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CLERK OF THE APPELLATE COURT
CASE NUMBER: 117103

No. 17-117103-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

HM of Topeka, LLC,

Plaintiff/Appellee,

v.

Indian Country Mini Mart and Carla D. Nissen,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Jackson County, Kansas
The Honorable Gary Nafziger, Judge
District Court Case No. 2006-CV-41

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Oral Argument: 15 minutes

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NATURE OF THE CASE

Over the period of several years beginning in 2004-2006 the sole owner of HM of Topeka, LLC a/k/a HM of Kansas, LLC, Terry Hummer, had multiple discussions with Roger Aldis about purchasing Indian Country Mini Mart ("ICMM"). The parties drafted a purchase agreement which both parties signed but the parties never closed on the sale of the business. At the pretrial stage and without allowing the parties to present all the factual evidence in support of their arguments, the trial court found that there was a meeting of the minds and that the parties had entered into a valid agreement. The trial court refused to consider whether Plaintiff was ready, willing, and able to perform under the agreement at the time of the alleged closing in 2006. The trial court further found that there was no ambiguity within the terms. ICMM and Carla D. Nissen now appeal the trial court's decision in ordering the parties to specifically perform the agreement.

STATEMENT OF THE ISSUES

I. **Whether the District Court erred by entering summary judgment at the pretrial conference without the filing of a motion for summary judgment and providing notice to the parties that the court intended to rule on the merits; and by disallowing a jury trial on those issues.**

II. **Whether the District Court erred when it summarily granted judgment on the issue of contract formation.**

III. **If the Court of Appeals finds that the contract was a valid and complete contract, whether the District Court erred in finding that the purported agreement was not ambiguous.**

IV. **Whether the District Court erred by considering parol evidence in determining whether the contract was ambiguous or not, which should have been an issue for the jury.**

V. **Whether the District Court erred by ignoring whether the agreement violated the statute of frauds, and not finding that it did.**

VI. **The Court erred by ordering specific performance on a real estate contract when facts and circumstances related to the marketability of title and ability to sell the**

property have changed subsequent to the making of the purported contract, and by changing an essential term of the contract.

STATEMENT OF FACTS

In *HM of Topeka, LLC v. Indian Country Mini Mart*, 44 Kan. App. 2d 297, 236 P.3d 535 (2010), the Kansas Court of Appeals reversed and remanded the district court's decision dismissing the case for lack of standing. The July 30, 2010, appellate decision is not part of the record on appeal, but it is a published decision that this court may take judicial notice of its previous findings of fact and conclusions of law, some of which are copied below for reference.

1. On July 30, 2010, the Court of Appeals did not rule on whether or not there was a contract because that was not the issue before the Court. Rather, the court determined that HM of Topeka LLC had standing to sue Appellants, and then reversed and remanded the District Court's decision dismissing the case on that ground. *See HM of Topeka, LLC v. Indian Country Mini Mart*, 44 Kan. App. 2d 297, 236 P.3d 535 (2010).

2. In making this determination, the Court made the following findings of fact that were in the record at that time at 44 Kan. App. 2d at 297-99:

> Terry Hummer is the sole member of HM of Topeka, LLC, a Kansas limited liability company. Indian Country Mini Mart (Indian Country) is a convenience store organized as a Kansas general partnership and owned in equal shares by Roger Aldis and Carla Nissen.
>
> Hummer had known Aldis for some time and first approached Aldis about purchasing Indian Country in July 2004. Hummer was unable to purchase Indian Country himself at the time, so he attempted to put together a transaction by which an unrelated entity, J & J Development, would purchase Indian Country and then lease the premises to Hummer Markets, another entity owned by Hummer. Although J & J Development signed a purchase agreement, the deal fell through prior to closing.
>
> In March 2006, Hummer again approached Aldis about purchasing Indian Country. Aldis provided Hummer with a purchase agreement document, which still listed J & J Development as the purchaser. On the first page of the agreement, Hummer

whited out "J & J Development" and handwrote "HM OF KANSAS LLC" (as opposed to HM of Topeka) in the space designated for the purchaser. On the final page of the purchasing agreement, Hummer removed J & J Development's signature block and representative's signature and handwrote "HM of KANSAS, LLC" (as opposed to HM of Topeka) under his signature. The purchase agreement was executed on March 20, 2006, by Nissen, in both her individual capacity and on behalf of Indian County, and by Hummer on behalf of HM of Kansas.

Hummer later realized his apparent mistake in writing "HM of Kansas" (which is not a legal entity) rather than "HM of Topeka" on the purchase agreement. Accordingly, Hummer's attorney prepared an amended purchase agreement that corrected the error. Although other closing documents prepared by Hummer and Hummer's counsel correctly identified the purchaser as HM of Topeka rather than HM of Kansas, there is no evidence that Aldis or Nissen saw these other documents.

The purchase agreement provided that closing would take place within 45 days. That date, May 4, came and went. Believing that the purchaser was having trouble obtaining financing, Aldis testified that he considered the purchase agreement to have terminated on May 15, 2006. Hummer stated that the delay was due to title insurance issues and insisted that the deal should still close. A title insurance commitment was issued on May 22, 2006. HM of Topeka was listed as the proposed insured on a title insurance commitment issued for Indian Country.

The transaction never closed. On June 15, 2006, HM of Topeka filed suit against Indian Country seeking specific performance on the purchase agreement and damages for breach of contract.

3. This court further noted "...that, notwithstanding knowledge of this typographical mistake, both Hummer and Indian Country continued to actively work towards closing the deal in April, May, and June 2006." *Id.*

Additional details about the parties

4. Roger Aldis and Defendant Carla Nissen were 50/50 partners in owning Indian Country Mini Mart ("ICMM"), a convenience store and gas station, located at 20330 US-75 Highway, Holton, Kansas. (R. II, 121, 185).

5. Aldis was a silent partner and Nissen operates the daily business. (R. II, 152, 166).

6. Nissen is the sole owner of the land upon which ICMM sits and she owns the surrounding land which also contains her residence. (R. II, 165).

7. Roger Aldis did not own the real property associated with the ICMM deal. (R. II, 151-52).

8. The residence and the mini mart have separate propane tanks, but both tanks are located on the residential property. (R. II, 167).

Negotiations and Unresolved Material Terms

9. In 2004, when the original contract between J&J Development and ICMM was drawn, Nissen believed that the contract involved other documents concerning the operations issues of ICMM. (R. II, 169).

10. Nissen operated ICMM and was not involved in negotiating the real estate or the contract between J&J Development and ICMM. (R. II, 170).

11. At the time Nissen signed the agreement with J&J Development, she did not understand whether she could add terms to the agreement and she did not have an attorney review the contract. (R. II, 171). Nissen did not have legal counsel review it because she thought it was part of a package of agreements which would then lead to counsel reviewing. (R. II, 171).

12. Aldis understood the purpose of the agreement that he presented to Carla Nissen to sign and that Hummer signed was simple—to present it to the bank to see if the ICMM could be added to the loan package. The agreement "didn't necessarily reflect all of our conversations with Tex Mex Express [a potential leaser that Hummer was trying to engage in a multi-party deal]." (R. II, 154-55).

13. What was originally conceived was that "Carter Petroleum had interest in placing up to 30 Tex Mex Express stores. . . and that we would need Carla to train managers." (R. II, 159).

14. Roger Aldis gave the agreement to Carla Nissen to sign and told her that he and the Purchaser were not sure if the bank would approve financing the purchase of the store. Aldis and

Hummer were aware of the lagoon issue but Aldis thought "why spend money at this point in time until we find out if Valley View [financing bank] would even approve of the addition of this to his existing loan package." (R. II, 154-55).

15. Nissen thought the original agreement was "an avenue to get the ball rolling" with Carter Petroleum. (R. II, 173).

16. Aldis testified:

> Q: So was there any kind of plan to modify the contract once Mr. Hummer had then gotten the package put together and the Indian Country Mini Mart added?
>
> A: Mr. Hummer actually asked if we should go ahead and put together a lease on the Tex Mex Express space, and we agreed there's no reason to create a lease or any other expense until we find out if the Mini Mart could ever be added to the loan package.

(R. II, 156).

17. Aldis testified:

> Q: My question was why did you not have that particular condition that the Tex Mex stores be opened be a part of the agreement to sell the Indian Country Mini Mart?
>
> A: I think the ...general consensus was we don't even know if the bank is going to let him add the Mini Mart or let the purchase, HM of Kansas, add the Mini Mart to their existing loan package. If they aren't going to allow them to do that, Carla would still be managing the Mini Mart.
>
> Q: And my question to you was if that was an important condition and the reason that the Indian Country Mini Mart was going to be sold, why was that not incorporated into any documentation?
>
> A: I will answer it the best I can is that we thought that this was step number one. If we don't accomplish step number one there is not really a step number two, because without Carla we have no one to train managers in our – in our circle of people we know.

(R. II, 160).

