the business to the mutual benefit of the parties; and

WHEREAS the parties acknowledge that an agreement was put in place reciting that all assets of this enterprise are placed in the name of Jayson Orvis so as to protect these assets and provide for continued growth and mutual profitability; and

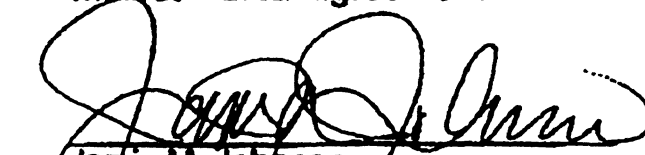
WHEREAS the parties acknowledge that they have governed and operated these enterprises under an outline agreement and under a course of performance that they desire to continue;

NOW THEREFORE, for good consideration, the parties agree as follows:

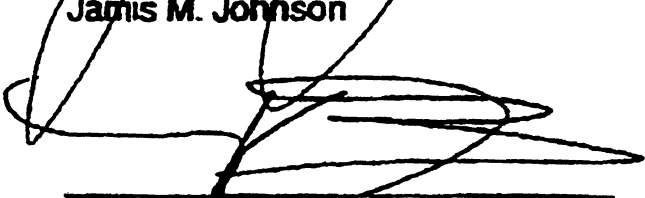
1. Governance and compensation/allocation of profits shall continue in the percentages as heretofore provided under the operating arrangements and as the enterprise continues to grow, however, all monies shall be paid to Jayson Orvis or his business entity as may be established and Jayson Orvis shall provide Johnson's share or allocation to any party directed by Johnson. The intent herein being that these enterprises shall continue to grow, expand, multiply as

directed by the parties under their outline agreement and course of performance to their mutual economic benefit.

2. The agreement is to kept confidential between the parties and the parties shall not disclose the arrangement herein to third parties without mutual agreement.



Jamis M. Johnson



Jayson Orvis

Exhibit 13

September 1, 1994

To: Merrill Chandler, John Hollingshead, Jamis Johnson, Jayson Orvis, Steve Paige

From: Merrill Chandler, John Hollingshead, Jamis Johnson, Jayson Orvis, Steve Paige

Re: Gentleman's Agreement

Whereas, Merrill Chandler has expertise in computers, databases, operations and business management, systems development as well as rents computers and software to businesses, and owns a third of the equity in NACA, and

Whereas, John Hollingshead has expertise in business consulting, leasing, financing and funding, and owns a third of the equity in NACA, and

Whereas, Jamis Johnson is an attorney and is an expert in the law, and one hundred percent of the equity of Law Offices of Consumer Affairs P.C. and fifty percent of the profits of Law Offices of Consumer Affairs, and

Whereas, Jayson Orvis has expertise in writing, marketing, advertising, clarity, and fifty percent of the profits of Law Offices of Consumer Affairs, and

Whereas, Steve Paige has expertise in consumer credit, marketing, worry, shell games, cost cutting, and owns a third of the equity in NACA,

Therefore, in acceptance of the aforementioned contributions we agree to:

1. Establish a limited liability corporation. *The Genesis Project*, whose purpose is to create and manage profitable entities for the five partners.
2. Divide equally the equity and profits of *The Genesis Project*
3. Provide vehicles and mechanisms to have ALL profits from NACA, LOCA and any other related company or subsidiary be funneled into *The Genesis Project*
4. Meet weekly to discuss the items pertinent to the mission of *The Genesis Project*

To these ends we will do the following:

1. Merrill - Act as Executive Director of the North American Consumer Alliance and have responsibility over NACA personnel issues, oversee marketing programs, business operations, member services, etc., committing at least 40 hours per week to the task.
2. John Hollingshead - Act as business consultant to NACA and LOCA committing at least 20 hours per week to the task.
3. Jamis Johnson - Protect LOCA/NACA and all other endeavors legally, perform all legal functions except where a majority indicates outside counsel is required, committing at least 20 per week to the task.
4. Jayson Orvis - Business Manager of the Law Offices for Consumer Affairs and have responsibility over LOCA personnel issues, marketing programs, oversee business operations, client relations, etc., committing at least 40 hours per week to the task.
5. Steve Paige - Act as a marketing and operations consultant regarding credit and debt issues and matters as surface from time to time and will commit 20 hours per week to the task.

Exhibit 14

ASSIGNMENT

ASSIGNMENT made this 12th day of January, 2001, by Jamis M. Johnson to Jayson Orvis/Attorneys for People, LLC., a Utah limited liability company, as follows:

WHEREAS, the name Lexington Law Firm is a duly registered assumed name and/or d.b.a. of Jamis M. Johnson with the State of Utah, and constitutes a valid trade name having been used extensively in the business of credit repair, and

WHEREAS, the said trade name is an asset actually owned jointly by Jamis M. Johnson and Jayson Orvis, and

WHEREAS, Jamis M. Johnson and Jayson Orvis own intellectual property and tangible and intangible assets for the business of credit repair and per prior agreement, this trade name is to be assigned by Jamis M. Johnson to Jayson Orvis, and

WHEREAS, Jayson Orvis has established a limited liability company called Attorneys for People, LLC., of which he is the only member, and which he was to hold some of these joint assets and through which he administrates some of the credit repair business, and

WHEREAS, Jamis M. Johnson desires to assign the trade name to Jayson Orvis/Attorneys for People and it shall form and is part of the assets jointly owned by Johnson and Orvis and administrated by Orvis;

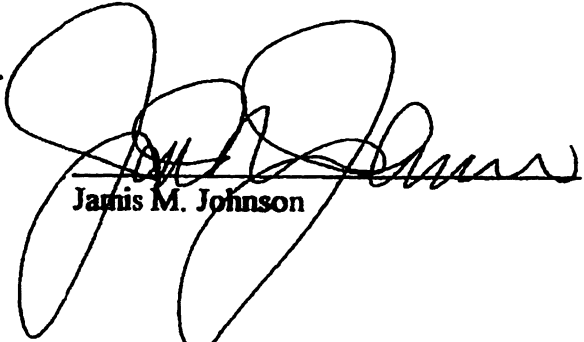
NOW THEREFORE, based upon the foregoing recitals and upon the prior agreement of the parties,

Jamis M. Johnson does hereby assign to Jayson Orvis/Attorneys for People, LLC., the trade name/assumed name Lexington Law Firm.

Johnson agrees that the name may reside in his name on the files of the State of Utah, if Orvis so desires.

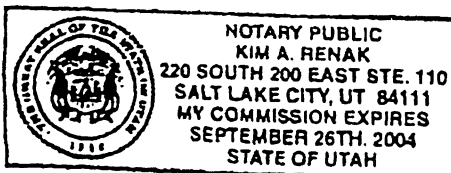
DATED on the date first above written.

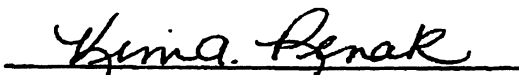
State of Utah)
 :SS
County of Salt Lake)



Jamis M. Johnson

On this 12th day of January, 2001, personally appeared before me, Jamis M. Johnson, the signer of the foregoing ASSIGNMENT, who duly acknowledged to me that he executed the same.





Kim A. Renak

Exhibit 15

**Attorneys for Plaintiff and Third Party
Defendant, Jayson Orvis**

STATE OF UTAH

Honorable Timothy R. Hanson

As a licensed attorney, he was responsible for running the legal side of the practice entirely. By putting himself in a position to be disciplined by the Utah State Bar, and, therefore, incapable of fulfilling his responsibility under their agreement, he breached his agreement with Orvis.

INTERROGATORY NO. 11: Identify all payments from you or the Orvis entities to Johnson or to an assignee of Johnson during the relevant time period as alleged in Paragraph 24 of the Complaint and the Eighteenth Defense of the Third Party Answer by stating the amount, the date, and the reason for each such payment.

RESPONSE: The following payments were made by Jayson Orvis to Jamis Johnson, or Johnson's assignees, voluntarily, and in Orvis' full discretion as to both amount and frequency:

1. 12/16/99 - Payment made to Millgate, L.L.C. in the amount of \$3950.
2. 12/17/99 - Payment made to Millgate in the amount of \$3000.
3. 1/18/00 - Payment made to Millgate in the amount of \$1500.
4. 1/18/00 - Payment made to Millgate in the amount of \$3500.
5. 1/21/00 - Payment made to Millgate in the amount of \$3750.
6. 2/2/00 - Payment made to Millgate in the amount of \$9250.
7. 2/17/00 - Payment made to Millgate in the amount of \$2500.
8. 3/13/00 - Payment made to Zion Web Design in the amount of \$14,500.
9. 3/24/00 - Payment made to Zion Web Design in the amount of \$2500.
10. 4/12/00 - Payment made to Zion Web Design in the amount of \$13,500.
11. 5/9/00 - Payment made to Zion Web Design in the amount of \$2750.
12. 5/9/00 - Payment made to Zion Web Design in the amount of \$19,500.

13. 6/5/00 - Payment made to Zion Web Design in the amount of \$2000.
14. 6/5/00 - Payment made to Zion Web Design in the amount of \$19,500.
15. 7/13/00 - Payment made to Zion Web Design in the amount of \$10,000.
16. 7/18/00 - Payment made to Zion Web Design in the amount of \$10,500.
17. 8/4/00 - Payment made to Zion Web Design in the amount of \$17,000.
18. 10/9/00 - Payment made to Zion Web Design in the amount of \$24,750.
19. 10/17/00 - Payment made to Zion Web Design in the amount of \$2000.
20. 11/6/00 - Payment made to Zion Web Design in the amount of \$25,229.26.
21. 12/11/00 - Payment made to Zion Web Design in the amount of \$31,500.
22. 1/11/01 - Payment made to Zion Web Design in the amount of \$30,760.
23. 2/7/01 - Payment made to Zion Web Design in the amount of \$31,500.
24. 3/1/01 - Payment made to Zion Web Design in the amount of \$33,020.
25. 4/6/01 - Payment made to Zion Web Design in the amount of \$30,300.
26. 5/7/01 - Payment made to Zion Web Design in the amount of \$24,058.
27. 6/7/01 - Payment made to Zion Web Design in the amount of \$33,510.
28. 6/27/01 - Payment made to Zion Web Design in the amount of \$500.
29. 7/3/01 - Payment made to DM Johnson in the amount of \$13,000.
30. 8/1/01 - Payment made to Zion Web Design in the amount of \$1000.
31. 8/8/01 - Payment made to Zion Web Design in the amount of \$34,875.

INTERROGATORY NO. 12: Explain the basis for your contention that Johnson is limited to payments in an amount equal to 25% of the profits originating from intellectual lease payments resulting from the Lexington Law Firm eClient program and from Johnson & Associates.

Exhibit 16

Jamis Johnson

HAND DELIVERED

January 22, 1999

Dear Jamis,

I wanted to put a couple of things in writing so that you're clear on my position.

I have a lot on my plate right now and I really don't want to spend more of my time trying to work out your contingency plan. I would like you to work that out and let me know what your plan is when you feel ready. I'm fine with anything that meets the following criterium:

1. those of us with profit share and salary commitments will continue to receive our same compensation and will continue to receive it in proportion to growth and revenue.
2. that the arrangement be fully disclosed (or disclosable) to the Bar Association and other authorities without fear of the appearance of impropriety,
3. that Victor Lawrence not feel shorted or "ripped off" by the arrangement, and
4. that all current commitments to team members be honored.

I'm glad that you've turned away from the idea of a straight buyout, as I was becoming increasingly uncomfortable with the figures being discussed.

But, it reminded me how distracted I was becoming by this transition while I'm in the midst of several pivotal Lex projects.

Another note: if you are in need of financial statements for whatever reason, it looks better if you get those through me. I really don't want myself or Trina getting the idea that you don't trust me enough to follow our traditional chain of authority.

Warm regards,

Jayson Orvis

ORV031

November 8, 1999

Jayson Orvis
220 So. 200 East
Suite 300
Salt Lake City, Ut 84111

Re: Contract/partnership relations between Johnson and Orvis

Dear Jayson,

This letter is to outline the substance of our conversations and understanding regarding the management and operations of our ventures and the way forward.

We agree that you will continue to manage these businesses for our joint benefit. You may have "control" to manage these businesses and I will not attempt to exercise managerial control over these endeavors. There will be a good faith effort on my part not to be disruptive of the day to day operations of the business and you will use reasonable business skill, fidelity, judgment and your best efforts in such management.. You will aid in good faith in making all financial, accounting and operations data freely available to me on request if I want to review or audit any such matters. We will continue to communicate about all aspects of the business operations as I request from time to time. The goal here is to leave you free to run the operations and let me be "passive". Ultimately the whole point is to grow the business and make it profitable for all. You correctly understood, as you stated in our last meeting, that "We don't want to go backwards" in relation to income/benefits established thus far in our businesses. I affirm that. However, we have decided to cease paying cell phones for all people out of these businesses including ourselves and our wives. I agree with that.

In addition, such ongoing obligations that affect us and the businesses such as Tennessee litigation, attorney's fees, trust account management, back IRS tax withholding, State Consumer Division/bar issues will continue to be paid attention to and dealt with economically so that all these matters and any others will ultimately be put to bed.

With regard to the Lexington/telemarketing portion of the business (as opposed to e-client) and with regard to Jade's 10% profit share from that Lexington/telemarketing portion of the business—you have acquired that interest yourself by paying Jade from your own resources. I assert no claim to any of Jade's interest.

With regard to the arrangements that we made with the phone system a few months ago wherein you and Sam are paid an extra \$500 each (until I believe it was November, December or January) for the guarantee on the phones that you entered into, we agreed that Sam would put this arrangement into writing. As yet, I have not received a written outline of this arrangement. I will ask Sam to prepare it for both of us to have in our files.

Also, as we discussed, it probably is time for Johnson & Associates to have another board meeting to keep the proper corporate formalities. As you suggested I am glad to help get this together. This meeting should only involve simply a report on the status of J&A and any housekeeping you all feel might be necessary. The prior minutes should have caught everything up. I will proceed to arrange a meeting and get minutes prepared in the next short while.

I think this outlines our understanding of the various issues discussed above. If you want to add anything please feel free to put it down in writing. I think I have covered much of it.

Thanks for your consideration. I sincerely hope that all this may result in business growth, exceptional mutual prosperity, and partnership tranquility between us

Very truly yours,

Jamie M. Johnson

cc: Victor Lawrence.

ORV028

To: JAYSON ORVIS
From: Jamis M. Johnson
Date: 1/3/00

Re: You are piece of dog shit

Jayson,

OK. Here I go. I am going to jump into the void. It ain't easy to exercise faith. But I shall. I appreciated our conversation yesterday greatly—you don't even know how much. Thank you. In spite of the fact that you are indeed a total piece of dog shit albeit a genius, I am going to leap anyway. I am coming to believe that you deserve the trust. Meantime, in the ongoing attempt to keep the spirit of whatever our contract is, try to get me to \$45,000 per month from the growth. That is a worthy goal. And I in the meantime will try to be relatively normal—not an easy task for me as you may know. I am going to try the faith/trust thing. Thank you again Jayson..

Regards,

Jamis, the Faithful One

To: Jayson
From: Jamis
Date: August 29, 2000

Jayson,

This memo sets forth a few issues that have come up in the last month or so that we need to get resolution on. We last met face to face about four weeks ago before your trip to Alaska.

1. We have discussed Lexington's and affiliated companies' work on a move to a new location. You mentioned that you have a cubicle there. I realize that your office is primarily at your home. I expressed an interest in having space there in the new premises as well. I am not sure I want a full blown office or just some space set aside for the use of your space. I don't really have a lot of energy over this but let's kick it around. I need to discuss this with you and with Sam as he plans the space. In any event, this move disrupts several key services that are in place here and represent considerable cost benefit to me. Currently, our organization pays my rent down in my basement space. I also am currently a part of the Lex phone system with some shared receptioning (Kim and Terry do some trading off both as telephone operators and in reception.) I use our copier and our faxes as well. I have mentioned to Sam briefly that since our phone system has remote capabilities that I will need an extension connected here at least so the phone receptioning can continue and I still hook into the phone system. Obviously the cost to replace these items such as phone system, copier leases, long distance, etc., is reduced if we just move my offices to the new location—though I am not sure I want to go. Otherwise, we need to figure out the cost of this change and I guess take it out as a cost.

2. With regard to the lease, you mentioned to me in passing in our last meeting that you and Sam want to receive an extra fee to yourselves for personally guaranteeing the lease. This is similar to the fee we negotiated that you both received for your securing the telephone system lease. The system is now paid for and that payment is finished and we own the system. With regard to the lease, I don't have a problem with this lease guarantee payment concept necessarily. I want to see what you are proposing—the amount you propose that you two are paid, what is being guaranteed, the term of this payment, i.e. when it expires, etc. Again I don't think I have a problem with something reasonable. Once we have agreed on the

.arrangement, we need to memorialize it in writing for our records. You and I did this on the payment of my rental space and it was painless. Please get me the specifics of your proposal in the next few days. Also, I haven't seen the latest copy of the lease. I guess I can get a copy from Sam. Please get me the latest if you can.

3. You have me rather excited to see the results of the new client-friendly-extend-the- payment efforts that Sam and Spencer Bingham have been working on. Profit share was down in July as you predicted because of the equipment expenditures, the hiring of Spencer, etc. but as we both know, even one extra month of client payments (based on increased client care and satisfaction) is extremely profitable. I have great hopes for profit share at the end of this month but even greater hopes for the fourth quarter of the year.

I'll call you on this stuff shortly and if you are in lets get together.

Jamis

To: Jamis
From: Jayson
Date August 30, 2000

Jamis,

I am struggling a little with this latest series of written correspondences. As you surely recall, you and I have a marked difference of opinion as to the nature of our business relationship. Within your correspondences, you present as premises several positions with which I disagree. That makes it a little tough for me, as I'm forced to respond and realign those assumptions so that it doesn't appear that I'm acquiescing to them. As I have recorded my opinion of what our relationship is (and isn't) in the past, I will not bore you with it again. However, I would prefer that you not continue with written correspondence, as you have, so that I can stop playing anti-lawyer and go back to the business of business.

