

CAUSE NO. 74068-422

TURNER BROS. TRUCKING, L.L.C.,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
KRISTAL M. BAKER, INDIVIDUALLY	§	
AND D/B/A K&D LOGISTICS CO.,	§	KAUFMAN COUNTY, TEXAS
CLIFFORD DWAYNE JACKS,	§	
INDIVIDUALLY AND D/B/A	§	
K&D LOGISITICS CO., S/W QUALITY	§	
HAY, LLC, AND C.D. JACKS, INC.	§	
<i>Defendants.</i>	§	422 ND JUDICIAL DISTRICT

PLAINTIFF TURNER BROS. TRUCKING, L.L.C.'S
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff Turner Bros. Trucking L.L.C. ("Plaintiff" or "TBT") and moves the Court for summary judgment on its claims against Defendants Clifford Dwayne Jacks ("Jacks" or "Dwayne") and Kristal Marie White Baker ("Baker" or "Kristal"), each individually and doing business collectively and as general partners of K&D Logistics ("K&D"), and against C.D. Jacks, Inc. ("CDJ" or "CDJI") and S/W Quality Hay, LLC ("SWQH"), and in support thereof shows the Court as follows.

I.
Summary of the Motion

A. Contract Claims

1.1 Jacks and Baker have lived together as a couple for several years and had a child born of their relationship. They never married. When Baker saw a business opportunity, she had Jacks front the business and handle all of the money. They first did business with and defrauded Dynasty Transportation, Inc. ("Dynasty") and after Dynasty terminated its relationship, they looked for a new

target in the transportation industry. Baker and Jacks, doing business as partners of K&D then proceeded to enter into a broker's contract (the "Broker's Contract" or "Contract" or "Agreement") with TBT, then breached that contract repeatedly while perpetuating a fraud against TBT.

1.2 Baker and Jacks signed the Broker's Contract as owners and partners of K&D. Both repeatedly breached the contract they signed. Jacks apparently claims or may claim (since he has done so in the *Dynasty* case pending in Kaufman County against him) that, even though he collected and spent the money from the contract freely and kept hundreds of thousands of dollars of that money, he was not responsible for the breaches, even though the Court in this case has previously ruled by Order dated August 8, 2008 (**Exhibit "22"**), that at all times Baker and Jacks were general partners of K&D, a Texas general partnership.

1.3 Jacks cannot benefit in this way from the breaches and not be responsible for them. Baker was his partner in entering into and breaching the contract. Even if she was not, Jacks is responsible under the general rule that one cannot benefit from a contract while at the same time claiming to not be bound by its terms. Either way, Jacks has breached or benefited from the contract, and thus, is liable for the damages TBT has sustained.

1.4 Furthermore, the language in the Broker's Contract that Jacks and Baker signed with TBT provides that they are liable for nonpayment by the shipper or the consignee of the freight and transportation loads and arrangements they made.

B. Theft, Fraud, and Conspiracy Claims

1.5 Defendants engaged in a conspiracy to defraud TBT to obtain transportation services from TBT without paying for those services. They did so through K&D, as an independent contractor and freight broker and fiduciary of TBT, who was also acting as SWQH's agent, arranging to haul hay, bought by K&D, and sold to SWQH, by documenting the loads fraudulently. They

conspired and agreed that on the loads that were booked that K&D would not be named on the Rate Confirmation Sheets and bills of lading as the consignor or shipper and that SWQH would not be listed as the consignee or buyer, even though in each transaction those were the actual roles possessed by each. Instead, they conspired to name the hay seller that was selling the hay to K&D as the consignor and the hay buyer that was buying the hay from SWQH as the consignee. They did so to avoid the statutory liability that a consignor and consignee, respectively, have to pay for freight shipped and delivered as described in *49 USC § 13706* and the regulations issued thereunder.

1.6 They knew that under those regulations K&D could not, as a broker, arrange a load of freight in which it had a material and financial interest. Doing so would violate the provisions of *49 CFR § 371.9* and the other provisions of *49 CFR Parts 371 through 377*. They conspired to avoid having their respective names on any of the Rate Confirmation Sheets and bills of lading and other freight documents to avoid having any liability to TBT for the freight charges incurred or paid by TBT.

C. Implied Contract, Quantum Meruit, and Unjust Enrichment Claims

1.7 In any and all events K&D as the broker and *de facto* shipper and consignor shipped hay it bought and sent it to SWQH or its designees, and SWQH was the *de facto* consignee or buyer. Each received the benefit of the transportation services furnished or paid to other carriers by TBT and whether as *de facto* consignor and consignee, respectively, or otherwise, Defendants K&D and SWQH should be required to pay TBT for the services they received. It would be inequitable and unjust to allow each of the Defendants to be enriched at the expense of TBT. Furthermore, the Court has by Orders signed in this case on February 21, 2008 and September 3, 2008, granted Plaintiff interlocutory judgments on these claims against Baker and SWQH, respectively, for the reason expressed in those Orders.

D. Theft of Services, Fraud, Diversion of Funds, Conversion, Conspiracy, and Other Tort Claims

1.8 During the period in question at some point in time Dynasty Transportation ("Dynasty") filed a lawsuit in the 86th District Court of Kaufman County, Texas, and obtained prejudgment garnishment against bank accounts held by Jacks and K&D at American National Bank. The prejudgment garnishment was awarded Dynasty after it established at a hearing that it was swindled out of a great deal of money by similar tactics used by Jacks, Baker, and K&D when they were working as brokers for Dynasty. As a result of Jacks' and K&D's bank accounts being seized by Court process, K&D and SWQH agreed that any future payments for hay and/or freight that SWQH would or may make to K&D would instead be paid to Baker, individually or CDJI. CDJI and Baker, individually, never furnished any services to SWQH and CDJI was a corporation wholly owned by Jacks. SWQH thereafter paid numerous payments to Baker and CDJI to pay invoices it received from K&D for work actually done by or at the direction of TBT. (**Exhibit "5", Vol. 1, pps. 93-102; 115-134; Vol. 2, pps. 23-45; 57-95; 189-197; Exhibit "7", Vol. 1, pps. 151-185; Vol. 2, pps 220-222; 267-270; Exhibit "8", Baker Depo. exhibits "29 and "49"; and Exhibit "10"**). Again, this diversion of funds had as its purpose the nonpayment of TBT and the unjust enrichment of Defendants.

E. Fraudulent Tender of Payments to Plaintiff

1.9 To further their fraud, Jacks, Baker, and K&D tendered a check in the amount of \$132,000.00 made payable to Plaintiff to partially pay their obligations owed to Plaintiff under the Broker's Contract and under their open account. The check was drawn on the K&D bank account at American National Bank and was dated March 16, 2007. Baker refused to testify whether she forged Jacks' signature to the check but, in any event, she and Jacks testified that the check was tendered to

Plaintiff. However, at the time the check was written, dated, signed, and delivered, both Jacks and Baker knew the check would "bounce" and not be honored since they both had previously been served with case papers in the *Dynasty* case many weeks before and they both knew that the account the check was written on had been garnished and frozen. Nevertheless, they tendered the check to "pay to oldest invoices" as the memo on the lower left corner of the check states. Thereafter, Baker sent an email to TBT advising it that she, on behalf of Jacks and K&D, wired additional funds to pay TBT. The statements in that email were likewise false.

II. **Statement of Facts**

All references contained above and below are to exhibits that are contained in the Appendix to this Motion, unless otherwise indicated. Plaintiff incorporates the matters and evidence referred to above by reference for all purposes.

Factual Background Pertinent to All of Plaintiff's Claims

2.1 TBT is a common carrier that transports freight using its equipment or by the brokering of freight to other licensed common carriers. TBT's brokerage business involves the arrangement of freight shipments for shippers by authorized common carriers for a fee. TBT uses independent brokers or agents to solicit both shippers and carriers and to help arrange the shipping transaction. (**Exhibits "1", "2", "3", and "4"**).

2.2 On or about December 14, 2006, Plaintiff and Baker and Jacks, individually and d/b/a K&D, entered into a Broker's Agreement (the "Broker's Agreement" or the "Agreement"), a copy of which is attached to the Appendix as **Exhibit "23"** and is incorporated herein by reference for all purposes, for the hauling and transporting of merchandise and freight by motor vehicle under and in accordance with all appropriate governmental authority. In accordance with the terms of the

Agreement, TBT, as broker and a common carrier, agreed to compensate K&D, as independent contractor and a transportation broker, sixty percent (60%) of the net commissions received by Plaintiff from approved customers for shipments solicited by K&D for which K&D made all the arrangements and had the cargo shipped by Plaintiff or Plaintiff's authorized carriers. Under the terms of the Agreement, K&D represented that it was a licensed and authorized common carrier and transportation broker authorized to transport merchandise by motor vehicle and, to the extent it did not directly carry the cargo, it would broker the loads, and find licensed carriers that were acceptable to TBT to do so. Under the terms of the Agreement, K&D had limited authority to solicit and arrange for freight shipments. As a freight transportation broker K&D, and its partners, Baker and Jacks, owed TBT contractual and fiduciary duties. (*Id.*)

2.3 From on or about December 14, 2006 until the end of May, 2007, K&D engaged in an unlawful scheme involving numerous interstate and other freight transactions to misroute and embezzle funds that should have been paid to TBT and defrauded TBT out of at least \$414,215.56 in revenue and expenses. Defendants, Baker and Jacks d/b/a K&D, wrongfully diverted Plaintiff's shipping income to their own personal accounts. Baker and Jacks d/b/a K&D induced TBT to set up and utilize one or more accounts either in the names of non-existent customers, or in the names of existing customers, but with incorrect addresses for customer billing purposes by TBT, to fraudulently induce TBT to perform transportation and freight services for K&D and its customers, including, but not limited to, SWQH, and to engage other common carriers to transport the freight in accordance with information that was furnished by K&D to TBT. Furthermore, K&D was the actual shipper and consignor of the freight loads at issue but K&D, in conspiracy with SWQH, failed to properly document the freight documents to reflect the reality of the transactions and failed to name

SWQH as the consignee of the freight. Such conduct violated the contractual and fiduciary duties Baker, Jacks, and K&D owed to TBT. **(Exhibits "1", "2", "3", "4", "5", "7", and "15")**.

2.4 In addition to unlawfully diverting revenue that belonged to TBT and defrauding TBT into paying freight expenses to other common carriers, Defendants Baker and Jacks d/b/a K&D, and Defendant CDJ engaged in other unlawful acts including, but not limited to, the misappropriation of the identity, credit and other information of customers or potential customers of TBT, the creation of a fictitious business location for SWQH to trick TBT into sending freight bills to SWQH at a fake address, the creation and dissemination of false information and tendering insufficient funds checks and bogus information about wire transfers of funds to TBT to pay or attempt to pay freight expenses incurred by K&D for itself or its customers, collecting funds for services rendered by TBT or common carriers engaged by TBT under false pretenses, and other unlawful acts. **(Exhibits "5" and "7")**.

2.5 Defendants Jacks, Baker, and CDJ have deposited the money from their sham transactions into bank accounts owned or controlled by them. They have previously transferred the money and otherwise placed the funds that they have wrongfully collected that actually belong to or were earned by TBT beyond the reach of TBT. Evidence presented in the *Dynasty* and *Lakeview* cases pending against Jacks and Baker establish that the same scheme was perpetrated by Defendants on other common carriers doing business in Texas. **(Exhibit "5", "7", and "15")**.

