

2004

Jon and Elizabeth Triesault, Raymon and Stephanie Bori, individuals, Imagination Theaters, Inc., a corporation, and Imagination Theaters Holdings, L.L.C., a limited liability company v. The Greater Salt Lake Business District, a Utah corporation, doing business as Deseret CDC : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Triesault v. Greater Salt Lake Business District*, No. 20040811 (Utah Court of Appeals, 2004).
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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JON and ELIZABETH TRIESAULT,
RAYMON and STEPHANIE BORI,
individuals, IMAGINATION THEATERS,
INC., a corporation, and IMAGINATION
THEATERS HOLDINGS, L.L.C., a limited
liability company,

Plaintiffs-Appellants,

v.

THE GREATER SALT LAKE BUSINESS
DISTRICT, a Utah corporation, doing
business as DESERET CDC,

Defendant-Appellee.

Case No. 20040811-CA

BRIEF OF DEFENDANT-APPELLEE

**Appeal from the Final Order of the Fourth Judicial District Court
of Utah County, State of Utah
The Honorable Fred D. Howard, District Court Judge**

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FILED

UTAH APPELLATE COURT

MAR 08 2005

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JURISDICTION

This Court has jurisdiction of this matter pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

1. **Issue:** Did the trial court correctly rule that Deseret CDC did not owe plaintiffs a fiduciary duty and therefore could assist a potentially competing movie theater in procuring SBA-backed funding? **Standard:** “For a mixed question of law and fact, which requires a trial court to determine ‘whether a given set of facts comes within the reach of a given rule of law, [the court will] still review legal questions for correctness, but [it may] grant a trial court discretion in its application of the law to a given fact situation.’” *Covey v. Covey*, 2003 UT App 380, ¶17, 80 P.3d 553 (citations omitted). The determination of the existence of a fiduciary duty involves a “mixed question of law and fact” and as such, “the trial court’s factual findings shall not be set aside on appeal unless clearly erroneous.” *See also, State v. Irizarry*, 945 P.2d 676, 683 (Utah 1997). “The question of whether a ‘duty’ exists is a question of law, and this Court, which is not bound by the trial court’s conclusions, may independently review the issue.” *Weber v. Springville City*, 725 P.2d 1360 (Utah 1986). A reviewing court reviews “legal questions for correctness.” *Covey v. Covey*, 2003 UT App 380 at ¶17.

2. **Issue:** Did the trial court correctly rule that expert testimony was required on the issue of whether Deseret’s involvement in the loan application of plaintiffs’ potential competitor, caused plaintiffs’ business to fail, and that plaintiffs failed to present

sufficient evidence in opposition to defendant's motion to withstand summary judgment?

Standard: The ruling is subject to *de novo* review. *Harline v. Barker*, 912, P.2d 433, 438 (Utah 1996).

3. **Issue:** Did the trial court correctly rule that plaintiffs failed to adduce evidence sufficient to withstand summary judgment on their intentional interference with prospective economic relations claims? **Standard:** The trial court's order granting Deseret's motion for summary judgment is subject to *de novo* review. *Harline v. Barker*, 912, P.2d 433, 438 (Utah 1996).

STATEMENT OF THE CASE

Plaintiffs Imagination Theaters, Inc., its officers and owners appeal from the District Court's order granting summary judgment in favor of defendant Deseret CDC ("Deseret"). Plaintiffs claim that Deseret caused the failure and eventual bankruptcy of the Imagination Theaters of Spanish Fork, Utah, in 2002. Deseret is a certified development company for the SBA and as such, the SBA required it to assist qualifying small businesses in processing their SBA loan applications. Plaintiffs allege that: because Deseret provided this service to plaintiffs for their movie theater business in Spanish Fork, Deseret was barred from performing SBA loan processing for any potentially competing movie theater, even as far away as Payson; and Deseret's subsequent work assisting the Payson Theaters in procuring an SBA loan constituted a breach of a duty of loyalty to plaintiffs, amounted to an intentional interference with plaintiffs' relations with its customers, and ultimately caused the plaintiffs' business to fail.

Deseret moved the court for summary judgment, on the grounds that: the trial court must determine the nature of any duty as a matter of law; given the nature of Deseret's relationship with plaintiffs and the very nature of an SBA certified development company, Deseret did not owe a fiduciary duty to plaintiffs; Deseret did nothing to interfere with plaintiffs' prospective business relations with its customers; even when considered in the light most favorable to plaintiffs, the minimal evidence adduced by plaintiffs on the issue of their intentional interference with prospective economic relations claim failed as a matter of law; and plaintiffs could not carry their burden of proving that Deseret caused the plaintiffs' business failure, especially without expert testimony. The trial court agreed with Deseret on all three counts and granted summary judgment. As will be explained in this Brief, the trial court ruled correctly.

STATEMENT OF FACTS

The following facts are established in the record from the trial court:¹

¹ It should be noted that the majority of plaintiffs' alleged "Statement of Facts" are not facts established in the record; rather, they are conclusory statements and argumentative positions. By way of illustration, though not by any means a comprehensive list, the bolded section headers within the "Statement of Facts" are reflective of this problem: "Deseret acts as plaintiffs' agent for all dealings with the SBA;" "The loan closing and Deseret's multiple roles;" "Deseret and Mr. Vanchiere continue advising plaintiffs and acting as their agent after the SBA-backed financing closes;" "Deseret takes on a competitor as a client." (Pltffs Brief, pp. 12, 14, 15, and 16).

Further compounding this improper form is plaintiffs' simultaneous use of facts, misleading statements and argument without a citation to the trial court record to support any actual facts, as required by Rule 24(e) of the Utah Rules of Appellate Procedure. Without belaboring the point, plaintiffs' improper citation both misstates the record and places issues before the court that are not established by the record. For this reason, Deseret will refute in footnotes some of the more blatant misstatements and/or misrepresentations contained in Plaintiffs Brief, although an exhaustive approach cannot

On March 26, 2002, plaintiffs filed a Complaint against defendant Deseret.

Plaintiffs alleged that Deseret was liable to them for assisting a group of investors in Payson, Utah, in processing an SBA loan application and finding SBA financing for a movie complex that allegedly competed with plaintiffs' Spanish Fork movie theater. (**R. at 001-013**). Plaintiffs Imagination Theaters, Inc. and Imagination Theaters Holding, L.L.C. obtained an SBA loan to finance a movie theater in Spanish Fork, which opened in November 1997. (**R. at 121**). Plaintiffs Triesault and Bori were shareholders and co-owners of the Imagination Theaters entities. (**R. at 129**). Deseret, through Mike Vanchiere, a loan officer for Deseret, acted as the SBA's certified development company on the Imagination Theaters loan.² (**R. at 121, 127**). Deseret was the only SBA certified development company authorized to operate in the area at that time. (**R. at 459**).

be utilized due to page constraints. Deseret objects to and moves to strike those arguments and misstatements.

² Despite plaintiffs' "contentions," Mr. Vanchiere did not act as plaintiffs' agent, nor did he act as plaintiffs' "business advisor." While it is undisputed that Mr. Vanchiere offered assistance in procuring an SBA Loan (Triesault Depo. at 61, 71-72), plaintiffs' assertion that Mr. Vanchiere "agreed to both be a consultant and advisor" is not established in the record, other than from plaintiffs' conclusory statements. Plaintiffs' assertions on page 8 of their Brief regarding Mr. Vanchiere's alleged "advice" relate solely to procuring SBA-backed assistance and not to "expert advice."

More important, plaintiff's statement that Mr. Vanchiere "brought to the table . . . his knowledge of the Utah business community" and therefore "made it clear that his advice would extend beyond the area of getting SBA-backed financing," is not established in the record and misrepresents the evidence. Plaintiffs rely on their own interpretation of the relationship as "fact," and misstate Mr. Vanchiere's actions in assisting with business decisions relating to procuring and servicing an SBA 504 loan. Specifically, Triesault testified during his deposition that Vanchiere "knew a lot more than I did about the business climate here in Utah County." (Triesault Depo. at 84:15-16); *see* Plaintiffs' Brief, pp.6-8. Triesault testified that Vanchiere's opinion was valuable "[f]or anyone who was contemplating starting a business and looking for a loan. Because his job was to advise people and pass judgment basically on whether or not they would qualify for a SBA loan." (Triesault Depo. at 84:18-22)

Triesault had an extensive background in the movie and television industry, being employed in various capacities involving film directing from 1979 to 1991 and participating as a member of the Director's Guild. (R. at 129). In 1991, Triesault moved to Utah in search of a lifestyle change and began investigating the movie theater business for approximately one year beginning in 1993. (R. at 127). Triesault subsequently decided to pursue the possibility of building a movie theater in Spanish Fork, Utah. *Id.* By 1994, Triesault had found a business partner, Kevin Hales, and had determined where the Theater should be located. (R. at 126). Triesault and Hales selected the Theater site without the advice of outside experts or consultants. (R. at 126).

During Triesault's involvement with Deseret in his attempts to procure SBA-backed financing, at no time did Vanchiere make any representations that he had any expertise in the movie business. (R. at 121). Rather, Vanchiere stated in his meetings with Triesault and Bori that "his job was to advise people and pass judgment basically on whether or not they would qualify for a SBA loan." *Id.* In fact, Bori testified during his deposition that he believed the "end purpose" of the SBA Loan was "a million dollars to start the business." (R. at 112). At or prior to negotiating over the acquisition of the Theater site, Triesault engaged the services and advice of attorney Paul Newton. (R. at 122-23). Newton advised Triesault in matters regarding the acquisition of the Theater site and with business matters generally, both before and after the acquisition of the Theater

site, including setting up Imagination Theaters, LLC and Imagination Theaters, Inc, as well as financing and dealing with Deseret. **(R. at 123)**³.

Triesault considered all movie theaters throughout Utah County to be in the same “area” and were a “concern” because he believed there were a limited number of movie-goers in Utah County. **(R. at 118)**. Triesault claims that plaintiffs’ “targeted market” included the area from southern Provo to south of Nephi, Utah **(R. at 271)**, but the evidence does not reflect that Vanchiere and the plaintiffs ever reached that conclusion together, or that Triesault’s opinion about the geographical market was accurate. Rather, that contention seems illogical on its face.

On or about May 27, 1998, plaintiffs’ SBA 504 loan closed. **(R. at 119)**. Bori is unaware of the existence of any verbal contracts between the plaintiffs and Deseret as of May 27, 1998. **(R. at 119)**. Bori is likewise unaware of the existence of any verbal contracts entered into between plaintiffs and Deseret subsequent to May 27, 1998. **(R. at 119)**. The Theater opened as a second-run theater and was unprofitable during the first

³ With regard to Newton’s involvement with Deseret, plaintiffs have stated that “Paul Newton’s interactions with the DCDC were very limited.” **(R. at 310)**. However, in Triesault’s deposition, he stated as follows:

Q. Okay. At any of these meetings was anyone else present besides yourself and Mr. Vanchiere?

A. Mr. Hales, my wife, I believe Mrs. Hales. Many of the staff members of Deseret Certified were there. Mr. Newton was there on several occasions. At a certain point Mr. Newton and Mr. Vanchiere were in constant consultation.

Q. How do you know that?

A. Because I talked with Mr. Newton who was negotiating helping Mr. Vanchiere with some negotiations.

(Triesault Depo. at 86:12-21) (relevant deposition testimony contained in Addendum).

nine months of operation. (**R. at 456**). Deseret's theater expert, Tony Rudman, testified that the initial opening of the Theater as a second-run theater created a permanent perception that the Theater was not showing first-run movies. (**R. at 674**). Likewise, the decision to open as a second-run theater shortened the window in which the Imagination Theater had the opportunity to exclusively develop a loyal clientele prior to the opening of the Provo Cinemark 16 Theaters. *Id.* Moreover, the plaintiffs' made questionable decisions regarding the quality of presentations at the Spanish Fork Theater that foreclosed the possibility of profitability. (**R. at 673**). Unlike the Spanish Fork Theater, the Provo Cinemark 16 Theaters were equipped with the latest projection and digital sound equipment, stadium seating, high-back loveseats, and larger auditoriums with larger screens. (**R. at 674**).

Consistent with standard practice in such loans, Deseret borrowed funds, through use of a debenture, to make the SBA 504 loan, and was obligated to repay those funds. (Vanchiere Depo at 32:8-21). In 504 loans, the SBA guarantees that a CDC, in this case Deseret, will repay the Debenture, should the stream of income from repayment of the Promissory Note between the CDC and the borrower be interrupted or cease. *Id.* at 36:21-25) (relevant deposition testimony contained in Addendum).

Subsequent to the SBA Loan funding, Vanchiere came to the Theater a number of times as Triesault's guest and was informed as to the state of the Theater business by Triesault. (**R. at 113**).⁴ Vanchiere discussed with Triesault various aspects of the future

⁴ Plaintiffs incorrectly assert that "even though Deseret nominally became plaintiffs' lender after the loan closed, it continued to provide plaintiffs its advisory and

Theater business including the number of screens to be constructed in the context of “how much money should be borrowed and how much lenders would give us, whether they would give us enough for six or eight.” (R. at 115). Vanchiere was involved in various meetings with Triesault and others, but made no specific decisions with regard to equipment selection, architectural plans, or construction, and made no specific representation that Vanchiere had particular knowledge or expertise in the movie theater business. (R. at 113-14). Triesault admits he never substituted Vanchiere’s will for his own. (R. at 113).

After the plaintiffs’ Theater construction had commenced, and before the Payson theaters were built, competing theaters in Provo opened in November of 1999 (the much larger and closer Cinemark 16 Theaters at the Provo Towne Centre shopping mall).⁵ Of course, plaintiffs admit that the opening of the Cinemark 16 Theaters negatively affected the profitability of the Imagination Theaters. (R. at 116). Neither Triesault nor Bori, who replaced Kevin Hales, have been able to quantify the extent of the negative effect caused by the Provo theaters. (R. at 116).

agency services.” (Brief, 15). Mr. Vanchiere’s involvement, such as advising plaintiffs to never personally take any money from the theater until it turned a profit, and advising plaintiffs that SBA approval was required before accepting money in exchange for a neighbor’s use of their parking lot, was specifically to service the SBA loan and to protect Deseret’s collateral interests in the corresponding Debenture obligation.

⁵ With regard to the relative distance between the theaters, the door-to-door driving time from the Spanish 8 Theater to the Provo Cinemark 16 Theater is only 11 minutes with a distance of only 7.2 miles. (R. at 673). By comparison, the distance from the Spanish 8 Theater to the Payson 6 Theater is 9.9 miles, or 13 minutes. *Id.*

Stadium Cinemas in Payson obtained an SBA 504 loan, also working through Deseret as the certified development company, and opened in 2000. (**R. at 459**). In the October 25, 1999 Stadium Cinemas Appraisal Report, the appraiser commented that twelve other screens were then located in southern Utah County, including the Spanish 8 Theater and three older single screen theaters. (**R. at 233**). The appraisal concluded that with the addition of Stadium Cinemas, there would be 15 first-run screens in Southern Utah County, although “according to various sources, there is one other movie theater development in the pipeline for Utah County. This is located in south Provo [the Cinemark 16 Provo Town Centre Theater].” *Id.*

Bori testified that he had no way of knowing where the Imagination Theater’s movie customers came from but felt he had a “good idea” that they came “as far as Beaver south to Orem north.” (**R. at 116**). One day in 1998 or 1999, Bori asked customers in the Theater line where they were from and made notes of their responses, but failed to keep his notes and doesn’t remember which movies were being shown at the Theater at the time. (**R. at 116**). Triesault attributes a significant reduction in Theater revenues to the opening of the Payson theaters, but has not conducted any surveys or studies to establish the connection. (**R. at 116**). Bori and Triesault admit that other factors, including a lack of good movies due to an actor’s strike, may have contributed to a drop-off in the Theater business. (**R. at 117**).

