

2010

Leslie D. Mower v. David R. Simpson : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Craig Carlile; Caleb J. Freshnect; Ray, Quinney & Nebeker; Attorneys for Appellees.

Bart J. Bailey; William T. Jennings; Bailey & Jennings; Attorneys for Appellants.

Recommended Citation

Brief of Appellee, *Mower v. Simpson*, No. 20100532 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2411

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LESLIE D. MOWER, an individual, et al.,

Plaintiffs and Appellants,

v.

DAVID R. SIMPSON, an individual, et al.,

Defendants and Appellees.

Appellate Case No.: 20100532-CA

BRIEF OF SIMPSON APPELLEES

Appeal from the Order of the Fourth Judicial District Court
for Utah County, Judge Samuel D. McVey

Bart J. Bailey

William T. Jennings

BAILEY & JENNINGS, LC

584 South State Street

Orem, Utah 84058

Attorneys for Appellants Leslie D. Mower;
LD SQ, LLC; LD III, LLC; LD Purpose,
LLC; and Navona, LC

Craig Carlile

Caleb J. Frischknecht

RAY QUINNEY & NEBEKER P.C.

86 North University Avenue, #430

Provo, Utah 84601-4420

Attorneys for Appellees David R. Simpson;
Nathan R. Simpson; Michael K.
Thompson; Todd Dorny; Brandon Dente;
ALS Properties, LLC; Mai Ke Kula, LLC;
Hanalei Kai Holdings, LLC; Ka Mahina,
LLC; He Kiakolu, LLC; Koamalu
Plantation, LLC; Landmark Real Estate,
Inc.; Wood Springs, LLC; Oak Leaf, LLC;
Dente, LLC; Sunny Ridge, LLC; KNDJ
Development, LLC; DN Simpson
Holdings, LLC; SOS Mapleton
Development, LLC; DN Simpson Mapleton
Holdings, LLC; The Preserve at Mapleton
Development Company, LLC; Pheasant
Meadows, LLC; Carnesecca Orchard
Estates, LLC; Spanish Vista Plat I, LLC;
Landmark Homes of Utah, LLC; Maple
Mountain Water Tank, LLC; and Kathy A.
Templeman

FILED
UTAH APPELLATE COURT

APR - 1 2011

IN THE UTAH COURT OF APPEALS

LESLIE D. MOWER, an individual, et al.,

Plaintiffs and Appellants,

v.

DAVID R. SIMPSON, an individual, et al.,

Defendants and Appellees.

Appellate Case No.: 20100532-CA

BRIEF OF SIMPSON APPELLEES

Appeal from the Order of the Fourth Judicial District Court
for Utah County, Judge Samuel D. McVey

Bart J. Bailey

William T. Jennings

BAILEY & JENNINGS, LC

584 South State Street

Orem, Utah 84058

Attorneys for Appellants Leslie D. Mower;
LD SQ, LLC; LD III, LLC; LD Purpose,
LLC; and Navona, LC

Craig Carlile

Caleb J. Frischknecht

RAY QUINNEY & NEBEKER P.C.

86 North University Avenue, #430

Provo, Utah 84601-4420

Attorneys for Appellees David R. Simpson;
Nathan R. Simpson; Michael K.
Thompson; Todd Dorny; Brandon Dente;
ALS Properties, LLC; Mai Ke Kula, LLC;
Hanalei Kai Holdings, LLC; Ka Mahina,
LLC; He Kiakolu, LLC; Koamalu
Plantation, LLC; Landmark Real Estate,
Inc.; Wood Springs, LLC; Oak Leaf, LLC;
Dente, LLC; Sunny Ridge, LLC; KNDJ
Development, LLC; DN Simpson
Holdings, LLC; SOS Mapleton
Development, LLC; DN Simpson Mapleton
Holdings, LLC; The Preserve at Mapleton
Development Company, LLC; Pheasant
Meadows, LLC; Carnesecca Orchard
Estates, LLC; Spanish Vista Plat I, LLC;
Landmark Homes of Utah, LLC; Maple
Mountain Water Tank, LLC; and Kathy A.
Templeman

Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84601
Attorneys for Appellees Allen Hakes and
Lonestar Gutters, LLC

Mark D. Eddy
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Please Grove Blvd., Suite 202
Pleasant Grove, Utah 84062
Attorneys for Appellee Michael Aviano

Jonathon L. Jaussi
P.O. Box 460
Payson, Utah 84651
Attorneys for Appellees Dallas Hakes and
Lonestar Builders, Inc.

Julian D. Jensen
Attorney at Law
311 South State Street, Suite 380
Salt Lake City, Utah 84111
Attorney for Appellees Chad Carlson and 2
Brothers Communications

Steven R. Sumsion
SUMSION BUSINESS LAW
86 N. University Ave., Suite 400
Provo, Utah 84601
Attorneys for Appellee David Nemelka

LIST OF ALL PARTIES TO PROCEEDINGS IN DISTRICT COURT

Plaintiffs and Appellants:

Leslie D. Mower; LD SQ, LLC; LD III, LLC; LD Purpose, LLC; and Navona, LLC.

The Simpson Defendants and Appellees (referred to herein as the "Simpson Defendants"):

David R. Simpson; Nathan R. Simpson; Michael K. Thompson; Todd Dorny; Brandon Dente; ALS Properties, LLC; Mai Ke Kula, LLC; Hanalei Kai Holdings, LLC; Ka Mahina, LLC; He Kiakolu, LLC; Koamalu Plantation, LLC; Landmark Real Estate, Inc.; Wood Springs, LLC; Oak Leaf, LLC; Dente, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC; Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; Maple Mountain Water Tank, LLC; and Kathy A. Templeman.

Other Defendants and Appellees:

David N. Nemelka; Dallas M. Hakes; Chad D. Carlson; Michael Marx; Allen R. Hakes; Michael W. Aviano; Lonestar Gutters, LLC; 2 Brothers Communications, and Lonestar Builders, Inc.; Koamalu Plantation Investment, LLC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	vii
JURISDICTION	1
STATEMENT OF THE ISSUES	1
DETERMINATIVE STATUTES, RULES, AND REGULATIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENTS	14
ARGUMENT	18
I. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS’ FRAUD-BASED CLAIMS FOR FAILURE TO PLEAD WITH PARTICULARITY	18
A. The Second Amended Complaint Did Not Comply With Rule 9(b)’s Fundamental Requirement of Clarity and Conciseness.	19
B. Plaintiffs Improperly Lumped David Simpson, Nathan Simpson, and Others Together in Levying Unsupported “Information and Belief” Fraud Allegations Throughout the Second Amended Complaint.	25
C. Plaintiffs Pleaded the Magnet Bank Fraud Claims Using Labels and Conclusions Rather Than Properly Pleaded Facts.	28
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE FRAUD-BASED CLAIMS RELATED TO KEN DOLEZSAR UNDER RULE 19 FOR FAILURE TO JOIN AN INDISPENSABLE PARTY	30
A. The Trial Court Acted Within Its Discretion In Determining Dolezsar Was Necessary to the Just Adjudication of This Action	31
B. The Trial Court Acted Within Its Discretion In Determining the Action Could Not Proceed In Equity And Good Conscience in Dolezsar’s Absence.	37

1.	The Trial Court Properly Concluded That Rendering Judgment In Dolezsar's Absence Would Result in Unfair Prejudice to Defendants.....	38
2.	Plaintiffs Did Not Dispute That Prejudice to Defendants Could Not Be Avoided By Any Protective Measures.	40
3.	The Trial Court Properly Determined That It Could Not Render An Adequate Judgment in Dolezsar's Absence.....	40
4.	The Trial Court Properly Concluded That the Unavoidable Prejudice to Defendants Outweighed Plaintiffs' Interest in a Forum For Their Fraud Claims.....	42
III.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' FRAUD-BASED CLAIMS WITHOUT LEAVE TO AMEND.....	43
IV.	THE COURT SHOULD DECLINE TO RECOGNIZE A NEW CIVIL CAUSE OF ACTION FOR "AIDING AND ABETTING" IN THIS CASE.....	45
	CONCLUSION	46
	ADDENDUM.....	48
Ex. 1.	Ruling Granting in Part the Various Defendants' Motions to Dismiss. (R. 2608-2606.).....	48
Ex. 2.	Memorandum in Opposition to the Simpson Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint. (R. 5382-5350.).....	48
Ex. 3.	Motion to Dismiss Second Amended Complaint. (R. 5267-5263.).....	48
Ex. 4.	Memorandum in Support of Motion to Dismiss Second Amended Complaint. (R. 5288-5263.).....	48
Ex. 5.	Reply Memorandum in Support of Motion to Dismiss Second Amended Complaint. (R. 5430-5407.)	48
Ex. 6.	Transcript of May 13, 2010 Oral Arguments. (R. 6136, pp. 182-187.).....	48
Ex. 7.	Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint. (R. 5606-5600.)	48

Ex. 8. Ruling and Order on Defendants' Motion to Dismiss Fraud Claims in Second Amended Complaint Under Rule 19. (R. 5595-5591.).....	48
--	----

TABLE OF AUTHORITIES

Cases

<i>Arena Land & Inv. Co. v. Petty</i> , No. 94-4196, 69 F.3d 547, 1995 WL 645678 (10th Cir. Nov. 3, 1995)	20, 21, 22
<i>Ashcroft v. Iqbal</i> , ___ U.S. ___, 129 S. Ct. 1937 (2009)	28
<i>Barber Bros. Ford, Inc. v. Foianini</i> , 2008 UT App 463	23
<i>Brooks v. Bank of Boulder</i> , 891 F. Supp 1469 (D. Col. 1995).....	26
<i>Caprin v. Simon Transp. Servs., Inc.</i> , 99 Fed. Appx. 150 (10th Cir. Feb. 23, 2004).....	23
<i>Cook v. Zions First Nat'l Bank</i> , 645 F. Supp. 423 (D. Utah 1986).....	26, 28, 45
<i>Coroles v. Sabey</i> , 2003 UT App 339, 79 P.3d 974	passim
<i>Davis v. United States</i> , 343 F.3d 1282 (10th Cir. 2003)	41
<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995)	18, 19
<i>Foman v. Davis</i> , 371 U.S. 178 (1962).....	44
<i>Freeman v. Nw. Acceptance Corp.</i> , 754 F.2d 553 (5th Cir. 1985)	42
<i>Gardiner v. Virgin Islands Water & Power Auth.</i> , 145 F.3d 635 (3d Cir. 1998)	40
<i>Glenn v. First Nat'l Bank in Grand Junction</i> , 868 F.2d 368 (10th Cir. 1989)	21, 25
<i>Glenny v. Am. Metal Climax, Inc.</i> , 494 F.2d 651 (10th Cir. 1974).....	37, 42
<i>Green v. Louder</i> , 2001 UT 62, 29 P.3d 638	31
<i>Hancock v. The True and Living Church of Jesus Christ of the Last Days</i> , 2005 UT App 314, 118 P.3d 297.....	35
<i>Hass v. Jefferson Nat'l Bank of Miami Beach</i> , 442 F.2d 394, 398 (5th Cir. 1971)	42
<i>Heathman v. Hatch</i> , 372 P.2d 990 (Utah 1962).....	20, 29
<i>Holmes Dev., LLC v. Cook</i> , 2002 UT 38, 79 P.3d 974	44
<i>Jurimex Kommerz Transit G.M.B.H. v. Case Corp.</i> , 201 F.R.D. 337 (D. Del. 2001)	42
<i>Kelly v. Hard Money Funding, Inc.</i> , 2004 UT App 44, 87 P.3d 734	1, 44

<i>Kuhre v. Goodfellow</i> , 2003 UT App 86, 69 P.3d 286	27
<i>Nottingham v. Gen. Am. Commc'ns Corp.</i> , 811 F.2d 873 (5th Cir. 1987).....	36
<i>Odyssey Re (London) Ltd. v. Sterling Cook Brown Holdings Ltd.</i> , 85 F. Supp. 2d 282 (S.D.N.Y. 2000).....	23
<i>Otsuka Elecs. (USA, Inc.) v. Imaging Specialists, Inc.</i> , 937 P.2d 1274 (Utah Ct. App. 1997).....	18
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	39, 40
<i>Seftel v. Capital City Bank</i> , 767 P.2d 941 (Utah Ct. App. 1989).....	1, 31
<i>Turville v. J & J Props., Inc.</i> , 2006 UT App 305, 145 P.3d 1146	passim
<i>United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah</i> , 472 F.3d 702 (10th Cir. 2006)	18
<i>Werner-Jacobsen v. Bednarik</i> , 946 P.2d 744 (Utah Ct. App. 1997).....	35
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982).....	19, 28
Statutes	
Utah Code Ann. § 75-3-108 (1975)	39
Utah Code Ann. § 75-3-803(a) (1992).....	7
Rules	
Utah R. Civ. P. 12(b)(6)	4, 12, 14
Utah R. Civ. P. 15(a)	2
Utah R. Civ. P. 19	4, 11, 17, 30, 32, 33, 35, 37, 40, 41
Utah R. Civ. P. 8(a)	19
Utah R. Civ. P. 9(b).....	4, 11, 13, 14, 15, 18, 19, 20, 26, 28, 29, 30, 45
Treatises	
2 <i>Moore's Federal Practice</i> § 9.03[1][g] (3d ed. 2010)	27

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated §§ 78A-3-102(3)(j) and 78A-4-103(2)(j) (2009).

STATEMENT OF THE ISSUES

I. Did the trial court err in dismissing the fraud based claims in Plaintiffs' 361-page Second Amended Complaint for failure to plead the clear and concise particularity required by Utah Rule of Civil Procedure 9(b)?

Standard of Review: This Court reviews a trial court's decision to grant a motion to dismiss for correctness. *Coroles v. Sabey*, 2003 UT App 339, ¶ 15, 79 P.3d 974.

II. Did the trial court abuse its discretion in determining, based on the facts affirmatively pleaded by Plaintiffs, that Plaintiffs' fraud based claims relating to the Hawaii Development, the Mapleton Development, and the Springville Property could not proceed in equity and good conscience in the absence of Ken Dolezsar's estate under Utah Rule of Civil Procedure 19?

Standard of Review: This Court reviews a trial court's determination under Rule 19 for abuse of discretion. *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

III. Did the trial court abuse its discretion in dismissing Plaintiffs' fraud based claims without leave to amend?

Standard of Review: This Court reviews the trial court's denial of leave to amend for abuse of discretion. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 14, 87 P.3d 734.

IV. Did the trial court err in dismissing Plaintiffs' civil claims for aiding and abetting?

Standard of Review: This Court reviews a trial court's decision to grant a motion to dismiss for correctness. *Coroles v. Sabey*, 2003 UT App 339, ¶ 15, 79 P.3d 974.

DETERMINATIVE STATUTES, RULES, AND REGULATIONS

I. Utah Rule of Civil Procedure 9(b) provides:

Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

II. Utah Rule of Civil Procedure 15(a) provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

III. Utah Rule of Civil Procedure 19(a)-(b) provides:

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of plaintiff. If the joined party objects to venue and his joinder would

render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not Feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The facts to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

The claims in this case alleged by Appellants Leslie D. Mower, LD SQ, LLC, LD III, LLC, LD Purpose, LLC, and Navona, LC (collectively, "Plaintiffs") primarily arise from two real property developments: a condominium development on the island of Kauai in Hawaii (the "Hawaii Development") and an up-scale residential subdivision in Mapleton, Utah called The Preserve at Mapleton (the "Mapleton Development"). In their 361-page Second Amended Complaint, Plaintiffs asserted 48 causes of action, including, among others, claims for breach of contract, quasi contract, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, fraudulent nondisclosure, aiding and abetting fraudulent nondisclosure, negligent misrepresentation, conspiracy, violation of the Utah Pattern of Unlawful Activity Act, and conversion.

Plaintiffs originally filed this lawsuit on October 20, 2009. (R. 461.) After motions to dismiss were filed by multiple defendants, Plaintiffs filed a First Amended

Complaint on November 27, 2009, which contained 216 pages and 713 numbered paragraphs. (R. 1873; R. 1893; R. 2161; R. 2143.) The First Amended Complaint prompted several more motions to dismiss from the defendants. (R. 2229; R. 2256; R. 2271; R. 2373.)

On January 22, 2010, the trial court “dismissive[d] the fraud allegations arising throughout the Amended Complaint since they [did] not contain the required level of particularity” under Utah Rule of Civil Procedure 9(b). (R. 2608-2607, attached as Ex. 1 in the Addendum hereto.) However, the Court granted Plaintiffs a “chance to plead fraud within 20 days [of the January 22, 2010 Order] and do it concisely and with particularity.” (*Id.*)

Plaintiffs filed their Second Amended Complaint on March 5, 2010, followed by an 11-page Notice of Errata Regarding Second Amended Complaint on March 12, 2010. (R. 3194, attached as Ex. B in Addendum to Appellants’ Opening Brief on Appeal; R. 5048.) The Simpson Defendants (as defined in the List of All Parties to Proceedings in District Court above) then filed a Motion to Dismiss Second Amended Complaint, asking the trial court (1) to dismiss Plaintiffs’ fraud based claims for failure to plead with particularity as required under Utah R. Civ. P. 9(b), (2) to dismiss the fraud based claims related to the Hawaii Development, the Mapleton Development, and the Springville Property (defined below) under Utah R. Civ. P. 19, (3) to dismiss Plaintiffs’ fraudulent nondisclosure claim related to the Double T Ranch water purchase for failure to state a claim under Utah R. Civ. P. 12(b)(6), and (4) to dismiss Plaintiffs’ aiding and abetting claims for failure to state a claim under Utah R. Civ. P. 12(b)(6). (R. 5267-5264.)

Defendant Michael Aviano, Defendant Chad D. Carlson, and Defendant David Nemelka also filed motions to dismiss on the basis that the allegations of fraud in the Second Amended Complaint did not meet the particularity requirements under Rule 9(b). (*See* R. 5110; R. 5055; R. 5300.)

After hearing oral argument concerning the several motions to dismiss, the trial court ruled from the bench on May 13, 2010, indicating it would dismiss the fraud based claims for failure to plead with particularity and would dismiss the fraudulent nondisclosure claim concerning the Double T Ranch water purchase, as well as Plaintiffs' aiding and abetting claims, for failure to state a claim. (R. 6136, 182:15-187:8, attached as Ex. 6 in the Addendum hereto.) The court took the Rule 19 issues under advisement. (R. 6136, 183:24-184:3.)

The trial court then issued two written rulings concerning the motions to dismiss. The trial court's June 22, 2010 Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint reflected its ruling from the bench, dismissing Plaintiffs' fraud based claims for failure to plead with particularity and dismissing the Double T Ranch water purchase, and the aiding and abetting claims, for failure to state a claim. (R. 5606-5602, attached as Ex. 7 in the Addendum hereto.) In its June 16, 2010 Ruling and Order on Defendants' Motion to Dismiss Fraud Claims in Second Amended Complaint Under Rule 19, the trial court concluded that the estate of Ken Dolezsar was a necessary and indispensable party, necessitating dismissal of Plaintiffs' fraud based claims related to Dolezsar. (R. 5595-5592, attached as Ex. 8 in the Addendum hereto.)

Plaintiffs then filed two separate petitions for discretionary appeal — one for each

of the trial court's written orders. This Court granted Plaintiffs' petitions and consolidated them into a single appeal in the above-captioned matter. (R. 5959.)

Statement of Facts

1. Plaintiffs' Second Amended Complaint alleged 48 causes of action against 38 defendants. (R. 3194.)

2. In Claim Nos. 1-10, Plaintiffs alleged claims related to the Hawaii Development for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent nondisclosure, aiding and abetting fraudulent nondisclosure, conversion, unjust enrichment, conspiracy, and violation of the Utah Pattern of Unlawful Activity Act against the following defendants: David Simpson; Nathan Simpson; Michael Thompson; Todd Dorny; Brandon Dente; Wood Springs, LLC; ALS Properties, LLC; Mai Ke Kula; Hanalei Kai Holdings, LLC; Ka Mahina, LLC; Dente, LLC; He Kaikolu, LLC; and Koamalu Plantation (the "Hawaii Development Defendants"). (R. 3017-2978.)

3. In the fraud-based claims related to the Hawaii Development, Plaintiffs alleged that Ken Dolezsar (Plaintiff Mower's late ex-husband) communicated a number of misrepresentations to Mower. Plaintiffs alleged that Dolezsar communicated these misrepresentations to Mower, either "in ignorance of the falsity of the representations or as part of a conspiracy with Michael Thompson, David Simpson, Nathan Simpson, Todd Dorny, Brandon Dente and their entities," after allegedly hearing such misrepresentations from David Simpson and Nathan Simpson. (R. 3016, ¶ 543.)

4. Nowhere in the fraud allegations associated with the Hawaii Development did Plaintiffs allege that David Simpson, Nathan Simpson, or any other of the Hawaii

Development Defendants made any representations directly to Mower. (R. 3017-3012, ¶¶ 538-559.)

5. Dolezsar could not be joined to the case because he was killed on November 15, 2007. (R. 3056, ¶ 400.)

6. Dolezsar's estate could not be joined because Plaintiffs waited to file this case until October 2009, long after the expiration of the one year statute of limitations for claims against Dolezsar's estate found in Utah Code Ann. § 75-3-803(a) (1992). (R. 5593.)

7. In Claim Nos. 11-20, Plaintiffs alleged claims related to the Mapleton Development for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent nondisclosure, aiding and abetting fraudulent nondisclosure, conversion, unjust enrichment, conspiracy, and violation of the Utah Pattern of Unlawful Activity Act against the following defendants: David Simpson; Nathan Simpson; Wood Springs, LLC; Landmark Real Estate, Inc.; Oak Leaf, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC; Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; David Nemelka; Chad Carlson; 2 Brothers Communications; Allen Hakes; Lonestar Gutters, LLC; Dallas Hakes; Lonestar Builders, LLC; Michael Marx; and Michael Aviano (the "Mapleton Development Defendants"). (R. 2978-2909.)

8. Similar to the fraud claims concerning the Hawaii Development, Plaintiffs alleged Dolezsar made a number of misrepresentations to Mower concerning the Mapleton Development. Again, Plaintiffs alleged that Dolezsar communicated all of the alleged misrepresentations directly to Mower, after allegedly hearing them from David Simpson and Nathan Simpson, and that he did so “as part of a conspiracy with the Simpsons.” (R. 2975, ¶ 731; R. 2977, ¶ 721; R. 2974, ¶ 734; R. 2973, ¶ 739; R. 2970, ¶ 757-758; R. 3048, ¶ 434; R. 2925, ¶ 977.)

9. Plaintiffs do not allege that the Mapleton Development Defendants made any misrepresentations directly to Mower. (R. 2978-2962, ¶¶ 717-814.)

10. As part of the claims related to the Mapleton Development, Plaintiffs asserted claims on behalf of Magnet Bank, which claims Plaintiffs alleged were acquired by Plaintiff Navona, LC in February 2008. (R. 2965, ¶ 793.)

11. In the Magnet Bank fraud-based claims (Claim Nos. 11, 14, 15, 16, and 20.), Plaintiffs alleged that the Mapleton Development Defendants made misrepresentations and material omissions to Magnet Bank in connection with a loan extended by Magnet Bank for the Mapleton Development. (R. 2969-2963, ¶¶ 766 – 811.)

12. In Claim Nos. 21-25, Plaintiffs alleged claims for fraud, negligent misrepresentation, breach of fiduciary duty, fraudulent nondisclosure, and conspiracy arising from Mower’s purchase of approximately 30 acres of real property in Springville, Utah (the “Springville Property”). Plaintiffs asserted these claims against David Simpson, Nathan Simpson, Wood Springs, and Pheasant Meadows (the “Springville Property Defendants”). (R. 2909-2896.)

13. As in the claims related to the Hawaii Development and the Mapleton Development, Plaintiffs alleged that Dolezsar, “whether duped by or complicitous with the Simpsons,” communicated a number of alleged misrepresentations to Mower with respect to the Springville Property. (R. 3048, ¶ 434; R. 2908, ¶ 1014.)

14. Plaintiffs did not allege that any of the Springville Property Defendants made any misrepresentations directly to Mower. (R. 3048, ¶ 435; R. 2909-2905, ¶¶ 1007-1035.)

15. In Claim Nos. 26-30, Plaintiffs alleged claims for fraud, negligent misrepresentation, breach of fiduciary duty, fraudulent nondisclosure, and conspiracy against David Simpson and Nathan Simpson, claiming the Simpsons made misrepresentations to Mower through her “representatives” concerning the Mapleton Development’s share of costs for the construction of a water tank by Maple Mountain Water Tank Development Company in connection with the Mapleton Development. (R. 2896-2885.)

16. In Claim Nos. 31-32, Plaintiffs alleged claims for breach of fiduciary duty and fraudulent nondisclosure against David Simpson, claiming Simpson failed to disclose to Mower that he used funds from Plaintiff LD III to purchase water shares from a company named Double T Ranch (the “Double T Water Purchase”). (R. 2885-2881.)

17. Plaintiffs affirmatively alleged, and not in the alternative, that Ken Dolezsar, David Simpson, Nathan Simpson, and others conspired and agreed to convert Plaintiffs’ property, make misrepresentations and material omissions to Plaintiffs, and

breach their alleged fiduciary duties to Plaintiffs. (R. 2926-2924, ¶¶ 975-980; R. 2897-2896, ¶ 1090.)

18. Plaintiffs' Second Amended Complaint spanned 361 pages and contained 48 causes of action and 1362 numbered paragraphs. (R. 3194.)

19. Unfortunately, much of the length of the Second Amended Complaint resulted from unnecessary detail, such as the 20 pages filled by Plaintiffs with minutia from credit card statements to claim that David Simpson and Nathan Simpson allegedly breached fiduciary duties to LD SQ by authorizing LD SQ to pay for personal expenses. (R. 3149-3129, ¶¶ 179-198; *see, e.g.*, R. 3172-3169, ¶¶ 93-105; R. 3162-3154, ¶¶ 131-162; R. 3122-3121, ¶¶ 223-226; R. 3051-3050, ¶¶ 420-426.)

20. Despite having included a host of unnecessary details, Plaintiffs' Fraud Based Claims (as defined below) routinely omit essential details concerning the "who, what, when, where and how" of the alleged fraud. (*See, e.g.*, R. 2974, ¶ 737 (who, when, where); R. 2970, ¶¶ 757-758 (who, when, where); R. 3005-3004 (who, how); R. 3003-3002 (who, how); R. 2952-2948 (who, how); R. 2947-2945 (who, how); R. 2899-2898 (who, how); R. 2889-2888 (who, how); R. 2883-2881 (how); R. 3017, ¶ 542 (who); R. 2986, ¶ 679 (who), R. 2977, ¶ 720 (who); R. 2976, ¶ 726 (who); R. 2972, ¶ 743 (who); R. 2908, ¶ 1014 (who); R. 2895, ¶ 1094 (who); R. 2895, ¶ 1096 (who); and R. 2895, ¶ 1099 (who).)

21. Throughout the Second Amended Complaint, Plaintiffs consistently lumped David Simpson and Nathan Simpson, and often others, together in levying Plaintiffs' allegations of fraud. (*See, e.g.*, R. 3017, ¶ 542; R. 2986, ¶ 679, R. 2977, ¶ 720; R. 2976, ¶

726; R. 2974, ¶ 737; R. 2972, ¶ 743; R. 2970 ¶¶ 757-758; R. 2908, ¶ 1014; R. 2895, ¶ 1094; R. 2895, ¶ 1096; and R. 2895, ¶ 1099; R. 3005, ¶¶ 580-581; R. 2951-2949, ¶¶ 833-846; R. 2899-2898, ¶ 1075; R. 2889, ¶ 1134.)

22. Although such allegations are made on “information and belief,” Plaintiffs consistently failed to plead any facts to explain the basis for their belief that David Simpson, Nathan Simpson, or others made any of the alleged misrepresentations, or their belief as to what David Simpson or Nathan Simpson said or did not say to Dolezsar. (*See, e.g.*, R. 3113-3112, ¶¶ 256-257; R. 3092-3086, ¶¶ 314-317; R. 3048-3046, ¶¶ 434-435; R. 3177-3174, ¶¶ 83-84.)

23. Plaintiffs also made other information and belief allegations without the necessary factual basis. For example, Plaintiffs alleged, “on information and belief,” that the 15 offers used in an appraisal of the Mapleton Development submitted to Magnet Bank were somehow “contrived sham transactions.” (R. 2966, ¶ 787; R. 3098-3096, ¶¶ 300-304.) However, Plaintiffs did not plead *any* facts demonstrating a basis for their “information and belief” that the offers were somehow “sham transactions.” They simply asserted the conclusion. (R. 2967-2966, ¶¶ 784, 787; R. 3079, ¶ 340.)

24. The Simpson Defendants addressed the several deficiencies in the Second Amended Complaint in a motion to dismiss in which they asked the trial court (1) to dismiss Plaintiffs’ fraud based claims for failure to plead with the concise particularity required under Utah R. Civ. P. 9(b), (2) to dismiss the fraud based claims related to the Hawaii Development, the Mapleton Development, and the Springville Property under Utah R. Civ. P. 19 for failure to join Dolezsar’s estate, (3) to dismiss Plaintiffs’

fraudulent nondisclosure claim related to the Double T Ranch Water Purchase for failure to state a claim under Utah R. Civ. P. 12(b)(6), and (4) to dismiss Plaintiffs' aiding and abetting claims for failure to state a claim under Utah R. Civ. P. 12(b)(6). (R. 5267-5264, attached as Ex. 3 in the Addendum hereto; R. 5288-5263, attached as Ex. 4 in the Addendum hereto; R. 5430-5407, attached as Ex. 5 in the Addendum hereto.)

25. The trial court granted the Simpson Defendants' motion to dismiss, ruling from the bench and in two subsequent written rulings. (R. 6136, 182:15-187:14; R. 5606-5602; R. 5595-5592.)

26. The court dismissed Plaintiffs' fraud based claims — Claim Nos. 1, 4, 5, 11, 14, 15, 21, 24, 26, 29, and 32 in their entirety, and Claim Nos. 9, 10, 19, 20, 25, and 30 to the extent they were based on allegations of fraud (collectively, the "Fraud Based Claims") — for failure to plead with particularity under Rule 9(b). (R. 5603.)

27. The court's Rule 9(b) decision adopted the reasoning in the Simpson Defendants' memoranda. (R. 5605; R. 6136, 182:21-25; R. 5288-5265.) Additionally, the court stated that Plaintiff Mower "was directly privy to what was said to her," yet failed to include "where that should have occurred, when it would have occurred, what words were used, who else was present, all those types of things that the Court indicated in its prior rulings." The court also specifically noted that "there [were] circumstances where there were not references to earlier facts that were pleaded, and [the Court] do[es] not believe that counsel and the Court should have to guess where those facts are coming from or go back and research where those facts are coming from." (R. 6136, 183:1-19.)

28. In its written ruling, the trial court determined that the “much too long and involved” Second Amended Complaint “still [did] not provide the particularity mandated by Rule 9(b)” and improperly “dump[ed] upon the [court] . . . the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs [had] allege[d] . . . the facts necessary to make all their elements of fraud.” (R. 5605 (internal quotations omitted).)

