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

SEAN KENDALL, Plaintiff/Counterclaim Defendant, v. BRETT OLSEN, BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Counterclaim Plaintiffs.	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM** Case No. 2:15-cv-00862 District Judge Robert J. Shelby Magistrate Judge Dustin B. Pead **ORAL ARGUMENT REQUESTED**

Plaintiff Sean Kendall ("Kendall") respectfully submits this Memorandum in Opposition to the Motion for Summary Judgment on Defendants' Counterclaims ("Defendants' Motion") filed by Defendants Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman and Salt Lake City Corporation (collectively, "Defendants").

TABLE OF CONTENTS

TABLE OF EXHIBITS ii
INTRODUCTION 1
RESPONSE TO DEFENDANTS' STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS 1
ARGUMENT 19
I. No Legally Enforceable Contract Was Formed. 19
A. The Settlement Negotiations Between Kendall and the City Never Resulted in a Binding Contract Because the City Clearly Manifested Its Intent That No Legal Obligations Would Exist Until the Settlement Agreement Was in Writing and Fully Executed. 19
II. The Court Should Deny Defendants' Motion for Summary Judgment Because Kendall and the City Agreed to Rescind Any Settlement Agreement, If There Were Any. 32
A. The City Offered to Consider Kendall to Have Withdrawn His Offer and to Terminate Settlement Negotiations, Which Offer Kendall Accepted and Thereby Created a Binding Contract. 33
B. Kendall Demonstrated an Intention to Cease Performance of the Settlement Agreement, If There Were Any Such Agreement, and the City Acquiesced to a Rescission of Any Agreement. 34
III. Even If a Settlement Agreement Were Entered into by Kendall and the City, and Even If Kendall and the City Did Not Agree to Rescind Such Agreement, the City is Precluded from Enforcing an Agreement Because of the City's Non-Performance. 36
IV. Even If a Settlement Agreement Were Entered into by Kendall and the City, and Even If Kendall and the City Did Not Agree to Rescind Such Agreement, Then the City is Estopped from Enforcing Such an Agreement Because Kendall Reasonably Relied, to Kendall's Severe Detriment, on the City's Promise That Settlement Negotiations Were Terminated and That Kendall's Offer Would Be Considered "Rescinded." 38
A. Promissory Estoppel Applies to Enforce the City's Promise to Terminate Settlement Negotiations and Consider Kendall's Offer as Rescinded. 38
1. Kendall Acted in Reasonable Reliance on the City's Promise to Terminate Settlement Negotiations and Consider Kendall's Offer to Be Rescinded. 38
2. The Defendants Knew Kendall Relied on the City's Promise, Which Defendants Expected to Induce Kendall to Believe There Was No Settlement Agreement. 39
3. The City Knew All Material Facts of the Incident Leading to Kendall's Claims Against the City, the Settlement Negotiations Related to Those Claims, and Each of Kendall's Pleadings Related to Those Claims. 39
4. Kendall Relied on the City's Promise and, Accordingly, Pursued His Claims Against the City Defendants. 40
B. Equitable Estoppel Applies to Prevent the City from Enforcing a Settlement Agreement, If There Were Any Such Agreement. 40
1. The Defendants' Counterclaim Is Inconsistent with the City's Failure to Assert That It Believed Kendall and the City Entered into an Enforceable Settlement Agreement in the More Than One Year and Four Months Between the City Declaring

That Settlement Negotiations Were Terminated and the Defendants Filing Their Counterclaim. 40
2. Kendall Took Reasonable Action—Pursuing His Claims Against the City Defendants—on the Basis of the City Defendants' Failure to Timely Assert the Claim That Kendall and the City Entered a Binding Settlement Agreement. 41
3. If the Purported Settlement Agreement Is Now Enforced, Kendall Will Suffer Substantial Injury. 41
CONCLUSION 41

TABLE OF EXHIBITS

Declaration of Ross C. Anderson ..... Exhibit I

Relevant Portions of Deposition of Mark E. Kittrell ..... Exhibit A

July 15, 2014, Email from Boulton to Kittrell ..... Exhibit 1

July 17, 2014, Email from Boulton to Kittrell ..... Exhibit 2

July 21, 2014, Email from Kittrell to Boulton ..... Exhibit 3

July 21, 2014, Email from Boulton to Kittrell ..... Exhibit 4

July 23, 2014, Email from Kittrell to Boulton ..... Exhibit 5

July 24, 2014, Email from Kittrell to Boulton ..... Exhibit 6

July 28, 2014, Email from Kittrell to Boulton ..... Exhibit 7

July 29, 2014, Email from Boulton to Kittrell ..... Exhibit 8

July 29, 2014, Email from Kittrell to Boulton ..... Exhibit 9

July 29, 2014, Email from Kittrell to Boulton ..... Exhibit 10

July 29, 2014, Email from Boulton to Kittrell ..... Exhibit 11

July 29, 2014, Email from Kittrell to Boulton ..... Exhibit 12

Chief Burbank Statement on Settlement Negotiations with Sean Kendall ..... Exhibit 14

Relevant Portions of Salt Lake City Corporation's Responses to Plaintiff's Request for Admissions ..... Exhibit B

Harry Stevens, *Owner of dog shot by Utah police turns down $10,000 offer*, THE SALT LAKE TRIBUNE ..... Exhibit C

INTRODUCTION

Defendants seek to enforce a purported settlement agreement with Kendall when (1) there was never an enforceable agreement; (2) the parties agreed to rescind or abrogate any agreement that might have been previously reached; and (3) Defendants are estopped from enforcing any agreement. Defendants' contention that there is an agreement to enforce is directly contrary to (1) the intent manifested by Salt Lake City Corporation (the "City") that there would be "no effective agreement" until a written agreement was executed; (2) the City's own written agreement; (3) the conduct of the City from the time of the agreement until the City filed its Counterclaim; and (4) the parties' agreement to rescind or repudiate any settlement agreement, if there were any, between Kendall and the City.

Defendants seek to avoid any accountability for the City's conduct and communications manifesting the absence of a settlement agreement with Kendall by pursuing a now-convenient legal theory that has no basis in fact and, indeed, is completely at odds with the uncontroverted facts. The City would have the Court ignore the City's own writings, communications, and conduct, which are diametrically contrary to Defendants' contention that there is, or was, an enforceable settlement agreement.

RESPONSE TO DEFENDANTS' STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

I. BREACH OF ENFORCEABLE SETTLEMENT AGREEMENT.

A. RESPONSE TO LEGAL ELEMENTS.

1. "Settlement agreements are governed by the rules applied to general contract actions." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995).

Plaintiff/Counterclaim Defendant's Response: Agreed.

2. Formation of a contract "requires an offer, an acceptance, and consideration." *Cea v. Hoffman*, 2012 UT App 101, ¶ 24, 276 P.3d 1178, 1185. If the acceptance occurs before an offer is withdrawn, a binding contract is created. *See Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995).

Plaintiff/Counterclaim Defendant's Response: Agreed.

3. "The mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that parties intended that until such formal writing was executed, the parol or informal contract should be without binding force." Miller v. Basic Research, LLC, No. 2:07-CV-871 TS, 2013 WL 1194721, at *5 (D. Utah Mar. 22, 2013) (citation and quotation omitted).

Plaintiff/Counterclaim Defendant's Response: Agreed.

4. Under Utah law, courts will compel the enforcement of settlement agreements "if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial." Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah Ct.App.1989) (quotation omitted).

Plaintiff/Counterclaim Defendant's Response: Agreed.

5. "The trial court has the power to enter a judgment enforcing a settlement agreement if it is an enforceable contract." Badger v. MacGillivray, 2016 UT App 109, ¶2, ___ P.3d ___ (citing Tracy-Collins Bank and Trust Co. v. Travelstead, 592 P.2d 605, 607 (Utah 1979)).

Plaintiff/Counterclaim Defendant's Response: Agreed.

B. RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff Sean Kendall retained attorney Brett Boulton to pursue potential legal claims against Salt Lake City and its police officers arising from the events of June 18, 2014. (Declaration of Mark E. Kittrell ("Kittrell Decl.), ¶¶ 3-4, July 7, 2016.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

2. In early July of 2014, Brett Boulton and Mark Kittrell, the attorney for Salt Lake City and its police officers, entered into settlement negotiations. (Kittrell Decl. ¶¶ 3-4 & Exhibit 1 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

3. Through counsel, the parties exchanged several offers and counter-offers. (Kittrell Decl. ¶ 4 & Exhibit 1 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

4. On Tuesday, July 15, 2014, Mr. Boulton communicated an offer to Mr. Kittrell from Sean Kendall to resolve all Kendall's claims against Salt Lake City and its employees arising from the events of June 18, 2014 in exchange for payment of $10,000.00. (Kittrell Decl. ¶ 5 & Exhibits 2 & 3 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

5. Kendall admits he made this offer and that it was conveyed to the City. (See Counterclaim, Dkt. 4, ¶ 8 ("On or about July 15, 2014, counsel for Kendall communicated an offer from Kendall to resolve all claims arising out of this incident in exchange for a payment of $10,000.00"); Answer to Counterclaim, Dkt. 7, ¶ 8 ("Kendall admits the allegations set forth in paragraph 8 of the Counterclaim.")

Plaintiff/Counterclaim Defendant's Response: Undisputed.

6. Over the next few days Mr. Kittrell exchanged emails with Mr. Boulton stating the City would likely accept Kendall's offer. (Kittrell Decl. ¶ 6 & Exhibit 4 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

7. On Monday, July 21, 2014, the City accepted Kendall's offer. (Kittrell Decl. ¶ 7 & Exhibit 2 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. The City accepted Kendall's offer, but qualified the acceptance by requiring a written settlement agreement, which stated there would be "no effective agreement" until it was executed by both parties. That agreement was rejected by Kendall. When it agreed to pay $10,000, the City communicated that it would draft the written agreement. Kittrell stated in an email to Boulton on July 29, 2014, "I informed you on Monday, July 21st that the City accepted your client's offer **and that we would prepare the settlement agreement.**" (Exhibit 9 to Deposition of Mark E. Kittrell ("Kittrell Deposition"), attached as Exhibit A to Declaration of Ross C. Anderson ("Anderson Declaration"), attached hereto as Exhibit I, at bates SLCC 000045.) (Emphasis added.) The settlement agreement drafted by the City expressly provided "there is no effective agreement until each of the parties hereto has executed at least one counterpart." (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028.) Kendall never executed that written settlement agreement, by counterpart or otherwise. (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

8. Two days later, on Wednesday, July 23, 2014, Mr. Kittrell forwarded a draft settlement and release agreement to Mr. Boulton via email. (Kittrell Decl. ¶ 8 & Exhibit 5 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

9. The draft settlement and release called for payment to Kendall of $10,000.00 in exchange for a complete release of all claims against Salt Lake City and its employees arising from the events of June 18, 2014. Exhibit 5 to Kittrell Decl.)

Plaintiff/Counterclaim Defendant's Response: Disputed, insofar as the statement is incomplete and misleading. The draft written settlement agreement also provided as follows: "there is no effective agreement until each of the parties hereto has executed at least one counterpart." (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028.)

10. Later that day, Mr. Boulton sent an email indicating his approval of the draft form of agreement and representing Sean Kendall would sign it. (Kittrell Decl. ¶ 9 & Exhibit 6 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Boulton sent an email stating as follows: "This looks fine to me. I will send it to Sean to look at. I do not have any changes. Please send me a final copy and I will have Sean sign it." (Exhibit 6 to Kittrell Deposition, at bates SLCC 000030.)

11. The next day Mr. Kittrell forwarded a final form of the agreement with non-material changes to Mr. Boulton for Kendall's signature. (Kittrell Decl. ¶ 10 & Exhibit 7 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

12. Mr. Boulton did not express any reservations or objections to the final settlement documents. (Kittrell Decl. ¶ 11.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

13. Mr. Boulton and Kendall then went silent. (Kittrell Decl. ¶ 12 & Exhibit 8 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed, insofar as "went silent" is ambiguous and misleading. Less than six days later Kendall stated he would not enter into the settlement agreement. (*See* Exhibits 6–10 to Kittrell Deposition.)

14. On Tuesday, July 29, 2014, Kendall posted the following statement on his "Justice For Geist" Facebook page:

> *After speaking with people whom I trust the most and my legal council [sic]; I have decided to accept the settlement offer.*

(Kittrell Decl. ¶ 13 & Exhibit 9 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

15. A short time later, Kendall removed the Facebook post and announced to the media that he had turned down "the City's $10,000 offer." (Kittrell Decl. ¶ 14.)

Plaintiff/Counterclaim Defendant's Response: Disputed, insofar as "[a] short time later" is imprecise and misleading. Kendall removed the Facebook post and made his statement to the media that he would not accept the City's offer on the same day, July 29, 2014, that Kendall made the aforementioned Facebook post.

16. The media stories are how the City and Mr. Kittrell first learned that Kendall did not intend to fulfill his obligations under the settlement agreement. (Kittrell Decl. ¶ 15.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Kittrell knew that Kendall had not signed the written settlement agreement. (*See* Exhibit 8 to Kittrell Deposition, at bates SLCC 000038.) Kendall agrees the City and Mr. Kittrell first learned that Kendall had stated he did not want to settle through media stories. Kendall disagrees that there were any "obligations under the settlement agreement" because (1) the City drafted terms of the agreement that there would be "no effective agreement" until signed by the parties, (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028); (2) the City repeatedly referred to the communications between Kendall and the City, including the offer and acceptance the City now claims were binding and later communications, as "negotiations" (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45); (3) the City communicated that the "potential settlement" would be "entered into" on the date the parties

executed the agreement (*Id*. at bates SLCC 000045); (4) the City responded to Kendall's expression that he intended to not sign the agreement by offering to "consider [Kendall] to have withdrawn his offer" and to "terminate settlement negotiations" (*Id.*); (5) after the deadline had passed that the City set of 5 p.m. on July 29, 2014, for Kendall to sign the agreement, the City confirmed with Boulton that "you and your client should consider settlement negotiations terminated" (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048); (6) Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands" (Exhibit 14 to Kittrell Deposition); (7) the City never attempted to perform its obligations under the purported agreement (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7); and (8) the City never communicated to Kendall that the City believed there was an enforceable settlement agreement until December 15, 2015, more than one year and four months after the City terminated settlement negotiations, when the City filed its counterclaim. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7)

17. Mr. Kittrell contacted Mr. Boulton via email, informed him of Kendall's actions, and reminded him that it was Kendall that made the offer to settle this matter and that the City had accepted the offer. (Kittrell Decl. ¶ 16 & Exhibit 10 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Kittrell's email states, "[O]n July 15th, your client offered to settle his claims if the City paid him $10,000. I informed you on Monday, July 21st that the City accepted your Client's offer **and that we would prepare the settlement agreement**." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.) (Emphasis added.) Kittrell's email was therefore reminding Kendall that the City had agreed to prepare a written agreement that would be potentially entered into in the future. Further, Kittrell's email was not about "remind[ing]" Kendall about an offer and acceptance. The next paragraph of Kittrell's

email states, "From your client's statements, it seems clear to us that he is withdrawing his offer to settle this matter. If we do not receive the signed settlement agreement by 5 p.m. today (July 29th), because of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations." (*Id.*)

18. Mr. Boulton immediately emailed Kendall and instructed him to "send me a signed release as soon as you can." (Kittrell Decl. ¶ 17 & Exhibit 11 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

19. Mr. Boulton then replied to Mr. Kittrell implying this was the first he had heard of Kendall's actions stating "[t]he first I heard of the Trib article was your email" and "I will see what I can do." (Kittrell Decl. ¶ 18 & Exhibit 12 thereto.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

20. Mr. Boulton did not dispute there was a binding agreement or that the City had accepted Kendall's offer. (Kittrell Decl. ¶ 19 & Exhibit 12 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Boulton could not have "dispute[d] there was a binding agreement" because the existence of a binding agreement was not **asserted** until Defendants filed their Counterclaim, dated December 15, 2015, more than one year and four months later. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7; Defs.' Ans. & Counterclaim, Dkt. 4.) Further, the assertion that "there was a binding agreement" is contrary to the facts that (1) the City drafted terms of the agreement that there would be "no effective agreement" until signed by the parties (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028); (2) the City repeatedly referred to the communications between Kendall and the City, including the offer and acceptance the City now claims were binding and later communications, as "negotiations" (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45); (3) the City

communicated that the "potential settlement" would be "entered into" on the date the parties executed the agreement (*Id*. at bates SLCC 000045); (4) the City responded to Kendall's expression that he intended to not sign the agreement by offering to "consider [Kendall] to have withdrawn his offer" and to "terminate settlement negotiations" (*Id.*); (5) after the deadline had passed that the City set of 5 p.m. on July 29, 2014, for Kendall to sign the agreement, the City confirmed with Boulton that "you and your client should consider settlement negotiations terminated" (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048); (6) Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands" (Exhibit 14 to Kittrell Deposition); (7) the City never attempted to perform its obligations under the purported agreement (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7); and (8) the City never communicated to Kendall that the City believed there was an enforceable settlement agreement until December 15, 2015, more than one year and four months after the City terminated settlement negotiations, when the City filed its counterclaim. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7.)

