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Max B. Graff, Anita B. Graff, Curtis A. Graff, Carol A. Graff, Graff Ranches, LC v. Naterra West, LLC; Naterra West, Gateway Farms, LLC; and Fusion Group, LLC v. Max B. Graff, Anita B. Graff, Curtis A. Graff, Carol A. Graff, Graff Ranches, LC and Don D. Gilbert : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

<p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; Plaintiffs;</p> <p>v.</p> <p>NATERRA WEST, LLC, Defendants,</p> <hr/> <p>NATERRA WEST, GATEWAY FARMS, LLC; and FUSION GROUP, LLC,</p> <p>Counterclaimants and Appellants,</p> <p>v.</p> <p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; and DON D. GILBERT</p> <p>Counterclaim Defendants and Appellees.</p>	<p>Case Number: 20080075-CA</p>
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**BRIEF OF APPELLEE**

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Appeal from the Fourth Judicial District Court, Utah County, State of Utah

The Honorable Fred D. Howard

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**IN THE UTAH COURT OF APPEALS**

MAX B. GRAFF; ANITA B. GRAFF;  
CURTIS A. GRAFF; CAROL A. GRAFF;  
GRAFF RANCHES, LC;

Plaintiffs;

v.

NATERRA WEST, LLC,  
Defendants,

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NATERRA WEST, GATEWAY FARMS,  
LLC; and FUSION GROUP, LLC,

Counterclaimants and Appellants,

v.

MAX B. GRAFF; ANITA B. GRAFF;  
CURTIS A. GRAFF; CAROL A. GRAFF;  
GRAFF RANCHES, LC; and DON D.  
GILBERT

Counterclaim Defendants and  
Appellees.

Case Number: 20080075-CA

**BRIEF OF APPELLEE**

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Appeal from the Fourth Judicial District Court, Utah County, State of Utah

The Honorable Fred D. Howard

### QUESTION PRESENTED

Under Utah law, did the trial court err in granting Graffs summary judgment, where the only issue Developers presented in their Opposition to Summary Judgment was partial performance, and when said exception was clearly inapplicable in the Developers' case?

## TABLE OF CONTENTS

QUESTION PRESENTED .....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF THE FACTS .....	2
STANDARD OF REVIEW .....	11
SUMMARY OF THE ARGUMENT .....	11
ARGUMENT .....	13
I. THIS COURT SHOULD AFFIRM BECAUSE THE ONLY ISSUE APPELLANTS PROPERLY PRESERVED FOR REVIEW WAS THE PARTIAL PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS, AND APPELLANTS CLEARLY DID NOT PLEAD SUFFICIENT FACTS TO MEET THE STRINGENT REQUIREMENTS OF THE PARTIAL PERFORMANCE EXCEPTION. ....	13
A. <u>The trial court did not err in granting Graff’s Motion for Summary Judgment when the Developers presented only the argument that the partial performance exception overcame the statute of frauds defense.</u> ....	13
B. <u>Appellants failed to plead facts sufficient to meet the stringent case law requirements for the partial performance exception to a statute of frauds defense.</u> ....	16
II. EVEN ASSUMING THAT THE REMAINING EQUITABLE CLAIMS WERE PROPERLY PRESENTED TO THE TRIAL COURT AND PRESERVED FOR APPEAL, THIS COURT SHOULD AFFIRM BECAUSE RECOVERY WOULD BE BARRED BY THE STATUTE OF FRAUDS. ....	20

A.	<u>Developers’ equitable claims are barred by Utah’s statute of frauds because, the Developers’ equitable claims attempt to create an interest which concerns real property.</u>	20
B.	<u>Max Graff did not not expressly and unambiguously waive the statute of frauds.</u>	27
C.	<u>Even if the statute of frauds wasn’t applicable, all of Appellants’ claims would fail as a matter of law.</u>	28
III.	APPELLANTS HAVE BROUGHT A FRIVOLOUS APPEAL IN CONTRAVENTION OF RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE.	31
A.	<u>Appellants’ Brief was “not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.”</u>	32
B.	<u>Appellants’ attitude toward this appeal is evidently frivolous as evidenced by the disorganized nature of Appellants’ Brief and their failure to cite to or characterize the record accurately.</u>	32
	CONCLUSION	42

## TABLE OF AUTHORITIES

### CASES

<i>Allen v. Hall</i> , 148 P.3d 939, 945 (Utah 2006).....	25
<i>Am. Towers Owners' Ass'n. v. CCI Mech.</i> , 930 P.2d 1182 (Utah 1996).....	26
<i>Busch Corp. v. State Farm Fire &amp; Cas. Co.</i> 743 P.2d 1217 (Utah 1987). ....	14, 15
<i>David Early Group, Inc. v. BFS Retail &amp; Commer. Operations, LLC</i> , 2008 U.S. Dist. LEXIS 5694 (D. Utah Jan. 25, 2008).....	17
<i>Eldridge v. Farnsworth</i> , 166 P.3d 639 (Utah App. 2007). ....	14
<i>F. C. Stangl v. Ernst Home Center, Inc.</i> , 948 P.2d 356 (Utah App. 1997). ....	27, 28
<i>Fischer v. Johnson</i> , 525 P.2d 45 (Utah 1974).....	30
<i>Harmon v. Greenwood</i> , 596 P.2d 636 (Utah 1979). ....	17
<i>Harper v. Evans</i> , 185 P.3d 573 (Utah App. 2008).....	13
<i>Israel Pagan Estate v. Cannon</i> , 746 P.2d 785 (Utah App. 1987).....	31
<i>Mackay v. Hardy</i> , 973 P.2d 941 (Utah 1998). ....	32, 33, 41
<i>McKay Dee Credit Union v. Federal Home Loan Mortg. Corp.</i> , 2008 WL 1970944 (Utah App. 2008). ....	24
<i>Medesco, Inc. v. LNA Intern. Inc.</i> , 762 F.Supp. 920 (D. Utah 1991). ....	27
<i>Pace v. Parrish</i> , 247 P.2d 273 (Utah 1952).....	29
<i>Spears v. Warr</i> , 44 P.3d 742 (Utah 2002).....	16
<i>Themy v. Seagull Enter., Inc.</i> , 595 P.2d 526 (Utah 1979). ....	11
<i>Utah State Coalition of Sr. Citizens v. Utah Power and Light Co.</i> , 776 P.2d 632 (Utah 1989). ....	11

### STATUTES

U.C.A. §25-5-1 (2008).....	22
----------------------------	----

U.C.A. §25-5-3 (2008).....	23
U.C.A. 25-5-1 (2008).....	20
U.C.A. 78A-4-103(2)(j) (2008). ....	1

#### OTHER AUTHORITIES

37 C.J.S., Statute of Frauds, § 250 (1943). ....	28
Susan Haack, Philosophy of Logics, Cambridge University Press, 1978. ....	29



### OPINIONS BELOW

The Order of the district court may be found on pages 1264-73 of the Record. The Order was not part of the record at the time Appellants filed their Brief . (R. at 1262-63.) However, it is now included in the Supplement to the Record.

### JURISDICTIONAL STATEMENT

This Court’s jurisdiction rests upon Utah Code Ann. sec. 78A-4-103(2)(j).<sup>1</sup>

### STATEMENT OF THE ISSUES

While Appellants couch the issue for appeal in broad terms – “[w]hether the trial court correctly granted summary judgment to Plaintiffs/Appellees Graffs” – the Appellants in fact only preserved one issue – partial performance – for appeal. Appellant’s Opposition to Plaintiff’s Motion for Summary Judgment, dated March 19, 2007, raised *only the issue of partial performance*, and Appellants point to this memorandum exclusively as its citation to the record showing the issue preserved in the trial court. (R. at 1003-24; Appellants’ Brief at p. 2.)

### STATEMENT OF THE CASE

Appellees are essentially in agreement with Appellants that their statement of the procedural history of the case is accurate. The one exception is that Appellants did not

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<sup>1</sup> U.C.A. § 78-2a-3 is newly renumbered as U.C.A. § 78A-4-103.

mention that their Opposition to Plaintiff's Motion for Summary Judgment, dated March 19, 2007, preserved only the issue of partial performance. (R. at 1003-24.)

### STATEMENT OF THE FACTS

This case centers on the failed sale of approximately 27.5 acres of land in or near American Fork, Utah. (Appellants' Brief at p. 6; See also R. at 731-34.)

The Appellees in this action are members of the Graff family. For three generations the Graffs have owned a family farm ("Graff Farm") consisting of 27.5 acres in the environs of American Fork, Utah. (R. at 827, ¶ 3.) The patriarch of the Graff family is Max Graff, who is now 74 years old. (*Id.* at ¶ 4.) Max's father, George, purchased the land with an eye toward dairy farming. (R. at 826, ¶ 5.) Those dairy operations commenced in 1944. *Id.* Though the farm was modest in size, the Graff family has supported itself by not only dairy but also cattle operations. (*Id.* at ¶ 5-6.) These operations were made possible through leasing of neighboring farmland for feed production. (*Id.* at ¶ 7-8.) However, over the decades, real estate in Utah County increased in value to the point that in 2004 the Graffs began to seriously consider selling their farm. (*Id.* at ¶ 10.) Specifically, the undeveloped areas between Pleasant Grove and American Fork became an object of interest for real estate investors.

Not far from the Graff Farm lived the Robinson family, in fact, one of the Robinson's sons, David Robinson, trained horses for Max Graff. (R. at 380, ¶ 13.) Robinson was also involved with an entity known as the Fusion Group ("Fusion") (R. at 382, ¶ 2.) Fusion's business objective was real estate development. (R. at 382 ¶ 3.)

In 2004, Robinson approached Max Graff with a business proposal: Fusion wanted to facilitate the purchase of the Graff Farm. (*Id.* at ¶ 4.) In fact, Fusion had big plans for to develop a substantial real estate development project called the Vintaro Project (“Project”) that included the Graff Farm and surrounding properties. (R. at 1, 381 ¶ 7.) Specifically, Robinson was, in his own words, “responsible for land acquisition for Fusion Group, LLC, (“Fusion”) and its related entities with respect to the Project.” (R. at 382 ¶ 2.) The entities Robinson was referring to are the other two Appellants in this action: Gateway Farms, LLC (“Gateway”), and Naterra West (“Naterra”). (*Id.* at ¶ 3.) Fusion owns a 100% interest in Gateway and a 5% minority interest in Naterra. (R. at 83.) Naterra and Gateway are essentially the same group of individuals, acting as agents for Fusion Group. (R. at 826) Collectively, Appellants Gateway, Naterra and Fusion will be referred to as “Developers.” (see generally R. at 1014-24 where Appellants themselves refer to Naterra, Gateway, and Fusion collectively as “Developers.”)