2.6 Under the terms of the Broker's Contract, TBT was to invoice the approved customers for the transportation services rendered and was to be paid by those customers and once paid, TBT would remit to K&D its share of the net commissions. Baker, Jacks, and K&D billed customers, including SWQH, for the freight expenses of the loads, collected the freight charges from the customers but failed to pay TBT those collected freight expenses in violation of their contractual and

fiduciary duties to TBT. Furthermore, on most of the loads at issue, K&D was the actual shipper and consignor but failed to reveal those facts to Plaintiff in violation of K&D's fiduciary duties owed to Plaintiff. **(Exhibits "1", "2", "3", "4", "5", "7", and "23")**.

2.7 One such customer was SWQH. Plaintiff received numerous freight shipment orders through K&D for transportation services to be performed to and for the benefit of SWQH. Plaintiff accepted such orders and either directly or indirectly fulfilled such orders and invoiced SWQH and/or K&D for the transportation services and labor furnished. Both K&D and SWQH received the benefit of Plaintiff's services but refused to pay Plaintiff for such services, SWQH advising Plaintiff that it considered itself to be K&D's customer, not Plaintiff's customer, and therefore SWQH failed and refused to pay Plaintiff for the invoiced transportation services. K&D refused to pay the freight expenses to Plaintiff claiming alternatively that it was not the shipper/consignor, or that the freight expense was to be paid only by SWQH even though its name did not appear on the bills of lading, created by K&D, either as shipper/consignor or buyer/consignee. **(Exhibits "1", "3", "4", "5", "7", "10", "18", and "21")**.

2.8 The transportation services were furnished by Plaintiff to K&D and SWQH during the period of December 11, 2006 through at least April 24, 2007. **(Exhibits "1", "3", "4", "9", "12", "13", and "14")**.

2.9 Although SWQH failed to directly pay Plaintiff for all of the services provided, it apparently did pay some of the invoices to K&D. K&D in turn paid only a very small portion of such invoiced amounts to Plaintiff. Both K&D and SWQH have failed to pay Plaintiff in full for all transportation services furnished to K&D and SWQH by TBT or other carriers engaged and paid by TBT. **(Exhibits "1", "3", "4", "5", "6", "7", "8", "9", "10", "11", "12", "13", "14", "15", "18", and "21")**.

2.10 At some point in time during this process Defendants Baker, Jacks, SWQH and CDJ conspired and agreed to have SWQH remit payments due for the transportation services furnished by Plaintiff to K&D and SWQH to CDJ, instead of paying Plaintiff. CDJ performed none of the services and was not a party to any express contract with Plaintiff or with SWQH. Thus, Defendants, at some point in time, apparently entered into a concert of action and/or conspiracy to deprive Plaintiff of the payment of funds due it for the transportation services which it furnished to K&D and SWQH through K&D. Through this concert of action and/or conspiracy those Defendants diverted, misapplied, misappropriated, withheld, procured by theft, exercised dominion and control over funds, money and payment proceeds due to Plaintiff from SWQH for transportation services rendered to K&D and SWQH. Most, if not all, of these diverted, misapplied, misappropriated, stolen, and withheld funds were never paid to Plaintiff by any of these Defendants, and Plaintiff's claims and causes of action relate to these unpaid and misappropriated funds. (**Exhibits "5", "6", "7", "8", "10", and "18"**).

2.11 Plaintiff's Broker's Agreement with K&D required the approved customers to pay Plaintiff for the transportation services furnished and only after Plaintiff was paid was Plaintiff, as broker or carrier, obligated to pay K&D, as independent contractor and freight broker, its percentage of the net commissions received from the customers. By reason of the concert of action and/or conspiracy which the Defendants engaged in, as described above, Defendants Baker and Jacks, individually and doing business as K&D breached the Broker's Contract causing Plaintiff to suffer damages as described below. Defendants SWQH and CDJ induced or conspired with Baker and Jacks and K&D to breach the Broker's Agreement in several respects, including by insisting on paying K&D and later CDJ for the services furnished by TBT or other carriers which TBT hired and paid to transport the loads. (*Id.*)

2.12 By reason of the concert of action and/or conspiracy which the Defendants engaged in, as described above, Defendants CDJ and SWQH tortiously interfered with the contractual relationship between Plaintiff and K&D causing Plaintiff to suffer damages as described below. **(Exhibits "1", "3", "4", "11", "12", "13", and "14")**.

2.13 The Defendants conduct, both individually and collectively, constitutes the theft of transportation services which Plaintiff furnished to both K&D and SWQH and was designed to deprive Plaintiff of the payment for the services which it rendered and the Plaintiff suffered damages as a result thereof. **(Exhibits "5", "6", "7", "8", "9", "10", "11", "12", "13", "14", "15", "18", "19", "20", and "21")**. The Defendants' conduct, as described above, constitutes one or more violations of the *Texas Theft Liability Act (TLA)*, §§134.001 *et. seq.* of the *TCPRC*.

2.14 The conduct of the Defendants resulted in the Defendants wrongfully maintaining dominion and control of money and other payments and property due to Plaintiff for services rendered by Plaintiff to K&D and SWQH and those funds and properties belong to Plaintiff in equity and good conscience. One, more than one, or all of the Defendants hold those funds and properties, which properly belong to Plaintiff, whether as a matter of an express or implied contract, or under the doctrines of *quantum meruit* or unjust enrichment, or for money had and received, or under other applicable legal theories. **(Id.)**

2.15 Demand has previously be made upon each of the Defendants to pay Plaintiff for all amounts due it by each Defendants, and for the Defendants to return to Plaintiff all funds, money and other property and assets to which it is entitled. Despite such demands, Defendants have failed and continue to fail to either return funds and property belonging to Plaintiff and/or to pay Plaintiff what is due. **(Id.)**

METHOD OF DOCUMENTING SHIPPING TRANSACTIONS

2.16 In the ordinary course of business, an independent contractor and freight broker like K&D has authorization to arrange a freight shipment in the following manner. The contractor, like K&D, solicits a shipper who wishes to ship a product or commodity often across state lines to a recipient. Sometimes the shipper may be an entity in the brokerage business of buying and selling commodities, which the evidence establishes was the nature of the business operations of both K&D and SWQH. In any event, after soliciting business from the shipper or broker, the contractor furnishes the information to TBT so that TBT sets up the customer in its database and assigns a customer number to that customer with all identifying information, including addresses, telephone numbers, and contact individuals. In the case of SWQH, K&D reported to TBT that SWQH would become a new customer of TBT and furnished false and fraudulent information concerning SWQH's address, telephone number, and other information. TBT set up an account for SWQH in its accounting and billing software based on the data that K&D, acting as SWQH's agent, provided to TBT. Furthermore, K&D failed to reveal to TBT that on the freight loads it was arranging for billing to SWQH, K&D was the actual consignor, shipper, and customer. K&D was buying hay from hay sellers across the United States and selling that hay to SWQH, who itself was reselling the hay to customers of SWQH. Jacks, Baker, and K&D failed to disclose their personal relationship to the freight transactions to TBT in violation of their fiduciary and contractual duties to TBT. Furthermore, by failing to inform TBT that K&D was the *de facto* shipper and consignor of the freight loads at issue, K&D breached the duties owed by it to TBT pursuant to the statutory and regulatory obligations owed to it under *49 CFR 371.9* and the other regulatory provisions of *49 CFR Parts 371 – 377*, generally. It was a conflict of interest for K&D to act as both consignor/shipper and freight broker on these transactions and to not document the transportation documents, including the

bills of lading, accurately and completely. K&D specifically breached numerous duties owed to TBT by failing to properly document those transactions involved in this lawsuit to correctly reflect that it was the consignor and shipper and that SWQH was the consignee and buyer. K&D and SWQH conspired to improperly document these transactions to avoid the responsibility for payment of those shipping transactions that each would have as a matter of law under *49 USC § 13706*, if the transactions were properly documented on the bills of lading and other shipping documents to reflect them as the consignor and consignee, respectively. (*Id.*)

2.17 Thereafter, the customer, like SWQH, placed an order with K&D and K&D obtained the shipping information including the customer, the shipper, the consignee, the freight destination, the nature of the freight, and other necessary information and furnishes that information to the delivering carrier. Upon receiving that information, an independent broker, like K&D, or representatives of TBT assigned the shipping transaction a Pro-Number. The Pro-Number is used to process the shipment for billing and record keeping purposes. Thereafter, a Rate Confirmation Sheet containing an assigned Pro-Number is prepared by the independent broker like K&D or TBT and it sends it to the performing carrier, if TBT will not directly be carrying the cargo. Furthermore, if more than one carrier may be involved in the process, the Rate Confirmation Sheet may also reflect those facts. The Rate Confirmation Sheet confirms the terms of the agreement between TBT and the performing carrier, including the destination and shipping rate. The performing carrier then completes the rate sheet, hauls the freight, and returns the rate sheet to TBT along with the original bill of lading confirming the shipment, a weight ticket for the load, and an invoice for the work. TBT relies on the information and paperwork submitted by the broker contractor, like K&D, and the paperwork submitted from the customer and the performing carrier. In the situation where TBT does not actually haul the freight, TBT pays the actual transporting carrier for its fee and expenses.

Finally, TBT bills its customer and collects payment from its customer in the normal course of business. **(Exhibits "1", "2", "3", and "4")**.

MISUSE OF THE PROCESS BY JACKS, BAKER, AND CDJ

2.18 Sometime on or about December 14, 2006, Defendants Baker and Jacks d/b/a K&D advised TBT of a new customer for TBT, namely SWQH, and sent information to TBT to set up a new account for SWQH at a location in Abilene, Texas. At the time of the communications from K&D, SWQH had no office or facilities in Abilene, Texas; however, TBT was not informed about those facts until much later in the process when it ultimately had learned that SWQH was located in Hawley, Texas at a completely different address. In any event, after TBT set up the account for SWQH in Abilene, Texas, TBT began processing orders for shipment of goods either shipped by or brokered by K&D and/or SWQH and processed those orders in the manner indicated above charging all of the orders to K&D as the agent or broker for SWQH. Baker and Jacks either falsely represented to the customer, like SWQH, that K&D was arranging for the transportation or was paying for the carrier's expenses or K&D and SWQH had agreed to conspire to obtain the freight services without paying the carrier's expenses. Apparently, there was no mention of the name of TBT to the customer, like SWQH. Defendants Baker and Jacks d/b/a K&D gave false information to representatives of TBT to set up the account and location for SWQH as the shipping customer. **(Exhibits "1", "2", "3", "4", "5", "6", "7", "8", "10", and "18")**.

2.19 After shipments were prepared, confirmed, and all of the freight arrangements made, the product being brokered by K&D and/or SWQH was shipped as the erroneously prepared Rate Confirmation Sheet and way bills required. Baker and Jacks d/b/a K&D then billed SWQH an amount of money. It is unclear from the evidence whether the amount of money billed to SWQH included or was intended to include freight and transportation charges. SWQH claims that the bills it

received from K&D included freight charges, while Baker and Jacks contend that on many of its invoices freight charges were not included, unless specifically stated on the invoices. In any event, K&D billed either SWQH as a commodities broker or the shippers or consignees directly for the freight services furnished by TBT or its contracting carriers, collected funds, and failed to pay TBT for the services which it or its contracting carriers rendered. The funds collected by K&D were deposited into one or more checking accounts possessed by Baker, Jacks, K&D, or CDJ. To the extent K&D ever received freight revenue, that revenue was almost never tendered to TBT. In total, TBT received two or three small payments for freight services furnished by TBT to K&D and SWQH that cleared the collection process. One alleged wire transfer and one check dishonored for insufficient funds were each offered or tendered to TBT by Defendants Jacks, Baker, and/or CDJ but did not clear the collection process as Plaintiff's account records indicate. (**Exhibits "1", "2", "3", "4", "5", "6", "7", "8", "9", "10", "11", "15", "16", "18", "19", "20", and "21"**).