18. The purported agreement, dated March 20, which is entitled "Agreement for Purchase of Real Estate and Personal Property" contains the following paragraphs:

> [Paragraph] 8. Unless additional time is required to provide marketable title, this contract shall be closed on or before forty-five (45) days from the date hereof, with possession to be delivered to purchaser upon closing.
>
> [Paragraph] 9. Time is of the essence in this contract.
>
> ...
>
> [Paragraph] 11. This contract is expressly conditioned upon the **PURCHASER** being able to secure suitable financing for the purchase price as set forth above, and if such financing cannot be suitably arranged by **PURCHASER**, this Contract shall be null and void and Seller and Purchaser shall be released from all liability, and any monies paid hereunder shall be returned to the Purchaser.

(R. II, 189, 206-07).

19. Forty-five (45) days from the date the parties signed the contract on March 20, 2006 was May 4, 2006. (R. II, 126).

20. Hummer thinks closing would depend on when marketable title was delivered. He does not read the closing date to mean that the deal would close 45 days after it was executed or on May 4, 2006. (R. II, 189).

21. However, Aldis interpreted the same closing paragraph to mean that closing was to be 45 days after the agreement was signed. (R. II, 155).

22. When Hummer signed the agreement, he thought he was acquiring all the property from the southern edge of the concrete to include the storage tanks, and then head north and angle back to the concrete somewhere at a line between the house and the diesel pumps. (R. II, 188).

23. During his deposition, on a picture of the mini mart, Hummer drew the area that he thought he was purchasing. (R. II, 188, 198). In commenting on his markings on the picture,

Hummer indicated that it mattered a lot that he was purchasing a driveway to access the property. (R. II, 188-89).

24. Hummer testified:

> Q: Okay. Now was it important in your decision to execute Exhibit 5 [the purported agreement] that this portion of the driveway, where all of the driveway be part of the land that was being conveyed to you?
>
> A: To have sufficient ingress egress, yes.
>
> Q: It was a material term, wasn't it?
>
> A: I don't understand the question.
>
> Q: It mattered a lot that you had a driveway to get in?
>
> A: Yes.

Id.

25. Hummer was aware that there is a lagoon adjacent to the mini mart that services the mini mart as well as the residential house. (R. II, 189).

26. The agreement states that the purchaser shall have full access and right to the lagoons located on the property for as long as purchaser owns the property in question. (R. II, 189). However, the lagoon was not located on the property. (R. II, 189).

27. Hummer contemplated that he would need an additional document such as an easement in order to facilitate closing the agreement and to obtain access to the lagoon; in fact, one of his attorney's mentioned it. (R. II, 189).

28. When Hummer executed the agreement, he did not know whether the water meter serving the property was actually located on what was purportedly going to be conveyed to him. (R. II, 189).

29. Hummer now understands that the water meters are not located on the property described in the agreement. (R. II, 196).

30. Hummer agrees that if the mini mart did not have its own water meter and could not get water, Hummer would not have gone through with the transaction, stating: "it has to have water, yes." (R. II, 189).

31. Hummer further states that if what he was purchasing in terms of property did not include the driveway, he would not have gone through with the transaction; even though he thought he was purchasing the driveway. Hummer specifically answers: "If there was no entrance, no, I would not have [wanted to purchase the property]." (R. II, 196).

32. Concerning entry to the property, Hummer testified at his deposition:

Q: Okay, that's a very critical important issue, is it not?

A: Having entrance?

Mr. Lanterman: Object to form.

Q: Yes.

A: Yeah.

(R. II, 196).

33. Hummer also did not know whether the propane tank that serves the property was located in the property he planned to purchase. (R. II, 189).

34. On or about May 9, 2006, Hummer was trying to figure what parts of the property were included or not included in the legal description Roger Aldis provided to him and that is provided in the purported agreement (referred to as Exhibit 5 in the deposition). (R. II, 190).

35. On May 9, 2006, Terry Hummer's attorney, Brian Jacques, wrote to Kyle J. Mead, an examining attorney at Lawyer's Title of Topeka, Inc., to notify Mead that Hummer was sending a contract concerning the alleged purchase of 20330 US Highway 75, Holton, KS with an attached legal description. Mr. Jacques wrote, "I would note that there is also a second legal description attached which Terry has blocked off an area that he would like to additionally acquire and it

appears that the Seller is agreeable to this. A legal description will need to be obtained for this." (R. II, 191).

36. Hummer gave the last sheet on Exhibit 13, showing the legal description and a picture of the property in which Hummer drew the dashed line showing what he wanted to purchase to his attorney because "**it was part of the contract.**" Emphasis added. (R. II, 191).

37. On the second legal description attached and referenced by Jacques in his letter to Mead, Hummer indicated the area that he wanted to purchase includes storage tanks adjacent to the gas station. *Id.* at pp. 71-72. (R. II, 191).

38. In turn on May 10, Mead wrote to Judy Thomas of Jackson County Title and Abstract Co. Mead indicated that he was "advised that the buyer, HM of Kansas, LLC, wants to square off the tract and intends to buy all of the Seller's property to the eastern boundary with her neighbor on the east, as 'shown' on the survey markup Buyer has provided, in which I include. We're trying to convince buyer that a surveyor or engineer needs to draw up a final legal for the additional property. Intervening matters may have altered what seller owns from the legal that is shown on the survey. If that is the case, just let me know. Contract closing is set for August." (R. II, 211).

39. In or about May 30, 2006, the water line problem was disclosed to Hummer. Hummer describes it as: "there was a water meter that Indian Country Mini Mart paid the bill for but it also fed the house, and my understanding was that it crossed back and forth, that it started on land that would not be conveyed to us on the original contract, went through land that would be conveyed to us and then went to the house. And so they [Hummer's attorney and Aldis] were trying to determine a solution to how to provide water to the house." (R. II, 192).

40. On May 30, 2006, Brian Jacques wrote to Roger Aldis enclosing an easement agreement "concerning the lagoon located outside of the property agreed to be purchased by Mr.

Hummer," a deed conveying the real property to HM of Topeka, LLC (instead of HM of Kansas), and a bill of sale. In addition, a seller's affidavit was enclosed and Mr. Jacques informed Mr. Aldis that the title company will need this for closing. (R. II, 195, 212-45). None of these agreements were subsequently signed. (R. II, 192).

41. More than forty-five (45) days after the execution of the agreement, in or about May 30, 2006, Hummer states that Aldis called Hummer and told him that "they" decided not to close. (R. II, 156, 193).

42. Aldis states that during that same conversation, Hummer said "if you don't close tomorrow, I'll just have to sue you." (R. II, 156).

43. Following Defendants' revocation of the negotiations, Hummer directed his attorneys to prepare an Amendment to the agreement which states "HM of Kansas, LLC was improperly titled in the original agreement for purchase of real estate and personal property." (R. II, 194).

44. Hummer testified at his deposition as follows:

> Q: You understand there were many additional terms that needed to be worked out in order to effectuate the closing?
>
> A: I mean I have no idea. We'd have to ask Brian how many and what it was.
>
> Q: But again, had you believed you had a fully valid contract with all of the essential terms, why were you authorizing your attorney to continue to prepare documents?
>
> Mr. Lanterman: Object to form.
>
> A: Because you guys said no, so in this point we're trying to say well, what's wrong, what's it going to take. Let's get it done.
>
> Q: Well, wasn't it your attorney that wanted the change of name from HM of Kansas, LLC to HM of Topeka, LLC?
>
> Mr. Lanterman: Object to form.
>
> A: Yeah, to my knowledge we needed to put HM of Topeka.

(R. II, 195).

45. Under threat of being sued, on June 1, 2006, Daniel Crow wrote to Mr. Hummer's attorneys and informed him that he had been retained by the sellers, ICMM and Nissen on the above-referenced property. (R. II, 157, 246-47).

46. Mr. Crow informed Mr. Hummer's counsel that he believed that the Agreement had expired by its own terms and specifically referenced paragraph 8 which required the transaction to close within forty-five (45) days of the date of agreement or no later than May 4, 2006. *Id.*

47. Mr. Crow also identified a number of issues outstanding between the parties including ancillary documents that had been provided but had not been signed and unresolved issues regarding certain details of the transaction including, but not limited to, "accuracy of legal descriptions for the property conveyed as well as the property retained; wastewater lagoon system permit and/or approval; specific easement language for the shared usage of the lagoon and/or egress and the egress rights; specific terms of the lease and/or inventory calculations; potential lender funding issues; and, unknown circumstances surrounding the location of the shared water meter and/or any easement language required for use and maintenance of the water lines." *Id.*

48. Under threat of being sued, Mr. Crow, indicated that his clients were still willing to proceed in trying to resolve some of the issues. *Id.*

49. When Nissen's lawyer, Crow, sent the letter pointing out missing information from the original agreement (exhibit 5), and indicated ICMM was still willing to close, Nissen felt like she was forced into cooperating and closing because Hummer had threatened to sue her. (R. II, 176-77).