29. As Plaintiffs had failed on successive attempts to properly plead their fraud claims, the trial court granted dismissal under Rule 9(b) without leave to amend. (R. 5605, 5603; R. 6136, 184:12-17, 186:20-23.)

30. The trial court also granted the Simpson Defendants’ motion to dismiss under Rule 19, dismissing Plaintiffs’ fraud-based claims related to the Hawaii Development (Claim Nos. 1, 4-6, 9, and 10), the Mapleton Development (Claim Nos. 11, 14-16, 19, and 20), and the Springville Property (Claim Nos. 21, 22, 24, and 25). (R. 5595-5592; R. 5265.)

31. Relying on the case of *Turville v. J & J Properties, Inc.*, 2006 UT App 305, 145 P.3d 1146, and its remarkably similar fact pattern, the court determined that Dolezsar’s estate was both a necessary and indispensable party under Rule 19. Specifically, based on the facts affirmatively pleaded by Plaintiffs, the trial court concluded that Dolezsar “occupied a pivotal representative role in the alleged fraud” because all of the alleged misrepresentations related to the Hawaii Development, the Mapleton Development, and the Springville Property were made to Mower directly by Dolezsar. The court therefore determined that “Dolezsar acted as more than a simple go-

between” as argued by Plaintiffs, and that “complete relief would not be available for those who [were] already parties” in his absence. The trial court further determined that “an adequate resolution to [Plaintiffs’] claims for fraud [could not] be reached in the absence of Mr. Dolezsar’s estate, and the only way to mitigate the resulting prejudice to Simpsons is to dismiss the claims for fraud.” (R. 5595-5592.)

32. The trial court also dismissed the Double T Ranch Water Purchase fraudulent nondisclosure claim (Claim No. 32) for failure to state a claim under Rule 12(b)(6) because Plaintiffs failed to allege that any of the allegedly non-disclosed facts induced any action or influenced any decision by Plaintiffs. (R. 5605 n.1; R. 5603.)

33. Finally, the court dismissed Plaintiffs aiding and abetting claims (Claim Nos. 3, 5, 13, 15) for failure to state a claim under Rule 12(b)(6) because the Supreme Court has not yet recognized civil causes of action for aiding and abetting. (R. 5604.)

SUMMARY OF ARGUMENTS

Dismissal Under Rule 9(b)

The trial court correctly dismissed Plaintiffs’ Fraud Based Claims for failure to meet the “basic and fundamental . . . requirement of clarity and conciseness” imposed under Rule 9(b). *Coroles v. Sabey*, 2003 UT App 339, ¶ 23, 79 P.3d 974. Plaintiffs’ Second Amended Complaint was 361 pages in length, contained 48 causes of action, and had 1362 numbered paragraphs. Unfortunately, its length resulted from “unnecessary detail, if not minutia,” rather than the concise particularity required by Rule 9(b). By intermingling unnecessary minutia and leaving out essential detail, Plaintiffs’ 361-page Complaint “[was] actually *too* replete with alleged facts, to such a degree that it [was]

functionally incomprehensible,” justifying dismissal under Rule 9(b). *Coroles*, 2003 UT App 339, ¶ 27 n.12.

Additionally, throughout the Second Amended Complaint, Plaintiffs consistently lumped David Simpson and Nathan Simpson, and often others, together in levying allegations of fraud. This did not satisfy Rule 9(b)’s standard, which requires a plaintiff to set forth with specificity the time, place, content, and manner of *each* defendant’s alleged misrepresentations. Plaintiffs’ practice of lumping defendants together in their fraud allegations was compounded by the fact that they consistently did so based solely on “information and belief.” This is not surprising as Plaintiffs did not allege that David Simpson or Nathan Simpson ever made any representations directly to Mower. Yet, Plaintiffs failed to plead any facts to explain the basis for their belief that David Simpson or Nathan Simpson made any of the alleged misrepresentations to Dolezsar (who allegedly made the misrepresentations to Mower), or their belief as to what David Simpson or Nathan Simpson said or did not say to Dolezsar. Accordingly, Plaintiffs’ information and belief allegations had no value under Rule 9(b).

The trial court therefore found that Plaintiffs’ failure to specifically plead what Mower knew and how she knew it justified dismissal of Plaintiffs’ Fraud Based Claims for failure to plead with particularity. In so doing, the trial court did not “ignore[] established agency principles,” as argued by Plaintiffs. Rather, the court required Mower to allege what she knew and how she knew it to support her “information and belief” allegations that David Simpson, Nathan Simpson, and others made any misrepresentations or omissions at all.

For these and the other reasons outlined below, the trial court correctly dismissed Plaintiffs' Fraud Based Claims for failure to meet the pleading standard of Rule 9(b).

Dismissal Under Rule 19

As demonstrated by the case of *Turville v. J&J Props., L.C.*, 2006 UT App 305, ¶¶ 36-37, 145 P.3d 1146, the trial court acted within its discretion in concluding under Rule 19 that the estate of Ken Dolezsar was a necessary and indispensable party to this case. Based on the facts affirmatively pleaded by Plaintiffs, the trial court determined that Dolezsar, like the absent party in *Turville*, "occupied a pivotal representative role" in the alleged fraud because all of the alleged misrepresentations were made to Mower directly by Dolezsar. Plaintiffs cannot dispute that all of the misrepresentations were made to Mower by Dolezsar because that is what they affirmatively alleged in their Complaint.

That Plaintiffs alleged Dolezsar was Mower's agent does not make him any less indispensable. Dolezsar was indispensable not because he was an agent, a joint tortfeasor, or even a co-conspirator, but because he "occupied a pivotal representative role" in the alleged fraud similar to the absent party in *Turville*. As has been recognized by this Court, situations like those in *Turville* and in this case are not governed by the general rule that joint tortfeasors are not necessary parties. If anything, Dolezsar's having made the misrepresentations to Mower while acting as her agent only strengthens the conclusion that Dolezsar occupied a pivotal representative role in the alleged fraud. The trial court therefore acted within its discretion when it concluded that Dolezsar was necessary to the just adjudication of this case because "complete relief would not be available for those who [were] already parties" in his absence.

The trial court also acted within its discretion in concluding that Dolezsar was an indispensable party, necessitating dismissal of Plaintiffs' fraud claims related to the Hawaii Development, the Mapleton Development, and the Springville Property.¹ Applying the factors outlined in Rule 19(b), the trial court determined that "an adequate resolution to [Plaintiffs'] claims for fraud [could not] be reached in the absence of Mr. Dolezsar's estate, and the only way to mitigate the resulting prejudice to Simpsons is to dismiss the claims for fraud." This unavoidable prejudice included, among other things, the fact that the Simpson Defendants might be subjected to joint and several liability for misrepresentations allegedly communicated by Dolezsar without the ability to hold Dolezsar accountable through cross-claim, cross-examination, or otherwise as a result of Plaintiffs' failure to file their fraud claims within the applicable limitations period. Further, because Dolezsar's estate can still bring claims against the Simpson Defendants, allowing the fraud claims to go forward in this case would potentially subject the Simpson Defendants to multiple or inconsistent obligations. The trial court's Rule 19(b) determination was thus fully supported and within its discretion.

Dismissal Without Leave to Amend

The trial court did not abuse its discretion in dismissing without leave to amend after Plaintiffs had failed to properly plead their fraud despite at least three prior attempts and express direction from the court. Furthermore, Plaintiffs failed to file a properly

¹ The trial court did not dismiss all of the fraud based claims under Rule 19 as asserted by Plaintiffs. It simply granted the Simpson Defendants' motion to dismiss, which sought dismissal under Rule 19 of all fraud based claims related to the Hawaii Development, the Mapleton Development (other than those associated with Magnet Bank), and the Springville Property. (R. 5592, 5265; R. 5768-5763.)

supported written motion for leave to amend to the trial court, which of itself justifies the court's refusal to grant leave to amend.

Dismissal of Aiding and Abetting Claims

The Court should decline to create a new cause of action for aiding and abetting in this case, where Plaintiffs have alleged claims for conspiracy and violation of the Utah Pattern of Unlawful Activity Act. To the extent Plaintiffs wish to extend liability to persons with whom they had no dealings, they should be required to prove their claims for conspiracy and violation of the Utah Pattern of Unlawful Activity Act.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' FRAUD-BASED CLAIMS FOR FAILURE TO PLEAD WITH PARTICULARITY.

"Rule 9(b) of the Utah Rules of Civil Procedure requires that fraud claims be pled with particularity." *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995). Under Rule 9(b), a plaintiff must "allege with particularity facts necessary to make all their elements of fraud." *Id.*; see also *Otsuka Elecs. (USA, Inc.) v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1278 (Utah Ct. App. 1997) ("[A]ppellants must state with particularity the circumstances supporting each element of fraud."). "At a minimum, Rule 9(b) requires that a plaintiff set forth the who, what, when, where and how of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006) (internal quotations and citations omitted).

Rule 9(b)'s particularity requirements apply not only to "allegations of common-law fraud," but extend to "all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term 'fraud' in its broadest dimension." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982). Thus, Rule 9(b)'s pleading requirements apply to all of Plaintiffs' Fraud-Based Claims.

Ignoring the fact pleading requirement of Rule 9(b), Plaintiffs incorrectly ask the Court to apply the standard governing motions under Rule 12(b) to determine whether the trial court properly dismissed Plaintiffs' Fraud-Based Claims for failure to plead with particularity. (Appellants' Opening Br. 25.) "[Rule 12(b)(6)], however, does not apply to actions for fraud." *DeBry*, 889 P.2d at 443. Accordingly, the Court need not "draw all reasonable inferences in the light most favorable to the plaintiff," as proposed by Plaintiffs. (Appellants' Opening Br. 25.)

In this case, Plaintiffs' 361-page Complaint failed to clearly and concisely provide the particularity required by Rule 9(b). Accordingly, as outlined below, the trial court properly dismissed Plaintiffs' Fraud Based Claims.

A. The Second Amended Complaint Did Not Comply With Rule 9(b)'s Fundamental Requirement of Clarity and Conciseness.

Under the notice pleading requirements espoused by the Utah Rules of Civil Procedure, plaintiffs are required to set forth their claims for relief in "a short and plain statement . . . showing that the pleader is entitled to relief." Utah R. Civ. P. 8(a). Where fraud is at issue, "the circumstances constituting fraud or mistake shall be stated with particularity." Utah R. Civ. P. 9(b). Together, the purpose of these pleading Rules is "to

require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed.” *Heathman v. Hatch*, 372 P.2d 990, 992 (Utah 1962).

A trial court may properly dismiss a complaint that does not satisfy the “basic and fundamental . . . requirement of clarity and conciseness” imposed under Rule 9(b).

Coroles v. Sabey, 2003 UT App 339, ¶ 23, 79 P.3d 974. For example, in the case of *Coroles v. Sabey*, the plaintiffs filed a complaint containing 13 different causes of action, consisting of “725 paragraphs spanning 136 pages, the first 646 paragraphs and 125 pages of which [were] alleged facts.” *Id.* at ¶ 6. However, the length of the complaint was the result of “unnecessary detail, if not minutia,” instead of the concise “particularity” required by Rule 9(b). *Id.* at ¶ 23 n.11. Indeed, the complaint “[was] actually *too* replete with alleged facts, to such a degree that it [was] functionally incomprehensible,” leaving the Court “unable to ascertain what facts are claimed to constituted [the fraud] charges.” *Id.* at ¶ 27 n.12 (internal quotations omitted).² This problem was compounded by the fact that the plaintiffs merely incorporated the facts stated in the 660 paragraphs preceding their fraud claim, rather than setting forth the specific facts constituting the alleged fraud within the actual cause of action. *Id.* ¶ 25.

In so doing, the *Coroles* plaintiffs “essentially dump[ed] upon the trial court . . .

² See also *Arena Land & Inv. Co. v. Petty*, No. 94-4196, 69 F.3d 547, 1995 WL 645678, at *2 (10th Cir. Nov. 3, 1995) (“As this case exemplifies, mere wordiness is not what it takes to state a cause of action under Rule 9. It is a matter of precision, not length that is required.”). The *Arena Land & Investment* case was favorably cited by this Court in *Coroles*. *Coroles*, 2003 UT App 339, at ¶ 27.

the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs ha[d] allege[d] . . . facts necessary to make all their elements of fraud.” *Id.* at ¶ 27 (internal quotations omitted). The Court held that the plaintiffs’ “much too long and involved complaint” thus failed to set forth “with simplicity, brevity, clarity and certainty” the relevant surrounding facts “*in such a manner that it [was] evident* what facts [were] claimed to constitute [the fraud] charges.” *Id.* at ¶ 27 (emphasis added) (internal quotations omitted).³ Accordingly, the Court affirmed the trial court’s dismissal of the plaintiffs’ fraud claims for failure to plead with particularity under Rule 9(b). *Id.* at ¶ 30; *see also Glenn v. First Nat’l Bank in Grand Junction*, 868 F.2d 368, 371-72 (10th Cir. 1989) (affirming dismissal of complaint after concluding “the trial court did not err in refusing to attempt to create order out of chaos”); *Arena Land & Inv. Co. v. Petty*, No. 94-4196, 69 F.3d 547, 1995 WL 645678, at *1 (10th Cir. Nov. 3, 1995) (affirming dismissal under Fed. R. Civ. P. 8, 9(b) after concluding “[i]t is neither the court’s nor the appellees’ role to sift through a lengthy, conclusory and poorly written complaint to piece together the cause of action.”)

As with the complaint in *Coroles*, the Plaintiffs’ Second Amended Complaint failed to satisfy Rule 9(b)’s fundamental requirement of clarity and conciseness. The Second Amended Complaint spans 361 pages in length, containing 1362 numbered paragraphs. Unfortunately, much of the length of the Complaint results from

³ The *Coroles* Court also noted that the plaintiffs’ had failed “to identify exactly who made the alleged misrepresentations” by asserting allegations in the passive voice. *Coroles*, 2003 UT App 339, at ¶ 28. As set forth in Part I.B below, Plaintiffs likewise failed to identify exactly who made the alleged misrepresentations by improperly grouping defendants throughout their Second Amended Complaint.

“unnecessary detail, if not minutia,” rather than the concise particularity required by Rule 9(b). *See Coroles*, 2003 UT App 339, ¶ 23 n.11. For example, Plaintiffs filled 20 pages of the Complaint with unnecessary detail from credit card statements to claim that David Simpson and Nathan Simpson allegedly breached fiduciary duties to LD SQ by authorizing LD SQ to pay for personal expenses. (R. 3149-3129, ¶¶ 179-198; *see also* R. 3172-3169, ¶¶ 93-105; R. 3162-3154, ¶¶ 131-162; R. 3122-3121, ¶¶ 223-226; R. 3051-3050, ¶¶ 420-426.) As a result of including unhelpful minutia, the Complaint “rambles on for [177] pages before reaching the first claim for relief.” *Arena Land & Inv. Co.*, 1995 WL 645678, *1.

Similar to the complaint in *Coroles*, the Second Amended Complaint incorporates by reference all of the 536 paragraphs from the general factual statement into each of the fraud-based claims. (R. 3017, ¶ 73; 3005, ¶ 579; R. 3003, ¶ 588; R. 2994, ¶ 631; R. 2987, ¶ 670; R. 2978, ¶ 717; R. 2952, ¶ 831; R. 2947, ¶ 855; R. 2926, ¶ 971; R. 2923, ¶ 984; R. 2909, ¶ 1007; R. 2899, ¶ 1074; R. 2898, ¶ 1081; R. 2896, ¶ 1093; R. 2889, ¶ 1133; R. 2888, ¶ 1139; R. 2882, ¶ 1175.) As Plaintiffs point out, the Fraud Based Claims contain a number of references to specific allegations within the 536-paragraph general factual statement. However, many of the allegations within those claims do not contain the “who, what, when, where and how” of the alleged fraud and do not reference any other allegations in the general section that might supply the missing information. For example, as part of the fraud claims related to the Mapleton Development, Plaintiffs made the following allegation:

737. David Simpson, Nathan Simpson, and Ken Dolezsar also

represented to [Mower] that the \$6,800,000.00 would be specifically used to fund development work at The Preserve at Mapleton development project, that she would receive a first position deed of trust securing a promissory note and that they would record the deed of trust in the office of the Utah County Recorder.

(R. 2974, ¶ 737.) Plaintiffs did not specify who in particular made the alleged representations or when or where they were made. When Defendants pointed out this deficiency to the trial court, Plaintiffs claimed that paragraph 737 somehow “refer[ed] to the allegations contained in paragraph 736.” (R. 5375.) However, neither paragraph 736 nor paragraph 315 (to which paragraph 736 refers) provided the missing information.

Similarly, each of Plaintiffs’ fraudulent non-disclosure claims failed to include allegations explaining how the alleged omissions resulted in damages to Plaintiffs (*i.e.*, why they were material or how Plaintiffs relied on them).⁴ For example, in the fraudulent nondisclosure claim related to the Double T Ranch Water Purchase, Plaintiffs alleged that David Simpson fraudulently failed to disclose to Mower that he had used money from LD III to purchase water shares in the name of Wood Springs, as well as other alleged happenings *after* the alleged purchase. (R. 2882, ¶¶ 1176-1179.) However, Plaintiffs did

⁴ “A party is liable for fraudulent nondisclosure if he ‘omi[ts] . . . a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party.’” *Barber Bros. Ford, Inc. v. Foianini*, 2008 UT App 463, ¶ 2 (emphasis added) (unpublished decision). “Under Rule 9(b), a complaint must identify the time, place, and content of each allegedly fraudulent representation or *omission*, identify the person responsible for it, and identify the consequences thereof.” *Caprin v. Simon Transp. Servs., Inc.*, 99 Fed. Appx. 150, 158 (10th Cir. Feb. 23, 2004) (emphasis added) (unpublished decision). See also *Odyssey Re (London) Ltd. v. Sterling Cook Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000) (“[W]here the alleged fraud consists of an omission . . . the complaint must still allege . . . the context of the omissions and the manner in which they mislead the plaintiff.”).

not allege that these nondisclosures induced any action or influenced any decision by Mower. Instead, they simply alleged that David Simpson's failure to disclose somehow damaged Mower and LD III in the amount of \$300,125.00. (R. 2882, ¶ 1182.) In their brief to this Court, Plaintiffs argue that the necessary detail concerning their reliance on the alleged omissions in their five claims for fraudulent nondisclosure was found in paragraphs 85, 258, 318, 359, 436, and 487. Yet, none of these allegations was referenced within any of the nondisclosure causes of action. (R. 3005-3004; R. 3003-3002; R. 2952-2948; R. 2947-2945; R. 2899-2898; R. 2889-2888; R. 2883-2881.) They were simply buried in the 536 paragraphs of general facts. Moreover, Plaintiffs did not direct the trial court's attention to any of these paragraphs in opposing the Simpson Plaintiffs' motion to dismiss.

As demonstrated by these and other examples,⁵ Plaintiffs improperly placed the burden of sifting through the hundreds of paragraphs of alleged facts on the trial court to determine whether Plaintiffs had supplied the missing information. Plaintiffs make clear that this is precisely what they intended by urging this Court to reverse the trial court for not "consider[ing] the Second Amended Complaint as a whole." (Appellants' Opening Br. 30.) Plaintiffs also complain that the Simpson Defendants used examples in its memoranda to the trial court rather than pointing out every single deficiency in Plaintiffs'

⁵ (See R. 2970, ¶¶ 757-58 (failing to set forth who among David Simpson, Nathan Simpson, and Dolezsar made the alleged representations or when or where they were made).)

Fraud Based Claims.⁶ However, “[i]t is [Plaintiffs’] responsibility, not the courts’, to set forth the *relevant* surrounding facts in such a manner that it is evident what facts are claimed to constitute [the fraud] charges.” *Coroles*, 2003 UT App 339, ¶ 27 (internal quotations omitted). In their memorandum to the trial court, Plaintiffs merely addressed the examples of pleading deficiencies highlighted by the Simpson Defendants, making no attempt to point the trial court to other allegations that Plaintiffs apparently believed were pleaded with particularity. That the trial court refused “to do Appellants’ work for them” in this regard is not grounds for reversal. *Glenn*, 868 F.2d at 371.

In short, by intermingling unnecessary minutia and leaving out essential detail, Plaintiffs’ 361-page Second Amended Complaint “is actually *too* replete with alleged facts, to such a degree that it is functionally incomprehensible.” *Coroles*, 2003 UT App 339, ¶ 27 n.12. As a result, the Complaint failed to provide “a clearly defined foundation upon which further proceedings by way of responsive pleadings and/or trial [could] go forward in an orderly manner.” *Id.* at ¶ 23. The trial court was therefore justified in dismissing Plaintiffs’ fraud-based claims for failure to plead with the concise particularity required by Rule 9(b).

B. Plaintiffs Improperly Lumped David Simpson, Nathan Simpson, and Others Together in Levying Unsupported “Information and Belief” Fraud Allegations Throughout the Second Amended Complaint.

The particularity requirements of Rule 9(b) “[are] especially important in cases involving multiple defendants.” *Cook v. Zions First Nat’l Bank*, 645 F. Supp. 423, 424

⁶ The Simpson Defendants’ opening and reply memoranda to the trial court were 24 pages and 22 pages, respectively, and surely would have been longer had they attempted to point out every deficiency in the Second Amended Complaint.

(D. Utah 1986). “[E]ach defendant is entitled to know precisely what it is the plaintiff claims he did wrong.” *Id.* Lumping multiple defendants together into allegations of fraud does not meet this requirement and constitutes grounds for dismissal. *See id.* at 424-25 (dismissing with prejudice fraud claims where plaintiffs failed on third attempt to “allege specifically the factual basis upon which they charge *each defendant* with fraud.” (emphasis added)); *Coroles*, 2003 UT App 339, ¶ 28 n.15 (citing *Cook* for the proposition plaintiffs must “set forth in specific terms the time, place, content, and manner of *each defendant’s* alleged misrepresentations or otherwise fraudulent conduct.”) (emphasis added); *Brooks v. Bank of Boulder*, 891 F. Supp 1469, 1477 (D. Col. 1995) (“When plaintiff is dealing with more than one defendant, he or she is under a Rule 9(b) obligation to specify which defendant told which lie and under what circumstances.”).

Throughout the Second Amended Complaint, Plaintiffs consistently lumped David Simpson and Nathan Simpson, and often others, together in levying Plaintiffs’ allegations of fraud. (*See, e.g.*, R. 3017, ¶ 542; R. 2986, ¶ 679, R. 2977, ¶ 720; R. 2976, ¶ 726; R. 2974, ¶ 737; R. 2972, ¶ 743; R. 2970 ¶¶ 757-58; R. 2908, ¶ 1014; R. 2895, ¶ 1094; R. 2895, ¶ 1096; and R. 2895, ¶ 1099; R. 3005, ¶¶ 580-581; R. 2951-2949, ¶¶ 833-846; R. 2899-2898, ¶ 1075; R. 2889, ¶ 1134.) Paragraph 542 of the Complaint exemplifies this improper practice:

542. Michael Thompson, David Simpson and Nathan Simpson, knowing that Ken Dolezsar was acting as [Mower’s] agent, that Dolezsar was managing Leslie’s business affairs and that he was [Mower’s] husband, made the representations to Dolezsar described in paragraphs [sic] 83 herein.

(R. 3016, ¶ 542.) Here, Plaintiffs merely lumped Michael Thompson, David Simpson,

and Nathan Simpson together without specifying which of the three made the alleged misrepresentations. Plaintiffs then went on to attribute these statements to Dolezsar, claiming he was “part of a conspiracy” with Michael Thompson, David Simpson, Nathan Simpson, and others. (R. 3016, ¶ 543.) Plaintiff similarly lumps David Simpson, Nathan Simpson, and Dolezsar together throughout the Second Amended Complaint. (*See, e.g.*, R. 2974, ¶¶ 737, 758.)

Plaintiffs’ practice of lumping defendants together in their fraud allegations is magnified because they consistently do so solely on “information and belief.” (*See, e.g.*, R. 3113-3112, ¶¶ 256-257; R. 3092-3086, ¶¶ 314-317; R. 3048-3046, ¶¶ 434-435; R. 3177-3174, ¶¶ 83-84.) Fraud allegations made on information and belief are sufficient for Rule 9(b) purposes only if the plaintiffs “include[] the facts upon which the belief is based.” *Roth v. Pedersen*, 2009 UT App 313, ¶ 8 (citing *Kuhre v. Goodfellow*, 2003 UT App 86, ¶ 24, 69 P.3d 286) (unpublished decision); *see also* 2 *Moore’s Federal Practice* § 9.03[1][g] (3d ed. 2010) (“Pleadings alleging fraud usually may not be based on information and belief.”).

Plaintiffs did not plead any factual basis to support their information and belief allegations. For example, in paragraph 316 Plaintiffs alleged, “[o]n information and belief,” that “David Simpson and Nathan Simpson . . . made . . . promises, representations and offers of contractual consideration to Ken Dolezsar and caused Dolezsar to repeat the promises, representations and offers of contractual consideration to [Mower] in behalf of the Simpsons.” (R. 3090, ¶ 316.) As neither David Simpson nor Nathan Simpson is alleged to have ever made any representations directly to Mower,

Plaintiffs had to plead this allegation on information and belief. Yet, Plaintiffs failed to plead any facts to explain the basis for their belief that David Simpson or Nathan Simpson made any of the alleged representations, or their belief as to what David Simpson or Nathan Simpson said or did not say to Dolezsar. (R. 3092-3086, ¶¶ 314-318.) Thus, Plaintiffs' information and belief allegations are of no value under Rule 9(b). Plaintiffs' failure to specifically plead what Mower knew and how she knew it was specifically cited by the trial court as justification for its conclusion that the Fraud Based Claims had not been properly pleaded with particularity. (R. 6136, at 183:1-10, 186:8-13; R. 5594.⁷)

Plaintiffs' consistent lumping of David Simpson, Nathan Simpson, and others in their unsupported "information and belief" fraud allegations violated the pleading requirements of Rule 9(b) and therefore fully supported the trial court's dismissal of the Fraud Based Claims. *See Cook*, 645 F. Supp. at 424-25.

C. Plaintiffs Pleaded the Magnet Bank Fraud Claims Using Labels and Conclusions Rather Than Properly Pleaded Facts.

Mere pleading of labels and conclusions, such as "false statements" or "fraud," does not satisfy Rule 9(b)'s fact pleading requirements. *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982); *see also Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (condemning pleading of "labels and conclusions" that "do not permit the

⁷ As stated by the trial court: "[T]here is no factual basis in the complaint for what, if anything, Simpsons actually told Mr. Dolezsar and no way of determining the accuracy of any information Mr. Dolezsar may have passed to Ms. Mower from Simpsons. This is one of the problems with the fraud allegation in the Complaint. What Mr. Dolezsar specifically told Ms. Mower and how and where he said it is presumably known only to her, but none of her complaints identify it with particularity." (R. 5594.)

court to infer more than a mere possibility of misconduct”).

Plaintiffs pleaded their Magnet Bank fraud claims by using labels and conclusions rather than properly pleaded facts. Specifically, Plaintiffs alleged that David Simpson and Nathan Simpson somehow duped an appraiser into using allegedly fraudulent “pre-sales” — which the appraisal itself clarifies were offers — to arrive at the valuation of the Mapleton Development submitted to Magnet Bank in connection with a loan application. (R. 2966, ¶ 787; R. 5373.) However, Plaintiffs failed to include any factual basis for their claim that the offers were “sham transactions.” (R. 2967-2966, ¶¶ 784, 787; R. 3079, ¶ 340.) Rather, Plaintiffs merely alleged, “on information and belief,” that each of the approximately 15 offers were somehow “contrived sham transactions.” (R. 3098-3096, ¶¶ 300-04.) Plaintiffs did not plead *any* facts in their 361-page Complaint demonstrating a basis for their “information and belief” that the offers were somehow “sham transactions.” They simply asserted the conclusion, which has no Rule 9(b) value.

Similarly, Plaintiffs alleged in conclusory fashion that the Simpsons submitted false financial statements to Magnet Bank in connection with the application. (R. 2969-2967, ¶¶ 766-777.) Without making any attempt to explain how, Plaintiffs merely conclude that David Simpson and Nathan Simpson’s financial statements overstated their assets and understated their liabilities. (R. 3074-3073, ¶¶ 352, 353, 355; R. 2968, ¶¶ 771-773.) Rule 9(b) requires that this detail be pleaded “so that there will be a clearly defined foundation upon which further proceedings . . . can go forward in an orderly manner.” *Heathman*, 372 P.2d at 992. In their memorandum to the trial court, Plaintiffs argued that the missing information was supplied in other paragraphs in the Complaint, specifically

referencing paragraphs 323-326. (R. 5370-5369, attached as Ex. 2 in the Addendum hereto.) However, these allegations are not referenced anywhere in the Magnet Bank fraud claim. (R. 2969-2963, ¶¶ 767-810.) This is yet another example where Plaintiffs expected the Court to “sift[] through hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs ha[d] allege[d] . . . facts necessary to make all their elements of fraud.” *Coroles*, 2003 UT App 339, ¶ 27.⁸

Based on this pleading deficiency, as well as those outlined above, the trial court correctly dismissed Plaintiffs’ Fraud Based Claims for failure to plead with the clear and concise particularity required by Rule 9(b).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE FRAUD-BASED CLAIMS RELATED TO KEN DOLEZSAR UNDER RULE 19 FOR FAILURE TO JOIN AN INDISPENSABLE PARTY.

Rule 19 of the Utah Rules of Civil Procedure requires joinder of “necessary” parties where feasible, and dismissal of the action in the absence of “indispensable” parties. Utah R. Civ. P. 19(a)-(b); *Turville v. J&J Props., L.C.*, 2006 UT App 305, ¶¶ 36-37, 145 P.3d 1146. Analysis under Rule 19 proceeds in two steps: First, the trial court must determine whether an absent party is necessary to the “just adjudication” of the action. Second, where an absent party is found to be necessary to the action, but cannot feasibly be joined, the court must determine whether such party is indispensable such that the action must be dismissed in his absence. *Turville*, 2006 UT App 305, at ¶¶ 36-37.

⁸ The Simpson Defendants expressly incorporate the arguments of Appellee Michael Aviano concerning the remaining portion of the Magnet Bank fraud claim, in which Plaintiffs alleged that Aviano, David Simpson, and Nathan Simpson misrepresented the sales price for Aviano’s purchase of Lot 76 in the Mapleton Development.

“[A] trial court’s determination properly entered under Rule 19 will not be disturbed absent an abuse of discretion.” *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989); *see also Green v. Louder*, 2001 UT 62, ¶ 40, 29 P.3d 638 (“A trial court’s determination of whether a party should be joined to an action will not be disturbed absent an abuse of discretion.”); *Turville*, 2006 UT App 305, ¶ 24 (“We will not disturb [a] trial court’s determination [that] a party should be joined to an action . . . absent an abuse of discretion.”) (internal quotations omitted).

