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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.	**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM** Case No. 2:15-cv-00862 District Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM

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INTRODUCTION

The City contended in its Counterclaim, for the first time, that Kendall and the City had entered into a binding settlement agreement that would foreclose Kendall's claims in this lawsuit. That contention, which has spawned hundreds of pages of depositions, motions, memoranda, and exhibits, is belied by all the City did and said.

The City called all the communications preceding the proffer of a proposed written settlement agreement "negotiations." The City stated in the proposed written agreement, which its lawyer drafted, that there would be "no effective agreement" until the document was signed by all parties and, then, none of the parties signed the proposed written agreement. The City threatened Kendall that if he did not sign by a specific deadline, the City would consider Kendall's "offer" to be "rescinded" and would "terminate" "negotiations" with Kendall. After the City's deadline passed, the City stated that because Kendall had not signed the document, he and his lawyer "should consider settlement negotiations terminated."

The City never, until its filing of the Counterclaim in this matter, used the term "contract" or "agreement." Rather, it characterized all that had transpired as "negotiations," the "rescission" of an "offer," and the "termination" of "negotiations."

For almost a year and a half, the City made no claim there was an agreement, it never sought enforcement of a supposed agreement, and it never tendered performance of its purported obligation under the purported agreement.

Never can there have been such a legally and factually baseless claim to enforce a non-existent settlement agreement. Defendants' claim cannot be permitted to deprive Kendall of justice for the tragic consequences of the blatant violations of his constitutional rights.

KENDALL'S REPLY TO DEFENDANTS' RESPONSES TO KENDALL'S STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

I. Kendall's Claim: NO ENFORCEABLE AGREEMENT EXISTED BECAUSE THE CITY REPEATEDLY MANIFESTED THAT LEGAL OBLIGATIONS SHALL NOT EXIST UNLESS THE WRITING WAS EXECUTED.

A. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Elements

Defendants' Response: The Defendants respond to Kendall's Statement of Elements regarding Kendall's first claim by saying that it is an "inaccurate or incomplete statement of the law." (Defs.' Opp. to P. Mot. for Summ. J. (hereinafter, "Defs.' Opp.") (Dkt. 64), at 4.) Defendants offer two statements of law.[1]

Defendants' First Statement of Law:

> [T]he 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 the parties intended that until such formal writing was executed the parol or informal contract should be without binding force.

Id. (quoting *Shoels v. Klebold*, 375 F.3d 1054, 1065 (10th Cir. 2004)).

Kendall's Reply: Kendall disputes this statement of law. First, it is a statement of Colorado law, not Utah law. "Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law." *Shoels v. Klebold*, 375 F.3d at 1060.

[1] DUCivR Rule 56-1(c)(2) requires the non-moving party to either (1) "[i]f the party disagrees with a stated element, state what the party believes is the correct element" or (2) "[i]f there are additional legal elements . . . state each such element" in a statement of additional elements and material facts. Defendants, once again, have not followed the structure and format required by DUCivR Rule 56-1(c)(2). Defendants have not stated what they "believe[] is the correct element" nor have they stated additional elements in a statement of additional elements and material facts. Instead, Defendants say Kendall's statement of the element is "inaccurate or incomplete" (they do not say which) then provide two statements of law. (Defs.' Opp. (Dkt. 64), at 4.) It is unclear whether Defendants (1) contend Kendall's statement is inaccurate and to be replaced with Defendants' additional statements of law or (2) contend Kendall's statement is incomplete and to be supplemented with Defendants' additional statements of law.

Second, it is inconsistent with two statements of Utah law. One, that "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." *Lebrecht v. Deep Blue Pools & Spas Inc*. 2016 UT App 110, ¶ 18, 374 P.3d 1064 (quoting Restatement (Second) of Contracts § 27 (Am. Law Inst. 1981)). Two, that "[w]here it is apparent from their negotiations " 'that the determination of certain details is deferred until the writing is made out' " or " 'if 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.' " *Id.* at ¶ 23 (quoting *R.J. Daum Constr. Co. v.* Child, 122 Utah 194, 200, 247 P.2d 817, 820 (1952) (quoting Restatement (First) of Contracts § 26 cmt. a (Am. Law Inst. 1932))).

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim (hereinafter, "Kendall's Motion") (Dkt. 56), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–7, 9–10, ¶¶ 1–7, 13–15.

Defendants' Second Statement of Law:

> Legal obligations are only deferred if there are outstanding material terms and/or the parties expressly reserved rights.

(Defs.' Opp. (Dkt. 64), at 10.)

Kendall's Reply: Kendall disputes this statement of law. That statement is contrived by Defendants. None of the cases cited by Defendants state what Defendants proffer as a statement of law. The correct statement is as follows:

> Where it is apparent from their negotiations " 'that the determination of certain details is deferred until the writing is made out' " or " 'if 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.' "

Lebrecht v. Deep Blue Pools & Spas Inc., 2016 UT App 110, ¶ 23, 374 P.3d 1064 (quoting *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 200, 247 P.2d 817, 820 (1952) (quoting Restatement (First) of Contracts § 26 cmt. a (Am. Law Inst. 1932)).

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Kendall's Motion (Dkt. 56), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–7, 9–10, ¶¶ 1–7, 13–15.

1. In settlement negotiations with the City, beginning no later than July 1, 2014, Kendall sought changes in SLCPD policy and training with respect to encounters with household pets. (Exhibit 1 to Deposition of Mark E. Kittrell ("Kittrell Deposition"), which was provided to the Court as Exhibit A to Exhibit 1 to Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim (Dkt. 56) and which is attached hereto for convenience as Exhibit A, at SLCC 000018) ("Additionally, as sought by your client, the SLCPD has begun the process of reaching out to the United States Humane Society, Best Friends Animal Society, and the U.S. Department of Justice to re-evaluate how its officers are trained regarding encounters with household pets.")).

2. Kendall continued to place high importance on changes in SLCPD policy and training throughout settlement negotiations with the City, until those negotiations were terminated by the City on July 29, 2014. (Second Declaration of Mark E. Kittrell (Dkt. 44), at ¶ 4 and Exhibit A thereto ("SLCPD has offered a generous settlement as compensation for the loss of Geist. However, there has been no disciplinary action taken against Brett Olson [sic] or action regarding policy change and training. . . . I would rather a public apology and non lethal policy change than any amount of money."); *id.* at ¶ 12 and Exhibit E thereto ("I will continue to demand that training and policies be instituted to protect our family members and make the community safer."))

3. The "offer" and "acceptance" that the Defendants allege created an enforceable settlement agreement did not include any agreement of terms relating to changes in SLCPD policy and training regarding encounters with household pets. (*See* Defs.' Opp. (Dkt. 64), at 9–10.)

4. At the time Kendall first saw the written proposed agreement provided by the City, Kendall believed he had agreed to one element—the amount of money that would be paid by the City—but believed the parties would still negotiate concerning other elements, including policies and training regarding police interactions with pet dogs and the use of lethal force. (Declaration of Sean Kendall (hereinafter, "Kendall Declaration III"), a copy of which is attached hereto as Exhibit "B," ¶¶ 3, 5.)

5. On July 23, 2014, Kendall's attorney, Brett Boulton ("Boulton") forwarded the Draft Settlement Agreement to Kendall, and stated in the body of that email, in part, as follows:

> You mentioned that you didn't want to sign anything until you got the report and the citizens review board's decision was made. I advise against waiting because this part of the process is independent from those two things and our case could be weakened if the report or the board's decision supports the officer.

> By signing the release you are not required to stop any of your activities with regard to your legislative efforts or participation in the process of discipline against the officer.

(Kendall Declaration III, ¶ 4 and Exhibit 1 thereto.)