III.

A. Overview of Plaintiff's Transportation and Brokerage Business

3.1 TBT's transportation brokerage business involves contracting with customers or shippers who need freight shipped and arranging for an authorized carrier, including TBT, to haul it for a fee. (**Exhibits "1", "2", and "3"**). TBT's transportation and brokerage business includes brokering and shipping hay and other cargo shipments in Texas and across the United States. (*Id.*) TBT is authorized to arrange for the transportation of freight for shippers with authorized common carriers under ICC License MC-444847 (*Id.*) The license allows TBT to appoint brokers to book freight through TBT. (*Id.*) The license does not authorize agents or brokers to book freight through a broker, carrier, or transportation entity other than TBT. (*Id.*)

3.2 TBT sometimes uses independent broker agents to solicit existing and potential shipping customers and carriers and to help arrange the shipment. (*Id.*) TBT enters into a broker's contract with its brokers and pays its brokers a commission based on a percentage of the shipping profit the broker generates. (**Exhibits "1" and "2"**). A TBT broker is sometimes provided support, or assistance by TBT and is required to coordinate its activities with the local and main offices of TBT in booking freight loads. (**Exhibits "1" and "2"**).

B. How TBT's Brokerage Business is Supposed to Work

3.3 A TBT broker is authorized to arrange a freight shipment as follows. The broker solicits a shipper such as a business with freight shipping needs. A credit application and related materials are completed for the shipper and submitted to TBT for credit approval. If approved, the shipper is set up as a TBT customer and assigned a unique customer number. (**Exhibits "1" and "2"**).

3.4 When the customer places an order, the TBT broker negotiates with carriers, finds the least expensive carrier available and then prepares the initial freight and transportation documentation, including a Rate Confirmation Sheet, and sends the shipping information, including the previously assigned customer number and freight destination to TBT. The shipping information should have the correct identity and address of the shipper and consignor and recipient and consignee, as federal law and regulations required. (**Exhibits "1" and "2"**). The TBT system then generates a Pro-Number for each transaction. (*Id.*) The Pro-Number is used to process the shipment for billing and record keeping purposes by TBT. (**Exhibits "1", "2", and "3"**).

3.5 The broker then confirms the arrangements with an authorized carrier (which may be TBT or others) to haul the customer's freight. The broker finalizes a Rate Confirmation Sheet which contains the assigned Pro-Number and shipping information and sends it to the carrier for review and

signature. The Rate Confirmation Sheet confirms the terms of the agreement between TBT and the carrier, including the destination and shipping rate. The carrier signs and returns the Rate Confirmation Sheet to the broker. The broker maintains the Rate Confirmation Sheet and forwards it or a copy to TBT's local and/or home office as needed to confirm a rate. (*Id.*)

3.6 Once the shipper, destination, and carrier have been arranged by the broker, the carrier hauls the freight. The carrier sends documentation to TBT to confirm the shipment. Such documentation includes, but is not limited to, a bill of lading, weigh ticket, and an invoice for services. TBT relies on the information and paperwork submitted from the broker and the carrier. TBT pays the carrier for its fee once the load has been properly delivered. Finally, TBT bills the customer and collects payment from the customer and splits the net profit on the load with the broker as the commission in accordance with the contract with the broker. (**Exhibits "1", "2", and "3"**).

C. Defendants Jacks and Baker Form K&D and Become TBT Brokers

3.7 For several years before 2006, Baker and Jacks were involved in a romantic relationship and lived together. They are not married. They had a child together. (**Exhibits "5" and "7"**). Their child support litigation was previously pending before this Court. (*Id.*) In about July 2006, they formed K&D. "K&D" stands for "Kristal and Dwayne." (**Exhibits "5", "7", and "15", pps. 118-186**). Both Baker and Jacks are listed as owners and partners on the document which set up the entity as a general partnership. (**Exhibit "7", Vol. 1, pps. 9-19; Exhibit "8", Baker Depo. exhibits "1", "2", "3", and "4"**). The Court has previously ruled by Order dated August 8, 2008, (**Exhibit "22"**) that at all times their business as K&D was a general partnership. Throughout their stormy relationship, Baker always described the entity as a "joint venture" or "partnership" between herself and Jacks. Moreover, in December, 2006, Baker and Jacks each signed a document acknowledging that they were partners in K&D. (**Exhibit "5", Vol. 2, pps. 8,**

176-183; Exhibits "6", Jacks Depo. exhibits "35, and "36"; Exhibit "7", Vol. 1, pps. 9-19, 116-117, 159; Vol. 2, pps. 224-228; 246-248, 2768; Exhibit "8", Baker Depo. exhibits "1", "2", "3", "4").

3.8 On December 14, 2006, TBT and Baker and Jacks as owners of K&D entered into a Broker's Contract with TBT ("Broker's Contract"). (**Exhibits "23" and "6", Admissions in Exhibits "6" and "8"; Exhibit "5", Vol. 1; pps. 81-91**). They made a number of promises in the Broker's Contract, including: (1) a promise to solicit and arrange for freight in accordance with TBT's authority; (2) a promise not to compete with TBT in the arranging of freight shipments or act as an agent for another broker or transportation entity; and (3) a promise to use their best efforts to solicit and arrange business for TBT. They further agreed to hold TBT harmless for any liability resulting from what K&D arranged and to pay for all loads if the shipper or receiver failed to do so. In exchange, TBT agreed to pay a net profit commission for all shipments booked by K&D. (*Id.*)

3.9 Although they were partners of K&D, sometimes it appeared that, at least in Jacks' view, Baker was his agent or contract worker, rather than a partner. (**Exhibit "15", pps. 118-186**). He wrote her checks from the K&D checking account (starting as early as August, 2006) and authorized her to prepare invoices from K&D to its customers, one of which was SWQH.

3.10 Jacks opened K&D's checking account on July 25, 2006, in the name of "C. Dwayne Jacks d/b/a K&D Logistics" with the Terrell, Texas branch of the American National Bank of Texas ("Bank"). Jacks explicitly set up the account "to deposit the income from the freight operations that Baker and K&D Logistics were engaging in." Jacks is the only person authorized to transfer money out of the account. (**Exhibit "5", Vol. 1, pps. 24-27, 38, 77, 119-121**). Baker had no signatory authority on the account because she had previously written "hot checks" on Jacks' prior account at the same bank and that bank refused to allow Baker to have any authority on the accounts. (*Id.*)

D. Defendants Create a Sham Business Location and Account Number for SWQH in Abilene, Texas

3.11 Sometime before December, 2006, Baker contacted Bob Dyke, Rockwall Terminal Manager for TBT, and asked about the procedure for setting up a credit account for SWQH at its alleged location in Abilene, Texas. (**Exhibit "7", Vol. 1, pps. 37-41**). TBT advised Baker that she needed to send her request in writing. Baker agreed to do so. Shortly thereafter, Baker sent a notice to TBT that SWQH was a customer located in Abilene, Texas, that wanted to do business with TBT. (**Exhibits "8", Baker Depo. exhibit "5"**). Relying on Baker's representations about a location and address for SWQH, TBT then set up a new customer number and billing address for SWQH. (**Exhibits "1", "2", and "3"**). The new customer number for SWQH was SWQUAL0001, and the billing address was P.O. Box 1701, Abilene, Texas 79604. (**Exhibit "7", Vol. 1, pps. 37-41 and Exhibit "8", Baker Depo. exhibit "5"**).

3.12 Defendants' apparent intent in setting up a fake billing address for SWQH was to cause TBT to send its invoices to the fake address instead of the correct address for SWQH in Hawley, Texas. Defendants' representations about the business location and address for SWQH were false because SWQH never had an office address in Abilene, Texas; never authorized anyone to set up a business location for it in Abilene, Texas; and did not have any knowledge of the information sent to TBT by K&D. Further, the address given to TBT for SWQH's location in Abilene, Texas was incorrect and the Defendants all knew that. Thus, all of TBT's original invoices to the fake address set up for SWQH were ultimately returned. Once TBT became aware of these false representations by K&D, TBT sent replacement invoices to SWQH at its correct address in Hawley, Texas, but SWQH refused to pay the invoices claiming that it was not a customer of TBT but was only a customer of K&D. (**Admissions in Exhibits "18" and "21"**).

E. Defendants Divert TBT Revenue, Compete with TBT, and Defraud TBT into Paying Freight Expenses and Commissions

3.13 After setting up the fake account for SWQH, Defendants Jacks, Baker, and K&D, and later CDJI, then engaged in numerous shipping transactions with their customer, S/W Quality Hay, LLC ("SWQH"), and defrauded TBT into paying the freight expenses and commissions for the shipments. (**Exhibits "1", "2", and "3"**). In short, the K&D Defendants sold carrier services, pocketed the money, and had TBT pay for it, and SWQH benefited from all the services furnished to it.

3.14 The documentation in support of the numerous shipping transactions using the fake SWQH account, and later a corrected account, is contained on **Exhibits "12", "13", and "14"**. The documentation in support of the transactions contains TBT's business records. (*Id.*) The business records reflect the following business record information that was entered into TBT's computer system using the data supplied by K&D and later SWQH:

- **Billing Information:** Contains the Pro-Number for each transaction and the customer name and number for the SWQH account set up by K&D;
- **Ship From/Ship To:** Information reflecting the pick up and delivery locations;
- **Commodity Description:** Hay;
- **Carrier Information:** identifying the carrier that actually delivered the load;
- **Payouts:** Reflecting the amount of money TBT was required to pay the Carriers;
- **Shipper or Consignor:** Reflecting who K&D identified as being the shipper and consignor;
- **Buyer or Consignee:** Reflecting who K&D identified as being the buyer and consignee.

3.15 In addition, **Exhibits "6" and "10"** contain copies of K&D's invoices to SWQH using a Reference Number and shipping destination that sometimes matches TBT's Pro-Number and shipping information. (*Id.*) Further, **Exhibit "6"** contains copies of K&D's work-in-progress documents, including their corresponding Rate Confirmation Sheets. All of the Rate Confirmation Sheets and many of the other documents contain Baker's handwriting.

3.16 Defendants' scam is best illustrated by taking a look at the documentation for these transactions. In all of them, K&D solicited a freight order from SWQH. (**Exhibits "6", "9", and "10"**). K&D represented to SWQH that K&D was arranging for the transportation and was paying for the carrier's expenses. (**Exhibit "6", "9", ad "10"**). There was no mention of TBT to SWQH. (*Id.*) There was no mention of SWQH to TBT. Defendants did not obtain a written agreement from TBT that they could compete against TBT or act as a broker, carrier, or transportation with an entity other than for TBT. K&D and later CDJI were paid by SWQH. The dispatch records K&D generated and furnished to TBT never mentioned K&D as the shipper or consignor and never mentioned SWQH as the buyer and consignee. (**Exhibit "6", pps. Jacks' Depo. Ex. 000281 – 000453; Exhibit "9"**, exhibit pages TurnersBros-v.Baker,etal. 000159-000885).

3.17 K&D falsely represented to TBT that the fake address in Abilene, Texas, that it gave to Plaintiff was SWQH's correct location was the shipping customer instead of SWQH's address in Hawley, Texas. (*Id.*) Relying on the misrepresentation, TBT issued a Pro-Number for the transaction and set up the billing for SWQH's fake Abilene, Texas address. (**Exhibits "1", "2", and "3"**).

