

2016

**Ryan Uresk Harvey, Rocks Off, Inc. And Wild Cat Rentals, Inc.,
Plaintiffs/ Appellants, -v.- Ute Indian Tribe of the Uintah and Ouray
Reservation, Et Al., Defendants/ Appellees.**

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellee, *Ryan Uresk Harvey v UTE Indian Tribe*, No. 20160362 (Utah Supreme Court, 2016).
https://digitalcommons.law.byu.edu/byu_sc2/3356

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (2000–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE
SUPREME COURT OF THE STATE OF UTAH

SKYLER WITMAN, JOHN WASHENKO, JONATHAN
BONNETTE, MATT LOVELADY, AND DON JORGENSEN,
Plaintiffs, Appellees and Cross-Appellants,

v.

RICHARD BLOOMFIELD AND RICHARD BLOOMFIELD CFO,
PLLC, et al.,
Defendants, Appellants and Cross-Appellees.

BRIEF OF APPELLEE AND CROSS-APPELLANT

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Katie Bernards-Goodman, District Court No. 120905237

Michael D. Zimmerman
Troy L. Booher
Clemens A. Landau
ZIMMERMAN JONES BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111

*Attorneys for Appellants and Cross-
Appellees Richard Bloomfield and
Bloomfield CFO, PLLC*

Mathew D. Parke (13468)
Brent Gordon (8794)
PARKE GORDON, LLC
1150 West State St., #300
Boise, Idaho 83702

D. Loren Washburn (10993)
WASHBURN LAW GROUP LLC
50 West Broadway, Suite 1010
Salt Lake City, Utah 84101

*Attorneys for Appellees and Cross-
Appellants Skyler Witman, John
Washenko, Jonathan Bonnette, Matt
Lovelady, and Don Jorgensen*

Additional Counsel and Parties on Following Page

FILED
UTAH APPELLATE COURTS

JAN 27 2017

IN THE
SUPREME COURT OF THE STATE OF UTAH

SKYLER WITMAN, JOHN WASHENKO, JONATHAN
BONNETTE, MATT LOVELADY, AND DON JORGENSEN,
Plaintiffs, Appellees and Cross-Appellants,

v.

RICHARD BLOOMFIELD AND RICHARD BLOOMFIELD CFO,
PLLC, et al.,
Defendants, Appellants and Cross-Appellees.

BRIEF OF APPELLEE AND CROSS-APPELLANT

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Katie Bernards-Goodman, District Court No. 120905237

Michael D. Zimmerman
Troy L. Booher
Clemens A. Landau
ZIMMERMAN JONES BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111

*Attorneys for Appellants and Cross-
Appellees Richard Bloomfield and
Bloomfield CFO, PLLC*

Mathew D. Parke (13468)
Brent Gordon (8794)
PARKE GORDON, LLC
1150 West State St., #300
Boise, Idaho 83702

D. Loren Washburn (10993)
WASHBURN LAW GROUP LLC
50 West Broadway, Suite 1010
Salt Lake City, Utah 84101

*Attorneys for Appellees and Cross-
Appellants Skyler Witman, John
Washenko, Jonathan Bonnette, Matt
Lovelady, and Don Jorgensen*

Additional Counsel and Parties on Following Page

Additional Counsel and Parties

Additional counsel:

John H. Bogart
Julie Edwards
TELOS VG, PLLC
299 South Main Street, Suite
1300 Salt Lake City, Utah 84111

Charles A. Stormont
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111

Jacob L. Fannesbeck (14176)
Trinity Jordan (15875)
Smith Correll, LLP
50 West Broadway, Suite 1010
Salt Lake City, Utah 84101

*Attorneys for Appellees and Cross-
Appellants Skyler Witman, John
Washenko, Jonathan Bonnette, Matt
Lovelady, and Don Jorgensen*

*Attorneys for Appellants and Cross-
Appellees Richard Bloomfield and
Bloomfield CFO, PLLC*

Dismissed defendants:

Jonathan Feldman
Millennium Drilling Inc.
Millennium, LLC
Montcalm Co., LLC
Patriot Exploration, LLC
10 Century Finance Company Inc.
Matthew Barnes
Aaron Sokol
William Pepper
Avalanche Drilling Partners
Blackbear Drilling Partners
Sabre Drilling Partners

Table of Contents

Table of Authorities.....	7
Statement of Jurisdiction	11
Statement of Issues Raised By Plaintiffs on Cross-Appeal.....	11
Determinative Provisions for Cross-Appeal.....	12
Statement of Relevant Facts and Procedural History	12
Summary Of The Argument Opposing The Issues On Appeal From Defendants	20
Argument.....	21
1. Plaintiffs' Expert Disclosure Summary Complied With Rule 26 Of The Utah Rules Of Civil Procedure And Defendants Have Failed to Establish That The District Court Abused Its Discretion In Finding That Any Deficiencies In The Expert Notice Were Harmless.	21
1.1 The District Court Did Not Abuse Its Discretion In Finding That Any Failures With Regard To The Expert Notification Were Harmless.....	22
1.2 Plaintiffs' Expert Notice Was Sufficient Under Rule 26.	24
2. Val Oveson's Expert Report Fairly Disclosed The Opinions He Offered At Trial And His Testimony Complied With Rule 702 Of The Utah Rules Of Evidence.	27
2.1 Defendants' Brief Misstates the Procedural Record And Mischaracterizes The Ruling Of The District Court.	27
2.2 Defendants Failed To Identify Any Testimony Offered That Went Beyond the Expert Report.	29
2.3 The District Court Correctly Interpreted Utah Rules Of Civil Procedure Rule 26 As Amended In 2011 In Denying Defendants' Motion In Limine.	30
2.4 Defendants Did Not Argue To The District Court That Mr. Oveson's Report And Testimony Did Not Meet the Requirements Of Rule 702 Because He Did Not Calculate Net Damages, Which Is Their Argument Here.....	31

2.5	Defendants' Argument Is Merely A Quibble With The Factual Conclusions That Oveson Relied On In Making His Conclusions. .33
3.	Mr. Oveson's Expert Testimony Did Not Go Beyond His Written Report.35
3.1	Mr. Oveson's Testimony Was Fairly Disclosed In His Written Expert Report.36
3.2	Mr. Oveson's Methodology Complied With Rule 702.....36
3.3	Defendants Have Failed To Show How They Were Harmed.37
4.	The District Court Sanctioned Plaintiffs By Dismissing The 2007 Accounting Malpractice Claim In Agreement With Defendants' Proposal.38
4.1	The District Court Has Broad Discretion In Fashioning A Discovery Sanction And Did Not Abuse That Discretion in Dismissing Almost Two Thirds Of The Dollar Value Of Plaintiffs' Accounting Malpractice Claims.38
4.2	Defendants' Counsel Proposed The Sanction That Defendants Now Claim Was Insufficient.40
5.	The Jury's Award Of Damages Was Supported By Sufficient Evidence Presented At Trial.....41
5.1	Defendants Did Not Follow Utah Rules Of Appellate Procedure 24(A)(5)(A) By Identifying Where They Preserved This Issue On Appeal.41
5.2	Defendants Did Not Make A Rule 59 Motion In The District Court.43
5.3	Defendants' Rule 50 Motion To The District Court Raised Different Issues Than Those Raised Here On Appeal.43
5.4	The District Court Did Not Plainly Error When It Refused To Grant A New Trial Because The Jury's Verdict Was Not Excessive.45
6.	The District Court Did Not Err In Awarding Prejudgment Interest.....47

6.1	Damages Were Fixed And Definitive At The Time Of Plaintiffs Investment And Not Speculative.	47
6.2	Because Defendants Did Not Raise This Particular Argument Below, Plain Error Review Is Required And No Plain Error Occurred In The District Court.....	49
	Conclusion.....	53
	Summary Of The Argument On Cross-Appeal.....	54
	Background For Cross-Appeal.....	54
	Argument on Cross-Appeal.....	57
1.	The District Court Erred By Incorrectly Stating the Law That Pertains To A Violation Of The Utah Securities Act In The Jury Instructions.....	57
1.1	Jury Instruction 13 Was Adopted In Error Because It Had No Factual Basis.	57
1.2	Jury Instruction 13 Was Error Because It Was Taken From Federal Securities Law And Not Utah Securities Law.	59
1.3	Jury Instruction 13 Was Given In Error Because Even If There Had Been A Claim Based On A Violation Of Federal Securities Law The Factors Included In Instruction 13 Are Not Required To Be Considered In Every Case.	61
1.4	Jury Instruction 13 Was Givern In Error Because It Misstated Utah Securities Law.....	63
1.5	Jury Instruction 13 Was Error Because It Was Prejudicial.....	65
	Conclusion On Cross-Appeal.....	66

Addenda

- A Determinative Provision For Cross-Appeal, UTAH CODE ANN. § 61-1-13
- B Determinative Provision For Cross-Appeal, 15 U.S.C. § 77*l*

Table of Authorities

Federal Cases

<i>Fed. Sav. & Loan Ins. Corp. v. Provo Excelsior Ltd.</i> , 664 F. Supp. 1405 (D. Utah 1987)	61-63
<i>In Re Activision Sec. Litigation</i> , 621 F. Supp. 415 (N.D. Cal. 1985)	61-63
<i>Sec. and Exch. Comm'n v. Murphy</i> , 626 F.2d 633 (9th Cir. 1980).....	62
<i>Winn v. Killian</i> , 307 F.3d 1011 (9th Cir. 2002).....	44

State Cases

<i>Allen v. Friel</i> , 2008 UT 56, 194 P.3d 903	30
<i>Anderson v. Toone</i> , 671 P.2d 170 (Utah 1983)	58
<i>ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.</i> , 2013 UT 24, 309 P.3d 201	46
<i>Baumann v. The Kroger Co.</i> , 2016 UT App 165, -- P.3d --	22
<i>Braithwaite v. W. Valley City Corp.</i> , 921 P.2d 997 (Utah 1996)	46
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968	44
<i>Clifford P.D. Redekop Family LLC v. Utah Cnty. Real Estate LLC</i> , 2016 UT App 121, 378 P.3d 109	39
<i>Crookston v. Fire Ins. Exch.</i> , 817 P.2d 789 (Utah 1991)	23
<i>Eckelson v. Davis Hosp. & Med. Ctr.</i> , 2010 UT 59, 242 P.3d 762	34

<i>Encon Utah, LLC v. Fluor Ames Kraemer, LLC</i> , 2009 UT 7, 210 P.3d 263	47
<i>Gold Standard, Inc. v. Getty Oil Co.</i> , 915 P.2d 1060 (Utah 1996)	46
<i>Highlands at Jordanelle, LLC v. Wasatch Cnty.</i> , 2015 UT App 173, 355 P.3d 1047	47
<i>Holladay v. Storey</i> , 2013 UT App 158, 307 P.3d 584	41
<i>Lebaron & Assocs. v. Rebel Enters.</i> , 832 P.2d 479 (Utah Ct. App. 1991).....	50
<i>Normandeau v. Hanson Equipment, Inc.</i> , 2009 UT 44, 215 P.3d 152	44
<i>Morton v. Cont'l Baking Co.</i> , 938 P.2d 271 (Utah 1991)	38
<i>Pratt v. Nelson</i> , 2007 UT 41, 164 P.3d 366	24, 32, 40, 50, 52
<i>Salt Lake Cnty. v. Butler, Crockett & Walsh Dev. Corp.</i> , 2013 UT App. 30, 297 P.3d 38	24, 32, 51, 52
<i>Schoney v. Mem'l Estates, Inc.</i> , 790 P.2d 584, 585 (Utah Ct. App. 1990).....	38
<i>Seamons v. Brandley</i> , 2011 UT App 434, 268 P.3d 195	41
<i>SFR, Inc. v. Control, Inc.</i> , 2008 UT App 31, 177 P.3d 629	40
<i>State v. Bolson</i> , 2007 UT App 268, 167 P.3d 539	63, 64
<i>State v. Clopten</i> , 2009 UT 84, 223 P.3d 1103	33

<i>State v. Collins</i> , 2014 UT 61, 342 P.3d 789	23
<i>State ex rel. Road Comm'n v. Danielson</i> , 247 P.2d 900 (Utah 1952)	53
<i>State v. Hansen</i> , 734 P.2d 421 (Utah 1986)	57
<i>State v. Jeffs</i> , 2010 UT 49, 243 P.3d 1250	11
<i>State v. Low</i> , 2008 UT 58, 192 P.3d 867	51, 57
<i>State v. Maestas</i> , 2012 UT 46, 299 P.3d 892	65
<i>State v. McCardell</i> , 652 P.2d 942 (Utah 1982)	57
<i>State v. Miller</i> , 2008 UT 61, 193 P.3d 92	11
<i>State v. Perea</i> , 2013 UT 68, 322 P.3d 624	33, 34
<i>State v. Pinder</i> , 2005 UT 15, 114 P.3d 551	51
<i>State v. Standiford</i> , 769 P.2d 254 (Utah 1988)	57
<i>State v. Stringham</i> , 2001 UT App 13, 17 P.3d 1153	57
<i>State v. Tenney</i> , 913 P.2d 750 (Utah Ct. App. 1996).....	58
<i>State v. Winfield</i> , 2006 UT 4, 128 P.3d 1171	40

<i>Steffensen v. Smith's Mgmt. Corp.</i> , 820 P.2d 482 (Utah Ct. App. 1991).....	23
<i>Tuck v. Godfrey</i> , 1999 UT App 127, 981 P.2d 407	39
<i>Turner v. Univ. of Utah Hosps. & Clinics</i> , 2013 UT 52, 310 P.3d 1212	57, 59
<i>USA Power v. PacifiCorp</i> , 2016 UT 20, 372 P.3d 629	50
<i>Vali Convalescent & Care Inst. v. Div. of Health Care Fin.</i> , 797 P.2d 438 (Utah Ct. App. 1990).....	53
<i>W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc.</i> , 568 P.2d 734 (Utah 1977)	39

State Statutes

Utah Code § 15-1-1	47-50, 52, 53
Utah Code § 61-1-3	54, 59
Utah Code § 61-1-13	12, 54
Utah Code § 61-1-22	54
Utah Code § 78B-5-825	11, 42

State Rules

Utah R. App. P. 24	41
Utah R. Civ. P. 26.....	18, 21-26, 40, 42
Utah R. Civ. P. 37.....	19, 40, 42
Utah R. Civ. P. 50.....	41-43
Utah R. Civ. P. 59.....	41-43
Utah R. Evid. 702	20, 27, 31-36

Federal Statutes

15 U.S.C. § 77l	12, 59-62
-----------------------	-----------

Statement of Jurisdiction

Jurisdiction by this Court over the issues presented on appeal is appropriate pursuant to § 78A-3-102(3)(j) of the Utah Code.

