

1997

Joseph R. and Florence Brunetti v. Gilbert R.  
Turner, Kenneth T. Holman and Overland  
Developmental Corp., : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS

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JOSEPH R. and FLORENCE BRUNETTI

Plaintiffs/Appellees/Cross-Appellants

v.

Case No. 970339-CA

GILBERT R. TURNER, KENNETH T.  
HOLMAN and OVERLAND  
DEVELOPMENT CORP.,

Defendants/Appellants/Cross-Appellees.

---

BRIEF OF APPELLEES/CROSS-APPELLANTS

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE SANDRA N. PEULER, DISTRICT JUDGE

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Argument priority classification 15

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## **STATEMENT OF JURISDICTION**

This appeal and cross-appeal arise from a civil action brought by Plaintiffs for breach of contract, for quantum meruit, for equitable estoppel, for breach of the implied covenant of good faith and fair dealing, and for fraud against a corporation (Overland Development Corp. -- hereinafter “Overland”) which failed to close on the purchase of a parcel of real property owned by the Plaintiffs despite a written contract therefor -- and which corporation also failed to pay the two required \$15,000 nonrefundable earnest money deposits required by the parties’ agreement, and under the same causes of action against the principal of Overland, Kenneth Holman (“Holman”), on an alter ego theory and also as a direct participant in the alleged fraud, and for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing and for fraud against the Brunettis’ real estate agent, Gilbert Turner (“Turner”).

Jurisdiction of the Third Judicial District Court, Salt Lake County, Utah from which this appeal arises, is based on U.C.A. 78-3-4(1)(1953, as amended).

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to Article VIII, Section 5 of the Constitution of the State of Utah, U.C.A. 78-2-2(3)(j)(1995 Supp.) and Rule 3(a) of the Utah Rules of Appellate Procedure. This case was poured over to the Court of Appeals by the Supreme Court on May 15, 1997.

The Appellant Overland appealed the granting of a motion for partial summary judgment entered on June 23, 1995 in favor of the Plaintiffs/Appellees, the Brunettis, on their breach of contract claim. In a serious lack of candor, Overland failed to fully disclose in its brief that after the trial in this matter (on Fraud, Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Fiduciary Duty), Overland asked the trial court to reconsider the earlier granting of



partial summary judgment in light of the evidence adduced at trial -- raising in said motion essentially the same arguments raised in this appeal. The parties fully briefed these issues, with recitations to trial testimony. The trial court heard argument on this motion to reconsider and for summary judgment. The trial court rejected Overland's arguments, affirmed the judgment and denied Overland's motion in an Order Denying Defendants' Motion to Reconsider the Order Granting Partial Summary Judgment entered on October 17, 1997. In essence, these issues have already been "tried" -- and need no new trial.

The Cross-Appeal addresses three issues (1) the trial court's refusal at trial to allow plaintiffs to amend their pleadings to conform to the evidence as to additional instances of fraud by Overland and Holman, and refusal to receive evidence on said matters; (2) the trial court's ruling after trial that Overland did not breach its covenant of good faith and fair dealing such that attorney's fees should be awarded to the Brunettis; and (3) the trial court's rulings that Turner neither breached his fiduciary duty to the Brunettis, nor his duty of good faith and fair dealing. These rulings were made final in the judgment entered on December 17, 1997 (prior to this "final judgment," the Brunetti filed a motion for reconsideration on the issues of breach of the implied covenant of good faith and fair dealing; this motion has never been ruled upon, but the Utah Supreme Court, Justice Zimmerman, denied the Brunettis' motion for summary disposition and ruled that this appeal should proceed even though this motion to reconsider has never been ruled on by the trial court).

Overland filed its first Notice of Appeal on January 2, 1997 and an Amended Notice of Appeal on January 13, 1997. The Brunettis filed their Notice of Cross-Appeal on January 24, 1997.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**Prologue.** Judge Peuler granted in part the cross-motions of the parties prior to trial herein. Judge Peuler found that the parties had entered into a real estate purchase agreement which required Overland to either purchase the Brunettis' property for \$895,000 within 120 days, or an additional period of 60 days if "needed" or "required," or to pay the Brunettis two \$15,000 non-refundable earnest monies as liquidated damages, and granted the Brunettis partial summary judgment based thereon. Having granted the Brunettis this partial summary judgment, Judge Peuler dismissed the Brunettis' claims of alter ego, quantum meruit and equitable estoppel. With respect to the dismissal of the quantum meruit and equitable estoppel claims, Judge Peuler specifically stated that since these claims were theories of relief alternative to that upon which she had already granted summary judgment, they were superfluous. Consequently, if the contractual summary judgment in favor of the Brunettis is reversed as requested by Overland, these other theories of relief/claims should be revived and allowed to go forward as alternate theories of recovery.

Subsequent to the ruling on the motions for summary judgment, a trial was had on the issues of fraud, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, in which testimony was received from all parties relating to the formation of the agreement at issue and the performance, or alleged lack of performance, of the obligations of the parties with respect to said agreement. After this trial, Judge Peuler ruled against the Brunettis on these additional claims (which ruling is the subject of the Brunettis' cross-appeal). Overland then filed a motion for reconsideration and/or for summary judgment in which Overland raised essentially the same arguments raised in this appeal, and asked Judge Peuler to reconsider and set

aside her earlier granting of partial summary judgment in light of “the evidence” heard at the trial. Judge Peuler considered Overland’s arguments, and reviewed the evidence that she had received at trial, heard argument from counsel, and based thereon reaffirmed the summary judgment which had been granted to the Brunettis on the contract claim for the two \$15,000 nonrefundable earnest monies. Obviously, Judge Peuler felt like the evidence at trial supported her prior ruling that the agreement was unambiguous, that it required Overland to either buy the property or pay the nonrefundable earnest monies, and that the purported “joint venture” was merely a proposed illegal sham which Overland should not be allowed to raise as a possible means of escaping its obligations under the contract.

Consequently, the judgment in favor of the Brunettis for liquidated damages due to Overland’s failure to close on the purchase of the Brunettis’ property should be affirmed for two reasons: (1) Judge Peuler was correct in her analysis of the contract and the obligations which it imposed upon the parties when she first granted the summary judgment, and (2) after hearing evidence at the trial herein, Judge Peuler decided that said evidence supported her prior ruling that the Brunettis were entitled to judgment against Overland for breach of contract.

#### **Issues Presented -- Overland’s Appeal**

1. Was it correct or not clearly erroneous for Judge Peuler to find that the real estate purchase agreement was an unconditional agreement by Overland to purchase the real property for \$895,000 within 120 days, or an additional 60 days, or pay the Brunettis two \$15,000 nonrefundable earnest monies?
2. Was it correct or not clearly erroneous for Judge Peuler to find that Overland’s agreement to purchase the property was not contingent upon Overland closing a construction

loan, or upon any other contingency?

3. Was it correct or not clearly erroneous for Judge Peuler to find that the Brunettis had not breached the agreement by failing to enter into the sham and illegal joint venture agreement which Overland had proposed?

**Standard for Review -- Overland Appeal.** It is the Brunettis' position that the standard of review is not one of "correctness" of the legal rulings, Kimball v. Campbell, 699 P. 2d 714 (Utah 1985), but is one of whether there was sufficient evidence presented at the trial to support Judge Peuler's decision after trial to affirm the prior granting of summary judgment when she denied Overland's motion for reconsideration and/or for summary judgment such that the decision was not "clearly erroneous." Stewart v. State By and Through Deland, 830 P. 2d 306 (Ut. App. 1992). If this is in fact the standard, then Overland's appeal must be summarily denied because Overland has not marshaled the evidence on these issues.

**Statement of Issues -- Brunettis' Cross-Appeal.**

1. Was it reversible error for Judge Peuler to refuse to allow the Brunettis to amend their pleadings to include examples of fraudulent conduct beyond the pleadings but which had been actually litigated in connection with the cross-motions for partial summary judgment and then again during the trial, albeit on other issues?

2. Was it reversible error for Judge Peuler to find that there was no evidence of a violation of the implied covenant of good faith and fair dealing by Overland, and thereby refuse to award to the Brunettis their attorney's fees as consequential damages?

3. Was it reversible error for Judge Peuler to find that there was no evidence of a violation of the implied covenant of good faith and fair dealing by Turner, and thereby refuse to

award to the Brunettis any damages, including their attorney's fees as consequential damages?

4. Was it reversible error for Judge Peuler to find that there was no evidence of a breach of fiduciary duty on the part of Turner, and thereby refuse to award to the Brunettis any damages therefor, including their attorney's fees as consequential damages?

**Standard of Review -- Cross-Appeal --** With respect to the first issue, the standard is one of whether Judge Peuler's ruling, as a matter of law, was correct. No deference is given to Judge Peuler's ruling. Kimball v. Campbell, 699 P. 2d 714 (Utah 1985) With respect to the other issues, the standard is whether there was insufficient evidence to support Judge Peuler's findings such that the findings were clearly erroneous. Deference is given to Judge Peuler's factual rulings. Stewart v. State By and Through Deland, 830 P. 2d 306 (Ut. App. 1992).

#### **STATEMENT OF THE CASE**

Overland seeks to read into the simple language of the agreement obligations and contingencies that simply are not present. This is in fact a very simple case. Overland wrote a letter offering to purchase the property for \$850,000 within 120 to 180 days, and stating that an initial \$15,000 earnest money would be deposited in an independent trust account, and that if additional time was needed to close on the purchase, a second \$15,000 "nonrefundable earnest money" would be deposited in trust and the first \$15,000 deposit would be released to the Brunettis and that Overland would have an additional 180 days to close on the purchase. The letter also stated that the Brunettis would be asked to enter into a "joint venture" agreement so that Overland could represent that the property had been "contributed," but that there would be a separate agreement abrogating the "joint venture"/contribution concept by requiring that the property actually be paid for in cash at the closing. The Brunettis testified at trial that they asked

Turner about this, objecting to anything other than being paid in full at closing for their property, and that Turner assured them that the “joint venture” was not a real joint venture and that they would be paid in full and would not be required to actually contribute their property to any sort of partnership. Based upon this explanation of the language of Overland’s proposal, the Brunettis proceeded with the negotiations.

The Brunettis countered with a higher purchase price of \$895,00 and shorter periods in which to close, and the parties finally agreed upon a price of \$895,000, an initial time to close of 120 days, and with a second time period to close of 60 days.

