

2009

# Gilbert Development Corporation v. Wardley Corporation, Don Grymes, Terry Locicero, Lloyd Melling, and Chad Riddle : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS**

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**GILBERT DEVELOPMENT  
CORPORATION,**

**Plaintiff/Appellant,**

**v.**

**WARDLEY CORPORATION, DON  
GRYMES, TERRY LOCICERO,  
LLOYD MELLING, and CHAD  
RIDDLE,**

**Defendants/Appellees.**

**No. 20090358**

**Appeal from Fifth Judicial District  
Court, Washington County,  
Honorable G. Rand Becham,  
District Court No. 030501128**

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## **Statement of Issues and Standards of Review**

Gilbert Development Corporation raises two issues on appeal: (i) whether the trial court erred in entering partial directed verdict on Gilbert's fraudulent nondisclosure claim; and (ii) whether the trial court abused its discretion in awarding attorney fees to Wardley Corporation, Don Grymes, Terry LoCicero, Lloyd Melling, and Chad Riddle (collectively "Wardley" or "Wardley defendants") as the prevailing parties.

### **I.**

On the first issue, the jury considered and rejected an element of the fraudulent nondisclosure claim when it found on the special verdict form that Gilbert did not impose as a condition on the seller-financed transaction that Wright not be "involved" in the transaction. Without that condition, there could be no fraudulent nondisclosure of Wright's "involvement." The jury also considered and rejected a breach of fiduciary duty claim premised on the same duty and the alleged failure of the same defendants to disclose the same information as the fraudulent nondisclosure claim. The only difference between the fiduciary duty and fraudulent nondisclosure claims is that fraudulent nondisclosure requires both additional proof of intent and clear and convincing evidence.

The jury's rejection of the fiduciary duty claim—and thus rejection of fraudulent nondisclosure—is understandable since there is no evidence that the Wardley defendants knew Wright was "involved in the seller-financed transaction," as opposed to having a previous business relationship with Butterfield. This distinction is important. In the middle of trial, Gilbert abandoned his claim that Butterfield was a "straw buyer" and Wright was the real buyer. Gilbert instead conceded that only Butterfield purchased the property and only Butterfield was obligated under the finance agreement. (R. 2200:160;

2001:76-84, 98, 133; 2206:14-15.) Thus, only Butterfield was “involved in the seller-financed transaction.”

**Issue 1:** Whether the trial court erred in dismissing a fraudulent nondisclosure claim based upon the alleged failure to disclose a person’s involvement in a real estate transaction, where there was no clear and convincing evidence that (i) the person was involved in the seller-financed transaction at issue, instead of a prior cash transaction that failed; (ii) defendants were aware of the person’s involvement in the transaction at issue; (iii) the person’s involvement with the buyer was material, or understood to be material, by the defendants; or (iv) any defendant acted with intent to deceive.

**Harmless Error:** Even if the trial court erred in entering partial directed verdict, the error was harmless because (i) the jury found that Gilbert did not impose a condition concerning Wright’s “involvement” on the seller-financed transaction and (ii) the jury rejected an identical breach of fiduciary duty claim involving the same duty, same factual allegations, and the same legal elements. Steffensen v. Smith’s Mgmt. Corp., 820 P.2d 482, 490 (Utah Ct. App. 1991) (partial directed verdict harmless error).

**Alternative Grounds to Affirm:** Whether a fraudulent nondisclosure claim involving the sale of real estate fails as a matter of law where (i) the seller benefited from the alleged nondisclosure when he resold the property at a higher price and kept more than \$600,000 in payments from the original buyer; and (ii) the seller’s claimed consequential damages of “nearly \$600,000 in legal fees” in defending a subsequent “frivolous” complaint filed by a California bankruptcy trustee were not a reasonably foreseeable result of the nondisclosure. Bailey v. Bayles, 2002 UT 58, ¶ 10, 52 P.3d 1158 (courts may affirm on “any legal ground or theory apparent on the record”).

## II.

With the second issue, Gilbert challenges the amount of attorney fees awarded by the trial court. The opening brief fails to mention that, until Wardley prevailed at trial, Gilbert advanced the interpretation of the attorney fees provision he rejects on appeal.

**Issue 2:** Whether the trial court abused its discretion in finding the amount of attorney fees reasonable, where that finding was based upon nearly 100 pages of evidence that the fees were incurred in defending claims encompassed by the fee provision and was consistent with both parties' interpretation of the attorney fees provision.

**Standard of Review:** This court reviews a reasonableness finding for "clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988-89 (Utah 1988).

**Failure to Marshal:** Gilbert failed to marshal evidence in support of the trial court's finding. This court may refuse to consider a challenge to a finding that attorney fees were reasonably incurred where the challenging party fails to marshal evidence in support. Kraatz v. Heritage Imports, 2003 UT App 201, ¶ 60, 71 P.3d 188.

### Sub-Issues

Because Gilbert failed to marshal evidence, Wardley alternatively construes the sub-issues as contending the attorney fees award was unreasonable as a matter of law.

**Sub-Issue 2a:** Whether attorney fees incurred in preparing an initially unsuccessful motion for summary judgment are per se unreasonable, where the non-moving party (i) later agrees to dismiss claims on the same ground articulated in the motion and (ii) previously interpreted the fee provision to permit recovery of all fees.

**Sub-Issue 2b:** Whether attorney fees at discounted Salt Lake City rates incurred for a trial held in St. George are per se unreasonable where both parties interpreted the

provision to permit recovery of fees at Salt Lake City rates, both parties retained Salt Lake City counsel, the non-prevailing party filed the lawsuit in Salt Lake County, and a St. George trial court expressly found that the expertise of Salt Lake counsel made the rates reasonable.

**Sub-Issue 2c:** Whether attorney fees incurred when a new law firm discusses issues with a former law firm are per se unreasonable, where there is no evidence of duplication, but is evidence that fees were discounted for transitions involving counsel.

**Sub-Issue 2d:** Whether attorney fees incurred in conducting a single mock trial in a lawsuit in which \$6 million is sought are per se unreasonable.

**Sub-Issue 2e:** Whether a party may contend on appeal that some of its claims are not subject to an attorney fee provision after it represented in the trial court, and at times in the opening brief, that fees associated with all claims are subject to that provision.

**Alternative Sub-Issue 2e:** Whether attorney fees incurred in defense of claims not subject to an attorney fee provision are per se unreasonable where the prevailing party provides evidence that defense of the various claims cannot be separated and the non-prevailing party provides no evidence to the contrary.

### **Determinative Provisions**

All are attached to the opening brief.

## **Statement of the Case**

### **I. Nature of the Case**

This case involves the sale of a large tract of real property in LaVerkin, Utah. In 2000, Gilbert owned the property and entered into a real estate purchase contract and seller-finance agreement with Henry Butterfield, who agreed to purchase the property for \$1.6 million. Under the terms of the agreements, Butterfield paid Gilbert a \$100,000 initial deposit, \$400,000 at closing, and \$138,608.05 during the year before Butterfield defaulted on the finance agreement and declared bankruptcy in California. (Tr. Ex. 36.)

In the California bankruptcy, Gilbert retained the right both to foreclose on the property and to keep the \$638,608.05 Butterfield had paid Gilbert. Gilbert then sold the property to another buyer for \$1,644,473.68, which is \$44,473.68 more than the contract price with Butterfield. In other words, as a result of Butterfield's breach of the seller-finance agreement, Gilbert profited by \$683,081.73 when he both resold the property at a higher price and kept the \$638,608.05 Butterfield paid him.

In this lawsuit, Gilbert alleges, under various legal theories, that Wardley's broker and agents failed to inform Gilbert that a person he did not like, Dave Wright, was "involved" in the seller-financed transaction between Butterfield and Gilbert. Ultimately, (i) the trial court entered partial directed verdict on Gilbert's fraud claims and prayer for punitive damages, (ii) the jury rejected Gilbert's remaining claims, and (iii) the trial court awarded Wardley attorney fees as the prevailing party.

This appeal involves (i) whether the trial court erred in entering partial directed verdict on Gilbert's fraudulent nondisclosure claim, and (ii) whether the trial court abused its discretion in the amount of attorney fees it awarded Wardley.

## **II. Course of the Proceedings**

On April 10, 2003, the Salt Lake City office of Ray, Quinney & Nebeker filed this lawsuit on behalf of Gilbert in Salt Lake County. (R. 1.) The complaint sets forth claims for (i) breach of contract; (ii) breach of fiduciary duty; (iii) breach of the covenant of good faith and fair dealing; (iv) fraud/fraudulent nondisclosure/misrepresentation; (v) conspiracy to commit fraud; (vi) negligent misrepresentation; (vii) collusive tort; (viii) aiding and abetting fraud; (ix) negligence; (x) declaratory judgment, and (xi) quiet title. (R. 1-31.) Importantly, with the first 8 claims—which involved Wardley—Gilbert sought the same damages arising from the same alleged conduct. (R. 15-30, ¶¶ 68, 77, 82, 88, 95, 101, 106, 111.) In total, Gilbert sought more than \$6 million. (R. 2152.)

On May 1, 2003, the defendants moved to change venue to Washington County. (R. 102, 133, 165.) Ultimately, Gilbert stipulated to the change of venue. (R. 167.) Once in Washington County, various defendants were dismissed until only the Wardley defendants remained by the time of trial. (R. 222, 425, 945, 1571.)

In 2005, Wardley moved for summary judgment on the following grounds:

- (i) Gilbert could not prove proximate cause and is not entitled to consequential damages because any losses stemming from a California bankruptcy trustee’s later filing what Gilbert described as “frivolous” claims were not the reasonably foreseeable result of Wardley’s alleged failure to disclose Wright’s “involvement” with the transaction; and
- (ii) Gilbert’s claims of “collusive tort” and “aiding and abetting fraud” are not recognized under Utah law. (R. 1125-28.) While the trial court denied the motion, it stated that Wardley’s arguments were “strong” and explained, “appellate courts have consistently reversed far more summary judgment decisions than they have affirmed.” (R. 1625-27.)

Just before trial, Gilbert agreed to dismiss his claims for (i) negligent misrepresentation, (ii) negligence, (iii) aiding and abetting fraud, and (iv) collusive tort. (R. 2207:48-49, 87.) Gilbert agreed to dismiss the collusive tort and aiding and abetting fraud claims after the trial court stated that they are not recognized causes of action under Utah law—the same argument Wardley advanced in its summary judgment papers.<sup>1</sup> (R. 1125-28; 2207:48-49, 87.) Therefore, even though the motion for summary judgment was not granted, arguments made in support of that motion ultimately were successful.

By the time of trial, the remaining claims included: (i) breach of contract; (ii) breach of fiduciary duty; (iii) breach of the covenant of good faith and fair dealing; (iv) fraud/fraudulent nondisclosure/misrepresentation; and (v) conspiracy to commit fraud. All of these claims were premised upon Gilbert having imposed a condition that Wright could not be involved with a seller-financed transaction. (R. 2200:11-14, 40.)

Throughout this lawsuit, including trial, Gilbert maintained that all of his claims were both based upon contract and premised upon Gilbert’s imposing a condition that Wright could not be “involved” in a seller-financed transaction.<sup>2</sup> (R. 2204:213, 241.) Gilbert stipulated that the following question on the special verdict form would be dispositive of all claims, including a tort claim, because it determined whether Gilbert imposed such a condition: “Do you find by a preponderance of evidence that [Gilbert] imposed, under the terms of any agreement, in sufficiently definite terms a condition that [Gilbert] would not seller-finance the sale of [the property] to anyone if Dave Wright . . . were involved in the transaction in any way, shape or form?” (R. 1890.)

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<sup>1</sup> Wardley cannot locate a record cite for the dismissal of the collusive tort claim.

<sup>2</sup> “With respect to the tort and fraud claims, many of the same facts and testimony and arguments relating to the contract claims related to the tort claims.” (R. 2204:213.)



After the close of evidence, the trial court granted partial directed verdict on Gilbert's fraud and conspiracy claims and prayer for punitive damages. (R. 2204:228.) In closing, Gilbert then abandoned his theory that Wardley had failed to disclose that Wright was the "real" buyer and Butterfield a "straw buyer," presumably because Gilbert had to concede during trial that only Butterfield purchased the property and was obligated under the finance agreement. (R. 2200:12; 2206:13-16; 2200:160; 2001:76-84, 98, 133.)

After closing arguments, the jury answered "no" to the first question on the special verdict form and thereby rejected all of Gilbert's claims. (R. 1890.) Gilbert has not appealed any issues related to the special verdict form, and yet ignores the jury's finding and asserts on appeal that Gilbert did communicate in "sufficiently definite terms" a condition that Wright not be "involved" in a seller-financed transaction. Otherwise, Gilbert appeals only that part of the partial directed verdict dismissing his fraudulent nondisclosure claim—which includes the same elements, and is based upon the same factual allegations, as the fiduciary duty claim rejected by the jury. (AOB at 17.)

After Wardley prevailed at trial, it requested its attorney fees and costs. (R. 1897, 1927.) In support, Wardley pointed out that (i) Gilbert had previously interpreted the attorney fees provision as entitling the prevailing party to all fees, at Salt Lake City rates, regardless of whether the fees were incurred in advancing successful positions; and (ii) by April 2006—two years before trial—Gilbert sought his entire \$275,150 in attorney fees under the attorney-fee provision. (R. 1941.) After two more years of litigation, a six-day trial, and post-trial motions, the trial court awarded Wardley \$397,911 in attorney fees—only \$122,761 more than Gilbert had incurred by 2006. (R. 2164.) Gilbert appeals only the amount of attorney fees, not Wardley's entitlement to fees as prevailing party.

