ESTTA Tracking number: **ESTTA476173**

Filing date: **06/04/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200692
Party	Plaintiff Nettadoz Enterprises
Correspondence Address	CHRISTOPHER J FALKOWSKI FALKOWSKI PLLC 50064 DRAKES BAY DRIVE NOVI, MI 48374 UNITED STATES chris@falkowskipllc.com
Submission	Motion for Summary Judgment
Filer's Name	Christopher J. Falkowski
Filer's e-mail	chris@falkowskipllc.com
Signature	/Christopher J. Falkowski/
Date	06/04/2012
Attachments	Exhibit25-29.pdf (44 pages)(7951820 bytes)

Exhibit 25

00001

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

----------x

CINTRON BEVERAGE GROUP, LLC, :CIVIL ACTION

Plaintiff(s), :NO. 11-3926(JS)

v. :

VEDOZI, INC., et al., :

Defendant(s). :

----------x

Thursday, February 2, 2012

Oral deposition of RICHARD WYATT, held at the law offices of MONTGOMERY McCRACKEN WALKER & RHOADS, LLP, 123 South Broad Street, Avenue of the Arts, Philadelphia, Pennsylvania 19109, beginning at 10:00 a.m., on the above date, before Debra J. Weaver, a Federally Approved RPR, CRR, CCR of NJ (No. XI 01614), and a Notary Public of Pennsylvania and Delaware.

ESQUIRE DEPOSITION SOLUTIONS

1835 Market Street

Suite 2600

Philadelphia, Pennsylvania 19103

(215) 988-9191

area. The Midwest. We're going to begin targeting the southeast, Texas, Florida, Alabama, Louisiana area.

Q. So does that mean you're considering expanding?

A. Yeah.

Q. Okay. And if you do that, you would expect the number of employees to grow?

A. Correct.

Q. What areas did you scale back from that you were previously distributing products in?

A. I guess they would -- similar areas, it's just level of saturation you could say. The Northeast we scaled back from almost completely.

Q. Are you currently distributing in any countries other than the United States?

A. Yes.

Q. What countries?

A. Guatemala.

Q. Anywhere else?

A. I don't know if you consider South Africa and the African continent as

current distribution. Bermuda.

Q. Let's go back to South Africa.

A. We currently have a distribution agreement with a distributor in South Africa. His territory is Africa.

Q. Who is that distributor?

A. Vedozi.

Q. Okay. You consider the distribution agreement with Vedozi ongoing?

A. It has not been terminated to my knowledge.

Q. When is the last time Vedozi purchased product from CBG?

A. I don't recall the date.

Q. Has it been at least a year?

A. I don't know if it's been that long or not.

Q. Okay. So you said Guatemala. You discussed your distribution agreement with Vedozi. Any other countries?

A. Bermuda, Afghanistan.

Q. Anywhere else?

A. Not that I can recall sitting here.

00115
that indicated that an assignment agreement was -- a proposed assignment agreement was sent to Mr. Edozien in late '09 or early 2010?

A. I don't recall the dates. I recall the e-mail, that there was one sent to him, yeah.

Q. Okay. We'll get to those e-mails.

Take a look at paragraph 62, sir. In the first sentence there, you say, "For the reasons set out I submit that Cintron is the sole lawful proprietor in Nigeria and **throughout the world of the trademark CINTRON** and that because of its substantial use worldwide, including in Nigeria, has acquired substantial protectable goodwill in particular in connection with beverages."

Do you truly believe, sir, despite not registering marks in many countries in the world, Cintron is the owner of that mark worldwide?

A. The "worldwide" reference there is a distribution that we have in various parts of the world.

Q. Okay. That's not what it says here, sir. It says "worldwide."

MS. HARVEY: Objection to form.

THE WITNESS: What is your definition of -- can you provide -- I don't --

BY MR. HIRSCH:

Q. My definition of worldwide is the entire world.

A. Saturated in every country?

Q. You're not claiming, sir, that you have trademark rights throughout the entire world, correct?

A. No. I'm saying we've had substantial use worldwide, across the world. Distribution in Pennsylvania and distribution in California you would probably -- and some parts in between would be considered nationwide. That doesn't mean I'm in every store, in every convenience store in every country.

Q. According to the countries that we listed earlier that you're distributing in, other than the African countries, which you said you haven't been distributing since the

relationship with Mr. Edozien broke down approximately a year ago, the only countries you listed for me were Guatemala, Bermuda and Afghanistan. Would you consider that to be distribution worldwide?

MS. HARVEY: Objection to form.

THE WITNESS: It's across the world, yes.

BY MR. HIRSCH:

Q. Sir, you talked about substantial use in Nigeria. The only use of Cintron beverage product in Nigeria was through the distribution agreement with Vedozi, Inc., correct?

A. Correct.

Q. Sir, CBG has opposed Nettadoz's trademark rights in Nigeria, correct?

A. Yes.

Q. And do you know what the result of that opposition was?

A. I don't recall, no.

Q. You don't know if there's been a decision?

A. I don't know if there's been a

specifically energy drinks and sports drinks, as early as August 2006."

A. I'm sorry, where are you looking at?

MS. HARVEY: I think you have a different document there, Kev.

BY MR. HIRSCH:

Q. Sir, now I've handed you the correct R. Wyatt Exhibit 4, which is also a declaration of Rich Wyatt. It is a different declaration, correct?

A. Yes.

Q. Okay. And you signed this declaration as well, correct?

A. Yes.

Q. Under penalty of perjury, right?

A. Yes, I believe so.

Q. Okay. And in paragraph 5 it says, "The mark CINTRON was first used in commerce in association with beverages specifically energy drinks and sports drinks, as early as August 2006."

Do you have personal knowledge of that, sir, of the date that CBG first started

selling their beverages?

A. I don't know the specific date. It was believed that August of '06 was the time that it was being sold.

Q. Okay. You weren't even involved with the company in August of '06, correct?

A. Not in a formal capacity.

Q. Okay. Now, then, in paragraph 6, you say that "...the mark CINTRON has been in continuous and substantially exclusive use in commerce to describe Applicant's beverages for substantially 5 years."

Now, this declaration was signed on February 1st, 2011, correct?

