DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO **Denver County District Court** **Denver City & County Bldg.** **1437 Bannock Street, Room 256** **Denver, Colorado 80202**	**▲COURT USE ONLY▲**
Plaintiffs: ALVERTIS SIMMONS, SIMMONS AND ASSOCIATES CONSULTANTS, and SIMMONS SECURITY, INC. **v.** **Defendant: REGIONAL TRANSPORTATION DISTRICT**	**Case Number: 2007CV1384** **Courtroom: 9**
Rolf G. Asphaug, Atty. No. 18701 Attorney for Defendant Address: 1600 Blake Street Denver, Colorado 80202-1399 Phone Number: 303-299-2203 Fax Number: 303-299-2217 rolf.asphaug@rtd-denver.com	
BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Plaintiff Simmons and Associates Consultants had a contract with RTD for facility and park-n-Ride inspection and other sporadic duties as assigned. The contract, signed by RTD on January 4, 2006, approved by the RTD Board of Directors on January 10, 2006, and signed by Simmons & Associates Consultants on January 11, 2006, was a no-bid "demonstration

project" for one year in duration with no options for renewal, and provided for RTD to pay $22 per hour with Simmons and Associates Consultants responsible for all costs to perform. The contract contained a not-to-exceed cap of $184,999. Contract personnel, including Alvertis Simmons, were required to undergo background checks. RTD advanced Simmons start-up costs, with Simmons required to pay back such costs at a set monthly rate.

2. Due to the "demonstration project" nature of the contract, RTD had the right to terminate the contract for convenience at any time, with no provisions for advance notice. The contract further specified that in such event RTD would be liable only for payment for services rendered prior to the effective date of termination with no other monies owed.

3. After RTD had advanced start-up costs but before Simmons had begun to perform, RTD became aware of information previously undisclosed by Simmons that RTD believed harmed the value of the contract as a demonstration project. Simmons concurred, and on January 13, 2006 signed a letter voluntarily withdrawing from the contract. Also on that same date, RTD issued its own written notice terminating the contract.

4. Over several weeks following Simmons' withdrawal letter and RTD's notice of cancellation, Simmons submitted claims for payment to RTD. The claims were generally described as start-up expenses for the contract. RTD paid all reasonably documented claims to Simmons, even though the contract had actually called for RTD only to advance Simmons such costs and for Simmons eventually to reimburse RTD for all such costs. In doing so, RTD told Simmons that RTD was paying Simmons his claims for the "cancelled" contract, and Simmons accepted RTD's money with no objections. Only four months after the contract was cancelled

did Simmons suddenly declare to RTD that the contract was not cancelled after all, in his opinion, and that he wanted to perform – or negotiate a "buyout" of – the contract.

5. Plaintiffs now allege breach of contract. However, not only did Simmons voluntarily withdraw from the contract and accept payments from RTD, but RTD also had the right under the contract to terminate it whenever RTD considered termination to be in its best interest. RTD did cancel the contract, due to information not previously disclosed by Simmons that harmed the value of the contract as a demonstration project for RTD. There had been no services rendered by Simmons when the contract was terminated, but RTD also paid Simmons all documented start-up costs.

6. There was no breach of contract by RTD, and RTD seeks summary judgment under C.R.C.P. 56(b). The parties mutually agreed to rescind the contract, with Simmons being paid sums that he would actually have been required to repay RTD had the contract continued in effect. If there was any doubt concerning the parties' intentions RTD also issued its own notice of termination.

7. Moreover, even if plaintiffs could somehow prove a breach of contract, they incurred no actual damages, and RTD alternatively requests summary judgment under C.R.C.P. 56(b) and (d) on the issue of damages. Simmons was paid all reasonably documented start-up costs even though the contract actually specified that such costs were only to be advanced to Simmons, with Simmons required to repay RTD on an installment basis. Damages for lost profits and loss of business reputation are also barred, both because the contract was terminable whenever RTD deemed it in its best interest with no advance notice required; and because any

such claims are speculative, remote, contingent, not reasonably ascertainable based on past experience, and not reasonably anticipated.

