

1988

Machan Hampshire Properties v. Western Real Estate : Brief of Respondent

Utah Court of Appeals

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880229-CA

MACHAN HAMPSHIRE PROPERTIES,
INC., a Utah corporation,

Plaintiff-Appellant,

vs.

WESTERN REAL ESTATE &
DEVELOPMENT COMPANY, a Utah
corporation; WESTERN MORTGAGE
AND LOAN CORPORATION, a Utah
corporation; K-E ENTERPRISES,
a Utah general partnership;
BIRTCHER INVESTMENTS, a
California general partnership;
BIRTCHER AMERICAN PROPERTIES,
a California association; and
CAPITALCORP FINANCIAL, INC.,
a California corporation,

Defendants-Respondents.

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, JUDGE LEONARD RUSSON

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Appellant

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Respondents

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COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES,	:	
INC., a Utah corporation,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Case No. 880229-CA
	:	
WESTERN REAL ESTATE &	:	(Supreme Court No. 870426)
DEVELOPMENT COMPANY, a Utah	:	
corporation; WESTERN MORTGAGE	:	
AND LOAN CORPORATION, a Utah	:	
corporation; K-E ENTERPRISES,	:	
a Utah general partnership;	:	
BIRTCHER INVESTMENTS, a	:	
California general partnership;	:	
BIRTCHER AMERICAN PROPERTIES,	:	
a California association; and	:	
CAPITALCORP FINANCIAL, INC.,	:	
a California corporation,	:	
	:	
Defendants-Respondents.	:	

RESPONDENTS' BRIEF

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, JUDGE LEONARD RUSSON

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STATEMENT OF JURISDICTION

This is an appeal from an order of summary judgment denying plaintiff's claim to a commission on the sale of real property. This Court has jurisdiction over the appeal pursuant to Utah Constitution Art. VIII, §3 and Utah Code Ann. §78-2-2(3)(i).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court properly ruled that there is no enforceable agreement to pay plaintiff a commission on the sale to Birtcher because there is no writing as required by the statute of frauds?

2. Whether the judgment may be affirmed on the alternative ground argued in the district court that plaintiff was not the procuring cause of the sale to Birtcher?

CONTROLLING STATUTE

U.C.A. §25-5-4, the governing section of the statute of frauds, is set out in relevant part in the brief, infra, and reproduced verbatim in the Addendum (Add. 43).

STATEMENT OF THE CASE

This is an action by Machan Hampshire Properties, Inc. ("MHP") to obtain payment of a commission on the sale of real property from Western Mortgage and Loan Corp. and K-E Enterprises (collectively "Western Mortgage") to Birtcher Investments ("Birtcher"), a California real estate company. Western Mortgage denied the commission and defended the action on the dual grounds that (1) there was no written agreement to

pay MHP a commission on the sale to Birtcher, as required by U.C.A. §25-5-4(5); and (2) the sale to Birtcher was procured, not by MHP, but by another broker to whom the full commission has already been paid. (R. 49, 92, 266-97.) The district court initially ruled that Western Mortgage and related defendants were entitled to summary judgment on both grounds (R. 414, Add. 1-2), but limited its order to the statute of frauds ground (R. 454, Add. 4-5). MHP subsequently stipulated to dismissal of its remaining claims against the remaining defendants (R. 553, Add. 6-7) and filed this appeal from the earlier summary judgment order (R. 557).

STATEMENT OF FACTS

Plaintiff MHP's statement of facts is incomplete and paints a distorted picture of what happened. The statement carefully omits undisputed material facts that reveal MHP's agent, Robert Polcha, as a back door Johnny-come-lately who is attempting to reap the reward from someone else's labor.

Western Mortgage was the record owner of 16.6 acres of land in northern Utah, on which it developed the Iomega Industrial Park. (Goddard Aff't, R. 208.) In approximately January of 1985, Western Mortgage decided to sell Iomega Park and contacted the Daum Corporation, dba Business Properties Brokerage Co. ("Daum"), a California brokerage company, to procure a buyer. (Lewis Aff't, R. 303.) On or about January 21, 1985, Daum contacted CapCorp Financial, Inc. ("CapCorp"), a California corporation, and provided information regarding the

possible purchase of Iomega Park. On January 30th, CapCorp extended to Western Mortgage a firm offer to purchase Iomega Park for \$7 million. Paragraph 9 of the written offer provided that Western Mortgage would pay the sales commission to Daum, the procuring broker. (Slavin Aff't, R. 184-85, Exh. A, R. 190-93, Add. 9-12.) On February 5, 1985, Western Mortgage sent CapCorp an "Acceptance and Modification of Offer to Purchase" requiring an escrow deposit of \$50,000 to guarantee CapCorp's performance of the purchase agreement. CapCorp accepted the proposed agreement on February 8th. (Slavin Aff't, R. 184-85, Exh. B, R. 194, Add. 13-15; Goddard Aff't, R. 208-09.)

During the second week of February 1985, immediately after CapCorp had entered into the purchase agreement with Western Mortgage, Richard Slavin, CapCorp's Executive Vice President, contacted Al Nagy and Stuart Ackenberg, Chief Executive Officer and Executive Vice President of Birtcher, respectively, regarding a possible joint venture with Birtcher in purchasing Iomega Park. Slavin had been involved with Nagy and Ackenberg in several other joint ventures between CapCorp and Birtcher for more than 10 years. These discussions among the top executives of CapCorp and Birtcher regarding a possible joint venture purchase of Iomega Park continued on an almost weekly basis from February to September of 1985. (Slavin Aff't, R. 185-86; Nagy Aff't, R. 314-15; Ackenberg Aff't, R. 125-26.)

MHP's Polcha telephoned Kelly Goddard, President of Western Real Estate & Development Co., an affiliate of Western

Mortgage, in February of 1984, after the agreement with CapCorp had been reached, and inquired whether Western Mortgage had any properties for sale. Goddard told Polcha that Iomega Park was being sold, but that an offer to purchase had already been accepted. Polcha still requested an information packet on Iomega Park. Goddard complied by sending Polcha the information, but in the transmittal letter, dated February 21, 1985, Goddard reiterated that a purchase offer had already been accepted and stressed that any offer procured by Polcha would be only a backup offer. (Goddard Aff't, R. 210-11, Exh. D, R. 262, Add. 16.)

A few days later, Polcha again called Goddard and disclosed that he had learned of CapCorp's intent to involve Birtcher in the purchase of Iomega Park. Polcha then sent a letter to Goddard, dated February 26, 1985, purporting to register Birtcher as MHP's client with regard to the Iomega Park sale. (Goddard Aff't, R. 211, Exh. E, R. 263, Add. 17; Polcha Dep. 33-34.) This proposed unilateral registration was never accepted by Goddard or anyone else affiliated with Western Mortgage. (Goddard Aff't R. 211; Second Polcha Dep. 14-16, 51.) Nevertheless, on February 27, 1985, Polcha first contacted Birtcher regarding Iomega Park by sending an information packet to Birtcher employee Andrew Trachman. Realizing he had no commission agreement with Western Mortgage regarding a possible sale of Iomega Park to Birtcher, Polcha sent a second letter to Goddard dated April 12, 1985, again attempting to register

Birtcher. This second attempted registration also went unaccepted because Birtcher had previously been contacted by CapCorp. (Second Polcha Dep. 14-16, 50-51, Exh. 14, Add. 19; Goddard Aff't R. 211-12, Exh. F., Add. 22.)

Over the next few months, Polcha sent Goddard several more letters proposing to register various clients regarding the sale of Iomega Park. (Second Polcha Dep., Exhs. 9-12, 16-18.) One such letter, dated August 7, 1985, proposed registration of the Estate of James Campbell for a commission of 5 percent. (Id., Exh. 18, Add. 20.) In response, Goddard wrote that the terms of the Campbell registration were agreeable, except that any commission on the sale would be only 4 percent. (Id., Exh. 19, Add. 21.) Regarding the other registration letters, Goddard responded to Polcha that all the proposed clients were acceptable with the exception of Birtcher and two others who had been contacted previously. (Id., Exh. 21, and follow-up letter, Exh. 23, Add. 22-23.) As it turned out, neither Polcha nor anyone else acting for MHP ever procured from Birtcher or any of the registered clients an offer to purchase Iomega Park. (Goddard Aff't, R. 212; First Polcha Dep. 41-42.)

In June of 1985, CapCorp learned that it would be financially unable to go through with the purchase of Iomega Park. Slavin, on behalf of CapCorp, intensified discussions with Nagy and Ackenberg on whether Birtcher would be interested in either a joint venture or in assuming CapCorp's position in the purchase agreement with Western Mortgage. Nagy and

Ackerberg ultimately decided that Birtcher would buy out CapCorp's purchase rights to Iomega Park and enter into an agreement directly with Western Mortgage for purchase of the property. (Slavin Aff't, R. 186-87; Nagy Aff't, R. 315; Ackerberg Aff't, R. 126.)

Accordingly, on September 27, 1985, Birtcher entered into an agreement with Western Mortgage to purchase Iomega Park on substantially the same terms as contained in the CapCorp agreement. Section 9 of the agreement provided for payment of a sales commission to Daum, the broker through whose efforts the related CapCorp/Birtcher deal was procured and consummated. (Nagy Aff't, R. 315-16, Exh. B, R. 324, relevant portions of which are reproduced at Add. 24-36; see also Ackerberg Aff't, R. 126-27; Slavin Aff't, R. 187-88; Goddard Aff't, R. 209-10.) Concurrently, Birtcher signed a "Contract for Services" with CapCorp agreeing to pay \$500,000 to CapCorp as a "finder's fee" and to buy out CapCorp's interest in Iomega Park. (Nagy Aff't, R. 316, Exh. C, R. 366, Add. 37-42; see also Ackerberg Aff't, R. 127; Slavin Aff't, R. 188.) The sale to Birtcher closed according to the agreed terms on January 31, 1986, and CapCorp's \$50,000 escrow deposit was released because CapCorp's obligation had been satisfied by Birtcher. (Goddard Aff't, R. 210; Slavin Aff't, R. 188.)

Both Nagy and Ackerberg have testified that Birtcher's first contact regarding purchase of Iomega Park came through Richard Slavin of CapCorp, and that Birtcher's offer and

ultimate purchase of the property was procured by CapCorp, not by MHP. (Nagy Aff't, R. 314, 316-17; Ackerberg Aff't, R. 125, 127-28; see also Contract for Services, section 4.03, R.367, Add.38.)

MHP subsequently filed this suit claiming entitlement to the sales commission. The Amended Complaint alleges breach of contract against Western Real Estate, Western Mortgage, and K-E Enterprises ("Western defendants") and alleges interference with contract and economic relations against the Birtcher entities and CapCorp. (R. 30.) MHP moved for partial summary judgment on the contract claim. (R. 59.) The Western defendants filed a cross-motion for summary judgment asserting that MHP's contract claim is unenforceable under the statute of frauds, and that MHP was not the procuring cause of the sale to Birtcher. (R. 299-300.) Following a hearing, the district court issued a Ruling denying MHP's motion and granting the Western defendants' motion "for the reasons set forth in defendants'" memoranda, which included both grounds asserted by the Western defendants. (Ruling, R. 414-16, Add.1-3; Defendants' Memoranda, R. 266, 418.) The court entered an order to the same effect (R. 437), but later changed the order to deny the contract claim solely on the basis that "no writing exists memorializing the claimed agreement to pay a commission." (R. 453-54, Add.4-5.)

