

2003

Janalee Tobias and Judy Feld v. Anderson Development CO. LC. : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Tobias and Feld v. Anderson Development*, No. 20030469.00 (Utah Supreme Court, 2003).
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IN THE UTAH SUPREME COURT

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| JANALEE TOBIAS; JUDY FELD | : | |
| | : | Consolidated Appeal No. 20030469-SC |
| Defendants/Appellants, | : | |
| | : | Supreme Court No. 20030469-SC |
| vs. | : | Supreme Court No. 20030690-SC |
| | : | |
| ANDERSON DEVELOPMENT | : | Trial Court No. 980902813 |
| CO., L.C. | : | Judge Douglas Cornaby |
| | : | |
| Plaintiff/Appellee. | : | |

BRIEF OF APPELLEE

**ON CONSOLIDATED APPEAL OF THE FOLLOWING
TWO INTERLOCUTORY APPEALS:**

- 1. Granting Plaintiff's Motion for Partial Summary Judgment over Defendants' SLAPP Counterclaim and Granting Plaintiff's Motion to Dismiss Defendants' Counterclaims for Emotional Distress, Abuse of Process and Punitive Damages.**
 - 2. Denying Defendants' Motion for Summary Judgment over Plaintiff's Intentional Interference with Existing Contractual Relations and Prospective Economic Relations Claims.**
-

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UTAH APPELLATE COURTS

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- Gerald Anderson – the Manager and Member of ADC

II. FACTS FROM SOUTH JORDAN CITY:

- David Millheim – the former City Manager of South Jordan City
- Thomas Christensen – a former member of the South Jordan City Council

III. FACTS FROM THE WILLIAMS FAMILY:

- Boyd Williams – the owner of the Williams Property
- Dorothy Williams – the owner of the Williams Property
- Cheri Johnson – the adult daughter of Boyd and Dorothy Williams

IV. FACTS FROM LAKEVIEW FARMS:

- Douglas Andersen – the Manager and a Member of LakeView Farms

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STATEMENT OF FACTS

The following is a consolidated statement of the facts in this case. The record contains voluminous chronologies of the factual events underpinning this action. Attached as Appendix “A” is a more comprehensive presentation of the facts pertaining to ADC’s Case-in-Chief, with corresponding citations to the record. Attached as Appendix “B” is greater detail as to the facts associated with Tobias/Feld’s counterclaims, with corresponding citations to the record.

1. This case is principally about Janalee Tobias and Judy Feld’s (“Tobias/Feld”) wrongful attempts to stop a local developer, Anderson Development Company (“ADC”), from purchasing and developing a parcel of property located in South Jordan, Utah, that was part of a larger real estate development (the “RiverPark Business Park”). See Appendix “A” at passim.

2. Tobias/Feld live adjacent to the RiverPark Business Park. While Tobias/Feld exercised their properly protected rights in the public forum to criticize this planned development, they also chose to engage in other actions outside the public forum that intentionally and wrongfully interfered with ADC’s contractual and economic relations with many of these landowners to further try and stop the development.¹ See Appendix “A” at ¶¶47,

¹As discussed herein, Tobias/Feld has wrongfully and intentionally interfered with several of the landowners involved in the RiverPark Business Park. Only the wrongful interference with the Williams is the subject of this case. Tobias/Feld’s action to try and stop the purchase by ADC of the William’s Property was the most egregious, most likely because the William’s Property was the parcel closest to Tobias’ residence.

48, 50, 51(a)-51(q).

3. This action addresses Tobias/Feld's intentional and wrongful interference with ADC's contractual and economic relations outside of the public forum with one of these landowners, the Williams. See Appendix "A" at *passim*.

4. The RiverPark Business Park was the result of ADC assembling approximately 120 acres of contiguous real property from several different landowners, obtaining governmental entitlements so the property could be used as a business park, and then buying the entitled property from the landowners. See Appendix "A" at ¶¶2, 3, 60.

5. Specifically, ADC entered into an option purchase agreement (in the form of a Real Estate Purchase Contract or "REPC") with the Williams on or about October 28, 1996 to purchase approximately 30 acres that comprised the southern part of the anticipated RiverPark Business Park (the "Williams Property") for \$35,000.00 per acre (the "First REPC"). See Appendix "A" at ¶¶5, 6, 49, 61, 79, 80, 108, 109, 113.

6. The First REPC provided that ADC had until June 30, 1997 to obtain the requisite zoning that would permit the Williams Property to be used as a business park. It is this contractual and economic relationship that Tobias/Feld wrongfully attacked. Their goal – to interfere with and use any means to thwart the sale of the Williams' property to ADC. See Appendix "A" at ¶¶7, 49, 83.

7. Tobias/Feld failed to understand that this case is not about how Tobias/Feld impacted the Williams from performing under the First REPC or otherwise, but rather how Tobias/Feld wrongfully and intentionally damaged ADC in its contractual and economic

relations with the Williams.

A. Tobias/Feld's Intentional and Wrongful Interference with ADC's Contractual Relations with the Williams under the First REPC.

8. Tobias/Feld's first improper efforts were to try and get the Williams to breach or otherwise refuse honor their contract to sell the Williams Property to ADC. Their efforts were concerted, intentional and wrongful in this regard. See Appendix "A" at ¶¶9-19, 51, 84-88, 96, 110.

9. However, when they concluded that despite these efforts, the Williams were going to honor the First REPC, they changed tactics and decided that to stop ADC from buying the Williams Property they needed to delay the zoning changes over the property until after the First REPC expired. See Appendix "A" at ¶¶7, 12, 28, 29, 30, 51(b), 51(j), 51(k), 66, 67, 101.

10. Tobias/Feld contacted various key decision-makers at South Jordan City for the improper purpose of delaying the process for re-zoning the Williams Property until after June 30, 1997, when the Williams Option Agreement expired. See Appendix "A" at ¶¶23, 28, 51(j), 51(k), 64, 66.

11. Tobias/Feld continued their pattern of misrepresentations, including, but not limited to, that they had raised hundreds of thousands of dollars for the protection of open spaces, were a tax-exempt entity and were interested in preserving open spaces throughout the Jordan River Valley generally, as well as their abilities to purchase the Williams Property bought and preserve it as open spaces to these key decision-makers. See Appendix "A" at ¶¶20, 21, 25, 29, 32, 51(p), 51(q), 53, 67, 91, 92, 99, 111, 115.

12. These decision-makers agreed to accommodate Tobias/Feld and delay the process for re-zoning the Williams Property until after June 30, 1997, so that the Williams Property could be purchased by SOS or its associates. See Appendix “A” at ¶¶22, 24, 54, 70, 98-100.

13. While every other parcel comprising the RiverPark Business Park was rezoned and otherwise entitled to be part of a master planned business park before June 30, 1997, these decision-makers delayed the rezoning of the Williams Property, as requested by Tobias/Feld, until after the expiration of the First REPC. See Appendix “A” at ¶¶30, 31, 73, 101.²

B. Tobias/Feld’s Intentional and Wrongful Interference with ADC’s Prospective Economic Relations with the Williams as Evidenced by the Second REPC.

14. Concurrent with Tobias/Feld wrongful efforts to delay the zoning over the Williams Property, they also worked to stop ADC from purchasing by acting as a “shill” in the marketplace for the Williams Property. A shill is one who poses as a decoy in a con-game. For example, a shill is used in an auction setting by misrepresenting itself as an interested and financially able buyer. The shill then runs up the cost of items at the auction without any intent or ability to actually pay for the items. This wrongful conduct by the shill results in legitimate buyers being required to pay significantly more for the items at auction. See Appendix “A” at ¶¶27, 91-100, 102, 103, 111, 112, 115, 116.

²David Millheim, the then City Manager of South Jordan City and Thomas Christensen, a then member of South Jordan City Council, have provided credible and substantial testimony to these material facts. See Appendix “A” at ¶¶ 45-78.

15. In the present case, Tobias/Feld introduced themselves to the Williams as willing and able buyers or facilitators for the purchase of the Williams Property. They misrepresented themselves as the principals of a credible and legitimate environmental charitable entity called “Save Open Spaces,” commonly referred to by them as “SOS,” and that they had the ability and connections to buy the property to be preserved as “open spaces.” See Appendix “A” at ¶¶20, 21, 25, 29, 31, 51(q), 53-55, 91-100, 102, 103, 111, 112, 115, 116.

16. These misrepresentations included that they had raised hundreds of thousands of dollars for the protection of open spaces, were a tax-exempt entity and were interested in preserving open spaces throughout the Jordan River Valley generally. Tobias/Feld further misrepresented to the Williams that they had buyers ready and able to buy the Williams Property for significantly more than the \$35,000 per acre contractual amount under the First REPC. See Appendix “A” at ¶¶51(q), 74, 91-100, 102, 103.

17. **These representations were false.** Tobias/Feld’s sole concern and interest was stopping ADC from developing the RiverPark Business Park adjoining their neighborhood. They were not part of a tax-exempt entity, were not recognized by any governmental division (either state or federal) as a charity, had never raised any substantial monies, and were in violation of Utah law. See Appendix “A” at ¶¶56-58, 106, 107.

18. Furthermore, and significantly, Tobias/Feld never had procured any able and willing buyers for the Williams’ Property. See Appendix “A” at ¶¶56, 76.

19. By acting as a shill, Tobias/Feld intentionally caused the Williams to wrongfully believe they could obtain more money for the Williams Property than the \$35,000 per acre

offered by ADC in the First REPC.³ See Appendix “A” at ¶104.

C. Tobias/Feld’s Wrongful Actions Caused ADC to Sustain Significant Financial Damages.

20. These intentional and wrongful actions by Tobias/Feld caused ADC to lose the benefits that it had under the First REPC. Once the First REPC expired, ADC was required to pay a significantly higher price for the Williams Property. See Appendix “A” at ¶¶95, 98, 102, 103, 111, 112, 115, 116.

21. Based on Tobias/Feld’s misrepresentations to Williams that they were or had procured a buyer willing to pay more money for the Williams Property than what ADC had offered under the First REPC, coupled with the then undiscovered con that they had played on South Jordan City officials, the Williams would not sell their property to ADC under the same terms of the First REPC. See Appendix “A” at ¶¶33, 34(a)-(g), 35, 95, 98, 102-104, 111, 112, 116.

22. Instead, in order to complete the River Park Development, as ADC had committed to do to both South Jordan City and its investors, it had to pay more than \$700,000 in actual additional to expenses to obtain the Williams Property, thus the Second REPC cost ADC significantly more than under the First REPC. See Appendix “A” at ¶¶35, 95, 98, 102-104.

23. This and other incidental and consequential damages to ADC were the direct and

³Boyd Williams, Dorothy Williams and Cheri Johnson (William’s Daughter) have provided credible and substantial testimony to these material facts. See Appendix “A” at ¶¶79-116.

proximate result of Tobias/Feld's concerted, intentional and wrongful interference with ADC's business and economic relations. These damages caused ADC to initiate the present suit, as such wrongful conduct by Tobias/Feld and resulting damages to ADC are actionable under Utah law. See Appendix "A" at ¶¶34(a)-(g), 35.

24. While Tobias/Feld want to now deny that they engaged in these actions, they have publically admitted that they did engage in a concerted effort to damage ADC. In an article published by THE VOICE in September 2001, defendant Brent Foutz (who acted in concert with Tobias/Feld) literally gloated that he, Tobias and Feld had "cost [ADC] millions of dollars." See R. 3676.

D. Tobias/Feld's Statement of Facts Contain Misstatements and Extraneous Facts.

Tobias/Feld's Statement of Facts includes substantial extraneous statements of fact. Tobias/Feld seem more intent on arguing their position than setting forth facts (i.e. outlining who was not sued (¶¶26g and h); stating what a reporter wrote (¶26k); and stating the obvious that an entity must be represented by counsel instead of appearing *pro se* (¶26l)), all of which are nothing more than an attempt to influence this Court based upon extraneous and immaterial factors. In particular, referring to numbered paragraphs of Tobias/Feld's Statement of Facts:

1. **Paragraph 17** attempts to create inferences from settlement discussions held in an attempt to settle the matter. Settlement discussions are privileged, confidential and inadmissible. The trial court found such efforts to bring settlement discussions into the resolution of the matter on the merits to be improper and struck the allegations that the

settlement negotiations were evidence of wrongdoing. See Order dated October 22, 2002; R. 1836. Tobias/Feld cannot seem to abide by the decision of the Court and continue to claim that the settlement negotiations are evidence of wrongdoing.

2. **Paragraphs 22 through 23 and 38 through 40** merely state procedural history of the case that has no bearing on the underlying merits of the case.

3. **Paragraph 26** makes an unfounded claim that the facts recited thereafter “clearly and convincingly show the Developer’s lawsuit was ‘commenced and continued for the purpose of harassing, intimidating, [or] punishing’” Tobias\Feld for participation in the process of government. The facts show nothing of the case. ADC carefully only brought its claims against Tobias\Feld for actions that were clearly outside of the process of government. Tobias\Feld acted to damage ADC outside of the public process. Yet Tobias\Feld have consistently and arrogantly claimed that their activity in the process of government (for which no complaint has ever been made) gives them a “free pass” for their wrongful and damaging activities outside of the process of government. Such a premise is clearly objectionable to both the SLAPP legislation and the United States Constitution. No one gets any such “free pass.”

4. **Paragraphs 29 through 32** attempts to state as facts the appellants’ arguments and the appellants’ characterization of the trial court rulings (i.e. “tortured reasoning,” “erroneous legal conclusions,” “ignored the factual allegations”). Tobias/Feld may disagree with the rulings below but stating that as the facts of this case is totally inappropriate.

5. **Paragraph 36** misstates the facts. The ADC complains because Tobias\Feld misrepresented that they had funding when they had none in order to delay the zoning change.

6. **Paragraph 37** attempts to make a statement of law (misstated) as fact.

STATEMENT OF PROCEEDING

The following is a chronological listing of the major and pertinent procedural events that have occurred in this action. ADC has not attempted to present a comprehensive itemization of all the filings in this action and refers this Court to the trial court's docketing listing for further detail as to any specific filing in this action.

1. This action was filed by ADC on March 17, 1998 against Tobias/Feld asserting, in pertinent part, claims for relief for intentional interference with existing contractual relations and for intentional interference with prospective economic relations. See R. 1-22.

2. On or about April 21, 1998, Tobias/Feld filed a Motion to Dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure claiming that ADC's Complaint failed "to state a claim for intentional interference with existing contractual relations or intentional interference with prospective economic relations". . . [and that Tobias/Feld had been] "subjected to the oppression of this lawsuit for no reason other than that [ADC] ha[d] the resources to misuse the judicial system in order to harass and retaliate against [Tobias/Feld] who have exercised their rights. . . ." See Tobias/Feld's Memorandum in Support of their Motion to Dismiss at pp. 6-7; R. 23-33, 48-53.

3. On or about December 8, 1998, the trial court denied Tobias/Feld's Motion to Dismiss ruling that "[t]he Plaintiff [ADC] has stated a cause of action in its complaint of intentional interference with existing economic relations or prospective economic relations." See Disposition Summary dated December 8, 1998; R. 68.

4. On or about November 9, 2001, Tobias/Feld filed a Motion for Summary Judgment claiming again that ADC had failed to state a cause of action against them for interference with either existing contractual relations or prospective economic relations. See Tobias/Feld's Memorandum in Support of their Motion for Summary Judgment at p. 9; R. 337-370.

5. On or about May 21, 2002, the trial court denied Tobias/Feld's Motion for Summary Judgment. See Ruling on Motions dated May 21, 2002 at p. 1; R. 927-930.

6. On or about July 2, 2002, Tobias/Feld filed their counterclaim (the "Counterclaim") asserting claims against ADC under the Utah Citizen Participation in Government Act, UCA §§78-58-101, et seq. (the "SLAPP Act") and corresponding common law claims of unlawful civil proceedings, abuse of process, intentional and negligent infliction of emotional distress, punitive damages and attorney's fees. See Tobias/Feld's Counterclaim dated July 2, 2002; R. 988-1437.

7. On or about November 26, 2002, ADC filed a Motion for Summary Judgment over Tobias/Feld's SLAPP Counterclaims. See ADC's Motion and supporting Memorandum for Summary Judgment dated November 20, 2002; R. 1905-1940, 3051-3108.

8. On or about December 16, 2002, ADC filed a Motion to Dismiss over Tobias/Feld's common law counterclaim. See ADC's Motion and supporting Memorandum to Dismiss dated December 12, 2002; R. 1967-1993, 3027-3050.

9. On or about January 31, 2003, the trial court granted summary judgment in favor of ADC over Tobias/Feld's SLAPP counterclaims and granted ADC's Motion to Dismiss over

Tobias/Feld's common law counterclaims including 1) wrongful use of civil proceedings, 2) intentional infliction of emotional distress, 3) negligent infliction of emotional distress and 4) punitive damages. See R. 3139, 3885-3888.

10. After the trial court dismissed the SLAPP Counterclaim and all but one of the Common Law Counterclaims, Tobias/Feld requested that the trial judge certify these rulings as final under Rule 54(b) of the Utah Rules of Civil Procedure to facilitate a right to interlocutory appeal. The trial judge refused this request by Tobias/Feld, noting it was time for this case to go to trial. See R. 4405 at pp. 80-82.

11 On or about February 10, 2003, ADC filed a Motion for Summary Judgment over Tobias/Feld's Abuse of Process Counterclaim (their only remaining counterclaim). See ADC's Motion and supporting Memorandum for Summary Judgment over Tobias/Feld's Abuse of Process Counterclaim. This motion was granted on July 25, 2003. Tobias/Feld have not sought interlocutory appeal over this ruling. See R. 3540-3562, 3983-4035, 4376-4380.

STANDARD OF REVIEW

It is well settled that an appellate court may affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." Dipoma v. McPhie, 2001 UT 61, P 18, 29 P.3d 1225 (quoting Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 225-26 n.2, 461 P.2d 290, 293 n.2 (1969); see also Orton v. Carter, 970 P.2d

1254, 1260 (Utah 1998) (applying Limb); 5 C.J.S. Appeal & Error § 714 (1993) ("Generally, the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court.").

Moreover, "[a] party to an appeal does not have a constitutional right to have a cause of action decided on a particular ground." DeBry v. Noble, 889 P.2d 428, 444 (Utah 1995); see also State of Utah v. Topanotes, 76 P.3d 1159, 1160 (Utah 2003); Bailey v. Bayles, 2002 UT 58, *7-9; 52 P.3d 1158 (Utah 2002); Davis County v. Jensen, 83 P.3d 405, 406, n3 (Utah App. 2003). This standard of review is applicable to the present appeal, as this Court may affirm the rulings of the trial court either by applying again the analysis the trial court adopted or any of the alternative analyzes presented by ADC to the trial court.

SUMMARY OF ARGUMENT

A. The Trial Court Properly Granted ADC's Motion for Partial Summary Judgment Over Tobias/Feld's SLAPP Counterclaim.

The SLAPP Act should not be applied to this case. It does not contain any language for retroactive application and Tobias/Feld's efforts to create a claim against ADC in this pending action by way of the SLAPP Act would result in serious and multiple constitutional consequences.

However, if applied, the SLAPP Act by its very terms and procedures requires sustaining the trial court's dismissal of Tobias/Feld's SLAPP Counterclaims, as a matter of law. The SLAPP Act requires a finding that the action was commenced or continued without

a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. This Tobias/Feld have also failed to prove.

The statutory scheme under which the SLAPP Act exists requires a finding by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the First Amendment right of the defendant. This Tobias/Feld have failed to prove. ADC's claims do not arise within the governmental process, but rather arise from a private sales transaction to which Tobias/Feld have interfered. These failures and deficiencies are fatal to Tobias/Feld's SLAPP Counterclaims.

B. The Trial Court Properly Granted ADC's Motion to Dismiss Over Tobias/Feld's Common Law Counterclaims.

The Trial court properly dismissed the following common law counterclaims brought by Tobias/Feld:

- ▶ Wrongful use of civil proceedings
- ▶ Abuse of civil process
- ▶ Intentional or negligent infliction of emotional distress
- ▶ Punitive damages and attorney's fees

Tobias/Feld have not sought an appeal over the trial court's dismissal of the wrongful use of civil proceedings. The Utah courts have established that the tort of abuse of civil process is predicated on having the underlying action terminate in favor of the person or party asserting the claim for abuse of civil process. This is the same requirement as the Utah courts have applied to its counterpart tort of abuse of civil proceedings. It is undisputed that the present litigation has not yet terminated. As a result, Tobias/Feld's counterclaim for abuse of civil process, like its counterclaim for wrongful use of civil proceeding was premature and

therefore properly dismissed.

Furthermore, even when reviewed by the trial court, the only "abuse" raised by Tobias/Feld was that ADC abused the civil process when it took Ms. Tobias' deposition. Yet, applicable law indisputably required the trial court to find that ADC had sufficient probable cause, as well as the actual right, to take Ms. Tobias' deposition and discover the basis and circumstances surrounding her emotional state. Therefore, taking her deposition cannot form the basis for an abuse of civil process claim.

The counterclaim asserted by Tobias\Feld for emotional distress and punitive damages were also properly dismissed by the trial court, as a consequence of Tobias\Feld having failed to meet crucial elements — intentional and negligent emotional distress claims cannot be based upon the filing of a complaint and there is no recognized independent tort justifying punitive damage or attorney's fees.

C. The Trial Court Properly Denied Tobias/Feld's Motion for Summary Judgment Over ADC's Claims for Intentional Interference with Existing Contractual Relations and Prospective Economic Relations Claims.

This case is not about a developer attempting to punish concerned citizens for voicing their honest objections to a development. This case is about lawless extremists who actively and intentionally, over the course of months wrongfully interfered with ADC's contractual rights to purchase the Williams Property – a critical part of the RiverPark Business Park. This interference impaired ADC's contractual right by wrongfully delaying the requisite zoning changes over the Williams Property until the first contract expired. And at the same time, acting as a shill in the market for the Williams Property, Tobias/Feld created the mis-

impression, through false representations, that Tobias/Feld or others were willing and able to purchase the Williams Property for more than what ADC had offered, evidenced by the terms of the second contract.

These intentional and wrongful actions resulted in the first contract expiring before the Williams Property was rezoned (even though every other parcel in the RiverPark Business Park had been rezoned before that time) and the Williams demanding that ADC pay more for the Williams Property under the second contract based critically on assurances and representations by Tobias/ Feld that they had the money or procured others willing and able to purchase the Williams Property at a higher price.

This lawless approach to opposing the RiverPark Business Park is actionable under Utah law by asserting the torts of intentional interference with existing contractual or prospective economic relations.

ARGUMENT

I. TOBIAS/FELD's COUNTERCLAIM BROUGHT UNDER THE CITIZEN PARTICIPATION IN GOVERNMENT ACT (Utah Code Ann. §§78-58-101 et. seq.) WAS PROPERLY DISMISSED AS A MATTER OF LAW.

A. The Enactment of The Citizen Participation in Government Act: Its Purpose and Scope.

Three years after this the Utah legislature enacted during its 2001 legislative session House Bill 112 entitled, "Prevention of Retaliatory Lawsuits." 2001 Utah Laws 163, 2001 Ut. Ch. 163, 2001 Ut. HB 112. This bill was signed into law by Governor Leavitt on March 15, 2001, became effective on April 30, 2001, and was codified as Utah Code Ann. §§78-58-101,

et seq., as the “Citizen Participation in Government Act” (the “SLAPP Act”).

The SLAPP Act was enacted for two primary purposes: First, to modify the judicial code by creating a summary procedure for courts to determine whether a suit filed is in retaliation against citizens as a consequence of their participation in the governmental process. See Utah Code Ann. §§78-58-103 and 104 (2001). Second, to provide citizens with a statutory counterclaim against a party who files suit against citizens arising from their participation in the governmental process. These suits are often referred to as “slapback” suits. See Utah Code Ann. §78-58-105 (2001).

It is under this SLAPP Act that Tobias/Feld specifically pleaded their First Claim for Relief, captioned as, “SLAPP Suit Counterclaim - Utah Code Ann. §§78-58-101, et seq.” (The “SLAPP Counterclaim”).

Tobias/Feld’s SLAPP Counterclaim was brought under the statutory framework of the second purpose and provisions of the SLAPP Act that creates a new cause of action. See Utah Code Ann. §78-58-105 (2001). Tobias/Feld attempted to use this statutory created claim against ADC, citing to the specific provisions within the SLAPP Act that created an independent cause of action and thereby seeking affirmative relief as follows:

“196. Pursuant to Utah Code Ann. § 78-58-105(1)(a), Tobias/Feld are entitled to recover against Anderson Development their costs and reasonable attorney’s fees incurred in defending this action.

“197. Pursuant to Utah Code Ann. § 78-58-105(1)(b), Tobias/Feld are entitled to recover against Anderson Development compensatory damages in an amount to be determined at trial.”

See Counterclaim at ¶¶196 and 197; R. 1030; see also Utah Code Ann. §§78-58-105(1)(a) and 105(1)(b) (2001).

However, as discussed herein, because all of the underlying interactions between Tobias/Feld and ADC occurred prior to the enactment of the SLAPP Act, the counter-claim does not state a viable cause of action for recovery under the SLAPP Act. Accordingly, as a matter of law, this cause of action was properly dismissed by the trial court.

B. Interpreting the SLAPP Act.

1. Utah law provides the framework for interpreting statutes like the SLAPP Act.

Under applicable Utah law, when interpreting and applying a statutory scheme, two critical objectives must be achieved. First, courts must “presume that the legislature used each word advisedly” and must “give effect to the terms according to its ordinary and accepted meaning. State v. Huntington-Cleveland Irrigation Co., 2002 UT 75, ¶13, 52 P.3d 1257; see also Olsen v. Samuel McIntyre Investment Co., 956 P.2d 257, 259 (Utah 1998) (“Because we assume that the legislature used each term in the statute advisedly, we read the statute’s words literally unless such a reading is unreasonably confusing or inoperable”). Second, courts have a “duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities.” State v. Bell, 785 P.2d 390, 397 (Utah 1989); see also State v. Wood, 648 P.2d 71, 82 (Utah 1982)(“We construe statutes, if possible, to avoid the risk of running afoul of constitutional prohibitions”). It is within this interpretive framework that the SLAPP Act must be analyzed.