6. On July 25, 2014, Kendall replied to Boulton by email and stated, in part, as follows:

> 10,000 is great but have they done anything for training and policies. It isn't about the money for me. I want to make sure that this doesn't happen again. I understand that seems ridicules and immature but there needs to be some policies that require officers to use non lethal means unless they are physically attacked. I can't use "I feel threatened" as an excuse to kill someone's dog.

(Kendall Declaration III, ¶ 5 and Exhibit 2 thereto.)

7. On July 29, 2014, Kendall emailed Boulton and stated, in part, as follows:

> Thank you for all your hard work to get to 10,000. I feel that without non lethal policy change I can not settle. I feel very strongly about this . . . I am strongly considering filing the lawsuit given the lack of follow through and holding [Chief Burbank] to his word.

(Kendall Declaration III, ¶ 6 and Exhibit 2 thereto.)

8. On July 29, 2014, Boulton replied to the email described in paragraph 7, *supra*, and stated, in part, as follows: "I respect your feelings on this." (Kendall Declaration III, ¶ 7 and Exhibit 2 thereto.)

9. Later on July 29, 2014, Boulton emailed Kendall again and recommended Kendall should "immediately consult with other lawyers to take the necessary steps needed to successfully pursue [Kendall's] case." In that email, Boulton also made reference to what his fee would have been "had the case settled for $10,000." (Kendall Declaration III, ¶ 8 and Exhibit 2 thereto.)

10. Boulton did not indicate to Kendall in any way that there had been a legally enforceable settlement agreement. In fact, Boulton communicated that no legally enforceable

settlement agreement had been entered into. Boulton did so by referencing what his fee would have been "had the case settled for $10,000" and by recommending that Kendall should seek other representation to "pursue [Kendall's] case." (Kendall Declaration III, ¶ 9.)

11. Kendall understood that (1) at no point in settlement negotiations had the parties reached an agreement about changes in policies and training and (2) that Kendall needed to sign the written proposed agreement before it would be effective, just as was required by the text of the proposed written agreement itself. (Kendall Declaration III, ¶ 10–11.)

12. On July 29, 2014, Boulton forwarded to Kendall an email from the City that stated, in part, as follows:

> 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.

(Kendall Declaration III, ¶ 12.)

13. Kendall understood the email referenced in paragraph 12, *supra*, to mean that if Kendall did not sign the proposed agreement and send it to the City, then settlement negotiations would be terminated and there would be no deal regarding settlement of Kendall's claims or payment of $10,000. Kendall rejected the proposed agreement by refusing to sign it and at all times understood he had never entered a final settlement agreement with respect to his claims related to the killing of his dog, Geist. (Kendall Declaration III, ¶ 13.)

B. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Undisputed Material Facts

1. **Kendall's Contention: The City Repeatedly Manifested an Intent That No Binding Agreement Had Been Reached and That Legal Obligations Between the City and Kendall Would Not Exist Unless and Until a Writing Was Made and Executed.**

Defendants' Responses to Kendall's Statement of Facts (¶¶ 1–7):

The Defendants do not dispute Kendall's Statement of Undisputed Material Facts ¶¶ 1–7.[2]

C. Defendants' Statement of Additional Facts and Kendall's Replies

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. (Dkt. 33, Declaration of Mark E. Kittrell ("Kittrell Decl."), ¶¶ 3-4, July 7, 2016.)

Kendall's Reply: 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. (Dkt. 33, Kittrell Decl., ¶¶ 3-4 & Exhibit 1 thereto.)

Kendall's Reply: Undisputed.

3. Through counsel, the parties exchanged several offers and counter-offers. (Dkt. 33, Kittrell Decl., ¶ 4 & Exhibit 1 thereto.)

Kendall's Reply: 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

[2] DUCivR 56-1(c)(2)(B) requires that "[i]f a fact is disputed, so state and concisely describe and cite with particularity the evidence on which the non-moving party relies to dispute that fact (without legal argument)." Defendants have, instead of stating a dispute, said Kendall's statements of fact have "been taken out of context" and are only part of "a long chain of emails." (Defs.' Opp. (Dkt. 64), at 5–8.) DUCivR 56-1(c) provides that "[f]or the purpose of summary judgment, all material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the movant's statement of material facts will be deemed admitted unless specifically controverted by the statement of the opposing party identifying and citing to material facts of record meeting the requirements of Fed. R. Civ. P. 56."

from the events of June 18, 2014 in exchange for payment of $10,000.00. (Dkt. 33, Kittrell Decl., ¶ 5 & Exhibits 2 & 3 thereto.)

Kendall's Reply: Undisputed.

5. Kendall admits he made this offer and that it was conveyed to the City. (See Dkt. 4, Counterclaim, ¶ 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"); Dkt. 7, Answer to Counterclaim, ¶ 8 ("Kendall admits the allegations set forth in paragraph 8 of the Counterclaim."); Dkt. 42, Opp'n to City's Mot. Summ. J., at 3 (stating this fact is "undisputed.").)

Kendall's Reply: Undisputed, except disputed insofar as Kendall had in mind that the money issue could be settled, while issues relating to changes in policy and training would be left for later negotiations and agreement. (Kendall Declaration III, at ¶¶ 3, 5.)

6. Over the next few days Mr. Kittrell exchanged emails with Mr. Boulton stating the City would likely accept Kendall's offer. (Dkt. 33, Kittrell Decl., ¶ 6 & Exhibit 4 thereto.)

Kendall's Reply: Undisputed.

7. On Monday, July 21, 2014, the City accepted Kendall's offer. (Dkt. 33, Kittrell Decl., ¶ 7 & Exhibit 2 thereto; Dkt. 7, Answer to Counterclaim, ¶ 8.)

Kendall's Reply: 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 and by consistently and repeatedly referring to the communications prior to the City's submission of the written agreement as "negotiations." The

written 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 Kittrell Deposition, at 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 SLCC 000028.) Kendall never executed that written settlement agreement, by counterpart or otherwise. (Exhibit 10 to Kittrell Deposition, at SLCC 000048.) The City repeatedly referred to the July 21, 2014, communications as "negotiations." (Exhibits 9, 10 to Kittrell Deposition, at SLCC 000044–45, 48).

8. Two days later, on Wednesday, July 23, 2014, Mr. Kittrell forwarded a draft settlement and release agreement to Mr. Boulton via email. (Dkt. 33, Kittrell Decl., ¶ 8 & Exhibit 5 thereto.)

Kendall's Reply: 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. (Dkt. 33, Kittrell Decl., Exhibit 5 thereto.)

Kendall's Reply: 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 SLCC 000028.)

10. Later that day, Mr. Boulton sent an email indicating his approval of the draft form of agreement. (Dkt. 33, Kittrell Decl., ¶ 9 & Exhibit 6 thereto.)

Kendall's Reply: 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 SLCC 000030.) (Emphasis added.) Defendants have never asserted, and there is no evidence, that Boulton ever represented to Kittrell that Kendall "was fine with," or approved, the written proposed settlement agreement.

11. The next day Mr. Kittrell forwarded a final form of the agreement with non-material changes to Mr. Boulton for Kendall's signature. (Dkt. 33, Kittrell Decl., ¶ 10 & Exhibit 7 thereto.)

Kendall's Reply: Undisputed.

12. Mr. Boulton said: "This looks fine to me . . . I do not have any changes. Please send me a final copy and I will have Sean sign it." (Dkt. 33, Kittrell Decl., ¶ 11 & Exhibit 8.)

Kendall's Reply: Disputed. First, the language quoted by Defendants was communicated *before* the "final form of the agreement" was sent by Kittrell to Boulton. (Exhibit 8 to Kittrell Deposition, at SLCC 000036–37.) Second, Defendants have misleadingly omitted a relevant sentence. Boulton stated 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 SLCC 000030.) (Emphasis added.)