STATEMENT OF UNDISPUTED FACTS

9. The following facts are set forth in the Affidavit of RTD Assistant General Manager for Administration Phillip A. Washington, attached as Exhibit A hereto; exhibits to Washington's affidavit designated A-1, A-2, etc.; the Affidavit of RTD Contract Negotiator Robert E. Brown, attached as Exhibit B hereto; exhibits to Brown's affidavit designated B-1, B-2, etc.; the disclosures and discovery responses of plaintiffs attached as Exhibits C and D, respectively; and excerpts from Alvertis Simmons' deposition attached as Exhibit E. Citations to affidavits are by paragraph number (e.g., "Exh. A ¶ 2; Exh. A-1").

10. The contract at issue in this case was between RTD and Simmons & Associates Consultants. Exh. A ¶ 6. The contract was signed on RTD's behalf by Clarence W. Marsella, RTD's General Manager – RTD's chief executive officer – and by RTD purchasing agent Robert E. Brown on January 4, 2006. Exh. A ¶ 7. The contract was approved by the RTD Board of Directors on January 10, 2006. Exh. A ¶ 5. The contract was signed by Alvertis Simmons as CEO of Simmons & Associates Consultants on January 11, 2006. Exh. A ¶ 8. The contract contained the terms summarized in paragraphs 1 and 2 above, including this clause:

> **TERMINATION FOR CONVENIENCE. The Director of Materials Management, or his designate, by written notice, may terminate this Purchase Order, in whole or in part, when it is in the best interest of the RTD. Since this Purchase Order is for a Demonstration Project and is for services and if so terminated, the RTD shall be liable only for payment for services rendered prior to the effective date of termination with no other monies owed to either party.**

Exh. A ¶ 9; Exh. A-1; Exh. B ¶ 4.

11. RTD Contract Negotiator Robert E. Brown was the purchasing agent assigned to create the contract and was RTD's designate to administer the contract. Exh. A ¶ 10; Exh. B ¶ 9.

12. An amendment to the contract, signed by Alvertis Simmons as CEO of Simmons & Associates Consultants on January 11, 2006, as well as by RTD's General Manager Marsella and purchasing agent Brown on the same date, varied from the original contract only in changing the name of the project manager. Exh. A ¶ 11; Exh. A-2; Exh. B ¶ 9.

13. Simmons read the contract, including its terms and conditions. Exh. E, p. 86, lines 6-16.

14. On January 13, 2006, Simmons met with Washington. Exh. A ¶ 12. During the meeting Simmons signed a letter drafted by RTD and addressed to Marsella which stated:

> **Dear Cal:**
> **I regret that I have determined that it would be in the best interest of RTD to withdraw my participation in the contract to do business with RTD (BPO #67200CR).**
>
> **I have seen the high visibility that this contract has caused and I do not believe that it is [in] RTD's or my best interest to continue.**
>
> **I thank you for your past support and I hope to have an opportunity to work with RTD in a different capacity in the future.**
>
> **Sincerely,**
> **Alvertis Simmons**

Exh. A ¶¶ 12-14; Exh. A-3.

15. RTD accepted Simmons' withdrawal. Exh. A ¶ 15. After the contract had been approved by RTD's Board of Directors and signed by Simmons, "RTD became aware of certain matters previously undisclosed by Simmons to RTD that RTD believed harmed the value of the contract as a demonstration project." Exh. A ¶ 16; see also Exh. E p. 51 line 13 to p. 53 line 10;

Exh. E, p. 109 line 15 to p. 111 line 20 . “RTD therefore determined it to be in RTD’s best interest to end the contract as of January 13, 2006.” Exh. A ¶ 16.