50. On Sunday, June 4, 2006, Brian Jacques emailed Daniel Crow stating, "The two issues we need to decide on Monday are insurance and the water meter." He further explains that he left many areas of these agreements blank but he is attaching the proposed documents. (R. II, 133)

51. Mr. Crow responded Sunday afternoon and said, "You are correct, there are issues that yet need to be resolved. The amount of the rent, the term of the lease, the water meter circumstances and various insurance issues are some of them." *Id.*

52. Mr. Crow further indicated that much of the information put in the lease was not agreed to by ICMM. Then Mr. Crow stated, "Additionally, it was my understanding that these documents were merely designed to 'clean up' the existing documents. That would include providing the proper name for the buyer and modifying the attachments as we had agreed. Instead, a glance at the agreement of purchase and sale reveals certain seller obligations that did not exist before (i.e., Article 8, Paragraph 9.2). Is this intended to completely open the door to renegotiating the other terms as well? If not, and subject to consultation with my client, Article 8 and Paragraph 9.2 need to be deleted. If so, I will prepare some additional terms as well. Please advise." *Id.*

53. Mr. Aldis testified that Mr. Hummer's law firm informed Mr. Crow, his lawyer, that "hey, all of these documents have to be redone. They're all screwed up. And HM of Kansas doesn't even exist." And then, Aldis was relieved of his involvement in the negotiations because Carla Nissen's residential property and additional details were being discussed. (R. II, 158).

54. As part of the amended agreement and to facilitate a gap in time for the takeover, a lease agreement was to be prepared between HM of Topeka, LLC and Carla Nissen and the mini mart. (R. II, 194).

55. One of the requirements for closing with Hummer's financier, Valley View Bank, was to have an executed lease for the mini mart. (R. II, 195).

56. Hummer is not aware of any other lease agreement for the mini mart. (R. II, 195-96).

57. Aldis testified that he never received confirmation from Hummer that Valley View was willing to finance Hummer's purchase of the mini mart. (R. II, 153).

58. Nissen was not provided documentation or any information that Mr. Hummer had a commitment to purchase the ICMM. (R. II, 175).

59. Concerning Plaintiff being ready, willing, and able to close, Nissen testified:

> Q: Did Mr. Hummer ever indicate that he was willing to close the deal based upon Deposition Exhibit 5?
>
> A: He was willing to close on based on this Exhibit 5?
>
> Q: Yes.
>
> A: No, I did not recall Mr. Hummer closing on that.
>
> Q: I don't think he ever did or we wouldn't be here today.
>
> A: Right.
>
> Q: The issue is, do you recall him saying we'll close in accordance with the terms just as they're set forth in Exhibit 5 and we'll deal with ...the ingress/egress. We'll just have to leave it be, the noncompete, we'll just have to leave it be?
>
> A: I do recall that sloppy attitude continuing on, **that the more things were undefined, then it became it's okay to be undefined**.
>
> Q: And so am I to take it from your answer that that meant you understood Mr. Hummer said yea, well, then let's go back to the original deal that's proposed in Exhibit 5 and do it that way?
>
> A: I don't recall it specifically going back to five. I recall not Mr. Hummer talking to me, of course, but **some talk of his discussions that seemed to be less defined or just as less defined**.

(R. II, 178).

60. As Nissen saw it, the original agreement failed for several reasons, including but not limited to, it did not contain an easement to the residential property and it contained an incorrect

legal description with a difference in acreage from 1.58 acres to 1.72 acres. (R. II, 179). If Nissen sold ICMM, items such as water, propane, diesel islands, gas pumps, storage tanks, and sewage would have to be part of a sale. (R. II, 180).

61. In the end, Nissen was trying to run ICMM which takes, on average 5,475 hours of her time on average per year or 15 hours per day. She did not go through with the sale because of issues concerning "...the lagoon, the water meter, the propane tanks, the phone lines, the inventory and how I was going to pack that up and move it if no one paid me for it. The issue of get your stuff out in two weeks because we're coming in and where I was going to go. The issue of who I was going to have in and out on my residential property and how is that traffic going to be monitored. It became an issue with my home life, and that's when it got to be too much and it escalated from all of those points on." (R. II, 177, 181).

Procedural Background

62. Plaintiff filed this matter on June 15, 2006. (R. I, 13-20).

63. On February 6, 2008, the Court entered summary judgment in favor of Indian Country Mini Mart, Carla D. Nissen and Roger Aldis. (R. I, 311).

64. The Plaintiff, HM of Topeka, LLC a/k/a HM of Kansas, LLC, appealed the decision granting summary judgment and the Court of Appeals reversed and remanded this matter on July 30, 2010. *HM of Topeka, LLC v. Indian Country Mini Mart*, 44 Kan. App. 2d 297, 236 P.3d 535 (2010).

65. Since the case has been pending, several procedural happenings have occurred including one of the defendants, Roger Aldis, passing away from cancer; the sole and principal owner of HM of Topeka, LLC, Terry Gene Hummer, pleading guilty to wire fraud, a Class B Felony on April 20, 2015; and, the Kansas Department of Revenue filing two tax liens on the

property which is the subject of this lawsuit in June 2014 totaling in excess of $2,000,000.00 (R. II, 61, 74).

66. On October 12, 2016, the parties filed their Amended Pretrial Questionnaires. (R. II, 102, 113).

67. ICMM and Nissen's Amended Pretrial Questionnaire clarify that their theory of defense is that the parties "did not have a meeting of the minds sufficient to create an enforceable contract. The contract referenced in Plaintiff's petition has terms which render performance impossible or otherwise impracticable. Plaintiff was not ready, willing and able to close on the purported real estate contract and not able to close on the purported date that the purported real estate contract was to have been closed." (R. II, 113-14).

68. Further, Defendants identified another theory of defense that "the purported real estate contract lacked material terms which necessitated negotiations subsequent to the executed purported real estate contract in order for the closing to occur." During the course of the subsequent negotiations, Plaintiff sought additional terms and conditions which, Defendants did not agree to. Ultimately, the closing under the terms of the executed real estate purported contract could not occur because it lacks so many material terms that Defendants decided that executing a new purported real estate contract was simply not in the best interest of the Defendants." (R. II, 114).

69. Defendants further identified as a question of fact in their Amended Pretrial Questionnaire "whether the parties had a meeting of the minds as to the essential terms of the contract." And "whether Plaintiff was ready, willing and able to close on the contract"; "whether Plaintiff was ready, willing and able to close on the contract sufficient to support enforcement of

the contract."; and, whether Plaintiff has or had the purchase money available to enforce specific performance as a condition precedent to pursuing specific performance as a remedy." (R. II, 114).

70. On October 19, 2016, the parties had a pretrial conference before Judge Gary Nafziger. (R. III).

71. During the October 19, 2016, pretrial conference, Defendants' attorney requested that the Court make the initial determination on whether there is a contract and that HM Topeka of Kansas was ready, willing and able to perform such contract. Defendants' attorney argued that that was a factual determination that a jury should make. Further, he indicated that determination of the appropriate remedy, in which Plaintiff was requesting specific performance, could be bifurcated after the factual determination whether the contract was created and whether HM of Topeka was ready, willing and able to perform such a contract was found by a jury. (R. III, 3:21-4:10).

72. Plaintiff's attorney argued that the Court of Appeals ruled previously that HM of Topeka, LLC had legal standing to sue Defendants for specific performance of the underlying purchase agreement and damages for breach of the underlying agreement and thus, the issue of whether there was a valid and binding contract had already been decided that there was no question of fact. (R. III, 5:5-18).

73. During the pretrial arguments, the Court continued to press Defendants' counsel on what Defendants claimed in the contract was ambiguous rather than analyzing or accepting that the issue was about contract formation. (R. III, 6-10).

74. Defendants' counsel continued to argue that the issue was really whether or not there was a complete contract because there were material terms that still needed to be negotiated. He referenced this fact by indicating that the parties each were paying their attorneys at the time

the purported agreement was being negotiated in 2006 to negotiate additional terms and that there would be evidence presented at trial that there were emails back and forth between negotiating attorneys on both sides, drafts of additional language terms, and that the parties did not even have the correct legal description attached to the initial purported agreement. (R. III, 8:13-14).

75. Further, Defendants' counsel argued that if there was no question about whether there was an enforceable contract, the opposing party could have filed summary judgment which it did not. (R. III, 9:4-11).

76. When the Court began to consider Defendants' argument by asking whether it was a question of fact or a question of law as to whether the contract was complete, HM of Topeka, LLC's attorney interrupted the Court to press his opinion that the issue was whether the contract was ambiguous and that if the contract is ambiguous it is capable of two meanings and that is a fact question as opposed to the Court deciding within the four corners whether an ambiguity exists, which is a question of law. (R. III, 9:15-21).

77. The Court then went back to the same line of questioning to Defendants' counsel pressing him to identify the ambiguity in the contract. (R. III, 9:22-25) Defendants' counsel again restated that their position was that there are missing terms to the contract and when the Court followed up with what terms counsel recited, that the contract was lacking all material terms. When further pressed during the hearing, Counsel clarified that there is not an easement for the property owner to access her residential property. In other words, that the residential property and the convenience store shared the same lane, and that the easement is located on the plat of land that includes her residence (not part of the sale). (R. III, 12).

78. Counsel further argued that there was no meeting of the minds as indicated by the parties' conduct during the negotiations in which they continued to employ attorneys, that Mr.

