

2016

The Armer Texas Trust, Et Al., Plaintiffs and Appellants, vs. Robert v. Brazell, Et Al., Defendants and Appellees

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 Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellee, *Brazell Armer Te v. Brazell*, No. 20150140 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3116

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 (2007–) 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.

THE UTAH COURT OF APPEALS

THE ARMER TEXAS TRUST, ET AL.,

Plaintiffs and Appellants,

vs.

ROBERT V. BRAZELL, ET AL.

Defendants and Appellees.

**BRIEF OF APPELLEE
VON H. WHITBY**

Appellate Case No. 20150140-CA

**On Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Andrew Stone, District Court No. 130900740**

Donald H. Flanary, Jr.
DONALD H. FLANARY, JR., PLLC
1595 North Central Expressway
Richardson, Texas 75080

John P. Mertens
Adam L. Hoyt
PIA ANDERSON DORIUS REYNARD
& MOSS
222 S. Main Street, Suite 1830
Salt Lake City, Utah 84101
Attorneys for Appellants

Michael N. Zundel
John S. Chindlund
Florence M. Vincent
PRINCE YEATES & GEDLZAHLER
13 West Temple, Suite 1700
Salt Lake City, Utah 84101
*Attorneys for Appellees: Robert Brazell, In-
Store Broadcasting Network, LLC, In-Store
Broadcasting Holding, LLC, and Talos
Partners, LLC*

Richard D. Burbidge (#0497)
Jefferson W. Gross (#8339)
S. Ian Hiatt (#13535)
BURBIDGE MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, UT 84111
Telephone: 801-355-6677
Facsimile: 801-355-2341
Attorneys for Appellee Von H. Whitby

**FILED
UTAH APPELLATE COURTS**

MAR 11 2016

THE UTAH COURT OF APPEALS

<p>THE ARMER TEXAS TRUST, ET AL.,</p> <p>Plaintiffs and Appellants,</p> <p>vs.</p> <p>ROBERT V. BRAZELL, ET AL.</p> <p>Defendants and Appellees.</p>	<p>BRIEF OF APPELLEE VON H. WHITBY</p> <p>Appellate Case No. 20150140-CA</p>
--	---

**On Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Andrew Stone, District Court No. 130900740**

Donald H. Flanary, Jr.
DONALD H. FLANARY, JR., PLLC
1595 North Central Expressway
Richardson, Texas 75080

John P. Mertens
Adam L. Hoyt
PIA ANDERSON DORIUS REYNARD
& MOSS
222 S. Main Street, Suite 1830
Salt Lake City, Utah 84101
Attorneys for Appellants

Michael N. Zundel
John S. Chindlund
Florence M. Vincent
PRINCE YEATES & GEDLZAHLER
13 West Temple, Suite 1700
Salt Lake City, Utah 84101
Attorneys for Appellees: Robert Brazell, In-Store Broadcasting Network, LLC, In-Store Broadcasting Holding, LLC, and Talos Partners, LLC

Richard D. Burbidge (#0497)
Jefferson W. Gross (#8339)
S. Ian Hiatt (#13535)
BURBIDGE MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, UT 84111
Telephone: 801-355-6677
Facsimile: 801-355-2341
Attorneys for Appellee Von H. Whitby

Sean A. Monson
BENNETT TUELLER JOHNSON &
DEERE
3165 East Millrock Drive, Suite 500
Salt Lake City, Utah 84145
*Attorneys for Appellees: Robin Nebel and
Rob Wolf*

Mark D. Stubbs
FILLMORE SPENCER, LLC
3301 North University Ave.
Provo, UT 84604
Attorneys for Appellees Mark Oleksik

IDENTIFICATION OF PARTIES

Plaintiffs/Appellants¹

Steve Brazell	Craig S. Kagel
Armer Texas Trust (aka Texas Armer Trust)	JAKL Industries
A.T. Family Investment, LLC (fka Thomas Family Limited Partnership)	Tyler and Lindsey Labrum
Avrin Investment Group	Tiffany Lowery
Beals Family Revocable Trust	Tom Mack
Lawrence P. Benkes	Jeff and Jennifer Mallas
Victoria Townsend (fka Victoria Benkes)	Gary L. Mills
Suzanne Billingsly	Peter J. McLaughlin
Mark A. and Alexis C. Brausa	Michelle Nieto
Jeffrey D. Brazell	Jeffrey Scott Reinecke
Brooks Family Trust	Flint Richardson
Campbell Family Trust	Rusch Family Trust
Howard Cooper	Richard Schlesinger
Dave Cross	CCCM Living Trust
Jose and Juanita Cruz	Red Rock Properties Group
Curutchet Family Trust	Jeff and Tina Rogers
Scott Day	Quinn Smith
Howard N. Esbin	S. Kevin Smith
June L. Esbin	Philip J. Stoddart
Ronald Finken	Jason Straub
David A. French	Ray A. Stokes
Piotr Gorodetsky	Anthony Tegano
Vasily Gorodetsky	Mark M. Truncale
Scott and Cindy Hambrecht	Scott Warner
Hitman, Inc.	Mark Warner ²
	Mark & Connie Schellerup ³

¹ The complaint was amended multiple times. Each iteration of the complaint added and/or removed plaintiffs without explanation. The Appellants' Brief appears to name as appellants those persons who were named as plaintiffs in the proposed Fifth Amended Complaint.

² Mark Warner was named as a plaintiff in the Second Amended Complaint (R. at 477), but was not named as a plaintiff in the proposed Fifth Amended Complaint (R. at 2568) and was not named as an appellant in the Appellants' Brief.

³ The Schellerups were named as plaintiffs in the original Complaint, First Amended Complaint, Second Amended Complaint, Third Amended Complaint, and Fourth Amended Complaint (R. at 2, 29, 477, 1318), but were not named as plaintiffs in the proposed Fifth Amended Complaint (R. at 2568) and were not named as appellants.

Defendants/Appellees⁴

Robert Brazell
In Store Broadcasting Network, LLC
In Store Broadcasting Holdings, LLC
IBN Media, LLC,
In Touch LLC
In Touch Media LLC
Talos Partners, LLC
Von H. Whitby
Robert W. Kasten Jr.
Robert E. Riley
Robin Nebels
Rob Wolf⁵
Mark Oleksik⁶
Joel Ballstaedt⁷

⁴ The named defendants also varied in the iterations of the complaint.