Statement of Issues Raised By Plaintiffs on Cross-Appeal

Issue 1: Whether the district court erred by incorrectly instructing the jury on the definition of an offer or sale of a security under the Utah Securities Act in Jury Instruction No. 13 by adding a list of irrelevant factors for the jurors to consider, which lacked a factual basis in this case.

Standard of Review: Whether a jury instruction correctly states the law presents a question of law which this court reviews for correctness. *See State v. Miller*, 2008 UT 61, ¶ 13, 193 P.3d 92. In applying this standard, the reviewing court gives no deference to the district court. *See State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d 1250.

Preservation: Plaintiffs and Defendants disagreed on the language that should be included in the jury instruction defining an offer or sale so they filed different proposed jury instructions defining offer or sale. [R. 6238-39.] Plaintiffs objected to the jury instruction proposed by Defendants defining offer or sale of a security, which the district court ultimately used to instruct the jury. [R. 6294-95.] This issue was also in Plaintiffs' Memorandum in Opposition To Defendants' Motion For Judgment Under Utah Code § 78B-5-825. [R. 7261 n.13.]

Determinative Provisions for Cross-Appeal

The following provisions are set forth in the addenda.

Addendum A.

UTAH CODE ANN. § 61-1-13

UTAH CODE ANN. § 61-1-13(1)(bb)(i).

“Sale” or “sell” includes a contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

UTAH CODE ANN. § 61-1-13(1)(bb)(ii):

“Offer” or “offer to sell” includes an attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Addendum B.

15 U.S.C. § 77f

Statement of the Case

1. Defendant Bloomfield Solicited Plaintiffs to Invest \$5,300,000 in Oil and Gas Partnerships and Received an Undisclosed Commission of \$424,000.

Richard Bloomfield is a Certified Public Accountant and the sole owner of Bloomfield CFO, PLLC, his co-defendant, which provided tax-planning services to Plaintiffs. [R. 9189-91, 9199.] Mr. Bloomfield first initiated an accountant/client relationship with Plaintiffs in 2006, when he was hired as Plaintiffs’ company accountant and began advising them personally on asset protection. [R. 9202-05; 9267.] This accountant/client relationship between Mr. Bloomfield and Plaintiffs continued until 2009, except with Mr. Jorgenson, with whom Mr. Bloomfield ended his accountant/client

relationship in 2008. [R. 9204-05.]

In 2006, Mr. Bloomfield began introducing some of his clients to a program run by a man named Jonathan Feldman, who was the architect of an oil and gas investment that was purported to provide both investment returns and a reduction in income taxes equal to the amount invested. [R. 9219; 9017-18; 9236; 9275-76; 9457; 9868-70.] In 2007 he introduced this program to Plaintiffs, whom he told that every dollar they invested in the oil and gas partnerships would reduce their income tax liability in the year of the investment by one dollar: a dollar for dollar reduction. *Id.* Mr. Bloomfield also told Plaintiffs that he had invested in Mr. Feldman's program and that he had received returns of 13 to 15 percent per year, and that they could expect returns in the same amount; Mr. Bloomfield actually had not invested prior to recommending that Plaintiffs invest. [R. 9021; 9122-23; 9276; 9401; 9454; 9496; 9721.] For introducing his clients to the investments, Mr. Bloomfield was paid a commission of 8% of the amount his clients invested with Mr. Feldman, which he did not disclose to them. [R. 9028-29; 9219-23; 9465; 9496-97.]

Mr. Bloomfield had as many as eight or nine meetings with many of the Plaintiffs during 2007 and 2008 to discuss the oil and gas investments. [R. 9223-24.] Mr. Bloomfield was the only person that Plaintiffs Jonathan Bonnette, Don Jorgenson and Matt Lovelady ever met with concerning the investments. [R. 9280-81; 9291.] Messrs, John Washenko, and Skyler Witman met with Mr. Bloomfield, and also had one meeting with Mr. Feldman and Mr. Bloomfield, which took place in Utah. [R. 9224-27.]

After meeting with Plaintiffs, Mr. Bloomfield had projections prepared to identify

the optimal level of investment for each Plaintiff. [Tr. Ex. 53; R. 9707-08.] Following Mr. Bloomfield's recommendations, in 2007 Plaintiffs invested a total of \$3,500,000 in two oil and gas partnerships named Sabre and Black Bear: Mr. Bonnette invested \$800,000; Mr. Jorgenson invested \$300,000; Mr. Lovelady invested \$800,000; Mr. Washenko invested \$800,000; and Mr. Witman invested \$800,000. [R. 6911.] Mr. Bloomfield was paid \$280,000 for introducing Plaintiffs to the Feldman investment in 2007. [R. 9245-46.]

In 2008 Mr. Bloomfield again approached Plaintiffs and solicited them to invest in another of Mr. Feldman's oil and gas partnerships called Avalanche. [R. 9283-84.] Mr. Bloomfield encouraged them to invest early in 2008, which was before they could make accurate projections of their 2008 income. [R. 9285-86; 9876-77.] For 2008, Plaintiffs met only with Mr. Bloomfield to discuss the possibility of investing in additional oil and gas partnerships. [R. 9058-59; 9291; 9464.] Again, Mr. Bloomfield was the one who suggested the amount Plaintiffs should invest. [R. 9057-58; 9287-91; 9463-64.] Based on Mr. Bloomfield's recommendations, Plaintiffs invested a total of \$1,800,000 in Mr. Feldman's Avalanche oil and gas partnership in 2008: Mr. Bonnette invested \$400,000; Mr. Jorgenson invested \$200,000; Mr. Lovelady invested \$400,000; Mr. Washenko invested \$400,000; and, Mr. Witman invested \$400,000. Mr. Bloomfield was paid \$144,000 for introducing Plaintiffs to the Mr. Feldman's investment in 2008. [R. 9245-46.]

2. Plaintiffs Lost The Money They Invested And Were Audited By The IRS Putting Their Tax Savings That Mr. Bloomfield Had Promised Them At Risk.

After Plaintiffs made the investments, they did not receive the returns Mr. Bloomfield had represented and they were told that the partnerships were unable to pay any returns. [R. 9062; 9288-90.]

Later, the IRS began an audit of the oil and gas partnerships in which Plaintiffs had invested. [R. 9112-13; 9170; 9279; 9291-92; 9295; 9433; 9753.] At the time Plaintiffs filed their suit, and indeed during trial, the IRS audit was ongoing as to Plaintiffs' investment in the Feldman oil and gas partnerships. [R. 9063; 9112; 9295; 9433.] During trial, Plaintiffs testified that they had received preliminary settlement documents from the IRS that would require them to pay hundreds of thousands of additional taxes each. [R. 9112-13; 9170; 9306; 9531-45.] As a result of the audits, Plaintiffs were uncertain whether they would receive any of the tax benefits they had taken with respect to their 2007 or 2008 returns. [R. 9113; 9169-70; 9295; 9433.]

3. Plaintiffs Received No Tax Benefit For Their Investments In 2008 And Never Received The Dollar For Dollar Tax Reduction Promised By Mr. Bloomfield For Their 2008 Investments On Any Tax Returns, Which Were Later Audited By The IRS Putting The Limited Benefit They Received For Other Years At Risk.

Although Mr. Bloomfield induced Plaintiffs to invest in oil and gas partnerships in 2008 by telling them that they would need to invest as a tax planning strategy to reduce their taxes, in fact none of the Plaintiffs received any tax benefit from the oil and gas investments on their 2008 tax returns. [R. 9285-86; 9878.]

They were able to use their unneeded loss deductions from their 2008 investment

with respect to other tax years. Under certain circumstances, the tax laws allow a taxpayer to deduct losses in a current year against gains on past years' tax returns (carry back) or to deduct losses in a current year against gains on future years' tax returns (carry forward). [R. 9598.] Plaintiffs' tax preparers carried back and carried forward the losses from Plaintiffs' investment in 2008 to reduce taxes for earlier and later years.

However, even accounting for carry backs and carry forwards, Plaintiffs never received the dollar-for-dollar tax savings they had been promised, but instead received tax savings of about sixty cents for each dollar invested for 2007 and 2008 combined. [R. 9869-9873; Tr. Ex 90.] For the 2008 investments they received an even lower tax savings percentage. According to Defendants' expert, Mr. Witman received only about \$130,000 in tax savings from his investment of \$400,000 in 2008. [R. 9898.] This was a result of carry backs, which saved him about \$30,000 and carry forwards, which saved him approximately \$80,000. *Id.* However, as Mr. Witman testified, the IRS was auditing his taxes and questioning even those benefits. [R. 9112-13.] Mr. Washenko saved roughly the same amount (\$130,000) from his \$400,000 investment. [R. 9899.] According to Defendants' expert, Mr. Bonnette saved only about \$40,000 from his \$400,000 investment in 2008. [R. 9901-02.]

In addition to being at risk from the audit, these savings do not account for the time-value of money, which would reduce the real-dollar value of the savings realized in later years even more. [R. 9904-06.] Defendants' own expert concluded there is no chance that Plaintiffs could ever receive the dollar-for-dollar savings that had been promised for their investments in 2008. [R. 9905-06.]

4. Plaintiffs Filed Suit and Made Expert Disclosures In Accordance With the Rules

Plaintiffs filed the Complaint initiating this suit in August 2012. They ultimately entered a settlement with all defendants named in the original complaint other than Defendants Bloomfield and Bloomfield CFO. [R. 9311-13.]

In January 2015, Plaintiffs complied with the district court's scheduling order and timely served Rule 26(a)(A)(4) disclosures. [R. 4804-09.] Defendants objected to the filing, arguing that Plaintiffs' disclosure statement was deficient in numerous ways. [R. 4783-4798.] Plaintiffs filed an opposition in which they argued that even if there was a deficiency, the district court should not strike Plaintiffs' experts because, among other things, any deficiency was harmless to Defendants. [R. 4844-45.] Indeed, Plaintiffs offered to supplement their expert disclosures if Defendants believed that would be helpful, or to stipulate to an extension of deadlines for expert discovery. [R. 4845.] Defendants did not identify or make a record—then or later—of any specific harm they suffered from the alleged deficiencies. [R. 4854.] The district court denied Defendants' motion, finding that Plaintiffs' expert disclosures complied with Rule 26, and that “any alleged error was harmless.” [R. 5240.]

Thereafter, Plaintiffs' accounting expert, Val Oveson, prepared a final expert report that was timely served on Defendants. [R. 4909-36.] In this report Mr. Oveson calculated the damages to Plaintiffs from investing in the oil and gas investments in 2008. [R. 4912-13.] In doing so, Mr. Oveson concluded that “the Net Operating Losses claimed by reason of the oil and gas investments in the future cannot be quantified *nor is the*

benefit certain.” [R. 4911-12, n. 2] (emphasis added). At trial, Mr. Oveson testified consistent with this conclusion. When asked why he assigned no value to carry forwards for one of the Plaintiffs, Mr. Oveson explained, “[T]hey’re speculative. They may or may not happen, because if you don’t have income in the future to offset those losses at the end of the 20 year period, they go away.” [R. 9599.]

Defendants filed a motion styled “Motion in Limine Re Nature and Scope of Plaintiffs’ Experts’ Testimony.” [R. 5502-07.] Plaintiffs responded to this motion by arguing that Defendants had provided nothing other than speculation that Plaintiffs’ experts intended to offer “testimony at trial that materially differs from the opinions and reasoning contained in their reports” and that Plaintiffs actually intended to offer only testimony consistent with his report. [R. 5758-5764 at 5762.] After argument, the district court heard and denied Defendants’ motion, finding that the expert reports were “summary and further testimony elaborating on the reports will be allowed.” [R. 6279.]

During trial some Plaintiffs testified that they had reached preliminary settlements with the IRS regarding their 2007 taxes. [R. 9114; 9170; 9383.] These settlements had not previously been disclosed in discovery. [R. 9531-45.] The settlements pertained only to the investments Plaintiffs made in 2007. [R. 9539.] Defendants moved the district court to impose sanctions for Plaintiffs’ failure to turn over the documents related to their settlement with the IRS. [R. 9383-96.] After initially asking the district court to dismiss all Plaintiffs’ accounting malpractice claims, counsel for Defendants argued that Plaintiffs’ “claims, at least as to those years when they violated Rule 26,” *i.e.* 2007, should not go forward. [R.9387.] Later, Defendants’ counsel noted that, “if the expert is

no longer offering that opinion, it certainly seems that that would be an appropriate finding by the Court again on the – pursuant to the Rule 26 and Rule 37 that there are no damages available for any investments made in 2007.” [R. 9388.] The district court heard argument and issued an oral ruling [R. 9553], which was followed up by a written order finding a discovery violation, prejudice, and dismissing all accounting malpractice claims related to Plaintiffs’ 2007 investments. [R. 7096-7101.] In doing so, the district court selected one of the sanctions that had been proposed by Defendants’ counsel.

5. The Jury Instructions On the Utah Securities Act Were Misleading and Improperly Instructed the Jury.

In the joint pretrial order, Plaintiffs objected to Defendants’ proposed jury instruction number 13 (“Instruction 13”). Instruction 13 defined sale or sell of securities. [R. 6915.] Plaintiffs argued that, “because none of [the factors identified in Instruction 13] are factually applicable, a jury may be confused and believe that the Bloomfield Defendants did not offer or sale the securities to Plaintiffs because none of these factors are factually relevant.” [R. 6294.] Just before trial started the district court made rulings on the jury instructions, overruling Plaintiffs’ objection to Defendants’ proposed instruction, finding that “I don’t have a problem with those lists” “of behavior that might constitute securities fraud” even though those lists had no factual relevance to the case. [R. 8865; 8871.]