In the fall of 2000, plaintiffs themselves determined that the Imagination Theater was no longer viable. **(R. at 569)**. Plaintiffs subsequently went out of business and filed for bankruptcy in or about July 2002. **(R. at 569)**.

Pursuant to the Scheduling Order dated August 23, 2003, adopted by the court on September 4, 2003, plaintiffs' deadline for identifying expert witnesses was October 17, 2003. **(R. at 333)**. Plaintiffs designated no experts whatsoever. Deseret's theater expert, Tony Rudman, testified that a variety of market factors contributed to plaintiffs' business failure, particularly the Provo Cinemark 16 Theaters, and that there was no way of knowing whether the establishment of the Payson theaters even contributed to the failure of plaintiffs' business.⁶ **(R. at 672-73)**.

In their First Cause of Action, plaintiffs alleged that defendant Deseret breached fiduciary duties to plaintiffs by first helping plaintiffs, then later working with the group of Payson investors who opened Stadium Cinemas. **(R. at 004-05)**. In their Second Cause of Action, plaintiffs alleged that Deseret interfered with plaintiffs' prospective economic relations by facilitating the opening of a movie complex in Payson, thereby prohibiting plaintiffs from enjoying the economic relations with movie complex customers in the Spanish Fork/Payson area. **(R. at 002-03)**. Plaintiffs' Third Cause of Action alleged that defendant breached the implied covenant of good faith and fair dealing, and that defendant had an obligation not to deprive plaintiffs of the what they construe to be the intended benefits of the loan agreement. **(R. at 001-02)**.

⁶ On May 25, 2004, the court approved the stipulation of counsel to allow the testimony of Mr. Rudman. **(R. at 930)**.

For each Cause of Action, plaintiffs Triesault and Bori alleged that they sustained damages in an amount in excess of five million (\$5,000,000.00) dollars. (**R. at 001, 02, 04**). For each Cause of Action, they alleged that they suffered severe emotional distress in addition to their business and economic losses. *Id.* For each Cause of Action, they further alleged that they were entitled to punitive damages. *Id.*

On December 30, 2002, Deseret filed a Motion for Summary Judgment. As part of that Motion, Defendant asserted that it did not owe a legal duty to plaintiffs:

The essence of Plaintiffs' Complaint is that [defendant] DCDC, after having made a loan to Plaintiffs, made an SBA loan to one of Plaintiffs' competitors (the "Payson Theater") to Plaintiffs' detriment. Plaintiffs' Complaint should be dismissed because it seeks to impose a duty upon DCDC not recognized by law: i.e., a duty to not make loans to competing businesses. In particular, the depositions of Jon Triesault and of Raymon Bori disclose the absence of any factual basis to sustain any of the three causes of action alleged in the complaint.

(**R. at 111**). In a Minute Entry dated June 17, 2003, the district court (J. Claudia Laycock at that time) denied defendant's Motion for Summary Judgment, finding that issues of fact existed as to the content of that particular motion, but did not make a determination of what if any duty existed, or what issues would be addressed by the jury after the court defined for the jury the nature of any duty owed by defendant. (**R. at 320**).

On January 1, 2004, Judge Fred Howard rotated into the fifth division and assumed responsibility for the case. (**R. at 972**). On February 6, 2004, Deseret again moved the trial court for summary judgment, this time on the basis that plaintiffs had failed to meet their burden of proving that defendant Deseret caused the failure of the

Theater or any financial damage to plaintiffs, and that plaintiffs Triesault's and Bori's claims for emotional distress had no basis in law or fact. (R. at 435). The court heard arguments on the second Motion for Summary Judgment and subsequently denied summary judgment on the issue of causation and granted summary judgment on the claim for emotional distress.⁷ (R. at 620). Based on subsequent developments and statements by Judge Howard, the court was unaware of defendants' first Motion and arguments regarding duty at the time that he denied the second Motion for Summary Judgment.

In anticipation of trial, Deseret submitted its Trial Memorandum on May 7, 2004, wherein it pointed out the need for decision on various significant legal issues, which had been raised but not resolved in the prior summary judgment motions; defendant explained in that Memorandum that those issues could not be left to the jury and must be decided by the court as a matter of law. (R. at 746-760). Specifically, the Trial Memorandum addressed, *inter alia*, the need for the court to determine the existence and nature of any duty owed by Deseret to plaintiffs. *Id.* Defendant also addressed the legal standard and lack of facts establishing a fiduciary duty, the lack of expert testimony to support plaintiffs theory of causation, and public policy considerations involving certified development companies and the SBA. *Id.* On May 25, 2004, the trial court informed the parties that it wished to revisit all of the issues previously raised in the summary judgment motions and that it was vacating the jury trial scheduled for June 1-11, 2004. (R. at 930). On May 27, 2004, the court held a telephone conference to set both of Deseret's motions

⁷ Upon motion for reconsideration filed by the plaintiffs, the court subsequently reversed its ruling on emotional distress. (R. at 116).

for summary judgment for oral argument on June 8, 2004. (**R. at 931**). Counsel agreed to waive additional briefing and to rest on the previously submitted briefs and the motions were argued at a hearing on June 8, 2004, whereupon the court took the matter under advisement. (**R. at 972**).

After hearing oral arguments, and reconsidering the prior briefs regarding summary judgment, the trial court dismissed plaintiffs' Complaint with prejudice. (**R. at 946**). In doing so, the court found, as a matter of law, that Deseret was not plaintiffs' agent and did not owe a fiduciary duty, that plaintiffs have failed to produce adequate evidence to allow the issue of causation to go before a jury, and that there was insufficient evidence to defeat summary judgment on plaintiffs' intentional interference with prospective economic relations and violation of implied covenant of good faith and fair dealings causes of action. (**R. at 946**).

SUMMARY OF THE ARGUMENT

The trial court correctly ruled, as a matter of law, that Deseret did not owe plaintiffs a fiduciary duty and therefore could assist a potentially competing movie theater in procuring SBA-backed funding. The trial judge recognized that it was his responsibility to determine whether, in light of the relevant facts, Deseret owed any duty to the plaintiffs in the first instance. The very nature of the relationship between an SBA certified development company (Deseret) and a borrower (plaintiffs) is such that no fiduciary or agency relationship (which the law does not lightly recognize) can be established. Plaintiffs have failed to demonstrate that Deseret acted as plaintiffs' agent.

Deseret's role in plaintiffs' loan process negated plaintiffs' claims of a fiduciary relationship. Deseret was not an implied-in-law fiduciary for plaintiffs because plaintiffs have not presented any evidence that Deseret was subject to plaintiffs' control, nor that Deseret consented to be under plaintiffs' control. And finally, public policy disfavors imposing a fiduciary duty in this case. Plaintiffs cannot stop competition between small businesses or curtail the SBA loan program by its after-the-fact attempts to create a special relationship with Deseret.

Second, the trial court correctly ruled that expert testimony was required on the issue of whether Deseret's involvement in the loan application of plaintiffs' potential competitor, caused plaintiffs' business to fail. Plaintiffs never had or presented any evidence that Deseret's actions caused their business to fail. This is complex causation question, but plaintiffs lacked both factual and expert evidence. Without expert evidence, and given the various possibilities that contributed to the Theater's failure as admitted by the plaintiffs, there was no rational way for a jury to extract, without engaging conjecture or speculation, that the failure of the Imagination Theaters was caused by Deseret's assistance with the Payson Theater loan. Similarly, the jury could not possibly find that the Payson theater would have been unable to open without Deseret's assistance in finding SBA 504 financing.

Finally, the trial court correctly determined that plaintiffs failed to adduce evidence sufficient to withstand summary judgment on their intentional interference with prospective economic relations claims. Plaintiffs failed to prove the necessary elements

of such a claim. Because Deseret owed no duty to plaintiffs and it was appropriate for it to act as the SBA's CDC on other loans, there could be no improper means. In addition, as previously stated, Deseret did not cause plaintiffs' alleged damages, as required for an intentional interference claim.

Therefore, Deseret respectfully requests that this court uphold the trial court's careful and correct grant of Summary Judgment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT DESERET DID NOT OWE PLAINTIFFS A DUTY AS A MATTER OF LAW.

The trial court granted Deseret's Motion for Summary Judgment on the issue of whether Deseret owed a fiduciary duty to plaintiffs. In doing so, the trial court properly ruled as a matter of law that Deseret did not have a fiduciary relationship with plaintiffs, as they had alleged. Furthermore, to the extent that the existence of duty involved any partial question of fact, the court realized that reasonable jurors could not have reached any different conclusion. Whether or not there is a duty owed by one party to another, including the nature of that duty, is a question of law for the trial court to determine. In *Weber v. Springville City*, 725 P.2d 1360 (Utah 1986), the Utah Supreme Court held:

The question of whether a "duty" exists is a question of law, and this Court, which is not bound by the trial court's conclusions, may independently review the issue. Accordingly, the lack of legal conclusions in the record does not in any respect hinder our decision.

725 P.2d at 1363. Accord, *Hale v. Beckstead*, 2003 UT App. 240, 74 P.3d 628;

Fishbaugh v. Utah Power & Light, 969 P.2d 403, 405 (Utah 1998); *Loveland v. Orem*

City Corp, 746 P.2d 763, 765-66 (Utah 1987). Facing the trial below, the trial judge and parties confronted a significant practical problem. Before the court could charge the jury to decide whether there was a breach of duty, the parties and the jury needed to know the nature of any such duty. The trial judge must make such legal determinations; it was his responsibility to determine whether, in light of the relevant facts, the Defendant owed any duty to the plaintiffs in the first instance.

Plaintiffs contend that Deseret was a “fiduciary,” with the legal duties attendant to that status, based on arguments that (1) it was an “agent” owing a fiduciary duty of loyalty, and/or (2) it became an implied-in-law fiduciary on account of the “special and unique relationship” between the parties. The consideration, and ultimately the final determination, of such issues are reserved for the trial court, not the finder of fact. In an attempt to overcome the principle that duty is a question of law, and to put their case before a jury, plaintiffs argued that Deseret acted as plaintiffs’ agent, and that the determination of agency contains factual nuances reserved for a jury. Indeed, plaintiffs assert that there is “ample evidence that Deseret acted as plaintiffs’ agent, and the question of the existence of an agency relationship should not have been resolved on a motion for summary judgment.” (Plaintiffs’ Brief, p. 26). Plaintiffs’ assertion neglects the practical problem that the jury needs instructions on the law before it can make factual determinations based thereon, and ignores the court’s duty to determine issues of law.

Sound policy supports the trial court’s grant of summary judgment finding no duty. The law does not lightly recognize the existence of a confidential relationship. See *Von*

Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985). Nevertheless, plaintiffs argue case law to suggest that a fiduciary relationship is “generally a question of fact.” Contrary to plaintiffs’ assertion, *Von Hake* does not support their position. In *Von Hake*, the Utah Supreme Court reviewed a verdict in favor of an 82-year old property owner who sued the purchaser for fraud, and breach of an allegedly confidential relationship giving rise to a fiduciary duty. The elderly seller, who had an opportunity to consult with his attorney, alleged that the purchaser committed fraud in inducing him to sign over the property. The Court upheld the verdict; however, in doing so, it likewise determined that no fiduciary relationship existed between the plaintiff and purchaser. *Id.* at 770.

While the *Von Hake* Court noted that the existence of a “confidential relationship” is generally a question of fact,⁸ it nevertheless found as a matter of law, as the reviewing appellate court, that there was no fiduciary duty under these circumstances. The Court explained that with regard to a confidential or fiduciary relationship, circumstances may arise when, “even viewing the evidence in the light most favorable to [the] verdict, the evidence is insufficient to support it.” *Id.* The Court also found that “a confidential relationship arises when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party.” *Id.* at 669 (citing *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978)). The Court stated:

The law presumes that one ordinarily makes his or her own judgments, however imperfect, and acts on them; it does not

⁸ The terms “confidential” and “fiduciary” have sometimes been used interchangeably by the Utah Supreme Court in past cases. *See, e.g., State Bank of Southern Utah v. Troy Hygro Systems, Inc.*, 894 P.2d 1270, 1275 (Utah 1995).

readily assume that one's will has been overborne by another. Therefore, the law does not lightly recognize the existence of a confidential relationship.

Id. at 770 (emphasis added). In reaching the conclusion that “the evidence is insufficient to establish that a confidential relationship arose,” the Court examined extensively the evidence adduced by the plaintiff at trial. *Id.* The Court found “no long-established relationship of trust,” and no relationship that “traditionally imposes a fiduciary duty, such as an attorney/client relationship.” *Id.* Likewise, Von Hake knew that he could and should consult his own attorney, and there was “no evidence that at any time Von Hake relinquished control over his own decision making.” *Id.* After reviewing the facts, the Utah Supreme Court held: “Accordingly, the evidence here cannot support a finding of a confidential relationship.” *Id.* (emphasis added).

The circumstances in *Von Hake* are remarkably similar to those in this case. In the case at bar, plaintiff Triesault possessed experience in the movie and entertainment business, being employed in various capacities involving film directing, participating in the Director's Guild, investigating the movie theater business in Utah, finding a business partner, and located the property in Spanish Fork for a movie theater. (**R. at 126, 127, 129**). Triesault and his business partner selected the theater site without the advice of outside experts or consultants. (**R. at 126**).

In contrast, Deseret and Vanchiere never claimed to have movie or theater experience. At no time did Vanchiere make any representations that he had any expertise in the movie business during Triesault's involvement with Deseret in order to obtain SBA

financing. (R. at 121). Rather, Vanchiere indicated during his meetings with Triesault and Bori that “his job was to advise people and pass judgment basically on whether or not they would qualify for a SBA loan.” *Id.*

Moreover, plaintiffs had an attorney and consulted with him. At or prior to negotiating the acquisition of the Theater site, Triesault engaged the services and advice of attorney Paul Newton. (R. at 122-23). Newton continually advised Triesault in matters regarding the acquisition of the Theater site and with business matters generally, both before and after the acquisition of the Theater site, including setting up Imagination Theaters, LLC and Imagination Theaters, Inc, as well as financing, and dealing with Deseret. (R. at 123). During Triesault’s attempts to procure SBA-backed financing, Mr. Newton and Vanchiere engaged in frequent consultation and negotiation. (Triesault Depo. at 86:12-21). They made their own decisions about location, business plan, type of facility, showing second-run movies, the subsequent change to first-run movies, and all other key business decisions. When Vanchiere met with Triesault and others, he made no specific decisions with regard to equipment selection, architectural plans, or construction, and made no specific representation that he had particular knowledge or expertise in the movie theater business. (R. at 113-14). Indeed, plaintiffs’ only reliance on Deseret and Vanchiere was in the loan application and processing. Significantly, in exactly the same way that the elderly seller in *Von Hake* failed to adduce evidence that he relinquished control over his own decision making, Triesault admits that he never substituted Vanchiere’s will for his own. (R. at 113).

Plaintiffs' claim of reliance extends far beyond the loan, however, and is without factual or legal basis. Perhaps most important, the very nature of the relationship between plaintiffs and Deseret refutes the possibility of a fiduciary relationship. Plaintiffs knew that they were getting an SBA loan, and the most superficial level of direct inquiry or independent research would have readily established that the SBA is charged with administering a loan program to all qualifying businesses, even competing businesses. Deseret was the only SBA certified development company in the area at the time in question, so of course it must work with competing businesses in their various SBA loans, consistent with the nature of the program. As will be set forth more fully, the facts cannot support a finding that a confidential relationship existed.