13. Mr. Boulton and Kendall then went silent. (Dkt. 33, Kittrell Decl., ¶ 12 & Exhibit 8 thereto.)

Kendall's Reply: 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. Five days later, on the morning of July 29, 2014, Mr. Kittrell became aware of a Facebook post Sean Kendall had made on July 28, 2014 that stated:

> SLCPD has offered a generous settlement as compensation for the loss of Geist. However, there has been no disciplinary action taken against Brett Olson or action regarding policy change and training. I believe this is an attempt to placate me and buy me off. I would rather a public apology and non lethal policy change than any amount of money. (Dkt. 44, Second Kittrell Decl., ¶ 4 & Exhibit A thereto.)

Kendall's Reply: Undisputed.

15. Mr. Kittrell also became aware of a Salt Lake Tribune article that referenced this July 28, 2014 Facebook post. (Dkt. 44, Second Kittrell Decl., ¶ 5.)

Kendall's Reply: Undisputed.

16. Mr. Kittrell attempted to contact Mr. Boulton around 10:00 a.m. and left a message. He also sent him an email asking him to call me. (Dkt. 44, Second Kittrell Decl., ¶ 7 & Exhibit B thereto.)

Kendall's Reply: Disputed, insofar as it is unknown to Kendall who is the person referred to as "me" in the statement.

17. At 2:17 p.m., having not heard from Mr. Boulton, Mr. Kittrell sent an email informing Mr. Boulton of Kendall's Facebook posts, reminding Mr. Boulton that the parties had reached an agreement on July 21, 2014, and asking for a copy of the signed settlement agreement by 5:00 p.m. (Dkt. 44, Second Kittrell Decl., ¶ 8 and Exhibit C thereto.)

Kendall's Reply: Disputed. Defendants grossly mischaracterize the evidence by saying Kittrell was "reminding Mr. Boulton that the parties had reached an agreement" and was "asking" for a copy of the signed agreement. Kendall made clear in the part of his email omitted in Defendants' characterization of the email that the City would consider Kendall to have "rescinded his offer" and that "settlement negotiations" would be "terminated" if Kendall did not sign the written agreement by a deadline unilaterally imposed by the City. Materially different than Defendants' characterization of it, 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 SLCC 000045.) 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. Two minutes later, at 2:19 p.m., Mr. Boulton emailed Kendall and instructed him to "send me the signed release as soon as you can." (Dkt. 33, Kittrell Decl., ¶ 17 & Exhibit 11 thereto.)

Kendall's Reply: Undisputed.

19. Mr. Boulton then responded to Mr. Kittrell, at 2:22 p.m., saying "I will see what I can do." (Dkt. 44, Second Kittrell Decl., ¶ 11 and Exhibit D thereto.)

Kendall's Reply: Undisputed.

20. Mr. Kittrell's intent in requesting a signed agreement by 5:00 p.m. was to ensure Kendall would honor the settlement agreement. (Dkt. 44, Second Kittrell Decl., ¶ 9.)

Kendall's Reply: Disputed. Kittrell introduced the 5:00 p.m. deadline in an email to Boulton, which email Kittrell had given the subject line: "RE: DRAFT SETTLEMENT AGREEMENT – KENDALL – 5 pm Deadline" and in which Kittrell stated:

> 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 SLCC 000045.) (Emphasis added.)

Kittrell's statement cannot reasonably be read to indicate Kittrell was merely making a "request" that Kendall sign the agreement or that Kittrell intended to "ensure Kendall would honor the settlement agreement." Kittrell expressly represented that "settlement negotiations" would be terminated and that the City would consider Kendall to have "rescinded his offer." Although Kittrell stated during his deposition that he "intended" to "get [Kendall] to honor the Settlement Agreement," he admitted that the supposed intent was not "in there"—meaning his intent was unexpressed in the email to Boulton, which threatened to quote "terminate settlement negotiations" if Kendall did not sign the written proposed settlement agreement. (Kittrell Deposition, at 114:22–117:24.)

21. Setting a 5:00 p.m. deadline would provide a mark by which the City could know what Kendall's intentions were with regard to honoring the settlement agreement, given the July 28, 2014 Facebook post. (Dkt. 44, Second Kittrell Decl., ¶ 10.)

Kendall's Reply: Disputed. Defendants' statement is incredible. The City's email setting the 5:00 p.m. deadline in no way indicated there was any "agreement" to honor, but instead stated the parties were in "negotiations" and that Kendall's offer could be "rescinded." Further, the City explicitly provided that there were consequences if Kendall did not sign: The City would consider Kendall's "offer" to have been rescinded and the City would "terminate settlement negotiations." Kittrell's email speaks for itself:

> 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 SLCC 000045.) (Emphasis added.)

22. At 3:21 p.m., Mr. Kittrell became aware that Kendall had made the following post:

> I have had many things on my mind lately. I can not say that I have been the most reasonable and most level headed. After speaking with people whom I trust the most and my legal council [sic]; I have decided to accept the settlement offer. The money will be used to build a memorial for Geist as well as other family pets who were lost or taken abruptly. I will continue to demand that training and policies be instituted to protect our family members and make the community safer.

(Dkt. 44, Second Kittrell Decl., ¶ 12 and Exhibit E thereto.)

Kendall's Reply: Undisputed.

23. At 4:19 p.m., Mr. Kittrell became aware of a twitter post from Gene Kennedy of Fox 13 News that states: NEW: Sean Kendall just said he is NOT accepting a settlement offer with @slcpd and deleted a hasty post he made on Facebook. (Dkt. 44, Second Kittrell Decl., ¶ 13 and Exhibit F thereto.)

Kendall's Reply: Undisputed.

24. At that point, Mr. Kittrell became aware that Kendall had removed the post set forth in paragraph 22 and replaced it with the following:

> I would like to clarify, personally, the last 24 hrs. I have been under a great deal of stress personally and have felt the effects of it over the past few days. I have been working with the SLCPD to reach a settlement for the loss of Geist. This settlement was for a sum my lawyer and I felt would be an acceptable amount. I shared my thoughts about accepting the settlement a little to prematurely. However, I did not accept the settlement.
>
> I was basing my decision to settle on the advice of my lawyer as well as from others. I personally feel that fighting is the right decision but momentarily went against my personal feelings because of the recommendations of my lawyer. I apologize for the confusion and understand the lack of confidence. I will try to resolve this issue but understand those who feel they can not support any longer. (Dkt. 44, Second Kittrell Decl., ¶ 14 and Exhibit G thereto.)

Kendall's Reply: Undisputed.

25. At 4:49 p.m., Mr. Boulton emailed again stating "It looks like I need another day or so to get this worked out. I would appreciate if you would consider keeping the offer open until Thursday at 5 p.m. (Dkt. 44, Second Kittrell Decl., ¶ 15 and Exhibit D thereto.)

Kendall's Reply: Undisputed.

26. At 4:52 p.m., Mr. Kittrell responded saying "I'll talk to my client, but quite honestly I don't think they will agree" and referenced Kendall's July 29, 2014 Facebook post saying he would settle, the removal of that post, and Gene Kennedy's Twitter post. (Dkt. 44, Second Kittrell Decl., ¶ 16 and Exhibit H.)

Kendall's Reply: Undisputed.

27. At 4:57 p.m., Mr. Kittrell became aware that Kendall had made a definitive statement to the Tribune that he was not going to settle. (Dkt. 44, Second Kittrell Decl., ¶ 17.)

Kendall's Reply: Undisputed.

28. At 5:08 p.m. Mr. Kittrell emailed Mr. Boulton and informed him of the Tribune article. (Dkt. 44, Second Kittrell Decl., ¶ 18 and Exhibit I.)

