

2008

Miller Family Real Estate, LLC, a Utah limited liability company v. Saied Hajizadeh, an individual : Appellant's Opening Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MILLER FAMILY REAL ESTATE,	:	
LLC, a Utah limited liability	:	
company,	:	Utah Court of Appeals No. 20080365-CA
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	Oral Argument Priority No. 15
SAIED HAJIZADEH, an individual,	:	
	:	Trial Court Case No. 070906776
Defendant-Appellant.	:	Trial Judge: Hon. John Paul Kennedy
	:	

Pursuant to Utah Rule of Appellate Procedure 24(a), Defendant-Appellant Saied Hajizadeh (hereinafter "Defendant seller ") by and through his undersigned counsel of record John Martinez, hereby submits the following Opening Brief:

LIST OF PARTIES

The parties to this appeal are identified in the caption herein.

TABLE OF CONTENTS

	<u>PAGE</u>
LIST OF PARTIES	ii
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
JURISDICTION OF THE UTAH COURT OF APPEALS	1
ISSUES AND STANDARDS OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE TO THIS APPEAL	2

STATEMENT OF THE CASE	2
Nature of the case, course of proceedings, disposition in the court below	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE PARTIES' CONTRACT ESTABLISHED MANDATORY TIME LIMITS FOR GIVING NOTICE OF A CONTRACT DISPUTE, FOR SCHEDULING MEDIATION, AND FOR CONDUCTING SUCH MEDIATION	7
A. Mediation is highly favored in Utah as an alternative dispute resolution mechanism	7
B. Failure to fulfill conditions precedent in a timely manner <u>as required by a contract</u> bars enforcement of the substantive claims involved	8
C. Here, <u>the parties' contract</u> provides that mediation was required to occur in a timely manner, and if not, then enforcement of the contract was forever barred . .	9
D. That the REPC forever prohibits Plaintiff buyer from filing a lawsuit asserting any claim relating to the REPC is consistent with the intent of the parties . . .	11
E. Defendant seller would be prejudiced and deprived of the benefit of his contract if Plaintiff buyer were allowed to re-file its lawsuit	13
II. SINCE PLAINTIFF BUYER FAILED TO TIMELY COMPLY WITH THE CONDITIONS PRECEDENT EXPRESSLY SET FORTH IN THE CONTRACT AND IS NOW PROHIBITED BY THE CONTRACT FROM DOING SO THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT <u>WITH</u> PREJUDICE	14
III. DEFENDANT SELLER IS ENTITLED TO ATTORNEY FEES ON APPEAL . . .	14
IV. SECOND <i>IDENTICAL</i> LAWSUIT FILED BY PLAINTIFF BUYER; DEFENDANT SELLER'S REQUEST FOR STAY	15
CONCLUSION	15
ADDENDUM	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

UTAH CODE ANNOTATED

UTAH CODE § 78A-4-103(2)(j)(2008)	1
UTAH CODE §§ 78B-10-101--114	7
UTAH CODE § 13-43-204(2)	8
UTAH CODE § 30-3-39(1)	8
UTAH CODE § 78B-3-421(b)(i)	8
UTAH CODE § 78B-6-207(1)	8

UTAH RULES

UTAH R. APP. P. 23	14
UTAH R. APP. P. 24(a)	ii
UTAH R. APP. P. 28A(d)	8
UTAH R. CIV. PROC. 12(b)(1)	2
UTAH R. CIV. PROC. 12(b)(6)	2
UTAH R. EVIDENCE 201(b)(2)	6, 15

CASES

<i>Dessart v. Burak</i> , 252 Mich. App. 490, 652 N.W.2d 669 (2002)	7
<i>Diener v. Diener</i> , 2004 UT App 314, 98 P.3d 1178	11
<i>Foster v. Montgomery</i> , 2003 UT App 405, 82 P.2d 191	2
<i>Glew v. Ohio Savings Bank</i> , 2007 UT 56, 181 P.3d 791	14
<i>Green River Canal Co. v. Thayn</i> , 2003 UT 50, 84 P.3d 1134	9
<i>Harper v. Great Salt Lake Council, Inc.</i> , 1999 UT 34, 976 P.2d 1213	9, 11, 14, 14
<i>Interwest Const. v. Palmer</i> , 923 P.2d 1350 (Utah 1996)	2
<i>Keith v. Rizzuto</i> , 212 F.3d 1190 (10th Cir. 2000)	11
<i>Low v. City of Monticello</i> , 2002 UT 90, 54 P.3d 1153	9, 11
<i>Office of the Guardian Ad Litem v. Anderson</i> , 1999 UT App 251, 987 P.2d 611	11
<i>Saleh v. Farmers Insurance Exchange</i> , 2006 UT 20, 133 P.3d 428	9
<i>United States v. Myers</i> , 106 F.3d 936 (10th Cir.1997)	12
<i>Wilburn v. Interstate Elec.</i> , 748 P.2d 582 (Utah Ct. App. 1988)	13

ADDITIONAL AUTHORITY

3A Arthur L. Corbin, <i>Corbin on Contracts</i> § 628 (1960)	8, 11
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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has jurisdiction pursuant to UTAH CODE §78A-4-103(2)(j)(2008).

ISSUES AND STANDARDS OF REVIEW

ISSUE I: Does the Real Estate Purchase Contract ("REPC") herein provide that Plaintiff buyer was required to (1) give notice of a dispute, (2) schedule mediation within 30 days of such notice **and** (3) complete such mediation, all as conditions precedent to Defendant seller's obligation to close on the contract?¹ Standard of Appellate Review:

¹. Issue Preserved: Defendant seller set out these conditions precedent in Defendant's Reply Memorandum in Support of Defendant's Request for an Order Dismissing Plaintiff's Complaint With Prejudice, and Other Relief (R. 153-54):

... (1) Buyer was required to provide seller with notice as a condition precedent to the seller's obligation to submit the dispute to mediation; (2) such mediation was required to occur within 30 days of such notice, thus making the 30-day deadline an additional condition precedent on the seller's obligation to submit the dispute to mediation; and (3) mediation was required to occur as a condition precedent to the buyer's right to bring suit... ."

Defendant seller also set out these conditions precedent in oral argument:

MR. COLESSIDES: Our position, your Honor, is, there is a series of conditions precedent that are required to be fulfilled, I just want to make the record clear, your Honor, that we believe that number one, the buyer was required to provide seller with notice as a condition precedent to the seller's obligation to submit to--this to mediation.

Number two, such mediation was required to occur within 30 days of such notice, because of the mandatory language "shall." Thus making the 30-day deadline an additional conditional (sic) precedent on the seller's obligation to submit the dispute to mediation.

And three, the mediation was required to occur as a condition precedent to the buyer's right to bring this suit... .

(R. 337, Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs, p.19, ll.4--17)(Addendum Exh. 1).

Correctness:²

ISSUE II: Did the trial court err in dismissing Plaintiff buyer's complaint **without** prejudice, rather than **with** prejudice, given that Plaintiff buyer failed to timely comply with the conditions precedent expressly set forth in the Contract and is now prohibited by the contract from doing so?³ Standard of Appellate Review: Correctness:⁴

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
OF CENTRAL IMPORTANCE TO THIS APPEAL**

UTAH RULES CIV. PROC. 12(b)(1) and 12(b)(6)

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter ... (6) failure to state a claim upon which relief can be granted... .

STATEMENT OF THE CASE

Nature of the case, course of proceedings, disposition in the court below

This is a straightforward case of enforcing the unambiguous, express terms of a real estate contract between two sophisticated commercial parties.

Plaintiff buyer drafted and submitted to Defendant seller a Real Estate Purchase

². Interwest Const. v. Palmer, 923 P.2d 1350, 1358-59 (Utah 1996)("If a contract is unambiguous, a trial court may interpret the contract as a matter of law, and we review the court's interpretation for correctness.").

³. Issue Preserved: (R. 129-130)(Defendant seller's **Amended** Objection to Plaintiff's Proposed Order of Dismissal; Dismissal Should be "With Prejudice").

⁴. Foster v. Montgomery, 2003 UT App 405, ¶11, 82 P.2d 191 (Whether there was failure of conditions precedent, where contract interpretation does not require resort to extrinsic evidence, is matter of law, "and on such questions we accord the trial court's interpretation no presumption of correctness.").

Contract (REPC) offer to purchase Defendant seller's real estate. The REPC expressly and unambiguously provided that if Defendant seller defaulted: (1) buyer was required to provide seller with notice as a condition precedent to the seller's obligation to submit the dispute to mediation; (2) such mediation was required to occur within 30 days of such notice, thus making the 30-day deadline an additional condition precedent on the seller's obligation to submit the dispute to mediation; and (3) mediation was required to occur as a condition precedent to the buyer's right to bring suit. Instead of fulfilling all these conditions precedent to suit, Plaintiff buyer filed a complaint in district court against Defendant seller.

Defendant seller successfully moved to dismiss Plaintiff buyer's complaint and was awarded attorney fees as the prevailing party. The trial court, however, dismissed Plaintiff buyer's complaint "without prejudice." Since Plaintiff buyer did not fulfill the conditions expressly set out in the REPC as necessary pre-requisites to its ability to bring suit--and since such necessary pre-requisites were supposed to occur within a definite time frame that has now passed--the trial court should have dismissed Plaintiff buyer's complaint "with prejudice."

In conjunction with this Opening Brief, Defendant seller has filed a Petition for Emergency Relief, or in the Alternative, a Motion for Stay Pending Appeal, in the identical parallel case filed by Plaintiff seller and currently pending before Judge Medley.