MHP appealed the order of partial summary judgment (R. 484), and this Court eventually dismissed the appeal for lack of

prosecution (R. 532).¹ The parties subsequently stipulated to dismissal of the remaining claims against Birtcher and CapCorp (R. 553-54, Add. 6-7), and the district court entered an order of dismissal based on the stipulation (R. 555, Add. 8). MHP has now filed this second appeal from that order. (R. 557.)

SUMMARY OF ARGUMENT

The statute of frauds protects sellers of real property from fraudulent or fictitious claims for sales commissions by requiring all commission agreements to be in writing and signed by the seller. Commission agreements that do not satisfy the writing requirements are void and unenforceable. In this case, there was no written commission agreement sufficient to satisfy the statute of frauds. Moreover, there is no basis under Utah law for MHP to recover a commission on the equitable grounds of a supposed oral agreement, part performance, or unjust enrichment.

Alternatively, the commission claim should be denied on the basis that MHP was admittedly not the predominant, procuring cause of the sale to Birtcher.

¹ Query whether dismissal of the first appeal precludes this second appeal. See generally Annot., "Dismissal of Appeal For Want of Prosecution As Bar to Subsequent Appeal," 96 A.L.R.2d 312 (1964) and Supp.

ARGUMENT

POINT I: MHP'S CLAIM IS BARRED BY THE STATUTE OF FRAUDS
 BECAUSE THERE IS NO WRITTEN AGREEMENT TO PAY MHP A
 COMMISSION ON THE SALE OF IOMEGA PARK TO BIRTCHER.

Statutes of frauds are intended to bar enforcement of certain agreements that the law requires to be memorialized in writing. Colonial Leasing Co. v. Larsen Bros Constr. Co., 731 P.2d 483, 486 (Utah 1986). The controlling provision of Utah's statute of frauds, section 25-5-4(5), states:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

.

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation. [Add. 43.]

The conceded purpose of this particular provision is "to protect owners of land from fraudulent and fictitious claims for commissions." Williams v. Singleton, 723 P.2d 421, 424 (Utah 1986); Fowler v. Taylor, 554 P.2d 205, 208 (Utah 1976). That purpose has been satisfied in the present case.

The Utah Supreme Court has construed section 25-5-4(5) to require an express written contract that sets forth all the essential terms of the agreement and is signed by the party to be charged therewith. E.g., Case v. Ralph, 56 Utah 243, 188 P. 640, 642 (1920); see also McDonald v. Barton Bros. Invest. Corp., 631 P.2d 851, 854 (Utah 1981). The writing must plainly identify the parties to the contract, Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114, 1118 (1956), one of which must be the broker

claiming the commission, Smith Realty Co. v. Dipietro, 77 Utah 176, 292 P. 915, 917 (1930); identify the property to be sold, Johnson v. Allen, 108 Utah 148, 158 P.2d 134, 139 (1945); set forth the amount of the commission to be paid, Case v. Ralph, supra, 188 P. at 643; specifically authorize the broker to procure a purchaser, id.; Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578, 580 (1952); and be signed by the party responsible for paying the commission, i.e., property owner, McDonald, supra, at 854. In the absence of such a written agreement, the broker cannot recover a commission for services rendered or for the reasonable value of services under quantum meruit. E.g., Case v. Ralph, supra, 188 P. at 642. In short, a broker's commission agreement that fails to satisfy these requirements is "void," §25-5-4(5), and unenforceable. See, e.g., Knight v. Chamberlain, 6 Utah 2d 394, 315 P.2d 273, 276 (1957); Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 340 (1947).

Plaintiff MHP argues that certain correspondence between Polcha and Goddard satisfies the written contract requirements outlined above. (App. Br. 16-18.) However, that argument has no merit. Goddard's letter of February 21 transmitting information on Iomega Park to Polcha (Add. 16) states clearly that Western Mortgage had already accepted an offer on the property and that any offer procured by Polcha would be merely a backup. That letter does not mention Birtcher or contain any reference to a commission. A statement of the amount of commission to be paid is an essential term of a broker's

contract, without which the contract cannot be enforced. Case v. Ralph, supra, at 643; Gray v. Kohlhase, 18 Ariz. App. 368, 502 P.2d 169, 171 (1972); Carney v. McGinnis, 68 N.M. 68, 358 P.2d 694, 696 (1961).

Polcha's letters of February 26 and April 12 to Goddard purporting to register Birtcher as a client with regard to the purchase of Iomega Park and setting forth a proposed commission of 4 percent are also deficient (Add. 17, 19). The letters are not signed by anyone from Western Mortgage and, therefore, do not specifically authorize Polcha to represent Western Mortgage in seeking an offer from Birtcher. (Second Polcha Dep. 11-12.) The fact of employment of the broker to act for the owner is the "chief element required to be shown in writing" in order to comply with the statute of frauds. Maricopa Realty & Trust Co. v. VRD Farms, Inc., 10 Ariz. App. 524, 460 P.2d 195, 198 (1969). Without a signature by Western Mortgage accepting and authorizing the proposed representation, the supposed commission agreement is unenforceable. McDonald, supra, at 854; Case v. Ralph, supra, at 643; Birdzell, supra, at 580. Moreover, acceptance of Polcha's proposed representation cannot be implied by Western Mortgage's silence. See Brown v. Brown, 744 P.2d 333, 335 (Utah App. 1987).

Goddard's letters of August 9 and September 6 are also insufficient to create an obligation to pay Polcha a commission on the sale of Iomega Park to Birtcher (Add. 21-22). The August 9 letter agrees to the registration of the Estate of James

Campbell for a 4 percent commission. The letter does not mention, and was not understood as accepting registration of, Birtcher. (Second Polcha Dep. 12-14.) The September 6 letter agrees to the registration of various other clients, but specifically rejects registration of Birtcher and two other clients because they had been contacted previously by another broker. (See Add. 23.)

Thus, there is no writing signed by Western Mortgage agreeing to pay MHP a commission on the sale of Iomega Park to Birtcher. Polcha admitted as much in his deposition after discussing each of the documents referred to above:

Q. You cannot cite to me any document in which someone representing Western has signed it stating that they would pay a four percent commission if Birtcher became the purchaser of the property; isn't that true?

A. I don't know. I can't answer that because I don't have all the documents. . . .

Q. Let's just answer to the extent of your knowledge at the present time.

A. To the extent of my knowledge, the answer would be no. [Second Polcha Dep. 14-15.]

Plaintiff MHP also argues that the various letters considered collectively constitute a sufficient "note or memorandum" to satisfy the statute of frauds. (App. Br. 15.) However, if more than one writing is relied upon to establish a contract, either all such documents must be signed by the party to be charged or the signed document must refer to the unsigned documents so as to ratify or accept the terms therein. See Gregerson v. Jensen, 617 P.2d 369, 373 (Utah 1980) (notation on

check referred expressly to the related deed); Balboa Constr. Co. v. Golden, 97 N.M. 299, 639 P.2d 586, 591 (App. 1981). In the present case, only the Goddard letters of February 21 (Add. 16) transmitting an information packet to Polcha; August 9 (Add. 21) accepting registration of the Estate of James Campbell; and September 6 (Add. 22) expressly rejecting registration of Birtcher, were signed by Western Mortgage. None of those documents referred by way of acceptance to the Polcha letters of February 26 and April 12 proposing registration of Birtcher. Accordingly, there was no written agreement regarding payment of a commission to MHP for sale of the property to Birtcher, and the requirements of the statute of frauds remain unsatisfied. See Balboa Constr. Co., *supra*; Boswell v. Rio de Oro Uranium Mines, 68 N.M. 457, 362 P.2d 991, 995 (1961); Grant v. Auvil, 39 Wash. 2d 722, 238 P.2d 393, 395 (1951).

Finally, MHP makes the equitable argument that the totality of circumstances and evidence establish the existence of an oral commission agreement which, in view of Polcha's good efforts, should be enforced notwithstanding the statute of frauds. (App. Br. 14, 18-20.) However, MHP misperceives both the facts and the law. Goddard's deposition testimony that Western Mortgage would have paid MHP the commission if it had procured the buyer does not constitute an admission of a prior oral agreement to that effect, but merely states that as a matter of honesty and good business practice, even without a contract, Western Mortgage would have paid the commission to

whoever procured the buyer. Moreover, even if there had been an admitted oral agreement to pay MHP a commission on the sale to Birtcher, it would be unenforceable. As stated in Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 340 (1947):

It is clear that if the plaintiff had had an oral agreement to act as agent for the defendant in selling the land, or in procuring a purchaser therefor, he would not have been entitled to recover for the value of his services. We can see no reason why he should be in any better position when he did not even have an oral agreement to perform the services which he did perform.

See also Knight v. Chamberlain, supra, 315 P.2d at 276; Butterfield v. MacKenzie, 292 P. 1097, 1098 (Ariz. 1930) (to permit enforcement of an oral commission agreement "would completely defeat the purpose of the statute of frauds"). Neither may MHP enforce a supposed oral agreement under the theories of part performance or unjust enrichment. Baugh, supra, at 339-40; Case v. Ralph, supra, 188 P. at 642; Gene Hancock Constr. Co. v. Kempton & Snedigar Dairy, 20 Ariz. App. 122, 510 P.2d 752, 756 (1973) (mailing of brochures to prospective clients cannot defeat statute of frauds).

In sum, there was no written or oral agreement to pay MHP a commission on the sale of Iomega Park to Birtcher. And even if there had been an oral agreement, it would be void and unenforceable under the statute of frauds.

POINT II: THE JUDGMENT MAY BE AFFIRMED ON THE ALTERNATIVE GROUND THAT MHP WAS NOT THE PROCURING CAUSE OF THE SALE TO BIRTCHER.

This Court may affirm the judgment on any proper ground even if the district court assigned an incorrect reason for its ruling. Allphin Realty, Inc. v. Sine, 595 P.2d 860, 861 (Utah 1979); Berry v. Berry, 738 P.2d 246, 247 (Utah App. 1987). Accordingly, even though the district court limited the basis for its ruling to the statute of frauds, this Court may affirm the judgment for the reason that MHP was not the procuring cause of the sale to Birtcher.

Plaintiff MHP does not claim to have had an exclusive listing agreement with Western Mortgage. (Second Polcha Dep. 17-18.) Therefore, any right to a commission on the sale of Iomega Park must be based on a general or open listing agreement by which MHP was left in competition with all other brokers attempting to sell the property. As stated in Young v. Whitaker, 46 Utah 474, 150 P. 972, 975-76 (1915):

It is also well settled that where an owner or agent lists property with different brokers for sale, the contract, not being exclusive the brokers run a race in energy for the prize, viz., the commission; that they enter into a competition in this respect, and that no matter how much effort or time a broker may have expended in attempting to make a sale, he cannot complain if his competitor reaches the goal before he does by securing a purchaser who is ready, able, and willing to purchase.

"Under such [nonexclusive] contracts a broker must be the procuring cause in order to be entitled to a commission for such a sale." Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266, 269 (1962).

Factors considered in determining which broker is the "procuring cause" of the sale are "whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture," id.; whether the buyer is "ready, able, and willing to purchase," Young v. Whitaker, supra, 150 P. at 976; and whether the broker's efforts are the "predominant and effective cause and not merely an indirect, incidental or contributing cause" producing culmination of the sale, E.A. Strout Western Realty Agency v. W.C. Foy & Sons, Inc., 665 P.2d 1320, 1323-24 nn.10-12 (Utah 1983). As stated in Brooks v. Geo. Q. Cannon Ass'n, 53 Utah 304, 178 P. 589, 591 (1919):

It is elementary in this class of cases that in order for a broker to recover commissions his efforts must have been the procuring cause which resulted in the closing of the transaction upon which his claim is predicated. The rule is variously stated in the decisions of the courts and by the text writers, but all are agreed that the efforts of the broker, in order to entitle him to a commission, must have been the efficient procuring or producing cause of the transaction relied upon by him.