With regards to your issues:

1. Victor's firms are moving to a new location and I will have no space there whatsoever. In the spirit of "keeping the peace," I'll throw my weight behind whatever feels necessary and equitable to keep you as unaffected as possible by their move.
2. No personal guarantee was necessary in their new lease, so this discussion is probably moot either way. Victor has been actively reviewing and negotiating the lease, and since he is the signer, I'm pretty confident that he's on top of it.
3. Again, I feel awkward discussing the particulars of firm management with you. As I have stated in the past, I am pleased to continue paying your company as an adjunct consultant to my consulting services agency. As I have also stated, I take the opinion that you have no control whatsoever in the management of any firms with which I associate. While the terms of the compensation I pay your company are foggy at best, I believe that you have been pleased with the amount of compensation afforded. I, too, feel that it has been reasonable and fair. However, I'm unwilling to hold it out that you hold an ownership interest in these firms. I am sure that that would constitute some kind of complicity in defrauding personal

non ownership interest

creditors to whom you have represented that you draw no income from these organizations and that you hold no controlling interest.

I am not pleased to have been compelled to say these things, but I'm feeling a little backed into a corner by the nature of the last two letters that you have sent me. Since I can see only more positioning and time-wasting brinksmanship arising as a result of this letter campaign, I again suggest that we let this be.

Might I make a suggestion? I would suggest that we just let our foggy, little business relationship continue down it's foggy, little course. You have no reason to believe that I will stop compensating your company for consulting services along the lines already established. Attempting to fortify your position can only heat up the debate. I am committed to making a bigger pie for as long as is feasible, and that has been nothing but good for both of us.

I'll call you right now, but, bummer that we had to talk about this now.

Warmest regards,

Jayson

MEMORANDUM

RE: Voice mail received by Jamis Johnson from Jayson Orvis approximately mid-August 2001, to the phone number 680-3333

Hey dirt bag, this is Jayson. Hey, uh, Gavin just told me that he talked to you a second ago. Profit share is slow this month because we switched accounting systems, controllers and all that, so they are dragging it out, it looks like for a couple of days. Hey, if you want me to float you some funds between now and then, I don't know if you're tight or what, but I'd be happy to just cut you ten grand or something to tide you over for a couple of days. Uh, in fact, I think I owe you a little bit from last month still. Uh, there were some checks that we had to hold from Lexington that I think I could deposit now. So if you want a little bit of interest though, what's today Thursday, I would think, uh Wednesday, I would think we'd be done by the end of the week where we'd be ready to cut, but, I'm far from sure that, you know, it's really no problem if you want me to cut you a few bucks. Uh, if you want that, you can call me at 652-1801 or Gavin at 243-3325, and we'll be happy to do it. He's bringing Kim's check over this morning, so if you'd call in the next little while, that'd be cool. Talk to you later.

End of message.

Exhibit 17

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

* * *

JAYSON ORVIS

Plaintiff,

vs.

JAMIS JOHNSON

Defendant.

Civil No. 010907449

Deposition of:

JAMIS JOHNSON and
DaNELL JOHNSON,

Third-Party Plaintiffs,

vs.

Jamis Johnson

V O L U M E I

JAYSON ORVIS, SAM
SPENDLOVE, DION SCHNELING
VICTOR LAWRENCE and JOHN
DOES 1-15,

Third-party Defendants.

BE IT REMEMBERED that on the 5th of June,
2002, the deposition of JAMIS JOHNSON was taken before
Stacie Anderson, Registered Professional Reporter and
Notary Public in and for the State of Utah, at the hour
of 9:20 a.m. at the office of Atkin & Hawkins, P.C.,
136 South Main Street, 6th Floor, Salt Lake City, Utah.

* * *

Stacie Anderson
-Registered Professional Reporter-

MERIT REPORTERS

VAN TASSELL & ASSOCIATES

185 South State Street #920
Salt Lake City, Utah 84111

— 5-DAY DELIVERY —

Phone 801-322-3742
FAX 801-322-3722

1 provide for the continued representation of clients and
2 of the credit law practice." Do you see that?

3 A. Yes.

4 Q. So by this agreement you were desiring to
5 stop acting in the credit law practice; is that right?

6 MR. MARSDEN: I object to the form of the
7 question.

8 A. With regard to, I guess, this body of claims
9 that would be correct.

10 Q. Okay. Let me ask you this. Mr. Johnson,
11 this agreement talks about a national clientele of
12 credit law practice that you developed under the name
13 of Lexington Law Firm. Did you have a credit law
14 practice outside of this clientele that's being
15 described in this agreement?

16 A. That's a difficult question to answer, but
17 the answer would be yes.

18 Q. And what was that? Who were those clients or
19 what was that practice outside of the Lexington Law
20 Firm practice?

21 A. It was -- it's hard to describe, but if you
22 look in this contract we indicate that Victor Lawrence
23 will have no ownership of the trade name Lexington Law
24 Firm and that would be reserved to Jayson Orvis.
25 Mr. Orvis and I had an ongoing partnership that did a

1 lot of credit repair business and what could also be
2 called credit repair law. We had approached other
3 counsel. We had concepts to co-counsel with others and
4 so the credit law practice, the credit law business
5 would still be going forward probably even using the
6 name Lexington Law Firm, but with regard to the clients
7 Victor Lawrence was really stepping into that
8 situation. He had been one of four or five attorneys
9 that I hired. So he was more or less continuing on.

10 Q. Let me ask you this. Was it not correct then
11 when you stated in this agreement that Johnson desires
12 to discontinue credit law practice?

13 MR. MARSDEN: I object to form.

14 Q. Was that not a true statement? Were you
15 being truthful when you stated in this agreement that
16 Johnson desires to discontinue credit law practice?

17 MR. MARSDEN: Objection to the form of the
18 question. It's argumentative. Calls for a legal
19 conclusion.

20 A. I would imagine I was being truthful.

21 Q. Now in this agreement you've identified a
22 national clientele that had been developed under the
23 name of Lexington Law Firm. Were there credit law
24 clients that you continued to serve as a lawyer after
25 the date of this agreement, that you didn't pass over

1 A. Yes.

2 Q. Tell me how that factored into your agreement
3 with Victor Lawrence.

4 A. Well, we had just talked to the SBA, a
5 creditor holding a judgment against me. Victor had
6 spoken with them. Jason had been involved in
7 discussing it. They had deposed my wife. They had
8 sought some documentation, I believe, from Johnson &
9 Associates that had been subpoenaed. And we wanted to
10 preserve our business and not be a big target for the
11 SBA. I don't think we realistically thought I would be
12 disbarred at that time and we knew that it would be
13 going on for many years to come.

14 Q. And just so I can understand, what was your
15 concern with regard to the SBA that they would try to
16 take over or somehow the credit repair law firm?

17 A. The concern was vague and generated mostly by
18 Jayson Orvis, so it's hard me to articulate exactly the
19 concern, but I was willing to take the steps that we
20 had discussed which would be to take Victor, who was
21 already running portions of the credit law practice,
22 and put him in and Jayson and I would deal with our
23 ownership of assets as well in contemporaneous
24 agreements.

25 Q. Now you've alluded to this before. Victor

1 identify them.

2 A. I think I got them from you.

3 Q. Tell me what those agreements are. Tell me
4 how you would identify them.

5 A. There's an agreement where Jayson and I agree
6 to hold everything in his name for our mutual benefit.

7 Q. First of all, if you would, tell me who the
8 parties are to that agreement.

9 A. It's an agreement between Jayson and Jamis.

10 Q. Jayson Orvis and Jamis Johnson?

11 A. Right. We agreed to hold everything jointly.
12 We would hold it in his name, but it's for our mutual
13 benefit, all credit repair businesses.

14 Q. So that agreement was that the business --
15 give me the substance of that again. That Jayson would
16 own the business for the mutual benefit of you both?

17 MR. MARSDEN: I object. That
18 mischaracterizes his testimony.

19 Q. I'm not trying to mischaracterize your
20 testimony. Give me again what you --

21 A. That agreement contemplates that all of the
22 assets, intellectual property that we own jointly would
23 be held in Jayson's name for our mutual benefit and
24 that the payment arrangements and profit shares would
25 continue and that the businesses would expand and our

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

* * *

JAYSON ORVIS

Plaintiff,

vs.

JAMIS JOHNSON

Defendant.

Civil No. 010907449

Deposition of:

JAMIS JOHNSON and
DaNELL JOHNSON,

Jamis Johnson

Third-Party Plaintiffs,

V O L U M E II

vs.

JAYSON ORVIS, SAM
SPENDLOVE, DION SCHNELLING
VICTOR LAWRENCE and JOHN
DOES 1-15,

Third-party Defendants.

BE IT REMEMBERED that on the 11th of June,
2002, the deposition of JAMIS JOHNSON was taken before
Stacie Anderson, Registered Professional Reporter and
Notary Public in and for the State of Utah, at the hour
of 9:20 a.m. at the office of Atkin & Hawkins, P.C.,
136 South Main Street, 6th Floor, Salt Lake City, Utah.

* * *

Stacie Anderson
-Registered Professional Reporter-

MERIT REPORTERS
VAN TASSELL & ASSOCIATES

185 South State Street #920
Salt Lake City, Utah 84111

— 5-DAY DELIVERY —

Phone 801-322-3742
FAX 801-322-3722

1 A. Well, I think I just answered that. I think
2 I said that I may have that information and at this
3 time I don't know.

4 Q. Okay. Do you know how Sam Spendlove acquired
5 the software?

6 A. I don't have specific knowledge of how he
7 acquired it.

8 Q. And then you talked about some entities that
9 Sam Spendlove had an interest in that you claim some
10 interest in or ownership in. Do you know what entities
11 Sam Spendlove owns that you claim to have some right to
12 an interest in?

13 A. You know, whatever my answer was last week, I
14 mean last time, but any entities that deal with credit
15 repair that he shares with Jayson Orvis jointly or
16 directly or indirectly I would claim interest in.

17 Q. And on what basis would you claim an interest
18 in any entity that Sam Spendlove owns?

19 A. Well, I don't know that I can list all of the
20 bases exhaustively and it may call for a legal
21 conclusion, but I have a partnership agreement with
22 Jayson Orvis that we share all the credit repair
23 business that he does. And Sam was one of our
24 employees and anything that he does with Jayson I would
25 claim an interest in.

1 wife's company? You don't own any interest in that
2 company?

3 A. No.

4 Q. And did your wife ever perform services for
5 Johnson & Associates?

6 A. Well, it indicates here that she's on the
7 board.

8 Q. Other than being a member of the board, did
9 your wife ever perform any services for Johnson &
10 Associates?

11 A. She provided some equipment, furniture,
12 computers for the original company.

13 Q. And was her -- was the compensation that she
14 received in any way tied to services that you were
15 performing for Johnson & Associates?

16 A. The compensation she received or DM Johnson
17 received, I'd assigned to her. So whatever I was
18 negotiating would have gone to her. So whatever that
19 negotiation resulted in would nonetheless have been to
20 Johnson & Associates.

21 Q. So there was some compensation that Johnson &
22 Associates owed to you that ended up being paid to DM?

23 A. No, I don't think that's accurate.

24 Q. Then explain to me what you're talking about.

25 A. From the outset of our partnership I had

1 explained that the beneficial interest of this endeavor
2 would be owned by my wife or her entity and that the
3 payments should go to my wife or her entity and that's
4 what happened. And I have a power of attorney that I
5 represented that entity and my wife in a number of
6 companies, these and elsewhere. And everything that I
7 would negotiate in my name nonetheless would result in
8 that remuneration to that entity as our agreement would
9 have been. So whenever you have money going out of
10 these companies it almost always goes to an entity
11 owned or controlled by DaNell Johnson.

12 Q. Okay. What services did DaNell Johnson
13 perform if any for Johnson & Associates?

14 A. I think you asked and answered that.

15 MS. ATKINSON: Yeah, that's asked and
16 answered.

17 Q. Other than being a trustee did you identify
18 any other services that she performed?

19 A. I did.

20 Q. What were those?

21 A. I identified the contributions she made at
22 the start of the endeavor. In addition, based on my
23 power of attorney and my agency relationship with that
24 entity and her, what I did often were down to the
25 benefit of my services and could be attributed to her.

Exhibit 18

August 30, 2001

Daniel L. Berman
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144

VIA FACSIMILE & U.S. MAILS

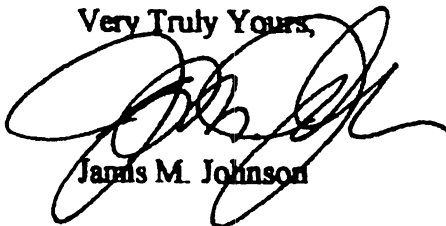
Re: Jayson Orvis v. Jamis M. Johnson

Dear Dan:

This confirms the substance of our meeting yesterday, August 29, 2001. Jayson Orvis was present and you also were there with an associate. You indicated at the meeting that your firm had filed a complaint for declaratory relief in behalf of Jayson Orvis against me. (I have since been served with that complaint.) In that meeting you extended an offer of settlement to resolve all matters between Jayson Orvis and myself. The substance of that offer as I recorded in my notes, is as follows: Jayson Orvis has acquired two judgments against me personally that total approximately \$700,000. Jayson indicated that these judgments are the SBA judgment and a judgment held by an Arizona resident, Pamela Belding. Jayson offers to pay me between \$16,000 and \$18,000 per month for a period of two years (provided the businesses don't suffer economic set backs that would prevent those payments) after which time all further payments would stop. Also at the end of that payment period, Jayson Orvis would have the two judgments satisfied and they would be of no further force and affect against me. My notes do not indicate an expiration date for this offer, but we have scheduled to meet again in your offices at 4:00 p.m. next Wednesday, September 5, 2001.

I write this letter so that we may have an accurate record of our interactions to date. If I have mis-stated the facts above in any way or have misunderstood the offer as presented, would you kindly please correct me.

Very Truly Yours,



Jamis M. Johnson

JMJ/kr

Exhibit 2

JAYSON ORVIS, et al.,	:	Case No. 010907449
	:	
Plaintiff,	:	
	:	
	:	
	:	
JAMIS JOHNSON, et al.,	:	
	:	
Defendant.	:	

THE HONORABLE TIMOTHY R. HANSON

Deputy Clerk

FINA

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

544 1122 C A

APPEARANCES

For the Plaintiff:

ANGELA W. ADAMS
BERMAN, GAUFIN,
TOMSIC & SAVAGE
328-2200

For the Defendant:

SEAN N. EGAN
GIAUQUE CROCKETT
BENDINGER & PETERSON
801-533-8383

For the Third-Party Defendant:

BLAKE S. ATKIN
ATKIN & LILJA
801- 533-0300

1 SALT LAKE CITY, UTAH - JANUARY 29, 2003
2 HONORABLE TIMOTHY R. HANSON, JUDGE PRESIDING
3 P R O C E E D I N G S
4 THE COURT: Good morning. Jayson Orvis v. Jamis
5 Johnson; Jamis Johnson and Donnelle Johnson v. Jayson Orvis,
6 Sam Spendlove, Deon Schilling and Victor Lawrence. Appearances
7 please.
8 MR. EGAN: Your Honor, Sean Egan. I'm from
9 Bendinger, Crockett on behalf of Jamis Johnson.
10 MR. ATKIN: Blake Atkin representing Victor Lawrence
11 and Sam Spendlove, Your Honor.
12 MS. ADAMS: Angela Adams representing the Plaintiff
13 Jayson Orvis.
14 THE COURT: Okay. The things we want to take up
15 today, this first would be the third party defendants Lawrence
16 and Spendlove's Motion for Summary Judgment and then secondly
17 we'll talk about some attorney's fees being sought by the
18 plaintiff on an unrelated matter today. All right. Whatever
19 happened to Schilling? Did he ever get served or make an
20 appearance?
21 MS. ADAMS: His name is actually Deon Steckling and
22 he's a third party defendant. I represent him as well.
23 THE COURT: Oh, okay.
24 MS. TOMSIC: It's S-T-E-C-K-L-I-N-G.
25 THE COURT: All right. Let's hear from Lawrence and

1 Spendlove.

2 MR. ATKIN: Thank you, Your Honor. Blake Atkin, I
3 represent Mr. Lawrence and Mr. Spendlove. I presume that the
4 Court has read our moving papers.

5 THE COURT: You presume correctly.

6 MR. ATKIN: Great. I'll try not to be to repetitive.
7 When I first came into this suit, Your Honor, I thought it
8 would be a relatively straight forward matter. I had a copy of
9 the May, 1999 agreement whereby Victor Lawrence bought this
10 credit repair law practice from Mr. Johnson and that agreement
11 specifically required Mr. Lawrence to continue to use the
12 consulting services and paralegal services that were provided
13 by Mr. Orvis and my client assured me that while he complied
14 with that portion of the agreement and substantial funds were
15 paid by the law firm to Mr. Orvis and his companies for those
16 services, that there wasn't any flow of money the other way and
17 I thought that we would be able to that to the plaintiff's in
18 this case and at least end the matter with regard to Lexington
19 Law Firm and Mr. Lawrence and Mr. Spendlove.

20 Talking to plaintiff's counsel, I was informed it was
21 more complicated than that and so I took Mr. Johnson's
22 deposition and in his deposition I attempted to lay out that it
23 wasn't really more complicated than that, that we had a
24 contract whereby Mr. Lawrence had purchased this law practice
25 and that Mr. Lawrence had been complying with the contract and

1 really shouldn't be involved in this dispute that was existing
2 between Mr. Johnson and Mr. Orvis. Mr. Johnson then explained
3 to me that in order to understand the agreement between him
4 and my client, one had to understand two other agreements that
5 had been entered into contemporaneously, he called it, with
6 that agreement and so I began asking him about those
7 agreements. And the first of those agreements that he
8 described is what I've called the backdated agreement, an
9 agreement dated April, 1997 but which Mr. Johnson testified was
10 actually executed in May of 1999, and quite frankly I was
11 shocked about testimony when he was asked why this backdated
12 agreement had been prepared, he explained that the SBA, the
13 Small Business Administration, had a judgment against him and
14 he and Mr. Orvis were trying to protect the partnership assets,
15 the partnership that he now suffuses is the basis of this
16 lawsuit, from the SBA and so they entered into this agreement
17 to make it appear that all of those partnership assets belonged
18 to Mr. Orvis and not to Mr. Orvis and Mr. Johnson.