Statement of Facts

1. Defendant seller owns certain land and buildings located at 5712 South State Street

in Murray, Utah (hereinafter "the Property").⁵

2. Plaintiff buyer desired to buy the Property because its strategic location would serve to substantially grow and increase profits of Plaintiff's related businesses -- automobile dealerships, which adjoined the Property.⁶

3. Plaintiff buyer drafted an offer to purchase and submitted it to Defendant seller on January 5, 2007.⁷

4. The parties bargained intensely about the terms of the contract, as shown by the four (4) addenda to the contract that passed back and forth between the parties during their negotiations.⁸

5. The parties' negotiations culminated in a Real Estate Purchase Contract (REPC) which became effective on March 1, 2007.⁹

6. Closing on the REPC was set for April 30, 2007.¹⁰

7. Defendant seller refused to close on April 30, 2007 and by letter of that date so informed Plaintiff buyer.¹¹

⁵. R. 2, ¶ 2 (Plaintiff buyer's Complaint).

⁶. R. 2, ¶ 6 (Plaintiff's Complaint).

⁷. R. 8--18 (REPC), at 11, Addendum Exh. 2 (Offer Reference Date: January 5, 2007).

⁸. R. 13--18, Addendum Exh. 2 (four (4) Addenda to REPC).

⁹. R. 8--18 (REPC), at 18, Addendum Exh. 2 ("March 1, 2007 (1:00 p.m.)").

¹⁰. R. 2, ¶ 8 (Plaintiff's Complaint).

¹¹. R. 3, ¶ 10 (Plaintiff's Complaint).

8. On May 8, 2007, Plaintiff-buyer filed its complaint in the district court.¹²

9. On February 4, 2008, the district court granted Defendant seller's Motion to Dismiss Plaintiff buyer's complaint, but such dismissal was without prejudice to its refiling.¹³

10. On March 24, 2008, the district court entered its order granting attorney fees to Defendant seller as the prevailing party in connection with his Motion to Dismiss.¹⁴

Second identical lawsuit filed by Plaintiff buyer; Defendant seller's request for stay

11. **Meanwhile**, on September 7, 2007, the day after Judge Kennedy in this case announced his decision to dismiss Plaintiff buyer's suit, Plaintiff buyer filed a *second* lawsuit against Defendant.¹⁵

12. The *second lawsuit* ("Judge Medley case") is *identical* to the lawsuit that Judge Kennedy dismissed below.¹⁶

13. However, at a hearing on July 7, 2008, Judge Medley in the *second lawsuit* denied

¹². R. 1 (Plaintiff's complaint, stamped filed May 8, 2007).

¹³. R. 171-72, Addendum Exh. 3 (Dismissal without prejudice).

¹⁴. R. 288-89, Addendum Exh. 4 (order granting attorney fees).

¹⁵. R. 337 Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs, p.4, ll.13--15 ("MR. MOORE:... then the following day, [Plaintiff buyer] filed a complaint for specific performance and recorded a lis pendens. The second complaint...was assigned to Judge Medley [case No. 070912945].")(Addendum Exh. 1).

¹⁶. R. 337 Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs, p.5, ll.5--11 ("MR. MOORE:... [The Medley case]--it's basically ... same allegations. The only difference is the defendant has a corporate entity [Exclusive Cars, Inc.] that actually occupies the premises and they were named as a co-defendant in the action before Judge Medley. In the [Kennedy case below], it's just the fee title holder [Saied Hajizadeh] that is named.")(Addendum Exh. 1).

Defendant seller's Motion to Dismiss and Motion for Stay.¹⁷

14. Concurrently with this Opening Brief, Defendant seller has filed a Petition for Emergency Relief or in the Alternative, a Motion for Stay Pending Appeal, to stay the **Judge Medley** case, pending the resolution of this appeal.

SUMMARY OF ARGUMENT

This is a straightforward case of enforcing the unambiguous, express terms of a real estate contract between two sophisticated commercial parties.

Plaintiff buyer drafted and submitted to Defendant seller a Real Estate Purchase Contract (REPC) offer to purchase Defendant seller's real estate. The REPC expressly and unambiguously provided that if Defendant seller defaulted: (1) buyer was required to provide seller with notice as a condition precedent to the seller's obligation to submit the dispute to mediation; (2) such mediation was required to occur within 30 days of such notice, thus making the 30-day deadline an additional condition precedent on the seller's obligation to submit the dispute to mediation; and (3) mediation was required to occur as a condition precedent to the buyer's right to bring suit. Instead of fulfilling all these conditions precedent to suit, Plaintiff buyer filed a complaint in district court against Defendant seller.

Defendant seller successfully moved to dismiss Plaintiff buyer's complaint and was awarded attorney fees as the prevailing party. The trial court, however, dismissed Plaintiff buyer's complaint "without prejudice." Since Plaintiff buyer did not fulfill the conditions

¹⁷. Addendum Exh. 5 (Docket in Medley Case). This court may take judicial notice of such docket. UTAH R. EVIDENCE 201(b)(2)(Judicial notice of adjudicative facts that are capable of accurate and ready determination).

expressly set out in the REPC as necessary pre-requisites to its ability to bring suit--and since such necessary pre-requisites were supposed to occur within a definite time frame that has now passed--the trial court should have dismissed Plaintiff buyer's complaint "with prejudice."

Both because mediation as an alternative dispute resolution mechanism is highly favored in Utah, and because of the express terms of the parties' contract here, the trial court should have dismissed Plaintiff buyer's complaint with prejudice.

In conjunction with this Opening Brief, Defendant seller has filed a Petition for Emergency Relief, or in the Alternative, a Motion for Stay Pending Appeal, in the identical parallel case filed by Plaintiff seller and currently pending before Judge Medley.

ARGUMENT

I. THE PARTIES' CONTRACT ESTABLISHED MANDATORY TIME LIMITS FOR GIVING NOTICE OF A CONTRACT DISPUTE, FOR SCHEDULING MEDIATION, AND FOR CONDUCTING SUCH MEDIATION

A. Mediation is highly favored in Utah as an alternative dispute resolution mechanism

"The overall purpose of...mediation...is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases."¹⁸ In Utah, mediation as a dispute resolution mechanism is highly favored as a matter of public policy.¹⁹ Indeed, Utah statutes provide for **mandatory** mediation in many and varied settings, including: (1) takings

¹⁸. Dessart v. Burak, 252 Mich. App. 490, 498, 652 N.W.2d 669, 674 (2002).

¹⁹. See generally UTAH CODE §§ 78B-10-101--114(Utah Uniform Mediation Act).

and eminent domain,²⁰ (2) divorce,²¹ (3) medical malpractice,²² (4) cases in the trial courts, where a Utah judge or commissioner may refer "to mediation any case for which...[there is an] established program,²³ and (5) cases on appeal.²⁴

B. Failure to fulfill conditions precedent in a timely manner as required by a contract bars enforcement of the substantive claims involved

A "condition precedent" is defined as "an act or event, other than lapse of time, that must exist or occur before a duty to perform something promised arises."²⁵ Compulsory contractual conditions precedent to litigation bar any subsequent lawsuit where the contractual conditions precedent have not been fulfilled:

Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, **the obligee may not require performance by the obligor**, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists. *See* 3A Arthur L. Corbin, *Corbin on*

²⁰. UTAH CODE § 13-43-204 (2)("[In takings or eminent domain settings, if]...mediation is requested by a private property owner ...the government entity or condemning entity **shall** participate in the mediation...as if the matter were ordered to mediation...by a court.")(emphasis added).

²¹. UTAH CODE § 30-3-39(1)("There is established a **mandatory** domestic mediation program to help reduce the time and tensions associated with obtaining a divorce.")(emphasis added).

²². Utah Code § 78B-3-421(b)(i)("When a medical malpractice action is arbitrated, the action **shall**...include any one or more of the following hen requested by the patient before an arbitration hearing is commenced:...**mandatory mediation**... .")(emphasis added).

²³. UTAH CODE § 78B-6-207(1)(emphasis added).

²⁴. UTAH R. APP. P. 28A(d)(participation in appellate-court ordered mediation is **mandatory**).

²⁵. Black's Law Dictionary 289 (7th ed. 1999).

Contracts § 628, at 16 (1960). **Failure of a material condition precedent relieves the obligor of any duty to perform.** *See id.* § 630, at 20-21.²⁶

C. Here, the parties' contract provides that mediation was required to occur in a timely manner, and if not, then enforcement of the contract was forever barred

"If the language within the four corners of [a] contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law."²⁷

Paragraph 15 of the parties' real estate contract herein provides:

15. DISPUTE RESOLUTION. The parties agree that **any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit and the breach or termination of this Contract,** shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Mediation **shall** take place within 30 days after notice by either party of the existence of a dispute or claim. Any agreement signed by the parties pursuant to mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this **Contract** shall apply. Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of summons or as otherwise permitted by law, and recording a lis pendens with regard to the action; provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. Also the parties may agree in writing to waive mediation.²⁸

Thus, (1) once Plaintiff-buyer became aware that Defendant seller allegedly breached,

²⁶. Harper v. Great Salt Lake Council, Inc., 1999 UT 34, ¶ 14, 976 P.2d 1213 (emphasis added); see also Low v. City of Monticello, 2002 UT 90, ¶ 20, 54 P.3d 1153 (citing Harper case for same proposition).

²⁷. Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428 quoting Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134.

²⁸. R. 10, ¶15, Addendum Exh. 2 (REPC)(emphasis added).

Plaintiff buyer was required to provide Defendant seller with notice as a condition precedent to the Defendant seller's obligation to participate in mediation; (2) such mediation was required to occur within 30 days of such notice, thereby making the 30-day deadline an additional condition precedent on the Defendant seller's obligation to submit the dispute to mediation; and (3) mediation was required to occur, which was a further condition precedent on the Plaintiff buyer's right to sue.

