No. 05-11-00692-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

AUTOGAS ACQUISITIONS CORPORATION,
AND AUTOGAS SYSTEMS, INC.,

Appellant,

v.

DANA KELMAN,

Appellee.

On appeal from the 219th District Court of Collin County, Texas
No. 219-03718-2008, The Honorable Scott Becker, Judge Presiding

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APPELLEE'S RESPONSE BRIEF

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Oral Argument Not Requested

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STATEMENT OF THE CASE

This is an appeal from a final judgment entered in favor of Appellee/Plaintiff Dana Kelman against Appellant/Defendant, AutoGas Systems. (C.R. at 240.) Dana Kelman brought suit against AutoGas Systems for breach of contract, quantum meruit, and promissory estoppel [1] on November 7, 2008 because AutoGas Systems refused to pay Kelman amounts due under a compensation agreement. (C.R. at 12-15.)

Kelman filed a traditional motion for summary judgment on December 14, 2009, attaching affidavits, documents and deposition excerpts. (C.R. at 27-130.) AutoGas responded on January 8, 2010, attaching to its response the affidavits and full depositions of AutoGas founder and CEO, Randy Nicholson, and his son-in-law, Jeffrey Upp. (C.R. at 131-224.)

On April 9, 2010, the Honorable Judge Henderson of the 219th district court issued a memorandum opinion granting summary judgment for Kelman on his breach of contract, quantum meruit, and promissory estoppel causes. (C.R. at 234.) Final judgment was entered eleven months later. (C.R. at 240-41.)

On April 18, 2011, AutoGas filed a motion for new trial. (C.R. at 243.) AutoGas did not allege, cite to, or attach any new evidence to its motion. (C.R. at 244-380.) Instead, AutoGas reattached the exact same evidence and

[1] The original petition also included causes of action for suit on a sworn account, assumpsit, common law debt, common law fraud, fraud by nondisclosure, and negligent misrepresentation. (C.R. at 15-17).

briefing considered by the trial court before summary judgment was granted. (C.R. at 271-380.) This motion was overruled by operation of law on June 3, 2011 and formally on June 9, 2011 (C.R. at 417, 430.)

On June 7, 2011, AutoGas filed its notice of appeal. (C.R. at 416.)

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rules of Appellate Procedure 38.1(e), Appellee does not request oral argument. The record before the Court clearly establishes no genuine issues of material fact. Unlike what Appellant contends, the trial court did not grant summary judgment in Appellee's favor based on a legal argument that goes against Texas law. *See* Appellant's Br. at ix. Appellee did not contend that the president of a company can bind the company to any and all contracts simply by virtue of his title. Therefore, oral argument will not aid the court's decisional process. For these reasons, Appellee's respectfully do not request oral arguments.

ISSUES PRESENTED

ISSUE NO. 1: Did president, COO, and board member, John Cullen bind AutoGas when he made a compensation agreement with Kelman?

ISSUE NO. 2: Did AutoGas breach Kelman's compensation agreement when it refused to pay him the amount owed to him?

ISSUE NO. 3: Is AutoGas liable under quantum meruit and promissory estoppel when it is undisputed that AutoGas benefitted from a promise made to Kelman?

SUMMARY OF THE ARGUMENT

The trial court correctly entered judgment in favor of Kelman. This case is not complicated or unusual. This is a case for unpaid wages and commissions that Kelman claims were promised to him by the president, chief operating officer (COO), and board member of the company, John Cullen. Cullen entered into an agreement with Kelman on behalf of AutoGas. Cullen admits that there was an offer and acceptance. Cullen admits that he intended the contract to be mutual and binding. Kelman performed and is therefore owed his unpaid commissions and wages.

Appellant does not argue that Cullen did not make the promised compensation agreement with Kelman. Instead, Appellant continues to argue that Cullen in his official capacity as the president, COO, and board member did not have the authority to offer the compensation agreement at issue to Kelman.

Simply put, there is no genuine dispute that Cullen, the president, COO, and board member, entered contracts on behalf of the company and promised a compensation agreement with an employee who reported directly to him and received his duties only from him. This compensation agreement was ordinary and routine. Each aspect of the compensation agreement had been done before for other employees with full knowledge and approval of AutoGas. Under Texas law, ordinary and routine matters are within the

powers of a president, COO, and board member of a company. This compensation agreement was within the authority of Cullen to make.

Cullen also had apparent authority to make the agreement. AutoGas never objected to any payments made to other employees under the same compensation agreement. Nicholson never introduced himself to Kelman as CEO of AGA/Centego or reprimanded him for going through Cullen to communicate with Nicholson. There was no way for Kelman to distinguish between Cullen's individual approval and board approval of any action. Under Texas law, that creates apparent authority sufficient to bind the company.

AutoGas breached its contract with Kelman when it did not pay him what he was owed. Under contract law, Kelman is entitled to be put in the place he would be in if the contract had not been breached. That means he is owed his commission, paid time off, and severance payment.

AutoGas was unjustly enriched by Kelman's performance because it did not pay him for his services. Through renegotiation of the deal with Meijer, Kelman saved AutoGas considerable money. He has not been paid for that even though AutoGas knew he expected to be.

The trial court also correctly ruled for Kelman on promissory estoppel. The undisputed evidence shows that Cullen promised Kelman a compensation agreement, that Cullen intended Kelman rely on that

agreement and that Kelman did rely on that agreement to his detriment. Therefore, Kelman is entitled to recovery under promissory estoppel.

Kelman has presented competent summary judgment evidence that entitles him as a matter of law to judgment in his favor. The only evidence produced by AutoGas are self-serving conclusory statements for which there is no evidentiary support in the record. That is not sufficient to create fact issue.

Therefore, this court should affirm the trial court's judgment on breach of contract, quantum meruit, and promissory estoppel.

STATEMENT OF FACTS

1. Dana Kelman was not paid according to his compensation agreement.

The facts in this case are straightforward. In January 2008, Dana Kelman entered into a compensation agreement with John Cullen, who was concurrently the president, chief operating officer (COO), and one of four board members of AGA/Centego. (C.R. at 75.) That is undisputed. (C.R. at 63, 72, 245.)

It is also undisputed that AutoGas, the parent company of AGA/Centego, refused to pay Kelman what he was owed under that agreement. (C.R. at 128, 160, 207.)

2. Dana Kelman worked under and reported only to John Cullen.

Since 2005, Kelman worked as Director of Finance directly under John Cullen. (C.R. at 62, 72-73.) Kelman was an exceptional employee, providing financial reports, projections, and management of receivables with Roberta Frohardt. (C.R. at 71-73, 81.) Kelman reported directly to Cullen, receiving his duties and responsibilities exclusively from him. (C.R. at 73, 175, 220.) As employees of Centego, both Kelman and Frohardt received annual bonuses in addition to their salaries. (C.R. at 73, 81.)

In spring 2005, AutoGas Systems, Inc. (AGS) acquired Centego. (C.R. at 62, 71, 80.) Centego became AGA/Centego[2]. (C.R. at 63, 72, 80-81.) AGA/Centego was a subsidiary of AGS. (C.R. at 167.) AGS primarily deals in software for retail gasoline outlets and customer loyalty programs. (C.R. at 167.) As founder, CEO, president, chairman of the board, and shareholder, Randy Nicholson runs AGS. (C.R. at 165, 167.) There have been no other presidents or CEOs of AGS. (C.R. at 166.) Nicholson is unaware of whether AGS has any vice-presidents, the number of board meetings conducted in the last 12 months, and cannot recall the last time he attended a shareholders meeting. (C.R. at 166-67.) Nicholson's son-in-law, Jeffrey Upp, currently sits on the board of AGS and has been its chief financial officer for 14 or 15 years. (C.R. at 185, 166, 210.)

After the acquisition, AGA/Centego's board of directors consisted of four people, including Randy Nicholson and John Cullen. (C.R. at 168.) Upp was named treasurer of AGA/Centego. (C.R. at 210.)