21. The parties then engaged in further negotiations in an attempt to resolve the situation, but shortly after 5:00 p.m. on July 29, 2014, Mr. Boulton informed Mr. Kittrell by email that he no longer represented Kendall and would "forward a lien against [Kendall's] claim for my fees and costs to your attention." (Kittrell Decl. ¶ 20 & Exhibit 13 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. The parties did not "engage[] in further negotiations in an attempt to resolve the situation." Rather, the City offered to repudiate any agreement that had been reached between Kendall and the City or otherwise acquiesced in and accepted Kendall's repudiation of any agreement that had been reached. The City did so by stating:

> From your client's statements, it seems clear to us that he is withdrawing his offer to settle this matter. If we do not receive the signed settlement agreement by 5 p.m.

> today (July 29th), because of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations.

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.)

The City was not attempting to enforce the purported settlement agreement. After receiving the above email, indicating a 5 p.m. deadline on July 29th, 2014, Boulton emailed Kittrell and asked for more time.

> It looks like I need another day or so to get this worked out. I would appreciate it if you would consider keeping the offer open until Thursday at 5.pm.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000051.)

The City did not provide Kendall an extension for the time to sign the agreement.

> I'll talk to my client, but quite honestly, I don't think they'll agree to it. They feel that they've been yanked around just this afternoon. . . . First he says he now will settle, and then he tells Gene Kennedy that he's not settling.
>
> If I can get my client to agree to this delay, can you guarantee that your client will not make any public statements? That might be key.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

The next communication occurred after the 5 p.m. deadline set by the City. The City stated, unequivocally:

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . [W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

22. Kendall has produced in discovery in this matter email communications with Mr. Boulton that occurred after the City accepted Kendall's offer to settle this matter for $10,000 in which

Kendall informs his attorney he is not going to honor his agreement. (Kittrell Decl. ¶ 21 & Exhibit 14 thereto.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Kendall did not "inform[] his attorney he is not going to honor his agreement." Obviously, Kendall understood, based on the language of the agreement drafted by the City and based on all of the conduct and statements by the City, that there was no binding agreement to honor until the settlement agreement was executed, which never occurred. Kendall stated, "I feel that without non lethal policy change I can not settle. I feel very strongly about this and am in the process of writing state legislation that would require all law enforcement officials to exhaust non lethal means before resorting to lethal force. . . . I am strongly considering filing the lawsuit given the lack of follow through and holding to [Chief Burbank's] word." (Exhibit 14 to Defendants' Motion for Summary Judgment on Defendants' Counterclaims.)

23. After Kendall's relationship with Mr. Boulton ended, Kendall retained new counsel and filed this action asserting numerous claims against Salt Lake City and several of its police officers arising from the events of June 18, 2014. (See generally Amended Compl., Dkt. 2.)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

24. Kendall claims damages of $1.5M. (See Amended Notice of Claim, Exhibit B to Amended Complaint, Dkt. 2.)

Plaintiff/Counterclaim Defendant's Response: Disputed. Kendall's prayer for relief states that he is entitled to: "(1) judgment against defendants, jointly and severally, for all general and special damages in an amount to be determined at trial, but no less than $300,000, (2) punitive damages against the defendants Olsen and Purvis in an amount to be determined at trial, (3) an award against defendants, jointly and severally, of all reasonable attorneys fees and costs incurred by plaintiff in

this matter and in conjunction with the declaratory judgment action filed by plaintiff against defendants, (4) all further relief as deemed just and equitable." (Am. Compl., Dkt 2.)

25. The City responded asserting a counterclaim for breach of the parties' settlement agreement. (See Answer & Counterclaim, Dkt. 4)

Plaintiff/Counterclaim Defendant's Response: Undisputed.

C. PLAINTIFF/COUNTERCLAIM DEFENDANTS' STATEMENT OF ADDITIONAL ELEMENTS AND MATERIAL FACTS.

I. DEFERRAL OF LEGAL OBLIGATIONS UNTIL A WRITING IS MADE AND ABSENCE OF AN ENFORCEABLE AGREEMENT.

A. Elements and Legal Authority.

"[I]f an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract." *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶ 7, 127 P.3d 1241 (alteration in original).

B. Undisputed Material Facts.

1. The City expressed, through its attorney Mark Kittrell ("Kittrell"), a manifestation of intent that the City not be bound and that legal obligations between the City and Kendall be deferred until a written settlement agreement was executed. The City expressed this intention by drafting a proposed settlement agreement, which the City sent to Brett Boulton ("Boulton"), counsel for Kendall during settlement negotiations, on July 23, 2014, that included the following language:

> This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. However, **there is no effective agreement until each of the parties hereto has executed at least one counterpart**.

(Exhibit 5 to Kittrell Deposition, at bates SLCC 000028.) (Emphasis added.)

2. The City, through its attorney Mark Kittrell, reaffirmed its expressed intention—that the City not be bound and that legal obligations between the City and Kendall be deferred until a written settlement agreement was executed—by drafting a revised settlement agreement, which the City sent to Boulton on July 24, 2014, that included the following language:

> This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. However, **there is no effective agreement until each of the parties hereto has executed at least one counterpart**.

(Exhibit 6 to Kittrell Deposition, at bates SLCC 000034.) (Emphasis added.)

3. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that the City's proposed written settlement agreement was the final expression of all terms of the settlement agreement between the City and Kendall. The City expressed this intention by drafting a proposed settlement agreement, which the City sent to Boulton on July 23, 2014, that included the following language:

> The provisions of this Agreement embody and reflect the entire understanding of the parties and **there are no representations, warranties or undertakings other than those expressed and set forth in this Agreement**. The provisions of this Agreement shall not be modified or amended in any way except by writing signed by all parties.

(Exhibit 5 to Kittrell Deposition, at bates SLCC 000027.) (Emphasis added.)

4. The City, through its attorney Mark Kittrell, reaffirmed its intention—that the City's proposed written settlement agreement was the final expression of all terms of the settlement agreement between the City and Kendall—by drafting a revised settlement agreement, which the City sent to Boulton on July 24, 2014, that again included the following language:

> The provisions of this Agreement embody and reflect the entire understanding of the parties and **there are no representations, warranties or undertakings other than those expressed and set forth in this Agreement**. The provisions of this Agreement shall not be modified or amended in any way except by writing signed by all parties.

(Exhibit 6 to Kittrell Deposition, at bates SLCC 000033.) (Emphasis added.)

5. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that a settlement agreement would only be "enter[ed] into" at the time a written settlement agreement was executed. The City manifested this intent by stating, in an email dated July 24, 2014, that "the date that we enter into the settlement agreement . . . will be apparent from the signature lines." (Exhibit 6 to Kittrell Deposition, at bates SLCC 000030.)

6. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that no settlement agreement had been entered into between the City and Kendall by stating, in an email dated July 29, 2014, "I sent you an email asking you to call me regarding the public statements that your client made on Facebook regarding the **potential settlement**." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044.) (Emphasis added.)

7. The City expressed, through its attorney Mark Kittrell, manifestations of intent that the City and Kendall were still in preliminary negotiations by referring to the communications between the City and Kendall as "negotiations" in emails dated July 29, 2014:

> We believe that your client is not **negotiating** in good faith and simply looking to turn **settlement negotiations** into a publicity stunt to promote his group "Justice for Geist." . . . [B]ecause of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate **settlement negotiations**.

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45.) (Emphasis added.)

> [Y]our client has taken confidential compromise **negotiations** and made them public. Because he has made public statements about **the negotiations** that are not quite correct, my client may be compelled to correct any misstatements he has made. . . . [W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider **settlement negotiations** terminated. My client may be willing to re-open **negotiations**, but we will not do so if those **negotiations** are made public[.]

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048) (Emphasis added.)

8. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that (1) the City had not accepted Kendall's offer so as to conclude a bargain, but instead considered the signing of the agreement to be required before the agreement would be effective, and (2), because the agreement was not signed, no contract had been formed. The City manifested this intent by stating, in an email dated July 29, 2014:

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . [W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

II. AGREEMENT TO RESCIND A PRIOR AGREEMENT.

A. Elements and Legal Authority.

> A mutual rescission is like a contract to undo a prior contract. An agreement to rescind a contract must include at least an offer and acceptance and evidence a mutual meeting of the minds to rescind. This may take the form of a simple offer and acceptance or a demand followed by an agreement or acquiescence in the demand. The acceptance or acquiescence may also be inferred from the conduct of the parties.

Spor v. Crested Butte Silver Min., Inc., 740 P.2d 1304, 1308 (Utah 1987) (citations omitted).

B. Undisputed Material Facts.

9. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that whatever settlement agreement, if any, had been reached between the City and Kendall would be rescinded if Kendall did not sign the settlement agreement before 5 p.m., July 29, 2014. The City manifested this intent by stating, in an email dated July 29, 2014:

> From your client's statements, it seems clear to us that he is withdrawing his offer to settle this matter. If we do not receive the signed settlement agreement by 5 p.m. today (July 29th), because of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations.

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.)

10. Kendall refused to execute the written agreement. (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

11. The City expressed, through its attorney Mark Kittrell, a manifestation of intent that whatever settlement agreement, if any, had been reached between the City and Kendall was rescinded when Kendall did not sign the settlement agreement before 5 p.m., July 29, 2014. The City manifested this intent by stating, in an email dated July 29, 2014:

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . [W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

12. Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands." (Exhibit 14 to Kittrell Deposition.)

III. PROMISSORY ESTOPPEL.

A. Elements and Legal Authority.

> To prove promissory estoppel a party must show that: (1) the [promisee] acted with prudence and *in reasonable reliance* on a promise made by the [promisor]; (2) the [promisor] knew that the [promisee] had relied on the promise which the [promisor] should reasonably expect to induce action or forbearance on the part of the [promisee] or a third person; (3) the [promisor] was aware of all material facts; and (4) the [promisee] relied on the promise and the reliance resulted in a loss to the [promisee].

Johannessen v. Canyon Rd. Towers Owners Ass'n, 2002 UT App 332, ¶ 21, 57 P.3d 1119 (alterations in original) (emphasis in original) (quotations and citations removed).

B. Undisputed Material Facts.

13. After the City's email terminating "settlement negotiations," (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048), the Defendants never communicated to Kendall that the

Defendants intended to enforce a purported settlement agreement—or that such a settlement agreement existed—between Kendall and the City until the Defendants filed their Counterclaim, more than one year and four months after the City terminated settlement negotiations. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7; Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

14. The City never tendered performance by paying $10,000, as the City would have been required to do under the purported settlement agreement the Defendants seek to enforce. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7.)

15. Kendall reasonably relied on the City's promise—to consider Kendall's offer rescinded and settlement negotiations terminated—by pursuing Kendall's claims against the Defendants, including: (1) filing a Notice of Claim and an Amended Notice of Claim against the City relating to the same subject matters that were under discussion in connection with the purported settlement agreement; (2) filing an action for a declaratory judgment that the bond and undertaking statutes—applicable to his filing of his claims against the Defendants—were unconstitutional; (3) filing an appeal from the decision denying a declaratory judgment that the bond and undertaking statutes are unconstitutional; and (4) filing and litigating the present matter. (Anderson Declaration, at ¶ 6.)

16. Kendall's pursuit of his claims against the Defendants, in reliance on the City's promise to consider Kendall's offer rescinded and settlement negotiations terminated, resulted in Kendall incurring attorneys fees and costs of approximately $74,000, not inclusive of the predominate portion of Kendall's legal fees that are being handled under a contingency fee arrangement (Anderson Declaration, at ¶ 7), and the obvious expenditure of a tremendous amount of time and effort.

IV. EQUITABLE ESTOPPEL.

A. Elements and Legal Authority.

"Utah case law establishes that [t]he elements of equitable estoppel are (i) a . . . failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action . . . taken . . . on the basis of the . . . failure to act; and (iii) injury . . . would result from allowing [a repudiation of] such . . . failure to act." *Bahr v. Imus*, 2009 UT App 155, ¶ 6, 211 P.3d 987, *aff'd on other grounds*, 2011 UT 19, ¶ 6, 250 P.3d 56 (alterations in original) (omissions in original) (quotations and citations omitted).

B. Undisputed Material Facts.

See *infra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF ADDITIONAL FACTS, ¶¶ 13–16.

ARGUMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Defendants' Motion fails because the undisputed facts show Kendall and the City never entered into an enforceable settlement. Even if, *arguendo*, Kendall and the City did initially enter into an enforceable settlement agreement, the undisputed facts show the City and Kendall agreed to rescind any agreement that had been made. Further, the City is estopped from now asserting Kendall and the City entered into an enforceable settlement agreement because Kendall has reasonably and detrimentally relied on the City's manifestations of intent and on the City's failures to act that are entirely inconsistent with the City's new position set out in the Defendants' Counterclaim.

I. No Legally Enforceable Contract Was Formed.

"The trial court has the power to enter a judgment enforcing a settlement agreement **if it is an enforceable contract**." *Badger v. MacGillivray*, 2016 UT App 109, ¶ 2, ___ P.3d ___ (emphasis added). Defendants' Motion fails because the undisputed facts show that no enforceable settlement agreement was entered into between Kendall and the City.

A. The Settlement Negotiations Between Kendall and the City Never Resulted in a Binding Contract Because the City Clearly Manifested Its Intent That No Legal Obligations Would Exist Until the Settlement Agreement Was in Writing and Fully Executed.

The purported oral settlement agreement was not an enforceable contract; rather, the undisputed facts show it was a part of preliminary negotiations. "[I]f an intention is manifested in any way that legal obligations between the parties shall be deferred **until the writing is made**, the preliminary negotiations and agreements do not constitute a contract." *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶ 7, 127 P.3d 1241 (alteration in original) (emphasis added). "[T]he

parties' manifestation of an intention to prepare and adopt a written agreement may show that the parties' agreements are preliminary negotiations rather than a contract." *Lebrecht v. Deep Blue Pools and Spas Inc.*, 2016 UT App 110, ¶ 18, ___ P.3d ___ (quotation marks and brackets omitted) (citing Restatement (Second) of Contracts § 27 (Am. Law Inst. 1981)). "This makes sense considering parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein." *Id.* (quotation marks and brackets omitted) (citing Restatment (Second) of Contracts § 27 cmt a).

In *Lebrecht*, the Utah Court of Appeals found that even though the evidence suggested the parties to a purported settlement agreement "agreed on many of the essential terms and conditions," both parties "contemplated additional steps before the agreement was complete and final" and therefore it was "**clear the parties expected to be bound by a written agreement, not an oral one.**" *Id.* at ¶¶ 16–17, 19 (emphasis added). The Court looked to "statements during negotiations [that] demonstrate [one of the parties to the agreement] understood the parties would not enter a binding agreement until sometime in the future." *Id.* at ¶ 22. The Court also looked to the knowledge of one of the parties that there would be a "back and forth of the written settlement agreement, until it was executed later that week." *Id.* (quotation marks omitted). The Court concluded, "At no point did either party definitely agree their dispute was settled; rather, they made clear their intention to enter into a written settlement agreement in the future. Thus, the parties did not merely intend to memorialize an oral contract but planned to defer their legal obligations until the settlement was drafted." *Id.* at ¶ 23.

In *Sackler v. Savin*, the Supreme Court of Utah looked to the communications of the parties to a purported settlement agreement and found no binding settlement agreement had been formed

because the parties contemplated that the parties would not enter an agreement until sometime in the future.

> An examination of the correspondence between the parties leads us to agree with the trial court's conclusion that a settlement agreement was never reached. Savin's August 19 letter indicates that even if Sackler found the terms of Savin's proposal acceptable, Savin contemplated that the parties would not enter an agreement until sometime in the future. Savin's proposal clearly provided that if the terms of the letter were acceptable, then the parties could "proceed to a formal agreement." Although Sackler refers to Savin's proposal as an "offer," the characterization is not determinative. . . .
>
> Sackler's response to Savin's August 19 proposal further indicates that both parties understood a binding contract would not be entered until some point in the future. Sackler's October 18 letter stated that if Savin found the counterproposals acceptable, to please call "so that I can prepare an agreement." These letters indicate that both parties understood they had not yet formed a binding settlement agreement.

