## Newton's Response to Kruse's Opinion and Order of 6/27/23

This opinion and Order is a very poorly constructed document that reeks of having been pre-determined even before trial. The writer has not taken the time to review the trial or the supporting exhibits and/or has not taken the time to understand what he has heard at trial or read. There are many errors and omissions pointed out below. This is an insult to the Judicial System of American Samoa.

## Regarding derogatory remarks about the lapsed time mentioned in this opinion

On September 22, 2015, Associate Justice Richmond wrote an opinion denying the Defendant's motion for dismissal and approving the fundamental premises of Newton's claims. There was no mention of an unenforceable contract in Richmond's ruling. Newton retained counsel immediately upon Richmond's ruling. Richmond had a bad fall and subsequently died early in the history of this litigation. After Richmond's untimely accident and subsequent death, it took considerable time for the Court to assign a new judge to the case. The new judge was Chief Justice Kruse, who took a very long time to schedule the first hearing. While awaiting a first hearing, Plaintiff filed a Motion for Summary Judgment which was denied for the flimsiest of reasons. Then came Covid, and everything came to a halt for over 2 years. Newton was never the cause of any delays.

## Bench Trial January 10-11

The trial was severely impacted by Kruse's ruling to have Langkilde testify by deposition only and the fact that Langkilde changed deposition dates two times, pushing the deposition back to truly the last minute, thereby making a thorough review and response to the Langkilde deposition impossible – the transcripts of the deposition were received by Newton and his counsel at 4pm on the afternoon preceding the trial. Newton had no opportunity to respond to or confront Langkilde in court, a constitutional right he was denied. The bench trial was truncated, giving Plaintiff no time to testify on behalf of himself – again, Newton's constitutional right was denied. Since the Defendant was also a Plaintiff in their countersuit, Newton becomes the Defendant and thereby is entitled to The Sixth Amendment to the United States Constitution, which guarantees a defendant the right to confront the witnesses against him. Newton had no opportunity to exercise his rights.

**Facts**

1. **The following statement is untrue and without any form of supporting evidence.** In fact, a witness at Trial, Margaret Willis, testified that she had no problems with Newton for all the years she worked directly with him. It was ASTCA's Marketing Manager who approached Newton asking, with great enthusiasm, for Newton to do future telephone directories. In the more than a decade of working on ASTCA's directories, there were no complaints of difficulties with Newton, except from Langkilde. It seems reasonable to assume that Langkilde simply does not like Newton, not that he is difficult to work with, because of the long history of successful completion of directories of exemplary quality. Langkilde and only Langkilde made many very nasty remarks about Newton and her inability to work with him, none of which is supported by even a shred of evidence.

   **Court: "ASTCA, however, chose not to extend or renew the contract beyond 2008 because, according to ASTCA's then in-house counsel Gwen Tauiliili-Langkilde ("Langkilde"), Newton was difficult to work with and was constantly complaining about the quality, timeliness, and accuracy of the subscriber listings ASTCA provided him."**

2. **Regarding Newton's Draft Outline of suggested terms for a new contract, it is ridiculous that this intentional obfuscation of the facts has continued to be perpetrated in this opinion.**

   **The Court completely misconstrues Newton's request for an estimated count of listings for future telephone directories.** Newton never made any mention of the accuracy of listings, and this error has been reiterated many times over the years, including at Trial. Newton only wanted to know how many listings there might be in future directories for planning purposes, as is clearly stated in his DRAFT. This was made crystal clear at Trial.

   **Court: "In the early stages of their negotiations, Newton wrote a draft contract outlining the terms and responsibilities he believed the parties should have under the new agreement. See Exhibit 34. Two of the proposed terms were for ASTCA to (1) provide him subscriber listings accurate to within plus-or-minus ten (10) percent, and (2) have a count of the subscriber listings announced to him no later than 180 days before the projected publication date."**

**Below is the exact wording of the request for a count of listings:**

There is no mention of listing accuracy. The only accuracy issue here has to do with the counting of the listings. It begs the question of what part of the word "count" the writer of this opinion does not understand. It is important to note that ASTCA subscribers were diminishing at high rates, and this method of determining the number of required directories is much fairer than previous contracts where an arbitrary number was specified, and thousands of surplus directories were subsequently burned. Also, it is inconceivable that ASTCA does not have immediate access to the count of its subscribers.

1. ASTCA shall announce to PPC a count of all listings. Within plus or minus I0% accuracy, no later than 180 days prior to target publication date.
    - The purpose of this count is to facilitate planning of the book size and quantities required, all of which impacts advertising rates.
    - It is understood that each paid telephone subscription is entitled to one book with some additional books required by government and business offices.
        - A list of these additional requirements will be produced by ASTCA and presented to PPC at the same time as the listing count.
        - Any books in addition to those determined by ASTCA to be allotted to each subscriber shall be sold at a price to be determined each year but not less than $5.00 for each additional book.
    - The total quantity of books required each year shall be determined by adding together the total number of subscriber numbers with the additional requirements of business and government offices.

