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Nu-Med USA Inc. v. 4Life Research, L.C. : Reply Brief

Utah Court of Appeals

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[redacted]

IN THE UTAH SUPREME COURT

NU-MED USA, INC., Appellant/Plaintiff, v. 4LIFE RESEARCH, L.C., Appellee/Defendant.	Case No. 20060505-SC

REPLY BRIEF OF APPELLANT NU-MED USA, INC.

Appeal from the Third Judicial District Court,
Salt Lake County Department, State of Utah,
Honorable J. Dennis Frederick Presiding

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4Life has attempted to present this Court with several different arguments suggesting that Nu-Med's claims in this case should be barred by Rule 13. These arguments, however, continue to ignore the plain language of Rules 13 and 41, and for the reasons discussed more fully below, Nu-Med contends that 4Life's arguments should all be rejected by the Court, and the trial court's dismissal of Nu-Med's claims should be reversed.

A. The Fact That Ulrich's Claims Proceeded To Trial Is Not Relevant To The Issues On Appeal.

A common theme throughout 4Life's arguments is the suggestion that the fact that claims between Paul Ulrich and 4Life ultimately proceeded to trial in the prior litigation is somehow relevant to the issue of whether Rule 13 prohibits Nu-Med from pursuing its own separate claims against 4Life in the present case. More specifically, 4Life suggests that because there was some similarity between one of Ulrich's counterclaims against 4Life and one of Nu-Med's counterclaims against 4Life in the prior litigation, then Nu-Med should have been required under Rule 13 to have litigated its claims against 4Life in the trial that went forward between Ulrich and 4Life. Nothing in Rule 13, however, even remotely suggests that multiple claimants who may have similar or overlapping claims against a single defendant (or counter-defendant in this case) are required to pursue their claims in the same case and in a single trial.

While there may arguably be some benefit for purposes of judicial economy in

requiring multiple claimants with similar claims against a single defendant to pursue those claims in a single case, the Rules of Civil Procedure and Utah law simply do not require it. For example, if two passengers in the same vehicle are injured when that vehicle is struck by a negligent driver, those two passengers would be entitled to pursue separate lawsuits against the negligent driver for injuries sustained in the accident. In fact, even if one of the injured passengers had already fully litigated his claims through trial against the negligent driver, nothing would prohibit the other injured passenger from then initiating his own claim against the negligent driver so long as the applicable statute of limitation had not yet expired. Thus, under that scenario, it is entirely possible and allowable under the law for the negligent driver to be faced with having to defend himself in two separate cases that both arose out of a single incident. There is certainly nothing in Rule 13 that would prohibit that type of scenario. Rule 13 applies solely to "counterclaims" and "cross-claims", neither of which are involved in this example. Nothing in Rule 13 suggests that the rule was intended to prevent multiple claimants from pursuing separate actions against a single defendant, even when those actions may arise out of the same underlying facts or involve similar claims.

While the prior litigation between Nu-Med and 4Life involved claims and counterclaims running between Nu-Med and 4Life, and also involved separate claims and counterclaims running between 4Life and Ulrich, there were absolutely no claims, counterclaims or cross-claims of any type running between Nu-Med and Ulrich. Therefore, there was nothing under Rule 13 which required that Nu-Med's claims against 4Life be pursued and tried in the same case with Ulrich's claims against 4Life. The fact that Nu-Med

and Ulrich each had claims against 4Life arising out of some of the same facts makes their situation analogous to the injured passengers in the above-stated example. If 4Life had never filed claims against Nu-Med in the prior litigation, Nu-Med would have still had grounds to bring its tortious interference claim against 4Life based on 4Life's interference with the Ulrich/Nu-Med contract, and it would have been entirely permissible for Nu-Med to bring those claims in a separate matter from the 4Life v. Ulrich lawsuit even though Ulrich's claims against 4Life included a similar tortious interference claim.

The only factor that forced Nu-Med to initially bring its claims against 4Life as counterclaims in the prior litigation is the fact that 4Life filed its claims against Nu-Med in that case. Thus, as Nu-Med has acknowledged, Nu-Med was initially required by Rule 13 to file its claims against 4Life as counterclaims in the prior litigation, and Nu-Med fully complied with that requirement. This requirement, however, had absolutely nothing to do with the fact that Ulrich also had a similar tortious interference claim pending against 4Life in that same case. The sole reason that Nu-Med was initially compelled to file its counterclaims in the prior litigation was to ensure, as required by Rule 13, that all claims running between Nu-Med and 4Life were litigated in the same action and not separate cases.