Overland gave Turner a check made out for \$15,000 as the initial earnest money deposit, together with a letter asking that Turner hold off for a short while before depositing the check. This check was never deposited in trust as required by the agreement. Turner approached Overland and obtained an agreement that if he could arrange for the acquisition of a second parcel owned by the Brunettis immediately adjacent to the property subject to the purchase agreement, Turner would be a partner or participant in the development of the larger development. Rather than prepare plans for, and make attempts to develop the property subject to the purchase agreement, Overland and Turner developed a site plan for the larger development and submitted it to Salt Lake City for review with a request for rezoning.

When the first 120 day time period came to a close, Overland complained that it had not been successful in moving the development forward and asked for an extension of time to pursue the project, but without having to pay any money therefor. Overland also expressly told the Brunettis that they were not yet required to enter in to the “joint venture” agreement and would not be required to do so until further notice, and again assured them that it was not a real joint

venture.

The Brunettis refused to modify the agreement. Overland asked for and received the return from Turner of the first \$15,000 earnest money check. Since Overland neither bought the property nor paid the two \$15,000 nonrefundable earnest monies to the Brunettis, the Brunettis brought the underlying suit herein.

As indicated previously, the parties filed cross-motions for summary judgment. Judge Peuler granted the motions in part and denied them in part. The Brunettis submitted deposition and documentary testimony in opposition to Overland's and Holman's motions for summary judgment on the fraud claims that (1) contrary to the representations in the letter offering to purchase the Brunettis' property, Overland was a brand new company with no development history whatsoever, (2) that Overland had very little assets at the time that it entered into the purchase contract (only a few items of office furniture), and did not have the cash to pay the first \$15,000 earnest money unless it could borrow the same somewhere, and (3) that Overland and Holman knew that Overland did not have the wherewithal or track record to be able to obtain financing and close on the purchase, but would need to obtain a joint venture partner. The Court denied Overland's motion to dismiss the Brunettis' fraud claims. At trial, when the Brunettis sought to present evidence on these same matters, Judge Peuler refused to receive it -- claiming that the pleadings did not encompass these instances of fraud. The Brunettis brought a motion to amend to conform to the evidence which had already been received in connection with the motions for summary judgment, arguing that these issues had already been litigated. Judge Peuler denied the motion. During the trial, as evidence pertinent to these issues came in on other matters (such as on the issue of bad faith or to show lack of credibility), the Brunettis again asked

the Court to amend the pleadings to conform to this evidence. Judge Peuler steadfastly refused -- ruling that she would only consider evidence relating to the first \$15,000 earnest money check, and the fact that it was without sufficient funds, as to whether Overland had defrauded the Brunettis -- whereas the Brunettis claimed that Overland's April 6, 1990 letter/offer had created the false impression that Overland was a substantial corporation fully capable of fulfilling its obligations under the purchase agreement, when the truth was that Overland was a newly formed company, with no history, no assets and not even enough money to fund the first promised \$15,000 earnest money deposit and would have no prospect of completing the sale without finding a substantial financial partner. The Brunettis asserted in their opposition to the motions for summary judgment that if they had known of these true facts, they never would have dealt with Overland.

After trial, Overland asked Judge Peuler to set aside the summary judgment in light of the evidence heard at trial -- which Judge Peuler refused to do. These appeals thereafter were undertaken. The Brunettis ask this appellate court to affirm the granting of judgment against Overland for the two \$15,000 nonrefundable earnest monies, and further to reverse Judge Peuler's decision to refuse to allow the Brunettis to present evidence and seek relief on the full breadth of Overland's fraudulent conduct as developed in the motions for summary judgment on the grounds that the pleadings should have been amended to conform to the evidence, and that the issues had actually been tried by the parties in connection with the motions for summary judgment.

With respect to Judge Peuler's finding after trial that there was no breach of the implied covenant of good faith and fair dealing by Overland, the Brunettis cross-appealed on the grounds



that the evidence was without dispute that: (a) Overland did not make the first \$15,000 deposit into an independent trust account as required by the agreement, (b) Overland did not pursue the original development, but changed course mid-stream and started working on the larger project in concert with Gilbert Turner (the Brunettis' erstwhile real estate agent), (c) Overland unilaterally declared the agreement terminated when the Brunettis refused to modify it to give Overland more time without having to pay any earnest monies; (d) despite knowing that the Brunettis had refused to modify the agreement and had refused to enter into a new agreement including both of their parcels of real property, Overland wrote a false letter to the Brunettis stating that it appreciated the fact that the Brunettis had agreed to terminate the relationship; (e) Overland asked Turner to return its \$15,000 check which had never been deposited, which Turner did. These facts are without dispute. Furthermore, Overland's positions in this litigation and on this appeal are so obviously merit less that they also constitute violations of the implied covenant of good faith and fair dealing. Based upon the foregoing, it was clearly erroneous for Judge Peuler to find that there was no breach of the implied covenant of good faith and fair dealing, and to fail to award the Brunettis as damages therefor their attorney's fees herein.

Similarly, the Brunettis request this Court, to find that it was clearly erroneous for Judge Peuler to find that Turner did not breach his fiduciary duty to the Brunettis, and violate the covenant of good faith and fair dealing, by (a) receiving the first \$15,000 earnest money check and not depositing it in his trust account as required by the agreement, (b) negotiating a joint venture with Overland for the development of the larger project, (c) supporting Overland in its attempts to get the Brunettis to modify the original agreement on favorable terms to Overland so as to benefit Turner's arrangement with Overland, (d) giving the \$15,000 check back to Overland

despite knowing that his principals, the Brunettis, had expressly demanded that Overland pay the same to them. Again, the foregoing facts were admitted and not in dispute. Based upon them, it was clearly erroneous for Judge Peuler to rule that Gilbert Turner did not breach his fiduciary duty as the Brunettis' real estate agent and that he did not act in bad faith.

### **STATEMENT OF FACTS**

1. The Brunettis were the owners of two parcels of land at approximately North Temple and Redwood Road. The eastern most parcel consisted of approximately 5.33 acres and had a private club (the Norwood Club) located on its eastern frontage (the "Eastern Parcel"). The western parcel consisted of approximately 6 acres which was entirely vacant (the "Western Parcel"). The first, Eastern Parcel, is the property which became subject to a purchase agreement with Overland. **R. 117.**

2. In late 1989 or early 1990, Gilbert Turner obtained an agreement from the Brunettis that he could act as their real estate agent with respect to finding a buyer for the Eastern Parcel. **R. 117 and 759.**

3. On or about April 6, 1990, Overland wrote a letter to Turner offering to purchase the Eastern Parcel (**R. 117**), which stated the following:

"Dear Mr. Turner:

Overland Development Company would like to purchase the 5.33 (+ or -) acres, Parcel No. 38019-0000, located on North Temple west of Redwood Road. The terms of the purchase are slightly different from the normal Earnest Money Agreement that is presented, however, we have found our approach to be very sound and profitable for both the landowner and the developer. Over the past 6 years we have developed over \$30 million of real estate using this method. Our proposal is as follows:

Overland Development Company would agree to purchase the property for an agreed price of \$850,000. Included in the purchase price is the assignment of the private club

license and purchase of the existing building, excluding inventory. A \$15,000 earnest money would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance being paid from the proceeds of the construction loan. Overland would then enter into a joint venture agreement with the landowner, within two weeks, to develop the property. It would be Overland's responsibility to pay for all the development and approval costs, including: a feasibility study; an appraisal; environmental studies; engineering drawings; architectural drawings; city approvals; and all other costs incident to the development of the property for the purpose of building a hotel and restaurant/club.

The landowner would agree to permit Overland Development Company, or another entity to which Overland assigns its interest, to represent to the City and to lending institutions that the land has been contributed to the partnership. This enables Overland to establish an equity position in the deal to comply with the lending institutions requirements.

Overland, by separate agreement, would agree to pay the landowner the agreed upon price, in cash, at the closing of the construction loan.

The benefit of a joint venture relationship of this type is that it enables the developer to use its limited resources on the development of the property instead of the purchase of the land. This also reduces some of the risk of the developer and gives assurance that the project can be consummated before the expiration of the agreement.

Under the conventional method of purchasing a property, the landowner, usually, would be required to accept an earnest money agreement which had enough contingencies in the agreement to insure that the developer could develop the property. In most cases, the length of time to close the deal would be about the same. It is estimated that the construction loan and all approvals can be obtained within 120 to 180 days, however, if additional time is needed the developer agrees to release the original \$15,000 earnest money to the landowner and to deposit an additional \$15,000 nonrefundable earnest money for an additional extension of 180 days. It is the intention of the developer to proceed with the development as rapidly as possible. Any delays in the process will likely be due to delays in obtaining City approvals.

Sincerely,  
Kenneth T. Holman  
President

What kind of "joint venture" did this agreement propose/require? One in which (a) Overland is "permit[ted] ... to represent to the City and lending institutions that the land has been contributed

to the partnership” so that Overland can mislead the lending institutions into thinking that Overland has “an equity position in the deal to comply with the lending institutions requirements,” but (2) in actuality “Overland, by separate agreement, would agree to pay the landowner the agreed upon price, in cash, at the closing of the construction loan.” This is not a real joint venture. It is a sham, one designed to allow Overland to commit fraud upon its proposed lending institutions -- which is probably the reason that Overland, in an incredible lack of candor to this Court, failed to quote this portion of the language of its April 6, 1990 letter/offer in the body of its brief (See Overland’s Brief, p. 7) **(A copy of the April 6, 1990 letter/offer is attached hereto as Exhibit A)**

4. The Brunettis reviewed this offer with Turner and were not interested in being in any real joint venture which required an actual contribution of their property. They wanted to be paid in full for their property. Turner assured the Brunettis that it was not a real joint venture, that there would be a firm “separate agreement” requiring Overland to pay them in full for their property at the closing. **R. 649.**

5. Based upon this construction of the offer, which is clear and unambiguous on its face to anyone with a legal, real estate and/or banking background, the Brunettis agreed to the offer subject to the following modification offered by way of an Addendum/Counteroffer:

“The terms and conditions of the letter dated April 6, 1990, are acceptable with the following changes:

- 1) The price shall be \$895,000
- 2) The initial contract term shall be for 120 days. Should additional time be required, the developer agrees to release the original \$15,000 earnest money to the seller and replace it with another \$15,000 non refundable earnest money for an additional 60 days.”