2. Section 105 of the SLAPP Act provides for two cumulative remedies.

As noted above, Tobias/Feld involved Section 105 of the SLAPP Act that provides, in pertinent part, for a statutory counterclaim. The operative language of this section provides as follows:

- (1) A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover:
 - (a) **costs and reasonable attorney's fees**, upon a demonstration that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law; and
 - (b) **other compensatory damages** upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.

UCA §§78-58-105(1)(a) and (1)(b) (emphasis added).⁴

A plain reading of this statutory scheme evidences that there are two kinds of **cumulative remedial actions** under the SLAPP Act: (i) the recovery of “costs and reasonable attorney’s fees” (See UCA §78-58-105(1)(a) (2001)) (the “Fee Claim”); and (ii) the recovery of “other compensatory damages” (See UCA §78-58-105(1)(b) (2001)) (the “Damage

⁴Section 105 of Utah’s SLAPP Act was taken from New York State’s statute at Section 70-a, entitled, ACTIONS INVOLVING PUBLIC PETITION AND PARTICIPATION; RECOVERY OF DAMAGES.

Claim”).⁵ To qualify for the Fee Claim one must “demonstrate” that the action filed by the plaintiff (i) involves public participation in the process of government **and** (ii) was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. See UCA §78-58-105(1)(a) (2001) (emphasis added). If either of these two elements is not proven, a recovery of costs and reasonable attorney’s fees is not available.

If the defendant qualifies for the Fee Claim, then, and only then, upon an “additional” showing that the action of the plaintiff was “commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution” can a Damage Claim be sought. See UCA §78-58-105(1)(b) (2001). In this manner the Fee Claim and the Damage Claim are cumulative.

3. Sections 103 and 104 of the SLAPP Act provide the procedural framework to access the fee and damage claims under section 105 of the SLAPP Act.

Section 103 of the SLAPP Act further provides a summary procedural process to make a determination as to whether the remedies under Section 105 are available. Section 103 specifically states that this process is to be governed by Rule 12(c) of the Utah Rules of Civil Procedure for a Motion for Judgment on the Pleadings. Furthermore, to curtail the possible

⁵Interestingly, the New York version provides for three cumulative remedies: first, recovery of attorney’s fees and costs under (1)(a); second, recovery of other compensatory damages under (1)(b); and third, recovery of punitive damages under (1)(c). The Utah SLAPP Act only adopted the first two cumulative remedies, omitting a possible punitive recovery.

increase of costs, once a party seeks a motion under Section 103, Section 104 of the SLAPP Act stays all pending discovery,⁶ provides for an expeditious hearing on the motion, and provides the right to an interlocutory appeal.

Section 104 further sets the evidentiary standard which the moving party must meet, specifically noting that the moving party must prove by “**clear and convincing evidence**” that “the **primary purpose** of the action is to prevent, interfere with, or chill the moving party's proper participation in the process of government.” See UCA §78-58-104(1)(b) and (2) (2001) (emphasis added). The SLAPP Act contemplates that only if the moving party proves its case and is successful under its Motion for Judgment on the Pleadings, then the remedies under Section 105 become available.

It is interesting and important to note that under this statutory procedure to determine the viability of a Fee Claim, as well as the cumulative Damage Claim, there is no “continuing” language as relied upon so heavily by Tobias/Feld to justify their misplaced claim. The reason for this difference appears clear. At the time this procedure was intended to be used the action would have just been filed and no "continuing" issue would exist. It is only once the moving party is able to establish by clear and convincing evidence that the primary purpose of the action was to prevent, interfere with, or chill the moving party's proper participation in the

⁶This option to stay all discovery until the motion has been determined may be one of the central issues in determining whether attorney's fees that could become available under Section 105 were “reasonable.” Should counsel, like Tobias/Feld's counsel have done in this case, not seek a stay during a determination as to whether a Fee Claim is available, then the subsequent attorney's fees that are spent in discovery may in and of themselves be determined “unreasonable.”

process of government (thereby justifying an award of costs and attorney's fees damages) that one can then seek at the second remedy of other compensatory damages under Section 105.

D. Applying the SLAPP Act.

1. The SLAPP Act does not provide for any applicable retroactive application.

The law in Utah is clear, consistent and conclusive: “[S]tatutes are not applied retroactively unless retroactive application is expressly provided for by the legislature.” Brown & Root Industrial Service v. Industrial Commission of Utah, 947 P.2d 671, 675 (Utah 1997).⁷ This rule has been codified in Utah Code Ann. §68-3-3 (1996), which states: “No part of these revised statutes is retroactive, **unless expressly so declared.**” (Emphasis added).

In the present case, the SLAPP Act contains no language that the SLAPP Act was intended to be applied retroactively. As a consequence, under the above-stated legal authorities, the SLAPP Act should not be given retroactive treatment. The only exception to this rule is when the legislation provides for purely procedural changes. In such procedural circumstances the statute may be given retroactive effect. See Roark v. Crabtree, 893 P.2d

⁷See also Olsen v. Samuel McIntyre Investment Co., 956 P.2d 257, 261 (Utah 1998) (“A long-standing rule of statutory construction is that we do not apply retroactively legislative enactments that alter substantive law or affect vested rights unless the legislative has clearly expressed that intention”); Evans & Sutherland Computer Corp. v. Utah State Tax Commission, 953 P.2d 435, 437 (Utah 1997) (“The intent to have a statute operate retroactively may be indicated by explicit statements that the statute should be applied retroactively”); see accord State of Utah v. Jacoby, 975 P.2d 939, 942 (Ut. App. 1999) (“A statute is presumed to be prospective and will not be applied retroactively in the absence of clear legislative intent”); Washington National Insurance Company v. Sherwood Associates, 795 P.2d 665, 667 (Ut. App. 1990) (“In Utah, a statute generally cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute.”)

1058, 1062 (Utah 1995); Pilcher v. State Dep't of Social Servs., 663 P.2d 450, 455 (Utah 1983). This Court stated that “[t]his is a narrow exception” and that “only procedural changes ‘which do not enlarge, eliminate, or destroy vested or contractual rights’ may be applied retroactively.” Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1020 (Utah 1995)(quoting Pilcher, *supra*, 663 P.2d at 455).⁸

In contrast, “[a] ‘substantive’ change, or one that affects substantive rights, may not be applied retroactively.” Brown & Root Indus. Service v. Industrial Com’n of Utah, 947 P.2d 671, 675 (Utah 1997)(citing Ball v. Peterson, 912 P.2d 1006, 1009 (Ut. App.1996)). “Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and **which may give rise to a cause of action. . . .**” *Id.*(citing Washington Nat’l Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 668 n.5 (Ut. App.1990) (emphasis added)).⁹

In the present case, the SLAPP Counterclaim is clearly substantive as it is a **new** cause of action created by the SLAPP Act. Therefore, the SLAPP Counterclaim is only potentially

⁸See also State of Utah v. Jacoby, 975 P.2d 939, 942 (Ut. App.1999) (“[A] statute may be applied retroactively only if it is procedural in nature and does not enlarge or eliminate vested rights”); Evans & Sutherland Computer Corp. v. Utah State Tax Commission, 953 P.2d 435, 437-38 (Utah 1997) (“[P]ermits retroactive application where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights without enlarging or eliminating vested rights.”)

⁹See also Homeside Lending, Inc. v. Miller, 31 P.3d 607, 615 (Ut. App. 2001) (“[W]hen statutory amendments are substantial and substantive and not merely procedural, then retroactive application is not appropriate. If the ‘vested rights’ given by a statute have been enlarged, then the amendment cannot be considered procedural.”)

available to Tobias/Feld if the SLAPP Act can be retroactively applied. However, Tobias/Feld are attempting to state a claim under the newly created SLAPP Act which became law in April 2001 to facts occurring in 1996, 1997 and 1998. As discussed in more detail herein, such efforts are not judicially permitted, and accordingly, ADC was entitled to summary judgment in its favor over the SLAPP Counterclaim as determined by the trial court.

The SLAPP Counterclaim brought by Tobias/Feld is also an attempt to assert a claim based on the second part of the SLAPP Act. The SLAPP Counterclaim even cites to the specific provisions in the SLAPP Act that creates this new cause of action as the basis for the claim itself. See Counterclaim at ¶¶196 and 197; R. 1030; see also Utah Code Ann. §78-58-105 (2001). As discussed above, creating a new statutory counterclaim with new statutory remedies is the very definition of creating new substantive rights between the parties. As such, accompanying the creation of these new rights is the absolute preclusion of retroactive application.¹⁰ That is the law. And the law makes fundamental sense. All notions of fairness and justice would be violated if the legislature is allowed to retroactively make past conduct actionable. Yet, that is exactly what Tobias/Feld are attempting to do in the present case by way of their SLAPP Counterclaim.

There is no dispute that Tobias/Feld actively opposed the RiverPark Project. This opposition began concurrently with the filing by ADC of the ADC Application to both change the Master Plan of South Jordan City, as well as make zoning changes to the subject property

¹⁰See generally J. Laitos, Legislative Retroactivity, 52 WASH. U.J. URB. & CONTEMP. L. 81 (1997).

comprising the RiverPark Project. Tobias/Feld's opposition continued throughout the pendency of the ADC Application. Once the RiverPark Project was approved in April 1998, the only outstanding issue was ADC's present suit against Tobias/Feld for tortious interference with ADC's contractual rights with the Williams.

No subsequent events or facts have ever been even alleged by Tobias/Feld after April 1998. This is because none exist. After the RiverPark Project was completely approved by South Jordan City in April 1998, Tobias/Feld cannot claim that their "free exercise of rights granted under the First Amendment to the U.S. Constitution" were inhibited, as required under the SLAPP Act. See Utah Code Ann. §78-58-105(1)(b) (2001). Certainly after ADC sold the RiverPark Project in January 2000 to third-parties, Tobias/Feld cannot claim that their "free exercise of rights granted under the First Amendment to the U.S. Constitution" were inhibited, as required under the SLAPP Act. See id. Importantly, both of these critical events occurred years before even the enactment of the SLAPP Act.

Attached hereto as Appendix "B" is a detailed factual chronology, including a time-line chart that dramatically illustrates this reality. As alleged in Tobias/Feld's counterclaim (approximately fifty-three (53) pages in length with hundreds of exhibits) all of the actions that Tobias/Feld took in opposition to the development of the William's Property occurred between October 7, 1996 (when ADC first filed for a zoning change) and March 6, 1998 (when ADC filed its Complaint in this action.) Tobias/Feld even brag that the filing of this suit by ADC did not stop their efforts to oppose the RiverPark Project. See Counterclaim at ¶160; R.

1023.¹¹

The SLAPP Act providing for a SLAPP Counterclaim went into effect over three (3) years after any of the above-delineated relevant facts occurred. Even if ADC's purpose were to chill public participation, which ADC vehemently contends was not the case, all of the "chilling" would have taken place over three (3) years prior to the enactment of the SLAPP Act. Tobias/Feld cannot now take advantage of a statute that was enacted in 2001 to remedy any alleged damage that occurred between 1996 and 1998. The SLAPP Act enacted in 2001 cannot be applied retroactively to create these kinds of substantive rights or claims. Accordingly, the dismissal of the SLAPP Counterclaim should, as a matter of law, be sustained by this Court.

2. Bill of attainder and other constitutional concerns.

Applying the foregoing interpretation of the SLAPP Act to the present case resulted in the trial court's dismissal of Tobias/Feld's SLAPP Counterclaims as a matter of law. The SLAPP Act was enacted over three years after the Complaint was filed in this action. Significant legal precedence supports the effective preclusion of the retroactive application of the SLAPP Act to the present case.

Interestingly, a fair reading of Tobias/Feld's Opposition Memorandum to ADC's Motion for Partial Summary Judgment over their SLAPP Counterclaim, as reaffirmed in their

¹¹Tobias/Feld states in paragraph 160 of the SLAPP Counterclaim that "[n]otwithstanding Anderson Development's SLAPP suit, Mrs. Tobias and Mrs. Feld continued to participate in the process of government and attended the next Planning & Zoning Commission hearing on March 11, 1998." See R. 1023.

Appellants' Brief before this Court, leads to the conclusion that Tobias/Feld themselves effectively concede ADC's argument that the SLAPP Act cannot have retroactive application in this case. Instead, Tobias/Feld argue that the SLAPP Act need only apply prospectively from its enactment in April 2001 because ADC "continued" pursuing its valid claims by filing a certificate for readiness of trial. By so doing, Tobias/Feld argue that ADC violated the "continuing" provisions of the recently enacted SLAPP Act. Tobias/Feld now are apparently in the posture of making a Fee Claim and a Damage Claim for attorneys fees and damages arising from the time that ADC filed its certificate of readiness for trial. This argument was rejected by the trial court.

Tobias/Feld apparently believe that the SLAPP Act was specifically designed and even enacted by the Utah legislature to provide them with a possible claim against ADC and other protection from ADC in this very case that had been pending at that time for more than three years. See Affidavits of former State Senator Mont Evans¹² and State Senator D. Chris

¹²Former State Senator Mont Evan states in his affidavit that "Mrs. Tobias and I discussed introducing legislation in the Utah state senate to remedy the injustice of the strategic lawsuit against public participation ("SLAPP suit") filed by Anderson Development against her and Mrs. Feld." See Affidavit of Mont Evans attached to Tobias/Feld's Memorandum in Opposition to ADC's Motion for Partial Summary Judgment over Tobias/Feld's SLAPP Counterclaim (the "SLAPP Opposition Memorandum") as Exhibit 10 at ¶4; R. 2356. Mr. Evans emphatically notes, "I drafted and sponsored Senate Bill 0027 specifically for the purpose of providing Mrs. Tobias and Mrs. Feld with an expeditious procedural remedy for Anderson Development's SLAPP Suit against them . . . Id. at ¶7; R. 2357. While Mr. Evans statements contains evidentiary impermissible legal conclusions without foundation (e.g., that ADC's suit was a SLAPP suit), he does provide us with ample evidence that he specifically intended to interfere with pending litigation and create a bill of attainder. ADC objected to this affidavit to the extent that it is without foundation and states impermissible legal conclusions.

Buttars.¹³ Such actions, if they are actually true, would be an illegal use of the legislative powers and the SLAPP Act would be deemed a prohibited bill of attainder. Parenthetically, while this further legal problem associated with the SLAPP Counterclaim was raised by ADC at the trial court level, the trial court did not need to apply this additional basis to dismiss the SLAPP Counterclaim. Yet, at the appeals level every basis proffered to the trial court, even if not relied upon by the trial court in rendering its opinion can be used as a basis for affirming by the appeals court. See Dipoma v. McPhie, 2001 UT 61, P 18, 29 P.3d 1225 (quoting Limb

¹³State Senator D. Chris Buttars similarly provides testimony that, while laced with obviously self-serving statements for Tobias/Feld, are equally impermissible legal conclusions without foundation. However, he does show that he too wanted to create a bill uniquely beneficial to Tobias/Feld and specifically hurtful to ADC. Senator Buttars notes: “I knew Mrs. Tobias and Mrs. Feld and knew that they had been sued by Anderson Development, LC (“Anderson Development”) for \$1.2 million in retaliation for their opposition to certain Master Plan and zoning changes in South Jordan City. See Affidavit of D. Chris Buttars attached to the SLAPP Opposition Memorandum as Exhibit 15 at ¶4.; R. 2457. It is interesting and troubling that this State Senator did absolutely no independent verification as to the basis for Tobias’ claim that the suit was without merit. In fact, all that Senator Buttars did was to read an obviously biased and overtly slanted article that Tobias gave him from the SALT LAKE CITY WEEKLY published in April 1998 even before this Court had ruled against Tobias/Feld’s Motion to Dismiss. State Senator Buttars should be asking the question now, “Why didn’t Tobias inform me that this suit had survived all attempts to have it dismissed summarily?” Such misinformation or omission of information speaks both to Senator Buttar’s lack of adequate attention to this matter AND Tobias’ lack of both candor and ethics. It is in this inaccurate light that Senator Buttars continues, “It was my intent that HB0112 would apply to the retaliatory lawsuit pending against my constituents, Janalee Tobias and Mrs. Feld. Id. at ¶7; R. 2458. Such admissions are troubling indicators that he too wanted to create legislation tailored to interfere with pending litigation and create a bill of attainder. In his case, he actually got what he wanted. Unfortunately for Tobias/Feld, they had over-sold their belief that the ADC case was a SLAPP suit and, therefore, Senator Buttars (like Mr. Evans) required that such a determination would be a condition precedent to a claim under the SLAPP Act. ADC also objected to this affidavit to the extent that it is without foundation and states impermissible legal conclusions.

v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 225-26 n.2, 461 P.2d 290, 293 n.2 (1969); see also Orton v. Carter, 970 P.2d 1254, 1260 (Utah 1998) (applying Limb); 5 C.J.S. Appeal & Error § 714 (1993).

The Utah constitutional restrictions against Bills of Attainder in Art. I, §9, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, e. g., United States v. Brown, 381 U.S. 437, 456-462, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965). The United States Supreme Court has defined bills of attainder as "legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial" United States v. Lovett, 328 U.S. 303, 315, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946); see accord Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846-47, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984), quoting Nixon v. Administrator of General Services, 433 U.S. 468 (1977); see also State v. Washburn, 34 Conn. App. 557, 562, 642 A.2d 70, cert. denied, 230 Conn. 912, 645 A.2d 1017 (1994). Further, the Court has broadly defined what may constitute punishment for bill of attainder jurisprudence, stating that "the deprivation of any rights, civil or political, previously enjoyed, may be punishment [depending on] the circumstances attending and the causes of the deprivation" Cummings v. Missouri, 71 U.S. 277, 320, 18 L. Ed. 356 (1866). The specificity element of the definition of "bill of attainder" is met by a statute singling out an individual, whether the individual is called by name or described in terms of past conduct which, because it is past conduct, operates only as a designation of particular persons. Communist Party of the United States v. Subversive Activities Control

Board, 367 U.S. 1, 81 S. Ct. 1357, 1405, 6 L. Ed. 2d 625 (1961).

In the present case, Tobias/Feld argue that the SLAPP Act was enacted specifically referencing Anderson Development's suit against Mrs. Tobias and Mrs. Feld. See SLAPP Opposition Memorandum at p. 64; R. 2089. Tobias/Feld go even further stating that "[t]he intent of the bill [the SLAPP Act] . . . was intended to apply to lawsuits, such as Anderson Development suit against Mrs. Tobias and Mrs. Feld, that were pending at the time the bill was passed." Id. Based on these representations, Tobias/Feld's efforts of getting assurances that the SLAPP Act would apply to their case, only subject to their showing that the claims brought by ADC were in fact nothing more than a SLAPP case, have resulted in the unconstitutional application of the Act as an illegal Bill of Attainder.

As further presented to the trial court by ADC, there are other serious potential constitutional violations if the trial court had allowed the SLAPP Act to be applied in this case as requested by Tobias/Feld.¹⁴ Indeed, applicable Utah law requires this Court to interpret and

¹⁴In addition to the Bill of Attainder and the problematic issues connected to this constitutional protection, should the SLAPP Act be accepted for what Mr. Evans, Senator Buttars and Tobias/Feld allege, there are several other constitutional principles that similarly come into question, including the following:

1. Law Impairing the Obligation of Contracts. Art. I, §18 of the Utah Constitution states: "No . . . law impairing the obligation of contracts shall be passed." The SLAPP Act, as Tobias/Feld seek to apply it, does impair the obligation of contracts and is illegal. In this case, the trial court has previously ruled, before enactment of the SLAPP Act, that ADC has a valid and cognizable claim for intentional interference with existing and prospective contractual relations. The obligation of contracts is clear. ADC had a contract with Williams and had the right to seek enforcement of that contract without interference by Tobias/Feld. Tobias/Feld also shared an obligation in those contracts to not interfere with ADC's contract.

(continued...)

apply the SLAPP Act in a constitutional manner. See, e.g., State v. Bell, 785 P.2d 390, 397

¹⁴(...continued)

The trial court has previously recognized this tort in this case and has stated that ADC has presented a valid and cognizable cause of action. The Court should not allow the SLAPP Act to apply to this case as its application would impair the obligation of contracts.

2. Open Courts. Art. I, §18 of the Utah Constitution states: “All Courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.” The application of the SLAPP Act to ADC’s pending civil case as proposed by Tobias/Feld should be deemed as unconstitutional. Applying the SLAPP Act, as proposed by Tobias/Feld, effectively bars ADC from prosecuting its valid cause of action which was pending before a tribunal of this State. According to the affidavits proffered by Tobias/Feld in their Opposition Memorandum, the SLAPP Act was specifically passed to interfere with ADC’s right to seek redress before a tribunal of this state. If allowed by this Court, the application of the SLAPP Act to this pending case will interfere with ADC’s ability to obtain a remedy by due course of law and will act as an effective bar to ADCs prosecution of its valid civil cause of action.

3. Separation of Powers. Art. V, §1 and other sections of the Utah Constitution define separation of powers. In this case, ADC had availed itself its constitutional right to seek redress before the Judicial Branch of government. Thereafter, Tobias/Feld also availed themselves of the protections of law before the Judicial Branch by filing a Motion to Dismiss.

When the motion was dismissed, Tobias/Feld went before the Legislative Branch of government and asked that branch to specifically intervene and to “change the rules” associated with how the ADC case against them was proceeding before another branch of government, the Judiciary. According to the affidavits propounded by Tobias/Feld, the Legislative Branch of government attempted to change the rules and allow for the imposition new law into the case, effectively giving Tobias/Feld new causes of action.

4. Other Important Constitutional Provisions. Other relevant constitutional provisions include Art I, §27 (Fundamental Principles): “Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government”; Art. I, §24 (Uniform Operation of Laws): “All laws of a general nature shall have uniform operation.”; Art. I, §7 (Due Process): “No person shall be deprived of life, liberty or property, without due process of law.”; and Art. I, §1 (Inherent and Inalienable rights): “All men have the inherent and inalienable right to enjoy and defend their lives an liberties, to acquire, possess and protect property; . . .petition for redress of grievances”

(Utah 1989) (Courts have a “duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities.”); State v. Wood, 648 P.2d 71, 82 (Utah 1982)(“We construe statutes, if possible, to avoid the risk of running afoul of constitutional prohibitions”).

3. **Tobias/Feld’s Motion to Dismiss is the substantive equivalent to a Motion for Judgment on the pleadings, as contemplated under Sections 103 and 104 of the SLAPP Act.**

Section 103(1)(b) of the SLAPP Act provides that the party challenging the complaint should file a motion under URCP 12(c) – a Motion for Judgment on the Pleadings. Such a motion is akin to the general Motion to Dismiss that is typically brought under Rule 12(b)(6). See, e.g., Russell v. Standard Corp., 898 P.2d 263 (Utah 1995); St. Benedict Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194 (Utah 1991). In fact, the standard for review of both of these motions is effectively the same. See, e.g., Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099, 1100 (1958) (The standard of review for a Motion for Judgment on the Pleadings under URCP 12(c) is to have all the facts of the complaint given to the party to whom the motion is against with all inferences fairly arising therefrom); Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991) (The standard of review for a Motion to Dismiss under URCP 12(b)(6) is to construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor). Accordingly, the scrutiny given under either of these motions would be the same.

In the present case, on or about April 28, 1998, Tobias/Feld filed a Motion to Dismiss claiming that ADC had “failed to state a claim for interference with existing contractual

relations, failed to state a claim for interference with prospective economic relations . . . [and that the Complaint was brought] to harass and retaliate against people who have exercised their rights” (the “Motion to Dismiss”). See R. 32. After the Motion to Dismiss was fully briefed by both parties, on or about December 8, 1998, the trial court denied the Motion to Dismiss. In so denying the Motion, the trial court specifically found that “[t]he Plaintiff [ADC] has stated a cause of action in its complaint of intentional interference with existing economic relations or prospective economic relations” (the “Motion to Dismiss Ruling”). See R. 68.

The Motion to Dismiss Ruling effectively and fully extinguished any possible claim that Tobias/Feld might have hoped to achieve under the SLAPP Act. This reality is even further substantiated when one acknowledges that under Section 104(1)(b) the moving party is required to prove by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment rights of the defendant. This standard is even higher than the traditional level of preponderance of the evidence used for such motions.

The original Motion to Dismiss ruling denying the dismissal of ADC’s case in 1998 was later reaffirmed in 2002 when the trial court denied Tobias/Feld’s Motion for Summary Judgment in this action. This reaffirmation was the result of Tobias/Feld filing on or about November 9, 2001 a Motion for Summary Judgment claiming again that ADC had failed to state a cause of action against them for interference with either existing contractual relations or prospective economic relations. See R. 337-339. After this motion was fully briefed by the parties the trial court, on or about May 21, 2002, denied Tobias/Feld’s Motion for Summary Judgment finding that material factual disputes existed. See R. 927-929. Therefore,

Tobias/Feld twice failed to meet an even lower standard than that required under the SLAPP Act to qualify for relief.

E. **Courts in Other Jurisdictions Have Similarly Interpreted and Applied SLAPP Acts.**

1. **A finding that the context of the claims is not solely within the governmental process is sufficient alone to dismiss a SLAPP counterclaim.**

While the foregoing cases illustrate that the claims brought must have a substantial basis in fact or law for the extension, modification or reversal of existing law is sufficient to dismiss a SLAPP counterclaim, these cases also demonstrate that unless the claim arises specifically from the exercise within the governmental process a dismissal of the SLAPP counterclaim is also appropriate. This basis was further explained by the Supreme Court of Maine in Millett v. Atlantic Richfield Company, 1999 Me. Super. LEXIS 240 (Maine 1999) where the court held that in order to avoid finding the SLAPP Act unconstitutional, the party seeking dismissal must “make a threshold showing that the claims against it are based on *petitioning activities alone* and have no substantive basis other than or in addition to the petitioning activities.” (Emphasis added). This same analysis was also used by the Supreme Court of Massachusetts in Duracraft Corp. v. Holmes Product Corp., 427 Mass. 156, 691 N.E. 2d 935, 943 (Mass. 1998), wherein the court similarly found that the SLAPP Act was not intended to authorize dismissal of legitimate, cognizable claims based on something other than petitioning activities and that if the statute was to be so construed, then it would violate a plaintiff’s own constitutional right to petition a court for redress of their grievances.