Instead, Plaintiff-buyer became aware on April 30, 2007 that Defendant-seller allegedly had breached,²⁹ and then almost immediately, on May 8, 2007, Plaintiff-buyer filed its complaint in the district court.³⁰

According to the penultimate sentence of Paragraph 15, Plaintiff buyer could have sought specific performance by filing a complaint and *lis pendens*, but only "provided that the Buyer permits the Seller to refrain from answering the complaint **pending mediation**." This confirms that Plaintiff buyer was required to initiate the mediation **before** filing suit, which Plaintiff buyer did not do.

The consequences of Plaintiff buyer's failure to fulfill the mandatory condition precedent to suit set out in Paragraph 15 of the contract are expressly and unambiguously spelled out in Paragraph 16, which provides:

"Where a Section of this Contract provides a specific remedy, the parties intend that

²⁹. R. 3 (Plaintiff's complaint, ¶ 10: "On April 30, 2007, Defendant refused to close and, via a letter from his attorney, informed Plaintiff that he will [sic] not close on the sale of the Property...").

³⁰. R. 1 (Plaintiff's complaint, stamped filed May 8, 2007).

the remedy **shall be exclusive regardless of rights which might otherwise be available under common law.**"³¹

Since Plaintiff-buyer failed to perform the conditions precedent to its right to sue under Paragraph 15, the express, unambiguous terms of Paragraph 16 provide that Plaintiff-buyer therefore has no right to sue.³²

D. That the REPC forever prohibits Plaintiff buyer from filing a lawsuit asserting any claim relating to the REPC is consistent with the intent of the parties

Numerous provisions in the contract confirm that the REPC forever prohibits Plaintiff buyer from filing a lawsuit asserting any claim relating to the REPC. (1) The phrase "The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit and the breach or termination of this Contract" at the beginning of Paragraph 15 is broad and all-encompassing of all claims Plaintiff buyer might assert. (2) The word "shall" is mandatory and appears in several places in Paragraph 15.³³

³¹. R. 10, ¶16, Addendum Exh. 2 (REPC).

³². "Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists. *See* 3A Arthur L. Corbin, *Corbin on Contracts* § 628, at 16 (1960). Failure of a material condition precedent relieves the obligor of any duty to perform. *See id.* § 630, at 20-21." *Harper v. Great Salt Lake Council, Inc.*, 1999 UT 34, ¶ 14, 976 P.2d 1213; see also *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153.

³³. See e.g., Diener v. Diener, 2004 UT App 314, ¶ 12, 98 P.3d 1178: Ordinarily, the use of the word "shall" in a statute creates a mandatory condition, eliminating any discretion on the part of the courts. *See, e.g., Office of the Guardian Ad Litem v. Anderson*, 1999 UT App 251, ¶ 10, 987 P.2d 611; *Keith v. Rizzuto*, 212

(3) The clause, "If mediation fails, the procedures applicable and remedies available under this **Contract** shall apply" presupposes that mediation must occur *before* any other "procedures" or "remedies" under the contract can be invoked. (4) The phrase "Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court," appears *after* the mandatory provisions for mediation, and hence anticipate that mediation must occur *before* such remedy is available to the buyer. (5) The proviso, "provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation" anticipates that mediation is ongoing *before* any buyer action for specific performance might be brought. (6) The provision that "Also the parties may agree in writing to waive mediation" appearing at the end of Paragraph 15 shows that the only way in which the mandatory obligation to invoke mediation may be avoided is if the parties expressly agree to do so in writing.

(7) The phrase in Paragraph 16 that "Where a Section of this Contract provides a specific remedy, the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law" is general and all-encompassing, thus precluding all claims Plaintiff buyer might now seek to assert.

In summary, the REPC as a whole forever prohibits Plaintiff buyer from filing any lawsuit asserting any claim "relating" to the REPC.

F.3d 1190, 1193 n. 3 (10th Cir.2000) ("It is a basic canon of statutory construction that the use of the word "shall" indicates a mandatory intent." (quoting United States v. Myers, 106 F.3d 936, 941 (10th Cir.1997)).

E. Defendant seller would be prejudiced and deprived of the benefit of his contract if Plaintiff buyer were allowed to re-file its lawsuit

Plaintiff buyer is the real estate arm of Larry Miller Enterprises which, by any measure, is an extremely sophisticated party in the marketplace.³⁴ The substantive provisions and remedies included in the contract--and particularly the specific procedures and timelines for asserting those substantive provisions and remedies--were intentionally inserted by the parties for their mutual protection. The contract was the subject of intense bargaining between the parties, as shown by the four (4) addenda to the contract that passed back and forth between the parties during their negotiations.³⁵ Significantly, Plaintiff buyer drafted the contract herein and therefore its terms should be construed against Plaintiff buyer.³⁶

As a result of Plaintiff buyer's failure to follow the procedures in the contract, Defendant seller was immediately forced to defend the lawsuit filed by Plaintiff buyer. Thus, Defendant seller would be deprived of the fruits of his contract, and the salutary policy objectives of conducting mediation before resorting to litigation would be nullified if Plaintiff seller were allowed to re-file its lawsuit.

³⁴. R. 2, ¶ 6 ("Plaintiff desired to buy the Property because its strategic location would serve to substantially grow and increase profits of Plaintiff's related businesses -- automobile dealerships, which adjoined the Property.").

³⁵. R. 13--18 (four (4) Addenda to REPC).

³⁶. Plaintiff buyer drafted the initial offer to purchase and submitted it to Defendant seller. R. 8, Addendum Exh. 2 (REPC: Offer drafted and submitted by Plaintiff buyer to Defendant seller); Wilburn v. Interstate Elec., 748 P.2d 582, 585-86 (Utah Ct. App. 1988)(ambiguities in a contract are construed against the drafter).

II. SINCE PLAINTIFF BUYER FAILED TO TIMELY COMPLY WITH THE CONDITIONS PRECEDENT EXPRESSLY SET FORTH IN THE CONTRACT AND IS NOW PROHIBITED BY THE CONTRACT FROM DOING SO THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT WITH PREJUDICE

In Harper v. Great Salt Lake Council, Inc., 1999 UT 34, 976 P.2d 1213, a real estate contract was subject to the condition precedent that a third party not exercise a right of first refusal. The right was exercised by the third party, but the buyer nonetheless demanded specific performance from the seller. The Utah Supreme Court held that the third party's "exercise of its right of first refusal terminated any obligation [the seller] had to perform under the...contract" with the buyer.³⁷

Similarly here, Plaintiff buyer's failure to perform the mandatory conditions precedent and to conduct mediation in a timely manner terminated any obligation Defendant seller had to perform under the parties' contract. As a matter of law, no amendment or modification to the complaint can be asserted by Plaintiff buyer. Therefore, the district court should have dismissed the Plaintiff buyer's complaint **with prejudice**.

III. DEFENDANT SELLER IS ENTITLED TO ATTORNEY FEES ON APPEAL

Since Defendant seller was awarded attorney fees in the district court as the prevailing party, Defendant seller is also entitled to attorney fees on appeal and will make the appropriate motion pursuant to UTAH R. APP. P. 23.³⁸

³⁷. Harper v. Great Salt Lake Council, Inc., 1999 UT 34, ¶ 15, 976 P.2d 1213.

³⁸. UTAH R. APP. P. 23; Glew v. Ohio Savings Bank, 2007 UT 56, 181 P.3d 791, as supplemented on February 22, 2008 by 2008 UT 17, Order Granting Attorney Fees on Appeal, (It is the "settled view that a party who received an award of attorney fees [in the trial court] is entitled to their fees on appeal...").

IV. SECOND *IDENTICAL* LAWSUIT FILED BY PLAINTIFF BUYER; DEFENDANT SELLER'S REQUEST FOR STAY

Meanwhile, on September 7, 2007, the day after Judge Kennedy in this case announced his decision to dismiss Plaintiff buyer's suit, Plaintiff buyer filed a *second* lawsuit against Defendant.³⁹ The *second lawsuit* ("Judge Medley case") is *identical* to the lawsuit that Judge Kennedy dismissed below.⁴⁰ However, at a hearing on July 7, 2008, Judge Medley in the *second lawsuit* denied Defendant seller's Motion to Dismiss and Motion for Stay in that proceeding.⁴¹

Therefore, concurrently with this Opening Brief, Defendant seller has filed a Petition for Emergency Relief or in the Alternative, a Motion for Stay Pending Appeal, to stay the **Judge Medley** case, pending the resolution of this appeal.

CONCLUSION

The district court's dismissal of Plaintiff buyer's lawsuit without prejudice should be reversed and the district court should be ordered to dismiss Plaintiff buyer's lawsuit with

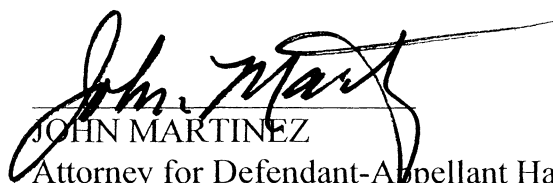
³⁹. R. 337 Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs, p.4, ll.13--15 ("MR. MOORE:... then the following day, [Plaintiff buyer] filed a complaint for specific performance and recorded a lis pendens. The second complaint...was assigned to Judge Medley [case No. 070912945].")(Addendum Exh. 1).

⁴⁰. R. 337 Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs, p.5, ll.5--11 ("MR. MOORE:... [The Medley case]--it's basically ... same allegations. The only difference is the defendant has a corporate entity [Exclusive Cars, Inc.] that actually occupies the premises and they were named as a co-defendant in the action before Judge Medley. In the [Kennedy case below], it's just the fee title holder [Saied Hajizadeh] that is named.")(Addendum Exh. 1).