Overland accepted this modification on May 7, 1990. **R. 568 (A copy of this**

**Addendum/Counteroffer is attached hereto as Exhibit B).**

This agreement is simple. Overland agreed to purchase the Eastern Parcel for \$895,000 within 120 days. A \$15,000 earnest money deposit was to be made immediately into an independent trust account. During the 120 days, Overland represented that it would undertake normal development activities (apply for rezoning, get plans, arrange for financing, etc. -- all at its expense). If Overland “needed” or “required” (not “requested -- as Overland now in bad faith argues) more than 120 days to complete its efforts and to close on the purchase of the property, it was required to release the first \$15,000 to the Brunettis and to deposit an “additional \$15,000 nonrefundable earnest money” in trust. Thereafter Overland would have an additional 60 days to complete its activities preparatory to closing on the purchase, and to close on the purchase. If Overland did not close on the purchase of the Eastern Parcel within this next 60 days, Overland would be in breach of the agreement. The Brunettis elected as their remedy for this breach of contract to sue for the liquidated damages embodied in the two promised \$15,000 nonrefundable earnest money deposits **R. 965** (as alternative remedies, the Brunettis asserted quantum meruit -- i.e., that the benefit derived by Overland from the Brunettis from having the exclusive right to pursue development of the Brunettis’ property for the specified time period equals the sum of the two \$15,000 nonrefundable earnest monies; and equitable estoppel **R. 1-12**; which theories must be restored if this Court orders that the matter go back to trial on the contract issue).

6. Upon execution of the Addendum/Counteroffer, Overland delivered a check to Turner for \$15,000, together with a letter asking Turner to hold off for a while before depositing the check. **R. 173 and 504** Holman testified that he did not have the money to cover the check and was trying to get a loan to cover it. **R. 338-339** The check was never deposited. **R. 504**

7. The Brunettis testified that they were never shown the letter asking that the check not yet be deposited, and that if they had known that Overland did not have enough resources to cover a \$15,000 check, they would not have entered into an agreement to sell them their property for \$895,000. **R. 339-340.**

8. Holman and Turner testified that shortly thereafter they discussed a possible joint venture involving the development of both of the Brunettis' properties -- i.e., both the Eastern Parcel and the Western Parcel **R. 996, pp. 139-140 and 185-186.** Holman testified that he told Turner that Turner could participate in the development if he could help pull it together. **R. 996, pp. 185-186**

9. A proposed development plan for this larger property/project was prepared and submitted to Salt Lake City officials even though Overland and Turner had no agreement from the Brunettis as to the additional property and even though they were supposed to be trying to rezone and develop the Eastern Parcel for development. **R. 996, pp. 128-134 and 190-193** By so doing, Turner compromised himself and ceased to be exclusively loyal to the Brunettis. Thereafter Turner had a financial incentive to assist Overland at the possible expense of the Brunettis. Neither Turner nor Overland disclosed this conflict of interest to the Brunettis -- it was only discovered during the course of this litigation. **R. 339 and 996, p. 146**

10. Just before the expiration of the first 120 day time period to close, Overland wrote the Brunettis a letter (dated August 25, 1990), which sought a modification to the agreement. **R. 173.** Three paragraphs of this letter are of critical importance to the instant appeal. The first paragraph sets forth the nature of the agreement exactly as the Brunettis understood it:

“On May 9, 1990, you and your wife, Florence, accepted an offer I made to Purchase 5 (+ or

-) acres located at North Temple near Redwood Road for \$895,000. The agreement gave me 120 days to complete the sale. If I needed additional time I would be required to release the original \$15,000 Earnest Money deposit to you and pay an additional \$15,000 non-refundable Earnest Money for an additional 60 day extension. September 6, 1990 will be the 120th day since our Agreement was signed on May 9th.”

The letter then describes purported difficulties which Overland claimed to be experiencing in connection with the development, and which meant that Overland was not prepared to close within the first 120 days, and then continues:

“I would therefore request that our Agreement be extended for an additional 120 days for no additional Earnest Money deposit. If this is acceptable I will authorize Mr. Turner to hold my deposit until the rezoning has been approved at which time I will then authorize in writing its release to you.

...

In my original letter to you dated April 6, 1990, I indicated that Overland Development Company would enter into a Joint Venture Agreement with you to develop the property. The purpose of this Agreement was not to get you involved in our development but merely as a way of permitting Overland to represent that it was also an owner of the property for purposes of getting the property rezoned and for financing the restaurant and hotel developments. At this stage you have signed a letter to the City indicating that I can represent you in getting the property rezoned. There is no need to enter into a Joint Venture Agreement until we have rezoned the property and are preparing to get a construction loan on the hotel and/or restaurant(s). At that time it will be necessary to prepare the Joint Venture Agreement to obtain the financing and pay you for the land.”

**(A copy of the entire text of this letter is attached hereto as Exhibit C)**

The first quoted paragraph above is an exquisitely clear and concise a statement of what the Brunettis contend was the agreement of the parties. Nowhere therein does Overland state that the agreement was to be a real joint venture as Overland in bad faith now asserts. In the last quoted paragraph, Overland and Holman reiterate that the “joint venture” referred to in the April 6, 1990 letter/offer is not intended to be a real joint venture since it is “not to get you involved in our development but merely a way of permitting Overland to represent that it was also an owner of the property for purposes of getting the property rezoned and for financing ....” Also very

importantly, Overland admits that the Brunettis as of that date -- August 25, 1990 -- had not even been required to sign the sham “joint venture,” and would not be required to do so until after rezoning. By Overland’s own admission, the Brunettis were not in breach of the purchase agreement in any way as of the date of this letter, nor at any time before Overland unilaterally repudiated the agreement within days thereafter.

Finally, this letter is clearly an admission that Overland was not able to close within the first 120 days, such that more time to close was “needed” and “required.” Overland expressly asked for an extension of time to close -- admittedly in conjunction with a request that the terms of the agreement be modified -- but this letter nevertheless constituted a request for more time, just as Judge Peuler ruled.

Incredibly, Overland again demonstrates a tremendous lack of candor toward this Court by failing to quote in the body of its brief the language of the August 25, 1990 letter explaining that the “joint venture” was really just a sham to allow Overland to misrepresent to potential lenders that it had partial ownership in the property. (See Overland’s Brief, pp. 11-12)

11. The Brunettis declined Overland’s request to modify the agreement, and sent a letter demanding performance under the agreement. **R. 598. (A copy of this letter is attached hereto as Exhibit D).**

12. Holman, on behalf of Overland, and getting desperate, met with Turner and the two of them decided to meet with Joseph Brunetti and try and talk him into modifying the agreement to include a purchase of both the Eastern and Western Parcels. Turner and Holman met with Mr. Brunetti at his motel on North Temple, made their pitch, but Mr. Brunetti refused -- stating that if Overland could not perform on the prior agreement, how could Mr. Brunetti



reasonably expect that they could perform on the new proposal. **R. 997, pp. 261-271**

13. Despite knowing that Mr. Brunetti had flatly rejected this proposal, Holman, on behalf of Overland, wrote a letter to the Brunettis dated September 14, 1990, in which he claimed that Mr. Brunetti had agreed to a modification. **R. 997, pp. 261-271.**

14. Overland asked Turner to return to it the \$15,000 earnest money check. Despite the fact that Turner knew that the Brunettis -- his clients -- claimed that the money represented by that check was owed to them, Turner returned the check to Overland. **R. 174.**

15. Thereafter, Overland and Turner have maintained in bad faith that either there was no unconditional agreement to purchase the property by Overland, or that the Brunettis breached the agreement by refusing to enter into the joint venture, or that there never was any request for an extension of time to close, etc. **R. 562-599** This has forced the Brunettis to retain counsel and pursue this litigation to vindicate their rights under the agreement. The retention of counsel and the bringing of this litigation was a foreseeable result of the bad faith actions of Overland and Turner.

16. In support of its motion to dismiss the Brunettis' alter ego claims against Holman, Overland presented corporate records and tax returns to the trial court which disclosed that Overland was newly formed in the Spring of 1990, and that it did not have any appreciable assets or activities that year or before. **R. 270-317**

17. During discovery, Holman testified at his deposition that Overland was newly formed at the time the purchase agreement was entered into, that it had no appreciable assets, that it did not have enough cash to fund the first \$15,000 nonrefundable earnest money without borrowing the same, that he knew that it could not fulfill its obligations to purchase the Eastern

Parcel without arranging for a financial partner, and that at the time that he entered into the agreement on behalf of Overland, Overland did not have such a partner in mind. **R. 337-339**

18. These facts were raised and argued in connection with the summary judgment motions. **R. 337-339**

19. At or shortly after the commencement of trial, the Brunettis moved to amend their pleadings to allege additional instances of fraud uncovered in the foregoing testimony which had previously been submitted to the Court and argued in connection with the motions for summary judgment. This and other related motions were denied. **R. 544-551**

20. After trial, Overland moved for reconsideration and/or summary judgment on the issue of whether or not the Brunettis were entitled to recover judgment for the two \$15,000 earnest monies. Overland argued that the August 25, 1991 letter did not constitute a request for an extension of time to close, that Overland's obligation to close was conditioned upon the Brunettis' entering into the "joint venture" and upon a construction loan being obtained. **R. 605-606**

21. The Brunettis opposed the motion for reconsideration and/or summary judgment by arguing in part that:

"3. The purported 'joint venture' was merely a sham; language which the defendants improperly failed to cite to the Court from the agreement makes it clear that an actual joint venture was never intended (rather, the Brunettis were to be paid in full at the closing of the purchase)

a. As a sham, the purported sham joint venture was illegal and unenforceable as against the Brunettis.

b. Even if there had been a requirement for a 'joint venture', and even if such a requirement were not illegal and therefore unenforceable as against the Brunettis, the defendants never asked the Brunettis to enter into the sham joint venture, never drafted the sham joint venture agreement, and in their August 25, 1990 letter to the Brunettis stated that the sham joint venture was then not yet required -- and would not be required until 'after

rezoning'; so the 'joint venture requirement' was indefinitely waived by Overland.

c. Holman admitted that the Brunettis never told him that they would not enter into the sham joint venture agreement.

