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Utah Supreme Court

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WILEY, REIN & FIELDING, a  
professional law partnership, and  
RICHARD E. WILEY,

) **REPLY BRIEF OF APPELLANTS**  
 ) **WILEY, REIN & FIELDING AND**  
 ) **RICHARD E. WILEY AND**  
 ) **OPPOSITION BRIEF OF CROSS-**  
 ) **APPELLEES WILEY, REIN &**  
 ) **FIELDING AND RICHARD E. WILEY**

Trial Court No. 900901064 CV

URAP 29(b) Priority -- 15

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## INTRODUCTION

In their Opposition, plaintiffs use two techniques to avoid addressing the merits of the many errors that tainted the trial and dictated the jury's verdict in this case. First and foremost, plaintiffs try to hide those errors behind a veil of self-serving and unjustifiable factual assertions that are irrelevant to the errors of law committed below. Second, when plaintiffs are forced to justify the District Court's legal rulings, they seek radically to rewrite settled law. Neither approach should deflect this Court from the fundamental legal errors that require reversal of the judgment against defendants.

It should now be clear that this appeal principally presents questions of law, not fact. Plaintiffs concede that the following issues present pure questions of law that this Court reviews *de novo*: (1) whether the District Court erred in granting plaintiffs a partial directed verdict, and a peremptory jury instruction, that, as a matter of law, Wiley Rein & Fielding ("Wiley Rein") had an implied attorney-client relationship with plaintiffs; (2) whether the District Court violated Utah's comparative fault statute by preventing the jury from apportioning fault among all defendants and all plaintiffs; and (3) whether the District Court improperly refused to give the jury any instruction on defendants' special defenses of waiver and estoppel, thereby effectively granting plaintiffs a directed verdict on these critical defenses. See Pls.' Br. at 1.

Furthermore, while plaintiffs try to recast other legal issues as *mixed* questions of fact and law, plaintiffs cannot support such wishful thinking. It is clear, therefore, that the following errors by the District Court present additional questions of law for this Court: (4) allowing the jury to measure damages as of the date of trial, long after the date

of defendants' last conceivable breach of duty; (5) permitting the jury to award lost ownership and cash distribution damages based on hypothetical and speculative estimates of plaintiffs' damage expert; and (6) letting the jury award compensatory damages (and in Richard Wiley's case, punitive damages) for a 1991 "cash call," even though plaintiffs admit they never suffered any harm or out-of-pocket loss as a result of the cash call.

Rather than devote space to briefing these important legal issues, plaintiffs squander most of their allotted 140 pages on a self-serving and slanted version of the "facts" and an impermissible cross-appeal. Plaintiffs even submit an additional 20-page appendix purporting to correct alleged misstatements of the record.<sup>1</sup> The reason plaintiffs seek refuge in these alleged "facts" is all too obvious – plaintiffs cannot justify the District Court's rulings on the basis of the law.

Plaintiffs' singular focus on their version of events is particularly indefensible in light of the procedural posture in which many of the District Court's rulings arise. For, while plaintiffs conspicuously avoid mentioning it, the District Court granted them partial directed verdicts on several key issues. The court expressly granted plaintiffs a directed

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<sup>1</sup> Defendants will not burden this Court with a point-by-point response to the rhetoric and accusations that permeate plaintiffs' Appendix. Suffice it to say that defendants did not misstate the evidence and they are confident that a neutral review of the record citations provided in defendants' briefs will expose plaintiffs' assertions for what they are – unfounded. Defendants showed their adherence to the record by providing in their brief direct quotations to key testimony and exhibits (principally plaintiffs' own witnesses and exhibits) and by submitting an addendum containing important portions of the record cited in the brief. The same cannot be said for plaintiffs, who often give no citations or quotations to support their version of the facts. In this reply, defendants point out a number of plaintiffs' misstatements and distortions, putting the actual evidence and rulings of the District Court in the context of the legal issues presented.

verdict (and a peremptory jury instruction) when it ruled, as a matter of law, that Wiley Rein and plaintiffs had an implied attorney-client relationship from 1988 through 1991. The District Court also effectively directed partial verdicts for plaintiffs by refusing to allow the jury to apportion fault among all plaintiffs and by failing to give the jury *any* instructions on defendants' affirmative defenses of waiver and estoppel.

It is well-established that when reviewing a directed verdict, an appellate court is required to examine the evidence in the light *most favorable to the nonmoving party*. See Nay v. General Motors Corp., 850 P.2d 1260, 1263 (Utah 1993); Alta Health Strategies, Inc. v. CCI Mech. Serv., 930 P.2d 280, 282 (Utah Ct. App. 1996). Plaintiffs therefore are wrong to assert that the Court must view *all* of the facts “in the light most favorable” to them. See Pls.' Br. at 7. Quite the opposite is true for many issues presented by this appeal: the existence of an implied attorney-client relationship; comparative fault; and waiver and estoppel. As a consequence, to the extent facts are relevant to these issues of law at all, this Court must credit the evidence supporting defendants' position and disregard plaintiffs' self-serving version of the facts.

When plaintiffs do address the law, they repeatedly advance positions that require this Court to alter Utah law fundamentally. Remarkably, plaintiffs do so without ever acknowledging the profound changes they propose and without any regard for the implications of the positions they urge. Most significantly, plaintiffs effectively ask this Court to overturn Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), and to adopt an “exception” to Utah's long-standing entity rule that is unprecedented in American law and that would, by its own terms, obliterate the entity rule.

Plaintiffs also make no attempt to distinguish the many cases cited in defendants' brief or even to argue that they were wrongly decided. Instead, plaintiffs simply ignore case after case in the apparent hope that if they ignore relevant authority, perhaps this Court will do the same. For example, in their opening brief, defendants discussed this Court's recent decision in Gildea v. Guardian Title Co., 970 P.2d 1265 (Utah 1998). Gildea held that a breach of fiduciary duty claim requires evidence of *actual* disclosure or misuse of confidential information. Speculation that confidential information "must have" been disclosed or misused – the precise argument plaintiffs advance in this case – is legally insufficient to support such a claim. Id. at 1270. Yet, plaintiffs do not discuss or even cite Gildea. Plaintiffs also never address or acknowledge the abundant authorities (including Utah decisions and even the writings of their own trial expert) that state unequivocally that damages must be measured as of the date of a breach, not, as plaintiffs argue, years later when a case finally proceeds to trial.

Plaintiffs' assertions of wrongdoing, no matter how vigorously stated, do not give them the right to ignore controlling authority or to rewrite settled law to sustain an unsupportable verdict. By elevating their desire for a verdict over the rule of law, plaintiffs led the District Court into numerous errors that resulted in a flawed and unjust verdict. Plaintiffs must now reap what they have sown. This Court should set aside the jury's verdict and reverse the judgment of the District Court in its entirety.

## **ARGUMENTS COMMON TO WILEY REIN AND RICHARD WILEY**

### **I. Plaintiffs' Reading Of Margulies Bears No Relationship To Its Text And Would Rewrite Utah Law.**

Plaintiffs make two important concessions regarding the District Court's error in granting plaintiffs a directed verdict and peremptory jury instruction that, as a matter of law, Wiley Rein had an implied attorney-client relationship with plaintiffs from May 1988 through the December 1991 cash call. *First*, plaintiffs have abandoned the central argument from their post-trial briefs that the District Court's error was harmless. See R.20753-20879 (Feb. 16, 1999 Plaintiffs' JNOV Opp. at 3-7). Plaintiffs now acknowledge what should be obvious: If the District Court erred in granting plaintiffs a partial directed verdict and peremptory instruction on this point, that error necessarily prejudiced defendants and requires – at a minimum – a new trial.

*Second*, and for good reason, plaintiffs make no effort to argue that they fit within the “reasonable belief” exception to the well-established rule – the entity rule – under which an attorney representing a limited partnership ordinarily represents the entity only and not the limited partners. As discussed in defendants' opening brief, this Court held in Margulies that a factfinder *may* imply an attorney-client relationship between a partnership's attorney and its limited partners if, based on *all of the facts and circumstances*, the individual partners *reasonably* believed that the partnership's attorney also represented their individual (as opposed to partnership) interests. See 696 P.2d at 1200-01. Here, however, the District Court expressly ruled that plaintiffs' professed belief that Wiley Rein represented them from 1988 through 1991 was unreasonable in

light of the undisputed facts. See R.16852-16869 (Aug. 21, 1998 Mem. Decision at 15). Plaintiffs never challenge this ruling.<sup>2</sup> Accordingly, plaintiffs cannot – and do not – argue that the “reasonable belief” exception recognized in Margulies applies and supports the District Court’s ruling that, as a matter of law, an attorney-client relationship existed between plaintiffs and Wiley Rein from 1988 through 1991.

In light of plaintiffs’ concessions, this Court is faced with only two questions: (1) whether plaintiffs are correct in arguing that Margulies created a “separate, alternative” exception to the entity rule under which a court would be required to find that an attorney-client relationship exists between individual limited partners and the law firm that represents a limited partnership whenever the partnership is asserting its rights against the limited partners; and (2) whether this second exception applies as a matter of law and allowed the District Court to take away from the jury the *fact* question of whether an attorney-client relationship existed between plaintiffs and Wiley Rein. The jury’s verdict can be sustained only if this Court answers *both* of these questions in the affirmative. However, for the reasons stated below and in defendants’ opening brief, this Court should answer each of these questions in the negative. Accordingly, the judgment of the District Court should be reversed.

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<sup>2</sup> As discussed in defendants’ opening brief, the District Court concluded correctly that it was not reasonable for plaintiffs to believe that Wiley Rein represented them after Barry Wood left the firm in September 1987. See R.16852-16869; see also Defs.’ Br. at 26, 48-50 (discussing additional undisputed facts, such as plaintiff Joseph Lee’s writing Wiley Rein to terminate plaintiffs’ relationship with the firm, and plaintiffs’ filing of a lawsuit against Wiley Rein, showing that plaintiffs could not believe that Wiley Rein represented them in the 1988-1991 time period).

**A. Plaintiffs' Argument Is Contrary To Margulies.**

As an initial matter, this Court should reject plaintiffs' effort to rewrite the Margulies decision. Aware that they are bound by the District Court's ruling that they could not reasonably have believed Wiley Rein represented them after September 1987, plaintiffs argue that Margulies announced a second, unprecedented exception to the rule that an attorney representing a limited partnership does not also represent the individual interests of the limited partners. See Pls.' Br. at 47-53. Under this purported "second test for implying an attorney-client relationship" – which plaintiffs call the "direct involvement" exception to the entity rule – a law firm representing a limited partnership will *always* be deemed, as a matter of law, to have an attorney-client relationship with each of the individual limited partners whenever the law firm is handling matters that may affect the "financial viability and success of the partnership." See id. at 49-51. Plaintiffs' contrivance finds no support in Margulies – or in any other reported decision – and would, if accepted, swallow the entity rule whole.

A simple reading of Margulies rebuts plaintiffs' claim that this Court created two "separate, alternative" exceptions to the entity rule.<sup>3</sup> Rather, Margulies recognized that in the context of a disqualification motion, even if there is no express attorney-client relationship, "circumstances *may* give rise to an implied professional relationship or a

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<sup>3</sup> Notably, plaintiffs cite no decision or other authority from Utah – nor from any other jurisdiction – supporting either their reading of Margulies or the existence of a "direct involvement" exception to the entity rule. In fact, commentators have long noted that this Court in Margulies merely applied the well-recognized "reasonable belief" exception to the entity rule. See, e.g., K. Saulsbury, Beyond the Attorney-Client Relationship: The Implied Professional Relationship, 18 J. Legal Prof. 351-52 (1993).



fiduciary duty toward the client.” 696 P.2d at 1200 (emphasis added). In determining what those “circumstances” might be in the context of that case, this Court looked to federal precedent in which a district court had found that a corporate officer “reasonably believed” an attorney was representing him personally despite the attorney’s disavowal of any attorney-client relationship. *Id.* (citing E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 387-92 (S.D. Tex. 1969) (granting motion to disqualify attorney because it was reasonable for officer to believe he was personally represented by corporation’s attorney who entered appearance on his behalf)).

The focus of the Court in Margulies was, therefore, fixed firmly on the reasonableness of the individual partners’ professed belief that in the bank lawsuit the Jones Waldo law firm was representing *both* the partnership *and* the individual partners. Since that lawsuit was directly “aimed at preventing foreclosure on the individual letters of credit,” *id.* at 1198, this Court agreed with the trial court that “it was not at all unreasonable for the limited partners to believe that *Jones, Waldo was acting for their individual interests* as well as the interests of the partnership in that litigation.” *Id.* at 1200 (emphasis added).

This Court’s reference to “direct involvement” in Margulies was not intended to, and did not, create an *additional* exception to the entity rule. Rather, the reference to direct involvement appears in a portion of the opinion in which the Court explained the *limited nature* of the reasonable belief exception:

It should be noted that we do not find that an attorney automatically becomes counsel for limited partners when he or she undertakes representation of a limited partnership. . . . *If the limited partners stand to*

*gain nothing more from the attorney's representation of the limited partnership than the incidental gain which will accrue to them as partners, and not in their individual capacities, no attorney-client relationship should be implied.* When, however, the individual interests of the limited partners are directly involved, as they are here, there *may* be sufficient grounds for implying the existence of an attorney-client relationship.

Id. at 1200-01 (emphasis added) (citations omitted). The Court's use of the phrase "directly involved, as they are here" in the above-quoted passage merely underscores that in the bank lawsuit Jones Waldo was affirmatively representing and furthering the *personal* interests of the individual limited partners "in their individual capacities," and not merely as members of a limited partnership. There is no principled basis for twisting this statement from Margulies – which merely explains the limits on when it is reasonable for a limited partner to believe that the firm representing the partnership is also representing the partners' individual interests – into creation of an unprecedented "direct involvement" exception to the entity rule.