This lawsuit centers on negotiations between Developers and the Graffs over four different parcels of land. (R. at 1-20, 26 ¶ 7.) While the first set of contracts were signed on December 10, 2004 (R. at 382 ¶ 2), Developers failed to fulfill their contractual obligations and subsequent negotiations continued for the following *year and a half*. (R. at 378 ¶ 21.) The first set of contracts was between Gateway and Graffs, while the subsequent contracts were between Naterra and the Graffs. (R. at 380-381 ¶¶ 9-10.)

The relevant REPCs, which applied to all four parcels of land, include:

Gateway REPC-1 and the first Addendum was signed December 10, 2004, and set closing for January 31, 2005. (R. at 29-40.)

Gateway Addendum 2 was signed January 28, 2005, and extended closing to April 1, 2005. (R. at 123.)

Gateway Addendum 3 was signed March 31, 2005, and extended closing to October 1, 2005. (R. at 122.)

At this point Naterra took over negotiations with the Graffs. Naterra West REPC-1 and the first Addendum was signed May 25, 2005, and set closing for December 31, 2005. (R. at 3-20.)

Naterra Addendum 2 was signed after the expiration of the previous contract, on April 22, 2006, and extended the closing deadline to May 31, 2006. (R. at 1.) Specifically, §2 provided that:

...[T]he Closing must occur on or prior to May 31, 2006. If the appraisal or other financing conditions needed for acquisition of the Properties have not been met before May 31, 2006 **for reasons outside the control of the Buyer**, then **Closing may be deferred until no later than June 30, 2006**. **Buyer to provide Sellers at least 10 days notice prior to closing...** In the event **the Closing does not take place as required by this paragraph, then the RECP's [sic] shall automatically terminate** as of the date to closing should have taken place.

(R. at 1 ¶ 2.) (Emphasis added.)

A timeline to illustrate the sequence of REPCs and addenda (R. at 729) is attached as Appendix A.

According to Developers' vague representation on the record, "[o]n several occasions between May 25, 2005 and June 22, 2006 including after May 31, 2006" Developers discussed with one of the Sellers, Max Graff, "possible funding options to purchase the property, including [Developers] obtaining a bank loan or in the alternative,

obtaining a loan from other investors or various ‘hard money’ lenders.” (R. at 380, ¶ 15.) Construing this statement in the light most favorable to Developers, sometime in the year prior to the closing and sometime in the 22 days leading up to the closing deadline, Developers represented to a single Seller, Max Graff, that Developers were considering various funding options, including hard money investors. *Id.*

Further, Developers again informed the same single Seller, Max Graff, some time prior to June 30, 2006 "that if [Developers] could not obtain financing from the preferred bank loan by the closing deadline, [Developers] would be able to close on the purchase of the property through these various investors or ‘hard money lenders.’” (R. at 379, ¶ 18.) Read in the light most favorable to the Developers, this statement can mean no more than sometime before (maybe a year before, or maybe one day before) June 30, 2006 Developers informed a single seller (Max Graff) that if the bank loan fell through, other options were available to Developers that could allow them to close on the property prior to the closing deadline.

The Record does not show any attempt by the Developers to provide the Graffs “at least 10 days notice prior to closing” as required by the contract. (R. at 1 ¶ 2.) In fact, the only evidence regarding the contractually required notice is in the final paragraph of Robinson’s affidavit; a tacit admission that Developers failed to give the required notice, which reads

My understanding of the 10 days notice as contained in Addendum 2 required that if the buyers wanted to close earlier than May 31, 2006 or before the final closing date of June 30, 2006, the buyers were to give 10 days notice to allow closing arrangements to be made prior to June 30,

2006. I understood that the contract called for a June 30, 2006 closing unless notice of an earlier closing was given.

The addendum, however, clearly states that Developers were required to give 10 days notice prior to closing, without any qualification. (R. at 1, ¶ 2.) Further, Robinson's characterization of the agreement as calling for a June, 30, 2006 closing is clearly erroneous, as the contract called for a May 31, 2006 closing unless circumstances beyond the control of the Developer required a later closing, and in that case, the ultimate deadline could be extended to no later than June 30, 1006. *Id.* Developers' attempt to introduce parol evidence, in the form of Robinson's affidavit, does not change the clear meaning of the contract. (R. at 375, ¶ 34.)

On June 22, 2006, twenty two days after the May 31, 2006 deadline and just eight days (and coincidentally, two days too late for ten days' notice) prior to the final June 30<sup>th</sup> deadline, (R. at 1, ¶ 2) Developer representative David Robinson again contacted one of the sellers, Max Graff, and informed Max that "due to delays in the various appraisals, city approvals, including a road mylar approval, that the closing, using the preferred bank loan, would need to be deferred into the first part of July, 2006." (R. at 378, ¶ 21).

According to Developers, on June 22, 2006, Max Graff responded by telling Robinson to contact Graff's attorney, Don Gilbert "to work things out concerning closing arrangements." (R. at 378, ¶ 22). Further, Developers assert that through "tone, body language and actions" Max indicated to Robinson "that everything would be fine with closing in July, 2006." (R. at 378-377, ¶ 23.)

It is important to note the Developers characterize this conversation in their Brief differently than it appears in the record.<sup>2</sup>

Although it appears that Developers could have obtained financing through hard money lenders prior to May 31<sup>st</sup>, 2006 and thus the failure to close on or before May 31, 2006 was entirely within the control of the Developers, (*supra*) for the purposes of this appeal Graffs shall assume that closing did not occur prior to May 31, 2006 due to "reasons outside the control of" Developers, and, according to the contract terms, the closing may have been extended to no later than the ultimate deadline of June 30<sup>th</sup>.

It is undisputed that Developers were unable to contact Graffs' attorney after June 22<sup>nd</sup> by telephone or e-mail to get an extension. (R. at 376, ¶ 27.)

While disputing that an oral extension was ever granted to Developers, Graffs assume, for the purposes of this appeal, that the representation by Max Graff that Developers should contact Graffs' attorney and Max Graff's tone and body language were somehow sufficient to create *some type* of oral agreement between Developers and Graffs. *Id.*

It is undisputed that "after the [June 30, 2006] closing deadline passed, the Graffs informed Developers that they were not willing to take less than \$250,000 per acre for the

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<sup>2</sup> On page 15 of Appellant's Brief, Appellants state that Max told David to "contact Don Gilbert, the Graffs' attorney, about **extending the June 30, 2006 closing deadline** and making closing arrangements." (Emphasis added.) Developers again mischaracterize the Record on page 11 of their Brief by saying that, in a later conversation "Max indicated that he had not heard from Gilbert and again told David that he should continue to attempt to contact Gilbert concerning **extension and** closing arrangements." (Emphasis added.) Somewhere between the affidavit and the Brief Appellants have managed to put the words "**extension**" into Max Graff's mouth, not only once, but twice.

subject property,” whereas the previous contract price was approximately \$171,000 per acre. (R. at 375, ¶¶ 32-33.) On July 18, 2006, Naterra filed a notice of interest in the property that was subject to these agreements. See Appendix B.

In response to the notice of interest, Graffs filed suit on July 28, 2006 seeking to collect liquidated damages in the amount of \$185,000 under the Naterra REPC, as well as a declaratory judgment that the REPC had terminated by its own terms on May 31, 2006. (R. at 23.)

On August 9, 2006, Naterra filed a *lis pendens* (R. at 63-68) and answered Graffs’ complaint, asserting in counterclaim five causes of action: (1) detrimental reliance, (2) fraud, (3) breach of good faith and fair dealing, (4) unjust enrichment, and (5) conspiracy. (R. at 28-62.) Subsequently, on September 5, 2006, Gateway Farms, LLC, and Fusion Group, LLC, moved to intervene as plaintiffs (R. at 82-137), and on October 25, 2006, they filed a Complaint in Intervention against the Graffs. (R. at 217-282.)

On February 5, 2007, the Graffs moved for summary judgment against Developers, arguing that the statute of frauds defeated the Developers’ counterclaims. (R. at 852-981.)

Developers opposed the motion on March 22, 2007, arguing that Developers believed that an oral agreement had been reached between the Parties granting them some sort of extension based “on the voice tone, body language, and oral communications of Max Graff in June, 2006; specifically Max Graff’s instructions to plaintiffs to work things out with his attorney concerning arrangements for closing.” (R. at 1023, internal quotation marks omitted.) Further, Developers argue that by attempting, but failing, to



contact Graffs' attorney (R. at 1017) that the "Developers... overcome the statute of frauds based on its performance of the agreement reached by Max Graff and Dave Robinson." (R. at 1018.) The Developers relied exclusively on the doctrine of partial performance to defeat the Graffs' statute of frauds defense. (R. at 1002-24.)

While the Developers erroneously claim in their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment that many facts that the Graffs vigorously dispute are "undisputed," Graffs particularly object to the first paragraph on page 1017 of the Record which states that "In the present matter, it is undisputed that Dave Robinson informed Max Graff that they were ready willing to close on the purchase of the property through the various 'hard money' investors. (Robinson Aff. ¶¶ 11, 15, 18 and 29.)" Careful examination of those paragraphs shows that the Developers being ready, willing and able to close was **NOT** specifically communicated to the Graffs in any way. *Id.* The affidavit only refers to hard money investors in general discussions about funding options in paragraphs 15 and 18, and a declarative statement in paragraph 29 that "On June 30, 2006, Naterra was ready, willing and able to close." (R. at 379 and 377.)

The Graffs filed a reply memorandum on April 12, 2007 and filed a request to submit the motion on the same day. (R. at 1062-69; 1070-72.)

On May 14, 2007, the trial court conducted a hearing on the Graffs' motion. (R. at 1165.) Two months later, on July 10, 2007, the trial court issued its Order holding that the statute of frauds defeated all of Developers' claims and counterclaims. (R. at 1152-66.) The Graffs moved on November 2, 2007, for the order to be made final under Rule 54(b). (R. at 1201-29.) The trial court granted that motion on December 10, 2007. (R. at 1258-

60.) Then on January 15, 2008, the trial court issued an Amended Order, certifying it under Rule 54(b) as final and appealable. (R. at 1265-73.)

