

2015

Jacob D. Williams, an Individual, Plaintiff/Appellant v. Craig Alan Anderson, an Individual, and Anderson Zite, LLC, F/K/a Fix a Phone, LLC, a Utah Limited Liability Company, Defendants and Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JACOB D. WILLIAMS, an individual,

Plaintiff and Appellant,

v.

CRAIG ALAN ANDERSON, an individual,
QUINN ZITE, an individual, and
ANDERSON ZITE, LLC, f/k/a FIX A
PHONE, LLC, a Utah limited liability
company,

Defendants and Appellees.

Case No. 20150886-CA

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court of
Salt Lake County
Case No. 130901891
The Honorable Robert P. Faust

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j). On September 23, 2015, the Utah Supreme Court transferred this appeal to the Utah Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The lone issue presented for this Court's review is whether the district court abused its discretion by excluding evidence of Appellant Jacob D. Williams' ("*Williams*") damages due to his failure to provide a computation of his damages as required by Utah Rule of Civil Procedure 26(a)(1)(C).

The district court's interpretation of Rule 26(a)(1)(C) is a legal question reviewed for correctness. *See Am. Interstate Mortg. Corp. v. Edwards*, 2002 UT App 16, ¶ 10, 41 P.3d 1142. The district court's imposition of sanctions, on the other hand, may be set aside *only* "if abuse of discretion is *clearly* shown." *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (emphasis in original) (alteration and internal quotation marks omitted); *see also First Fed. Sav. & Loan Ass'n of Salt Lake City v. Schamanek*, 684 P.2d 1257, 1266 (Utah 1984) ("The choice of an appropriate discovery sanction is primarily the responsibility of the trial judge and will not be reversed absent an abuse of discretion.").

Appellate courts give the district court "a great deal of latitude in determining the most fair and efficient manner to conduct court business" because the district court judge "is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties." *Bodell Const. Co. v. Robbins*, 2009 UT 52, ¶ 35,

215 P.3d 933 (alteration in original). An abuse of discretion may be found only where the district court relied on “an erroneous conclusion of law” or where there “was no evidentiary basis for the trial court’s ruling.” *Kilpatrick*, 2008 UT 82, ¶ 23 (internal quotation marks omitted).

The issue on appeal arose in connection with a motion in limine filed by the appellees, Craig Alan Anderson (“*Anderson*”), Quinn Zite (“*Zite*”), and Anderson Zite, LLC f/k/a Fix A Phone, LLC (“*Fix A Phone*” and, collectively, “*Appellees*”), requesting that the district court exclude any evidence of Williams’ damages based on his failure to provide a computation of damages pursuant to Rule 26(a)(1)(C). The motion in limine was fully briefed (R. 439–476, 505–572), argued (R. 839–960), and granted by the district court (R. 693–698). The district court thereafter ordered that Williams “[wa]s and shall be prevented from opining on or otherwise presenting damages-related evidence at the trial of this matter.” (R. 802.) This issue was therefore preserved.

DETERMINATIVE PROVISIONS

Utah Rule of Civil Procedure 26(a)(1)(C) is determinative of this appeal and provides as follows:

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

...

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

Utah Rule of Civil Procedure 26(d)(4) is also determinative of this appeal, and it provides as follows:

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

STATEMENT OF THE CASE

Nature, Course, and Disposition of Proceedings

Williams sued Appellees in the Third Judicial District Court, Salt Lake County (the Honorable Robert P. Faust, Judge), for various claims of fraud and breaches of contract and duty. Williams pleaded that Fix A Phone—the limited liability company at the center of this dispute—was worth \$1.5 million, and he was entitled to 30% of that value as damages, among other categories of damages. Williams' pleading placed his claims in Tier 3 discovery pursuant to Utah Rule of Civil Procedure 26(c)(5).

Following Tier 3 discovery, and in anticipation of a jury trial, Appellees filed a motion in limine. Therein, Appellees argued that Williams had never provided a computation of his damages as required by Utah Rule of Civil Procedure 26(a)(1)(C) and that Williams should therefore be barred from presenting any damages-related evidence or material at trial. The motion was briefed, argued, and granted by the Court. (R. 697.)

In light of the Court's ruling and order on the motion in limine, the parties stipulated to striking the jury trial. Williams petitioned the Utah Supreme Court for interlocutory review of the district court's ruling and order. That petition was granted.

Statement of Facts

Williams' Complaint

Williams filed his complaint against Appellees on March 15, 2013. (R. 1–12.) In his complaint, Williams alleged, *inter alia*, as follows:

- In August 2010, Williams and Anderson “started a business called Fix A Phone, LLC.” (R. 2, ¶ 9.)
- In November 2010, Williams and Anderson executed an operating agreement making each of them 50% owners of Fix A Phone. (R. 3, ¶ 14.)
- Anderson’s father and Zite ultimately became members of Fix A Phone, with both Anderson and Williams agreeing to reduce their respective ownership percentages. (R. 3, ¶¶ 15–17.)
- In or around February 2012, Williams and Anderson began a months-long falling out, which caused them to obtain a valuation of Fix A Phone and Williams’ ownership interest. (R. 4–5.)
- At that time, an independent valuator valued Williams’ “ownership interest in . . . Fix A Phone at between \$77,000 and \$119,000.” (R. 4–5, ¶ 25.)
- With that figure in hand, Anderson “offered to buy out . . . Williams’ ownership interest for \$1,800 a month for five years,” but Williams rejected the offer. (R. 5, ¶ 26.)
- In May 2012, Anderson again offered to purchase Williams’ 30% ownership interest, but no agreement was reached. (R. 6, ¶¶ 33–34.)
- In September 2012, after months of contention and Williams’ refusal to participate in a capital contribution, Williams was “voted out of the company” and his membership interest cancelled. (R. 6–7, ¶ 39.)
- “Upon information and belief,” the value of Fix A Phone in February 2012 was \$1,500,000. (R. 7, ¶ 42.)