In fact, to adopt plaintiffs' "direct involvement" exception to the entity rule would not merely twist this Court's language in Margulies beyond recognition – it would also overrule that decision. In the present case, for example, plaintiffs claim that the "direct involvement" exception applies because decisions made by MWT Ltd. – the limited partnership that Wiley Rein represented – affected the "financial viability and success" of the partnership (and therefore "the value of their partnership interest") and also might have subjected them, as limited partners, "to a claim of personal liability if those decisions led to the demise and dissolution of the partnership." Pls.' Br. at 51-52. If plaintiffs were correct that this sort of "direct involvement" were sufficient to trump

application of the entity rule, then any law firm representing a limited partnership would automatically be deemed also to represent each limited partner, because a partnership's decisions *always* have some effect on the partnership's success or viability or some impact on the value of the limited partners' interests. But Margulies rightly holds that this kind of "incidental" effect that "accrue[s] to [limited partners] as partners" is *not* sufficient to permit a trier of fact to imply an attorney-client relationship between a law firm representing a limited partnership and its limited partners. 696 P.2d at 1200-01.

Furthermore, Margulies expressly affirmed the trial court's finding of an attorney-client relationship because in the bank lawsuit the Jones Waldo law firm was "*acting for*" the individual interests of the limited partners. Id. at 1200. That is why the Court looked to what "the limited partners st[ood] to *gain*" from Jones Waldo's representation. Id. (emphasis added). Here, however, plaintiffs have always asserted that in representing MWT Ltd., Wiley Rein was *harming* their interests and acting *adverse* to the limited partners. Nothing in Margulies suggests that when a law firm is representing a partnership in matters adverse to its limited partners, a court may imply an attorney-client relationship between the law firm and the individual partners.

There should be little question that plaintiffs' "direct involvement" exception, if accepted, would wholly obliterate the entity rule and would effectively prevent a limited partnership from ever seeking an attorney's assistance in resolving disputes with its limited partners. In each such case, an individual partner's interests would always be "directly involved," as plaintiffs have defined their exception, since the success or viability of the partnership or the value of partnership interests might be affected by the

partnership's decisions. In those circumstances, therefore, the law firm would always be deemed to represent both the limited partnership and the individual partners, thereby creating a built-in conflict of interest. Plaintiffs' "direct involvement" exception would thus prevent a law firm from ever representing a limited partnership (or, by logical extension, a corporation) in matters adverse to the interests of the limited partners (or shareholders). No decision or commentary supports such a nonsensical exception to the entity rule. In fact, courts throughout the country, including this Court in Margulies, have recognized that an attorney *must* be free to represent a partnership's interests separate from the interests of individual partners. See id. at 1200 ("A limited partnership is an entity equivalent to a corporation . . . and therefore representation of a limited partnership does not of itself require allegiance to the interests of the limited partners."); Defs.' Br. at 51-52 (citing cases). That is undoubtedly why plaintiffs never address the adverse policy implications of adopting their truly bizarre exception to the entity rule.

**B. The District Court Erred In Taking From The Jury The Question Of The Existence Of An Attorney-Client Relationship.**

Even if this Court were to accept plaintiffs' novel exception to the entity rule, the jury's verdict may not be sustained because the District Court erred in taking from the jury the question of whether an attorney-client relationship existed between plaintiffs and Wiley Rein. In Margulies, this Court made clear that whether an attorney-client relationship "may" be implied from the circumstances is a *question of fact*. Id. at 1200. Yet, at plaintiffs' urging, the District Court took this fact question away from the jury and

ruled that Wiley Rein had an implied attorney-client relationship with the limited partners *as a matter of law*. At a minimum, this error requires a new trial.

Plaintiffs cite no decision holding that the existence of an attorney-client relationship can be decided as a matter of law, as the District Court did in this case.<sup>4</sup> Certainly, Margulies does not say that, and plaintiffs simply ignore other Utah decisions that are directly contrary to their argument. See Sorenson v. Beers, 585 P.2d 458, 460 (Utah 1978) (dispute over existence of attorney-client relationship is a factual one sufficient to make summary judgment inappropriate); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 729 (Utah Ct. App. 1990) (holding that “whether an attorney-client relationship exist[s]” is a “fundamental factual issue”). Tellingly, plaintiffs even ignore the writings of their own expert at trial, who has stated that “[w]hether the attorney-client relationship existed presents an issue for the trier of fact.” 1 R. Mallen & J. Smith, Legal Malpractice § 8.3, at 565 (4th ed. 1996) (hereinafter “Mallen, Legal Malpractice”).

In Utah, a reviewing court must reverse a directed verdict if there was any competent evidence supporting the nonmoving party’s position *and* must consider the evidence in the light most favorable to the nonmovant. Nay, 850 P.2d at 1263 (“We reverse a directed verdict when the evidence, taken in a light most favorable to the nonmoving party, is sufficient to permit a reasonable jury to find for the nonmovant.”);

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<sup>4</sup> David Welch Co. v. Erskine & Tulley, 203 Cal. App. 3d 884, 890 (1988), cited by plaintiffs, has no application to this case. Welch holds only that, *given* the existence of an attorney-client relationship, “the existence of the [fiduciary] duty is a question of law.” Id. at 890. In Welch, the existence of an attorney-client relationship was not in dispute. See id. at 889.

Alta Health Strategies, 930 P.2d at 284 (“[A] party who moves for a directed verdict has the very difficult burden of showing no evidence exists that raises a question of material fact.”). Here, the evidence supporting plaintiffs’ claim of an attorney-client relationship is nonexistent. Indeed, the record conclusively shows that from 1988 through 1991: (1) Wiley Rein did not represent *any* plaintiff; (2) at all times during this period, plaintiffs were individually represented and billed by Ralph Hardy and his firm Dow Lohnes in connection with all dealings with MWT Ltd.; and (3) by 1990, plaintiffs had even sued Wiley Rein and Richard Wiley in this lawsuit, thereby completely destroying any conceivable attorney-client relationship. See Defs.’ Br. at 25-30, 41-42, 48-50 (citing record).<sup>5</sup> In the face of such evidence, it is impossible to conclude – as the District Court did – that, *as a matter of law*, Wiley Rein represented plaintiffs’ individual interests from 1988 through the cash call in 1991. The District Court’s directed verdict and peremptory instruction are unsustainable. See Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah Ct. App. 1995) (“Where there is *any* evidence that raises a question of material fact . . . judgment as a matter of law is improper.”) (emphasis added).<sup>6</sup>

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<sup>5</sup> Plaintiffs are wrong to maintain that defendants must marshal all evidence in support of the District Court’s partial directed verdict. See, e.g., Pls.’ Br. at 46-47. The rule that appellants must “marshal the evidence” applies only when an appellant is challenging factual findings. See Utah R. App. P. 24(a)(9). This marshalling requirement has no application where, as here, a defendant is challenging a directed verdict for plaintiff.

<sup>6</sup> As an afterthought, plaintiffs also suggest that this Court should disregard the District Court’s directed verdict because Wiley Rein had an alleged continuing duty of loyalty to former clients. See Pls.’ Br. at 53-55. However, this argument is entirely dependent on two premises that are false. One premise is that defendants “admit” that Wiley Rein represented the individual plaintiffs until Barry Wood left Wiley Rein in September 1987. See id. at 54. Defendants did no such thing, and none of plaintiffs’ citations to the

In sum, the District Court wrongly told the jury that, as a matter of law, Wiley Rein was the guardian of plaintiffs' individual interests from 1988 through 1991, a time when, as the record showed, Wiley Rein was representing only the interests of MWT Ltd. and Northstar in matters plaintiffs considered adverse to their interests. The court's peremptory instruction, coupled with its broadly worded instructions on the scope of a law firm's duty to its clients, effectively directed the jury, contrary to the evidence, to find that defendants breached their duty of loyalty to plaintiffs and to award plaintiffs millions for actions taken by MWT Ltd. and Northstar between 1988 and 1991. Because the District Court's error irrevocably tainted the verdict, this Court should reverse the judgment against defendants.

## **II. The District Court Erred In Preventing The Jury From Considering The Fault Of All Plaintiffs.**

Just as plaintiffs ask this Court to ignore the plain language of Margulies and to adopt an "exception" to the entity rule that would undermine the rule's very purpose,

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record supports this assertion. Rather, each cite merely corroborates what defendants do not deny: Wiley Rein had an attorney-client relationship with the *general partnership* Mountain West Television Company from 1981 to 1986, not with the individual plaintiffs. See Defs.' Br. at 40. Indeed, had defendants admitted that Wiley Rein represented plaintiffs during this period, the District Court could never have ruled, as it did, that there were disputed issues of fact as to the existence of an attorney-client relationship between Wiley Rein and the plaintiffs between 1981 and 1986, a ruling plaintiffs do not challenge. See R.19657-19661. The second false premise of plaintiffs' argument is that the jury found that an attorney-client relationship existed between Wiley Rein and plaintiffs *prior to 1987*. See Pls.' Br. at 54-55. The jury made no such finding. See R.20429-20433. The District Court precluded any consideration by the jury of the attorney-client issue with its directed verdict and peremptory instruction, which *required* the jury to find an attorney-client relationship existed. Accordingly, the jury never made any independent determination that an attorney-client relationship existed between Wiley Rein and plaintiffs prior to 1987.

plaintiffs also want this Court to disregard the express language, legislative history and intent of Utah's comparative fault statute. Plaintiffs urge a reading of the comparative fault statute that would turn the statute on its head and would violate its "main purpose" of ensuring that defendants pay only their fair share of liability. See Sullivan v. Scoular Grain Co., 853 P.2d 877, 880 (Utah 1993) (citing to legislative history) ("The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages.").

As detailed in defendants' opening brief, the provisions of Utah's comparative fault statute, Utah Code Ann. §§ 78-27-37 through 78-27-43 (Supp. 2000) ("the Act"), together achieve this "fair share" objective. See Defs.' Br. at 61-62. The Act provides courts with a straightforward rule – "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant." Utah Code Ann. § 78-27-40(1); see also id. § 78-27-38(3). Section 78-27-39 then sets forth the mechanism that ensures that this statutory mandate is met: "The trial court may, *and when requested by any party shall*, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery [and] to each defendant . . . ." Id. § 78-27-39(1) (emphasis added). The Act is unambiguous. Once requested by any party, the trial court *must* direct the jury to determine the fault of each plaintiff and each defendant. The District Court ignored this statutory directive.



**A. Defendants Did Not Need To File Counterclaims.**

Rather than address the Act's clear requirements, plaintiffs ask this Court to accept the notion that, when the District Court held during trial that the jury needed to determine plaintiffs' damages individually, the court's ruling (the "November 13 Ruling") somehow magically "created [eleven] separate and distinct complaints on behalf of each plaintiff against both defendants." Pls.' Br. at 58. It follows, according to plaintiffs, that the Act *required* defendants to file counterclaims against these new "nonparties" in order for the jury to consider their fault. *Id.* at 58-59. Plaintiffs are wrong for three reasons: (1) the District Court never transformed this case into separate actions; (2) the Act does not require a defendant to file counterclaims in order for a factfinder to apportion fault among all parties to an action; and (3) the Act's 1999 amendments confirm that the Act has *never* required the filing of counterclaims before the trial court is required to direct the jury to apportion fault to each person potentially liable for a plaintiff's injuries.

*First*, plaintiffs point to no portion of the record that supports their assertion that the District Court or the parties ever viewed the court's November 13 Ruling as creating eleven separate actions. *See id.* at 57-58. There is good reason for this failure – the record shows just the opposite. For example, the District Court's jury instruction implementing the November 13 Ruling describes just one action.<sup>7</sup> Furthermore, every

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<sup>7</sup> *See* R.20362 (Jury Inst. No. 20) ("Although there are 11 plaintiffs *in this action*, it does not follow from that fact alone that if one plaintiff is entitled to recover, all plaintiffs are entitled to recover. Each plaintiff has the burden of proving, by a preponderance of the evidence, every element of a claim alleged against a particular defendant before that plaintiff may recover as against that defendant.") (emphasis added).

pleading filed after the November 13 Ruling (including every motion and brief filed by plaintiffs) demonstrates that there was only one case, with one district court docket number and one caption collectively naming *all* of the plaintiffs.

The reality of what occurred below is simple. The District Court correctly recognized that this case involved “eleven different plaintiffs with varying interests” and that a collective damage award, therefore, was patently inappropriate. R.18983-18984. The District Court did nothing more than apply the basic rule of law that each plaintiff must individually establish that he or she is entitled to recovery. See, e.g., Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 336 (Utah 1985). Significantly, the District Court never ruled or even suggested (on November 13 or at any other time) that defendants must file counterclaims before they would be permitted to exercise their statutory right to have the jury apportion fault among all plaintiffs and all defendants. Nor did the court suggest, even in its rulings on post-verdict motions, that defendants’ failure to file counterclaims precluded them from having the fault of all plaintiffs considered. Plaintiffs’ argument is pure fiction, motivated by their justifiable concern that the District Court’s action is unsustainable, and this Court should reject it.

*Second*, plaintiffs mistakenly argue that section 78-27-41 of the Act required defendants to join co-plaintiffs as defendants “or risk[] being found liable for more than [their] proportionate share of fault.” See Pls.’ Br. at 61. By its plain terms, however, that section merely *allows* – but does not *require* – defendants to bring other persons into a case “for the purpose of having determined their respective proportions of fault.” Utah Code Ann. § 78-27-41(1). Thus, the provision states that defendants “may” join other

parties for the purposes of apportioning fault. Id. Plaintiffs argue that the legislature really meant that defendants “must” file a claim in order “to have the proportionate fault of ‘any person,’ other than the claiming party, determined . . . .” Pls.’ Br. at 60-61. Yet, plaintiffs cite no legislative history to support their reading of the permissive “may” as a mandatory “must.” Plaintiffs also ignore the rule of statutory construction that a court must “assume the legislature used each term advisedly [and must] give effect to each term according to its ordinary and accepted meaning.” State v. Candelario, 909 P.2d 277, 278 (Utah Ct. App. 1995) (internal quotation marks and citation omitted). In Utah, as elsewhere, “[a]ccording to its ordinary construction, the term “may” means permissive.” State ex rel. M.C. & K.S. v. K.H.C., 940 P.2d 1229, 1236 (Utah Ct. App. 1997).