Summary Of The Argument Opposing The Issues On Appeal From Defendants

Defendants' appeal presents numerous arguments that were never made to the district court, most of which simply constitute disagreements with the district court's exercise of discretion and with Plaintiffs accounting expert's interpretation of facts.

In issues one, two, three, and five, Defendants challenge Plaintiffs' accounting expert, Mr. Oveson. The district court found that even if there were deficiencies in the summary expert notice as alleged in issue one, those errors were harmless, and Defendants failed—here and below—to demonstrate that this ruling was erroneous. In issues two and three Defendants argue that Plaintiffs' expert was allowed to testify to matters not fairly disclosed in his expert report, but Defendants fail to identify any piece of testimony that was allegedly outside the scope of his report. They also allege that Mr. Oveson's report and testimony were not admissible under Rule 702, but in reality, in their argument they simply quibble with Mr. Oveson's factual conclusion about the uncertainty of the tax benefits they think he should have weighted more heavily. Similarly in issue five Defendants argue the evidence was insufficient to sustain a finding of damages. Ignoring their very different argument made to the district court below, they also fail to account for the fact that even their own expert found that Plaintiffs never received anywhere near the benefits that Defendants promised. In any event, Mr. Oveson was entitled to disregard the tax benefits they allege he had to consider because he found that they were still uncertain to exist, and Plaintiffs' testimony that the oil and gas investments were under audit provided a factual basis for that conclusion.

In issue four Defendants find fault with the district court for imposing a discovery sanction that they themselves recommended.

Finally, in issue six, Defendants contend that the district court ordered pre-judgment interest at an improper rate. However, the argument Defendants are making now was never made to the district court, and at the time, the district court's decision was consistent with Utah law.

Argument

This brief will first address the arguments raised by Defendants in their opening brief, in the order presented therein. The brief will then address the issue raised by Plaintiffs on appeal: the legal error committed by the district court in giving Jury Instruction 13.

1. Plaintiffs' Expert Disclosure Summary Complied With Rule 26 Of The Utah Rules Of Civil Procedure And Defendants Have Failed to Establish That The District Court Abused Its Discretion In Finding That Any Deficiencies In The Expert Notice Were Harmless.

Rule 26 of the Utah Rules of Civil Procedure (Utah R. Civ. P.), which was amended in 2011, governs disclosure obligations, including expert disclosures. Under the amended rule, a party who bears the burden of proof on an issue for which expert testimony is offered (the Designating Party) must provide notice of its intent to designate a person as an expert witness. *See* Rule 26(a)(4)(A). Among other things, the Designating Party is required to provide "a brief summary of the opinions to which the witness is expected to testify" and "all data and other information that will be relied upon by the witness in forming those opinions." *Id.* The party who receives such notice (the

Opposing Party) may elect to either 1) take the expert witness' deposition, or 2) have the expert prepare a report of their opinions. *See id.* at 26(a)(4)(B).

If the Designating Party fails to disclose a witness or document, the evidence may be excluded provided there was no good cause and the failure to disclose was not harmless. Rule 26(a)(4)(A).

The Advisory Committee notes from the 2011 amendments make clear that the purpose of the 2011 amendments, which included amendments to Rule 26, are to “curb[] excessive expert discovery.” *See* Utah R. Civ. P. 1 advisory comm. notes. The objectives of the disclosure are two-fold (1) to reduce costs by giving litigants an informed choice of whether to get a report or take a deposition of an expert, *see* Utah R. Civ. P. 26 advisory comm. notes, and, (2) avoid surprise testimony at trial. *See id.* Neither objective is advanced by Defendants' arguments; indeed, Defendants would expand excessive expert discovery.

1.1 The District Court Did Not Abuse Its Discretion In Finding That Any Failures With Regard To The Expert Notification Were Harmless.

The district court denied Defendants' motion to strike Plaintiffs' experts' summary notices. [R. 5240.] In that ruling, the district court found that even if there was a deficiency in the summary notice (which the district court found there was not), any error was harmless. *Id.*

This finding of harmless error is reviewed for abuse of discretion. *Baumann v. The Kroger Co.*, 2016 UT App 165, ¶ 8, -- P.3d --. An error is harmless if it is “sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the

proceedings.” *State v. Collins*, 2014 UT 61, ¶ 44, 342 P.3d 789 (quotations and citation omitted). “Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict.” *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991). “On appeal, the appellant has the burden of demonstrating an error was prejudicial.” *Steffensen v. Smith’s Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991) (quotations and citation omitted).

In their briefing to the district court Defendants did not identify any harm they suffered because of the alleged violations. [R. 4783-4797.] While Defendants did argue to the district court that the alleged omissions were “not harmless,” Defendants identified nothing specific in support of this assertion. [R. 4797.] Instead they offered only a generic lecture on the importance of compliance with discovery rules and, in their reply, a statement that their experts needed information “now, not weeks from now.” *Id.*; [R. 4854]. Plaintiffs offered that any harm could be cured by granting Defendants more time to file their expert responses. [R. 4844-45.] The district court evidently found Defendants’ generic, unsupported description of harm unconvincing and ruled that any violation related to the summary report was harmless. [R. 5240.]

On appeal, Defendants have articulated different theoretical harm not identified below, but again have provided nothing specific or any basis to conclude that the district court’s finding of harmlessness was in error. Appellant Br. at 27-28. Defendants’ only argument of harm before this Court is that they were “foreclosed” “from having the opportunity to review a summary report before deciding whether to obtain a full written expert report from Oveson or depose him.” *Id.* at 27. This argument was not raised before

the district court, and thus, their current argument related to harmlessness should be reviewed for plain error. *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366; *Salt Lake Cnty. v. Butler, Crockett & Walsh Dev. Corp.*, 2013 UT App. 30, ¶ 33, 297 P.3d 38.

Defendants chose to have Plaintiffs' experts prepare a full written report, and notably, made this request *before* the district court even decided on Defendants' objection to the summary designations. [R. 4838 n.2.] Further, Defendants have never made an argument, much less presented any evidence, that they would have chosen a deposition rather than the expert report had the summary report been different. Importantly, Defendants did not move the district court below to allow them to change their election or to obtain additional discovery, such as a deposition in addition to the report to counteract the deficiencies they now allege, even though Plaintiffs' counsel offered that he believed "that there should be at least a limited deposition, you know, after reports to address some of those issues." [R. 8503-04.] Defendants never requested such a deposition. They only asked for a final expert report, which they received.

Defendants were also able to find their own expert who offered his own opinions on all the material issues in the case. At no point did Defendants offer evidence that their own expert's report or testimony was adversely affected by the alleged deficiency in the summary expert report.

1.2 Plaintiffs' Expert Notice Was Sufficient Under Rule 26.

Defendants' argument fails for another reason: There was no error in the summary report that was provided. A notice of intent to designate expert witnesses is the first step—not the last—in the expert discovery process contemplated by Rule 26. *See*

generally R. 26(a). Rule 26 provides that parties are required to provide the opposition with a “**brief** summary of the opinions to which the witness is **expected to testify**.” R. 26(a)(4)(A)(ii) (emphasis added). Plaintiffs provided a sufficient summary. Plaintiffs’ notice to designate Mr. Oveson as an expert witness reads, in pertinent part:

Mr. Oveson will **provide an analysis of relevant issues in this case**, including, but not limited to, the following:

(1) That accountants engaged in providing services to clients in Utah have a **duty to exercise due care** in performing those services;

(2) That accounts engaged in providing income tax services to clients have specific duties imposed by U.S. Treasury Department circulars and the ethical codes issued by national professional organizations applicable to accountants in Utah, including duties to avoid conflicts of interest;

(3) That the ethical codes require an accountant to perform due diligence investigation into both the factual basis and likely merit of tax positions or tax-related transactions before recommending them to clients;

(4) That accountants are prohibited from providing tax advice or preparing tax returns for clients when their own financial interest or other personal interest may affect the advice they give unless the client give specific consent in writing;

(5) That at least the following actions alleged in the complaint implicate Defendants’ **ethical duties** to Plaintiffs and the standards of care and professional competence required of accountants in Utah:

A. Accepting commissions or contingency fees from third parties for referring Plaintiffs to the third parties when Defendant will be preparing tax returns and giving tax advice relative to the transaction;

B. Advising Plaintiffs to enter the oil and gas transactions in 2007; and

C. Advising Plaintiffs to enter the oil and gas transactions in 2008.

[R. 4806-4807.] (emphasis added).

Plaintiffs provided more than a “brief” summary of the opinions that Mr. Oveson was expected to offer at trial. Specifically, the notice informed Defendants that Mr. Oveson would testify that accepting commissions and advising Plaintiffs to enter the oil and gas transactions as alleged in the complaint “implicate Defendants’ ethical duties.”

Subsequently, Mr. Oveson provided a written report that addressed Defendants’ conduct in light of all the standards identified in the summary report as well as calculating damages from the investments that Mr. Bloomfield advised Plaintiffs to make. [R. 4909-36.] As the advisory committee notes state the 2011 amendments to Rule 26 in adding this brief summary, sought to ensure the expert would not offer surprise testimony at trial. Utah R. Civ. P. 26 advisory committee notes (2014). Here Defendants have not identified any surprise testimony.

Finally, the summary notice included a list of the data and other facts that Mr. Oveson would rely on as required by Rule 26(a). [R. 4807-4808.] Defendants argue on appeal that the tax returns were not specifically mentioned in the list, but they were part of the discovery that was listed in the disclosure. *Id.* Again, as the advisory committee noted, if the expert is relying on “materials produced in discovery, then a list of the specific materials relied upon is sufficient.” Utah R. Civ. P. 26 advisory committee notes (2014).

The district court did not abuse its discretion in finding that Plaintiffs’ summary report complied with Rule 26 and that any errors in the report were harmless. Accordingly, Defendants’ appeal on this issue must be denied.

2. Val Oveson's Expert Report Fairly Disclosed The Opinions He Offered At Trial And His Testimony Complied With Rule 702 Of The Utah Rules Of Evidence.

Defendants next argue that the district court erred in failing to exclude Mr. Oveson's testimony because, they argue, the district court made the wrong interpretation of the amended Utah Rules of Civil Procedure. They also argue that Mr. Oveson's report should have been excluded because it violated rule 702 of the Utah Rules of Evidence.

2.1 The Defendants' Brief Misstates The Procedural Record And Mischaracterizes The Ruling Of The District Court.

As an initial matter, it is important—though exceedingly difficult—to identify what ruling Defendants are challenging on appeal. This is made difficult by: (1) confusion between the table of contents/heading to Defendants' argument and the actual argument made in the brief; (2) the confusion between the characterization of the motion the district court was ruling on in Defendants' brief and the actual motion filed by Defendants which led to the challenged ruling identified in the brief; and, (3) by Defendants' failure to identify a single piece of evidence admitted at trial that would violate the ruling they argue should have been made.

In the table of contents and in the heading in their brief, Defendants define issue two as follows: "The district court erred in interpreting the 2011 amendments as allowing the Plaintiffs to submit a full written report that went significantly beyond their expert disclosures." Appellant Br. at 28. But at no point in that section of the brief do Defendants actually make that argument. *Id.* at 28-32. Rather, their argument that section of their brief is best characterized as "[T]he district court should not have permitted any

testimony from Mr. Oveson that was not previously disclosed.” *Id.* at 30. This is important because Defendants do not identify any testimony offered by Mr. Oveson at trial that went beyond what was disclosed in his full written report.

The Defendants also mischaracterize the motion that led to the ruling they claim to be appealing. *Id.* at 3. Defendants argue before this Court that the “district court denied the Bloomfield Defendants’ motion in limine seeking to exclude Mr. Oveson’s report.” *Id.* at 28. But the motion they cite as preserving the issue in their brief is captioned “Motion And Memorandum In Support Of Motion In Limine Re Nature And Scope Of Plaintiffs’ Experts’ Testimony” which sought an order “defining and limiting the nature and scope of testimony offered by Plaintiffs’ experts.” *Id.* at 3-4; [R. 5502-07.] This is the motion at issue in the ruling identified in Defendants’ brief as preserving this issue. Appellant Br. at 3-4; [R. 6279.] The motion they cite in their brief as having preserved the issue did not raise any of the issues they raise in section two of their brief.

Though they did not cite it in their brief, Defendants did file a motion to strike the testimony of Mr. Oveson (indeed they filed it twice), which raised similar, but not the same, issues as the ones they raise in their brief to this Court. [R. 5277-5329; 6022-24.] However, at no point in their brief do Defendants cite that motion. Curiously, they do cite to Plaintiffs’ arguments in opposition to the motion to strike, without identifying them as such. Appellant Br. at 31; [R. 5833.] Defendants also never reference the district court’s ruling on their motion to strike Mr. Oveson’s testimony, which is in the record. [R. 8791-92.]

In short, given the confusion in Defendants' brief and the fact that the issues raised in their opening brief to this Court were not at issue in the ruling they say they contest, it is not clear which ruling of the district court Defendants believe constitutes error.

To the extent the Court limits Defendants to assigning error to the arguments they made in the motion they say preserved the issue, Defendants did not preserve the argument they are making now on appeal.

2.2 Defendants Failed To Identify Any Testimony Offered That Went Beyond The Expert Report.

As noted above, Defendants' brief argues that Mr. Oveson's testimony should have been limited to the testimony previously disclosed in his final expert report. Appellant Br. at 30. However, Defendants have failed to identify any testimony offered at trial that went beyond what was fairly disclosed in the expert report. Neither in this section of their brief, nor anywhere else that Plaintiffs can identify, do Defendants identify for this Court any testimony of Mr. Oveson that was outside the scope of his expert written report.¹

¹ The only record cite in Defendants' brief that even possibly touches on evidence offered outside the scope of Mr. Oveson's report is a record cite at page 33 in Section three of Defendants brief. [R. 9574-75.] They argue that this passage shows that the district court overruled Defendants' objection to "Plaintiffs' attempt to allow Mr. Oveson to rely on additional evidence to cure the defects in his damages methodology." However, the document at issue there, Trial Exhibit 62, had nothing to do with damages and was used only to demonstrate that the Bloomfield Defendants claimed to comply with Circular 230 and therefore IRS Circular 230 was a standard that provided a measure of Bloomfield's ethical compliance. Circular 230, however, was disclosed in both Mr. Oveson's summary disclosure and in his final report and so this testimony was fairly disclosed in his expert report. [R. 9574-9577; 4910; 4808.]

