

2008

LD III, LLC, a Utah limited liability company 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: Reply Brief

Utah Court of Appeals

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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.	:	

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

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

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**\* ORAL ARGUMENT REQUESTED**

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**\* ORAL ARGUMENT REQUESTED**

**APPELLANT'S REPLY BRIEF**

Appellant, LD III, LLC, submits this reply 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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## ARGUMENT

This case concerns an unconsummated sale of real property with water rights, and the recording of a wrongful lien. In August of 2007, BBRD, Inc. and/or Richard Davis (collectively "Davis") made an offer to buy property from Plaintiff, LD III, LLC ("LD III"). The offer was set out in a standard form Real Estate Purchase Contract for Land ("REPC"). Plaintiff accepted that offer. However, before closing, BBRD failed to meet the deadlines of the REPC and it terminated according to its terms. BBRD then filed a lien against the real property. LD III sued to remove the lien, seeking relief under the Utah wrongful lien statute.

The parties discussed the concept of settlement. The parties agreed to the price and parties set in the REPC, but all remaining terms were left open. Davis agreed to prepare settlement documents containing the specific terms of Davis' settlement offer ("Counteroffer"). However, the documents Davis prepared contained significantly different settlement terms than had been discussed by the parties and imposed new risks, burdens and obligations upon LD III which were unacceptable. Therefore, LD III rejected the Counteroffer, leaving the parties without any settlement agreement.

Davis moved to specifically enforce the Counteroffer as a settlement agreement. Fourth District Court Judge Howard granted Davis' Motion to Enforce Settlement Agreement. LD III appealed the decision. The appeal raises the question of whether there was a meeting of the minds and whether material terms missing from the Counteroffer constitute a settlement agreement. Both a meeting of the minds and a complete agreement are necessary for the enforcement of a settlement agreement and neither exist.

Davis claims he and LD III reached an enforceable settlement agreement based on email exchanges between counsel, when read together with the terms of the REPC. Davis further argues he has since resolved his issues relating to the transfer of property (which gave rise to the original dispute) and, therefore, LD III breached the covenant of good faith and fair dealing by not closing on the transaction.<sup>1</sup> Davis further claims he should receive attorneys' fees for defending this appeal.

Davis' claims are without merit. There was no final agreement showing a meeting of the minds on the terms of settlement and, further, the Counteroffer Davis drafted was not consistent with the terms of the REPC, the document upon which the parties based settlement discussions. Davis' Counteroffer was nothing more than a counteroffer, which LD III rejected. Therefore, LD III did not breach any covenant or agreement. Further, LD III's appeal has merit, is made in good faith and Davis' request for attorneys' fees should be denied.

This Court should grant LD III's appeal, reverse the District Court's decision, and relieve LD III from enforcement of the unlawful settlement agreement.

**I. There was No Meeting of the Minds to Form a Settlement Agreement Because Davis Included Additional Parties in the Sale Without LD III's Approval.**

Davis argues LD III failed to marshal the evidence to contradict the District Court's findings and to present any evidence that the parties agreed to transfer the property to Davis alone. (See Appellee's Brief, pp. 17-19.) Davis relies solely upon self-serving affidavits of

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<sup>1</sup> Davis failed to file a cross-appeal. Therefore, this issue is not properly before the Court of Appeals and should not be considered.



his counsel, Zundel and Boevers. Davis fails to mention the email exchanges between the parties' counsel during settlement discussions, and fails to account for the proffered testimony and arguments presented in open court, which are directly to the contrary. The email exchanges clearly show there was no meeting of the minds on terms of the settlement, and are the best and least-biased evidence showing the parties had two materially different ideas about settlement; namely, who were the buyers in the transaction. *See Crismon v. Western Co. of North America*, 742 P.2d 1219, 1221 (Utah App. 1987) ("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.") Thus, there was no meeting of the minds and no settlement. (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.")