Section 78-27-41 serves two purposes, each of which is consistent with the Act’s “fair share” objective. First, this provision permits, but does not require, named defendants to bring nonparties into a case so that their fault can be included in the apportionment process. In addition, as discussed below, section 78-27-41 provides a procedural mechanism for a defendant to assert an individual claim for apportionment against a party who may be dismissed from the action as a matter of law. Neither situation is present here. Accordingly, defendants’ failure to invoke a permissive and plainly inapplicable provision cannot possibly be used to require defendants to answer for more than their share of fault for plaintiffs’ damages.

Unable to find any case adopting their reading of the Act, plaintiffs cite a trilogy of cases – National Serv. Indus., Inc. v. B.W. Norton Mfg. Co., 937 P.2d 551 (Utah Ct. App. 1997); Packer v. National Serv. Indus., Inc., 909 P.2d 1277 (Utah Ct. App. 1996);

and Church of Jesus Christ of Latter-Day Saints v. Queen Carpet Corp., 5 F. Supp. 2d 1246 (D. Utah 1998) – to support their argument that defendants were required to file counterclaims against plaintiffs in order to have their fault considered in determining liability. Because none of these cases involved defendants seeking to apportion fault to co-plaintiffs, the decisions provide no support for plaintiffs’ arguments.

Combined, Norton, Packer and Queen Carpet stand for three related propositions, none of which advance plaintiffs’ cause: (1) since the enactment of Utah’s comparative fault statute, no actions seeking to redistribute loss based on degree of fault may be brought separately from the underlying action; (2) the Act ordinarily requires a court, when requested and regardless of whether a counterclaim has been filed, to consider other tortfeasors’ fault when awarding damages; and (3) when a co-defendant may be dismissed from the action as a matter of law, a defendant should file counterclaims against the co-defendant to preserve the right to seek apportionment from that dismissed co-defendant. As the court in Norton explained:

Under the Act, the trier of fact must take other tortfeasor’s culpability into consideration when making any damages awards, even if a cross-claim is not or could not be filed. . . . Thus, tortfeasor codefendants do not necessarily need to file a cross-claim to ensure that any other tortfeasor’s culpability is determined. However, if the trial court rules as a matter of law that a codefendant bears no liability, then the fact-finder does not consider that party when apportioning fault. . . . [W]here one codefendant moves for summary judgment against the plaintiff on the basis that it bears no liability – any other defendant must file an apportionment cross-claim in order to have standing to oppose the other codefendant’s motion . . . . [because] the Act prohibits such an apportionment claim from being brought outside the underlying tort action, the apportionment claim must be brought – if at all – as a cross-claim in the underlying suit . . . .

Norton, 937 P.2d at 556 n.2.

These cases thus required defendants to do nothing more than they did – follow the plain language of the Act and ask the District Court to instruct the jury to apportion fault among all plaintiffs and all defendants. After defendants made their request, the statute *required* the court to direct the jury to apportion fault among defendants and all plaintiffs. The District Court was wrong to do otherwise.

*Third*, plaintiffs miss the point of defendants’ reference to the 1999 amendments to the Act. It should be emphasized that defendants’ comparative fault arguments are not dependent on whether the 1999 amendments apply retroactively to this case. Therefore, this Court need not reach the retroactivity issue to reverse the District Court’s judgment. As explained in their opening brief, defendants point to the 1999 amendments principally to provide further evidence of the Legislature’s long-standing intent that no defendant be held liable for more than its proportionate share of fault. Defs.’ Br. at 64-65. As this Court made clear in Field v. Boyer Co., 952 P.2d 1078 (Utah 1998), the Act requires the trial court, when requested, to direct the jury to allocate fault to “three classes of persons – plaintiffs, defendants, and immune persons . . . .” Id. at 1081. Because defendants indisputably made such a request, the District Court was wrong to prevent the jury from allocating fault to *all* plaintiffs as required by the Act, regardless whether the 1999 amendments apply retroactively or not.

This Court would have to consider the application of the 1999 amendments to this case only if the Court were to conclude, contrary to the record, that plaintiffs were somehow transformed into “nonparties” at the end of trial. As defendants explained in

their opening brief, the 1999 amendments clarified that the Act *has always required* fault to be allocated to whomever may be responsible for a plaintiff's injuries, even nonparties. See Utah Code Ann. § 78-27-39(1). Contrary to plaintiffs' claims, this was the law even at the time of trial. See Floor Debate, Utah Judiciary Comm., Jan. 29, 1999 (noting that the portion of the holding in Field that fault should not be attributed to nonparties, was "contrary to the intent of the principle of comparative fault . . . . [Field] changed some of the practice before that decision so we are trying to correct that by clarifying that defendant means any person, that even if they can't be located, can be proved has something to do with [the claimed negligence] . . . *the changes that we're recommending will place us back in pretty much the position we thought we were in before this recent Supreme Court case.*") (statement of Rep. Swallow) (emphasis added).

The Legislature expressly made the 1999 amendments retroactive to March 3, 1998 for any actions for which "a final unappealable judgment or order has not been issued" as of the amendments' effective date, May 3, 1999. 1999 Utah Laws, ch. 95, § 6. Since this case is now pending before this Court, no "final unappealable judgment" has yet issued. Plaintiffs do not contend otherwise. Instead, plaintiffs argue that retroactive application of the amended Act to this case would "destroy plaintiffs' vested right in the existing jury verdict." Pls.' Br. at 63. While the amendments do provide that courts should not apply them retroactively if they would "destroy a vested right," see 1999 Utah Laws, ch. 95, § 6, the legislative history to the amendments shows that plaintiffs never had any "vested right" to exclude nonparties from the apportionment process, see Defs.' Br. at 63-65. Where, as here, an amendment only confirms and clarifies how the law

should have been understood at the time of trial, the amendment “will be given retroactive effect.” Evans & Sutherland Computer Corp. v. Utah State Tax Comm’n, 953 P.2d 435, 440 (Utah 1997).<sup>8</sup> Therefore, if this Court determines that plaintiffs were nonparties, it should apply the 1999 amendments of the Act to this case and reverse.

In sum, the guiding theme of the Act has remained unchanged since its enactment in 1986: The “maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.” Utah Code. Ann. § 78-27-40(1); see also, e.g., Farmers Ins. Exch. v. Parker, 936 P.2d 1088, 1091 (Utah Ct. App. 1997) (“Clearly, [the Act] mandate[s] that a trial court cannot apportion more fault to a defendant than that amount of fault attributable to that defendant, even if he or she refuses to bring other potentially liable defendants into the lawsuit.”). By refusing to instruct the jury to apportion fault among all plaintiffs and defendants, the District Court improperly allowed the jury to attribute to defendants more than their fair share of fault for plaintiffs’ claimed injuries.

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<sup>8</sup> Plaintiffs’ reliance on Stephens v. Henderson, 741 P.2d 952 (Utah 1987), is therefore misplaced. In Stephens, the issue before the Court was whether the 1986 amendments to the Act should apply retroactively when the amendments were silent on this point. 741 P.2d at 953. The jury had returned a verdict finding one defendant 25% liable and another defendant 75% liable. Since joint and several liability existed in Utah at the time of the tort (1984), the trial court permitted plaintiff to collect the entire judgment from the defendant who was found to be 25% at fault. Id. Because the 1986 amendments replaced joint and several liability with a comparative fault scheme, the Stephens court held that the amendments changed the “substantive law” in effect at the time of the tort and thus concluded that the 1986 amendments would not apply retroactively. Id. Here, the amendments to the comparative fault statute did not change the substantive law, but merely clarified what the Legislature always intended the law to be.

**B. Defendants Never “Waived” Their Right To Have The Jury Allocate Fault To All Plaintiffs.**

Plaintiffs make the equally unsupportable claim that defendants somehow “waived” their statutory right to a proper consideration and apportionment of fault among all plaintiffs and defendants. Pls.’ Br. at 63-65. Plaintiffs can make this assertion only by ignoring the standard of review and by closing their eyes to the mountain of evidence demonstrating that: (1) plaintiffs were partners in the Channel 13 venture; (2) many plaintiffs acted as agents for their fellow plaintiffs; and (3) plaintiffs were involved intimately in the key decisions that led to Channel 13’s decline. See Defs.’ Br. at 56-60.

*First*, plaintiffs’ “waiver” argument ignores basic partnership law. As this Court has held, “[p]artners obviously occupy a fiduciary relationship and must deal with each other in the utmost good faith.” Burke v. Farrell, 656 P.2d 1015, 1017 (Utah 1982). Therefore, by definition, plaintiffs who were partners in the Channel 13 venture owed fiduciary duties to their fellow partners.

*Second*, because the District Court effectively directed a verdict in plaintiffs’ favor when it refused to allow the jury to apportion fault among defendants and all plaintiffs, this Court must review the evidence demonstrating plaintiffs’ fault for each others’ damages in the light most favorable to *defendants*. See, e.g., Pavoni v. Nielsen, 2000 UT App. 74, ¶ 14, 999 P.2d 595, 596. That evidence, which plaintiffs conveniently ignore in their brief, shows that plaintiff David Lee (a lawyer) played a pivotal role in the Channel 13 venture, provided legal advice during critical periods to his father Joseph Lee, and acted as his father’s agent and lawyer on virtually every Channel 13 matter. See, e.g.,



R.26144 at 40-41. Plaintiff Brent Pratt, by his own admission, represented plaintiff Sidney Foulger's interests in Channel 13. Plaintiff Sidney Foulger also admitted that co-plaintiffs Brent Pratt and Clayton Foulger acted as his agents and advised him regarding the Channel 13 venture. See R.27111 at 14.

Defendants also established at trial that Sidney Foulger refused to make available \$2.6 million in financing he previously had agreed to provide Channel 13. R.25158 at 146-148, 153-154. As plaintiffs testified, Sidney Foulger's unexpected default left MWT Ltd. in a precarious situation and without funds required to purchase the necessary equipment and programming to put a new station on the air. R.21883 at 28; R.24600 at 149-51.<sup>9</sup> The jury, therefore, had more than sufficient evidence to determine whether, for example: the actions of Brent Pratt caused Sidney Foulger's damages; the legal advice David Lee gave his father Joe Lee resulted in plaintiffs' harm; and/or Sidney Foulger's default on his commitment to provide \$2.6 million caused the station to fail and injured his co-partners (plaintiffs Joseph Lee, Jo-Ann Kilpatrick and George Gonzales).

Plaintiffs assert, *without any citation to the record*, that the District Court made a determination that this abundant evidence of the fault of co-plaintiffs for the harms that

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<sup>9</sup> Plaintiffs maintain repeatedly and erroneously that plaintiff Sidney Foulger did not default on an obligation to provide \$2.6 million in financing to Channel 13, but merely declined to exercise an "option" to make such a contribution. See Pls.' Br. App. at 10, 12, 13. Tellingly, plaintiffs avoid citing the language of the actual document signed by Sidney Foulger. That agreement makes it clear that he had a *contractual obligation* to loan MWT Ltd. \$2.6 million; the document makes no reference to a purported "option" to provide funding. See R.31110 (DX 112) ("Northstar and Foulger *agree . . . to make loans to the Partnership. . . . The loan by Foulger shall be in the aggregate principal amount of \$2,600,000.*") (emphasis added).

each recovering plaintiff suffered was somehow insufficient to support a comparative fault instruction. See Pls.’ Br. at 64-65. But this is yet another fiction. The District Court recognized that a comparative fault instruction was necessary in this case, and it gave a comparative fault instruction. What the District Court did not do was allow the jury to apportion fault among *all* plaintiffs and all defendants. See R.20429-20443. Plaintiffs’ attempt to convince this Court that the District Court found that there was insufficient evidence to support a proper comparative fault instruction is plain wrong.<sup>10</sup>

To affirm the District Court’s refusal to allow the jury to apportion fault to all plaintiffs, this Court would need to conclude that “reasonable minds would agree that *no substantial evidence*” supported having the jury (as required by Utah’s comparative fault statute) apportion fault among all plaintiffs. Pavoni, 2000 UT App. 74, ¶ 14, 999 P.2d at 598 (internal quote and citation omitted) (emphasis added). In view of the overwhelming evidence that several, if not all, co-plaintiffs were at least partially responsible for the damages that each recovering plaintiff suffered, this Court cannot draw such a conclusion. See, e.g., Nay, 850 P.2d at 1263 (directed verdict justified only if examining all of the evidence “in a light most favorable to the nonmoving party,” there is no

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<sup>10</sup> Plaintiffs also cannot credibly argue that it was a mystery to them until the charge conference that defendants would ask the jury to consider the fault of all plaintiffs. See Pls.’ Br. at 65. Defendants were put on notice at the very beginning of this case that defendants would argue that plaintiffs were themselves responsible for a portion of their alleged damages. See R.13161-13177 (Defendants’ Answer at ¶ 65) (“Plaintiffs’ damages, if any, must be reduced by . . . breach of duty, acts or omissions, contributory negligence, assumption of the risk or fault of or attributable to the plaintiffs.”). Plaintiffs certainly never were “deprived” of the “opportunity to meet defendants’ claim of fault comparison.” Pls.’ Br. at 65.

competent evidence that would support a verdict in the nonmoving party's favor). It therefore was reversible error for the District Court to refuse to instruct the jury that it must consider the fault of *all* plaintiffs when allocating liability. See, e.g., Zieber v. Bogert, 747 A.2d 905, 908-09 (Pa. Super. 2000) ("Because even minimal evidence of comparative negligence requires a charge on the issue when requested, and Appellants had requested such an instruction, we hold that the trial court should have given an appropriate jury instruction on comparative negligence and that its failure to do so is reversible error."), appeal denied, 2000 Pa. LEXIS 2173 (Pa. Aug. 31, 2000).