19 He described an elaborate fraudulent scheme where
20 they intentionally used different computers, different
21 typewriters, to prepare these different agreements to make it
22 look like they had been prepared upon the dates that they bore
23 rather than being a part of this scheme. And then he talked
24 about the secret agreement that he had with Mr. Orvis in which
25 they basically agreed that the backdated agreement didn't

1 accurately reflect their relationship, but that they had an
2 ongoing partnership relationship with each other and that
3 secret agreement by its own terms says that they're not going
4 to disclose it to anybody else and I asked him if he had
5 disclosed that to anyone else and he said no, that was
6 something simply between me and Mr. Orvis.

7 Then I wanted to make the record clear what we were
8 looking at here and I asked Mr. Johnson, was this backdated
9 agreement designed to defraud your creditors or did it
10 accurately reflect the facts as they existed in April of 1997?
11 And Mr. Johnson gave an answer to that. He said it did not
12 reflect the facts as they existed in April of 1997, and he said
13 that it had also been created for the purpose of providing a
14 continuum.

15 Now I didn't understand at first what he meant by
16 providing this continuum so I continued to question him about
17 that and he explained the continuum in this way, explained that
18 in April of 1997 what had actually existed was a group of
19 people working together to provide these credit repair and
20 legal services that included him and Mr. Orvis, and a Mr. Page
21 and a Mr. Hollingshead and a Mr. Chandler and of that group,
22 only Mr. Johnson was a lawyer, the rest of them were not
23 lawyers, and so they entered into this backdated agreement.
24 But Mr. Johnson in addition to having the SBA chase him as a
25 creditor, Mr. Johnson had some problems with the Utah State

1 Bar.

2 THE COURT: I know about those.

3 MR. ATKIN: And so he was concerned about having to--

4 THE COURT: Unless there's more than one. I know
5 about the one that he got disbarred for.

6 MR. ATKIN: Right. And so he was looking for someone
7 to take over the credit repair law firm and so with the law
8 practice being so combined with these non-lawyers, there were
9 issues about illegal practice of law or illegal, inappropriate
10 fees with non-lawyers, and so another purpose of this backdated
11 agreement was to make it appear that the Lexington law firm
12 that Victor Lawrence would be buying was a separate entity and
13 not part of this partnership arrangement with these non-
14 lawyers. And so that was what he was trying to accomplish in
15 that regard.

16 So, his testimony, specifically, in a succinct way he
17 was asked, "So the reason this was backdated to April of 1997
18 was in connection with your concerns with the SBA?"

19 Answer: "That's not accurate actually."

20 "Okay, why was it backdated to April, 1997?"

21 "One reason was the SBA."

22 "Okay."

23 "The other reason was that it would difficult to have
24 an agreement where I conveyed to Victor Lawrence the Lexington
25 Law Firm and we have all sorts of agreements out there where

1 Jayson and I and John Hollingshead and Steve Page and Merrill
2 Chandler are all running this operation together so we wanted
3 something that would be viewed as a continuum."

4 So that's what he meant by this continuum. He wanted
5 to create an appearance that Lexington Law Firm had been a
6 separate entity since at least 1994 so that he could not only
7 prevent the bar that was already concerned about him from
8 learning that he might have been involved with the illegal
9 practice of law or illegal splitting of fees with non-lawyers,
10 but it would also be difficult to try to attract a lawyer to
11 take over that law practice if it had this unsavory past. So
12 this backdated agreement was not only designed to defraud his
13 creditor, it was also designed to defraud the Utah State Bar
14 and I'm not sure if Victor Lawrence was a specific target of
15 that fraud or if he was just a dupe of that fraud, but in any
16 event, Mr. Lawrence entered into this May 1999 agreement
17 understanding that he was buying a law practice that was
18 separate from this other partnership entity that was being run
19 by Jayson Orvis.

20 THE COURT: Did he have any knowledge of these two
21 agreements, this backdated agreement or this secret agreement?

22 MR. ATKIN: Not the backdated agreement, Your Honor.
23 Mr. Johnson's testimony was that that was between him and Mr.
24 Orvis and he had not disclosed it to anyone.

25 THE COURT: How about the other one?

1 MR. ATKIN: Mr. Lawrence was - I'm not sure if he was
2 specifically aware of the backdated agreement, but he was aware
3 of the continuum idea he was being told and the agreement Mr.
4 Lawrence entered into, the May 1999 agreement, describes
5 Lexington Law Firm as a separate entity and then Mr. Lawrence
6 also entered into an agreement with Mr. Orvis to contract for
7 these management services, paralegal services that was, for all
8 intensive purposes a mirror image of the backdated April 19,
9 '97 agreement. And so he was certainly aware of the continuum
10 concept that they had created and the representation of the
11 relationship between those parties.

12 Now, Mr. Johnson comes into this Court and wants to
13 repudiate the April 1997 agreement and say "No, it doesn't
14 accurately reflect the facts as they existed. You know, I have
15 an ongoing partnership with Mr. Orvis that has continued since
16 1994 and Mr. Lawrence, you know, you're not entitled to rely
17 upon that agreement that made the Lexington Law Firm separate
18 from the Orvis entities, so now, you know, you have to deal
19 with the fact that I'm claiming to be a partner with Jayson
20 Orvis, this is a partnership that included the Lexington Law
21 Firm back through the past.

22 Mr. Lawrence is entitled to receive what was
23 represented to him in this May 1999 agreement that he entered
24 into. He's entitled to rely upon this continuum that had been
25 created by Mr. Johnson in the 1997 agreement. He's entitled to

1 that not only to avoid having to continue with this litigation
2 and receive a summary judgment in this case but he's also
3 entitled to that because of the problems that it might create
4 for him with the Utah State Bar is he's now saddled with at
5 least two non-lawyers who claim to be his partners, Mr. Orvis
6 who is not a lawyer and Mr. Johnson who is no longer a lawyer.
7 And there are a number of legal theories that support Mr.
8 Lawrence's request that this Court grant him judgment and allow
9 him to continue on practicing law and serving his clients as he
10 contracted to do in this May 1999 agreement.

11 The first legal theory that we've asserted is fraud.
12 It's an old concept in the law but we believe still a valid
13 concept in the law in this state and that is the law, when the
14 law finds people who have entered into illegal contracts, it
15 will leave those people where it finds them, that the Court
16 won't allow someone to come into court and try to change their
17 position from the position that they've taken in an illegal
18 contract. The backdated, 1997 agreement, was an illegal
19 contract with regard both to the SBA, with regard to the Utah
20 State Bar and with regard to Mr. Lawrence. If the Court were
21 to allow Mr. Johnson to repudiate that backdated agreement by
22 reference to the secret agreement that he didn't disclose to
23 anybody or even by saying, my claims are based on an agreement
24 that started in 1994 and not affected by that '97 agreement,
25 then the SBA becomes a subject of his fraud and the Utah State

1 Bar would be and Mr. Lawrence would be -

2 THE COURT: It sounds like the SBA has already been
3 defrauded.

4 MR. ATKIN: They have been, Your Honor.

5 THE COURT: Has the U.S. Attorney heard about all
6 this?

7 MR. ATKIN: The lawyer from the SBA, I've talked with
8 him about it.

9 THE COURT: Somebody ought to be looking into it. If
10 there's any substance to it, it's serious business.

11 MR. ATKIN: It is very serious business, Your Honor,
12 and that brings me to the next theory that we would rely on to
13 prevent Mr. Johnson from being able to recover from this case,
14 from my clients and that is estoppel and this is even more
15 serious than the fraud argument, Your Honor, and that is, I'd
16 like first of all to talk about judicial estoppel. As the
17 Court has some genuine concerns about what Mr. Johnson is
18 trying to do in this case, judicial estoppel as our Supreme
19 Court has said, prevents a party from seeking judicial relief
20 by offering statements inconsistent with its own sworn
21 statements in a prior judicial proceeding. Then the Court went
22 on to explain the purpose of judicial estoppel. The purpose of
23 judicial estoppel is to uphold the sanctity of oaths, thereby
24 safeguarding the integrity of the judicial process from conduct
25 such as knowing misrepresentations or fraud on the court.

1 Now, in supplemental proceedings in that SBA action
2 where the SBA was attempting to collect from Mr. Johnson, he
3 was asked this question, "Do you have any interest in any
4 partnerships." Answer, "No." He went on to elaborate. He
5 said, "You know, often I'll have a joint endeavor with somebody
6 but I don't have a partnership or set up a partnership or an
7 LLC, you know. If I get a deal I say, Hey, do you want to do
8 this deal together? We'll go up to Summit County and buy a
9 lot." Question, "So a joint venture." Answer, "Yeah, you can
10 call it that but I don't have any ongoing partnerships."

11 Now, that supplemental proceeding was taken on
12 November the 18th, 1999. Mr. Johnson, according to the court
13 reporter's certificate that Jamis M. Johnson was by me before
14 examination duly sworn to testify to the truth, the whole truth
15 and nothing but the truth in said cause. That was November 18,
16 1999.

17 Now in this case, in response to our Summary Judgment
18 Motion, he comes into Court saying I'm making my claims based
19 on a partnership that existed in the beginning of 1994 and so
20 we'd ask, where was this partnership when he was under oath to
21 tell the SBA the truth? Where was this partnership on November
22 18, 1999 when he swore under oath that he had no ongoing
23 partnerships? I hope I don't live long enough to see the day
24 when someone can, under oath, make an answer to that kind of a
25 question and say I don't have any ongoing partnerships and then

1 come into this Court and on the basis of what would have to be
2 perjured testimony, try to establish that he does have.

3 THE COURT: Well, one of them (inaudible) perjured,
4 that's for sure.

5 MR. ATKIN: Yeah. So on the basis of whether you
6 call it judicial estoppel or whether you call it equitable
7 estoppel or whether you just term it the Court's inherent
8 discretion to not allow people to assert claims that are
9 diametrically opposed to testimony they gave under oath to tell
10 the truth, the Court should grant us summary judgment.

11 I'd be happy to answer any questions.

12 THE COURT: No.

13 MR. ATKIN: Thank you Your Honor.

14 THE COURT: Explain to me how Mr. Spendlove all fits
15 into this.

16 MR. ATKIN: Mr. Spendlove is an employee of Lexington
17 Law Firm. He also has businesses in which he provides similar
18 services to Lexington Law Firm, consulting services.

19 THE COURT: Similar to Mr. Orvis?

20 MR. ATKIN: Similar to Mr. Orvis's services.

21 THE COURT: Okay. And the claim is he's involved in
22 this conspiracy as well as I understand it?

23 MR. ATKIN: There is that claim but again, Your
24 Honor, all of those claims go back to a conspiracy to divert
25 assets from a partnership that Mr. Johnson claims he's a part

1 of which he disavowed in the backdated agreement in which he
2 disavowed in his sworn testimony to the SBA and that's the
3 basis under which we think summary judgment should be also be
4 granted for Mr. Spendlove.

5 THE COURT: Okay. Thank you.

6 MR. ATKIN: Thank you.

7 THE COURT: Mr. Egan?

8 MR. EGAN: Thank you, Judge. We appreciate the Court
9 making time for us. I think at the outset, I know the Court
10 has read the papers and I am content, Your Honor, to rely on
11 the briefing to identify disputed facts and point out the
12 pertinent controlling authority which I think makes summary
13 judgment inappropriate. But I did want to raise a couple of
14 points particularly in response to some of the remarks Mr.
15 Atkin has made. The Johnson's claims in this case are based on
16 an oral agreement, a long standing course of conduct and a
17 number of agreements, not simply those that Mr. Atkin has
18 identified and I think it's important with respect to the
19 remarks made about the SBA to try to differentiate and unravel
20 as best we can, the nature of the Johnson interests. The
21 checks that Jayson Orvis wrote were actually written to
22 Donnelle Johnson or to entities controlled by Donnelle Johnson.
23 Jamis Johnson has had a long standing relationship with his
24 wife whereby he acts as a power of attorney for her and so
25 there has been some imprecision perhaps created in part by our

1 own pleadings and certainly by the pleadings and remarks of
2 others, confusing Jamis Johnson with Donnelle Johnson with
3 respect to who owns what. But for purpose of this case and
4 what we're trying to assert here, it's an interest that's owned
5 beneficially by Donnelle Johnson although it's true that Jamis
6 Johnson has been involved in representing that interest and
7 interacting in that interest and so there may be some
8 imprecision with that.

9 THE COURT: Wait a minute. Are these Donnelle
10 Johnson's claims or Jamis Johnson's claims in this third party
11 complaint?

12 MR. EGAN: I think they're both but with respect to
13 the existence of an interest in the Orvis entities, it is
14 Donnelle Johnson who has received money and has received checks
15 from Jayson Orvis in recognition of the interest and I think
16 that's an important distinction to make.

17 THE COURT: How does she become a third party? I
18 assume Donnelle Johnson is -

19 MR. EGAN: Because I think, Your Honor, and I
20 apologize, I don't mean to duck your question, I'm a late comer
21 to the case, but I think the case came about because there was
22 a declaratory judgment filed by Jayson Orvis to say that Jamis
23 had no partnership interest with Jayson Orvis and we have
24 responded by saying Donnelle and Jamis have interests that
25 spread across, but with respect as to who actually had the

1 partnership interest with Jayson Orvis, it was Donnelle but
2 Donnelle is represented and has given power of attorney to
3 Jamis and I think that is an important point to bear in mind.

4 THE COURT: That doesn't solve the question, how does
5 she become a third party plaintiff if she's not a defendant to
6 start with?

7 MR. EGAN: Well, I think because she's instituting a
8 separate action by way of the counterclaim. I mean, I see your
9 point, Your Honor, and I'm not sure how to remedy it at this
10 stage.

11 THE COURT: She's an improper party. It's as simple
12 as that. If she wasn't named as a defendant, she can't assert
13 a third party complaint and she cannot assert a counterclaim.
14 If she becomes a defendant, then she can but no one has sued
15 her, have they?

16 MR. EGAN: No, I don't believe anyone has sued her.

17 THE COURT: Then she ought not to be in this lawsuit.

18 MR. EGAN: Well, that may be the subject of an
19 appropriate pleading either for me to amend and get her in
20 properly or on the part of Jayson Orvis and Spendlove, Victor
21 Lawrence's interests to get her out but we're here now and a
22 number of important points have been raised so I think we ought
23 to proceed.

24 THE COURT: Just because everybody has done it the
25 wrong way, doesn't mean that I'm going to just go along with

1 it.

2 MR. EGAN: No, and I wasn't suggesting that you
3 should, Your Honor. I think you've made an important
4 observation that's passed us all.

5 THE COURT: That's one of the first things that
6 jumped out to me. I don't know how anybody could have missed
7 that, but, that all aside, proceed.

8 MR. EGAN: It's important, Your Honor, to make clear
9 that as I said a moment ago, the Johnsons are not attempting -
10 or the Johnsons are pursuing an interest based on far more than
11 the agreements that Mr. Atkin has identified. The Johnsons are
12 not attempting to recover from Victor Lawrence or Sam Spendlove
13 or the Lexington Law Firm based on any of these agreements.
14 They're not claiming that Victor Lawrence or Sam Spendlove are
15 partners with them. What the Johnsons are claiming is that
16 Victor Lawrence and Sam Spendlove are part of a scheme to
17 deprive the Johnsons of their beneficial interest in the
18 partnership arrangement they have with Jayson Orvis and that
19 there's been conduct that Mr. Spendlove and Mr. Lawrence have
20 been involved in or have abetted in some fashion which we're
21 still trying to work out a way through the discovery process to
22 assist Mr. Orvis in his efforts to deprive Mr. Johnson of his
23 interests.

24 THE COURT: I thought Mr. Johnson told the SBA under
25 oath that he didn't have a partnership interest?

1 MR. EGAN: No. What he said - he doesn't but this
2 gets back to the distinction between Donnelle Johnson and Jamis
3 Johnson.

4 Now, with respect to the SBA testimony, Judge, I
5 think that obviously the quoted testimony is there. I could
6 not come before the Court and tell you that I have a full
7 understanding of what is proper asset shielding and improper
8 asset hiding. I know that Mr. Johnson was attempting to manage
9 his affairs with the SBA to his advantage, whether in that
10 testimony he cuts it too close, is too cute or is affirmatively
11 misleading the SBA, I quite frankly believe is an issue for the
12 jury to decide after all of the evidence is in about what was
13 said to the SBA and what they're doing with Jamis Johnson and
14 what they were doing with Donnelle Johnson. I think it's
15 interesting to note and it's of great concern to us, that at
16 some point during Mr. Johnson's involvement with the SBA he was
17 represented by Victor Lawrence. At some point during her
18 involvement with the SBA, Donnelle Johnson was represented by
19 Victor Lawrence.

20 THE COURT: Did Victor Lawrence tell them to lie to
21 the examiner under oath in the SBA supp order?

22 MR. EGAN: No, I don't think he did that.

23 THE COURT: I'm sure he didn't.

24 MR. EGAN: I'm sure that's true, Judge.

25 THE COURT: Then why do you tell me all that?

1 MR. EGAN: I'm telling you that because I think that
2 it's far more complicated than Mr. Atkin is making it appear
3 and that's--

4 THE COURT: I understand your claim. You say you're
5 not basing anything on any of these agreements and so
6 therefore, you've got some type of an oral deal here based on
7 course of conduct that's a big conspiracy that takes your
8 client's interest that is not the subject of a writing,
9 basically, isn't that it?

