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behalf of University of Utah Hospitals and Clinics  
and University of Utah Health Sciences Center*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

COLORADO CASUALTY INSURANCE  
COMPANY, a Colorado corporation,

Plaintiff,

vs.

PERPETUAL STORAGE, INC., a  
California corporation; UNIVERSITY OF  
UTAH, a body politic and corporate of the  
State of Utah, on behalf of UNIVERSITY  
OF UTAH HOSPITALS AND CLINICS  
and UNIVERSITY OF UTAH HEALTH  
SCIENCES CENTER,

Defendants.

**ANSWER TO COMPLAINT FOR  
DECLARATORY JUDGMENT,  
CROSS-CLAIM, COUNTERCLAIM AND  
THIRD-PARTY CLAIM  
AND JURY DEMAND**

Case No. 2:10-CV-00316-BCW

Honorable Brooke C. Wells

The University of Utah, a body politic and corporate of the State of Utah, on behalf of its University of Utah Hospitals and Clinics and University of Utah Health Sciences Center (the “**University**”), answers the Complaint for Declaratory Judgment of Plaintiff Colorado Casualty Insurance Company (“**Plaintiff**”), and counterclaims as follows:

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

In response to the numbered paragraphs of the Complaint, the University hereby admits, denies, and affirmatively avers as follows:

1. Answering paragraph 1 of the Complaint, the University admits that Plaintiff has commenced this adversary proceeding and appears to rely on 28 U.S.C. §§ 2201 *et seq.*, the Federal Declaratory Judgment Act.

2. Admitted.

3. Admitted.

4. Admitted.

5. Answering paragraph 5 of the Complaint, the University admits that this Court has jurisdiction over the parties and subject matter of this litigation.

6. Answering paragraph 6 of the Complaint, the University admits that venue is proper in this judicial district.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.
19. Admitted.
20. Admitted.
21. Admitted.
22. Admitted.
23. Admitted.
24. Admitted.
25. Admitted, upon information and belief.
26. Denied.
27. Denied.
28. Denied.
29. Denied.
30. Denied.

31. The University admits there is a justiciable controversy between the named parties, but denies the remaining averments in paragraph 31.

32. The University denies all averments not specifically admitted herein.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims against the University are barred, in whole or in part, by the equitable doctrines of estoppel, waiver, unclean hands, and laches.

#### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims against the University are barred, in whole or in part, by the provisions of the contracts of insurance.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims against the University are barred, in whole or in part, by reason of its own conduct, including ratification.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims against the University are barred, in whole or in part, by the doctrine of the election of remedies.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by its own negligence and/or breaches of contract.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by its failure to join indispensable parties.

**EIGHTH AFFIRMATIVE DEFENSE**

The University reserves the right to amend this Answer to assert additional affirmative defenses to the Complaint or to delete affirmative defenses already pled to the extent the same are impacted through discovery.

WHEREFORE, the University respectfully asks this Court to enter judgment in their favor and against Plaintiff as follows:

- A. That Plaintiff take nothing on its Complaint, and that the Complaint be dismissed with prejudice and upon the merits;
- B. That the University be awarded its reasonable attorneys' fees and costs incurred in defending themselves in this action; and
- C. That this Court award the University such other and further relief as this Court deems just and proper.

**CROSS-CLAIM, COUNTERCLAIM AND THIRD-PARTY CLAIM**

For its cross-claim, counterclaim and third-party claim, the University alleges the following:

1. The University of Utah is a body politic and corporate of the State of Utah, with its principal place of business in Salt Lake City, Utah.

2. Colorado Casualty is a Colorado corporation in the business of selling insurance policies with its principal place of business in Colorado and is licensed to do business in the State of Utah.

3. Perpetual Storage, Inc. (“**Perpetual**”) is a California corporation doing business in the State of Utah with its principal office in Utah at 6279 East Little Cottonwood Canyon Road, Sandy, Utah, 84092.