⁵ Rob Wolf was named as a defendant in the First Amended Complaint and the proposed Fifth Amended Complaint (R. at 30, 2569), but was not named as an appellee in the Appellants' Brief.

⁶ Mark Oleksik was named as a defendant in the Second Amended Complaint (R. at 478), but was not named as a defendant in the proposed Fifth Amended Complaint (R. at 2569) and was not named as an appellee in the Appellants' Brief.

⁷ Joel Ballstaedt was named as a defendant in the Third Amended Complaint and the proposed Fifth Amended Complaint (R. at 1320, 2570), but was not listed as an appellee in the Appellants' Brief.

TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT	1
II.	STATEMENT OF THE ISSUES	1
III.	DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS	2
IV.	STATEMENT OF THE CASE	2
A.	Nature of the Case	2
B.	Statement of Facts and Course of Proceedings	3
	<i>The Plaintiffs' Complaints and Stipulation as to Whitby</i>	3
	<i>The Plaintiffs' Deficient Initial Disclosures</i>	5
	<i>Motions to Dismiss, Motion for Summary Judgment, and Memorandum Decision</i>	7
VI.	SUMMARY OF THE ARGUMENT	8
VII.	ARGUMENT	10
A.	THE PLAINTIFFS FAIL TO CITE THE RECORD BELOW	10
B.	THE TRIAL COURT CORRECTLY DENIED LEAVE TO AMEND.....	10
C.	ALTERNATIVE GROUNDS FOR AFFIRMING THE TRIAL COURT.....	12
1.	The Plaintiffs Failed to Meet Their Disclosure Obligations	12
2.	The Plaintiffs Conceded That They Have No UFTA Claim Against Whitby.....	14
VIII.	CONCLUSION	15

ADDENDA

Addendum A: Memorandum Decision (R. at 3594-600)

Addendum B: Utah Rules of Civil Procedure 9, 15, and 26

TABLE OF AUTHORITIES

Cases

<i>Andersen v. Andersen</i> , 2015 UT App 260, 361 P.3d 698	10
<i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158	12
<i>Coroles v. Sabey</i> , 2003 UT App 339, 79 P.3d 974	12
<i>Dipoma v. McPhie</i> , 2001 UT 61, 29 P.3d 1225	12
<i>Nelson v. Target Corp.</i> , 2014 UT App 205, 334 P.3d 1010	2
<i>Turville v. J & J Prop., LLC</i> , 2006 UT App 305, 145 P.3d 1146	1

Statutes

Utah Code Ann. § 78A-4-103(2)(j)	1
--	---

Rules

Utah R. App. P. 24(i)	10, 12
Utah R. Civ. P. 26	2, 3, 9, 12, 13, 14
Utah R. Civ. P. 9(b)	3, 9, 11
Utah R. Civ. P. 26(a)(1)(A)	13
Utah R. Civ. P. 26(a)(1)(C)	13
Utah R. Civ. P. 26(c)	14
Utah R. Civ. P. 26(d)(4)	13

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

II. STATEMENT OF THE ISSUES

The plaintiffs/appellants are a fluctuating group of individuals and entities (hereinafter, the “Plaintiffs”) who allegedly invested the “In-Store Broadcasting” entities in 2006 and 2007 and who asserted fraud claims in 2013 arising out of their alleged investment. After almost two years of litigation and multiple amendments to the Plaintiffs’ complaint, several defendants (the “IBN Defendants”) sought dismissal on the grounds that the operative complaint failed to plead its claims with the requisite particularity; Defendant Von H. Whitby (hereinafter “Whitby”) joined in this motion. In response, the Plaintiffs declined to defend their complaints, instead seeking leave to file a proposed Fifth Amended Complaint. Finding that the proposed Fifth Amended Complaint was untimely, prejudicial, unjustified, and futile, the trial court correctly denied leave to amend and dismissed the undefended prior versions.

The issues on appeal are as follows:

Issue 1: Whether the Plaintiffs’ appellate brief should be stricken and the appeal dismissed for the lack of any citation to the record below.

Issue 2: Whether the trial court properly exercised its discretion in denying leave to file a proposed Fifth Amended Complaint based on the determination that the proposed amendment was untimely, prejudicial, and unjustified.

Standard of Review: The denial of leave to amend is reviewed for abuse of discretion. *Turville v. J & J Prop., LLC*, 2006 UT App 305, ¶ 23, 145 P.3d 1146.

Issue 3: Whether the trial court correctly denied leave to amend for futility when it determined that the Plaintiffs' proposed Fifth Amended Complaint failed to state a claim upon which relief could be granted in that it failed to plead fraud-based claims with the requisite particularity.

Standard of Review: A denial of leave to amend for futility where a complaint would not survive a motion to dismiss is reviewed for correctness. *Nelson v. Target Corp.*, 2014 UT App 205, ¶ 12, 334 P.3d 1010.

Issue 4: Whether the trial court's decision can be affirmed on the alternative grounds that the Plaintiffs failed to adequately make or supplement the initial disclosures required by Rule 26, Utah Rules of Civil Procedure.

Issue 5: Whether the trial court's decision can be affirmed, at least in part, as to Whitby on the alternative grounds that the Plaintiffs conceded that their Uniform Fraudulent Transfer Act claim against Whitby should be dismissed.

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

The following Rules are attached as Addendum B: Utah Rules of Civil Procedure 9, 15, and 26.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This case concerns the obligations of all plaintiffs to adequately plead and prosecute their claims. Because Utah law is clear that (1) a trial court has considerable discretion to permit or deny leave to amend and (2) a party asserting fraud-based claims

must plead such claims with sufficient particularity as to allow the defendants to understand the nature of the claims and defend against them, this Court can resolve the issues on appeal on the grounds that the Plaintiffs failed in each of their successive complaints – including their proposed Fifth Amended Complaint – to meet the requirements of Rule 9(b). In addition, because the Utah rules are clear as a party's affirmative disclosure obligations, this Court can resolve the issues on appeal on the alternative grounds that the Plaintiffs failed to properly disclose their witnesses and damages during fact discovery as required by Rule 26.