This same analysis is also fatal to Tobias/Feld's SLAPP Counterclaims. It is indisputable that the claims asserted by ADC against Tobias/Feld do not involve the governmental process. For example, the ADC's claim of contractual interference does not arise from something Tobias/Feld said or did during a South Jordan City public meeting or filed as part of the opposition to the Commercial Development with South Jordan City. In contrast, the claims asserted by ADC against Tobias/Feld are specifically and narrowly focused at their activities in regards to a private sales transaction between ADC and the Williams family. As such, the SLAPP Act simply does not apply. Further, as articulated by the New York, Maine and Massachusetts' Supreme Courts, to apply the SLAPP Act in such a way would be unconstitutional as it would effectively violate ADC's constitutional right to petition a court for redress of its grievances. For this reasoning alone, Tobias/Feld's SLAPP Counterclaims were appropriately dismissed.

2. A finding that the claims have a substantial basis in fact or law is sufficient alone to dismiss a SLAPP counterclaim.

As previously discussed, the Utah SLAPP Act was modeled after the New York SLAPP Act. The New York SLAPP Act was enacted in 1992. There have been several cases that have been brought under this act giving the New York courts the opportunity to examine both the procedural and constitutional implications of the act. For example, in Niagra Mohawk Power Corp. v. Testone, 272 A.D. 2d 910, 708 N.Y.S. 2d 527 (4th Dept. 2000), the appellate court determined that the trial court had improperly allowed the filing of a counterclaim under the SLAPP Act because "the plaintiff's action was supported by substantial arguments for

extension, modification, or reversal of existing law.” In Niagra Mohawk, the plaintiff had brought an action against the defendants for attempted civil extortion as a result of the defendants’ alleged attempt to have the plaintiff pay money to defendants in return for defendants not disclosing certain information to the Public Service Commission. The claim for attempted civil extortion was dismissed on the grounds that the New York law did not recognize the tort of attempted extortion. At the same time, the defendants sought permission to file a counterclaim under the New York’s SLAPP Act, which the trial court allowed. Both parties appealed the trial court’s rulings. The Supreme Court of New York affirmed the trial court’s dismissal of the attempted civil extortion claim.

However, and most interestingly, the Court also reversed the trial court’s allowance of the SLAPP counterclaim on two applicable theories:

- That the basis for the unsuccessful claim of attempted extortion was “based in part on his [defendant’s] statements to the Public Service Commission, it is not ‘materially related’ to such participation”; and
- That “plaintiff’s action, although now dismissed, was ‘supported by a substantial argument for the extension, modification or reversal of existing law.’”

Id. at 912. Consequently, even though the plaintiff failed in its claim against the defendant, the claim was not the basis for a SLAPP claim because it was not materially related to public participation and was supported by a “substantial argument for the modification or reversal of existing law.”

Similarly, in Clemente v. Impastato, 290 App. Div. 2d 864, 736 N.Y.S. 2d 281, app

den., 2002 NY LEXIS 1536 (N.Y. 2002), plaintiff had brought a defamation action against defendant for comments that defendant had included in a letter sent to the Department of Environmental Conservation. Defendant counterclaimed under the New York SLAPP Act alleging that the defamation action was a SLAPP suit. At trial, after plaintiff concluded his proof, the court granted defendant's motion to dismiss plaintiff's action. Ultimately, the court also dismissed defendant's SLAPP counterclaim. Defendant appealed. On appeal, the New York Court of Appeals affirmed. Again the Court reasoning is also instructive.

- First, the court found that “Plaintiff's defamation action centered on defendant's statements contained in her letter to DEC, which accused plaintiff of criminal conduct directed against defendant and a DEC employee. Such allegations of plaintiff's criminal acts were not within the scope of DEC's oversight of plaintiff's permits to operate a gravel mine and are, therefore, not "materially related" to defendant's opposition to plaintiff's application to DEC for renewal and expansion of those permits as required by Civil Rights Law § 76-a (1) (a) [the SLAPP Act]; and
- Second, the court “conclude[d] that plaintiff's defamation action, although now dismissed, was commenced with a substantial basis in fact and law.”

Id. at 282. Again, even though the plaintiff failed to prove its claim, the claim was nonetheless not a SLAPP claim because of not being materially related to public participation and there being a substantial basis of fact and law in bringing it in the first place.

Like these cases in New York, Tobias/Feld have twice failed to qualify for relief under Utah's SLAPP Act, as the trial court has twice found that, at the very minimum, that the causes

of action asserted by ADC have a substantial basis in fact and law. Accordingly, dismissal of their SLAPP Counterclaims was the only appropriate result under the circumstances. Tobias/Feld's sole claim under the SLAPP Act appears to be a misplaced notion that because ADC "continued" to pursue its valid claims against Tobias/Feld that the SLAPP Act provides relief. Yet, the profound truth is that the reason that ADC continued its claims against Tobias/Feld in this action is because the trial court twice told it that it legally could.

Furthermore, the SLAPP Act itself states that "[n]othing in this section [Section 105] shall affect or preclude the right of any party to any recovery otherwise authorized by law." UCA §78-58-105(2) (2001). This express language is in complete harmony with the courts in other jurisdictions who have ruled on this matter. As discussed above, these courts have found that to apply the SLAPP Act constitutionally, it cannot be used as a vehicle to affect or preclude a party's right to bring a valid claim against another. Such permission cannot form a basis for relief under the SLAPP Act. Tobias/Feld's SLAPP Counterclaim was therefore, properly dismissed.

III. TOBIAS/FELD'S CLAIMS BASED UPON EMOTIONAL DISTRESS FOR THE FILING OF A LAWSUIT AGAINST THEM WAS PROPERLY DISMISSED, AS A MATTER OF LAW.

A. Emotional Distress Damages Are Not Available for Filing a Lawsuit.

Tobias/Feld allege that ADC has caused emotional distress based upon the filing and pursuit of this action. See Counterclaim. However, Tobias/Feld's claims for emotional distress are not appropriate under applicable law. Claims for emotional distress may not be based on the filing of lawsuits. This issue was directly addressed by this Court in Bennett v. Jones,

Waldo, Holbrook & McDonough, 203 UT 9, 70 P.3d 17, 470 Utah Adv. Rep. 19 (Utah 2003),

wherein this Court succinctly stated that

“[a]n allegation of improper filing of a lawsuit or use of the legal process against an individual is not redressable by a cause of action for intentional infliction of emotional distress . . . even if we were to assume that the . . . conduct . . . were sufficiently outrageous, [the plaintiff’s] claim for intentional infliction of emotional distress is barred by the judicial proceedings privilege.”

This holding is in accord with virtually every jurisdiction that has reached this issue. For example, the Court of Appeals for the State of California has held that there can be no emotional distress claim arising from a lawsuit because such claims are privileged. See Cantu vs. Resolution Trust Co., 4 Cal. App. 4th 857, 888-889 (Cal. App. 2 Dist. 1992) (“Where . . . a party acts in good faith to pursue its own legal rights, such conduct is privileged, even if emotional distress will result).

Similarly, in Early Detection Center, PC v. New York Life Ins. Co., 403 N.W.2d 830, 833 (Mich. App. 1986), the Court of Appeals for the State of Michigan held that

[t]he conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is **never liable**, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

Id.(citing to Restatement 2d (Torts) 46, comment g) (emphasis added).

Furthermore, the court in Early Detection Center, PC, supra, stated that “[w]e believe that the last comment quoted above closely describes the situation presented here. Plaintiffs allege that the outrageous conduct on the part of the defendants was the filing of a “groundless” suit. However, this amounts to nothing more than an assertion of legal rights in

a permissible way.” Id.

The case at hand could not be more analogous. The plaintiffs in Early Detection Center, PC filed suit partly based upon a claim of emotional distress based upon a previously filed lawsuit. They claimed emotional distress for the filing of what they termed a groundless lawsuit. The court found that even if the suit was groundless, that action is not enough to rise to the level of extreme and outrageous conduct. See id. In fact, the court stated that “by resorting to a court of law for the resolution of its dispute with plaintiffs, defendant followed what a civilized society would consider the most appropriate form of conduct.” Id.

These cases are in complete accord with the Restatement of Torts which sets forth a clear rule that while one is attempting to enforce his legal rights in a permissible way there is no liability for emotional distress. Numerous jurisdictions have adopted this Restatement rule that where a party is enforcing one’s legal rights that action can never be considered to extreme and outrageous behavior necessary to support a claim of emotional distress.¹⁵

¹⁵See, e.g., Bendalin v. Valley National Bank, 540 P.2d 194, 196 (Az. Div. I 1975) (actor not liable when trying to enforce legal rights); Public Finance Corp. v. Davis, 360 N.E.2d 765, 768-69 (Ill. 1976) (creditor must be given some latitude to pursue reasonable methods of collecting debts even though such methods may result in some inconvenience, embarrassment or annoyance to the debtor); Early Detection Center v. New York Life, Inc., 403 N.W.2d 830, 833-34 (Mich. 1986) (allegation that the outrageous conduct on the part of the defendants was the filing of a “groundless” suit . . . amounts to nothing more than an assertion of legal rights in a permissible way); Lachenmaier v. First Bank Systems, Inc., 803 P.2d 614, 619-20 (Mt. 1990) (bank not liable for emotional distress where it merely exercised a legal right to foreclose on the mortgage and notes); Straus v. Kirby Court Corp., 909 S.W.2d 105, 109-10 (Tex. App. - Houston 1995) (legal action taken to enforce a lease does not rise to the level of outrageous conduct necessary for emotional distress); Jackson v. Peoples Federal Credit Union, 604 P.2d 1025, 1030 (Wis. 1979) (collection tactics not permissible but did not
(continued...))

ADC has alleged from the outset that its claims are based upon an interference with exiting contractual relations. The trial court has twice agreed that ADC's allegations comprise a legitimate claim for such torts. By seeking to enforce its rights, ADC does not, and cannot, subject itself to an emotional distress claim. Accordingly, the Tobias/Feld claim in the Counterclaim, as a matter of law, was properly dismissed by the trial court. R. 3887.

B. Taking Tobias/Feld's Allegations as True, ADC's Conduct Does Not Rise To The Level Required To Sustain Claims for Emotional Distress.

As discussed above, Tobias/Feld cannot plead a claim, as a matter of law, for emotional distress based on the mere filing of the lawsuit. On this basis alone, the counterclaim for emotional distress was dismissed. However, the counterclaim for emotional distress further failed because Tobias/Feld have not even alleged that ADC engaged in outrageous conduct sufficient to cause emotional distress or acted in reckless disregard of the probability of causing emotional distress as a result of the conduct. The law is clear that "it is for the **court to determine**, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Gygi v. Storch, 503 P.2d 449, 450 (Utah 1972)(citing Restatement (Second) of Torts § 46, Comment h) (emphasis added).

This Court has articulated the well-established criteria for an emotional distress claim in Samms v. Eccles, 358 P.2d 344, 347 (Utah 1961):

¹⁵(...continued)
rise to the level of clearly excessive); Mummery v. Pold, 770 P.2d 241, 243 (Wyo. 1989) (where party to a lawsuit purchases a judgment from a separate suit solely to levy on judgment and harass other party to current suit, not enough to maintain cause of action for emotional distress).

[A]n action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

See accord White v. Blackburn, 787 P.2d 1315, 1317 (Utah App.1990) (“[I]n an action for severe emotional distress, the court has held that the plaintiff must show the offensive behavior to have been perpetrated (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.”).

This Court has repeatedly held that merely unreasonable or offensive conduct does not qualify as outrageous conduct. Outrageous conduct exceeds all bounds of what is usually tolerated in a civilized community and that the conduct was so “outrageous and intolerable that it offended against the generally accepted standards of decency and morality.” Retherford v. AT&T Communications, 844 P.2d 949, 970-72 (Utah 1992).

Taking all of Tobias/Feld’s claims as true, as alleged in the Counterclaim, one is left with the following factual picture:

- ADC was aware that Tobias/Feld were attempting to stop the development of the Williams Property.
- ADC warned Tobias/Feld that if they interfered with a contractual relationship they would take legal action.
- ADC took legal action believing that Tobias/Feld wrongfully interfered with

its contractual relationship over the Williams Property

See generally R. 988-1040.

Certainly, the threatening of a lawsuit or the subsequent filing of a lawsuit does not rise to the level of extreme or outrageous conduct. If such were the case, the courts would be flooded with suits claiming emotional distress damages for merely being named a party to the suit.

Under Utah law it is proper to dismiss an emotional distress claim, as a matter of law, if the conduct alleged is not sufficiently outrageous. Ankers vs. Rodman, 995 F. Supp.1329, 1336 (D. Utah 1997); Boisjoly vs. Morton Thiokol, Inc., 706 F. Supp. 795, 801-802 (D. Utah 1988). Both Ankers and Boisjoly are instructive in how extreme the alleged behavior must be in order to qualify as outrageous. In Ankers, a professional basketball player, Dennis Rodman, pinched a spectator's backside and made crude remarks to her in the middle of a nationally televised game. In Boisjoly, the defendant fired and attempted to blacklist and destroy the career of an engineer who revealed errors and irregularities in the company's solid rocket engines after the Space Shuttle *Challenger* disaster. In both cases the emotional distress claims were dismissed because the conduct complained of was not sufficiently outrageous. See Ankers at 1337; Boisjoly at 802.

In the case at hand, Tobias/Feld's only allegations set forth in the Counterclaim is that ADC threatened to sue and subsequently sued them. Subsequently, the trial court twice denied Tobias/Feld's Motion to Dismiss and Motion for Summary Judgement. Under the circumstances of this case, those allegations cannot, as a matter of law, amount to the necessary

outrageous conduct that is required in Utah in order to support a claim for emotional distress. Accordingly, the Tobias/Feld Counterclaim for such emotion distress damages was dismissed by the trial court. R. 3887.

IV. TOBIAS/FELD’S CLAIMS BASED FOR ABUSE OF PROCESS WERE PROPERLY DISMISSED, AS A MATTER OF LAW.

A. Tobias/Feld Failed to Understand the Scope of Their Dismissed Wrongful Use of Civil Proceeding Counterclaim.

On January 27, 2003, the trial court, in ruling on ADC’s Motion to Dismiss, dismissed Tobias/Feld’s counterclaim for wrongful use of civil proceedings. R. 3887. Tobias/Feld did not appeal this dismissal. Despite this dismissal, Tobias/Feld continue to defend its sole remaining counterclaim for abuse of process as if it was the same cause of action as the dismissed wrongful use of civil proceeding. ADC could only surmise that Tobias/Feld failed to understand the scope and differences between these two torts. However, the trial court did understand the differences as it granted ADC’s Motion for Summary Judgment over Tobias/Feld’s abuse of process counterclaim.

In 1999, this Court in Gilbert v. Ince, 981 P.2d 841 (Utah), provided clear direction as to the scope of the civil tort of wrongful use of civil proceeding. In this regard, this Court acknowledged that “[t]his court has only infrequently treated the tort of wrongful use of civil proceedings.” Id. at 844. The Gilbert court concluded that “[t]o preserve analytical clarity with respect to the species of tort permitting suit for misuse of judicial proceedings, we apply the Restatement’s formulation of wrongful use of civil proceedings.” Id. at 846. In this regard, the Gilbert court, in citing to the Restatement, held:

The Restatement denominates wrongful use of civil proceedings as the civil counterpart to malicious prosecution. It consists in *instituting or maintaining* civil proceedings for an improper purpose and without a justifiable basis. The Restatement describes the pertinent criteria for wrongful use of civil proceeding as follows:

One who takes an active part in the *initiation, continuation, or procurement* of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he [or she] acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, *the proceedings have terminated in favor of the person against whom they are brought*.

Id. at 845 (citing to Restatement (Second) of Torts §674) (emphasis added).¹⁶

In the present case, the trial court properly determined that because the underlying claims brought by ADC against Tobias/Feld for intentional interference with its existing contractual rights with the Williams (the First REPC) and for intentional interference with its prospective economic relations with the Williams (the Second REPC) have yet to be resolved in favor of Tobias/Feld, Tobias/Feld's claim for wrongful use of civil proceedings was premature, and therefore, must be dismissed.

¹⁶Interestingly, the Gilbert opinion was issued after Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563 (D. Utah 1995). The Utah Supreme Court did not adopt the reasoning of the Keller court in Gilbert. In contrast, the Gilbert court cited to the Keller opinion as illustrative as to the divergent rulings that had been issued in this area of the law. For example, in this regard the Gilbert court noted, "[h]owever, even the more recent cases do not always employ the same nomenclature [for wrongful use of civil proceeding and abuse of process claims]. Keller, for instance, appears to treat civil and criminal proceedings under a common rubric of 'malicious prosecution.'" Gilbert v. Ince, supra, 981 P.2d at 845, n.7.

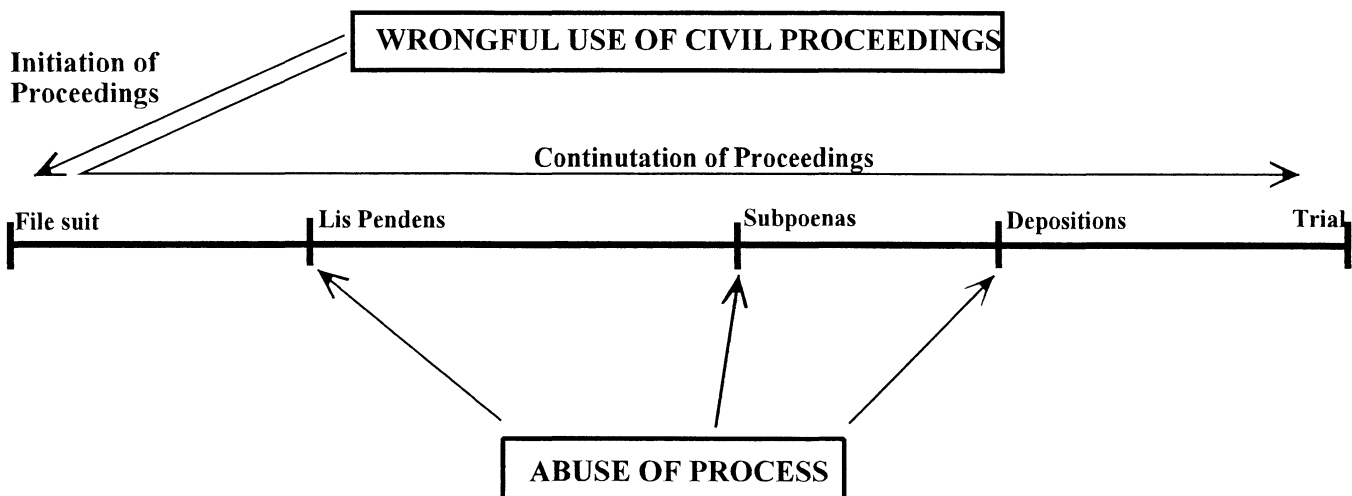
B. Tobias/Feld Failed to Understand the Scope of Their Counterclaim for Abuse of Process.

An abuse of process claim centers on the *process*, rather than the *proceedings*. See generally C. Pate, Clarifying the Elements of Malicious Use of Process and Abuse of Process Claims, 57 MD. L. REV. 1039 (1998). Therefore, typical examples of abuse of process naturally include:

Excessive execution on a judgment; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property . . .; extortion of excessive sums of money

Farmers Gin Co. v. Ward, 73 N.M. 405, 407-08, 389 P.2d 9, 11 (1964).

The following graph depicts the difference between the torts of wrongful use of civil procedure and abuse of process:



As this graph depicts, the tort of wrongful use of civil proceedings centers on the proceedings in general, either at the initiation stage or at any point when the continuation

becomes wrongful. On the other hand, the tort of abuse of process centers on specific process or events during the litigation that lack probable cause and are used for an improper purpose. While related, these two torts deal with fundamentally different issues.

1. Utah Law Distinguishes Claims for Abuse of Criminal Process and Claims for Abuse of Civil Process.

Under Utah law, there is an important further distinction between abuse of process claims brought within the *civil context* and those that are brought under the *criminal context*. Unfortunately, in the present case that distinction has also been either innocently confused or obviously obfuscated by Tobias/Feld. Understanding the distinctions between the application of this tort in these two contexts is critical. The following chart delineates these differences:

| <u>Criminal Abuse of Process Claim</u> | <u>Civil Abuse of Process Claim</u> |
|---|---|
| Does not require the prior proceeding to have terminated in favor of the person against whom they were brought. <u>See Amica Mutual Insurance Company v. Schettler</u> , 768 P.2d 950, 959 (Utah App. 1989) | Requires that the prior proceeding to have terminated in favor of the person against whom they were brought. <u>See Amica Mutual Insurance Company v. Schettler</u> , 768 P.2d 950, 959 (Utah App. 1989) |
| The basis for an action for abuse in the criminal context requires a showing that the suit was “a perversion of the process to accomplish some improper purpose, such as compelling its victim to do something which he would not otherwise be legally obligated to do.” <u>Crease v. Pleasant Grove City</u> , 30 Utah 2d 451, 519 P.2d 888, 890 (1974). | The basis for an action for abuse of process in the civil context requires a showing that a process was (1) “brought without probable cause, (2) “for the purpose of harassment or annoyance; and (3) “it is usually said to require malice.” <u>Baird v. Intermountain Sch. Fed. Credit Union</u> , 555 P.2d 877, 878 (Utah 1976); <u>Winters v. Schulman</u> , 977 P.2d 1218, 1225 (Utah App. 1999). |

Unfortunately, Tobias/Feld have utterly failed to account for these distinctions. Rather,

Tobias/Feld have exclusively relied upon own misunderstanding of the reasoning and holding of this Court in Crease v. Pleasant Grove City, *supra*. See Tobias/Feld Opposition Memorandum at p. 17. Yet, as noted above, the Crease opinion was directed to the application of this tort in the criminal context only. As this Court specifically noted that all other claims previously brought in the Crease case “have been eliminated except against Councilman Klemm on the issue of *abuse of criminal process*.” Crease v. Pleasant Grove City, *supra*, 519 P.2d at 888 (emphasis added). As a result, the reasoning found in Crease is inapplicable to the present case.

The trial court properly looked to those distinct Utah cases brought within the civil context in Utah to understand the proper application of the tort of abuse of process. For example, Winters v. Schulman, 977 P.2d 1218 (Utah App. 1999), involved a claim brought for abuse of process arising in the civil context of a claim for wrongful lien. In Winters, Winters and his wife divorced in California in 1989. In 1990, Winters bought a home in Sandy, Utah. Subsequently, Winter’s ex-wife hired a lawyer to seek enforcement of their divorce decree. The lawyer, Schulman, filed a *lis pendens* on Winter’s Sandy home as part of her enforcement efforts. Winters filed suit claiming that the *lis pendens* constituted a wrongful lien, and that such alleged baseless filing constituted an abuse of process within the divorce proceedings. Ultimately, the trial court ruled that the *lis pendens* was not a wrongful lien and, therefore, Winters could not state a viable cause of action for abuse of process. In this regard the Winters court held:

The Utah Supreme Court has recognized a civil cause of action for abuse of

process where it is shown that a suit was brought without probable cause, for the purpose of harassment or annoyance, and it is usually said to require malice. Further an abuse of process [in the civil context] requires that the prior proceedings have terminated in favor of the person against whom they were brought.

Id. at 1225.¹⁷

It is within this context, applying these elements that Tobias/Feld's abuse of process counterclaim was examined by the trial court and must be examined by this Court.

2. A Claim for Abuse of Civil Process Requires that the Prior Proceedings Terminate in Favor of the Person against Whom They were Brought.

In Amica Mutual Insurance Company v. Schettler, 768 P.2d 950, 950-55 (Utah App. 1989), Schettler filed counterclaims against Amica Mutual for both criminal and civil abuse of process arising from Amica Mutual's procurement of a criminal case against Schettler for insurance fraud and Amica Mutual's initiation of a case against him for civil fraud and related claims. The Utah Court of Appeals affirmed the dismissal of the civil abuse of process claim, holding:

In his pleadings, Schettler attempts to allege both an abuse of the criminal and civil process. The latter [the abuse of civil process] is premature since it requires that the proceedings have terminated in favor of the person against whom they were brought.

Id. at 960; see accord Baird v. Intermountain School Fed. Credit Union, 555 P. 2d 877, 878

¹⁷Winters v. Schulman, *supra*, was also issued after Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1562 (Utah 1995) was issued by the United States District Court for the District of Utah. Like the Utah Supreme Court in Gilbert v. Ince, 981 P.2d 841 (Utah 1999), the Utah Court of Appeals in Winters similarly decided not to adopt or follow the holdings in Keller.

(Utah 1976); see also MODEL UTAH JURY INSTRUCTIONS ABUSE OF PROCESS MUJI 10.20 (1993) (“[A]n abuse of process action requires that the proceedings have terminated in favor of the person against whom they were brought.”); see also Winters, supra (“[A]n abuse of process [in the civil context] requires that the prior proceedings have terminated in favor of the person against whom they were brought.”)

Consequently, the timing for bringing an abuse of process claim is the same as a claim for wrongful use of civil proceedings. See, e.g., Gilbert v. Ince, 981 P.2d 841, 845 (Utah 1999) (a condition precedent to bringing a claim for wrongful use of civil proceeding is that the underlying action terminated in favor of the person against whom that underlying case is brought); see accord Restatement (Second) of Torts at §674(b). There is no dispute that the underlying claims of ADC against Tobias/Feld have not yet been adjudicated in favor of Tobias/Feld. As a result, Tobias/Feld’s claim for abuse of civil process against ADC is premature and therefore properly dismissed by the trial court. See R. 4379.

3. A Claim for Abuse of Civil Process Requires a Lack of Probable Cause in Bringing the Alleged Abusive Process.

Central to establishing a claim for abuse of civil process is showing that the process was “brought without probable cause.” Winters v. Schulman, supra, 977 P.2d at 1225; see accord Baird v. Intermountain School Fed. Credit Union, 555 P.2d 877, 878 (Utah 1976). Yet, as discussed below, none of the basis pleaded and/or argued by Tobias/Feld as their basis for a claim of abuse of process against ADC is sufficient as a matter of law.

a. Tobias/Feld’s claim that ADC’s initiation and continuation of the present action forms the factual basis for their abuse of process claim against ADC is insufficient as a matter of law.