Application of the "procuring cause" rule is illustrated by the case of E.A. Strout Western Realty Agency, supra. There the owner of a ranch contacted a neighboring Indian tribe and offered to sell the ranch to the tribe, but no agreement was reached. Subsequently, the owner entered into an open, nonexclusive listing agreement with a broker and informed the broker of the tribe's interest. The broker immediately recontacted and made a sales presentation to the tribe. Ultimately, the ranch was sold to the tribe without the

involvement of the broker. The broker sued for the commission, but his claim was properly denied on the grounds that he was not the procuring cause of the sale. See also Barnard v. Hardy, 77 Utah 218, 293 P. 12, 15 (1930) (broker contacted buyer but was not instrumental in effecting the sale); Fritsch v. Hess, 49 Utah 75, 162 P. 70, 71-72 (1916) (buyer and seller not "brought together" by broker); McCartney v. Malm, 627 P.2d 1014, 1021 (Wyo. 1981) (broker causing consummation of transaction is entitled to commission). While the question whether a broker is the procuring cause of a sale is ordinarily one of fact for the jury, it may be decided for the seller as a matter of law where there is no competent evidence from which a jury could reasonably grant the broker's claim. E.g., Hiniger v. Judy, 194 Kan. 155, 398 P.2d 305, 309-16 (1965).

Applying the foregoing principles to the present case, it is evident that, as a matter of law, MHP was not the predominant, efficient, or procuring cause of the sale to Birtcher. Birtcher's first contact regarding possible purchase of Iomega Park came from CapCorp, who was in turn procured by Daum. MHP's Polcha contacted Birtcher only after learning that CapCorp was considering a resale of the property to Birtcher. After sending the information packet to Birtcher employee Trachman, Polcha did nothing that led to Birtcher's ultimate purchase of the property. Therefore, MHP cannot possibly be regarded as the procuring cause of the sale. See E.A. Strout Western Realty, supra; Douse v. Meehan, 47 Utah 628, 156 P. 920,

921 (1916) (broker's contact with buyer did not lead to the sale); Butterfield v. Consolidated Fuel Co., 42 Utah 499, 132 P. 559, 562 (1913) (ultimate sale to party contacted by broker does not necessarily entitle broker to commission).

The undisputed evidence shows that Birtcher's purchase of Iomega Park was procured principally, if not exclusively, through the efforts of CapCorp. CapCorp's Slavin procured the sale to Birtcher through constant negotiations with Birtcher's top executives, Nagy and Ackenberg, over a period of several months. The commission was paid to Daum because it procured CapCorp's interest in the property, and all parties understood that Birtcher was simply undertaking or consummating CapCorp's purchase agreement with Western Mortgage. Birtcher executives testified that CapCorp, rather than MHP, was the procuring cause of the purchase. (R. 125, 127-28, 314, 316-17.) See Butterfield, supra, at 562 (upholding competence of buyer's testimony regarding procuring cause). And Polcha himself also admitted that he did not procure the deal:

Q. Okay. You acknowledge, do you not, that an offer by either Cap/Corp. or Birtcher to acquire the Iomega property has never been communicated through you as the broker to Western Real Estate and Development; is that correct?

A. I'm not sure if I understand that.

Q. Well, have you ever been the channel through which any offer to purchase the Iomega property has come from Birtcher or CapCorp.?

MR. STEVENS: By offer, do you mean something specific by way of terms?

MR. POELMAN: That's right, laying an offer on

the table saying, "We hereby offer to purchase Iomega property"?

A. Have I gotten a written offer to Birtcher?

Q. From Birtcher to Western.

A. No.

Q. Or from Cap/Corp. to Western?

A. No. [Polcha Dep. 41-42.]

Thus, this Court may conclude as a matter of law that MHP was not the procuring cause of the sale to Birtcher. The conclusion in Young v. Whitaker, supra, is applicable here:

Where, as in the case at bar, the brokers apply to the seller for authority to sell property to a purchaser they have in view, and the owner grants them permission to sell, and acts in perfect good faith in selling the property to a purchaser produced by one of the brokers, we cannot see under what rule of law or justice the owner may not safely pay the commission to the one who in fact produced the purchaser. We further think that he is not required to first determine just what the other broker may have done in trying to effect a sale to the actual purchaser. [150 P. at 976.]

Since MHP was not the predominant, procuring cause of the sale, it is not entitled to the commission.


CONCLUSION

Based on the foregoing, the judgment should be affirmed.

DATED this 28th day of April, 1988.

Respectfully submitted,

KIRTON, McCONKIE & BUSHNELL

By: 
Dan S. Bushnell
David M. Wahlquist
Merrill F. Nelson
Attorneys for Defendants-
Respondents

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed four copies of the foregoing Respondents' Brief, postage prepaid this 28th day of April, 1988, to:

Michael N. Emery
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Plaintiff-Appellant

Merill F. Nelson

ADDENDUM

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10:11:11
L. A. Bundy

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

MACHAN HAMPSHIRE PROPERTIES, INC., a Utah corporation,	:	RULING
Plaintiff,	:	CIVIL NO. C-85-7387
vs.	:	
WESTERN REAL ESTATE & DEVELOPMENT COMPANY, a Utah corporation, et al.,	:	
Defendants.	:	

Machan Hampshire Properties, Inc. (hereinafter "plaintiff"), and Western Real Estate & Development, Western Mortgage and Loan, and K-E Enterprises (hereinafter "defendants"), have each filed Motions for Partial Summary Judgment. Each claims entitlement to Summary Judgment based upon the sworn testimony given in affidavits and deposition, and both claim there are no remaining material issues of fact to be tried.

Plaintiff claims it is entitled as a matter of law to a 4% commission in regards to sale of commercial property in Roy, Utah, since they procured a purchaser (Birtcher) for defendants pursuant to an agreement between plaintiff and defendants.

Defendants claim that no such agreement existed between them and plaintiff; that no writings exist memorializing such a claimed agreement as required by Utah Code Ann., Section 25-5-4(5);

that plaintiff did not procure the purchaser of the property as claimed; and that the purchaser had its own relationship with defendants which had no connection with plaintiff, and in fact its purchase merely consummated an earlier agreement with which it had connection.

Both sides have filed extensive and long Memoranda of Points and Authorities which contain copies of various pleadings, exhibits, affidavits, excerpts from depositions, and legal authorities.

Both Motions were argued before the Court, at which time the Court took the matter under advisement.

The Court has now reviewed and given consideration to the arguments of counsel during the hearing, and the Memoranda of Points and Authorities, and makes its ruling, as follows:

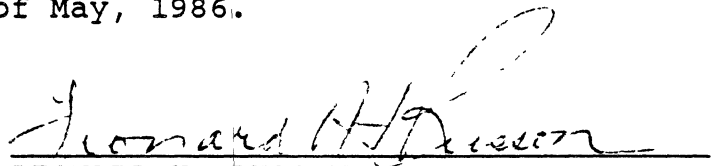
1. Plaintiff's Motion for Partial Summary Judgment is denied.

2. Defendants' Motion for Summary Judgment is granted.

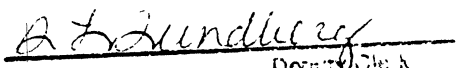
The Court rules in favor of the defendants for the reasons set forth in defendants' Memorandum of Points and Authorities filed in support of its own Motion for Summary Judgment, and its Reply Memorandum filed in opposition to plaintiff's Memorandum.

Defendants will prepare the Order granting Summary Judgment in favor of Western Real Estate and Development Company, Western Mortgage and Loan Corporation, and K-E Enterprises.

Dated this 7th day of May, 1986.


LEONARD H. RUSSON
DISTRICT COURT JUDGE

ATTEST
H. DIXON HUNLEY
Clerk

By 
Deputy Clerk

KIRTON, McCONKIE & BUSHNELL
DAN S. BUSHNELL - A522
DAVID M. WAHLQUIST - A3349
ATTORNEYS FOR DEFENDANTS
330 SOUTH THIRD EAST
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 521-3680

JUL 22 1986

A. H. Lundberg

IN THE THIRD DISTRICT COURT FOR THE COUNTY OF SALT LAKE
STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES,)	
INC., a Utah corporation,)	
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
WESTERN REAL ESTATE & DEVELOP-)	Civil No. C85-7387
MENT COMPANY, a Utah corpora-)	
tion; WESTERN MORTGAGE AND)	
LOAN CORPORATION, a Utah)	
corporation; K-E ENTERPRISES,)	
a Utah general partnership;)	
BIRTCHER INVESTMENTS, a)	
California general partnership,)	Judge Leonard Russon
BIRTCHER AMERICAN PROPERTIES,)	
a California association; and)	
CAPITALCORP FINANCIAL, INC.,)	
a California corporation,)	
)	
Defendants.)	

Plaintiff's Motion for Partial Summary Judgment against defendant Western Real Estate & Development Company and the Motion of defendants Western Real Estate & Development Company, Western Mortgage Loan Corporation and K-E Enterprises for Summary Judgment against plaintiff came on for hearing before the above-entitled court on April 28, 1986 at the hour of 2:00 p.m. Plaintiff appeared by its counsel of record,

C 00110

2.

Lewis T. Stevens and Craig W. Anderson of Van Wagoner & Stevens. Defendants appeared by their counsel of record, Dan S. Bushnell and David M. Wahlquist of Kirton, McConkie & Bushnell.

Having heard argument of counsel and read extensive memoranda filed by the parties and being otherwise advised in the premises, THE COURT HEREBY ORDERS:

1. Plaintiff's Motion for Partial Summary Judgment against defendant Western Real Estate & Development Company is denied; and

2. The Motion of defendants Western Real Estate & Development Company, Western Mortgage Loan Corporation and K-E Enterprises for Summary Judgment against plaintiff is granted dismissing plaintiff's action against said defendants because plaintiff's claim is barred by the Statute of Frauds set forth in Utah Code Ann. §25-5-4(5) because no writing exists memorializing the claimed agreement to pay a commission.

Dated this 22nd day of July 1986.

BY THE COURT:

Leonard H. Russon
JUDGE LEONARD RUSSON

ATTEST
H. DIXON HINDLEY
Clerk

By L. Sundberg
Deputy Clerk

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SEP 25 1987

Dan S. Bushnell - A522
David M. Wahlquist - A3349
James J. Cassity - A595
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendants
Birtcher Investments, Birtcher
American Properties and
Capitalcorp Financial, Inc.
330 South Third East
Salt Lake City, Utah 84111-2599
Telephone: (801) 521-3680

H. Dixon, Clerk of Salt Lake County Court
By [Signature]
Deputy Clerk

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

MACHAN HAMPSHIRE PROPERTIES, INC., a Utah corporation,	:	STIPULATION AND ORDER
Plaintiff,	:	
vs.	:	Civil No. C85-7387
WESTERN REAL ESTATE & DEVELOP- MENT COMPANY, et al.	:	
Defendants.	:	Judge Leonard Russon

Plaintiff Machan Hampshire Properties, through its counsel of record, Michael N. Emery, Esq. of Richards, Brandt, Miller and Nelson, and all named defendants through their counsel of record, David M. Wahlquist, of Kirton, McConkie & Bushnell, hereby stipulate as follows:

1. The Motion of defendants Birtcher Investments, Birtcher American Properties and Capitalcorp Financial, Inc. for summary judgment dismissing plaintiff's Second Claim for Relief against them with prejudice may be granted. The parties agree that under the current state of the law in the State of Utah, there can be no

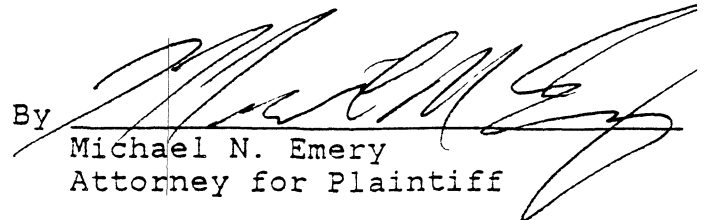
tortious interference with a contract which is unenforceable under U.C.A. §25-5-4(5). On June 23, 1986, the court entered an order dismissing plaintiff's First Claim for Relief because the alleged contract was unenforceable under U.C.A. §25-5-4(5). The parties hereto understand and agree that in the event plaintiff is successful in obtaining a reversal of this Order, then the dismissal of this Second Claim for Relief will also be deemed to be reversed because it is presently based solely on the Court's Order of June 23, 1986.