On July 9, 2008, there was a telephone conference between both parties' counsel where they discussed a proposed settlement. (Affidavit of Michael N. Zundel ("Zundel Aff."), ¶ 6 (R. 287); Affidavit of James A. Boevers ("Boevers Aff."), ¶ 3 (R. 305).) The outline for settlement anticipated a written agreement would follow up the oral discussions, and the writing would mirror the original terms of the REPC (with such modifications as would be necessary because of the passage of time). (Zundel Aff., ¶¶ 7-8 (R. 286); Boevers Aff., ¶¶ 4-5 (R. 305).) The understanding of both parties was that a writing reflecting all the terms would be prepared allowing **"defendant Davis [to] complete his purchase from plaintiff of real property and water rights** pursuant to a Real Estate Purchase Contract signed by the parties on August 29, 2007." (Affidavit of Richard H. Thornton ("Thornton

Aff."), ¶ 3 (emphasis added) (R. 341).) Davis' counsel was to prepare the settlement documents "necessary to close the real estate transaction pursuant to the August 29, 2007 contract." (*Id.*)

On July 18, 2008, Davis' counsel, Mr. Thornton, sent an email to Mr. Snuffer, counsel for LD III, stating "I am waiting for some final legal descriptions, at which time I will be able to finalize (and then send to you) proposed closing documents." (*Id.*, Exhibit A thereto (R. 336-338).) On July 28, 2008, Mr. Thornton sent an email to Mr. Snuffer stating "[a]ttached for your **review** are drafts of the following closing documents for the sale of LD III property to Richard Davis. Mr. Davis **desires to have the different parcels conveyed to affiliated companies and designees as shown in the deeds ... Please review these documents and matters and get back to me as soon as possible with your comments.**" (*Id.*, Exhibit B thereto (emphasis added) (R. 329-331).)

Two days later on July 30, 2008, Mr. Snuffer sent an email to Mr. Zundel, Davis' counsel, stating "**I received the documents and have forwarded them for review and comment from the client.** Unfortunately, [Ms. Mower] fell down at her home and was injured ... which has rendered her less able to function in all respects." (Zundel Aff., Exhibit B thereto (emphasis added) (R. 278-279).) The next day, on July 31, 2008, Mr. Snuffer sent a second email to Mr. Zundel, stating "I just got an email informing me that Bart Bailey's father passed away yesterday. **[Ms. Mower] wants Bart to look over the documents before she gives me final word.**" (*Id.*, Exhibit C thereto (emphasis added) R. 276-277).) Mr. Zundel responded "[t]he schedule you suggest is workable." (*Id.*) After delays due to family

and personal emergencies, the seller and her counsel, Mr. Bailey, reviewed the draft documents and saw they deviated substantially from what was discussed. The draft documents contained terms which would jeopardize terms of Ms. Mower's Federal probation. On August 20, 2008, Mr. Garriott, LD III's counsel, sent an email to Zundel stating, "the terms of the proposed settlement of this matter are not acceptable to our client." (*Id.*, Exhibit F thereto (R. 270-271).)

The email exchanges between the parties' counsel confirm there was never a meeting of the minds to form a settlement agreement. The parties discussed a proposed settlement on the terms contained in the original REPC. However, when the settlement documents were prepared, Mr. Thornton informed Mr. Snuffer that Davis desired to convey parcels to different entities or parties – which was not covered by the REPC or discussed. This Counteroffer was never approved by LD III and, in the initial response, Mr. Snuffer stated his client will need to review and comment on the variations from the prior agreement. Mr. Zundel agreed to the schedule. Mr. Garriott then informed Davis' counsel the Counteroffer was not accepted. The terms of the REPC did not allow for "designees," as Davis now argues. In fact, designees were never discussed, nor made an issue in this case, until Davis presented the Counteroffer containing that additional term.