A. Correct.

Q. Okay. So it was certainly less than five years, correct? Yeah, certainly less than five years, because August 2006 and February 1st, 2011, correct?

A. I raised that question, and there was some legal determination that substantially five years was appropriate to use.

Q. So you believe "substantially 5

years" is -- that was a term that was put in by your lawyers and you agreed with it?

A. I agreed that -- number 6 to be accurate, correct.

Q. Okay. But it was certainly not five years as of February 1st, 2011?

A. Like I said, it would have not been, then.

Q. Do you know why the five years is relevant? In other words, do you know why you were asked to put this in an affidavit or a declaration that it had been in commerce for five years? Is there some special relevance to that number?

A. I believe there is. I don't know what it is specifically.

Q. Okay. But you believe the requirement to be five years or substantially five years?

MS. HARVEY: Objection to form.

THE WITNESS: Again, I don't know what the legal determination of what substantially five years is, so I don't know that I could answer that.

BY MR. HIRSCH:

Q. Okay. Then, in paragraph 7, you say that "US Application," and then it has serial numbers, I'm not going to read the numbers, "have over the past at least 5 years acquired specific distinctiveness..."

Now, we established that it had been less than five years. Why are you using the term "at least 5 years" in paragraph 7?

A. Again, a legal determination that that was appropriate wording to be used, and also that the name, prior to this formation of the company, was, I believe -- there was discussions prior to that. I don't know what marketing was done prior to it.

Q. Are you telling me, sir, that the term "at least 5 years" has a legal meaning that could mean less than five years?

MS. HARVEY: Objection to form.

THE WITNESS: I'm not -- I don't know. I'm not a -- I can't answer a legal determination like that.

BY MR. HIRSCH:

Q. Who wrote the -- did you do the

initial draft of this declaration or did someone else?

A. Someone else drafted it.

Q. A lawyer?

A. Yes.

Q. Paragraph 13. Same declaration. It says, "The undersigned is unaware of any consumers that have associated the CINTRON **mark with a person or surname."**

Cintron is a strand of surname, correct?

A. Yes, there are people with the name.

Q. And, in fact, the company Cintron Beverage Group got its name based on the relationship with Edgardo Cintron, the band leader, correct?

A. I don't know how it was derived from that. One could conclude.

Q. Do you conclude?

A. He was involved at that time, so the similarity of the name.

Q. Do you believe Cintron to be a popular Spanish surname?

MS. HARVEY: Objection to the form.

BY MR. HIRSCH:

Q. Do you have any knowledge of whether --

A. I don't have any knowledge. No.

Q. Okay.

MR. HIRSCH: Let's get this marked as R. Wyatt-5.

(Deposition Exhibit No. R. Wyatt-5, Presentation entitled "Cintron Liquid Energy," Bates CBG006061-6065, was marked for identification.)

BY MR. HIRSCH:

Q. Sir, I've handed you what's been marked as R. Wyatt Exhibit 5.

Have you seen this document before?

A. Yeah. It looks like a PowerPoint presentation of some sort.

Q. Were you involved in the preparation of this document?

A. Yes.

Q. Okay. Who else was involved?

A. I believe Donna.

Q. Donna Davin?

A. Um-hum.

Q. Okay.

A. And I believe Wes.

Q. Okay. Now, in the third line down from the top, it says, "Deciding on the name Cintron, a popular Latin surname..."

Who decided to use that language in this PowerPoint presentation?

A. I guess I did.

Q. Okay. So do you want to change your testimony now? Do you agree that you had knowledge that Cintron was a popular Latin surname?

A. I said before that I don't have that knowledge or information. I chose to use that, from a marketing perspective, for a prospective customer.

Q. So you don't know if that's true, but you used it in promotional marketing materials not knowing if it was true?

MS. HARVEY: Objection to form.

THE WITNESS: Correct. I think

that the issue of that statement has no impact on the overall presentation. So I chose to use it, use that wording as a popular surname.

BY MR. HIRSCH:

Q. Okay. So you think that in your marketing materials generally it doesn't matter if something is true or false as long as it's not --

A. I don't think that's a true statement.

MS. HARVEY: Objection to form.

BY MR. HIRSCH:

Q. You don't disagree that it's a popular Latin surname, do you, sir?

A. I don't have the knowledge as to whether it is or not. I don't think it's as popular as Smith would be, but I don't know if it's as unpopular as others.

Q. Okay.

MR. HIRSCH: This would probably be a good time to take a break. I'm about to move into some new documents.

(Off the record from 12:24 p.m. to 1:39 p.m.)

Exhibit 26

Search

Most Common Surnames
1-1000
1001-2000
2001-3000
3001-4000
4001-5000

Surnames Alphabetical
A B C D E
F G H I J
K L M N O
P Q R S T U
V W X Y Z

Most Common Male Names
1-300
301-600
601-900
901+
Alphabetical list

Most Common Female Names
1-1000
1001-2000
2001-3000
3001+
Alphabetical list

Popular Baby Names
United States - Boys
1-250 251-500
501-750 751-1000
United States - Girls
1-250 251-500
501-750 751-1000
Historic
1880-2005
By State
Select a State

Ancestry in the United States
United States
Ancestry by city
Mexican
German
Irish
English
African American
More

Zip Codes
Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Washington DC
Delaware
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts

Where does CINTRON rank in the most common names in the U.S.?

CINTRON is identified by the U.S. Bureau of the Census as a surname with more than 100 occurrences in the United States for the year-2000 U.S. Census. In "Demographic Aspects of Surnames from Census 2000", the Census Bureau tabulated the surnames of all people who had obtained Social Security Numbers by the year 2000.

CINTRON ranks # 3230 in terms of the most common surnames in the United States for 2000.

CINTRON had 10,158 occurrences in the 2000 Census, according the U.S. government records.

Out of a sample of 100,000 people in the United States, CINTRON would occur an average of 3.77 times.

Race / ethnic origin

The race categories shown in these files are the modified race categories used in the Census Bureau's population estimates program. All people were categorized into six mutually exclusive racial and Hispanic origin groups: "White only", "Black only", "American Indian and Alaskan Native only", "Asian and Pacific Islander only", "Two or More Races", and "Hispanic".