In its thorough Ruling and Order on Defendants’ Motion to Dismiss Fraud Claims in Second Amended Complaint Under Rule 19, the trial court in this case determined that Dolezsar’s estate was a necessary and indispensable party and carefully “identif[ied] the specific facts and reasoning that support[ed] its conclusion.” *Turville*, 2006 UT App 305, ¶ 38. The court therefore granted the Simpson Defendants’ motion to dismiss Plaintiffs’ fraud based claims related to the Hawaii Development, the Mapleton Development, and the Springville Property. As set forth below, the Court acted well within its discretion in so doing.

A. The Trial Court Acted Within Its Discretion In Determining Dolezsar Was Necessary to the Just Adjudication of This Action.

Under Rule 19(a), a party may be necessary in either of two ways:

“(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.”

Utah R. Civ. P. 19(a). Here, the trial court concluded that Dolezsar was a necessary party under Rule 19(a)(1) based on facts affirmatively pleaded by Plaintiffs.⁹ (R. 5595-5591.) Specifically, the court determined that Dolezsar “occupied a pivotal representative role in the alleged fraud” and therefore that “complete relief would not be available” in his absence, relying on the remarkably similar case of *Turville v. J&J Properties, L.C.*, 2006 UT App 305, 145 P.3d 1146. (R. 5593.)

As demonstrated by the *Turville* opinion, the trial court’s determination in this regard was within its discretion. In *Turville*, this Court upheld the lower court’s determination that complete relief was not possible for purposes of Rule 19(a) in the absence of a party who was the primary participant in the fraud alleged by the plaintiff. *Turville*, 2006 UT App 305, ¶ 40. The plaintiff (Turville) sued Tri-J Properties LLC and its principals (Clark, Quitiquit, and Ritchie) in relation to two real estate transactions. *Id.* at ¶¶ 2-8. Turville primarily dealt with Clark, who agreed to sell two parcels of property owned by Tri-J in exchange for a \$1,000,000 note and assumption of the debts associated with the properties. *Id.* at ¶¶ 3-6. Unfortunately, Clark entered this agreement without the knowledge or consent of Quitiquit and Ritchie, who thereafter refused to allow Tri-J to turn over its property interest. *Id.* As a result, Turville asserted claims for (among

⁹ As outlined in Parts II.B.1 and II.B.3 below, Dolezsar was also a necessary party under Rule 19(a)(2) because in his absence, the Simpson Defendants would be subject to a substantial risk of incurring multiple and potentially inconsistent obligations.

others) fraud, breach of contract, and civil conspiracy against Ritchie, Quitquit, Clark,¹⁰ Tri-J, and other related persons and entities. *Id.* at ¶ 8. Turville initially served only Ritchie and then waited more than two years to serve the other defendants. *Id.* at ¶ 9. In the interim, Clark died of cancer and was never served. *Id.* at ¶ 10. Clark sought leave to amend to join Clark's estate as a party to the case, but leave was denied as untimely and unjustified. *Id.* at ¶ 32.

Ritchie and Quitquit then moved the court to dismiss Turville's complaint for failure to join Clark's estate as a necessary and indispensable party. *Id.* at ¶¶ 10, 17. Recognizing Clark's "pivotal representative role . . . in the transactions at issue," and that the other parties faced a "substantial risk of incurring multiple obligations without recourse to [Clark's] estate," the trial court found that Clark's estate was a necessary party to the case. *Id.* at ¶ 9. This Court affirmed, holding "the record support[ed] the trial court's conclusion that 'in [the Estate of Mr. Clark's] absence[,] complete relief cannot be accorded among those already parties.'" *Id.* at ¶ 40 (quoting Utah R. Civ. P. 19(a)).

¹⁰ Plaintiffs incorrectly argue that the *Turville* Court concluded Clark was a necessary party solely because he was named as a defendant in the case. Careful reading of the *Turville* opinion shows that Clark's having been named as a defendant was simply strong evidence that he was "primarily" responsible for the conduct that allegedly damaged the plaintiff — which was the justification for finding he was a necessary party. *Turville*, 2006 UT App 305, ¶ 40. Whether a person is a necessary party under Rule 19(a) cannot turn merely on whether the plaintiff names such person as a defendant. Otherwise, plaintiffs could control the outcome of Rule 19 analysis merely by declining to name an otherwise necessary party as a defendant. Moreover, as they allege that Dolezsar made all of the representations of which they complain as part of a conspiracy to defraud them, Plaintiffs surely would have named Dolezsar as a defendant had they filed this case before he died or during the limitations period for joining his estate under Utah Code Ann. § 75-3-803(a). That Clark happened to die after the *Turville* complaint was filed does not make him any more necessary under Rule 19(a) than Dolezsar.

Specifically, because Clark's actions "primarily, if not solely, . . . led to Plaintiff's alleged damages," the Court held that "the interest of fairness to the parties in [the] litigation" justified the trial court's determination that Clark's estate was a necessary party to Turville's case. *Id.*

As did the lower court in *Turville*, the trial court in this case acted within its discretion when it concluded that Dolezsar was a necessary party to Plaintiffs' fraud-based claims. Based on the facts alleged by Plaintiffs, the trial court concluded that Dolezsar, like Clark, "occupied a pivotal representative role in the alleged fraud. (R. 5593.) Comparing Dolezsar to Clark, the Court noted Plaintiffs affirmatively pleaded that all of the alleged misrepresentations related to the Hawaii Development, the Mapleton Development, and the Springville Property were made to Mower directly by Dolezsar. (R. 5594.) "[Plaintiffs] [did] not cite an instance where [the] Simpsons directly made a misrepresentation to her." (R. 5594.) The Court therefore concluded that "Dolezsar acted as more than a simple go-between" as argued by Plaintiffs, and that "complete relief would not be available for those who [were] already parties because of the inability to hold him accountable" due to Plaintiffs' failure to join Dolezsar's estate before the statute of limitations expired. (R. 5593.) In other words, "the interest of fairness to the parties in [the] litigation" necessitated the joinder of Dolezsar's estate in order for there to be a "just adjudication" of this matter. *See Turville*, 2006 UT App 305, ¶ 40. Additionally, like the defendants in Clark, the Simpson Defendants would face a substantial risk of incurring multiple obligations without recourse to Dolezsar's estate, as outlined in Parts II.B.1 and II.B.3 below.

The facts affirmatively alleged, and thereby admitted, by Plaintiffs in the Second Amended Complaint fully supported the trial courts' determination that Dolezsar was a necessary party.¹¹ Plaintiffs alleged that David Simpson, Nathan Simpson, Dolezsar, and others conspired and agreed to make misrepresentations to Plaintiffs. (R. 2925, ¶ 977.) Importantly, however, Plaintiffs consistently alleged that Dolezsar was the one who actually made the alleged misrepresentations to Mower. (R. 3016, ¶ 543; R. 2977, ¶ 721; R. 2975, ¶ 731; R. 2974, ¶ 734; R. 2973, ¶ 739; R. 2970, ¶ 757-58; R. 3048-3046, ¶¶ 434-435; R. 2908, ¶ 1014.) Nowhere in the fraud allegations associated with the Hawaii Development, the Mapleton Development, or the Springville Property did Plaintiffs allege that any of the Simpson Defendants made any representations directly to Mower. (R. 3017-3012, ¶¶ 537-559; R. 2978-2962, ¶¶ 717-814; R. 3048-3046, ¶¶ 434-35; R. 2909-2905, ¶¶ 1007-1035.) The Second Amended Complaint itself thus shows that Dolezsar is alleged to be the nexus for the fraud alleged by Plaintiffs.

Plaintiffs attempt to distinguish Dolezsar from Clark in the *Turville* case because they alleged David Simpson and Nathan Simpson participated in the fraud by authorizing

¹¹ Plaintiffs assert that the trial court made a factual determination in concluding that Dolezsar occupied a pivotal representative role. This is incorrect. The trial court merely relied on the facts affirmatively pleaded by Plaintiffs, thereby satisfying the requirement that it "identify the specific facts and reasoning that support[ed] its conclusion that a party is . . . necessary under Rule 19(a). *Werner-Jacobsen v. Bednarik*, 946 P.2d 744, 747 (Utah Ct. App. 1997). As outlined herein, Plaintiffs affirmatively alleged, and cannot dispute, that Dolezsar communicated all of the alleged misrepresentations to Plaintiffs. By contrast, in the *Hancock* case cited by Plaintiffs, the trial court's denial of leave to amend was unsupported by the allegations in the complaint. *Hancock v. The True and Living Church of Jesus Christ of the Last Days*, 2005 UT App 314, ¶ 19, 118 P.3d 297.

and instructing Dolezsar to make the misrepresentations to Plaintiffs.¹² (*See, e.g.*, R. 3016, ¶ 543.) However, as the trial court recognized, Plaintiffs cannot, and did not, dispute that all of the alleged misrepresentations were made to Mower by Dolezsar, because that is what Plaintiffs alleged. (R. 5594.) Accordingly, the district court did not abuse its discretion in concluding that, like Clark in the *Turville* case, Dolezsar “occupied a pivotal representative role in the alleged fraud.” (R. 5593.)

That Plaintiffs alleged Dolezsar was Mower’s agent does not change this result. It is true that agents are typically not necessary parties to lawsuits against their principals simply by virtue of their agency. *See, e.g., Nottingham v. Gen. Am. Commc’ns Corp.*, 811 F.2d 873 (5th Cir. 1987) (holding agent was not necessary party to claims against his principal). However, the trial court did not conclude that Dolezsar was indispensable because he was allegedly Mower’s agent. Dolezsar was indispensable because he was the one who allegedly communicated all of the alleged misrepresentations to Mower. If anything, Dolezsar’s having made the misrepresentations to Mower while acting as her agent only strengthens the conclusion that Dolezsar occupied a pivotal representative role in the alleged fraud. As the nexus for Plaintiffs’ alleged fraud, Dolezsar’s presence is necessary to the “just adjudication” of Plaintiffs’ fraud claims regardless of whether he was acting as Mower’s agent.

¹² Notably, Plaintiffs did not allege any factual basis for what David Simpson, Nathan Simpson, or others may or may not have said to Dolezsar. Presumably, they rely on hearsay statements from Dolezsar, which were not alleged.

B. The Trial Court Acted Within Its Discretion In Determining the Action Could Not Proceed In Equity And Good Conscience in Dolezsar's Absence.

Where a necessary party cannot be feasibly joined, and the action cannot proceed “in equity and good conscience” in his absence, the party is deemed “indispensable,” and the action “should be dismissed.” Utah R. Civ. P. 19(b). Rule 19(b) instructs the trial court to consider the following factors in deciding whether “equity and good conscience” require dismissal:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him *or those already parties*; second the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Utah R. Civ. P. 19(b) (emphasis added). As the Rule itself “does not state what weight is to be given each factor,” the trial court “must determine the importance of each factor on the facts of each particular case and in light of equitable considerations.” *Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir. 1974).

Applying these factors, the trial court determined that “an adequate resolution to [Plaintiffs'] claims for fraud [could not] be reached in the absence of Mr. Dolezsar's estate, and the only way to mitigate the resulting prejudice to Simpsons is to dismiss the claims for fraud.” (R. 5593-5592.) The court therefore concluded that Dolezsar's estate was an indispensable party, necessitating dismissal of Plaintiffs' fraud claims related to the Hawaii Development, the Mapleton Development, and the Springville Property. (*Id.*)

1. The Trial Court Properly Concluded That Rendering Judgment In Dolezsar's Absence Would Result in Unfair Prejudice to Defendants.

The *Turville* case again demonstrates that the trial court's indispensable party determination was within its discretion. In *Turville*, the Court relied heavily on two facts in upholding the lower court's determination that Clark was an indispensable party. *Turville*, 2006 UT App 305, ¶¶ 41-42. First, Clark was "the major, if not the sole, actor responsible for Plaintiffs' alleged damages." *Id.* at ¶ 42. Second, the plaintiffs were responsible for Clark's absence because they failed to join the estate within the limitations period after Clark's death. *Id.* Under these circumstances, the court found that it was unfair and prejudicial to require the other defendants to defend the case in Clark's absence. *Id.* The Court therefore concluded that "the nonjoinder of the Estate of Mr. Clark would violate principles of 'equity and good conscience.'" *Id.* at ¶ 42.

The two factors on which the *Turville* Court relied are also present in this case. First, the trial court concluded that, like Clark, "Mr. Dolezsar is more than a mere joint tortfeasor and is one of the major actors in this case—potentially one who self-dealt and defrauded others; all the allegedly fraudulent statements were made to Ms. Mower by Mr. Dolezsar." (R. 5593.) As outlined in Part I.A. above, the facts alleged by Plaintiffs in the Second Amended Complaint fully support this conclusion. Second, as did *Turville*, Plaintiffs failed to bring this action against Dolezsar's estate within the limitations period found in Utah Code Ann. § 75-3-803(a) (1992) after Dolezsar's death. Under these circumstances, which are indistinguishable from those at issue in *Turville*, the trial court determined within its discretion that it would be unfair and prejudicial to require

Defendants to defend against Plaintiffs' fraud claims in Dolezsar's absence. *See Turville*, 2006 UT App 305, ¶ 40.

Moreover, were Plaintiffs' fraud claims allowed to proceed without Dolezsar's estate, the Simpson Defendants would be at risk of incurring, double, multiple, or otherwise inconsistent obligations. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, at 110 (1968) ("[T]he defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another.") The one year statute of limitations set forth in Utah Code Ann. § 75-3-803(a) (1992) applies to claims against the estate, but not to claims brought by the estate on behalf of Dolezsar. In fact, under Utah Code Ann. § 75-3-108 (1975), the applicable statutes of limitation on any claims held by Dolezsar at his death were automatically tolled for a period of 12 months. Accordingly, Dolezsar's estate is not precluded by Utah Code Ann. § 75-3-803(a) from bringing claims against the Simpson Defendants related to Plaintiffs' fraud claims. Consequently, Defendants are not only at risk of incurring multiple or inconsistent obligations in subsequent litigation, but they would be precluded from asserting their claims against the estate in any such proceeding. The trial court acted within its discretion to prevent this unfair prejudice.

Finally, due to Dolezsar's untimely death, the parties in this case cannot question him concerning the misrepresentations he allegedly communicated to Mower. Plaintiffs attempted to impute Dolezsar's alleged misrepresentations to the Simpsons by alleging David Simpson and Nathan Simpson participated in the fraud by authorizing and instructing Dolezsar to make the misrepresentations to Plaintiffs. (*See, e.g.*, R. 3016, ¶

543.) Plaintiffs did not allege any factual basis for what David Simpson, Nathan Simpson, or others may or may not have said to Dolezsar. Presumably, Plaintiffs would claim that they rely on hearsay statements from Dolezsar. However, as a practical matter, any statements by Dolezsar to Mower constitute inadmissible hearsay and cannot be considered as evidence in this case. More important, Defendants will be denied the opportunity to question Dolezsar concerning Plaintiffs' allegations in his absence. *See Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998) (recognizing possibility for prejudice resulting from inability to obtain evidence from absent party).

2. Plaintiffs Did Not Dispute That Prejudice to Defendants Could Not Be Avoided By Any Protective Measures.

The trial court properly concluded that the prejudice which would result to Defendants if Plaintiffs' fraud claims were allowed to proceed in Dolezsar's absence "[could] be avoided [only] by dismissing the claims for fraud." (R. 5593-5592.) Plaintiffs did not address the second factor listed in Rule 19(b) before the trial court, or in their Opening Brief on Appeal, thereby conceding that the prejudice to Defendants could not be avoided by other protective measures.

3. The Trial Court Properly Determined That It Could Not Render An Adequate Judgment in Dolezsar's Absence.

The third factor listed in Rule 19(b) — whether a judgment rendered in the person's absence will be adequate — "refer[s] to [the] public stake in settling disputes by wholes, whenever possible." *Provident Tradesmens*, 390 U.S. at 111. "Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's

point of view,” as argued by Plaintiffs’ to the trial court. *See Davis v. United States*, 343 F.3d 1282, 1292-93 (10th Cir. 2003) (rejecting plaintiff’s argument that a judgment would be adequate because it would afford the plaintiffs complete relief). “Rather, the factor is intended to address the adequacy of the dispute’s resolution.” *Id.* at 1293.

Applying this standard, the trial court acted within its discretion in concluding “judgment rendered without Mr. Dolezsar would be inadequate because, among other things mentioned by Simpsons, no cross claims can not be brought against his estate.” (R. 5593). As outlined in Part II.B.1 above, Dolezsar’s estate is not precluded under Utah Code Ann. § 75-3-803 from bringing claims related to the alleged fraud against Defendants in a different proceeding, thereby subjecting Defendants to risk of incurring multiple or inconsistent obligations in Dolezsar’s absence. Moreover, because Plaintiffs did not timely join the estate to this proceeding, the trial court could not hear Defendants’ claims against Dolezsar relating to the alleged fraud. The trial court therefore correctly concluded that any judgment rendered in Dolezsar’s absence would be inadequate.

Plaintiffs argue that Dolezsar cannot be an indispensable party by citing the general rule that Rule 19 typically does not require joinder of joint tortfeasors or co-conspirators. (Appellants’ Opening Br. 40.) However, Dolezsar was indispensable not because he was a joint tortfeasor or co-conspirator. Rather, the trial court concluded that Dolezsar was indispensable because he “occupied a pivotal representative role” in the alleged fraud. (R. 5594-5593.) As recognized by this Court in *Turville*, situations like

those of Clark and Dolezsar are not governed by the general rule.¹³ See *Turville*, 2006 UT App 305, ¶ 40; see also *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985) (dismissing case where absent subsidiary company was “more than an active participant in the [wrong] alleged by [the plaintiffs]; it was the primary participant.”); *Hass v. Jefferson Nat’l Bank of Miami Beach*, 442 F.2d 394, 398 (5th Cir. 1971) (dismissing case under Rule 19(b) in absence of “active participant in the alleged conversion of [plaintiff’s] stock”); *Jurimex Kommerz Transit G.M.B.H. v. Case Corp.*, 201 F.R.D. 337, 340 (D. Del. 2001) (dismissing case under Fed. R. Civ. P. 19 where “Plaintiffs’ interactions were almost entirely with the [absent subsidiary companies] and not with Defendant”). The trial court therefore acted within its discretion in applying the *Turville* case and dismissing Plaintiffs’ fraud claims for failure to join Dolezsar’s estate during the limitations period.

4. The Trial Court Properly Concluded That the Unavoidable Prejudice to Defendants Outweighed Plaintiffs’ Interest in a Forum For Their Fraud Claims.

The trial court “must determine the importance of each factor on the facts of each particular case and in light of equitable considerations.” *Glenny*, 494 F.2d at 653. In this case, the trial court properly determined based on the facts alleged in Plaintiffs’ Second

¹³ Plaintiffs also claim that Dolezsar is not indispensable because Defendants “can be held liable for damages only in proportion to their own fault.” (Appellants’ Opening Br. 40.) This is simply incorrect. Plaintiffs alleged that the fraud perpetrated on them was carried out as part of a conspiracy. The Utah Supreme Court has expressly held that claims for conspiracy, which impose joint and several liability, are not subject to apportionment of fault under the Utah Liability Reform Act. *Jedrzejewski v. Smith*, 2005 UT 85, 128 P.3d 1146. The *Jedrzejewski* court also held that whether other intentional torts are subject to apportionment of fault is an open question. *Jedrzejewski*, 2005 UT 85, ¶ 24.

Amended Complaint that the unavoidable prejudice to the Simpson Defendants outweighed the fact that Plaintiffs might not have another forum for their fraud claims. (R. 5593.) The court recognized that the Plaintiffs' remaining claims would not "perfectly protect Ms. Mower's interests."¹⁴ (R. 5592.) However, recognizing the unfair prejudice to the Simpson Defendants, the trial court concluded that "[i]n the absence of Mr. Dolezsar and with the inability to join his estate as a party at this juncture, [Plaintiffs'] remaining claims must suffice.") As demonstrated in *Turville*, the trial court did not abuse its discretion in assigning greater weight to the unfair and unavoidable prejudice that would result to the Simpson Defendants in Dolezsar's absence. *Turville*, 2006 UT App 305, ¶¶ 40-42 (upholding dismissal for failure to join indispensable party despite absence of alternative forum for plaintiff's claims).

For all of these reasons, this Court should uphold the trial court's determination that Plaintiffs' fraud based claims related to the Hawaii Development, the Mapleton Development, and the Springville Property could not continue in equity and good conscience in the absence of Dolezsar and his estate.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' FRAUD-BASED CLAIMS WITHOUT LEAVE TO AMEND.

"This [C]ourt reviews a trial court's denial of a motion to amend for an abuse of discretion, reversing only when the decision exceeds the limits of reasonability."

¹⁴ Any possible deficiency in this regard resulted from Plaintiffs' failure to bring the fraud-based claims within the limitations period. Plaintiffs should not be permitted to wait until after the central figure in the case can no longer be joined to seek recovery from others who are alleged only to have acted in concert with him.

Turville, 2006 UT App 305, ¶ 23 (internal citation and quotations omitted). Exercising its broad discretion, the trial court may consider any factor it deems relevant to the case before it in ruling on a motion to amend, including without limitation timeliness, motivation, and prejudice. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶¶ 39-41, 87 P.3d 734. Among other reasons, the court may deny leave to amend where there have been “repeated failure[s] to cure deficiencies by amendments previously allowed.” *Id.* ¶ 41 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

As a preliminary matter, Plaintiffs failed to make a motion for leave to amend. (Appellants’ Opening Brief 43 (“Plaintiffs did not make a motion to amend the complaint”).) For this reason alone, the Court should affirm the trial court’s dismissal without leave to amend. *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶¶ 56-59, 79 P.3d 974 (upholding denial of leave to amend where plaintiff failed to file a written motion for leave to amend supported by a memorandum of points and authorities); *Coroles*, 2003 UT App 339, ¶ 42-45 (same).

Regardless, the trial court acted within its discretion when it dismissed Plaintiffs’ fraud-based claims “without leave to amend” after Plaintiffs had failed to properly plead their fraud despite at least three attempts at doing so. (R. 5606-5602; R. 6136, at 186:20-23 (“So there will not be leave to amend in this case, this would be going on our third – well, as Mr. Carlile says we’d be down the road on this quite a ways.”).) Each of the three complaints filed by Plaintiffs was met with motions to dismiss. (R. 1873; R. 1893; R. 2196; R. 2229; R. 2256; R. 2271; R. 2373; R. 5055; R. 5110; R. 5237; R. 5300.) The trial court dismissed Plaintiffs’ First Amended Complaint on January 22, 2010 for failure

to plead with particularity, indicating it would give Plaintiffs a “chance to plead fraud within 20 days [of the January 22, 2010 Order] and do it concisely and with particularity.” (R. 2608-2607.) Plaintiffs then filed their Second Amended Complaint, and an 11-page Notice of Errata, which the trial court again dismissed for failure to plead with particularity. (R. 3194; R. 5048.) The trial court did not abuse its discretion in denying leave to amend under these circumstances. *See, e.g., Cook*, 645 F. Supp. at 425 (“Based on plaintiffs’ continued failure to comply with Rule 9(b), the court believes that plaintiffs’ cause of action should be dismissed with prejudice.”)

IV. THE COURT SHOULD DECLINE TO RECOGNIZE A NEW CIVIL CAUSE OF ACTION FOR “AIDING AND ABETTING” IN THIS CASE.

As recognized by Plaintiffs, neither this Court nor the Utah Supreme Court has recognized a civil cause of action for aiding and abetting another person’s commission of a tort. *See Coroles*, 2003 UT App 339, ¶ 34 n.19 (declining to decide whether claims for aiding and abetting breach of fiduciary duty and fraud are cognizable under Utah law.) Creating a new cause of action for aiding and abetting is not necessary in this case. Plaintiffs have alleged that the same group of defendants that “aided and abetted” breaches of fiduciary duties and fraudulent nondisclosure also conspired to breach fiduciary duties and engage in fraudulent nondisclosure, and were part of an “enterprise” that allegedly did so in violation of the Utah Pattern of Unlawful Act. (Claim Nos. 3, 5, 9, 10, 13, 15, 19, 20.) To the extent Plaintiffs wish to broaden their net with respect to claims for breach of fiduciary duty and fraud, they should be required to prove their

claims for conspiracy and violation of the Utah Pattern of Unlawful Activity Act, the contours of which are clearly defined under Utah law.

Moreover, even were the Court to recognize a civil cause of action for aiding and abetting, Plaintiffs' claims for aiding and abetting fraudulent nondisclosure are deficient because Plaintiffs failed to properly allege the underlying fraud with particularity as required by Rule 9(b). *Coroles*, 2003 UT App 339, ¶ 36 (“[T]o sufficiently plead their secondary fraud claims, Plaintiffs were obligated to adequately plead the existence of [the underlying] tort.”)


For these reasons, as well as those stated in the brief of Appellee Aviano, the Court should uphold the trial courts dismissal of Plaintiffs' aiding and abetting claims.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the rulings of the trial court in this matter.

DATED this 1st day of April, 2011.

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in black ink, appearing to be 'Craig Carlile', written over a horizontal line.

Craig Carlile

Caleb J. Frischknecht

Attorneys for the Simpson Defendants

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF
SIMPSON APPELLEES were mailed, postage prepaid, on this 1st day of April, 2011, to:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058

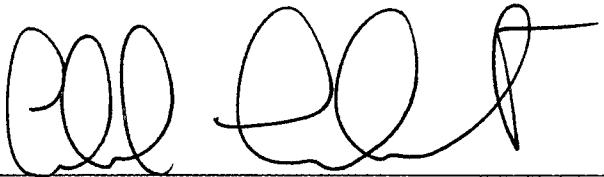
Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84601

Mark D. Eddy
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Please Grove Blvd., Suite 202
Pleasant Grove, Utah 84062

Julian D. Jensen
311 South State Street, Suite 380
Salt Lake City, Utah 84111

Jonathon L. Jaussi
P.O. Box 460
Payson, Utah 84651

Steven R. Sumsion
SUMSION BUSINESS LAW
86 N. University Ave., Suite 400
Provo, Utah 84601



1126551

ADDENDUM

- Ex. 1. Ruling Granting in Part the Various Defendants' Motions to Dismiss. (R. 2608-2606.)
- Ex. 2. Memorandum in Opposition to the Simpson Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint. (R. 5382-5350.)
- Ex. 3. Motion to Dismiss Second Amended Complaint. (R. 5267-5263.)
- Ex. 4. Memorandum in Support of Motion to Dismiss Second Amended Complaint. (R. 5288-5263.)
- Ex. 5. Reply Memorandum in Support of Motion to Dismiss Second Amended Complaint. (R. 5430-5407.)
- Ex. 6. Transcript of May 13, 2010 Oral Arguments. (R. 6136, pp. 182-187.)
- Ex. 7. Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint. (R. 5606-5600.)
- Ex. 8. Ruling and Order on Defendants' Motion to Dismiss Fraud Claims in Second Amended Complaint Under Rule 19. (R. 5595-5591.)

Tab 1

FILED
JAN 25 2010
9 4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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

LESLIE D. MOWER, et al., Plaintiffs, vs. DAVID R. SIMPSON, et al., Defendants.	RULING GRANTING IN PART THE VARIOUS DEFENDANTS' MOTIONS TO DISMISS Civil No. 090403844 Judge SAMUEL D. MCVEY
--	--

The Court has reviewed the First Amended Complaint in light of common claims of insufficiency made by the numerous defendants in this case. The claims which can be addressed without the need for oral argument are those disputing the private rights of action pled under different Utah criminal statutes and those claiming a failure to plead fraud with particularity. The Court grants the Motions to Dismiss in part by dismissing Claims I, II, III, IV, V and VI of the First Amended Complaint. The Court acknowledges plaintiffs now state they did not seek to set forth causes of action under criminal statutes, but only meant to plead predicate facts for their Pattern of Unlawful Activity Claim (UPUA). Since each violation of criminal statute is identified as a "CLAIM," the Court assumes plaintiffs mispled and do not object to dismissing those claims and moving the facts alleged in them to the UPUA claim..

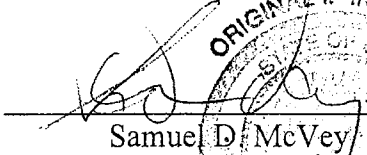
The Court further dismisses the fraud allegations arising throughout the Amended Complaint since they do not contain the required level of particularity—who in particular said or represented what to whom in particular, when, where, and how such representations occurred, the specific terminology used, why reliance was reasonable and what particular damages were caused by each discrete action. Defendants are entitled to know the precise events on which plaintiffs rely without having to infer what happened through assembling pieces of a puzzle contained throughout a voluminous complaint. Plaintiffs are granted a chance to plead fraud within 20 days hereof and do it concisely and with particularity.

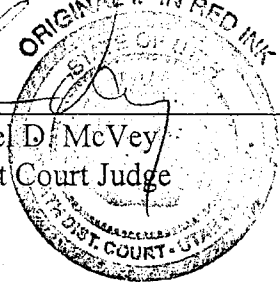
All other facets of the motions, as well as plaintiffs' Rule 56(f) motions for additional time in which to conduct discovery, are reserved for resolution after oral argument. Counsel wishing to participate should contact the clerk to set an oral argument. Defendants should attempt to identify their common arguments to allow them to be addressed together. To the extent any defendants have unique arguments, such as Mr. Nemelkas,' they can be heard after the common arguments. Given the fact the file is going on 7 volumes, the Court would appreciate courtesy copies five days before any hearing. Each party need present only its own pleadings as courtesy copies.

WHEREFORE IT IS ORDERED:

Claims I through VI of the First Amended Complaint are dismissed but the facts alleged therein and not already stated in Claim VII may be used to support the sufficiency of other claims. The fraud allegations throughout the First Amended Complaint are dismissed with leave to amend within 20 days hereof.

Dated this 22nd day of January 2010


Samuel D. McVey
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090403844 by the method and on the date specified.

Fax: Jonathan Jausser 801-418-7798
MAIL: BART J BAILEY 584 S STATE ST OREM, UT 84058
MAIL: JASON D BOREN 201 S MAIN ST STE 800 SALT LAKE CITY UT 84111
MAIL: CRAIG CARLILE 86 NORTH UNIVERSITY STE430 PROVO UT
84601-4420
MAIL: MARK D EDDY 233 S PLEASANT GROVE BLVD STE 202 PLEASANT GROVE
UT 84062
MAIL: CHRISTOPHER D GREENWOOD 1840 N STATE ST SUITE 200 PROVO UT
84604-0117
MAIL: JULIAN D JENSEN 311 S STATE ST STE 380 SALT LAKE CITY UT
84111
MAIL: R SPENCER MACDONALD 86 N UNIVERSITY AVE STE 400 PROVO UT
84601
MAIL: LAURA S SCOTT 201 S MAIN ST STE 1800 POB 45898 SALT LAKE
CITY UT 84145-0898

Date: 1-28-10

Call Steph
Deputy Court Clerk

Tab 2

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
CLERK'S OFFICE

2010 APR 26 A 10: 21

Bart J. Bailey (172)
William T. Jennings (8213)
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058
Telephone: (801) 426-8600
Attorneys for Plaintiffs

**IN THE FOURTH DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

LESLIE D. MOWER, an individual; LD SQ, LLC, a
Utah limited liability company; LD III, LLC, a Utah
limited liability company; LD PURPOSE, LLC, a
Utah limited liability company; and, NAVONA, LC,
a Utah limited liability company;

Plaintiffs;

vs.

