

2016

William Compton, and John Simcox, Individuals, and Saltair Investments, LLC., a Utah Limited Liability Company v. Daniel J. McDonald, an Individual, Smith Hartvigsen, PLLC, a Utah Professional Limited Liability Company, Houston Casualty Company, a Texas Licensed Insurance Company, and John Does 2-11 : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WILLIAM COMPTON, and JOHN
SIMCOX, individuals, and SALTAIR
INVESTMENTS, L.L.C., a Utah limited
liability company,

Plaintiffs/Appellants,

v.

DANIEL J. McDONALD, an individual,
SMITH HARTVIGSEN, PLLC, a Utah
professional limited liability company,
HOUSTON CASUALTY COMPANY, a
Texas licensed insurance company and
JOHN DOES 2-11,

Defendant/Appellees.

**BRIEF OF APPELLEE HOUSTON
CASUALTY COMPANY**

Appellate Case No. 20150837-SC

Appeal from the Third District Court,
Salt Lake County, Judge Paul Maughan

Trial Court Case No. 130906137

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STATEMENT OF THE CASE

Through this action, William Compton, John Simcox, and Saltair Investments, L.L.C. (collectively, "Plaintiffs") seek to obtain coverage for a \$1,000,000 judgment that falls outside the plain and unambiguous scope of coverage provided by a professional liability insurance policy. Plaintiffs filed this civil action and appeal against Houston Casualty Company ("HC") based on HC's denial of coverage for non-party Robert Seegmiller ("Seegmiller") with regard to a claim made under a professional liability policy HC previously issued to Seegmiller's former employer, non-party Utah County Real Estate, LLC ("Prudential"). Plaintiffs bring this claim against HC as Seegmiller's assignees and judgment creditors, but their standing does not change the fact that there is no coverage available under the applicable insurance policy because Seegmiller acted outside the scope of his covered profession and his conduct is not otherwise covered under the plain and unambiguous terms of the policy. As such, this Court should uphold Judge Maughan's decision to grant summary judgment in favor of HC.

I. PLAINTIFFS' UNDERLYING LAWSUIT

Approximately ten years ago, Plaintiffs invested over \$1 million dollars into two of Seegmiller's personal real estate development projects, one in Highland, Utah and the other in Herriman, Utah. Plaintiffs later learned that Seegmiller made material misrepresentations to induce Plaintiffs to invest, which included Seegmiller's failure to disclose his personal interest in both transactions. Plaintiffs subsequently filed two lawsuits, one for each project, to get their money back. This case stems from an

underlying judgment in Civil No. 070916209, which relates to Seegmiller's project in Herriman, Utah ("Herriman Litigation").¹

In the Herriman Litigation, Plaintiffs moved for summary judgment against two of Seegmiller's co-defendants, Sterling Barnes ("Barnes") and Valley View, L.L.C. ("Valley View"), on April 28, 2011² because the undisputed evidence showed that Barnes and Valley View stole Plaintiffs' investment into the project and used the funds to pay kickbacks to, among others, Seegmiller. Days later, Plaintiffs moved for summary judgment against Seegmiller because the undisputed evidence showed that Seegmiller had a personal interest in the real estate deal and Seegmiller failed to disclose his conflict of interest to Plaintiffs.

On October 18, 2011, Judge Toomey granted summary judgment in Plaintiffs' favor with respect to their claim for theft against Barnes and Valley View and their claim for negligence against Seegmiller. (A copy of Judge Toomey's decision is attached as Addendum Exhibit 1.) With regard to Plaintiffs' claim against Seegmiller, Judge Toomey found that Seegmiller "owed certain duties to the Plaintiffs, which he breached by failing to clarify his role in the transaction and failing to disclose a personal interest in the transaction." On June 7, 2012, Judge Toomey, based on her October 11, 2011 decision, entered a judgment in Plaintiffs' favor and against Seegmiller for \$1,041,275.34.

¹ Civil No. 070916208 relates to Seegmiller's project in Highland, Utah ("Highland Litigation") and is not at issue in this appeal.

² Barnes was one of the principal members of Valley View.

II. SEEGMILLER SETTLES WITH PLAINTIFFS

On May 29, 2013, Seegmiller entered into a settlement with Plaintiffs. As part of that deal, Seegmiller assigned to Plaintiffs his alleged claims against (1) the other defendants in the Herriman Litigation, (2) Prudential's insurance carriers (including HC), and (3) Defendants Dan McDonald ("McDonald") and Smith Hartvigsen, PLLC ("Smith Hartvigsen").³ In exchange, Plaintiffs promised to eventually dismiss the remaining charges against Seegmiller in the Herriman Litigation, which include causes of action for fraud, theft, conspiracy, and negligent misrepresentation. To HC's knowledge, however, those claims remain pending to this day.

III. THE PRESENT ACTION

On September 13, 2013, Plaintiffs filed the present civil action against McDonald and Smith Hartvigsen. On or about July 29, 2014, Judge Maughan granted Plaintiffs leave to amend their Complaint, name HC as a Defendant, and allege a cause of action for breach of contract against HC; Plaintiffs' claim against HC is based on HC's decision to deny Seegmiller coverage for the Highland and Herriman Litigation under Prudential's professional liability policy.⁴

HC filed a Motion for Summary Judgment on March 31, 2015 and Plaintiffs filed a Cross-Motion for Summary Judgment on April 3, 2015. Judge Maughan held a hearing on the Motions on August 13, 2015. Judge Maughan subsequently GRANTED HC's

³ Plaintiffs' claims against McDonald and Smith Hartvigsen do not relate to Plaintiffs' claim against HC. As such, HC will not address them in this brief.

⁴ As noted above, coverage for the Highland Litigation is not at issue here.

Motion for Summary Judgment in its entirety and DENIED Plaintiffs' Cross-Motion for Summary Judgment. (A copy of Judge Maughan's decision is attached as Addendum Exhibit 2.) Judge Maughan found for HC because, under the applicable professional liability insurance policy, HC "agreed to provide insurance coverage to Prudential, and its real estate agents while providing Professional Services 'on behalf of' Prudential, 'solely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee.'" Judge Maughan found that "[b]ecause Robert Seegmiller had a personal interest [in the Herriman Transaction], he held dual or competing roles in the transaction giving rise to the Herriman Lawsuit. Robert Seegmiller cannot have held dual or competing roles in the transaction and simultaneously have acted 'solely' as Plaintiffs' real estate agent 'on behalf of' Prudential." Judge Maughan also held that Plaintiffs, as judgment creditors, cannot "obtain greater coverage than the HC[] Policies provide for Robert Seegmiller."

STATEMENT OF FACTS

I. THE UNDERLYING TRANSACTIONS

This case stems from Plaintiffs' investment of over \$1 million into two real estate development projects approximately ten years ago, one in Highland, Utah ("Highland Transaction") and the other in Herriman, Utah ("Herriman Transaction"). There is no dispute that Seegmiller introduced Plaintiffs to both projects and, at the time, was a Prudential real estate agent. (R. 2586-87; 2776-77, ¶¶ 2-8; 2783-84, ¶¶ 2-8; 2790, ¶ 5.) Apart from his work for Prudential, however, Seegmiller was also a property owner, developer, manager, investor, and consultant. The undisputed evidence, including

Seegmiller's and Plaintiffs' testimony, demonstrates that the Highland and Herriman Transactions were two of Seegmiller's personal real estate projects. (R. 2617; 2625-27; 2635-36; 2807, ¶ 5.)

The idea behind the Highland Transaction was that Plaintiffs, through a limited liability company, would create a new development by purchasing a large piece of property, subdividing it into lots, and selling off the individual lots. (R. 2588-89; 2596.) Seegmiller stood to personally profit from the deal in a number of ways. First, Seegmiller joined the limited liability company Plaintiffs formed to purchase the property. (R. 2590; 2598.) In addition, and unbeknownst to Plaintiffs, Seegmiller was a member of a second, secret limited liability company that used Plaintiffs' down payment to purchase the property at a lower price and "flip" it to Plaintiffs for a profit; that is, Seegmiller had an ownership interest in the property on both sides of the transaction. (R. 2596-97; 2623; 2631.) Given his self-interest, Seegmiller never told Plaintiffs about his "flipping" limited liability company intermediary. (R. 2596-97.) Instead, he told Plaintiffs that they were purchasing the property directly from "farmers." (R. 2586; 2589; 2596-97.) Seegmiller's unlawful conduct in the Highland Transaction is the subject of the Highland Litigation, which remains ongoing. Plaintiffs are not seeking coverage for the Highland Litigation through this appeal.

With respect to the Herriman Transaction, Plaintiffs agreed to purchase forty-seven lots from Valley View for \$225,000 per lot under the belief that they "were purchasing them at a price that it would allow those lots to then in turn be sold for a profit." (R. 2593, p. 58:4-10. *See also* R. 2593-95; 2982-2989.) Plaintiffs paid Valley

View a \$705,000 “refundable” deposit and agreed to pay the remainder of the purchase price when the lots were developed and ready to be sold. The deal, however, never closed because Valley View did not develop the lots. (R. 2594; 2603; 2607; 2982–89.) When Plaintiffs demanded their deposit back due to Valley View’s failure to develop the lots, Valley View refused. (R. 2603.) Plaintiffs later learned that Valley View used Plaintiffs’ deposit to, among other things, buy the property for itself and pay off parties who worked for Valley View. For example, Seegmiller received \$165,000 for bringing Plaintiffs’ money into the deal and providing other management, development, and consulting services to Valley View, Barnes, and their developer, Maxwell Real Estate Development (“Maxwell”). (R. 2602–03; 2606; 2625; 2662; 5038–39.)

There is no dispute that Plaintiffs never acquired the Herriman lots and did not know about Seegmiller’s relationship with Valley View, Barnes, and Maxwell when they put their \$705,000 into escrow. In Plaintiffs’ own words, their decision to deposit the funds was “a result of the fraud of Barnes and Seegmiller” (R. 2881, ¶ 74. *See also* R. 2594; 2603; 2982–89.)

II. THE UNDERLYING LAWSUITS

In November 2007, Plaintiffs filed two lawsuits to get back the money they invested in the Highland and Herriman Transactions: Civil Nos. 070916208 and 070916209 (i.e. the Highland and Herriman Litigation). (R. 2815–38.) Plaintiffs served Seegmiller, who they named as a defendant in both lawsuits, with copies of the Complaints on December 1, 2007. (R. 3089–90.) Among others, Plaintiffs also named Prudential, Seegmiller’s former employer, as a defendant in both lawsuits. (R. 2815–38.)

McDonald and Smith Hartvigsen initially represented both Seegmiller and Prudential in the Highland and Herriman Litigations. (R. 2619; 3197, ¶ 19.) Early on, Seegmiller, Bruce Tucker, the owner and CEO of Prudential, and McDonald discussed whether to submit the Claim⁵ to HC, Prudential's professional liability insurance carrier. At Seegmiller's insistence, they did not submit the Claim. (R. 2669; 2792–98, ¶¶ 12–34; 3230.)

Seegmiller was adamant that Prudential not submit the Claim to HC for several reasons. First, Seegmiller acknowledged the Highland and Herriman Transactions were his personal real estate deals. (R. 2807, ¶ 5.) Seegmiller worked on the Highland and Herriman Transactions as a property owner, developer, manager and consultant; not as a Prudential real estate agent. (R. 2617; 2625–27; 2635–36; 2807, ¶ 5.) In addition, and in Seegmiller's own words, "there was no commissionable event." (R. 2625–26, pp. 65:23–66:10.) Indeed, neither Seegmiller nor Prudential received a commission in connection with either deal. (R. 2596; 2625–26; 2632; 5038–39.) Recognizing the Highland and Herriman Transactions were his personal deals, Seegmiller actually volunteered to pay for Prudential's defense because "this was [his] mess that [he] created and [he] wanted to make sure that" Tucker and Prudential were not harmed. (R. 2659–60, pp. 373:21–374:3. *See also* R. 2650; 2793–94, ¶¶ 15, 18; 3231.) Seegmiller and Prudential consequently

⁵ While there are two separate lawsuits, HC treated the Highland and Herriman Litigation as a single Claim because, under the terms of the Policy, "[o]ne or more Claims based upon or arising out of the same Wrongful Act or interrelated Wrongful Acts by one or more of the Insureds shall be considered a single Claim." (R. 2719, Section VI(b).)

defended the lawsuits themselves for more than two years before finally giving HC notice of the Claim. During that same time period, they omitted any reference to the lawsuits from policy renewal applications. (R. 2742; 2773; 2888–90; 5689.)

On January 21, 2010, McDonald, on Prudential's and Seegmiller's behalf, finally notified HC of the Highland and Herriman Litigation. (R. 2888–90.) In the notice to HC, McDonald confirmed the Highland and Herriman lawsuits included allegations that Seegmiller was a principal in both deals and “part of a conspiracy that fraudulently induced” Plaintiffs to invest hundreds of thousands of dollars. (R. 2888–90.)

On March 23, 2010, HC sent Prudential and Seegmiller its coverage position letter, informed them that there was no coverage for the Highland or Herriman Litigation under Prudential's professional liability policy, and reserved its right to deny coverage, as the facts may warrant, on grounds other than those specifically set forth in its initial coverage position letter. (R. 2892–2900.) HC also invited Prudential and Seegmiller to provide any additional information that may be relevant to HC's coverage analysis; neither of them did. (R. 2892–2900.)

After HC confirmed there was no coverage, Seegmiller asked McDonald to write “a letter to [Mr. Roundy] letting him know [Prudential and Seegmiller] were denied coverage based on the fact there was no representation” of Plaintiffs in connection with the Highland and Herriman Transactions. (R. 2643, p. 169:1–13. *See also* R. 3186–88.) Months later, Seegmiller similarly instructed Judson Pitts, who succeeded McDonald as Seegmiller's counsel in the Highland and Herriman Litigation, “to position [him] as

having no insurance and no money to cover a judgment.” (R. 2644–45, pp. 176:4–177:11. *See also* R. 3190–92.)

III. THE UNDERLYING JUDGMENT

On May 9, 2011, Plaintiffs moved for summary judgment with respect to their negligence, breach of fiduciary duty, and conspiracy claims against Seegmiller in the Herriman Lawsuit. Days earlier, Plaintiffs also moved for summary judgment with respect to their theft, fraud, negligent misrepresentation, and conspiracy claims against Barnes and Valley View. (R. 2902–17.)

On October 18, 2011, Judge Toomey issued her decision on Plaintiffs’ motions for summary judgment. She granted Plaintiffs summary judgment with respect to their negligence claim against Seegmiller and held that regardless of whether Seegmiller acted as Plaintiffs’ real estate agent during the Herriman Transaction, which she determined was a question of fact, Seegmiller “owed certain duties to Plaintiffs, which he breached by failing to clarify his role in the transaction, and *failing to disclose a personal interest in the transaction.*” (R. 2909–11 (emphasis added).) Judge Toomey also awarded summary judgment in Plaintiffs’ favor with respect to their theft claim against Barnes and Valley View. (R. 2911–13.) She held that Plaintiffs “demonstrated sufficient evidence to prove the elements of theft. Mr. [Barnes] and Valley View unlawfully took the earnest money, depriving the Plaintiffs of their property.” (R. 2911–13.)⁶

⁶ To HC’s knowledge, Plaintiffs’ fraud, theft, conspiracy, and negligent misrepresentation claims against Seegmiller remain pending. (R. 2865–86; 2902–17.)

Following Judge Toomey's ruling, Plaintiffs threatened to pursue their remaining claims against Seegmiller unless he assigned his alleged claims against, among others, HC to them. For example, on April 17, 2012, Mr. Roundy wrote Mr. Pitts a letter and stated:

If I pursue the negligence judgment against the E&O Policy and Mr. Seegmiller's former attorneys, then the judgment will never be more than a negligence judgment.

On the other hand, if that strategy fails to result in a complete recovery for my clients, they will have no other option but to proceed to trial. *At trial, I will obtain judgments against Mr. Seegmiller for breach of fiduciary duty and fraud.* Those judgments will not be eligible for insurance coverage. . . . *This case will never end for Mr. Seegmiller unless he reaches a settlement with us that prevents our claims against him from going to trial.*

(R. 2961–62 (emphasis added).)

On June 7, 2012, Judge Toomey, based on her October 11, 2011, decision, entered a judgment in Plaintiffs' favor and against Seegmiller in the amount of \$1,041,275.34. The judgment consists of (1) \$705,000, which reflects the exact amount Plaintiffs placed into escrow to "hold the lots" in the Herriman Transaction, and (2) \$336,275.34 in interest. (R. 2594; 2603; 2920–21; 2982–89.)

