

2008

LD III, LLC, a Utah limited liability v. BBRD, L.C., a Utah limited liability company, Richard W. Davis, an individual; Mountain West Title Company; and BBRD, Inc, an alter ego of Defendant Richard W. Davis : Brief of Appellant

Utah Court of Appeals

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Michael N. Zundel; James A. Boevers; Richard H. Thornton; Prince, Yeates & Geldzahler; Attorneys for Defenders-Appellees BBRD, L.C., Richard W. Davis, and BBRD, Inc..

Denver C. Snuffer, Jr.; Steven R. Paul; Daniel B. Garriott; Nelson, Snuffer, Dahle & Poulson, P.C.; Attorneys for Plaintiff-Appellant LD III, LLC.

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IN THE UTAH COURT OF APPEALS

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LD III, LLC, a Utah limited liability company	:	Utah Supreme Court No. 20080839
	:	District Court Civil No. 080400318
Plaintiff,	:	
	:	
vs.	:	
	:	
BBRD, L.C., a Utah limited liability company, RICHARD W. DAVIS, an individual; MOUNTAIN WEST TITLE COMPANY; and BBRD, INC, an alter ego of Defendant Richard W. Davis,	:	PRIORITY NO.: 15
	:	
Defendants.	:	

**APPELLANT LD III, LLC'S
OPENING BRIEF ON APPEAL**

Appeal from the Order of the Fourth District Court,
Utah County, Provo Division, The Honorable Judge Fred Howard

Michael N. Zundel (3755)
James A. Boevers (0371)
Richard H. Thornton (3253)
PRINCE, YEATES & GEDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000

Denver C. Snuffer, Jr.(3032)
Steven R. Paul (7423)
Daniel B. Garriott (9444)
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

Attorneys for Defendants-Appellees
BBRD, L.C., Richard W. Davis, and
BBRD, Inc.

Attorneys for Plaintiff-Appellant LD III,
LLC

*** ORAL ARGUMENT REQUESTED**

FILED
UTAH APPELLATE COURTS
MAR 05 2009

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10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

Attorneys for Defendants-Appellees
BBRD, L.C., Richard W. Davis, and
BBRD, Inc.

Attorneys for Plaintiff-Appellant LD III,
LLC

*** ORAL ARGUMENT REQUESTED**

APPELLANT'S BRIEF

Appellant, LD III, LLC, submits this brief in the appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellant:

LD III, LLC, a Utah limited liability company.

The Defendants-Appellees:

BBRD, L.C., a Utah limited liability company, RICHARD W. DAVIS, an individual; MOUNTAIN WEST TITLE COMPANY; and BBRD, INC, an alter ego of Defendant Richard W. Davis.

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JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts "shall be provided by statute."¹ Section 78-2-2(3)(j) of the Utah Code, provides that: "The Supreme Court has appellate jurisdiction..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]"² This is an appeal from the final judgment of the Fourth District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j), which provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred by determining an enforceable settlement agreement had been reached between the parties when the parties never agreed on all the material terms of settlement and a writing acceptable to the parties was never agreed upon, prepared or executed by the parties.

¹ Utah Const., Article VIII, § 5.

² Ut. Code Ann., § 78-2-2(3)(j) (1953, as amended).

STANDARD OF REVIEW

"The issue of whether a contract exists may present both questions of law and fact, depending on the nature of the claims raised." *Wadsworth Const. v. City of St. George*, 865 P.2d 1373, 1375 (Utah App. 1993); *see O'Hara v. Hall*, 628 P.2d 1289, 1290-91 (Utah 1981) (existence of a contract is generally a conclusion of law, unless there is a material dispute of fact, which presents a subsidiary question of fact). "Factual findings made by the trial court will be upheld unless they are clearly erroneous." *Mostrong v. Jackson*, 866 P.2d 573, 577 (Utah App. 1993) (citing *In Re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989)). "Legal conclusions are reviewed for correction of error." *Mostrong*, 866 P.2d at 577 (citing *Marchant v. Park City*, 771 P.2d 677, 680 (Utah App. 1989), *aff'd*, 788 P.2d 520 (Utah 1990)).

RULES AND REGULATIONS APPLICABLE TO APPEAL

None.

STATEMENT OF THE CASE

Nature of the Case:

The Statute of Frauds requires any agreement for the sale or purchase of real property to be in writing to be enforceable. See Utah Code Ann. § 25-5-1. Plaintiff LD III, LLC ("LD III") is the owner of real property located in Utah County. See Court Record, the "Rec." pp. 17-15, ¶ 3. In August of 2007, Defendant Davis made an offer to purchase the real property from LD III. Rec. 370-366. The offer was set out in a standard form Real Estate Purchase Contract for Land (the "REPC"). The buyer was listed on the REPC as BBRD, Inc.³ and/or Richard Davis (collectively "Davis"). The REPC contained all the terms of the sale, including performance dates, that "time was of the essence" and others. *Id.* LD III accepted the offer contained in the REPC. *Id.* Thereafter Davis failed to close the purchase by the deadline contained in the REPC. Therefore the REPC lapsed. Rec. 14-1.

Notwithstanding Davis' failure to perform, he recorded a "Notice of Interest" in the records of the Utah County Recorder. Rec. 69-68. LD III filed this action to have the lien removed. Rec. 14-1. During an expedited discovery process, the parties began settlement discussions. The parties discussed settling the matter on terms modeled after the REPC, but with adjusted closing dates and other terms to be offered by Davis and approved by LD III. Davis agreed to prepare the settlement documents for review and approval by LD III,

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It is important to note that BBRD, Inc. does not exist and has never existed as a registered corporate entity.

including a settlement agreement containing all of the specific terms of settlement and closing documents which the parties would sign to resolve the matter and create an enforceable contract to transfer the property. New closing dates were not discussed, but were to be included in the written settlement documents.

Davis did not prepare a settlement agreement. Instead, Davis provided LD III with closing documents which contained new terms to which LD III had never agreed. The closing documents Davis prepared constituted a very different offer for settlement than had been discussed, contained terms the parties had never discussed and did not contain material terms, including new dates for performance. See Rec. 328-307. The new and different settlement offer contained terms which were unacceptable and never agreed to by LD III. Davis' new offer to settle involved new parties and would have created unacceptable risks for LD III and its sole member because it constituted a scheme by Davis to evade income taxes. *Id.* LD III rejected this offer to settle. Rec. 372 (see email from Daniel B. Garriott to Michael Zundel dated August 20, 2008). When LD III refused to accept the terms offered as contained in the closing documents Davis prepared, Davis moved the District Court to enforce what he has argued to be an enforceable contract. Rec. 257-255.

Course of Proceedings and Disposition Below:

Defendants filed a Motion to Enforce Settlement Agreement, which was fully briefed by each party. Rec. 423-255. The motion was argued before Judge Fred D. Howard of the

Fourth Judicial District Court on September 17, 2008. Rec. 365. The Court requested post-hearing briefs, which were filed on September 19, 2008. Rec. 423-364. On September 23, 2008, the Court held a short telephone conference with the parties' counsel, in which it granted Defendants' Motion to Enforce the Settlement Agreement. Rec. 416. The Court entered an Order granting Defendant's Motion to Enforce the Settlement Agreement. Rec. 453-450 (a copy of which is attached hereto as Appendix Exhibit 1). LD III timely appealed the District Court's decision. Rec. 432.

Facts established in the District Court Record:

1. LD III owns of certain real property and water rights located in Utah County. Rec. 17-15.
2. On August 29, 2007, Davis offered to purchase the real property and water rights. Rec. 370-366 (a copy of the REPC is attached hereto as Appendix Exhibit 2.)
3. The REPC required Davis to pay \$1,500,000.00 for the real property and water rights, with \$10,000.00 as an earnest money deposit and the remaining \$1,490,000.00 to be paid in cash at closing. *Id.*
4. The deadline for closing was September 28, 2007. *Id.* at ¶24(c).
5. Davis failed to close and pay the balance of the purchase price prior to the closing date of September 28, 2007. Rec. 14-1.
6. On December 26, 2007, Davis recorded a "Notice of Interest" against the real property. Rec. 69-68.

7. On February 1, 2008, LD III initiated this action to remove the lien. Rec. 14-1.

8. On July 9, 2008, LD III's counsel, Denver Snuffer, participated in a telephone conference with Davis' counsel, Michael Zundel and Jim Boevers. See Rec. 288-283 (the Affidavit of Defendant's counsel, Michael Zundel (hereinafter "Zundel Aff.", ¶ 6); see also, Rec. 306-304 (the Affidavit of Defendant's counsel James A. Boevers (hereinafter "Boevers Aff."), ¶ 31.