3.18 Baker then negotiated and arranged for a carrier to transport the freight and submitted the carrier's information to TBT. (*Id.*) K&D generated a Rate Confirmation Sheet in Baker's handwriting containing the Pro-Number that Baker assigned to the transaction rather than Plaintiff

(**Exhibit "6"**) and forwarded it to the carrier. The carrier completed, signed, and returned the sheet, hauled the freight, and returned the documentation to either K&D or TBT, but TBT ultimately received the documentation. TBT got the carrier's bill, paid the carrier for its efforts, and billed SWQH's Abilene, Texas address. Defendants, acting as K&D, then billed SWQH an amount of money that included freight charges or failed to bill SWQH for the freight charges. SWQH made some payments to K&D for hay and freight shipments. (**Exhibit "10"**). Defendants did not inform SWQH that TBT was paying the freight charges. (**Exhibit "10"**). Defendant Jacks took all of the revenue received and deposited it into his K&D checking account until that account was garnished by Dynasty. (**Exhibit "5", Vol. 1, pps. 36-37**). He later deposited all funds into the CDJI account even though it never sold hay or did any work for SWQH. (**Exhibit "5", Vol. 1, pps. 106-110; 115-116; 119-121**).

3.19 Sometimes, the Defendants' unlawful activities as documented in the records prepared by K&D correspond with TBT's freight shipments and payments, because Defendants sometimes used the last three digits of the TBT Pro-Number that K&D created as the Reference Number on K&D's bills to its customer. (**Exhibit "7", Vol. 1, pps. 59-79; Exhibit "8"**, Baker Depo. exhibits "8", "9", "10", compare, TBT's Pro-Numbers in **Exhibits "12", "13", and "14"** with Defendants' Reference Numbers in **Exhibits "6" and "10"**.) In addition, **Exhibit "11"** contains a Table of Comparisons of Transactions where the TBT Pro-Number for its invoices to SWQH and K&D match K&D's Reference Number in its invoices to SWQH. Thus, it is evident that SWQH appears to have paid K&D for at least some of the freight TBT paid for. (**Exhibit "7", Vol. 1 and 2; Exhibit "8"**, Baker Depo. exhibits "8", "9", and "10"). With two or three minor exceptions, Defendants never tendered a dime to TBT for the freight services they received. (*Id.*) Instead, Jacks,

Baker, and K&D competed with TBT for business in violation of their Broker's Contract, and had TBT pick up the tab for freight that they should have paid for. (*Id.*).

F. Defendants' Fake Check with Possibly Forged Signature

3.20 Eventually, TBT noticed that SWQH was not paying its bills. (**Exhibits "1", "2", and "3"**). When questioned, Baker and K&D perpetuated more fraud to conceal their actions and continue their scam.

3.21 By January or February, 2007, the SWQH account became delinquent. (**Exhibits "1", "2", and "3"**). TBT's collections department began an investigation into the account. TBT had several discussions with Baker and K&D about the account. In an effort to buy time to engage in more unlawful shipping transactions, Baker as a partner of K&D made numerous false statements to TBT, including her lack of knowledge about errors on the SWQH account. One such false statement was that she knew virtually nothing about giving TBT a false business address for SWQH. In a further effort to continue their scam as long as possible, on or about March 16, 2007, Baker presented a check from K&D to TBT in the amount of \$132,000.00, which was delivered to TBT to pay some of the debt owed TBT by Defendants. That check appears to have a forged signature on the check since Jacks testified he did not sign it (**Exhibit "5", Vol. 2, pps. 110-112; Exhibit "6", Jacks Depo. exhibit "27"**) and Baker refused to answer, invoking her Fifth Amendment privilege against self incrimination, whether she forged Jacks' signature to it. (**Exhibit "7", Vol. 1, pps. 185-189; Vol. 2, pps. 202-205; Exhibit "8", Baker Depo. exhibit "41"**). Nevertheless, the check was delivered to TBT and was dishonored by the Bank, as Defendants knew it would, having prior knowledge that the account it was written on was previously garnished and frozen. (**Exhibit "5", Vol. 2, pps. 111-113; Exhibit "6", Jacks Depo. exhibit "27"; Exhibit "7", Vol. 2, pps. 202-205**).

G. Bob Dyke's Meeting with Baker

3.22 Bob Dyke arranged for a meeting with Baker and K&D to discuss their involvement and knowledge of the delinquent SWQH account, their dealings with SWQH, and the forged and dishonored check. (**Exhibit "2"**). The meeting was held sometime in January, 2007. During the meeting, Baker admitted the following:

- She booked the freight that was billed to the SWQH account;
- At the same time, K&D was brokering hay and selling it to SWQH and arranging freight for SWQH; and
- SWQH sometimes paid K&D a price for hay that included freight charges. (*Id.*)

H. Termination of Defendants

3.23 TBT's suspicions were confirmed during the telephone conferences and emails exchanged with Baker and K&D (**Exhibit "2"**), and it decided to terminate the Broker's Contract. (*Id.*) TBT terminated the Broker's Contract by notice dated February 13, 2007. (**Exhibit "1"**). TBT later made demand on Defendants for payment of all amounts due on the accounts of SWQH and K&D, but Defendants refused to pay for the freight services they received. TBT, through Chasemax as its agent, made demand on June 5, 2007, to K&D for K&D to pay for the bounced check. (**Exhibit "1"**).

I. TBT's Damages

3.24 TBT paid the carrier expenses for the numerous shipping transactions that were billed to SWQH and K&D. **Exhibits "12", "13", and "14"** are summaries of the transactions and show the amount of money that TBT paid to the carriers and invoiced K&D and SWQH and the payments made by K&D on the accounts. TBT paid freight charges under the Broker's Contract with K&D in the amount of \$394,122.25. In addition, TBT lost profits in the amount of \$30,119.31 under the

K&D Broker's Contract for a total of \$424,241.56, and not less than \$414,245.56 as other records show. (Exhibits "9", "11", "12", "13", and "14").

J. C.D. Jacks, Inc.'s and Baker's Receipt and Use of TBT's Money

3.25 Baker deposited funds paid to her by SWQH directly to and for her exclusive benefit. Defendants also deposited the revenue that K&D received from SWQH into K&D's, or CDJI's checking accounts with American National Bank of Texas. (Exhibit "5", Vol. 1, pps. 22, 58-60, 106-107, 133-136, 142; Vol. 2, pps. 135-142; and Exhibit "7", Vol. 1, pps. 168-185; Exhibit "8", Baker Depo. exhibits "35" – "40"). The total amount of at least \$206,670.00 was deposited as follows by each of the following Defendants:

Table 1 All SWQH Transactions for C.D. Jacks, Inc. d/b/a Texas Alarm Systems, (January through April 2007)

SWQH Check No.	Date	Amount	Jacks' Depo Exhibits Bates Nos.
1989	01/26/07	23,809.40	Jacks Depo Ex 14 000071
2019	02/05/07	8,297.30	Jacks Depo Ex 14 000071
2021	02/05/07	3,600.00	Jacks Depo Ex 14 000071
2022	02/05/07	3,955.05	Jacks Depo Ex 14 000071
2038	02/12/07	74,793.80	Jacks Depo Ex 14 000071
2039	02/13/07	3,688.10	Jacks Depo Ex 14 000071
2045	02/15/07	13,201.75	Jacks Depo Ex 14 000072
2046	02/16/07	3,000.00	Jacks Depo Ex 14 000072
2047	02/16/07	4,797.50	Jacks Depo Ex 14 000072
2060	02/22/07	31,103.00	Jacks Depo Ex 14 000072
TOTAL		\$170,245.90	

Table 2 All SWQH Transactions for Kristal Baker (January through April 2007)

SWQH Check No.	Date	Wal-Mart Moneygrams Amount	SWQH Amount	
Debit	03/29/07	\$5,580.00	\$5,600.00	SWQH 000034-35
2137	04/05/07	999.30	1,000.00	SWQH 000036-37
2158	04/12/07	4,895.00	4,900.00	SWQH 000038-39
2168	04/14/07	9,000.00	9,000.00	SWQH 000041-42
2189	04/25/07	9,000.00	9,900.00	SWQH 000043-44
Debit	05/03/07	4,400.00	4,400.00	SWQH 000044-45
2211	05/05/07	2,550.00	2,550.00	
TOTAL		\$36,424.30	\$31,190.00	

3.26 As previously noted, Jacks was the only person who could withdraw money from the accounts. He did so with impunity, spending the money from the contract breaches and fraud as fast as it came into the account. Jacks freely admits he used the money for personal use. (**Exhibit "15", pps. 140-158**). He bought clothes (\$1,700). He bought food and gas (\$3,700). He paid his cell phone and satellite bills (\$2,000). He took his family on vacations to Las Vegas, Nevada, and Snowbird, Utah (\$5,400). He bought flowers and jewelry for Baker (\$700). He bought golf equipment and fitness memberships for himself (\$1,800). He went shopping at Sam's and Wal-Mart (\$1,900). (*Id.*). Altogether, Jacks spent almost \$20,000 on personal expenses from the K&D account, not including the money he paid Baker. When asked about this amount, Jacks could state only that, "It's what you consider a lot. It's not a lot to me." (**Exhibit "15", pps. 156-157**). (Excerpts of the Testimony of Jacks from hearing on temporary injunction and garnishment in the *Dynasty* case.)

3.27 Jacks also made numerous wire transfers out of his K&D account, including several to his personal investment account. He admits to directly transferring at least \$117,000 to this account. (*Id.*) At the end of the year, he also paid himself a bonus of \$138,000 "for the profits that

was in K&D." (*Id.*) Again, this money appears to have been transferred to his investment account.

(*Id.*) There were also numerous other wire transfers in and out of the account. (*Id.*)

3.28 By January 2007, Jacks left only \$60,000 in the K&D account for payments to himself, his "living" expenses, and payments to Baker. (**Exhibit "15", p. 156**) He and K&D made only three payments to TBT. (**Exhibit "5", Vol. 2, pps. 128-132, 190-197**). The total of the payments to TBT was \$36,150.00 (**Exhibit "12"**).

K. Jacks' Involvement With and Knowledge of Baker's Activities

3.29 Jacks admits to the following involvement with and knowledge of Baker's and K&D's activities.

3.30 During the time in question, Jacks and Baker lived together as boyfriend and girlfriend. (**Exhibit "15"**).

3.31 On July 14, 2006, Jacks signed and filed an assumed name certificate on behalf of K&D, a general partnership. (**Exhibit "5", Vol. 1, pps. 23; and Exhibit "6"**, Jacks Depo. exhibit "5").

3.32 On July 21, 2006, Jacks signed and filed an assumed name certificate to conduct business as K&D, a sole proprietorship owned by Jacks (**Exhibit "5", Vol. 1, p. 24**), even though the business was actually a general partnership. *See*, the Court's Order dated August 8, 2008.