For the last name of CINTRON the Census Bureau reports the following race / ethnic origin breakdown:

- 8.08 percent, or 821 total occurrences, were "Non-Hispanic White Only"
- 1.69 percent, or 172 total occurrences, were "Non-Hispanic Black Only"
- 0.45 percent, or 46 total occurrences, were "Non-Hispanic Asian and Pacific Islander Only"
- 0.16 percent, or 16 total occurrences, were "Non-Hispanic American Indian and Alaskan Native"
- 0.68 percent, or 69 total occurrences, were "Non-Hispanic of Two or More Races"
- 88.93 percent, or 9,034 total occurrences, were "Hispanic Origin"

NOTE: Fields suppressed for confidentiality are assigned the value "Insignificant"

The presentation of data on this site focuses on summarized aggregates of counts and characteristics associated with surnames, and, as such, do not in any way identify any specific individuals.

All data is derived from David L. Word, Charles D. Coleman, Robert Nunziata and Robert Kominski (2008). "Demographic Aspects of Surnames from Census 2000". U.S. Census Bureau.

Search the web for more on the name CINTRON :
Search

Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

Canada Postal Codes
Alberta
Brit Columbia
Manitoba
New Brunswick
Newfoundland
NW Territories
Nova Scotia
Nunavut
Ontario
Pr Edw Island
Quebec
Saskatchewan
Yukon

Search

what's new | for kids | rainforests | other languages | tropical fish | search | about | contact

Exhibit 27

Products About Us Happenings Mix Cintron Contact Us

Cintron Band

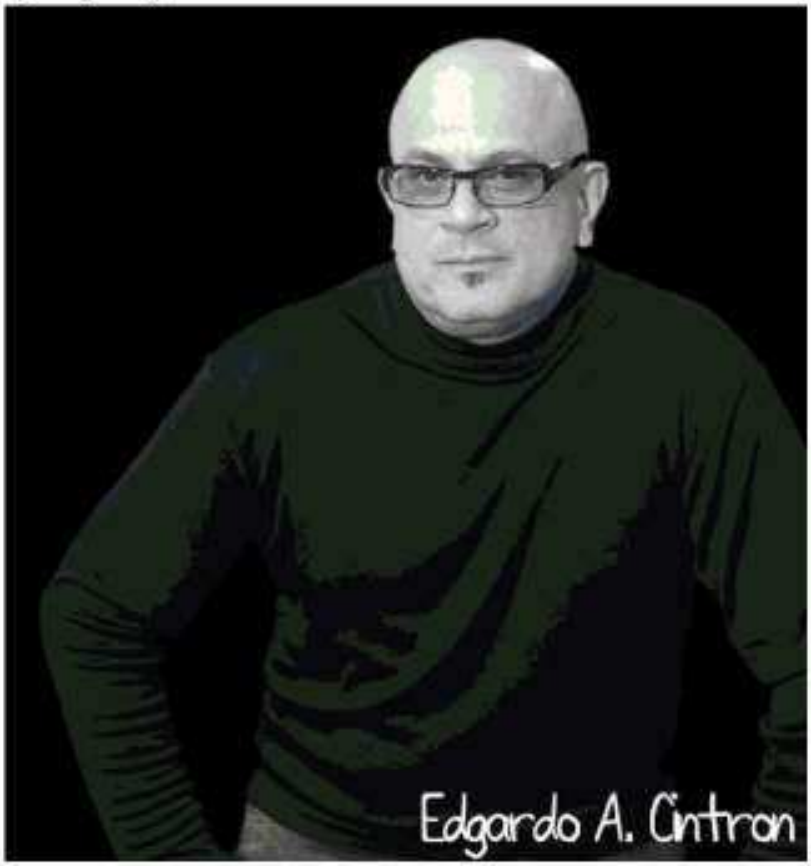
Cintron invites you to enjoy the Latin pop sounds of The Cintron Band lead by percussionist Edgardo Cintron.
Our refreshing iced teas, fruit drinks, and great tasting Liquid Energy shots and drinks are named Cintron in honor of this common Latin surname and in tribute to Edgardo Cintron.
Visit our happenings and events page to see where The Cintron Band will be next appearing. And in the meantime, pour yourself a Cintron over ice and enjoy a pop of Latin-inspired refreshment.

Privacy Policy
Terms of Use
design by Strategia Design

Exhibit 28

CINTRÓN BAND

By Rudy Mangual



For several decades, percussionist/bandleader Edgardo A. Cintrón has been making music inspired by his father and all the great musicians of our times. Responsible for 16 productions as a leader — eight of them with "Cintrón", his New Jersey-based band— the veteran musician is still making magic and enjoying his career. What follows is a conversation with Edgardo A. Cintrón...

Rudy Mangual: Edgardo, where is the Cintrón family originally from?
Edgardo Cintrón: My parents are originally from Yauco, Puerto Rico, but I was born in the middle of the United States —in Fort Reilly, Kansas.

RM: How did that happen?
EC: My dad was a sergeant major in the U.S. Army, retiring after 34 years. We were brought up as "army brats", all twelve of us, born in different places.

RM: How did music come into your life?
EC: My dad was also a musician (bass player) and led a band in Fort Buchanan, Puerto Rico, back in the 1950s. The band featured Maso Rivera, among many other excellent Puerto Rican musicians who also served in the U.S. Army.

RM: Did you serve in the military?
EC: I served two years in the Army, from 1975 to 1977.

RM: Do you have any formal music education?
EC: In middle school, I started playing the French horn because a girl I liked was in the class. Then I switched to the guitar for a while, before getting the percussion bug, which really clicked, and I truly fell in love with it. I did take some private percussion classes in my early teens for several months. In high school (Kennedy High School in New Jersey) I played in the jazz band, and at home I was playing with my dad's band (Los Tropicales) performing mainly in the Trenton, New Jersey area. That was basically my musical training, aside from listening to lots of music from all genres and styles. I remember working at New Jersey's Great Adventure (an amusement park) one entire summer to save money to buy my first set of timbales.

RM: Do you remember what brand they were?
EC: Yes, they were LP (Latin Percussion). They slept with me. I loved those drums!