3. AGA/Centego is run the same way as before the acquisition.

After the acquisition, no changes were made in how AGA/Centego would be run, including the payroll system. (C.R. at 72, 168, 191, 217.) Cullen remained president and chief operating officer, but also became a board member of AGA/Centego and an executive vice-president of AGS, the parent company. (C.R. at 72, 113, 168.) Kelman remained Director of

[2] Centego became AGA/Centego because AGS created AutoGas Acquisitions ("AGA") to hold the assets of Centego. (C.R. at 167-68.)

Finance and Frohardt remained responsible for managing receivables and payroll at Centego with Kelman. (C.R. at 72, 1.) Cullen testified that Kelman would continue to report directly to him and receive his duties and responsibilities from him, not the board of directors. (C.R. at 73, 175, 220.) In fact, Nicholson never introduced himself to Kelman as CEO of AGA/Centego. (C.R. at 171.) Nicholson never told Kelman that he expected Kelman to report to him. (C.R. at 171.) Nicholson never reprimanded Kelman for going through Cullen to give information to him. (C.R. at 171.)

Nicholson testified that Cullen spoke with him on a daily basis about AGA/Centego. (C.R. at 168, 179.) Cullen testified that as president and board member of AGA/Centego, he entered into contracts on behalf of the company without Nicholson's permission or approval. (C.R. at 72.) These contracts were enforceable. (C.R. at 72.) Frohardt testified that Cullen approved all payroll for AGA/Centego employees (C.R. at 81.) Nicholson never disapproved. (C.R. at 81.) In fact, between January 2006 and August 2008 numerous payments were made over and above Centego's monthly salaries with the knowledge of Nicholson and Upp, but no action was taken to stop them. (C.R. 193, 214-15.)

4. AGA/Centego loses its only Customer, Meijer.

Meijer, a grocery and gas station chain, had a Fuel Rewards program run by AGA/Centego. (C.R. at 205, 66.) The program worked like this: third-party vendors would issue gas vouchers to customers, which could then be

redeemed at Meijer businesses. (C.R. at 66, 186.) When those vouchers were redeemed at Meijer businesses, AGA/Centego would reimburse Meijer for the cost of the voucher. (C.R. at 66, 186.) AGA/Centego would then collect the cost of the redeemed voucher from the third-party vendors. (C.R. at 66, 186.) Essentially, AGA/Centego was a middleman. (C.R at 66, 186.)

During this process, the money appeared as a receivable for AGA/Centego. (C.R. at 186.) After AGA/Centego reimbursed Meijer, there was no guarantee that AGA/Centego would be able to collect from these third-party vendors. (C.R. at 186.) AGA/Centego was not making any money on this deal. (C.R. at 214.)

In late 2007, Meijer gave notice to AGA/Centego that it would let its contract expire. (C.R. at 205.) Because Meijer was AGA/Centego's only customer, this resulted in AGA/Centego planning to shut down completely by July 18, 2008. (C.R. at 81, 180.)

5. Cullen creates a compensation agreement for AGA/Centego employees due to the impending shut down of the company.

In anticipation of AGA/Centego's shut down, Cullen and Nicholson discussed the creation of a compensation plan for employees affected. (C.R. at 73, 158.) The plan was based on previous Centego compensation plans. (C.R. at 73.) The plan would give seven AGA/Centego employees two weeks salary for each year of service at the time of termination, as well as stay-on bonuses and collection-based commissions for some employees. (C.R. at 73.) Under the plan, both Kelman and Frohardt would each receive a stay-on

bonus and half of a 25% commission on any outstanding receivables collected or offset. (C.R. at 75-76.)

Cullen put the plan in a spreadsheet and sent it to Nicholson for approval. (C.R. at 73, 126, 180.) Nicholson's only objection was that the plan gave two-weeks salary per year of service, instead of one-week, which was AutoGas's policy. (C.R. 159, 73, 180, 198, 200.) Accordingly, Cullen made that change and sent Nicholson a copy of the revised plan and spreadsheet offering only one-week salary per year of service for the seven AGA/Centego employees. (C.R. at 74.)("I specifically discussed with him the stay-on bonuses and collections commissions that two employees, Dana Kelman and Roberta Frohardt, would receive. Nicholson agreed to include and appreciated the need for that as part of the plan in order to collect receivables and potentially wind up the company.") Nicholson approved this version. (C.R. at 74, 126.) Execution of the plan began. (C.R. 73.)

6. Cullen's compensation agreement is executed.

The compensation agreement sent to Nicholson listed seven AGA/Centego employees: Quinn Hudson, Eric Fooks, Jeff Mark, Nick Flores, John Cullen, Roberta Frohardt, and Dana Kelman. (C.R. 123.)

According to the spreadsheet, Hudson and Fooks would be terminated on January 15, 2008, and receive $3,173.08 and $9,846.15, respectively. (C.R. at 73.) According to both Cullen and Frohardt, on January 15, both Hudson and Fooks were terminated and received their respective amounts. (C.R. at

73, 82.) Jeff Mark was to receive $9,230.77 and be terminated on February 4, 2008. (C.R. at 73.) However, Cullen postponed Mark's termination date pending the result of a prospective new customer and Mark eventually stayed on. (C.R. 73, 201.) Nick Flores was to be terminated on April 3, 2008 and receive $4,846.15. (C.R. 73.) According to Cullen, Frohardt and AutoGas, Flores was terminated on that date and received that amount. (C.R. 73, 82, 108.) Hudson, Fooks, and Flores also received paid time off (PTO) in accordance with Centego policy. (C.R. at 77, 218.) Frohardt testified that she personally submitted the payouts to these individuals to the payroll company, without objection from AutoGas. (C.R. at 82.) Between January and August 2008, three employees were paid according to the compensation agreement. (C.R. at 76-77, 82.) Neither Nicholson nor Upp ever objected. (C.R. at 82.)

7. Kelman performs under the compensation agreement

Kelman and Frohardt stayed on past the company shut down date, July 18, 2008, to ensure continuity in billing preparation and collection efforts. (C.R. at 74, 123.) Because the company benefited from Kelman and Frohardt staying on, each was promised a stay-on bonus and a 25% commission on any and all receivables collected or offset. (C.R. at 74, 76, 82, 123-24.)

Commission structures were not unknown or unusual within AGA/Centego. (C.R. 124, 222.) In fact, the commission structure here was the same one used to incentivize Kelman and Frohardt to stay on when AGA

bought Centego in 2005. (C.R. at 124.) Furthermore, AutoGas was aware that commissions were given to AGA/Centego employees. (C.R. at 196, 222.)

Both Kelman and Frohardt stayed on through July 18, 2008, performed billing and collections as agreed, thus becoming entitled to their stay-on bonuses under the compensation agreement. (C.R. at 77.) Kelman received his bonus in the amount of $21,000. (C.R. at 77, 180.)

Kelman and Frohardt also collected $418,988.90 in receivables. (C.R. at 77, 83.) This was done by renegotiating the agreement with Meijer. (C.R. at 76.) The new agreement took AGA/Centego out of the middle of Meijer's pay arrangement so that Meijer would collect directly from the vendors, instead of AGA/Centego fronting any money like before. (C.R. at 76.) This had been unsuccessfully attempted on numerous occassions. (C.R. 187, 213.) In fact, this had still not been accomplished when AutoGas acquired Centego. (C.R. at 213.)

However, through Kelman and Frohardt's efforts, the deal with Meijer finally succeeded. (C.R. at 67, 214.) The new arrangement with Meijer prevented further cash drain and eliminated the substantial risk that a significant amount of money would go uncollected. (C.R. at 75-76.) Cullen testified that he, himself, assured Kelman before the deal happened that if Kelman could successfully eliminate this debt, it would count toward his half of the 25% commission. (C.R. at 76.)

8. Kelman has not been paid what he is owed under his compensation agreement

Under the compensation agreement, Kelman is entitled to $52,373.61 as his half of the 25% commission. (C.R. at 77.)

This has not been paid to Kelman. (C.R. at 78.) Despite sending Cullen an email on August 21, 2008, explicitly stating that he, Nicholson, agreed to the compensation agreement, on August 26, Nicholson instructed Cullen and Kelman to cease payments made according to the agreement. (C.R. 128, 130.)