9. During the telephone conference, Mr. Zundel asked Mr. Snuffer if LD III would be willing to settle the matter on terms modeled after the REPC. See Rec. 288-283 (Zundel Aff.) ¶7 and Rec. 272, Ex. E to Zundel Aff.; see also Rec. 306-304 (Boevers Aff.), ¶4 and Rec. 301-297 (Ex. A thereto.) Mr. Snuffer replied that he could not respond until after he had conferred with his client. Several days later, having conferred with LD III, Mr. Snuffer communicated to Mr. Zundel that LD III was willing to consider settlement terms similar to the terms contained in the REPC. See Rec. 693, pp. 19,9-25; 20; 21 1-13.

10. However, both parties knew that a settlement agreement would have to be in writing to be enforceable and that additional terms would need to be agreed to by both parties. Davis' counsel agreed to draw up settlement documents which would include all the material terms settlement so Mr. Snuffer could present them to and discuss them with LD III. Rec. 288-283 (Zundel Aff.), ¶9.

11. The parties had not agreed on critical, material terms of settlement including closing dates and allocation issues, as the sale included the sale of both real property and water rights. See Rec. 693, pp. 23:18-25; 24:1-13.

12. On July 28, 2008, almost three weeks after the telephone conference between the parties' counsel, Davis' counsel, Mr. Richard H. Thornton, sent an e-mail to Mr. Snuffer, attaching drafts of closing documents Mr. Thornton had prepared. *Id.* at ¶¶ 9-10; see also Rec. 328-307 (copy of closing documents prepared and sent by Mr. Thornton).

13. The closing documents attached to the July 28, 2008 email did not include a settlement agreement document. See Rec. 328-307. Further, the closing documents contained material terms to which LD III had not agreed and that were not in conformity with the parties' settlement discussions. *Id.* The documents provided by Davis' counsel therefore constituted a counteroffer. (These documents shall be referred to as the "Counteroffer".) See Rec. 328-307 (Counteroffer), Rec. 301-297 (REPC). Among other things, instead of selling the real property and water rights to Davis, the Counteroffer requires LD III to sell the real property and water rights to five separate parties/entities. Rec. 328-307.

14. The Counteroffer required LD III to transfer the real property and water rights, not just to Davis, but to: (a) Stephen Sandstrom and Jennifer Sandstrom; (b) SWLRD, LLC a/k/a SWRD, LLC; (c) PBRD, LLC; (d) Richard W. Davis and Beverly B. Davis, trustees of the R.W. David Family Protection Trust dated the 4th day of December 2000; and (e) BBRD, L.C. The Counteroffer implicates LD III and its sole member in a tax evasion

scheme.^{4 5 6} *Id.* (see also Appendix Exhibit 3.) The Settlement Statement prepared by Davis shows that Davis is the buyer of the real property and water rights. However, Davis did not receive title to any ownership rights under the terms of the Counteroffer. *Id.* The Counteroffer allows Davis to "pay" for the property, divide it into six parcels, transfer five parcels to other parties (these other five parties would pay for the entire purchase), and retain

⁴The tables in footnotes 5 and 6 demonstrate the difference in the nature of the transaction between the REPC (Rec. 370-66) and the Counteroffer (Rec. 328-07).

⁵REPC

Seller	Buyer	Proposed Owner	Acres of Property to be Purchased	Shares of Water to be Purchased
LD III, LLC	BBRD, Inc. and/or Richard W. Davis	BBRD, Inc. and/or Richard W. Davis	70.81	25.93

⁶COUNTEROFFER

Seller	Buyer	Proposed Owner	Acres of Property to be Purchased	Shares of Water to be Purchased
LD III, LLC	BBRD, Inc. and/or Richard W. Davis	Stephen and Jennifer Sandstrom	7.496	2.0
		SWLRD, LLC a/k/a SWRD, LLC	7.506	2.0
		PBRD, LLC	7.500	2.0
		Richard W. Davis and Beverly B. Davis, trustees of the R.W. Davis Family Protection Trust dated the 4 th day of December 2000	10.500	2.0
		BBRD, LC	37.808	21.93

one parcel worth \$300,000.00 without Davis recognizing any taxable gain on the sale of the five parcels. See Rec. 699, p. 11:3-12, 15:8-12.

15. Leslie D. Mower, the sole member of LD III, has been previously convicted of conspiracy to commit tax evasion. (See *United States v. Leslie Mower*, U.S. District Court for the District of Utah, Case No. 2:02-CR-00787.)

16. Because the Counteroffer constituted a scheme by Davis to evade paying income tax on the sale of the five parcels, Ms. Mower and her tax advisors determined the Counteroffer would implicate her in a tax evasion scheme and therefore could not be accepted. Rec. 395-390.

17. On August 20, 2008, LD III, rejected the Counteroffer. Rec. 372, see also Appendix Exhibit 4.

18. There never was a settlement agreement reached in this matter. *Id.* LD III is unwilling to deal with Davis regarding the real property because of his attempt to implicate LD III and its sole member in a scheme to evade income taxes. Rec. 395-390.

SUMMARY OF ARGUMENTS

This case concerns the failed sale of real property and water rights, and the recording of a wrongful lien. The parties discussed settlement terms modeled after the REPC, but had yet to agree to all material terms of settlement. After discussions between counsel, Davis agreed to prepare settlement documents containing the specific terms of Davis' settlement offer. However, he did not do this. The documents which Davis prepared contained

different settlement terms than had been discussed by the parties and imposed risks and burdens to LD III that were unacceptable. Therefore LD III rejected the Counteroffer, leaving the parties without any settlement agreement.

Every contract requires a "meeting of the minds." In this case, there was no meeting of the minds. This is evident by comparing the REPC and the Counteroffer. LD III expected Davis to prepare a settlement agreement modeled after the terms in the REPC. However, the Counteroffer did not do that, rather it contained materially different terms. The District Court's decision to find an enforceable settlement "agreement" was in error because there was no meeting of the minds, or alternatively because the Counteroffer constituted a rejection of the settlement terms discussed by the parties and was rejected by LD III. There was no agreement.

Furthermore, the Counteroffer presumes an assignment of Davis' interest to new and different parties who were strangers to the REPC. Davis previously argued that such an assignment was valid and acceptable. That, however, is not the case. There was no provision in the REPC, on which the parties' settlement was modeled, allowing for assignment. The Counteroffer created additional risks and burdens upon LD III that are unacceptable. It was of serious consequence to LD III that Davis attempted to make the attempted assignment. As such, there is no agreement between the parties and the District Court's decision was in error and should be reversed.

ARGUMENT

The parties discussed settlement and Defendants were to prepare a writing memorializing a proposed form for agreement, as required not only by the parties' discussions, but also by the Utah Statute of Frauds. See Utah Code Ann. § 25-5-1 (1998). There could be no settlement without a writing in this case, and the parties believed there remained material terms left to be discussed, including specific dates of performance. The documents which were prepared, however, did not reflect the transaction described in the REPC, did not involve the same parties as the REPC, nor did they contain all material terms necessary to complete the transaction.

These documents, which are referred to herein as the "Counteroffer," contemplate not one transaction between one buyer and one seller, as discussed, but involve multiple buyers (who were to pay for the entirety of the transaction (see Rec. 699, p. 11:3-12, 15:8-12)) in multiple transactions. The Counteroffer is constructed in an apparent attempt to avoid the payment of taxes by Davis for \$300,000 in profits made on the resale of the property by Davis to his buyers. In effect, the transaction written up by Davis removes him as the buyer and re-seller to the third parties, and instead makes the transaction a direct sale between LD III and these third parties, but gifts to Davis a portion of the property worth at least 25% of the purchase price, free and clear, without any cost to him. The tax implications of this new and very different transaction are significant and create unacceptable risks and burdens to the LD III, which it was entitled to reject. Essentially Davis was asking LD III to agree to join

him in concealing \$300,000 in taxable gain. Given the foregoing, it was error for the District Court to find an enforceable settlement agreement.

I. The Alleged Settlement Agreement Is Not Enforceable Because There Was No Meeting of the Minds.

"It is a basic rule that the law favors the settlement of disputes. Such agreements under the proper circumstances may be summarily enforced. However, whether a court should enforce such an agreement does not turn merely on the character of the agreement. An agreement of compromise and settlement constitutes an executory accord. Since an executory accord 'constitutes a valid enforceable contract,' basic contract principles affect the determination of when a settlement agreement should be so enforced."

Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah App. 1993) (quoting *Mascaro v. Davis*, 741 P.2d 938, 942 (Utah 1987) (emphasis added) (footnotes omitted) (quoting *Lawrence Constr. Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982))); accord *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah App. 1989). For a settlement agreement to be enforced, the basic contract law requirements - offer, acceptance, consideration, and a meeting of the minds - are necessary for a valid agreement to exist. See *Peirce v. Peirce*, 994 P.2d 193, 199 (Utah 2000); *Cove View Excavating & Constr. Co. v. Flynn*, 758 P.2d 474, 476 (Utah Ct. App. 1988); see also *Oberhansley v. Earle*, 572 P.2d 1384, 1386 (Utah 1977) (stating "[i]t is a basic principle of contract law there can be no contract without a meeting of the minds of the parties.")