Davis' counsel confirmed this position during argument before Judge Howard on Davis' Motion to Enforce Settlement Agreement. Mr. Zundel specifically stated to the Fourth District Court:

The opposition simply takes the position that because in the a, closing documents that we submitted we did not list Mr. Davis and BBRD as the

grantees but a, for [sic] additional companies that Mr. Davis controls as grantees, that we made some sort of counterproposal. That is not true. I mean we're, we have made clear to Mr. Snuffer and his clients that we're happy with the language of the original contract and the settlement.

(See R. 693, Hearing transcript from September 17, 2008, pp. 4:19-25, 5:1-2.)

Judge Howard questioned Mr. Zundel about the terms of the agreement and, referring specifically to new transfer documents provided to LD III that day, asked:

THE JUDGE: I guess the question I have is if you concede or agree that you had a settlement but the documents don't conform to your settlement, do you intend to have the document, the closing document conform to your settlement?

MR. ZUNDEL: They do now.

(*Id.* at p. 5:16-21.)

Davis never told the District Court, "Davis or his designee" could be substituted as the purchasers of the property. Rather, Davis argued that although he desired to convey the properties to other persons and entities, and although he had attempted to make that change in the agreement, he would concede he was required instead to follow the terms of the original REPC. (*Id.*, see also pp. 14:9-17; 15:8-12; 18:17-22; 21:18-22.)

Davis wants to convey the parcels to different entities, not to Davis. But this was never within the terms of the REPC. Nor was this discussed or agreed to as one of the terms of settlement. The emails from Thornton (the attorney drafting the documents) state the transaction requires LD III to sell the property to Davis; however, the Counteroffer submitted to LD III requires LD III to convey the property to five different entities, none of which were Davis. Therefore, the parties did not agree on one of the essential contract terms: the identity of the buyer(s). There was no meeting of the minds. Therefore, there was no settlement.

## II. Because Davis Included Additional Parties to the Sale in the Proposed Settlement Offer, It Constituted a Counteroffer, Which LD III Rejected.

The Counteroffer was a rejection of the last offer of settlement and a new counteroffer of settlement. The Counteroffer contained materially different terms from the REPC, including a tax-evasion scheme, which LD III necessarily could not accept. Davis fails to address this argument anywhere in his response brief. Because of its importance we are compelled to address it again here.

"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) (emphasis added) (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) (emphasis added).

Also, "[a]n 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 (emphasis added). 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*, supra, at p. 1376.)

Here, the Counteroffer was materially different from any prior communication between the parties. The email exchanges show the proposed settlement was to enforce the terms of the original REPC, with the property conveyed from LD III to Davis. (Thornton Aff., ¶ 3 (R. 341).) However, the Counteroffer required LD III to convey the property and water rights to five totally different buyers, none of whom are parties to the REPC. (*Id.*, Exhibit B thereto (R. 309-331).) This variation on the terms of settlement created a much different transaction than contemplated by the terms of the REPC.

Further, Mr. Thornton's email confirms the change in settlement terms. (*Id.* (R. 329-330).) ("Mr. Davis desires to have the different parcels conveyed to affiliated companies and designees as shown in the deeds.") This variation in terms constitutes a rejection of the earlier proposal and a new counteroffer by Davis.

**III. The Counteroffer Materially Increased LD III's Risk as Seller Because It Involved Her in a Tax-Evasion Scheme by Requiring Her to Sell the Property to Five Buyers Without Disclosing Income Tax to Davis.**

Davis argues there is no anti-assignment clause in the REPC and, therefore, Davis' rights are assignable. Davis further argues he previously transferred his rights to purchase a portion of the property to a separate party. (See Appellee's Brief, pp. 19-20.) However, the law is clear that an assignment is invalid if it materially changes the duty of the obligor or materially increases the obligor's risk or burden in the transaction:

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, §317(2) (1981).)*

Here, Davis' Counteroffer materially increased the burden and risk to LD III by implicating LD III and Ms. Mower in Davis' scheme to evade income taxes. Davis argues there is no evidence in the record to support this claim; however, the alteration of the transaction changes the tax implications (by concealing a re-sale and profits derived from that re-sale) and is clearly a tax-evasion scheme. Under the REPC, LD III was required to convey the real property with water rights to Davis. The closing would be a reported tax event. After receiving title, if Davis wanted to re-sell the real property and water rights for a taxable gain, he could sell to whomever he wanted, but that re-sale would also be a reported tax event. The transfer and closing for all of these transactions 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 as ordinary income.