### **III. Statement of Facts**

In July 1999, Gilbert retained Wardley agents Karen Fuller and Terry LoCicero to sell real property located in LaVerkin, Utah. (R. 2200:114.) Butterfield later retained Wardley agents Chad Riddle and Lloyd Melling to represent him in buying the property. (R. 2202:147-48.) Wardley broker Don Grymes served as the broker. (R. 2200:119.)

Gilbert initially entered into a real estate purchase contract to sell the property to Butterfield for \$1.2 million in a cash deal. (AOB at 6; R. 2200:140-41.) That contract lapsed. After further negotiations, Gilbert and Butterfield entered into a second real estate purchase contract in which Gilbert agreed to sell the property for \$1.6 million, and seller finance the purchase, if Butterfield paid \$500,000 in cash by the time of closing, which Butterfield did. (AOB at 6.) After Butterfield made 6 payments totaling \$138,608.05, both he and his company, Mobile Mansions, declared bankruptcy in California. Gilbert claims to have spent “nearly \$600,000 in legal fees” in California, but ultimately not only retained the \$638,608.05 Butterfield had paid him but also reacquired title and resold the property for \$1,644,473.68. (AOB at 11, 12.)

#### **A. Facts Relevant to the Partial Directed Verdict on Gilbert’s Fraudulent Nondisclosure Claim**

The following facts are relevant to the trial court’s partial directed verdict on Gilbert’s fraudulent nondisclosure claim. In the opening brief, Gilbert states that he would not have sold the property to, nor seller-financed the transaction with, Butterfield had he known Dave Wright was “involved.” (AOB at 27.) Although one would never know from reading the opening brief, much of the trial concerned what Gilbert meant, and was understood to mean, by the term “involved.” While Wardley will set forth the

facts in the light most favorable to Gilbert, Wardley reminds the court that information—here, Wright’s “involvement”—is material only if it is “something which a buyer or seller of ordinary intelligence and prudence would think to be of importance in determining whether to buy or sell.” Yazd v. Woodside Homes Corp., 2006 UT 47, ¶¶ 32-33, 143 P.3d 283 (deleting word “some” from definition of “material”). Thus, evidence of what information was material must be viewed through an objective, not a subjective, lens.

### **1. The Two Meanings of “Involved”**

Gilbert testified that he meant “involved” in a seller-financed transaction in the broadest sense of “any way, shape or form,” including if “Dave Wright even stepped foot on the property,” or Wright “was on there pulling weeds.” (R. 2001:52, 59, 61-63.) Gilbert understood the term so broadly that it would have raised concerns for Gilbert if Wright had flown over the property at 30,000 feet. (R. 2001: 78.) Even if “Donald Trump” had been the purchaser, Gilbert testified, he would not have seller financed the transaction if Wright were “involved” with the development of the property. (R. 2001:54-65, 88-89.) Importantly, and despite his contentions at trial, Gilbert conceded that he never clarified to the Wardley defendants that he used the term “involved” in this extraordinarily broad sense. (R. 2200:160.)

The other meaning of the term “involved” was a narrower, more natural meaning in the context of the real estate transaction: neither Wright nor an entity owned by Wright could be the purchaser or obligor under the finance agreement. Consistent with this meaning, during opening statements Gilbert’s counsel outlined Gilbert’s theory that Wright was “involved” in the seller-financed transaction because Wright was the “real buyer” and Butterfield was a “straw buyer.” (R. 2200:12.) Under this definition, Wright

could not be the purchaser or obligor, but could, for example, set foot on the property or pull weeds on the property or fly over the property.

The different meanings are important because (i) only the narrow meaning satisfies the objective test for materiality; (ii) Gilbert never clarified to the Wardley defendants that he meant anything other than the narrow meaning of “involved;” and (iii) Gilbert eventually abandoned his theory that Wright was the “real buyer” when he was forced to concede that only Butterfield purchased the property and was obligated under the finance agreement. (R. 2200:160; 2001:76-84, 98, 133; 2206:13-16.) In other words, it is undisputed that Wright was not “involved” in the narrow sense.

## **2. The Two Different Transactions**

Not only is there just one meaning of “involved” relevant to the fraudulent nondisclosure claim, only one transaction is relevant. Most of the evidence cited in the opening brief concerns the first, failed transaction in which Butterfield agreed to pay \$1.2 million in a cash deal. (AOB at 6, 28-35; R. 2200:140-41.) The parties signed the real estate purchase contract in that first deal in August 1999, and that deal failed when Butterfield did not come forward with the purchase price to close the transaction in November 1999. (AOB at 6.) At trial, Gilbert conceded that Wright’s “involvement”—in any sense of that term—was irrelevant with regard to this first transaction because Gilbert would have sold the property to Wright himself in a cash deal. (R. 2201:72.)

On December 13, 1999, at a mediation to determine who had the right to the earnest money deposited for the first deal, Gilbert and Butterfield negotiated and signed both a new real estate purchase contract for \$1.6 million and a seller-financed agreement. (Tr. Ex. 36.) It is undisputed that during the negotiations on December 13, 1999, Gilbert

was represented by his wife and lawyer, Cyndi Gilbert, and Butterfield was represented by his lawyer, Bruce Jenkins, not by Dave Wright. (AOB at 7-8.) It also is undisputed that Gilbert did not perform any due diligence on Butterfield because, he testified, he was “getting half a million dollars down,” which was “[p]retty good insurance.”

(R. 2001:108, 107.) Gilbert explained that “if Butterfield’s a deadbeat and defaults, I get to keep the money he’s paid me down, and I repossess the property.” (R. 2001:109-10.) In other words, whether Butterfield was solvent (i.e., could make payments) did not concern Gilbert because he had \$500,000 in security and the right to foreclose.

Importantly, it is only the seller-financed transaction that Gilbert claims he would not have entered into had he known of Wright’s “involvement,” and therefore, it is only Wright’s involvement in the seller-financed deal that is at issue. (AOB at 9.) Gilbert’s fraudulent nondisclosure claim thus not only requires Wright’s “involvement” in the broad sense somehow to have been a condition of the transaction, but also requires evidence concerning such “involvement” in the seller-financed transaction, not in the first transaction. Gilbert and Butterfield agreed to the terms of the seller-financed transaction on December 13, 1999, and closed that transaction on January 13, 2000. (AOB at 10.)

**3. LoCicero Arguably Understood Gilbert Meant “Involved” in the Broadest Sense, but Was Unaware of Wright’s “Involvement”**

Gilbert testified that he told his agents—Fuller<sup>3</sup> and LoCicero—that he did not want to seller finance if Wright was “involved.” (R. 2200:136.) Gilbert told Fuller and LoCicero that he “didn’t want to have anything to do with [Wright].” (R. 2202:142-43, 176-77.) Gilbert testified that he made it clear to LoCicero that Wright could not be

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<sup>3</sup> Gilbert never filed a claim against Fuller.

involved in any way. (R. 2200:135-36; 2201:52-55.) With the facts construed most favorably to Gilbert, LoCicero arguably understood that Gilbert subjectively meant “involved” in the broadest sense.

However, LoCicero never met Wright and had no knowledge of any involvement of Wright in any way. (R. 2202:148, 150, 182, 186.) As Gilbert points out in the opening brief, the only evidence that LoCicero had any knowledge of Wright’s “involvement” was that Gilbert told LoCicero that he had heard a rumor that Wright was involved in the first contract. (AOB at 28.) Of course, LoCicero did not need to tell Gilbert about the rumor because Gilbert told her.

**4. Grymes, Riddle, and Melling Understood “Involved” in the Natural Sense, But Wright Was Not “Involved” in This Sense**

As for the broker (Grymes) and Butterfield’s agents (Riddle and Melling), the only evidence is that they understood the prohibition on Wright’s “involvement” as prohibiting Wright from being the buyer or obligor under the financing agreement—i.e., in Gilbert’s terminology, Wright could not be the “real buyer” and Butterfield the “straw buyer.”<sup>4</sup> Gilbert testified that he mentioned to Grymes that Wright could not be involved. (R. 2001:127.) Fuller testified that she recalled telling Melling that Wright could not be “the person on the other end of the deal.” (R. 2202:176, 154-56.) Fuller also may have told Grymes that Wright should not be involved, but, nine years after the conversation, she was “trying to put this together in my head, and I don’t know exactly.” (R. 2202:157-58, 162.) And Gilbert testified that he told Grymes that he did not want to do the deal

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<sup>4</sup> Again, Gilbert admits he never clarified what he meant by the term “involved,” and the jury found that Wright’s involvement in the broad sense was not a condition imposed on the seller-financed transaction. (R. 2200:160; 1890.)

with Wright. (R. 2000:151.) None of this evidence supports an inference beyond the natural meaning of “involved” in the context of a real estate transaction.

Consistent with this, Riddle testified that Gilbert told him he “did not want to deal with and did not like” Wright. (R. 2202:16.) Riddle explained that he understood “involved” to mean, “He’s not the buyer of the con – or he’s not the buyer, period, you know, so he’s not involved. He’s not the buyer.” (R. 2202:40, 19.) Riddle then explained that it would not have occurred to him that if Butterfield “even knew Dave Wright” that Gilbert would not have sold the property to Butterfield. (*Id.*)

Melling testified that he did not understand the prohibition on Wright’s being “involved” to mean that if Wright was involved in “any way, shape, or form,” then Gilbert would not have sold the property to Butterfield. (R. 2202:107-08.) Melling understood only that Wright could not be “financially involved with this project and be responsible for making payments or anything like that on this.” (R. 2202:123.)

Grymes testified that he did not recall ever being told that Wright could not be “involved” and did not know Wright was “involved,” even in the broad sense of the term. (R. 2201:250-51, 253-59.) And while Riddle and Melling dealt with Wright during the failed cash deal, neither agent dealt with Wright during the seller-financed transaction for which Butterfield was represented by his own attorney. (R. 2202:38, 70.)

Thus, there is no evidence that Grymes, Melling, or Riddle understood—or should have understood—the term “involved” in the broad sense Gilbert claims he intended; indeed, at trial Gilbert admitted he never made that clarification. (R. 2200:160; 1890.) Moreover, there is no evidence that the Wardley defendants were aware of any “involvement” of Wright in the seller-financed transaction.

**B. Facts Relevant to the Alternative Grounds to Affirm**

The district court also could have entered partial directed verdict on Gilbert's fraudulent nondisclosure claim on the following grounds: (i) Gilbert was not harmed by the alleged nondisclosures; (ii) the claimed consequential damages were not reasonably foreseeable; and (iii) the nondisclosures were not the proximate cause of any claimed damages. The facts relevant to these issues are as follows.

**1. Gilbert Benefited From the Alleged Nondisclosures**

Gilbert testified that he did not perform any due diligence on Butterfield because he was "getting half a million dollars down" and "if Butterfield's a deadbeat and defaults, I get to keep the money he's paid me down, and I repossess the property." (R. 2001:108-10.) Whether Butterfield could make payments was not an issue for Gilbert.

Gilbert also claims that had he known Wright was "involved" in any way, then he would not have entered into the seller-financed transaction. (AOB 27.) In the "but for" world of this lawsuit, then, Gilbert does not sell the property to Butterfield. In that world, Gilbert continues to pay all property taxes and maintenance costs on the property, is entitled to no interest payments or late fees from Butterfield, receives no down payments from Butterfield, and must sell the property to another buyer. (R. 2001:10-11.)

Instead, Gilbert kept \$638,608.05 Butterfield paid him and then repossessed and resold the property to another buyer for an additional \$44,473.68. (Tr. Ex. 36.) In other words, Gilbert profited by at least \$638,608.05 from the alleged nondisclosure. Even if Wardley were legally responsible for the "nearly \$600,000" Gilbert spent in attorney fees two years later in a California bankruptcy proceeding, Gilbert still benefited from any nondisclosures.



**2. Gilbert's Incurring Attorney Fees in the California Bankruptcy Was Neither a Reasonably Foreseeable Result of, nor Proximately Caused by, the Alleged Nondisclosures**

After the seller-financed deal closed on January 13, 2000, Butterfield made six payments through February 2, 2001. (R. 1196.) On February 28, 2001, Mobile Mansions—owned by Butterfield—filed bankruptcy in California. (R. 1198; 2203:12.) On June 8, 2001, Butterfield filed bankruptcy in California. (*Id.*)

On February 27, 2002, one of the bankruptcy trustees filed a complaint against Gilbert that clouded title to the property and sought the return of the money Butterfield had paid Gilbert. (R. 1201.) Gilbert claims to have spent “nearly \$600,000” in attorney fees to maintain his right to foreclose on the property and to retain the money Butterfield paid him. (AOB at 12.) Gilbert characterized the trustee’s complaint as “frivolous,” sought leave to file a malicious prosecution claim against the trustee, and, as part of Gilbert’s settlement with the new trustee, insisted upon being assigned all claims against the former trustee. (R. 1354-60.)

**C. Facts Relevant to the Trial Court’s Attorney Fees Award**

In the opening brief, Gilbert has not marshaled any evidence in support of the trial court’s finding that all but \$ 1,625 of the attorney fees sought by the Wardley defendants were reasonable. (AOB at 13; R. 2153, 2162.) There is, however, evidence relevant to the trial court’s reasonableness finding, some of which is set forth below.

All five Gilbert defendants agreed to waive conflicts and be represented by the same law firm. (R. 2158.) Had each defendant retained separate counsel, the attorney fees award would have been much higher. As some measure of how reasonable Wardley’s fees were, Gilbert did not submit for comparison the bills of his own counsel,

Ray, Quinney & Nebeker. The reason is obvious. By April 2006—two years before trial—Gilbert listed his fees as totaling \$275,150. (R. 1941.) After two more years of litigation, a six-day trial, and post-trial motions, the trial court awarded Wardley \$397,911 in attorney fees, only \$122,761 more than Gilbert’s figure in 2006. (R. 2164.)