2. Plaintiff's Third Claim for Relief may be dismissed with prejudice.

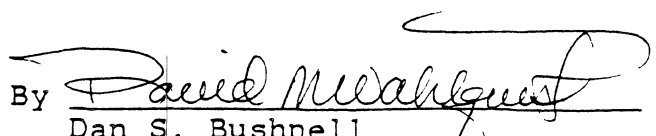
3. Plaintiff's time for appeal of the June 23, 1986 order shall begin to run upon entry of the following Order, all issues in this matter having been reduced to judgment.

DATED this 24th day of September, 1987.

RICHARDS, BRANDT, MILLER & NELSON

By 
Michael N. Emery
Attorney for Plaintiff

KIRTON, McCONKIE & BUSHNELL

By 
Dan S. Bushnell
David M. Wahlquist
James J. Cassity
Attorneys for defendants:
Birtcher Investments
Birtcher American Properties,
Machan Hampshire Properties,
Inc.

ORDER

Based on the foregoing Stipulation of counsel for the respective parties and being otherwise advised in the premises, the Court hereby orders as follows:

1. The Motion of defendants Birtcher Investments, Birtcher American Properties and Capitalcorp Financial, Inc. for summary judgment dismissing plaintiff's Second Claim for Relief against them with prejudice is hereby granted on the basis that:

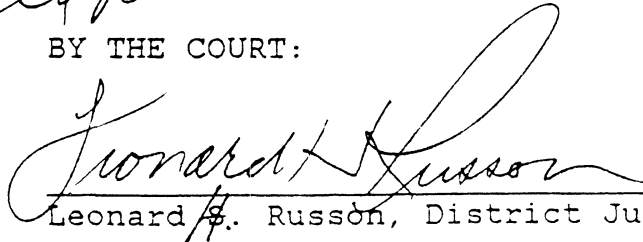
- (a) Under the current law of the State of Utah, there can be no tortious interference with a contract which is unenforceable under U.C.A. §25-5-4(5); and
- (b) The Court has previously ruled on June 23, 1986 that the alleged contract for a real estate commission in this matter is unenforceable because it does not satisfy the requirements of U.C.A. §25-5-4(5).

2. Plaintiff's Third Claim for Relief is hereby dismissed with prejudice based solely on the foregoing consent and stipulation of the parties.

3. Plaintiff's time for appeal of the June 23, 1986 Order shall begin to run upon entry of this Order, all other issues in this matter having been reduced to judgment.

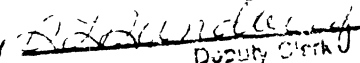
DATED this 25th day of Sept, 1987.

BY THE COURT:


Leonard S. Russon, District Judge

ATTEST
H. DIXON HINDLEY
CLERK

-3-

BY 
Deputy Clerk

FIRST CAPITALCORP

January 30, 1985

Western Mortgage Corporation
376 East 400 South
Salt Lake City, Utah 84111

Re: Cordillera Business Plaza

Please allow this letter to serve as a firm offer to purchase the real estate and improvements at 1900 West 4000 South, Roy, Utah on the following terms and conditions:

1. PURCHASE PRICE: \$7,000,000.00
2. TERMS OF SALE:
 - A. Cash at close of escrow: \$7,000,000.00
 - B. There are leases in full force and effect showing a net operating income of \$833,530.00 after allowing for a management fee of 4% (\$37,096.00) and a replacement reserve of \$.05 sq. ft. (\$10,405.00) and a vacancy factor of 5% (\$46,370.00).
3. ESCROW OR PURCHASE CONTRACT
 - A. Buyer and Seller to enter into an escrow at Commerce Escrow Company, 1545 Wilshire Blvd, Los Angeles, Ca 90017.
 - B. Unless otherwise designated in the escrow instructions of Buyer, title shall vest in Capcorp Financial, Inc. or Assignee.
 - C. Seller shall warrant that at the close of escrow there exist no violations of law or codes, ordinances, rules, regulations or requirements respecting the subject property Seller to provide Certificate of Occupancy or its equivalent if improvements have been completed within eighteen (18) months of close of escrow.

- D. Seller to furnish an ALTA survey and policy of Title Insurance with extended coverage at Seller's expense.
- E. Escrow will be contingent upon Buyer's approval of the Preliminary Title Report, CC&R's and all underlying documents within twenty (20) days of receipt of same.
- F. Seller is to furnish to Buyer, on the property, the following:
 - 1. MAI Appraisal;
 - 2. As-built drawing and specifications for all improvements on the Property, including architectural, structural, mechanical, electrical and landscaping plans and specifications.
 - 3. A preliminary title report, issued by title company approved by Buyer, together with all documents relating to exceptions noted in such report. Such report shall included a plotting of all easements.
 - 4. All engineering, soils, or geological tests or reports relating to the Property.
 - 5. Photographs of the Property, showing interior, exterior and aerial views.
 - 6. A survey of the Property.
 - 7. All service, maintenance and other agreements related to the Property.
 - 8. A list of all personal property used in connection with the operations of the Property (which personal property shall be included in the sale).
 - 9. An inventory of all usable construction material located at the site.
 - 10. Copies of all tax bills of the Property (including utility and school districts).
 - 11. All operating statements on the Property.
 - 12. Current financial statements on IOMEGA.
- G. Buyer to approve within 20 days of opening of escrow the books and record of Seller referable to the Subject Property. In this connection, upon acceptance of this letter agreement, Seller shall immediately provide Buyer or its representative access to inspect and review all of Seller's books and records relative to the Subject Property. In addition, Escrow Closing shall be contingent upon representation provided by Seller at such Closing that there have been no material changes in the financial condition of the Subject Property since the date of Buyer's said written approval.

- H. This offer is contingent upon Buyer or Buyer's agent inspecting the property and providing written approval of the physical condition of the improvements located upon the Subject Property at Buyer's expense within 30 days of opening of escrow. In this connection, upon acceptance of this letter agreement, Seller shall permit Buyer or its representative to enter on the Subject Property accompanied by Seller's representative to conduct an engineering survey of Subject Property, which survey shall be conducted at a reasonable time and in a manner not to disturb any occupancy tenants. Any major physical defects will be corrected by Seller.
 - I. Buyer to receive at Escrow Closing from Seller (in form mutually agreed upon within 30 days of acceptance opening of escrow a registered professional engineer's certificate certifying that all improvements upon the Subject Property have been fully completed and are in compliance with all applicable laws and ordinances.
 - J. Seller to provide Buyer with estoppel certificates at Escrow Closing; and the matters contained in such estoppel certificates shall be true and correct to the best of Seller's knowledge and belief as of the date of the Escrow Closing.
 - K. Escrow is to open within ten days of acceptance of this offer and close on or before April 15, 1985.
 - L. All costs of the transaction are to be borne by Seller, except for Buyer's legal expenses.
- 4. All documentation required in this transaction, including but not limited to tenant leases, operating statements, escrow instructions, preliminary title reports, title policies, CC&R's mortgages, notes, and items described in 3F above, is subject to the unconditional approval of the Buyer.
 - 5. At the time of closing, Seller shall deliver and assign to Buyer:
 - A. All building and construction warranties, and maintenance contracts and equipment warranties relating to the Subject Property or any part thereof in possession of Seller, if any;

- B. All technical and service manuals relating to the operation of all heating, ventilation, air conditioning and other equipment on Subject Property in possession of Seller, if any;
- C. All leases on the Subject Property,
- D. Certificate of Seller, Exhibit A, executed by Seller; and
- E. All security and other deposits held or controlled by Seller in connection with the Subject Property.

Any personal property owned by Seller (which personal property is located on Subject Property and used in connection with the operation of the Subject Property) will be treated as an appurtenance to the Subject Property for all purposes, and title to the same shall be transferred to Buyer free and clear of all liens and encumbrances by suitable instruments of conveyance concurrently with the conveyance of the Subject Property without any additional consideration therefor.

In the event any of the above conditions are not satisfied, eliminated or waived within the above time periods, Buyer may at his option, accept title in its then condition; otherwise, this contract shall be deemed null and void and the escrow shall then be cancelled without any liability to Buyer.

Improvements consist of seven building Business Park containing 208,112 sq. ft. of rentable space on 15.2 acres of fee land.

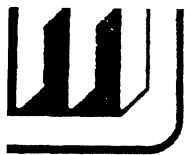
Seller to pay all commissions and/or brokerage fees in connection with the sale of this property to Business Properties Brokerage Company in the amount of 3% of the sales price.

We hereby submit the above offer and unless acceptance hereof is signed by Seller and a signed copy delivered to the undersigned at the address shown above by February 5, 1985 this offer shall be deemed revoked.

Very truly yours,



CAPCORP FINANCIAL, INC.



MORTGAGE LOAN CORPORATION

376 East 400 South
Salt Lake City, Utah 84111
(801) 530-1700

ACCEPTANCE AND MODIFICATION
OF
OFFER TO PURCHASE

February 5, 1985

CAPCORP FINANCIAL, INC.
280 South Beverly Drive, Suite 204
Beverly Hills, CA 90212

Gentlemen:

Western Mortgage Loan Corporation accepts your offer to purchase (dated January 30, 1985) the real estate and improvements at 1900 West 4000 South, Roy, Utah with the following modifications:

1. The Seller's name is Western Mortgage Loan Corporation.
2. The property known as Building 8 is owned by K-E Enterprises, a Utah general partnership. Your offer to purchase and this Acceptance and Modification shall be deemed to constitute:
 - (i) an agreement by your firm to purchase Building 8 (and appurtenant ground) from K-E Enterprises for \$500,000;
 - (ii) an agreement by your firm to purchase the balance of the property described in your offer from Western Mortgage Loan Corporation for \$6,500,000.

These agreements must be closed simultaneously.

3. Upon your acceptance of this Acceptance and Modification you will deposit with Commerce Escrow Company (i) \$50,000 in cash to be held in an interest-bearing account with the interest to be owned by Buyer until Buyer defaults in its obligations under the agreement to purchase; (ii) an irrevocable letter of credit payable to Western Mortgage Loan Corporation and K-E Enterprises in the amount of \$50,000 by a national bank; or (iii) your promissory note in the amount of \$50,000 payable on or before April 15, 1985 to Western Mortgage Loan Corporation and K-E Enterprises. This deposit shall constitute consideration for the agreements between the parties.



The deposit shall be refunded or returned to Buyer if the sale shall not occur as scheduled unless Buyer shall default in its obligations under this agreement to purchase in which case the deposit shall be given to Seller to apply to its damages.

4. Seller will use its best efforts to complete construction of Building Nos. 3,6 and 7B prior to closing. However, Seller shall have until July 15, 1985 to complete construction without penalty in accordance with plans and specifications and any applicable lease. An escrow shall be established by Buyer at closing in the amount of 110% of the amount required to finish construction in the estimate of a licensed architect approved by both Buyer and Seller.

