

2015

**State of Utah, Plaintiff/ Appellee, vs. Allan Bruun, Defendant/  
Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

State of Utah,

Plaintiff / Appellee,

vs.

Allan Bruun,

Defendant / Appellant.

Case No. 20140295-CA

Appellant is not incarcerated.

Appeal from a judgment of conviction and order of restitution concerning 7 counts of theft, a second degree felony, 5 counts of theft, a third degree felony, and one count of theft, a class A misdemeanor, in violation of Utah Code § 76-6-404, and one count of Pattern of Unlawful Activity, a second-degree felony, in violation of Utah Code § 76-10-1603

Third District Court in and for Salt Lake County, State of Utah

The Hon. Katie Bernards-Goodman presiding

BRIEF OF APPELLANT ALLAN BRUUN

Clifton W. Thompson, 9305  
Law Offices of Clifton W. Thompson  
562 South Main  
Bountiful, Utah 84010  
*Attorney for Defendant/Appellant Allan Bruun*

Sean D. Reyes  
Utah Attorney General  
160 East 300 South, 6th Floor  
5272 S. College Drive, Suite 200  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
*Attorneys for State of Utah/Appellee*

FILED  
UTAH APPELLATE COURTS  
MAY 13 2015

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Clifton W. Thompson, 9305  
Law Offices of Clifton W. Thompson  
562 South Main  
Bountiful, Utah 84010  
*Attorney for Defendant/Appellant Allan Bruun*

Sean D. Reyes  
Utah Attorney General  
160 East 300 South, 6th Floor  
5272 S. College Drive, Suite 200  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854  
*Attorneys for State of Utah/Appellee*

## **LIST OF PARTIES TO THE PROCEEDINGS**

All parties to this appeal are identified in the caption. A companion appeal for Mr. Bruun's co-defendant, State of Utah v. James Diderickson, Case No. 20140296, is co-pending. The alleged victims in the case, judgment creditors on the challenged order of restitution, are Kerry R. Posey and Bobbie M. Posey.



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**Rules**

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## JURISDICTION

The Court has jurisdiction over this appeal under Utah Code § 78A-4-103(2)(e).

## ISSUES PRESENTED FOR REVIEW

Four issues are presented relating to the convictions. A fifth issue is raised in the appeal of the Order of Restitution consolidated herewith.

### *Regarding the Conviction:*

**ISSUE I:** Liability for theft turns on whether defendant Bruun reasonably believed he had authority to make the checks at issue, and the corollary question of whether the Operating Agreement of Tivoli Properties LLC or the Utah LLC Act gave him authority to make the expenditures at issue. We ask for review of whether the trial court erred in not reviewing the Operating Agreement and relevant statutes to determine the question of authority, and also not instructing the jury concerning interpretation of the contract or the LLC Act; and whether the relevant counts charged should have been dismissed as a matter of law and thus the convictions should be reversed in light of these errors.

**Standard of Review:** Interpretation of a contract is a question of law reviewed for correctness; as is interpretation of case law and of a statute. *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 19, 258 P.3d 539.

If the Court is required to find manifest injustice, plain error, or ineffective assistance of counsel on this issue, those issues are reviewed *de novo*. *State v. Lucero*, 2014 UT 15, ¶ 11, 328 P.3d 841; *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230; Utah R. Crim. P. 19(e).

**Preservation:** The issue of interpretation of the LLC's operating agreement being an issue of law for the court and not the jury was preserved. (*E.g.*, R. 1515, p. 4:4-23; R. 1521, pp. 194-195:22-6; R. 984; R. 1382; R. 1443.) Trial counsel did not specifically ask the court to interpret the LLC Act. However, such a request would have been similar to the request to construe the LLC's Operating Agreement and would not have been reached or would have been futile in light of the trial court's rulings concerning the latter. Here the issue can be reached under the doctrines of manifest injustice, plain error, or ineffective assistance of counsel. *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230; Utah R. Crim. P. 19(e).

Trial counsel did not object to the trial court's failure to instruct the jury on any principles of law relating to contract interpretation or Utah's LLC Act. Counsel averred that he did not request such contract-related instructions because he believed that an agreement had been reached with the State that the Operating Agreement would be interpreted by the trial court as a matter of law post-verdict as to any count on which the jury returned a guilty verdict. (R. 1383.) As discussed below, either

counsel's belief was unreasonable, or the State unfairly induced reliance. Either way the court's jury instructions can be reached under the doctrines of manifest injustice, plain error, or ineffective assistance of counsel. *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230; Utah R. Crim. P. 19(e).

**ISSUE II:** The alleged victims (Poseys) had at most a 25% profits interest in the LLC. The remainder effectively belonged to the defendants. The trial court allowed the State to charge 100% of the amount of each check at issue rather than the Poseys' percentage ownership interest. Had the trial court reviewed the LLC operating agreement and correctly applied the law, all but four counts would have been chargeable only as misdemeanors instead of felonies, and barred by the statute of limitations. The issue on appeal is whether the relevant counts in each instance should have been dismissed as a matter of law and the judgments be reversed due to these errors.

**Standard of review:** This issue involves interpretation of a statute (*i.e.*, the theft statute), and of a written, integrated, Operating Agreement. Both are questions of law. (*See* cases cited in Issue I.) If the Court is required to find manifest injustice, plain error, or ineffective assistance of counsel on this issue, those issues are reviewed *de novo*. (*See* cases cited in Issue I.)

**Preservation:** Defendant's contention that the value of the property allegedly stolen was limited to the alleged victims' interest in the property, and that



all the counts should be dismissed or that all but four of the theft counts were therefore chargeable only as misdemeanors, was preserved. (R. 163-164; R. 233-235; R. 985; R. 1514, p. 12:2-18; R. 1515, pp. 4-5:4-3, and pp. 12-13:21-3; R. 1523, pp. 178-180.)

Because the lower court ruled against Mr. Bruun on the threshold legal issues and allowed the State to pursue the counts as felonies there was no procedural opportunity, and it would have been futile, to seek dismissal of the charges under the two-year statute of limitations for misdemeanors. Given this procedural background, the statute of limitations and contract interpretation issues were adequately preserved. If not, however, the failure to raise a valid statute of limitations defense should be reviewed under the doctrines of ineffective assistance of counsel or manifest injustice. *State v. McCloud*, 2005 UT App 466, 126 P.3d 775, *cert. denied*, 133 P.3d 437 (Utah 2006).

**ISSUE III:** Wrongful appropriation is a lesser-included offense of theft under applicable statute. The jury was not instructed on wrongful appropriation, nor was the lesser included offense given to the jury as an option on the verdict form. The issue on appeal is whether the defendant should receive a new trial because the trial court failed to instruct the jury as to the lesser included offense.

**Standard of review:** Claims of erroneous jury instructions present questions of law reviewed for correctness. *State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d

1250; *State v. Bryant*, 965 P.2d 539, 544 (Utah Ct. App. 1998). If the Court is required to find manifest injustice, plain error, or ineffective assistance of counsel on this issue, those issues are reviewed *de novo*. (See cases cited in Issue I.)

**Preservation:** Trial counsel did not object to the court's failure to instruct on wrongful appropriation. However, as mentioned above and discussed more fully below, counsel forwent such instruction pursuant to what he believed was an agreement with the State. Apart from whether the State unfairly induced reliance by trial counsel, the jury instructions and verdict form can be reached under the doctrines of manifest injustice, plain error, or ineffective assistance of counsel. *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230; Utah R. Crim. P. 19(e).

**ISSUE IV:** Defendant was convicted of violating the Utah Pattern of Unlawful Activity Act, which requires three or more predicate offenses occurring over a "substantial period of time."

A. The trial court did not instruct the jury that the activities must occur over a substantial period of time. Also the period of time alleged in the Information was insufficient as a matter of law to satisfy that element of the statute. The issue on appeal is whether the count should have been dismissed as a matter of law, or alternatively whether Mr. Bruun should be granted a new trial due to deficient jury instructions.

B. If the convictions are reversed due to the failure to instruct on the lesser included offense of wrongful appropriation (*see* Issue III) then the issue arises for determination whether Defendant should also receive a new trial on the UPUAA count because wrongful appropriation is not a predicate offense under said Act.

**Standard of review:** Claims of erroneous jury instructions present questions of law reviewed for correctness. *State v. Jeffs*, 2010 UT 49, ¶ 26, 354 P.3d 1250; *State v. Bryant*, 965 P.2d 539, 544 (Utah Ct. App. 1998). If the Court is required to find manifest injustice, plain error, or ineffective assistance of counsel on this issue, those issues are reviewed *de novo*. *See*, cases cited in Issue I.

**Preservation:** Trial counsel did not object to the trial court's failure to instruct the jury on the element of substantial period of time, or move the court to dismiss the UPUAA count due to insufficiency of the period alleged. However, failure to give an elements instruction for a crime satisfies the manifest injustice standard in view of U.R.Crim.P. 19(c) and constitutes reversible error as a matter of law. *State v. Stringham*, 957 P.2d 602, 609 (Utah Ct. App. 1998). These issues can also be reached under the doctrines of ineffective assistance of counsel or plain error. (*See* cases cited in Issue I and discussion below.)

*Regarding Appeal of the Order of Restitution:*

**ISSUE V:** The trial court ordered Mr. Bruun to pay \$189,574.33 in restitution to the Poseys. (R. 1377.) This is the aggregated full amounts of the 12 checks on

which Mr. Bruun was convicted.

A. Prior to charges being filed, the Poseys accepted full compensation and released all potential claims relating to these checks. An issue for review is whether the trial court erred in not taking into account compensation previously received by the victims when determining “court-ordered” restitution (as opposed to “complete” restitution) as set forth in the Utah Crime Victims Restitution Act as interpreted in controlling case law.

B. Restitution cannot exceed the victim’s actual pecuniary damages caused by the defendant’s acts for which the defendant was convicted. As described in Issue II, the maximum pecuniary loss caused to the Poseys from the alleged theft of LLC funds was at most their 25% interest in those funds. An issue for review is whether the court erred in interpreting the restitution statute as allowing complete restitution to be determined based on the full amount (100%) of the checks, rather than the Poseys’ actual loss.

**Standard of review:** A trial court’s interpretation of the restitution statute is a question of law reviewed for correctness. *State v. Birkeland*, 2011 UT App 227, ¶ 7, 258 P. 3d 662.

**Preservation:** This issue was preserved. *See* R. 1077 and preservation cites in Issue II.



## DETERMINATIVE STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Utah Code § 48-2c-803 and -804 (Utah LLC Act)

Utah Code § 76-1-302 (Time limitations for prosecution of offenses)

Utah Code § 76-6-404.5 (Wrongful appropriation – penalties)

Utah Code § 77-17-10. (Court to determine law; the jury, the facts)

Utah Code § 77-38a-102(6) (Crime Victims Restitution Act)

Utah Code § 77-38a-302(1) and (2) (Crime Victims Restitution Act).

(The provisions are set out in Addendum Exh. D.)

## STATEMENT OF THE CASE

### *Nature of the Case, Course of Proceedings, and Disposition Below*

As discussed more fully below, Alan Bruun and a second defendant (James Diderickson) were managers of a Utah LLC. The alleged victims, Kerry R. Posey and Bobbie M. Posey, were members of the LLC.

The State charged Mr. Bruun (and Mr. Diderickson) with 28 counts of theft in connection with 28 checks written from the LLC's bank account; and one count of a pattern of unlawful activity. (R. 69.) By Pre-trial motions the defendants asked the court to interpret the written Operating Agreement under which they managed the LLC. (*See, e.g.*, R. 98-99, 101, 107-110, 113, 117, 163-164, 224-236.)<sup>1</sup>

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<sup>1</sup> The defendants also filed a motion for bill of particulars, asking that the State be required to identify what portions of the Operating Agreement were allegedly violated. (R. 162-163.) The trial court denied the motion, ruling that the State was not required

The court denied the motions, and the case proceeded to trial in November 2013. The defendants moved to dismiss at the end of the State's case in chief, which motion was denied. (R. 1535, pp. 178-181.) During trial the State voluntarily dismissed two counts. (R. 1536, pp. 207-209.) Of the remaining counts, the jury found the defendants guilty on 12 counts of theft (2, 3, 4, 5, 7, 8, 15, 19, 21, 22, 24, and 28), and on the Pattern of Unlawful Activity Act count (29). (R. 971-973, Addendum Exhibit A) The defendants filed a motion for new trial (R. 1193), which was denied. (R. 1473.)

The trial court sentenced the defendant to five years in prison, suspended; and ordered probation. As part of probation Mr. Bruun was ordered to serve one year in the Salt Lake County jail. (R. 1107, Add. Exh. B.) The court also determined complete restitution to be \$189,574.33 (the aggregated amounts of the checks on which there were convictions) and ordered the defendants to pay restitution to the Poseys in the same amount. (R. 1377, Add. Exh. C.)

Mr. Bruun separately appealed the order of restitution and the conviction. (R. 1378; R. 1475.) These appeals were consolidated by the Court into the above-captioned case.

### *Statement of Facts*

In 2007 a Utah limited liability company, Tivoli Properties, LLC, was formed.

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to identify a legal theory. (R. 1514 and *id.*, p. 9:5-11.)

(Def's Exh. 29, p. 20, and R. 1534 (State stipulating to defendants' exhibit).) The LLC was governed by a written Operating Agreement (Add. Exh. E) signed by all three of the LLC's members: Equity Partners, LLC, Manager/Member; Kerry R. Posey, Member; and Bobbie M. Posey, Member.<sup>2</sup> *Id.*

The Operating Agreement provided that Kerry and Bobbie Posey had a combined sharing interest in Tivoli of 25%. The remaining 75% interest belonged to Equity Partners (thus effectively defendants). (*See* Add. Exh. E, §§ 1.2.12 (“Membership Interest” or “Interest” means a Member’s percentage interest in the Company, consisting of the Member’s right to share in Profits, receive distributions, participate in the Company’s governance, approve the Company’s acts, participate in the designation and removal of a Manager, and receive information pertaining to the Company’s affairs. The Membership Interests of the Initial Members [Equity, Posey and Posey] are set forth in Article 3.3.”) and § 3.3 (“[T]he initial Sharing Ratio of Equity Partners is 75%, and the initial Sharing Ratio of Kerry R. and Bobbie M. Posey is 12.5% each”). *See also* Utah Code § 48-2c-906 (profits of an LLC “shall be allocated among the members in the manner provided in the operating agreement”).<sup>3</sup>

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<sup>2</sup> The managing member, Equity Partners, LLC, had a single member, Four Winds Development Group, LLC. Defendants Bruun and Didericksen were managing members of Four Winds. (R. 84; State’s Exh. 14 and 19.) As a result, Diderickson and Mr. Bruun were the managers of both the Equity Partners and Tivoli LLCs.

<sup>3</sup> In a later addendum the Poseys agreed to adjustment of their interest down slightly to 23.8%. *See* Deft’s Exh. 29. Because it is essentially immaterial to resolution of the issues on appeal (and Section 3.3 of the operating agreement was not expressly

The funds in Tivoli's bank account came from a hard money loan taken out by Equity Partners, personally guaranteed by Bruun and Diderickson. The loan was for the purchase of 29 acres of land in Saratoga Springs owned by the Poseys, which Equity bought from the Poseys. (R. 1534, pp. 287-289:12-6.) Equity used the 29 acres as security for the hard money loan, and assigned its rights in the property to Tivoli. *Id.*

From the net loan proceeds, a portion was used to pay off the underlying mortgage on the purchased property, and the remainder was placed in Tivoli's bank account. The State's investigator and expert witness confirmed that the funds were placed in Tivoli's account, that they were Tivoli's money at that point, and that the Poseys' interest in the funds was then in their capacity as members of the Tivoli LLC. (R. 1535, pp. 67-69:20-1.)<sup>4</sup>

Under the Operating Agreement, Tivoli agreed to pay the Poseys \$10,000 monthly from the operating capital of the LLC. (Add. Exh. D, p. 5, § 3.1.1.)

Between December 21, 2007, and April 11, 2008, Mr. Bruun as manager was involved in the making of 11 checks at issue drawn from Tivoli's bank account.<sup>5</sup>

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amended in the addendum), Diderickson uses the stated percentages from Section 3.3 (75/12.5/12.5) herein.

<sup>4</sup> The State maintained that the money was obtained lawfully, and then later misappropriated by the making of the checks. (*e.g.* R.86) (State's Memorandum of Probable Cause).)

<sup>5</sup> Mr. Bruun did not sign check no. 1051 (count 24), but signed the others personally.



One additional check was made on September 4, 2008, for \$983.81. (State's Exh. 4 (checks) and R. 971-972 (verdict).) These are the checks for which the jury found Bruun guilty of theft. *Id.*

With respect to the disputed checks, Kerry Posey and Bobbie Posey testified that they were not asked about nor did they consent to the expenditures these checks represented, and that the defendants' actions were contrary to discussions they had with the defendants and that the use of the funds was contrary to the LLC purpose. (*E.g.*, R. 1554, pp. 147-148, 160, 163-167; R. 1533, pp. 78-79, 85-86, 146-147, 160-163, and 227-228.)

Most of the disputed checks went in some way toward development of a project called Hidden Acres, which was being developed by an affiliated entity, Hidden Acres, LLC. (*E.g.*, Checks 1007 ("lot closing Hidden Acres Lot #2"), 1015 (dump fee), 1029 (landscaping), 1098 (dirt removal).)<sup>6</sup>

Equity Partners (through Diderickson and Bruun) had executed a joint venture agreement between Tivoli and Hidden Acres, LLC with respect to the Hidden Acres development. (R. 1535, p. 213:4-7.) While the Poseys acknowledged visiting the Hidden Acres development site with the defendants (R. 1520, pp. 38-39:17-25; R. 1533, pp. 135-136:3-8), the Poseys averred that they did not consent to Tivoli's entry

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<sup>6</sup> Some of this construction work was performed by other companies of which Bruun or Diderickson were principals. (*E.g.*, State's Exh. 13, 15, 18 (U. S. General Construction Group, LLC, Construction Advisers, LLC, Granite Builders, LLC, Hidden Acres, LLC).)

into a joint venture on the Hidden Acres project. (R. 1520, p. 34:6-24.)

### *The Operating Agreement*

The Tivoli Operating Agreement set out the authority of Equity (defendants). It began with a recitation of the members' intent to "appoint a person or persons to assume responsibility for certain management matters (the 'Manager')," and to "provide for the restriction on the transfers of ownership interests in the Company ('Interests')[.]" (Add. Exh. E, p. 1.) "Manager" was defined as "a Person, Persons or Committee, whether or not consisting of a Member, Members or not, who is vested with authority to manage the Company in accordance with Article VII." *Id.*, § 1.2.10.

Article VII, in turn, provided:

7.1. Business of the Company. (a) Equity Partners, LLC ("EP") shall have full, exclusive and complete authority and discretion in the management and control of the business of the Company for the purposes stated herein and shall make all decisions affecting the business of the Company. At *[sic]* such, any action taken shall constitute the act of, and serve to bind, the Company. EP shall manage and control the affairs of the Company to the best of its ability and shall use its best efforts to carry out the business of the Company and will be compensated for providing various services...."

(Add. Exh. E, p. 12.)

The manager's authority was further described in Section 7.4, General Powers of Managers, which included authority to:

7.4.1 Purchase, lease, or otherwise acquire any real or personal property; Sell, convey, mortgage, grant a security interest in, pledge, lease, exchange, or otherwise dispose or encumber any real or personal property;

7.4.2 Open one or more depository accounts and make deposits into, and write checks and withdrawals against such accounts;...

7.4.7 Participate with others in partnerships, joint ventures, and other associations and strategic alliances only where same are directly in pursuit of the Business, as defined above.

(Add. Exh. E, p. 13.)

Section 7.4.7.1 included a limitation on the manager's authority:

There is an express limitation on the nature of the Business and the powers granted the Managers herein, the Company is intended to purchase and develop, hold and sale *[sic]* real estate for investment purposes only, and no activities inconsistent with such limited purposes shall be undertaken.

(Add. Exh. E, p. 14.)

Article 9.1 authorized Tivoli to make payments to affiliated entities:

Affiliates of the parties to this Agreement may be engaged to perform services for the Company. The validity of any transaction, agreement or payment involving the Company and any affiliates of the parties to this Agreement otherwise permitted by the terms of this Agreement shall not be affected by reason of the relationship between them and such Affiliates or the approval of said transactions, agreement or payment.

(Add. Exh. E., p. 16.)

The Operating Agreement conferred authority on Tivoli's managers to resolve disputes in its interpretation. See Add. Exh. C, p. 8, § 5.3.5 ("Any questions regarding the conduct of the Company business shall be determined by a vote of 100% of the Managing Members of the Company.") and p. 18, § 12.6 ("In every instance where agreement between the members does not exist with reference to the policies to be followed by the company, the managing members shall have the right

to decide what policy or policies shall be followed and the other member or members shall consider the decision as final.”).

The Operating Agreement contained an integration clause:

This Agreement embodies the entire understanding and agreement among the parties concerning the Company and supersedes any and all prior negotiations, understandings or agreements in regard thereto.

(Add. Exh. E, p. 19, § 12.10.)

Prior to trial, the defendants asked the trial court to interpret the Operating Agreement, both with respect to its provisions regarding managers’ authority and the degree of the Poseys’ interest in the LLC. (*E.g.*, R. 98, 99, 101, 107, 108, 109, 110, 113, 117, 163, 164, 224-236.)

The judge at the Preliminary Hearing (the Hon. Randall K. Skanchy) had previously interpreted one portion of the Operating Agreement as a matter of law. Judge Skanchy had concluded that a section requiring “Members” to obtain consent for expenditures exceeding \$500 applied only to persons acting in their capacity as members, not to “Managers.” (R. 146 n.1.)<sup>7</sup>

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<sup>7</sup> Judge Skanchy wrote: “The defendants make much of Mr. Posey’s preliminary hearing testimony that he believed each expenditure made by defendants over the amount of \$500 violated the Operating Agreement because that document limited expenses over \$500 unless by unanimous consent. In fact, the Operating Agreement imposed that limitation only on “members” of Tivoli Properties, such as Mr. Posey and Ms. Posey, but it does not apply to managers such as the defendants. The Court determines that Mr. Posey’s testimony as to defendants’ breach of the Operating Agreement in this manner is not asserted by the State as a basis for any of the theft charges. That Mr. Posey’s legal conclusion may be incorrect has no relation to the crimes charged.” (R. 146 n.1.)