- With that larger valuation in mind, Williams claimed that he was an owner of Fix A Phone, that his membership interest had not been canceled, and that he was therefore “entitled to recover thirty percent (30%) of the purchase price” of Fix A Phone, which had subsequently been sold to Tricked Out Services, Inc. (“*Tricked Out*”), and “thirty percent (30%) of any equity or ownership interest” that Anderson and Zite possessed in or were owed by Tricked Out. (R. 8, ¶ 47.)

Appellees filed their answer and counterclaim on June 13, 2013. (R. 102–124.)

Based on the date of that filing and the amount of damages Williams claimed, and pursuant to Utah Rule of Civil Procedure 26, fact discovery was set to conclude on February 27, 2014, with expert discovery set to conclude on June 5, 2014. (R. 125.)

Williams’ Damages Disclosures and Discovery

On or around July 1, 2013, Williams served his initial disclosures. (R. 453, 459.) Therein, Williams set forth a rudimentary damages formula, claiming that he was entitled to 30% of the price Tricked Out Services, Inc. paid for Fix A Phone, LLC, *as well as* 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc., *including* any money owed by Tricked Out Services, Inc., and punitive damages.

(R. 458 (emphasis added).) Williams also noted that “[d]iscovery is just beginning and Plaintiff will supplement his damages claim as necessary, including with expert opinion.” (R. 458.)

On July 29, 2013, Appellees disclosed, in their initial disclosures, an asset purchase agreement (the “*Asset Purchase Agreement*”) (R. 159, 538–553), detailing that Fix A Phone was sold to Tricked Out for \$200,000. (R. 538.) The Asset Purchase Agreement also provided as follows:

In addition to the Purchase Price, and as consideration for the Members’ services to be rendered pursuant to Section 2.02(c) below, Buyer further

covenants and agrees to pay to the Members 50% of Buyer's Net Profits (as defined below) derived from cell phone repair services for a period of two (2) years beginning on April 1, 2013 and continuing through March 31, 2015 (the "*Revenue Share Payments*")

(R. 538–539.)

Williams delayed conducting discovery. He issued a subpoena duces tecum to Appellees' counsel's office on July 11, 2013 (R. 150–156), but issued a request for production of documents for the first time on January 22, 2014, mere weeks before fact discovery was initially set to close (R. 199–200). Therein, Williams requested documents related to "the negotiation of the sale or purchase of Fix A Phone's assets or any membership interests in Fix A Phone," communications between Appellees and Tricked Out, documents related to "the sale of Fix A Phone's assets to Tricked Out," documents related to payments to Appellees from Tricked Out, and even requested "[a]ll statements for any bank account owned or possessed by any of the [Appellees]." (R. 199–200, 466–468.) On or about April 25, 2014, Appellees served their Objections and Responses to Plaintiff's First Set of Requests for Production of Documents. (R. 251–254.) Although Williams thereafter requested that the Court compel the production of Appellees' personal bank statements (R. 342–346), he did not issue any other document requests to Appellees in the course of discovery or otherwise demand follow-up or other documentary production. (*See generally* R.)

After fact discovery was set to close, Williams and Appellees moved the Court twice for extensions of the fact discovery deadline, first noting that the parties were considering mediation, and then that mediation had failed. (R. 234–236, 259–261.) The

Court granted both requests and ultimately issued an Order Granting Joint Motion for Extension of Discovery Deadlines on May 19, 2014. (R. 267–269.) Following that joint extension, Williams propounded his first set of interrogatories to the Appellees on May 29, 2014. (R. 318–319.) That same day, Williams issued his first (and final) Amended Initial Disclosures. (R. 470–476.)

In his Amended Initial Disclosures, Williams again provided only his rough formula of damages, insisting once more that he was

entitled to 30% of the price Tricked Out Services, Inc. paid for Fix A Phone, LLC, *as well as* 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc., *including* any money owed by Tricked Out Services, Inc., and punitive damages.

(R. 475 (emphasis added).) Williams also added that he was entitled to “30% of any cash or other assets that remained at Fix A Phone after the asset sale,” and “Fix A Phone distributions from which he was excluded.” (R. 475.)

On June 5, 2014, Appellees took Williams’ deposition. (R. 560.) In his deposition, Williams testified as follows:

Q. Do you know how much the company did sell for?

A. Two hundred, plus a percentage of the stores’ profit or revenue.

...

Q. Okay. And your knowledge of this is just based on receiving the agreement in this litigation from Tricked Out?

A. Right.

Q. Have you actually read that agreement?

A. Yes.

(R. 528, 566–567.) That was not the first time that Williams had refused to limit his damages to 30% of Fix A Phone’s sale price. Previously, in connection with a proposed mediation, Appellees requested that Williams agree to a damages ceiling of \$60,000—

representing 30% of the \$200,000 purchase price of Fix A Phone, but Williams declined. (R. 536, 555–56.)

On approximately July 31, 2014, Appellees issued (with the exception of a minor pre-trial supplementation) the final response to any discovery request by either party in this matter. (R. 376–377.) On December 12, 2014, Williams took the depositions of Anderson and Zite, effectively marking the end of fact discovery. (R. 384–385.) On December 19, 2014, Appellees served a designation of expert witness pursuant to Utah Rule of Civil Procedure 26(a)(4). (R. 388.) Later, on February 13, 2015, Appellees served the expert report of Lone Peak Valuation Group. (R. 396.)

Appellees' Motion in Limine and the District Court's Ruling

On June 9, 2015, some two years after discovery began in this matter, Williams asked the Court to convene a Pretrial Conference. (R. 401–402.) The district court conducted a pretrial conference on July 23, 2015 and scheduled the lawsuit for a three-day jury trial to begin on September 8, 2015. (R. 426.)