RM: Do you still play LP timbales?
EC: Yes, but I also played Toca (Sheila E) Signature series for a while, and currently I'm playing Gon Bops (Alex Acuña brass model), which deliver an amazing "cáscara" sound from their shells.

RM: When did the Cintrón Band come to be?
EC: Around 1995, I was leading a band under the name of "Tiempo 90", releasing an album called *Música Caliente*. We followed with a second recording titled *Straight No Chaser* (a Latin jazz production), which did very well at the Gabón charts and was also pre-nominated for the Latin Grammies in 1998, but soon thereafter the recording label (DBK) went out of business. I was left with another production ready to be pressed and released, and without a record label. So I called my attorney friend, Rocco Depersia, and explained my predicament. He said, "Let's start a new band and we will call it Cintrón, and I will help you finance it." And that was the beginning of Cintrón (the band) 11 years ago. Our first official gig was performing in D.C. at President Bush's Inaugural Celebration.

RM: Was Cintrón (the band) always based in New Jersey?
EC: Yes, most of the players were from New Jersey, with a few actually residing in Pennsylvania and Delaware.

RM: What was Rocco Depersia's role in the band?
EC: Rocco was a vocalist in the band and my business partner. He actually retired from the band about a year ago after a ten-year run with Cintrón. In the early days of Cintrón, we had as many as five vocalists, three singing leads and two singing background and chorus. In recent years, we have cut the band to a maximum of three vocalists, and four horns (instead of five).

RM: How would you describe the sound of the early Cintrón Band?
EC: We did a lot of Latin soul and salsa with bilingual lyrics. For example, we would make medleys of R&B hit songs arranged to salsa and Latin jazz styles. Took many oldies but goodies like *Lonely Boy* and Latinized them. You have to understand that we were catering to mixed audiences of African Americans, Anglos and Latinos; not playing in New York City's "cuchifrito circuit" (local salsa circuit). Our version of the classic hit song *Suavecito* earned us a letter from the group Malo, praising our work and thanking us for doing right by their song.

RM: When did Cintrón start to evolve into a Latin band?
EC: We have always been more of a Latin band than anything else, because regardless of playing R&B scores, oldies or top forty hits, we always add our Latin flavor and swing to just about everything we do. By our second album (*Hitmen*), I started including more salsa tracks in the repertoire, such as *El Paso de Encarnación*. In every album thereafter, we continued including more and more salsa tracks. Then, after Rocco left the band, I really started bringing in old-school salsa dura into the band. Currently our sets are 80% salsa and Latin jazz, with a ballad or a pop/oldie in between, depending on the audience.

RM: Tell us about your most recent release, *Manteca*?
EC: This is something we did a couple of years ago at The Mohegan Sun Hotel and Casino in Connecticut. It captured the band in one of our best performances. After listening to it a couple of times, we

decided to release it as a live album. We opened the performance with the Dizzy Gillespie/Chano Chozo classic *Manteca*, hence *Cintrón Band Live: Manteca* is the title of the CD. A total of 12 tracks showcase the Latin big band sound of Cintrón and the versatility of Latin music, from our version of the Eddie Palmieri classic *Vámonos Pa'l Monte* to Tito Puente's *Picadillo* to *Take The 'A' Train* and *Cherry Pink Apple Blossom White*. The CD also has a bonus track, *Human Nature* (the Michael Jackson mega-hit), which we recorded in the studio last year, arranged to a salsa beat. Featured on lead Spanish vocals is Raúl Vigueros, with background vocals by Lia Montalvo and Eddie García. Also featured on lead guitar is Roosevelt Walker, Jr. The CD was co-produced by Cintrón Beverages.

RM: Is there a company called Cintrón Beverages?
EC: It produces an energy drink called "Cintrón," currently available in 40 states of the U.S. and in nine other countries. Cintrón Beverages is owned by Wes Wyatt, who helped produce our first album for Universal Records years ago and has always been a good friend to Rocco Depersia and I. In order to help us promote the band, Mr. Wyatt used my last name on his race boat initially, which led to the creation of the energy drink called Cintrón. The drink has become an instant success, surpassing all expectations from its makers. The beverage is available in about a dozen flavors, using organic cane sugar and also offering an alternative, sugar-free product, as well as a liquid energy shot-drink. Since the drink bares my name, I own a percentage of the company. So what's happening now is that the Cintrón Band is helping to promote the Cintrón drink, while the beverage company helps the band. Last week, we performed in Detroit, Michigan, at the Motor City Casino in a promotion for Cintrón (the drink), while Cintrón Beverage Group is hosting and producing our new record release party this month.

RM: What's next for Cintrón Band?
EC: With these promotions for Cintrón (the drink), I'm planning to incorporate Latin dancers with the band to present a complete Latin music and dance show to our audiences. We are also working on our next studio recording and planning a Latin Motown tribute recording for next year.

RM: What advice would you give to young musicians?
EC: Follow the best in whatever genre or style of music you prefer and always stay open-minded to all types of music. As a musician, my main goal is to attract kids and youngsters to music. It keeps them off the streets and utilizes their minds in a productive and positive way. Making music makes you feel well about yourself.

Exhibit 29

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CINTRON BEVERAGE GROUP, LLC,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 07-3043
ROCCO DEPERSIA,	:	
Defendant/ Third Party Plaintiff,	:	
v.	:	
A. WESLEY WYATT	:	
Third Party Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **APRIL 1, 2009**

Presently before the Court is a Motion for Summary Judgment filed jointly by Plaintiff, Cintron Beverage Group, LLC ("Cintron"), and Third Party Defendant, A. Wesley Wyatt ("Wyatt") (collectively, the "Moving Parties"), against Defendant/Third Party Plaintiff, Rocco DePersia ("DePersia"). For the reasons set forth below, the Motion will be denied.

I. BACKGROUND

Cintron is a limited liability company that produces and distributes various beverages, one of which is an energy drink by the name of "Cintron." On July 25, 2007, Cintron filed a Complaint in this Court seeking a declaration that DePersia has no ownership interest in Cintron, and is entitled to no compensation or ownership in the company. On September 13, 2007, DePersia filed a Motion to Dismiss Cintron's Complaint for failure to join Wyatt as a necessary

party. This Court denied the Motion to Dismiss by Order dated October 2, 2007.