16. Also on January 13, 2006, RTD Contracts Negotiator Brown prepared and RTD General Manager Marsella signed a written notice canceling the contract and reducing the contract price to zero. Exh. A ¶ 17; Exh. A-4). The notice stated, in relevant part:

> **CHANGE NOTICE CREATED TO CANCEL THIS PURCHASE ORDER IN ITS ENTIRETY PER THE REQUEST OF THE VENDOR IN HIS LETTER DATED JANUARY 13, 2006.**

Exh. A-4.

17. On January 13, 2006 Brown delivered the notice of cancellation to Simmons, either through mailing to the same address as appeared on the original or through delivery to Simmons’ accountant Roy Gentry. Exh. B ¶ 13. The notice was not returned to RTD as undelivered. Exh. B ¶ 13.

18. From January 13, 2006 through May 11, 2006, Simmons did not communicate to anyone affiliated with RTD that Simmons considered the contract to be anything other than terminated. Exh. A ¶ 19; Exh. B ¶ 15.

19. The contract did not expressly require RTD to advance any specific amount as start-up costs. Instead the contract provided for an hourly billing rate which was to be inclusive of all operating expenses incurred by Simmons, and further specified:

> **Contractor shall provide RTD with a comprehensive detailed start-up plan prior to the commencement of service. Contractor will reimburse RTD for the start-up costs on a monthly basis following the first month of operation. Such reimbursement shall take its form as a deduction from the ensuing invoices for work performed on an equal pro-rata basis each month provided that contractor has worked a full monthly schedule.**

Exh. A-1, p. RTD 000015.

20. On January 19, 2006, Simmons delivered a letter and Invoice No. 02-167 to RTD with claims for expenses incurred prior to cancellation of the contract. Exh. B ¶ 16; Exh. B-1.

21. On January 20, 2006, Brown advised Simmons by phone that supporting documentation for expenses was required in order for RTD to consider Simmons' claims. Exh. B ¶ 18. In this conversation with Brown, Simmons did not dispute that the contract was terminated. Exh. B ¶ 19.

22. On January 24, 2006, Brown delivered to Simmons a letter confirming the January 20 conversation and detailing the additional documentation that was required. Exh. B ¶ 20; Exh. B-2. The letter advised that "If the required invoices and statements are not received by this office by February 13, 2006 we will consider this matter closed." Exh. B ¶ 20; Exh. B-2.

23. On January 24 and February 2, 2006, Simmons and his accountant delivered to Brown additional documentation in support of Simmons' claims. Exh. B ¶ 21; Exh. B-3.

24. The documentation included an invoice from Simmons' attorney for attorney fees for "Review of Contract/Purchase Order between Simmons & Associates Consultants and Regional Transportation District," and "Provide advice and consultation on nature of the Contract/Purchase Order." Exh. B ¶ 22; Exh. B-3.

25. The documentation submitted by Simmons also included a claim for "Insurance cancellation requests," and a policy release form, signed by Simmons, that gave the reason for cancellation as "Requested by Insured." Under a "Remarks" section of the form signed by Simmons was the notation, "Lost contract before it started." Exh. B ¶ 23; Exh. B-3.

26. On February 6, 2006, Brown wrote to Simmons enclosing checks for invoiced items that RTD had determined were "applicable to and appropriate for the project for which you

were awarded purchase order 672001CR (later cancelled)." Exh. B ¶ 24; Exh. B-4. The checks enclosed with Brown's letter were made payable jointly to Alvertis Simmons and various vendors, and totaled $4,555.50. Exh. B. ¶ 25; Exh. B-4.

27. Simmons was personally named as a payee on all of the above checks, and all of the checks were eventually cashed and paid by RTD. Exh. B ¶ 26.

28. Following the February 6, 2006, letter from Brown, at no time did Simmons state that Simmons was accepting the checks from RTD but did *not* consider the purchase order "later cancelled" as Brown had stated in his February 6, 2006 letter. Exh. B ¶ 27.