In preparing for the three-day jury trial, Appellees served pretrial disclosures (R. 431), issued three trial subpoenas (R. 499, 577, 581), filed non-stipulated jury instructions (R. 587), participated in formulating joint jury instructions (R. 609), participated in formulating a special verdict form (R. 658), and supplemented discovery responses (R. 682).

On August 4, 2015, Appellees also filed a motion in limine requesting that the Court “issue an order in limine preventing Williams from opining on or otherwise presenting damages-related evidence” because Williams had “never provided a

computation of his damages” under Rule 26. (R. 439–440 (emphasis omitted).)

Williams opposed the motion in limine on August 19, 2016, less than a month before trial, arguing that Appellees possessed sufficient factual information to utilize Williams’ disclosed damages formula to discern the quantity of damages Williams claimed. (R. 505.) In that opposition, Williams stated that the parties would “likely” stipulate that Fix A Phone’s purchase price was \$200,000, but backed away from actually stipulating. (R. 507.) In reply, Appellees noted that “Williams never disclosed what he seeks 30% of,” noting that Williams “never so much as suggested that he sought 30% of \$200,000 until faced with [Appellees’] motion.” (R. 531.)

The district court conducted a hearing on Appellees’ motion in limine on September 2, 2015. (R. 912–960.) Following argument, the district court took the motion in limine under advisement. (R. 692, 959.) The next day, September 3, 2015, the court issued a memorandum decision granting the motion in limine, concluding that “[a] claim of a fixed percentage for damages does not comply with the requirement to disclose a calculation of the damages a plaintiff is required to disclos[e] under Rule 26.” (R. 697.)

In support of its conclusion, the district court found that Williams’ formula was insufficient given that Williams consistently and aggressively disputed the amount of the figures to be input into the formula Williams described. (R. 695.) For example, Williams did not agree that Fix A Phone “sold for \$200,000” and that Williams had “contended that the purchase price includes the 50% net profit calculation” envisioned in the Asset Purchase Agreement. (R. 695.) Furthermore, the district court noted that, in his deposition, Williams “continued to insist that his damages consisted not only of 30%

of \$200,000, but also 30% of any compensation Tricked Out . . . paid [the Appellees] for consulting services rendered.” (R. 695.) Finally, the district court observed that Williams had indicated from the outset of the lawsuit that he thought his case was worth much more than just 30% of \$200,000:

[I]n his Complaint, Williams alleged that [Fix A Phone] was worth \$1.5 million. Based on that allegation, and absent any further disclosure, Williams obtained Tier 3 discovery in both quantity and time, and [Appellees] assert they defended this lawsuit as if it were a \$450,000 case. As a result, a three-day jury trial has been set in this matter which would have likely been handled much differently. While Williams argues that [Appellees] never complained about the lack of a disclosure, such is irrelevant as it is Williams’ obligation to disclose a damages calculation, not [Appellees’] obligation to demand one.

(R. 696–97.)

With the district court’s order excluding Williams’ damages in place, the parties agreed to strike the jury trial. (R. 704.) On September 22, 2015, Williams petitioned the Utah Supreme Court for leave to file an interlocutory appeal. (R. 805.) Williams’ petition for interlocutory review was granted on November 16, 2015.

SUMMARY OF ARGUMENT

Appellees’ argument is a simple one: Williams never provided a computation of his damages within the meaning of Utah Rule of Civil Procedure 26(a)(1)(C), even though he easily could have. Pursuant to Rule 26(d)(4), the district court did not abuse its discretion by excluding all of Williams’ damages evidence as a sanction.

At the outset, the district court correctly interpreted Rule 26(a)(1)(C). That rule requires a “computation” of damages. By definition, a computation is a calculated figure. That reality is supported not only by the commonsense meaning of the word

“computation,” but also by the advisory committee notes and the context of Rule 26. Rule 26(a)(1)(C) requires a plaintiff to disclose not just a computation, but the evidence upon which that computation is based. That requirement does not contemplate disclosure of a mere set of categories of damages that a plaintiff hopes to recover. Also, Rule 26(b)(5) assigns discovery thresholds (for duration, quantity, and methods) based upon the dollar amount of damages claimed, and assesses the proportionality of discovery based upon that computation.

Furthermore, Rule 26(e) subjects disclosures to the requirements of Utah Rule of Civil Procedure 11. That rule, of course, indicates that the signer of any paper certifies that “the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” “Evidentiary support” entails not just a recitation of the categories of damages a plaintiff hopes to recover, but the plaintiff’s computation of the damages that it believes the evidence will allow it to recover. The very purpose of the 2011 amendments to Rule 26 turns on early determination and disclosure of a computation of damages, so that parties and the Court can assess the proportionality of any discovery conducted. Critically, it is not Appellees’ job to harangue Williams into complying with Rule 26(a)(1)(C). Williams was the plaintiff in the case he commenced, and Rule 26(a)(1) makes clear that he must provide that computation as a prerequisite to being able to put on evidence of damages. As a matter of law, the district court correctly read Rule 26(a)(1)(C).

Rather than provide the computation required by Rule 26(a)(1)(C), Williams provided an algebraic formulation, insisting throughout the litigation of his case that he was entitled to “30% of x .” But Williams staunchly refused to ever define x . Was it 30% of \$200,000? Does Williams contend that the \$200,000 sale price of Fix A Phone was artificially or collusively deflated? Does Williams contend that there were, in fact, profit-share payments from Tricked Out to Anderson or Zite pursuant to the Asset Purchase Agreement? Were there distributions that Appellees denied, but that Williams identified based upon his review of produced documents? Appellees were certainly prepared to mount a defense to these questions, based on their understanding of the evidence, but the fact remains that Rule 26(a)(1) places the obligation upon Williams—as the plaintiff—to disclose the answers to these questions. The plaintiff has to tell the defendants what he seeks. Williams did not do so. The district court did not abuse its discretion by deeming Williams’ disclosure to be noncompliant with Rule 26(a)(1)(C).