The trial court, in its order, found that the alleged oral agreement was not clear in its language or its terms, nor did it even address whether an extension was granted, or for how long, but suggested at best, “some form of an extension.” (see Appendix C, or R. at 1264-73.) Further, the alleged oral agreement did not contain an express waiver of the statute of frauds. *Id.* Assuming, however, that such an oral agreement existed, the trial court held that all of Developer’s claims and/or causes of action should be dismissed because “Developer’s failure to close...was not arguably shown as exclusively based on reliance upon on [sic] the alleged oral agreement” and that non-action does not constitute partial performance under Utah law. *Id.* Further, “[t]he allegations of part-performance in terms of calling Graffs’ attorney and sending him e-mail are insufficient part performance because these are not substantial and are ‘word oriented’ not ‘act oriented.’” *Id.* The court noted, in addition, “it would be expected, that contact with Graff’s attorney would occur (e.g. he was to prepare the closing documents, etc.) and therefore the e-mail and phone calls were not adequately shown as exclusively based on reliance upon on [sic] the alleged oral agreement.” *Id.*

Developers filed their Notice of Appeal on January 8, 2008, *prior to* the issuance of the final Order of the trial court. (R. at 1261-63.)

## STANDARD OF REVIEW

When reviewing a case disposed of in the district court by summary judgment, this Court should consider the evidence in the light most favorable to the losing party, and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. *Themy v. Seagull Enterprises, Inc.*, 595 P.2d 526, 529-30, (Utah, 1979).

Further, in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, this Court should give no deference to the trial court's view of the law; but review it for correctness. *Utah State Coalition of Sr. Citizens v. Utah Power and Light Co.*, 776 P.2d 632 (Utah, 1989).

## SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's ruling because the only argument Developers properly placed before the trial court (the partial performance exception to the statute of frauds) fails as a matter of law. Developers tacitly concede that the statute of frauds applies, but assert that the partial performance exception overcomes the Graff's statute of frauds defense. (R. at 1015-18.) Developers' partial performance argument, however, fails as a matter of law because (1) the alleged oral contract and its terms were not clear and definite, (2) the alleged acts done in performance of the contract were not equally clear and definite, nor did Developers show that such acts would not have been performed had the contract not existed, and, finally, (3) failure to enforce the contract

would not result in a fraud on the Developers. Further, partial performance is the only argument Developers cite as preserved. (See Appellant's Br. at p. 2 where Developers reference only their Memorandum in Opposition as their citation to the record showing which issues were preserved in trial court.)

Although the Developers' new unjust enrichment claim was not properly presented to the trial court nor preserved for appeal, Developers in their Brief, however, go to great lengths in an attempt to resurrect their claim of unjust enrichment as well as the rest of their equitable counterclaims, by claiming that the statute of frauds is inapplicable to these claims (Appellants' Br. at 22-26.) Even if this Court were to come to the conclusion that Developers properly presented and preserved these claims this Court should affirm the trial court's ruling because (1) the statute of frauds bars any such recovery, and (2) each of these claims fail as a matter of law.

Finally, this Court should award the Appellee attorney's fees and punitive damages for being required to defend this frivolous appeal that was "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." The frivolity with which Developers' counsel have treated this case is also evident from the poorly drafted nature of their Brief – it is riddled with mischaracterizations and erroneous citations to the Record. The Appellee has expended many hours sifting through the Record in an often futile effort of figuring out what Developers' Brief was actually citing to. Such behavior on the part of Developers' counsel merits sanctions from this Court.

## ARGUMENT

- I. THIS COURT SHOULD AFFIRM BECAUSE THE ONLY ISSUE APPELLANTS PROPERLY PRESERVED FOR REVIEW WAS THE PARTIAL PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS, AND APPELLANTS CLEARLY DID NOT PLEAD SUFFICIENT FACTS TO MEET THE STRINGENT REQUIREMENTS OF THE PARTIAL PERFORMANCE EXCEPTION.

Developers, by presenting the single issue of the partial performance exception to the statute of frauds to the trial court prior to the trial court's ruling, waived any and all remaining arguments it might have brought on appeal. Developers' argument that the partial performance exception to the statute of frauds fails because Developers have not plead facts sufficient to meet the stringent requirements of the partial performance exception, such as the requirement that the terms of the oral agreement be clear and definite, and that the action taken must clearly be a result of that agreement.

- A. The trial court did not err in granting Graff's Motion for Summary Judgment when the Developers presented only the argument that the partial performance exception overcame the statute of frauds defense.

Developers failed to present and preserve all of their equitable claims for appeal and thus waived all but the partial performance claims. "To allow the trial judge the opportunity to rule on a particular issue, the issue must be specifically raised in a timely fashion and with supporting evidence or relevant legal authority." *Harper v. Evans*, 185 P.3d 573, 577 -578 (Utah App. 2008). In a motion for summary judgment, that opportunity comes in the opposing party's memorandum in opposition. *Id.* at 578. Hence, an appellant's opposition to summary judgment is the crucial place to preserve an issue. *Id.*, at 578 (Issue not preserved when appellant's "opposition to summary

judgment in the district court purported to *abandon*” that claim.); see also *Eldridge v. Farnsworth*, 166 P.3d 639, 649 -650 (Utah App. 2007) (issue not preserved for appeal when appellant did not rely on that issue in its opposition to motion for summary judgment and did not mention the issue again until its motion to reconsider.)

Where it is conceivable that an argument was raised, and thus preserved, in oral argument, the appellant must have evidence that such arguments were made. *Busch Corp. v. State Farm Fire & Cas. Co.* 743 P.2d 1217, 1219 (Utah 1987) (“when an argument has not been made in the trial court, we will not allow it to be raised on appeal. Although it is conceivable that these arguments were raised orally in the hearing on the motion for summary judgment, there is nothing *in the record* to support that possibility.”) (Emphasis added.)

Developers’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment presented the single argument of partial performance as an exception to the statute of frauds to the trial court. (R. at 1003-24.) Therefore, this was the only argument properly before the trial court and thus preserved for appeal. *Busch*, 743 P.2d 1219. By failing to present and thus preserve any other arguments any attempt by the Developers to resurrect these arguments in their Brief must fail. *Id.*

Developers opposed Graffs’ motion for summary judgment on March 22, 2007, arguing **only** the issue of partial performance. In fact, like *Eldridge*, Developers appear to abandon all other arguments including any claim for unjust enrichment. Further, by stating in its Opposition:

Plaintiffs also correctly identify *some* [emphasis in original] of the circumstances when the statute of frauds *may* be overcome, such as *detrimental reliance, equitable estoppel, promissory estoppel and fraud*. While Developers *may* overcome the statute of frauds based on the foregoing circumstances, Developers also overcome the statute of frauds based on its performance of the agreement reached by Max Graff and Dave Robinson.

(Emphasis added, internal citations omitted.) (R. at 1018.) The Developers went on to ONLY address the partial performance issue in their Memorandum in Opposition. (R. at 1003-24.) Not only did Developers fail to address any remaining arguments regarding the Graffs' statute of frauds defense, but Developers admitted that these claims "may" overcome the statute of frauds – not "will" – and, as a result, implicitly abandoned those arguments. (R. at 1018.)

Even if Developers were to contend that the other equitable claims arguments were raised, and thus preserved, in oral argument, said argument would also fail. *Busch*, 743 P.2d 1219. Like the appellant in *Busch* who could not prove what was said at oral arguments, Developers did not request a transcript and thus there is no transcript of oral arguments in the Record for appeal. (R. at 1187.)

Developers chose to rely exclusively in their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment on the partial performance exception to the statute of frauds defense, and, as a result, failed to present and preserve their remaining arguments. (R. at 1003-24.)

- B. Appellants failed to plead facts sufficient to meet the stringent case law requirements for the partial performance exception to a statute of frauds defense.

In order to prevail using the partial performance exception to a statute of frauds defense, Developers must meet the stringent requirements of this exception. Developers quite properly pointed out on page 18 of their Brief that the

standard for partial performance in Utah provides that ‘[1] the oral contract and its terms must be clear and definite; [2] the act is done in performance of the contract must be equally clear and definite; and [3] the acts must be in reliance on the contract.’... Moreover, the acts in reliance must be such that ‘(a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate.’

(Citing *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002), internal quotations and citations omitted.) It is important to note that all four requirements are essential, and the failure of the Developers to meet any one of these requirements makes the claim of partial performance fail as a matter of law. *Id.* The trial court properly found that the Developers failed to meet, not just one, but each and every one of these requirements. (R. at 1264-73.)

[1] The trial court properly found that oral agreement as alleged and its terms were far from clear and definite. (R. at 1271-72, ¶¶ 1, 3.) Developers argued in its Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment, that Developers believed that an oral agreement had been reached between the Parties granting them some sort of extension based “on the voice tone, body language, and oral communications of Max Graff in June, 2006; specifically Max Graff’s instructions to plaintiffs to work things out with his attorney concerning arrangements for closing.” (R.



at 1023, ¶ 2, internal quotation marks omitted.) The words alleged by David Robinson in his affidavit (unlike the Brief<sup>3</sup>) do NOT clearly and definitely address whether an extension was granted. (R. at 375-73.) Further, Developers never claimed that critical terms of the extension were discussed, such as the length of the extension or consideration. *Id.* Therefore, as a matter of law, the terms of the contract, as Judge Howard ruled, are far from clear and definite, thereby defeating the Appellants' claims that the partial performance exception to the statute of frauds applies to this case. (R. at 1271-72, ¶¶ 1, 3.)

Moreover, the oral agreement as alleged by the Developers is not an oral contract at all, but is at most an agreement to agree, which is unenforceable as a matter of law.

*David Early Group, Inc. v. BFS Retail & Commer. Operations, LLC*, 2008 U.S. Dist. LEXIS 5694 (D. Utah Jan. 25, 2008).

An agreement to agree at a later date is unenforceable as a matter of law...."So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all."; see also *Harmon v. Greenwood*, 596 P.2d 636, 639 (Utah 1979) ("Such agreements to agree are generally unenforceable because they leave open material terms for future consideration, and the courts cannot create these terms for the parties.")

Like the Utah District Court in *David Early* and *Harmon* that refused to create terms for the parties, the missing essential terms of the alleged extension cannot be inferred from the comments or actions of either party.