3. Newton agreed to the following statement because it means that ASTCA will be required to provide Newton with all their listings with no exceptions. There is absolutely no other way to define this. Newton never, ever asked for anything more than what was in ASTCA's records. After all, what other records could there possibly be? For ASTCA to say they will not guarantee the accuracy of their listings is reprehensible. In past contracts, ASTCA had required of themselves that listings be 95% accurate (see Independent Contractor Service Contract of 2001, page 2, reading as follows: The preliminary draft must contain at least 95% of the

listings for these sections, and the content and form of the listings must be at least 95% accurate.") This entirely debunks everything Gwen said about accuracy requirements, in any of her testimony or affidavits.

In the following statement, the **Court gets it entirely wrong**. The statement in the MOU reads, "To the extent available in ASTCA's customer service records." The court attempts to obfuscate the language of the MOU to mean there is an implication of accuracy when the actual language concerns only the availability of the listings in ASTCA's customer service records. Furthermore, Langkilde did not reject the aforementioned proposed terms, rather Langkilde did not accept one item of the five items in the proposed terms and only one line of another of the five items, leaving 60% of the proposed terms intact.

> **Court: "During that meeting, Langkilde rejected the aforementioned proposed terms and informed Newton that ASTCA would only provide him its subscriber listings as they appeared in ASTCA's system without any guarantee of accuracy and that ASTCA was unwilling to agree to provide anything more than that."**

4. **The Court is entirely wrong here.** The following statement is patently untrue. Just a cursory review of the file attached to the email in Exhibit 35, Document 16, would reveal that there were many inexplicable notations along the right side of the document and about 70 lines of unrelated text at the bottom of the document, and there were at least 600 numbers listed more than once, under different names. There were no government listings and there was not a single number for ASTCA itself. These errors and omissions rendered the file unusable. This statement makes it clear that the Court was unfamiliar with the documents they were opining on. Nobody at ASTCA, including Hall, ever claimed the subject file contained "everything needed".

   > **"Then, on February 3, 2011, approximately two months after the parties executed the MOU, Hall delivered the first version of the subscriber listings, which contained everything needed to create the white pages section of the phone directories (i.e., all the residential, commercial, and government subscribers)." (this was Exhibit 35, Document 16)**

5. **The Court is entirely wrong here**. The writer of this opinion apparently has not read the MOU id ex 1. In the MOU, it is clearly stated under ASTCA Responsibilities that separate files will be delivered for commercial and government listings. Newton's request in Doc 17 was

simply a question as to whether he would receive the files as specified in the MOU prepared by Langkilde. This question cannot possibly be considered any kind of complaint – rather, this is just another example of a polite question.

This is the actual text from the MOU "To the extent available in ASTCA's customer service records, the listings will include the subscriber's name. village where the telephone is located. a notation if the line is a facsimile. and telephone number. **The same shall be grouped by residential landline subscribers. post paid cell phone subscribers, government offices. and commercial subscribers to appear in the classified or yellow pages section."**

> **Court: "Newton, in turn, requested for the delivery of separate commercial and government listings, Id. at Certified Document 17, to which Hall responded by sending Newton a separate Excel file containing the business listings. Id. at Certified Document 19."**

**The Court never bothered to look at this file.** Below is a small clip from the above-mentioned ***Id.*** **at Certified Document 19.** As you can see this document has no village names, incorrect syntax for phone numbers, and no mention of fax numbers. Furthermore, there are government office listings intermingled with commercial listings. But, of greatest importance is that almost none of the names listed in this file match the names of any businesses. This file is useless for directory purposes.

| Agreement | | | | Name |
|---|---|---|---|---|
| (684)622-0103 | | | | TULA A.O.G. |
| (684)622-0119 | | | | ECE MAIN OFFICE |
| (684)622-0151 | | | | EASTSIDE SERVICE STATION |
| (684)622-3000 | | | | FEMA (SAMOA TSUNAMI 9/29/09) |
| (684)622-6725 | | | | ALOFAU ASSEMBLY OF GOD |
| (684)622-7029 | | | | ALAO CATHOLIC CATECHIST |
| (684)622-7094 | | | | AMOULI CCCAS |
| (684)622-7104 | | | | MASEFAU ELEMENTARY |
| (684)622-7107 | | | | SCHOOL LUNCH |
| (684)622-7108 | | | | SCHOOL LUNCH |
| (684)622-7109 | | | | SCHOOL LUNCH |
| (684)622-7130 | | | | CATHOLIC MISSION-FAGAITUA |
| (684)622-7151 | | | | DAYCARE CENTER |
| (684)622-7181 | | | | CCCAS FAGAITUA |
| (684)622-7235 | | | | THE COALITION OF REEF LOVERS |
| (684)622-7247 | | | | FIRST SAMOAN CHRISTIAN CHURCH |
| (684)622-7251 | | | | DEPARTMENT OF PUBLIC SAFETY |
| (684)622-7276 | | | | PUBLIC HEALTH DEPT (FAGA'ALU) |
| (684)622-7279 | | | | SCHOOL LUNCH |
| (684)622-7283 | | | | SCHOOL LUNCH |
| (684)622-7318 | | | | SPECIAL EDUCATION |

6. Trial Exhibit 19 in the Opinion, which is Exhibit 35, Doc 34. This exhibit is not a submission of listing data to Newton. Rather, it is an email from Hall to the then-CEO of ASTCA, Alex Sene Jr, wherein Hall and Alex are reviewing the numbers that need to be withheld from the listings due to subscriber paid requests. The following passage from this email is clear evidence of the incomplete and non-usable nature of this file.