DAVID R. SIMPSON, an individual; NATHAN R.
SIMPSON, an individual; MICHAEL K. THOMPSON, an
individual; TODD DORNY, an individual; BRANDON
DENTE, an individual; DAVID N. NEMELKA, an
individual; DALLAS M. HAKES, an individual; CHAD
D. CARLSON, an individual; MICHAEL A. MARX, an
individual; ALLEN R. HAKES, an individual; MICHAEL
W. AVIANO, an individual; ALS PROPERTIES, LLC,
a Hawaii limited liability company; MAI KE KULA,
LLC, a Hawaii limited liability company; HANAIEI
KAI HOLDINGS, LLC, a Hawaii limited liability
company; KA MAHINA, LLC, a Hawaii limited
liability company; HE KIAKOLU, LLC, a Hawaii
limited liability company; KOAMALU PLANTATION,
LLC, a Hawaii limited liability company; LANDMARK
REAL ESTATE, INC., a Utah corporation; WOOD
SPRINGS, LLC, a Utah limited liability company;
OAK LEAF, LLC, a Utah limited liability company;
DENTE, LLC, a Utah limited liability company;
SUNNY RIDGE, LLC, a Utah limited liability
company; KNDJ DEVELOPMENT, LLC, a Utah
limited liability company; DN SIMPSON HOLDINGS,
LLC, a Utah limited liability company;

[cont'd on Page 2]

**MEMORANDUM IN OPPOSITION
TO THE SIMPSON
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT**

(Oral Argument Requested)

Case No. 090403844

Judge: Samuel D. McVey

SOS MAPLETON DEVELOPMENT, LLC, a Utah limited liability company; DN SIMPSON MAPLETON HOLDINGS, LLC, a Utah limited liability company; THE PRESERVE AT MAPLETON DEVELOPMENT COMPANY, LLC, a Utah limited liability company; PHEASANT MEADOWS, LLC, a Utah limited liability company; CARNESECCA ORCHARD ESTATES, LLC, a Utah limited liability company; SPANISH VISTA PLAT I, LLC, a Utah limited liability company; LANDMARK HOMES OF UTAH, LLC, a Utah limited liability company; MAPLE MOUNTAIN WATER TANK, LLC, a Utah limited liability company; LONESTAR GUTTERS, LLC, a Utah limited liability company; 2 BROTHERS COMMUNICATIONS, a sole proprietorship; LONESTAR BUILDERS, INC., a fictitious entity; and, DOES 1-100;

Defendants;

and

KOAMALU PLANTATION INVESTMENT, LLC, a Utah limited liability company; BANK OF AMERICAN FORK, a Utah Corporation; and, KATHYA A. TEMPLEMAN, an individual;

Rule 19 Defendants.

Plaintiffs, by and through their undersigned counsel, respectfully submit this
Memorandum in Opposition to the Simpson Defendants' Motion to Dismiss Plaintiffs'
Second Amended Complaint.

/

/

/

/

/

TABLE OF CONTENTS

Table of Authorities	3
Introduction	4
Discussion	5
I. Pleading Fraud With Particularity	6
II. MagnetBank Fraud	9
III. Double T Water Purchase	16
IV. Maple Mountain Water Project	17
V. Failure to Join Estate of Ken Dolezsar	18
VI. Fraudulent Non-Disclosure	29
VII. Aiding and Abetting Claims In Utah	30
Conclusion	31
Request for Oral Argument	32

TABLE OF AUTHORITIES

<i>Armed Forces Ins. Exchange v. Harrison</i> , 2003 UT 14; 70 P.3d 35 (Ut. Ct. App. 2003)	6
<i>Barber Bros. Ford, Inc. v. Foianini</i> , 2008 UT 463	29
<i>Call v. City of West Jordan</i> , 788 P.2d 1049 (Ut. Ct. App. 1990)	29
<i>Coroles v. Sabey</i> , 2003 UT App. 339	8, 30
<i>Dale v. ALA Acquisitions, Inc.</i> , 203 F.Supp. 2d. 694 (S.D. Miss. 2002)	31
<i>Dennis v. Wachovia Securities</i> , 429 F.Supp. 2d. 281 (D. Mass. 2006)	27
<i>Gardiner v. Virgin Islands Water & Power Authority</i> , 145 F.3d 635 (3 rd Cir. 1998)	27, 28
<i>Grand County v. Rogers</i> , 2002 UT 25; 44 P.3d 734 (Utah 2002)	19, 30
<i>Hill v. Allred</i> , 2001 UT 16; 28 P.3d 127 (Utah 2004)	7
<i>Johnson v. Higley</i> , 989 P.2d 61 (Ut. Ct. App. 1999)	24
<i>Ludlow v. Salt Lake County Board of Adjustment</i> , 893 P.2d 1101 (Ut. Ct. App. 1995)	29
<i>Mackey v. Cannon</i> , 996 P.2d 1081 (Ut. Ct. App. 2000)	3, 4

<i>Mallalieu-Golder Ins. Agency v. Executive Risk Indem.</i> , 254F.Supp 2d. 521 (M.D. Pa. 2003)	23, 24
<i>Milligan v. Anderson</i> , 522 F.2d 1202 (10 th Cir. 1975)	27
<i>Nottingham v. General American Communications Corp.</i> , 811 F.2d 873 (5 th Cir. 1975)	27
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	26, 28
Restatement (Second) of Torts, §874	31
Rule 19 of the Utah Rules of Civil Procedure	20
<i>Seftel v. Capital City Bank</i> , 767 P.2d 941 (Ut. Ct. App. 1989)	19, 21
<i>Shapiro v. UJB Financial Corp.</i> , 964 F.2d 272 (3 rd Cir. 1992)	7
<i>Smith v. Osguthorpe</i> , 58 P.3d 854 (Ut. Ct. App. 2002)	20
<i>Sony Electronics, Inc. v. Reber</i> , 203 P.3d 186 (Ut. Ct. App. 2004)	4
<i>Turville v. J&J Properties, L.C.</i> , 2006 UT App. 305; 145 P.3d 1146 (Ut. Ct. App. 2006)	21, 22, 23, 24, 25
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982)	7
<i>Wipple v. American Fork Irrigation Co.</i> , 910 P.2d 1218 (Utah 1996)	3
<i>Yazd v. Woodside Homes Corp.</i> , 2006 UT 47	30

INTRODUCTION

On March 5, 2010, Plaintiffs filed their *Second Amended Complaint*. In a hearing held in relation to David Nemelka's *Motion to Dismiss*, the Court ordered that any Defendants who wanted to file a motion to dismiss Plaintiffs' *Second Amended Complaint* were required to file and serve such motion by April 13, 2010. On April 13, 2010, Defendants David R. Simpson; Nathan R. Simpson; Todd Dorny; Koamalu Plantation, LLC; Landmark Real Estate, Inc.; Wood Springs, LLC; Oak Leaf Investments, LLC; Dente, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC; Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; Maple Mountain Water

Tank, LLC and Kathy A. Templeman (collectively referred to as the "Simpson Defendants") filed and served their *Motion to Dismiss Second Amended Complaint*.¹

DISCUSSION

The purpose of a Rule 12(b)(6) motion is "to challenge the **formal sufficiency** of the claim for relief, **not to establish the facts** or resolve the merits of the case." *Wipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996)(emphasis added). "[A] dismissal is justified **only** when the allegations of the complaint **clearly demonstrate** that the plaintiff does not have a claim." *Id.* (emphasis added). "A dismissal is a severe measure and should be granted by the trial court **only** if it is clear that a party is not entitled to relief **under any state of facts which could be proved in support of its claim.**" *Mackey v. Cannon*, 996 P.2d 1081, 1084 (Ut. Ct. App. 2000)(emphasis added).

The Court must consider all the reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff. See *Id.* "The courts are a forum for settling controversies and if there is **any doubt** about whether a claim should be dismissed for the lack of a factual basis, the issues should be resolved in favor of giving the party an opportunity to present its proof." *Id.* (emphasis added). "A motion to dismiss is properly granted only in cases in which, even if the factual assertions in the complaint were correct,

¹Previously, Craig Carlile, represented the defendants submitting this Motion to Dismiss Second Amended Complaint. In addition, he previously represented Michael K. Thompson; Brandon Dente; ALS Properties, LLC; Mai Ke Kula, LLC; Hanalei Kai Holdings, LLC; Ka Mahina, LLC and He Kiakolu, LLC. Plaintiffs can only assume that those parties are not part of the *Motion to Dismiss Second Amended Complaint*. Further, the *Motion to Dismiss Second Amended Complaint* lists Oak Leaf Investments, LLC as being a party to the motion. However, Oak Leaf Investments, LLC was dismissed as a party to this action and was previously represented by Jason Born, and has never been represented by Mr. Carlile.

they provided no legal basis for recovery." *Id.* Stated another way, "a motion to dismiss is appropriate only where it **clearly** appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged **or under any state of facts they could prove to support their claim.**" *Sony Electronics, Inc. v. Reber*, 203 P.3d 186, 188-89 (Ut. Ct. App. 2004)(emphasis added).

In summary, when considering a motion to dismiss, the Court must assume all the allegations contained in the complaint are true and it must also make all reasonable inferences in the plaintiffs' favor. Here, when the allegations of Plaintiffs' *Second Amended Complaint* are taken as true and when all reasonable inferences are taken in Plaintiffs' favor, the Simpson Defendants' *Motion to Dismiss Second Amended Complaint* must be denied.

PLEADING FRAUD WITH PARTICULARITY

The Simpson Defendants request that the Court dismiss Plaintiffs claims that are based on fraud because Plaintiffs fail to plead fraud with the particularity required by Rule 9 of the Utah Rules of Civil Procedure. The Simpson Defendants claim that they are left to guess the substance of the acts constituting the alleged wrong. However, the Simpson Defendants fail to read and comprehend the allegations contained in Plaintiffs' *Second Amended Complaint*.

When alleging a cause of action for fraud, a party must set forth the facts with "sufficient particularity to show what facts are claimed to constitute such charges." *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14 ¶16; 70 P.3d 35, 40 (Ut. Ct. App. 2003). In

addressing the adequacy of pleading fraud, the Utah Supreme Court stated, "our liberalized rules of pleading are designed to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Hill v. Allred*, 2001 UT 16 ¶14; 28 P.3d 1271, 1275 (Utah 2001).

Speaking of the requirement that fraud be plead with particularity, the United States Circuit Court for the Third Circuit stated that "courts should be sensitive to the fact that application of the Rule prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud." *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 284 (3rd Cir. 1992). The Utah Supreme Court stated that to claim fraud with particularity means that a party's allegations must contain the "substance of the acts constituting the alleged wrong." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982). Plaintiffs' *Second Amended Complaint* adequately sets forth the alleged fraud with the required particularity and gives the defendants fair notice of the substance of the alleged wrongs.

While arguing generally that Plaintiffs' *Second Amended Complaint* fails to contain the required specificity, the Simpson Defendants point to only one paragraph they believe does not meet the particularity requirement. The Simpson Defendants argue that paragraph 737 of the *Second Amended Complaint* does not specify who in particular made the alleged representations or when they were made. The Simpson Defendants fail to

carefully read the allegations. Paragraph 737 of Plaintiffs' *Second Amended Complaint* clearly states that David Simpson, Nathan Simpson and Ken Dolezsar made the representations. The allegations in paragraph 737 refer to the allegations contained in paragraph 736. Those allegations clearly state that the misrepresentations were made at the end of November or the beginning of December.

Further, the Simpson Defendants complain that Plaintiffs do not specifically set forth who said exactly what. However, David Simpson and Nathan Simpson, father and son, would speak for each other. Plaintiffs' *Second Amended Complaint* alleges that David Simpson and Nathan Simpson made the misrepresentations and therefore it satisfies the pleading standard for fraud.

The Simpson Defendants further complain that they are left to guess the substance of the acts constituting the alleged wrong. They point to paragraphs 721, 731, 734 and 739 of Plaintiffs' *Second Amended Complaint* as examples of Plaintiffs' failure to plead the specifics. However, an examination of those paragraphs shows otherwise.

Paragraph 721 alleges that Ken Dolezsar ("Dolezsar"), acting on David Simpson's and Nathan Simpson's direction, repeated the misrepresentations contained in paragraphs 256 and 259 of Plaintiffs' *Second Amended Complaint*.² Plaintiffs' clearly describe when the misrepresentations were made. Paragraph 731 of Plaintiffs' *Second Amended Complaint* states that the representations contained in paragraph 314 were made to Leslie

²The Utah Court of Appeals specifically approved the practice of referencing preceding paragraphs in a complaint. See *Coroles v. Sabey*, 2003 Ut App 339, fn13.

D. Mower ("Leslie"). Paragraph 314 states the misrepresentations were made at the end of November or the beginning of December. The allegations contained in paragraph 734 refer to the allegations in paragraph 315. Therefore, all of the necessary particularity is present.

The misrepresentations referred to in paragraph 315 are clearly alleged to have been made at the same time the misrepresentations referred to in paragraph 314 were made. The allegations contained on paragraph 739 also refer to a previous paragraph, which clearly indicates the misrepresentations were made at the same time as those contained in paragraphs 314 and 315. In an attempt to make their arguments, the Simpson Defendants simply construe Plaintiffs' *Second Amended Complaint* in the most narrow manner possible. However, the standard for a motion to dismiss is that the allegations must be read broadly and all reasonable inferences must be taken in Plaintiffs favor. Further, the Simpson Defendants focus on when their misrepresentations were relayed to Plaintiffs, not when they made them, which is the issue in this matter. Plaintiffs clearly allege when David Simpson and Nathan Simpson made the misrepresentations.

MAGNETBANK FRAUD

The Simpson Defendants argue that Plaintiffs' have failed to explain what in particular about the "offers" used in the appraisal relied on by MagnetBank makes them fraudulent. The Simpson Defendants make a narrow reading of Plaintiffs' *Second Amended Complaint*, failing to refer to the relevant allegations and exhibits. Paragraphs 300 through 303 of Plaintiffs' *Second Amended Complaint* set forth the basic facts of the "offers" that

were made for 14 lots located in The Preserve Development Project. The "offers" were made between October 1, 2006 and October 6, 2006. In paragraph 335, Plaintiffs allege, as part of the plan to deceive MagnetBank and its participating bank, that David Simpson and Nathan Simpson caused MagnetBank to use the services of Free and Associates for an appraisal. Plaintiffs clearly allege that the "offers" were used by the appraiser in arriving at a value for The Preserve Development Project property.

The appraisal itself, dated January 3, 2007, is attached to Plaintiffs' *Second Amended Complaint*. The parties who made offers on the 14 lots never actually purchased the lots. However, the appraisal contains a section titled "History of the Project." It states, "According to the purchase agreement provided by Mr. Nathan Simpson, the purchases are as follows:

Transaction #3 - This is an offer on the subject lot numbers 40, 39, 38, and 37
Information Source: Real Estate Purchase Agreement

Date of Contract: October 1, 2006

Closing Date: Current Offer, to close when lots are finished

Buyer: Dallas Hakes

Purchase Price: \$1,685,000.00

Price/Per Lot: Lot 40: \$340,000.00

Lot 39: \$340,000.00

Lot 38: \$340,000.00

Lot 37: \$340,000.00

Lot 33: \$325,000.00

Relevancy to Current Value: This is an offer on the subject lots and therefore, is a good indicator for valuing the individual lots.

Transaction #4 - This is an offer on the subject lot numbers 51, 52, 53, 54 and 55.

Information Source: Real Estate Purchase Agreement

Date of Contract: October 2, 2006

Closing Date: Current Offer, to close when lots are finished

Buyer: Chad Carlson

Purchase Price: \$1,650,000.00

Price/Per Lot: Lot 51: \$325,000.00
Lot 52: \$325,000.00
Lot 53: \$350,000.00
Lot 54: \$325,000.00
Lot 55: \$325,000.00

Relevancy to Current Value: This is an offer on the subject lots and therefore, is a good indicator for valuing the individual lots.

Transaction #5 - This is an offer on the subject lot numbers 49 and 50.

Information Source: Real Estate Purchase Agreement

Date of Contract: October 6, 2006

Closing Date: Current offer, to close when lots are finished

Buyer: Allen Hakes

Purchase Price: \$650,000.00

Price/Per Lot: Lot 49: \$325,000.00

Lot 50: \$325,000.00

Relevancy to Current Value: This is an offer on the subject lots and therefore, is a good indicator for valuing the individual lots.

See Exhibit "A" attached hereto.

Further, in using the income approach for valuing the lots in The Preserve Development Project, the appraiser clearly relied on the "offers" for the 14 lots. In the Income Approach section of the appraisal, the appraiser states that the offers on the lots were used as comparables. On page 57 is a chart that refers to the **sale** of lots 51, 52, 53, 54, 55, 49, 40 and 39. See Exhibit "B" attached hereto. All of these lots were subject to the purchase agreements Plaintiffs allege were entered into fraudulently. The chart also includes a **Date of Sale** which refers to the date the "offers" were made. Page 58 of the appraisal lists lots 33 through 35, lots 37, 38 and 50 as comparables, using the amount "offered" as the value. See Exhibit "B."

On page 68 of the appraisal, the appraiser notes that "the subject property has already sold several one acre lots between \$325,000.00 and \$340,000.00." See Exhibit "C"

attached hereto. Again, the appraiser clearly relied on the "offers" in making his appraisal of the property.

The chart contained on page 69 of the appraisal also shows the value of lots 37, 38, 39 and 40 as the value of the "offer" and lists the value as "Lot Sale Price." See Exhibit "D" attached hereto. The chart on page 71 of the appraisal lists the values for lots 33, 34, 35, 49, 50, 51, 52, 53, 54 and 55 as the sales price of the "offer" and states that the value is the "Lot Sale Price." See Exhibit "D." The lot purchase agreements themselves are included in the appendix to the appraisal.

Plaintiffs have clearly plead that the "offers" were not real offers, that they were made with the intention of artificially raising the values of the real property, that they were supplied to the appraiser by David Simpson and Nathan Simpson for the purpose of raising the values in the appraisal, that the offers were indeed used by the appraiser and that MagnetBank, to its detriment, relied on the appraisal. Therefore, Plaintiffs *Second Amended Complaint* regarding the misrepresentations made to MagnetBank meets the particularity requirements imposed by Rule 9.

The Simpson Defendants argue that Plaintiffs must allege **exactly** which assets David Simpson and Nathan Simpson over-valued in their financial statements submitted to MagnetBank, which liabilities were under-stated and the amount of each liability. However, the Simpson Defendants do not refer to any case law or other controlling precedent to support their argument. The Simpson Defendants would require that Plaintiffs have in their possession all the information from discovery before filing a complaint.

Further, Plaintiffs specifically allege that neither David Simpson's nor Nathan Simpson's financial statements reflected any amounts owed to Plaintiffs. Plaintiffs' *Second Amended Complaint* sets forth with great detail the amounts owed to Plaintiffs by David Simpson and Nathan Simpson. Paragraph 323 of the Second Amended Complaint clearly describes the promissory note executed by The Preserve at Mapleton Development Company, LLC ("The Preserve") in favor of LD III, LLC ("LD III") in the amount of \$6,800,000.00. A review of the financial statements David Simpson and Nathan Simpson submitted to MagnetBank, which are attached to Plaintiffs' *Second Amended Complaint* as Exhibits 119 through 121, clearly demonstrates that David Simpson and Nathan Simpson failed to include the amounts owed to LD III and Leslie.

Paragraph 325 of Plaintiffs' *Second Amended Complaint* clearly describes the promissory note from David Simpson and Nathan Simpson **personally** to Leslie D. Mower ("Leslie") in the amount of \$6,800,000.00. Paragraph 326 of Plaintiffs' *Second Amended Complaint* clearly describes a promissory note from David Simpson and Nathan Simpson personally to Leslie in the amount of \$3,300,000.00.

The financial statements submitted by David Simpson and Nathan Simpson to MagnetBank, which are attached to Plaintiffs' *Second Amended Complaint*, show that there is no mention of the amounts owed to Leslie. It is disingenuous for the Simpson Defendants to argue that they do not have a clearly defined foundation so the proceedings can go forward in an orderly manner. Even a cursory reading of Plaintiffs' *Second Amended Complaint* explains what amounts were owed to Leslie but which were not included in David

Simpson's and Nathan Simpson's financial statements. There is no mention in David Simpson's and Nathan Simpson's financial statements of any funds owing to Leslie. The promissory notes from David Simpson and Nathan Simpson to Leslie and LD III are clearly explained and attached to Plaintiffs' *Second Amended Complaint*. There is no doubt regarding what amounts Plaintiffs allege were owed to Leslie that were not included on the financial statements. Further, Rule 9 does not require that Plaintiffs include the detail being demanded by the Simpson Defendants. It is clear what funds were owed to Plaintiffs and that they were not included on the financial statements.

The Simpson Defendants argue that Plaintiffs fail to allege how MagnetBank's position changed as a result of the fact that David Simpson, Nathan Simpson and Michael Aviano ("Aviano") misrepresented the purchase price that Aviano paid for lot in The Preserve Development Project. There is no requirement that Plaintiffs show as part of a fraud claim that MagnetBank changed its position. The Simpson Defendants assert the requirement without supplying any support for such a requirement. Plaintiffs need only allege that MagnetBank relied on the misrepresentation to its detriment and that it was damaged. The Simpson Defendants also wrongly argue that Plaintiffs fail to allege what particular damages were caused by the Aviano sale.

Plaintiffs allege the false closing documents were provided to MagnetBank and its participating bank and that in reliance on the false closing documents MagnetBank reduced the amount they required to be paid for MagnetBank to release the security interest in Aviano's lot. Plaintiffs further allege that if MagnetBank and its participating bank had

known the true sales price and that the closing documents were false, they would not have allowed the purchase to go forward, they would have had reason to suspect that the loan was in peril and they would have taken steps to protect the loan. Plaintiffs also allege that if MagnetBank and its participating bank had known the truth, they would have immediately called the loan due, and that they were induced to not call the loan due and to take other protective measures because of the false closing documents signed by Aviano, which he knew would be submitted to MagnetBank and its participating bank.

Plaintiffs allege that MagnetBank and its participating bank would not have approved the sale of a lot to Aviano and that they would not have agreed to accept the \$900,000.00 payment had they known the truth. Plaintiffs allege that had MagnetBank and its participating bank known the truth, they would have at the very least insisted on payment of the previously agreed release price of \$1,020,000.00. Plaintiffs also clearly allege that had MagnetBank and its participating bank known the truth, they would have called the loan to The Preserve due and would have taken additional steps to protect their loan. However, because of David Simpson's, Nathan Simpson's and Aviano's, fraud and misrepresentations, MagnetBank and its participating bank believed the lots in The Preserve Development Project were actually worth what David Simpson and Nathan Simpson had represented they were worth, not nearly half that value. Therefore, Plaintiffs have sufficiently alleged the fraud and the damage from the fraud. Taking all the allegations as true and making all reasonable inferences in Plaintiffs' favor, Plaintiffs clearly meet the pleading standard regarding the Aviano transaction.

DOUBLE T RANCH WATER PURCHASE

The Simpson Defendants argue that Plaintiffs cause of action for fraudulent non-disclosure in relation to the Double T Ranch water purchase must fail because Plaintiffs fail to allege how the non-disclosures resulted in damage. The Simpson Defendants again attempt to impose their own heightened pleading requirements, without any supporting authority.

Plaintiffs clearly allege that Leslie's funds were wrongfully taken and used to partially fund the purchase price of the water shares. Plaintiffs also clearly allege that David Simpson purchased the water shares in the name of his own entity, that Leslie was never reimbursed for her funds that were wrongfully taken and used, that Leslie never received any profits from the sale of such water shares and that David Simpson wrongfully kept some of the water shares for himself.

Further, Plaintiffs clearly allege that LD III's funds were wrongfully taken, that they were used to purchase water shares which were titled in an entity owned by David Simpson, that LD III was never reimbursed for its funds and that the water shares were sold and that LD III never received any proceeds. It is clear that LD III and Leslie were damaged in that their funds were taken and never repaid. If all reasonable inferences are extended to Plaintiffs, it is clear that the Simpson Defendants *Motion to Dismiss the Second Amended Complaint* in relation to the claims regarding the Double T Ranch water purchase must be denied.

MAPLE MOUNTAIN WATER PROJECT

The Simpson Defendants argue that Plaintiffs' claims for fraud regarding the Maple Mountain Water project must be dismissed because Plaintiffs fail to plead the fraud with the required particularity. However, Plaintiffs have clearly alleged the fraud with the required particularity.

In paragraph 479 of Plaintiffs' *Second Amended Complaint*, Plaintiffs allege that Leslie provided The Preserve \$281,693.59, with the understanding that it would be used to pay The Preserve's share of the water tank cost. Instead, the funds were not used for the water tank but were taken by Nathan Simpson and David Simpson. Paragraph 1094 of Plaintiffs' *Second Amended Complaint* alleges that David Simpson and Nathan Simpson told Leslie's son that The Preserve needed at least \$281,693.59 to pay past due bills, much of that amount being required to pay The Preserve's share of the water tank. Paragraph 1096 alleges that at the end of March or beginning of April, David Simpson and Nathan Simpson again told Leslie's son that they needed additional funds for The Preserve's share of the water tank cost. Paragraph 1099 alleges that between November 15, 2007 and April 23, 2008, David Simpson and Nathan Simpson repeatedly solicited Leslie and her representatives for funds to pay past due bills of The Preserve. Paragraph 1101 clearly states that David Simpson and Nathan Simpson used funds they had requested and received from Leslie to pay Nathan Simpson \$72,814.78 and to pay David Simpson \$65,000.00 instead of using the funds to pay The Preserve's share of the water tank costs.

Contrary to the Simpson Defendants arguments, there is no attempt by Plaintiffs to "cryptically attempt to bolster" their general allegations. Plaintiffs clearly allege that David Simpson and Nathan Simpson represented they needed funds to pay the debts of The Preserve, specifically The Preserve's share of the water tank cost, that when they received the funds they used them for other purposes, such as paying themselves and using the funds to pay The Presidio's share of the water tank cost. David Simpson and Nathan Simpson had previously entered into a contract to purchase real property owned by The Presidio and were obligated to pay part of The Presidio's share of the water tank cost as part of the purchase. It is clear that Leslie furnished the funds in reliance on David Simpson's and Nathan Simpson's misrepresentations and that she was damaged because here funds were deceitfully taken. Therefore, contrary to the Simpson Defendants' statement that "the Court and the defendants are left to guess what Mower did in response to these alleged misrepresentations and how it damaged her," Plaintiffs clearly allege that her funds were used for purposes other than those for which they were provided and that she no longer has the funds. Such is clear from even a cursory reading of Plaintiffs' *Second Amended Complaint*. Therefore, the Simpson Defendants' *Motion to Dismiss Second Amended Complaint* should be denied.

FAILURE TO JOIN ESTATE OF KEN DOLEZSAR

The Simpson Defendants argue that Dolezsar is the "central figure" in this case and that Dolezsar's estate is a necessary and indispensable party to this action. The Simpson Defendants fail to describe in what way Dolezsar is the "central figure" in this matter. There

can be little doubt that the central figures in this matter are David Simpson and Nathan Simpson. It is nothing more than a red herring.

The Simpson Defendants argue that the Estate of Ken Dolezsar (the "Estate") is a necessary and indispensable party that cannot be joined. Therefore, they argue that Plaintiffs' fraud based claims related to the Hawaii development scam, The Preserve at Mapleton Development scam and the commercial property scam must be dismissed because they cannot proceed in equity and good conscience. The Simpson Defendants argue that they are prevented from asserting their claims against Dolezsar and from otherwise requiring Dolezsar to account for his alleged actions by way of deposition or trial testimony.

However, the reasons put forth by the Simpson Defendants for finding that the Dolezsar or the Estate are necessary and an indispensable parties do not meet the standard set forth in Rule 19 of the Utah Rules of Civil Procedure. The burden of presenting specific facts and reasoning is on the party attempting to persuade the Court that Dolezsar or the Estate are necessary or indispensable parties. See *Grand County v. Rogers*, 2002 UT 25, ¶29; 44 P.3d 734, 741 (Utah 2002). "[A]bstract generalizations are not a substitute for the analysis required under Rule 19." *Seftel v. Capital City Bank*, 767 P.2d 941, 945 (Ut. Ct. App. 1989). Simply alleging that Dolezsar is the central figure and that the defendants will be prevented from pursuing any cross claims against Dolezsar does not establish that Dolezsar or the Estate are necessary or indispensable parties. Such conclusory statements do not satisfy the required analysis under Rule 19. The Simpson

Defendants have failed to carry their burden to show that Dolezsar and/or the Estate are necessary and indispensable parties. Therefore, their claim should be denied.

Rule 19 of the Utah Rules of Civil Procedure states:

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(b) Determination by court whenever joinder not feasible. If a person described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In addressing a Rule 19 issues, a court must first determine whether a party is necessary under Rule 19(a) See *Smith v. Osguthorpe*, 58 P.3d 854, 864 (Ut. Ct. App. 2002). In doing so it considers the factors set out in the rule. If a court concludes that a party is necessary, it then must "consider whether joinder of the necessary party is feasible." *Id.*

Rule 19 of the Utah Rules of Civil Procedure is "substantively similar to its federal counterpart" and federal case law may be used as guidance. *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Ut. Ct. App. 1989). Therefore, cases interpreting Rule 19 of the Federal Rules of Civil Procedure have precedential value in the courts of the State of Utah.

The Simpson Defendants argue that Dolezsar and the Estate are necessary parties. The Simpson Defendants rely primarily on *Turville v. J&J Properties, L.C.*, 2006 UT App 305; 145 P.3d 1146 (Ut. Ct. App. 2006) to support their argument that Dolezsar and/or the Estate are necessary parties. However, the only similar fact in *Turville* and this matter is that someone died and could not be made a party to the case. Otherwise, the facts are very different.

The Simpson Defendants allege that Dolezsar was the central figure in this matter, and, based only on their conclusory statement, argue that Dolezsar is just like Mr. Clark in *Turville*. However, a close examination of the facts in *Turville* shows that it is David Simpson and Nathan Simpson who performed the fraudulent acts like those alleged to have been done by Mr. Clark, not Dolezsar.

In *Turville*, James Ritchie ("Ritchie"), John Quitiquit ("Quitiquit") and Clark Properties, Inc. ("CPI"), whose officers were Mrs. and Mr. Clark, formed Tri-J Properties, LLC ("Tri-J") for the purpose of buying 142 acres of real property from Davis County. Tri-J won the bid on the property and it was transferred to Tri-J. Unbeknownst to the other members of Tri-J, Mr. Clark ("Clark") executed a quitclaim deed for the property from Tri-J to CPI. Clark then deeded 128 acres back to CPI and retained 14 acres in the name of CPI. See *Id.* at ¶2.