With regards to the stated policy reasons behind Rule 13, 4Life has cited excerpts from court opinions dealing with Rule 13 to suggest that Nu-Med was somehow compelled by Rule 13 to litigate its claims against 4Life in the same action and at the same trial where Ulrich litigated his claims against 4Life. For example, 4Life cites language from this Court's prior decision in Raile Family Trust v. Promax Dev. Corp., 24 P.3d 980 (Utah 2001), wherein

the Court stated that "[t]he purpose of Rule 13(a) is to ensure that all relevant claims arising out of a given transaction are litigated in the same action." Id. at 983. That case, however, did not involve multiple claimants with similar claims against a single defendant, nor did it suggest in any way that Rule 13 extends to cases involving multiple claimants against a single defendant or requires that the multiple claimants all litigate their claims against that defendant in a single action. Instead, Raile Family Trust dealt with issues involving a single plaintiff (Promax) and a single defendant (the Raile Family Trust), and the Court examined the issue of whether the Raile Family Trust was required by Rule 13 to bring any claims it had against Promax in the initial suit filed by Promax where the Raile Family Trust had failed to allege any counterclaims. Id. 981-82. While Raile Family Trust clearly establishes that Rule 13 is intended to ensure that all claims and potential counterclaims running between a plaintiff and defendant are litigated together in the same action, the case had absolutely nothing to do with the separate issue of whether multiple claimants should be required to litigate similar claims against a single defendant in the same action.

While Rule 13 and the cases dealing with Rule 13 do not extend to situations involving multiple claimants bringing similar claims against a single defendant, there is a separate procedural rule that expressly deals with such scenarios. Rule 42 of both the Utah and Federal Rules of Civil Procedure provides that a trial court *may* consolidate separately filed cases which involve "common questions of law or fact." Thus, if Nu-Med and Ulrich had filed separate tortious interference suits against 4Life in the same court, the court would have had the option of consolidating the cases under Rule 42 into a single case. It is

important to note, however, that such consolidation is not mandatory under Rule 42, and is something which is initiated by motion of one of the parties. Thus, it is clear under Rule 42 that if a motion is not filed, or if the court chooses not to consolidate the cases, then it is entirely permissible under the rules for parties such as Nu-Med and Ulrich to pursue their similar claims against 4Life in separate actions.

It is also interesting to note that Rule 42(b) of the Utah and Federal Rules of Civil Procedure actually gives a trial judge the option of separating certain claims, counterclaims, and cross-claims that are pending in a single action, and ordering separate trials when the court deems it appropriate. This rule seems to acknowledge that while judicial economy may be one important consideration, there are other considerations as well, and in some cases it may be appropriate and even preferred to have separate trials for claims arising out of the same underlying facts.

The present litigation and the prior litigation between Nu-Med and 4Life did not present the trial courts with issues and arguments based on Rule 42. Rule 42 is persuasive, however, in countering 4Life's attempts to suggest that Nu-Med's claims in this case should be deemed barred because the claims and counterclaims running between 4Life and Ulrich proceeded to trial in the prior litigation.

The Court's focus in this appeal should be solely on the claims and counterclaims running between Nu-Med and 4Life, and the Court should not be distracted or misled by the fact that Ulrich's separate counterclaims against 4Life in the prior litigation proceeded to trial. It is worth noting that while there is certainly an overlap and similarity in the tortious

interference counterclaims which Nu-Med and Ulrich alleged against 4Life in the prior litigation, Nu-Med and Ulrich also had other separate counterclaims against 4Life which were not similar and did not overlap. For example, Nu-Med also stated causes of action for abuse of process, wrongful bringing of civil proceedings, and bad faith wherein Nu-Med alleged that 4Life had absolutely no basis for dragging Nu-Med into its legal dispute with Ulrich. (R. 60-82). Ulrich's counterclaims against 4Life in the prior litigation did not include these causes of action. Ulrich's counterclaims did include other causes of action, however, which were entirely separate and distinct from those alleged by Nu-Med, including claims of defamation and breach of contract, both of which were ultimately submitted to the jury together with Ulrich's tortious interference claim. (R. 7, 21).

Thus, while there was some limited overlap between Nu-Med's claims against 4Life and Ulrich's claims against 4Life, there were also some significant differences between the types of claims being made that weighed in favor of separating Nu-Med's claims from Ulrich's claims for purposes of trial. Had Nu-Med been compelled to continue litigating its claims against 4Life together with Ulrich, the trial which was held would have been considerably longer, and the scope of issues and potential damages being submitted to the jury would have been greatly widened, thereby creating a substantial risk of confusion of the issues amongst the jury during the course of a multi-week trial. It could be argued that this is precisely the type of case where it would have made sense to separate Nu-Med's claims against 4Life from Ulrich's claims against 4Life under Rule 42(b), especially when all of 4Life's original claims against Nu-Med had been dismissed before trial.