On September 3, 2008, Kelman was terminated. (C.R. at 69.) Up until that time, Kelman had never been reprimanded, written up, or counseled. (C.R. at 171, 175, 214.) There is no termination cause letter in the record. Kelman has still not received his severance payment of $8,076.92 or his paid time off in the amount of $2,692.30. (C.R. at 69.)

On November 7, 2008, Kelman filed his petition in the 219th District Court in Collin County. (C.R. at 11.) Motion for summary judgment was filed on December 14, 2009, granted on April 9, 2010 and final judgment issued on March 19, 2011. (C.R. at 234-241.) AutoGas's Motion for New Trial was filed on April 18, 2011 and overruled by operation of law on June 3, 2011. (C.R. at 417.) AutoGas timely filed this appeal.

STANDARD OF REVIEW

This Court reviews grants of summary judgment de novo. *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.). Summary judgment must be granted when there is no genuine dispute as to material facts or elements of the cause of action. *See id.* While all evidence favorable to the nonmovant is taken as true, here, where the trial court has not specified its grounds for granting summary judgment, the Court must affirm the trial court's judgment if the ruling can be upheld on any grounds asserted. *See Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 895 (Tex. App.—Dallas 2008, no pet.)

ARGUMENT

A. PRESIDENT, COO, AND BOARD MEMBER OF AGA/CENTEGO AND EXECUTIVE VICE-PRESIDENT OF AUTOGAS, JOHN CULLEN HAD THE AUTHORITY TO BIND AUTOGAS WHEN HE MADE KELMAN'S COMPENSATION AGREEMENT.

Cullen had authority to bind AutoGas to Kelman's compensation agreement. His authority to do so does not arise merely from his position as president, but rather from his various positions as president, chief operating officer, and board member of AGA/Centego, and executive vice-president of AGS. Furthermore, this compensation agreement was not unusual but consistent with past practices of both AGS and Centego.

In an attempt to further prolong this case by creating non-existent fact issues, AutoGas has mischaracterized the basis for the trial court's grant of

summary judgment. AutoGas incorrectly asserts that the trial court granted summary judgment based on the proposition that a president can bind the company to unusual and extraordinary contracts. *See* Appellant's Br. at 10. Kelman's motion for summary judgment makes clear that Cullen's authority comes from his multiple high-ranking positions at AGA/Centego and AutoGas and that the compensation agreement was routine and ordinary. (C.R. at 44.) No law in Texas and no case cited by AutoGas conflicts with that proposition. Indeed, the law supports that proposition. Therefore, the trial court's grant of summary judgment should be upheld.

1. Cullen the president, COO, and board member of Centego and executive vice-president of AGS had the authority to bind the company to routine severance agreements.

Kelman is aware of no case, nor has AutoGas cited to a case, in which the court has struck down routine compensation agreements of a corporate officer concurrently holding the positions of president, chief operating officer, and board member, as well as executive vice-president of the parent company.

Unlike what AutoGas alleges, Kelman does not argue that Cullen's position and title as president, alone, gave him the authority to bind the company to the compensation agreement at issue. Appellant's Br. at 10. It is undisputed that the actual authority of a president as agent of the principal may be conferred either expressly or by implication. *See Intermedics, Inc. v. Grady, M.D.*, 683 S.W.2d 842, 847 (Tex. App.—Houston [1st Dist.] 1985, writ

ref'd n.r.e.) ("A principal may confer actual authority upon an agent either expressly or by implication."). This actual authority may be found in specific statutes, the organic law of the corporation, by delegation from the board of directors, implied from the nature of the officer's position, from custom or from habit of doing business. *See Templeton Hills v. Nocona Hills Owners Assn., Inc.*, 555 S.W.2d 534, 537 (Tex. Civ. App.—Texarkana 1977, no writ).

It is well-established law in Texas that a president can bind a corporation in routine matters arising in the ordinary course of business. *See Ennis Bus. Forms, Inc. v. Todd*, 523 S.W.2d 83, 86-87 (Tex. Civ. App.—Waco 1975, no writ) (finding company president acted with authority when he raised employee's salary based on president's determination that it was for the benefit of the company). *See also Capital Bank v. Am. Eyewear, Inc.*, 597 S.W.2d 17, 20-21 (Tex. Civ. App.—Dallas 1980, no writ) (finding president lacked authority because long term lease was not routine); *Templeton*, 555 S.W.2d at 538 (finding routine agreement not entered by president-elect when he signed a fixed-term contract for a month-to-month employee). An individual who is both an executive vice-president and board member also has the power to bind the company in routine matters. *See Intermedics*, 683 S.W.2d at 847 (upholding oral compensation agreement involving salary and stock made by individual who was both executive vice-president and board member because the company had similar agreements in the past and the individual had general authority to act in furtherance of company goals).

It is undisputed that Cullen was not only the president of AGA/Centego, but also its chief operating officer, and one of four members of the board of directors. (C.R. at 72, 113, 168.) He was also the executive vice-president of AutoGas. (C.R. at 72, 113, 168.) AutoGas has not provided any statute, by-law, board resolution, or policy manual restricting Cullen's authority regarding routine and ordinary matters. In fact, AutoGas has not provided any by-laws, board resolutions, or policy manuals whatsoever. Conclusory statements such as "Cullen did not have authority to make 'agreements' for AutoGas or Centego such as the one alleged by Kelman" fail to create a fact issue. (C.R. at 159); *see Hamilton v. Wilson*, 249 S.W.3d 425, 427 (Tex. 2008)(finding conclusory statements insufficient to raise fact issue); *Brown v. Brown,* 145 S.W.3d, 745, 752 (Tex. App.—Dallas 2004, pet. denied)(finding affidavit statements referencing unattached documents as being conclusory and not competent summary judgment evidence). Therefore, Cullen had authority to enter routine and ordinary agreements.

2. Kelman's compensation agreement was routine and ordinary

Compensation and employment agreements that have been done before are routine and ordinary. *See Todd*, 523 S.W.2d at 86-87 (finding company president had authority to give compensation with deferred payments because other employees had such plans); *Intermedics*, 683 S.W.2d at 847 (upholding compensation agreement involving salary and stock because such agreements had been done for other employees). The standard

for a routine agreement is

> "if the circumstances surrounding its making 'would have justified an ordinary competent person, familiar with the situation and with the ordinary methods of business, considering the matter in the light of every day experience, to say without serious hesitation that the making of [the] contract formed a natural and ordinary part' of the company's business at the time in question."

See Todd, 523 S.W.2d at 86 (citing *Babicora Dev't Co., Inc., v. Edelman*, 54 S.W.2d 552, 555 (Tex.Civ.App.—El Paso, 1932, writ dism.)).

In *Todd*, the company president orally agreed to raise an employee's salary without approval from the board of directors. *See Todd*, 523 S.W.2d at 87. The company argued, not that the president lacked authority to make compensation decisions, but rather the president lacked authority to make a compensation agreement with a provision that involved deferred payment of compensation. *See id.* at 86. The company argued that the inclusion of this provision transformed the compensation agreement into an extraordinary and unusual one. *Id.* Thus such compensation agreement was beyond the president's authority. *Id.* In upholding the compensation agreement as being within the president's ordinary and routine powers, the court focused on the fact that deferred payment contracts had been given to other employees by the board of directors. *Id.* The court also referenced president's testimony regarding the company's existing policy of offering incentive packages to induce workers to come to Ennis, Texas. *See id.* at 87 ("Gehrig testified ... 'Sometimes it was deferred compensation, sometimes it was

adding to their years of service credit for the pension plan, and we worked various arrangements with different people according to their needs.'").