Finally, the district court did not abuse its discretion by excluding all of Williams’ damages-related materials. Rule 26(d)(4) expressly states that “[i]f a party fails to disclose or to supplement timely a disclosure . . . that party may not use the . . . material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.” Williams does not argue that good cause supported his failure. And Williams’ primary argument regarding harmlessness to the district court was that Appellees could have discerned the amount of Williams’ damages on their own—which, as demonstrated above, is false and contrary to Rule 26(a)(1)(C). Moreover, Appellees were dragged through a two-year case, prepared for a three-day jury trial, and even retained an expert

witness, all for a case that Williams halfheartedly disclosed, days before trial, was worth only \$60,000. Rule 26 was amended in 2011 to require plaintiffs to engage, early on, with the facts of their damages, so that legal fees would not swallow up the actual amount in controversy, and so that plaintiffs cannot justify extensive litigation simply by pleading stratospheric damages without support.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED RULE 26(a)(1)(C) TO REQUIRE DISCLOSURE OF A FIGURE REPRESENTING WILLIAMS' CLAIMED DAMAGES.

“[W]ithout waiting for a discovery request,” a plaintiff must disclose, among other things, “a *computation* of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered.” *See* UTAH R. CIV. P. 26(a)(1), (a)(1)(C) (emphasis added). The district court correctly interpreted the word “computation” to require disclosure of a figure representing Williams’ claimed damages. (R. 693–97.)

When interpreting a statute (or a rule¹), “it is axiomatic that [the] court’s primary goal is to give effect to the [drafter’s] intent in light of the purpose that the statute was meant to achieve.” *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875 (internal quotation marks omitted). The best evidence of that purpose is “the plain language of the statute itself.” *See State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92 (internal quotation marks omitted); *see also Wilson Supply, Inc. v. Fradan Mfg. Corp.*,

¹ *See Drew v. Lee*, 2011 UT 15, ¶ 16, 250 P.3d 48 (“When we interpret a rule of civil procedure, we look to the express language of the rule . . .”).

2002 UT 94, ¶ 14, 54 P.3d 1177 (“When interpreting statutes, we determine the statute’s meaning by first looking to the statute’s plain language, and give effect to the plain language unless the language is ambiguous.” (internal quotation marks and citation omitted)). But courts “do not interpret the ‘plain meaning’ of a statutory term in isolation”; rather, they “determine the meaning of the text given the relevant context of the statute (including, particularly, the structure and language of the statutory scheme).” *See Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 12, 248 P.3d 465.

A “computation” means “the act or action of computing” and can also simply mean “an amount computed.” MERRIAM-WEBSTER DICTIONARY (*available at*: <http://www.merriam-webster.com/dictionary/computation>) (last visited April 8, 2016). In turn, to “compute,” as a transitive verb, means “to *determine especially by mathematical means*,” or “to *determine or calculate by means of a computer*.” MERRIAM-WEBSTER DICTIONARY (*available at*: <http://www.merriam-webster.com/dictionary/computation>) (last visited April 8, 2016) (emphases added). In other words, the plain result of a computation is a definite, concrete number or solution to a mathematical process. In fashioning Rule 26, the rules committee used the term in its active, transitive verb form—noting that “[p]arties should make a good faith attempt to *compute* damages to the extent possible.” *See* UTAH R. CIV. P. 26 adv. comm. n (emphasis added). In other words, a plaintiff must disclose a computation, which, by definition, is a definite, concrete number.²

² Williams’ argument before this Court is that the Court should adopt the passive notion of a “computation”—a system of reckoning. Apl’t. Br. at 19. Based on the advisory

That definition makes sense in the context of Rule 26. Rule 26(a)(1)(C) requires a plaintiff to not only disclose its computation, but also “a copy of all discoverable *documents or evidentiary material on which such computation is based.*” See UTAH R. CIV. P. 26(a)(1)(C) (emphasis added). Therefore, a computation must be based upon “documents or evidentiary material” as a source. A mere listing of categories of damages that a plaintiff seeks to recover is not based upon any “documents or evidentiary material,” but rather a plaintiff’s aspirations of what it hopes to recover. Also, Rule 26(c)(5) requires a party to compute its damages with at least sufficient particularity to determine a discovery tier, which in turn impacts the proportionality of discovery. See UTAH R. CIV. P. 26(c)(5), 26(b)(2). And Rule 26(e) makes disclosures subject to Utah Rule of Civil Procedure 11, which in turn indicates that the signer of any paper certifies that “the allegations and other *factual contentions* have *evidentiary support* or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” See UTAH R. CIV. P. 11(b)(3) (emphasis added). “Factual contentions” and “evidentiary support” entail not just a recitation of the categories of damages a plaintiff hopes to recover, but the plaintiff’s computation of the damages that it believes the evidence will allow it to recover. The language and context of Rule 26 contemplate a plaintiff analyzing its evidence, determining an amount of damages that it seeks, and disclosing that figure. If supplementation is required—either to disclose more damages, or if a plaintiff determines in the course of discovery that its damages computation does not satisfy Rule 11 and

committee notes to Rule 26, that is plainly not what the committee intended.

therefore must be reduced—a plaintiff must do so. *See* UTAH R. CIV. P. 26(d)(4).³

This interpretation of “computation” is also consistent with the stated purpose of the 2011 amendments to Rule 26. One of the purposes of those amendments was “to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief.” *See* UTAH R. CIV. P. 26 adv. comm. n. Among other things, the 2011 amendments “require parties to provide more information about damages early in the case.” *Id.* The committee went on to explain that