Thus, even if the district court's legal ruling was incorrect, and Mr. Oveson's testimony should have been strictly confined to his written expert report, Defendants have not identified any evidence admitted based on that ruling that would constitute error.

Failure to identify a piece of evidence admitted in violation of the ruling they say should have been made is fatal to Defendants' issue on appeal. Neither Plaintiffs nor this Court is required to sift through the 10,000-page record of this case hunting for a piece of Mr. Oveson's testimony that Defendants might think went beyond the scope of his expert report. "An appellate court is not a depository in which a party may dump the burden of argument and research." *Allen v. Friel*, 2008 UT 56, ¶ 9, 194 P.3d 903 (quotation and citations omitted). Further, identifying such evidence in the reply brief would be too late as it would not provide Plaintiffs the opportunity to respond in their briefing. *Id.* at ¶ 8.

2.3 The District Court Correctly Interpreted Utah Rules Of Civil Procedure Rule 26 As Amended In 2011 In Denying Defendants' Motion In Limine.

The district court correctly denied Defendants' motion in limine that sought to limit Mr. Oveson's trial testimony to matters previously disclosed in his final expert report.² The district court stated that "[t]he reports are found to be summary and further testimony elaborating on the reports will be allowed." [R. 6279.] Defendants argue that the district court was wrong in this conclusion based on the 2011 amendments.

² As noted above, Defendants mischaracterize this ruling as one based on a motion never filed by Defendants below. It is not clear why Defendants mischaracterized the motion on which the district court was ruling.

Defendants' argument is not based upon a fair reading of the district court's ruling and, in any event, the alleged harm never occurred as noted in Section 2.2 above. The district court explained her ruling:

[A] report cannot be verbatim and that even a final report is going to have to be somewhat of a summary of what an expert has to say . . . I'm going to consider their reports to be something that they are allowed to elaborate on. If they [sic] totally outside of anything they have said in that report, then I'll entertain that objection at trial.

[R. 8791-92.] Defendants have not pointed to any objection they made at trial that was overruled leading to testimony that was not fairly disclosed in the expert report.

The district court's ruling advanced the goal of the advisory committee's amendments by limiting Mr. Oveson's testimony to topics fairly disclosed in his final report. The ruling did not allow, nor result in, surprise testimony from a surprise witness. Defendants cross-examined Mr. Oveson on every opinion he offered at trial, and did so vigorously. [R. 9603-35.]

2.4 Defendants Did Not Argue To The District Court That Mr. Oveson's Report And Testimony Did Not Meet the Requirements Of Rule 702 Because He Did Not Calculate Net Damages, Which Is Their Argument Here.

Defendants further argue that the district court erred by allowing the Plaintiffs' expert report because it violated rule 702 of the Utah Rules of Evidence.³ More specifically they argue that Mr. Oveson's expert testimony should have been excluded

³ While Defendants claim to have objected to Mr. Oveson's expert report, it was never offered into evidence by Plaintiffs so presumably their argument is that his testimony should not have been admitted.

because although he identified the correct methodology for calculating damages, “Mr. Oveson did not employ this methodology.” Appellant Br. at 31.

This argument is raised for the first time on appeal. Although, as noted above, but not cited in Defendants’ brief, Defendants filed a Motion to Exclude Testimony of Val Oveson that referenced Rule 702. The Rule 702 argument they made to the district court was different than the one they make to this Court. [R. 5277-78, 5316-28.] In the motion to the district court, Defendants argued that Mr. Oveson’s report failed to meet the requirements of Rule 702 because his conclusions were not supported by any reasoning, and because Mr. Oveson supposedly made up facts. [R. 5322-28.] At no point did Defendants argue to the district court that Mr. Oveson’s report did not comply with Rule 702 because he did not properly account for benefits received by Plaintiffs in calculating net damages, which is the argument Defendants make to this Court. *Id.*; Appellant Br. at 30-32.

Indeed, unlike below, where they argued that Mr. Oveson’s methodology was flawed [R. 5323-24], here they argue that “[t]here was no dispute as to whether [Oveson’s] methodology was correct.” Appellant Br. at 31. It was.

Because the argument made here was not made before the district court it was not preserved and is reviewed only for plain error. *See Pratt*, 2007 UT 41 at ¶ 15; *Butler*, 2013 UT App. at ¶ 33. Here there is no plain error.

2.5 Defendants' Argument Is Merely A Quibble With The Factual Conclusions That Oveson Relied On In Making His Conclusions.

The two-part analysis articulated in Rule 702 is the governing rule for the admissibility of expert witness testimony. "First, the trial judge must find that the expert testimony will 'assist the trier of fact.'" *State v. Clopten*, 2009 UT 84, ¶ 31, 223 P.3d 1103 (quoting Utah R. Evid. 702(a)). Second, the party wishing to rely on the expert's testimony must make a threshold showing that "the principles or methods that are underlying in the testimony (1) are reliable, (2) are based upon sufficient facts or data, and (3) have been reliably applied to the facts." Utah R. Evid. 702(b); *see also State v. Perea*, 2013 UT 68, ¶ 72, 322 P.3d 624.

Defendants' argument here, while dressed in the clothes of Rule 702 and Mr. Oveson's application of his methodology, is merely a factual dispute with Mr. Oveson about whether tax savings from the 2008 investment should have been used to reduce his calculation of the damage suffered by Plaintiffs.⁴ Defendants argue that Mr. Oveson was required to determine what benefits Plaintiffs received from carrying back the investment losses from the 2008 investments, and then subtract that value from the gross losses. Mr. Oveson, in his report and his testimony, adopted this methodology but concluded that no value should be attributed to the carry backs and carry forwards because those savings were not quantifiable and were "uncertain." [R. 5304 n.2.] His conclusion that the benefits from the 2008 losses were uncertain is supported by the evidence in the record

⁴ While Defendants make their argument monolithic, in fact there was no evidence that Mr. Bonnette, Mr. Lovelady, or Mr. Jorgenson received benefits from their 2008 investment. At most Defendants' argument applies to Mr. Witman and Mr. Washenko.

that Plaintiffs' oil and gas investments were under audit even at the time of trial. [R. 9112-13; 9170; 9279; 9291-92; 9295; 9433; 9753; 5305 n.4.] This was not Mr. Oveson merely cherry picking "uncertainty" to benefit the Plaintiffs, he also did not increase the damages based on the possibility of future cancelation of indebtedness income tax liability because that was uncertain as well. [R. 5305 n.4.; 9591-92.]

Defendants fault Mr. Oveson for not looking at subsequent years' tax returns to determine if losses incurred in 2008 were used to offset income in later years, but given his reason for not including those losses to offset the damages (that the ongoing IRS audit meant those losses might be disallowed) determining the extent of those losses would not have changed his conclusion. Moreover, while Defendants challenge this methodology, in fact their own expert found that some Plaintiffs received a small benefit in future years, which after accounting for the time value of money was even smaller than the absolute dollar figures they saved. [R. 9899-9902; 9904-05.]

While Defendants were free to, and indeed did, disagree with the factual conclusions underpinning Mr. Oveson's opinion, he was free to base his opinion on the factual conclusions he made. "Although an expert cannot give opinion testimony that flies in the face of uncontroverted physical facts also in evidence, an expert can rely on his own interpretation of facts that have a foundation in the evidence, even if those facts are in dispute." *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶16, 242 P.3d 762 (citation and quotations omitted); *see also Perea*, 2013 UT 68 at ¶ 40 ("While *our rules of evidence allow [the expert] to present theories that contradicted the testimony of other witnesses*, our rules do not allow him to comment directly on the veracity of those

witnesses.”) (emphasis and alteration added). When an expert favors some evidence over other evidence it is, if anything, grounds for cross-examination. *Eskleson*, 2010 UT 59 at ¶ 17. That occurred here. Defendants were given an opportunity at trial to cross-examine Mr. Oveson. [R. 9603-35.]

Defendants also had their own expert testify. But even Defendants’ expert had agreed with Mr. Oveson’s general conclusion that Plaintiffs received—at most—a fraction of the savings that Defendants had promised them, and that there is no chance they would receive the full promised savings. [R. 9905-06.]

Indeed, during closing argument Plaintiffs’ counsel invited the jury to follow Defendants’ expert, if they chose, and give credit for the uncertain tax savings that Plaintiffs Washenko and Witman received. [R. 9951-52.] The jury, having heard both sides, apparently concluded that the tax savings Defendants pointed to were uncertain and should not be deducted from the investment in damages. [R. 7814-16.] Therefore, the district court did not abuse its discretion, much less commit plain error, in ruling that Mr. Oveson’s testimony was admissible under Rule 702.

3. Mr. Oveson’s Expert Testimony Did Not Go Beyond His Written Report.

The arguments made by Defendants in part three are closely connected to, if not identical to, those made in issue two of their brief. *Compare* Appellant’s Br. at 28-32 with Appellant’s Br. at 32-35.

3.1 Mr. Oveson's Testimony Was Fairly Disclosed in His Written Expert Report.

First, Defendants complain that the district court allowed Mr. Oveson to present and form new opinions based on evidence presented at trial. This is not what happened. Mr. Oveson did not offer any new opinions that differed from his written report. Importantly, Defendants have pointed to no place in the record where Mr. Oveson's trial testimony contained opinions not fairly disclosed in his final expert report. *See argument 2.2, supra*. Their failure to identify any testimony that went beyond the scope of his final report is fatal to their argument.

3.2 Mr. Oveson's Methodology Complied With Rule 702.

Defendants again argue that Mr. Oveson's methodology was flawed and his testimony should have been excluded under Rule 702. *Compare* Appellant Br. at 30-31 with Appellant Br. at 34-35. Here, though, they make a new argument, which also was never presented to the district court: Defendants argue that because Mr. Oveson withdrew his opinion with regard to the 2007 investments, his opinion as to damages from 2008 was deficient. However, as noted above, Mr. Oveson's report and his testimony were consistent in concluding that the tax savings from the 2008 investment were uncertain. Nothing about the withdrawal of his opinion as to 2007 makes the 2008 tax savings more certain.

Defendants may disagree with Mr. Oveson's factual conclusion that the future tax losses were uncertain, but they have pointed to no law, accounting standard, or general principal that required Mr. Oveson to find those later years' losses were certain, despite

the ongoing audit. In the absence of such a standard, their argument under Rule 702 is merely a disagreement with the facts relied on by Mr. Oveson, and apparently accepted by the jury.

3.3 Defendants Have Failed To Show How They Were Harmed.

Defendants have also failed to identify how they were harmed by Mr. Oveson's testimony. Their own expert concluded that for their 2008 investments, Mr. Washenko and Mr. Witman received no tax savings in 2008 and only about \$130,000 in future tax savings (discounted for the time value of money), and not the \$400,000, dollar-for-dollar savings that Mr. Bloomfield promised to them. [R. 9878 9898-99.] Mr. Bonnette, under Defendants' expert's calculations, saved nothing on his 2008 tax return and only saved \$40,000 in total from his 2008 investment. [R. 9878, 9899-9901.]

Thus, even Defendants' own expert concluded that Plaintiffs had not received the tax benefits that they were promised by Mr. Bloomfield, and consequently, they collectively suffered more than one million dollars in damages. The jury instructions—which Defendants proposed—required the jury to conclude with certainty that there were damages (which both experts agreed on) and only required a reasonable estimate of what those damages were. [R. 6929.] Mr. Oveson's opinion—which excluded the tax savings that were uncertain to be maintained in the face of an IRS audit—provided the jury a reasonable estimate of damages; Defendants' expert's testimony also provided a reasonable estimate of damages. The jury was entitled to choose between those two reasonable estimates..

4. The District Court Sanctioned Plaintiffs By Dismissing The 2007 Accounting Malpractice Claim In Agreement With Defendants' Proposal.

4.1 The District Court Has Broad Discretion in Fashioning A Discovery Sanction And Did Not Abuse That Discretion In Dismissing Almost Two Thirds Of the Dollar Value Of Plaintiffs' Accounting Malpractice Claims.

During trial some of the Plaintiffs testified that they had reached preliminary settlements with the IRS on their tax liability for 2007, but they did not have signed settlement documents. This information had not previously been disclosed in discovery. After hearing argument on the matter twice, the district court entered an extensive oral ruling, [R. 9552-53], followed by a written ruling, largely memorializing the oral ruling [R. 7809-11.] The district court dismissed all of Plaintiffs' accounting malpractice claims for 2007 as a discovery sanction under Rule 37. Defendants now argue that the district court abused its discretion in sanctioning Plaintiffs by *only* dismissing the accounting malpractice claim for 2007, and not the accounting malpractice claims in their entirety. Defendants have not shown that the district court abused its discretion in imposing this sanction.

A court may impose sanctions against a party under Rule 37(d) of the Utah Rules of Civil Procedure when a party has disregarded a discovery obligation or order. *See Schoney v. Mem'l Estates, Inc.*, 790 P.2d 584, 585 (Utah Ct. App. 1990). "Once the trial court determines that sanctions are appropriate, [t]he choice of an appropriate discovery sanction is primarily the responsibility of the trial judge." *Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997) (alteration in original) (citation and internal quotations omitted). "Appellate courts may not interfere with such discretion unless abuse of

discretion is clearly shown.” *Tuck v. Godfrey*, 1999 UT App 127, ¶ 15, 981 P.2d 407. “A trial court’s abuse of discretion in selecting which sanction to impose may be shown only if there is either an erroneous conclusion of law or no evidentiary basis for the trial court’s ruling.” *Id.* (citation and internal quotations omitted). Sanctions of dismissal are not to be taken lightly and must be carefully exercised by a trial court. *See W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc.*, 568 P.2d 734, 738 (Utah 1977). *See Tuck*, 1999 UT App 127, ¶ 15, 981 P.2d 407; *see also Park W. Vill., Inc.*, 568 P.2d 734, 738 (Utah 1977). “[A] trial court does not clearly abuse its discretion in choosing a sanction, even a harsh one, unless there is either an erroneous conclusion of law or . . . no evidentiary basis for the trial court’s ruling.” *Clifford P.D. Redekop Family LLC v. Utah Cnty. Real Estate LLC*, 2016 UT App 121, ¶ 13, 378 P.3d 109 (citation and internal quotations omitted) (alteration added).