5. Seller will provide a standard owners title insurance policy to Buyer without extended coverage, but Seller will warrant against all mechanics liens.

6. Covenants, Conditions and Restrictions have not been recorded yet, but will be completed soon and will be submitted to Buyer for review and approval.

7. The Seller has no aerial photographs and will not provide any to Seller.

8. As to Paragraph 3H of the agreement, if Buyer shall notify Seller in writing of any "major physical defects", Seller shall have the option either to repair or remedy the defects or to give written notice to Buyer that it elects to rescind the agreement to purchase.

9. The estoppel certificates referred to in Paragraph 3J of the agreement will require all tenants to affirm the current existence of their lease, the current rent, that there are no defaults under the lease by Seller and similar matters.

10. Seller will use its best efforts to obtain permission from Aetna Life Insurance Company and Transohio Savings Bank to pay off their loans on parcels of the property. If these loans cannot be paid off, Buyer will assume these loans (and will receive due credit towards the purchase price in the amount of the unpaid balances of said loans) or will cancel this agreement without liability to Seller or Buyer. If Buyer should assume any of said loans, Seller shall pay any prepayment penalty incurred in connection with any such loan if subsequently prepaid by Buyer within sixty 60 days after any such loan shall become prepayable by its terms.

11. If Buyer shall decide to select third party local property management for the property, Western Mortgage Loan Corporation shall

February 5, 1985
Capcorp Financial, Inc.
Page 3


have the first right of refusal to provide such property management services.

12. If Buyer shall cancel or rescind this agreement, except for the breach hereof or failure of performance by Seller, Buyer shall reimburse Seller for actual out-of-pocket expenses incurred in providing the items to Buyer required for closing, such as MAI appraisal, survey and title reports. Buyer shall approve of the MAI appraiser prior to commencement of the appraisal and in any event, Seller's expenses in complying with Paragraph 3L of the agreement shall not exceed the expenses specifically enumerated in the agreement. Seller shall pay one-half of the escrow agent's actual fee, and Buyer shall pay one-half of the escrow agent's actual fee.

Kindly execute the originals hereof and return one original to us. This Acceptance and Modification of Offer to Purchase shall expire unless we receive an executed original hereof on or before February 12, 1985.


WESTERN MORTGAGE LOAN CORPORATION

By


John B. Goddard
Chairman of the Board

K-E ENTERPRISES,
a Utah general partnership,

By


John B. Goddard
General Partner

Accepted and agreed to this 5th day of February, 1985.

CAPCORP FINANCIAL, INC.

By


Its Exec. Vice President

GSB/mr
020585-2[W9]



February 21, 1985

Mr. Bob Polcha
245 Brickyard Road #70
Salt Lake City, Utah 84106

RE: IOmega Park
Roy, Utah


Dear Bob:

Enclosed, please find the information you requested on the above captioned project.

As I indicated to you on the phone, we have accepted another offer, and should you have success in obtaining a buyer, be sure they understand it would be a backup-offer.

If there are any questions you may have on the information, please contact me.

Very truly yours,

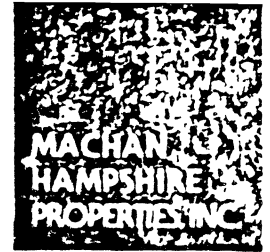

Kelly Goddard
President

KG/bm

ENCL: 1



February 26, 1985



Mr. Kelly Goddard, President
Western Real Estate & Development Company
P.O. Box 3088
Ogden, UT 84409

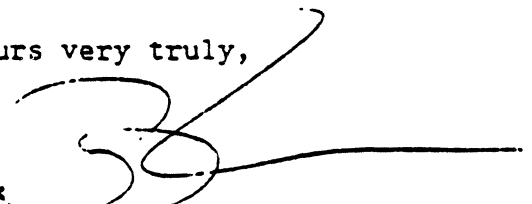
RE: REGISTRATION OF CLIENT FOR PROPERTY KNOWN AS
IOMEGA PARK/ROY, UTAH

Dear Mr. Goddard:

Machan Hampshire Properties, Inc./Robert F. Polcha represents the following clients in connection with the proposed purchase of the subject properties. The purpose of this letter is to register the clients with you and to set forth our understanding that in the event a transaction is consummated between yourself and these clients, you agree to pay a commission to Machan Hampshire Properties, Inc./Robert F. Polcha. Said commission shall be four percent (4%) on Iomega Park.

CAL FED SYNDICATIONS
BIRTCHEER AMERICAN PROPERTIES
EQUITABLE LIFE REAL ESTATE DIVISION

Yours very truly,


By: _____
Robert F. Polcha





February 27, 1985.

Mr. Andrew Trachman, Vice President
Birtcher American Properties
9665 Wilshire Blvd., Suite 628
Beverly Hills, CA 90212

RE: IOMEGA LIGHT INDUSTRIAL PARK

Dear Andrew:

Enclosed please find the Iomega Light Industrial Park which is strategically located off of the Ogden Municipal Airport. The project is presently under contract, and only at my urging, would the seller's be interested in considering a back-up offer. If you are interested in the following, please understand the only terms available would be assumptions on those loans as indicated. The seller is presently considering a cash offer. The tenancy is superior as well as the plan, development and site.

I heartily suggest your immediate attention to this as it would do nothing but enhance your portfolio.

Sincerely yours,

MACHAN HAMPSHIRE PROPERTIES, INC.


Robert F. Polcha
Acquisitions & Investments Director

RFP:sl

Enclosure

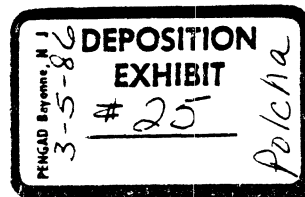


EXHIBIT "B"



April 12, 1985

Mr. Kelly Goddard, Vice President
Western Real Estate & Development Company
P.O. Box 3088
Ogden, UT 84409

RE: REGISTRATION OF CLIENT FOR PROPERTY KNOWN AS
IOMEGA LIGHT INDUSTRIAL PARK

Dear Kelly:

Machan Hampshire Properties, Inc./Robert F. Polcha represents the following client in connection with the proposed lease of the subject property. The purpose of this letter is to register the client with you and to set forth our understanding that in the event a transaction is consummated between yourself and this client, you agree to pay a commission to Machan Hampshire Properties, Inc./Robert F. Polcha. Said commission shall be four percent (4%) on Iomega Light Industrial Park.

BIRTCHEER AMERICAN PROPERTIES, INC.
EQUITABLE LIFE REAL ESTATE

Yours very truly,

By: Robert F. Polcha
Robert F. Polcha

RFPS:sl



August 7, 1985



Mr. Kelly Goddard, Vice President
EASTERN REAL ESTATE & DEVELOPMENT CO.
P.O. Box 3088
Provo, Utah 84409

RE: REGISTRATION OF CLIENT FOR PROPERTIES KNOWN AS
IOMEGA LIGHT INDUSTRIAL PARK

Dear Mr. Goddard:

Machan Hampshire Properties, Ltd./Robert F. Polcha represents the following client in connection with the proposed purchase of the above mentioned properties:

THE ESTATE OF JAMES CAMPBELL

The purpose of this letter is to register this client with you and to set forth our understanding that in the event a sale is consummated between yourself and this client, you agree to pay a commission to Machan Hampshire Properties, Ltd./Robert F. Polcha, based on 5% of the gross selling price, paid at closing.

The preceding confirms, in full, our understanding as presented to us by you. If, for any reason, you do not agree, we will delay presenting the subject property for five (5) days from date hereon so you may respond. Thereafter, the above mentioned terms will apply.

Sincerely truly yours,

MACHAN HAMPSHIRE PROPERTIES, LTD.

Robert F. Polcha, Director
Acquisitions and Investments

RP:cl





WESTERN

pc / 1-1-1-1
1- Campbell

August 9, 1985

Robert F. Polcha
Machan Hampshire Properties
1981 East Murray Holladay Road
Salt Lake City, Utah 84117-5139

Re: Registration of Client
Iomega Park
James Campbell

Dear Bob:

In response to your letter, we only have agreed to pay a 4% commission on the above park. All other terms of your letter are acceptable.

Very truly yours,

Kelly Goddard
President

JKG/lh

Eh 19

September 6, 1985

Robert F. Polcha
Machan Hampshire Properties Inc.
1981 E. Murray Holladay Rd.
S.L.C. Utah 84117-5139

Re: Iomega Park Roy Utah

Dear Bob:

I have been receiving your letters of registration of clients. Though most are acceptable the following were contacted prior to receipt of your letters.

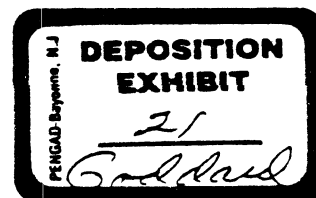
1. DeAuza Corporation
2. August Financial
3. Birtcher Properties/Cap Corp

Therefore we can not recognize the above. Should you have any questions please contact me.

Very truly yours,

Kelly Goddard
President

JKG/ns





September 12, 1985

Robert F. Polcha
Acquisitions and Investments Director
Machan Hampshire Properties, Inc.
1981 East Murray Holladay Rd.
SLC, Utah 84117-5139

Re: Iomega Park

Dear Bob:

Enclosed are the letters I told you I'd send on the proposed buyers.

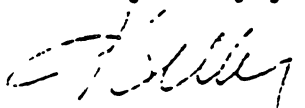
You can see I contacted August Financial on January 18, 1985, received their letter February 15, 1985 and your letter March 12, 1985.

I contacted DeAnza on January 18, 1985, received their response January 24, 1985, and your letter July 16, 1985.

As for Cap Corp/Birtcher, they presented their offer January 30, 1985 as you well know. Their initial offer expired, but Cap Corp is still working on a proposal.

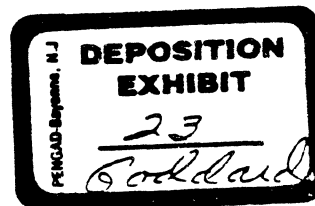
If you have any questions on the above let me know.

Very truly yours,


Kelly Goddard
President

KG/ns

enc



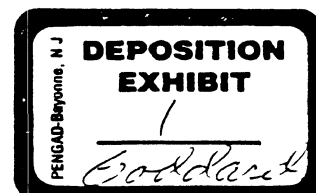
AGREEMENT OF
PURCHASE AND SALE OF REAL PROPERTY
[CORDILLERAN BUSINESS PLAZA]

THIS AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY (the "Agreement") is made as of the 27 day of September, 1985, among WESTERN MORTGAGE LOAN CORPORATION, a Utah corporation ("Western Mortgage"), whose address for the purposes hereof is 376 East 400 South, Salt Lake City, Utah 84111, Attention: Chad Mullins, President, and K-E ENTERPRISES, a Utah general partnership ("K-E"), whose address for the purposes hereof is 376 East 400 South, Salt Lake City, Utah 84111, Attention: Kelly Goddard, (Western Mortgage and K-E are hereinafter sometimes collectively referred to as "Seller," which term shall mean all of the entities comprising Seller, and each of them), and BIRTCHER INVESTMENTS, a California general partnership ("Buyer"), whose address for the purposes hereof is P. O. Box 19677, Irvine, California 92713-9677, or 1261 East Dyer Road, Santa Ana, California 92705, Attention: Stuart I. Ackerberg.