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

Id. (emphases added). In other words, one of the key purposes of the 2011 amendments was to encourage parties to cut to the chase regarding damages. That would reduce discovery costs and allow the parties, and the district court, to assess proportionality—specifically, to ensure that parties do not spend a fortune on a case that does not financially merit such an expenditure. That purpose can be accomplished only by

³ A plaintiff cannot satisfy its damages disclosure obligation simply by disclosing an arbitrary number. The disclosure must be grounded in some sort of evidentiary support, either actual or reasonably expected. If a plaintiff discloses, say, \$1 million in damages, but later learns through discovery that its damages are much less, Rule 26(e) and Rule 11—particularly when viewed through the lens of the advisory committee notes to Rule 26—contemplate an amendment of the disclosure to reflect the lower damage amount.

disclosure of a damages figure, not a mere aspirational formula or set of categories of damages a plaintiff hopes to recover.

Federal courts have taken a similarly dim view of formulas in lieu of concrete computations. For example, in *Design Strategy, Inc. v. Davis*, 469 F.3d 284 (2nd Cir. 2006), the Second Circuit affirmed a district court's exclusion of damages evidence for, among other failures, a plaintiff's disclosure of financial statements and a "simple arithmetic" calculation. *Id.* at 305. At the hearing on the matter before the district court, plaintiff's counsel stated that he "didn't think [plaintiffs] were obligated to do [defendants'] homework." *Id.* at 293. In response, the district court stated that

It is quite the opposite You, the plaintiff, are the one[] who [is] asserting the damages. If you assert the damages and you claim that you suffered a certain amount of injury . . . you have the burden of proof on injury and the amounts thereof, and they have to be calculated with reasonable certainty.

Id. at 293–294. The Second Circuit ultimately agreed with the district court's assessment and concluded that a "simple arithmetic" calculation was "wholly inadequate as a measure of damages." *Id.* The court also opined that "by its very terms Rule 26(a) requires more than providing—without any explanation—undifferentiated financial statements; it requires a 'computation,' supported by documents." *Id.* at 295. Other courts follow this analysis.⁴

⁴ See, e.g., *City & Cty. of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221 (N.D. Cal. 2003) ("Moreover, the 'computation' of damages required by Rule 26(a)(1)(C) contemplates some analysis; for instance, in a claim for lost wages, there should be some information relating to hours worked and pay rate. On the other hand, disclosing a precise figure for damages without a method of calculation may be sufficient in cases where other evidence is developed e.g. in the context of a preliminary hearing,

As the foregoing demonstrates, the district court's interpretation of Rule 26(a)(1)(C) as requiring disclosure of a computation of damages, resulting in an actual figure of damages claimed, was correct.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT WILLIAMS' DISCLOSURE DID NOT SATISFY RULE 26(a)(1)(C).

The district court determined that Williams' damages disclosure did not satisfy Rule 26(a)(1)(C). (R. 693–97.) That determination was not an abuse of discretion.

Williams' initial disclosure of his damages computation was nothing more than a statement that he was entitled to:

30% of the price Tricked Out Services, Inc. paid for Fix A Phone, LLC, *as well as* 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc., *including* any money owed by Tricked Out Services, Inc., and punitive damages.

(R. 458 (emphasis added).) His amended disclosure of his damages computation was nothing more than a statement that he was entitled to:

30% of the price Tricked Out Services, Inc. paid for Fix A Phone, LLC, *as well as* 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc., *including* any money owed by Tricked Out Services, Inc., and punitive damages.

(R. 475 (emphasis added).) Williams also added that he was entitled to “30% of any cash or other assets that remained at Fix A Phone after the asset sale,” and “Fix A Phone distributions from which he was excluded.” (R. 475.) In other words, Williams’

and it is appropriate to defer further specification to *e.g.* development of expert testimony” (internal citations omitted)); *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, No. 10-CV-419-GPC WVG, 2013 WL 4716210, at *3 (S.D. Cal. Sept. 3, 2013) (unpublished disposition) (concluding that “computation” contemplates some analysis beyond merely setting forth a lump sum amount).

“computation” of his damages is nothing than, “I’m entitled to 30% of x .”

The problem with that “computation” is that Williams never conclusively disclosed, in a disclosure document, what x is. That is not disputed. Williams nevertheless attempts to justify his disclosure by arguing that Appellees always knew what x was, based on the fact that they knew Fix A Phone’s sale price and the value of the other inputs of Williams’ formula. That argument ignores the reality that it is Williams’ obligation, as plaintiff, to disclose what *he* seeks in *his* case. See UTAH R. CIV. P. 26(a)(1). Although Appellees knew that Fix A Phone sold for \$200,000, they did not know whether Williams agreed with that, or thought that the sale price included Anderson’s and Zite’s profit-sharing payments, or thought that the sale price was artificially or collusively depressed (after all, it was Williams who pleaded that Fix A Phone was worth \$1.5 million). They similarly did not know whether Williams claimed, based on the financial documents produced, distributions or payments by Tricked Out that Appellees denied. The fact that Appellees could figure out what those sums total does not mean that Williams could not disagree, or claim more damages. It is Williams’ case, and he had the obligation to disclose the damages he claimed, based on the evidence as *he* perceived it—not as Appellees perceived it.

Furthermore, it is unclear what “inputs” Williams believes Appellees possessed. Appellees asked Williams to agree to a damages ceiling in mediation, but he refused. In Williams’ deposition, Appellees directly asked Williams what he deemed Fix A Phone’s sale price to be, and he answered that it included Anderson’s and Zite’s profit-sharing payments. Plainly Williams sought *more* than 30% of \$200,000. Williams’ own initial

disclosures, both initial and amended, tilt at damages above and beyond 30% of Fix A Phone's sale price. And despite the ringing silence of Williams' damages disclosures, his complaint boldly alleges that Fix A Phone was worth \$1.5 million, and that he is entitled to 30% of that figure: \$450,000. Even less than a month before trial, Williams stated that a stipulation regarding the sale price of Fix A Phone was simply "likely." If Williams learned that his allegations or his damages disclosures lacked a factual basis, he should have amended them consistent with Rule 26(e) and Rule 11(b)(3). He did not. The very formula Williams says that he disclosed is the same formula he rejected at least twice, when Appellees proposed it to him.