A successor judge (the Hon. Katie Bernards-Goodman), however, effectively ruled that interpretation of the Operating Agreement was for the jury. The court accepted the State's argument that interpretation of an LLC's operating agreement in a criminal case is for the jury, not the court. (R. 1514, p. 13:1-8 (Court: "This isn't a civil case.")); R. 1535, p. 180:5-7 (Court: "[D]espite what percentages are written in the contract, we are here talking about criminal matters."); R. 1535, p. 194:12-21 (State: "It's up to the jury to decide what the operating agreement means. The jury's not bound by this operating agreement.") The Operating Agreement was given to jurors as an exhibit to give whatever weight they thought it deserved. (R. 1444.)

Given the trial court's stance, much of the trial was consumed with witnesses reading aloud, and then offering their interpretations of, various language in the Operating Agreement. (*See, e.g.,* R. 1533, pp. 147-151, 154-156, 158-161, 190-193, 207-213, 260, 265-266; R. 1534, pp. 4-10, 49-51, 121-126, 220-222, 264-265, 279-282); R. 1535, pp. 70-71, 108-121, 125-137, 141-142, 146-148, 158-167, 176-177, 264-271, 282-283, 299-301, 304-307, 314-315, 331-332.)

Under the trial court's ruling, the State was allowed to argue that the defendants lacked authority because of alleged oral discussions that predated the signed Operating Agreement. For example, the State elicited testimony from its expert that he had "investigated several cases where the stuff on paper doesn't

necessarily match the verbal agreement,” and that he believed”[t]here had been verbal conversations about what the deal was.” (R. 1534, p. 228:2-9, p. 234:6-18.)

The State and the Poseys also argued to the jury the very interpretation of Tivoli’s operating agreement that Judge Skanchy had already rejected, *i.e.*, that the consent of all members was required for all expenditures over \$500. (*E.g.*, R. 1534, p. 240:4-9, p. 241:6-19, p. 246:4-22, pp. 248-249:20-7 (State’s investigator repeatedly testifying that “everyone should have agreed” to release funds.).)

The State even asked its investigator whether, in his “experience when it comes to interpreting contracts,” witnesses in *other* trials commonly testify as to what contract language means. The witness replied, “Yes. Almost in every case.” (R. 1535, p. 158:4-14.))

### *The Information*

A Criminal Information was filed in the Third District Court on May 9, 2011. (R. 1.) An Amended Information was filed on March 23, 2012. (R. 69.) (Except where otherwise noted, references to “the Information” herein are to the Amended Information.)

The Information alleged that Mr. Bruun had committed 10 counts of second-degree felony theft, 11 counts of third-degree felony theft, 4 counts of class A misdemeanor theft, and 3 counts of class B misdemeanor theft, plus one count of Pattern of Unlawful Activity, a second degree felony. (R. 69.)

Each theft count stated that “the defendants obtained or exercised unauthorized control over the property of another (Kerry and Bobbie Posey) with a purpose to deprive them thereof.” Each count identified a specific “check #”, and a statement that “the value of the property is or exceeds” a dollar amount depending on the amount of the check.

For example, Count 1 says it is based on “check #1006,” which was a check written on December 10, 2007, in the amount of \$2,000.00. (See State’s Exh. 4, p. 1.) Thus, for Count 1 the Information reads:

COUNT 1  
THEFT  
a third degree felony

From on or about December 2007, the defendants obtained or exercised unauthorized control over the property of another (Kerry and Bobbie Posey) with a purpose to deprive them thereof. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (check #1006). This is a violation of Utah Code Ann. § 76-6-404, a third degree felony.

*The checks found to be theft*

A table of the 12 checks for which the jury found theft, their dates, their face amounts, and those amounts reduced to 25% (with the resulting degree of offense) is as follows.



<b>Check (count)</b>	<b>Date</b>	<b>Face amount of check</b>	<b>25% of face amount</b>
Count 2 Check #1007	12/21/2007	\$31,506.85	\$7,876.71 (2nd degree felony)
Count 3 Check #1012	1/7/2008	\$5,300	\$1,325 (class A misdemeanor)
Count 4 Check #1015	1/15/2008	\$4,080	\$1,020 (class A misdemeanor)
Count 5 Check #1016	1/04/2008	\$4,500	\$1125 (class A misdemeanor)
Count 7 Check #1018	1/11/2008	\$18,493.15	\$4,623.29 (3rd degree felony)
Count 8 Check #1019	1/9/2008	\$100,000	\$25,000 (2nd degree felony)
Count 15 Check #1029	1/25/2008	\$3,475	\$868.75 (class A misdemeanor)
Count 19 Check #1041	2/15/2008	\$4,015.52	\$1,003.88 (class A misdemeanor)
Count 21 Check #1047	3/31/2008	\$5,000	\$1,250 (class A misdemeanor)
Count 22 Check #1098	2/20/2008	\$4,000	\$1,000 (class A misdemeanor)
Count 24 Check #1051	4/11/2008	\$7,500	\$1,875 (3rd degree felony)
Count 28 Check #1070	9/4/2008	\$983.81	\$245.95 (class B misdemeanor)

(See also R. 83 (State's summary of checks, dates, amounts, and payees); State's Exh. 4 (checks); R. 900-951 (jury instructions specifying which checks are associated with each count), and 971-973 (verdict).)

*The defendants' settlement with the Poseys*

In November 2008, more than two years before any criminal charges were filed, the Poseys entered into a Settlement Agreement and Release with Equity Partners, Diderickson and Bruun. (R. 294-305, attached hereto as Add. Exh. F.) Pursuant to the settlement and release, Equity Partners signed back over to the Poseys the 29 acres in Saratoga Springs plus a \$174,000 payment from UDOT for a small parcel, and the Poseys paid Equity Partners \$25,000.00. The Poseys released any claims relating to the 28 checks that the Poseys were questioning. *Id.*

## SUMMARY OF ARGUMENT

Liability for theft here turns on whether the expenditures made were authorized. The Operating Agreement of Tivoli Properties, LLC and a governing statute (the Utah Limited Liability Company Act), each provide a separate and sufficient basis of authority of the defendants acting as managers and as owners of a 75% sharing interest in the company to make expenditures they deemed appropriate, including making the checks at issue. In fact, the Utah LLC Act provides owners of 2/3 or more of interests in an LLC can apply company

resources to activities outside the stated purposes of the company or the operating agreement regardless of contrary desires of minority owners.

Neither the LLC Act nor the Operating Agreement were interpreted as a matter of law and applied to the facts of the case by the trial court. They should have been. The jury was not instructed regarding the Utah LLC Act, nor was it instructed regarding the controlling provisions of the Operating Agreement as interpreted by the Court. This is error. The counts should have been dismissed as a matter of law under the controlling statutes and Operating Agreement provisions, had these authorities been properly interpreted by the court below. To the extent the LLC Act was not preserved below, this dispositive principle is reviewable under the doctrines of ineffective assistance of counsel, plain error, and manifest injustice.

Moreover, the alleged victims (Poseys) had (at most) a 25% interest in the funds at issue in accordance with section 3.3 of the Operating Agreement. Nevertheless the trial court allowed the full amount of the checks to be charged. Had the court correctly applied the law the charged amounts would have dropped so as to be chargeable only as misdemeanors (and would have been barred by the statute of limitations) as to all but four counts.

Additionally, wrongful appropriation is a lesser included offense of theft; and the jury was not instructed on wrongful appropriation, nor was it included on

the verdict form. Counsel for defendants believed they had a stipulated agreement with the State that included not objecting to this. Whether or not the understanding of defendant's counsel was reasonable, the trial court's failure to include the instruction was reversible error. Aggravating the error, the State's own argument to the Jury supported wrongful appropriation rather than theft; and wrongful appropriation is not a predicate act under the Utah Pattern of Unlawful Activity Act and this count would have been unsupportable. This reversible error is reviewable under the doctrines of ineffective assistance of counsel, plain error, or manifest injustice.

In addition to the theft counts, Mr. Bruun was charged and convicted under the Utah Pattern of Unlawful Activity Act, which requires at least three predicate offenses occur over a "substantial period of time." The jury was not instructed on this element of the offense. While the Utah Supreme Court has not determined the parameters of the element, other courts to which the trial court should look for guidance have overwhelmingly held that less than one year does not meet this requirement. The checks at issue were made mostly in a four month period, with one tag-along check five months later (i.e. over a nine-month period), insufficient as a matter of law. Moreover if the jury had been given the opportunity and had found wrongful appropriation (instead of theft) these would not be predicate offenses as defined under the statute. Either way the count should be dismissed as

a matter of law. These reversible errors are reviewable under the doctrines of ineffective assistance of counsel, plain error, and manifest injustice.

Lastly, the trial court determined complete restitution to be the full aggregated amount of the 12 checks on which Mr. Bruun was convicted; and ordered restitution to be paid in the same amount. Complete restitution cannot exceed the 25% ownership interest the Poseys had in the funds as a matter of law. But more importantly, in determining what portion of the amount determined as “complete” restitution under the Utah Crime Victims Restitution Act should be ordered by the trial court to be actually paid, the court failed to consider substantial consideration previously paid by defendants in connection with the settlement agreement and the Poseys’ release of all claims. This double recovery by the Poseys is reversible error.

## ARGUMENT

### **I. THE CONVICTIONS SHOULD BE REVERSED BECAUSE REQUISITE INTERPRETATIONS OF THE UTAH LIMITED LIABILITY ACT AND THE WRITTEN OPERATING AGREEMENT WERE QUESTIONS OF LAW FOR THE COURT, AND AUTHORIZED MR. BRUUN’S ACTIONS AS A MATTER OF LAW.**

Mr. Bruun was charged with multiple counts of theft of property established at trial as Tivoli LLC assets. The State was also required to establish that Mr. Bruun’s use of the LLC’s property was “unauthorized.” This foundational question regarding liability should not have gone to the jury because as a matter of

law Mr. Bruun's actions in making the checks were governed by (and authorized under) both the Limited Liability Company Act (Utah Code § 48-2c-100, *et seq.*, and the Tivoli Operating Agreement). Each of these should have been interpreted and applied to the issue of liability by the trial court, as a matter of law.

**A. The actions of defendant were authorized as a matter of law under the Utah LLC Act.**

The issue of authority is determinative of criminal liability and the Utah Limited Liability Company Act is relevant. In fact, it is dispositive on this issue.

The legislature wanted to give majority owners of LLCs wide authority and flexibility in operating their companies. Under the LLC Act, owners having at least 2/3 of the sharing interests in an LLC have extremely broad authority – even to take actions in contravention to the operating agreement or the stated purpose of an LLC.

Utah Code § 48-2c-804(4) provides: “[N]o manager shall have authority to do any act *in contravention of* the articles of organization or *the operating agreement, except as provided in Subsection 6(g).*” (Emphasis added.) Under Subsection 6(g) [48-2c-804(6)(g)], “members holding 2/3 of the profits interests in the company, and 2/3 of the managers shall be required for all matters described in Subsection 48-2c-803(3).”<sup>8</sup>

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<sup>8</sup> Profits interest means that portion of the company's profits to be allocated to an individual member upon an allocation of profits. § 48-2c-102(20). The State's expert

The referenced subsection [§48-2c-803(3)] permits members holding two-thirds of the profits interests in a company to “authoriz[e] a member or any other person to do any act on behalf of the company that is not in the ordinary course of the company’s business, or business of the kind carried on by the company.” Moreover, members having 2/3 or greater profits interest are authorized to “mak[e] a substantial change in the business purpose of the company.” Utah Code § 48-2c-803(3)(d). Further, they have final say; as they may “resolv[e] any dispute connected with the usual and regular course of the company’s business.” Utah Code § 48-2c-803(3)(c). Thus wide authority is granted to such majority holders, even if their decisions are contrary to the provisions of the operating agreement, the stated purpose of the LLC, or expressed wishes of the minority owners, however important to the minority the issue may be, and regardless of prior conflicting understandings.

As noted, the defendants’ profit-sharing interest in Tivoli was 75%. That fact is undisputed; and should have precluded the criminal charges, as the expenditures at issue were authorized by more than two-thirds of the sharing ownership.

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acknowledged that the allocation of profits to the Poseys was 12.5% each (R. 1535, p. 167); *see also* § 48-2c-906 (profits and losses of an LLC “shall be allocated among the members in the manner provided in the operating agreement”).



The trial court's error in view of the statute is apparent: the court should have dismissed the counts as the defendants had statutory authority to enter into the joint venture and expend Tivoli funds on the Hidden Acres development (and in fact pursue all the other opportunities and meet the incurred obligations of Tivoli the checks at issue were associated with), regardless of whether such actions were in contravention of the Operating Agreement, in the course of Tivoli's regular business, or even in direct opposition to the original purpose of the company as repeatedly voiced by the minority owners.<sup>9</sup>

**B. The Operating Agreement also authorized defendants' actions as a matter of law, and should have been interpreted by the court rather than the jury.**

Mr. Bruun's actions were also authorized by the Operating Agreement as a matter of law. Under the LLC Act, the adoption of an LLC's initial operating agreement must be by "unanimous consent of the members." Utah Code § 48-2c-801. The manager of an LLC is thus entitled to rely on the operating agreement through which all members authorize the manager to make the decisions for the company consistent with its terms.

If the Operating Agreement authorizes the manager to do certain things – for example, to enter into joint ventures (Add. Exh. E, § 7.4.7), purchase real property

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<sup>9</sup> At a minimum, the jury should have been instructed as to these dispositive provisions of the LLC Act.

other than the Posey property (Add.Exh. E, § 7.4.1), or other things – then alleged oral discussions or understandings predating the signed Operating Agreement are legally irrelevant.

Tivoli's Operating Agreement was fully integrated. An integrated agreement is "a writing or writings constituting a final expression of one or more terms of an agreement." *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 12, 182 P.3d 326. A contract is integrated if it contains a clear integration clause, and extrinsic evidence is not admissible on the question of integration. *Id.*, ¶¶ 17, 19. Under Utah law evidence of prior oral communications or understandings is not admissible to contradict the provisions of the agreement. *Trangren Family Trust*, *supra*.

Nevertheless the trial court allowed such testimony. (*E.g.*, R. 1534, 11/8/13 Tr., p. 14:1-11 (State's expert testifying that, from the Posey's testimony, it was his opinion that expenditures had to be approved by all Tivoli members); *id.*, pp. 39-40:20-5 ("we look to the evidence as were the transactions authorized or approved? Under the agreements, under the representations, verbal and otherwise, under the understanding of the parties, were those transactions authorized?") and pp. 49-50:23-8 (stating that his conclusion that a majority of expenditures discussed were unauthorized was based "partly" on the operating agreement, as well as "verbal, and email representations[.]").)

Oral communications, etc. inconsistent with the integrated agreement should have been excluded. Rather, applicable provisions of the Operating Agreement should have been interpreted by the trial court as a basis for determination of liability. Interpretation of a written document is a question of law, *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 19, 258 P.3d 539, which means that interpretation of the Operating Agreement as to whether or not there was authority to make the checks at issue was a question for the court (not the jury). Utah Code § 77-17-10(1) (“In a jury trial, questions of law are to be determined by the court[.]”).

The State successfully argued below, however, that interpretation of the Operating Agreement was for the jury. The State’s argument, as the State itself acknowledged, was this:

The State filed *theft* charges under § 76-6-404 of the Utah Criminal Code. Thus, this is obviously not a breach of contract action. The Operating Agreement is merely one of several exhibits that the State introduced as evidence to support the charges. The jurors heard extensive testimony regarding the Operating Agreement, had ample opportunity to review it, and give it whatever weight they thought it deserved. The defendants offer no rule of evidence or any other legal authority holding that only the District Court – instead of the jury – can interpret the Operating Agreement as an item of evidence in a criminal action. As for the cases that the defendants cite in their Supplemental Brief, they are all civil cases involving breach of contract claims – *not* criminal theft allegations. In essence, the defendants are confusing questions of evidence with questions of contract law.

(R. 1444 (italics and triple emphasis in original).)

However, regardless of the nature of the proceeding the court is required to decide questions of law. Utah Code § 77-17-10(1). In fact, this Court has interpreted contracts as a matter of law for the purpose of assessing whether a defendant's use of property was authorized (or not authorized) in the context of a theft conviction. See, e.g., *State v. Burton*, 800 P.2d 817 (Utah Ct. App. 1990), (whether or not the conduct of the defendant charged as theft in a seller-financed real estate purchase was authorized under the relevant private financing agreement),<sup>10</sup> *State v. Stringham*, 957 P.2d 602, 610 (Utah Ct. App. 1998) (reviewing terms of a written agreement found to exist by the jury, noting that "double-payment was not authorized by defendant's agreement with APA"); cf. *State v. Snyder*, 747 P.2d 417, 418 (rejecting a claim of authority to use funds where the only written provision cited by defendant regarding authority was a general nonrefundability clause in an earnest money agreement).

In *Burton, Supra*, this Court states that it is a court's role to interpret unambiguous agreements as a matter of law. *Id.* at 819. In this case the result would be the same even if the trial court had found the operating agreement to be ambiguous.<sup>11</sup> If a provision is ambiguous, the jury's role is to decide fact

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<sup>10</sup> The brief of co-defendant Jame Didericksen discusses the *Burton* case *Id.* at some length, as *Burton* is analogous in certain respects to this case.

<sup>11</sup> To do so, the court would first have had to conclude that "it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1267 (citations omitted).

questions regarding the parties' intent at the time they adopted that specific provision. *See, e.g., Northgate Village Development, LC v. Orem City*, 325 P.3d 123 (Ct. App. UT) 2014 at 131. The State did not argue that the Tivoli Operating Agreement was ambiguous (and the jury was not so instructed). This may be because a finding of ambiguity would have meant that the defendants' interpretation and perception of their authority was *per se* reasonable, and that would have been problematic for the State.

More problematic for the State in this connection is that the Legislature has prescribed a method for resolving ambiguities in operating agreements where there is a 2/3 majority. As previously discussed, under the Utah LLC Act holders of 2/3 profits interests are expressly authorized to resolve disputes regarding the conduct of the business. Utah Code § 48-2c-803(3)(c). That broad authority would include disputes over which of two reasonable interpretations of an operating agreement to follow. The Operating Agreement itself also confers similar interpretation authority on Tivoli's managers. *See* p. 13, *supra*.

Thus by statute and express written agreement of the members, Equity Partners (Bruun and Didericksen) had the authority to interpret or reconcile inconsistent provisions or resolve ambiguities of the Operating Agreement. So even if provisions of the Operating Agreement were ambiguous, the State could not as a matter of law meet its burden of proving beyond a reasonable doubt that

the Operating Agreement did not authorize expenditures in furtherance of the decisions of the managers for the conduct of the LLC (for example the Hidden Acres joint venture, or pursuing other real estate development endeavors). *State v. Franks*, 649 P.2d 3, 4 (Utah 1982) (“the burden is on the state to show unauthorized control, *not* on the defendant to show authorized control”) (emphasis in original).

In sum, reversal and dismissal of all counts is compelled by both the LLC Act and the Operating Agreement.

**C. If any of these issues not preserved should be reviewed for ineffective assistance of counsel, plain error, and manifest injustice.**

The defendants argued below that the trial court was required to interpret the Operating Agreement as a matter of law. *See* p. 2, *supra*, Issue I Preservation. That issue, accordingly, was preserved. If the Court concludes that the effect of the LLC Act was not preserved, the Court should still reverse under the doctrines of ineffective assistance of counsel, plain error, or manifest injustice.

**1. Ineffective assistance of counsel.**

To prevail on a claim of ineffective assistance of counsel, a defendant must show 1) that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and 2) that counsel’s performance prejudiced the defendant.

*State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. In this case, those elements would be met. As shown above, the LLC Act expressly authorizes the exact conduct of which the defendants were accused, *i.e.*, acting in contravention of an operating agreement or changing or going outside the business of the company. The Act also contains other provisions directly supportive of the defendant's innocence in this case. *See* pp. 24-25, *supra*.

Mr. Bruun's trial counsel did not mention this governing statute however, let alone ask the trial court to apply it or to instruct the jury in accordance with its provisions. Failing to discover or address a dispositive state statute is a deficiency that falls well below any objective standard of care. *See, e.g., State v. Jeffs*, 2010 UT 49, ¶ 26, 354 P.3d 1250. That this omission was prejudicial is shown above – among other things, the statute affords a complete defense to all charges.

## **2. Plain error.**

To show plain error, an appellant must show that (i) an 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 appellant, or phrased differently, that confidence in the verdict is undermined. *State v. Bedell*, 2014 UT 1. Those elements are, again, met here.

Mr. Bruun has shown above that it was error not to apply governing provisions of the LLC Act and that, but for that error, the counts would have been



dismissed. That error should have been obvious to the trial court: The entire issue before the court was whether the managers of an LLC were authorized to use LLC property. It should be obvious that LLC statutes would come into play. When a dispositive issue is the subject of a clear statute, failure to apply that statute is plain error.

Given that the statute is straightforward (not fact-intensive or complex) and could not conceivably have been ignored on strategic grounds, it should have been obvious to the court and parties below. *State v. Nielsen*, 326 P.3d 645 (2014) (citing *State v. Gornick*, 340 Or. 160, 130 P.3d 780, 783 (2006) as “identifying the following considerations as suggesting that an error is ‘plain’: that the error is one of law; that it is ‘obvious, not reasonably in dispute’; that it ‘appears on the face of the record,’ meaning that the reviewing court does not need to ‘go outside the record to identify the error or choose between competing inferences,’ such as a strategy of the parties; and that “the facts constituting the error are irrefutable’”).

The prejudice from such error is also obvious: the convictions cannot stand as the charges cannot: as a matter of law. Had the issue gone to the jury, the jury would likely have reached a different result if instructed about the statutory authority possessed by two-thirds profits holders.

### 3. Manifest injustice.

Apart from the preceding two contentions, the governing LLC Act provisions should be reached to prevent manifest injustice. A state statute directly relates to, and exonerates, the defendant's alleged acts. The defendant has multiple felony convictions on his record, has a large restitution judgment against him, and his freedom will be constrained for some time to come, all unnecessarily and unjustly.

## II. ALL BUT FOUR COUNTS SHOULD HAVE BEEN DISMISSED, OR A NEW TRIAL GRANTED, BECAUSE AT MOST 25% OF THE AMOUNTS ALLEGEDLY STOLEN WAS THE VICTIM'S PROPERTY.

### A. The value of "property of another" is limited to the other's interest in the property.

It is well settled that a person cannot be charged with stealing his own property, however our code states that "[i]t is no defense...that the actor has an interest in the property...stolen if another person also has an interest that the actor is not entitled to infringe." Utah Code § 76-6-402(2). Inherent in this section is that the "infringement" (theft) is limited to the extent of the other person's interest in the property at issue.