Kendall's Reply: Disputed, insofar as the statement is incomplete and misleading. Kittrell did not merely inform Boulton of the *Salt Lake Tribune* article. Kittrell's email stated as follows:

> While I was on the phone with my client discussing whether to extend **the offer deadline**, I received an email that contains a link to a Trib article where your client indicates that he turned down "the City's offer" of $10,000.00. http://www.sltrib.com/sltrib/news/58236771-78/police-department-kendall-dog.html.csp
>
> First, **we will take these 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**.
>
> Second, we believe it is beyond the pale that your 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. Rule 3.6 of the Rules of Professional Conduct allow a party to make a public statement that is required to protect a client from undue prejudicial effect.
>
> Third, it 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.** My client may be willing to reopen **negotiations**, but we will not do so if those **negotiations** are made public, and we will not initiate any offers of compromise.

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

29. In light of the most recent statement to the media it appeared to Mr. Kittrell that continued efforts to get Kendall to honor the settlement agreement were futile and he communicated that the City was ending those attempts. (Dkt. 44, Second Kittrell Decl., ¶ 20.)

Kendall's Reply: Disputed. The Defendants blatantly misrepresent Kittrell's email, which speaks for itself:

> **[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 SLCC 000048.) (Emphasis added.)

30. At 5:13 p.m., Mr. Boulton informed Mr. Kittrell that he no longer represented Kendall. (Dkt. 44, Second Kittrell Decl., ¶ 21 and Exhibit I thereto.)

Kendall's Reply: Undisputed.

31. The following was posted after release of the Tribune article confirming Kendall was not going to honor the settlement agreement:

> Fellow Americans, today Sean has made a great judgment call. Sean has made it very clear that he is in this fight till the end by refusing to a monetary settlement which would result in the ability of the Chief to hide the investigation results from the public! Sean needs the continued support from everyone, please let Sean know how much we deeply appreciate him! The Justice for Geist movement will not be bought. The thousands of people that make up this group are what make this group so great. Today we saw Sean and this movement become more powerful than the Police Chief and his terribly policy and procedures which resulted in the death of Geist. Today we have become even more unified in our efforts. Today is a new beginning. We will secure accountability, police department policies and procedures will be changed for the better and Olsen and Burbank will meet justice first hand! WE WILL TAKE BACK OUR GREAT CITY.

(Dkt. 44, Second Kittrell Decl., ¶ 22 and Exhibit J thereto.)

Kendall's Reply: Undisputed. However, the statement has no relevance to whether or not Kendall and the City entered a binding settlement agreement on July 21, 2014.

32. 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 Dkt. 2, Amended Compl.)

Kendall's Reply: Disputed in that the statement is incomplete and misleading about the timeframe of these events. The City terminated settlement negotiations on July 29, 2014. Kendall filed the Complaint in this matter on October 16, 2015. (Exhibit A, Compl. (Dkt. 2-2), at 34.)

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

Kendall's Reply: 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.))

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

Kendall's Reply: Undisputed.

II. Kendall's Claim: THE PARTIES AGREED TO RESCIND ANY CONTRACT THAT MAY HAVE BEEN ENTERED INTO.

A. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Elements

Defendants' Response: Defendants agree with Kendall's statement of the elements, but state that two additional "principles" also apply.[3]

[3] Defendants have again deviated from the structure and form as prescribed by DUCivR Rule 56-1(c)(2) and have not stated what they "believe[] is the correct element" nor have they stated additional elements in a statement of additional elements and material facts. Instead, Defendants

Defendants First "Principle" of Law:

> "The proponent of the contract 'has the burden of showing that an offer and acceptance were more probable than not.'"

(Defs.' Opp. (Dkt. 64), at 14 (quoting *Cea v. Hoffman*, 2012 UT App 101, ¶ 27, 276 P.3d 1178).)

Kendall's Reply: Agreed.

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Kendall's Motion (Dkt. 42), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–15.

Defendants' Second "Principle" of Law:

> "For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous."

(Defs.' Opp. (Dkt. 64), at 14 (quoting *DCM Inv. Corp. v. Pinecrest Inv. Co.*, 2001 UT 91, ¶ 12, 34 P.3d 785).

Kendall's Reply: Disagreed. The authority cited by Defendants does not discuss an agreement of rescission. 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. *Spor v. Crested Butte Silver Min., Inc.*, 740 P.2d 1304, 1308 (Utah 1987) (citations omitted). "If one party, even

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say two additional principles of law apply. (Defs.' Opp. (Dkt. 64), at 4.) It is unclear whether Defendants contend these principles of law form additional elements that Kendall must meet.

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. (Am. Law Inst. 1981). *Accord Wallace v. Build, Inc.*, 16 Utah 2d 401, 405 n. 3, 402 P.2d 699 (1965).

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Kendall's Motion (Dkt. 42), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–10, ¶¶ 1–15.

B. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Undisputed Material Facts

1. Kendall's Contention: The City Offered to Rescind Any Agreement, and Kendall Accepted.

Defendants' Response to Kendall's Statement of Facts (¶ 8): The Defendants do not dispute Kendall's Statement of Undisputed Material Facts ¶ 8.

Kendall's Statement of Facts (¶ 9): 9. Kendall did not deliver to the City an executed written agreement before the City's deadline of 5 p.m., July 29th, 2014. (Exhibit 10 to Kittrell Deposition, at SLCC 000048.)

> **Defendants' Response:** Undisputed that Kendall did not sign the written agreement. The balance of the statement is disputed. The City refers the Court to the City's Statement of Additional Facts.

(Defs.' Opp. (Dkt. 64), at 15.)

Kendall's Reply: Defendants state they dispute the "balance of the statement." Of course, Kendall cannot have delivered an executed agreement if he did not execute such an agreement,

therefore the "balance of the statement" to which Defendants must be refuting is that the City had a deadline of 5 p.m., July 29th, 2014, for Kendall to provide a signed agreement to the City. Such a deadline is uncontroverted in the record.

Kittrell originally proposed the 5 p.m. deadline in an email that he wrote with the subject "RE: DRAFT SETTLEMENT AGREEMENT – KENDALL – 5 pm Deadline" and in which Kittrell wrote as follows:

> 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 8 to Kittrell Deposition, at SLCC 000038.) (Emphasis added.)

Kittrell subsequently referred to the 5 p.m. mark as "the offer deadline." (Exhibit 10 to Kittrell Deposition, at SLCC 000048 ("While I was on the phone with my client discussing whether to extend **the offer deadline**, I received an email that contains a link to a Trib article[.]") (Emphasis added.))

Defendants repeatedly refer to the "deadline" in their briefing. (*See, e.g.,* Defs.' Opp. (Dkt. 64), at 11.

The effect of the deadline was what Kittrell wrote, not what he later contended was his undisclosed, supposed intention. He wrote: "If we do not receive the signed settlement agreement by 5 p.m. . . . we will consider your client to have rescinded his offer, and accordingly, we will terminate settlement negotiations. (Exhibit 8 to Kittrell Deposition, at SLCC 000038.)

2. Kendall's Contention: The City and Kendall Reached a Meeting of the Minds to Rescind.

Defendants' Response to Kendall's Statement of Facts (¶ 10): The Defendants do not dispute Kendall's Statement of Undisputed Material Facts ¶ 10.

Kendall's Statement of Facts (¶ 11): 11. The City understood that, to whatever extent an enforceable agreement may have existed between Kendall and the City, Kendall's public statements on July 29, 2014, were a repudiation of any such agreement. (Defendants' Reply Memorandum, Docket 43 at 37 ("Kendall stated an intent to breach the settlement agreement[.]"); *id.* at 24 ("[Chief Burbank's] statement was issued after Kendall's statements to the media **repudiating his agreement**") (emphasis added); Exhibit 8 to Kittrell Deposition, at SLCC 000038 ("From your client's statements, it seems clear to us that he is withdrawing his offer to settle this matter"); Exhibit 10 to Kittrell Deposition, at SLCC 000048 ("First, we 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."))