3.33 On July 25, 2006, Jacks, doing business as K&D, opened a checking account in order to receive and deposit income from freight transactions that Baker and K&D were engaging in. (**Exhibit "5", Vol. 1, pps. 26-27**). Jacks engaged in hundreds, if not thousands, of K&D's checking account transactions between December, 2006 and May, 2007, including writing checks, making deposits and using a debit card. (**Exhibits "5" and "15"**)

3.34 Jacks controlled one hundred percent of the finances for K&D. (**Exhibit "5", Vol. 1, pps. 34-37; Vol. 2, pps. 39-40, 63-68**). He did so because the Bank would not let Baker be a signatory on the account because of her prior forgeries on Jacks' accounts. (*Id.*) Between December, 2006 and April, 2007, Jacks deposited the sum of \$619,803.84 into the K&D checking account, \$281,604.40 in the CDJI account, and \$326,860.93 into his personal account. Thus Defendants K&D, Jacks, and CDJI received \$974,478.97 in freight and hay transactions during this five month period and, except for three small payments, did not pay TBT any of its charges. (**Exhibit "5", Vol. 2, pps. 11-13, 75, and Exhibits "13", "14", and "15"**).

3.35 On December 14, 2006, Jacks and Baker doing business as K&D Logistics, a general partnership, entered into a Broker's Contract with TBT. (**Exhibit "23" and Exhibit "5", Vol. 1, pps. 8-9, 81-91**).

3.36 During the period of December, 2006 through May, 2007, Baker brokered loads of hay out of the K&D and Jacks' office set up for Baker at Jacks' home and was in the office on nearly a daily basis. (**Exhibit "5", Vol. pps. 90-92; Exhibit "7", Vol. 1, pps. 114-117**).

3.37 SWQH was K&D's and Jacks' primary customer. (**Exhibit "5", Vol. 1, pps. 93-100; Vol. 2, pps. 44-45**).

3.38 During the time Jacks, Baker, and K&D were doing business with TBT, they were brokering hay loads to and for SWQH. (**Exhibit "5", Vol. 1, pps. 90-100; Vol. 2, pps. 44-45; Exhibit "7", Vol. 1, pps. 114-117**).

3.39 During the time that K&D, Jacks, and Baker were brokering hay loads to and for SWQH, they knew that Baker was responsible for shipping the hay and arranging for freight. (*Id.*)

3.40 Jacks authorized and trusted Baker to prepare all of the transportation and freight documentation and K&D's invoices to SWQH. (**Exhibit "5", Vol. 1, pps. 75-77, 93-98**).

3.41 The money K&D, Jacks, and CDJI received from SWQH included payment for delivery of the hay. (**Exhibit "15", pps. 175-176; Exhibit "5", Vol. 1, pps. 111-116; Vol. 2, pps. 65-68, 105-108, 128-135**). Jacks testified at the hearing in the *Dynasty Case*, on his Motion to Dissolve the Injunction, on examination by his own counsel, Bruce Monning, before Judge Tygrett, that his dealings with SWQH provided that:

"A. Well, whenever I bought hay by the ton, then the deal from this other guy [referring to Mark Stevens at SWQH] was that he would pay so much for the hay by the ton."

"Q. And he paid for it delivered wherever he wanted it to go."
(Emphasis added.)"

"A. Right."

(**Exhibit "15", p. 176, ls. 1-6**).

3.42 Jacks received checks from SWQH and deposited them into the K&D and later CDJI checking accounts. (**Exhibit "5", Vol. 1, pps. 100-116; Vol. 2, pps. 128-135**).

3.43 Jacks ratified Baker's and K&D's transactions with SWQH when he paid for the purchase of the hay that he shipped to SWQH or its designee. (**Exhibit "5", Vol. 1, pps. 76-80, 93-97**).

3.44 Jacks spent the money received from SWQH on personal goods, payments to Baker and other staff, and paid himself bonuses from K&D's profits. (**Exhibit "15", pps. 140-156**).

3.45 With two or three minor exceptions, Baker, K&D, CDJI, and Jacks have not paid TBT a dime for its transportation expenses. (**Exhibit "12", Exhibit "5", Vol. 2, pps. 11-13, 75**). They did tender a check to TBT for \$132,000.00 that bounced and that the Defendants knew at the time the check was written would be dishonored. (**Exhibit "5", Vol. 2, pps. 111-114, and Exhibit "7"**).

3.46 On December 1, 2006, Jacks signed an acknowledgment that he and Baker were partners in K&D; that SWQH was a customer of K&D; and that K&D was in no way affiliated with Dynasty. (**Exhibit 5", Vol. 1, pps. 176-177, and Exhibit "6"**, Jacks Depo. exhibit "35"). Similar statements were given to SWQH about their relationship with K&D and that all payments should be sent by SWQH to K&D and not to freight companies. (**Exhibit "5", Vol. 1, pps. 184-186; Exhibit "6"**, Jacks Depo. exhibit "36").

3.47 Jacks admits to having knowledge as of February 8, 2007, that Baker apparently retained revenues from later jobs that otherwise would have been sent to Plaintiff. (**Exhibit "15", p. 171**). Baker admitted that she received payments directly from SWQH. (**Exhibits "7", pps. 177-185**).

3.48 Jacks had or is deemed to have full knowledge of Baker's activities with TBT since he at all times was a general partner with Baker in K&D, a general partnership, and shares the same knowledge that Baker had. (**Exhibit "22"**).

IV.

Evidence and Argument in Support of Summary Judgment

4.1 The evidence in support of this Motion is contained in the Appendix to this Motion being filed simultaneously with the Motion. TBT relies in part on Jacks' testimony excerpted from a transcript from the full day hearing previously held on Jacks' Motion to Dissolve Injunction from the *Dynasty case* (**Exhibit "15"**). TBT submits a true and correct copy of the excerpts from that transcript. TBT also supports this Motion with the Defendants' answers to Requests for Admissions, Interrogatories, and Requests for Production, deemed admissions, Court Orders, transcripts of the depositions of Baker and Jacks taken in this case, and the pleadings and other case papers filed in

this case, and those other materials included in the Appendix. This evidence is fully incorporated throughout each section of this Motion, as is the above statement of facts.

V.

Defendants K&D, Baker, and Jacks Breached Their Broker's Contract With TBT

5.1 Breach of contract requires proof of an enforceable contract, breach by the defendants, and injury arising from the breach. *Case Corp. v. Hi-Class Bus.*, 184 S.W.3d 760, 769 (Tex. App. – Dallas 2005, *pet. denied*). The facts herein set forth each element of this claim and establish it as a matter of law. Summary judgment is therefore appropriate as to the breach of contract claim.

5.2 On December 14, 2006, TBT entered into a Broker's Contract with Jacks and Baker doing business as K&D Logistics, a Texas general partnership. (**Exhibit "23"**). Each Defendant in answer to Request for Admissions admitted doing so. (**Exhibits "19" and "20"**). They each admitted that they entered into the Broker's Contract with Plaintiff when they were deposed. (**Exhibit "5", Vol. 1, pps. 8-9; Exhibit "7", Vol. 1, pp. 29**).

5.3 Under the Broker's Contract, K&D and Baker and Jacks as co-owners and partners, as the Independent Contractor and carrier, obligated themselves to TBT as follows:

"1. **INDEPENDENT CONTRACTOR agrees to solicit and arrange for freight under and in accordance with BROKER'S authority.** The INDEPENDENT CONTRACTOR has no authority to otherwise bind the BROKER for any expense, debts, capital, contracts, or purchases of any kind or nature **and agrees to hold BROKER harmless and to indemnify BROKER in connection herewith.**

1.1 BROKER agrees to compensate INDEPENDENT CONTRACTOR as follows:

- a. Sixty percent (60%) of the net commission received by broker from approved customers for shipments solicited by the INDEPENDENT CONTRACTOR, wherein INDEPENDENT CONTRACTOR has made all of the arrangements and has shipped via the BROKER'S authorized carrier(s).
- b. No other payments shall be due by BROKER to

INDEPENDENT CONTRACTOR for solicitation or for any expenses incurred by INDEPENDENT CONTRACTOR in connection herewith.

c. Payments to INDEPENDENT CONTRACTOR shall be due within thirty (30) days of receipt of all necessary paperwork by the BROKER. **BROKER is hereby authorized to make deductions from the amounts due INDEPENDENT CONTRACTOR for any adjustments made by Shippers or Carriers or for any expenses incurred by BROKER on behalf of/or because of actions of the INDEPENDENT CONTRACTOR in contradiction to this agreement.**

2. INDEPENDENT CONTRACTOR agrees that all general commodities (except Classes A and B explosives, household goods, hazardous wastes and commodities in bulk) between points in U.S. which are tendered by BROKER and accepted by INDEPENDENT CONTRACTOR for transportation from time to time during the life of this agreement, shall be transported by carrier under the terms, provision and conditions of this Agreement. It is hereby expressly agreed by the parties that the terms of this Agreement shall govern each and every such shipment without designation.

2.1 For such services, BROKER shall receive compensation as follows:

- a. When freight is available for dispatch, BROKER shall offer the haul at a flat or per unit rate.
- b. Carrier, exercising its sole judgment, shall determine if this rate is acceptable and shall affirmatively accept or reject the load.

3. **Carrier agrees, upon receipt of the commodity under terms of this Agreement from shippers designated by BROKER, to issue receipts and bills of lading to the respective consignors of such goods in compliance with the terms of this Agreement and the rules and regulations of the Interstate Commerce Commission.** Such receipts and bills of lading will be exclusive evidence of the receipt of such goods by Carrier in good order and condition unless otherwise specifically noted on the fact thereof.

4. BROKER agrees to arrange for tendering tonnage to INDEPENDENT CONTRACTOR for transportation under the terms of this Agreement, but BROKER shall not be obligated to tender all freight it has available to INDEPENDENT CONTRACTOR. INDEPENDENT CONTRACTOR, at its discretion hereby agrees to accept for transportation all lawful shipments of the above described commodities, and agrees to transport such commodities to the destination or destinations designated by BROKER. In the event the INDEPENDENT CONTRACTOR is unable to supply transportation service for a designated shipment, it shall notify BROKER. This shall not be a breach of the terms of this agreement.

5. INDEPENDENT CONTRACTOR agrees under tender of commodities pursuant to this Agreement to transport such commodities to the specified destination with reasonable dispatch. **As between INDEPENDENT CONTRACTOR and BROKER, INDEPENDENT CONTRACTOR hereby represents and warrants that it shall be liable and does hereby assume any and all liability for loss, delay, destruction, theft, damage or liability of whatever nature (including the failure to remit payment due BROKER by Carrier or Shipper) arising from the transportation of any and all loads of freight arranged by BROKER while being transported by INDEPENDENT CONTRACTOR or Carrier or from INDEPENDENT CONTRACTOR'S or Carrier's failure to perform the transportation arranged by BROKER and accepted by INDEPENDENT CONTRACTOR. INDEPENDENT CONTRACTOR will indemnify and hold BROKER harmless for any claims arising therefore or, for any violations by INDEPENDENT CONTRACTOR or Carrier of this Agreement. INDEPENDENT CONTRACTOR represents that its operations will comply with all laws and regulations and INDEPENDENT CONTRACTOR will indemnify and hold BROKER harmless for any violations therefore by INDEPENDENT CONTRACTOR for loads of freight transferred by INDEPENDENT CONTRACTOR under this Agreement.**

6. INDEPENDENT CONTRACTOR further covenants and agrees to indemnify and forever save harmless BROKER from and against any and all loss, damage, injury and/or claims arising from the breach of the representation and warranties set forth in Section 4 above and for the same asserted by any and all persons, including the employees, contractors, or agents of INDEPENDENT CONTRACTOR or Carrier, which arise by the action of or failure to act by INDEPENDENT CONTRACTOR or Carrier in connection with the carriage of any and all commodities under the Agreement. INDEPENDENT CONTRACTOR also agrees to require Carrier to procure and to keep and maintain in full force and effect at its own expense, in accordance with the terms set forth in this Agreement, cargo insurance on all merchandise carried hereunder and property damage and public liability insurance on all motor vehicles of Carrier in transporting commodities under this Agreement. **IT IS THE EXPRESS INTENT OF THIS AGREEMENT FOR INDEPENDENT CONTRACTOR, CARRIER, AND SHIPPER TO FOREVER HOLD HARMLESS AND INDEMNIFY BROKER FROM ANY AND ALL CLAIMS, HOWEVER SO CAUSED.**

8. It is further mutually understood and agreed that the relationship of INDEPENDENT CONTRACTOR to BROKER hereunder is and shall remain solely that of an independent contractor and that INDEPENDENT CONTRACTOR shall and does own or lease or contract all tractor-trailer units carrying commodities under this Agreement. It is further understood and agreed that all drivers of said tractor-trailer units are not the employees or agents of the BROKER, are subject solely to the

direction, control and supervision of the INDEPENDENT CONTRACTOR not the BROKER, and INDEPENDENT CONTRACTOR accepts the sole and total responsibilities of assuring that adequate workmen's Compensation insurance is in place for such drivers as required by law. BROKER and INDEPENDENT CONTRACTOR are not in any way involved in an agency relationship, either expressed or implied and any liabilities of the INDEPENDENT CONTRACTOR are not the liabilities of the BROKER.