On October 30, 2007, DePersia filed a Third Party Complaint against Wyatt, asserting claims for breach of contract, quantum meruit, and unjust enrichment. In his Complaint, DePersia alleges that a contract existed between him and Wyatt, whereby the parties jointly agreed to manufacture and distribute the energy drink, Cintron. DePersia asserts that Wyatt agreed to share an ownership interest in the company, as well as profits from the sale of the energy drink with DePersia, in exchange for the use of DePersia's band's name and image and DePersia's efforts in marketing the business.

On January 4, 2008, the Moving Parties both filed Motions to Strike the Third Party Complaint and Motions to impose sanctions upon DePersia and his attorneys. The Motions also asked this Court to issue an injunction enjoining DePersia from filing any further actions against them without leave of court. By Order dated April 14, 2008, we denied the Motion to Strike the Third Party Complaint, as well as the Motions for sanctions and for injunctive relief. The Moving Parties currently seek summary judgment with respect to Cintron's Complaint against DePersia and DePersia's Third Party Complaint against Wyatt.[1]

This matter stems from a series of business dealings between DePersia and Wyatt. DePersia is an attorney licensed to practice in the State of New Jersey. Since 2000, he has also been the co-leader and lead singer in a local Latin band named Cintron (the "Band"), along with

---

[1]DePersia asserts that the Moving Parties seek summary judgment on all his causes of action, but have not challenged Count II (Quantum Meruit) and Count III (Unjust Enrichment) in their Motion. Consequently, DePersia argues that this Motion should be treated as a Motion for Partial Summary Judgment. A review of the Motion reflects that the Moving Parties have not challenged these claims, and thus, we shall address it as a Motion for Partial Summary Judgment.

its co-leader, Edgardo Cintron. DePersia also owns a corporation called Shark Salsa Latin Productions, Inc. ("Shark Salsa"), which acts as the music production company for the Band, and books the Band's business. DePersia and Wyatt first began a business relationship in 2004 when DePersia sought an investor to finance the recording and promotion of a Latin jazz CD by his Band. Wyatt invested in the Band and financed the completion and promotion of a CD called "Back in the Day." In exchange for his investment, DePersia agreed to share equally with Wyatt all revenues generated by sales of the CD. This deal was never reduced to writing.

Shortly thereafter, Wyatt expressed an interest in re-branding his off-shore racing boat that was being sponsored by his company, D.F. Young, Inc. DePersia and Wyatt agreed that cross-marketing between the Band and the racing venture would be beneficial to both, so they reached an oral agreement whereby DePersia permitted Wyatt to re-brand his racing boat with the name and image of the Cintron Band. DePersia asserts that in December 2004, while attending a social dinner, DePersia and Wyatt discussed the idea of creating a consumer product that they could cross-market with the Band and the racing team. Wyatt suggested the idea of an energy drink, and they agreed to pursue all three ventures. DePersia contends that he and Wyatt orally agreed that Wyatt would invest the funds necessary for the development of the energy drink, while DePersia agreed to contribute the name and image of the Band, as well as, his marketing concepts, design concepts, and leg work to get the energy drink side of the business established. According to DePersia, both parties agreed to share in the ownership and profits from the energy drink venture. He states that in May 2005, Wyatt asked him to draft a written agreement to encompass the oral agreements reached with respect to the Cintron Band, the off-shore racing boat venture, and the development of the energy drink. DePersia drafted an agreement, but

Wyatt did not sign it. (Pls.' Mot. Summ. J., Ex. E). The agreement stated, in part:

> [A]ny income generated by the CINTRON CD, the theme song CD and/or the energy drink shall be allocated between the parties pursuant to a mutually accepted agreement to be entered into between the parties within 30 days of the release of the aforesaid CINTRON CD or the production of the first 50 cases of the aforesaid energy drink. . . .

Id.

In May or June 2005, Wyatt asked DePersia to approach Edgardo Cintron and acquire rights to the use of the Cintron name in connection with the energy drink, so that they could use the name freely without any objection from Edgardo Cintron. DePersia testified in his deposition that he suggested five percent (5%) of the profits a year up to a cap of $50,000, and Wyatt responded that this sounded fair to him. DePersia stated further that he drew up the document and that he and Wyatt agreed that the contract would be between Edgardo Cintron and Shark Salsa because Cintron did not exist at that point. They further agreed that once Cintron got up and going, it would assume the obligation to Edgardo Cintron. (DePersia Dep. 72:16- 73:16.)

DePersia testified that beginning in December 2005, until approximately January 2006, he was actively making efforts to develop an energy drink. He researched the market, and met with potential manufacturers and distributors. (Id. at 134:20- 136:9.) In January 2006, DePersia stated that he and Wyatt became discouraged with the progress of the development of the drink, so they decided to secure someone with experience in the beverage industry. DePersia met with Joseph Roberts ("Roberts"), the current Chief Operating Officer of Cintron. At that time, Roberts was working for another beverage company, but expressed interest in other opportunities. DePersia arranged a meeting with Wyatt and Roberts. On April 22, 2006, Wyatt sent DePersia and Roberts an email agreeing to include Roberts in the company and to give him a

ten percent (10%) share in the business, and ultimately in May 2006, Roberts agreed to join the team. Thereafter, Cintron was formed on May 16, 2006.

On July 6, 2006, DePersia sent a draft agreement to counsel for Cintron. This agreement contemplated the assignment of the name "Cintron" without any restrictions. It also proposed that DePersia would receive a 10% interest in Cintron, and that Cintron would assume Shark Salsa's obligation to pay Edgardo Cintron. (Pls.' Mot. Summ. J., Ex. I.) Wyatt then sent his own draft, titled "Trademark Assignment Agreement," to DePersia on July 12, 2006. This agreement was to be made among Shark Salsa, Edgardo Cintron, and Cintron and proposed a transfer of all rights to the name "Cintron" from Shark Salsa and/or Eduardo Cintron to Cintron, and also contemplated that once Wyatt's investment in the costs for the production, promotion, and sale of the energy drink through the date of the agreement were recovered, Cintron would provide 20 % of its issued and outstanding membership interests to Shark Salsa. The draft agreement also provided that once costs were recovered by Cintron, Cintron would pay 5% of its profits, up to a cap of $50,000 to Edgardo Cintron. (Pls.' Mot. Summ. J., Ex. J.)