Sackler v. Savin, 897 P.2d 1217, 1221 (Utah 1995).

The purported oral settlement agreement in this case was not a binding contract because the City communicated its intention that a written agreement must be executed by both parties and settlement negotiations were terminated before either party signed the agreement.

Kittrell recounted the discussions between Boulton and him, which Defendants now argue constitute an enforceable settlement agreement, in writing to Boulton, on July 29, 2014, as follows: "[O]n July 15th, your client offered to settle his claims if the City paid him $10,000.00. I informed you on Monday, July 21st that the City accepted your client's offer **and that we would prepare the settlement agreement**." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000045) (Emphasis added.) As stated in *Lebrecht*, "the parties' manifestation of an intention to prepare and adopt a written agreement may show that the parties' agreements are preliminary negotiations rather than a contract." 2016 UT App 110, ¶ 18, ___ P.3d ___ (quotation marks and brackets omitted) (citing Restatement (Second) of Contracts § 27 (Am. Law Inst. 1981)). Any doubts about the intention of

the City when it accepted Kendall's offer are resolved by the communications and conduct of the City throughout the remainder of its dealings with Kendall.

The City could not have made clearer that it intended there would be no enforceable settlement agreement until the written settlement agreement was signed. The City expressed a manifestation of intent that there would be "no effective agreement" until the written settlement agreement was signed by (1) Kittrell's statement that he would send a written settlement agreement to Boulton; (2) the express language of the written settlement agreement, which the City drafted; (3) the language the City used in corresponding with Kendall; and (4) the City's conduct with respect to the agreement.

1. The Language of the Written Settlement Agreement, Drafted by the City, Expressly Manifests the City's Intent That There Would Be No Enforceable Settlement Agreement Until the Parties Executed the Written Agreement.

The written settlement agreement drafted by the City is a three-page, double-spaced document, of only twelve paragraphs. (Exhibit 5 to Kittrell Deposition, at bates SLCC 000026–28.) Paragraph 11 reads, in its entirety:

> Counterparts. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. However, **there is no effective agreement until each of the parties hereto has executed at least one counterpart**."

(*Id.* at bates SLCC 000028) (the "Execution Requirement") (emphasis added).

Paragraph 7 reads, in its entirety:

> Entire Agreement. The provisions of this Agreement embody and reflect the entire understanding of the parties and **there are no representations, warranties or undertakings other than those expressed and set forth in this Agreement**. The provisions of this Agreement shall not be modified or amended in any way except by writing signed by all parties.

(*Id.* at bates SLCC 000027) (the "Integration Provision") (emphasis added).

The Execution Requirement and Integration Provision were drafted by the City in accordance with the City's representation to Kendall's lawyer that the City "accepted [Kendall]'s offer" and "would prepare the settlement agreement." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.) That settlement agreement provided that there is "no effective agreement until each of the parties hereto has executed at least one counterpart." The Integration Provision further demonstrates the City's intention that the express provisions of the written settlement agreement supersede any other communications and agreements between the parties, which intention is consistent with Utah law. *See, e.g., MediaNews Grp., Inc. v. McCarthey*, 494 F.3d 1254, 1262 (10th Cir. 2007) ("Parol evidence is not so much *inadmissible* to vary the terms of an integrated writing as it is *irrelevant,* because the later agreement discharges the antecedent ones in so far as it contradicts or is inconsistent with the earlier ones.") (emphasis in original) (quoting *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 772 (Utah Ct. App. 2004)).

The Defendants, with their Counterclaim and Defendants' Motion, blatantly ignore the objective manifestation of intent by the City in the settlement agreement drafted by the City. In his deposition, Mark Kittrell, who authored the written settlement agreement and provided it to Boulton, stated, curiously, that the Execution Requirement "doesn't matter,"[1] that the City never

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[1] Q. All right. And it said nothing is binding until both parties sign the agreement, true?
A. The clause you refer to stated what it states, but it didn't matter.

(Kittrell Deposition, at 55: 19–22.)

Q. And if you put a clause in that says this isn't effective until both parties sign either the same agreement or in counterparts, you intend that that has a legal effect, right?
A. That clause has no—that clause doesn't matter, quite honestly.

(Kittrell Deposition, at 57:20–25.)

Q. That isn't my question. I know you have a self-serving reason to try to get out of the agreement that you sent, but I'm asking you did you intend that there be any

communicated to Kendall that, in the City's view, the provision did not "have any meaning,"[2] and

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effect of the language that you put in that agreement that it would not be effective until both parties signed the agreement?
A. It doesn't matter what the clause says.
Q. Would you answer the question?
A. I am answering your question. It doesn't matter what that clause says.

(Kittrell Deposition at 58:20–59:4.)

Q. You included in this agreement the language, and I quote (as read): "However, there is no effective agreement until each of the parties hereto has executed at least one counterpart." Do you see that?
A. Yeah. The clause is in the draft agreement, yes.
Q. And you put it there, did you not?
A. Yes.
Q. And by "effective agreement," you were referring to the Settlement Agreement, to pay and accept $10,000 for settlement of the claims, correct?
A. The agreement was, yes, the material terms of that agreement were to pay 10,000 release of claims.
Q. And that's what you're referring to as "effective agreement" in that clause in that sentence in paragraph 11?
A. Again, I'd say that clause does not matter on the material terms.

(Kittrell Deposition, at 72:9–73:1.)

[2] Q. So you—you put something in an agreement that you were sending off to Mr. Kendall's lawyer that you, in the back of your mind, without disclosing to him, didn't have any meaning?
A. Ultimately, yes, that's what I'm saying.

(Kittrell Deposition, at 78:14–18.)

Q. And you didn't tell Sean Kendall that it wasn't intended to have any meaning?
A. I had no communications with Mr. Kendall
* * *
Q. So you didn't tell Mr. Boulton that you didn't really intend that sentence that you wrote and included in the agreement to have any meaning?
A. Like I said, we had no discussions about paragraph 11.
Q. And you didn't disclose to him that it didn't—that you didn't intend it to have any meaning?
A. We had no discussions about paragraph 11. The answer to your question is no[.]

(Kittrell Deposition, at 86:21–87:14.)

then refused to explain his intention behind the Execution Requirement other than its plain meaning—simply repeating, evasively, "the clause states what the clause states."[3]

[3]
Q. Did you mean that there would be no effective agreement until each of the parties hereto has executed at least one counterpart?
A. The clause states what the clause states.
Q. No. I'm asking you did you mean that?
A. I know you're asking that. The clause states what the clause states.
Q. Did you mean that it would not be effective?
A. The clause states what the clause states, Mr. Anderson.
Q. It sure as hell does. When you referred to parties in that sentence, were you referring to Salt Lake City Corporation and Sean Kendall?
A. The clause states what the clause states.
Q. No. I'm asking you what you were intending when you referred—
A. The clause states what the clause states.
Q. It sure does. I'm asking you, since you drafted the agreement, what that term means?
A. The clause states what the clause states.
Q. Who were you referring to when you said "parties"?
A. The clause states what the clause states in there.

(Kittrell Deposition, at 79: 2–80:2.)

Q. And in that second sentence could you explain what you intended and meant by the word "executed"?
A. **Look, there was no intent that this clause had**.
Q. I'm asking you a question.
A. Okay.
Q. What did you mean by that word "executed"?
A. I'm getting there.
Q. No. Just answer the question.
A. Executed?
Q. Yeah. Did you mean signed?
A. Executed would mean signed there.
Q. And you're referring to signed by each of the parties, correct?
A. The parties would refer to Mr. Kendall and the City, yes.

(Kittrell Deposition, at 80:19–81:8.) (Emphasis added.)

Q. Get out of lawyer mode and answer the question. What did you mean when you said there would not be an effective agreement until each of the parties had executed at least one counterpart?
A. It was not intended to have the parties reserve rights.

Q. What did you mean? I'm not asking what it didn't mean. I'm asking you what it did mean?

* * *

Q. What did you intend? You know, this is one unbelievable lawyer's game here where I'm asking you what you meant by a very simple sentence that says there's no deal. There's no effective agreement until each of the parties has executed at least one [counterpart].

* * *

Q. What was your intent by that sentence?
A. It wasn't—
Q. What was your intent?
A. May I answer now?
Q. Please.
A. Okay. There was no intent to have the parties reserve rights on this. This was a boilerplate clause. There was no intent to have parties reserve rights. I'm not proud that I have a boilerplate clause in there. That's what it is.
Q. So because you put something that you're not proud of that's a boilerplate clause, you think it should just be invisible, nobody pay any attention to it. It has no legal effect, even though it's part of a written agreement?