B. Statement of Facts and Course of Proceedings

The Plaintiffs' Complaints and Stipulation as to Whitby

1. The Plaintiffs filed their original Complaint in this action on February 1, 2013. (R. at 1.) On April 1, 2013, the Plaintiffs filed their First Amended Complaint. (R. at 27.)

2. Whitby was served with the First Amended Complaint and a Summons on April 23, 2013. (R. at 2859-61.)

3. The first Defendant to answer the Plaintiffs' Complaint was Rob Wolf, who filed his Answer on June 3, 2013. (R. at 106.)

4. Because the Plaintiffs did not consider Whitby a primary target of the litigation, they agreed that Whitby need not respond to the operative complaint until twenty days (20) days after each of the other Defendants had been served. (R. at 2863.)

5. Even after the Plaintiffs substituted counsel, the agreement regarding Whitby's open-ended extension on responding to the operative complaint and Whitby's service of initial disclosures was confirmed by the Plaintiffs' new counsel. (R. at 2865.)

6. On or about September 3, 2013, seven (7) months after filing their original Complaint, the Plaintiffs filed their Second Amended Complaint. (R. at 476-93.)

7. According to the Court's Notice and based on the first filed Answer, fact discovery was to be completed by February 18, 2014. (R. at 125-26.)

8. On or about March 6, 2014, more than one year after filing suit, the Plaintiffs filed their Third Amended Complaint, apparently without leave of Court. (R. at 1316-37.)

9. In May 2014, the Plaintiffs unilaterally revoked their prior stipulation and demanded a response to the complaint from Whitby. (R. at 2871.)

10. On May 29, 2014, Whitby filed his Answer to the Third Amended Complaint. (R. at 1867-77.)

11. On July 3, 2014, the Plaintiffs filed their Fourth Amended Complaint without leave of Court. (R. at 2024-47.) On July 18, 2014, Whitby filed an Answer to the Fourth Amended Complaint, subject to and without waiving his objection that the Fourth Amended Complaint was filed without leave of Court and without Whitby's consent. (R. at 2126-37.)

12. In its September 16, 2014 Minute Entry, the trial court recognized that the Fourth Amended Complaint was filed without the court's leave, stating that "Defendant

correctly points out that no order authorized the filing of the Fourth Amended Complaint.

Until such order is made, no answer or other response is required.” (R. at 2389.)

The Plaintiffs’ Deficient Initial Disclosures

13. On September 10, 2013, more than seven (7) months after filing their original complaint, The Plaintiffs served initial disclosures. (R. at 2875-82.) The Plaintiffs’ initial disclosures include a list of fifty-five (55) potential witnesses. However, the Plaintiffs did not include any subjects of information or any summary of anticipated testimony with respect to any of these witnesses, not even with respect to the Plaintiffs themselves. (R. at 2876-78.)

14. Further, the Plaintiffs’ initial disclosures did not include any information regarding a computation of damages, instead stating only that:

an exact computation of damages suffered by Plaintiffs, including lost profits, legal fees and costs incurred in connection with bringing The Plaintiffs’ claims, cannot be determined until such time as the Court adjudicates the existing claims.

(R. at 2879.) The Plaintiffs claimed that “attached hereto is a list of each Plaintiff’s amount invested with the Defendants, which forms a portion of the damages,” but nothing was attached. (*Id.*)

15. On or about May 28, 2014, more than fifteen (15) months after filing their initial complaint, the Plaintiffs served supplemental disclosures. (R. at 2884-88.) The Plaintiffs’ supplemental disclosures did not include any additional information regarding potential witnesses, nor any additional documents. The Plaintiffs’ supplemental disclosures purported to provide damages information, but stated only that the Plaintiffs

“will be making claims for damage against the defendants of at least \$40,000,000.00 excluding exemplary damages.” (*Id.*) The supplemental disclosure includes no computation of how that \$40 million figure was derived. (*Id.*)

16. At a July 16, 2014 hearing, the trial court admonished the Plaintiffs to provide appropriate initial disclosures, warning the Plaintiffs that any testimony that was not fairly disclosed would be excluded. (R. at 2890-92.)

17. On August 6, 2014, the Plaintiffs served their Consolidated Second Supplemental Initial Disclosures. (R. at 2894-905.) In their second supplemental disclosures, the Plaintiffs identified fifty-five (55) Plaintiffs (or the Plaintiffs’ representatives). (*Id.* at 2900-03.) These individuals would apparently each offer the same testimony. (*Id.* at 2899-900.)

18. In the Plaintiffs’ second supplemental disclosures, the only anticipated testimony with respect to Whitby is that he and others “indicated in correspondence and otherwise that they were or are officers, directors and or managers of the Defendant entities.” (R. at 2900.) Apparently, all fifty-four (54) Plaintiffs will provide that same testimony. (*Id.*) Aside from this statement, the second supplemental disclosures are silent with respect to Whitby. (*See generally, id.*)

19. The Plaintiffs did not serve any documents with their August 6, 2014 second supplemental disclosures. (R. at 2894-905.)

20. The Plaintiffs’ second supplemental disclosures did not provide any additional information regarding damages. (R. at 2894-905.)

21. The Plaintiffs did not otherwise supplement their initial disclosures.

Motions to Dismiss, Motion for Summary Judgment, and Memorandum Decision

22. On October 29, 2014, the IBN Defendants filed a Motion to Dismiss. (R. at 2419-41.) Whitby joined the motion. (R. at 2475-77.)

23. On November 21, 2014, the IBN Defendants also filed a Motion to Dismiss Plaintiffs' First Cause of Action (securities fraud) based on the 5-year statute of repose in the Utah Uniform Securities Act. (R. at 2514-25.) Whitby also joined in this motion. (R. at 2547-48.)

24. On December 3, 2014, the Plaintiffs filed their memorandum in opposition to the IBN Defendants' Motion to Dismiss. (R. at 2646-60.) Although they styled their response an "Opposition," "[r]ather than defend their amended complaints, regardless of which one is before the Court, the Plaintiffs have chosen to seek leave to file an amended complaint." (R. at 2649.)