[2] The trial court properly found that non-action and word-based actions are insufficient to reach the conclusion that the act done in performance of the contract is

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<sup>3</sup> See footnote 2, above.

clear and definite. (R. at 1270-72, ¶¶ 2, 5-8.) Despite the fact that Developers never raised the issue that “not closing” was an act made in reliance on the alleged oral agreement, the trial court found that this non-action was not sufficiently clear and definite to meet the requirements of the second prong of the standard. (R. at 1271, ¶ 6.) It is the general rule in Utah that to avoid enforcement of the statute of frauds, **non-action may not constitute partial performance or reliance upon an oral agreement.** *Id.* As a matter of law, then, a party’s failure to close before the deadline is legally insufficient to establish partial performance as an exception to the statute of frauds in this case. *Id.* Further, the trial court went on to hold that calling Graffs’ attorney and sending him e-mail are not sufficiently clear and definite to meet the second prong of the standard because they are “word oriented” not “act oriented” (*Id.* at ¶ 7.)

[3] (a) The trial court found that the acts Developers might point to as evidence of their reliance on the contract were not done such that (a) they would not have been performed had the contract not existed. (R. at 1270, ¶ 8.) The trial court properly pointed out that Developers might not have closed for myriad other reasons including, the *lack of funding*, a decision not to go forward with the transaction, or other reasons wholly apart from the alleged oral agreement. *Id.* Further, the court properly noted that attempts to contact Graffs’ attorney would be expected because he was preparing the closing documents etc. and therefore the emails and phone calls would still have been made if the contract had not existed. *Id.* Developers themselves even mentioned throughout the Record that they had several reasons for attempting to contact the Graffs’ attorney including setting a closing date, determining the water rights, etc. (R. at 376-382 ¶¶ 6, 13-

20, 30.) Therefore, as a matter of law, as Judge Howard ruled, the Developers have failed to meet their burden in showing that they would not have attempted to perform if the purported oral contract had not existed. (R. at 1264-73.)

[3](b) Finally, Developers failed to allege in their Brief or elsewhere in the Record that the failure of the Graffs to perform on the alleged agreement to extend would result in a fraud on the Developers. First, had Developers tendered their notice to close on June 20<sup>th</sup> (within the ten days required by the written contract) or even on June 22<sup>nd</sup> (when they told the Graffs that they again failed to obtain the preferred bank financing and could not close until mid-July), then the Developers might have purchased the property and there would be no problem today.

Instead, Developers spend a great deal of their Brief alleging stonewalling efforts that prevented them from closing. (Appellant's Brief at 13, 15-17.) Developers fail to mention, however, that whether or not Don Gilbert was in the state or even incommunicado **could not have stopped the Developers from tendering their readiness to close** according to the contract. If, after Developers had tendered their readiness to close, Don Gilbert had failed to close, then the Developers would have an action against the Graffs for breach of contract, (which is not alleged by the Developers).

The opposite occurred, however. The Developers failed to tender their readiness to close, and failed to close, assuming that the Graffs would grant them one more extension after a year and a half of holdups. (R. at 377, ¶ 23, see also the timeline in Appendix A.) Then Developers attempt to blame the Graffs for misleading them through the voice tone, body language, and instructions to Developers to work things out with Graff's attorney

concerning arrangements for closing. (R. at 1023.) No fraud occurred on the Developers because they chose to disregard the contract that they signed, and relied on an alleged oral agreement with no set terms. (R. at 377 ¶ 23.) Therefore, as a matter of law, Developers failed to show how the failure of the Graffs to extend the deadline resulted in a fraud on the Developers, again defeating the Developers' claims that the partial performance exception to the statute of frauds applies to this case.

II. EVEN ASSUMING THAT THE REMAINING EQUITABLE CLAIMS WERE PROPERLY PRESENTED TO THE TRIAL COURT AND PRESERVED FOR APPEAL, THIS COURT SHOULD AFFIRM BECAUSE RECOVERY WOULD BE BARRED BY THE STATUTE OF FRAUDS.

Even were the remaining equitable claims preserved, they would be barred by Utah's statute of frauds.

- A. Developers' equitable claims are barred by Utah's statute of frauds because, the Developers' equitable claims attempt to create an interest which concerns real property.

Section 25-5-1 of the Utah Code specifically states that:

No estate **or interest in real property**,... **or power over or concerning real property or in any manner relating thereto**, shall be **created, granted**, assigned, surrendered or **declared** [unless] authorized by writing.

Developers, through their equitable claims are attempting to create an interest in, or power over the Graffs' property which is not authorized by writing. This attempt to create an interest in real property is contrary to the Utah law. Through a contortion of both legal authority and the facts in this case, Developers attempt to persuade this Court that the Developers have established some type of equitable rights in the Graffs' property,

and since those equitable claims were not addressed by the Graffs or the trial court, this Court should find that the trial court improperly granted summary judgment on those claims. (Appellants' Br. at 22.)

Developers state in their Brief that "DEVELOPERS' EQUITABLE CLAIMS WERE NOT BRIEFED OR ARGUED. AND DEVELOPERS' EQUITABLE CLAIMS ARE NOT SUBJECT TO THE STATUTE OF FRAUDS. THEREFORE, THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON DEVELOPERS' EQUITABLE CLAIMS." (Appellants' Br. at 22.) Developers seem to have forgotten that after the trial court's hearing on the Graffs' Motion for Summary Judgment, but before the trial court issued its initial Order (R. at 1166), the Developers filed an Amended Objection to Plaintiffs' Proposed Order on *their* Motion for Summary Judgment on June 7, 2007, (R. at 1097) arguing nearly word for word the same argument they propound in Argument III of the Appellants' Brief found on pages 22 through 26. Further, Developers ignore the fact that Graffs responded to this objection outlining why the Developers' equitable claims were barred by the statute of frauds. (R. at 1140.) But most incredibly, Developers do not even mention the trial court's ruling that the equitable claims were in fact barred by the statute of frauds. (R. at 1151.)<sup>4</sup>

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<sup>4</sup> The Graffs contend that this issue was not properly presented to the trial court prior to the trial court's hearing on the motion for summary judgment in the Developers Memorandum in Opposition, which is exclusively cited as the Developers' authority that the appealed issues were preserved. Therefore, the Developers have not preserved this issue for appeal. (*See Argument I(A) Supra.*) However, out of an abundance of caution, the Graffs will address this issue.

Developers attempt to contort binding authority by stating that its equitable claims are not barred by the statute of frauds because:

the statute of frauds defense applies only to actions related to a contract or agreement. In this case, Developers' unjust enrichment claim is not a tort action as discussed or briefed in the Graffs' summary judgment motion. More importantly, Developers' unjust enrichment claim does not relate to any contract or agreement, but rather, only to benefits unjustly retained by the Graffs.

The only authority Developers rely on to establish that "the statute of frauds defense applies only to actions related to a contract or agreement" is a quote from *Fericks v. Lucy Ann Soffe Trust*, 100 P.3d 1200, 1204 (Utah 2004). The Developers state (mistakenly citing *Stangl* <sup>5</sup>):

We have stated that the operation of the statute [of frauds] is not confined to cases where an action is brought directly on the contract. Whatever the form of the action may be, *if the proof of a promise or contract within the statute is essential to maintain it*, there can be no recovery unless the statute is satisfied.

Based on *Stangle* [sic], the key element in applying the statute of frauds to other tort actions is whether proof of a promise or contract within the statute is essential for maintaining that tort action. Again, the statute of frauds defense applies only to actions related to a contract or agreement.

(Appellants' Br. at 25)

The first sentence of the quote completely contradicts the Developers' argument that "the statute of frauds defense applies only to actions related to a contract or agreement." The

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<sup>5</sup> Although the Developers point The Court to a Utah Supreme Court decision in *F.C. Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356 (Utah 1997) the actual quote is located in *Fericks*. The Graffs admitted to a lack of clarity in their original citation See footnote 2 of its Response to Developers Amended Objections to Graffs Purposed Order as Direct by the Court. (R. at 1133.) The Graffs take no responsibility for this second misrepresentation of authority.

requirement for a promise in *Fericks* stems not from the statute of frauds contained at U.C.A. §25-5-1, relating to interests in land, upon which the Graffs rely, but on an entirely different statute of frauds contained at U.C.A. §25-5-3 which relates to contracts. (See R. at 1129-1140 where Graffs fully briefed this issue to the trial court.)

To further complicate the issue, Developers twist the facts of the case to make it appear as though some benefit was conferred upon the Graffs.

Developers conferred benefits including but not limited to getting the Property annexed into the city of American Fork; acquiring all of the parcels necessary for the planned community; working to acquire access to the property, proper open space, surveys, and engineering so that the plat and planning could be approved; establishing relationships with city officials; paying hundreds of thousands of dollars in acquisition costs; and paying interest in carrying costs.

(Appellants' Brief at 24.)

In other words: the Developers encouraged the city of American Fork to annex the Graff Property. Developers acquired other land for a planned community. Developers worked to acquire - access to the planned community, plans for proper open spaces in the planned community, surveys for the planned community, and engineering for the planned community so that the plat and planning could be approved by the city of American Fork. Developers established relationships with city officials. Developers paid hundreds of thousands of dollars to acquire other land in the planned community and paid interest in carrying costs. Although the Developers qualify this list with the language "but not limited to" Developers fail to allege that anything of value was actually ever directly added to the Graff Property upon which an unjust enrichment claim might be brought.

Graffs fail to see how any of the actions listed above conferred a benefit upon them. Developers claim in their Statement of Facts, but not in their argument, that “[t]he Graffs knew Naterra was working to improve and increase the value of the Property, and they gladly accepted this benefit without cost to them.” (Appellants’ Br. at 8.)

What the Graffs actually knew at the time Developers performed the actions that supposedly conferred benefits was that the Property was under contract with the Developers, that the Developers were working to establish a planned community, and that the property might become more valuable to the Developers. The Graffs made it abundantly clear in the second addendum to the Naterra REPC that Developers were to close no later than June 30, 2006, or in the event the Closing did not take place as required by the addendum, then the REPCs would automatically terminate as of the date on which closing should have taken place. (R. at 1 ¶ 2.)

Graffs now know that Developers did not close and the contract terminated by its own terms. Any work Developers did to increase the property value was done with only one real risk, e.g., the Developers would fail to close, and the Developers accepted this risk. *Id.* Any increase in property value was forfeited by the Developers due exclusively to the Developers breach of contract.

This Court in an unpublished opinion found that “[i]f the benefit is considered to be the profit FHLM realized on the later sale of the property, this benefit was not conferred by McKay Dee but the by the purchasing party.” *McKay Dee Credit Union v. Federal Home Loan Mortg. Corp.*, 2008 WL 1970944 (Utah App. 2008). Likewise, without showing that anything of real value was added to the Graffs’ Property in this



case, if the benefit is considered as only the increased property value, that is yet unrealized by the Graffs, that benefit will be conferred *not by the Developers*, but by the future purchasing party.