9. **In consideration of such services by INDEPENDENT CONTRACTOR, BROKER agrees to pay the delivery rate and charges negotiated, EXCEPT TO THE EXTENT the shipper does not or cannot pay BROKER.** It is specifically understood that BROKER'S guarantee of payment is dependent upon receipt of properly signed delivery receipts, bills of lading, and receipt of payment to BROKER by the shipper.

...

11. INDEPENDENT CONTRACTOR represents that the transportation rendered hereunder will be performed without violating any local, state or federal laws and regulations **and that it has complied and will comply with all laws and regulations of local, state or federal authorities and regulatory bodies having jurisdiction over the operation of said vehicle, including but not limited to, the Department of Transportation and the Interstate Commerce Commission.**

12. It is further agreed the BROKER shall not be liable or responsible to anyone for the operation, maintenance or control of INDEPENDENT CONTRACTOR'S or Carrier's equipment, nor shall BROKER be liable or responsible for any violation of traffic regulations, load weight limitations, or rules, regulations or laws which pertain to or affect the transportation of the property contemplated herein.

...

17. On termination or cancellation of this Agreement, for any reason, the INDEPENDENT CONTRACTOR shall promptly return all documents, price lists, literature, and other information to the BROKER **and the INDEPENDENT CONTRACTOR shall immediately discontinue use of or reference to the BROKER'S name and license. The BROKER may withhold final settlement pending all compliance with this condition.** [Bold fonts are emphasis added, not in original document.]

5.4 The summary judgment evidence establishes that Defendants' breached these obligations on numerous and repeated occasions as follows.

1. Jacks and Baker on behalf of K&D represented to TBT that K&D was a fully licensed common carrier and had all authority to perform the work required of it. This was a material misrepresentation by Defendants.
2. Defendants breached paragraph 1 by soliciting and arranging for freight in a manner other than "under and in accordance with" TBT's authority. Specifically, TBT is authorized to arrange for the transportation of freight for shippers with authorized carriers under TBT's ICC License. By booking freight through K&D instead of through TBT, Defendants Baker and Jacks failed to act "under and in accordance with" TBT's authority.
3. Defendants Baker and Jacks breached paragraph 1 by committing TBT to K&D's debts. In other words, Defendants Baker and Jacks bound TBT to pay for freight expenses for shipping transactions brokered by and for the benefit of K&D. Baker admitted that the Broker's Contract required K&D, Baker, and Jacks to pay for freight if its customers like SWQH failed to do so. (**Exhibit "7", pps. 231-232**). TBT paid those shipping costs but was never paid for those costs by the *de facto* shipper and recipient, K&D and SWQH, respectively. Under these circumstances, TBT is entitled to indemnification under paragraphs 1, 5, and 6, for its expenses, and Defendants have refused to do so in breach of the Broker's Contract.
4. Defendants breached paragraph 5 by failing to identify their independent broker status with TBT to SWQH and others in all activities engaged in under the Contract. As stated above, Defendants failed to advise SWQH that they were acting as TBT's brokers in their dealings with the carriers, that all

payments by SWQH were to have been made to TBT, and that TBT was paying for the freight expenses and billing a fake address for SWQH furnished to TBT by K&D. Defendants also failed to use TBT's full name and ICC License number in any transaction with SWQH. On the contrary, Defendants affirmatively disclaimed to SWQH any affiliation with TBT and other carriers at the same time they were committing TBT to pay their freight expenses. (**Exhibit "5", Vol. 1, pps. 176-186; Exhibit "6",** Jacks Depo. exhibits "35" and "36"; **Exhibit "7", Vol. 2, pps. 225-228**).

5. Defendants breached paragraph 5 by failing to comply with TBT's policies, including the policies in the Broker's Contract. As stated above, Defendants did not follow TBT's policies in setting up a fake account number and billing address for SWQH, making TBT liable to carriers for freight shipments to Defendants or to customers of K&D, then pocketing the proceeds paid while sticking TBT with the bill.
6. Defendants breached paragraph 5 because they misrepresented their activities and authority to the carrier, shippers, and to TBT. The misrepresentations included the creation of a fake address for the customer account with SWQH and using the fake address on numerous transactions to ship hay for the benefit of K&D and SWQH and paid for by TBT.
7. Defendants breached paragraphs 1, 2, 3, 5, and 6 of the Broker's Contract by competing with TBT in arranging hay shipments for SWQH who was to have been and was a customer of TBT.

8. Defendants breached paragraph 6 by acting for the benefit of K&D, as another broker, at the same time they were TBT's agents, without obtaining permission from TBT to do so.
9. Defendants breached paragraphs 6, 8, and 13 of the Broker's Contract by failing to use their "best efforts," and by directly competing with TBT. All of the freight shipments paid for by TBT were for the benefit of K&D and SWQH who were principals to the shipping transactions. By arranging freight for SWQH to be paid to K&D, to the exclusion of TBT, Defendants were in direct competition with TBT, even without the scam they put together.
10. Jacks, Baker, and K&D breached their contract with TBT by intentionally documenting the shipping transactions between it and SWQH improperly, incorrectly, and in violation of federal law and regulations. Although K&D was the shipper and consignor of all of the loads of hay sold and delivered to SWQH as buyer and consignor neither its name nor the name of SWQH appear anywhere on the rate confirmation sheets it generated and furnished to the carriers delivering the loads. By doing so, K&D and SWQH sought to avoid the statutory liability they would have for the freight charges pursuant to *49 USC § 13706*. By documenting the freight transactions this way, Jacks, Baker, and K&D breached their obligations owed to Plaintiff pursuant to paragraphs 2, 3, 5, 6, and 11, and also failed to comply with the regulations that dealt with their conflict of interest contained in *49 CFR Parts 371-377*.

11. Jacks, Baker, and K&D fraudulently induced TBT to pay the delivering carrier's expenses in accordance with paragraph 9 of the Broker's Contract and by their failure to comply with the Broker's Contract terms, as described above. Such conduct, in addition to being independent torts, also is a breach of the Broker's Contract and TBT has been damaged by these repeated breaches.
12. Pursuant to the Broker's Contract, the customers were to have paid all of the freight expenses to Plaintiff and Plaintiff, after being first paid, would then have an obligation to pay commissions to Defendants Jacks, Baker, and K&D as the Independent Contractor. However, Jacks, Baker, and K&D caused the customers, including SWQH, to pay them directly, rather than TBT and such conduct is a violation of the provisions of paragraphs 1, 2, 3, 4, 5, 6, 11, and 12 of the Broker's Contract, causing damages to be suffered by Plaintiff.

5.5 TBT suffered losses because of these breaches and is entitled to recover its carrier expenses incurred in its performance of the Broker's Contract. (**Exhibits "1", "2", "3", "4", "9", "12", "13", and "14"**). *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. App. – Texarkana 1988, no writ); *Restatement (2d) of Contracts* § 349; see *Foley v. Parlier*, 68 S.W.3d 870, 884-85 (Tex. App. – Fort Worth 2002, no pet.) (out-of-pocket damages constitute reliance damages, which are to reimburse plaintiff for expenditures made toward execution of contract and restore status quo). The measure of reliance damages is equal to the expenditures made by TBT in reliance on the Broker's Contract. *Id.* at 638. The amount of "Carrier Pay" expenses TBT paid the carriers based on the Defendants' scam is a direct result of Defendants' breaches. TBT's Carrier Pay expenses under the Broker's Contract are \$394,122.25. In addition, TBT lost profits in the sum of

\$30,119.31, for a total of \$424,241.56 and at least \$414,245.56, under the K&D Broker's Contract. (Exhibits "1", "3", "4", "9", "11", "12", "13", and "14").

VI.

Jacks is Vicariously Liable for Baker's Actions as a General Partner of K&D

6.1 Even if Jacks claims that he cannot be held liable for Baker's actions, because Jacks claims ignorance of her breaches of the Broker's Contract and related fraud or otherwise, he cannot do so. The problem with this argument is that Baker was working with Jacks as a general partner and co-owner of K&D throughout these events, and they were in a general partnership (Exhibit "22"), and he directly profited from their wrongs. (Exhibits "5", "6", "7", "8", and "15").

A. Baker was Either Jacks' Agent or Partner

6.2 As the Court previously ruled Jacks and Baker were at all times general partners of K&D. (Exhibit "22"). "K & D" stands for "Kristal and Dwayne." (Exhibits "5", "7", and "15"). They represented to TBT that it was a partnership. (Exhibits "5", "6", "7", "8", and "23"). They represented to SWQH that it was a partnership. (Exhibit "5", Vol. 1, pps. 176-186; Exhibit "6", Jacks Depo. exhibits "35" and "36"; Exhibit "7", Vol. 2, pps. 225-228). Throughout their relationship, Baker and Jacks identified and represented K&D as a partnership to TBT. The Court has previously determined that to be the fact. (Exhibit "22"). The Broker's Contract refers to them as co-owners of K&D. (Exhibit "23"). As a result, Jacks cannot claim and should be estopped from claiming or asserting that he has no relation to Baker or the Broker's Contract. This position is untenable. Baker was both his agent and his partner. He is bound by her actions either way.

1. Jacks Admits that Baker Was His Agent, Because She Acted for Him.

6.3 An agent is one who is authorized by another to transact some business for the principal; the relationship is a consensual one between two parties by which one party acts on behalf

of the other subject to the other's control. *Bhalli v. Methodist Hospital*, 896 S.W.2d 207 (Tex. App. – Houston [1st Dist.] 1995, writ denied). Proof of agency requires showing that the alleged principal has the right to assign the agent tasks and the right to control the means and details of process to be used to accomplish those tasks. *Ross v. Texas One Partnership*, 796 S.W.2d 206 (Tex. App. – Dallas 1990, writ denied).