⁴¹. Addendum Exh. 5 (Docket in Medley Case). This court may take judicial notice of such docket. UTAH R. EVIDENCE 201(b)(2)(Judicial notice of adjudicative facts that are capable of accurate and ready determination).

prejudice. Defendant seller should be awarded attorney fees on appeal.

DATED this 23rd day of July, 2008.


JOHN MARTINEZ
Attorney for Defendant-Appellant Hajizadeh

ADDENDUM

- Addendum Exhibit 1:** (R. 337, Relevant Portions of Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs)
- Addendum Exhibit 2:** Real Estate Purchase Contract (REPC) (R. 8--18)
- Addendum Exhibit 3:** District Court Order dismissing complaint without prejudice (R. 171-72)
- Addendum Exhibit 4:** District Court Order granting attorney fees to Defendant seller (R. 288-89)
- Addendum Exhibit 5:** Docket in Parallel Medley Case No. 070912945 (This court may take judicial notice of such docket. UTAH R. EVIDENCE 201(b)(2)(Judicial notice of adjudicative facts that are capable of accurate and ready determination)).

ADDENDUM EXHIBIT 1

(R. 337, Relevant Portions of Transcript of Hearing on Defendant's Motion For Award of Attorney's Fees and Costs)

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

MILLER FAMILY REAL ESTATE)	
LLC,)	
)	
Plaintiff,)	Case No. 070906776
)	
vs.)	<u>DEFENDANT'S MOTION</u>
)	<u>FOR AWARD OF ATTORNEY'S</u>
SAIED HAJIZADEH,)	<u>FEES AND COSTS</u>
)	
Defendant.)	

-o0o-

BE IT REMEMBERED that on the 17th day of
January, 2008, commencing at the hour of 10:00 a.m., the
above-entitled matter came on for hearing before the
HONORABLE JOHN PAUL KENNEDY, sitting as Judge in the
above-named Court for the purpose of this cause, and that
the following proceedings were had.

-o0o-

FILED DISTRICT COURT
Third Judicial District

FEB 26 2008

By hjn SALT LAKE COUNTY
Deputy Clerk



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1

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337

1 I think my ruling was clear that the dismissal was
2 without prejudice and frankly, I don't--I am not clear as to
3 what has been done since that time. Why don't you bring me up
4 to date? Did you re-file your complaint or what did you do?

5 MR. MOORE: Yes, your Honor. We had our last
6 hearing on September 6th, 2007. The Court made a ruling from
7 the bench. When I got back to my office, I prepared a
8 proposed order of dismissal without prejudice and had it hand-
9 delivered over to Court and mailed a copy to Mr. Colessides.

10 That same afternoon, we prepared an offer of
11 mediation letter that complied with all the terms of the
12 contract. We sent it to Mr. Colessides, naming three possible
13 mediators, suggesting various mediation dates and then the
14 following day, filed a complaint for specific performance and
15 recorded a lis pendens.

16 That second complaint, in the rotation, was assigned
17 to Judge Medley and I have the case number here, if the Court
18 would like it.

19 In response to that complaint, Mr. Colessides
20 ultimately filed a motion to dismiss that basically said it
21 needed to await the Court's ruling on his request that the
22 dismissal be with prejudice and that's--that's where the case
23 assigned to Judge Medley stands, as of today, your Honor.

24 THE COURT: All right. Has anyone filed a motion to
25 consolidate that case with this case?

1 MR. MOORE: No. And--and frankly, your Honor, I
2 don't have an opinion about that either way. If it's--if
3 someone wanted to do it, we wouldn't--

4 THE COURT: It's the same facts and--

5 MR. MOORE: Except it--it would--it's basically, we
6 backed off, gave the notice on mediation and filed it, same
7 allegations. The only difference is the defendant has a
8 corporate entity that actually occupies the premises and they
9 were named as a co-defendant in the action before Judge
10 Medley. And in the case before you, it's just the fee title
11 holder that is named.

12 THE COURT: All right. Well, I guess the question
13 is, is there a time limit on asking for mediation? And I
14 think Mr. Colessides' argument, I'm trying to anticipate it,
15 is going to be that there was a time limit and that you
16 couldn't, when you did in September, it was too late to
17 request mediation. What's your position on that?

18 MR. MOORE: Your Honor, there's no language
19 whatsoever in the contract that would support that and there's
20 no case law any place that would support that.

21 THE COURT: He's--he's talked about this 30-day time
22 limit. You don't see that as impacting this at all?

23 MR. MOORE: It--it's not relevant, your Honor. If I
24 understand the argument defendants are making, they're saying,
25 look, this--this offer of mediation was a condition precedent

1 requiring the defendant in this case to mediate. That's what
2 I think--that's where I think we are now. I haven't had that
3 request presented to me yet, but I expect that that will come.

4 MR. COLESSIDES: Our position, your Honor, is, there
5 is a series of conditions precedent that are required to be
6 fulfilled, I just want to make the record clear, your Honor,
7 that we believe that number one, the buyer was required to
8 provide seller with notice as a condition precedent to the
9 seller's obligation to submit to--this to mediation.

10 Number two, such mediation was required to occur
11 within 30 days of such a notice, because of the mandatory
12 language "shall." Thus making the 30-day deadline an
13 additional conditional (sic) precedent on the seller's
14 obligation to submit the dispute to mediation.

15 And three, the mediation was required to occur as a
16 condition precedent to the buyer's right to bring this suit
17 for specific performance and to file the lis pendens.

18 And let just digress for a moment, your Honor. Last
19 time when you ruled that the complaint would be dismissed
20 without prejudice, implied in that ruling was also the fact
21 that the lis pendens should be released. And today, you have
22 ordered attorney's fees, and I think that was not in that
23 order that was originally submitted to the Court, that was not
24 there either.

25 But we believe that it was--they raised--the issue

ADDENDUM EXHIBIT 2

Real Estate Purchase Contract (REPC)

(R. 8--18)

**COMMERCIAL - INDUSTRIAL - INVESTMENT
REAL ESTATE PURCHASE CONTRACT**

This is a legally binding Contract. It has been prepared for the use of COLLIERS COMMERCE CRG in transactions involving agents' clients or customers. As such the Contract is intended to represent a reasonable effort to balance the interests of Buyer and Seller. Nonetheless, the Buyer and the Seller may legally agree in writing to alter or delete provisions of this form. Seek legal or tax advice from your attorney or tax advisor before entering into a binding contract.

EARNEST MONEY RECEIPT

The Buyer, **JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL**, offers to purchase the **Property** described below and delivers as **Earnest Money Deposit \$25,000.00** in the form of a check to be deposited within three (3) business days after Acceptance of this offer to purchase by all parties to: ☐ the Brokerage ☒ the Title/Escrow Company to be agreed upon by the parties.

Brokerage or Title/Escrow Company _____

Received by _____ on _____ (date) Phone Number _____
(If Title/Escrow Company) for deposit no later than (date)

OFFER TO PURCHASE

1. PROPERTY: A parcel of real property containing approximately 1.31 acres and all buildings and improvements located thereon.

Address: 5720 South State Street, City of Murray, County of Salt Lake, State of Utah (#22-18-152-012, 016)

For legal description, see: ☐ attached Addendum # _____ ☒ preliminary title report when available as provided below.

1.1 Included Items. Unless excluded herein, this sale shall include all fixtures presently attached to the **Property**. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: None

1.2 Excluded Items. These items are excluded from this sale: None

2. PURCHASE PRICE AND FINANCING. Buyer agrees to pay for the **Property** as follows:

\$ 25,000.00 **Earnest Money Deposit**

\$ 850,000.00 **Loan Proceeds:**

☐ Representing the liability to be assumed by Buyer under an existing assumable loan ☐ with ☐ without Seller being released of liability. Any net differences between the approximate balance of the loan shown above and the actual balance at **Closing** shall be then adjusted in cash.

☐ From new institutional financing on terms no less favorable to the Buyer than the following: _____ (interest rate for first period prior to adjustment, if any); _____ (amortization period); _____ (term). Other than these, the loan terms shall be the best obtainable under the loan for which the Buyer applies below.

☐ From seller-held financing, as described in the attached **Seller Financing Addendum**.

☒ Other: Third party financing on terms prevailing in the marketplace.

\$ 0.00 **Other:** _____

\$ 825,000.00 **Balance of purchase price in cash at closing.**

\$ 1,700,000.00 **TOTAL PURCHASE PRICE**

3. CLOSING. This transaction shall be closed on or before **March 31, 2007**. **Closing** shall occur when: (a) Buyer and Seller have signed and delivered to each other (or to the escrow/title company), all documents required by this **Contract**, by the Lender, by written escrow instructions signed by the Buyer and the Seller, and by applicable law; (b) the monies required to be paid under these documents have been delivered to the escrow/title company in the form of collected or cleared funds; and (c) the deed which the Seller has agreed to deliver under Section 6 has been recorded. Seller and Buyer shall each pay one-half of the escrow **Closing** fee, unless otherwise agreed by the parties in writing. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated as set forth in this Section. All deposits on tenancies shall be transferred to Buyer at **Closing**. Prorations set forth in this Section shall be made as of ☒ date of **Closing**; ☐ date of possession; ☐ other _____.

4. POSSESSION. Seller shall deliver possession to Buyer at **Closing**.

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this **Contract** the listing agent Jeff Richards/Coldwell Banker Commercial represents ☐ Seller ☐ Buyer, and the selling agent John Owens/Commerce CRG represents ☐ Seller ☒ Buyer. Buyer and Seller confirm that prior to signing this **Contract** written disclosure of the agency relationship was provided to him/her.