Hummer was paying an attorney to negotiate terms, and that "it's a little disingenuous to say that those are not material terms, we don't get paid lightly, I certainly wouldn't pay an attorney to negotiate something that wasn't necessary. Our position is the parties never fully agreed. (R. III, 11:21-12:6)

79. The Court continued to get stuck on whether or not he had to decide first if the contract is ambiguous or not rather than deciding whether or not it was a complete contract. (R. III, 13:1-5). The Court opined that Defendants were talking about things that are not in the contract so it is not an interpretation of the contract; it is a supplemental negotiation incident to the contract. (R. III, 3:22-14:1)

80. The Court repeated two more times that he believed the first step was to decide whether or not the contract was ambiguous or unambiguous **and then it would turn to a bench trial on the issue of equities of specific performance.** (Emphasis supplied). (R. III, 17:2-6, 12-16).

81. As part of the pretrial conference the Court ordered the parties to brief the issue of ambiguity of the contract or non-ambiguity for the Court to rule on and provide case law on specific performance. (R. III, 18:21-19:1). The Court asked how long the parties needed to get a brief to him. Plaintiff's attorney said they could do a brief on just the law of specific performance but they really need Defendants to point out where the ambiguity is so that they could respond. The Court clarified that he did not hear Defendants' counsel say that there was an ambiguity in the contract but that it was incomplete as it was continuing negotiations. (R. III, 21:2-6)

82. Defendants' attorney reiterated that before you can get to ambiguity you have got to get past formation and the Court then stated "well, the contract is signed" and Defendants' attorney argued "yes, but it's an issue of meeting of the minds and that they would brief that issue."

(R. III, 21:12-16) The attorneys in court further wrestled with the issue of whether there is meeting of the minds which ultimately goes to the issue on whether the case should be tried or not. Therein, the parties decided on a briefing schedule to brief issues of ambiguity and contract formation following the pretrial. (R. III, 22:9-10)

83. The parties submitted their pretrial briefs on October 28, 2016. (R. II, 120)

84. The Court held oral arguments on the briefs on October 31, 2016. (R. IV, Transcript of Hearing, 1).

85. At the outset of the hearing the Court dismissed ICMM and Carla Nissen's argument that the contract was incomplete by stating "the issue for the Court is if the contract, which is not in dispute—whether the contract between the parties is vague and ambiguous or if its complete within the four corners of the document." (R. IV, p. 2:13-18) Although ICMM and Nissen's attorney argued that they were still taking the position that the contract was not formed and presented deposition testimony indicating that the parties did not have a meeting of the minds in their briefs, the Court questioned whether the parties went forward and attempted to close the contract. Defendants' attorney reminded the Court that although Plaintiff, HM of Topeka, LLC a/k/a HM of Kansas, LLC's attorney argued that they had scheduled a closing he did not cite anything in the record that would indicate that and, further, if you are going to review that you have to go to parol evidence to find out why. (R. IV, 9:1-14).

86. The Court continued to question whether there was a closing scheduled within forty-five (45) days, the time period required in the contract, and Defendants' attorney proffered that there was no closing ever scheduled. (R. IV, 10:1-10).

87. Defendants' attorney continued to argue that as presented in its pretrial brief, HM of Topeka, LLC's principle owner stated that he needed issues worked out in order to close, issues that were not worked out in the purported contract. (R. IV, 10:23-25).

88. He further argued that HM of Topeka, LLC wanted to have its cake and eat it too by saying "hey this contract is enforceable but we need parol evidence to show why it did not close according to its terms." (R. IV, 11:6-12).

89. ICMM and Nissen argued that their position has always been that the contract did not close within forty-five (45) days and the reason it did not close is that the parties never fully agreed on all the material terms necessary for the contract to close in the first place. (R. IV, 15:9-14).

90. Defendants' argued that if the Court does rule that there is a sufficient number of terms to create a contract, ICMM and Nissen would like to present evidence as to why it did not close, i.e. whether Mr. Hummer was ready, willing and able to close under the terms of that contract and the evidence so far presented to the Court was that he was not willing to close with these issues not being worked out such as the access to the lagoon and other access to utilities and an easement issue. (R. IV, 15:15-25).

91. Defendants argued that based on Mr. Hummer's own testimony that those issues were important, that makes those unresolved issues material terms to the contract. (R. IV, 15:25-16:2).

92. At the oral argument, the Court ruled that the contract was not ambiguous based on its four corners and ordered specific performance. (R. IV., 18).

93. ICMM's and Nissen's attorney then argued that if the Court is going to the remedy stage (by ordering the equitable remedy of specific performance) then it should first consider and

allow ICMM and Nissen to present testimony regarding the entire situation of why the contract did not close and present evidence for the Court to determine whether or not the appropriate remedy is equitable and whether the appropriate equitable remedy is specific performance. (R. IV, 19:3-14). Further, Defendants' attorney preserved his objection on the record that this was being ruled upon based on Mr. Weir's (Plaintiff's attorney) brief which cites to no record in support of the allegations of fact. (R. IV, 20:1-4).

94. On December 5, 2016, the Court entered the Journal Entry memorializing this ruling at the hearing. (R. II, 320).

95. It states the Journal Entry was accepted without ICMM and Nissen's signature due in part and over its objections as indicated in letters preserved for the record contained in R. II, 276-285 and as described between the parties in their exchange of letters concerning objections to the Journal Entry contained in R. II, 287-293.

ARGUMENT AND AUTHORITIES

I. Whether the District Court erred by entering summary judgment at the pretrial conference without the filing of a motion for summary judgment and providing notice to the parties that the court intended to rule on the merits; and by disallowing a jury trial on those issues.

Introduction:

The District Court held a pretrial conference and then asked the parties to brief whether the agreement at issue was ambiguous and whether it could order specific performance. (R. III, 18-21). Both parties submitted their briefs, albeit, Defendants' brief contained other issues that it thought should be decided before the issue of ambiguity was determined such as whether there was a valid contract and specifically whether there was a meeting of the minds and whether the Plaintiff was ready, willing and able to purchase ICMM. After reviewing the briefs and hearing oral argument, the District Court then granted judgment and ordered that the agreement be

specifically performed. Although the District Court declared that it based its decision on the four corners of the agreement, it stated that it received and reviewed the briefs (which contained evidence other than the agreement at issue) (R. IV, 2), heard argument from both parties, considered why the agreement did not close, and incorporated the authorities cited in Plaintiff's pretrial brief (R. IV, 20).

Standard of Review:

Before a court can issue summary judgment on its own merit, the same conditions present for summary judgment must exist. Since the Court issued summary judgment at pretrial and without a motion for summary judgment, then the standard of review for the appellate court is the same as it would be when reviewing a district court's decision to grant or deny a motion for summary judgment, which this court observed in *HM of Topeka, LLC v. Indian Country Mini Mart*, 44 Kan. App. 2d 297, 302, 236 P.3d 535 (2010), quoting:

> "'"'"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." ' " [Citations omitted.]' " *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009).

Argument:

The trial court has broad discretion in the handling of a pretrial conference. *Burkhart by Meeks v. Philsco Products Co., Inc.* 241 Kan. 562, 738 P.2d 433 (1987). The purpose of a pretrial conference is set forth in K.S.A. 60-216.

> The pretrial conference... has become an important part of our procedural process designed, among other things, to acquaint each party in advance of trial with the respective factual contentions of the parties upon matters in dispute, thus reducing the opportunity for maneuver and surprise at the trial, and enabling all parties to prepare in advance for trial. . . . Orders entered at pretrial conference have the full force of other orders of court and they control the subsequent course of the action, unless modified at the trial to prevent manifest injustice (K.S.A. 60-216.). . . .

Herrell v. Maddux, 217 Kan. 192, 194, 535 P.2d 935, 937 (1975) (citations omitted).

However, there are some functions that the pretrial conference is not designed to perform. *Burkhart by Meeks*, 241 Kan. at 572. It may not be used as a fishing expedition in which an opponent or court insists plaintiff provide the factual basis or evidence that it would rely on to support its claim and that could have been garnered during discovery. *Id.* (citing 6 Wright and Miller, Federal Practice and Procedure: Civil § 1525 (1971).

In a personal injury suit against a tow rope manufacturer, the trial court erred when it questioned plaintiff's counsel on what specific witness(es) would testify that the rope in question was manufactured and distributed by the corporate defendants. *Id.* at 573. Plaintiff's counsel was adamant that he did not have to furnish reports from his expert witnesses or prove his case by specific witnesses who could identify the rope. He argued that defendants could come to trial and find out. *Id.* Despite defense counsel's arguments to the contrary and in favor of granting plaintiff time to produce expert reports, the trial court dismissed the case with prejudice. The journal entry of judgment approved by the court explained that the case was dismissed for "failure to provide the Court with sufficient factual information to allow the Court to determine whether this matter should be submitted to the jury." *Id.* at 574-75.

The trial court erred in two ways. First, under the facts and circumstances of that case, it improperly sanctioned the plaintiff by dismissing his claims. Second and more important to the instant issue, the court erred in dismissing the action because "plaintiff's counsel has put before the Court insufficient facts upon which a jury verdict could be supported." At the pretrial all

parties agreed that discovery was incomplete and that more discovery was needed. The Court of Appeals held that "[A] determination that plaintiff's proposed case was insufficient as a matter of law was premature when all parties concede that discovery was incomplete and there remained controverted questions of fact as well as law." *Id.* at 576.