* * *

Q. **Did you mean that there is no effective agreement until each of the parties to the agreement has executed at least one counterpart?**
A. **No.**
Q. Yes or no?
A. No.
Q. **You didn't intend what you wrote?**
A. **No.** There was not an intention for reservation or rights with that clause.
Q. You didn't intend for that sentence to have any meaning?
A. There was no intent to have the parties reserve rights under that clause, no.
Q. I'm not asking about reservation [of] rights.
A. **There was no intent, no.**
Q. I'm asking about whether you intended that there be an effective agreement?
A. That was not the intent, no.

* * *

Q. Okay. I'm asking you did you understand and intend when you wrote this document and included the second sentence of paragraph 11 that there is no effective agreement until each of the parties hereto has executed at least one counterpart?
MS. SLARK: Asked and answered.
A. No.
Q. **You didn't intend that that would have any meaning?**
A. **Correct.**

(Kittrell Deposition, at 82:16–23; 83:20–25; 84:8–22; 85:4–21; 86:8–20.) (Emphasis added.)

The City's objective manifestations of intent *do* matter, regardless of the Defendants' self-serving, evasive conclusions and regardless of any secret and unexpressed intentions the City may have had. The Court of Appeals of Utah addressed unexpressed intentions with regard to settlement negotiations as follows:

> [T]he Jensens' affidavit merely identifies their unsubstantiated and entirely unilateral "understanding" and "beliefs" as to the legal effect of these discussions and their actions. On the record before us, it appears that these "understandings" were the Jensens' private thoughts and were not expressed to Zions.
>
> It is well established in the law that unexpressed intentions do not affect the validity of a contract. . . . The apparent mutual assent of the parties . . . must be gathered by the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts.

Zions First Nat. Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 480 (Utah Ct. App. 1989) (quotation marks and citations omitted).

2. The Communications by the City Manifest the City's Intent to Defer Legal Obligations Until the Agreement Was Executed.

The communications by the City to Kendall also manifest the City's intent that legal obligations would be deferred until the written settlement agreement was executed. On July 24, 2014, Kittrell sent an email to Boulton discussing the terms of the written settlement agreement and said, "the date that we **enter into** the settlement agreement . . . will be apparent from the signature lines." (Exhibit 6 to Kittrell Deposition, at bates SLCC 000030.) (Emphasis added). Kittrell's language is an objective manifestation of the City's intent that the City and Kendall **had not yet** entered into a settlement agreement. The City further expressed an objective manifestation of its intent by characterizing, in an email dated July 24, 2014, from Kittrell to Boulton, the agreement between Kendall and the City as "the **potential** settlement." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044.) (Emphasis added.) The City intended "not merely . . . to

memorialize an oral contract but . . . to defer their legal obligations until the settlement was drafted." *Lebrecht v. Deep Blue Pools and Spas Inc.*, 2016 UT App 110, ¶ 22, ___ P.3d ___.

At all times before "negotiations" were "terminated" by the City, the City clearly expressed its understanding that the City and Kendall were still in settlement negotiations. The City repeatedly characterizes the communications between Kendall and the City as "negotiations" and characterizes Kendall's offer as being capable of revocation, *i.e.*, not unconditionally assented to as to conclude a bargain. *Cea v. Hoffman*, 2012 UT App 101, ¶ 25, 276 P.3d 1178.

On July 29, 2014, eight days after the City's purported acceptance of Kendall's offer, the City communicated by email to Boulton:

> We believe that your client is not **negotiating** in good faith and simply looking to turn **settlement negotiations** into a publicity stunt to promote his group "Justice for Geist." . . . [B]ecause of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate **settlement negotiations**.

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45.) (Emphasis added.)

> [Y]our client has taken confidential compromise **negotiations** and made them public. Because he has made public statements about **the negotiations** that are not quite correct, my client may be compelled to correct any misstatements he has made. . . . **[W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated**. My client may be willing to re-open **negotiations**, but we will not do so if those **negotiations** are made public[.]

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.) (Emphasis added.)

Not only does the City repeatedly refer to the communications generally between Kendall and the City as "negotiations," the City characterizes specifically the offer and purported acceptance, which the City now argues created a binding settlement agreement, as "negotiations." The City referred to Kendall's "public statements" about the "confidential compromise negotiations," as reported in a *Salt Lake Tribune* article, which the City included in its email. (*Id.*)

The disclosure by Kendall in that article is about the $10,000 "offer." (Exhibit C to Anderson Declaration.) ("The owner of a dog killed by a Salt Lake City police officer last month said he has turned down the department's offer to pay him $10,000 to compensate him for his pet.")

3. The Conduct of the City Manifests the City's Intent to Defer Legal Obligations Until the Written Agreement Was Executed.

The conduct of the City, from the time of the settlement negotiations all the way until the time the City filed its Counterclaim, is consistent with an intention by the City that there was no enforceable settlement agreement unless and until a written settlement agreement was executed. When the City learned Kendall might not sign the settlement agreement, the City's reaction was *not* to communicate to Kendall that there was an enforceable agreement, and it was *not* to attempt to enforce such an agreement; rather, the City responded by stating to Boulton:

> From your client's statements, it seems clear to us that he is withdrawing his offer to settle this matter. **If we do not receive the signed settlement agreement by 5 p.m.** today (July 29th), because of your client's public statements, **we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations.**

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.) (Emphasis added.)

In his deposition, Kittrell attempted to explain that the intent behind providing the 5 p.m. deadline was to get Kendall to "honor the Settlement Agreement."[4] Kittrell admits such an

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[4]
Q. You were basically saying if he doesn't sign, we're done?
A. The intent of this entire e-mail was to get Mr. Kendall to honor the Settlement Agreement. He made very public statements. We were frustrated that day. He had misrepresented who—the actual terms of the Settlement Agreement in public. We were frustrated. We wanted to get him to honor the Settlement Agreement.
Q. And you were saying if you don't sign it, it's history, we're done?
A. The words say what they say.
Q. What were you trying to communicate?
A. We were trying to get him to honor the Settlement Agreement.
Q. Okay. But if he didn't, what? What were the consequences?
A. Well, that—those discussions would be attorney-client privilege province.
* * *

intention was not expressed. (Kittrell Deposition, at 117:23–24.) ("My words say what they say in the e-mail. The intent behind it's not in there.") Moreover, the conduct of the City shows it cannot have been the intention of the City to enforce the purported settlement agreement. In response to receiving the City's deadline, Boulton asked Kittrell for more time to provide a copy of the settlement agreement signed by Kendall.

> It looks like I need another day or so to get this worked out. I would appreciate it if you would consider keeping the offer open until Thursday at 5 pm.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000051.)

The City, if it were interested in enforcing the purported settlement agreement, would have allowed the forty-eight-hour extension requested by Boulton. The City did not, however, allow such an extension, meaning that any potential deal was dead. First, the City communicated it was unlikely to allow such an extension.

> I'll talk to my client, but quite honestly, I don't think they'll agree to it. They feel that they've been yanked around just this afternoon. . . . First he says he now will settle, and then he tells Gene Kennedy that he's not settling.
>
> If I can get my client to agree to this delay, can you guarantee that your client will not make any public statements? That might be key.

Q. No. I'm asking what you intended to communicate?
A. I told you what I intended to communicate that we were—we were concerned that Mr. Kendall was not going to honor a Settlement Agreement. We were trying to make sure that he would honor a Settlement Agreement.
Q. But telling him if he didn't sign the Settlement Agreement, the execution, that he had to sign, then the deal was off, right?
A. No.
Q. That's not what you were saying?
A. No. What I'm—the words say what they say.

* * *

Q. Were you communicating if you didn't sign by 5:00 the deal was off and you weren't going to negotiate any further?
A. My words say what they say in the e-mail. **The intent behind it's not in there.** The intent was to try to get him to honor the Settlement Agreement.

(Kittrell Deposition, at 114:22–117:24.) (Emphasis added.)

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

Then, when Kendall did not sign the agreement by the 5 p.m. deadline, the City doubled down on its position:

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . **[W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.**

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.) (Emphasis added.)

If the emails from Kittrell were not enough to demonstrate the City intended to defer legal obligations, then further support comes from a document published on the Salt Lake City Police Department website, appropriately titled "Chief Burbank Statement on **Settlement Negotiations** with Sean Kendall," (emphasis added) which states, "Due to Mr. Kendall's premature Facebook posts and desire to negotiate through the press, **the police department has ended our attempts to meet his financial demands**." (Exhibit 14 to Kittrell Deposition.) (Emphasis added.)