JO) Buyer's initials () Seller's initials

6. TITLE TO PROPERTY AND TITLE INSURANCE. (a) Seller has, or shall have at **Closing**, fee title to the **Property** and agrees to convey such title to Buyer by ☐ general ☒ special warranty deed, free of financial encumbrances as warranted under Section 10.6; (b) Seller agrees to pay for, and furnish Buyer at **Closing** with, a current standard form owner's policy of title insurance in the amount of the **TOTAL PURCHASE PRICE**; (c) the title policy shall conform with Seller's obligations under subsections (a) and (b). Unless otherwise agreed under subsection 8.4, the commitment shall conform with the title insurance commitment provided under Section 7.1.

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- The Buyer may elect to obtain a full-coverage extended ALTA policy of title insurance under (b). The costs of this coverage above that of a standard owner's policy shall be paid for by the ■ Buyer □ Seller. Also the cost of a full-coverage ALTA survey shall be paid for by the □ Buyer ■ Seller. See also 7.3 (c).

7. SPECIFIC UNDERTAKINGS OF SELLER AND BUYER.

7.1 SELLER DISCLOSURES. The Seller will deliver to the Buyer the following **Seller Disclosures** no later than the number of calendar days indicated below which shall be after **Acceptance**:

- (a) a Seller property condition disclosure for the **Property**, signed and dated by Seller. 5
- (b) a commitment for the policy of title insurance required under Section 6, to be issued by Founders Title Company, including copies of all documents listed as Exceptions on the Commitment; 5
- (c) a copy of all loan documents relating to any loan now existing which will encumber the **Property** after Closing; —
- (d) a copy of all leases and rental agreements now in effect with regard to the **Property** together with a current rent roll; —
- (e) operating statements of the **Property** for its last _____ full fiscal years of operation plus the current fiscal year through _____, certified by the Seller or by an independent auditor; —
- (f) tenant estoppel agreements. See 7.3 (b) below
- (g) a copy of an ALTA survey of the **Property**, certified to Seller. 10

Seller agrees to pay any charge for cancellation of the title commitment provided under subsection (b).

If Seller does not provide any of the **Seller Disclosures** within the time periods agreed above, and such failure results from conditions within Seller's control, the Buyer may either waive the particular **Seller Disclosure** requirement by taking no timely action or the Buyer may notify the Seller in writing within 5 calendar days after the expiration of the particular disclosure time period that the Seller is in **Default** under this **Contract** and that the remedies under Section 16 are at the Buyer's disposal. The holder of the **Earnest Money Deposit** shall, upon receipt of a copy of Buyer's written notice, return to the Buyer the **Earnest Money Deposit** in accordance with paragraph 6 of the Addendum #1 hereto.

7.2 BUYER UNDERTAKINGS. The Buyer agrees to:

(a) Apply for approval of the assumption or funding of the loan proceeds described in Section 2 by completing, signing and delivering to the Lender the initial loan application and documentation required by the lender and by paying all fees required by the lender (including appraisal fee) no later than 30 calendar days after **Acceptance**; and

(b) No later than 45 calendar days after **Acceptance**, obtain from the lender to whom application is made under subsection (a) a written commitment to approve the assumption of the existing loan or to fund the new loan subject only to changes of conditions in Buyer's creditworthiness and to normal loan closing procedures; or, if Buyer elects, provide the Seller with absolute assurance within the same time frame that the proceeds required for funding the Total Purchase Price are available.

These **Buyer Undertakings** are at the sole expense of the Buyer and are material elements of this **Contract** for the benefit of both the Buyer and the Seller. If Buyer does not initiate any **Buyer Undertaking** and provide Seller with written confirmation in the time agreed above, the Seller may either waive the particular **Buyer Undertaking** requirement by taking no timely action or the Seller may notify the Buyer in writing within 15 calendar days of the expiration of the particular undertaking time period that the Buyer is in **Default** under this **Contract** and that the remedies under Section 16 are at the Seller's disposal, subject to Buyer's option to cure within 10 days of such notice.

7.3 ADDITIONAL DUE DILIGENCE.

(a) The Buyer has until March 15, 2007 ~~days after mutual acceptance within~~ which to conduct economic, architectural and engineering studies; title review, obtain environmental audits and government permits; and perform other tests and studies as the Buyer wishes. If within this time period the Buyer in its sole discretion wishes to void this **Contract**, the Buyer may do so by providing the Seller with written notice to that effect within the same time period. Whereupon, the Seller shall release, or authorize the release of, any **Earnest Money** deposited by the Buyer and the parties shall be released of all further obligation under this **Contract**.

(b) ~~The time period for the Seller's providing and the Buyer's reviewing tenant estoppels is _____ and _____ calendar days, respectively, beyond the time provided in 7.3(a).~~

(c) If the Seller has agreed to provide a survey under paragraph 6 above, the Buyer must receive it no later than 10 calendar days before the expiration of the time period stated in 7.3 (a) above. If the Seller has not agreed to provide a survey under paragraph 6 above, the Buyer may obtain a survey and approve it within the time period stated in 7.3 (a) above.

(d) ~~If the acquisition of the survey is not governed by paragraph 6, the survey shall be a □ boundary survey □ a full-coverage ALTA survey and shall be paid for as follows: _____.~~

Seller agrees to cooperate fully with Buyer's completing these due diligence matters and to make the **Property** available as is reasonable and necessary for the same.

8. CONTINGENCIES. This offer is subject to the Buyer's approving in its sole discretion on or before March 15, 2007 the **Seller Disclosures**, the **Buyer Undertakings** and **Additional Due Diligence** matters in Section 7. However, the Buyer's discretion in approving the terms of the loan under section 7.2(b) is subject to Buyer's covenant with regard to minimally acceptable financing terms under Section 2.

8.1 Buyer shall have _____ calendar days after mutual acceptance (except for tenant estoppels) to review the content of the Seller Disclosures and the outcome of the Buyer Undertakings. The times stated in 7.3 (a) and (b) apply to the diligence items which those paragraphs address.

8.2 If Buyer does not deliver a written objection notice of disapproval to Seller regarding a Seller Disclosure, Buyer Undertaking or Due Diligence by March 15, 2007 ~~matter within the times provided~~, those items will be deemed approved by Buyer and the Buyer shall have no right to cancel this REPC with regard to those items after March 15, 2007 (except for Seller's Default), and the Buyer shall have no right to cancel with regard to those items beyond the applicable dates.

8.3 If Buyer objects, Buyer and Seller shall have 5 calendar days after receipt of the objections to resolve Buyer's objections. Seller may, but

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shall not be required to resolve Buyer's objections. Likewise, the Buyer is under no obligation to accept any resolution proposed by the Seller. If Buyer's objections are not resolved within the stated time, Buyer may void this Contract by providing written notice to Seller.

8.4 The holder of the **Earnest Money Deposit** shall, upon receipt of a copy of Buyer's written notice, return to Buyer the **Earnest Money Deposit** without the requirement of any further written authorization from Seller. If this Contract is not voided by Buyer, Buyer's objection is deemed to have been waived. However, this waiver does not affect warranties under Section 10.

8.5 Resolution of Buyer's objections if any under Section 8.3 shall be in writing and shall become part of this Contract. After the latest of the dates which apply under this Section 8 and absent notice of Buyer to void this REPC as permitted herein, the Buyer's **EARNEST MONEY DEPOSIT SHALL BE NONREFUNDABLE EXCEPT IN THE CASE OF DEFAULT BY THE SELLER AS ADDRESSED IN PARAGRAPH 16 BELOW.**

9. **SPECIAL CONTINGENCIES.** This offer is made subject to the terms of attached Addendum # 1 which is incorporated into this Contract by this reference.

10. **SELLER'S LIMITED WARRANTIES.** Seller's warranties to Buyer regarding the Property are limited to the following:

- 10.1 When seller delivers possession of the Property to Buyer, it will be broom-clean and free of debris and personal belongings;
- 10.2 Seller will deliver possession of the Property to Buyer with the plumbing, plumbed fixtures, heating, cooling, ventilating, electrical and sprinkler (indoor and outdoor) systems, appliances and fireplaces in working order;
- 10.3 Seller will deliver possession of the Property to Buyer with the roof and foundation free of leaks known to Seller;
- 10.4 Seller will deliver possession of the Property to Buyer with any private well or septic tank serving the Property in working order and in compliance with governmental regulations;
- 10.5 Seller will be responsible for repairing any of Seller's moving-related damage to the Property;
- 10.6 At Closing, Seller will bring current all financial obligations encumbering the Property which are assumed in writing by Buyer and will discharge all such financial obligations which Buyer has not so assumed; which encumber the Property.
- 10.7 As of Closing, Seller has no knowledge of any claim or notice of an environmental, building or zoning code violation regarding the Property which has not been resolved.

11. **VERIFICATION OF WARRANTED AND INCLUDED ITEMS.** After all contingencies have been removed and before Closing, the Buyer may conduct a "walk-through" inspection of the Property to determine whether or not items warranted by Seller in Section 10.1, 10.2, 10.3 and 10.4 are in the warranted condition and to verify that items included in Section 1.1 are presently on the Property. If any item is not in the warranted condition, Seller will correct, repair or replace it as necessary or, with the consent of Buyer and (if required) Lender, escrow an amount at Closing to provide for such repair or replacement. The Buyer's failure to conduct a "walk-through" inspection or to claim during the "walk-through" inspection that the Property does not include all items referenced in Section 1.1 or is not in the condition warranted in Section 10, shall constitute a waiver of Buyer's rights under Section 1.1 and of the warranties contained in Section 10.

12. **CHANGES DURING TRANSACTION.** Seller agrees that no changes in any existing leases shall be made, no new leases entered into, and no substantial alterations or improvements to the Property shall be undertaken without the written consent of the Buyer.

13. **AUTHORITY OF SIGNERS.** If Buyer or Seller is a corporation, partnership, trust, estate or other entity, the person signing this Contract on its behalf warrants his or her authority to do so and to bind Buyer or Seller and the heirs or successors in interest to Buyer or Seller. If the Seller is not the vested owner of the Property but has control over the vested owner's disposition of the Property, the Seller agrees to exercise this control and deliver title under this Contract as if it had been signed by the vested owner.