Even though discovery is complete in this case, questions of fact as well as law remain controverted and reasonable minds could differ on the resolution of those questions, so the court's dismissal of Defendants' defenses without providing warning to Defendants that it was deciding the case on the merits of the pretrial briefs and argument at the hearing, without scheduling a summary judgment brief schedule, and *without giving Defendants the opportunity to present all the facts to a trier of the facts*, overstepped the court's broad authority pursuant to K.S.A. 60-216. "At a pretrial conference, the trial court has authority to compel the parties to agree as to all facts concerning which there can be no real dispute, but the court should not attempt to determine disputed questions of fact as to such conference." *Connell v. State Highway Comm'n*, 192 Kan. 71, 375, 388 P.2d 637 (1964).

In *Connell*, the Kansas Supreme Court relied on its decision in *Cow Creek Valley food Prevention Ass'n v. City of Hutchinson*, 163 Kan. 261, 263, 181 P.2d 320 (1947), in reiterating the application of the pretrial statute:

> ...We think the primary purpose of the statute is to enable district courts to aid counsel in the orderly and efficient trial of cases...It must, however, be observed the statute grants such discretionary power to pass upon questions of law 'arising in the case' only 'under the allegations of the pleadings.' That means all of the pleadings that may be filed under the provisions of the civil code. Until such pleadings are completed it cannot be certain that the issues are fully joined. Until the issues are fully joined there can be no determination of questions of law which may be relied upon to govern the trial of the case.

Green v. Kaesler-Allen Lumber Co., 197 Kan. 788, 420 P.2d 1019 (1966), illustrates the error of judgment entered summarily on the trial court's own motion during a pretrial conference.

At the pretrial conference of a personal injury case, the court concluded: "After having considered the pleadings and the deposition and the statement of counsel and the photographs, the Court finds that summary judgment for the defendant should be sustained on the ground that reasonable minds could not differ on whether the threshold was improperly or negligently maintained." *Id.* at *789.

Like this case, the appellant contended that the trial court erred in entering summary judgment at the pretrial conference without the filing of a motion for summary judgment and without previous notice. The Kansas Supreme Court noted that "neither the summary judgment statute nor any other procedural statute give the trial court specific authority to enter a summary judgment on its own motion. The authority is inherent in the power of the trial court to summarily dispose of litigation when there remains no genuine issue as to any material fact and giving the benefit of all reasonable inferences that may be drawn from the evidence the judgment must be for one of the parties as a matter of law." Therefore, before a court may enter a judgment summarily the same conditions must exist as would justify a summary judgment on a motion of a party. *Id.* *790. Summary judgment may be granted after a pretrial conference where proper pretrial procedures disclose the lack of disputed issues of material fact and indicate an unequivocal right to a party. The Kansas Supreme Court then examined federal cases and noted that federal courts "have clearly established that where no disputed fact survives a pretrial conference judgment may be summarily issued". *Id.* (*citing Lynch v. Call*, 261 F.2d 130, 132 (10th Cir. 1958).

The appellant in *Green* argued that the trial court erred by granting judgment for defendant at the pretrial conference because there was substantial competent evidence to be submitted to the jury on genuine issues of disputed fact. As we also assert below, the trial court erred by summarily granting judgment for Plaintiff at the pretrial conference because there was also substantial competent evidence to be submitted to the jury on whether a contract had been formed based on

the behavior and conduct of the parties before, during and after the purported agreement at issue was signed. For example, and as detailed below, the parties continued negotiating terms of the purported agreement and never scheduled a closing within the initial 45 day term to close.

In *Green* the Supreme Court reversed the judgment of the trial court after examining the pretrial testimony and surmising that the trial court discarded the testimony of appellant that she fell due to the flooring and its condition, and had accepted instead appellee's photograph in regard to the condition of the threshold. The Kansas Supreme Court stated "[i]t can hardly be disputed that there was a serious conflict between the testimony of the appellant and what appeared in the photograph as represented by the appellee. However, photographs should not be accepted as absolute and positive evidence in a negligence case without an opportunity for the opposing party to inquire as to whether they present with fair accuracy the place of the happening and the physical condition surrounding it at the time of the injury." *Id.* at 792. Further, the *Green* court directed that a trial court, on considering a summary judgment, should not accept as positive and absolute that which an attorney says he can prove by witnesses, especially where the statement is in conflict with the opposing party's testimony. *Id.* Again, the purpose of "pretrial procedure is not to determine controverted issues of fact." *Id.* A trial court should not, as it did here, attempt to "determine a disputed question of fact by pressing counsel for evidentiary statements." *Id.*

The District Court's judgment should be reversed because it summarily granted summary judgment when there were disputed facts presented by both parties on the issue of contract formation, specifically meeting of the minds and missing material terms, and when he disregarded Defendants' evidence in support of a lack of contract formation but believed Plaintiff's proffers of evidence at oral argument and in its pretrial brief despite no citation to the record. The District Court tried to get around this issue by "relying on the four corners of the contract alone," even

though the issue of contract formation is not as simple and goes to the parties' intent. Evidence of a disputed question of fact was thus ignored in error and judgment was granted summarily at the pretrial stage of litigation. The District Court's judgment for specific performance should be reversed, and the parties should proceed to trial on the issue of the contract formation.

The District Court erred when it deemphasized the issue of contract formation and instead first considering whether the agreement was ambiguous or indefinite. The question of fact as to the intent of the parties in forming a contract is an issue for the trier of fact to decide—here, a jury. *Integrated Living Communities, Inc. v. Homestead Co., L.C.*, 106 F.Supp.2d 1141, 1143 (D. Kan. 2000). In *Hozeng v. Topeka Broadcomm, Inc.*, 911 F.Supp. 1323 (D. Kan. 1996), the court allowed a jury to decide issues concerning contract formation first, then the parties submitted findings of fact and conclusions of law to the judge regarding specific performance. There are issues of contract formation in this case and that is a question of fact that should be decided by a jury. Therefore, we request that the District Court's judgment for specific performance be reversed because reasonable minds could differ about whether a contract was formed and that question of fact should be decided by a jury.

II. Whether the District Court erred when it summarily granted judgment on the issue of contract formation.

Standard of Review:

Determination of whether parties have entered into a contract presents a mixed question of fact and law. *Kansas VIP, Inc. v. KDL, Inc.*, 247 P.3d 233 (2011) (unpublished). If facts that establish the existence and terms of a contract are undisputed this raises a question of law for the court's determination. *M West Inc. v. Oak Park Mall, L.L.C.*, 44 Kan. App. 2d 35, 46, 234 P.3d 833 (2010). But "when the evidence pertaining to the existence of a contract or the content of the contract's terms is conflicting or permits more than one inference, a question of fact is presented."

Id; Hays v. Underwood, 196 Kan. 265, 267, 411 P.2d 717 (1966) (Where the evidence is conflicting on the formation or terms of a contract, a question of fact is presented.).

The issue of whether the parties have formed a contract presents a question of fact. *Rosen v. Hartstein*, 2014 WL 278717, *4, 317 P.3d 148 (Kan. Ct. App. Jan. 24, 2014). "Courts generally should be cautious about granting summary judgment when the controlling issue turns on intent, and contract formation is no exception." *Id.* (citing *M West, Inc. v. Oak Park Mall, L.L.C.*, 44 Kan. App. 2d 35, 48, 234 P.3d 833 (2010); *Ives v. McGannon*, 37 Kan. App. 2d 108, 116, 149 P.3d 880 (2007)). On appeal, the trial court's findings of fact are reviewed to determine if they are supported by substantial evidence. Stated differently, if the record presents evidence sufficient to cause a reasonable person to accept a given finding without taking into account any countervailing or conflicting evidence, the factual finding has been sufficiently supported. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). However, the appellate court's review of any of the trial court's conclusions of law is plenary. *Id.* When a trial court makes findings of fact and conclusions of law, the appellate court determines if the factual finding support the legal conclusion. *Sampson v. Sampson*, 267 Kan. 175, 181, 975 P.2d 1211 (1999); *cf. Southwest & Assocs., Inc. v. Steven Enterprises,* 32 Kan. App. 2d 778, 780, 88 P.3d 1246 (2004) (applied to contract formation issue).

Argument:

A. The District Court failed to consider conflicting evidence that there was no meeting of the minds and that a complete and full contract was not entered when it supposedly only looked to the four corners of the purported agreement.

The Kansas Supreme Court has consistently held that there must be a meeting of the minds on all essential terms in order to form a binding contract. *Phillips & Easton Supply Co., Inc. v. Eleanor International Inc.,* 212 Kan. 730, 512 P.2d 379 (1973); *Storts v. Eby Constructions Co.*,

217 Kan. 34, 535 P.2d 908 (1975). However, the omission of a single term is not necessarily fatal if the parties' conduct indicates there is an intent to be bound. *Arrowhead Construction Co. v. Essex Corp.*, 233 Kan. 241, 662 P.2d 1195 (1983). The terms of a contract can be fully agreed upon even though the parties know that there are other matters on which they have not agreed and on which they anticipate further negotiations. This does not prevent the agreement already being made from being an enforceable contract. *Storts v. Eby Construction Co.,* 217 Kan. 34, 535 P.2d 908 (1975). Conversely, where the parties have negotiated with a definite understanding that no contract is to exist until execution of a written agreement, a binding contract does not come into existence until the written instrument is executed. *Weil & Assoc. v. Urban Renewal Agency*, 206 Kan. 405, 479 P.2 875 (1971). The determination of the existence of a sufficient meeting of the minds to form the basis for a binding contract is **one of fact to be determined by the trier of the facts**. Emphasis added. *Care Display, Inc. v. Didde-Glaser, Inc.* 225 Kan. 232, Syl. ¶ 3, 589 P.2d 599 (1979). In this case, the parties requested a jury be the trier of facts, but the Judge ultimately decided the issue by ignoring the conflicting competing facts and Defendants' proffers of evidence and by finding that there was a valid contract.

