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| Colorado Court of Appeals<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>District Court, Saguache County<br>2015 CV30020<br><br>Plaintiff-Appellant: CHAD R. ROBISON, sole trustee, for his successors in trust, under the CHAD R. ROBISON living trust, dated July 22, 2013, and any amendments thereto,<br><br>v.<br><br>Defendants-Appelles: CIRCLE T LAND COMPANY, LLLP; TONSO FARMS; and STEVEN R. TONSO | ▲ **COURT USE ONLY** ▲ |
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| OPENING BRIEF | |

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 6,243 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p.___), not to an entire document, where the issue was raised and ruled on.

☐For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that the brief may be stricken if it does not comply with any of the requirements of C.A.R. 28 or C.A.R. 32

s/ *Erich Schwiesow*

Signature of attorney or party

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## ISSUE PRESENTED FOR REVIEW

Did the trial court err in determining, as a matter of law, that the Statute of Frauds operates to bar Plaintiff's breach of contract claims, where there were writings satisfying the Statute of Frauds pursuant to the Uniform Electronic Transactions Act, or at least a factual dispute as to whether, in the context of the parties' actions and words, the writings express such an agreement, such that entry of summary judgment was improper?

## NATURE OF THE CASE, THE RELEVANT FACTS AND PROCEDURAL HISTORY, AND THE RULING, JUDGMENT, OR ORDER PRESENTED FOR REVIEW

### A. Nature of the Case and Proceedings Below

This is a breach of contract case involving purchase of an approximately 1600 acre ranch in the San Luis Valley, located primarily in Saguache County, but also in Rio Grande and Alamosa Counties. The parties negotiated both in person and via email and text messaging concerning all relevant terms of the transaction. By mid-summer of 2015 they had come to an agreement on all essential terms of the contract. The parties had discussed reducing those terms to a formal written contract, but that was never done. After having reached agreement on all essential terms of the contract, the seller emailed buyer saying that he had received a substantially larger offer, and would not complete the transaction that had been agreed upon.

Buyer filed suit for breach of contract and for estoppel. Seller filed for summary judgment, alleging that there was no writing satisfying the statute of frauds, C.R.S. § 38-10-108. Buyer contends that the emails and text messages constituting assent to the essential terms of the contract satisfy the writing required by the statute of frauds pursuant to the provisions of the Uniform Electronic Transactions Act, C.R.S. § 24-71.3-101 et. seq. The trial court found that the seller did not have the requisite intent to enter into a binding agreement when he signed his name to the emails, and entered summary judgment on the breach of contract claim. The court denied summary judgment on the estoppel claim, as a claim for

estoppel is not barred by the statute of frauds. Because the estoppel claim was not worth trying on its own, Plaintiff sought voluntary dismissal of the estoppel claim, which was entered on May 5, 2016, thereby making this case ripe for review.

## B. Relevant Facts

In its Order Granting Defendants' Motion for Summary Judgment the Trial Court set out the undisputed facts upon which it based its decision. There is no dispute as to the relevant facts. As found by the trial court (R. 100-102) they are as follows (quoted verbatim from the trial court's Order):

1. In the summer of 2015, the Plaintiff Chad Robison began negotiating with Defendant Steven R. Tonso of Tonso Farms for several things — including, the purchase of the real and personal property at issue in this case; the use of the Tonso Farms name; transfer of existing leases; seed for the 2016 crop; and transfer of going concerns, such as current employees.

2. During negotiations, the parties met in person, spoke on the phone, exchanged emails and text messages.

3. On June 16, 2015, Mr. Tonso emailed Mr. Robison the "preliminary proposed terms as [he] understand[s] them." Ex. A, at 7. The email specified the

selling price (nine million dollars) among other things. *Id.* Mr. Tonso concludes by saying:

> I am sure that it won't look like this or be this simple when the accountants and lawyers get done with it, but it is a start! I hope this all agrees with what you were thinking and the direction you want to go. Like I said, it is a start. Let's get 'er done! This basic formula looks good to me. . . . .
>
> With best regards,

Steve Tonso

4. On June 23, 2015, Mr. Robison responded with additional proposed terms, including the following: a description of the property, namely "11 quarters of land"; a modified payment schedule; an agreement to purchase life insurance to cover outstanding payments; a break-down of the selling price; proposed collateral; and other things.