14. **COMPLETE CONTRACT.** This instrument (together with its addenda, any attached exhibits, and Seller Disclosures) constitutes the entire Contract between the parties and supersedes all prior dealings between the parties. This Contract cannot be changed except by written agreement of the parties.

15. **DISPUTE RESOLUTION.** The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit and the breach or termination of this Contract, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Mediation shall take place within 30 days after notice by either party of the existence of a dispute or claim. Any agreement signed by the parties pursuant to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this Contract shall apply. Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of summons or as otherwise permitted by law, and recording a *lis pendens* with regard to the action; provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. Also the parties may agree in writing to waive mediation.

16. **DEFAULT.** If Buyer defaults, Seller may elect to either: as its exclusive remedy retain the **Earnest Money Deposit** as liquidated damages, or to return the **Earnest Money Deposit** and sue Buyer to enforce Seller's rights. If Seller defaults, in addition to return of the **Earnest Money Deposit**, Buyer may elect to either accept from Seller as liquidated damages a sum equal to \$25,000.00 or sue Seller for specific performance and/or damages. If Buyer elects to accept the liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. Where a Section of this Contract provides a specific remedy, the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law. Buyer and Seller acknowledge that actual damages arising out of certain Defaults hereunder are difficult or impossible to ascertain with any degree of certainty and have, therefore, agreed upon the liquidated damages as aforesaid as a reasonable estimate thereof.

17. **ATTORNEY'S FEES.** In any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees.

18. **DISPOSITION OF EARNEST MONEY.** The **Earnest Money Deposit** shall not be released unless it is authorized by paragraph 6 of Addendum #1 hereto and: (a) Sections 7.1, 7.2, 7.3 and 8.3; (b) separate written agreement of the parties including an agreement under Section 15 if (a) does not apply; or (c) court order.

19. **ABROGATION.** Except for Sections 10, 13, 15, 17 and 19 of this Contract, and Seller's representations set forth in Seller's Property Condition Disclosure delivered pursuant to Section 7.1(a) above, the provisions of this Contract shall not apply after Closing.

20. **RISK OF LOSS.** All risk of loss or damage to the Property shall be borne by Seller until Closing.

21. **TIME IS OF THE ESSENCE.** Time is of the essence regarding the dates set forth in this transaction. Extensions must be agreed to in writing by all parties. Performance under each Section of this Contract which references a date shall be required absolutely by 5:00 P.M., Mountain Time on the stated date.

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22. COUNTERPARTS AND FACSIMILE (FAX) DOCUMENTS. This Contract may be signed in counterparts, and each counterpart bearing an original signature. Also facsimile transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original.

23. ACCEPTANCE. Acceptance occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counter offer where noted to indicate acceptance; and (b) communicates to the other party or the other party's agent that the offer or counteroffer has been signed as required.

24. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the **Property** on the above terms and conditions. If Seller does not accept this offer by 5:00 ☐ AM ☒ PM Mountain Time, January 10, 2007 this offer shall lapse; and the holder of the **Earnest Money Deposit** shall return it to the Buyer.

January 5, 2007
(Offer Reference Date)

(IF COMPANY BUYER)

Company name _____

By: _____

Its: _____

Address: _____

Phone: _____

(IF INDIVIDUAL BUYER)

(Buyer's Signature) _____

JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL
(Print Buyer's Name)

(Buyer's Signature) _____

(Print Buyer's Name) _____

ACCEPTANCE / REJECTION / COUNTER OFFER

☐ **Acceptance of Offer to Purchase:** Seller **Accepts** the foregoing offer on the terms and conditions specified above.

(IF COMPANY SELLER)

Company name: _____

By: _____

Its: _____

Address: _____

Phone: _____

(IF INDIVIDUAL SELLER)

(Seller's Signature) _____

(Print Seller's Name) _____

(Seller's Signature) _____

(Print Seller's Name) _____

☐ **Rejection:** Seller **Rejects** the foregoing offer.

(Seller's Initials) _____

(Date) _____

(Time) _____

☐ **Counteroffer:** Seller presents for Buyer's **Acceptance** the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached Counter Offer # _____.

DOCUMENT RECEIPT

☐ I acknowledge receipt of a final copy of this Real Estate Purchase Contract dated _____ bearing all signatures, between
_____(Buyer) and _____(Seller).

SELLER

BUYER

Authorized Signature for Seller

Authorized Signature for Buyer

Print Name

Print Name

☐ I personally caused a final copy of this Real Estate Purchase Contract dated _____ bearing all signatures, between
_____(Seller) and _____(Buyer)
to be mailed on _____(date) by certified United States Mail, return receipt attached, to ☐ Buyer ☐ Seller.
Sent by:_____.

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ADDENDUM #1
REAL ESTATE PURCHASE CONTRACT

This is an **ADDENDUM/COUNTER OFFER** to that **REAL ESTATE PURCHASE CONTRACT** (the "REPC") with an Offer Referenced Date of January 5, 2007, including addenda and counter offers between **JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL**, as Buyer, and _____ as Seller, on the property located at: 5720 South State Street, City of Murray, County of Salt Lake, State of Utah (#22-18-152-012, 016).

The following terms are hereby incorporated as part of the REPC, and to the extent these terms modify or conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same.

1. **Tenancies.** Seller shall deliver the Property free of any and all tenancies or rights of occupancy by third parties.
2. **Brokers.** Seller shall pay a brokerage fee at closing equal to 6% of the purchase price to be divided equally between Coldwell Banker NRT and Commerce CRG. Buyer and Seller represent and warrant to one another that they know of no brokers or finders involved in this transaction other than those identified in the foregoing REPC.
3. **Environmental Matters.** Seller shall provide to Buyer, within 5 days after mutual execution, copies of all environmental studies or information related to the Property in Seller's possession or within its control, and disclose to Buyer any other relevant environmental information known to the Seller related to the Property which is not contained in said studies. Further, Seller covenants that it will immediately disclose to Buyer any new information regarding the environmental condition of the Property throughout the pendency of this transaction and through Closing. Buyer has the right to obtain a current report as set forth in Paragraph 4 below. To the best of Seller's knowledge, Seller hereby represents and warrants to Buyer that, except as disclosed in writing to Buyer, the Property is not contaminated with, nor threatened with contamination from outside sources by, any chemical, material or substance to which exposure is prohibited, limited or regulated by any federal, state, county, local or regional authority or which is known to pose a hazard to health and safety and that the Land has never been used for a landfill, dump site, storage of hazardous substances, or by a manufacturer of any product or for any other industrial use (collectively, "Contamination"). This representation and warranty shall survive the Closing.
4. **Phase 1 Environmental Audit.** Buyer has the right, at its own election, to obtain and be responsible to pay for a current Phase 1 Environmental Report on the Property as a part of its Additional Due Diligence matters contemplated by Section 7.3 of the foregoing REPC.
5. **Tax -Deferred Exchange Cooperation.** Buyer intends to avail itself of the benefits of Section 1031 of the Internal Revenue Code of 1986 relating to tax-deferred exchange treatment of this transaction. In such event, the Seller agrees to cooperate with the Buyer so long as such cooperation does not result in additional cost to the Seller, will not delay any facet of this transaction and does not require the Seller to take title to any property other than the Property.

☒ Seller ☐ Buyer shall have until 5:00 ☐ A.M. ☒ P.M. Mountain Time, January 10, 2007, to accept these terms in accordance with Section 23 of the REPC. Unless so accepted, this offer shall lapse.

(IF COMPANY BUYER)

Company name: _____

By: _____

Its: _____

Address: _____

Phone: _____

(IF INDIVIDUAL BUYER)

(Seller's/Buyer's Signature)

JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL
(Print Seller's/Buyer's Name)

(Seller's/Buyer's Signature)

(Print Seller's/Buyer's Name)

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE: ☐ Acceptance: ☐ Seller ☐ Buyer hereby accepts these terms.

(IF COMPANY SELLER)

(IF INDIVIDUAL SELLER)

Company name: _____

(Seller's Signature)

By: _____

(Print Seller's Name)

Its: _____

Address: _____

(Seller's Signature)

Phone: _____

(Print Seller's Name)

☐ Rejection: ☐ Seller ☐ Buyer rejects these terms.

Initials _____ Date _____ Time _____

☐ Counter Offer: ☐ Seller ☐ Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.

DOCUMENT RECEIPT

☐ I acknowledge receipt of a final copy of this Real Estate Purchase Contract dated _____ between _____
(Buyer) and _____ (Seller)
bearing all signatures.

SELLER

BUYER

Authorized Signature for Seller

Authorized Signature for Buyer

Print Name

Print Name

☐ I personally caused a final copy of this Real Estate Purchase Contract dated _____ bearing all signatures, between _____
(seller) and _____ (buyer)
to be mailed on _____ (date) by certified United States Mail, return receipt attached, to ☐ Buyer ☐ Seller.
Sent by: _____.

**ADDENDUM NO. 2
TO
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☐ ADDENDUM ☒ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference of January 5, 2007, including all prior addenda and counter-offers, between John Owens, on behalf of an undisclosed principal, as Buyer, and Saied Hajizadeh, as Seller, regarding the Property located at 5720 South State Street, City of Murray. The following terms are hereby incorporated as part of the REPC.