25. On December 3, 2014, the Plaintiffs also filed a Motion for Leave to File Amended Complaint (and a supporting memorandum the following day) in which they sought leave to file their proposed Fifth Amended Complaint. (R. at 2561-640; 2685-92.)

26. On December 17, 2014, Whitby filed his memorandum in opposition to the Plaintiffs' motion for leave to amend. (R. at 2743-99.)

27. On December 17, 2014, Whitby also filed a motion for summary judgment as to all claims against him. (R. at 2814-52.)

28. On December 29, 2014, the Plaintiffs filed their reply memorandum in support of their motion for leave to amend. (R. at 3068-259) The Plaintiffs' pejorative Introduction read as follows:

Brazell, Whitby and Kasten, using their individual and corporate identities, are nothing more than twenty-first century bandits willing to say anything to avoid the truth being known about them and the justice that will result from that truth.

(R. at 3069.)

29. On January 5, 2014, the trial court heard oral argument on the Defendants' two motions to dismiss and the Plaintiffs' motion for leave to amend. (R. at 5570-615.)

30. On January 15, 2015, the Plaintiffs filed their opposition to Whitby's motion for summary judgment. (R. at 3321-84.) In their opposition, the Plaintiffs conceded that Whitby was entitled to summary judgment on the "constructive trust," "fraudulent transfer," "derivative action," and "request for receivership" claims set forth in the Fourth Amended Complaint and Proposed Fifth Amended Complaint. (R. at 3382.)

31. On January 22, 2015, the trial court issued its Memorandum Decision, denying the Plaintiffs' motion for leave to amend and dismissing each of the Plaintiffs' various complaints. (R. at 3594-600.)

32. In light of the trial court's Memorandum Decision, Whitby filed a "Suggestion of Mootness" regarding his motion for summary judgment rather than a reply memorandum and his motion for summary judgment was never submitted to or considered by the trial court. (R. at 3601-04.)

VI. SUMMARY OF THE ARGUMENT

Where fraud is alleged, defendants have a right to a particularized pleading explaining, at a minimum, the "who, what, when, where, and how" of the alleged

misrepresentations. This allows each defendant to formulate his or her individual defenses. In this case, for example, Whitby was a manager of one or more defendant entities, but only at certain periods of time, and long after the Plaintiffs made their investments. Probably for this reason, the Plaintiffs did not treat Whitby as a primary target: the Plaintiffs stipulated that Whitby need not respond to the complaint until after all Defendants had been served, and this stipulation remained in place for a full year until it was unilaterally revoked by the Plaintiffs (despite the fact that all Defendants had still not been served).

After almost two years of litigation and multiple versions of their complaint, however, the Plaintiffs still had not stated with any particularity what misrepresentations of fact were said to whom, by whom, and when, and how, and (of particular importance with respect to Whitby) what Whitby's purported involvement had been in any such representations. Faced with a motion to dismiss, the Plaintiffs abandoned their prior iterations of the complaint, instead relying entirely on a proposed Fifth Amended Complaint which *still* could not explain what purported misrepresentations were made by whom, to which Plaintiff, and when, and how each Plaintiff relied. Carefully reviewing this proposed complaint, the trial court determined that not only was it untimely, prejudicial, and unjustified, it still failed to plead fraud with the requisite particularity demanded by Rule 9(b). As the trial court succinctly held, "[s]ix tries at pleading fraud are enough." (R. at 3598.)

There are additional reasons to affirm. Not only did the Plaintiffs fail to adequately plead their claims, they failed to make proper disclosures under Rule 26,

failing to disclose any anticipated testimony implicating Whitby and failing to disclose their computation of damages. And, in response to Whitby's motion for summary judgment, the Plaintiffs conceded that their Uniform Fraudulent Transfer Act claim should be dismissed.

The Plaintiffs have ignored their obligations under the Rules at every turn, including, as the latest example, their failure to cite the record in their appellate brief. Accordingly, the appeal should be dismissed and the trial court affirmed.

VII. ARGUMENT

A. THE PLAINTIFFS FAIL TO CITE THE RECORD BELOW.

As set forth in the brief of the IBN Defendants, which arguments are adopted herein pursuant to Rule 24(i), Utah Rules of Appellate Procedure, the Appellants' Brief should be stricken and the appeal dismissed for the Plaintiffs' failure to cite to the record. The rules are clear, as is the precedent authorizing dismissal. The Plaintiffs have "dump[ed] the burden or their argument and research" on this Court, *see Andersen v. Andersen*, 2015 UT App 260, ¶ 6, 361 P.3d 698, and the Appellants' Brief should be stricken and the appeal dismissed on this basis alone.

B. THE TRIAL COURT CORRECTLY DENIED LEAVE TO AMEND.

Even if the Court were to consider the Plaintiffs' non-compliant appellate brief, the trial court's decision should be affirmed. The Plaintiffs do not challenge the trial court's dismissal of each of their complaints up to and including the Fourth Amended Complaint. Accordingly, this appeal hinges on the trial court's denial of the Plaintiffs' motion for leave to file their proposed Fifth Amended Complaint. As the Plaintiffs

concede, denial of leave to amend is reviewed under the “abuse of discretion” standard.

(*See* Appellants’ Br. at 2.)

The trial court, in its thorough and well-reasoned Memorandum Decision, correctly determined that the proposed Fifth Amended Complaint was untimely, prejudicial, and unjustified. (*See* R. at 3595.) Moreover, the trial court determined that amendment would be futile as the proposed Fifth Amended Complaint failed to state a claim upon which relief could be granted. (*See* R. at 3594-600.) Specifically, it failed to plead the Plaintiffs’ claims with the particularity required by Rule 9(b). In this regard, the trial court made specific reference to Whitby, observing:

Defendant Whitby’s joinder in the Motion illustrates this problem. It is impossible to tell from the Fifth Amended Complaint when Whitby supposedly joined Plaintiffs’ posited conspiracy, and which Plaintiff relied on any representation with which he might possibly be charged. No allegation is made of any representation actually made by him. As Whitby pointed out in argument, he has factual defenses to make based on when he came to the company, so each plaintiff needs to explain what representation they relied on as to which that they can properly claim Whitby is accountable. . . . Rule 9(b) is essential in such as case; Whitby is entitled to the specifics of each plaintiff’s claim against him, without being lumped together with every other defendant, defending the lumped-together claims of every plaintiff.