5. On June 24, 2015, Mr. Tonso responded that the proposed collateral was insufficient. The email concludes: "Steve." *Id.* Except for the collateral, the parties agreed that everything else looked good at this point.

6. On June 26, 2015, Mr. Robison sent email an email addressing the collateral.

7. On June 29, 2015, Mr. Tonso responded:

> Chad,
>
> Just got back in town from a long weekend up at the cabin. We can make the collateral work, house stays in it, seconds on ground if we need to. Not to worry. Everything is still good to go. Let's keep kicking the can down the road. Is it time to put together some sort of contract? I meet with my attorney on 7/22. Let me know where you are on all of this. Sounds like we are getting close.
>
> Let's get 'er done!
>
> Steve

8. Also on June 29, 2015, Mr. Robison responded: "Ya I think we are, as my dad says 'put pen to paper'. I think we got all major things covered."

9. Although Mr. Tonso suggested that he could have his attorney prepare a formal contract, it is undisputed that the parties never completed such a contract.

10. On July 6, 2015, Mr. Robison sent an email identifying himself as the "sole trustee" for the CHAD R. ROBISON living trust, dated July 22, 2013, and any amendments thereto. Ex. A, at 2.

11. On July 13, 2015, Mr. Tonso emailed Mr. Robison, indicating that he received a "substantially larger offer" to sell his Potato Packing Facility, his farm, and the crop as a "package deal." He indicated that he no longer intended to sell the property to Mr. Robison.

## SUMMARY OF THE ARGUMENT

The statute of frauds, C.R.S. § 38-10-108, is applicable to the transaction at issue in this case, and requires that "some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made." The email chain attached as an exhibit to the Response to Motion for Summary Judgment is precisely such a note or memorandum. R. 53-60 (in reverse chronological order, begin at p. 60 (June 16, 2015), and read to page 53 (July 14, 2015) for proper chronological order). A wet ink signature is not necessary for such email exchanges, pursuant to the Uniform Electronic Transaction Act (UETA), C.R.S. § 24-71.3-101 *et seq.*, enacted by Colorado in 2002, which provides that electronic communications will satisfy statutes requiring records to be in writing.

The trial court framed the issue as whether the signing of the email chains was intended by Tonso to constitute a legally significant act, and concluded that Tonso did not intend to enter into a contract by signing the emails, therefore his signature did not constitute a legally significant act. The flaw in that analysis is revealed by treating the signed emails as signed paper letters, and then asking whether they constitute a contract. If they do, then the only issue is whether the

emails were "signed" in accordance with the act. Because the emails were signed by Tonso in the same way a letter is signed, they serve the same function signed letters would. Viewed under that rubric, they constitute written evidence of a meeting of the minds and a contract was formed.

The email chain between the parties contains all the essential terms of the contract, such that the requirement of a meeting of the minds is met. Certainly enough dispute exists that reading the undisputed facts in the light most favorable to Plaintiff, summary judgment should not have been granted.

## ARGUMENT

STANDARD OF REVIEW:

An appellate court reviews a summary judgment *de novo. Brodeur v. Am. Home Assurance Co*., 169 P.3d 139, 146 (Colo.2007). Summary judgment is appropriate only if the pleadings and supporting documents show that there is no genuine, material, factual issue and that the moving party is legally entitled to judgment. *Id.* The nonmoving party is entitled to all favorable inferences reasonably drawn from the undisputed facts; all doubts must be resolved against the moving party. *Id.*

CITATION TO THE PRECISE LOCATION IN THE RECORD WHERE THE ISSUE WAS RAISED AND RULED ON:

The issue being appealed was the subject of the summary judgment briefing (R. 45 (Motion for Summary Judgment), R. 74 (Response), R. 88 (Reply). It was ruled on by the Court's Order entering summary judgment, R. 100.

## 1. Introduction

The Parties appear to agree that the issue that resolves this case is whether the email chain found at R. 53-60 satisfies the statute of frauds. The Trial Court based its determination that the email chain did not satisfy the statute of frauds on its conclusion that Tonso did not, by his emails, intend to enter into a contract, and that therefore his signature on the emails was not a legally significant act. That, however, is not the question. The legal significance pertains to the actual signing of the emails as set forth in the statute. If that signing was an intentionally performed act, then it has the same legal significance as the signing of a paper letter, and the email chain must be analyzed in that context. Doing so leads to the conclusion that a contract for the sale of the ranch was formed.