4. Further, the August 25, 1990 letter also clearly demonstrated that the defendants wanted to continue to work to develop the Brunettis' property and were asking for an additional 120 days to complete the purchase (albeit without paying any further earnest monies)." **R.645-646.**

The memorandum thereafter, in part, explained why what Overland proposed to do via the sham joint venture was a violation of Utah criminal law and that if the Court were to allow Overland to escape its obligations based thereon the Court would be rewarding criminal behavior. **R. 652-654**

(The Brunettis' Memorandum in Opposition to Defendants' Motion for Reconsideration, R. 644-665 addresses most of the arguments raised by Overland in this appeal, and is incorporated herein by reference in opposition to Overland's appeal.)

22. Judge Peuler heard argument from the parties on these issues, and affirmed the summary judgment and denied the motion for reconsideration without describing her reasons therefor. **R. 678** (This Court is free to consider any of the arguments made to support that decision, or even other arguments not made which support Judge Peuler's decision, and to affirm it based thereon.)

### **SUMMARY OF ARGUMENT**

There were no material issues of fact with respect to Overland's breach of the agreement. Contrary to Overland's assertions, the agreement was clear and unambiguous. Overland agreed to buy the property for \$895,000 -- plain and simple. There were no contingencies whatsoever. The agreement does not say, for example, that "if acceptable zoning is not received, Overland

does not have to purchase the property,” or, “if a construction loan is not obtained, Overland does not have to purchase the property.” Why? Because Overland’s purchase of the property was not contingent upon these or any other conditions precedent. Any experienced real estate attorney asked to review the agreement to determine if it contained any contingencies would be forced to conclude that there were absolutely no “outs” in that agreement.

Consequently, if Overland was not prepared to close on the purchase within the first 120 day time period, such that Overland literally “needed” or “required” additional time to fulfil its unconditional obligation to purchase the property, Overland was required to acquiesce in the release of the first \$15,000 earnest money to the Brunettis and to place “an additional \$15,000 nonrefundable earnest money” in trust. Why did Overland, in its initial April 6, 1990 letter/offer, use the phrase “an **additional \$15,000 nonrefundable** earnest money” if the first \$15,000 earnest money was not intended to be “nonrefundable” also? Of course the first \$15,000 was intended to be nonrefundable. Of course the first \$15,000 earnest money was required to be released/paid to the Brunettis if the sale had not yet closed by the expiration of the first 120 day time period.

Overland understood this full well as evidenced by Holman’s August 25, 1990 letter to the Brunettis. The first paragraph of Overland’s letter articulates perfectly the Brunettis’ construction of the agreement. (See Exhibit C) Then, after Overland and Holman spend several paragraphs “whining” about how much trouble Overland has allegedly experienced in trying to develop the property, Overland, in the first and second full paragraphs on the second page of that letter, states that:

“With so many issues still unanswered I do not intend to permit Mr. Turner to

release my \$15,000 check until these issues are resolved and the property is rezoned. Otherwise I could be left with a property that is improperly zoned for my purposes.”

I would therefore request that our Agreement be extended for an additional 120 days for no additional Earnest Money deposit. ...”

It is extremely telling that in this language Overland declares that it “does not want to” pay the required earnest monies, rather than claiming that it “is not required to” pay them due to some condition precedent which had gone unfulfilled. Overland earnestly importunes the Brunettis to agree to change the agreement. Why did Overland plead with the Brunettis to allow it to continue to work on developing the property without having to release the first \$15,000 earnest money or to deposit a second \$15,000 nonrefundable earnest money? Because absent such an agreement by the Brunettis, the original terms of the agreement would stand -- and Overland would be in default if it did not comply.

It is also extremely telling that in this same letter, Overland did not claim that the Brunettis had breached the agreement by failing to enter in to the “joint venture,” like Overland now so shrilly asserts. Rather, Overland expressly stated that the Brunettis were then not yet required to execute the purported “joint venture” agreement. This admission at the exact moment of truth -- just a few days before the expiration of the first 120 day time period to close - - should put an absolute end to Overland’s false and bad faith claim that the Brunettis breached the agreement by refusing to enter the “joint venture.” Overland’s claims in this regard are a recent fabrication by Overland and its counsel.

The claim that the parties did not have a “meeting of the minds” because the Brunettis testified at their deposition and at trial that they never intended to “enter into a joint venture,” is similarly feckless. Neither the Brunettis nor Overland ever contemplated that the “joint venture”

referred to in the purchase agreement would be a “real” joint venture -- nor that the Brunettis would be required to actually contribute their property to some sort of partnership. Rather, Overland expressly assured the Brunettis that there would be a separate agreement requiring that the property be paid for in cash at closing and that the “joint venture” was not meant to be a real joint venture (i.e. -- one that involved the Brunettis in the development), but merely a sham joint venture to permit Overland and Holman to falsely represent to prospective lenders that the property had been contributed to a partnership, when in fact it had not. Being elderly and relatively unsophisticated, the Brunettis did not understand that what Overland intended to do was illegal and criminal. So, they naively agreed to enter into this non-joint venture, so long as they were paid in cash for their property at closing. As such, there was a “meeting of the minds” as to this non-joint venture issue. Overland’s arguments to the contrary are again disingenuous and made in bad faith -- and support the Brunettis’ claim that Overland has breached its obligation of good faith and fair dealing and should be required to pay the Brunettis’ attorney’s fees herein as additional consequential damages.

When Overland refused to either close on the property or pay the two \$15,000 nonrefundable earnest money deposits, what remedies were available to the Brunettis for this breach of contract? The Brunettis elected to sue for the two \$15,000 nonrefundable earnest monies -- which from the agreement the Court could reasonably and correctly determine were what the parties felt constituted liquidated damages. Why would Overland in its April 6, 1990 letter/offer refer to the second \$15,000 earnest money deposit as “nonrefundable” if Overland did not understand and agree that this second \$15,000 was to be given to the Brunettis if Overland failed to close on the purchase after the expiration of the last 60 day time period? Overland’s

arguments in this regard are again nonsensical and disingenuous. “Nonrefundable” is not an ambiguous concept.

The Brunettis’ alternative theory of quantum meruit alleged that the two \$15,000 nonrefundable earnest monies represented the value of the right that Overland obtained to exclusively pursue development of the Brunettis’ property for six months (180 days), and that Overland would be unjustly enriched at the Brunettis’ expense if it were allowed to retain said benefit without paying the Brunettis therefor. If the Court reverses Judge Peuler, the Brunettis must be allowed to pursue this alternative theory of relief on remand. Alternatively, this Court can rule that the theory of quantum meruit also justifies the judgment which Judge Peuler granted to the Brunettis for the two \$15,000 nonrefundable earnest monies.

The relief granted by Judge Peuler to the Brunettis due to Overland’s admitted failure to either purchase the Eastern Parcel or to pay either of the two \$15,000 nonrefundable earnest monies was not only mandated by the clear and unambiguous language of the agreement, but any ambiguities were resolved by Judge Peuler after hearing full testimony at the trial and then affirming the judgment when Judge Peuler denied Overland’s motion for reconsideration. These matters have already been tried, and Overland has not even attempted to make any showing that there was not sufficient evidence at trial to support Judge Peuler’s decision after trial to affirm the summary judgment.

### **Cross-Appeal Arguments**

**Fraud -- Overland/Holman** --The issues of whether it was fraud for Overland to represent in the letter/offer that it had developed \$30 million in real estate, when Overland was a brand new corporation with no prior development experience and no assets; and whether it was

fraud to fail to disclose to the Brunettis that Overland had no development experience, had no assets, had no money to pay the initial \$15,000 nonrefundable earnest money deposit, and had no possibility of performing its obligations under the purchase agreement without obtaining a financial partner; were raised and actually litigated by the parties in connection with the cross-motions for summary judgment. It was improper therefore for Judge Peuler to deny the Brunettis' motion to amend to conform to the evidence and to refuse to allow the Brunettis to litigate these issues at the trial. Judge Peuler's ruling in this regard should be reversed and these issues remanded for trial.

**Breach of the Implied Covenant of Good Faith and Fair Dealing -- Overland and Turner** -- The evidence was without dispute that: (1) Overland never deposited the first \$15,000 nonrefundable earnest money in trust as required by the agreement and that Turner did not require them to do so, (2) although Holman did testify at trial that he made some efforts to try and develop the Eastern Parcel, sometime in June or July of 1990, Overland and Turner agreed to work together to develop both the Eastern and Western Parcels, and started development efforts thereon rather than on just the Eastern Parcel as required by the purchase agreement, (3) when the Brunettis refused to modify the agreement with respect to the payment of the nonrefundable earnest money deposits, Overland and Turner boldly approached the Brunettis with a proposal that the agreement be modified to include the purchase and development of both the Eastern and Western Parcels (and allow Overland to escape its obligation to pay the two required \$15,000 nonrefundable earnest monies), (4) when the Brunettis refused, Overland wrote a letter to the Brunettis brazenly thanking the Brunettis for modifying the agreement despite the fact that no such agreement had been reached, (5) despite having no justification for doing so, Overland



asked Turner to return the first \$15,000 earnest money check, which Turner did return, and (6) Overland and Turner falsely and in bad faith claimed thereafter that there were conditions precedent to Overland's obligation to close on the purchase of the Eastern Parcel and that the Brunettis breached the agreement by refusing to enter into the "joint venture" referred to in the agreement. With these facts not in dispute after the trial, it was an abuse of discretion for Judge Peuler to fail to find that Overland and Turner breached the implied covenant of good faith and fair dealing. This Court should grant the Brunettis summary judgment on this claim and direct that the Brunettis be awarded their attorney's fees as consequential damages arising from this failure to act in good faith.

**Breach of Fiduciary Duty -- Turner** -- Upon the same undisputed facts found at trial set forth in the previous section, it was an abuse of discretion for Judge Peuler to fail to find that Turner breached his fiduciary duty as the Brunettis' real estate agent. This Court should grant the Brunettis summary judgment on this issue and remand the matter to Judge Peuler to determine damages.