6.4 This is exactly the relationship between Jacks and Baker. They were partners regardless of how Jacks described their relationship. Even as Jacks describes it, he controlled all funds; and he paid Baker for her work, claiming that she worked for him. (**Exhibit "5", Vol. 1, pps. 75-77; Exhibit "15", p. 130**). Jacks ratified Baker's transactions with SWQH when he paid for the purchases of the hay. (**Exhibit "15", pps. 97-100**). He also admitted that he authorized her and trusted her to prepare the invoices involved in these transactions. (**Exhibit "15", p. 130; Exhibit "5", Vol. 1, pps. 75-77**). He was happy with this arrangement. As he put it, "I didn't see a problem as long as I was making my money back." (**Exhibit "15", p. 178; Exhibit "5", Vol. 1, pps. 75-82**). He set her up in the business as the father of his child and let her run the day-to-day operations of the business. (**Exhibit "5", Vol. 1, pps. 34-36; 75-82**). He did this even though he tried to have her charged for previously forging checks on his bank accounts. (**Exhibit "5", Vol. 1, pps. 34-35**). She had already been convicted of writing "hot checks" on two prior occasions. (**Exhibit "7", Vol. 2, pps. 234-236**).

6.5 Agents, of course, bind their principals to the contracts they sign. Jacks was thus obligated by the Broker's Contract he signed and the contracts, agreements, and documents his partner, Baker, generated on behalf of K&D.

2. **In Any Event, the Court has Ruled that Jacks and Baker Were General Partners of a General Partnership**

6.6 Baker and Jacks have acknowledged that they were in a partnership with each other, and the Court has ruled that they were general partners. (**Exhibit "22"**). As such, each of them is considered an agent of the other and is liable for the acts committed in the furtherance of the partnership's business. *King v. Matney*, 259 S.W.2d 606, 609 (Tex. App. – Amarillo 1953, writ ref'd n.r.e.); *Shaw v. Green*, 29 S.W.2d 818, 821 (Tex. App. – San Antonio 1930, writ dismiss'd). Both of them admitted at their respective depositions that whatever Baker did she did it in furtherance of K&D's business and Jacks received all of the proceeds generated by that business. (**Exhibits "5" and "7"**).

6.7 This same sharing of control and profits and losses qualifies the relationship as a partnership. Partnerships are formed when there is: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. *See, Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). At various times, Jacks himself described the relationship as a partnership in the various legal documents he signed. (**Exhibits "5" and "6"**).

B. Jacks Cannot Deny Liability Under the Broker's Contract Because He Signed It and Benefited From It

6.8 Even if Baker and Jacks were not in their unique general partnership relationship, Jacks could not deny his obligations under the Broker's Contract because he signed it and he has benefited so much from TBT's performance of its terms. Since 1907, Texas courts have recognized a very simple rule: you cannot profit from a contract, then claim no obligation under that contract. *See, H. Goldschmidt & Co. v. Wagner*, 99 S.W. 737, 738 (Tex. Civ. App. 1907); *Accord, D. Sullivan & Co. v. Ramsey*, 155 S.W. 580 (Tex. Civ. App. – San Antonio, 1913, no writ). As that court put it,

"one 'cannot blow hot and cold' with the same breath." (*Id.*) In that case, when a salesman claimed that he had not authorized a sale, the court nevertheless concluded that he was bound by the sales contract because he had kept the proceeds. (*Id.*)

6.9 This concept has been approved by courts throughout the years. *See, e.g., D. Sullivan & Go. v. Ramsey, 155 S.W. 580, 588 (Tex. Civ. App. – San Antonio 1913, no writ)* ("[I]t is a principle of the highest form of justice that a principal will not be permitted to keep and enjoy the benefits arising from a repudiated agency without assuming the burdens imposed by the agency."); *Royal Mort. Co. v. Montague III, 41 S.W.3d 721, 735 n.6 (Tex. App. – Fort Worth 2001)* (applying rule to determine agency for purposes of special appearance).

6.10 In addition, Jacks is liable for Baker's actions, even if he was unaware of them at the time she engaged in them, under the doctrine of ratification. A principal cannot partake of such acts as are beneficial and repudiate such as are detrimental, whether the ratification be expressed or implied. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc., 609 S.W.2d 754, 756-57 (Tex. 1980)*. Rather, if a principal elects to ratify any portion of a unauthorized transaction of an agent, he or she must ratify the whole of it. *Id.* Accordingly, where an agent exceeded her authority in making a contract, the principal cannot ratify and accept that part which is good and repudiate that part which is bad. *Id. at 757*. A principal can even ratify an agent's alleged fraudulent activities. *Barrington v. McBroom, 157 S.W.2d 463, 465-66 (Tex. Civ. App. – Waco 1941, no writ)*.

6.11 Here, Jacks cannot deny that he profited from the Broker's Contract with TBT and from Baker's and K&D's actions in defrauding TBT into paying for the hay shipments. He took all the money received under the Broker's Contract. (**Exhibits "5" and "6"**). To the extent Baker ever deposited funds, Baker put the money into one or more accounts only he controlled. (**Exhibits "5" and "7"**). He used the funds on a personal spending spree. (**Exhibit "15"**). His failure to tender

back to TBT any of its freight expenses after learning of Baker's and K&D's activities gives rise to ratification.

6.12 Jacks undoubtedly profited from the Broker's Contract. The breach of the Broker's Contract is his breach as well as hers, and he should be liable for damages, particularly since he kept the money from those breaches.

VII.

TBT is Entitled to Recover Its Collection Costs, Including Attorney's Fees

7.1 TBT has employed the undersigned attorneys, who are license to practice law in Texas, and has promised to pay such attorneys a reasonable fee for prosecuting this case and any and all appeals which are necessary, as authorized by § 38.001 of the Texas Civil Practice and Remedies Code ("TCPRC"). TBT has presented its claims to Defendants, and payment for the amount owed has not been tendered. (*Id.*) (**Exhibits "1", "2", "3", and "4"**).

VIII.

Conspiracy and Diversion of Funds

8.1 As described previously, K&D and SWQH arrived at an arrangement at the beginning of their relationship with Plaintiff whereby neither of their names would appear on any shipping documentation arranged by K&D as a broker and "booking agent" for SWQH. (**Exhibit "18"**). K&D acted as an agent for SWQH in buying hay, then selling it to an end user who was a customer of SWQH. K&D was the *de facto* shipper and consignor and SWQH was the *de facto* buyer and consignee. (**Exhibit "18", Exhibit "7", Vol. 1, pps. 20-23**). As SWQH admitted in its *pro se* Original Answer, K&D served as its broker "arranging for transportation of our product." (**Exhibit "18"**). That is how K&D invoiced and billed SWQH for itself. (**Exhibit "18"**; testimony of Baker, **Exhibit "7", Vol. 1, pps. 20-23**) but not how K&D documented the freight transactions for TBT.

(Exhibits "1", "2", "3", "5", "6", and "9"; testimony of Baker, Exhibit "7", Vol. 1, pps. 20-23; 57-65, and Exhibit "8").

8.2 SWQH thereafter received bills from K&D and paid them to K&D, not TBT, even though it was TBT who paid the delivering carriers their freight charges. (Exhibits "1", "2", "3", "6", and "10"). Baker had admitted that K&D and CDJI received these payments from SWQH. (Exhibit "7", Vol. 2, pps. 172-176).

SWQH Payments to K&D:

Date	Check No.	Amount	Bates Numbered Documents
10/03/06	1661	\$ 68,593.74	SWQH 000142
10/05/06	1670	4,215.15	SWQH 000142
10/06/06	1669	2,240.00	SWQH 000142
10/06/06	1671	3,959.30	SWQH 000142
10/06/06	1672	3,763.65	SWQH 000142
10/06/06	1673	1,250.00	SWQH 000142
10/06/06	1674	3,721.10	SWQH 000142
10/06/06	1675	3,194.55	SWQH 000142
10/06/06	1676	1,500.00	SWQH 000142
10/11/06	1691	46,454.00	SWQH 000142
10/18/06	1705	6,743.25	SWQH 000142
10/20/06	1706	38,803.10	SWQH 000142
10/20/06	1707	31,321.85	SWQH 000142
10/25/06	1714	25,997.25	SWQH 000142
10/27/06	1717	79,482.30	SWQH 000142
11/02/06	1736	36,827.70	SWQH 000142
11/07/06	1748	17,479.10	SWQH 000142
11/09/06	1754	36,024.00	SWQH 000142
11/15/06	1769	44,439.35	SWQH 000142
12/02/06	1815	27,925.45	SWQH 000142
12/05/06	1826	28,667.25	SWQH 000142
12/08/06	1833	1,800.00	SWQH 000142
12/08/06	1836	10,706.50	SWQH 000142
12/11/06	1843	5,015.05	SWQH 000142
12/11/06	1847	8,200.00	SWQH 000142
12/12/06	1849	34,286.40	SWQH 000142
12/12/06	1850	32,731.30	SWQH 000142
12/20/06	1870	12,817.60	SWQH 000142

Date	Check No.	Amount	Bates Numbered Documents
12/21/06	1874	37,018.40	SWQH 000142
12/22/06	1875	31,402.25	SWQH 000142
12/22/06	1882	7,810.90	SWQH 000142
12/27/06	1895	18,643.25	SWQH 000142
12/28/06	1897	27,861.95	SWQH 000142
12/30/06	1898	29,024.40	SWQH 000142
01/05/07	1922	13,647.70	SWQH 000142
01/09/07	1941	10,343.65	SWQH 000142
01/12/07	1948	38,813.20	SWQH 000142
01/12/07	1949	51,279.30	SWQH 000142
01/19/07	1967	28,591.30	SWQH 000142
01/22/07	1975	1,071.45	SWQH 000142
01/22/07	1977	29,032.95	SWQH 000142
01/26/07	1989	23,809.40	SWQH 000142
TOTAL		\$966,509.04	

8.3 After Dynasty garnished K&D's bank accounts, Jacks, Baker, K&D, and CDJI, along with SWQH, agreed that all payments then owed would be paid to CDJI instead. (**Exhibit "6"**, Jacks Depo. exhibit "33"; testimony of Jacks, **Exhibit "5"**, Vol. 2, pps. 132-137; testimony of Baker, **Exhibit "7"**, Vol. 1, pps. 158-160; 174-175). SWQH paid CDJI the following amounts at the following times in furtherance of that conspiracy:

SWQH Payments to CDJI:

SWQH Check No.	Date	Amount	Jacks' Depo Exhibits Bates Nos.
1989	01/26/07	23,809.40	Jacks Depo Ex 14 000071
2019	02/05/07	8,297.30	Jacks Depo Ex 14 000071
2021	02/05/07	3,600.00	Jacks Depo Ex 14 000071
2022	02/05/07	3,955.05	Jacks Depo Ex 14 000071
2038	02/12/07	74,793.80	Jacks Depo Ex 14 000071
2039	02/13/07	3,688.10	Jacks Depo Ex 14 000071
2045	02/15/07	13,201.75	Jacks Depo Ex 14 000072
2046	02/16/07	3,000.00	Jacks Depo Ex 14 000072
2047	02/16/07	4,797.50	Jacks Depo Ex 14 000072
2060	02/22/07	31,103.00	Jacks Depo Ex 14 000072
TOTAL		\$170,245.90	

(**Exhibit "6"**, Jacks Depo. exhibit "33"; testimony of Baker, **Exhibit "7"**, **Vol. 1, pps. 158-177**; testimony of Jacks, **Exhibit "5"**, **Vol. 2, pps. 132-137**; Answers to Requests for Admissions and Interrogatories of Defendants Jacks, CDJI, and Baker, **Exhibits "19" and "20"**). CDJI retained the funds paid to it at the direction of the Defendants. (*Id.*) Jacks at all times has been the sole officer, director, and shareholder of CDJI and his testimony makes clear it is one of his many alter egos. (**Exhibit "5"**; Testimony of Jacks at **Vol. 1, pps. 39-40, 115-116; Vol. 2, pps. 76-77**).