10 MR. EGAN: Well, there are additional writings but
11 the bottom line is the course of conduct and the oral
12 understandings of the parties entered into over the course of
13 many years, that's true. The reason I'm raising these points,
14 and the additional point that the SBA sold their judgments to
15 Jayson Orvis or an Orvis controlled entity, is to suggest to
16 you that it's not nearly as clean or not nearly as black and
17 white as Mr. Atkin has presented to you and I think that what
18 went on in front of the SBA to the extent that it's pertinent
19 to these claims, is a matter for the jury to decide that you're
20 being asked to come in and make credibility determinations and
21 make factual determinations with a record that is not, in my
22 judgment, complete about what the SBA was told. One of the
23 things I can tell you, Your Honor, it's my understanding the
24 SBA had full access to Mr. Johnson's finances, full access to
25 his documentation and nothing was held back but we're isolating

1 on this testimony as a sign and literally proof that there was
2 some elaborate scheme to defraud the SBA. I don't think that
3 the evidence will support that and that's what I'm suggesting
4 about not rushing to judgment about what Mr. Johnson was saying
5 to the SBA and not allowing it to serve as the basis for a
6 summary judgment here.

7 I think Mr. Atkin did not - Mr. Atkin summarized the
8 testimony. He only read a little bit of it. He only included
9 a little bit more in his briefing papers, but I think the
10 inference - they don't say what Mr. Atkin says they do. He has
11 summarized it. He may be able to convince a jury of that, but
12 I think that for summary judgment purposes under Rule 56, Mr.
13 Johnson and Mrs. Johnson are entitled to favorable inferences
14 about what that testimony meant, what the significance of it
15 is.

16 THE COURT: Well, have they come forward with
17 affidavits to explain what their testimony is in this case, to
18 explain why they made what appears to be a false representation
19 - Mr. Johnson?

20 MR. EGAN: They have not come forward with testimony,
21 Your Honor, because I don't think the way the issue was framed,
22 I don't think the way the issue was framed, allows or makes
23 that necessary and also the testimony itself doesn't support
24 that. You've reached the conclusion that Mr. Atkin wants you
25 to reach in your question to me which is, this is fraud and I'm

1 suggesting to you that -

2 THE COURT: Well, you know, I don't even care if it's
3 fraud. Just a flat lie is bad enough for me, particularly from
4 someone who used to be a lawyer.

5 MR. EGAN: Well, again, Your Honor, the factual
6 foundation for that remark has not been laid out by anybody.
7 I'm attempting to provide some information and lay out some
8 foundation for the Court but if Mr. Spendlove and Mr. Lawrence
9 are mis-perceiving the claims, suddenly this issue of what was
10 said to the SBA becomes the tail that wags the dog and I'm
11 suggesting to the Court that that's not accurate.

12 THE COURT: Well, tell me what you're basing your
13 claim on. Tell me about all this course of conduct and all
14 these other documents that supports this claim.

15 MR. EGAN: The course of conduct is an understanding
16 between Jayson Orvis and Jamis Johnson that Jayson Orvis would
17 pay money to Donnelle Johnson based upon a preexisting
18 established relationship between Jamis Johnson and his wife and
19 checks were cut routinely for several months. But as the
20 business grew -

21 THE COURT: Okay. Let me ask you before you move on,
22 who was doing this work that Mr. Orvis was paying for, Mr.
23 Johnson or Mrs. Johnson?

24 MR. EGAN: I think it was more in the form of - at
25 first, Mr. Johnson was doing work as part of the partnership,

1 as part of the arrangement. As time progressed, Mr. Johnson
2 became more of a passive investor because of his own issues and
3 so it wasn't consideration necessarily for work done, it was
4 payment for an interest in the business entities that Jayson
5 Orvis -

6 THE COURT: Did he assign this partnership interest
7 that was created by his relationship with Mr. Orvis to his wife
8 and then he became her attorney in fact -

9 MR. EGAN: I don't think that's quite what happened,
10 Your Honor. I think what happened is that any entity that Mr.
11 Johnson was involved in long before his involvement or his
12 disciplinary problems with the Bar, long before the SBA, Mr.
13 Johnson routinely, when he would set up or get involved in a
14 business interest, would have his wife be the beneficial owner
15 of the interest.

16 MR. JOHNSON: She sat on the boards as well, Sean.

17 MR. EGAN: Yeah and Mr. Johnson is reminding me that
18 Mrs. Johnson sat on the Board of the various entities, not
19 simple these credit repair entities. I know, for example, that
20 Mr. Johnson had, or Mrs. Johnson was on the Board of a hospital
21 that Mr. Johnson was involved in Louisiana -

22 THE COURT: The whole thing smells.

23 MR. EGAN: Well, no one is coming into this courtroom
24 completely clean, Judge.

25 THE COURT: No, they're not.

1 MR. EGAN: I have no problem conceding that.

2 THE COURT: There's the degree of odor but it's not
3 looking too good for Mr. Johnson.

4 MR. EGAN: Well, I understand what you're saying,
5 Your Honor, but I'm also urging the Court to place Mr.
6 Johnson's position in the context of Rule 56 and who gets to
7 decide whether it stinks and if so, from whose side of the
8 fence the odor is emanating most from. That's, I think, very
9 important. I share Your Honor's concerns. I understand them
10 but I'm also suggesting that in businesses of this sort as in
11 many other commercial transactions, there's a lot of stuff
12 that's going on and the best way to approach this is to allow
13 the litigation process to run its course so that we can find
14 out what happened, so that a jury can decide whose telling the
15 truth here and whose not, so that there can be a full
16 explication of the facts and not simply some cherry picked
17 testimony that looks bad right now and, Your Honor, I'm not
18 trying to run away from it. It says so right there. It's a
19 troublesome bit of testimony. But what is its significance?
20 What did Jamis Johnson mean? What was going on in other
21 portions of those SBA proceedings? Why is Jayson Orvis buying
22 the judgments and then calling Mr. Johnson up to the Berman
23 office and being presented with them as a threat to resign any
24 interest in a partnership? Why did he do that? We're not the
25 only people that have mud on our shoes.

1 THE COURT: I don't know about Mr. Orvis. I'm
2 concerned about Mr. Spendlove and Mr. Lawrence.

3 MR. EGAN: And I understand that, Your Honor, but
4 what I'm suggesting to you is, what is troubling the Court is
5 best resolved by allowing the case to proceed forward and then
6 by truncating it or preempting it based on a summary judgment
7 motion for which I'm not sure they even having standing to
8 raise as to some of these agreements. That's all I'm
9 suggesting to Your Honor. I'm not trying to suggest to you
10 that this is a rose. It's not a rose, but there is more going
11 on here and there are explanations that a lot of people have to
12 give and not simply Mr. Johnson and there will be a time and
13 place for that and I'm suggesting respectfully, Your Honor,
14 that the time and the place for that is at a trial and not in a
15 summary proceeding.

16 The bottom line of the case, Your Honor, is there's
17 an effort on the part of Jayson Orvis with the assistance of
18 Victor Lawrence and Sam Spendlove to deprive Mr. and Mrs.
19 Johnson of their interests in the Jayson Orvis entities.

20 THE COURT: Tell me exactly what Mr. Lawrence did
21 upon which you base your claim, this conspiracy he had with Mr.
22 Orvis and Mr. Spendlove to beat whoever owned this, Mr. Johnson
23 or Mrs. Johnson, out of their interest, assuming they had one?

24 MR. EGAN: Let me answer this two ways. First, if we
25 refer to the brief and the specific facts, facts 23, 24 and 25

1 sets out the detail of the claims against Mr. Spendlove and Mr.
2 Lawrence. But generally speaking, Your Honor, we believe that
3 Mr. Spendlove was advising Mr. Orvis and assisting Mr. Orvis
4 with the strategy of in part, purchasing SBA judgments to use
5 the SBA judgments against Jamis Johnson to obtain leverage over
6 Mr. Johnson to renounce any interest that he or his wife had in
7 the Jayson Orvis entities and there was a meeting prior to the
8 filing of suit at Mr. Berman's office where Mr. Johnson was
9 presented with all this and was basically told to renounce your
10 interests or we're going to sue you, we're going to chase you
11 down. That's the primary claim that we have against Mr.
12 Lawrence. There hasn't been discovery taken of Mr. Lawrence.
13 We got dropped several boxes right on the eve of having them
14 respond to the motion and I would suggest that more time would
15 be useful to develop further theories.

16 I know that these are serious allegations being made
17 against Mr. Spendlove and Mr. Lawrence. I'm trying very hard
18 not to come here waving my arms about it because I understand
19 that reputations are important but I also want to proceed with
20 caution and say let me take some discovery. Let me depose Mr.
21 Lawrence. Let me depose Mr. Spendlove.

22 THE COURT: Where is your Rule 56F request?

23 MR. EGAN: Because the motion is predicated as a
24 motion based on law and it's not really a question of fact
25 necessarily.

1 THE COURT: You don't need to take anybody's
2 deposition to respond to this motion.

3 MR. EGAN: That's right, but I'm also-

4 THE COURT: Then why are you telling me we need to
5 discover more facts?

6 MR. EGAN: Because you've asked me some additional
7 questions about what else is going on. I think what I've tried
8 to do is point out the conduct of Mr. Spendlove and Mr.
9 Lawrence as identified in the brief and you've said what did
10 they do? It's there. That's where it is and then more
11 generally our approach is to explore his relationship with
12 Jayson Orvis as it relates to getting the Johnson's interests
13 extinguished.

14 THE COURT: All right.

15 MR. EGAN: Thank you, Judge.

16 THE COURT: All right, thank you.

17 Mr. Atkin?

18 MR. ATKIN: Your Honor, today is the first time that
19 I've heard any attempt to articulate that Donnelle Johnson's
20 interests somehow is different from that of Mr. Johnson and
21 with regard to the explanation that has been attempted for the
22 testimony that was given to the SBA, not only do I point out in
23 our reply brief, that if there was an explanation, it's in
24 response to a summary judgment motion that they need to give
25 that explanation, not by counsel making statements that aren't

1 under oath but through admissible evidence, explaining what
2 that testimony meant if it meant something different. If there
3 was going to be this argument that Donnelle Johnson was the
4 owner of the partnership interest, that should have been set
5 out but that wasn't set out and, in fact, the testimony of Mr.
6 Johnson in his deposition, precludes that kind of an argument.
7 Had that been made, we would have pointed the Court to this
8 testimony which is in fact in our reply memorandum but was put
9 in for a different reason, but the Court will see the obvious
10 relevance of it.

11 And the question was asked, "And was this agreement
12 in May of 1999 between you and Victor Lawrence, was that part
13 of your contingent plans for your preparations in the event
14 that you were disbarred?"

15 Answer, "That may have been part of it. There were
16 other considerations."

17 Question, "What were the other considerations?"

18 And then he gives this answer, "Jayson Orvis and I,
19 we had this credit repair business and we wanted to protect it
20 from creditors as well."

21 No mention of Donnelle Johnson or her being involved
22 in it. But his testimony in recent deposition, setting out
23 that these agreements were entered into for the purpose of
24 defrauding the SBA. They wanted to protect this business from
25 creditors as well. "You wanted to protect the credit repair

1 business from creditors?" Answer, "Yes. We wanted to preserve
2 our business and not be a big target for the SBA." And so, not
3 only has there been no attempt to try to explain that testimony
4 to the SBA in a way that would take it outside the realm of
5 fraud, but the evidence that he has given makes it clear that
6 there was that testimony for the purpose of defrauding the SBA
7 and judicial estoppel.

8 THE COURT: Let me cut to the chase here. Even
9 assuming that I was convinced that your theory that fraudulent
10 contracts can't be relied upon by Johnson or Johnsons or
11 whoever owns the interest, or that estoppel does not apply for
12 statements made under oath that are contrary to what the
13 assertions are here, if the allegation is that the Johnsons
14 claims are based upon a long standing course of conduct and
15 oral agreements that don't have anything to do with these
16 written agreements, then how do I grant a summary judgment?

17 MR. ATKIN: On the basis of judicial estoppel, Your
18 Honor.

19 THE COURT: But judicial estoppel only implies to the
20 basis of the contract, that he didn't have a partnership
21 agreement. I suppose - I understand what you're saying.

22 MR. ATKIN: If he didn't have a partnership
23 agreement, if he's precluded from relying on a claim that he
24 had a partnership with Jayson Orvis, then-

25 THE COURT: Well, what if Mrs. Johnson owned this

1 interest?

2 MR. ATKIN: Well, Your Honor, again, there's no
3 evidence of that and Mr. Johnson's testimony in his deposition
4 is exactly to the contrary. "Jayson Orvis and I, we had this
5 credit repair business and we wanted to protect it from
6 creditors as well." Throughout all the briefing, there's been
7 no suggestion that it was Donnelle Johnson's interest. The
8 argument has been that it was Jamis Johnson's interest and to
9 bring that kind of thing up at this point without evidence,
10 just by unsworn statements of counsel, doesn't comply with Rule
11 56. We're entitled to not be ambushed by that kind of thing
12 without evidence.

13 THE COURT: Okay. Anything else?

14 MR. ATKIN: Only Your Honor, I'd like to comment, I
15 sat patiently while there were suggestions made that there was
16 some kind of odor, some kind of improper conduct by the other
17 parties in this lawsuit. There is no evidence of any improper
18 conduct by Mr. Lawrence or Mr. Spendlove and I just wanted to
19 make that clear on the record.

20 THE COURT: Well, there's a suggestion that at least
21 Mr. Spendlove - there's been some question on Mr. Spendlove but
22 nobody has said anything about Mr. Lawrence but the question,
23 when I asked about what did Mr. Spendlove do to engage in this
24 conspiracy, there was that he encouraged Mr. Orvis to buy these
25 things with SBA and then use that against Mr. Johnson to divest

1 him and I guess now his wife from the interest that they had in
2 this property. What about that? Is there any support for that
3 in the record?

4 MR. ATKIN: Again, that needs to be based on evidence
5 and not just unsworn statements by counsel. Your Honor, I'm
6 not sure that there would be anything improper in a person
7 buying a judgment and then using that to negotiate the
8 settlement of a civil lawsuit. I'm unaware of any law that
9 would suggest that that's illegal or improper.

10 THE COURT: Has Mr. Spendlove's deposition been
11 taken?

12 MR. ATKIN: It has not.

13 THE COURT: Has Mr. Lawrence's deposition been taken?

14 MR. ATKIN: It has not.

15 THE COURT: Has Mr. Orvis's deposition been taken?

16 MR. ATKIN: It has not, Your Honor. There's been
17 ample time to do that and, in fact, we produced documents way
18 back in October that would have shown them that we haven't
19 received any monies from Mr. Orvis but the money has been going
20 the other direction and they simply haven't come over and
21 looked at those documents even after we got them ready for
22 them.

23 THE COURT: Okay. Anything else?

24 MR. ATKIN: That's all, Your Honor.

25 THE COURT: Thank you. I'll think about the matter.

1 I'll take the matter under advisement. I may revisit the
2 briefs. It's been a couple of week since I looked at them and
3 made my notes.

4 Let's turn briefly to the issue about fees on this
5 matter. I suppose this is directed to Ms. Adams.

6 Ms. Adams, I believe there was an order that I issued
7 granting a protective order regarding certain conduct of a John
8 Bogart, Mr. Johnson's attorney in a deposition that somebody
9 else was being deposed. I indicated fees would be appropriate
10 and asked for an attorney fee affidavit. I got your affidavit
11 and I realize there was no objection to it and perhaps that
12 should have been enough but my concern is that the amount of
13 the fees requested were somewhere around \$9,000 and I'm having
14 trouble understanding how we get \$9,000 worth of fees for
15 having to file a Motion for Protective Order and having to
16 retake a deposition.

17 MS. ADAMS: I was under the impression from the
18 order, maybe this was a mistaken impression that I'll have to
19 remedy in a new affidavit, but I was under the impression that
20 the order granted attorney's fees on the taking of the
21 deposition, the preparing of the motion and the preparing for
22 the first deposition.

23 THE COURT: I'm sure it did. I've got it right here
24 and we can see what the minute entry says.

25 MS. ADAMS: I brought with me so that you could take

1 a look at them if you wanted.

2 THE COURT: I don't need it. Let me just read with I
3 said here. I know it was rather broad because I was rather
4 upset with - yes, here is the minute entry of November 5.
5 Preparation for Mr. Vigil's deposition, attendance at
6 deposition and preparation for the motions. And that's what
7 you've included in your affidavit?

8 MS. ADAMS: Yes. If you'd like to see I brought the
9 statements that were sent to Mr. Orvis. I didn't provide them
10 with my affidavit because they're obviously attorney/client and
11 work product issues but I highlighted them for you so you could
12 look and see where the expenses went.

13 THE COURT: Well, but just give me a representation
14 here today as an officer of this Court that you've already done
15 your affidavit, but I just want to be clear that all this time
16 was necessary.

17 MS. ADAMS: All this time was necessary. The bulk of
18 the beginning, you'll see in the affidavit I'm sure you've got
19 a copy of that, the hours that were spent in preparation for
20 the deposition, the bulk of the time, at that time I had no
21 knowledge of how Mr. Vigil was involved in this situation at
22 all, but as it turns out he was an employee who knew both the
23 defendant and the plaintiff and the third party defendants
24 quite well, both personally and professionally and was involved
25 in the business during the process, during the time period,

1 during the relevant time period while all of this was going on
2 so Jayson and I, Mr. Orvis and I spent the first two listings -
3 the first two listings on there are meetings between he and I
4 where he was just listing to me all of the meeting he had with
5 Mr. Vigil that he could recall and all the interactions with he
6 and Mr. Vigil and Mr. Johnson and the then the bulk of the rest
7 of that time in the preparation was me going through, re-
8 reading the transcripts of the recording of our conversations
9 and then calling him and asking him further followup questions
10 on all of that and all of it was necessary to prepare for the
11 deposition. I, in fact, only spent about, I believe an hour
12 and a half, two hours, questioning Mr. Vigil, but I believe
13 I've got another day or two full of questions to ask him when
14 we reconvene that deposition. He's pretty well involved as far
15 as I can tell in a lot of what went on between - in the
16 interactions between these parties and in working with
17 Lexington Law Firm for a brief period of time and so he's got
18 quite a bit of information that needs to be looked at very
19 seriously. The time of the deposition obviously was necessary
20 and then there's two listing on there after that where I was
21 preparing the motion and that's simply a case of going back
22 through. I re-read the deposition two or three times I believe
23 to make sure that we had all of the pertinent, important pieces
24 of the record in that motion and then also doing the research
25 for that, the legal research on the cases and things and then

1 putting that together and then the last couple of entries on
2 that are just going through and revising that and making sure
3 that it was as streamlined as possible for the Court to take
4 care of and then obviously there's a reply memo.

