

2004

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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,	:	
	:	BRIEF OF PLAINTIFFS-APPELLANTS
Plaintiffs-Appellants,	:	
	:	
v.	:	
	:	No. 20040811-CA
THE GREATER SALE LAKE	:	
BUSINESS DISTRICT, a Utah	:	
corporation, doing business as	:	
DESERET CDC,	:	Oral argument requested
	:	
Defendants-Appellees.	:	

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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STATEMENT OF JURISDICTION

On July 21, 2004, the trial court issued a Ruling granting summary judgment in favor of the defendant and dismissing the complaint with prejudice. (Addendum at 1-30) On August 24, 2004, the court entered a final Order and Judgment dismissing the case with prejudice. (Record at 000977; hereinafter “Rec ____”) On September 16, 2004, plaintiffs filed a timely Notice of Appeal from the Order and Judgment. (Rec 000982) This Court has jurisdiction pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in ruling that plaintiffs failed to raise a triable issue of fact on their breach of fiduciary duty claim.

This legal ruling was made on a motion for summary judgment and is therefore subject to *de novo* review. *Harline v. Barker*, 912 P.2d 433, 438 (Utah 1996). Plaintiffs filed a timely Notice of Appeal (Rec 000982), which preserved this error for appeal. Rule 3, Utah Rules of Appellate Procedure.

II. Whether the trial court erred in ruling that plaintiffs failed to raise a triable issue of fact on their intentional interference with prospective economic relations claim.

This legal ruling was made on a motion for summary judgment and is therefore subject to *de novo* review. *Harline v. Barker*, 912 P.2d 433, 438 (Utah 1996). Plaintiffs filed a timely Notice of Appeal (Rec 000982), which preserved this error for appeal. Rule 3, Utah Rules of Appellate Procedure.

III. Whether the trial court erred in ruling that plaintiffs failed to raise a triable issue of fact that defendant's actions caused plaintiffs' injuries.

This legal ruling was made on a motion for summary judgment and is therefore subject to *de novo* review. *Harline v. Barker*, 912 P.2d 433, 438 (Utah 1996). Plaintiffs filed a timely Notice of Appeal (Rec 000982), which preserved this error for appeal. Rule 3, Utah Rules of Appellate Procedure.

APPLICABLE STATUTORY PROVISIONS

There are no statutory provisions of central importance to this appeal.

STATEMENT OF THE CASE

Nature Of The Case

Defendant Deseret Certified Development Company ("Deseret") is a "public finance specialist" that advertises that it works with clients "in assessing financial needs and in selecting the most appropriate public sector finance programs." What Deseret specifically does for clients is guide them through the Small Business Administration ("SBA") loan process. Deseret provides this service for a "contingent fee" in the sense that clients pay Deseret only if the clients get their SBA-backed loan.

Plaintiffs sought Deseret's assistance when they were unable to get conventional financing for a proposed movie theater in Spanish Fork. With Deseret in their corner, plaintiffs were able to secure the necessary SBA-backed financing to build and open their movie theater. The plaintiffs were business novices at the time, and Deseret's assistance was critical, both with respect to the financing issues, and also on a broad range of issues concerning the creation and operation of a successful new business venture.

Unfortunately, Deseret decided not only to assist in the creation of plaintiffs' business, but also to assist in its destruction. Soon after plaintiffs' theater opened, while still actively advising and representing plaintiffs, Deseret took on as a client a second group of investors that sought to open a theater in nearby Payson (the "Payson Group"). Deseret and the Payson Group knew that the area's population was insufficient to support two theaters in such close proximity. They nonetheless decided to move forward because they expected the newer Payson theater to drive plaintiffs' theater out of business and therefore succeed.

Their prediction came true. Deseret secured SBA-backed financing for the Payson Group's theater, and when it opened, revenues for plaintiffs' theater dropped precipitously and never recovered. Plaintiffs eventually filed for bankruptcy, losing not only their investment, but their life's savings as well.

There is, of course, no prohibition on one company attempting to drive another company out of business. Capitalism is built on unrestricted competition between businesses. There are, however, certain service providers such as attorneys, brokers, accountants and agents that undertake to loyally represent the interests of their clients, and as a result are held to a fiduciary obligation not to take actions contrary to their clients' interests.

Plaintiffs contend that by virtue of the extensive advice and representation that Deseret provided plaintiffs, Deseret took on fiduciary obligations and therefore could not represent a second client with contrary interests. The trial court, however, concluded that Deseret acted as a middleman arranging a transaction between plaintiffs and the SBA, and

therefore should not be held to an obligation of loyalty to the plaintiffs. The trial court's error was its attempt to sort this out on summary judgment. There is an extensive record of a complex relationship between plaintiffs and Deseret, and the question of whether Deseret acted as plaintiffs' agent and or fiduciary is a disputed issue of fact that should have been left to a trial.

The trial court also concluded that plaintiffs failed to raise an issue of fact as to causation. Plaintiffs' theory, in this regard, was quite simple. The evidence is undisputed that the Payson theater would never have opened without SBA-backed financing, and the evidence is also undisputed that only Deseret could secure SBA-backed financing for the Payson theater. Finally, the evidence is undisputed that business at plaintiffs' theater dropped dramatically and never recovered after the Payson theater opened. The trial court thought this insufficient to prove causation because other factors might have caused that drop, such as bad management by the plaintiffs or poor movie choices. In effect, the trial court ruled that to raise an issue of fact on causation, plaintiffs had to eliminate all potential alternative causes of the catastrophic drop in their business. This, however, is not the burden on summary judgment. Plaintiffs were required to show admissible evidence that defendants' conduct was a proximate cause of their injury, and the drastic and irreversible drop in business following the Payson theater's debut more than satisfied that burden.

Judge Howard struggled with the question of whether this case should be resolved by summary judgment. Deseret filed its first motion for summary judgment when the case was before Judge Laycock, and the motion was denied in its entirety. The case was then transferred to Judge Howard, and Deseret filed a second motion for summary judgment.

Judge Howard denied this second motion for summary judgment and set the matter for trial. In the course of pre-trial proceedings, however, Judge Howard began to have doubts about the prior rulings and *sua sponte* vacated the prior summary judgment rulings and ordered the matter reargued. After reargument, Judge Howard reversed the prior rulings and granted summary judgment. Plaintiffs submit, with respect, that in so doing Judge Howard became a fact finder, resolving disputed issues of fact that should have been resolved through trial.

Statement Of Facts

In reviewing the facts, it is useful to keep in mind the two related but analytically distinct services plaintiffs contend they received as defendant's client. First, plaintiffs contend Deseret acted as their agent, representing plaintiffs before the SBA. Applying for, using and repaying an SBA-backed loan is a complex process in which the borrower has to petition the SBA both for initial approval of the financing and later for any modifications that need to be made. Plaintiffs contend that Deseret petitioned the SBA on their behalf, making Deseret their agent for all matters before the SBA. Just like a lawyer making an argument in court on behalf of a client, Deseret petitioned the SBA on plaintiffs' behalf whenever necessary.

Second, plaintiffs contend that Deseret acted as a business advisor, consulting on all aspects of plaintiffs' movie theater project. Just as lawyers, accountants or stockbrokers provide advice to their clients in their respective areas of expertise, Deseret provided plaintiffs the expertise it had developed from years of assisting in the creation of new businesses in the Utah market.

Although the “agent before the SBA” and “business advisor” roles are interconnected and at times overlap, plaintiffs will show in the Argument section that they support two separate bases for finding that Deseret owed plaintiffs a fiduciary obligation of loyalty.

The start of plaintiffs’ movie theater project and Deseret’s offer of assistance

Plaintiff Jon Triesault, along with his wife Elizabeth, his friend Raymon Bori, and Raymon’s wife Stephanie, sought to open a movie theater in Spanish Fork. They later formed two corporations, Imagination Theaters, Inc. and Imagination Theaters Holding, LLC, which are also plaintiffs in this action. Mr. Triesault was the leader of the group. While he had a background in the movie industry, he had had no prior experience starting, operating or financing any kind of business. None of the four individual plaintiffs had any prior experience with, or knowledge of, SBA loan programs. (Rec 000544)

As with most new ventures, financing was the first order of business. Mr. Triesault talked with several banks about obtaining a loan, but these efforts bore no fruit.

Conventional financing was simply not available. (Rec 000544) In the course of talking to one of the banks about a conventional loan, Mr. Triesault met Mr. Vanchiere, a Vice-President of defendant Deseret Certified Development Company (“Deseret”). Mr. Triesault described their first meeting as follows:

Mr. Vanchiere came up to me and put his arm around me and said, I don’t think you’re going to get anywhere with the bank. But I like your idea and I can help you

get an SBA loan. And I can also help you get a bank that would also partially fund your project. (Triesault dep. 61)¹

After receiving further information from Mr. Triesault on his plans for the movie theater, Mr. Vanchiere agreed to both be a consultant and advisor and to provide assistance in getting SBA-backed financing:

[The theater] was my idea, but I had never done this before. I thought it was a good idea. But Mr. Vanchiere was the consultant and the advisor who was the motivating factor in saying, I believe in your idea. I can help you get this SBA loan. And I can also help you find a first position lender that will give you money – you know, another loan. I didn't know I needed two loans at this point. He revealed all of that to me and guided us. (Triesault dep. 71-72)

One particular area of expertise that Mr. Vanchiere brought to the table was his knowledge of the Utah business community. Mr. Triesault had only lived in Utah a few years, but Mr. Vanchiere had extensive experience in starting local businesses:

[H]e told me first that he could really be of assistance to us as an advisor because of his knowledge in this community. He knew I was fairly new here.

He knew a lot more than I did about the business climate here in Utah County. And he told me – or lead me to believe that his opinion was very valuable. (Triesault dep. 83-84)

Mr. Vanchiere made it clear that his advice would extend beyond the area of getting SBA-backed financing:

Q. [Mr. Vanchiere] would help you get a loan. Anything else?

A. That he would advise us as to the business itself and what he thought of it and what he thought about its viability. He would make suggestions to us. He would guide us along. He would work with our attorney. He would come down and take a look at it and he would follow along the development of the project. And we could call him for advice along the way. He was our mentor. (Triesault dep. 101)

¹ The transcripts of the depositions of Jon Triesault and Mike Vanchiere are part of the record on appeal, but were not numbered by the clerk's office. They will therefore be cited by referring directly to the pages of the deposition transcript.

Plaintiffs relied heavily not only on Mr. Vanchiere's advice, but also his general opinion that the project was viable:

Before meeting Mr. Vanchiere, the other plaintiffs in this matter and I had not completely committed ourselves to the theater project. To make it work, I was going to have to put my whole life-savings on the line. Mr. Vanchiere assured me that the project was economically viable and would work. (Rec 000544)

Mr. Vanchiere proceeded to advise and consult with plaintiffs on every aspect of the project, including the number of screens the theater should have (Triesault dep. 87-88), the types of movies it should show (Triesault dep. 91), the kinds of decorations it should have (Triesault dep. 91), what promotions and other ways there were to get the community involved (Triesault dep 91), the corporate structure plaintiffs' should create (Rec 000542), and even how to run the concession stands. (Triesault dep 92-93). Mr. Triesault described this consulting as "brainstorming" with Mr. Vanchiere where they would:

talk about how the theater would develop and what we would do with it and how we could run it and how we could maximize our potential. (Triesault dep. 92)

One of Mr. Vanchiere's most important functions was getting plaintiffs SBA-backed financing. Before moving on to the specifics of Mr. Vanchiere's role in this process, however, it is useful to pause and describe how SBA-backed financing works.

The SBA's Section 504 loan program

Plaintiffs applied under the Section 504 loan program, which provides long term permanent financing for small businesses. The financing typically involves a package with three components: the borrower contributes 10%, a private bank loans 50% and a certified development company loans the remaining 40%. The certified development company's loan

loan is funded by debentures that are backed by a 100% SBA guarantee.² The defendant in this case is the certified development company.

The SBA guarantee is the key to the whole scheme. Section 504 loans are made to businesses that are unable to qualify for private financing. 13 C.F.R. § 120.101. The private lender contributes 50% of the financing, but with a senior lien on all the project's assets. While the private lender would not provide full funding for the project, they will almost always agree to provide 50% of the funding, secured by 100% of the assets. The remaining 40% is provided by a certified development company such as the defendant, which raises the money by selling debentures. The sale of those debentures is a simple matter because the SBA provides a 100% guarantee of their repayment. Thus, with the SBA guarantee in hand, a financing package can be created for small businesses that would not otherwise qualify for funding.

There is, not surprisingly, a complex application process involved in securing the SBA's approval for a Section 504 loan. An applicant must show the SBA that it meets the general eligibility requirements for SBA loans (13 C.F.R. § 120.100), that credit is not available from any other source (13 C.F.R. § 120.101), that it is a kind of business eligible for an SBA loan (13 C.F.R. § 120.110), that it plans to use the loan proceeds for eligible uses (13 C.F.R. § 120.120), that it meets the SBA's lending criteria (13 C.F.R. § 120.150), and that it meets a host of additional requirements specific to 504 loans. *See* 13 C.F.R. §§ 120.880 – 120.923. A detailed application must be completed to show that all of the requirements have been met. 13 C.F.R. § 120.191.

² 13. C.F.R. §120.801; <http://www.sbaonline.sba.gov/financing/sbalan/cdc504.html>; Title V of the Small Business Investment Act, 15 U.S.C. 695 to 697f.

Deseret's role in the SBA loan application process

The existence of these labyrinthine regulations should not be unexpected; one is, after all, applying for financial backing from the federal government. Neither Mr. Triesault nor any of the other plaintiffs had any prior knowledge of the SBA loan process. They placed complete trust and confidence in Mr. Vanchiere to handle this for them and Mr. Vanchiere accepted this role. (Rec 000544) Mr. Vanchiere agreed not only to guide plaintiffs through the 504 process, but also to help secure the private lender that would provide the first 50% of the financing. (Triesault dep. 71)

Mr. Vanchiere's offer to undertake the SBA application process on plaintiffs' behalf was consistent with Deseret's public statements about the services it provides for customers. Deseret's web site describes the company's role as follows:

The Deseret Certified Development Company staff members are public sector finance specialists. They work with all types of businesses in assessing financial needs and in selecting the most appropriate public sector finance programs.

(Rec 000306; emphasis added).

This statement touting Deseret's expertise is also consistent with the services such a company is authorized to provide by federal regulation:

Services a CDC [certified development company] provides to small businesses.

(a) ... It must market the 504 program, package and process 504 loan applications, and close and service 504 loans....

(b) A CDC may provide small businesses with *financial and technical assistance*....

13 C.F.R. § 120.827 (emphasis added).

These statements are also consistent with The Standard Industrial Code Title Deseret selected for its filings with the Utah Department of Commerce. Deseret chose 6282, a code that means Deseret has designated itself a “seller of investment advice.” (Rec 000305)

The SBA considers many factors in deciding whether to grant a Section 504 loan, including the “strength of the business,” “projected cash flow,” and the “potential for future success.” 13 C.F.R. § 120.150. The starting point for an SBA application, therefore, is the development of a business plan, and Mr. Vanchiere worked closely with plaintiffs on the preparation of this plan. (Rec 000271) Specifically, Mr. Triesault and Mr. Vanchiere discussed the fact that 10,000 people per movie screen was a generally accepted number used to determine the economic viability of rural movie theaters. Plaintiffs’ proposed theater was going to have eight screens. The targeted market was from southern Provo to south of Nephi, an area that included approximately 80,000 people. Plaintiffs and Mr. Vanchiere concluded, therefore, that the proposed theater had a sufficient population of potential customers to support a successful movie theater. (Rec 000271)

Mr. Vanchiere also helped plaintiffs prepare a statement of the theater’s projected cash flow for the business plan by providing plaintiffs with the necessary formulas. (Rec 000270) Plaintiffs viewed Mr. Vanchiere as the expert in creating a business plan that would pass muster under the SBA’s criteria. (Rec 000268)

Once all the required materials had been collected, Mr. Vanchiere provided plaintiffs with all of the necessary application documents and provided considerable assistance in filling them out. Those documents included the loan applications, personal financial statements, business plans and individual resumes. (Rec 000271)

Mr. Vanchiere advised plaintiffs what to include in their personal loan applications, personal financial statements and resumes. For instance, Mr. Vanchiere found out that Mr. Triesault had rental properties in California worth approximately \$1,000,000.00. Initially, Mr. Triesault had not included those properties on any of the documents. Mr. Vanchiere advised him to include the information regarding his California rental properties in the applications and financial statements. (Rec 000271)

Throughout this process, Mr. Vanchiere continued to provide advice that went beyond what was necessary for obtaining the SBA loan, encompassing general business advice on how to make the project successful. For example, Mr. Vanchiere suggested to plaintiffs that they needed to hire a manager to run the theater because they lacked the necessary experience, and plaintiffs proceeded to hire a manager. (Rec 000270)

Deseret acts as plaintiffs' agent for all dealings with the SBA

Once the application was complete, it needed to be submitted to the SBA for approval. First, however, Mr. Vanchiere and Deseret reviewed the application to decide if it would likely meet the SBA's criteria. (Rec 000269) Once Desert decided the application would likely be acceptable to the SBA, it was Deseret that submitted the application to the SBA, not the plaintiffs. The plaintiffs did not know where or to what office the application was submitted. (Rec 000269)

From this point forward, all communications with the SBA were handled for plaintiffs by Deseret. To this day, plaintiffs have never had a single direct communication with the SBA. (Rec 000269) When plaintiffs had to petition the SBA for approval of some action they sought to take, Deseret would make that request for them. When the SBA

would respond to such a petition, it would provide its response to Deseret, not plaintiffs. (Rec 000268)

One example of this is the SBA's Authorization For Debenture Guarantee, which was the SBA's preliminary approval of plaintiffs' application for SBA financing. The SBA sent this document to Deseret, not plaintiffs. (Rec 000258) Furthermore, the Authorization had to be signed by both Deseret and plaintiffs and returned to the SBA District Office. (Rec 000250) Presumably, Deseret returned the signed Authorization because, as noted earlier, plaintiffs had no direct communications with SBA.

Deseret takes plaintiffs from preliminary approval to loan closing

The SBA Authorization is a preliminary approval with many requirements to be fulfilled before the SBA-backed loan can close. Mr. Vanchiere continued to act during this phase as both plaintiff's expert business advisor and agent for all communications with the SBA. Thus, for example, Mr. Vanchiere continued to help plaintiffs with the theater's construction, which had to be completed before the SBA-backed financing could close. At one point during the construction, plaintiffs were over budget. In a meeting in his office, Mr. Vanchiere advised plaintiffs how to cut costs in order to stay under budget. He did this by proposing to shrink the size of the theater and going over the construction costs item by item. He continued to examine virtually every aspect of the costs of the theater's construction until the construction was completed. (Rec 000269)

Plaintiffs' cost overruns eventually required an increase in their construction financing. This needed to be approved by both the SBA and Stearns Bank. Stearns Bank was the private lender that provided both the interim construction financing and later the

50% private lender portion of the Section 504 loan. Deseret handled this entire matter for the plaintiffs, communicating with both Stearns Bank and the SBA and successfully securing the necessary modifications to the financing agreements. (Rec 000268)

Securing an SBA-backed loan is not a one-shot project. First, one must apply. Then, after preliminary approval, one must meet all the conditions for final approval. After final approval, one must continue to meet all of the SBA's requirements on an ongoing basis. Mr. Triesault understood that Mr. Vanchiere would make sure that everything that needed to be done with respect to the SBA financing was done, and that he would represent plaintiffs before the SBA whenever necessary, until the loan was fully repaid. (Rec 000268)

The loan closing and Deseret's multiple roles

On or about May 27, 1998, the SBA-backed financing closed. At the closing, Mr. Vanchiere presented plaintiffs a huge stack of documents and told plaintiffs that, because they trusted him, they did not need to read any of those documents. Plaintiffs agreed and signed the documents without reviewing them. (Rec 000268)

At this point, Deseret took on an additional role, because it became, in a limited sense, plaintiffs' lender. As is typically the case for 504 financing, there were two separate loans. One loan, for 50% of the total, was from Stearns Bank. The second loan, which is the SBA-backed loan, is technically made by Deseret to the plaintiffs. We say "technically" because, although there is a loan agreement between Deseret and plaintiffs, Deseret did not provide a loan in the true sense of loaning its own funds. The money provided by the loan came from a debenture sold as part of the SBA's debenture pools, and the Debenture was

fully guaranteed by the SBA. Thus, Deseret acted as a conduit in getting the debenture funds to plaintiffs. As the Authorization explains:

The Small Business Administration (SBA) authorizes the guarantee of a Debenture to be issued by [Deseret] to assist Borrower.... The proceeds of the Debenture shall be used only toward financing the purchase [or lease] and/or improvement or renovation by Borrower [of the Spanish Fork movie theater]. (Rec 000258)

Unlike a true Bank, therefore, Deseret did not loan out any of its own funds. Indeed, the actual disbursement of the Debenture funds and the collection of plaintiffs' payments were handled by Colson Services Corp., a New York servicing agent hired by the SBA. (Rec 000088, 000210)

Deseret and Mr. Vanchiere continue advising plaintiffs and acting as their agent after the SBA-backed financing closes

Plaintiffs' theater opened in Spanish Fork on November 26, 1997, and the SBA-backed financing closed in May 1998. Even though Deseret nominally became plaintiffs' lender after the loan closed, it continued to provide plaintiffs its advisory and agency services. (Rec 000268) Mr. Vanchiere, in particular, continued his constant role as plaintiffs' agent and business advisor.

To fulfill his advisory duties, Mr. Vanchiere visited plaintiffs' theater on the average of two weekends per month and continued to advise Mr. Triesault and Mr. Bori on the theater's operations. (Rec 000268) During these visits Mr. Vanchiere consulted with plaintiffs on everything from what they should serve at the concessions stand to what movies they should show. Thus, before plaintiffs made a critical switch from second-run movies to first-run movies, they discussed the issue with Mr. Vanchiere. Mr. Vanchiere

referred to plaintiffs as “special favorites” and told plaintiffs to call him if they had any questions. (Rec 000267)

Mr. Vanchiere also continued to advise plaintiffs on financial matters. For example, Mr. Vanchiere told plaintiffs they should never personally take any amount of money from the theater until the theater became profitable, and he checked to see whether they took this advice. (Rec 000267) In order to enable Mr. Vanchiere to provide this kind of advice, plaintiffs continually gave Mr. Vanchiere confidential information about how their business was doing. (Rec 000268)

Deseret also continued to act as plaintiffs’ agent with the SBA. For example, in August 1999, a neighboring property owner sought the right to use some of plaintiffs’ parking spaces for a planned grocery store. The neighbor offered to pay \$15,000 and other valuable consideration. Plaintiffs thought the deal made sense, but could not enter into such a transaction without SBA approval. On August 10, 1999, Deseret wrote a letter on plaintiffs’ behalf to the SBA seeking its approval. The approval was obtained the next day. (Rec 000267)

Deseret’s fees

Deseret’s services did not come for free. Plaintiffs paid Deseret \$14,553 for a Processing Fee, and other miscellaneous fees of \$9,681.50, (Rec 000092) for a total fee of \$24,234.50 for the services provided to plaintiffs

Deseret takes on a competitor as a client

Plaintiffs’ theater, which opened in November of 1997, had some growing pains and was initially not profitable. After approximately 9 months, plaintiffs, in consultation with

Mr. Vanchiere, made the decision to switch from second run to first run films. (Triesault Dep. 143). This decision had an immediate impact on their business, which soon began showing a profit. By the end of 1999, plaintiffs' business had turned the corner and was consistently turning a profit. (Rec 000538)

Right about the same time, however, Deseret was actively working on a possible Section 504 loan package for a group of investors that sought to open a competing theater in Payson (the "Payson Group"), which is about nine miles from Spanish Fork, and directly in the target market area for plaintiffs' theater. (Rec 000267) Deseret and the Payson Group put together a business plan that targeted the destruction of plaintiffs' theater. While "destruction" may sound a bit dramatic, it is in fact precisely what occurred. Deseret knew that the proposed Payson theater was in the market area that plaintiffs were counting on to provide sufficient customers for their theater complex. (Rec 000267) The Payson Group's business plan specifically discussed and acknowledged that the Payson Theater would succeed only by taking substantial business from plaintiffs' theater and rendering that theater "***no longer feasible.***" Thus, the Market Analysis for the Payson Group's theater stated:

At first glance it appears that there may not be sufficient demand or population for the proposed theater; however, it should be noticed that a new project which is superior to existing supply frequently takes away market share from the existing supply – and in effect, ***makes the older projects no longer feasible***, rather than the newer project. In the case of the subject property, it will be the only theater in this market with stadium seating and all THX sound system. Given this fact, it is reasonable that the subject property will be able to attract more than its "fair share."

(Rec 000223; emphasis added)

The previously existing first-run screens that the above-quoted analysis concludes will "no longer [be] feasible" include plaintiffs' theater. Thus, the Payson's Group's business

plan, which was prepared with the assistance and approval of Deseret, was designed to take market share from the plaintiffs' and make the plaintiffs' theater "no longer feasible." *Id.* Deseret submitted an application to the SBA on behalf of the Payson Group that included this business plan, and the SBA approved the proposed loan. (Rec 000228)

There are two critical facts about this that are undisputed. First, the Payson Group could not have gotten funding from any source other than the SBA. In fact, it is a requirement for a Section 504 loan that the borrower be unable to secure any other financing. 13 C.F.R. § 120.101. Second, the only way to get a 504 loan in Utah at the time was to hire Deseret. (Rec 000459) Therefore, the Payson Group's theater would never have been possible without Deseret's assistance.

Deseret was also dishonest in its dealings with the SBA. As shown above, the business plan submitted to the SBA on behalf of the Payson Group depended upon depleting the customer base of plaintiffs' theater. The Payson Group's submission to the SBA, however, never mentions plaintiffs' theater by name and never discloses that one of the theaters that will "no longer [be] feasible" is funded by an SBA-guaranteed loan. (Rec 000235) The SBA was provided no information, therefore, revealing that it was being asked to approve a loan to one entity that was intended to cause a default in an existing SBA-backed loan. *Id.* Had the SBA known that, it surely would not have approved a loan to the second theater group. Thus, only by deceiving the SBA was Deseret able to get the Payson Group loan approved.

The motivation for this activity would not seem terribly obscure. Deseret received approximately \$24,000 in fees from plaintiffs' transaction (Rec 000092), and about \$25,000**

more in fees from the Payson Group transaction. (Rec 000227) When Mr. Vanchiere told plaintiffs about the new Payson theater, he was apologetic and attempted to claim that he had had no personal involvement in that loan. (Triesault dep. 147)

Plaintiffs' business is destroyed

The Payson Groups' theater opened in or about April 2000. By July, 2002, the plaintiffs filed for bankruptcy.

The evidence linking the opening of the Payson Group's theater to the decline in plaintiff's business is overwhelming. Plaintiffs' theater had begun to show a profit several months before the Payson Theater opened. After that theater opened, plaintiffs' theater never again made a profit. (Rec. 000538)

The financial figures show the devastating before-and-after effect. On a gross level, for the 12 months prior to Payson theater's opening, plaintiffs' revenues were approximately \$2 million, but just \$1.4 million for the 12 months after the new theater opened. (Rec 000538)

One key measure of a theater's success is the amount of concession dollars per customer. From May 1998 to May 2002, plaintiffs' theater made average per capita concession sales of \$1.80. At that time, movie theater industry standards considered a movie theater to be doing well if the theater made more than a \$1.70 average per capita on concession sales. This shows that plaintiff's theater was well managed and potentially a successful operation, if attendance was sufficient. (Rec 000521)

The opening of the Payson Group's theater had a direct and devastating effect on attendance. Comparing similar months, in May 1999 the attendance for plaintiffs' theater

was 42,813; in May 2000 attendance was 21,141. In June 1999 attendance was 49,058, in June 2000, 18,856. In July 1999 attendance was 43,080, but in July 2000 attendance was 28,712. (Rec 000520)

For the year before the Payson Theater opened, plaintiffs' attendance was approximately 336,722 (Rec 000570), and revenues from concession sales were approximately \$606,099.60. (Rec 000569) For the year after the Payson Theaters opened, attendance was approximately 231,717, and revenues from concession sales dropped to approximately \$417,090.60. (Rec 000569)

The Star Wars Episodes show with precision just how badly the opening of the Payson theater hurt plaintiffs' business. In May 1999, Star Wars Episode I came out and the theater had an attendance of 13,520 and \$55,115.29 in admissions in the first week of the movie. In May 2002, Star Wars Episode II came out and the theater had an attendance of only 6,734 and just \$26,188.71 in admissions in the movie's first week. (Rec 000569)

In the aggregate, in the year after the Payson Theaters opened, plaintiffs lost over 100,000 customers, over \$600,000 in gross revenues and over \$189,000 in gross concession sales. (Rec 000569)

As a result of the bankruptcy, plaintiffs have lost the entirety of the \$1.5 million personal investment in this business. In addition, the SBA is demanding payment from each of the four individual plaintiffs pursuant to their personal guarantees of the balance of the \$1,000,000.00 loan. (Rec 000741)

The Trial Court Proceedings

Plaintiffs' complaint contains four claims. Count I alleges breach of fiduciary duty, Count II tortious interference with prospective economic relations, and Count III alleges breach of the duty of good faith and fair dealing. (Rec 000005) The complaint also alleges a claim for intentional infliction of emotional distress. (Rec 000001)

Deseret initially moved for summary judgment on Counts I, II and III, arguing that the undisputed facts showed that plaintiffs could not sustain those claims. The case was before Judge Laycock at the time, and she denied defendant's motion in its entirety. (Rec 0000320).

The case was then transferred to Judge Howard. Deseret promptly filed a second motion for summary judgment, arguing that there was no evidence that defendant's conduct had caused plaintiffs' injuries, and that there was insufficient evidence to support the intentional infliction of emotional distress claim. At the conclusion of the hearing on this motion, Judge Howard denied the motion as to causation, but granted it as to the emotional distress claim. (Rec 0000620) Before an order was entered, however, plaintiffs moved to reconsider the dismissal of the emotional distress claim. (Rec 0000651) On May 5, 2004, Judge Howard issued a ruling granting plaintiffs' Motion To Reconsider and upholding the emotional distress claim. (Rec 0000741) Consequently, on May 18, 2004, Judge Howard entered an order denying defendant's Second Summary Judgment Motion in its entirety. Rec 0000888)

A trial date was set and the parties proceeded to prepare the matter for trial. In the middle of the pre-trial proceedings, however, Judge Howard expressed concern over the

previous rulings on the summary judgment motions. No new evidence or legal argument had been presented; his concern apparently arose from giving the matter more thought in the course of conducting pre-trial proceedings. As a result, Judge Howard struck not only his own ruling on defendant's Second Motion for Summary Judgment, but also Judge Laycock's ruling on defendant's first Motion for Summary Judgment. Judge Howard also cancelled the trial date and set a time for "re-argument" of the two summary judgment motions. After hearing argument, Judge Howard issued a Ruling on July 21, 2004, that granted defendant's motions for summary judgment in their entirety. Judge Howard ruled that there was no evidence to support any of the claims, and furthermore, even if there was evidence to support liability, there was no evidence showing causation. (Add 28) A final Judgment and Order was entered on August 24, 2004, and this appeal followed.

Plaintiffs appeal the entry of summary judgment on the breach of fiduciary duty and tortious interference claims (Count I and II). Plaintiffs do not appeal the dismissal of the breach of the duty of good faith and fair dealing claim (Count III).

The trial court did not separately discuss the intentional infliction of emotional distress claim in its final ruling, except to state, "the Court dismisses Plaintiffs' Complaint with prejudice and all respective causes of action along with the intentional infliction of emotional distress claims Plaintiffs attached to each cause of action." (Add 29) The emotional distress claim was therefore dismissed because in the court's view its viability depended upon the existence of a valid claim of unlawful conduct under Counts I, II or III. There will, therefore, be no separate discussion of the emotional distress in this brief, but it clearly should be reinstated if Counts I or II are reinstated as a result of this appeal.

SUMMARY OF ARGUMENT

Count I – Breach of Fiduciary Duty: Plaintiffs allege that Deseret was a fiduciary because it was plaintiffs’ agent in presenting matters to the SBA, and also because it was an expert business advisor in which plaintiffs placed great trust and confidence. The trial court rejected both of these bases for plaintiffs’ breach of fiduciary duty claim because it found that: (1) although the defendant acted as plaintiffs’ “voice before the SBA,” the plaintiff did not “control” the defendant and thus defendant was not plaintiffs’ agent, and (2) there was no evidence that plaintiffs placed the requisite trust and confidence in the defendant so as to create a fiduciary duty. Both of these issues, however, should not have been resolved on a motion for summary judgment. The plaintiffs and the defendant had a long and close relationship, and there is ample evidence that defendant was, in fact, plaintiffs’ agent, and also a trusted expert business advisor. A trial is required to determine the precise relationship between the parties.

Count II – Tortious Interference With Prospective Economic Relations: Plaintiffs allege that defendant’s assistance to the competing theater in Payson intentionally interfered with its prospective relations with its customers. The trial court acknowledged that there are facts showing intentional interference, but ruled, as a matter of law, that the defendant did not use improper means, which is an element of the tortious interference claim. This was error because there was ample evidence that the defendant deceived the SBA into granting the loan to the competing theater, which it would not otherwise have done had it known the full facts, and defendant’s actions constituted a conflict of interest, which violates the federally mandated standard of behavior for those assisting businesses in

the SBA loan process. These facts create triable issues of fact as to whether the defendant used “improper means,” and thus summary judgment should have been denied.

Causation: The trial court ruled there was no evidence that defendant’s conduct in arranging financing for the competing theater was the cause of the demise of plaintiffs’ business. However, the evidence shows that plaintiffs’ theater suffered an immediate and irreversible decline immediately after the Payson theater opened, and that the Payson Group could not have gotten financing without Deseret’s assistance. That evidence, alone, raised a triable issue of fact as to whether Deseret’s conduct caused plaintiffs’ injuries.

ARGUMENT

All of the trial court’s rulings were made on motions for summary judgment. When considering the record, therefore, this Court must consider the “facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Carrier v. Salt Lake County*, 2004 WL 2659178 (Utah 2004).

I. Count I: Breach Of Fiduciary Duty

There are two types of fiduciary relationships under Utah Law, one created by contractual relationships, and the other implied in law:

It has, however, been noted that there are generally 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.

First Sec. Bank of Utah N.A. v. Banberry Development, 786 P.2d 1326, 1332 (Utah 1990)

Plaintiffs contend that Deseret acted as both types of fiduciary. First, plaintiffs assert that Deseret was a contractual fiduciary because it agreed to act as plaintiffs' agent for all matters before SBA. Thus, for example, when plaintiffs needed approval from the SBA for some action they wanted to take, Deseret would be the one to contact the SBA, make the presentation, and secure the necessary approval. If Deseret was indeed plaintiffs' agent, it owed a fiduciary duty to plaintiffs as a matter of law.

Second, plaintiffs contend that Deseret was a fiduciary implied in law because it acted as plaintiffs' expert business advisor. Fiduciary duties arise when one party places a particular trust and confidence in another (*Id.* at 1333), and plaintiffs will show that by agreeing to act as plaintiffs' expert business advisor, plaintiffs justifiably reposed special trust and confidence in Deseret, thereby creating a fiduciary relationship.

A. Deseret Was Plaintiffs' Agent For All Matters Concerning The SBA.

The trial court ruled that, as a matter of law, Deseret did not act as plaintiffs' agent. The court found that plaintiffs "authorized Defendant to act on their behalf in obtaining an SBA loan" and that "Defendant ... was their voice with the SBA" (Add at 6), but that Deseret was not an agent because it was not subject to plaintiffs' "control." There is a contradiction on the face of this conclusion. If Deseret was "plaintiffs' voice with the SBA," then Deseret must have been subject to plaintiffs' control. To be someone's "voice" means Deseret was stating to the SBA what plaintiffs wanted in the way of an SBA loan, which necessarily means it was under plaintiffs' control. *See, e.g., Christean v. Industrial Comm'n.*, 196 P.2d 502, 511 (Utah 1948) (an agent is "employed to represent another in contractual negotiations or similar transactions"). For this and many other reasons, plaintiffs will show

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.

Before examining the merits of this issue, there is one important bit of history. Deseret's initial summary judgment on the breach of fiduciary claim *admitted* Deseret was plaintiffs' agent:

[Deseret's] representation of Plaintiffs as Plaintiffs' limited agent for the purpose of securing the SBA Loan ended once the Authorization was obtained. Thereafter, [Deseret] owed a duty not to the Plaintiffs, but to the SBA, as SBA's limited agent for the purpose of closing and servicing the SBA Loan. (Rec 000106)

Deseret thus admitted it was plaintiffs' agent, arguing only that the agency relationship – and with it the fiduciary duty – terminated when the initial SBA authorization was received. Later, Deseret tried to ease away from this admission, arguing without much elaboration that it was not “plaintiffs' agent in the sense argued by Plaintiffs.” (Rec 000154) At no point, however, did Deseret ever argue that it was not subject to plaintiffs' control, as the trial court found. The trial court based its summary judgment conclusion, therefore, on a position never taken by Deseret.

Now to the merits of the trial court's conclusion on the absence of “control.” There is no question but that control is an element of agency. An agent is one who undertakes to act on someone's behalf subject to that person's control. *Restatement (Second) of Agency* §1 (1958); *Mecham v. Consolidated Oil & Transportation, Inc.*, 53 P.3d 479, 483 (Utah App. 2002). What, then, does the evidence show on this issue?

The first instance in which Deseret represented the plaintiffs before the SBA was the submission of plaintiffs' Section 504 loan application. (Rec 000541) Although there is no

copy of plaintiffs' application in the record,³ we know from the Authorization that was received that plaintiffs applied for \$1 million loan for a movie theater in Spanish Fork. Furthermore, plaintiffs Jon and Elizabeth Triesault and Raymon and Stephanie Bori personally guaranteed the loan. (Rec 000087))

The question is who "controlled" Deseret's actions when tendering plaintiffs' loan application to the SBA, and the answer must be the plaintiffs. Deseret had no authority to submit an application unless plaintiffs told them to. Deseret had no authority to decide how much financing to seek, or whether the funds would be used for a movie theater or a restaurant, unless plaintiffs told them to do so. Deseret had no authority to decide who would personally guarantee the loan, nor the myriad of other particulars of the loan sought by plaintiffs, unless plaintiffs told them what to do.

Mr. Vanchiere was certainly consulted on every aspect of the loan application and his advice was crucial in deciding how to present the proposal to the SBA. But relying on someone's advice does not mean that the person is not under your "control." Mr. Vanchiere could advise, suggest, influence or cajole, but he ultimately had to present the application that plaintiffs wanted. Mr. Vanchiere could even refuse to present an application for plaintiffs, but there is no basis for concluding that Mr. Vanchiere was not ultimately subject to the control of his client, the plaintiffs, when tendering that application to the SBA.

³ The fact that neither party thought the application relevant to the summary judgment motions reflects the degree to which the trial court's analysis varied from what the parties focused on.

Mr. Triesault's testimony repeatedly reflects that fact that, while plaintiffs always sought Mr. Vanchiere's input, and while they discussed nearly everything with him, plaintiffs made the ultimate decisions on the nature of their project:

Kind of seating: "In our particular case we decided on going with auditorium seating with an additional slope." (Triesault dep. 77)

Number of screens: "Q. ... Did he recommend it or did he just validate what you suggested [as to the number of screens]?"

"A. I've forgotten whether he validated or suggested. There were conversations concerning many aspects of the physical plant and the operation itself. He offered quite a few ideas and suggestions about the theater as we were developing. I never separated them out." (Triesault dep. 88)

Type of movies: "I had the idea of a family values theater, but we took it further after talking with Mr. Vanchiere. We did additional things to make it family friendly." (Triesault dep. 91)

Equipment: "I ran all kinds of – just about everything past Mr. Vanchiere just to get his read of it. And sometimes he would have an opinion on something and sometimes he wouldn't." (Triesault dep. 117)

Getting additional funds: "Q. What did you understand the consequences of a glitch of needing more money to be potentially with respect to the SBA authorization.

"A. I knew that Mike was going to have to go and ask for an authorization to get more." (Triesault dep. 127).

Mr. Triesault eventually summed up the role Mr. Vanchiere played:

"My impression was that Mike Vanchiere was acting as our advocate to see that we had a business project that could stand on its own and that he would help us through the 504 loan process. That he acted as our mentor and as our loan arranger and guide in this process." (Triesault dep. 135)

This testimony shows that plaintiffs, although heavily dependent on Mr. Vanchiere's expertise and advice, were seeking financing for *their* business project. Plaintiffs ultimately

decided what kind of business they wanted to be in. Deseret was under plaintiffs' control because what it agreed to do was get SBA approval for the project plaintiffs chose.

After plaintiffs received the authorization from the SBA, the terms of the financing had to be modified because of cost overruns. Consequently, on December 5, 1997, Deseret wrote a letter to the SBA asking for certain modifications to the terms of the financing. (Rec 000081) Deseret likely advised plaintiffs that SBA approval was needed, and how to go about getting that SBA approval. When writing to the SBA, however, Deseret was doing what plaintiffs wanted by getting the SBA approval plaintiffs needed because of cost overruns.

These facts, plaintiffs submit, would seem to show that it is undisputed that Deseret was under plaintiffs' control. The question presented by this appeal, however, is only whether there is enough evidence to raise a triable issue of fact that Deseret was acting as plaintiffs' agent. When the facts are viewed in the light most favorably to plaintiffs, there is clearly evidence that Deseret was under plaintiffs' control, and thus the question of whether Deseret was plaintiffs' agent should not have been resolved through summary judgment.

The trial court confused plaintiffs' reliance on Deseret's expert advice with the ability to control what Deseret presented to the SBA. Thus, the trial court noted "Defendant directed Plaintiffs on how to conduct their business." (Add. at 7) The testimony quoted above, however, shows only that plaintiffs relied on defendant's advice and expertise, and this does not preclude the element of control. The perfect illustration of this is the lawyer-client relationship. Clients typically rely heavily on their lawyer's advice, but lawyers have always been held to be the agents of their clients, because a lawyer ultimately can only seek

what the client wants and is therefore subject to the client's control. *Ditty v. Checkrite, Ltd., Inc.*, 973 F.Supp. 1320, 1334 (D.Utah 1997).

In the realm of agency law, Deseret is considered an independent contractor that is an agent. Deseret was an independent contractor because plaintiffs did not control its physical conduct,⁴ but it was an agent because its task was to represent its clients. The *Restatement* points out that this is a very common arrangement:

In fact, most of the person known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors as the term is used in the Restatement of this Subject, since they are contractors, but, although employed to perform services, are not subject to the control or right of control of the principal with respect to their physical conduct in the performance of the services. However, they fall with the category of agents. They are fiduciaries; they owe to the principal the basic obligations of agency: loyalty and obedience.

Restatement (Second) of Agency § 14N, comment a (1958).

The trial court concluded that Deseret acted as a “middleman” because it represented plaintiffs before the SBA for its own purposes – to foster economic growth. The fact that Deseret has an underlying goal of fostering economic growth in Utah, however, does not undermine the fact that when it communicated with the SBA on plaintiffs’ specific loan, it was doing what plaintiffs wanted it to do.

The narrow question presented by this appeal is whether Deseret’s status as an agent can be decided as a matter of law, rather than at a trial. Plaintiffs respectfully submit that the evidence discussed above would permit a fact finder to conclude that in communicating with

⁴ When a principal controls the physical conduct of an agent, there is a master servant relationship, the most common example of which is the employer/employee relationship. *Dowsett v. Dowsett*, 207 P.2d 809, 811 (Utah 1949). An agent not subject to physical control by the principal is an independent contractor. *Id.*

the SBA Deseret was acting as plaintiffs' agent, and therefore the trial court erred in granting summary judgment to Deseret under this theory.

**B. The Impact Of The SBA's Regulations
And Standard Operating Procedures.**

The trial court initially noted that the SBA's regulations were not controlling because this is a common law claim. If Deseret acted as an agent, federal regulations cannot undo that, and if Deseret did not act as an agent, federal regulations cannot make them an agent. The trial court nonetheless noted that it found some support in an internal SBA operating procedure. Although these matters are marginally relevant, we note that the trial court erred in its reading of the SBA's regulations and operating procedures.

There are two relevant pronouncements. First, an SBA regulation defines an "agent" as follows (13 C.F.R. § 103.1):

(a) ... 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....

Deseret is an "agent" under this definition because it has never denied that it "submitted" an application for financial assistance to the SBA on behalf of plaintiffs. Indeed, Mr. Vanchiere admitted in his deposition that Deseret was an agent under the definition in this federal regulation. (Vanchiere Dep. 32)

In addition to the above-quoted Regulation, which is part of an extensive set of official regulations governing the SBA loan programs, the SBA has issued an internal manual

of standard operating procedures. That manual contains a statement that under the Section 504 loan program, certified development companies such as Deseret are not “agents.” SOP-10(4) Subpart A, chapter 6. This raises the question of how to reconcile the Regulation quoted above with the statement in this standard operating procedure. Plaintiffs submit that the reconciliation can be found in the multiple roles played by certified development companies under a Section 504 loan. In addition to acting as the applicant’s agent and advisor, unlike other SBA programs, in a Section 504 loan the certified development company also loans money to the applicant. When providing the loan, certified development companies are not acting as agents. That, however, does not negate that fact that if they choose to provide assistance to applicants in preparing and presenting their applications to the SBA, certified development companies also act as agents for the borrowers. The standard operating procedure, therefore, is not suggesting that certified development companies never act as agents in connection with 504 loans, but only that they are not agents when loaning money to applicants.

In the final analysis, the Regulation and the standard operating procedure are not determinative of the factual question of whether Deseret acted as an agent. Furthermore, as the above analysis shows, they would appear to create more confusion than clarity. Nonetheless, to the extent they have some value, the pronouncement most directly relevant is the federal Regulation that provides that those who prepare or submit applications on behalf of potential borrowers are considered agents, and that is precisely what Deseret did for the plaintiffs.

**C. Deseret's Fiduciary Duty Precluded
Providing Assistance To The Payson Group.**

The trial court held, in the alternative, that if Deseret was plaintiffs' agent, its fiduciary duty was not broad enough to preclude providing assistance to the Payson Group. This issue should have been decided at a trial.

The trial court began in the correct place, by noting that an agent owes a fiduciary duty only with respect to matters within the scope of its agency. *Restatement (Second) Of Agency* §13 (1958). The alleged breach here, however, related to a matter directly within the scope of the agency. The scope of Deseret's agency was obtaining SBA-backed financing to fund plaintiffs' movie theater. The breach was providing assistance to a competing venture that caused the very venture that was the subject of the agency to fail. Deseret's actions with respect to the Payson Group caused plaintiffs to default on the very loan Deseret, acting as an agent, had secured. It is hard to imagine a much closer connection between an agent's actions and the scope of the agency.

One of the specific prohibitions on an agent is working for a competitor:

Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.

Restatement (Second) of Agency § 394 (1958). Deseret's work with the Payson Group plainly violated this prohibition on an agent's conduct. *See also, Prince, Yeates & Geldzahler v. Young*, 94 P.3d 179, 184 (Utah 2004) ("an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency").

The trial court relied on the fact that Deseret loaned money to plaintiffs, and from this concluded that it could not be a fiduciary. The court found support for this from the

“fact” that should plaintiffs default on the loan, Deseret would have to sue plaintiffs. The trial court’s logic is flawed because Deseret can and did wear multiple hats. While it is true Deseret loaned money to plaintiffs – which is not a fiduciary act – Deseret continued to act as an agent and expert advisor and thus continued in its fiduciary role. Many courts have held that banks can be both lenders and fiduciaries. For example, in *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 738 (Colo. 1991), the court reversed a grant of summary judgment in favor of a bank on this very issue:

When a bank moves into the role of an advisor, the resulting relationship extends beyond the relationship of debtor and creditor and may give rise to higher duties.

A Florida court reached the same conclusion in *Capital Bank v. MVB Co.*, 644 So.2d 515, 519 (Fla.App. 1994):

Generally, the relationship between a bank and its borrower is that of creditor to debtor, in which parties engage in arms-length transactions, and the bank owes no fiduciary responsibilities. [citations omitted] However, ... [i]n *Barnett Bank of West Florida v. Hooper*, 498 So. 2d at 923, the Florida Supreme Court found that a fiduciary relationship arose between a lender and a customer from the parties’ established relationship of trust and confidence.

Accord, Security Pacific National Bank v. Williams, 262 Cal.Rptr. 260, 278 (Ct.App. 1989)(“while there exists no per se fiduciary relationship between a bank and its customers, a fiduciary duty may nevertheless arise from their business relationship when the customer reposes trust in a bank and relies on the bank for financial advice or under other special circumstances.”); *Deist v. Wachholz*, 678 P.2d 188 (Mont. 1984)(“modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into the role of an advisor, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank”); *Tokarz v. Frontier Federal Savings and Loan Assoc.*, 656 P.2d

1089 (Wash.App. 1983); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991) (“The bank may have breached this fiduciary relationship by agreeing to lend money to Scanlan to help him form Scansteel with the knowledge that such formation could have an adverse effect on Steelvest”).

Numerous courts, therefore, have held that banks can undertake roles that create fiduciary obligations. These holdings apply *a fortiori* to the facts of this case because Deseret was not a true bank. As noted in the Statement of Facts, Deseret loaned none of its own money. It acted as a conduit channeling the money from the Debenture to the plaintiffs. (Rec 000094) From an economic standpoint, therefore, there never was a true debtor/creditor relationship between Deseret and plaintiffs.⁵ Indeed, the trial court erred when it held that if plaintiffs defaulted on the loan, Deseret would have to sue them. Plaintiffs have defaulted, and the SBA has sued them, not Deseret.⁶ The reason for this is that Deseret lost no money when plaintiffs defaulted because the loan was funded by the Debenture, and the repayment of the Debenture was guaranteed by the SBA. It is the SBA, therefore, that has suffered a loss.

To conclude, the question of whether Deseret’s assistance to the Payson Group constituted a breach of its fiduciary duty presents a question of fact for a trial.

⁵ At the loan closing, Deseret assigned the Note from plaintiffs to the SBA (Rec 000162), and plaintiffs’ loan payments were made to Colson Services Corp., a servicing agent retained by the SBA. (Rec 000088, 000210) This further shows that Deseret was never truly in a debtor/creditor relationship with plaintiffs.

⁶ *The United States of America, through its Agency, The Small Business Administration, v. Raymon Bori, Stephanie Bori, Jon L. Triesault, and Elizabeth A. Triesault*, United States District Court, District of Utah, Central Division, Case No. 2:03CV446DB. The court can take judicial notice of this under Utah Rule of Evidence 201(b).

**D. Deseret Became A Fiduciary Because Mr. Vanchiere
Undertook To Act As Plaintiffs' Expert Business Advisor.**

A fiduciary relationship can arise due to the specific facts of a relationship.

Furthermore, whether such a relationship exists is “generally a question of fact.” *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985).

It is not easy to define when such fiduciary relationships arise. The most thorough discussion of the subject is found in *First Security Bank of Utah N.A. v. Banberry Development Corp.*, 786 P.2d 1326 (Utah 1990), where the Utah Supreme court made the following observations:

A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary. [footnote omitted]

A confidential relationship may similarly arise whenever a continuous trust is reposed by one party in the skill and integrity of another. Also, as one court noted in 1910,

There is no invariable rule which determines the existence of a fiduciary relationship, but it 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.

Plaintiffs' evidence raises a triable issue of fact that Mr. Vanchiere's conduct created a fiduciary relationship with plaintiffs. As discussed in the Statement of Facts, Mr. Vanchiere offered to be an advisor to plaintiffs in ways far beyond the financing issues. (Rec 000301-304) Mr. Triesault was new to the Utah area, and Mr. Vanchiere touted his extensive

experience in assisting start up business in the Utah area. As a result, Mr. Vanchiere was consulted on every phase of the operations, and his advice was central to plaintiffs' operations. (Rec 000301-306)

Financing was certainly a key to the success of plaintiffs' project, and here, Mr. Vanchiere went beyond mere advice. He told plaintiffs they could entrust him to take all of the steps necessary to get them the financing they needed for their project. (Rec 000300) Indeed, Deseret advertises that it is a "public finance specialist." (Rec 000306)

The trial court concluded that all of the facts concerning the relationship did not add up to a fiduciary relationship. With respect, the trial court could reach this conclusion only by weighing the facts and coming to its own conclusion. There is sufficient evidence to support a claim that plaintiffs placed enormous trust and confidence in defendant, and defendant accepted and even encouraged them to do that. Whether this rose to the level of a fiduciary relationship must be decided after a full airing at trial of the facts concerning this complex relationship.

E. The Trial Court Relied On A Non-Existent Public Policy.

The trial court held that a "strong" public policy disfavors imposing a fiduciary duty on lenders because it would dampen competition. (Add 16) In reaching this conclusion, the court talked broadly about the chilling effect on "lenders" such a duty might have. This misses the essential thrust of the SBA loan program.

Private banks are free to simultaneously lend to direct competitors. Furthermore, there is no need for a "policy" favoring this because if a bank does nothing more than lend money, it does not owe a fiduciary duty. Nothing in plaintiffs' claims would preclude private

banks from loaning money to competitors. It should be noted, however, that common sense will prevent a bank from doing what Deseret did here. What bank would loan money to one company, only to turn around and loan money to a competitor that will drive the first customer into default? The only reason this was able to happen here is because Deseret had none of its own money at stake and the SBA fully guaranteed the repayment of the Debenture. Thus, unlike a private lender, Deseret had no incentive to refuse to accept the Payson Group as a client even though it would cause a default under the plaintiffs' loan.

This points to the difference between private loans and SBA loans that in turn reveals a very different policy concern. SBA loans are intended to nurture small businesses that might not otherwise have an opportunity to exist:

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....

15 U.S.C. § 631. By providing this assistance, the SBA furthers the overall health of the American economy because “security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.” *Id.*

While some of the small businesses sponsored by the federal government will fail on their own, the function of the SBA loan program is to “aid, counsel, assist, and protect” small businesses. The loan to the Payson Group, while it assisted one small business, destroyed another. This is clearly inconsistent with the underlying policy of the SBA loan program. There is no policy served by blindly loaning to every small business that comes along, even when a loan to one small business destroys another SBA-backed small business.

The true policy concern underlying this case is that the SBA loan program is designed to launch *successful* small businesses by “aiding” and “protecting” those businesses it

chooses to sponsor. Viewed in this light, placing the fiduciary obligation of loyalty on companies such as Deseret is not only consistent with the SBA's purpose, it is all but required to insure that the program meets its goal. No purpose is served by allowing Deseret to provide assistance to one client, but then take on another client that attempts to destroy its first client. Deseret should be required to treat its clients with the same loyalty that brokers, lawyers, accountants and all other expert advisors treat their clients. In this way, the SBA loan program will not blindly launch as many small business as possible, but will rather insure that those businesses it launches have the greatest chance of success.

II. Count II: Intentional Interference With Prospective Economic Relations

The three elements of a claim for intentional interference with prospective economic relations are set forth in *Leigh Furniture and Carpet Co. v. ISOM*, 657 P.2d 293, 304 (Utah 1982):

in order to recover damages, the plaintiff must prove (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.

The essence of the plaintiffs' intentional interference claim is that Deseret's actions in promoting the Payson Group's theater interfered with plaintiffs' existing and potential economic relations with its movie patrons. The claim further alleges that this was intentional, because the business plan for the Payson Group's theater intended to succeed by luring away plaintiffs' customers.

The trial court found the second and third elements – improper means and causation – lacking. We will discuss the causation element, which the trial court found lacking for all of plaintiffs' claims, in Section III below. We focus here, therefore, on the second element,

which is whether Deseret used “improper means” in interfering with plaintiffs’ economic relations with its customers.⁷

In *Leigh Furniture and Carpet Company v. ISOM*, 657 P.2d 293, 308 (Utah 1982), the Utah Supreme Court held that the improper means test was satisfied “where the means used to interfere with a party’s economic relations are contrary to law....” The court further explained as follows:

“Commonly included among improper means are violence, threats or other intimidation, ***deceit or misrepresentation***, bribery, unfounded litigation, defamation, or disparaging falsehood.” [citation omitted] Means may also be improper or wrongful because they ***violate “an established standard of a trade or profession.”***

Id. Plaintiffs have highlighted two sections in this quotation because the evidence shows that Deseret engaged in both: (1) deceit or misrepresentation, and (2) the violation of an established standard of a trade or profession.

A. Deseret’s Misrepresentations Or Deceit

As shown in the Statement of Facts, the Payson Group’s business plan depended upon taking significant numbers of plaintiffs’ customers and making plaintiffs’ theater “no longer feasible.” In blunt terms, the Payson Group’s business plan was dependent upon the destruction of plaintiffs’ business. (Rec 000297)

This raises the interesting question of why the SBA approved the Payson Group loan. The SBA guaranteed plaintiffs’ loan and the SBA takes the most exposed position in such a transaction. The private bank takes the first layer of the 504 loan and receives the primary

⁷ The second element of the tortious interference claim can be fulfilled by showing either “improper motive” or “improper means.” *Leigh Furniture and Carpet Company*, 657 P.2d at 304. Plaintiffs’ claim is based solely on a showing of “improper means.”

mortgage. The certified development company takes the second layer loan, funded by the sale of debentures, and the SBA guarantees those debentures. Thus, if the business fails, the SBA will have to pay its guarantees on the debentures, and it will have the lowest priority in the assets of the company. If a borrower defaults on a Section 504 loan, therefore, it will be the SBA that suffers the loss.

Why, then, did the SBA approve the second loan, which made the failure of the plaintiffs' loan almost a certainty? The answer is that the SBA never knew the Payson loan was going to cause the failure of plaintiffs' loan because Deseret never told the SBA. The business plan submitted to the SBA by Deseret and the Payson Group contains an appraisal that refers to taking customers from existing first-run screens in the area. (Rec 000514) The business plan never points out, however, that the referenced first run screens include one that is funded by an SBA-backed loan. *Id.* Deseret therefore secured approval of the Payson Group loan by deceiving the SBA.

The trial court acknowledged that the appraisal fails to inform the SBA that the Payson Group loan would destroy plaintiffs' ability to repay their loan. (Add 19) The trial court thought this insufficient to show deceit because the appraisal does not necessarily mean that the SBA was actually unaware of the relationship between the two loans. In effect, the trial court decided that showing that the SBA was given a deceptive document does not prove deception, because the SBA may have gotten the missing information about the relationship between the two loans from some other source.

The trial court's reasoning was flawed. A jury would be permitted to infer from the appraisal alone that the SBA was deceived. The appraisal was the most logical place to

discuss the relationship between the two SBA-backed projects, because it specifically identifies the need to make other theaters “no longer feasible” in order for the Payson theater to succeed. Yet, it leaves out the critical fact that the theater that will “no longer be feasible” is an SBA-backed project. This, alone, would permit a jury to conclude that it was more likely than not that the SBA was deceived. It is sufficient to show that the SBA was given a deceptive document without ruling out every other possible source of the truth.

This is particularly true where, as here, Deseret was in the best position of all to demonstrate that the SBA was told the truth, had that actually happened. Just as with the plaintiffs, Deseret represented the Payson Group before the SBA and was therefore the SBA’s source of information on the Payson Group’s project. Thus, if the SBA had been told about the relationship between the two projects, *the information would have come from Deseret*. Deseret, therefore could have stepped forward and provided evidence, if it had existed, that it told the SBA about the relationship between the projects. Tellingly, Deseret has never done so. Indeed, the jury would be permitted to infer from Deseret’s silence that the SBA was never told about the relationship between the two projects. *Gerard v. Young*, 432 P.2d 343, 346 (Utah 1967) (unfavorable inference drawn based on the failure to produce witness or evidence within party’s control).

The appraisal, therefore, is sufficient to raise a triable issue of fact that the SBA was deceived. That, alone, demonstrates improper means and fulfils the second of the three elements of a tortious interference claim.

B. Violation Of An Established Standard Of A Trade Or Profession

Plaintiffs contend as an alternative basis for their tortious interference claim that Deseret violated an established standard of its trade.⁸ Deseret is a certified development company, and the “standards” for this entity are set forth in the following federal regulation, which refers to such companies by the abbreviation “CDC:”

Lenders, Intermediaries, CDCs, and Associate Development companies (“ADCs”) (in this section, collectively referred to as “Participants”), must act ethically and exhibit good character.... The following are examples of such unethical behavior. A Participant may not:

(b) Have a real or apparent conflict of interest with a small business with which it is dealing....

13 C.F.R. § 120.140(b).

The trial court agreed that this regulation sets the standard of conduct for Deseret, but ruled that Deseret’s actions in aiding the Payson Group at the time it was still involved with plaintiffs’ loan did not constitute a “real or apparent conflict of interest.” With respect, if what Deseret did was not a conflict of interest, there will never be a conflict of interest. A “conflict of interest” means the certified development company undertakes to act in a way that conflicts with the interests of a current client. Deseret clearly did that, or certainly there are facts sufficient to create a triable issue of fact on this question.

The trial court reasoned that it would be bad public policy to limit the activities of certified development companies by applying the conflict of interest provision to this case, so the trial court decided this cannot be a conflict of interest. This harkens back to the error we discussed earlier. The SBA’s program is designed to foster successful businesses, and

⁸ It is well settled that violating the standards of a trade or profession constitutes “improper means.” *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945, 957 (Utah App. 1999).

public policy does and should preclude certified development companies from taking on one client, only to then take on a second client that destroys the business of the first client. If one views the role of the certified development company as developing successful small business, the regulatory conflict of interest provision makes eminent sense.

In plaintiffs' view, Deseret's actions should be deemed a conflict of interest as a matter of law. However, at a minimum, there is a triable issue of fact as to whether Deseret had a conflict of interest, and thereby used "improper means" by violating an industry or professional standard as set by the federal government.

III. The Evidence Presented A Triable Issue Of Fact On Causation

The trial court ruled that plaintiffs lacked any admissible evidence that Deseret's assistance to the Payson Group caused plaintiffs' harm. There is, however, abundant evidence that (a) the opening of the Payson theater caused plaintiffs' theater to fail, and (b) that the Payson theater could never have opened without Deseret's assistance. This evidence was more than sufficient to create a triable issue of fact on causation.

A. There Is Abundant Evidence That The Opening Of The Payson Theater Caused The Demise Of Plaintiffs' Theater.

The evidence on this point was not only sufficient, it was overwhelming:

- Comparing before and after revenues, for the 12 months prior to Payson theater's opening, plaintiffs' revenues were approximately \$2 million, but just \$1.4 million for the 12 months after the new theater opened. (Rec 000520)
- Comparing attendance for comparable months before and after, in May 1999 the attendance at plaintiffs' theater was 42,813, in May 2000 attendance was 21,141. In June 1999 attendance was 49,058, in June 2000, 18,856. In July 1999 attendance was 43,080, but

in July 2000 attendance was 28,712. (Rec 000520) For the entire year before the Payson theater opened plaintiffs' attendance was approximately 336,722 (Rec 000520), but only 231,717 in the year after.

- Concession revenues, a key measure of a theater's success, were approximately \$606,099.60 before the Payson theater opened (Rec 000520), but only \$417,090.60 in the following year. (Rec 000520)

- In response to the suggestion that plaintiffs' theater just had bad luck with the movies it picked after the Payson theater opened, consider the Star Wars data. In May 1999, Star Wars Episode I came out. Plaintiffs' theater had 13,520 customers and made \$55,115.29 admissions in the first week of the movie. In post-Payson May 2002, Star Wars Episode II came out and plaintiffs' theater had just 6,734 customers and made only \$26,188.71 in admissions in the first week of the movie. (Rec 000519-520)

- In the aggregate, in the year after the Payson theater opened, plaintiffs' theater lost over 100,000 people in attendance, over \$600,000 in gross revenues and over \$189,000 in gross concession sales. (Rec 000520)

The trial court ruled that all of this might have been due to bad management, market factors or general economic conditions. (Add 28) This suggests, however, that plaintiffs have to rule out every other possible cause of their post-Payson theater decline in order to raise a triable issue of fact. This overstates the burden on plaintiffs. The evidence cited above is more than sufficient to raise a triable issue of fact.

The trial court also ruled that plaintiffs needed an expert witness on causation because this issue was “not within the common knowledge and expertise of the layman.” (Add 26) There is no legal basis for imposing such a requirement.

Rule 702 of the Utah Rules of Evidence provides that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, *may* testify thereto in the form of an opinion or otherwise.” (emphasis added) There is nothing in this or any other rule of evidence that requires that expert testimony be used.

Utah courts have developed a very limited exception to this in malpractice cases:

[B]efore the plaintiff can prevail in a medical malpractice action, he must establish both the standard of care required of the defendant as a practicing physician in the community and the defendant's failure to employ that standard. In the majority of medical malpractice cases the plaintiff must introduce expert testimony to establish this standard of care. Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.

Nixdorf v. Hicken, 612 P.2d 348, 351-52 (Utah 1980.)

There are exceptions to this rule even in malpractice cases. *Id.* (No expert testimony needed to prove loss of a needle during surgery was negligent.) More critically, however, this rule has never been extended outside the malpractice arena to create other categories of cases where expert testimony is required. Indeed, in the only case cited by the trial court, *Shreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Utah App. 1994), the question was whether the plaintiff had to present expert testimony on the standard of care owed by the operator of a retiree apartment building who had failed to install a sprinkler system. Although the court

noted that expert testimony is sometimes needed “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,” the court concluded that expert testimony was *not* required in that case because juries could determine what was reasonable for the operator of retiree housing. *Id.*

Expert testimony has never been required in business cases involving economic issues. For example, in *Acculog, Inc. v. Peterson*, 692 P.2d 728 (Utah 1984), the plaintiff claimed that a fire destroyed some of its equipment and caused it to lose profitable contracts. Plaintiff’s evidence supporting its lost profit claim was the testimony of an employee about the jobs they lost and the value of those contracts. The trial court granted a directed verdict for the defendant, but the Utah Supreme Court reversed, holding the testimony of the employee was sufficient to place the lost profits issue before the jury.

Plaintiffs’ evidence on causation consists of showing the severe drop in attendance, sales and other indicators that occurred directly after the Payson theater opened. A jury can surely understand these facts. Deseret is welcome to attack this evidence in any way it chooses, even through expert testimony, but there is no basis for finding that causation can only be proven with expert testimony. The finding that expert testimony is required would appear to be another reflection of the trial court’s view that plaintiffs’ numerical evidence is insufficient. The trial court thought that the only way to prove causation would be to have an expert in the movie business perform some comprehensive (and expensive) analysis on the overall market place, and through this analysis rule out every other possible cause of the

cause of the demise of plaintiffs' theater. While such evidence is certainly possible, there is no legal basis for requiring such evidence.

**B. The Payson Theater Would Never Have
Opened Without Deseret's Assistance.**

The trial court held, in the alternative, that even if the Payson theater's opening caused the demise of plaintiffs' theater, Deseret's actions in obtaining financing for the Payson theater were too remotely related to the failure of plaintiffs' theater to be deemed the cause. (Add 27, 28) This finding is based on both incorrect legal and factual assumptions.

Factually, there are two undisputed facts that show the necessary link. First, the Payson theater would not have opened without an SBA-backed loan. This fact is indisputable because the SBA cannot provide assistance unless no other financing is available. 13 C.F.R. § 120.101.

Second, at the relevant time, Deseret was the only company providing assistance in obtaining SBA-backed loans in Utah. (Rec 000459) Thus, the jury can find that the Payson theater would never have opened without Deseret's assistance.

Plaintiffs need to prove that the loan was a "proximate cause" of their loss:

Proximate cause is that cause which, in 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. [citation omitted] "[T]he issue of proximate cause should be taken from the jury only where: (1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation."

Rose v. Provo City, 67 P.3d 1017, 1024-25 (Utah App. 2000).

Under this standard, plaintiffs must present evidence from which a jury could conclude that the loan “set in operation” events that caused plaintiffs’ injury. The loan, which only Deseret could secure, meets this test.

The trial court also ruled that factors such as “market forces, business judgment and quality of movies” were “efficient intervening causes.” (Add 28) The trial court seemed to be ruling that, even if the loan was a proximate cause of plaintiffs’ injuries, other factors such as market conditions or management ability were intervening causes that broke the line of causation. This, however, was pure speculation. No evidence was presented that these other factors played any role in the demise of plaintiffs’ theater. The trial court therefore found that plaintiffs failed to raise an issue of fact on causation because they did not rule out all other possible causes of their injuries. There is no legal basis for such a burden.

The burden on a defendant arguing that there is an intervening cause is considerable. In *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah App. 1996), for example, the plaintiff sued a law firm for breach of fiduciary duty, claiming that if the firm had acted appropriately, the plaintiff would have gotten different financing, which would have caused a business transaction to turn out much more favorably. The trial court entered summary judgment holding in part that the plaintiff had used a lawyer other than the defendant, and that the advice of that other lawyer was an intervening cause. The appellate court reversed, ruling that issue should have been resolved at trial.

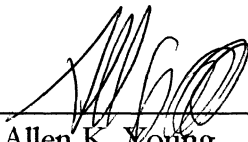
In the case at bar, there is no dispute but that plaintiffs’ business declined immediately after the Payson theater opened. The trial court found that this decline was due to some other intervening cause as a matter of law, even though no evidence of any other

cause was presented. The question of whether there was an intervening cause should have been left for trial, and could not properly provide a basis for summary judgment.

CONCLUSION

For the reasons stated in this brief, plaintiffs-appellants respectfully request that the Court reverse the entry of summary judgment in favor of the defendant on the Count I breach of fiduciary duty claim, the Count II intentional interference with prospective economic relations claim and the intentional infliction of emotional distress claim, and remand the case for trial on those claims.

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CERTIFICATE OF SERVICE

I, Allen K. Young, certify that that on January 6, 2005, I served two copies of the attached Appellate Brief upon the following counsel for appellee by mailing it by first class mail with sufficient postage prepaid to the following addresses:

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ADDENDUM

FILED
Fourth Judicial District Court
of Utah County, State of Utah

7/21/04 MDA Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JON and ELIZABETH TRIESAULT, RAYMON and STEPHANIE BORI, individuals, IMAGINATION THEATERS, INC , a corporation, and IMAGINATION THEATERS HOLDING, L L C a limited liability company, Plaintiffs, vs. THE GREATER SALT LAKE BUSINESS DISTRICT, a Utah corporation, doing business as DESERET CDC, Defendant.	RULING Case # 020401399 Judge Fred D Howard Division 5
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This matter comes before the Court regarding Defendant's *Motion for Summary Judgment* and Defendant's *Motion for Summary Judgment (Causation; Emotional Distress)*. The Court, having reviewed the parties' respective pleadings and being fully advised in the premises, hereby issues the following:

RULING

BACKGROUND

This case arises from the involvement of the Defendants, a certified development company (CDC), and the duty, if any, such company owes to small businesses that it assists in obtaining federally guaranteed loans through the 504 SBA loan program. Plaintiffs obtained an SBA loan with Defendant's assistance in 1998 in order to build a movie theater in Spanish Fork, Utah, named Spanish 8 Theater. Subsequently, Defendant aided another business, Payson

Theater, in obtaining an SBA loan which enabled it to construct a competing movie theater in Payson, Utah. Plaintiffs' business subsequently failed, which failure Plaintiffs attribute to competition from Payson Theater. Plaintiffs sued Defendant alleging (1) breach of fiduciary duty, (2) intentional interference with prospective economic relations, and (3) violation of implied covenant of good faith and fair dealing. Plaintiffs also allege intentional infliction of emotional distress as part of each cause of action. The Defendant has denied any wrongdoing, claiming that it owed no fiduciary duty toward Plaintiff and did not commit the alleged torts.

The Defendant filed a motion for summary judgment on December 31, 2002 contending that it owed no fiduciary duty toward Plaintiffs and, therefore, could not breach such a duty. Defendant also asserted that it could not have interfered with Plaintiffs' economic relations as a matter of law because there were no facts to establish either an improper purpose or improper means necessary to establish such a tort. The Defendant also argued that it did not violate the covenant of good faith and fair dealing because each party received what it bargained for in the loan contract negotiations. The Plaintiffs responded alleging that Defendant was Plaintiffs' agent and owed a corresponding duty because of that agency and that Defendant's actions constituted a special relationship, by which it owed a duty implied by law. Plaintiffs also argued that the grant of the loan to Payson Theater without informing the SBA of its potential harmful effect upon Plaintiffs' business constituted an intentional interference with Plaintiffs' economic relations and was in violation of the covenant of good faith and fair dealing.

On June 17, 2003 Judge Claudia Laycock heard oral arguments on Defendant's motion for summary judgment, which motion she denied, ruling that factual issues existed that precluded summary judgment. On January 1, 2004 Judge Fred Howard rotated into the fifth division and assumed assignment over the present case. The Defendant subsequently filed a second motion for summary judgment on causation and emotional distress which was heard by the Court on April 13, 2004. The Court denied summary judgment on the issue of causation and granted summary judgment on the claim for emotional distress, but subsequently reversed its ruling on emotional distress and denied summary judgment on that issue as well.

The case was set for trial but upon review of Defendant's trial memorandum the Court informed the parties that it wished to revisit all of the issues previously raised in the preceding summary judgment motions. The Court vacated the previous rulings and invited the parties to supplement their briefing on the issues, which the parties declined instead choosing to rest upon their earlier submitted pleadings. The trial date was then stricken and oral arguments were presented to the Court on June 8, 2004, whereupon the Court took the matter under advisement.

With respect to the standard governing summary judgment, the Court notes that summary judgment is appropriate "only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Butterfield v. Okubo*, 831 P.2d 97, 101 (Utah 1992). The Utah Supreme Court has stressed that the rules regarding summary judgment "should be liberally interpreted to effectuate their purpose, to effect the prompt administration of

justice, and to expedite litigation by avoiding needless trials where no triable issue of fact is disclosed ” *Nat’l American Life Ins. Co. v. Bayou Country Club, Inc.*, 403 P.2d 26, 29 (Utah 1965) Further, the purpose of a motion for summary judgment “is to provide a means of searching out the undisputed facts” to determine if the matter can be resolved “as a matter of law,” thereby saving both the court and the parties the “time, trouble, and expense of a trial.” *Rich v. McGovern*, 551 P.2d 1266, 1267-68 (Utah 1976).

FIDUCIARY DUTY

Before this case may be presented to the jury on the question of any breach of duty, this Court must determine whether, in light of the relevant facts, the Defendant owed a duty to the Plaintiff. It is the province of the Court to determine as a matter of law the nature and extent, if any, of the duty Defendant owed to Plaintiffs. *Weber v. Springville City*, 725 P.2d 1360 (Utah 1986); *Hale v. Beckstead*, 74 P.3d 628 (Utah Ct. App. 2003); *Fishbaugh v. Utah Power & Light*, 969 P.2d 403 (Utah 1998). Utah appellate courts have established two types of fiduciary relationships. Specifically, the Utah Supreme Court recognized those relationships that are:

(1) 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) those 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.

First Sec. Bank of Utah N.A. v. Banberry Development Corp., 786 P.2d 1326, 1332 (Utah 1990).

In this case, Plaintiffs have advanced two theories to establish a fiduciary duty. First, Plaintiffs allege that Defendant was Plaintiffs' agent, and as such, owed a fiduciary duty of 'loyalty' to Plaintiffs not to do anything that might harm their business. Alternatively, Plaintiffs argue that the relationship between the parties, including Defendant's advice and counsel to Plaintiffs, created a relationship by which Defendant became an implied in law fiduciary to Plaintiffs. The Court will consider each theory in turn.

A. Plaintiffs have failed to demonstrate the elements of 'agency' to support their assertion that Defendant acted as Plaintiffs' agent.

The Plaintiffs have alleged that Defendant was their agent in the procurement of an SBA 504 loan and giving of financial and business advice to Plaintiffs after the loan and, therefore, owed a fiduciary duty to Plaintiffs under a theory of agency. Defendant defends that it was never an agent for Plaintiffs. Among other things, Defendant refers the Court to the SBA's standard operating procedure, which specifically states, "neither the development company nor its employees is an agent for a 504 loan application in which the CDC is involved." SOP-10(4)(E) Subpart A, chapter 6, 13 Regulations Regarding Agents(d). The SBA's standard operating procedure, while possessing the air of authority, is neither a congressional nor administrative regulation. As such, it is merely the SBA's interpretation of the relationship between a CDC and prospective borrower and has no real authority upon the parties or the courts. Therefore, the Court must look to the parties, their relationship, and general agency principles to determine if an agency relationship existed.

In order to establish that Defendant acted as Plaintiffs' agent, Plaintiffs must demonstrate that their relationship satisfies basic agency principles. 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." See also *Mecham v. Consolidated Oil & Transportation, Inc.*, 53 P.3d 479, 483 (Utah Ct. App. 2002) ("agency is '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'") (quoting *Wardley Corp. v. Welsh*, 962 P.2d 86, 89 (Utah Ct. App. 1998)); *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1269 (Utah 1998) ("[t]o be an agent, a person must be authorized by another to 'act on his behalf and subject to his control'") (quoting Restatement (Second) of Agency § 1 (1958)).

The Plaintiffs have produced evidence demonstrating that they authorized Defendant to act on their behalf in obtaining an SBA loan. Plaintiffs were SBA loan applicants who relied upon Defendant to assist them in preparing their application materials and were required to work with and to conform to Defendant's requirements in order to obtain SBA approval. The Plaintiffs placed their trust and confidence in Defendant, who was their voice with the SBA, and without Defendant's assistance, Plaintiffs likely would not have obtained the SBA loan.

Plaintiffs have not, however, presented any evidence that Defendant was subject to Plaintiffs' control, nor that Defendant consented to be under Plaintiffs' control. To the contrary, Plaintiffs have presented evidence that Defendant directed Plaintiffs as to how to prepare their SBA loan application and have alleged that Defendant directed Plaintiffs on how to conduct their business. Nowhere in their pleadings do Plaintiffs submit evidence that Defendant was subject to Plaintiffs' control. Rather, the Plaintiffs have repeatedly emphasized the direction and control Defendant allegedly had over Plaintiffs. This element of agency law is not simply to be glossed over. "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." Restatement (Second) of Agency § 1 cmt. b (1958).

Plaintiffs refer to 13 C.F.R. § 103.1(a) and (b) (1996) in support of their assertion that Defendant was Plaintiffs' agent. This 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.
- (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...

Plaintiffs contend the above regulation establishes Defendant as Plaintiffs' agent.

Plaintiffs are in error. This regulation simply defines what it means to be an agent, but does not establish Defendant as Plaintiffs' agent, nor does it obviate the need for traditional agency law analysis. If Plaintiffs had *hired* an attorney, accountant, consultant, etc. to represent them in their

dealings with the SBA, this regulation would establish that individual as an agent who could do business with the SBA. This regulation does not, however, confirm agency status upon Defendant simply because Defendant assisted Plaintiffs in preparing their loan application. Further, the SBA's interpretation of this regulation, while not binding, is certainly illustrative of the intent behind this regulation. See SOP-10(4)(E) Subpart A, chapter 6, 13 Regulations Regarding Agents(d), "neither the development company nor its employees is an agent for a 504 loan application in which the CDC is involved."

A certified development company is required by the SBA to assist loan applicants to ensure that the applicants meet certain qualifications in order to protect the SBA. Thus, the relationship between the Defendant and Plaintiffs is more akin to that of an intermediary than that of agent/principal, i.e. someone who wields power in the name of another but is not considered an agent under agency law principles. The Restatement (Second) of Agency § 1 cmt. g (1958) addresses such individuals "who bind others, or even act in the name of others, but do so for their own purposes." The Restatement specifically refers to the relationship between a mortgagor and mortgagee¹ to illustrate this principle that a person may act in the name of another without becoming an agent, and concluded that "[s]uch a power is not an agency power and the holder of one is not an agent of the one who created it." *Id.* Such is the case here. Defendant was

¹ The Utah Supreme Court has declared that the relationship between mortgagor and mortgagee is presumptively "not of a fiduciary character." *First Sec. Bank of Utah* at 1332.

empowered to act in Plaintiffs' name in its communication with the SBA, but did so for its own purpose - to foster economic growth in the community by assisting small businesses to obtain SBA loans. The Defendant possessed power to act on Plaintiffs' behalf in the facilitating and servicing of the SBA loan, such as "collect[ing] money due on the contract," *id.*, but was not under the control of the Plaintiffs and, therefore, not an 'agent' under a legal agency analysis.

In conclusion, without some evidence from Plaintiffs that they did in fact exercise some degree of control over Defendant and that Defendant consented to the control, this Court cannot conclude that Defendant acted as Plaintiffs' agent. Accordingly, without an agency relationship, Defendant did not owe Plaintiffs a fiduciary duty and could, therefore, assist Payson Theater in obtaining an SBA loan.

B. The limited scope and purpose of Defendant's agency, assuming such an agency existed, prevented Defendant from having a fiduciary duty toward Plaintiffs.

Even should the Plaintiffs be able to produce evidence that Plaintiffs exercised some degree of control over Defendant sufficient to establish an agency relationship, the Court cannot conclude that the relationship between the parties was a fiduciary relationship due to the fact that "an agent is a fiduciary with respect to the matters within the scope of the agency" only. 3 Am. Jur. 2d *Agency* § 205 (2004). In other words, "an agent is not in a fiduciary relationship to the principal in matters in which the agent is not employed unless the nature of the agency is such as to create a confidential relationship in all matters." *Id.* The Restatement (Second) of *Agency* § 390

cmt. d (1958) states, an “agent is not, as such, in a fiduciary relation with the principal as to matters in which he is not employed ” See also *Bancoklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1104 (10th Cir.1999) (“agency is characterized by ... a fiduciary relationship with respect to matters *within the scope* of the agency”) (emphasis added), *Taylor v. Hamden Hall School*, 182 A.2d 615, 618 (Conn. 1962) (“[h]e is not in a fiduciary relation to his principal, however, in matters in which he is not employed”). The facts of this case, even when considered in the light most favorable to the Plaintiffs, demonstrate that Defendant, assuming an agency relationship existed, was an agent for the limited purpose of obtaining and servicing the SBA loan for Plaintiffs. Defendant was not a director or officer of Plaintiffs’ business, did not possess authority to bind Plaintiffs to contracts with third parties, did not share in the risks or rewards of the theater, and was not directly compensated by Plaintiffs for any suggestions given to Plaintiffs.

Thus, the facts submitted by Plaintiffs clearly establish that, under agency law, Defendant did not have a confidential relationship in all matters, and as such, could only be considered an agent for the limited purpose of obtaining and servicing the SBA loan. This limited duty cannot reasonably be expanded to include a fiduciary duty of ‘loyalty’ not to do anything that might harm Plaintiffs’ business interests. To accept Plaintiffs’ argument would mean that anyone who performs a service for another now has a duty to that individual or business entity similar to that possessed by directors and officers of a corporation, only this duty would be imposed without granting the rights and privileges that accompany directors and officers. Such logic would impose

the rigorous responsibilities of directors and officers upon all agents, regardless of the agent's authority within the business, without the corresponding rights and rewards. Such a conclusion is not warranted by the law or the facts of this case.

In addition, once the loan was made, Defendant became Plaintiffs' lender via contract. Contractually, Plaintiffs were obligated to Defendant to repay the loan. Should Plaintiffs default on the loan, Defendant would be legally entitled to sue them for breach of contract. In short, Defendant and Plaintiffs were arms-length parties to a contract, which by its nature, precluded Defendant from having a duty of 'loyalty' for Plaintiffs. *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). It would be inconsistent for Defendant to pursue its lawful remedy in court should Plaintiffs default and simultaneously observe a duty of 'loyalty' toward Plaintiffs. Therefore, under an agency law analysis, Defendant did not possess a fiduciary duty as advocated by Plaintiffs, and could, therefore, assist other businesses such as Payson Theater in obtaining an SBA loan.

C. Defendant was not an implied in law fiduciary for Plaintiffs.

Plaintiffs' second theory for imposing a duty upon Defendant is that Defendant became an implied in law fiduciary "due to the factual situation surrounding the involved transactions and the relationship of the parties to each other." *First Sec. Bank of Utah*, 786 P.2d at 1332. To become an implied in law fiduciary several principles must be considered, namely: (1) "A fiduciary

relationship imparts a position of peculiar confidence placed by one individual in another;” (2) a “fiduciary is a person with a duty to act primarily for the benefit of another,” (3) a “fiduciary is in a position to have and exercise and does have and exercise influence over another; (4) a “fiduciary relationship implies a condition of superiority of one of the parties over the other;” and (5) generally speaking, “in a fiduciary relationship, the property, interest, or authority of the other is placed in the charge of the fiduciary.” *Id.* at 1333. In *First Sec. Bank of Utah*, the court also noted that a confidential relationship may be established when one party places continuous trust in the skill and integrity of another and that there exists “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.*”²

²Plaintiffs cite several cases where different courts found various lending institutions to have created a fiduciary duty with their respective borrowers through the actions of bank/lender employees. However, while it is true that a fiduciary duty may arise between a lender and its borrower through special factual circumstances, all of the cases cited by Plaintiffs are inapposite to the case at hand. In all of the cited cases, the courts found that specific, special facts existed to warrant finding that a special relationship and corresponding duty existed. For instance, in the cases cited by Plaintiffs the courts find one of the following facts to be present: (1) the lender claimed ownership in the borrower’s property, (2) the lender had a financial interest in property purchased by borrower, (3) the lender induced the borrower to sell and unfairly purchased the borrower’s property, (4) the lender made affirmative false representations and induced borrower to purchase property the lender had a financial interest in, or (5) the lender knowingly assisted a client in breaching the client’s fiduciary duties the client owed to his former corporation as a director of that corporation. Plaintiffs have not alleged any of these factual settings, and as such, the Court observes that the facts of this case are distinguishable from the authorities cited by Plaintiffs. See *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Ccolo. 1991); *Capital Bank v. MVB Co.*, 644 So.2d 515 (Fla. 3rd DCA 1994); *Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985); *Security Pacific National Bank v. Williams*, 213 Cal. App. 3d 927 (Cal. Ct. App. 1989); *Steelevest, Inc. v. Scansteel Service Ctr. Inc.*, 807 S.W.2d 476 (Kent. 1991).

Applying the facts of this case to the law, it is clear that Defendant did not possess a fiduciary relationship with the Plaintiffs. In their pleadings, Plaintiffs place great emphasis on the fact that Defendant advised and assisted Plaintiffs in procuring the SBA loan. While it is true that Defendant did have a responsibility to assist Plaintiffs in the loan application and approval process, and for purposes of the motions, presumably possessed superior knowledge and skill to advise Plaintiffs on how to obtain an SBA loan, the Defendant did in fact obtain the loan for the Plaintiffs, thereby fulfilling its obligation. Had the Defendant thereafter ceased to advise Plaintiffs, there would be no question that a fiduciary relationship did not exist. Thus, the real issue concerns the relationship between the parties in light of their history and the advice given to the Plaintiffs *post-loan*.

The Plaintiffs recite facts in support of their assertion that Defendant owed Plaintiffs a fiduciary duty. Specifically, Plaintiffs allege, *inter alia*, that Mr. Vanchiere, Defendant's employee, visited the theater twice per month, advised Plaintiffs regarding the theater's operation including what concessions to sell and what movies to show, was given confidential financial information concerning the theater, and assisted the Plaintiffs in obtaining SBA approval to lease portions of the theater's parking lot to a neighboring business. *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment*, p. 14-15. Though Plaintiffs have also alleged that Defendant "made sure plaintiffs never personally took any amount of money from the theater until the theater became profitable," they have failed to produce any evidence to demonstrate how

Defendant “made sure ” *Id* Absent such record, Plaintiffs have failed to establish such assertion as a ‘fact ’

While it is clear from the facts that Plaintiffs trusted Defendant, taken together, these facts cannot establish the requirements for a fiduciary as mandated by the Utah Supreme Court in *First Sec. Bank of Utah*, 786 P.2d at 1332. First, the recited facts do not demonstrate that Defendant had a duty to act primarily for the benefit of Plaintiffs, nor that the Defendant was ever placed in charge of Plaintiffs’ property or interests. Defendant was not a partner or party to a joint venture business with the Plaintiffs, nor did Defendant share in the risks or rewards of the theater. In addition, Defendant never possessed any authority to compel Plaintiffs to act on any of its suggestions. There is no evidence suggesting that Defendant utilized any of the theater’s confidential financial information for any purpose let alone to the Plaintiffs’ detriment.³ Thus, the fact that Defendant possessed confidential financial information is immaterial. Also, the fact that Plaintiffs were later required to obtain SBA approval for the parking lot lease through Defendant does not establish a fiduciary duty. The terms of the contract required Plaintiffs to obtain SBA approval in order to ensure that the collateral for the SBA loan remained viable. Defendant was simply acting in accordance with the contract in servicing the loan for the Plaintiffs. Defendant

³The Third Circuit Court of Appeals ruled that a bank did not possess a fiduciary duty toward a client who divulged confidential information to the bank when the bank loaned money to the client's competitor knowing that the competitor would use the money to purchase controlling stock in the client's corporation. *Washington Steel, Corp. v. TW Corp.*, 602 F.2d 594 (3rd Cir. 1979).

was not engaging in behavior outside the contract that would give rise to a special relationship and corresponding duty

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. Any arguable duty possessed by Defendant was created by its behavior, and is, therefore, also limited by that behavior. If Defendant possessed any duty beyond obtaining an SBA loan for Plaintiffs, it was a duty to continue to give advice to the best of its knowledge concerning the operation of the theater. Plaintiffs argue that by virtue of the parties' relationship, Defendant had a duty of 'loyalty' to Plaintiffs not to do anything that would injure Plaintiffs' business, or a duty similar to that possessed by directors and officers of a corporation. The Court cannot conclude that such a duty was created by Defendant's limited actions. Defendant was not a director, officer, or owner of Plaintiffs' business, did not share in the risks or rewards of the business, and possessed no authority to compel the Plaintiffs to follow any of its suggestions. In short, Defendant was simply a facilitator for obtaining an SBA loan whose employee, Mr. Vanchiere, developed an amicable relationship with Plaintiffs and who gave gratuitous advice, if not mere suggestions, to Plaintiffs after the SBA loan was obtained. Such behavior by Defendant cannot as a matter of law confer a fiduciary duty upon Defendant.

D. Public policy disfavors conferring fiduciary duties upon lenders.

In addition to the proceeding, public policy strongly opposes conferring any such duty. The policy of the United States government favors 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.” 15 U.S.C. § 631(a) (1997). The purpose of a certified development company, (CDC), is to develop communities by assisting small businesses in obtaining capital loans. The logic advanced by Plaintiffs would preclude a CDC from loaning money to any business that might compete with an existing business that previously obtained SBA funding through the CDC. Such logic is iraproposite to the concept of free markets and commercial competition, and would essentially eviscerate a CDC’s ability to provide funding.

If Plaintiffs’ argument were accepted, any business could limit, if not eliminate, competition simply by obtaining a loan before its competitors. Lenders would be limited in funding types of businesses. Arguments over the “type of business,” its scope and breadth, would inevitably arise and burden lenders to assess if a potential loan was an inappropriate aid to a competitor. For example, would Defendant be precluded from lending to a candy store near Plaintiffs’ theater since Plaintiffs sell candy at the theater and a large percentage of Plaintiffs’ revenue comes from concession sales? Would lending to a video rental store, cable, or satellite industry, which are presumably businesses competitive to a theater, be prohibited?

Plaintiffs' competition argument creates a host of problems concerning the availability of funding and economic development that would undoubtedly hinder rather than foster the growth of business. While it may be true that competition may cause some of the businesses to which SBA has loaned funds to go out of business, it is the province of Congress to determine the regulations and procedures by which such funding shall be available.

For these reasons, and for those set forth in Defendant's memoranda, this Court concludes the Defendant owed no fiduciary duty to Plaintiffs that would prevent Defendant from giving a loan to any business that competed with Plaintiffs. Specifically, the Court finds as a matter of law that Defendant did not possess a fiduciary duty toward Plaintiffs that prevented Defendant from giving a loan to Payson Theater and, accordingly, dismisses Plaintiffs' first cause of action.

INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

In order 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 and Carpet Co. v. ISOM*, 657 P.2d 293, 304 (Utah 1982).

The Plaintiffs contend the first element of interference with economic relations is satisfied by the fact that Defendant facilitated the SBA loan for Payson Theater when it 'knew' such loan would destroy Plaintiffs' business. The Court declines to address this issue of whether Defendant

intentionally interfered with Plaintiffs' business, instead finding that the analysis on the second and third elements of economic interference to be dispositive

Plaintiffs rest their argument for the second element of interference with economic relations upon 'improper means,' which may be established by showing "violence, threats or intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." *Id.* at 308 Specifically, Plaintiffs allege Defendant committed deceit or misrepresentation by failing to inform the SBA of the alleged harmful effect the Payson Theater competition could have upon Plaintiffs' business where the Plaintiffs' business was also funded by the SBA. Improper means may also be established through a violation of "an established standard of a trade or profession," *id.*, which Plaintiffs contend occurred when Defendant allegedly violated a federal regulation prohibiting a "conflict of interest with a small business with which it is dealing." 13 C.F.R. § 120.140(b) (2003).

Plaintiffs contend that deceit or misrepresentation is demonstrated by the fact that Defendant, for "pure profit," assisted the Payson Theater in obtaining an SBA loan without informing the SBA of the 'fact' that the loan to Payson Theater would result in the "destruction of plaintiffs' business," which was funded by the SBA. *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* p. 29-30. Plaintiffs argue the SBA did not know that Payson Theater would compete with and possibly drive Plaintiffs' theater out of business and that the SBA would not have authorized the Payson Theater loan had it been advised of such facts.

There are several flaws to Plaintiffs' argument. First, Plaintiffs have produced no evidence supporting their assertion that Defendant loaned money to Payson Theater because of a profit motive. Plaintiffs have simply assumed that because Defendant would receive no fee from the SBA if the loan to Payson Theater was not approved that Defendant must have been operating with a self-interested motive. The Court notes that the Defendant is a non-profit organization and Plaintiffs have failed to produce affidavits or other record showing a profit motive, such as Defendant needing fees to continue its operation, or of an employee, such as Mr. Vanchiere, requiring such fees to maintain his employment.

More importantly, the Plaintiffs have failed to frame the non-disclosure of the alleged effect of the Payson Theater loan on Plaintiffs in terms of SBA knowledge. Plaintiffs assume that the SBA was unaware that arguably the Payson Theater's business plan would take 'market share' of theater patrons from Plaintiffs' theater, thereby reducing revenues and potentially cause Plaintiffs to default on their loan obligations. Plaintiffs contend that such non-disclosure constitutes 'deceit or misrepresentation' and was, therefore, an improper means. However, the only record produced by Plaintiffs in support of this allegation is an appraisal that states the Payson Theater should succeed despite the fact that there are several theaters in the area because the Payson Theater will be new and, therefore, will likely attract more than its 'fair share' of the market and make the older theaters "no longer feasible." *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment*, Exhibit G, A Complete Appraisal, p. 31. The

appraisal does specifically mention Plaintiffs' business, Spanish 8 Theater, but not the fact that Spanish 8 Theater was funded by an SBA loan *Id*

Deceit is defined as "the act or practice of deceiving as by falsification, concealment, or cheating" *Webster's Third New International Dictionary* (1993) To show these elements, Plaintiffs must produce some evidence that the Defendant falsified or concealed information from the SBA or somehow cheated the SBA Plaintiffs have produced no such evidence to support such an assertion of deceit There is no record by an appropriate SBA agent stating that it was unaware of the competing nature of the loans and that the SBA would not have awarded the Payson Theater loan with such knowledge The SBA might have been aware of both loans and the competing nature of those loans or the SBA may have been unpersuaded by the appraisal's claim that Payson Theater would drive other theaters out of business The record is silent as to whether the SBA was ignorant of those facts Plaintiffs contend were undisclosed The only 'fact' before the Court is the above mentioned appraisal, which, by itself, is insufficient to establish an allegation of deceit There is not, therefore, a material fact in dispute over whether the SBA was deceived since the facts before this Court, which are not disputed, cannot establish the elements of deceit or misrepresentation.

Regarding Plaintiffs' contention that Defendant violated an established standard of a trade or profession, such arguments also fail The Plaintiffs present no evidence to support this assertion other than the fact that Defendant assisted Payson Theater in obtaining SBA financing Plaintiffs

argue with emphasis that this fact alone demonstrates a violation because the competing loan was in conflict with Plaintiffs' interests and federal regulations prohibit a CDC from having a "conflict of interest with a small business with which it is dealing" 13 C.F.R. § 120.140(b) (2003).

Plaintiffs interpret this regulation as meaning a CDC cannot grant a loan to any business that may compete with a business that has already obtained SBA financing. However, the regulation contains no such language. It simply prohibits conflicts of interest but does not define what constitutes a conflict of interest. Again, public policy cuts against Plaintiffs' argument that Defendant has a conflict of interest when it assists competing businesses to obtain loans because competition fosters development, and the very purpose for Defendant's existence is to develop communities by assisting small businesses in obtaining loans. Having no fiduciary duty, or at the minimum a clearly defined regulation barring the granting of competing loans, it cannot be said that Defendant had a conflict of interest when it assisted Payson Theater in obtaining SBA financing.

In addition, Plaintiffs cannot meet the third element of interference with economic relations: causation. The Plaintiffs have assumed that the Defendant's loan to Payson Theater caused Plaintiffs' business to fail. However, while Plaintiffs make many assertions that said loan caused their business to fail, the Court disagrees with such arguments. The Plaintiffs have not produced sufficient evidentiary facts to allow a jury to conclude, without speculation, that the giving of the loan to Payson Theater caused Plaintiffs' business to fail. As will be discussed under

the causation section of this Ruling, Plaintiffs, as a matter of law, cannot establish that the Defendant caused Plaintiffs' business to fail by assisting Payson Theater in obtaining an SBA loan

In conclusion, the facts as recited by Plaintiffs do not support an act of deceit or misrepresentation or a violation of an established standard of a trade or profession sufficient to defeat summary judgment. Also, Plaintiffs cannot as a matter of law meet the third element required to establish economic interference, which is to demonstrate that Defendant's actions caused Plaintiffs' injury. For these reasons, the Court concludes as a matter of law that Defendant did not intentionally interfere with Plaintiffs' prospective economic relations and, therefore, dismisses Plaintiffs' second cause of action.

GOOD FAITH AND FAIR DEALING

The covenant of good faith and fair dealing entitles each party to a contract the right to enjoy the benefits of the contract. *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P 2d 194 (Utah 1991). "To comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party ... [t]he purpose, intentions, and expectations of the parties should be determined by considering the contract language and the course of dealings between and conduct of the parties." *Id.* at 200.

Plaintiffs argue that Defendant breached its covenant of good faith and fair dealing under the contract by granting a loan to a competitor, thereby undermining Plaintiffs' business. The

Plaintiffs have again failed to marshal sufficient evidentiary facts to defeat summary judgment. Plaintiffs have failed to show any evidence that Defendant violated Plaintiffs' reasonable expectations to enjoy the fruits of the contract. Plaintiffs contend there is a disputed material fact by virtue of Defendant allegedly violating Plaintiffs' reasonable expectation "that they would be able to pay off the loan without DCDC affirmatively sabotaging their business." *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* p. 32. Defendant does not dispute that Plaintiff did in fact possess such a reasonable expectation, however, the Court concludes that Plaintiffs' recited facts do not support the assertion that Defendant did in fact sabotage Plaintiffs' business. Again, Plaintiffs rely upon the argument that Defendant's assistance to Payson Theater is evidence per se of Defendant damaging Plaintiffs' business. Plaintiffs' assumption and subsequent arguments are unsupported by the facts or law, however.

The Court has previously discussed the fact that Defendant did not possess a fiduciary duty toward Plaintiffs and that public policy favors competition. The Plaintiffs contracted with Defendant for Defendant to provide SBA financing and subsequent servicing of the loan, which Defendant accomplished, and the Plaintiffs agreed to pay back the loan. The parties never contracted for a prohibition by Defendant never to give competing loans during the life of the Plaintiffs' loan. It is unreasonable for Plaintiffs to expect that Defendant would never give loans to competing businesses. Further, a party may not acquire via a covenant of good faith and fair dealing that which he could not obtain through contract negotiation. Noting the Court's previous

analysis, Plaintiffs have failed to establish facts which show that Defendant did anything to violate Plaintiffs' justified expectations. Accordingly, the Court dismisses the Plaintiffs' third cause of action for the violation of the implied covenant of good faith and fair dealing.

CAUSATION

In order for the Plaintiffs to prevail upon their claims against Defendant, Plaintiffs must show that Defendant's actions were the proximate cause of Plaintiffs' injuries. Proximate causation is defined as, "that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred." *Butterfield v. Okubo*, 831 P.2d 97, 106 (Utah 1992) (quoting *Mitchell v. Pearson*, 697 P.2d 240, 245 (Utah 1985)). Ordinarily, proximate cause should be submitted to the jury. *Harris v. Utah Transit Authority*, 671 P.2d 217 (Utah 1983). However, "notwithstanding the general rule, it is also true that summary judgment may be granted on proximate cause in appropriate circumstances." *Thurston v. Workers Comp. Fund of Utah*, 83 P.3d 391, 395 (Utah Ct. App. 2003). Summary judgment is appropriate where "there is no evidence that establishes a direct causal connection between [defendant's] alleged negligence and the injury," and where 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. Baker*, 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");

Sumison v. Streator-Smith, Inc , 132 P 2d 680, 683 (Utah 1943) (summary judgment is appropriate because “where the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law”)

A. Plaintiffs have failed to provide evidence that would allow a jury to conclude, without speculation, that Payson Theater caused Plaintiffs’ business to fail.

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 v. Ross*, 990 P.2d 933, 938 (Utah 1999). 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 (Utah Ct. App. 1994) (quoting *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980)). Expert testimony is particularly needed “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.” *Id.* at 574. “The need for positive expert testimony to establish a causal link between the defendant’s negligent act and the plaintiff’s injury depends upon the nature of the injury.” *Beard v. K-Mart Corp.*, 12 P.3d 1015, 1019 (Utah 2000) (citing *Riggins v. Bechtel Power Corp.*, 722 P.2d 819, 824 (Wash Ct. App 1986)).

The case before this Court involves complex commercial 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. These are matters that are certainly not within the “common knowledge and experience of the layman.”

Shreiter, 871 P.2d at 574. The Plaintiffs have offered little evidence of causation other than Plaintiffs’ own beliefs that Payson Theater drove them out of business. Plaintiffs have failed to offer an expert who could assist the jury in determining causation without impermissible speculation. The causal evidence Plaintiffs have tendered includes the attendance numbers at Plaintiffs’ theater before and after Payson Theater opened, a comparison of Star Wars movies, and a market analysis appraisal for the Payson Theater’s feasibility. See *Plaintiffs’ Memorandum in Opposition to Defendant’s Second Motion for Summary Judgment*.

This evidence is insufficient to demonstrate that Payson Theater caused Plaintiffs’ business to fail. The Plaintiffs have failed to address many issues of causation including consumer taste, business judgment in the operation of the theaters, and market factors, such as general economic conditions that may affect movie-goers and the opening of the Provo Towne Centre movie theaters to name just a few. The Plaintiffs seem fixated on the above mentioned appraisal and believe that it demonstrates causation. However, the appraisal does not address the need for competent directors to operate the Payson Theater and the possibility of its failure due to poor business judgment. 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. In short, the possible reasons a business may fail are many and

complex and a jury would require expert assistance in making such a determination. The Plaintiffs have failed to provide any expert testimony, instead relying upon conjecture to sustain their causative argument. From the evidence before the Court, it is clear that no reasonable juror could conclude, without speculation, that the Payson Theater caused Plaintiffs' business to fail.⁴

B. Plaintiffs have failed to produce evidence that Defendant's grant of the loan to Payson Theater caused Plaintiffs' business to fail.

Not only must the Plaintiffs prove that Payson Theater caused Plaintiffs' theater to fail, Plaintiffs must establish the fact that because Defendant assisted Payson Theater in obtaining an SBA loan this caused Plaintiffs' business to fail. In other words, Plaintiffs must provide evidence establishing a direct causal link that shows the giving of the loan to Payson Theater caused Plaintiffs' theater to fail. Plaintiffs have provided no evidence to support such a burden of proof in order to avoid summary judgment.

In the Court's view, the grant of the Payson Theater loan is a step removed from the competition between the two theaters. It cannot be said that the grant of the loan to Payson Theater would result in a successful operation and profitability of the Payson Theater since, ultimately, its success and profitability were dependent upon the independent exercise of good business judgment by its owners and managers. Inasmuch as the mere grant of the loan did not

⁴Plaintiffs are obligated to produce sufficient facts to defeat summary judgment in their opposition memorandum. Plaintiffs may not rely upon statements in oral argument that they will produce sufficient facts at trial, and thereby defeat summary judgment.

guarantee Payson Theaters' success, it cannot be said that the loan to Payson Theater caused Plaintiffs' injury. To illustrate, if Payson Theater were operated by incompetent business people and ultimately failed due to the exercise of poor business judgment, Plaintiffs would still be in business regardless of the fact that Defendant obtained an SBA loan for Payson Theater.

The grant of a loan to Payson Theater is not the cause of its success or Plaintiffs' failure, but such success or failure is the product and result of the operation of a business by the exercise of good business judgment under favorable market and economic conditions. The many factors that comprise business success such as market forces, business judgment, quality of movies, location, etc. are "efficient intervening cause[s]" that effectively eliminate the proximate cause connection. *Butterfield*, 831 P.2d at 106.

In conclusion, it is clear that the Plaintiffs have failed to produce sufficient evidence to defeat summary judgment. The Plaintiffs have failed to produce adequate evidence establishing a direct causal link that would enable a jury to conclude, without speculation, that (1) Payson Theater did in fact cause Plaintiffs' business to fail, and (2) that Defendant's grant of the SBA loan to Payson Theater caused Plaintiffs' theater to fail. In order for a jury to make such a causal determination, the jury would require expert testimony to assist it due to the complex nature of the economic circumstances, which the Plaintiffs have failed to provide. Taken together, this Court finds that the Plaintiffs have failed to produce sufficient evidence regarding causation to allow this issue to go before a jury. Accordingly, the Court dismisses Plaintiffs' Complaint, and all

respective causes of action, based upon the lack of causation between Defendant's alleged conduct and Plaintiffs' injury

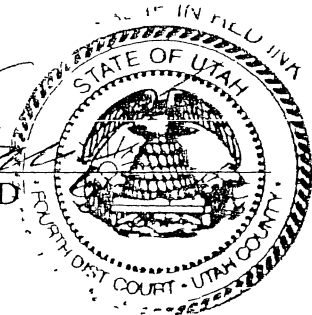
CONCLUSION

For the reasons stated above, the Court finds that Defendant was not Plaintiffs' agent and did not owe Plaintiffs a fiduciary duty. The Court further finds that Plaintiffs have failed to produce sufficient evidence to defeat summary judgment on both their intentional interference with prospective economic relations and violation of implied covenant of good faith and fair dealing causes of action. The Court also finds that the Plaintiffs have failed to produce adequate evidence to allow the issue of causation to go before a jury. Accordingly, and respectfully, the Court dismisses Plaintiffs' Complaint with prejudice and all respective causes of action along with the intentional infliction of emotional distress claims Plaintiffs attached to each cause of action. Counsel for Defendant is instructed to prepare an order consistent with this Ruling.

Dated this 21st day of July 2004

BY THE COURT


JUDGE FRED D. HOWARD
District Court Judge



CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 21 day of July 2004 to the following in the manner indicated, to wit

by U.S. first class mail

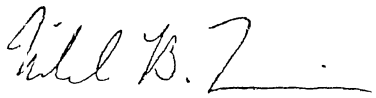
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