## **ARGUMENT**

### **I. With Respect to the Judgment Against Overland For the Two \$15,000 Nonrefundable Earnest Money Deposits, the Essential Facts Are Not in Dispute and the Agreement was Clear and Unambiguous**

#### **A. The Essential Facts, Both at the Time of the Granting of the Motion for Partial Summary Judgment, and After Trial When the Court Affirmed the Summary Judgment After Considering the Evidence, Were and Are Not in Dispute**

The following facts were not in dispute at the time that Judge Peuler heard arguments on the Brunettis' motion for partial summary judgment on the contract claim as to the following

matters:

- That Overland sent an offer to the Brunettis embodied in the April 6, 1990 letter which is attached hereto as Exhibit A. **Overland's Brief, p. 7, par. 3**
- That, after negotiation, the offer was modified by the Addendum/Counteroffer set forth in Exhibit B. **Overland's Brief, p. 10, par. 10**
- That Overland sent the Brunettis the August 25, 1990 letter attached hereto as Exhibit C. **Overland's Brief, p. 11, par. 13**
- That the Brunettis rejected the request to modify the agreement which Overland made in the August 25, 1990 letter, in the letter attached hereto as Exhibit D. **Overland's Brief, p. 12, par. 14**
- That Overland did not close on the purchase of the Eastern Parcel. **Overland's Brief, p. 13, par. 17**
- That Overland did not pay the Brunettis either of the two \$15,000 nonrefundable earnest monies referred to in Exhibits A and B, which exhibits form the agreement of the parties. **Overland's Brief, p. 13, par. 17**

These factual matters were not disputed by any testimony adduced at the trial, nor are they disputed at this time.

**B. If The Parties Agreement Was Clear and Unambiguous, No Parol Evidence Is Allowed to Contradict the Clear Meaning and Intent of the Agreement**

If the parties' agreement embodied in the Overland letter/offer in Exhibit A, as modified by the Addendum/Counteroffer in Exhibit B, is clear and unambiguous, no parol evidence is allowed on the issue of what the terms of the parties' agreement were. Hall v. Process Instruments and Control, Inc., 866 P. 2d 604 (Utah App. 1993), *aff'd* 890 P.2d 1025 (Utah 1995)

Whether the agreement is clear and unambiguous is determined by the trial judge. If the trial judge determines that the agreement is clear and unambiguous, the trial judge can construe the agreement and grant such relief as that construction, in light of the other undisputed facts,

warrants. **Id.**

At the time that Judge Peuler considered the cross-motions for summary judgment, she ruled that the parties' agreement was clear and unambiguous, and that based upon her construction of the language of that agreement, and in light of the foregoing undisputed facts, the Brunettis are entitled to judgment in the form of the sum of the two \$15,000 nonrefundable earnest money deposits. **R. 423** After trial at which evidence was heard as to the nature of the parties' agreement, and the parties' conduct in fulfilling or not fulfilling said agreement, Judge Peuler reaffirmed her prior ruling. **R. 678** This Court's review of the parties' agreement should lead it to conclude that Judge Peuler was correct in her rulings as a matter of law. Even if this Court determines that there might have been some ambiguities, Judge Peuler, as the trier of fact, heard evidence on these matters at trial and affirmed the judgment in light thereof. This Court cannot reverse the denial of the motion to reconsider, and the confirmation of the earlier summary judgment in favor of the Brunettis, without finding that Judge Peuler did not hear sufficient evidence at trial upon which she could reasonably conclude that her prior rulings were correct.

- C. The Agreement Required Overland to do That Which It Did Not Do -- Either Purchase the Property or Pay the Two \$15,000 Nonrefundable Earnest Money Deposits to the Brunettis**
  - 1. The Agreement Was An Unconditional Agreement to Purchase The Eastern Parcel -- There Were No Contingencies or Legal Excuses for Overland to Fail to Perform**
    - a. There were no conditions precedent to Overland's obligation to purchase the property**

The language of the agreement contains no contingencies or "outs." The agreement says

that Overland will purchase the property for \$895,000 within 120 days, or, if “needed” or “required”, within an extra 60 days. **R. 117** The agreement states that Overland will take certain steps to further its development and purchase of the property (such as rezoning, environmental investigations, etc.)(**See Exhibit A**), but under no stretch of the imagination does it state that if any of these steps or not successfully completed, Overland is excused from its obligation to purchase the property. The agreement refers to a construction loan, but only in the context of clarifying that the proposed “joint venture” was not to be a real joint venture, but a sham, or non-joint venture, and to assure the Brunettis that they will be paid in full for their property at the closing. This language referring to a construction loan cannot logically be construed to provide that Overland is not required to purchase the property if a construction loan is not obtained.

Overland, of course, attempts to find contingencies in every nook and cranny of the agreement, but its arguments strain logic to the breaking point. An example of Overland’s wild and totally illogical arguments is found in Overland’s assertion that: “The Brunettis were to be involved in developing the Property to the extent they would contribute the land up front in exchange for a payment if a construction loan was obtained by Overland.” (**Overland’s Brief, p. 29**) Does Overland seriously expect this Court to believe that the Brunettis agreed to give Overland an interest in their property up front, but that Overland would not have to pay the Brunettis anything for that interest unless Overland was successful in obtaining a construction loan? This illogical construction would allow Overland to obtain an interest in the Brunettis’ property with the possibility of never having to pay the Brunettis anything for that interest. This argument is not only belied by the clear language of the agreement (i.e., that the joint venture was for appearance and misrepresentation-to-proposed-lenders purposes only, and that the

Brunettis would unconditionally be paid for their property at closing), but is ludicrous.

Nevertheless, Overland makes this argument, and the other disingenuous arguments in its brief, in support of its appeal.

After the trial, Judge Peuler was well within her rights as the trier of fact to compare Overland's protestations that there were contingencies with the language of not only the agreement, but also the August 25, 1990 Overland letter to the Brunettis, as well as the Brunettis' testimony as to what they understood the agreements to provide, and to resolve any factual issues in favor of the Brunettis' and her prior construction of the agreement. This she did, and she cannot be reversed unless this Court finds that her weighing of the facts, after trial in connection with the motion for reconsideration/summary judgment, was an abuse of discretion and/or that the facts at trial were insufficient to support her ruling such that it was clearly erroneous. Stewart v. State By and Through Deland, 830 P. 2d 306 (Utah App. 1992) The summary judgment, either as a matter of law, or after Judge Peuler heard the evidence and resolved the factual issues in the Brunettis' favor, was legally correct and not factually clearly erroneous and should be affirmed by this Court.

- b. Overland's "joint venture" arguments are without merit**
  - (i) The agreement is clear and unambiguous as to what was intended by the "joint venture"**

As indicated in the factual statement and summary of argument sections above, Overland's April 6, 1990 letter/offer (See **Exhibit A**) makes it clear, when one reviews the portions of the agreement that Overland failed to quote to this Court in the body of its brief, that the proposed "joint venture" was not to be a real joint venture because its purpose was to allow

Overland to misrepresent to lenders that it had an equity interest in the Brunettis' land, when in fact, pursuant to the "separate agreement" required by the agreement, Overland was unconditionally required to purchase and pay for the property at closing. This Court should consider sanctioning Overland and its counsel for the serious lack of candor displayed by its failure to quote in the body of its brief those portions of the agreement that make it crystal clear that the proposed "joint venture" was not intended to be a real joint venture, but rather a sham, or non-joint venture. Overland engaged in the same lack of candor in its memorandum in support of its motion for reconsideration/summary judgment. **R. 644-665**

**(ii) The August 25, 1990 letter from Holman to the Brunettis is clear and unambiguous as to what was intended by the "joint venture"**

The August 25, 1990 Overland letter to the Brunettis again assured the Brunettis that "[t]he purpose of this [joint venture] Agreement was not to get you involved in our development but merely as a way of permitting Overland to represent that it was also an owner of the property for ... financing the restaurant and hotel developments." See **Exhibit C**. The proposed "joint venture" was clearly not intended to be a real joint venture which "involved [the Brunettis] in [Overland's] development. Rather, it was "merely .. a way of permitting Overland to [mis]represent that it was also an owner of the property ... [to prospective lenders]."

**(iii) The August 25, 1990 letter is a clear admission that the Brunettis had not violated the "joint venture" provision of the agreement and that those provisions had as of that point in time been indefinitely waived by Overland**

The August 25, 1990 Overland letter continues on with respect to the proposed "joint

venture” stating: “At this stage you have signed a letter to the City indicating that I can represent you in getting the property rezoned. There is no need to enter into a Joint Venture Agreement until we have rezoned the property and are preparing to get a construction loan on the hotel and/or restaurant....” **(Exhibit C)** This is an unequivocal admission that the Brunettis had fulfilled their obligations with respect to the “joint venture” as of August 25, 1990, and that the Brunettis were not required to do anything further in that regard until after Overland rezoned the property. This latter part constitutes an indefinite waiver of the “joint venture” requirements of the agreement. In light of these admissions and this clear waiver, it is incredible that Overland has the temerity to continue to argue in this appeal that the Brunettis breached the “joint venture” requirements of the agreement.

Judge Peuler was correct originally when she rejected at summary judgment Overland’s then nascent argument that the “joint venture” portions of the agreement provided Overland with a possible excuse for failing to close on the purchase of the property and failing to pay either of the two \$15,000 nonrefundable earnest monies. But, after the trial, the evidentiary admission found in this August 25, 1990 letter is unquestionably sufficient to support Judge Peuler’s decision to affirm the granting of the prior summary judgment and to reject Overland’s feckless “joint venture”-related arguments.

- (iv) Even if the Brunettis had violated the “joint venture” provisions of the agreement, those provisions are illegal and unenforceable and cannot be interposed by Overland to defeat its obligations otherwise under the agreement**

Holman testified at trial at length about his extensive experience as a real estate developer. **R. 997, p. 305** Prior to proposing the transaction to the Brunettis in the April 6, 1990

letter/offer, Holman and Overland apparently became aware that lenders would not loan 100% of the monies necessary to purchase land and to build improvements thereon. Holman/Overland knew that lenders almost always required developers to demonstrate that they have “equity” in any proposed development project. This “equity” often takes the form of actual cash contributions toward the development of the project (sometimes required to be paid into escrow prior to closing, or to be demonstrated by bank deposits) to pay for the required portion (often 20% to 30%) of the total land purchase and construction costs. However a developer can often avoid demonstrating or paying additional cash (above and beyond the proposed loan proceeds) toward a project’s costs if the developer can show that it has already paid for or otherwise acquired (i.e. through a partner’s contribution of) the land for the proposed development. If a developer can make such a showing of equity/land contribution, the developer can claim that he is not seeking to use any portion of the construction loan proceeds to purchase the land for the development.