> **Defendants' Response:** Disputed. This is not a recitation of a fact, but rather Kendall's legal argument that he repudiated the agreement and the City accepted that repudiation, which is addressed in the body of this opposition brief and the Reply in Support of the City's Motion for Summary Judgment.1 (See Dkt. 43.)

(Defs.' Opp. (Dkt. 64), at 16.)

Kendall's Reply: What the City understood about Kendall's public statements is a question of fact. Defendants have not cited any evidence to dispute that the City understood Kendall's statements were a repudiation of any settlement agreement that may have been reached between Kendall and the City. Hence, Kendall's statement must be viewed as being undisputed.

Kendall's Statement of Facts (¶ 12): 12. After the deadline of 5 p.m., July 29, 2014, had passed without Kendall signing the agreement, the City stated, in an email to Boulton 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 SLCC 000048.) (Emphasis added.)

> **Defendants' Response:** Undisputed that Mr. Kittrell sent an email that contains the quoted language. However, this quoted language is just a portion of the email. Moreover, this email is just one email in a long chain of emails and is taken out of context. The City refers the Court to the City's Statement of Additional Facts for a description of the entire email exchange between the parties and a description of the events of July 29, 2014 that give context and meaning to this email and other emails sent on July 29, 2014. The balance of this statement is disputed because it is not a statement of fact, but rather a recitation of Kendall's legal arguments regarding the legal effect of the City's emails and/or that the City offered to rescind the agreement, which are addressed in the body of this opposition brief and the Reply in Support of the City's Motion for Summary Judgment. (See Dkt. 43.)
>
> (Defs.' Opp. (Dkt. 64), at 17.)

Kendall's Reply: The Defendants dispute the "balance of this statement." Kendall has simply stated that there was a deadline, that the deadline passed without Kendall signing the agreement, and that Kittrell's email was sent after the deadline passed. These are facts, not legal argument. The Defendants have cited no evidence to dispute these facts. They have admitted there was a deadline. (*See, e.g.,* Defs.' Opp. (Dkt. 64), at 11 ("Setting a 5:00 p.m. deadline would provide a mark by which the City would know what Kendall's intentions were[.]")) They have admitted Kendall did not sign the agreement. (*Id.* at 15 ("Undisputed that Kendall did not sign the written agreement.")) Defendants assert that Kittrell's email was sent at 5:08 p.m. on July 29, 2014, (*see*

id. at 10–13 ("At 5:08 p.m. Mr. Kittrell emailed Mr. Boulton and informed him of the Tribune article.")), which was necessarily after the deadline of 5 p.m. of July 29, 2014.

Defendants' Response to Kendall's Statement of Facts (¶ 13): The Defendants do not dispute Kendall's Statement of Undisputed Material Facts ¶ 13.

III. Kendall's Claim: PROMISSORY ESTOPPEL PREVENTS THE CITY FROM ENFORCING ANY PURPORTED SETTLEMENT AGREEMENT.

A. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Elements

Defendants' Response: The City's Response[4] is that "the elements of promissory estoppel are not disputed, but this is an incomplete statement of the law." (Defs.' Opp. (Dkt. 64), at 18.) Defendants then provide two principles of law.[5]

Defendants' First Principle of Law:

Estoppel can rarely be invoked against a government entity.

> "As a general rule, estoppel may not be invoked against a governmental entity." *Anderson v. Pub. Serv. Comm'n of Utah*, 839 P.2d 822, 827 (Utah 1992) "In Utah, there is a limited exception to this general principle for unusual circumstances where it is plain that the interests of justice so require." *Anderson*, 839 P.2d at 827 (quoting *Eldredge v. Utah State Retirement Bd*., 795 P.2d 671, 675 (Utah Ct. App. 1990) (quotation marks omitted). "This exception applies, however, only if 'the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception.'" *Anderson*, 839 P.2d at 827 (quoting *Utah State Univ. v. Sutro & Co*., 646 P.2d 715, 720 (Utah 1982)). Indeed, "[t]he few cases in which Utah courts have permitted estoppel against the government have involved very specific written representations by authorized government entities.'" *Anderson*, 839 P.2d at 827.

[4] Defendants write "City's Response," (Defs.' Opp. (Dkt. 64), at 18), apparently using "City" and "Defendants" interchangeably.

[5] Once again, Defendants ignore DUCivR 56-1(c)(2) and have not stated what they "believe[] is the correct element" nor have they stated additional elements in a statement of additional elements and material facts. Instead, Defendants just state principles of law. (Defs.' Opp. (Dkt. 64), at 18.)

> "[I]t is well settled that equitable estoppel is only assertible against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice." *Benson v. Peace Officer Standards & Training Council*, 2011 UT App 220, ¶ 12, 261 P.3d 643, 647 (quoting *Holland v. Career Serv. Review Bd*., 856 P.2d 678, 682 (Utah Ct.App.1993)). "[T]he critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Id.* "'[T]he few cases in which Utah courts have permitted estoppel against the government have involved very specific written representations by authorized government entities.'" *Id.*

Kendall's Reply: Kendall agrees he must show failure to apply the rule of estoppel would result in manifest injustice, such as in cases involving "very specific written representations by authorized government entities." *Anderson v. Pub. Serv. Comm'n of Utah*, 839 P.2d 822, 827 (Utah 1992).

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim (hereinafter, "Kendall's Motion") (Dkt. 56), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–11, ¶¶ 1–18.

Defendants' Second Principle of Law:

> Also, the party seeking to rely on estoppel must have acted without fault, in good faith and not in violation of equitable principles.
>
> "Estoppel is a doctrine of equity purposed to rescue from a loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another." *Benson v. Peace Officer Standards & Training Council*, 2011 UT App 220, 13, 261 P.3d 643, 647 (quoting *Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976)). "[A] party who seeks an equitable remedy must have acted in

good faith and not in violation of equitable principles." Id. (quoting *Hone v. Hone*, 2004 UT App 241, ¶ 7, 95 P.3d 1221).

Kendall's Reply: Agreed.

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Kendall's Motion (Dkt. 56), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–11, ¶¶ 1–18.

1. In settlement negotiations with the City, beginning no later than July 1, 2014, Kendall sought changes in SLCPD policy and training with respect to encounters with household pets. (Exhibit 1 to Kittrell Deposition, at SLCC 000018 ("Additionally, as sought by your client, the SLCPD has begun the process of reaching out to the United States Humane Society, Best Friends Animal Society, and the U.S. Department of Justice to re-evaluate how its officers are trained regarding encounters with household pets."))

2. Kendall continued to place high importance on changes in SLCPD policy and training throughout settlement negotiations with the City, until those negotiations were terminated by the City on July 29, 2014. Second Declaration of Mark E. Kittrell (Dkt. 44), at ¶ 4 and Exhibit A thereto ("SLCPD has offered a generous settlement as compensation for the loss of Geist. However, there has been no disciplinary action taken against Brett Olson [sic] or action regarding policy change and training. . . . I would rather a public apology and non lethal policy change than any amount of money."); *id.* at ¶ 12 and Exhibit E thereto ("I will continue to demand that training and policies be instituted to protect our family members and make the community safer.")

3. The "offer" and "acceptance" that the Defendants allege created an enforceable settlement agreement did not include any agreement of terms relating to changes in SLCPD policy and training regarding encounters with household pets. (*See* Defs.' Opp. (Dkt. 64), at 9–10.)

4. At the time Kendall first saw the written proposed agreement provided by the City, Kendall believed he had agreed to one element—the amount of money that would be paid by the City—but believed the parties would still negotiate concerning other elements, including policies and training regarding police interactions with pet dogs and the use of lethal force. (Kendall Declaration III, ¶¶ 3, 5.)