Tobias/Feld have argued that ADC’s initiation and then continuation of the present action form a valid basis for their abuse of process counterclaim. However, as discussed above, allegations as to the initiation and/or the continuation of that action falls expressly within the rubrics of the tort of wrongful use of civil proceedings, not under the tort of abuse of civil proceedings. See Gilbert v. Ince, *supra*, 981 P.2d 845. The trial court had already dismissed Tobias/Feld’s counterclaim for wrongful use of civil proceedings.

b. Tobias’ claim that ADC’s taking of her deposition forms a factual basis for a claim of abuse of civil process against ADC is insufficient as a matter of law.

The sole remaining factual basis for their claim of abuse of civil process is Tobias’ allegations that ADC wrongfully took her deposition on October 30, 2003 (the “Tobias Deposition”).¹⁸ This claim fails for several reasons. ADC surely had probable cause for taking a deposition of a named party. See Winters v. Schulman, *supra*, 977 P.2d at 1225 (The process being alleged as abusive must of been “brought without probable cause.”); see also URCP 30(a)(1) (“A party may take the testimony of any person, including a party, by deposition upon oral examination”). ADC had “probable cause” for the taking of this deposition and, as such, Tobias was unable to satisfy the first element of this tort.

¹⁸It should be noted that only Ms. Tobias has this claim against ADC. No claim has ever been even asserted that a claim for abuse of process exists for ADC’s taking of Ms. Feld’s deposition.

Furthermore, the taking of her deposition was for discovery purposes in the pending action and not for the purpose of harassment or annoyance for multiple reasons. Ms. Tobias was represented by counsel throughout her deposition. The questions posed and the relevance of them was the result of Tobias' own actions. This deposition was taken BEFORE the trial court dismissed her counterclaim for intentional and negligent infliction of emotion distress. By bringing counterclaims for intentional and negligent infliction of emotional distress, Tobias brought her emotional state into issue. ADC, therefore, in its defense had the responsibility to fully explore any sources of emotional distress.

The law is clear that “a defendant is entitled to discover whether there have been other stressors relating to plaintiff's mental and physical health during the relevant time period which may have contributed to the claimed emotional distress.” Gatewood v. Stone Container Corp., 1996 U.S. Dist. LEXIS 21076, ¶13 (D. Iowa 1996). For example, in Gladfelter v. Wal-Mart Stores, 1995 U.S. Dist. LEXIS 18545, ¶3(D. Neb. 1995), the plaintiff opposed a scheduled deposition of his former girlfriend on the grounds that it would only be used to embarrass him. However, the court found that “[p]laintiff has affirmatively placed his emotional well being in issue. Plaintiff's own expert witness opines that a significant cause of plaintiff's emotional distress was the deterioration of plaintiff's relationship with the proposed deponent, Jeanette Carol. On these grounds, the court agrees with defendant that the deposition of Ms. Carol appears reasonably calculated to lead to the discovery of admissible evidence as permitted by Rule 26(b)(1).” The court realized that there were other possible causes for the alleged emotional distress and allowed discovery of those potential causes as the plaintiff had placed

emotional health into issue.

Many of the same dynamics and needs as determined in the Gladfelter v. Wal-Mart Stores, supra, case were also evident in the present action. Ms. Tobias attempted to mischaracterize herself as an innocent and simple housewife being attacked by ADC who caused her emotional distress. Such an attempt was also demonstrated in her prior pleadings wherein she and Ms. Feld are referred to as the “Housewives.” See R. 988-1040. Discovery was undertaken to determine what Ms. Tobias really was and what kind of emotional distress she would likely experience. The truth is, as discovered from Ms. Tobias, is that she is a self proclaimed political and social activist. She has been involved in literally dozens of causes,¹⁹ and has been actively involved in many political campaigns and personal election efforts.²⁰

¹⁹ADC was able to discover that Ms. Tobias organized the following groups for various causes in addition to her formation with Ms. Feld of Save Our South Jordan River Valley, Inc., dba SOS and Save Open Spaces:

1. Ladies at Home (See Tobias Deposition at p. 34, ln. 11);
2. Hot Pink Mamas (See Tobias Deposition at p. 37, ln. 11);
3. Women Against Gun Control (See Tobias Deposition at p. 92, lns. 7-13);
4. Three Neighborhood Watch Groups (See Tobias Deposition at p. 115, lns. 7-8);
5. People Against More Taxes (See Tobias Deposition at p. 118, lns. 10-16);
6. Citizens for Smart Transportation (See Tobias Deposition at p. 122, lns. 19-22);
and
7. Citizens for Term Limits (See Tobias Deposition at p. 130, lns. 10-11).

See R. 3093.

²⁰ADC was able to discover that Ms. Tobias also was involved in the following political campaigns:

1. Genevieve Atwood’s campaign for the U.S. House of Representatives (See Tobias Deposition at p. 42, lns. 20-23);
2. Merrill Cook’s campaign for the U.S. House of Representatives (See Tobias
(continued...))

Her causes are varied, from open space issues to pro-gun rights. It is within this context and level of confrontation and controversy of her own making that ADC was required to examine Tobias' claim that this case was "*the source*" of all her emotional distress. One must understand her world which is aptly summarized by the bumper-sticker on her minivan – "**So Many Causes, So Little Time.**" See R. 3092.

It was of further interest that during the pendency of this action, Ms. Tobias was very

²⁰(...continued)

- Deposition at p. 43, Ins. 18-20);
3. Jim Decker's campaign for State House of Representatives (See Tobias Deposition at p. 46, Ins. 22-25);
 4. Ken Olafson's campaign for Mayor of West Valley City (See Tobias Deposition at p. 50, Ins. 18-22);
 5. Dan Bresnahan's campaign for State House of Representatives (See Tobias Deposition at p. 53, Ins. 13-18);
 6. Sue Lockman's campaign for State House of Representatives (See Tobias Deposition at p. 56, Ins. 1-3);
 7. Merrill Cook's campaign for Utah Governor (See Tobias Deposition at p. 61, Ins. 2-5);
 8. Brent Foutz's campaign for South Jordan City Council (See Tobias Deposition at p. 82, Ins. 22-24); and
 9. Merrill Cook's re-election campaign for U.S. House of Representatives (See Tobias Deposition at p. 86, Ins. 1-2).

See R. 3093-3094.

ADC was also able to discover that Ms. Tobias ran for the following political offices (she lost in each of these elections):

1. In 1998 for the State House of Representatives (See Tobias Deposition at p. 62, Ins. 12-19); and
2. In 1999 for South Jordan City Council (See Tobias Deposition at p. 72, Ins. 10-12).

See R. 3094-3095.

active with Women Against Gun Control, to which she is president. See R. 3094-3095. During the same period of time that Ms. Tobias claimed that she suffered emotional distress due to the filing of the present action, she attended various news conferences, sent e-mail alerts, organized rallies, traveled to Washington, D.C. to attend a “Second Amendment Sister” rally wherein she spoke and marched in protest, organized a rally at the Utah State Capitol, and organized another rally on Mother’s Day.

Following these activities and still during the very same time that she was claiming emotional distress damages against ADC, Ms. Tobias’ group was listed among “hate groups” by the national Simon Wiesenthal Center, a prominent Los Angeles organization whose focus is ending anti-Semitism and bigotry around the world. After apparent further confrontation, the Simon Wiesenthal Center took Women Against Gun Control off its “hate” list. (See generally Tobias Deposition at pp. 104-114; R. id.).

In July 2002, at a panel discussion at the Hinckley Institute of Politics Controversial Legal Issues Class, entitled “*2nd Amendment: Should private persons be allowed to carry guns on campus?*” Ms. Tobias was a panel member, along with Fred Esplin, U of U Spokesperson, Dave Jones, former state legislator, and John Flynn, U of U Law Professor. In her introductory statement, Ms. Tobias recounts:

“As you can see, it was 3 anti-gun men against 1 pro-gun woman(me). In my opening remarks (after each of them had been given 10 minutes to speak before me), I said that in a match of wits against wits, that they needed to send more men to debate against me, but in a match against physical strength, I admitted to being the weaker sex against even one man at a time--and that's why I carry a gun.”

As a result of her remarks and offensive, confrontational approach, Fred Esplin walked out of the room and reported that he refused to participate in the debate with Ms. Tobias. See R. 3095-3096. It is the emotional distress and attendant damages of this “housewife” that needed to be understood in this case. The questions asked during her deposition were for purposes of understanding her background, her life, her lifestyle and her activities – all of which are relevant to any consideration of her claims for emotional distress.²¹

Further, as part of ADC’s examination into the “world” that Ms. Tobias had created for herself was to examine both her familial and other inter-personal relationships. Unfortunately, this included co-defendant Brent Foutz. The facts were undisputed that Mr.Foutz worked closely and as an ally with Ms. Tobias in her efforts to interfere with the Williams’ sale of property to ADC. Brent Foutz had developed an unhealthy attraction to Ms. Tobias during that time and this was causing her emotional distress. This relationship was considered by Jane

²¹Such aggressive and often abusive conduct was most recently noted in articles published by the SALT LAKE TRIBUNE dated June 12, 2003 and the DESERET MORNING NEWS dated June 13, 2003. Both of these articles describe a South Jordan Planning Commission meeting on June 11, 2003, wherein defendants Tobias and Foutz were cited as disrupting. THE DESERET MORNING NEWS reported that Tobias, “lobbed the first salvo at Tuesday’s meeting by calling commission chairman Bob Stubbs “arrogant.” Stubbs told the reporter that Tobias “was ‘hassling’ others at the meeting and that she wrote on the back of a comment card given to the commission, ‘We’re back’ . . . Stubbs said Foutz and Tobias wanted to speak to every item on the commission’s agenda and to use the meeting as a forum to air their ‘dirty laundry.’” See DESERET MORNING NEWS, *S. Jordan in uproar over name calling*, (June 13, 2003) at Section B, p. 3. The Salt Lake Tribune reported further that Bob Stubbs stated that “Tobias was ignorant and exhibited ‘immature and out-of-order behavior’” that even included “‘yell[ing] at us from the audience’ when they no longer had the floor.” Mr. Stubbs noted that in his entire tenure as the commission chair this was the first time that he had to call “in a South Jordan police officer to maintain order.” See THE SALT LAKE TRIBUNE, *South Jordan Repeals Ordinance*, (June 12, 2003) at Section B, p. 4.

Foutz as one of the central factors that lead to failure of her 20+ year marriage with defendant Brent Foutz.²² Understanding Ms. Tobias' reaction to this relationship was important and relevant because it illustrated another possible source of emotional stress and further evidenced Ms. Tobias' capacity to manage emotionally difficult situations of her own creation.

While obviously resistant to explain or acknowledge, Ms. Tobias confirmed during her deposition that she knew of the many troubling indicators or information about Mr. Foutz's attraction to her. See Tobias Deposition at pp. 147-48- lns. 24-11; p. 151, lns. 7-18; pp. 161-62, lns. 13-17; pp. 166-69; R. 4006-4007. In response to questioning as to whether such conduct was hurting Mr. Foutz, Ms. Tobias responded:

Ms. Tobias: No, they were hurting *me*.

Question: So you didn't really care if they were hurting his [Brent Foutz's] family; is that what you're saying?

Ms. Tobias: *My concern* was my husband and his honor.

See Tobias Deposition at p. 168-69, lns. 25-3 (emphasis added); see also Tobias Deposition at p. 171, lns. 18-19, p. 173, lns. 6-13; pp. 173-74, lns. 3-1; R. 4007.

While the testimony proffered during Ms. Tobias' deposition was at times personal, as the foregoing demonstrates, its was highly relevant to the emotional distress counterclaims she filed. Ms. Tobias' claims that this litigation was the primary if not the sole source of her emotional struggles, in light of this testimony, is disingenuous. Through discovery, ADC

²²See generally Affidavit of Jane Foutz attached as Exhibit "A" to ADC's Memorandum in Support of its Motion to Dismiss Tobias/Feld's common law counterclaims, including the claims for emotional distress, specifically at ¶¶13-20. See R. 4021-4035.

confirmed that Ms. Tobias thrust herself into the vortex of multiple disputes. She appears to thrive on publicity and seeks opportunity to call attention to herself (a search on the Internet of her name found numerous hits, containing dozens of news articles that she is quoted in and press releases she is credited with). She was the recipient of romantic expressions from a co-defendant. Ms. Tobias' "naive housewife" claim was nothing but an ill-conceived facade. It is within that context that her actions against ADC for emotional distress needed to be determined.

As a result, ADC's taking of Tobias' deposition was both necessary and appropriate in the present case. While being represented throughout her deposition by counsel, Tobias cannot now claim that the taking of said deposition was for the purpose of "harassment or annoyance." ADC was preparing its defense to Tobias' counterclaims by taking her deposition. Tobias may take some misconceived offense at the questions asked, but she cannot legitimately claim that ADC was abusing the process by so taking her deposition.²³

C. Tobias/Feld's Abuse of Process Claims Fail Even Under the Misplaced Standards That Toblis/Feld Articulated.

Even under Tobias/Feld's view of the law, Tobias/Feld must show that the legal process pursued was used "primarily to accomplish a purpose for which [the legal process] was not designed" Restatement 2d of Torts § 682. In other words, under Tobias/Feld's

²³PROSSER ON TORTS aptly noted in these circumstances that indeed, "there is no liability where the defendant [or plaintiff] has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." PROSSER AND KEETON ON THE LAW OF TORTS §121, at 898 (5th ed. 1984).

own position, “the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying the process justified in itself for an end other than that which it was designed to accomplish.” Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1570 (D. Utah).

ADC has repeatedly proven that its purpose in bringing the action against Tobias/Feld was legitimate at law, and ADC has at all times directed the litigation within the properly defined parameters of its cause of action. To date, Tobias/Feld have attempted to assert their abuse of process claim by presenting to the trial court facts which were immaterial, irrelevant, and which fall well outside the necessary scope of maintaining their counterclaim.

Tobias/Feld asserted that the trial court could not grant ADC’s Motion for Summary Judgment because the question of whether ADC used the judicial system for an improper purpose was a question of intent which must be determined by a jury. See Tobias/Feld Memorandum in Opposition to ADC’s Motion to Dismiss at p. 18; R. 3608. However, Tobias/Feld once again fail to understand the law as it pertains to an abuse of process claim, even as cited by them.

Under Tobias/Feld’s rubrics, an abuse of process claim does not hinge on the intent of the parties. While it is true that a “proper issuance of process may become tainted by its subsequent use, [a] regular use of process with bad intentions is not a malicious abuse of that process.” McKay Machine Company v. Bosway Tube and Steel Corp., 180 N.W.2d 96, 97 (Mich.App. 1970). Intent may be relevant to a claim for malicious prosecution, but in an abuse of process claim *“the purpose for which the process is used, once it is issued, is the only*

thing of importance.” Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1570 (D. C. Utah 1995)(Emphasis the court’s). In this case, the only purpose for which ADC has used the legal process was to discover that Tobias/Feld intentionally interfered with ADC’s contractual and economic relations and the facts upon which Tobias/Feld based their claims – this “*is the only thing of importance.*” Id.

The key element to Tobias/Feld’s abuse of process claim requires that Tobias/Feld show that ADC has perverted the legal process underlying a claim for intentional interference with contractual and economic relations. Tobias/Feld cite to Crease v. Pleasant Grove City, supra to support their position²⁴ that the primary element for proving an abuse of process claim is as follows:

the essence of [abuse of process] is a perversion of the process to accomplish some other purpose, such as compelling its victim to do something which he would not otherwise be legally obligated to do. On the other hand if it is used for its proper and intended purpose, the mere fact that it has some other collateral effect does not constitute abuse of process.

30 Utah 2d 451, 519 P. 2d 888, 890 (Utah 1974). This language was further explained by the Federal District Court for Utah when it commented to the standard set forth in the Crease opinion:

In addition, whether there was an abuse of process is to be determined as an issue independent from the rightfulness or wrongfulness of the prior steps in the proceedings. Although abuse of process is not well-defined in Utah caselaw, other jurisdictions have examined it more closely. *In those jurisdictions it is*

²⁴As previously discussed, the Crease v. Pleasant Grove City, supra case involves the application of an abuse of process claim within the criminal context, rather than the civil context as found in the present case.

generally agreed that if the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is no abuse. Even if the plaintiff had an ulterior motive in bringing the action or if he knowingly brought suit upon an unfounded claim. Moreover, while the ulterior motive may be inferred from the wrongful use of the process, the wrongful use may not be inferred from the motive. A cause of action for abuse of process may arise through an act by a defendant ‘outside of the regular and legitimate use of the process resulting in an interference with either the person or property of the plaintiff. Such as an excessive execution on a judgment or attaching property in an excessive amount.

Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1571 (D. Utah) (emphasis added); see accord Crease v. Pleasant Grove City, supra, 519 P.2d at 890; Institute for Professional Dev. v. Regis College, 536 F. Supp. 632, 635 (D.Colo. 1982)(quoting Am. Jur. 2d, Abuse of Process § 13 (1962)).

Once again, ADC is compelled to reiterate that the action brought by ADC for intentional interference with economic relations, is a legitimate and recognized claim for relief under Utah law the trial court has recognized this on at least two occasions.²⁵ To maintain its claim against Tobias/Feld, under Tobias/Feld’s own analysis, ADC is required to prove: (1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations (2) for an improper purpose or by improper means, (3) causing in injury to the plaintiff.²⁶ The legal process affixed to the tort was designed to protect existing contractual

²⁵See St. Benedict’s Dev. Co. v. St. Benedict’s Hospital, 811 P.2d 194, 200 (Utah 1991)(citing Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 302 (Utah 1982)).

²⁶These are the three elements, or three-pronged test, established by the Utah Supreme Court in Leigh Furniture for proving or maintaining a cause of action for intentional interference with contractual and economic relations. See, Leigh Furniture, 657 P.2d at 302.

relationships and prospective relationships of economic advantage not yet reduced to a formal contract. Id. Moreover, the process is designed to provide redress where contracts have been interfered with wrongfully.

Having again established what the legal process to maintain a claim for interference with contractual and economic relations is, the proper analysis for determining whether ADC abused the process must of legal necessary focus on whether the process has been used to accomplish some other purpose or whether Tobias/Feld are being compelled to do something which they would not otherwise be legally obligated to do. The material facts do not support Tobias/Feld's assertions under this analysis.

Tobias/Feld claim that ADC committed an abuse of process by filing the lawsuit to punish them and silence them. See R. 3591. However, in pursuing its litigation, ADC is simply seeking redress for the wrongful actions of Tobias/Feld, regardless of whether they view it as "punishment."

1. Whether ADC Filed or Continued This Litigation for an Improper Purpose is Not Material to an Abuse of Process Analysis.

Tobias/Feld assert that whether ADC initiated or maintained its litigation against Tobias/Feld's for their intentional interference with contractual and economic relations was done with an improper purpose is a question of fact for a jury to decide. Again, Utah law defines what is necessary to prove an abuse of process claim. Regardless of whether this litigation was filed with an improper purpose (and ADC vigorously defends the position that it was not), Tobias/Feld must provide the court with some factual evidence showing that ADC

has used the process associated with its claim for intentional interference with contractual and economic relations or in defense of the Counterclaim as it existed in a manner which is outside the processes' regular and legitimate functions. See Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1571 (D. Utah), citing, Crease v. Pleasant Grove City, 519 P.2d 888, 890 (Utah 1974); Institute for Professional Dev. v. Regis College, 536 F. Supp. 632, 635 (D.Colo. 1982)(quoting, Am. Jur. 2d, Abuse of Process § 13 (1962). This, Tobias/Feld have failed to do.

Tobias/Feld utterly failed to show to the trial court that ADC has used, or is using, its claim against them to accomplish anything other than to seek redress and remedy for the actual damages that Tobias/Feld caused to ADC's contractual relations with the Williams. The "Statement of Disputed Facts" presented by Tobias/Feld only show that there exists no evidence which would tend to prove their abuse of process claim. The facts they raise in regards to ADC's actions in this case are focused on the timing of letters, timing of the lawsuit filing, timing of service, delays in prosecuting the case, etc. None of these facts show that ADC abused the legal process or acted outside the process' regular and legitimate function.

2. There Are No Material Facts Which Show that ADC Abused the Judicial Process.

Regardless of whether ADC was unhappy by the political actions of Tobias/Feld in regards to the pending master plan or zoning change of the Riverpark Project at South Jordan City, ADC's cause of action against Tobias/Feld has at all times focused and remained on their interference with contractual relations, not their right to be active in the political process.

As the foregoing illustrates, even under Tobias/Feld's own legal understanding Tobias/Feld failed to establish why summary judgment wasn't appropriate over their abuse of process claim. As a consequence, the trial court properly granted summary judgment over the same.

V. ANY AND ALL CLAIMS FOR PUNITIVE DAMAGES AND FOR ATTORNEYS' FEES AND COSTS WERE PROPERLY DISMISSED, AS A MATTER OF LAW.

Tobias/Feld characterize their punitive damages claim as part of their SLAPP counterclaim, however the SLAPP Act does not provide for punitive damages. Therefore, Tobias/Feld plead under Utah Code Ann. § 78-18-1(1)(a) which permits punitive damages only if

compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

As discussed above, ADC's claims have been the subject of two dispositive motions by Tobias/Feld, both claiming that ADC's claims were without merit and cannot be maintained. These motions have been denied by the trial court. Accordingly, punitive damages are not available in the present case. Additionally, the law is clear that any claim for punitive damages can only be supported if the underlying claims of Tobias and Feld are successful and result in an award of compensatory or general damages. Without such a showing, punitive damages are simply not available.

Finally, Tobias/Feld seek attorneys' fees and costs pursuant to Utah Code Ann. § 78-27-

56 (1953, as amended). However, the law in Utah requires that “[a] court may award attorney fees under section 78-27-56 and/or costs under rule 54(d) only to a prevailing party.” Utah Code Ann. § 78-27-56(1) (1953, as amended); see also Utah R. Civ. P. 54(d); see accord Robinson v. State, 20 P.3d 396 (Utah 2000); Faust v. KAI Techs., Inc., 15 P.3d 1266 (Utah 2000). Additionally, to be a prevailing party, a party ‘must obtain at least some relief on the merits’ of the party’s claim or claims. See Crank v. Utah Judicial Council, 20 P.3d 307 (Utah 2001). Tobias/Feld’s claims for attorneys’ fees and costs are only derivatives of their underlying claims and can only be awarded if Tobias/Feld are able to succeed on the merits of those claims. No independent cause of action for such damages exist.

The Counterclaim is explicit that the only action complained of by Tobias/Feld was the threat and subsequent filing of a lawsuit that ADC maintains, and which the trial court twice affirmed, as having been properly pled under Utah law. Tobias/Feld’s independent claim for punitive damages was therefore properly dismissed.

VI. AS THE TRIAL COURT HAS FOUND, TWICE: A CLAIM FOR INTENTIONAL INTERFERENCE WITH EXISTING CONTRACTUAL RELATIONS AND PROSPECTIVE ECONOMIC RELATIONS DOES NOT REQUIRE A BREACH BUT ONLY AN IMPAIRMENT.

The issue as to whether a breach is required to state a claim for intentional interference with existing contractual relations as been previously raised and resolved by the trial court, twice.

- First, this issue was raised when Rocky Anderson was counsel for Tobias/Feld. He filed a Motion to Dismiss just after the case was filed. In this motion, Mr. Anderson

argued that the law required a breach. See R. 27-28. Unfortunately, the law that Mr. Anderson cited to had been expressly rejected by this Court. See R. 41-42. Accordingly, on or about December 14, 1998, the trial court denied Tobias/Feld's Motion to Dismiss ruling that "[t]he Plaintiff [ADC] has stated a cause of action in its complaint of intentional interference with existing economic relations or prospective economic relations." See R. 68.

- Secondly, on or about November 9, 2001, Tobias/Feld filed a Motion for Summary Judgment claiming again that ADC had failed to state a cause of action against them for interference with either existing contractual relations because there was no breach. See R. 345-346. On or about May 21, 2002, the trial court again denied such an attempt noting that material issues of disputed fact existed thereby precluding the granting of summary judgment. See R. 927-928.

Despite such express prior rulings by the trial court, Tobias/Feld have yet again argued that because there was no actual breach of the First REPC and that the Second REPC was closed, that no actionable interference occurred. A brief recount as to the evolution of this tort in Utah evidences just how misplaced Tobias/Feld are in repeatedly asserting that position.

A. Utah Law Rejected Early Case Law That Indicated A Breach is an Element of Intentional Interference with Existing Contractual Relations.

The notion that a breach was a required element under the tort of intentional interference with existing contractual relations finds its root in the Restatement (Second) of Torts as interpreted by this Court in Bunnell v. Bills, 368 P.2d 597 (Utah 1962). However, the

approaches proffered by both the Restatement (Second) and the Bunnell court, as relied upon by Tobias/Feld, have been expressly rejected by this Court in Leigh Furniture and Carpet Company v. Isom, 657 P.2d 293 (Utah 1982), and its progeny.

In Leigh Furniture, this Court considered the different maturations of the tort of intentional interference with economic relations. This included the Restatement (Second) definition of the tort of intentional interference with economic relations. The Restatement (Second) approach to this tort involves the interplay and interrelation of seven factors. Id. at 303. Ultimately, the Leigh Furniture Court rejected this approach altogether. Id. at 304.

Likewise, the Leigh Furniture Court rejected the “prima facie-tort” approach adopted by the Restatement (First) of Torts. In rejecting this approach, the Court noted that several prior Utah opinions wrongfully “assumed” that this approach would be adopted. This included the Bunnell opinion. See id. at 303; see also Gammon v. Federated Milk Producers Assoc., 360 P.2d 1018 (Utah 1961).

As such, Tobias/Feld’s reliance on the Restatement (Second) and the “prima facie-tort” approaches are both misguided and unsupported by current Utah law. Accordingly, the analysis employed by Tobias/Feld yet again is not helpful in adjudicating this cause of action for intentional interference with economic relations.