Holman and Overland testified that they had no cash to contribute to the project (they did not even have enough cash to pay the two \$15,000 nonrefundable earnest money deposits). **R. 337-368** So, to get around the lenders’ “equity” requirements, Holman and Overland asked the Brunettis to agree to make it look like the property had been “contributed” to the development by entering into a sham joint venture agreement. **(Exhibit A)** It was unquestionably a sham because there was going to be a separate, under-the-table, agreement requiring Overland to pay cash for the property at closing. But, Overland would be able to submit the phony joint venture agreement to the prospective lenders and falsely claim that Overland was not going to use any of the construction loan proceeds to purchase the land.



Not only would this constitute civil fraud upon any lending institution that agreed to loan monies to Overland based upon such falsehoods, but it would constitute theft under Utah's criminal code found at U.C.A. 76-6-401 et seq. (a second degree felony). Any written loan application which failed to disclose the secret agreement to pay the Brunettis in full at closing could constitute a "written false statement" under U.C.A. 76-8-504 (See copies of these code sections attached hereto as Exhibit E).

Since the proposed sham joint venture would be illegal if carried out, even if the Overland had not waived this requirement of the agreement in the August 25, 1990 letter, Overland is legally estopped from asserting the Brunettis' purported failure to go through with this illegal scheme as a defense to the Brunettis' contract claim. For this Court to hold otherwise would in effect reward Holman and Overland for their illegal and criminal activities and violate public policy.

The Brunettis made the foregoing argument to Judge Peuler after the trial in connection with Overland's motion for reconsideration/summary judgment. **R. 652-654.** Judge Peuler's affirmation of the summary judgment, and rejection of Overland's "joint venture" related challenges, was correct and not clearly erroneous and should be affirmed for these same reasons.

**2. The Agreement Required Overland to Pay the Two \$15,000 Nonrefundable Earnest Money Deposits to the Brunettis If Overland Did Not Purchase the Eastern Parcel Within the Specified Time Periods**

- a. Since the obligation to purchase the Eastern Parcel was unconditional, the words "needed" and "required" in the letter/offer and the Addendum/Counteroffer do not mean "request" or "desire", but are literal**

Once the conclusion is reached that the parties' agreement constituted an unconditional

agreement by Overland to purchase the Eastern Parcel, it becomes obvious that the words “needed” (in the April 6, 1990 letter/offer) and “required” (in the Addendum/Counteroffer) do not mean “request” as urged by Overland. “Request” would only make sense if Overland had the right to determine that it no longer wished to pursue the purchase of the Brunettis’ property. While the agreement would permit Overland to cease development efforts, it does not allow Overland to determine that it no longer desires to purchase the property with impunity.

Since the obligation to purchase the property was unconditional, the concept of “need[ing]” or “requir[ing]” more time to close on that purchase makes sense -- if for any reason Overland cannot or does not close on the purchase of the property within the first 120 days, such that it literally “needs” or “requires” more time to close, it must release the first \$15,000 nonrefundable earnest money deposit and deposit a second \$15,000 nonrefundable earnest money deposit in trust. If Overland does so, it will not at that point in time be in default under the agreement for failing to close on the purchase of the property.

- b. If Overland did not close on the purchase of the Eastern Parcel within the first 120 time period, regardless of the reason, such that it literally “needed” or “required” additional time to fulfil its obligations to close the purchase of the Eastern Parcel, the Agreement required Overland to release the first \$15,000 nonrefundable earnest money deposit, and place “an additional \$15,000 nonrefundable earnest money deposit in trust**

Overland argues that since it decided not to pursue the purchase of the Eastern Parcel from the Brunettis prior to the expiration of the initial 120-day time period to close, Overland somehow was no longer required to pay the first \$15,000 nonrefundable earnest money to the Brunettis, and was also not required to pay into trust the second \$15,000 nonrefundable earnest

money. This is illogical. Overland's argument suggests that if Overland breached its agreement to purchase the property through repudiation before the expiration of the first 120 days, somehow this breach relieves Overland of its remaining obligations under the agreement. This argument is contrary to the unambiguous language of the agreement which provides that if Overland is not able to close on the purchase of the property within 120 days, such that it literally needs additional time to fulfill its obligations to purchase the property, Overland must release the first \$15,000 nonrefundable earnest money deposit to the Brunettis, and must deposit the second \$15,000 nonrefundable earnest money deposit in trust.

Overland similarly cannot get out of these obligations simply by failing to "request" additional time to close. Nowhere in the agreement does it state that if Overland does not "request" additional time to close, it does not have to close on the property and does not have to pay the two nonrefundable earnest monies (though, as argued above and as found by Judge Peuler, Overland did communicate to the Brunettis its desire to continue the project and Overland did request more time to close. **(See the August 25, 1990 letter, Exhibit C)**

That the first \$15,000 earnest money was intended to be nonrefundable and payable to the Brunettis at the end of the initial 120 day time period to close is also found in the language of Overland's April 6, 1990 letter/offer (**Exhibit A**) when it refers to the second \$15,000 earnest money deposit as "an additional \$15,000 nonrefundable earnest money." The word "additional" modifies the entire phrase "\$15,000 nonrefundable earnest money," not just the "\$15,000" portion thereof. As such, the agreement makes it clear that the first \$15,000 earnest money was also to be nonrefundable and payable to the Brunettis without any conditions upon the expiration of the first 120 days if the purchase had not yet closed.

- c. If Overland still did not close on the purchase of the Eastern parcel within the remaining 60 day time period, the second \$15,000 nonrefundable earnest money was to be released to the Brunettis -- because it was “nonrefundable”**

Overland admits that it did not close on the purchase of the Eastern Parcel, and that it did not pay the Brunettis either of the two \$15,000 nonrefundable earnest monies. Overland attempts to excuse this failure by again arguing that unless Overland “requested” additional time to close the purchase, Overland was not required to deposit the second “15,000 nonrefundable earnest money.” For the reasons set forth in the previous section, this argument is without merit. Judge Peuler correctly found that if Overland did not close on the purchase of the property within the first 120 days, the obligation to release the first \$15,000 nonrefundable deposit to the Brunettis, and to deposit the second \$15,000 nonrefundable earnest money into trust, was triggered.

Since Overland did not close on the purchase of the property within the second 60 day time period, Overland was required to deliver the second \$15,000 nonrefundable earnest money to the Brunettis. The concept of “nonrefundable” with respect to this second \$15,000 earnest money deposit is not ambiguous. “Nonrefundable” means that if there is no closing, the funds are to be paid to the seller and not back to the buyer. Judge Peuler was correct when she determined that the second \$15,000 nonrefundable deposit became due and payable to the Brunettis at the expiration of the second 60 day time period, or on or before November 7, 1990, and the judgment in favor of the Brunettis for both the \$15,000 earnest monies which were not paid to them should be affirmed.

For the foregoing reasons, Overland’s appeal should be rejected and Judge Peuler’s granting of judgment to the Brunettis for the sum of the two \$15,000 nonrefundable earnest

monies should be affirmed.

## **II. The Brunettis' Cross-Appeal**

### **A. Under URCP, Rule 15(b), Judge Peuler Was Required to Allow An Amendment of the Pleadings to Include Issues Which Had Been Tried By Express or Implied Consent of the Parties**

URCP, Rule 15(b), relating to amendments to conform to the evidence, provides that:

“When issues not raised in the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment.”

If the issues of fraud which the Brunettis sought to litigate at trial had been previously tried by the express or implied consent of the parties in connection with the earlier motions for summary judgment, the foregoing rule required that Judge Peuler treat them “in all respects as if they had been raised in the pleadings.”

#### **1. The Issues of Fraud Which the Brunettis Sought to Raise Had Been Litigated In Connection With the Motions for Summary Judgment**

The issues of whether it was fraud for Overland to represent in the April 6, 1990 letter/offer (**Exhibit A**) that it had developed \$30 million in real estate, when Overland was a brand new corporation with no prior development experience and no assets; and whether it was fraud to fail to disclose to the Brunettis that Overland had no development experience, had no assets, had no money to pay the initial \$15,000 nonrefundable earnest money deposit, and had no possibility of performing its obligations under the purchase agreement without obtaining a financial partner; were raised and actually litigated by the parties in connection with the cross-motions for summary judgment. **R. 337-339**

The Brunettis made a formal motion to amend to conform to this evidence, but Judge Peuler denied the same and refused to allow the Brunettis to pursue said issues at trial. **R. 554-551** This ruling was incorrect as a matter of law and should be reversed and these issues remanded for trial.

**2. The Issues of Fraud Were Also Litigated In Connection With Other Matters During the Course of the Trial**

In connection with other issues, the facts which supported these additional allegations of fraud were introduced at trial, and the Brunettis made additional motions to amend to conform to this evidence. **R. 231-237** Again, Judge Peuler denied these motions, which denial was incorrect as a matter of law and should be reversed.

**B. Substantial Evidence of Overland's Breach of the Implied Covenant of Good Faith and Fair Dealing Was Without Dispute and Sufficient That It Was Clearly Erroneous for Judge Peuler to Find That There Was no Such Breach**

The evidence at trial was without dispute that: (1) Overland never deposited the first \$15,000 nonrefundable earnest money in trust as required by the agreement and that Turner did not require them to do so, **R. 173 and 594, Overland's Brief, p. 10, par. 11** (2) although Holman did testify at trial that he made some efforts to try and develop the Eastern Parcel, sometime in June or July of 1990, Overland and Turner agreed to work together to develop both the Eastern and Western Parcels, and started development efforts thereon rather than on just the Eastern Parcel as required by the purchase agreement, **R. 996, pp. 139-140 and 185-186** (3) when the Brunettis refused to modify the agreement with respect to the payment of the nonrefundable earnest money deposits, Overland and Turner boldly approached the Brunettis with a proposal that the agreement be modified to include the purchase and development of both

the Eastern and Western Parcels (and to allow Overland to escape its obligation to pay the two required \$15,000 nonrefundable earnest monies), **R. 997, pp. 261-271 (4)** when the Brunettis refused, Overland wrote a letter to the Brunettis brazenly thanking the Brunettis for modifying the agreement despite the fact that no such agreement had been reached, **R. 997, pp. 261-271 (5)** despite having no justification for doing so, Overland asked Turner to return the first \$15,000 earnest money check, which Turner did return, **R. 174** and (6) Overland and Turner have falsely and in bad faith claimed that there were conditions precedent to Overland's obligation to close on the purchase of the Eastern Parcel and that the Brunettis breached the agreement by refusing to enter into the "joint venture" referred to in the agreement. **R. 562-599**

The covenant of good faith and fair dealing requires parties to act in good faith to effectuate the terms of the contract. Olympus Hills Center, Ltd. v. Smith's Food and Drug Centers, Inc., 889 P. 2d 445, 450-451 (Utah App. 1994) With these facts not in dispute after the trial, it was clearly erroneous for Judge Peuler to fail to find that Overland and Turner breached the implied covenant of good faith and fair dealing. This Court should grant the Brunettis summary judgment on this claim and direct that the Brunettis be awarded their attorney's fees as consequential damages arising from this failure to act in good faith.