This has long been the law in Utah. In *State v. Parker*, 104 Utah 23, 137 P.2d 626 (1943), the defendant took his car to a mechanic for repairs. By law, the mechanic had a statutory lien on (thus interest in) the car to the extent of his unpaid

services. Without having paid the bill in full, the defendant took back his car, and was subsequently charged with stealing the automobile from the garage owner. He was charged with grand larceny because the value of the automobile was more than \$50.00.

The defendant argued that he could not be charged with stealing his own property, *i.e.*, a car that he owned. While agreeing with that proposition generally, the Supreme Court held that it does not apply to the extent that another party – in that case, the mechanic – has a legal interest in the property. The principal opinion ordered a new trial because, among other things, the jury was not instructed on the nature of the garage owner's interest in the property. *Id.* at 630 (“Not one word in the instructions is said with reference to a bailor or bailee, to a lienholder's rights, or to general or special property in a chattel...”)<sup>12</sup>

Through concurring opinions, a majority of the justices made clear that the value of the property stolen was not the value of the *automobile*, but rather only the amount of the mechanic's legal *interest* therein. Chief Justice Wolfe wrote:

The opinion rightly states that at common law a bailor could steal his own chattel from a bailee. What he stole was the special property of the bailor in the chattel.... By the reasoning above, when the chattel possess a legal attribute or property in respect to the bailee by which he can retain possession for recourse, such attribute is a property of the whole chattel but its value is as to the bailee only the amount of his indebtedness.

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<sup>12</sup> “This case illustrates the misuse of the criminal machinery of the law in attempting to enforce a civil obligation,” the opinion noted. *Id.* at 626.

Mr. Justice McDonough has developed this matter according to the intent of the legislature as discerned from the gradation of degrees of larceny. I agree with his conclusions in this regard. The third question must therefore be answered that if the jury found only \$30 owing, the offense must be considered a misdemeanor.

*Id.* at 631 (Wolfe, C.J., concurring).

Although the adequacy of jury instructions was not raised by the parties, Chief Justice Wolfe concluded that “the lack of an instruction as to the amount of the indebtedness being the measure of grand or petty larceny may not be only an inadequacy but be misleading.” *Id.* at 632. “Since the first element in Instruction No. 5 used the phrase ‘did steal, take and carry away *one automobile* of the value of more than fifty dollars’ the jury’s mind would naturally conclude that the value of the car and not the special property of the complaining witness was the measure of whether the offense was petty or grand larceny.” *Id.* (emphasis in original).

Agreeing with Justice Wolfe’s conclusion, Justice McDonough offered the example of a mechanic who was owed \$1 for material and labor on a bicycle worth \$50. If the bicycle’s owner stole it from the mechanic, the crime would only be a misdemeanor (*i.e.*, below \$50), he observed:

We must refer the degree of the offense to the assumed injury to the owner..... It is true that a thief who has no property rights therein, steals property worth \$100 from one who has merely the possession thereof, he is guilty of grand larceny even though the one in possession was not even rightfully in possession. However, in such case the thief deprives the true owner of property of value \$100. He likewise enriches himself

to the same extent. But we should not apply such rule so as to say that by stealing property of \$100 in value from a lienholder, the general owner is guilty of grand larceny although he deprived the possessor of only \$1 in value and enriched himself but to the same extent. The value of the property taken," as such words are used in the [statute] should be held to be but \$1.

*Id.* at 633; *see also id.* at 634 (Wade, J., concurring) ("I agree with Mr. Justice McDonough that the value of the property stolen cannot exceed the amount of the lien which the lienholder has against it at the time of taking.").

In this case, the jury was misled in a manner similar to that in *Parker*. The relevant "property" charged by the State as having been stolen was Tivoli assets dispersed by the 12 individual checks written on Tivoli, LLC's bank account. *See* p. 19, *supra*. The jury was instructed on the entire face value of the checks, rather than the 25 percent interest that (at most) the Poseys had under the written Operating Agreement. Indeed, the jury received no instruction at all that the value or quantum of property at issue was limited to the Poseys' interest in the funds.

The State has the burden of proving the value of the property stolen. *State v. Forshee*, 588 P.2d 181, 184 (Utah 1978) ("The value of the property determines the degree of the offense and must be proved by the State."); *State v. Carter*, 707 P.2d 656, 659, 662 (Utah 1985) (felony charge requires proof of theft of property having a value in excess of the statutory amount); *State v. Seymour*, 49 Utah 285, 163 P. 789, 790 (1917) (ordering a new trial because the Information did not allege

the value of a \$250 promissory note given by the victim to the defendant in payment for stock).<sup>13</sup>

The State proffered two theories to justify claiming the full face value of the checks. First, the State argued that the Poseys had “a contractual right” to receive \$750,000 from Tivoli for the purchase of the property, and that “the 25% interest the Poseys had (12.5% each) [sic] was in Tivoli’s profits after they were paid the remaining \$2.75 million of the purchase price due to them. The Poseys were due the \$2.75 million before Equity Partners received any profits from Tivoli. Thus, while the money deposited into Tivoli’s account may have been designated for Tivoli, the Poseys maintained a complete interest in it until they were paid the remaining \$2.75 million in full.” (R. 1447 (emphasis in original).)

The State’s argument was internally inconsistent. The State acknowledged the claim to money relating to purchase of the property was “a contractual right” to receive the remaining purchase price – but that means (in other words) the Poseys were *creditors* of Tivoli with respect to that sale. The State cited no authority for the proposition that someone who allegedly steals from an entity may be charged with the full amount of creditors’ claims against that entity. Nor was the State’s argument supported by the theft statute, which bars such a contention with respect

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<sup>13</sup> This requirement is particularly critical “when the value alleged is close to the line dividing one offense from another.” *State v. Larsen*, 966 P.2d 278 (Utah Ct. App. 1998) (vacating felony conviction where the State’s evidence was of the original purchase price of the stolen property rather than the value at the time of the theft).

to claims such as posited. *See* Utah Code § 76-6-402(2) (under theft statute, “an interest in property for purposes of this subsection shall not include a security interest for the repayment of a debt or obligation.”).

The State tried a second tack in its closing argument, telling the jury that the value of the property at issue was \$3.5 million. (R. 1538, p. 17:13-25.) That was based on a wholly improper argument that the “property” was the 29 acres of land purchased by Equity Partners and assigned to Tivoli – something that was neither alleged in the Information nor in the Jury Instructions, which expressly defined the “property” stolen as the 12 checks. (R. 69-77; R. 900-951.)

Apart from the failure of the charging documents to set out theft of real estate rather than the money (checks), the State’s new theory was baseless under the LLC Act. Even when an LLC owns real property, by statute a member’s interest is personal property regardless of the nature of the property owned by the company. Utah Code § 48-2c-701(1). Members have no specific interest in, or claim to, specific assets held by an LLC. *Id.* § 48-2c-701(2). The State had no basis whatsoever for claiming that the value of the checks charged was the value of a piece of real property owned by the LLC.

In sum the defendants were charged with theft from the Poseys by writing checks from the LLC’s bank account. The defendants owned all but 25% of the LLC funds. As a matter of law, the value of the allegedly stolen property was no



more than 25% of the amounts of the checks at issue. The jury should have been instructed accordingly, and reversal is compelled on that ground alone.

**B. Correctly applying the law, all but four counts should be dismissed as time barred.**

As Mr. Bruun's trial counsel repeatedly advised the trial court, limiting the value of the checks to the Poseys' 25% interest would have dropped all but four counts (2, 7, 8, and 24) below the felony threshold. (*See* Table, p.19, *supra*.) Had the State amended its Information accordingly, the resulting misdemeanors would then have been subject to dismissal based upon the two-year statute of limitations. Utah Code § 76-1-302.

The State bears the burden of proving that a criminal action is not barred by the statute of limitations. *State v. Pierce*, 782 P.2d 194 (Utah Ct. App. 1989). It would have no argument here, particularly where the Poseys brought their complaints to the State well within the statute of limitations period even for misdemeanors. (R. 1520, p. 31:15-24.)<sup>14</sup>

Independent of all other issues on appeal, the court should reverse Mr. Bruun's convictions and remand with instructions to dismiss all but Counts 2, 7, 8, and 24 as time-barred.

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<sup>14</sup> One might surmise that the statute of limitations problem was the driving force behind the State's overcharging of the defendants. The Poseys presented their allegations to the State in September 2008, well within a two-year period, but the State did not file the Information until March 2011, after the limitation period had passed. *Id.*

**III. THE CONVICTIONS SHOULD BE REVERSED DUE TO THE FAILURE TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF WRONGFUL APPROPRIATION.**

**A. The Jury should have been instructed on the lesser included offense of wrongful appropriation**

By statute, and the State's acknowledgment "[w]rongful appropriation is a lesser included offense of theft. See §76-6-404.5(4), Utah Code Annotated." (R. 86.) "A person commits wrongful appropriation if he obtains or exercised unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property." § 76-6-405.1(1).

The trial court did not instruct the jury on wrongful appropriation, or include it as an option on the special verdict form. This was a critical omission for several reasons. "Wrongful appropriation is punishable one degree lower than theft, as provided in Section 76-6-412...." § 76-6-405.1(3). Not only does wrongful appropriation result in reduced penalties, but conviction on the lesser included offense would have resulted in automatic and non-appealable acquittals on the greater theft charges. See § 76-1-403(1) and (2). Additionally, wrongful appropriation, § 76-6-404.5, is not a predicate offense upon which a violation of the Pattern of Unlawful Activity Act can be charged. See Utah Code § 76-10-1603 (list

of UPUAA predicate offenses). Accordingly, had the jury convicted only on wrongful appropriation, the defendants would been acquitted on the UPUAA claim.

The difference between theft and wrongful appropriation is the length of time that the jury believes the defendant intended to appropriate the property. *Compare* § 76-6-404 and 76-6-404.5. In support of its theft counts, the State argued to the jury that it need not find an intent to permanently deprive, that essentially it could convict for any intended deprivation for any period of time. (R. 1538, p. 20:2-16 (“You are instructed that if one misappropriates and converts to his own use money or property belonging to another under circumstances that constitute theft, it is not made otherwise because the one doing so might have some intention of restoring the loss sometime.... If someone commits a theft and has someone else’s property, whether it’s 30 months, 30 days, 30 seconds, returning it is not a defense.”))

Under the State’s own argument – that the jury could convict Bruun even if the intended deprivation was as little as 30 days or 30 seconds – the jury could easily have found the deprivation “temporary,” *i.e.*, wrongful appropriation rather than theft. That is particularly true when the defendants owned at least 75 percent of Tivoli, and had reimbursed Tivoli for certain expenditures (*e.g.*, R. 1535, p. 278-279:23-7; R. 1536, p. 179-180:9-5).

The trial court was obligated to instruct the jury on the lesser included offense of wrongful appropriation. *State v. Hansen*, 734 P.2d 421 (Utah 1986) (instruction

must be given if there is any rational basis for acquitting the defendant of the offense charged and convicting him of the included offense); § 76-1-402(4). Failure to do so was reversible error affecting all counts.

**B. Ineffective assistance and manifest injustice.**

Notwithstanding the clear statutory language and the State's acknowledgment that wrongful appropriation is a lesser included offense of the offense of theft, the defendants' trial counsel "forwent an instruction on the lesser included offense of misappropriation" (R. 1383); *see also* R. 1537, p. 214 (counsel stating that they were "dropping" request for wrongful appropriation instruction). Counsel also did not object to a Verdict Form with theft as the jury's only option. (R. 971(verdict form).)

Trial counsel's reason for this decision was a belief that an agreement was in place with the State that the trial court would interpret the Operating Agreement and determine the Poseys' legal interest after the verdict. (R. 1383.) Before the jury was instructed, the trial court was advised that the defendants and State had an agreement:

MR. DIUMENTI: I think we've resolved it, your Honor. Go ahead, Clif. I think you can articulate the issue that we've agreed with [Mr. Taylor, the State's counsel] about better than I can.

MR. THOMPSON: Well, yes. Counsel discussed that we are going to ask the Court to look into the issue of what percentage of the ownership of the assets under the contract, as a matter of law, is actually the Poseys' in determining what the sentence should be. [Mr. Taylor] suggested that we brief this in the intervening time.

THE COURT: Okay. Sure. I'll look at briefs if you want to do them.

MR. TAYLOR: So I'll just wait to see something from you? And then I'll just file a responding brief.

(R. 1538, P. 102:11-24.)

Accordingly, after the verdict, the defendants filed a memorandum addressing the value of the Poseys' property as a matter of law, along with a motion for judgment notwithstanding the verdict. (R. 984.) In response, however, the State argued that the court should not interpret the Operating Agreement as a matter of law. (R. 1039.)

In their briefing, defense counsel stated that their discussion with the State's counsel was "that the issue of what the true dollar amount of the Poseys' property involved in the thefts was a matter of contract interpretation, and was a determination of law and a matter for the Court, not the Jury, and that the issue would be submitted if the Defendants were convicted." (R. 985; R. 1125.)

The State denied that the statements made to the court reflected a stipulation that the Operating Agreement would be interpreted by the trial court as a matter of law; "[r]ather," according to the State, "the State suggested that the defendants could reserve this issue for future briefing in the event of guilty verdicts." (R. 1444.)

Defense counsel's interpretation of the agreement seems more consistent with the actual summary in court. At the very least, an attorney could reasonably infer agreement from the State's response to counsel's characterization. Regardless, what

is clear is that either: 1) Bruun's trial counsel reasonably believed there was a stipulation with the State on which he relied in foregoing the instruction, and on which the State later reneged, or 2) Bruun's trial counsel unreasonably believed there was a stipulation with the State. Either way, a new trial is required, either to remedy a manifest injustice or to remedy ineffective assistance of counsel.

This Court has provided guidance on when the failure to request a lesser-included offense instruction constitutes ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Ross*, Utah App. 1997, (citation omitted). To establish such a failure, the defendant must show that "counsel's representation fell below an objective standard of reasonableness," and that "counsel's errors were so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Id.*

If Mr. Bruun's trial counsel waived a lesser included offense instruction due to an unreasonable belief that a stipulation existed with the State, that unreasonable action – by definition – fell below an objective standard of reasonable professional judgment. It would mean that counsel gave up an important right, one that could have produced lower sentences and eliminated the most serious felony count (UPUAA), for literally no benefit to the defendant.

Alternatively, if the exchange in court did reflect a stipulation, or could reasonably have been interpreted as a stipulation by counsel, upon which the State later reneged, then the Court's review of this issue is necessary to prevent manifest injustice.

**IV. THE UPUAA COUNT SHOULD BE DISMISSED AS A MATTER OF LAW, OR THE CONVICTION REVERSED FOR FAILURE TO GIVE A COMPLETE ELEMENTS INSTRUCTION, AND BECAUSE WRONGFUL APPROPRIATION IS NOT A PREDICATE OFFENSE.**

**A. The trial court did not instruct the jury on all the required elements of UPUAA.**

Under the Sixth Amendment, a defendant has the right to have a jury determine, beyond a reasonable doubt, whether the defendant is guilty of every element of the crime charged. *State v. Duran*, 2011 UT App 254, ¶ 16, 262 P.3d 468. In this case, the State charged Mr. Bruun with one count of violating the Utah Pattern of Unlawful Activity Act, § 76-10-1603. Section 1603 identifies three different offenses, delineated as subsections (1), (2), and (3), plus a conspiracy offense in subsection (4); the Amended Information charged a violation of subsections (1), (2), and (3). (*See* R. 77-78.)

Among the statutory elements of all three subsections is the existence of a "pattern of unlawful activity." Utah Code § 76-10-1603. The State submitted a proposed jury instruction on that element, to which Mr. Bruun's trial counsel did not object:

“Pattern of Unlawful Activity” means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. The most recent act constituting part of a pattern of unlawful activity as defined shall have occurred within 5 years of the commission of the next preceeding [*sic*] act alleged as part of the pattern.

(R. 496, ¶ 2.) While this instruction is a quote from part of the Act (§ 76-10-1602(2)), it fails to define or instruct the jury regarding a required element of a pattern under the UPUAA, *i.e.*, that the required predicate acts occurred over a “substantial period of time.” As such, the instruction constitutes reversible error as a matter of law. *See Hill v. Estate of Allred*, 2009 UT 28, 216 P.3d 929.

The reference to “continuing unlawful conduct” was added to the statutory definition of “pattern” shortly after the United States Supreme Court’s ruling in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Therefore, the Utah Supreme Court has said, “it makes sense to use the Supreme Court’s clarification of that phrase as the test for whether there is a pattern of unlawful activity.” *Hill*, 2009 UT 28, ¶ 38.

That clarification, the court noted, came in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In *H.J.*, the U. S. Supreme Court rejected a contention that multiple schemes were required to establish a pattern. The court held, however, that continuity must be shown.



With respect to closed continuity (when the alleged activities have stopped prior to charges being filed), “[c]ontinuity may be demonstrated ‘over a closed period by proving a series of related predicates extending over a substantial period of time[.]’” *Id.*, 492 U.S. at 241, 109 S.Ct. at 2901.

Adopting a similar interpretation of UPUAA’s pattern requirement, the Utah Supreme Court held in *Hill* that “[t]he proper test for determining whether there was a pattern of unlawful activity, is whether there was ‘a series of related predicates extending over a substantial period of time’ or a demonstrated threat of continuing unlawful activity and not whether there were multiple schemes.” 2009 UT 28, ¶ 40.

The State’s instruction given by the trial court omitted the key requirement that the related predicates extend over a “substantial period of time.” That element is material, because, as noted above, the checks for which the jury found theft extended over a period of less than four months (December 21, 2007, to April 11, 2008), with one small outlier in September 2008. *See* p. 19, *supra*.

The Utah Supreme Court has not had occasion to decide what constitutes a “substantial period of time” under *Hill*. However, the court looked to federal law in interpreting Utah’s UPUAA, which was patterned after federal RICO and has been amended by the statute legislature to incorporate federal RICO rulings. *See*

*Hill*, 2009 UT 28, ¶¶ 38-40. Accordingly, it is appropriate to again seek federal guidance on this issue.

Federal courts “overwhelmingly” hold that a period of less than one year is insufficient – as a matter of law – to constitute a “substantial period of time” under RICO. *Jackson v. BellSouthTelecomms.*, 372 F.3d 1250, 1266 (11th Cir. 2004) (“The substantial period of time requirement for establishing closed-ended continuity cannot be met with allegations of schemes lasting less than a year.”) (string citing cases); *Menasco v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) (finding no continuity when predicate acts with a single goal occurred over a one-year period); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (17 month period insufficient to show continuity); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir. 1991) (13 months is not a substantial period of time under RICO); *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 407 (8th Cir. 1999) (10-month period is “too short” to constitute substantial period for purposes of closed-ended continuity); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (“We have found no case in which a court [of appeals] has held the [continuity] requirement to be satisfied by a pattern of activity lasting less than a year.”); *Efron v. Embassy Suites (P. R.), Inc.*, 223 F.3d 12 (1st Cir. 2000) (no closed-ended continuity where predicate acts occurred over

21-month period); *Hughes v. Consol Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3rd Cir. 1991) (12 months “is not a substantial period of time” under RICO).

In the influential Second Circuit, the threshold is two years. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2nd Cir. 2004) (“This Court has never found a closed-ended pattern where the predicate acts spanned fewer than two years.”); *see also GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 67 F.3d 463, 467-68 (2d Cir. 1995) (finding that courts of appeals have consistently considered eleven months to be insufficiently “substantial”).

In this case, 11 of the 12 checks were written during a single three-and-one-half month period, plainly not a “substantial period of time”. Even if the discontinuity comprising the small check from September 2008 is included, that brings the maximum period to less than nine months, again insufficient as a matter of law.

Per the State’s own Amended Information and the jury’s verdict, the UPUAA claim should instead have been dismissed. Alternatively and at a minimum, the jury should have been instructed on the required element of a “substantial period of time.” Either way, Bruun’s UPUAA conviction constitutes reversible error.

**B. Because wrongful appropriation is not a predicate act under the UPUAA, reversal under Point III requires reversal of the UPUAA conviction.**

By its express terms, the Utah Pattern of Unlawful Activity Act can be violated only through commission of specified predicate acts. *See* § 76-10-1603. Unlike theft, wrongful appropriation is not included on that list. *Id.* Consequently, if Mr. Bruun's convictions are reversed for retrial on wrongful appropriation, the UPUAA conviction must similarly be reversed.

**C. Review of this issue is warranted due to ineffective assistance of counsel, plain error, and to prevent manifest injustice.**

Bruun's trial counsel did not seek dismissal of the UPUAA claim, or request a jury instruction regarding the substantial period of time requirement. Knowledge of the law is a basic prerequisite to providing competent legal assistance. An attorney who does not investigate clearly relevant law has failed to provide effective assistance. *See, e.g., State v. Crosby*, 927 P.2d 638, 645-46 (Utah 1996) (holding failure to request consolidation of theft counts was ineffective assistance because existing case law supported consolidation).

The Utah Supreme Court was not presented with this specific issue in *Hill* (the acts there occurred over a five-year period), and has not been presented with the issue since. However, the facial insufficiency of a four-month period – or even nine (if the September 2008 outlier is included) – is demonstrated by the “overwhelming weight of case authority.” *Jackson, supra*. The failure to research

this readily available and extensive case law, and to seek dismissal of the UPUAA count thereunder, was ineffective assistance.

The error was compounded by not seeking a complete elements instruction. The Utah Supreme Court clearly and unambiguously adopted the “substantial period of time” requirement for a UPUAA pattern more than four years before the defendant’s trial. The failure to request an instruction on this express element was ineffective assistance of counsel, and the trial court’s failure to give the instruction constitutes plain error. Allowing Bruun’s UPUAA conviction to stand in the face of case law universally holding otherwise would also result in manifest injustice.

## **V. THE TRIAL COURT ERRED IN ITS RESTITUTION AWARD.**

### **A. The court was required to take into account compensation previously received by the victims.**

The Utah Crime Victims Restitution Act provides that restitution can be awarded (only) when there have been “pecuniary damages.” *See*, §77-38a-302(1). “Pecuniary damages” are defined as all economic injury “a person could recover in a civil action.” *See*, §77-38a-102(6).