**C. Defendants Submitted Proper Comparative Fault Jury Instructions.**

In a final effort to justify the District Court's error, plaintiffs argue that the special verdict forms and jury instructions defendants proposed were inaccurate, and that the District Court therefore properly excluded the jury from considering the fault of all plaintiffs. Plaintiffs are wrong for three reasons.

*First*, the District Court gave the jury a comparative fault instruction – it simply failed properly to tell the jury that it was required to allocate fault among *all plaintiffs*, not just an individual recovering plaintiff. See R.20436-20442. This is the sole error in the court's comparative fault charge that defendants challenge on this appeal. Plaintiffs' effort to raise claimed technical errors in proposed instructions on *other* aspects of comparative fault (such as any alleged error in the definition of "fault" in defendants' proposed instructions, see Pls.' Br. at 67) is, therefore, a transparent effort to deflect this Court from the only error that is the focus of this appeal.

*Second*, the forms and instructions defendants submitted accurately stated the law and properly requested the jury to apportion fault among all plaintiffs and defendants. Compare R.19166-19170 (proposed special verdict form for plaintiff Joseph Lee) (directing jury to assign fault to Joseph Lee, to the defendants, and to the other plaintiffs if the jury “find[s] that one or more of the other plaintiffs acted or failed to act in a manner so as to contribute to the damages that you awarded Joseph Lee”), with Utah Code Ann. § 78-27-39(1) (trial court “shall” direct the jury to determine “the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not”). Defendants’ proposed jury instruction similarly was proper and conformed to the language of the Act. Compare R.19991-19994 (Proposed Jury Instr. No. 45) (“[I]f, in addition to any liable defendant, one or more plaintiffs acted or failed to act in a manner that contributed to the plaintiffs’ claimed injury and damages, the fault of each of those plaintiffs and each liable defendant must be considered and assigned a percentage of the total fault . . .”), with Utah Code Ann. §§ 78-27-38 through 78-27-40.

*Third*, even if there were any technical defects in these proposed instructions – and there were not – it would still be error to refuse to give a comparative fault instruction where the “requests sufficed to alert the district court to the need for some instructions, even if not the specific ones urged by the defendants, on the affirmative defense[] of comparative negligence.” Wilson v. Maritime Overseas Corp., 150 F.3d 1, 10 (1st Cir. 1998); see also Harville v. Anchor-Wate Co., 663 F.2d 598, 603 (5th Cir. Dec. 1981) (same). This is a standard that defendants’ proposed instructions satisfied.

Defendants submitted correct jury instructions and special verdict forms, and the District Court never ruled otherwise. Moreover, any imperfections in the proposed instructions that plaintiffs now conjure up cannot possibly serve as a basis for supporting the District Court's erroneous refusal to direct the jury to apportion fault among all plaintiffs and all defendants, as required by the Act. Plaintiffs rightly do not dispute that if the District Court erred – as it surely did – in failing to follow the Act's requirements, defendants are entitled to a new trial on *all* issues. Compare Defs.' Br. at 60, 68, with Pls.' Br. at 56-65. Therefore, this Court should reverse the judgment and order a new trial on both liability and damages.

**III. The District Court Did Not Instruct The Jury On Defendants' Affirmative Defenses Of Waiver And Estoppel And Its Failure To Do So Was Error.**

Plaintiffs acknowledge that waiver and estoppel are recognized defenses to claims of legal malpractice. See id. at 70-76. Plaintiffs also do not dispute that the factual record below fully supports the defenses of waiver and estoppel, and that the District Court refused to provide instructions on these defenses (thereby essentially directing a verdict in plaintiffs' favor on two of defendants' central defenses). See id. This should end the inquiry because “[a] party is entitled to have his theory of the case submitted to the jury, and where there is evidence to support a party's theory of the case, it is error for the court to refuse to instruct thereon.” Goode v. Dayton Disposal, Inc., 738 P.2d 638, 640 (Utah 1987); see also Rodgers v. Withers, 593 N.E.2d 669, 673 (Ill. App. Ct. 1992) (“[A]n instruction which omits reference to a defendant's affirmative defense is reversible error.”).

Rather than accept the District Court's error, plaintiffs instead attempt to rationalize the court's refusal to give *any instruction* on the affirmative defenses of waiver and estoppel, by claiming that "the concepts of waiver and estoppel were given in substance" and by raising, once again, hyper-technical – and incorrect – arguments that defendants' proposed instructions were somehow improper. See Pls.' Br. at 70-71. Neither argument has any merit.

*First*, as they did below, plaintiffs persist in confusing the concept of informed consent with the affirmative defenses of waiver and estoppel. See Pls.' Br. at 75-76. Plaintiffs point the Court to certain of the District Court's instructions discussing the requirements for plaintiffs to have given their informed consent to Wiley Rein's representation of Northstar. Plaintiffs then claim that these instructions, in substance, instructed the jury on the defenses of waiver and estoppel because they supposedly focus on the "client's conduct" after he or she becomes aware of a conflict. See id. at 75. However, plaintiffs fail to inform the Court that the District Court instructed the jury that informed consent principally focuses on the *attorney's conduct* and whether the lawyer adequately informed the client of the conflict. See, e.g., R.20402 (Jury Inst. No. 55) ("A client cannot waive the right to object to simultaneous adverse representation where full disclosure of the effects of the adverse representation is not made."); R.20388 (Jury Inst. No. 41) ("A lawyer representing one client may represent another client with conflicting interests if both clients give their informed consent after full disclosure by the attorney of all the facts, legal implications, possible effects and other circumstances relating to the proposed multiple representation . . . .").

Therefore, the jury instructions, “taken as a whole,” see Pls.’ Br. at 71, 74-75, told the jury that a client can give informed consent to a conflict of interest *only* if he or she was advised adequately of the conflict and the ramifications of consenting to it. What the District Court did not tell the jury is that regardless of whether plaintiffs gave their “informed consent” to the conflict at the outset, plaintiffs’ legal malpractice claims could still be *barred* if plaintiffs did not object to the conflict, and take other appropriate action, once they became aware of it. This is the essence of the affirmative defenses of waiver and estoppel. Yet, this concept is found nowhere in the court’s instructions. In short, instructions on informed consent do not suffice to charge a jury on waiver and estoppel.

*Second*, plaintiffs similarly miss the mark in arguing that defendants’ proposed jury instruction on waiver and estoppel was erroneous. The District Court never held or even suggested that defendants’ proposed waiver and estoppel instruction was worded improperly. Rather, the court mistakenly believed that its informed consent instructions were appropriate substitutes for instructions on waiver and estoppel. See R.21219-21231 (Aug. 13, 1999 Mem. Decision at 6).

In any event, defendants’ proposed instructions were correct. Plaintiffs’ claim that the proposed waiver instruction was defective because it did not inform the jury that “adequate or full disclosure” is a condition of “waiver,” Pls.’ Br. at 72-73, again confuses informed consent with waiver of a legal malpractice claim. An instruction on waiver would never include any reference to an attorney’s disclosure because waiver,

unlike informed consent, principally focuses on the client's conduct after the conflict comes to light. See Defs.' Br. at 71.<sup>11</sup>

Plaintiffs also argue that defendants' proposed waiver instruction failed adequately to state the test for waiver (in particular, the intent element of waiver) as set forth in Geisdorf v. Doughty, 972 P.2d 67 (Utah 1998). See Pls.' Br. at 73. But plaintiffs are wrong. Consistent with Geisdorf, defendants' proposed instruction stated that waiver is an affirmative relinquishment of a known right. Compare Geisdorf, 972 P.2d at 72 (“[W]aiver is the intentional relinquishment of a known right.”), with R.19453-19455 (Proposed Jury Inst. No. 26) (“Waiver is the voluntary relinquishment of a known right.”). Plaintiffs also criticize defendants' proposed instruction for not stating that silence cannot constitute a waiver unless there is some “duty or obligation to speak.” See Pls.' Br. at 73. However, defendants' proposed instruction explained that a failure to object to a known conflict is merely a “factor” to be considered in determining whether a party has waived a claim. See R.19453-19455. As this Court in Geisdorf noted, a waiver may be “implied” based on an assessment of the “totality of the circumstances,” a holding that is consistent with defendants' proposed charge. See 972 P.2d at 72.

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<sup>11</sup> In support of this argument, plaintiffs cite their trial expert for the proposition that the affirmative defense of *waiver* “must be based on full disclosure and knowledge of the consequences.” Pls.' Br. at 72. However, the passage from Mallen's treatise that plaintiffs cite discusses the defense of *ratification*, not waiver. The complete sentence from the treatise reads as follows: “In contrast to assuming liability to a third person, however, ratification, when applied in favor of an attorney, must involve more than mere consent or approval of the attorney's action; it must be based on full disclosure and knowledge of the consequences.” 2 Mallen, Legal Malpractice § 20.11, at 701.



Defendants' proposed estoppel instruction was also correct. Compare Clarke v. American Concept Ins. Co., 758 P.2d 470, 473-74 (Utah Ct. App. 1988) ("The elements of estoppel are: conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.") (internal quotation marks and citation omitted), with R.19453-19455 (Proposed Jury Inst. No. 26) ("Estoppel occurs when a party acts in a manner so as to cause another party acting in reasonable reliance to alter its position to its harm."). Plaintiffs incorrectly cite Utah County v. Young, 615 P.2d 1265, 1268 (Utah 1980) for the proposition that "silence or inaction" can *never* "operate to work an estoppel." Pls.' Br. at 74. However, as this Court has held, the essential elements of estoppel include "a statement, admission, act *or failure to act* by one party inconsistent with a claim later asserted." CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969 (Utah 1989) (emphasis added). Moreover, defendants' instructions properly focused on plaintiffs' "conduct" and "acts," not their silence.

Finally, any technical errors in defendants' proposed waiver and estoppel instruction would not permit the District Court to refuse to provide *any* instruction on the defenses of waiver and estoppel and in effect grant plaintiffs a directed verdict on two of defendants' affirmative defenses that the record supported. See, e.g., Harville, 663 F.2d at 603 ("Even if a requested instruction is not correct in every respect, it may impose

upon the court a duty to submit a more specific instruction where such instruction is necessary for the defendant's affirmative defense."').<sup>12</sup>

There can be no question that the factual record fully supported both of defendants' affirmative defenses. Waiver is the intentional relinquishment of a known right. See Clarke, 758 P.2d at 473-74. The record shows the following: (1) plaintiffs were aware for years that Wiley Rein represented Northstar; (2) plaintiffs were independently represented by Ralph Hardy and his firm in all matters where Northstar was adverse to plaintiffs; and (3) plaintiffs never once objected to Wiley Rein's representation of Northstar during the four year period from 1987-1991 when plaintiffs assert defendants were breaching duties to plaintiffs by representing Northstar. See Defs.' Br. at 69-72.<sup>13</sup> Plaintiffs' repeated failure to object to Wiley Rein's representation

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<sup>12</sup> Plaintiffs' reliance on Pacific Chromalox Div. v. Irey, 787 P.2d 1319 (Utah Ct. App. 1990); Black v. McKnight, 562 P.2d 621 (Utah 1977); Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998); Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995); AMERCO v. Shoen, 907 P.2d 536 (Ariz. Ct. App. 1995); State ex rel. State Highway Dept. v. Strosnider, 747 P.2d 254 (N.M. Ct. App. 1987); and St. Paul Mercury Ins. Co. v. Salovich, 705 P.2d 812 (Wash. Ct. App. 1985), is therefore inappropriate. None of these cases holds that a court can refuse to provide any instruction on an affirmative defense that is legally viable and supported by the evidence merely because a party submits a technically imperfect instruction. In fact, many of these cases support defendants' position that a trial court must instruct on defenses supported by the evidence. See, e.g., Pacific Chromalox, 787 P.2d at 1328 ("It is the trial court's duty to cover both parties' theories and points of law in giving jury instructions, provided there is competent evidence to support them."); Black, 562 P.2d at 622 (same).

<sup>13</sup> Because the District Court essentially directed a verdict in plaintiffs' favor by refusing to instruct on the defenses of waiver and estoppel, defendants are entitled to all favorable inferences that can be drawn from the record. See, e.g., Pavoni, 2000 UT App. 74, 999 P.2d 595.

of Northstar at a time when they were admittedly represented by Ralph Hardy, satisfies the requirements of a waiver defense.

The evidence also supported an estoppel defense. As explained in Eldredge v. Utah State Ret. Bd., 795 P.2d 671, 675 (Utah Ct. App. 1990), estoppel is a defense based on a “failure to act by one party inconsistent with a claim later asserted.” Plaintiffs’ claim that Wiley Rein represented them and breached fiduciary duties owed plaintiffs from 1987 through 1991 was flatly inconsistent with the undisputed facts that they retained, and relied on, Ralph Hardy to represent them during this time and never objected to Wiley Rein’s representation of Northstar during that period. Wiley Rein properly relied on plaintiffs’ retention of Hardy as well as plaintiffs’ conspicuous failure to object to Wiley Rein’s representation of Northstar. Properly instructed, the jury, therefore, could have found that plaintiffs’ conduct during this period estopped them from asserting that Wiley Rein owed them, or breached, any fiduciary duties.

Plaintiffs quote Tingey v. Christensen, 1999 UT 68, 987 P.2d 588, for the proposition that this Court will reverse a district court’s refusal to give a proffered jury instruction only when “there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party.” Pls.’ Br. at 76. As the foregoing evidence shows, defendants were in fact deprived of a more favorable result because the jury was prevented from accepting their defenses of waiver and estoppel. Furthermore, a decision not to instruct the jury on a party’s theory is always error when that decision prevents a party from “argu[ing] its theory of the case” to the jury. Id.; see Rodgers, 593 N.E.2d at 673 (reversible error to omit reference to defendant’s affirmative

defense). Because the District Court's instructions did not enable defendants to argue their affirmative defenses to the jury, any "confidence in the jury's verdict is undermined." Tingey, 1999 UT 68, ¶ 16, 987 P.2d at 592. The verdict should therefore be reversed.