1. Purchase price shall be \$2,250,000.
2. Title work and insurance shall be provided through Landmark Title.
3. The Seller shall lease the property back from the Buyer for a period of six months. The lease rate shall be \$15,000 per month NNN.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 8 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☒ ARE CHANGED AS FOLLOWS: _____

_____ dates shall be extended by 21 days _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☒ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on February 9, 2007 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☒ Buyer ☒ Seller Signature _____ (Date) (Time)

☐ Buyer ☐ Seller Signature _____ (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ **ACCEPTANCE:** ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ **COUNTEROFFER:** ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM #3 (Counter-Offer)
REAL ESTATE PURCHASE CONTRACT

This is an **ADDENDUM/COUNTER OFFER** to that **REAL ESTATE PURCHASE CONTRACT** (the "REPC") with an Offer Referenced Date of January 5, 2007, including addenda and counter offers between **JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL**, as Buyer, and Saied Hajizadeh as Seller, on the property located at: 5720 South State Street, City of Murray, County of Salt Lake, State of Utah ((#22-18-152-012, 016)).

The following terms are hereby incorporated as part of the REPC, and to the extent these terms modify or conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same.

1. Post-Closing Tenancy. Seller shall continue to be a tenant of the Property from and after closing for a period of one (1) year, provided however, that Buyer shall have the right to terminate such tenancy not earlier than 6 months after closing by giving Seller 90 days advance written notice. Rent during the post-closing occupancy shall be \$18,750.00/month payable monthly in advance with all operating expenses, taxes, insurance, utilities and maintenance being tenant's responsibility.
2. Fixtures, Equipment & Personal Property. Seller shall provide to Buyer within 15 days after mutual execution a list of equipment and personal property currently on the Property and used in connection with the business operated thereon. The foregoing shall not include business records. Ownership of said equipment and personal property shall be transferred to Buyer at closing without additional payment from Buyer (subject to tenant's right to use the same after closing during its occupancy of the Property).

☒ Seller ☐ Buyer shall have until 5:00 ☐ A.M. ☒ P.M. Mountain Time, February 13, 2007, to accept these terms in accordance with Section 23 of the REPC. Unless so accepted, this offer shall lapse.

(IF COMPANY BUYER)

Company name: _____

By: _____

Its: _____

Address: _____

Phone: _____

(IF INDIVIDUAL BUYER)

(Seller's/Buyer's Signature)

JOHN OWENS, ON BEHALF OF AN UNDISCLOSED PRINCIPAL
(Print Seller's/Buyer's Name)

(Seller's/Buyer's Signature)

(Print Seller's/Buyer's Name)

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE: ☐ **Acceptance:** ☐ Seller ☐ Buyer hereby accepts these terms.

(IF COMPANY SELLER)

Company name: _____

By: _____

Its: _____

Address: _____

Phone: _____

(IF INDIVIDUAL SELLER)

(Seller's Signature)

(Print Seller's Name)

(Seller's Signature)

(Print Seller's Name)

☐ **Rejection:** ☐ Seller ☐ Buyer rejects these terms.

Initials

Date

Time

☐ **Counter Offer:** ☐ Seller ☐ Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.

DOCUMENT RECEIPT

☐ I acknowledge receipt of a final copy of this Real Estate Purchase Contract dated _____ between
_____ (Buyer) and _____ (Seller)
bearing all signatures.

SELLER

BUYER

Authorized Signature for Seller

Authorized Signature for Buyer

Print Name

Print Name

☐ I personally caused a final copy of this Real Estate Purchase Contract dated _____ bearing all signatures, between
_____ (seller) and _____ (buyer)
to be mailed on _____ (date) by certified United States Mail, return receipt attached, to ☐ Buyer ☐ Seller.
Sent by: _____.

ADDENDUM # 4 /COUNTER OFFER #
TO REAL ESTATE PURCHASE CONTRACT

This is an ADDENDUM to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of January 5, 2007, including all addenda and counter offers, between John Owens, on behalf of an undisclosed principal, Buyer, and Saied Halizadeh seller. The following terms are hereby incorporated, as part of the REPC, and to the extent these terms modify or conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same:

This addendum shall replace the addendum #4 dated February 13, 2007.

- 1) After the Date of Closing Seller shall be a tenant of the Buyer. Buyer to submit a lease or rental agreement for Seller's approval during the "buyer's due diligence" period. Said terms shall include items from Paragraph 6 below.
- 2) Item 10.1 of the REPC, since the Buyer will take possession of the subject property at closing and the Seller shall remain as a tenant, at the expiration of the Seller's tenancy, the seller (tenant) will remove all of his personal belongings and debris. The Buyer during his "due diligence" period will become familiar with the premises and the premises will be surrendered to Buyer Landlord) in approximately the same condition as of the date of closing.
- 3) Item 10.2 of the REPC, there is no fireplace or appliances as part of the subject property.
- 4) Item 10.4 of the REPC is not applicable.
- 5) The Seller is unaware of any environmental violations or problems with the subject property, other than the building to the north, which the Seller has only used for storage, has floor tiles that MAY contain asbestos. If this is of concern to the Buyer he needs to make his own determination during his "due diligence" period.
- 6) After the Date of Closing Seller shall be a tenant (The "Tenant") at the subject property for a period of not less than six (6) months and not more than twelve (12) months. Seller may cancel the aforementioned tenancy after 150 Days with 30 days advance written notice. Rent during the post-closing occupancy shall be \$18,000 per month payable monthly in advance with all operating expenses, taxes, insurance, utilities and maintenance being tenant's responsibility.
- 7) Seller's pylon outdoor advertising sign is not included in this sale. At the termination of Seller's tenancy and upon terminating the lease and vacating the property, the Seller shall remove the 1. pylon post; and 2) the "Exclusive Cars" sign that are on the property at Seller's own cost.
- 8) The following personal property shall be included in the purchase and sale of the subject property: Security system with cameras, alarms and monitoring electronics; Hydraulic Floor Jacks; Garage door openers. Excluded from the sale shall be the seller's furniture, phone system (should he decided to take it) his compressors and portable car washer.
- 9) The Listing agent on Item 5 of the REPC shall include Doug Richards who represents the Seller.
- 10) Buyer's "due diligence" shall be until April 15, 2007 and closing shall take place on or before April 30, 2007.

[] Seller ☒ Buyer shall have until 5:00 [] A.M. ☒ P.M. Mountain Time, MARCH 1, 2007
to accept these terms in accordance with Section 23 of the REPC.
Unless so accepted, this offer shall lapse.

[] Buyer ☒ Seller Signature

Date

[] Buyer [] Seller Signature

Date

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE:

☒ Acceptance: [] Seller [] Buyer hereby accepts these terms.

☒ Buyer [] Seller Signature

Date

ADDENDUM EXHIBIT 3

District Court Order dismissing complaint without prejudice
(R. 171--72)

James S. Jardine (A1647)
Larry G. Moore (A2305)
Gregory S. Roberts (A9092)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Plaintiff

FILED DISTRICT COURT
Third Judicial District

FEB 04 2008

SALT LAKE COUNTY

By 
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MILLER FAMILY REAL ESTATE, L.L.C., a
Utah limited liability company,

Plaintiff,

v.

SAIED HAJIZADEH, an individual,

Defendant.

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

Judge: John Paul Kennedy

Civil No. 070906776

THIS MATTER originally came for hearing before the Honorable John Paul Kennedy, District Judge, at 9:45 a.m. September 6, 2007, on the defendant Saied Hajizadeh's Motion to Dismiss. The plaintiff was represented by Larry G. Moore of Ray Quinney & Nebeker P.C. The defendant was represented by Nick J. Colessides. A subsequent hearing was held at 10:00 a.m. on January 17, 2008, to consider defendant's objections to the form of the proposed Order, and defendant's request for an award of attorneys' fees incurred in filing defendant's Motion to Dismiss. The Court having reviewed the pleadings on file, and having considered the arguments of counsel at both hearings, does hereby order that:

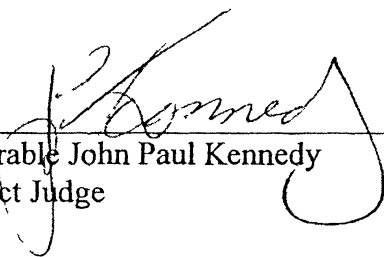
1. Plaintiff's complaint be dismissed "without prejudice" to its refile.

2. Promptly upon dismissal of this suit, the Lis Pendens in this action recorded on the real property that is the subject of this action be released of record by Plaintiff.

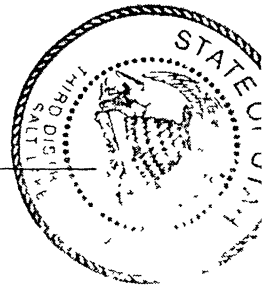
3. Defendant is awarded its reasonable attorneys' fees and costs incurred in connection with the Motion to Dismiss. A copy of the affidavit and any other supporting documentation regarding such fees and costs shall be submitted to Plaintiff's counsel, when filed, who shall have the opportunity to review and object to such fees prior to this Court determining the actual amount of fees which will be awarded by the Court in connection with the Motion to Dismiss.

Dated this 4 day of ^{Feb}~~January~~, 2008.

BY THE COURT



Honorable John Paul Kennedy
District Judge



ADDENDUM EXHIBIT 4

District Court Order granting attorney fees to Defendant seller
(R. 288--89)

IMAGED

James S. Jardine (A1647)
Larry G. Moore (A2305)
Gregory S. Roberts (A9092)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Plaintiff

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 03/26/08

FILED DISTRICT COURT
Third Judicial District

MAR 24 2008

SALT LAKE COUNTY

By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MILLER FAMILY REAL ESTATE, L.L.C., a
Utah limited liability company,

Plaintiff,

v.

SAIED HAJIZADEH, an individual,

Defendant.