(R. at 3596-97.)

On appeal, the Plaintiffs do not challenge the trial court’s application of Rule 9(b) to their claims (except as to their UFTA claim, addressed below). Moreover, the Plaintiffs largely ignore the trial court’s reasoning and analysis as to futility, making only the conclusory assertion that they “set forth the ‘who, what, when, where, and how’” of their claims, but failing to identify with any specificity where in the proposed Fifth

Amended Complaint such questions are answered as to any particular Plaintiff, any particular Defendant, or any particular misrepresentation. (See Appellants' Br. at 25-26.) Thus, the Plaintiffs have dumped upon the trial court and now upon this Court the burden of sifting through the alleged facts to ascertain whether Plaintiffs have alleged facts necessary to make all their elements of their claims. See *Coroles v. Sabey*, 2003 UT App 339, ¶ 27, 79 P.3d 974. This approach is "unacceptable." *Id.*

Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Whitby adopts by reference the arguments of the IBN Defendants as to the correctness of the trial court's denial of leave to amend. The trial court's decision should be affirmed.

C. ALTERNATIVE GROUNDS FOR AFFIRMING THE TRIAL COURT.

The trial court's decision should also be affirmed on alternative grounds. It is well-settled that an appellate court may affirm the judgment appealed from

if it is sustainable on any legal ground or theory apparent on the record, even though such ground differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory . . . was not considered or passed on by the lower court.

Bailey v. Bayles, 2002 UT 58, ¶¶ 10, 13, 52 P.3d 1158 (affirming court of appeals in affirming trial court's order on alternative grounds) (quoting *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225).

1. The Plaintiffs Failed to Meet Their Disclosure Obligations.

As is apparent on the record, the Plaintiffs' claims also fail for their failure to make, during fact discovery, the requisite disclosures for the presentation of their case-in-chief. Under Rule 26, the Plaintiffs were required to provide, as part of their initial

disclosures, the name of each individual likely to have discoverable information supporting their claims and each fact witness they may call in their case-in-chief with a “summary of the expected testimony.” Utah R. Civ. P. 26(a)(1)(A). In addition, the Plaintiffs were required to provide “a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based.” *Id.* at 26(a)(1)(C).

Rule 26(d)(4) provides that a party’s failure to submit timely disclosures precludes that party from using the undisclosed evidence, unless the failure is harmless or the party shows good cause for the failure. *Id.* at 26(d)(4). Regarding initial disclosures, the commentary to Rule 26 explains:

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. **To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial.** The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

Id. at R. 26, Advisory Committee Notes (emphasis added).

Here, the Plaintiffs had the affirmative obligation to disclose any testimony and documents they intended to present to establish their claims. Moreover, the trial court specifically warned the Plaintiffs that without an adequate description of witness testimony, their witnesses would be precluded from testifying. (R. at 2890-92.) Even in the face of this warning, the Plaintiffs failed to disclose any testimony or documents which demonstrate liability. The Plaintiffs completely failed to provide any facts which set forth a single representation by Whitby to any Plaintiff, much less a

misrepresentation, much less one on which any Plaintiff relied to its detriment. This failure is fatal to their claims. And, the Plaintiffs had plenty of time to make the requisite disclosures: based on the presumptive 210-day period found in Rule 26(c), fact discovery closed in February 2014, long before the trial court's dismissal. (*See* R. at 125-26)

Further, the Plaintiffs' failure to make an adequate disclosure of their damages computation is fatal to each of their claims. With respect to the disclosure of damages information, the Rule 26 commentary explains that "[p]arties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages." Utah R. Civ. P. 26, Advisory Committee Notes. The Plaintiffs did nothing more than pull a \$40 million dollar number out of the air without any support or explanation or any discernible relationship to the allegations and claims. (R. at 2884-88.) Thus, having failed to disclose a computation of damages, the Plaintiffs would be precluded from presenting evidence of damages, and their claims—whether under the proposed Fifth Amended Complaint or any prior complaint—would fail. The trial court's dismissal should be affirmed on this alternative basis.

2. The Plaintiffs Conceded That They Have No UFTA Claim Against Whitby.

The Plaintiffs' proposed Fifth Amended Complaint added four causes of action: "Constructive Trust," "Fraudulent Transfer," "Derivative Action," and "Request for Receivership." (R. at 2634-37.) The trial court denied the Motion to Amend as to these claims "without regard to futility" and on the grounds that they were untimely, without

justification, and unduly prejudicial. (R. at 3598-99.) Apparently ignoring this portion of the trial court's decision, the Plaintiffs make the ironic claim that the trial court "ignored" their Uniform Fraudulent Transfer Act ("UFTA") claim and argue that the trial court incorrectly applied Rule 9(b) to their UFTA claim.¹ (See Appellants' Br. at 26-28.) The Plaintiffs' argument was not preserved and, in any event, lacks merit for the reasons set forth in the IBN Defendants' brief, which reasons are adopted and incorporated herein.

In addition, the trial court's rejection of the Plaintiffs' UFTA claim should be affirmed on alternative grounds as to Whitby. Whitby moved for summary judgment arguing, *inter alia*, that the Plaintiffs' newly-added claims should be dismissed as a matter of law. (R. at 2814-52.) In response, the Plaintiffs conceded summary judgment on their late-filed claims, including their UFTA claim. (R. at 3382.) Although the trial court issued its Memorandum Decision before briefing on Whitby's summary judgment motion was complete, the Plaintiffs' concession of judgment stands on the record and provides an alternative basis for this Court to affirm the trial court's decision.

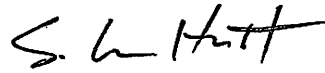
VIII. CONCLUSION

Whitby respectfully asks this Court to strike the Appellants' Brief and dismiss the appeal or, in the alternative, to affirm the trial court's order denying leave to amend and dismissing the Plaintiffs' complaints with prejudice.

¹ The Plaintiffs do not challenge the trial court's rejection of the other three new claims.

DATED this 11th day of March, 2016.