Here, Defendants' counsel argued at pretrial that the contract was not formed and that it had missing material terms, but opposing counsel convinced the court the issue was really about whether the contract was ambiguous because that is an issue of law the court can decide. Defendants' attorney argued that the court first had to determine whether there was a valid contract and that the issue of whether the contract was ambiguous was a separate issue that should be addressed only after determining there was a contract. The court disagreed but provided little factual findings other than to note that the contract is signed by both parties. The "Agreement for Purchase of Real Estate and Personal Property," between ICMM, Carla Nissen and HM of Kansas

a/k/a HM of Topeka (hereinafter "HM"), the purported contract, was signed, but was never formed because there was no meeting of the minds on issues that were material to both parties.

Defendants presented the following evidence in their pretrial brief and at the pretrial hearings on October 19 and 31, 2016. There was no "meeting of the minds" between ICMM, Carla Nissen and HM of Topeka over details such as lagoon access and use, easement to the residence and use of the shared driveway between Nissen's residence and ICMM, and there was an incorrect legal description for real property attached to the purported agreement. Further, there was no agreement on usage of diesel tanks, usage of water tanks, or propane tanks, which were shared by Nissen's residence and ICMM and some of which were located on real property owned by Nissen and not part of the purported sale of ICMM. Finally, the purported agreement contained the incorrect identity of purchaser and no time frame to deliver marketable title. The parties never formed a clear and specific understanding of the necessary components of the real estate and personal property transaction as evidenced by Hummer's deposition testimony, which the Court did not allow or consider. Hummer testified that access to the drive and water meter were important, and if not included he would not have agreed to purchase ICMM (R. 189, 196).

To form a binding contract, there must be a meeting of the minds as to **all essential terms.** (Emphasis added.) *Sidwell Oil & Gas Co., Inc. v. Loyd*, 230 Kan. 77, 84, 630 P.2d 1107 (1981). *Sidwell Oil & Gas Co., Inc.* cites to the Kansas Supreme Court's opinion in *Steele v. Harrison*, 220 Kan. 422, 552 P.2d 957 (1976) for the explanation of the requirement:

> To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract.

Id. at 84.

Terms must be certain to form a contract. Certainty is defined as followed by the Restatement of Contracts, Second Edition, § 33:

> (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
>
> (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
>
> (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

Comment "c" explains: "the more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement." Other indefinite terms can defeat a contract. Comment "f" clarifies that "the more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable." *See also McCue v. Hope*, 97 Kan. 85, 154 P. 216 (1916).

It is generally recognized in Kansas "for an agreement to be binding it must be sufficiently definite as to its terms and requirements as to enable the court to determine what acts are to be performed and when performance is complete." *Adams Parker Furniture, Inc. v. Ethan Allen, Inc.*, 1988 WL 235667, *1 (D. Kan. Aug., 16, 1988) (quoting *Hayes v. Underwood*, 196 Kan. 265, 267-68, 411 P.2d 717, 721 (1966)). Although there are exceptions to this rule, they do not apply in this case.

In *Steele v. Harrison,* 220 Kan. 422, 425, 552 P.2d 957 (1976), there was no meeting of the minds as to the essential terms of the contract between two parties. The documents offered by the parties did not demonstrate that the parties agreed on the essential terms to sell and purchase land. The seller's letter of acceptance did not agree on the immediate possession by purchaser or to grant the landlord's share of wheat to the purchaser for immediate income. The Court **examined**

the purchaser's responsive communication to determine that the parties' subsequent actions evidenced that there was no meeting of the minds. The purchaser noted in his reply to the seller's letter that "they would want to get some income pretty rapidly." The Court ultimately determined that the seller's "letter of acceptance" was really a counteroffer. *Id.*

In the instant case, the Court should have let the issue of contract formation proceed to a jury because of the parties' subsequent actions evidencing there was no meeting of the minds. As Defendants' attorney argued at the pretrial hearing, Plaintiff hired attorneys to rewrite the agreement after the original closing came and went—why would it do that (spend money on an attorney) if he thought the original agreement was sufficient. (R. II, 8:13-16). Defendants' attorney argued:

> "We'll put on that there were emails back and forth between negotiating attorneys on both sides, drafts of additional language terms. They didn't even have the legal description right initially. It wouldn't allow them to access the property. Our claim is it was not a complete contract and that there were additional terms that were necessary for it to be a complete contract that the parties never agreed to." (R. III, 8:16-9:3).

There was no meeting of the minds of parties to a an oil and gas lease arrangement when one party thought he was purchasing a three-year- paid-up lease but he erroneously used a form lease not suited to such a lease; and the other party thought the lease was to be the type of lease commonly used in western Kansas, a three year lease with a bonus payment of $320.00 and requiring annual delay rentals of one dollar per acre beginning one year from the date of the lease. *Sidwell Oil & Gas Co., Inc. v. Loyd*, 230 Kan. 77, 84, 630 P.2d 1107 (1981). Even though **the lease was signed**, it was apparent that the parties had a different understanding of the lease terms. (Emphasis added.) *Id.* at 79. More importantly, the Court must have allowed (and heard) evidence as to the parties' mind set as opposed to just looking at the four corners of the agreement (as the District Court did in the instant case).

There was no meeting of the minds in *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 15 P.3d 338 (2000), where the parties entered into a settlement agreement in which they agreed to enter into an easement. When the parties were setting forth the settlement agreement to the court, they admitted that they had not put the easement in writing and "may have to refine that a little bit as we go along." Further, as part of the settlement agreement, a stipulation of dismissal would be filed but neither party clearly understood when the stipulation would be filed. *Id.* at 487. Following the hearing in which the parties agreed on the record to terms of the settlement, one of the parties refused to agree to provide and sign an easement. *Id.* Even though the Court found that the party who would not provide an easement "refused to undertake good faith negotiations of the terms of the document which would finalize the agreement," it concluded that the informal agreement was not an enforceable settlement because there was no meeting of the minds as to **all** essential terms of the agreement. (Emphasis added.) *Id.*

The judge found that the parties contemplated continued negotiation of essential terms and conditions of the contract but lacked a "meeting of the minds" regarding an essential term of the contract. The court specifically noted that agreements pertaining to an interest in land must be reduced to writing to avoid the statute of frauds. *Id.*

Even though Nissen and Hummer signed the agreement, it was clear from Aldis', Nissen's, and Hummer's deposition testimony that the parties contemplated continued negotiation of essential terms. Defendants presented evidence of this in its pretrial brief, but the District Court ignored the fact. Aldis testified that he understood the purpose of the agreement was to present something to the bank to see if Hummer could get financing. Aldis said that the agreement "didn't necessarily reflect all of our conversations with Tex Mex Express," which was the operational aspect of the parties' deal. (R. II, 154-55). Aldis also testified that he and Hummer were aware of

the lagoon issue but did not want to spend the money to iron out the agreements in writing if Hummer could not get a loan. *Id.* Aldis testified that "we thought this was step number one. If we don't accomplish step number one there is not really a step number two...." (R. II, 160).

Nissen did not negotiate this deal directly with Hummer, so her understanding from Aldis was that the agreement was to get Carter Petroleum to purchase the ICMM. (R. II, 159). Aldis assured Nissen that the negotiations were not with Hummer, and since the agreement did not originally have Hummer's name (as it referenced J & J Development) and the entity HM does not indicate in its name who may own it, Nissen would not have necessarily known from the agreement that she was dealing with Hummer. Nissen thought the original agreement was "an avenue to get the ball rolling" with Carter Petroleum." (R. II, 173).

Hummer's and Nissen's testimony should have indicated to the Court that the parties did not intend for the signed agreement to be the final agreement but that they were using it to further negotiate more material issues such as to see if Hummer could obtain financing and to see if Hummer could entice a bigger buyer to the table, i.e. Carter Petroleum. Further, Nissen's testimony indicated she did not even know what party she would be selling ICMM to, believing she was dealing with J & J Development, the typed written party indicated in the initial agreement, not HM of Topeka/HM of Kansas. At a minimum, this evidence shows a question of fact exists and such should be decided by a jury.

The pretrial brief also cited to Nissen's deposition testimony that the original agreement failed because it did not contain an easement to the residential property and it contained an incorrect legal description with a difference in acreage from 1.58 acres to 1.72 acres. If Nissen sold ICMM, items such as water, propane, diesel islands, gas pumps, storage tanks, and sewage would have to be part of a sale. Nissen did not go through with the sale because of issues

concerning "...the lagoon, the water meter, the propane tanks, the phone lines, the inventory and how I was going to pack that up and move it if no one paid me for it. . . ." (R. II, 177, 181).