Developers' claim for unjust enrichment must fail. The elements of an unjust enrichment claim are:

First, there must be a benefit conferred by one person on another. Second, the conferee must appreciate or have knowledge of the benefit. Third, there must be acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.

*Allen v. Hall*, 148 P.3d 939, 945 (Utah 2006).

First of all, for a claim of unjust enrichment, the party claiming unjust enrichment must aver that they were the party that conferred a benefit on the opposing party. The only supposed benefits mentioned by the Developers were benefits that were conferred by the City of American Fork or a future purchaser of the property, not the Developers. Further, all of the benefits that Developers claim they conferred were given at a time when the property was under a valid, enforceable contract, and Developers forfeited their rights to the property when they beached the contract.

Even if this Court were to find that Appellants had conferred some kind of tangible benefit on the Appellee's property, the analysis for unjust enrichment does not end there – there must be “acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit.”

Consider a homeowner who expends a great deal of money landscaping her yard, and as a result, increases her neighborhood's property value. If this Court were just to consider

whether a benefit was conferred, this homeowner would have a cause of action for unjust enrichment against her neighbor since she, the homeowner, “conferred” a benefit on the neighbor by increasing the neighborhood’s property value. Such a result, however, would be nonsensical. The homeowner’s action was done for her own benefit and she cannot force her neighbor to pay part of the costs of landscaping her yard. It is not inequitable for the neighbor to retain the benefit conferred.

Likewise Developers cannot sue the Graffs for the work that Developers expended in preparing the Project that might benefit the Graffs if the Developers failed. This is especially so since the Developers were the breaching party that let the Project fall through. Thus it is not inequitable for the Graffs to retain whatever benefits may have been conferred. Had Developers merely followed through with the terms of the written contract that they entered into, they would have received these perceived “benefits” themselves.

Developers correctly state on page 24 of their Brief, that “[t]he [unjust enrichment] doctrine is designed to provide an equitable remedy where one does not exist at law. In other words, if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment.” *Am. Towers Owners’ Ass’n. v. CCI Mech.*, 930 P.2d 1182, 1193 (Utah 1996). However, Developers fail to state that the only reason there is no remedy available to them at law is due to their breach of contract.

B. Max Graff did not not expressly and unambiguously waive the statute of frauds.

The standard for overcoming the statute of frauds in the case of equitable claims is a limited one. While *Medesco, Inc. v. LNA Intern. Inc.*, 762 F.Supp. 920, 926 (D. Utah 1991) provided that the statute of frauds may be overcome when “enforcement of [an unwritten contract] is the *only* way to avoid injustice,” *Medesco* has been overruled by *Stangl* to create an even more exacting standard: “A defendant is estopped from asserting the statute of frauds as a defense only when he or she has expressly and unambiguously waived the right to do so.” *F. C. Stangl v. Ernst Home Center, Inc.*, 948 P.2d 356, 365 (Utah App. 1997).

In *Stangl* the Utah Court of Appeals analyzed Judge Winder’s opinion in *Medesco* and reasoned:

The trial court in this case followed *Medesco*’s reasoning, and, in effect, applied many of the elements of [The Restatement employed by *Medesco*]. *Ernst* argues that this approach is contrary to the law announced in *Ravarino*, *Easton*, and *McKinnon* and “would allow frustrated negotiators to claim promissory estoppel and seek damages for money spent in ‘anticipation’ of a possible contract.” We agree.

The Utah Court of Appeals recognized the policy the court in *Medesco* subscribed to, but the Court of Appeals then noted:

“Just as the statute of frauds should not be used to perpetrate fraud[,] so, too, promissory estoppel should not be allowed to eviscerate the Statute of Frauds.” *Medesco*, 762 F.Supp. at 926. If this court were to reject prior Utah case law and adopt [Winder’s approach] parties to a contract negotiation could not rely on the protections afforded by the Statute of Frauds, thereby “eviscerating” it.

*Id.* As a result, Utah law requires an express, unambiguous waiver of the statute of frauds before a party can be estopped from using the statute of frauds as a defense.

Graff's statement "talk to my attorney concerning closing arrangements," even with "tone and body language," is hardly a clear and unambiguous waiver of the statute of frauds defense. (R. at 377-78.) Because all of Developer's remaining claims were rooted in this unenforceable agreement, and the statute of frauds was not waived by Max Graff, Developers' remaining equitable claims must fail.

C. Even if the statute of frauds wasn't applicable, all of Appellants' claims would fail as a matter of law.

Interestingly, Developers assert that Graffs have failed to sufficiently analyze each of their five counterclaims, while failing to assert in their motion in Opposition or even their Brief how they have met their burden of proving the elements of these counterclaims. (Appellant's Br. at 22-26.) While this is not the Appellees' burden, for the convenience of the Court, and in the interest of justice, the Appellee will address the elements of each of the Developers' other counterclaims and show how the Developers failed to satisfy each of them in turn:

**(1) Detrimental Reliance**

Developers' claim for detrimental reliance fails as a matter of law because non-action does not count for detrimental reliance. 37 C.J.S., Statute of Frauds, § 250 (1943).<sup>6</sup>

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<sup>6</sup> Detrimental reliance is an element of promissory estoppel. Waiver by estoppel has been defined by courts and commentators as requiring (1) conduct by the first party, (2) that leads the second party to the reasonable belief that a contract provision has been waived, and (3) detrimental reliance or a change in position by the second party." *Valley Oil*

Developers claim that their reliance was non-action – that they *failed* to close on the contract was their reliance on Max’s statement “talk to my attorney concerning closing arrangements.” Not only was this reliance non-action, but there was also no detrimental reliance. Before Max’s statement was even made, Developers had already breached the contract by not giving ten days notice. (R. at 1 ¶ 2, 378 ¶ 21.) The contract would have been breached with or without Max’s statement. If anything, Developers detrimentally relied on themselves and not on the Graffs.

## **(2) Fraud**

Developers’ claim for fraud fails as a matter of law. The elements of fraud are as follows:

(1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

*Pace v. Parrish*, 122 Utah 141, 247 P.2d 273 (Utah 1952).

Developers’ fraud claim fails on nearly every element. Max Graff did make a representation (essentially telling Robinson to talk to Graffs’ attorney concerning closing arrangements. (R. at 378, ¶ 22 & 377, ¶ 26)) but this representation was not false.

Technically, as an imperative it could not be false.<sup>7</sup> Further, Developers can hardly be

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*Transp. Inc. v. Union Pacific R. Co.* 2002 WL 1050089, 1 (Utah App.) (Utah App., 2002).

<sup>7</sup> “Imperative and Interrogative sentences...fail to be either true or false...” Susan Haack, *Philosophy of Logics*, Cambridge University Press, 1978.

said to have reasonably relied on that statement by failing to tender their willingness to close ten days before the scheduled deadline. In fact, this statement occurred two days too late for tendering that willingness to close under the contract, so by the time the representation was made there was no change in position for the Developers. (R. at 1, ¶ 2., 378 ¶¶ 21-22.) Developers had already breached, and they would continue to breach.

### **(3) Breach of Good Faith & Fair Dealing**

Developers' claim for Breach of Good Faith & Fair Dealing is without merit. "It is fundamental that, whether expressed or not, every contract includes a covenant of good faith with respect to dealings between the parties. The parties to a contract must deal fairly and honestly with each other." *Fischer v. Johnson*, Utah, 525 P.2d 45 (1974). Max Graff made no misrepresentation and dealt fairly and honestly with Robinson. The very fact that the Graffs were still willing to go into a fourth contract with Developers after over a year and a half of Developers failure to close shows that the Graffs wanted to sell the farm and hoped the deal would go through. That the Developers failed to meet the very clear terms of that agreement is not the fault of the Graffs or in any way a sign of dishonesty or unfair dealing.

### **(4) Unjust Enrichment**

See argument II(a) *supra*.

### **(5) Conspiracy**

Plaintiffs failed to prove conspiracy. The following elements are necessary to prove civil conspiracy: "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or

more unlawful, overt acts, and (5) damages as a proximate result thereof.” *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah App. 1987).

There were no unlawful acts done by Graff, and if there were a combination or “two or more persons” it has not been factually alleged, unless Robinson believes he can prove that Graff was conspiring while he was “praying.” (R. at 376 ¶ 31, see also Appellants’ Br. at 17.)

### III. APPELLANTS HAVE BROUGHT A FRIVOLOUS APPEAL IN CONTRAVENTION OF RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE.

Under Rule 33 of the Utah Rules of Appellate Procedure, “a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.” Further, “if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party’s attorney.”

Hill, Johnson & Schmutz is, according to their website,<sup>8</sup> “Utah County’s Largest Law Firm” and should be charged to have knowledge of the Rules of Appellate Procedure. However, not only have Appellants, through their attorneys, brought an action after being warned by opposing counsel that any appeal would be frivolous, but Hill,

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<sup>8</sup> <http://www.hjslaw.com/main.html>

Johnson & Schmutz submitted a Brief riddled with inaccuracies and entirely disorganized. Such unprofessional conduct on the part of Appellants' attorneys evinces a frivolous attitude that warrants Rule 33 sanctions.

- A. Appellants' Brief was "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."

Appellants Brief misrepresents the facts, relies on little or no applicable legal authority, and does not make a good faith argument to extend, modify, or reverse existing law.

- B. Appellants' attitude toward this appeal is evidently frivolous as evidenced by the disorganized nature of Appellants' Brief and their failure to cite to or characterize the record accurately.

Developers have evidenced a serious disregard for Appellee's time and the time of this Court by submitting a Brief that is entirely disorganized and fails to cite to the Record. *Mackay v. Hardy*, 973 P.2d 941 (Utah 1998). Like the cross appellant in *Mackay* whose brief was stricken for having "utterly failed to comply with [the Utah Supreme Court's] briefing requirements," this Court should "disregard issues raised" in Appellants' Brief for its utter disregard for this Court's time and its briefing rules. *Id.* at 947.

Failure to comply with briefing rules is sufficient reason to disregard arguments found in a brief. *Id.* at 947-949. In *Mackay*, cross appellant's brief had numerous defects, among them that it

fail[ed] to correctly cite to the original record as paginated pursuant to rule 11(b) of [the Court's] rules of appellate procedure ....fail[ed] to support



some of the arguments with citations to *relevant* authorities...[and it was] not presented with accuracy...[and] not logically arranged.