**IV. Plaintiffs Confirm That The Jury's Liability Determination Is Fatally Flawed Because The District Court Allowed The Jury To Do Exactly What This Court Said It Cannot Do – Speculate About The Disclosure Of Confidential Information.**

In an effort to support the District Court's decision to send their breach of confidentiality claim to the jury, plaintiffs ignore entirely a recent decision of this Court (cited in defendants' opening brief) holding that a breach of fiduciary duty claim cannot be founded on speculation that confidential information "must have been disclosed" by the defendant. See Gildea, 970 P.2d at 1270. This Court is not alone. Courts throughout the country hold that to find a breach of the duty of confidentiality there must be evidence that defendants not only received confidential information, but that they *actually* misused or disclosed such information. See, e.g., Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 409-10 (Tenn. 1991); Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1217 (Miss. 1996). Plaintiffs' own trial experts confirmed this requirement for a breach of confidentiality claim. See 2 Mallen, Legal Malpractice § 14.5, at 244; R.26954 at 5-6 (Prof. Morris) (agreeing that in order for there to be a breach of confidentiality, a lawyer must "actually misuse or make unauthorized disclosures" of confidential information). As they do with Gildea, plaintiffs simply ignore this abundant authority in an effort to salvage an unsustainable verdict.

The reason plaintiffs are hiding from Gildea and this other authority is apparent – plaintiffs are unable to cite *any* evidence that defendants actually disclosed or misused any confidential information. Instead, as they did at trial, plaintiffs support their breach of confidentiality claim with nothing more than unsubstantiated speculation that defendants “must have” disclosed or misused confidential information in representing Northstar. See Pls.’ Br. at 77-80. Thus, plaintiffs argue that defendants (in particular Wood) “must have” divulged confidential information to Northstar because Northstar was able to take advantage of plaintiffs during the November 1986 meetings and force them to enter into an unfavorable business relationship. See Pls.’ Br. at 78.

This is exactly the type of speculation that Gildea held was insufficient to support a breach of confidentiality claim. As this Court held: “without any evidence that [defendant] communicated confidential information, such a conclusion [that defendant must have disclosed confidential information] is pure speculation and conjecture which cannot be allowed to form the basis of a jury’s verdict.” 970 P.2d at 1270. See also Park v. Georgia Gulf Corp., No. 91-569, 1992 WL 714968, at \*5 (D. Del. Sept. 14, 1992) (fact that employee who disclosed information given in confidence to executive was terminated *immediately after* executive spoke with employee’s manager not sufficient to prove that executive *disclosed* confidential information to the manager; there “[was] not a sufficient factual basis to support an inference that those two events were causally connected”); Quad County Distrib. v. Burroughs Corp., 385 N.E. 2d 1108, 1111 (Ill. App. Ct. 1979) (judgment based on alleged breach of confidentiality reversed where there was

no specific act linking third party's access to information with a breach and only basis for concluding that the information was divulged was "assumption and supposition").

Moreover, plaintiffs overlook the unequivocal testimony at trial that defendants never disclosed or misused any confidential information, and fail to deal with the testimony of their own trial experts who agreed, based upon their review of the record, that there was no evidence of actual misuse or disclosure of confidential information by defendants. Defs.' Br. at 74-75. Although a jury is permitted to draw reasonable inferences from the evidence, a jury may not base its verdict on pure speculation, particularly when, as here, such speculation flies in the face of the record. See Walter v. Holiday Inns, Inc., 784 F. Supp. 1159, 1179-80 (D.N.J. 1992) ("[P]laintiffs cannot rest on the hope that the jury will not believe the record evidence and therefore spin a web of under-handedness which entangles the defendants . . . . There must be some affirmative evidence that the event occurred.") (internal quotation marks and citation omitted).<sup>14</sup> Therefore, as set forth in their opening brief, defendants are entitled to judgment on plaintiffs' breach of the duty of confidentiality claim and a new trial on all remaining issues. See Defs.' Br. at 76.

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<sup>14</sup> Plaintiffs repeat their mantra that defendants failed to marshal the evidence supporting the jury's verdict. Pls.' Br. at 77. But plaintiffs are wrong. Defendants *did address* in their opening brief the speculative "evidence" of misuse that plaintiffs cite. See Defs.' Br. at 75. Furthermore, defendants detailed the evidence that demonstrates defendants never misused or disclosed any confidential information. See id. at 73-76.

**V. The District Court Made Several Erroneous Rulings On Damages That Resulted In An Unsustainable Damage Award.**

**A. The District Court Should Have Directed The Jury To Measure Damages From The Date Of Breach, Not Years After The Alleged Injury Occurred.**

Plaintiffs admit that the jury awarded them damages measured as of the date of trial (based on their expert's 1997 damage calculations), not as of the date of any claimed breach. See Pls.' Br. at 89 (jury awarded "lost profits from 1987 to the date of trial *and* the [market] value of Channel 13 *as of* the date of trial") (emphasis added). This admission makes clear that the jury's lost ownership damage award cannot stand because, as cases in Utah and throughout the country hold, the jury must measure damages as of the *date of the breach* – not years later when the case is tried. See Defs.' Br. at 78-80.<sup>15</sup>

Plaintiffs' argument in support of the District Court's decision to allow the jury to measure plaintiffs' damages as of the date of trial, rather than as of the date of breach, boils down to a single flawed proposition: plaintiffs assert that awarding them damages as of the date of the breach would somehow "under-compensate" them. See Pls.' Br. at 85, 89. This argument reflects a fundamental misunderstanding of the legal rules governing

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<sup>15</sup> Issues relating to the proper measure of damages present questions of law when there is a "rule or principle" governing the measure of damages that can be "uniformly applied." Lysenko v. Sawaya, 2000 UT 58, 7 P.3d 783, 787. There is such a "rule or principle" that can be "uniformly applied" in this case (and in all similar cases) – damages are to be measured from the date of the breach. See Defs.' Br. at 78; see also General Auto Parts Co. v. Genuine Parts Co., 979 P.2d 1207, 1212 (Idaho 1999) (measure of damages is a question of law reviewed *de novo*). Plaintiffs therefore are wrong to claim that the standard of review on this issue is abuse of discretion. See Pls.' Br. at 83.

the recovery of damages, which, if accepted, would radically alter the way damages are awarded throughout this State.

To begin with, even plaintiffs' own damage expert rejects their false cry of under-compensation. Mr. Schutz offered two damage estimates: one as of 1987 and another (discussed below) as of the expected date of trial in 1997. Mr. Schutz testified that his estimate of the fair market value of Channel 13 (i.e., lost ownership damages) as of 1987, shortly after the FCC awarded MWT Ltd. the Channel 13 license, would account fully for *both* the going concern value of Channel 13 at the time of defendants' alleged breach *plus future profits* the station might have earned for ten years thereafter, discounted to present value. See R.26677 at 45-52; see also R.29534 (PX 293). It is difficult to understand how such an award could possibly under-compensate plaintiffs.

Courts in Utah confirm that measuring market value damages as of the date of an alleged breach ensures that a plaintiff is fully compensated for all damages proximately caused by that breach. See, e.g., Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 784 P.2d 475, 480 (Utah Ct. App. 1989) (holding that because liability attaches "at the time of the loss," an appraisal done shortly after a breach "is more relevant to the actual loss incurred" than measuring damages years later at the time of trial) (internal quotation marks and citation omitted). This long-standing rule for measuring damages is followed throughout the country. For example, in Sharma v. Skaarup Ship Mgmt. Corp., 916 F.2d 820, 826 (2d Cir. 1990), a case discussed in defendants' opening brief but which plaintiffs do not even cite, the Second Circuit explained: "Measuring . . . damages by the value of the item at the time of the breach is eminently sensible and *actually takes expected lost*



*future profits into account . . . .* The [market] value of assets . . . is the discounted value of the stream of future income that the assets are expected to produce. This stream of income, of course, includes expected future profits and/or capital appreciation.” Id. at 826 (emphasis added).

The reasons for this uniform rule are quite sensible, which is undoubtedly why plaintiffs never bother to discuss the rule’s rationale. If the time of trial, as opposed to the date of breach, governed the date for measuring damages, “the rule would be a two-edged sword, because courts would have to diminish damage awards where the value of the item decreased or where losses were encountered subsequent to the breach as well as enhance them where conditions improve.” Id.; see also Price-Orem, 784 P.2d at 480 (“[D]efendant cannot take advantage of events occurring *after* harm has occurred and liability has attached to reduce the damages for that harm.”) (internal quotation marks and citation omitted). Allowing the court’s docket to control the date for measuring damages would mean that a plaintiff’s recovery would never be tied to the damages the plaintiff actually suffered at the time of breach; instead, the amount of plaintiff’s recovery would ebb and flow based on the court’s docket and market conditions from the date of breach until the date of trial.

Far from rebutting defendants’ arguments, the authorities plaintiffs cite support the rule that damages should be measured as of the date of the breach, not the time of trial. For example, in Henderson v. For-Shor Co., 757 P.2d 465 (Utah Ct. App. 1988), the court held that the measure of damages for conversion “is the value of the property *at the time of conversion*, plus interest.” Id. at 468 (internal quote and citation omitted); see

also Fairway Builders, Inc. v. Malouf Towers Rental Co., 603 P.2d 513, 525-526 (Ariz. Ct. App. 1979) (acknowledging that “the general rule appears to be that the rights of the parties with respect to a breach of contract are fixed at the time of breach and that damages are measured as of that time”).<sup>16</sup>

Other cases plaintiffs cite are simply inapposite. For example, in Alexander v. Brown, 646 P.2d 692 (Utah 1982), this Court held that when a party breached a 1973 contract to pave a road and install a curb, gutter and sidewalk, plaintiffs were entitled to “benefit of the bargain” damages in 1980 (the date of the trial) that were calculated by looking at the 1976 costs incurred by plaintiffs’ neighbor for similar road improvements and estimating how much it would cost plaintiff to have the bargained for improvements made. Id. at 695. In Alexander, the plaintiffs could only be made whole by receiving sufficient money at the time of trial so they could then pay for the road improvements for which they bargained. Here, plaintiffs would have been made whole by measuring damages as of the date of the breach, because such damages would have awarded plaintiffs the value of Channel 13 as of the time of the breach, including ten years of future profits.<sup>17</sup>

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<sup>16</sup> The Fairway Builders court upheld an award of damages for repair of an improperly installed surface to the exterior of a building that was calculated as of the trial date because “the extent of the breach (requiring the entire removal of the marblcrete) was not ascertainable until two years after its installation and shortly before the trial.” 603 P.2d at 527. Therefore, the date of trial and the date when the extent of the breach fully manifested were virtually identical. This is not so here. The date of trial was eight years after the latest conceivable breach (i.e., the 1990 sale of Channel 13 to Fox).

<sup>17</sup> In re Estate of Rothko, 372 N.E.2d 291 (N.Y. 1977), is also distinguishable. There, the court affirmed an award based on the appreciated value of paintings sold in violation of

By impermissibly allowing the jury to award damages measured as of the date of trial, the District Court allowed the jury to over-compensate plaintiffs in violation of the basic rule of awarding damages only for actual losses sustained. The over-compensation is obvious: Mr. Schutz's 1987 estimate of lost ownership damages (which included a projection of lost profits from 1987 to 1997) was \$10 million; yet, the jury awarded plaintiffs more than \$23 million. The only way to correct this error is by granting a new trial. And because the jury's damage calculation is inextricably linked to the date when any breach occurred, the new trial must include both liability and damages. See Mikkelsen v. Haslam, 764 P.2d 1384, 1389 (Utah Ct. App. 1988).

For similar reasons, plaintiffs are also wrong when they assert that the jury was entitled to award them both lost cash distributions from the date of breach until the date of trial *plus* lost ownership damages as of the date of trial. There is no basis for permitting such double recovery. As plaintiffs' damage expert confirmed, plaintiffs cannot recover lost ownership damages as of the date of any breach *plus* future cash distributions, because the lost ownership damages already include lost future profits.

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an injunction and restraining order when the executors had a duty to abide by these orders and retain the paintings. The New York court did not address the issue of the appropriateness of measuring damages from the date of the breach when, as here, doing so would fully compensate plaintiffs for all damages flowing from the alleged breach. Similarly, Rea v. Ford Motor Co., 560 F.2d 554 (3d Cir. 1977), and the string of cases that plaintiffs cite in footnote 26, see Pls.' Br. at 88, also do not support deviating from the rule that damages should be measured from the date of the breach. These decisions consider issues related to the award of non-speculative lost profits for a reasonable time after the breach. That is just what Mr. Schutz's 1987 estimate did. These decisions, therefore, support defendants' argument that damages must be calculated from the date of the breach, not the date of the trial.

R.22155 at 16 (“Q. You can’t have both, can you? A. That is correct.”). In the end, even plaintiffs are forced to concede as much. For they implicitly acknowledge, quite correctly, that if damages were properly measured as of the date of the breach, it would constitute an impermissible double recovery for the jury to award both lost ownership damages as of the date of the breach *plus* future cash distributions after that date. See Pls.’ Br. at 90 (“Lost future profits [beyond 1998] would at least arguably duplicate the award based on the 1998 value of Channel 13 because the 1998 station value would be based on projected future profits.”). Therefore, in reversing the judgment, this Court should vacate the jury’s \$6.4 million award of cash distributions damages because that award gives plaintiffs recovery for the same lost profits that are included in a fair market value of Channel 13 as of the date of breach. See Defs.’ Br. at 80-82; see also Protectors Ins. Serv., Inc. v. U.S. Fid. & Guar. Co., 132 F.3d 612, 615-17 (10th Cir. 1998) (plaintiff may not recover both lost ownership value, when future earnings are considered in arriving at that value, and future profits as this would constitute a double recovery).