Williams relies upon federal decisions and commentary to argue that partial compliance with Rule 26's disclosure requirements ought to suffice when later discovery and record evidence clarifies the deficient disclosure. *See* Aplt. Br. at 10–14. But that argument overlooks the purpose of the 2011 amendments to Rule 26, which do not appear in the Federal Rules. When Utah amended Rule 26 to streamline the litigation process and "to reduce discovery costs," it discarded both its prior discovery model and the federal courts' discovery model, including the timing and production of initial disclosures, the proportionality determination, and scope and timing of discovery generally in order to forge its own path. UTAH R. CIV. P. 26 adv. comm. n.; *see also id.* (noting the differences between Utah's prior Rule 26 and Federal Rule 26, and observing that the proportionality "method of limiting discovery . . . was rarely invoked either under the Utah rules or federal rules."). The Advisory Committee made this abundantly clear when it stated that "[t]he 'one-size-fits-all' system is rejected." *Id.* Given that wholesale

rejection then, federal decisions and commentary are not on point.

Accordingly, even if this Court were to accept that a formula with fixed inputs would satisfy Rule 26's damages computation requirement—and it should not—Williams failed to even offer any fixed inputs. Williams merely provided the Appellees with an undefined formula for his damages and then failed to disclose (and even contested) the amounts of the formula's inputs through the rest of the litigation, leaving the Appellees to guess at exactly how much Williams was seeking—whether \$450,000 (30% of his \$1.5 million alleged valuation), \$60,000 (30% of the actual sales price of Fix A Phone), or some number in between. That is precisely the kind of hedging that the revisions to Rule 26 were designed to prevent.⁵ The district court did not abuse its discretion when it determined that Williams did not disclose a computation of damages consistent with Rule 26(a)(1)(C).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING ALL OF WILLIAMS' DAMAGES-RELATED EVIDENCE.

In light of Williams' nondisclosure of his damages computation consistent with Rule 26(a)(1)(C), the district court excluded all of Williams' damages-related evidence. That exclusion was most assuredly not an abuse of the district court's discretion. Utah Rule of Civil Procedure 26(d)(4) expressly provides that “[i]f a party fails to

⁵ See UTAH R. CIV. P. 26 adv. comm. n. (“Ideally, *rules of procedure should be crafted to promote predictability for litigants*. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The ‘one-size-fits-all’ system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.” (emphasis added)).

disclose or to supplement timely a disclosure . . . that party may not use the undisclosed . . . material at any hearing or trial unless the failure is harmless or the party shows good cause for the disclosures.”⁶ To “discourage sandbagging,” the advisory committee warned that “parties must know that if they fail to disclose important information . . . they will not be able to use that information at trial.” *See* UTAH R. CIV. P. 26 adv. comm. n.

The advisory committee observed as follows:

More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. *Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard.* Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Id. (emphasis added). This Court has recently reiterated the seriousness of failing to comply with Rule 26’s disclosure obligations. *See R.O.A. General, Inc. v. Chung*, 2014 UT App 124, ¶¶ 10–11, 327 P.3d 1233. Where a party has not complied with Rule 26 “the sanction of exclusion is *automatic* and *mandatory* unless the sanctioned party can show that the violation of rule 26 . . . was either justified or harmless.” *Id.* at ¶ 11 (emphasis added).⁷ This standard echoes the stance taken by the federal courts, which

⁶ This provision of Rule 26 was imported from the prior version of Rule 37 which stated that “[i]f a party fails to disclose a witness, document or other material as required by Rule 26(a) . . . that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.” *See* UTAH R. CIV. P. 37(f) (superseded November 1, 2011); *see also R.O.A. General, Inc. v. Chung*, 2014 UT App 124, ¶ 10, 327 P.3d 1233 (quoting prior version of Rule 37(h) of the Utah Rules of Civil Procedure).

⁷ Although the *R.O.A. General* court was analyzing prior versions of Rules 26 and 37, its rationale still holds given that the operative language of those rules still survives, albeit in

impose a “self-executing, automatic sanction” where disclosures have not been timely and fully made.⁸

Here, the district court’s imposed sanction must be accorded substantial deference. *See Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (observing that appellate courts will only disturb a district court’s sanctions “if abuse of discretion is *clearly* shown,” since “trial courts must deal first hand with the parties and the discovery process” (citations and internal quotation marks omitted) (emphasis in original)). Days before this brief was filed, this Court affirmed an exclusion of damages-related evidence (and the entry of summary judgment) for failure to disclose an adequate computation of damages. *See Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, ¶ 28, 2016 WL 1273327.⁹ As the following sections demonstrate, Williams’ failure to disclose a

a different location (Rule 26(d)).

⁸ *See, e.g., Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir.2008) (noting that Rule 37 has been described as “a self-executing, automatic sanction to provide a strong inducement for disclosure of material”); *see also Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 543 (N.D. Cal. 2009) (concluding that proportionality “require[s] that both parties focus on the amount of damages at issue from the outset of the case” and chiding plaintiffs for “rely[ing] on the vague, very general damages allegations in their initial complaint to preserve their new, more extensive damages theories, even though they failed to disclose those theories in discovery for over two years, despite [d]efendants’ efforts from the outset to flesh out [p]laintiffs’ sketchy damages allegations through appropriate discovery tools”).