   **From JD Hall:** "There are #'s in here that I believe should be non-pub/non-list but where the non-pub/non-list has expired, or have been manually removed from the directory by the publisher or by whoever provided the data to the publisher in the past."

**Court: "the separate and extensively reviewed residential listings provided on March 22, 2011, *see* Exhibit 19"**

The above-referenced document and attached file are not a submission of listings to Newton. **And to call this "extensively reviewed" is a gross error and an example of the Court's bias against Newton.** The Court never took the time to review this document and did not even read the email to which it was attached.

7. Referencing Exhibit 35 at Certified Document 47, the following passage makes clear that the file is not of any use for publishing purposes due to a large number of listings "pulled out". This is another error by the Court and an example of bias against Newton.

   **From Hall:** "Included here are the certified residential and the certified small business. I pulled out the larger businesses for me to work on separately because of multiple locations or multiple PBX systems with different pilot #'s (similar to government)."

8. The following paragraph from the Opinion is rife with errors and obfuscation. Further explanation of the items referenced in this paragraph is required. Also, the footnote on this page is a case of taking something out of context.

   **Court: "In August 2011, Hall provided Newton with yet another version of the subscriber listings, to which he subsequently stated in a November 2011 email that it was the best available data from ASTCA's records. Exhibit 35 at Certified Documents 64-67. Newton responded by personally attacking Hall's competency and blaming the lack of a territorial phone directory on ASTCA's failures in handling their listings. Id. at Certified Document 68."**

   **[3] At trial, Newton testified that a delivery date was never formally established.**

In an attempt to further explain the above paragraph from the opinion:

- Certified Document 64, August 22, 2011, is a very polite and thorough instructional email, including a graphic, designed to help Hall better understand how listings had been presented in the past and how to prepare listings for the current publication. Newton was simply trying to be helpful.

- Document 65, of August 26, 2011, is Hall sincerely thanking Newton for the additional information and **promising to try and complete "it" over the weekend.** Hall's exact words were: "Thanks John for the more detailed formatting information. I'm taking all of this home with me so I can try and complete it over the weekend."
- Document 66, of September 17, after waiting 3 weeks for some indication of status, contains a polite request for information, "Can you give me some information on our present status with listings?"
- Document 67, of November 23, 2011, is a very rude and **untruthful email from Hall to Newton** in which Hall says, among other things, "The listings as provided are the best available data from our customer database and I've even gone so far as importing the historical data from the previous phonebook and have compared, verified, and updated the records from both sources, merging them into a single data set with over 6,000 records. Most of the missing records that I've identified were related to temporary and non-pay disconnections effective during the time period that the data was pulled from the database."

  The above paragraph, from Document 67, is an outright lie because if he had done what he describes here, he certainly would have noticed things like the fact that there are no listings for Bluesky, ASPA, the hospital, homeland security, just to mention a few. He might also have noticed that ASTCA doesn't have a single listing anywhere. There were no listings for public schools. Here again, the Court has not taken the time to review the actual file in question before making inaccurate and misinformed statements.

  And this part of his email represented here as Document 67 was the tour de force among his many insults when Hall says, **"The scripting to create the visually formatted data that you want is not going to happen, and upon review of the MOU, the only requirement is that we provide you with the listings in CSV format, which we have."**

  The above sentence is extremely rude and untrue. Hall is venting frustration here and not making much sense. In this sentence, he says, "formatted data that you want," which is a ridiculous statement because the formatting is fully dictated by ASTCA and is provided for in the MOU under PPC's Responsibilities as follows: "**PPC agrees to use its commercially reasonable efforts to produce the Telephone Directory each year. in a quality standard consistent**

**with good telephone directory publishing standards as exemplified by the past six Telephone Directory publications."**

This email was shocking to Newton because he had spent many hours attempting to help Hall learn how to produce and provide listing, and now Hall says, **"formatted data that you want is not going to happen"**. This is even after previously, as early as February 3, 2011, Hall sent a properly formatted file to Newton, albeit with errors and omissions, but nonetheless, properly formatted, showing that Hall can prepare properly formatted listings.

- Referencing Opinion **Id. at Certified Document 68**. This email from Newton to Hall was a function of extreme frustration. However, there were no untruthful statements or obfuscation in this email. It is important that the entire email be displayed here. Below is that email with highlights and further explanation.

  **Thank you for your 11/23 response to my 10/12 email. I must say your response makes it very clear to me that you simply don't have a clue. After over a year of promise after promise, you have finally decided that you just can't do the job.**

  *This first paragraph thanks Hall for his reply and talks about previous promises to provide listings. This goes to the fact that an agreement to deliver listings on a certain date is in force.*

  **If you had actually merged, compared, and updated records, you certainly would have noticed things like the fact that there are no listings for Bluesky, ASPA, the hospital, or homeland security, just to mention a few. You might also have noticed that ASTCA doesn't have a single listing anywhere. How about the schools? Do schools not have phones? You tried to pawn off the task of creating ASG listings on ASG ITD, and they did a miserable job of identifying a few numbers but not anything close to a representation of all vital ASG numbers.**