**C. Substantial Evidence of Turner's Breach of the Implied Covenant of Good Faith and Fair Dealing Was Without Dispute and Sufficient That It Was Clearly Erroneous for Judge Peuler to Find That There Was no Such Breach by Turner**

For the reasons set forth in the previous section, it was clearly erroneous for Judge Peuler to find that Turner did not breach the implied covenant of good faith and fair dealing. This Court should grant the Brunettis summary judgment on this claim and direct that the Brunettis be

awarded damages arising from said breach, including their attorney's fees as consequential damages.

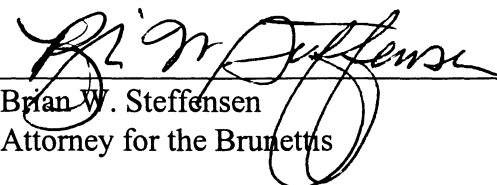
**D. The Evidence of Turner's Breach of Fiduciary Duty Was Sufficiently Without Dispute That It Was Clearly Erroneous for Judge Peuler to Find That There Was no Breach of Fiduciary Duty by Turner**

A real estate agent owes his clients a fiduciary duty to disclose all material facts and to act solely in the best interests of his clients. Hopkins v. Wardley Corporation, 611 P. 2d 1204, 1206 (Utah 1980) For the reasons and based upon the facts set forth in the previous two sections, it was clearly erroneous for Judge Peuler to find that Turner did not breach his fiduciary duty to the Brunettis. This Court should grant the Brunettis summary judgment on this claim and direct that the Brunettis be awarded damages arising from said breach, including their attorney's fees as consequential damages.

**CONCLUSION**

For the foregoing reasons, the Brunettis respectfully request that the Court affirm Judge Peuler's judgment against Overland for the sum of the two \$15,000 nonrefundable earnest monies, but, pursuant to the cross-appeal, reverse Judge Peuler's refusal to allow the Brunettis to litigate the full breadth of Overland's fraud, reverse Judge Peuler's finding that Overland and Turner did not violate their obligation to deal fairly and in good faith with the Brunettis, and to reverse Judge Peuler's finding that Turner did not breach his fiduciary duty to the Brunettis.

Respectfully submitted this 14th day of October, 1997.

  
\_\_\_\_\_  
Brian W. Steffensen  
Attorney for the Brunettis

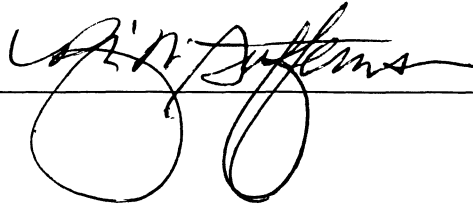


**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of October, 1997, I caused four copies of foregoing Brief to be \_\_\_xxx\_\_\_ mailed, postage prepaid; addressed to:

Cohne Rappaport & Segal  
Attn: Richard Rappaport  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
FAX 355-1813

Gilbert R. Turner  
P.O. Box 1804  
Salt Lake City, Utah 84060

A handwritten signature in black ink, appearing to read "Gilbert R. Turner", is written over a horizontal line.



April 6, 1990

Gil Turner  
Turner Co. Real Estate  
P.O. Box 2264  
Salt Lake City, Utah 84110

Dear Mr. Turner:

Overland Development Company would like to purchase the 5.33 (+ or -) acres, Parcel No. 38019-0000, located on North Temple west of Redwood Road. The terms of the purchase are slightly different from the normal Earnest Money Agreement that is presented, however, we have found our approach to be very sound and profitable for both the landowner and the developer. Over the past 6 years we have developed over \$30 million of real estate using this method. Our proposal is as follows:

Overland Development Company would agree to purchase the property for an agreed price of \$850,000. Included in the purchase price is the assignment of the private club license and purchase of the existing building, excluding any inventory. A \$15,000 earnest money would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance being paid from the proceeds of the construction loan. Overland would then enter into a joint venture agreement with the landowner, within two weeks, to develop the property. It would be Overland's responsibility to pay for all the development and approval costs, including: a feasibility study; an appraisal; environmental studies; engineering drawings; architectural drawings; city approvals; and all other costs incident to the development of the property for the purpose of building a hotel and restaurant/club.

The landowner would agree to permit Overland Development Company, or another entity to which Overland assigns its interest, to represent to the City and to lending institutions that the land has been contributed to the partnership. This enables Overland to establish an equity position in the deal to comply with the lending institutions requirements.

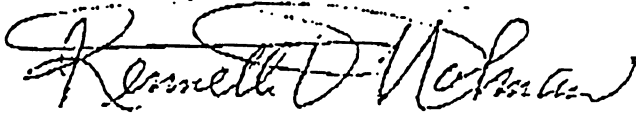
Overland, by separate agreement, would agree to pay the landowner the agreed upon price, in cash, at the closing of the construction loan.

The benefit of a joint venture relationship of this type is that it enables the developer to use it's limited resources on the development of the property instead of the purchase of the land. This also reduces some of the risk of the developer and gives assurance that the project can be consummated before the expiration of the agreement.

0015 7

Under the conventional method of purchasing a property, the landowner, usually, would be required to accept an earnest money agreement which had enough contingencies in the agreement to insure that the developer could develop the property. In most cases, the length of time to close the deal would be about the same. It is estimated that the construction loan and all approvals can be obtained within 120 to 180 days, however, if additional time is needed the developer agrees to release the original \$15,000 earnest money to the landowner and to deposit an additional \$15,000 nonrefundable earnest money for an additional extension of 180 days. It is the intention of the developer to proceed with the development as rapidly as possible. Any delays in the process will likely be due to delays in obtaining City approvals.

Sincerely,



Kenneth T. Holman  
President

Accepted:

✓

✓

Date: \_\_\_\_\_

THE ACCEPTANCE OF THIS PROPOSAL BY SELLER  
IS SUBJECT TO THOSE CHANGES IN THE ATTACHED  
COUNTER OFFER DATED APRIL 25, 1990.

610588

ADDENDUM/COUNTER OFF  
TO EARNEST MONEY SALES AGR

This ADDENDUM/COUNTER OFFER constitutes: ( ☒ ) a COUNTER OFFER ( ) an ADDENDUM to that EARNEST MONEY  
SALES AGREEMENT (THE AGREEMENT) dated the 6th day of APRIL 19 90, between  
OVERLAND Dev. Co. as buyer(s), and Joseph R. & FLORENCE W. BRUNETTI as seller(s).

covering real property described as follows:

5.33 (+ or -) Acres, Tax Assessors PARCEL NO.  
08-34-381-019

The following terms are hereby incorporated as part of THE AGREEMENT:

THE TERMS AND CONDITIONS OF THE LETTER DATED  
APRIL 6, 1990, ARE ACCEPTABLE WITH THE  
FOLLOWING CHANGES:

- 1) THE PRICE SHALL BE 895,000  
2) THE INITIAL CONTRACT TERM SHALL BE  
FOR 120 DAYS. SHOULD ADDITIONAL TIME  
BE REQUIRED, THE DEVELOPER AGREES TO  
RELEASE THE ORIGINAL \$15,000 EARNEST  
MONEY TO SELLER AND REPLACE IT  
WITH ANOTHER \$15,000 NON REFUNDABLE  
EARNEST MONEY FOR AN ADDITIONAL 60 DAYS.

All other terms of THE AGREEMENT shall remain the same ( ) Seller ( ☒ ) Buyer shall have until 5:00 (A.M. ☒ P.M.)  
4-30 19 90 to accept the terms specified above Unless so accepted this Addendum shall lapse.

Date 4-26-90  
Time 9:50 (A.M. ☐ P.M. ☒ )

Signature of ( ☒ ) Seller ( ) Buyer  
Joseph R. Brunetti  
Florence W. Brunetti

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One

( ☒ ) I hereby ACCEPT the foregoing on the terms specified above.

( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum.

Principal and Broker for Overland Right & Realty, Inc.  
( ) I hereby reject the foregoing (Initials) 5/7/90 5:00 pm.

DOCUMENT RECEIPT

( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures.

Signature of Buyer(s) Date Florence W. Brunetti 5-9-90  
Signature of Seller(s) Date Joseph R. Brunetti 5-9-90

( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on \_\_\_\_\_

19\_\_\_\_ by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer.

Sent by \_\_\_\_\_

This form has been approved by the Utah Real Estate Commission

EXHIBIT B



August 25, 1990

Joseph R. Brunetti

Dear Mr. Brunetti:

On May 9, 1990 you and your wife, Florence, accepted an offer I made to purchase 5 (+ or -) acres located on North Temple near Redwood Road for \$895,000. The Agreement gave me 120 days to complete the sale. If I needed additional time I would be required to release the original \$15,000 Earnest Money deposit to you and pay an additional \$15,000 non-refundable Earnest Money for an additional 60 day extension. September 6, 1990 will be the 120th day since our Agreement was signed on May 9th.

So far I have spent considerable time and money trying to get Salt Lake City to rezone the property from R-6 to C-1. Gil Turner and I have met with members of the Planning Commission on four separate occasions. Two of those meetings have been with the Development Coordination Committee. Because the Committee will not rezone a property without a specific development project in mind I have had my architect design a conceptual site showing two restaurant pads and a hotel. After meeting with the Development Coordination Committee for the second time they ask me to completely revise the conceptual plan. They wanted wider streets for Duder and Gertie. They wanted to eliminate any access into the property from Redwood Road to Gertie and they wanted Duder to dead end instead of tying into New Star Road. Additionally they requested changes in the height of buildings and in the parking layout and landscaping schemes.

Besides the time delays we have experienced in dealing with the City there have been some other major issues to resolve. In order to enter the property, with the elimination of access from Gertie, we need a left hand turn lane to replace the island on North Temple. Although the State has expressed a willingness to provide a left hand turn lane into the property I will need to have an engineer design the turn lane and submit it to the Utah Department of Transportation for approval.