In addition to these facts of general relevance to the trial court’s reasonableness finding, there are also facts relevant to the particular sub-issues raised by Gilbert. With the first sub-issue, Gilbert maintains that the attorney fees incurred in preparing an unsuccessful motion for summary judgment are unreasonable. Some of the evidence relevant to this sub-issue is that (i) Gilbert previously interpreted the attorney fees provision as allowing the recovery of all fees; (ii) Gilbert subsequently agreed to dismiss two of the claims for the reasons articulated in the summary judgment papers; and (iii) the trial court specifically found that the particular summary judgment motion in this case was valuable even though it was denied. (R. 1941; 1125-28; 2207:48-49, 87; 2156.)

With the second sub-issue, Gilbert maintains that Salt Lake City rates are unreasonable for a trial held in St. George. Some of the evidence relevant to this sub-issue is that (i) Gilbert retained the Salt Lake City law firm of Ray, Quinney & Nebeker to file this lawsuit in Salt Lake County; (ii) the Salt Lake City office of Stoel Rives is one of two firms representing Gilbert on appeal; and (iii) Gilbert previously interpreted the fee provision as sanctioning his recovery of all of his fees. (R. 1; 1941.)

With the third sub-issue, Gilbert maintains that \$2,632.50 in attorney fees were “related to the transition” of counsel from the St. George office of Jones Waldo to the Salt Lake City office of Snell & Wilmer. Gilbert’s only support is that some unspecified fee entries on pages 2020-22 of the record describe discussions between old and new

counsel and new counsel's review of documents. (AOB at 46.) Some of the evidence relevant to this sub-issue is that counsel for Wardley discounted fee rates and wrote off time for things such as turnover in representation. (R. 1996.)

With the fourth sub-issue, Gilbert maintains that \$45,669 allegedly incurred in conducting a mock trial were unreasonable. Some of the evidence relevant to this sub-issue is that (i) the trial court specifically rejected Gilbert's \$45,669 figure based on its review of the time entries in the record; (ii) other entries with the phrase "mock trial" describe work such as preparing exhibits later used for trial; and (iii) the mock trial was valuable in this case because the issues were complex and Gilbert sought more than \$6 million in damages. (R. 2157.)

With the fifth sub-issue, Gilbert maintains that Wardley failed to allocate fees associated with claims subject to the attorney fee provision and fees associated with claims not subject to that provision, the latter presumably being tort claims. Some of the evidence relevant to this sub-issue is that (i) Gilbert rejected this position in the trial court and rejects it at times in the opening brief (he argues that if he prevails on the fraudulent nondisclosure claim then he is the prevailing party under the contract provision); and (ii) Wardley provided evidence that it is not possible to separate fees incurred in defense of the contract claims from fees incurred in defense of the tort claims because all claims were premised upon the same conduct and duties. (AOB at 36; R. 1952, 1994.)

### **Summary of the Argument**

This court can affirm the dismissal of Gilbert's fraudulent nondisclosure claim on six separate grounds. First, the jury considered and rejected the factual predicate to all of Gilbert's claims, including fraudulent nondisclosure, when the jury found that Gilbert did not impose a condition that Wright could not be involved in a seller-financed transaction.

Second, because Gilbert's fraudulent nondisclosure claim is subsumed by his breach of fiduciary duty claim, when the jury rejected the breach of fiduciary duty claim it necessarily rejected the fraudulent nondisclosure claim. The fraudulent nondisclosure claim required clear and convincing evidence that Wardley (i) had an intent to defraud, (ii) had a legal duty to disclose material information, (iii) knew of that information, and (iv) failed to disclose that information. (AOB at 17.) The breach of fiduciary duty claim required a preponderance of the evidence that Wardley (i) had a duty to disclose material information, and (ii) had knowledge of that information, and (iii) failed to disclose that information. Hermansen v. Tasulis, 2002 UT 52, ¶¶ 18-22, 48 P.3d 235. Because here the duties and undisclosed information are identical, the jury verdict would have been the same had the trial court not entered partial directed verdict. Any error was harmless.

Third, the test for whether information is material under Utah law is whether a reasonable person would consider the information material. Here, the only information that arguably qualifies as material would be if Wright had been the "real" buyer or obligor, a theory Gilbert advanced during opening statements but abandoned during trial. It is now undisputed that Wright was not the buyer or obligor, and therefore, there was no material information concerning Wright's involvement to disclose.

Fourth, in the opening brief Gilbert impermissibly combines (i) the duties of certain Wardley defendants with the information known by other Wardley defendants, and (ii) information related to two different transactions, even though only one seller-financed transaction is at issue here. Only one Wardley defendant—LoCicero—believed Gilbert considered any “involvement” by Wright to be material, but LoCicero knew nothing about Wright. The other Wardley defendants—Grymes, Melling, and Riddle—arguably knew Wright had a relationship with Butterfield during the first transaction, but they not only had no duty to disclose that information, but also, quite reasonably, did not consider that relationship to constitute Wright’s being “involved” in the seller-financed transaction. Moreover, evidence concerning the first, cash deal is irrelevant because Gilbert conceded that he would have sold the property to Wright himself in a cash deal.

Fifth, partial directed verdict was appropriate because Gilbert suffered no damages. Gilbert agreed to seller finance the sale of the property to Butterfield for \$1.6 million. Before Butterfield declared bankruptcy, Butterfield paid Gilbert \$638,608.05. Gilbert foreclosed on the property and subsequently sold it to another buyer for \$1,644,608.68. Thus, Gilbert profited by at least \$638,608.05. And even if Gilbert spent “nearly \$600,000 in legal fees” in bankruptcy proceedings defending what he describes as “frivolous” claims, Gilbert still profited from any nondisclosure. (AOB at 12.)

Finally, Gilbert could not recover damages on his fraudulent nondisclosure claim because his incurring fees in defending against what he described as “frivolous” claims in a subsequent bankruptcy proceeding was not a reasonably foreseeable result of Wardley’s failing to disclose anything concerning Wright. Thus, Gilbert’s claimed consequential damages are not recoverable, and Gilbert could not establish proximate cause.

With the second issue, Gilbert argues that the trial court abused its discretion in the amount of attorney fees it awarded Wardley as prevailing party. The court should decline to address these arguments because Gilbert failed to marshal any evidence supporting the trial court's reasonableness findings. If the court chooses to address the arguments, it should reject them, especially to the extent they are pure legal challenges.

First, Gilbert argues that fees spent on temporarily unsuccessful arguments in a motion for summary judgment are per se unreasonable, even where, as here, the non-moving party later agrees to dismiss claims for the reasons articulated in the summary judgment papers. This court should not adopt the suggested per se rule.

Second, Gilbert argues that the contractual attorney fees provision contemplates St. George rates for attorney fees. Gilbert fails to mention that he took the opposite position when his Salt Lake City counsel's attorney fees were in play. This court should reject Gilbert's new position, which would prohibit St. George trial judges from finding it reasonable for St. George clients to hire Salt Lake City counsel with an expertise. If Salt Lake City rates are per se unreasonable, then St. George residents must forfeit the ability to hire counsel with the expertise their case requires or to recover their attorney fees.

Third, Gilbert argues that attorney fees incurred in transitioning counsel are per se unreasonable. In making this argument, Gilbert fails to identify which time entries he considers objectionable and, more important, fails to marshal any evidence in support of the court's reasonableness finding. Wardley provided evidence that its counsel discounted fees for transitioning counsel, which is sufficient support for the trial court's finding.

Fourth, Gilbert argues that attorney fees incurred in a single mock trial to prepare to defend against \$6 million in claims are per se unreasonable. Gilbert does not cite a single Utah case, or marshal any evidence, in advancing this argument. Moreover, Gilbert provides no support for his assertion that Wardley incurred \$45,669 in fees associated with the mock trial, an assertion the trial court expressly rejected after reviewing hundreds of time entries. In fact, most of the fees Wardley incurred were for things such as preparing exhibits and developing strategies that were also used at trial.

Finally, Gilbert argues that Wardley failed to apportion attorney fees incurred in defending tort claims, which Gilbert asserts are not recoverable under the contract. In the trial court, Gilbert asserted that he was entitled to all attorney fees under the same contract provision. (R. 1941.) And on appeal, Gilbert asserts that if this court reverses the fraudulent nondisclosure claim (a tort claim), then Wardley will no longer be the prevailing party for purposes of the attorney fees provision, a position that assumes that provision encompasses tort claims. (AOB at 36.) Gilbert cannot interpret the provision differently simply because he was not the prevailing party. Regardless, Wardley provided evidence that defense of the different claims is inseparable, something Gilbert's prior counsel acknowledged during trial.

For all of these reasons, this court should (i) affirm the trial court's dismissal of the fraudulent nondisclosure claim; (ii) affirm the trial court's finding that the amount of Wardley's attorney fees was reasonable; (iii) award Wardley its attorney fees on appeal as the prevailing party; and (iv) remand to permit the trial court to supplement the judgment against Gilbert with Wardley's reasonable attorney fees on appeal.

## Argument

The opening brief is remarkable for what it omits. Gilbert first contends that the trial court erred in entering partial directed verdict on his fraudulent nondisclosure claim. Gilbert does not mention that on the special verdict form the jury found that Gilbert did not impose a condition on the seller-financed transaction that Wright not be “involved,” the very condition Gilbert cites as supporting his fraudulent nondisclosure claim. Gilbert also does not disclose that the jury considered and rejected a breach of fiduciary duty claim involving the same duties and same factual allegations as the fraudulent nondisclosure claim. And Gilbert omits that the test for whether Wright’s “involvement” was material is an objective, not a subjective, test. Under the objective test, Wright’s “involvement” meant Wright was the buyer or obligor under the finance agreement, and, by the end of trial, Gilbert had conceded that Wright was neither. As demonstrated below, these considerations, and others, provide this court a number of reasons to affirm the trial court’s dismissal of Gilbert’s fraudulent nondisclosure claim.

Gilbert next contends that the amount of attorney fees awarded by the trial court was unreasonable. Gilbert omits, and therefore fails to marshal, any evidence in support of the trial court’s reasonableness finding. Gilbert also does not mention that he advances positions inconsistent with his previous positions. In the trial court, Gilbert asserted that all of his counsel’s fees were recoverable at Salt Lake City rates. The provision cannot mean something different simply because Gilbert did not prevail. As demonstrated below, the court should affirm the trial court’s award of attorney fees and award Wardley its attorney fees on appeal as the prevailing party.



**I. This Court Should Affirm the Trial Court’s Dismissal of Gilbert’s Fraudulent Nondisclosure Claim on a Number of Grounds**

This court can affirm the trial court’s dismissal of Gilbert’s fraudulent nondisclosure claim on a number of different grounds, which are set forth below.

**A. Any Error Concerning the Partial Directed Verdict Was Harmless Because the Same Elements and Facts Were Considered by the Jury When It Rejected the Breach of Fiduciary Duty Claim**

Even though the trial court entered partial directed verdict on the fraudulent nondisclosure claim, the jury nonetheless rejected an element of that claim when it found that Gilbert did not impose a condition on the seller-financed transaction that Wright could not be “involved.” (Addendum B.) That alleged condition is the factual predicate to all of Gilbert’s claims, including fraudulent nondisclosure. The elements of fraudulent nondisclosure include: “(1) that the nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate.” Yazd v. Woodside Homes Corp., 2006 UT 47, ¶ 10, 143 P.3d 283. Information about Wright’s involvement was not material, and the Wardley defendants thus had no duty to disclose it, if Gilbert never imposed the condition that Wright could not be involved in the seller-financed transaction. (AOB at 20.)

Acknowledging this, Gilbert stipulated to a special verdict form with the following dispositive question: “Do you find by a preponderance of evidence that [Gilbert] imposed, under the terms of any agreement, in sufficiently definite terms a condition that [Gilbert] would not seller-finance the sale of [the property] to anyone if Dave Wright . . . were involved in the transaction in any way, shape or form?” (R. 2204:281; 2206:19; 1890; Addendum B.) Because information concerning Wright’s “involvement” had to be a communicated condition of the transaction to support the fraudulent nondisclosure

claim, the jury rejected the fraudulent nondisclosure claim when it answered “no” to this question on the special verdict form.<sup>5</sup> (R. 1890.)

Moreover, the jury considered and rejected a breach of fiduciary duty claim that was duplicative of the fraudulent nondisclosure claim. Both claims involved the same duties and legal elements. To prove fraudulent nondisclosure, Gilbert had to establish by clear and convincing evidence that each defendant (i) had an intent to defraud, (ii) had a legal duty to communicate material information to Gilbert, (iii) had knowledge of that information, and (iv) failed to disclose that information to Gilbert. (AOB at 17.) To prove breach of fiduciary duty, Gilbert had to establish by a preponderance of the evidence that each defendant (i) had a duty to disclose material information to Gilbert and (ii) had knowledge of that information, and (iii) failed to disclose that information to Gilbert. Hermansen v. Tasulis, 2002 UT 52, ¶¶ 18-22, 48 P.3d 235.

Comparing the two causes of action, Gilbert had to prove every element of his fiduciary duty claim to prove part of his fraudulent nondisclosure claim. In the trial court, Gilbert’s counsel recognized the overlap, explaining that the failure to disclose Wright’s involvement “would certainly be a fraudulent omission, and it would certainly be a breach of fiduciary duty.”<sup>6</sup> (R. 2207:47, 111.) The two claims required Gilbert to

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<sup>5</sup> Whether Gilbert should have stipulated to this question as dispositive of his breach of fiduciary duty claim is another matter. Gilbert has not, and now cannot, challenge the dispositive nature for a tort claim. While a fiduciary duty is distinct from contractual duties, Hermansen v. Tasulis, 2002 UT 52, ¶¶ 11, 17, 48 P.3d 235, Gilbert repeatedly represented that all claims were based upon contractual duties so he could recover all of his attorney fees under the fee provision. (R. 1646-49; 1941; 2204:213, 341; 2207:47.)