4. Ron Sutherland is a resident of Utah and acted as Perpetual’s insurance broker or agent during all relevant times.

5. United Insurance Services is a Utah corporation doing business in the State of Utah with its principal office in Utah at 189 East Fort Union Boulevard, #101, Midvale, Utah 84047.

6. This Court has jurisdiction over this matter pursuant to § 78B-6-401 (2009) and 28 U.S.C. §1332 and §1367.

7. Venue is appropriate in this Court pursuant to 28 U.S.C. §1391.

### **GENERAL ALLEGATIONS**

#### **The University**

8. The University owns and operates the University of Utah Hospitals and Clinics (“UUHC”) and the University of Utah Health Sciences Center (“UUHSC”). UUHC and UUHSC together include several hospitals such as the main University Hospital, Huntsman Cancer Institute, Huntsman Cancer Hospital, the Moran Eye Center, the University Orthopaedic Center, numerous outlying clinics, and a group of approximately 1,000 physicians, and several thousand additional licensed health care providers such as nurses and social workers.

9. UUHC and UUHSC maintain records, including electronic records, of patients treated at UUHC and UUHSC. These electronic records are regularly backed up onto backup tapes for data recovery purposes and stored offsite by Perpetual. Patient records contain

demographic information on patients such as name and address as well as billing and diagnostic information, and in many cases social security numbers.

**Storage Agreement**

10. Perpetual and the University entered into a Record Storage Agreement effective December 6, 1996 (“Storage Agreement”) which is attached hereto as Exhibit “A.”

11. The Storage Agreement provided that Perpetual would store certain records, including hardcopies, microfilm, microfiche, and magnetic computer tape (aka “backup tapes” or “backup computer tapes”) on behalf of the University in exchange for payment.

12. Paragraph 2 of the Storage Agreement is a “Warranty By Perpetual Storage” and provides in relevant part that:

A. Unless otherwise specified in writing between the parties, all records will be kept in the maximum security area of the storage facility, in the usual storage fixtures supplied by Perpetual Storage.

.....

E. Strict admission and retrieval procedures will be adhered to concerning access to the storage facility. At no time will depositor’s records be accessible to anyone but the depositor, his authorized agents as set forth on the ACCESS AUTHORIZATION FORM and bonded personnel employed by Perpetual Storage.

F. Reasonable precautions will be taken to assure safe handling, filing, retrieval and delivery of all records.

13. Paragraph 14 of the Storage Agreement provides that: “Perpetual Storage shall not be liable for any loss or injury to records however caused unless such loss or injury results from failure by Perpetual Storage to exercise such care in regard to records as a reasonably careful man would exercise under like circumstances, and Perpetual Storage is not liable for damages that could not have been avoided by the exercise of such care.”

14. Perpetual knew of the sensitive nature of the data contained on the backup tapes that it transported and stored for the University.

15. The University elected to use Perpetual for offsite storage because Perpetual maintains a secure granite vault in the Wasatch Mountains (“granite vault facility”). In the event of a natural disaster such as flood, fire, or earthquake, best business practices require maintaining backup data at a secure, offsite facility, such as the one maintained by Perpetual.

16. Perpetual made regular weekly and sometimes daily pickups of backup tapes owned by the University.

17. On information and belief, Perpetual’s normal business practices and protocols required Perpetual to immediately deliver University records, including backup tapes, to the granite vault facility. Specifically, Perpetual employees are required to make all storage runs using a Perpetual vehicle that has locked storage compartments in the rear. Moreover, Perpetual employees are forbidden from delaying their delivery of records from the client to the granite vault facility.

**Perpetual Failed to Secure University Records**

18. During the afternoon or early evening hours of Sunday, June 1, 2008, Perpetual made a normal pickup of backup storage tapes at the University. These backup tapes were in an unmarked silver colored metal case. These tapes contained identifying information for approximately 1.7 million University patients and guarantors, covering a time period of approximately 16 years. Approximately 1.1 million names were associated with social security numbers, and all the names were associated with protected health information.

19. Pursuant to the Storage Agreement and the course of dealing between the parties, these tapes were to be delivered immediately and directly to the granite vault facility.