The court also noted that the company was run informally, often with oral agreements being made. *See id.* at 86-87 ("It was not their custom to operate on a formal basis, and there were many discussions and decisions on a day-by-day basis among them involving company management that were not formally reduced to writing."). That, in addition to the fact that the agreement had been done before "show[ed] that the contract in question was made within an established, functioning policy of the defendant company for the company's benefit. It is legally sufficient to support the questioned finding." *Id.* In other words, it was a routine and ordinary agreement. *Id.*

Here, the situation is remarkably similar. Like the company in *Todd*, AutoGas operates informally. The AutoGas board meets only occasionally based on the situation. (C.R. at 166.) At those board meetings, Nicholson's son-in-law, Upp, would take handwritten minutes of the meeting. (C.R. at 166.) At board meetings, policies were discussed and regularly communicated orally. (C.R. at 179.) AutoGas CEO and shareholder, Nicholson, testified in his deposition that he attended stockholder meetings, but could not recall the last time he did so. (C.R. at 167.) Nicholson was also unaware of whether there were any vice-presidents at AutoGas. (C.R. at 166.) Furthermore, Nicholson, as CEO of AGA/Centego, was unaware of the powers given to the president of AGA/Centego in its by-laws. (C.R. at 179.)

Like the employee in *Todd*, Kelman was promised a specific compensation agreement, which included a severance payment. Here, the case is even stronger than *Todd* because unlike *Todd*, the compensation agreement was memorialized in a spreadsheet and not simply made orally. (C.R. at 123.) Severance payments were not unusual at Centego or AutoGas. (C.R. at 216.) It is undisputed that AutoGas made severance payments to employees in the past. (C.R. at 216.); Appellant's Br. at 14, 21, 23. Upp, who had been with AutoGas for 19 years and the CFO for 14-15 years, stated that in the previous three reductions in force at AutoGas, severance plans were made. (C.R. at 216.) The company's prior practice with severance payments involved giving employees one-week salary for each year of service. (C.R. at 216.) It is undisputed that the compensation agreement memorialized in the spreadsheet before the Court is consistent with that routine practice for severance payments. (C.R. at 216, 123.) It is undisputed that severance payments were made in accordance with the compensation agreement at issue. (C.R. at 108.) Therefore, the severance payments were ordinary and routine. *See Todd,* 523 S.W.2d at 87; *Intermedics*, 683 S.W.2d at 847.

Kelman was promised payment for his unused paid time off. (C.R. at 77.) This was consistent with Centego policy. (C.R. at 77.) Upp, AutoGas CFO and AGA/Centego treasurer, knew AGA/Centego paid for unused time off. (C.R. at 21.) In other words, this was not an unusual or unknown aspect to the compensation agreement but consistent with Centego policy. *See*

Todd, 523 S.W.2d at 87 (finding prior practice of providing deferred compensation plans along with other kinds of compensation plans put president's agreement within established company policy); *Intermedics*, 683 S.W.2d at 847.

The compensation agreement also promised Kelman commissions on receivable collections he made. (C.R. at 77.) Contrary to the statements of AutoGas, commissions were not an unusual form of compensation at AGA/Centego. (C.R. at 196, 222.) It is undisputed that commissions were given to some employees of AGA/Centego. (C.R. at 196, 222.) It is undisputed that AutoGas was aware of payment of these commissions. (C.R. at 196, 222.) The commission structure given to Kelman was no different than what he had received just 3 years earlier when AGS acquired Centego. (C.R. at 124.) Therefore, promising Kelman a commission was not unusual. *See Todd*, S.W.2d at 87; *Intermedics*, 683 S.W.2d at 847.

As in *Todd* and *Intermedics*, this compensation agreement was created for the benefit of the company. *See Todd*, 523 S.W.2d at 87 (upholding agreement made for benefit of company); *Intermedics*, 683 S.W.2d at 847 (upholding agreement made in furtherance of company goals). Cullen wanted to ensure continuity in billing procedures and collection efforts for AutoGas. (C.R. at 123.) Furthermore, Cullen states that as the president and board member he would enter into contracts on behalf of the company. (C.R. at 72.) Cullen, therefore, exercised his authority to enter routine and ordinary

contracts for the benefit of the company when entering into a compensation agreement with Kelman. *See Todd*, 523 S.W.2d at 87; *Intermedics*, 683 S.W.2d at 847.

There is simply no genuine dispute that this agreement was somehow unusual or extraordinary as AutoGas alleges. *See* Appellant's Brief at 12. As shown above, each aspect of the compensation agreement had been used and approved of by AutoGas and AGA/Centego. Therefore, Cullen had the authority to create it. *See Todd*, 523 S.W.2d at 86-87.

AutoGas asserts that this severance package needed to be approved by the compensation committee. Appellant's Br. at 11. However, the existence of AutoGas's compensation committee is irrelevant to the issues in this case. Even if one assumes that such a committee exists,[3] Nicholson's testimony establishes that the committee only approved or disapproved employee bonuses. (C.R. at 180). Bonuses for purposes of the compensation committee did not include severance pay or commissions. (C.R. at 180-81). Kelman is

[3] There is no evidence in the record of the existence of this committee besides the deposition and affidavit of Nicholson and Upp's deposition. (C.R. at 159, 180, 218.) There is no written documentation that provides what matters this alleged compensation committee addresses. (C.R. at 180, pg. 65:15.) There are merely conflicting statements by Nicholson and Upp over just what the alleged compensation committee did. *Compare* (C.R. at 180 (Nicholson stating that the committee only had power to approve bonuses)) and (C.R. at 218 (Upp stating that the compensation committee approved all pay-related issues). There are no documents, minutes or schedules in the record for any meetings this alleged compensation committee ever had. (C.R. at 180, pg 66.) Finally, reference to this committee is conspicuously absent in all email communications between Nicholson and Cullen that were provided in the record. The absence of any reference to this alleged compensation committee is unusual considering Nicholson's testimony that whenever bonuses were suggested, the compensation committee was discussed and that the committee was supposedly made up of the only other two AGA/Centego board members besides Cullen and Nicholson. (C.R. at 180, pg 66.)

not alleging that he is entitled to any additional bonus as Kelman has already been paid his stay on bonus. (C.R. at 77.) Kelman has not received, however, his severance or commission pay, both of which are beyond the scope of the compensation committee's powers. (C.R. at 180-81.) Therefore, the compensation committee has no relevance to this case.

3. Cases involving contracts for lifetime employment, long-term leases, and violations of public policy are inapplicable to an ordinary compensation agreement entered into by the president, COO, and board member of AGA/Centego, and executive vice-president of AutoGas

First, none of the cases cited by AutoGas deal with the authority of a person concurrently holding high-ranking positions with both the subsidiary and parent company. Second, it is undisputed that *extraordinary* contracts and agreements include contracts for lifetime employment, contracts contrary to public policy, and contracts for long-term leases. *See* Appellant's Br. at 12-13. However, none of those issues are present in this case.

AutoGas's reliance on *Leak v. Halaby Galleries, Inc.* is misplaced for two reasons: (1) the Court actually finds the president had authority to bind the company to employment contracts; and (2) this case was decided under the old public policy of prohibiting corporations from entering multi-year employment contracts. *See* Appellant's Br. at 12-13; *Leak v. Halaby Galleries, Inc.*, 49 S.W.2d 858 (Tex. Civ. App.—Dallas 1932, writ ref'd). The 1932 case of *Leak v. Halaby Galleries* does not stand for the proposition that a company president cannot bind the company in general or even that

employment contracts are necessarily unusual and not routine. *Leak v. Halaby Galleries* involved the issue of whether or not a three-year employment contract was valid where only the company president signed it. *Id.* at 859. This Court found that the company president did have the power to bind the corporation to employment contracts, but only for one-year contracts. *Id.* at 861 ("We are of opinion, and so hold, that the contract was effective for only one year . . . ."). The reason the employment contract was not valid for the full three years was because at the time the case was decided, it was deemed contrary to public policy for a corporation to enter into multi-year employment contracts. *See id. citing Denton Milling Co. v. Blewett*, 254 S.W. 236 (Tex. Civ. App. 1923, writ refused); *see also Pioneer Specialties, Inc. v. Nelson*, 339 S.W.2d 199, 201 (Tex. 1960) (discussing the historical context of the holding in *Leak*).