5 I've also got in here, highlighted on these sheets,
6 the time that Peggy Tomsic who is a partner in my firm, spent
7 on this and there's actually about \$1,500 worth of charges that
8 were not included on my affidavit because I hadn't specifically
9 asked for attorney's fees for both she and I, so I didn't
10 include that information in my affidavit.

11 THE COURT: Okay. Thank you. I think that explains
12 my concerns. I'll allow the attorney's fees and the request
13 for attorney's fees and the costs in the amount of \$9,297.40.
14 I don't know - have you submitted an order on that?

15 MS. ADAMS: I have not.

16 THE COURT: No, you haven't. Well, you may do so.

17 MS. ADAMS: Okay. Thank you.

18 THE COURT: All right. Well, the only final thing
19 I'm concerned about is Donnelle Johnson. This Motion for
20 Summary Judgment goes to her and I don't think she's a party.
21 There may have been no motion but I'm going to take care of
22 this on my own motion. Unless somebody can tell me a reason
23 why a person who is not a party to a lawsuit can file a third
24 party claim, or for that matter a counterclaim, if a
25 counterclaim has been filed on behalf of Donnelle Johnson, I'm

1 going to strike her from this lawsuit. Can anybody do that?

2 MR. ATKIN: I think that's correct, Your Honor.

3 MR. EGAN: Your Honor, rather than strike her from
4 the lawsuit, I would request an opportunity to correct the
5 pleadings so that she can become properly joined in the suit.
6 I understand the Court's point. It's obviously escaped our
7 notice but rather than strike her, I'd rather keep her in and I
8 will set to work on getting her into the case properly through
9 the proper channel.

10 THE COURT: Well, but in the meantime, what do I do
11 about this motion?

12 MR. EGAN: Well, you can hold it in abeyance or you
13 can deny it because I think there is basis to deny it
14 regardless of whether she's properly -

15 THE COURT: I don't think I ought to be entering
16 orders against people that I don't think are proper parties to
17 a lawsuit. There's a way to bring her in - well, I don't know
18 if there is or not. I mean, I haven't even given her an ounce
19 of thought but I do know that the rules do not allow a third
20 party complaint by some intervener that just cruises in from
21 the side without leave of the Court and all of a sudden she
22 just appears here and if she needs to be here, fine. But as
23 far as this motion is concerned, I'm going to decide it as far
24 as Mr. Johnson. I don't think it make any difference in the
25 outcome but I'm not going to have one of the appellate courts

1 shaking their heads saying what the hell is Hanson doing? He's
2 hearing motions against parties and granting motions or denying
3 motions regarding parties that shouldn't even be in the lawsuit
4 and he knows it. Donnelle Johnson is out of this lawsuit. She
5 has been improperly included in the lawsuit. She has no claims
6 that are properly asserted in this lawsuit and as far as these
7 pending motions are concerned, she's a non-party.

8 I'd like an order in that regard, Mr. Atkin.

9 MR. ATKIN: I will, Your Honor.

10 THE COURT: Just indicate that the Court on its own
11 motion is striking Donnelle Johnson from these pleadings
12 because she has been improperly named and has improperly
13 asserted in claims herein and that's not a bar to her
14 attempting to get into this lawsuit as a proper party through
15 legitimate means, but at this point in time, she's out, she's a
16 non-party.

17 I'll let you know in a written decision on my
18 decision for your Motion for Summary Judgment. Thank you.

19 (Whereupon the hearing was concluded)

20

21

22

23

24

25

-c-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Timothy R. Hanson was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 13th day of February, 2003 in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

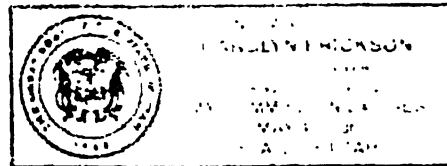


Exhibit 3

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAYSON ORVIS, et al.,	:	Case No. 010907449
	:	
Plaintiff,	:	Appellate Case No. 20041122-CA
	:	
v	:	
	:	
JAMIS JOHNSON, et al.,	:	
	:	
Defendant.	:	

HEARING ON MOTIONS AUGUST 9, 2004

BEFORE

THE HONORABLE TIMOTHY R. HANSON

FILED DISTRICT COURT
Third Judicial District

FEB 17 2005

By bn SALT LAKE COUNTY
Deputy Clerk

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

APPEARANCES

For the Plaintiff:

PEGGY A. TOMSIC
BERMAN, GAUFIN,
TOMSIC & SAVAGE
328-2200

For the Defendant:

D. JOSEPH CARTWRIGHT
ATTORNEY AT LAW
801-363-5255

* * *

ORAL ARGUMENTS

Ms. Tomsic

Mr. Cartwright

Page

1, 27

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1 SALT LAKE CITY, UTAH - AUGUST 9, 2004

2 JUDGE TIMOTHY R. HANSON PRESIDING

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

4 THE COURT: Good afternoon.

5 MS. TOMSIC: Good afternoon, Your Honor.

6 THE COURT: Jayson Orvis v. Jamis Johnson, 010907449.

7 Appearances please.

8 MS. TOMSIC: Peggy Tomsic representing the plaintiff,
9 Jayson Orvis. Today Your Honor, I have with me Heather Keoyo
10 who has just joined our firm but has not as yet been admitted
11 to the bar, who's helping me. Mr. Orvis, the plaintiff and his
12 wife, Pam Orvis, are also present in the courtroom.

13 THE COURT: Thank you.

14 MR. CARTWRIGHT: Joe Cartwright here representing Mr.
15 Johnson, Your Honor.

16 THE COURT: Thank you. This is on for Plaintiff's
17 Motion for Summary Judgment. I've reviewed the pleadings that
18 you've filed counsel, so if you'd like to proceed Ms. Tomsic,
19 you may.

20 MS. TOMSIC: Your Honor, as you know this action is a
21 declaratory judgment action that was brought by the plaintiff,
22 Jayson Orvis, seeking a declaration from this Court that the
23 defendant, Jamis Johnson holds no interest, title, or right to
24 the credit repair businesses of Mr. Orvis and seeking the costs
25 involved in that case. Mr. Johnson has filed a counterclaim

1 asserting various claims against Mr. Orvis and other third
2 parties, two of whom you've already granted summary judgment
3 on, all of which, regardless of the label are predicated on the
4 assumption that Mr. Johnson has a partnership with Mr. Orvis
5 relative to these credit repair businesses.

6 Previously Your Honor, just in terms of history, two
7 of the defendants, Mr. Lawrence and a Mr. Spendlove moved the
8 court for summary judgment and the Court had granted that
9 Motion for Summary Judgment basically on two grounds, one of
10 which was judicial estoppel. Mr. Orvis has moved this Court
11 for summary judgment on one ground, Your Honor, and that is
12 judicial estoppel, that is that as a matter of law, Mr.
13 Johnson, Jamis Johnson, the defendant and counterclaim
14 plaintiff and third party plaintiff in this action, cannot
15 assert that he has a partnership interest or any right or title
16 to the credit repair businesses of Mr. Orvis or the proceeds or
17 profits from those businesses.

18 Your Honor, as you know, judicial estoppel is a
19 doctrine that was created in the late 1800s and has been
20 adopted by those courts who have considered it including the
21 Supreme Court of the United States and obviously was applied by
22 this Court in granting the summary judgments for Mr. Lawrence
23 and Mr. Spendlove. Judicial estoppel is a doctrine that the
24 courts have created which is an equitable doctrine; that it is
25 a doctrine that is applied by a court as in matter of law where

1 you have a party coming into court and asserting a position or
2 making a claim that is inconsistent with a position or claim
3 that they have asserted in a prior case. And in this case,
4 Your Honor, we have a situation where Mr. Johnson was sued by
5 the Small Business Administration, SBA, back in 1997 and they
6 got a judgment against him for money owed. The SBA
7 subsequently engaged in supp hearings to determine whether Mr.
8 Johnson had any assets including any interest in any
9 partnerships, any limited liability companies, any businesses
10 on which the SBA could execute to collect on its judgment.

11 In the course of those supp hearings, the SBA in
12 1999, took the deposition of Mr. Johnson. Mr. Johnson was
13 sworn to tell the truth in that deposition as all deponents are
14 and given an opportunity to correct the deposition prior to the
15 time it becomes final. In this case, while Mr. Johnson
16 testified to tell the truth and purported to tell the truth, he
17 never corrected that deposition and never made any changes and
18 in fact has never made any assertions before this Court that in
19 anyway that his testimony before the SBA was somehow mistaken
20 or wrong, and in fact, has stood by that testimony.

21 We have submitted the testimony that Mr. Johnson gave
22 in the SBA proceeding and that testimony, Your Honor, flatly
23 contradicts Mr. Johnson's position in this case both by way of
24 a defense and in its counterclaim and third party claims that
25 he has a partnership issue in these credit repair businesses.

1 And Your Honor, what I'd like to do is I'd just like
2 to read from the pages that I have attached to Mr. Orvis'
3 affidavit. They are attached as Exhibits 5 and 6, if I could,
4 and I'm beginning on page 23 on line 3 and again, this is the
5 supp hearing that is being conducted by the SBA to determine
6 whether Mr. Johnson holds any interest in anything that they
7 can execute on and this is Mr. Johnson's testimony beginning at
8 line 3 on page 23 and he states, testifies under oath, "But I
9 have resigned with any involvement in Lexington Law Firms
10 because of the pending bar problem." Question, "Aren't we
11 talking about Johnson and Associates, not Lexington Law Firms?"
12 Answer, "No. I resigned from anything. I have practiced law
13 under Jamis M. Johnson and Jamis M. Johnson and Associates.
14 Johnson and Associates is a not-for-profit corporation and
15 you've been told this. Nobody has shares of stock. I resigned
16 from that. Lexington Law Firm, Victor Lawrence and another
17 attorney have taken over all of that. I've indemnified them.
18 They have indemnified me. I've resigned from any relationship.
19 Lexington Law Firm was just an operating entity that was doing
20 credit repair." Question, "Now Lexington Law Firm is not an
21 entity, it's an assumed name registered to you?" Question by
22 Mr. Hugey. Answer, "Actually, I think what happened, and I'll
23 have to recall this but I assigned, a couple of years ago there
24 was a corporation being set up but that was assigned, the name
25 was assigned to - it was going to be assigned into a

1 corporation. I don't know if we've ever registered the fact
2 that it was assigned." And then he goes on to talk about a
3 suit by the state of Tennessee and this is the next page, page
4 24. Beginning on line 4 he says, "But since that time" that's
5 the time of the Tennessee suit and his problems with the bar,
6 "and with my bar problem, I have completely relinquished any
7 interest. They paid me a little bit, made my payment and I
8 resigned. Now if it's listed as an assumed name by Jamis
9 Johnson, they're going to have to go in and change that but,
10 you know, they're operating now without me." So he testified
11 to that in terms of Lexington Law Firm which was the credit
12 repair business that was being run by Mr. Johnson and then by
13 Mr. Lawrence and it was a credit repair business that was
14 utilizing intellectual property and equipment of Mr. Orvis,
15 part of the intellectual property and equipment that's at issue
16 here but Mr. Johnson didn't stop his testimony there, Your
17 Honor. The attorney for the SBA really wanted to find out
18 geez, okay, we're talking about Lexington Law Firm and we're
19 talking about Johnson Associates, you're saying you've resigned
20 any interest, you don't have anything at all, well, I'm going
21 to be real categorical about this and beginning on page 30 at
22 line 16 the lawyer says, question, "Do you have any interest in
23 any partnerships?" On line 18 Mr. Johnson testifies under
24 oath, "No." Now he does go on to say in that he says, "I mean,
25 you know, often I'll have a joint venture with somebody but I

1 don't have a partnership or set up a partnership or an LLC.
2 You know, if I get a deal I say, hey, do you want to do this
3 deal together? We'll go up to Summit County and buy a lot."
4 Question, "So a joint venture." "Yeah, you could call it that
5 but I don't have any outgoing partnerships." I believe that's
6 a typo. I believe it's ongoing, Your Honor, partnerships.
7 Question, "Any interests in any limited liability companies?"
8 Answer, "No." And then he goes on on line 11 on page 31 and
9 says, "I have no interest in LLCs or corporations."

10 Clearly Your Honor, the supp hearing was to determine
11 what if any interests he held in anything. The questions were
12 specifically put to him under oath as to whether he had any
13 interest in Lexington Law firm, Johnson and Associates, any
14 partnership, any LLC, any corporation and he categorically said
15 no.

16 In this proceeding Your Honor, Mr. Johnson has done
17 an entire about face and his answer, all you have to do is look
18 at his answer to the declaratory judgment in this action and
19 his counterclaim and third party claim and he says "I, Jamis
20 Johnson, am a partner with Jayson Orvis. I have a partnership
21 interest in these credit repair business." That is the
22 foundation of his defense. That is the foundation of every
23 single claim he has made against Mr. Orvis, the plaintiff in
24 this case and every third party defendant including the two
25 third party defendants who were let out of this case on summary

1 judgment.

2 Your Honor, so I would say as a matter of law, under
3 the doctrine of judicial estoppel, Mr. Johnson is estopped from
4 claiming he owns a partnership and Mr. Orvis, as a matter of
5 law, is entitled to a declaratory judgment that Mr. Johnson
6 does not have an ownership interest.

7 And I want to address a couple of issues that were
8 raised by Mr. Johnson in his opposition because I think that
9 they're ones that I'd like to address in my opening and then if
10 there are further issues, I'd like to deal with that in my
11 rebuttal.

12 Mr. Johnson takes the position that the doctrine of
13 judicial estoppel does not apply here even though this Court
14 applied it relative to Mr. Lawrence and Mr. Spendlove because
15 he says that under Utah law, you have to have been a party or
16 privy with a party in this prior action and it had to involve
17 the same subject matter and he cites to a Utah Supreme Court
18 case that quotes from a 1942 decision, the Tracy Loan case by
19 the Utah Supreme Court and says that's the state of the law.

20 Well, Your Honor, the problem with that position is
21 that the Utah Supreme Court subsequent to that Tracy decision
22 stated that in fact to the extent there was that type of broad
23 language in the Tracy case, that it had been revisited and
24 reconstructed in a later decision by the Supreme Court, the
25 Hodge decision which he said has clarified what that is and in

1 the Hodge decision, Your Honor, they were talking about
2 collateral estoppel and on collateral estoppel there had been
3 prior case law just like there had been on judicial estoppel,
4 that you had to be same parties in the same suit or privy on
5 the same subject matter and the Court made it clear that that
6 is not correct. What you have to demonstrate is that in fact
7 you have someone in a prior proceeding who takes a position and
8 if they're doing it under oath before a tribunal or in a case,
9 and that position is contrary to a position they're not
10 asserting before a court, that you do not have to be the same
11 parties, that what you have to show is they are contrary
12 positions and in this case, the defendant got a benefit out of
13 it. Well, clearly in this case Your Honor, Mr. Johnson got a
14 benefit out of it because the SBA didn't collect on anything
15 because he claimed he didn't own anything including this
16 partnership interest.

17 And so Your Honor, I would say there is not a Supreme
18 Court case after the Supreme Court basically overruled the
19 Tracy decision on the grounds of having to have identities of
20 parties and subject matter. Where this Court, being the
21 Supreme Court, Court of Appeals, or even a district court has
22 held that in order to utilize judicial estoppel, you have to be
23 the same parties in the same action. And that's important,
24 Your Honor, because as you stated in your opinion explaining
25 why you had granted summary judgment to Mr. Lawrence and Mr.

1 Spendlove, the purpose for judicial estoppel is to make sure
2 that the courts are not being utilized to commit fraud and that
3 they are not allowing people to lie in one tribunal and use it
4 to their benefit in another tribunal and, Your Honor, I would
5 say that the issue that this Court decided relative to Mr.
6 Lawrence and Mr. Spendlove on the issue of judicial estoppel is
7 identical as that raised by Mr. Orvis.

8 The courts are clear that when you're talking about
9 judicial estoppel versus equitable estoppel, the relationship
10 you're looking at is the relationship between a party of the
11 tribunal. The question is, are you misusing the justice
12 system? And that's the relationship you're looking at and on
13 the summary judgment motion against Mr. Johnson by Mr.
14 Spendlove and Mr. Lawrence, this Court stated and I'm quoting
15 Your Honor from page 4 of your opinion in that case that was
16 entered, I believe, more than a year ago in February 2003, you
17 stated, "Mr. Johnson is also estopped from asserting any claims
18 in this action which are based on the partnership he denied
19 under oath when questioned by the SBA." "Estoppel is a bar or
20 impediment which precludes allegations denial of a certain fact
21 or state of facts in consequence of a previous allegation or
22 denial or conduct or admission. It operates to put a party
23 entitled to its benefits in the same position as if the thing
24 represented were true." And you're quoting Black's Law
25 Dictionary. And then you go on to say, judicial estoppel

1 "prevents a party from seeking judicial relief by offering
2 statements inconsistent with its own sworn statements in a
3 prior judicial proceeding."

4 You then go on to state on page 5, "Mr. Johnson seeks
5 judicial relief in this matter by offering statements that are
6 inconsistent with his own sworn statements in the proceedings
7 brought against him by the SBA. In a sworn deposition, Mr.
8 Johnson told the SBA that he had no interest in and had no
9 right to receive payments from Lexington Law Firm. He went on
10 to aver that he had no partnership interest nor interest in a
11 limited liability company. Because each of the claims asserted
12 against Lawrence and Spendlove are expressly negated in Mr.
13 Johnson's prior testimony where he was attempting to avoid
14 payment to the SBA, the claims must be dismissed." And again,
15 those claims, Your Honor, were all predicated on an assumption
16 that Mr. Johnson owned a partnership interest or had a
17 partnership with Mr. Orvis.