Under the Counteroffer, Davis' taxable gain is concealed in the direct sale (which conceals a re-sale<sup>2</sup>), because the buyers from Davis receive title directly from LD III and

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<sup>2</sup> In tax parlance this is called a "step-transaction" – the IRS will not allow form to rule over substance. "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

there would be no reporting of the intermediate sale (and gain) by Davis. The Counteroffer transfers the property from LD III to five separate purchasers, none of which are Davis, thereby involving Ms. Mower in a conspiracy to evade payment of income taxes. *See Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945) (The incident of taxation depends on the substance of the transaction, not the form); *Griffiths v. Commissioner*, 308 U.S. 355, 357-58 (1939); *Lucas v. Earl*, 281 U.S. 111, 115 (1930). The Counteroffer hid the re-sale and the taxable gain, and created a criminal scheme whereby Davis would be able to evade payment of taxes.

Davis' scheme unreasonably implicates LD III and Ms. Mower in this conspiracy. For Ms. Mower, the sole member of LD III, to participate in Davis' scheme puts her in peril of violating the terms of her parole, and being prosecuted as part of Davis' tax-evasion scheme. LD III could not accept the Counteroffer. It never would have considered the Counter Offer had its terms been disclosed before it was prepared. LD III could not allow itself to be implicated in any way with this illegal scheme. Therefore, LD III rejected the Counteroffer and there was no settlement. The District Court erred in finding an enforceable settlement agreement, and the Court of Appeals should reverse and relieve LD III from any obligation to go forward with this unlawful new transaction.

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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).



**IV. Davis Raises New Arguments on Appeal that Should Not be Addressed By the Court of Appeals.**

**A. Davis' New Argument that He Never Insisted the Transfer Be to His Designees is a Misrepresentation to the Court of Appeals and Should Not Be Addressed By the Court of Appeals.**

On appeal, Davis raises a new argument: "he **never** insisted that the transfers be to his designees." (See Appellee's Brief, p. 21 (emphasis added).) Specifically, Davis argues he never required the property to be conveyed from LD III to Davis and his designees and, further, he claims to have agreed to take title to the property in his name alone and close the transaction. Davis never raised this argument in the District Court. This new argument should not be considered by this Court. It was never raised in the District Court. This is improper.

The Court of Appeals will "not address any new arguments raised for the first time on appeal." *Smith v. Four Corners Mental Health Center*, 70 P.3d 904, 911 (Utah 2003); *see also Coombs v. Juice Works Dev., Inc.*, 91 P.3d 769, 772, fn. 3 (Utah App. 2003). From the outset of this litigation, Davis argued the REPC allowed LD III to transfer the property to Davis **or his designees**. In Davis' Memorandum in Support of Defendants' Motion to Enforce Settlement Agreement, Davis states "plaintiff and defendants, ... agreed to settle this action by completing the sale of the real property and water rights at issue, from plaintiff to defendant Richard W. Davis, **or his designee**." (Memo. Enforce Settlement, p. 2 (emphasis added) (R. 268).) The affidavits of both Davis' counsel, Mr. Zundel and Mr. Boevers, additionally state the transfer of property was to be from LD III to Davis **or his designee**. (Zundel Aff., ¶ 7 (emphasis added) (R. 286).) Davis' Reply Memorandum in Support of

Defendants' Motion to Enforce Settlement Agreement also states "the parties agreed to settle this action by completing the sale of the real property and water rights at issue, from plaintiff to defendant Richard Davis, **or his designees.**" (Reply. Enforce Settlement, p. 2 (emphasis added) (R. 422).) Davis further argued his counsel confirmed the transfer of property to Davis **or his designee**, and LD III did sell a portion of the property to one of Davis' designees. (*Id.*, p. 3 (R. 421).) Davis argued the settlement required LD III to sell the property to Davis **or his designee**.

