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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 MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM AND SUPPORTING MEMORANDUM** Case No. 2:15-cv-00862 District Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., Plaintiff Sean Kendall respectfully moves for summary judgment dismissing with prejudice the Counterclaim filed in this matter by Defendants Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman, and Salt

Lake City Corporation ("Defendants' Counterclaim"). Defendants' Counterclaim to enforce a purported settlement agreement fails as a matter of law because the undisputed material facts show (1) there was never an enforceable settlement agreement; (2) in at least two ways, the parties unequivocally agreed to rescind any agreement that might previously have been reached; and (3) Defendants are estopped from enforcing any such agreement.

This Motion is supported by the accompanying Memorandum.

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

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INTRODUCTION

Defendants/Counterclaim Plaintiffs Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman, and Salt Lake City Corporation (collectively, "Defendants") seek to enforce a purported settlement agreement, which, if such an agreement exists, could bar Plaintiff Sean Kendall ("Kendall") from pursuing his claims against the Defendants relating to the tragic events of June 18, 2014, that led to the brutal and unnecessary killing of Kendall's best friend, his Weimaraner dog named Geist.

The incontrovertible facts show (1) no binding settlement agreement was ever reached because Salt Lake City Corporation (the "City") repeatedly manifested an intent that there would be, in its own words, "no effective agreement" until a written agreement was executed, which execution never occurred; (2) even if a settlement agreement had been reached, Kendall and the City came to a meeting of the minds to rescind any agreements made during settlement negotiations if Kendall did not execute the agreement by a deadline demanded by the City, which deadline passed without Kendall's execution of the agreement; and (3) Kendall's pursuit of his claims against the Defendants was in reasonable reliance, to his detriment, on the conduct and communications of the City.

BACKGROUND STATEMENT OF FACTS

After the tragic killing of Geist, Kendall, through his attorney Brett Boulton ("Boulton"), began negotiating with City to settle Kendall's claims. On July 15, 2014, Boulton offered to Mark Kittrell ("Kittrell"), attorney for the City, that Kendall's claims could be settled for $10,000. Kittrell informed Boulton that the City "accepted [Kendall]'s offer and that [the City] would

prepare the settlement agreement."[1] Boulton understood that he and Kittrell had merely "reached agreement on the settlement figure."[2] The City at all times, as explicitly stated on July 29, 2014, understood (1) the "offer" and "acceptance" were part of "negotiat[ing] a settlement figure" and (2) Kendall's "offer" was capable of being "rescinded," *i.e.*, it had not been unconditionally accepted so as to conclude a bargain.[3]

The City now argues that when Kittrell drafted the settlement agreement on July 23, 2014, Kittrell's intention was to memorialize the agreement that had been reached up to that point by Boulton and Kittrell.[4] On its face, the written settlement agreement drafted by Kittrell was an integrated agreement[5] and stated, unequivocally, "there is no effective agreement until each of the parties hereto has executed at least one counterpart."[6] The City then sent a revised written

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[1] 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 SLCC 000045.

[2] Declaration of Brett R. Boulton ("Boulton Declaration") (attached as Exhibit "B" to Anderson Declaration), ¶ 3.

[3] Exhibit 8 to Kittrell Deposition, at SLCC 000038 ("Your client made the initial offer to settle this matter during our face-to-face meeting on June 23rd. While that offer was rejected by the City, the parties **continued to negotiate a settlement figure**. After what appeared to be an impasse, on 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**. . . . 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.") (emphasis added).

[4] Kittrell Deposition, 57:12–17, 59:7–8, 71:20–72:7, 73:13–16, 89:4–6, 90:9–11, 90:16–18, 91:1–2; Mot. Summ. J. On Defendants' Counterclaims and Mem. in Supp. ("Defendants' Motion"), Docket 32 at 3 ("A settlement agreement was drafted to memorialize the terms of the parties' settlement agreement."); Reply Mem. in Supp. of Mot. for Summ. J. on Defendants' Counterclaims ("Defendants' Reply Memorandum"), Docket 43 at 1 ("[Kendall] refused to sign the writing memorializing the agreement.").

[5] Exhibit 5 to Kittrell Deposition, at SLCC 000027, ¶ 7.