Nelms is inapplicable to this case because it concerns a lifetime employment contract. *See Nelms v. A & Liquor Stores, Inc.,* 445 S.W.2d 256, 258-260 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.). In *Nelms*, one of the corporation's directors allegedly entered into an oral agreement with the corporation for lifetime employment. *See id.* at 257. The plaintiff asserted the contract was valid for two reasons: (1) because he and another director had agreed to it and/or (2) the other director was the president of the company. *Id.* First, the court held that the contract was invalid because a majority of disinterested directors had not voted for it. *Id.* at 258. Second,

the court, stressing that lifetime employment contracts were unusual and extraordinary, held that even a president with hiring ability could not bind the company to a lifetime employment contract. *Id.* at 359 ([B]y the weight of authority . . . a general manager of a corporation with authority to employ is not presumed to have the power to make contracts for *lifetime* employment.") (emphasis added). *Nelms* stands merely for the fact that *lifetime* employment is, as a matter of law, an unusual business contract and is thus inapplicable to this case. *See* Appellant's Br. at 12.

Brown v. Grayson Enters., Inc. does not apply for the same reason. In that case this Court explicitly confined its ruling to the authority of an agent to enter into lifetime contracts. 401 S.W.2d 653 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) ("[C]orpoate officers and agents lack the power or authority to hire employees for *life*.") (emphasis added). Indeed, this Court expressly adopts the reasoning of the Maryland Court of Appeals on this issue, quoting that court's opinion on the matter with approval:

> "We have announced the rule that a general manager or a managing agent of a corporation ordinarily has implied authority to hire employees when the employment is usual and necessary and within the scope of corporate purpose. But it is also accepted that an officer of a corporation ordinarily has no implied authority to bind it by a contract of employment for life."

See id. at 657 (*quoting Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray*, 84 A.2d 870, 872) (citations omitted). These cases could only apply if Kelman were alleging a multi year or lifetime employment contract, which he is not.

Capital Bank is also inapplicable because (1) it involves a long-term lease of property to a third party, not compensation or employment of an employee and (2) there was no evidence presented that leases were routine or ordinary. *See Capital Bank v. Am. Eyewear, Inc.,* 597 S.W.2d 17, 20-21 (Tex. Civ. App.—Dallas 1980, no writ) ("There is no proof here that the execution of a long-term lease on the bank's property was a matter of routine . . . ."). As shown above, in our case there is substantial undisputed evidence that each aspect of Kelman's compensation agreement was routine, ordinary, and had been used with other employees. *Capital Bank* is not on point. *See* Appellant's Br. at 13.

Finally, *Templeton* is distinguishable on its facts. In that case, the court struck down a fixed-term employment contract signed by the president-elect of the company because the employee had only ever had month-to-month contracts and the president-elect had not even been sworn in at the time. *See Templeton*, 555 S.W.2d at 537-38. In our case, it is undisputed that at the time of the severance agreement Cullen was the president, COO, and board member of AGA/Centego, in addition to being the executive vice-president of AutoGas. (C.R. 63, 72, 245.) Furthermore, as shown above, Kelman's compensation agreement was not unusual in any way. Therefore, *Templeton's* holding does not apply to this case. *See* Appellant's Br. at 12.

4. Cullen had apparent authority to enter into the contract.

This case presents a hornbook example of apparent authority. Apparent authority is the reasonable belief of a third party that the agent has the authority to act for the principal. *See Gaines v. Kelly*, 235 S.W.3d 179, 182-83 (Tex. 2007). This reasonable belief must be based on conduct of the principal either knowingly permitting a person to hold themselves out as an agent or behaving with such lack of ordinary care as to clothe the agent with indicia of authority. *Id.* at 182.

Here, AutoGas and Nicholson both permitted Cullen to hold himself out as an agent and clothed Cullen with authority. It is undisputed that Nicholson made no changes to how AGA/Centego was run when AutoGas acquired it, including maintaining the same payroll. (C.R. at 168, 191.) It is undisputed that Nicholson and Cullen spoke daily concerning AGA/Centego. (C.R. at 168.) It is undisputed that both Nicholson and Upp knew about payments above AGA/Centego's monthly salaries being made between January 2006 and August 2008. C.R. at 193, 214-215.) It is undisputed that no action was ever taken to stop these payments, despite knowledge and reporting of those payments. (C.R. at 193, 214-215.) It is undisputed that Cullen himself believed he had authority to enter into contracts. (C.R. at 72.) It is undisputed that he meant for the compensation agreement to be binding. (C.R. at 76.) It is undisputed that Nicholson knew of the compensation agreement. (C.R. at 126, 180.) It is undisputed that Nicholson objected to the *first* version of the compensation agreement. (C.R. at 180.) It is

undisputed that Nicholson approved a compensation agreement that was in accordance with AutoGas's practice of giving one-week salary per year of service. (C.R. at 130.) Finally, it is undisputed that AutoGas knew that payments were being made in accordance with the compensation agreement (spreadsheet) to the employees listed on the compensation agreement. (C.R. at 108.)

Based on the undisputed facts above, there is no genuine dispute that Cullen had apparent authority based on the actions of Nicholson and AutoGas.

Kelman could reasonably rely on Cullen's authority to act based on the actions of AutoGas and Nicholson. *See Gaines*, 235 S.W.3d at 182-83. Kelman received his duties and responsibilities only from Cullen. (C.R. at 73.) Kelman reported directly to Cullen. (C.R. at 73.) Nicholson admits that he never introduced himself to Kelman as CEO of AGA/Centego. (C.R. at 171.) Nicholson admits that he never told Kelman to report directly to him, nor reprimanded him for going through Cullen to give information to Nicholson. (C.R. at 171.) Nicholson admits that he was not present for any conversations between Kelman and Cullen regarding the compensation agreement. (C.R. at 199.) Upp admits that there was no way for Kelman to distinguish between Cullen's individual approval and board approval of any given action. (C.R. at 222.) Therefore, Kelman could reasonably rely on Cullen's actions and did so.

Because Cullen had apparent authority, the agreement he made with Kelman is binding on AutoGas. The trial court's grant of summary judgment should be upheld.

B. KELMAN'S COMPENSATION AGREEMENT WAS BREACHED WHEN AUTOGAS REFUSED TO PAY HIS COMMISSION, SEVERANCE PAYMENT AND PAID TIME OFF.

To prove a breach of contract, there must be a (1) a valid contract, (2) performance by the plaintiff, (3) breach, and (4) damages. *Southwell v. Univ. of the Incarnate Word*, 974 S.W.2d 351, 354-55 (Tex. App.—San Antonio 1998, pet. denied). Once one sifts through AutoGas's alleged fact disputes, it is apparent that none of the disputed facts are material regarding whether or not a contract was created between Cullen and Kelman, that Kelman performed, and that he has not been paid what was promised

1. The uncontroverted testimony from disinterested witnesses, Cullen and Frohardt, as well as the spreadsheet, internal emails, and deposition testimony of Nicholson and Upp establish there is no genuine dispute as to the existence of a valid contract.

An enforceable contract requires (1) offer, (2) acceptance, (3) meeting of the minds, (4) consent to terms, (5) execution of the contract with intent that it be mutual and binding, and (5) consideration. *Cessna Aircraft Co. v. Aircraft Network*, LLC, 213 S.W.3d 455, 465 (Tex. App.—Dallas 2006, pet. denied). Whether a particular agreement is enforceable is a question of law. *Learners Online, Inc. v. Dallas Ind. Sch. Dist.,* 333 S.W.3d 636, 643 (Tex. App.—Dallas 2009, no pet.).

The elements of a valid contract can be found as a matter of law through the use of documents and affidavits. *See Sibley, P.C. v. Brentwood Inv. Dev. Co.*, --- S.W. 3d ----, No. 08-10-00033-CV, 2011 WL 3913634 at *2-3 (Tex. App.—El Paso 2011, no pet. h.) (affirming summary judgment based on finding valid and enforceable contract established by unsigned lease, uncontroverted affidavit testimony, and conduct); *Jackson v. Knight*, No. 05-01-01533-CV, 2002 WL 1470359 at *2 (Tex. App.—Dallas 2002, no pet.) (affirming summary judgment on breach of contract dispute based on contract elements established by document and uncontroverted affidavit).