On appeal, Gilbert represents that his fraudulent nondisclosure claim “arises from” a contractual duty when he argues that he could be the prevailing party under the fee provision if he prevails only on his fraudulent nondisclosure claim. (AOB at 36-37.)

<sup>6</sup> There is no question that the fiduciary duty claims were directed at all five Wardley defendants. (R. 1891-92.) Whether they should have been is a different matter.

establish the same duty, and that the same material information was known to, but not disclosed by, each Wardley defendant. Gilbert presented this case to the jury with its breach of fiduciary duty claim, and the jury rejected it. (R. 1842, 1871-74, 1890-92.)

For both reasons, the jury's verdict would not have differed had Gilbert presented the same issues in the packaging of "fraudulent nondisclosure." Where a jury's verdict would not have differed had partial directed verdict not been granted, this court affirms. Steffensen v. Smith's Mgmt. Corp., 820 P.2d 482, 490 (Utah Ct. App. 1991).

**B. Partial Directed Verdict Was Appropriate Because No Defendant Both Knew that Wright's Involvement Was Material and Knew of Wright's Involvement and No Defendant Acted with an Intent to Deceive**

Even ignoring that the jury effectively rejected the fraudulent nondisclosure claim, the trial court did not err in entering partial directed verdict. Under Utah law, fraud claims at the directed verdict stage still must be evaluated under the "clear and convincing evidence" standard. Berkeley Bank for Coops. v. Meibos, 607 P.2d 798 (Utah 1980). Gilbert failed to provide evidence from which a reasonable juror could find that (i) Wright's involvement in a seller-financed transaction (assuming there was involvement) was material; or (ii) any Wardley defendant knew that Wright was "involved" in the seller-financed transaction or acted with an intent to defraud.

At the outset, it is important to note that the only transaction at issue is the second, seller-financed transaction, not the first, cash deal that never occurred. This is important because Gilbert conceded that he would have sold the property to anyone, including Wright in a cash deal, so Wright's involvement in that deal is irrelevant. (R. 2201:72.) The seller-financed deal was negotiated on December 13, 1999, by Butterfield's counsel, not by Wright. (AOB at 7-8.) Any information concerning Wright's "involvement"

therefore must pertain to events after December 13, 1999, and prior to January 13, 2000, when the transaction closed. (AOB at 10.) The evidence about Wright cited in the opening brief concerns activities before December 13, 1999, and relates to the failed cash deal, not the subsequent seller-financed deal at issue here.

**1. The Only “Involvement” Material to the Transaction Would Have Been Wright’s Being a Buyer or Obligor, and It Is Undisputed That Wright Was Neither**

Gilbert’s fraudulent nondisclosure claim requires that information concerning Wright’s “involvement” in the seller-financed transaction be material. Under Utah law, information is material only if it is “something which a buyer or seller of ordinary intelligence and prudence would think to be of importance in determining whether to buy or sell.” Yazd v. Woodside Homes Corp., 2006 UT 47, ¶¶ 32-33, 143 P.3d 283 (emphasis added) (deleting “some” from the definition of “material”). “Importance,” in turn, is determined by “the degree to which the information could be expected to influence the judgment of a person buying property or assenting to a particular purchase price.” Id. at ¶ 34 (emphasis added). In other words, the test for whether information is material is an objective test asking what a “seller of ordinary intelligence and prudence would think,” not what the actual seller subjectively thought.<sup>7</sup>

Here, determining what level of Wright’s involvement would concern a seller of ordinary intelligence and prudence is especially important because Gilbert testified that he never clarified what he meant by the term “involved,” so how Wright’s “involvement”

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<sup>7</sup> That objective understanding of “involved” governs in this case for the additional reasons that (i) Gilbert never clarified that he was using “involved” in a very broad idiosyncratic sense; and (ii) the jury rejected the notion that Gilbert imposed that broad sense of “involved” on the seller-financed transaction. (R. 1890; 2200:160.)

would be understood by a reasonable person is the only relevant test. (R. 2200:160.) Applying the objective test for materiality, any prohibition on Wright's involvement would be material, if at all, only to the extent it meant that Wright could not be the buyer or obligor under the seller-finance agreement. Throughout this lawsuit and during opening statements, Gilbert's theory was that the Wardley defendants failed to disclose that Wright was the "real" buyer and obligor and Butterfield was a "straw buyer." (R. 2200:12.) Gilbert was forced to concede during his testimony, however, that only Butterfield purchased the property and only Butterfield was obligated under the finance agreement. (R. 2200:160; 2001:76-84, 98, 133.) Therefore, by the time of closing arguments Gilbert had abandoned his theory that Wright was the "real" buyer and obligor. (R. 2206:13-16.) This concession is important because if "involvement" means Wright is the real buyer or obligor, then there was no information that Wright was the real buyer or obligor for any Wardley defendant to have disclosed.

In fact, even Wright's being the "real" buyer would not have been a concern for Gilbert, as Gilbert testified that in a cash transaction—like the first, failed transaction—Gilbert would have sold the property to Wright. (R. 2201:72.) Therefore, the only issue was the seller financing, which suggests that the only issue was Butterfield's ability to repay Gilbert. Yet Gilbert testified that he performed no due diligence on the seller-financed deal because he was "getting half a million dollars down," which was "[p]retty good insurance." (R. 2001:108, 107.) Gilbert explained that due diligence on Butterfield was unnecessary because Gilbert received \$500,000 by the time of closing and retained the right to foreclose on the property, which he eventually did. As Gilbert explained, "if Butterfield's a deadbeat and defaults, I get to keep the money he's paid me down, and I

repossess the property.” (R. 2001:107-10.) Thus, the financial condition of the buyer and obligor were of no concern to Gilbert and would not have been of concern to any reasonable seller who received a \$500,000 down payment. Other than Butterfield’s ability to repay the seller financing, it is difficult to discern any reason for Gilbert, or any seller in his position, to be concerned about Wright’s “involvement,” even if Wright were the buyer or obligor, let alone if Wright were involved in some more attenuated sense.

For all of these reasons, under Utah law the only arguably material information concerning Wright’s “involvement” would have been information that Wright was the real buyer or obligor, but it is undisputed that Wright was neither the real buyer nor the real obligor. Gilbert therefore could not prove that information concerning Wright’s involvement in the seller-financed transaction was material, which is fatal to his fraudulent nondisclosure claim. The trial court properly dismissed it.

## **2. Wright Was Not Involved in the Seller-Financed Transaction or the Wardley Defendants Knew Nothing About His Involvement**

Even if Gilbert’s broad idiosyncratic use of the term “involved” that included Wright’s stepping foot on the property or pulling weeds on the property was legally relevant,<sup>8</sup> at best there is evidence Gilbert communicated that condition to only one Wardley defendant, LoCicero.<sup>9</sup> Gilbert concedes in the opening brief, however, that the only information LoCicero possessed concerning Wright was told to LoCicero by Gilbert himself. (AOB at 28.) LoCicero did not need to tell Gilbert what he already knew. The

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<sup>8</sup> Gilbert did not understand the term so broadly except in hindsight. When Gilbert learned Wright had been “involved”—Wright called Gilbert on behalf of Butterfield—Gilbert did not file any claims against Wardley or call a Wardley agent to complain. (R. 2001:163-65.) Only after the bankruptcy did Gilbert complain. (R. 2201:166.)

<sup>9</sup> It appears that Wright may have understood that Gilbert subjectively used “involved” in the broadest possible sense as well, but Wright is not a defendant. (R. 2202:230-33.)

most Gilbert can say is that the jury may have concluded LoCicero was lying, but Gilbert provides no evidence by which the jury could have reached that conclusion. (AOB at 28.) Therefore, while LoCicero arguably understood that Gilbert did not want Wright to be involved in “any way, shape, or form,” LoCicero had no information that Wright was involved in any way, shape, or form.<sup>10</sup> (R. 2202:142-43, 148, 150, 176-77, 182, 186.)

As for Grymes, Riddle, and Melling, Gilbert never clarified for them what he meant by the term “involved,” leaving them to understand it, quite reasonably, to mean that Wright could not be “the person on the other end of the deal.” (R. 2202:19, 40, 123, 176, 154-56.) Moreover, the only Wardley defendants who dealt with Wright—Riddle and Melling—had no dealings with Wright during the seller-financed transaction. (R. 2202:38, 70.) The evidence that anyone was aware of Wright’s “involvement” stems from the first transaction, which is not at issue here. Butterfield hired counsel to represent him in negotiating the seller-financed transaction, and thereafter the Wardley defendants learned nothing concerning Wright’s “involvement” in that deal.

The evidence Gilbert sets forth in the opening brief proves this point. Although Grymes testified that he had no recollection of Gilbert’s conversation, if Gilbert is to be believed, then Grymes was aware that (i) Wright knew Butterfield, (ii) Wright provided documents to Butterfield, and (iii) Mobile Mansions had demanded the earnest money from the previous transaction that is not at issue in this case. (AOB at 30.) As a limited agent, Grymes’s duty was to disclose information that “would be a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill

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<sup>10</sup> Gilbert argues LoCicero had a duty to investigate the rumor Wright was involved; however, even if correct, LoCicero’s co-agent, Fuller, did investigate. (AOB at 10, 29.)

their obligations.” Utah Admin. Code R162-6.2.15.3.1(c). Wright’s being acquainted with Butterfield or his information courier does not impact Butterfield’s ability to fulfill obligations, especially in a seller-financed transaction with a \$500,000 down payment.

Gilbert cites evidence that Melling was aware that (i) Wright couriered information to Butterfield, (ii) Butterfield did business with Wright, and (iii) Gilbert had a concern over Wright’s company, Capital Housing, being “involved.” (AOB at 32.) Gilbert then cites evidence that Riddle was aware that in the previous transaction (i) Wright had couriered information to Butterfield, (ii) Wright communicated how to negotiate, and (iii) Wright was going to be “in charge” of any future development project. (AOB at 34-35.) Melling and Riddle, as Butterfield’s agents, had a duty to be “honest, ethical, and competent.” Hermansen, 2002 UT 52, ¶ 22. As Gilbert recognized in the opening brief, Utah case law applies this duty only to disclosing material defects in the property, not information about the agent’s client with regard to financing. (AOB at 23.) Thus, Melling and Riddle had no unfulfilled duties, even if they had known Wright was somehow “involved” in the seller-financed transaction, which they did not.

In short, there is no evidence that any Wardley defendant had any information concerning Wright’s “involvement” in the seller-financed transaction. Moreover, as the trial court noted, no reasonable juror could have found there was clear and convincing evidence that any Wardley defendant acted with intent to defraud, an essential element of the fraudulent nondisclosure claim. (R. 2203:228-29.) Here, there was nothing clear or convincing about what Gilbert told the Wardley defendants, what the Wardley defendants knew about Wright’s involvement in the seller-financed transaction, or, most important, whether the Wardley defendants intended to defraud anyone. This court should affirm.



**C. Dismissal Was Appropriate Because Gilbert Suffered No Damages**

The trial court could have dismissed the fraudulent nondisclosure claim on the alternative ground that Gilbert suffered no damages. Damages cannot place a plaintiff in a better position than had the defendants acted just as the plaintiff contends. Mahmood v. Ross, 1999 UT 104, ¶ 31, 990 P.2d 933; Ford v. American Express Fin. Advisors, Inc., 2004 UT 70, ¶ 37, 98 P.3d 15. Gilbert does not seek to affirm the seller-finance agreement, and instead states that he would not have entered into the seller-financed transaction had he known about Wright’s “involvement.” (AOB at 9, 24.) Thus, assuming Gilbert could otherwise prove fraudulent nondisclosure, Gilbert could recover only those damages that would put Gilbert in the position he would have been in had the seller-financed transaction with Butterfield never taken place.

For this reason, Gilbert could not have recovered damages for the following claimed losses: (i) interest or late payments or remaining payments from Butterfield under the purchase contract; (ii) past property taxes paid after Gilbert repossessed the property; and (iii) maintenance of the property. At most, Gilbert would not have incurred the “nearly \$600,000 in legal fees” in defending against a California bankruptcy trustee’s complaint against Gilbert. (AOB at 12.) But if Gilbert had not sold the property to Butterfield, he also could not have kept the \$638,608.05 that Butterfield paid him. Gilbert therefore benefited from any nondisclosure.

**D. Partial Directed Verdict Was Appropriate Because Gilbert’s Consequential Damages Were Not Reasonably Foreseeable and Wardley Was Not the Proximate Cause of Gilbert’s Claimed Losses**

Apart from profiting from any nondisclosure, Gilbert could not have recovered consequential damages of the “nearly \$600,000” he spent on attorney fees in bankruptcy

proceedings because those fees were not the reasonably foreseeable result of any nondisclosure of Wright's "involvement." To recover consequential damages, a plaintiff must present evidence that the damages were reasonably foreseeable. "[T]he only damages recoverable are those that could be reasonably foreseen and anticipated by the parties at the time the contract was entered into. Mere knowledge of possible harm is not enough." Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979).