[6] Exhibit 5 to Kittrell Deposition, at SLCC 000028, ¶ 11.

agreement, with the same integration provision and the same execution requirement. Kittrell communicated to Boulton that "the date [the parties] enter into the settlement agreement" would be the date the parties executed the agreement.[7] The written agreement "looked fine" to Boulton, who said he "will send it to Sean to look at."[8]

On July 29, 2014, the City learned Kendall publicly communicated that he did not want to settle with the City. In response the City stated, "From [Kendall's] statements, it seems clear to us that he is withdrawing his offer to settle this matter."[9] The City also provided Kendall a deadline: If Kendall did not provide a signed agreement by 5 p.m. on July 29, 2014, then the City would "consider [Kendall] to have rescinded his offer, and accordingly, [the City would] terminate settlement negotiations."[10]

Boulton asked for an extension to that deadline, but the City refused.[11] Kendall did not provide a signed agreement before the deadline.[12] As soon as the deadline passed, the City communicated to Boulton that "we will take these public statements to mean [Kendall] has rescinded his offer" and "you and your client should consider settlement negotiations terminated."[13]

Kendall then proceeded to pursue his claims. Kendall filed a Notice of Claim and an Amended Notice of Claim against the City; (2) Kendall pursued, for nine months, a declaratory

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[7] *Id.*
[8] Exhibit 6 to Kittrell Deposition, at SLCC 000030.
[9] Exhibit 8 to Kittrell Deposition, at SLCC 000038.
[10] *Id.*
[11] Exhibit 9 to Kittrell Deposition, at SLCC 000041, 44; Exhibit 10 to Kittrell Deposition, at SLCC 000048.
[12] Exhibit 10 to Kittrell Deposition, at SLCC 000048.
[13] *Id.*

judgment that the bond and undertaking statutes are unconstitutional; and (3) Kendall filed an appeal, which is pending before the Utah Court of Appeals, from the decision denying the declaratory judgment. Never during this entire time did the City communicate to Kendall anything about a purported settlement agreement.[14] Kendall then filed the Complaint in this action. Then, more than one year and four months after the City had terminated settlement negotiations, the City for the first time communicated to Kendall that it was asserting that Kendall and the City had entered into an enforceable settlement agreement.[15]

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

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

A. Elements and Legal Authority

If a party manifests in any way that there should be no legal consequences of oral negotiations unless and until a formal writing is executed, then there is no enforceable contract until that time. *Engineering Associates, Inc. v. Irving Place Associates, Inc.*, 622 P.2d 784, 787 (Utah 1980) ("There does not appear to be any doubt that if the parties make it clear that they do not intend that there should be legal consequences unless and until a formal writing is executed, there is no contract until that time."); *1-800 Contacts, Inc. v. Weigner*, 2005 UT APP 523, ¶ 7, 127 P.3d 1241 ("[I]f an intention is manifested in any way that legal obligations between the parties

[14] Salt Lake City Corporation's Responses to Plaintiff's Request for Admissions (attached as Exhibit "B" to Anderson Declaration), at 7 (the City admitted that "subsequent to July 29, 2014, and prior to the City's Answer and Counterclaim filed in this action on December 15, 2015, the City never communicated to Kendall that (1) the City believed there was an enforceable settlement agreement between Kendall and the City or (2) the City intended to enforce such a settlement agreement.").

[15] *Id*.

shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.") (citations and quotations omitted) (alteration in original); *Lebrecht v. Deep Blue Pools and Spas Inc.*, 2016 UT App 110, ¶ 22, 374 P.3d 1064 ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.") (quoting Restatement (Second) of Contracts § 21 (Am. Law Inst. 1981)).

B. Undisputed Material Facts

1. **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.**

1. On July 29, 2014, Kittrell, attorney for the City, sent to Boulton, attorney for Kendall, an email that stated:

> I left a message with your receptionist at your office this morning around 10 a.m., and I sent you an email asking you to call me regarding the public statements that your client made on Facebook regarding **the potential settlement**. We believe that your client is not **negotiating** in good faith and is simply looking to turn **settlement negotiations** into a publicity stunt to promote his group "Justice for Geist." In addition to his Facebook post, there is another post from Ryan Peltekian yesterday who indicates that the Justice for Geist group intends to use this unfortunate incident as a springboard for a political movement.
>
> Your client made the initial offer to settle this matter during our face-to-face meeting on June 23rd. While that offer was rejected by the City, **the parties continued to negotiate a settlement figure**. After what appeared to be an impasse, on 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**. This is not a situation where the City is attempting to "buy him off," rather, it is your client trying to leverage publicity in order to extract a settlement amount that is certainly larger than the fair market value of a male Weimaraner.
>
> 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.)