**B. The Damage Award Is Impermissibly Based On Speculative Estimates.**

Plaintiffs had only one expert, Mr. Schutz, provide evidence of their damages as of 1997, and, as plaintiffs concede, the jury awarded plaintiffs damages as of that date. See Pls.’ Br. at 89. Mr. Schutz’s assessment of plaintiffs’ lost ownership damages as of 1997 consisted of hypothetical “revenue and cash flow projections for the station during the 1987 to 1997 period” plus a fair market value estimate as of 1997 that was founded on “revenue and expense projections for channel 13 from 1997 onward for 10 years” until 2007. R.029555-029564 (PX 295 at 2-3). Therefore, by awarding damages as of the date

of trial, as opposed to the date of breach, the jury awarded plaintiffs *twenty years (1987-2007) of hypothetical lost profits*. See Pls.’ Br. at 89, 91-92. It is only by relying on Mr. Schutz’s speculative estimates of twenty years of hypothetical profits that any jury could award more than \$23 million to the part owners of an untested television station that was on the verge of bankruptcy almost immediately after it went on the air – an award that ignores reality and represents a 23,000% return on plaintiffs’ \$100,000 investment. See Defs.’ Br. at 6, 26-29 (citing record).

In their scramble to defend an indefensible award, plaintiffs once again ignore well-established precedent in Utah and elsewhere holding that estimates of a new business’ future success that are not based on prior or comparable operating experience are inherently speculative and, therefore, legally inadequate to support a lost profit award. See, e.g., Canyon Country Store v. Bracey, 781 P.2d 414, 418 (Utah 1989) (reversing award of damages for lost business based on “theoretical” revenue figures); see also Defs.’ Br. at 86-90 (citing cases); R. Dunn, Recovery of Damages for Lost Profits § 7.14, at 557 (5th ed. 1998) (speculative damage evidence goes to admissibility and “[i]f expert testimony is improperly admitted at trial based on assumptions of fact not substantiated by the evidence, a judgment in favor of the party propounding the expert testimony should be reversed”). Plaintiffs also do not address the numerous cases requiring presentation of even more particularized evidence when valuing an entertainment venture like Channel 13, because of the uncertainties in predicting future profits in such a fickle industry. Id. at 88. Plaintiffs’ silence speaks volumes; it only underscores that plaintiffs’

expert's speculative lost profit estimates fall far short of proving damages "with reasonable certainty." Canyon Country, 781 P.2d at 417.<sup>18</sup>

Plaintiffs' explanation of what Mr. Schutz did to arrive at Channel 13's hypothetical revenue and expense figures only confirms the speculative and legally insufficient nature of his lost profit calculation and fair market value appraisals. In determining his revenue figures, plaintiffs concede that Mr. Schutz "estimated" Channel 13's share of total advertising revenues for the Salt Lake City market to arrive at a gross income figure. See Pls.' Br. at 98. This revenue "estimate" was not based on any actual revenue figures of Channel 13 or any other comparable television station in Utah. It was simply a guess. R.22097 at 28-31.

Mr. Schutz's "estimated direct costs" of operating Channel 13 (see Pls.' Br. at 98) were equally speculative; they were based on industry-wide data with no consideration of Channel 13's actual expenses or the actual operational costs of any other comparable television station in Utah or elsewhere. As Mr. Schutz candidly agreed when questioned by defendants' counsel: "Q. . . . [E]very single item of expense in every one of your

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<sup>18</sup> Contrary to what plaintiffs want this Court to believe, damages cannot be based on pure conjecture. As the cases cited by plaintiffs hold, a plaintiff must still establish damages with reasonable certainty. See Pls.' Br. at 80-83 (citing decisions that confirm that damages must be proven with "reasonable certainty"). Plaintiffs also incorrectly characterize defendants' damage arguments, claiming that defendants are essentially challenging the denial of a remittitur motion and complaining about the admissibility of expert testimony. See id. at 92. Plaintiffs improperly transmute this issue in order to avoid facing the fact that the District Court committed a fundamental *legal error* when it permitted the jury to award damages based on the speculative estimates of Mr. Schutz. Finally, contrary to plaintiffs' claims, defendants marshal the evidence on this issue in their opening brief and demonstrate that, viewed in any light, the evidence was too speculative to support the damage award. See Defs.' Br. at 82-90.

studies simply represents your estimate of the amount of that item of expense for the period involved based on your judgment . . . . A. That is correct.” R.22097 at 27. In summary, Mr. Schutz confirmed that all of his numbers are estimates for the Channel 13 revenues and expenses. R.26389 at 62-63. Indeed, Mr. Schutz’s own written damage appraisals contain the disclaimer that his estimates “are primarily intended for investment evaluation purposes only” and that they “should not be considered as either a direct or indirect prediction[] of what would actually occur.” R.29534 (PX 293 at 3).<sup>19</sup>

Recognizing that their expert’s speculative estimates do not satisfy the reasonable certainty standard, plaintiffs ask this Court to uphold the jury’s award on the basis of other “damage” evidence in this case, including appraisals and business plans by Frazier, Gross & Kadlec, Barry Wood, CPL and Northstar. See Pls.’ Br. at 93-96. This Court should reject plaintiffs’ invitation. Appraisals and business plans generated for the purpose of attracting investors are not sufficient to establish lost profits for a start-up venture. For example, affirming the trial court’s ruling that plaintiff’s proof of damages was too speculative, the Eighth Circuit in Mostly Media v. U.S. West Communications, 186 F.3d 864 (8th Cir. 1999), held that the parties’ business plans could not be used to establish lost profits since these plans “were nothing more than optimistic projections for

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<sup>19</sup> Plaintiffs are wrong to claim that the appraisal approved by the court in Price-Orem, 784 P.2d 475, and Mr. Schutz’s appraisals are “very similar.” Pls.’ Br. at 100. Nothing is further from the truth. The rental revenue figures used in arriving at the appraised value in Price-Orem were based on the actual rents paid by other tenants in the shopping center in question and the rates paid by other tenants in comparable shopping centers in the surrounding Price-Orem area. 784 P.2d at 479. As demonstrated above, Mr. Schutz did not use *any* actual revenue and expense figures from Channel 13 or any other television station in Utah.

an enterprise that never got off the ground.” Id. at 866. Similarly, in Schonfeld v. Hilliard, 62 F. Supp. 2d 1062, 1076-78 (S.D.N.Y. 1999), aff’d in part, rev’d in part, 218 F.3d 164 (2d Cir. 2000), the district court rejected use of “business plans sent to investors” to establish lost profits, noting that the solicitation to invest in a start-up cable television channel “is as much an appeal to faith as to experience” and does not establish with any degree of certainty that the projected revenues would eventually be realized. See also CigarCafe, L.C. v. America Online, Inc., 50 Va. Cir. 146, 162 (Va. Cir. Ct. 1999) (forecast of projected profits developed by plaintiff and defendant “would be too speculative to use as evidence” of lost profits where the forecast was merely the estimates of the profits the parties hoped the joint venture would reap).

Plaintiffs’ reliance on Super Valu Stores, Inc. v. Peterson, 506 So. 2d 317, 330 (Ala. 1987) is therefore misplaced. In Super Valu, an Alabama court permitted a lost profit award based on a party’s pre-dispute projections because the projections resulted from “the application of a scientific methodology that for many years had accurately predicted the future performance of stores associated with Super Valu.” 506 So. 2d at 330. Here, there is no evidence that these “pre-dispute” business plans and appraisals would accurately have predicted the future success of Channel 13. In fact, the evidence shows that the optimistic business plans cited by plaintiffs quickly proved wrong and that Channel 13 was a failed venture that lost over \$11 million in its first two years of operations. See Defs.’ Br. at 85.

The Seventh Circuit recently reiterated that “[d]amages must be proved, and not just dreamed.” Mindgames, Inc. v. Western Publ’g Co., 218 F.3d 652, 658 (7th Cir.



2000), reh'g denied, No. 98-1879, 2000 U.S. App. LEXIS 21295 (7th Cir. Aug. 22, 2000). The court cautioned that “[A] start-up company [like Channel 13] should not be permitted to obtain pie-in-the-sky damages upon allegations that it was snuffed out before it could begin to operate . . . capitalizing fantasized earnings into a huge present value sought as damages . . . .” Id. These comments fit this case exactly: the only thing Mr. Schutz did was capitalize fantasized earnings for a Channel 13 that never existed. Because the evidence supporting the damage awards was based on nothing more than speculation heaped upon conjecture, plaintiffs failed to establish damages with the requisite degree of certainty and this Court should vacate the jury’s award of both lost ownership and cash distributions damages.

**C. The Cash Call Award Cannot Stand.**

As set forth more fully below, the “cash call” award against Wiley Rein and Richard Wiley is not sustainable. Even though plaintiffs admittedly suffered no harm as a result of the issuance of a memorandum that Northstar sent to plaintiffs notifying them of the need to make up the deficiencies in their limited partner capital accounts, the so-called “cash call,” see R.033408-033416 (DX 511), plaintiffs ask this Court to uphold the award and ignore the black letter rule that requires a plaintiff to establish that he or she suffer some actual injury before being entitled to recover damages, see, e.g., Atkin Wright & Miles, 709 P.2d at 336 (reversing judgment when plaintiff could not establish actual damages). It is undisputed that plaintiffs did not suffer (and never will suffer) any actual harm as a result of the cash call. Therefore, this Court should reject plaintiffs’ efforts to retain such a windfall.

## **ARGUMENTS OF RICHARD WILEY**

### **VI. There Is No Basis For Personal Liability On The Part Of Richard Wiley.**

Plaintiffs attempt to make much of what Richard Wiley already has conceded: that, as a partner in Wiley Rein, he is liable for his share of any damages the firm may have caused plaintiffs. See Defs.' Br. at 92. Since a law firm is essentially one lawyer for purposes of fiduciary duties, each law firm member is vicariously bound by the ethical obligations of other lawyers in the firm and liable for a share of any damages the firm causes.

Plaintiffs' citation to this legal truism, and their accompanying recitation of facts seeking to establish that Richard Wiley was bound by Wiley Rein's duties to plaintiffs, ignores Richard Wiley's arguments in this case. For by filing two separate claims in this action, with two special verdict forms, plaintiffs separately sought damages from *both* Wiley Rein *and* Richard Wiley personally. Moreover, the jury awarded plaintiffs damages (including punitive damages) against Mr. Wiley personally, *over and above and in addition to* the damages assessed against the firm. See R.20429-20443; R.20507-20508. To receive compensatory and punitive damages from Richard Wiley personally, in addition to any damages he would be liable for as a member of Wiley Rein, plaintiffs were required to establish some *personal* attorney-client relationship between Richard Wiley and plaintiffs. See *Sucese v. Kirsh*, 606 N.Y.S.2d 60, 62 (N.Y. App. Div. 1993).

Plaintiffs' refusal to acknowledge this fundamental distinction confirms that they seek, in essence, double recovery for the same conduct. For it is uncontroverted that Mr. Wiley did not have a personal attorney-client relationship with any individual plaintiffs at

anytime. See Defs.' Br. at 93-98 (citing record). Plaintiffs claim that the record shows that *Richard Wiley* had a personal attorney-client relationship with MWT Corp., the only plaintiff with whom the jury found Richard Wiley had an attorney-client relationship. In fact, the portions of the record cited show no such thing. See, e.g., R.27176 at 73, 76-77 (Mr. Wiley states that *the firm* represented MWT Ltd., not a party to this litigation, and its general partner MWT Corp.); R.29686-29729 (PX 302B) (time records show Mr. Wiley performing legal services for Northstar). That plaintiffs are forced to rely on such citations confirms that there is no evidence to support the jury's finding that Richard Wiley had a personal attorney-client relationship with MWT Corp.

To the extent plaintiffs are entitled to recover any damages from Wiley Rein, Richard Wiley, as a partner in the firm, is responsible for his fair share. To require more of Richard Wiley (or any other Wiley Rein partner for that matter), without requiring plaintiffs to prove the existence of a personal attorney-client relationship, would violate basic tort law. See Williams v. Barber, 765 P.2d 887, 889 (Utah 1988) (attorney malpractice actions require proof of an attorney-client relationship). There is no reason to rewrite Utah law to sustain the unjust verdict in this case.

**VII. The Court Cannot Affirm The Cash Call Award Because MWT Corp. Never Suffered Any Harm As A Result Of The Cash Call.**

Plaintiffs ask this Court to hold that individuals who never suffered any actual harm are nonetheless entitled to recover damages. See Pls.' Br. at 103-06. Although plaintiffs wrongly assert that this is a sufficiency of the evidence issue, plaintiffs really want this Court to adopt a new *rule of law* that would permit plaintiffs to recover

damages based on Northstar's mere issuance of the "cash call" memo. See R.033408-033416 (DX 511). Yet plaintiffs acknowledge that they never paid a dime as a result of the cash call, Northstar took no steps to recover against plaintiffs on the cash call, plaintiffs will never be required to pay the cash call, and plaintiffs have suffered no harm as a result of the cash call. As plaintiffs' star witness Joseph Lee testified, plaintiffs "haven't paid them [the cash calls]," plaintiffs "protested them," and "[t]here has been no suit [to collect them]." R.24794 at 76. The Court should reject yet another request by plaintiffs to ignore black letter law – this time, the rule that requires a plaintiff to establish that he or she has suffered or will suffer some quantifiable injury before recovering damages. See, e.g., Atkin Wright & Miles, 709 P.2d at 336 (reversing judgment when plaintiff could not establish actual damages).

Once again, plaintiffs ignore the case law defendants cite in their opening brief. For example, plaintiffs do not discuss or even cite the recent decision of the Second Circuit holding that the mere receipt of a letter from a credit card company demanding payment of a debt did not establish actual damages, because there was "no evidence in the record that [plaintiff] paid the debt, acted in reliance on the letter, suffered emotional loss or harm, or responded to the letter in any way." Maguire v. Citicorp Retail Servs., 147 F.3d 232, 238 (2d Cir. 1998). More telling, plaintiffs also pay no attention to their own liability expert who has written: "The mere possibility, *or even probability*, that the plaintiff will sustain an injury at some time does not alter the speculative nature of the damage claim or support a cause of action for legal malpractice." 2 Mallen, Legal Malpractice § 19.3, at 599-600 (emphasis added).