RECITALS:

A. The entities comprising Seller own that certain approximately 16.61 acres of real property located in Weber County, Utah, at approximately 1900 West 4000 South, Roy City, legally described on the attached Exhibit A, and owned by such entities as set forth thereon, which, together with all easements and rights of way over adjoining properties and any and all appurtenances in any way appertaining thereto, including all oil, gas, water and mineral rights, and all right, title and interest of Seller in and to any land lying in the bed of any street, road or avenue, open, closed or proposed, in front of or adjoining such land, in and to any award made or to be made in lieu thereof and in and to any unpaid award or damages to such land by reason of the change of any street or a condemnation or a taking for a public use, is referred to herein as the "Real Property."

B. The seven (7) buildings (the "Buildings") located on the Real Property and the other structures, parking lots, walks and walkways on, and all fixtures attached to, the Real Property (including, without limitation, all plumbing, electrical, heating, air conditioning and ventilating lines and systems and boilers), and all other physical improvements located on or affixed to the Real Property, to the extent such improvements constitute realty under the laws of the State in which the Real



Property is located, are collectively referred to herein as the "Improvements."

C. All goods, equipment, machinery, inventory, supplies, fixtures, furniture, furnishings, tools, appliances and all other tangible personal property now or hereafter owned by Seller and located on the Real Property, and any substitutions and replacements thereof, and any attachments, accessions and additions thereto are collectively referred to herein as the "Tangible Personal Property."

D. All right, title and interest of Seller in and to the business, trademarks, trade names, logos and designs for the operations located on the Real Property, including, without limitation, ~~the nonexclusive right (to the extent held by Seller) to use the trade name "Cordilleran Business Plaza" and "Western Business Park,"~~ all contract rights, escrow accounts, accounts receivable, insurance policies, agreements, instruments, documents of title, general intangibles, business records, plans and specifications, site plans, floor plans, landscape plans and other plans, drawings, options, declarations, surveys, soil and substrata studies, architectural renderings, diagrams and studies of any kind, maps, use and operating permits and licenses, zoning and subdivision development applications, filings and approvals, all other permits, approvals and certificates obtained or held in connection with the ownership of the Real Property, and any other intangible personal property now or hereafter owned by Seller and used in connection with the ownership or operation of the Real Property or any business located thereon are collectively referred to herein as the "Intangible Personal Property."

E. The Real Property, the Improvements, the Tangible Personal Property and the Intangible Personal Property are collectively referred to herein as the "Property."

F. Buyer desires to purchase and Seller desires to sell the Property on the terms and conditions set forth herein.

AGREEMENT:

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, Seller and Buyer hereby agree as follows:

1. AGREEMENT OF SALE; PURCHASE PRICE; EARNEST MONEY

1.1 Agreement of Sale. Seller hereby agrees to sell to

Buyer and Buyer hereby agrees to purchase from Seller the Property, subject to all of the terms and conditions contained herein.

1.2 Purchase Price. The Purchase Price (the "Purchase Price") for the Property shall be Seven Million Four Hundred Twenty-Five Thousand and 00/100 Dollars (\$7,425,000.00), which shall be payable in cash by Buyer to Seller at the "Closing" (as that term is defined herein).

1.3 Earnest Money. Within five (5) business days after the "End of the Feasibility Period" (as defined herein), Buyer shall deposit the sum of Fifty Thousand and 00/100 Dollars (\$50,000.00) (the "Earnest Money") in cash in an escrow established at Associated Title Company, a Utah corporation (the "Title Company"), at 349 East 200 South, Salt Lake City, Utah 84111, Attention: Blake T. Heiner (telephone: (801) 363-0909). At the Closing, the Earnest Money, with all accrued interest thereon, shall be returned to Buyer. The escrow for the Earnest Money shall be opened and maintained solely for the purpose of holding and disbursing the Earnest Money as directed by Buyer and Seller, and the Title Company is hereby directed to disburse funds held by it in accordance with the terms and provisions of this Agreement, or as otherwise directed in a writing signed by both Buyer and Seller. If this Agreement is terminated for any reason other than a default by Buyer, the Title Company is hereby instructed to promptly return the Earnest Money, together with any interest earned thereon, to Buyer. These instructions shall be irrevocable and shall supersede any conflicting provision in the Title Company's general conditions or in any escrow instructions executed upon the Title Company's request. This Agreement shall constitute escrow instructions to the Title Company with respect to the Earnest Money, but the Title Company shall be concerned only with the receipt, deposit and disbursement of the Earnest Money as provided in this Agreement, or as otherwise directed in writing by both Buyer and Seller, and with such other matters as are expressly set forth herein, but shall not otherwise be concerned with the terms and provisions of this Agreement. At the Closing and at Buyer's request, Seller shall deliver to Buyer, in addition to all other deliveries required herein, an executed instruction directing the Title Company to return the Earnest Money to Buyer, which instruction shall be in a form approved by Buyer and the Title Company.

1.4 Investment of Earnest Money. Seller and Buyer agree that the Earnest Money shall be invested in a federally insured account in a manner which includes, but is not limited to, Treasury Bills, certificates of deposit, short-term money market instruments or bank repurchase contracts, as determined by mutual agreement between Buyer and Seller, in such manner as to make

the Property from Seller pursuant to the provisions hereof. The person or persons executing this Agreement on behalf of Buyer have been duly authorized to execute this Agreement and to take such other actions as may be necessary or appropriate to consummate the transactions contemplated hereby. All requisite partnership action has been taken to make this Agreement valid and binding upon Seller.

8.1.3 Litigation. Buyer is not a party to any pending suit or proceedings by or before any tribunal (whether judicial, administrative or otherwise) which could have a material adverse effect on Buyer's performance of its obligations under this Agreement, or the transactions contemplated hereunder, nor to the best of Buyer's knowledge are there any threatened claims or actions which may become the subject of litigation, which might have a similar material adverse effect.

8.1.4 Violation of Law by Buyer. Buyer is not in violation of any governmental law, rule or regulation in any respect which could have a material adverse effect upon the validity, performance or enforceability of this Agreement or any document referred to or contemplated herein.

8.1.5 Other Agreements. Neither this Agreement nor the transactions contemplated hereby violate or shall violate any contract, document, understanding, agreement or instrument to which Buyer is a party or by which Buyer is bound.

8.1.6 Bankruptcy. Within the two years immediately preceding this Agreement, Buyer has made no assignment for the benefit of creditors, and, to the best of Buyer's knowledge, no petition of bankruptcy is threatened or pending against Buyer.

8.2 Survival of Representations and Warranties. All of the representations and warranties of Buyer set forth in Paragraph 8.1 shall survive the Closing. In the event any of the foregoing representations and warranties are incorrect at any time prior to the Closing Date, and should Buyer be unwilling or unable to correct the condition giving rise thereto on or prior to the Closing Date, Seller may, at Seller's option, exercise the remedies set forth in Paragraph 4.2 or waive such incorrect representation or warranty and proceed to close notwithstanding the incorrect representation or warranty.

9. REAL ESTATE COMMISSION

9.1 Brokers. Seller hereby represents and warrants to Buyer that the only real estate agents which may be involved in this transaction and may have been retained by Seller, including

any negotiations relating to this Agreement and any other agreements and documents contemplated hereby is Russell Madsen of Daum Business Properties Brokerage Company (the "Seller's Broker"). Seller agrees that any compensation due to the Seller's Broker as a result of this Agreement or the Closing is and shall be the exclusive responsibility of Seller, and Buyer shall have no liability or responsibility therefor. Seller hereby agrees to pay to the Seller's Broker a real estate commission for its efforts in arranging for the purchase of the Property by Buyer.

9.2 Mutual Indemnification. Seller and Buyer represent and warrant to each other that they have employed no broker or finder other than as set forth in Paragraph 9.1. Seller and Buyer each agree that to the extent a brokerage or finder's fee shall have been earned or claimed in connection with this Agreement other than the fees which may be payable as provided in Paragraph 9.1, the payment of such fees and the defense of any action in connection therewith shall be the exclusive obligation of the party who requested the services of the broker or finder. In the event that any claim, demand or cause of action for brokerage or finder's fees is asserted against a party to this Agreement who did not request such services, the party through whom the broker or finder is making the claim shall indemnify, defend (with an attorney of indemnitee's choice) and hold harmless the other party from and against any such claims, demands and causes of action.

9.3 Listing Agreement. The provisions of this Agreement shall be superior to and shall control over any factual discrepancies contained in any listing agreement relating to the Property.

10. MISCELLANEOUS

10.1 Material Damage or Condemnation. If the Property is materially damaged prior to the Closing Date, Seller shall have the right to repair the Property, provided that such damage can be and is repaired within fifteen (15) days after the date such damage occurs. If Seller elects to repair the Property, Seller shall notify Buyer in writing of its intent to do so within five (5) days after the date such damage occurs. If Seller fails to so notify Buyer within such five (5) day period, Seller shall be deemed to have elected not to repair such damage. In the event Seller elects to repair such damage, the Closing Date shall be extended until the fifth (5th) day after Seller gives Buyer written notice of the completion by Seller of the repair of such damage. In the event Seller elects or is deemed to have elected not to repair such damage, if such repair is not completed within fifteen (15) days after the date such damage occurs, or if the

Property or any part thereof is taken by condemnation prior to the Closing Date, Buyer shall have the right to reject the Property and, on written demand by Buyer to Seller, this Agreement shall be terminated and neither Seller nor Buyer shall thereafter have any obligation to each other, except as set forth in Paragraph 2.3; provided, that the Earnest Money shall be returned to Buyer with any interest accrued thereon. In the alternative, Buyer may elect to complete the transaction on the terms set forth in this Agreement and, in such event, Buyer shall receive an assignment of such insurance proceeds or condemnation proceeds, as the case may be, as are allocable to the restoration of the damaged Property or to the portion of the Property taken, or receive a reduction of the Purchase Price in an amount proportionate to the cost of fully repairing such damage, such amount to be approved by Buyer, in its sole discretion.

10.2 General Indemnification.

10.2.1 Seller's Indemnification. Seller shall indemnify and hold harmless Buyer and each partner, employee and legal representative of Buyer from and against any and all losses, damages, claims, causes of action, demands, obligations, suits, controversies, costs, expenses (including, without limitation, litigation expenses and attorneys' fees, including any such expenses or fees incurred in connection with any appeals), liabilities, judgments and liens, of whatever kind or character, which are caused by Seller's failure to perform any of its obligations under this Agreement or under any instrument delivered pursuant to this Agreement, any representation or warranty made by Seller in this Agreement or in any instrument delivered pursuant to this Agreement being untrue or inaccurate as of the date such representation or warranty is made, any violation of any law, regulation or requirement, including, without limitation, those concerned with zoning, building, subdivision, environmental protection, land use or land disposition, that occurs in connection with the Property at any time prior to or on the Closing Date, or the payment by Buyer of a portion of the Purchase Price into an escrow account established by Seller for the purpose of effecting a tax-free exchange, the establishment by Seller of such escrow account or the making or attempt to make such tax-free exchange. This provision shall survive the Closing.

10.2.2 Buyer's Indemnification. Buyer shall indemnify and hold harmless the entities comprising Seller and each officer, director, partner, employee and legal representative of such entities from and against any and all losses, damages, claims, causes of action, demands, obligations, suits, controversies, costs, expenses (including, without limitation, litigation

expenses and attorneys' fees incurred in connection with any appeals), liabilities, judgments and liens, of whatever kind or character, which are caused by Buyer's failure to perform any of its obligations under this Agreement or under any instrument delivered pursuant to this Agreement, any representation or warranty made by Buyer in this Agreement or in any instrument delivered pursuant to this Agreement being untrue or inaccurate as of the date such representation or warranty is made, or any violation by Buyer of any law, regulation or requirement, including, without limitation, those concerned with zoning, building, subdivision, environmental protection, land use or land disposition, that occurs in connection with the Property at any time after the Closing Date. This provision shall survive the Closing.