In *Sibley*, the El Paso Court of Appeals found a valid and enforceable contract as a matter of law for purposes of summary judgment based on the plaintiff's affidavit, an unsigned lease, and the conduct of both parties. *Sibley*, 2011 WL 3913634 at *2-3. That case involved a suit by a landlord against a tenant for a breach of contract. *Id.* at * 1. In that case, the court reasoned that because the defendant had not disputed the evidence in the plaintiff's affidavit establishing the lease agreement, the affidavit did not create a fact issue as to the contract's existence. *Id.* at *2. The court further found that the unsigned lease did not create a fact issue because mutual assent had been indicated by conduct. *Id.* at *3. Specifically, the lessee moved into the property and made partial payments, and the landlord maintained the property. *Id.* at *3. The court held as a matter of law that a valid contract had been created. *Id.*

a. A Contract Exists

Similarly here, AutoGas has not disputed any material facts regarding the formation of the compensation agreement. AutoGas has not disputed the fact that Cullen offered a compensation agreement to AGA/Centego employees, including Kelman. (C.R. at 76-77, 82.) AutoGas has not disputed that the Centego employees accepted these agreements. (C.R. at 76, 82.) AutoGas has not disputed that Cullen meant for these agreements to be mutual and binding. (C.R. at 76.) AutoGas has not disputed that AGA/Centego employees were provided a copy of the spreadsheet outlining the terms of the compensation agreement. (C.R. at 82.)

AutoGas admits that employees were given severance payments according to Cullen's compensation agreement. (C.R. at 108.) AutoGas admits that it knew of payments being made to AGA/Centego employees above and beyond monthly salaries. (C.R. at 193, 214-15.) AutoGas admits that these payments were allowed to continue through August 2008. (C.R. at 214-215.) Applying the same reasoning as the court in *Sibley* did, there is no dispute that a contract exists. *Sibley*, 2011 WL 3913634 at *2-3. The uncontroverted affidavit testimony of Cullen and Frohardt combined with the conduct of AutoGas in actually making payments under the compensation agreement establishes a contract. (C.R. 76-77, 82.) Furthermore, the use of affidavit testimony by Cullen and Frohardt, as well as the emails, spreadsheet and deposition testimony of Nicholson and Upp are proper bases

for a court to find as a matter of law that a contract exists and that no genuine dispute exists as to the existence of the contract. *See Sibley*, 2001 WL 3913634 at *2-3.

Contrary to the assertions of AutoGas, this agreement was not orally modified in February 2008. *See* Appellant's Br. at 28. The uncontroverted testimony of Kelman and the disinterested Cullen establish that Cullen merely clarified what was already part of the agreement. (C.R. at 66, 76.)

Furthermore, as discussed at length above, Cullen as president, COO, board member, and executive vice-president had authority to enter into routine and ordinary agreements with AGA/Centego employees. *See generally*, Section A, above.

b. The agreement is not vague

AutoGas alleges that any agreement shown by the uncontroverted affidavit testimony of Cullen and Frohardt, the spreadsheet, the emails, and Nicholson's own deposition would be too vague, uncertain and indefinite to be a contract. *See* Appellant's Br. at 24. AutoGas seems to imply there is an essential term in the severance agreement that is undetermined. *See* Appellant's Br. at 24. However, AutoGas does not state what the vague, uncertain, indefinite or undefined essential term of the severance agreement is. *See* Appellant's Br. at 24-25.

In any event, an employment contract is sufficiently definite if a court can determine the material legal obligations of the parties. *Abatement Inc. v.*

Williams, 324 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Whether a contract is too indefinite is a matter of law. *Id.* at 862 (finding employment contract sufficiently definite despite lacking a duration term, specific profit calculation method, a right to payment trigger, or dispute resolution mechanism).

Here, the terms of the severance agreement are sufficiently definite. The spreadsheet provides detailed information for each employee covered. (C.R. at 123.) The spreadsheet states the hire date, termination date, years and months of employment, weekly salary, number of weeks of severance, amount of stay-on bonus, and the total amount of each employee's compensation package. (C.R. at 123.) The spreadsheet further states the commission rate for Kelman and Frohardt. (C.R. at 124.) This information is corroborated by Cullen and Frohardt and is uncontroverted. (C.R. at 74-75, 82.) It is undisputed that employees were paid based on this compensation agreement. (C.R. at 108.) All of the material terms are there: who is paid, what is paid, and when it is paid. (C.R. at 74-75, 82, 123.) These terms are sufficiently definite to determine the legal rights and obligations of the parties. *See Williams*, 324 S.W.3d at 861. Therefore, this contract does not fail for indefiniteness. *See id.*

2. There is no genuine dispute that Kelman performed under the compensation agreement entitling him to his severance payment, commission, and paid time off.

AutoGas attempts to create non-existent fact issues by alleging Kelman is not entitled to payment because he was terminated for cause and because he received a salary. *See* Appellant Br. at 26. Both of these issues are irrelevant as to whether or not Kelman performed under the contract.

First, it is undisputed that Kelman stayed on past July 18, 2008. (C.R. at 181.) Second, it is undisputed that Kelman arranged the Meijer deal. (C.R. at 214.) Those were the preconditions to getting his stay-on bonus and his commission. (C.R at 75.) He was paid his stay-on bonus. (C.R. at 77.) There is simply no evidence that termination for cause would preclude Kelman from being paid his commission, his severance payment and his PTO.

The only evidence and reference to any alleged AutoGas policy regarding termination for cause and severance is found in conclusory statements made by AutoGas in its interrogatories and by Nicholson, AutoGas's founder, CEO, president and Chairman. (C.R. at 114, 160 ("The company always retained the right to refuse to pay severance and did not pay it to employees that resigned or were terminated."), 189.) A conclusory statement is one that does not provide the facts to support it. *Brown,* 145 S.W.3d at 751. Conclusory statements are not sufficient to defeat summary judgment. *See Hamilton*, 249 S.W.3d at 427; *see also Brown* 145 S.W.3d at 752 (finding affidavit was conclusory and not competent summary judgment evidence because affidavit did not have the papers referenced attached).

Here, no facts support Nicholson's testimony concerning the fact that because Kelman may have been fired for cause, he was not entitled to the compensation he was promised. *See* Appellant's Br. at 26. There is no evidence of the existence of a policy prohibiting a severance payment and PTO when someone has been fired for cause, let alone that this policy applied to Kelman's compensation agreement. There is no policy manual in the record. There are no minutes of any board meetings in the record. There are no emails in the record where this policy was discussed. There are no calendar entries, journal entries or logbook entries in the record that would indicate this policy existed or applied to Kelman or anyone. Upp does not mention this policy in his affidavit or deposition. (C.R.367-82.) The conclusory statements from Nicholson conveniently providing an unsubstantiated policy violation to somehow avoid payment of Kelman's severance, commission and PTO are not sufficient to create a genuine fact issue. (C.R. 160.) *See Brown* 145 S.W.3d at 752

3. There is no dispute that Kelman suffered damages

Kelman suffered damages amounting to his severance payment, his PTO, and his commission. AutoGas's unsupported contention that the jury must consider whether Kelman's salary negated any damages is contrary to basic contract law and again attempts to create a non-existent fact issue by muddying the water. *See* Appellant's Br. at 27.

The most common interest protected in breach of contract cases is the expectation interest. *See Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888-89 (Tex. App.—Dallas 2004, pet. denied). The expectation interest places the non-breaching party in the same economic position that party would have been in had the contract not been breached. *Id.*

Here putting Kelman in that position means paying his commission, PTO and severance payment. *See id.* It is undisputed that Kelman was promised a stay-on bonus, commission, severance payment and PTO in addition to his salary. (C.R. at 75.) Kelman was paid his stay-on bonus. (C.R. at 77.) It is undisputed that Kelman was not paid his commission, PTO or severance payment. Appellant's Br. at 3. (C.R. at 160, 207.) It is undisputed that he expected to be paid those amounts based on his contract. (C.R. at 67.) To put Kelman in the same position he would be in had the contract not been breached requires payment of his commission, PTO, and severance payment. (C.R. at 75.) It is irrelevant whether Kelman also received his regular salary from AutoGas. *See* Appellant's Br. at 27-28. The agreement with Cullen was for a stay-on bonus, commission, PTO and a severance payment. (C.R. at 75.) There is simply no genuine dispute that Kelman suffered damages due to AutoGas's breach.