*(The entire list prepared by ASG ITD is shown below.)*

| Department Names | Alternative Line | Fax Lines | Main Lines |
|---|---|---|---|
| Administration Law Judge | 633-7713 | 633-7725 | 633-7712 |
| Planning and Budget | 633-4202 | 633-1148 | 633-4201 |
| Criminal Justice | 633-5222 | 633-1990 | 633-5221 |
| Administrative Sevices | 633-4157 | 633-1841 | 633-4156 |
| Homeland Security | 633-4800 | 633-2979 | 633-2827 |
| Human & Social Services | 633-7508 | 633-7449 | 633-7506 |
| Marine & Wildlife Resources | 633-4456 | 633-5944 | 633-4481 |
| Agriculture | 633-1327 | 699-4031 | 699-9272 |
| Commerce | 633-5156 | 633-4195 | 633-5155 |
| Education | SAML | 633-4240 | 633-5237 |
| Public Health | SAML | 633-2362 | 633-4606 |
| Public Safety | SAML | 633-7296 | 633-1111 |
| Election Office | 699-3570 | 699-3574 | 699-3571 |
| ASEPA | SAML | 633-5801 | 633-2304 |
| Governor's Office | SAML | 633-2269 | 633-4116 |
| Arts Council & Humanities | 633-4490 | 633-2059 | 633-4347 |
| Historical Preservation | SAML | 699-2276 | 699-2376 |
| Human Resources | 633-5172 | 633-1139 | 633-4485 |
| Information technology | 633-3649 | 633-3651 | 633-3648 |
| Legal Affairs | SAML | 633-1838 | 633-4163 |
| Samoan Affairs | 633-5202 | 633-5590 | 633-5201 |
| AESRO | 633-5653 | 633-5684 | 633-5652 |
| Protection & Advocacy | 699-0929 | 699-7286 | 699-2441 |
| Public Defender | SAML | 633-4745 | 633-1286 |
| Property Management | 699-6504 | 699-6536 | 699-6505 |
| Procurement | 699-1171 | 699-8387 | 699-1170 |
| Parks & Recreation | SAML | 699-4427 | 699-9513 |
| Territorial Audit Office | SAML | 633-1039 | 633-5191 |
| Territorial Office on Aging | SAML | 633-2533 | 633-1251 |
| Territorial Office on Fiscal Reform | 699-1330 | 699-5005 | 699-1329 |
| Treasury | SAML | 633-4100 | 633-4155 |
| Veteran Affairs | 633-4206 | 633-5801 | 633-2911 |
| Youth & Women Affairs | 633-2835 | 633-2875 | 633-2836 |

*This paragraph recounts the fact that there are many missing parts to what Hall says, "listings as provided are the best available data from our customer database," and flies in the face of the MOU.*

**You have not given me the commercial listings and, given all the other errors, I cannot be certain that you have removed the unlisted numbers and you have never indicated to me that these things would be or have been done.**

*The Opinion mistakenly and, quite frankly, stupidly refers to the file in a reply to Id. at Certified Document 19. This is not even a valid attempt at providing commercial listings. It, too, flies in the face of the MOU.*

**Throughout the world, telephone directories are the source of vital and emergency information. We have done a pretty good job of providing that information for many years. But the listings you are trying to give me do not meet minimum requirements. It is clear that ASTCA simply doesn't know who their customers are.**

*This paragraph is important because the Department of Homeland Security was preparing to place a huge order for multiple ads, and ASTCA was not even making the simplest effort to provide emergency information. Without that basic emergency information, DHS might very well have decided against placing the promised ads. Newton requested DHS to provide an emergency number list which they did. Upon receipt, Newton completely reformatted the list to make it acceptable for publication in the directory.*

> **Your comments about formatting demonstrate your lack of ability and/or understanding of your objective. My thirteen-year-old daughter has it figured out just fine. So don't worry about those things that are so perplexing to you. Just give me the listings in a format similar to the previous 10 years,' and we'll take it from there. But the listings must be COMPLETE AND ACCURATE!**

*This paragraph contains two salient items. The first is that my mention of my thirteen-year-old daughter has caused reverberations. I did not explain at Trial that my daughter is now 25 and earns a six-figure income because of her exceptional computer skills. I showed her the mess Hall had been sending me, and she stated, quite as a matter of fact, "No problem, I'll fix that." The second salient item is that in this email,* ***Hall is told that Newton will handle all the formatting if Hall will just provide complete listings.***

> **Perhaps you should have Margaret handle this. She has been doing a much better job than you for many years.**

*This paragraph is very important because Margaret was subsequently brought in and was able to complete the White Pages and Government listings in just a matter of a few days. But Hall never delivered Margaret's work to Newton.*

> **Oh, and btw if you think I'm angry, you finally got it. You have cost me 10s if not 100s of thousands of dollars in lost revenues and unnecessary expenses.**

*It turns out Newton's losses are in the multiple hundreds of thousands of dollars.*

**AMERICAN SAMOA DOES NOT HAVE A CURRENT TELEPHONE DIRECTORY AND IT'S YOUR FAULT!"**

*This statement remains true to this day – November of 2023.*

9. The following statement is entirely wrong, and one can only wonder about the intelligence of the person making this statement because that person assumes that an email addressed to someone at bluesky.as is a Bluesky employee when, in fact, bluesky.as is the domain name used by Bluesky for their email service subscribers and used by thousands of people throughout the territory, not necessarily Bluesky employees. In this case, the addressee was the company address of David Robinson, a long-time friend and colleague of Newton.