ORDER RE: ATTORNEY FEES

Judge: John Paul Kennedy

Civil No. 070906776

THIS MATTER came for hearing before the Honorable John Paul Kennedy, District Judge, at 10:00 a.m. on March 24, 2008, on the Motion for an Order Awarding Defendant His Attorney's Fees. Plaintiff was represented by Larry G. Moore of Ray Quinney & Nebeker P.C. Defendant was represented by Nick J. Colessides. The Court having reviewed the pleadings on file, and having considered the arguments of counsel, does hereby order that:

Defendant is awarded \$ 5,000.00 in reasonable attorneys' fees and costs incurred in connection with his Motion to Dismiss.

Order re: Attorney Fees @J



JD26400941

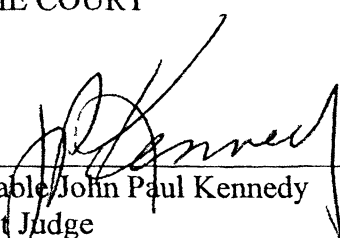
pages:

070906776 MILLER FAMILY REAL ESTATE I

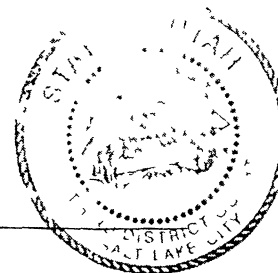
722

Dated this 24 day of March, 2008.

BY THE COURT



Honorable John Paul Kennedy
District Judge



07096776

973915

ADDENDUM EXHIBIT 5

Docket in Parallel Medley Case No. 070912945

(UTAH R. EVIDENCE 201(b)(2)(Judicial notice may be taken of such Docket.))

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

MILLER FAMILY REAL ESTATE LLC vs. SAIED HAJIZADEH

CASE NUMBER 070912945 Contracts

CURRENT ASSIGNED JUDGE
TYRONE E. MEDLEY

PARTIES

Plaintiff - MILLER FAMILY REAL ESTATE LLC
Represented by: LARRY G MOORE

Defendant - SAIED HAJIZADEH
Represented by: NICK J COLESSIDES

Defendant - EXCLUSIVE CARS INC
Represented by: NICK J COLESSIDES

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	155.00
	Amount Paid:	155.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	
Amount Due:	155.00
Amount Paid:	155.00
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

09-07-07 Case filed
09-07-07 Judge TYRONE E. MEDLEY assigned.
09-07-07 Filed: Complaint No Amount
09-07-07 Fee Account created Total Due: 155.00
09-07-07 COMPLAINT - NO AMT S Payment Received: 155.00
Note: Code Description: COMPLAINT - NO AMT S
12-24-07 Filed return: Summons
Party Served: HAJIZADEH, SAIED for Exclusive Car
Service Type: Personal
Service Date: December 17, 2007

Printed: 07/23/08 07:44:03

Page 1

CASE NUMBER 070912945 Contracts

12-24-07 Filed return: Summons
 Party Served: HAJIZADEH, SAIED
 Service Type: Personal
 Service Date: December 17, 2007

01-04-08 Filed: Appearance of Counsel (Nick Colessidess)

01-07-08 Filed: Defendants' Motion to Dismiss Plaintiff's Complaint with
 Prejudice
 Filed by: COLESSIDES, NICK J

01-07-08 Filed: Memorandum in Support of Defendants' Motion to Dismiss

01-07-08 Filed: Request for Hearing Upon Defendants' Motion to Dismiss

02-01-08 Filed: Withdrawal of Defendant's Motion to Dismiss

02-06-08 Filed: Defendants' Motion to Dismiss Plaintiff's Complaint with
 Prejudice
 Filed by: COLESSIDES, NICK J

02-06-08 Filed: Memorandum in Support of Defendants' Motion to Dismiss
 Plaintiff's Complaint with Prejudice

02-06-08 Filed: Request for Hearing Upon Defendants' Motion to Dismiss
 with Prejudice

02-25-08 Filed: Memorandum in Opposition to Defendants' Motion to
 Dismiss Complaint with Prejudice (Oral Argument Requested)

03-07-08 Filed: Reply Memorandum in Support of Motion to Dismiss and
 Request to Treat Motion as Motion for Summary Judgment Pursuant
 to URCP 12(b) (Oral Argument Requested)

04-17-08 Filed: Notice to Submit for Decision

05-01-08 Filed: Defts Motion to Stay the Proceedings Now Pending Before
 this Court Pending a Decision from th Utah Court of Appeals.

05-01-08 Filed: Request for Hrg Upon Defts Motion to Stay the
 Proceedings Now pending Before a Decision from the Utah Court
 of appeals.

05-01-08 Filed: Memo in Support of Hajizadeh's Motion to For an Order
 Staying the Proceedings Now Pending before the Court

05-01-08 Filed: Notice of Taking Deposition

05-05-08 Notice - NOTICE for Case 070912945 ID 11453272
 ORAL ARGUMENT is scheduled.
 Date: 06/02/2008
 Time: 03:00 p.m.
 Location: Fourth Floor - W48
 THIRD DISTRICT COURT
 450 SOUTH STATE
 SLC, UT 84114-1860
 Before Judge: TYRONE E. MEDLEY

Please take notice the following is set for one hour.

1. Defendants' Motion to Dismiss Plaintiff's Complaint with
 Prejudice

05-05-08 ORAL ARGUMENT scheduled on June 02, 2008 at 03:00 PM in Fourth
 Floor - W48 with Judge MEDLEY.

05-14-08 ORAL ARGUMENT rescheduled on June 16, 2008 at 09:00 AM

Printed: 07/23/08 07:44:04

Page 2

CASE NUMBER 070912945 Contracts

Reason: Stipulation of counsel.

05-14-08 Note: Based on the Stipulation of counsel hearing set for 6/2/08 is now continued Larry Moore to send notice.

05-19-08 Filed: Memorandum in Opposition to Defendants' Motion for Stay Pending Appeal (Oral Argument Requested)

05-19-08 Filed: Notice of Rescheduling of Hearing

05-29-08 Filed: Request for Changing the Hearing Date from June 16 2008 to a new Conveinent to Court and Counsel

06-02-08 Filed: Reply Memorandum in Support of Hajizadeh's Motion for an Order Staying the Proceedings Now Pending before this Court

06-10-08 Filed: Notice to Submit for Decision (Oral Argument Requested)

06-10-08 Filed: Request to Submit for Decision

06-12-08 ORAL ARGUMENT Cancelled.

Reason: Stipulation of counsel

06-12-08 Notice - NOTICE for Case 070912945 ID 11491695

ORAL ARGUMENT is scheduled.

Date: 07/07/2008

Time: 09:00 a.m.

Location: Fourth Floor - W48

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84114-1860

Before Judge: TYRONE E. MEDLEY

Please take notice the Oral Argument set for 6/16/08 is now continued to the date stated. Please note the motions to be heard.

1. Defendants' Motion to Dismiss Plaintiffs Complaint with Prejudice.

2. Defendants' Motion to Stay the Proceedings now Pending Before this Court Pending a Decision from the Utah Court of Appeals.

1 Hour setting.

06-12-08 ORAL ARGUMENT scheduled on July 07, 2008 at 09:00 AM in Fourth Floor - W48 with Judge MEDLEY.

07-07-08 Minute Entry - Minutes for ORAL ARGUMENT

Judge: TYRONE E. MEDLEY

Clerk: tinaa

PRESENT

Plaintiff's Attorney(s): LARRY G MOORE

Defendant's Attorney(s): NICK J COLESSIDES

Video

Tape Number: 9.12-10.05

HEARING

CASE NUMBER 070912945 Contracts

This matter is before the Court for Oral Argument. Appearances as stated above.

1) Defendants Motion to stay the Proceeding Now Pending Before the court Pending a Decision from the Utah Court of Appeals is denied.

2) Defendants Motion to Dismiss Plaintiff's Complaint with Prejudice is argued by respective counsel and submitted.

The Court reserves ruling at this time.

PHONE RULING ON HRG 7/7/08 is scheduled.

Date: 07/08/2008

Time: 01:45 p.m.

Location: Fourth Floor - W48

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84114-1860

Before Judge: TYRONE E. MEDLEY

07-07-08 PHONE RULING ON HRG 7/7/08 scheduled on July 08, 2008 at 01:45 PM in Fourth Floor - W48 with Judge MEDLEY.

07-08-08 Minute Entry - Minutes for RULING FROM HRG 7/7/08

Judge: TYRONE E. MEDLEY

Clerk: tinaa

TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): LARRY G MOORE

Defendant's Attorney(s): NICK J COLESSIDES

Video

Tape Number: 2.15-

HEARING

This matter is before the Court for the ruling on the hearing from 7/7/08. Appearances as stated above.

Defendants Motion to Dismiss is denied.

Larry Moore to prepare an Order with in 10 days.

07-11-08 Filed: Certificate of Service

07-14-08 Filed order: Order Denying Defendant's Motion to Stay

Judge TYRONE E. MEDLEY

Signed July 14, 2008

07-14-08 Filed order: Order Denying Defendants' Motion to Dismiss

Judge TYRONE E. MEDLEY

Signed July 14, 2008

CERTIFICATE OF SERVICE

Filed **eight** copies of the foregoing, *one of which contains an original signature*, including a **CD in accordance with Utah Supreme Court Standing Order No. 8, Effective May 15, 2008**, with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
UTAH COURT OF APPEALS
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84114-0210

and served **two** copies of the foregoing, **including a CD in accordance with Utah Supreme Court Standing Order No. 8, Effective May 15, 2008**, upon the following:

Larry G. Moore, Esq.
Gregory S. Roberts, Esq.
Ray Quinney & Nebeker
36 South State St., Suite 1400
P O Box 45385
Salt Lake City, Utah 84111

via first class mail, postage pre-paid, this 23rd day of July, 2008 addressed as set forth above.

A handwritten signature in black ink, appearing to read "John M. Martz", is written over a horizontal line.