IV. THE UNDERLYING SETTLEMENT

Seegmiller subsequently entered into a settlement with Plaintiffs on May 29, 2013. Under the terms of the settlement, Seegmiller assigned Plaintiffs his alleged claims against (1) the other defendants in the Herriman Litigation, (2) McDonald and Smith Hartvigsen, and (3) HC. (R. 2968–75.) Seegmiller also agreed to "assist [P]laintiffs in

the prosecution of [their] [c]laims by providing all reasonably requested assistance[.]” (R. 2968–69.) In his own words, Seegmiller needed to placate Plaintiffs because he is “not paying a judgment against [him] plain and simple.” (R. 2638, pp. 133:10–134:15.)

V. THE POLICY

HC issued the relevant Professional Liability Errors & Omissions Insurance Policy, Policy No. H707-16865 (“Policy” or “2007 Policy”), to Prudential with effective dates of November 26, 2007 to November 26, 2008. (R. 2715 (a copy of the Policy is attached as Addendum Exhibit 3).) Under the Policy’s Insuring Clause, HC agreed to:

pay on behalf of the Insured any Loss and Claim Expense in excess of the Deductible amount and subject to the Limit of Liability as the Insured acting in the profession described in Item 3 of the Declarations shall become legally obligated to pay for Claim or Claims first made against the Insured during the Policy Period by reason of any Wrongful Act by an Insured provided always that the Insured has no knowledge of such Wrongful Act prior to the Inception Date of this Policy and further provided that such Wrongful Act took place subsequent to the Retroactive Date set forth in Item 8 of the Declarations.

(R. 2716, Section I.)

The Policy defines an Insured as, among other things, “[a]ny partner, executive officer, director or employee of the Named Insured while acting within the scope of their duties on behalf of the Named Insured[.]” (R. 2716, Section II(b).) Independent contractors are also covered under the Policy, “but only if the Professional Services of the Independent Contractor(s) are the same as those set forth in Item 3 of the Declarations Page and in Endorsement No. 1 of th[e] Policy.” (R. 2730.)

The Policy is a professional liability policy. It clearly and unambiguously defines the covered profession/professional services as (those) “[s]olely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee.” (R. 2715–16; 2724.) Similarly, the Policy excludes coverage for “any claim [or] claim expenses arising out of or connected with the performance of or failure to perform services as an insurance agent, insurance broker, mortgage banker, mortgage broker, escrow agent, property developer, builder, construction manager, or property manager” as well as “any claim [or] claim expenses arising out of or connected with any transaction in which any Insured has a direct or indirect beneficial ownership interest as a buyer or seller of real property” (R. 2727–28.)

Regardless of whether an Insured was acting within the scope of the covered profession, the Policy excludes coverage for any Claim or Claim Expense “[b]ased upon or arising out of any dishonest, criminal, fraudulent, malicious or intentional Wrongful Acts, errors or omissions committed by or at the direction of the Insured.” (R. 2717, Section IV(a).)

In the event of a Claim, the Policy requires Insureds to “immediately forward to the firm named in Item 6 of the Declarations every demand, notice, summons or other process received by the Insured or his representative.” (R. 2720, Section VIII(a)(2).)

In addition to the 2007 Policy, HC also issued Prudential professional liability policies in 2006 and 2008. Those policies contain the same material provisions as those found in the 2007 Policy, including Insuring Clauses, definitions of profession/professional services, and exclusions. (R. 2685–712; 2745–73.)

SUMMARY OF ARGUMENT

This Court should affirm Judge Maughan's decision to grant HC's Motion for Summary Judgment because the undisputed facts show that Seegmiller was not acting within the scope of his covered profession during the Herriman Transaction; thus, there is no coverage under the Policy. The Policy, through its plain and unambiguous terms, only provides coverage for Prudential real estate agents while they are acting "solely" as real estate agents/brokers "on behalf of" Prudential and "for a fee." There is no dispute that Seegmiller held an undisclosed, personal interest in the Herriman Transaction and received a \$165,000 kickback from stolen funds in exchange for his work as a consultant, developer, and property manager on behalf of Valley View, Barnes, and Maxwell. That is, as Judge Maughan held, Seegmiller did not "act[] 'solely' as Plaintiffs' real estate agent 'on behalf of' Prudential" and thus did not act within the scope of the profession covered by Prudential's Policy.

Even if this Court is not persuaded that Seegmiller's personal interest in the Herriman Transaction took him outside the scope of the covered profession as a matter of law, this Court should nevertheless affirm Judge Maughan's decision to grant summary judgment in favor of HC on alternative grounds.

This Court may affirm Judge Maughan's decision because the undisputed evidence shows that Seegmiller's self-dealing was not the type of conduct Prudential and HC intended to cover under the plain terms of the Policy's Insuring Clause. In addition to only providing coverage for individuals acting "solely" as real estate agents/brokers, the Policy also only provides coverage for real estate agents acting "on behalf of"

Prudential who receive or expect to receive a “fee.” There is no question that the Herriman Transaction was Seegmiller’s personal deal; Prudential was never going to receive any fees from the proposed, failed transaction. That is, it cannot be said Seegmiller participated in the deal “on behalf of” Prudential. Similarly, Seegmiller simply did not receive or expect to receive the type of professional “fee” necessary to trigger coverage. Prudential insurance agents are paid one way: by commission. It is undisputed that Plaintiffs never paid and never intended to pay Seegmiller a commission in connection with the Herriman Transaction. It is also undisputed that the only payment Seegmiller received or expected to receive in connection with the Herriman Transaction was his \$165,000 kickback, paid out of Plaintiffs’ stolen funds. That secret payoff is not the type of “fee” that triggers coverage under the Policy. Because Seegmiller’s conduct is not covered under the Policy’s Insuring Clause, there is no coverage.

In addition, the Court may uphold Judge Maughan’s decision because the Policy excludes coverage for dishonest acts, and Plaintiffs’ Claim and judgment are based on Seegmiller’s deceitful conduct. While Plaintiffs argue there must be coverage because they have a judgment against Seegmiller for “negligence,” this Court should follow the long-held principal that the underlying *facts*, not the title of the legal theory applied, determine whether coverage exists. When this Court reviews the undisputed facts, including Plaintiffs’ own testimony, it will become apparent that Seegmiller acted dishonestly, which negates any coverage available under the Policy.

Finally, this Court may uphold Judge Maughan’s decision because Seegmiller waived any right to coverage and would be estopped from seeking coverage now.

Seegmiller and Prudential withheld notice of the Claim from HC for years, did not disclose the litigation on policy renewal applications, and never challenged HC's decision to deny coverage. Given such actions, Seegmiller would be barred from seeking coverage now under the doctrines of waiver and estoppel. As Plaintiffs stand in Seegmiller's shoes, they similarly cannot recover under the Policy at this late date.

HC does not challenge Plaintiffs' standing to bring this action as either judgment creditors or Seegmiller's assignees. Whether Plaintiffs stand before this Court as judgment creditors or assignees, however, is irrelevant. Simply put, Plaintiffs cannot obtain greater coverage than would otherwise be available to Seegmiller. Judge Toomey specifically found that whether Seegmiller was even acting as Plaintiffs' real estate agent during the Herriman Transaction is a question of fact, negating any possibility that coverage exists as a matter of law. More importantly, and for the reasons discussed above and addressed more fully below, the undisputed facts actually reveal there is no coverage available for Seegmiller under the plain and unambiguous terms of the Policy as a matter of law. As such, Plaintiffs cannot use the Policy to fund their underlying judgment.

For these reasons, this Court should affirm Judge Maughan's decision to grant summary judgment in favor of HC.

ARGUMENT

I. THE 2007 POLICY APPLIES.

The 2007 Policy applies because the undisputed evidence shows that Plaintiffs did not serve Seegmiller with copies of the Complaints in the Highland and Herriman

Litigation until December 2007. The three professional liability policies HC issued to Prudential (in 2006, 2007, and 2008) are “claims made” policies. As such, the date Plaintiffs made their Claim against Seegmiller controls which policy applies. *AOK Lands, Inc. v. Shand, Morahan & Co.*, 860 P.2d 924, 926 (Utah 1993). Under the policies, a Claim is defined as “a demand *received* by the Insured for compensation of damages, including the service of suit . . .” (R. 2717 (emphasis added).) Plaintiffs have offered no evidence to show Seegmiller *received a demand* prior to November 26, 2007. Rather, Plaintiffs admit that Seegmiller was served with copies of the Complaints on December 1, 2007. As such, the 2007 Policy applies.

The question of which policy applies, however, is essentially a non-issue because Prudential’s three HC professional liability policies contain the same material provisions.

II. THE COURT SHOULD INTERPRET THE POLICY TO EFFECTUATE THE INTENT OF THE PARTIES.

A. The Policy’s terms are plain and unambiguous.

This Court should interpret the Policy according to its plain and unambiguous terms. HC agrees with Plaintiffs that “[w]hen interpreting an insurance contract, the Court must read the policy as a whole and attempt to harmonize and give effect to all of its provisions.” (Plaintiffs’ Br., p. 35.) HC also agrees that “[a] construction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties.” (*Id.* at p. 34.) Indeed, words should be interpreted ““according to their usually accepted meaning and in light of the insurance policy as a whole.”” *Am. Nat. Prop. & Cas. Co. v. Sorensen*, 2013 UT App 295, ¶ 11,

362 P.3d 909 (quoting *Utah Farm Bureau Ins. Co. v. Crook*, 1999 UT 47, ¶ 5, 980 P.2d 685). “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” *Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 2012 UT 1, ¶ 16, 268 P.3d 180 (quoting *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 14, 140 P.3d 1210).

Given these basic principles of policy construction, this Court should disregard Plaintiffs’ call to interpret the Policy “in a way that provides the most broad potential coverage to Prudential and Seegmiller that the Policy will allow by its interpretation.” (Plaintiffs’ Br., p. 36.) Such a request, on its face, actually begs the Court to ignore Utah law and distort the clear and unambiguous provisions of the Policy. Notably, Plaintiffs have never alleged that any Policy provisions or terms are ambiguous or provided a legal basis for construing the Policy according to anything other than its plain and unambiguous terms. Those terms reveal the true intent of the parties and must be honored.

B. The Policy does not provide coverage for Prudential’s real estate agents’ personal real estate deals.

Judge Maughan properly granted HC’s Motion for Summary Judgment because the undisputed evidence shows that Seegmiller’s conduct in the Herriman Transaction is not covered under the Policy’s Insuring Clause. In an insurance coverage dispute, the insured has the burden to prove it suffered a loss covered by the policy’s insuring or coverage provision. *Young v. Fire Ins. Exch.*, 2008 UT App 114, ¶¶ 25–28, 182 P.3d

911; *Morris v. Farmers Home Mut. Ins. Co.*, 500 P.2d 505, 507 (Utah 1972). Here, the Policy's Insuring Clause provides coverage when the:

Insured acting in the profession described in Item 3 of the Declarations shall become legally obligated to pay for Claim or Claims first made against the Insured during the Policy Period by reason of any Wrongful Act by an Insured provided always that the Insured has no knowledge of such Wrongful Act prior to the Inception Date of this Policy

The Insuring Clause incorporates several definitions by reference that further clarify the scope of coverage available, including, most importantly, the definition of the Insured's Profession, as found in Item 3 of the Declarations Page, which refers to Endorsement 1. Endorsement 1 identifies the Insured's Profession, the only profession for which the Policy provides coverage, as "[s]olely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee." That is, the performance of any non-covered professional services, including property management, development, and consulting, takes an individual outside the scope of the covered profession because (s)he is not acting *exclusively* as a Prudential real estate agent or broker. The same holds true if an individual does not receive or expect to receive a professional "fee" or holds an ownership interest in the property.⁷ Simply put, an individual is not covered under the Policy unless (s)he "checks off" each of the specific criteria that define the covered profession. See *Walston v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, Nos. 3:09-CV-112-AC, 3:10-CV-579-AC, 3:10-CV-6126-AC, 2012 WL

⁷ As discussed above, it is undisputed that Seegmiller held an ownership interest in the Herriman property. Plaintiffs are not seeking coverage for the Highland Transaction in this appeal.

2049451, at *19 (D. Or. June 6, 2012) (“[T]he specific language of the Endorsement limits coverage to [Investment Advisor Representatives] only when they are acting solely in their capacity as an [Investment Advisor Representative] and then provides a specific definition for [Investment Advisor Representative] that requires those [Investment Advisor Representatives] to meet other requirements established by State Farm.”); *Hirani Eng’g & Land Surveying v. Mehar Inv. Grp. LLC*, No. 09-252-RGA, 2012 WL 917566, at *1 (D. Del. March 19, 2012) (“Were there no limitations on the term ‘Professional Services,’ it would appear that the work of a professional engineer or environmental engineer would fall within the ordinary understanding of the term. Since the contract narrowed the definition of ‘Professional Services,’ it is necessary to consider what the contract covered with the more limited definition.”).

As discussed more fully below, the undisputed facts show that Seegmiller (1) did not act “solely” as a real estate agent during the Herriman Transaction, if at all, (2) did not act “on behalf of” Prudential, and (3) did not receive a “fee.” As such, and pursuant to the plain and unambiguous terms of the Policy, there is no coverage.

III. SEEGMILLER HELD A PERSONAL INTEREST IN THE HERRIMAN TRANSACTION.

This Court should affirm Judge Maughan’s ruling that Seegmiller’s personal interest in the Herriman Transaction negates any potential for coverage under the Policy because it took him outside the scope of the covered profession. The Policy’s plain and unambiguous terms, including its specific definition of the covered profession, establish the criteria an individual must meet to be covered under the Policy. If an individual does

not meet the criteria, there is simply no coverage available. See *Walston*, 2012 WL 2049451, at *19; *Hirani*, 2012 WL 917566, at *1.

The policy language and facts in *Walston* are particularly helpful in demonstrating how a professional liability policy may refine the scope of coverage provided through the use of a specific definition of the covered profession. In *Walston*, the plaintiffs were underlying judgment creditors (“Garnishors”) who obtained limited judgments against a State Farm agent (McCoy) for “negligence” based on representations McCoy made to get the Garnishors to invest in a real estate development company, Willamette Development Services, LLC. *Walston*, at *1–5. After obtaining their judgments, the Garnishors brought suit against McCoy’s State Farm professional liability insurer (National Union), alleging their damages were “based on claims that McCoy was negligent with respect to investment advice she gave them and that McCoy’s conduct f[ell] within the terms of the Policy.” *Id.* at *7. There was no dispute that McCoy was, at all relevant times, employed as a State Farm agent and certified to sell State Farm securities. *Id.* at *3. Willamette, however, was one of McCoy’s “outside business activities.” That is, her brother started the company, she received compensation directly from Willamette for services she provided, and Willamette investment documents revealed McCoy held an ownership interest in the company. *Id.* at *4–5. Thus, the question before the Court was whether the express terms of *State Farm’s* professional liability policy provided coverage for McCoy’s personal ventures.

Like Prudential’s Policy, the State Farm professional liability policy at issue in *Walston* specifically defined the covered profession; the State Farm policy only provided

coverage for “Wrongful Act[s] committed by [an] Investment Adviser Representative *solely while acting in his/her capacity as such.*” *Id.* at *7 (emphasis added).⁸ The Court determined the policy was clear and unambiguous, providing that “an IAR must be acting exclusively on behalf of, and for the benefit of, State Farm to be covered by the [p]olicy.” *Id.* at *22. Given the clear language of the policy, the Court found there was no coverage for the Garnishors’ underlying judgments because “McCoy was acting on behalf of, and for Willamette in promoting and recommending that Garnishors invest in Willamette. Even if, as Garnishors argue, McCoy was also soliciting potential clients for her State Farm business, that secondary purpose does not change that McCoy was working for Willamette at all times in question, and primarily so.” *Id.* That is, the Court found that McCoy was acting outside the scope of the profession covered by the express terms of the State Farm policy while working for Willamette, even if there was some potential benefit to State Farm.

Prudential’s Policy only provides coverage for Insureds “*solely* in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee.” If an individual is not acting “solely” as a real estate agent/broker, (s)he is not acting within the covered profession. The term “solely” means “to the exclusion of all else.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/solely> (last visited

⁸ The State Farm policy also specifically defined the term “Investment Adviser Representative” (“IAR”). *Id.* at *7–8.

Apr. 12, 2016).⁹ Its synonyms include: exclusively, just, and only. *Id.* See also *Plank-Greer v. Tannerite Sports, LLC*, 102 F.Supp.3d 954, 957 (N.D. Ohio 2015) (“The term ‘only’ modifies the phrase ‘with respect to the conduct of the business,’ thereby expressly limiting the insured’s coverage to conduct that relates solely to the insured’s business. Activities that are mixed in nature—done for both business and pleasure—or activities unrelated to the business, are outside the policy’s scope.”). Thus, as in *Walston*, the Policy provides no coverage for Seegmiller’s personal business pursuits, even when there was some theoretical, tangential benefit to Prudential.