BURBIDGE MITCHELL & GROSS

A handwritten signature in black ink, appearing to read "S. Ian Hiatt". The signature is written in a cursive, flowing style with a horizontal line extending from the end.

S. Ian Hiatt

Attorneys for Appellee Von H. Whitby.

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

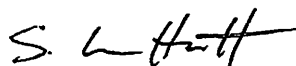
I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3,843 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 13.

DATED this 11th day of March, 2016.

BURBIDGE MITCHELL & GROSS

By 
S. Ian Hiatt
Attorneys for Appellee Von H. Whitby

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that two copies of the foregoing **BRIEF OF APPELLEE VON H. WHITBY**, and a disk containing an electronic copy were served upon the persons named below, in the manner indicated, on the 11th day of March, 2016.

Donald H. Flanary, Jr.	<input checked="" type="checkbox"/> U.S. Mail
DONALD H. FLANARY , JR., PLLC	<input type="checkbox"/> Federal Express
1595 North Central Expressway	<input type="checkbox"/> Hand Delivery
Richardson, Texas 75080	<input type="checkbox"/> Telefacsimile
	<input type="checkbox"/> E-mail
	<input type="checkbox"/> Electronic

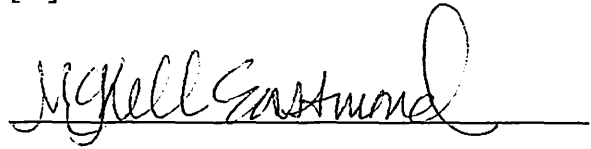
John P. Mertens	<input checked="" type="checkbox"/> U.S. Mail
Adam L. Hoyt	<input type="checkbox"/> Federal Express
PIA ANDERSON DORIUS REYNARD	<input type="checkbox"/> Hand Delivery
& MOSS	<input type="checkbox"/> Telefacsimile
222 S. Main Street, Suite 1830	<input type="checkbox"/> E-mail
Salt Lake City, Utah 84101	<input type="checkbox"/> Electronic
<i>Attorneys for Appellants</i>	

Michael N. Zundel	<input checked="" type="checkbox"/> U.S. Mail
John S. Chindlund	<input type="checkbox"/> Federal Express
Florence M. Vincent	<input type="checkbox"/> Hand Delivery
PRINCE YEATES & GEDLZAHLER	<input type="checkbox"/> Telefacsimile
13 West Temple, Suite 1700	<input type="checkbox"/> E-mail
Salt Lake City, Utah 84101	<input type="checkbox"/> Electronic
<i>Attorneys for Appellees: Robert Brazell,</i>	
<i>In-Store Broadcasting Network, LLC, In-</i>	
<i>Store Broadcasting Holding, LLC, and</i>	
<i>Talos Partners, LLC</i>	

Sean A. Monson	<input checked="" type="checkbox"/> U.S. Mail
BENNETT TUELLER JOHNSON &	<input type="checkbox"/> Federal Express
DEERE	<input type="checkbox"/> Hand Delivery
3165 East Millrock Drive, Suite 500	<input type="checkbox"/> Telefacsimile
Salt Lake City, Utah 84145	<input type="checkbox"/> E-mail
<i>Attorneys for Appellees: Robin Nebel and</i>	<input type="checkbox"/> Electronic
<i>Rob Wolf</i>	

Mark D. Stubbs
FILLMORE SPENCER, LLC
3301 North University Ave.
Provo, UT 84604
Attorneys for Appellees Mark Oleksik

☒ U.S. Mail
☐ Federal Express
☐ Hand Delivery
☐ Telefacsimile
☐ E-mail
☐ Electronic

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

Tab A

ADDENDUM A

JAN 22 2015

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE ARMER TEXAS TRUST (AKA TEXAS ARMER
TRUST), ET AL,

Plaintiffs,

-VS-

ROBERT V. BRAZELL, IN-STORE BROADCASTING
NETWORK, LLC, IN-STORE BROADCASTING
HOLDING, LLC, IBN MEDIA, LLC, INTOUCH, LLC,
INTOUCH MEDIA, LLC, TALOS PARTNERS, LLC,
VON WHITBY, ROBERT W. KASTEN JR., ROBERT
E. RILEY, ROBIN NEBEL, ROB WOLF, MARK
OLEKSIK, and DOES 1-15,

Defendants.

MEMORANDUM DECISION

Civil No. 130900740

Judge Andrew Stone

This case comes before the court on the motion of Defendants Robert V. Brazell, Robert W. Kasten Jr., In-Store Broadcasting Network, LLC, In-Store Broadcasting Holding, LLC, Talos Partners, LLC, IBN Media, LLC, InTouch Media, LLC and InTouch, LLC (collectively, "IBN Defendants") to dismiss all of Plaintiffs' Causes of Action under Rule 12(b)(6). These Defendants assert that the complaint fails to state a claim under the standards of Rule 9(b) of the Utah Rules of Civil Procedure. Defendant Von Whitby joins their motion. These same IBN Defendants move as well to dismiss the First Cause of Action as time barred. Defendants Von Whitby and Robert Riley join in this motion.

Plaintiffs respond to the 12(b)(6) motion by seeking leave to file a Fifth Amended Complaint.

This case was filed in February, 2013. Plaintiffs amended their original complaint before an answer was filed and later obtained leave to file a Second Amended Complaint. Thereafter, the parties stipulated in January 2014 that amended pleadings could be filed up to July 3, 2014. The Court never approved this stipulation. However, pursuant to that stipulation Plaintiffs filed a Third Amended and a Fourth Amended Complaint within the time agreed in the stipulation. After that time had passed, Defendants made the present motion. Plaintiffs sought leave to file the Fifth Amended Complaint on December 4, 2014.

Thus, the operative Complaint is actually the Second Amended Complaint, the last iteration as to which leave was granted for filing pursuant to the Rules. However, the reality is that Plaintiffs have relied on a stipulation permitting the filing of amendments without leave in filing the Third and Fourth Amended Complaints. The Court, therefore, would ordinarily base its analysis of the adequacy of the pleadings on those later filed papers. However, the filing of the Motion to Amend (pertaining to the proposed Fifth Amended Complaint) necessitates that the Court resolve that motion first—the Court declines to simply evaluate the earlier filed versions and dismiss with prejudice, given the filing of the Motion to Amend.