Here, after the sale of the property on January 13, 2000, Butterfield made six payments through February 2, 2001. (R. 1196.) On February 28, 2001, Mobile Mansions (a company owned by Butterfield) filed bankruptcy. (R. 1198; 2203:12.) On June 8, 2001, Butterfield filed bankruptcy. (R. 1198.) On February 27, 2002, counsel for the trustee in the Mobile Mansions' bankruptcy filed a complaint against Gilbert clouding title to the property and seeking the return of the money Butterfield had paid Gilbert. (R. 1201.) Gilbert characterized these claims as "frivolous" and contends that he spent "nearly \$600,000" defending against them. (AOB at 12.) Frivolous claims filed by a California bankruptcy trustee more than two years later are not the reasonably foreseeable result of Wright being "involved" in the seller-financed transaction, especially where the reason for Butterfield's bankruptcy was his divorce, gambling problems, and lines of credit in his flooring business being called due. (R. 2202:250-71.) Thus, Gilbert could not have recovered the "nearly \$600,000" in attorney fees.

For similar reasons, a reasonable juror could not have found proximate cause. Under Utah law, Gilbert had to prove not only "but for" causation, but also proximate causation. Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah Ct. App. 1996) (fiduciary duty claim requires proof of actual and proximate cause); Crookston v. Fire

Ins. Exch., 817 P.2d 789 (Utah 1991) (fraud requires proof of proximate cause).

“Proximate cause is that cause which, in the natural and continuous sequence (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred.” Mahmood v. Ross, 1999 UT 104, ¶ 22, 990 P.2d 933.

For reasons just discussed, Gilbert’s incurring fees in defending against the trustee’s frivolous claims in the California bankruptcy was not the “natural” consequence of Wright’s involvement with Butterfield. Weber v. Springville City, 725 P.2d 1360 (Utah 1986) (“A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture . . . it becomes the duty of the court to direct a verdict for the defendant.”). For this additional reason, Gilbert’s fraudulent nondisclosure claim would have failed as a matter of law. This court should affirm the dismissal of Gilbert’s fraudulent nondisclosure claim.

## **II. The Trial Court Did Not Abuse Its Discretion in the Amount of Attorney Fees It Awarded the Wardley Defendants**

This court should also affirm the trial court’s finding that the amount of attorney fees it awarded the Wardley defendants was reasonable. Under Utah law, trial courts have considerable discretion in determining whether attorney fees are reasonable, and appellate courts will reverse a reasonableness finding only where there has been “a clear abuse of discretion.” Dixie State Bank v. Bracken, 764 P.2d 985, 988-89 (Utah 1988). Here, the trial court did not abuse its considerable discretion in awarding the Wardley defendants \$397,911 in attorney fees under the contractual attorney fee provision.<sup>11</sup>

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<sup>11</sup> The attorney fee provision provides: “[I]n case of the employment of an attorney in any matter arising out of this Listing Agreement, the prevailing party shall be entitled to receive from the other party all costs and attorney fees, whether the matter is resolved through court action or otherwise.” (R. 2095.)

The Wardley defendants agreed to waive conflicts and share counsel, which saved hundreds of thousands of dollars in attorney fees.<sup>12</sup> Even so, the Wardley defendants did not submit all attorney fees they incurred (R. 1996), and the trial court did not award the Wardley defendants all attorney fees they submitted. (R. 2162.)

Gilbert nonetheless challenges the amount of the award. Tellingly, Gilbert did not submit his attorneys' bills to compare with the Wardley defendants' bills. By May of 2006—two years before trial—Gilbert had paid Ray, Quinney & Nebeker \$275,150, a figure that does not include the claimed fees of Gilbert's in-house counsel. (R. 1941.) In contrast, the attorney fees award was only \$122,761 more than Gilbert's figure after (i) two more years of litigation, (ii) a six-day trial, and (iii) briefing post-trial motions. (R. 2164.) Unsurprisingly, the trial court found it “entirely relevant to observe that, nearly two years before trial, [Gilbert] had already incurred fees equal to 69% of [the Wardley defendants'] fees for the entire litigation through the jury trial.” (R. 2158.)

Moreover, the context of this case is sufficient to demonstrate that the trial court's attorney fees award of \$397,911 was reasonable. Gilbert was a well-financed and relentless plaintiff, with experienced in-house counsel and the Salt Lake City office of Ray, Quinney & Nebeker prosecuting 11 separate claims and seeking more than \$6 million in damages. Had Gilbert succeeded, each of the Wardley defendants would have faced financial ruin. Fortunately, the Wardley defendants had counsel who carefully, thoroughly, and efficiently prepared a defense and prevailed at trial. For reasons set forth in more detail below, this court should affirm the trial court's reasonableness finding.

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<sup>12</sup> Gilbert did not challenge in the trial court that all 5 Wardley defendants were entitled to recover fees under the provision. (R. 2153.)

**A. This Court Should Refuse to Consider Gilbert’s Challenge Because He Failed to Marshal Evidence in Support of the Reasonableness Finding**

Gilbert failed to marshal evidence in support of the trial court’s findings. Under Utah law, a party challenging a trial court finding must marshal evidence in support of that finding. Utah R. App. P. 24(a)(9). As this court has explained, the marshaling requirement applies when a party is challenging a trial court’s finding that attorney fees are reasonable. Kraatz v. Heritage Imports, 2003 UT App 201, ¶ 60, 71 P.3d 188.

And when a party fails to marshal evidence in challenging the reasonableness of an attorney fees award, this court may decline to address the argument. Kealamakia, Inc. v. Kealamakia, 2009 UT App 148, ¶ 8, 213 P.3d 13. Because Gilbert failed to marshal any evidence in support of the trial court’s reasonableness finding, this court should refuse to consider his various challenges to the trial court’s reasonableness finding.

**B. The Trial Court Found, Based Upon Substantial Evidence, That the Fees award Was Reasonable Under the Dixie State Factors**

Had Gilbert marshaled the evidence in support of the trial court’s findings, it would have revealed ample evidence to support those findings. In determining the amount of an attorney fees award, trial courts consider the following non-exhaustive list of factors: “the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.” Dixie State Bank v. Bracken, 764 P.2d 985, 989 (Utah 1988). Here, the Gilbert defendants provided sufficient evidence to support the attorney fees award under each of these factors.

There was evidence this litigation was difficult. Russell Mitchell with Jones Waldo and Matthew Lalli with Snell & Wilmer both submitted affidavits in support of the attorney fees request, and both testified that the “legal issues in the case were novel and very difficult” and that the “factual issues were relatively complex and required a great deal of work to conduct and assimilate necessary discovery [and in] consultation with various experts.” (R. 1993, 1951.) The trial court found this case to be “somewhat unusual in its factual and legal complexity.” (R. 2161.)

There was evidence the Wardley defendants’ attorneys were efficient. The Wardley defendants were jointly represented, and, unlike Gilbert’s counsel, the Wardley defendants had only one attorney attend depositions in this case. (R. 2097.) Moreover, Mr. Lalli testified that because there was some turnover in representation—including some turnover within the firm—Snell & Wilmer had “discounted its rates and wrote off some time that was necessary to ramp up for trial.” (R. 1996.) In addition, Mr. Lalli testified that attorneys with specialized knowledge were used at times “to maximize efficiency.” (R. 1996.) The trial court found counsel for the Wardley defendants to be efficient, especially considering that Gilbert’s counsel had “incurred fees equal to 69% of [the Wardley defendants’] fees for the entire litigation through the jury trial.” (R. 2158.)

There was evidence that the number of hours spent was reasonable. The Wardley defendants submitted scores of pages of bills that detail what each attorney did during the time billed, and both Mr. Lalli and Mr. Mitchell testified that the hours submitted were reasonable. (R. 1951, 1993.) As Mr. Lalli also explained, because Mr. Gilbert’s counsel was “well prepared and professional,” the Wardley defendants’ counsel had to pay extra attention to detail in this case. (R. 1994.) The trial court found that the work performed

by counsel for the Wardley defendants “was reasonably necessary to present a completely successful defense against [Gilbert’s] several claims.” (R. 2161.)

There was evidence that the fee was customary. Mr. Mitchell and Mr. Lalli both testified that the hours devoted by attorneys in their firms and the hourly rates they charged were “reasonable in the community for comparable legal services.” (R. 1951, 1993.) The trial court found that Washington County is neither “isolated from the rest of Utah” nor “more economically distressed than the rest of Utah,” and that its residents typically “purchase goods and services” outside their county, and, therefore, it made no sense to treat the county as an isolated “locality” for purposes of attorney services in a complex case such as this. (R. 2160.) The court also found that Salt Lake City rates were reasonable given the complexity of this case. (R. 2160-61.)

There was evidence that the amount at issue and ultimate result supported the trial court’s award. Mr. Mitchell and Mr. Lalli both testified that the fees were reasonable given the (i) amount of damages sought, more than \$6 million; and (ii) the result in the case, a complete victory for the Wardley defendants. (R. 1952, 1994.) The trial court also found that counsel for the Wardley defendants presented “a completely successful defense against [Gilbert’s] several claims,” with which Gilbert “sought judgment of more than \$6,000,000 against [the Wardley defendants].” (R. 2152, 2161.)

Finally, there was evidence that the experience and expertise of the attorneys justified the trial court’s award. Mr. Lalli detailed the level of experience of each person who worked on the case, and testified about his own experience of “trying large commercial cases.” (R. 1991-96.) The trial court found the work done by counsel for the Wardley defendants to be “exemplary” and specifically noted that the Wardley

defendants’ “lead attorney, Mr. Lalli, was especially well prepared, professional, skillful, expert, and effective in this case.” (R. 2161.)

Based upon that evidence—as well as more evidence detailed in the extensive billing records that the trial court reviewed—the trial court found that nearly all of the attorney fees requested by the Wardley defendants were reasonable and awarded \$397,911. (R. 2162.) It is difficult to understand what is deficient in this evidence, which Gilbert failed to marshal, or the court’s findings. At the very least, the trial court’s attorney fees award was not a “clear abuse of discretion.” Dixie State Bank v. Bracken, 764 P.2d 985, 988-89 (Utah 1988). This court should affirm the attorney fees award.

**C. If This Court Addresses the Individual Challenges to the Attorney Fees Award, This Court Should Reject Each**

If the court reaches each of Gilbert’s various sub-arguments, it should reject them. As an initial matter, this court should reject the sub-arguments because with them Gilbert advances an interpretation of the attorney fee provision he previously rejected.

The attorney fees provision provides: “[I]n case of the employment of an attorney in any matter arising out of this Listing Agreement, the prevailing party shall be entitled to receive from the other party all costs and attorney fees, whether the matter is resolved through court action or otherwise.” (R. 2095 (emphasis added).) In the trial court, Gilbert interpreted this language as sanctioning his recovery of all fees charged by his Salt Lake City law firm, without regard to whether the actions taken by that law firm were individually successful or particularly efficient. As Gilbert testified, “[w]e’re going to claim all attorney fees that have been expended on this lawsuit.” (R. 2110.) Gilbert explained that “the documents and contracts I signed said that I’m entitled to all actual



costs and all actual attorney fees. So if they've been expended on the case, then my understanding is I'm entitled to them." (R. 2110.) Gilbert then acted in accordance with this interpretation in his second supplemental Rule 26(a) disclosures, in which he sought all attorney fees billed by Ray, Quinney & Nebeker and his in-house counsel. (R. 1941.)

Under Utah law, when a party claims entitlement to attorney fees under a contractual provision, the other party is entitled to fees under that provision regardless of whether the first party was correct that the provision sanctioned the fees award. Hooban v. Unicity Int'l, Inc., 2009 UT App 287, ¶ 9, 220 P.3d 485 (citing Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041); see also Rothey v. Walker Bank & Trust Co., 754 P.2d 1222, 1224 (Utah 1988) (estoppel generally applies to claims for attorney fees). To prevent a party from taking such inconsistent positions, some courts apply judicial estoppel<sup>13</sup> and other courts apply equitable estoppel.<sup>14</sup> To the same end, this court could consider the actions of Gilbert in interpreting the attorney fees provision as relevant and construe the provision as sanctioning an award of all costs and attorney fees incurred by the Wardley defendants. Valley Mortuary v. Fairbanks, 119 Utah 204, 228, 225 P.2d 739 (1950) (subsequent actions of the parties to a contract provision are relevant to its interpretation). Regardless of legal packaging, Gilbert should not be permitted to interpret the provision in a manner he previously rejected simply because he did not prevail at trial. Even ignoring this global problem, however, each argument fails.

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<sup>13</sup> International Billing Servs., Inc. v. Emigh, 84 Cal. App. 4th 1175 (Cal. Ct. App. 2000) (non-prevailing party judicially estopped from changing positions re fee provision).

<sup>14</sup> Hammann v. Falls/Pinnacle, LLC, Nos. A07-0515, A07-1252, 2008 Minn. App. Unpub. LEXIS 351 (Minn. Ct. App. Apr. 8, 2008) (non-prevailing party equitably estopped from changing positions re the fees provision).

**1. Trial Courts Have Discretion to Award Attorney Fees Incurred in Preparing Arguments for Motion Papers Where the Motion Is Denied but the Arguments Are Ultimately Successful**

Gilbert's first sub-argument is that the trial court abused its discretion in awarding the Wardley defendants \$54,407.50 for fees incurred in preparing a motion for summary judgment that was denied. (AOB at 39-41.) While Gilbert cites cases that indicate fees incurred in preparing unsuccessful motions are not part of a prevailing party's successful efforts, none of these cases adopt the per se rule Gilbert invites this court to adopt.

The two cases Gilbert cites are Cache County v. Beus, 2005 UT App 503, 128 P.3d 63, and ProMax Development Corporation v. Raile, 2000 UT 4, 998 P.2d 254. (AOB at 39-41.) ProMax states, without discussion, that the court was declining to award Raile "fees in pursuing their unsuccessful motion to dismiss this appeal." ProMax, 2000 UT 4, ¶32. ProMax says nothing about whether the arguments in the motion to dismiss were related to the later successful effort on appeal.