As stated in the pretrial brief, Hummer's deposition testimony revealed that he was aware that there was a lagoon adjacent to the ICMM that served the mini mart and Nissen's residence. (R. II, 189). He also was aware that the lagoon was not located on the property, even though the agreement states that the purchaser would have full access and right to the lagoon "located on the property." (R. II, 189). Hummer testified that he knew he would need an additional document such as an easement **in order to facilitate closing the agreement** and to obtain access to the lagoon. *Id.* He testified that one of his attorney's mentioned it to him. *Id.* One and half months after Hummer signed the agreement, he was trying to figure out what parts of the property were included or not included in the legal description attached to the agreement. (R. II, 190). Hummer agreed in his deposition testimony (which was attached to Defendants' pretrial brief) that if the mini mart did not have its own water meter and could not get water, he would not have gone through with the transaction. (R. II, 189) That means, access to the water meter was essential to the agreement, but the District Court disagreed. Hummer also admitted that if the land he was purchasing did not include the driveway, he would not have gone through with the transaction. (R. II, 196). But the legal description affixed to the agreement and the language of the agreement did not contain that access.

At pretrial, Defendants argued that Hummer's actions after signing the agreement further indicate that the agreement did not contain essential terms necessary to carry out the parties' intent, or even, what the parties intended. Hummer told his attorney that he wanted to purchase property to the east of the original legal description, as this property contained water access and access to storage tanks necessary to operate the ICMM. (R. II, 211). His attorney drew up an amended

agreement, easement, and a bill of sale—all the necessary documents needed to satisfy the statute of frauds and clarify and include the essential terms of an agreement. All documents needed at closing. Even in June 2006, issues such as insurance and rights to the water meter were undecided. (R. II, 133, 157, 246-47).

Essential terms were missing and there was clearly no meeting of the minds between the parties concerning the easements and usage to the lagoon and driveway, diesel tanks, water lines, and propane tanks attached to the real property. For these reasons the contract was incomplete and specific performance should not have been ordered.

It is a fundamental rule in Kansas that specific performance will not be ordered where the contract is incomplete or uncertain in its terms. *Nichols v. Coppock*, 124 Kan. 652, 261 P. 57, 576 (1927). When there are unsettled conditions to be agreed upon by the owner and purchaser of property, there is no binding contract to be specifically enforced. *Bentz v. Eubanks*, 41 Kan. 28, 20 P. 505. As explained above, there were multiple unresolved conditions to be agreed upon by HM of Topeka and Nissen that prevented the creation of a binding contract.

"When the evidence pertaining to the existence of a contract is conflicting, a question is presented for the trier of facts. The controlling question as to whether a binding contract was entered into depends on the intention of the parties and is a question of fact." *Sidwell Oil & Gas Co., Inc.*, at 83. Even though there was no binding contract, at a minimum the court should have viewed the conflicting evidence in a light most favorable to Defendants and allowed the parties to present the issue of contract formation to the trier of fact; here, a jury. (*See* Defendant's request for a jury trial in its Pretrial Questionnaire at R. II, 118). In not doing so, the court erred and judgment should be reversed.

B. Whether the District Court erred when it failed to consider or allow evidence about an element of contract formation-being ready, willing and able to close; or alternatively, whether it erred when it found that the Plaintiff was ready, willing and able to close on the subject transaction.

An essential element of a breach of contract claim is whether the plaintiff, here HM of Topeka, has performed or is willing to perform in compliance with the contract. P.I.K. KS 4th Ed. 124.01—A. In Defendants' pretrial brief, it noted that one of the issues for trial was whether Plaintiff was ready, willing, and able to perform under the contract, i.e. whether it could pay or "close" the contract. At the pretrial stage, the trial court refused to entertain any argument or hear facts concerning Plaintiff being unable to perform or unwilling to perform in compliance with the contract. The contract provided, *inter alia* that the parties must close within 45 days. In reality that meant that Plaintiff would need to pay at least $1.4 million by May 4, 2006. May 4 came and went and Plaintiff did not schedule a closing or submit consideration to Defendants. Hummer never provided written notice of financing which would indicate he was ready, willing and able to close by May 4. (R. II, 153, 175). After the 45 day window, and only after that window, did Plaintiff request title work, and schedule a closing. During the pretrial proceedings however, the trial court heard Plaintiff's proffered evidence that was based on no citations to the record that Plaintiff had scheduled a closing within 45 days and that Defendants did not attend. It further heard Plaintiff's counsel's argument that a second closing date was set after the 45 days and that Defendant again failed to attend. (R. IV, 9, 17). This argument simply is not supported by the record.

When the evidence pertaining to the existence of a contract or the terms thereof is conflicting or admits of more than one inference, a question is presented for the trier of facts. *Hays v. Underwood*, 196 Kan. 265, 411 P.2d 717 (1966). The District Court heard (and should have

read in the pretrial briefs) conflicting evidence as to contract formation, yet it did not allow the trier of fact to decide the issue; and, instead, ruled on the issue. The District Court's conclusions of law are not supported by substantial competent evidence and its judgment should be reversed.

III. If the Court of Appeals finds that the contract was a valid and complete contract, whether the District Court erred in finding that the purported agreement was not ambiguous.

Standard of Review:

The interpretation of a written contract is a question of law. The appellate court may construe the instrument de novo and determine its effect. *Jones v. Reliable Sec. Incorporation, Inc.*, 29 Kan. App. 2d 617, 626, 28 P.3d 1051 (2001).

Argument:

To the extent the court finds that the parties formed a contract, the District Court still erred when it decided that the agreement was not ambiguous. Several terms of the contract are ambiguous. "'To be ambiguous, the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.'" *Id.* (*quoting Clark v. Prudential Ins. Co. of America,* 204 Kan. 487, 464 P.2d 253, 256 (1970)). A contract is ambiguous where pertinent rules of interpretation are applied to the fact of the instrument and there are genuinely more than one meanings. *Id.* "If a written contract is actually ambiguous concerning a specific matter in the agreement, facts and circumstances existing prior to and contemporaneously with its execution are competent to clarify the intent and purpose of the contract in that regard, but not for the purpose of varying and nullifying its clear and positive provisions." *First Nat. Bank of Olathe v. Clark*, 226 Kan. 619, 624, 602 P.2d 1299 (1979). The court may consider the interpretation placed upon the contract by the parties themselves in construing an ambiguous or indefinite contract. *Id.*

There are several terms of the purported agreement that contain insufficient words used to express meaning and intention of these parties. Section 8 concerning the closing is ambiguous. Terry Hummer testified that he believed closing was 45 *after* proof of title was made *by* Seller. Conversely, Roger Aldis and Carla Nissen believed that closing was 45 days after the contract was entered. The agreement states, "Seller shall convey marketable title by General Warranty Deed to be delivered to Purchaser at the closing of this Contract, upon receipt of the total purchase price, free of all Liens and encumbrances...." There is nothing in writing from Plaintiff requesting that the closing period should be extended because a title policy was not delivered by closing. At the time the contract was signed, Nissen could have conveyed marketable title by deed to the real property described in the legal description but HM did not tender payment on May 4.

The agreement also provides: "[t]he Purchaser shall have full access and right to the lagoons located on the property for as long as Purchaser owns the property in question." However, the lagoon is not located on the property to be sold, so the meaning of this clause is unclear and nonsensical.

The terms described above have more than one meaning, but instead the Court determined that they were clear and unambiguous. The parties intended to clarify, modify, and/or amend these terms because they had more than one meaning. HM realized this and sent drafts of an easement, bill of sale, amended purchase agreement and inventory agreement to ICMM. Where ambiguity exists in a document, evidence is admissible as an aid to its interpretation. The parties to a contract know best what was meant by its terms. Thus, "especially may resort be had to the parties themselves." *Mobile Acres, Inc. v. Kurata,* 211 Kan. 833, 839, 508 P.2d 889 (1973).

These proposed agreements attempted to clarify at least HM's intent. For example, the easement provides HM use and access to a certain lagoon located on Nissen's residential property.

The easement, as drafted by HM's attorney, provides: "Carla D. Nissen and Indian Country Mini-Mart...entered into a Purchase of Real Estate and Personal Property Agreement dated March 20, 2006, as subsequently amended by the First Amendment to the Purchase of Real Estate and Personal Property Agreement dated of even date herewith. Under such contract, as part of consideration for the acquisition of such property, Carla D. Nissen and HM of Topeka, LLC, agreed to grant each other this easement." The easement also grants to Nissen from HM an ingress and egress easement over the existing driveway on the ICMM property to access the residential property.

The amended agreement, which was never signed by either party, but drafted by HM's attorney, adds a number of terms which were never discussed, but also provides that "Seller has provided Buyer with a title commitment evidencing that Seller has marketable title" and identifies Nissen as seller and HM as buyer. It clarifies utility usage and has a blank for how the parties were going to address the water line problem; just to name a few of the essential terms that were not provided in the agreement dated March 20.