Thus, Defendants face a tall burden in showing the district court abused its discretion; they do not meet the burden. The district court provided an extensive oral and written decision based on the evidence presented, and even made factual findings and legal determinations based on the arguments of counsel. The district court chose one of the most severe sanctions available, dismissing claims related to the issue on which discovery was not provided. Defendants’ argument here is nothing more than a disagreement with the district court after the fact on the sanction it imposed. This is nothing other than an invitation for this Court to second guess the district court.

But it gets worse for Defendants’ argument: They actually recommended the sanction the district court imposed.

4.2 Defendants' Counsel Proposed The Sanction That Defendants Now Claim Was Insufficient.

Defendants' argument to the district court, "created a situation analogous to that of invited error." *SFR, Inc. v. Control, Inc.*, 2008 UT App 31, ¶ 16, 177 P.3d 629 (citing *Pratt*, 2007 UT at ¶¶ 17-22). Invited error comes about from the idea "that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Winfield*, 2006 UT 4, ¶ 15, 128 P.3d 1171.

Although they initially argued for dismissal of the entire case, Defendants' counsel ultimately settled on a recommendation that it would be an appropriate sanction to dismiss only the Plaintiffs' 2007 claims. Defense counsel argued to the district court that Plaintiffs' "claims, at least as to those years when they violated Rule 26" [2007] should not go forward. [R. 9387.] Later, Defendants' other trial counsel argued to the district court that, "[w]ell, it seems if the expert is no longer offering [his opinions on tax losses in 2007], it certainly seems that that would be an appropriate finding by the Court again on the – pursuant to the Rule 26 and Rule 37 that there are no damages available for any investments made in 2007." [*Id.*] The district court followed Defendants' recommendation and dismissed the accounting malpractice claims for 2007. [R. 7811; 9553.]

Now on appeal Defendants argue that the district court committed error when it chose one of the remedies that they themselves recommended. As such, their claim on appeal amounts to the kind of invited error that must be rejected. *Winfield*, 2006 UT 4 at

¶ 15 (The Defendants “cannot take advantage” of an alleged error when they themselves “led the trial court into committing the error.”).

5. The Jury’s Award Of Damages Was Supported By Sufficient Evidence Presented At Trial.

Defendants contend that the district court erred in not granting their motion for a new trial, but here again, Defendants have misconstrued what happened at trial and have not followed this Court’s rules in regards to appellate briefing.

5.1 Defendants Did Not Follow Utah Rules Of Appellate Procedure 24(A)(5)(A) By Identifying Where They Preserved This Issue On Appeal.

Defendants argue that the district court denied their Rule 50 motion and Rule 59 motion, but their citations in the section of their brief where they identify where this issue was preserved have nothing to do with any motion under Rules 50 or 59. “[Defendants] have failed to demonstrate where they preserved this issue, as [they are] required to do.” *Holladay v. Storey*, 2013 UT App 158, ¶ 34, 307 P.3d 584 (alterations added) (citing Utah R. App. P. 24(a)(5)(A)); *see also Seamons v. Brandley*, 2011 UT App 434, ¶ 3, 268 P.3d 195 (“The Utah Rules of Appellate Procedure also require that the appellant’s brief provide a citation to the paginated record demonstrating where the issue was preserved.”). “Particularly in a case such as this, with a voluminous record and numerous issues, it is not the appellate court’s burden to comb through the record to verify whether, and where, [Defendants] preserved this issue, and [the appellate court should] therefore decline to address it.” *Hollady*, 2013 UT APP 158 at ¶ 34.

In the section of their brief where Defendants were to identify where in the record they preserved this issue they cite to two parts of the record. Appellant Br. at 5; [R. 7578-87; 9531-54]. The first citation is to an exhibit to a reply Defendants filed in relation to their motion seeking attorneys' fees under Utah Code §78B-5-825. [R. 7359-7372; 7587-87.] That exhibit was a transcript of one portion of the trial argument by Defendants where they argued that the failure to disclose the IRS settlements was prejudicial and required sanctions. *Id.* Neither the document they cited, nor the motion to which it was an exhibit (which they do not cite), has anything to do with a sufficiency of evidence argument under Rule 50 or a new trial argument under Rule 59.

The other place they say they preserved this issue is another portion of the trial transcript where the parties argued the same issue—sanctions for the discovery failures. The only rules mentioned in this portion of the transcript are Rule 26 and Rule 37. There is no argument about sufficiency of the evidence for a jury award under Rule 50 or a new trial under Rule 59.

The record is over 10,000 pages and this Court should not be required to sift through it to find the correct citations or find where exactly Defendants have made the appropriate arguments to the district court below.

Although not in the section identifying where they preserved the issue, at least in the body of their brief Defendants cited to a ruling by the district court on a Rule 50 motion they filed, though they never cite to any Rule 59 motion. However, the Rule 50 motion they filed does not raise the issues presented to this Court on appeal, again raising

the question of whether Defendants actually preserved the arguments they make on appeal.

But even in the body of their brief Defendants never cite to any Rule 59 motion.

5.2 Defendants Did Not Make A Rule 59 Motion In The District Court.

Defendants did not actually file a motion under Rule 59. After scouring the 10,000-page record, Plaintiffs were able to find one place where Rule 59 was mentioned, though not by Defendants. In a memorandum decision and order addressing, among other things, Defendants Rule 50 motion [R. 7794-7808], the district court noted that although a request for a new trial “was not clearly articulated in the Bloomfield Defendant’s Motion” she would analyze the request for a new trial on the basis of insufficiency of the evidence under Rule 59(a)(5) and (a)(6) as well as Rule 50. [R. 7797 and n.2.] Although Defendants never filed a motion under Rule 59, the district court analyzed their Rule 50 motion under that standard as well and found it deficient under both the Rule 50 and Rule 59 standards. [R. 7795-98.]

5.3 Defendants’ Rule 50 Motion To The District Court Raised Different Issues Than Those Raised Here on Appeal.

After trial Defendants filed a motion under Rule 50. [R. 7224-42.] However, they never cite that motion or the arguments made therein to this Court. That is likely because Defendants raised different, and meritless, arguments below, which have no relation to the arguments they raise here.

In their Rule 50 motion, Defendants made only one argument about damages: “If Plaintiffs in fact used all of the deductions yielded by the Partnerships, then Plaintiffs had

no damages.” [R. 7232; 7230-32.] This argument is meritless because it conflates two disparate concepts: tax deductions and tax savings. As noted by Defendants’ expert, Mr. Bickel, in order to receive the full tax savings Mr. Bloomfield promised Plaintiffs would need substantial income in excess of \$300,000 per year. [R. 9867; 9901-03.] This is because the value of a tax deduction is affected by the marginal tax rate of the dollars shielded from taxation by the deduction. *See e.g. Winn v. Killian*, 307 F.3d 1011, 1015 n.5 (9th Cir. 2002) (explaining that the value of a tax deduction to a taxpayer is affected “by the tax rate applicable to his income bracket.”). Because Plaintiffs were promised one dollar in tax savings for every dollar they invested in the oil and gas partnerships, they could, and did, have damages even if they used all of the deductions, because in order to obtain the promised benefit, Plaintiffs needed to have substantial income (and a correspondingly high marginal tax rate) in the years the deductions were used, which they did not. In any event, even the lower savings were uncertain because of the IRS audits.

In any event, this argument—that Defendants had no damages because they used all their deductions—was the only damages argument presented to the district court. “In order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, ¶ 23, 215 P.3d 152 (quoting *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968). That was the only issue related to the sufficiency of the evidence to support an award of damages that was preserved on appeal. That is not the issue Defendants now raise before this Court.

5.4 The District Court Did Not Plainly Error When It Refused To Grant A New Trial Because The Jury's Verdict Was Not Excessive.

The argument raised by Defendants for the first time here on their appeal is that the evidence presented at trial was insufficient to sustain an award of damages. This argument tracks most of the rest of Defendants' brief and rests on their contention that Mr. Oveson's expert opinion should have accounted for the benefits Plaintiffs received from carrying back and carrying forward losses from the 2008 investments.

As the district court pointed out in ruling on the new trial, "there was evidence that the Plaintiffs receive[d] some 'benefit' from the 2008 investments, there was also testimony that the future deductions and carrybacks were contingent on Plaintiffs' income in future years and were not readily measurable as to 2008 when the advice was given." [R. 7797.] (alteration added). It bears noting that Mr. Oveson was not alone in concluding that Plaintiffs did not get the full value of the investments they made in 2008 or that the benefits were uncertain. [R. 9599; 9113; 9170; 9295; 9433.] Each Plaintiff testified that they did not receive the value they were promised, and Defendants' own expert agreed that the Plaintiff who benefited most from the 2008 investments received only \$130,000 in benefits, instead of the promised \$400,000. [R. 9898]; Tr. Ex. 53. The jury heard this conflicting testimony and apparently concluded that the deductions and carrybacks were sufficiently uncertain that they should not reduce the damages to the Plaintiffs. "This conclusion is not against the weight of the evidence and [the district court did] not disturb it." [R. 7798.] (alteration added). The award was not excessive

because it was a reasonable estimate of the harm suffered by Plaintiffs in light of the uncertainty of their position in the ongoing IRS audit. [*Id.*; R. 9113; 9170; 9295; 9433]

A jury's verdict should not be overturned without sufficient and good reasons "[b]ecause it is the exclusive function of the jury to weigh the evidence." *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24, ¶ 18, 309 P.3d 201 (quotations and citation omitted). A grant of a motion made pursuant to Rule 50 can only be made if there is no "basis in the evidence, including reasonable inferences which could be drawn therefrom, to support the jury's determination." *Braithwaite v. W. Valley City Corp.*, 921 P.2d 997, 999 (Utah 1996). The only way a trial court is justified in overturning a jury's verdict is "after looking at the evidence and all of its reasonable inferences in a light most favorable to [the nonmoving party], the trial court conclude[s] that there [is] no competent evidence to support a verdict in [the nonmoving party's] favor." *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1066 (Utah 1996). Here, there was competent evidence to support a finding of damages, and the specific number assigned by the jury. In any event, the jury's verdict is not clearly erroneous.

Defendants cite several cases relating to gross damages, but those are not applicable here. First, the jury was presented with the fact that Plaintiffs had received benefits, but also heard that those benefits were in the process of being disallowed as part of an IRS audit. So, the question of whether there was any benefit at all was a question of fact, which the jury resolved. But, more to the point, all the cases Defendants cite relate to gross damages arising in entirely different factual contexts; namely, business losses where the lost profits must be netted against the costs of generating those profits.

6. The District Court Did Not Err In Awarding Prejudgment Interest.

Defendants argue that the district court erred in awarding prejudgment interest at the rate of 10% per annum on the jury's award for three reasons: the damages were not fixed to a definite time, the jury's damage award was too speculative, and the 10% per annum rate found in Utah Code § 15-1-1 is inapplicable in this case. Despite Defendants' arguments, the district court did not commit error in awarding prejudgment interest because the damages were fixed and the damage award was not speculative. Also, because Defendants failed to preserve the argument they are presenting to this Court, concerning the use of Utah Code § 15-1-1 by the district court, the standard of review on that portion of their argument is plain error and no plain error occurred in the district court.

6.1 Damages Were Fixed And Definitive At The Time Of Plaintiffs Investment And Not Speculative.

"[P]rejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and circumstances." *Highlands at Jordanelle, LLC v. Wasatch Cnty.*, 2015 UT App 173, ¶ 27, 355 P.3d 1047 (2015) (internal quotations and citations omitted). This also encompasses losses where the "damage figures are subject to calculation" such as where the method of calculation is uncertain or the damage figures change. *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 55, 210 P.3d 263 (2009). This Court has held that "a party is [not required to] demonstrate that its damage figures are known and static from the date the claim is filed through the final judgment." *Id.* at ¶ 67. Prejudgment is not allowed

when damages cannot be calculated with mathematical accuracy and “the trier of fact” is given some broad discretion “to assess damages based on a mere description of the wrongs done or injuries inflicted,” such as “in [cases involving] personal injury, wrongful death, defamation of character and false imprisonment.” *Id.* at ¶ 53 (internal quotations and citations omitted) (alteration added).

Defendants argue that “it is undisputed that the Plaintiffs arbitrarily selected a date seven years prior to the entry of judgment as the date from which to begin accruing prejudgment interest.” Appellant Br. at 50. And they also argue that “[t]here [was] no evidence that the Plaintiffs’ losses were complete as of this arbitrarily selected date of loss.” *Id.* (alterations added). Defendants are wrong on both accounts. There was evidence presented to the jury by Plaintiffs’ expert accountant, Mr. Oveson, that the damages suffered by Plaintiffs were equal to their cash investment in 2008 and that any future benefit to Plaintiffs from those 2008 investments was both impossible to calculate and uncertain. Thus the amount of damages could be calculated at Plaintiffs’ aggregate investment of \$1.8 million. [R. 9570-7; 9591; 9601-603; 9625-9626.] The \$1.8 million damage figure was *fixed* at the time Plaintiffs made their investments in 2008. Plaintiffs received no tax benefits on their 2008 tax returns for their 2008 investments—a fact that Defendants’ own expert accountant agreed with. [R. 9878.] The date to calculate when damages started was not an arbitrarily selected date and the trial judge agreed, finding that “the damage amount claimed by Plaintiffs [was] fixed as of the date Plaintiffs made their cash investments in 2008.” [R. 7802.]

The jury was also not given broad discretion to calculate a damage figure during trial. This was not a case where the jury was simply asked to listen to a mere description of the wrongs done and return an award. To the contrary, the jury was presented with damage calculations prepared by both sides' respective experts, and in this case, the jury chose to accept one expert's calculation of those damages. Thus, the district court did not err by awarding prejudgment interest because the damages were fixed to the date of the investment in 2008 and were not speculative.