Beus provides a discussion and states that only fees "attributable to the successful vindication of contractual rights" should be recovered, but Beus reverses the award of fees incurred in preparing an unsuccessful summary judgment motion because "nothing since then has changed the propriety of that ruling." Beus, 2005 UT App 503, ¶ 17. In contrast, here something did happen after the denial of Wardley's motion for summary judgment that "changed the propriety of that ruling." Wardley moved for summary judgment on the following grounds: (i) Gilbert could not prove proximate cause, and is not entitled to consequential damages, because Gilbert's claimed losses were not reasonably foreseeable; and (ii) Gilbert's claims of "collusive tort" and "aiding and

abetting fraud” are not recognized under Utah law. (R. 1125-28.) In denying the motion, the trial court stated that Wardley’s arguments were “strong.” (R. 1625-27.)

The arguments were apparently strong enough that, just before trial, the trial court questioned whether collusive tort or aiding and abetting fraud are recognized under Utah law. (R. 1125-28; 2207:48-49, 87.) And the trial court’s articulation of the arguments in Wardley’s motion papers was apparently persuasive enough that Gilbert voluntarily dismissed his claims for collusive tort and aiding and abetting fraud. (R. 2207:48-49, 87.) Moreover, this court can judge for itself whether Wardley’s proximate-cause arguments should have prevailed. These subsequent developments “changed the propriety” of the ruling.<sup>15</sup>

Regardless, this court should not adopt a rule that trial courts can never find time spent preparing unsuccessful motions contributes to a successful vindication of rights. As the trial court noted, unsuccessful motions for summary judgment can have a number of benefits, including (i) producing important evidence; (ii) testing a party’s understanding of legal issues and command of the facts; and (iii) revealing new facts valuable for negotiation and trial. (R. 2156.) Here, the trial court did not mindlessly award the Wardley defendants their fees. Instead, the court carefully considered the evidence and found: “Having heard the summary judgment motion as well as having conducted the jury trial of this case, and having studied summary judgment practice for

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<sup>15</sup> Alternatively, Gilbert argues that the amount of attorney fees Jones Waldo incurred on the motion was unreasonable. (AOB at 40-41.) This argument does not appear in Gilbert’s opposition to the request for attorney fees, and therefore, is not preserved for appeal. (R. 2074-75.) In fact, in the trial court Gilbert stated that it was “impossible to tell” whether work performed by Jones Waldo was duplicative. (R. 2079.)

nearly three decades, this Court finds both Defendants' motion and the time spent by their counsel on the motion to be reasonable in a case of this magnitude." (R. 2156.)

This finding was not "a clear abuse of discretion." Dixie State Bank, 764 P.2d at 988-89. If this court addresses Gilbert's challenge to the trial court's award of attorney fees related to the motion for summary judgment, the court should reject the challenge.

**2. St. George Trial Courts Have Discretion to Award Fees at Salt Lake City Rates in Sufficiently Complex Cases**

Gilbert next argues that the Wardley defendants could not recover any attorney fees at Salt Lake City rates. (AOB at 41-45.) To make this argument, Gilbert assumes that "locality" means St. George for any case in which the trial is held in St. George. Gilbert concedes, as he must, however, that Utah appellate courts have not adopted a rule that, as a matter of law, only St. George rates may be awarded for a case in St. George. (AOB at 42.) This court should not adopt that per se rule here, especially since, as the trial court found, the rates charged by counsel for the Wardley defendants "were specifically discounted for this action." (R. 2159.)

Utah courts have not addressed how "locality" is to be determined in awarding attorney fees. This court should adopt the view that "locality" refers to the location of the court, except when, as here, the complexity of the case warrants counsel from outside that specific location. Gilbert originally believed Salt Lake County should be the location of this lawsuit, as he filed his complaint in Salt Lake County. And all parties concluded that the complexity of the case warranted counsel from Salt Lake City because Gilbert and each Wardley defendant (as well as many other original defendants) retained Salt Lake City law firms. On appeal, all parties again are using Salt Lake City law firms, as Gilbert

has now retained the Salt Lake City office of Stoel Rives. At the very least, a contracting party should be permitted to hire counsel equivalent to counsel hired by the other party without forfeiting the right to recover a portion of its attorney fees.

The trial court interpreted “locality” to be “the general geographic area in which a party litigating . . . might reasonably look for litigation counsel.” (R. 2160.) Of course, the more complex the case, the more reasonable it will be to seek counsel from outside the city in which the court is located. As the trial court noted, this case was “unusual in its factual and legal complexity,” and the legal work performed by all attorneys was “exemplary.” (R. 2161.) After “[h]aving reviewed all the information provided by the parties,” the trial court found “no reason to believe that the rates charged by Defendants’ attorneys were unreasonable.” (R. 2161.)

The approach of the trial court is consistent with that of courts in other jurisdictions. As the First Circuit explained, “Where it is unreasonable to select a higher priced outside attorney—as, for example, in an ordinary case requiring no specialized abilities not amply reflected among local lawyers—the local rate is the appropriate yardstick.” Maceira v. Pagan, 698 F.2d 38, 40 (1st Cir. 1983). However, “if the client needs to go to a different city to find that specialist, he will expect to pay the rate prevailing in that city. In such a case, there is no basis for concluding that the specialist’s ordinary rate is unreasonably high.” Id. In Pagan, the court approved of awarding Detroit rates for a case tried in Puerto Rico. Id.

For similar reasons, in a case in which both parties retained counsel from Portland, the Oregon Court of Appeals approved an award at Portland rates, which were up to \$129 more per hour than rates in southern Oregon where the trial was held. Hanna Ltd. P’ship

v. Windmill Inns of Am., Inc., 194 P.3d 874, 882 (Or. Ct. App. 2008). A Washington court similarly declined to limit “locality” to anything other than the entire Puget Sound area. Hudson Co. v. Ryffel, No. 37403-0-II, 2009 Wash. App. LEXIS 2155, ¶¶ 24-25 (Wash. Ct. App. Aug. 25, 2009). And courts in New Jersey and Ohio have gone so far as to define “locality” to mean the location of counsel’s office, even holding that it was an abuse of discretion to limit locality to where the trial was held. Village of W. Unity ex rel. Beltz v. Merillat, 861 N.E.2d 902 (Ohio Ct. App. 2006); In re Trust of Brown, 517 A.2d 893, 903 (N.J. Super. Ct. Law Div. 1986).

The reasoning of the trial court here, and courts in other jurisdictions, in rejecting the per se rule advanced by Gilbert is persuasive. This court should not prohibit St. George trial judges from finding it reasonable for St. George clients to hire Salt Lake City counsel with a particular expertise in complex cases. If Salt Lake City rates were per se unreasonable, then, in sufficiently complex cases, St. George clients must forfeit either their ability to recover attorney fees or their right to hire counsel with the expertise their case requires. At the very least, clients should be able to recover fees at rates in the “locality” from which the other party’s attorneys practice, here Salt Lake City. If the court addresses Gilbert’s challenge to the rates charged by the Wardley defendants’ counsel, the court should reject that challenge.

### **3. Fees Incurred When New Counsel Discusses Issues with Prior Counsel Are Not Per Se Unreasonable**

This court also should reject Gilbert’s challenge to unspecified time entries concerning the transition of counsel. In the trial court, Gilbert acknowledged that the evidence provided by the Wardley defendants showed “that they are not making a claim

for time spent by their former counsel ‘on transition related items.’” (R. 2155.) Thus, only Snell & Wilmer’s fees are at issue. And the issue is not whether duplicative work occurred during transition of counsel, but whether the time submitted was duplicative.

In the trial court, Gilbert stated that he could not refute the affidavits provided by the Wardley defendants stating that the fees were reasonably incurred because the time entries reveal no duplicative time entries. (R. 2079.) In light of Gilbert’s conceded inability to call into question the Wardley defendants’ fees, he invited the trial court to “use its best judgment and reduce the fees accordingly.” (R. 2079.) The trial court reviewed the billing records, and used its best judgment to find the “records and explanations to be sufficient to overcome speculation” that the Wardley defendants must be including some “duplication of work.” (R. 2155.)

On appeal, Gilbert merely repeats his inability to show that any work was duplicative and asks this court to impose upon the Wardley defendants the burden of proving a negative: “The Wardley Defendants presented no evidence that the time spent by their current and prior firms was for anything other than transition between two firms.” (AOB at 46.) The Wardley defendants provided evidence that they wrote off time and discounted rates due to “turnover in representation,” including turnover within the law firm. (R. 1996.) The Wardley defendants also provided evidence that all fees submitted were reasonably incurred, i.e., not duplicative, evidence the trial court apparently found persuasive in light of the pages of time entries it reviewed. (R. 1993.)

In response, Gilbert asserts that pages 2020 to 2022 of the record reveal that Wardley’s “attorneys spent approximately \$2,632.50 on issue related to the transition.” (AOB at 46.) Without specifying which time entries are objectionable, it is unclear

which of the 56 time entries totaling more than \$12,000 require further explanation in Gilbert's view. (R. 2020-22.) And without more specificity, it is difficult to demonstrate that the entries were not duplicative of anything Jones Waldo billed.

Gilbert also complains about time entries related to the bankruptcy proceedings in California but fails to mention that the depositions in those bankruptcy proceedings were used in this case, and therefore, despite Gilbert's assertion to the contrary, "time spent on the bankruptcy litigation is compensable." (AOB at 46.) This court should reject Gilbert's challenge to the fees he speculates were duplicative.

**4. Conducting a Single Mock Trial in Preparing for Trial in a Multi-Million Dollar Lawsuit Is Not Per Se Unreasonable**

This court also should reject Gilbert's challenge to fees incurred in conducting a single mock trial. The trial court found the mock trial to be "a reasonable investment of time" in a complex case with more than \$6 million at issue and something that "clearly aided in [defendants'] preparation for the long, difficult jury trial." (R. 2157.) The court also found, "[t]he unusual high intensity of the conflict between the parties and the large amount in controversy justified—even necessitated—more than usual trial preparation." (R. 2157.) The trial court did not abuse its discretion.

Gilbert asserts the Wardley defendants "requested, and the trial court awarded, \$45,669.00 in fees for a 'mock trial.'" (AOB at 47.) The opening brief does not mention that the trial court specifically rejected Gilbert's \$45,669 figure as "clearly incorrect, since many time entries which mention 'mock trial' also mention work unrelated to the mock trial." (R. 2157.) Moreover, some entries for the mock trial describe work used for trial. Gilbert does not attempt to correct that problem identified by the trial court.



Gilbert argues that the trial court had insufficient evidence to conclude the mock trial was a reasonable expense. Since Gilbert failed to marshal evidence, Wardley interprets Gilbert's argument as advocating a rule of law—fees incurred for mock trials are per se unrecoverable. This court should reject the rule. Courts routinely award fees related to mock trials that “confer a benefit to the prevailing party by helping to produce a favorable result.” City of Shreveport v. Chanse Gas Corp., 794 So. 2d 962, 979 (La. Ct. App. 2001).<sup>16</sup> Mock trials can “prepare even the most experienced litigators for trials and oral arguments. . . . Such time is appropriately billed to clients.” Moon v. Gab Kwon, No. 99 Civ. 11810 (GEL), 2002 WL 31512816, at \*6 (S.D.N.Y. Nov. 8, 2002). “[T]ime spent rehearsing oral advocacy, i.e., ‘moot court,’ may be compensated as long as the time requested is not ‘excessive.’” Flying J Inc. v. Comdata Network, Inc., No. 1:96-cv-066BSJ, 2007 WL 3550342, at \*22 (D. Utah Nov. 15, 2007).

Here, the time spent on the mock trial was not excessive, especially considering the dire consequences for the Wardley defendants and that the time preparing for the mock trial was simultaneously used to prepare for trial. There is no reason for this court to adopt a per se rule that trial courts cannot consider the complexity of the case it just presided over and find that fees associated with a single mock trial were reasonable. This court should reject Gilbert's challenge concerning the mock trial fees.

##### **5. The Record Shows That Time Spent Defending Contract Claims Also Defended Tort Claims**

This court also should reject Gilbert's challenge concerning the allocation of fees between tort and contract claims. Gilbert claims in the opening brief that if he succeeds

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<sup>16</sup> United Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990); Charles v. Daley, 846 F.2d 1057, 1076-77 (7th Cir. 1988).

in resurrecting his fraudulent nondisclosure claim, he could become the “prevailing party” for purposes of attorney fees. (AOB at 35-37.) To be correct, the fraudulent nondisclosure claim must be encompassed by the attorney fee provision, which, by its own terms, applies “in any matter arising out of this Listing Agreement.”<sup>17</sup> (R. 2095.) If fraudulent nondisclosure arises out of the listing agreement, then there is no need to allocate between tort and contract claims and, more important, the argument that the jury, in fact, rejected the fraudulent nondisclosure claim with its answers on the special verdict form becomes more straightforward and compelling.

Assuming fees incurred in defending tort claims are unrecoverable, Gilbert’s argument still fails. Under Utah law, “where the proof of a compensable claim and otherwise non-compensable claim are closely related and require proof of the same facts, a successful party is entitled to recover its fees incurred in proving all of the related facts.” Brown v. David K. Richards & Co., 1999 UT App 109, ¶ 20, 978 P.2d 470. Where such issues are intertwined, a court may award the full amount of attorney fees to the prevailing party, even where the party does not separate time that does not pertain to the contract claims. Sprouse v. Jager, 806 P.2d 219, 226 (Utah Ct. App. 1991).