Because Kelman had a valid compensation contract with Cullen and AutoGas, that contract was breached and Kelman suffered damages because of it; the trial court's judgment should be upheld.

C. THERE IS NO GENUINE DISPUTE THAT AUTOGAS HAS BEEN UNJUSTLY ENRICHED BY KELMAN'S SERVICE AND HAD NOTICE THAT KELMAN EXPECTED COMPENSATION.

As the trial court correctly found, Kelman is entitled to recovery in quantum meruit. (C.R. 388.)

A person is entitled to recovery under quantum meruit if (1) valuable services are furnished (2) to the party sought to be charged, (3) the services were accepted and (4) the party had notice that it was expected to pay for the services. *See Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Generally one cannot recover for quantum meruit when there is an express contract covering the same services. *See generally Woodward v. Southwest States Inc.*, 384 S.W.2d 674, 675 (Tex. 1964). But this is only the general rule. When a plaintiff performs duties over and above those duties governed by the employment contract, recovery based on quantum meruit is allowed. *See Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 154 (Tex. App.—Houston[1st Dist.] 2005, pet. denied) (stating plaintiff must show that work performed was beyond scope of employment).

Here, there is no genuine issue of material fact that AutoGas was unjustly enriched. Kelman provided services to Centego and AutoGas beyond the scope of his employment relationship by negotiating the Meijer deal and staying beyond July 18, 2008. (C.R. at 63, 73, 77.) The only contrary evidence presented by AutoGas are conclusory statements by Nicholson and Upp. (C.R. at 160, 183, 206, 214.) As stated above, conclusory statements of

unsupported factual allegations cannot create a fact issue to defeat summary judgment. *See Hamilton*, 249 S.W.3d at 427. Both Nicholson and Upp even admit their statements are unsupported. (C.R. at 193, 221.) Nicholson admits he never saw a job description or duties list for Kelman. (C.R. at 173, 193.) Upp states that he read a written job description for Kelman, but does not recall what was on it. (C.R. at 221.) Despite Upp's claims that he could produce a written job description for Kelman, none appear in the record by AutoGas for this appeal. There is simply no genuine dispute on this issue. *See Hamilton*, 249 S.W.3d at 427.

There is also no dispute that when Kelman took on these extra responsibilities, he saved AutoGas hundreds of thousands of dollars. (C.R. at 75-76, 213-214.) AutoGas had been trying to get this very same deal done for several years before Kelman was finally able to make it happen and it gladly accepted the resulting savings. (C.R. at 188, 214.) Cullen knew Kelman expected to be paid half of 25% of all commissions collected pursuant to the compensation agreement, which was a reasonable value for the services performed. (C.R. at 77.); *Lamajak, Inc. v. Frazin*, 230 S.W.3d 786, 796 (Tex.App.—Dallas 2007, no pet.) (finding plaintiff's own testimony concerning value of services to defendant sufficient valuation of services). Kelman has not been paid for time and services. (C.R. at 78.) Therefore, Kelman is entitled to recovery under quantum meruit.

AutoGas's unsupported argument that Kelman's salary might negate any damages is wrong. The measure of damages for quantum meruit is the reasonable value of the work performed. *Lamajak*, 230 S.W.3d at 796.

Here the services that resulted in AutoGas's unjust enrichment were services Kelman provided above and beyond his salaried position. (C.R. at 63, 73, 77.) Thus, his salary did not and could not have compensated him for those services. Similarly, AutoGas's unsupported statement that termination for cause needs to be considered by the jury in awarding quantum meruit is meritless. *See* Appellant's Br. at 28-29. The focus of a quantum meruit claim is on the services provided and accepted without payment by the opposing party. *Heldenfels,* 832 S.W.2d at 41 (stating the elements of a quantum meruit claim). Whether or not Kelman was terminated for cause is irrelevant to that inquiry. Therefore this Court should uphold the trial court's judgment for Kelman's quantum meruit claim.

D. THERE IS NO GENUINE DISPUTE THAT KELMAN WAS PROMISED PAYMENT, THAT KELMAN WOULD RELY ON THAT PROMISE, AND THAT KELMAN DID RELY ON THAT PROMISE.

The trial court correctly granted summary judgment on Kelman's promissory estoppel claim.

Promissory estoppel requires (1) a promise, (2) foreseeability of reliance by the promisor, and (3) substantial and reasonable reliance by the promisee to his detriment. *See Sipco Services Marine, Inc. v. Wyatt Field Service Co.,* 857 S.W.2d 602, 605 (Tex.App.--Houston. 1993, no writ) (finding

contractor could reasonably rely on subcontractor's bid despite presence of lower bids for promissory estoppel claim).

In *Central Texas Micrographics v. Leal*, the plaintiff sold Kodak products for Central Texas Micrographics (CTM). *See Leal*, 908 S.W.2d 292, 294 (Tex. App.—San Antonio 1995, no writ). When Kodak terminated its contract with CTM, CTM sued. *Id.* The plaintiff remained employed with CTM to assist in the litigation for which he was paid a small monthly salary—approximately $30,000 less than he could have earned otherwise—and was given oral assurances he would receive a $50,000 bonus after the trial. *Id.* at 294-5, 299. The Court of Appeals found there was legally and factually sufficient evidence to support the jury's finding of detrimental reliance to entitle Plaintiff to the $50,000 bonus because that was the approximate difference between what he could have earned and what he did earn by working for CTM. *Id.* at 299.

Similarly, Cullen promised Kelman that he would receive a severance payment and commissions. (C.R. at 74, 123.) Kelman was given a copy of the spreadsheet outlining this compensation agreement. (C.R. at 65, 123.) This spreadsheet detailed the amount of his severance payment, the amount of his stay-on bonus, and his commission percentage. (C.R. at 123.) Before Kelman performed work under the agreement, he verified with Cullen that collections and offsets attributable to the Meijer deal would count towards his commission. (C.R. at 66, 76.) Cullen assured him that the Meijer deal would

count as collections. (C.R. at 66, 76.) Kelman relied on that assurance when he remained employed beyond July 18, 2008 and renegotiated the contract with Meijer. (C.R. at 67.) The Meijer deal resulted in the collection of receivables for AGA/Centego in the amount of $418,988.90 and prevented further cash drain for the company. (C.R. at 75-76.)

Kelman detrimentally relied on that promise by remaining employed with Centego and passing up other employment opportunities until after July 18, 2008. (C.R. at 67, 77.) Cullen knew Kelman detrimentally relied on his promise, and that Kelman suffered damages as a result. (C.R. at 77.) Therefore, this Court should uphold the trial's judgment on Kelman's promissory estoppel claim.

E. THERE ARE NO REMAINING FACT ISSUES REGARDING AUTOGAS'S AFFIRMATIVE DEFENSES

Under section III of AutoGas's appellate brief, AutoGas alleges that the trial court erred by granting summary judgment in favor of Kelman because AutoGas had asserted affirmative defenses in its answer and response to the motion for summary judgment. *See* Appellant's Br. at 31. However, the mere assertion of an affirmative defense does not preclude summary judgment. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (stating that person asserting affirmative defense must come forward with sufficient evidence to raise a fact issue to overcome summary judgment).

To the extent that AutoGas is arguing that summary judgment was improper because the trial court did not expressly rule on its affirmative

defenses, that claim is also without merit. *See* Appellant's Br. at 31-32. A trial court necessarily overrules the affirmative defenses as insufficient to raise a fact issue when the trial court grants summary judgment. *See Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd.*, 225 S.W.3d 721, 730 (Tex. App.—Dallas 2007, pet. dism'd) ("The trial court is not required to state expressly that the affirmative defenses were ruled on, overruled, denied, or struck.").