While Judge Jenkins never specifically referenced Rule 42 during the course of the pre-trial conferences in the prior litigation, this may have been the type of consideration he was making when he specifically asked Nu-Med's counsel whether Nu-Med intended to pursue its counterclaims against 4Life if 4Life's claims against Nu-Med were to be dismissed on summary judgment. (R. 86-90). As noted in the prior opening briefs filed by the parties, Nu-Med's counsel responded by stating that Nu-Med would be willing to voluntarily dismiss the counterclaims *without prejudice* if the court dismissed 4Life's claims against Nu-Med. In the end, that is precisely what happened. Judge Jenkins dismissed 4Life's claims against Nu-Med on summary judgment, and then exercised his discretion under Rule 41(a)(2) by allowing Nu-Med to voluntarily dismiss its counterclaims without prejudice. In doing so, Judge Jenkins shortened what was already scheduled to be a multi-week jury trial, and significantly narrowed and simplified the issues that would be submitted to the jury in the trial between Ulrich and 4Life.

4Life has repeatedly attempted to stress judicial economy as the reason why Nu-Med should be barred from attempting to pursue its claims in the present litigation. As noted above, however, there are many other factors which also need to be considered. There would have been advantages and disadvantages for all parties and the courts if Nu-Med had chosen or been compelled to remain in the prior litigation to pursue its claims against 4Life in the same trial where 4Life and Ulrich litigated their various disputes. In the end, however, there is nothing in the Rules which bound Nu-Med's claims to Ulrich's claims, or which prohibited Nu-Med from voluntarily dismissing its claims simply because claims between Ulrich and

4Life were proceeding on to trial. Since nothing in the plain language of the Rules required that Nu-Med litigate its claims together with Ulrich, and since the Rules actually permit claimants to pursue such claims in separate actions unless consolidated by the court under Rule 42, the Court should entirely disregard the fact that the claims between Ulrich and 4Life were tried separately, and should focus its analysis solely on the claims running between Nu-Med and 4Life.

B. 4Life Has Failed to Establish Any Conflict Between Rules 41 and 13 Which Should Lead the Court to Look Beyond the Plain Language of the Rules.

Another common theme throughout 4Life's arguments is the suggestion that there is a conflict between Rule 13 and Rule 41, and therefore, the Court must delve into principles of statutory construction to determine which Rule takes priority. As shown in Nu-Med's opening brief, however, there is only a conflict between Rule 13 and Rule 41 if the Court applies the Rules in the manner being proposed by 4Life. More specifically, the potential conflict between Rule 13 and Rule 41 arises only if the Court concludes that Rule 13 continues to apply to claims that were originally filed as counterclaims even when the underlying claims filed against the counterclaimant have all been fully resolved by summary judgment or some other means. Nu-Med submits that this Court should reject 4Life's strained interpretation of the Rules which ignores the plain language of the Rules, and forces this Court to address issues of statutory construction that are generally reserved for rules and statutes that truly are in conflict.

Under 4Life's proposed principles of statutory construction, 4Life suggests that the

Court should conclude that Rule 13 trumps Rule 41 because 4Life believes Rule 13 to be the more "specific" provision. Nu-Med contends, however, that Rule 41 is actually the more specific provision with respect to the issues presented in this appeal, and therefore, even if the Court were to find a conflict between the Rules, it should be Rule 41 which prevails. The language establishing the scope of voluntary dismissals under Rule 41 does not speak of claims and counterclaims in general terms as suggested by 4Life, but rather very clearly and specifically states in a separate subparagraph that the provisions of Rule 41 "apply to the dismissal of ***any*** counterclaim, cross-claim, or third-party claim." Rule 41(c) (emphasis added). It is difficult to imagine how this provision could be any more clear or specific. There is no question that the drafters of this Rule intended for the Rule to apply to all types of counterclaims, including compulsory counterclaims filed pursuant to Rule 13. Therefore, while Nu-Med contends that there is no conflict between Rule 41 and Rule 13, Nu-Med also submits that Rule 41 is the more specific provision with respect to the issues presented on appeal, and thus, would trump Rule 13 if a conflict were found to exist.

4Life also attempts to suggest that its proposed interpretation of Rule 41 and Rule 13 is the "prevailing approach" adopted by courts around the country. A closer review of those cases cited by 4Life in support of this so-called prevailing approach reveals that most of the cases are simply not on point with the issues presented in this appeal, and do not involve situations where counterclaimants attempted to voluntarily dismiss their claims only ***after*** the underlying claims against the counterclaimant had all been dismissed or otherwise resolved. See Stern v. Whitlach & Co., 631 N.E.2d 680 (Ohio Ct. App. 1993); Lenihan v. Shumaker,

No. 12814, 1987 WL 10916, 1987 Ohio App. LEXIS 6693 (Ohio Ct. App., May 6, 1987); Clements v. Austin, 673 S.W.2d 867 (Tenn. Ct. App. 1983).