B. The Proper Standard to Establish the Tort of Intentional Interference with Economic Relations in Utah Is Set Forth in Leigh Furniture to Which ADC Has Sufficiently Established Each Element Against Tobias/Feld.

In Utah, the tort of intentional interference with economic relations protects “both existing contractual relationships and prospective relationships of economic advantage not yet

reduced to a formal contract.” St. Benedict’s Dev. Co. v. St. Benedict’s Hospital, 811 P.2d 194, 200 (Utah 1991) (emphasis added) (citing Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 302 (Utah 1982)). Three requirements exist for such a claim:

1. “that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations”;
2. “for an improper purpose or by improper means”;
3. “causing injury to the plaintiff.”

St. Benedict’s, 811 P.2d at 200 (emphasis added) (citing Leigh Furniture, 657 P.2d at 304).

Under the express rulings of this Court both torts of intentional interference with either existing or prospective economic relations are governed by the same test. In contrast, Tobias/Feld claims that a different test should be used for each claim. Yet, this argument is based on the application of legal theories expressly rejected by the Utah courts.

Furthermore, under the test adopted by the Utah courts, *no actual breach of contract is required under either tort, but only the impairment of performance*. As succinctly stated in St. Benedict’s: “[T]here is no allegation in the complaint that any existing [contract] was breached or that the performance under any [contract] was in any way impaired by defendants’ actions.” St. Benedict’s, 811 P.2d at 201 (emphasis added). Under this analysis, the St. Benedict’s court determined that either a “breach” or an “impairment” would be sufficient to state a claim for intentional interference with economic relations. Thus, while a breach definitely meets the standard, so does an impairment. Tobias/Feld’s argument to the contrary must, therefore, be rejected again by this Court.

C. **ADC has Stated Sufficient Material Facts in Support of its Claim that the First REPC and Second REPC were Both Impaired by the Wrongful and Intentional Conduct of Tobias/Feld.**

Unfortunately, Tobias/Feld have missed again the central issue underlying ADC's causes of action for intentional interference with existing contractual relations and prospective economic relations. Tobias/Feld wants this Court to look only at what the *Williams* did or didn't do in regards to the First REPC and Second REPC. Yet, such a perspective misses the mark. This case is not about how Tobias/Feld damaged the Williams, but how Tobias/Feld damaged ADC.²⁷ This case is about how Tobias/Feld impaired *ADC's* ability or capacity or willingness to perform under the First REPC and Second REPC. It is that wrongful impact that ADC seeks relief against Tobias/Feld. As the facts repletely demonstrate, Tobias/Feld actively and intentionally worked to impair ADC's contractual relations with the Williams under the First REPC and intentionally worked to impair ADC's prospective economic relations with the Williams that resulted in the Second REPC. Such intentional and wrongful conduct is actionable.

As previously discussed, this Court in St. Benedict's, 811 P.2d at 201 held that the torts of intentional interference with existing contractual relations and prospective economic relations only required an "impairment" of the underlying existing contract or prospective economic relations. The term "impairment" is defined as a process or event to make worse or

²⁷Ironically, one could argue that Tobias/Feld's wrongful actions in damaging ADC in the end actually benefitted the Williams, as the Williams were wrongfully induced to charge ADC more for the Williams Property to which ADC ultimately paid.

to diminish in some material respect. See Webster's New Collegiate Dictionary (1974) at p. 574.

Under Black's Law Dictionary, the term "impairment" in relation to contracts is defined as follows:

A law which impairs the obligation of a contract is one which renders the contract itself less valuable or less enforceable, whether by changing its terms and stipulations, its legal qualities and conditions, or by regulating the remedy for its enforcement. . . . The word 'impair' means, according to the standard writers in our language, simply 'to diminish; to injure; to make worse,' etc.

See Black's Law Dictionary, Revised Fourth Ed. (1968) at 885.

As discussed below, the facts clearly demonstrate how Tobias/Feld impaired ADC's ability and willingness to close under the First REPC (the claim for interference with existing contractual relations) and impaired or made less valuable to ADC the terms under which it bought the Williams Property under the Second REPC (the claim for intentional interference with prospective economic relations). This case requires Tobias/Feld to be accountable for their actions. Once they chose to "do everything in their power to stop the project" (as told to David Millheim by Tobias/Feld) they crossed the lines of ethics and legal public participation and intentionally damaged ADC. Such wrongful conduct is actionable.

1. Tobias/Feld Wrongfully Interfered With the First REPC By Impairing ADC's Ability, Capacity or Willingness to Purchase the Williams Property under the Terms of the First REPC

Tobias/Feld's wrongful and intentional actions were directed to "impair" or "diminish" the value of the First REPC to ADC by attempting to induce the Williams to breach the First REPC with ADC, as well s by preventing the requisite zoning changes to occur over the

Williams Property until the First REPC had expired. The evidence is overwhelming that these objectives were specifically and intentionally acted upon by Tobias/Feld. The following summary of facts establish this reality:

1. Once the First REPC was executed ADC begin the process necessary to get the Williams Property rezoned or otherwise entitled to meet the terms of the First REPC with South Jordan City. See Appendix “A” at ¶¶8, 9.

2. At all times, ADC acted in conformity to the express requirements of applicable law in their efforts to get the Williams Property. In fact, the time allotted under the First REPC to get the necessary zoning completed was both reasonable and sufficient. See Appendix “A” at ¶¶47, 48, 58, 64.

3. Tobias/Feld’s first efforts to “impair” the First REPC were trying to convince the Williams to breach the First REPC by refusing to sell to ADC. See Appendix “A” at ¶¶11, 16, 17, 51(o).

4. Tobias/Feld believed that ADC would only close on the First REPC if the requisite zoning changes were completed. So, Tobias/Feld contacted key decision-makers at South Jordan City for the purpose of convincing them to improperly delay rezoning on the Williams Property until after June 30, 1997, when the First REPC expired. See Appendix “A” at ¶¶12, 64.

5. To convince these key South Jordan City decision-makers, Tobias/Feld misrepresented themselves as a credible and legitimate charitable environmental entity that had the ability and connections to purchase the Williams Property and preserve it as open spaces --

as a park or science center. These misrepresentations included claims that Tobias/Feld were interested in preserving open spaces in the Jordan River Valley, that it was a tax-exempt entity and that it had raised hundreds of thousands of dollars for the protection of open spaces. See Appendix “A” at ¶¶11, 25, 29, 51(p), 51(q), 53, 54, 67, 73.

6. Tobias/Feld represented to these key decision-makers that Tobias/Feld had either raised sufficient funds or had friendly buyers who were willing to purchase the Williams Property for more than what ADC was offering to pay and then leave the property as open space. See Appendix “A” at ¶¶11, 28, 51(b), 51(j), 51(q), 53, 54, 67, 73.

7. Key decision-makers at South Jordan City were deceived by Tobias/Feld and as a result agreed to delay the rezoning of the Williams Property until after June 30, 1997 in accord with Tobias/Feld’s request. See Appendix “A” at ¶¶12, 23, 30, 53, 54, 66.

8. Based critically on Tobias/Feld’s wrongful and intentional actions, as discussed above, ADC was unable to get the Williams Property rezoned to be part of the RiverPark Business Park on or before June 30, 1997, when the First REPC expired. See Appendix “A” at ¶¶13, 31, 66, 73.

As the foregoing demonstrates, Tobias/Feld intentionally and wrongfully interfered with ADC’s contractual relationship (the First REPC) with the Williams impairing, or diminishing or reducing the value of the First REPC by improperly delaying the rezoning of the Williams Property. Such wrongful conduct is actionable under Utah law. It is for such wrongful conduct that ADC seeks recovery.

2. Tobias/Feld Wrongfully Interfered With the Second REPC By Impairing the Terms of the Second REPC Compared to the Terms of the First REPC.

Coupled with their misrepresentations to key decision-makers at South Jordan City to induce a delay in rezoning the Williams Property until after the First REPC had expired, Tobias/Feld engaged in a concerted effort to convince these city officials and the Williams that they represented a viable financial alternative to ADC. They did this through multiple misrepresentations. As Boyd Williams told South Jordan City:

So you can benefit from our experience, I will tell you what happened when we let our original contract expire with Anderson Development to entertain an offer from Open Lands Trust people (as prompted by the SOS group.) They made promises and offers that were not fulfilled. They skewed the facts to take unfair advantage of our situation, and, to our dismay, we found that they were not credible and, in fact, misleading and untruthful. We will not work with these people and feel that they have mislead many who support their possible cause and involvement in this project.

See Appendix “A” at ¶106.

The following summary of facts establish this reality:

1. Tobias/Feld’s wrongful actions included, but were not limited to, repeatedly representing to South Jordan City officials, the Williams and others that they had located willing and able buyers for the Williams Property for more than ADC was willing to pay under the First REPC, bringing potential buyers to the Williams while the First REPC was still in place, when they knew that such was utterly untrue. See Appendix “A” at ¶¶51(b), 51(q), 67, 91, 95, 99, 100, 103, 104, 112, 116.

2. Tobias/Feld’s misrepresentations pertaining to South Jordan City officials, the

Williams and others was further compounded by misrepresenting themselves as a credible and legitimate charitable environmental entity that had the ability and connections to facilitate these kinds of transactions. These misrepresentations included claims that Tobias/Feld and their organization were interested in preserving open spaces in the Jordan River Valley, that they were a tax-exempt entity, and that they had raised hundreds of thousands of dollars for the protection of open spaces. See Appendix “A” at ¶¶25, 51(q), 53, 54, 67, 74, 91, 92, 98, 102, 111, 115.

3. The true facts are that Tobias/Feld’s sole concern was stopping ADC’s development. Tobias/Feld and SOS were not a tax exempt entity, had never raised any substantial money, and had failed to comply with numerous provisions of Utah law, including, but not limited to, the Utah Charitable Solicitation Act, Utah Code Ann. §§13-22-1, et seq. and the Election Code. Utah Code Ann. §§20A-11-701, et. seq. and were not even registered in Utah under the name of as SOS. See Appendix “A” at ¶¶55-57.

4. The foregoing wrongful actions by Tobias/Feld caused the Williams to consider that they should be getting more for the Williams Property than what was contracted for under the First REPC. See Appendix “A” at ¶¶27, 104.

5. ADC was required to pay at nearly \$700,000 more for the Williams Property to the Williams and suffered consequential and incidental damages in excess of \$300,000.00. See Appendix “A” at ¶¶34(a)-(g), 35.

As the foregoing demonstrates, Tobias/Feld intentionally and wrongfully interfered with ADC’s prospective economic relations with the Williams. Tobias/Feld acted as a shill in the

market for the Williams Property, creating a fabricated competitive market through misrepresentations. The result damaged ADC by requiring it to pay more for the Williams Property under the Second REPC. Such wrongful conduct is actionable under Utah law. It is such wrongful conduct that ADC seeks recovery.

D. Tobias/Feld Are the Proximate Cause of the Impairment of the Contract Between the Williams and ADC.

Tobias and Feld's actions are the proximate and legal cause of the injury suffered by ADC. Proximate cause is "that cause which, in natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury." Interwest Constr. v. Palmer, 923 P.2d 1350, 1356-57 (Utah 1996) (citing Harline v. Barker, 912 P.2d 433, 439 (Utah 1996)).

Here, but for the interference by Tobias and Feld with the Williams contract directly, and the improper induced delays of South Jordan City that were a result of Tobias and Feld's misrepresentations to city officials and others, ADC would not have suffered injury. Tobias and Feld now are attempting to distance themselves from the actions that were taken by the city on its request and based upon their representations. See Affidavits of David Millheim and Thomas Christensen at Appendix "A" at ¶¶45-78.

Finally, however, this Court has stated that "[q]uestions relating to negligence and proximate cause are generally for the fact-trier, court or jury, to determine." Rees v. Albertson's, 587 P.2d 130, (Utah 1978).

Tobias/Feld were not only interested in denying ADC's zoning application on the Williams Property, but would use any means available to harm ADC. They deliberately sought improper and then delay of city actions in the hopes that once the Williams option expired ADC would not economically be able to purchase the Williams property in the First REPC.

E. ADC Was a Real Party in Interest to the Contract; ADC Was Assigned All Rights to the Litigation by Lakeview Farms and Janice Phelps Andersen.

Tobias and Feld contend that ADC cannot assert its claims because it was not the ultimate purchaser of the Williams property. This argument fails to recognize the facts as they have been presented in this action, including the following:

- ▶ ADC was the contracting party with the Williams. See Appendix "A" at ¶5.
- ▶ ADC, Janice Phelps Andersen and LakeView Farms, LLC operated under a contractual relationship whereby ADC would secure the property and Janice Phelps Andersen and LakeView Farms, LLC would finance the project. See Appendix "A" at ¶¶36-39, 118-122.
- ▶ ADC was assigned any and all potential rights to this litigation by LakeView Farms, LLC and Janice Phelps Andersen. See Appendix "A" at ¶¶40, 123.
- ▶ ADC was a party to the contract when the impairment occurred. See Appendix "A" at ¶5.
- ▶ ADC was assigned any and all rights to this litigation and is the real party in interest in this litigation. See Appendix "A" at ¶¶41(c), 44, 123(c), 126.

As a result, Tobias/Feld's arguments are simply misplaced and not based on the factual realities of this matter.

F. The Actions of South Jordan City Were Based upon the Misrepresentations of Tobias/Feld, as Has Been Alleged All Along.

While the allegations that Tobias and Feld wrongfully petitioned and ultimately

convinced South Jordan City to delay action have been made at every pertinent stage of this litigation, Tobias and Fled now attempt to claim that these are new facts that were not raised earlier. This position is not supported by the record. See Plaintiff's Amended Complaint ¶ 31; Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Complaint and for the Award of Attorney's Fees and Costs, throughout; Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Motions for Summary Judgment, for an Order Granting Leave to Amend Their Pleadings to Plead a Counterclaim, for an Order Granting a Jury Trial and For an Order Continuing the Trial, throughout.

ADC has maintained that this action is not aimed at chilling legitimate economic speech. However, ADC has also alleged from the outset that a portion of the statements made and actions taken by Tobias and Feld's action ceased to be legitimate protected speech and became unprotected and economically harmful misrepresentations to South Jordan City officials. Tobias and Feld's claims that this argument is new is simply untrue. For example, when defending against Tobias and Feld's previous Motion for Summary Judgment against ADC, ADC alleged that "SOS furthered their wrongful conduct by contacting key decision-makers at the City of South Jordan for the purpose of convincing them to delay rezoning the Williams Property until after June 30, 1999." See Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Motions for Summary Judgment, for an Order Granting Leave to Amend Their Pleadings to Plead a Counterclaim, for an Order Granting a Jury Trial and For an Order Continuing the Trial at p.

33; R. 527.

G. The Misrepresentations Made by Tobias and Feld Are Not Privileged.

Tobias and Feld argue that their misrepresentations to South Jordan City officials are somehow protected under the First Amendment right to petition in a variety of actions, including actions for tortious interference with business relationships. To support this position Tobias and Feld cite Havoco of America, Ltd. v. Hollobow, 702 F.2d 643 (7th Cir. 1983)²⁸. However, the Seventh Circuit Court in Havoco stated that “a private citizen’s acts pursuant to his right to petition a legislative body, be it local or otherwise, are *conditionally privileged*. . . .” Id. at 648 (emphasis added)²⁹. Furthermore, the court cited the Illinois Supreme Court

²⁸Tobias and Feld also cite a number of other cases for the proposition that their actions were immune, however, each of these cases recognize the “sham” exception to the Noerr-Pennington doctrine. In Westfield Partner’s, Ltd. v. Hogan, 740 F. Supp 523, 526 (N.D. Ill. 1990), the court recognized that “there is an exception to Noerr-Pennington immunity, the “sham” exception. This exception applies when it can be shown that an ostensible campaign to petition the government is actually a cover for nothing more than an attempt to harass” Id. at Note 10. (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)). In Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981), the court stated that “[c]onduct which prevents a party from participating in the policy-making functions of the executive, legislative, or judicial branches of government is not petitioning activity protected by the right to petition the government, and such conduct may give rise to a cause of action for damages.” Id. at 29. In Oregon Natural Resources Council v. Mohla, 944 F.2d 531(9th Cir. 1991), the court held that “Noerr-Pennington protection is not absolute. The Noerr court recognized an exception where a publicity campaign, ‘ostensibly directed toward influencing governmental action . . . is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.’” Id. at 535 (citing Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1960)). There is no First Amendment or Noerr Pennington doctrine protected for one who uses the political process to harm others.

²⁹Similarly, Utah law allows for a conditional privilege. The Utah Constitution states
(continued...)

where it held that “[t]here must be a desire to harm, which is independent of and unrelated to a desire to protect the acting party’s rights and which is not reasonably related to the defense of a recognized property or social interest.” *Id.* at 649. Additionally, the Seventh Circuit went on to examine the Noerr-Pennington doctrine³⁰ stating that “activity within the ambit of the right

²⁹(...continued)

that “All men have the inalienable right . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right.” Utah Constitution, Article 1, Section 1 (emphasis added).

³⁰The United States Supreme Court developed the Noerr-Pennington doctrine in the context of antitrust litigation in order to protect the legitimate exercise of the constitutional right to petition the government after retributive civil claims were brought by parties harmed by petitioning activity. See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)(citing Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)). The courts have adopted the United States Supreme Court’s position that petitioning activity that amounts to ‘a mere sham’ are not immune under Noerr-Pennington. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). Consequently, sham petitioning activities that ‘are not genuinely aimed at procuring favorable government action’ but constitute inappropriate uses of governmental process, are not protected under the doctrine. Pound Hill Corp, Inc. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996). Under this doctrine, “[t]hose who petition government for redress are generally immune from antitrust liability.” Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56 (1993). “However, under the sham exception to the Noerr-Pennington doctrine, there is no immunity if the effort to influence or obtain government action is in fact only an attempt to interfere with the business relationships of a competitor.” *Id.* The “sham” exception to Noerr encompasses situations in which persons use the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). A “sham” situation involves a defendant whose activities are “not genuinely aimed at procuring favorable government action” at all. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988).

Tobias and Feld are attempting to explain away their tortious interference with contractual relations by arguing that they were merely engaging in the political process. The

(continued...)

to petition the government for redress of grievances is privileged under the First Amendment, *unless the alleged petitioning activity "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of [another]."* Id. at 649 (emphasis added)(citing Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972).

CONCLUSION

A. The Trial Court Properly Granted ADC's Motion for Partial Summary Judgment Over Tobias/Feld's SLAPP Counterclaim.

This action was filed over five years ago. ADC has survived multiple attempts by Tobias/Feld to have it dismissed or judgment entered against ADC over it. The trial court has ruled and affirmed that ADC, at the very least, has stated viable causes of action against Tobias/Feld for their wrongful interference with both its then existing and prospective economic relations. The SLAPP Act should not apply to this case at all. It does not contain any language for retroactive application and Tobias/Feld's efforts to create a claim against ADC in this pending action by way of the SLAPP Act, if sanctioned, results in serious and multiple constitutional consequences.

³⁰(...continued)

Noerr-Pennington doctrine does not protect defendants who have engaged in illegal behavior. In Oberndorf v. City and County of Denver, 900 F.2d 1434 (10th Cir.1990), the United States Tenth Circuit Court of Appeals clearly held that the Noerr-Pennington doctrine "does not provide immunity where legitimate lobbying efforts are accompanied by illegal or fraudulent actions." Id. at 1440; See also Westborough Mall, Inc. v. City of Cape Girardeau, Mo., 693 F.2d 733, 746 (8th Cir.1982), cert. denied, 461 U.S. 945 (1983). From the outset, ADC has alleged that Tobias and Feld went beyond simple political activism. They began to interfere with contractual relationships that ADC had with a seller, the Williams. There can be no constitutional protection for this type of behavior.

However, applying the SLAPP Act by its very terms and procedures to this case required the dismissal of Tobias/Feld's SLAPP Counterclaims, as a matter of law. The SLAPP Act requires a finding that the action was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. This Tobias/Feld have also failed to do. The statutory scheme under which the SLAPP Act exists requires a finding by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant. This Tobias/Feld have failed to do. ADC's claims do not arise within the governmental process, but rather arise from a private sales transaction to which Tobias/Feld have interfered. These failures and deficiencies were fatal to Tobias/Feld's SLAPP Counterclaims.

Based on the foregoing, ADC respectfully requests that the trial court's granting of summary judgment in ADC's favor over Tobias/Feld's SLAPP Counterclaim be affirmed.

B. The Trial Court Properly Granted ADC's Motion to Dismiss Over Tobias/Feld's Abuse of Process Counterclaim.

The Utah courts have established that the tort of abuse of civil process is predicated on having the underlying action terminate in favor of the person or party asserting the claim for abuse of civil process. This is the same requirement as the Utah courts have applied to its counterpart tort of wrongful use of civil proceedings. It is undisputed that the present litigation has not yet terminated. As a result, Tobias/Feld's counterclaims for abuse of civil process, and wrongful use of civil proceeding were premature and therefore properly dismissed.

Furthermore, the only factual basis for this tort is Ms. Tobias' claim that ADC abused the civil process when it took her deposition. Yet, applicable law indisputably required the trial court to find that ADC had sufficient probable cause, as well as the actual right, to take Ms. Tobias' deposition and discover the basis and circumstances surrounding her emotional state. Therefore taking her deposition cannot form the basis for an abuse of civil process claim. Finally, while ADC's taking of her deposition was uncomfortable for all parties, Ms. Tobias was represented by counsel during the deposition and the information sought was relevant to the defense by ADC to the then existing counterclaims, as well as was relevant to ADC's prosecution of its claims.

The undisputed facts establish that this litigation has proceeded according to the rules. Tobias/Feld initiated legal challenges to the sufficiency of the allegations of ADC's Complaint. These challenges have been unsuccessful. Discovery has proceeded under the auspice of both the trial court and each party's legal counsel. Dispositive motions have been heard and ruled upon which have narrowed the matters to be tried. Litigation brings with it inherent stress and anxiety, but it also provides a mechanism to resolve complicated and hotly disputed matters. In the present case, the process has been followed by ADC. No abuse existed.

Based on the foregoing, ADC respectfully requests that the trial court's granting of summary judgment in ADC's favor over Tobias/Feld's abuse of process Counterclaim be affirmed.

C. The Trial Court Properly Granted ADC's Motion to Dismiss Over Tobias/Feld's Emotional Distress, Punitive Damage and Attorney's Fees Counterclaims.

The counterclaim asserted by Tobias\Feld for emotional distress and punitive damages were properly dismissed by the trial court. On careful review of each of these counterclaims asserted, it is evident that Tobias\Feld have failed to meet crucial elements. Intentional and negligent emotional distress claims cannot be based upon the filing of a complaint. There is no recognized independent tort for punitive damages or attorney's fees.

Based on the foregoing, ADC respectfully requests that the trial court's dismissing of Tobias/Feld's emotional distress, punitive damage and attorney's fees counterclaims be affirmed.

D. The Trial Court Properly Denied Tobias/Feld's Motion for Summary Judgment Over ADC's Claims for Intentional Interference with Existing Contractual Relations and Prospective Economic Relations Claims.

Tobias/Feld abandoned the role of concerned citizens and chose the role of lawless activists. Tobias' statement to the then South Jordan City manager that she would "do anything in her power to stop the development," is telling. Defendant Foutz's bragging to the press that Tobias, Feld and he has cost ADC "millions of dollars," is dramatic proof that they were willing to engage in unlawful means to damage ADC.

This case is not about a developer attempting to punish concerned citizens for voicing their honest objections to a development. This case is about lawless extremists who actively and intentionally, over the course of months wrongfully interfered with ADC's contractual rights to purchase the Williams Property – a critical part of the RiverPark Business Park. This

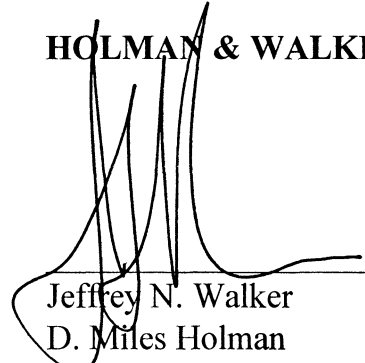
interference impaired ADC's contractual right by wrongfully delaying the requisite zoning changes over the Williams Property until the First REPC had expired. And at the same time, acting as a shill in the market for the Williams Property, Tobias/Feld created the misimpression, through false representations, that Tobias/Feld or others were willing and able to purchase the Williams Property for more than what ADC had offered, evidenced by the Second REPC. These intentional and wrongful actions resulted in the First REPC expiring before the Williams Property was rezoned (even though every other parcel in the RiverPark Business Park had been rezoned before that time) and the Williams demanding that ADC pay more for the Williams Property under the Second REPC based critically on assurances and representations by Tobias/ Feld that they had the money raised or others willing and able to buy the Williams Property at a higher price.

This lawless approach to opposing the RiverPark Business Park is actionable under Utah law by asserting the torts of intentional interference with existing contractual or prospective economic relations. Both actual, consequential and punitive damages are available. Tobias/Feld 's wrongful conduct caused ADC to sustain significant actual, incidental and consequential damages.

Tobias/Feld's Motion for Summary Judgment was properly denied by the trial court and should be affirmed here.

RESPECTFULLY SUBMITTED this 27th day of April 2004.

HOLMAN & WALKER, LC



Jeffrey N. Walker
D. Miles Holman
Attorneys for Appellee

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, two (2) true and exact copies of the foregoing Appellee's Brief to the following party on the 27th day of April 2004:

Dale F. Gardiner
Douglas J. Parry
Jennie B. Garner
PARRY ANDERSON & GARDINER
60 East South Temple
Suite 1200
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be "Dale F. Gardiner", is written over a horizontal line. The signature is stylized with large, sweeping loops and a long horizontal stroke extending to the right.

APPENDIX "A"
TO
APPELLEE'S BRIEF

JANALEE TOBIAS and JUDY FELD
Defendants and Counter Claimants\Appellants

vs.