As noted above, in November 2008 the Poseys entered into a Settlement Agreement and Release with all other parties including Equity Partners, Mr. Bruun and Mr. Diderickson. Pursuant to the settlement and release, Equity Partners signed over the (rezoned) 29 acres in Saratoga Springs to the Poseys, and a \$174,000.00 payment from UDOT, and the Poseys paid Equity Partners

\$25,000.00. The Poseys accepted this as compensation in full for each specific check that they were questioning and released all claims in the matter. *See* p. 20, *supra*, and Add. Exh. F.<sup>15</sup>

The trial court erred in refusing to take into account this prior compensation received by the victims when determining court-ordered restitution. *See State v. Corbitt*, 2003 UT App 417, ¶ 12 n.3, 82 P.3d 211 (trial court was obligated to factor in insurance payments received by the victim when determining the amount of restitution); *see also State v. Miller*, 2007 UT App 332, ¶ 7, 170 P.3d 1141 (rejecting State's argument that "limitations on civil damage awards, such as those imposed by the no-fault insurance statutes, should not rigidly limit restitution awards in criminal cases"); *State v. Robinson*, 860 P.2d 979 (Utah Ct. App. 1993) (disagreeing with the State's argument that a court "may order restitution without regard to potential civil affirmative defenses," but finding that a release signed by victim was invalid because she had previously assigned her claims to the Crime Victims' Reparations Trust Fund); *State v. Stayer*, 706 P.2d 611, 612-613 (Utah

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<sup>15</sup> By statute, restitution is limited to damages caused by the offenses for which the defendant was convicted, *i.e.*, the 12 checks. *See State v. Watson*, 1999 UT App 273 ¶ 5, 987 P.2d 1289 (restitution award improper where defendant's obstruction of justice did not cause pecuniary loss); *State v. Galli*, 967 P.2d 930, 937 (Utah 1998) (restitution award improper where the pecuniary damages were caused by bail jumping, for which defendant was not charged, rather than the robbery of which the defendant was convicted); *State v. Brown*, 2009 UT App 285, ¶¶ 10-11, 221 P.3d 273 (restitution award improper where State failed to establish that moving expenses of defendant's girlfriend were caused by the defendant's criminal activities).

1985) (noting that discharge in bankruptcy would be a defense to some restitution claims).

In *State v. Laycock*, 213 P.3d 04 (Utah 2009) the Utah Supreme Court addressed determination of “complete” and “court ordered” restitution under the Utah Crime Victims Restitution Act. Justice Nehring’s opinion addresses concerns of the lower court concerning determination of restitution; and gives controlling guidance to trial courts. “Complete” restitution can include any pecuniary damages (defined as those which a victim could recover in a civil action ( U.C.A. §77-38a-102(6) and §77-38a-302(1)) under the guidelines set forth in the Restitution Act (listed in §77-38a-302(5)). In contrast, “court ordered” restitution is that part of complete restitution that the trial court determines should be paid in the interests of justice. The opinion states:

...it is critical to understand that while a court is required to determine complete restitution, and to consider the enumerated elements of loss, the statute does not require a court to order the defendant to pay complete restitution.

*Id.* 110-111.

After determining complete restitution, a district court judge may then order court-ordered restitution as part of the criminal sentence based on facts that would meet the same strict requirements as found in a civil setting.

*Id.* 112.

Here the trial court erroneously ordered restitution in the full amount determined as complete restitution (the aggregated check amounts: \$189,574.33). The consideration given by the defendants to the Poseys in the settlement and the

Poseys release of claims with regard to the checks were not taken into account in the amount actually ordered to be paid.

The rehabilitative purposes of restitution do not mean that victims are entitled to double recovery. A trial court must take into account any compensation that the victim has already received toward his or her alleged pecuniary damages. In this case the rezoned and retitled 29 acre property and UDOT payment were given to the victims, and due to their release of claims the Poseys could not recover on the checks in a civil action. The trial court's refusal to take this into account in the order was reversible error.

**B. Restitution must match the amounts of the checks actually owned by the victims and cannot be awarded for any convictions that are reversed.**

As discussed above in connection with Issue II, the Poseys owned at most 25% of the amount of each check at issue. Therefore if the Court finds for Mr. Brunn on Issue II it must also find the trial court erred in determining complete restitution to be the full (100%) amount of each of the checks at issue. The order should be reversed and remanded with instructions to correct this error if the court does not find that the order should be reversed in total under A., just above.

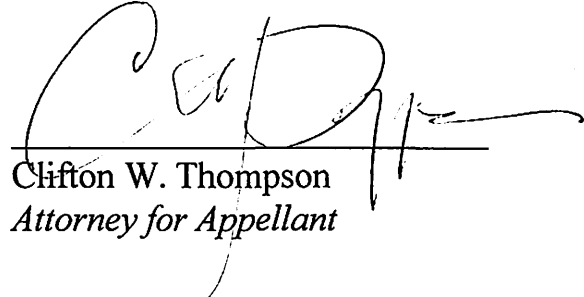
Moreover, To the extent that any of the convictions against Bruun are reversed as urged herein, the portion of the restitution award associated with those counts must also be reversed.



## CONCLUSION

All these errors together militate for, and Appellant Bruun respectfully requests, that the Court reverse the judgment. It should be remanded with instructions to dismiss all counts under Issue I. Alternatively, the case should be remanded with instructions to dismiss all counts under Issues II and III except counts 2, 7, 8, and 24, which should be remanded for a new trial. For the reasons stated in Issue IV, the conviction on count 29 should be reversed with directions to dismiss. The court's order of restitution should be reversed with any of these, and also for and in accordance with the reasons discussed in Issue V.

DATED this 13th day of May, 2015.



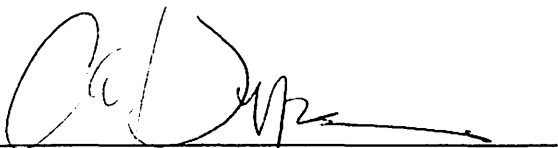
Clifton W. Thompson  
*Attorney for Appellant*

## CERTIFICATE OF SERVICE

This is to certify that on the 13th day of May, 2015, two true and correct copies of the foregoing Brief of Appellant were mailed, first-class postage prepaid, to:

Utah Attorney General's Office  
Attn: Laura Dupaix  
Appellate Division  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

Karra J. Porter  
Attorney for James Diderickson  
Christensen & Jensen  
257 East 200 South, Suite 1100  
Salt Lake City, UT 84111




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Clifton W. Thompson  
*Attorney for Appellant*

## CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 13,717 words, as determined by an automatic word count feature on WordPerfect X6, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



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Clifton W. Thompson  
*Attorney for Appellant*

## **ADDENDUM**

**Exhibit A** Verdict

**Exhibit B** Sentence, Judgment, Commitment

**Exhibit C** Restitution Judgment

**Exhibit D** Statutes Determinative of or of Central Importance to Appeal

**Exhibit E** Operating Agreement of Tivoli Properties, LLC

**Exhibit F** Settlement Agreement and Release

**Exhibit G** Jury Instructions

# EXHIBIT A

FILED DISTRICT COURT  
Third Judicial District

NOV 15 2013

SALT LAKE COUNTY

By: \_\_\_\_\_

*[Signature]*  
Deputy Clerk

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

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THE STATE OF UTAH, :  
Plaintiff, : VERDICT  
VS. :  
ALLAN BRUUN, : Case No. 111903468FS  
Defendant. : Judge Katie Bernards-Goodman

---

WE THE JURORS IN THE ABOVE CASE FIND THE DEFENDANT, Allan BRUUN  
AS FOLLOWS:

Count 1: THEFT, as charged in the information:

X Not Guilty \_\_\_\_\_ Guilty

Count 2: THEFT, as charged in the information:

\_\_\_\_\_ Not Guilty X Guilty

Count 3: THEFT, as charged in the information:

\_\_\_\_\_ Not Guilty X Guilty

Count 4: THEFT, as charged in the information:

\_\_\_\_\_ Not Guilty X Guilty

Count 5: THEFT, as charged in the information:

\_\_\_\_\_ Not Guilty X Guilty

Count 6: THEFT, as charged in the information:

X Not Guilty \_\_\_\_\_ Guilty

Count 7: THEFT, as charged in the information:

☐ Not Guilty ☒ Guilty

Count 8: THEFT, as charged in the information:

☐ Not Guilty ☒ Guilty

Count 9: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 10: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 12: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 13: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 15: THEFT, as charged in the information:

☐ Not Guilty ☒ Guilty

Count 16: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 17: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 18: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 19: THEFT, as charged in the information:

☐ Not Guilty ☒ Guilty

Count 20: THEFT, as charged in the information:

☒ Not Guilty ☐ Guilty

Count 21: THEFT, as charged in the information:

       Not Guilty   X   Guilty

Count 22: THEFT, as charged in the information:

       Not Guilty   X   Guilty

Count 23: THEFT, as charged in the information:

  X   Not Guilty        Guilty

Count 24: THEFT, as charged in the information:

       Not Guilty   X   Guilty

Count 25: THEFT, as charged in the information:

  X   Not Guilty        Guilty

Count 26: THEFT, as charged in the information:

  X   Not Guilty        Guilty

Count 27: THEFT, as charged in the information:

  X   Not Guilty        Guilty

Count 28: THEFT, as charged in the information:

       Not Guilty   X   Guilty

Count 29: PATTERN OF UNLAWFUL ACTIVITY, as charged in the  
information:

       Not Guilty   X   Guilty

DATED this 15 day of November, 2013.

Jess McKnight  
FOREPERSON



## EXHIBIT B

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH ATTORNEY GENERAL, : MINUTES  
Plaintiff, : SENTENCING  
: SENTENCE, JUDGMENT, COMMITMENT  
: NOTICE  
:  
vs. : Case No: 111903468 FS  
ALLAN BRUUN, : Judge: KATIE BERNARDS-GOODMAN  
Defendant. : Date: January 17, 2014

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PRESENT

Clerk: jacquelc  
Prosecutor: TAYLOR, JACOB S  
Defendant  
Defendant's Attorney(s): THOMPSON, CLIFTON W

DEFENDANT INFORMATION

Date of birth: May 13, 1951  
Sheriff Office#: 346264  
Audio  
Tape Number: W43 Tape Count: 9:27

CHARGES

2. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
3. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
4. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
5. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
7. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
8. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
15. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
19. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
21. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
22. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
24. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
28. THEFT - Class A Misdemeanor  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
29. PATTERN OF UNLAW ACTIVITY - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty

HEARING

The defendant is sentenced.

Defense counsels state the Restitution amount is in dispute and disagreement.

Set Restitution Hearing on 02/21/14 at 2:00 pm.

SENTENCE PRISON

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

The prison term is suspended.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison. The prison term is suspended.

Based on the defendant's conviction of THEFT a Class A Misdemeanor, the defendant is sentenced to an indeterminate term of not to exceed one year in the Utah State Prison.

The prison term is suspended.

Based on the defendant's conviction of PATTERN OF UNLAW ACTIVITY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

The prison term is suspended.

#### SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Defendant is ordered to serve 1 year concurrent at the Salt Lake County Jail, taken forthwith.

#### ORDER OF PROBATION

The defendant is placed on probation for 60 month(s). Probation is to be supervised by Adult Probation & Parole.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation and Parole.

If supervised by Adult Probation and Parole: all fines, fees and/or restitution are to be paid directly to Adult Probation and Parole.

Pay monthly supervision fee as determined by probation agency.

Pay restitution in amount(s) as determined by prosecutor or probation agency.

Complete community service hours as directed by probation officer.

Complete 150 hours of community service.

Defendant is not to obtain any employment with fiduciary responsibilities.

Defendant is not to have any contact with the Posey's.

Defendant to serve 1 year in the Salt Lake County Jail, taken forthwith.

Set Restitution Hearing on 02/21/14 at 2:00 pm.

RESTITUTION HEARING is scheduled.


Date: 02/21/2014

Time: 02:00 p.m.

Location: Fourth Floor - W43  
Third District Court  
450 South State  
SLC, UT 84114-1860

Before Judge: KATIE BERNARDS-GOODMAN

Date: 1/17/14

  
KATIE BERNARDS-GOODMAN  
District Court Judge  
STAMP USED AT DIRECTION OF JUDGE

Individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at (801)238-7500 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801)238-7300.

# EXHIBIT C

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH ATTORNEY GENERAL: CASE HISTORY

Plaintiff,

:

:

:

vs.

: Case No: 111903468 FS

:

ALLAN BRUUN

: Judge: KATIE BERNARDS-GOODMAN

:

Defendant.

: Date: Dec. 17, 2014

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DOCUMENTS

Date filed: Feb 21, 2014

Title: Restitution Judgment

melodys

Judge/Commissioner: Judge KATIE BERNARDS-GOODMAN

Signed Date: Feb 21, 2014



3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH ATTORNEY GENERAL, : MINUTES  
Plaintiff, : RESTITUTION HEARING  
: NOTICE  
:  
vs. : Case No: 111903468 FS  
ALLAN BRUUN, : Judge: KATIE BERNARDS-GOODMAN  
Defendant. : Date: February 21, 2014

---

PRESENT

Clerk: melodys  
Prosecutor: TAYLOR, JACOB S  
Defendant  
Defendant's Attorney(s): THOMPSON, CLIFTON W

DEFENDANT INFORMATION

Date of birth: May 13, 1951  
Sheriff Office#: 346264  
Audio  
Tape Number: W43 Tape Count: 1.58

CHARGES

2. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
3. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
4. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
5. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
7. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
8. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
15. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
19. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
21. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
22. THEFT - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
24. THEFT - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
28. THEFT - Class A Misdemeanor  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty  
29. PATTERN OF UNLAW ACTIVITY - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/15/2013 Guilty



HEARING

Mr. Thompson addresses the Court.

2.06

Mr. Taylor addresses the Court.

2.24

Mr. Thompson responds.

2.28

Court orders restitution in the amount of \$189,574.33.  
Restitution is joint and several with James Diderickson 111903467.

Restitution is complete and court ordered restitution. AP&P to monitor payments.

Review hearing is set.

RESTITUTION REVIEW is scheduled.

Date: 03/27/2015

Time: 09:00 a.m.

Location: Fourth Floor - W43  
Third District Court  
450 South State  
SLC, UT 84114-1860

Before Judge: KATIE BERNARDS-GOODMAN

MOTION FOR A NEW TRIAL is scheduled.


Date: 05/02/2014

Time: 02:00 p.m.

Location: Fourth Floor - W43  
Third District Court  
450 South State  
SLC, UT 84114-1860

Before Judge: KATIE BERNARDS-GOODMAN

Date: 2.21.14

  
KATIE BERNARDS-GOODMAN  
By District Court Judge  
STAMP USED AT DIRECTION OF JUDGE

Individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at (801)238-7500 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801)238-7300.

# EXHIBIT D

**Utah Code § 48-2c-803. Management by members.**

In a member-managed company, each member shall be subject to the duties described in Section 48-2c-807 and, unless otherwise provided in this chapter, in the articles of organization, or an operating agreement:

- (1) the affirmative vote, approval, or consent of members holding a majority of profits interests in the company shall be required to decide any matter connected with the business of the company;
- (2) the affirmative vote, approval, or consent of all members shall be required to:
  - (a) amend the articles of organization, except to make ministerial amendments including:
    - (i) amendments made only to reflect actions previously taken with the requisite approval, such as a change in managers; or
    - (ii) to change an address;
  - (b) amend the operating agreement, except to make ministerial amendments, including:
    - (i) amendments made only to reflect actions previously taken with the requisite approval, such as a change in managers; or
    - (ii) to change an address; or
  - (c)
    - (i) authorize a member or any other person to do any act on behalf of the company that contravenes the articles of organization or operating agreement; and
    - (ii) after authorizing an act under Subsection (2)(c)(i) to terminate the authority so granted; and
- (3) the affirmative vote, approval, or consent of members holding 2/3 of the profits interests in the company shall be required to bind the company to any of the following actions:
  - (a)
    - (i) authorizing a member or any other person to do any act on behalf of the company that is not in the ordinary course of the company's business, or business of the kind carried on by the company; and
    - (ii) after authorizing an act under Subsection (3)(a)(i) to terminate the authority so granted;
  - (b) making a current distribution to members;
  - (c) resolving any dispute connected with the usual and regular course of the company's business;
  - (d) making a substantial change in the business purpose of the company;

- (e) a conversion of the company to another entity;
- (f) a merger in which the company is a party to the merger;
- (g) any sale, lease, exchange, or other disposition of all or substantially all of the company's property other than in the usual and regular course of the company's business;
- (h) any mortgage, pledge, dedication to the repayment of indebtedness, whether with or without recourse, or other encumbering of all or substantially all of the company's property other than in the usual and regular course of the company's business; or
- (i) any waiver of a liability of a member under Section 48-2c-603.

**Utah Code §48-2c-804. Management by managers.**

In a manager-managed company, each manager and each member shall be subject to Section 48-2c-807 and:

- (1)
  - (a) the initial managers shall be designated in the articles of organization;  
and
  - (b) after the initial managers, the managers shall be those persons identified in documents filed with the division including:
    - (i) amendments to the articles of organization;
    - (ii) the annual reports required under Section 48-2c-203; and
    - (iii) the statements required or permitted under Section 48-2c-122;
- (2) when there is a change in the management structure from a member-managed company to a manager-managed company, the managers shall be those persons identified in the certificate of amendment to the articles of organization that makes the change;
- (3) each manager who is a natural person must have attained the age of majority under the laws of this state;
- (4) no manager shall have authority to do any act in contravention of the articles of organization or the operating agreement, except as provided in Subsection (6)(g);
- (5) a manager who is also a member shall have all of the rights of a member;
- (6) unless otherwise provided in the articles of organization or operating agreement of the company:
  - (a) except for the initial managers, each manager shall be elected at any time by the members holding at least a majority of the profits interests in the company, and any vacancy occurring in the position of manager shall be filled in the same manner;
  - (b) the number of managers:
    - (i) shall be fixed by the members in the operating agreement; or
    - (ii) shall be the number designated by members holding at least a majority of the profits interests in the company if the operating agreement fails to designate the number of managers;
  - (c) each manager shall serve until the earliest to occur of:
    - (i) the manager's death, withdrawal, or removal;
    - (ii) an event described in Subsection 48-2c-708(1)(f); or

- (iii) if membership in the company is a condition to being a manager, an event described in Subsection 48-2c-708(1)(d) or (e);
- (d) a manager need not be a member of the company or a resident of this state;
- (e) any manager may be removed with or without cause by the members, at any time, by the decision of members owning a majority of the profits interests in the company;
- (f) there shall be only one class of managers; and
- (g) approval by:
  - (i) all of the members and all of the managers shall be required for matters described in Subsection 48-2c-803(2); and
  - (ii) members holding  $\frac{2}{3}$  of the profits interests in the company, and  $\frac{2}{3}$  of the managers shall be required for all matters described in Subsection 48-2c-803(3).

**Utah Code § 76-1-302. Time limitations for prosecution of offenses . . .  
Commencement of prosecution.**

- (1) Except as otherwise provided, a prosecution for: ... (b) a misdemeanor other than negligent homicide shall be commenced within two years after it is committed[.]

**Utah Code § 76-6-404.5. Wrongful appropriation – penalties.**

- (1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.

\* \* \*

- (4) Wrongful appropriation is a lesser included offense of the offense of theft under Section 76-6-404.



**Utah Code § 77-17-10. Court to determine law; the jury, the facts.**

- (1) In a jury trial, questions of law are to be determined by the court, questions of fact by the jury.
- (2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court.

**Utah Code § 77-38a-102(6). Definitions [Crime Victims Restitution Act].**

“Pecuniary damages” means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, but excludes punitive or exemplary damages and pain and suffering.

## Utah Code § 77-38a-302(1) and (2)

- (1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).
- (2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.
  - (a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.
  - (b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.
  - (c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5)....

# EXHIBIT E

Operating Agreement  
for  
Tivoli Properties, LLC  
A Utah Limited Liability Company

THIS OPERATING AGREEMENT is made and entered into as of August 15, 2007 by and among Equity Partners, LLC and Kerry R. and Bobbie M. Posey, ie; Tivoli Properties LLC, a Utah LLC (the "Company") and the persons executing this Operating Agreement as Members of the Company and all of those who shall hereafter be admitted as Members (individually, a "Member" and collectively, the "Members") whose names and signatures shall appear on "MEMBER LISTING; CAPITAL CONTRIBUTIONS," below, hereby agree as follows:

**WITNESSETH:**

1. Whereas, the Members desire to enter into this agreement ("Operating Agreement") or ("Agreement") for the purposes of governing the Company, to and for the sole purpose of investing in, purchasing, selling, granting, or taking an option on lands for investment purposes and/or development. The Company shall not conduct any other business unless related to the business, unless approved by unanimous consent of all Members.

2. Whereas, a limited liability company was formed in accordance with the provisions of the Utah Limited Liability Company Act (the "Act") under the name of Tivoli Properties, LLC (the "Company") pursuant to a Certificate of Formation filed November 11, 2007, with the Utah Division of Corporation. This Operating Agreement of the Company was entered into as of that same date.

3. Whereas, the Members intend to operate the Company, appoint a person or persons to assume responsibility for certain management matters (the "Manager") and provide for the restriction on the transfers of ownership interests in the Company ("Interests").

NOW, THEREFORE, in consideration of the mutual premises below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

**I. DEFINITIONS**

**1.1 Scope.** For purposes of this Agreement, unless the language or context clearly indicates that a different meaning is intended, the following capitalized terms shall have the meanings specified in this Article.

**1.2. Defined Terms.**

1.2.1. "Act" means the Utah Revised Limited Liability Company Act and any successor statute, as amended from time to time.

1.2.2. "Agreement" means this Operating Agreement, including any amendments, supplements, or modifications thereto.

1.2.3. "Articles" means the articles of organization filed with the Utah Department of Commerce, Division of Corporations and Commercial Code, to organize the Company as a limited liability company, including any amendments.

1.2.4 "Available Funds" means the Company's gross cash receipts from operations, less the sum of: (a) payments of principal, interest, charges, and fees pertaining to the Company's indebtedness; (b) expenditures incurred incident to the usual conduct of the Company's business, including without limitation the Manager compensation payments made pursuant to Article 7.9; and (c) amounts reserved to meet the reasonable needs of the Company's business in the future as determined by the Manager in its sole discretion.

1.2.5 "Capital Account" of a Member means the capital account maintained for the Member in accordance with Article II, paragraph 5.

1.2.6 "Code" means the Internal Revenue Code of 1986, as amended.

1.2.7 "Company" means Tivoli Properties, LLC, a Utah Limited Liability Company.

1.2.8. "Loan" means the acquisition and development loan obtained by Equity Partners, LLC from a third party lending institution to finance the acquisition and development of the Property.

1.2.9 "Loss" means, for any given tax year, the Company's loss for such tax year, as determined in accordance with accounting principles appropriate to the Company's method of accounting and consistently applied.

1.2.10. "Manager" means a Person, Persons or Committee, whether or not consisting of a Member, Members or not, who is vested with authority to manage the Company in accordance with Article VII.