*Id.* at 947-49. Because of its defects, the Court in *Mackay* struck the cross appellant's brief in its entirety. The Utah Supreme Court went on to explain the paramount interest behind the briefing rules that "were fashioned in part to lower the costs of litigation and maximize judicial economy by facilitating communication between parties and this court. Failure to comply with our rules hinders the judicial process." *Id.* at 949.

Like the cross appellant's brief in *Mackay*, Appellants' Brief also "fails to correctly cite to the original record as paginated...fails to support some of the arguments with citations to relevant authorities... [is] not presented with accuracy, [and] not logically arranged." *Id.* at 947-49.

### **1. Appellants' illogical arrangement of arguments**

Appellant's Brief was not logically arranged. First there was technical disorganization: while the first "argument" was a statement of the standard of review, there were two arguments numbered "II." (Appellants' Br. at 15, 18.) Beyond the technical problems, the Appellants' only basis for their arguments was the result of mischaracterizing and twisting the record, which will be set forth more fully below.

### **2. Appellant fails to cite to the record as paginated**

Appellants failed to cite to the Record properly throughout their entire Brief, in excess of 100 erroneous citations to the Record. Appellee's efforts to find the correct citations to the Record have been time-consuming and frustrating, with the Appellee finding few, if any, citations that are accurate.

### **3. Appellant fails to cite relevant authorities**

Further, many citations are lacking entirely because the Order and the transcript are missing from the Record – at least the Order was missing at the time Developers’ submitted their Brief . Many of the Developers’ contentions rest on a lack of treatment in oral argument, repeatedly alleging “Developers’ equitable claims were neither briefed nor argued.” (Appellants’ Br. at 13, 25-26). There is, however, no authority to back this contention, since the Developers certified that a transcript of oral argument was **unnecessary for their appeal**. (R. at 1187.) Most disturbing, Developers make no reference or citation to the Order they are appealing from, which Order was not even in the Record at the time that Developers submitted their brief. (R. at 1262-73.)

Worse than using irrelevant authority, Developers used no authority at all in many of their material contentions. Developers frequently misrepresented the Record through asserting that both parties were in agreement on certain material facts. Page 20 of Developers’ Brief states “The Graffs do not dispute that there was an oral agreement reached between David and Max. It is further undisputed that Developers acted in reliance on that agreement....” Both contentions were disputed by Graffs (R. at 1272, ¶ 1), but the Developers, unable to provide actual evidence for these propositions, instead used inaccurate, conclusory statements, with no citations to the Record.

### **4. Appellants’ inaccuracies & mischaracterizations**

There were many other inaccuracies and mischaracterizations of the Record. Note the following mischaracterizations of material facts.

### a. Max's Statements

First, Developers in their Brief repeatedly mischaracterize key conversations between Max Graff and David Robinson, specifically mischaracterizing Max Graff's words by addition of some form of the word "extension."

On page 378 of the record, David Robinson avers,

Max Graff represented to me that I should contact Don D. Gilbert the Graffs' attorney to work things out concerning closing arrangements.

(Emphasis added.) Careful scrutiny of this sentence reveals no mention by Max Graff of the word extension. The nearest possible reference in Robinson's affidavit to an extension is Robinson's averment further down on page 378, in paragraph 23, that

[Max's] tone and body language also reflected the same willingness to continue with the sale and grant some form of extension.

(Emphasis added). Not only does Robinson admit that any agreement was only for "some form of extension," but Robinson *never* avers that the words "extension" ever came out of Max's mouth.

This is curiously different than the Appellants' characterization of the conversation in their Brief. According to Appellants' Brief, Max tells David on page 10 to contact Don

to work out *an extension and* closing arrangements

and on page 21 Max tells David to contact Don to

work out details about closing the transaction *or extending the closing deadline*.

Somewhere in the translation between the Record and Appellants' Brief, the words "and extension" or "or extending" magically – and conveniently – appear. Perhaps this is

understandable since the Appellants failed to cite to the Record accurately to begin with.

*See* Argument III(B)(2), *supra*.

The added “extension” misrepresentation continues with another conversation referred to on page 11 of the Appellants' Brief . Developers’ attorneys state:

Max indicated that he had not heard from Gilbert and again told David that he should continue to attempt to contact Gilbert concerning *extension* and closing arrangements.

Paragraph 26 of Robinson's affidavit, however, simply states:

Max Graff indicated that he had not heard from Gilbert and again represented that I should just continue to attempt to contact Gilbert concerning closing arrangements.

Again, Max makes *no mention* of the word “extension” in David’s affidavit, but it appears in Developers’ Brief .

On page 13 of the Brief , Developers’ go even farther to puts words in Max’s mouth that were never there:

Developers partially performed pursuant to **their agreement** with Max Graff **to wait and rely on Graffs’ attorney**, Don Gilbert, for closing and **extension** instructions.

(Emphasis added.) Not only is the word “extension” once more put in Max’s mouth, but an elaborate agreement in which Max tells Robinson to “wait and rely” on Gilbert for extension instructions. This gravely goes beyond Max’s “voice tone and body language,” and is a very inappropriate mischaracterization of the Record.

Finally, Developers’ mischaracterizations were not limited to the nature of the agreement. Another key conversation between Max and David is mischaracterized on

Page 17 of the Developers' Brief that goes to the "heart" of Developers' alleged unjust enrichment and fraud claims:

Max wanted Naterra to go out of contract because Max felt that the Graffs could sell the property for *more money due to the improvements that Developers made on the property* (obtaining city approvals, appraisals, rezoning, etc.). (R. at 1007.) This is the heart of the Developers unjust enrichment claim.

(Emphasis added.) While page 1007 does not contain anything like that statement, a similar passage appears nearby in the Robinson affidavit on page 1004, paragraph 31, though it is noticeably different:

At the July 5, 2006 meeting between myself, Naterra, Gilbert and the Graffs, Max Graff informed me while we were walking together that he had been praying that the sale would go into default so he could get more money.

Nowhere in the Record does Max refer to getting "*more money due to the improvements*" at all. The heart of the Developers' unjust enrichment claim, then, relies on a mischaracterization of the Record, as Max's statement does not refer to the *improvements* at all. (Appellants' Br. at 17.) This entirely disregards the fact that the Property may be worth more money simply because for a year and a half the land has been increasing in value while the Developers were failing to follow through on the sale of the property.

Such mischaracterization of Graff's statements that surround the alleged extension and unjust enrichment – issues central to Developers' claims – is intentionally misleading and untenable.

**b. Ready, willing, and able to close**

Second, Developers mischaracterize the Record with regards to their being “ready, willing, and able to close.” The Developers attempt to persuade the Court that they were ready willing and able to close through “hard money” lenders even though the Developers had not yet obtained city approvals or various appraisals. (Appellants’ Br. at 10.) Developers omit, however, that they also “informed Max Graff that due to delays... the closing... *would need to be deferred* into the first part of July 2006.” (R. at 378, ¶ 8) (emphasis added). There is no evidence in the Record to support any assertion that the Developers indicated *to the Graffs* that they had any ability to close on June 30, 2006 using “hard money” lenders or any other alternative. The Developers, using paragraphs 15 and 18, with no specific reference to any date or a particular conversation, in conjunction with paragraph 21, with a specific date and in reference to a specific conversation, are spinning two separate and distinct references to infer that Max Graff understood that the Developers were ready, willing and able to close on June 30, 2006. However, only one conversation, that is to say, the critical, specific, and dated, conversation, was clear in its meaning: “The Developers need to defer the closing.” (R. at 378, ¶ 8.)

**c. 10 day notice**

Which brings Appellees to the third misrepresentation: the Appellants’ failure to include the necessity of a 10 day notice before closing. (R. at 1, ¶ 2.) One of the contingencies listed in paragraph 2 is that “Buyer to provide Sellers at least 10 days notice prior to Closing.” *Id.* This was clear in the contract and yet eight days before the

closing the only sign of the Developers' readiness for closing was the statement that they needed "to defer the closing." (R. at 378, ¶ 8.) Despite the requirement of 10 days notice, Developers claim in their Brief that it was *Graffs'* duty to contact *them* concerning closing arrangements. (Appellants' Br. at 11, 16, "Natterra was ready, willing, and able to close. But neither Gilbert nor Graffs scheduled a closing for June 30, 2006....Neither Gilbert nor Max informed Natterra of any closing instructions or arrangements for closing prior to or on June 30, 2006.")

**d. "happily accepted"**

Finally, Appellant on both pages 7 and 8 of the Record state "the Graffs...happily accepted—Gateway's efforts." However, the Record contains no evidence that the Graffs "happily accepted" anything, whether on the pages cited by Appellants or on any page of David Robinson's affidavit. (R. at 375-83.)

**e. undisputed arguments**

As mentioned above, Page 20 of Appellants' Brief states "The Graffs do not dispute that there was an oral agreement reached between David and Max. It is further undisputed that Developers acted in reliance on that agreement..." Both contentions were disputed by Appellees, they were only held as true for the purposes of the motion for summary judgment. (R. at 977, "Even if the claims made by the Developers are true (**as Graffs allow only for this Motion**), Developers cannot escape enforcement of the Statute of Frauds..." (Emphasis added.))

Note also that the Developers' own Brief is internally inconsistent on this point. Despite the language that "Graffs do not dispute that there was an oral agreement,..."

page 15 of Developers' Brief begins with the heading: "WHETHER THE GRAFFS EXTENDED THE CLOSING DEADLINE IS A DISPUTED MATERIAL FACT." The very next line repeats the same proposition: "The parties dispute whether they agreed to extend the closing deadline." Thus, not even the Developers are consistent in their story of whether or not this fact was actually disputed or not.

**f. "neither briefed nor argued"**

Appellants on page 13 of their Brief claim that "Developer's equitable claims were neither briefed nor argued, so the trial court should not have ruled on them."

First it should be pointed out that there is no way for the Developers to claim that such claims were not "argued" since they certified that a transcript of the oral arguments was unnecessary. (R. at 1187.)

Second, the fact that those claims weren't properly briefed (or possibly even argued) before the trial court ruled on the motion was the fault of the Developers themselves for failing to raise those issues in their Opposition to Graffs' Motion for Summary Judgment. *See* Argument I, *supra*.