    **Court: "In 2012, Newton emailed an employee at Bluesky (a telecommunications market competitor to ASTCA) telling the employee that he "strongly suspect[ed] the project is being intentionally sabotaged by ASTCA." Exhibit 35 at Certified Document 77."**

10. The following is complete nonsense. **Newton did not accept the listings; no commercial or cellphone listings were involved in the website posting** because they were simply not available. Posts to the website are not permanent like a printed-on-paper directory because changes can be made easily and without any significant cost, and no formatting is required for website posting. Furthermore, Hall had been posting ASTCA listings on his own website designed to mimic Newton's website for quite a while. The writer of this opinion seems to think posting to a website is somehow against the rules when, in fact, it is just a simple expression of freedom of speech. There is no indication anywhere that Newton fully accepted the subject subscriber listings.

    **Court: "By September 2013, Hall delivered subscriber listings, which Newton finally accepted and used, not to publish any phone directory but to update his online directory on "pagopago.com."**

11. The following is complete nonsense. The parties agreed to delivery dates on multiple occasions. Newton accepted each change of delivery date promises because he simply had no choice but to play along with ASTCA and their fraudulent promises.

    **Court: "Significantly, the parties never formally agreed to a delivery date for the subscriber listings throughout the entire ordeal."**

12. The lead-in to the discussion on the validity of the contract is completely unjustified because there was absolute mutual assent by all parties as of the signing of the contract (MOU); otherwise, it is reasonable to assume that the parties would not have signed the contract. Further comments on the discussions are below this opening remark.

**Court:**
**"I. <u>Breach of contract claims"</u>**
**"Each side has accused the other of materially breaching the terms of the contract. The success of such claims necessarily depends on the existence of a valid contract with terms that are sufficiently definite for the court to ascertain the parties' obligations. The first order of business, therefore, is to determine whether such a contract actually did exist and whether the terms contained therein unambiguously impose obligations upon the contracting parties for the court to ascertain whether the obligations have been performed or breached.**
**"There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract."**

13. ASTCA reaffirmed its contractual obligations by continuing to respond to Newson's requests and apologizing when their obligations were not properly complied with. ASTCA had every right to cancel the contract without cost, which they never did.

The denial of ASTCA's Motion to Dismiss, Richmond, 9/22/15, makes numerous references to the Contract but never questions the validity of the Contract. It is reasonable for Plaintiff to be assured the Court has determined the Contract to be valid and that the provisions of the Contract are enforceable.

14. Any reasonable person would find a full existence of mutual assent in the signing of the contract and the follow-through of said contract.

**"The test for determining the existence of mutual assent is not based on any subjective criteria but is instead an objective standard that focuses on how the words and conduct of the parties involved would be interpreted by a reasonable person."**

On page 7 of the Order, the **Court errors in citing** "*Banner Entertainment, Inc.,* v. *Superior Court, 62* Cal.App.4th 348, 359" which is referencing an oral agreement, not a written and signed agreement.
On page 7 of the Order, the **Court again errors in citing** "*Bustamante* v. *Intuit. Inc.,* 141 Cal.App.4th 199, 208" which was an agreement requiring input from a third party, not an agreement between two parties.
On page 8 of the Order, the **Court errors in citing** "*Bethlehem Steel Corp. v. Litton Industries, Inc., 321* Pa.Super. 357, 373", wherein the dispute is over a two-page letter, not a contract.

15. The next item to be resolved is the claim shown below. Take note of this statement and that the MOU does not call for the delivery time agreement to be in writing. However frivolous this agreement may be, it is important to note that it was written entirely by ASTCA and **accepted, <u>in good faith</u>, by Newton**. It is perfectly reasonable for intelligent adults to work within these agreements. The "mutually agreed upon date" was settled when ASTCA sent the first set of listings on February 3, 2011, ex 35, doc 16, and Newton responded noting errors and omissions. At that point, the parties had full mutual assent and were working on complying with the contract obligations.

    This specification in the contract applies to each year of the five-year term of the contract. Each year, ASTCA must be a party to setting a mutually agreed upon date and Newton has no responsibility to do this. Although the MOU is very poorly written, it should be noted that ASTCA's in-house counsel prepared the contract, and the Court is now seeking to punish Newton for Langkilde's incompetence.

    **Court: "In spite of seeming appearances of contract formation, the MOU is unenforceable for the singular reason that the parties never actually mutually agreed upon a delivery date for ASTCA's subscriber listings. The MOU states, in relevant part, "upon a mutually agreed upon date, ASTCA agrees to supply [Newton] with its subscriber listings."**

16. The part of the MOU, under ASTCA Responsibilities, regarding extra copies can reasonably be called an absurdity. But it is important, once again, to note that the MOU was prepared entirely by ASTCA and that ASTCA's Executive Director signed the MOU. This absurdity is a clear example of what amendments are meant to manage. It is also important to note that there was absolutely no relationship between the requested delivery date of a count of listings and the deadline for ordering extra copies. Furthermore, ASTCA had never before ordered extra copies and, in fact, resorted to burning thousands of excess copies that they had

failed to deliver to their subscribers. The writer of this paragraph is showing discrimination against Newton.