The undisputed facts show that Seegmiller did not participate in the Herriman Transaction “solely” as a Prudential real estate agent. Seegmiller himself admits the Herriman Transaction was his personal real estate deal; he worked on the deal as a property developer, manager, and consultant and received a \$165,000 kickback for his efforts, which was taken out of Plaintiffs’ stolen funds. Plaintiffs similarly acknowledge that Seegmiller held a personal interest in the Herriman Transaction. Indeed, Seegmiller’s secret, personal alliance with Valley View, Barnes, and Maxwell was the basis of Plaintiffs’ underlying suit, and Plaintiffs have continuously emphasized that they wish they had known Seegmiller had a conflict of interest and “was being paid a large undisclosed fee . . . for bringing [them] and [their] money to the transaction” prior to placing their deposit. (R. 2779, ¶ 23; 2786, ¶ 23.) Judge Toomey found Seegmiller was

⁹ *Am. Nat. Prop. & Cas. Co. v. Sorensen*, 2013 UT App 295, ¶ 11, 362 P.3d 909 (“As we would for contract language, we ‘interpret words in insurance policies according to their usually accepted meanings and in light of the insurance policy as a whole.’”) (citations omitted).

liable for Plaintiffs' losses because he "fail[ed] to clarify his role in the transaction, and fail[ed] to disclose a personal interest in the transaction." (R. 2909-11.) In short, everyone acknowledges Seegmiller held a personal interest in the Herriman Transaction. As it cannot be said that Seegmiller acted "solely" as a Prudential real estate agent, if at all, Seegmiller was not acting within the Policy's covered profession. That means there is no coverage under the plain and unambiguous terms of the Policy.

This Court should reject Plaintiffs' plea to read the Policy as providing coverage for acts that are "unrelated to the covered activity for which the insurance policy was purchased." (Plaintiffs' Br., p. 37.) As an initial matter, such a construction would ignore the clear language of the Policy, which unambiguously defines the scope of the covered profession (i.e. "solely in the performance of services as a Real Estate Agent/Broker . . ."). See *Walston*, 2012 WL 2049451 at *19 ("It would be objectively unreasonable to construe the language of the Policy, and the Endorsement, to provide coverage for IARs no matter who they are representing or benefitting."); *Plank-Greer*, 102 F.Supp.3d at 957. Moreover, Plaintiffs provide no support, in law or fact, to support such a broad construction. There is no evidence to suggest either Prudential or HC intended to provide coverage for Prudential's real estate agents when they were pursuing their personal interests, and the only cases Plaintiffs cite are inapplicable. The policies in *T.M. v. Exec. Risk Indem. Inc.* and *Jarvis Christian Coll. v. Nat'l Union Fire Ins. Co.* used the word "solely" to define Wrongful Acts – neither policy used the term to define the scope of the

covered profession.¹⁰ In addition, the insureds in *T.M.* and *Jarvis* argued the policies' definitions of "Wrongful Act" were ambiguous. 59 P.3d 721, 725 (Wyo. 2002); 197 F.3d 742, 751 (5th Cir. 1999).¹¹ Plaintiffs have never alleged that any provision of the Policy, let alone the definition of the covered profession, is ambiguous. Indeed, its terms are clear and reveal Prudential's real estate agents are not covered if they have a personal interest in a transaction because they cannot be acting "solely" as real estate agents on behalf of Prudential in such situations. Thus, Seegmiller's personal interest in the Herriman Transaction, which is at the heart of Plaintiffs' Claim and judgment, negates any potential for coverage

IV. THE COURT MAY AFFIRM JUDGE MAUGHAN'S DECISION ON ALTERNATIVE GROUNDS.

Even if this Court is not persuaded that Seegmiller's undisputed personal interest in the Herriman Transaction entitles HC to judgment as a matter of law, this Court should affirm Judge Maughan's decision on one of several alternative grounds.

A. Seegmiller's conduct is not covered under the Policy's Insuring Clause.

1. Seegmiller did not act "on behalf of" Prudential.

The Policy provides no coverage for the Herriman Transaction because Seegmiller did not act "on behalf of" Prudential. Contrary to Plaintiffs' contention, Seegmiller's

¹⁰ The Court in *Walston* specifically found the policies in *T.M.* and *Jarvis* were "easily distinguishable" because the policies in those cases used the term "solely" in their definitions of "Wrongful Act" and not to define the scope of the covered professions. *Walston*, 2012 WL 2049451 at *20.

¹¹ The policy in *T.M.* did not even define the covered profession ("psychologist"). 59 P.3d at 723, 725.

status as a Prudential employee/independent contractor¹² does not automatically make him an Insured. Rather, Seegmiller was only insured under the Policy when acting “on behalf of” Prudential. (R. 2716, Section II(b).) That is, there is no coverage if the Claim relates to work Seegmiller performed to further his own self-interests. *Walston*, 2012 WL 2049451 at *22 (finding there could be no coverage unless the alleged Wrongful Act was committed by the individual while acting “exclusively, on behalf of, and for the benefit of” the named insured). *See also Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 814–15 (10th Cir. 2009); *Farr v. Farm Bureau Ins. Co. of Neb.*, 61 F.3d 677, 681 n.4 (8th Cir. 1995) (“[T]he proper inquiry is whether Farr and Markley were acting on behalf of the corporation (*as opposed to themselves*) when they engaged in the alleged behavior.”) (emphasis added). Given the plain language of the Policy and relevant case law, Plaintiffs’ contention that “the coverage provision requires coverage for any negligence committed by Seegmiller when acting within the real estate profession”¹³ is misplaced. For example, Plaintiffs would not argue the Policy provides coverage if Seegmiller performed services as a real estate agent for another brokerage.

¹² Seegmiller’s status as an employee or independent contractor is irrelevant with respect to the coverage analysis since employees and independent contractors are subject to the same Insuring Clause, definitions (including the definition of the covered profession), and exclusions. (R. 2730 (“It is further understood and agreed that the Independent Contractors, of the “Named Insured”, are covered solely for their Professional Services provided on behalf of the Insured; but only if the Professional Services of the Independent Contractor(s) are the same as those set forth in Item 3 of the Declarations Page and in Endorsement No. 1 of this Policy.”).) As such, HC will not address whether Seegmiller is more properly classified as a Prudential employee or independent contractor.

¹³ (Plaintiffs’ Br., p. 41.)

Similarly, by its plain and unambiguous terms, the Policy provides no coverage for Seegmiller's personal deals.

The undisputed evidence shows that Seegmiller did not participate in the Herriman Transaction "on behalf of" Prudential. Again, Seegmiller's admissions are telling: he testified that he acted solely in the role of developer and not as a Prudential agent. (R. 2627-28, pp. 76:21-77:7.) It is also undisputed that because the Herriman Transaction was Seegmiller's personal real estate deal, neither Seegmiller nor Prudential ever entered into a service contract with Plaintiffs or received a commission in connection with the proposed deal. Prudential's name is also noticeably absent from the relevant Real Estate Purchase Contract, and it was Barnes, not Seegmiller, who placed Seegmiller's name on that document. (R. 2982-89; 5037.)¹⁴ Seegmiller volunteered to pay for Prudential's defense in the Herriman Litigation and requested that McDonald withhold notice of the Claim from HC for a reason, and it was certainly not because Seegmiller wanted to be personally liable for a \$1 million judgment. (R. 2659-60, pp. 373:21-374:3. *See also* R. 2650; 2793-94, ¶¶ 15, 18; 3231.) Rather, Seegmiller recognized the Herriman Transaction was his personal deal and he should take

¹⁴ Barnes told Plaintiffs' counsel that Seegmiller:

wasn't making any commission on it there was no commission on that transaction I think I was the one who ended up writing his name on the REPC and my agent's name on the REPC just because I thought you had to have somebody in each of those spots but neither of those agents were actually making any commission in the transaction it was just a document that they provided for us.

(R. 5037 (emphasis added).)

responsibility. Because it was Seegmiller's personal deal, there is no coverage under the Policy.

2. Seegmiller did not receive or expect to receive a "fee" that would trigger coverage under the Policy.

Barnes and Valley View stole Plaintiffs' money, and Seegmiller's receipt of a \$165,000 kickback from those stolen funds cannot trigger coverage under the Policy. The parties agree that the Policy provides no coverage unless Seegmiller received or expected to receive a "fee" in connection with the Herriman Transaction. As the term "fee" is not defined, it should be given its plain and ordinary meaning, which is "[a] charge for labor or services, especially professional services." *Am. Nat. Prop. & Cas. Co. v. Sorensen*, 2013 UT App 295, ¶ 11, 362 P.3d 909 ("As we would for contract language, we 'interpret words in insurance policies according to their usually accepted meanings and in light of the insurance policy as a whole'") (citations omitted); BLACK'S LAW DICTIONARY 309 (4th pocket ed. 2011). Plaintiffs cite no authority to suggest the term "fee" is ambiguous or that it should be defined in any other way.

Several undisputed facts reveal Seegmiller did not receive or expect to receive a "fee" in the Herriman Transaction that would trigger coverage. First, Prudential insurance agents are paid in one way: by commission. (R. 2993, ¶ 13; 3022.) Second, Seegmiller and Barnes agree that Seegmiller's \$165,000 payment was not a commission. (R. 2625–26; 2632; 5038–39.) Barnes emphasized that fact in a conversation with Plaintiffs' counsel:

Barnes: I didn't think there was an *agent there was no commission as far as someone representing someone and getting paid there wasn't anybody*

Roundy: Right you knew that because you would have been the one paying the commission as the seller so you weren't

Barnes: Yeah

Roundy: As far as what his relationship was with Bill [Compton] and John [Simcox] did you have an impression one way or the other about whether he was representing them or why was he involved in the communication if he wasn't acting in some role on their behalf

Barnes: Well I didn't think he was their agent no and I understood *he was going to get some management fees from the management company* for putting the deal together but nothing beyond *that no agent buyer relationship*.

(R. 5038–39 (emphasis added).) Third, Seegmiller never received or expected to receive a commission from Plaintiffs, his alleged clients, in connection with the Herriman Transaction. Fourth, no portion of Seegmiller's \$165,000 kickback went to Prudential.¹⁵ Fifth, Seegmiller's kickback was paid out of *stolen funds*. (R. 2911–13.) Finally, the *illegal* nature of Seegmiller's kickback was the basis of Plaintiffs' underlying lawsuit and judgment. Given these facts, Seegmiller simply never received or expected to receive a professional "fee" for services he allegedly provided Plaintiffs.

This Court should reject Plaintiffs' argument that Seegmiller's \$165,000 kickback is the type of professional "fee" that triggers coverage under the Policy. In an effort to

¹⁵ Under Utah law, real estate commissions belong to the brokerage (i.e. Prudential). UTAH ADMIN CODE R. 162-2f-401a(15)(b). So, even if the \$165,000 payment to Seegmiller could be classified as a "commission," which HC refutes, it was unlawful for Seegmiller to keep the money all to himself.

create coverage where none exists, Plaintiffs now contend Seegmiller received his payout in accordance with common real estate practices. (Plaintiffs' Br., p. 38.) That position, however, directly contradicts Plaintiffs' prior statements and arguments. In addition to the facts discussed above, Plaintiffs' own testimony evidences the fact that Seegmiller's kickback was anything but common, as they stated that "[i]t would have . . . been very material for [them] to know that Mr. Seegmiller was being paid a large undisclosed fee by Valley View for bringing [them] and [their] money to the transaction" (R. 2779, ¶ 23; 2786, ¶ 23.) Judge Toomey agreed when she held that Seegmiller was liable for "failing to clarify his role in the [Herriman] [T]ransaction, and failing to disclose a personal interest in the transaction." (R. 2909–11.) Even Plaintiffs' counsel admits that Seegmiller's "secret commission" was not a standard real estate commission. (R. 7547, p. 94:12–23¹⁶ ("That's one of the reasons why I think Judge Toomey was concerned that there was non-disclosure, because it wasn't paid in the traditional course of where the closing takes place then from the money that the seller received at the closing table, he takes a part of that money and pays the agent a commission.").) Indeed, "common," lawful payments cannot serve as the basis for a \$1 million judgment.

There is no escaping the fact that Seegmiller received a large, undisclosed, illegal kickback from stolen funds for getting Plaintiffs to invest with Barnes, Valley View, and Maxwell. This Court should avoid any policy construction that rewards and encourages

¹⁶ Mr. Roundy first used the term "secret commission" to describe Mr. Seegmiller's \$165,000 kickback at the August 13, 2015 hearing on the parties' Motions for Summary Judgment.

such deceptive, unlawful behavior and find there is no coverage because such an illegal payment does not satisfy the Policy's "fee" requirement.

B. Seegmiller acted dishonestly.

Even if Seegmiller's unlawful conduct was covered under the Policy's Insuring Clause, which HC refutes, the Policy provides no coverage for the Herriman Litigation, including Plaintiffs' judgment, because Seegmiller acted dishonestly. The Policy excludes coverage for any Claim or Claim Expenses "[b]ased upon or arising out of any dishonest, criminal, fraudulent, malicious or intentional Wrongful Acts, errors or omissions committed by or at the direction of the insured."¹⁷ (R. 2717, Section IV(a).) Plaintiffs will likely contend the exclusion is inapplicable because they strategically obtained summary judgment against Seegmiller in the Herriman Litigation with respect to their "negligence" claim only. The facts, however, not Plaintiffs' legal theory, control whether coverage exists. *Fire Ins. Exch. v. Alsop*, 709 P.2d 389, 390 (Utah 1985) ("In applying the policy's exclusion to the insured's conduct, the emphasis should be placed upon the alleged activities or omissions of the insured which give rise to the claim and not upon the claimant's characterizations of her legal theories of liability."); 9 COUCH ON INSURANCE § 126:3 (3d ed. 2014) ("[T]he legal theory asserted by the claimant is

¹⁷ As the insurer, HC has the burden to prove the applicability of any exclusion. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1312 (D. Utah 1994) (citing *Draughon v. CUNA Mut. Ins. Soc.*, 771 P.2d 1105, 1108 (Utah Ct. App. 1989)).

immaterial to the determination of whether the risk is covered.”¹⁸ When this Court examines the undisputed facts, it will be clear that Seegmiller’s deceitful conduct and misrepresentations to Plaintiffs, which Seegmiller used to induce Plaintiffs into investing in the Highland and Herriman Transactions, are the basis of Plaintiffs’ Claim and judgment.¹⁹ Indeed, the undisputed facts reveal that Seegmiller’s purposeful, dishonest conduct negates coverage.

The record is replete with undisputed evidence of Seegmiller’s dishonest conduct. For example, in the Herriman Litigation, Plaintiffs presented the following *statements of fact*:

- “The conduct of Robert Seegmiller did not meet industry standards *for treating the plaintiffs honestly*, regardless of whether or not he was representing them.”
- “The conduct of Robert Seegmiller did not meet industry standards that prohibited Seegmiller from doing anything *that would mislead plaintiffs* . . .”
- “The conduct of Robert Seegmiller did not meet industry standard [sic] *of full disclosure*, which obligated [Seegmiller] to tell [Plaintiffs] all material information which [Seegmiller] learn[ed] about the property or the seller’s ability to perform his obligations.”

¹⁸ It is also important to note that under Utah law, dishonest representations, like Seegmiller’s, “are considered purposeful rather than accidental for the purpose of insurance coverage. The underlying rationale of this rule is that negligent misrepresentation requires *intent to induce reliance* and, therefore, is a subspecies or variety of fraud which is excluded from policy coverage.” *Nova Cas. Co. v. Able Constr. Co.*, 1999 UT 69, ¶ 16, 983 P.2d 575 (quoting *Dyksta v. Foremost Ins. Co.*, 17 Cal. Rptr. 2d 543, 545 (Cal Ct. App. 1993)).

¹⁹ Plaintiffs’ passing references to Prudential’s alleged failure to properly supervise Seegmiller are not at issue as Plaintiffs never obtained a judgment against Prudential and Prudential never assigned Plaintiffs the right to pursue any claims on Prudential’s behalf.

- The Herriman Transaction was a “dishonest . . . flip[.]” and Seegmiller withheld information about the “dishonest” nature of the transaction from Plaintiffs.

(R. 3133–34, ¶¶ 27, 28, 31; 2779, ¶ 23; 2786, ¶ 23 (emphasis added).) That is, in Plaintiffs’ own words, Seegmiller lied to them to get them to invest in his personal real estate deals. Judge Toomey agreed, and consequently found Seegmiller liable for “*failing to disclose* a personal interest in the transaction.” (R. 2909–11 (emphasis added).) Since Seegmiller’s dishonest conduct provides the basis for Plaintiffs’ lawsuit and judgment against Seegmiller, the Policy excludes coverage.