Rather than deal with this clear authority and their own expert's treatise, plaintiffs claim that the right to recover damages arises "when the plaintiff becomes *legally bound* to pay a bill or demand, even though the demand has not been paid at the time of trial." Pls.' Br. at 104 (emphasis added).<sup>20</sup> It goes without saying, however, that a *request* for payment does not, in and of itself, make plaintiffs "*legally bound*" to do anything. Surely, had Northstar ever sought to recover the cash call amounts – and it never did – plaintiffs would have vehemently denied any legal liability. In fact, Joseph Lee testified that plaintiffs "protested" the cash call memo when it was issued. See R.24794 at 76. Therefore, plaintiffs cannot claim that they became "legally obligated" to pay the cash call by merely receiving a memo from Northstar.

Plaintiffs also refuse to accept the undoubted fact that they cannot now be "legally bound" to pay the cash call. As explained in defendants' opening brief, any claim to recover on the cash call is barred because the limitations period ran before trial even

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<sup>20</sup> The cases plaintiffs cite in support of this proposition merely hold that, when it is *undisputed* that the plaintiff will have to pay a debt in the future, a plaintiff is entitled to recover for damages a plaintiff actually has suffered. See Wilson v. Southern Pac. Co., 44 P. 1040, 1042 (Utah 1896) (allowing recovery for medical expenses incurred as a result of injuries sustained when train hit plaintiff even though the medical bills had not been paid as of the date of trial); Wilson Leasing Co. v. Seaway Pharm. Corp., 220 N.W.2d 83, 87 (Mich. Ct. App. 1974) (allowing recovery for financial liability incurred, even though not actually paid at time of trial, when "the liability must eventually be satisfied"); Barilla v. Gunn Buick-Cadillac-GMC, Inc., 528 N.Y.S.2d 273, 280 (Oswego Cty. Ct. 1988) (allowing recovery for expenses incurred as a result of breach of a used car warranty where plaintiff was legally liable to pay the amount although she had not done so). None of these cases deals with a situation where, as here, a plaintiff did not suffer any damages as a result of a request for payment, is not legally bound to make any payment merely due to the issuance of the request, and can never in the future be required to make any payments pursuant to the request.

commenced. See Defs.’ Br. at 101. The District Court took judicial notice that the statute of limitations for claims based on the cash call was six years, that the limitations period began to run in 1991, and that as of 1998 (seven years later) no one had sought to enforce the cash call. R.27121 at 132-136. Plaintiffs do not challenge these rulings.

While the District Court did suggest that there was a remote possibility that at trial plaintiffs could produce some facts establishing that the statute of limitations on the cash call had been tolled, see id., plaintiffs never presented any such evidence, because there is none. More important, to this day plaintiffs have not provided a shred of evidence that they suffered any harm by receiving the cash call. See Pls.’ Br. at 103-106. Actual harm, not the hypothetical “risk of a multi-million dollar liability,” id. at 103, is what is required to prove liability and damages, see, e.g., Harline v. Barker, 854 P.2d 595, 598 (Utah Ct. App. 1993), aff’d, 912 P.2d 433 (Utah 1996); Atkin Wright & Miles, 709 P.2d at 336; Semenza v. Nevada Med. Liab. Ins. Co., 765 P.2d 184, 186 (Nev. 1988).

In short, this Court should not permit any recovery for cash call damages because plaintiffs admit that neither MWT Corp. (the only plaintiff to whom the jury awarded cash call damages), nor any other plaintiff, suffered any actual harm as a result of the cash call. Allowing this award to stand would give plaintiffs an impermissible windfall of \$184,000 in clear violation of Utah law that a plaintiff “may not recover . . . more than his actual damages.” Nelson ex rel. Hirschfeld v. Corporation of the Presiding Bishop, 935 P.2d 512, 514 (Utah 1997). This Court should, therefore, vacate the jury’s award of cash call damages against both Mr. Wiley and Wiley Rein.

### **VIII. There Is No Justification For A Punitive Damage Award Against Mr. Wiley.**

Plaintiffs agree that a jury may only award punitive damages if plaintiffs are entitled to recover compensatory damages. See Pls.' Br. at 110. Because cash call damages were the only compensatory damages that the jury awarded against Richard Wiley and because there is no basis for that award, this Court must also set aside the jury's punitive damage award against Mr. Wiley. Defs.' Br. at 98-102; C.T. v. Johnson, 1999 UT 35, ¶ 15, 977 P.2d 479, 483 (noting that this requirement "assure[s] that punitive damages cannot be recovered where the plaintiff did not sustain any monetary loss or injury").

Even if this Court were to sustain the cash call award, however, there is no evidence supporting the punitive damage award against Richard Wiley. Plaintiffs argue that punitive damages need not relate to the conduct giving rise to the compensatory damage award. See Pls.' Br. at 111. But that is not the law in Utah. This Court in Cook Assocs., Inc. v. Warnick, 664 P.2d 1161 (Utah 1983), held that punitive damages must be tied to tortious conduct. As this Court put it, there must be "an award of compensatory damages to which such punitive damages [can] be ascribed." Id. at 1168; see also DiPrima v. DiPrima, 490 N.Y.S.2d 607, 608 (N.Y. App. Div. 1985) (finding attorney engaged in "deceit or collusion," but rejecting punitive damages because conduct was unrelated to plaintiff's injury). Plaintiffs also neglect to follow the teachings of their own trial expert, who has written that punitive damages must relate to the acts causing the harm for which compensatory damages are awarded. See 2 Mallen, Legal Malpractice § 19.16, at 625 ("[T]he conduct that supports a punitive damages claim must bear a

relationship to the wrongs that are the basis of the legal malpractice claim.”). As a consequence, plaintiffs’ claims that Richard Wiley acted with malice or fraudulent intent during the period *before the cash call*—assertions that are not supported by the record—are irrelevant. Those allegations have no bearing on the 1991 cash call, the only injury that was the basis for the jury’s compensatory damage award against Mr. Wiley.

Finally, plaintiffs’ list of the alleged evils Richard Wiley committed before the cash call, Pls.’ Br. at 111-14, merely demonstrates that he was representing the interests of Northstar (as both a Northstar board member and attorney for Northstar), not that he was “willfully, knowingly and recklessly disregard[ing] the rights of MWT Corp.,” an entity with which Mr. Wiley never had an attorney-client relationship and that was separately represented by Ralph Hardy in all of its dealings with Northstar. See Defs.’ Br. at 26, 91-97 (citing record).

Moreover, at the time the cash call was issued, Wiley Rein no longer represented any plaintiff. There was no evidence that Richard Wiley, who merely served as a director of Northstar, had any direct involvement in the sending of the cash call, which simply notified the limited partners in accordance with the MWT Ltd. Agreement of the need to fund negative balances in their capital accounts. See Defs.’ Br. at 29-30, 103-04 (citing record). Mr. Wiley cannot be punished for Northstar’s exercise of its contractual obligation as MWT’s general partner to issue the cash call. Mere conclusory assertions that Richard Wiley acted with malice in carrying out his responsibilities as a Northstar director (notably, *not* as plaintiffs’ lawyer), Pls.’ Br. at 112, do not rise to the level of



“outrageous conduct” or “exceptional case” for which punitive damages are warranted. See, e.g., Crookston v. Fire Ins. Exch., 817 P.2d 789, 807 (Utah 1991).

In this case, malice is nonexistent. Plaintiffs’ efforts to demonize Mr. Wiley cannot substitute for evidence. Accordingly, the Court should set aside the punitive damage award against Mr. Wiley.

### **DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ “CROSS-APPEAL”**

In a tacit recognition that the District Court’s errors require reversal of the judgment and a new trial, plaintiffs ask this Court to provide advisory opinions on issues they assert will recur upon remand. The Court should reject plaintiffs’ request. First, this Court lacks jurisdiction over plaintiffs’ purported “cross-appeal.” Second, not one of plaintiffs’ arguments has any merit.

#### **I. The Court Lacks Jurisdiction Over The “Cross-Appeal.”**

Plaintiffs’ “cross-appeal” is not proper – and this Court lacks jurisdiction over it – because plaintiffs do not seek to alter the judgment of the District Court. Indeed, plaintiffs concede that they “accept the jury’s verdict and the trial court’s judgment on the verdict.” See Pls.’ Br. at 3, 114. As this Court has emphasized, “[i]t is important to remember that a cross-appeal is a separate appeal raising distinct issues for review” and “a cross-appeal must be able to stand on its own.” MacKay v. Hardy, 973 P.2d 941, 949 n.11 (Utah 1998). Here, plaintiffs’ “cross-appeal” does not – and cannot – “stand on its own” because under well-settled Utah law, a cross-appeal is proper only if a party is seeking to “attack a judgment of a trial court for the purpose of enlarging their own rights or lessening the rights of their opponent.” Nova Cas. Co. v. Able Constr., 1999 UT 69,

¶ 7, 983 P.2d 575, 578 (internal quotation marks and citation omitted). If a party merely desires affirmance of the lower court’s judgment it must not, *and should not*, cross-appeal. State v. South, 924 P.2d 354, 356 (Utah 1996).<sup>21</sup>

“Cross-appeals are properly limited to grievances a party has with the judgment as it was entered – not grievances it might acquire depending on the outcome of the appeal.” Halladay v. Cluff, 739 P.2d 643, 645 (Utah Ct. App. 1987). In other words, a cross-appeal is not a vehicle to seek advisory opinions from this Court in the event of a new trial. Good reasons exist for this rule. “Unnecessary cross-appeals . . . multiply the number of briefs filed and lead to confusion of the issues presented.” South, 924 P.2d at 356; see also Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987) (cross-appeals by parties receiving judgments in their favor unnecessarily “disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges”).<sup>22</sup>

In the present case, this Court’s admonition in South is particularly relevant. Plaintiffs apparently filed this improper cross-appeal so they could obtain the last word in this appeal – an additional 25-page reply brief of issues that plaintiffs themselves concede

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<sup>21</sup> Defendants moved to dismiss plaintiffs’ “cross-appeal” promptly after it was filed. See Oct. 29, 1999 Motion to Dismiss. Because the Court deferred ruling on the Motion to Dismiss, defendants now renew their Motion and incorporate in this brief the arguments set forth in their Motion.

<sup>22</sup> Although conditional cross-appeals are permitted by some courts, they are appropriate only when a party is seeking to overturn or modify a *judgment* of a lower court and are not proper vehicles to seek advisory opinions on rulings made during the trial. See Defendants’ Nov. 24, 1999 Reply in Support of Motion to Dismiss Cross-Appeal at 5-9 (citing cases).

are only contingent.<sup>23</sup> Plaintiffs' novel approach to cross-appeals is contrary to the Utah Rules of Appellate Procedure and undermines the orderly processing of appeals. This Court should dismiss the cross-appeal.

## **II. The District Court Did Not Err By Refusing To Rule As A Matter Of Law That Richard Wiley Had An Attorney-Client Relationship With Plaintiffs.**

Once again, plaintiffs argue a point defendants concede – all members of a law firm owe duties of loyalty to the *firm's* clients. See Pls.' Br. at 115-116. However, because plaintiffs sued Richard Wiley *personally* – separate and apart from his status as a partner of Wiley Rein – they cannot recover against him based merely upon his membership in the firm. To recover against Richard Wiley, plaintiffs had to present evidence establishing the existence of a *personal* attorney-client relationship between plaintiffs and Richard Wiley. Plaintiffs failed to do so below and do not now marshal any evidence establishing that Richard Wiley had a personal attorney-client relationship with any plaintiff. See Pls.' Br. at 114-116. The District Court was therefore correct to reject plaintiffs' request to skip the threshold factual question and rule that, *as a matter of law*, Richard Wiley “had an attorney-client relationship with any plaintiff who is found to be a client of [Wiley Rein].” Id. at 116. See Sorenson, 585 P.2d at 460.

Plaintiffs cannot separately recover against Richard Wiley merely by resting on the legal principle that each attorney of a firm owes a fiduciary duty to each client of the firm. Pls.' Br. at 115. To allow plaintiffs to recover against Richard Wiley on this basis

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<sup>23</sup> Worse yet, plaintiffs may even have filed their “cross-appeal” with the intent to use their cross-appeal reply as an impermissible sur-reply to the points raised in defendants' reply to plaintiffs' opposition brief. See Utah R. App. P. 24(c).

alone – without any showing that he had a personal attorney-client relationship with any plaintiff and without any showing that he breached a personal duty owed to plaintiffs – would permit plaintiffs an impermissible double recovery for the identical claims asserted against Wiley Rein.

### **III. The District Court Should Not Have Admitted The Indemnity Agreements Between Allstate And Defendants To Prove Defendants' Liability.**

Plaintiffs' argument that the indemnity agreements between Allstate, Richard Wiley and Wiley Rein should have been admitted as evidence of defendants' "liability, intent and malice," Pls.' Br. at 122, is wrong for two reasons. First, if anything, the indemnity agreements should not have been admitted for *any* purpose, as evidence of these agreements was unfairly prejudicial and likely confused the jury. As a result, if this Court deems it appropriate to give guidance to the District Court on this issue at all, it should tell the court that the indemnity agreements should not be admitted into evidence at any new trial. Second, at a minimum, the court correctly ruled that the indemnity agreements could not be used to prove misconduct.