On appeal, Davis now argues he "never insisted the transfers be to his designees." (Appellee's Brief, p. 21.) However, Davis contradicts himself by stating "The agreement is, and always has been, that the transfers could be made to Davis' designees ...." (Appellee's Brief, p. 23.) This inconsistency demonstrates there could not have been a meeting of the minds. There was no settlement and Davis' new argument on appeal should not be addressed by the Court of Appeals.

Moreover, Davis argues LD III previously interpreted the REPC as permitting transfers from it to Davis' designees. (See Appellee's Brief, p. 19.) Davis bases this argument upon a transfer of one portion of the property to an unrelated party named Charles Warner. However, just as Davis mentions, that transfer occurred "[p]rior to filing this action." (*Id.*) It had nothing to do with either the lawsuit or the proposed settlement, and has no bearing on either. This is a wholly severed transaction involving the parties agreement to allow that single sale to go forward. It was done to avoid the complication of involving another party in this dispute.

**B. Davis' New Argument that LD III Breached the Covenant of Good Faith and Fair Dealing is a New Argument that Should Not be Addressed By the Court of Appeals.**

Davis also argues for the first time on appeal LD III breached the covenant of good faith and fair dealing by not closing on the settlement agreement. (Appellee's Brief, p. 23.) Davis continues "[t]he fact that LDIII [sic] refused to accept resolution of its only concern about the form of the closing documents, simply illustrates the absence of good faith and fair dealing on its part." (*Id.*) This argument is unfounded and improper. It was not discussed at the District Court level or considered by Judge Howard in issuing his ruling. The Court of Appeals should not address this new argument. *Smith*, 70 P.3d at 911.

Even if the Court of Appeals addresses Davis' new argument, there is still no settlement agreement and LD III did not breach the covenant of good faith and fair dealing. The Counteroffer had materially different terms, and materially increased the risks and burdens upon LD III. LD III was required to accept all material terms, "including price and method of performance, or it [was] a rejection of the offer." *Nunley v. Westates Casing Servs., Inc.*, 989 P.2d 1077, 1086 (Utah 1999). It does not matter that Davis discarded his Counteroffer and prepared new documents that transfer title to him alone. His Counteroffer was still a counter offer. LD III could not and did not accept the method of performance of the Counteroffer. Doing so would place LD III (and therefore Ms. Mower) as a willing party in a tax-evasion scheme. Under Utah law, LD III rejected Davis' Counteroffer and there is no settlement. *Id.* LD III did not breach the covenant of good faith and fair dealing.

**V. Davis is Not Entitled to Attorneys' Fees Because LD III's Appeal is Based Upon Fact and Law and is Not Frivolous.**

Davis lastly makes a claim for an award of attorneys' fees. (See Appellee's Brief, pp. 24-25.) Davis' claim is without basis and should be denied. LD III's appeal is neither frivolous, nor without factual basis. The Utah Court of Appeals has stated, "We recognize that sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions." *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988). An appeal is frivolous if it "is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(b)(2008 Supp.); *see also O'Brien v. Rush*, 744 P.2d 306, 310 (Utah Ct. App. 1987) ("A frivolous appeal is one without merit.")

Davis attempts to diminish the factual bases of LD III's appeal through its own interpretation of the facts, particularly by disregarding the email communications between the parties' counsel. Davis argues the only evidence pertaining to the settlement is confined to the Affidavits of Mr. Zundel, Mr. Thornton, and Mr. Boevers. (See Appellee's Brief, p. 24.) However, the email communications between the parties are much more relevant than an advocates' affidavit. By email, Mr. Thornton admits the transfer of property is from LD III to Davis alone then adds, "Mr. Davis desires to have the different parcels conveyed to affiliated companies and designees as shown in the deeds." (Thornton Aff., Exhibit B thereto (R. 330).) It is clear, that if there was to be a settlement agreement, Davis was to receive the property transfer in his name, in conformity with the REPC, but that Davis' closing

documents did not conform and further added qualifications to the sale. This is a counter offer demonstrating LD III's appeal is based in fact and law.