To the extent that AutoGas is arguing that Kelman did not disprove its affirmative defenses, that claim is also unsupported by case law. *Id. See* Appellant's Br. at 31-32. Plaintiffs do not have the burden of disproving an affirmative defense. *Id.* Once a plaintiff produces evidence entitling it to summary judgment, as Kelman did in the trial court, the burden is on the defendant to raise a fact issue on any affirmative defenses. *See id.* Since AutoGas did not raise a genuine issue of fact with regards to its affirmative defenses, Kelman was not required to disprove them. *Id.*

F. THE TRIAL COURT DID NOT ABUSE ITS DICRETION BY GRANTING SUMMARY JUDGMENT ON THE EVIDENCE IN THE RECORD.

Finally, AutoGas argues that the trial court erred by granting summary judgment because Kelman did not present competent summary judgment evidence. *See* Appellant's Br. at 32. Specifically, AutoGas states that Kelman's affidavit, Cullen's affidavit, and the spreadsheet memorializing the agreement are all incompetent summary judgment

evidence. Appellant's Br. at 32. The trial court did not err in granting summary judgment based on those pieces of evidence.

The standard of review for a trial court's decision to admit or deny summary judgment evidence is abuse of discretion. *Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848, 852 (Tex. App—Dallas 2003, no pet.).

First, AutoGas's objections to this evidence are not specific enough. *Kyle v. Countrywide Home Loans*, 232 S.W.3d 355, 359 (Tex. App.—Dallas 2007 pet. denied) (finding objections that evidence is not competent and does not comply with civil procedure rule 166a(f) not specific enough for court to review). Here, AutoGas has merely stated that the evidence is incompetent because Kelman relies on interested parties and the spreadsheet is unauthenticated. *See* Appellant's Br. at 32. However, AutoGas does not state why Cullen's affidavit is interested or how the spreadsheet has not been authenticated. *Id.*; *Kyle*, 232 S.W.3d at 360) (finding objection not specifying how evidence violated civil procedure rule not specific enough for court to consider). Therefore, these objections are not properly submitted before this Court.

Second, even if these objections were properly before this Court, they are without merit.

Kelman's affidavit is proper summary judgment evidence. Texas Rule of Civil Procedure 166(a)(c) states "summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the

evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c). "Readily controverted" is defined as being effectively countered by opposing evidence. *See Double Diamond*, 109 S.W.3d at 852-53. AutoGas does not specify which parts of Kelman's affidavit are improper. AutoGas also fails to counter all material aspects of Kelman's affidavit with opposing evidence.

For example, C.R. 64 ¶ 19 lists the dates and amount of severance Hudson and Fooks received. This evidence could be easily controverted by producing employee payroll records and logs. Instead of producing those records, AutoGas meekly states it could not find information sufficient to admit or deny those payments made to its own employees. (C.R. at 108.) In ¶ 26 on C.R. 66, Kelman states that Nicholson never objected to any payments made under the severance agreements. Both Nicholson and Upp confirmed this statement. (C.R. at 193, 214-215.) In ¶ 32 at C.R. 67, Kelman states that he relied on Cullen's authority to enter into the agreement. This could be readily controverted by producing the by-laws, corporate charter, board resolution, or any other document detailing the powers of the president, chief operating officer, and board member of the corporation. None of those documents appear in the record that AutoGas created for its appeal. Because Kelman's affidavit satisfies rule 166a(c), the court did not abuse its discretion in admitting Kelman's affidavit as summary judgment testimony.

Cullen's affidavit is also proper summary judgment evidence. Despite the repeated unsupported assertions of AutoGas, Cullen is not an interested witness. He is not a party and does not stand to gain in any way from a judgment in favor of Kelman[4]. Therefore, Cullen's affidavit is a proper form of summary judgment evidence. *See* TEX. R. CIV. P. 166a(c). Even if Cullen were an interested witness, his affidavit would still be proper evidence because the Texas Rules of Civil Procedure expressly allow interested affidavits to be used in summary judgment. *Id.* The trial court did not abuse its discretion in admitting and using this evidence.

Finally, the spreadsheet is competent summary judgment evidence. Authentication is satisfied by evidence sufficient to support a finding that the matter is what it is purported to be. *Sierad v. Barnett*, 164 S.W.3d 471, 486 (Tex. App.—Dallas 2005, no pet.) (upholding admission of documents over authentication objection because trial court could have concluded the documents were genuine thereby not abusing discretion); TEX. R. EVID. 901. These preliminary questions of admissibility are determined by the trial court. *Sierad*, 164 S.W.3d at 486; TEX. R. EVID. 104(a).

Here Kelman, Cullen and Frohardt describe in consistent detail the spreadsheet attached with their affidavits as exhibits to the motion for summary judgment. (C.R. at 65, 74-75, 82). These affidavits describe the format, headings, and contents of the spreadsheet with sufficient

[4] If anything, the evidence supports the inference that Cullen would be biased towards AutoGas, since AutoGas settled its lawsuit against him. (C.R. at 184-85).

particularity to identify it as the spreadsheet attached. (C.R. at 65, 74-75, 82). Therefore, the trial court properly concluded that the spreadsheet was genuine and did not abuse its discretion in admitting it. *See Sierad*, 164 S.W.3d at 486.

G. AUTOGAS HAS FAILED TO CREATE A GENUINE DISPUTE OF MATERIAL FACT

Despite having almost a year and half between Kelman's original petition and the summary judgment that was granted in Kelman's favor, AutoGas has failed to produce sufficient evidence to defeat summary judgment. Once the plaintiff has established that he is entitled to summary judgment, the defendant must cite evidence creating a genuine issue of material fact. *Tarrant Restoration*, 225 S.W.3d at 729. Mere speculation, unsupported allegations, assertions, arguments, and conclusory statements cannot defeat summary judgment. *See Kyle,* 232 S.W.3d 355, 359 (finding unsupported allegation that affidavit is by interested party was insufficient to defeat summary judgment); *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 742-43 (Tex. App.—Dallas 2003, pet denied) (finding unsupported assertions concerning company's status as corporation and ability to do business in Texas insufficient to defeat summary judgment); *Martin v. Cadle Co.,* 133 S.W.3d 897, 904 (Tex. App.—Dallas 2004, pet. denied) (finding unsupported speculation concerning facts insufficient to defeat summary judgment); *see Brown* 145 S.W.3d at 752 (finding affidavit conclusory and not competent

summary judgment evidence because affidavit did not have the papers referenced in it attached).

Here, AutoGas relies on unsupported factual allegations, assertions and conclusory statements to create non-existent fact issues. The totality of the evidence cited to by AutoGas is from either the testimony of Nicholson, or his son-in-law, Upp. Their statements reference policies, documents, and records that are not found anywhere in the record compiled by AutoGas for this appeal. For example, Nicholson claims that Cullen as president has no authority to enter employment contracts, but does not produce the by-laws, job description, board resolution, or corporate charter that would establish such a statement. (C.R. at 179.) In fact, Nicholson did not even review the by-laws for his deposition. (C.R. at 179.) Upp claims to be able to produce a written job description for Kelman's position, but the record on appeal does not include any such document. (C.R at 221.) Since Kelman has produced evidence entitling him to summary judgment, it is not enough for AutoGas to make bare assertions and unsupported factual allegations. *See Kyle,* 232 S.W.3d 355, 359. These actions serve only to prolong this already protracted case.

The trial court correctly granted summary judgment in favor Kelman because there is no genuine dispute of material fact as to Kelman's breach of contract claim, quantum meruit claim, and promissory estoppel claim.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee Dana Kelman respectfully prays that the Court affirm the trial courts grant of summary judgment, and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011 I sent a true and correct copy of the foregoing to counsel for Defendant via facsimile and certified mail in accordance with the Texas Rules of Appellate Procedure.

/s/ Stacey Cho

[5] Colin Walsh, a recent graduate of law school, contributed to writing this brief.