In so doing, the Court does not accept Plaintiffs' argument that they are entitled to this new amendment because Defendants have not previously objected to the particularity of the previous complaints. Each of the answers filed interposed a defense that the applicable complaint failed to state a cause of action. Rule 9(b) applies from the start, and does not merely contemplate an automatic "do-over" if a defendant raises particularity. Rather, the Court first addresses the Motion to Amend because Plaintiffs acknowledge it contains greater particularity than the earlier versions—thus, if the Fifth Amended Complaint still fails in particularity, consideration of the other complaints becomes unnecessary. On the other hand, if leave to amend is granted, the present Motion is moot with respect to earlier versions of the Complaint.

The Court denies the Motion to Amend. The Complaint is untimely, coming long after both the Court-imposed presumptive deadline for amendment as well as that stipulated to by the parties. Amendment at this point would substantially prejudice defendants as they would now be faced with new factual theories for which they have not had time to prepare. In addition, Plaintiffs offer no justification for not having pleaded their multiple earlier versions of the complaint with the additional facts offered in the Fifth Amended Complaint—all of the facts regarding supposed misrepresentations and Plaintiffs' reliance thereon were plainly available to them from the start. Most significantly, the Court has determined that the proposed amendment would be futile. In so doing, the Court has carefully reviewed the proposed Fifth Amended Complaint and concludes that it still fails to plead a fraud claim as to any specific plaintiff against any specific defendant with the particularity required by Rule 9(b).

The proposed Fifth Amended Complaint is long on narrative and short on specifics with respect to each individual party. It does not explain when any false representation was made to any individual plaintiff, or any plaintiff's specific reliance on that statement. It fails to explain when each plaintiff obtained their respective shares or otherwise relied on statements by defendants. Fraud-based claims are highly individualized, because reliance is an individual decision. Accordingly, stating a particularized claim of fraud requires each plaintiff to allege which representations were made to them, when and how and by whom, and how they each relied on that representation. This permits each of the defendants to defend against the allegation as to each defendant and each plaintiff. The Fifth Amended Complaint does not permit any one defendant to determine which supposed misrepresentation of fact was relied on by which plaintiff in what way, and why each defendant should be charged with that alleged misrepresentation. Rule 9(b) requires that minimal pleading before permitting a party to cry "fraud."

The proposed Fifth Amended Complaint alleges a long course of supposed misrepresentations, mostly occurring in 2006-2007. Nearly all of them are statements of future intent, or opinions as to value. A statement that an investment "is going to be huge" is not a statement of presently existing fact. Statements of intent regarding future investments or their structure are likewise not statements of presently existing fact. If such an intent was not genuinely held at the time of the statement, it might constitute an implied misrepresentation of existing fact, but the Fifth Amended Complaint makes no attempt to allege as much. Likewise a statement that other investments "have been secured" or a statement of intent to put one's own money into the venture is not false at the time merely because it did not ultimately happen. The Fifth Amended Complaint simply glosses over this principle, conclusorily alleging misrepresentations regarding forward-looking statements (and conveniently omitting any actual disclosure documents given to the purchasers). It is not too much to require plaintiffs to allege statements of existing fact, that the facts represented were untrue at the time, and how plaintiffs relied to their detriment on that misrepresentation. The Fifth Amended Complaint does not accomplish this.

This is not a class action. Each plaintiff will have made individual decisions as to buying and holding stock in this case. Each of the defendants played different roles. We are dealing with separate fraud actions pursued by each proposed plaintiff against various defendants. Particularity is required for each of these claims.

Defendant Whitby's joinder in the Motion illustrates this problem. It is impossible to tell from the Fifth Amended Complaint when Whitby supposedly joined Plaintiffs' posited conspiracy, and which plaintiff relied on any representation with which he might possibly be charged. No

allegation is made of any representation actually made by him. As Whitby pointed out in argument, he has factual defenses to make based on when he came to the company, so each plaintiff needs to explain what representation they relied on as to which that they can properly claim Whitby is accountable. But under the proposed Fifth Amended Complaint, he was at the scene of the crime at some point in time, apparently, so he must be liable as well. Rule 9(b) is essential in such a case; Whitby is entitled to the specifics of each plaintiff's claim against him, without being lumped together with every other defendant, defending the lumped-together claims of every plaintiff.

Defendants' Motion with respect to the First Cause of Action also illustrates the inadequacy of the proposed Complaint. That motion articulates a complete defense to the Utah Securities Act claim based on a statute of repose. It is made as a 12(b)(6) claim, but is accompanied by an affidavit establishing that each of the plaintiffs purchased their respective shares well outside the statutory period. Plaintiffs objected to the consideration of that material outside the pleadings. But the point is that the affidavit should not have been necessary—at a minimum, Plaintiffs should have pleaded the dates on which they acquired their shares to establish when they at least initially relied on Defendants' supposed misrepresentations.

The proposed Fifth Amended Complaint, at its core, alleges, for the most part, supposed misrepresentations made by Defendant Rob Brazell to Plaintiff Steve Brazell, which plaintiffs allege were passed along to all of them. A few other supposed misrepresentations are charged to other defendants, though the pleading fails to reveal how these other statements of presently existing fact were false at the time. But taking one example of an actual alleged misrepresentation shows the weakness of the pleading: Plaintiffs allege that Rob Brazell misrepresented his role at prior Overstock.com. In conclusory fashion, the pleading claims that this representation was made to each of plaintiffs and relied on by each of them in investing in In-Store Broadcasting Holding, Inc. Fifth Amended Complaint, ¶28. Rob Brazell is entitled to a pleading establishing at what time his brother, Steve Brazell, believed these representations, and the manner in which he relied on them. He is entitled to require a pleading setting out the same as to each of the proposed plaintiffs. And the same is true with respect to each Defendant—after all, assuming Steve Brazell, (who under the proposed Complaint's allegations, was intimately involved in the promotion of IBN) was duped by this supposed misrepresentation, aren't the other defendants entitled to a pleading that explains how they, unlike Steve Brazell, knew it to be false?