20. The Perpetual employee charged with this delivery (“Driver”) failed to deliver the tapes to the granite vault facility because he went to his second job with the University tapes still in the vehicle.

21. At some point, the Driver transferred the University backup tapes to his personal vehicle, in direct violation of the Perpetual policy that required that all records be transported in the secure storage vehicle.

22. Following the completion of his shift at his second place of employment, the Driver returned to his home in Kearns, Utah and parked his car overnight in his driveway or on the street near his home, in direct violation of the Perpetual policy that all records be transferred immediately to the granite vault facility.

23. The Driver was thus in violation of at least two Perpetual policies: first, he placed the records in his personal vehicle rather than the secure Perpetual vehicle; second, he delayed the delivery of the records when he went to his second job and again when he returned to his home and parked the car outside of his home.

24. In the early morning hours of Monday, June 2, 2008, the Driver’s personal vehicle was burglarized and the silver colored metal case containing the tapes was stolen with the University backup tapes inside. It is unknown exactly what time the car was burglarized; however, an estimated eight to twelve hours or more had elapsed between the time the tapes were picked up from the University and the time of the theft. According to police reports, the silver colored metal case was placed on the passenger seat or floor near the passenger seat.

25. Prior to being notified of the theft by Perpetual on June 2, 2008, the University had no knowledge that Perpetual or its employees failed to adhere to their own standard business practices or the Storage Agreement in the transporting and storage of the records.

**Efforts to Recover the Tapes**

26. Upon learning of the theft of the backup tapes, the University immediately contacted the Salt Lake County Sheriff's office, the FBI, and other law enforcement authorities to attempt to recover the tapes.

27. The University immediately sent a team of employees to the area of the Perpetual employee's home to attempt to locate the tapes.

28. The University immediately established a reward for the recovery of the tapes; this reward was publicized using major media sources including local television stations.

29. Based on its knowledge of the sensitive nature of the information contained on the backup tapes, Perpetual reasonably should have foreseen that the University would have to undertake these efforts to recover the tapes.

**Notification of Patients and Damages Incurred**

30. The University had no assurance from law enforcement authorities or otherwise that the backup tapes would ever be located. Thus, the University took steps to mitigate patient privacy concerns and to notify patients of the loss.

31. Specifically, the University held a major media press conference to notify the public of the loss of the backup tapes.

32. Beginning approximately two weeks after the data loss incident and continuing for several weeks thereafter, the University, at its own expense, issued personal letters to all of the affected 1.7 million individuals to notify them of the compromise to their medical or financial information. These letters directed patients to a hotline and to a website that contained additional information.

33. The University, at its own expense, established both in-house and external calling centers to handle the massive influx of calls from concerned individuals. The University responded to or outsourced responses to more than 11,000 phone calls related to this matter during a two-week period during the summer of 2008. In addition, the University subsequently responded to or outsourced responses to thousands of additional phone calls related to this matter beyond this two-week period.

34. The University, at its own expense, offered one-year free credit monitoring to any individual whose social security number had been compromised.

35. The University estimates that the University expended at least 6,232 personnel hours in responding to this incident.

36. On or around July 1, 2009, law enforcement officials recovered the stolen backup tapes. By this time, the University had already promised free credit monitoring to all patients whose social security numbers were contained in the backup tapes.

37. To date, the University has incurred approximately \$3,354,753 total in damages related to this incident. Of this amount, \$2,483,057 is related to credit monitoring expenses; \$646,149 is related to printing and mailing costs; \$81,389 is related to phone bank costs; and an additional \$144,158 in miscellaneous costs was incurred.

38. The University is likely to suffer additional harm in the future.

39. Based on its knowledge of the sensitive nature of the information contained on the backup tapes, Perpetual reasonably should have foreseen that the University would be subject to liability and would have to assume these notification responsibilities.

40. The University has demanded that Perpetual reimburse the University for the amounts of money it expended as a result of the Incident.