In *Crismon v. Western Co. of North America*, 742 P.2d 1219 (Utah App. 1987), the Utah Court of Appeals stated that "contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." *Id.* at 1221;

see also Sackler v. Savin, 897 P.2d 1217, 1220-22 (Utah 1995) (holding that to form an enforceable settlement agreement, there must be a meeting of the minds). Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into. *Id.* at 1221-22 (quoting *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978)). "If there was evidence from which it would be reasonable to find that there was [no] meeting of the minds, the decision [decided as a matter of law] cannot be sustained." *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 196-97, 247 P.2d 817, 818 (1952). In this instance, it is evident there was no meeting of the minds, and therefore it was error for the District Court to find there to be an enforceable agreement.

Under Utah law, the party claiming the existence of a contract has the burden to prove "there has been mutual assent by the parties manifesting their intention to be bound by its terms." *Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995); *see also Oberhansley v. Earle*, 572 P.2d 1384, 1386 (Utah 1977) (*citing B & R Supply Co. v. Bringham*, 503 P.2d 1216, 1217 (Utah 1972)). "Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978).

"[A] contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." *Bunnell v. Bills*, 368 P.2d 597, 600 (Utah 1962), *overruled in part on other grounds by Leigh Furniture & Carpet Co.*

v. Isom, 657 P.2d 293, 302-04 (Utah 1982). "If 'there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of contract the parties ought to have made and enforce it.'" *Homestead Golf Club v. Pride Stables*, 224 F.3d 1195, 1200 (10th Cir. 2000) (quoting *Valcarce v. Bitter*, 362 P.2d 427, 428-29 (Utah 1961)).

In *Homestead Golf Club*, the parties disputed whether an oral settlement agreement was an enforceable contract. *Id.* at 1199. The Tenth Circuit Court of Appeals held that no enforceable settlement agreement existed because essential terms were missing, namely the funding date of the loan, the interest rate, and the payment schedule. *Id.* at 1200-01. Specifically, the *Homestead* court ruled the parties merely entered into an "agreement to agree" because essential material terms were missing, thereby preventing an enforceable agreement. *Id.* Citing *Harmon v. Greenwood*, 596 P.2d 636, 639 (Utah 1979), the *Homestead* court found an agreement to agree is "unenforceable because [it] leave[s] open material terms for future consideration, and the courts cannot create these terms for the parties." *Homestead Golf Club*, 224 F.3d at 1200-01.

Homestead Golf Club is directly applicable to this case. Here, LD III and Davis did not enter into an enforceable settlement agreement. The parties discussed a settlement modeled after the terms contained in the REPC. However, material terms were not agreed upon. LD III and Davis did not come to any agreement on the dates of performance, including when the transaction would commence and close, when the loan would be funded,

when the money would exchange hands, and when title to the property would exchange hands, or how to apportion the sale price between real property and water rights. There was no meeting of the minds regarding the terms of a settlement agreement. Settlement remained entirely contingent upon the acceptance by LD III of the terms contained in a writing that was to be prepared by Davis. Any agreement had to be written to be enforceable for several reasons, including the requirements of the Statute of Frauds.

Utah Code Ann. § 25-5-1 states:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

This statute requires any agreement transferring real property to be in writing in order to be enforceable. No enforceable agreement could have been achieved in this matter without its terms being reduced to a writing that the parties signed. In this case, the writing (Counteroffer) created was materially different from the terms discussed by the parties and was never agreed to nor signed by LD III.

Furthermore, the purchasers in the Counteroffer did not even include Davis. In the REPC, the only purchaser/buyer is Davis. However, the Counteroffer contains warranty deeds transferring the real property in separate parcels to five different purchasers/buyers. These purchasers/buyers included: (a) Stephen Sandstrom and Jennifer Sandstrom; (b) SWLRD, LLC, also known as SWRD, LLC; (c) PBRD, LLC; (d) Richard W. Davis and

Beverly B. Davis, as trustees of The R.W. Davis Family Protection Trust dated the 4th day of December 2000; and (e) BBRD, L.C. (Rec. 337-22, Thornton Affidavit, Exhibit B.) These additional purchasers/buyers were never discussed with LD III nor contemplated by LD III to be parties to any agreement to settle this matter. LD III never agreed to sell the property to any other person or entity than Davis.

LD III and Davis did not enter into a settlement agreement. At best, they merely entered into an agreement to agree, which cannot be enforced. *Homestead Golf Club, supra*. Therefore, the District Court should be reversed.

II. Counteroffer Constitutes Rejection.

In this case, the District Court erroneously found the parties had settled this dispute. The District Court incorrectly determined the parties agreed to be bound by the terms of the REPC, and then judicially created and enforced terms that had never previously existed. The District Court's incorrect finding was made without the benefit of an actual writing containing the parties' agreement. Even assuming *arguendo* that LD III verbally agreed to be bound by the terms of the REPC, Davis' written Counteroffer (the Closing Documents) rescinded his offer, constituted a new offer (which was never accepted by LD III), and evidenced his intent not to be bound by the verbal agreement. This rejection eliminates Davis' ability to enforce any agreement.

"To create a binding contract the acceptance must unconditionally agree to all the material provisions of the offer, and must not add any new material conditions." *R.J. Daum*

Const. Co. v. Child, et al., 122 Utah 194, 202 (1952) (citations omitted). "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer." *Wadsworth Const. v. City of St. George*, 865 P.2d 1373, 1376 (Utah App. 1993) (citing *R.J. Daum Constr. Co.*, 247 P.2d at 821). "An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist." *John Hancock Mut. Life Ins. Co. v. Dietlin*, 199 A.2d 311, 313 (R.I. 1964). Also, "[i]f the optionee attaches conditions not warranted by the terms of the option to his acceptance ... this itself amounts to a rejection." 55 Am. Jur. 508, § 39. "An offeree's proposal of different terms from those of the offer constitutes a counteroffer, and no contract arises unless the original offeror accepts it unconditionally." *Cal Wadsworth Constr.*, 898 P.2d at 1378. If material terms are altered, the altered form becomes a counteroffer and therefore a rejection of the original offer. See *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 27, 989 P.2d 1077 ("An acceptance must unconditionally assent to all material terms presented in the offer, including price and method of performance, or it is a rejection of the offer.") (quoting *Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995)).

The REPC, which the District Court held was to be followed "exactly," indicates who the parties to the transaction were intended to be. Davis was the offeror. (See Appendix Exhibit 2.) There were no other potential offerors. The REPC has no language permitting

assignment. Nevertheless, the written closing documents required LD III to deed its real property and water rights to five totally different buyers, none of whom are parties to the REPC. Their substitution created a much different transaction than that contained within the terms of the REPC. This constitutes a rejection of the original agreement and counteroffer by Davis.

This new transaction constituted a scheme by Davis to evade paying income taxes on the resale of portions of the real property and water rights. Ms. Mower (the sole member of LD III) and her tax advisors were concerned that the transaction would involve her in a conspiracy to evade paying income taxes. The Counteroffer invited LD III to join in this tax evasion scheme- an opportunity LD III rejected.

A. Assignment Not Valid.

As stated above, the REPC does not permit assignments. (Rec. 301-297.) Furthermore, the law is clear that assignments cannot be made where, as here, there is a material alteration in the risk imposed upon LD III: "A party can assign its contractual rights to a third party unless: (a) the substitution of a right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him." Restatement 2nd of Contracts, Section, 317(2) (1981).

B. The Counteroffer Creates Unfavorable Tax Implications.

The Counteroffer materially increased the burden or risk to LD III by implicating LD III and Ms. Mower in Davis' income tax evasion scheme. Pursuant to the REPC, LD III was required to convey the real property and water rights to Davis. Then if Davis wanted to re-sell the real property and water rights for a taxable gain, he could sell to whomever he wanted. The transfer and closing would be reported to the IRS, and the taxes owing on any gain to Davis from re-selling the real property and water rights would be due and owing by Davis. However, Davis' Counteroffer required LD III to transfer the real property and water rights directly to five buyers who were not parties to the REPC. Davis' Counteroffer would avoid the disclosure to the IRS of the sale to Davis and his resale of the real property and water rights to others.

LD III rejected Davis' scheme. The terms contained in the Counteroffer were never discussed, never agreed to, and constitute a fundamentally different transaction than the one which was originally contemplated. The Counteroffer constitutes a new and different offer. LD III rejected the offer and there is no agreement remaining to be enforced.

Under the tax laws, Davis should realize a taxable gain from the purchase and re-sale of the real property and water rights. That gain would be taxable ordinary income at applicable rates. The way the Counteroffer is structured, Davis' gain is hidden in the concealed re-sale, because the buyers from Davis receive title directly from LD III.

Under the REPC, Davis was to purchase the real property and water rights from LD III. All the real property and water rights would be sold directly to Davis in a single, simple transaction. Davis would be free to re-sell the real property and water rights, but any gain he realized on such an immediate re-sale would be taxable as ordinary income to him. Davis' scheme evades recognition of \$300,000 taxable income from Davis' "re-sale" to the five purchasers. In contrast, the original REPC would require Davis to re-sell the real property and water rights to his buyers in a separately documented transactions, generating taxable income. In Davis' scheme, transfers would be made to five separate purchasers creating a conspiracy to evade payment of income taxes. Davis' scheme unreasonably implicates LD III and Ms. Mower in this conspiracy.