ANDERSON DEVELOPMENT CO., L.C.
Plaintiff and Counter Defendant\Appellee

Consolidated Appeal No. 20030469

APPENDIX A

STATEMENT OF CASE – ADC’s Case-in-Chief

The following facts provide additional substantiation and materiality to the overview of the factual context of the section entitled, “STATEMENT OF CASE” This appendix includes the following sections:

| | | |
|------|---|----|
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Please note that these facts are taken from various affidavits submitted to the trial court in by ADC in opposition to Tobias/Feld’s Second Motion for Summary Judgment over ADC’s case-in-chief. See R. 3742-3884. Thereafter, Tobias/Feld filed corresponding motions to strike these affidavits and the trial court denied the vast majority of Tobias/Feld’s requests in this regard. See R. 4039-4128. For example, Tobias/Feld sought to strike 25 of the 32 paragraphs submitted by David Millheim, the City Manager for South Jordan City

during much of the relevant time.¹ This included striking paragraph eight that contained 16 subparagraphs delineating Tobias/Feld's actions of misrepresentation to South Jordan City. See R. 4088-4103. Ultimately, the trial court granted Tobias/Feld's request striking paragraphs 9 and 15, on foundational grounds. See R. 4376-4380. ADC is fully confident that at trial the matters discussed in these two paragraphs will be admissible, as any foundational objections can be remedied. Accordingly, the full content of these affidavits are presented herein, with appropriate notation as to any adverse ruling by the trial court.

As presented below, ADC has compiled significant, credible and admissible testimony and documentary evidence to support ADC's allegations that Tobias/Feld intentionally interfered with or impaired ADC's then existing contractual relations and prospective economic relations with the Williams over the purchase of the Williams Property.

¹Tobias/Feld also made the following requests to strike portion of the affidavits submitted by ADC:

| <u>Affiants</u> | <u>No. Requested</u> | <u>No. Struck</u> |
|--|-----------------------------|--------------------------|
| Gerald Anderson (Affidavit 1) (Manager/Member of ADC) | 5 of 21 | 3 |
| Gerald Anderson (Affidavit 2) (Manager/Member of ADC) | 21 of 44 | 13 |
| David Millheim (former South Jordan City Manager) | 25 of 32 | 2 |
| Thomas Christensen (former South Jordan City Councilman) | 10 of 20 | 0 |
| Boyd Williams (Co-owner of the Williams Property) | 19 of 30 | 3 |
| Dorothy Williams (Co-owner of the Williams Property) | 4 of 6 | 1 |
| Cheri Williams (daughter to Boyd and Dorothy Williams) | 3 of 6 | 1 |
| Douglas Andersen (Manager/Member of Lakeview Farms) | 0 of 10 | 0 |

I. FACTS FROM ADC: Gerald Anderson – the Manager and Member of ADC.

Gerald Anderson (“Anderson”) provides a chronological recount of the operative facts in this action. His testimony provides a workable factual framework to understand the contours of this case, including the following:

- Testimony about Tobias/Feld’s actions with South Jordan City in seeking to delay the rezoning of the Williams Property until the First REPC expired is directly supported by the testimony of David Millheim, the then City Manager of South Jordan City, and Thomas Christensen, a then member of the South Jordan City Council. The affidavits submitted by these two men provide ample foundation to Anderson’s testimony in this regard.

- Testimony about Tobias/Feld’s actions as a shill in the market thereby wrongfully driving the price up on the Williams Property is fully supported by the unified testimonies of Boyd Williams, Dorothy Williams and their adult daughter, Cheri Johnson. The affidavits submitted by these three people provide ample foundation to Anderson’s testimony in this regard.

- Testimony pertaining to the contractual financial arrangement that ADC had with LakeView Farms and Janice Andersen in the financing of the purchase of the Williams Property. These material facts are fully supported by the testimony of Douglas Andersen, the manager and member of LakeView Farms, LLC and the husband of Janice Andersen. The affidavit submitted by this person provides ample foundation and support to Anderson’s

testimony in this regard. In sum, Anderson provides this Court with a cohesive and understandable description of this case and illuminates the reality as to the strength of plaintiff ADC's case against Tobias/Feld for intentional interference with existing contractual relations and intentional interference with prospective economic relations.

1. Gerald Anderson ("Anderson") is the manager and a member of ADC, a locally owned and operated real property development company. Since its formation, Anderson has acted as the manager of ADC. See Affidavit of Gerald Anderson attached hereto as Exhibit "A" at ¶1 (the "Anderson Affidavit"); R. 3643.

2. For many years ADC worked at developing real property located in the southern portion of the Salt Lake Valley including South Jordan, Utah. See Anderson Affidavit at ¶2; R. 3643.

3. In 1996, ADC determined to develop an office project located west of the Jordan River and south of 106th South Street which has been and currently is referred to as the RiverPark Project. See Anderson Affidavit at ¶3; R. 3643.

4. A key part of the RiverPark office development included the purchasing or optioning certain real property owned by various parties, including the Williams family. See Anderson Affidavit at ¶4; R. 3643.

5. On or about October 23, 1996, ADC and the Williams entered into an option agreement, in the form of a Real Estate Purchase Contract for the purchase of the Williams

Property that would comprise the southern portion of the then proposed RiverPark Business Park (the “First REPC”). See Anderson Affidavit at ¶5; R. 3643.

6. Pursuant to the terms of the First REPC, the Williams agreed to sell the Williams Property to ADC for \$35,000 per acre and ADC was willing to buy the Williams Property for this price once the property had obtained zoning that would allow for the RiverPark Business Park (See the First REPC attached as Exhibit “A” to the Anderson Affidavit). See Anderson Affidavit at ¶6; R. 3643.

7. The First REPC further provided that ADC would do the work to get the Williams Property master planned and zoned and they would do so on or before June 30, 1997. Id. See Anderson Affidavit at ¶7; R. 3644.

8. Once the First REPC was executed, ADC began the process necessary to get the Williams Property rezoned or otherwise entitled to meet the terms of the Williams Option Agreement by filing an application for master plan and zone change with South Jordan City. See Anderson Affidavit at ¶8; R. 3644.

9. Once the application for master plan and zoning the Williams Property was filed with South Jordan City, Anderson was informed by many people in the community that defendants, JanaLee S. Tobias and Judy Feld (“Tobias and Feld”), began to oppose the development of the RiverPark Business Park. See Anderson Affidavit at ¶9. [Trial court struck this paragraph on the basis that it lacked adequate foundation. ADC believes that any

such failure will be cured at trial and this information will be heard by the jury.]; R. 3744, 4376-4380.

10. After the zoning application was filed with South Jordan City and once it began to be processed, Tobias and Feld began to oppose the RiverPark Business Park through various activities including engaging in what Anderson believed to be a concerted, intentional and wrongful attempt to interfere with the ADC contract to purchase and develop the Williams Property, as well as other properties constituting the RiverPark Project. See Anderson Affidavit at ¶10. [Trial court struck this paragraph on the basis that it lacked adequate foundation. ADC believes that any such failure will be cured at trial and this information will be heard by the jury.]; R. 3744, 4376-4380.

11. In early December 1996, Anderson was informed that Tobias and Feld engaged in a pattern of repeatedly speaking with the Williams and other land owners asking them not to honor their contracts to sell their properties to ADC; and inviting landowners, including the Williams to meetings specifically designed to induce the land owners from honoring their contracts to sell property to ADC; specifically offering to buy the very land that ADC had under contract of purchase for the RiverPark project. See Anderson Affidavit at ¶11. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony will be admissible at trial based on the state of mind exception to the hearsay rule.]; R. 3744-3745, 4376-4380.

12. Anderson was present at South Jordan City council meetings where Tobias and Feld asked South Jordan City officials to delay a timely decision on the zoning application so that options on properties would expire and that Tobias and Feld would have more time to raise even more money to purchase the Williams Property and other lands comprising the RiverPark project. See Anderson Affidavit at ¶12; R. 3745.

13. Anderson felt that the efforts by Tobias and Feld were against the law and, accordingly, Anderson signed and sent a letter dated December 13, 1996 (see attached Exhibit “B” to the Anderson Affidavit) to Tobias and Feld. Anderson also sent a copy of that letter to others including two South Jordan City officials, Dave Millheim, South Jordan City Manager, and Mike Mazuran, South Jordan City Attorney, putting the City on notice of his grave concerns regarding efforts to interfere with ADC’s contractual rights to purchase the Williams Property, as well as his concerns with efforts to violate ADC’s due process rights to a timely and fair decision by South Jordan officials on the pending application to master plan and zone property. See Anderson Affidavit at ¶13; R. 3745.

14. Anderson’s purpose in sending this letter was to insist that Tobias and Feld cease interfering with ADC’s rights including its right to due process at South Jordan City, as well as its rights to purchase properties pursuant to the legally binding contracts for purchase of the land involved in the RiverPark Project including the Williams Property. See Anderson Affidavit at ¶14; R. 3745.

15. After Anderson sent the December 13, 1996 letter, Anderson had a conversation with Tobias and Feld. This conversation occurred late in the evening after a city meeting regarding the RiverPark project at the Denny's Restaurant in South Jordan in the later part of December 1996. In that meeting, Tobias informed him that she had received his December 13, 1996 letter and had conferred with her husband, Steve Tobias, regarding its contents. Tobias stated that she had also discussed the contents of the December 13, 1996 letter with Feld. Feld acknowledged that she and Tobias had extensively discussed those matters. Both Tobias and Feld admitted to Anderson that the statements made in the December 13, 1996 letter were, in fact, true. See Anderson Affidavit at ¶15; R. 3746.

16. In that same meeting, Tobias and Feld both admitted that they had encouraged Boyd Williams and Dorothy Williams and other land owners not to honor their legally binding contracts to sell property to ADC. Tobias and Feld also specifically admitted that they had asked city officials to delay a decision on the pending ADC zoning application until after the option contracts for purchase of the Williams Property and other properties had expired. See Anderson Affidavit at ¶16; R. 3746.

17. After that evening conversation with Tobias and Feld, Anderson was shocked to learn from Boyd and Dorothy Williams and their family members that Tobias and Feld had made further contacts with Boyd and Dorothy Williams encouraging them to dishonor the contract with ADC for the purchase of the Williams Property. In fact, Ms. Tobias and Ms. Feld brought prospective purchasers to the Williams home, including Wendy Fisher of the

organization, Utah Open Lands, who had looked at the Williams property and had offered more money to Williams and who had encouraged Williams not to honor their contract with ADC. These events occurred while the First REPC was still in place. See Anderson Affidavit at ¶17. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony will be admissible at trial based on the state of mind exception to the hearsay rule.]; R. 3746-3747; 4376-4380.

18. Furthermore, on at least two different occasions, Anderson was told by Boyd Williams that the husband of Tobias, Steve Tobias, had approached Boyd Williams and made offers to purchase the Williams Property for his own real estate development project. See Anderson Affidavit at ¶18. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony will be admissible at trial based on the state of mind exception to the hearsay rule.]; R. 3747; 4376-4380.

19. In early January 1997, Mr. Williams informed Anderson that South Jordan City officials contacted him and encouraged him to meet with Wendy Fisher of Utah Open Lands. Anderson was also told by the city officials that he should ask Mr. Williams if he would be interested in donating his property to the city as opposed to selling it. See Anderson Affidavit at ¶19. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony will be admissible at trial based on the state of mind exception to the hearsay rule.]; R. 3747; 4376-4380.

20. Later, Anderson learned that Ms. Fisher and Utah Open Lands as well as Jim Davis of the Trust for Public Land had entered into a contract wherein these organizations would act as an agent of South Jordan City for purposes of arranging property acquisition for parks, recreation and open space preservation – especially involving lands along the Jordan River within South Jordan City limits. See Anderson Affidavit at ¶20. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony will be admissible at trial based on the state of mind exception to the hearsay rule.]; R. 3747; 4376-4380.

21. Sometime in January 1997, Anderson became aware of the fact that South Jordan City officials had made a proposal for purchase and development of the Williams Property. This proposal involved allowing the private citizens's groups, Tobias and Feld, the opportunity to have time to come up with money to purchase the Williams Property for a science center. In return, South Jordan City officials proposed that they would consider master planning and rezoning the other properties in the RiverPark project. See Anderson Affidavit at ¶21. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony is not hearsay at all and such necessary foundational requirements will be made at trial so that such testimony will be admissible.]; R. 3747-3748; 4376-4380.

22. ADC had option contracts that expired by January 31, 1997 on some of the other properties. Accordingly, Anderson sent a letter dated January 27, 1997 to Dave

Millheim, South Jordan City Manager, objecting to this treatment. (See letter dated January 27, 1997 marked as Exhibit “C” and attached to the Anderson Affidavit). On page 2 of that letter, Anderson stated: “The City has proposed that the Williams ground not be remasterplanned to accommodate some vocal private citizens who desire to build a science center. This reduces the size of the project by 30 acres. . .” The statements Anderson made in this letter were never rebutted at any time by any city officials. See Anderson Affidavit at ¶22; R. 3748.

23. Later, on January 28, 1997, Anderson sent another letter to Mr. Millheim complaining about the City’s proposal to allow the private citizen’s group (Tobias and Feld) the opportunity to have time to come up with money to purchase the Williams Property for a "science center.” (See letter dated January 28, 1997 marked as Exhibit “D” and attached to the Anderson Affidavit). See Anderson Affidavit at ¶23; R. 3748.

24. About this time, City officials requested that Anderson provide copies of all option contracts associated with the properties involved in the RiverPark project. The city officials indicated that they wanted to be sure that ADC had indeed the purchase rights to purchase the properties. Anderson provided copies of the option contracts. One of these contracts, of course, was the first option contract for the Williams Property which had an option deadline of June 30, 1997. See Anderson Affidavit at ¶24; R. 3748.

25. Tobias and Feld’ misrepresentations pertaining to Williams was further compounded by Tobias and Feld misrepresenting themselves as a credible and legitimate

charitable environmental entity that had the ability and connections to facilitate these kinds of transactions. Anderson feels that many in South Jordan relied on the misrepresentations made by Tobias and Feld in delaying the zoning on the Williams Property. These misrepresentations included claims that Tobias and Feld were interested in preserving open spaces in the Jordan River Valley generally, that it was a tax-exempt entity, and that it had raised hundreds of thousands of dollars for the protection of open spaces. See Anderson Affidavit at ¶25. [Trial court struck this paragraph on the basis that it was conclusory. ADC believes that any such necessary foundational and opinion requirements will be made at trial so that such testimony will be admissible.]; R. 3749, 4376-4380.

26. However, Anderson believed that the true facts are that Tobias and Feld' sole concern was injuring ADC and its RiverPark development. See Anderson Affidavit at ¶26. [Trial court struck this paragraph on the basis that it was conclusory. ADC believes that any such necessary foundational and opinion requirements will be made at trial so that such testimony will be admissible.]; R. 3749, 4376-4380.

27. The foregoing wrongful actions by Tobias and Feld caused Williams to consider that they should be getting more for the Williams Property than what was contracted for under the First REPC. See Anderson Affidavit at ¶27. [Trial court struck this paragraph on the basis that it was conclusory. ADC believes that any such necessary foundational and opinion requirements will be made at trial so that such testimony will be admissible.]; R. 3749, 4376-4380.

28. Tobias and Feld furthered their wrongful conduct by contacting key decision-makers at the City of South Jordan for the purpose of convincing them to delay rezoning the Williams Property until after June 30, 1997. These efforts were successful. See Anderson Affidavit at ¶28 ; R. 3749, 4376-4380.

29. Anderson believed that Tobias and Feld represented to these key decision-makers that they had either raised sufficient funds or had friendly buyers who were willing to purchase the Williams Property for more than what ADC was offering to pay and then leave and preserve it as open spaces. See Anderson Affidavit at ¶29. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that any such testimony is not hearsay at all and such necessary foundational requirements will be made at trial so that such testimony will be admissible.]; R. 3749, 4376-4380.

30. Key decision-makers at the City of South Jordan delayed the rezoning of the Williams Property until after June 30, 1997. The South Jordan City Council master planned and rezoned all properties, except for the Williams property, on April 28, 1997. See Anderson Affidavit at ¶30; R. 3749-3750.

31. When ADC failed to get the Williams Property rezoned to be part of the RiverPark Business Park on or before June 30, 1997, the Williams Option Agreement expired. See Anderson Affidavit at ¶31; R. 3750.

32. On July 15, 1997, Anderson attended a meeting with representatives of South Jordan City, various wildlife and environmental preservation groups. This meeting occurred

at the Towers Office Complex at 400 West 106th South, in South Jordan, Utah. Anderson was invited to the meeting to discuss a matter that was calendared late on the agenda involving wetlands issues on properties on the east side of the Jordan River. The meeting was conducted by Keith Snarr, the South Jordan City Economic Development Director. During the meeting, the parties began to strategize about how the Williams Property could be purchased. Statements were made that South Jordan City officials were not going to rezone the Williams Property and that it would be preserved for open space and other environmental uses in accordance with Tobias and Feld's requests. It was clear to Anderson that the matter had been extensively discussed beforehand and that it had been an agenda item in previous meetings before June 30, 1997. When the parties realized that Anderson was present and listening to the conversation, they abruptly stopped their strategy session and moved on to the next agenda item. See Anderson Affidavit at ¶32; R. 3750.

33. On November 23, 1997, ADC entered into a new Real Estate Purchase Contract with the Williams for the William's Property (the "Second REPC"). The Second REPC was less advantageous to ADC than the First REPC. See Anderson Affidavit at ¶33; R. 3750.

34. The Second REPC was much more costly to ADC. A calculation and summary of these costs includes, but is not limited to, the following:

a. Purchase price. The First REPC' price was \$35,000 per acre. The Williams Property per a Bush and Gugell survey contained 23.5684 acres or a total purchase

price of \$824,894.00. The Second REPC provided for a guaranteed purchase price of \$1,000,000. The difference in cost is **\$175,106.00**. See R. 3751.

b. Water shares. The First REPC gave ADC the option of purchasing 10 shares of water in the Beckstead Canal company for \$1,000 per share. The Second REPC provided that the shares of water were to be priced at \$3,000 which more closely paralleled the fair market value of the water shares. ADC never exercised the option and lost out on a profit of \$2,000 per water share multiplied by 10 shares for damages of **\$20,000**. See R. 3751.

c. Restrictions on the height of buildings. The Second REPC, unlike the First REPC, contained the additional restriction that buildings constructed on the Williams Property could be no more than 3 stories in height. ADC estimates the value of this restriction to be approximately **\$175,000**. See R. 3751.

c. Bridge over Beckstead Canal. The Second REPC requires ADC to construct a bridge over the Beckstead Canal to provide access to Williams Property. The First REPC did not have this obligation. ADC estimates the value of this restriction to be approximately **\$ 50,000**. See R. 3752.

d. Oversized utilities sufficient to service the Williams Property. The Second REPC requires ADC to construct at ADC's "sole expense electric utility lines, natural gas utility lines, telephone cables, water lines, sanitary sewer lines and storm drain lines sufficient for intended development of the West Property." The First REPC did not

have these obligations. ADC estimates the value of this restriction to be approximately **\$50,000**. See R. 3752.

e. 10' Right of Way along Midas Creek. The Second REPC requires that Williams be given a 10' right of way along Midas Creek. The First REPC did not include this obligation. ADC estimates the value of this restriction to be approximately **\$12,000**. See R. 37512

f. Significant Limitations on the Use of the Williams Property. The Second REPC requires that the Williams Property have significant passive park use restrictions prohibiting use of “sports activity fields such as baseball, soccer, sport facilities, public concerns or nighttime activities. Further, pursuant to the Second REPC, “any lighting shall be shielded to avoid off-site intrusion.” The First REPC did not have these obligations. ADC estimates the value of this restriction to be approximately **\$200,000**. See R. 3752.

g. Cornerstone survey, engineering and attorney’s fees. The Second REPC required ADC to provide a survey for the Williams. The First REPC did not have this obligation. This cost **\$3,000**. Additionally, the contract required ADC to pay **\$750** for engineering of Williams property, and **\$5,000** for Williams attorneys fees. See Anderson Affidavit at ¶¶34(a) through (g). See R. 3752.

35. With the inclusion of interest charges of approximately **\$312,484.77** plus total estimated general damages of **\$690,856** leaves a final estimated damages to ADC as a result of the material differences between the First and Second REPCs is **\$1,003,340.70**. Further,

ADC has sought punitive damages and costs and attorneys' fees according the facts of the case and law of Utah. In this case, ADC believes that punitive damages could exceed the sum of **\$3 million**. See Anderson Affidavit at ¶35; R. 3753.

36. In late1997, Anderson contacted Doug Andersen, Manager of LakeView Farms, L.L.C. ("LakeView"), and Janice Phelps Andersen ("Janice") and asked if they would be interested in jointly funding the purchase of the Williams Property. Janice and LakeView accepted Anderson Development's offer. See Anderson Affidavit at ¶36; R. 3753.

37. This relationship was always "arm's length" yet the parties had confidence in one another and they entered into other oral contracts with one another. See Anderson Affidavit at ¶37; R. 3753.

38. Janice and LakeView agreed to fund the Williams Property but a condition to this funding would be that the Williams Property needed to be positively master planned and rezoned by South Jordan City. See Anderson Affidavit at ¶38; R. 3753.

39. The contractual relationship between LakeView, Janice and ADC was formed involving some of the following features:

a. ADC already obtained the Second REPC on the Williams Property. The purchase portion of the Second REPC would be assigned to LakeView Farms and Janice when the Williams Property was to be purchased. See R. 3753.

b. ADC would take all measures and expend all reasonable costs to obtain acceptable South Jordan City master planning and zoning approval of the Williams Property. See R. 3754.

c. LakeView and Janice would fund the purchase of the Williams Property. The Williams Property would remain titled in the names of LakeView and Janice in light of the fact that Section 1031 Like Kind Exchange monies were being used See R. 3754.

d. Once purchased, ADC would take all measures and expend all reasonable costs to obtain: a development agreement with South Jordan City covering the Williams Property and other properties in the RiverPark Office Project, successful creation by South Jordan City of a special improvement district to fund some of the needed infrastructure in the RiverPark Project, a favorable vote involving a land trade involving some of the Williams Property. This land trade involved obtaining approvals from the State of Utah as well as South Jordan City. See R. 3754.

e. Once purchased, ADC would also market the Williams Property along with other properties within the RiverPark office project and would find a final purchaser who would close on the Williams Property. The final terms of the sale had to be approved and agreeable to ADC, LakeView and Janice. See R. 3754.

f. At closing on the final sale of the property to an end user, LakeView, Janice and ADC would construct the closing transaction to preserve favorable tax and financial treatment for LakeView, Janice, and ADC. See R. 3754.

g. At closing, ADC, Janice and Lakeview would recoup their basis and expenses and divide profits in an equitable manner. See Anderson Affidavit at ¶¶39(a) through (g); R. 3755.

40. Additionally, during the initial discussions between LakeView, Janice and Anderson, they discussed a dispute between ADC and JanaLee Tobias and Judy Feld. Anderson told them about his concerns with Janalee Tobias and Judy Feld. Anderson was concerned because the cost of the second option contract was significantly higher and that the profits from the sale of the Williams Property would be significantly diminished. Anderson told them that he would probably be filing suit against Tobias and Feld for their efforts to interfere with ADC's first and second REPC. See Anderson Affidavit at ¶40 ; R. 3755.

41. At that time, LakeView and Janice agreed:

a. That any decision whether to file suit would be that of ADC,

b. ADC would be fully responsible to pay for all costs and attorney fees in filing suit, if it chose to file suit. See R. 3755.

c. That ADC would retain any rights to pursue claims against Tobias and Feld. LakeView and Janice would assign all rights to ADC to pursue all claims against Tobias and Feld. See Anderson Affidavit at ¶¶41(a) through (c); R. 3755.

42. In March 1998, Anderson informed LakeView and Janice that ADC had filed suit against Tobias/Feld for intentional interference with existing and prospective contractual relations. See Anderson Affidavit at ¶42; R. 3755.

43. Pursuant to the contractual relationship with ADC the parties all closed on the Williams Property on April 17, 1998. See Anderson Affidavit at ¶43; R. 3755.

44. Additionally, when the Williams Property was ultimately sold to High Uinta Investment Properties, LC, the litigation between Anderson Development and Janalee Tobias and Judy Feld was expressly reserved by ADC. (See the Purchase Agreement between ADC and High Uinta Investment Properties attached as Exhibit “E” to the Anderson Affidavit). See Anderson Affidavit at ¶44; R. 3755-56.

II. FACTS FROM SOUTH JORDAN CITY.

A. David Millheim – the former City Manager of South Jordan City.

45. David Millheim (“Millheim”) was the City Manager for South Jordan City from March 1995 through August 1998. See Affidavit David Millheim attached hereto as Exhibit “B” at ¶2 (the “Millheim Affidavit”); R. 3803.

46. During the time that Millheim was the City Manager he had the responsibility to oversee all staff and implement city council direction. Further, he was intimately involved with all City Council actions. Millheim was present at City Council meetings and met with members of the City Council regularly. Millheim also became intimately involved with large development projects to be undertaken in the city where City involvement was required such

as rezoning or the obtaining of permission to develop. See Millheim Affidavit at ¶3; R. 3803.

47. In the Fall of 1996 Millheim became aware that Anderson Development LC (“ADC”) desired to do develop a parcel of land for commercial development in the Jordan River bottoms on the west side of the Jordan River at approximately 10600 South and southward. ADC made an application to South Jordan City on October 7, 1996, to change the city’s master plan to allow for commercial and office building development, restaurants and a community park in the area to be developed. Attached as Exhibit “A” to the Millheim Affidavit is a copy of the request. This request became a project that Millheim undertook to oversee on behalf of the City and to which he became intimately involved. See Millheim Affidavit at ¶4; R. 3803.

48. The application for the change to the master plan immediately caused a significant stir in the community with some very vocal opposition to the proposed change. See Millheim Affidavit at ¶5; R. 3803.

49. On or about October 31, 1996, Millheim received copies of the contract that Anderson Development had with the Williams that had deadlines for the obtaining of City approval of the masterplan and zoning changes. On November 4, 1996, Millheim received a letter from ADC (a copy of which is attached as Exhibit “B” to the Millheim Affidavit) stressing to him the importance meeting the deadlines. See Millheim Affidavit at ¶6; R. 3803-3804.