Mr. Mitchell and Mr. Lalli testified that “[a]lthough there were contractual and non-contractual claims at issue, the evidence rebutting all such claims was necessary to defend against the contractual claims.” (R. 1952; 1994.) And based upon that testimony, and having presided over the case and observed the overlap, the trial court found that “[a]ll of [Gilbert’s] claims were based on the Listing Agreement and on theories of

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<sup>17</sup> While determining the prevailing party in multi-claim case is difficult only where each party prevails on claims encompassed by the attorney fee provision. R.T. Nielson Co. v. Cook, 2002 UT 11, ¶¶ 23-26, 40 P.3d 1119.

liability which depended on the Listing Agreement.” (R. 2155.) Moreover, the trial court found that Gilbert’s “causes of action were different theories of recovery based on the same set of facts. Under these circumstances, Defendants are not required to account separately for the time spent by each of the ten persons on each of [Gilbert’s] several causes of action over the course of five years of litigation.” (R. 2155.) This court should also reject Gilbert’s challenge related to the overlap of claims.

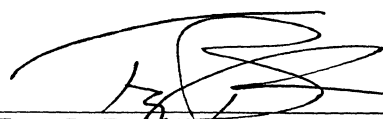
### **Conclusion**

This court should not resurrect Gilbert’s fraudulent nondisclosure claim because (i) with the jury’s answer on the special verdict form, it rejected the fraudulent nondisclosure claim; (ii) the court correctly dismissed that claim because no material information was undisclosed; and (iii) the court could have dismissed that claim because Gilbert suffered no damages. This court should also affirm the trial court’s attorney fees award because it is supported by record evidence, which Gilbert failed to marshal.

This court should (i) affirm the trial court’s dismissal of the fraudulent nondisclosure claim; (ii) affirm the trial court’s finding that the amount of Wardley’s attorney fees was reasonable; (iii) award Wardley its attorney fees on appeal as the prevailing party; and (iv) remand to permit the trial court to supplement the judgment against Gilbert with Wardley’s reasonable attorney fees on appeal.

DATED this 28<sup>th</sup> day of January, 2010.

SNELL & WILMER L.L.P.

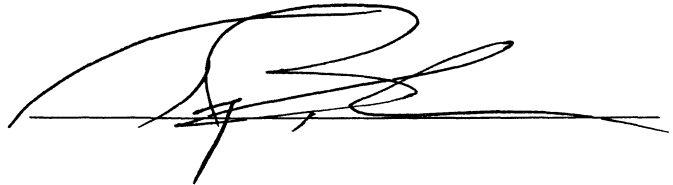
  
\_\_\_\_\_  
Troy L. Bozher  
*Attorney for Appellees*

Certificate of Service

I hereby certify that on the 28<sup>th</sup> day of January, 2010, two true and correct copies of **Response Brief of Appellees** was served via U.S. Mail, postage-prepaid, upon the following:

Bryan J. Pattison  
Thomas J. Burns  
Durham Jones & Pinegar, P.C.  
192 East 200 North, Third Floor  
St. George, UT 84770

David J. Jordan  
David J. Williams  
Stoel Rives LLP  
201 S. Main Street, Suite 1100  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be "RJ", with a long horizontal line extending to the right.

## **Addenda**

Addendum A: Memorandum Decision and Order Re Award of Attorneys' Fees and Costs, entered 2/13/09

Addendum B: Special Verdict Form, dated 3/25/08

## Addendum A

FILED  
DISTRICT COURT

2009 FEB 18 PM 4:10

WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT FOR  
WASHINGTON COUNTY, STATE OF UTAH

BY: 

GILBERT DEVELOPMENT  
CORPORATION,

Plaintiff,

vs.

WARDLEY CORPORATION, et al.,

Defendants.

MEMORANDUM DECISION  
AND ORDER RE AWARD OF  
ATTORNEYS' FEES AND COSTS

Civil No. 030501128  
Judge G. Rand Beacham

This matter now comes before the Court upon the "Bill of Costs" and the "Request for Attorneys' Fees" filed by defendants Wardley Corporation, Terry LoCicero, Don Grymes, Lloyd Melling, and Chad Riddle (collectively the "Defendants"), who were the remaining defendants when this case reached jury trial last year. Defendants' claims for fees and costs are vigorously disputed by Plaintiff. The Court has heard oral arguments and has reviewed the papers and authorities filed in support of and in opposition to Defendants' claims.

This case began with a complaint filed in this Court on June 5, 2003, after a change of venue from another court. Plaintiff named ten different defendants, including all the Defendants who went to trial. Plaintiff sought judgment of more than \$6,000,000 against these Defendants. Plaintiff's claims were all based upon or dependent upon a written Listing Agreement involving Plaintiff and Defendants, which provided, with one inapplicable exception: "[I]n case of the employment of an attorney in any matter arising out of this Listing Agreement, the prevailing party shall be entitled to receive from the other party all costs and attorney fees, whether the matter is resolved through court action or otherwise."

Some of Plaintiff's claims were resolved in Defendants' favor prior to trial. At the conclusion of the seven-day jury trial, the jury found in favor of Defendants on all remaining claims.

Clearly, Defendants are the prevailing party and are "entitled to receive from [Plaintiff] all costs and attorney fees" according to the bargain made in the Listing Agreement.<sup>1</sup> It is the Court's responsibility to enforce the fees-and-costs provision of the Listing Agreement, just as it would enforce any other provision of the Listing Agreement.

#### HOURS REASONABLY EXPENDED BY DEFENDANTS' ATTORNEYS

Defendants' Request for Attorneys' Fees is supported by an Affidavit of Attorneys' Fees and Costs signed by their lead attorney, Matthew L. Lalli. Attached to the Affidavit is a 61-page printout listing work and cost descriptions and dollar amounts claimed. The Affidavit lists the names of all persons in Mr. Lalli's law firm who worked on Defendants' case, the total hours for each person, and a total dollar amount of \$338,390. Defendants' Request is also supported by the Affidavit of Russell S. Mitchell, with similar records, describing work done by Defendants' original attorneys and claiming a total dollar amount of \$61,146. Except for the issue of transition between firms, Plaintiff has not separately challenged Mr. Mitchell's portion of Defendants' Request, so it will not be separately discussed herein. Plaintiff challenges the hours reported and claimed by Defendants' attorneys in five respects:

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<sup>1</sup>The parties to the Listing Agreement were Plaintiff and "Wardley Better Homes and Gardens," a business owned and operated by defendant Wardley Corporation. The four individual defendants were officers and/or employees of Wardley Corporation, and Plaintiff has not challenged or separately treated these defendants' claims for fees and costs pursuant to the provision of the Listing Agreement.



1. Project Assistants and IT Department. The Affidavit of Attorneys' Fees lists two persons as "Proj. Assist." and one person as "IT Dept." Plaintiff challenges charges for the work of these persons, asserting that these are a part of the "standard overhead in any law firm" and not what could be deemed to be "attorneys' fees." In argument, Mr. Lalli explained that a "project assistant" is a paralegal. While there are some circumstances in which this Court does not award paralegal fees, the use of paralegals has been recognized for many years as a desirable practice in litigation and other legal work, to promote efficiency and thrift and to limit both the hours spent and the hourly rates charged by attorneys. Paralegals generally do work that attorneys could do and might have done in past decades, but at a lower cost. The paralegals' fees claimed by Defendants' are not part of their counsel's overhead, and may be awarded as part of attorneys' fees. Mr. Lalli also explained in argument the IT<sup>2</sup> person assisted with preparation of the "electronic presentation" used in the trial. While that presentation was well-done and very effective, it appears to me to be too far removed from the work that attorneys have traditionally done to be included as "attorneys' fees." Consequently, the charge of \$1625 for thirteen hours of work will be deducted from Defendants' claim for fees.

2. Apportionment of Contract and Non-Contract Issues. Defendants acknowledge that Plaintiff's complaint brought several causes of action against them, including "contractual and non-contractual claims." Plaintiff asserts that Defendants have not separated "compensable and non-compensable claims" sufficiently to allow the Court to award them their attorneys fees. Defendants

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<sup>2</sup>I assume this is the well-known abbreviation for "Information Technology."

argue that all of Plaintiff's claims involved the same set of facts, and that argument is factually correct. All of Plaintiff's claims were based on the Listing Agreement and on theories of liability which depended on the Listing Agreement. For example, Plaintiff could not claim any defendant had a fiduciary duty to him independent of the fact that he had accepted the Listing Agreement. Similarly, Plaintiff could not make a claim based on an implied covenant of good faith and fair dealing without having the Listing Agreement into which such covenant could be implied. Plaintiff's causes of action were simply different theories of recovery based on the same set of facts. Under these circumstances, Defendants are not required to account separately for the time spent by each of ten persons on each of Plaintiff's several causes of action over the course of five years of litigation.

3. Transition Between Law Firms. Defendants' original counsel withdrew at an early point in this litigation and was replaced by Defendants' trial counsel. Plaintiff objects to being required to pay attorneys' fees incurred in that transition, but he also acknowledges that Defendants' records show that they are not making a claim for the time spent by their former counsel "on transition related items." Plaintiff simply speculates that Defendants' claims must include some duplication of work, or some work on other cases. The Court finds Defendants' records and explanations to be sufficient to overcome speculation in this regard.

4. Summary Judgment Motion. In the course of this litigation, Defendants filed a motion for summary judgment which was heard and denied by this Court. Plaintiff asserts that Defendants cannot claim attorney fees for a failed motion for summary judgment because Defendants did not "prevail" on that motion. The Court finds Plaintiff's argument to be based on

an excessively narrow concept of the summary judgment process. Summary judgment is an ordinary procedure in the litigation of any civil matter and in the preparation of a civil case for trial. Avoiding trial by obtaining summary judgment, however, is only one proper objective of a summary judgment motion. Such a motion, if done competently, may produce important evidence even if it is denied. A summary judgment motion may test the resolve of an opposing party, the party's understanding of the legal issues, and the party's command of the facts, regardless of whether it is granted or denied.<sup>3</sup> A summary judgment motion may reveal facts and issues that were previously unnoticed by the moving party and thus be valuable in negotiation and in trial preparation. Accordingly, a summary judgment motion that is denied is not necessarily a failure, and failing to "prevail" on a summary judgment motion is not properly considered to be a reason to deny attorneys' fees to a party who ultimately prevails.<sup>4</sup> The real issue is whether the time spent by Defendants on their summary judgment motion was reasonable, and the fact that the Court ruled that the issues should go to a jury is not evidence that the motion was unreasonable. Having heard the summary judgment motion as well as having conducted the jury trial of this case, and having studied summary judgment practice for nearly three decades, this Court finds both Defendants' motion and the time spent by their counsel on the motion to be reasonable in a case of this magnitude.

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<sup>3</sup>In my own practice, I considered a summary judgment motion to be an effective discovery tool for forcing a recalcitrant opposing party either to produce information or to suffer the consequences of stonewalling.

<sup>4</sup>Some appellate courts who, due either to (a) limited experience in litigation practice or to (b) little or no experience in the trial courts, are apparently unacquainted with the proper uses of summary judgment motions make mistakes in this regard when they assume that the only way to "prevail" is to win every point in every argument and every motion.

5. Mock Trial. Part of Defendants' counsel's preparation for trial involved preparing for and conducting a mock trial. Plaintiff asserts that Defendants are claiming some \$45,669<sup>5</sup> for fees related to this mock trial and that such claim is unreasonable. Defendants assert that they already wrote off some fees related to the mock trial and that the fees for the day of the trial were only \$2066.37.<sup>6</sup> Regardless of the obvious utility of a mock trial in preparation for any jury trial involving difficult issues, it is not usual or typical in this Court's experience for a prevailing party to claim fees for having prepared in this manner. The trial in this case was superbly conducted by both sides, however, with Defendants prevailing in the jury's verdict. The unusually high intensity of the conflict between the parties and the large amount in controversy justified—even necessitated—more than usual trial preparation. I have presided over many jury trials which would have been improved by better preparation, including perhaps a mock trial, because preparation for a mock trial would also improve preparation for jury trial. I find that the mock trial used by Defendants' counsel to prepare in this case clearly aided in their preparation for the long, difficult jury trial and was a reasonable investment of time.

6. Plaintiff's Vigorous Prosecution of Claims. One interesting issue has to do with the extent to which Plaintiff employed multiple attorneys in the prosecution of its claims and the relevance, if any, of Plaintiff's vigorous prosecution to the reasonableness of Defendants' request

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<sup>5</sup>Plaintiff's calculation is clearly incorrect, since many time entries which mention "mock trial" also mention work unrelated to the mock trial.

<sup>6</sup>This figure is clearly too limited, because Defendants' counsel's records show more than a dozen individual entries relating to "mock trial."

for attorneys' fees. As the losing party, Plaintiff has not been required to disclose its own attorneys' hours and charges. Without detailed information from Plaintiff, Defendants noted in their initial memorandum that "while the one plaintiff in this case (Gilbert) was primarily represented by three attorneys throughout discovery and trial of this matter . . . the five defendants in this case were primarily represented by one attorney . . . in discovery, and two attorneys . . . at trial." This comparison of "manpower," though factually accurate, apparently struck a nerve with Plaintiff, whose response calls the comparison "unhelpful"<sup>7</sup> and implies that Plaintiff's own spending on attorneys' fees is irrelevant to the reasonableness of Defendants' attorneys fees because it is not a *Dixie State Bank* factor. In their reply memorandum, Defendants' then flesh out their point, referring to Plaintiff as "a well-financed and relentless plaintiff, represented by in-house counsel and two partners from one of the state's largest and most respected law firms," which Defendants describe as "heavy artillery." In both of their memoranda, Defendants note that Plaintiff's Second Supplemental Rule 26 Disclosures stated that Plaintiff's own attorneys fees for this case totaled \$275,150 as of May 2006. In the opinion of this Court, it is entirely relevant to observe that, nearly two years before trial, Plaintiff had already incurred fees equal to 69% of Defendant's fees for the entire litigation through the jury trial. Plaintiff does not argue that either the time spent or the fees charged by its own attorneys to vigorously prosecute its claims were unreasonable, and the Court finds no fault with Plaintiff in its vigorous prosecution and finds that Plaintiff was very well represented. This Court also finds, however, that evidence of Plaintiff's investment of time and

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<sup>7</sup>Conversely, however, Plaintiff later argues that some of the work done for Defendants was "overstaffed" with attorneys.

resources in this case is entirely relevant to the question whether it was reasonable for Defendants' attorneys to spend significant time and resources to defeat Plaintiff's claims.