29. In the February 6, 2006, letter, Brown had advised Simmons that documentation for certain claims was "insufficient to validate direct costs incurred at the request of the RTD in support of contract work or preparation therefor." Exh. B ¶ 29; Exh. B-4. At no time from February 6, 2006 onward did Simmons ever attempt to provide additional documentation to meet RTD's concerns as expressed in Brown's February 6, 2006 letter. Exh. B ¶ 29.

30. The documentation for the denied claims – a claim of $1,000 payable to Freddie Hanns, a claim of $800 payable to Simmons' ex-wife Betty Walker-Simmons, and a claim of $500 as an advance to Alvertis Simmons – was, in fact, insufficient to validate that the costs were for services rendered to RTD under the subject purchase order. Exh. B ¶ 30; Exh. B-3.

31. In his deposition, Alvertis Simmons described the $1,000 to Hanns as repayment of Hanns' loans to Simmons to cover "the Boulder project" – a separate RTD contract, Exh. B ¶ 34 – plus Simmons' cell phone bills "for November, December, and then some in January." "And then, of course, food, gas, that sort of thing. And also helped me with my rent." Exh. E, p.

98 line 25 to p. 99, line 20. Food and rent, and cellphone bills for November and December, would not be considered legitimate start-up expenses for the contract. Exh. B ¶ 34.

32. In his deposition, Simmons said that the $800 to Walker-Simmons "was for helping me with the Boulder project. Also, she provided me with cash to go back and forth to Boulder for that two months that I was doing it." Exh. E, p. 99 line 21 to p. 100 line 11. Again, the Boulder project was a separate, earlier purchase order contract that Simmons had had with RTD. Exh. B ¶ 34.

33. Finally, in his deposition Simmons said of the $500 advance to him: " 'I think it was for gas.' Q. 'Anything else?' A. 'Food.'" Exh. E p. 96, lines 7-9. Food, and a mere statement that Simmons "thought" he was paid for "gas," would also not have been considered legitimate start-up expenses. Exh. B ¶ 34.

34. In their April 4, 2007 C.R.C.P. 26(a)(1) disclosures, which have not been amended or supplemented, the plaintiffs described damages as follows:

1. **Compensation amount specified by contract, $184,999.**
2. **Anticipated contract renewal amounts, to be determined.**
3. **Incidental, consequential and general damages, to be determined.**
4. **Loss of business opportunities and business reputation, to be determined.**
5. **Prejudgement [sic] and post-judgment interest, costs and reasonable attorney's fees; current costs and attorneys fees of approximately $4,000.**

Exh. C, p. 4.

35. In their June 19, 2007 answers to RTD's interrogatories, Exh. D,[1] the plaintiffs described their damages as follows:

[1] Plaintiffs did not preface their responses with RTD's discovery requests, and for all interrogatories regarding damages the plaintiffs Simmons & Associates Consultants and Simmons Security, Inc. referenced plaintiff Alvertis Simmons' interrogatory answers. Copies of all of RTD's discovery requests and plaintiffs' responses (minus exhibits) are therefore jointly

10. Please provide a full and complete description, explanation (including identification of all relevant DOCUMENTS), and precise calculation of plaintiffs' claims for incidental, consequential, and special damages.

RESPONSE: Incidental and consequential damages include the amounts specified in the memorandum of January 19, 2006, revised January 24, 2006 and contained in Invoice No. 02-167, dated January 19, 2006, copies provided herewith.

11. Please provide a full and complete description, explanation (including identification of all relevant DOCUMENTS), and precise calculation of plaintiffs' claims for damages related to anticipated renewals of the contract.

RESPONSE: I was advised by RTD that the contract would be eligible for renewal at the end of each year, that our performance would be evaluated by the staff, that Mr. Washington would make a recommendation regarding renewal to the Board, and that the contract was likely to be renewed if our performance was satisfactory. No precise figures for the renewal of the contract were discussed.

12. Please provide a full and complete description, explanation (including identification of all relevant DOCUMENTS), and precise calculation of plaintiffs' claims for damages for loss of business opportunity.