2. The City drafted a written settlement agreement (the "Draft Settlement Agreement"), which (1) the City sent to Boulton, on July 23, 2014, (2) was never signed by Kendall or the City, and (3) 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.
>
> * * *
>
> 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 SLCC 000027–28.) (Emphasis added.)

3. The City drafted a revised settlement agreement ("Revised Settlement Agreement"), which (1) the City sent to Boulton on July 24, 2014, (2) was never signed by Kendall or the City, and (3) 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.
>
> * * *
>
> 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 SLCC 000034.) (Emphasis added.)

4. The City stated, in an email to Boulton 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 SLCC 000030.)

5. After the City sent the email referenced in ¶ 1, *supra*, Boulton sent an email to Kittrell at

4:49 p.m. on July 29, 2014, which had the subject line "Re: DRAFT SETTLEMENT AGREEMENT – KENDALL – 5 pm Deadline" and stated:

> 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 9 to Kittrell Deposition, at SLCC 000044.)

6. The City replied by email at 4:52 p.m. on July 29, 2014, and stated:

> I'll talk to my client, but quite honestly, I don't think they'll agree to it.

(Exhibit 9 to Kittrell Deposition, at SLCC 000041.)

7. The City then stated, in an email to Boulton at 5:08 p.m. on July 29, 2014:

> [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 SLCC 000048.) (Emphasis added.)

II. THE PARTIES AGREED TO RESCIND ANY CONTRACT THAT MAY HAVE BEEN ENTERED INTO.

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 [1] at least an offer and acceptance and [2] 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

1. The City Offered to Rescind Any Agreement, and Kendall Accepted.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 2–3.

8. The City stated, in an email to Boulton 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 SLCC 000045.) (Emphasis added.)

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.)

2. The City and Kendall Reached a Meeting of the Minds to Rescind.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 8–9.

10. The City was aware on July 29, 2014, that Kendall had made public statements that he had turned down "the City's offer" of $10,000. (Exhibit 10 to Kittrell Deposition, at SLCC 000048; Kittrell Deposition, 128:15–18; Declaration of Mark E. Kittrell, Docket 33, at ¶ 14).

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.")

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.)

13. Salt Lake City Police Chief Chris Burbank publicly stated on July 29, 2014, that:

> As a public agency negotiating in good faith through proper channels, we were disappointed in today's outcome. 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**. To clarify, this was his request for a settlement, not our offer.

(Exhibit 14 to Kittrell Deposition.) (Emphasis added.)

III. PROMISSORY ESTOPPEL PREVENTS THE CITY FROM ENFORCING ANY PURPORTED SETTLEMENT AGREEMENT.

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).

Additionally, the government may be estopped only where "it is plain that the interests of justice so require," such as in cases involving "very specific written representations by authorized government entities." *Anderson v. Public Service Com'n of Utah*, 839 P.2d 822, 827 (Utah 1992).

B. Undisputed Material Facts

1. 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.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–13.

14. The City admitted that "subsequent to July 29, 2014, and prior to the City's Answer and Counterclaim filed in this action on December 15, 2015, the City never communicated to Kendall that (1) the City believed there was an enforceable settlement agreement between Kendall and the City or (2) the City intended to enforce such a settlement agreement." (Exhibit B to Anderson Declaration, at 7.)

15. The City never tendered performance by paying $10,000. (Kittrell Deposition, at 123:1–124:25; Exhibit B to Anderson Declaration, at 7.)

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.)

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.)

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

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 14–17.

3. The City Was Aware of All Material Facts.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–17.

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

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.

5. Kendall Relied on Very Specific Written Representations by the City.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12–13, 16–17.

IV. EQUITABLE ESTOPPEL PREVENTS THE CITY FROM ENFORCING ANY PURPORTED SETTLEMENT AGREEMENT.

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).