By virtue of the *Von Hake* Court's determination of "insufficient evidence" to support a verdict on the issue of a fiduciary relationship, a trial court must review the facts to determine whether they are sufficient to support a claim that a fiduciary duty exists or has been created. When a party properly puts that issue before the trial court on a motion for summary judgment, as in the trial court below, and the opposing party is unable to present facts sufficient to support a finding of a fiduciary relationship, as below, then summary judgment provides the appropriate resolution.

The existence of a confidential relationship may present a question of fact. Nevertheless, it is well-established that "when the evidence is insufficient to support a verdict, the trial court has the duty to decide the issue." *Bingham v. Rasekh*, 2003 UT App 434, 2003 WL 22966236, *1 (unpublished decision, see Addendum) (rev'd on other

grounds) (citing *Rhoads v. Harvey Publ'ns, Inc.*, 700 P.2d 840, 846 (Ariz. Ct. App. 1984)). For example, in *Bingham*, the Utah Court of Appeals held that even if it were to assume that a confidential relationship existed, Bingham did not relinquish control over her own decision-making and there was no evidence of the requisite exercise of extraordinary control. *Id.* Consequently, Bingham “failed to adduce sufficient evidence to defeat summary judgment” on the issue of fiduciary duty. *Id.*

Likewise, the Utah Court of Appeals, in *State Bank of Southern Utah v. Troy Hygro Sys. Inc.*, 894 P.2d 1270, 1275 (Ut. Ct. App. 1995), affirmed summary judgment finding that the bank had no special or fiduciary relationship with its borrower. The *Troy Hygro* court noted that despite the allegations that Hygro trusted the bank, the plaintiff presented no evidence in support of these claims. *Id.* Stating that “mere confidence in one party by another is not sufficient alone to constitute a fiduciary or confidential relationship,” the Court of Appeals held that the claims “fail as a matter of law.” *Id.* More recently, the Utah Court of Appeals affirmed the dismissal of a confidential relations claim in *Kuhre v. Goodfellow*, 2003 UT App 85, ¶20, 69 P.3d 286. The Court of Appeals disagreed with the plaintiff’s assertion that the trial court “should not be allowed to make fact-intensive determinations as to whether or not a confidential relationship existed.” *Id.* at ¶19. The court stated: “Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal.” *Id.* (citing *Chapman v. Primary Children’s Hosp.*, 784 P.2d 1181, 1186

(Utah 1989)). The *Kuhre* court stated that the facts alleged by the plaintiffs, “even when assumed to be true, do no rise to the level of a confidential relationship.” *Id.*

Plaintiffs apparently contend that this case raises at least mixed questions of fact and law. However, even if that were true, the trial court’s decision was appropriate and should be upheld. See *State v. Hansen*, 2002 UT 125, ¶26 n.3, 63 P.3d 650 (“A mixed question involves the application of law to fact, or stated more fully, the determination of whether a given set of facts comes within the reach of a given rule of law.”). In such instances, a reviewing court reviews “legal questions for correctness, but [it may] grant a trial court discretion in its application of the law to a given fact situation.” *Covey v. Covey*, 2003 UT App. 380 at ¶17; See also, *State v. Irizarry*, 945 P.2d 676, 683 (Utah 1997) (“while in reviewing a mixed question of fact and law appellate courts are free to make an independent determination of the trial court’s conclusions . . . the trial court’s factual findings shall not be set aside on appeal unless clearly erroneous.”).

In reaching conclusions on legal issues, a court must determine what evidence is available and must consider such facts. A factual determination of liability must rest on a breach of a legally cognizable duty. “Without a duty, there can be no negligence as a matter of law and summary judgment is appropriate.” *Nelson v. Salt Lake City*, 919 P.2d 568, 572 (Utah 1996). It is apparent that Judge Howard correctly recognized that the determination of whether a duty exists is one for the trial court. Accordingly, the jury could consider whether Deseret breached a fiduciary duty only if the court had ruled that a duty existed, and had defined the nature and scope of that duty.

In *First Sec. Bank of Utah N.A. v. Banberry Development Corp.*, 786 P.2d 1326

(Utah 1990), the Utah Supreme Court recognized two types of fiduciary relationships:

(1) [T]hose specifically created by contract such as principal and agent, attorney and client, and trustee and *cestui que trust*, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, and executor or administrator of an estate, among others, and (2) [T]hose implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions. *Id.* at 1332.

After reviewing the facts in the light most favorable to the plaintiffs, the trial court properly determined as a matter of law that (A) plaintiffs failed to demonstrate that Deseret acted as plaintiffs' agent and that it was consequently not a fiduciary, (B) Deseret's role in plaintiffs' loan process negated plaintiffs' claims of a fiduciary relationship, (C) Deseret was not an implied-in-law fiduciary for plaintiffs, and (D) public policy disfavors imposing a fiduciary duty in this case.

A. Plaintiffs have failed to demonstrate that Deseret acted as plaintiffs' agent.

Plaintiffs argue that they were simultaneously dependent on Vanchiere's judgment and expertise and that Vanchiere was their agent, such that they had the right to control his conduct. The trial court astutely recognized that far from controlling Vanchiere's and Deseret's conduct, plaintiffs "have repeatedly emphasized the direction and control defendant allegedly had over plaintiffs." (**R. at 968**). The very nature of the relationship, as well as the applicable facts, establish that no such control existed, in either direction. Deseret assisted plaintiffs in their loan application and processing, and then became their lender, at least nominally. Neither party controlled the other. Accordingly, the trial court

correctly determined that Vanchiere and Deseret were not acting as plaintiffs' agents, and that the contract created no fiduciary relationship.

The Restatement (Second) of Agency § 1 (1958) defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Quoted in *Mecham v. Consolidated Oil & Transp. Inc.*, 53 P.3d 479 (Utah Ct. App. 2002). "To be an agent, a person must be authorized by another to act on his behalf and subject to his control." *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1269 (Utah 1998).

The Utah Supreme Court stated in *Banberry*, supra, that "the relation of mortgagor and mortgagee is not of a fiduciary character." 786 P.2d at 1332. Furthermore, "the relationship between a borrower and a lender does not ordinarily create [a] confidential relationship," *Id.* at 1341, n. 21. This line of reasoning tracks the SBA's interpretation of 13 C.F.R. § 103.1(a) and (b) (1996)⁹ wherein it states:

Neither the development company nor its employees is an agent for a 504 loan application in which the CDC is involved. SBA SOP 50-10(4)(B).

⁹ That Regulation defines an agent as:

... an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an applicant or participant by conducting business with SBA. (See Addendum).

Of course, that Regulation must be read as consistent with other related Regulations, which specifically state that a CDC is not an agent.

The trial court found that the relationship between plaintiffs and Deseret is “more akin to that of an intermediary than of principal/agent.” (**R. at 967**). Actually, that is a more favorable view of plaintiffs’ argument than the reality of the situation. Under the SBA 504 loan program, the CDC ultimately occupies a potentially adverse position with the borrower, because the CDC in effect becomes the lender and may have to sue the borrower on the obligation.

Plaintiffs have attempted to explain away, through unsupported argument, the SBA’s statement that a CDC is not an agent. To do so, plaintiffs leap to the self-serving conclusion that CDCs are non-agents only when loaning money to applicants. This presupposes that a CDC, in the plaintiffs’ words, “can wear two hats,” both as a representative of borrowers before the SBA and as a lender. This is not the case.

As a CDC, Deseret does not petition the SBA on behalf of the applicant. Rather, it assists in the loan application process, interacting with both the SBA and the borrower on the loan, then becomes the lender. The borrower makes application to the CDC for a loan; that loan is reviewed by a credit committee, which determines whether the applicant is creditworthy and whether it has complied with the eligibility rules that govern the source of funds used to make the loan. Once reviewed, Deseret borrows funds to make the loan. Therefore, the stream of income used by Deseret to repay the obligation comes from the repayment of a Promissory Note between Deseret and the applicant/borrower. The SBA guarantees that the CDC will repay the Debenture obligation, should the stream of income from repayment of the Promissory Note be interrupted or cease.

Plaintiffs grossly misconstrue both the CFR provisions and Deseret's activities before the SBA by contending, without factual or expert support, that Deseret was a "lender service provider" with regard to the subject loan. Plaintiffs do so not because of the nature of the relationship, but because of language in the regulations suggesting that a "lender service provider" as defined at 13 CFR 103.1(d), is a type of agent. However, plaintiffs simply do not understand, or misconstrue, those regulations and the definition of "lender service provider."¹⁰ Under the SBA program, a "lender service provider" provides services to lenders, not to applicants or borrowers. The agency relationship that exists in such cases is one of *agency between the lender service provider and the lender*. A CDC is a lender in and of itself and provides the services mentioned to itself. If there were a lender service provider in the context of the subject loan, that lender service provider would have been the agent for Deseret, not for the plaintiffs as borrowers. A CDC is not a lender service provider with respect to its 504 lending activity.¹¹

Plaintiffs' position is that there is a discrepancy between 13 CFR 120.10 and the SBA statement. However, far from there being a conflict, the SBA has deliberately and

¹⁰ 13 CFR 103.1(d) provides as follows: "Lender Service Provider means an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender. SBA determines whether or not one is a 'Lender Service Provider' on a long-by-loan basis. (See Addendum).

¹¹ A CDC can be a lender service provider when it provides services to other lenders. For example, a CDC may have an agreement with a bank to conduct some servicing activities for the bank on loans where the bank is the private sector first trust deed lender and the CDC/SBA is the 504 second Trust Deed lender. In such cases, the CDC is compensated by the bank, not the borrower, for services such as monitoring the currency of property hazard insurance, performing annual field visits, and performing other servicing activities as directed by the bank.

specifically clarified its stance by expressly stating that a CDC is not an agent, despite contentions to the contrary. Particularly, in the SBA's SOP 50-10(4)(B), the question is posed: Are Development Companies Agents? The clear response is as follows: "For purposes of this rule, neither the development company nor its employees is an agent for a 504 loan application in which the CDC is involved." (Relevant SBA Standard Operational Procedures (SOP) Informational and Interpretational Data is contained in the Addendum.) *Id.* Moreover, even if there were a conflict, the more definite statement (a CDC is not an agent) controls over the more general provision (definition of "agent" without reference to CDCs). See *State ex rel. Public Service Comm'n v. Southern Pac. Co.*, 79 P.2d 25 (Utah 1938) ("Where there is a general provision in a statute and a specific one, the specific one must be given full effect."); see also *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 561 (10th Cir. 1979) ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way . . . the latter will prevail . . . unless it appears that the legislature intended to make the general act controlling.").

Consequently, the trial court correctly determined that in the absence of some evidence from plaintiffs that they exerted control over Deseret and that Deseret consented to such control, no agency relationship existed and Deseret therefore did not owe a fiduciary duty. Deseret, as a CDC, is a lender. Not only does Utah case law hold that "the relationship between a borrower and a lender does not ordinarily create a confidential relationship" (see *Banberry, supra*, 786 P.2d at 1332), but the SBA has specifically stated that a CDC is not an agent for a 504 loan application.

B. Deseret's role in plaintiffs' loan process negates plaintiffs' claims of a fiduciary relationship.

At most, Deseret acted as an “intermediary” between plaintiffs and the SBA for the purpose of securing the SBA Loan, not as plaintiffs’ agent. However, a more accurate description of Deseret’s role is agent for the SBA in processing the loan, and subsequently, lender to plaintiffs for the SBA loan itself. To the extent that Deseret’s role was that of “intermediary,” as characterized by the trial court, that role ended once the authorization for the SBA loan was obtained. In the loan application process and especially in administering the loan, Deseret owed a duty not to the plaintiffs, but to the SBA. Thereafter, Deseret acted in the same capacity any lender would act, to protect its collateral interests and to collect the payment owed to it, which was necessary to repay Deseret’s corresponding Debenture obligation. Deseret was, in sum, servicing its loan, rather than acting as an agent or advisor to plaintiffs. As a CDC, Deseret “must . . . market the 504 program, package and process 504 loan applications, and close and service 504 loans.” 13 CFR 120.827 (emphasis added).

Plaintiffs’ argument that they relied on Deseret as their “expert business evaluator” and therefore their agent is completely without merit. The evidence does not support such a conclusion, as determined by the trial court. Indeed, an agent “is not . . . in a fiduciary relation with the principal as to matters in which he is not employed.” The Restatement (Second) of Agency §390 cmt. d (1958) (*quoted in Bancoklahoma Mortg. Corp v. Capital Title Co.*, 194 F.3d 1089, 1104 (10th Cir. 1999)). Plaintiffs cannot support their contention that involvement in processing the SBA 504 loan application also required Deseret to act

in any special capacity for plaintiffs throughout the entire course of the business's future. Plaintiffs' theory of continued and ongoing agency is impractical and anti-competitive. The SBA's efforts to offer the 504 loan program through CDCs would grind to a halt and produce endless litigation if plaintiffs' theory were accepted by the courts.

A certified development company's primary responsibility is to the SBA, to ensure that only qualified borrowers submit loan applications, and to ensure that such applicants/borrowers comply with all requirements of the SBA. This responsibility, as noted, also affects the CDC in that the CDC is ultimately obligated to repay the borrowed funds. As a result, a certified development company will advise the loan applicant of technical requirements, such as the proper completion of forms, the necessary submission of financial statements and other materials, and appropriate completion of the application. In order to ensure that the loan qualifies, the certified development company must also review the loan application materials of the applicant, including the business plan and proposed operational approach. If the applicant has a generally viable plan, but is deficient in some details, the certified development company will inform the applicant of those deficiencies so that it can make modifications and reach qualified status. It should be obvious to plaintiffs that Deseret's providing such information, instruction and assistance did not make Deseret the agent of plaintiffs, either for purposes of obtaining the loan or throughout the plaintiffs' business operations thereafter. In fact, upon completion of the application materials and approval of the loan, Deseret was the lender and plaintiffs were the borrowers. Any intermediary relationship necessarily terminated once plaintiffs procured the bargained-for financing.

The facts of this case, even when considered in the light most favorable to the plaintiffs, demonstrated that Deseret was at most an intermediary between the SBA and plaintiffs for the limited purposes of obtaining and servicing the SBA loan for plaintiffs. Deseret has never claimed ownership of plaintiffs' property,¹² never had a financial interest in property purchased by the plaintiffs,¹³ never induced plaintiffs to sell anything of which it was the unfair purchaser,¹⁴ and neither Deseret nor the officers and directors of plaintiffs' theaters were ever plaintiffs' officers or employees.¹⁵

Plaintiffs' assertions, if taken to be true, would impose responsibilities on CDCs virtually equivalent to those duties owed by directors and officers of a corporation, but without the attendant rights and privileges. As found by the trial court, the relationship between Deseret and plaintiffs stemmed from an arms-length contract, which by its very

¹² Thus distinguishing this case from *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991), where the issue of agency was allowed to go to trial.

¹³ Distinguishing the present case from *Capital Bank v. MVB Co.*, 644 So.2d 515 (Fla. App. 1994) and from *Security Pacific National Bank v. Williams*, 262 Cal. Rptr 260 (Ct. App. 1989) (opinion not officially published). Those courts allowed the issues of fraud and breach of fiduciary duty against the defendant banks go to trial based on the allegation that the banks induced the plaintiffs to purchase certain worthless assets so that the banks would not bear the loss of the sellers' non-performing loans.

¹⁴ Distinguishing the present case from *Deist v. Wachholz*, 678 P.2d 188 (Mont. 1984), where the court allowed a claim for damages and equitable relief by a widow who was induced to sell her ranch by a bank official who failed to disclose he was in partnership with the buyer.