10.3 Attorneys' Fees. In the event either party brings suit to enforce or interpret this Agreement or for damages on account of the breach of a covenant or representation or warranty contained herein, the prevailing party shall be entitled to recover from the other party its reasonable attorneys' fees and costs incurred in any such action, in addition to the other relief to which the prevailing party is entitled.

10.4 Notices. Any notice or demand to be given by one party to the other shall be given by personal service, telegram, express mail, Federal Express, DHL or any other similar form of airborne/overnight delivery service, or mailing in the United States mail, postage prepaid, certified mail, return receipt requested, addressed to the parties at their respective addresses as follows:

If to Buyer:

Birtcher Investments
1261 East Dyer Road
Santa Ana, California 92705
Attention: Mr. Stuart I. Ackerberg

With a copy to:

Larsen, Kimball, Parr & Crockett
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Attention: Victor A. Taylor, Esq.

If to Seller:

Western Mortgage Loan Corporation
K-E Enterprises
376 East 400 South
Salt Lake City, Utah 84111
Attention: Mr. Chad Mullins, President

With a copy to:

Kirton, McConkie & Bushnell
330 South 300 East
Salt Lake City, Utah 84111
Attention: Gregory S. Bell, Esq.

Any such notice shall be deemed to have been given upon delivery if personally delivered or given by telegram, or upon the expiration of four (4) days if mailed. Either party may change the address at which it desires to receive notice upon written notice of such change to the other party. Buyer and Seller, and their respective counsel, all hereby agree that if notice is to be given hereunder by Buyer's or Seller's counsel, such counsel may communicate directly with all principals, as required, to comply with the foregoing notice provisions.

10.5 Time of Essence. Time is of the essence of this Agreement and each and every term and provision hereof.

10.6 Waiver or Modification. No waiver of any breach or default by any party hereto shall be considered to be a waiver of any other breach or default. A modification of any provision contained herein, or of any other amendment to this Agreement, shall be effective only if the modification or amendment is in writing and signed by each of Seller and Buyer.

10.7 Successors and Assigns. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, successors and assigns; provided, that this provision shall not be construed as permitting assignment, substitution, delegation or other transfer of rights or obligations except strictly in accordance with the provisions of the other paragraphs of this Agreement.

10.8 Applicable Law; Construction. This Agreement is to be construed according to the laws of the State of Utah. In the event any lawsuit is filed hereunder, the parties agree that the venue for such lawsuit shall be in Salt Lake County, Utah. Unless otherwise provided, references to Paragraphs are to those in this Agreement. This Agreement shall be construed as if both

Buyer and Seller had prepared it.

10.9 Integration of Other Agreements. This Agreement supersedes all previous contracts, correspondence and documentation relating to the sale of the Property. Any oral representations or modifications concerning this Agreement shall be of no force or effect.

10.10 Counterparts. This Agreement may be executed in any number of duplicate originals or counterparts, each of which shall be of equal force and effect.

10.11 Further Actions. Buyer and Seller agree to execute such additional documents and take such further actions as reasonably may be required to carry out each of the provisions and the intent of this Agreement. From time to time following the Closing Seller shall, upon Buyer's request, furnish Buyer with access to and with copies of all books, records, documents and information which Buyer may reasonably request that are within the possession of, under the control of, available to or obtainable by, Seller, and that relate to the Property. Following the Closing, Seller shall reasonably cooperate with Buyer in effecting a smooth and orderly transfer of operation and administration of the Property from Seller to Buyer.

10.12 Titles and Headings. Titles and headings of Paragraphs of this Agreement are for convenience of reference only and shall not affect the construction of any provisions of this Agreement.

10.13 Exhibits. Each of the exhibits referred to herein and attached hereto is an integral part of this Agreement and is incorporated herein by this reference.

10.14 Pronouns. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine or neuter, singular or plural, as the identity of the parties may require.

10.15 Severability. Whenever possible, each provision of this Agreement and every related document shall be interpreted in such manner as to be valid under applicable law; but, if any provision of any of the foregoing shall be invalid or prohibited under said applicable law, such provision shall be ineffective to the extent of such invalidity or prohibition without invalidating the remainder of such provision or the remaining provisions of this document.

10.16 No Merger. Neither the occurrence of the Closing nor execution or delivery of the various documents that are

contemplated hereby to be executed and delivered prior to, in connection with, or after the Closing shall result in the termination or extinguishment of this Agreement or the merger of this Agreement into such documents. Buyer and Seller expressly agree and intend that this Agreement and each and every provision hereof shall survive all of the aforesaid matters.

10.17 Recorded Memorandum. Concurrently with the deposit of the Earnest Money by Buyer with the Title Company or, at the election of Buyer, at such later time as Buyer may request, Seller shall execute and deliver to Buyer, for recording, a Memorandum of this Agreement, in the form attached as Exhibit V.

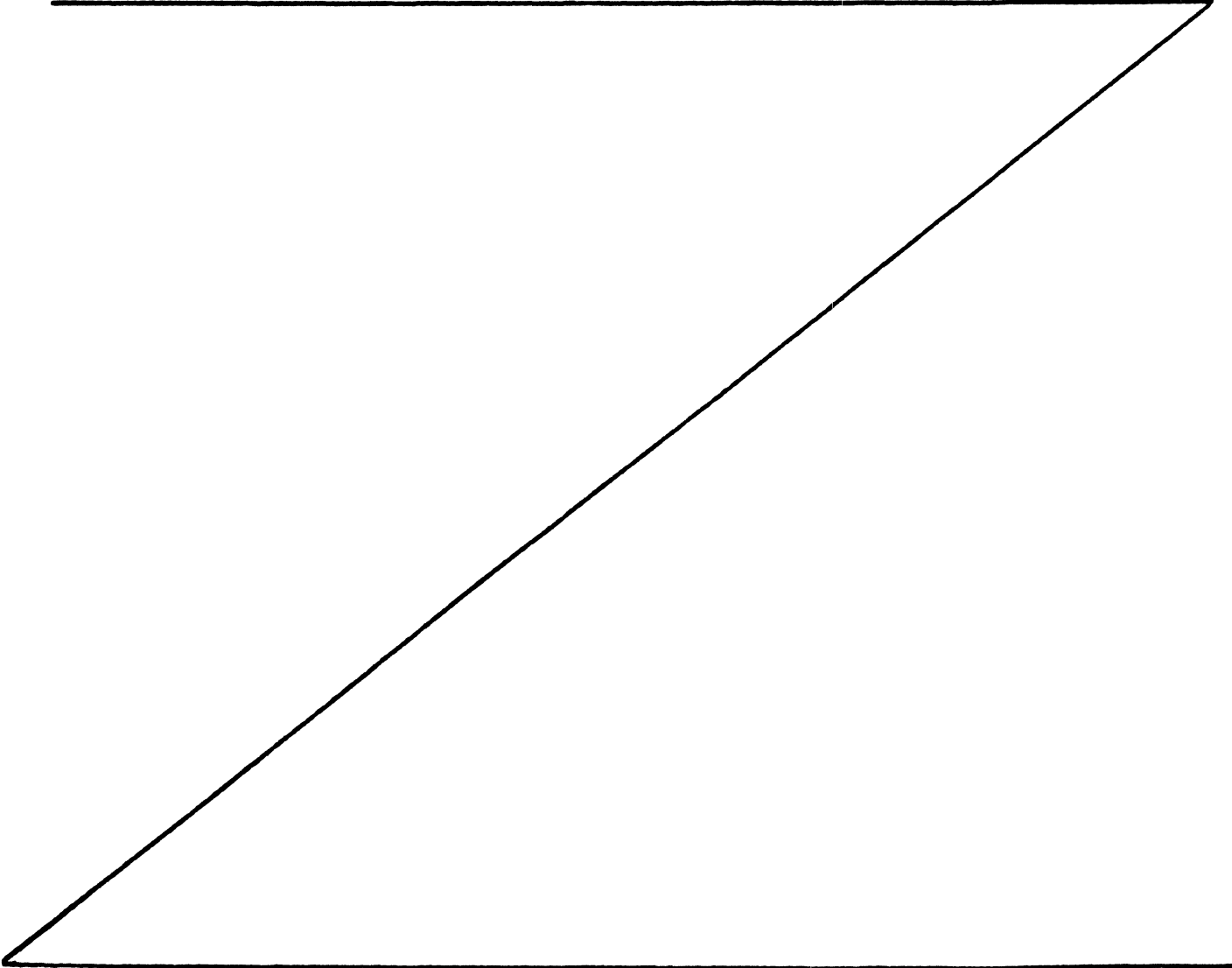
10.18 Publicity. Seller shall not publicize Buyer's interests in the Property or under this Agreement without the prior written consent of Buyer. Seller shall reasonably cooperate with Buyer to assist Buyer in obtaining a letter of confidentiality from Seller's Broker with respect to the transaction set forth herein.

10.19 Assignment by Buyer. Buyer may, in its sole discretion, concurrently with the Closing, assign or transfer all or any portion of Buyer's rights and obligations under this Agreement to any other person or persons. In the event that Buyer assigns its interest under this Agreement, Buyer shall, upon the making of such assignment, be released and relieved of all of Buyer's obligations and liabilities hereunder, provided that Buyer's obligations and liabilities are assumed by such assignee.

10.20 Liability of Buyer; Tax-Free Exchange. Seller hereby agrees that it will look only to the assets of Buyer for the performance (or liability for nonperformance) of any and all obligations of Buyer hereunder or pursuant hereto or to the transactions contemplated hereby, it being expressly understood and agreed that no general or limited partner of Buyer or any assignee of Buyer's interest herein shall have any personal liability or obligations of any kind or nature whatsoever under or pursuant to the terms of this Agreement. Seller and Buyer intend to enter into a tax-deferred exchange in connection with the transactions contemplated herein, but the sole obligation of Buyer with respect thereto is expressly limited to directing a portion of the Purchase Price into the Turner Escrow, as described in Paragraph 6.3.1. Seller agrees that such tax-deferred exchange shall be completed at no cost or expense whatsoever to Buyer, and Seller shall reimburse Buyer for any and all such cost or expense.

10.21 Disclosure. Seller acknowledges that Buyer may

assign its rights hereunder, or, after the Closing, transfer the Property to a limited partnership whose limited partnership interests are offered to investors, either publicly or privately, and Seller consents to Buyer's disclosure of the terms hereof and any and all information available to Buyer or said assignee regarding the Property or Seller, to such investors, prospective investors, their brokers and representatives, underwriters, counsel to any of the foregoing, and state and federal governmental securities-regulating authorities. Seller shall maintain in a safe place all financial and other records with respect to the operation, management and maintenance of the Property for the three (3) year period immediately preceding the Closing Date, which records are not delivered by or on behalf of Seller to Buyer pursuant to the terms of this Agreement, and Buyer, or persons or entities designated by Buyer, shall have the right to review and audit such records during the two (2) year period next following the Closing Date. Seller shall make the records available to Buyer, or to persons or entities designated by



Buyer, within ten (10) days following receipt by Seller of a written notice from Buyer indicating Buyer's desire to have the records reviewed and/or audited.

10.22 Assignment of Warranties. Seller acknowledges that Buyer may assign its rights under this Agreement to another entity, and that at a later date such entity may transfer the Property to Buyer, an affiliate of Buyer (that is, a limited partnership in which Buyer or an affiliate of Buyer is a general partner), or some other person or entity. In that regard, Seller agrees to execute a consent to an assignment of the warranties set forth in Paragraph 7 and all documents executed in connection with this Agreement, to any subsequent purchaser of the Property. Such consent shall not be a condition to the validity or enforceability by an assignee of the rights of Buyer arising from such representations, warranties and documents.