Turville, the plaintiff in the action, met with Ritchie, Quitquit and Clark in hopes of purchasing the property. Tri-J's members were undecided regarding selling the real property. However, Clark informed Turville that CPI owned the 128 acres and that he had authority to sell both the 128 acres and the 14 acres to Turville. Clark subsequently agreed to sell the properties to Turville for \$1,000,000.00. Clark caused CPI to deed the 128 acres to Turville and gave Turville a quitclaim deed for CPI's interest in the 14 acres, promising that he could convince the other members of Tri-J to sell the 14 acre parcel to Turville. Turville gave Clark a note for \$1,000,000.00 and began developing the properties. See *Id.* at ¶¶3-4.

Tri-J and CPI sued Turville claiming he had no legal right to the properties. Clark then made a deal with Ritchie and Quitquit that they would receive a portion of the proceeds of the \$1,000,00.00 note. The lawsuit was then dismissed. See *Id.* at ¶7.

Later, Plaintiff filed a complaint against Tri-J, Ritchie, Quitquit, J&J Properties, CPI, Mrs. Clark and Clark. Turville served Ritchie but took no further action. Later, Turville filed for a default against Ritchie. Then Clark died of cancer. See *Id.* at ¶¶8-9. Several of the defendants moved the court to dismiss the complaint because of failure to join the estate of Mr. Clark as an indispensable party. See *Id.* at ¶17. Ultimately, the trial court, and later the Utah Court of Appeals, found that Clark's estate was a necessary and indispensable party.

The Simpson Defendants argue that the present case is just like *Turville* because, like Clark, Dolezsar was the person "primarily involved" in the alleged conduct that caused

Plaintiffs' damages³. However, even a cursory reading of Plaintiffs' *Second Amended Complaint* show that the those primarily involved in the alleged conduct that caused Plaintiffs' damages were David Simpson and Nathan Simpson.

The activity, involvement and roles of Clark and the activity, involvement and roles of Dolezsar are readily distinguishable. Here, Plaintiffs' *Second Amended Complaint* alleges that Dolezsar was acting as Leslie's agent. See *Second Amended Complaint*, ¶¶542, 601, 718 and 864. It was in his capacity as Leslie's husband and agent that he relayed the misrepresentations made by David Simpson, Nathan Simpson and others to Leslie. Dolezsar only relayed David Simpson's and Nathan Simpson's representations, he did not make them.

In *Turville*, it is clear that the person who made the misrepresentations and committed the fraud was Clark. Plaintiffs do not allege that Dolezsar was the source of the misrepresentations or the source of the fraud. He was simply the go between used by David Simpson, Nathan Simpson and others. Therefore, his situation is quite different from Clark's.

Further, in finding that Clark was a necessary and indispensable party, the Utah Court of Appeals found it important that the complaint filed by Turville actually named Clark as a defendant. See *Id.* at ¶40. The Utah Court of Appeals specifically cites to cases which hold that when a plaintiff makes no claims against an unjoined party, it is clear that

³ On page 17 of their *Memorandum in Support of Motion to Dismiss Second Amended Complaint*, the Simpson Defendants state, "noting his 'pivotal representative role ... in the transactions at issue,' the trial court found that Clark was a necessary party to the case. *Id.* at ¶9. A careful reading of paragraph 9 of *Turville* shows that it contains no such language.

complete relief can be granted in [the party's] absence. See *Id.* (referring to *Mallalieu-Golder Ins. Agency v. Executive Risk Indem.*, 254 F.Supp.2d 521, 525 (M.D. Pa. 2003)). The Court of Appeals goes on to say that "Plaintiff's reason for naming and including Mr. Clark is apparent where the record reveals that it was primarily, **if not solely**, the actions of Mr. Clark in his individual capacity that led to Plaintiff's alleged damages." *Id.* (emphasis added). Here, it is the actions of David Simpson, Nathan Simpson and others which primarily, if not solely, led to Plaintiffs' damages.

The Utah Court of Appeals cited the case of *Johnson v. Higley*, 989 P.2d 61 for the proposition that a party was not a necessary party because the plaintiff's claims were expressly limited to the defendants acts or omissions." See *Id.* In other words, because Plaintiffs in this matter have limited their claims to the named defendants and have not made any claims against Dolezsar or the Estate, neither Dolezsar nor the Estate are necessary parties.

While the *Turville* court found that Clark's estate was a necessary and indispensable party, the factual basis for those conclusions is very different from the facts in this matter. Regarding Clark's status as an indispensable party, the court found that "because Plaintiff named or included Mr. Clark in his claims as the major, if not the sole actor responsible for Plaintiff's alleged damages, a judgment rendered in the Estate of Mr. Clark's absence would prejudice those already parties to the action; protective provisions would not ameliorate this prejudice; a judgment entered in the Estate of Mr. Clark's absence would be less than

adequate; and, most importantly, as a result of the foregoing factors, the nonjoinder of the Estate of Mr. Clark would violate principle of equity and good conscience." *Id.* at ¶42.

The *Turville* court clearly based its decision on the very important fact that the plaintiff had identified Clark as the major actor and as a defendant. Despite the Simpson Defendants' best efforts to decide for Plaintiffs' who caused their damages and despite their best efforts to shift responsibility for their misrepresentations made in this matter to Dolezsar, the facts are that they are the main actors who are primarily responsible for Plaintiffs' damages, not Dolezsar. Therefore, the Simpson Defendants' reliance on *Turville* is misplaced and their *Motion to Dismiss Second Amended Complaint* should be denied.

The Simpson Defendants argue they will not be able to question Dolezsar concerning the origin of the information he passed on to Leslie because of his untimely death. They fail to explain how, if Plaintiffs had filed this action before the time to make claims against the Estate had lapsed, it would have allowed them to question Dolezsar concerning the origin of the representations. It is just another attempt to shift the focus of the wrongdoing from themselves to Dolezsar.

The Simpson Defendants also argue that any judgment issued in Dolezsar's absence will result in unavoidable prejudice to the other defendants. They argue that the defendants in this matter will be "unable to require Dolezsar to account for his alleged conduct at a deposition or a trial in this matter. It is important to note that the scope of Rule 19 deals with making persons parties to the litigation, not with the availability of evidence because of the death of a person. The Simpson Defendants cannot argue that having the

opportunity to join the Estate as a party would allow them to conduct depositions or examine Dolezsar at trial. Therefore, the Simpson Defendants' argument that the Estate is an indispensable party because the Simpson Defendants will be prejudiced because of their inability to question Dolezsar must fail. Such an argument has nothing to do with joinder of a party.

If the Court finds that Dolezsar or the Estate are necessary parties, it then must move to the second prong of the analysis and decide if Dolezsar or the Estate are indispensable parties. The United States Supreme Court has analyzed Rule 19 of the Federal Rules of Civil Procedure. In the seminal case of *Provident Tradesmens Bank & Trust Co. v. Patterson*, 309 U.S. 102 (1968) the Court stated "Rule 19 (b) suggests four interests that must be examined in each case to determine whether in equity and good conscience the court should proceed without a party whose absence from the litigation is compelled." *Id.* at 109. The United States Supreme court went on to list the interests as:

First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists. ... Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. ... Third, there is an interest of the outsider whom it would have been desirable to join. ... Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issues in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible

Id. at 109-111.

Here, Plaintiffs' have a great interest in having a forum. There is no other forum available where Plaintiffs could bring their claims. If the case is dismissed, Plaintiffs will be

prevented from pursuing any remedy for the fraud perpetrated against them. Further, there is no danger of multiple litigation or inconsistent relief. Lastly, it is in the interest of the courts and the public to be able to settle controversies and have redress for alleged wrongs. All of the factors listed by the United States Supreme Court support a denial of the Simpson's Defendants' *Motion to Dismiss Second Amended Complaint* based on Rule 19.

The Simpson Defendants argue that any judgment issued in the absence of the Estate will be inadequate. They argue that none of the defendants in this case will be able to bring any related claims against the Estate, such as cross claims or claims for contribution.

However, the inability to bring a cross claim against another party does not make that party an indispensable party. The United States Court of Appeals for the Fifth Circuit stated, "it is well-established that Rule 19 does not require the joinder of joint tortfeasors. Nor does it require the joinder of principal and agent. Finally, Rule 19 does not require the joinder of persons against whom [the parties] have claim for contribution." *Nottingham v. General American Communications Corp.*, 811 F.2d 873, 880 (5th Cir. 1987), *See also Milligan v. Anderson*, 522 F.2d 1202, 1204-05 (10th Cir. 1975); *Dennis v. Wachovia Securities*, 429 F.Supp. 2d 281, 290 (D. Mass. 2006).

"[A] defendant's right to contribution or indemnity from an absent non-diverse party does not render that absentee indispensable pursuant to Rule 19." *Gardiner v. Virgin Islands Water & Power Authority*, 145 F.3d 635, 641 (3rd Cir. 1998). The *Gardiner* court added that "the possibility that the defendant may have a claim for contribution or indemnity

does not render an absentee indispensable. The right of contribution and indemnity should not, therefore, be considered to cause inadequacy of the resulting judgment." Further, when considering whether a judgment will be adequate, the proper inquiry is whether the remedy will be adequate from a plaintiff's point of view. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 309 U.S. 102, 112 (1968). Here, Plaintiffs will have an adequate remedy without the joinder of Dolezsar or the Estate.

The Simpson Defendants argument is based on the fact that they will not be able to pursue the Estate for contribution as a joint tortfeasor. Therefore, they have failed to carry their burden. The Estate is not a necessary and indispensable party.

The last factor that a court must consider is whether the plaintiff will have an alternate remedy if the action is dismissed for nonjoinder. The Simpson Defendants argue that Plaintiffs' other causes of action for breach of contract, quasi contract, breach of fiduciary duty, conversion and unjust enrichment provide a remedy for any alleged wrongs. However, the Simpson Defendants are again wrong.

Plaintiffs other claims do not address the fraud that was perpetrated against them. If Plaintiffs causes of action for fraud are dismissed pursuant to Rule 19, Plaintiffs will have no remedy for those wrongs. There is no other venue or court available for Plaintiffs to bring their claims. *See Id.*

The Simpson Defendants would have the Court believe that pursuant to Rule 19 Plaintiffs' fraud causes of action must be dismissed because they do not have the opportunity to press cross claims against the Estate. They would categorize Rule 19 as

being there to protect their rights against other possible defendants. However, as explained above, such is not the purpose of the rule. "The basic purpose of Rule 19 is to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations." *Ludlow v. Salt Lake County Board of Adjustment*, 839 P.2d 1101 (Ut. Ct. App. 1995). Further, "[t]he purpose of rule 19 is to protect against the entry of judgments which might prejudice the rights of indispensable parties in their absence." *Call v. City of West Jordan*, 788 P.2d 1049, 1054-55 (Ut. Ct. App. 1990). Here, there is no possibility of prejudice to the Estate. Further, the Simpson Defendants are not in danger of being subject to multiple litigation or inconsistent judgments. Therefore, the Simpson Defendants' motion to dismiss the fraud claims pursuant to Rule 19 must be denied.

FRAUDULENT NON-DISCLOSURE

The Simpson Defendants argue that Plaintiffs fail to allege that Leslie relied on David Simpson's fraudulent non-disclosures in relation to the Double T Ranch water purchase.⁴ The Simpson Defendants, relying on an unpublished opinion, claim that Plaintiffs must allege reliance by Leslie to pursue their cause of action for fraudulent non-disclosure. However, the standard proclaimed by the Simpson Defendants is wrong.

⁴The Simpson Defendants rely on the case of *Barber Bros. Ford, Inc. v. Foianini*, 2008 UT App 463 for the standard of pleading a cause of action for fraudulent non-disclosure. However, *Barber Bros.* is a Memorandum Decision of the Utah Court of Appeals and states it is "NOT FOR OFFICIAL PUBLICATION." Therefore, the Simpson Defendants cannot rely on it as authority and it cannot be cited as precedent. See *Grand County v. Rogers*, 2002 UT 25 ¶17; 44 P.3d 734, 736 (Utah 2002)(stating court of appeals' memorandum decisions designated as such are not published and cannot be relied upon as precedent).

The Utah Supreme Court addressed the elements of fraudulent non-disclosure in *Yazd v. Woodside Homes Corp.*, 2006 UT 47. The court stated that "[i]n order to prevail on a claim of fraudulent concealment, a plaintiff must prove "(1) that the nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate." *Id.* at ¶10. Here, Plaintiffs allege that David Simpson failed to disclose material and relevant facts, that such facts were material and that David Simpson had a duty to disclose the facts. Therefore, contrary to the Simpson Defendants' argument, Plaintiffs have alleged all the necessary elements for their claim of fraudulent non-disclosure regarding the Double T Ranch water purchase. Therefore, the Simpson Defendants' motion to dismiss should be denied.

AIDING AND ABETTING CLAIMS IN UTAH

The Simpson Defendants argue that Plaintiffs' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent non-disclosure are not recognized by Utah courts and therefore must be dismissed. To support their argument, the Simpson Defendants cites to language from *Colores v. Sabey*, 2003 UT App 339, 79 P.3d 974 (Ut. Ct. App. 2003) in which the *Colores* court declined to decide whether claims for aiding and abetting breach of fiduciary duty are recognized in Utah. The *Colores* court stated, "since we decide the aiding and abetting breach of fiduciary duty claim on the basis discussed above, **we do not need to decide the issue, reached by the trial court, of whether this cause of action is cognizable under Utah law** in the first place." *Id.* at FN 19 (emphasis

added). Just because the *Colores* court declined to reach the issue, does not mean that such a claim is not cognizable in Utah.

Causes of action for aiding and abetting are recognized by the Restatement (Second) of Torts, §876. A majority of states have adopted the validity of a claim for aiding and abetting under the Restatement. See *Dale v. ALA Acquisitions, Inc.*, 203 F.Supp.2d 694, 700 (S.D. Miss. 2002) (listing states that have adopted the validity of claims for aiding and abetting). Therefore, the court should allow Plaintiffs to proceed with their aiding and abetting claims.

CONCLUSION

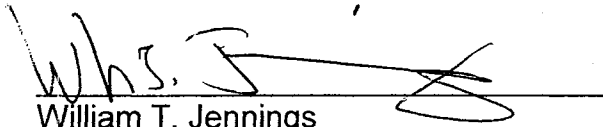
On a motion to dismiss the Court must take all allegations contained in Plaintiffs' *Second Amended Complaint* as true and it must make all reasonable inferences in Plaintiffs' favor. Further, the Court must resolve all doubts in Plaintiffs' favor. Applying that standard, Plaintiffs' *Second Amended Complaint* clearly and adequately asserts causes of action against the Simpson Defendants for fraud, fraudulent non-disclosure and aiding and abetting fraudulent non-disclosure. Plaintiffs have plead all of their fraud based claims with the particularity required by Rule 9. Further, the Simpson Defendants have failed carry their burden and show that Dolezsar or the Estate are either necessary or indispensable parties. Therefore, the Simpson Defendants' *Motion to Dismiss Second Amended Complaint* should be denied and Plaintiffs should be awarded their reasonable costs and fees incurred in addressing the Simpson Defendants motion.

REQUEST FOR ORAL ARGUMENT

Plaintiffs hereby request oral argument on the Simpson Defendants' *Motion to Dismiss Second Amended Complaint*.

DATED this 26th day of April, 2010

Bailey & Jennings, LC


William T. Jennings
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2010, I served a true and correct copy of the foregoing *Memorandum in Opposition to the Simpson Defendants' Motion to Dismiss Second Amended Complaint* on the following by mailing the same, United States mail, postage prepaid, addressed as follows:

Chris D. Greenwood
1840 North State St., Suite 200
Provo, UT 84604

Craig J. Carlile
86 North University Ave., Suite 430
Provo, UT 84601

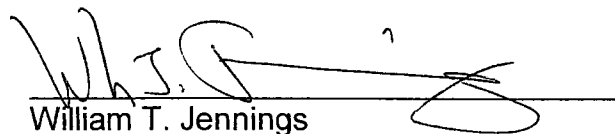
Mark D. Eddy
233 South Pleasant Grove Blvd.
Suite 202
Pleasant Grove, UT 84062

Laura S. Scott
201 South Main Street
Suite 1800
Salt Lake City, UT 84111

Jonathan L. Jaussi
P.O. Box 460
Payson, UT 84651

Julian D. Jensen
311 South State Street, Suite 380
Salt Lake City, UT 84111

Steven R. Sumsion
86 North University Ave., Suite 400
Provo, UT 84601


William T. Jennings

Tab 3

JUDICIAL DISTRICT COURT
PROVO DEPARTMENT

2010 APR 13 P 5:55 ⁶⁹

Craig Carlile (0571)
Caleb J. Frischknecht (11648)
RAY QUINNEY & NEBEKER P.C.
86 North University Avenue, #430
Provo, Utah 84601-4420
Telephone: (801) 342-2400

Attorneys for Defendants David R. Simpson, Nathan R. Simpson, Todd Dorny, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf Investments, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, an individual; et al.,

Plaintiff,

v.

DAVID R. SIMPSON, an individual; et al.,

Defendants

and

KOAMALU PLANTATION INVESTMENT,
LLC, a Utah limited liability company, et al.,

Rule 19 Defendants.

**MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Civil No: 090403844

Judge: Samuel D. McVey

Defendants David R. Simpson, Nathan R. Simpson, Todd Dorny, Koamalu Plantation,

LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf Investments, LLC, Dente,

LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS

Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton

Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman hereby move to dismiss the Second Amended Complaint of Plaintiffs Leslie D. Mower, LD SQ, LLC, LD III, LLC, LD Purpose, LLC, and Navona, LC (collectively, "Plaintiffs"), pursuant to Rules 8(a), 9(b), 12(b)(6), and 19(b) of the Utah Rules of Civil Procedure.

The grounds for this motion are that Plaintiffs' Second Amended Complaint again fails to meet the basic pleading requirements of Rules 8(a) and 9(b) of the Utah Rules of Civil Procedure. The Court previously dismissed the allegations of fraud in Plaintiffs' 216-page First Amended Complaint because they did not contain the level of particularity required under Rule 9(b). Despite now spanning 361 pages, the Second Amended Complaint still fails to provide the concise particularity required by the pleading standards under the Utah Rules of Civil Procedure and, therefore, must be dismissed.

Additionally, Plaintiffs' fraud-based claims related to Ken Dolezsar (Plaintiff Mower's ex-husband who was killed in November 2007) must be dismissed for failure to join an indispensable party under Rule 19(b). Ken Dolezsar is the central figure in this case. Plaintiffs affirmatively allege that all of the claimed misrepresentations with respect to the Hawaii development, the Mapleton development, and the Springville property were communicated to Mower by Dolezsar, who was allegedly acting in conspiracy with Defendants David Simpson and Nathan Simpson. However, Dolezsar cannot be joined because Plaintiffs failed to bring this case within the one year statute of limitations for claims against Dolezsar's estate after his death. The other defendants are thus prevented from asserting their claims against Dolezsar and from

otherwise requiring Dolezsar to account for his alleged actions by way of deposition or trial testimony. Under these circumstances, the fraud-based claims related to Dolezsar must be dismissed under Rule 19(b).

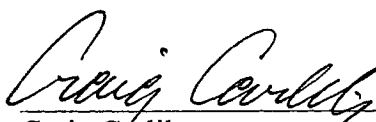
Plaintiffs' claim for fraudulent nondisclosure with respect to the alleged purchase of water shares from Double T Ranch should also be dismissed for failure to state a claim because Plaintiffs fail to allege any justifiable reliance resulting in damages.

Finally, Plaintiffs' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent nondisclosure should be dismissed for failure to state a claim as Utah courts have not recognized a cognizable civil cause of action for "aiding and abetting."

Therefore, as more fully stated in the supporting memorandum filed contemporaneously herewith, the Court should (1) dismiss Plaintiffs' fraud allegations for failure to plead in accordance with Rules 8(a) and 9(b); (2) dismiss Plaintiffs' fraud-based claims related to the Hawaii Development (Claim Nos. 1, 4-6, 9, and 10), the Mapleton Development (Claim Nos. 11, 14-16, 19, and 20), and the Springville Property (Claim Nos. 21, 22, 24, and 25) under Rule 19(b) for failing to join an indispensable party; (3) dismiss Plaintiff's fraudulent nondisclosure claim with respect to the Double T Ranch water purchase (Claim No. 32) under Rule 12(b)(6); and (4) dismiss Plaintiff's claims for aiding and abetting breach of fiduciary duty (Claim Nos. 3, and 13) and aiding and abetting fraudulent nondisclosure (Claim Nos. 5, and 15) under Rule 12(b)(6).

DATED this 3rd day of April, 2010.

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in cursive script, appearing to read "Craig Carlile", written over a horizontal line.

Craig Carlile
Caleb J. Frischknecht
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION TO DISMISS
SECOND AMENDED COMPLAINT** was mailed by First Class U.S. Mail, postage prepaid,
on this 13 day of April, 2010 to the following:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058

Steven R. Sumsion
Spencer MacDonald
Daniel M. Woods
SUMSION & MACDONALD
86 North University Avenue, #400
Provo, Utah 84601-4420

Mark D. Eddy
Morgan L. Cummings
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Pleasant Grove Blvd., Suite 202
Pleasant Grove, Utah 84062

Julian D. Jensen
Attorney at Law
311 South State Street, #380
Salt Lake City, Utah 84111

Jonathan L. Jaussi
Joshua P. Langeland
P.O. Box 460
Payson, Utah 84651

Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84604

Christopher A. Scharman
Vantus Law Group
3165 East Millrock Drive, #160
Salt Lake City, Utah 84121

Laura S. Scott
Parsons Behle & Latimer
201 South Main Street, #1800
P.O. Box 45898
Salt Lake City, Utah 84145

1079486

A handwritten signature in cursive script, reading "Rhonda Bartholomew", written over a horizontal line.

Tab 4

200 OCT 13 P 5:56

Craig Carlile (0571)
Caleb J. Frischknecht (11648)
RAY QUINNEY & NEBEKER P.C.
86 North University Avenue, #430
Provo, Utah 84601-4420
Telephone: (801) 342-2400

Attorneys for Defendants David R. Simpson, Nathan R. Simpson, Todd Dorny, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf Investments, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, an individual; et al.,

Plaintiff,

v.

DAVID R. SIMPSON, an individual; et al.,

Defendants

and

KOAMALU PLANTATION INVESTMENT,
LLC, a Utah limited liability company, et al.,

Rule 19 Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Civil No: 090403844

Judge: Samuel D. McVey

Defendants David R. Simpson, Nathan R. Simpson, Todd Dorny, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf Investments, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton

Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman submit this memorandum in support of their Motion to Dismiss Second Amended Complaint.

TABLE OF CONTENTS

INTRODUCTION.....	4
STATEMENT OF FACTS.....	5
ARGUMENT.....	9
I. PLAINTIFFS HAVE AGAIN FAILED TO PLEAD THEIR CLAIMS ACCORDING TO THE PLEADING STANDARDS OF THE UTAH RULES OF CIVIL PROCEDURE.....	9
A. Plaintiffs Fail to Plead the Fraud Claims of Magnet Bank With the Particularly Required Under Rule 9(b) and the Court’s January 22, 2010 Order.....	12
B. Plaintiffs Also Fail to Plead Their Fraud Claims With Respect to the Double T Ranch Water Purchase With Rule 9(b) Particularity.....	14
C. Plaintiffs Have Not Pleaded With Particularity Their Fraud Claims Concerning the Maple Mountain Water Project.	14
II. PLAINTIFFS’ FRAUD-BASED CLAIMS RELATED TO KEN DOLEZSAR MUST BE DISMISSED UNDER RULE 19(b) FOR FAILURE TO JOIN DOLESZAR’S ESTATE.....	15
A. Dolezsar Is Necessary to This Action Because Complete Relief Cannot Be Accorded the Parties in His Absence.	16
B. Dolezsar Is Indispensable Because This Action Cannot Proceed In Equity And Good Conscience Without Him.....	19
1. Any Judgment Rendered in Dolezsar’s Absence Will Result in Unavoidable Prejudice to the Other Defendants in This Case.	20

2.	Any Judgment Rendered in Dolezsar's Absence Will Be Inadequate.	21
3.	Plaintiffs Will Retain Adequate Remedies After Dismissal of the Dolezsar Fraud Claims.	22
III.	PLAINTIFFS' FRAUDULENT NONDISCLOSURE CLAIM CONCERNING THE DOUBLE T RANCH WATER PURCHASE MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM.	22
IV.	PLAINTIFFS' AIDING AND ABETTING CLAIMS HAVE NOT BEEN RECOGNIZED AS VALID CLAIMS UNDER UTAH LAW AND SHOULD BE DISMISSED ACCORDINGLY.	23
	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Barber Bros. Ford, Inc. v. Foianini</i> , 2008 UT App 463	22
<i>Coroles v. Sabey</i> , 2003 UT App 339, 79 P.3d 974	12, 23
<i>Heathman v. Hatch</i> , 372 P.2d 990 (Utah 1962)	10
<i>Turville v. J&J Props., L.C.</i> , 2006 UT App 305, 145 P.3d 1146	16, 20
<i>U.S. ex rel. Ritchie v. Lockheed Martin Corp.</i> , 558 F.3d 1161 (10th Cir. 2009)	12
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982)	10, 11

Statutes

Utah Code Ann. § 75-3-803(a)	4, 15, 20
------------------------------	-----------

Rules

Utah R. Civ. P. 19	16
Utah R. Civ. P. 19(b)	19
Utah R. Civ. P. 8(a)	10
Utah R. Civ. P. 9(a)	10

INTRODUCTION

The Plaintiffs' Second Amended Complaint again fails to meet the basic pleading requirements of Rules 8 and 9 of the Utah Rules of Civil Procedure. The Court previously dismissed the allegations of fraud in Plaintiffs' 216-page First Amended Complaint because they did not contain the level of particularity required under Rule 9(b). At that time, Plaintiffs were given a "chance to plead fraud within 20 days . . . and *do it concisely and with particularity.*" (Ruling Granting in Part the Various Defendants' Motions to Dismiss (emphasis added).) Plaintiffs have responded by adding 145 more unnecessary pages to their Second Amended Complaint. Despite now spanning 361 pages, the Second Amended Complaint still fails to provide the concise particularity required by the pleading standards under the Utah Rules of Civil Procedure. As Plaintiffs have now failed on all three of their chances, their improperly-pleaded fraud claims should be dismissed with prejudice.

Additionally, Plaintiffs' fraud-based claims with respect to the Hawaii development, the Mapleton development, and the Springville property must be dismissed for failure to join an indispensable party under Rule 19. As demonstrated by the allegations in the Second Amended Complaint, Ken Dolezsar (Plaintiff Mower's ex-husband who was killed in November 2007) is the central figure in this case. Plaintiffs affirmatively allege that all of the claimed misrepresentations with respect to these three transactions were communicated to Mower by Dolezsar, who was allegedly acting in conspiracy with Defendants David Simpson and Nathan Simpson. However, Plaintiffs failed to bring this case within the one year statute of limitations for claims against Dolezsar's estate after his death. See Utah Code Ann. § 75-3-803(a).

Consequently, Dolezsar cannot be made a party to this case. The other defendants are thus prevented from asserting their claims against Dolezsar and from otherwise requiring Dolezsar to account for his alleged actions by way of deposition or trial testimony. Under these circumstances, the fraud-based claims related to the Hawaii development, the Mapleton development, and the Springville property cannot proceed in equity and good conscience in Dolezsar's absence. Accordingly, these claims must be dismissed under Rule 19(b).

Plaintiffs' claim for fraudulent nondisclosure with respect to the alleged purchase of water shares from Double T Ranch should also be dismissed for failure to state a claim. Plaintiffs fail to allege any justifiable reliance resulting in damages from the alleged omissions concerning the Double T Ranch water shares.

Finally, Plaintiffs' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent nondisclosure should be dismissed for failure to state a claim as Utah courts have not recognized a cognizable civil cause of action for "aiding and abetting."

STATEMENT OF FACTS

1. **Plaintiffs** Leslie D. Mower, LD SQ, LLC, LD III, LLC, LD Purpose, LLC, and Navona, LC (collectively, "Plaintiffs") originally filed this lawsuit on October 20, 2009. (*See* Docket.)

2. After motions to dismiss were filed by multiple defendants, Plaintiffs filed a First Amended Complaint on November 27, 2009, which contained 216 pages and 713 numbered paragraphs. (First Amended Complaint.)

3. The First Amended Complaint prompted several more motions to dismiss from the defendants. (*See* Docket.)

4. On January 22, 2010, the Court “dismis[s]e[d] the fraud allegations arising throughout the Amended Complaint since they [did] not contain the required level of particularity” under Utah Rule of Civil Procedure 9(b). (Ruling Granting in Part the Various Defendants’ Motions to Dismiss, dated January 22, 2010, attached hereto as Ex. A (hereinafter, “January 22, 2010 Order”).)

5. The Court granted Plaintiffs a “*chance to plead fraud within 20 days [of the January 22, 2010 Order] and do it concisely and with particularity.*” (*Id.* (emphasis added).)

6. On March 5, 2010, Plaintiffs filed their Second Amended Complaint (hereinafter “Complaint”), which now contains 361 pages, 48 causes of action and 1362 numbered paragraphs.

7. Then, on March 12, 2010, Plaintiffs filed an 11-page Notice of Errata Regarding Second Amended Complaint.

8. The claims alleged in the Complaint primarily arise from two real property developments: a condominium development on the island of Kauai in Hawaii (the “Hawaii Development”) and an up-scale residential subdivision in Mapleton, Utah called The Preserve at Mapleton (the “Mapleton Development”).

9. In Claim Nos. 1-10, Plaintiffs allege claims related to the Hawaii Development for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent nondisclosure, aiding and abetting fraudulent nondisclosure, conversion, unjust enrichment, conspiracy, and violation of the Utah Pattern of Unlawful Activity Act against the following defendants: David Simpson; Nathan Simpson; Michael Thompson; Todd Dorny; Brandon Dente; Wood Springs, LLC; A.L.S. Properties, LLC; Mai Ke Kula; Hanalei Kai Holdings, LLC; Ka

Mahina, LLC; Dente, LLC; He Kaikolu, LLC; and Koamalu Plantation (collectively, the “Hawaii Development Defendants”).

10. In the fraud-based claims related to the Hawaii Development, Plaintiffs allege that Ken Dolezsar (Plaintiff Mower’s late ex-husband) communicated a number of misrepresentations to Mower. Plaintiffs allege that Dolezsar communicated these misrepresentations to Mower after allegedly hearing them from David Simpson and Nathan Simpson, either “in ignorance of the falsity of the representations or as part of a conspiracy” with the Simpsons. (Complaint ¶ 543.)

11. Nowhere in the fraud allegations associated with the Hawaii Development do Plaintiffs allege that the Simpsons or the other Hawaii Development Defendants made any representations directly to Mower. (Complaint ¶¶ 538-559.)