RESPONSE: Until *RTD canceled this contract* [emphasis added]**, I and my companies, Simmons Security, Inc., and Simmons and Associates Consultants, had successfully completed all of our contracts, including such major projects as the Webb Building, the Colorado Convention Center, Invesco Field, and the Blair-Caldwell Library. *The cancellation of the contract*** [emphasis added]**, particularly for reasons suggesting some criminal activity or impropriety on my part damaged my business opportunities and reputation, but I cannot give you a precise figure for the damage.**

13. Please provide a full and complete description, explanation (including identification of all relevant DOCUMENTS), and precise calculation of plaintiffs' claims for damages for loss of business reputation.

RESPONSE: Same as Answer No. 12.

14. Please provide a full and complete description, explanation (including identification of all relevant DOCUMENTS), and precise calculation of plaintiffs' claims for all other "similar injuries and damages" as stated in the Complaint.

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attached as Exhibit D. Page references are to RTD's handwritten numbers on the lower right.

RESPONSE: Same as Answer No. 12.

Exh. D, pp. 5 (interrogatories to Alvertis Simmons), 11 (Alvertis Simmons' answers). Plaintiffs Simmons & Associates Consultants and Simmons Security, Inc. stated that their damages differed in no respect from those claimed by Alvertis Simmons. Exh. D, pp. 18 (interrogatory 8 to Simmons & Associates Consultants), 23 (its answer), 28 (interrogatory 5 to Simmons Security, Inc.), 33 (its answer).

36. In his deposition, Simmons testified that his companies had not had any contracts since April 2004. Exh. E, p. 26, line 17 to p. 28, line 15. Simmons also testified that his companies had not bid for any work since January 13, 2006. Exh. E, p. 130 line 18 to p. 132 line 20. Simmons & Associates Consultants did receive a contract with Albertson's Grocery covering part of 2006. Exh. E, p. 132 line 16 to p. 137 line 16.

37. Simmons testified that Washington had told him that if he did a good job on the contract, there was a "good possibility" that the contract would be renewed. Exh. E, p. 91, lines 2-4.

38. The contract was for a not-to-exceed amount of $184,999. Exh. E, p. 92, lines 1-3.

39. Simmons testified that he did not know what profits he would have made on the contract had it gone forward. Exh. E, p. 105 line 17 to p. 106 line 18; p. 139 line 21 to p. 140 line 2.

ARGUMENT

I. There Was No Breach of Contract; The Contract Was Cancelled

A. Simmons Withdrew from the Contract, and RTD Accepted His Withdrawal

On January 13, 2006 Simmons agreed to withdraw from the contract after his admitted bad checks for $4,500 in gambling debts and resulting arrest warrant were disclosed to the public and RTD. RTD accepted Simmons' withdrawal.

B. Even if Simmons' Withdrawal was Somehow Disregarded, RTD Also Terminated the Contract for Convenience

The termination clause at issue was not ambiguous, and it therefore cannot be contradicted by extrinsic evidence. *Friedman & Son, Inc. v. Safeway Stores, Inc*., 712 P.2d 1128, 1130 (Colo. App. 1985); *see also Cant Strip Corp. of America v. Schuller International, Inc*., 1995 WL 767805 (D. Ariz) (applying Colorado law).

A contract that allows a party to terminate for convenience if the party determines such to be in the party's best interest is a contract terminable at will. *4N International, Inc. v. Metropolitan Transit Authority*, 56 S.W.3d 860, 863 (Tex. Ct. App. 2001); *see also Roof Systems, Inc. v. Johns Manville Corp*., 130 S.W.3d 430, 442 (Tex. Ct. App. 2004) (termination for convenience clause allows termination with or without cause, and bars a claim for wrongful termination).

RTD believed it to be in its best interest to terminate the contract – either by Simmons' withdrawal or, if necessary, by RTD exercising its right to terminate the contract – due to Simmons' failure to disclose information harmful to the value of the contract as a demonstration project. Simmons' own withdrawal letter even stated that *he* believed that ending the contract was in RTD's as well as Simmons' best interests under the circumstances.