And finally, this statement itself in Appellant's Brief is incredibly disingenuous because the Developers submitted their Opposition to Graff's proposed Order, which included nearly word-for-word the same arguments presented in Argument III of Developers' Brief. (R. at 1119-27; Appellants' Br. at 22-26.) Thus, both arguments were considered by the trial court prior to the court issuing its Order. Specifically, at the conclusion of oral argument the court ruled in favor of Graffs' motion from the bench and ordered Graffs to prepare the Order. Then Developers' submitted their Opposition to



Graffs’ proposed Order, which contained Developers’ equitable arguments. The trial court then specifically instructed to Graffs to address the equitable arguments—including unjust enrichment—raised by Developers. (R. at 1129-40.) Further, the trial court considered those arguments and overruled Developers’ objection to the Order because the court was “unpersuaded” by the Developers’ arguments and “persuaded with the Response of Plaintiffs.” (R. at 1150-51.) To say that Developers’ equitable claims “were neither briefed nor argued,” is simply not as straightforward as Developers claim.

## **5. Conclusion & Call for attorney fees**

Like the cross appellant in *Mackay*, Appellants have, through their Brief, “hinder[ed] the judicial process.” *Id.* at 949. Appellants’ poorly cited and unorganized Brief “increased the costs of litigation for both parties and unduly burdened the judiciary’s time and energy.” *Id.* Appellants utterly failed to cite to the Record, not only failing to cite the Order from which they were appealing, but, after certifying that a transcript would not be necessary, Appellants proceeded to make arguments based on what occurred at oral argument, knowing that they could not cite any authority to back up their contentions. Like the cross-appellees in *Mackay*, Appellants’ failure “to comply with [the Utah Supreme Court’s] briefing rules...” caused Appellee to “expend additional attorney fees in responding.” *Id.* Therefore, like the brief in *Mackay* that was stricken for noncompliance with the Court rules, this Court should “disregard the issues raised therein pursuant to rule 24(i) of the Utah Rules of Appellate Procedure.” *Id.* Consistent with Rules 24 and 33 of the Utah Rules of Appellate Procedure, this Court should dismiss

Appellants' Brief , and order that Appellants and/or its counsel pay attorney's fees for bringing a frivolous appeal.

CONCLUSION

For these reasons the Court should dismiss this appeal and order the Appellants and/or their Attorneys to pay double the Appellees' costs and reasonable attorney's fees for defending this frivolous appeal.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of September, 2008.

THE LAW OFFICE of MARK L. ANDERSON

A handwritten signature in black ink, appearing to read 'Mark L. Anderson', is written over a horizontal line. The signature is stylized and somewhat cursive.

Mark L. Anderson NO. 0105  
Michael L. Nixon NO. 7589

The Law Offices of Mark L. Anderson  
Attorneys for Appellees  
977 South Orem Blvd  
Orem, Utah 84058  
Telephone: (801) 224-9677

## **CERTIFICATE OF SERVICE**


I hereby certify that on the 23<sup>rd</sup> day of September 2008 I caused a true and correct copy of the foregoing BRIEF OF APPELLEE to be either hand-delivered, or mailed, first class, postage prepaid to the following:

Fourth District Court  
125 North 100 West  
Provo, UT 84601

Stephen Quesenberry  
Charles L. Perschon  
Hill, Johnson and Schmutz  
River View Plaza, Suite 300  
4844 North 300 West  
Provo, Utah 84604

DONALD D. GILBERT  
Hand Delivered

GRAHAM H. NORRIS, JR.  
1329 South 800 East  
Suite 243  
Orem, UT 84097

  
Elizabeth Thompson, Law Clerk  
THE LAW OFFICE of MARK L. ANDERSON

# APPENDIX A

# APPENDIX A

### Graff Farms Timeline

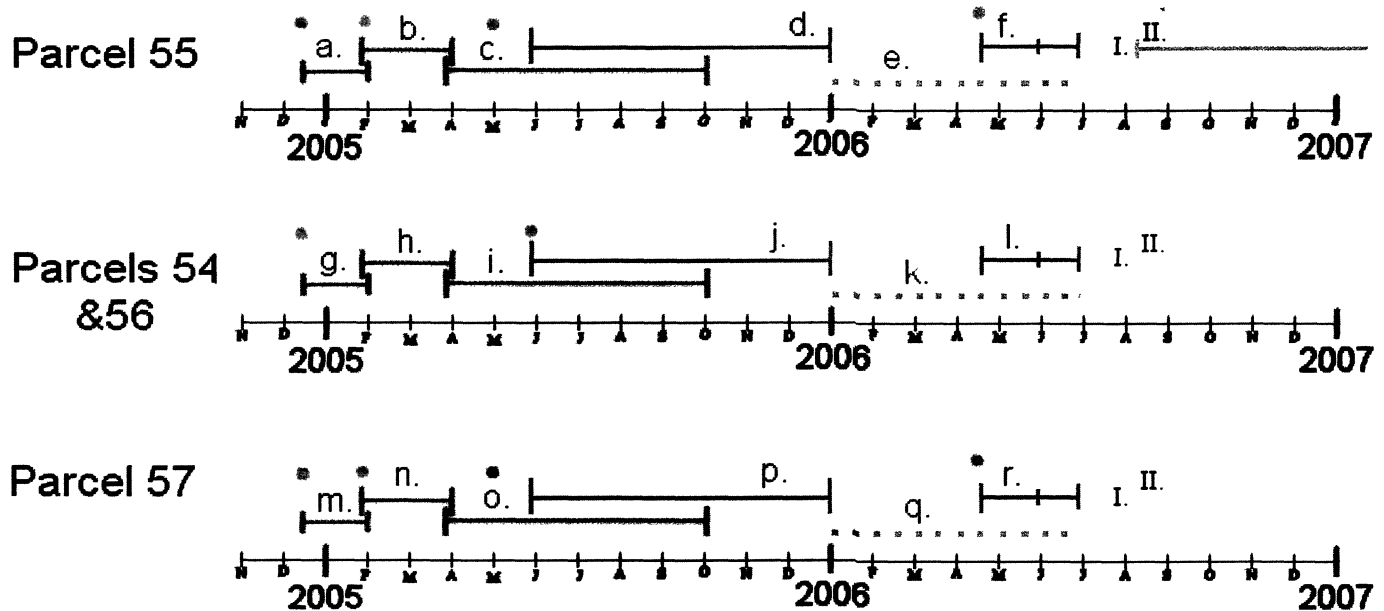
Late

Payment Date	12/10/04	01/31/05	05/01/05	05/25/05	02/08/06	04/22/06
Curtis Graff, 55	\$100,000 Earnest	\$25,000 Consideration	\$100,000 Earnest, \$20k/month x 5, starting 05/01/05	LD of 1%/month, to begin 01/01/06	\$10,000	Contract to 06/30/06, defer LD
Graff Ranches, 54&56	\$100 Earnest	NA	NA	\$100,000 Earnest, LD of 1%/month, to begin 01/01/06	\$72,500	NA
Max Graff, 57	\$50,000 Earnest	\$25,000 Consideration	\$100,000 Earnest, \$20k/month x 5, starting 05/01/05	LD of 1%/month, to begin 01/01/06	\$10,000	Intend contract to 06/30/06, defer LD

### Gateway Farms, LLC Naterra West, LLC

II. Las Fendos.

2006



# APPENDIX B

# APPENDIX B

## NOTICE OF INTEREST IN REAL PROPERTY

TO WHOM IT MAY CONCERN:

ENT 90643:2006 PG 1 of 2  
RANDALL A. COVINGTON  
UTAH COUNTY RECORDER  
2006 Jul 18 12:23 pm FEE 15.00 BY SW  
RECORDED FOR SELECT TITLE INSURANCE AGEN  
ELECTRONICALLY RECORDED

Notice is hereby given that the undersigned has an interest in that certain real property situated in Utah County, State of Utah, described as follows:

COMMENCING NORTH 1353.83 FEET & WEST 433.11 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE SOUTH 89 DEG 59'57" WEST 632.01 FEET; THENCE NORTH 0 DEG 21'18" EAST 365.42 FEET; THENCE SOUTH 89 DEG 51'38" EAST 623.96 FEET; THENCE SOUTH 0 DEG 54'40" EAST 363.93 FEET TO BEGINNING.  
Aka Tax Serial No. 13-59-57. AREA APPROX 5.257 ACRE.

COMMENCING NORTH 1353.83 FEET & WEST 1065.09 FEET FROM SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 59'58" WEST 1075.96 FEET; THENCE NORTH 0 DEG 21'34" EAST 368 FEET; THENCE SOUTH 89 DEG 51'43" EAST 1075.92 FEET; THENCE SOUTH 0 DEG 21'22" WEST 365.43 FEET TO BEG.  
Aka Tax Serial No. 13-59-56. AREA APPROX 9.058 ACRE.

COMMENCING NORTH 1009.31 FEET & WEST 427.62 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 26'11"W 664.98 FEET; THENCE NORTH 0 DEG 21'28" EAST 338 FEET; THENCE SOUTH 89 DEG 59'57" EAST 657.34 FEET; THENCE S 0 DEG 54'50" EAST 344.57 FEET TO BEGINNING.  
Tax Serial No. 13-59-55. AREA APPROX 5.179 ACRE.

COMMENCING NORTH 1015.84 FEET & WEST 1092.2 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 26'7" WEST 1050.62 FEET; THENCE NORTH 0 DEG 21'28" EAST 327.63 FEET; THENCE NORTH 89 DEG 59'59" EAST 1050.63 FEET; THENCE SOUTH 0 DEG 21'28" WEST 338 FEET TO BEGINNING.  
Tax Serial No. 13-59-54. AREA APPROX 8.027 ACRE.

Said interest arises in connection with purchase agreements with respective owners.