Additionally, the government may be estopped only where "it is plain that the interests of justice so require," such as in cases involving "very specific written representations by authorized government entities." *Anderson v. Public Service Com'n of Utah*, 839 P.2d 822, 827 (Utah 1992).

B. Undisputed Material Facts

1. The Defendants' Counterclaim Is Inconsistent with the Defendants' Prior Failures to Act.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12–17.

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

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–17.

3. Kendall Would Suffer Injury If the City Is Allowed to Repudiate Its Prior Failures to Act.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF

UNDISPUTED MATERIAL FACTS, ¶¶ 14–18.

4. Kendall Relied on Very Specific Written Representations by the City.

See *supra* PLAINTIFF/COUNTERCLAIM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, ¶¶ 1–9, 12–13, 16–17.

ARGUMENT

Summary judgment is appropriate where "the movant shows 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). Under Utah law, the existence of a contract is generally a conclusion of law. *Hone v. Advanced Shoring & Underpinning, Inc.*, 2012 UT App 327, ¶ 11, 291 P.3d 832 (citing *O'Hara v. Hall*, 628 P.2d 1289, 1290–91 (Utah 1981)); *see also Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004) ("Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law."). The existence of a contract may not be decided as a matter of law when "the evidence is conflicting or admits of more than one inference." *O'Hara*, 628 P.2d 1291.

Whether an enforceable contract was formed is a question of the parties' expressed manifestations of intent.

> 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."

Jaramillo v. Farmers Ins. Group, 669 P.2d 1231, 1233 (Utah 1983) (quoting Allen v. Bissinger & Co., 62 Utah 226, 219 P. 539, 541–42 (1923)).

Kendall is entitled to judgment as a matter of law because the undisputed material facts show (1) Kendall and the City did not create an enforceable settlement agreement, (2) Kendall and the City *did* reach an enforceable agreement to rescind any agreement that may have been reached during settlement negotiations, and (3) the City is estopped from asserting Kendall entered an enforceable settlement agreement because of the City's representations that it would consider Kendall to have rescinded his offer and to consider "settlement negotiations terminated."

I. KENDALL AND THE CITY NEVER ENTERED AN ENFORCEABLE CONTRACT BECAUSE THE CITY REPEATEDLY MANIFESTED ITS INTENTION THAT THERE WOULD BE NO EFFECTIVE AGREEMENT UNLESS A WRITTEN AGREEMENT WAS EXECUTED BY EACH OF THE PARTIES, WHICH EXECUTION NEVER OCCURRED.

Basic contract law provides that contract formation requires, among other things, an offer and an acceptance. *Lebrecht v. Deep Blue Pools & Spas Inc*. 2016 UT App 110, ¶ 13, 374 P.3d 1064. Where the offer and acceptance are oral, "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." *Id.* at ¶ 18 (quoting Restatement (Second) of Contracts § 27 (Am. Law Inst. 1981)).

To determine whether an enforceable contract was created, the Court "should consider all preliminary negotiations, offers, and counteroffers and interpret the various expression of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms." *Id.* at 14 (quoting *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶ 4, 127 P.3d 1241). A contract is *not* formed where a party manifests the intention there will be no contract unless and until the writing is executed. *Engineering Associates, Inc. v. Irving Place Associates, Inc.*, 622 P.2d 784, 787 (Utah 1980) ("There does not appear to be any doubt that if the parties make it clear that they do not intend that there should be legal consequences unless and until a formal writing is executed, there is no contract until that time."); *1-800 Contacts, Inc. v. Weigner*, 2005 UT APP 523, ¶ 7, 127 P.3d 1241 ("[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."); *Lebrecht*, 2016 UT App 110, ¶ 22 ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a

manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.") (quoting Restatement (Second) of Contracts § 21 (Am. Law Inst. 1981)).

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**. . . . Because these were merely preliminary negotiations regarding the terms of a future settlement agreement, the parties did not create an enforceable contract." *Id.* at ¶ 23 (emphasis added).

The communications between Kendall and the City show, repeatedly and unambiguously, that the parties intended they would not be bound unless and until the written document was executed. Accordingly, any oral agreement reached was merely a part of preliminary negotiations. The City manifested its intent that there would be no contract unless and until the writing was executed through (A) the written settlement agreement that the City drafted, (B) the City's

numerous emails to Boulton, and (C) the City's actions from July 21, 2014, until December 15, 2015, the date the City filed its Counterclaim.