The City's conduct on July 29, 2014, manifests the intention that there was "no effective agreement" until the written agreement was executed. Like in *Lebrecht*, "the parties expected to be bound by a written agreement, not an oral one." *Lebrecht v. Deep Blue Pools and Spas Inc.*, 2016 UT App 110, ¶ 19, ___ P.3d ___.

The City's conduct afterward also demonstrates the City believed there was no enforceable settlement agreement. After July 29, 2014, until the filing of the Counterclaim, the City never communicated to Kendall that it believed there was an enforceable settlement agreement. (Exhibit B to Anderson Declaration.) The City never attempted to fulfill its duties under its purported agreement by paying $10,000 to Kendall. (Kittrell Deposition, at 123:1–124:25.) The City never mentioned the purported settlement agreement when (1) Kendall filed a Notice of Claim and an

Amended Notice of Claim against the City; (2) Kendall filed for a declaratory judgment that the bond and undertaking statutes are unconstitutional; or (3) Kendall filed an appeal from the decision denying the declaratory judgment. (*Id.*; Exhibit B to Anderson Declaration, at 7.)

II. The Court Should Deny Defendants' Motion for Summary Judgment Because Kendall and the City Agreed to Rescind Any Settlement Agreement, If There Were Any.

The Defendants' Motion cannot be granted where, if there was a settlement agreement, it was rescinded by the parties. Because Kendall did not sign the written settlement agreement by 5 p.m. on July 29, 2014, Kendall and the City came to a meeting of the minds to halt settlement negotiations and put an end to any understanding about a settlement that may have arisen from the settlement negotiations between Kendall and the City.

Parties may mutually agree to undo a prior contract, either expressly or by one party acquiescing to the other party's intention to cease performance.

> A mutual rescission is like a contract to undo a prior contract. An agreement to rescind a contract must include at least an offer and acceptance and evidence a mutual meeting of the minds to rescind. This may take the form of a simple offer and acceptance or a demand followed by an agreement or acquiescence in the demand. The acceptance or acquiescence may also be inferred from the conduct of the parties.

Spor v. Crested Butte Silver Min., Inc., 740 P.2d 1304, 1308 (Utah 1987) (citations omitted).

> If one party, even wrongfully, expresses a wish or an intention to cease performance and the other party fails to object, circumstances may justify the inference that there has been an agreement of rescission.

Restatement (Second) of Contracts § 283, cmt a. (1981). *Accord Wallace v. Build, Inc.*, 16 Utah 2d 401, 405 n. 3, 402 P.2d 699 (1965) ("Sometimes even circumstances of a negative character, such as the failure by both parties to take any steps looking towards the enforcement or performance of a contract, may amount to a manifestation of mutual assent to rescind it") (quoting Restatement, Contracts § 406b (1932)).

A. The City Offered to Consider Kendall to Have Withdrawn His Offer and to Terminate Settlement Negotiations, Which Offer Kendall Accepted.

The City, on July 29, 2014, communicated to Kendall an offer:

> If we do not receive the signed settlement agreement by 5 p.m. today (July 29th), because of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations.

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.)

Kendall accepted the City's offer by choosing not to send the City a signed settlement agreement before the deadline. *See* Restatement (Second) of Contracts § 69 (1981) ("Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance . . . . Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer."). Consideration is provided by each party's discharge of the duties of the other. Restatement (Second) of Contracts § 283, cmt. a. (1981).

Therefore, a binding agreement was formed, whereby the City "will consider [Kendall] to have rescinded his offer" and settlement negotiations were terminated. The City went one step further to ensure Kendall understood the rescission of the agreement. After the 5 p.m. deadline passed, the City concluded:

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . [I]t is now past 5 p.m. and we have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.)

In line with the emails by Kittrell, (1) Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands" (Exhibit 14 to Kittrell Deposition); (2) the City never attempted to perform its obligations under the purported

agreement, (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7); and (3) the City never communicated to Kendall that the City believed there was an enforceable settlement agreement until December 15, 2015, more than one year and four months after the City terminated settlement negotiations, when the City filed its counterclaim. (Exhibit B to Anderson Declaration, at 7)

As of 5 p.m., July 29, 2014, Kendall and the City came to a meeting of the minds to "consider [Kendall] to have rescinded his offer" and to "terminate settlement negotiations." (*Id.*) Therefore, any settlement agreement that may previously have been reached between the City and Kendall, if there were any, was rescinded.

B. Kendall Demonstrated an Intention to Cease Performance of the Settlement Agreement, If There Were Any Such Agreement, and the City Acquiesced to a Rescission of Any Agreement.

The City learned through Facebook and the media that Kendall had expressed an intention to not settle his claims with the City. (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044; Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.) Assuming, *arguendo*, Kendall and the City had entered into a binding settlement agreement on July 21, 2014, Kendall's expressed intention to not settle his claims against the City would amount to an intention to not perform his obligations under the contract. Kendall's intention to not perform was not objected to by the City. Instead, the City responded by communicating its own intention to "consider [Kendall] to have rescinded his offer" and to "terminate settlement negotiations." (Exhibit 9 to Kittrell Deposition, at bates SLCC 000045.)

Because Kendall "expresse[d] . . . an intention to cease performance" and the City "fail[ed] to object," the circumstances "may justify the inference that there has been an agreement of rescission." Restatement (Second) of Contracts § 283, cmt a. (1981). *Accord Wallace v. Build, Inc.*, 16 Utah 2d 401, 405 n. 3, 402 P.2d 699 (1965). The circumstances here include that the City

drafted terms of the agreement that there would be "no effective agreement" until signed by the parties (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028); the City repeatedly referred to the communications between Kendall and the City, including the offer and acceptance the City now claims were binding and later communications, as "negotiations" (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45); the City communicated that the "potential settlement" would be "entered into" on the date the parties executed the agreement (*Id*. at bates SLCC 000045); the City responded to Kendall's expression that he intended to not sign the agreement by offering to "consider [Kendall] to have withdrawn his offer" and to "terminate settlement negotiations" (*Id.*); after the deadline had passed that the City set of 5 p.m. on July 29, 2014, for Kendall to sign the agreement, the City confirmed with Boulton that "you and your client should consider settlement negotiations terminated" (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048); Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands" (Exhibit 14 to Kittrell Deposition); the City never attempted to perform its obligations under the purported agreement (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7); and the City never communicated to Kendall that the City believed there was an enforceable settlement agreement until December 15, 2015, more than one year and four months after the City terminated settlement negotiations, when the City filed its counterclaim. (Exhibit B to Anderson Declaration, at 7.)

These circumstances show the City intended to rescind any oral settlement agreement made between Kendall and the City, if there had been one. Because the agreement was rescinded, the City is not entitled to summary judgment on its Counterclaim.

III. Even If a Settlement Agreement Were Entered into by Kendall and the City, and Even If Kendall and the City Did Not Agree to Rescind Such Agreement, the City is Precluded from Enforcing an Agreement Because of the City's Non-Performance.

The purported settlement agreement may only be enforced "if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial." *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah Ct.App.1989) (quotation omitted). Even if, *arguendo*, Kendall had an obligation to refrain from filing claims against Defendants under the purported settlement agreement, Kendall's excuse for non-performance is compelling.

First, Kendall's non-performance is excused because the City communicated to Kendall, through its words and actions, that the deal was off. This is shown by the facts that (1) the City drafted terms of the agreement that there would be "no effective agreement" until signed by the parties, (Exhibit 5 to Kittrell Deposition, at bates SLCC 000028); (2) the City repeatedly referred to the communications between Kendall and the City, including the offer and acceptance the City now claims were binding and later communications, as "negotiations", (Exhibit 9 to Kittrell Deposition, at bates SLCC 000044–45); (3) the City communicated that the "potential settlement" would be "entered into" on the date the parties executed the agreement, (*Id*. at bates SLCC 000045); (4) the City responded to Kendall's expression that he intended to not sign the agreement by offering to "consider [Kendall] to have withdrawn his offer" and to "terminate settlement negotiations," (*Id.*); (5) after the deadline had passed that the City set of 5 p.m. on July 29, 2014, for Kendall to sign the agreement, the City confirmed with Boulton that "you and your client should consider settlement negotiations terminated," (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048); (6) Chief Burbank communicated on July 29, 2014, that "the police department has ended our attempts to meet [Kendall's] financial demands" (Exhibit 14 to Kittrell Deposition);

(7) the City never attempted to perform its obligations under the purported agreement, (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7); and (8) the City never communicated to Kendall that the City believed there was an enforceable settlement agreement until December 15, 2015, more than one year and four months after the City terminated settlement negotiations, when the City filed its counterclaim. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7.)