¹⁵ Distinguishing this case from *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476 (Kent. 1991), where the court allowed trial to proceed against a bank on the issue of conspiracy to breach fiduciary duty where the bank which financed a newly formed competitor of the plaintiff was alleged to have known that the plaintiff's former officer formed the competitor in breach of his fiduciary duties to the plaintiff.

nature precluded Deseret from owing a special duty of loyalty to the plaintiffs. *See Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1064 (Utah 1996) (“when the parties deal ‘at arm’s length’ or in an adversarial relationship, no fiduciary relationship can be said to exist.”) (emphasis added by trial court). Furthermore, plaintiffs’ theory is ripe with potential abuse – borrowers could effectively block other businesses from obtaining the benefits of SBA or other loan programs by making sure that they obtained the first loan among competing businesses in an area, then claim that all other businesses were barred from obtaining SBA loans because of an alleged agency relationship with the SBA’s certified development company.

C. Deseret was not an implied-in-law agent.

Alternatively, plaintiffs have argued that Deseret had a fiduciary duty to plaintiffs, which is implied due to the relationship between Vanchiere and the plaintiffs. Finding an implied fiduciary relationship with a resulting legal duty “where none is expressed in the contract has much the same effect as judicially rewriting the contract for the parties.”

Banberry, *supra*, 786 P.2d at 1341, n.24.

In *Banberry*, the Utah Supreme Court explained that “the relationship between a borrower and a lender does not ordinarily create [a] confidential relationship,” *Id.* The court noted that “a fiduciary relationship implies a condition of superiority of one of the parties over the other.” *Id.* at 1333. In summarizing the many cases bearing on the issue of whether a fiduciary duty exists, the court stated:

. . . [I]t is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental

strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other.

Id. at 1333.

The trial court in this case correctly examined the allegations and evidence presented by plaintiffs, and determined that Deseret's actions and the nature of the relationship "cannot as a matter of law confer a fiduciary duty upon [Deseret]." (**R. at 960**). In reaching this conclusion, the trial court found as follows:

Simply put, all of the facts of this case considered in the light most favorable to Plaintiffs demonstrate that Plaintiffs were not dependent on the Defendant in the operation of their business, nor were the Plaintiffs inferior to Defendant in weakness of age, mental strength, business intelligence, or knowledge, that would give Defendant an advantage over the plaintiffs. *Id.*

The trial court's ruling is similar in most respects with *Semenov v. Hill*, 982 P.2d 578, 580 (Utah 1999), where the Utah Supreme Court explained that "merely depending on another does not create a fiduciary relationship," and that "the general rule is no fiduciary obligations exist between a buyer and seller of any property." (citations omitted). In a different case, the Utah Supreme Court granted summary judgment and explained: "Under Utah law, a fiduciary or confidential relationship will be found only when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party." *Gold Standard, Inc, supra*, 915 P.2d at 1064. A determination of extraordinary influence requires more than mere confidence or reliance, as stated by the Utah Supreme Court:

Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.

Von Hake, supra, 705 P.2d at 769. A fiduciary relationship means that the individual claiming the benefit of the relationship must have so trusted the other as to substitute the other's will for his own. See id. at 770. Moreover, a fiduciary relationship will be found to exist only if the evidence demonstrates "the placement of trust and reliance such that the nature of the relationship is clear." *Hal Taylor Associates v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982).

In the current case, plaintiffs have not presented any evidence that Deseret was subject to plaintiffs' control, nor that Deseret consented to be under plaintiffs' control. Rather, plaintiffs have alleged that they were completely at the mercy of Deseret and that they placed their trust and confidence in Vanchiere as their business advisor. Noticeably absent from plaintiffs' position is the type of control, let alone allegations of such control, which is required to create a fiduciary relationship that correlates with agency. There are no facts that would give rise to the implication that plaintiffs were unequal to Deseret. Instead, plaintiffs relied on the advice of their own attorney, Paul Newton, at all times in the transactions that form the basis of plaintiffs' Complaint. (**R. at 122-23**). Plaintiffs never trusted Deseret so as to substitute its will for their own. Triesault admits he never substituted Vanchiere's will for his own. (**R. at 113**).

D. Public policy disfavors plaintiffs' arguments.

In reaching its decision, the trial court correctly concluded that “public policy strongly opposes conferring any such duty” on CDCs that plaintiffs seek to impose. (**R. at 959**). To imply a common law fiduciary duty on a CDC or other lender, such that it would be precluded from lending to potential competitors of their borrowers, would wreak havoc with the availability of public, small business financing. Companies seeking to insulate themselves from competition could simply arrange for loans from the CDC and from major banks, thereby limiting the borrowing ability of potential competitors. Furthermore, establishing a common law fiduciary duty of a CDC to its borrowers is within the domain of legislative judgment. The policy considerations against plaintiffs’ position are well-stated in *Washington Steel Corporation v. TW Corporation*, 602 F.2d 594 (3rd Cir. 1979), which found that a bank should not be enjoined from making a loan to one of its borrowers competitors even if the bank may have used confidential, non-public information in the decision to make the loan to the competitor. The policy of the United States favors “free markets, free entry into business and opportunities for the expression and growth of personal initiative and individual judgment.” 15 USC 631(a).¹⁶

¹⁶ Plaintiffs argue that there is a difference between private loans and SBA loans. They state that “the function of the SBA loan program is to “aid, counsel, assist, and protect” small businesses. (Plaintiffs’ Brief at 38) (quoting 15 U.S.C. § 631). Plaintiffs assert, without basis, that Deseret “had none of its own money at stake” and thus “had no incentive to refuse to accept the Payson Group as a client even though it would cause a default under the plaintiffs’ loan.” *Id.* As previously set forth, Deseret, as a CDC, is a lender and is obligated to repay funds. Ultimately, plaintiffs’ distinction is unavailing. They attempt to insert “successful small businesses” into the language of 15 U.S.C. § 631, but no such heightened obligation or purpose exists in the Code. As a point of reference, the existence of other competing SBA borrowers is not required on the SBA application check list. It does ask, for very different reasons, if the applicant has or had an SBA loan.

Taken to its logical end, plaintiffs' position would adversely impair and restrict future lending. Under the plaintiffs' theory, the CDC and SBA alike would be saddled with the obligation to investigate every other SBA loan in the area to determine whether the current applicant's business could possibly compete with existing businesses. Moreover, the CDC and other lenders would be forced to determine the potential geographical competitive area of a business, as well as the loss of market share to existing borrowers before making a loan to a competing business. By way of example, a CDC could thus be forced to limit its lending to only one gas station in a city, a given street or even on a particular intersection. Grocery stores, tire stores, car wash businesses or auto mechanics might be viewed as being in competition with a gas station or other service station. The SBA, a CDC or any lender would be completely hamstrung in its lending activities by fear of litigation if it made the wrong decision about the scope and nature of potential business competition. The fallacy of plaintiffs' position is shown by the fact that plaintiffs have defined their "targeted market" as extending from southern Provo to south of Nephi, Utah. If plaintiffs' arbitrary, unilateral determination of that geographical market were determinative, then they could prevent SBA-financing to any other theaters Noticeably absent is any question about competing SBA borrowers.

Moreover, plaintiffs' have failed to address the remaining part of 15 U.S.C. §631(a), which addresses fostering competition:

Only through full and free competition can free markets, free entry into business and opportunities for the expression and growth of personal initiative and individual judgment be assured.

Plaintiffs' position, if supported by the courts, would virtually obliterate the intended effect of this statute, which is designed to promote "full and free competition."

in that entire area. Under their theory, plaintiffs' could have easily named an even larger area, or a broader scope of their business enterprise, foreclosing even more competition.

In addition, various other considerations would disrupt lending. A CDC could potentially violate a supposed duty by lending to a video store simply if the video store business might take away a portion of a borrower's theater business. Moreover, issues relating to the amount of time the CDC must wait before it could make a loan to a business potentially competing with an existing borrower would be virtually impossible to appropriately and fairly determine. The effect of plaintiffs' argument is that the CDC would be limited to making only one loan per type of business in a given large region. Economic development would thereby be repressed rather than fostered. Plaintiffs are not entitled to protection from competition simply because they obtained their loan first.

II. THE DISTRICT COURT PROPERLY RULED AS A MATTER OF LAW THAT PLAINTIFFS CANNOT ESTABLISH PROXIMATE CAUSE.

A business such as the Imagination Theaters may succeed or fail due to a huge array of factors. In nearly every case, as in this case, it would be impossible to isolate any one factor as the cause of that success or failure. However, given the complexity of the issue, to make even a threshold showing that competition from Payson Stadium Cinemas constituted one of those factors, plaintiffs must have expert testimony to assist the jury. Plaintiffs had no experts. Without expert testimony to address the complex issue of causation, plaintiffs' case properly failed as a matter of law.

A. Utah law requires plaintiffs to meet their burden on the issue of proximate cause, without speculation, and with the assistance of expert testimony in complex matters.

First, plaintiffs could not meet their burden of proving that Deseret either directly or proximately “caused” the competition of which plaintiffs complain. To prevail on a negligence claim, a plaintiff must establish “(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached the duty, (3) that the breach of duty was the proximate cause of the plaintiff’s injury, and (4) that the plaintiff in fact suffered injuries or damages.” *Hunsaker v. State*, 870 P.2d 893, 897 (Utah 1993). In the case at bar, plaintiffs have completely failed to present any evidence, let alone expert evidence, to establish that the conduct of the defendant proximately caused the plaintiffs’ business failure. Accordingly, plaintiffs’ claim failed as a matter of law.

It is well-established in Utah that juries may not speculate regarding causation. The Utah Court of Appeals recently held that even if a duty is shown to exist, a plaintiff “still must present sufficient evidence that would allow a jury to conclude that such breach was a proximate cause” of the alleged injury. *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 12, 83 P.3d 391. Summary judgment on the issue of causation is appropriate, “notwithstanding the general rule that causation is a jury issue,” when the plaintiff cannot “show that a jury could conclude, without speculation” that the injury would not have occurred but for the defendant’s breach. *Id.*; see also *Harline v. Barker*, 912 P.2d 433 (Utah 1996) (“Issues regarding proximate cause can be decided as a matter of law . . . when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law.”) (emphasis added).

The *Thurston* court noted that although the plaintiffs' witnesses had expressed their opinion "that the Defendants breached their duties, there is no expert testimony or lay opinion that addresses proximate cause." *Id.* at ¶20. In fact, even the expert affidavit was purely speculative. *Id.* Consequently, the Utah Court of Appeals affirmed the trial court's determination that "summary judgment was appropriate due to the lack of evidence concerning the proximate cause" of plaintiffs' injury. *Id.*

The Court further explained:

[P]roximate cause is 'that cause which, in the natural and continuous sequence[] (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause - - the one that necessarily sets in operation the factors that accomplish the injury.

Id. at ¶20. (citing *Mahmood v. Ross*, 1999 UT 104, ¶ 22, 990 P.2d 933) (alterations in original). Indeed, "[d]emonstrating material issues of fact with respect to defendants' negligence is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between the alleged negligence and the injury." *Id.* at ¶16 (citing *Mitchell v. Pearson Enterprises*, 697 P.2d 240 (Utah 1985).

Utah courts have consistently held that juries are not "free to find a causal connection between a breach and some subsequent injury by relying on unsupported speculation." *Mahmood*, 990 P.2d at 938. In *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 601 (Utah Ct. App. 1995), the Utah Court of Appeals affirmed summary judgment due to the complete absence of evidence on causation and explained that the plaintiff "has not met his burden to establish a prima facie case of negligence." In *Clark*, the plaintiff

brought suit after he was injured during a multi-car collision while traveling on I-15 in Davis County. *Id.* at 600. He had exited his vehicle, jumped over the guardrail, and fell down the embankment, yet had no memory of the accident after exiting his vehicle. *Id.* The court in *Clark* explained that “no direct evidence exists on the issue of causation” and that even the plaintiff’s own expert was “unable to determine the mechanism of plaintiff’s injury without speculating or guessing.” *Id.* The court affirmed summary judgment and agreed with the trial court that “the jurors would have to engage in rank speculation to reach a verdict.” *Id.* at 600. The case at bar presents a similarly impossible situation for a jury. There is no rational way for a jury to extract, from all possible explanations for the failure of the Imagination Theaters, a single item like the competition of a theater 9.9 travel miles away, and find that to be the proximate cause. Similarly, the jury could not possibly find that the Payson theater would have been unable to open without Deseret’s assistance in finding SBA 504 financing.

Evidence presented by a plaintiff must “do more than merely raise a conjecture.” *Sumsion v. Streater-Smith, Inc.*, 132 P.2d 680, 683 (Utah 1943). When “causation is left to conjecture, the plaintiff must fail as a matter of law.” *Mahmood, supra*, 990 P.2d at 933. See also, *Mitchell, supra*, 697 P.2d at 246 (“When the proximate cause of an injury is left to speculation, the claim fails as a matter of law.”); *Stahel v. Farmers Cooperative of Southern Utah*, 655 P.2d 680 (Utah 1982). This is true regardless of whether the claim is a tort claim or a contract claim:

Categorizing some of those acts as contract breaches does not eliminate the need to establish a causal connection.

Defendants' acts, whether breaches of contract or torts, must be causally linked to Plaintiffs' damages.

Thurston, supra, 2003 UT App 438 at ¶23. See also, *Corbin on Contracts*, Vol.11, §997 at p.17 (interim ed. - originally published in 1964) ("Another form of the rule is that damages are not recoverable for losses suffered or gains prevented unless the requirements of the law as to 'proximate' causation are satisfied. The form of this rule is the same whether it is being applied in the field of contracts or in the field of torts;").

Plaintiffs cannot establish either aspect of causation under Utah law. They cannot show that their theater would have succeeded without competition from the Payson theater. They cannot show that the Payson theater would not have come into existence even without Deseret involvement.

Business success or failure is a complex issue, but plaintiffs had no expert to assist the jury. Plaintiffs argue that expert testimony is only required in very limited circumstances involving medical malpractice and that the rule has "never been extended outside the malpractice arena." (Plaintiffs' Brief at 46). This argument ignores the clear language of Utah appellate decisions that expert testimony is required to establish causation unless "the propriety of the defendant's action 'is within the common knowledge and experience of the layman.'" *Shreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Ut. App. 1994) (quoting *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980)). Particularly, expert testimony is required:

where the average person has little understanding of the duties owed by particular trades or professions, as in cases involving medical doctors, architects, and engineers.

Shreiter, 871 P.2d at 574 (emphasis added). It is clear that the need for experts is not limited to medical malpractice cases; rather, it extends to every situation where the actions and injury are not within the common knowledge and experience of the layman. Ultimately, “the need for positive expert testimony to establish a causal link between the defendants’ negligent act and the plaintiff’s injury depends upon the nature of the injury.” *Beard v. K-Mart Corp.*, 2000 UT 285, ¶ 16, 12 P.3d 1015 (citing *Riggins v. Bechtel Power Corp.*, 722 P.2d 819, 824 (Wash. App. 1986)).

Plaintiffs attempt to escape the consequences of not having an expert by arguing that this particular situation is not so complex as to require the use of an expert. However, they fail to acknowledge that they lacked evidence of any kind, expert or otherwise. Their only effort was to try to show a temporal relationship based on the logical fallacy “after this, therefore because of this” (*post hoc, ergo propter hoc*). Even though plaintiffs’ theaters had always been in financial trouble, they chose to file for bankruptcy after the Payson theaters opened, so that must be the cause for bankruptcy.

The trial court properly disagreed with this assertion, stating that this case “involves complex matters regarding the factors involved in a movie theater’s success or failure, including the theater’s feasibility, competency of theater’s directors, patrons’ preferences, location of theater, choice of movies and concessions, profit loss of the theater, competition, market conditions, and the economy as a whole.” (**R. at 949**). Plaintiffs admit that the opening of the nearby Cinemark 16 Theaters in south Provo negatively affected the profitability of the Imagination Theaters (**R. at 116**), although they are unable to quantify the extent of the negative effect caused by the Provo theaters (*id.*),

or of any other competitor, for that matter. Bori testified that he had no way of knowing where the Theater's movie customers came from, but felt he had a "good idea" that they came "as far as Beaver south to Orem north." (**R. at 116**). Although Triesault attributes a significant reduction in Theater revenues to the opening of the Payson theaters, he did not conduct any surveys or studies to establish the connection, and both he and Bori admit that other factors, including a lack of good movies due to an actor's strike, may have contributed to a drop-off in the Theater business. (**R. at 117**).

After arguing that this matter does not involve complex matters requiring expert testimony, plaintiffs then contradict themselves; they argue in their Brief that they had no expertise in the theater business and that they necessarily relied on Vanchiere's "extensive experience in start up business in the Utah area . . . [consulting him] on every phase of the operations, and [that] his advice was central to plaintiffs' operations." (Plaintiffs' Brief at 37). If starting up a business in this area was so complex, then it necessarily follows that issues relating to causation, where numerous other factors are involved, likewise requires the opinion of an expert. Rather than attempting to support their speculative arguments with an expert, plaintiffs designated no experts whatsoever.

In contrast, Defendant's theater expert, Tony Rudman, testified that a variety of market factors, particularly the Provo Towne Centre Theaters, contributed to plaintiffs' business failure, and that there was no way of knowing whether the establishment of the Payson theaters had any effect on the failure of plaintiffs' business. (**R. at 672-73**).

B. To withstand summary judgment, plaintiffs must have proved that defendant Deseret caused the competition of which they complain.

Even if plaintiffs could somehow meet their causation burden, they must still show that Deseret's actions caused the specific competition of which they complain, *i.e.*, that Deseret "caused" the Payson theater to open. In other words, plaintiffs must prove that the Payson theater could not have obtained other funding or financing absent Deseret's involvement. There are a multitude of other possible means of funding or financing a small business, other than an SBA 504 loan.

In this case, plaintiffs are unable to prove even actual cause, let alone proximate cause. Plaintiffs seem to confuse "actual cause" and "proximate cause." The Utah Supreme Court has noted a distinction and that actual cause is more readily established than proximate cause. *Nelson, supra*, 919 P.2d at 574 (quoting *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083 (Utah 1982)). That Court also cited *Prosser* with approval as to the general proposition that the plaintiff has the burden of proving cause in fact, that "a mere possibility of such causation is not enough," and that if the matter is left to speculation or conjecture, or if the probabilities are evenly balanced, the court must direct a verdict in favor of the defendant. *Id.* (citing *Prosser and Keeton on the Law of Torts*, § 41 at 265 at 5th Ed. 1984).

The Utah Court of Appeals has addressed a case that is even more directly pertinent to the issues in the case at bar. In *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah Ct. App. 1996), the court explained the necessity of a trial court's using an

appropriate actual cause, “but for” analysis, including the application of such analysis to claims in contract, negligence and breach of fiduciary duty. The Court of Appeals held:

In Utah, causation or the connection between fault and damages in legal malpractice actions “cannot properly be based on speculation or conjecture.” . . . To prevail in legal malpractice actions, clients must establish actual cause – that but for the attorney’s wrong their loss would not have occurred – and proximate cause – that a reasonable likelihood exists that they would have ultimately benefitted.

Id. at 1291. The Court went on to clarify this issue in a footnote:

Because plaintiffs’ claim sounds in breach of fiduciary duty rather than negligence, they argue the standard of causation should be less strict . . . plaintiffs suggest they need only establish that the course of action they took resulted in loss and that defendant’s breach was “a substantial factor” in leading plaintiffs to take that course of action . . . Although plaintiffs maintain the substantial factor standard is somehow less strict than the established standard of causation in Utah, they have not shown how it is conceptually any different. For this reason and because our research shows that generally the same rules of causation apply whether the cause of action sounds in contract, negligence, or breach of fiduciary duty . . . we decline to adopt a new standard of causation for legal malpractice actions based on breach of fiduciary duty.

Id. at 1291 n.2.

Plaintiffs’ assertion that the Payson Theater “would not have opened without an SBA-backed loan” is simply not accurate, and is without any factual support in the record. Plaintiffs have presented no evidence that would indicate that Payson totally exhausted all financing options and that they went to Deseret as a last resort. For example, an applicant may apply for an SBA-backed loan if the loan request exceeds the legal lending limit of a bank, or if a bank has liquidity problems. See SOP 50-10(4)(E)(3) (Attached in

Addendum).

These situations present valid reasons for stating that the credit is not available from another source on reasonable terms, each of which has nothing to do with the credit worthiness of the applicant. It does not follow, therefore, that obtaining SBA lending necessarily meant that Payson Stadium Cinemas first applied to every other source before it sought SBA assistance.

Plaintiffs have asserted a variety of conclusory “facts” in support of their assertion that they offered evidence sufficient to overcome summary judgment. The court noted that plaintiffs had produced virtually no evidence on causation other than plaintiffs’ “own beliefs.” Instead of submitting competent evidence supported by expert testimony regarding any one of the numerous possibilities explaining the failure of plaintiffs’ theaters, plaintiffs simply relied on the Payson Theater “appraisal” as sufficient evidence. Of course, that appraisal merely indicated that the Payson Theater might draw or would attempt to draw customers from a specified area, which coincides in part with the geographical area in which plaintiffs’ theaters attempted to compete. Furthermore, that appraisal used a population per movie screen of 10,000, meaning that the presence of the Payson theaters would create a lower population density per screen; however, other appraisals used a density as low as 5,000, which would suggest that the market was not yet saturated. These statements in the appraisal were far from definitive, however. The author simply stated an opinion, right or wrong, about factors that might allow the Payson Theater to succeed, but that theater’s success was not tantamount to the failure of plaintiffs’ theaters. The trial court correctly determined that “one appraisal commenting

on the feasibility of Payson Theater is insufficient to establish causation, especially when that appraisal does not address the myriad of factors that comprise a successful business.” (R. at 949). More specifically, based on the lack of evidence presented by plaintiffs, “it is clear that no reasonable juror could conclude, without speculation, that the Payson Theater caused the Plaintiff’s business to fail.” (R. at 948) (emphasis in original). As a result, plaintiffs cannot meet their burden of proving that Deseret directly or proximately “caused” the competition of which plaintiffs complain.

III. THE DISTRICT COURT PROPERLY RULED AS A MATTER OF LAW THAT DESERET DID NOT INTENTIONALLY INTERFERE WITH PLAINTIFFS’ PROSPECTIVE ECONOMIC RELATIONS.

To recover for common-law tort of intentional interference with prospective economic relations, a plaintiff must show:

(1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.

Leigh Furniture & Carpet Co. v. ISOM, 656 P.2d 293, 304 (Utah 1982). The trial court found that plaintiffs failed to produce evidence sufficient to satisfy the second and third prongs, and therefore granted summary judgment.

Essentially, the trial court’s findings re-assert those reached in addressing both duty and causation. Because plaintiffs failed to adduce evidence demonstrating that Deseret owed a fiduciary duty to plaintiffs, there could be no “improper means.” Further, plaintiffs have completely failed to support their assertions with expert testimony; therefore, the causation element likewise fails.

A. Plaintiffs did not show that Deseret's involvement in the Payson Theater SBA loan constituted interference with plaintiffs' business through improper means.

Plaintiffs claim was based solely on their assertion that Deseret utilized “improper means.” (Plaintiffs’ Brief at 40). To create that argument, plaintiffs relied exclusively on the Payson business appraisal, which it maintains would permit a jury to infer that Deseret deceived the SBA into providing financing to a second company that would allegedly cause the destruction of the first SBA-backed company. Because the “SBA’s program is designed to foster successful businesses,” plaintiffs argue that Deseret used “improper means” by seeking SBA approval when it had an alleged conflict of interest.” (Plaintiffs’ Brief at 43). Each of these conclusory allegations presumes that Deseret owed a duty to plaintiffs. However, the trial court properly concluded that Deseret did not owe a fiduciary duty to plaintiffs, and as an implied corollary, determined correctly that there could have been no improper means utilized by Deseret.

The trial court concluded that plaintiffs did not produce evidence that Deseret falsified or concealed information from the SBA or somehow cheated the SBA. This finding is readily apparent. Plaintiffs’ assertion that the SBA never knew the Payson loan would allegedly result in the failure of another SBA-supported business is not supported by the record, nor is it supportable. Plaintiffs presented no testimony from an appropriate SBA representative stating that they did not know about the competing nature of the loans.¹⁷ Nor is there any similar evidence from an SBA agent that the SBA would not

¹⁷ Plaintiffs make the incredible assertion that “if the SBA had been told about the relationship between the two projects” then it was Deseret’s obligation to step forward

have awarded the Payson Theater loan with such knowledge. Plaintiffs presented no evidence to that effect because their assertion in this regard is false, and no SBA representative would have so testified. Consequently, the only evidence plaintiffs advance in support of their position is the appraisal. The trial court correctly ruled that the appraisal, in and of itself, was insufficient to create an issue of material fact that could justify a finding of deceit. (**R. at 955-56**).

Moreover, plaintiffs' allegation that the SBA, not Deseret, was in the most exposed position in the transaction, is inaccurate. Plaintiffs have ignored the fact (more precisely, they appear completely unaware of the fact) that as a CDC, Deseret is a lender which borrows funds to make the loan and is obligated to repay these funds. (Vancheire Depo. at 32:8-14). The SBA merely guarantees that the CDC will repay the Debenture obligation, should the stream of income from repayment of the Promissory Note between the CDC and the borrower be interrupted or cease.

The trial court likewise summarily dismissed plaintiffs' contention that Deseret violated an established standard of its trade, finding that there is no supporting evidence "other than the fact that Deseret assisted Payson Theater in obtaining SBA financing." (**R. at 955**). A violation of an established standard could arise only from a conflict of interest, but because the regulation does not define what a conflict is and because there is no language that a CDC cannot grant a loan to any competing business, there can be no such

and provide such evidence. (Plaintiffs' Brief at 42). Instead of producing actual evidence to prevent summary judgment, plaintiffs ask for an adverse inference from their interpretation of the facts and their own speculation. Furthermore, plaintiffs failed to raise this issue in the proceedings below and should not be permitted to do so now.

violation. (**R. at 954**). Contrary to plaintiffs' claims, Deseret did not have a conflict of interest prohibited by 13 C.F.R. §120.140(b). Both the fact that Deseret owed no duty to refuse to assist a potentially competing business and the aforementioned public policy considerations regarding the devastating effect of limiting a CDC's dealings, support the trial court's ruling. Moreover, although 13 C.F.R. §120.140(b) prohibits a CDC from having a "conflict of interest with a small business with which it is dealing," the conflict regulation intends to address matters like a CDC officer's owning stock in a company to which a loan is being made, not to mere and common competition among borrowers.

B. Plaintiff cannot show that Deseret's involvement in the Payson Theater SBA loan caused plaintiffs' theater to fail.

As a necessary component of plaintiffs' claim of intentional interference with prospective economic relations, they must prove that Deseret's conduct caused their business failure. However, plaintiffs failed to present proper evidence regarding the cause of the theater's failure. It is well-established in Utah that juries may not speculate regarding the issue of causation, and that a plaintiff must present sufficient evidence that would allow a jury to conclude, without speculation, that the alleged injury would not have occurred but for the defendant's breach. *Thurston*, supra, 2003 UT App 438, ¶ 12. Due to the complexity of the commercial matters at issue in this case, the trial court further held that expert testimony was required to establish causation. Such expert testimony is required unless "the propriety of the defendant's action 'is within the common knowledge and experience of the layman.'" *Shreiter*, supra, 871 P.2d at 574. Plaintiffs have failed to produce any evidence, other than the appraisal, let alone expert testimony, that Deseret


caused plaintiffs' business to fail.

CONCLUSION

Plaintiffs' case was without merit and fatally flawed. In particular, the very nature of the relationship between an SBA certified development company (Deseret) and a borrower (plaintiffs) is such that no fiduciary or agency relationship can be established. No rational borrower would ever believe that to be the case. The facts of this matter show no different relationship than in any other typical SBA loan. Competition between small businesses is a fact of life. Plaintiffs cannot stop such competition or curtail the SBA loan program by its after-the-fact attempts to create a special relationship with Deseret. Those attempts are supported by neither law nor fact. Furthermore, plaintiffs never had or presented any evidence that Deseret's actions caused their business to fail. This is complex causation question, but plaintiffs lacked both factual and expert evidence. Their wholly inadequate argument was that there was a loose temporal relationship between their decision to file for bankruptcy and the opening of a competitor's theaters; that is not nearly enough to establish causation. Finally, on plaintiffs' claim for intentional interference with prospective economic relations, plaintiffs failed to prove any of the elements of such a claim. Deseret did not intentionally interfere with plaintiffs, Deseret employed no improper means, and as previously stated, Deseret did not cause plaintiffs' damages. Therefore, Deseret respectfully requests that this court uphold the trial court's careful and correct grant of Summary Judgment.

DATED this 7th day of March, 2005.

RICHARDS, BRANDT, MILLER & NELSON
-AND-
ELGGREN & VAN DYKE


LYNN S. DAVIES
PAUL H. VAN DYKE
MICHAEL P. ZACCHEO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 7th day of March, 2005, to the following:

Allen K. Young (two copies mailed with Addendum)
YOUNG, KESTER & PETRO
75 South 300 West
Provo, Utah 84601

Jonah Orlosfsky (two copies mailed with Addendum)
LAW OFFICES OF JONAH ORLOFSKY
122 South Michigan Ave., Suite 1850
Chicago, Illinois 60603

Attorneys for Plaintiffs-Appellants



ADDENDUM

Jon Triesault Deposition Excerpts

1 source other than your memory and the business plan from
 2 where we could find out what was discussed in the meeting?
 3 A. Mike Vanchiere was present.
 4 Q. Any other source?
 5 A. Whoever that loan officer was and whoever else --
 6 Zions may have notes of those people.
 7 Q. But you're not aware of any other documents?
 8 A. No.
 9 Q. Okay.
 10 A. I would imagine Zions has some documents.
 11 Q. Okay. Now, you've told me what Mike Vanchiere said
 12 to you at that basement at Zions. What did you say?
 13 A. To him or to others?
 14 Q. To Mike.
 15 A. I told him I'd love to talk with him.
 16 Q. And did you say anything else?
 17 A. He gave me his phone number and I called him and
 18 went to see him.
 19 Q. How long after the meeting was it before you met
 20 with him again?
 21 A. It was within a couple of weeks I imagine.
 22 Q. Had you made any inquiry from others as to who Mike
 23 Vanchiere was in the interim period?
 24 A. Actually, I didn't.
 25 Q. You didn't ask for any references or anything of

1 that sort?
 2 A. No.
 3 Q. Okay. Where did you meet with Mr. Vanchiere next?
 4 A. At his office.
 5 Q. Okay. Who was present?
 6 A. I don't remember.
 7 Q. Do you have any idea of the date?
 8 A. No.
 9 Q. With respect to the closing of the SBA loan, about
 10 how far back was it, any idea?
 11 A. Between a year and a year and a half.
 12 Q. Okay. And you met with it privately with Mr.
 13 Vanchiere?
 14 A. I don't remember whether Mr. Hales was there or
 15 not.
 16 Q. Was anyone besides Mr. Vanchiere there, you know,
 17 in connection with his business?
 18 A. I don't remember.
 19 Q. From what you're telling me there was you, Mr.
 20 Vanchiere and you don't know if anybody else was there?
 21 A. Mr. Hales may have been present.
 22 Q. Okay. Could you tell me what was said and by whom
 23 at this meeting.
 24 A. Mike Vanchiere said he had thought about it and he
 25 liked the idea of the project. He believed he could help

1 us -- he could arrange a package of loans for us. And that
 2 he had a lot of business expertise in Utah County businesses.
 3 And he thought that there was a good chance this project
 4 would succeed. And he gave us a package of application forms
 5 of various kinds and financial disclosure forms. Then there
 6 was a list of various kinds of documents he would need to
 7 proceed. And he had also explained for the first time to me
 8 what a 504 loan was and how you went about it. And it was a
 9 pleasure.
 10 Q. Tell me what you said, if anything.
 11 A. I told him that I -- he told me first that he could
 12 really be of assistance to us as an advisor because of his
 13 knowledge in this community. He knew I was fairly new here.
 14 And I remember from school that the SBA I had always thought
 15 was setup to help Americans achieve the American dream kind
 16 of. And that he could help with that. And it was a great
 17 relief to be validated by somebody. And I believed I could
 18 really rely upon him as an advisor and as a friend and as
 19 somebody who could advise all of what was necessary to help
 20 us put up the theater and get started.
 21 Q. Can you recall anything else that was said in that
 22 meeting?
 23 A. Not specifically.
 24 Q. Generally?
 25 A. We had many meetings with him.

1 Q. I'm just talking about this meeting.
 2 A. No.
 3 Q. At the meeting did Mr. Vanchiere make any
 4 representation that he had expertise in movie exhibition?
 5 A. I don't think he said anything one way or the
 6 other.
 7 Q. Did he make any representation of business
 8 knowledge about -- with regard to movies at all?
 9 A. I don't remember whether he did or not. He did
 10 make a representation to liking the project and thinking that
 11 it was a valuable concept that he was willing to back and get
 12 behind and kind of guide us through.
 13 Q. Basically he just validated your belief that it
 14 would be a successful project. Is that right?
 15 A. He knew a lot more than I did about the business
 16 climate here in Utah County. And he told me -- or lead me to
 17 believe that his opinion was very valuable.
 18 Q. Very valuable for what?
 19 A. For anyone who was contemplating starting a
 20 business and looking for a loan. Because his job was to
 21 advise people and pass judgment basically on whether or not
 22 they would qualify for a SBA loan.
 23 Q. So his business acumen and advice was directed to
 24 whether or not you would get a loan. Is that right?
 25 A. Could you rephrase that please.

1 Q. I'm trying to discover how he represented his
2 business expertise.

3 A. Okay.

4 Q. Was it with respect to getting a loan or did it
5 extend to other areas?

6 A. It extended to other areas.

7 Q. Primarily what was the representation?

8 A. Well, he had guided many businesses he told us.
9 And that he became involved in giving us a lot of advice
10 about our project. In addition to just getting the financing
11 he had many ideas.

12 Q. At this meeting that we're talking about, which is
13 the second time you met him, did he give you any advice other
14 than how to get the loan?

15 A. I don't recall exactly what he said. We had many
16 meetings with him. And what he said at the first meeting in
17 his office I can't separate from many, many, many meetings.

18 Q. Did you keep any record of your meetings?

19 A. No.

20 Q. Do you know when you next met with Mr. Vanchiere?

21 A. I don't remember.

22 Q. Do you remember specifically any other meetings
23 with Mr. Vanchiere?

24 A. They were many meetings and many phone calls. And
25 it was kind of like a glass mosaic window where different

1 Q. Okay. Prior to that time?

2 A. And then we met -- I think Mike came down to the
3 site once or twice. And also there was a meeting where our
4 first position lender, Stearns Bank, sent its representatives
5 out here. And I took them to Mike's office and Mike spoke
6 with them at length. That's all I can specifically recall.

7 Q. Now, I'm talking about prior to the time that you
8 closed in between the time you had the second meeting with
9 Mr. Vanchiere. In all of those meetings did Mr. Vanchiere
10 give you any advice with respect to movie exhibition?

11 A. Yes.

12 Q. What advice did he give you?

13 A. Well, he discussed with us the number of theaters
14 we were going to build.

15 Q. The number of screens?

16 A. The number of screens.

17 Q. And what advice did he give you in that regard?

18 A. The number of screens went back and forth on many
19 occasions with him. And we finally settled on eight.

20 Q. Did Mr. Vanchiere make a recommendation as to the
21 number of screens?

22 A. He was involved in discussions of what the theater
23 was going to look like. And there were different ways to go
24 with whether or not we were going to have six screens and
25 actually build enough for eight. He was involved in all

1 pieces of glass were put into it over a year and a half
2 process.

3 Q. Well, did you go to his office on other occasions
4 than this second time you met with him?

5 A. Yes.

6 Q. How many occasions?

7 A. Over the course of a year and a half I probably
8 went a dozen times to his -- somewhere in the nature of a
9 dozen -- 10 to 20 times.

10 Q. Ten to twenty meetings?

11 A. In his office.

12 Q. Okay. At any of these meetings was anyone else
13 present besides yourself and Mr. Vanchiere?

14 A. Mr. Hales, my wife, I believe Mrs. Hales. Many of
15 the staff members of Deseret Certified were there. Mr.
16 Newton was there on several occasions. At a certain point
17 Mr. Newton and Mr. Vanchiere were in constant consultation.

18 Q. How do you know that?

19 A. Because I talked with Mr. Newton who was
20 negotiating helping Mr. Vanchiere with some of the
21 negotiations.

22 Q. Do you remember specifically any other meeting or
23 is it just a blur?

24 A. I remember the time that we all went there and
25 closed.

1 kinds of discussions about how the project was going to
2 develop even down to the food.

3 Q. Well, let's talk about the screens. What I'm
4 trying to figure out is what advice Mr. Vanchiere gave you.
5 You said he was involved. But I'm asking did he make a
6 recommendation as to the number of screens?

7 A. He believed that eight was a good number.

8 Q. He believed. Did he recommend it or did he just
9 validate what you suggested?

10 A. I've forgotten whether he validated or suggested.

11 There were conversations concerning many aspects of the
12 physical plant and the operation itself. He offered quite a
13 few ideas and suggestions about the theater as we were
14 developing. I never separated them out.

15 Q. What I'm trying to figure out is did he suggest
16 eight screens or was that in your business plan?

17 A. I've forgotten how many screens were in the
18 business plan. But it was in a state of flux for a period of
19 time. Four, six and eight were all discussed. And for quite
20 a while that was an open subject. It was also a subject
21 during the -- how much money should be borrowed and how much
22 lenders would give us, whether they would give us enough for
23 six or for eight. And there were various discussions about
24 that.

25 Q. So discussion was not whether six or eight could

Mike Vanchiere Deposition Excerpts

1 A. Yes, I can.
 2 Q. Okay. Would you?
 3 A. Yes, I would. We have origination fees that are
 4 generated at the time a loan funds. Those origination fees
 5 are one and one half percent of the Deseret's loan amount.
 6 In addition, each loan once it's closed and is in portfolio,
 7 there is a monthly servicing fee that accrues to Deseret for
 8 servicing the loan. Other sources of income while negligible
 9 would be on occasion we package 7A loans, another type of SBA
 10 loan.
 11 Q. That wouldn't have anything to do with the 504?
 12 A. No.
 13 Q. And I appreciate that answer. And as you might
 14 expect I'm really interested in income generated by 504
 15 loans.
 16 A. Sure.
 17 Q. Okay. So let's take a million dollar loan.
 18 A. Total or our share?
 19 Q. Total, just the loan. Then the origination fee
 20 would be approximately \$15,000?
 21 A. No, our share would be \$400,000. We do 40 percent
 22 of the loan.
 23 Q. Let's say that 40 percent of the loan is a million
 24 just to keep it round.
 25 A. Okay.

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DANIELLE LITTLE -- DEPOMAX

1 Q. Because I think that's about what it was in this
 2 matter and we'll get into that in a little while.
 3 A. Correct, it would be \$15,000.
 4 Q. And that's paid to Deseret Certified?
 5 A. Yes.
 6 Q. And then there would be a monthly -- let's say the
 7 loan is -- Deseret Certified's portion or the SBA's portion
 8 is a million dollars.
 9 A. Okay.
 10 Q. There is a monthly servicing fee?
 11 A. Correct.
 12 Q. And what would that be on a million dollars?
 13 A. It's one half of one percent of -- is it the
 14 payment? I'm not sure how they figure it. It's one half of
 15 one percent on the payment amount. Again, I don't do
 16 servicing. I would venture to say that probably a loan that
 17 size \$350 a month maybe \$400, something like that.
 18 Q. All right, sir. And that does continue throughout
 19 the length of the loan?
 20 A. Yes.
 21 Q. And so your information is that the two ways
 22 primarily that Deseret Certified makes income on 504 loans is
 23 an origination fee and a monthly servicing fee?
 24 A. Yes.
 25 Q. And does the SBA pay the monthly servicing fee?

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DANIELLE LITTLE -- DEPOMAX

1 A. No.
 2 Q. Who pays that?
 3 A. The client, the borrower.
 4 Q. If you can help me and we're going to get into this
 5 in some depth. I take it the borrower would pay probably two
 6 notes. One to the first position bank and the second to the
 7 Small Business Administration?
 8 A. No, not to the Small Business Administration, but,
 9 yes. Colson Services is the fiscal agent who collects the
 10 funds and then disperses it to the debenture holders.
 11 Q. So the second mortgage check going to the debenture
 12 holders is paid to Colson Services?
 13 A. Correct, through automatic debit withdrawal.
 14 Q. From a bank account?
 15 A. Yes.
 16 Q. All right. And then does Colson Services send
 17 Deseret Federal the monthly servicing fee?
 18 A. Deseret Certified.
 19 Q. I'm sorry. You just plan on me missing that about
 20 20 times today.
 21 A. They do. Yes, they do.
 22 Q. Okay. I guess it's fair to say that on any given
 23 day here at your office in your job over 99 percent of that
 24 is dealing with 504 either in obtaining loans or servicing
 25 loans. Is that a fair statement?

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DANIELLE LITTLE -- DEPOMAX

1 A. Yes.
 2 Q. When you say a monthly servicing fee, what is
 3 Deseret Certified's obligation toward becoming entitled to
 4 that fee? Is there a process or a function that Deseret
 5 Certified has to perform to get that fee?
 6 A. There is.
 7 Q. And what is that?
 8 A. I'm not in servicing so I don't know all of the
 9 details. But I do know that if there is a problem with the
 10 payment, if the payment rejects the Automatic Clearing House,
 11 then we're responsible to follow up to make sure that the
 12 wire is made or that the payment is made. We're obligated to
 13 collect insurance data to make certain that there's adequate
 14 fire and hazard insurance. We're obligated to monitor any of
 15 the provisions of the loan agreement that require monitoring.
 16 Property tax compliance -- make sure they're paying their
 17 property taxes. Our services people do site visits, field
 18 visits to address servicing type issues, to check the
 19 condition of the collateral. They perform all kinds of
 20 servicing actions related to substitution of collateral,
 21 early payment of the debentures, things of that regard.
 22 Q. The servicing fees is there a written understanding
 23 between Deseret Certified and the SBA or Colson Services
 24 about specifically what services will be provided for that
 25 service fee?

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DANIELLE LITTLE -- DEPOMAX

1 A. I think there is, yes. But I don't know the
2 particulars of that. Again, I'm not involved in services so
3 I don't know.

4 Q. Okay. Do people here in this Orem office are they
5 involved in servicing?

6 A. No. Well, only to the extent that a lot of times a
7 request for a servicing action comes to us because we're
8 familiar with the clients. We know who they are and they
9 know who we are. So they contact us in which case then we
10 refer them to our servicing department and we act as a
11 liaison if needed.

12 Q. And who usually initiates that request the SBA or
13 the borrower?

14 A. The borrower.

15 Q. Okay. And is there a servicing agent here in Orem?

16 A. No.

17 Q. Does Deseret Certified subcontract out the
18 servicing of the loans?

19 A. No.

20 Q. It's just managed out of another location?

21 A. Correct.

22 Q. Is that the Salt Lake location?

23 A. Yes.

24 Q. And is there an individual in charge of servicing?

25 A. Is it Howard or John?

33

DANIELLE LITTLE -- DEPOMAX

1 Q. Just if you know.

2 A. I think it's Howard Bird.

3 Q. Is Mr. Bird a member of the organization that owns
4 this building?

5 A. Yes.

6 Q. Once a loan is processed -- and I want to get into
7 that in a few minutes. But is it reasonable to say that
8 Deseret Orem office has little to do with that loan
9 thereafter?

10 A. Would you please define process. You mean funded?

11 Q. Yeah, funded and closed and signed.

12 A. Yes, I think that's fair to say.

13 Q. But Deseret Certified does continue to service the
14 loans?

15 A. Correct.

16 Q. And knows when a loan, for instance, is in trouble?

17 A. Yes.

18 Q. I assume the first time that the payment doesn't go
19 through, Deseret Certified knows that the loan might have
20 some difficulty?

21 A. Yes.

22 Q. I'd like now to have you explain to me the service
23 for which Deseret Certified becomes entitled to an
24 origination fee. I think I kind of have a basic
25 understanding of that whole process. But I'd like to have

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DANIELLE LITTLE -- DEPOMAX

1 you explain to me, if you can, what that process is that
2 entitles Deseret Certified to an origination fee?

3 A. Based on a borrower's project meeting SBA's lending
4 criteria, eligibility and all the other relevant issues,
5 Deseret prepares the documentation required by the SBA
6 guidelines. They prepare all of the closing documentation
7 required to sell the debentures. They in essence obtain the
8 financing and then lend that to the end user which is the
9 borrower. And in consideration for that service of obtaining
10 the financing for the borrower, then they receive a one and a
11 half percent origination fee.

12 Q. Is Deseret an agent of the borrower?

13 A. No.

14 MR. VAN DYKE: Objection calls for a legal
15 conclusion.

16 BY MR. YOUNG:

17 Q. Deseret represents the borrower?

18 A. Well, I'd say that was sort of a loaded question.
19 No, we don't represent the borrower, no. We represent the
20 borrower's project insofar as it meets the SBA guidelines and
21 requirements. We're not an advocate for the borrower. We're
22 not a salesman for the borrower. We're not a -- we receive
23 the information that we request. We put it into the proper
24 format. If it meets the requirements for a SBA 504, then we
25 submit it. SBA determines based on the information we

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DANIELLE LITTLE -- DEPOMAX

1 provide if it's eligible, meets the requirements. And then
2 based on that then the transaction is completed.

3 Q. Thank you. It's my understanding that as a
4 generalism the borrower usually contributes in the
5 neighborhood of 10 to 20 percent of the total capitalization
6 of the project. Is that correct?

7 A. Yes.

8 Q. And then a bank that is going to be in a first
9 position contributes approximately 50 percent of the capital?

10 A. Yes.

11 Q. And then the Small Business Administration through
12 debentures -- which are sold it's my understanding after the
13 project is standing up?

14 A. Correct.

15 Q. Provides approximately 40 percent?

16 A. Small Business Administration doesn't provide it,
17 but yes.

18 Q. Who provides it?

19 A. Private investors who buy the debentures.

20 Q. What role does the SBA have in that?

21 A. SBA guarantees the debentures to the institutions
22 that purchase the debentures. They lend their full faith and
23 credit so in the event of a default there is a protection for
24 the debenture holders.

25 Q. You have indicated to me that the SBA has what you

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DANIELLE LITTLE -- DEPOMAX

***Bingham v. Rasekh*, 2003 UT App 434, 2003 WL 22966236**



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H
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.
Marie BINGHAM, Plaintiff and Appellant,
v.
Kal RASEKH, et al., Defendants and Appellee.
No. 20010651-CA.

Dec. 18, 2003.

Third District, Salt Lake Department; The
Honorable Timothy R. Hanson.

Ronald S. George, Salt Lake City, for Appellant.

Paul D. Veasy and R. David Grant, Salt Lake City,
for Appellee.

Before Judges BENCH, GREENWOOD, and
ORME.

MEMORANDUM DECISION (Not For Official
Publication).

BENCH, Judge:

*1 Summary judgment is proper when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). An appellate court "view[s] the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 636 (Utah 1989).

The trial court granted Rasekh summary judgment on the issue of breach of fiduciary duty because he fulfilled his duties as a dual agent under rule 162-6-2.16.3.2 of the Utah Administrative Code. Bingham did not produce evidence tending to show a breach of any of the fiduciary duties listed in the rule; therefore, summary judgment on this issue was

proper.

As for Rasekh's alleged oral promise to sell the Hirschi Center, Rasekh was precluded from selling the property because Bingham had listed it exclusively with VRUtah. *See Cahoon v. Cahoon*, 641 P.2d 140, 144 (Utah 1982) ("One party cannot by willful act or omission make it impossible or difficult for the other to perform and then invoke the other's nonperformance as a defense."). Rasekh's alleged promise to purchase the Hirschi Center falls within the statute of frauds. *See Utah Code Ann.* § 25-5-3 (1998).

While the existence of a confidential relationship is normally a question of fact, *see Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985), "[w]hen the evidence is insufficient to support a verdict, the trial court has a duty to decide the issue." *Rhoads v. Harvey Publ'ns, Inc.*, 700 P.2d 840, 846 (Ariz.Ct.App.1984); *see also Kuhre v. Goodfellow*, 2003 UT App 85, ¶¶ 20-21, 69 P.3d 286 (affirming trial court's dismissal of plaintiff's confidential relationship claim); *State Bank of S. Utah v. Troy Hygro Sys., Inc.*, 894 P.2d 1270, 1275 (Utah Ct.App.1995) (finding confidential relationship claim failed as a matter of law). Here, Bingham failed to adduce sufficient evidence to defeat summary judgment. "A confidential relationship arises when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party." *Von Hake*, 705 P.2d at 769. Even if we were to assume that a confidential relationship existed between Bingham and Rasekh, Bingham's independent investigation of the Hirschi Center would extinguish Bingham's claim. Bingham's investigation and subsequent behavior demonstrate that she did not relinquish control over her own decision-making, *see id.* at 770; therefore, it cannot be said that Rasekh exercised extraordinary influence over her.

Before bringing a claim for negligent misrepresentation, Bingham was required to exercise "such degree of care to protect [her] own interests as would be exercised by an ordinary,

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reasonable and prudent person under the circumstances." *Jardine v. Brunswick Corp.*, 18 Utah 2d 378, 423 P.2d 659, 662 (1967). Bingham visited the Hirschi Center a number of times, independent of Rasekh, consulted a friend and family members about the purchase and possible renovations, and looked over the financial statements and discussed them with the Hirschis' accountant. Rasekh had allegedly told Bingham that the financial statements were not accurate because the personal living expenses were combined with the operating expenses. The Hirschis' accountant told Bingham that he could not extract the personal living expenses from the operating expenses. Bingham alleges that Rasekh thereafter persuaded her that he had analyzed the financial statements and that the business could support her family because it had been supporting two families.

*2 Knowledge of the falsity of the representation is not a requirement of negligent misrepresentation. [FN1] Bingham need only prove that Rasekh acted "carelessly or negligently" with regard to the veracity of his representations. *Robinson v. Tripco*, 2000 UT App 200, ¶ 13, 21 P.3d 219. Therefore, Bingham may recover any damages stemming from an injury caused by "reasonable reliance upon [Rasekh's] careless or negligent misrepresentation of a material fact" if Rasekh "had a pecuniary interest in the transaction, was in a superior position to know the material facts, and should have reasonably foreseen that [Bingham] was likely to rely upon the fact." *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell*, 713 P.2d 55, 59 (Utah 1986). While Bingham's affidavit indicates that she also relied upon and trusted the Hirschis, the bulk of her affidavit focuses on the trust she placed in Rasekh. Bingham's claim for negligent misrepresentation should not have been decided summarily on the record before the district court.

FN1. In *Price-Orem Investment Co. v. Rollins, Brown & Gunnell*, 713 P.2d 55 (Utah 1986), the supreme court noted that "[a]lthough the cause of action for negligent misrepresentation grew out of common law fraud, the elements of fraud need not be independently established.... Indeed, by its very terms, *negligent* misrepresentation does not require the intentional mental state necessary to

establish fraud." *Id.* at 59 n. 2; *see also Robinson v. Tripco*, 2000 UT App 200, ¶ 13, 21 P.3d 219 ("The tort of negligent misrepresentation ... carries a lesser mental state, requiring only that the seller act *carelessly or negligently*.").

We reverse summary judgment on Bingham's claim for negligent misrepresentation and affirm summary judgment on her other claims.

WE CONCUR: PAMELA T. GREENWOOD, Judge and GREGORY K. ORME, Judge.

2003 WL 22966236 (Utah App.), 2003 UT App 434

END OF DOCUMENT

Code of Federal Regulations

[Code of Federal Regulations]
[Title 13, Volume 1]
[Revised as of January 1, 2003]
From the U.S. Government Printing Office via GPO Access
[CITE: 13CFR103.1]

[Page 21-22]

TITLE 13--BUSINESS CREDIT AND ASSISTANCE

CHAPTER I--SMALL BUSINESS ADMINISTRATION

PART 103--STANDARDS FOR CONDUCTING BUSINESS WITH SBA--Table of Contents

Sec. 103.1 Key definitions.

(a) Agent means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an applicant or participant by conducting business with SBA.

(b) The term conduct business with SBA means:

(1) Preparing or submitting on behalf of an applicant an application for financial assistance of any kind, assistance from the Investment Division of

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SBA, or assistance in procurement and technical matters;

(2) Preparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance;

(3) Participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;

(4) Acting as a lender service provider; and

(5) Such other activity as SBA reasonably shall determine.

(c) Applicant means any person, firm, concern, corporation, partnership, cooperative or other business enterprise applying for any type of assistance from SBA.

(d) Lender Service Provider means an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender. SBA determines whether or not one is a ``Lender Service Provider'' on a loan-by-loan basis.

(e) Packager means an Agent who is employed and compensated by an Applicant or lender to prepare the Applicant's application for financial assistance from SBA. SBA determines whether or not one is a ``Packager'' on a loan-by-loan basis.

(f) Referral Agent means a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant. The Referral Agent may be employed and compensated by either an Applicant or a lender.

(g) Participant means a person or entity that is participating in any of the financial, investment, or business development programs authorized by the Small Business Act or Small Business Investment Act of 1958.

Section 631. Declaration of policy

(a) Aid, counsel, assistance, etc., to small business concerns

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

(b) Assistance to compete in international markets

(1) It is the declared policy of the Congress that the Federal Government, through the Small Business Administration, acting in cooperation with the Department of Commerce and other relevant State and Federal agencies, should aid and assist small businesses, as defined under this chapter, to increase their ability to compete in international markets by -

(A) enhancing their ability to export;

(B) facilitating technology transfers;

(C) enhancing their ability to compete effectively and efficiently against imports;

(D) increasing the access of small businesses to long-term capital for the purchase of new plant and equipment used in the production of goods and services involved in international trade;

(E) disseminating information concerning State, Federal, and private programs and initiatives to enhance the ability of small businesses to compete in international markets; and

(F) ensuring that the interests of small businesses are adequately represented in bilateral and multilateral trade negotiations.

(2) The Congress recognizes that the Department of Commerce is the principal Federal agency for trade development and export promotion and that the Department of Commerce and the Small Business Administration work together to advance joint interests. It is the purpose of this chapter to enhance, not alter, their respective roles.

(c) Aid for agriculturally related industries; financial assistance

It is the declared policy of the Congress that the Government, through the Small Business Administration, should aid and assist small business concerns which are engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries; and the financial assistance programs authorized by this chapter are also to be used to assist such concerns.

(d) Use of assistance programs to establish, preserve, and strengthen small business concerns

(1) The assistance programs authorized by sections 636(i) and

636(j) of this title are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.

(2) (A) With respect to the programs authorized by section 636(j) of this title, the Congress finds -

(i) that ownership and control of productive capital is concentrated in the economy of the United States and certain groups, therefore, own and control little productive capital;

(ii) that certain groups in the United States own and control little productive capital because they have limited opportunities for small business ownership;

(iii) that the broadening of small business ownership among groups that presently own and control little productive capital is essential to provide for the well-being of this Nation by promoting their increased participation in the free enterprise system of the United States;

(iv) that such development of business ownership among groups that presently own and control little productive capital will be greatly facilitated through the creation of a small business ownership development program, which shall provide services, including, but not limited to, financial, management, and technical assistance. (FOOTNOTE 1)

(FOOTNOTE 1) So in original. The period probably should be a semicolon.

(v) that the power to let Federal contracts pursuant to section 637(a) of this title can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital; and

(vi) that the procurement authority under section 637(a) of this title shall be used only as a tool for developing business ownership among groups that own and control little productive capital.

(B) It is therefore the purpose of the programs authorized by section 636(j) of this title to -

(i) foster business ownership and development by individuals in groups that own and control little productive capital; and

(ii) promote the competitive viability of such firms in the marketplace by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

(e) Assistance to victims of floods, etc., and those displaced as result of federally aided construction programs

Further, it is the declared policy of the Congress that the Government should aid and assist victims of floods and other catastrophes, and small-business concerns which are displaced as a result of federally aided construction programs.

(f) Findings; purpose

(1) with (FOOTNOTE 2) respect to the Administration's business development programs the Congress finds -

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(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is therefore the purpose of section 637(a) of this title to -

(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management (FOOTNOTE 3) assistance as may be necessary; and

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(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

(g) Assistance to disaster victims under disaster loan program

In administering the disaster loan program authorized by section 636 of this title, to the maximum extent possible, the Administration shall provide assistance and counseling to disaster victims in filing applications, providing information relevant to loan processing, and in loan closing and prompt disbursement of loan proceeds and shall give the disaster program a high priority in allocating funds for administrative expenses.

(h) Assistance to women owned business

(1) With respect to the programs and activities authorized by this chapter, the Congress finds that -

(A) women owned business has become a major contributor to the American economy by providing goods and services, revenues, and jobs;

(B) over the past two decades there have been substantial gains in the social and economic status of women as they have sought economic equality and independence;

(C) despite such progress, women, as a group, are subjected to discrimination in entrepreneurial endeavors due to their gender;

(D) such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities;

(E) it is in the national interest to expeditiously remove discriminatory barriers to the creation and development of small business concerns owned and controlled by women;

(F) the removal of such barriers is essential to provide a fair opportunity for full participation in the free enterprise system by women and to further increase the economic vitality of the Nation;

(G) increased numbers of small business concerns owned and controlled by women will directly benefit the United States Government by expanding the potential number of suppliers of goods and services to the Government; and

(H) programs and activities designed to assist small business concerns owned and controlled by women must be implemented in such a way as to remove such discriminatory barriers while not adversely affecting the rights of socially and economically disadvantaged individuals.

(2) It is, therefore, the purpose of those programs and activities conducted under the authority of this chapter that assist women entrepreneurs to -

(A) vigorously promote the legitimate interests of small business concerns owned and controlled by women;

(B) remove, insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production; and

(C) require that the Government engage in a systematic and sustained effort to identify, define and analyze those discriminatory barriers facing women and that such effort directly involve the participation of women business owners in the public/private sector partnership.

(i) Prohibition on use of funds for individuals not lawfully within United States

None of the funds made available pursuant to this chapter may be used to provide any direct benefit or assistance to any individual in the United States if the Administrator or the official to which the funds are made available receives notification that the individual is not lawfully within the United States.

(j) Contract bundling

In complying with the statement of congressional policy expressed in subsection (a) of this section, relating to fostering the participation of small business concerns in the contracting opportunities of the Government, each Federal agency, to the maximum extent practicable, shall -

(1) comply with congressional intent to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers;

(2) structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation; and

(3) avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.

[Code of Federal Regulations]
[Title 13, Volume 1]
[Revised as of January 1, 2003]
From the U.S. Government Printing Office via GPO Access
[CITE: 13CFR120.140]

[Page 219-220]

TITLE 13--BUSINESS CREDIT AND ASSISTANCE

CHAPTER I--SMALL BUSINESS ADMINISTRATION

PART 120--BUSINESS LOANS--Table of Contents

Subpart A--Policies Applying to All Business Loans

Sec. 120.140 What ethical requirements apply to participants?

Lenders, Intermediaries, CDCs, and Associate Development Companies ('`ADCs'') (in this section, collectively referred to as ``Participants''), must act ethically and exhibit good character. Ethical indiscretion of an Associate of a Participant or a member of a CDC will be attributed to the Participant. A Participant must promptly notify SBA if it obtains information concerning the unethical behavior of an Associate. The following are examples of such unethical behavior. A Participant may not:

- (a) Self-deal;
- (b) Have a real or apparent conflict of interest with a small business with which it is dealing (including any of its Associates or an Associate's Close Relatives) or SBA;
- (c) Own an equity interest in a business that has received or is applying to receive SBA financing (during the term of the loan or within 6 months prior to the loan application);
- (d) Be incarcerated, on parole, or on probation;
- (e) Knowingly misrepresent or make a false statement to SBA;
- (f) Engage in conduct reflecting a lack of business integrity or honesty;
- (g) Be a convicted felon, or have an adverse final civil judgment (in a case involving fraud, breach of trust, or other conduct) that would cause the public to question the Participant's business integrity, taking into consideration such factors as the magnitude, repetition, harm caused, and remoteness in time of the activity or activities in question;
- (h) Accept funding from any source that restricts, prioritizes, or conditions the types of small businesses that the Participant may assist under an SBA program or that imposes any conditions or requirements upon recipients of SBA assistance inconsistent with SBA's loan programs or regulations;
- (i) Fail to disclose to SBA all relationships between the small business and its Associates (including Close Relatives of Associates), the Participant, and/or the lenders financing the Project of which it is aware or should be aware;
- (j) Fail to disclose to SBA whether the loan will:
 - (1) Reduce the exposure of a Participant or an Associate of a Participant in a position to sustain a loss;
 - (2) Directly or indirectly finance the purchase of real estate, personal property or services (including insurance) from the Participant or an Associate of the Participant;
 - (3) Repay or refinance a debt due a Participant or an Associate of a Participant; or

(4) Require the small business, or an Associate (including Close Relatives of Associates), to invest in the Participant (except for institutions which require an investment from all members as a condition of membership, such as a Production Credit Association);

(k) Issue a real estate forward commitment to a builder or developer; or

(l) Engage in any activity which taints its objective judgment in evaluating the loan.

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Credit Criteria for SBA Loans

SBA Standard Operational Procedures (SOP)

- Q. What is the meaning of "exact reproductions"?
- A. In general reproduction of SBA forms may contain different fonts, spacing and other variations from the specifications of our forms. It is the language of the forms which must be exactly the same.

12. DISCLOSURE OF FEES

.120.195 Disclosure of fees.

An Applicant for a business loan must identify to SBA the name of each Agent as defined in part 103 of this chapter that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the Agent in conjunction with the performance of those services.

SBA requires the disclosure of all fees which an Applicant pays to or is charged by the lender or any Agent for services in connection with applying for and closing the SBA loan. Since the applicant is the party being charged, it is responsible for reporting these fees.

a. How Does An Applicant Disclose Their Fees?

An applicant must use SBA Form 159, "Compensation Agreement", to document the fees it has been or will be charged by any agent. The agent charging the fee must also sign the SBA Form 159. A separate SBA Form 159 must be executed for each agent

b. What Rules Apply to Agents And Disclosure of Fees?

13 CFR 103 governs the activities of agents and the disclosure of fees.

13. REGULATIONS REGARDING AGENTS

.103.1 Key Definitions.

(a) **Agent** means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an applicant, or participant by conducting business with SBA.

a. Definitions Of An Agent

The regulation defining an Agent is found in 13 CFR .120.103.1

b. Does This Include Loan Referral Agents?

Yes, personnel or businesses that provide loan referral services are classified as agents, as they fall into the category of other person representing an applicant, or participant regardless of whether the applicant or the lender compensates them for their loan referral service. Loan referral agents are subject to the requirement to complete an SBA Form 159 when compensated by the applicant.

When the referral agent is compensated by the lender, the use of the 159 is not required. However, this form (when next revised) will provide notification to applicants that there may be an existing relation between referral agents and lenders.

c. Must Agents Reveal What Fees Are Paid by Whom?

Each packager and referral agent must disclose the name of its customer and all fees charged in connection with the SBA loan transaction.

d. Are Development Companies Agents?

For purposes of this rule, neither the development company nor its employees is an agent for a 504 loan application in which the CDC is involved. An Associate Development Company (ADC) providing services to a CDC is considered a lender service provider or LSP.

For 7(a) loans, if the employee performs packaging or loan referral services within the scope of their CDC employment, both the CDC and the employee are agents. If the employee packages or acts as a loan referral agent outside the scope of their CDC employment, they are the agent, but the CDC is not.

(b) The term conduct business with SBA means:

(1) preparing or submitting on behalf of an applicant an application for financial assistance of any kind, the referral of an application to a Lender, or any assistance from the Investment Division of SBA, or assistance in procurement and technical matters;

e. Does This Include the Referral of an Application?

Yes.

(2) preparing or processing, on behalf of a lender or a participant in any of SBA's programs, an application for federal financial assistance;

(3) participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;

SUBPART H - DEVELOPMENT COMPANY LOAN PROGRAM (504)

CHAPTER 1 PURPOSE OF THE PROGRAM

1. WHAT ARE CERTIFIED DEVELOPMENT COMPANIES (CDC)?

.120.800 What is the purpose of the 504 program?

As authorized by Congress, SBA has established this program to foster economic development, create or preserve job opportunities, and stimulate growth, expansion, and modernization of small businesses.

a. What is the CDC (504) Loan Program and Why Does it Exist?

The 504 program is economic development financing specifically designed to stimulate private sector investment in long-term fixed assets to increase productivity, create new jobs, and increase the local tax base. The stimulus is provided by making long-term, low down payment, reasonably priced fixed-rate financing to healthy and expanding businesses which have the highest probability of successfully creating new jobs and competing in the world marketplace.

b. What is the Role of CDCs?

Loans made under the 504 program loans are administered by community-based development companies approved (certified) by SBA. SBA certified development companies (CDC) promote economic growth within their area of operations by:

- (1) Stimulating the growth and expansion of small businesses primarily through financial assistance; and
- (2) Offering the 504 loan program to eligible small businesses through a full-time professional staff.

c. How Do CDCs Work With SBA?

The SBA 504 loan program is a financial assistance program that a CDC makes available to eligible small businesses. It may be the only program that the CDC provides, or the CDC may have other loan programs that it oversees such as revolving lines of credit or microloans. No one CDC is exactly like another.

- (4) Within 10 working days of the date a CDC becomes a party to litigation or other legal proceedings, it must file a written report with the SBA field office where the CDC is headquartered. This includes any action taken by the CDC, or by a security holder in a personal or derivative capacity, against an officer, director, employee, or other member of the CDC in an official capacity. The report must be sent by certified mail or other form of delivery from which a receipt of acceptance is obtained. For those CDCs that work with multiple SBA district offices, the SBA district office where the CDC is headquartered must notify the other SBA offices, if appropriate.

The report must describe the proceedings, the CDC's identity and relationship to other parties involved. Upon request by SBA, copies of the pleadings and other documents specified must be submitted by the CDC. Once proceedings are terminated by settlement or final judgment, the CDC shall promptly advise SBA of the terms.

- (5) Any change affecting the perception of "good character" as it relates to a CDC must be reported immediately to the SBA field office overseeing that CDC.

6. SERVICES CDCs ARE REQUIRED TO PROVIDE SMALL BUSINESSES

.120.827 Services a CDC Provides to small businesses.

(a) A CDC must operate in and adequately service its Area of Operations. It must market the 504 program, package and process 504 loan applications, and close and service 504 loans. A CDC's loan portfolio must be diversified by business sector.

(b) A CDC may provide small businesses with financial and technical assistance, or may help small businesses obtain such assistance from other sources, including preparing, closing, and servicing loans under contract with Lenders in SBA's 7(a) program.

(c) A CDC also may loan amounts to the Borrower equal to the value of all or part of the Borrower's contribution to a Project in the form of cash or land, including site improvements, previously acquired by the CDC.

Q. What is meant by the requirement that the CDC's portfolio needs to be diversified?

A. The SBA field office staff should review a CDC's annual report for any industry concentrations. Concentrations in either a few industries and/or new businesses should be discouraged since either would indicate a greater vulnerability to market risks.

3. SBA'S CREDIT ELSEWHERE CRITERIA

As a Federal Agency that relies upon Federal taxpayer dollars to support its lending programs, SBA cannot provide financial assistance to small businesses that have the ability to obtain the financing on reasonable terms without Federal assistance. Therefore SBA has a "credit elsewhere test" to which all business loan applicants are subject. The regulatory rules of this "test" are detailed in .120.101:

.120.101 Credit not available elsewhere.

SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal sources. SBA requires the Lender or CDC to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time. Submission of an application to SBA by a Lender or CDC constitutes certification by the Lender or CDC that it has examined the availability of credit to the applicant, has based its certification upon that examination, and has substantiation in its file to support the certification.

a. The Credit Elsewhere "Test":

Credit Elsewhere is an eligibility factor that must be determined prior to assessing the credit factors of a loan request. The purpose of Credit Elsewhere is to determine if the applicant concern along with its affiliates and principals has the ability to obtain some or all of the requested loan funds from alternative sources without causing undue hardship to the applicant, its affiliate(s), or principal(s). These alternative sources include:

(1) The lending institution;

(2) The internal resources of the applicant concern;

(3) The external resources of the applicant concern;

(4) The personal resources of the principals of the applicant concern.

If the financial assistance applied for is otherwise available on reasonable terms from any of these sources, the application must be denied.

b. The Lending Institution as an Alternative Source:

Lending institutions are a source of credit for small businesses. If a lending institution will provide the credit to the small business applicant, on reasonable terms, without SBA support, the requested financing is not eligible for SBA consideration. As part of the Credit Elsewhere Test, every lender who applies to SBA for a guaranty of a loan they propose to make to a small business must signify that they could not make the proposed loan without SBA support. Lenders have to substantiate their compliance with the credit elsewhere rules.

c. Lender Substantiation of Compliance with Credit Elsewhere Rules

504 third-party lenders and 7(a) lenders must explain to SBA the factors that prevent the financing from being accomplished without SBA support. The CDC or 7(a) lender must retain the explanation in the applicant's file. The CDC may use this information to satisfy the requirements of Exhibit #19 of the Application for 502/504 Loan (SBA Form 1244), Part A, when it applies for a 504 loan. Microloan intermediaries (microlenders) must have a letter of decline from an institutional lender such as a bank for loans of \$15,000 or more in the applicant's file. Substantiation is not required for microloans of less than \$15,000.

d. What Factors Are Acceptable as Substantiation?

Acceptable factors are those that demonstrate an identifiable weakness in the credit or exceed policy limits of the lender. These factors include, among others:

- (1) The business needs a longer maturity than the lender's policy permits (for example, the business needs a loan that is not on a demand basis);
- (2) The requested loan exceeds either the lender's legal limit or policy limit regarding the amount that it can loan to 1 customer;
- (3) The lender's liquidity depends upon selling the guaranteed portion of the loan on the secondary market;
- (4) The collateral does not meet the lender's policy requirements because of its uniqueness or low value;
- (5) The lender's policy normally does not allow loans to new ventures or businesses in the applicant's industry; and/or

- (6) Any other factors relating to the credit that, in the lender's opinion, cannot be overcome except for the guaranty.

e. What Factors Are Not Acceptable Substantiation?

Any factors related solely to a lender's choice to obtain a guaranty without any identifiable weakness in the credit or failure of the credit to meet the lender's established policies or regulatory restrictions are unacceptable. Typical examples are when SBA's guaranty is sought for unacceptable reasons:

- (1) Substantiate Community Reinvestment Act (CRA) compliance;
- (2) Improve the lender's collateral lien position;
- (3) Refinance debt already on reasonable terms; or
- (4) Comply with the requirement for small business lending companies (SBLCs) that SBA guarantee all loans.

f. What is the Certification Process Under Credit Elsewhere?

For 7(a) loans, the lender must certify that credit is not otherwise available by signing the Lender Official block on the appropriate application form. The lender's certification is

"I approve this application to SBA subject to the terms and conditions outlined above. Without the participation of SBA to the extent applied for we would not be willing to make this loan, and in our opinion the financial assistance applied for is not otherwise available on reasonable terms. I certify that none of the Lender's employees, officers, directors or substantial stockholders (more than 10 percent) have a financial interest in the applicant.

15 USC 631

§ 631. Declaration of policy

(a) Aid, counsel, assistance, etc., to small business concerns

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation.

(b) Assistance to compete in international markets

(1) It is the declared policy of the Congress that the Federal Government, through the Small Business Administration, acting in cooperation with the Department of Commerce and other relevant State and Federal agencies, should aid and assist small businesses, as defined under this chapter, to increase their ability to compete in international markets by—

- (A) enhancing their ability to export;
- (B) facilitating technology transfers;
- (C) enhancing their ability to compete effectively and efficiently against imports;
- (D) increasing the access of small businesses to long-term capital for the purchase of new plant and equipment used in the production of goods and services involved in international trade;
- (E) disseminating information concerning State, Federal, and private programs and initiatives to enhance the ability of small businesses to compete in international markets; and
- (F) ensuring that the interests of small businesses are adequately represented in bilateral and multilateral trade negotiations.

(2) The Congress recognizes that the Department of Commerce is the principal Federal agency for trade development and export promotion and that the Department of Commerce and the Small Business Administration work together to advance joint interests. It is the purpose of this chapter to enhance, not alter, their respective roles.

(c) Aid for agriculturally related industries; financial assistance

It is the declared policy of the Congress that the Government, through the Small Business Administration, should aid and assist small business concerns which are engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries; and the financial assistance programs authorized by this chapter are also to be used to assist such concerns.

(d) Use of assistance programs to establish, preserve, and strengthen small business concerns

(1) The assistance programs authorized by sections 636(i) and 636(j) of this title are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.

(2)(A) With respect to the programs authorized by section 636(j) of this title, the Congress finds—

(i) that ownership and control of productive capital is concentrated in the economy of the United States and certain groups, therefore, own and control little productive capital;

(ii) that certain groups in the United States own and control little productive capital because they have limited opportunities for small business ownership;

(iii) that the broadening of small business ownership among groups that presently own and control little productive capital is essential to provide for the well-being of this Nation by promoting their increased participation in the free enterprise system of the United States;

(iv) that such development of business ownership among groups that presently own and control little productive capital will be greatly facilitated through the creation of a small business ownership development program, which shall provide services, including, but not limited to, financial, management, and technical assistance.

(v) that the power to let Federal contracts pursuant to section 637(a) of this title can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital; and

(vi) that the procurement authority under section 637(a) of this title shall be used only as a tool for developing business ownership among groups that own and control little productive capital.

(B) It is therefore the purpose of the programs authorized by section 636(j) of this title to—

(i) foster business ownership and development by individuals in groups that own and control little productive capital; and

(ii) promote the competitive viability of such firms in the marketplace by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

(e) Assistance to victims of floods, etc., and those displaced as result of federally aided construction programs

Further, it is the declared policy of the Congress that the Government should aid and assist victims of floods and other catastrophes, and small-business concerns which are displaced as a result of federally aided construction programs.

(f) Findings; purpose

(1) with respect to the Administration's business development programs the Congress finds—

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is therefore the purpose of section 637(a) of this title to—

(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

(g) Assistance to disaster victims under disaster loan program

In administering the disaster loan program authorized by section 636 of this title, to the maximum extent possible, the Administration shall provide assistance and counseling to disaster victims in filing applications, providing information relevant to loan processing, and in loan closing and prompt disbursement of loan proceeds and shall give the disaster program a high priority in allocating funds for administrative expenses.

(h) Assistance to women owned business

(1) With respect to the programs and activities authorized by this chapter, the Congress finds that—

(A) women owned business has become a major contributor to the American economy by providing goods and services, revenues, and jobs;

(B) over the past two decades there have been substantial gains in the social and economic status of women as they have sought economic equality and independence;

(C) despite such progress, women, as a group, are subjected to discrimination in entrepreneurial endeavors due to their gender;

(D) such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities;

(E) it is in the national interest to expeditiously remove discriminatory barriers to the creation and development of small business concerns owned and controlled by women;

(F) the removal of such barriers is essential to provide a fair opportunity for full participation in the free enterprise system by women and to further increase the economic vitality of the Nation;

(G) increased numbers of small business concerns owned and controlled by women will directly benefit the United States

Government by expanding the potential number of suppliers of goods and services to the Government; and

(H) programs and activities designed to assist small business concerns owned and controlled by women must be implemented in such a way as to remove such discriminatory barriers while not adversely affecting the rights of socially and economically disadvantaged individuals.

(2) It is, therefore, the purpose of those programs and activities conducted under the authority of this chapter that assist women entrepreneurs to—

(A) vigorously promote the legitimate interests of small business concerns owned and controlled by women;

(B) remove, insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production; and

(C) require that the Government engage in a systematic and sustained effort to identify, define and analyze those discriminatory barriers facing women and that such effort directly involve the participation of women business owners in the public/private sector partnership.

(1) Prohibition on the use of funds for individuals not lawfully within the United States

None of the funds made available pursuant to this chapter may be used to provide any direct benefit or assistance to any individual in the United States if the Administrator or the official to which the funds are made available receives notification that the individual is not lawfully within the United States.

(Pub.L. 85-536, § 2[2], July 18, 1958, 72 Stat. 384; Pub.L. 87-70, Title III, § 305(b), June 30, 1961, 75 Stat. 167; Pub.L. 87-305, § 6, Sept. 26, 1961, 75 Stat. 667; Pub.L. 93-386, § 2(a)(1), Aug. 23, 1974, 88 Stat. 742; Pub.L. 94-305, Title I, § 112(a), June 4, 1976, 90 Stat. 667; Pub.L. 95-507, Title II, §§ 201, 203, Oct. 24, 1978, 92 Stat. 1760, 1763; Pub.L. 96-302, Title I, § 118(a), July 2, 1980, 94 Stat. 840; Pub.L. 99-272, Title XVIII, § 18015(a), Apr. 7, 1986, 100 Stat. 370; Pub.L. 100-418, Title VIII, § 8002, Aug. 23, 1988, 102 Stat. 1553; Pub.L. 100-533, Title I, § 101, Oct. 25, 1988, 102 Stat. 689; Pub.L. 100-590, Title I, § 118, Nov. 3, 1988, 102 Stat. 2999; Pub.L. 100-656, Title II, §§ 204, 207(b), Nov. 15, 1988, 102 Stat. 3859, 3861; Pub.L. 101-37, § 6(c), June 15, 1989, 103 Stat. 72; Pub.L. 103-403, Title VI, § 609, Oct. 22, 1994, 108 Stat. 4204.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
 1958 Acts. Senate Report No. 1714
 and Conference Report No. 2135, see
 1958 U.S. Code Cong. and Adm. News, p.

1961 Acts. Senate Report No. 281 and
 Conference Report No. 602, see 1961
 U.S. Code Cong. and Adm. News, p.
 1923.