A. The Written Agreement Drafted by the City Unequivocally States There Is "No Effective Agreement" Until Executed by Each of the Parties.

During negotiations, Kittrell stated: "I informed you on Monday, July 21st that the City accepted your client's offer **and that we would prepare the settlement agreement**." (Exhibit 8 to Kittrell Deposition, at SLCC 000038.) (Emphasis added.) The written settlement agreement—a three-page, double-spaced document, of only twelve paragraphs—was drafted by Kittrell and is characterized by Kittrell as being a "memorialization" of the oral agreement purportedly reached by Kendall and the City on July 21, 2014. (Kittrell Deposition, 57:12–17, 59:7–8, 71:20–72:7, 73:13–16, 89:4–6, 90:9–11, 90:16–18, 91:1–2; Defendants' Motion, Docket 32 at 3 ("A settlement agreement was drafted to memorialize the terms of the parties' settlement agreement."); Defendants' Reply Memorandum, Docket 43 at 1 ("[Kendall] refused to sign the writing memorializing the agreement.")). Therefore, there can be no clearer evidence of the City's intent than the written agreement itself.

The two versions of the written settlement agreement Kittrell sent to Boulton, on July 23, 2014, and July 24, 2014, both include the unambiguous requirement that, unless and until the document is signed by the parties, there is "no effective agreement."

> 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**.

(Exhibit 5 to Kittrell Deposition, at SLCC 000028 (the "Execution Requirement") (emphasis added); (Exhibit 6 to Kittrell Deposition, at SLCC 000034.))

The two versions of the settlement agreement also provided an integration clause:

> 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.

(Exhibit 5 to Kittrell Deposition. at SLCC 000027 (the "Integration Provision") (emphasis added); (Exhibit 6 to Kittrell Deposition, at SLCC 000033.))

The intention manifested by the City was that there would be "no effective agreement" until the document was executed by both parties. Neither of the written settlement agreements sent by Kittrell to Boulton were signed by Kendall or the City. (Exhibit 10 to Kittrell Deposition, at SLCC 000048.) Accordingly, Kendall and the City never entered an enforceable settlement agreement. Just as in *Lebrecht*, where one party stated "if we don't sign the [to be prepared] settlement agreement, then we're back where we are right now," 2016 UT App 110, ¶ 21, the City unambiguously manifested that unless and until all parties signed, there was "no effective agreement."

Defendants' Counterclaim and Defendants' Motion, (Docket 32), 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, strangely, that the Execution Requirement "doesn't matter,"[16] that the City never

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[16] 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?

communicated to Kendall that, in the City's view, the provision did not "have any meaning,"[17] and

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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 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.)

[17] 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

* * *

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."[18]

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.)

[18]
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.

The City's objective manifestations of intent *do* matter, regardless of the Defendants' self-serving, evasive conclusions of the game-playing sort that give lawyers a bad reputation among the public, 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).

B. The Emails Sent by Kittrell to Boulton Manifested an Intent That the Parties Were Not Bound Unless and Until the Written Agreement Was Executed.

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* * *

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.)

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 SLCC 000030.) Kittrell's language is an unequivocal objective manifestation of the City's intent that the City and Kendall *had not yet* entered into a settlement agreement. The City further manifested 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 SLCC 000044.) (Emphasis added.)

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 being rescinded, *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 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 SLCC 000048.) (Emphasis added.)

Those are not statements by someone who believed or intended that there was, at the time, a final, enforceable contract. The City manifested an "intention to enter into a written settlement agreement in the future." *Lebrecht,* 2016 UT App 110, ¶ 22. Accordingly, the communications between Boulton and Kittrell "were merely preliminary negotiations regarding terms of a future settlement agreement, [and] the parties did not create an enforceable contract." *Id.* at ¶ 23.

C. The Actions of the Defendants, Until Filing Their Counterclaim, Demonstrate They Did Not Intend to Enter an Enforceable Agreement Unless and Until a Writing Was Executed.