41. Perpetual has refused to pay for the University's loss for which Perpetual is responsible.

**Colorado Casualty's Contract of Insurance**

42. Colorado Casualty is Perpetual's commercial insurer under various policies, to which the University is a third-party beneficiary.

43. Colorado Casualty has refused to provide coverage for the allegations made by the University against Perpetual in relation to the Incident.

44. Colorado Casualty denies that its policies cover the University's loss.

45. Colorado Casualty failed to procure adequate insurance for Perpetual resulting in harm to the University.

**Broker Services of Ron Sutherland and United Insurance Services**

46. Ron Sutherland of United Insurance Services was Perpetual's insurance broker or agent with respect to coverage under Colorado Casualty's insurance policies, to which the University is a third-party beneficiary.

47. Mr. Sutherland and United Insurance Services failed to procure adequate insurance for Perpetual resulting in harm to the University.

**CAUSES OF ACTION AGAINST PERPETUAL STORAGE, INC.**

**CROSS-CLAIM: FIRST CAUSE OF ACTION  
(Negligence – Perpetual)**

48. Plaintiff incorporates by this reference all allegations made in paragraphs 1 through 47 above.

49. Perpetual had a duty to the University to take reasonable precautions in the transport and storage of the University records.

50. Perpetual violated its duty by failing to appropriately train, supervise, and/or monitor employees under Perpetual's control.

51. Perpetual violated its duty by not ensuring safe, direct, and immediate transport of the University records to the granite vault facility.

52. Perpetual violated its duty by transporting and/or allowing the Driver to transport the University records in a privately owned employee vehicle that was not secured against theft.

53. Perpetual violated its duty by delaying and/or allowing the Driver to delay delivery of the University records while such Perpetual Driver attended a second job and then parked the vehicle outside of his home while he slept.

54. Perpetual's negligence proximately caused the damages incurred by the University.

**CROSS-CLAIM: SECOND CAUSE OF ACTION  
(Breach of Contract – Perpetual)**

55. Plaintiff incorporates by this reference all allegations made in paragraphs 1 through 54 above.

56. The University and Perpetual entered into a Storage Agreement effective December 6, 1996 which is attached as Exhibit "A" to this Complaint.

57. Paragraph 14 of the Storage Agreement provides that:

"Perpetual Storage shall not be liable for any loss or injury to records however caused **unless such loss or injury results from failure by Perpetual Storage to exercise such care in regard to records as a reasonably careful man would exercise under like circumstances**, and Perpetual Storage is not liable for damages that could not have been avoided by the exercise of such care"

(emphasis added).

58. Perpetual failed to exercise such care in regard to records as a reasonably careful person would exercise under like circumstances in the following regards:

- a. A reasonably careful person would have taken the University records from the University directly to the granite vault facility, rather than delaying the delivery for eight to twelve hours or more.
- b. A reasonably careful person would have used a secure vehicle to transport the records, rather than an unsecure private vehicle.
- c. A reasonably careful person would not have parked the vehicle containing the records outside of his home overnight, while he slept.
- d. A reasonably careful person would not have left the records in a vehicle parked outside of his second place of employment for several hours or longer.
- e. A reasonably careful person would have followed Perpetual's policies which specifically required that employees use a secure company-owned vehicle and that employees not take detours or delays in between pickup of client records and the delivery of such records to the granite vault facility.
- f. A reasonably careful employer would have ensured that there were appropriate training, monitoring, and supervision in place to ensure that employees were aware of and in compliance with company policies.
- g. A reasonably careful employer would have been aware of the fact that an employee maintained a second employment and that the employee may have had a pattern of delaying deliveries or at least a potential of delaying deliveries because of the need to attend his second employment; with such

awareness a reasonably careful employer would have made modifications to ensure the safe transport and delivery of client records.

59. By failing to exercise reasonable care, Perpetual breached the contract, which breach caused damages to the University.

**CROSS-CLAIM: THIRD CAUSE OF ACTION  
(Bailment - Perpetual)**

60. Plaintiff incorporates by this reference all allegations made in paragraphs 1 through 59 above.

61. On June 1, 2008, the University caused the backup tapes to be delivered to Perpetual for the purpose of transport, storage, and safeguarding of the information stored thereon.