*First*, evidence of the indemnity agreements should have been excluded *in their entirety*. Even if there was an evidentiary foundation for the admission of the indemnity agreements for the purpose of showing bias, control or prejudice – the only uses permitted by the District Court, see R.27119 (Nov. 18, 1998 Ruling at 20-21) – the danger of unfair prejudice substantially outweighed any probative value of this evidence. See Utah R. Evid. 403; see, e.g., Braun v. Lorillard, No. 94-C796, 1996 U.S. Dist. LEXIS 205, at \*4 (N.D. Ill. Jan. 10, 1996) (excluding evidence of indemnity agreement offered

to show bias where “existence of the indemnity agreement is likely to distract the jury from essential issues which it is to resolve in a detached manner”), aff’d, 84 F.3d 230 (7th Cir. 1996); Delicious Foods Co. v. Milliard Warehouse, 507 N.W.2d 631, 639-40 (Neb. 1993) (evidence that did not qualify for exclusion as “liability insurance” under Rule 411 must still be excluded to establish liability because the probative value of the evidence far outweighed the danger of unfair prejudice; if the jury learned that plaintiff’s loss was fully covered by another party, “the jury would decide the issue of [defendant’s] liability on the basis that [plaintiff] suffered no great damage”).

In October 1989, ten months after Channel 13 was put up for sale, Allstate entered into an indemnity agreement with Richard Wiley. R.29323-29328 (PX 255). At that time Allstate (through its subsidiary Farragut Communications) owned Northstar, and Northstar was the general partner of MWT Ltd. Id. Mr. Wiley was one of Northstar’s two directors. R.27112 at 125-126. Angered over Northstar’s pending acceptance of the Fox bid to purchase Channel 13, plaintiffs threatened to sue Northstar and its directors, including Mr. Wiley, if they proceeded with the sale. In order to retain Mr. Wiley as director of Northstar, Allstate promised to hold him harmless for any liability incurred as a result of his remaining as a director – including any liability resulting from plaintiffs’ threatened lawsuit. R.29323-29328 (PX 255). *After* plaintiffs filed their suit against defendants, Allstate amended the indemnity agreement to extend its protection to Wiley Rein. R.29485-29488 (PX 279).

The indemnity agreements had no probative value, but they were highly prejudicial. They portrayed defendants as being covered by a “deep pocket” (i.e.,

Allstate) and thereby facing no real liability. See, e.g., Figueroa v. City of Chicago, No. 97-C8861, 2000 U.S. Dist. LEXIS 5661, at \*3 (N.D. Ill. April 24, 2000) (evidence that defendants would be indemnified by the City of Chicago’s “deep pockets” excluded under Rule 403 as such evidence was “unfairly prejudicial”). Knowledge of the agreements also impermissibly permitted the jury to enter a multi-million dollar liability verdict against defendants *to punish Allstate and its subsidiary Northstar* for what plaintiffs strenuously contended throughout trial was wrongdoing by Allstate and Northstar.<sup>24</sup> Accordingly, the District Court should never have permitted plaintiffs to admit the indemnity agreements at all. See DeMary v. Rieker, 695 A.2d 294, 303 (N.J. Super. Ct. App. Div. 1997) (error to admit indemnification agreement where agreement “may have given the jury the impression that in returning a large verdict against [defendant], it was also punishing [the indemnifying party]”).

*Second*, plaintiffs’ argument that the District Court erred in limiting the admission of the indemnity agreements is founded on the false premise that the District Court held the agreements were governed by Rule 411. Pls.’ Br. at 45, 119. In fact, the District Court ruling that plaintiffs challenge (but do not quote) shows clearly that the court concluded that Rule 411 *did not apply*. Nevertheless, recognizing that admitting these agreements in evidence to establish that defendants breached fiduciary duties was wholly

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<sup>24</sup> See, e.g., R.24939 at 33 (Joseph Lee testifying that Northstar’s failure to provide \$2.6 million in financing for Channel 13 after Sidney Foulger defaulted on his loan commitment “was the downfall of the whole thing”); R.21748 at 57-60 (due to the inadequate financing by Allstate and Allstate’s “decision to move forward with the sale [of Channel 13],” plaintiffs’ “valuable interest in Channel 13 was successively whittled away to nothing”).

inappropriate and would be severely prejudicial, the District Court exercised its discretion to limit the purpose for which the jury could use the indemnity agreements. See R.27119 (Nov. 18, 1998 Ruling at 20-24) (“I am persuaded that Rule 411 *is not technically applicable* in this matter . . . . However, the principals behind this [rule] . . . is similar enough to Rule 411 to look at 411 for *guidance* into the *prejudicial effect* of admitting the existence of this indemnity agreement.”); see also R.20354 (Jury Inst. No. 14).

Though not expressly stated in its ruling, it is evident that the District Court applied Rule 403 – that relevant evidence may be excluded if there is a “danger of unfair prejudice.” See Utah R. Evid. 403; see also Nay, 850 P.2d at 1262 (“Although the court did not identify the rule of evidence on which it based its determination, [its] language . . . indicates that the court found the evidence unfairly prejudicial under Utah Rule of Evidence 403 . . . . We [therefore] review [the] trial court’s determination . . . for abuse of discretion . . . .”). The reason for plaintiffs’ distortion of the court’s ruling is clear – plaintiffs want this Court to believe that the District Court made an “error of law,” to obtain *de novo* review of this issue, rather than face the impossible task of demonstrating that the court abused its discretion when it properly ruled that because evidence related to the indemnity agreements would unfairly affect the jury’s liability determination, such evidence could not be used to establish wrongdoing. Pls.’ Br. at 4.

As this Court has consistently held, rulings regarding admissibility of evidence under Rule 403 are reviewed for abuse of discretion and will be reversed only if the ruling “is beyond the bounds of reasonability” and a party can show harm resulting from the error. Nay, 850 P.2d at 1262. Plaintiffs never argue that the District Court’s ruling

was “beyond the bounds of reasonability” or even state how they were harmed by the court’s ruling. These failures alone warrant rejection of plaintiffs’ claim of error.

The District Court properly recognized that there was no connection between an indemnity agreement aimed at keeping Richard Wiley as a director of Northstar and any alleged breaches of his fiduciary duties as a lawyer before the date of the agreement. See R.29323-29328 (PX 255). Further, it is not possible that the indemnity agreement between Allstate and Wiley Rein – which was undisputedly entered into *after* this lawsuit was filed and thus *after* the actions giving rise to the lawsuit had occurred – had any relevance whatsoever to whether defendants did in fact breach any duties owed to plaintiffs. See R.29485-29488 (PX 279).<sup>25</sup>

This Court should, therefore, direct the court overseeing any new trial to rule that the indemnification agreements (and any evidence related to them) are inadmissible as evidence of liability. Furthermore, these agreements should not even be admitted for the limited purposes of showing control, bias or witness prejudice because their prejudice far outweighs whatever probative value they may have.

#### **IV. The District Court Correctly Excluded The Appraisal And Testimony Of Albin Seethaler.**

The District Court properly excluded Albin Seethaler’s appraisal, R.30378-30383 (PX 322), and his testimony because the court found that this evidence was not relevant

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<sup>25</sup> Plaintiffs provide no record support (because there is none) for their unfounded claim that defendants must have “believed they may have breached their duties to plaintiffs” because they received indemnification for “past actions.” See Pls.’ Br. at 121-22. It is precisely this type of argument that shows why admitting the indemnity agreements was so prejudicial to defendants.



to any measure of damages related to plaintiffs' claims. Mr. Seethaler was offered by plaintiffs to provide an opinion that the market value of a Fox-owned Channel 13 in 1998 was \$149.5 million. Pls.' Br. at 122-123. Mr. Seethaler's appraisal and testimony were inadmissible and utterly irrelevant to plaintiffs' damages in this case because: (1) the 1998 value of a Channel 13 owned by Fox bore no relevance to any damages resulting from alleged "breaches of fiduciary duties in the 1990 time frame," Pls.' Br. at 123; and (2) Mr. Seethaler's appraisal was speculative and based on the hypothesized revenues of a Fox-owned Channel 13. The District Court therefore correctly excluded this proffered evidence. Furthermore, because plaintiffs fail to challenge the District Court's determination that Mr. Seethaler's appraisal and testimony should also be excluded because it was prejudicial and would confuse the jury, the District Court's ruling should not be disturbed.

*First*, the 1998 market value of a Channel 13 run by a national media giant has no conceivable bearing on damages plaintiffs suffered between 1987 and, at the latest, 1990, when that station was sold to Fox. As the District Court noted, "if the plaintiffs sold the station in April of 1990, how can the position then be [that] they're then entitled to the appreciated value from 1990 to 1998?" R.27127 (Oct. 27 1998 Ruling at 74-75). In other words, the Court recognized that eight years of ownership and management by a successful broadcast network necessarily affected the value of the station and thus stripped the evidence of any conceivable relevance to the claims in this lawsuit. Accordingly, the court properly excluded Mr. Seethaler's appraisal "for the purpose of establishing the present value of a lost business opportunity . . . ." *Id.* at 76. See State v.

Kohl, 2000 UT 35, ¶ 17, 999 P.2d 7, 12-13 (court has “broad discretion to determine whether proffered evidence is relevant,” and error is found “only if the trial court has abused its discretion”) (internal quotation marks and citation omitted); Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 17, 979 P.2d 317, 321.

*Second*, Mr. Seethaler’s figures were completely speculative and thus legally insufficient to form a proper basis for awarding damages. See, e.g., Canyon Country, 781 P.2d at 414. Admittedly, however, Mr. Seethaler’s own testimony does not bear out the District Court’s finding. Mr. Seethaler admitted that he did not use any actual historical numbers or information in arriving at his 1998 appraised value of the Fox-owned Channel 13, even though the station had been owned and operated by Fox for eight years at the time of Mr. Seethaler’s appraisal, and historical operating information existed. R.27127 at 29, 34-37. The failure to use actual historical numbers in his appraisal is all the more striking because plaintiffs never made any attempts to obtain the information from Fox, by subpoena or otherwise. Id. at 33-34. Damage evidence (such as an appraisal) based on estimates and guesses rather than on available historic data is speculative. See, e.g., Brown v. McIBS, Inc., 722 S.W.2d 337, 341 (Mo. App. 1986) (to prove lost profits for an existing business “[i]t is indispensable that this proof include the income and expenses of the business for a reasonable anterior period”). Mr. Seethaler’s appraisal and testimony should therefore also be excluded on this alternative basis.

*Finally*, plaintiffs’ challenge to the District Court’s ruling is fatally flawed because plaintiffs focus on only *one part* of the court’s ruling – that the proffered appraisal was irrelevant – but fail to challenge (or even address) the District Court’s alternative reasons

for excluding Mr. Seethaler's appraisal and testimony. These additional reasons were as follows: (1) Mr. Seethaler's appraisal "would be more prejudicial than probative" because it was offered to value an opportunity lost by plaintiffs' in 1990 but did not account for the fact that by 1998, Channel 13 had been in the hands of the extremely successful Fox network for eight years; and (2) Mr. Seethaler's testimony would not aid the jury because it was based on "a horrendously confusing set of facts and numbers and theories and assumptions." See R.27127 (Oct. 22, 1998 Ruling at 76-78). Since plaintiffs never challenged these portions of the District Court's ruling, this Court should affirm the court's decision to bar admission of Mr. Seethaler's appraisal and testimony. See, e.g., American Towers Owners Ass'n v. CCI Mech., Inc., 930 P.2d 1182, 1185 n.5 (Utah 1996) ("Issues not briefed by an appellant are deemed waived and abandoned.").

### **CONCLUSION**

For the reasons set forth herein and in defendants' opening brief, the verdict and judgment against Wiley Rein should be reversed and judgment should enter in its favor that: (1) Wiley Rein did not have an attorney-client relationship with any plaintiff after May 1988, (2) Wiley Rein did not breach its duty of confidentiality to any plaintiff, (3) plaintiffs are not entitled to lost ownership damages, (4) plaintiffs are not entitled to cash distribution damages, and (5) plaintiffs are not entitled to cash call damages; any issues remaining thereafter should be remanded to the District Court for a new trial on both liability and damages. The verdict and judgment against Richard Wiley should also

be entirely vacated and judgment should enter in his favor on all claims. In the alternative, the Court should vacate the judgment against each defendant and grant each defendant a new trial on both liability and damages.

In addition, for the reasons set forth above and in defendants' previously filed Motion to Dismiss, plaintiffs' purported "cross-appeal" should be dismissed. Alternatively, the Court should affirm the District Court's rulings challenged by plaintiffs and direct the court overseeing any new trial that: (1) Richard Wiley does not have an attorney-client relationship with any plaintiff, (2) evidence regarding the indemnification agreements between Allstate, Wiley Rein and Richard Wiley is inadmissible for any purpose, and (3) the appraisal and testimony of Albin Seethaler is inadmissible.

Respectfully submitted this 22nd day of November, 2000.

A handwritten signature in black ink, appearing to read 'Mark R. Kravitz', written over a horizontal line.

Mark R. Kravitz

Timothy A. Diemand

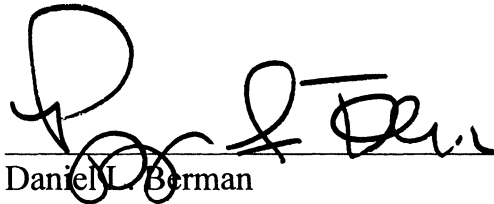
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A handwritten signature in black ink, appearing to read 'Daniel L. Berman', written over a horizontal line.

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I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS WILEY, REIN & FIELDING AND RICHARD E. WILEY AND OPPOSITION BRIEF OF CROSS-APPELLEES WILEY, REIN & FIELDING AND RICHARD E. WILEY** were hand-delivered this 22<sup>nd</sup> day of November, 2000, to the following:

Reed L. Martineau, Esq.

Rex E. Madsen, Esq.

Richard A. Van Wagoner, Esq.

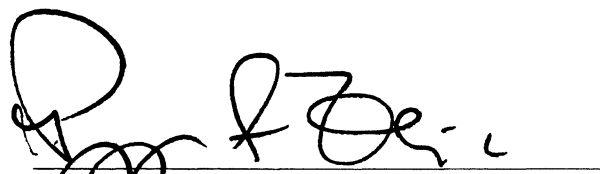
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