5. On July 23, 2014, Kendall's attorney, Brett Boulton ("Boulton") forwarded the Draft Settlement Agreement to Kendall, and stated in the body of that email, in part, as follows:

> You mentioned that you didn't want to sign anything until you got the report and the citizens review board's decision was made. I advise against waiting because this part of the process is independent from those two things and our case could be weakened if the report or the board's decision supports the officer.
>
> By signing the release you are not required to stop any of your activities with regard to your legislative efforts or participation in the process of discipline against the officer.

(Kendall Declaration III, ¶ 4 and Exhibit 1 thereto.)

6. On July 25, 2014, Kendall replied to Boulton by email and stated, in part, as follows:

> 10,000 is great but have they done anything for training and policies. It isn't about the money for me. I want to make sure that this doesn't happen again. I understand that seems ridicules and immature but there needs to be some policies that require officers to use non lethal means unless they are physically attacked. I can't use "I feel threatened" as an excuse to kill someone's dog.

(Kendall Declaration III, ¶ 5 and Exhibit 2 thereto.)

7. On July 29, 2014, Kendall emailed Boulton and stated, in part, as follows:

> Thank you for all your hard work to get to 10,000. I feel that without non lethal policy change I can not settle. I feel very strongly about this . . . I am strongly considering filing the lawsuit given the lack of follow through and holding [Chief Burbank] to his word.

(Kendall Declaration III, ¶ 6 and Exhibit 2 thereto.)

8. On July 29, 2014, Boulton replied to the email described in paragraph 7, *supra*, and stated, in part, as follows: "I respect your feelings on this." (Kendall Declaration III, ¶ 7 and Exhibit 2 thereto.)

9. Later on July 29, 2014, Boulton emailed Kendall again and recommended Kendall should "immediately consult with other lawyers to take the necessary steps needed to successfully pursue [Kendall's] case." In that email, Boulton also made reference to what his fee would have been "had the case settled for $10,000." (Kendall Declaration III, ¶ 8 and Exhibit 2 thereto.)

10. Boulton did not indicate to Kendall in any way that there had been a legally enforceable settlement agreement. In fact, Boulton communicated that no legally enforceable settlement agreement had been entered into. Boulton did so by referencing what his fee would have been "had the case settled for $10,000" and by recommending that Kendall should seek other representation to "pursue [Kendall's] case." (Kendall Declaration III, ¶ 9.)

11. Kendall understood that (1) at no point in settlement negotiations had the parties reached an agreement about changes in policies and training and (2) Kendall needed to sign the written proposed agreement before it would be effective, just as was written in the proposed written agreement itself. (Kendall Declaration III, ¶ 10–11.)

12. On July 29, 2014, Boulton forwarded to Kendall an email from the City that stated, in part, as follows:

> 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.

(Kendall Declaration III, ¶ 12.)

13. Kendall understood the email referenced in paragraph 12, *supra*, to mean that if Kendall did not sign the proposed agreement and send it to the City, then settlement negotiations would be terminated and there would be no deal regarding settlement of Kendall's claims or payment of $10,000. Kendall rejected the proposed agreement by refusing to sign it and at all times understood he had never entered a final settlement agreement with respect to his claims related to the killing of his dog, Geist. (Kendall Declaration III, ¶ 13.)

14. From July, 2014, until learning approximately one and a half years later that the Defendants filed a Counterclaim asserting that Kendall had entered into an enforceable settlement agreement, Kendall never received any communications from any of the Defendants, or anyone else, that any of the Defendants asserted or believed there had been a legally enforceable settlement agreement between Kendall and any of the Defendants. (Kendall Declaration III, ¶ 14.)

15. No one has tendered any amount to Kendall as payment under a purported settlement agreement. (Kendall Declaration III, ¶ 14.)

B. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Undisputed Material Facts

1. Kendall's Contention: Kendall Acted with Prudence and in Reasonable Reliance on the City's Promise to (1) Consider Kendall's Offer Rescinded and (2) Terminate Settlement Negotiations.

Defendants Response to Kendall's Statement of Facts (¶¶ 14–15): The Defendants do not dispute Kendall's Statement of Undisputed Material Facts ¶¶ 14–15.

Kendall's Statement of Facts (¶ 16): 16. Kendall pursued his claims against the Defendants after receiving the City's email to Boulton that stated "we will take these public statements to mean that [Kendall] has rescinded his offer" and "you and your client should consider settlement negotiations terminated." (Exhibit 10 to Kittrell Deposition, at SLCC 000048); (Anderson Declaration, at ¶ 6.)

> **Defendants' Response:** The City does not dispute that Kendall has pursued claims against the Defendants. The balance of this statement is disputed because it is not a statement of fact, but rather a recitation of Kendall's legal arguments regarding the legal effect of the City's emails and/or that the City should be estopped from enforcing the settlement agreement, which are addressed in the body of this opposition brief and the Reply in Support of the City's Motion for Summary Judgment. (See Dkt. 43.)
>
> (Defs.' Opp. (Dkt. 64), at 20.)

Kendall's Reply: The Defendants again dispute the "balance of this statement." The Defendants do not cite to any evidence to dispute Kendall's factual account.

Defendants do not dispute Kittrell sent an email to Boulton with the quoted language. (Defs.' Opp. (Dkt. 64), at 17.)

It is clear that Boulton sent his email before Kendall filed his Notice of Claim, Amended Notice of Claim, and the Complaint and Amended Complaint in this action. Boulton's email was sent on July 29, 2014. (Exhibit 10 to Kittrell Deposition, at SLCC 000048.) Kendall filed his Notice of Claim on December 17, 2014, (Exhibit A to Am. Compl. (Dkt. 2), at 37); his Amended Notice of Claim on January 26, 2015, (*id.* at 52); his Complaint in this action on October 16, 2015, (*id.* at 35); and his Amended Complaint on December 8, 2015, (Am. Compl. (Dkt. 2)).

Kendall's Statement of Facts (¶ 17) 17. Kendall pursued his claims against the Defendants by (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) pursuing, for nine months, 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.)

> **Defendants' Response:** Undisputed that Kendall filed a Notice of Claim and an Amended Notice of Claim for claims arising from the events of June 18, 2014 and that Kendall is litigating this matter. The City disputes Kendall "pursued his claims" by filing a separate action challenging the constitutionality of certain state statutes and his appeal of the state court's decision upholding those statutes.

Kendall's Reply: Kendall obviously was "pursuing his claims" when he was challenging the barriers to bringing his claims presented by the bond and undertaking statutes.

2. Kendall's Contention: The City Knew Kendall Relied on the City's Promise, Which the City Knew Would Reasonably Induce Kendall to Act.

Defendants' Response to Kendall's Statement of Facts (¶¶ 14–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 14–17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

3. Kendall's Contention: The City Was Aware of All Material Facts.

Defendants' Response to Kendall's Statement of Facts (¶¶ 1–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

4. Kendall's Contention: Kendall Relied on the City's Promise and That Reliance Resulted in a Loss to Kendall.

Kendall's Statement of Facts (¶ 18): 18. Kendall's pursuit of his claims against the Defendants, after receiving the City's email stating the City would 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.

> **Defendants' Response:** The City does not dispute that Kendall claims to have incurred attorneys' fees and costs of $74,000. The balance of this statement is disputed because it is not a statement of fact, but rather a recitation of Kendall's legal arguments regarding the legal effect of the City's emails and/or that the City should be estopped from enforcing the settlement agreement, which are addressed in the body of this brief.

Kendall's Reply: The Defendants do not cite to evidence in their dispute of "the balance of this statement." Indeed, it is incontrovertible that Kittrell's email stated, unequivocally, as follows:

> [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 SLCC 000048; Defs.' Opp. (Dkt. 64), at 17 ("Undisputed that Mr. Kittrell sent an email that contains the quoted language."))

And it is incontrovertible that Kendall's pursuit of his claims against the Defendants—including retaining Ross C. Anderson, filing a Notice of Claim, an Amended Notice Claim, and the Complaint and the Amended Complaint in this action—occurred *after* Kittrell's email.