The contract provided that RTD could terminate it by written notice of the Director of Materials Management or his designate. It is undisputed that RTD did not merely rest on

Simmons' withdrawal letter.[2] Robert Brown was that designate, and that on January 13 Brown issued a written notice – also signed by RTD's General Manager (chief executive officer) Clarence Marsella – canceling the contract. The contract did not specify any address for notices, but Brown issued the notice either to the same address as set forth on the original and amended contracts that Simmons had signed, or to Simmons' accountant. The termination notice was not returned to RTD as undelivered. The contract was therefore duly terminated effective January 13, 2006.

In their interrogatory answers, the plaintiffs effectively concede that RTD canceled the contract: "Until RTD *canceled this contract* …" "The *cancellation* of the contract …" Exh. D, p. 11. Even if Simmons now maintains that his withdrawal letter was somehow ineffective, Simmons admits that the contract was canceled by RTD on January 13, 2006.

Upon termination of the contract, RTD was liable "only for payment for services rendered prior to the effective date of termination with no other monies owed to either party." There had actually been no services rendered, since the contract was cancelled so shortly after it was signed. However, RTD did pay Simmons all claims for which Simmons submitted reasonable documentation. The only claims submitted by Simmons which RTD declined to pay were, on their face, inadequately documented or not for services rendered under the contract at issue. RTD's determination was buttressed by Simmons' later deposition testimony, and by

[2] Had RTD not actually terminated for convenience, the doctrine of constructive termination for convenience would also be a defense, since RTD did have the right to terminate for convenience and did pay Simmons all sums due for termination for convenience. *See Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Comm'rs,* 152 Ohio App. 3d 95, 786 N.E.2d 921, 933-34 (2003) (analyzing federal common law of constructive termination for convenience).

plaintiffs' failure to provide any additional documentation in their Rule 26 disclosures and interrogatory answers.

C. RTD Did Not Engage in Anticipatory Breach

Simmons may be asserting a theory of anticipatory breach of contract by RTD to try to escape the legal effect of his signed letter of withdrawal. He may allege that Washington told him that RTD had already stopped payment on checks for expenses and that RTD was terminating the contract if Simmons did not voluntarily withdraw, and that such statements or conduct amounted to anticipatory breach. However, such a legal theory does not fit this case since RTD had the right to terminate the contract at any time, whenever RTD deemed it to be in its best interest, and without prior notice.

" 'In order to constitute an anticipatory breach of contract there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arises.' " *Johnson v. Benson*, 725 P.2d 21, 25 (Colo. App. 1986), *quoting* 4 A. Corbin, Contracts § 973 (1951). Anticipatory breach requires an unequivocal refusal to perform according to the terms of the contract, but here RTD was not refusing to perform according to the contract; instead, RTD was exercising its rights under the contract to terminate it – unless Simmons agreed to the alternative of voluntarily withdrawing from the contract.

In this case, the parties did agree to terminate the contract, with RTD accepting Simmons' voluntary withdrawal, and with RTD paying Simmons for items that – had the contract continued – Simmons would actually at some point have had to repay RTD, and with RTD also – on the same date as Simmons' withdrawal letter – issuing a written notice of

cancellation that was in full compliance with the contractual termination provisions. There was no breach of contract by RTD.