## 2. THE UNIFORM ELECTRONIC TRANSACTIONS ACT

### a. The Requirements of the UETA

The Uniform Electronic Transactions Act (UETA) provides, at C.R.S. § 24-71.3-107, that if a law (such as the statute of frauds) requires a record to be in writing, an electronic record satisfies the law. If a law requires a signature to be in writing, an electronic signature satisfies the law. In the legislative note to the scope section, official comments to Section 103, the note specifically provides that with respect to real estate transactions, and as between the parties, "it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts."

The statute defines an electronic signature very broadly, to include "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." C.R.S. § 24-71.3-102. Again here, the comment suggests that "including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile."

Colorado does not appear to have any case law directly interpreting the Uniform Electronic Transactions Act. However, other states that have adopted the Uniform Electronic Transactions Act have affirmed the plain language of the Act, and recognized that emails may constitute a writing sufficient to satisfy the statute of frauds. *See McClare v. Rocha,* 86 A.3d 22, 27 (Me. 2014) and cases cited therein. See also cases cited in *J.B.B. Investment Partners, Ltd v. Fair*, 232 Cal. App. 4th 974, 988 (Cal. App. 1st Dist, 2nd Div. 2014).

One of the features of the Act is that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." C.R.S. § 24-71.3-105. As set forth in the official comment to the section, "If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the

requisite agreement, express or implied, must be determined from all available circumstances and evidence . . . In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically. Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3, and 19."

In *Waddle v. Elrod*, 367 S.W.3d 217, 227-28 (Tenn. 2012), a settlement agreement involving transfer of real property (and thus subject to the statute of frauds) was determined to have been reached by an email exchange even though the exchange contemplated preparation of a formal settlement agreement. Similarly, the Massachusetts Court of Appeals found a settlement agreement had been reached and the two parties intended to be bound by the term set forth in email exchanges even though an email stated that "the parties did not intend to be bound until a formal settlement document had been signed." *Fecteau Benefits Group, Inc. v. Knox*, 890 N.E. 2d 138, 145 (Mass App. Ct. 2008).

**b. The Particulars of this Case as Relevant to the UETA**

Here, the emails themselves evidence the nature of the electronic transaction, and the agreement reached by the parties. That process starts with a detailed email from Tonso to Robison on June 16, 2015 setting forth "the preliminary proposed terms as I understand them." It concludes "I am sure it won't look like this or be this simple when the accountants and lawyers get done with it, but it is a start. . . this basic formula looks good to me." R. last line on p. 58 to 60. On June 23, Robison responds with a detailed recapitulation, adding some terms and discussing some changes in collateral. R. 56-58. On June 24, Tonso responds that the collateral discussion needs work. R. 56. That same day, Robison responds that he will work on the collateral, and asks, "does everything else look like it would work?" R. 56. Again that same day, Tonso responds "Yes, everything all looks good to me. . . seriously, see what you can do to sweeten [the collateral], would make us all feel better. Not a big issue, just a concern." R. 55-56. On June 26, Robison responds with a new proposal on collateral. R. 55. On June 29, Tonso responds that he can make the collateral work "everything is still good to go. . . Is it time to put together some sort of contract?" R. last line of 54 to 55. On that same day, Robison responds "put pen to paper. I think we got all major things covered." R. 54. At that point, there was a meeting of the minds,

evidenced by the electronic signatures on the emails. The only reference to any other more formal document was to the drafting of a contract to cover all minor details that may not have been addressed in the detailed email exchange.

All of the emails involved in the transaction are signed pursuant to the standard set forth in the comment to C.R.S. § 24-71.3-102, whereby "including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile." Specifically, Steve Tonso's final email accepting the transaction dated June 29, 2015, wherein he stated "We can make the collateral work . . . everything is still good to go," concludes with the signature block "Let's ger 'er done! Steve."