Boulton's email was sent on July 29, 2014. (Exhibit 10 to Kittrell Deposition, at SLCC 000048.) Kendall filed his Notice of Claim on December 17, 2014, (Exhibit A to Am. Compl. (Dkt. 2), at 37); his Amended Notice of Claim on January 26, 2015, (*id.* at 52); his Complaint in this action on October 16, 2015, (*id.* at 35); and his Amended Complaint on December 8, 2015, (Am. Compl. (Dkt. 2)).

5. Kendall's Contention: Kendall Relied on Very Specific Written Representations by the City.

Defendants' Response to Kendall's Statement of Facts (¶¶ 1–9, 12–13, 16–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12–13, 16–17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

IV. Kendall's Claim: EQUITABLE ESTOPPEL PREVENTS THE CITY FROM ENFORCING ANY PURPORTED SETTLEMENT AGREEMENT.

A. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Elements

Defendants' Response:

> The elements of equitable estoppel are not disputed, but this is an incomplete statement of the law because generally a claim of estoppel cannot be asserted against a government entity and the party asserting estoppel must have acted without fault, in good faith and not in violation of equitable principles.

(Defs.' Opp. (Dkt. 64), at 22–23.)

Kendall's Reply: Agreed.

It is unclear whether Defendants intend their statement of the law to be an additional element that Kendall must meet.

Kendall's Proffer of Undisputed Facts Demonstrating Kendall Has Met That Element:

See Kendall's Motion (Dkt. 56), PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, at 5–11, ¶¶ 1–18.

B. Kendall's Reply to Defendants' Disputes of Kendall's Statement of Undisputed Material Facts

1. **Kendall's Contention: The Defendants' Counterclaim Is Inconsistent with the Defendants' Prior Failures to Act.**

Defendants' Response to Kendall's Statement of Facts (¶¶ 1–9, 12–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12—17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

2. **Kendall's Contention: Kendall Took Reasonable Action on the Basis of the City's Failures to Act.**

Defendants' Response to Kendall's Statement of Facts (¶¶ 1–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

3. **Kendall's Contention: Kendall Would Suffer Injury If the City Is Allowed to Repudiate Its Prior Failures to Act.**

Defendants' Response to Kendall's Statement of Facts (¶¶ 14–18): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 14–18."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

4. Kendall's Contention: Kendall Relied on Very Specific Written Representations by the City.

Defendants' Response to Kendall's Statement of Facts (¶¶ 1–9, 12–13, 16–17): Defendants respond by referring to "CITY'S RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12–13, 16–17."

Kendall's Reply: Kendall refers the Court similarly to his replies to those same paragraphs *supra*.

ARGUMENT

I. ALL COMMUNICATIONS BY THE CITY UNTIL THE FILING OF DEFENDANTS' COUNTERCLAIM CONSISTENTLY AND UNDISPUTABLY ESTABLISH THAT THE PARTIES INTENDED TO BE BOUND, IF AT ALL, BY A WRITTEN AGREEMENT, NOT AN ORAL ONE, AND THAT THEY HAD MERELY ENGAGED IN NEGOTIATIONS, WHICH WERE TERMINATED BY THE CITY.

Whether an enforceable agreement was entered into depends on "all preliminary negotiations, offers, and counteroffers and interpret[ion of] the various expressions of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms.' " *Lebrecht v. Deep Blue Pools & Spas Inc.,* 2016 UT App 110, ¶ 14, 374 P.3d 1064 (quoting *1–800 Contacts, Inc.*, 2005 UT App 523, ¶ 4, 127 P.3d 1241). If it is apparent that either "the determination of certain details" was deferred until the written agreement was drafted and signed *or* that "an intention [was] manifested *in any way* that legal obligations between the parties [were to] be deferred until the writing [was] made, the preliminary negotiations and agreements do not constitute a contract." *Id.*, at ¶ 23 (quoting *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 200, 247 P.2d 817 (1952) (quoting Restatement (First) of Contracts § 26 cmt. a (Am. Law Inst. 1932))).

Through their Counterclaim, Defendants sought (1) to elevate the oral agreement regarding a single term—the settlement figure—as determinative of the parties' weeks-long negotiations regarding several terms and (2) to ignore or blatantly mischaracterize the many consistent manifestations that only "negotiations" had occurred and that the parties understood they would not be bound unless and until a final writing was executed by both parties.

Kendall does not argue that the City's intention to adopt a writing, alone, prevented the enforceability of an otherwise enforceable oral agreement. Rather, effect must be given to (1) the many consistent manifestations of intent that there was no agreement unless a written agreement

were executed; (2) the obvious understanding that no binding agreement had been reached and that the parties had only been engaged in "negotiations;" and (3) the City's acquiescence in the rescission of any offer Kendall may have made and the termination by the City of any negotiations.

A. The Undisputed Facts Establish Manifestations of Intent That the Parties Would Not Be Bound Unless and Until the Written Agreement Were Executed and That, Until That Happened, They were Simply Engaged in What the City Always Referred to as "Negotiations."

Lebrecht's ultimate holding is that, "[b]ecause the parties mutually understood a settlement agreement would not be entered into until some point in the future, we conclude it was clear error for the trial court to find that the parties entered into an enforceable settlement agreement." 2016 UT App 110, ¶ 28. In determining whether parties understood they had entered an enforceable settlement agreement, courts may look to the parties' conduct after the purported agreement was reached. *See, e.g, McKelvey v. Hamilton*, 2009 UT App 126, ¶ 30, 211 P.3d 390; *Goodmansen v. Liberty Vending Sys., Inc.*, 866 P.2d 581, 585 (Utah Ct. App. 1993); *On the Planet v. Intelliquis Int'l, Inc.*, No. 2:99-CV-324 DAK, 2000 WL 33363260 at *5.

The Defendants erroneously analogize the negotiations between Kendall and the City to the inapposite facts in *Murray v. State*, 737 P.2d 1000 (Utah 1987), and *Hunt v. Schauerhamer*, No. 2:15-CV-1-TC-PMW, 2016 WL 715797 (D. Utah Feb. 22, 2016). In *Murray*, after a settlement was offered and accepted, the defendant immediately sent a check in accordance with that agreement. That is diametrically the opposite of what the City did in this matter.

In *Hunt*, the defendant prepared a settlement check more than two weeks before the plaintiff's public statements that she would not settle. 2016 WL 715797, at *3–4. The defendant's performance was consistent with the existence of a final agreement. Again, that is far different

than the City's counsel in this matter stating that Kendall must sign the written agreement by 5:00 p.m. or the City "will terminate settlement negotiations" and the City's failure to tender payment.

Unlike in *Murray* and in *Hunt*, the Defendants here did not manifest, at any time until the filing of the Counterclaim, that a final agreement had been reached. The uncontroverted facts are:

(1) The City drafted a settlement agreement stating "there is no effective agreement until each of the parties hereto has executed at least one counterpart." (Exhibits 5, 6 to Kittrell Deposition, at SLCC 000027–28, 34; Defs. Opp. (Dkt. 64), at 6–7.)

(2) The City consistently referred to communications as "negotiations" after July 21, 2014. (Exhibits 9, 10 to Kittrell Deposition, at SLCC 000044–45, 48; Defs. Opp. (Dkt. 64), at 5–8.)

(3) The City referred to the "potential settlement" after July 21, 2014. (Exhibit 8 to Kittrell Deposition, at SLCC 000038; Defs. Opp. (Dkt. 64), at 5.)

(4) The City never prepared or proffered a check for $10,000. (Defs.' Opp. (Dkt. 64), at 20 ("The City does not dispute it has not tendered the $10,000 due under the settlement agreement."))