D. RTD Did Not Violate the Covenant of Good Faith and Fair Dealing

RTD was allowed to terminate the contract if in its best interest. The contract was a "demonstration project," and within hours after the contract was signed by Simmons RTD became aware of Simmons' outstanding arrest warrant for writing bad checks: charges that Simmons did not dispute. RTD paid Simmons all documented start-up expenses relating to the contract, and cancelled the contract January 13, 2007. Under these circumstances, there was no actionable violation of the covenant of good faith and fair dealing as a matter of law. *Interboro Packaging Corp. v. Fulton County Schools*, 2006 WL 2850433 (N.D. Ga. 2006) (school district not liable for breach of covenant of good faith and fair dealing when district terminated for convenience as permitted by contract); *Praecomm, Inc. v. U.S.*, 78 Fed. Cl. 5, 10-14 (Fed. Cl. 2007) (analyzing termination for convenience with good faith and fair dealing; also discussing constructive termination for convenience); *A.J. Temple Marble & Tile, Inc. v. Long Island R.R.*, 256 A.D.2d 526, 527, 682 N.Y.S.2d 422 (N.Y.A.D. 2d Dept. 1998) (termination for convenience did not violate covenant of good faith and fair dealing).

E. By Their Conduct Subsequent to January 13th, the Parties Effectively Rescinded the Contract If It Had Not Already Been Terminated

Simmons' acceptance of the checks tendered to him by RTD with the February 6, 2006 cover letter – a letter clearly stating that the checks were for payment of claims under "purchase order 672001CR (*later cancelled*)" – constituted mutual rescission of the contract as a matter of law. RTD would not have made those payments to Simmons had Simmons disclosed to RTD that he believed the contract still to be in effect. Exh. B ¶ 28.

Simmons' conduct is analogous to that of an insured cashing a premium refund check: the insurance contract is rescinded by the insured's conduct in cashing the check, and the insured's professed subjective intent to the contrary is irrelevant. *Avemco Insurance Co. v. Northern Colorado Air Charter, Inc*., 38 P.3d 555, 559 (Colo. 2002). "It is the knowing, voluntary, and informed *action* of cashing the check that effects a meeting of the minds and the resulting mutual rescission." *Id*. (emphasis in original).

II. RTD Is Not Liable for General or Special Damages

Assuming, also solely for purposes of this motion, that there somehow was an actionable breach of contract by RTD, Simmons would nevertheless not be entitled to any actual damages but only to nominal damages. *See* CJS-Civ 4th 30:33 (2002).

A. Plaintiffs Have No Valid Claim for Lost Profits

Plaintiffs have asserted a claim for lost profits. However, the claim is barred as a matter of law due to the immediately terminable nature of the Simmons-RTD contract. "[A]n aggrieved party to a terminable at will contract may recover only the net profits which would have been received had the other party to the contract given proper and timely notice of his intention to terminate." *Denver Publishing Co. v. Kirk*, 729 P.2d 1004, 1009 (Colo. App. 1986), *cited in* CJS-Civ 4th 30:46 (2002); *see also Cant Strip, supra*, 1995 WL 767805 (citing *Kirk*).

In *Kirk*, "[b]ecause the [contract] could be terminated … on 30 days notice, damages for loss of net profits beyond that time are uncertain, and accordingly, they are not subject to recovery in this case." *Id*. In this case, the RTD-Simmons contract could be terminated by RTD immediately, with no prior notice, and therefore loss of *any* net profits is necessarily uncertain as a matter of law.

And in any event, the contract was indisputably canceled by RTD by written notice on the *same day* as the meeting at which Simmons claims RTD breached the contract.

The claim for lost profits is also barred under the general principles for damages for breach of contract: that to be awarded, such damages must not be speculative, remote, contingent, or not reasonably anticipated. *See, e.g., Lee v. Durango Music*, 144 Colo. 270, 355 P.2d 1083, 1086-88 (1960); *Logixx Automation, Inc. v. Lawrence Michels Family Trust*, 56 P.3d 1224, 1227-28 (Colo. App. 2002). Neither in their Rule 26 disclosures nor in their answers to interrogatories specifically seeking such information have the plaintiffs provided any reasonable calculation, explanation and description of any claimed damages for lost profits. Simmons plainly had no idea about what his profits might actually have been had the contract lasted the full year. Plaintiffs also have not designated any experts to testify to such matters, and the time for such designation has long since passed. Summary judgment is therefore entirely proper on the issue. *Terrones v. Tapia*, 967 P.2d 216, 218 (Colo. App. 1998).