12. In Claim Nos. 11-20, Plaintiffs allege claims related to the Mapleton Development for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent nondisclosure, aiding and abetting fraudulent nondisclosure, conversion, unjust enrichment, conspiracy, and violation of the Utah Pattern of Activity Act against the following defendants: David Simpson; Nathan Simpson; Wood Springs, LLC; Landmark Real Estate, Inc.; Oak Leaf, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC; Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; David Nemelka; Chad Carlson; 2 Brothers Communications; Allen Hakes; Lonestar Gutters, LLC; Dallas Hakes;

Lonestar Builders, LLC; Michael Marx; and Michael Aviano (collectively, the “Mapleton Development Defendants”).

13. Similar to the fraud claims concerning the Hawaii Development, Plaintiffs allege Dolezsar communicated a number of misrepresentations to Plaintiff Mower concerning the Mapleton Development. Again, Plaintiffs allege that Dolezsar communicated all of the alleged misrepresentations directly to Mower, after allegedly hearing such misrepresentations from David Simpson and Nathan Simpson, and that he did so “as part of a conspiracy with the Simpsons.” (Complaint ¶¶ 721, 731, 734, 739, 757-758, 434, and 975.)

14. Plaintiffs do not allege that the Mapleton Development Defendants made any misrepresentations directly to Mower. (Complaint ¶¶ 717-814.)

15. As part of the claims related to the Mapleton Development, Plaintiffs assert claims on behalf of Magnet Bank, which claims Plaintiffs appear to allege were acquired by Plaintiff Navona, LC in February 2008. (Complaint ¶ 793.)

16. In the Magnet Bank fraud-based claims (Claim Nos. 11, 14, 15, 16, and 20.), Plaintiffs allege that the Mapleton Development Defendants made misrepresentations and material omissions to Magnet Bank in connection with a loan extended by Magnet Bank for the Mapleton Development. (*See generally* Complaint ¶¶ 766 – 811.)

17. In Claim Nos. 21-25, Plaintiffs allege claims for fraud, negligent misrepresentation, breach of fiduciary duty, fraudulent nondisclosure, and conspiracy arising from Mower’s purchase of approximately 30 acres of real property in Springville, Utah (the “Springville Property”). Plaintiffs assert these claims against David Simpson, Nathan Simpson, Wood Springs, and Pheasant Meadows (collectively, the “Springville Property Defendants”).

18. As in the claims related to the Hawaii Development and the Mapleton Development, Plaintiffs allege that Dolezsar, “whether duped by *or complicitous with the Simpsons*,” communicated a number of alleged misrepresentations to Mower with respect to the Springville Property. (Complaint ¶¶ 434, and 1014.)

19. Plaintiffs do not allege that the Springville Property Defendants made any misrepresentations directly to Mower. (Complaint ¶¶ 435, 435, and 1007-1035.)

20. In Claim Nos. 26-30, Plaintiffs allege claims for fraud, negligent misrepresentation, breach of fiduciary duty, fraudulent nondisclosure, and conspiracy against David Simpson and Nathan Simpson, claiming the Simpsons made misrepresentations to Mower through her “representatives” concerning Mapleton Development’s share of costs for the construction of a water tank by Maple Mountain Water Tank Development Company in connection with the Mapleton Development (the “Maple Mountain Water Project”). (*See generally* Complaint ¶¶ 1094-1107.)

21. In Claim Nos. 31-32, Plaintiffs allege claims for breach of fiduciary duty and fraudulent nondisclosure against David Simpson, claiming Simpson failed to disclose to Mower that he used funds from Plaintiff LD III to purchase water shares from a company named Double T Ranch (the “Double T Water Purchase”).

ARGUMENT

I. PLAINTIFFS HAVE AGAIN FAILED TO PLEAD THEIR CLAIMS ACCORDING TO THE PLEADING STANDARDS OF THE UTAH RULES OF CIVIL PROCEDURE.

Under the notice pleading requirements espoused by the Utah Rules of Civil Procedure, plaintiffs are required to set forth their claims for relief in “a short and plain statement . . .

showing that the pleader is entitled to relief.” Utah R. Civ. P. 8(a). Where fraud is at issue, “the circumstances constituting fraud or mistake shall be stated with particularity.” Utah R. Civ. P. 9(a). Together, the purpose of these pleading Rules is “to require that the essential facts upon which redress is sought be set forth with *simplicity, brevity, clarity and certainty* so that it can be determined whether there exists a legal basis for the relief claimed.” *Heathman v. Hatch*, 372 P.2d 990, 992 (Utah 1962) (emphasis added).

As set forth in the Court’s January 22, 2010 Order, Rule 9(b) requires that Plaintiffs allege “who in particular said or represented what to whom in particular, when, where, and how such representations occurred, the specific terminology used, why reliance was reasonable and what particular damages were caused by each discrete action.” (January 22, 2010 Order ¶ 2.) These requirements apply not only to “allegations of common-law fraud,” but extend to “all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term ‘fraud’ in its broadest dimension.” *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982). Thus, Rule 9(b)’s pleading requirements apply to Plaintiffs’ common law fraud claims as well as their claims for aiding and abetting fraud, conspiracy, and violation of the Utah Pattern of Unlawful Practices Act, insofar as they are based on circumstances of fraud.

Despite having now filed three complaints, along with a lengthy “notice of errata,” Plaintiffs have yet again failed to plead their fraud-based claims with the particularity required by Rule 9(b). Rather than providing the necessary particularity, Plaintiffs have merely lengthened their Complaint (which now totals 361 pages and contains 1,362 paragraphs) by an additional 145 pages. For example, Plaintiffs fill 20 pages of their Complaint with “unnecessary detail, if

not minutia”¹ from credit card statements to claim that Defendants David and Nathan Simpson allegedly breached fiduciary duties to Plaintiff LD SQ by authorizing LD SQ to pay for personal expenses. (Complaint ¶¶ 179-198.)

Yet, Plaintiffs routinely fail to provide the necessary particularity with respect to their fraud claims. For example, as part of the fraud claims related to the Mapleton Development, Plaintiffs make the following allegation:

737. David Simpson, Nathan Simpson, and Ken Dolezsar also represented to [Mower] that the \$6,800,000.00 would be specifically used to fund development work at The Preserve at Mapleton development project, that she would receive a first position deed of trust securing a promissory note and that they would record the deed of trust in the office of the Utah County Recorder.

(Complaint ¶ 737.) Plaintiffs do not specify who in particular made the alleged representations or when they were made. These alleged misrepresentations are among several others claimed with respect to the Mapleton Development. As outlined below, Plaintiffs allege that all of the other claimed misrepresentations made to Mower concerning the Mapleton Development were communicated by Dolezsar after he allegedly received information from the Simpsons. (See Complaint ¶¶ 721, 731, 734, and 739.) Without the specifics as to “who in particular said or represented what to whom in particular, when, where, and how such representations occurred” with respect to the alleged misrepresentations in paragraph 737 (see January 22, 2010 Order), the Mapleton Development Defendants are left to guess as to “the substance of the acts constituting the alleged wrong.” *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971-72 (Utah 1982) .

This example, and those that follow, illustrate that Plaintiffs’ Complaint is “much too long and involved” and merely “dumps upon the trial court . . . the burden of sifting through the

¹ See *Coroles v. Sabey*, 2003 UT App 339, ¶ 23, 123 P.3d 674, 674-75 (Utah 2003), cert. denied, 123 P.3d 674, 674-75 (Utah 2003). Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU. Machine-generated OCR, may contain errors.

hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have allege[d] . . . the facts necessary to make all their elements of fraud.” *Coroles v. Sabey*, 2003 UT App 339, ¶¶ 23, 27, 79 P.3d 974 (internal quotations omitted). As Plaintiffs have now failed to properly plead their claims on their third attempt, the Court should dismiss Plaintiffs’ fraud claims without leave to amend. *U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) (denial of leave to amend appropriate after “repeated failure to cure deficiencies by amendments previously allowed”). At a minimum, the Court should dismiss the fraud claims related to Magnet Bank (part of Claim Nos. 11, 14, 15, 16, and 20), the Double T Water Purchase (Claim No. 32), and the Maple Mountain Water Project (Claim Nos. 26, 27, 29, and 30).

A. Plaintiffs Fail to Plead the Fraud Claims of Magnet Bank With the Particularly Required Under Rule 9(b) and the Court’s January 22, 2010 Order.

For example, Plaintiffs allege that David and Nathan Simpson somehow duped an appraiser into using allegedly fraudulent “pre-sales” — which the appraisal itself clarifies were offers — to arrive at the valuation of the Mapleton Development submitted to Magnet Bank in connection with a loan application. (Complaint ¶ 787.) However, Plaintiffs do not plead any allegations to explain what in particular about these offers made them fraudulent. They merely allege, “on information and belief” and without *any* supporting detail, that each of the approximately 15 offers were somehow “contrived sham transactions.” (Complaint ¶¶ 304, 298-303.) Merely labeling the offers as “sham transactions” does not make them so. Plaintiffs do not provide any explanation as to how or when the offers were “contrived.” These conclusory allegations carry no weight under Rule 9(b).

Plaintiffs also conclusorily allege that the Simpsons submitted false financial statements to Magnet Bank in connection with the loan application. (Complaint ¶¶ 766-777.) Without making any attempt to explain how, Plaintiffs merely allege that David Simpson and Nathan Simpson's financial statements overstated their assets and understated their liabilities. (Complaint ¶¶ 352, 353, 355, 771-773.) Plaintiffs fail to specify which of the several assets listed in the statements in particular was overvalued, by how much each such asset was overvalued, or why each such asset was otherwise improperly included. Plaintiffs further fail to specify what liabilities in particular were understated or otherwise not included, and the amount of each such liability. Plaintiffs conclusorily allege that the financial statements did not reflect unspecified money allegedly owed by the Simpsons to Mower, but provide no explanation as to what debt they refer, how much money was owed, or how the money was owed — such as money possibly owed through one of the several entities listed in the financial statements. (Complaint ¶ 774.) Rule 9(b) requires that this detail be pleaded “so that there will be a clearly defined foundation upon which further proceedings . . . can go forward in an orderly manner.” *Heathman*, 372 P.2d at 992.

Plaintiffs further allege the Simpsons and Defendant Aviano falsely represented to Magnet Bank that the sales price for Aviano's purchase of Lot 76 in the Mapleton Development was \$900,000. (Complaint ¶¶ 794-811.) Even though they admit that Magnet Bank actually received \$900,000 from the sale, Plaintiffs allege that the sales price was misrepresented because Aviano allegedly only paid \$575,000 and the Simpsons allegedly paid the rest. (Complaint ¶¶ 802-03.) However, Plaintiffs fail to explain how Magnet Bank's position changed as a result. As Magnet Bank had already funded the loan with respect to the Mapleton Development prior to

the Aviano sale, Plaintiffs cannot claim that Magnet Bank somehow relied on the Aviano sale to fund the loan. Furthermore, Plaintiffs make no attempt to allege “what particular damages were caused” by the Aviano sale. (*See* January 22, 2010 Order ¶ 2.) These allegations do not meet the requirements in Rule 9(b) or the Court’s Order.

In short, the Magnet Bank claims have not been pleaded with particularity and must be dismissed.

B. Plaintiffs Also Fail to Plead Their Fraud Claims With Respect to the Double T Ranch Water Purchase With Rule 9(b) Particularity.

Plaintiffs allege that David Simpson fraudulently failed to disclose a number of alleged material facts to Mower concerning his alleged purchase of Double T Ranch’s water shares. (Complaint ¶¶ 1175-79.) However, Plaintiffs completely fail to allege how such nondisclosures resulted in any damage. Instead, Plaintiffs merely allege without any detail that they were somehow damaged in the amount of \$300,125.00. (Complaint ¶¶ 1182-83.) This does not comply with Rule 9(b) or the Court’s January 22, 2010 Order.

C. Plaintiffs Have Not Pleaded With Particularity Their Fraud Claims Concerning the Maple Mountain Water Project.

A final example of Plaintiffs’ failure to plead required details is found in the fraud claims related to the Maple Mountain Water Project. Plaintiffs generally allege that “[b]etween November 15, 2007 and April 23, 2008, David Simpson and Nathan Simpson repeatedly solicited [Mower] and her representatives claiming [the] Simpsons needed funds to pay due and past due bills of the Preserve” and that Mower provided money in response to these solicitations, which money Plaintiffs claim was used for unauthorized purposes. (Complaint ¶¶ 485, 1099, and 1103.) This allegation is obviously lacking the detail required by Rule 9(b). Plaintiffs

cryptically attempt to bolster this general allegation by alleging that on two occasions the Simpsons falsely told Mower's son that the Mapleton Development needed funds to satisfy its share of the costs for the Maple Mountain Water Project, which alleged false statements were related to Mower. (Complaint ¶¶ 1094-1096.) However, Plaintiffs fail to allege what specific actions were taken in reliance on the alleged misrepresentations, when those actions were taken, and "what particular damages were caused by each [of these] discrete action[s]." (January 22, 2010 Order ¶ 2.) Thus, the Court and the defendants are left to guess what Mower did in response to these alleged misrepresentations and how it damaged her.

As illustrated by the foregoing, Plaintiffs' 361-page Complaint remains deficient and should be dismissed without leave to amend.

II. PLAINTIFFS' FRAUD-BASED CLAIMS RELATED TO KEN DOLEZSAR MUST BE DISMISSED UNDER RULE 19(b) FOR FAILURE TO JOIN DOLEZSAR'S ESTATE.

The allegations in the Complaint demonstrate that Dolezsar is the central figure in this case. Plaintiffs affirmatively plead that Mower received all of her information regarding the Hawaii Development, the Mapleton Development, and the Springville Property from Dolezsar, her late ex-husband. Indeed, each of the representations of which Plaintiffs complain with respect to these projects was made by Dolezsar as a member of some alleged conspiracy to defraud her.

Yet, Dolezsar is not a party to this case. Plaintiffs allege that Dolezsar was murdered in Sandy, Utah on November 15, 2007. (Complaint ¶ 400.) This case was filed in October 2009, long after the expiration of the one year statute of limitations for claims against Dolezsar's estate. See Utah Code Ann. § 75-3-803(a). Thus, Plaintiffs did not, and cannot, join Dolezsar's estate

to this case, preventing the other defendants from asserting their claims against Dolezsar and from otherwise requiring Dolezsar to account for his alleged actions by way of deposition or trial testimony. Under these circumstances, the fraud-based claims related to the Hawaii Development (Claim Nos. 1, 4-6, 9, and 10), the Mapleton Development (Claim Nos. 11, 14-16, 19, and 20), and the Springville Property (Claim Nos. 21, 22, 24, and 25) cannot proceed in equity and good conscience in Dolezsar's absence. Such claims must therefore be dismissed under Rule 19.

Rule 19 of the Utah Rules of Civil Procedure requires joinder of "necessary" parties where feasible, and dismissal of the action in the absence of "indispensable" parties. Utah R. Civ. P. 19(a)-(b); *Turville v. J&J Props., L.C.*, 2006 UT App 305, ¶¶ 36-37, 145 P.3d 1146. Analysis under Rule 19 proceeds in two steps: First, the Court must determine whether an absent party is necessary to the "just adjudication" of the action. Second, where an absent party is found to be necessary to the action, but cannot feasibly be joined, the Court must determine whether such party is indispensable such that the action must be dismissed in his absence. *Turville*, 2006 UT App 305, at ¶¶ 36-37.

A. Dolezsar Is Necessary to This Action Because Complete Relief Cannot Be Accorded the Parties in His Absence.

A party is necessary to an action if "in [the party's] absence complete relief cannot be accorded among those already parties." Utah R. Civ. P. 19(a). Complete relief is not possible in the absence of a party who was primarily involved in the alleged conduct that caused the plaintiff's damages. *Turville*, 2006 UT App 305, ¶ 40. For example, in the case of *Turville v. J&J Properties, L.C.*, the plaintiff brought contract, fraud, conspiracy, and other claims against a

company and its members related to a dispute concerning two real estate transactions. *Id.* at ¶¶ 2-8. One of the defendants, named Clark, died before he was served with the complaint. *Id.* at ¶¶ 9-10. After the plaintiff failed to join Clark's estate into the case, the other defendants moved the court to dismiss the complaint for failure to join Clark's estate as a necessary and indispensable party. *Id.* at ¶¶ 10, 17. Clark was the person with whom the plaintiff had primarily dealt. *Id.* at ¶¶ 3-6. Noting his "pivotal representative role . . . in the transactions at issue," the trial court found that Clark was a necessary party to the case. *Id.* at ¶ 9. The Utah Court of Appeals affirmed, holding that Clark was a necessary party because he was primarily involved in the conduct that led to the plaintiff's alleged damages and, therefore, complete relief could not be accorded among the parties in his absence. *Id.* at ¶ 40.

Dolezsar is a necessary party to this action as complete relief cannot be accorded to the parties in his absence. As did Clark in the *Turville* case, Dolezsar is alleged to have played a "pivotal representative role" in the misrepresentations alleged by Plaintiffs. Plaintiffs have affirmatively pleaded that all of the alleged misrepresentations related to the Hawaii Development, the Mapleton Development, and the Springville Property were made to Mower directly by Dolezsar, who Plaintiffs allege was a coconspirator with the Simpsons. (Complaint ¶ 975.) For example, with respect to the Hawaii Development, Plaintiffs allege that Dolezsar made the misrepresentations of which Plaintiffs complain to Mower, after hearing them from the Simpsons, either "in ignorance of the falsity of the representations *or as part of a conspiracy.*" (Complaint ¶ 543 (emphasis added).) Nowhere in the fraud allegations associated with the Hawaii Development do Plaintiffs allege that the Hawaii Development Defendants made any representations directly to Mower (Complaint ¶¶ 538-559). All of the alleged

misrepresentations with respect to the Hawaii Development were communicated to Mower by Dolezsar. (*Id.*) At most, Plaintiffs allege that the Hawaii Development Defendants instructed Dolezsar to make the misrepresentations to Mower. (Complaint ¶ 542.) Accordingly, Plaintiffs' allegations establish that Dolezsar was the nexus for all of the conduct that Plaintiffs allege caused them damage.

The same is true for the fraud claims related to the Mapleton Development and the Springville Property. With respect to the Mapleton Development, Plaintiffs again allege that Dolezsar made all of the alleged misrepresentations to Mower "as part of a conspiracy with the Simpsons." (Complaint ¶¶ 721, 731, 734, 739, 757-758, and 434.)² Plaintiffs do not allege that the Mapleton Development Defendants made any misrepresentations directly to Mower. (Complaint ¶¶ 717-814.) Likewise, Plaintiffs allege that Dolezsar, "whether duped by *or complicitous with the Simpsons*," made the alleged misrepresentations to Mower with respect to the Springville Property. (Complaint ¶¶ 434, 435, 1014.) Plaintiffs do not allege that the Springville Property Defendants made any misrepresentations directly to Mower. (Complaint ¶¶ 435, 435, 1007-1035.)

Scrutiny of Plaintiffs' Complaint thus shows that Dolezsar is alleged to be the primary perpetrator of Plaintiffs' claimed wrongs. Surely, had Dolezsar been alive when Plaintiffs filed this case, they would have named and served him as a defendant. However, Dolezsar's untimely death left Plaintiffs looking for other sources of recovery, leading to the 361-page Complaint before the Court, which is completely devoid of any alleged misrepresentations made to Mower

² As noted in Part I.A above, Magnet Bank's fraud claims related to the Mapleton Development have not been pleaded with particularity and must be dismissed.

by anyone other than Dolezsar. Plaintiffs apparently base their allegations that the other defendants were somehow involved in the alleged fraud solely on Dolezsar's statements to Mower. However, the parties will not be able to question Dolezsar concerning the origin of his alleged statements due to his untimely death. Moreover, none of the other defendants in this case may proceed with their claims against Dolezsar's estate because Plaintiffs failed to bring this case until after the applicable probate statute of limitations had run. Therefore, as the party primarily responsible for the damages claimed by Plaintiffs, Dolezsar's absence will prevent the Court from according complete relief among the other parties in this case. Consequently, as was Clark's estate in the *Turville* case, the estate of Dolezsar is a necessary party to this action under Rule 19(a).

B. Dolezsar Is Indispensable Because This Action Cannot Proceed In Equity And Good Conscience Without Him.

Where a necessary party cannot be feasibly joined, and the action cannot proceed "in equity and good conscience" in his absence, the party is deemed "indispensible," and the action "should be dismissed." Utah R. Civ. P. 19(b). Rule 19(b) instructs the Court to consider the following factors in deciding whether equity and good conscience require dismissal:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him *or those already parties*; second the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Utah R. Civ. P. 19(b) (emphasis added).

Applying these factors, the *Turville* court held that Clark's estate was an indispensable party and, therefore, the case was properly dismissed in its absence. *Turville*, 2006 UT App 305,

at ¶¶ 41-42. Clark's estate could no longer be joined to the action because the probate statute of limitations had already run. *Id.* at ¶ 41. Because Clark was the "major" party responsible for the alleged damages, the court concluded that "a judgment rendered in [the Estate of Mr. Clark's] absence w[ould] prejudice . . . those already parties' to the action" and "would be less than adequate." *Id.* at ¶ 42. Additionally, as all claims against Clark's estate, whether those of the plaintiff or those of the other defendants, were barred by the statute of limitations, "protective judgment provisions would not ameliorate [the] prejudice." *Id.* Accordingly, the court held that allowing the case to proceed despite the nonjoinder of Clark's estate "would violate the principles of 'equity and good conscience.'" *Id.* (quoting Utah R. Civ. P. 19(b)). Accordingly, the court affirmed the dismissal of the case. *Id.*

As in the *Turville* case, the principles of equity and good conscience mandate that Plaintiffs' fraud-based claims relating to the Hawaii Development, the Mapleton Development, and the Springville Property be dismissed in Dolezsar's absence. Due to his untimely death, Dolezsar cannot be joined to this action. Dolezsar's estate also cannot be joined because Plaintiffs failed to bring this lawsuit within the period of limitations set forth in the Utah Uniform Probate Code. *See* Utah Code Ann. § 75-3-803(a).

1. Any Judgment Rendered in Dolezsar's Absence Will Result in Unavoidable Prejudice to the Other Defendants in This Case.

Dolezsar is the central figure with respect to the fraud-based claims involving the Hawaii Development, the Mapleton Development, and the Springville Property. Plaintiffs have specifically alleged that *all* of the claimed misrepresentations made to Mower were communicated to her by Dolezsar. Thus, as was Clark in *Turville*, Dolezsar is the "major" party

responsible for the damages alleged in the Complaint. To the extent Plaintiffs attempt to somehow impute any of Dolezsar's alleged misrepresentations to the other defendants, they do so based solely on hearsay statements made by Dolezsar. As a result of his death, the other defendants will be unable to require Dolezsar to account for his alleged conduct at a deposition or a trial in this matter. There are no protective provisions or other measures to remedy this problem. Consequently, this action cannot proceed to a judgment in Dolezsar's absence without resulting in unfair prejudice to the other defendants.

2. Any Judgment Rendered in Dolezsar's Absence Will Be Inadequate.

Plaintiffs failed to bring this lawsuit before the statute of limitations expired with respect to claims against Dolezsar's estate. As a result, neither Plaintiffs nor any of the defendants can bring their related claims against Dolezsar's estate. Of course, the Hawaii Development Defendants, the Mapleton Development Defendants, and the Springville Property Defendants vigorously dispute that they made any misrepresentations to Dolezsar. To the extent liability could somehow be imputed to them based on Dolezsar's alleged misrepresentations, these defendants would seek to assert cross-claims against Dolezsar's estate. However, because Plaintiffs delayed in bringing this lawsuit until after the statute of limitations had run, any such cross-claims would likely be barred. Accordingly, any judgment on the fraud-claims related to the Hawaii Development, the Mapleton Development, or the Springville Property will be inadequate.

3. Plaintiffs Will Retain Adequate Remedies After Dismissal of the Dolezsar Fraud Claims.

Plaintiffs have asserted 48 causes of action in this case, including claims for breach of contract, quasi contract, fiduciary duty, conversion, and unjust enrichment in addition to their fraud-based claims. These claims provide an adequate remedy for the wrongs alleged by Plaintiffs in their Complaint. Moreover, any possible deficiency is the result of Plaintiffs' failure to bring the fraud-based claims within the limitations period. Plaintiffs should not be allowed to wait until after the central figure in the case can no longer be joined to seek recovery from others who are alleged only to have acted in concert with him.

Accordingly, applying the factors outlined in Rule 19(b), the principles of equity and good conscience dictate that Plaintiffs' fraud based claims related to the Hawaii Development, the Mapleton Development, and the Springville Property be dismissed in the absence of Dolezsar and his estate, both indispensable parties to this action.

III. PLAINTIFFS' FRAUDULENT NONDISCLOSURE CLAIM CONCERNING THE DOUBLE T RANCH WATER PURCHASE MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM.

"A party is liable for fraudulent nondisclosure if he 'omi[ts] . . . a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, *with actual, justifiable reliance resulting in damage to that party.*" *Barber Bros. Ford, Inc. v. Foianini*, 2008 UT App 463, ¶ 2 (emphasis added).

In Plaintiffs' fraudulent nondisclosure claim related to the Double T Ranch Water Purchase, Plaintiffs allege that David Simpson fraudulently failed to disclose to Mower that he had used money from Plaintiff LD III to purchase water shares in the name of Defendant Wood

Springs, as well as other alleged happenings subsequent to the alleged purchase. (Complaint ¶¶ 1176-79.) However, Plaintiffs fail to allege Mower relied on these alleged fraudulent nondisclosures, or for that matter, how Mower could possibly have relied on these nondisclosures — each of which allegedly took place after the purchase of the Double T Ranch water shares — to her detriment. (Complaint ¶¶ 1176-79.) Instead, Plaintiffs simply allege that Simpson's failure to disclose somehow damaged Mower and LD III in the amount of \$300,125.00. (Complaint ¶ 1182.)

Having failed to plead justifiable reliance resulting in damages, Plaintiffs' fraudulent disclosure claim with respect to the Double T Ranch water shares fails as a matter of law. This claim is nothing more than Plaintiffs' attempt to turn an alleged breach of fiduciary duty into a fraud claim.

IV. PLAINTIFFS' AIDING AND ABETTING CLAIMS HAVE NOT BEEN RECOGNIZED AS VALID CLAIMS UNDER UTAH LAW AND SHOULD BE DISMISSED ACCORDINGLY.

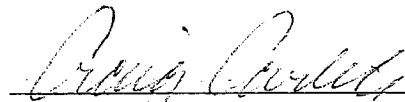
In Claim Nos. 3, 5, 13, and 15, Plaintiffs purport to allege claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent nondisclosure. However, claims for aiding and abetting have not been recognized by Utah Courts. *See Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (declining to decide whether claims for aiding and abetting breach of fiduciary duty and fraud are cognizable under Utah law). To the extent Plaintiffs wish to broaden their net with respect to claims for breach of fiduciary duty and fraud, they should be required to prove their claims for conspiracy and violation of the Utah Pattern of Unlawful Activity Act, which have been recognized as valid causes of action under Utah law.

CONCLUSION

For all of the reasons set forth above, Plaintiffs' fraud-based claims should be dismissed for failure to plead with particularity as required by Rule 9(b) and failure to join an indispensable party under Rule 19(b). Additionally, Plaintiffs' fraud claims with respect to the alleged purchase of water shares from Double T Ranch, as well as their "aiding and abetting" claims, should be dismissed for failure to state a claim under Utah law.

DATED this 13th day of April, 2010.

RAY QUINNEY & NEBEKER P.C.



Craig Carlile

Caleb J. Frischknecht

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was mailed by First Class U.S. Mail, postage prepaid, on this 13 day of April, 2010 to the following:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058

Steven R. Sumsion
Spencer MacDonald
Daniel M. Woods
SUMSION & MACDONALD
86 North University Avenue, #400
Provo, Utah 84601-4420

Mark D. Eddy
Morgan L. Cummings
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Pleasant Grove Blvd., Suite 202
Pleasant Grove, Utah 84062

Julian D. Jensen
Attorney at Law
311 South State Street, #380
Salt Lake City, Utah 84111

Jonathan L. Jaussi
Joshua P. Langeland
P.O. Box 460
Payson, Utah 84651

Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84604

Christopher A. Scharman
Vantus Law Group
3165 East Millrock Drive, #160
Salt Lake City, Utah 84121

Laura S. Scott
Parsons Behle & Latimer
201 South Main Street, #1800
P.O. Box 45898
Salt Lake City, Utah 84145

A handwritten signature in cursive script, reading "Rhonda Bartholomew", is written over a horizontal line.

1078696v2

Tab 5

4TH JUDICIAL DISTRICT COURT
PROVO, UTAH
2017-05-12 P 3:40

Craig Carlile (0571)
Caleb J. Frischknecht (11648)
RAY QUINNEY & NEBEKER P.C.
86 North University Avenue, #430
Provo, Utah 84601-4420
Telephone: (801) 342-2400

Attorneys for Defendants David R. Simpson, Nathan R. Simpson, Michael K. Thompson, Todd Dorny, Brandon Dente, ALS Properties, LLC, Mai Ke Kula, LLC, Hanalei Kai Holdings, LLC, Ka Mahina, LLC, He Kiakolu, LLC, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, an individual; et al.,

Plaintiff,

v.

DAVID R. SIMPSON, an individual; et al.,

Defendants

and

KOAMALU PLANTATION INVESTMENT,
LLC, a Utah limited liability company, et al.,

Rule 19 Defendants.