6.2 Because The Defendants Did Not Raise This Particular Argument Below, Plain Error Review Is Required And No Plain Error Occurred In The District Court.

Although Defendants did contest the rate of interest the district court used to calculate the final award, they did not raise the same argument they are now pursuing here. Instead, below they argued that Utah Code § 15-1-1 does not apply to this case because § 15-1-1 is to be used “only for claims relating to a ‘lawful contract,’ not claims of professional malpractice.” [R. 7019.] Specifically, Defendants argued that, because there was no contract in this case, § 15-1-1 did not apply. This was the sole argument presented to the district court by Defendants for not applying the 10% interest rate outlined in § 15-1-1.

The district court concluded—based on controlling case law at the time—that § 15-1-1 was “not limited to only those instances where a ‘lawful contract’ exists.” [R. 7803.]

On appeal Defendants have changed their argument and now offer a new theory why § 15-1-1 does not apply to this case that was never presented to the district court.

They argue for the first time in their appeal that this section only applies to “contracts for loan[s] of any money[s] or goods or for the forbearance of any chose in action.” Appellant Br. at 53 (alterations added). In essence, Defendants have changed their argument from *§ 15-1-1 only applies to lawful contracts* to *§ 15-1-1 only applies to contracts that are for loans of any money or goods*. These are two different arguments. Their new argument opportunistically tracks the holding of this Court’s recent decision in *USA Power v. Pacificorp*, 2016 UT 20, 372 P.3d 629, which was decided after the district court entered judgment in this case. Defendants now attempt to conform their argument below to the ruling this Court made in *Pacificorp*, but that is not the argument they made to the district court.

In order to preserve an issue on appeal, “a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue’s merits.” *Lebaron & Assocs. v. Rebel Enters.*, 832 P.2d 479, 482-83 (Utah Ct. App. 1991) (alteration added). There are “three factors that help determine whether the trial court had such an opportunity: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority. In short, a party may not claim to have preserved an issue for appeal by merely mentioning an issue without introducing supporting evidence or relevant legal authority.” *Pratt*, 2007 UT 41 at ¶ 15 (quotations and citations omitted).

Here, Defendants can only credibly claim that they met one of these three factors. First, the issue must be raised in a timely fashion and the Defendants did object to

prejudgment interest in their Objection to Plaintiffs' Second Proposed Form of Judgment.
[See R. 7014.]

The second and third factors are where the Defendants fail. The issue was not raised specifically to the district court. "Where there is no clear or specific objection . . . the theory cannot be raised on appeal." *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867 (quotation and citation omitted). The specific objection that the Defendants brought to the district court's attention was "[w]hile Utah Code § 15-1-1 provides for a 10% interest rate, it does so *only* for claims relating to a 'lawful contract,' not claims of professional malpractice." [R. 7019] (emphasis added). This is what the district court was tasked to decide based on the objection raised by Defendants. Defendant's current argument on appeal, however, is not the same as the one they presented to the district court below.

And thirdly, the evidence or relevant legal authority that was presented to the district court in support of the actual argument Defendants presented did not exist; Defendants did not cite or present any legal authority in their argument to the district court. [R. 7019.] Indeed, none of the law Defendants present to this Court in support of their argument on appeal was presented to the district court.

When a party does not *properly* preserve an issue for appeal there must be an appropriate justification for appellate review and "the party must argue either plain error or exceptional circumstances." *Butler*, 2013 UT App. 30 at ¶ 33 (quotation and citation omitted). A party must articulate one of these justifications in their opening brief for this Court to consider the unpreserved objection. *See State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551.

Here, Defendants have not argued that plain error or exceptional circumstances exist. Therefore, this argument is not properly before this Court and should not be considered. *See Butler*, UT App. 30 at ¶ 34.

Nevertheless, if this Court does see fit to consider this issue, then it should be reviewed under the manifest injustice or plain error standard. *Pratt*, 2007 UT 41 at ¶ 16 (explaining that “cases where a party raises an issue on appeal, but the party did not properly preserve the issue below, [are] review[ed] . . . under the manifest injustice or plain error standard”) (quotations and citations omitted, alterations added). Under plain error review, [the Court] may reverse the lower court on an issue not properly preserved for appeal when a party can show the following: (i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, *i.e.*, absent the error, there is a reasonable likelihood of a more favorable outcome for the [party], or phrased differently, [the court’s] confidence in the verdict is undermined.” *Id.*

No plain error exists here because the Defendants cannot show that the error should have been obvious to the trial court. In an opinion that Defendants cite in their brief, this Court specifically said that the limiting language of § 15-1-1 had not been decided by the Court prior to that time. *See Pacificorp*, 2016 UT 20 at ¶ 107 (“[W]e have *suggested* in prior cases that section 15-1-1 applies to all cases involving a contract.”) (emphasis added).

The argument that is now being presented to this Court—that § 15-1-1 is limited to a very specific type of contract, those for loans or forbearance of money or goods—was only either proffered in dicta in prior decisions and when it was mentioned was

questioned as an acceptable interpretation of the law on two different occasions. *See id.* The district court relied upon controlling case law to decide the issue that it was presented with, whether § 15-1-1 applied only to contracts. The district court was never presented with the new issue the Defendants have articulated to this Court, which now asks if § 15-1-1 was limited to a specific type of contract—those for loans or forbearance of money or goods.⁵ [R. 7803.] Because of the case law at the time and because this Court had not articulated the limitation of § 15-1-1 until *Pacificorp*, the error would not have been obvious to the district court. And because the error was not obvious to the district court, plain error review should lead this Court to conclude that Defendants' argument was not specifically raised at the district court and thus fails.

Conclusion

Because Defendants' have failed to establish that they are entitled to the relief they seek, this Court should affirm the judgment of the district court in favor of Plaintiffs, including prejudgment interest at the rate ordered by the district court.

⁵ The district court cited *Vali Convalescent & Care Inst. v. Div. of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990) to find that § 15-1-1 defines the rate of interest in instances where the specific rate has not been agreed to and interest accrues as a matter of law. The district court also cited *State ex rel. Road Comm'n v. Danielson*, 247 P.2d 900, 901-02 (Utah 1952) to find that § 15-1-1 is not limited to only those instances where a contract exists.

Summary Of The Argument On Cross-Appeal

Jury Instruction 13, as given by the district court to the jury, was needlessly confusing. The district court, at the urging of Defendants and over the objection of Plaintiffs, included a list of four factors the jury could consider that had no factual relevance to this case. The only reason Defendants could have asked for their inclusion was to confuse the jury, because they are not factors that limit the definition of who conducts a sell of securities. The district court should have given the jury instruction offered by Plaintiffs, which simply tracked the statutory language of the Utah Securities Act.

Background For Cross-Appeal

Plaintiffs filed a complaint against Mr. Bloomfield alleging, inter alia, that he violated the Utah Uniform Securities Act (Utah Securities Act) for selling a security as an unlicensed agent. The Utah Securities Act provides for a private cause of action against “a person who offers or sells a security in violation of . . . 61-1-3.” Utah Code § 61-1-22. Section 61-1-3 provides that “it is unlawful to transact business in this state as . . . [an] agent unless the person is licensed under this chapter.” *Id.* at 61-1-3(1) (alterations added). An agent is defined in the Utah Securities Act as an individual who represents an issuer “in effecting or attempting to effect purchases or sales of securities.” *Id.* at 61-1-13(1)(b)(i).

Prior to trial, the parties disagreed about the language in Jury Instruction 13, which defined the terms “sale,” “sell,” “offer,” or “offer to sale” under the Utah Securities Act, and therefore, each side filed a proposed jury instruction. Plaintiffs’ proposed jury

instruction defined the foregoing terms by using the definition of those terms as they are found in the Utah Securities Act.

The Utah Securities Act defines “sale” or “sell” as follows:

“Sale” or “sell” includes a contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

Id. at 61-1-13(1)(bb)(i).

The Utah Securities Act defines “offer” or “offer to sell” as follows:

“Offer” or “offer to sell” includes an attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Id. at 61-1-13(1)(bb)(ii).

Plaintiffs’ proposed jury instruction was as follows:

“Sale” or “sell” includes a contract for sale of, contract to sell, or disposition of, a security or interest in a security for value. “Sale” or “sell” includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities. “Offer” or “offer to sell” includes an attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value. The fact that a person encourages a transaction that results in a sale does not necessarily make that person a seller or offeror.

[R. 6239.]

Defendants’ proposed jury instruction added the following language to Plaintiffs’ proposed instruction:

For example, accountants or lawyers whose involvement with a transaction is only the performance of their professional services does not make such professionals sellers or offerors. For a person other than the person who actually transfers title in the stock to qualify as a seller or offeror, that person must actively and directly participate in soliciting a person’s purchase of the security.

To determine whether a person actively and directly participated in

soliciting a person's purchase of a security, you may consider the following factors:

- Did the person or entity help draft the Private Placement Memoranda, the Subscription Agreements or the Promissory Notes?
- Did the person or entity help create or actively participate in road show presentations of information to securities brokers and investment analysts?
- Did the person or entity analyze the market for the securities and set the price for the securities?
- Did the person or entity negotiate the terms of any of the agreements with the issuer?

The list of factors is not exhaustive and you may consider other evidence presented during the case to determine whether a person actively and directly participated in soliciting a person's purchase of a security. These factors are also not necessarily to be weighted equally, and you may apply the weight you deem appropriate in determining whether a person actively and directly participated in soliciting a person's purchase of a security.

[R. 6238.]

At the pretrial hearing held to address the disputed jury instructions, the district court adopted Defendants' proposed Jury Instruction 13 and denied Plaintiffs' objections to Jury Instruction 13. [R. 8865; 8871.]

At trial, Mr. Bloomfield admitted that he was not a licensed agent, and the parties stipulated that the investments in the oil and gas partnerships were securities. [R. 6235; 6911.] Thus, the only question for the jury to decide was whether Mr. Bloomfield *sold* the oil and gas partnerships because if he did so he violated the Utah Securities Act.

Argument On Cross-Appeal

1. The District Court Erred By Incorrectly Stating The Law That Pertains To A Violation of The Utah Securities Act In The Jury Instructions.

This Court has held that “[t]he court has a duty to instruct the jury on the relevant law.” *Low*, 2008 UT 58 at ¶ 27 (quoting *State v. Hansen*, 734 P.2d 421, 428 (Utah 1986)). “It is error to give an instruction if there is no evidence to support it and if it could be misleading.” *State v. Standiford*, 769 P.2d 254, 264.(Utah 1988) (citing *State v. McCardell*, 652 P.2d 942, 945 (Utah 1982)). “Failure to give requested jury instructions constitutes reversible error only if their omission tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law.” *State v. Stringham*, 2001 UT App 13, ¶ 17, 17 P.3d 1153; *see also Turner v. Univ. of Utah Hosps. & Clinics*, 2013 UT 52, ¶ 17, 310 P.3d 1212 (holding that “[e]rrors with regard to jury instructions require reversal only if confidence in the jury’s verdict is undermined.”).

1.1 Jury Instruction 13 Was Adopted In Error Because It Had No Factual Basis.

Before addressing the law related to Jury Instruction 13, it bears asking a simple, revealing question: Why did Defendants want the additional factors they inserted in Instruction 13? There was no factual basis for either party to argue that Defendants engaged in any of the conduct identified in those four factors, so why argue to include factually irrelevant factors that other courts have found contribute to a finding that a person acted as a seller? The only plausible reason was to confuse the jury.

The instruction given by the district court is the rough equivalent of instructing a jury in a “note job” bank robbery. In deciding whether a bank robbery occurred, they can consider: whether there was a gun, whether a mask was used, whether shots were fired, and whether there was a threat of violence. While those factors may all be things that others who have robbed banks may have done, their absence is not probative of whether this bank robber robbed this bank, albeit in an entirely different manner. The instruction to consider the gun, mask, and threat as factors could only lead to jury confusion.

The district court erred when it rejected Plaintiffs’ requested jury instruction for Jury Instruction 13 and instead adopted the Defendants’ version, because Jury Instruction 13 was a misleading and erroneous statement of the definition of the terms “sale,” “sell,” “offer,” or “offer to sale” under the Utah Securities Act as applied to the facts of this case. This erroneous jury instruction added terms, factors, and concepts for which there was no factual basis.

In *State v. Tenney*, the Utah Court of Appeals concluded that it would be inappropriate to include a list of exceptions in a jury instruction defining “agent” under the Securities Act when no evidence was presented to support a finding that the defendant fell within any of the exceptions. *See State v. Tenney*, 913 P.2d 750, 758 (Utah Ct. App. 1996) (citing *Anderson v. Toone*, 671 P.2d 170, 174 (Utah 1983)). Here, the district court adopted a list of factors to define if someone sold a security. The factors included: if someone drafted the Private Placement Memoranda, Subscription Agreement, or Promissory Note; if someone helped create or participate in road show presentations; if someone set the price for the security; and if someone negotiated the terms of the

agreement. There was no basis in the trial record to conclude that any of those factors conceivably applied. *See also, Turner*, 2013 UT 52, ¶ 17 (“The district court erred when it included Instruction No. 30 because no evidence was before the jury that supported that instruction.”). In fact, the statutory definition does not include these factors, nor does any case require a jury to consider those factors in every case, especially cases such as this one where those activities are not at issue. These additional factors in Defendants’ instruction were never anything more than distracting red herrings for the jury to chase.

Just as in *Tenney*, where it was error for a court to include exceptions that clearly did not apply, it was error to include these factors here because they could not serve any function other than to confuse the jury.

1.2 Jury Instruction 13 Was Error Because It Was Taken From Federal Securities Law And Not Utah Securities Law.

It was error to include these factors not only because there was no factual basis for them, but also because those factors do not apply to the state-law claims in Plaintiffs’ complaint. The factors included in Jury Instruction 13 relate to aiding and abetting liability for violation of § 12(2) of the Securities Act of 1933, a federal statute. *See* 15 U.S.C. § 77l. However, Plaintiffs did not allege a cause of action under any federal securities laws, much less § 12(2). Instead, Plaintiffs brought a claim against Mr. Bloomfield for selling a security as an unlicensed agent in violation of the Utah Securities Act. *See* Utah Code § 61-1-3 (“it is unlawful to transact business in this state as . . . [an] agent unless the person is licensed under this chapter.”).