⁹ Notably, in *Sleepy Holdings*, the Court rejected the argument that a bare, formulaic disclosure could be cured if the defendant would perform its own math. There, the appellant—who sought to overturn the exclusion of its damages-related evidence—disclosed the following: “[T]he Lakes entered into a contract . . . providing for the sale of twenty (20) lots for the purchase price of \$2,000,000. The circumstances created by defendants’ failure to obtain and record the subordination documents prevented said sale from moving forward causing further damage to plaintiffs.” *See Sleepy Holdings*, 2016

damages computation was neither the product of good cause nor harmless.

A. The District Court Did Not Abuse Its Discretion By Determining that Williams' Failure to Disclose a Damages Computation Was Not the Product of Good Cause.

Good cause justification exists only where circumstances outside the control of the obligated party prevent the party from complying. *See Reisbeck v. HCA Health Servs. of Utah, Inc.*, 2000 UT 48, ¶ 13, 2 P.3d 447 (concluding that good cause “pertains to special circumstances that are *essentially beyond a party's control*” (emphasis in original)).¹⁰

The district court's determination of no good cause is not an abuse of discretion.

To the district court, Williams offered no justification for his non-disclosure to the district court. Rather, Williams insisted that he *had* complied with Rule 26's damages disclosure requirement and that “[the Appellees] understood the amount of damages claimed because the information to determine [the amount of damages] was at all times in [the Appellees'] possession.” (R. 506.) At bottom, Williams argued, his damages formula was adequate. (R. 509.) Williams maintains the same tack before this Court. The district court rejected Williams' position, concluding, correctly, that it was “Williams' obligation to disclose a damages calculation” and that “[a] claim of a fixed percentage for damages does not comply with the requirement to disclose a calculation of the damages.” (R. 697.) *See* UTAH R. CIV. P. 26(a)(1) (requiring disclosure of a damages

UT App 62, ¶ 15. The appellant argued, unsuccessfully, that “an ‘arithmetic computation’ is unnecessary because \$2 million minus 0 equals \$2 million.” *See id.*

¹⁰ *See also, e.g., Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶ 11, 982 P.2d 565 (concluding that “[g]iven the unexpected nature of [a previously disclosed expert's] withdrawal,” a party's request to postpone trial or extend discovery to obtain a new expert was backed by good cause).

computation “without waiting for a discovery request”). This Court should do the same.

Williams’ failure to provide a concrete computation was *not* outside of his control. Williams *could* have committed to a concrete computation of his damages at multiple points throughout the litigation of his case. He obviously possessed enough evidence to allege, in his complaint, that Fix A Phone was worth \$1.5 million, and that he was entitled to 30% of that. At a minimum, Williams received the Asset Purchase Agreement, detailing the purchase price of Fix A Phone, on approximately July 29, 2013. He received Appellees’ bank statements and other financial information well before the conclusion of fact discovery. There is no reason why he could not review those documents and either identify the facts supporting his damages computation, or amend his formula to remove the categories he asserted. He could have done so in connection with mediation in early 2014, when the issue of damages was again raised and contested. (R. 527–528, 733.) Later, when Williams was asked at his June 2014 deposition what he believed Fix A Phone was valued at and sold for, he again could have clarified what his computation of damages was. (R. 564–567.) Indeed, at *any* point during the discovery or pretrial phases of this lawsuit (from July 2013 to June 2015), Williams could have supplemented or clarified his computation of damages. But he never did.

Instead, Williams allowed the high water mark of his damages to control the default proportionality of the case (firmly within the universe of Tier 3). *See* UTAH R. CIV. P. 26(c)(5). It was only when push came to shove—via Appellees’ motion in limine—that Williams actually suggested (but did not commit) that he sought only \$60,000. That kind of reticent, last minute concession—when the relevant, operative

damages information had been in Williams' possession for some time—is not a computation of damages and certainly does not justify Williams' failure to disclose such a computation earlier. The district court did not abuse its discretion when it took these realities into account.

B. The District Court Did Not Abuse Its Discretion By Determining that Williams' Failure to Disclose a Damages Computation Was Not Harmless.

Although Utah courts have not directly opined on what “harmlessness” means under Rule 26's disclosure provisions, they have clarified what it is *not*: prejudice. If a failure to disclose prejudices the other party, it is *not* harmless. See *Lippman v. Coldwell Banker Residential Brokerage Co.*, 2010 UT App 89, ¶ 3, 2010 WL 1511748, at *2 (unpublished disposition) (“[T]he failure to disclose was not harmless, i.e., the extension would prejudice [d]efendants and delay trial”) (abrogated on other grounds); see also *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 16, 236 P.3d 791 (citing cases).

Prejudice can result from untimely disclosure of damages and damages-related theories¹¹—specifically, where such disclosures are made after the court-ordered or rule-

¹¹ See *Bodell Const. Co. v. Robbins*, 2009 UT 52, ¶ 37, 215 P.3d 933 (affirming district court's conclusion that “the defendants will suffer prejudice if [plaintiff] were allowed to present [new] damages theories at trial because these claims and the bases for them were not disclosed during fact discovery and defendants are now unable to conduct fact discovery to rebut those theories”). The *Robbins* case is particularly instructive—there, the Utah Supreme Court determined that the plaintiff had violated Rule 26 “when [it] failed to disclose [damages] theories” during fact discovery that its expert later utilized in formulating his report, noting that “the district court is *required* to impose discovery sanctions on” a party who “fails to make timely disclosure.” *Id.* ¶ 35 (emphasis added).

imposed deadline.¹² The rationale in each of these circumstances is that dilatory disclosures (or non-disclosures) impair the other party's ability to defend against the disclosing party's claims, and are therefore presumptively prejudicial. *See Brussow v. Webster*, 2011 UT 193, ¶ 4, 258 P.3d 615 (abrogated on other grounds).