In this case, similar to the situations addressed in the *Waddle* and *Fecteau Benefits* cases discussed above, the meeting of the minds occurred through the electronic transaction, with an intended recapitulation to happen on paper. However, the circumstances clearly suggest that the paper writing was merely to memorialize the agreement that had been reached through emails. In other words, the "put pen to paper" was not an action to allow an agreement to be reached, because that agreement had been reached by June 29, 2015, through the email exchange, but rather to allow for the agreement to be separately memorialized. Chad Robison's Affidavit, R. 51-52 at ¶6, , makes clear that the parties understood

that they had reached an agreement, and intended to have Tonso's lawyer draft that agreement up, i.e. "put pen to paper."

### 3. THE SUFFICIENCY OF THE CONTRACTUAL TERMS

In order for there to be an enforceable contract, the email exchange must be sufficient to satisfy the requirements of the statute of frauds that the memorandum express the consideration and be subscribed by the party by whom the lease or sale is to be made. C.R.S. § 38-10-108. In *Micheli v. Taylor*, 159 P.2d 912, 913-14 (Colo. 1945), the Court identified four elements that must be contained in the memorandum, which must show on its face or by reference to other writings: (1) the names of the parties, vendor and vendee; (2) the terms and conditions of the contract (3) the interest or property affected; (4) the consideration to be paid therefor. The Court further held that, "If the names and intention of the contracting parties can be determined with reasonable certainty from the language of the instrument, and a valid contract is thereby disclosed, specific performance may be decreed thereon."

In *Micheli*, the contract was fairly abbreviated, and stated, in its entirety, the following: "'Received of The Taylor Coal Mining Co. of Walsenburg, Colo., one Dollar and other valuable consideration for my entire interest in the lands and

properties formerly belonging to the Pio Micheli estate purchase price balance of $7000 to be paid on or Before 12 months from date and covered by a partial Deed of Trust on the Rapson mine property and bearing 3% interest." The *Micheli* Court held that the contract satisfied the statute of frauds. In particular, it held that the property to be conveyed, "my entire interest in the lands and properties formerly belonging to the Pio Micheli estate", "is sufficiently identified to permit its designation by other documentary or parol evidence." The Court cited to numerous other cases with scant property descriptions that were sufficient when reference could be made to parol evidence to understand the property encompassed by the agreement. Of particular note is a citation to *Ryder v. Loomis*, 161 Mass. 161, 36 N.E. 836, wherein an agreement reciting sale of "my right in Benjamin Ryder's (my father) estate" was held to constitute a sufficient description to comply with the statute upon showing by parol evidence the positions of the parties and their relation to any property that would satisfy that description.

In this case, the email chain clearly refers to "11 quarters . . ." See email from Robison to Tonso dated June 23, 2015. R. 56-58. As shown on the Affidavit of Chad Robison, R. 51, the parties clearly knew the 11 quarters were the 10 originally listed with the Broker, plus an additional quarter subsequently acquired by Circle T, and 90 acres of brush land – it was all land owned by Circle T at the

time the agreement was made. So as to the terms of the contract, all 4 requirements delineated in *Micheli* are met. Each is discussed below.

1) The names of the parties, vendor and vendee

Steve Tonso was acting throughout the negotiation as the manager of Circle T Land Company, LLLP, and it was Circle T that was the seller. As shown in the Robison Affidavit, R 51 at ¶ 5, the 11 quarters described stood in the name of Circle T. Chad Robison was acting throughout as trustee of the Chad R. Robison Trust, as is clear from the email dated July 6, 2015, from Robison to Tonso. R. 54.

(2) The terms and conditions of the contract

The terms and conditions of the contract are clearly set forth in the email exchange. They are that the Circle T ranching operation is being purchased for the sum of $9 Million, specifically as follows (from Robison to Tonso email June 23, 2015, R. 56-58):

1) $6.5 Million at closing in January of 2016, with the balance of $2.5 Million carried by Seller with 12 annual payments of $225,000 beginning March 1, 2016.

2) 11 quarters of land together with all improvements, machinery, trucks, storage, and house.

3) Buyer to purchase $2.5 Million in life insurance to ensure the carried balance is paid.

4) Valuation of the Land at $6 Million, the house at $1 Million, and the machinery at $2 Million.

5) Seller to take back a mortgage interest in the storage units and seconds on the farm ground (Tonso to Robison email June 29, 2015, R. last line of 54 to 55).