Davis completely fails to allocate value as is required by Section 1012 of the Internal Revenue Code. 26 U.S.C. §1012. This creates a new and different agreement than what was originally contemplated. This constitutes a counteroffer and therefore rejection of even the conceptual idea discussed between the parties.

Davis' scheme is a sham transaction. The IRS requires the substance of the transaction to be reported. Here, the Counteroffer hid the resale, the taxable gain, and wrongly created a superficial basis for evading payment of taxes. This is something LD III refused. The proposed settlement documents deviate to such a degree from the originally discussed agreement, that they constitute a counteroffer, which has been duly rejected.

The Supreme Court put it best, stating:

The incident of taxation depends upon the substance of the transaction...[T]he transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant...To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liability, would seriously impair the effective administration of tax policies of Congress.

Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945). Further, the government is "not bound to recognize as the substance or character of a transaction a technically elegant arrangement which a lawyer's ingenuity has devised." *Griffiths v. Commissioner*, 308 U.S. 355, 357-58 (1939). As such, taxes cannot be escaped "by anticipatory arrangements and contracts however skilfully [sic] devised ... by which the fruits are attributed to a different tree from that on which they grew." *Lucas v. Earl*, 281 U.S. 111, 115 (1930).

For Ms. Mower, the sole member of LD III, to participate in Davis' scheme puts her in peril of violating her parole, and being prosecuted. She could not accept the Counteroffer. She never would have considered it had it been disclosed to her before it was written up. Once she learned of the terms for this new offer she could not allow herself to be implicated in any way with this illegal scheme. Therefore she rejected the offer. The District Court's finding of an enforceable settlement agreement is therefore in error and should be reversed.

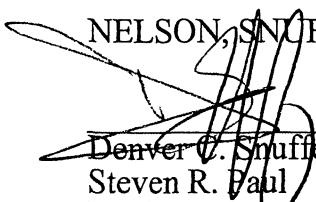
CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the error made by the Fourth District Court in this matter and find that there is no binding settlement agreement between the parties. This very real concern is not based

on financial considerations. Rather, it is an essential result for Ms. Mower to show her refusal to involve herself in any kind of tax evasion scheme.

DATED this 5th day of March, 2009.

NELSON, SNUFFER, DAHLE & POULSEN


Denver C. Snuffer, Jr.

Steven R. Paul

Daniel B. Garnott

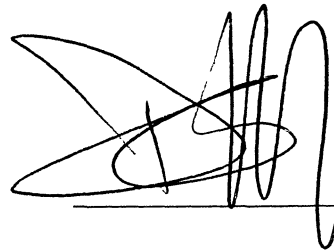
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing
APPELLANT'S OPENING BRIEF ON APPEAL, via first class mail, postage prepaid,
on the following:

Michael N. Zundel (3755)
James A. Boevers (0371)
Richard H. Thornton (3253)
PRINCE, YEATES & GEDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

on this 5th day of March, 2009.


A handwritten signature in black ink, consisting of a large, stylized 'S' followed by several vertical loops, is written over a horizontal line.

ADDENDUM TABLE OF CONTENTS

1. Order Granting Defendant's Motion to Enforce Settlement Agreement and Strike Trial Dates, dated October 8, 2008. Rec. 453-50.
2. Real Estate Purchase Contract, dated August 29, 2007. Rec. 370-66.
3. "Counteroffer" closing documents prepared by Davis. Rec. 328-07.
4. Email from Daniel B. Garriott to Michael Zundel, dated August 20, 2008. Rec. 372.

Michael N. Zundel (3755) mnz@princeyeates.com
James A. Boevers (0371) jab@princeyeates.com
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
(801) 524-1000

Attorneys for Defendants

FILED
Fourth Judicial District Court
of Utah County, State of Utah

10/9/08 Max Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

LD III, LLC, a Utah limited liability
company,

Plaintiff,

vs.

BBRD, L.C., a Utah limited liability
company; RICHARD W. DAVIS, an
individual; TIM HERRERA, an individual;
MOUNTAIN WEST TITLE COMPANY;
and BBRD, INC, an alter ego of Defendant
Richard W. Davis,

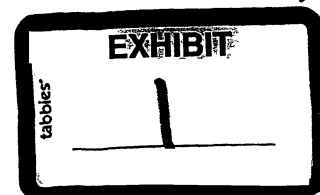
Defendants.

**ORDER GRANTING DEFENDANTS'
MOTION TO ENFORCE
SETTLEMENT AGREEMENT AND
STRIKE TRIAL DATES**

Civil No. 080400318

Judge: Howard

The Court having considered Defendants' Motion to Enforce Settlement Agreement and Strike Trial Dates, the supporting memorandum and the supporting affidavits of Michael N. Zundel, James A. Boevers and Richard H. Thornton, the Opposition to defendants' motion filed by plaintiff, the reply memorandum filed by



0453

defendants, having heard the arguments of counsel for plaintiff (Denver C. Snuffer) and defendants (Mr. Zundel) on September 17, 2008, having considered the supplemental memoranda filed by the parties as directed by the Court, and having issued its ruling by telephone conference call on September 23, 2008, in which David B. Garriott appeared on behalf of plaintiff, and James A. Boevers appeared on behalf of defendants, and good cause appearing,

It is hereby Ordered:


1. Defendants' motion is granted. Defendant Richard W. Davis ("Davis") made no change to the settlement agreement with plaintiff LD III, LLC ("LD III"), material or otherwise. The settlement agreement is and always was that LD III would convey the subject parcels of real property and water rights to Davis or his designee. However, Davis has agreed to take title in his own name because the issue is not a material one.
2. LD III shall close the real estate transaction with Davis by September 30, 2008 in accordance with the closing documents attached as Exhibits B and C to Mr. Thornton's affidavit, with the exception that the transferee shall be Davis, and by such date plaintiff shall sign and deliver the closing documents that call for plaintiff's signature, and deliver the other closing documents, all as shown by such documents. If

LD III does not close the real estate transaction by September 30, 2008, the Court shall quiet title to the subject real property and water rights in Davis.

3. The September 17 through 19, 2008 trial dates are hereby stricken.

DATED this 8 day of ^{Oct}~~September~~, 2008.

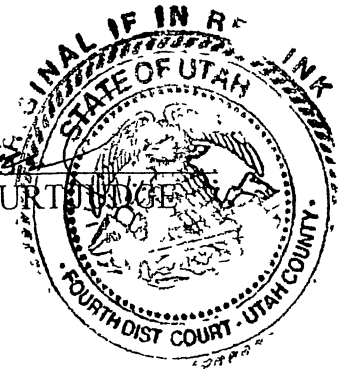
BY THE COURT:



FOURTH DISTRICT COURT

APPROVED AS TO FORM:

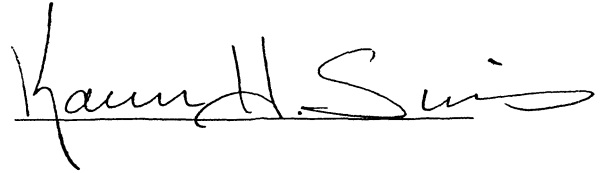
Denver C. Snuffer
Daniel B. Garriott
Attorneys for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2008, I caused to be delivered by e-mail and by hand-delivery a true and correct copy of the foregoing **ORDER GRANTING DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND STRIKE TRIAL DATES** to the following:

Denver C. Snuffer
Daniel B. Garriott dbgarriott@msn.com
Nelson Snuffer Dahle & Poulsen
10885 South State Street
Sandy, Utah 84070

A handwritten signature in black ink, appearing to read "Kenneth H. Smith", written over a horizontal line.

G:\ab\Davis, Richard\LD III\Order re Mot to Enforce 9 16.08.wpd

REAL ESTATE PURCHASE CONTRACT
FOR LAND

DEPOSITION
EXHIBIT 5

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

D. SIMPSON

Buyer BBRD, Inc. and Richard Davis offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 10,000.00 in the form of Personal Check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [Signature] on 8/29/07 (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: LandMark Real Estate Phone Number: 801-489-3211

OFFER TO PURCHASE

1. PROPERTY: See Exhibit A also described as: Tax# 21-82-10, 21-82-12, 21-82-17, 21-82-18, 21-82-19 City of Lake Shore County of Utah State of Utah, ZIP 84660 (the "Property").