ENT 90643:2006 PG 2 of 2

## BUYER

Gateway Farms, LLC

By: 

Steven G. Black, Manager


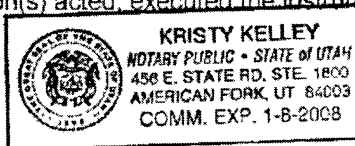
Naterra West, LLC

By: 

Steven G. Black, Manager

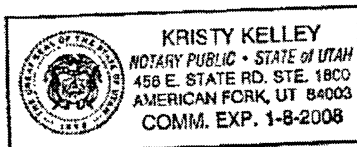
State of Utah, Utah County;

On July 18, 2006, before me, the undersigned Notary Public, personally appeared Steven G. Black, Manager of Gateway Farms, LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

  
Notary Public

State of Utah, Utah County;

On July 18, 2006, before me, the undersigned Notary Public, personally appeared Steven G. Black, Manager of Naterra West, LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

  
Notary Public



# APPENDIX C

# APPENDIX C

MARK L. ANDERSON, NO. 0105  
MICHAEL L. NIXON, NO. 7589  
977 South Orem Blvd  
Orem, Utah 84058  
Telephone: (801) 224-9677  
Facsimile: (801) 224-8909  
Attorney for Plaintiffs MAX B. GRAFF;  
ANITA B. GRAFF; CURTIS A. GRAFF;  
CAROL A. GRAFF; GRAFF RANCHES, LC;

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah  
1/15/08 WBS Deputy

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

<p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; Plaintiffs;</p> <p>Vs.</p> <p>NATERRA WEST, LLC, Defendants,</p>	<p>AMENDED ORDER</p> <p>Case Number: 060402272</p> <p>Division No 5</p> <p>Judge: Fred D. Howard</p>
<p>NATERRA WEST, Counterclaimant;</p> <p>GATEWAY FARMS, LLC; and FUSION GROUP, LLC, Intervening Plaintiffs,</p> <p>Vs.</p> <p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; DON D. GILBERT Counterclaim Defendants</p>	

PLAINTIFFS MAX B. GRAFF, ANITA B. GRAFF, CURTIS A. GRAFF, and CAROL A. GRAFF, AND GRAFF RANCHES LC (“Graffs”) filed a motion for summary judgment by and through their counsel Mark L. Anderson. Said Motion was made pursuant to rule 56 U.R.P.C. and moved the court for summary judgment against Defendant Naterra West, LLC; Plaintiffs in Intervention, Gateway Farms LLC and Fusion Group LLC, (hereinafter “Developers”). Its accompanying memorandum dated February 1, 2007 supported this motion. The Developers filed a Memorandum in Opposition, and Graffs responded with their Reply Memorandum. Graffs filed a Notice to Submit.

On May 14, 2007, this Court held a hearing on the issues presented to it on said Motion.

Now having heard the arguments, and having carefully considered all of the submissions, the Court:

**HEREBY FINDS, CONCLUDES AS A MATTER OF LAW, AND ORDERS**  
**as follows:**

**FINDINGS OF FACT:**

1. Even though the parties dispute the existence of an oral agreement to extend the closing date as between Developers and Graffs, when considering the Developer’s factual allegations as true, the alleged oral agreement regarding an extension, as between Max Graff and the Developers, contained terms that were far from clear.
2. The words contained in the alleged oral agreement (judged in the light most favorable to the Developers) do not address whether an extension was granted, or

for how long, but suggest at best, “some form of an extension ”

- 3 The words contained in the alleged oral agreement are not clear and definite
- 4 The words allegedly spoken by Max Graff to Developer David Robinson, at the time of the alleged oral agreement, do not amount to an express waiver of the statute of frauds
- 5 Notwithstanding, even assuming an oral agreement existed the Developers’ claims and/or causes of action should be dismissed because
  - a Developer’s failure to close on June 30, 2006 was not arguably shown as exclusively based on reliance upon on the alleged oral agreement
  - b The court notes that the fact that Developers did not close on June 30, 2006 arguably could have occurred for other reasons, e g the lack of funding, a decision not to go forward with the transaction, or other reasons wholly apart from the alleged oral agreement
  - c This failure to show the alleged oral agreement as the sole basis for the Developers non-action of not closing bars Developers’ claims as such claims are prohibited by Utah Law
- 6 It is the general rule in Utah, to avoid enforcement of the Statute of Frauds, that the part performance, or reliance, upon an oral agreement, may not be mere non-action Here, the mere non-action of failing to close is insufficient to allow allegations of part performance to prevail In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action as part performance
- 7 The allegations of part-performance in terms of calling the Graffs’ attorney and

sending him e-mail are insufficient part performance because these are not substantial and are “word oriented” not “acts oriented.”

8. In addition, it would be expected, that contact with Graff’s attorney would occur (e.g. he was to prepare the closing documents, etc.) and therefore the e-mail and phone calls were not adequately shown as exclusively based on reliance upon on the alleged oral agreement.
9. The present case has multiple claims and multiple parties.

**CONCLUSIONS OF LAW:**

1. The Utah Legislation has enacted U.C.A. 1953 (as amended) §25-5-1, and U.C.A. 1953 (as amended) § 25-5-3 which speak to Utah’s Statute of Frauds, these Statutes are controlling law in this case.

2. It is the general rule in Utah that the part performance, or reliance, upon an oral agreement, may not be mere non-action. The non-action of failing to close is insufficient to allow allegations of part performance to prevail. Therefore, in this regard Developers’ claims or arguments cannot prevail.

3. In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action (as in failing to close) as part performance. Therefore, in this regard Developers’ claims or arguments cannot prevail.

4. Developers’ failure to arguably show the alleged oral agreement as the sole basis for the non-action of not closing prohibits Developers’ claims under Utah Law.

Therefore, in this regard Developers' claims or arguments cannot prevail.

5. In order to set aside the Statute of Frauds, the party asserting the Statute of Frauds as a defense must be shown to have clearly and expressly waived the Statute of Frauds as a defense. There is no showing that occurred. Therefore, in this regard Developers claims or arguments cannot prevail.

6. An oral agreement, which pertains to the sale of real property, which contains terms, which are not clear and definite, cannot prevail. Therefore, in this regard Developers' arguments fail.

7. In this matter the alleged oral agreement cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments fail.

8. In this matter the alleged part performance cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments cannot prevail.

9. The Statute of Frauds controls the parties' rights and obligations in this matter. Therefore, in this regard Developers' arguments cannot prevail.

10. For these reasons all of the Developers' claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC, and Fusion Group LLC must fail.

These include:

- A. Detrimental Reliance,
- B. Fraud,
- C. Breach of Good Faith and Fair Dealing,
- D. Unjust Enrichment,
- E. Conspiracy,
- F. Claim for Damages, attorney's fee(s), etc.
- G. Claim for Specific Performance.

11. For these reasons, described above, any and all of the Developers' filings, as described in the Order below, consisting of *Lis Pendens*, or Notice of Interest, or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings should be hereby declared null and void, without any legal force or effect of any of kind.

12. But for the Graffs' remaining claims in the present case, this Order, without being made final pursuant to Rule 54(b) would become immediately appealable.

13. Although there is some overlap in the facts that underlie the Developers' counterclaims and the Graffs' remaining claims, that the difference is significant enough as to both facts and parties that this order shall not have a res judicata effect on the remaining claims in this case.

14. The rights of the parties in this case will not be significantly abridged by making this Order “final” within the meaning of U.R.C.P. 54 (b). Further, by making this order final, there is a high likelihood that the parties will be able to move forward with an appeal of this order more quickly (if they so choose), thereby allowing the appellate process give certain direction as to the disposition of the subject property (if any direction is necessary) in a more timely manner, than if the parties were to wait until the final adjudication of the remaining claims. Therefore the Court finds that there is no just reason for delay in making this Order final.

**ORDER:**

1. The Graffs’ Motion for Summary Judgment against the Developers regarding the above described matter is granted.

**Therefore**, all of the Developers’ claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC. and Fusion Group LLC fail.

These include:

- A. Detrimental Reliance,
- B. Fraud,
- C. Breach of Good Faith and Fair Dealing,
- D. Unjust Enrichment,
- E. Conspiracy,
- F. Request for Damages, attorney’s fee(s), etc.
- G. Request for Specific Performance.



2. There are no genuine issues of material fact, so judgment as a matter of law is appropriate.

3. All causes of action, or any other claims, as noted above, and as raised in any of the Developer's pleadings are hereby dismissed with prejudice.

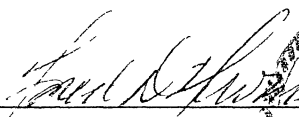
4. Any and all of the Developers' filings of Notice of Interest (including but not limited to the NOTICE OF INTEREST IN REAL PROPERTY, dated and filed on July 18, 2006, a copy of which is attached hereto as Exhibit "A"), of *Lis Pendens* (including but not limited to the NOTICE OF LIS PENDENS, dated August 9, 2006, a copy of which is attached hereto as Exhibit "B") or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's Office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings are hereby declared null and void, without any legal force or effect of any of kind and title to said Real Property is hereby quieted in favor of the Graffs as against any and all claims the Developers have, had or may have pertaining to this law suit with all rights, title and interest of the Real Property remaining with the Graffs and no rights of any kind inuring to the benefit of the Developers.

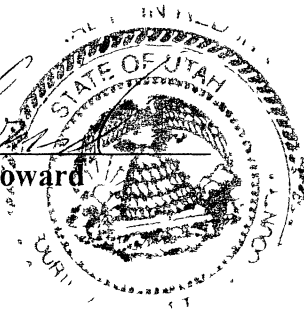
5. The previous Motion to Nullify Liens as filed by Donald Gilbert on behalf of the Graffs is granted

6. For the reasons stated above and those contained in the Graffs' memorandum in support of the motion to amend the July 10, 2007 Order (incorporated by reference herein, This Order is Final within the meaning of Rule 54(b) of the Utah Rule of Civil Procedure and hereby certified for appeal.

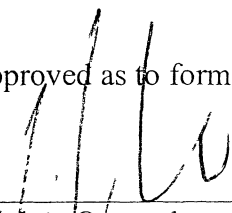
DATED this 15<sup>th</sup> day of January, 2008.

BY THE COURT:

  
The Honorable, Fred D. Howard  
Fourth District Court Judge



Approved as to form.

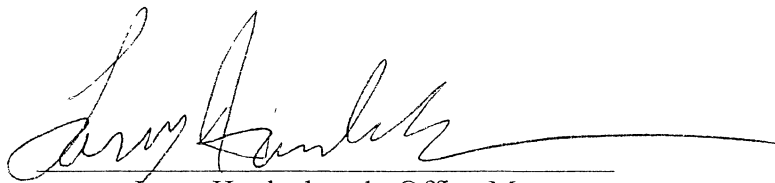
  
Stephen Quesenberry  
Charles Perschon  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of January 2008 I caused a true and correct copy of the foregoing **AMENDED ORDER** to be mailed, first class, postage prepaid or hand delivered to the following:

HILL JOHNSON & SCHMUTZ  
Stephen Quesenberry  
Charles L. Perschon  
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4844 North 300 West  
Provo, UT 84604

THE FOURTH JUDICIAL DISTRICT COURT  
125 North 100 West  
Provo, UT 84601

  
\_\_\_\_\_  
Larry Hardenbrook, Office Manager  
THE LAW OFFICE OF MARK L. ANDRSON