62. Upon delivery to Perpetual, the University relinquished possession and control of the backup tapes so that Perpetual had sole and exclusive possession and control of the backup tapes and all data stored thereon.

63. Perpetual transported the backup tapes on behalf of the University in vehicles controlled exclusively by Perpetual, under the control of employees trained, monitored, and supervised exclusively by Perpetual.

64. Prior to June 1, 2008, Perpetual stored and safeguarded backup tapes on behalf of the University at premises controlled exclusively by Perpetual, under the control of employees trained, monitored, and supervised exclusively by Perpetual.

65. The backup tapes that are the subject of the complaint were stolen while in the sole and exclusive possession and control of Perpetual.

66. By taking possession of the backup tapes, Perpetual assumed a duty to store, transport, and safeguard the backup tapes.

67. By failing to secure the backup tapes in an appropriate vehicle, and by permitting delay in transporting the tapes to the granite vault facility, Perpetual failed to exercise the care necessary to effectively store, transport, and safeguard the backup tapes.

68. As between the University and Perpetual, only Perpetual was in a position to properly transport and secure the computer backup tapes.

69. Perpetual's failure to properly secure and transport the data caused the damages and consequential economic harms suffered by the University.

**CROSS-CLAIM: FOURTH CAUSE OF ACTION  
(Breach of Implied Warranty – Perpetual)**

70. Plaintiff incorporates by this reference all allegations made in paragraphs 1 through 69 above.

71. The University entered into the Storage Agreement for the specific purpose of safely transferring the backup tapes to Perpetual's granite vault facility and for the purpose of safely storing the backup tapes there.

72. Perpetual entered into the Storage Agreement knowing or having should have known that the University sought its services for the specific purposes of safely transferring the backup tapes to the granite vault facility and safely storing the backup tapes therein.

73. By entering into the Storage Agreement with knowledge that the University sought its services for a particular purpose, Perpetual impliedly warranted that its services would serve that particular purpose.

74. The Storage Agreement does not disclaim—conspicuously, implicitly, explicitly or otherwise—any warranties.

75. Perpetual breached the Storage Agreement’s implied warranty because a reasonable professional who agreed to store, transport, and safeguard the backup tapes would not have permitted the Driver to transport the University records in a privately owned employee vehicle that was not secured against theft.

76. Perpetual breached the Storage Agreement’s implied warranty because a reasonable professional who agreed to store, transport, and safeguard the backup tapes would not have permitted the Driver to delay delivery of the University records while such Perpetual Driver attended a second job and then parked the vehicle outside of his home while he slept.

77. Perpetual’s breach of the implied warranties in the Storage Agreement caused the damages and consequential economic harms suffered by the University.

**CROSS-CLAIM: FIFTH CAUSE OF ACTION  
(Breach of Express Warranty – Perpetual)**

78. The University incorporates by this reference all allegations made in paragraphs 1 through 77 above.

79. Pursuant to the express warranty contained in the Storage Agreement at paragraph 2, Perpetual warranted that “all records will be kept in the maximum security area of the storage facility.”

80. Pursuant to the express warranty contained in the Storage Agreement at paragraph 2, Perpetual warranted that, “[a]t no time will depositor’s records be accessible to anyone but the depositor, his authorized agents as set forth on the ACCESS AUTHORIZATION FORM and bonded personnel employed by Perpetual Storage.”

81. Pursuant to the express warranty contained in the Storage Agreement at paragraph 2, Perpetual warranted that “reasonable precautions will be taken to assure safe handling, filing retrieval and delivery of all records.”

82. Perpetual breached the Storage Agreement’s express warranty by failing to keep all records in the maximum security area of the storage facility, failing to protect the accessibility of the records, and failing to assure safe handling, filing, retrieval and delivery of all records.

83. Perpetual’s breach of the express warranty in the Storage Agreement caused the damages and consequential economic harms suffered by the University.