50. Early in the process of ADC's effort to get the Master Plan changed by the city Millheim became aware of Janalee Tobias' ("Tobias") and Judy Feld's ("Feld") extreme opposition to the project. Very early on they expressed opposition to the project and became involved in an effort to stop the project. Because of their extreme opposition to the ADC project Tobias and Feld were placed on a committee comprised of Millheim, Tobias, Feld, Richard Warne (a city councilman) and Kent Money (a city councilman) to help work through the project and come to some compromises on the project. Because of that committee assignment and because of his position as city manager Millheim had numerous conversations and meetings with Tobias and Feld about the project and Anderson Development's efforts to have the project approved by an amendment to the master plan so that a commercial development could be built. Millheim also saw Tobias and Feld as they appeared before the City Commission. Tobias and Feld would call Millheim and meet with him separately and in the committee meetings. Tobias and Feld would call Millheim for information and an understanding of the process involved at the Planning Commission and City Council Meetings about this project. Millheim always provided the information they requested. Tobias and Feld always expressed that they did not want to have the project go through in any way. They were not willing to compromise on the project in any way. See Millheim Affidavit at ¶7; R. 3804.

51. Early on (early 1997 to mid-1997) Millheim had many conversations with Tobias and Feld at the council meetings, committee meetings, over the telephone and in

person outside of the committee and council meetings. Some of the conversations were with Tobias alone and some were with Feld alone but most of the time the conversations were with both Tobias and Feld. What follows is a rendition of those conversations that Millheim had. Since there were so many conversations Millheim cannot at this time designate precisely when those conversations were held other than to say that they were conducted in early 1997 to mid-1997; R. 3804-3805. Those conversations and events included:

a. As early as November 20, 1996, Feld indicated to the City Planning and Zoning Commission that she would fight the ADC project every inch of the way. See Minutes of Planning and Zoning Commission dated November 20, 1996 (relevant pages) attached as Exhibit “C” to the Millheim Affidavit; R. 3805.

b. On or about November 26, 1996, Tobias and Feld sent to Millheim a letter asking him to delay the action of the city council on the ADC application. They indicated that they had pledged support for the purchase of the property and asked for additional time to “gain financial support.” See copy of letter from Tobias and Feld to Dave Millheim dated November 26, 1997, attached as Exhibit “D” to the Millheim Affidavit; R. 3805.

c. Tobias and Feld asked Millheim specifically what they could do to “kill” (their word) the Anderson Development project. Millheim told them that Anderson Development already had the property under contract. Millheim’s first response to them was that they probably could not kill the project since it was already under contract. See R. 3805.

d. Tobias and Feld asked for copies of all the applicable city ordinances. Millheim gave them copies of the relevant ordinances. See R. 3805.

e. When asked what they could do Millheim told Tobias and Feld to write their concerns and share them with the council members. See R. 3805.

f. Tobias and Feld always wanted to entirely prevent the project. See R. 3806.

g. Tobias and Feld, apparently believing that Millheim had the power to do so, asked him in my capacity as city manager to “kill” (their word choice again) the Anderson Development project. Millheim told them that he was a staff person in the city and that was not his role but the role of the city council if the city council chose to do so. See R. 3806.

h. Millheim told them if they thought they could buy the ground they should do so. See R. 3805.

i. Tobias and Feld asked Millheim about the contract that Anderson Development had to buy the property from the Williams and all the other parcels that Anderson Development was attempting to purchase. They asked the nature of the project, boundaries, relationship to homes and other questions. They asked Millheim when the Anderson Development\Williams contract expired. Millheim does not recall telling them when the Anderson Development\Williams contract would expire by its terms. See R. 3806.

j. Tobias and Feld asked Millheim if he would delay the city's approval of the Anderson Development project to make it so that the Anderson Development contract with the Williams would have expired. See R. 3806.

k. Tobias and Feld asked Millheim what the city could do to slow down the Anderson Development project and "kill" it. See R. 3806.

l. Tobias and Feld told Millheim, with great vehemence, that they would "do everything in their power to stop the project." See R. 3806.

m. Tobias and Feld told Millheim that they would pack the council room with people to oppose the project. See R. 3806.

n. Tobias and Feld told Millheim that they would sue the city if the project looked like it was going to go through. Millheim responded by asking: "Sue for what?" They said: "Whatever we can come up with." See R. 3807.

o. Tobias told Millheim on one occasion that she had told Boyd (understood to be "Williams") to "not sell his property." See R. 3807.

p. Tobias and Feld told Millheim that they had "several hundreds of thousands of dollars" available to purchase the Williams Property. See R. 3807.

q. Tobias and Feld first told Millheim that they had people or groups that would buy the Williams Property. Millheim asked: "Who?" Tobias and Feld told him that they had "wealthy people and citizens groups" that they were forming. Tobias and Feld continued to tell Millheim that they needed time to make it work (that they or someone else

would buy the Williams Property). Tobias told Millheim that she had talked to the governor's office, Congressman Cooks's Office and open space preservation groups (Trust for Public Lands; Utah Open Spaces) that were supposedly supporting the preservation of the property for open space and had money (or access to money) to buy the Williams Property. Tobias and Feld told Millheim and council members that they had money or had others who had money to purchase the Williams Property. See Millheim Affidavit at ¶8; R. 3807.

52. During this time (early 1997 to mid-1997) Tobias and Feld talked to numerous members of the South Jordan City Council. Millheim expected that they were telling the city council members the same information that they were telling him because during that period of time council members were telling him that they had been talking to Tobias and Feld and the council members were reiterating many of the same things that Tobias and Feld had been telling Millheim. See Millheim Affidavit at ¶9. [Trial court struck this paragraph on the basis that it lacked foundation. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible.]; R. 3807-3808, 4376-4380.

53. Because Tobias and Feld were representing that they had money to buy the Williams Property the city delayed the approval of the project. Council members expressed to Millheim that they wanted to allow time for Tobias and Feld to do what they said they had the capacity to do. The city council members, as Millheim heard them express themselves, choose to allow Tobias and Feld to make good on their representations that they had money

and people to buy the Williams Property. The representations made by Tobias and Feld that they had money or buyers for the Williams Property was made frequently and caused the council to delay approving the project. That delay extended beyond the contact date of June 30, 1997. See Millheim Affidavit at ¶10; R. 3808.

54. Because of the representations that Tobias and Feld made that there was money at their disposal to purchase the Williams Property and convey the property to the City or retain the property in open space and that the persons having that money were The Trust for Public Lands and Utah Open Spaces the city in April 1997, invited representatives of the Trust for Public Lands and Utah Open Lands to present to the city council what they would be willing to do. A proposed Memorandum of Understanding was drafted that would put the city in a relationship with The Trust for Public Lands and the Utah Open Lands for the purchase of the property. The Memorandum of Understanding was signed in May and June 1997 and covered the West side of the Jordan River parkway. See copy of Memorandum of Understanding attached as Exhibit “E” to the Millheim Affidavit. See Millheim Affidavit at ¶11; R. 3808.

55. Eventually it turned out that Tobias and Feld did not come forward with money or other people with money to buy the project. Tobias and Feld frequently said that they had arranged for The Trust for Public Lands to buy the project. Ultimately, a council meeting was held that Millheim attended and Wendy Fisher from Utah Open Lands was invited to attend and express the interest of Utah Open Lands had in the purchase of the project.

Wendy Fisher, stated that Utah Open Lands did not have the funds to purchase the project. Wendy Fisher further stated that Utah Open Lands wanted to help preserve the area as open space but had no money or anything to contribute to do so other than a desire to help facilitate such an action. At that time the city was very much aware that the city could not just “take” the Williams Property, through eminent domain or any other zoning restrictions due to counsel . See Millheim Affidavit at ¶12; R. 3809.

56. At a subsequent meeting (about two weeks after the council meeting noted above) with Tobias and Feld at which Millheim was present, Kent Money (a city council member) asked Tobias and Feld if they had any money to purchase the project. That time was the first time that Tobias and Feld admitted that they did not have the money. At all times prior to that time Tobias and Feld told Millheim and others that they had either sufficient money to buy the Williams Property or had others who would buy the Williams Property. See Millheim Affidavit at ¶13; R. 3809.

57. No other buyers ever materialized for the Williams Property other than Anderson Development. See Millheim Affidavit at ¶14; R. 3809.

58. Anderson Development first sought the approval of the South Jordan City Council in October 1996 to approve a change to the zoning over the Williams Property. Typically, a period of time from October through the end of June the next year is plenty of time to get a zoning change through the South Jordan City Council. Millheim believes that the efforts of Tobias and Feld to represent that they had buyers for the Williams Property

when they in fact did not delayed the approval of the zoning change sought by Anderson Development by as much as one (1) year. Millheim felt that Tobias and Feld failed to be candid with him and with the South Jordan City Council and the South Jordan City government when they represented to the city that they either had the money or had people or organizations to buy the Williams Property when they did not. See Millheim Affidavit at ¶15. [Trial court struck this paragraph on the basis that it lacked foundation and parts were hearsay. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible and that any hearsay aspects (what city council persons thought) will be testified by Thomas Christensen, a then South Jordan City Councilman.]; R. 3808-3809, 4376-4380.

B. Thomas Christensen – a former member of the South Jordan City Council.

59. Thomas Christensen was a former member of the South Jordan City Council. He served as an elected member of the South Jordan City Council for 8 years from January 1992 to January 2000. See Affidavit of Thomas Christensen attached hereto as Exhibit “C” (the “Christensen Affidavit”) at ¶1. All of the information stated in the Christensen Affidavit is based upon his own personal knowledge from memory, personal conversations, and review of official documents. See Christensen Affidavit at ¶1; R. 3839.

60. In the fall of 1996, Anderson Development, LC (hereinafter “Anderson”) filed a master plan and zoning application with South Jordan City to master plan and rezone various properties in the river bottoms areas located generally south of 106th South, north of

112th South (Midas Creek), east of the Jordan River and east of the Beckstead Canal. This project was referred to as the RiverPark project. See Christensen Affidavit at ¶2; R. 3839.

61. The portion of the RiverPark Property located furthest to the south was owned by Boyd and Dorothy Williams (hereinafter “the Williams”). See Christensen Affidavit at ¶3; R. 3839.

62. After the initial master plan and zoning applications were filed and began to be processed in the City, Jana Lee Tobias, Judy Feld (and later Brent Foutz) gathered a group of South Jordan City residents in opposition to the RiverPark office project. See Christensen Affidavit at ¶5; R. 3840.

63. Christensen understood that a key element of the RiverPark office development included certain real property owned by the Williams. At the time Anderson filed its master plan and zoning application the Williams property was zoned A-5 (Agricultural Use). See Christensen Affidavit at ¶5; R. 3840.

64. After Anderson filed its applications, South Jordan City officials became aware of the fact that the Anderson option to purchase the Williams Property would expire on June 30, 1997. City officials knew that a key condition to Anderson’s purchase of the Williams Property was obtaining a positive city council vote on its pending master plan and zoning application. See Christensen Affidavit at ¶6; R. 3840.

65. In December 1996, Christensen was informed that Anderson had sent a letter to Tobias/Feld objecting to efforts by Tobias/Feld to interfere with Anderson’s contractual

relations with the Williams and others. (See letter dated December 13, 1996 marked as “Exhibit A” and attached to the Christensen Affidavit). See Christensen Affidavit at ¶7; R. 3840.

66. In public and private communications with City officials, Tobias/Feld encouraged city officials to delay consideration of the master plan and zone changes on the Williams Property until the Anderson option to purchase had expired. See Christensen Affidavit at ¶8; R. 3840.

67. In public and private communications with City officials, Tobias/Feld stated that they had raised large sums of money and had friendly buyers who were willing to purchase the Williams property a for a science center or a park and donate it to the City for use as a city park, for open space or for some other recreational amenity. See Christensen Affidavit at ¶9; R. 3840.

68. Tobias/Feld was particularly closely associated with another member of the South Jordan City Council named Richard Warne. Councilman Richard Warne had an assignment of responsibility to oversee city parks and chaired a citizens park committee. See Christensen Affidavit at ¶10; R. 3840.

69. Members of the City Council and other city officials were generally in favor of the idea of Tobias/Feld purchasing or arranging for the purchase of the Williams Property for use as a science center or a city park. See Christensen Affidavit at ¶11; R. 3840-3841.

70. The City Council postponed action on the Anderson applications in relation to the Williams Property in order to give Tobias/Feld a six (6) month time frame to raise the money and arrange for the purchase of the Williams property for a public use. See Christensen Affidavit at ¶12; R. 3841.

71. In late 1996, SOS introduced Wendy Fisher of Utah Open Lands, who had been working with Tobias/Feld to acquire property in the river bottoms, contacted South Jordan officials. Later, Jim Davis of the Trust for Public Lands also approached South Jordan officials. It was contemplated that Utah Open Lands and the Trust for Public Lands could help Tobias/Feld and the City in obtaining the Williams Property for use as a public park and open space use. See Christensen Affidavit at ¶13; R. 3841.

72. In April 1997, the City began negotiating with Utah Open Lands and the Trust for Public Lands to work on behalf of the City to obtain lands on the west side of the Jordan River, including the Williams Property, for park and open space uses. The executed contract with Utah Open Lands and the Trust for Public Lands is attached as “Exhibit B” to the Christensen Affidavit). See Christensen Affidavit at ¶14; R. 3841.

73. Accordingly, on April 28, 1997, the South Jordan City Council master planned and rezoned all other properties that were controlled by Anderson within the RiverPark Project (Schmidt, Peterson, Forrest, Robbins, Edmunds). The City Council took no action on the Williams Property. See Christensen Affidavit at ¶15; R. 3841.

74. At various times since April 28, 1997, members of the City Council would ask whether SOS had raised the money or had secured options on the purchase of the Williams Property (the First REPC). See Christensen Affidavit at ¶16; R. 3841.

75. In early July 1997, Christensen became aware of the fact that Anderson did not purchase the Williams property pursuant to the First REPC. See Christensen Affidavit at ¶17; R. 3841.

76. Thereafter, Tobias/Feld, Utah Open Lands, and the Trust for Public Lands could not raise the money or otherwise arrange to obtain the Williams Property for a park, open space or for any other recreational use. See Christensen Affidavit at ¶18; R. 3841.

77. Thereafter, Christensen became aware that Anderson Development placed under contract the Williams Property for a second time (the Second REPC). Anderson requested that the City act on Anderson's previously filed applications for master plan and zoning the Williams Property. See Christensen Affidavit at ¶19; R. 3841.

78. In 1998, the City Council voted favorably on the Anderson applications and master planned and rezoned the Williams Property. See Christensen Affidavit at ¶20; R. 3841.

III. FACTS FROM THE WILLIAMS FAMILY.

A. Boyd Williams – the owner of the Williams Property.²

²Boyd and Dorothy Williams were the owners of the Williams Property. During the course of the First and Second REPC while they engaged in some estate planning whereby their property was placed into a trust, they always maintained ownership of the property and

Boyd Williams owned the Williams Property with his wife, Dorothy Williams. His testimony substantiates, but is not limited to, the following:

- Tobias and Feld activity attempted to persuade him to breach the First REPC.
- Tobias and Feld represented to him that they had raised hundreds of thousands of dollars to purchase his property.
- Tobias and Feld sought to delay the rezoning of his property until the First REPC had expired.
- Tobias and Feld brought people to his property both while the First REPC was in place and after it had expired whom they represented were interested and able to purchase the property.
- That he entered into the Second REPC with ADC for a higher amount directly because of the representations of Tobias and Feld.
- That he now believes that Tobias and Feld had materially misrepresented, stating, in pertinent part, “[t]hey made promises and offers that were not fulfilled. They skewed the facts to take unfair advantage of our situation, and, to our dismay, we found that they were not credible and, in fact, misleading and untruthful. We will not work with these people and feel that they have mislead many who support their possible cause and involvement in this project.”

were authorized signatories to these inter-vivos trusts. Tobias/Feld’s arguments that the Williams were not the owners is factually misplaced.

The following is specific testimony proffered by Boyd Williams:

79. On or about October 23, 1996, Anderson Development Company, LC (“ADC”) and my wife and I entered into a Real Estate Purchase Agreement (“First REPC”) for the purchase of a portion of our property that would comprise the southern portion of the then proposed RiverPark Business Park. See Affidavit of Boyd Williams attached hereto as Exhibit “D” at ¶2 (the “B. Williams Affidavit”); R. 3857.

80. Pursuant to the terms of the First REPC, we agreed to sell a portion of our property to ADC for \$35,000 per acre and ADC was willing to buy our property for this price once the property had obtained zoning that would allow for the RiverPark Business Park. See B. Williams Affidavit at ¶3; R. 3857.

81. I was interested in selling a portion of my property to a commercial developer. I had been approached many times in the past about selling my land to residential developers, but I did not want to sell to a residential developer who would simply put a subdivision in next to the land that I would continue to live on. See B. Williams Affidavit at ¶4; R. 3857.

82. It was my plan to sell only a portion of my property and preserve the remainder for my wife and me. When we met with Gerald Anderson of ADC we liked his plan and were willing to sell the property for that type of development. See B. Williams Affidavit at ¶5; R. 3857.

83. The First REPC further provided that ADC would do the work to get our property master planned and zoned and they would do so on or before June 30, 1997. See B. Williams Affidavit at ¶6; R. 3857.

84. In early December 1996, I was invited to attend a meeting at Tom Peterson's house in South Jordan, Utah. Janalee Tobias and Judy Feld ("Janalee and Judy") were present at that meeting, both myself and my wife attended that meeting. See B. Williams Affidavit at ¶7; R. 3858.

85. Janalee and Judy were present at the meeting, as well as another neighboring property owner, Kay Edmunds. I was aware that Kay Edmunds had also signed a REPC with ADC. At the end of the meeting I told Janalee that we should all work together to make the project work for the whole community, including ADC. She curtly replied that she was against the ADC development and that it was "all or nothing." See B. Williams Affidavit at ¶8; R. 3858.

86. I was invited to the meeting and told that Janalee and Judy had arranged for Wendy Fisher, from Utah Open Lands, to be present at the meeting. Upon arriving at the meeting I was informed that Wendy Fisher was not going to be present. See B. Williams Affidavit at ¶9; R. 3858.

87. Throughout the meeting, Janalee and Judy repeatedly encouraged me not to perform on the First REPC that I had entered into with ADC. Janalee and Judy also

encouraged Kay Edmunds and me to not sell to ADC and to get out of our contracts. See B. Williams Affidavit at ¶10; R. 3858.

88. Janalee and Judy stated that if I would get out of the contract with ADC they could find other buyers for the property. Janalee and Judy continued to encourage us to break our contract throughout this time. See B. Williams Affidavit at ¶11; R. 3858.

89. During the period that the First REPC was in existence, I was informed many times that Janalee and/or Judy had been contacting my daughter, Cheri Johnson, to get her to encourage us to break the contract with ADC. See B. Williams Affidavit at ¶12. [Trial court struck this paragraph on the basis that it was hearsay. ADC believes that at trial such testimony will be admissible through the testimony of Cheri Williams.]; R. 3859, 4376-4380.

90. I thought that it was odd that Janalee was opposed to the development of my property because on at least two different occasions, her husband, Steve Tobias, approached me and made offers to purchase our property for his own real estate development project. See B. Williams Affidavit at ¶13; R. 3859.

91. Janalee and Judy represented to me that they had formed a non-profit organization and had raised hundreds of thousands of dollars to buy my property. See B. Williams Affidavit at ¶14; R. 3859.

92. I thought that they had raised the money because they had convinced South Jordan City to go in with them in buying the property. See B. Williams Affidavit at ¶15; R. 3859.

93. In January 1997, while the property was under contract, Gerald Anderson came to my home and asked me if I would be interested in donating my property for a science center. He told me that he had been told by the South Jordan City to find out if we would be interested in donating my property for a science center. I informed him that I was only interested in selling my property, as it was part of my retirement. See B. Williams Affidavit at ¶16; R. 3859.

94. Sometime in January 1997, South Jordan City officials made a proposal for purchase and development of our property. This proposal involved allowing Tobias and Feld to come up with all the money to purchase our property for a science center. See B. Williams Affidavit at ¶17; R. 3859.

95. Janalee Tobias contacted me repeatedly during the period of the First REPC and stated that she had multiple potential buyers for my property and that I should not sell to ADC. See B. Williams Affidavit at ¶18; R. 3860.

96. Prior to the expiration of the First REPC, Janalee and Judy brought people to my property in order to induce me to break my contract with ADC and allow others to purchase the property. See B. Williams Affidavit at ¶19; R. 3860.

97. I had received offers from other residential developers but was not interested in selling to a residential developer. See B. Williams Affidavit at ¶20; R. 3860.

98. Janalee and Judy, in many South Jordan City meetings I attended, encouraged South Jordan City to deny any application or, at the least, delay the application until the

expiration of the First REPC. They also stated that they had raised hundreds of thousands of dollars through their non-profit group and were working to buy the property. See B. Williams Affidavit at ¶21; R. 3860.

99. Prior to the expiration of the First REPC, Janalee and Judy brought Wendy Fisher to our property to discuss selling the property to them. See B. Williams Affidavit at ¶22; R. 3860.

100. In the Summer of 1997, I received a phone call from Richard Warne, a South Jordan City Council Member, he asked if he could come to my home and bring with him Jim Davis from the Trust for Public Lands. They arrived at our home and Mr. Warne acted very nervous. He asked my wife to close the blinds so he could not be seen in our home. He and Jim Davis explained how the Trust for Public Lands could acquire my property and encouraged me to sell to the Trust for Public Lands. At the end of the meeting Mr. Warne asked that we not tell anyone about their visit to our home. See B. Williams Affidavit at ¶23; R. 3860-3861.

101. Due to the delays encouraged by Janalee and Judy, ADC failed to get our property rezoned to be part of the RiverPark Business Park on or before June 30, 1997, consequently, the First REPC expired. See B. Williams Affidavit at ¶24; R. 3861.

102. After the First REPC expired, Janalee and Judy brought many others to our property including people from Utah Open Lands and Salt Lake County. It appeared that between the money that Janalee and Judy had raised and the money from other sources that

I would be able to sell the property for more money than what was offered under the First REPC. See B. Williams Affidavit at ¶25; R. 3861.

103. During a city council meeting in South Jordan, Janalee Tobias stated that she had a written offer and a check from Wendy Fisher to buy our property. However, I never saw the offer. See B. Williams Affidavit at ¶26; R. 3861.

104. On November 25, 1997, we entered into a Second REPC with ADC for purchase of our property. The cost of this second contract was substantially higher than the first contract. This higher price was directly because I figured that if ADC didn't pay this higher price that I could get this much from Janalee and Judy or their contacts, as such had been expressly assured to me by Janalee. See B. Williams Affidavit at ¶27; R. 3861.

105. On January 2, 1998 I sent a letter to Mayor Dix McMullin asking that the city consider the zoning change that I had requested for my property. In that letter I stated, "[a]t the City's urgings we have entertained and negotiated with several others to purchase this property attempting to preserve it as open space, to no avail. My wife and I are convinced that no one can or will pay what Anderson is willing to pay for my property, as proven when we let our contract expire and tried to work with the open lands people with no results and empty promises." A copy of the January 2, 1998 letter is attached to the B. Williams Affidavit as Exhibit "A" See B. Williams Affidavit at ¶28; R. 3861-3862.

106. Later, on February 2, 1998, My wife and I sent a "memo" to the Mayor, City Council and other city officials. In that memo we stated that "[s]o you can benefit from our

experience, I will tell you what happened when we let our original contract expire with Anderson Development to entertain an offer from Open Lands Trust people (as prompted by the SOS group.) They made promises and offers that were not fulfilled. They skewed the facts to take unfair advantage of our situation, and, to our dismay, we found that they were not credible and, in fact, misleading and untruthful. We will not work with these people and feel that they have mislead many who support their possible cause and involvement in this project.” A copy of the February 2, 1998 letter is attached to the B. Williams Affidavit as Exhibit “B.” See B. Williams Affidavit at ¶29. [Trial court struck this paragraph on the basis that it lacked foundation and contained hearsay. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible and that it contains no hearsay, as the statements are not being proffered for the truth of the statements, but for the fact that the statements were made.]; R. 3862, 4376-4380.

107. In these letters I was referring to the many misrepresentations and half truths that were told to us and many in our community by Janalee and Judy. See B. Williams Affidavit at ¶30. [Trial court struck this paragraph on the basis that it lacked foundation and contained hearsay. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible and that it contains no hearsay, as the statements are not being proffered for the truth of the statements, but for the fact that the statements were made.]; R. 3862.

B. Dorothy Williams – the owner of the Williams Property.

Dorothy Williams is the wife of Boyd Williams and owned the Williams Property with her husband. Her testimony further substantiates the testimony of her husband. In addition, she testifies to the fact that at one point Tobias claimed at a public meeting that she had actually in-hand an offer and accompanying check from Wendy Fisher, of Utah Open Lands, for the Williams Property. She further testifies that she asked Tobias for the offer, but Tobias and Feld refused to ever deliver said offer or check to Mrs. Williams or her husband.

The following are specific testimony proffered by Dorothy Williams:

108. On or about October 23, 1996, Anderson Development Company, LC (“ADC”) and my wife and I entered into a Real Estate Purchase Agreement (“First REPC”) for the purchase of a portion of our property that would comprise the southern portion of the then proposed RiverPark Business Park. See Affidavit of Dorothy Williams attached hereto as Exhibit “E” at ¶2 (the “D. Williams Affidavit”). [Trial court struck this paragraph on the basis that there is a typo noting “my wife and I”, instead of “my husband and I.” This correction will be easily made at trial so that such testimony will be admissible.]; R. 3874, 4376-4380.

109. Pursuant to the terms of the First REPC, we agreed to sell a portion of our property to ADC for \$35,000 per acre and ADC was willing to buy our property for this price once the property had obtained zoning that would allow for the RiverPark Business Park. See D. Williams Affidavit at ¶3; R. 3874.

110. From the time that the project was announced Janalee Tobias and Judy Feld (“Janalee and Judy”) began to work against ADC to stop the project. See D. Williams Affidavit at ¶4; R. 3874.

111. Janalee and Judy stated in a South Jordan City council meeting that they had formed a non-profit organization and that they had raised hundreds of thousands of dollars to buy our property. See D. Williams Affidavit at ¶5; R. 3874.