The only case cited by 4Life with facts that are arguably analogous to the present case is Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006), a recent decision issued by the Court of Appeals of Colorado. While the facts of that case may be somewhat analogous, Nu-Med submits that the Colorado court's opinion fails to even address the plain language of Rule 41, and specifically the provision that allows for the voluntary dismissal of "any" counterclaim *without prejudice*. It is Nu-Med's position that the Arkansas Supreme Court decision addressed in Nu-Med's opening Brief is the better reasoned approach, and is the case which should be followed by this Court. See Linn v. NationsBank, 14 S.W.3d 500 (Ark. 2000).

Interestingly, the Colorado Court of Appeals referenced Linn in its Grynberg decision, but rejected the approach followed by Arkansas Supreme Court, stating simply that "Arkansas' procedural rules are substantially different from the federal, Colorado, and Wyoming rules." Grynberg, 148 P.3d at 449. The Colorado court fails to point out any specific differences in those procedural rules, however. While the versions of Rule 41 in effect in Colorado, Wyoming and Arkansas all have some stylistic differences, it is Nu-Med's position that the rules are all substantively the same, and most importantly, the Rule 41 in effect in each of these states specifically includes a provision stating that the provisions of Rule 41 are applicable to "any counterclaim." Grynberg, however, unlike Linn, completely ignores this provision, and fails to offer any explanation for doing so.

4Life also attempts to suggest that the Arkansas version of Rule 41 is substantively different from the Utah version because the Arkansas version contains a provision which grants a counterclaimant the "right" to continue pursuing his counterclaims in the original litigation even if the plaintiff elects to voluntarily dismiss its original claims against the counterclaimant. 4Life erroneously suggests that the Utah version of Rule 41 does not contain a comparable provision. In subparagraph (a)(2)(ii) of Utah's Rule 41, a counterclaimant is granted the same right that is granted in the Arkansas version of the rule. Specifically, under Rule 41(a)(2)(ii) of the Utah Rules of Civil Procedure, "counterclaim[s] can remain pending for independent adjudication by the court" even after a plaintiff moves for a voluntary dismissal of claims under Rule 41. Interestingly, the use of the word "can" in this provision clearly suggests that it is not mandatory for the counterclaims to remain pending in that action for adjudication by that court. Thus, Nu-Med contends that the express language in 41(a)(2)(ii) offers further support to Nu-Med's claim that a counterclaimant should have the option of either pursuing its counterclaims in the original action or voluntarily dismissing those claims *without prejudice* in those cases where the plaintiff's original claims against the counterclaimant are no longer pending.

II. The Court Should Reject 4Life's Argument That Nu-Med's Notice Of Appeal Was Untimely.

After Nu-Med commenced the present appeal, 4Life filed a Motion to Dismiss the Appeal for Lack of Appellate Jurisdiction, claiming that Nu-Med's Notice of Appeal was not timely filed. Although the parties had previously submitted memoranda in support of and

in opposition to 4Life's Motion, the Court deferred ruling on the Motion, and indicated that the parties may present their arguments in their appellate briefs. Since 4Life presented its arguments again in its Appellate Brief, Nu-Med will likewise respond herein with its previously stated arguments as to why its Notice of Appeal should be deemed timely filed and 4Life's Motion to Dismiss should be denied.

A. Nu-med's 30 Day Period for Filing its Notice of Appeal Did Not Begin to Run Until the Trial Court Entered its Final Order on May 1, 2006.

Nu-Med contends that its Notice of Appeal (R. 274-275), which was filed on May 25, 2006, was filed well within the required 30 day period which did not begin to run until May 1, 2006. Rule 4 of the Utah Rules of Appellate Procedure states that a notice of appeal "***shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.***" (emphasis added).

The order from which Nu-Med has taken this appeal is the Order that was entered by the trial court on May 1, 2006 which granted 4Life's Motion for Judgment on the Pleadings (treated as a motion for summary judgment) and dismissed all of the claims asserted in Nu-Med's Complaint with prejudice and on the merits. (R. 269-271). Since Nu-Med's Notice of Appeal was filed approximately 25 days later on May 25, 2006, and clearly within the allotted 30 day period, Nu-Med's Notice of Appeal should be deemed timely, and 4Life's motion to dismiss the appeal should be denied.