HC expects Plaintiffs may again attempt to argue that Seegmiller’s misrepresentations were the product of an honest mistake. Plaintiffs first made that argument while briefing the underlying Motions for Summary Judgment when faced with the cold truth that the Policy excludes coverage for dishonest acts. (R. 5009.) If Plaintiffs revisit the argument, this Court should reject their new-found classification of Seegmiller’s conduct. For starters, it is a self-serving argument that cuts against the evidence and sworn statements Plaintiffs used to secure their underlying judgment in the Herriman Litigation. *See Fowler v. Mark McDougal & Assocs.*, 2015 UT App 194, ¶ 6, 357 P.3d 5 (a party cannot contradict a prior statement without a clear explanation for the discrepancy). It also calls for the Court to ignore Plaintiffs’ promise to “obtain judgments against Mr. Seegmiller for breach of fiduciary duty and fraud” at trial if Plaintiffs are unable to collect from HC; it is notable that, to HC’s knowledge, those claims remain pending. (R. 2961–62.) Plaintiffs obtained their underlying judgment by proving Seegmiller deceived them. That *fact*, not Plaintiffs’ strategic pursuit of a select

legal theory in an effort to circumvent Policy exclusions, controls whether coverage exists. As the Policy provides no coverage for Seegmiller's dishonest conduct, Plaintiffs cannot use the Policy to fund their judgment.

C. Seegmiller disclaimed any right to coverage.

Seegmiller's decision to actively disclaim coverage for years negates any potential for coverage under the Policy now. Whether Plaintiffs stand as judgment creditors or Seegmiller's assignees, HC may assert all defenses against Plaintiffs as it would have against Seegmiller. *First Inv. Co. v. Andersen*, 621 P.2d 683, 686 (Utah 1980) ("[T]he assignor cannot give another a larger right than he has himself."); *Guaranty Nat. Ins. Co. v. McGuire*, 192 F. Supp. 2d 1204, 1208 (D. Kan. 2002) ("An assignee takes subject to all equities and defenses existing between the assignor and the debtor prior to the notice of assignment, but not those arising after notice of the assignment."); 7A COUCH ON INSURANCE §106:6 (3d ed. 2015) ("[T]he insurer can assert against the injured party all defenses available to against the insured."). *See also* Section VIII(i) of the Policy ("Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy *to the extent of the insurance afforded by this Policy.*") (R. 2722 (emphasis added).) That is, Plaintiffs stand in Seegmiller's shoes.

Seegmiller, and thus, Plaintiffs, effectively waived any potential coverage under the Policy and are estopped from obtaining coverage now. "[W]aiver is the intentional relinquishment of a known right." *IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2008 UT 3, ¶ 16, 196 P.3d 588. It may be either express or implied. *Id.* Estoppel applies

when a party makes a statement or conducts himself/herself in a certain manner and another party relies on it and would suffer harm if the first party was allowed to “take back” its statement. *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 14, 158 P.3d 1088. It is undisputed that Seegmiller failed to timely notify HC of the Highland and Herriman Litigation and actively disclaimed coverage for years. Specifically, Seegmiller waited over two years to notify HC of the Claim, which deprived HC of the opportunity to meaningfully participate in the litigation. Further, prior to notifying HC of the Claim, Seegmiller and Prudential omitted any reference to the Highland and Herriman Litigation from multiple policy renewal applications. Finally, neither Seegmiller nor Prudential ever challenged HC’s coverage analysis; in fact, Seegmiller agreed with HC’s decision. (R. 2643, p. 169:1–13; 2644–45, pp. 176:4–177:11; 3186–88; 3190–92; 5689) Because Seegmiller disclaimed any right to coverage at all times since 2007, Plaintiffs, now standing in his shoes, are barred from using the Policy to satisfy their \$1 million judgment.

V. HC DID NOT BREACH ITS DUTY TO DEFEND SEEGMILLER.

This Court need not decide whether HC breached its duty to defend Seegmiller in the Herriman Litigation because Plaintiffs did not present it as an issue before this Court. In their Statement of Issues, Plaintiffs ask this Court to do nothing more than determine whether the Policy provides coverage for the judgment Plaintiffs obtained against Seegmiller in the Herriman Litigation. That judgment has nothing to do with HC’s duty to defend under the Policy; it relates only to the damages Plaintiffs suffered as a result of

Seegmiller's dishonest conduct and therefore concerns only HC's alleged duty to indemnify, which HC has shown was never triggered.

Even if the issue of whether HC breached its duty to defend Seegmiller in the Herriman Litigation was before this Court, HC properly determined it had no duty to defend Seegmiller. Under Utah law, "an insurer 'has a duty to defend the insured against a liability claim which is covered or which is potentially covered.'" *Summerhaze Co., L.C. v. Fed. Deposit Ins. Corp.*, 2014 UT 28, 36, 332 P.3d 908 (quoting *Mesmer v. Md. Auto. Ins. Fund*, 725 A.2d 1053, 1061 (Md. 1999)). Even if an insurer initially has a duty to defend a claim, that duty ends once it is determined the claim is not covered under the policy. *E.g., Am. Nat. Prop. & Cas. Co. v. Jackson*, No. 1:07-CV-00162, 2010 WL 2555120, at *8 (D. Utah June 21, 2010) ("[I]f ANPAC could establish that all claimed bodily injuries arose from Michael's sexual misconduct, ANPAC's duty to defend would end."); 14 COUCH ON INSURANCE § 200:47 (3d ed. 2014) ("Generally, an insurer's duty to defend arises out of a potentially covered claim and lasts until the conclusion of the underlying lawsuit, *or until it has been shown that there is no potential for coverage.*") (emphasis added). From the moment HC received notice of the Highland and Herriman Litigation, it was apparent there was no coverage. In his written notice to HC, McDonald specifically stated the Highland and Herriman Litigation contained allegations "that Mr. Seegmiller, . . . acting in his capacity as a Prudential agent *and a principal in the transaction*, was part of a conspiracy that fraudulently induced" Plaintiffs to invest hundreds of thousands of dollars in the Highland and Herriman Transactions. (R. 2888–90 (emphasis added).) That is, McDonald confirmed the litigation relates to deals where

Seegmiller did not act “solely” as a Prudential real estate agent and acted dishonestly. Consequently, HC had no duty to defend Seegmiller. As Plaintiffs stand in Seegmiller’s shoes,²⁰ Plaintiffs cannot claim that HC breached its duty to defend.

VI. PLAINTIFFS ARE NOT ENTITLED TO GREATER COVERAGE THAN THE POLICY AFFORDS SEEGMILLER.

Whether Plaintiffs stand as judgment creditors or Seegmiller’s assignees is irrelevant. That is, under no circumstances are Plaintiffs entitled to greater coverage than the Policy affords under its plain and unambiguous terms. *First Inv. Co. v. Andersen*, 621 P.2d 683, 686 (Utah 1980) (as Seegmiller’s assignees, Plaintiffs took the claims subject to all applicable defenses); *Mullin v. Travelers Indem. Co. of Conn.*, 541 F. Supp. 1219, 1224 (D. Utah 2008) (judgment creditors cannot obtain coverage for a claim that is not covered under the plain and unambiguous terms of the policy). Judge Toomey specifically found that whether Seegmiller was even acting as Plaintiffs’ real estate agent in the Herriman Transaction remains a question of fact. (R. 2909–11.) As such, the Court may disregard Plaintiffs’ argument that they are entitled to judgment as a matter of law. Moreover, the undisputed facts, as demonstrated more fully above, show there is no coverage under the plain and unambiguous terms of the Policy because (1) Seegmiller did not act “solely” as a Prudential real estate agent in the Herriman Transaction, if at all, (2) Seegmiller did not act “on behalf of” Prudential in the Herriman Transaction, (3) Seegmiller did not receive or expect to receive a “fee” in connection with the Herriman Transaction that would trigger coverage, (4) Seegmiller acted dishonestly, and

²⁰ See *First Inv. Co. v. Andersen*, 621 P.2d 683, 686 (Utah 1980); 7A COUCH ON INSURANCE §106:6 (3d ed. 2015).

(5) Seegmiller waived and/or is estopped from seeking coverage now. As such, Plaintiffs, as both judgment creditors and Seegmiller's assignees, cannot recover under the Policy.

CONCLUSION

For these reasons, Defendant Houston Casualty Company respectfully requests that this Court affirm Judge Maughan's decision to GRANT HC's Motion for Summary Judgment in its entirety and DENY Plaintiffs' Cross-Motion for Summary Judgment.

DATED this 31st day of May, 2016.

CHRISTENSEN & JENSEN, P.C.



Rebecca Hill

*One of the Attorneys for Appellee
Houston Casualty Company*

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE HOUSTON CASUALTY COMPANY**, Trial Court Case No. 130906137, Appellate Court Case No. 20150837 were served via U.S. Mail to all parties listed below on this 31st day of May, 2016:

Thor Roundy
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Rebecca L. Hill
*One of the Attorneys for Appellee
Houston Casualty Company*

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 13-point typeface and contains 9,905 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

A handwritten signature in cursive script, reading "Rebecca L. Hill", is written over a horizontal line.

Rebecca L. Hill

Attorneys for Appellee

Addendum
Exhibit 1

FILED DISTRICT COURT
Third Judicial District

OCT 18 2011

SALT LAKE COUNTY

by [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

WILLIAM COMPTON, JOHN SIMCOX,
and SALT AIR INVESTMENTS, LLC,

Plaintiffs,

vs.

ROBERT SEEGMILLER, STERLING
BARNES, UTAH COUNTY REAL
ESTATE, LLC dba PRUDENTIAL UTAH
REAL ESTATE, VALLEY VIEW
ESTATES, LLC, SURETY TITLE
AGENCY, and JOHN DOES 1-20,

Defendants.

MEMORANDUM DECISION
AND ORDER

Case No. 070916209

Judge Kate A. Toomey

This matter is before the Court on the following motions: (1) Plaintiff's Motion for Partial Summary Judgment Concerning Robert E. Seegmiller, filed May 9, 2011; (2) Robert Seegmiller's Cross Motion for Partial Summary Judgment, filed May 13, 2011; (3) Robert Seegmiller's Motion to Strike, filed May 13, 2011; (4) Robert Seegmiller's Motion to Amend, filed August 11, 2011; (5) Plaintiffs' Motion for Summary Judgment Concerning Valley View Estates, LLC and Sterling Barnes, filed April 28, 2011; and (6) Sterling Barnes and Valley View Estates, LLC's Motion for Summary Judgment, filed April 13, 2011. The motions were fully briefed, and oral arguments were held on August 26 and August 29,

Exhibit:	7
Wit:	<u>[Signature]</u>
	1-28-14
	Judy A. Holdeman

02902

2011. The motions are now ready for decision.¹

BACKGROUND

In March 2006, Plaintiffs William Compton and John Simcox met Defendant Robert Seegmiller, a real estate agent working for Prudential Utah Real Estate. The parties discussed their common interest in developing commercial land. Mr. Seegmiller showed the Plaintiffs various properties for prospective purchase, provided them with information about comparable sales, assisted with negotiations to purchase property, and drafted documents on the Plaintiffs' behalf.

On September 21, 2006, Mr. Seegmiller identified a promising parcel of real estate in Herriman, Utah. On December 26, the Plaintiff's company Saltair Investments, LLC entered into a real estate purchase contract ("REPC") to buy the property from Defendant Valley View Estates, LLC. The REPC required that Saltair deposit \$705,000 in earnest money for the potential purchase of the lots. On November 29, 2006 and January 4 and 10, 2007, the Plaintiffs deposited the earnest money into an escrow account with Surety Title Agency, per the terms of the REPC. The REPC provided that the earnest money would become non-refundable once the plat was recorded.

The REPC, Addendum 1, provides:

2. The Buyer will secure their specific Lots or priority position with a paid reservation deposit in the amount of FIFTEEN THOUSAND dollars (\$15,000) per lot by making a check or wire transfer payable to the Sellers Title Company. Once the plat is recorded this money will become non-refundable to the buyers.
3. As soon as the Lots are recorded the Buyer will be notified. No later than ten days after notification of recordation of the final plat, each

¹ Mr. Barnes and Valley View filed a Motion to Strike Affidavit of Thor Roundy. The motion has not been submitted for decision and will not be addressed.

reservation deposit will be converted to earnest money and this Real Estate Purchase Contract will replace the reservation held on each lot. This purchase contract and addendum will identify the specific price and settlement date. The Buyer will be notified by certified mail of the recordation of the plat.

4. Buyer will close on all lots identified below thirty (30) days after any adjustments per agreement and building permits can be issued by the city.

On January 10, 2007, Defendant Sterling Barnes and Brett Redd,² owners of Land Development Alliance ("LDA"), purchased the Herriman property for \$7,458,500. Defendant Valley View Estates, also owned by Mr. Barnes and Mr. Redd, then purchased the property from LDA for \$12,886,500. LDA "loaned" \$5,609,162 to Valley View to pay the closing costs. In fact, it was the Plaintiffs' escrow money that was deposited with the same institution (Defendant Surety Title Agency) that was used to pay the closing costs.

Meanwhile, ANB Financial N.A. agreed to loan Valley View over \$16 million. Of that money, \$7 million was deposited with Surety Title Group for the purchase of the property, Land Development Alliance got \$1.5 million, and Mr. Seegmiller and two other men got \$304,000 to share.

Valley View failed to develop the property pursuant to the terms promised by Mr. Barnes, and the Plaintiffs attempted to exercise their right to cancel the REPC and forego purchasing the lots. However, Surety could not return the earnest money because it had released the money to Valley View upon Sterling Barnes's request.

The Plaintiffs have brought causes of action against Mr. Seegmiller and Prudential for accounting, breach of fiduciary duty, negligence, fraud, negligent misrepresentation, and conspiracy. Against Mr. Barnes and Valley View, the Plaintiffs bring claims for

² Mr. Redd is not a party to this action.

accounting, theft, fraud, and conspiracy.

DISCUSSION

There are four motions for summary judgment before the Court. The Plaintiffs move for partial summary judgment against Mr. Seegmiller and Prudential on their claims for breach of fiduciary duty and negligence. Mr. Seegmiller and Prudential filed a cross-motion for summary judgment. The Plaintiffs also move for summary judgment on all claims against Mr. Barnes and Valley View. Mr. Barnes and Valley View filed a cross-motion for summary judgment.

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). "A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, viewing the facts and all reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party." *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 24, 42 P.3d 379 (citation omitted). "A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on any material issue." *Ron Shepherd Ins. Inc. v. Shields*, 882 P.2d 650, 655 (Utah 1994) (citation omitted).

Mr. Seegmiller's Motion for Leave to Amend

Mr. Seegmiller moves the Court for leave to amend his Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment. He

oppose the motion, and the Court GRANTS the motion.

Mr. Seegmiller's Motion to Strike

Mr. Seegmiller moves the Court to strike certain paragraphs of the Affidavit of John Simcox filed in support of Plaintiff's Motion for Partial Summary Judgment. Mr. Simcox testified as to what Mr. Seegmiller said to co-Plaintiff Mr. Compton. Rule 56(e), Utah Rules of Civil Procedure, requires affidavits to be made on personal knowledge. Mr. Simcox does not have personal knowledge of the intentions and actions of his co-plaintiff, and the Court GRANTS the motion as to paragraphs 2, 4, 5, 16, 20, 21, 22, 23, 24, 25, 26 of Mr. Simcox's affidavit.

Claims against Mr. Seegmiller and Prudential

The Plaintiffs claim that between March 15, 2006 through early 2007, Mr Seegmiller acted as their real estate agent and thus owed them certain fiduciary duties. They also argue that even if Mr. Seegmiller was not acting as their agent, he nevertheless breached common law duties owed to them.

Claim for Breach of Fiduciary Duty

Real estate agents owe fiduciary duties to their clients, including the duties of diligence, loyalty, full disclosure, honesty, care, and good faith. See, e.g., *Hopkins v. Wardley Corp.*, 611 P.2d 1204, 1206 (Utah 1982). The Utah Administrative Code provides that an agent owes, *inter alia*, the following duties: protect and promote the interests of the client ahead of oneself, loyalty, full disclosure of material information, and reasonable care

and diligence. The agent must provide a written agency agreement defining the scope of representation. Utah Admin. Code Rule 162.

The Plaintiffs argue that they believed Mr. Seegmiller was acting as their real estate agent during the process of the Herriman property purchase, and they put their trust in him. They claim that he breached an agent's fiduciary duties to his principals. For example, they cite that he placed his own interest ahead of theirs when he accepted a fee from Valley View; he did not provide disclosure of material information, especially details of the "flip" sale; he failed to conduct due diligence on Valley View's financial status; he failed to provide a written agency agreement or disclose in writing the scope of his representation; he failed to draft the REPC in a manner that prohibited Mr. Barnes and Valley View from using the earnest money the Plaintiffs had deposited with Surety; he failed to include terms in the REPC for the return of the earnest money; and he failed to supply Surety with a copy of the REPC and its escrow instructions.