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Civil No: 090403844

Judge: Samuel D. McVey

Pursuant to Rule 7(c) of the Utah Rules of Civil Procedure, Defendants David R. Simpson, Nathan R. Simpson, Todd Dorny, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ

Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman (collectively, “Defendants”¹) submit the following reply memorandum in support of their Motion to Dismiss Second Amended Complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ARGUMENT	5
I. THE COURT SHOULD REJECT PLAINTIFFS’ ATTEMPT TO MEET RULE 9(b)’S PLEADING STANDARD WITH LABELS AND CONCLUSIONS.	5
A. Plaintiffs Improperly Lump David Simpson, Nathan Simpson, and Others Together in Levying Allegations of Fraud.	6
B. Plaintiffs’ Fraud Claims Related to Magnet Bank Are Based on Labels and Conclusions Rather Than Properly Pleaded Facts.	8
C. Plaintiff’s Fail to Properly Plead Any Damages Resulting From the Alleged Fraudulent Nondisclosures Concerning the Double T Ranch Water Purchase.	11
D. Plaintiffs Have Not Pleaded the Required Particularity Within Their Fraud Claims Concerning the Maple Mountain Water Project.	12

¹ Counsel for Defendants inadvertently used an outdated pleading header, and consequently, did not include Defendants Michael K. Thompson, Brandon Dente, ALS Properties, LLC, Mai Ke Kula, LLC, Hanalei Kai Holdings, LLC, Ka Mahina, LLC, and He Kiakolu, LLC in filing the Motion to Dismiss. These defendants are filing a motion for joinder contemporaneously herewith and are included in the term “Defendants” as used in Defendants’ supporting memoranda. The outdated header also mistakenly listed “Oak Leaf, LLC” as “Oak Leaf Investments, LLC.” Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

II.	PLAINTIFFS' COMPLAINT DEMONSTRATES THAT DOLESZAR IS AN INDISPENSIBLE PARTY TO THIS CASE, REQUIRING DISMISSAL OF THE FRAUD CLAIMS IN HIS ABSENCE.....	13
A.	The Allegations in Plaintiffs' Complaint Establish That Dolezsar Is the Central Figure in This Case and Is Necessary to Its Just Adjudication.....	13
B.	Application of the Factors in Rule 19(b) Demonstrates that Plaintiffs' Fraud Claims Cannot Proceed in Equity and Good Conscience in Dolezsar's Absence.	15
1.	Defendants Will Be Unfairly Prejudiced If Plaintiffs Are Allowed to Proceed With Their Fraud Claims in Dolezsar's Absence.....	16
2.	Prejudice to Defendants Cannot Be Avoided By Any Protective Measures.....	18
3.	The Court Cannot Render An Adequate Judgment on Plaintiffs Fraud Claims in Dolezsar's Absence.	19
4.	Plaintiffs Have An Adequate Remedy In This Case.....	20
III.	THE COMPLAINT DOES NOT STATE A CLAIM FOR FRAUDULENT NONDISCLOSURE WITH RESPECT TO THE DOUBLE T RANCH WATER PURCHASE.	20
IV.	THE COURT SHOULD DECLINE TO CREATE NEW CAUSES OF ACTION FOR AIDING AND ABETTING, WHICH HAVE NOT BEEN RECOGNIZED AS VALID CLAIMS UNDER UTAH LAW.....	21
	CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009)	5, 9
<i>Barber Bros. Ford, Inc. v. Foianini</i> , 2008 UT App 463.....	21

<i>Chang v. Soldier Summit Development</i> , 1999 UT App 27	10
<i>Cook v. Zions First Nat'l Bank</i> , 645 F. Supp. 423 (D. Utah 1986)	6, 7
<i>Coroles v. Sabey</i> , 2003 UT App 339, 79 P.3d 974	5, 10, 12, 21
<i>Davis v. United States</i> , 343 F.3d 1282 (10th Cir. 2003)	19
<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995)	5
<i>Gardiner v. Virgin Islands Water & Power Auth.</i> , 145 F.3d 635 (3d Cir. 1998)	17
<i>Giusti v. Sterling Wentworth Corp.</i> , 2009 UT 2, 201 P.3d 966	10
<i>Glenny v. Am. Metal Climax, Inc.</i> , 494 F.2d 651 (10th Cir. 1974)	16
<i>Kemp v. Murray</i> , 680 P.2d 758 (Utah 1984)	17
<i>Kuhre v. Goodfellow</i> , 2003 UT App 86, 69 P.3d 286	8
<i>Nottingham v. Gen. Am. Commc'ns Corp.</i> , 811 F.2d 873 (5th Cir. 1987)	18
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	17, 19
<i>Roth v. Pederson</i> , 2009 UT App 313	6, 8
<i>Turville v. J & J Properties, L.C.</i> , 2006 UT App 305, 1445 P.3d 1146	14, 15, 16, 17, 18, 20
<i>U.S. ex rel. Ritchie v. Lockheed Martin Corp.</i> , 558 F.3d 1161 (10th Cir. 2009)	6
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982)	5
<i>Yazd v. Woodside Homes Corp</i> , 2006 UT 46	20, 21

Statutes

Utah Code Ann. § 75-3-108	17
Utah Code Ann. § 75-3-803	15, 17, 19

Treatises

<i>Moore's Federal Practice</i> § 9.03[1][g] (3d ed. 2010)	8
--	---

ARGUMENT

I. THE COURT SHOULD REJECT PLAINTIFFS' ATTEMPT TO MEET RULE 9(b)'S PLEADING STANDARD WITH LABELS AND CONCLUSIONS.

In their opposition memorandum, Plaintiffs accuse Defendants of failing to “read and comprehend” Plaintiff’s Complaint, which contains 361 pages and 1362 individually numbered paragraphs, and of narrowly construing the Complaint “in the most narrow manner possible.” (See Mem. in Opp’n 6, 9.) Plaintiffs essentially argue that the pleading deficiencies in their fraud claims should be excused because the allegations in the Complaint “must be read broadly and all reasonable inferences must be taken in Plaintiffs’ favor.” (See Mem. in Opp’n 9.)

However, “[the Rule 12(b) standard] does not apply to actions for fraud.” *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995). Rather, “Rule 9(b) of the Utah Rules of Civil Procedure Requires that fraud claims be pled with particularity.” *Id.* Rule 9(b) imposes a “basic and fundamental requirement . . . of clarity and conciseness,” mandating that “the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity, and certainty so that it can be determined whether there exists a legal basis for the relief claimed.” *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (quoting *Heathman v. Hatch*, 372 P.2d 990, 992 (Utah 1962)). Mere pleading of labels and conclusions, such as “false statements” or “fraud,” does not satisfy this standard. *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (condemning pleading of “labels and conclusions” that “do not permit the court to infer more than a mere possibility of misconduct”).

As outlined below, Plaintiffs’ opposition memorandum only highlights the deficiencies in their fraud claims. Plaintiffs have now failed on their third attempt to properly plead their fraud

claims. Accordingly, the Court should dismiss those claims with prejudice. *U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) (denial of leave to amend appropriate after “repeated failure to cure deficiencies by amendments previously allowed”); *see, e.g., Roth v. Pederson*, 2009 UT App 313 (affirming dismissal with prejudice of fraudulent concealment claim for failure to plead with particularity).

A. Plaintiffs Improperly Lump David Simpson, Nathan Simpson, and Others Together in Levying Allegations of Fraud.

The particularity requirements of Rule 9(b) “[are] especially important in cases involving multiple defendants.” *Cook v. Zions First Nat’l Bank*, 645 F. Supp. 423, 424 (D. Utah 1986). “[E]ach defendant is entitled to know precisely what it is the plaintiff claims he did wrong.” *Id.* Accordingly, in its January 22, 2010 Order, the Court required that Plaintiffs plead facts showing “who in particular said or represented what to whom in particular.” (January 22, 2010 Ruling Granting in Part the Various Defendants’ Motions to Dismiss (the “January 22, 2010 Order”) ¶ 2.) Lumping multiple defendants together into allegations of fraud does not meet this requirement and constitutes grounds for dismissal. *See Cook*, 645 F. Supp. at 424-25 (dismissing with prejudice fraud claims where plaintiffs failed on third attempt to “allege specifically the factual basis upon which they charge *each defendant* with fraud.” (emphasis added)).

Throughout the Complaint, Plaintiffs consistently lump David Simpson and Nathan Simpson (and sometimes others) together in levying Plaintiffs’ allegations of fraud. (*See, e.g.,* Complaint ¶¶ 542, 720, 726, 737, 743, 757-58, 1014, 1094, 1096, and 1099.) As cited in

Defendants' initial memorandum, paragraph 737 of the Complaint exemplifies this improper practice:

737. David Simpson, Nathan Simpson and Ken Dolezsar also represented to Leslie that the \$6,800,000.00 would be specifically used to fund development work at The Preserve at Mapleton development project, that she would receive a first position deed of trust securing a promissory note and that they would record the deed of trust in the office of the Utah County Recorder.

(Complaint ¶ 737.) Plaintiffs fail to plead “who in particular” made the claimed misrepresentations alleged in paragraph 737 and when such misrepresentations were made. The importance of these missing details is highlighted by the fact that all of the other claimed misrepresentations were allegedly made to Mower by Dolezsar “acting on authorization and instructions from David Simpson and Nathan Simpson, or as part of a conspiracy with David Simpson and Nathan Simpson.” (*See, e.g.*, Complaint ¶¶ 721, 731, 734, and 739.)

Plaintiffs argue that the allegations in paragraph 737 are proper because “David Simpson and Nathan Simpson, father and son, would speak for each other.” (Mem. in Opp’n 8.) Unsurprisingly, Plaintiff offers no authority and no explanation for this proposition. Plaintiff’s lumping of David Simpson, Nathan Simpson, and others in the fraud allegations violates the pleading requirements of Rule 9(b) and constitutes grounds for dismissal. *See Cook*, 645 F. Supp. at 424-25.

Plaintiffs also try to salvage the defective representations in Paragraph 737 by claiming that they somehow “refer to the allegations contained in paragraph 736.” (Mem. in Opp’n 8.) In its entirety, paragraph 736 reads as follows:

736: The representations described in paragraph 315 were false as follows:

a. The \$6,800,000.00 loan could not be repaid in twelve months; and

b. David Simpson and Nathan Simpson could not pay [Mower] \$250,000.00 from the sale of each lot, nor did they intend to pay [Mower] \$250,000.00 from the sale of each lot.

(Complaint ¶ 737.) Nothing in this paragraph, or in paragraph 737, suggests that the alleged representations in paragraph 737 refer in any way to the allegations in paragraph 736. This after-the-fact attempt to prop up Plaintiffs' insufficient allegations should be rejected.

B. Plaintiffs' Fraud Claims Related to Magnet Bank Are Based on Labels and Conclusions Rather Than Properly Pleaded Facts.

Plaintiffs have not properly pleaded a factual basis for their claim that the offers referenced in the appraisal submitted by Free and Associates to Magnet Bank were "sham-real-estate-transactions." (Complaint ¶ 304.) Rather, Plaintiffs merely allege, "on information and belief," that each of the approximately 15 offers were somehow "contrived sham transactions." (Complaint ¶ 304, 300-03.) However, fraud allegations made on information and believe are sufficient for Rule 9(b) purposes only if Plaintiffs "include[] the facts upon which the belief is based." *Roth v. Pedersen*, 2009 UT App 313, ¶ 8 (citing *Kuhre v. Goodfellow*, 2003 UT App 86, ¶ 24, 69 P.3d 286); *see also* 2 *Moore's Federal Practice* § 9.03[1][g] (3d ed. 2010) ("Pleadings alleging fraud usually may not be based on information and belief.").

Plaintiffs do not plead *any* facts demonstrating a basis for their "information and belief" that the offers were somehow "sham transactions." They simply assert the conclusion.

Plaintiffs do not provide any additional basis for such “belief” in their opposition memorandum, in which they conclusorily claim that the offers “were not real offers” and that they must have been made “with the intention of artificially raising the values of the real property.” (Mem. in Opp’n 12.) Moreover, other allegations in the Complaint directly contradict Plaintiffs’ “belief” that the offers were “sham transactions.” For example, Plaintiffs admit that because the debris collection basin remains unfinished, “The Preserve at Mapleton development cannot be completed,” which would obviously prevent the offers from progressing to completed sales. (See Complaint ¶ 381.) Indeed, the Free and Associates appraisal specified that the offers would not close until the lots were finished. (Mem. in Opp’n 10-11 (“Closing Date: Current Offer, to close when lots are finished.”).)

In short, Plaintiffs’ fraud claim related to the offers referenced in the appraisal is based merely on unsupported labels and conclusions, which are insufficient to satisfy the requirements of Rule 9(b). See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (condemning pleading of “labels and conclusions” that “do not permit the court to infer more than a mere possibility of misconduct”)

Plaintiffs’ fraud allegations also fail with respect to the financial statements provided by the Simpsons in connection with the Magnet Bank loan. Plaintiffs argue that even a “ cursory reading” of the 361-page Complaint would provide the details lacking in the allegations contained within this claim for fraud in paragraph 176-780. Plaintiffs then refer the Court and Defendants to allegations found in paragraphs 323-325 (a little more than halfway into the general facts section), which Plaintiffs’ claim supply the missing details. However, nowhere in paragraphs 767-780 do Plaintiffs refer to paragraphs 323-325. Apparently, Plaintiffs expect the

Court and Defendants to “sift[] through hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have allege[d] . . . facts necessary to make all their elements of fraud.”

Coroles, 2003 UT App 339, ¶ 27. “This method for pleading fraud is unacceptable under rule 9(b), especially in a complaint of such enormous length.” *Id.* at ¶ 26.

Finally, Plaintiffs assert they have properly pleaded their fraud claim related to Defendant Aviano’s purchase of Lot 76 by arguing that “[t]here is no requirement that Plaintiffs show as part of a fraud claim that Magnet Bank changed its position.” (Mem. in Opp’n 14.) However, this is the very essence of fraud under Utah law, which requires that Plaintiffs prove that they did in fact rely on the alleged misrepresentations “and [were] thereby induced to act . . . to [their] injury and damage.” *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 53 n.38, 201 P.3d 966; *see, e.g., Chang v. Soldier Summit Development*, 1999 UT App 27, ¶ 7 (affirming summary judgment on fraud claim where only evidence of reliance was that plaintiffs “did not ‘worry about the progress of the project’”). Consequently, Plaintiffs must allege “what particular damages were caused by each discrete action” taken in reliance on the alleged misrepresentations to satisfy Rule 9(b). (January 22, 2010 Order.)

Plaintiffs do not allege any facts showing what damages were caused to Magnet Bank by each discrete action allegedly taken in reliance on the claimed misrepresentation concerning the price paid by Aviano. (See Complaint ¶¶ 794-811.) Plaintiffs allege that “[i]f Magnet Bank had known the actual selling price, it would not have allowed the sale to go forward.”² (Complaint ¶ 806.) However, Plaintiffs do not allege what damages in particular were caused by Magnet

² Defendants are unable to find any allegation in the Complaint that “had Magnet Bank and its participating bank known the truth, they would have at the very least insisted on payment of the previously agreed release price of \$1,020,000.00,” as claimed in Plaintiffs’ opposition memorandum. (Mem. in Opp’n 15.)

Bank's allowing the sale to go forward.³ Plaintiffs also allege that had Magnet Bank known the alleged "true" purchase price, it would have "taken steps to protect the collateral and the loan" and it "would have called the loan due." (Complaint ¶¶ 806, 808.) But, Plaintiffs do not allege what damages resulted from Magnet Bank's not taking the unidentified steps to "protect the collateral" and not calling the loan due.⁴ Indeed, with respect to damages concerning the Aviano sale, Plaintiffs only generally allege as follows:

811. As a direct and proximate result of David Simpson's, Nathan Simpson's and Michael Aviano's misrepresentations, as described in this cause of action, Leslie, LD III and Navona were damaged in the amount of at least \$24,827,892.39.

(Complaint ¶ 811.) This does not satisfy the mandate of Rule 9(b) and the Court's January 22, 2010 Order that Plaintiffs alleged "what particular damages were caused by each discrete action" taken in reliance on the alleged misrepresentations.

Accordingly, the Magnet Bank fraud claims should be dismissed with prejudice.

C. Plaintiff's Fail to Properly Plead Any Damages Resulting From the Alleged Fraudulent Nondisclosures Concerning the Double T Ranch Water Purchase.

In its opening memorandum, Defendants argued that the fraud claims related to the Double T Ranch Water Purchase should be dismissed because Plaintiffs failed to allege how the claimed nondisclosures resulted in any damages. (Mem. in Supp. 14.) In response, Plaintiffs

³ Belying any damage claim in this regard, Plaintiffs have affirmatively pleaded that Magnet Bank "received payment of \$900,000.00 toward the purchase of Lot 67, but did not release its security interest." (Complaint ¶¶ 410, 802.) Moreover, assuming Plaintiffs' allegations that the values of the lots were artificially inflated are true, Magnet Bank was actually better off by receiving \$900,000 instead of the "true" purchase price of \$575,000.

⁴ Moreover, Plaintiffs do not explain what steps Magnet Bank would have taken to "protect the collateral," particularly in light of the fact that it did not release its security interest on the lot. (Complaint ¶¶ 410.) Indeed, Plaintiff LD III has since acquired fee title to the property in a trustee's sale. (Complaint ¶ 426.) Plaintiffs also do not explain how Magnet Bank would have been entitled to call the loan due. In reality, Magnet Bank began the process of calling the loan due only one month after the Aviano sale, declaring in a letter that it would not renew the loan. Magnet Bank eventually received payment in full from Navona, demonstrating that Magnet Bank did not suffer any damage. (Complaint ¶¶ 414, 416.)

state that they “clearly allege that LD III’s [and Mower’s] funds were wrongfully taken, that they were used to purchase water shares which were titled in an entity owned by David Simpson, that LD III [and Mower] [were] never reimbursed for [their] funds and that the water shares were sold and that LD III [and Mover] never received any proceeds.” (Mem. in Opp’n 16.) Plaintiffs further state that “[i]t is clear that LDIII and [Mower] were damaged in that their funds were taken and never repaid. (*Id.*)

Tellingly, Plaintiffs make no attempt to explain how such damages resulted from the alleged nondisclosures. Plaintiffs thereby confirm that their claims related to the Double T Water Purchase have nothing to do with fraud. Accordingly, Plaintiffs’ fraudulent nondisclosure claim with respect to the Double T Ranch Water Purchase should be dismissed.

D. Plaintiffs Have Not Pleaded the Required Particularity Within Their Fraud Claims Concerning the Maple Mountain Water Project.

Plaintiffs fail to plead the necessary facts within their claims for fraud related to the Maple Mountain Water Project. In their opposition memorandum, Plaintiffs argue that they have properly pleaded these claims, referring the Court to allegations contained in paragraph 479. However, paragraph 479 is not referenced in Plaintiffs’ fraud claim, which is found in Paragraph 1093-1107. Plaintiffs cannot expect the Court and Defendants to “sift[] through hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have allege[d] . . . facts necessary to make all their elements of fraud.” *Coroles*, 2003 UT App 339, ¶ 27. “This method for pleading fraud is unacceptable under rule 9(b), especially in a complaint of such enormous length.” *Id.* at ¶¶ 26-30 (affirming dismissal of fraud claim for failure to meet the requirements of Rule 9(b)).

The story told in Plaintiffs' opposition memorandum is simply not apparent when reading the fraud claim in the Complaint.

In summary, Plaintiffs have again failed to plead their fraud claims with the particularity required under Rule 9(b) and should, therefore, be dismissed with prejudice.

II. PLAINTIFFS' COMPLAINT DEMONSTRATES THAT DOLEZSAR IS AN INDISPENSIBLE PARTY TO THIS CASE, REQUIRING DISMISSAL OF THE FRAUD CLAIMS IN HIS ABSENCE.

A. The Allegations in Plaintiffs' Complaint Establish That Dolezsar Is the Central Figure in This Case and Is Necessary to Its Just Adjudication.

Plaintiffs do not dispute that each of the alleged misrepresentations concerning the Hawaii Development, the Mapleton Development, and the Springville Property were made to Mower by Ken Dolezsar (Mower's late ex-husband). (*See, e.g.*, Complaint ¶¶ 543, 721, 731, 734, 739, 757-58, 434, and 1014.) Yet, Plaintiffs claim that Defendants do not offer enough support to show that Dolezsar is the central figure in this case. Plaintiffs claim that Dolezsar was "[Mower's] husband and agent" and that he merely "relayed the misrepresentations made by David Simpson, Nathan Simpson and others to [Mower]." (Mem. in Opp'n 18-19, 23.)

However, Plaintiffs cannot dispute their own allegations, which make clear that all of the alleged misrepresentations were made to Mower by Dolezsar. In paragraph 739, for example, Plaintiffs allege that "Ken Dolezsar, acting on authorization and instructions from David Simpson and Nathan Simpson, or as part of a conspiracy with David Simpson and Nathan Simpson, made the representations described in paragraph 316 herein to [Mower]." (Complaint ¶ 739.) Likewise, in paragraph 734, Plaintiffs allege that "Ken Dolezsar, acting either on the authorization and instructions of David Simpson and Nathan Simpson or as part of a conspiracy

with the Simpsons, made the representations to [Mower] described in paragraph 315.”

(Complaint ¶ 734.) Plaintiffs’ own allegations thus establish that Dolezsar is the central figure in this case, and not merely a “go between” as argued in Plaintiffs’ opposition memorandum. (*See* Mem. in Opp’n 23.)

In this regard, Dolezsar is just like Clark in the recent Utah Court of Appeals case of *Turville v. J & J Properties, L.C.*, 2006 UT App 305, 1445 P.3d 1146. As the person with whom the plaintiff had primarily dealt, Clark occupied a “pivotal representative role . . . in the transactions at issue.” *Id.* at ¶¶ 3-6, 39.⁵ As the alleged damages resulted primarily from Clark’s actions, the Court concluded that Clark was a necessary party because “complete relief [could not] be accorded to those already parties” in his absence. *Id.* ¶ 39-40.

Likewise, complete relief cannot be accorded to those already parties in this case without Dolezsar. As did Clark in the *Turville* case, Dolezsar played a “pivotal representative role” in the transactions at issue in this case. Plaintiffs allege that Dolezsar made all of the alleged misrepresentations of which Plaintiffs’ complain. Plaintiffs have not cited a single instance in which David Simpson, Nathan Simpson, or any of the other Defendants made a misrepresentation directly to Mower. Rather, Plaintiffs claim David Simpson and Nathan Simpson “authorized and instructed” Dolezsar to make the alleged misrepresentations to Mower. (*See, e.g.*, Complaint ¶¶ 731, 734, 739.) However, Plaintiffs have not alleged any factual basis for what David Simpson, Nathan Simpson, or others may or may not have said to Dolezsar. Plaintiffs apparently rely in this regard on hearsay statements from Dolezsar. This further

⁵ Defendants inadvertently cited paragraph 9, rather than paragraph 39, when quoting referencing Clark’s “pivotal representative role” in Defendants’ Opening Memorandum (Mem. in Supp. 17).
Machine-generated OCR, may contain errors.

demonstrates that Dolezsar is the central figure in this case and that Plaintiffs' alleged damages resulted primarily from his actions. *See Turville*, 2006 UT App 305, ¶ 40. Consequently, as was the case in *Turville*, the "interest of fairness to the parties in [this] litigation" dictates that Dolezsar be treated as a necessary party. *Id.*

Plaintiffs attempt to distinguish the *Turville* case on the basis that Clark was actually named as a defendant in the complaint before he died. This distinction is without a difference. Whether a person is a necessary party under Rule 19(a) cannot turn merely on whether the plaintiff names such person as a defendant. Otherwise, plaintiffs could control the outcome of Rule 19 analysis merely by declining to name an otherwise necessary party as a defendant. Moreover, as they allege that Dolezsar made all of the representations of which they complain as part of a conspiracy to defraud Mower and her companies, Plaintiffs surely would have named Dolezsar as a defendant had they filed this case before he died or during the limitations period for joining his estate under Utah Code Ann. § 75-3-803(a). That Clark happened to die after the *Turville* complaint was filed does not make him any more necessary under Rule 19(a) than Dolezsar.

For all of these reasons, Dolezsar is a necessary party to the just adjudication of this case.

B. Application of the Factors in Rule 19(b) Demonstrates that Plaintiffs' Fraud Claims Cannot Proceed in Equity and Good Conscience in Dolezsar's Absence.

The Court considers the following factors to determine "whether in equity and good conscience [Plaintiffs' fraud claims] should proceed" in Dolezsar's absence:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him *or those already parties*; second the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure,

the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Utah R. Civ. P. 19(b) (emphasis added). As the Rule itself "does not state what weight is to be given each factor," the Court "must determine the importance of each factor on the facts of each particular case and in light of equitable considerations." *Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir. 1974).

Under the circumstances of this case, the prejudice that will result to Defendants if Plaintiffs' fraud claims are allowed to proceed in the absence of Dolezsar and his estate requires that the fraud claims be dismissed.

1. Defendants Will Be Unfairly Prejudiced If Plaintiffs Are Allowed to Proceed With Their Fraud Claims in Dolezsar's Absence.

The *Turville* case recently decided by the Utah Court of Appeals is directly on point with respect to the issue of prejudice to Defendants. In *Turville*, the court relied heavily on two facts in holding that Clark was an indispensable party. *Turville*, 2006 UT App 305, ¶¶ 41-42. First, Clark was "the major, if not the sole, actor responsible for Plaintiffs' alleged damages." Second, the plaintiffs failed to join Clark while he was alive and failed to join his estate within the limitations period after his death. *Id.* Under these circumstances, the court found that it was unfair and prejudicial to require the other defendants to defend the case in Clark's absence. *Id.*

In this case, Defendants will likewise be unfairly prejudiced by any judgment issued in the absence of Dolezsar, the central party responsible for the damages alleged by Plaintiffs. Plaintiffs have specifically alleged that all of the claimed misrepresentations were made to Mower by Dolezsar. Plaintiffs do not cite a single instance in which any of the Defendants made

a false or misleading representation directly to Mower. To the extent Plaintiffs attempt to impute any of Dolezsar's alleged misrepresentations to the other defendants, they apparently do so based solely on hearsay statements made by Dolezsar. As a practical matter, these inadmissible hearsay statements will not be considered as evidence in this case. Moreover, Plaintiffs will be unable to question Dolezsar concerning his alleged misrepresentations. *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998) (recognizing possibility for prejudice resulting from inability to collect evidence from absent party). Under these circumstances, which are indistinguishable from those at issue in *Turville*, it is simply unfair and prejudicial to require Defendants to defend against Plaintiffs' fraud claims in Dolezsar's absence. See *Turville*, 2006 UT App 305, ¶ 40 (citing *Kemp v. Murray*, 680 P.2d 758, 760 (Utah 1984) for the proposition that Rule 19 "seeks to protect the interest of fairness to the parties as well as the interest of judicial economy").

Moreover, should the Court allow Plaintiffs' fraud claims to proceed without Dolezsar. Defendants will be at risk of incurring, double, multiple, or otherwise inconsistent obligations. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, at 110 (1968) ("[T]he defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another.") The one year statute of limitations set forth in Utah Code Ann. § 75-3-803(a) applies to claims against the estate, but not claims brought by the estate on behalf of Dolezsar. In fact, under Utah Code Ann. § 75-3-108, the applicable statutes of limitations on any claims held by Dolezsar at his death were automatically tolled for a period of 12 months. Accordingly, Dolezsar's estate is not precluded by Utah Code Ann. § 75-3-803(a) from bringing claims against Defendants related to Plaintiffs' fraud claims. However,

because Plaintiffs failed to bring this action against Dolezsar's estate within the limitations period under Utah Code Ann. § 75-3-803(a), Defendants are unable to assert their related claims against Dolezsar. Consequently, Defendants are not only at risk of incurring multiple or inconsistent obligations in subsequent litigation, but they would be precluded from asserting their claims against the estate in any such proceeding. This unfair prejudice must be prevented.

Plaintiffs argue that Dolezsar is not an indispensable party, citing to the general rule that "Rule 19 does not require the joinder of joint tortfeasors . . . or parties against whom [the parties] have claim for contribution." (Mem. in Opp'n ¶ 27-28, quoting *Nottingham v. Gen. Am. Commc'ns Corp.*, 811 F.2d 873, 880 (5th Cir. 1987).) However, as outlined above, Dolezsar is not a mere joint tortfeasor, but is the party primarily responsible for the alleged fraudulent conduct of which Plaintiffs' complain. The Utah Court of Appeals recognized in *Turville* that situations like those of Clark and Dolezsar are not governed by the general rule. *See Turville*, 2006 UT App 305, ¶ 40; *see also Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985) (dismissing case where absent subsidiary company was "more than an active participant in the [wrong] alleged by [the plaintiffs]; it was the primary participant."). This case is indistinguishable from the *Turville* case and, therefore, requires the same result — dismissal for failure to join Dolezsar during the limitations period.

2. Prejudice to Defendants Cannot Be Avoided By Any Protective Measures.

Plaintiffs do not address the second factor listed in Rule 19(b), and therefore concede that the prejudice which would result to Defendants if Plaintiffs' fraud claims proceed in Dolezsar's

absence cannot be avoided by any protective provisions in a potential judgment or other measures.

3. The Court Cannot Render An Adequate Judgment on Plaintiffs Fraud Claims in Dolezsar's Absence.

The third factor listed in Rule 19(b) — whether a judgment rendered in the person's absence will be adequate — “refer[s] to [the] public stake in settling disputes by wholes, whenever possible.” *Provident Tradesmens*, 390 U.S. at 111. Nonetheless, Plaintiffs incorrectly argue that whether a judgment is adequate should be determined from the Plaintiffs' point of view, claiming that Plaintiffs will have an adequate remedy without the joinder of Dolezsar or his estate. (Mem. in Opp'n 28.) The Tenth Circuit has heard and rejected this argument. *See Davis v. United States*, 343 F.3d 1282, 1292-93(10th Cir. 2003) (rejecting the plaintiffs' argument that a judgment would be adequate because it would afford the plaintiffs complete relief).

Applying the standards set forth by the Supreme Court in *Provident Tradesmens* demonstrates that any judgment rendered in Dolezsar's absence would be inadequate. Dolezsar's estate is not precluded under Utah Code Ann. § 75-3-803 from bringing claims related to the alleged fraud against Defendants in further proceedings, thereby subjecting Defendants to risk of incurring multiple or inconsistent obligations. Moreover, because Plaintiffs did not timely join the estate to this proceeding, this Court cannot hear Defendants' claims against Dolezsar relating to the alleged fraud. Therefore, any judgment rendered in Dolezsar's absence will be inadequate.

4. Plaintiffs Have An Adequate Remedy In This Case.

Upon dismissal of their fraud claims, Plaintiffs will still have some 48 causes of action in this case, including claims for breach of contract, fiduciary duty, conversion, and unjust enrichment. Plaintiffs argue that these claims do not provide a remedy for their fraud allegations. However, any deficiency in this regard results solely from Plaintiffs' failure to join Dolezsar's estate within the applicable limitations period. The Court should not allow Plaintiffs to wait until after the central figure in this case can no longer be joined to seek recovery from others who are alleged only to have acted in concert with him. Accordingly, the Court should assign little weight to this factor, particularly when compared to the prejudice that will be experienced if Plaintiff's fraud claims are allowed to go forward in Dolezsar's absence. *See Turville*, 2006 UT App 305, ¶ 41-42 (declining to consider the plaintiff's lack of adequate remedy in similar circumstances).

Therefore, considering the factors set forth in Rule 19(b), Plaintiffs' fraud claims cannot proceed in equity and good conscience in the absence of the Dolezsar and his estate and must be dismissed accordingly.

III. THE COMPLAINT DOES NOT STATE A CLAIM FOR FRAUDULENT NONDISCLOSURE WITH RESPECT TO THE DOUBLE T RANCH WATER PURCHASE.