Beyond the email communications regarding the potential settlement agreement, the other "actions and performances," *id.* at ¶ 14, of both the City and Kendall reflect the intention that there was no enforceable agreement unless and until the written document furnished by the City was executed by both parties. This intention is reflected beginning from the initial oral "offer" and "acceptance," through all actions and communications by both parties until the surprising filing by Defendants of their spurious counterclaim.

1. The Conduct of the City During Formation of the Purported Settlement Agreement Demonstrates the City Intended There Was No Agreement Unless and Until a Writing Was Signed.

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"). "[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*, 2016 UT App 110, ¶ 18

(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 Restatement (Second) of Contracts § 27 cmt a (Am. Law Inst. 1981)).

Kittrell's statement that the City would prepare the settlement agreement does show, when it is considered in context, that the parties' agreements up to that point were preliminary negotiations rather than a contract. The relevant points of context are (1) the written agreement subsequently drafted by the City and provided to Kendall stated "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); (2) the City later referred to the agreement as a "potential settlement," (Exhibit 9 to Kittrell Deposition, at SLCC 000045); (3) the City repeatedly referred to the communications between Kendall and the City as "negotiations," (Exhibit 10 to Kittrell Deposition, at SLCC 000048, 52; Exhibit 14 to Kittrell Deposition); (4) the City communicated Kendall's *signing* of the settlement agreement was key to concluding settlement negotiations, (Exhibit 6 to Kittrell Deposition, at SLCC 000030 ("the date that we enter into the settlement agreement . . . will be apparent from the signature lines."); Exhibit 10 to Kittrell Deposition, at SLCC 000048–52); (5) the City communicated that Kendall's offer was subsequently capable of being rescinded, (Exhibit 10 to Kittrell Deposition, at SLCC 000048–52); and (6) after Kendall did not sign the written document furnished by the City, the City answered that "settlement

negotiations" were "terminated." (*Id*. at SLCC 000048). Indeed, Mr. Boulton understood that he and the City had merely "reached agreement on the settlement figure." Boulton Declaration, ¶ 3.

2. The Conduct of the City in Response to Kendall's Public Statements Shows the City Did Not Intend There Was Any Enforceable Agreement Unless and Until a Writing Was Signed.

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 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."[19] Kittrell admits such an

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[19]
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.

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.

After the City gave Boulton the 5 p.m. deadline, Boulton asked for an extension. (Exhibit 10 to Kittrell Deposition, at SLCC 000051 ("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.")) The City, if it were interested in enforcing, or even reaching, a settlement agreement, would have allowed the forty-eight-hour extension requested by Boulton. The City did not, however, allow such an extension, (Exhibit 10 to Kittrell Deposition, at SLCC 000048), meaning that any potential deal was dead.

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 SLCC 000048.) (Emphasis added.)

> 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 City's intent is further shown by 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.)

Just as in *Lebrecht*, "the parties expected to be bound by a written agreement, not an oral one." 2016 UT App 110, ¶ 19, 374 P.3d 1064.

3. The City's Inaction After July 29, 2014, Shows the City Did Not Believe There Was an Enforceable Settlement Agreement.

The City's conduct afterward also demonstrates the City intended there was no settlement agreement unless and until the written agreement was signed. 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, at 7.) 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 even mentioned, and certainly never invoked, the purported settlement agreement when (1) Kendall filed a Notice of Claim and an Amended Notice of Claim against the City; (2) Kendall pursued, for nine months, 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. Kendall and the City Agreed to Rescind Any Settlement Agreement, If There Were One.

When 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. (Am. Law Inst. 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)). The proponent of a contract "has the burden of showing that an offer and acceptance were more probable than not." *Sackler v. Savin*, 897 P.2d 1217, 1222 (Utah 1995).

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 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 (Am. Law Inst. 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. (Am. Law Inst. 1981).

Therefore, a binding contract 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 SLCC 000048.)

In line with the emails by Kittrell, (1) Salt Lake City Police Chief Chris 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. The City Offered to Replace Any Binding Oral Agreement, If One Had Been Reached, with an Agreement That There Is No Effective Agreement Unless and Until the Writing Was Executed, Which Offer Kendall Accepted.

"Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. . . . Two minds are required to change the terms and conditions of a contract[.]" *Green v. Garn*, 11 Utah 2d 375, 379–80, 359 P.2d 1050 (1961) (quoting 12 Am.Jur., 1011, § 431.) Assuming, *arguendo*, that Kendall and the City reached a binding oral agreement, the City subsequently offered to consider there was no binding oral agreement and that, instead, there was "no effective agreement" until the written agreement was executed by both parties. The City made such an offer by, subsequent to the purported oral settlement agreement, drafting and sending to Boulton the written terms of the agreement that stated ". . . there is no effective agreement until each of the parties hereto has executed at least one counterpart." (Exhibit 5 to Kittrell Deposition, at SLCC 000027–28.)

Kendall accepted that offer, and the parties came to a meeting of the minds that there would be no effective agreement until the written agreement was executed by both parties. Kendall accepted the offer by choosing not to sign the written agreement and communicating publicly that he did not intend to settle with the City. *See, e.g.*, Exhibit 8 to Kittrell Deposition, at SLCC 000038

("From [Kendall's] statements, it seems clear to us that he is withdrawing his offer to settle this matter.").

Accordingly, even if a binding oral agreement had been reached, which clearly did not occur, such an agreement was replaced with the terms of the written agreement drafted by the City, which unequivocally states "there is no effective agreement" until executed by both parties.

C. 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 understood that, to whatever extent an enforceable agreement 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 ("[Salt Lake City Police Chief Chris Burbank's] statement was issued after Kendall's statements to the media repudiating his agreement[.]"); 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.")).

Kendall's manifest 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 SLCC 000045.) Thus, the City not only failed to object to rescission, it expressly agreed to it. Even without the City's express agreement, the circumstances alone "may justify the inference that there has been an agreement of rescission" because Kendall "expresse[d] . . . an intention to cease

performance" and the City "fail[ed] to object." 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 circumstances in this case leave no doubt that Kendall and the City reached an agreement of rescission. Those circumstances include (1) that 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," (Exhibit 8 to Kittrell Deposition, at SLCC 000038); (2) after the City's deadline passed 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 SLCC 000048); (3) 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); (4) 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 (5) 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.)

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 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' Counterclaim must be dismissed with prejudice because all of the elements of promissory estoppel and equitable estoppel are met.

The government may be estopped only where "it is plain that the interests of justice so require," such as in cases involving "very specific written representations by authorized government entities." *Anderson v. Public Service Com'n of Utah*, 839 P.2d 822, 827 (Utah 1992). *Anderson* describes that estoppel was allowed against the government where an applicant for a liquor license relied on an explicit representation by the Liquor Control Commission that the applicant's proposal complied with a statutory requirement. *Id.* (citing *Celebrity Club, Inc. v. Utah Liquor Control Commission*, 602 P.2d 689 (Utah 1979)). Estoppel was also allowed where a county employee relied on an explicit representation from the Utah State Retirement Office that the employee would receive credit for years of service that accrued prior to a temporary break in his employment with the county. *Id.* at 827–28 (citing *Eldridge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah Ct.App. 1990)).

The City made similarly explicit, unequivocal representations that, first, there was no effective agreement until the written agreement was executed by Kendall and the City and, second, the City would consider Kendall to have rescinded his offer and would consider that settlement negotiations were terminated.

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 at least 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 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 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 there was no enforceable contract and 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 Amended Notice of Claim against the Defendants; he pursued, for nine months, an action for declaratory relief that the bond and undertaking statutes were unconstitutional; he appealed the decision denying the declaratory relief, which is still pending before the Utah Court of Appeals; and he has been aggressively litigating his claims in this action for months, incurring substantial attorneys' fees and costs. (Anderson Declaration, at ¶ 6.)

2. The Defendants Knew Kendall Relied on the City's Promise, Which Defendants Expected to Induce Kendall to Understand 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 plain meaning 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 communications to Kendall to induce him to understand 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 representations of 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, for nine months, 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 sought 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 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. Based on the representations by the City, Kendall 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: First, as the City itself said, there was "no effective agreement" since there was no execution of the written settlement agreement insisted upon by the City. Second, the City unequivocally told Kendall the City would consider Kendall "to have rescinded his offer" and that he "should consider settlement negotiations terminated." The City's baseless contention that there is an enforceable settlement agreement is also precluded by 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 litigated this action.

DATED this 28th day of October, 2016.

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