In addition to the conduct described above, Kendall's non-performance is excused by the fact that the City has never tendered performance—or even communicated an intention to tender performance—of paying Kendall $10,000, (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7), despite the passage of more than one year and four months between when the City terminated settlement negotiations and when the Defendants filed their Counterclaim.

The failure of performance by the City discharged Kendall's obligations under the purported agreement. "[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." Restatement (Second) of Contracts § 237 (1981).

Where the City has failed to perform its obligations under the purported agreement and repeatedly communicated to Kendall that the City will consider Kendall's offer rescinded and that settlement negotiations are terminated, Kendall has a substantial excuse to not perform his obligations—if there were any—under the purported settlement agreement.

IV. Even If a Settlement Agreement Were Entered into by Kendall and the City, and Even If Kendall and the City Did Not Agree to Rescind Such Agreement, Then the City is Estopped from Enforcing Such an Agreement Because Kendall Reasonably Relied, to Kendall's Severe Detriment, on the City's Promise That Settlement Negotiations Were Terminated and That Kendall's Offer Would Be Considered "Rescinded."

In the absence of a finding that either no enforceable settlement agreement was entered into or that Kendall and the City agreed to rescind such an agreement, if there were any, the Defendants may not enforce such a settlement agreement because Kendall can establish all of the elements of promissory estoppel and equitable estoppel.

A. Promissory Estoppel Applies to Enforce the City's Promise to Terminate Settlement Negotiations and Consider Kendall's Offer as Rescinded.

> To prove promissory estoppel a party must show that: (1) the [promisee] acted with prudence and *in reasonable reliance* on a promise made by the [promisor]; (2) the [promisor] knew that the [promisee] had relied on the promise which the [promisor] should reasonably expect to induce action or forbearance on the part of the [promisee] or a third person; (3) the [promisor] was aware of all material facts; and (4) the [promisee] relied on the promise and the reliance resulted in a loss to the [promisee].

Johannessen v. Canyon Rd. Towers Owners Ass'n, 2002 UT App 332, ¶ 21, 57 P.3d 1119 (alterations in original) (emphasis in original) (quotations and citations removed).

1. Kendall Acted in Reasonable Reliance on the City's Promise to Terminate Settlement Negotiations and Consider Kendall's Offer to Be Rescinded.

The City made a promise to Kendall through two of its communications:

> If we do not receive the signed settlement agreement by 5 p.m. today (July 29th), because of your client's public statements, we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations."

(Exhibit 9 to Kittrell Deposition, at bates SLCC 000045)

> [W]e will take [Kendall's] public statements to mean that he has rescinded his offer to the City that was made on July 15th to settle his claims in exchange for $10,000.00. . . . [W]e have not received a copy of the settlement agreement that is signed by your client, and therefore you and your client should consider settlement negotiations terminated.

(Exhibit 10 to Kittrell Deposition, at bates SLCC 000048)

Kendall reasonably relied on the plain meaning of the City's emails. Kendall believed that the City's position that his offer was rescinded and that settlement negotiations were terminated meant Kendall had no obligations to refrain from bringing claims against the City.

Based on the promises by the City, Kendall pursued his claims against Defendants. Kendall filed a Notice of Claim and an Amended Notice of Claim against the Defendants; he filed for declaratory relief that the bond and undertaking statutes were unconstitutional; he filed an appeal from the decision denying the declaratory relief; and he filed the Complaint in this action and has been aggressively litigating his claims for many months. (Anderson Declaration, at ¶ 6.)

2. The Defendants Knew Kendall Relied on the City's Promise, Which Defendants Expected to Induce Kendall to Believe There Was No Settlement Agreement.

When Kendall filed each of the pleadings described above, the City Defendants had to have known Kendall believed there was no enforceable settlement agreement. The purpose of the City's promise to consider Kendall's offer as rescinded and to terminate settlement negotiations was to communicate to Kendall that the deal was off, and therefore the City must have expected its communication to Kendall to induce him to believe just that.

3. The City Knew All Material Facts of the Incident Leading to Kendall's Claims Against the City, the Settlement Negotiations Related to Those Claims, and Each of Kendall's Pleadings Related to Those Claims.

The City was at all times, and continues to be, inextricably connected to Kendall's claims and the actions Kendall has taken, and continues to take, with respect to those claims. Therefore, the Defendants must be charged with knowledge of all material facts.

4. Kendall Relied on the City's Promise and, Accordingly, Pursued His Claims Against the City Defendants.

Based on the promise by the City, Kendall pursued his claims against Defendants. Kendall filed his Notice of Claim and an Amended Notice of Claim against the Defendants; he filed and litigated his Declaratory Judgment action; he filed an appeal from the decision denying the desired declaratory relief; and he filed the Complaint in this action and has been litigating it at substantial expenditure of time, effort, and costs. (Anderson Declaration, at ¶ 6–7.)

B. Equitable Estoppel Applies to Prevent the City from Enforcing a Settlement Agreement, If There Were Any Such Agreement.

> Utah case law establishes that [t]he elements of equitable estoppel are (i) a . . . failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action . . . taken . . . on the basis of the . . . failure to act; and (iii) injury . . . would result from allowing [a repudiation of] such . . . failure to act.

Bahr v. Imus, 2009 UT App 155, ¶ 6, 211 P.3d 987, *aff'd on other grounds*, 2011 UT 19, ¶ 6, 250 P.3d 56 (alterations in original) (omissions in original) (quotations and citations omitted).

1. The Defendants' Counterclaim Is Inconsistent with the City's Failure to Assert That It Believed Kendall and the City Entered into an Enforceable Settlement Agreement in the More Than One Year and Four Months Between the City Declaring That Settlement Negotiations Were Terminated and the Defendants Filing Their Counterclaim.

If the Defendants wished to enforce the purported settlement agreement, they could have tendered performance, communicated an intent to Kendall to tender performance, or communicated to Kendall their belief—if they ever had such a belief before filing the counterclaim—that there was an enforceable agreement. Failing to take any of those steps toward the enforcement of the purported settlement agreement is inconsistent with filing a counterclaim to enforce the purported agreement more than one year and four months after the City declared settlement negotiations were terminated,

2. Kendall Took Reasonable Action—Pursuing His Claims Against the City Defendants—on the Basis of the City Defendants' Failure to Timely Assert the Claim That Kendall and the City Entered a Binding Settlement Agreement.

Kendall reasonably relied on the plain meaning of the City's emails that stated the City will "take [Kendall's] public statements to mean that he has rescinded his offer" and "you and your client should consider settlement negotiations terminated." (Exhibit 10 to Kittrell Deposition, at bates SLCC 000048.) Kendall believed that considering his offer to be rescinded and that settlement negotiations were terminated meant Kendall had no obligations to refrain from bringing claims against the City.

Kendall then, based on the promise by the City, has pursued his claims against Defendants.

3. If the Purported Settlement Agreement Is Now Enforced, Kendall Will Suffer Substantial Injury.

The actions taken by Kendall to pursue his claims against Defendants involved incurring substantial attorneys' fees and costs and involved a substantial expenditure of Kendall's time and effort. (Anderson Declaration, at ¶ 6–7.) Thus, allowing the Defendants to enforce a purported settlement agreement, after failing to take any steps toward enforcement for more than one year and four months, would cause substantial injury to Kendall.

CONCLUSION

The City must be held to its word: There was—as the City itself said—"no effective agreement" since there was no execution of the written agreement insisted upon by the City.

Further, the City's contention that there is an enforceable settlement agreement precluding Kendall from pursuing his claims in this matter must be rejected, because of (1) the City's unequivocal statements that "negotiations" were "terminated" because of the absence of a signed written agreement; (2) the City's failure to tender payment under the terms of the purported agreement; and (3) the City's failure to take any measures to enforce the purported agreement

during the entire time Kendall filed his Notice of Claim, pursued his Declaratory Judgment action, pursued his appeal relating to the Declaratory Judgment action, and filed this action.

DATED this 4th day of August, 2016.

LEWIS HANSEN

By: /s/ Ross C. Anderson
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