Williams points to four factors employed by the Tenth Circuit when determining whether a non-disclosure is harmless: (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness. *See* Aplt. Br. at 14–15 (citing *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002)). But in the district court, where discretion was employed, Williams argued that his failure was harmless on two general grounds: that Appellees had all the information they needed, and that *reducing* damages sought from the amount pleaded is really just a boon to Appellees, because, if anything, they overprepared their case. The district court properly rejected both of those arguments.

First, the district court correctly noted that it was *Williams'* job to disclose his damages computation, because Rule 26(a)(1)(C) requires him to, and he is the master of

¹² *See DeBry v. Cascade Enterprises*, 879 P.2d 1353, 1361 (Utah 1994) (finding prejudice if experts disclosed after the deadline were allowed to testify “because the defendants had relied on the deadline set by the court for designating witnesses in planning and carrying out their discovery”); *see also Townhomes at Pointe Meadows Owners Ass’n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 17, 329 P.3d 815 (upholding a district court’s exclusion of evidence and noting prejudice where “substantial amount of discovery would need to be revisited or performed in the first instance in response to the [party’s tardy] disclosure, well after the deadline for completing these steps had passed”).

his case. Appellees should be required to speculate as to Williams' damages by—quite ironically—making their own arguments for why Williams is wrong, and then assuming that Williams will agree with Appellees that his case is worth 87% less than what so emphatically pleaded. Williams asks the Court to ignore the fact that he is the one who quite nearly sent Appellees to trial *without any damages computation*. That is not harmless, and the district court did not abuse its discretion by so determining

Second, the type of “overpreparing” for which Williams congratulates Appellees is precisely the type of harm that Rule 26’s requirement of an early, precise damages calculation is supposed to avoid. The district court determined that because of Williams’ nebulous formulation of damages (based in part on his allegations that Fix A Phone was valued at \$1.5 million), “Williams obtained Tier 3 discovery in both quantity *and time*” and that Appellees had “defended this lawsuit as if it were a \$450,000 case.” (R. 696 (emphasis added).) “As a result,” the district court held, “a three-day jury trial has been set in this matter which would have likely been handled much differently” had Williams disclosed that his damages were more in the range of reasonableness: \$60,000. (R. 696–697.) Indeed, Appellees retained an expert witness—a litigation step that is notoriously expensive—in a \$60,000 case. At a minimum, Appellees were forced through two years of litigation, when the presumptive discovery tier would have been only 180 days. *See* UTAH R. CIV. P. 26(c)(5). The district court’s determination of prejudice is supported by record evidence and cannot be disturbed on appeal.

Therefore, even if *Jacobsen* was applicable here, the district court still did not abuse its discretion by determining that Williams’ failure was not harmless. Even

Jacobsen's second and fourth factors—the ability of the prejudiced party to cure the prejudice and the willfulness or bad faith of the non-disclosing party—likewise show that Williams' failure to disclosure was not harmless. Appellees asked Williams to commit to a mediation ceiling, but Williams rebuffed them. Also, Appellees asked Williams, in his deposition, to clarify the damages he sought, and how, but Williams answered that he lumped Anderson's and Zite's profit-sharing payments as part of Fix A Phone's purchase price—indicating that he sought more than 30% of \$200,000. Appellees gave Williams opportunities to cure his failure to disclose, but Williams declined. In any event, Utah's version of Rule 26 (which is different than the federal rule) does not *require* the non-disclosing party to undertake any type of curative action. Instead, it places the burden of disclosing and supplementing disclosures squarely on the party that intends to present that material at trial. *See generally* UTAH R. CIV. P. 26(a)(1). Accordingly, Appellees could not cure Williams' faulty damages computation for him, just as they could not supplement his initial disclosures for him.

Moreover, given that from the earliest stages of the case Williams had at his disposal the information necessary to compute his damages, he appears to have acted willfully in failing to disclose an adequate computation of damages. Williams received his last set of material documents, from any source, on July 31, 2014. Whatever fact would support any computation of damages, Williams had that fact in his possession no later than July 31, 2014. Fact discovery implicitly continued until the end of Anderson's and Zite's respective depositions, on December 12, 2014. Had Williams timely supplemented his damages computation on July 31, 2014, Appellees would have had

months to make litigation decisions proportionate to the value of the case. Such a decision may have included an election to not retain an expert witness for a \$60,000 case, and not to undergo such extensive preparations for a three-day jury trial. Had Williams engaged with his discovery facts early on, as Rule 26 requires him to, the case would not have reached Tier 3 discovery, at least as to time, and would not have dragged on for two years.

Appellees were forced to wade through years of discovery, retain their own expert, and wonder the whole time whether they were facing a suit for millions of dollars, hundreds of thousands of dollars, or merely handfuls of thousands of dollars. That could have been cured had Williams simply done what he should have done from the beginning: make hard decisions regarding the value of his claims, rather than disclose a broad formula to hedge against the possibility that some as-yet undiscovered evidence would convert his claims into something of more significant value. Plainly, Williams simply intended to not commit to his low damages number until the last minute. The district court's decision to hold him to the consequences of his strategy was not an abuse of discretion. That is, in fact, the result compelled by Rule 26, and it is the result the Court should affirm here.

CONCLUSION

The district court correctly concluded that the computation spoken of by Rule 26(a)(1)(C) required an actual number. It did not abuse its discretion when it determined that Williams fell short of that standard, and that his failure was not harmless. Its

sanction of excluding all of Williams' damages-related evidence was proper. This Court should affirm the district court's determination in every respect.

ADDENDUM

No addendum is necessary.

RESPECTFULLY SUBMITTED this 8th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, I caused to be served, via U.S. Mail, First Class, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEES**, together with an electronic Courtesy Brief in searchable PDF format, upon the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 8,787 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B) and complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 13 point font size.

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