**Court: "There is also another absurdity in the MOU that is tied directly with the subscriber listings delivery date. According to the MOU, the subscriber listings that ASTCA delivered to Newton determined the total number of phone directories that Newton was supposed to print under the agreement. Any copy in addition to the print quantity (plus 1000 copies) would cost ASTCA extra. ASTCA had until December 30, 2010—i.e., a mere 30 days after Newton executed the MOU—to place orders for additional phone books."**

17. The following paragraph is a cruel example of prejudice against Newton. After all, the parties to the contract proceeded for five years as if the contract was fully in force and the matter of contract enforceability never came up in previous court actions.

**Court: "The facts presented at trial paint a convincing picture of the parties' abject failure to mutually assent to a material term. Lacking such crucial foundation, the agreement in question cannot be considered a legally binding contract. Any and all claims for breach of contract, consequently, must be dismissed."**

18. On Page 10 of the Order, the Court delves further into the mutually agreed-upon date issue. First, we have to understand what the purpose of the "mutually agreed upon date" is. Here the Court fails to recognize that this is a 5-year contract to produce 5 telephone directories, one for each year of the contract. It is impossible to set definite start dates years in advance, because of the inevitable occurrence of normal obstacles during each year of the contract. Thus, there would be a time each year when the parties would need to have a meeting of the minds. It had already been determined that both ASTCA and Newton wanted the first book to be published ASAP and both parties had begun the process of preparing the first book.

In a 5-year Memorandum of Understanding (MOU), it's common to include provisions that outline the agreement's terms and conditions, including the start dates for each year's production. These provisions help ensure clarity and provide a framework for both parties to follow. Think of it as a roadmap that helps you navigate your way through the agreement smoothly.

**Court: "Rather than setting an actual date, the parties chose instead to enter an agreement within the agreement to set a delivery date at some future time. They agreed to do something requiring a further meeting of the minds. Such can hardly be construed in any reasonable sense as mutual assent on an issue so instrumental to their agreement."**

19. ASTCA expressed a feeling of confidence and pride in the fact that they delivered listings on February 3, 2011. They claimed the listings were complete, but a simple review showed these listings to be far less than complete. Nonetheless, ASTCA expressed their feeling of accomplishment that they delivered listings in a timely manner. In doing so, ASTCA has expressed mutual assent. The Court errors in saying "ASTCA showed extreme reluctance in committing to a specific delivery date".

**Court: "This apparent lack of mutual assent is further highlighted by the evidence presented at trial, wherein, it was revealed that ASTCA, from the beginning, showed extreme reluctance in committing to a specific delivery date."**

20. Gwen made many statements to this effect, but she has no evidence to verify any problems between Newton and ASTCA prior to 2010. Newton produced 6 outstanding telephone directories under three contracts with ASTCA and ASTCA initiated the pursuit of a fourth contract with Newton, which clearly shows that ASTCA and Newton worked well together under the previous contracts.

**Court: "This was in large part motivated by the difficulties ASTCA experienced under the previous contracts with Newton, wherein, ASTCA continuously struggled with satisfying Newton's exacting subscriber listings delivery standards."**

21. The below statement makes no sense. The "mutually agreed upon date" is a commitment, not a noncommittal stance. Furthermore, the problem Gwen had was with the count of listings part of Newton's proposal because she had never gotten a grip on the fact that this proposed item was simply a count and not an accuracy requirement for the listings themselves.

The Court is basing its opinion on the obfuscated explanation of a paragraph in Newton's proposed terms wherein he asks for a count of listings. The delivery date of listings has no relation to the count of listings. This is another **error on the part of the Court** wherein the

Court is itself obfuscating the meaning of Newton's proposed Count of listings.

The issue of "a count of listings" being misinterpreted or obfuscated to mean the accuracy of listings came up in multiple documents, including but not necessarily limited to the following:

- Affidavit of Gwen Tauili'ili-Langkilde, Page 2, 5. John Newton's proposed contract sought a requirement that ASTCA produce all of its listings "within plus or minus 10% accuracy" and within a specified deadline of "no later than 180 days prior to the target publication date". See Exhibit A, Attachment A, Responsibilities of ASTCA.
- And again, in Order Denying Plaintiff's Motion for Summary Judgment, Page 6, footnote 1. Where the Court falls for Gwen's obfuscation of the facts.
- And again, in Deposition of Gwen Landkilde as read into the Court record on January 10, 2023, Page 64, lines 7-25, and Page 65, lines 1-9.
- And again, in the Order Denying Motion for New Trial, pg3, footnote 3. Where the Court once again falls for Gwen's obfuscation of Newton's proposed contract, ex34.