There are other issues that still need to be addressed before we can finalize our Agreement. It is likely that there is soil contamination on the east side of your property because of its proximity to the Cash Saver

gas station. I need to have a soil test run to determine if this is the case. If it is I still intend to buy the property at the agreed price but it will require that I move one of the restaurant pad sites and maybe redesign the hotel layout.

With so many issues still unanswered I do not intend to permit Mr. Turner to release my \$15,000 check until these issues are resolved and the property is rezoned. Otherwise I could be left with a property that is improperly zoned for my purposes.

I would therefore request that our Agreement be extended for an additional 120 days for no additional Earnest Money deposit. If this is acceptable I will authorize Mr. Turner to hold my deposit until the rezoning has been approved at which time I will then authorize in writing its release to you.

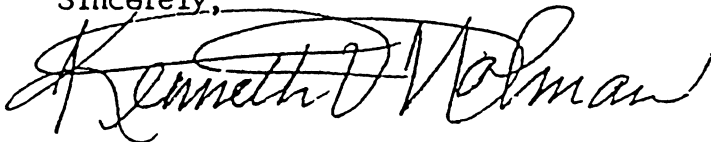
I appreciate your patience and apologize for the delay. I can't believe how incredibly slow the City is rezoning property. Regardless of the City's delays I am moving forward as fast as I can on all the other issues. It appears that I have tentatively lined up an additional equity partner to joint venture the development of the hotel. I have also received verbal approval from Hampton Inn regarding the acquisition of the Franchise rights for the location. Mr. Turner and I have also secured two very strong national restaurant chains who are now going through their review and approval process.

I apologize for the delay. A lot of the blame rests with the City and their inability to move faster on rezoning the property. I believe that even if another developer were found to replace me that they would have to go through the same process and frustrations of rezoning the property before they would agree to buy it.

In my original letter to you dated April 6, 1990, I indicated that Overland Development Company would enter into a Joint Venture Agreement with you to develop the property. The purpose of this Agreement was not to get you involved in our development but merely as a way of permitting Overland to represent that it was also an owner of the property for purposes of getting the property rezoned and for financing the restaurant and hotel developments. At this stage you have signed a letter to the City indicating that I can represent you in getting the property rezoned. There is no need to enter into a Joint Venture Agreement until we have rezoned the property and are preparing to get a construction loan on the hotel and/or restaurant/s. At that time it will be necessary to prepare the Joint Venture Agreement to obtain the financing and pay you for the land.

If you and Mrs. Brunetti agree to provide the extension requested above and to permit me to continue forward with the rezoning and construction financing as has been outlined above please sign the acceptance below.

Sincerely,



Kenneth T. Holman  
President

Accepted:

\_\_\_\_\_  
Joseph R. Brunetti

\_\_\_\_\_  
Florence W. Brunetti

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

000527

JOSEPH R. BRUNETTI  
1216 WEST 900 SOUTH  
SALT LAKE CITY, UTAH

Gil Turner  
Turner Co. Real Estate  
P.O. Box 2264  
Salt Lake City, Utah 84110

Kenneth T. Holman  
Overland Development Company  
230 East Broadway  
Salt Lake City, Utah 84111

Re: Payment of Earnest Money Fees

Gentlemen:

Florence and I have reviewed the April 6, 1990, letter from Mr. Holman and the Addendum proposed by us on April 26, 1990, and accepted by Mr. Holman on May 7, 1990. These indicate that the \$15,000 on deposit with Mr. Turner was to be turned over to us if Mr. Holman did not buy the property on or before September 4, 1990. Also, Mr. Holman is required to deposit the second \$15,000 nonrefundable payment. We cannot see any conditions on either of these payments. So, we do not have to agree to the terms of Mr. Holman's August 25, 1990, letter. It does not matter why Mr. Holman is not ready to buy our property. The agreement simply says that if he hasn't done so by September 4, 1990, Mr. Turner must turn over the first \$15,000 and Mr. Holman must immediately deposit a second \$15,000 with Mr. Turner. If Mr. Holman then does not buy our property within 60 days of September 4, 1990, the second \$15,000 must be immediately turned over to us and the deal is off.

Florence and I must insist that the required payments be paid on or before Monday, September 10, 1990, or else we will pursue our legal rights.

Please do not call to try and change our minds. We won't change our minds, and Florence will not let you talk to me. You have tied up our property for the past 4 months. Just pay us the money that you agreed to.

Yours truly,

Joseph R. Brunetti  
Joseph R. Brunetti

Florence Brunetti  
Florence Brunetti

Brian Stephenson.

EXHIBIT

D



- (ii) intends to commit any crime, other than theft or a felony; or
- (iii) is reckless as to whether his presence will cause fear for the safety of another; or
- (b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
  - (i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;
  - (ii) fencing or other enclosure obviously designed to exclude intruders;
  - (iii) posting of signs reasonably likely to come to the attention of intruders.
- (3) (a) A violation of Subsection (2)(a) is a class C misdemeanor unless it was committed in a dwelling, in which event it is a class B misdemeanor.
- (b) A violation of Subsection (2)(b) is an infraction.
- (4) It is a defense to prosecution under this section that the:
  - (a) property was open to the public when the actor entered or remained; and
  - (b) actor's conduct did not substantially interfere with the owner's use of the property.

1992

### PART 3

#### ROBBERY

##### 76-6-301. Robbery.

- (1) A person commits robbery if:
  - (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or
  - (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.
- (2) An act shall be considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.
- (3) Robbery is a felony of the second degree.

1995

##### 76-6-302. Aggravated robbery.

- (1) A person commits aggravated robbery if in the course of committing robbery, he:
  - (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
  - (b) causes serious bodily injury upon another; or
  - (c) takes an operable motor vehicle.
- (2) Aggravated robbery is a first degree felony.
- (3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

1994

### PART 4

#### THEFT

##### 76-6-401. Definitions.

For the purposes of this part:

- (1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as

telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

- (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
  - (b) To restore the property only upon payment of a reward or other compensation; or
  - (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.
- (4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

- (a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or
- (b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or
- (c) Prevents another from acquiring information likely to affect his judgment in the transaction; or
- (d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or
- (e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

1973

##### 76-6-402. Presumptions and defenses.

The following presumption shall be applicable to this part:

- (1) Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.
- (2) It is no defense under this part that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe, provided an interest in property for purposes of this subsection shall not include a security interest for the repayment of a debt or obligation.
- (3) It is a defense under this part that the actor:
  - (a) Acted under an honest claim of right to the property or service involved; or
  - (b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

000001

EXHIBIT

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## PART 5

## FALSIFICATION IN OFFICIAL MATTERS

## 76-8-501. Definitions.

For the purposes of this part:

(1) "Official proceeding" means any proceeding before a legislative, judicial, administrative, or other governmental body or official authorized by law to take evidence under oath or affirmation, including a notary or other person taking evidence in connection with any of these proceedings.

(2) "Material" means capable of affecting the course or outcome of the proceeding. A statement is not material if it is retracted in the course of the official proceeding in which it was made before it became manifest that the falsification was or would be exposed and before it substantially affected the proceeding. Whether a statement is material is a question of law to be determined by the court. 1973

## 76-8-502. False or inconsistent material statements.

A person is guilty of a felony of the second degree if in any official proceeding:

(1) He makes a false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true; or

(2) He makes inconsistent material statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this section, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true. 1973

## 76-8-503. False or inconsistent statements.

A person is guilty of a class B misdemeanor if:

(1) He makes a false statement under oath or affirmation or swears or affirms the truth of the statement previously made and he does not believe the statement to be true if:

(a) The falsification occurs in an official proceeding, or is made with a purpose to mislead a public servant in performing his official functions; or

(b) The statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths; or

(2) He makes inconsistent statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this section, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

(3) No person shall be guilty under this section if he retracts the falsification before it becomes manifest that the falsification was or would be exposed. 1973

## 76-8-504. Written false statement.

A person is guilty of a class B misdemeanor if:

(1) He makes a written false statement which he does not believe to be true on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable; or

(2) With intent to deceive a public servant in the performance of his official function, he:

(a) Makes any written false statement which he does not believe to be true; or

(b) Knowingly creates a false impression in a written application for any pecuniary or other benefit by

omitting information necessary to prevent statements therein from being misleading; or

(c) Submits or invites reliance on any writing which he knows to be lacking in authenticity; or

(d) Submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(3) No person shall be guilty under this section if he retracts the falsification before it becomes manifest that the falsification was or would be exposed. 1973

## 76-8-505. Perjury or false swearing — Proof of falsity of statements — Denial of criminal guilt.

(1) On any prosecution for perjury or false swearing, except a prosecution upon inconsistent statements, pursuant to Subsection 76-8-502(2), falsity of a statement may not be established solely through contradiction by the testimony of a single witness.

(2) No prosecution shall be brought under this part when the substance of the defendant's false statement is his denial of guilt in a previous criminal trial. 1973

## 76-8-506. Provision of false information to law enforcement officers, government agencies, or specified professionals.

A person is guilty of a class B misdemeanor if he:

(1) knowingly gives or causes to be given false information to any law enforcement officer with a purpose of inducing the officer to believe that another has committed an offense; or

(2) knowingly gives or causes to be given to any law enforcement officer, any state or local government agency or personnel, or to any person licensed in this state to practice social work, psychology, or marriage and family therapy, information concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger. 1988

## 76-8-507. False personal information to peace officer.

A person commits a class C misdemeanor if, with intent of misleading a peace officer as to his identity, birth date, or place of residence, he knowingly gives a false name, birth date, or address to a peace officer in the lawful discharge of his official duties. 1983

## 76-8-508. Tampering with witness — Retaliation against witness or informant — Bribery — Communicating a threat.

(1) A person is guilty of a third degree felony if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

(a) testify or inform falsely;

(b) withhold any testimony, information, document, item;

(c) elude legal process summoning him to provide evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person is guilty of a third degree felony if he:

(a) commits any unlawful act in retaliation for anything done by another as a witness or informant;

(b) solicits, accepts, or agrees to accept any benefit in consideration of his doing any of the acts specified under Subsection (1); or

(c) communicates to a person a threat that a reasonable person would believe to be a threat to do bodily injury to the person, because of any act performed or to be performed by the person in his capacity as a witness or informant in an official proceeding or investigation. 1988

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