18 So I would say Your Honor, one, you have visited this
19 issue with regard to other defendants. You clearly have laid
20 out what judicial estoppel is and what the purpose behind it is
21 and why it would apply in this situation.

22 Your Honor, the arguments that the Defendant Johnson
23 asserts here are exactly the arguments that he asserted in
24 opposition to Mr. Spendlove and Mr. Lawrence's motion and which
25 were rejected by the court in finding summary judgment based at

1 least in part on the judicial estoppel doctrine.

2 Finally Your Honor, the argument that Mr. Johnson
3 raises again which he raised in the last hearing on the other
4 summary judgment motion, is that, well, geez, you know, my wife
5 and I both have this interest in the partnership and it's
6 really her interest in the partnership. Well, Your Honor, we
7 attach as Exhibit A to our reply an order from this court that
8 was signed and was basically reflected your ruling at the oral
9 argument in connection with the last Motion for Summary
10 Judgment, that his wife, Danelle Johnson is not a proper party
11 before this Court and you ordered that any reference to her in
12 any pleadings, be stricken and the reason this had arisen is
13 because the Memorandum in Opposition, just as the Memorandum in
14 Opposition to our motion was styled, Jamis and Danelle
15 Johnson's opposition and your point was, she's not a proper
16 party in this case. She's not a party. She cannot be
17 asserting claims and that is not before the court. Well, that
18 was back in February 2003, Your Honor, and here we are again
19 with the same point.

20 And I might point out, Your Honor, even if she were a
21 party to this action, it would make no difference and that is
22 because to the extent she's claiming any interest and I believe
23 that Jamis has described it as a "beneficial interest" it all
24 derives and is part and parcel of his claim that he is a
25 partner and has a partnership interest with Mr. Orvis in credit

1 repair and that he has given the benefit of that, that is in
2 profit sharing to his wife. So even if she were before this
3 court which she's not, it would make no difference because
4 judicial estoppel, estops Mr. Johnson from making that claim
5 and he can't give a benefit to his wife that he's estopped from
6 claiming.

7 Finally Your Honor, I would just say, this is an
8 issue that is firmly established in the law. The record is
9 uncontroverted in this record that Mr. Johnson made those
10 statements under oath before the SBA. They are inconsistent
11 with the position he has taken here and as a matter of law, the
12 Court should grant our Motion for Summary Judgment, both on our
13 declaratory judgments and on his counterclaim and third party
14 claims predicated on him having an ownership interest. We
15 would ask that our motion be granted.

16 THE COURT: Thank you.

17 Mr. Cartwright?

18 MR. CARTWRIGHT: Good afternoon, Your Honor. I'm
19 somewhat new to this case and I want to first address a
20 misunderstanding I had when I first got involved in the case
21 because I think that may be a misunderstanding that is taking
22 place here in the way this motion is being presented. What had
23 happened here as explained in Mr. Johnson's affidavit was there
24 were initially five guys who created a partnership in doing
25 credit repair, the credit repair business, where they dispute

1 certain things on people's credit and challenge them. After a
2 period of time three of those partners dropped out and there
3 were just two guys left, Mr. Orvis and Mr. Johnson. They were
4 the two remaining partners. Now this credit repair partnership
5 that existed between the two of them - and here's where my
6 misunderstanding was - was not called Lexington Law Firm. This
7 partnership had many different organizations that it was
8 managing, some LLCs, this law firm. It hired attorneys to
9 manage the law firm including Lexington Law Firm but the
10 partnership existed outside and separately of Lexington Law
11 Firm. So later on Mr. Johnson, there was a judgment obtained
12 against him by the SBA and after that judgment there was a
13 deposition and he was asked about his interest in Lexington Law
14 Firm and at that time Mr. Johnson truthfully stated that he had
15 disclaimed all interest in Lexington Law Firm. Now even though
16 he didn't have that interest in Lexington Law Firm, there still
17 remained this partnership between Mr. Johnson and Mr. Orvis and
18 Mr. Orvis isn't an attorney but this was the marketing arm that
19 was generating clients for Lexington Law Firm, contract between
20 the law firm and Mr. Orvis, where all this money was being
21 poured into the partnership and therefore, in accordance with
22 the partnership agreement between Mr. Johnson and Mr. Orvis, he
23 was receiving a cut of that. So I just want to clarify that
24 issue right now. It isn't - Mr. Johnson still isn't claiming I
25 own Lexington Law Firm. He's saying I have a partnership with

1 Mr. Orvis.

2 THE COURT: That's swell but why did he tell the SBA
3 he didn't have any interest in any partnerships?

4 MR. CARTWRIGHT: Let me look at the broader context
5 of this statement. Mr. Johnson earlier in this deposition had
6 talked about - and in his other deposition with the SBA and in
7 his wife Danelle's deposition with the SBA, explained that
8 there was a lot of money coming to Danelle Johnson. Danelle
9 was pretty much a figurehead. Jamis was the one with the
10 involvement and was doing the work and so they had talked about
11 that in this deposition and in previous ones. Now we get to
12 the specific question where they asked about partnerships and
13 that was done in the context of the laundry list of things do
14 you own or not own. Do you own stocks? No. Bonds? No. It's
15 a big list and it gets down to partnerships. No. Now in Mr.
16 Johnson's mind set as explained in his affidavit, he thought
17 that had to do with real estate or other partnerships not
18 having to do with this one that he'd already talked about
19 extensively with the SBA and that his wife had talked about
20 extensively with the SBA.

21 THE COURT: So being a lawyer, he, of course, said to
22 the question, are you just talking about the Lexington Law Firm
23 or what partnerships are you talking about?

24 MR. CARTWRIGHT: I don't think that he was being that
25 tap dancing around the issue at that time.

1 THE COURT: Of course he didn't because he said no.

2 MR. CARTWRIGHT: He said no in the context of his
3 mind that they'd already talked about these other issues and
4 that that question meant other than the partnership that
5 Danelle's already talked about, that you've already talked
6 about, that the SBA knew that money was coming to Danelle and
7 so in his mind it wasn't even a tap dance. It was thinking in
8 the context of the entire deposition, other partnership
9 interests other than the one with Mr. Orvis. So in his mind,
10 he answered that question truthfully. It wasn't referring to
11 that and it wasn't any legal lawyer tap dancing around the
12 issue asking about definition. He was just answering a
13 question to the best of his knowledge with his understanding,
14 as he explains in his affidavit, that the SBA was well aware of
15 the relationship of the partnership and the money going to
16 Danelle Johnson and Jamis' involvement in the partnership.

17 Now that's what he's testified in his affidavit. It
18 doesn't have to do with Lexington Law Firm. He doesn't assert
19 an ownership in that. He asserts a continuing partnership
20 relationship. He says no there but the reason he says no, his
21 intent is that he's already talked about that and that was
22 related to real estate holdings or other types of partnerships
23 that he was involved in.

24 Now, having said that, we shouldn't even get as far
25 as his answers in this prior proceeding because the law I agree

1 is clear that judicial estoppel does not apply in this case. I
2 think counsel has clearly, is clearly mistaken as to what the
3 law of judicial estoppel is in the state of Utah. She
4 indicated that there was no more recent law in the United
5 States Supreme Court than this Hodge case in 1971 and that
6 ignores two separate cases that are far newer. One is in 2001
7 and one is in the year 2000 and following these cases, we don't
8 even get to what's in this deposition. In Nebeker which we
9 cited in our Memorandum in Opposition, the Utah Supreme Court
10 outlines what judicial estoppel is. "Under judicial estoppel a
11 person may not, to the prejudice of another person, deny any
12 position taken in a prior judicial proceeding 'between the same
13 persons or their privies involving the same subject matter and
14 if such prior position was successfully maintained.'" So the
15 Utah Supreme Court is setting forth three requirements; number
16 one, between the same persons or their privies; number two,
17 involving the same subject matter; and number three, if such
18 prior position was successfully maintained. Those elements are
19 clearly not satisfied here. Number one, it isn't the same
20 persons or privies. In that case it was the SBA. In this case
21 it's Mr. Orvis. Number two, involving the same subject matter.
22 In the SBA case they were litigating issues over the contract
23 liability under the SBA loan. After a judgment was entered,
24 this isn't litigating a claim, he made a statement that can be
25 construed several different ways in a post judgment,

1 supplemental proceeding. And number three, I don't see how
2 this can be met under any reasoning, if such prior position was
3 successfully maintained. There was no position taken in there
4 that was asserted or litigated or decided by anyone. He lost
5 that case. He made a statement in a post judgment deposition.
6 There wasn't any successfully maintaining this. Interestingly,
7 in the plaintiff's memorandum, they say that this element is
8 met successfully maintained because the SBA hasn't received a
9 cent from Johnson on the judgment and that that constitutes
10 meeting this element. Well, the fact of the matter is, they
11 didn't tell the Court that Mr. Orvis bought that judgment from
12 the SBA. The SBA got I believe \$30,000. That's a lot more
13 than not receiving a cent on this and it certainly doesn't
14 satisfy if such a prior position was successfully maintained.
15 Simply put, under judicial estoppel, it doesn't meet any of the
16 requirements set forth by the Utah Supreme Court.

17 The Utah Supreme Court, this is 2001 in Nebeker
18 Trucking versus the Utah State Tax Commission and that's not
19 the only case that talks about it. The Nebeker Court actually
20 - it cites I believe to a 2000 case, Salt Lake City versus
21 Silver Fork Pipeline Corporation and in that they talk about
22 the requirements that you have to have for judicial estoppel to
23 apply. In this, SFPC claimed that Salt Lake City was
24 judicially estopped and the Utah Supreme Court again said,
25 SFPC's contention is untenable for two reasons. First, SFPC

1 was not a party to Progress, that's another party, that
2 detrimentally changed its position by reason of Salt Lake's
3 inaccurate representation of Utah's water law in progress.
4 Then they cite the law. Under judicial estoppel, a person may
5 not, to the prejudice of another person, deny any position
6 taken in a prior judicial proceeding, one - and these are my
7 ones - between the same persons or their privies; that doesn't
8 apply in this case; (2) involving the same subject matter; SBA
9 subject matter and this one is different; and (3) if such prior
10 position was successfully maintained. The exact same elements
11 and they're citing an earlier case involving the same parties
12 and they also cite Tracy Loan and Trust Company versus
13 Openshaw. Again, there's two Supreme Court cases, 2000 and
14 2001 which directly say here's the elements to judicial
15 estoppel and in this case they say because these elements
16 weren't met, judicial estoppel does not apply.

17 Now, this 2000 case also cites to AMJUR, talking
18 about what the judicial estoppel is. Now AMJUR, if you go to
19 section 70, it lists the requirements. Number one, the
20 inconsistent position first asserted must have been
21 successfully maintained; two, a judgment must have been
22 rendered; three, the positions must be clearly inconsistent;
23 four, the parties in question must be the same; five, the party
24 claiming estoppel must have been misled and have changed his
25 position; and six, it must appear unjust to one party or permit

1 the other to change. Now these elements in AMJUR also aren't
2 met here. The parties in question must be the same. Clearly
3 they're different parties in the SBA case and this one. The
4 party claiming estoppel must have been misled and have changed
5 its position. Here there's been zero reliance by Mr. Orvis
6 upon any statements made in this SBA deposition. In fact, he
7 wasn't just misled, he actually bought that judgment and he is
8 right now continuing to trying to collect on that judgment in
9 federal court and we've been over there in federal court just a
10 couple of weeks ago arguing this other case and there's been no
11 - he wasn't misled and Mr. Orvis has never changed his
12 position.

13 And the last requirement, it must appear unjust to
14 one party to permit the other to change, that clearly hasn't
15 happened here because after this deposition was taken by the
16 SBA, post judgment, Mr. Orvis continued to provide checks to
17 Danelle Johnson and one actually to Jamis Johnson every month
18 for, well, that's what we're fighting about, what those
19 payments are for and this is significant money. It went all
20 the way up to \$35,000 a month. It's not that he changed his
21 position or was unjust, he continued to make these payments
22 and, in fact, we have partnership agreements that we presented
23 to the court and we have statements by Mr. Orvis indicating a
24 business relationship between the two that we presented to the
25 court and there are also depositions taken after the Victor

1 Lawrence judgment was done that indicate Mr. Orvis was being
2 deceitful about the accounting provided to Mr. Johnson and the
3 monies that were owed to the Johnsons. But we can't even get
4 to what was said in the deposition or how the court or a jury
5 should characterize that because judicial estoppel simply
6 doesn't apply. Interestingly in AMJUR, section 70-

7 THE COURT: Wait a minute. What do you mean we can't
8 get to it?

9 MR. CARTWRIGHT: Well, judicial estoppel doesn't
10 apply..

11 THE COURT: Okay. That's fine. You can still get to
12 it. You have to get to it to decide whether it's judicial
13 estoppel.

14 MR. CARTWRIGHT: You're right, and I guess what I
15 mean is that the plaintiffs are making certain
16 characterizations on what he meant by saying no in the context
17 of the deposition and I'm saying we don't get that far to the
18 saying no because it doesn't meet any of the elements of
19 judicial estoppel. Let's assume that Mr. Johnson was the most
20 dishonest person in the world and he sat there and lied during
21 his deposition, which he didn't and the evidence shows he
22 didn't, but assume that he did. Even if he did and was the
23 biggest liar in the world which he's not, it doesn't matter in
24 this case. It would be evidence against him that could be
25 presented to the jury but it's not judicial estoppel because

1 the requirements aren't met. That's what I mean about not
2 getting that far.

3 Now the plaintiffs have indicated that, I believe
4 their language is that Tracy has been expressly overruled.
5 That's simply mistaken. Tracy was not expressly overruled.
6 There's two cases they cite where they talk about how Tracy
7 shouldn't apply and I notice they don't even mention, it's
8 almost pretending like the 2002 and 2001 Supreme Court
9 decisions don't exist. But what they argue - they're pretty
10 much trying to ignore judicial estoppel and go into cases that
11 talk about res judicata versus collateral estoppel. What they
12 say supports their position, they're talking about the
13 International Resources v. Cremfield case and there the Utah
14 Supreme Court said, "Concerning the doctrine of res judicata it
15 is said that both parties the issues must have been the same
16 and also judgment is conclusive and then certain issues tried.
17 This court explains - and then it talks about res adjudicata
18 versus collateral estoppel, not judicial estoppel, collateral
19 estoppel and there they talk about how you can have different
20 parties in collateral estoppel unlike res judicata where you
21 need the same parties.

22 THE COURT: I understand the difference.

23 MR. CARTWRIGHT: But they even say in collateral
24 estoppel that operates only as to issues which were actually
25 asserted "and tried" in that case. There's no allegation here

1 that these statements made in a post judgment supp order was
2 tried in the prior case. It simply wasn't and it indicates if
3 the material issue was not actually asserted and determined,
4 there is no basis upon which it could be concluded that it had
5 actually taken a different position on the issues. So even
6 arguing this collateral estoppel, that doesn't go but when it's
7 talking about the difference between the two, there's a
8 footnote in the case and this is where the plaintiffs say Tracy
9 was expressly or explicitly overruled. Here's the footnote,
10 "We so state an awareness of a conceitedly, over broad
11 statement in our case of Tracy Loan and Trust to the effect
12 that one would not be judicially estopped unless the parties
13 and the issues are the same in the instant and the prior suit.
14 Any misstatement of the rule was corrected and superceded by
15 our decision in Richard v. Hodson." So this is the first time
16 they talk about judicial estoppel in this case. They were
17 talking about collateral estoppel before and they refer to
18 Richard v. Hodson. Going to Richard v. Hodson where they say
19 this is where they clarified it, and again, it doesn't talk
20 about judicial estoppel. It talks about collateral estoppel
21 versus res judicata. It talks about the difference between the
22 two and then it says, "This doctrine known as collateral
23 estoppel differs from res judicata not only in the fact that
24 all the parties need not be the same, but also in the fact that
25 the estoppel applies only to issues actually litigated and not

1 as to those that could be determined." So again, talking about
2 collateral estoppel and issues actually litigated.

3 THE COURT: The Supreme Court doesn't know what
4 judicial estoppel is.

5 MR. CARTWRIGHT: No, I think what I'm saying is-

6 THE COURT: Wait a minute. Didn't they say in the
7 footnote judicial estoppel?

8 MR. CARTWRIGHT: Yeah.

9 THE COURT: And they referred to a case that talks
10 about only collateral estoppel?

11 MR. CARTWRIGHT: That's correct.

12 THE COURT: Then I guess they don't know what they're
13 talking about, huh?

14 MR. CARTWRIGHT: I can't figure out why they were
15 saying that because in International Resources they're talking
16 about res judicata versus collateral estoppel. They have a
17 footnote that says our Tracy Loan and Trust with judicial
18 estoppel as clarified by this other case. I go to the other
19 case and I see them talking about collateral estoppel and res
20 judicata in talking about elements there. I can't fit those
21 cases together and I'm not sure why they talk about that. All
22 I'm left with is - and this Hodson case is 1971. All I'm left
23 with is two Supreme Court cases in the year 2000 and 2001 that
24 don't deal with collateral estoppel but talk about judicial
25 estoppel and it outlines the specific requirements there.

1 Putting aside the issues of law that judicial
2 estoppel doesn't apply here, I'd like to point out to the Court
3 that judicial estoppel is the only claim asserted before the
4 Court in this motion and judicial estoppel based upon really
5 one thing and that one thing only is what he said in this
6 deposition transcript. In the reply memorandum we get for the
7 first time new arguments and that new argument talks about a
8 prior order that the judge entered in this court in regards to
9 Victor Lawrence.

10 THE COURT: That's me and I said judicial estoppel
11 applied.

12 MR. CARTWRIGHT: That's correct.

13 THE COURT: Did somebody appeal that?

14 MR. CARTWRIGHT: Yes, he should if that's a-

15 THE COURT: Did someone appeal that?

16 MR. CARTWRIGHT: No, because it hasn't been certified
17 as a final order to be appealed.

18 THE COURT: Third party action, wasn't it? Yeah, a
19 third party defendant. I guess that kind of ended the third
20 party complaint, didn't it?