  **Court: "Throughout the negotiation period and even up to the signing of the MOU, ASTCA remained steadfast in its noncommittal stance, which it clearly communicated to Newton by even rejecting his proposed deadline for submitting a counting of subscriber listings, choosing instead to table the delivery date to a "mutually agreed upon date." Id."**

22. **The below statement is untrue, and the Court is drawing a conclusion based on what they thought Newton was believing**. In fact, Newton accepted the statement "to the extent available in ASTCA customer service records" without any mention of timing except that of "upon a mutually agreed upon date". Newton's acceptance of the "extent available" provision was because this wording meant that ASTCA would provide all their listings, with no exceptions. There is no other way to interpret this statement. There are no other records regarding ASTCA listings other than what is "in their systems". Using the words "explicitly rejected" in the below statement is a **serious error on the part of the Court**. What ASTCA was rejecting was its absurd misinterpretation of Newton's request for <u>a count of listings</u>.

**Court: "Newton, in turn, accepted this nebulous provision believing ASTCA would deliver the subscriber listings "as soon as possible" which, to him, meant sometime within the delivery time frame established under the prior contracts he entered into with ASTCA (i.e., the very same time frames that ASTCA explicitly rejected)."**

23. The agreement reached a status of mutual assent when ASTCA delivered the first listing files to Newton on February 3, 2011, ex 35, cert doc 16.

**Court: "Even after the MOU had been executed, the parties failed to find any common ground on the delivery date for the subscriber listings."**

24. The below statement is contrary to the normal evaluation of the meaning of the term agreement. Newton couldn't get new deadline agreements as long as ASTCA kept leading him to believe the listings would be available soon. ASTCA's continued statements that they would deliver listings and/or correct the erroneous listings were fraudulent.

**Court: "They traded an increasingly escalated series of emails and other electronic communications where generic delivery deadlines and various parts and versions of the subscriber listings were passed back and forth without any explicit agreement ever being made on delivery timelines**. [4]"

25. **The behavior of the parties is quite reasonable and shows they wanted to achieve the same outcome: a quality telephone directory. The Court fails to explain why it thinks the terms of the MOU are noncommittal.** There was mutual assent, a contract was produced by ASTCA with the clear intent to produce telephone directories. This contract was signed by both parties and the execution of the contract was overseen by the "Contracting Officer" of ASTCA. The fact that there was mutual assent is exemplified by:
    a. The assignment of an ASTCA employee to act as the contact person with Newton. Gwen depo 10/19/2016, pg 14, ln 13-14.
    b. Gwen Langkilde email to Newton on March 31, 2011, stating that "JD has been working diligently to provide you with verified telephone listings". Ex 35, cert doc 39.

c. JD Hall email of March 31, 2011, in which he says, among other things, "We need all of this data anyway to update our database once and for all". This email clearly shows that many people at ASTCA are working toward the goal of producing a new telephone directory. Ex 35, cert doc 40.
d. Newton email to JD Hall, April 9, 2011, "Anyway, glad you're trying to get it right." Cert Doc 44.
e. JD Hall email of April 18, 2011, in which he says, "I should have a business listing (non-government) prepped and ready by Wednesday". Ex 35, cert doc 46.
f. JD Hall email of May 18, 2011, in which he says, "All done by Friday afternoon with minor manual formatting tweaks in Excel to do what I couldn't do within the database." Ex 35, cert doc 50.
g. Newton email to JD Hall May 19, 2011, saying "This looks good although I can't be absolutely sure until I get it in Excel. Ex 35, cert doc 53.
h. JD Hall email to Newton August 26, 2011, saying "Thanks John for the more detailed formatting information. I'm taking all of this home with me so I can try and complete it over the weekend." Ex 35, cert doc 65.
i. JD Hall email of November 23, 2011, in which he stated that "The scripting to create the visually formatted data that you want is not going to happen, and the only requirement is that we provide you with the listings in CSV format, which we have". Ex 35, cert doc 67.

**Court: "Their behavior throughout this entire period, together with the unspecific terms of the MOU and the noncommittal negotiations, showcases just how fundamentally disconnected they were from one another."**

26. The below statement is untrue. There was no tie between any decision on the number of books required or the allowed time for ordering additional books. Using the word "absurdity" in this statement is absurd.

**Court: "There is also another absurdity in the MOU that is tied directly with the subscriber listings delivery date."**

27. Below is a true statement. Newton wanted the number of copies of the book to be tied to reality, not just a random number. In previous contracts, the Executive Director of ASTCA demanded an arbitrary number of books, even when the number of subscribers was rapidly

diminishing. Newton saw this new contract as an opportunity to set a method for determining reasonable quantities.

**Court: "According to the MOU, the subscriber listings that ASTCA delivered to Newton determined the total number of phone directories that Newton was supposed to print under the agreement. Any copy in addition to the print quantity (plus 1000 copies) would cost ASTCA extra."**

28. Below is clearly an error in the MOU prepared by ASTCA's in-house counsel. Errors do occur in documents, and amendments or corrections are not precluded. There is no provision for this document to be held out as non-amendable. Newton admits to overlooking this minor discrepancy because it was such an unimportant provision. ASTCA has always had the opportunity to order additional copies of directories but never has. Furthermore, there is nothing in Newton's proposed contract (Ex 34) that specifies a deadline for ordering additional copies.

**Court: "ASTCA had until December 30, 2010--i.e., a mere 30 days after Newton executed the MOU--to place orders for additional phone books. Ex. 1. This necessarily would have limited the parties' delivery date options to the 30-day time frame; otherwise, ASTCA would have been precluded under the MOU from ordering additional phone directories without a modification of the agreement."**

29. It is unreasonable to assume that an error in writing this MOU would reflect on future actions by the parties. It is clear that this document is a miserable attempt by ASTCA legal counsel to create a contract, but it is unreasonable to cause the Plaintiff in this case to suffer the consequences of the inefficiencies of the Defendant's legal counsel.