This is more than an exercise in requiring plaintiffs to disclose their theory of fraud. By requiring the "who, what, where, and how" of the alleged fraud, the Rules permit defendants in these actions to formulate their defenses. With adequate particularity, defendants can match the

supposed misrepresentations and allegations of reliance against the disclosures that were made to the plaintiffs. In this case, plaintiffs attempt to allege that they received an interest different than what they were told it was going to be. The obvious question that begs asking is what did they receive at the time of purchase? Did subsequent disclosures bar contrary reliance on previous statements of intent? What were the facts known at the time of reliance? Conclusory allegations do not permit defendants to intelligently formulate these defenses.

At argument, Defendants repeatedly accused Plaintiffs of pursuing this claim as a means of defaming Defendants, pointing to the website challenged in the counterclaim and its use of materials from this litigation. Plaintiffs' motivation in bringing this suit, or one or more of them publishing its details, plays no role in the Court's decision regarding the adequacy of the pleadings here.¹ But Defendants point does highlight the policy behind Rule 9(b); Fraud is a serious matter. Because a charge of fraud has so much potential for the type of collateral damage Defendants claim here, it is subject to heightened standards of pleading and proof. Here, Plaintiffs fail the first hurdle of establishing this serious claim.

As Plaintiffs acknowledge, earlier versions of the Complaint are no better. The Court has analyzed the proposed Fifth Amended Complaint as a logical first step in determining whether to permit amendment. Plaintiffs have been candid that the Fifth Amended Complaint was drafted in response to the Motion to Dismiss, and the Court concludes (having reviewed the earlier versions of the complaint as well) it fails to cure the problems of pleading asserted in that Motion. Accordingly, the Court grants the Defendants' Motions to Dismiss, with prejudice. Six tries at pleading fraud are enough. With discovery now at an end, Plaintiffs' inability to plead with the required particularity does not justify permitting further attempts. This moots the motion concerning the First Cause of Action being time-barred, though the Court acknowledges that, assuming the factual predicates posed by Defendants, the arguments concerning the statute of repose are well-taken.


As to the remaining proposed new claims, Plaintiffs offer no justification for having brought them at this late date, and Defendants would be prejudiced by now having to defend entirely new claims at this late stage in the case's progress. The Court also notes that the new claims lack necessary allegations for both the purported derivative claim and the receivership claim. Accordingly, without regard to futility, the Court denies the Motion to Amend with respect to

¹ Were the Court not satisfied that the amendment should be denied based on timeliness, lack of justification, substantial prejudice to the Defendants, and futility, the Court might be inclined to consider the potential of ulterior purposes for the pursuit of the lawsuit, as that, too, could inform the decision whether to grant leave. *Kelly v. Hard Money Funding*, 87 P.3d 734 at ¶40. (Utah App. 2004).


the new proposed Causes of Action as untimely, without justification and unduly prejudicial to Defendants.

The Motion to Amend is denied. Plaintiffs' various Complaints, all of which lack the particularity required under Rule 9, are dismissed with prejudice as to the moving defendants (IBN Defendants and Whitby). The First Cause of Action is dismissed as to Defendant Riley on the same basis. No further order is necessary.

DATED this 21 day of January 2015.

BY THE COURT


ANDREW H. STONE
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130900740 by the method and on the date specified.

MANUAL EMAIL: JUSTIN B BRADSHAW jbb@princeyeates.com
MANUAL EMAIL: RICHARD D BURBIDGE rburbidge@bmgtrial.com
MANUAL EMAIL: JOHN CHINDLUND jsc@princeyeates.com
MANUAL EMAIL: DONALD H FLANARY JR dhflanary@gmail.com
MANUAL EMAIL: STEWART I HIATT ihiatt@bmgtrial.com
MANUAL EMAIL: ADAM L HOYT ahoyt@padrm.com
MANUAL EMAIL: CRAIG T JACOBSEN ctjacobsen@froererandmiles.com
MANUAL EMAIL: CAROLYN J LEDUC cleduc@bmgtrial.com
MANUAL EMAIL: JOHN P MERTENS jmertens@padrm.com
MANUAL EMAIL: SEAN A MONSON smonson@btjd.com
MANUAL EMAIL: MARK D STUBBS mstubbs@fslaw.com
MANUAL EMAIL: MICHAEL N ZUNDEL mnz@princeyeates.com

01/22/2015

/s/ MICHELLE ADAMS

Date: _____

Deputy Court Clerk

Tab B

ADDENDUM B

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part III. Pleadings, Motions, and Orders

Utah Rules of Civil Procedure, Rule 9

RULE 9. PLEADING SPECIAL MATTERS

Currentness

(a)(1) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) *Designation of unknown defendant.* When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) *Actions to quiet title; description of interest of unknown parties.* In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) **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.

(c) **Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) **Official document or act.** In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) **Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special damage.** When items of special damage are claimed, they shall be specifically stated.

(h) **Statute of limitations.** In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) **Private statutes; ordinances.** In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) **Libel and slander.**

(j)(1) *Pleading defamatory matter.* It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) *Pleading defense.* In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) **Renew judgment.** A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated. The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

Credits

[Amended effective November 1, 2003; May 2, 2005; November 1, 2008; November 1, 2011.]

Notes of Decisions (109)

Rules Civ. Proc., Rule 9, UT R RCP Rule 9
current with amendments received through February 1, 2016.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part III. Pleadings, Motions, and Orders

Utah Rules of Civil Procedure, Rule 15

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Currentness

(a) **Amendments.** 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 21 days after it is served. Otherwise a party may amend his 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 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Credits

[Amended effective May 1, 2014.]

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS, UT R RCP Rule 15

Notes of Decisions (515)

Rules Civ. Proc., Rule 15, UT R RCP Rule 15
current with amendments received through February 1, 2016.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) **Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in

accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality

assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality*. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden*. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it

must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming \$50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120
2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180

3	\$300,000 or more	30	20	20	20	210
---	-------------------	----	----	----	----	-----

(c)(6) *Extraordinary discovery*. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) **Signing discovery requests, responses, and objections.** Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) **Filing.** Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts

often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in *Drew v. Lee*, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized

knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of \$50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of \$300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the

party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

Notes of Decisions (206)

Rules Civ. Proc., Rule 26, UT R RCP Rule 26
current with amendments received through February 1, 2016.