4Life, however, argues that the Court should completely ignore the May 1, 2006 Order which 4Life itself prepared and submitted to the Court for approval. Instead, 4Life urges this

Court to focus solely on the April 17, 2006 Minute Entry (R. 266-67) as the "judgment or order" which triggered the 30 day period, in which case Nu-Med's Notice of Appeal would have been filed approximately one week after the expiration of the 30 day period. 4Life's arguments are based on a recent Utah Court of Appeals opinion that was filed just a few weeks before the Order dismissing Nu-Med's claims was entered in this case. See Code v. Utah Department of Health, 2006 UT App. 113; 133 P.3d 438; 548 Utah Adv. Rep. 6 (March 23, 2006).[1]

As will be discussed more fully in Section II below, Nu-Med contends that the standard adopted by the Utah Court of Appeals in Code is inconsistent with Rule 7 of the Utah Rules of Civil Procedure, and inconsistent with prior opinions issued by this Court, and therefore, this Court should either overrule or clarify Code to bring it in conformance with Utah law. Even if Code is affirmed, however, Nu-Med contends that several key facts distinguish this case from Code, and that even under the standard adopted in Code, it would still be the trial court's May 1, 2006 Order that triggered the commencement of the 30 day period for the filing of Nu-Med's Notice of Appeal.

The facts in Code involved a situation where appeal was taken after the trial court dismissed the appellant's complaint in response to a 12(b)(6) motion. The court granted the motion to dismiss by way of a "memorandum decision" entered on January 10, 2005, and

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[1] As noted in 4Life's Appellate Brief, Code v. Utah Department of Health is currently under certiorari review by this Court. If Code is reversed by this Court, 4Life's arguments would be rendered moot, and the Court should deny 4Life's Motion to Dismiss the Appeal without further review. As noted herein, however, even if Code were to be affirmed, 4Life's Motion to Dismiss should be denied.

which expressly stated: "For the reasons stated above, the Court dismisses Plaintiff's claim." Id. at ¶4. Sometime later, the appellant submitted a proposed order of dismissal that essentially reiterated what was stated in the trial court's memorandum decision. That proposed order was entered by the trial court on February 25, 2005, and appellant filed her notice of appeal on March 8, 2005. Id. at ¶¶4-5. The appellant maintained that the 30 day period for filing her notice of appeal should have been calculated from the date of the February 25, 2005 order. The Utah Court of Appeals disagreed, however, concluding that the 30 day period commenced on the date of the January 10, 2005 memorandum decision, and therefore, dismissed the appeal for lack of jurisdiction since the notice of appeal was filed well after the 30 day deadline. Id. at ¶¶3-7.

In reaching its decision, the Utah Court of Appeals cited to the standard previously established by this Court which stated that "[f]or a judgment to be final and start the time for appeal to run, there must be a judgment which is ***definite and unequivocal in finally disposing of the matter.***" Id. at ¶3 (emphasis added) (quoting Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249; 399 P.2d 141, 144 (1965)). The Utah Court of Appeals referred to the express language in the memorandum decision where the trial court stated that "[f]or the reasons stated above, ***the Court dismisses Plaintiff's claim***," and concluded based on that language that "[t]he parties' substantive rights in this case were definitively and unequivocally determined by the Memorandum Decision; ***the decision's unambiguous language was clearly intended to end the litigation.***" Id. at ¶¶3-4 (emphasis added). Based on its determination that the January 10, 2005 memorandum decision included express

language which definitively and unequivocally terminated the litigation, the Utah Court of Appeals concluded that the 30 day period for filing a notice of appeal commenced with the entry of that memorandum decision, and not the later order which, in the court's opinion, "did not alter the substantive rights of the parties in any way; it did nothing more than reiterate the dismissal already fully effectuated by the Memorandum Decision." Id. at ¶¶4-7.

While the memorandum decision at issue in Code included express language dismissing the plaintiff's claims and terminating the litigation, the Minute Entry in the present case did ***not*** include a similar pronouncement dismissing Nu-Med's claims and terminating the litigation, and therefore, the holding in Code would not apply to this case. Noticeably absent from the trial court's April 17, 2006 Minute Entry is any language referring to a dismissal of claims or termination of the litigation. Such language was, however, included by 4Life in its proposed Order that was entered by the trial court on May 1, 2006. In that May 1, 2006 Order, after indicating that 4Life's "Motion for Judgment on the Pleadings – treated as a Motion for Summary Judgment – is GRANTED," and that Nu-Med's "Motion for Partial Summary Judgment is DENIED," the Order expressly stated:

> Based on the foregoing, ***IT IS HEREBY ORDERED that the Complaint*** filed by Plaintiff Nu-Med USA, Inc. in the above referenced matter against Defendant 4Life Research, L.C., ***including all claims asserted therein, be DISMISSED WITH PREJUDICE AND ON THE MERITS.***

(emphasis added). Thus, this Order, when entered by the trial court on May 1, 2006, included additional substantive language which expanded the scope of the trial court's ruling from what was stated in the April 17, 2006 Minute Entry. Most notably, the May 1, 2006 Order

included key language which "definitively and unequivocally" dismissed Nu-Med's claims in their entirety and terminated the litigation.