On July 17, 2006, DePersia responded to Wyatt's draft Trademark Assignment Agreement, and requested that the agreement be amended to state that DePersia owns 20% of Cintron, but would not be able to take a profit until Wyatt recovered his investment. DePersia also requested that the agreement reflect that the "mark cannot be sold, transferred and/or assigned, in whole or part, without written consent of Shark Salsa Latin Productions, Inc. . . . " (Pls.' Mot. Summ. J., Ex. K.) On this same day, Wyatt's attorney wrote DePersia and stated that an assignment would not be needed, as he had "completed [his] research with respect to the mark 'Cintron' and there [were] no other individuals or entities using the mark in connection with

beverages." (Def.'s Resp. Mot. Summ. J., Ex. M.)

On January 15, 2007, DePersia sent Wyatt an updated agreement regarding ownership of Cintron. In such, he wrote:

> [I]t is hereby reaffirmed and restated that ROCCO A. DePERSIA shall have ownership of 10% of the CINTRON BEVERAGE GROUP, LLC and that any and all documents, papers, forms and authorizations shall be executed and all other actions taken that may be necessary to complete and vest said ownership in ROCCO A. DePERSIA immediately upon execution of this Agreement.

(Def.'s Resp. Mot. Summ. J., Ex. L.)

Wyatt points out that this agreement was with Cintron, DePersia and Shark Salsa, and that Wyatt was not a party to the alleged agreement. He further asserts that the parties never signed an agreement as to any of the terms outlined above, including ownership interest in Cintron, and accordingly, all of the above-referenced documents were merely negotiations between the parties. Wyatt testified that Cintron is entirely financed by him, and that, to date, he had invested twenty million dollars into the business. Wyatt further testified that, to date, Cintron has not made any profit, and he has not recovered any of his investment. (Wyatt, Dep. 229:15- 232:2.)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." See Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991). The Court asks "whether the evidence presents a sufficient disagreement to require submission to the jury or whether . . . one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the

basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Once the moving party has produced evidence in support of summary judgment, the non-moving party must go beyond the allegations set forth in its pleadings and counter with evidence that presents "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362-63 (3d Cir. 1992). "More than a mere scintilla of evidence in its favor" must be presented by the non-moving party in order to overcome a summary judgment motion. Tziatzios v. U.S., 164 F.R.D. 410, 411-12 (E.D. Pa. 1996). If the court determines that there is no genuine issues of material fact, then summary judgment will be granted. Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Ownership of Cintron

As stated above, Wyatt argues that a contract never existed between himself and DePersia wherein he agreed that DePersia would share in the ownership of Cintron. An enforceable contract requires an offer, acceptance, consideration and mutual meeting of the minds. Schreiber

v. Olan Mills, 627 A.2d 806, 808 (Pa. Super. Ct. 1993). The offer and the acceptance must include the essential terms that both parties intend to be binding. Cosme v. Durham, No. 07-3153, 2008 WL 324020, at *3 (E.D. Pa. Feb. 4, 2008) (citing In re Estate of Hall, 731 A.2d 617, 621 (Pa. Super. Ct.1999)). The essential terms must be definite enough to provide a basis for enforcing the agreement. Cosme, 2008 WL 324020, at *3, (citing Biddle v. Johnsonbaugh, 450, 664 A.2d 159, 163 (Pa. Super. Ct. 1995)). In short, the "test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced." Channel Home Ctrs v. Grossman, 795 F.2d 291, 298-99 (3d Cir.1986). Further, "'it is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract.'" Id.; see also Middleton v. Realen Homes, 24 F. Supp. 2d 430, 435-36 (E.D. Pa. 1998). In other words, before preliminary negotiations ripen into contractual obligations, there must be manifested mutual assent to the terms of a bargain. McCloskey v. Novastar Mortg., Inc., No. 05-1162, 2007 WL 2407103, at *5 (E.D. Pa. Aug. 21, 2007).

Wyatt asserts that the parties went through a number of preliminary negotiations whereby they exchanged proposed terms in a number of writings, but that they never reached a meeting of the minds as to establish an enforceable contract with regard to several issues, including ownership of Cintron. As outlined in detail above, there is no question that there were a number of preliminary negotiations between Wyatt and DePersia. This is evidenced by the numerous written proposals sent back and forth between them. There is also no question that none of these documents was signed by the parties. Thus, the issue before us is whether the parties came to an enforceable oral contract regarding ownership of Cintron. It is established law in Pennsylvania

that if parties agree upon essential terms and intend them to be binding, "a contract is formed even though they intend to adopt a formal document with additional terms at a later date." Johnston v. Johnston, 499 A.2d 1074, 1076 (Pa. Super. Ct. 1985); Courier Times, Inc. v. United Feature Syndicate, Inc., 445 A.2d 1288, 1295 (Pa. Super. Ct. 1982).

Here, there is significant evidence in this record that, although there was no final agreement(s) in writing, an oral agreement existed between Wyatt and DePersia, and that such agreement may establish that DePersia had an ownership interest in Cintron. Whether the agreement established ownership, and the exact percentage of that ownership, are questions for the factfinder, as the intent of the parties is a question of fact which must be determined by the factfinder. Yellow Run Coal Co. v. Alma-Elly-Yv Mines, Ltd., 426 A.2d 1152, 1154 (Pa. Super. Ct. 1981); Luria v. Robbins, 302 A.2d 361, 363 (Pa. Super. Ct. 1973).

DePersia testified at his deposition that near the end of May 2005, at a restaurant in Philadelphia, he and Wyatt officially agreed how the interests in Cintron were to be divided. DePersia stated:

> He [Wyatt] said let's – here's how we are going to split it [ownership of Cintron]. We're going to give - - he said to me, you and I are going to split it equally. And now, what should we do about Joe Mangold and Ronny Kyle, because they had been very – both of these guys had been helpful in getting us going. And then, he and I agreed that we would give them each 10 percent. So it was - - excuse me - - he takes his costs off the top. Then we give Joe Mangold 10 percent, we give Ronny Kyle 10 percent, and then he and I split the rest equally. And that was communicated to Joe Mangold right in my presence.