Aiding and abetting liability under § 12(2) requires a finding that a person who does not transfer title in stock must actively and directly participate in soliciting a person's purchase before being held liable. Defendants suggested to the district court, and the district court adopted, factors the jury could consider to determine if the person actively and directly participated in soliciting a person's purchase. According to Defendants, "these factors are taken directly from *Federal Sav. & Loan Ins. Corp. v. Provo Excelsior Ltd.*, 664 F. Supp. 1405, 1411 (D. Utah 1987)." [R. 6295.] While that is true, as far as it goes, that case dealt with liability under § 12(2) of the Securities Act of 1933, which was not at issue here.

Federal Sav. & Loan Ins. Corp. addressed the question, "[w]ho is a 'Seller' Under § 12(2) of the 1933 Act." 664 F. Supp at 1410. The court explained that § 12(2) provides a private cause of action for a purchaser of a security against a person who offered or sold a security "by means of a prospectus . . . which includes an untrue statement of material fact or omits to state a material fact." *Id.* The court noted that § 12(2) expressly states that only the person who sold the security is liable to the "person purchasing the security from him." *Id.* The court agreed that § 12(2) expressly limited liability to those in strict privity with the seller but noted that courts have expanded liability to persons who "ought" to be liable to the buyer and adopted the position that persons who aided and abetted in the sale of a security could also be found liable under § 12(2). *Id.* at 1411 (holding that "'seller status for § 12(2) will exist as to the person who transfers title to the stock and such additional persons who actually, and directly participate in soliciting a plaintiff's

purchase.”). But the federal court was only analyzing § 12(2) of the Securities Act of 1933 and not the Utah Securities Act.

It goes without saying, but should be repeated, instructing the jury in this case on factors determining who can be found liable under § 12(2) of the Securities of Act of 1933 was an error because Plaintiffs brought claims against Defendants under the Utah Securities Act for selling securities as an unlicensed agent. Defendants have not pointed to any law establishing that the factors for determining liability under § 12(2) of the Securities of Act of 1933, a federal statute, are the same as those to determine liability on the claims Plaintiffs brought.

1.3 Jury Instruction 13 Was Given In Error Because Even If There Had Been A Claim Based On A Violation Of Federal Securities Law The Factors Included In Instruction 13 Are Not Required To Be Considered In Every Case.

But the error goes even further because even if Plaintiffs had brought federal claims against Mr. Bloomfield under § 12(2) of the Securities Act of 1933, Jury Instruction 13 erroneously states the law. Liability under § 12(2) is determined on a case-by-case basis after examining the facts of that case, not based on a static list of factors that are presented to the jury regardless of their applicability to the facts in the record. *See In Re Activision Sec. Litigation*, 621 F. Supp. 415, 420 (N.D. Cal. 1985).

In *Federal Sav. & Loan Ins. Corp.*, the federal district court recognized a cause of action for aiding and abetting under § 12(2) and adopted a middle ground definition of “seller” as advanced by the court in *In Re Activision Sec. Litigation*, 621 F. Supp. 415, 421 (N.D. Cal. 1985). *See Fed. Sav. & Loan Ins. Corp.* 664 F. Supp at 1411. In *In re*

Activision, the court found that a company and its officers and directors were not liable under § 12(2) to purchasers of securities who purchased their securities from underwriters because the company and its directors did nothing more than engage in “conduct typical of a corporation and its directors in any public offering.” *Id.* at 421. The court noted that the company and its directors helped draft the prospectus, participated in road show presentations, analyzed the market and set the price for the shares, and negotiated an agreement with the underwriters. *Id.* The court found that the defendants in *In re Activision* participated in each of the activities listed as a factor in Jury Instruction 13 and yet it found that such conduct was insufficient to find seller liability under § 12(2) in that case. Thus the factors contained in Jury Instruction 13, which were not factually applicable to this case at all, are apparently also not legally sufficient—much less legally required—to establish liability as a seller.

In *In re Activision*, the court differentiated the case before it from another case which found that a company’s president was liable when the president “met personally with investors and spoke at broker-dealer seminars.” *Id.* (citing *Sec. and Exch. Comm’n v. Murphy*, 626 F.2d 633, 652 (9th Cir. 1980)). The court did not come up with a list of factors to determine whether a person who did not transfer title was liable under § 12(2), but instead noted that the question should be “examined on a case-by-case basis.” *Id.*

The District of Utah’s adoption of the approach taken in *In re Activision* did not include any discussion about the factors or test used to determine if a person was liable for aiding and abetting under § 12(2). *See Fed. Sav. & Loan Ins. Corp.* 664 F. Supp at 1410. Instead, the court noted that the list of conduct in *In re Activision* was insufficient

to trigger liability, but also noted that meeting investors in person was a distinguishing factor that could give rise to liability under § 12(2). *See id.* (noting that “[i]n dismissing the 12(2) claim the [*In re Activision*] court distinguished the above activities from other cases where a defendant had met personally with investors and had spoken at broker-dealer seminars.”). The court did not consider or in any way address any of the factors included in Jury Instruction 13 to determine whether Defendants were liable for aiding and abetting under § 12(2). So, even if Plaintiffs had made a claim against Defendants under § 12(2) of the Securities Act of 1933, Jury Instruction 13 would still have been in error because the instruction should have focused on whether a Defendant met personally with investors and not the other factors listed in the instruction.

1.4 Jury Instruction 13 Was Given In Error Because It Misstated Utah Securities Law.

The issue of whether additional factors or elements should have been added to the simple statutory definitions of “offer” or “sale” under the Utah Securities Act was addressed by the Utah Court of Appeals in *State v. Bolson*, 2007 UT App 268, 167 P.3d 539. Ms. Bolson was convicted for selling an unregistered security. Ms. Bolson was an unpaid volunteer of an issuer who “encourag[ed] others to invest in the Program and. . . became the contact person for information about the Program.” *Id.* at ¶ 13. Ms. Bolson was convicted for selling an unregistered security even though she did not personally transfer title to securities, did not draft the private placement memoranda or other investment documents, did not participate in road show presentations, did not analyze the market and set the securities’ price and did not negotiate terms with the issuer. *See id.* at ¶

19. None of the factors listed in Jury Instruction 13 were even mentioned by the Court of Appeals when evaluating whether Ms. Bolson was guilty for selling a security. *See id.*

Ms. Bolson argued that the State was required to prove that she intended and had the ability to complete the transactions in which she was involved before being convicted of selling an unregistered security. *See id.* The court rejected her argument and noted the Utah Securities Act prohibited the offer or sale of an unregistered security. *See id.* The court quoted the statutory definition of “offer to sell” word for word from the statute, similar to the instruction proposed by Plaintiffs. *See id.* The court held that the “statute does not contemplate a defendant’s ability or authority to complete these transactions, and Defendant has not presented us with any persuasive analysis that would require the *addition* of these elements.” *Id.* at ¶ 20 (emphasis added).

Bolson demonstrates that a determination as to whether a person sold or offered to sell a security can and should be determined by reference to the statutory definition of “sell,” “sale,” “offer,” or “offer to sale” under the Utah Securities Act without listing other confusing factors or adding other elements not included in the statute. Here, the addition of factors for which there was no factual basis could only have served to confuse the jury. Because there was no factual basis to conclude that Mr. Bloomfield engaged in any of the conduct in those additional factors, the only effect they could have had on the jury was to mislead them into believing that these additional factors were functionally additional elements of Plaintiffs’ cause of action under the Utah Securities Act.

1.5 Jury Instruction 13 Was Error Because It Was Prejudicial.

Jury Instruction 13 was prejudicial and affected the outcome of the case because none of the factors listed in the instruction were relevant to the case and the parties, and the district court was aware prior to trial that none of the parties would present any evidence to support any of the factors listed in Jury Instruction 13—which the jury was told to consider and weigh.

Plaintiffs were able to present evidence similar to the evidence in *Bolson*: Mr. Bloomfield approached Plaintiffs with the investment; Mr. Bloomfield introduced Plaintiffs to the promoter, Mr. Feldman [R. 9219; 9017-18; 9236; 9275-76; 9457; 9868-70]; Mr. Bloomfield helped Plaintiffs determine how much to invest [R. 9057-58; 9287-91; 9463-64; Tr. Ex. 53; R. 9707-08]; Mr. Bloomfield promised high returns on the investment [R. 9021; 9122-23; 9276; 9401; 9454; 9496; 9721]; Mr. Bloomfield received a substantial commission to convince Plaintiffs to invest [R. 9028-29; 9219-23; 9465; 9496-97; 9245]; and Mr. Bloomfield was Plaintiffs' primary contact person for information about the investment [R. 9058-59; 9291; 9464; 9280-81]. Based on the foregoing, a jury could have found that Mr. Bloomfield effectuated the sale of securities to Plaintiffs. And had the factors and exemptions not been listed in Jury Instruction No. 13, the jury would have found Defendants liable for selling a security without a license, all of the elements of which were stipulated or Mr. Bloomfield admitted to at trial. [R. 6235.]

Further, the definition of what constitutes a sale of a security in Jury Instruction 13 affected the meaning of Jury Instruction 15, which defines an agent, because Jury

Instruction 15 defines an agent as a person who effects or attempts to effect the “sale” of a security. [R. 6828.] The jury would need to reference Jury Instruction 13 to determine whether Mr. Bloomfield was an agent because “sale” and “offer to sell” were defined by Jury Instruction 13. *See State v. Maestas*, 2012 UT 46, ¶ 148, 299 P.3d 892 (holding that when reviewing an alleged error in the jury instructions, courts “look at the jury instructions in their entirety.”).

Conclusion On Cross-Appeal

Because the district court erroneously included factually irrelevant factors in Jury Instruction 13, this Court should reverse the judgment on Plaintiffs’ claims arising under the Utah Securities Act and grant Plaintiffs a new trial on those causes of action.

Dated this 27th day of January 2017.

WASHBURN LAW GROUP LLC



D. LOREN WASHBURN

Attorney for Appellees and Cross-Appellants Skyler Witman, John Washenko, Jonathan Bonnette, Matt Lovelady, and Don Jorgensen

Certificate of Compliance with Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(5)(b) because this brief contains 15,610 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief was prepared in a proportionally spaced typeface using Microsoft Word for Mac in 13 point New Times Roman.

DATED this 27th day of January, 2017.



Certificate of Service

This is to certify that on the 27th day of January, 2017, I caused two true and correct copies of the Brief of Appellee and Cross-Appellant to be served on the following via first-class mail, postage prepaid:

Michael D. Zimmerman
Troy L. Booher
Clemens A. Landau
ZIMMERMAN JONES BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111

John H. Bogart
Julie Edwards
TELOS VG, PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111

Charles A. Stormont
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111

A handwritten signature in blue ink, appearing to be "D. G. Jones", written over a horizontal line.

Tab A

West's Utah Code Annotated

Title 61. Securities Division--Real Estate Division

Chapter 1. Utah Uniform Securities Act (Refs & Annos)

U.C.A. 1953 § 61-1-13

§ 61-1-13. Definitions

Effective: May 10, 2016
Currentness

(1) As used in this chapter:

(a) "Affiliate" means a person that, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with a person specified.

(b)(i) "Agent" means an individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

(ii) "Agent" does not include an individual who represents:

(A) an issuer, who receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of securities in this state, and who effects transactions:

(I) in securities exempted by Subsection 61-1-14(1)(a), (b), (c), or (g);

(II) exempted by Subsection 61-1-14(2);

(III) in a covered security as described in Sections 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933¹; or

(IV) with existing employees, partners, officers, or directors of the issuer; or

(B) a broker-dealer in effecting transactions in this state limited to those transactions described in Section 15(h) (2) of the Securities Exchange Act of 1934².

(iii) A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if the partner, officer, director, or person otherwise comes within the definition of "agent."

(iv) "Agent" does not include a person described in Subsection (3).

(c)(i) "Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account.

(ii) "Broker-dealer" does not include:

(A) an agent;

(B) an issuer;

(C) a depository institution or trust company;

(D) a person who has no place of business in this state if:

(I) the person effects transactions in this state exclusively with or through:

(Aa) the issuers of the securities involved in the transactions;

(Bb) other broker-dealers;

(Cc) a depository institution, whether acting for itself or as a trustee;

(Dd) a trust company, whether acting for itself or as a trustee;

(Ee) an insurance company, whether acting for itself or as a trustee;

(Ff) an investment company, as defined in the Investment Company Act of 1940³, whether acting for itself or as a trustee;

(Gg) a pension or profit-sharing trust, whether acting for itself or as a trustee; or

(Hh) another financial institution or institutional buyer, whether acting for itself or as a trustee; or

(II) during any period of 12 consecutive months the person does not direct more than 15 offers to sell or buy into this state in any manner to persons other than those specified in Subsection (1)(c)(ii)(D)(I), whether or not the offeror or an offeree is then present in this state;

(E) a general partner who organizes and effects transactions in securities of three or fewer limited partnerships, of which the person is the general partner, in any period of 12 consecutive months;

(F) a person whose participation in transactions in securities is confined to those transactions made by or through a broker-dealer licensed in this state;

(G) a person who is a principal broker or associate broker licensed in this state and who effects transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(H) a person effecting transactions in commodity contracts or commodity options;

(I) a person described in Subsection (3); or

(J) other persons as the division, by rule or order, may designate, consistent with the public interest and protection of investors, as not within the intent of this Subsection (1)(c).

(d) "Buy" or "purchase" means a contract for purchase of, contract to buy, or acquisition of a security or interest in a security for value.

(e) "Commission" means the Securities Commission created in Section 61-1-18.5.

(f) "Commodity" means, except as otherwise specified by the division by rule:

(i) an agricultural, grain, or livestock product or byproduct, except real property or a timber, agricultural, or livestock product grown or raised on real property and offered or sold by the owner or lessee of the real property;

(ii) a metal or mineral, including a precious metal, except a numismatic coin whose fair market value is at least 15% greater than the value of the metal it contains;

(iii) a gem or gemstone, whether characterized as precious, semi-precious, or otherwise;

(iv) a fuel, whether liquid, gaseous, or otherwise;

(v) a foreign currency; and

(vi) all other goods, articles, products, or items of any kind, except a work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner of the work.