Prior to the entry of the May 1, 2006 Order, a third party who was attempting to determine the status of the litigation would not have been able to determine solely from a review of the April 17, 2006 Minute Entry whether there were still any remaining claims pending between the parties or other issues that needed to be resolved. The Minute Entry would simply inform the third party that Nu-Med's motion had been denied and 4Life's motion had been granted. It was only after the trial court expressly stated in the May 1, 2006 Order that Nu-Med's Complaint, "including all claims asserted therein, be DISMISSED WITH PREJUDICE AND ON THE MERITS," that a third party could know that Nu-Med's claims had been dismissed in their entirety, and that the litigation was terminated. Therefore, even under the standard applied by the Utah Court of Appeals in Code, Nu-Med's time for filing its Notice of Appeal would not have commenced until May 1, 2006.

Another distinguishing factor between the present case and Code is the strict compliance by the parties in this case with the requirements of Rule 7(f) of the Utah Rules of Civil Procedure. Rule 7(f) addresses the preparation of "Orders" by the trial courts and parties, and in subparagraph 7(f)(2), the rule states as follows:

> . . . [U]nless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

The appellant in Code attempted to argue that her time for filing a notice of appeal did not commence with the trial court's initial memorandum decision because the later order submitted to the court was a further action that was required by Rule 7(f)(2). The Utah Court of Appeals rejected this argument, however, at least partly due to the fact that the parties in Code had not complied with the procedure set forth in Rule 7(f)(2). Code, 2006 UT App. 113; 133 P.3d 438; 548 Utah Adv. Rep. 6 at ¶6 and n.2. The Court of Appeals noted that it was actually the appellant, rather than the "prevailing party", that had prepared and submitted the proposed order to the trial court, and that the proposed order had not been submitted within fifteen days after the trial court's decision as required by Rule 7(f)(2).

In the present case, however, the parties complied precisely with the procedure set forth in Rule 7(f)(2). 4Life, as the prevailing party, prepared the proposed Order and sent it to Nu-Med's counsel just two days after the April 17, 2006 Minute Entry. Nu-Med did not file any type of objection to the proposed Order, and shortly after the expiration of the five day objection period, 4Life submitted the proposed Order to the trial court for final approval and entry by the court. Upon receipt of this proposed Order, and having received no objection from Nu-Med, the trial court entered the final Order on May 1, 2006.

Since the parties and the trial court in the present case followed the exact procedure for the preparation and entry of a final judgment as established by the Utah Rules of Civil Procedure, and since it was not until the entry of that final Order on May 1, 2006 that the trial court made a "definite and unequivocal" statement dismissing Nu-Med's Complaint in its entirety and terminating the litigation, it should be concluded by this Court that Nu-Med's

time for filing its Notice of Appeal did not commence until May 1, 2006.

B. Code Is Inconsistent with the Requirements of Rule 7(f)(2) and Contrary to Prior Precedent.

While Nu-Med contends that the present case is sufficiently distinguishable from Code to justify a denial of 4Life's Motion to Dismiss the appeal solely on that basis, Nu-Med also contends that the Court should either overrule or clarify Code to bring it into conformity with Rule 7(f)(2) and the prior decisions of this Court.

As noted above, Rule 7(f)(2) expressly states that "***unless otherwise directed by the court, the prevailing party shall***" prepare and submit a proposed order to the trial court reflecting the court's decision. The Rule does not suggest that this is an optional procedure or that a party "may" submit a proposed order, but rather uses the term "***shall***", thereby making it clear that this procedure is mandatory in all circumstances except where the trial court expressly directs otherwise. Thus, pursuant to this plain language, in those cases where the trial court is silent as to whether it wants the parties to submit a proposed order, or in other words, the trial court has not "otherwise directed" the parties, then the parties are obligated by Rule 7(f)(2) to go through the additional process of preparing and submitting "a proposed order in conformity with the court's decision."

In Code, however, where the trial court was silent in its memorandum decision as to the issue of whether the parties needed to submit a proposed order, the Utah Court of Appeals appears to be suggesting that this procedure is not mandatory. According to the Utah Court of Appeals:

> When the court issues its own Memorandum Decision, which explicitly and unambiguously dismisses the underlying claim without inviting submission of a further order, it leaves nothing more to be done. Such clear action by the trial court necessarily serves under rule 7(f)(2) as direction from the court that the prevailing party need not draft an order, and thus renders the Memorandum Decision final and appealable.