Davis also contends LD III misrepresents the record concerning settlement negotiations and the form of the settlement documents, and by claiming Davis was attempting to commit tax evasion. (See Appellee's Brief, p. 24.) LD III does not misrepresent the record. LD III's arguments emphasize the least-biased evidence, namely the email communications between the parties' counsel and the substance of the transaction. Just as the IRS looks to the substance of the transaction over the form, LD III highlights the tax implications of Davis' Counteroffer as a tax-evasion scheme, which is exactly what was discovered by LD III's counsel upon receipt of the Proposed Closing Documents. There is no misrepresentation. The appeal is based in fact and law.

Lastly, Davis contends LD III misrepresents the record in its comparison of the REPC with the closing documents prepared by Mr. Thornton. (See Appellee's Brief, pp. 24-25.) Again, LD III does not misrepresent the record. Comparing the REPC to the closing documents (Counteroffer), it is clear the two do not align. The REPC requires the property be sold from LD III to BBRD, Inc., and/or Richard Davis. (Boevers Aff., Exhibit A thereto (R. 297-302).) The Counteroffer deeds the property from LD III to Stephen Sandstrom and Jennifer Sandstrom; SWLRD, LLC; PBRD, LLC; Richard W. Davis and Beverly B. Davis, as trustees of The R.W. Davis Family Protection Trust; and BBRD L.C. (Thorton Aff., Exhibit B thereto (R. 321-327).) None of the buyers in the Counteroffer are buyers in the REPC. Further, Mr. Thornton's email confirms Davis desired to have different parcels

conveyed to different parties. (*Id.* (R. 330).) This is an additional, material requirement apart from the terms listed in the REPC. Therefore, LD III does not misrepresent the record.

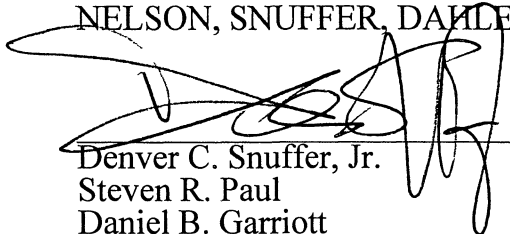
Davis should not receive his attorneys' fees. LD III's appeal is not frivolous or baseless, and LD III does not misrepresent the record. LD III's arguments are based in fact and law. There was no settlement agreement because there was never a meeting of the minds. Therefore, LD III's appeal is sound. The District Court erred in finding an enforceable settlement agreement. LD III's appeal is warranted and there is no basis for an award of attorneys' fees to Davis.

### CONCLUSION

Pursuant to the foregoing, Appellant respectfully requests this Court to reverse the decision of the Fourth District Court and to find there is no enforceable settlement agreement here.

DATED this 5 day of June, 2009.

NELSON, SNUFFER, DAHLE & POULSEN



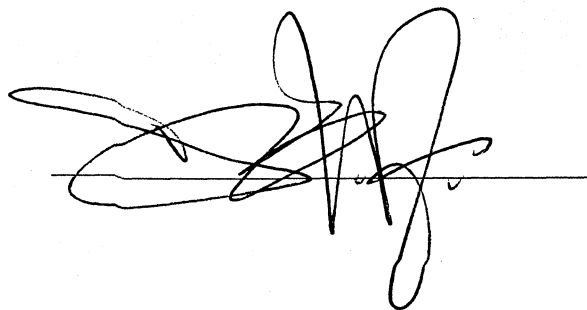
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Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott  
Attorneys for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLANT'S REPLY 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 5 day of June, 2009.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned over a horizontal line.