Before the Court can consider the breach of fiduciary duty claims, it must determine whether Mr. Seegmiller was acting as real estate agent for Mr. Compton and Mr. Simcox. If Mr. Seegmiller was not their agent, he does not owe the Plaintiffs the same duties a fiduciary owes a client. The Utah Court of Appeals explains "agency:"

The key relationship between a real estate broker and a client is agency, and the universal laws applying to principals and agents control their rights and responsibilities. Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Thus, for Welsh to show Wardley was his agent, he must prove that (1) he manifested that Wardley could act for him; (2) Wardley accepted the proposed undertaking, and (3) both Welsh and Wardley understood that Welsh was to be in charge of the undertaking. In other words, an agency is created and authority is actually conferred very much as a contract is

made: a meeting of the minds must exist between the parties. Moreover, and critical in this case, [a]n agency relationship can arise only at the will and by the act of the principal.

Wardley Corp. v. Welsh, 962 P.2d 86, 89 (Utah Ct. App. 1998) (internal quotations and citations omitted).

The Court first considers the evidence submitted by the Plaintiffs in favor of finding an agency relationship. The Plaintiffs claim that Mr. Seegmiller "represented his credentials to plaintiffs and told plaintiffs that he would represent them as a buyer's real estate agent." He showed potential investment properties to the Plaintiffs and provided them with sales data and Multiple Listing Service ("MLS") info. Mr. Seegmiller drafted the REPC for purchase of the Herriman property on behalf of the Plaintiffs, and he did not object when another party filled in his name as the buyer's agent.

The Court also considers Mr. Seegmiller's arguments against finding that he was acting as a real estate agent for the Plaintiffs. Mr. Seegmiller denies that he ever told the Plaintiffs he would represent them in any capacity; he denies filling in his name on the REPC as the Plaintiff's agent; and he argues that he was merely contributing his expertise as a member of a group of investors. He raises the issue that the "broker" field in the REPC was left blank, where normally he would write in Prudential; without the backing of Prudential, he claims that he could not legally represent Plaintiffs as their agent. Mr. Seegmiller did not provide any sort of agency contract to the Plaintiffs nor did he make mention of any agent-client relationship. He acknowledges that he drafted the REPC requiring Plaintiff's earnest money to be deposited with Surety but claims that the Plaintiffs negotiated the amount of earnest money with Mr. Barnes, and Mr. Seegmiller only formalized the agreement.

The Court concludes that issues of fact remain whether Mr. Seegmiller was acting as the Plaintiff's real estate agent. Both parties submitted an expert affidavit. The Plaintiffs' expert concluded that Mr. Seegmiller was acting as the Plaintiffs' agent, and Mr. Seegmiller's expert opined that he was not. There is evidence supporting each position, and on several contentions the parties plainly disagree as to the facts. This issue is therefore reserved for the jury as the trier of fact.

Claim for Negligence

Even if a real estate agent is not acting in the capacity of agent for another party, he still owes certain duties to all parties to any transaction in which he is involved. *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980). Under the Utah Administrative Code Section 162-2f, an agent involved in a transaction must disclose in writing his agency relationships. He must disclose in writing to all parties to the transaction any compensation he will receive.

The Plaintiffs argue that Mr. Seegmiller breached his common law duties toward them, including: failing to advise them to consult an attorney; failing to draft necessary terms in the REPC; failing to deliver a copy of the REPC to Surety; maintaining and hiding a conflict of interest (by receiving money from Valley View); failing to obtain escrow instructions, failing to disclose in writing his agency relationships or any fees he might collect; and concealing the fact that Valley View planned to remove the escrow money to finance the purchase.

The Plaintiffs claim that Mr. Seegmiller's failure to disclose material information caused them to rely on his advice and deposit a large sum of money into the escrow account, which was then taken and used by Valley View. The Plaintiffs argue that Mr.

Seegmiller breached his duties to the Plaintiffs, thus causing them harm.

Mr. Seegmiller argues that the breach of fiduciary duty and negligence claims are barred by the economic loss rule. The economic loss rule bars tort recovery for contract claims. Where a contract exists, recovery is limited to the terms of that contract. *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 30, 28 P.3d 669. Mr. Seegmiller argues that the Plaintiffs' claims are based on a theory that there was a quasi-contract between Mr. Seegmiller and the Plaintiffs, and therefore the Plaintiffs are barred from bringing any tort claim outside the contract.³

The economic loss rule does not bar tort claims based upon duties independent of those found in a contract. *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 51, 70 P.3d 1. When an independent duty exists, the rule does not bar tort claims based on a duty of care. *Hermansen v. Tasulis*, 2002 UT 52, ¶ 15, 48 P.3d 235 (holding that real estate brokers owe a duty to prospective buyers to disclose material facts about the property).

The Court concludes that regardless of whether Mr. Seegmiller was acting as the real estate agent for Plaintiffs for the purpose of purchasing the Herriman lots, he owed certain duties to the Plaintiffs, which he breached by failing to clarify his role in the transaction, and failing to disclose a personal interest in the transaction.

³ Under the economic loss rule, a duty is owed only to the parties to a contract. The "implied duty to use reasonable and customary care in the provision of professional services arising from contract is owed only to the person or entity for whom the professional services are to be rendered." *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 30, 28 P.3d 669. The "economic loss rule" provides that one may not recover "economic" damages for a non-intentional tort. Economic loss is defined as: "Damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damage to other property." *Am. Towers Owners Ass'n v. CCI Mech.*, 930 P.2d 1182, 1189 (citation omitted).

Mr. Seegmiller, in his Motion for Summary Judgment, argues that he is not personally liable for the alleged bad acts because Prudential is liable for the acts of its agents within the scope of employment authority. See *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991) (an agent acting on behalf of broker is not liable for torts unless he intended to be personally liable). Under the doctrine of respondeat superior, a supervisor may be liable along with the agent. Prudential's potential liability does not foreclose Mr. Seegmiller's joint liability. An agent may be held liable for his own torts. *Brady v. Roosevelt SS Co.*, 317 U.S. 575, 580.

For the foregoing reasons, the Court DENIES the Plaintiffs' Motion for Partial Summary Judgment on the breach of fiduciary duty claim and GRANTS summary judgment on the claim for negligence.

Claims against Sterling Barnes and Valley View Estate

The Plaintiffs and Sterling Barnes and Valley View have filed cross-motions for summary judgment on the claims for theft, fraud, negligent misrepresentation, and conspiracy.

The REPC, Addendum 1, discusses the Plaintiffs' earnest money:

2. The Buyer will secure their specific Lots or priority position with a paid reservation deposit in the amount of FIFTEENTHOUSAND dollars (\$15,000) per lot by making a check or wire transfer payable to the Sellers Title Company. Once the plat is recorded this money will become non-refundable to the buyers.

3. As soon as the Lots are recorded the Buyer will be notified. No later than ten days after notification of recordation of the final plat, each reservation deposit will be converted to earnest money and this Real Estate Purchase Contract will replace the reservation held on each lot. This purchase contract and addendum will identify the specific price and settlement date. The Buyer will be notified by certified mail of the

recording of the plat.

4. Buyer will close on all lots identified below thirty (30) days after any adjustments per agreement and building permits can be issued by the city.

(Emphasis added.)

The plat was not recorded until March 6, 2007, but Mr. Barnes caused the escrow money to be removed from the account on January 10, contrary to the terms of the REPC. The REPC provides that the earnest money was to be held in escrow until closing, and closing could not have occurred prior to September 7, 2007 (30 days after the city authorized the permits). The Plaintiffs were not notified by certified mail that the plats were recorded. It was not until August 3 – when the Plaintiffs notified Valley View of their intent to cancel the transaction – that they learned that the earnest money had been taken months earlier.

Theft/Conversion

Theft occurs when a person "obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404. The Plaintiffs argue that Mr. Barnes (through Valley View) stole the Plaintiffs' \$704,000 earnest money deposit. The Plaintiffs claim that Mr. Barnes was aware that he was not entitled to the escrow money, evidenced by the fact that he did not provide a copy of the REPC's escrow instructions to Surety Title. Mr. Barnes also told the escrow officer that the money was his own when it was not.

Mr. Barnes first counters that there is no provision in the REPC prohibiting Valley View's use of the earnest money. The REPC provides: "No later than ten days after notification of recording of the final plat, each reservation deposit will be converted to

earnest money [.]” Clearly, the fact that the contract provides for how the money shall be used is an implicit message that the money may not be used for other purposes.

Mr. Barnes next claims that the Plaintiffs cannot maintain a claim for theft because they did not have the earnest money in their possession at the time it was taken. See *Fibro Trust, Inc. v. Broman Financial, Inc.*, 974 P.2d 288 (Utah 1999) (claimant must show he was immediately entitled to possession of the property at the time of the alleged theft). This argument is unavailing. The Plaintiffs had the right to a refund of their earnest money until the plats were recorded. Mr. Barnes took the money from the account prior to the recording of the plats.

The Court concludes that the Plaintiffs have demonstrated sufficient evidence to prove the elements of theft. Mr. Sterling and Valley View unlawfully took the earnest money, depriving the Plaintiffs of their property.

Fraud

The Plaintiffs argue that Mr. Barnes (and Valley View) committed fraud by misrepresentation. Rule 9(b), Utah Rules of Civil Procedure, specifies that claims of fraud shall be stated with particularity. The elements of fraud are:

(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35 (citations omitted).

First, the Plaintiffs claim that Mr. Barnes made false representations to induce them

The standard of proof for establishing a claim of fraud is clear and convincing evidence. *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536. The Court cannot determine with certainty Mr. Barnes's intent regarding the earnest money when he executed the REPC with the Plaintiffs. This determination must be left to the trier of fact.

The Plaintiffs next argue that Mr. Barnes committed fraud by misrepresentation through non-disclosure, specifically that he failed to disclose the following: the Defendants were structuring the land sale as a "flip"; Mr. Seegmiller would be financially compensated in return for convincing the Plaintiffs to deposit the earnest money; Mr. Barnes did not have the financial means to develop the property as he had represented; and the Plaintiffs' earnest money had been taken and used for another purpose.

The Plaintiffs argue that Mr. Barnes had a duty to speak because he was in a superior position to know the material facts around the purchase. Fraudulent concealment requires a showing that one with a duty or obligation to communicate certain facts remained silent or concealed material facts. "Such a duty or obligation may arise from a relationship of trust between the parties, an inequality of knowledge or power between the parties, or other attendant circumstances indicating reliance[.]" *McDougal v. Weed*, 945

Proving fraud carries a heavy burden. The Court determines that the Plaintiffs have not established clear and convincing evidence of fraudulent concealment. There remain issues of fact regarding what information Mr. Barnes actually passed on to the Plaintiffs. The Court reserves this issue for the jury.

Negligent Misrepresentation

Mr. Barnes kept the Plaintiffs apprised of the estimated timeline for the development project. Specifically, he updated the Plaintiffs in November and December 2006 and January 2007. The date of completion was material to the Plaintiffs because they hoped to resell the developed lots while the real estate market was high. Mr. Barnes told the Plaintiffs that the lots would be ready for resale as early as June 2007, but that was incorrect.

The Plaintiffs now claim that Mr. Barnes did not have experience as a developer or enough information to make such promises. Negligent misrepresentation occurs when:

(1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material facts, and (3) carelessly or negligently makes a false representation concerning them, (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so and (6) suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present.

DeBry v. Valley Mortg. Co., 835 P.2d 1000, 1008 (Utah Ct. App. 1992) (citation omitted).

Negligent misrepresentation carries a lesser mental state than fraud, "requiring only that the seller act carelessly or negligently." *Robinson v. Tripco Inv., Inc.*, 2000 UT App 200, ¶ 13, 21 P.3d 219.

The Plaintiffs argue that Mr. Barnes was in a superior position to know the facts

because he took it upon himself to keep the Plaintiffs updated on the project and he signed the closing papers on behalf of Valley View. Mr. Barnes disagrees that he was in a superior position. It appears to the Court that Mr. Barnes held himself out to possess pertinent information that was material to the Plaintiffs, and he passed along relevant information at various times throughout the transaction. He was, to some extent, in a superior position and made several misrepresentations to the Plaintiffs. However, whether those representations were negligent is as yet uncertain. The Court does not have sufficient information to determine whether Mr. Barnes's representations regarding the estimated completion dates were reasonable. An incorrect guess is not necessarily negligent. This issue is left for determination by the jury.

Conspiracy

The Plaintiffs claim that Mr. Barnes, Valley View, and Mr. Seegmiller conspired to coerce the Plaintiffs to execute the REPC and deposit the earnest money into an escrow account, which would then be used by Valley View to obtain a loan to acquire the Herriman property.

Conspiracy requires the following elements: "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." *Israel Pagan Estate v. Cannon*, 748 P.2d 785, 790 (Utah Ct. App. 1987).

The Plaintiffs claim that the theft of their money could not have occurred unless both Mr. Seegmiller and Mr. Barnes failed to provide REPCs to Surety and Mr. Barnes misrepresented the source of the money to the escrow officer.

Again, the material facts are disputed and the Court cannot determine whether

Seegmiller had a meeting of the minds to defraud the Plaintiffs. Just because two steps may be required to achieve a certain outcome does not necessarily mean that commission of those two steps was intentional in relation to one another.

CONCLUSION

For the foregoing reasons, the Court: (1) DENIES in part (claim for fiduciary duty) and GRANTS in part (claim for negligence) Plaintiff's Motion for Partial Summary Judgment Concerning Robert E. Seegmiller, (2) GRANTS in part (claim for fiduciary duty) and DENIES in part (claim for negligence) Robert Seegmiller's Cross Motion for Partial Summary Judgment, (3) GRANTS Robert Seegmiller's Motion to Strike, (4) GRANTS Robert Seegmiller's Motion to Amend, (5) GRANTS in part (claim for theft/conversion) and DENIES in part (claims for fraud, negligent representation and conspiracy) Plaintiffs' Motion for Summary Judgment Concerning Valley View Estates, LLC and Sterling Barnes, and (6) GRANTS in part (claims for fraud, negligent misrepresentation and conspiracy) and DENIES in part (claim for theft/conversion) Sterling Barnes and Valley View Estates, LLC's Motion for Summary Judgment.

DATED this 18 day of October, 2011.



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070916209 by the method and on the date specified.

MAIL: JAMES T DUNN 1108 W S JORDAN PKWY STE A S JORDAN, UT 84095
MAIL: STEPHEN B ELGGREN 7390 S CREEK RD #201 SANDY UT 84093-2031
MAIL: GARY L JOHNSON 299 S MAIN ST 15TH FLOOR SALT LAKE CITY UT 84111
MAIL: JUDSON T PITTS 45 W 10000 S # 211 SANDY UT 84070
MAIL: THOR B ROUNDY 6965 UNION PARK CNTR STE 180 MIDVALE UT 84047-6019
MAIL: CHAD T WARREN 3319 N UNIVERSITY AVE PROVO UT 84604

Date: 18 Oct 2011

KW
Deputy Court Clerk

Addendum
Exhibit 2

The Order of Court is stated below:

Dated: September 10, 2015
01:22:22 PM

/s/ PAUL G MAUGHAN
District Court Judge



KEITH A. CALL (6708)
ROBERT T. DENNY (13687)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400

*Attorneys for Defendants Daniel J. McDonald
and Smith Hartvigsen, PLLC*

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

WILLIAM COMPTON, and JOHN
SIMCOX, individuals, and SALTAIR
INVESTMENTS, L.L.C., a Utah limited
liability company,

Plaintiff,

vs.

DANIEL J. McDONALD, an individual,
SMITH HARTVIGSEN, PLLC, a Utah
professional limited liability company,
HOUSTON CASUALTY COMPANY, a
Texas licensed insurance company and
JOHN DOES 2-10,

Defendants.

**FINAL ORDER GRANTING MOTIONS
FOR SUMMARY JUDGMENT IN PART
AND DISMISSING CASE IN ITS
ENTIRETY WITH PREJUDICE**

Civil No. 130906137

Judge Paul Maughan

Pending before the Court are the following motions:

1. Defendants Daniel J. McDonald's and Smith Hartvigsen's Motion for Summary Judgment re: Assignment of Legal Malpractice Claims.

2. Houston Casualty Company's Motion for Summary Judgment.
3. Plaintiffs' Motion for Partial Summary Judgment against Defendant Houston Casualty Company.
4. Defendants Daniel J. McDonald's and Smith Hartvigsen's Motion for Summary Judgment re: Damages and Causation.
5. Defendants Daniel J. McDonald's and Smith Hartvigsen's Amended Motion for Summary Judgment re: Breach.

The Court held a hearing on these motions on August 13, 2015. Thor Roundy appeared on behalf of Plaintiffs. Keith A. Call and Robert W. Lin appeared on behalf of Daniel J. McDonald and Smith Hartvigsen, PLLC (collectively, the "Lawyer Defendants"). Karl A. Bekeny and Rebecca Hill appeared on behalf of Houston Casualty Company.