(DePersia Dep. 10:17-112:12.)

DePersia added that this was not a proposal between him and Wyatt, but an agreement. "We shook on it. We toasted to it. We embraced each other, like we're going to do this, we're

going to do that, type of thing. And we reaffirmed it on several occasions." (DePersia Dep. 115: 21- 116: 4.) DePersia further testified that the agreement was later modified.

> After we got Mr. Roberts involved and the company was incorporated, at some point in that spring, late spring, summer, Wes and I had a conversation about how we were going to split the company. And I said to him that what I thought would be fair under this new company, we'll amend our agreement and I'll take 20 percent rather than half. And that's how it happened.

(DePersia Dep.159: 16-24.)

DePersia also submitted affidavits which support his assertion that an oral agreement with Wyatt concerning his ownership in Cintron had been made. Richard DePersia, Rocco DePersia's brother, stated in an affidavit that sometime in 2004, Wyatt became an investor in the Band's making of a CD, and that near the end of 2004, DePersia and Wyatt agreed to begin a beverage business together. He stated that he was in their company many times over the next couple of years and that, "[a]t all times, when Rocco and Wes were together, they talked about the beverage business as their joint endeavor and held themselves out as partners in this venture." Richard DePersia further stated that while playing golf with Wyatt in the fall of 2006, Wyatt told him that DePersia had a 20% ownership interest in Cintron. (Richard DePersia Aff., at 2-3.)

Joseph Mangold stated in an affidavit that he had known Wyatt from prior business dealings, and had introduced him to DePersia. He stated that Wyatt and DePersia immediately became friends and worked on the Band's CD together. After the Band's CD was completed, Wyatt put the Cintron Band name on his off-shore racing boat, and thought the Band was a great promotional tool for his boat. Mangold added that at some point, Wyatt and DePersia advised him of their idea to launch an energy drink, and explained that they thought it was a great cross-promotional tool for the Band and the racing boat. Mangold stated that he attended numerous

meetings with Wyatt and DePersia regarding the energy drink, and that at all times, Wyatt and DePersia referred to each other as partners in the energy drink endeavor. Mangold also stated that he has had conversations directly with Wyatt about DePersia's interest in Cintron, and that during one of those conversations, Wyatt advised him that DePersia owned a 20% share in Cintron. (Mangold, Aff., 1-2.)

Furthermore, Wyatt's own deposition testimony indicates that he had oral agreements with DePersia regarding ownership of Cintron, although the exact percentage was modified several times. At one point during their dealings, as noted above, DePersia's interest in Cintron was to be an equal share with Wyatt after Wyatt's initial investment came off the top and Ronny Kyle and Joe Mangold got their 10% shares. Later, the percentage interest may have changed from 20% down to 10%, but nonetheless, Wyatt's testimony indicates that he orally agreed that DePersia did have an ownership interest in Cintron. Wyatt testified:

Q: Did Rocco agree to you verbally to the 10 percent deal?
A: He said to me as I was leaving something to the effect are we going to get this done? I said it sounds good to me, I will call Jeff and have him paper it up.
Q: So the purpose of having Jeff paper it up as you say is to put in writing what you guys had discussed at lunch?
A: Correct.
Q: To memorialize the deal in writing, right?
A: Yes.

(Wyatt Dep. 141:2-15.)

Wyatt twice more acknowledged this oral agreement:

Q: It was only three weeks before that you had met with [DePersia] and come to terms on the 10 percent deal, right?
A: Right. As I said, I had a conversation with counsel, and that is when I determined that I wouldn't be signing the deal.

(Id. at 198:15-21.)

. . . .

Q: When you say you didn't agree is that because you didn't sign any agreement that has these numbers in it?
A: That is because I didn't agree to it.
Q: You didn't agree to it verbally with him?
A: No.
Q: Never shook hands with him over that deal?
A: I shook hands with him as I stated on a 10 percent deal, not a non dilution deal.

(Id. at 173: 1-12.)

Further supporting DePersia's contention that he and Wyatt came to a verbal agreement regarding ownership of Cintron, is the evidence in the record that the parties had a history of oral agreements between them that they relied upon in doing business together. DePersia testified at his deposition that he and Wyatt had a "history of doing things on a handshake and having conversations and being able to rely on them." (DePersia Dep. 108: 17-19.) Furthermore, Wyatt testified:

Q: By investing in the band what was your goal?
A: Well, to help Rocco complete the CDs, the unfinished CD, and have the band to market or cross market the race team or have the band be part of the race team.

(Wyatt Dep. 37:24-38:5.)

. . . .

Q: So at some point did you and Rocco reach an agreement as to how you were going to invest into the band and how the band was going to cross-promote the racing boat venture?
A: I think I had an agreement with Shark Salsa to use the band and promote the band and the race team where needed together, if not separately.
Q: But the discussions that you had were primarily between Rocco, right, not any representative of Shark Salsa Latin Productions.

A: I thought Shark Salsa was Rocco.

(Id. at 38:15-39:4.)

. . . .

Q: I appreciate that, but that wasn't my question. My question is notwithstanding the fact that you guys didn't sign an agreement that explicitly laid out your investment in the band and the band's cross-promotion of the racing venture, you guys still followed through with the, let's call it verbal agreement that you made to do those things; isn't that right?
[counsel's objection]
A: As I said, we did complete the CD.

(Id. at 44:14 - 45:3.)

. . . .

Q: Now, after you and Rocco entered into this arrangement did the band create songs for the racing boat team?
A: Yes.

(Id. at 46:11-14.

. . . .

Q: Shortly after you made this arrangement with Rocco you did brand your boat with the name of the band, right?
A: We put Cintron on the boat in addition to DF Young.

(Id. at 47:12- 16.)

Where the facts are in dispute, the question of whether a contract was formed is for the jury to decide. StockTrans, Inc. v. Rostolder, No. 07-1339, 2007 WL 2317403, at * 3 (E.D. Pa. Aug. 7, 2007); Ingrassia Constr. Co., Inc. v. Walsh, 486 A.2d 478, 482 (Pa. Super. Ct. 1984). For all of the above reasons, there exists in this matter material facts which must be decided by the finder of fact as to whether DePersia and Wyatt entered into a verbal agreement(s) concerning

the ownership of Cintron.