1.2.11. "Member" means an initial member of the Company and any Person who is subsequently admitted as an additional or substitute member of the Company pursuant to the terms of this Agreement.

1.2.12 "Membership Interest" or "Interest" means a Member's percentage interest in the Company, consisting of the Member's right to share in Profits, receive distributions, participate in the Company's governance, approve the Company's acts, participate in the designation and removal of a Manager, and receive information pertaining to the Company's affairs. The Membership Interests of the initial Members are set forth in Article 3.3. Changes in Membership Interests after the date of this Agreement, including those necessitated by the admission and dissociation of Members, will be reflected in the Company's records. The allocation of Membership Interests reflected in the Company's records from time to time is presumed to be correct for all purposes of this Agreement and the Act. Except as expressly provided otherwise herein, with respect to the interest of a Transferee, "Interest" or "Membership Interest" means a Transferee's percentage interest in distributions from the Company; provided that nothing in this sentence shall be interpreted to grant to a Transferee the right to vote on or otherwise participate in any matter as a Member hereunder other than the right to receive distributions as set forth in Article 6.1.5.

1.2.13. "Net Investment" means, with respect to each Member and as of any given date of determination, the aggregate amount of cash capital contributions actually paid to and received by the Company from such Member less all amounts of Available Funds distributed to such Member by the Company with respect to such Member's Membership Interest.

1.2.14. "Person" means any individual, association, cooperative, corporation, trust, partnership, joint venture, limited liability company, or other legal entity.

1.2.15. "Profit" means, with respect to any given tax year, the Company's income for such tax year, as determined in accordance with accounting principles appropriate to the Company's method of accounting and consistently applied.

1.2.16. "Purchase Agreement" means that certain Real Estate Purchase Contract, entered into by and among Equity Partners, LLC, as buyer, and Poseys as Seller, pursuant to which Seller has agreed to sell and Equity Partners, LLC has agreed to purchase, the Property, as such contract is amended from time to time.

1.2.17 "Regulations" means proposed, temporary, or final regulations promulgated under the Code by the Department of the Treasury, as amended.

1.2.18 "Seller" means, collectively, Kerry R. Posey, both individually and as a trustee of the Kerry R. Posey Charitable Remainder Unitrust, and Bobbie M. Posey, both individually and as trustee of the Bobbie M. Posey Charitable Remainder Unitrust, in each case in such individual's or trustee's capacity as a seller under the Purchase Agreement.

1.2.19. "Property" means approximately 29 acres of real property located in Utah County, Utah, held by Seller, Assessor Parcel Numbers 58-035-0029 and 58-035-0030, which real property is the subject of the Purchase Agreement.

1.2.20 "Developer" means, Tivoli Properties, LLC, a Utah Limited Liability Company, established to manage, improve, subdivide, develop, lease, and sell the Property and to perform all other activities reasonably related thereto.

1.2.21 "Transfer" means, with respect to an Interest, a sale, pledge, encumbrance, lien, assignment, subordinate, gift or any other disposition, direct or indirect, by Member, whether voluntary, involuntary, or by operation of law; *provided, however*, that the term "Transfer" shall not include a redemption of all or part of a member's Membership Interest by the Company.

1.2.22. "Transferee" means a Person who acquires a Membership Interest by Transfer from a Member or another Transferee and is not admitted as a Member in accordance with the Agreement. Notwithstanding anything herein to the contrary, a Transferee shall not have the rights of a Member set forth in Article 1.2.11, other than the right to receive distributions as set forth herein.

1.2.23. "Sharing Ratio" shall mean the percentage representing the ratio that the number of Units owned by a Member bears to the aggregate number of Units owned by all of the Members. Upon the issuance of additional Units or the transfer, repurchase or cancellation of any outstanding Units, the Sharing Ratios of the Members shall be recalculated as of the date of such issuance,



transfer, repurchase or cancellation. The recalculated Sharing Ratio of each Member shall be the percentage representing the ratio that the number of Units owned by the Member bears to the aggregate number of Units owned by all of the Members after giving effect to the issuance, transfer, repurchase or cancellation.

1.2.24. "Unit" shall mean an equity interest in the Company. The Company shall have two classes of Units: Class A and Class B. The two classes of Units shall be identical in all respects except for their respective Voting Interests. The number of Units owned by each Member shall be determined in connection with the issuance of a membership interest in the Company in exchange for the capital contribution made by such Member. Initially the Units shall not be represented by certificates. If the Management Committee determines that it is in the interest of the Company to issue certificates representing the Units, certificates shall be issued and the Units shall be represented by such certificates. The Company is authorized to issue 1,000,000,000 Class A Units and 200,000,000 Class B Units.

1.2.25 "Voting Interest" (a) With respect to the Class A Units, "Voting Interest" shall mean that number of Class A Units held by a Member, and (b) with respect to the Class B Units, "Voting Interest" shall mean that number of Class B Units held by a Member divided by 10.

## II. ORGANIZATION

**2.1. Formation of the Company.** The Company has been organized as a Utah Limited Liability Company pursuant to the Act. The rights and obligations of the Members shall be as set forth in the Act unless the Articles or this Agreement expressly provide otherwise, in which case the provisions of the Articles or this Agreement shall control.

**2.2. Name of the Company.** The name of the Company shall be: TIVOLI PROPERTIES, L.L.C. and all Company business shall be conducted in that name or such other name the Members may select from time to time and which is in compliance with applicable laws.

**2.3. Registered Agent and Location of Records.** The registered agent and registered office of the Company in the State of Utah shall be the initial registered agent and registered office set forth in the Articles or such other Person or location, as the case may be, as the Manager may designate from time to time. The records of the Company required to be maintained by the Act shall be kept at the designated office identified in the Articles, or at such other designated office as the Manager may designate from time to time, consistent with the Act.

**2.4. Purposes of the Company.** The Company is organized for the purpose of carrying on the business of acquiring, managing, improving, subdividing, developing, leasing and selling the Property or any other enterprise that members may mutually agree upon.

**2.5. Fiscal year, accounting.** The Company's fiscal year shall be the calendar year. the particular accounting methods and principals to be followed by the Company shall be selected by the accountant for the Company ("Accountant") who is hereby designated as Dallas Cooke, CPA as the independent CPA firm, The CPA Accountant may be changed by written Notice of the then serving Manager, consented to in writing by at least Two (2) Members.



**2.6. Reports.** The Managers shall provide reports concerning the financial condition and results of operation of the Company and the Capital Accounts of the Members to the Members in the time, manner, and form as the Manager determines. Such reports shall be provided at least annually as soon as practicable after the end of each calendar year and shall include a statement of each Member's share of profits and other items of income, gain, loss, deduction and credit.

**2.7. Term of Existence.** The company shall begin on 15th day of August, 2007, and shall continue until dissolved by mutual consent or by a 30 day notice in writing on the part of the person or persons desiring to withdraw to the other member or members of the company, and the member or members desiring to withdraw shall first offer all his right, title and interest in the company and assets thereof to the other member or members at a valuation to be determined by three disinterested persons, one of whom shall be named by the member or members desiring to withdraw, one by the remaining member or members and the third by the two so chosen.

### III. CAPITAL CONTRIBUTIONS

**3.1 Initial Capital Contributions.** The Members shall make the following initial capital contributions to the Company, in cash, services, or property, in the following amounts:

**3.1.1. Contributions from Equity Partners.** Equity Partners shall contribute and assign to the Company all of Equity Partners' right, title, and interest as buyer in, to, and under the Purchase Agreement and the Company shall assume and shall perform all of Equity Partners obligations as buyer thereunder. Furthermore, Equity Partners will arrange for, sign and guarantee an interim loan in the amount of Seven Hundred-Fifty Thousand Dollars (\$750,000.00) which will be used as operating capital for the Company. Additionally, all amounts paid by Equity Partners pursuant to the entitlement process, Purchase Agreement or otherwise related to the acquisition and development of the Property, whether paid prior to or after the execution of this Agreement, shall be deemed to be capital contributions made to the Company by Equity Partners. As of the date of this Agreement, the aggregate amount of such deemed capital contribution made by Equity Partners to the Company \$800,000.00. Once the Loan is obtained, Equity Partners shall set aside and pay \$10,000.00 per month to the Sellers from the operating capital of the Company. As a result of such contribution, Equity Partners has been credited with a capital account equal to \$800,000.00, and has received 800,000 Class A Units.

**3.1.2 Contribution from Kerry R. Posey.** Kerry R. Posey shall contribute the carrying costs of his subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Kerry R. Posey. As a result of such contribution, Kerry R. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units.

**3.1.3 Contribution from Bobbie M. Posey.** Bobbie M. Posey shall contribute the carrying costs of her subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Bobbie M. Posey. As a result of such contribution, Bobbie M. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units

**3.2 Initial Commitments and Contributions.** By the execution of this Operating Agreement, the initial Members hereby agree to make the capital contributions set forth herein. The interests of the

respective Members in the total capital of the Company (their respective "Sharing Ratios", as adjusted from time to time to reflect changes in the Capital Accounts of the Members and the total capital in the Company). Any additional Member (other than an assignee of a Membership Interest who has been admitted as a Member) on any capital contribution except as provided in this Operating Agreement.

**3.3 Allocation of Membership Interest.** As a result of the transactions described above, the Members own the number and classes of Units and have capital account balances attributable to the Units as set forth below:

Member	Class "A" Units	Class "B" Units	Capital Account Balance
Equity Partners	750,000	-0-	\$750,000
Kerry R. Posey	100,000	25,000	\$125,000
Bobbie M. Posey	100,000	25,000	\$125,000

Based on the above, the initial Sharing Ratio of Equity Partners is 75%, and the initial Sharing Ratio of Kerry R. and Bobbie M. Posey is 12.5% each.

**3.4 Subsequent Capital Contributions** No Member shall be obligated to make any capital contributions to the Company other than those set forth herein, except as the Company and such Member may agree in writing.

**3.5 Failure to Contribute.** If any member fails to make a capital contribution when required, the Company may, in addition to the other rights and remedies the Company may have under the Act or applicable law, take such enforcement action (including, the commencement and prosecution of court proceedings) against such Member as the Managers consider appropriate. Moreover, the remaining Members may elect to contribute the amount of such required capital themselves according to their respective Sharing Ratios. In such an event, the remaining Members shall be entitled to treat such amounts as an extension of credit to such defaulting Member, payable upon demand, with interest accruing thereon at the federal midterm rate provided for under Code Sec.1274(d), plus Two Percent (2%) until paid, all of which shall be secured by such defaulting Member's interest in the Company, each Member who may hereafter default, hereby granting to each Member who may hereafter grant such an extension of credit, a security interest in such defaulting Member's interest in the Company.

**3.6 Return of Capital Contributions.** Except as expressly provided herein, each Member agrees not to withdraw as a Member of the Company and no Member shall be entitled to the return of an part of his or her capital contributions or to be paid interest in respect to either his or her Capital Account or his or her capital contributions.

**3.7 Capital Accounts of the Members.** Separate Capital Accounts for each Member shall be maintained by the Company. Each Member's Capital Account shall reflect the Member's capital contributions and increases for the Member's share of any net income or gain of the Company. Each Member's Capital Account shall also reflect decreases for distributions made to the Member and the Member's share of any losses and deductions of the Company.

- 3.7.1. Each Member's Capital Account may be increased by:
- (i) The amount of money contributed by the Member to the Company.
  - (ii) The fair market value of property contributed by the Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Code Sec... If any property, other than cash, is contributed to or distributed by the Company, the adjustments to Capital accounts required by Treasury Regulation Sec... shall be made.
  - (iii) The Member's share of the increase in the tax basis of Company property, if any, arising out of the recapture of any tax credit.

## V. MEMBERS

**5.1 Initial Members.** The initial Members of the Company are the Persons executing this Agreement as Members as of the date first set forth above, each of which is admitted to the Company as a Member effective contemporaneously with the execution of this Agreement by such person.

**5.2 Member Compensation.** The members shall be paid such salaries as may be agreed upon which will be charged as an expense of the business.

5.2.1 The salaries so paid, as provided hereof, shall not be considered as part of the profits to which said parties shall be entitled.

### **5.3 Rights and duties of the Members.**

**5.3.1 Allocation.** Each of the members shall be entitled to the net profits of the business, as well as the losses happening in the course of the business which shall be borne by each member. Such shall be borne in the same proportions as their respective company ownership, unless the same shall happen through the wilful neglect or default and not the mistake or error) of either of the members. In which case the loss so incurred shall be made good by the member through whose neglect or default such losses shall arise.

**5.3.2. Distributions.** The Managers may make distributions to the Members from time to time. Distributions may be made only after the Managers determine in their reasonable judgement, that the Company has sufficient cash on hand which exceeds the current and the anticipated needs of the Company to fulfill its business purposes (including needs for operating expenses, debt service, acquisitions, reserves, and mandatory distributions, if any). All distributions shall be made to the Members in accordance with their Sharing Ratios. Distributions shall be in cash or property or particularly in both, as determined by the Managers. No distribution shall be declared or made if, after giving it effect, the Company would not be able to pay its debts as they become due in the usual course of business or the Company's total assets would be less than the sum of its total liabilities plus, the amount that would be needed if the Company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other Members upon dissolution that are superior to the rights of the Members receiving the distribution.

5.3.3. Family Partnership Savings Provision. Notwithstanding anything in this Operating Agreement to the contrary, should any provision of this Operating Agreement, or any act of the parties, result in violation of the family partnership provisions of Code Sec. 704(e) or the regulations and cases thereunder, the Managers may amend this Agreement, or take any other actions reasonably necessary to prevent such violation, or to correct such violation.

5.3.4. Other business In view of the fact that all the Members are engaged in other business ventures, no member shall be bound to devote all of his time to the affairs of the company but he shall devote at least a part of his working time to the affairs of the company business and when the demands of the business shall warrant, he agrees to give his entire working time to the business.

5.3.5 Conduct of the Company Any questions regarding the conduct of the Company business shall be determined by a vote of 100% of the Managing Members of the Company.

5.3.6 Business Continuation. The expulsion of any Member shall not dissolve the Company as to other Members, and the remaining Members shall have right to continue the Company business by themselves or in conjunction with any other person or persons they might select.

5.3.7 Withdrawal The Members shall have the right to retire or withdraw from the Company, and this Agreement may be terminated as to one or more Members and new members may be admitted under the provisions hereinafter set forth, but neither such retirement, withdrawal, termination, death of any Member, or admission of any new Member shall dissolve this Company.

5.3.8 Selling of Members Interest Should one or more of the members desire to sell his or their interest in the company or to withdraw from the company he or they shall do so upon the following terms:

- (i) He or they shall give to the remaining member or members 30 days' written notice of such intention and shall, if the other member or members indicates willingness to buy within such 30 days, sell to the remaining member or members his or their interest in the company for an amount equal to the value of the interest or interests according to standard accounting procedure. In the valuation of the interest, market value, not book value, is to be considered; nor is goodwill to be considered as an asset.
- (ii) The selling member or members shall accept payment for his or their interest in cash to be paid within 45 days from the giving of a notice of acceptance by the remaining member or members.
- (iii) The option to purchase may be exercised by the remaining members, if more than one, in equal proportion, or, if one of them fails to exercise his option and the others do not fail to do so, the latter shall have the right to purchase the whole

of the selling member's or members' interest. The selling member or members shall not be required to sell unless their entire interest is purchased.

(iv) Should there be any disagreement by the members as to the value of the interest of the selling member or members, the selling member or members shall appoint an arbitrator and the buying member or members shall appoint another and if these two arbitrators are unable to agree, the two shall appoint a third arbitrator, and the value of selling member's or members' interest fixed by said arbitrators or any two of them shall determine the purchase price. All parties agree to be bound by such decision of the arbitrators.

#### 5.4. Manner of Acting Among Members

5.4.1. No Member shall, without consent in writing of the other Members, do any of the following:

- (i). Assign his share or interest in the Company.
- (ii) Except by will, no Member shall sell, pledge or in any way encumber his or her interest in the Company without written consent of all other Members.
- (iii) Without the consent of all the other Members or Member, draw, accept, or sign any bill of exchange or promissory note, or contract any debt on account of the Company, or employ any of the money or effects thereof, or in any manner pledge the credit thereof, except in the usual and regular course of business. Any infraction of this provision shall be a ground for an immediate dissolution of the Company as regards that Member so offending, and the other Members may forthwith declare the same dissolved by a written notice to the offending Member, or left for him at the office of the Company.
- (iv) Without the consent of all the other Members or Member, compound, release, or discharge any debt which shall be due or owing to the Company, without receiving the full amount thereof. Any infraction of this provision shall be a ground for an immediate dissolution of the Company as regards that Member so offending, and the other Members may forthwith declare the same dissolved by a written notice to the offending Member, or left for him at the office of the Company.
- (v) Lend any money, or give credit to, or have dealings on behalf of the Company, with any person, company, or corporation whom the other Members or Member shall have forbidden him to trust or deal with; and if he shall act contrary to this provision he shall repay to the Company any loss which may have been incurred thereby.
- (vi) Hire or dismiss, except in case of gross misconduct, any clerk or other person in the employment of the Company, without the consent of all the other Members.
- (vii) Give their signature separately or collectively on behalf of the company or any Member thereof, except for legitimate business purposes and with the consent of 100% of the other Members of the Company.

(viii) Without the previous consent in writing of all the other Members, enter into any bond, or become bail, surety, or security, for any person.

(ix) Buy, order, or contract for any article exceeding the value of \$500.00 dollars, without the previous consent in writing of all the other Members; and in case he or she does so, the other Members shall have the option to take the goods or articles so bought, ordered, or contracted for, on behalf of the Company, or to leave the same for the separate use of the Member so buying, ordering, or contracting, to be paid for out of his or her own money.

(x) Have the right to embark in any speculative transactions involving the Company without the consent of all the other Members.

(xi) Divulge to any person not a Member of the Company any trade secret connected with the Company business that shall come to his or her knowledge by reason of his or her being a Member, during the continuance of this Company and for five (5) years after its termination.

(xii) With the approval of all the other Members and consent of the all Members, any Member shall be entitled to purchase any goods carried by the Company at actual invoice price, plus the freight.

5.4.2 Meetings. An annual meeting of Members for the transaction of such business as may properly come before the Meeting, shall be held at such place, on such date and at such time as the Managers shall determine. Special meetings of Members for any proper purpose or purposes may be called at any time by the Managers or the holders of at least Ten Percent(10%) of the Sharing Ratios of all Members. The Company shall deliver or mail written Notice stating the date, time, place, and purposes of any meeting to each Member entitled to vote at the meeting. Such Notice shall be given not less than Ten(10) and no more than Sixty(60) days before the date of the meeting. All meetings of Members shall be presided over by a Chairperson who shall be a Manager. A Member may participate and vote at such meeting via phone conference call.

5.4.3. Consent. Any action required or permitted to be taken at an annual or special meeting of the Members may be taken without a meeting, without prior Notice, and without a vote, if consents in writing, setting forth the action so taken, are signed by the Members having not less than the minimum number of votes that would be necessary to authorize or take action were present and voted. Every written consent shall bear the date and signature of each Member who signs the consent. Prompt Notice of the taking of action without a meeting by less than unanimous written consent shall be given to all Members who have not consented in writing to such action.

5.4.4 Voting Rights. Each member shall have a number of votes equal to such Member's Membership Interest in the Company.

5.4.4.1 Required Vote. Except with respect to matters for which a greater minimum vote is required by the Act or this Agreement, the vote of Members



whose aggregate Membership Interest exceeds 50% of the aggregate Membership Interest of all Members present binds the Company.

## VI. TERMINATION OR DISSOLUTION

**6.1 Accounting.** Upon the dissolution of the Company a full and general account of the assets, liabilities, and transactions of the Company shall be taken, and the assets and property thereof shall, as soon as practicable, be sold, the debts due the Company collected, the proceeds applied, first, in discharge of the liabilities of the company and the expenses of liquidating the same; and next in payment to each Member or his or her representatives of any unpaid interest or profits belonging to him or her, and of his or her share of the capital; and the surplus, if any, shall be divided between the Members or their representatives in equal shares; and the Members or their representatives shall execute all such instruments for facilitating the collection and division of the Company, and for their mutual indemnity and release, as may be requisite or proper.

**6.2 Distribution.** The Members agree that the determination of the amount to be paid to either Member shall be determined by the auditor or certified public accountant then employed by the company, and such computation shall be final and conclusive upon them.

**6.3. Goodwill** On the termination or dissolution of the Company or the death or retirement therefrom of a Member, neither the goodwill of the Company nor the right to the use of the firm name shall be considered as an asset of the Company, nor shall any value be placed thereon for the purpose of accounting or distribution.

**6.4 Death of Member** Upon the death of any Member, the Company shall immediately cease as to him or her, but shall continue as to the survivors in accordance with the terms and conditions hereinafter set forth.

(i). Upon the death of any Member, the surviving Members shall have the right to purchase the interest of the deceased Member at the appraised value reached by appraisers selected as herein stated.

(ii) If the surviving Members do not desire to purchase the interest of the deceased Member, they shall have the right to continue to operate the Company business so long as it shows a profit; and accurate records shall be kept and frequent audits made to ascertain whether a profit is being made for a term of one year. In this event the profits of the deceased Member shall be paid to his or her legal representative or representatives in semiannual installments.

(iii) After the term of one year without the surviving Members purchase of the interest of the deceased Member, an account and statement shall be taken and made out of his or her share of the capital and effects of the Company, and of all unpaid interest and profits belonging to him or her up to the time of his decease plus the year extension, for which purpose a valuation shall be made of any assets or effects requiring valuation, and the amount so ascertained to be due and owing to the deceased Member shall be paid by the surviving Members to his or her representatives within three (3) calendar months from the date of the one year extension from his or her decease, with interest thereon until payment

at the rate of 10 percent per annum (10%); and on such payment the share of the deceased Member in the Company property and effects shall go and belong to the surviving Members in the proportions in which they shall have contributed to the purchase thereof.

(iv) In case of the death of a Member and of the purchase of his or her interest by the remaining Members as herein provided, the right to use the name of the Company and to carry on the business under such name shall, so far as the deceased Member is concerned, be the property of the remaining Members.

(v) In the event the remaining Members do not perform under the terms set forth above in respect to the purchase of the deceased portion of the Company, the Company's business shall be wound up and liquidated in 30 days from the fore-named time limit and divided as herein provided.

**6.5 Bankruptcy or insolvency of a Member.** If any member shall be adjudicated bankrupt, or insolvent, or take proceedings for liquidation by arrangement or composition with it, his or her creditors, the Company shall thereupon terminate as to it, him, or her and it, he, she, or its, his or her executors, administrators or assigns, as the case may be, shall have no interest in common with the surviving or other Members or Member in the property of the Company, but shall be considered in equity as a vendor to the surviving Members or Member for the share in the company of the bankrupt or liquidating or compounding Member as and from the date of its, his or her bankruptcy, or insolvency, or of its, his or her having compounded as aforesaid, for the price and on the terms to be arrived at under the provisions hereinbefore contained.