Having reviewed all the information provided by the parties, the Court finds that the time spent by Defendants' attorneys was reasonable, except as stated above.

#### REASONABLE HOURLY RATE

Determining a reasonable hourly rate for attorneys' services is an issue on which the appellate courts have been unusually vague. The usual statement by an appellate court is, for example, that the rate must be what is "customarily charged in the relevant community." So far as the parties have disclosed to this Court, however, no appellate court has disclosed how "the relevant community" is to be determined.

Defendants' attorneys' affidavits recite that some of the attorneys' hourly rates "were specifically discounted for this action" and that all hourly rates charged "are consistent with rates charged in this locality," without identifying that locality. Plaintiff relies on Utah cases using such terms as "other local attorneys' rates" and "in the locality" and assumes that this means the city in which this Court is located. Accordingly, Plaintiff concludes that the only reasonable hourly rates for litigation in this "locality" are those charged by attorneys whose offices are located in St. George, Utah—even though Plaintiff's two primary attorneys do not have their offices in that "locality."<sup>8</sup> Defendants' reply memorandum identifies the logical fallacy in Plaintiff's argument: If "the

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<sup>8</sup>Fortunately for Plaintiff's argument, Plaintiff is not required to explain what its position would be if it had been the prevailing party and it were seeking, as it has during this entire case, an award of the attorneys' fees it has paid to Salt Lake City counsel.

locality” in which attorneys’ hourly rates are relevant and limiting is strictly the location of this Court, then a prevailing party could never recover its attorneys fees without restricting itself to St. George attorneys or attorneys charging St. George rates, regardless of whether the opposing attorneys were from St. George.

This Court does not perceive the appellate courts’ vague statements about “locality” and “relevant community” to be a basis for concluding that the appellate courts are imposing a “buy local” philosophy upon a litigating party’s choice of counsel. Instead, it is the opinion of this Court that “the locality” to be considered is the general geographic area in which a party litigating in this Court might reasonably look for litigation counsel.

The particular community in which this Court is located, Washington County, is not isolated from the rest of Utah, is neither more wealthy nor more economically distressed than the rest of Utah, and is not less sophisticated about legal matters than the rest of Utah. Residents of this community do not restrict their purchases of goods and services to providers in this community, much to the dismay of local providers. The market for legal services in Washington County is limited only to attorneys who are licensed to practice in Utah, and this Court considers “the relevant community” to be the State of Utah for determining whether Defendants’ attorneys’ hourly rates are reasonable.

In addition, the Court should consider “the fee customarily charged” for similar services in the relevant locality or community. This does not mean that the Court is required to base an award on an “average” hourly rate, however. The fee awarded simply must be reasonable in light of all circumstances.

The circumstances affecting the reasonableness of an attorney's hourly rate include the experience and skill of the particular attorneys. All but one of the attorneys participating in this case (the exception being Plaintiff's in-house counsel who, too, is highly competent) are from some of the premier law firms in Utah: (a) Plaintiff's litigation attorneys are from Ray, Quinney & Nebeker; (b) Plaintiff's attorneys on this issue are from Durham, Jones & Pinegar; (c) Defendants' attorneys are from Snell & Wilmer; and (d) Defendants' former attorneys were from Jones, Waldo, Holbrook & McDonough. In the trial and all matters brought before the Court, the work done by all attorneys has been exemplary. The focus, of course, is now on Defendants' attorneys, and the Court observed that their lead attorney, Mr. Lalli, was especially well prepared, professional, skillful, expert, and effective in this case.

Having reviewed all the information provided by the parties, the Court finds no reason to believe that the rates charged by Defendants' attorneys are unreasonable.

#### AWARD OF ATTORNEYS' FEES

Having fully reviewed the evidence, the Court finds that the work outlined by Defendants' attorneys was actually done by them,<sup>9</sup> that the work was reasonably necessary to present a completely successful defense against Plaintiff's several claims, and that the billing rates shown by Defendants' attorneys are consistent with the rates customarily charged by Utah attorneys with the experience and skill of those who defended in this case. The Court finds that this case was somewhat unusual in its factual and legal complexity and that Plaintiff's vigor in pursuing its case, though entirely

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<sup>9</sup>With the one exception for IT Department work, which is excluded.



appropriate, made a vigorous defense necessary. The Court concludes that Defendants' Request for Attorneys' Fees should be granted, with the exception noted above, so that the total award is \$397,911.00.

#### BILL OF COSTS

Defendants' Bill of Costs explains their claim for a total of \$82,942.89 in costs incurred by them in this litigation, which the supporting affidavits describe as "necessary and reasonable." Plaintiff objects to several of the claims or amounts.

Plaintiff asserts that the \$49,943.00 in costs related to Defendants' mock trial are not shown to have been reasonable. The Court has rejected Plaintiff's argument against Defendants' attorneys fees claim related to the mock trial, but the Court finds the costs to be a different matter. Time spent by attorneys for the prevailing party in preparation for trial, including study, research and training, should be awarded if the time and effort are reasonable and related to the case. If all costs of doing relevant study or research and of obtaining relevant training were automatically chargeable to the losing party, however, it might even be said that those costs include law school tuition and library acquisitions. The costs that Defendants claim in relation to the mock trial include consultant fees, travel, site rental, and recruiting and paying mock jurors. There is no evidence before the Court to show that such costs were reasonable, except a blanket assertion in Mr. Lalli's affidavit. Without evidence showing that such costs were in fact reasonable—e.g., as opposed to conducting a mock trial at one's own offices with volunteer jurors—the Court cannot find these costs to be reasonable. Accordingly, the costs awarded will not include the costs of the mock trial.

Plaintiff also objects to Defendants' claim of \$8467,09 for copying and document

reproduction costs. The only charges shown to be directly related to prevailing in this case are for "Preparation of Trial Exhibits" in the amount of \$1596.66. The Court finds that all other claims in this category are the usual overhead of a law firm that is covered by attorneys' fees and not the sort of costs that are necessary to prevailing in litigation.

Plaintiff objects to the costs claimed for Defendants' expert, David Johnson. Contrary to Plaintiff's characterization of Mr. Johnson's importance to the case, the Court finds that Mr. Johnson's advice to Defendants' and his testimony at trial were sufficiently necessary to Defendants' success that a reasonable fee should be assessed against Plaintiff. The invoices attached to the Bill of Costs, however, total only \$4670.75, and the remainder of this claim is undocumented.

Plaintiff challenges Defendants' claims for the costs of "travel and communications." The Court finds charges for telephones, faxes and postage to be normal overhead expenses like routine photocopies. Reasonable travel costs are an ordinary expense of litigation, however, and may be awarded to a prevailing party. The total awarded in this case is \$6216.03.

Finally, Plaintiff objects to being charged with \$429.45 for the costs of depositions, because deposition transcripts were not employed at trial. Depositions costs are routinely incurred in trial preparation, however, regardless of whether they are used at trial. In addition, it appears that the two depositions involved in Defendants' claim were taken upon notices given by Plaintiff, so Plaintiff can hardly argue that it was not necessary for Defendants' to incur these costs.

#### AWARD OF COSTS

Having reviewed all of the evidence before the Court on the subject, the Court finds the following costs to be reasonable and, pursuant to Rule 54(d) of the Utah Rules of Civil Procedure


and Section 8 of the parties' Listing Agreement, awards the total of such costs to Defendants as costs of this litigation:

Preparation of Trial Exhibits	\$1596.66
Expert Witness	\$4670.75
Travel	\$6216.03
Depositions	\$429.45
TOTAL	\$12,912.89

#### CONCLUSION

The Court awards attorneys' fees and costs to Defendants and against Plaintiff in the amounts of \$397,911.00 for fees and \$12,912.89 for costs, and judgment may be entered for the total of \$410,823.89. Defendants' counsel may submit an appropriate judgment.

Dated this 13<sup>th</sup> day of February, 2009.

  
G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 18 day of Feb, 2009, I provided true and correct copies of the foregoing MEMORANDUM DECISION AND ORDER to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Bryan J. Pattison  
Attorney for Plaintiff  
192 East 200 North, Third Floor  
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P.O. Box 45385  
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Cyndi W. Gilbert  
Attorney for Plaintiff  
P.O. Box 190  
Toquerville, Utah 84774

Matthew L. Lalli  
James D. Gardner  
Attorneys for Wardley defendants  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004

  
DEPUTY CLERK OF COURT

## Addendum B

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

FILED  
JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY  
2008 MAR 25 PM 5:31

GILBERT DEVELOPMENT  
CORPORATION,

Plaintiff,

v.

WARDLEY BETTER HOMES &  
GARDENS, et al.,

Defendants.

**SPECIAL VERDICT FORM**

Case No. 030501128

Honorable G. Rand Beacham

**MEMBERS OF THE JURY:**

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No."

1. Do you find by a preponderance of evidence that Gilbert Development Corporation ("GDC") imposed, under the terms of any agreement, in sufficiently definite terms a condition that GDC would not seller-finance the sale of Zion View Estates ("ZVE") to anyone if Dave Wright or a manufactured housing company were involved in the transaction in any way, shape or form?

YES 1

NO 7

If your answer is No to question 1, sign this form at the bottom and notify the clerk. If you answered Yes, go to question 2.

*Richard L. Babb*

2. Do you find by a preponderance of the evidence that David Wright or a manufactured housing company was involved in the seller-financed transaction between GDC and Henry Butterfield?

YES \_\_\_\_\_ NO \_\_\_\_\_

If you answered No, sign this form at the bottom and notify the clerk. If you answered Yes, go to question 3.

3. Do you find by a preponderance of the evidence that David Wright's or a manufactured housing company's involvement, if any, was sufficiently material to the seller-financed transaction between GDC and Henry Butterfield to impose either (1) a contractual duty, (2) a fiduciary duty, or (3) a duty under the implied covenant of good faith and fair dealing on any of the defendants to disclose such involvement to GDC?

YES \_\_\_\_\_ NO \_\_\_\_\_

If you answered No, sign this form at the bottom and notify the clerk. If you answered Yes, go to question 4.

4. Do you find by a preponderance of the evidence that any defendant knew that David Wright or a manufactured housing company was involved in the seller-financed transaction between GDC and Henry Butterfield?

TERRY LoCICERO Yes \_\_\_\_\_ No \_\_\_\_\_

DON GRYMES Yes \_\_\_\_\_ No \_\_\_\_\_

LLOYD MELLING Yes \_\_\_\_\_ No \_\_\_\_\_

CHAD RIDDLE Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered No for all defendants, sign this form at the bottom and notify the clerk. If you answered Yes for one or more defendants, answer question 5 with respect to each such defendant only.

5. With respect to each defendant to which you answered "Yes" in question 4, do you find by a preponderance of the evidence that such defendant(s) breached a contractual, fiduciary or other duty to inform GDC of David Wright or a manufactured housing company's involvement in the seller-financed transaction between GDC and Henry Butterfield?

TERRY LOCICERO Yes \_\_\_\_\_ No \_\_\_\_\_

DON GRYMES Yes \_\_\_\_\_ No \_\_\_\_\_

LLOYD MELLING Yes \_\_\_\_\_ No \_\_\_\_\_

CHAD RIDDLE Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered No for all defendants, sign this form at the bottom and notify the clerk. If you answered Yes for one or more defendants, answer question 6 with respect to each such defendant only.

6. With respect to each defendant to which you answered "Yes" in question 5, do you find by a preponderance of the evidence that any defendant's failure to inform GDC of Dave Wright or a manufactured housing company's involvement in the seller-financed transaction between GDC and Henry Butterfield proximately caused GDC to suffer any loss?

TERRY LoCICERO Yes \_\_\_\_\_ No \_\_\_\_\_

DON GRYMES Yes \_\_\_\_\_ No \_\_\_\_\_

LLOYD MELLING Yes \_\_\_\_\_ No \_\_\_\_\_

CHAD RIDDLE Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered No for all defendants, sign this form at the bottom and notify the clerk. If you answered Yes for one or more defendants, answer question 7.

7. What amount of damages, if any, will reasonably and fairly compensate GDC for loss proximately caused by any defendant's failure to inform GDC of Dave Wright or a manufactured housing company's involvement in the seller-financed transaction between GDC and Henry Butterfield?

\$ \_\_\_\_\_

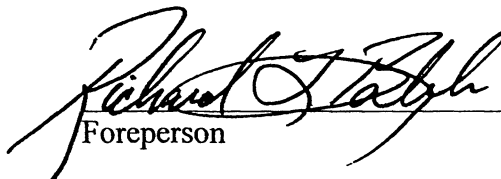


If you answered with a number greater than zero, go to question 8. If you answered zero, sign this form at the bottom and notify the clerk.

8. Do you find by a preponderance of the evidence that Wardley Better Homes & Gardens is liable for the actions of any of the following defendants?

TERRY LoCICERO	Yes _____	No _____
DON GRYMES	Yes _____	No _____
LLOYD MELLING	Yes _____	No _____
CHAD RIDDLE	Yes _____	No _____

DATED this 3-25-08 day of March, 2008.

  
Foreperson