After careful consideration of the briefing submitted and the arguments of the parties presented on August 13, 2015, the Court RULES and ORDERS as follows:

1. Defendants Daniel J. McDonald's and Smith Hartvigsen's Motion for Summary Judgment re: Assignment of Legal Malpractice Claims is hereby GRANTED in its entirety. All claims against Defendants Daniel J. McDonald and Smith Hartvigsen, PLLC are DISMISSED with prejudice.

In this case, the Plaintiffs, William Compton, John Simcox and Saltair Investments, LLC, have sued the Lawyer Defendants for legal malpractice. It is undisputed that the Plaintiffs never had an attorney-client relationship with the Lawyer Defendants. Rather, they have taken their claims for legal malpractice by assignment from the Lawyer Defendants' former client, Bobby Seegmiller. The Lawyer Defendants' motion seeks an order that legal malpractice claims are not

assignable as a matter of law, at least under the facts of this case.

In *U.S. Fidelity & Guarantee Co. v. U.S. Sports Specialty Ass'n*, 2:07-CV-996-TS, 2012 WL 6624202, at *2 (D. Utah Dec. 19, 2012), the United States District Court for the District of Utah determined that the Utah Supreme Court would likely adopt the majority rule that legal malpractice claims may not be assigned. In *Sleepy Holdings, LLC v. Snell & Wilmer, LLP*, Case No. 120401523, (Fourth District Court, State of Utah), the trial court entered a Ruling on Plaintiff's Motion to Amend, Motion to Consolidate, and on Defendant Snell & Willmer [sic] L.L.P. and Wade Budge's Motion to Dismiss on July 15, 2013. In that ruling, the Court found that legal malpractice claims are not voluntarily assignable. In consideration of those cases and the public policy considerations as outlined in *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 397, 133 Cal. Rptr. 83, 87 (Cal. Ct. app. 1976), as well the policy considerations outlined in the various other jurisdictions that prohibit the voluntary assignment of legal malpractice claims, this Court adopts the majority rule in this case and finds that legal malpractice claims are not voluntarily assignable, at least under the circumstances of this case.

Specifically, the Court is persuaded that this case represents exactly why a majority of jurisdictions in the United States have prohibited voluntary assignment of legal malpractice claims. For example, allowing voluntary assignment of legal malpractice claims would compromise a client's expectation of confidentiality and loyalty, along with the lawyer's duty to provide the same. The Court finds that these policies have been violated here. For example, Mr. Seegmiller, the "client" in the underlying case and the "assignor" of the legal malpractice claims, has shared with Plaintiffs in this case attorney-client communications not only between himself and the Lawyer Defendants, but also between his former co-client (Prudential Real Estate) and

the Lawyer Defendants. Thus, the attorney-client privilege between Prudential Real Estate and the Lawyer Defendants was violated. In addition, allowing voluntary assignment of legal malpractice claims would increase the risk that a client who was satisfied with his legal representation would be exploited or coerced to invent and assign a legal malpractice claim in order to get out from under a judgment entered against him. In this case, it appears that Mr. Seegmiller had no intention of bringing a legal malpractice claim, but may have been unduly influenced to assign and “cooperate” with Plaintiffs’ pursuit of a malpractice claim to get out from under a judgment that the Plaintiffs had obtained against him. Even if confidential information was not shared with Plaintiffs, and even if the former client was not exploited or unduly influenced, the circumstances of this case show that the *risk* of such is real and that legal malpractice claims should therefore not be voluntarily assignable.

The Court further finds that to allow voluntary assignment of legal malpractice claims, especially in view of the facts here, would pry apart, or risk prying apart, the attorney-client relationship, would adversely reflect on the judicial process, and should not be encouraged.

At the August 13, 2015 hearing, Plaintiffs argued that the Court could allow them to substitute Mr. Seegmiller as Plaintiff in this case, thereby resolving any concern with respect to Mr. Seegmiller’s voluntary transfer of his legal malpractice claims. In *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. Ct. App. 2002), the Court of Appeals of Arizona invalidated an assignment of legal malpractice claims. Just as here, the plaintiff in *Botma* argued that the assignor of the legal malpractice claim should be able to continue to pursue the claim. The Court held that the assignor had “nothing to ‘retain’ in the present lawsuit, a lawsuit that can benefit only [assignee]. The purpose of the assignment agreement was only to allow [assignee] to recover any and all

monies which might be owing to [assignor] and that [assignee] will be the ultimate beneficiary of [assignor's] claims. To allow the present lawsuit, which was born out of that assignment agreement, to proceed in [assignor's] name would be to wink at the rule against assignment of legal malpractice claims." *Id.* at 543.

The Court finds this reasoning persuasive. Here, just as in *Botma*, there is no dispute that Plaintiff is the ultimate beneficiary of the alleged malpractice claims. To allow this lawsuit, which was born out of an invalid assignment, to proceed in Mr. Seegmiller's name, would be to wink at the rule against assignment of legal malpractice claims.

For these reasons, the Court GRANTS Defendants Daniel J. McDonald's and Smith Hartvigsen's Motion for Summary Judgment re: Assignment of Legal Malpractice. The Court DISMISSES WITH PREJUDICE Daniel J. McDonald and Smith Hartvigsen from the suit.

2. Defendant Houston Casualty Company's Motion for Summary Judgment is hereby GRANTED in its entirety. All claims against Defendant Houston Casualty Company are DISMISSED with prejudice.

In their Second Amended Complaint, Plaintiffs allege they are entitled, as both judgment creditors and Robert Seegmiller's assignees, to recover \$1,041,275.34 from Houston Casualty Company as a result of Houston Casualty Company's decision to deny coverage for Robert Seegmiller with respect to two underlying lawsuits in which Plaintiffs sued Robert Seegmiller, among others.¹ On October 18, 2011, the Court in the Herriman Lawsuit granted summary judgment in Plaintiffs' favor and against Robert Seegmiller; Plaintiffs subsequently obtained a judgment in the Herriman Lawsuit against Robert Seegmiller for \$1,041,275.34 on June 7, 2012.

¹ The two underlying lawsuits are: *Simcox, et al. v. Seegmiller, et al.*, Case No. 070916208, filed in the Third Judicial District Court, Salt Lake County (the "Highland Lawsuit") and *Compton, et al. v. Seegmiller, et al.*, Case No. 070916209, filed in the Third Judicial District Court, Salt Lake County (the "Herriman Lawsuit").

Plaintiffs allege Houston Casualty Company is liable under one or more insurance policies Houston Casualty Company issued to Utah County Real Estate, LLC ("Prudential") from November 26, 2006 through November 26, 2009.² During that time, Robert Seegmiller was a Prudential real estate agent.

Pursuant to the HCC Policies' Insuring Agreement and Endorsements 1 and 5 of the HCC Policies, Houston Casualty Company agreed to provide insurance coverage to Prudential, and its real estate agents while providing Professional Services "on behalf of" Prudential, "[s]olely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee." In her October 18, 2011 Memorandum and Decision in the Herriman Lawsuit, the Honorable Kate Toomey ruled that "regardless of whether Mr. Seegmiller was acting as the real estate agent for Plaintiffs for the purpose of purchasing the Herriman lots, he owed certain duties to the Plaintiff [sic], which he breached by failing to clarify his role in the transaction, and failing to disclose a personal interest in the transaction." Because Robert Seegmiller had a personal interest, he held dual or competing roles in the transaction giving rise to the Herriman Lawsuit. Robert Seegmiller cannot have held dual or competing roles in the transaction and simultaneously have acted "solely" as Plaintiffs' real estate agent "on behalf of" Prudential. As such, there is no coverage for Robert Seegmiller for the Herriman Lawsuit under the HCC Policies as a matter of law.

Further, at the hearing Plaintiffs argued that pursuant to Section VIII(i) of the HCC

² From November 26, 2006 to November 26, 2009, Houston Casualty Company provided Professional Liability Errors and Omissions Insurance to Prudential and its real estate agents under three successive policies that contained the same material terms. Policy H706-17424 covered the Policy Period of November 26, 2006 to November 26, 2007; Policy No. H707-16855 covered the Policy Period of November 26, 2007 to November 26, 2008; and Policy No. H708-16288 covered the Policy Period of November 26, 2008 to November 26, 2009 (the policies are, collectively, the "HCC Policies").

Policies, Plaintiffs, as judgment creditors, have a direct right of action against Houston Casualty Company regardless of whether Robert Seegmiller was covered by the HCC Policies. Section VIII(i) of the HCC Policies states that “[a]ny person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy.” The Court finds that pursuant to the clear and unambiguous language of Section VIII(i), Plaintiffs cannot obtain greater coverage than the HCC Policies provide for Robert Seegmiller. The Court has ruled that the HCC Policies do not provide coverage for Robert Seegmiller. Therefore Plaintiffs, whether as judgment creditors or assignees, are similarly not entitled to coverage under the HCC Policies.

For these reasons, the Court GRANTS Houston Casualty Company’s Motion for Summary Judgment. The Court DISMISSES WITH PREJUDICE Houston Casualty Company from the suit.

3. For the reasons discussed in Section 2, above, the Court DENIES Plaintiffs’ Cross Motion for Partial Summary Judgment against Defendant Houston Casualty Company.

4. For the reasons discussed in Section 2, the Court GRANTS-IN-PART and DENIES-IN-PART Defendants Daniel J. McDonald’s and Smith Hartvigsen’s Motion for Summary Judgment re: Damages and Causation. The Court grants the motion as to the allegations in the Second Amended Complaint that implicate insurance coverage with respect to claims made against Bobby Seegmiller. To the extent there are allegations that do not implicate insurance coverage with respect to claims made against Bobby Seegmiller, the Court denies the motion as to those allegations.

5. The Court DENIES Defendants Daniel J. McDonald’s and Smith Hartvigsen’s

Amended Motion for Summary Judgment re: Breach.

In light of the Court's rulings contained in this Order, all claims against all Defendants are being dismissed with prejudice. This Order addresses all claims asserted against all Defendants, and dismisses this case in its entirety, with prejudice. This constitutes the final order of the Court.

-----END OF ORDER-----

*** Entered by the Court on the date indicated by the Court's Seal at the top of the first page ***

APPROVED AS TO FORM:

SNOW CHRISTENSEN & MARTINEAU

Date: September 8, 2015

/s/ Keith A Call
Keith A. Call
Robert T. Denny
*Attorneys for Defendants Daniel J. McDonald and
Smith Hartvigsen, PLLC*

///

///

///

TUCKER ELLIS LLP

Date: September 8, 2015

/s/ Karl A. Bekeny

Karl A. Bekeny, *admitted pro hac vice*
(Signature added by Counsel for Attorneys for
Defendants Daniel J. McDonald and Smith
Hartvigsen, PLLC with permission)

CHRISTENSEN & JENSEN

Rebecca Hill
Attorneys for Defendant Houston Casualty
Company

Date: September 8, 2015

/s/ Thor Roundy

Thor Roundy
Attorney for Plaintiffs William Compton, John
Simcox and Saltair Investments, LLC
(Signature added by Counsel for Attorneys for
Defendants Daniel J. McDonald and Smith
Hartvigsen, PLLC with permission)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2015, I caused a true and correct copy of the foregoing **FINAL ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT IN PART AND DISMISSING CASE IN ITS ENTIRETY WITH PREJUDICE**, to be electronically filed via the Court's GreenFiling system which will send notification to the following:

Cory B. Mattson, Attorney
Thor Roundy, Attorney
801 North 500 West, Suite 150
Bountiful, Utah 84010
Attorneys for Plaintiffs

Rebecca Hill, Attorney
Christensen & Jensen
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Attorneys for Houston Casualty Company

Karl A. Bekeny, Attorney, *admitted pro hac vice*
Kevin M. Young, Attorney, *admitted pro hac vice*
Tucker Ellis LLP
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113-7213
Attorneys for Houston Casualty Company

/s/ Cynthia L. Worne

Legal Assistant

3376630v1

Return of Electronic Notification

Recipients

REBECCA L HILL - Notification received on 2015-09-10 13:23:13.423.

KEITH A CALL - Notification received on 2015-09-10 13:23:13.36.

Cory Mattson - Notification received on 2015-09-10 13:23:11.53.

THOR B ROUNDY - Notification received on 2015-09-10 13:23:11.547.

ROBERT T DENNY - Notification received on 2015-09-10 13:23:12.61.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 130906137

Judge:

PAUL G MAUGHAN

Official File Stamp:

09-10-2015:13:22:29

Court:

3RD DISTRICT COURT - SALT LAKE

District

Salt Lake

Case Title:

COMPTON, WILLIAM, et al. vs. MCDONALD,
DANIEL J, et al.

Document(s) Submitted:

Order - Final Order Granting Motions for
Summary Judgment in Part and Dismissing Case
in Its Entirety With Prejudice

Filed by or in behalf of:

PAUL G MAUGHAN

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

REBECCA L HILL for HOUSTON CASUALTY
COMPANY

ROBERT T DENNY for DANIEL J MCDONALD,
SMITH HARTVIGSEN PLLC

KEITH A CALL for DANIEL J MCDONALD,
SMITH HARTVIGSEN PLLC

CORY B MATTSON for WILLIAM COMPTON et
al

THOR B ROUNDY for WILLIAM COMPTON et al

The following people have not been served electronically by the Court. Therefore, if service is required, they must be served by traditional means:

JOHN X DOE

JOHN IX DOE


07416

Addendum
Exhibit 3

CERTIFICATION

The undersigned hereby certifies that the attached Declarations, Endorsements, Application and Policy Form (Professional Liability Errors & Omissions Insurance) combined form a true, complete and accurate copy of Houston Casualty Company Policy No. H707-16865 as issued in favor of Utah County Real Estate, LLC DBA: Prudential Utah Real Estate DBA: Prudential Cres Commercial Real Estate.

HCC Specialty
on behalf of Houston Casualty Company



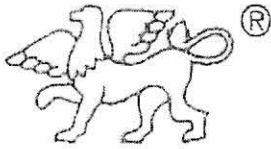
Pauline Morley, Senior Vice President
Authorized Representative

Subscribed and sworn to before me this 29th day of October 2014 in Mount Kisco, New York by Pauline Morley to me known, and known to me to be an authorized representative of HCC Specialty on behalf of U.S. Specialty Insurance Company and who executed the foregoing Certification, and who duly acknowledged to me that he did execute the same.



NOTARY PUBLIC

JILL E. TORRES
NOTARY PUBLIC-STATE OF NEW YORK
No. 02106134572
Qualified in Westchester County
My Commission Expires 2/11/18



HOUSTON CASUALTY COMPANY

ADMINISTRATIVE OFFICES: 13403 NORTHWEST FREEWAY, HOUSTON, TEXAS 77040

DECLARATIONS PROFESSIONAL LIABILITY ERRORS & OMISSIONS INSURANCE THIS IS A CLAIMS MADE POLICY

Broker No. 9991146
TRI-CITY BROKERAGE, INC.

No.: H707-16865
Renewal of: H706-17424

Item 1. Named Insured: UTAH COUNTY REAL ESTATE, LLC DBA:
PRUDENTIAL UTAH REAL ESTATE DBA:
PRUDENTIAL CRES COMMERCIAL REAL ESTATE
Item 2. Address: 240 N OREM BLVD.
OREM, UT 84057

Item 3. Named Insured's Profession: See Endorsement # 1, E32

Item 4. Limit of Liability: \$ 1,000,000 Each Claim and in the Aggregate
including Claim Expenses.

Item 5. Deductible: \$ 35,000 Each Claim including Claim Expenses.

Item 6. Notice of Claim to: PIA, Director of Claims
37 Radio Circle Drive, Mount Kisco, NY 10549

Item 7. Policy Period: Inception Date: 11/26/07 Expiration Date: 11/26/08
12:01 A.M. Standard Time at the address of the Named Insured herein.

Item 8. Retroactive Date: 8/01/01 Item 9. Date of Application: 8/29/07

Item 10. Premium: \$ 36,965.00 Administrative/Inspection Fee. \$50.00

Item 11. Extension Period: 12 MONTHS Item 12. Extension Percentage: 125.00%

Attachments: (1) E32, (2) E46, (3) E17, (4) E127, (5) E161, (6) E133, (7) E166,
(8) E34, (9) E109, (10) E53, (11) E174, (12) E192, (13) E193.

This Policy has been signed at Upper Saddle River, NJ
11/26/07

Dated _____ by _____ RCM

PROFESSIONAL LIABILITY ERRORS & OMISSIONS INSURANCE

(This Insurance Is On A Claims Made Basis)

THIS POLICY IS LIMITED TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD. DEFENSE COSTS REDUCE THE LIMIT OF LIABILITY PROVIDED. PLEASE REVIEW THIS POLICY CAREFULLY WITH YOUR INSURANCE BROKER OR ADVISOR.