**6.5.1** This Agreement is expressly not intended for the benefit of any creditor of the Company, the Manager, the Members, or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under this Agreement. No third person shall under any circumstances have any right to compel any actions or payments by the Company, any Manager, or any Member.

## **VII. BUSINESS OF THE COMPANY**

**7.1 Business of the Company.** (a) Equity Partners, LLC ("EP") shall have full, exclusive and complete authority and discretion in the management and control of the business of the Company for the purposes herein stated and shall make all decisions affecting the business of the Company. At such, any action taken shall constitute the act of, and serve to bind, the Company. EP shall manage and control the affairs of the Company to the best of its ability and shall use its best efforts to carry out the business of the Company and will be compensated for providing various services.

(b) The expenses so paid, as provided hereof, shall not be considered as part of the profits to which any of the parties shall be entitled.

(c) All the members of the company shall fix the wages or salaries to be paid to any of the members of the company, and shall be binding upon all.

(d) The Company has retained Four Winds Development Group, LLC ("Four Winds") as their representative to obtain all necessary governmental permits, approvals and entitlements which are required to allow the improvement, development, construction and



sale of the real estate property. Such expenses are considered expenses of the Company and shall be paid by Four Winds and shall be reimbursed by the Company.

(e) The Company shall indemnify, save harmless, and pay all expenses, costs, or liabilities of any Member who for the benefit of the Company makes any deposit, acquires any option, or makes any other similar payment or assumes any obligation in connection with any property proposed to be acquired by the Company, which action shall have been consented to by the Company, and who suffers any financial loss as the result of such action.

**7.2 Change of Managers** The Members from time to time may change the number of Managers upon the affirmative vote or written consent of Members holding an aggregate of not less than 100% of the outstanding Membership Interest.

**7.3 Election of Managers** Managers shall be elected at a meeting of the Members in the case of a Manager vacancy. If more than one Manager is to be elected, all management positions shall be filled in the same election, i.e.; the candidate with the highest vote total will fill the first available position, the candidate with the next highest vote total will fill the next available position, and so forth. In voting for Managers, each Member shall have the number of votes equal to his, her or its Membership Interest. Members may cast all of their votes for one candidate, or divide their votes among multiple candidates.

**7.4. General Powers of Managers** Except as may otherwise be provided in this Operating Agreement, the ordinary and usual decisions concerning the business and affairs of the Company, shall be made by the Managers. The managers have the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company, including, the power to:

7.4.1 Purchase, lease, or otherwise acquire any real or personal property;  
Sell, convey, mortgage, grant a security interest in, pledge, lease, exchange, or otherwise dispose or encumber any real or personal property;

7.4.2 Open one or more depository accounts and make deposits into, and write checks and withdrawals against such accounts;

7.4.3 Borrow money, incur liabilities, and other obligations;

7.4.4 Enter into any and all agreements and execute any and all contracts, documents, and instruments relating to the Business;

7.4.5 Engage consultants and agents, define their respective duties and establish their compensation or remuneration;

7.4.6 Obtain insurance covering the Business and affairs of the Company's name;

7.4.7 Participate with others in partnerships, joint ventures, and other associations and strategic alliances only where same are directly in pursuit of the Business, as defined above.

7.4.7.1 There is an express limitation on the nature of the Business and the powers granted the Managers herein, the Company is intended to purchase and develop, hold and sale real estate for investment purposes only, and no activities inconsistent with such limited purposes shall be undertaken.

**7.5. Limitations.** Notwithstanding the foregoing and any other provision contained in this Operating Agreement to the contrary, no act shall be taken, sum expended, decision made, obligation incurred or power exercised by any Manager on behalf of the Company except by the consent of One Hundred percent (100%) of all Membership Interests with respect to:

7.5.1 Any significant and material purchase, receipt, lease, exchange, or other acquisition of any real or personal property or business;

7.5.2 The sale of all or substantially all of the assets and property of the Company;

7.5.3 Any mortgage, grant of security interest, pledge, or encumbrance upon all or substantially all of the assets and property of the Company;

7.5.4 Any merger;

7.5.5 Any amendment or restatement of the Articles or of this Operating Agreement;

7.5.6 Any matter which could result in a change in the amount or character of the Company's capital;

7.5.7 Any change in the character of the business and affairs of the Company;

7.5.8 The commission of any act which would make it impossible for the Company to carry on its ordinary business and affairs;

7.5.9 Any act that would contravene any provision of the Articles or of this Operating agreement or the Act.

**7.6. Standard of Care.** Every Manager shall discharge his or her duties as a Manager in good faith, with care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the Company. A manager shall not be liable for any monetary damages to the Company for any breach of such duties except for a receipt of a financial benefit to which the Manager is not entitled; voting for or assenting to a distribution to Members in violation of this Operating Agreement.

**7.7 Tenure of Managers.** Each Manager shall serve for an indefinite period, except that: (a) a Manager may resign at any time by giving written notice to the Members at least 30 days prior to the effective date of the resignation; (b) a Manager who is a natural person shall cease to be a Manager upon his or her death or at such time as he or she is adjudicated incompetent; (c) a Manager who is a legal entity other than a natural person shall cease to be a Manager upon its dissolution or upon a change in the controlling ownership of such Person; (d) a Manager shall cease to be a Manager at such time as he or she files , or fails to successfully contest, a petition seeking liquidation, reorganization, arrangement,

readjustment, protection, relief, or composition in any state or federal bankruptcy, insolvency, reorganization, or receivership proceeding; and (e) if a court of competent jurisdiction removes a Manager for cause, such Manager shall cease to be a Manager upon the date of such order.

**7.8. Managers Need Not be Members.** A Manager need not also be a Member.

**7.9. Informal Action.** Any action required or permitted to be taken by the Manager may be taken without a meeting if the action is evidenced by a written record describing the action taken, signed by the Manager.

## VIII. EXCULPATION OF LIABILITY: INDEMNIFICATION

**8.1. Exculpation of Liability.** Unless otherwise provide by law or expressly assumed, a person who is a Member or Manager, or both, shall not be liable for the acts, debts or liabilities of the Company.

**8.2. Indemnification.** Except as otherwise provided in this Article, the Company shall indemnify any Manager and may indemnify any employee or agent of the Company who was or is a party or is threatened to be made a party to a threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal, other than an action by or in the right of the Company, by reason of the fact that such person is or was a Manager, employee or agent of the Company against expenses, including attorney's fees, judgements, penalties, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with the action, suit or proceeding, if the person acted in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner that such person reasonably believed to be in the best interests of the Company and with respect to a criminal action or proceeding, if such person had no reasonable cause to believe such person's conduct was unlawful.

8.2.1. To the extent that a Member, employee, or agent of the Company has been successful on the merits or otherwise in defense of an action, suit, or proceeding or in the defense of any claim, issue, or other matter in the action, suit, or proceeding, such person shall be indemnified against actual and reasonable expenses, including attorney's fees, incurred by such person in connection with the action, suit, or proceeding and any action, suit or proceeding brought to enforce the mandatory indemnification provided herein. Any indemnification permitted under this Article, unless ordered by a court, shall be made by the Company only as authorized in the specific case upon a determination that the indemnification is proper under the circumstances because the person to be indemnified has met the applicable standard of conduct and upon an evaluation shall be made by a majority vote of the Members who are not parties or threatened to be made parties to the action, suit, or proceeding. Notwithstanding the foregoing to the contrary, no indemnification shall be provided to any Manager, employee, agent of the Company for or in connection with the receipt of a financial benefit to which such person is not entitled, voting for or assenting to a distribution to Members in violation of this Operating Agreement or the Act, or a knowing violation of law.

**8.3 Insurance.** The Company shall maintain for the protection of the Company and all of its

Members such insurance as the Management Committee, in its sole discretion, deems necessary for the operations being conducted.

## IX. AGREEMENTS WITH THIRD PARTIES AND WITH AFFILIATES OF THE COMPANY

**9.1. Validity of Transactions.** Affiliates of the parties to this Agreement may be engaged to perform services for the Company. The validity of any transaction, agreement or payment involving the Company and any Affiliates of the parties to this Agreement otherwise permitted by the terms of this Agreement shall not be affected by reason of the relationship between them and such Affiliates or the approval of said transactions, agreement or payment.

**9.2. Other Activities** Any Member and the Managers may engage in other business ventures of every nature, including, without limitation by specification, the ownership of another business similar to that operated by the Company. Neither the Company nor any of the other Members shall have any right or interest in any such independent venture or to the income and profits derived therefrom.

## X. BOOKS, RECORDS, REPORTS, AND BANK ACCOUNTS.

10.1 There shall be kept at all times, during the continuance of the company, full and correct books of account wherein each of the members shall enter all moneys by them or either of them received, paid, laid out, or expended in and about the business, as well as all goods, wares, commodities, and merchandise by them or either of them bought or sold, by reason or on account of the business and the management thereof in any wise belonging. The books shall be used in common among the members, so that any of them may have access thereto without an interruption or hindrance of the others.

10.1.1 The company shall operate on the basis of a calendar year. On the last day of each year, a general account shall be taken of the assets and liabilities of the company and of all dealings and transactions of the same during the then preceding calendar year or portion thereof.

10.1.2 The bankers of the firm shall be Zion's 1<sup>st</sup> National Bank or such other bankers as shall from time to time be agreed upon by the members, and all money and credits not required for current expenses shall be deposited with the bank, and all checks, drafts, bills of exchange, promissory notes or the like drawn thereon shall be signed one member and countersigned by another, and shall be of no effect unless so signed and countersigned. All indorsement of commercial paper by the company shall be by the company stamp or name affixed by any member, and the same shall be signed by two members; and shall be of no effect unless so made. If any member shall give such obligation, except in the case aforesaid, the same shall be deemed to be given on his separate account and shall be payable out of his separate estate, and he shall indemnify the other member or members against the payment thereof.

10.2 Schedule K-1. On or before the 90<sup>th</sup> day following the end of each fiscal year of the Company's existence, the Company shall cause each Member to be furnished with a federal (and where applicable state) income tax reporting Schedule K-1 or its equivalent.

**10.3 "Tax Matters Partner."** The Members shall designate a Member to the "Tax Matters Partner" of the Company pursuant to Section 6231 (a)(7) of the Code. The Member so designated is authorized to take such actions as are permitted by Sections 6221 through 6233 of the Code. The initial Tax Matters Partner shall be James Didericksen, in his capacity as a Member of Equity Partners. The Tax Matters Partner may be removed by the Members at any time with or without cause. The Tax Matters Partner will inform the Members of all administrative and judicial proceedings pertaining to the determination of the Company's tax items and will provide the Members with copies of all notices received from the Internal Revenue Service regarding the commencement of a Company-level audit or a proposed adjustment of any of the Company's tax items. The Company will reimburse the Tax Matters Partner for reasonable expenses properly incurred while acting within the scope of the Tax Matters Partner's authority, including, but not limited to, legal and accounting fees, claims, liabilities, losses, and damages. The payment of such expenses shall be made as an expense of the Company and before any distributions are made to Members. The provisions related to limitation of liability and indemnification of the Managers set forth in this Agreement shall be fully applicable to the Member acting as the Tax Matters Partner for the Company.

## XI. DISSOLUTION AND WINDING UP

**11.1. Dissolution.** The Company shall dissolve and its affairs shall be wound up on the first to occur of the following events:

- (i) At any time specified in the Articles or this Operating Agreement;
- (ii) Upon the happening of any event specified in the Articles or this Operating Agreement;
- (iii) By the unanimous consent of all Members;
- (iv) Upon the death, withdrawal, expulsion, bankruptcy, or dissolution of a Member or the occurrence of any other event that terminates the continued memberships of a Member in the Company unless within Ninety (90) days after the disassociation of membership, a majority in interest of the remaining Members consent to continue the business of the Company and to the admission of one or more Members as necessary.

**11.2. Winding Up.** Upon dissolution, the Company shall cease carrying on its business and affairs and shall commence the winding up of the Company's business and affairs and complete the winding up as soon as practical. Upon the winding up of the Company, the assets of the Company shall be distributed first to creditors to the extent permitted by law, in satisfaction of Company debts, liabilities, obligations and then to Members and former Members first, in satisfaction of liabilities for distributions and then, in accordance with their Sharing Ratios. Such proceeds shall be paid to such Members within One Hundred Twenty(120) days after the date of winding up.

## XII. GENERAL PROVISIONS

**12.1 Formation of Company** The Company was formed as a new venture for the purpose of acquiring real property for development. There can be no assurance that the real property acquired by the Company will be able to be developed and sold at a profit. Furthermore, there can be no assurance that the application of the capital contributions required hereunder and the proceeds of the Loan (if obtained



by Equity Partners) will be sufficient to cover the acquisition, development, and carry costs of the real property acquired and held by the Company.

**12.2. Disposition of Membership Interests** Every sale, assignment, transfer, exchange, mortgage, pledge, grant, hypothecation or other disposition of any Membership Interest shall be made only upon compliance with this Article. No Membership Interest shall be disposed of if the disposition would cause a termination of the Company under Sec 708 of the Internal Revenue Code of 1986, as amended; without compliance with any and all state and federal securities laws and regulations; and unless the assignee of the Membership Interests provides the Company with the information and agreements that the Managers may require in connection with such disposition, including but not limited to an executed counterpart of this Agreement.

12.2.1 No Member shall be entitled to assign, convey, sell, encumber, or in any way alienate all or any part of its Membership Interest in the Company and as a Member except with the prior written consent of a majority in the interest of the non-transferring Members, which consent may be given or withheld, conditioned, or delayed (as allowed by this Agreement or the Act), as the non-transferring Members may determine in their sole discretion. Transfers in violation of this provision shall only be effective to the extent of an assignment of such interest with only rights set forth in the following provision "Permitted Dispositions".

**12.3 Permitted Dispositions.** Subject to the provisions of this Article, a Member may assign such Member's Membership Interest in the Company in whole or part. The assignment of a Membership Interest does not in itself entitle the assignee to participate in the management and affairs of the Company or to become a Member. Such assignee is only entitled to receive, to the extent assigned, the distributions the assigning Member would otherwise be entitled to, and such assignee shall only become a assignee of a Membership Interest and not a substitute Member.

**12.4 Acknowledgment of Access to Records.** Each Member acknowledges that such Member has been furnished and has reviewed the Articles of Organization and Operating Agreement of the Company and all amendments, if any, to those documents. Each Member further acknowledges that all instruments, documents, records, books, and financial information pertaining to this investment have been made available for inspection by such Member and its professional advisors and that the books and records of the Company will be available upon reasonable notice for inspection by such Member during reasonable business hours at the Company's principal place of business.

**12.5 Required Amendments.** The Members and Managers will execute and file any amendments to the Articles required by the Act. If any such amendments results in inconsistencies between the Articles and this Agreement, this Agreement will be considered to have been amended in the manner necessary to eliminate the inconsistencies.

**12.6 Policies.** In every instance where agreement between the members does not exist with reference to the policies to be followed by the company, the managing members shall have the right to decide what policy or policies shall be followed and the other member or members shall consider the decision as final.

**12.7 Additional Instruments.** Each Member will execute and deliver any document or statement necessary to give effect to the terms of this Agreement or to comply with any law, rule, or regulation governing the Company's formation and activities.

**12.8 Power of Attorney.** Each Member appoints each Member, with full power of substitution, as the Member's attorney-in-fact, to act in the Member's name and to execute and file (a) all certificates, applications, reports, and other instruments necessary to qualify or maintain the Company as a limited liability company in the states and foreign countries where the Company conducts its activities, (b) all instruments that effect or confirm changes or modifications of the Company or its status, including, without limitation, amendments to the Articles, and (c) all instruments of transfer necessary to effect the Company's dissolution and termination. The power of attorney granted by this article is irrevocable, coupled with an interest, will survive any incapacity of the Member, and shall be binding upon the Member's successors and assigns.

**12.9 Disputes.** In the event that any dispute should arise concerning any of the terms, covenants or conditions of this agreement, or with respect the enforcement thereof, or with respect to any dissolution or liquidation of the Company, or with respect to any matter affecting the operation and conduct of the business of the Company, such dispute shall be disposed by arbitration by submitting the same to two indifferent, competent persons in or well acquainted with the trade or business of the company, one to be chosen by either party, or by an umpire to be chosen by the referees in the usual course in such or similar cases; and their or his decision shall, in all respects, be final and conclusive on both parties, and shall be given, in writing, within 10 days next after such submission, or within such further time, not exceeding 30 days, as they or he shall require.

**12.10 Entire Agreement.** This Agreement embodies the entire understanding and agreement among the parties concerning the Company and supersedes any and all prior negotiations, understandings or agreements in regard thereto.

**12.11. Amendment.** This Agreement may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by Members having a Sharing Ratio of more than 50% in the aggregate.

**12.12 Pronouns.** References to a Member, including by use of a pronoun, shall be deemed to include masculine, feminine, singular, plural, individuals, partnerships, corporations or other legal entities where applicable.

**12.13 Severability.** If any provision of this Agreement or the application of such provision to any Person or circumstance shall be held invalid, the remainder of the Agreement, or the application of such provision to Persons or circumstances other than those as to which it is held invalid, shall not be affected.

**12.14 Applicable Law.** The laws of the State of Utah shall govern this Agreement, excluding any conflict of laws rules.

**12.15 Counterparts.** This instrument may be executed in any number of counterparts each of which shall be considered an original.

**12.14. Applicable Law.** The laws of the State of Utah shall govern this Agreement, excluding any conflict of laws rules.

**12.15. Counterparts.** This instrument may be executed in any number of counterparts each of which shall be considered an original.

**12.16. Parties and Successors Bound.** This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto and constitutes the entire agreement of the parties hereto, and may not be amended by the parties except in writing signed by the majority of the parties.

**12.17. Article Headings.** The Article headings and numbers contained in this Operating Agreement have been inserted only as a matter of convenience and for reference, and in no way shall be construed to define, limit, or describe the scope or intent of any provision of this Operating Agreement.

**12.18. Amendment.** This Operating Agreement may be amended or revoked at any time by a written agreement executed by all of the parties to this Operating Agreement, except where a lesser percentage of Membership Interests is permitted elsewhere in this Operating Agreement. No change or modification to this Operating Agreement shall be valid unless in writing and signed by all of the parties to this Operating Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the date and year first above written.

EQUITY PARTNERS, LLC

By: [Signature] 8-16-07  
Its: Managing Member

[Signature] 8-10-07  
KERRY R. POSEY

[Signature]  
BOBBIE M. POSEY



FIRST AMENDMENT TO OPERATING AGREEMENT FOR TIVOLI PROPERTIES ,  
LLC

A UTAH LIMITED LIABILITY COMPANY

This First Amendment to Operating Agreement for Tivoli Properties, LLC (this "Amendment") is made and entered into on November 14, 2007, by and between Equity Partners, LLC., ("EP") a Utah Limited Liability Company, Kerry Posey and Bobbie Posey, ("Poseys") individuals, with reference to the following facts:

1. All capitalized terms not defined in this Amendment will have the meaning ascribed to them in that certain "Operating Agreement for Tivoli Gardens, LLC" by and between PEGI and VSI dated as of August 15, 2007 (the "Agreement").

A. The parties formed Tivoli Properties, LLC, a limited liability company organized under the laws of the State of Utah (the "Company"), and in connection therewith the parties have entered into the Agreement.

B. The parties desire to adopt and approve the following provisions shall replace Sections 2.5, 3.1.1, 3.1.2 and 3.1.3 and incorporate them into the Agreement, effective as of the Effective Date.

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements contained herein, and intending to be legally bound, the parties agree as follows:

1. Amendment to Agreement. Upon execution of this Amendment, the Agreement will be amended by replacing and inserting the following new provision as Section 3.1.1 thereof:

*"3.1.1 Contribution from Equity Partners. Equity Partners shall contribute and assign to the Company all of Equity Partners' right, title, and interest as buyer in, to, and under the Purchase Agreement and the Company shall assume and shall perform all of Equity Partners obligations as buyer thereunder. Furthermore, Equity Partners will arrange for, sign and guarantee an interim loan in the amount of Seven Hundred-Fifty Thousand Dollars (\$750,000.00) which will be used as operating capital for the Company. Additionally, all amounts paid by Equity Partners pursuant to the entitlement process, Purchase Agreement or otherwise related to the acquisition and development of the Property, whether paid prior to or after the execution of this Agreement, shall be deemed to be capital contributions made to the Company by Equity Partners. As of the date of this Agreement, the aggregate amount of such deemed capital contribution made by Equity Partners to the Company \$800,000.00. Once the Loan is obtained, Equity Partners shall set aside and pay \$10,000.00 per month to the Sellers from the operating capital of the Company. As a result of such contribution, Equity Partners has been credited with a capital account equal to \$800,000.00, and has received 800,000 Class A Units."*

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2. Section 3.1.2 shall be amended by replacing and inserting the following new provision as Section 3.1.2 thereof:

"3.1.2 Contribution from Kerry R. Posey. Kerry R. Posey shall contribute the carrying costs of his subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Kerry R. Posey. As a result of such contribution, Kerry R. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units."

3. Section 3.1.3 shall be amended by replacing and inserting the following new provision as Section 3.1.2 thereof:

"3.1.3 Contribution from Bobbie M. Posey. Bobbie M. Posey shall contribute the carrying costs of her subordination agreement under the Purchase Agreement and shall contribute One Hundred Seventy-five Thousand Dollars (\$175,000.00) be deemed to be capital contributions made to the Company by Bobbie M. Posey. As a result of such contribution, Bobbie M. Posey has been credited with a capital account equal to \$125,000.00, and has received 100,000 Class A Units and 25,000 Class B Units."

4. Section 2.5 shall be amended by replacing and inserting the following new provision as Section 2.5 thereof:

2.5. Fiscal year, accounting. The Company's fiscal year shall be the calendar year. the particular accounting methods and principals to be followed by the Company shall be selected by the accountant for the Company ("Accountant") who is hereby designated as Dallas Cooke, CPA as the independent CPA firm. The CPA Accountant may be changed by written Notice of the then serving Manager, consented to in writing by at least Two (2) Members.