In their opposition memorandum, Plaintiffs contend that proving reliance is not required to recover on a claim for fraudulent nondisclosure, citing to the case of *Yazd v. Woodside Homes Corp*, 2006 UT 46. Plaintiffs are correct that *Yazd* does not use the word "reliance" in listing the elements of fraudulent nondisclosure. *Id.* ¶ 10. However, the concept of reliance is clearly embodied in the first element listed by the *Yazd* court: "a plaintiff must prove (1) that the

nondisclosed information is material” *Id.* The *Yazd* court defined materiality as “something which a buyer or seller of ordinary intelligence and prudence would think to be of . . . importance in determining whether to buy or sell.” *Id.* at ¶ 32. In other words, the fact must have been important enough that its nondisclosure would “induce action on the part of the other party, with actual justifiable reliance resulting in damage to that party.” *Barber Bros. Ford, Inc. v. Foianini*, 2008 UT App 463, ¶ 2.⁶

In Plaintiffs’ fraudulent nondisclosure claim related to the Double T Ranch Water Purchase, Plaintiffs allege that David Simpson fraudulently failed to disclose to Mower that he had used money from Plaintiff LD III to purchase water shares in the name of Defendant Wood Springs, as well as other alleged happenings subsequent to the alleged purchase. (Complaint ¶¶ 1176-79.) However, Plaintiffs do not allege that these nondisclosures induced any action or influenced any decision by Mower. Plaintiffs simply allege that Simpson’s failure to disclose somehow damaged Mower and LD III in the amount of \$300,125.00. (Complaint ¶ 1182.) These allegations do not support a claim for fraud and should, therefore, be dismissed.

IV. THE COURT SHOULD DECLINE TO CREATE NEW CAUSES OF ACTION FOR AIDING AND ABETTING, WHICH HAVE NOT BEEN RECOGNIZED AS VALID CLAIMS UNDER UTAH LAW.

Plaintiffs admit that the Utah Supreme Court has not yet recognized civil causes of action for aiding and abetting. *See Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (declining to decide whether claims for aiding and abetting breach of fiduciary duty and fraud are cognizable under Utah law. The process of creating new law should left to the Utah Supreme Court. To the

⁶ Plaintiffs complain of Defendants’ citation to the unpublished *Foianini* case. However, Rule 30(f) of the Utah Rules of Appellate Procedure expressly allows for citation of unpublished decisions “in all courts of the state.”

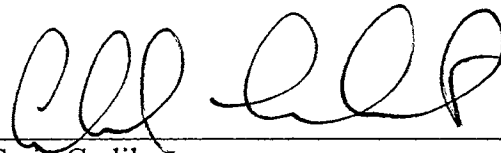
extent Plaintiffs wish to broaden their net with respect to claims for breach of fiduciary duty and fraud, they should be required to prove their claims for conspiracy and violation of the Utah Pattern of Unlawful Activity Act, which have been recognized as valid causes of action under Utah law.

CONCLUSION

For all of the reasons set forth above, Plaintiffs' fraud-based claims should be dismissed for failure to plead with particularity as required by Rule 9(b) and failure to join an indispensable party under Rule 19(b). Additionally, Plaintiffs' fraud claims with respect to the alleged purchase of water shares from Double T Ranch, as well as their "aiding and abetting" claims, should be dismissed for failure to state a claim under Utah law.

DATED this 6th day of May, 2010.

RAY QUINNEY & NEBEKER P.C.



Craig Carlile
Caleb J. Frischknecht
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM**
IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT was
mailed by First Class U.S. Mail, postage prepaid, on this 6th day of May, 2010 to the following:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058

Steven R. Sumsion
Spencer MacDonald
Daniel M. Woods
SUMSION & MACDONALD
86 North University Avenue, #400
Provo, Utah 84601-4420

Mark D. Eddy
Morgan L. Cummings
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Pleasant Grove Blvd., Suite 202
Pleasant Grove, Utah 84062

Julian D. Jensen
Attorney at Law
311 South State Street, #380
Salt Lake City, Utah 84111

Jonathan L. Jaussi
Joshua P. Langeland
P.O. Box 460
Payson, Utah 84651

Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84604

Christopher A. Scharman
Vantus Law Group
3165 East Millrock Drive, #160
Salt Lake City, Utah 84121

Laura S. Scott
Parsons Behle & Latimer
201 South Main Street, #1800
P.O. Box 45898
Salt Lake City, Utah 84145

1082743

A handwritten signature in cursive script, reading "Amanda Bartholomew", written over a horizontal line.

Tab 6

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2010 DEC -3 P 2:12

Leslie D. Mower, et al.,

Plaintiffs,

vs.

David R. Simpson, et al.,

Defendants.

)
)
)
)
) Case No. 090403844
) Appellate No. 20100532
)
)
)
)

BEFORE THE HONORABLE SAMUEL McVEY

Provo, Utah
May 13, 2010
9:08 a.m.

ORAL ARGUMENTS

Transcribed By:
Matthew B. Rose, RPR

ORIGINAL

1 that will be fine.

2 MR. JENNINGS: And again, I feel I should get the
3 opportunity to reply to the argument that 9(b) is the
4 standard, I'm not saying it's not. But 9(b) interplays with
5 12(b) which interplays with 8.

6 THE COURT: Well, okay. Well, I understand your
7 argument on that. I understand what you're saying.

8 MR. JENNINGS: Thank you, Your Honor.

9 THE COURT: But I am inclined to agree with
10 Mr. Carlile. Fraud is -- fraud and a mutual mistake are
11 peculiar animals, and they have to be pled with
12 particularity. You get a lot more inferences under Rule
13 12(b) then you do under 9(b). Okay? That's my position.
14 So okay. All right.

15 The Court's prepared to rule in this case. I
16 appreciate the memoranda that have been submitted and the
17 arguments of counsel. I have read all of those. I have
18 read through the Second Amended Complaint. And let me state
19 -- let me first go through the items addressed by
20 Mr. Carlile.

21 The Court is going to grant the motion to dismiss
22 the fraud-based claims, and I will do that -- I won't stay
23 here -- I don't want to go -- rehash all of those reasons,
24 but in addition to what Mr. Carlile said, there's another
25 reason.

1 The plaintiff in this case, the live breathing
2 plaintiff, Ms. Mower, was directly privy to what was said to
3 her. She has all of that information in her knowledge. She
4 was -- she was there. I mean, she knows where that should
5 have occurred, when it would have occurred, what words were
6 used, who else was present, all those types of things that
7 the Court indicated in its prior rulings. Those things were
8 not included in the Complaint, and that would be an
9 additional reason for finding that there was no
10 particularity.

11 Also, I do believe that this Complaint was a big
12 huge improvement over the last one, but still there are
13 circumstances where there were not references to earlier
14 facts that were pleaded, and I do not believe that counsel
15 and the Court should have to guess where those facts are
16 coming from or go back and research where those facts are
17 coming from. Those should be identified and included in the
18 cause of action, but that's just redundant. That's
19 something that Mr. Carlile had already addressed.

20 With respect to the Double T claim, I would also
21 note that there is a failure to state a claim in that there
22 was no alleged reliance, or action, or inaction, change of
23 position based on what was allegedly conferred.

24 And with respect to the Rule 19(b), I'm going to
25 actually reserve ruling on that. I want to look at that

1 some more. I did read through the memoranda. I did read
2 the Turville case and so forth, but I would like to review
3 further and make a determination on that.

4 Let's see, the aiding and abetting claims are
5 dismissed. The Court is not going to create a new cause of
6 action; that is not the Court's province. I don't know what
7 the supreme court would do in this circumstance, maybe they
8 would follow the 56 percent of the states that are doing
9 that, maybe they wouldn't, it's very difficult to say. But
10 that would not be something I would be inclined to go
11 forward on.

12 Let's see --

13 UNIDENTIFIED SPEAKER: Is that with prejudice, Your
14 Honor?

15 THE COURT: I'm getting there, okay, I'm getting
16 there. It's without legal amend, let me say that. So I
17 think those cover the arguments by Mr. Carlile. Okay.

18 Now, let's turn over to Mr. Nemelka here. Find my
19 notes. Okay. The fraud claims against Mr. Nemelka are not
20 pled with particularity for the reasons that have been
21 stated; however, with respect to the conspiracy and
22 injunction matter, again, injunction is a remedy but it's
23 pled as a cause of action. So it's pled. I don't weigh --
24 I don't weigh the evidence on a motion to dismiss and say,
25 yeah, there's grounds for an injunction here or not. All I

1 look at is the allegations and say are the elements pled,
2 they're pled. So I'm not going to dismiss the injunction
3 claim.

4 Same thing with the conspiracy because it's not a
5 fraud-based claim, it's relating to an alleged breach of
6 fiduciary duty and a conspiracy to do that. Again, I don't
7 think there's -- I mean, if all of this evidence was proved,
8 I think you'd have a hard time selling this to a finder of
9 fact; but nonetheless, you have the opportunity to try.

10 So again, I'm not weighing the evidence here, I'm
11 not saying that the claim is valid. All I'm saying is it
12 was pled and that's all I'm saying. So you do have -- so
13 you do have those claims with respect to Mr. Nemelka.

14 And the same -- and then also, I believe, you had
15 him enjoined in the UPUA claim, right?

16 UNIDENTIFIED SPEAKER: Correct.

17 THE COURT: So same thing on the UPUA. Again,
18 they're not alleging the fraud-based claim under the UPUA,
19 they're saying they're just going after the fiduciary duty
20 issue. So that claim survives, that was pled.

21 The same -- the same reasoning would apply to
22 Mr. Carlson on the conspiracy and the UPUA, and then the
23 injunctive claim. The same would apply to --

24 UNIDENTIFIED SPEAKER: Mr. Hakes.

25 THE COURT: -- Mr. Hakes and his related entity.

1 With respect to Mr. Aviano, the fraud claim is not
2 properly plead. It's not pled with particularity. I am --
3 in addition to what was stated in counsel's briefs, today we
4 find out outside the Complaint that we do know who this
5 deputy assessor is. We were introduced to him, but that
6 information's not included. So it's things like that that
7 would create the -- create the issue here.

8 I recognize plaintiffs' concern with not being able
9 to put everything in here because they don't know yet. I
10 mean, they don't know all that yet. The fact is the things
11 that they do know they don't put in the Complaint, at least
12 to the extent that they know them. So that's the concern of
13 the Court.

14 But again, with Mr. Aviano, I believe that the
15 conspiracy, the UPUA and the negligent misrepresentation
16 claims have been adequately pled and would survive in this
17 case. Again, not passing judgment on the how strong those
18 claims are or anything of that nature, but merely stating
19 that they've set out a claim in the Complaint.

20 So there will not be leave to amend in this case,
21 this would be going on our third -- well, as Mr. Carlile
22 says we'd be down the road on this quite a ways. We need to
23 get going on this case.

24 So plaintiff will be allowed to try and prove their
25 causes of action for the things such as conversion, and I

1 believe that they will have -- and those other matters, I
2 believe they will have the opportunity to do that; breach of
3 fiduciary duty, the contract claims and so forth, they'll be
4 allowed to do that. And if those can survive summary
5 judgment, then they will be able to present those at trial.

6 So that would be the ruling of the Court in this
7 case. I wondered if, Mr. Carlile, if you would mind
8 preparing an order in this case?

9 MR. CARLILE: I will.

10 THE COURT: And submitting that to counsel. And
11 again, I appreciate -- I appreciate what everyone said here
12 today. I thought that I was persuaded by everybody's
13 arguments, but I believe I've made the right decision.
14 Mr. Jennings?

15 MR. JENNINGS: Your Honor, we would ask that you
16 certify the dismissal of the aiding and abetting claims as
17 final orders.

18 THE COURT: I'm not going to do that because you
19 have to comply with Rule -- well, I don't even think you can
20 -- it's not under Rule -- well, you'd have to comply with
21 Rule 54 on that, okay, if you want to do that. Okay?

22 And if you want to do that, we can look at that
23 because I want the other side to be able to look at that,
24 all right, and make an objection. So look under Rule 54(b),
25 I believe it is, for a motion for certification and I'll be

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

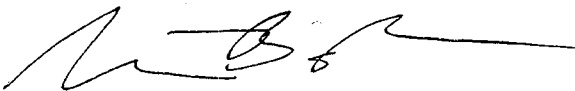
C E R T I F I C A T E

STATE OF UTAH)
)
COUNTY OF UTAH)

 This is to certify that the foregoing proceedings
were transcribed by me, Matthew B. Rose, RPR, a Certified
Shorthand Reporter and Official Court Transcriber in and for
the State of Utah;

 That the proceedings were reported by me in
stenotype from an audio recording and thereafter caused by
me to be transcribed into typewriting; and that said
transcript contains all of the evidence, objections of
counsel and rulings of the Court and all matters to which
the same relate; and that the foregoing pages constitute a
true and accurate transcription of said proceedings.

DATED this 25th day of November, 2010.



MATTHEW B. ROSE, RPR, CSR
UT NO. 5965543-7801

Tab 7

JUN 22 2010

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Craig Carlile (0571)
 Caleb J. Frischknecht (11648)
RAY QUINNEY & NEBEKER P.C.
 86 North University Avenue, #430
 Provo, Utah 84601-4420
 Telephone: (801) 342-2400

Attorneys for Defendants David R. Simpson, Nathan R. Simpson, Michael K. Thompson, Todd Dorny, Brandon Dente, ALS Properties, LLC, Mai Ke Kula, LLC, Hanalei Kai Holdings, LLC, Ka Mahina, LLC, He Kiakolu, LLC, Koamalu Plantation, LLC, Landmark Real Estate, Inc., Wood Springs, LLC, Oak Leaf, LLC, Dente, LLC, Sunny Ridge, LLC, KNDJ Development, LLC, DN Simpson Holdings, LLC, SOS Mapleton Development, LLC, DN Simpson Mapleton Holdings, LLC, The Preserve at Mapleton Development Company, LLC, Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC, Spanish Vista Plat I, LLC, Landmark Homes of Utah, LLC, Maple Mountain Water Tank, LLC, and Kathy A. Templeman

IN THE FOURTH JUDICIAL DISTRICT COURT
 UTAH COUNTY, STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, an individual; et al.,

Plaintiff,

v.

DAVID R. SIMPSON, an individual; et al.,

Defendants

and

KOAMALU PLANTATION INVESTMENT,
 LLC, a Utah limited liability company, et al.,

Rule 19 Defendants.

**RULING AND ORDER ON
 DEFENDANTS' MOTIONS TO DISMISS
 THE SECOND AMENDED COMPLAINT**

Civil No: 090403844

Judge: Samuel D. McVey

Before the Court are the following motions to dismiss related to the Second Amended Complaint: Motion to Dismiss Second Amended Complaint (the "Simpson Motion"); Defendant Michael W. Aviano's Motion to Dismiss Plaintiffs' Second Amended Complaint (the "Aviano

Motion”); Defendant Chad D. Carlson’s Motion to Dismiss Plaintiffs’ Second Amended Complaint (the “Carlson Motion”); and Defendant David Nemelka’s Motion to Dismiss (the “Nemelka Motion”).

After careful review of the memoranda and authorities submitted by the parties, and having heard oral argument concerning the matters, the Court will dismiss Plaintiffs’ fraud-based claims (Claim Nos. 1, 4, 5, 11, 14, 15, 21, 24, 26, 29, and 32¹), as well as Plaintiffs’ claims for conspiracy (Claim Nos. 9, 19, 25, and 30) and violation of the Utah Pattern of Unlawful Activity Act (Claim Nos. 10 and 20) to the extent they are based on allegations of fraud, for failure to plead with particularity as required by Utah Rule of Civil Procedure 9(b). The Court previously dismissed all of the fraud allegations in Plaintiffs’ First Amended Complaint for failure to meet the pleading standards under Rule 9(b), but allowed Plaintiffs one more chance to plead its fraud claims concisely and with particularity. Despite Plaintiffs’ addition of 145 more pages, the Second Amended Complaint still does not provide the particularity mandated by Rule 9(b). Instead, Plaintiffs’ “much too long and involved” Second Amended Complaint merely “dumps upon the [Court] . . . the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have allege[d] . . . the facts necessary to make all their elements of fraud.” *Coroles v. Sabey*, 2003 UT App 339, ¶¶ 23, 27, 79 P.3d 974 (internal quotations omitted). Accordingly, for the reasons set forth in the memoranda supporting the Simpson Motion, the Court will dismiss Plaintiffs’ fraud-based claims without leave to amend.

¹ The Court will also dismiss Claim No. 32 for failure to state a claim under Utah R. Civ. P. 12(b)(6). Claim No. 32 is a fraudulent nondisclosure claim. Yet, Plaintiffs fail to allege that any of the facts Defendants allegedly failed to disclose induced any action or influenced any decision of Plaintiffs.

Additionally, the Court will dismiss Plaintiffs' claims for aiding and abetting (Claim Nos. 3, 5, 13, and 15) for failure to state a claim under Utah R. Civ. P. 12(b)(6). The Utah Supreme Court has not yet recognized a claim for aiding and abetting under Utah law, and the Court declines to do so here. *See Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (declining to decide whether claims for aiding and abetting breach of fiduciary duty and fraud are cognizable under Utah law).

The Court has taken under advisement the issues raised in the Simpson Motion under Utah Rule of Civil Procedure 19(b) and will issue a ruling after further review.

The Court denies the Aviano Motion, the Carlson Motion, and the Nemelka Motion with respect to Plaintiffs' conspiracy claim related to the Mapleton development (Claim No. 19), to the extent such claim is based on alleged breaches of fiduciary duties, which are not subject to the particularity requirements of Utah R. Civ. P. 9(b). Likewise, the Nemelka Motion is denied with respect to Plaintiffs' claim under the Utah Pattern of Unlawful Activity Act (Claim No. 20), insofar as that claim is not based on allegations of fraud.² Finally, the Court denies the Aviano Motion with respect to Plaintiffs' claim for negligent misrepresentation concerning the Mapleton development, which claim the Court finds is not subject to the particularity requirements of Utah R. Civ. P. 9(b).

Accordingly, for all of the reasons set forth above, and those stated by the Court from the bench during the May 13, 2010 hearing in this matter,

² To the extent alleged against Defendants Carlson, 2 Brothers Communication, Allen Hakes, Lonestar Gutters, LLC, Dallas Hakes, Lonestar Builders, LLC, and Aviano, Plaintiffs' Claim No. 20 is based entirely on Plaintiffs' inadequate fraud allegations. Accordingly, Claim No. 20 shall be dismissed in its entirety with respect to these defendants, for the reasons set forth above.

IT IS HEREBY ORDERED that Claim Nos. 1, 4, 5, 11, 14, 15, 21, 24, 26, 29, and 32 in the Plaintiffs' Second Amended Complaint are DISMISSED WITHOUT LEAVE TO AMEND for failure to meet the pleading standard found in Utah R. Civ. P. 9(b).

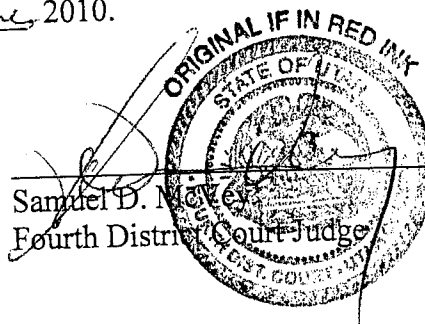
IT IS FURTHER ORDERED that Claim Nos. 9, 10, 19, 25, and 30 in the Plaintiffs' Second Amended Complaint are DISMISSED WITHOUT LEAVE TO AMEND to the extent those claims are based on allegations of fraud for failure to meet the pleading standard found in Utah R. Civ. P. 9(b).

IT IS FURTHER ORDERED that Claim No. 20 in the Plaintiffs' Second Amended Complaint is DISMISSED IN ITS ENTIRETY AND WITHOUT LEAVE TO AMEND with respect to Defendants Carlson, 2 Brothers Communication, Allen Hakes, Lonestar Gutters, LLC, Dallas Hakes, Lonestar Builders, LLC, and Aviano for failure to meet the pleading standard found in Utah R. Civ. P. 9(b).

IT IS FURTHER ORDERED that Claim No. 20 in the Plaintiffs' Second Amended Complaint is DISMISSED WITHOUT LEAVE TO AMEND with respect to the remaining Defendants to the extent Claim No. 20 is based on allegations of fraud for failure to meet the pleading standard found in Utah R. Civ. P. 9(b).

IT IS FURTHER ORDERED that Claim Nos. 3, 5, 13, 15, and 32 are DISMISSED WITHOUT LEAVE TO AMEND under Utah R. Civ. P. 12(b) for failure to state a claim upon which relief can be granted.

ENTERED this 22 day of June 2010.



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RULING AND ORDER
ON DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT**
was mailed by First Class U.S. Mail, postage prepaid, on this 28 day of May, 2010 to the
following:

Bart J. Bailey
William T. Jennings
BAILEY & JENNINGS, LC
584 South State Street
Orem, Utah 84058

Steven R. Sumsion
Spencer MacDonald
Daniel M. Woods
SUMSION & MACDONALD
86 North University Avenue, #400
Provo, Utah 84601-4420

Mark D. Eddy
Morgan L. Cummings
HANSEN WRIGHT EDDY & HAWS, P.C.
233 South Pleasant Grove Blvd., Suite 202
Pleasant Grove, Utah 84062

Julian D. Jensen
Attorney at Law
311 South State Street, #380
Salt Lake City, Utah 84111

Jonathan L. Jaussi
Joshua P. Langeland
P.O. Box 460
Payson, Utah 84651

Chris D. Greenwood
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84604

Christopher A. Scharman
Vantus Law Group
3165 East Millrock Drive, #160
Salt Lake City, Utah 84121

Laura S. Scott
Parsons Behle & Latimer
201 South Main Street, #1800
P.O. Box 45898
Salt Lake City, Utah 84145

A handwritten signature in cursive script, reading "Rhonda Bartholomew", written over a horizontal line.

1083992

Tab 8

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

LESLIE D. MOWER, an individual; et al.,

Plaintiff,

v.

DAVID R. SIMPSON, an individual; et al.,

Defendants

And

KOAMALU PLANTATION
INVESTMENT, LLC, a Utah limited liability
company, et al.,

Rule 19 Defendants

**RULING AND ORDER ON
DEFENDANTS' MOTION TO DISMISS
FRAUD CLAIMS IN SECOND
AMENDED COMPLAINT UNDER RULE
19**

Case No: 090403844

Judge Samuel D. McVey

The Court, having heard the arguments of counsel and having carefully reviewed the motion and memoranda submitted by counsel makes the following Ruling and Order.

I. Procedural History

The current case was filed in October, 2009. On March 5, 2010, Ms. Mower and the other plaintiffs ("Ms. Mower") filed a Second Amended Complaint. On April 13, 2010, the Simpson defendants filed a Memorandum in Support of Motion to Dismiss Second Amended Complaint including an argument that the estate of Mr. Dolezsar, Ms. Mower's deceased husband who died on November 15, 2007, should have been joined as a necessary and indispensable party. On April 26, 2010, Ms. Mower filed a Memorandum in Opposition to the Simpson Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint. On May 6, 2010, the Simpson Defendants filed a Reply Memorandum in Support of Motion to Dismiss Second Amended Complaint. The Court heard oral argument and took the issue under advisement.

II. Analysis

The Simpson and related defendants (the "Simpsons"), argue plaintiff's fraud claims should be dismissed under Utah Rules of Civil Procedure, Rule 19(b) as Ken Dolezsar is a necessary and indispensable party to this case and cannot now be joined because the statute of limitations in which to sue his estate has run. The Simpsons support this argument by citing *Turville v. J&J Properties, L.C.*, 145 P.3d 1146 (Utah App. 2006). *Turville* quotes from *Seftel v. Capital City* in setting out the required steps for a case to be dismissed under Rule 19(b). *Seftel*

v. Capital City Bank, 767 P.2d 941, 945 (Utah App. 1989). First, a court must determine if a party “has sufficient interest in the action to make it a necessary party.” *Id.* Second, if the court has held the party is necessary, and joinder is not feasible, the court must determine whether a party is indispensable. *See id.* To determine if a party is indispensable, the court considers the four factors found in Rule 19(b):

- 1) To what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties.
- 2) The extent to which the prejudice can be lessened or avoided.
- 3) Whether a judgment rendered in a person’s absence will be adequate.
- 4) Whether a plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Simpsons compare Mr. Dolezsar in the present case to Mr. Clark in *Turville* as one who occupied a pivotal representative role. Mr. Clark actively participated in a scheme to defraud other parties and was the figure in the scheme who withheld material information from and made false representations to property owners. Like Mr. Clark in *Turville*, Mr. Dolezsar was the person with whom Ms. Mower dealt. Ms. Mower does not dispute that Dolezsar passed all of the allegedly fraudulent information to her. Ms. Mower does not cite an instance where Simpsons directly made a misrepresentation to her. Additionally, there is no factual basis in the complaint for what, if anything, Simpsons actually told Mr. Dolezsar and no way of determining the accuracy of any information Mr. Dolezsar may have passed to Ms. Mower from Simpsons. This is one of the problems with the fraud allegation in the Complaint. What Mr. Dolezsar specifically told Ms. Mower and how and where he said it is presumably known only to her, but none of her complaints identify it with particularity.

Ms. Mower does not contest the inability to join Dolezsar’s estate due to the statute of limitations but disagrees *Turville* is applicable to the present case. Ms. Mower states the only similarity *Turville* and the present matter is someone died and thus could not be joined. Ms. Mower attempts to distinguish Mr. Dolezsar from Mr. Clark, the *Turville* party, by referring to Mr. Dolezsar as a simple go-between while Mr. Clark was a principle perpetrator of fraud. However, Ms. Mower previously admitted more than this. In the Second Amended Complaint, Ms. Mower acknowledged all the alleged misrepresentations from Simpsons were made by Mr. Dolezsar to Ms. Mower, and Mr. Dolezsar may have been acting as part of the alleged conspiracy. Again, she does not give sufficient particulars even though she is presumably the only one with specific knowledge, and omitted an adequate explanation of why she did not share that knowledge in her serial complaints.

Additionally, Ms. Mower claims Simpsons do not meet the standard for Rule 19 as stated in *Grand County v. Rogers*, 44 P. 3d 734 (Utah 2002). In *Grand County*, the court determined the burden was on the party attempting to persuade the court to present specific facts. *Id.* at 741. Ms. Mower claims Simpsons did not present specific facts sufficient to meet the Rule 19 standard. However, Simpsons accurately presented the facts alleged in the Second Amended Complaint, noting that all of the alleged fraudulent information passed to Ms. Mower came via Mr. Dolezsar, and Mr. Dolezsar may have been part of the alleged conspiracy.

In the present case, the Court finds the Second Amended Complaint alleges, at least in the alternative, Mr. Dolezsar acted as more than a simple go-between. He occupied a pivotal representative role in the alleged fraud. In his absence, complete relief would not be available for those who are already parties because of the inability to hold him accountable as well as the other reasons identified by Simpsons. There is, therefore, sufficient interest to make him a party to this action. The statute of limitations as found in Utah Code Ann. § 75-3-803(1) (a) – (b) (1993)) has already run and Mr. Dolezsar cannot be joined unless Ms. Mower presented an exception to tolling the limitations period, which she has not attempted to do. Thus, the Court will look to the Rule 19(b) factors to determine whether Mr. Dolezsar is an indispensable party. No Rule 19 factor is determinative and each must be given weight appropriate to the facts of this case. *Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir. 1974).

First, the Court must determine to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties to the action. Ms. Mower claims Mr. Dolezsar is simply a joint tortfeasor and his absence would not unfairly prejudice any current parties. Simpsons properly assert Mr. Dolezsar is more than a mere joint tortfeasor and is one of the major actors in this case—potentially one who self-dealt and defrauded others; all the allegedly fraudulent statements were made to Ms. Mower by Mr. Dolezsar. The Defendants will be unfairly prejudiced by any judgment issued in the absence of Mr. Dolezsar because of, for example, their inability to cross claim against him.

Second, the Court must decide the extent to which the prejudice can be mitigated. Ms. Mower made no argument concerning this factor, however Simpsons properly noted the prejudice can be avoided by dismissing the claims for fraud.

Third, the Court must ascertain whether a judgment rendered in a person's absence will be adequate. Ms. Mower claims the Court should consider adequacy of judgment from the Plaintiff's point-of-view. In *Davis v. United States*, 343 F.3d 1282, 1292-93 (10th Cir. 2003) the Tenth Circuit addresses adequacy not from the standpoint of the plaintiff, but by evaluating the quality of the resolution of the dispute. *Id.* In looking at the resolution, judgment rendered without Mr. Dolezsar would be inadequate because, among other things mentioned by Simpsons, no cross claims can now be brought against his estate.

Finally, the Court must determine whether a plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Dismissal of the fraud claims will not affect Ms. Mower's claims for breach of contract, breach of fiduciary duty, conversion and unjust enrichment. The Court is well aware these claims may not perfectly protect Ms. Mower's interests were all of the facts alleged to be proved. (The Court previously ruled, however, inadequate facts regarding fraud were alleged by plaintiffs.) In the absence of Mr. Dolezsar and with the inability to join his estate as a party at this juncture, the remaining claims must suffice.

Based on the above analysis and all other reasons stated by Simpsons, the Court finds Simpsons would be substantially prejudiced by proceeding with the fraud claims in the absence of Mr. Dolezsar. Mr. Dolezsar played a key role in the communication of the information which is claimed to form the basis of the alleged fraud in this action. The Court cannot conclude an adequate resolution to the claims for fraud may be reached in the absence of Mr. Dolezsar's

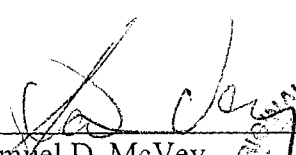
estate, and the only way to mitigate the resulting prejudice to Simpsons is to dismiss the claims for fraud. Ms. Mower's remaining claims provide an adequate remedy for the injuries of which she complains.

III. Conclusion

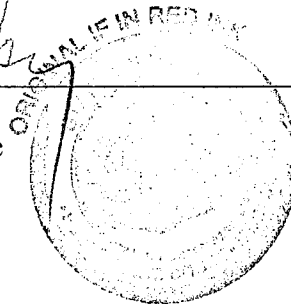
The Simpson defendant's Motion to Dismiss fraud claims in the Second Amended Complaint on the basis of Rule 19 is GRANTED.

DATED this 16 of June, 2010

BY THE COURT:



Samuel D. McVey
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090403844 by the method and on the date specified.

MAIL: BART J BAILEY 584 S STATE ST OREM, UT 84058
MAIL: CRAIG CARLILE 86 NORTH UNIVERSITY STE 430 RAY QUINNEY &
NEBEKER PROVO UT 84601-4420
MAIL: MARK D EDDY 233 S PLEASANT GROVE BLVD STE 202 PLEASANT GROVE
UT 84062
MAIL: CHRISTOPHER D GREENWOOD 1840 N STATE ST SUITE 200 PROVO UT
84604-0117
MAIL: JONATHAN L JAUSSE PO BOX 460 PAYSON UT 84651
MAIL: JULIAN D JENSEN 311 S STATE ST STE 380 SALT LAKE CITY UT
84111
MAIL: LAURA S SCOTT 201 S MAIN ST STE 1800 PO BOX 45898 SALT LAKE
CITY UT 84145-0898
MAIL: DENVER C SNUFFER 10885 S STATE ST SANDY UT 84070
MAIL: STEVEN R SUMSION WELLS FARGO BUILDING 86 N UNIVERSITY AVE
STE 400 PROVO UT 84601

Date: 12/17/10

Call Stephen
Deputy Court Clerk