(5) When the City learned Kendall did not intend to settle, the City did *not* communicate there was an enforceable settlement agreement,[6] but instead demanded that Kendall sign the written agreement by 5 p.m. or, otherwise, it would consider Kendall to have "rescinded" his "offer" and the City would, "accordingly", "terminate settlement negotiations." (Exhibit 8 to Kittrell Deposition, at SLCC 000038; Defs. Opp. (Dkt. 64), at 5.)

[6] The City never communicated there was an enforceable settlement agreement or that it intended to enforce a 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. (Salt Lake City Corporation's Responses to Plaintiff's Request for Admissions, Exhibit B to Exhibit 1 to P. Mot. for Summ. J. (Dkt. 56), at 7.)

Defendants now contend the City understood it had entered an enforceable agreement, stating, "Mr. Kittrell sent an email informing Mr. Boulton of Kendall's Facebook posts, reminding Mr. Boulton that the parties had reached an agreement on July 21, 2014, and asking for a copy of the signed settlement agreement by 5:00 p.m." (Defs.' Opp. (Dkt. 64), at 11.) Nowhere does Kittrell's email state the parties "had reached an *agreement*." Defendants mischaracterize and misleadingly fail to mention highly material parts of Kittrell's email. The 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 SLCC 000045.) Directly contrary to the City's characterization, the next paragraph 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.**

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

Kittrell's email compels the conclusion that the parties were still, as he stated, in "negotiations." The City, just like Kendall, understood the parties had not reached a *final agreement* and the parties were not bound unless and until a written agreement was executed. Kendall and the City mutually understood a settlement agreement would only be entered into at some point in the future, when a written agreement was executed. This mutual understanding prevented the formation of a contract, just as in *Lebrecht*.

II. THE PARTIES REACHED A MEETING OF THE MINDS ON JULY 29, 2014, THAT THERE WAS NO SETTLEMENT AGREEMENT AND SETTLEMENT NEGOTIATIONS WERE TERMINATED.

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. *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. (Am. Law Inst. 1981). *Accord Wallace v. Build, Inc.*, 16 Utah 2d 401, 405 n. 3, 402 P.2d 699 (1965).

The City expressly acknowledged and acquiesced to the rescission of the purported "offer" by Kendall. Again, that is not merely an inference; it is precisely what the City's legal counsel communicated. The City's unequivocal, uncontroverted statement on that point was as follows:

> 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 SLCC 000045.) (Emphasis added.) When Kendall did not sign by 5 p.m., the City confirmed the status of "**negotiations**," stating:

> [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 SLCC 000048 (emphasis added).)

Defendants argue, puzzlingly, "No one understood the 5:00 p.m. deadline to be an offer by the City not to enforce the settlement agreement reached some six days earlier, if Kendall did not sign." (Defs.' Opp. (Dkt. 64), at 35.) Kendall understood Kittrell's email according to its *only*

possible meaning: If Kendall did not sign by the deadline, any offer made by Kendall and any understanding between him and the City concerning a monetary payment would be "rescinded." (Kendall Declaration III, at ¶ 13.) In support of their baseless position, Defendants cite to over fifty pages of the transcript of the deposition of Mark Kittrell. (Defs.' Opp. (Dkt. 64), at 35.) In that testimony, Kittrell had this to say in a transparent effort to twist the plain meaning of his email:

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.

* * *

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.)

The Utah Court of Appeals addressed unexpressed intentions like those Kittrell now purports to have had, as follows:

> 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).

III. IF THERE WERE AN AGREEMENT, THE CITY WOULD BE IN BREACH, PRECLUDING ENFORCEMENT OF THE AGREEMENT.

Defendants argue "[t]endering the amount owed under a settlement agreement is not a pre-condition to enforcement of an oral settlement agreement." (Defs.' Opp. (Dkt. 64), at 39.) In support, Defendants cite *Hunt.* However, in *Hunt,* the defendant notified plaintiff's counsel that a settlement check was available on August, 21, 2015, more than two weeks before the plaintiff publicly declared she would not settle. *Hunt v. Schauerhamer*, 2016 WL 715797, at *4. In contrast, the Defendants here have never tendered or offered tender of payment to Kendall.

> A party should not . . . be permitted to compel enforcement of a settlement agreement the material terms of which that party has willfully breached.
>
> 15B Am. Jur. 2d Compromise and Settlement § 41 (footnotes omitted).

IV. THE DEFENDANTS ARE ESTOPPED FROM ENFORCING ANY PURPORTED SETTLEMENT AGREEMENT.

Defendants cite to no evidence that Kendall acted in bad faith after receiving the City's email stating, "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 SLCC 000048.) Instead, they argue Kendall is "at least partially at fault" for the City's emails. (Defs.' Opp. (Dkt. 64), at 40.) Defendants argue the City's

emails were sent because "Kendall chose to breach a settlement agreement"[7] and cite, irrelevantly, *Benson v. Peace Officer Standards & Training Council*, 2011 UT App. 220, 261 P.3d 643. *Benson* simply held it was not reasonable for a person to give the false impression he was acting in a certain capacity nor for him to rely on a privilege bestowed based on that premise. *Id.* at ¶ 15.

Unlike in *Benson*, Kendall did not give any impression to the City that Kendall knew or should have known was false. Instead, Kendall reasonably believed the City's adamant and unequivocal statement (which Defendants seek to have the Court disregard by calling it "boilerplate") that there would be "no effective agreement" until the written document was executed. Specifically, Kendall took the City at its word when the City's legal counsel stated:

(1) "[T]here is no effective agreement until each of the parties hereto has executed at least one counterpart," (Exhibits 5, 6 to Kittrell Deposition, at SLCC 000027–28, 34.)

(2) "[T]he date that we enter into the settlement agreement . . . will be apparent from the signature lines." (Exhibit 6 to Kittrell Deposition, at SLCC 000030.)

When Kendall was surprised and angry that the written proposed agreement provided no opportunity for further negotiations about changes in police training and policy, he refused to sign the agreement. (Kendall Declaration III, at ¶¶ 5, 13.) Kendall then reasonably relied on the City's unequivocal and unilateral threat to terminate negotiations, which was stated as follows:

> **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.**

[7] Defendants' position that, in July 2014, Kendall breached a settlement agreement by not executing a written proposed settlement agreement, which expressly provided there would be no effective agreement if the document were not signed, is not only absurd, but is inconsistent with their contention that "Kendall did not actually breach the agreement until he filed the Complaint in this action," which occurred in October 2015. (*See* Defs.' Opp. (Dkt. 64), at 39.)

(Exhibit 9 to Kittrell Deposition, at SLCC 000045.) (Emphasis added.) The City left no room for confusion when it confirmed, shortly after the deadline passed, as follows:

> [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 SLCC 000048.) Kendall ascribed the only possible meaning to the City's words and believed his offer or any agreement that may have been reached was rescinded and negotiations were terminated. (Kendall Declaration III, at ¶ 13.)

CONCLUSION

Summary judgment against Defendants on their Counterclaim should be entered to give effect to the words of Kittrell when (1) he acknowledged that all communications prior to his submission of a proposed written settlement agreement were "negotiations," (2) he threatened Kendall that if he did not sign the document by 5:00 p.m. on July 29, 2014, the City would consider Kendall to have rescinded his offer, and "accordingly," the City would "terminate settlement negotiations, and (3) he stated, after the City's unilateral deadline passed without Kendall signing the document, Kendall and his attorney "should consider settlement negotiations terminated."

Indisputably, no agreement was ever entered into, and if there had been, no agreement remained after the City's acquiescence to Kendall's "rescission" of his "offer" and the "termination" by the City "of settlement negotiations." Kendall is entitled to pursue accountability for the unconstitutional search and seizure leading to the unnecessary killing of his dog Geist.

DATED this 6th day of December, 2016.

LEWIS HANSEN

By: /s/ Ross C. Anderson
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