1.1 Included Items. (specify) All Pertinent Building and Fences

1.2 Water Rights/Water Shares. The following water rights and/or water shares are included in the Purchase Price.
(Name of Water Company)

[] Shares of Stock in the _____
[X] Other (specify) All Pertinent Water Stock and 2 Wells Approx. 33 Acre FT

2. PURCHASE PRICE The purchase price for the Property is \$ 1,500,000.00

The purchase price will be paid as follows:

\$ 10,000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ _____ (b) New Loan. Buyer agrees to apply for one or more of the following loans:

[] CONVENTIONAL [] OTHER (specify) _____
If the loan is to include any particular terms, then check below and give details:
[] SPECIFIC LOAN TERMS _____

\$ _____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)

\$ _____ (d) Other (specify). _____

\$ 1,490,000.00 (e) Balance of Purchase Price in Cash at Settlement.

\$ 1,500,000.00 PURCHASE PRICE. Total of lines (a) through (e)

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(c), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: [X] Upon Closing [] Other (specify) _____

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this contract:

☒ Seller's Initials ☒ Buyer's Initials

Listing Agent _____, represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Listing Broker for _____, represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;
Buyer's Agent _____, represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
as a Limited Agent;
Buyer's Broker for _____, represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller
(Company Name) as a Limited Agent;

6. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. SELLER DISCLOSURES. No later than the Seller Disclosure Deadline referenced in Section 24(a), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems;
- (e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and
- (f) Other (specify) Seller is a Licensed Broker in the State of Utah

8. BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE. Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☒ IS ☒ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;
- (d) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;
- (e) ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price;
- (f) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;
- (g) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, the Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted

Page 2 of 5 pages Seller's Initials [Signature] Date 8/24/07 Buyer's Initials [Signature] Date 8-28-07

9. ADDITIONAL TERMS. There ☐ ARE ☒ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☐ Addenda No.'s _____
☐ Seller Financing Addendum ☐ Other (specify) _____

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

☐ SELLER ☒ BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:

- (a) the Property shall be free of debris and personal property;
- (b) the Property will be in the same general condition as it was on the date of Acceptance.

11. FINAL PRE-CLOSING INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine only that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property, and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the property as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances affecting the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon _____ and _____.

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

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

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Seller Disclosure Deadline _____ (Date)

(b) Due Diligence Deadline _____ (Date)

(c) Settlement Deadline September 28, 2007 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: _____ [] AM [] PM Mountain Time on _____ (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

Richard Davis 8-28-07
(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

BBRD, Inc. and or Richard Davis

(Buyers' Names) (PLEASE PRINT) _____ (Notice Address) _____ (Zip Code) _____ (Phone) _____

CHECK ONE:

☒ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

[Signature] 8/29/07 (Date) (Time) [Signature] Aug 29/07 (Date) (Time)

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

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Page 5 of 5 pages Seller's Initials [Signature] (Date 8/29/07) Buyer's Initials [Signature] Date 8-29-07

Certification of Non-foreign Status

Section 1445 of the Internal Revenue Code of 1986, as amended (the "Code"), provides that a transferee (buyer) of a United States real property interest must withhold tax if the transferor (seller) is a foreign person.

LD III, LLC, a Utah limited liability company (the "Transferor") is selling certain real property (the "Property") that is located in Utah County, Utah to Stephen Sandstrom and Jennifer Sandstrom, as joint tenants with rights of survivorship (collectively the "Transferee"). To inform Transferee that withholding of tax is not required upon Transferor's disposition of the Property (a U.S. real property interest) to Transferee, Transferor hereby certifies the following:

1. Transferor is not a foreign person (including a foreign corporation, foreign partnership, foreign trust or foreign estate) as those terms are defined in the Code and regulations promulgated under the Code.
2. Transferor's tax identification number is _____.
3. Transferor's address is 584 South State Street, Orem, Utah 84058.

Transferor understands that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained herein could be punished by fine, imprisonment or both. Under penalty of perjury, Transferor declares that: (1) Transferor has examined this certificate (the "Certificate"); (2) to the best of Transferor's knowledge and belief it is true, correct and complete; and (3) Transferor has the authority to sign this Certificate. Transferor recognizes that Transferee and other persons will rely on the accuracy of the matters set forth in this Certificate.

DATED the ____ day of _____ 2008.

LD III, LLC, a Utah limited liability
company

By: _____
ROBERT L. STEED
Manager

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me the ____ day of _____ 2008 by
ROBERT L. STEED, manager of LD III, LLC, a Utah limited liability company.

Notary Public

G:\Rh\DV7980 Sandstrom.doc



0328

RECORDED AT THE REQUEST OF,
AND AFTER RECORDING RETURN TO:
Stephen and Jennifer Sandstrom
1775 North Skyline Drive
Orem, UT 84097

Space above for Use of County Recorder

Warranty Deed

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, LD III, LLC, a Utah limited liability company ("*Grantor*") hereby *conveys and warrants* to STEPHEN SANDSTROM and JENNIFER SANDSTROM, husband and wife, as joint tenants with rights of survivorship, whose address is 1775 North Skyline Drive, Orem, Utah 84097, the following real property (the "*Property*") that is located in Utah County, Utah:

Beginning at a point which is North 00°17'46" West along the section line 1329.27 feet and North 89°32'54" East 33.00 feet from the Southwest corner of Section 33, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89°32'54" East 841.54 feet; thence South 00°13'47" West 390.00 feet; thence South 89°42'14" West 837.96 feet; thence North 00°17'46" West 387.70 to the point of beginning

[Utah County tax parcel no. 21-82-21 with part of tax parcel no. 21-82-23]
[Identified on a map in Grantor's possession as parcel 1 containing 7.496 acres]

TOGETHER WITH: (1) all improvements located on the Property; (2) all easements, rights of way and other matters benefiting the Property; and (3) two acre feet of Grantor's overall 31.48 acre feet evidenced by Utah Division of Water Rights water right no. 51-7283 and approved change application no. a23152; and

SUBJECT TO real property taxes, assessments, penalties and interest for the year 2008 and thereafter, including taxes and assessments under the Utah Farmland Assessment Act.

DATED the ____ day of _____ 2008.

LD III, LLC, a Utah limited liability company

By: _____
ROBERT L. STEED
Manager

STATE OF UTAH)
 :ss
COUNTY OF UTAH)

The foregoing instrument was acknowledged before me this ____ day of _____ 2008 by ROBERT L. STEED as a manager of and on behalf of LD III, LLC, a Utah limited liability company.

Notary Public

RECORDED AT THE REQUEST OF,
AND AFTER RECORDING RETURN TO:
SWLRD, LLC
1483 East Springdell Drive
Provo, UT 84604

Space above for Use of County Recorder

Warranty Deed

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, LD III, LLC, a Utah limited liability company ("*Grantor*") hereby *conveys and warrants* to SWLRD, LLC, also known as SWRD, LLC, a Utah limited liability company whose address is 1483 East Springdell Drive, Provo, Utah 84604 ("*Grantee*"), the following real property (the "*Property*") that is located in Utah County, Utah

Beginning at a point which is North 00°17'46" West along the section line 941.66 feet and North 89°42'14" East 33.00 feet from the Southwest corner of Section 33, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89°42'14" East 837.96 feet; thence South 00°13'47" West 391.02 feet; thence South 89°42'14" West 834.37 feet; thence North 00°17'46" West 391.00 to the point of beginning

[Utah County tax parcel no. 21-82-24, with parts of tax parcel nos. 21-82-17, -18 and -21 and -23]

[Identified on a map in Grantor's possession as parcel 2 containing 7.506 acres]

TOGETHER WITH: (1) all improvements located on the Property; (2) all easements, rights of way and other matters benefiting the Property; (3) a quitclaim by Grantor to Grantee of all strips and overlaps adjacent to the west boundary of the Property and in which Grantor or its predecessors in interest have any interest; and (4) two acre feet of Grantor's overall 31.48 acre feet evidenced by Utah Division of Water Rights water right no. 51-7283 and approved change application no. a23152; and

SUBJECT TO real property taxes, assessments, penalties and interest for the year 2008 and thereafter, including taxes and assessments under the Utah Farmland Assessment Act.

DATED the ____ day of _____ 2008.

LD III, LLC, a Utah limited liability company

By: _____
ROBERT L. STEED
Manager

STATE OF UTAH)
 :SS
COUNTY OF UTAH)

The foregoing instrument was acknowledged before me this ____ day of _____ 2008 by ROBERT L. STEED as a manager of and on behalf of LD III, LLC, a Utah limited liability company.

Notary Public

Certification of Non-foreign Status

Section 1445 of the Internal Revenue Code of 1986, as amended (the "*Code*"), provides that a transferee (buyer) of a United States real property interest must withhold tax if the transferor (seller) is a foreign person.

LD III, LLC, a Utah limited liability company (the "*Transferor*") is selling certain parcels of real property (the "*Property*") that is located in Utah County, Utah variously to (1) SWLRD, LLC a/k/a SWRD, LLC; (2) PBRD, LLC; (3) Richard W. Davis and Beverly B. Davis, trustees; and (3) BBRD, L.C. (collectively the "*Transferee*"). To inform Transferee that withholding of tax is not required upon Transferor's disposition of the Property (a U.S. real property interest) to Transferee, Transferor hereby certifies the following:

1. Transferor is not a foreign person (including a foreign corporation, foreign partnership, foreign trust or foreign estate) as those terms are defined in the Code and regulations promulgated under the Code.