8.4 Additionally, SWQH issued money orders payable directly to and paid to Baker for the freight and hay sales generated by K&D for SWQH, rather than paying TBT for the freight charges it paid for and on behalf of K&D and SWQH. The amounts paid to Baker were net of the costs of the money orders so that SWQH deducted those costs from the amounts otherwise due. (**Exhibit "7"**, **Vol. 1, pps. 177-185**). The dates of payment, gross amount owed, net amount paid to Baker are described below (**Exhibits "7" and "8"**):

SWQH Payments to Baker:

SWQH Check No.	Date	Wal-Mart Moneygrams Amount	SWQH Amount	
Debit	03/29/07	\$5,580.00	(\$5,600.00)	SWQH 000034-35
2137	04/05/07	999.30	1,000.00	SWQH 000036-37
2158	04/12/07	4,895.00	4,900.00	SWQH 000038-39
2168	04/14/07	9,000.00	9,000.00	SWQH 000041-42
2189	04/25/07	9,000.00	9,900.00	SWQH 000043-44
Debit	05/03/07	4,400.00	4,400.00	SWQH 000044-45
2211	05/05/07	2,550.00	2,550.00	
TOTAL		\$36,424.30	\$31,190.00	

8.5 These payments to Baker for freight charges owed to TBT were paid in furtherance of the conspiracy to deprive TBT of the reimbursement for the freight expenses it incurred on behalf of Jacks, Baker, K&D, and SWQH. (**Exhibits "7" and "8"**).

8.6 Thus, in total, \$206,670.20 of funds that should have been paid to TBT to reimburse it for freight expenses it incurred on behalf of K&D and SWQH were diverted, redirected, and converted from TBT's rightful possession, all to Plaintiff's damage.

IX. **Theft Liability and Violation**

9.1 The actions of Defendants as described above, based on representations made by Jacks, Baker, and K&D in particular, were designed to and did steal the freight services and expenses paid by TBT on the Defendants' behalf. Such conduct is in violation of the Texas Theft Liability Act in that: (1) TBT was the provider of the freight services and paid the carriers for the work; (2) the Defendants individually and collectively, unlawfully secured or stole the Plaintiff's services; (3) The unlawful taking by the Defendants was made with the intent to avoid payment to Plaintiff for its services, (4) Defendants failed and refused to pay Plaintiff for the services after Plaintiff made demand on them for payment; and (5) the Plaintiff sustained the damages, as described above, as a result of the theft. *TCPRC § 134.002(5)* and *Texas Penal Code § 31.04; Rodriguez v. State*, 889 S.W.2d 559 (Tex. Civ. App. – Houston [14th Dist.] 1994, pet. ref'd).

9.2 As a result of such conduct, Defendants should be found liable to Plaintiff for exemplary damages by reason of the Defendants' illegal and oppressive conduct in accordance with the provisions of § 134.005 of the *Theft Liability Act*. Plaintiff submits that exemplary damages that should be awarded an additional \$1,000.00 from each Defendant under *TCPRC § 134.005(a)(1)*, plus Plaintiff's reasonable attorney's fees for a trial and any necessary appeal. Additionally, or alternatively, Plaintiff seeks its actual and punitive damages from the Defendants, jointly and severally, for their independent tortious conduct and common law fraud in accordance with the provisions of *TCPRC §§ 41.001, et. seq.*

X.
TBT is Entitled to Prejudgment Interest

10.1 Plaintiff is entitled to recover prejudgment interest on each and every claim it has asserted based upon the provisions of § 302.002 *et. seq.* of the *Texas Finance Code* or as a matter of common law. The rate of the interest accruing on each such claim, and the date the accruals began, and the per diem rate of the accruals are as follows: *Tex. Fin. Code* § 304.002, 6% on all amounts due, 30 days after the amount was due. The amounts due are reflected on the account records and affidavits filed in this case and included in the Appendix and accrual begins no later than April 30, 2007, on all amounts due from Defendants resulting in a per diem rate of at least \$69.74 from that date to the date of judgment in this case. (Exhibits "1" and "3").

XI.
Conclusion and Prayer

11.1 Jacks and Baker, as partners of K&D and in conspiracy with SWQH, set up this scheme to defraud Plaintiff. They defrauded TBT collectively, and in the process, breached almost every major clause of their agreements. Jacks then spent, gave Baker, or transferred almost every penny of the money they earned in breach of the Broker's Contract. Jacks cannot be allowed to "pass the buck" to his undoubtedly judgment-proof girlfriend and escape all liability. The fact that Plaintiff already obtained interlocutory judgments and sanctions against Baker and SWQH has no bearing on whether Plaintiff is entitled to judgment against all of them.

11.2 Instead, Jacks should be held liable for what Baker, his agent and partner, did in breach of the Broker's Contract he signed. He should be liable because Baker was his agent or partner. He ratified all her actions and received and retained the proceeds collected from her actions. More importantly, he should be held liable because he should not be allowed to profit from a breached contract and then claim no liability.

11.3 SWQH hired K&D as its freight transportation broker and agent to purchase and sell loads of hay and deliver those loads to the ultimate buyers. K&D was the *de facto* consignor while SWQH was the *de facto* consignee. They each received the benefit of Plaintiff's services incurred by the fraud and breach of contract of Jacks, Baker, K&D, and CDJI, and Plaintiff has been damaged by each of them and their wanton actions. In addition to the actual damages suffered by Plaintiff by reason of Defendants' conduct, Plaintiff is entitled to statutory and punitive damages against each of the Defendants on each of the claims asserted, plus reasonable attorney's fees and costs incurred by Plaintiff.

Specific Relief to be Awarded Plaintiff

11.4 In particularly and based upon the summary judgment evidence, Plaintiff seeks a judgment against the Defendants for the following amounts on the following claims and causes of action.

1. Breach of the Broker's Contract against Defendants Baker and Jacks, individually and as general partners of K&D Logistics, jointly and severally, in the principal amount of \$414,245.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
2. Breach of Implied Contract, *Quantum Meruit*, or Unjust Enrichment against Defendants Baker and Jacks, individually and as general partners of K&D

Logistics and against S/W Quality Hay, jointly and severally, in the principal amount of \$414,245.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;

3. For Amounts owed by Defendants Baker and Jacks, individually and as general partners of K&D Logistics and by S/W Quality Hay, jointly and severally, in the principal amount of \$414,245.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
4. Against each and all Defendants, joint and severally, for Fraud, Fraudulent Representation and Misrepresentation, and Conspiracy, in the principal amount of \$414,245.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this

cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;

5. Against each and all Defendants, jointly and severally, for theft of transportation services and violation of the Texas Theft Liability Act, in the principal amount of \$414,245.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
6. Against each and all of the Defendants, jointly and severally, for the additional damages available under the *Theft Liability Act, TCPRC § 134.005(i)* for \$1,000.00 each, payable severally;
7. Punitive Damages against each of the Defendants, in the amount of two times the actual damages awarded to Plaintiff on its claims for fraud and misrepresentation, in the total amount of \$848,483.12;
8. Alternatively, for Plaintiff's reasonable attorney's fees in the amount of \$131,000.00 for the trial and \$30,000.00 for each necessary and successful appeal by Plaintiff, based on Plaintiff's claims under the *Theft Liability Act*, quasi contract, declaratory relief, and other claims for which Plaintiff is entitled to an award of reasonable attorney's fees;

9. Alternatively, on Plaintiff's separate sworn account claims against Defendants Baker and Jacks, individually and as general partners of K&D Logistics, in the principal amount of \$326,583.16, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$53.68 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
10. Alternatively, on Plaintiff's separate sworn account claim against Defendant S/W Quality Hay in the principal amount of \$87,632.40, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$14.14 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
11. For declaratory relief determining that Defendants and each of them violated Plaintiff's rights by obtaining freight and transportation services by deception or otherwise and not paying for those services caused Plaintiff to suffer damages in the principal amount of \$414,215.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00

for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;

12. Against Defendants and each of them jointly and severally for negligent misrepresentation causing damages to Plaintiff in the principal amount of \$414,215.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
13. Additionally and/or alternatively, against Defendants Jacks and Baker, individually and as general partners of K&D Logistics, for breach of their fiduciary duties owed to Plaintiff as independent transportation brokers, causing damages to Plaintiff in the principal amount of \$414,215.56, with prejudgment interest thereon from May 2, 2007, until the date of judgment at the per diem rate of \$68.09 until the date of judgment, reasonable attorney's fees of \$131,000.00 for one trial of this cause, and in the amount of \$30,000.00 for each successful appeal of this cause if any appeal is filed or necessary, plus post-judgment interest on the amounts awarded at the judgment rate from the date of judgment until paid in full and satisfied;
14. A Permanent Injunction enjoining the Defendants and each of them from further transferring any money or funds they received from the shipping transactions in which they were involved and for which they failed to pay

Plaintiff for the transportation services which it performed for them, and particularly enjoining the Defendants and each of them from transferring, depositing, investing, or moving any of their funds, property, or assets to jurisdictions outside of the State of Texas to attempt to evade enforcement of any judgment awarded to Plaintiff;

15. For all other relief for which Plaintiff's Motion for Summary Judgment and the summary judgment evidence shows Plaintiff to be entitled.

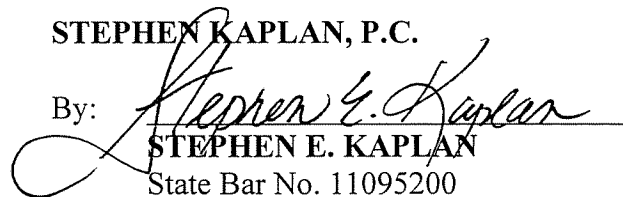
11.5 For all these reasons, TBT prays that the Court enter summary judgment in its favor and against Baker, Jacks, CDJI, and SWQH finding both breach of contract and damages for that breach, fraud, and other tortious conduct, and awarding Plaintiff its damages, including attorney's fees and costs, and against all of the Defendants on the other claims asserted in this case, and for all other relief, both general and special, at law or in equity, to which TBT shall be justly entitled.

WHEREFORE, PREMISES CONSIDERED, TBT respectfully requests that this Court grant its Motion for Summary Judgment, and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

STEPHEN KAPLAN, P.C.

By:



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**ATTORNEYS FOR PLAINTIFF,
TURNER BROS. TRUCKING, L.L.C.**

CERTIFICATE OF SERVICE

I certify that on the 24 day of October, 2008, a true and correct copy of the *Plaintiff Turner Bros. Trucking, L.L.C.'S Motion for Summary Judgment and Appendix* was served upon all counsel of record or parties appearing *pro se* in the above-styled and numbered cause via certified mail return receipt requested and/or by regular U.S. mail, and/or by email.


STEPHEN E. KAPLAN

CAUSE NO. 74068-422

TURNER BROS. TRUCKING, L.L.C.,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
KRISTAL M. BAKER, INDIVIDUALLY	§	
AND D/B/A K&D LOGISTICS CO.,	§	KAUFMAN COUNTY, TEXAS
CLIFFORD DWAYNE JACKS,	§	
INDIVIDUALLY AND D/B/A	§	
K&D LOGISITICS CO., S/W QUALITY	§	
HAY, LLC, AND C.D. JACKS, INC.	§	
<i>Defendants.</i>	§	422 ND JUDICIAL DISTRICT

FIAT

The above and foregoing *Motion for Summary Judgment* has been set for hearing before the Court on the ___ day of _____, 2008, at _____ .m.

JUDGE PRESIDING