(3) The interest or property affected

As discussed above, the property affected is the 11 quarters and 90 acres of waste land owned by Circle T, as well as all water rights and equipment. The specific identification of the sections of land, water rights, and machinery and equipment is shown in Gary Morgan's (Seller's broker) email to Robison of May 4, 2015, R. 61-71. The email specifically identified the following quarters:

1. NW¼ 5-40-9
2. SW¼ 32-41-9
3. SE¼ 1-40-8
4. NE¼ 1-40-8
5. SW¼ 30-41-9
6. NW¼ 25-41-8

7. NW¼ 22-41-9

8. NE¼ 22-41-9

9. SE¼ 15-41-9

10. NE¼ 15-41-9[1]

As discussed in Chad Robison's affidavit, R. 51 at ¶5, the 11th quarter mentioned in the email of June 23, 2015, the SW¼ of 14-41-9, was one subsequently acquired by Circle T that had earlier been the subject of a potential lease. *Compare* Gary Morgan email of May 5, 2015 "The seller said the following: Also the other 6 quarters would be available to lease for right at $30,000 per year,"(R. 72) with Robison email of June 23, 2015, "We have also spoken of many other such as . . . the leases on the 5 quarters" (R. 58).

(4) The consideration to be paid therefor.

The email chain clearly sets forth the purchase price of $9 Million, paid as follows: $6.5 Million at closing in January of 2016, with the balance of $2.5 Million carried by Seller with 12 annual payments of $225,000 beginning March 1, 2016. *See* email Robison to Tonso of June 23, 2015, R.57.

[1] There is a discrepancy between the designation of the NE¼15-41-9 in the materials attached to the May 4, 2015 email and the SW¼15-41-9 designated in materials prepared by Plaintiff, which will need to be resolved by parol evidence.

## 4. THE SUFFICIENCY OF THE E-MAIL EXCHANGE TO CONSTITUTE A CONTRACT

There can be no dispute that the parties had reached agreement on all of the essential terms of the contract, as discussed above. Indeed, that was the conclusion of the parties as evidenced in the email exchange: Tonso, June 29, 2015: "Let me know where you are on all of this. Sounds like we are getting close. Let's get 'er done!" (R 55), and Robison's response, the same day: "Ya I think we are, as my dad says, 'put pen to paper.' I think we got all major things covered." R 54. That exchange evinces the meeting of the minds required to form a contract.

The trial court, however, concluded that not only must Tonso have intended to sign the emails, he must have explicitly intended that the emails constitute a contract. The trial court stated that neither the email chain nor the affidavit support any inference that he intended to enter into a binding agreement, citing *Regions Bank v. Cabinet Works, LLC*, 92 S. 3d 945, 956 (La. App. 5 Cir. 2012) and *J.B.B. Inv. Partners, Ltd. V. Fair*, 232 Cal. App. 4th 974, 988-91, 182 Cal. Rptr. 3d 154, 164-66 (Cal. App. 1st Dist, 2nd Div. 2014) for that conclusion. The *Regions Bank* case is distinguishable from this case, as in *Regions Bank* it was clear that the email exchange proffered as the basis for an agreement left many material items unaddressed. 92 S. 3d at 956. Furthermore, the signatures at issue in that case

were of the attorneys involved in a settlement, and Louisiana law requires signatures of parties, not attorneys, to settlement agreements. *Id.*

Much closer to this case is the *J.B.B.* case. The first issue that must be noted with respect to *J.B.B.* is that it was not postured the same way this case is postured. *J.B.B.* was decided by the trial court after a hearing at which testimony was taken. 232 Cal. App. 4th at 981. Thus, the circumstances surrounding the context of undertaking the agreement electronically had been fully explored, satisfying the requirement of the statute that "the parties' actions and words be broadly construed in determining whether the requisite agreement exists." Official comment to C.R.S. § 24-71.3-105. In this case, to the contrary, because the trial court granted summary judgment, those facts and circumstances have not been explored. Because they have not, summary judgment was inappropriate, as further discussed in Section 5, below.

In *J.B.B.*, a series of emails certainly appear to show an agreement. Specifically, Fair, who was challenging the existence of an agreement, had emailed (with respect to a court proceeding that had been filed and that involved one of the subjects of the settlement agreement) "I have accepted by phone and [email]. Stop proceeding. . . you must stop and you must tell the court we have an agreement." 232 Cal. App. 4th at 980. The parties intended to draft a written settlement

agreement. At a subsequent point, the other side told Fair via email "It's a good thing we have a settlement, then; let's put pen to paper and close it. We are not going to stay anything until we have a signed deal." *Id.* The trial court in *JBB* found that there was an agreement as evidenced by the emails, which satisfied California's electronic transactions act. The court of appeals disagreed. The court of appeals noted that courts in other jurisdictions that have adopted versions of the Uniform Electronic Transactions Act (UETA) have concluded that names typed at the ends of emails can be electronic signatures, and cited to four of them. 232 Cal. App. 4th at 987. In distinction to those cases, the court of appeals relied on that portion of the UETA that requires that the context and surrounding circumstances, including the conduct of the parties, show that the parties agree to use electronic communication to formalize their agreement, citing California Civil Jury Instruction No. 380. *Id.* at 989. Colorado has no counterpart to CACI No. 380. Instead, Colorado has the language of the statute itself, which provides that "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." C.R.S. § 24-71.3-105. The issue is thus not whether the parties agreed to use email to *formalize* their agreement, as cited in the *J.B.B.* court's decision, but whether they agreed to conduct their transaction via email, as Colorado law

requires. If *J.B.B* were to be decided in Colorado, it is likely that the conclusion would have been in line with the trial court's.

When making that consideration, Colorado case law governing contracting in general is applicable. In other words, if the email was signed with the requisite intent to affix a signature, then the email can be considered in the same way in which paper letters or correspondence are considered to determine whether there is a writing sufficient to satisfy the statute of frauds. Colorado has long held that the writing required by the statute of frauds may be satisfied by a chain of correspondence. *See, e.g., Farmer's Equity Co-op Creamery Ass'n v. United States*, 132 F.2d 738, 739-40 (10th Cir. 1943): "Offers and acceptances by letters and telegrams may constitute an enforceable contract even though reference be made therein to the future execution of a more formal contract."

The case of *McClurg v. Crawford*, 209 F. 340 (8th Cir. 1913), provides the paper letter exchange analog of a slower time to the UETA case here. In *McClurg*, the owner of a series of mining claims in Ouray, Colorado solicited assistance from a law firm in dealing with them, and the response letter from Crawford offered to purchase the claims. The Court held that a series of letters that were exchanged that set forth all of the details of the transactions constituted a written contract sufficient to satisfy the statute of frauds, indicating agreement on all material terms

of the contract. The final letters, as recited by the court, were of a nature similar to those at issue in this case:

> 'Rogers, Ellis & Johnson, City-- Gentlemen: I have just heard from my friend in Ouray and also from my friend in New York to whom I had written concerning the funds needed to take up the J.I.C. deed, and I am glad to report that I have made the arrangement, and in the course of the next few weeks will be able to deposit the money to your credit. 'I will keep you advised in the course of a couple of weeks as to just when we want the deed deposited and whether we want it deposited here or sent to New York City. 'I am also securing some other property in the same neighborhood, and the whole matter will come through at the same time. My friend advises me definitely and beyond question and assures me that I can make you this definite promise. 'Very truly yours, Thos. B. Crawford.'

209 F. at 343. Accordingly, the Court held that the buyer, Crawford, was bound by the contract. Similarly in this case, the parties have concluded that they had an agreement. As in *McClurg*, where deeds and details still had to follow, here the intention was for a written memorandum to follow. However, the meeting of the minds took place. The contemplated written contract would have just been confirmation of the agreement reached. In none of the emails in the chain of communication in this case was there ever a reservation expressed, as in *J.B.B.*, that there would be no deal if there was not a separate written agreement.

In that regard, this situation is closer to the four cases cited in *J.B.B.* for the proposition that the signatures on emails in an email chain can satisfy the definition of an electronic signature. In *Preston Law Firm, L.L.C. v. Mariner Health Care*

*Management Co*., 622 F.3d 884, 891 (5th Cir. 2010) the Court noted that there was no explicit language accepting an agreement, but that the emails read together showed an agreement. In *Cloud Corp. v. Hasbro, Inc*., 314 F.3d 289, 296 (7th Cir. 2002), the Seventh Circuit, noted that had the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, been in effect (which has provisions recognizing electronic signatures analogous to those in the UETA), then there would have been no question of writings satisfying the statute of frauds. Noting that the transaction took place before that act's effective date, the Court nonetheless found the email chain in that case to be a writing satisfying the statute of frauds. The Court noted that "The purpose of the statute of frauds is to prevent a contracting party from creating a triable issue concerning the terms of the contract--or for that matter concerning whether a contract even exists--on the basis of his say-so alone." Here, that purpose is exactly satisfied by the email chain.

*Lamle v. Mattel, Inc*., 394 F.3d 1355 (Fed. Cir. 2005) is instructive with respect to this case. There, the parties were negotiating a licensing agreement. Before negotiating, Lamle had signed Mattel's disclosure that there were no agreements unless contained in a formal written contract. However, thereafter, the parties reached agreement on all terms at a face to face meeting. As related by the Court, "Mattel employee Mike Bucher ('Bucher') subsequently sent Lamle an

email entitled ‘Farook Deal’ on June 26, 1997 (the ‘June 26 email’), that substantially repeated terms agreed to at the June 11 meeting. The email stated that the terms ‘ha[ve] been agreed in principal [sic] by ... Mattel subject to contract.’ (Pl.App. at 153.) The salutation ‘Best regards Mike Bucher appears at the end of the email. (Id.)” *Lamle v. Mattel, Inc*., 394 F.3d at 1357. That email is similar in structure to the email of Tonso dated June 29, 2015, stating that everything was still good to go, and asking if it was time to draft the contract. While the *Lamle* court did not hold that the email chain and evidence before it conclusively demonstrated that there was a contract to enforce, it held that the email chain certainly it raised the issue in a way that summary judgment was inappropriate. Similarly here, summary judgment on the basis on the statute of frauds is inappropriate where the issue of the intent of the parties as expressed in the emails remains to be determined.

## 5. SUMMARY JUDGMENT IS INAPPROPRIATE

Summary judgment is appropriate only if the pleadings and supporting documents show that there is no genuine, material, factual issue and that the moving party is legally entitled to judgment. *Brodeur v. Am. Home Assurance Co*., 169 P.3d 139, 146 (Colo.2007). The nonmoving party is entitled to all favorable

inferences reasonably drawn from the undisputed facts; all doubts must be resolved against the moving party. *Id.* Here, the email chain and the conversations referenced in Chad Robison's affidavit, R. 51, clearly indicate that his understanding of the circumstances was that an agreement had been reached and the ranch was being sold to him. The Counter Affdavit signed by Steve Tonso, R. 87, merely asserts that he did not have a final agreement, and did not sign his name as if he were signing a contract. It is for the trier of fact to determine whether a contract was formed, which is a question of fact to be determined in light of all surrounding circumstances. *Yaekle v. Andrews*, 195 P.3d 1101, 1111 (Colo. 2008). It is also for the trier of fact to determine whether the agreement to conduct the transaction electronically is shown by the facts and circumstances including the conduct of the parties. "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." C.R.S. § 24-71.3-105. Accordingly, it was inappropriate for the trial court to enter summary judgment in favor of defendants when a dispute existed as to the intent and actions of the parties in conducting their transaction electronically. The court should have followed the reasoning of *Lamle, supra*, and denied summary judgment.

## CONCLUSION

The statute of frauds does not operate to bar the claim for breach of contract in this case because the email exchanges between the parties satisfy the requirement of a written memorandum subscribed by the seller. Certainly there was a sufficient showing of a dispute concerning the actions and intentions of the parties as it relates to conducting business electronically that summary judgment was inappropriate. Accordingly, the trial court erred in entering summary judgment for Defendant. Plaintiff requests that the entry of summary judgment be reversed and this matter remanded for further proceedings.

RESPECTFULLY SUBMITTED this 16th day of September, 2016.

ERICH SCHWIESOW, PC

By /s/ *Erich Schwiesow*

*Duly signed Original at the law offices of Erich Schwiesow, PC*

## CERTIFICATE OF SERVICE

I do hereby certify that on September 16, 2016, a true and correct copy of the above Second Amended Opening Brief was e-served via ICCES

/s/ *Erich Schwiesow*

*Duly signed Original at the law offices of Erich Schwiesow, PC*