B. Plaintiffs Have No Valid Claim for Anticipated Renewal of the Contract

The contract at issue was a no-bid "demonstration contract" with a maximum duration of one year. There were absolutely no option provisions for renewal of the contract; to the contrary, the contract was terminable whenever RTD deemed it in its best interest to do so. The fact that the contract was terminable at will eliminated, as a matter of law, any expectation of its renewal, just as it operated to eliminate any legal expectation of lost profits. To be recoverable, damages must be within the reasonable contemplation of the parties. *Fountain v. Mojo*, 687 P.2d 496, 500 (Colo. App. 1984).

Moreover, in their interrogatory answers plaintiffs admitted that renewal was contingent on RTD staff evaluation, and that no figures for the renewal of the contract had been discussed. Simmons testified about the mere "possibility" that the contract would be renewed. Plaintiffs have provided no basis for a jury to conclude that the contract would be renewed for any subsequent time period. The claim is by its very nature barred as speculative, remote and contingent. *See, e.g., Lee, supra; Terrones, supra.*

C. Plaintiffs Have No Valid Claims for Loss of Business Reputation or Business Opportunity

The same arguments set forth above hold true for plaintiffs' claims for loss of business reputation or business opportunity. The contract was terminable for convenience by RTD. The plaintiffs admit that RTD canceled the contract. A party's proper exercise of its contractual right to terminate a contract is not a breach of contract and therefore cannot give rise to recoverable damages for loss of business reputation. Plaintiffs' argument is even more illogical because in this case Simmons was actually offered, and accepted, the alternative of withdrawing from the contract himself.

In addition, in their answers to interrogatories plaintiffs failed to provide any evidence in support of any specific award for loss of business reputation. To the contrary, Simmons testified that he had not had any other business since 2004, and had not bid for any other work since. Any amount for such damages is therefore entirely speculative. *See, e.g., Lee, supra; Terrones, supra*.

D. Plaintiffs Have No Valid Claims for Other Incidental, Consequential or Special Damages

Simmons accepted and signed the checks tendered by RTD on February 6, 2006: checks that Simmons was told were to close out the "cancelled" contract. RTD paid Simmons

everything he requested except for three claims for which documentation was plainly inadequate, and which Simmons actually confirmed through his testimony were not for legitimate start-up expenses for the contract at issue. Alleged "start-up" expenses that were actually loans to him for food, residential rent, and the like were not special damages within the reasonable contemplation of the parties. *See, e.g., Lee, supra; Terrones, supra.*

III. Standard for Summary Judgment

Summary judgment for RTD is warranted under C.R.C.P. 56(b), as "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." *Id.* The purpose of the motion is to save litigants the expense and time connected with a trial. *E.g., Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287, 1288-89 (1972). The non-moving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Id.* Where the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, it may satisfy its initial burden of producing and identifying the absence of any genuine issue of material fact by demonstrating that there is an absence of evidence in the record to support the non-moving party's case. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987).

CONCLUSION

For all of the above reasons, RTD respectfully requests that the Court grant RTD summary judgment under C.R.C.P. 56(b). If for any reason the Court declines to dismiss this entire action on summary judgment, RTD respectfully requests that the Court in such event at

least enter partial summary judgment on RTD's behalf under C.R.C.P. 56(b) and (d), striking all but nominal damages, for the reasons set forth above.

DATED November 5, 2007.

Respectfully submitted,

REGIONAL TRANSPORTATION DISTRICT

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing **Brief in Support of Defendant's Motion for Summary Judgment (including Exhibits A through E to the Brief)** was [ ] hand delivered, or [**x**] e-served by LexisNexis File and Serve, or [ ] served by facsimile to 303-393-0132, or [ ] sent by United States mail postage prepaid, to the following on this 5th day of November, 2007:

MARK S. BOVE, ESQ.
730 17TH STREET, SUITE 635
DENVER, CO 80202

S/ Rolf G. Asphaug
_____
Rolf G. Asphaug