2. Damages for Beach of Contract

The Moving Parties next assert that summary judgment is appropriate because DePersia cannot establish damages to a reasonable certainty. They contend that DePersia has provided no evidence which establishes the value of the ownership units that were supposed to be given to him by Wyatt. To state a claim for breach of contract under Pennsylvania law, a plaintiff must allege three things: (1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages. Alpart v. Gen. Land Partners, Inc., 574 F. Supp. 2d 491, 502 (E.D. Pa. 2008); CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). Under Pennsylvania law, an injured party need only prove damages with reasonable certainty. ATACS Corp. v. Trans World Commc'n, Inc., 155 F.3d 659, 669 -70 (3d Cir. 1998); See also Scobell, Inc. v. Schade, 688 A.2d 715, 719 (Pa. Super. Ct. 1997). Doubts are construed against the breaching party. Delahanty v. First Pa Bank, 464 A.2d 1243, 1257 (Pa. Super. Ct. 1983).

The Third Circuit in ATACS, stated that "'reasonable certainty,' as with most other standards of proof, is a difficult concept to quantify, but Pennsylvania courts have provided guidance as to what the term entails for purposes of assessing damages. At a minimum, reasonable certainty embraces a rough calculation that is not 'too speculative, vague or contingent upon some unknown factor.'" ATACS, 155 F.3d at 669; see Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866 (Pa. 1988). "Conversely, applying the reasonable certainty standard does not preclude an award of damages because of 'some uncertainty as to the precise amount of damages incurred.'" ATACS, 155 F.3d at 670; see Pugh v. Holmes, 486 Pa. 272, 405

A.2d 897, 909 (Pa. 1979). ATACS further stated that "Pennsylvania jurisprudence governing the issue is summarized in Aiken Indus., Inc. v. Estate of Wilson, 383 A.2d 808 (Pa. 1978), where the Pennsylvania Supreme Court ultimately concluded 'that compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof. What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages.'" Id.

The Moving Parties argue that DePersia cannot establish his damages to a reasonable certainty since no profits would be paid under the purported agreement until Wyatt recouped his investment in Cintron, and Cintron has yet to make a profit. Wyatt testified that, to date, he had invested $20 million in Cintron, and has not recovered any of this investment. (Wyatt Dep. 9:15-19, 231:24- 232:2.) The Moving Parties also claim that DePersia cannot establish his damages to a reasonable certainty because he has produced no proof of his damages.

We, however, find that there is evidence in the record upon which a factfinder could base an award of damages, and such creates a genuine issue of material fact at this summary judgment stage. As discussed above, DePersia maintains that he owns at least a 10% share in the ownership of Cintron. Wyatt testified that he certainly expected a rate of return on his investment, but has not yet recouped any of the $20 million. This, however, does not mean that Cintron would not make a profit in the future entitling DePersia to possibly 10% or more of such profits. Wyatt testified that total sales for the company in 2007 were approximately $4 million. (Wyatt Dep. 229:15- 232:1.) In addition, Joseph Roberts, President of Cintron, testified at his deposition concerning the growth and sales of the company. He stated that, currently, the

company was selling 19 products (four fruit drinks, six green teas, three black teas, and six energy drinks), and distributed these products in thirty- eight states. Roberts testified further that the company sold more than 200,000 cases of beverages in 2007, and projected to sell approximately 275,000 in 2008. He also testified that there are company documents that reflect these numbers, but did not think they were given to Cintron's lawyer. (Roberts Dep. 237:19-241:16.) Furthermore, when asked what he thought the company was worth, Roberts responded that "I don't think about it. We are still building." (Roberts Dep. 245:19- 20.) Accordingly, we find that this evidence is sufficient to establish a genuine issue of material fact as to damages.

3. DePersia's Failure to Name Cintron in his Third Party Complaint

The Moving Parties lastly assert that DePersia claims that there was an agreement(s) reached between himself and Wyatt, yet Wyatt never appears as a party in any of the draft agreements prepared by DePersia. The Moving Parties argue that this shows that DePersia's intention was to have a final agreement with Cintron, the corporation, and that DePersia's failure to name Cintron in his Third Party Complaint is fatal to his cause of action against Wyatt.

This argument, however, is flawed. First, DePersia is not arguing that any of the draft agreements that he sent to Wyatt were final written agreements between himself and Wyatt. As discussed above, the issue for the factfinder in this action is whether an oral contract was established between DePersia and Wyatt concerning the ownership of Cintron, not whether a particular agreement was the final contract.

Next, it is clear from the deposition testimony that DePersia always considered Wyatt as Cintron itself, just as Wyatt considered DePersia as Shark Salsa. Wyatt cannot have the argument both ways. In his deposition testimony regarding a verbal agreement between himself

and DePersia concerning his use of the Cintron name for his racing boat, Wyatt was asked:

> Q: So at some point did you and Rocco reach an agreement as to how you were going to invest into the band and how the band was going to cross-promote the racing boat venture?
> A: I think I had an agreement with Shark Salsa to use the band and promote the band and the race team where needed together, if not separately.
> Q: But the discussions that you had were primarily between Rocco, right, not any representative of Shark Salsa Latin Productions.
> A: I thought Shark Salsa was Rocco.

(Wyatt Dep. 38:15-39:4.)

For all of the above reasons, the Moving Parties' Motion for Summary Judgment is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CINTRON BEVERAGE GROUP, LLC,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 07-3043
ROCCO DEPERSIA,	:	
Defendant/ Third Party Plaintiff,	:	
v.	:	
A. WESLEY WYATT	:	
Third Party Defendant.	:	

ORDER

AND NOW, this 1st day of April, 2009, upon consideration of Plaintiff, Cintron Beverage Group, and Third Party Defendant, A. Wesley Wyatt's, joint Motion for Summary Judgment (Doc. No. 31), Defendant/Third Party Plaintiff, Rocco DePersia's, Response, and the Reply to this Response, it is hereby **ORDERED** that said Motion is **DENIED.**

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE