Mark W. Pugsley (8253)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

William T. Reid, IV (*admitted pro hac vice*)
Gregory S. Schwegmann (*admitted pro hac vice*)
REID COLLINS & TSAI LLP
1301 S. Cap. of Texas Hwy, Suite C300
Austin, Texas 78746
Telephone: (512) 647-6100
Facsimile: (512) 647-6129

Attorneys for Plaintiff Gil A. Miller, as the Trustee of the Randall Victims Private Actions Trust

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

GIL A. MILLER, in his capacity as the Trustee of the Randall Victims Private Actions Trust, Plaintiff, vs. UNION CENTRAL LIFE INSURANCE COMPANY, AMERITAS LIFE INSURANCE CORP., AMERITAS LIFE INSURANCE CORP. OF NEW YORK, AND ACACIA LIFE INSURANCE COMPANY, Defendants.	PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS **Case No. 2:14-cv-00575** **Judge: Clark Waddoups** Electronically Filed.

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Plaintiff Gil A. Miller (the "Trustee"), in his capacity as the trustee of the Randall Victims Private Action Trust (the "Victims PAT"), submits this memorandum of law in opposition to the Motion to Dismiss filed by Defendants Union Central Life Insurance Company, Ameritas Life Insurance Corporation, Ameritas Life Insurance Corporation of New York, and Acacia Life Insurance Company (collectively, "Union Central" or "Defendants"),[1] and respectfully states as follows:

I. INTRODUCTION

This case is about Union Central and its deliberate and reckless disregard for the duties it owed to Dee Randall's ("Randall") victims in hiring, supervising, and retaining Randall ("Randall") as its general agent. The Trustee's Complaint holds Union Central both *directly* liable for its own acts and omissions and also *vicariously* liable for Randall's fraud as a control person under the Utah Uniform Securities Act (the "Utah Act"). Union Central knew or should have known the details of Randall's scheme and not only looked the other way, but also deliberately promoted Randall directly to his many victims as an honest and trustworthy businessman. By putting its imprimatur on Randall and recklessly turning him loose on the public, without reasonable supervision, Union Central caused millions of dollars of damages to a heartbreaking array of victims, while it made millions in premiums from the policies that Randall sold.

The Trustee brings this action on behalf of the hundreds of beneficiaries of the Victims PAT (the "Victims").[2] The Victims PAT was established pursuant to the Plan, which was confirmed in Bankruptcy Case No. 10-37546 on October 28, 2013, by Judge Joel T. Marker of

[1] The Trustee adopts here the naming convention used in the Complaint. To the extent that the Court finds that the Trustee has failed to adequately allege claims against any individual defendant based upon this convention or otherwise, the Trustee respectfully requests leave to amend the Complaint.
[2] Compl. ¶ 1.

the United States Bankruptcy Court for the District of Utah (the "Bankruptcy Court").[3] Although, Randall will be prosecuted for his crimes,[4] the Victims PAT represents the only chance that the Victims will ever have of recouping any of their financial losses.

Rather than directly addressing the well-pleaded allegations of the Complaint, Union Central ignores them. Indeed, its motion is founded on nothing more than improper inferences and straw-man arguments, supported by inapposite case law and incorrect legal standards. Union Central cannot simply ignore the well-pleaded facts that demonstrate that it deliberately and recklessly breached the duties it owed to the Victims. For the reasons stated herein, the Trustee has sufficiently pleaded each of its claims against Union Central, and as such, the Trustee respectfully request that Union Central's motion be denied in its entirety.

II. ARGUMENT

A. Legal Standard on Rule 12(b)(6) Motion.

On a motion to dismiss, the Court must take the Trustee's well-pleaded facts as true and view those well-pleaded facts in the light most favorable to the Trustee.[5] "The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed."[6] Thus to survive a motion to dismiss, the Trustee is only required to plead enough facts to state a claim for relief that is plausible on its face.[7] The Trustee satisfies this standard by pleading factual content that allows the Court to draw the reasonable inference that Union Central is liable

[3] Compl. ¶ 21.
[4] On June 18, 2014, the Utah Attorney General filed a criminal information against Randall alleging 22 counts of securities fraud. Compl. ¶ 2.
[5] *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008) (court must view facts in light most favorable to non-moving party).
[6] *Id.*
[7] *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010).

for the misconduct alleged.[8] The issue is not whether the Trustee will ultimately prevail but whether he is entitled to offer evidence to support his claims.[9]

Where claims are based upon allegations of fraud, as the Trustee's allegations of primary violations of section 61-1-1 of the Utah Act are here, there is a heightened pleading requirement, requiring the plaintiff to plead the circumstances constituting fraud with particularity. The quantum of particularity required, however, depends on context and varies with the complexity of the transaction.[10] Where, as here, the "alleged scheme involved numerous transactions that occurred over a long period of time, courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct."[11] Furthermore, a plaintiff may generally plead intent, knowledge, and other condition of the mind as long as it provides a factual basis that gives rise to a strong inference of fraudulent intent.[12]

In sum, at the early motion-to-dismiss stage, the Court does not weigh the evidence that may be presented at trial, but instead assesses the legal feasibility of the Complaint. In its motion, Union Central ignores the well-pleaded allegations in the Complaint and supports its arguments by cherry picking allegations, removing them from context, and drawing inferences in its own favor that are inconsistent with the Complaint taken as a whole. Because the Trustee has sufficiently pleaded his claims for negligent employment, unjust enrichment, and control personal liability under the Utah Act, Union Central's Motion to Dismiss must fail.

B. <u>The Trustee is the Real Party in Interest in this Action.</u>

Union Central argues that the Trustee's claims must be dismissed because the Victims

[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[9] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 583 (2007).
[10] *In re Catanella & E.F. Hutton & Co., Inc. Sec. Litig.*, 583 F. Supp. 1388, 1397-98 (E.D. Pa. 1984); *See also, Hewlett-Packard Co. v. Byd:Sign, Inc.*, No. 6:05-456, 2007 WL 275476, at *4 (E.D. Tex. Jan. 25, 2007).
[11] *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66, 74.
[12] FED. R. CIV. P. 9(b).

did not assign their claims against it to the Victims PAT.[13] This argument does not withstand even modest scrutiny.

The terms of the Plan govern whether the Victims assigned their claims against Union Central to the Victims PAT. A confirmed plan of reorganization has the indicia of a contract, and in fact is much more than a contract, because it is enforceable as a Court order against parties, such as Union Central, that did not even agree to its terms.[14] The terms of a bankruptcy plan "should be analyzed according to the principles of the contract law of the state in which [it] was confirmed."[15] Under Utah law, "[w]here the language [of a contract] is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language."[16] Further, in interpreting a contract, or in this case, the Plan, the court must also "consider each [Plan] provision in relation to all of the others, with a view toward giving effect to all and ignoring none."[17] Union Central's arguments violate both of these basic rules of contract interpretation: (i) Union Central's interpretation contradicts the unambiguous language of the Plan; and (ii) Union Central's interpretation renders certain terms of the Plan meaningless. As Union Central acknowledges, whether the Victims assigned their claims against Union Central to the Victims PAT turns on whether the Victims' claims against Union Central are included within the Plan's definition of "Victim Causes of Action."[18] They are.

The unambiguous language of the Plan defines "Victim Causes of Action" to include "Causes of Action of a Victim against ***any*** Facilitators."[19] Union Central does not, and cannot, argue that it is not a "Facilitator" as defined by the Plan because it specifically waived any such

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[13] Defendants' Memo in Supp. of its Mot. to Dismiss ("Def. Brief") at 5–7.
[14] *United States Trustee v. CF&I Fabricators (In re CF&I Fabricators)*, 150 F.3d 1233, 1239 (10th Cir. 1998).
[15] *In re Angel Fire Corp.*, No. 11-93-12176, 2012 WL 5880675, at *8 (Bankr. D.N.M. Nov. 20, 2012).
[16] *Glenn v. Reese*, 2009 UT 80, 225 P.3d 185, 188-89.
[17] *Id.*
[18] Def. Brief at 5–6.
[19] *See* Plan at p. 13, attached as Ex. A to Def. Brief.

argument during a September 9, 2013 hearing before Judge Marker as a condition for the removal of its name from the definition of Facilitator contained in the Disclosure Statement:

> THE COURT: . . . And I think Union Central is complaining about a lawsuit that hasn't yet been filed and, maybe through the work of some good attorneys, may never be filed. **But with the deletion of Union Central's specific reference from the disclosure statement as a facilitator, conditioned upon what I heard was an affirmative waiver of any defense in the future that that was somehow fatal to the Trustee bringing a claim against Union Central** -- yes? You --
> MR. BECKETT: **That is confirmed.** [20]

Nevertheless, Union Central falls within the Plan's definition of "Facilitator" as a Person alleged to "have assisted, facilitated or perpetuated the Ponzi Scheme."[21] Because Union Central is a "Facilitator" under the Plan, the Victims' claims against Union Central are included among the Victims Causes of Action and were therefore assigned to the Victims PAT. As such, the Trustee is the real party in interest in this action.

In addition to disregarding the Plan's plain language, Defendants' narrow interpretation of the definition of "Victims Causes of Action" as limited to claims against "attorneys, accountants, auditors, and financial advisors" violates a basic rule of contract construction by rendering certain portions of the definition meaningless.[22] The definition of "Victim Causes of Action" includes, among other things, Causes of Action arising out of the offering, solicitation, promotion, servicing, or repayment of a "Policy" by a Facilitator.[23] "Policy" is defined as an insurance product issued by a Facilitator on which one of the Debtors received a commission from a Facilitator.[24] Similarly, "Victim Causes of Action" also includes those Causes of Action arising out of any "Terminated Policy."[25] "Terminated Policy" is defined as a Policy held at any

[20] Sept. 9, 2013 Hearing Transcript [Bankruptcy Case Dkt No. 1536] (discussion between Court and Mr. Beckett, appearing on behalf of Union Central) (emphasis added).
[21] Plan at p. 7.
[22] Def. Brief at 5–6.
[23] Plan at p. 13.
[24] *Id.* at p. 9.
[25] *Id.* at p. 13.

time by a Policyholder that has been terminated.[26] Because attorneys, accountants, auditors, and financial advisors do not issue insurance products or pay commissions on such products, Union Central's interpretation of the definition improperly renders at least two clauses of the definition meaningless. Therefore, Union Central's narrow interpretation of "Victims Causes of Action" as exclusive of claims against "insurance companies such as Union Central" necessarily fails.[27]

C. Defendants Misapply the "Plausibility" Requirement of Rule 8.

Without referring to any specific claim, Union Central argues that the Complaint must be dismissed because its allegations are generally implausible. Union Central's argument both misapplies the notice pleading standard set forth in Rule 8 and misrepresents the facts alleged in the Complaint. There is no basis to dismiss any cause of action on this ground.

As the Tenth Circuit has explained, "[d]etermining whether a complaint states a plausible claim for relief is a context-specific task."[28] "This contextual approach means comparing the pleading *with the elements of the cause(s) of action.*"[29] Union Central has not even attempted to argue that any specific claim for relief alleged in the Complaint fails to satisfy Rule 8; instead, it attacks individual allegations that it has cherry-picked, and divorced from context, as being either implausible or conclusory.[30] In doing so, Union Central ignores the factual allegations in the Complaint that contradict its arguments and draws inappropriate inferences in its favor.[31]

Union Central's primary argument is that the Complaint does not identify the Victims by name.[32] The names of the Victims, however, are entirely irrelevant to the Trustee's claims and

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[26] *Id.* at p. 12.
[27] Def. Brief at 6.
[28] *Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1236 (10th Cir. 2013).
[29] *Id.* (emphasis added).
[30] Def. Brief at 7–9.
[31] *See Burnett.*, 706 F.3d at 1235 ("We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff.").
[32] Def. Brief at 9. There is no mystery regarding the identities of individual Victims that assigned their claims to the Victims PAT or their individual damages. This information is publicly available. On March 27, 2014, Miller, in his

are not required to be pleaded with specificity under the Rule 8 notice pleading standard. For the purposes of meeting Rule 8's requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief," the relevant circumstances of each of the Victims are identical.[33] By definition, every Victim (*i.e.*, every beneficiary of the Victims PAT) invested in Randall's Ponzi scheme by purchasing a fraudulent Horizon Note and, as a result, suffered harm.[34] As alleged in the Complaint, the Victims' "grievances against Union Central" are all exactly the same and are based upon Union Central's acts or omissions – namely, that Union Central breached the duty of care that it owed the Victims by deliberately and recklessly permitting Randall to perpetrate his scheme for over a decade despite having knowledge of, or willfully ignoring, the fact that he posed a foreseeable risk of harm to the Victims. As such, Union Central has sufficient notice of the claims asserted against it under Rule 8 and the individual circumstances of the Victims, to the extent relevant, can be fleshed out in discovery.

Union Central continues its Rule 8 criticisms with a barrage of argument that takes particular allegations out of context and ignores their place in the Complaint as a whole. For example, in its attempt to characterize the allegations in the Complaint as "so general that they encompass a wide swath of conduct, much of it innocent," Union Central disparages the Trustee's allegation that Union Central put Randall's picture in its annual report as "barely innuendo, which is insufficient to satisfy Rule 8."[35] The allegation, however, does not, by itself state a claim for relief that must be judged by Rule 8. Rather, it is a factual allegation that lends support to the Trustee's allegations that Union Central held Randall out as its general agent and

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capacity as the post-confirmation trustee of the reorganized consolidated estate and Trustee of the Victims PAT, filed a status report with the Bankruptcy Court and attached a detailed list of each of the Victims that assigned their claims to the Victims PAT along with their individual claim amounts and the premiums each paid on Union Central policies. *See* Bankruptcy Case Dkt. No. 1483.

[33] FED. R. CIV. P. 8(a)(2).

[34] Plan at 13.

[35] Def. Brief at 8.

that Randall was one of Union Central's top producing agents.[36] It also supports, along with numerous other allegations, the fact that, given Randall's high profile within the company, Union Central knew, or should have known, the true nature of Randall's business and the foreseeable risks he posed to the Victims.[37]

Similarly, Union Central's characterization of the Trustee's allegations that it willfully ignored the "red flags" of Randall fraud as "conclusory" ignores the numerous factual allegations that directly support this conclusion. The Complaint contains allegations regarding the specific red flags of fraud that Union Central willfully ignored, as well as details of specific instances where Union Central chose to ignore such red flags. For example, the Complaint alleges in detail that:

- Randall was fired by his previous insurance company for selling promissory notes to his insurance clients. Nevertheless, Union Central hired him without any investigation into the circumstances of his dismissal.[38]
- A Union Central executive, Kevin O'Toole, deliberately refused to listen to an explanation of how Randall used his fraudulent promissory notes to help him become one of Union Central's top producers nationwide.[39]
- Union Central representatives were present during training sessions during which Randall discussed his illegal sales practices in detail.[40]
- Union Central knew of and ignored Randall's routine violations Union Central's Market Conduct Guide, including by selling both insurance and securities without a license and distributing marketing materials containing deceptive and misleading statements.[41]

Union Central also points to the Trustee's allegation that Randall did not hold an active insurance license and argues that it is "probative of the fact that Randall did not sell any Union

[36] *See, e.g.*, Compl. ¶¶ 15, 97–100.
[37] *See, e.g.*, Compl. ¶¶ 8–10, 12, 14, 97–104.
[38] Compl. ¶¶ 48–64.
[39] Compl. ¶¶ 101–04.
[40] Compl. ¶¶ 106–07.
[41] Compl. ¶¶ 108–25.

Central policies."[42] In so arguing, Union Central not only inappropriately draws an inference in its favor, but altogether ignores the well-pleaded allegations that Randall did, in fact, participate in the sale, solicitation, and negotiation of Union Central insurance policies despite not having a license to do so.[43] Finally, Union Central claims, without any support or analysis, that the Trustee's allegation "that Union Central is liable to all people who bought investment notes from Randall, even if they did not buy insurance policies from Union Central is beyond implausible." This, however, is a legal conclusion which goes to the heart of the case. And, as discussed below, it is well supported by the factual allegations in the Complaint and the prevailing law of both negligent employment and control person liability. [44]

D. Rule 8, Not Rule 9(b), Applies to the Trustee's Claims for Negligent Employment and Unjust Enrichment.

Union Central argues that Rule 9(b)'s heightened pleading standards apply to each of the Trustee's negligence-based claims – negligent hiring, negligent supervision, and negligent retention – and its claim for unjust enrichment (Counts I–III and V). This argument fails because claims that are grounded in negligence, rather than fraud, need only meet the Rule 8(a) pleading standards.[45] The basis for this distinction is that "when persons or businesses are accused of negligent conduct, they do not face the same potential damage to their goodwill as when they face allegations of fraud."[46] As such, claims of negligence "are only subject to Rule 8(a)'s 'short and plain statement' standard—not the more rigorous standard of Rule 9(b)."[47] The same is true for unjust enrichment.[48]

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[42] Def. Brief at 8.
[43] *See, e.g.*, Compl. ¶¶ 111, 155, 164.
[44] *See Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations").
[45] *City of Raton v. Arkansas River Power Auth.*, 600 F. Supp. 2d 1130, 1143 (D.N.M. 2008).
[46] *Id.*
[47] *Jackson v. John Hancock Fin. Servs., Inc.*, No. 04-2500, 2006 WL 2710327, at *1 (D. Kan. Sept. 20, 2006).
[48] *See, e.g., Sheldon v. Vermonty*, 31 F. Supp. 2d 1287, 1294 (D. Kan. 1998).

Union Central's argument that the heightened pleading standards of Rule 9(b) apply to the Trustee's negligent employment and unjust enrichment claims is entirely unsupported and incorrect.[49] Indeed, Union Central does not cite a single case that applies Rule 9(b) to a claim of negligent employment.[50] The Trustee's claims for negligent employment and unjust enrichment do not allege that Union Central defrauded any Victim, and do not seek to hold Union Central vicariously liable for Randall's fraud. Because these claims are not predicated on Randall's fraud, but rather on Union Central's negligence, they need only meet the Rule 8(a) pleading standards. Nevertheless, as discussed herein, to the extent the Trustee is required to plead Randall's fraud with particularity to maintain a negligence action against Union Central – which he is not required to do – the Trustee has pleaded Randall's fraud with the requisite specificity.[51]

E. The Trustee has Pleaded Sufficient Factual Allegations to Survive a Motion to Dismiss on its Claims for Negligent Hiring, Negligent Supervision, and Negligent Retention.

Union Central argues that the Trustee failed to state a claim because he failed to "accurately allege[] that Union Central was Randall's employer."[52] Union Central's argument, based exclusively upon the GA Contract, misstates the relevant law and misrepresents the facts alleged in the Complaint. To state claims against Union Central for negligent employment,[53] the Trustee must allege that (i) Union Central knew or should have known that Randall posed a foreseeable risk of harm to third parties; (ii) Randall did indeed inflict such harm; and (iii) Union

[49] Def. Brief at 15.
[50] The only case that Union Central cites is *Berry v. Indianapolis Life Ins. Co*., 600 F. Supp. 2d 805, (N.D. Tex. 2009) for the unremarkable proposition that Rule 9(b) applies to allegation of fraud.
[51] *See* infra at 16.
[52] Def. Brief at 17.
[53] As the Supreme Court of Utah has explained, "[t]he causes of action variously termed 'negligent hiring,' 'negligent supervision,' and 'negligent retention,' are all basically subsets of the general tort of negligent employment. . . . These variants differ only in that they arise at different points in the employment relationship." *Retherford v. AT & T Commc'ns of Mountain States, Inc*., 844 P.2d 949, n.15 (Utah 1992).

Central's negligence in hiring, supervising, or retaining Randall proximately caused the injury.[54] Union Central does not dispute that the Trustee has pleaded facts that, if proven, would establish each of these elements. Indeed, the Complaint contains ample factual support for these claims.[55]

1. Negligent employment claims assert direct – *NOT* vicarious – theories of liability.

Union Central's reliance on the boiler-plate and self-serving "independent contractor" language of the GA Contract and the "general rule" that an employer is not *vicariously* liable for the acts or omissions of an "independent contractor" are misplaced.[56] The Trustee's negligent employment claims seek to hold Union Central *directly* liable for its own acts and omissions, not those of Randall or anyone else. Critically, Union Central does not cite a single case that stands for the proposition that an employer cannot be held liable for *its own* acts and omissions in hiring, supervising, or retaining an independent contractor. Instead, Union Central attempts a slight-of-hand by citing *Berrett v. Albertsons, Inc.* for an altogether irrelevant "general rule" regarding *vicarious* liability of an employer.[57] But, even the *Berrett* court recognized that the general rule does not apply where (as here) the plaintiff has "allege[d] direct – not vicarious – liability."[58] Furthermore, Utah courts have expressly recognized that the "tort[s] of negligent hiring, supervision, [and] retention [are] exception[s] to the general rule 'that there is no affirmative duty to control the conduct of a third party so as to prevent the third party from

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[54] *See Id.* at 973.
[55] *See, e.g.*, Compl. ¶¶ 48–64, 101–131 (allegations that Union Central knew or should have known that Randall posed a foreseeable risk of harm to third parties); Compl. ¶¶ 65–68 (allegations that Randall inflicted such harm); Compl. ¶¶ 77–96 (allegations that Union Central's negligence in hiring, supervising, and retaining Randall was the proximate cause of such harm).
[56] Def. Brief at 18.
[57] UC Brief at 18; *Berrett v. Albertsons Inc.*, 2012 UT App 371, 293 P.3d 1108, 1112 *cert. granted sub nom. Berrett v. Albertsons*, 304 P.3d 469 (Utah 2013).
[58] *Berrett.*, 293 P.3d 1108 at 1112; *see also*, *Retherford*, 844 P.2d at 973 (Utah 1992) ("Also we note that because the tort of negligent employment can impose liability on the employer even when the employer would not otherwise be liable under the doctrine of respondeat superior, we have no need to consult the collective bargaining agreement to determine whether [three named individuals] were acting in the scope of their employment").

causing harm to another.'"[59] Thus, vicarious liability law is irrelevant to the Trustee's negligent employment claims.

2. Union Central's duties regarding its hiring, supervising, and retention of Randall arises from Utah common law, *NOT* private contract.

Moreover, Union Central's duty to third parties concerning its employment of Randall as its general agent derives from common law, not from the terms of the GA Contract. In the seminal Utah case on negligent employment, *Retherford v. AT & T Commc'ns of Mountain States, Inc.*, the Utah Supreme Court explained that an "employer's duty toward those people whom its employees place in a position of reasonably foreseeable risk of injury does not stem from its private employment contract."[60] Rather, the court continued, "it is a duty imposed by the common law of the state" and "[t]he common law of tort expresses public policy, the scope of which is not generally determined by reference to privately contracted obligations."[61] Indeed, the torts of negligent employment would make no logical sense if the employer's duties to third parties derived from employment contracts.

For example, for negligent hiring, the relevant inquiry is whether Union Central engaged Randall as its general agent even though it knew or should have known that doing so would place the Victims at a foreseeable risk of harm.[62] Whether Randall served as an "employee" or an "independent contractor" *after* Union Central negligently engaged him makes no difference to this analysis. The same is true for negligent retention. The question there is whether, after Union Central knew or should have known that Randall posed a foreseeable risk of harm to third parties, it breached its duty of care owed to the Victims by continuing to permit Randall to serve

[59] *Tomlinson v. NCR Corp.*, 2013 UT App 26, 296 P.3d 760, 770 (quoting the Restatement (Third) of Torts § 41 (2012)).
[60] 844 P.2d 949, 974 (Utah 1992).
[61] *Id.*
[62] *Retherford*, 844 P.2d at n.15 (Utah 1992).

as its general agent. Because Union Central had the right to terminate its agency relationship with Randall at any time with written notice, Randall's legal employment status as an "employee" or "independent contractor" is also irrelevant to this analysis.[63]

The Trustee's negligent supervision claim follows the same analysis. Under the common law, an employer has a duty to supervise an employee who it knows or should know poses a foreseeable risk of harm to its customers or the public.[64] The duty arises when the employer knows or has reason to know of the risk posed.[65] If, in breach of this duty, the employer fails to take adequate supervisory, risk-alleviating actions, the employer is directly liable for any proximately resulting and foreseeable harm.[66] The court may look to the GA Contract to discover whether it contains limitations that precluded Union Central from taking steps to prevent the harm, but the GA Contract contained no such limitations.[67] On the contrary, as alleged in the Complaint, the GA Contract gave Union Central broad authority to supervise and control Randall. For example, Union Central purported to require Randall to abide by "all laws and regulations governing the sale and solicitation of insurance" and to comply with its policies and procedures. To enforce compliance, Union Central could, among other things:

- Suspend payment of any compensation due to Randall;
- Introduce new policies or procedures that Randall had to follow;
- Audit Randall's books, records and accounts of business;
- Reject the appointment of any sub-agent Randall wanted to hire;

[63] *See, e.g.*, *Stallings v. Werner Enterprises, Inc.*, 598 F. Supp. 2d 1203, 1214 (D. Kan. 2009) (permitting claims of negligent retention and negligent hiring against an employer of an independent contractor to go to the jury).
[64] *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1048 (Utah 1991) (foreseeability, not scope of employment, determines negligent supervision).
[65] *J.H. ex rel. D.H. v. W. Valley City*, 840 P.2d 115, 126 (Utah 1992) (prima facie case of negligent supervision requires showing that the employee's actions were foreseeable).
[66] *Clover*, 808 P.2d at 1048 (Utah 1991) (fact issue for trial existed on negligent supervision claim because the employer knew about the risk).
[67] *See Retherford*, 844 P.2d 949, 974 (Utah 1992).

- Terminate the Randall's agency agreement for cause if Randall committed fraud against any Union Central policy holder or otherwise failed to comply with the terms of the GA Contract.[68]

Thus, regardless of whether Randall was an "employee" or an "independent contractor," as pleaded in the Complaint, Union Central had sufficient control rights over Randall to be found liable for negligent supervision.

Finally, Union Central's argument that it had no relationship whatsoever with Randall based upon the fact that it executed the GA Contract with HMI and not Randall is unfounded. The Complaint adequately alleges that HMI was Randall's alter ego and supports that allegation with numerous additional factual allegations.[69] In any event, the Complaint adequately alleges that Randall was, in fact, Union Central's general agent during the relevant time period and that Union Central recognized him as such.[70] Thus, the Trustee has pleaded sufficient allegations to put Union Central on notice of the Trustee's claims for negligent employment. As such, Defendants' motion to dismiss the Trustee's negligent employment claims should be denied.

F. The Trustee has Pleaded Sufficient Factual Allegations to Survive a Motion to Dismiss on its Claim of Unjust Enrichment.

Union Central argues that certain sub-sets of the Victims do not have claims for unjust enrichment. Specifically, Union Central argues that the Victims that never purchased insurance from Union Central do not have a claim for unjust enrichment and that the Trustee lacks standing to pursue claims in connection with policies that remain active. To be clear, the Trustee is not pursuing either of these sub-sets of Victim claims. The Trustee's unjust enrichment claim seeks to recover only the premiums paid to Defendants by Victims on policies that have lapsed.[71]

[68] Compl. ¶¶ 38–41.
[69] *See, e.g.*, Compl. ¶¶ 2, 74.
[70] *See, e.g.*, Compl. ¶¶ 2, 15, 97–100.
[71] Compl. ¶¶ 182–84.

To plead a claim for unjust enrichment, the Trustee must allege that (i) the Trustee conferred a benefit on Defendants; (ii) Defendant appreciated or had knowledge of the benefit; and (iii) the retention of the benefit by Defendant would be inequitable under circumstances.[72] Union Central does not dispute that the Trustee has pleaded sufficient factual allegations to satisfy each of these elements for the Victims whose policies have lapsed; therefore, the Trustee's unjust enrichment claims survive the Motion to Dismiss.

G. The Trustee has Pleaded Sufficient Factual Allegations to Survive a Motion to Dismiss on its Claim for Control Person Liability.

Union Central asserts two grounds for the dismissal of the Trustee's claim for control person liability under sections 61-1-1 and 61-1-22 of the Utah Act: (i) that the Trustee must name the primary violator as a defendant in this action; and (ii) that the allegations regarding Randall's fraud do not satisfy the requirements of Rule 9(b). Both of these arguments fail.

1. The Trustee is not required to name a primary violator as a defendant to maintain an action against Union Central as a control person.

To allege a claim for control person liability under section 61-1-22 of the Utah Act, "the plaintiff must establish (1) a primary violation of the securities laws and (2) "control" over the primary violator by the alleged controlling person."[73] Contrary to Union Central's legally unsupported assertions, the first element does not require the Trustee to bring an action against the primary violator. To maintain an action for control person liability, the plaintiff need only sufficiently *allege* a primary violation of section 61-1-1.[74] Union Central, however, takes the unsupportable position that not only does the Trustee have to allege a primary violation, but also

[72] *Allen v. Hall*, 2006 UT 70, 148 P.3d 939, 945.
[73] *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998).
[74] *Id.* (explaining that the plaintiff satisfied the first element of his prima facie case by *alleging* primary violations of the relevant securities laws).

must join the primary violator, Randall, as a defendant in this case to successfully plead a claim against it as a control person.[75] This is not the law.

None of the cases Union Central cites supports its position. Rather, in each case Union Central cites, the court considered only whether the plaintiff *alleged* a primary violation of the securities laws, not whether it has obtained a judgment against the primary violator or joined the primary violator in the action.[76] Moreover, there are numerous examples in this Circuit of plaintiffs proceeding on a claim of vicarious liability against a defendant based upon a predicate harm without naming the primary wrongdoer as a defendant in the suit.[77] The same principle applies here – there is no requirement to sue the primary violator of section 61-1-1 to hold a controlling person vicariously liable for the harm under section 61-1-22(4).

2. The Trustee has pleaded a primary violation of the Utah Securities Act with sufficient particularity under Rule 9(b).

To state a claim for a violation of section 61-1-1(2) of the Utah Securities Act, the Trustee must allege that "in connection with the offer, sale, or purchase of any security, directly or indirectly" the primary violator willfully either (i) "made any untrue statement of material fact" or (ii) "omit[ted] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they [were] made, not misleading."[78] The Trustee must plead these elements with particularity under the Rule 9(b) pleading standards; however,

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[75] Def. Brief at 10–11.

[76] *See, e.g.*, *Sanders Confectionery Products, Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 485 (6th Cir. 1992) (primary violator not named as defendant; control person claim dismissed on other grounds).

[77] *See, e.g.*, *Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1080 (10th Cir. 2010) (affirming verdict holding employer vicariously liable for agent's actions where agent not named in suit); *UBS Bank USA v. Ibby, LLC*, No. 2:09-372, 2009 WL 4884383 (D. Utah Dec. 10, 2009) (permitting claims to proceed against principal based upon agent's misrepresentation; agent not joined in the suit).

[78] UTAH CODE ANN. § 61-1-1(2). Union Central does not specifically argue that the Trustee has failed to allege facts that establish that Union Central was a control person under the statute, it is worth noting that the control aspect of the cause of action is governed by Rule 8. *See Petro Source Corp. v. Foreland Corp.*, No. 2:00-306, 2000 WL 33363257, at *5 (D. Utah Sept. 21, 2000) ("Allegations of 'controlling person' liability are not subject to the particularity requirements of Rule 9(b)"). The Complaint contains factual allegations sufficient to meet this standard. *See, e.g.*, Compl. ¶¶ 38–41.

the level of particularity required depends on context and varies with the complexity of the transaction.[79] "Furthermore, Rule 9(b) must be read in conjunction with Rule 8(a) which requires only a short and plain statement of the cause of action."[80] Therefore, "the rule should not be applied with such draconian strictness as to undermine the liberal spirit of the Federal Rules of Civil Procedure."[81]

The Utah Supreme Court's decision in *State v. Apotex Corp*. is instructive on this point.[82] There, relying on federal precedent, the court interpreted Utah's analogue to Fed. R. Civ. P. 9(b) in the context of a complex false claims act case. The court explained that although the general rule is that a claim based upon fraud "must specify the time, place, and content of the alleged false representations," "it is not a straightjacket for Rule 9(b)."[83] Rather, the court noted, "the rule is context specific and flexible and must remain so to achieve the remedial purpose of the UFCA."[84] "For example, where the alleged scheme involved numerous transactions that occurred over a long period of time, courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct."[85] Ultimately, the court held that a plaintiff may survive a motion to dismiss under rule 9(b) "by alleging particular details of a scheme [to defraud] paired with reliable indicia that leads to a strong inference that [misrepresentations were made]."[86] The court then applied this same standard to claims of fraudulent misrepresentation that allege a "wide spread fraudulent scheme and many

[79] *See Flinn Found. v. Petro-Lewis Corp.*, No. 84-2413, 1985 WL 358, at *5 (D. Colo. Nov. 8, 1985).
[80] *In re Catanella & E.F. Hutton & Co., Inc. Sec. Litig.*, 583 F. Supp. 1388, 1397-98 (E.D. Pa. 1984).
[81] *Id.*
[82] *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66.
[83] *Id.* at 74.
[84] *Id.*; *see also Technomedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320, 322 (Utah Ct. App. 1987) ("Securities laws are remedial in nature and should be broadly and liberally construed to give effect to the legislative purpose.").
[85] *Apotex Corp*., 282 P.3d at 74.
[86] *Id.* at 75.

misrepresentations over a lengthy period."[87] There, as here, the plaintiff has asserted "fraud over the course of many years and countless misrepresentations." As such, "a more flexible approach to rule 9(b) is useful and sufficient."[88]

a. The Trustee has alleged misrepresentations of material fact with sufficient particularity under Rule 9(b).

The Trustee has alleged primary violations of section 61-1-1(2) of the Utah Act with sufficient particularity to survive a motion to dismiss under the Rule 9(b) pleading standards. The Trustee has alleged the particulars of Randall's Ponzi scheme in great detail and also identified numerous misrepresentations of material fact that he made to the Victims over the course of a decade.[89] Because this case involves a fraudulent course of conduct that occurred over an extended period of time, the Trustee "need not allege in detail the facts of each transaction of the fraudulent scheme" to comply with Rule 9(b).[90] The Trustee pleads sufficient factual allegations concerning Randall's fraudulent scheme and specific misrepresentations to provide Union Central with adequate notice of the claims asserted against it.[91] As such, the Trustee has pleaded Randall's misrepresentations in connection with the marketing and sale of the Horizon Notes with sufficient particularity to survive a motion dismiss under Rule 9(b).

b. The Trustee has alleged omissions of material fact with sufficient particularity.

The Trustee has alleged omissions of material fact with sufficient particularity to survive a motion to dismiss under Rule 9(b). Rule 9 does not require specification of time, place, and nature of misrepresentation for these statements; rather, it requires only that the plaintiff identify

[87] *Id.*
[88] *See Id.*
[89] *See, e.g.*, Compl. ¶¶ 69–80, 87–96.
[90] *See Hewlett-Packard Co. v. Byd:Sign, Inc.*, No. 6:05-456, 2007 WL 275476, at *4 (E.D. Tex. Jan. 25, 2007).
[91] *See Flinn Found.*, 1985 WL 358, at *5.

the facts not communicated.[92] The Trustee has alleged that Randall engaged in a course of conduct of selling the Horizon Notes without providing the Victims with a Private Placement Memorandum ("PPM") or providing them with an incomplete PPM.[93] As such, the Trustee has sufficiently pleaded that Randall omitted material facts about the notes in violation of section 61-1-1(2). The Complaint also alleges that even the complete PPMs omitted material facts about the investments. For example, the Trustee has alleged that the PPM failed to inform the Victims that (i) Randall had previously filed for personal bankruptcy; (ii) HMI's failure to make interest payments on the Horizon Notes could result in the Victims insurance policies, that were purchased in conjunction with the note, lapsing; (iii) that HMI and HFI commingled funds; and (iv) that Randall paid commissions to his sub-agents on the sale of the Horizon Notes.[94] These omissions are sufficiently material to constitute a violation of section 61-1-1(2).[95] Thus, for each Victim, the Complaint sufficiently alleges that Randall, the primary violator, "omit[ted] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they [were] made, not misleading." As such, the Trustee pleaded a primary violation of section 61-1-1(2) of the Utah Act with sufficient particularity under Rule 9(b) based upon the material facts Randall omitted from the PPMs alone.

c. The Trustee is not required to allege scienter to maintain an action for control person liability under the Utah Act.

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[92] *See, e.g., Golden Trade, S.r.L. v. Jordache*, 143 F.R.D. 504, 508 (S.D.N.Y.1992); *Cottman Transmission Sys. Inc. v. Dubinsky*, 95 F.R.D. 351, 353 (E.D.Pa.1982) ("Conduct which never occurred cannot be described with greater particularity other than to state that it did not occur.").
[93] Compl. ¶ 71.
[94] Compl. ¶¶ 72–73.
[95] *See State v. Wallace*, 2005 UT App 434, 124 P.3d 259, 261 *aff'd*, 2006 UT 86, 150 P.3d 540 (securities fraud conviction upheld where evidence showed Defendant omitted multiple material facts including his failure to disclose the risks of his investment scheme and his previous personal bankruptcy).

Union Central's argument that the Trustee has failed to plead scienter[96] misses the mark because scienter is not a required element of a claim under section 61-1-1(2) of the Utah Act.[97] The Trustee has alleged, in accordance with the statute, that Union Central is vicariously liable as a control person for Randall's violations of section 61-1-1(2) of the Utah Act. As the Utah Supreme Court has instructed, the Trustee is only required to plead that the primary violator acted willfully.[98] "A person engages in conduct willfully when it is his conscious objective or desire to engage in the conduct or cause the result."[99] The Complaint sufficiently pleads that Randall willfully misstated or omitted material facts in connection with his sale of the Horizon Notes to each of the Victims.[100] Union Central does not argue otherwise.

H. The Trustee has Pleaded Facts Sufficient to Establish that the Claims are Not Time-Barred.

Union Central argues that some, but not all, of the Trustee's claims are time-barred. The parties agree that the Trustee's claims for negligent employment and unjust enrichment that accrued after October 30, 2009, are not time barred. Also, the Trustee does not dispute that its claims under the Utah Securities Act based upon notes purchased before October 30, 2008 are time-barred. Thus, Union Central's limitations defense is limited to whether the Trustee has alleged sufficient facts to invoke (i) the discovery rule set forth in section 61-1-22(7)(a) of the Utah Act for its securities fraud claims that accrued on or after October 30, 2008; and (ii) the equitable discovery rule for the Trustee's negligence and unjust enrichment claims that accrued before October 30, 2009. The Trustee has alleged sufficient facts to permit all such claims to go forward at this stage of the case.

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[96] Def. Brief at 13–14.
[97] *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, 974 P.2d 288, 293.
[98] *Id.*
[99] *Id.*
[100] Compl. ¶¶ 69–76.

1. The Trustee's securities fraud claims are not time-barred.

The Trustee has pleaded facts sufficient to apply the statutory discovery rule set forth in section 61-1-22(7)(a) of the Utah Act.[101] To determine the applicability of this statutory discovery rule, the question is not, as Union Central argues (without citing a single case), when the Trustee discovered, or should have discovered, Randall's fraud, but rather when the ***Victims*** did.[102] Under section 61-1-22(7)(a), the statute of limitations does not begin to run until the discovery of the facts constituting the violation.[103]

As alleged in the Complaint, the earliest the Victims had actual notice of the facts constituting Randall's fraud, was upon receipt of the Disclosure Statement, which was filed well within the two year statutory tolling period for its Utah securities law claim.[104] The Complaint further pleads that because Randall was fraudulently concealing the facts constituting his fraud, a reasonably diligent Victim could not have discovered them.[105] Thus, the Trustee has pleaded facts sufficient to toll the statute of limitations under section 61-1-22(7)(a) of the Utah Act at this stage of the case.

2. The Trustee's negligence and unjust enrichment claims are not time-barred.

Union Central raises two arguments that Utah's equitable tolling doctrine does not apply to the Trustee's negligence-based causes of action as a matter of law: (i) that the Trustee failed to plead Randall's fraudulent concealment with the requisite particularity; and (ii) that Randall's fraudulent concealment does not toll the running of the statute against third parties. Union

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[101] The statute of limitations for liability under 61-1-1 is two years from discovery with a five year statute of repose. UTAH CODE ANN. § 61-1-22(7)(a).
[102] *See e.g.*, *In re Petters Co., Inc.*, 494 B.R. 413, 442–44 (Bankr. D. Minn. 2013) (application of the discovery rule to an action brought by a trustee turns on whether and when the "predicate creditor . . . had discovered the facts constituting the fraud").
[103] *See* UTAH CODE ANN. § 61-1-22(7)(a)(ii).
[104] *See* Compl. ¶ 141
[105] *See* Compl. ¶¶ 134–41.

Central is wrong on both arguments.

a. The Trustee has pleaded fraudulent concealment with the requisite particularity.

The Trustee has pleaded sufficient facts to support the application of Utah's equitable tolling doctrine to its negligence and unjust enrichment claims because he has pleaded fraudulent concealment with sufficient particularity. Indeed, affirmatively concealing the fraud is the very essence of a Ponzi scheme. "At the pleading stage, allegations asserting affirmative conduct to conceal the unlawful conduct are sufficient to invoke the doctrine of equitable tolling."[106] As the Trustee alleges throughout the Complaint, Randall's course of conduct in operating his Ponzi scheme involved making affirmative misrepresentations to the Victims both at the time they purchased a fraudulent note and thereafter.[107] Additionally, the Trustee alleges that Randall engaged in a deliberate course of conduct to conceal his fraud after his Ponzi scheme began to collapse. For example, the Trustee alleges that Randall engaged in a letter writing campaign in which he made numerous specific misrepresentations to the Victims, such as:

- blaming the cash short flows on new regulations, the rise in gasoline prices and other sources out of his control;
- that the Horizon Notes were secured and that the Victims would be repaid in full;
- that the Horizon Group was insured against business losses;
- that the Utah Division of Securities was monitoring the situation; and
- that his real estate projects were merely behind schedule and that payments would soon resume.[108]

These specific allegations, along with the very nature of Randall's Ponzi scheme are sufficient to toll limitation at the pleading stage.[109]

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[106] *In re Commercial Explosives Litig.*, No. 2:96-709, 1996 WL 795270, at *3 (D. Utah Dec. 20, 1996).
[107] Compl ¶¶ 69–76, 134–41.
[108] Compl. ¶¶ 135–37.
[109] *See In re Commercial Explosives Litig.*, 1996 WL 795270, at *3 ("Attempting to keep information about a conspiracy from others is . . . sufficient for fraudulent concealment."); *see also, King & King Enterprises v.*

The Trustee has also sufficiently alleged that, to the extent the Victims were on inquiry notice of Randall's fraud after Randall stopped making interest payments, the Victims could not have discovered the facts forming the basis of its causes of action against Union Central. Under Utah law, "[w]hen a plaintiff has made a prima facie showing of fraudulent concealment, a plaintiff will be charged with constructive notice of the facts forming the basis of a cause of action *only* at the point which a plaintiff, reasonably on notice to inquire into a defendant's wrongdoing, would have, with due diligence, discovered the facts forming the basis for the cause of action despite the defendant's efforts to conceal."[110] The Trustee alleges that Randall was the only source the Victims had to get information about the Horizon Group entities and that they reasonably relied upon Randall's assurances that their investments were secure.[111] The Trustee further alleges that the Victims did not discover, and could not have reasonably discovered, Randall's fraud or Union Central's involvement in the fraud until the Trustee filed the Disclosure Statement in the consolidated bankruptcy proceedings on September 11, 2013 and revealed the details of Randall's fraud.[112]

The case that Union Central relies upon in an attempt to rebut these allegations as a matter of law, *Sterlin v. Biomune Sys., Inc.*, is inapposite.[113] The Tenth Circuit held that investors were put on inquiry notice of fraud at a company by the publication of an article in *Barrons*, and remanded to determine whether the exercise of reasonable diligence would have uncovered the facts underlying the fraud.[114] On remand, the court held that reasonable diligence

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Champlin Petroleum Co., 657 F.2d 1147, 1156 (10th Cir. 1981) (finding that defendant's conduct , by reason of its fraudulent nature, was inherently self-concealing).

[110] *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, 108 P.3d 741, 750 (emphasis added).

[111] Compl. ¶ 138.

[112] Compl. ¶ 141.

[113] 154 F.3d 1191 (10th Cir. 1998).

[114] *Id*. at 1202–05.

would have uncovered the fraud.[115] Central to this holding was the fact that the *Barrons* article pointed to the publicly available information that formed the basis for its conclusions.[116] Here, by contrast, there were no public filings or any other source, aside from Randall, for the Victims to check or rely upon. Thus, the factual consideration at the heart of the court's decision in *Sterlin* does not exist here. As such, the case, and its holding, are completely irrelevant to the facts alleged in the Complaint. In any event, "weighing the reasonableness of the plaintiff's conduct in light of the defendant's steps to conceal the cause of action necessitates the type of factual findings which preclude [judgment as a matter of law] in all but the clearest of cases."[117]

b. Randall's fraudulent concealment tolls the statute of limitations of claims asserted against Union Central.

Union Central relies on *Jensen v. IHC Hosps., Inc.* for the proposition that "fraud committed by a third party in concealing a cause of action against another defendant will not toll the statute of limitations."[118] But the *Jensen* court also recognized the exception to this rule, which applies here: "Where . . . there is an agency or privity relationship between the third party committing the fraud and the defendant, . . . the agent's negligent or intentional tort can be imputed to the principal if the agent acts in whole or in part to carry out the purposes of the principal."[119] The *Jensen* court also recognized that that fraudulent concealment is "highly fact dependent" and "necessarily" a fact question for trial.[120]

Thus, for the purposes of a motion to dismiss, the statute of limitations is tolled if the Trustee has sufficiently alleged that: (i) Union Central had an agency or privity relationship with

[115] *Sterlin v. Biomune*, 114 F.Supp.2d 1163, 1171 (D. Utah 2000)
[116] *Id.*
[117] *Russell Packard Dev., Inc.*, 2005 UT 14, 108 P.3d at 751.
[118] *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 338 (Utah 1997).
[119] *Id.*
[120] *Id.* at 334.

Randall; and (ii) Randall acted "at least in part" to further Union Central's aims.[121] The Trustee's Complaint meets both elements of this standard.

The Complaint adequately alleges that Union Central and Randall were in privity by virtue of the GA Contract,[122] which gave both parties a contractual interest in the premiums generated by Randall's sub-agents.[123] In addition, the Trustee has pleaded facts sufficient to establish that Randall was Union Central's agent.[124] Thus, one way or the other, the Complaint satisfies the first prong of the exception to the rule.

The Complaint also satisfies the second prong because the Trustee alleges that Randall's fraudulent concealment of the Victims' claims benefited Union Central.[125] Union Central's relationship with Randall generated massive profits for Union Central that would not continue if Randall's fraud were exposed.[126] Thus, so long as Randall's scheme was concealed, Union Central benefitted. Thus, the Trustee has alleged more than sufficient facts to invoke the equitable discovery rule on its claims for negligence and unjust enrichment at the motion-to-dismiss stage.

III. CONCLUSION

For the reasons set forth above, the Trustee respectfully requests that the Court deny Defendants' motion in its entirety or, in the alternative, grant the Trustee leave to amend.

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[121] *See id.* at 337–39.
[122] *See supra* at 14.
[123] *See, e.g.*, *Newell v. Newell*, 942 N.E.2d 776, 782 (Ill. App. 2011) (fraudulent concealment imputed to bank because it was in a privity-like relationship with deposit-account trustee); *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 186 (Ill. 1980) (fraudulent concealment imputed to developers because they were in a privity-like relationship with city alderman whom they bribed).
[124] *See* Compl. ¶¶ 2, 15, 97–100.
[125] Compl. ¶ 140.
[126] Compl. ¶¶ 99, 100.

Dated: November 24, 2014

REID COLLINS & TSAI

/s/ *Gregory Schwegmann*
Gregory S. Schwegmann

Attorney for Plaintiff Gil A. Miller, as the Trustee of the Randall Victims Private Actions Trust

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2014, I filed the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means:

J. Thomas Beckett (5587)
Erik A. Christiansen (7372)
Mark W. Dykes (5067)
Alissa Mellem (13299)
PARSONS BEHLE & LATIMER
201 S. Main St. Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Email: ecf@parsonsbehle.com

Robert D. Phillips, Jr. (pro hac vice)
Kathy J. Huang (pro hac vice)
REED SMITH LLP
355 South Grand Ave. Suite 2900
Los Angeles, CA 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080
Email: rphillips@reedsmith.com

/s/ *Gregory S. Schwegmann*