10.23 Joint and Several Liability. The obligations and liabilities hereunder of the general partners or other appropriate persons or entities that comprise the entities of which Seller consists, if such entities are a general or limited partnership, joint venture or other similar organization, are and shall be joint and several.

IN WITNESS WHEREOF, this Agreement of Purchase and Sale of Real Property is executed by Buyer and Seller as of the date first set forth above, and shall be deemed effective as of said date.

SELLER:

WESTERN MORTGAGE LOAN CORPORATION,
a Utah corporation

By Chad E. Hall

Its PRESIDENT

K-E ENTERPRISES,
a Utah general partnership

By Kellye J. Hume

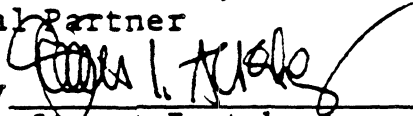
Its Partner

BUYER:

BIRTCHER INVESTMENTS,
a California general partnership,

By ALBERT S. NAGY,
General Partner

By



Stuart I. Ackenberg,
Attorney-In-Fact.

CONTRACT FOR SERVICES

This AGREEMENT is made this 7 day of October, 1985, by and between Birtcher Investments, a California general partnership, having a principal place of business at 1261 East Dyer Road, Santa Ana, California 92705, and its successors and assigns, collectively referred to herein as the "Client", and First Capitalcorp, a California corporation, First Beverly Consultant, Inc., a California corporation, and D.L.H., Inc., a California corporation, independent contractors, having a principal place of business at 280 South Beverly Drive, Suite 204, Beverly Hills, California, collectively referred to herein as the "Contractor".

ARTICLE 1. TERM OF CONTRACT

Section 1.01. This agreement shall become effective on the date stated above and shall continue in effect thereafter.

ARTICLE 2. SERVICES TO BE PERFORMED BY CONTRACTOR

Specific Services

Section 2.01. Contractor has performed and/or shall perform certain consulting and/or other services related to and/or in connection with the acquisition of Northpointe Business Center, referred to herein as the "Property", by Client from Western Mortgage Loan Corporation, a Utah corporation, and K-E Enterprises, a Utah general partnership, collectively referred to herein as the "Seller", pursuant to that certain Agreement of Purchase and Sale of Real Property, dated September 27, 1985, by and between Client, as "Buyer", and Seller, referred to herein as the "Purchase Contract". The Property is located at approximately 1900 West 4000 South, Roy City, Weber County, Utah.

ARTICLE 3. COMPENSATION

Flat Rate

Section 3.01. In consideration for the services performed and/or to be performed by Contractor and as a finder's fee for the Property, Client agrees to pay Contractor the sum of Five Hundred Thousand and 00/100 Dollars (\$500,000.00) on and subject to the terms and conditions set forth herein.

Date for Payment of Compensation

Section 3.02. For services rendered under this agreement, Client agrees to pay Contractor the sum set forth in Section 3.01 of this agreement as follows: At the closing of the

acquisition of the Property by Client from Seller pursuant to the Purchase Contract, Client shall pay to First Capitalcorp the sum of Zero and 00/100 Dollars (\$-0-), to First Beverly Consultant, Inc. the sum of Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000.00), and to D.L.H., Inc. the sum of Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000.00). At Client's election, said sums may be paid through the escrow provided for in the Purchase Contract. Upon Client's request, Contractor shall provide to Client the name of Contractor's bank(s), account number(s), and deposit instructions with respect thereto; Client may elect to deposit Contractor's compensation directly or indirectly (i.e., through escrow by the escrow holder) into such account(s) at such bank(s). In no event shall Contractor receive any sum or payment hereunder until the closing and Client has obtained title to the Property in accordance with the terms of the Purchase Contract.

ARTICLE 4. OBLIGATIONS OF CONTRACTOR

Workers Compensation

Section 4.01. Contractor agrees to provide workers compensation insurance for Contractor's employees and agents and agrees to hold harmless and indemnify Client for any and all claims arising out of any injury, disability, or death of any of Contractor's employees or agents.

Confidentiality

Section 4.02. Contractor and its employees agree not to make any public announcements, press releases, or advertisements concerning the purchase price and/or any of the financial terms and considerations of the transaction which shall result in the acquisition of the Property by Client, without the prior written consent of Client. Further, Contractor and its employees shall not unnecessarily disclose any information whatsoever concerning the acquisition transaction without the prior written consent of Client.

No Other Contractors

Section 4.03. Contractor hereby represents and warrants to Client that Contractor is the only party involved in bringing the acquisition transaction referred to herein to Client, with the exception of Russell Madsen of Daum Business Properties Brokerage Company. Contractor agrees that any compensation due to any other entity claiming by or through Contractor as a result of this agreement or Client's acquisition of the Property shall be the sole and exclusive responsibility of Contractor, and Client shall have no liability or responsibility therefor.

Indemnification

Section 4.04. Contractor shall and does hereby agree to indemnify, defend, and hold Client, and Client's agents and employees, harmless of and from any and all claims, demands, losses, liabilities, causes of action, costs or expenses (including any increase in real property taxes, or other taxes, and reasonable attorneys' fees and costs), directly or indirectly, arising in connection with the breach of this agreement or any covenant, warranty, or representation of Contractor contained herein. In the event that any claim, demand or cause of action for brokerage and/or finder's fees is asserted against Client or its agents or employees through or relating to Contractor, then this section shall apply and the indemnification provided for herein shall result in Contractor indemnifying, defending (with an attorney of Client's choice), and holding harmless the Client, and its agents and employees, from any and all such claims, demands and causes of action.

Assignment

Section 4.05. Neither this agreement nor any duties or obligations under this agreement may be assigned by Contractor without the prior written consent of Client.

Joint and Several Liability

Section 4.06. The obligations of Contractor hereunder, and each party comprising Contractor shall be joint and several.

ARTICLE 5. OBLIGATIONS OF CLIENT

Assignment

Section 5.01. This agreement and any and all duties or obligations under this agreement may be assigned by Client without the prior written consent of Contractor.

ARTICLE 6. TERMINATION OF AGREEMENT

Termination on Occurrence of Stated Events

Section 6.01. This agreement shall terminate automatically on the occurrence of any of the following events:

1. Bankruptcy or insolvency of either party;
2. Sale of the business of either party;

3. Dissolution of either party; or

4. Assignment of this agreement by Contractor without the consent of Client.

Termination by Client upon Failure to Complete Acquisition

Section 6.02. This agreement shall terminate automatically upon the termination or cancellation of the Purchase Contract or should Client elect, for any reason or no reason, not to acquire the Property.

ARTICLE 7. GENERAL PROVISIONS

Notices

Section 7.01. Any notices to be given hereunder by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change the address by written notice in accordance with this section. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three (3) days after mailing.

Entire Agreement of the Parties

Section 7.02. This agreement supersedes any and all agreements, either oral or written, between the parties hereto with respect to the rendering of services by Contractor for Client and contains all of the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding. Any modification of this agreement shall be effective only if it is in writing signed by the party to be charged.

Partial Invalidity

Section 7.03. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Attorneys' Fees

Section 7.04. If any action at law or in equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, which may be set by the court in the same action or in a separate action brought for that purpose, in addition to any other relief to which that party may be entitled.

Governing Law

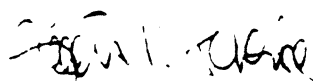
Section 7.05. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Executed on the date and year first above written.

CLIENT


BIRTCHER INVESTMENTS,
a California general partnership

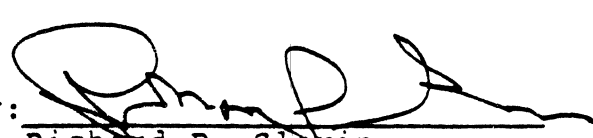
By: Albert S. Nagy,
General Partner

By: 
Stuart I. Ackenberg,
Attorney-in-Fact


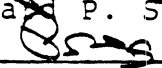
CONTRACTOR

FIRST CAPITALCORP,
a California corporation

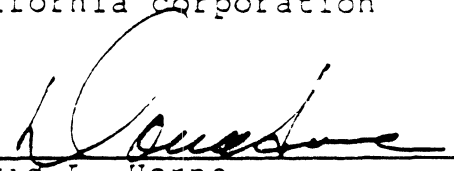
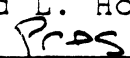
By: 
David L. Horne,
President

By: 
Richard P. Slavin,
Executive Vice President

FIRST BEVERLY CONSULTANT, INC.,
a California corporation

By: 
Richard P. Slavin
Title: 

D.L.H., INC.,
a California corporation

By: 
David L. Horne
Title: 

RJS/1011751004/10-4-85

rejected written offer. *Mendelson v. Roland* (1926) 66 U 487, 243 P 798.

Surrender, release or discharge.

Surrender of interest under contract for purchase of land could be properly effected without deed or conveyance in writing in

compliance with statute. *Budge v. Barron* (1917) 51 U 234, 169 P 745.

Collateral References.

Frauds, Statute of § 71 et seq.
37 CJS Frauds, Statute of § 90 et seq.
72 AmJur 2d 616 et seq., Statute of Frauds § 59 et seq.

25-5-4. Certain agreements void unless written and subscribed. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another.

(3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

(4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate.

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

History: R.S. 1898 & C.L. 1907, § 2467; L. 1909, ch. 72, § 1; C.L. 1917, § 5817; R.S. 1933 & C. 1943, 33-5-4.

Compiler's Notes.

Analogous former statutes, Comp. Laws 1876, § 1014; 2 Comp. Laws 1888, §§ 2835, 3918, 4219.

Affirmative defense.

When action is on contract, admitted by defendant, he must interpose special plea of statute if statute is to be available as defense. *Abba v. Smyth* (1899) 21 U 109, 59 P 756.

Statute of frauds must be pleaded by party relying upon it as a defense. *M & S Constr. & Engineering Co. v. Clearfield State Bank* (1967) 19 U 2d 86, 426 P 2d 227.

Defendant, who answered by a general denial and simultaneous motion to dismiss plaintiff's claim as being barred under subsec. (2) of this section, proceeded improperly, since under Rule 12(b), Utah Rules of Civil Procedure, statute of frauds is not a ground for motion to dismiss but rather an affirmative defense under Rule 8(c). *W. W. & W. B. Gardner, Inc. v. Pappas* (1970) 24 U 2d 264, 470 P 2d 252.

Alteration or modification of original contract.

If original contract, to be binding and enforceable, and to satisfy the statute of frauds, is required to be in writing and subscribed by parties sought to be charged, then a subsequent agreement altering or modifying any of its material parts or terms is also required to be in writing and so subscribed, no part performance or anything done by such party in reliance on the subsequent agreement being alleged or proved, especially if interest in land is involved. *Combined Metals, Inc. v. Bastian* (1928) 71 U 535, 267 P 1020, distinguished in 100 U 516, 116 P 2d 578.

Parties may modify orally an agreement in writing where the original contract is not required by statute of frauds to be in writing, at least where there is consideration for such modification. But a contract required by statute of frauds to be in writing cannot be modified by a subsequent oral agreement, although this rule is subject to many exceptions, the first great division coming between executory and executed modifications. *Bamberger Co. v. Certified Productions, Inc.* (1935) 88 U 194, 48 P 2d 489, affirmed on rehearing 88 U 213, 53 P 2d 1153.

An oral modification of a contract required to be in writing, when such modification is fully executed, is taken out of the statute. In