21 MR. CARTWRIGHT: Your Honor, I'm not aware that
22 that's been certified a final issue or not.

23 THE COURT: Why would you have to certify it if it's a
24 third party?

25 MR. CARTWRIGHT: That could be and here's where this

1 argument should not apply. First of all, I haven't had the
2 opportunity to respond to this issue because it was presented
3 to the Court for the first time in the reply memorandum and
4 under Rule 56, what they're stuck with and what they elected to
5 argue then was judicial estoppel based upon the statements that
6 were made in the deposition only and not this subsequent order
7 and if they want to bring this in a subsequent motion, that
8 would allow Mr. Johnson and I the time and the opportunity to
9 fully respond to that and to address the issue of whether it's
10 a final order or not, but they didn't. They raised that issue
11 at the very beginning in their reply memorandum and the Utah
12 Court of Appeals - we filed a Motion to Strike that.

13 THE COURT: I know.

14 MR. CARTWRIGHT: The Utah Court of Appeals indicated
15 that you may grant a Motion to Strike on issues raised for the
16 first time in a reply memorandum and we're not saying that
17 they've lost their chance forever. We're simply saying, we
18 should have the opportunity to submit affidavits and other
19 evidence in response to that, that it's too late now.

20 Number two, I've indicated that it's my understanding
21 that it's not a final order, that they're still able to appeal
22 that or even more importantly, Your Honor can, based upon
23 additional information presented here and the evidence that he
24 presented in his affidavit here is much more comprehensive than
25 it was before, would justify not only denying this motion, if

1 that were at issue, but changing the court's order previously
2 and we're saying that - we haven't made that motion now. We're
3 saying it's not-

4 THE COURT: Assuming a year has gone by and I haven't
5 seen any motion to change it and it hasn't been appealed, final
6 or not, the chances of my changing that are about slim to none.

7 MR. CARTWRIGHT: Okay. Also, Your Honor, there's
8 been things that have happened which doesn't make that - while
9 it may apply to Victor Lawrence, it shouldn't apply to Jayson
10 Orvis and the reason why is the relationships of the parties
11 are completely different. The relationship between Victor
12 Orvis and Mr. Johnson was that of attorney and client. Here
13 this is no attorney. This is partnership, partnership. He was
14 not making partnership claims against Victor Lawrence. He was
15 making various other claims that the Court dismissed. I'm not
16 arguing that those are right or wrongly dismissed. I'm saying
17 that the relationships are very different. The claims that
18 were made against Victor Lawrence are different than Jayson
19 Orvis and that even if they had raised this for the first time
20 and we'd had the opportunity to respond, the circumstances are
21 different.

22 Also, between then and now there's been the
23 additional discovery that Mr. Johnson has obtained that talks
24 further about the relationships between the parties and that
25 includes an assistant of Mr. Orvis that testified in a

1 deposition about Mr. Orvis' payments of monies to Mr. Johnson
2 and how those payments were false and were basically, it was
3 cheating one to the other and also an assistant of Victor
4 Lawrence. And we believe that with that additional testimony
5 presented to the Court, that Your Honor would find differently
6 if that matter were raised now with Mr. Orvis. But in any
7 event, we shouldn't get that far because judicial estoppel -
8 this one isn't even close. These elements don't apply and
9 that's it and that's our position.

10 THE COURT: All right, thank you.

11 MS. TOMSIC: Your Honor, briefly if I could just
12 address a couple of points.

13 THE COURT: Okay.

14 MS. TOMSIC: First of all, Your Honor, relative to
15 the order, obviously it's part of the record in this case and
16 the reason obviously we cited it, was in direct reputation as
17 to their position as to what the required elements for judicial
18 estoppel which is clearly would be contrary to Your Honor's
19 order and it is basically the law of this case at this point
20 given that it was issued almost a year and a half.

21 Second, Your Honor, in terms of Mr. Johnson's
22 purported explanation of his testimony before the SBA, it's all
23 well and good for Mr. Cartwright to stand up here and try to
24 explain it to the Court but we don't have anything before this
25 Court in any way explaining that. If you look at Mr. Johnson's

1 affidavit, all he talks about is that his testimony was
2 truthful and he quotes it, it says what it says. He denies he
3 had any partnership interest. Here he claims he has one.

4 And I think what else is important, Your Honor, is
5 when they're taking the position that somehow the SBA lawyer
6 that knew it was Danelle Johnson who had it, it's just not
7 true, Your Honor, and I would ask Your Honor to look at pages
8 40 through 42 of Mr. Johnson's deposition before the SBA and
9 I've got a copy for Your Honor and a copy for opposing counsel
10 if I could. And Your Honor, the SBA - if I may approach?

11 THE COURT: Yes.

12 MS. TOMSIC: - is asking them about Danelle Johnson
13 and where she's getting her income and if you go to I believe
14 it's page 44, he's talking about getting payments from
15 Lexington Law Firm to the SBA and Jamis Johnson takes the
16 position that basically, she's receiving those payments because
17 she's a trustee on these boards, that she had performed some
18 services for them that are undescribed and that she had donated
19 some computer equipment, furniture. There's absolutely no an
20 assertion in there that says, gee, well, I thought you were
21 talking to me about me owning a partnership interest. No, my
22 wife is the one who owns it. So not only did he say he didn't
23 own a partnership interest contrary to his position here, he
24 tells the SBA that the reason his wife is getting any money is
25 because she was doing services, acting as a trustee and had

1 contributed some things. So, Your Honor, I just say, his
2 deposition says what it says. It's unequivocal on its face
3 that he is denying any type of a partnership or any type of an
4 LLC interest or a corporation. His position in this case is
5 absolutely contrary to that. You can see it in their papers.
6 You can see it in their answer to the declaratory judgment and
7 you can see it in his third party complaint and counterclaim.

8 And Your Honor, I think the thing I want to say about
9 Mr. Cartwright's representation of the Utah Supreme Court
10 authority, it's true that the Nebeker and Silver Fork cases
11 were decided after the International case that we cite to Your
12 Honor but I think, Your Honor, in fairness, if you look at
13 those decisions, the issue before the Court in neither of those
14 decisions was whether or not the party asserting judicial
15 estoppel was the same party. That was not the issue on which
16 the court made a decision, and I think if you look at the cases
17 we cited - and I've got copies if you would like a copy.

18 THE COURT: I would, uh-huh (affirmative). I can
19 find them but I guess I better read them.

20 MS. TOMSIC: If you-

21 THE COURT: What do you say about this thing in the
22 footnote the Supreme Court talks about judicial estoppel being
23 clarified in a subsequent case that talks about collateral
24 estoppel?

25 MS. TOMSIC: Your Honor, I think - let me tell you, I

1 can't speak to what's in the minds and heart of the Supreme
2 Court.

3 THE COURT: Neither can I, not can ones that have
4 gone before.

5 MS. TOMSIC: But what I can tell you, Your Honor, is
6 this is that the Tracy Loan case which is really the prodigy
7 that is cited that they rely on in subsequent decisions, the
8 Nebeker decision and the Silver Fork decision, is a case
9 involving judicial estoppel and at the time of that case there
10 also was a law, both with regard to judicial estoppel and
11 collateral estoppel that the parties had to be the same as in
12 the prior suit and when they're citing to Tracy Collins, while
13 they may be looking to a case dealing with collateral estoppel,
14 basically the same principles were being applied on collateral
15 estoppel and judicial estoppel, that is requiring the parties
16 and the subject matters to be the same and the way I read this
17 footnote, Your Honor, is saying, look, we were really broad in
18 our language that we were using in Tracy Collins. Take a look
19 at this Hodson case because what we've done is we've redefined
20 those elements and that would apply with equal force to
21 judicial estoppel and collateral estoppel and that's how I
22 would read it.

23 But Your Honor, I do want to say one other thing. I
24 want to give you the Nebeker case and this Silver Fork case
25 because I think what you'll see is like many courts, they grab

1 a quote out of a case, put it up there, and then they pick the
2 element they're talking about and that's what they decide the
3 case on. If you look at the Nebeker case, the Court is taking
4 the position after it cites that, which really I think if you
5 look at it in terms of the holding of the court is dicta, it
6 says that the reason they're not applying judicial estoppel is
7 because the party hadn't changed its position in the original
8 litigation based on testimony which is obviously contrary in
9 this case because the SBA did change its position. It couldn't
10 collect on a \$250,000 plus judgment and while they ultimately
11 ended up selling it for \$30,000, it changed its position, Your
12 Honor, because it couldn't collect on a partnership that Mr.
13 Johnson is now claiming is worth hundreds, and hundreds, and
14 hundreds or thousands of dollars in this case.

15 So, one, the cite to Tracy Collins was a quote that
16 is dicta in the case if you look at the holding of the case and
17 in terms of the Silver Fork Pipeline case, again, while they
18 quote that whole long quote out of Tracy Collins, that case,
19 the only issue before the court was, can you apply judicial
20 estoppel where there is not a knowing misrepresentation, that
21 is where somebody might be mistaken about something and may not
22 have all the facts and again, neither the Nebeker case nor the
23 Silver Fork Corporation case are situations where a party was
24 arguing, geez, they weren't the same parties, it wasn't the
25 same subject matter. Those were not the issues before those

1 cases and unfortunately, the Supreme Court hasn't said anything
2 about this footnote and there is no case where it has said
3 again, after the International Resources case that it meant
4 something differently.

5 And a point I want to make Your Honor is one, I don't
6 think it's correct that you have to have those requirements
7 because the issue again is really the relationship between the
8 party and the judicial system which means that Mr. Cartwright's
9 argument that your prior order shouldn't apply because the
10 relationships between the parties are different, well, Your
11 Honor, the bottom line is, all you need to do is look at the
12 authorities and they make it clear. This is not equitable
13 estoppel. You're not looking at relationships between parties.
14 You're looking at the relationship between the defendant and
15 the judiciary and what the defendant has done within that
16 judicial system and what's important here, Your Honor, is you
17 take the position that Mr. Johnson, we believe didn't tell the
18 truth. But assuming he - if you're with me and you read it and
19 it's not the truth, what he's saying, Mr. Cartwright is saying,
20 is litigants can go and perpetrate a fraud on the court and
21 then turn around and totally change their position to their
22 benefit using the court again and that exactly the reason that
23 you have judicial estoppel. It's to keep parties from lying to
24 a court and as many courts have said, what it does is it
25 increased the costs of lying. If you lie in a judicial

1 proceeding, you can't then turn around and change your story to
2 get some benefit before another court and that's exactly what
3 we have here.

4 Your Honor, so I'd say again, one, the requirements
5 for judicial estoppel are that you have a litigant, Mr. Johnson
6 in the SBA case, making a statement under oath in a judicial
7 proceeding where the SBA changes its position and then in this
8 case, turns around and take a totally inconsistent position and
9 says he does have a partnership interest, hoping to benefit
10 economically from that and at the same time to have deprived
11 the SBA of that money. And under the doctrine of judicial
12 estoppel it's a deliberate false misrepresentation and it's
13 being used for their benefit and he's trying to use this Court
14 to either lie to the SBA in that case or lie to the Court in
15 this case and under the doctrine of judicial estoppel that is
16 not permitted.

17 Finally I'd say one last thing, Your Honor, and that
18 is, I think even assuming you were to buy the argument that the
19 court didn't mean whatever it said in footnote 4, and again, I
20 just want to state the language because they're talking about
21 collateral estoppel in the body of the text and then the
22 footnote, and they say "We so state an awareness of an
23 conceitedly over broad statement in our case Tracy Loan, to the
24 effect that one would not be 'judicially estopped' unless the
25 parties and the issue are the same in the instant and the prior

1 suit. Any misstatement of the rule was corrected and
2 superceded by our decision in Hodson". And again Hodson dealt
3 with collateral estoppel, but the elements were the same for
4 collateral estoppel and judicial estoppel prior to the Hodson
5 decision where it found you don't have to be the same parties
6 and as long as it was an issue that was actually addressed,
7 you're there.

8 And I think one last thing, Your Honor, and that is
9 that fundamentally in this case, if the Court were to overrule
10 its prior decision relative to Mr. Spendlove and Mr. Lawrence,
11 the bottom line is even if you impose that same party of
12 privity requirement, given that Mr. Orvis is an assignee of the
13 judgment, under Utah law, he is a privy. You know that as well
14 as I do, I mean, clearly the Utah Supreme Court has defined
15 privy to include that, AMJUR defines a privy as that. So Your
16 Honor, one, that's not the law but even assuming that you
17 decided, geez, I'm going to change my opinion and I'm going to
18 decide that's a requirement, it doesn't really matter for
19 purposes of Mr. Orvis.

20 And in terms of changing position, I think I've
21 covered that with the SBA. There was detrimental reliance,
22 Your Honor, selling a judgment that now with interest is
23 probably close to \$350,000 or \$400,000 for \$30,000 is clearly a
24 detrimental reliance on the truth of his testimony in that SBA
25 supp hearing.

1 I thank you for your time, Your Honor. Do you have
2 any questions?

3 THE COURT: I do. What's the date of the case that
4 uses the footnote regarding judicial estoppel?

5 MS. TOMSIC: The name of the case Your Honor is
6 International Resources, and would you like a copy?

7 THE COURT: Uh-huh (affirmative).

8 MS. TOMSIC: May I approach?

9 THE COURT: Yes, of course. That'll answer all the
10 questions I have.

11 MS. TOMSIC: Let me give you the other two cases,
12 Your Honor, if I could. This is the Silver Fork Pipeline case,
13 Your Honor, and this is the Nebeker.

14 THE COURT: Thank you. I'll take a look at these
15 cases. I want to read these to see what they have to say. As
16 a practical matter, the reason I wanted to know the date of the
17 case, I wondered who wrote it and whether or not it was
18 unanimous because I doubt seriously that all five justices
19 (inaudible) talk about when you use the words judicial
20 estoppel. That would be highly unlikely.

21 MR. CARTWRIGHT: May I just respond to one-

22 THE COURT: No sir, you may not. She gets the first
23 and last saying.

24 MR. CARTWRIGHT: But Your Honor there's been a
25 misstatement of the law that I'd like to correct. I don't want

1 to make any arguments but to point out a misstatement that was
2 said.

3 THE COURT: Go ahead.

4 MR. CARTWRIGHT: In the Salt Lake City v. Silver
5 Creek case that you have, paragraph 15, second paragraph,
6 SPFC's contention is untenable for two reasons; first, SPFC was
7 not a party to Progress. That's means the first case, that
8 detrimentally changes its position by reason of Salt Lake's
9 inaccurate representation of Utah water law in Progress. Under
10 judicial estoppel, a person may not to the prejudice the other
11 person, deny any position taken in a prior judicial proceeding
12 between the same persons. One of two reasons this case turns
13 on is it's different parties. That's all. She indicated to
14 the Court that that was not a reason. It simply is. That's
15 one of the two reasons for the decision, different parties.

16 THE COURT: I'll read these cases and let you know.
17 I'll be interested to know whether or not - well, I suppose one
18 way or the other this issue might get addressed by one of the
19 appellate courts but I'll be interested to know whether or not
20 the appellate courts are of the opinion that a person can make
21 a representation in one court and change it in another whether
22 you're the same party or whether you're not. I don't see that
23 it makes any difference but we will see. Thank you counsel.
24 I'll let you know within a day or two.

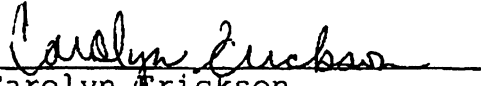
25 (Whereupon the hearing was concluded)

-c-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceedings held before Judge Timothy R. Hanson was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 16th day of February, 2005 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

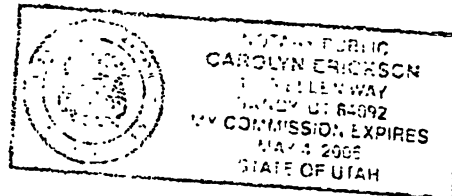


Exhibit 4

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Jayson Orvis,)	OPINION
)	(For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20041122-CA
v.)	
	)	F I L E D
Jamis M. Johnson,	)	(September 28, 2006)
)	
Defendant and Appellant.	)	2006 UT App 394

Third District, Salt Lake Department, 010907449
The Honorable Timothy R. Hanson

Attorneys: Jamis Johnson, Salt Lake City, Appellant Pro Se
Peggy A. Tomsic, Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Orme.

GREENWOOD, Associate Presiding Judge:

¶1 Jamis M. Johnson appeals the trial court's grant of summary judgment in favor of Jayson Orvis. Johnson maintains that the court misapplied the judicial estoppel doctrine and that genuine issues of material fact preclude summary judgment. We affirm.

BACKGROUND

¶2 In reviewing a grant of summary judgment, "we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶1 n.2, 117 P.3d 1082 (quotations and citation omitted). We present the facts accordingly.

¶3 In September 2005, the Small Business Administration (SBA) filed an action against Johnson in federal district court in an unrelated matter. A \$260,000 judgment was entered against Johnson. Subsequently, the SBA took Johnson's deposition during post-judgment proceedings in an attempt to satisfy its judgment by identifying Johnson's assets. At that time, Johnson was a

licensed attorney in Utah and had practiced law for a number of years.¹ During his deposition, Johnson testified under oath that he had no interest in any partnerships or limited liability companies. In particular, he responded "no" to the questions, "Do you have any interest in any partnership?" and "Any interest in any limited liability companies?" Johnson also testified that he had no other assets upon which the SBA could execute. As a result, the SBA was unable to collect its judgment, and it thereafter assigned the judgment to All Star Financial, which in turn assigned it to Orvis on August 11, 2001.

¶4 Johnson claims to have had a partnership with Orvis in several credit repair businesses. In July 2001, Johnson suspected Orvis of embezzlement and fraud and demanded an accounting from Orvis. On August 28, 2001, Orvis filed an action for declaratory judgment proclaiming that he did not have a partnership with Johnson and further that Johnson had no right, claim, or interest in any of Orvis's businesses. Johnson counterclaimed for an accounting on the basis of his purported partnerships with Orvis. Johnson also filed a third-party complaint against three other parties on the same basis. Two of the third parties filed a motion for summary judgment, which the trial court granted, ruling that Johnson was judicially estopped from asserting that he was a partner in Orvis's businesses. Johnson did not appeal that judgment.