Code, 2006 UT App. 113; 133 P.3d 438; 548 Utah Adv. Rep. 6 at ¶6. In other words, according to Code, silence by the trial court on the issue of whether a proposed order needs to be submitted is now to be interpreted as "direction from the court that the prevailing party need not draft an order," even though Rule 7(f)(2) reads to the contrary.

This apparent contradiction between the standard adopted in Code and Rule 7(f)(2) was at least acknowledged by one of the Utah Court of Appeals judges in Code. Judge McHugh, in a concurring opinion, agreed that "the interaction between the two can lead to confusion for practitioners," and stated that she is "sympathetic to the difficulty in assessing the proper moment when the decision becomes final for purposes of appeal when the trial court is silent on that issue." Id. at ¶¶11-13. In light of this concern, Judge McHugh stated as follows:

> Because the procedure set forth in rule 7(f) may lull practitioners into the mistaken belief that a decision of the trial court does not become final for purposes of appeal until an order is entered, clarity in the initial memorandum decision is essential. I believe the better practice for all concerned is for the decision to state expressly either that "no further order is necessary" or that the prevailing party "shall prepare an order implementing this court's decision."

Id. at ¶12. While Judge McHugh appears to recognize the potential confusion arising from parties having to choose between inconsistent requirements, and also recognizes the wisdom behind having the trial judge explicitly state whether or not an order from the parties is

required, she fails to acknowledge that the express language of Rule 7(f)(2) already accounts for those situations where the trial judge remains silent by stating simply that "unless otherwise directed by the court" the parties "shall" submit a proposed order.

The Utah Court of Appeals attempts to suggest in Code that the standard it followed in that case was consistent with the prior decisions of this Court, citing to prior cases where minute entries and memorandum decisions have been deemed to be final orders for purposes of filing a notice of appeal. While it is true that this Court has recognized that under certain circumstances, a signed minute entry or memorandum decision can constitute a final order or judgment for purposes of appeal, it important to note that there are no prior cases identified where this Court has ruled that the time for filing a notice of appeal runs from an earlier minute entry or memorandum decision rather than a later order that was entered pursuant to Rule 7(f)(2). In fact, Nu-Med contends that there are prior decisions from this Court that are to the contrary.

In C.M.C. Cassity, Inc. v. Aird, 707 P.2d 1304 (Utah 1985), this Court was faced with a scenario where an appellant had filed his notice of appeal "after the trial court entered its minute entry on August 11, 1982, but before the official judgment was entered on September 23, 1982." Id. at p. 1304. Under those facts, the Court concluded that the notice of appeal was "***premature***", but also concluded there was no prejudice as a result of the premature filing. Id. at 1305. The Court's conclusion that such a filing would be premature seems to be consistent with the current requirements of Rule 7(f)(2), but contrary to the standard adopted in Code.

In other prior decisions, this Court has cited the actions of the parties and the trial court in submitting and entering a final order as evidence that neither the parties nor the court intended a prior decision from the trial court to have been the final appealable order or judgment. For example, in Swenson Assoc. Architects, P.C. v. State of Utah, 889 P.2d 415 (Utah 1994), this Court considered the issue of whether a signed minute entry should be deemed the final order for purposes of appeal in that case, or whether the time for appeal should have commenced with a subsequent order which the plaintiff claimed was "simply superfluous". While the Court acknowledged that under "appropriate circumstances, a signed minute entry may be a final order for purposes of appeal," the Court reiterated the limited nature of those circumstances, stating:

> However, such treatment is appropriate only where "the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement." It must be clear that that "which is offered as the record of a judgment is really such and not an order for a judgment or a mere memorandum from which the judgment was to be drawn.

Id. at 417 (internal citations omitted). The Court noted that in its prior decision in Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 419; 135 P.2d 919, 921 (1943), it "held that a minute entry signed by the trial court stating that 'the within entitled matter having been by the court taken under advisement, the court now renders its decision that judgment be entered against the plaintiff and in favor of the defendant,' was not itself a final order." Swenson 889 P.2d at 417 (internal citation omitted).

The Court ultimately concluded that under the facts presented in Swenson, the time for appeal commenced with the later order that had been submitted by the parties and entered

by the trial court, and not the earlier minute entry. In reaching this conclusion, the Court expressly noted that the parties and the trial court "obviously" considered the later order to be the final appealable judgment because otherwise, there would have been no purpose in submitting and entering the later order. Id. at 417. In support of this conclusion, this Court cited back to an even earlier Utah Supreme Court decision in Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249; 399 P.2d 141 (1965), where the Court had faced a similar issue and reached a similar conclusion. In Walsh Plumbing, the Court rejected a defendant's claim that the final appealable order was a pretrial order which had expressly dismissed the opposing party's claims with prejudice, stating:

> Under the circumstances here shown such a pretrial order does not meet the above stated requirement of a final judgment. ***It seems obvious that neither the parties nor the court so regarded it, otherwise there would have been no purpose in entering the final judgment which was entered on April 2, 1964, and from which the appeal was taken on time.***

399 P.2d at 144-145 (emphasis added).

In the present case, it likewise seems "obvious" that neither 4Life, Nu-Med, or the trial court considered the trial court's April 17, 2006 Minute Entry to be the final appealable order, and that all parties involved believed a subsequent order still needed to be entered in order to comply with the requirements of Rule 7(f)(2). If 4Life truly believed that the April 17, 2006 Minute Entry was the final appealable order as it is now claiming, then why did 4Life go to the effort of preparing and submitting the additional proposed Order? Furthermore, if the trial court had considered its April 17, 2006 Minute Entry to be the final

appealable order, it could have rejected 4Life's proposed Order, thereby making it clear to the parties that the April 17 Minute Entry was the final order. Instead, however, the trial court simply entered 4Life's proposed Order, thereby further indicating that it did not intend its prior Minute Entry to be the final order.

As noted in the Section II(A) Argument above, the parties in this case and the trial court complied exactly with the requirements of Rule 7(f)(2) in preparing, submitting, and entering the May 1, 2006 Order. It seems somewhat disingenuous for 4Life to now suggest that it was only acting "[o]ut of an abundance of caution" when it sent the proposed Order to Nu-Med for review and later submitted the proposed Order to the trial court. (See 4Life Motion to Dismiss Appeal Memo. at p. 6, ¶ 18). There was nothing in the cover letters sent by 4Life to Nu-Med's counsel and the trial court with the proposed Order which suggested that 4Life thought the proposed Order was an unnecessary step.[2] To the contrary, these letters to Nu-Med's counsel and the trial court clearly demonstrate that 4Life was following the step by step requirements set forth in Rule 7(f)(2), and the trial court likewise complied with those requirements when it entered the Order on May 1, 2006. While Nu-Med did not take any affirmative actions in this process, it was not required to under the provisions of Rule 7(f)(2) since it did not have any objections to 4Life's proposed Order.

Given the parties exact compliance with Rule 7(f)(2), it would be extremely unfair to now penalize Nu-Med for relying on 4Life's initiation of this process, and thinking that this

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[2] Copies of these letters were attached as Exhibits 1 and 4 to Nu-Med's Response in Opposition to 4Life's Motion to Dismiss which was filed with this Court on July 18, 2006.

final step needed to be completed before the case could be considered appealable. Even if the April 17 Minute Entry originally could have qualified as a final appealable order, the Court should conclude that 4Life waived its right to make the arguments now being advanced when it decided to initiate the process of preparing and submitting the proposed Order, thereby leading Nu-Med to believe that there were additional steps remaining to fully terminate the litigation and make the case ready for appeal.

Nu-Med submits that the rules of civil and appellate procedure should not be interpreted such that practitioners, by complying with the requirements of one rule, may be lulled into a failure to comply with another rule, especially when the consequences of the non-compliance result in the complete dismissal of claims. Unfortunately, that is the situation that the Utah Court of Appeals has created with the standard adopted in Code.

While Nu-Med contends that the present case is distinguishable from Code, and therefore not subject to a dismissal of the appeal for lack of jurisdiction, Nu-Med believes this Court should nevertheless take the opportunity to either overrule or clarify Code in order to bring the law back into conformance with this Court's prior decisions, and to clearly establish the procedures which practitioners and parties are to follow when taking a case up on appeal. While it would be nice if trial courts would always explicitly state whether its decisions are to be followed-up with a separate order from the parties, that unfortunately is not always the case. Since the express language of Rule 7(f)(2) seems to accommodate for those situations where the trial court remains silent, the most obvious solution seems to be

to simply allow the parties to follow the procedure set forth in Rule 7(f)(2), while making it clear that when this procedure is followed by the parties, the time for appeal does not begin to run until the procedure has been completed and the final order has been entered by the Court. In the present case, that would mean that Nu-Med's time for filing its notice of appeal did not begin to run until May 1, 2006, and therefore, Nu-Med's Notice of Appeal would be deemed timely since it was filed on May 25, 2006.

CONCLUSION

For the foregoing reasons and for those reasons stated in Nu-Med's opening Brief, Nu-Med respectfully asks this Court to reverse the trial court's grant of summary judgment against Nu-Med and remand this case so that Nu-Med can continue to pursue its claims.

DATED this 2nd day of May, 2007.

STRONG & HANNI

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2007, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT NU-MED USA** were sent via U.S. mail, postage prepaid, to the following:

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DATED this 2nd day of May, 2007.

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