In consideration of the payment of the premium, the undertaking of the Insured to pay the Deductible herein and in reliance upon all statements made and information in the application, which is attached hereto and made a part of this Policy, and subject to all the terms and conditions of this Policy, the Company agrees with the Insured as follows:

I. COVERAGE

Coverage-Payment and Claims Made Provision

The Company shall pay on behalf of the Insured any Loss and Claim Expenses in excess of the Deductible amount and subject to the Limit of Liability as the Insured acting in the profession described in Item 3 of the Declarations shall become legally obligated to pay for Claim or Claims first made against the Insured during the Policy Period by reason of any Wrongful Act by an Insured provided always that the Insured has no knowledge of such Wrongful Act prior to the Inception Date of this Policy and further provided that such Wrongful Act took place subsequent to the Retroactive Date set forth in Item 8 of the Declarations.

II. DEFINITIONS

Whenever used in this Policy, the following terms or words are defined as follows:

a) Policy Period

"Policy Period" shall mean the period from the Inception Date of this Policy to its Expiration Date as set forth in Item 7 of the Declarations or its earlier termination date, if any.

b) Insured

"Insured" or "Insureds" shall mean

- 1) The Named Insured as designated in Item 1 of the Declarations;
- 2) Any partner, executive officer, director or employee of the Named Insured while acting within the scope of their duties on behalf of the Named Insured;
- 3) Any former partner, executive officer, director or employee of the Named Insured while acting within the scope of their duties on behalf of the Named Insured;
- 4) The estate, the heirs, assigns or legal representatives in the event of death or incompetency of any individual Insured under this Policy.

c) **Claim**

"Claim" shall mean a demand received by the Insured for compensation of damages, including the service of suit or institution of arbitration proceedings against the Insured.

d) **Loss**

"Loss" shall mean a monetary judgment, award or settlement for damages including an award by a court of reasonable attorney's fees and costs to a party making Claim, but does not include fines, penalties or any matter uninsurable under the Law pursuant to which this Policy will be construed, nor the return of fees or charges for the services rendered or to be rendered.

e) **Wrongful Act**

"Wrongful Act" shall mean any actual or alleged error or omission or breach of duty committed or alleged to have been committed or for failure to render such professional services as are customarily rendered in the profession of the Insured as stated in Item 3 of the Declarations.

f) **Claim Expenses**

"Claim Expenses" shall mean (1) fees charged by an attorney designated by the Company and (2) all other fees, costs or expenses incurred in the investigation, adjustment, defense and appeal of a Claim if incurred by the Company or an attorney designated by the Company, or by the Insureds with the written consent of the Company. However, "Claim Expenses" do not include salary charges of regular employees or officers of the Company nor salary or wages of the Insureds, nor any fees, costs, or expenses incurred with respect to any criminal proceedings or actions against an Insured.

III. CLAIMS MADE EXTENSION CLAUSE

If during the Policy Period, the Insured first becomes aware of any specific and identifiable Wrongful Act and during the Policy Period gives written notice to the Company of:

- a) the specific Wrongful Act; and
- b) the damage which has or may result from such Wrongful Act; and
- c) the circumstances by which the Insured first became aware of such Wrongful Act;

then any Claim that is subsequently made against the Insured arising out of such Wrongful Act shall be deemed for the purposes of this insurance to have been made against the Insured during the Policy Period.

IV. EXCLUSIONS

This Policy does not apply either directly or indirectly to any Claim and Claim Expenses:

- a) Based upon or arising out of any dishonest, criminal, fraudulent, malicious or intentional Wrongful Acts, errors or omissions committed by or at the direction of the Insured.

- b) For liability arising out of the Insured's services and/or capacity as:
- 1) an officer, director, partner, trustee, or employee of a business enterprise not named in the Declarations or a charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust;
 - 2) a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, or with respect to any employee benefit plan of an Insured.
- c) Made by any business enterprise which is operated, managed or owned, in whole or in part, by the Named Insured or the Named Insured's parent company or any affiliated, subsidiary or associate company.
- d) Arising out of infringement of patent, copyright or trademark.
- e) For bodily injury, sickness, disease or death of any person, or for emotional distress, mental anguish, or other similar injury or damage, or any injury to, or destruction of, any tangible property or loss of use resulting therefrom.
- f) Arising out of false arrest, humiliation, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, or malicious prosecution, libel, slander or other defamatory or disparaging material, or a publication or an utterance in violation of an individual's right of privacy.
- g) Based upon or arising out of discrimination with respect to a violation of any municipal, State or Federal Civil Rights law, regulation or ordinance.
- h) Based upon or arising out of a violation or alleged violation of the Securities Act of 1933 as amended, or the Securities Exchange Act of 1934 as amended, or any State Blue Sky or securities law or similar state or Federal statute and any regulation or order issued pursuant to any of the foregoing statutes, unless endorsed hereon.
- i) For the liability of others assumed by the Insured under any oral or written contract or agreement, unless such liability would have attached to the Insured even in the absence of such agreement.
- j) Based upon the Insured's failure to procure or maintain adequate insurance or bonds, or any Claim arising out of the Insured's failure to comply with any law with respect to the Insured's employees concerning Workers' Compensation, Unemployment Insurance, Social Security or Disability Benefits or any similar law.
- k) Based upon the Employee Retirement Income Security Act of 1974 or similar provisions of any Federal, State or local statutory law or common law.
- ~~l) For actual or alleged violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., and any amendments thereto, or any rules or regulations promulgated thereunder.~~
- m) Based upon assertions, allegations, causes of action or demands whatsoever by or on behalf of an Insured or Insureds under this Policy against another Insured or Insureds hereunder.

- n) Based upon the actual or alleged performance or the failure to perform by the Insureds any professional services as an attorney, or the actual or alleged performance or failure to perform any professional services as an attorney by any person or entity retained or employed by the Insureds.
- o) Due to, based upon or arising out of, directly or indirectly, resulting from or in consequence of, or in any way involving seepage, pollution or contamination of any kind.

V. WAIVER OF EXCLUSIONS AND CONDITIONS

Whenever coverage under any provision of this Policy would be excluded, suspended or lost:

- a) because of any exclusion relating to dishonest, criminal, fraudulent, malicious or intentional Wrongful Acts or omissions by an Insured and with respect to which any other Insured did not personally participate or personally acquiesce or remain passive after having personal knowledge thereof; or
- b) because of non-compliance with any condition relating to giving of notice to the Company with respect to which any other Insured shall be in default, solely because of the default or concealment of the default by any other Insured responsible for the loss or damage otherwise insured hereunder;

the Company agrees that such insurance as would otherwise be afforded under this Policy shall continue in effect with respect to each and every Insured who did not personally commit or personally acquiesce in or remain passive after having personal knowledge of one or more of the acts or omissions described in any such exclusion or condition; provided that if the condition be one with which such Insured can comply, after receiving knowledge thereof, the Insured entitled to the benefit of this Waiver of Exclusions and Conditions shall comply with such condition promptly after obtaining knowledge of the failure of any other Insured or employee to comply therewith.

VI. LIMITS OF LIABILITY

a) **Deductible**

The Deductible amount stated in the Declarations shall be paid by the Insured and shall apply to each Claim and shall include Claim Expenses.

b) **Multiple Claims**

One or more Claims based upon or arising out of the same Wrongful Act or interrelated Wrongful Acts by one or more of the Insureds shall be considered a single Claim.

c) **Limit of Liability**

Subject to the foregoing, the Company's total liability for Loss including Claim Expenses resulting from all Claims first made against the Insureds during the Policy Period shall not exceed the amount stated in the Declarations as "Limit of Liability," regardless of the time when such payment is made. The inclusion of more than one Insured hereunder shall not operate to either increase the amount of the applicable Deductible nor the amount of the Company's Limit of Liability. The Limit of Liability shall be excess of the Deductible amount.

d) **Exhaustion of Limits of Liability**

The Company will not be liable to pay any Loss or Claim Expenses or continue the defense of any Claim, after the Limit of Liability has been exhausted.

e) **Allocation of Claim Expenses**

In the event that any portion of a Claim does not come within the coverage afforded by this Policy, the Company shall be entitled to an allocation of Claim Expenses incurred on behalf of the Insureds based upon the ratio of the number of counts, causes of action or allegations for which coverage is afforded under this Policy as compared to the number of such counts, causes of action or allegations which are not within the scope of coverage. The Company shall not be required or obligated to pay that portion of Claim Expenses allocated to those counts, causes of action, or allegations which are not within the scope of coverage herein.

VII. TERRITORY

The insurance afforded applies worldwide, provided that suit is brought or Claim is made within the United States, its territories and possessions or Canada.

VIII. CONDITIONS

a) **Insured's Duties in the Event of Claim, Arbitration or Suit**

- 1) In the event of any Claim made against the Insured, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the Insured to the firm named in Item 6 of the Declarations as soon as practicable.
- 2) If the institution of arbitration proceedings or suit is brought against the Insured, the Insured shall immediately forward to the firm named in Item 6 of the Declarations every demand, notice, summons or other process received by the Insured or his representative.

b) **Assistance and Cooperation of the Insured**

The Insured shall cooperate with the Company and its representatives and upon the Company's request shall submit to examination and interrogation by a representative of the Company, under oath if required, and shall attend hearings, depositions and trials and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, as well as in the giving of a written statement or statements to the Company's representatives and meeting with such representatives for the purpose of investigation and/or defense, all without charge to the Company. The Insured shall further cooperate with the Company and do whatever is necessary to secure and effect any rights of indemnity, contribution or apportionment which the Insured may have. The Insured shall not, except at his own cost, make any payment, admit any liability, settle any Claims, assume any obligation or incur any expense without the written consent of the Company.

c) **Settlement of Claim**

The Company shall not settle any Claim without the consent of the Insured. If, however, the Insured shall refuse to consent to any settlement recommended by the Company and shall elect to contest the Claim or continue any legal proceedings in connection with such Claim, then the Company's liability for the Claim shall not exceed the amount for which the Claim could have been so settled plus Claim Expenses incurred up to the date of such refusal. Such amounts are subject to the provisions of Clause VI, Limits of Liability.

d) **Audit**

The Company may examine and audit the Insured's books and records at any time during the Policy Period and after the final termination of this Policy, as far as they relate to the subject matter of this Policy.

e) **Subrogation**

In the event of any Claim or payment under this insurance, the Company shall be subrogated to the extent of such payment to all rights of recovery therefor, and the Insureds shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents necessary to enable the Company to effectively bring suit in the name of the Insureds. The Insureds shall do nothing after Claim is made against them to prejudice such rights. Any recovery shall first be paid to the Company to the extent of any Loss or Claim Expenses paid by the Company, with the balance paid to the Insured. However, no subrogation shall be had against any Insured unless such Insured is excluded from coverage by reason of Exclusion IV (a).

f) **Other Insurance**

This Policy shall be excess insurance over any other valid and collectable insurance available to the Insured whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the Limit of Liability provided in this Policy.

g) **Cancellation**

This Policy may be cancelled by the Named Insured by surrender thereof to the Company or by mailing written notice stating when thereafter such cancellation shall be effective. If cancelled by the Insured, the Company shall retain the customary short rate proportion of the earned premium. This Policy may also be cancelled, with or without the return by tender of the unearned premium, by or on behalf of the Company by delivering to the Named Insured at the address set forth in the Declarations or by sending to the Named Insured by mail, registered or unregistered, at the address in the Declarations not less than thirty (30) days (or ten (10) days in the event of non-payment of premium) written notice stating when the cancellation shall be effective. If cancelled by the Company, the Company shall retain the pro rata portion of the earned premium. For the purpose of this Policy, notice of cancellation given to the Named Insured by the Company or given to the Company by the Named Insured pursuant to this paragraph shall be deemed to be notice on behalf of all Insureds hereunder.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction hereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

h) **Extension of Policy Period**

In the event of cancellation or non-renewal of this Policy in its entirety by the Company, this Policy may be extended for the additional period as indicated in Item 11 of the Declarations, for a premium based upon the percentage as indicated in Item 12 of the Declarations of the total premium, for Claims first made against the Insured during the said extension period provided:

- 1) The Wrongful Act giving rise to such Claim is committed or alleged to have been committed prior to the effective date of the cancellation or the original expiration date, whichever is applicable, and which would be otherwise Insured by this Policy; and
- 2) Written notice of the exercise of this option is given by the Named Insured in Item 1 of the Declarations to the Company within ten (10) days after the effective date of cancellation or non-renewal; and
- 3) Such additional period shall be deemed part of the expiring Policy Period and not an addition thereto; and
- 4) For purposes of such additional period, coverage shall be applicable only with respect to Claims first made against the Insureds during such additional period. The provisions of Clause III of this Policy shall not be applicable to such additional period.

The quotation of a renewal premium higher than the expiring premium or a change in other terms or conditions shall not be deemed to be a cancellation or non-renewal by the Company.

i) **Action Against the Company**

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join the Company as a party to any action against the Insured to determine the Insured's liability, nor shall the Company be impleaded by the Insured or his legal representative. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

j) **Assignment**

No assignment of interest under this Policy shall bind the Company unless its prior written consent is endorsed hereon.

k) **Changes**

Notice to or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy, nor estop the Company from asserting any rights under the terms of this Policy. The terms of this Policy shall not be waived or changed, except by endorsement issued to form a part of this Policy, signed by an authorized representative of the Company.

l) **Application**

By acceptance of this Policy, the Insureds agree that the statements in the application are personal representations, that they shall be deemed material and that this Policy is issued in reliance upon the truth of such representations and that this Policy embodies all agreements existing between the Insureds and the Company or any of their agents relating to this insurance.

m) **False or Fraudulent Claims**

If any Insured shall commit fraud in proffering any Claim as regards amount or otherwise, this insurance shall become void as to such Insured from the date such fraudulent Claim is proffered.

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

NAMED INSURED'S PROFESSIONAL DESCRIPTION ENDORSEMENT

In consideration of the premium charged, it is hereby understood and agreed that Item 3 of the Declarations, the "Named Insured's Profession", shall read as follows:

3. Named Insured's Profession:

Solely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee.

All other terms and conditions remain unchanged.

Endorsement effective: 11/26/07 HMP Policy No. H707-16865

Endorsement No. 1

Professional Indemnity Agency, Inc.

by _____
(Authorized Representative)

HMP E-32

Endorsement

Named Insured: UTAH COUNTY REAL ESTATE, LLC DBA: et al

NUCLEAR INCIDENT EXCLUSION CLAUSE-LIABILITY-DIRECT (BROAD)

In consideration of the premium charged, it is understood and agreed that this Policy of Insurance does not apply:

I. Under any Liability Coverage, to injury, sickness, disease, death or destruction

(a) with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

II. Under any Medical Payments Coverage, or under any Supplementary Payments Provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

III. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if

(a) the nuclear material (1) is at any nuclear facility owned by, or operated by or on behalf of, any insured or (2) has been discharged or dispersed therefrom;

(b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

~~(c) the injury, sickness, disease, death or destruction arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.~~

Endorsement

NUCLEAR INCIDENT EXCLUSION, Continued

Page 2 of 2

IV. As used in this endorsement:

"hazardous properties" include radioactive, toxic or explosive properties; "nuclear material" means source material, special nuclear material or byproduct material; "source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act 1954 or in any law amendatory thereof; "spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor; "waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof; "nuclear facility" means

- (a) any nuclear reactor;
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste;
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste;

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations; "nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material. With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

It is understood and agreed that, except as specifically provided in the foregoing to the contrary, this clause is subject to the terms, exclusions, conditions and limitations of the Certificate of Insurance to which it is attached.

It is further understood and agreed that this Policy has a 25% minimum earned premium condition.

~~All other terms and conditions remain unchanged.~~

Endorsement effective 11/26/07
Endorsement No. 2

HMP Policy No. H707-16865

Professional Indemnity Agency, Inc.

by

(Authorized Representative)

HMP E-46
E46

02726

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed the section of the Policy entitled "II. Definitions, part e), Wrongful Act", is amended to include the following:

With respect to the Insured's profession as stated in Item 3 of the Declarations, WRONGFUL ACT shall also mean any actual or alleged:

1. Libel, slander or other forms of defamation;
2. Invasion or infringement of the right of privacy or publicity;
3. Plagiarism, piracy or misappropriation of ideas under implied contract.

It is also understood and agreed that Exclusion "f" of this Policy is deleted in its entirety and replaced with the following:

- f) to any claim and claim expenses arising out of (1) false arrest, detention or imprisonment; (2) wrongful entry or evictions, or invasion of any right of private occupancy.