5. Other Terms. Except as otherwise provided herein, all other terms and conditions of the Agreement will remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused their duly authorized officers to execute this Amendment, effective as of the Effective Date

EQUITY PARTNERS, LLC. By: /s/ Allan Bruun [Signature] Title: Member

KERRY R. POSEY. By: /s/ Kerry R. Posey [Signature], Individual

BOBBIE M. POSEY, By: /s/ Bobbie M. Posey [Signature], Individual

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THE MEMBERSHIP INTERESTS WHICH ARE THE SUBJECT OF THIS AGREEMENT MAY UNDER FEDERAL LAWS AND THE LAWS OF VARIOUS STATES BE CONSIDERED SECURITIES. IN THAT LIGHT, THE MEMBERSHIP INTERESTS (A) HAVE NOT BEEN REGISTERED OR QUALIFIED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR UNDER THE SECURITIES LAWS OF ANY STATE, AND WILL BE OFFERED AND SOLD IN RELIANCE ON EXEMPTIONS FROM THE REGISTRATION REQUIREMENTS OF THESE LAWS BY VIRTUE OF THE COMPANY'S INTENDED COMPLIANCE WITH SECTION 4(2) OF THE SECURITIES ACT OF 1933, AS AMENDED, THE PROVISIONS OF REGULATION D UNDER SUCH ACT, AND SIMILAR EXEMPTIONS UNDER STATE LAW; (B) MAY BE PURCHASED FOR INVESTMENT ONLY; AND (C) MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED, OR OTHERWISE DISPOSED OF (1) UNLESS SO REGISTERED OR QUALIFIED OR UNLESS AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF SUCH ACTS APPLIES TO SUCH DISPOSITION, THE AVAILABILITY OF WHICH IS ESTABLISHED BY AN OPINION OF COUNSEL, WHICH OPINION AND COUNSEL ARE REASONABLY SATISFACTORY TO THE MANAGER, AND (2) UNLESS THE PROVISIONS OF ARTICLE 6 OF THIS OPERATING AGREEMENT RELATED THERETO ARE SATISFIED. ACCORDINGLY, HOLDERS OF THESE MEMBERSHIP INTERESTS INDEFINITE PERIOD. THE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY ANY REGULATORY AUTHORITY. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

# EXHIBIT F

## SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Settlement Agreement") is made and entered into by and among Kerry Posey and Bobbie Posey, individuals (the "Poseys"); Equity Partners, LLC, a Utah limited liability company, and Four Winds Development Group, LLC, a Utah limited liability company, as the sole member and manager of Equity Partners, LLC (collectively referred to as "Equity Partners"); Four Winds Development Group, LLC, a Utah limited liability company, James Didericksen, as an individual and as a member and manager of Four Winds Development Group, LLC, Allan Bruun, as an individual and as a member and manager of Four Winds Development Group, LLC, and Guy Anderson, as an individual and as a member and manager of Four Winds Development Group, LLC (collectively referred to as "Four Winds"); and Tivoli Properties, LLC, a Utah limited liability company, Equity Partners, LLC, as a member of Tivoli Properties, LLC, Kerry Posey, as a member of Tivoli Properties, LLC, Bobbie Posey as a member of Tivoli Properties, LLC, and Vladamir Canro, as an individual and as the manager of Tivoli Properties, LLC (collectively referred to as "Tivoli"); and collectively referred to as the "Parties."

### RECITALS

WHEREAS, up to the fall of 2007, the Poseys owned approximately thirty acres of real property located at 7916 North 10800 West, Saratoga Springs, Utah, 84045, and more particularly described in the legal descriptions attached hereto as Exhibit A (the "Property"); and

WHEREAS, as members of a newly created Utah limited liability company (Tivoli Properties, LLC), the Poseys and Equity Partners entered into an agreement to develop the Property for the anticipated mutual benefit of the Poseys and Equity Partners; and

WHEREAS, at a real estate closing held on or about November 16, 2007, in exchange for a cash payment and the agreement of Equity Partners to provide the Poseys with a third lien position in the Property, the Poseys conveyed title to the Property to Equity Partners, LLC; and

WHEREAS, due to declining real estate and financial markets, and also due to growing distrust, dissatisfaction and disappointment between the Parties, the Parties have chosen now to part ways, and by this Settlement Agreement have arrived at what each believes to be an agreeable resolution and settlement of all claims, disputes and defenses the Parties have or may have with respect to each other.

NOW THEREFORE, in order to memorialize their resolution and settlement, the Parties hereby enter into this following Settlement Agreement upon the following terms:

### TERMS

1. Settlement Payment: Equity Partners shall receive a lump sum Settlement Payment in the amount of Twenty Five Thousand dollars (\$25,000.00). The Settlement Payment shall be made as a transfer from Premier Title Company's escrow account to an account, or accounts, designated by Equity Partners within forty-eight hours after the execution of this Settlement Agreement.



2. Transfer of Property: Equity Partners shall execute a Quit Claim Deed in favor of the Poseys, as Grantees, for the Property. The Quit Claim Deed described in this paragraph has been approved by the Poseys, and is currently being held by Premier Title Company. The Quit Claim Deed will be recorded by Premier Title Company within forty eight-hours after the execution of this Settlement Agreement.

3. Release of Claims and Liability: The Parties mutually release, cancel, forgive and forever discharge each other, and each of their predecessors, parents, subsidiaries, affiliates and divisions, and all of their officers, members, directors and employees from all actions, claims, demands, damages, obligations, liabilities, controversies and executions, of any kind or nature whatsoever, whether known or unknown, which have arisen, or which may have arisen, or which may arise by reason of money received, management of funds, management actions or payments made, as designated and described in the Tivoli Properties, LLC, Operating Agreement and the Real Estate Purchase Agreement associated with the Property, as managers, buyers, sellers, consultants, agents, employees, representatives, owners, members, affiliates, contractors, associates, or any other affiliated operative from the first day of the world, including this day and each day hereafter. This release of claims includes, but is not limited to, the payments to and receipts by the persons and entities identified on the schedule of Questioned Payments attached hereto as Exhibit B.

4. Global /Comprehensive Release: The Parties specifically waive any claim or right to assert any cause of action or alleged case of action which has, through oversight or error, intentionally or unintentionally, and whether by mutual or unilateral mistake, been omitted from this Settlement Agreement.

5. Agreement to Execute Additional Documents to Carry Out Settlement: The Parties will execute any and all other documents as reasonably necessary to implement the terms and effecting the purposes of this Settlement Agreement.

6. Payment of Attorneys' Fees and Costs: Each Party is responsible for his/her/its own attorneys' fees and costs associated with resolution of the issues and transactions to which this Settlement Agreement pertains, including but not limited to negotiating, drafting and entering into this Settlement Agreement, and for any subsequent documents and actions necessary and appropriate for implementing the terms and effecting the purposes of this Settlement Agreement.

7. Confidentiality: Except as necessary to the conduct or protection of their legitimate business interests or as may be required by operation of law or order of court, the Parties covenant to hold the terms, conditions and performance of this Settlement Agreement in confidence and to refrain from discussing their dispute or its resolution with other persons not a party to this Settlement Agreement, except as necessary or appropriate with their legal and financial professionals.

8. No Actual or Implied Admission: This Settlement Agreement is not to be construed as an admission or acknowledgment of any wrongdoing, fault or liability by any Party to any other Party, or to any third person or entity not party to this Settlement Agreement; and each Party hereby expressly denies any such wrongdoing, fault or liability.

9. Severability: If any provision of this Settlement Agreement or the application thereof to any person, entity, or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, neither the remainder of this Settlement Agreement nor the application of such provision to any other person, entity, or circumstance shall be affected thereby, but rather shall be enforced to the greatest extent possible.

10. Default and Attorneys' Fees and Costs: In the event of breach or default hereunder, the prevailing party shall be entitled to recover from the other party all expenses, costs, and attorneys' fees incurred in connection with determining, protecting or enforcing their rights, including lay and expert witness fees, whether such expenses would be recoverable as costs and attorneys' fees in the original action or not.

11. Jurisdiction, Venue, and Governing Law: Jurisdiction and Venue shall exist only in the Fourth District Court, Utah County, State of Utah for any action in regard to this Settlement Agreement. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

12. Entire Agreement: This Settlement Agreement sets forth the entire Settlement Agreement of the Parties in the settlement of their respective differences. No provision of this Settlement Agreement may be amended or any right hereto modified or waived except by a written agreement executed by the Parties.

13. Cooperation in Drafting the Settlement Agreement: Each Party hereto has cooperated in establishing the terms of this Settlement Agreement as well as drafting the recitals and terms of this Settlement Agreement. Therefore, if any construction or interpretation is to be made regarding this Settlement Agreement or any of its Recitals or Terms, the same shall not be presumptively construed against any Party.

14. Counterparts: This Settlement Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and all of which when taken together shall constitute one and the same document.

15. Successors and Assigns: This Settlement Agreement is binding upon the Parties, their heirs, executors, administrators, successors, and assigns, and will inure to the benefit of the Parties, their heirs, executors, administrators, successors, and assigns.

16. Authority to Execute This Agreement: Each Party to this Settlement Agreement hereby represents and warrants to each other Party that he/she/it has the authority and/or has been duly authorized to execute, be bound to, and deliver this Settlement Agreement.

17. Acknowledgement: The Parties declare that each has read and understands this Settlement Agreement. The Parties have executed this Settlement Agreement voluntarily and without being unduly pressured, under duress or influenced by any statement or representation made by any other Party or by any person acting on behalf of any other Party, including their counsel. In negotiating, drafting and

entering into this Agreement, the Parties also acknowledge that they have either been represented, or have had an opportunity to be represented, by and/or consult with independent counsel of their own choosing.

Dated: 11/11/08

EQUITY PARTNERS, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
(Name) JAMES D. DIDERICKSEN  
Managing Member of Four Winds  
Development Group, LLC, its sole member  
and manager

Dated: 11/11/08

FOUR WINDS DEVELOPMENT GROUP, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
Guy Anderson  
Its: Managing Member

Dated: 11-11-08

FOUR WINDS DEVELOPMENT GROUP, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
Allan Bruun  
Its: Managing Member

Dated: 11/11/08

FOUR WINDS DEVELOPMENT GROUP, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
James Didericksen  
Its: Managing Member

Dated: 11/11/08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
(Name) JAMES D. DIDERICKSEN  
Managing Member of Four Winds  
Development Group, LLC, the sole member  
and manager of Equity Partners, LLC, its  
member

Dated: 11/12/08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
Kerry Posey  
Its: Member

Second Signature Page of Settlement Agreement on Following Page



Second Signature Page of Settlement Agreement

Dated: 11-12-08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: Bobbie Posey  
Bobbie Posey  
Its: Member

Dated: 11-12-08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: Vladimir Canro  
Vladimir Canro  
Its: Manager

Dated: 11-12-08

By: Kerry Posey  
Kerry Posey  
As an individual

Dated: 11-12-08

By: Bobbie Posey  
Bobbie Posey  
As an individual

Dated: 11/11/08

By: James Didericksen  
James Didericksen  
As an individual

Dated: 11-11-08

By: Allan Bruun  
Allan Bruun  
As an individual

Dated: 11/11/08

By: Guy Anderson  
Guy Anderson  
As an individual

Dated: 11-12-08

By: Vladimir Canro  
Vladimir Canro  
As an individual

## RELEASE OF PERSONAL GUARANTY

This Release of Personal Guaranty is made this \_\_\_\_ day of November, 2008

Whereas, on or about November 20 2007, Equity Partners, LLC executed a 1<sup>st</sup> Lien Position Secured Promissory Note ("Note") in the amount of \$750,000.00;

Whereas, Guy Anderson, Allan Bruun and James D. Diderickson each executed the aforementioned Note as personal guarantors for the same.

Whereas, Equity Partners, LLC has agreed to release the property which acts as security for the promissory note and to convey the same to Kerry and Bobbie Posey in exchange for the release of the personal guaranties described above and the payment of \$25,000.00, and

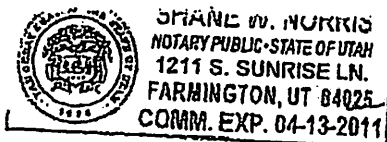
Whereas Dry Creek Structures, LLC is the current holder of the Note.

NOW THEREFORE, in exchange for Ten Dollars (\$10.00) and other good and valuable consideration, Dry Creek Structures, LLC hereby releases the personal guaranties of the 1<sup>st</sup> Lien Position Secured Promissory Note provided by Guy Anderson, Allan Bruun and James D. Diderickson. All remaining terms and conditions of the Note shall remain in full force and effect.

EXECUTED on the dates subscribed above.

DRY CREEK STRUCTURES, LLC

By: \_\_\_\_\_  
Its: \_\_\_\_\_



**EXHIBIT "A"**  
**(Legal Description)**

**Parcel 1:**

Commencing at a point located South 867.08 feet and East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 392.28 feet; South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East right of way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0029

**Parcel 2:**

Commencing East along Section line 60.69 feet and South 867.58 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian, thence East 2853.03 feet; thence South 42 degrees 41' West 667.20 feet to a fence; thence North 89 degrees 47' West along said fence line 2404.35 feet to a fence intersection; thence North 26' East along fence line 481.46 feet to the beginning,

and excluding the following described tract of land in Utah County, State of Utah:

Commencing at a point located South 867.08 feet East 56.12 feet from the North quarter corner of Section 23, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence North 89 degrees 56' 32" East along an existing fence line 392.28 feet; thence South 89 degrees 57' 57" East along an existing fence line 753.09 feet; thence South 197.62 feet; thence South 89 degrees 49' 19" West partially along a fence line and fence line extension 1145.68 feet; thence North 00 degrees 05' 14" East along East Right of Way line of Redwood Road 201.24 feet to point of beginning.

Tax Serial No.: 58-035-0030

25  
24  
5

Unexplained Payments

Related Entities	Check Number(s)	Amount
Four Winds Development	1004, 1008, 1021, 1024, 1027, 1034, 1042, 1049, 1055	\$47,500.00
Granite Builders	1007, 1018, 1023, 1028, 1047,	\$58,240.00
Geosystems	1016, 1029	\$7,975.00
U.S. General Construction	1019	\$100,000.00
Construction Advisors	1062, 1066	<u>\$6,000.00</u>
<b>TOTAL:</b>		<b>\$219,715.00</b>

Related Persons	Check Number(s)	Amount
Guy Anderson	1001	\$1,014.38
Jim Didericksen	1006, 1035	\$7,151.50
Dustin Didericksen	1030	<u>\$500.00</u>
<b>TOTAL:</b>		<b>\$8,665.88</b>

Other	Check Number(s)	Amount
Cash	Counter Check	\$100.00
Kamatsu Equipment	1012	\$5,300.00
Moulding & Sons	1015	\$4,080.00
Key Bank	1017	\$300.00
DOPL	1024, 1024 <sup>5</sup> (type 12)*	\$615.00
GWF Inc.	1098	\$4,000.00
Century 21 Elite	1051	\$7,500.00
Wasatch Trailers	1041	<u>\$4,015.52</u>
<b>TOTAL:</b>		<b>\$25,910.52</b>
<b>GRAND TOTAL</b>		<b>\$254,291.40</b>

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\*not corrected in original

## ADDENDUM TO SETTLEMENT AGREEMENT AND RELEASE

THIS ADDENDUM TO SETTLEMENT AGREEMENT AND RELEASE ("Addendum") is made and entered into by and among Kerry Posey and Bobbie Posey, individuals (the "Poseys"); Equity Partners, LLC, a Utah limited liability company, and Four Winds Development Group, LLC, a Utah limited liability company, as the sole member and manager of Equity Partners, LLC (collectively referred to as "Equity Partners"); Four Winds Development Group, LLC, a Utah limited liability company, James Didericksen, as an individual and as a member and manager of Four Winds Development Group, LLC, Allan Bruun, as an individual and as a member and manager of Four Winds Development Group, LLC, and Guy Anderson, as an individual and as a member and manager of Four Winds Development Group, LLC (collectively referred to as "Four Winds"); and Tivoli Properties, LLC, a Utah limited liability company, Equity Partners, LLC as a member of Tivoli Properties, LLC, Kerry Posey, as a member of Tivoli Properties, LLC, Bobbie Posey as a member of Tivoli Properties, LLC, and Vladamir Canro, as an individual and as the manager of Tivoli Properties, LLC (collectively referred to as "Tivoli"); and collectively referred to as the "Parties".

The purpose for this Addendum is to clarify, amend, revise, and restate portions of the original Settlement Agreement and Release executed by the Parties on or about November 12, 2008 (the "Agreement"). All capitalized terms used herein, unless otherwise defined herein, shall have the meanings set forth in the Agreement.

### RECITALS

WHEREAS, the Parties entered into a Settlement Agreement and Release (the "Agreement") on or about November 12, 2008; and

WHEREAS, prior to the time of executing the Agreement, Equity Partners had received from the Utah Department of Transportation ("UDOT") the amount of \$174,000.00 (the "UDOT Payment") and had conveyed to UDOT a portion of the Property (the "UDOT Parcel");

WHEREAS, the Parties desire hereby to memorialize and formalize their agreement that upon return by Equity Partners of the \$174,000.00 as contemplated herein, all disputes and issues between and among the Parties shall be settled and release in accordance with the terms of the Agreement as modified and/or enlarged by the terms of this Addendum.

NOW, THEREFORE, in consideration of the mutual promises herein contained and in order to further memorialize their resolution, settlement, and mutual releases, the Parties hereby enter into this Addendum upon the following terms and conditions:

### TERMS AND CONDITIONS

1. Escrow and Payment of UDOT Payment: Upon execution of this Agreement, Equity Partner shall deliver to Premier Title (the "Title Company") the amount of \$174,000.00 in cash or certified funds, made payable to Premier Title as escrow agent.

2. Release of UDOT Payment: The Poseys shall be solely responsible to obtain and to deliver to the Title Company (a) evidence acceptable to Equity Partners and the Title Company that Dry Creek Structures, LLC ("Dry Creek") is the current holder of all interests under the first and second notes and trust deeds affecting the Property<sup>1</sup>; (b) good and sufficient Partial Reconveyances of the UDOT Parcel from the effects of the First and Second Trust Deeds, as defined in Footnote No. 1 below, fully authorized by Dry Creek and executed by the Title Company, as Trustee; (c) a written request from the Poseys authorizing the Title Company to execute and record a Partial Reconveyance of the third trust deed<sup>2</sup>, fully releasing the UDOT Parcel from the effects of the Third Trust Deed, as defined in Footnote No. 2 below; and (d) a Release of Personal Guaranties, fully executed by an authorized Manager or member of Dry Creek, fully and unconditionally releasing Guy Anderson, Allan Bruun, and James D. Didericksen from their personal Guaranties associated with the First Note and Second Note. Upon receipt by the Title Company of the foregoing, the Title Company shall be authorized and directed to disperse the UDOT payment as instructed by written instructions executed by both the Poseys and Dry Creek.

3. Retention of the Settlement Payment: The Parties acknowledge and agree that Equity Partners shall be entitled to retain the \$25,000.00 payment received in accordance with the Agreement.

4. Settlement Agreement Terms Applicable: Except as clarified, amended, and revised herein, all of the terms and conditions contained in the Agreement, including, without limitation the provisions of Paragraphs 3 and 4 of the Agreement, are fully applicable to this Addendum and are incorporated herein by this reference.

5. Representations and Warranties: Equity Partners and Four Winds, and James Didericksen, Guy Anderson and Allan Bruun as individuals and as members and managers of Four Winds Development Group, LLC, hereby represent and warrant that no other UDOT Right of Way Contracts affecting the Property have been negotiated, signed or consummated other than the one referencing Tax ID/Sidwell No:58-035-0030 with signature dates of 10/24/08, 10/29/08 and 10/31/08 for the Total Selling Price of \$174,000 and relating to .59 acres of the Property.

6. Counterparts and Execution by Facsimile or Electronic Transmission: The Parties agree that this Addendum may be executed in counterparts, with all counterparts, when taken together, constituting one and the same instrument. To facilitate the execution and opening of escrow on this matter, the Parties agree that this document may become effective upon receipt by the Title Company of facsimile or email signatures of the Parties; provided, however, that all Parties shall deliver to the Title Company original signatures to this Addendum, mailed to the Title Company no later than the date of signing by any such Party.

<sup>1</sup> The first note ("First Note") is a promissory note in the principal amount of \$750,000.00 dated November 20, 2008, secured by a first priority trust deed (the "First Trust Deed") dated November 20, 2007 and recorded in the Utah County Recorder's Office on November 21, 2007, as Entry No. 164448:2007, and the second note (the "Second Note") is a promissory note in the principal amount of 11,250.00 dated on or about November 20, 2007 and recorded in the Utah County Recorder's Office on November 21, 2007, as Entry No. 16449:2007

<sup>2</sup> The third trust deed ("Third Trust Deed") is that certain Trust Deed dated November 16, 2007, and recorded in the Utah County Recorder's Office on November 21, 2007, as Entry No. 164450:2007.

IN WITNESS WHEREOF, the Parties have executed or caused these presents to be executed by their duly authorized officer, member, manager or representative as of the dates set forth opposite each signature block or line.

Dated: 11/21/08

EQUITY PARTNERS, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
(Name) James Didericksen  
Managing Member of Four Winds  
Development Group, LLC, its sole member  
and manager

Dated: 11/21/08

FOUR WINDS DEVELOPMENT  
GROUP, LLC  
A UTAH LIMITED LIABILITY CO.

By: [Signature]  
Guy Anderson  
Its: Managing Member

Dated: 11/21/08

FOUR WINDS DEVELOPMENT  
GROUP, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
Allan Bruun  
Its: Managing Member

Dated: 11/21/08

FOUR WINDS DEVELOPMENT  
GROUP, LLC  
A UTAH LIMITED LIABILITY CO.

By: [Signature]  
James Didericksen  
Its: Managing Member

Dated: 11/21/08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: [Signature]  
(Name) ALLAN BRUUN  
Managing Member of Four Winds  
Development Group, LLC, the sole member  
And manager of Equity Partners, LLC, its  
Member

Dated: 12-1-2008

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY CO.

By: [Signature]  
Kerry Posey  
Its: Member

*Second Signature Page of Settlement Agreement on Following Page*

Second Signature Page of Settlement Agreement

Dated: \_\_\_\_\_

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY COMPANY

By: Bobbie Posey  
Bobbie Posey  
Its: Member

Dated: 12-11-08

TIVOLI PROPERTIES, LLC  
A UTAH LIMITED LIABILITY CO.

By: Vladimir Canro  
Vladimir Canro  
Its: Manager

Dated: 12-1-2008

By: Kerry Posey  
Kerry Posey  
As an individual

Dated: \_\_\_\_\_

By: Bobby Posey  
Bobby Posey  
As an individual

Dated: 11/21/08

By: James Didericksen  
James Didericksen  
As an individual

Dated: 11/21/08

By: Allan Bruun  
Allan Bruun  
As an individual

Dated: 11/21/08

By: Guy Anderson  
Guy Anderson  
As an individual

Dated: 12-11-08

By: Vladimir Canro  
Vladimir Canro  
As an individual



# EXHIBIT G

**FILED DISTRICT COURT**  
Third Judicial District

**OPENING INSTRUCTIONS TO THE JURY**

NOV 14 2013

SALT LAKE COUNTY.

**1. INTRODUCTION:**

Ladies and Gentlemen of the Jury, you have been selected ~~and sworn as the jury~~ <sup>By</sup> ~~as the jury~~ <sup>Deputy Clerk</sup> case. The defendant is accused of committing certain crimes. You will decide if the defendant is guilty or not guilty. I will give you some instructions now and some later. You are required to consider and follow all my instructions. Keep an open mind throughout the trial. At the end of the trial you will discuss the evidence and reach a verdict. You took an oath to "well and truly try the issues pending between the parties" and to "render a true and just verdict." The oath is your promise to do your duty as a member of the jury. Please be alert, pay attention and follow all my instructions:

**2. INFORMATION, PLEA AND BURDEN OF PROOF:**

The prosecution has filed a document — called an "Information" — that contains the charges against the defendant. The Information is not evidence of anything. It is only a method of accusing a defendant of the crimes. The Information will now be read.

(Read the Information)

The defendant has entered pleas of not guilty and denies committing the crimes. Every crime has component parts called "elements". The prosecution must prove each and every element of each crime beyond a reasonable doubt. Until the prosecution has satisfied that burden, you must presume that the defendant is not guilty. The defendant does not have to prove anything. He/she does not have to testify, call witnesses, or present evidence.

**3. PRESUMPTION OF INNOCENCE:**

Remember, the fact that the defendant is charged with the crimes is not evidence of guilt. The law presumes that the defendant is not guilty of the crimes charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

**4. ROLE OF THE JUDGE, JURY AND LAWYERS:**

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

- \* As the judge I will supervise the trial, decide legal issues, and instruct you on the law.
- \* As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.
- \* The lawyers will present evidence and try to persuade you to decide the case one way or the other.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

**5. NOTE-TAKING:**

Feel free to take notes during the trial to help you remember the evidence but let me give you the following caution:

- \* Do not let note-taking distract you from the proceedings or cause you to miss testimony presented.
- \* You should not view your notes as authoritative record of the evidence presented. Your notes are not evidence and may be incomplete. Your memory should be your greatest asset when it comes time to deliberate.

**6. ORDER OF THE TRIAL:**

I will now explain to you how the trial will unfold. The prosecution will give its opening statement. An opening statement gives an overview of the case from one point of view, and summarizes what that lawyer thinks the evidence will show. Defense counsel may choose

to make an opening statement right after the prosecutor, or wait until after all the prosecution's evidence has been presented, or not make one at all. Next, you will hear the prosecution's evidence. Evidence is usually presented by calling and questioning witnesses. What the witnesses say is testimony. A witness is questioned first by the lawyer who called that witness. This is called direct examination. After direct examination, the witness will be questioned by the opposing lawyer. This is called cross-examination.

Consider all testimony, whether from direct or cross-examination, regardless of who calls the witness. After the prosecution has presented all its evidence, the defendant may present evidence, although the defendant has no duty to do so. If the defendant does present evidence, the prosecution may then present additional evidence. After both sides have presented all their evidence, I will give you final instructions on the law you must follow in reaching a verdict. You will then hear closing arguments from the lawyers. The prosecutor will speak first followed by defense counsel. Then prosecutor speaks last because the government has the burden of proof. Finally, you will deliberate in the jury room. You may take your notes with you. You will discuss the case and reach a verdict.

#### **7. CONDUCT OF JURORS:**

From time to time I will call a recess. It may be for a few minutes or longer. During recesses, do not talk about this case with anyone — not family, not friends, not even each other. Until the trial is over, do not mingle or talk with the lawyers, parties, witnesses or anyone else connected with the case. You are welcome to talk with other members of the jury panel but do not discuss this case, any matters discussed in court, or anyone involved in this case. Our court clerks and bailiffs can answer general questions, such as the length of breaks or location of restrooms. But they cannot comment about the case or anyone involved in the case. The goal is to avoid the impression that anyone is trying to influence you improperly. If people involved in the case seem to ignore you outside of court, they are just following this instruction.

Do not conduct any independent research or investigation of any issue involving this case. This includes but is not limited to the following: Do not visit or view any alleged location, do not do any research on the internet, do not read any articles, law books, dictionaries or other documents other than what is presented to you in court. Do not let anyone else do this for you.

Until the trial is over, do not read or listen to any news reports about this case. If you observe anything that seems to violate this instruction, report it immediately to a clerk or bailiff.

**8. FURTHER ADMONITION REGARDING ELECTRONIC DEVICES.**

Serious problems have been caused around the country by jurors using computer and electronic communication technology. It's natural that we want to investigate a case, or to share with others our thoughts about the trial, and it's easy to do so with the internet and instant communication devices or services, such as Blackberries, iPhones, Facebook, Twitter, and so on.

However, please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends entirely on you, the jurors, reaching your decisions based on evidence presented to you in court, and not on other sources of information. You violate your oath as jurors if you conduct your own investigations or communicate about this trial with others.

Jurors have caused serious consequences for themselves and the courts by "Googling" the parties, issues, or counsel; "Twittering" with friends about the trial; using Blackberries or iPhones to gather or send information on cases; posting trial updates on Facebook pages; using Wikipedia or other internet information sources, and so on. Even using something as seemingly innocent as "Google Maps" can result in a mistrial.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

Violations may also result in substantial penalties for the juror.

So I must warn you again - do not use your cellphone or computer to investigate or discuss anything connected with this trial until it is completely finished. Do no internet research of any kind, and advise me if you learn of any juror who has done so.

**9. CONFERENCES W/ COUNSEL:**

During the course of this trial, the attorneys and I will often meet before court starts or

during the recesses. Sometimes, these meetings will go beyond the time we are scheduled to start. I want to assure you, when that happens; we are not being inconsiderate of the importance of your time. To the contrary, every conference I have w/ counsel is necessary to simplify the issues of the trial, to expedite this case so it may be brought to a timely conclusion and most importantly to ensure matters are handled in a fair and just manner. Please accept my apologies in advance for any delay that may occur in our starting time.

INSTRUCTION NO. 10

CLOSING ROADMAP:

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal argument.

Finally, you will go to the jury room to discuss and decide the case.



INSTRUCTION NO. 11

JUROR DUTIES:

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I have given you and will now give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before the trial, any instructions I may have given to you during the trial, and these instructions I give to you now. All instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. You must also not let yourself be influenced by public opinion or what you may perceive as public opinion regarding any decision you make.

INSTRUCTION NO. 12

EVIDENCE:

You must base your decision only on the evidence that you saw and heard here in court.

Evidence includes:

- \* what the witnesses said while they were testifying under oath;
- \* any exhibits admitted into evidence;
- \* any facts to which the parties stipulated, that is to say, facts to which they agreed;
- \* any facts of which I took as judicial notice and told you to accept as true.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence.

In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

## INSTRUCTION NO. 13

### DIRECT AND/OR CIRCUMSTANTIAL EVIDENCE:

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. For example, if a witness testified she looked outside and saw the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence — direct, circumstantial, or both — to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

INSTRUCTION NO. 14

LEGAL RULINGS:

During the trial I have made certain rulings. I made these rulings based on the law, and not because I favor one side or the other.

However,

- \* if I sustained the objection,
- \* if I did not accept evidence offered by one side or the other, or
- \* if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

INSTRUCTION NO. 15

JUDICIAL NEUTRALITY:

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have said or done as indicating that I have any particular view of the evidence or the decision you should reach.

INSTRUCTION NO. 16

CLOSING ARGUMENTS:

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say something about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

INSTRUCTION NO. 17

DO NOT CONSIDER PUNISHMENT:

In making your decision, do not consider what punishment could result from a verdict of guilt. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.



## INSTRUCTION NO. 18

### WITNESS CREDIBILITY:

In deciding this case, you will need to decide how believable each witness is. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- \* How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- \* Does the witness have something to gain or lose from this case?
- \* Does the witness have any connection to the people involved in this case?
- \* Does the witness have any reason to lie or slant the testimony?
- \* Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- \* How believable was the witness's testimony in light of other evidence presented at trial?
- \* How believable was the witness's testimony in light of human experience?
- \* Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness has lied, you may disbelieve anything the witness said. In other words, you may believe all, or part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

INSTRUCTION NO. 19

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DEFENDANT TESTIFYING:

The defendant testified at trial. Another instruction mentions things for you to think about in weighing testimony. Consider those same things and any others that you think are important in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he/she is accused of a crime.

INSTRUCTION NO. 20

DEFENDANT NOT TESTIFYING:

A person accused of a crime may choose whether or not to testify. Do not hold that choice against the defendant. Do not try to guess why the defendant chose not to testify. Do not consider it in your deliberations. You must decide this case only on the basis of the evidence. The defendant does not have to prove that he/she is not guilty. The prosecution must prove the defendant's guilt beyond a reasonable doubt.

INSTRUCTION NO. 21

LAW ENFORCEMENT OFFICER'S TESTIMONY:

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that his/her testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 22

SEPARATE CONSIDERATION OF MULTIPLE CRIMES:

The defendant has been charged with more than one crime. It is your duty to consider each charge separately. For each crime charged, consider all of the evidence related to that charge. Decide whether the prosecution has presented proof beyond a reasonable doubt that the defendant is guilty of that crime. Your verdict on one charge does not determine your verdict on any other charge.

INSTRUCTION NO. 23

PRESUMPTION OF INNOCENCE:

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crimes charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

INSTRUCTION NO. 24

REASONABLE DOUBT:

As I instructed you before, the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find him/her not guilty.

INSTRUCTION NO. 25

OFFENSE REQUIRES CONDUCT AND MENTAL STATE:

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or a failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted (or failed to act), he/she did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly". For other crimes it is enough that the defendant acted "recklessly", "with criminal negligence" or with some other specified mental state.

Later, I will instruct you on the specific conduct and mental state that the prosecution must prove before the defendant can be found guilty of the crime(s) charged.



INSTRUCTION NO. 26

INFERRING THE REQUIRED MENTAL STATE:

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proven directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION NO. 27

MOTIVE:

A defendant's mental state is not the same as "motive". Motive is why a person does something. Motive is not an element of the crime(s) charged in this case. As a result, the prosecutor does not have to prove why the defendant acted (or failed to act).

However, motive or lack of motive may help you determine if the defendant did what he/she is charged with doing. It may also help you determine what his/her mental state was at the time.

INSTRUCTION NO. 28

FACT VS. EXPERT WITNESS:

There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that he/she can see, hear, touch, taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. An expert can testify about facts, and they can give their opinions in their area of expertise.

In weighing the opinion of an expert, you may look at their qualifications, the reasoning process the expert used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses including any expert witness. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

INSTRUCTION NO. 29

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count One of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1006).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count One of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count One.

INSTRUCTION NO. 30

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count One of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. That value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1006).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count One of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count One.

INSTRUCTION NO. 31

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Two of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1007).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Two of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Two.

INSTRUCTION NO. 32

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Two of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1007).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Two of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Two.

INSTRUCTION NO. 33

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Three of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1012).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Three of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Three.



INSTRUCTION NO. 34

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Three of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1012).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Three of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Three.

INSTRUCTION NO. 35

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Four of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1015).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Four of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Four.

INSTRUCTION NO. 36

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Four of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1015).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Four of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Four.

U.C.A. §76-6-404

INSTRUCTION NO. 37

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Five of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1016).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Five of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Five.

INSTRUCTION NO. 38

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Five of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1016).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Five of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Five.

INSTRUCTION NO. 39

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Six of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is less than \$500.00 (Check #1017).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Six of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Six.

INSTRUCTION NO. 40

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Six** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (**Kerry and Bobbie Posey**) thereof;
3. The value of the property is less than \$500.00 (Check #1017).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Six** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Six**.

INSTRUCTION NO. 41

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of **THEFT** as alleged in Count Seven of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1018).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Seven of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Seven.



INSTRUCTION NO. 42

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Seven of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1018).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Seven of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Seven.

INSTRUCTION NO. 43

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Eight of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1019).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Eight of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Eight.

INSTRUCTION NO. 44

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Eight** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1019).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Eight** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Eight**.

INSTRUCTION NO. 45

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Nine of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1021).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Nine of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Nine.

INSTRUCTION NO. 46

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Nine of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1021).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Nine of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Nine.

INSTRUCTION NO. 47

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Ten of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1027).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Ten of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Ten.

INSTRUCTION NO. 48

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Ten** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1027).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Ten** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Ten**.

INSTRUCTION NO. 49

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twelve of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is less than \$500.00 (Check #1024).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twelve of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twelve.



INSTRUCTION NO. 50

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Twelve of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is less than \$500.00 (Check #1024).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Twelve of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twelve.

INSTRUCTION NO. 51

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Thirteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is less than \$500.00 (Check #1025).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Thirteen of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Thirteen.

INSTRUCTION NO. 52

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Thirteen** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is less than \$500.00 (Check #1025).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Thirteen** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Thirteen**.

INSTRUCTION NO. 53

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Fifteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1029).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Fifteen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Fifteen.

INSTRUCTION NO. 54

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in Count Fifteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1029).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to Count Fifteen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Fifteen.

INSTRUCTION NO. 55

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Sixteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1030).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Sixteen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Sixteen.

INSTRUCTION NO. 56

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Sixteen** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about January 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1030).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Sixteen** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Sixteen**.

INSTRUCTION NO. 57

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Seventeen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1034).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Seventeen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Seventeen.



INSTRUCTION NO. 58

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of **THEFT** as alleged in Count Seventeen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1034).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Seventeen of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Seventeen.

INSTRUCTION NO. 59

In order for you to find the Defendant, **JAMES DIDERICKSON**, guilty of the crime of **THEFT** as alleged in **Count Eighteen** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, **JAMES DIDERICKSON** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1035).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **JAMES DIDERICKSON** guilty as to **Count Eighteen** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Eighteen**.

INSTRUCTION NO. 60

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in Count Eighteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about December 2007, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1035).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to Count Eighteen of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Eighteen.

INSTRUCTION NO. 61

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Nineteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about February 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1041).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Nineteen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Nineteen.

INSTRUCTION NO. 62

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Nineteen of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about February 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1041).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Nineteen of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Nineteen.

INSTRUCTION NO. 63

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about February 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1042).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty.

INSTRUCTION NO. 64

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Twenty of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about February 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1042).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Twenty of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty.

INSTRUCTION NO. 65

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-One of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about March 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1047).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-One of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-One.



INSTRUCTION NO. 66

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Twenty-One** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about March 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (**Kerry and Bobbie Posey**) thereof;
3. The value of the property is or exceeds \$5,000.00  
(Check #1047).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Twenty-One** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Twenty-One**.

INSTRUCTION NO. 67

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Two of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about March 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1098).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Two of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Two.

INSTRUCTION NO. 68

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Twenty-Two** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about March 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1098).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Twenty-Two** of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Twenty-Two**.

INSTRUCTION NO. 69

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Three of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about April 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1049).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Three of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Three.

INSTRUCTION NO. 70

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Twenty-Three of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about April 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1049).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Twenty-Three of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Three.

INSTRUCTION NO. 71

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Four of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about April 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1051).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Four of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Four.

INSTRUCTION NO. 72

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Twenty-Four** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about April 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1051).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Twenty-Four** of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Twenty-Four**.

INSTRUCTION NO. 73

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Five of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about May 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1055).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Five of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Five.



INSTRUCTION NO. 74

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Twenty-Five** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about April 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$5,000.00 (Check #1055).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Twenty-Five** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Twenty-Five**.

INSTRUCTION NO. 75

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Six of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about May 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1062).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Six of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Six.

INSTRUCTION NO. 76

In order for you to find the Defendant, **ALLAN BRUUN**, guilty of the crime of **THEFT** as alleged in **Count Twenty-Six** of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about May 2008, in the State of Utah, **ALLAN BRUUN** obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$1,500.00 but is less than \$5,000.00 (Check #1062).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find **ALLAN BRUUN** guilty as to **Count Twenty-Six** of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in **Count Twenty-Six**.

INSTRUCTION NO. 77

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Seven of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about June 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1066).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Seven of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Seven.

INSTRUCTION NO. 78

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Twenty-Seven of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about June 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1066).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Twenty-Seven of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Seven.

INSTRUCTION NO. 79

In order for you to find the Defendant, JAMES DIDERICKSON, guilty of the crime of THEFT as alleged in Count Twenty-Eight of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about September 2008, in the State of Utah, JAMES DIDERICKSON obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1070).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find JAMES DIDERICKSON guilty as to Count Twenty-Eight of the Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Eight.

INSTRUCTION NO. 80

In order for you to find the Defendant, ALLAN BRUUN, guilty of the crime of THEFT as alleged in Count Twenty-Eight of the Criminal Information, you must find from the evidence presented all of the following evidence of the crime:

1. Commencing on or about September 2008, in the State of Utah, ALLAN BRUUN obtained or exercised unauthorized control over the property of another;
2. That he did so with the purpose to deprive another (Kerry and Bobbie Posey) thereof;
3. The value of the property is or exceeds \$500.00 but is less than \$1,500.00 (Check #1070).

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find ALLAN BRUUN guilty as to Count Twenty-Eight of the Criminal Information. If you believe that the evidence has failed to establish one of more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant not guilty of the crime charged in Count Twenty-Eight.

INSTRUCTION NO. 81

Before you can find the defendant, JAMES DIDERICKSON, guilty of the crime of PATTERN OF UNLAWFUL ACTIVITY as alleged in Count Twenty-Nine of the Criminal Information, you must find from the evidence all of the following elements of the crime:

1. From on or about May 2007, in the State of Utah;
2. James Diderickson;
3. Purposefully;
4. Through a pattern of unlawful activity;
  - a. in which James Diderickson participated as a principal;
    - i. received any proceeds directly or indirectly;  
AND
    - ii. used or invested, directly or indirectly, any part of the income or proceeds of the income, which he received from the specified unlawful activity to acquire, establish or operate an enterprise; OR,
  - b. acquired or maintained, directly or indirectly, any interest in or control of an enterprise; OR,
  - c. was employed by or associated with any enterprise and conducted or participated, directly or indirectly, in the conducting of that enterprise's affairs;

If you believe that the evidence establishes each and every one of the above elements of the crime, beyond a reasonable doubt, it shall be your duty to find the Defendant JAMES DIDERICKSON guilty as to Count Twenty-Nine of the Criminal Information. On the other hand, if the evidence has failed to establish one or more of the above elements of the offense charged, beyond a reasonable doubt, it shall be your duty to find the defendant not guilty of the crime charged in Count Twenty-Nine.



INSTRUCTION NO. 82

Before you can find the defendant, ALLAN BRUUN, guilty of the crime of **PATTERN OF UNLAWFUL ACTIVITY** as alleged in Count **Twenty-Nine** of the Criminal Information, you must find from the evidence all of the following elements of the crime:

1. From on or about May 2007, in the State of Utah;
2. Allan Bruun;
3. Purposefully;
4. Through a pattern of unlawful activity;
  - a. in which Allan Bruun participated as a principal;
    - i. received any proceeds directly or indirectly;  
AND
    - ii. used or invested, directly or indirectly, any part of the income or proceeds of the income, which he received from the specified unlawful activity to acquire, establish or operate an enterprise; OR,
  - b. acquired or maintained, directly or indirectly, any interest in or control of an enterprise; OR,
  - c. was employed by or associated with any enterprise and conducted or participated, directly or indirectly, in the conducting of that enterprise's affairs;

If you believe that the evidence establishes each and every one of the above elements of the crime, beyond a reasonable doubt, it shall be your duty to find the Defendant ALLAN BRUUN guilty as to Count Twenty-Nine of the Criminal Information. On the other hand, if the evidence has failed to establish one or more of the above elements of the offense charged, beyond a reasonable doubt, it shall be your duty to find the defendant not guilty of the crime charged in Count Twenty-Nine.

INSTRUCTION NO. 83

You are instructed that under the laws of the State of Utah, the following words have the following meanings:

1. "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illegal as well as legal entities.

2 "Pattern of Unlawful Activity" means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. The most recent act constituting part of a pattern of unlawful activity as defined shall have occurred within 5 years of the commission of the next preceding act alleged as part of the pattern.

3. "Person" includes any individual or entity capable of holding a legal or beneficial interest in property, including state, county, and local governmental entities.

4. "Entity" includes a domestic and foreign corporation, a nonprofit corporation, a limited liability company, a profit or non-profit unincorporated association, a business trust, an

estate, a partnership, a trust, two or more persons having a joint or common economic interest.

5. "Unlawful Activity" means to directly engage in conduct or to solicit, request, command, encourage or intentionally aid another person to engage in conduct which would constitute an act of Theft, as defined in Counts 1 through 10, 12 through 13, and 15 through 28 above, or to attempt or conspire to engage in an act which would constitute that offense, regardless of whether the act is in fact charged or indicted by any authority.

INSTRUCTION NO. 84

You are instructed that under the laws of the State of Utah a person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf.

INSTRUCTION NO. 85

You are instructed that "purpose to deprive" means to have the conscious object:

- a. To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or,
- b. To restore the property only upon payment of a reward or other compensation; or,
- c. To dispose of the property under circumstances that make it unlikely that the owner will recover it.

You are instructed that "purpose to deprive" may be inferred from actions and surrounding circumstances and may be found at any time in which an actor exercises unauthorized control over the property of another.

You are instructed that "obtain" means in relation to property ... "to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or to another..."

You are instructed that "property of another" can include property of a limited liability corporation.

INSTRUCTION NO. 86

You are instructed that it is not a defense that an actor has an interest in the property obtained, if another person also has an interest that actor is not entitled to infringe.

INSTRUCTION NO. 87

You are instructed that if one misappropriates and converts to his own use money or property belonging to another under circumstances that constitute theft, it is not made otherwise because the one doing so might have some intention of restoring the loss sometime. And such an act is not prevented from being theft merely because the actor says that he or she had such an intention.

INSTRUCTION NO. 88

JURY DELIBERATIONS:

When you go into the jury room to deliberate, discuss the evidence and speak your minds to each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty". In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.



INSTRUCTION NO. 89

FOREPERSON SELECTION AND DUTIES:

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get a chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a unanimous verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

For each charge the verdict form will have two blanks — one for "guilty" and the other for "not guilty". The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge. When your verdict(s) has/have been found, please notify the bailiff.