(g)(i) "Commodity contract" means an account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise.

(ii) A commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes.

(iii)(A) A commodity contract may not include a contract or agreement that requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(B) A purchaser is not considered to have received physical delivery of the total amount of each commodity to be purchased under the contract or agreement when the commodity or commodities are held as collateral for a loan or are subject to a lien of any person when the loan or lien arises in connection with the purchase of each commodity or commodities.

(h)(i) "Commodity option" means an account, agreement, or contract giving a party to the option the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

(ii) "Commodity option" does not include an option traded on a national securities exchange registered:

(A) with the Securities and Exchange Commission; or

(B) on a board of trade designated as a contract market by the Commodity Futures Trading Commission.

(i) "Depository institution" means the same as that term is defined in Section 7-1-103.

(j) "Director" means the director of the division appointed in accordance with Section 61-1-18.

(k) "Division" means the Division of Securities established by Section 61-1-18.

(l) "Executive director" means the executive director of the Department of Commerce.

(m) "Federal covered adviser" means a person who:

(i) is registered under Section 203 of the Investment Advisers Act of 1940⁴; or

(ii) is excluded from the definition of "investment adviser" under Section 202(a)(11) of the Investment Advisers Act of 1940⁵.

(n) "Federal covered security" means a security that is a covered security under Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section 18(b) of the Securities Act of 1933.

(o) "Fraud," "deceit," and "defraud" are not limited to their common-law meanings.

(p) "Guaranteed" means guaranteed as to payment of principal or interest as to debt securities, or dividends as to equity securities.

(q)(i) "Investment adviser" means a person who:

(A) for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; or

(B) for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

(ii) "Investment adviser" includes a financial planner or other person who:

(A) as an integral component of other financially related services, provides the investment advisory services described in Subsection (1)(q)(i) to others for compensation and as part of a business; or

(B) holds the person out as providing the investment advisory services described in Subsection (1)(q)(i) to others for compensation.

(iii) "Investment adviser" does not include:

(A) an investment adviser representative;

(B) a depository institution or trust company;

(C) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of the profession;

(D) a broker-dealer or its agent whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for the services;

(E) a publisher of a bona fide newspaper, news column, news letter, news magazine, or business or financial publication or service, of general, regular, and paid circulation, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

(F) a person who is a federal covered adviser;

(G) a person described in Subsection (3); or

(H) such other persons not within the intent of this Subsection (1)(q) as the division may by rule or order designate.

(r)(i) "Investment adviser representative" means a partner, officer, director of, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who:

(A)(I) is employed by or associated with an investment adviser who is licensed or required to be licensed under this chapter; or

(II) has a place of business located in this state and is employed by or associated with a federal covered adviser; and

(B) does any of the following:

(I) makes a recommendation or otherwise renders advice regarding securities;

(II) manages accounts or portfolios of clients;

(III) determines which recommendation or advice regarding securities should be given;

(IV) solicits, offers, or negotiates for the sale of or sells investment advisory services; or

(V) supervises employees who perform any of the acts described in this Subsection (1)(r)(i)(B).

- (ii) "Investment adviser representative" does not include a person described in Subsection (3).
- (s) "Investment contract" includes:
 - (i) an investment in a common enterprise with the expectation of profit to be derived through the essential managerial efforts of someone other than the investor; or
 - (ii) an investment by which:
 - (A) an offeree furnishes initial value to an offerer;
 - (B) a portion of the initial value is subjected to the risks of the enterprise;
 - (C) the furnishing of the initial value is induced by the offerer's promises or representations that give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offeree as a result of the operation of the enterprise; and
 - (D) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.
- (t) "Isolated transaction" means not more than a total of two transactions that occur anywhere during six consecutive months.
- (u)(i) "Issuer" means a person who issues or proposes to issue a security or has outstanding a security that it has issued.
- (ii) With respect to a preorganization certificate or subscription, "issuer" means the one or more promoters of the person to be organized.
- (iii) "Issuer" means the one or more persons performing the acts and assuming duties of a depositor or manager under the provisions of the trust or other agreement or instrument under which the security is issued with respect to:
 - (A) interests in trusts, including collateral trust certificates, voting trust certificates, and certificates of deposit for securities; or
 - (B) shares in an investment company without a board of directors.
- (iv) With respect to an equipment trust certificate, a conditional sales contract, or similar securities serving the same purpose, "issuer" means the person by whom the equipment or property is to be used.

(v) With respect to interests in partnerships, general or limited, "issuer" means the partnership itself and not the general partner or partners.

(vi) With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payment out of production under the titles or leases, "issuer" means the owner of the title or lease or right of production, whether whole or fractional, who creates fractional interests therein for the purpose of sale.

(v)(i) "Life settlement interest" means the entire interest or a fractional interest in any of the following that is the subject of a life settlement:

(A) a policy; or

(B) the death benefit under a policy.

(ii) "Life settlement interest" does not include the initial purchase from the owner by a life settlement provider.

(w) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(x) "Person" means:

(i) an individual;

(ii) a corporation;

(iii) a partnership;

(iv) a limited liability company;

(v) an association;

(vi) a joint-stock company;

(vii) a joint venture;

(viii) a trust where the interests of the beneficiaries are evidenced by a security;

(ix) an unincorporated organization;

(x) a government; or

(xi) a political subdivision of a government.

(y) "Precious metal" means the following, whether in coin, bullion, or other form:

(i) silver;

(ii) gold;

(iii) platinum;

(iv) palladium;

(v) copper; and

(vi) such other substances as the division may specify by rule.

(z) "Promoter" means a person who, acting alone or in concert with one or more persons, takes initiative in founding or organizing the business or enterprise of a person.

(aa)(i) Except as provided in Subsection (1)(aa)(ii), "record" means information that is:

(A) inscribed in a tangible medium; or

(B)(I) stored in an electronic or other medium; and

(II) retrievable in perceivable form.

(ii) This Subsection (1)(aa) does not apply when the context requires otherwise, including when "record" is used in the following phrases:

(A) "of record";

(B) "official record"; or

(C) "public record."

(bb)(i) "Sale" or "sell" includes a contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

(ii) "Offer" or "offer to sell" includes an attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(iii) The following are examples of the definitions in Subsection (1)(bb)(i) or (ii):

(A) a security given or delivered with or as a bonus on account of a purchase of a security or any other thing, is part of the subject of the purchase, and is offered and sold for value;

(B) a purported gift of assessable stock is an offer or sale as is each assessment levied on the stock;

(C) an offer or sale of a security that is convertible into, or entitles its holder to acquire or subscribe to another security of the same or another issuer is an offer or sale of that security, and also an offer of the other security, whether the right to convert or acquire is exercisable immediately or in the future;

(D) a conversion or exchange of one security for another constitutes an offer or sale of the security received in a conversion or exchange, and the offer to buy or the purchase of the security converted or exchanged;

(E) securities distributed as a dividend wherein the person receiving the dividend surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or sale;

(F) a dividend of a security of another issuer is an offer or sale; or

(G) the issuance of a security under a merger, consolidation, reorganization, recapitalization, reclassification, or acquisition of assets constitutes the offer or sale of the security issued as well as the offer to buy or the purchase of a security surrendered in connection therewith, unless the sole purpose of the transaction is to change the issuer's domicile.

(iv) The terms defined in Subsections (1)(bb)(i) and (ii) do not include:

(A) a good faith gift;

(B) a transfer by death;

(C) a transfer by termination of a trust or of a beneficial interest in a trust;

(D) a security dividend not within Subsection (1)(bb)(iii)(E) or (F); or

(E) a securities split or reverse split.

(cc) "Securities Act of 1933,"⁶ "Securities Exchange Act of 1934,"⁷ and "Investment Company Act of 1940"⁸ mean the federal statutes of those names as amended before or after the effective date of this chapter.

(dd) "Securities Exchange Commission" means the United States Securities Exchange Commission created by the Securities Exchange Act of 1934.

(ee)(i) "Security" means a:

(A) note;

(B) stock;

(C) treasury stock;

(D) bond;

(E) debenture;

(F) evidence of indebtedness;

(G) certificate of interest or participation in a profit-sharing agreement;

(H) collateral-trust certificate;

(I) preorganization certificate or subscription;

(J) transferable share;

(K) investment contract;

(L) burial certificate or burial contract;

(M) voting-trust certificate;

(N) certificate of deposit for a security;

(O) certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease;

(P) commodity contract or commodity option;

(Q) interest in a limited liability company;

(R) life settlement interest; or

(S) in general, an interest or instrument commonly known as a "security," or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase an item listed in Subsections (1)(ee)(i)(A) through (R).

(ii) "Security" does not include:

(A) an insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period;

(B) an interest in a limited liability company in which the limited liability company is formed as part of an estate plan where all of the members are related by blood or marriage, or the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; or

(C)(I) a whole long-term estate in real property;

(II) an undivided fractionalized long-term estate in real property that consists of 10 or fewer owners; or

(III) an undivided fractionalized long-term estate in real property that consists of more than 10 owners if, when the real property estate is subject to a management agreement:

(Aa) the management agreement permits a simple majority of owners of the real property estate to not renew or to terminate the management agreement at the earlier of the end of the management agreement's current term, or 180 days after the day on which the owners give notice of termination to the manager; and

(Bb) the management agreement prohibits, directly or indirectly, the lending of the proceeds earned from the real property estate or the use or pledge of its assets to a person or entity affiliated with or under common control of the manager.

(iii) For purposes of Subsection (1)(ee)(ii)(B), evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, may not establish, without more, that all members are actively engaged in the management of the limited liability company.

(ff) "State" means a state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(gg)(i) "Undivided fractionalized long-term estate" means the same as that term is defined in Section 57-29-102.

(ii) "Undivided fractionalized long-term estate" does not include a joint tenancy.

(hh) "Undue influence" means that a person uses a relationship or position of authority, trust, or confidence:

(i) that is unrelated to a relationship created:

(A) in the ordinary course of making investments regulated under this chapter; or

(B) by a licensee providing services under this chapter;

(ii) that results in:

(A) an investor perceiving the person as having heightened credibility, personal trustworthiness, or dependability;
or

(B) the person having special access to or control of an investor's financial resources, information, or circumstances; and

(iii) to:

(A) exploit the trust, dependence, or fear of the investor;

(B) knowingly assist or cause another to exploit the trust, dependence, or fear of the investor; or

(C) gain control deceptively over the decision making of the investor.

(ii) "Vulnerable adult" means an individual whose age or mental or physical impairment substantially affects that individual's ability to:

(i) manage the individual's resources; or

(ii) comprehend the nature and consequences of making an investment decision.

(jj) "Whole long-term estate" means a person owns or persons through joint tenancy own real property through a fee estate.

(kk) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive of legal holidays listed in Section 63G-1-301.

(2) A term not defined in this section shall have the meaning as established by division rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community.

(3)(a) This Subsection (3) applies to the offer or sale of a real property estate exempted from the definition of security under Subsection (1)(ee)(ii)(C).

(b) A person who, directly or indirectly receives compensation in connection with the offer or sale as provided in this Subsection (3) of a real property estate is not an agent, broker-dealer, investment adviser, or investment adviser representative under this chapter if that person is licensed under Chapter 2f, Real Estate Licensing and Practices Act, as:

(i) a principal broker;

(ii) an associate broker; or

(iii) a sales agent.

Credits

Laws 1963, c. 145, § 1; Laws 1983, c. 284, § 16; Laws 1989, c. 225, § 84; Laws 1990, c. 133, § 7; Laws 1991, c. 161, § 9; Laws 1992, c. 216, § 1; Laws 1993, c. 158, § 2; Laws 1997, c. 160, § 5, eff. May 5, 1997; Laws 2003, c. 81, § 24, eff. May 5, 2003; Laws 2005, c. 257, § 1, eff. May 2, 2005; Laws 2006, 3rd Sp.Sess., c. 4, § 2, eff. May 26, 2006; Laws 2007, c. 292, §

2, eff. April 30, 2007; Laws 2007, c. 307, § 43, eff. April 30, 2007; Laws 2008, c. 382, § 1069, eff. May 5, 2008; Laws 2009, c. 351, § 9, eff. May 12, 2009; Laws 2009, c. 355, § 26, eff. May 12, 2009; Laws 2010, c. 379, § 17, eff. May 11, 2010; Laws 2011, c. 317, § 3, eff. May 10, 2011; Laws 2011, c. 319, § 1, eff. May 10, 2011; Laws 2011, c. 354, § 1, eff. May 10, 2011; Laws 2016, c. 381, § 12, eff. May 10, 2016.

Notes of Decisions (35)

Footnotes

- 1 See 15 U.S.C.A. § 77r.
- 2 See 15 U.S.C.A. § 78o.
- 3 See 15 U.S.C.A. § 80b-1 et seq.
- 4 See 15 U.S.C.A. § 80b-3.
- 5 See 15 U.S.C.A. § 80b-4.
- 6 See 15 U.S.C.A. § 77a et seq.
- 7 See 15 U.S.C.A. § 78 et seq.
- 8 See 15 U.S.C.A. § 80a-1 et seq.

U.C.A. 1953 § 61-1-13, UT ST § 61-1-13

Current through 2016 Fourth Special Session.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Tab B

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures (Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

15 U.S.C.A. § 77l

§ 77l. Civil liabilities arising in connection with prospectuses and communications

Effective: December 21, 2000

Currentness

(a) In general

Any person who--

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

CREDIT(S)

(May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686; Dec. 22, 1995, Pub.L. 104-67, Title I, § 105, 109 Stat. 757; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(5) [Title II, § 208(a)(3)], 114 Stat. 2763, 2763A-436.)

Notes of Decisions (1550)

15 U.S.C.A. § 77I, 15 USCA § 77I

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-280, 114-282 to 114-286, 114-291 to 114-294, 114-302 to 114-314, 114-316, 114-319 to 114-321, and 114-325. Title 26 current through 114-327.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.