**Court: "Moreover, the absence of additional language on the matter in the MOU suggests that the December 30, 2010 order deadline also would have applied to all of the phone books printed for the subsequent years under the MOU. In other words, ASTCA's window for ordering additional phone book copies for all five years under the MOU would have closed on December 30, 2010."**

30. The agreement was viable as illustrated by the party's many attempts to satisfy their agreed-upon Requirements.

**Court: "This contradiction fittingly illustrates just how far apart the parties were from reaching a viable agreement. "**

31. This statement requires specificity. The parties had certainly reached a viable agreement and shown mutual assent.

**Court: "The facts presented at trial paint a convincing picture of the parties' abject failure to mutually assent to a material term."**

32. This footnote is impossible to diagnose.

**Court footnote: " [4] The MOU would be unenforceable even if the court were to liberally interpret each subscriber listing submission that Newton accepted from ASTCA as a "mutually agreed upon date." This is because the execution of the MOU still would have preceded all of these submissions."**

**Below is one of the most famous cases of contract law.**

**Lucy v. Zehmer, 196 Va. 493; 84 S.E.2d 516 was a court case in the Supreme Court of Virginia about the enforceability of a contract based on outward appearance of the agreement. It is commonly taught in first-year contract law classes at American law schools.**

A contract is enforceable if one party reasonably believes that the other party has sufficient intent to enter into the agreement, even if the other party actually does not. Lucy vs Zehmer 196 Va. 493 (1954) Record No. 4272. Supreme Court of Virginia.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Clark on Contracts, 4 ed., | 3, p. 4.

An agreement or mutual assent is of course essential to a valid contract, but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, | 32, p. 361; 12 Am. Jur., Contracts, | 19, p. 515.

The material below shows just how far off base Kruse was in his Opinion and Order regarding contract law. Couple that with Kruse's total misunderstanding of the facts presented and his actions become a travesty of justice, favoritism towards Gwen Landkilde, and discrimination against John Newton.

**The following definitions are taken from the Cornell Law School website.**

A contract is an agreement[1] between parties, creating mutual obligations[2] that are enforceable by law. The basic elements required for the agreement to be a legally enforceable contract are mutual assent[3], expressed by a valid offer[4] and acceptance; adequate consideration[5]; capacity[6]; and legality[7].

[1] An agreement is a manifestation of mutual assent by two or more persons to one another.
It is a meeting of the minds in a common intention and is made through offer and acceptance. An agreement can be shown from words, conduct, and in some cases, even silence.
Agreements are often associated with contracts; however, "agreement" generally has a wider meaning than "contract," "bargain," or "promise." A contract is a form of an agreement that requires additional elements, such as consideration.

[2] The popular meaning of the term “obligation” is a duty to do or not to do something. In its legal sense, obligation is a civil law concept. An obligation can be created voluntarily, such as one arising from a contract, quasi-contract, or unilateral promise. An obligation binds together two or more determinate persons. Therefore, the legal meaning of an obligation does not only denote a duty but also denotes a correlative right—one party has an obligation means another party has a correlative right.

[3] Mutual assent refers to an agreement by all parties to a contract. Mutual assent is an essential element in the formation of a valid contract. Under modern contract law, mutual assent must be proven objectively.
Thus, courts will look to outward expressions of the parties to determine mutual assent, often established by showing an offer and acceptance (e.g., an offer to do X in exchange for Y, followed by an acceptance of that offer). Mutual assent is closely related to the concept of meeting of the minds, which requires that the parties to a contract agree to the same terms, conditions, and subject matter.

[4] An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

[5] Consideration is a promise, performance, or forbearance bargained by a promisor in exchange for their promise. Consideration is the main element of a contract. Without consideration by both parties, a contract cannot be enforceable.  The considerations in the MOU are simple:  ASTCA will provide listings and Newton will provide books.

[6] In the context of contract law, the term “capacity” denotes a person's ability to satisfy the elements required for someone to enter binding contracts.  For example, capacity rules often require a person to have reached a minimum age and to be of sound mind.

[7] Legality refers to whether or not something (whether it be a transaction, document, object, person, or a person's actions) is in accordance with the law.

**Additional notes on the abject bias of this opinion.**

1. There is no mention of ASTCA's failure to deliver cellphone listings, as specified in the MOU written and signed by ASTCA and as required in all telephone directories.

2. There is no mention of ASTCA's failure to deliver commercial listings as specified in the MOU written and signed by ASTCA.

3. There is no mention of ASTCA's failure to deliver a General Information section with proper approval as specified in the MOU and reiterated in the Langkilde deposition.

4. There is a blatant disregard for FCC Rules and Regulations as codified in the Code of Federal Regulations, Title 47, Chapter I, Subchapter B, Part 64, in which every aspect of Telecommunications Carrier responsibilities to provide their listings to telephone directory publishers on a timely basis is clearly defined to be 30 days from the request. This shows ASTCA's uncaring disregard for their duties as dictated by their controlling body and a major source of funding.