2. Transferor's tax identification number is _____.

3. Transferor's address is 584 South State Street, Orem, Utah 84058.

Transferor understands that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained herein could be punished by fine, imprisonment or both. Under penalty of perjury, Transferor declares that: (1) Transferor has examined this certificate (the "*Certificate*"); (2) to the best of Transferor's knowledge and belief it is true, correct and complete; and (3) Transferor has the authority to sign this Certificate. Transferor recognizes that Transferee and other persons will rely on the accuracy of the matters set forth in this Certificate.

DATED the ____ day of _____ 2008.

LD III, LLC, a Utah limited liability
company

By: _____
ROBERT L. STEED
Manager

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me the ____ day of _____ 2008 by
ROBERT L. STEED, manager of LD III, LLC, a Utah limited liability company.

Notary Public

Irrevocable Stock Power

FOR VALUE RECEIVED, _____ (“Assignor”) hereby:

1. Sells, assigns and transfers to the assignees (the “Assignees”) indicated in the following table, six shares of stock in LAKE SIDE IRRIGATION CO., a Utah non-profit corporation (the “Corporation”) that is represented by certificate no. ____, which shares shall be allocated among Assignees as indicated in the following table (parcel numbers shown in the following tables are for Assignees’ internal reference only):

<i>Name of Assignee</i>	<i>Address of Assignee</i>	<i>Number of Shares</i>
PBRD, LLC	1483 East Springdell Drive Provo, Utah 84604 [parcel 3]	One share
SWLRD, LLC, a/k/a SWRD, LLC	1483 East Springdell Drive Provo, Utah 84604 [parcel 2]	Four shares
Stephen Sandstrom and Jennifer Sandstrom, as joint tenants with rights of survivorship	1775 North Skyline Drive Orem, Utah 84097 [parcel 1]	One share

and

2. Irrevocably constitutes and appoints the secretary of the Corporation, as attorney, to transfer the shares on the books of the Corporation, with full power of substitution to carry out the transfer.

DATED THE ____ day of _____ 2008.

Assignor:

MOWER PROPERTIES

By: _____
LESLIE D. MOWER
President

WITNESSED IN THE PRESENCE OF:

Irrevocable Stock Power

FOR VALUE RECEIVED, MOWER PROPERTIES ("Assignor") hereby:

1. Sells, assigns and transfers to the assignees (the "Assignees") indicated in the following table, four shares of stock in FORT FIELD-LITTLE DRY CREEK WATER USERS ASSOCIATION, a Utah non-profit corporation (the "Corporation") that is represented by certificate no. 102, which shares shall be allocated among Assignees as indicated in the following table (parcel numbers shown in the following tables are for Assignees' internal reference only):

<i>Name of Assignee</i>	<i>Address of Assignee</i>	<i>Number of Shares</i>
BBRD, L.C.	1483 East Springdell Drive Provo, Utah 84604 [parcel 6]	2.8 shares
Charles Y. Warner, Trustee of the Charles Y. Warner Family Trust, Dated August 27, 1990	926 West 600 South Orem, Utah 84058 [parcel 5]	.20 share
Richard W. Davis and Beverly B. Davis, as trustees of The R.W Davis Family Protection Trust dated the 4 th day of December 2000	1483 East Springdell Drive Provo, Utah 84604 [parcel 4]	.25 share
PBRD, LLC	1483 East Springdell Drive Provo, Utah 84604 [parcel 3]	.25 share
SWLRD, LLC, a/k/a SWRD, LLC	1483 East Springdell Drive Provo, Utah 84604 [parcel 2]	.25 share
Stephen Sandstrom and Jennifer Sandstrom, as joint tenants with rights of survivorship	1775 North Skyline Drive Orem, Utah 84097 [parcel 1]	.25 share

(for Grantor's reference, the four shares of stock represented by certificate no. 102 are the subject of Utah Division of Water Rights water right no. 51-7283 and approved change application no. a23152); and

2. Irrevocably constitutes and appoints the secretary of the Corporation, as attorney, to transfer the shares on the books of the Corporation, with full power of substitution to carry out the transfer.

DATED THE ____ day of _____ 2008.

Assignor:

MOWER PROPERTIES

By: _____
LESLIE D. MOWER
President

WITNESSED IN THE PRESENCE OF:

A. U.S. Department of Housing and Urban Development		B. Type of Loan 1 <input type="checkbox"/> FHA 2 <input type="checkbox"/> FMHA 3 <input type="checkbox"/> Conv Unins 4 <input type="checkbox"/> VA 5 <input type="checkbox"/> Conv Ins 6. File Number 7. Loan Number M-43274 8. Mortgage Ins. Case No.	
Settlement Statement			
C. Note:		This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked ("POC") were paid outside the closing. They are shown here for information purposes and are not included in the totals.	
D. Name of Borrower:		BBRD, Inc Richard Davis	
E. Name of Seller:		LD III, L LC	
F. Name of Lender:			
G. Property Location:		of Section 33, Township 7, Range 2, Utah County, Utah, of Section 33, Township 7, Range 2, Utah County, Utah, of Section 33, Township 7, Range 2, Utah County, Utah, of Section 33, Township 7, Range 2, Utah County, Utah, of Section 33, Township 7, Range 2, Utah County, Utah	
H. Settlement Agent:		Mountain West Title (801) 225-2857 TIN 87-0454341	
Place of Settlement:		961 South Orem Blvd, Orem, UT 84058	
I. Settlement Date		7/23/2008 Proration Date: 7/25/2008	
J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross amount due from borrower.		400. Gross amount due to seller:	
101. Contract sales price	1,200,000.00	401. Contract sales price	1,200,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	1,011.18	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes		406. City/town taxes	
107. County taxes		407. County taxes	
108. Assessments		408. Assessments	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross amount due from borrower:	1,201,011.18	420. Gross amount due to seller:	1,200,000.00
200. Amounts paid by or in behalf of the borrower		500. Reduction in amount due to seller	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	4,280.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206. Funds from Holiday Bank Loan	900,000.00	506.	
207. Additional Deposit	223,270.21	507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes		510. City/town taxes	
211. County taxes 1/1/2008 to 7/25/2008	134.11	511. County taxes 1/1/2008 to 7/25/2008	134.11
212. Assessments		512. Assessments	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219. **Tax proration estimated on previous year taxes**		519. **Tax proration estimated on previous year taxes**	
220. Total paid by/for borrower:	1,123,404.32	520. Total reduction in amount due seller:	4,414.11
300. Cash at settlement from/(to) borrower		600. Cash at settlement to/from seller	
301. Gross amount due from borrower (line 120)	1,201,011.18	601. Gross amount due to seller (line 420)	1,200,000.00
302. Less amount paid by/for borrower (line 220)	1,123,404.32	602. Less total reduction in amount due seller (line 520)	4,414.11
303. CASH (X) FROM () TO BORROWER	77,606.86	603. CASH () FROM (X) TO SELLER	1,195,585.89

Settlement Charges		Plan Number: M230741-000	
700	Total sales/broker commission	Paid From	Paid From
	Division of commission (line 700) as follows	Borrower's	Seller's
701	\$	Funds at	Funds at
702	\$	Settlement	Settlement
703.	Commission paid at settlement		
704.			
705.			
800. Items payable in connection with loan			
801	Loan origination fee		
802.	Loan discount		
803	Appraisal fee		
804.	Credit report		
805	Lender's inspection fee		
806.	Mortgage Insurance application fee		
807	Assumption fee		
808.	Underwriting Fee		
809	Flood Certification Fee		
810.	Tax Service Fee		
811.	Document Prep Fee		
812			
813.			
814.	Yield Spread Premium		
900. Items not required by lender but paid in advance			
901.	Interest from		
902	Mortgage Insurance premium for		
903	Hazard Insurance premium for		
904			
905.	VA Funding Fee		
1000. Reserves deposited with lender			
1001.	Hazard insurance		
1002.	Mortgage insurance		
1003.	City property taxes		
1004.	County property taxes		
1005.	Annual assessments (maint)		
1006.			
1007.			
1008.			
1009.	Aggregate Adjustment		
1100. Settlement Charges			
1101.	Settlement or closing fee to Mountain West Title	350 00	350 00
1102.	Abstract or title search		
1103.	Title examination		
1104.	Title insurance binder		
1105.	Document preparation to Mountain West Title	100 00	100 00
1106.	Notary fees		
1107.	Attorney's fees to		
	includes above items no		
1108.	Title insurance to Mountain West Title		3,795 00
	includes above items no		
1109.	Lender's coverage		
1110	Owner's coverage \$1,200,000 00		\$3,795 00
1111.	100, 116, 8 1 Endorsements		
1112.	Payoff Processing Fee		
1113.	Courner Service		
1114.	Recording Servicing Fee to Mountain West Title	30 00	10 00
1115.	Wire Fee to Mountain West Title	25 00	25 00
1116.	Property Survey by MW Brown En to MW Brown Engineering, Inc	506 18	
1200. Government recording and transfer charges			
1201.	Recording fees		
1202.	City/county tax/stamps		
1203.	State tax/stamps		
1204.	Electronic Recording Fee		
1205.			
1206.			
1300. Additional settlement charges			
1301.	Survey		
1302.	Pest inspection		
1303.			
1304.			
1305.			
1400.	Total settlement charges (entered on lines 103, section J and 502, section K)	1,011 18	4,280 00

CERTIFICATION: I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me.

HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me.

HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me.

BBRD, Inc.

LD III, L.L.C.

Richard Davis

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.

Mountain West Title

Date

SELLER'S AND/OR PURCHASER'S STATEMENT Seller's and Purchaser's signature hereon acknowledges his/her approval of tax proration and signifies their understanding that proration was based on taxes for the preceding year, or estimates for the current year, and in the event of any change for the current year, all necessary adjustments must be made between Seller and Purchaser; likewise any default in delinquent taxes will be reimbursed to Title Company by the Seller. Title Company, in its capacity as Escrow Agent, is and has been authorized to deposit all funds it receives in this transaction in any financial institution, whether affiliated or not. Such financial institution may provide Title Company computer accounting and audit services directly or through a separate entity which, if affiliated with Title Company, may charge the financial institution reasonable and proper compensation therefore and retain any profits therefrom. Any escrow fees paid by any party involved in this transaction shall only be for checkwriting and input to the computers, but not for aforesaid accounting and audit services. Title Company shall not be liable for any interest or other charges on the earnest money and shall be under no duty to invest or reinvest funds held by it at any time. Sellers and Purchasers hereby acknowledge and consent to the deposit of the escrow money in financial institutions with which Title Company has or may have other banking relationships and further consent to the retention by Title Company and/or its affiliates of any and all benefits (including advantageous interest rates on loans) Title Company and/or its affiliates may receive from such financial institutions by reason of their maintenance of said escrow accounts.

The parties have read the above sentences, recognize that the recitations herein are material, agree to same, and recognize Title Company is relying on the same.

Purchasers/Borrowers

Sellers

BBRD, Inc.

LD III, L.L.C.

Richard Davis

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18: U.S. Code Section 1001 and Section 1010.

PRINCE, YEATES & GELDZAHLER

A PROFESSIONAL CORPORATION
LAWYERS

CITY CENTER I, SUITE 900
175 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 524-1000
FAX (801) 524-1098

E-MAIL: rlt@princeyeates.com

F S PRINCE (1910-1991)
DAVID S GELDZAHLER (1932-1994)

ROBERT M. YEATES (RETIRED)

ADAM S AFFLECK¹
WILFORD A. BEESLEY III
JAMES C BERGSTEDT
JAMES A. BOEVERS
GLENN R. BRONSON¹
J. RANDALL CALL^{2,3}
JOHN S. CHINDLUND
ANDREW B. CLAWSON³
T. EDWARD CUNDICK¹
M. DAVID ECKERSLEY
THOMAS J. ERBIN
D. JAY GAMBLE
JON C. HEATON
CHRISTOPHER A. JONES¹

WILLIAM G. MARSDEN
JAMES W. McCONKIE III
ROGER J. McCONKIE
SALLY B. McMINIMEE
G. TROY PARKINSON²
ALLEN SIMS
ERIN M. STONE
JAMES C. SWINDLER³
JONATHAN T. TICHY³
RICHARD H. THORNTON
RYAN R. WEST¹
MICHAEL N. ZUNDEL

ALSO ADMITTED IN:
¹CALIFORNIA
²IDAHO
³NEVADA
⁴TEXAS

2008

ESCROW INSTRUCTIONS

Via e-mail: timh@mountainwesttitle.com

Mountain West Title Company
961 South Orem Boulevard
Orem, Utah, 84058

Attention: Tim Herrera

Re: Commitment for Title Insurance No. M-43274 (the "*Title Commitment*") Dated 16 August 2007, Issued by Stewart Title Guaranty Company Through its Authorized Agent Mountain West Title Company ("*Title Company*") and Covering the Property Described in Item 5 of Schedule A of the Title Commitment (the "*Property*").

Dear Mr. Herrera:

We represent Richard W. Davis ("*Davis*") and related parties in connection with the settlement of litigation with LD III, LLC ("*Seller*") and the attendant sale of the Property by Seller to various designees of Davis. This letter will constitute your escrow instructions from Davis to close the settlement of the litigation and sale of the property to designees of Davis.

Deposit of Documents

Attached to this letter is a documents checklist (the "*Documents Checklist*"), the terms of which are incorporated in this letter by reference. The documents (the "*Documents*") that are described in the Documents Checklist have been deposited with you. Some of the Documents are defined in the Documents Checklist.

Closing

IF on or before _____ 2008 (or an extended date of which we advise you in writing; the "*Closing Date*") each of the following conditions precedent (the "*Conditions*") is satisfied (or is waived in writing by the party benefited by the Condition):

1.1 You have received funds from Davis in the amount set forth in the Settlement Statement (this Condition benefits Seller);

1.2 You have received originals of each of the Documents, which have been executed and acknowledged as called for in the Documents Checklist, and you may process those Documents as indicated in the Documents Checklist (this Condition benefits each party to whom a Document is to be delivered as set forth in the Documents Checklist);

1.3 Stewart Title Guaranty Company is irrevocably committed to, and can unconditionally, issue and deliver to the grantees shown in the Warranty Deeds for parcels 2, 3, 4 and 6 a standard coverage ALTA owner's policy of title insurance (the "*Title Policy*") that: (a) is in the face amount of \$976,729.79; (b) insures each such grantee as the owner of fee simple title to the parcel of the Property shown in the Warranty Deed; and (c) is subject only to: (i) special exception nos. 1 through 6 inclusive, 7 (modified to refer to taxes for the year 2007 only) and 8 through 10 inclusive of schedule B—section 2 of the Title Commitment and (ii) any financing or other documents arising from activities of Davis (this Condition benefits Davis);

1.4 Stewart Title Guaranty Company is irrevocably committed to, and can unconditionally, issue and deliver to the grantee shown in the Warranty Deed for parcel 1 of the Property, a standard coverage ALTA owner's policy of title insurance (the "*Title Policy*") that: (a) is in the face amount of \$223,270.21; (b) insures such grantee as the owner of fee simple title to parcel 1 of the Property; and (c) is subject only to special exception nos. 1 through 6 inclusive, 7 (modified to refer to taxes for the year 2007 only) and 8 through 10 inclusive of schedule B—section 2 of the Title Commitment (this Condition benefits Davis);

1.5 You have verified with Fort Field and Lakeside the amount of any unpaid water assessments related to the water stock described in the stock powers shown in the Documents Checklist and have prorated those assessments between Seller and Davis on the Settlement Statement;

1.6 You have not received any escrow instructions that conflict with these instructions (this Condition benefits Davis and Seller); and

1.7 You are in a position to disburse sales proceeds in the manner reflected on the Settlement Statement (this Condition benefits Davis and Seller);

THEN immediately upon the satisfaction of (or waiver in writing by the party benefited by) each of the Conditions, you are hereby authorized and directed to take the following actions in the following order:

2.1 Date any undated Documents as of the date of recording. Record in the office of the Utah County, Utah Recorder (or other recording office, if so indicated in the Documents Checklist), and/or give effect to, the Documents described in the Documents Checklist, and deliver Documents, or copies thereof, as indicated in the Documents Checklist (we request that this delivery occur within two weeks of the Closing Date).

2.2 Advise us by e-mail or telephone that the Deed and other loan documents have been recorded.

2.3 Disburse the proceeds from the sale in accordance with these instructions and the Settlement Statement.

General Matters

If by the close of business on the Closing Date the Conditions have not been satisfied (or waived in writing by each party benefited by the Condition), then you are hereby instructed to contact us immediately for further instructions. If we do not give you contrary written instructions, then return the Documents and any funds that you are holding under this escrow to the parties who delivered the same to you.

Please acknowledge acceptance of your appointment as escrow agent and your agreement to be bound by these instructions by executing the original and one copy of this letter and then distributing them as set forth in the Documents Checklist. **Recordation of the Documents and/or disbursement of funds that are described in the Settlement Statement constitute your acceptance of these instructions even without your execution and delivery of these instructions as requested. Any departure from these instructions requires our prior written consent.** Facsimile transmissions of signed counterparts of this letter shall be effective as the delivery of originals.

Very truly yours,

PRINCE, YEATES & GELDZAHLER

/s/

Richard H. Thornton
Legal Counsel for Richard Davis and his affiliates

Mountain West Title Company

_____ 2008

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AGREED TO:

NELSON, SNUFFER DAHLE & POULSEN

Denver C. Snuffer

Legal Counsel for LD III, LLC

MOUNTAIN WEST TITLE COMPANY hereby: (1) acknowledges receipt of the foregoing escrow instructions; (2) agrees to accept, hold and deliver the Documents and to disburse payments in accordance with the instructions; and (3) agrees otherwise to comply with the instructions.