**CROSS-CLAIM: FIFTH CAUSE OF ACTION  
(Vicarious Liability – Perpetual)**

84. Plaintiff incorporates by this reference all allegations made in paragraphs 1 through 83 above.

85. Pursuant to the Storage Agreement and the course of dealing between the parties, Perpetual agreed to store the University’s backup tapes in the granite vault facility, and use secure vehicles to transport the backup tapes directly and immediately to the granite vault facility.

86. The Storage Agreement does not permit the backup tapes to be diverted to a Perpetual employee’s unsecured vehicle or to be delayed in transport while an employee keeps the backup tapes overnight.

87. Through the actions of its employee, and in breach of the Storage Agreement, Perpetual caused backup tapes to be diverted during transport and stored in an unsecured vehicle.

88. By diverting the backup tapes in breach of the Storage Agreement, Perpetual took sole and absolute responsibility for the security of the tapes and the data contained thereon.

89. By storing the backup tapes in an unsecured vehicle, Perpetual caused the damages and consequential economic harm suffered by the University.

**CAUSES OF ACTION AGAINST COLORADO CASUALTY**

**COUNTERCLAIM: FIRST CAUSE OF ACTION  
(Declaratory Judgment – Colorado Casualty)**

90. The University incorporates paragraphs 1 through 89 by reference.

91. Colorado Casualty is obligated to defend and indemnify Perpetual against the claims made by the University in relation to the Incident.

92. There is insurance coverage for Perpetual under the Policies for the claims made by the University in relation to the Incident.

93. Colorado Casualty is obligated under its Policies to pay or otherwise satisfy any judgment the University may obtain against Perpetual in relation to the Incident.

94. The University, as a third-party beneficiary under the Policies, is entitled to a judgment against Colorado Casualty that there is coverage under the Policies for damages sustained in relation to the Incident.

**COUNTERCLAIM: SECOND CAUSE OF ACTION  
(Breach of Contract – Colorado Casualty)**

95. The University incorporates paragraphs 1 through 94 by reference.

96. Valid insurance contracts existed between Colorado Casualty and Perpetual, to which the University was a third-party beneficiary.

97. The University is informed and believes that Perpetual performed all obligations required of it under the insurance contracts.

98. Colorado Casualty materially breached its obligations under the insurance contracts by failing to provide insurance coverage for Perpetual under the Policies for the claims made by the University in relation to the Incident.

99. Colorado Casualty failed to procure adequate insurance for Perpetual resulting in harm to the University.

100. As a direct and proximate result of Colorado Casualty's breach of contract, the University, as a third-party beneficiary, has suffered damages in an amount to be proven at trial.

**COUNTERCLAIM: THIRD CAUSE OF ACTION  
(Reformation of Contract – Colorado Casualty)**

101. The University incorporates paragraphs 1 through 100 by reference.

102. To the extent that the provisions of the Policies between Colorado Casualty and Perpetual, to which the University was a third-party beneficiary, do not provide coverage for the claims made by the University in relation to the Incident, the court should reform the contract due to a mutual mistake of the parties in favor of coverage.

**COUNTERCLAIM: FOURTH CAUSE OF ACTION  
(Unjust Enrichment – Colorado Casualty)**

103. The University incorporates paragraphs 1 through 102 by reference.

104. Colorado Casualty has failed to provide insurance coverage for Perpetual under the Policies for the claims made by the University in relation to the Incident.

105. As a result, Colorado Casualty has been unjustly enriched, and has obtained an undue benefit by taking undue advantage of Perpetual and the University.

**CAUSES OF ACTION AGAINST RON SUTHERLAND  
AND UNITED INSURANCE SERVICES**

**THIRD-PARTY CLAIM: FIRST CAUSE OF ACTION  
(Breach of Contract – Ron Sutherland and United Insurance Services)**

106. The University incorporates paragraphs 1 through 105 by reference.

107. Ron Sutherland and United Insurance Services, as insurance experts, entered into an agreement with Perpetual to take care of its insurance needs and to provide consultation and

advice about obtaining and handling the insurance needs of Perpetual. The University was a third-party beneficiary to this agreement between Ron Sutherland, United Insurance Services, and Perpetual.