It is further understood and agreed that this Policy does not apply:

1. to any claim and claim expenses arising out of or connected with the performance of or failure to perform services as an insurance agent, insurance broker, mortgage banker, mortgage broker, escrow agent, property developer, builder, construction manager, or property manager;
 2. to any claim and claim expenses arising out of any Insured making warranties or guarantees as to any future value of any property;
 3. to any claim and claim expenses arising out of notarized certification or acknowledgement of a signature without the physical appearance at the time of said notarization before such notary public as insured hereunder of the person who is or claims to be the person signing;
-

Endorsement

4. to any claim and claim expenses arising out of or connected with any transaction in which any Insured has a direct or indirect beneficial ownership interest as a buyer or seller of real property; however, this exclusion does not apply to real property to which any Insured has taken legal title solely for immediate resale and has entered into a written contract to sell not later than ninety (90) days after taking legal title;
5. to any claim and claim expenses arising out of or connected with the formulation, promotion, syndication, offer, sale or management of any limited or general partnership or any interest therein.


All other terms and conditions remain unchanged.

Endorsement effective 11/26/07 HMP Policy No. H707-16865

Endorsement No. 3

Professional Indemnity Agency, Inc.

by


(Authorized Representative)

HMP E-17

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

ORGANIC GROWTHS EXCLUSIONARY ENDORSEMENT


In consideration of the premium charged, it is hereby understood and agreed that this Policy shall not apply to and no coverage will be afforded for any Claim, including any Loss or Claim Expenses, which, either in whole or in part, directly or indirectly, is for, based upon, relates to, or arises out of the formation, growth, presence, release, dispersal, containment, removal, testing for, or detection or monitoring of any molds, fungi, spores, or other similar growths or organic matter, including but not limited to aspergillus, penicillium, or any strain or type of Stachybotris, commonly collectively referred to as the "Black Molds".

All other terms and conditions remain unchanged.

Endorsement effective 11/26/07 HMP Policy No. H707-16865

Endorsement No. 4

Professional Indemnity Agency, Inc.

by 
(Authorized Representative)

HMP E-127
E127

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that coverage afforded by this Policy is hereby extended to provide property damage arising from the use and operation of a lock box. A \$25,000 sublimit shall apply for the lock box coverage afforded in this endorsement. This sublimit of liability is part of and not in addition to the limit of liability stated in Item #4 of the Declaration Page.

It is further understood and agreed that the section of this Policy entitled "IV. EXCLUSIONS, part o)" shall not apply to claims based upon or arising out of Wrongful Acts involving the Insured's failure to disclose the existence of pollutants. A sublimit of Liability of \$500,000 in the aggregate shall apply to this coverage. This sublimit of liability is part of and not in addition to the limit of liability stated in Item #4 of the Declaration Page.

It is further understood and agreed that the Independent Contractors, of the "Named Insured", are covered solely for their Professional Services provided on behalf of the Insured; but only if the Professional Services of the Independent Contractor(s) are the same as those set forth in Item 3 of the Declarations Page and in Endorsement No. 1 of this Policy.

It is further understood and agreed that exclusion g), of this Policy is deleted in its entirety, solely with regards to civil law suits that seek monetary damages. These civil law suits cannot be brought by or on behalf of any current or former partner, executive officer, director or employee of the Named Insured.

All other terms and conditions remain unchanged.

Endorsement Effective: 11/26/07 Policy No.: H707-16865

Endorsement No.: 5

Professional Indemnity Agency, Inc.

by _____
(Authorized Representative)

HMP E-161

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that the section of this Policy Titled "VIII. CONDITIONS", part h), Extension of Policy Period is deleted in its entirety and replaced with the following:

h) Extension of Policy Period

In the event of cancellation or non-renewal of this Policy in its entirety by the Company or the Insured, this Policy may be extended for the additional period as indicated in Item 11 of the Schedule, for a premium based upon the percentage as indicated in Item 12 of the Declarations of the total premium, for Claims first made against the Insured during the said extension period provided:

- 1) The Wrongful Act giving rise to such Claim is committed or alleged to have been committed prior to the effective date of the cancellation or the original expiration date, whichever is applicable, and which would be otherwise insured by this Policy; and
- 2) Written notice of the exercise of this option is given by the Named Insured in Item 1 of the Declarations to the Company within ten (10) days after the effective date of cancellation or non-renewal; and
- 3) Such additional period shall be deemed part of the expiring Policy Period and not an addition thereto; and
- 4) For purposes of such additional period, coverage shall be applicable only with respect to Claims first made against the Insureds during such additional period. The provisions of Clause III of this Policy shall not be applicable to such additional period; and
- 5) The limit of liability applicable to the Extended Discovery Period shall be only the remaining limit of liability available under the Policy and no additional limit of liability shall be applicable; and

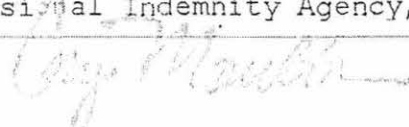
The quotation of a renewal premium higher than the expiring premium or a change in other terms or conditions shall not be deemed to be a cancellation or non-renewal by the Company.

All other terms and conditions remain unchanged.

Endorsement effective 11/26/07 HMP Policy No. H707-16865

Endorsement No. 6

Professional Indemnity Agency, Inc.

by 
(Authorized Representative)

HMP E-133
E133

02731

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that this Policy shall not apply to and coverage shall not be afforded for any Claim and Claim Expenses based upon or arising out of the sale, management, lease or rental of any Real estate located in the state of California.

All other terms and conditions remain unchanged.

Endorsement effective 11/26/07 HMP Policy No. H707-16865

Endorsement No. 7

by

(Authorized Signature)



HMP E-166

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

PENDING/PRIOR LITIGATION ENDORSEMENT

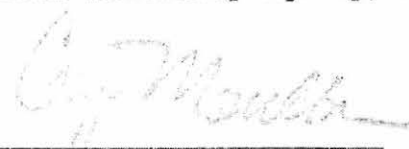
In consideration of the premium charged, it is hereby understood and agreed that this Policy excludes all claims and claim expenses arising from all pending or prior litigation, as well as future claims arising out of said pending or prior litigations.

All other terms and conditions remain unchanged.

Endorsement effective 11/26/07 HMP Policy No. H707-16865

Endorsement No. 8

Professional Indemnity Agency, Inc.

by 
(Authorized Representative)

HMP E-34
E34

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

SERVICE OF SUIT CLAUSE

As used in this endorsement, the "Company" refers to Houston Casualty Company.

This applies in jurisdictions where the Company is not an admitted insurer.

It is agreed that in the event of the Company's failure to pay the amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

It is further agreed that, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, the Company hereby designates the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this policy of insurance, and hereby designates the President of the Houston Casualty Company in care of the General Counsel, at 13403 Northwest Freeway, Houston, TX, 77040, as the person to whom the said officer is authorized to mail such process or true copy thereof.

It is further understood and agreed that service of process in such suit may be made upon JAY SIMMONS, Attorney-In-Fact, at 13403 Northwest Freeway, Houston, TX, 77040, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

All other terms and conditions remain unchanged.

Endorsement Effective: 11/26/07 Policy No.: H707-16865

Endorsement No.: 9

Professional Indemnity Agency, Inc.

by _____
(Authorized Representative)

UHS E-109

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that a Retroactive Date of 11/01/05 in lieu of 8/01/01 shall apply to the following Named Insured:

PRUDENTIAL CRES COMMERCIAL REAL ESTATE

All other terms and conditions remain unchanged.

Endorsement effective: 11/26/07 HMP Policy No.: H707-16865

Endorsement No.: 10

Professional Indemnity Agency, Inc.

by _____
(Authorized Representative)

HMP E-53

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged it is hereby understood and agreed that Section IV. EXCLUSIONS is amended to include the following:

This Policy does not apply to and the Company shall not be liable for Damages and/or Claims Expenses resulting from any claim made against the Insured:

P. for, based upon, or arising from any alleged unsolicited sending of information by fax, electronic mail (e-mail), or via any other means where prohibited by law.

All other terms and conditions remain unchanged.

Endorsement effective: 11/26/07

Policy No.: H707-16865

Endorsement No.: 11

Professional Indemnity Agency, Inc.

by:

(Authorized Representative)

HMP E-174

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that Section VI. LIMITS OF LIABILITY is amended to include the following:

f) Supplemental Payments

The Company will pay the reasonable expenses incurred, including actual and provable loss of wages, if the Insured is required by the Company to attend proceedings or trial in the defense of a covered Claim. Such payments are subject to the following:

- 1) The maximum reimbursement for such expenses shall not exceed \$250 per day for each Insured who attends such proceedings at the Company's request;
- 2) The Company's maximum total liability for reimbursement shall not exceed \$5,000 per Claim regardless of the number of Insureds who attend such proceedings at the Company's request; and
- 3) Such payments shall be part of and shall reduce the available Limit of Liability.

Solely for the purposes of this Endorsement, the Deductible amount applicable to each Claim shall not apply to the supplemental payments made by the Company under this subsection of the Policy.

All other terms and conditions remain unchanged.

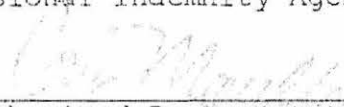
Endorsement Effective: 11/26/07

Policy No.: H707-16865

Endorsement No.: 12

Professional Indemnity Agency, Inc.

by


(Authorized Representative)

HMP E-192

Endorsement

NAMED INSURED: UTAH COUNTY REAL ESTATE, LLC DBA: et al

In consideration of the premium charged, it is hereby understood and agreed that Section II. DEFINITIONS, part b), is amended to include the following:

- 5) The lawful spouse of an Insured (as set forth in items 1 -4 above) in any Claims made against such spouse solely by reason of spousal status or ownership interest in marital property/ assets that are sought as recovery for such Claim, but only if Claim does not allege any Wrongful Act or omission by such spouse.

All other terms and conditions remain unchanged.

Endorsement Effective: 11/26/07 Policy No.: H707-16865

Endorsement No.: 13

Professional Indemnity Agency, Inc.

by

(Authorized Representative)

HMP E-193

APPLICATION FOR PROFESSIONAL LIABILITY ERRORS & OMISSIONS INSURANCE

IF COVERAGE IS ISSUED, IT WILL BE ON A CLAIMS-MADE BASIS

NOTICE: THIS INSURANCE COVERAGE PROVIDES THAT THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGEMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR LEGAL DEFENSE. FURTHER NOTE THAT AMOUNTS INCURRED FOR LEGAL DEFENSE SHALL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT.

1. NAME OF APPLICANT: Utah County Real Estate LLC d/ba Prudential Utah Real Estate
 ADDRESS: 240 N. Crown Blvd. - P.O. Box 84057

2. LIMIT OF LIABILITY DESIRED:
 \$500,000 _____ \$1,000,000 ☒ \$2,000,000 _____ Other _____

3. DEDUCTIBLE:
 \$5,000 ☒ \$10,000 _____ \$25,000 _____ Other _____

4. Please describe in detail the professional activities for which coverage is desired:
Residential/Commercial Real Estate Brokerage

5. Is the applicant engaged in any business or profession other than as described in Item 4? No.
 If yes, please attach an explanation and estimated revenues.

6. List the total gross revenues for the past two years derived from those activities in Question 4. In addition, please list projected revenues for the current year.

YEAR	AMOUNT
a) Current Projected	\$ 16,000,000
b) <u>2006</u>	\$ 17,765,000
c) <u>2005</u>	\$ 14,100,000

7. For the revenues listed in question 6a), please give the approximate percentage derived from each of the activities listed in Question 4:

ACTIVITY	% OF 6a) REVENUES
<u>Residential</u>	<u>86</u> %
<u>Commercial</u>	<u>14</u> %
_____	_____ %
_____	_____ %

8. Applicant is: Corporation _____ Partnership _____ LLC ☒ Individual _____

9. Year Established: 2001

10. Is the Applicant Firm controlled, owned or associated with any other firm, corporation or company? YES ☒ NO _____. If yes, attach an explanation. Are any activities listed in Question 4 provided to such business enterprise? YES _____ NO ☒

Prudential Real Estate Financial Services of America, Inc. owns 41.1% of this LLC

11. a) Number of principals, partners, officers and professional employees directly engaged in providing services to clients: 290
- b) Number of non-professional employees (clerks, secretaries, etc.): 25

12. Please provide the following:

Name in full of ALL Partners/Principals/ Key Employees.	PROFESSIONAL QUALIFICATIONS	DATE QUALIFIED	HOW LONG IN PRACTICE	HOW LONG AS PARTNER/ PRINCIPAL
<u>Dan Calkins</u>	<u>Broker</u>	<u>2002</u>	<u>11 years</u>	<u>5 years</u>
<u>Bruce Tudor</u>	<u>Broker</u>	<u>2002</u>	<u>12 years</u>	<u>4 years</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

13. To what professional association(s) does the Applicant Firm belong?

Utah County Association of Realtors

14. Please include a list of Applicant Firm's five (5) largest jobs or projects during the past three (3) years. Please give, in detail: 1) project/client name; 2) the nature of the services performed for the client; and 3) the revenues obtained from those services.

<u>Redevelop Provo University Plaza</u>	<u>Commercial Building</u>	<u>13,032,000</u>	<u>173,758</u>
<u>CEE, LLC / OSI Santaquin</u>	<u>Residential Land</u>	<u>11,936,590</u>	<u>379,279</u>
<u>Lone Peak / Summit Development</u>	<u>Development Land</u>	<u>10,035,000</u>	<u>343,942</u>
<u>Lone Peak / Casey Development</u>	<u>Development Land</u>	<u>10,035,000</u>	<u>200,600</u>
<u>Roney / Aurora</u>	<u>Residential</u>	<u>9,000,000</u>	<u>140,000</u>

15. Does the Applicant Firm use a written contract with client?
☒ In all cases ☐ Sometimes ☐ Never

Please attach a copy of your standard contract(s).

16. What percentage of the Applicant Firm's business involves subcontracting of work to others? _____ %. Does the Applicant Firm provide professional services to business entities in which it retains an ownership interest? Yes _____ No ☒. If yes, please explain.

17. Has any similar insurance ever been declined or cancelled? Yes ☒ (If yes, attach explanation.) No _____.

Cancelled for loss history of predecessor included on tail policy.

18. Is similar insurance currently in force? Yes ☒ No _____
If yes, please provide:

Description of services being covered: Residential and Commercial Real Estate

Name of Insurer: Houston Casualty Company # H70617424

Expiration Date: 11-26-07 Prior Acts/Retro. Date: 8/1/01

Limit: \$ 1,000,000 Deductible: \$ 25,000 Premium: \$ _____

Length of time coverage has been in force: 3 years

19. Attach most recent audited financial statements (or recent tax returns) and descriptive or promotional materials.

(A) Estimated Gross receipts for current fiscal period: \$ 16,000,000

(B) Estimated Cost of Goods Sold for current fiscal period: \$ 13,350,000

20. Have any of the individuals listed in question No. 12 ever been the subject of disciplinary action by authorities as a result of their professional activities? Yes _____ No ☒ If yes, please explain.

21. Does any person to be insured have knowledge or information of any act, error or omission which might reasonably be expected to give rise to a claim against him/her. YES _____ NO ☒ If yes, please complete a Supplemental Claim Information form for each.

22. After inquiry have any claims been made against any proposed insured(s) during the past three (3) years? Yes ☒ No _____ If yes, please complete a supplemental Claims Information form for each claim. Also, how many claims have been made in the last three (3) years? See attached loss runs

It is understood and agreed that with respect to questions 20, 21 and 22 above, that if such knowledge or information exists any claim or action arising therefrom is excluded from this proposed coverage.

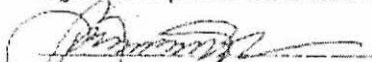
NOTICE TO NEW YORK APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE CONTAINING ANY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME.

The Applicant hereby acknowledges that he/she/it is aware that the limit of liability shall be reduced, and may be completely exhausted, by the costs of legal defense and, in such event, the Insurer shall not be liable for the costs of legal defense or for the amount of any judgement or settlement to the extent that such exceeds the limit of liability.

The Applicant hereby further acknowledges that he/she/it is aware that legal defense costs that are incurred shall be applied against the deductible amount.

I HEREBY DECLARE that, after inquiry, the above statements and particulars are true and I have not suppressed or misstated any material fact and that I agree that this application shall be the basis of the contract with the Underwriters.

Signature of person authorized to execute on behalf of the Applicant:

 Title Manager Date 8-29-07

This Application Form duly completed, together with any supplementary information, must be signed in ink by the person indicated.

Signing of this form does not bind the Applicant or the Underwriters to complete the insurance.

THIS APPLICATION MUST BE SUBMITTED TO:

PROFESSIONAL INDEMNITY AGENCY, INC.
PROFESSIONAL INDEMNITY AGENCY, INC. OF N.Y.
37 Radio Circle Drive - P.O. Box 5000
Mount Kisco, New York 10549-5000
Attention: Edward D. Donnelly, CPCU