112. At one meeting in particular, Janalee represented to South Jordan City officials that she had a Real Estate Purchase Contract and a check from Utah Open Lands to be given to my husband, Boyd Williams and me. I had never heard of such offer, and after the meeting I asked Janalee to see the offer and the check. She was pulled aside by Judy and they left without explaining where the check and offer on our property was. We never did see either the offer or the check. Ultimately I came to believe that Janalee and Judy had never obtained such an offer, nor had they raised any money as they represented to us and the city. Rather, these misrepresentations were made for the purpose of delaying the rezoning of our property to as to delay or prevent ADC from purchasing our property. See D. Williams Affidavit at ¶6. [Trial court struck the last two sentences for lack of personal knowledge. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible based on the personal knowledge of Mrs. Williams.]; R. 3874-3875, 4376-4380.

C. Cheri Johnson – the adult daughter of Boyd and Dorothy Williams.

Cheri Johnson is the daughter of Boyd and Dorothy Williams. She testifies that she was contacted many times by Tobias and/or Feld to encourage her parents to not honor the First REPC, as well as made representations about money that they raised to buy the Williams Property.

The following are specific testimony proffered by Cheri Johnson:

113. On or about October 23, 1996, Anderson Development Company, LC (“ADC”) and my parents entered into a Real Estate Purchase Agreement (“First REPC”) for the purchase of a portion of their property that would comprise the southern portion of the then proposed RiverPark Business Park. See Affidavit of Cheri Johnson attached hereto as Exhibit “F” at ¶2 (the “Johnson Affidavit”); R. 3878.

114. From the time that the project was announced, I became aware that Janalee Tobias and Judy Feld (“Janalee and Judy”) began to work against ADC to stop the project. See Johnson Affidavit at ¶3. [Trial court struck the last two sentences for lack of foundation. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible based on the personal knowledge of Mrs. Williams.]; R. 3878, 4376-4380.

115. I was present at a South Jordan City council meeting in Spring 1997, when Janalee and Judy stated that they had formed a non-profit organization and that they had raised hundreds of thousands of dollars to buy my parent’s property. See Johnson Affidavit at ¶4; R. 3878.

116. Also, I was with my mother at one meeting, Janalee represented to South Jordan City officials that she had a Real Estate Purchase Contract and a check from Utah Open Lands to be given to my parents as an offer on their property. My mother said that she was not aware of any such offer, and after the meeting my mother asked Janalee to see the offer and the check. After my mother asked about the offer and check Janalee was pulled aside by Judy and they left without explaining where the check and offer on our property was. Ultimately I came to believe that there was no offer and that Janalee and Judy had never in fact raised the funds as they had represented to the city that they had, but rather had made these misrepresentations in an effort to delay the rezoning of my parent's property that was necessary for ADC to purchase it.. See Johnson Affidavit at ¶5. [Trial court struck the last two sentences for lack of personal knowledge. ADC believes that at trial sufficient foundation can be proffered so that such testimony will be admissible based on the personal knowledge of Mrs. Williams.]; R. 3878-3879, 4376-4380.

IV. FACTS FROM LAKEVIEW FARMS: Douglas Andersen – the Manager and a Member of LakeView Farms.

117. Doug Andersen (“D. Andersen”) is the manager and a member of LakeView Farms, LLC, a Utah limited liability company. D. Andersen is also married to Janice Phelps Andersen. See Affidavit of Douglas Andersen attached hereto as Exhibit “G” at ¶1 (the “D. Andersen Affidavit”); R. 3881-3882.

118. In late 1997, D. Andersen was contacted by Gerald D. Anderson of ADC who invited his wife, Janice Phelps Andersen (hereinafter “Janice”), and LakeView Farms to fund a portion of a real estate development known as the RiverPark office project located in South Jordan, Utah. This portion of the real estate development was owned by Boyd and Dorothy Williams and their property was known as the “Williams Property.” Janice and LakeView accepted ADC’s offer. See D. Andersen Affidavit at ¶2; R. 3882.

119. While this was our their contractual relationship, ADC and D. Andersen have had positive contractual relationships in other successful real estate ventures. Their relationship was always “arm’s length” yet they had confidence in one another and always had entered into oral contracts with one another. See D. Andersen Affidavit at ¶3; R. 3882.

120. Janice and LakeView agreed to fund the Williams Property, but a condition to this funding would be that the Williams Property needed to be positively master planned and rezoned by South Jordan City. See D. Andersen Affidavit at ¶4; R. 3882.

121. The contractual relationship between LakeView, Janice and ADC was formed involving some of the following features:

a. ADC already obtained a second option contract on the Williams Property. The purchase portion of the second option contract would be assigned to LakeView Farms and Janice. See R. 3882.

b. ADC would take all measures and expend all reasonable costs to obtain acceptable South Jordan City master planning and zoning approval of the Williams Property.

See R. 3882.

c. LakeView and Janice would fund the purchase of the Williams Property. The Williams Property would remain titled in the names of LakeView and Janice in light of the fact that Section 1031 Like Kind Exchange monies were being used. See R. 3882.

d. Once purchased, ADC would take all measures and expend all reasonable costs to obtain: a development agreement with South Jordan City covering the Williams Property and other properties in the RiverPark Office Project, successful creation by South Jordan City of a special improvement district to fund some of the needed infrastructure in the RiverPark Project, a favorable vote involving a land trade involving some of the Williams Property. This land trade involved obtaining approvals from the State of Utah as well as South Jordan City. See R. 3882-3883.

e. Once purchased, ADC would also market the Williams Property along with other properties within the RiverPark office project and would find a final purchaser who would close on the Williams Property. The final terms of the sale had to be approved and agreeable to all ADC, LakeView and Janice. See R. 3883.

f. At closing on the final sale of the property to an end user, LakeView, Janice and ADC would construct the closing transaction to preserve favorable tax and financial treatment for LakeView, Janice, and ADC. See R. 3883.

g. At closing, ADC, Janice and Lakeview would recoup their basis and expenses and divide profits in an equitable manner. See D. Andersen Affidavit at ¶¶5(a) through (g); R. 3883.

122. Additionally, during the initial discussions between LakeView, Janice and ADC, they discussed a dispute with JanaLee Tobias and Judy Feld. Gerald Anderson told D. Andersen and Janice that Tobias and Feld had made efforts to intentionally interfere with the First REPC dealing with the Williams Property. Gerald reported that the cost of the Second REPC was significantly higher and that the profits from the sale of the Williams Property would be significantly diminished. Gerald stated that ADC probably would be filing suit against Tobias and Feld for their efforts to interfere with ADC's First and Second REPCs. See D. Andersen Affidavit at ¶6; R. 3883.

123. At that time, LakeView and Janice agreed:

- a. That the decision to file suit would be that of ADC,
- b. ADC would be fully responsible to pay for all costs and attorney fees in filing suit, if it chose to file suit. See R. 3883-3884.
- c. That ADC would retain any rights to pursue claims against Tobias and Feld. LakeView and Janice would assign all rights to ADC to pursue all claims against Tobias and Feld. See D. Andersen Affidavit at ¶¶7(a) through (c); R. 3884.

124. In March 1998, Gerald informed D. Andersen that ADC had filed suit against Tobias and Feld for intentional interference with existing and prospective contractual relations. See D. Andersen Affidavit at ¶8.

125. Pursuant to our contractual relationship with ADC, LakeView and Janice closed on the Williams Property on April 17, 1998. See D. Andersen Affidavit at ¶9.

126. When the Williams property was ultimately sold to High Uinta Investment Properties, LC, all claims in the litigation between ADC and Tobias and Feld were expressly reserved by ADC. See D. Andersen Affidavit at ¶10.

APPENDIX "B"
TO
APPELLEE'S BRIEF

JANALEE TOBIAS and JUDY FELD
Defendants and Counter Claimants\Appellants

vs.

ANDERSON DEVELOPMENT CO., L.C.
Plaintiff and Counter Defendant\Appellee

Consolidated Appeal No. 20030469

APPENDIX B

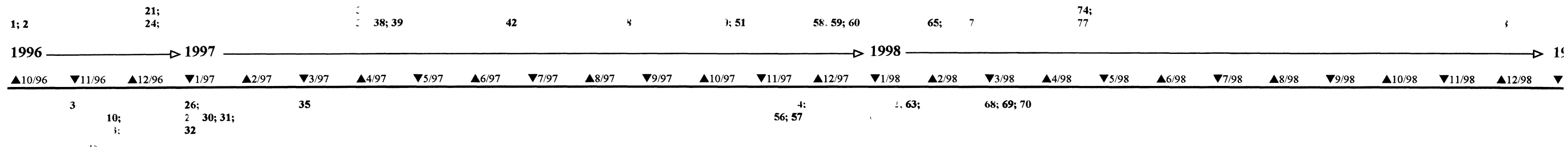
STATEMENT OF CASE – Tobias/Feld's Counterclaims

The following represents a summary of the voluminous facts contained principally in the 53 page counterclaimed filed by Tobias/Feld. This summary of facts was designed to give an overview of the time line of critical events associated with this case. For purposes of this appeal, this summary of facts was not intended to modify any of the events stated in the counterclaim filed by Tobias/Feld.

PLEASE REFER TO THE CHART ATTACHED HERETO THAT ADC PREPARED TO GRAPHIC DEPICT THE FACTUAL CHRONOLOGY SUMMARIZED BELOW. THE NUMBERED PARAGRAPHS CORRESPOND TO THE NUMBERS ON THE CHART.

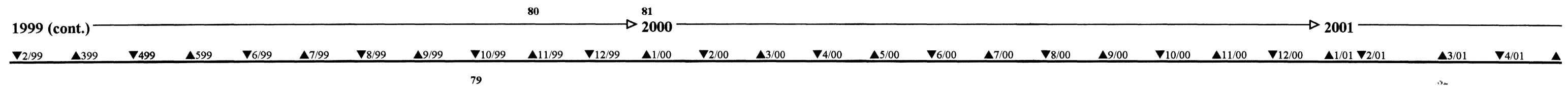
CHRONOLOGY OF EVENTS OVER THE RIVERPARK PROJECT

- ENTITLEMENT PROCESS



- SALE OF PROJECT

ENACTMENT OF ACT —



KEY:

- 1. Red numbers reflect actions by Tobias/Feld.**
- 2. Blue numbers reflect actions by ADC.**
- 3. Green numbers reflect actions by South Jordan City.**

1. On or about October 7, 1996, ADC filed an application with South Jordan City (“SJC”) for Master plan and zoning changes over the certain adjoining properties west of the Jordan River and south of 106th South Street in South Jordan City, Utah that were owned by various landowners including Robert Schmidt, Pat Forrest, Cal Robbins, Thomas K. Edmunds and Boyd and Dorothy Williams (the “ADC Application”). See Counterclaim at ¶16; R. 992.

2. On or about October 28, 1996, ADC entered into a Real Estate Purchase Contract (the “First REPC”) with Boyd G. Williams and Dorothy D. Williams for purchase of their property (the “William’s Property”) for development of the RiverPark Business Park (the “RiverPark Project”). See Counterclaim at ¶17; R. 992.

3. On or about November 6, 1996, SJC provided notice of a public hearing over the ADC Application. See Counterclaim at ¶21; R. 993.

4. On or about November 6, 1996, Tobias/Feld distributed a flyer regarding a meeting to discuss the notice of the SJC public hearing and to organize an opposition to the ADC Application. See Counterclaim at ¶22; R. 994.

5. On or about November 15, 1996, Tobias/Feld held a meeting at Feld's home regarding opposition to the ADC Application. See Counterclaim at ¶¶23-25; 30-32; R. 994-996.

6. On or about November 16, 1996, Tobias/Feld distributed a flyer regarding opposing the ADC Application. See Counterclaim at ¶33; R. 996.

7. On or about November 17, 1996, Tobias/Feld distributed a flyer regarding meeting to organize opposition to the ADC Application. See Counterclaim at ¶34; R. 996.

8. On or about November 18, 1996, Tobias/Feld held a meeting at Feld's home regarding opposing the ADC Application and started to circulate a petition to stop any change to SJC's Master Plan requested in the ADC Application. See Counterclaim at ¶¶35-37; R. 996-997.

9. On or about November 19, 1996, Tobias/Feld met with SJC councilman Richard Warne to discuss the traffic impact of the RiverPark Project. See Counterclaim at ¶38; R. 997.

10. On or about November 20, 1996, a SJC Planning and Zoning Meeting is held in which Tobias/Feld voice opposition to the RiverPark Project. A split vote resulted. See Counterclaim at ¶¶39-48; R. 997-999.

11. On or about November 20, 1996, Tobias/Feld distributed a flyer entitled “SOS Alert” against the ADC Application. See Counterclaim at ¶49; R. 999.

12. On or about November 23, 1996, Tobias/Feld distributed a flyer entitled “Top 10 reasons to SOS (Save Our South Jordan River Valley)” in opposition to the ADC Application. See Counterclaim at ¶50; R. 1000.

13. In or about November 1996, Tobias called Governor Leavitt regarding opposing the ADC Application. See Counterclaim at ¶51; R. 1000.

14. On or about November 25, 1996, Tobias received returned call from Governor's office regarding her opposition to the ADC Application. See Counterclaim at ¶52; R. 1000.

15. On or about November 26, 1996, Tobias/Feld sent a letter to SJC requesting a three-month delay in their ruling over the ADC Application and to give Tobias/Feld further opportunity to make a presentation in opposition to the ADC Application. See Counterclaim at ¶¶53-56; R. 1000-1001.

16. On or about December 5, 1996, Tobias/Feld held a meeting regarding opposing the ADC Application, Wendy Fisher, from Utah Open Lands, is invited, but does not attend. See Counterclaim at ¶¶58-61; R. 1002-1003.

17. On or about December 7, 1996, Tobias met with Congressman-elect Merrill Cook regarding obtaining federal funds to preserve open space in opposition to the ADC Application. See Counterclaim at ¶¶62, 63; R. 1003.

18. In or about December 1996, Tobias/Feld distributed a flyer regarding a December 9, 1996 meeting to advocate citizen opposition to the RiverPark Project. See Counterclaim at ¶64; R. 1003.

19. On or about December 9, 1996, Tobias/Feld held a meeting to discuss strategy to oppose the RiverPark Project. See Counterclaim at ¶65; R. 1003-1004.

20. In or about December 1996, Tobias/Feld distributed a flyer through South Jordan Elementary School announcing a December 17,1996 public hearing over the ADC Application. See Counterclaim at ¶66; R. 1004.

21. On or about December 13,1996, ADC sent a letter to SOS regarding possible improper conduct by Tobias/Feld and others. See Counterclaim at ¶70; R. 1004.

22. On or about December 16, 1996, Tobias/Feld sent a letter to SJC requesting time for five or six spokespersons to speak at public hearing in opposition to the ADC Application. See Counterclaim at ¶67; R. 1004.

23. On or about December 16,1996, Tobias/Feld sent a letter to SJC demanding ADC perform certain studies before SJC considers the ADC Application. See Counterclaim at ¶68; R. 1004-1005.

24. On or about December 17,1996, SJC held a public hearing wherein Tobias/Feld presents opposition to ADC Application and ADC presents its Application. See Counterclaim at ¶¶74-79; R. 1006-1007.

25. On or about December 26,1996, Tobias sent a letter to Governor Leavitt regarding opposition to ADC Application. See Counterclaim at ¶80; R. 1007.

26. On or about January 7, 1997, SJC Council Meeting is held wherein Tobias presents arguments against ADC Application, including preserving the river bottoms, open space and air quality. See Counterclaim at ¶ 81; R. 1007.

27. Prior to January 14, 1997, Tobias/Feld distributed a flyer for meeting on January 17, 1997 to discuss development of the South Jordan River Parkway. See Counterclaim at ¶84; R. 1008.

28. On or about January 14, 1997, Tobias/Feld sent a letter to SJC councilmen Richard Warne and Kent Money regarding opposing the ADC Application. See Counterclaim at ¶83; R. 1008.

29. On or about January 17, 1997, Tobias/Feld held a meeting to discuss strategy to oppose the ADC Application. See Counterclaim at ¶¶84-87; R. 1008.

30. On or about January 27, 1997, ADC sent a letter to SJC regarding the ADC Application. See Counterclaim at ¶85; R. 1009.

31. On or about January 27, 1997, ADC sent a memo to SJC regarding scope of possible approval of the ADC Application. See Counterclaim at ¶¶85-87; R. 1008.

32. On or about January 28, 1997, SJC Council Meeting is held wherein they approve the ADC Application without consideration of the William's Property. See Counterclaim at ¶¶89-92; R. 1009-1010.

33. On or about February 20, 1997, Tobias/Feld met with Jodi Ketelsen, SJC long-range planner, and Wendy Fisher to discuss conservation easements as a possible alternative to the ADC Application. See Counterclaim at ¶94; R. 1010.

34. On or about February 21, 1997, a meeting was held between Tobias/Feld, SJC and ADC to discuss future use of the William's Property. See Counterclaim at ¶¶95-97; R. 1010-1011.

35. On or about March 6, 1997, ADC filed an application with SJC over zoning changes to the William's Property (the "William's Application"). See Counterclaim at ¶98; R. 1011.

36. On or about April 1997, Tobias/Feld distributed a flyer for a meeting on April 23, 1997 to discuss opposition to the William's Application. See Counterclaim at ¶¶99-101; R. 1011-1012.

37. On or about April 23, 1997, Tobias/Feld held a meeting to discuss opposition to the William's Application. See Counterclaim at ¶102; R. 1012.

38. On or about April 24, 1997, Tobias/Feld attended a SJC Planning and Zoning Meeting over the RiverPark Project wherein the commission voted to approve the Williams Application. See Counterclaim at ¶¶103-105; R. 1012-1013.

39. On or about April 28, 1997, SJC Council Meeting is held wherein Tobias/Feld presented their opposition to the RiverPark Project. The project was thereafter approved without the William's Property being considered. See Counterclaim at ¶¶106-112; R. 1013-1014.

40. On or about June 10, 1997, Tobias contacted Congressman Merrill Cook again regarding preservation of the South Jordan River Valley River-bottom, including purchasing the William's Property. See Counterclaim at ¶116; R. 1015.

41. In or about June 1997, Tobias contacted Wendy Fisher again regarding purchasing the William's Property. See Counterclaim at ¶118; R. 1015.

42. On or about June 30, 1997, First REPC expires between ADC and the Williams. See Counterclaim at ¶114; R. 1014.

43. In or about July 1997, Tobias/Feld gave a video tape on Odgen Nature Center to Williams. See Counterclaim at ¶119; R. 1015.

44. In or about August 1997, Tobias/Feld contacted Dan Ross regarding purchasing the William's Property. See Counterclaim at ¶121; R. 1015-1016.

45. In or about August 1997, Tobias/Feld contacted Kay Morrill regarding purchasing the William's Property. See Counterclaim at ¶121; R. 1015-1016.

46. In or about August 1997, Tobias/Feld contacted SJC regarding purchasing the William's Property. See Counterclaim at ¶121; R. 1015-1016.

47. In or about August 1997, Tobias/Feld met with County Commissioner Randy Horiuchi (two times) regarding purchasing the William's Property. See Counterclaim at ¶¶123, 124; R. 1016.

48. In or about August 1997, Tobias/Feld informed the Williams that they had raised \$300k from the county to go towards the purchase of the William's Property. See Counterclaim at ¶125; R. 1016.

49. In or about October 1997, Tobias/Feld brought County Commissioner Brent Overson to the Williams to tour the property for purposes of preserving or purchasing the William's Property. See Counterclaim at ¶126; R. 1017.

50. In or about October 1997, Tobias/Feld learned that SJC had proposed that the William's Property be traded for some SJC undeveloped adjoining park property, thereby creating an open space (the proposed park) barrier between the RiverPark Project and a residential subdivision. Immediately thereafter Tobias/Feld distributed a flyer entitled, "Save Our Park" that was in opposition to the land swap between Williams and SJC and a petition entitled, "Do Not Move the Park by the Jordan River, Do Not Open Jordan River Drive." See Counterclaim at ¶¶127-129; R. 1017.

51. On or about October 23, 1997, Tobias/Feld released a news release regarding efforts to save the Jordan River-bottom in opposition to the RiverPark Project. See Counterclaim at ¶130; R. 1017-1018.

52. On or about November 14, 1997, Tobias/Feld sent a letter to Courtland Nelsen, State Director of Parks regarding opposition to land trade between the Williams and SJC. See Counterclaim at ¶131; R. 1018.

53. On or about November 6, 1997, Tobias/Feld met with Wes Johnson and Terry Green of State Park and Recreation Dept. regarding opposition to land trade between the Williams and SJC. See Counterclaim at ¶132; R. 1018.

54. On or about November 7, 1997, Tobias/Feld forwarded the December 13, 1996 ADC letter to Johnson and Green regarding opposing ADC Application. See Counterclaim at ¶133; R. 1018.

55. In or about November 1997, Tobias/Feld distributed a flyer opposing ADC's request for extension of time to complete of the RiverPark Project. See Counterclaim at ¶137; R. 1019.

56. On or about November 25, 1997, SJC Council Meeting wherein ADC's requested extension is discussed. Tobias/Feld spoke in opposition to the extension and ADC spoke in favor of the same. A decision is postponed until December 16, 1997. See Counterclaim at ¶¶139-143; R. 1019-1020.

57. On or about November 25, 1997, ADC entered into 2nd REPC with the Williams for the purchase of the William's Property. See Counterclaim at ¶138; R. 1019.

58. In or about December 1997, Tobias/Feld distributed a flyer regarding the scheduled December 16, 1997 SJC Council Meeting and Tobias/Feld's opposition to ADC's extension request. See Counterclaim at ¶144; R. 1020.

59. On or about December 16, 1997, SJC Council Meeting is held wherein Tobias/Feld urged rejection of ADC's extension. ADC requested for the extension. SJC granted the ADC extension. See Counterclaim at ¶¶145, 146; R. 1020-1021.

60. In or about December 1997, Tobias/Feld decided to prepare a petition, by way of a ballot initiative, to overturn the extension granted to ADC by SJC. See Counterclaim at ¶147; R. 1021.

61. In or about January 1998, Tobias/Feld circulated a petition to overturn the extension by way of a ballot initiative. See Counterclaim at ¶148; R. 1021.

62. On or about January 20, 1998, Tobias/Feld submitted an application to circulate a referendum to SJC. See Counterclaim at ¶148; R. 1021.

63. On or about January 26, 1998, SJC held a special meeting to discuss the RiverPark Project. See Counterclaim at ¶¶149, 150; R. 1021.

64. On or about January 30, 1998, Tobias/Feld met with State Senator Mont Evans and Governor Leavitt regarding opposing the RiverPark Project. See Counterclaim at ¶151; R. 1022.

65. On or about February 13, 1998, SJC informed Tobias/Feld that the application for referendum was rejected by the SJC. See Counterclaim at ¶¶152, 153; R. 1022.

66. On or about February 19, 1998, Tobias/Feld filed a Petition for Extraordinary Writ with Utah Supreme Court to require acceptance of application. See Counterclaim at ¶154; R. 1022.

67. In or about February 1998, Tobias/Feld distributed flyer in opposition to RiverPark Project. See Counterclaim at ¶155; R. 1022-1023.

68. On or about March 5, 1998, Tobias/Feld held a meeting with SJC mayor and others to oppose the RiverPark Project. See Counterclaim at ¶156; R. 1023.

69. On or about March 6, 1998, ADC served the original summons and complaint in this action on Tobias/Feld. See Counterclaim at ¶157; R. 1023.

70. On or about March 11, 1998, notwithstanding the filing this action, Tobias/Feld attended SJC Planning and Zoning Meeting to oppose the RiverPark Project. SJC voted to approved site plan for the RiverPark Project. See Counterclaim at ¶¶160-162; R. 1023-1024.

71. In or about April 7, 1998, Tobias/Feld mailed 7000 referendum and initiative petitions to residents of SJC to stop the possible land swap, as well as the entire RiverPark Project. See Counterclaim at ¶164; R. 1024.

72. In or about April 1998, Tobias/Feld continued working to gather hundreds of signatures for the petition as they waited for the Supreme Court to rule. See Counterclaim at ¶¶165-167; R. 1024-1025.

73. On or about April 14, 1998, Tobias/Feld obtained a TRO against the zoning of the RiverPark Project pending the outcome of the case at the Supreme Court. See Counterclaim at ¶168; R. 1025.

74. On or about April 15, 1998, ADC closed on the 2nd REPC with the Williams over the William's Property. See Counterclaim at ¶169; R. 1025.

75. On or about April 21, 1998, at the preliminary injunction hearing the injunction was denied and the TRO was lifted. See Counterclaim at ¶170; R. 1025.

76. On or about April 21, 1998, Tobias/Feld moved to dismiss ADC's Complaint on the following two-fold grounds: 1) that ADC had failed to state a claim for tortious interference with contract because there had been no breach, and 2) that the lawsuit was a misuse of the judicial system and had been filed solely to punish Tobias/Feld for their participation in government processes. See Defendants' Motion and Memorandum on file, esp. Memorandum Parts I and II for the tortious interference arguments and Part III for SLAPP arguments; R. 1025.

77. On or about April 25, 1998, a SJC Council Meeting is held wherein SJC approved the site plan as the final step in the approval of the RiverPark Project. See Counterclaim at ¶172; R. 1025.

78. On or about December 8, 1998, the Court denied Tobias/Feld's Motion to Dismiss, finding that ADC had in fact stated a claim for tortious interference. See Order dated December 8, 1998.

79. In or about October 1999, High Uinta Investment Properties, LC ("HUIP") enters into a Letter of Intent with ADC for the purchase of the RiverPark Development.

80. In or about November 1999, HUIP purchased portion of RiverPark Project from ADC (First Closing).

81. In or about January 2000, HUIP purchased remaining portion of RiverPark Project from ADC (Second Closing). After this date, ADC had no ownership interest in the RiverPark Project.

82. In or about April 30, 2001, 15 months after the final sale of the RiverPark Project by ADC, the Citizen Participation in Government Act (Utah Code Ann. §§ 78-58-101, et seq.) becomes law.