108. As part of this agreement, Ron Sutherland and United Insurance Services represented and acted on behalf of Perpetual in procuring insurance coverage, to which the University was also a third-party beneficiary.

109. Ron Sutherland and United Insurance Services failed to obtain the needed insurance coverage for Perpetual, to which the University was a third-party beneficiary.

110. Ron Sutherland and United Insurance Services are liable for all damages resulting to the University in the event that coverage under Colorado Casualty's Policies is unavailable, and the expense in bringing a lawsuit to resolve the coverage issues and Colorado Casualty's denial of coverage.

**THIRD PARTY CLAIM: SECOND CAUSE OF ACTION  
(Tort Claims – Ron Sutherland and United Insurance Services)**

111. The University incorporates paragraphs 1 through 110 by reference.

112. Ron Sutherland and United Insurance Services were careless, negligent and made various negligent misrepresentations about Perpetual's insurance coverage from Colorado Casualty, pursuant to Policies to which the University was a third-party beneficiary.

113. Ron Sutherland and United Insurance Services engaged in wrongful conduct including improperly preparing applications for Perpetual's insurance, resulting in a potential denial of coverage; failing to disclose to Perpetual what activities or items were not covered by the Policies, misrepresenting that Perpetual had adequate insurance when it did not; and in other ways failing to disclosure and act appropriately as it related to the insurance coverage and Policies of Perpetual, to which the University was a third-party beneficiary.

114. Ron Sutherland and United Insurance Services should reasonably have foreseen that the University, as one of Perpetual's major customers, would suffer harm if Perpetual was not adequately covered by the relevant insurance contracts.

115. In the event that coverage under Colorado Casualty's Policies is unavailable, the wrongful actions and omissions of Ron Sutherland and United Insurance Services constitute negligence, negligent or intentional misrepresentation, and breach of warranty. These wrongful actions and omissions have proximately caused the University damages for which Ron Sutherland and United Insurance Services are liable.

**THIRD PARTY CLAIM: THIRD CAUSE OF ACTION  
(Vicarious Liability/Agency/Respondeat Superior - United Insurance Services)**

116. The University incorporates paragraphs 1 through 115 by reference.

117. Because Ron Sutherland was an agent, employee or contractor of United Insurance Services, United Insurance Services is liable for the acts and omissions of Ron Sutherland under the theories of vicarious liability, agency and/or respondeat superior.

**JURY DEMAND**

The University hereby demands a trial by jury of any issue triable by right of jury.

**PRAYER FOR RELIEF**

WHEREFORE, the University hereby prays for the following declaratory findings and relief:

A. That the Colorado Casualty Policies do provide coverage for the claims made against Perpetual by the University in relation to the Incident;

B. That Colorado Casualty is obligated to indemnify or pay or otherwise satisfy any judgment the University may obtain against Perpetual in relation to the Incident.

C. That the University is entitled to a judgment against Colorado Casualty that there is coverage under the Policies for damages sustained in relation to the Incident.

D. Damages from Colorado Casualty, Perpetual, Ron Sutherland, and United Insurance Services in an amount to be proven at trial, including but not limited to: compensation for the related actual expenses already incurred by the University in the amount of \$3,354,753; compensation for approximately 6,632 personnel hours expended by the University related to this incident; and compensation for University expenses related to defending and settling current and future lawsuits related to this matter.

E. Attorneys' fees and interest as provided by contract and/or statute.

F. For such other, further or different relief as this Court deems appropriate under the circumstances.

DATED this 25th day of May, 2010.

Snell & Wilmer L.L.P.

/s/ Kamie F. Brown

Alan L. Sullivan

Kamie F. Brown

*Attorneys for Defendant*

*University of Utah, on behalf of*

*University of Utah Hospitals and*

*Clinics and the University of*

*Utah Health Sciences Center*

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing was served via the court's ECF system this 25th day of May, 2010, to the following:

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/s/ Kamie F. Brown