DATED the ____ day of _____ 2008.

MOUNTAIN WEST TITLE COMPANY

By: _____

Printed Name: _____

Its: _____

G:\RHTD\7978 DOC

*Sale of Utah County Property
by LD III, LLC
to Richard Davis Designees
(_____ 2008)*

Documents Checklist

(1) Description of Documents	(2) Deposited with Escrow Agent by:	(3) Other Action Necessary:	(4) After Closing, Deliver to:
Stipulation for Dismissal with Prejudice and Order of Dismissal with Prejudice (each in final form; two originals; signed by Nelson, Snuffer, Dahle & Poulsen, P.C. as legal counsel for Davis and Prince Yeates & Geldzahler as legal counsel for Davis)	Davis	File with Fourth Judicial District Court (as directed by counsel for Davis)	One original to each of Seller and Davis
Water Right Quitclaim Deed dated 9 February 2008, signed by Mower Properties, Inc. and conveying water right #51-7283 to Seller (original; must contain original signature of Seller and original acknowledgment of Seller's signature)	Seller	Record #1	Original to Seller; copy with recording information to Davis
* Warranty Deed signed and acknowledged by Seller conveying proposed parcel 1 of the Property to Stephen and Jennifer Sandstrom (in final form; one original)	Seller	Record #2	Original to Sandstrom, copies with recording information to Seller and Davis
* Warranty Deed signed and acknowledged by Seller conveying proposed parcel 2 of the Property to SWLRD, LLC, a/k/a SWRD, LLC (in final form; one original)	Seller	Record #3	Original to Davis, copy with recording information to Seller
* Warranty Deed signed and acknowledged by Seller conveying proposed parcel 3 of the Property to PBRD, LLC (in final form; one original)	Seller	Record #4	Original to Davis, copy with recording information to Seller
* Warranty Deed signed and acknowledged by Seller conveying proposed parcel 4 of the Property to Davis and Beverly B. Davis as trustees (in final form; one original)	Seller	Record #5	Original to Davis, copy with recording information to Seller
* Warranty Deed and Quitclaim Deed signed and acknowledged by Seller conveying proposed parcel 6 of the Property to BBRD, L.C. (in final form; one original)	Seller	Record #6	Original to Davis, copy with recording information to Seller

Financing documents required by Holladay Bank, lender to Davis, which may encumber proposed parcels 2, 3, 4 and 6, but which may not encumber proposed parcel 1 (in final form; one original)	Davis	Record #7	Original to Holladay Bank, copy with recording information to Davis
Water Right Quitclaim Deed signed and acknowledged by Seller quitclaiming 1.55 acre feet of water right 51-7283 to Charles Y. Warner, trustee (in final form; one original)	Seller	Record #8	Original to grantee named in deed; copies with recording information to Seller and Davis
Reapplication for greenbelt tax status for each proposed parcel shown in the Warranty Deeds, signed by the grantee shown in the Warranty Deed (Title Company should prepare these); alternatively, the grantee shown in the Warranty Deed must pay greenbelt rollback taxes	Grantee shown in each Warranty Deed	File with Utah County, Utah assessor	Copies to Davis
Certification of Non-foreign Status signed and acknowledged by Seller for the benefit of Sandstrom (insert federal employer identification number for Seller ; in final form; one original)	Seller	N/A	Original to Sandstrom, copies to Seller and Davis
Certification of Non-foreign Status signed and acknowledged by Seller for the benefit of SWLRD, PBRD, Davis trustees and BBRD (insert federal employer identification number for Seller ; in final form; one original)	Seller	N/A	Original to Davis, copy to Seller
Original stock certificate (" <i>Fort Field Stock Certificate</i> ") representing four shares of stock in Fort Field-Little Dry Creek Water Users Association (" <i>Fort Field</i> ")	Seller	Deliver to Fort Field with (1) instructions	Original to Davis, copy to Seller
Irrevocable Stock Power signed by holder of Fort Field Stock Certificate and assigning shares to grantees under Warranty Deeds and to Warner as trustee (in final form; one original)	Seller	to issue new shares to assignees and (2) any unpaid water assessment shown on Settlement Statement	Original to Davis, copy to Seller
Original stock certificate (" <i>Lake Side Stock Certificate</i> ") representing six shares of stock in Lake Side Irrigation Co. (" <i>Lake Side</i> ")	Seller	Deliver to Lake Side with (1) instructions	Original to Davis, copy to Seller
Irrevocable Stock Power signed by holder of Lake Side Stock Certificate and assigning shares to grantees under Warranty Deeds for	Seller	to issue new shares to	Original to Davis, copy to Seller

proposed parcels 1, 2 and 3 (in final form; one original)		assignees and (2) unpaid water assessment shown on Settlement Statement	
Escrow Instructions signed by legal counsel for Davis and acknowledged by (1) legal counsel for Seller and (2) Title Company	Seller	N/A	One original to each of Seller's legal counsel, Davis's legal counsel and Title Company
Settlement Statement (" <i>Settlement Statement</i> ") signed by Seller, Davis and Title Company	Seller Davis	N/A	Original or copy to Title Company; copies to Seller and Davis

Notes:

- References to the "final form" of documents means the form attached to the _____ 2008 e-mail to you from Seller's legal counsel, labeled "sign"
- Documents marked with an asterisk are the "*Warranty Deeds*" that are referred to in these escrow instructions
- Copies of all documents that are to be delivered to Davis should be sent to Davis's counsel: Richard H. Thornton, Prince, Yeates & Geldzahler, 175 East 400 South, Suite 900, Salt Lake City, UT 84111-2357

EXHIBIT "C"

RECORDED AT THE REQUEST OF,
AFTER RECORDING RETURN TO:
Richard W. and Beverly B. Davis, Trustees
1483 East Springdell Drive
Provo, UT 84604

Space above for Use of County Recorder

Warranty Deed

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, LD III, LLC, a Utah limited liability company ("*Grantor*") hereby *conveys and warrants* to RICHARD W. DAVIS and BEVERLY B. DAVIS, as trustees of The R. W. Davis Family Protection Trust dated the 4th day of December 2000, whose address is 1483 East Springdell Drive, Provo, Utah 84604, the following real property (the "*Property*") that is located in Utah County, Utah:

Beginning at a point which is North 00°17'46" West along the section line 916.61 feet and East 870.70 feet from the Southwest corner of Section 33, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence South 89°46'13" East 509.98 feet; thence South 00°13'47" West 896.87 feet; thence North 89°46'13" West 509.98 feet; thence North 00°13'47" East 896.87 feet to the point of beginning

[Utah County tax parcel no. 21-82-17, with part of tax parcel and 21-82-24]
[Identified on a map in Grantor's possession as parcel 4 containing 10.500 acres]

TOGETHER WITH: (1) all improvements located on the Property; (2) all easements, rights of way and other matters benefiting the Property; and (3) two acre feet of Grantor's overall 31.48 acre feet evidenced by Utah Division of Water Rights water right no. 51-7283 and approved change application no. a23152; and

SUBJECT TO real property taxes, assessments, penalties and interest for the year 2008 and thereafter, including taxes and assessments under the Utah Farmland Assessment Act.

DATED the ____ day of _____ 2008.

LD III, LLC, a Utah limited liability company

By: _____
ROBERT L. STEED
Manager

STATE OF UTAH)
 :SS
COUNTY OF UTAH)

The foregoing instrument was acknowledged before me this ____ day of _____ 2008 by ROBERT L. STEED as a member of and on behalf of LD III, LLC, a Utah limited liability company.

Notary Public

Receptionist

From: Michael Zundel
Sent: Wednesday, August 20, 2008 3:30 PM
To: Dan Garriott
Cc: dcsnuff@aol.com; Andy Davis; jab@pyglaw.com; Richard H. Thornton
Subject: RE: Mower v. LDIII

Dan and Denver,

Our deal was that the original contract terms would apply. We have demanded nothing in addition. We have a deal. We will file a motion to enforce the settlement.

I would be interested to know what terms are not acceptable to your client.

Michael N. Zundel
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Phone (801) 524-1000
Fax (801) 524-1098
E-mail mnz@princeyeates.com
Web-Site www.princeyeates.com

-----Original Message-----

From: Dan Garriott [mailto:dbgarrriott@msn.com]
Sent: Wednesday, August 20, 2008 12:50 PM
To: Michael Zundel
Cc: dcsnuff@aol.com
Subject: Mower v. LDIII

Dear Mike,

Denver is out of town until tomorrow and has asked me to inform you that the terms of the proposed settlement of this matter are not acceptable to our client. Denver will call you tomorrow, upon his return, to schedule the remaining depositions and to discuss deadlines for your client to respond to the pending discovery requests.

Sincerely,

Daniel B. Garriott
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 S. State St.
Sandy, UT 84070
Phone: (801) 576-1400
Fax: (801) 576-1960
Email: dbgarrriott@msn.com

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