¶5 Orvis filed a motion for summary judgment on the ground that Johnson was judicially estopped from claiming partnership interests with Orvis. Deon Steckling, the remaining third party, joined Orvis in the motion. In November 2004, the trial court, citing Johnson's deposition testimony in the post-judgment SBA proceedings, granted summary judgment to Orvis under the doctrine of judicial estoppel. The trial court entered a declaratory judgment that Johnson had no right, claim, or interest in any of Orvis's businesses. The trial court also dismissed with prejudice Johnson's third-party complaint against Steckling. Johnson appeals.²

¹Johnson was later disbarred in unrelated proceedings.

²In his appellate briefs, Johnson does not seek reversal of the summary judgment in favor of Steckling. Orvis's brief states that Orvis is also filing on behalf of Steckling, if necessary. For the sake of clarity, we affirm Steckling's summary judgment against Johnson.

ISSUES AND STANDARDS OF REVIEW

¶6 On appeal, Johnson contends that the trial court erred when it imposed the doctrine of judicial estoppel and granted summary judgment to Orvis, declaring that Johnson had no interest in any "business, enterprise or entity, relating to credit repair, in which Orvis has any ownership interest." "Summary judgment is appropriate only upon a showing 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶21, 54 P.3d 1054 (quoting Utah R. Civ. P. 56(c)). We review a grant of summary judgment for correctness, with no deference to the trial court.³ See id.

¶7 Johnson also contends that the trial court demonstrated bias toward him. We review an allegation of judicial bias for correctness as a question of law. See State v. Tueller, 2001 UT App 317, ¶7, 37 P.3d 1180.

ANALYSIS

I. Summary Judgment Based on Judicial Estoppel

¶8 Johnson argues that the trial court erroneously applied the judicial estoppel doctrine in its grant of summary judgment to Orvis. He also argues that genuine issues of material fact preclude summary judgment.

³Orvis notes that other appellate courts have applied an abuse of discretion standard of review to cases of judicial estoppel, even when presented in the context of a summary judgment. See, e.g., Stallings v. Hussman Corp., 447 F.3d 1041, 1046-47 (8th Cir. 2006); Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30-32 (1st Cir. 2004); De Leon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001); Ahrens v. Perot Sys. Corp., 205 F.3d 831, 833 (5th Cir. 2000). The rationale for applying this standard is that "'judicial estoppel is an equitable doctrine invoked by a court at its discretion.'" Alternative Sys., 374 F.3d at 30-31 (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (internal quotations and citation omitted)). Utah's appellate courts have not addressed that issue of standard of review and we find no need to consider its application in this case. Such consideration may, however, be appropriate in a different case.

¶9 "[J]udicial estoppel is the doctrine which 'prevents a party from seeking judicial relief by offering statements inconsistent with its own sworn statement in a prior judicial proceeding.'" Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1371 (Utah 1996) (quoting Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995)). "'The purpose of judicial estoppel is to uphold the sanctity of oaths, thereby safeguarding the integrity of the judicial process from conduct such as knowing misrepresentations or fraud on the court.'" Id. (quoting Silver Fork, 913 P.2d at 734).

¶10 First, Johnson maintains that his sworn statement from the post-judgment SBA proceedings presents a genuine issue of material fact. He contends that the trial court failed to consider the actual meaning of his testimony when it interpreted only a truncated version of his response. Even though he answered "no" to the question about whether he had interest in a partnership, he continued his response as follows:

Often I'll have a joint endeavor with somebody, but I don't have a partnership or set up a partnership or an L.L.C. You know, if I get a deal I say, [h]ey, do you want to do this deal together? We'll go up to Summit County and buy a lot.

¶11 Johnson asserts that he did not think the question referred to his partnerships with Orvis, but instead referred specifically to real estate partnerships. However, Johnson failed to present any specific facts in the record that support this view. Because, as the nonmoving party, Johnson must submit more than conclusory or speculative assertions, we fail to see how his deposition statements can be interpreted as anything but a denial of interest in any type of partnership. See Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶31, 54 P.3d 1054 ("The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.").

¶12 Further, the trial court considered the fact that Johnson was a licensed attorney at the time of the deposition and thus understood that the purpose of the deposition was to determine if he had assets that could be used to satisfy the SBA judgment against him. On review of these facts and the actual deposition transcript, there is no lack of clarity in Johnson's deposition testimony.

¶13 Second, Johnson contends that the trial court misapplied the judicial estoppel doctrine by not considering all of its

essential elements. He further maintains that genuine issues of material fact within each element preclude summary judgment under the judicial estoppel doctrine.

¶14 In Tracy Loan & Trust Co. v. Openshaw Investment Co., 102 Utah 509, 132 P.2d 388 (1942), the supreme court identified four elements a party seeking to invoke the judicial estoppel doctrine must show: (1) the prior and subsequent judicial proceedings involve the same parties or their privies; (2) the prior and subsequent judicial proceedings involve the same subject matter; (3) the party opposing judicial estoppel seeks to deny a position he or she took in the prior judicial proceeding; and (4) the party seeking judicial estoppel in the subsequent judicial

proceeding must have "relied on the former testimony."⁴ Id. at 390.

¶15 More recently, this court identified a fifth requirement for a party seeking to invoke the judicial estoppel doctrine--the party against whom judicial estoppel is sought must have exhibited bad faith. See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶12, 117 P.3d 1082 (explaining that the purpose of the judicial estoppel doctrine is not advanced when imposed "in instances where the party's prior

⁴Other jurisdictions have determined that mutuality of parties and reliance are not essential elements of the judicial estoppel doctrine. See Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002) ("The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded, and we agree, that 'while privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required.'" (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996))); see also Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

For reasons explained in our analysis, we need not analyze each element of the judicial estoppel doctrine in this matter; however, if we did, we would not depart from the controlling precedent in Tracy Loan & Trust Co. v. Openshaw Investment Co., 102 Utah 509, 132 P.2d 388 (1942). In Utah, challenges to the reliance element have been raised only in dissents. See Wiese v. Wiese, 699 P.2d 700, 705 (Utah 1985) (Durham, J., dissenting) (stating that because "judicial estoppel has a strong and independent public policy justification," the party asserting the judicial estoppel doctrine should not have to show either prejudice or reliance.); Royal Res. v. Gibraltar Fin. Corp., 603 P.2d 793, 798 n.7 (Utah 1979) (Maughan, J., dissenting) ("[E]lements such as reliance and injury or prejudice to the individual, which are generally essential to the operation of an equitable estoppel do not enter into a judicial estoppel or at least not to the same extent." (citing 31 C.J.S. Estoppel § 117(b))). Orvis cites International Resources v. Dunfield, 599 P.2d 515 (Utah 1979), as modifying the Tracy Loan criteria for judicial estoppel. That case, however, involved res judicata and collateral estoppel, not judicial estoppel. See id. at 516. This court is obligated to follow binding precedent by the Utah Supreme Court. Therefore, we assume that mutuality and reliance continue to be necessary elements of judicial estoppel in Utah.

position was based on mere mistake or inadvertence."⁵ (citing New Hampshire v. Maine, 532 U.S. 742, 753 (2001))). Put differently, the purpose of the judicial estoppel doctrine "is not served . . . where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding and where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts." Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995) (emphasis added); see also Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1371 (Utah 1996) (holding that if the party making a statement in a prior proceeding did not have access to relevant facts, then he could not have knowingly misrepresented the facts).⁶

¶16 As the moving party, Orvis had the burden of presenting evidence to demonstrate that no genuine issues of material fact existed and that he was entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). Orvis presented sufficient evidence that no partnership interest existed because Johnson, in sworn testimony in a prior judicial proceeding, declared that he had no such interest. "[O]nce the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a

⁵The "prior position" in 3D Constr was a mere failure to check a box on a bankruptcy form. See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App. 307, ¶4, 117 P.3d 1082.

⁶In contrast to Utah caselaw, in New Hampshire v. Maine, 532 U.S. 742 (2001), the U.S. Supreme Court elected not to establish a strict formula for determining when to apply judicial estoppel. See id. at 750-51; see also Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982). Nonetheless, in New Hampshire v. Maine, the Court enumerated several considerations adopted from other courts. See 532 U.S. at 750-51. The Court noted that courts typically consider whether (1) the party's earlier position is inconsistent with its later position, (2) the court accepted the party's earlier inconsistent position "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled," and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Id. at 751 (quotations and citations omitted).

genuine issue of material fact." Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶31, 54 P.3d 1054.⁷

¶17 In response to Orvis's motion for summary judgment, Johnson asserted that three elements of judicial estoppel were disputed. Those elements were (1) whether Orvis and Johnson or their privies were parties in both actions, (2) whether both proceedings involved the same subject matter, and (3) whether Johnson was successful in the prior proceeding. Johnson did not argue that reliance and bad faith were necessary elements upon which there were disputed material facts. Orvis argues that Johnson waived those arguments by not raising them before the trial court. See Brookside Mobile Home Park v. Peebles, 2002 UT 48, ¶14, 48 P.3d 968 ("[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (quotations and citation omitted)). Johnson, however, argues the trial court committed manifest error by failing to sua sponte analyze those two elements. We disagree. The trial court rightfully assumed, in reliance on Johnson's filings, that Johnson claimed that only those elements he actually discussed

⁷Our colleague's concurring opinion maintains that in this case, as in Shaw Resources Limited, L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 2006 UT App 313, we have applied the standard for summary judgment described in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which has not been adopted by the Utah Supreme Court. See Harline v. Barker, 912 P.2d 433, 445 n.13 (Utah 1996) ("This court has not previously adopted the reasoning of the majority opinion in Celotex, which is not binding on us as a matter of law, and declines to do so today."). According to the concurring opinion, in this case and in Shaw, we have, in effect, adopted Celotex as the applicable test for summary judgment cases. We do not agree. To the contrary, the supreme court decision, Waddoups v. Amalgamated Sugar Co., 2002 UT 69, 54 P.3d 1054, to which we refer above, cites rule 56 of the Utah Rules of Civil Procedure and another Utah Supreme Court case, Grand County v. Rogers, 2002 UT 25, 44 P.3d 734, as well as an Idaho Supreme Court case, as authority. See Waddoups, 2002 UT 69 at ¶31. Consequently, we apply Utah governing law and specifically rule 56's requirement that the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Utah R. Civ. P. 56(e). Neither this case nor Shaw relies on Celotex.

were relevant to the case and presented disputed material issues of fact. Accordingly, we do not address either bad faith or reliance.⁸

¶18 Furthermore, Johnson failed to identify issues of material fact regarding the three elements he raised before the trial court. Pursuant to the first element, both Orvis and Johnson were parties or privies thereof in both the SBA proceeding and the present litigation. Orvis and the SBA were privies because Orvis purchased the SBA judgment against Johnson prior to the commencement of the present litigation. See Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942) ("[A] person may not, to the prejudice of another person[,], deny any position taken in a prior judicial proceeding between the same persons or their privies.").⁹ In contrast, Johnson argues that there was no valid assignment because Orvis purchased the judgment with "monies misappropriated from the partnership" and "in violation of partner and lawyer fiduciary duties." He contends that genuine issues of material fact exist regarding misappropriation and violation of fiduciary duties. He asserts that if there was privity, it was between the partnership as assignee and the SBA. Yet, even viewed in the light most favorable to Johnson, All Star Financial assigned the judgment solely to Orvis, an undisputed fact evidenced by the assignment attached to Johnson's affidavit. Furthermore, Johnson failed to argue or present any evidence of misappropriation or violation of fiduciary duties by Orvis.

¶19 The second element, consistent subject matter in the prior and present litigation, has also been satisfied. According to Tracy Loan, a person may not take a position in prior litigation

⁸We do note, however, that the trial court stated in its minute entry that "there is no question of mistake. Mr. Johnson testified as he did, so as to avoid collection efforts from the [SBA]." Thus, there was no question of mistake or inadvertence in the SBA case. Similarly, it is undisputed that the SBA never collected on its judgment because Johnson testified that he had no available assets.

⁹A person in privity with another is one who is "so identified in interest with another that he represents the same legal right," and "as applied to judgments or decrees of court, privity means one whose interest has been legally represented at the time." Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978) (quotations and citation omitted). Also included as being in privity is "a mutual or successive relationship to rights in property." Id.

and later deny it in subsequent litigation if the two proceedings involve the same subject matter. See id. Here, although the underlying action in the SBA proceedings dealt with contract and foreclosure, it was similar to the present litigation because both involved Johnson's alleged partnership interest with Orvis. As the trial court observed, the subject matter of the post-judgment proceedings by the SBA was to determine Johnson's assets, including ascertaining whether he had any partnership or limited liability company assets.

¶20 Furthermore, as previously discussed, Johnson's affidavit does not create material issues of fact beyond mere speculation. Nothing in Johnson's affidavit supports his assertion that his response in the SBA deposition to the question about partnerships was based on his belief that it referred only to partnerships in real estate. An affidavit is deficient if it "reveal[s] no evidentiary facts, but merely reflect[s] the affiant's unsubstantiated opinions and conclusions." Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985). Moreover, the SBA deposition questions do not mention real estate, indicating that Johnson's response to the question about whether he had any partnerships was an unqualified "no."

¶21 Likewise, the record sufficiently supports the next element that Johnson's position in the prior litigation was successfully maintained. Johnson's denial that he was involved in any partnerships was successfully maintained because the SBA did not collect on its judgment against Johnson. See Tracy Loan, 132 P.2d at 390. We therefore hold that the trial court did not err in granting Orvis's motion for summary judgment against Johnson.

II. Judicial Bias

¶22 Johnson contends that the trial court's grant of Orvis's motion for summary judgment was based on bias against him. Johnson states that the trial judge was biased because he presided over a previous bar proceeding that resulted in Johnson's disbarment. In addition, he argues that the trial court had "preconceived notions" about Johnson and "preconceived certainty" about the "meaning of a few short words" from Johnson's deposition.

¶23 Because Johnson failed to properly preserve the issue of judicial bias by filing a motion to disqualify the judge and raises it for the first time on appeal, he must demonstrate that the trial court committed plain or manifest error. See State v. Tueller, 2001 UT App 317, ¶9, 37 P.3d 1180. "To be considered plain or manifest . . . , an error must be both harmful and obvious." State v. Menzies, 845 P.2d 220, 225 (Utah 1992). The

alleged bias must "have some basis in fact and be grounded on more than mere conjecture and speculation." In re M.L., 965 P.2d 551, 556 (Utah Ct. App. 1998) (quotations and citation omitted). We have carefully examined the record and find no evidence of judicial bias against Johnson.

CONCLUSION

¶24 In sum, Johnson failed to present genuine issues of material fact that a partnership existed between him and Orvis. We conclude that Johnson is precluded under the judicial estoppel doctrine from asserting the existence of a partnership. Accordingly, we affirm the trial court's grant of summary judgment in favor of Orvis and the court's entry of a declaratory judgment that Johnson does not have a right, claim, or interest in any of Orvis's businesses. We also reject Johnson's claim of judicial bias.

Pamela T. Greenwood,
Associate Presiding Judge

¶25 I CONCUR:

Gregory K. Orme, Judge

BENCH, Presiding Judge (concurring):

¶26 In my recent dissent in Shaw Resources Limited, L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 2006 UT App 313, ¶¶61-68, I pointed out that "[t]he traditional rule is that summary judgment is available only where the moving party can affirmatively demonstrate that there is no genuine issue as to any material issues of fact and that the moving party is entitled to judgment as a matter of law." Id. at ¶62 (quotations and citation omitted). Because of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the burden in federal courts has been shifted to the nonmoving party, aligning "the movant's production burden for summary judgment to the burden of proof that party would bear at

trial." Shaw Res. Ltd., L.L.C., 2006 UT App 313 at ¶63 (Bench, P.J., dissenting). In Shaw, I argued that Utah has never deliberately adopted the Celotex approach, and that the traditional rule for summary judgment should continue to be the controlling law in Utah. See generally id. at ¶¶64-68. In the present case, the main opinion again uses the burden-shifting Celotex standard. I reiterate my concern that the Celotex standard should not be considered the controlling authority in Utah.

¶27 Nevertheless, the doctrine of stare decisis establishes that "the first decision by a court on a particular question of law governs later decisions by the same court." State v. Menzies, 889 P.2d 393, 399 (Utah 1994) (quoting State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993)). The majority opinion in Shaw utilized the burden-shifting Celotex standard for summary judgment, even in the face of my concerns. For the first time, in Shaw, Utah knowingly adopted the burden-shifting standard. Until such time as that approach is changed by the Utah Supreme Court, I am constrained to follow Shaw. I therefore concur, albeit reluctantly.

Russell W. Bench,
Presiding Judge

Exhibit 5

FILED
UTAH APPELLATE COURTS
NOV 01 2006

IN THE UTAH COURT OF APPEALS

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Jayson Orvis,)	
)	ORDER
Plaintiff and Appellee,)	
)	Case No. 20041122-CA
v.)	
)	
Jamis M. Johnson,)	
)	
Defendant and Appellant.)	


This matter is before the court upon Appellant's petition for rehearing filed October 25, 2006.

Pursuant to section 78-2a-2(2) of the Utah Code, the Court of Appeals may not sit en banc but must always render judgment in panels of three judges.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 1 day of November, 2006.

FOR THE COURT:


Pamela T. Greenwood,
Associate Presiding Judge

CERTIFICATE OF SERVICE

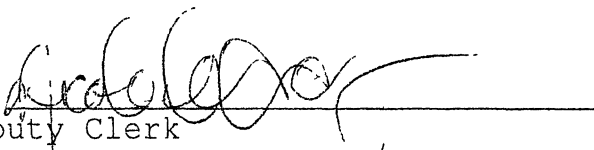
I hereby certify that on November 1, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Dated this November 1, 2006.

By 
Deputy Clerk

Case No. 20041122
District Court No. 010907449