This type of conflicting evidence was relied on by the Kansas Supreme Court in *Mobile Acres, Inc.* to reverse summary judgment concerning the interpretation of which party would pay taxes on improvements. If the original contract was unambiguous then there was no reason to draft an amended agreement. Parol evidence may be used to eliminate a doubtful meaning. *Mobile Acres, Inc. v.* Kurata, 211 Kan. 833, 839, 508 P.2d 889 (1973). The cardinal rule in construction of contracts is to ascertain the parties' intention and give effect to that intention. For this reason, the District Court erred when it determined that the terms concerning the lagoon access, water usage, utility usage, driveway access, tank usage, closing date, and marketable title were not ambiguous and ordered specific performance of the March 20th agreement.

IV. Whether the District Court erred by considering extrinsic evidence in determining whether the contract was ambiguous or not, which should have been an issue for the jury.

Standard of Review:

The standard of review of the district court's interpretation or construction of a contract is a matter of law and therefore de novo. *Bomhoff v. Nelnet Loan Services, Inc.*, 279 Kan. 415, 420, 109 P.3d 1241 (2005).

Argument:

Defendants' argued that the purported agreement's closing term was vague and ambiguous and that in order to interpret it, the Court had to consider extrinsic evidence of the parties' actions in meeting that term. The purported agreement provides, *inter alia*,

> [Paragraph] 8. Unless additional time is required to provide marketable title, this contract shall be closed on or before forty-five (45) days from the date hereof, with possession to be delivered to purchaser upon closing.
>
> [Paragraph] 9. Time is of the essence in this contract.
>
> ...
>
> [Paragraph] 11. This contract is expressly conditioned upon the **PURCHASER** being able to secure suitable financing for the purchase price as set forth above, and if such financing cannot be suitably arranged by **PURCHASER**, this Contract shall be null and void and Seller and Purchaser shall be released from all liability, and any monies paid hereunder shall be returned to the Purchaser.

(R. II, 189, 206-07). Forty-five (45) days from the date the parties signed the contract on March 20, 2006 was May 4, 2006. (R. II, 126). Hummer thinks closing would depend on when marketable title was delivered. He does not read the closing date to mean that the deal would close 45 days after it was executed or on May 4, 2006. (R. II, 189). However, Aldis interpreted the same closing paragraph to mean that closing was to be 45 days after the agreement was signed. (R. II, 155).

After reviewing the pretrial brief, at the October 31, 2016 hearing, the district court questioned, and thus considered, whether the parties went forward and attempted to close the contract. (R. IV, 8-10). Defendants' counsel argued that if the court was going to consider whey the parties did not close, i.e. when closing was scheduled and which if any parties failed to show, it was considering parol evidence to interpret that provision(s) of the contract. (R. IV, 9). Although Defendant's counsel argued no closing was ever scheduled, Plaintiff's counsel argued that closing was scheduled but Defendants failed to appear. (R. IV, 10).

Defendants argued that they should be allowed to present the reasons the contract did not close before the Court determined which remedy, i.e., damages or specific performance, would be granted. (R. IV, 10-11). In finding there was no ambiguity in the terms concerning closing or marketability of title, the Court ultimately relied on the extrinsic evidence in its finding by stating: "...the Plaintiff attempted to close within a reasonable time. The Defendants admit (Defendant's Brief at Paragraphs 53 and 54) that on the night before closing, Mr. Aldis, the Defendant's partner, called Terry Hummer and told him that Defendants were not closing on the sale of the Mini Mart." (R. II, 265). Therefore, the District Court erred and its decision ordering specific performance should be reversed.

V. Whether the District Court erred by ignoring whether the agreement violated the statute of frauds, and not finding that it did.

Standard of Review:

Where the issues involve applying the law to undisputed facts, the standard of review is de novo. *Miskew v. Hess,* 21 Kan.App.2d 927, 930-31, 910 P.2d 223 (1996).

Argument:

The District Court made no determination on the issue of whether the purported agreement (as ordered to be specifically performed) would violate the statute of frauds. Defendants' pretrial

questionnaire reserved the defense and argued the issue in its pretrial brief. (See R. II at 113, 115, 147-48) The statute of frauds applies to all contracts for assignment of an interest in property for a term of more than one year. *M West, Inc. v. Oak Park Mall, LLC*, 44 Kan.App.2d 35, 234 P.3d 833, 843 (2010). The statute of frauds requires that material terms of a contract are stated with reasonable certainty. *Id.* Terms must be in writing, signed by the parties to be charged lawfully, and provide an identity of the parties by name or description, the land or other subject matter to which the contract relates, and the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made. *Id.* at 843.

One of the reasons the parties in *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 15 P.3d 338 (2000), failed to form a contract is because their agreement did not satisfy the statute of frauds. The court held, "[n]o interests in lands shall at any time be assigned or granted unless it be by deed or note, in writing, signed by the party or his or her agent assigning or granting the interest." *Id.* at 488 (*citing* K.S.A. 33-105). Like in our case, in *Dougan*, although the purported agreement referenced the granting of easement access, the easement did not satisfy the statute of frauds because it was not stated with sufficient detail in writing and signed by both parties; holding that an easement is within the statute of frauds. *Id.*

The March 20 agreement does not properly identify the essential terms of the easement proposed with regard to the lagoon, or even mention necessary property rights to facilitate running the ICMM such as water access, tank access, and utility access. Nor does the March 20 agreement provide an easement for Nissen to access the driveway to her personal residence. For the same reasons argued above, the agreement does not satisfy the statute of frauds and should have been null and void. However, the District Court erred as a matter of law making no finding on this issue and ordering specific performance.

VI. The Court erred by ordering specific performance on a real estate contract when facts and circumstances related to the marketability of title and ability to sell the property have changed subsequent to the making of the purported contract, and by changing an essential term of the contract.

Standard of review:

The trial court's order of specific performance is reviewed for an abuse of discretion. *Hochard v. Deiter*, 219 Kan. 738, 740, 549 P.2d 970 (1976). Even under this standard of review, the appellate court has unlimited review of legal conclusions upon which a district court's discretionary decision is based. *State v. Gonzalez*, 290 Kan. 747, 755, 234 P.3d 1 (2010). A district court abuses its discretion when it makes an error of law. *Id.* Moreover, the facts upon which the discretionary decision must depend may be challenged on appeal as unsupported by substantial competent evidence in the record. *Id.* at 756.

Argument:

The Court erred by ordering specific performance without considering the merits of specific performance under the circumstances. Even if the first pretrial hearing, the judge said that he believed the first step was to decide whether or not the contract was ambiguous or unambiguous **and then it would turn to a bench trial on the issue of equities of specific performance.** (Emphasis supplied). (R. III, 17:2-6, 12-16). Yet, he disregarded his own belief by ordering specific performance at the second hearing.

The Court abused its discretion by not considering whether, regardless of Plaintiff's willingness to waive merchantable title, Plaintiff could finance (readiness, willingness and ability to purchase) the purchase of ICMM without it. Stated differently, if specific performance should only be ordered when enforcement will not be inequitable, oppressive, or unconscionable, or result in undue hardship, the court failed to consider the current circumstances and practicability of enforcing the purported agreement from 2006 on both parties. *Hochard v. Deiter*, 219 Kan. 738,

740, 549 P.2d 970 (1976). Now that there is more than a two million dollar tax lien on the property, the property will be difficult to obtain financing for and to sell. Meanwhile, the business is in limbo and the parties still cannot agree on how to execute closing. Ordering specific performance under these circumstances was erroneous, and an abuse of the Court's discretion.

Further, the court erred by finding that the term concerning closing was not an essential term of the contract when it ordered that the contract should be closed within a reasonable time period. (R. II, 265). The Court determined that when there is no definite time set for a closing, the law infers a reasonable time was intended, and then simply ordered that the contract be performed within no definite time frame. (R. II, 265-69).

The court abused its discretion because there is a specific term in the purported agreement. The purported agreement provides that time is of the essence. (R. II, 274). "Time is not ordinarily regarded as of the essence of a contract unless it is so stipulated by the express terms or is necessarily implied from the character of the obligations assumed." *Hochard v. Deiter*, 219 Kan. 738, 742, 549 P.2d 970 (1976). In *Hochard* the contract did not specify a time limit within which to furnish merchantable title so it was assumed that a reasonable time was intended. *Id.* Here, the purported agreement states that time is of the essence and states that "*unless additional time is required* to provide marketable title, this contract shall be closed on or before forty-five (45) days from the date hereof." (R. II, 274). Although Defendants admitted at pretrial that no marketable title was provided, it also proffered that Plaintiff did not request marketable title, give notice that it wanted a report or do anything to pursue closing the contract until after the 45 day period ran.

Since this case has been pending, a tax lien of more than two million dollars was filed on the instant property. Knowing this, at pretrial Plaintiff waived the requirement that merchantable title must be provided. Yet, the court still changed an essential term of closing—which was to

tender payment in exchange for possession within 45 days. The court's modification of an essential term in ordering specific performance was erroneous, an abuse of discretion, and its judgment should be reversed.

CONCLUSION

This Court should reverse the District Court's order of specific performance for the reasons provided above, and order a trial proceed on the issue of contract formation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellant was electronically mailed on this 17th day of May, 2017 addressed to:

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